

Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice

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I. INTRODUCTION

The United States Supreme Court’s decision in *Turner v. Rogers*¹ created a stir in the civil-right-to-counsel and access-to-justice communities. A unanimous Court ruled that there was no categorical right to counsel under the Due Process Clause in a civil contempt case based on failure to pay child support, even where the contemnor faced incarceration. The majority nonetheless found that South Carolina’s procedures violated due process. The Court reached this result after considering not only the rights at stake in the proceeding but potential drawbacks from the appointment of counsel, and steps short of creation of a categorical right to counsel that might sufficiently protect against an erroneous deprivation of liberty. The Court identified “procedural safeguards” that, when taken together, might provide the necessary protection for a defendant in a civil contempt case for failure to pay child support.² Because Mr. Turner was not appointed counsel and the South Carolina procedures failed to provide necessary procedural safeguards, the Court held that Turner’s incarceration violated due process.³

As discussed below in Part II.C, the responses to *Turner* varied. Some commentators decried the Court’s refusal to recognize a categorical right to counsel, while others praised that decision. Some focused on the promising implications, from an access-to-justice perspective, of the majority’s decision to recognize that the question of appointment of counsel is tied to the fairness of the underlying procedures. Others feared that the decision might foreshadow a rollback in the number of civil proceedings in which states currently recognize a right to counsel. The responses suggest that, while the decision represents a civil-right-to-counsel “loss,” it might well represent an access-to-justice “win.”

Despite the presumptive importance of a Supreme Court decision, the trends that form *Turner*’s backdrop are likely to have far greater impact on a civil right to counsel and access to justice than the decision itself. The Supreme Court infrequently addresses these issues, while state courts, state legislatures, and state access to justice commissions regularly grapple with the

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¹ 131 S. Ct. 2507 (2011).

² *Id.* at 2519.

³ See *infra* Part II.A.

flood of unrepresented litigants in the courts. Whether *Turner* proves to be a watershed or a footnote, the success of access-to-justice initiatives, including an expanded civil right to counsel, will likely be determined in other arenas.

This article begins by describing *Turner*, the access-to-justice backdrop against which *Turner* was decided, and scholarly responses to the decision. The article next revisits a comprehensive access-to-justice strategy I have articulated elsewhere⁴ that is consistent with the logic of *Turner*. The three-pronged strategy involves (1) expanding the roles of the key players in the court system to promote meaningful access, (2) utilizing an array of assistance programs short of full representation by counsel, paired with rigorous evaluation of the programs to identify the scenarios in which they can sufficiently protect the interests at stake, and (3) an expansion of a civil right to counsel where the lesser steps cannot afford meaningful access.⁵ Because the true meaning of *Turner* will emerge only over time, the success of the access-to-justice initiatives that formed *Turner's* backdrop will be more likely than the *Turner* decision itself to achieve the goal of meaningful access. The article illustrates the way in which progress on an array of initiatives, consistent with all three prongs of the comprehensive strategy, is underway. The article concludes with observations and questions that are implicit in *Turner* but which must be articulated and answered to help assess whether those without counsel can receive meaningful access to justice in the courts in the post-*Turner* world. While the solutions depend on the coordinated efforts of many actors in the public and private sectors, the courts themselves, as *Turner* suggests, must play a crucial role.

II. *TURNER V. ROGERS*: THE DECISION, ACCESS-TO-JUSTICE BACKDROP, AND SCHOLARLY RESPONSE

A. *The Turner Decision*

Turner involved the appeal of Michael Turner, who had been held in civil contempt for his failure to make child support payments to Rebecca Rogers, the mother of their child.⁶ Turner repeatedly failed to pay the amount due and was sentenced on numerous occasions to imprisonment for failure to pay; Turner was jailed on three occasions, the final time for a year.⁷ Turner was unrepresented at his civil contempt hearings and, while incarcerated, retained a pro bono attorney to challenge the failure of the South Carolina court to appoint counsel for him.⁸

⁴ See, e.g., Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006).

⁵ *Id.* at 197.

⁶ 131 S. Ct. at 2513.

⁷ *Id.* at 2513–14.

⁸ *Id.*

On appeal, all nine justices of the Supreme Court held that the Due Process Clause did not automatically require appointment of counsel on the facts presented. The four-person dissent would have ended the analysis there: “The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.”⁹

The majority analyzed the due process arguments through the lens of the *Mathews v. Eldridge*¹⁰ balancing test, which requires consideration of “(1) the nature of ‘the private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and the magnitude of any countervailing interest in not providing ‘additional or substitute requirement[s].’”¹¹ The Court relied on *Lassiter v. Department of Social Services*,¹² which applied the *Mathews* test in determining that the Due Process Clause did not provide a categorical right to counsel in termination-of-parental-rights proceedings.¹³

Applying the *Mathews* test to the *Turner* facts, the majority first found that the freedom from bodily restraint, the private interest affected, “argues strongly for the right to counsel that Turner advocates.”¹⁴ However, in considering the final two factors, the Court concluded that the balance tipped against appointment of counsel in all civil contempt proceedings in which incarceration is threatened for three reasons. First, on the critical issue of the defendant’s ability to pay, “when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel.”¹⁵ Second, since the person opposing the defendant was “not the government represented by counsel but the custodial parent *unrepresented* by counsel,” the Court noted that a requirement that the state provide counsel to the noncustodial parent “could create an asymmetry of representation that would ‘alter significantly the nature of the proceeding’”; indeed, doing so might not only mean “a degree of formality or delay that would unduly slow payment” but also “could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive.”¹⁶

Third, the Court believed that “there [was] available a set of ‘substitute procedural safeguards’ . . . which, if employed together, [could] significantly reduce the risk of an erroneous deprivation of liberty” without incur-

⁹ *Id.* at 2521 (Thomas, J., dissenting).

¹⁰ 424 U.S. 319 (1976).

¹¹ *Turner*, 131 S. Ct. at 2517–18 (quoting *Mathews*, 424 U.S. at 335).

¹² 452 U.S. 18 (1981).

¹³ *Turner*, 131 S. Ct. at 2517.

¹⁴ *Id.* at 2518.

¹⁵ *Id.* at 2519.

¹⁶ *Id.* at 2519 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973)).

ring drawbacks inherent to an automatic right to counsel.¹⁷ The Court identified four such safeguards:

(1) notice to the defendant that his “ability to pay” is a critical issue . . . ; (2) the use of a form (or the equivalent) to elicit relevant financial information . . . ; (3) an opportunity [for a] hearing for [the defendant] 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.¹⁸

Since the “record indicate[d] that Turner received neither counsel nor the benefit of alternative procedures” like those the majority had described, the Court held that Turner’s incarceration violated the Due Process Clause.¹⁹

B. *The Access-to-Justice Backdrop to Turner*

Turner was not decided in a vacuum. With unrepresented litigants flooding the courts, court and bar leaders have struggled to respond to the phenomenon, which has triggered access-to-justice initiatives and a push for an expanded civil right to counsel. The *Turner* decision, and the scholarly commentary it spawned, must be analyzed against this backdrop.

1. *Unmet Legal Needs, the Shortage of Legal Services, Unrepresented Litigants in Courts and the Impact of the Absence of Counsel*

Legal-needs studies consistently show that roughly eighty percent of the legal needs of the poor go unaddressed.²⁰ The recent recession has increased the numbers of Americans whose basic human needs are at issue in legal proceedings, and need counsel.²¹ Many unmet legal needs involve housing, family, and consumer issues.²² A related trend is the shortage of available and affordable legal services. Legal services offices represent only a fraction of eligible clients seeking assistance.²³ The same funding crisis

¹⁷ *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁸ *Id.*

¹⁹ *Id.* at 2520.

²⁰ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18 (2d ed. 2007) [hereinafter LEGAL SERVS. CORP., DOCUMENTING 2007], available at <http://lsc.gov/sites/default/files/LSC/images/justicegap.pdf>.

²¹ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (2009) [hereinafter LEGAL SERVS. CORP., DOCUMENTING 2009], available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (“The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”).

²² LEGAL SERVS. CORP., DOCUMENTING 2007, *supra* note 20, at 11 n.12.

²³ See Alan W. Houseman, *The Future of Legal Aid: A National Perspective*, 10 UDC L. REV. 35, 43–46 (2007).

that has expanded the numbers of those needing help has decimated the ability of legal services offices to provide assistance.²⁴

With a high incidence of unmet legal needs and a shortage of lawyers for the poor, unrepresented litigants (also referred to as “self-represented” or “pro se” litigants) are flooding the courts. Most family law cases involve at least one party without counsel, and often two.²⁵ “Most tenants, many landlords, and most debtors appear in court without counsel.”²⁶ Unrepresented litigants disproportionately are minorities and typically are poor.²⁷ They often identify an inability to pay for a lawyer as the primary reason for appearing without counsel.²⁸ As the reality has set in that unrepresented litigants are here to stay, the phenomenon has gained attention across the country among those involved with the courts, including judges, court managers, lawyers, and bar associations.²⁹ Conferences, publications, and websites have begun focusing on problems involving cases with unrepresented litigants.³⁰

The consequences of appearing without counsel are devastating, since unrepresented litigants often fare poorly in the courts. Studies and accounts suggest that representation can be a crucial variable impacting case outcomes in eviction, custody, debt-collection, and benefits proceedings.³¹ Yet, recent empirical work involving randomized studies suggests that the correlation between full representation and case outcomes is not clear in all settings.³²

²⁴ See LEGAL SERVS. CORP., DOCUMENTING 2009, *supra* note 21, at 5–8. Since the end of 2010, programs have lost “1,226 full-time legal services employees, a 13 percent reduction in staffing.” LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION STRATEGIC PLAN 2012–2016 2 (Draft June 2012), available at <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSCstrategicPlan-DRAFTForFedRegCommentsJune2012.PDF>.

²⁵ See JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 3–6 (2002), available at <http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf>; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2047–48 (1999).

²⁶ Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 41 (2010).

²⁷ See, e.g., GREACEN, *supra* note 25, at 12; OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES, THE RESULTS OF TWO SURVEYS 3–4 (2005); Engler, *supra* note 25, at 2046–47.

²⁸ See, e.g., Engler, *supra* note 26, at 41.

²⁹ See, e.g., JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998), available at <http://cdm16501.contentdm.oclc.org/utills/getfile/collection/accessfair/id/106/filename/107.pdf>; Engler, *supra* note 25, at 1987–88.

³⁰ See, e.g., GOLDSCHMIDT ET AL., *supra* note 29, at 15; The National Conference on Self-Represented Litigants Appearing in Court, in Scottsdale, Ariz. (Nov. 18–21, 1999); SELF HELP SUPPORT, <http://www.selfhelpsupport.org> (last visited Oct. 23, 2012) (serving as a network for practitioners of self-help programs, and funded by the State Justice Institute).

³¹ See, e.g., sources cited *supra* note 30.

³² See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, 121 *YALE L.J.* 2118, 2178–96 (2012); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* (forthcoming Feb. 2013), available at <http://papers.ssrn.com/sol3/papers.cfm?ab>

2. *The Access-to-Justice Movement*

Concern about the fate awaiting unrepresented litigants in the courts gave rise to a renewed commitment to access to justice. Over the past fifteen years, access-to-justice initiatives have proliferated, spurred by conferences dedicated to the topic.³³ Conferences of judges and state court administrators have adopted resolutions calling for the courts to provide meaningful access to justice.³⁴ The number of state access-to-justice commissions has increased rapidly; sixteen states created such commissions between 2003 and 2008.³⁵ The commissions, created by order of state supreme courts, are comprised of members of stakeholders in the legal system.³⁶ The commissions have a “broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initiatives to respond to those needs.”³⁷

3. *The Civil-Right-to-Counsel Movement*

The years after 2003, the fortieth anniversary of *Gideon v. Wainwright*,³⁸ saw a sharp increase in activity supporting a civil right to counsel. Articles,³⁹ conferences,⁴⁰ and speeches⁴¹ addressed the issue, while membership increased in the newly formed National Coalition for a Civil Right to

stract_id=1948286; D. James Greiner et al., How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court (Sept. 1, 2012) (working paper) [hereinafter Greiner et al., How Effective], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078.

³³ E.g., Eastern Regional Conference on Access to Justice for the Self-Represented Litigant, in White Plains, N.Y. (May 10–12, 2006); The New York State Unified Court System Access to Justice Conference, in Albany, N.Y. (Sept. 11–12, 2001).

³⁴ See NAT'L CONFERENCE OF STATE COURT ADM'RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000), available at <http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf>; THE CONFERENCE OF CHIEF JUSTICES, RESOLUTION 23, LEADERSHIP TO PROMOTE EQUAL JUSTICE (2001), available at <http://cej.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html>; THE CONFERENCE OF CHIEF JUSTICES, JOINT RESOLUTION 31 (2002), available at http://www.ncsconline.org/WC/Publications/Res_ProSe_CCJCOSCAResolution31Pub.pdf (resolving that “courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status”).

³⁵ Karla M. Gray & Robert Echols, *Mobilizing Lawyers, Judges, and Communities: State Access to Justice Commissions*, JUDGES' J., Summer 2008, at 33, 35–36.

³⁶ Robert Echols, *The Rapid Expansion of “State Access to Justice Commissions,”* MIE J., Summer 2005, at 41, 41. The stakeholders typically include the courts, the organized bar, civil-legal-aid providers, and law schools. *Id.*

³⁷ *Id.*

³⁸ 372 U.S. 335 (1963).

³⁹ See, e.g., Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2006); Symposium, *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163 (2006).

⁴⁰ For example, the Sparer Symposium held on March 28, 2006, was titled “Civil Gideon: Making the Case.” See Symposium Flyer for 23rd Annual Edward V. Sparer Symposium: *Civil Gideon: Making the Case*, available at <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/civilgideonsymposiumflyer.pdf>.

⁴¹ See, e.g., Earl Johnson, Jr., *Three Phases of Justice for the Poor: From Charity to Discretion to Right*, 43 CLEARINGHOUSE REV. 486 (2009).

Counsel (NCCRC).⁴² Advocates pursued test cases⁴³ and legislative strategies,⁴⁴ attempting to establish the right to counsel. In 2006, the American Bar Association (ABA) unanimously adopted Resolution 112A, urging the provision of “legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody,” as determined by each jurisdiction.⁴⁵ The adoption of ABA Resolution 112A spurred activity often coordinated with, and bolstered by, the work of state access to justice commissions.⁴⁶

C. *The Scholarly Response to Turner*

The online legal blog *Concurring Opinions* sponsored a symposium with immediate reactions to *Turner*.⁴⁷ Over the following year, articles by Judith Resnik,⁴⁸ Benjamin Barton and Stephanos Bibas,⁴⁹ Laura Abel,⁵⁰ and Richard Zorza explored the tensions in *Turner* reflected in the *Concurring Opinions* symposium. Three salient concerns involve (1) the Court’s failure to find a categorical right to counsel, (2) the promise of increased access to justice flowing from the majority’s analysis, and (3) the danger that the promise of increased access will be undermined by the implementation of *Turner*’s requirements.

⁴² See, e.g., Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, HUM. RTS., Summer 2005, at 8, 9.

⁴³ See, e.g., *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003); *King v. King*, 174 P.3d 659 (Wash. 2007) (en banc); *Kelly v. Warpinski*, No. 04-2999-OA (Wis. Apr. 6, 2005).

⁴⁴ See, e.g., Laura K. Abel & Max Rettig, *State Statutes Providing for Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132–33 (2009).

⁴⁵ AM. BAR ASS’N, RESOLUTION 112A (2006), available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc>.

⁴⁶ See *infra* Part III.D.3. Chief Judge of the State of New York Jonathan Lippmann issued one call for an expanded civil right to counsel in a speech to the Central Synagogue of New York on February 5, 2010, titled “*Justice, Justice Shall You Pursue: The Chief Judge’s Perspective on Justice and Jewish Values*” (on file with author). The Maryland Access to Justice Commission also called for creation of a civil right to counsel. MD. ACCESS TO JUSTICE COMM’N, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND (2011), available at <http://www.mdcourts.gov/mdatjc/pdfs/Implementingacivilrighttocounselinmd2011.pdf>.

⁴⁷ See *Archive for the ‘Symposium (Turner v. Rogers)’ Category*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers> (last updated June 28, 2011, 12:20 PM). Richard Zorza, an expert in self-represented litigation, and David Udell, the Director of the National Center for Access to Justice, moderated the discussion.

⁴⁸ Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) (analyzing *Turner* along with *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), and *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), also decided by the Supreme Court in the 2010–11 term).

⁴⁹ Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012).

⁵⁰ Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 90 DENV. U. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2000960>.

1. *Turner and the Categorical Right to Counsel*

Many contributors to the *Concurring Opinions* symposium decried the Supreme Court's failure to find a categorical right to counsel in a case involving not only the prospect but also the reality of incarceration. Norman Reimer, Executive Director of the National Association of Criminal Defense Lawyers, observed that "[f]rom the criminal defense practitioner's standpoint, the Court's decision betrays naïve simplicity and a breathtaking disconnect from the real world."⁵¹ Asking, "Does the Supreme Court Get It in *Turner*?", Peter Edelman, professor at Georgetown University Law Center⁵² and Chair of the District of Columbia Access to Justice Commission, noted that to "say that alternative measures would even the playing field is not to understand the world of trying to navigate the court system without a lawyer."⁵³ John Pollock, the Coordinator of the NCCRC, called the decision "A Day Late and a Dollar Short," noting that state courts have recognized and "will continue to increasingly recognize what the Supreme Court could not: litigants should not be expected to fend for themselves when extremely important interests (be they physical liberty, or parenting, or physical safety, or others) are at stake."⁵⁴

In contrast, Benjamin Barton and Stephanos Bibas argued that "*Turner* got it right."⁵⁵ Bibas, a University of Pennsylvania Law School professor, argued *Turner* in the Supreme Court,⁵⁶ while Barton, a professor at the University of Tennessee College of Law, submitted an amicus brief in *Turner* on behalf of a group of law professors advocating against a categorical right to counsel.⁵⁷ Barton and Bibas praised the Court's refusal "to constitutionalize a new civil *Gideon* right," steering "future developments" toward "more sustainable pro se court reform."⁵⁸ They concluded with "[t]wo-and-a-half [c]heers for *Turner*,"⁵⁹ which recognized "that different cases have differing levels of complexity and differing need for lawyers" and that there

⁵¹ Norman Reimer, *Turner v. Rogers: The Right to Counsel Haunted by the Ghost of Gagnon*, CONCURRING OPINIONS (June 27, 2011, 4:51 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-the-right-to-counsel-haunted-by-the-ghost-of-gagnon.html>.

⁵² Professor Edelman is the Faculty Director of Georgetown's Center on Poverty, Inequality, and Public Policy, with a long history of involvement in his areas of expertise, including constitutional law, legislation, and social welfare. See, e.g., *Peter B. Edelman*, GEORGETOWN L., <http://www.law.georgetown.edu/faculty/edelman-peter-b.cfm#> (last visited Dec. 24, 2012).

⁵³ Peter Edelman, *Does the Supreme Court Get It in Turner?*, CONCURRING OPINIONS (June 27, 2011, 9:20 AM), <http://www.concurringopinions.com/archives/2011/06/does-the-supreme-court-get-it-in-turner.html>.

⁵⁴ John Pollock, *Turner v. Rogers: Why the Supreme Court Is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011, 6:05 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html#more-46984>.

⁵⁵ Barton & Bibas, *supra* note 49, at 985.

⁵⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

⁵⁷ Brief for Law Professors Benjamin Barton and Darryl Brown as Amici Curiae in Support of Respondents, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 567493.

⁵⁸ Barton & Bibas, *supra* note 49, at 985.

⁵⁹ *Id.*

are available “less intrusive alternatives, most notably pro se legal assistance.”⁶⁰ Taking into account the complexity of the case and the interests of pro se custodial parents properly “accommodate[s] resource constraints and tradeoffs.”⁶¹

2. *Turner and the Promise of Increased Access to Justice*

The commentators uniformly acknowledge that the Court did not recognize a categorical right to counsel in the fact pattern presented in *Turner*. Yet, many nonetheless praise the decision as holding out the promise of increased access to justice in the courts. Jo-Ann Wallace, Executive Director of the National Legal Aid and Defender Association, called the decision “a watershed moment”; she observed that, “[to] the extent we can use the *Turner* due process analysis to ensure that courts provide a fair system for unrepresented litigants, our hopes of improving the administration of justice in this country are significantly improved.”⁶² The moderators of the *Concurring Opinions* symposium summarized the entries as understanding *Turner* to pave the way for a range of “positive jurisprudential and access-to-court impacts . . . over time.”⁶³ *Turner*’s obligations might lead courts to assure “fundamental fairness” through procedural safeguards, making the courts more open and accessible.⁶⁴ *Turner* also might empower access-to-justice commissions and national leaders to expand their roles and develop strategies to increase access in the courts. Finally, *Turner* might trigger progress in identifying safeguards that help protect self-represented litigants, identifying which litigants most need representation by counsel, and loosening “unauthorized practice laws” where complexity gives way to simplicity.⁶⁵ Zorza, one of the moderators of the symposium and a leader in self-represented litigation and access-to-justice movements, published a series of articles exploring the implications of *Turner* for access-to-justice initiatives generally⁶⁶ and the role of judges in cases involving self-represented litigants in particular.⁶⁷

Building on her contribution to the symposium, Laura Abel analyzed *Turner*’s implications for a right to meaningful access to the courts.⁶⁸ Abel,

⁶⁰ *Id.* at 982.

⁶¹ *Id.* at 985.

⁶² Jo-Ann Wallace, *Turner v. Rogers Is Watershed Moment for Civil Justice Guidance*, CONCURRING OPINIONS (June 27, 2011, 3:03 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-is-watershed-moment-for-civil-justice-guidance.html>.

⁶³ Richard Zorza & David Udell, *A Final Turner Post From Your Co-Hosts*, CONCURRING OPINIONS (June 28, 2011, 12:20 PM), <http://www.concurringopinions.com/archives/2011/06/a-final-post-from-your-co-hosts-richard-zorza-david-udell.html#more-47377>.

⁶⁴ *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

⁶⁵ Zorza & Udell, *supra* note 63.

⁶⁶ Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 JUDICATURE 255 (2012).

⁶⁷ Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES’ J., Fall 2011, at 16.

⁶⁸ See Abel, *supra* note 50 (manuscript at 4–7).

Deputy Director of the National Center for Access to Justice and formerly of the Brennan Center for Justice and NYU Law School,⁶⁹ reads *Turner* as reinvigorating the doctrine of meaningful access to the courts articulated in *Bounds v. Smith* in 1977 but severely limited twenty years later in *Lewis v. Casey*.⁷⁰ *Bounds* held that the Constitution guarantees prisoners “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts,”⁷¹ discussing the need not only to be able to file petitions and papers but also to have sufficient access to legal materials. *Lewis* rejected a class action lawsuit brought by prisoners in Arizona state prisons who challenged their lack of access to the courts due to inadequacies in the law library and the lack of photocopying facilities, severely limiting the right to access articulated in *Bounds*.⁷² The broader interpretation of *Bounds*, rejected in *Lewis*, is the vision of meaningful access embraced by Justice Breyer’s decision in *Turner*.

3. *Turner and the Illusion of Increased Access to Justice*

The cautious optimism flowing from the portions of *Turner* that lay the groundwork for increased access is tempered by the fear that the promise is illusory. Judith Resnik, a Yale Law School professor with expertise in federalism, procedure, courts, equality, and citizenship, argues that the *Mathews* balancing test can serve as a veneer “to mask the lack of genuine empiricism.”⁷³ “Neither judges nor litigants can identify with any rigor the actual costs of various procedures” or the basis for knowing “whether adding lawyers would enhance accuracy or produce more misguided results.”⁷⁴ Thus, “[w]hile one can state the equation, one cannot do the math because the data are missing.”⁷⁵ Resnik asks, “How in the future can one ascertain that the requisite findings are made and procedural alternatives installed?”⁷⁶ Observing that the trial judge “spent less than five minutes, made no findings on the record, left the form incomplete, and sent *Turner* to jail for twelve months,” Resnik contends that the public in-court process revealed the “inadequacies of the decider of fact.”⁷⁷ Resnik questions the ability of the Court’s scheme to deliver on the promise of fairness.⁷⁸

⁶⁹ Laura Abel, NAT’L CTR. FOR ACCESS TO JUST., <http://ncforaj.org/about-2/staff/laura-abel/> (last visited Dec. 24, 2012).

⁷⁰ See Abel, *supra* note 50 (manuscript at 4) (citing *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996)).

⁷¹ *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825).

⁷² See *id.* at 354.

⁷³ Resnik, *supra* note 48, at 158.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 160.

⁷⁷ *Id.*

⁷⁸ *Id.* at 161. As Resnik explains,

Absent some public accounting and lawyer involvement, few mechanisms exist to police the fairness that *Turner* calls for, to elaborate the normative question of when the state ought to conclude that a parent has the “ability”—as a matter of fact and

While Abel praises *Turner* for embracing the broader vision of meaningful access articulated in *Bounds*,⁷⁹ she notes that the Court's approach to evidence related to meaningful access "threatens to rob the standard of any real meaning."⁸⁰ "What *Turner* gives with one hand, it takes away with the other."⁸¹ Abel illustrates her concerns by discussing the Court's approaches in *Lassiter v. Department of Social Services* and *Walters v. National Ass'n of Radiation Survivors*.⁸² In *Walters*, the Supreme Court reversed the trial court's decision based on explicit factual findings showing the procedural and substantive difficulties facing veterans in pursuing disability claims, resulting from atomic-bomb tests, against the Veterans Administration. The Court rejected findings below regarding the need for representation by counsel, concluding that only a "tiny fraction of the total cases together" were "complex" in the sense of involving tricky legal questions.⁸³ *Lassiter's* rejection of due process claims seeking a categorical right to counsel in termination-of-parental-rights cases included a dismissive approach to studies showing the importance of counsel in reducing erroneous determinations; Justice Brennan's dissent, while acknowledging their methodological limitations, found the studies persuasive.⁸⁴

Turner raises troubling issues regarding the role of evidence in the Court's assessment as to the adequacy of access and process. The *Lassiter* and *Walters* Courts ultimately rejected or found unpersuasive evidence before them as to the actual difficulties facing litigants in having their claims heard meaningfully in court; the *Turner* Court's assertions regarding the simplicity or complexity of the litigation were based on arguments and information outside the trial court record, and lacked any rigorous statistical analysis to support the conclusions.⁸⁵ Abel concludes "that the only way to make the meaningful access standard meaningful is for the courts to rely on empirical evidence regarding the capabilities of pro se litigants."⁸⁶ Contributors to the *Concurring Opinions* symposium similarly called for better empirical work to help understand and evaluate the actual impact of court processes and procedures on self-represented litigants, rather than the theoretical impacts assumed by the court.⁸⁷

law—to pay, and to police the person making those judgments across a set of similarly situated litigants.

Id.

⁷⁹ See *supra* Part II.C.2.

⁸⁰ Abel, *supra* note 50 (manuscript at 1).

⁸¹ *Id.* (manuscript at 7).

⁸² See *id.* (manuscript at 10–13) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)).

⁸³ *Id.* (manuscript at 11–12) (citing *Walters*, 473 U.S. at 329–30).

⁸⁴ *Id.* (manuscript at 13) (citing *Lassiter*, 452 U.S. at 29 n.5; *id.* at 46 n.15 (Brennan, J., dissenting)).

⁸⁵ *Id.* (manuscript at 7–10).

⁸⁶ *Id.* (manuscript at 2); see also Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2009).

⁸⁷ See Laura Abel, *Turner v. Rogers: A Force for User-Friendly Courts or Empty Promises?*, CONCURRING OPINIONS (June 20, 2011, 12:38 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-a-force-for-user-friendly-courts-or-empty->

III. *TURNER* AND A COMPREHENSIVE ACCESS-TO-JUSTICE STRATEGY

This part first articulates a comprehensive strategy that connects access-to-justice initiatives with an expanded civil right to counsel as a unified response to the flood of unrepresented litigants in court and the perils facing many of those litigants as they attempt to navigate the legal system without counsel. Next, it illustrates how the logic of *Turner* fits this strategy, while cautioning that lessons of *Lassiter* serve as a reminder that the true impact of *Turner* itself may not be understood for years to come. The final subpart demonstrates that the pieces of the comprehensive strategy are in place. While *Turner* may prove to be an important tool in implementation of the strategy, the success of the strategy will likely depend on continued progress in each of the components of the strategy independent of *Turner* itself.

A. *A Comprehensive Access-to-Justice Strategy*

I articulate elsewhere an overarching, coordinated access-to-justice strategy that includes three prongs.⁸⁸ Prong one involves expansion of the roles of the court system's key players, such as judges, court-connected mediators, and clerks, to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights.⁸⁹ These individuals must play an active role to maintain the system's impartiality and ensure that unrepresented litigants do not forfeit rights due to the absence of counsel. At the same time, the court must take steps to simplify procedures, provide assistance to litigants in various forms, more effectively utilize technology, and reduce barriers to meaningful participation that currently impede those without counsel.

Prong two encourages the increased use of a variety of assistance programs, but requires that the programs be rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights.⁹⁰ This prong covers assistance programs beyond the work of court personnel and short of full representation by counsel, including hotlines, technological assistance, clinics, pro se clerks' offices, "Lawyer of the Day" programs, and self-help centers, which are developed to provide assistance to litigants who otherwise would receive no help at all.⁹¹ These programs are an important component in the strategy to increase access to justice. Yet, a comprehen-

promises.html; Jim Baillie, *Turner v. Rogers: An Opportunity for More Empirical Research on the Role of Counsel?*, CONCURRING OPINIONS (June 20, 2011, 9:12 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-an-opportunity-for-more-empirical-research-on-the-role-of-counsel.html#more-46922>; David Udell, *Known Unknowns, What Turner Suggests About the Need for a Justice Index*, CONCURRING OPINIONS (June 21, 2011, 5:30 PM), <http://www.concurringopinions.com/archives/2011/06/known-unknowns-what-turner-suggests-about-the-need-for-a-justice-index.html>.

⁸⁸ See, e.g., Engler, *supra* note 4.

⁸⁹ *Id.* at 198–200.

⁹⁰ *Id.* at 200–01.

⁹¹ See Houseman, *supra* note 23, at 40–43; see also Engler, *supra* note 25, at 2003–06.

sive access-to-justice strategy requires careful evaluation of the programs to identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes. Programs not affecting case outcomes may be worthwhile, but they are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

Prong three calls for the adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.⁹² When revising the roles of judges, mediators, and clerks and using assistance programs short of full representation are insufficient, a denial of access and routine forfeiture of rights are unacceptable outcomes, and a civil right to counsel must be established. The 2006 ABA Resolution, with its focus on basic human needs, is an important starting point for prong three.⁹³

B. *Turner Is Consistent With the Comprehensive Access-to-Justice Strategy.*

The comprehensive access-to-justice strategy described above is consistent with the logic of *Turner*. The right to counsel is tied not only to the rights at issue but the procedures in place. Where courts provide meaningful access and assistance programs are effective, there may be fewer litigants in need of counsel. Where procedures deprive litigants of meaningful access and steamroll their claims, more litigants will require appointed counsel.

Turner's focus on the complexity of the case is consistent with access-to-justice goals as well. The Court found the child support claims there to be "sufficiently straightforward,"⁹⁴ suggesting a different result might obtain in a case with more complex claims. The Court also noted that the opposing party was unrepresented by counsel.⁹⁵ It is not antithetical to the call for an expanded civil right to counsel to consider the capabilities and circumstances of both parties, suggesting a different result in some settings where the opposing party is a well-funded, represented party as opposed to an indigent, unrepresented one. The greater the imbalance of power between the parties, the greater the need for counsel will be.⁹⁶

C. *Rereading Lassiter as a Caution in Interpreting Turner*

While the logic of *Turner* is consistent with a comprehensive access-to-justice strategy, it would be a mistake to assume that is how the case will be understood over time. Scholars analyzing *Turner* have differed on the wis-

⁹² Engler, *supra* note 4, at 201–02.

⁹³ See *supra* note 45 and accompanying text.

⁹⁴ *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011).

⁹⁵ *Id.* at 2512.

⁹⁶ For a more detailed exploration of the access-to-justice implications of *Turner*, see Zorza, *supra* note 66.

dom of the policy implications of the decision but have agreed that only time will tell what the true impact of the decision will be.⁹⁷ *Lassiter* itself, a crucial underpinning to *Turner*, serves as a cautionary tale against a definitive assessment in the aftermath of the decision as to which parts of the *Turner* decision are most important and how the decision will eventually come to be understood.

Lassiter and its legacy underscore the wisdom of recognizing that the words within the four corners of the decision are only part of what constitutes a decision's legacy. *Lassiter* held that due process did not require a categorical right to counsel where termination of parental rights is involved.⁹⁸ Under *Lassiter*, whether a litigant is entitled to counsel as a matter of due process turns on the application of the *Mathews v. Eldridge* test to the particular case.⁹⁹

Despite a presumption against a right to counsel, *Lassiter* stated that a litigant may overcome that presumption on a case-by-case basis by demonstrating that the *Mathews* factors favor appointment of counsel.¹⁰⁰ As Clare Pastore observes, however, “[d]etermining how, and how often, the trial courts actually perform this due process analysis is a remarkably difficult task”¹⁰¹ “Without a detailed analysis of trial court minute orders, records, and perhaps even transcripts, how often pro se litigants request counsel, much less how courts handle such requests in the vast bulk of unappealed cases, is impossible to tell.”¹⁰² Despite the enormous number of pro se litigants, there is no evidence that judges appoint counsel regularly even on a case-by-case basis.

By the time *Turner* was decided, *Lassiter* stood less for the proposition that a civil right to counsel should be decided on a case-by-case basis and more for the proposition that a civil right to counsel exists primarily where such a right has been upheld as a matter of state law, whether by court decision or statute.¹⁰³ The reality may flow inevitably from the high volume of self-represented litigants flooding the courts, the crowded dockets of judges in the state courts, and the absence of a dedicated funding stream to pay for counsel on a case-by-case basis. Regardless of the path that led to the current understanding of *Lassiter*'s meaning, this understanding could

⁹⁷ See, e.g., Abel, *supra* note 50 (manuscript at 14); Zorza, *supra* note 66, at 266; Zorza & Udell, *supra* note 63.

⁹⁸ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

⁹⁹ See *id.* at 27–31.

¹⁰⁰ *Id.* at 31–32.

¹⁰¹ See Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186 (2006). In fact, “[o]ne commentator has observed that family courts in most states simply do not hold *Lassiter* hearings.” Abel, *supra* note 39, at 533 (citing William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 201–02 (1996)).

¹⁰² Pastore, *supra* note 101, at 186.

¹⁰³ See *id.* at 188; see also Abel & Rettig, *supra* note 44, at 245 (providing an overview of state statutes and court rules that provide a right to counsel in civil cases).

not be inevitably gleaned from the decision's four corners. For similar reasons, the true impact of *Turner* remains to be seen.

D. The Pieces of a Comprehensive Access-to-Justice Strategy Are Already in Place.

If *Turner*'s legacy will develop over time, then its impact, and the progress on providing meaningful access, will depend on changes implemented by the state courts and legal communities that deal with courts flooded by self-represented litigants. While the adoption and implementation of an overarching strategy consistent with *Turner* would seem to face immense challenges, steady progress has been achieved on each prong of the strategy articulated above. The subparts below summarize recent activities related to each of the three prongs of the comprehensive strategy. The subparts begin with changes involving the role of the courts (prong one), before turning to assistance programs short of full representation by counsel (prong two). The final subpart discusses activity related to prong three, an expanded right to counsel.

1. Prong One: The Role of the Courts

Regarding prong one, the attitudes toward the roles of judges, court-connected mediators, and clerks have undergone a sea change over the past fifteen years. The increased emphasis at conferences and trainings on judges playing an active role in protecting the rights of litigants and the publication of materials to guide judges in actively assisting litigants while remaining neutral reflect this reality.¹⁰⁴ Some states issued protocols or guidelines to assist judges in the handling of their cases involving self-represented litigants.¹⁰⁵ The materials to which judges have access include a national bench guide¹⁰⁶ and a curriculum, complete with PowerPoint slides, case scenarios,

¹⁰⁴ See, e.g., Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 367-68 (2008). Publications include GOLDSCHMIDT ET AL., *supra* note 29; CYNTHIA GRAY, AM. JUDICATURE SOC'Y & STATE JUSTICE INST., REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005), available at <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>; Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., Winter 2003, at 16. With respect to conferences, see, for example, GOLDSCHMIDT, ET AL., *supra* note 29; Albrecht, et al., *supra*.

¹⁰⁵ Minnesota, followed by Idaho, developed proposed protocols in the mid-1990s, focusing entirely on evidentiary hearings. Albrecht et al., *supra* note 104, at 18. Massachusetts promulgated more comprehensive guidelines a decade later covering all aspects of the proceedings. See *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants*, MASS. COURT SYS., <http://www.mass.gov/courts/judguidelinescivhearingstoc.html> (last updated Aug. 18, 2006, 4:17 PM).

¹⁰⁶ SELF-REPRESENTED LITIG. NETWORK, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A NATIONAL BENCH GUIDE FOR JUDGES (2008) [hereinafter NATIONAL BENCH GUIDE], available at http://www.selfhelpsupport.org/library/folder.42613-Communication_Protocol.

and videos.¹⁰⁷ Reflecting the trend toward acceptance of the more active judicial role, the ABA added a new comment to the Model Judicial Code allowing judges “to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard”;¹⁰⁸ as of 2012, twenty-three jurisdictions have adopted the ABA comment or comparable language.¹⁰⁹

Scholars have provided the underpinnings for this change by arguing persuasively that the active judicial role and the concept of judicial engagement are appropriate as a matter of both judicial ethics and policy.¹¹⁰ Discussions regarding the active judicial role occur in settings designed to promote access to justice¹¹¹ and against the backdrop of access-to-justice resolutions designed to make the courts more accessible to those without counsel.¹¹² As the *National Bench Guide*, a pathbreaking resource for judges, urges, judicial engagement in the overall functioning of the justice system is critical “to expand services and resources that will allow the system to work effectively and to build resources so that cases involving self-represented litigants can truly be decided on the law and facts of the case.”¹¹³ This sea change with regard to prong one is consistent with *Turner*. Zorza asserts that *Turner* “will greatly influence the judicial handling of civil self-represented litigation.”¹¹⁴ “Lurking behind this changed judicial environment is the Court’s effective endorsement of judicial engagement as helping ensure, and indeed sometimes required to ensure, fairness and accuracy, and to meet the

¹⁰⁷ The curriculum materials include a guide to the materials, optional activities, videos, and resources. See *Curriculum Resource Materials*, SELF HELP SUPPORT, <http://www.selfhelpsupport.org/library/folder.169512> (last visited Nov. 23, 2012). For a description of the curriculum, see Richard Zorza, *New Curriculum Helps Improve Access for the Self-Represented*, in *FUTURE TRENDS IN STATE COURTS 2008*, at 50 (Carol R. Flango et al. eds., 20th anniversary ed. 2008), available at http://www.ncsconline.org/WC/Publications/KIS_Ct_Futu_Trends08.pdf.

¹⁰⁸ MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

¹⁰⁹ See E-mail from Cynthia Gray, Dir., Am. Judicature Soc’y Ctr. for Judicial Ethics, to author (Nov. 19, 2012, 10:19 EST) (on file with author). For a comparison of state variations to the Model Judicial Code, see ABA Ctr. for Prof’l Responsibility, *Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, AM. B. ASS’N, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html (last visited Jan. 5, 2013).

¹¹⁰ See Engler, *supra* note 25; Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *FAM. CT. REV.* 36, 42–43 (2002) (rejecting the idea that impartiality equals passivity, and urging judges to be far more active in the adversary process); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations and Implications*, 17 *GEO. J. LEGAL ETHICS* 423, 425 (2004) (arguing that “our focus on the appearance of judicial neutrality has caused us improperly to equate judicial engagement with judicial non-neutrality, and therefore to resist the forms of judicial engagement that are in fact required to guarantee true neutrality”).

¹¹¹ See *supra* notes 33–34 and accompanying text.

¹¹² See *supra* note 34.

¹¹³ NATIONAL BENCH GUIDE, *supra* note 106.

¹¹⁴ Zorza, *supra* note 67, at 16.

requirements of due process.”¹¹⁵ *Turner*’s required procedural safeguards comprise a duty imposed on judges.¹¹⁶

2. *Prong Two: Assistance Short of Full Representation by Counsel*

Regarding prong two, the ongoing development of assistance programs ensures that energetic and innovative advocates will continue to try to identify ways to provide assistance, despite the shortage of resources.¹¹⁷ The extensive list of programs that have emerged along what may be understood to be a legal services spectrum includes self-help services, public legal education and information, advice from nonlawyers, and advice and brief services by lawyers in various settings. Programs vary in terms of the services they provide, with some providing legal advice and document preparation, and others limiting their services to general information and assistance. Some programs involve publicly funded lawyers, while others use volunteers from the private sector. An array of nonlawyers—including paralegals, law students, court personnel, community groups, and members of social services organizations—may work separately or with the lawyers. The assistance might be provided in person, either inside or outside the courthouse, or over the telephone, via e-mail, or through the Internet.¹¹⁸ The careful articulation of goals, the commitment to match needs with structures of assistance programs likely to effectuate the goals, and the use of evaluative tools to ensure that the programs are delivering as anticipated are essential tools for the prong-two strategy.

3. *Prong Three: An Expanded Civil Right to Counsel*

a. *Litigation in the State Courts*

Turner amounted to a rare statement by the United States Supreme Court on the topic of a civil right to counsel. The more frequent litigation activity has been in the state courts. In 2006, Pastore summarized litigation post-*Lassiter*, citing close to one hundred cases in the article.¹¹⁹ Numerous cases concerning a civil right to counsel arose around the country after Pastore’s article went to press.¹²⁰ For example, a pair of Massachusetts decisions extended the civil right to counsel in certain proceedings involving children

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Abel, *supra* note 50 (manuscript at 5).

¹¹⁸ For a more detailed discussion of the variety of potential programs, and ethical issues that flow from the varying structures, see Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance In Providing Access to Justice for Middle-Income Earners*, in *MIDDLE INCOME ACCESS TO JUSTICE 145* (Michael J. Trebilcock, Anthony J. Duggan & Lorne Mitchell Sossin eds., 2012).

¹¹⁹ Pastore, *supra* note 101.

¹²⁰ See *Civil Right to Counsel Update*, NAT’L COAL. FOR CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org/news/newsletter/> (last visited Jan. 5, 2013). Each newsletter of the NCCRC begins with a litigation update.

in need of services and privately initiated adoptions.¹²¹ In one instance in Alaska, litigation led to the appointment of counsel for an indigent parent in a private custody dispute.¹²² A Washington appeals court found, as a matter of statutory construction, that Washington's provision of a right to counsel in dependency proceedings included the concurrent family court proceeding in which the trial court would consider whether the child should return home.¹²³

Other recent litigation efforts to expand the civil right to counsel have failed. Court decisions in Washington limited the right to counsel, or found no right at all, in areas including, for example, child truancy and termination proceedings.¹²⁴ The Wisconsin Supreme Court denied a petition to create a civil right to counsel by court rule.¹²⁵ In an intriguing decision for post-*Turner* analysis, the New Hampshire Supreme Court, in a 2–1 decision, found constitutional a 2011 statute abolishing the statutory right to counsel for an indigent parent alleged to have abused or neglected his or her child, holding that the decision to appoint counsel should be made on a case-by-case basis.¹²⁶ The concurring justice would have found that all such cases should be decided on a case-by-case basis, while the dissent would have found a categorical right to counsel.¹²⁷ All three opinions relied on *Mathews* or *Lassiter* in their analysis; none even cited *Turner*.¹²⁸

b. State Legislative and Administrative Initiatives

Beyond litigation, legislative and administrative initiatives provide an alternative strategy to pursue an expanded civil right to counsel. Massachusetts's revised Uniform Probate Code provides a qualified right to counsel for persons facing potential appointment of a guardian or conservator.¹²⁹ New York expanded the right to counsel in place for child custody cases heard in family courts to similar proceedings in the state's supreme courts.¹³⁰

¹²¹ *In re Adoption of Meaghan*, 961 N.E.2d 110 (Mass. 2012) (holding that both parents and children are entitled to a right to counsel in privately initiated adoption proceedings that are contested); *In re Hilary*, 880 N.E.2d 343 (Mass. 2008) (extending the right to counsel to parents at the dispositional phase of a Children in Need of Services (CHINS) proceeding if the judge is considering awarding custody to the Department of Social Services).

¹²² *Gordanier v. Jonsson*, No. 3AN-06-8887 CI (Alaska Super. Ct. Aug. 14, 2007), available at <http://www.civilrighttocounsel.org/pdfs/Gordanier%20v%20Jonsson%20-%20Order%20Appointing%20Counsel.pdf>.

¹²³ *In re Dependency of E.H.*, 243 P.3d 160 (Was. Ct. App. 2010).

¹²⁴ *In re Dependency of MSR*, 271 P.3d 234 (Wash. 2012) (ruling that some, but not all, children are entitled to counsel in termination proceedings, with the decision resting in the discretion of the judge); *Bellevue Sch. Dist. v. E.S.*, 257 P.3d 570 (Wash. 2011) (denying a right to appointed counsel for a child in truancy proceeding); *In re Dependency of A.P.*, 163 Wash. App. 1018 (2011) (unpublished table decision) (finding that a parent in a dependency case does not have a statutory right to counsel).

¹²⁵ *In re Petition to Establish a Right to Counsel in Civil Cases*, No. 10-08 (Wis. Feb. 24, 2012) (declining to amend SCR 11.02 as requested by the petitioners).

¹²⁶ *In re C.M.*, 48 A.3d 942 (N.H. 2012).

¹²⁷ See *id.* at 950 (Lynn, J., concurring); *id.* at 953 (Conboy, J., dissenting).

¹²⁸ See *id.* at 945–46 (majority opinion); *id.* at 950–51 (Lynn, J., concurring); *id.* at 958 (Conboy, J., dissenting).

¹²⁹ MASS. GEN. LAWS ch. 190B, § 5-106 (2009).

¹³⁰ Marvy & Abel, *supra* note 44, at 132.

Tennessee expanded the right to counsel for parents in certain proceedings involving the adoption code.¹³¹

In contrast, other legislative efforts reduced the scope of the civil right to counsel. New Hampshire's legislation removing the statutory right to counsel for parents in abuse proceedings survived the recent challenge in *In re C.M.*, discussed above. Louisiana enacted legislation requiring the appointment of counsel for a parent facing termination of his or her parental rights through an adoption proceeding brought by a family member,¹³² only to repeal the legislation two years later and replace it with a discretionary appointment system.¹³³

Administrative initiatives also impact the civil-right-to-counsel and access-to-justice movements. In 2007, the Supreme Court of Washington promulgated Rule 33, providing for "Requests for Accommodation by Persons with Disabilities"; among the authorized accommodations are, "as to otherwise unrepresented parties to the proceedings, representation by counsel."¹³⁴ Amendments to court rules and ethics codes have authorized Limited Assistance Representation (LAR), often referred to as "Unbundled Legal Services" or "Discrete Task Representation,"¹³⁵ and added provisions supporting an expanded judicial role in assisting self-represented litigants to promote access to justice and allow litigants to be fairly heard.¹³⁶

c. *Experimentation, Pilot Projects, and Empirical Work*

A third strategy to expand the civil right to counsel and promote increased access to justice involves the growing use of pilot projects and experimentation, often paired with data collection and empirical work. Pilot projects can serve to obtain data and build support for civil-right-to-counsel initiatives, particularly where the support and funding for a full right to counsel in a substantive area is not yet established and the alternative would be no action at all. In Massachusetts, the task force charged with exploring the civil right to counsel proposed pilot projects across four substantive areas before obtaining funding to conduct two eviction-defense pilots.¹³⁷ California's Sargent Shriver Civil Counsel Act established three-year pilot programs for the right to counsel in cases affecting basic human needs (such as

¹³¹ S.B. 0417, 107th Gen. Assemb. (Tenn. 2011).

¹³² Marvy & Abel, *supra* note 44, at 132.

¹³³ H.B. 1146, 2010 Reg. Sess. (La. 2010).

¹³⁴ WASH. GR 33(a)(1)(C) (2012).

¹³⁵ For information about unbundling generally, see ABA Standing Comm. on the Delivery of Legal Servs., *The Pro Se/Unbundling Resource Center*, AM. B. ASS'N, http://www.americanbar.org/groups/delivery_legal_services/resources.html (last updated Dec. 14, 2011).

¹³⁶ See *supra* notes 108–109.

¹³⁷ BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS (2008), *available at* http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; BOS. BAR ASS'N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION: A REPORT ON THE BBA CIVIL RIGHT TO COUNSEL HOUSING PILOTS (2012) [hereinafter THE IMPORTANCE OF REPRESENTATION], *available at* <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

domestic violence, deprivation of child custody, housing, and elder abuse).¹³⁸ The Texas Access to Justice Foundation sponsored two civil-right-to-counsel pilot projects.¹³⁹ While denying the petition to create a civil right to counsel, the Wisconsin Supreme Court noted the existence of a pilot project being conducted by the Wisconsin Access to Justice Commission in conjunction with the court, asking to be kept “apprised of the progress of the Pilot Project.”¹⁴⁰

IV. BEYOND *TURNER*

While *Turner* stands as an important civil-right-to-counsel decision, its importance should not be overstated. The most meaningful activity in the civil-right-to-counsel and access-to-justice arenas has occurred at the state, rather than the federal, level. Access-to-justice and civil-right-to-counsel initiatives will continue in the post-*Turner* world. Whether those initiatives proceed because of *Turner*, despite *Turner*, or independent of *Turner* remains to be seen.

The context that provides *Turner*'s backdrop and the reaction to *Turner* nonetheless highlight crucial issues that will define the progress toward meaningful access to justice post-*Turner*. This part first presents observations for access-to-justice and civil-right-to-counsel initiatives that emerge from the discussion surrounding *Turner*. It then turns to the importance of research needed in the wake of *Turner*, while at the same time exploring the important connection between the need for research and the need to pursue policy choices that must shape the research and that may need to be made in advance of the completion of research. The final subpart uses *Turner* to frame specific research questions that access-to-justice and civil-right-to-counsel initiatives will need to address.

A. *Observations*

1. *An Expanded Civil Right to Counsel Will Depend on Politics More Than Doctrine.*

The politics and principles of social change are more likely than the development of constitutional or statutory doctrine to dictate the successes in

¹³⁸ See Recent Legislation, *California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 HARV. L. REV. 1532 (2010).

¹³⁹ For a summary of the Texas pilots, see *Texas Launches Two Civil Right to Counsel Pilots*, CIV. RIGHT TO COUNS. UPDATE (Nat'l Coal. for a Civil Right to Counsel), June 2010, at 2, available at <http://www.civilrighttocounsel.org/pdfs/2010-June-Civil-Right-to-Counsel-Update.pdf>.

¹⁴⁰ *In re* Petition to Establish a Right to Counsel in Civil Cases, No. 10-08, slip op. at 3 (Wis. Feb. 24, 2012).

the expansion of a civil right to counsel.¹⁴¹ Any implementation of a civil right to counsel, whether categorical, limited, or on a case-by-case basis, will involve painful questions of line drawing.¹⁴² Strategies that engage a broad array of stakeholders in the difficult task of identifying crucial starting points for where counsel is most likely to be needed are essential to progress on this front. This exercise will necessitate a prioritization of potential areas based on their importance and must involve a shared understanding as to the effectiveness of counsel over lesser forms of assistance.¹⁴³

The same holds generally with access-to-justice initiatives. Acceptance of the more active role of judges in cases involving self-represented litigants depends on the recognition that the problems facing the courts are here to stay, and on judicial education and training. Stakeholders similarly recognize that training of court staff, the push toward simplification, the increased use of technology to assist litigants, and the advent of self-help centers and court-based assistance programs are essential steps in responding to the crises facing the courts and litigants. In the face of severe cutbacks in resources for the courts, it remains to be seen whether the programs and initiatives will be derailed or viewed as essential to serving the public in a world of scarce resources. If Zorza is correct that there is an “emerging consensus” regarding the need to increase access to justice and employ system-wide triage,¹⁴⁴ it is from that consensus that the seeds of any expansion of a civil right to counsel will emerge.

2. *Access-to-Justice and Civil-Right-to-Counsel Initiatives Should Complement One Another and Need Not Be in Conflict.*

While critics of a categorical civil right to counsel like Barton and Bibas correctly note that we “live in a world of scarcity,”¹⁴⁵ they overstate their case by presenting pro se reform and a civil right to counsel as either/or choices.¹⁴⁶ The comprehensive access-to-justice strategy described above illustrates the need for access-to-justice initiatives, including pro se reform, to work in tandem with an expanded civil right to counsel. Since a scarcity of resources will persist for the foreseeable future, the logical extension of the Barton and Bibas argument would be to eliminate the categorical right to counsel everywhere. That Barton and Bibas nowhere argue that position reflects their own values as to which cases are most important, and which

¹⁴¹ Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006).

¹⁴² Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97 (2011).

¹⁴³ See, e.g., *id.* at 116–17 (describing a seven-step process I have previously proposed).

¹⁴⁴ Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 156 (2011).

¹⁴⁵ Barton & Bibas, *supra* note 49, at 990.

¹⁴⁶ See *id.* at 985–94; see also Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1228–29 (2010).

are less so. Their position implies that the deprivation of physical liberty in criminal cases is a more important right than the rights involved in a private custody dispute or an eviction case, and that appointment of counsel is therefore more critical. Yet, many parents would choose to serve thirty days in prison before giving up custody of their children. Many tenants would choose a temporary loss of liberty to avoid eviction and homelessness.

The right to appointed counsel must reflect our societal values, rights, and interests. The proper response to scarcity is not to draw artificial lines based on unstated value systems such as a presumption that a criminal case is always more important than a custody or eviction case, but to have an explicit conversation as to which types of issues or interests are most important and why, paired with careful analysis of what levels of intervention are necessary to protect those interests. Both pro se reform and an expanded right to counsel are needed, rather than one or the other.

3. *The Crucial Access-to-Justice and Civil-Right-to-Counsel Questions Require Both Better Data and Sound Policy Decisions.*

a. *Better Research Must Inform Efforts to Provide Increased Access to the Courts.*

The post-*Turner* commentary and increased use of pilot projects reflect the need for better data. While studies exist regarding both the impact of representation on case outcomes and the effectiveness of limited assistance and self-help programs, basic questions remain unanswered.¹⁴⁷ The data regarding limited assistance and self-help programs typically focus on data points such as “customer satisfaction,” shedding little light on the programs’ effectiveness in impacting case outcomes.¹⁴⁸ While reports and accounts in the areas of housing, family, debt-collection, and administrative proceedings typically show a dramatic impact where litigants have representation,¹⁴⁹ most of the reports may be methodologically unsound due to the failure to eliminate “selection bias” (whether by the clients who choose to seek lawyers or the cases the lawyers choose to take) in the cases studied.¹⁵⁰ The few studies that eliminate selection bias raise questions regarding the impact of representation, noting that variables such as the judge, the court’s procedures, the pool of cases, the lawyering strategies, and the nature and extent of the assistance in the control group might impact the results to varying degrees.¹⁵¹ As Abel observes, “Unfortunately, there is a shortage of solid, reliable data con-

¹⁴⁷ See, e.g., Engler, *supra* note 26, at 45.

¹⁴⁸ See *id.* at 66–73.

¹⁴⁹ See *id.* at 46–66.

¹⁵⁰ See Greiner & Pattanayak, *supra* note 32, at 2178–96 (critiquing the existing work).

¹⁵¹ See THE IMPORTANCE OF REPRESENTATION, *supra* note 137; Greiner & Pattanayak, *supra* note 32.

cerning which specific types of legal assistance various types of litigants need to obtain meaningful access.”¹⁵²

b. The Failure to Identify Key Factors That Should Impact Decisions Amounts to Making Unwitting and Ill-Informed Policy Choices.

Despite the gaps in research, courts, bar leaders, and legislators make policy decisions that rely heavily on the data that exist, without acknowledging that the choices may lead to a decrease in meaningful access to justice. For example, the emphasis on docket control provides incentive for judges to move their cases and for the system to focus on cases that are not resolved quickly. There is no countervailing pressure to explore cases that settle through an unmonitored, hallway negotiation between a represented party and an unrepresented one, which are approved with minimal judicial oversight.¹⁵³ If judges must only explain why some cases sit on their dockets longer and never need to defend the fairness in terms of outcomes of the cases involving minimal judicial oversight, the relative importance of speed versus fairness is evident. Articulating ways to measure fairness, collecting data, and providing oversight to ensure fair processes and outcomes in the speedy cases must offset the pressures of docket control.

c. While Better Research Should Inform Policy Decisions, the Absence of Research Cannot Serve as an Excuse for Inaction.

It is not inconsistent to press ahead with policy decisions based on tentative conclusions while simultaneously accumulating more data to allow for adjustments in the conclusions. Despite the methodological weaknesses of many of the existing reports, they nevertheless suggest a number of conclusions. First, representation is only one variable impacting case outcomes. The substantive law, the procedural law, the judge or decision maker, and the operation of the courts are other factors. Second, power matters greatly in interpreting the dynamics of cases. Identifying power imbalances and the sources of power are important steps in analyzing where full representation is more likely to be needed and where lesser forms of assistance might suffice. Finally, where representation is needed, a representative with specialized expertise in the area of law and the forum is likely to be needed, as opposed to merely any representative.¹⁵⁴

¹⁵² Abel, *supra* note 50 (manuscript at 14–15).

¹⁵³ See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations With Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 142–146 (1997).

¹⁵⁴ See Engler, *supra* note 26, at 73–85.

B. *The Turner Facts Reveal Research and Policy Questions That Must Be Addressed.*

Turner illustrates the types of inquiries that must be explored so that the promise of meaningful access articulated in *Turner* is not illusory. Questions include: (1) What must the evidence show? (2) How complex is too complex? (3) How great must the risk of error be? and (4) Who has what burden in a world short of a categorical right to counsel? How those questions are answered as a matter of policy and what data are developed to justify the policy decisions will be crucial in determining whether access is meaningful or illusory.

1. *What Must the Evidence Show?*

If evidence-based access to justice requires more data and better research, what, exactly, should the data show? Threshold questions or decisions as to what information is most crucial to inform sound policy choices are essential both to facilitate the search for existing information and also to guide the design of needed research. For example, if one were interested in evaluating the effectiveness of a self-help program offering assistance in housing matters, it would be important to understand the goals of the program, to determine whether to research the process of giving assistance or the case outcomes achieved, and to settle on data points to measure. If the goal is to reach as many people as possible, then data about time spent per case might be crucial. If the goal is to eradicate confusion and demystify the court process, then client interviews regarding their understanding might be crucial. If the goal is to measure the impact of the assistance in terms of case outcomes, then selecting crucial data points, such as retaining possession or obtaining repair orders, and a method for obtaining the information, such as by review of a court file or some other route, could be important.

The questions raised by *Turner* involve the fairness of the process for litigants absent counsel. But how can one begin to collect data regarding the fairness of a process without some agreement as to what constitutes a fair process? One might examine court data to learn the incidence of success, by various measures, of those appearing with versus without counsel. Absent an understanding of what constitutes an acceptable norm, it is impossible to interpret the data to determine whether the results are unfair or unacceptable. David Udell therefore reads *Turner* as suggesting the need for an “access to justice index” because “[s]o little is known about what is necessary to assure ‘fundamental fairness’ in our justice system.”¹⁵⁵

¹⁵⁵ Udell, *supra* note 87.

2. *How Complex Is Too Complex?*

One crucial factor in *Turner* was the Court's view that child support cases are relatively simple. How complex is too complex, and who makes this assessment? Abel notes that the Supreme Court's approach in *Turner*, *Lassiter*, and *Walters* suggests a cavalier approach to the question of data—that is, a willingness to make an independent judgment about fairness and complexity without data or by ignoring data introduced in the lower courts.¹⁵⁶

Complexity can relate to the substantive law and procedures as well. While lawyers and judges unfamiliar with the intricacies of landlord-tenant law in some jurisdictions might presume that the proceedings are simple, experts in the area often consider the law complex and the cases quite adversarial.¹⁵⁷ For Barton and Bibas, critics of a categorical civil right to counsel and proponents of pro se reform, “[s]ome exceptional civil cases may merit counsel, either because they are particularly complex or because they are otherwise especially important or meritorious.”¹⁵⁸ The concepts of “exceptional,” “particularly complex,” and “especially important and meritorious” imply that the decision to appoint counsel will be relatively rare, and elide the question of from whose perspective, and based on what information, the determination of complexity and importance will be made. Bewildered litigants without counsel routinely find complex many cases that experts in the area deem simple.

Where proceedings are too complex for litigants to handle on their own, who should provide the assistance? Again, the answers should be informed by data, not dictated by assumptions or invocations of scarcity. In discussing *Turner*, commentators identify a range of actors who might provide assistance to pro se litigants, including public-interest lawyers, pro bono lawyers, lay advocates, and court personnel, to name a few.¹⁵⁹ Greiner, Patanayak, and Hennessey identify lawyers and the manner in which they litigate cases as one potential variable impacting case outcomes.¹⁶⁰ The three-pronged approach suggested above urges the use of limited assistance programs, paired with rigorous evaluation, to identify what interventions actually impact case outcomes and preserve basic human needs. Scarcity alone cannot drive the decision making.

3. *How Great Must the Risk of Error Be?*

The *Mathews* factors, reaffirmed in *Lassiter* and *Turner*, requiring consideration of the risk of error, further illustrate the need to inform policy choices with data. The concept of an erroneous outcome assumes the con-

¹⁵⁶ Abel, *supra* note 50 (manuscript at 12).

¹⁵⁷ Engler, *supra* note 25, at 2059.

¹⁵⁸ Barton & Bibas, *supra* note 49, at 991.

¹⁵⁹ See, e.g., Abel, *supra* note 50 (manuscript at 5); Barton & Bibas, *supra* note 49, at 987.

¹⁶⁰ Greiner et al., How Effective, *supra* note 32, at 45–48.

cept of a correct one, which can be defined and measured. Moreover, regardless of the definition selected for an erroneous outcome, what is an acceptable error rate? The right to counsel on the criminal side does not seem to depend on empirically sound data showing that defendants would lose most cases without counsel and win them with counsel. To the contrary, the frequency of convictions, by plea bargain or at trial, attests to the idea that even a relatively small risk of error is too great a risk given the stakes.

How should this notion play out on the civil side? How likely must it be in an individual case that error might occur before the risk is too great? For a category of cases, is the need for representation triggered if we fear the risk is that 5%, 30%, 50%, or 90% of the cases will be erroneously decided? Reliable empirical work can help measure, but it is at the policy level that the understanding as to what level of error is unacceptable for a system that promises the balanced scales of justice must be determined.

4. *Who Has What Burden in a World Short of a Categorical Right to Counsel?*

Questions related to the acceptable risk of error implicate concerns articulated by right-to-counsel advocates regarding the case-by-case implementation of the right to counsel. The questions and analysis above suggest that counsel will never be appointed under a scheme in which litigants must themselves prove the need for counsel. Litigants who can prove what needs to be proven will show they are capable of self-representing; litigants overwhelmed by the system will be ill equipped to meet their burden.

The *Turner* Court identified as one reason for not appointing counsel for Mr. Turner the fact that the mother, Ms. Rogers, was herself without counsel and the Court did not want to trigger an imbalance in the adversarial system. Presumably, therefore, the Court might be more amenable to the provision of counsel where an imbalance of power exists. The substantive law, familiarity with the procedures, being a repeat player, and having access to counsel are sources of power. In contrast, poverty, unfamiliarity with the legal system, or barriers in terms of language, literacy, education, age, or disability are among the factors that make litigants particularly vulnerable.¹⁶¹

What, exactly, must this vulnerable, disadvantaged litigant do to demonstrate the need for counsel? The litigant first must recognize that the request for counsel is an option, something not acknowledged by the courts thirty years after *Lassiter*.¹⁶² Must the litigant then perform the legal analysis to demonstrate how, absent counsel, particular meritorious claims or defenses will not be presented to the court, resulting in an erroneous outcome? Must the litigant marshal data on the court's operation, demonstrating the unfairness of the procedures in a statistically significant way? Will the deci-

¹⁶¹ Engler, *supra* note 26, at 78–79.

¹⁶² See *supra* Part III.

sion maker be the judge in the case, who daily operates in the forum and likely presumes his or her court is fair, as opposed to unfair? What is the burden of proof for this presentation? Must the litigant merely raise a viable issue, prove that the risk of error is certain to occur, or meet the burden by a preponderance of the evidence?

There is a middle ground between a categorical right to counsel and a case-by-case analysis that puts the entire demonstrative burden on the vulnerable litigant who will be ill equipped to meet such a heavy burden.¹⁶³ The idea of identifying starting points for a civil right to counsel suggests the need to identify categories of cases important enough to be candidates for an expanded civil right to counsel and to develop a consensus as to the subcategories of cases and litigants within the broader category that are most likely to need counsel. A political agreement among key actors in the legal system, informed by data where a consensus cannot otherwise be reached, might be more useful than doctrine in making these determinations. Judges, legal-aid lawyers, and private lawyers might well provide comparable answers to the question of which subset of cases in their areas of expertise most need counsel. With the consensus in place, litigants with cases falling within the subset would meet the presumption without the need for independent proof, while litigants in cases outside the target area would still be able to attempt proof on a case-by-case basis, though without the benefit of the presumption.¹⁶⁴ Therefore, litigants for whom counsel is not provided will still be provided meaningful access to justice through fair procedures and other forms of assistance to uphold the promise of *Turner*, due process, and fundamental fairness.

C. The Courts Must Play a Crucial Role in Both Access to Justice and a Civil Right to Counsel.

The logic of *Turner*, its backdrop, and the need for a comprehensive access-to-justice strategy suggest the central role the courts must play both in promoting access to justice and in developing an expanded civil right to counsel. *Turner* identifies the interplay between the court procedures and the need for counsel: the more the procedures can provide meaningful access, the less the need for counsel is likely to be. The explosion of self-represented litigation combined with the devastating legal services cutbacks make clear that self-represented litigation is here to stay. Whether litigants are stymied by complex procedures and steamrolled by an unfair system depends on how accessible the procedures are to vulnerable litigants.

The “emerging consensus” Zorza identifies involves “court simplification, bar flexibility, legal aid efficiency and availability, and systems of

¹⁶³ See Engler, *supra* note 141, at 710–17; Engler, *supra* note 142, at 120–24.

¹⁶⁴ This approach is the one that advocates in Massachusetts are pursuing with the targeted-representation model under study in the eviction-defense pilot projects. See *supra* note 137 and accompanying text.

triage and assignment.”¹⁶⁵ As with the three-pronged approach, the key is the coordination of all available resources with the shared vision of working to increase meaningful access. As the courts reduce the complexity of their procedures, better utilize technology to increase court access, and facilitate the role of judges and court staff in assisting litigants, the need for counsel will diminish. As assistance programs proliferate and evaluation and data collection become more sophisticated, the “Triage and Referral” portion of Zorza’s “emerging consensus” will allow for better identification of litigants who most urgently should be matched with counsel, as opposed to an alternative form of assistance.¹⁶⁶

Courts and members of the judiciary are essential in ensuring that the promise of *Turner* is not illusory. Using the language of the three-prong analysis in the comprehensive access-to-justice strategy, the roles of individual judges, court-connected mediators, and clerks are crucial at prong one. Yet, the crucial role of judges also includes providing judicial leadership more generally. “Court systems are highly complicated organizations, perhaps appropriately not conducive to rapid transformative change. Judges are often the only players with the credibility, reputation, and leverage to build the momentum needed to increase access for the self-represented—and indeed for all people.”¹⁶⁷ Court leaders play crucial roles, such as adopting administrative directives that promote increased access and ensuring that individual judges and clerks receive the training and support they need to carry out their roles in this manner.¹⁶⁸

Nor is the leadership role for the courts limited to prong one. Successful assistance programs at prong two depend on the cooperation and support of the judiciary.¹⁶⁹ The expansion of unbundled legal services, or “limited assistance representation,” was often stymied by hostile court decisions but ultimately furthered by administrative directives and ethics rules that facilitated limited representation.¹⁷⁰ At prong three, as judges realize they may

¹⁶⁵ Zorza, *supra* note 144, at 156–57.

¹⁶⁶ *Id.* at 163.

¹⁶⁷ NATIONAL BENCH GUIDE, *supra* note 106, at 12-1. Undertaking a leadership role “reinforces the public’s understanding . . . of the court’s commitment to access and neutrality.” *Id.*

¹⁶⁸ For an illustration of trainings, see *supra* Part III.D.1. For examples of administrative directives, see CIVIL COURT OF THE CITY OF N.Y., ADVISORY NOTICE: ALLOCUTIONS OF STIPULATIONS IN LANDLORD AND TENANT CASES (2007), available at <http://www.nycourts.gov/courts/nyc/SSI/directives/AN/allocutions.pdf> (providing for judicial allocutions of stipulations in landlord and tenant cases); CIVIL COURT OF THE CITY OF N.Y., ADVISORY NOTICE: CONSUMER DEBT CASES: CPLR § 3015(e); VALIDATION; ALLOCUTIONS OF STIPULATIONS (2007), available at <http://www.nycourts.gov/courts/nyc/SSI/directives/AN/consumerdebt.pdf> (discussing approval of stipulations in debt collection cases involving cases where defendants are not represented by counsel).

¹⁶⁹ See, e.g., Zorza, *supra* note 144, at 157–58 (discussing the courts’ contribution to the emerging consensus designed to solve the access-to-justice problem).

¹⁷⁰ Judicial resistance and even hostility was most clearly evident in the area of ghostwriting. See, e.g., Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1190 (2002). In contrast, the adoption of Limited Assistance Representation in Massachusetts illustrates how the change depended on leadership from, and acceptance by, the judiciary. See, e.g., THE SUPREME JUDICIAL COURT STEERING COMM. ON SELF-REPRESENTED

appoint counsel in individual cases under *Lassiter* itself, the absence of a categorical right to counsel might cease to be the end of the conversation as to whether a litigant needs appointed counsel.¹⁷¹

Successful steps at prongs one and two should shrink the number of cases in which litigants in civil cases require full representation by counsel. The steps cannot eliminate such a need given the basic human needs at stake in many civil proceedings, the adversarial nature of many of those proceedings, and the vulnerability of many of those forced to navigate the system without the level of assistance they need. The courts alone are not the solution to the problem, but the courts remain responsible for the fairness of the procedures and the results emanating from the court system. The willingness to acknowledge scenarios in which nothing short of full representation by counsel is likely to suffice and the subsequent appointment of counsel are crucial components to an effective access-to-justice strategy.

V. CONCLUSION

A coordinated, overarching access-to-justice strategy, which includes leadership from the courts and an effective civil-right-to-counsel component, is essential to making this vision a reality. Only with the leadership both of court leaders and of individual judges will the courts' procedures and resources be marshaled to reduce the unfairness facing many litigants in our adversarial system. Assistance programs are an important piece of the puzzle, but data and evaluation are crucial to help match the particular programs to the scenarios in which each program is most effective. An expanded civil right to counsel is necessary where important interests are at stake and assistance levels short of assistance by counsel will fall short of providing meaningful access. Rather than placing an insurmountable burden on our most vulnerable litigants to prove the need for counsel, a shared consensus, supplemented with data where important questions remain unanswered, should help identify the scenarios in which counsel is most needed, and will presumptively be provided.

LITIGANTS, ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS 16–17 (2008), available at <http://www.mass.gov/courts/sjc/docs/self-rep-final-report.pdf>; Christina P. O'Neill, *Law à la Carte: Limited Assistance Representation's Impact on the Court System and Lawyers*, MASS. LAW. J., July 2010, at 1, available at <http://www.massbar.org/media/876538/july.pdf>.

¹⁷¹ For a discussion of the use of *Lassiter* to justify appointment of counsel in private custody cases, see Engler, *supra* note 142, at 102–04.

