Turner v. Rogers:
The Implications for Access to Justice Strategies

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I. Introduction

On June 20, 2011, the United State Supreme Court decided *Turner v. Rogers.* *Turner* should be considered a landmark decision for the self-represented, and indeed for access to justice. In its first ever trip to the civil self-represented courtroom (beyond right to counsel issues), the Court laid out as basic due process parameters for the self-represented requirements of fairness and accuracy for all parties.

The *Turner* case decides the steps a court must take to meet due process standards when a child support civil contempt defendant is at risk of incarceration and does not have a lawyer. In so doing it explicitly recognizes the constitutional significance of judicial questioning and the availability of court forms in such situations and indicates the structure of analysis to be used to determine when self-represented access procedures alone might not be sufficient, and where therefore counsel might be required prior to deprivation by the court of a constitutionally protected interest.

The Court, in analyzing the ways that due process standards might be met, including through judicial questioning and court forms, effectively endorsed (although without citation) the work of state courts throughout the United States in the last fifteen years to develop low cost, effective and public trust and confidence building procedures that ensure access to justice. It is doubly significant that this entire approach was at the suggestion of the United States Solicitor General, representing the interests of the United States in the case.

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1. The author is Coordinator of the Self-Represented Litigation Network, but opinions expressed are his, and his alone. This paper builds in part upon prior blog posts by the author as part of a post-decision online Symposium of which he was a co-host, [http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers](http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers).


3. The Court’s holding of no categorical right to counsel was limited to the situation of no counsel for the party seeking incarceration.


The case is likely to result in significantly more attention to access issues. The case ultimately challenges courts and other justice system institutions to continue the process of implementing and expanding such procedures, while facilitating the process of obtaining the resources needed to do so. The foundational leadership role that courts have already played, together with their bar and access to justice partners, such as the Access to Justice Commissions, positions them ideally to continue as leaders in making sure that the legal system takes advantage of the opportunity that Turner offers to move towards a 100% access to justice system. In some states, moreover, Turner may also trigger consideration of state law approaches that may go beyond Turner itself.

Part II of this paper summarizes the immediate holdings of Turner, Part III, discusses its broader legal implications, Part IV explores the implications for institutions such as the courts, the bar, legal aid and access to justice commissions, and Part VI briefly analyzes possible national support responses to assist the states in their responses.

II. What Does Turner Hold

In Turner, the Court establishes the following as matters of Federal law, as the minimum parameters dealing with self-represented litigation, parameters which may of course be expanded at the state level:

A. Due Process Right for Self-Represented Litigants.

There is a due process right to court “procedural safeguards” that ensure the protection of the right to be heard in cases involving potential deprivation of a constitutionally protected interest. “The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described . . . . Under these circumstances Turner’s incarceration violated the Due Process Clause.”

Significantly, protection of due process here therefore becomes a matter of court matter, rather than one that is dealt with simply either by appointing or not appointing counsel.

B. Three Factor Analysis of Safeguards Required.

The extent of those “procedural safeguards” depends on: “(1) the nature of ‘the private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safe- guards,’ and (3) the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirement[s].’” Quoting Mathews v. Eldridge, 424 U. S. 319, 325 (1976). (Interestingly, while the court does not explicitly limit the use of the costs of procedures as a “countervailing interest,” it does not mention cost in the application of the due process balancing test to these facts.) Of course, these are the kinds of analyses that courts often apply, but not at the state trial court level in day-to-day decision-making.

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6 Turner v. Rogers, slip opinion at 16.
7 Turner v. Rogers, slip opinion at 11.
C. **Fundamental Fairness and Accuracy.**

Ultimately overall “fundamental fairness” and accuracy are the touchstones as to what procedures are constitutionally required. This can hardly be news to courts. “But the Government does claim that these alternatives can assure the “fundamental fairness” of the proceeding.”

D. **Civil Contempt Incarceration Safeguards.**

In this case of threatened civil contempt incarceration, the constitutionally sufficient procedures include: (i) notice of the specific key determinative element (here ability to pay the overage); (ii) a form to gather information on the key elements; (iii) questioning on this key element from the bench (at least when needed to clarify the situation), and; (iv) an explicit (not implied) determination of the key element. These are just the kinds of procedures that are already in place in many courts, for many different kinds of situations. Moreover, while some may take some initial investment to set up, overall they are likely to save money rather than impose additional budgetary burdens.

E. **Application to Self-Represented Plaintiffs Seeking Court Intervention.**

The right to “fundamental fairness” and accuracy for one seeking government’s assistance in depriving someone of a constitutionally protected interest (i.e. plaintiffs) is very much part of the constitutional calculus, and not limited only that of those facing the deprivation (i.e. contempt defendants). Here, indeed, the risk of unfairness or inaccuracy to the plaintiffs caused by providing counsel to the defendant when the other did not have counsel was a major consideration for the Court in determining the requirements of due process. (Of course, the Court had not been asked to, and did not consider providing

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8 Turner v. Rogers, slip opinion at 15. See, also, id at 14 (possible increase of risk of error in providing counsel for only one side.)

9 The court points out that procedures other than those listed in the opinion could meet the need, Turner v. Rogers, slip opinion at 14-15.

10 “[T]here is available a set of ‘substitute procedural safeguards,’ Mathews v. Eldridge, 424 U. S. [319 (1976)], at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.” Turner v. Rogers, slip opinion at 14.

11 For example, good forms speed the hearing process, and skilled judicial questioning may reduce bench time. Moreover, both techniques may result in greater compliance and therefore few returns to court.

12 Turner v. Rogers, slip opinion at 14.
This aspect of the analysis is likely to require court process attention, but again the likely overall impact will be greater efficiency and accuracy.

F. Possible Need for Greater Protections, Including Counsel, In Other Circumstances, Such as Government Role or Opposing Counsel.

The specific “alternative procedures” are required by *Turner* even though the government is not on the other side, and the opposing party is also self-represented. Were these factors different, greater protections, including possibly the right to counsel at state expense, might be required. What the opinion leaves open is the question as to who would pay for such counsel.

In summary, the opinion in its own terms requires that certain procedures be put in place in civil contempt incarceration cases in those cases that do not involve government or counsel on the other side, and also suggests the possible need for counsel in cases when they are, or when the case is unusually complex.

At a minimum, therefore, courts need to assess their compliance with these requirements in civil contempt cases, and be ready for claims of right to counsel in those situations described in the opinion as possibly appropriate for such claims. The impact of doing so may be great in terms of court culture and perceived court role, but it is unlikely to place significant financial burdens on the courts – particularly if HHS and the Federal Government assists in the deployment of constitutionally adequate forms systems, and judicial education programs designed to ensure constitutionally adequate judicial questioning.

III. The Broader Implications of the Holding

However, much more important than the specifics of Turner are the implications of its analytic structure for a much broader range of self-represented cases, including potentially every case involving one or more self-represented litigants. These implications ultimately include the following:

A. Required Compliance of all Self-Represented Cases With *Mathews* and *Turner*.

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13 The decision has come in for criticism as being unrealistic in its lack of understanding of the need for counsel even in the circumstances of the case. Among the points made have been that the Court’s overlooking of the fact that Mr. Turner had actually filled out a form, the Court’s assumption that ability to pay and willfulness determinations are easy, the lack of any record demonstrating whether the procedures suggested by the Solicitor General in fact are adequate to provide meaningful access, and the opinion’s failure to specify how a court should determine whether a particular set of procedures is adequate to provide meaningful access, particularly for vulnerable groups of litigants.
The procedures in place in any self-represented case that involves potential deprivation of a constitutionally protected interest must comply with *Mathews*, and now *Turner* – although exactly what that means remains to be seen, and is likely to be a work in progress – one in which the courts themselves are equipped by experience to play a major leadership role. Both decisions lay out the standards that procedures must meet, but obviously fail to clarify exactly what procedures are needed in what situations.

Courts, with their decade or more of innovation to learn from, are well positioned to lead the process of determine what is necessary to meet the general standards of *Mathews* and *Turner*. They are likely to engage in this search both as administrators of innovation and partnership, and as decision makers in litigation brought by others. They are likely to find that innovations such as self-help centers, self-represented-oriented caseflow management, court staff education, informational websites, and programs of unbundled assistance are likely to be part of the mix put together to meet these requirements. Appellate courts are likely to defer to trial court expertise in the design of the most appropriate access-friendly solutions, but they are unlikely to accept trial court refusal to consider the needs of access – needs now constitutionally recognized by the Supreme Court.

B. Fairness to Both Sides.

Above all, the “alternative” procedures must be sufficient to provide fairness and accuracy to both sides – i.e., this is about both plaintiffs’ and defendants’ right to be heard. This implication in *Turner* (from the inclusion in the discussion of the rights of the plaintiffs) is highly important in giving courts the flexibility to craft the most appropriate, practical and balanced solutions for all the parties.

C. End to Claims That Judicial Questioning is Inappropriate.

The already largely discredited claim that judicial questioning is inappropriate and inherently non-neutral is now finally dead. That research and judicial education materials now show the relative ease of engaging in such information-gathering questioning should make it much easier speedily to engage the broad state judiciary in these practices.

D. End to Opposition to Forms.

Obviously, the now much less frequently made claim that court provision of forms is wrong as non-neutral is also consigned to the legal history book. Those resistant to change will surely claim that the opinion was limited to incarceration/civil contempt. This is wrong. It is only that so far forms are only *required* in that context – although the logic goes far further, and with so much already in place, it should not be hard to accelerate implementation. For example, often one court in a state will have implemented a form that can now with relative ease be deployed statewide.

E. Requirements of Forms and Judicial Engagement/Questioning.
Forms and judicial questioning, since they can be implemented at minimal cost, and with minimal burden, and because the Supreme Court has already explicitly drawn attention to their advantages, are therefore likely to be found constitutionally required (when needed for accuracy and fairness) in a wide variety of self-represented cases, for both sides. (Evaluation will be an important part of the rollout process.)

F. **Need to Include Broad Range of Procedures in the Analysis.**

These last points can more generally be made about a wide variety of neutral court-based services to the self-represented, such as informational centers, informational materials, and neutral assistance in moving the case forward. Moreover, potential costs of such procedures, while far from irrelevant to the balancing, are likely to be less constitutionally determinative than they were before *Turner*.

G. **Need for Development of Additional Types of Access-Friendly Procedures.**

The decision, and particularly its focus on accuracy and “fundamental fairness,” strengthens the argument for innovation in the creation of other alternative procedures. These might include as lay advocates before and during court or the use of neutral court staff to assist in preparation of the facts for the hearing (generally mentioned in the opinion.)

H. **Need for Processes to Determine What is Needed to Ensure Access.**

The decision will help focus courts’ attention on the process by which they decide what kind of procedures or services are necessary in a particular case. It may well be that the judge is not the best placed to make that decision, at least in the first instance. The choices, or course, go way beyond attorney or no attorney, but include unbundled assistance, technology services, as well as new forms of intermediate services, components of an increasing continuum.

I. **Experimentation into Triage.**

Thus triage – individualized assessment of needs – will need serious exploration as part of the court intake process. Where needs cannot be met by alternative procedures, civil Gideon claims, including both fact specific and categorical claims, will continue to be likely and appropriate, and processes will be needed to handle such claims.

**IV. Institutional Implications -- What This Means for Courts, Access to Justice Commissions, the Bar and Legal Aid**

A. **Overview**

The greatest significance of *Turner* may be its repositioning of responsibility for ensuring access to justice from an obligation on the state to fund counsel in a limited category of
cases, to a broader responsibility on the justice system as a whole to use a variety of techniques to provide access. In particular, the focus moves more to the courts as the institution both most likely to be in a position to deploy those techniques, and the one responsible for assessing their sufficiency.14

Ultimately, the decision challenges each of the key access to justice stakeholders to do more of what it has already been doing in two areas. The first is figuring out how it can innovate to deliver additional low cost flexible access services to those currently not receiving them. The second is expanding its efforts to collaborate with the other stakeholders in an integration of these services – existing and envisioned – into an integrated system that alone can meet the overall vision implicit in Turner.

B. The Courts

Turner, in its direct language, puts both the onus for assessing the adequacy of due process protections, and the delivery of services that would pass such assessment upon the courts, although, in the case of the required notice and forms, that could arguably be provided by a different agency.15

1. Immediate Obligations in Civil Contempt Incarceration Cases

Courts in states that do not provide counsel in child support civil contempt incarceration cases have certain immediate obligations and options under Turner.

i. Notice

Such courts are under an immediate direct obligation to ensure that those facing civil contempt incarceration are informed in comprehensible terms of the specific issues that will determine whether they are to be incarcerated, including, explicitly, their capacity to make current payment. Presumably, unless the arrearage has been previously judicially determined, after similar notice, the same would apply to the actual size of any outstanding arrearage. It would surely be appropriate for the notification to include an

14 A finding of a civil Gideon right in Turner would have had a very different impact, keeping the focus on the legislative obligation to fund lawyer services. The shift from such an approach might be viewed as a reflection of well-recognized strains in criminal Gideon implementation, and of the awareness of the breadth of access innovation in the courts themselves. It might be observed in response by the courts that no good deed goes either unpunished or unrewarded.

15 It is harder for child support enforcement agencies to provide such services when the obligation is not owed to the state, but it is not impossible, particularly given the breadth of federal law.
accounting sufficiently detailed and sufficiently clear that it can be understood and challenged if at risk of error.16

ii. Forms

Courts handling such cases are also now under an explicit responsibility to ensure that there are forms (or the equivalent) that those facing civil contempt incarceration can use to work through and demonstrate their ability or inability to pay the arrearage. While there is nothing in the opinion to suggest that such forms must meet any particular standard, presumably the requirement would be meaningless if the forms were not easy to understand and to use. Similarly, well-designed TurboTax-like software is generally considered easier to use for many, but not all populations.17 Limited English proficiency guidelines would appear to make translated forms and/or an interpreter mandatory when needed by a litigant.18

iii. Judicial Questioning

Such courts are also required to provide for the defendant (again unless sufficient alternatives are available): “an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form),”19 in other words, judicial questioning to remove ambiguities, uncertainties, or to deal with judicial skepticism about the contents of the form as completed by the defendant.20 (This might suggest a discomfort with the court in such a case merely

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16 A question might also be asked as to whether, given the realistic capacity of many of those facing such incarceration, whether for the notice to be reasonable, the person receiving it should be offered an in person explanation of its contents, perhaps explaining the notice.

17 As with the notice, it might be argued that where the person facing incarceration has difficulty understanding the form, he or she is entitled to sufficient human assistance to make completing the form practicable.


19 Turner v. Rogers, slip opinion at 14.

20 The opinion explicitly cites to the Solicitor’s General’s position at oral argument and to Brief of the United States, slip opinion at 14, citing Transcript of Oral Argument 26–27 (“The second would be a hearing at which the alleged contemnor has the opportunity to respond to any further inquiries that may be triggered by information that’s already been provided. This is, I think, a common feature of many systems outside of South Carolina which, by case law, have recognized that when a court has concerns that information on a financial affidavit might be misleading or inaccurate, they have a duty to inquire further and to require supporting documentation as necessary to confirm or dispel concerns about the accuracy of the information.”) and Brief for United States as Amicus Curiae 23–25. (“To the extent the court had questions about the information on the form or disbelieved it, the court could question the contemnor about his finances at
choosing to disbelieve the defendant, without probing the reasons for the court’s initial skepticism.)

iv. Explicit Finding

The court explicitly required “an express finding by the court that the defendant has the ability to pay,”21 (or sufficient equivalent) without however, requiring that it be in writing, although presumably it would need to be on the record. The use of the word “express” would appear to represent the Court’s rejection in these circumstances of the frequent appellate review standard under which findings necessary to a decision are to be implied from it. This obligation is not hard for courts to meet. Indeed, it appears that South Carolina already has in place the paper procedures to meet this standard, but the trial judge inexplicably failed to follow them.22

v. Possibility of Need for Counsel in Certain Civil Contempt Situations

The opinion clearly puts courts on notice of the strong possibility that it will ultimately require counsel in three sets of situations: when the government is seeking contempt incarceration, when a non-governmental party with counsel is seeking contempt incarceration, and in cases of unusual complexity when a “trained advocate” is needed to present the case. Moreover lower courts might make the same determination, based on the logic of the opinion. Courts might want to consider what system they might put in place to assess the need for counsel in particular situations.

vi. Possibility of Enhanced Neutral Services to Minimize Need for Counsel

Implicit in the Court’s opinion is that the need for counsel in such cases might be reduced by the additional of neutral services such as those of a social worker to assist in reviewing the extent of the arrearage, options for payment, and reasons that might be articulated for incapacity to pay. There is, of course, extensive experience in the state courts with how to deliver such service in a deeply engaged, yet fully neutral manner.

2. Non-Child Support Civil Contempt Incarceration Cases

While the Court addresses child support civil contempt incarceration cases with fact patterns different from that in Turner, it makes no reference at all to non-child support civil contempt cases. Such cases might occur in domestic violence cases, or indeed in a broad range of cases in which payments or injunctive relief is ordered.

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21 Turner v. Rogers, slip opinion at 14.
22 There was in the trial record a form on which the judge could have recorded, by checking a box, his finding as to whether the defendant had the ability to pay, but the judge did not do so. Turner v. Rogers, slip opinion at 4.
The stakes component of the analysis would be the same (loss of liberty), while the risk of unfairness/inaccuracy might depend on who the moving party would be, and on whether they would have counsel. With respect to available alternative procedures, notice, forms, judicial questioning and explicit finding would all be easily available. However, whether they would be sufficient would depend on the complexity of the underlying factual situation. (For example, there is law that when questioning would require such exploration of underlying facts as to turn the judge into an advocate, that would not be appropriate.)

3. Broader Obligations and Possibilities

i. Due Process Standard

Ultimately it is the courts that will have to take the lead in actually putting in place the procedures that will meet the general Turner standard in the broad range of cases to which it will have general application. In cases in which a constitutionally protected interest is at stake (a broad group indeed), the question will be whether procedures overall provide for sufficient accuracy and fairness, given the interest at stake, and the burden of providing protections.

This assessment will include both governing procedures as they relate to the self-represented, and services that might be provided to assist the self-represented in maneuvering through those governing procedures.

Procedures and rules that do not lead to sufficient fairness and accuracy because they can not reasonably be handled by the self-represented will fail this assessment, unless they can be justified by the state’s interest avoiding the additional burden the state would bear in putting in place alternative procedures that would provide greater accuracy and fairness. (A state also has an interest in uniformity, but to use that as justification for lack of fairness and accuracy for the self-represented, it would have to show that uniform rules could not be designed that would provide fairness and accuracy for both those with and without counsel. This would be a heavy burden, given that rules can be written to allow for sufficient discretionary flexibility to allow for judges making sure that all have access.)

ii. Forms

Turner powerfully strengthens the argument for forms in all types of cases in which any significant percentage of appearances are by self-represented litigants. It simply removes all legitimacy from any claim that courts should not be in the forms business. Moreover it is well recognized that a comprehensive system of forms is a sine qua non for most...

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23 Lombardi v. Citizens Nat'l Trust & Sav. Bank of Los Angeles, 289 P.2d 823, 824-25 (Cal. Ct. App. 1955) (finding no error in the failure to assist given the complexity of the dead-man’s statute at issue. The judge would have had to adopt a non-neutral advocacy role.)
other “alternative procedures” that protect accuracy and fairness for the self-represented, such as judicial questioning, self-help services, and discrete task representation. Indeed, the Court was explicit in Turner about the fact that the judicial questioning in such cases could grow out of the responses to the information provided on the form.24

Of course, many courts have forms,25 and there are extensive best practice materials,26 and an infrastructure for supporting court and legal aid online form document assembly systems.27

Since most of the barriers to forms adoption are political rather than financial, technical, or operational, Turner should provide a very major impetus to universal forms adoption. However, this process would be greatly sped by federal incentives, including the selection and promotion of model forms. There are huge advantages to states’ adopting standard forms, rather than allowing localization and fragmentation (At an absolute minimum states should adopt a “mandatory acceptance” policy for forms, requiring the standard forms to be accepted, although not necessarily excluding the submission of individualized pleadings in the alternative.28


Turner also makes a game-changing and ringing endorsement of judicial questioning and follow up. This too, of course, builds on decade long exploration by courts and others into how a more engaged judicial role is fully consistent with judicial neutrality.29 The

24 Turner v. Rogers, slip opinion at 14.
27 Law Help Interactive at https://lawhelpinteractive.org/.
28 California has had mandatory forms (not just mandatory acceptance) in many substantive areas for a generation, with no apparent ill effects.
endorsement of such questioning not only removes (indeed as matter of constitutional law) any objection to such questioning, but appropriately raises in any self-represented case the possibility that such questioning may be needed to ensure the level of accuracy and fairness constitutionally needed before a decision as to deprivation for a particular interest.

Renewed attention to judicial education, drafting of guidelines and bench guides, and consideration of adoption of Rule 2.2 of the ABA Model Code of Judicial Conduct\(^\text{30}\), or an alternative are obviously called for. *Turner* certainly strengthens the argument for the need for more specific language such as that adopted by New Hampshire, including its Comment.\(^\text{31}\)

Steps such as these are generally considered to have been highly successful at reassuring judges that the steps they need to take to obtain the information for an accurate and fair decision are appropriately neutral, provided taken with appropriate judicial care, clarity and transparency. What *Turner* adds is the possibility that in certain contexts they may


\(^{31}\) New Hampshire Code of Judicial Conduct, Rule 2.2, Impartiality and Fairness “. . . (B) A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard. COMMENT . . . [4] The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard.
be required. States might consider reviewing any previously developed materials and curricula in the light of *Turner*, as well as assessing how best to ensure that the entire judiciary has an opportunity to be exposed not only to its lessons, but to the already tested and neutral techniques that *Turner* generally endorses. The content of such materials and education might also be informed by analysis such as that which appears below at --, dealing with the post-*Turner* issues that individual judges may face.

iv. Neutral Informational and Facilitative Services

*Turner* similarly, but less specifically, endorses a wide range of court based informational and facilitative services, referencing specifically that “sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient.” The use of the word “say” in this form of speech is perhaps not typical for Supreme Court opinions and suggests not so much a lack of confidence in the concept as a lack of certainty that this is the best example, in other words an acknowledgment that there may be better or equally good examples.

Indeed, state courts have spent the last decade developing such examples, more usually as supplemental to, and integrated with, the other procedures the Court requires in the absence of alternative. Among these are informational websites, court-based self-help informational services, case conferences (with judges or court staff), mediation assistance, caseflow management assistance services, video, clinics etc. At a minimum, the opinion endorses the concept and viability of such neutral services, closing down the general argument that they are inconsistent with court neutrality.

But the implications go deeper. While no one of these is made constitutionally required by the decision, its logic is that some mix of these innovations and those explicitly discussed in the opinion must be sufficiently in place to ensure the required level of accuracy and fairness for the significance of the interest at stake.

Courts are now empowered to continue the innovation, experimentation, and assessment process, with now perhaps greater moral claims for Federal assistance in doing so.

It should also be noted that over time, innovating courts have found that court staff can be highly engaged with the detail of individual cases as they facilitate the case moving forward, without in any way threatening the neutrality or perceived neutrality of the courts. Court staff now routinely make sure that forms are correctly completed, explain to litigants what is needed to be done to keep a case moving, get in touch with other courts to move paper to keep a case moving, assist litigants with identifying whether they are in agreement etc. Many of these interventions are highly fact specific, but fully neutral, since the goal is not to help one party over the other, but to help both in moving the case forward. Traditional definitions of prohibited practice of law are proving less and less relevant in determining the key issue, which is whether a form of case resolution

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assisting activity can be performed in a neutral manner. Turner’s reference to “neutral services” can only help speed this process of continued innovation.

v. Non-lawyer Advocacy

Perhaps most intriguing of all in the opinion is its tantalizing reference to situations potentially needing a “trained advocate.”\textsuperscript{33} One interpretation of the use of the word “advocate” rather than counsel might be to suggest the possibility of an advocacy role being played by one who was “trained,” as an advocate in that context but not necessarily a member of the bar.\textsuperscript{34}

Courts may want to take the lead in exploring various forms of non lawyer advocacy, such as the use of trained and supervised college students whose role might be to interview self-represented litigants, present the key issues to the judge, and then stand aside so that the judge can engage in the kind of neutral questioning envisioned in Turner. It is fascinating that the rest of the common law world takes a much less rigid view of the potential roles on non-lawyers in the courtroom.\textsuperscript{35}

vi. Intake/Triage/Diagnosis.

\emph{Turner} recognizing as a general matter than the level of procedural protections required in a particular category of cases may depend on the “complexity” of the particular case, as well as whether the other side is the government, and/or is represented. This moves forward the concept, recently explored in a number of contexts,\textsuperscript{36} of diagnosis and triage

\footnotesize{33} “Neither do we address what due process requires in an unusually complex case where a defendant ‘can fairly be represented only by a trained advocate.’” Turner v. Rogers, slip opinion at 16, quoting Gagnon v. Scarpelli, 411 U. S. 778 788 (1973).

\footnotesize{34} While it must be acknowledged that Gagnon dealt with right to counsel (not other advocates) in the probation context, it is also of note that in Turner, the court cited with approval to Vitek v. Jones, 445, U.S. 480, 497 (1980) (holding, per controlling opinion of Justice Powell, “that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital.” But not “that the requirement of independent assistance demands that a licensed attorney be provided.” Turner, slip opinion at 15.

\footnotesize{35} Richard Moorhead, Access or Aggravation? Litigants in Person, McKenzie Friends and Lay representation, 22 Civil Justice Quarterly 133 (2003). The right to lay assistance in court is recognized in most common law countries, but is of relatively recent origin, apparently dating only back to 1970.

\footnotesize{36} This triage approach is being pioneered in the California Shriver Pilot Projects in civil Gideon, with the statute listing the following factors as to whether counsel is to be provided: Case complexity [, w]ether the other party is represented[, t]he adversarial nature of the proceeding[, t]he avail- ability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case[, l]anguage issues[, d]isabil- ity access issues[, l]iteracy issues[, t]he merits of the case [, t]he nature and severity of potential consequences for the potential client if representation is not...
as the key to access to justice. While *Turner* focuses on the implications of these possibilities for whether or not counsel may be constitutionally required in a particular case, the logic applies to any situation in which a deprivation is being considered.

While the full implications will take years to work out, the case should encourage courts to consider integrating into their self-help services, and their workflow, a focus on matching need with services. Courts might also consider using *Turner* as a lesson on the need to focus self-help services and procedure innovation in those situations in which the barriers to access are greatest.

vii. Consideration of Access Issues in Assessment of Rules and Procedures

To the extent that current court rules, processes and procedures may not result in such barriers to access when applied to the self-represented that the results are at risk of not being sufficiently fair and accurate, *Turner* effectively calls for the courts to review those rules and processes. As discussed below, this is really a two part inquiry. The first is whether the rules themselves put up impermissibly burdensome barriers to the self-represented (such as, for example, a discovery process so technical as to make its navigation by a non-lawyer impossible.) The second is whether the discretion inherent in the rules is being applied in such a way as to provide for access. Appropriate exercises of discretion may save rules and procedures that would otherwise impermissibly burden due process rights to fairness and accuracy. On the other hand, a court culture in which such discretion is either not recognized or systematically denied would raise very troubling questions in term of *Turner*.

This is obviously a very broad charge, the implications of which will ripple through a variety of court self-assessment processes. This is, however, a particularly opportune time for courts to consider these questions, faced as they are with the need to review processes and procedures as to their efficiency and effectiveness.

vii. Availability of Counsel in Complex Cases

*Turner* also gives renewed life to the largely ignored teaching of *Lassiter v. Dep’t of Social Services* that in certain classes of deprivation cases (in that case parental rights) the person facing the loss should be entitled to an individualized need for counsel based on the circumstances of the case.37 By being explicit that certain cases within the child

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37 “If, in a given case, the parent’s interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be
support contempt incarceration class might require such assistance because of such complexity, the Court in effect made it possible for litigants in a broad range of cases to request counsel, and courts should consider how they are to handle such requests. The situation is, or course made more complex by the difficulty a self-represented litigant may face in even appreciating or presenting the case of their need for counsel.

Consideration of some system for accessing such requests may be appropriate, as might be exploration with partners such as the bar or legal aid of ways that small numbers of counsel might be provided.

viii. Potential Vulnerabilities

While all these issues are likely to work out in a side variety of contexts, courts should consider whether, to the extent that courts fail to take leadership in the post-Turner world, they may find their processes subject to challenge, either on civil Gideon or Turner grounds.

3. The Judicial Role in Individual Cases

*Turner*, reversing the judgment in part because of failure by the judge to follow procedures that met due process standards – even though the litigant did not ask for such procedures, simultaneously highlights the judge’s individual obligations in such matters, and indicates just how easy it is for a judge to take the steps that the constitution requires.

An important distinction between two very different questions must be made early in the analysis. The distinction is between the question whether judges must apply the same rules to the same represented as they do to counsel – of course they must – and the question whether judges in self-represented cases must exercise their discretion under those rules in exactly the same way regardless of whether or not the litigant has a lawyer – of course the do not need to, and indeed should not. All too often these very different questions are confused.

said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," Gagnon v. Scarpelli, 411 U.S. at 788, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, [p32] and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981), [http://www.law.cornell.edu/supct/html/historics/USSC_CR_0452_0018_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0452_0018_ZO.html). This language has been simply ignored by most advocates, and apparently by the lower courts.
Thus the many judicial statements that the self-represented are held to the same rules as those with lawyers is absolutely correct as a matter of law. The problem is that they are all too often understood as meaning that the judge’s discretion cannot take into consideration the representation status of the parties in deciding how the rules are applied, which is completely wrong. Indeed, what Turner tells us is that judges are required to consider whether the needs for fairness and accuracy compel consideration of representation status in the exercise of discretion. (If rules are so rigid as to prohibit such consideration, then the question has to arise as to whether the rule may itself violate due process, at least as applied in the self-represented context.

Thus the decision requires courts to consider when and how to exercise discretion needed to ensure fairness and accuracy for the self-represented. Moreover, years of innovation and experimentation demonstrate just how easy that is. Curricula, best practices, research, and even model video has already been developed. Many states have included these approaches in their judicial education processes, although few if any have made sure that all judges in the state have participated.

Moreover, the costs of showing judges how easy it is to engage litigants in this appropriate way are very low. Most states already have judicial educational programs and conferences, so the systems are in place to give judges what it is now clear they need.

4. The Role of Clerks and Court Staff in Individual Cases

Similarly, Turner raises the question as to whether additional guidelines and training for court staff and clerks would help ensure that due process standards are met. While the requirements of due process are flexible under Turner, and while what is required will vary with the matter at stake, it is undeniable that a state that has trained and prepared its court staff to be informative and helpful about procedures and forms is far better positioned to respond to claims that the self-represented are being deprived of constitutionally protected interests without a process that is sufficiently fair and accurate. The keystone is court neutrality, and many of the forms of engagement that are appropriate for self-help centers are appropriate for clerks and other staff.

Moreover, as with other areas of innovation, state courts have been leading in this area for over a decade, with many having trained staff, developed guidelines etc. There is

40 Available model materials include: Self-Represented Litigation Network, Court Leadership Package, Module 5: Staff Ethics, http://www.selfhelpsupport.org/library/item.208596-Power_Points_for_Module_5_Staff_Ethics.
obviously room to improve those materials in the light of *Turner*, and to ensure 100% penetration to court clerks and staff.

5. **Scope of Appellate Review**

So far, little attention has been paid to the implications of *Turner* for processes of appellate review. As is all too obvious, one of the reasons for a lack of case law on procedural issues relating to the self-represented is that contemporaneous objection rules (which are often highly technical and illogical to the non-lawyer) as well as the details of appellate procedure, provide an insurmountable bar to review.

And then came *Turner*. The procedural facts are that there was no objection in the trial court to either the lack of counsel below, nor to the due process violation that the court ultimately found in the procedures as a whole. The South Carolina Supreme Court, in a brief opinion, not relying on contemporaneous objection rules, considered and rejected the right to counsel claim that had been raised by pro bono counsel on appeal. Then following the grant of a writ of certiorari by the Supreme Court, which did not raise general due process claims, but focused only on the counsel issue, and the raising of the due process argument in an *amicus* brief, the Supreme reached and accepted the Solicitor Generals position and recommendation offered in that brief.

At an absolute minimum, this unusual procedural history would give comfort and the cover of United State Supreme Court case citation to any appellate judge concerned that contemporaneous objection rules should not be allowed to cut off all review of what happens in self-represented litigant cases.

More specifically, at a minimum, the opinion should be read to mean that where due process violations are at stake, and the due process violation is itself insulating the error below from review, then the error must be addressed on appeal.

More generally the decision gives grounds for appellate courts to review records for due process violations without a technical application of contemporaneous objection rules. The logic behind this is that if the contemporaneous objection rules are being applied in such a rigid and non-discretionary manner as to be inconsistent with the level of accuracy and fairness required by the matter at stake, then those rules violate due process under *Turner* and can obviously not be applied.

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42 The majority opinion did not discuss the procedural anomaly that the solution it adopted had not been an issue in the state Supreme Court below, or in the trial court. In fact even the lack of counsel was not raised in the trial court.
The solution is certainly not necessarily to abolish all contemporaneous objection rules, but it is to make sure that they are applied with appropriate discretion. For example, when a litigant has asked a judge to do something, and the judge has refused, to require the litigant to formulaically respond “note my objection” and for the judge to have replied “your objection is noted,” may be gratifying to those concerned with ritual, but could be a due process violation as applied to the self-represented. Such a requirement might well violate due process because it would diminish fairness and accuracy by frustrating appeals, and because of the lack of any legitimate state interest in requiring that such a formula to be followed.

This interpretation does not abolish contemporaneous objection rules in self-represented cases, but does require them to be applied in common sense terms – something that would serve the interests of the bar, and of justice. The only losers would be those courts looking for excuses to dispose of cases for reasons other than on the merits.

C. Access To Justice Commissions

The decision will provide Access to Justice Commissions and court Self-Represented Task Forces with a constitutional imperative for addressing the sufficiency of their state’s self-represented procedures, and with political impetus for the implementation of their recommendations.

Many of the areas they may choose to explore are listed in the Courts section above, and the other sections below. A Commission is particularly well suited to play such an overall role since it can look at the whole picture, not just the rules and processes of the courts, but also those of the organizations that provide the outside services that should be helping to ensure access.

Some state supreme courts might choose to take the moment of opportunity provided by Turner to request their Commission to take on an ongoing review of court processes as they relate to the due process rights of the self-represented. This would remove the Court from the perhaps awkward role of both reviewing procedures themselves, and then later being the judicial decision-makers when rules and processes that they have already found sufficient are challenged in litigation. Indeed, the value of such a role might tip the balance in moving some state Supreme Courts to decide to establish a Commission (Only about half the states have done so.)

In short, each Access to Justice Commission should be asking itself these questions:

- What is our forms strategy?
- What is our judicial education strategy?
- What is our neutral informational services strategy?
• What is our due process intermediate services strategy?

• What is our strategy for right to counsel when required for access?

• What is our triage strategy?

D. The Bar

*Turner* is a disappointment to that section of the organized bar that had hoped for a result that endorsed an expanded right to counsel. However, the decision offers a number of opportunities (some not necessarily all universally welcome) to the bar.

Firstly, and most obviously, the opinion leaves open several categorical areas in which there might be a right to counsel (specifically when the government and/or a lawyer is on the other side). Secondly, by leaving open the possibility that in child support contempt incarceration, and thus in other cases too, there may be cases so complex that the due process standards of fairness and accuracy require counsel (perhaps even on both sides) the court effectively invites the bar to push to establish what such cases are, and how they might be identified.

The obvious path by which the bar might choose to do so would be through litigation (as has been much of the national strategy on the categorical level, but with signal lack of success.).

An example of a more subtle strategy would be to work with the courts to support research into a triage function – one that would try to identify pre-trial which cases require counsel for access and fairness, and to identify and validate the factors that go into making that decision.

Thirdly, the opinion challenges the bar to find ways in which attorneys can provide due process-guaranteeing services that are lower cost, and thus are more appealing under the *Mathews v. Eldridge* analysis. Interesting ideas such as unbundling are absent from the *Turner*, perhaps because not suggested by the Solicitor General. The bar should seriously explore such mixed and intermediate forms of practice. Moreover, exploration of technology-based delivery of advice, coaching etc., could be highly cost effective and potentially meet *Mathews/Turner* standards.

Potentially a far more controversial question for the bar to consider is whether they might support forms of non-lawyer assistance to the self-represented, such as trained student volunteers, or permitting friends/family to play a supportive role in the courtroom.

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43 Cases are collected at the website of the National Coalition for a Civil Right to Counsel, [http://www.civilrighttocounsel.org/](http://www.civilrighttocounsel.org/).
44 Cost does not appear in the *Turner* analysis. It is likely to argued intensively in the future, at least when the issue at stake is other than incarceration.
E. Legal Aid

While *Turner* may have been a disappointment to some of the civil *Gideon* advocates in the legal aid world, looked at broadly, the opinion opens many doors for increased participation in access to justice.

Firstly, and most obviously to the extent that *Turner* should be read as signaling lower courts that there are classes of cases in which they should establish categorical eligibility, legal aid might consider what role they should play in advocating for such categories, and what role they might want to play in whatever delivery system were to be set up.\(^{46}\)

Secondly, *Turner’s* apparently sympathetic attitude to the idea that even in the class of cases dealt with in the decision (no attorney and no government on the other side) there might well be cases so complex that a “trained advocate” is needed to present them, raises the question whether legal aid wants to be part of the process of advocating for as large a category as possible, whether it wants to contribute to the analysis of how such cases should be identified, and by whom, and whether it wants to be part of the service delivery system to meet those needs. Indeed, such an approach is consistent with the elements of the civil Gideon agenda, as in the ABA Resolution,\(^{47}\) that have emphasized that the right to counsel should be limited to those situations in which it is most necessary.

More generally, and going beyond the general confines of *Turner* the legal aid movement must ask itself how it wants to relate to the general idea of due process protections for the self-represented? Does it want to build on the already developing trend of legal aid programs providing a broad range of services to play a vanguard role in creating a broad range of intermediate services that provide access without traditional full service counsel? Does it want to limit its role to pressuring the access to justice commissions and courts to be proactive in designing and deploying such systems? Will its participation be primarily adversarial or collaborative? Does it want to focus on the counsel part of the formulation and leave other services to the courts – a position with some strategic merit?

F. The Integrative Opportunity

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\(^{46}\) The apparent hostility to civil *Gideon* in some of the legal aid world might be function of anxiety about loss of program control when an agency becomes responsible for fulfilling a constitutional mandate. Lonnie Powers, Jim Bamberger, Gerry Singsen and De Miller, *Key Questions and Considerations Involved in State Deliberations Concerning an Expanded Civil Right to Counsel*, MANAGEMENT INFORMATION EXCHANGE JOURNAL, Summer 2010, at 10

\(^{47}\) [http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf)
However the different components of the access system react to *Turner*, there is one
overwhelming lesson from this analysis: What must be built in an integrated system in
which all players cooperate in making sure that the needs of each litigant are met, not
necessarily with an ideal deployment of resources, but with at least sufficient to ensure
the level of accuracy and fairness promised and required by *Turner*.

V. State and National Strategies

States need strategies to encourage forms adoption, judicial engagement, and broader
innovation and experimentation. National organizations – including the Federal
Government -- need strategies to support those state efforts. This final section briefly
lists the core elements of such strategies.

A. Forms

By effectively endorsing forms as an access to justice tool – and indeed mandating them
in certain situations – the Supreme Court has challenged access communities and national
institutions to put in place national and local strategies for deploying forms for access.

1. State Forms Strategies
   Such state strategies are likely to include the following:
   
   ● Adoption of a rule governing how courts treat forms (perhaps the best option is so-
     called “mandatory acceptance” of standardized forms.
   
   ● Delegation to a group of responsibility – on a timeline—of development of such forms
     in the key areas of self-represented litigation
   
   ● Assigning responsibility to one or more agencies, again on a timeline, for automation
     of key forms, and integration where possible into state e-filing initiatives.
   
   ● Review of existing forms for compliance with plain language standards

2. National Strategies for Forms

National state support strategies are likely to include:

   ● Provision of technical assistance to above state activities

   ● Grant programs to states that meet minimum standards in their forms programs

   ● In appropriate model areas (such as child support enforcement) national model forms
     for state modification.

   ● Support for national capacity for automated forms
B. Judicial Engagement

1. State Judicial Engagement Strategies

A comprehensive state strategy is likely to include:

- State customization of national model educational materials
- Use of Judicial Conferences to expose all judges to general engagement and questioning concepts
- Focused educational programs for child support judges/commissioners on engagement and questioning
- State networking support for judges experimenting with questioning styles
- Development of state level best practices videos

2. National Strategies for Judicial Engagement

Needed national strategies to support the states will include

- Updating of national curricula based on Turner and other developments
- Development of national curriculum and best practices video focusing on child support cases with possible “educate the educator” launching conference
- Development of online versions of existing curricula
- Research strategy to develop additional best practices, particularly in difficult situations such as those in which only one side has counsel, there is a special burden or proof, there is a jury, or a “determined” self-represented litigant etc.
- Technical assistance and Incentive grants to states to encourage activities listed in B-1, above.

C. Intermediate Services

The phrase “intermediate services” is here used to mean the range of services that are more than the nothing that Turner received, yet less than the full representation which he urged in the Supreme Court he should have received below. Such services include self-help informational assistance, caseflow management reform, litigant services, discrete task representation, etc.
1. **State Strategies**

Among the components of state intermediate services strategies, which should cover at a minimum the above listed services, are:

- Support for a variety of pilots
- Promotion for adoption of already tested innovations
- Collaboration between courts and others to identify innovative services

2. **National Support Strategies**

National support strategies should include

- Competitive grant programs for state pilots, including evaluation
- Technical assistance in each of the areas described above
- Best Practices identification and communication

D. **Triage**

For a multi-component system to work, we must develop a coherent triage methodology designed to direct people to those services which will, as envisioned in *Turner* get people to the services they need. While courts and legal aid programs are already doing a lot of day to day triage, very little has been coherently organized. Moreover, while research that might feed a triage strategy is starting, it can hardly be said to provide a coherent body of knowledge into what works for whom.

Therefore the main energy for triage research and experimentation is likely to require national investment, in partnership with state-based laboratory environments.

E. **Research**

Similarly, almost all the above approaches need research. While a very small handful of states and local courts have research capacities, their capacity is highly limited. It is to be hoped that the national players will develop and stand behind an access research agenda that will support the *Turner* vision.

VI. **Conclusion**
The author of this paper takes from the process of writing it a very different conclusion from the one that he expected. He is reminded that the impact of a Supreme Court opinion is very much a malleable and flexible thing.

What Turner will come to mean is very much a matter for the future, and most of all, what it comes to mean will depend less on litigation and jurisprudential development, than on how a myriad of players in the courts and outside it interpret its vision and how they chose to respond to its call for due process for the self-represented.

Whether it is remembered as a footnote or a game-changer depends on all of us.