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John P. Gross

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THE TRUE BENEFITS OF COUNSEL: WHY “DO-IT-YOURSELF” LAWYERING DOES NOT PROTECT THE RIGHTS OF THE INDIGENT

By John P. Gross*

I. INTRODUCTION

In the United States, a defendant’s right to counsel often depends on whether a proceeding is labeled “criminal” or “civil,” even if the defendant’s liberty or other substantial rights are at stake. This article will compare the current state of the right to counsel under the Sixth and Fourteenth Amendments and argue that the distinction between criminal and civil proceedings on which the U.S. Supreme Court relies makes little sense. This “distinction without a difference” that currently exists between criminal and civil proceedings is built upon misconceptions concerning the value of counsel and the mistaken belief that counsel can be replaced by a set of substitute procedural safeguards. This article will examine the 2011 U.S. Supreme Court decision in *Turner v. Rogers*¹ regarding the right to counsel under the Fourteenth Amendment’s Due Process Clause, in which the Court ruled that a defendant charged with civil contempt who faces potential incarceration for the willful nonpayment of child support is not automatically entitled to counsel.² This article will question the wisdom of the Court’s decision not to expand the right to counsel under the Fourteenth Amendment. It will further point out the measurable positive effects that legal representation has on case outcomes, the relative ability of a typical pro se litigant to self-represent, and the financial and societal costs associated with the failure to provide legal representation in both civil and criminal cases.

* Indigent Defense Council, for the National Association of Criminal Defense Lawyers, Adjunct Associate Professor of Law at American University Washington College of Law.

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

2. *Id.* at 2520 (“We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year).”).

II. THE DISTINCTION BETWEEN THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

Common sense would suggest that counsel should be appointed when a person is faced with the threat of incarceration, whether the state chooses to label those proceedings civil or criminal. But in *Turner*, the Supreme Court declined to mandate the appointment of counsel to an indigent noncustodial parent who faced up to a year in jail for an alleged willful failure to pay child support.³ Instead of an automatic right to counsel in such proceedings, the Court ruled that the Due Process Clause of the Fourteenth Amendment⁴ requires “substitute procedural safeguards” that “can significantly reduce the risk of an erroneous deprivation of liberty.”⁵ Those safeguards include notice to the defendant that his or her ability to pay is the critical issue in the contempt proceeding, the use of some type of questionnaire or form that elicits relevant financial information, an opportunity for the defendant to respond to statements and questions at the hearing about his or her financial status, and a written decision by the trial court that the defendant has the ability to pay.⁶

The Supreme Court long ago recognized in criminal cases that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁷ The Court also recognized “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty.”⁸ “That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”⁹ Yet, instead of receiving the “guiding hand of counsel,”¹⁰ the Court in *Turner* suggested that defendants facing up to a year in jail be given a kind of “Do-It-Yourself” guide to constructing a defense.

3. *Id.*

4. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

5. *Turner*, 131 S.Ct. at 2519.

6. *Id.*

7. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

8. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

9. *Id.* at 463.

10. *Powell*, 287 U.S. at 69.

The Supreme Court made a distinction between a defendant's Sixth Amendment right to counsel in a criminal proceeding and the more limited right to counsel that exists under the Fourteenth Amendment's Due Process Clause in civil proceedings, even those civil proceedings that carry with them the threat of incarceration. The problem with the Court's reasoning is that it leads to the conclusion that it is unconstitutional to deny counsel to someone who is convicted of a criminal charge and sentenced to a single day in jail, but it is perfectly acceptable to send someone to jail for a year without counsel as long as that proceeding is labeled "civil."

The Supreme Court has previously stated that in criminal cases, the presence of counsel is "requisite to the very existence of a fair trial"¹¹ and any conviction "that has never been subjected to the crucible of meaningful adversarial testing"¹² is suspect. But in civil contempt proceedings, the Court seemed satisfied that procedural safeguards could be put in place to significantly reduce "an erroneous deprivation of liberty."¹³ Whether you say that an innocent person has gone to jail for a crime he or she did not commit, or you say that a civil contemnor has suffered an erroneous deprivation of liberty, the result is the same: someone who should have remained free went to jail.

The Supreme Court used two different rationales to decide when counsel is constitutionally required depending on whether a case is categorized as criminal or civil. Based on the Sixth Amendment's guarantee of the assistance of counsel in all criminal prosecutions,¹⁴ the Supreme Court decided that an indigent defendant has a right to counsel in any proceeding that "may end up in the actual deprivation of a person's liberty."¹⁵ The classification of the offense is irrelevant—the state can call it a petty offense, a misdemeanor, or a felony.¹⁶ What matters is whether actual jail time will be imposed if a defendant is convicted—even a single day of incarceration triggers the right to counsel in a criminal proceed-

11. *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

12. *Alabama v. Shelton*, 535 U.S. 654, 667 (2002) (internal quotation marks omitted).

13. *Turner*, 131 S.Ct.at 2519.

14. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

15. *Shelton*, 535 U.S. at 658.

16. *Argersinger*, 407 U.S. at 37.

ing.¹⁷ The same bright-line rule does not apply in a civil proceeding. The Sixth Amendment's requirement that counsel be provided at all stages of a criminal proceeding is not applicable in the civil context, even if the ultimate result, incarceration, is the same as in the criminal context. Instead, the Court simply requires that the proceedings comply with the Fourteenth Amendment's Due Process Clause. The Court looks at three factors to determine what due process requires: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.¹⁸ Counsel is only necessary under certain conditions and those conditions are generally determined on a case-by-case basis.

Under the Supreme Court's rationale, the appointment of counsel in civil proceedings where substantial rights are at issue may be "enlightened and wise,"¹⁹ but in the majority of cases, the Due Process Clause simply does not require it. The Court believes that the proceedings can be fundamentally fair without the participation of attorneys.

A. The Sixth Amendment Right to the Assistance of Counsel in All Criminal Prosecutions

The Supreme Court's declaration in *Gideon v. Wainwright* that "[t]he right of one charged with a crime may not be deemed fundamental in some countries, but it is in ours"²⁰ was founded upon the right to counsel "in all criminal prosecutions" guaranteed by the Sixth Amendment. The reasoning used by the Court in *Gideon* was that without counsel, a person too poor to hire an attorney could not receive a fair trial.²¹ While *Gideon* dealt with a felony charge, the Court's decision was based on the right to counsel under the Sixth Amendment in *all* criminal prosecutions. Still, the question remained open following the Court's decision in *Gideon*: whether the Sixth Amendment required the appointment of counsel to indigent defendants in every case or only in felony cases.²²

The Supreme Court answered that question in *Argersinger v. Hamlin*.²³ The Court rejected the idea that a distinction should be made based on the seriousness of the offense and concluded that "the problems associated with misdemeanor and petty offenses often require the presence of

17. *Glover v. United States*, 531 U.S. 198, 203 (2001).

18. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

19. *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18, 34 (1981).

20. 372 U.S. 335, 344 (1963).

21. *Id.* at 344-45.

22. *See id.* at 351 (Harlan, J., concurring) ("Whether the rule should extend to all criminal cases need not now be decided.").

23. 407 U.S. 25 (1972).

counsel to insure the accused a fair trial.”²⁴ However, while rejecting the idea that the classification of the offense should impact the applicability of the Sixth Amendment’s right to counsel, the Court did not rule that the Sixth Amendment actually applies to “all criminal prosecutions.”²⁵ The Court ruled that an indigent defendant’s conviction must result in incarceration for the right to attach.²⁶ Following its decision in *Argersinger*, the Court declined to extend the right to counsel to a defendant who was only facing a fine, reiterating that the right to counsel under the Sixth Amendment is tied to incarceration.²⁷ It is an important distinction that it is not the *possibility* of incarceration that implicates the Sixth Amendment right to counsel.²⁸ Instead, it is *actual* incarceration following a conviction that triggers the right to counsel under the Sixth Amendment.

24. *Id.* at 36–37.

25. See Sanjay K. Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487 (2009).

26. *Argersinger*, 407 U.S. at 37 (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

27. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); see also Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011) (“While some states have gone beyond *Scott* to provide counsel in all criminal cases, in cases involving substantial fines, or for all cases involving offenses punishable by imprisonment (regardless of whether a sentence of imprisonment is imposed), other states have hewn to *Scott*’s minimal requirement. Some states allow trial courts to avoid appointing counsel simply by certifying that they will not impose incarceration regardless of the seriousness of the misdemeanor offense or the possibility that it will carry other consequences. (In Florida and Maine, courts can use this mechanism even for felony offenses.) The number of defendants convicted without counsel may well be increasing in the current depressed economy as states look to save money by cutting back on both incarceration and counsel.”) (footnotes omitted).

28. While the Supreme Court bases the Sixth Amendment right to counsel on the actual sentence imposed and not the categorization of the offense, the Sixth Amendment right to trial by jury is based on the categorization of the offense without regard to the actual sentence imposed. See *Blanton v. North Las Vegas*, 489 U.S. 538 (1989) (“[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.”); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). The Court looks for “objective indications of the seriousness with which society regards the offense.” *Frank v. United States*, 395 U.S. 147, 148 (1969). The Court regards the most relevant criteria for assessing the seriousness of the offense to be “the severity of the maximum authorized penalty.” *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion). See also *Duncan*, 391 U.S. at 159. In fixing the maximum penalty for a crime, a legislature “include[s] within the definition of the crime itself a judgment about the seriousness of the offense.” *Frank*, 395 U.S. at 149.

The Supreme Court held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”²⁹ This requires the court to make what has been called a “predictive evaluation”³⁰ at the start of a case regarding the likelihood of a defendant receiving a sentence of incarceration if convicted. It does not matter if the offense is defined as “petty” since the Court was not convinced that “legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.”³¹

Therefore, under the Sixth Amendment, the right to counsel is not dependent upon the categorization of the offense, the complexity of the legal issues involved, or even the potential sentence. The defendant could be charged with a felony for drug possession, there could be Fourth Amendment issues regarding the search and seizure of the defendant, and the maximum penalty authorized for the offense could exceed one year in prison, but if the judge decides that a sentence of imprisonment will not follow a conviction, then the defendant does not have a Sixth Amendment right to counsel.³²

In both *Gideon* and *Argersinger*, the Supreme Court connected the right to counsel to the right to a fair trial—the one was necessary to safeguard the other. However, at other times, the Court has ruled that the right to counsel attaches at any “critical stage” of the proceeding.³³ At times, what makes a stage of the criminal proceedings critical is its potential to impact the result of the trial, such as when a lineup is conducted.³⁴

29. *Argersinger*, 407 U.S. at 25, 37.

30. *Id.* at 42 (Burger, C.J., concurring in the result).

31. *Id.* at 33.

32. However, the same defendant would have a Sixth Amendment right to a jury trial. *Blanton*, 489 U.S. 538.

33. *U.S. v. Wade*, 388 U.S. 218, 224 (1967) (“When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.”).

34. *Id.*; see also *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that preliminary hearings are a critical stage); *Mempa v. Rhay*, 389 U.S. 128 (1967) (holding that post-conviction proceedings may also be critical stages). *But see U.S. v. Ash*, 413 U.S. 300 (1973) (holding that a photographic identification was not a critical stage of the proceedings).

At other times, a stage is deemed critical if “the accused required aid in coping with legal problems or assistance in meeting his adversary.”³⁵ Based on this definition of “critical stage,” the plea bargaining process has been held to be a critical stage of the criminal proceedings.³⁶

The result is that while a defendant may have a Sixth Amendment right to counsel during certain critical stages of the proceeding, such as when he or she has to deal with legal problems or negotiate with the prosecution, that right may disappear if the trial court determines that a jail sentence will not be imposed upon conviction. And while the Supreme Court has made it clear that the right to counsel attaches at the first appearance before a magistrate,³⁷ it has not categorically ruled that counsel needs to be physically present at that time.³⁸ The result is that while a defendant cannot be sent to jail following a conviction unless he or she was represented by counsel at the trial, a defendant may be subjected to pretrial incarceration without the presence of counsel.

Finally, once a defendant has been convicted the Sixth Amendment does not require that he or she be provided with counsel during a parole or probation revocation hearing.³⁹ Since these proceedings occur after sentencing, they are no longer considered part of the criminal prosecution

35. *Ash*, 413 U.S. at 300, 313.

36. *See* *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

37. *See* *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (“We have, for purposes of the right to counsel, pegged commencement to ‘the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’” (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)) (internal quotation marks omitted)).

38. *Id.* at 212 (“Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the post attachment proceedings; what makes a stage critical is what shows the need for counsel’s presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” In a footnote the Court added: “We do not here purport to set out the scope of an individual’s postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.” (footnotes omitted)). *Id.*

39. *See* *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation hearing, where the Supreme Court found that these hearings were not part of the “criminal proceedings” against the defendants since they occurred after sentencing). *But see* *Mempa*, 389 U.S. 128 (where the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing since sentencing is critical stage of a criminal proceeding).

and as a result the Sixth Amendment does not apply.⁴⁰ This holds true even if a defendant faces years of additional incarceration for violating parole.⁴¹ So while the Sixth Amendment may require the presence of counsel at a defendant's trial before a court may impose a jail sentence, a defendant who is alleged to have violated probation and who is facing incarceration has no right to counsel under the Sixth Amendment.

Thus, under the Sixth Amendment, an indigent defendant is guaranteed the assistance of counsel to ensure that he or she receives a fair trial if he or she is to be subject to incarceration or at a critical stage of the proceedings in a criminal trial. However, an indigent party has no such guaranteed assistance in a civil trial, where the right to an attorney is governed by the Fourteenth Amendment's right to "Due Process."

B. The Fourteenth Amendment Right to Due Process of Law

While the Sixth Amendment explicitly mentions the right to counsel, the Fourteenth Amendment speaks more broadly of the right to due process of law. The Supreme Court has described "due process" as an "elusive concept;" its "exact boundaries are undefinable and its content varies according to specific factual contexts."⁴² While the Court has formulated categorical rules about when counsel must be appointed in criminal cases, it has approached the right to counsel under the Fourteenth Amendment on a case-by-case basis. One can question the wisdom of linking the right to counsel to incarceration under the Sixth Amendment, but the clarity of the rule is undeniable. In contrast, the right to counsel in civil cases is almost entirely dependent upon the facts and circumstances of an individual case.

Juvenile delinquency proceedings are the one type of civil proceeding that the Supreme Court has categorically ruled requires the presence of counsel. Juvenile delinquency proceedings would be criminal but for the accused's status as a minor; the potential loss of liberty makes such proceedings "comparable to. . .felony prosecution[s]."⁴³ In *In re Gault*, the Court first extended the right to counsel under the Fourteenth Amendment to juveniles in delinquency proceedings. The Court held that a juvenile "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and

40. However, the sentencing phase itself is deemed a "critical stage" which requires counsel. See *Mempa*, 389 U.S. 128; *Gardner v. Florida*, 430 U.S. 349 (1977).

41. *Morrissey*, 408 U.S. 471, 472-73 (two of the petitioners faced up to six or seven years of additional imprisonment following a parole revocation).

42. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

43. *In re Gault*, 387 U.S. 1, 36 (1967).

submit it.”⁴⁴ The Court gave little consideration to what the proceeding was labeled and instead focused on what would actually happen to the defendant if he or she were found delinquent.

“It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.”⁴⁵

The Supreme Court also compared the procedures available to the defendant in a juvenile delinquency proceeding to those available to a defendant in a criminal proceeding facing the same charge. Had the defendant been over eighteen, “the maximum punishment would have been a fine of \$5 to \$50, or imprisonment in jail for not more than two months.”⁴⁶ The Court goes on to list the various constitutional protections that would have applied had the charge been labeled “criminal”.⁴⁷ Ultimately, the Court found a disparity between the treatment of adults and the treatment of children: the proceeding’s label “requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide.”⁴⁸

Gideon and *Gault*, decided four years apart, represent the high water marks for the right to counsel in criminal and in civil proceedings. In each, the Supreme Court categorically required the presence of defense counsel based on the adversarial nature of the proceedings and the potential loss of liberty that the defendant faced. In subsequent cases in which the Court has been asked to extend the right to counsel under the Sixth Amendment, it has ruled that the right to counsel is contingent upon incarceration⁴⁹ or that there is no right because the proceedings at issue were not part of criminal prosecution, despite the fact that they may

44. *Id.*

45. *Id.* at 27.

46. *Id.* at 29.

47. *Id.* at 29. (“The United States Constitution would guarantee him rights and protections with respect to arrest, search, and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed.”).

48. *Id.* at 29–30.

49. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

have resulted in incarceration.⁵⁰ Under the Fourteenth Amendment's Due Process Clause, the Court has been reluctant to extend the right to counsel to an entire category of civil proceedings, the two exceptions being juvenile delinquency proceedings, which the Court has viewed as quasi-criminal,⁵¹ and involuntary commitment proceedings.⁵² The Court has held that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances"⁵³ and that the concept of due process "is flexible and calls for such procedural protections as the particular situation demands."⁵⁴

The Supreme Court considers three distinct factors when assessing whether a set of procedures ensures due process of law: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁵

The application of these factors in *Lassiter v. Department of Social Services*, which involved the right to counsel for an indigent parent in a civil proceeding to terminate parental rights, led the Supreme Court to conclude that the appointment of counsel was not required by the Due Process Clause of the Fourteenth Amendment.⁵⁶ The Court held that the failure to appoint counsel in *Lassiter* was not a violation of due process in light of the circumstances presented: the absence of any allegations that could lead to criminal charges, the absence of expert witness testimony, and the fact that the case did not involve any complex legal issues.⁵⁷

It is worth noting that the Supreme Court's decision in *Lassiter* does not stand for the proposition that counsel is never required in proceed-

50. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation hearing, where the Supreme Court found that these hearings were not part of the "criminal proceedings" against the defendants since they occurred after sentencing).

51. *In re Gault*, 387 U.S. 1.

52. *Vitek v. Jones*, 445 U.S. 480 (1980).

53. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

54. *Id.* (quoting *Morrissey*, 408 U.S. at 481).

55. See *Turner v. Rogers*, 131 S.Ct. 2507 (2011); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); *Mathews*, 424 U.S. 319.

56. *Lassiter*, 452 U.S. 18.

57. *Id.* at 32-34.

ings to terminate parental rights.⁵⁸ The Court came to the conclusion, based on the evidence presented in that matter and the fact that “no expert witnesses testified and the case presented no specially troublesome points of law, either procedural or substantive,”⁵⁹ that the presence of defense counsel “could not have made a determinative difference.”⁶⁰ Upon consideration of the Court’s precedents concerning the right to appointed counsel to ensure the fundamental fairness of a proceeding, the Court drew a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”⁶¹

In *Turner*, the Supreme Court had to distinguish these precedents in ruling that the threat of incarceration did not trigger the right to counsel under the Due Process Clause of the Fourteenth Amendment. The Court concluded that while a right to counsel may exist in some cases involving incarceration, it does not exist in every case where a defendant faces incarceration.⁶² While actual incarceration triggers a Sixth Amendment right to counsel in criminal proceedings, incarceration is just one factor that the Court takes into consideration when determining if the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel in civil proceedings. The rationale for a Sixth Amendment right to counsel in any criminal proceeding where the defendant is imprisoned is “that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment.”⁶³ That same rationale does not apply to civil proceedings that could result in incarceration.

58. *Id.* 31–32 (“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 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, 93 S.Ct., at 1762, 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*, 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. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220.”).

59. *Id.* at 32.

60. *Id.* at 33.

61. *Id.* at 26–27.

62. *Turner v. Rogers*, 131 S.Ct. 2507, 2517 (2011).

63. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

III. A DISTINCTION WITHOUT A DIFFERENCE

The Supreme Court's approach to the right to counsel under the Sixth Amendment in criminal cases and under the Fourteenth Amendment in civil cases produces inconsistent results. For example, a single day in jail guarantees the right to counsel in criminal proceedings, but the threat of incarceration for up to a year in a civil contempt proceedings does not. Juveniles are presumed to need counsel in delinquency proceedings, but no such presumption exists for an adult facing civil contempt proceedings. The result is a distinction without a difference: the proceeding may be called criminal or civil, but the ultimate result is the same—the incarceration of the defendant. The application of these inconsistent rules regarding the right to counsel creates a bizarre patchwork of legal representation for the indigent.

A. *Criminal Nonsupport or Civil Contempt*

The distinction without a difference between criminal and civil proceedings is only magnified by the fact that in many states the intentional nonpayment of child support is a criminal offense. In California, "Failure to Provide" for a child without lawful excuse is a misdemeanor punishable by a \$2,000 fine and one year in jail.⁶⁴ In Missouri, "Criminal Nonsupport" is a class "A" misdemeanor, but the "inability to provide support for just cause" is an affirmative defense.⁶⁵ In Oregon, "Criminal Nonsupport" is a class "C" felony and it is an affirmative defense to the charge that the defendant had a "lawful excuse" for failing to pay child support.⁶⁶ In Indiana, "Nonsupport of a Dependent Child" is a class "D" Felony, but "it is a defense that the accused person was unable to provide support."⁶⁷ In Texas, "Criminal Nonsupport" is a "state jail felony," but it is an affirmative defense that the defendant "could not provide support."⁶⁸ In Wisconsin, a "Failure to Support" a child for more than 120 days is a class "I" felony with the inability to provide support an affirmative defense.⁶⁹

If a state chooses to label the failure to pay support as "criminal," then the Sixth Amendment right to counsel applies. However, when a state chooses to enforce child support obligations through civil contempt

64. CAL. PENAL CODE § 270 (West 1983).

65. MO. ANN. STAT. § 568.040 (West 2011).

66. OR. REV. STAT. ANN. §163.555 (West 2005).

67. IND. CODE ANN. § 35-46-1-5 (West 1978).

68. TEX. PENAL CODE ANN. § 25.05 (West 2001).

69. WIS. STAT. ANN. § 948.22 (West 2011)

proceedings, as New Mexico does,⁷⁰ then the Fourteenth Amendment's Due Process Clause gives no such right. A defendant in a criminal case and the respondent in a civil contempt proceeding both have the same affirmative defense available to them, namely that they were unable to make the required payments. But in a criminal court, the defendant is afforded an attorney under the Sixth Amendment to make this argument on his or her behalf; in a civil court, the burden of mounting this affirmative defense falls upon the respondent.⁷¹

To make matters even more confusing, in *Turner*, the Supreme Court pointed out that the Sixth Amendment's right to counsel in criminal cases applies to "criminal contempt proceedings."⁷² The Court wrote that "[c]ivil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do."⁷³ Presumably, the Court's members believe that the goal of criminal contempt is to simply punish the offender for failure to comply with a court order. But the goal of child support enforcement is the same, whether it is pursued in criminal or civil court: to compel compliance with a court order and to discourage future noncompliance with that order.

Whether the contempt is labeled criminal or civil, the result is the same: the defendant faces incarceration for a willful failure to make payments. Yet, an indigent parent criminally charged in one state has a right to counsel to assert his defense, while an indigent parent civilly charged in another does not, despite the threat of incarceration to each. Such disparate consequences of the application of the Sixth and Fourteenth Amendments are also apparent when one considers the length of time a person may be incarcerated for a criminal versus a civil offense.

70. NMSA 1978, § 40-4A-11 (1997); see *State ex rel. Dept. of Human Svcs. v. Rael*, 97 N.M. 640, 643, 642 P.2d 1099, 1102 (1982).

71. In fact, a "criminal" statute that made nonpayment of child support a crime, and denied to the defendant the affirmative defense of an inability to pay, may not be constitutional. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's interest in punishment and deterrence may the state imprison a probationer who has made sufficient bona fide efforts to pay a fine or restitution but who has been unable to do so); see also Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J. L. & PUB. POL'Y 95, 117 (2008).

72. *Turner v. Rogers*, 131 S.Ct. 2507, 2516 (2011) (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Cooke v. United States*, 267 U.S. 517 (1925)).

73. *Id.* (citing *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418 (1911)).

B. One Day or One Year in Jail

For purposes of the Supreme Court's Sixth Amendment analysis of the right to counsel, the severity of the offense charged does not impact the right. A defendant could be charged with a felony, but if the trial court makes a determination that, even if the defendant is convicted, a sentence of incarceration will not be imposed, then the defendant has no right to counsel under the Sixth Amendment. However, if a defendant is charged with a misdemeanor that carries with it a maximum sentence of thirty days in jail, and the trial court concludes that a sentence of incarceration may be imposed if the defendant is convicted, then the defendant has a Sixth Amendment right to counsel. However, in a civil contempt proceeding for nonpayment of child support, where the noncustodial parent faces up to a year in jail, there is no automatic right to counsel under the Fourteenth Amendment's Due Process Clause.

In New Mexico, a defendant charged with a petty misdemeanor, facing a jail term of no longer than six months,⁷⁴ would be entitled to counsel under the Sixth Amendment. In California, a defendant charged with a misdemeanor who faces the possibility of imprisonment in the county jail for up to six months and a fine of up to \$1,000 would be entitled to counsel under the Sixth Amendment.⁷⁵ In Texas, a defendant charged with a class "B" misdemeanor who would face up to 180 days in jail and a \$2,000 fine would be entitled to counsel under the Sixth Amendment.⁷⁶ In Pennsylvania, a person who is only charged with a "summary offense" who faces a maximum of ninety days in jail would also be entitled to counsel pursuant to the Sixth Amendment.⁷⁷ In Arizona, a defendant charged with a class three misdemeanor who would face only thirty days in jail would also be entitled to counsel under the Sixth Amendment.⁷⁸ And in New York, someone charged with a "violation," which is defined as a noncriminal offense, could receive a sentence of fifteen days in jail and is still entitled to counsel under the Sixth Amendment.⁷⁹ Yet, a person charged with civil contempt who may be declared to be thousands of dollars in arrears, and who faces up to a year in jail, is not automatically entitled to counsel under the Fourteenth Amendment's Due Process Clause.

74. NMSA 1978, § 30-1-6(C) (1978).

75. CAL. PENAL CODE § 19 (West 1983).

76. TEX. PENAL CODE ANN. § 12.22 (West 1994).

77. 18 PA. CONS. STAT § 106(c)(2) (West 1997).

78. ARIZ. REV. STAT. ANN. § 13-707(A)(3) (West 2008).

79. N.Y. Penal Law § 55.10(3) (McKinney 1973).

C. Juveniles or Adults

In a civil juvenile delinquency proceeding, which is “little different” from and “comparable in seriousness” to a criminal prosecution, the child is entitled to counsel.⁸⁰ However, in the case of a noncustodial parent who faces incarceration for a failure to pay child support, the Due Process Clause does not automatically require the appointment of counsel.⁸¹ A juvenile needs “the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”⁸² Adults, on the other hand, apparently only need these protections if they are facing incarceration through a criminal proceeding, despite the fact that the risk of incarceration may be longer through a civil contempt proceeding.

The assumption is that an adult can defend him- or herself, or at the very least, procedures can be put into place that will adequately ensure the fairness of the civil contempt proceeding. However, the Supreme Court’s distinction between a juvenile and an adult seems arbitrary when considering the factors that formed the basis of the decision to provide counsel to juveniles in delinquency proceedings. An adult facing civil contempt for failure to pay child support is unlikely to be capable of coping with “problems of law” or of making “skilled inquiry into the facts.”⁸³ An adult, regardless of his or her level of education, is somehow presumed to be capable of “ascertaining whether he has a defense” and also presumed to be able “to prepare and submit” that defense in a civil contempt child support case.⁸⁴ As the Court noted in *Powell v. Alabama*:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he

80. See *In re Gault*, 387 U.S. 1, 29 (1967).

81. *Turner v. Rogers*, 131 S.Ct. 2510 (2011).

82. *In re Gault*, 387 U.S. at 36.

83. *Id.*

84. *Id.*

be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁸⁵

People do not simply acquire the ability to practice law by age and experience. It is hard to imagine why the Supreme Court is so confident that the average adult, who has no formal legal training, can adequately represent themselves in a court of law.

The distinction between a civil juvenile delinquency proceeding and a criminal prosecution seems even more illusory when one considers the fact that in many states juvenile courts and criminal courts have overlapping jurisdiction. A sixteen-year-old could be prosecuted for an offense as a juvenile delinquent in a civil proceeding or as a defendant in a criminal court. Because of his youth and presumptive inability to adequately defend himself, the Fourteenth Amendment's Due Process Clause requires that he be appointed counsel in a juvenile delinquency proceeding. However, in criminal court, that same sixteen-year-old would not be entitled to counsel under the Sixth Amendment absent the threat of incarceration. Perhaps even more striking is the example of the seventeen-year-old alleged juvenile delinquent who turns eighteen and then is suddenly presumed to be capable of adequately defending himself in a civil proceeding, which may result in incarceration as long as adequate procedural safeguards are in place. In *Gault*, the Supreme Court referenced the potential punishment which could have been imposed if the defendant had been charged as an adult: "the maximum punishment would have been a fine of five to fifty dollars, or imprisonment in jail for not more than two months."⁸⁶ Ironically, if he had been charged as an adult, and if the trial court had concluded that it would only impose a fine upon conviction, he would not have had a right to counsel.

IV. *TURNER V. ROGERS*: THE INEFFECTIVENESS OF ALTERNATIVE PROCEDURAL SAFEGUARDS

Rather than require the appointment of counsel to an indigent defendant facing incarceration for nonpayment of child support, the Supreme Court in *Turner* was satisfied that due process of law could be achieved through substitute procedural safeguards.⁸⁷ The Court's assertion that counsel can be replaced with procedural safeguards is based on a number of misconceptions concerning the complexity of the issues involved, the nature of the proceedings, and the effectiveness of the pro-

85. 287 U.S. 45, 68-69 (1932).

86. *In re Gault*, 387 U.S. at 29.

87. *Turner v. Rogers*, 131 S.Ct. 2510 (2011).

posed procedural safeguards. The Court oversimplifies the issues involved and underestimates the value of counsel. And when taking into consideration the cost of providing counsel, as compared with less expensive procedural safeguards, the Court fails to take into account the costs associated with under-resourcing indigent defense.

A. *The Defendant's Ability to Pay Is Not a Simple Issue*

The Supreme Court relies on the idea that the threshold issue to be resolved, specifically the noncustodial parent's ability to pay, is simple and straightforward. The Court assumes that a pro se litigant would be able to establish his or her inability to pay without counsel or that the judge would be able to ask a series of questions which would demonstrate the parent's ability or inability to make payments.⁸⁸ The participation of a lawyer is therefore deemed unnecessary.

The Court's comparison of the determination of a parent's ability to pay child support to the determination of indigency (and, therefore, right to appointed counsel) in criminal cases reveals the actual complexity of the issue involved. Courts have to make a "straightforward" determination concerning a defendant's ability to afford counsel in criminal cases. The Supreme Court has never actually defined "indigency" and the various definitions promulgated by the states since the Court's decision in *Gideon* vary widely.⁸⁹ "The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from state to state and often resulting in serious inequities to accused persons."⁹⁰ The one attempt to define indigency by a member of the Court does little to simplify the issue:

Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." An accused must be deemed indigent when "at any stage of the proceedings (his) lack of means. . . substantially inhibits or prevents the proper assertion of a (particular) right or a claim of right." Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain

88. *Id.* at 2519 ("But 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, even in a criminal case.").

89. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 *IND. L. J.* 571 (2005).

90. *Argersinger v. Hamlin*, 407 U.S. 25, 50 (1972) (Powell, J., concurring).

bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.⁹¹

In order to make a determination that a noncustodial parent is in willful violation of an order to pay child support, a court first needs to make a factual determination regarding that parent's level of income. If the court concludes that the noncustodial parent has appreciable income, the court then must make an inquiry into the parent's necessary expenses in order to evaluate whether the nonpayment of support was willful. The Supreme Court summarized the complex issues involved by stating that what is at issue in these types of proceedings is the noncustodial parent's "ability to pay." But the ability to pay is dependent upon a variety of factors—it is not a simple calculation where expenses are subtracted from income and if there is a balance, then the failure to pay was willful. The court must make a determination regarding how the noncustodial parent spends his or her income and inevitably value judgments will have to be made.⁹²

The Supreme Court's assumption that procedures can be put into place that will reveal the defendant's ability to pay so as to make the involvement of counsel unnecessary also fails to take into consideration the impact representation has in similar *pro forma* types of proceedings. The Court's argument could be extended to other proceedings that pre-

91. *Hardy v. United States*, 375 U.S. 277, at 289 n.7 (1964) (Goldberg, J., concurring) (quoting ATTN'Y GEN.'S COMM. ON POVERTY AND THE ADMIN. OF FED. CRIMINAL JUSTICE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, 8 (1963) (omission and alterations in original) (citations omitted).

92. See generally Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 119-21 (2008) ("Proving inability to comply can be factually complex, implicating the economic circumstances of the obligor, his work history and potential, his available assets, and his own subsistence needs. To meet this burden, the alleged contemnor must at the very least present evidence of his or her employment (or lack thereof), wages, expenses, and assets. However, gauging the ability to pay may be much more complicated than this, involving issues of good faith responsibility for other obligations, voluntariness of the obligor's unemployment or under-employment, and the availability of borrowed funds or assets owned by others to satisfy the obligor's debt. There may be legal as well as factual components to these issues. The complexity of these issues puts them beyond the understanding of most indigents, who will rarely be able to effectively respond to the petitioner's case in these areas, much less present a case in chief of their own. Even the simplest 'inability to pay' argument requires articulating the defense, gathering and presenting documentary and other evidence, and responding to legally significant questions from the bench-tasks that are 'probably awesome and perhaps insuperable undertakings to the uninitiated layperson.' This is particularly true where the layperson is indigent and poorly educated.") (footnotes omitted).

sent “straightforward” legal issues such as bail hearings or eviction proceedings—either on their own or by answering a series of questions posed to them by the presiding judge, pro se litigants should be able to adequately represent themselves during bail hearings or eviction proceedings. The legal issues involved could be characterized as formulaic and the facts that influence the outcome of these types of cases are easily discernible. The presence of lawyers should not make a difference in the outcome of the case.

In the case of bail, a judge is typically being asked to determine the likelihood of the defendant returning to court. To make this determination, a judge will look at the seriousness of the charge, including any potential sentence if the defendant is convicted, as well as the defendant’s prior criminal record and if the defendant has previously failed to appear in court.⁹³ All of these factors can be determined independently; neither the defendant nor an attorney can change these facts. A judge is also typically required to take into consideration some factors which are not readily apparent, such as the defendant’s ties to the community, which can include work history, financial resources, and dependents. Once again, these social and financial factors can be obtained by simply asking the defendant some simple questions—questions that the defendant is capable of answering on his or her own, without counsel.

Similarly, in eviction proceedings, the legal issues involved are simple and straightforward. The court must determine if the defendant was properly served; if the petition was legally sufficient; if the defendant failed to pay rent and if so, the reasons for it. The presiding judge is capable of making an independent legal judgment as to the sufficiency of the filed petition, and the defendant’s failure to pay rent is easily established and rarely contested. The defendant is readily able to articulate why he or she failed to pay rent and can easily raise an issue regarding the habitability of the residence—this being the primary legal justification for withholding payment. Once again, lawyers should not make a difference in the outcome of these proceedings. However, empirical data demonstrates that at both bail hearings and at eviction proceedings, the presence of

93. See generally Shima Baradaram, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 738-39 (2011) (“Until the 1950s, judges presumed bail for all non-capital defendants and were only permitted to deny bail where there was a risk of flight. However, from the late 1960s on, courts considered various factors, including the weight of the evidence against an individual and how release would impact the safety of the community. These changes in statutory laws attempting to “reform” bail from the 1960s to the 1980s opened the door to increased detention by allowing judges to make predictions about defendants’ guilt and future proclivity to commit crime.”) (footnotes omitted).

counsel makes a difference in the outcome of those proceedings for the defendants.⁹⁴

Even assuming that civil contempt proceedings for nonpayment of child support are simple and straightforward, with the only issue being a person's ability to pay, the number of legal issues presented should not be used to circumscribe a defendant's right to counsel. To suggest otherwise equates the number of issues presented with their complexity.

B. Providing Counsel to the Defendant Does Not Alter the Nature of the Proceedings

One of the other reasons the Supreme Court in *Turner* believed that defense counsel is unnecessary in civil contempt proceedings for the nonpayment of child support is that "the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *unrepresented* by counsel."⁹⁵ The Court does not want to create an "asymmetry of representation" that would "alter significantly the nature of the proceeding."⁹⁶ Providing counsel to the defendant might introduce a "degree of formality" that would cause delay and "could potentially make the proceedings *less* fair overall."⁹⁷

The lack of representation, the Supreme Court explained, creates a level playing field. But this reasoning overlooks the power imbalance, which exists in a civil contempt proceeding for nonpayment of child support. The custodial parent already has a judgment against the noncustodial parent, and he or she is merely asking for its enforcement. There is simply very little that the custodial parent has to prove or disprove to enforce the judgment. The defendant, on the other hand, needs to establish that his or her nonpayment was not willful. In criminal cases, the Court has often pointed to the need for effective assistance of counsel when dealing with an adversary who is a trained legal professional,⁹⁸ and based on the holding in *Turner*, if the opposing party is represented by

94. See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001); see also Douglas Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2001-2002).

95. *Turner v. Rogers*, 131 S.Ct. 2510, 2519 (2011) (citations omitted).

96. *Id.* at 2511 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973)).

97. *Id.*

98. See *U.S. v. Ash*, 413 U.S. 300, 313 (1973) ("This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.").

counsel, then a defendant may have the right to have counsel appointed.⁹⁹ But whether or not the custodial parent is represented, the legal burden falls on the defendant to establish his or her inability to pay. The defendant is not being accused of nonpayment of support, he or she is being asked to “show cause” as to why he or she should not be held in contempt.

The other reason given by the Supreme Court for denying a right to counsel is that the presence of counsel will create delay. The Court’s point seems to be that lawyers have the ability to make what should be “straightforward” determinations needlessly complex. On the one hand, the Court claims that these proceedings are so simple and straightforward that the presence of counsel is pointless, and on the other hand, it assumes that if counsel was present, such counsel would be able to grind the proceedings to a screeching halt. However, using this same logic, the Supreme Court’s decision in *Argersinger*—to extend the right to counsel to misdemeanor cases—should have ended the “assembly line justice” of criminal courts.¹⁰⁰ This has clearly not happened based on the steady increase in our nation’s incarceration rates.¹⁰¹

C. *The Ineffectiveness of Substitute Procedural Safeguards*

The Supreme Court identified a series of “substitute procedural safeguards” in *Turner* that “can significantly reduce the erroneous deprivation of liberty.”¹⁰² These include notice to the defendant that it is his or her ability to pay that is at issue, the use of a form to elicit relevant financial information, an opportunity for the defendant to respond to statements and questions about his or her financial status, and finally, an express finding by the court that the defendant has the ability to pay. The Court never offers a justification for relying on these “procedural safe-

99. *Turner*, 131 S.Ct. at 2520 (“In particular, [the Due Process Clause] does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of the ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).”).

100. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

101. See Jennifer Warren, *One in One 100: Behind Bars in America 2008*, THE PEW CTR. ON THE STATES (2008), http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf; see also Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. ATTORNEYS (2009), <http://www.nacdl.org/reports/>; *Three Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. ATTORNEYS (2011), <http://www.nacdl.org/reports/>.

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

guards,” and there simply is no evidence that these substitutes for counsel will be effective in preventing the incarceration of the indigent. There is even a tacit admission that these types of safeguards will not protect defendants from being jailed simply because they are poor, given the Court finds these safeguards will “reduce,” but not eliminate, “erroneous deprivation[s] of liberty.”¹⁰³

1. The Defendant’s Knowledge of the Issues

The well-documented problems created by pro se litigants clearly demonstrate that the average person is incapable of self-representation in a court of law. The Supreme Court seems to be acknowledging this reality in *Turner* when it makes it clear that the defendant needs to be told that the reason for the hearing is to determine if he or she is able to make payments. In other words, the first step that is required when dealing with a pro se defendant is to explain why he or she is in court. That acknowledgement, that the defendant may not even realize why he or she is there, casts serious doubt on the adequacy of additional procedural safeguards.

The first safeguard to be put into place is “notice” to the defendant. The Supreme Court failed to indicate how and when this “notice” will be provided, but the ultimate goal is to make it clear to the defendant exactly what the issue is that the court will decide: the ability to make child support payments. Someone will have to make it clear to a defendant what the current state of the law is regarding nonpayment of child support. This would seem to be a task best suited to an attorney. However, since attorneys in this situation are luxuries and not necessities, this responsibility will fall on either a member of the court’s staff or the presiding judge. Court personnel may not be legally able to perform this task because it could potentially involve the staff practicing law without a license. Judges are ethically constrained from providing legal advice to litigants.¹⁰⁴ A compromise might be worked out that would involve the dissemination of “legal information” as opposed to “legal advice” to liti-

103. *Id.*

104. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537 (2004-2005). But see Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367 (2008); Richard Zora, *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 (2003-2004).

gants.¹⁰⁵ However, simply giving litigants information without advice may prove the old adage that a little knowledge is a dangerous thing.

Another possibility might be to allow a defendant to have access to a lawyer for the purposes of consultation prior to the hearing. This type of “unbundled legal service” makes the lawyer an educator and an advisor to the client, but not an advocate for him or her.¹⁰⁶ The lawyer would try to prepare the defendant to represent him or herself, but would not actually represent the individual in court. But a recent study has demonstrated that these type of unbundled legal services do very little to affect the outcome of cases.¹⁰⁷ This type of limited lawyering, whether attempted by a member of the court’s staff, an attorney, or the presiding judge, is not a substitute for full representation and is simply not an effective procedural safeguard.

2. The Defendant’s Ability to Understand the Forms

The next procedural safeguard the Supreme Court relies on is a form designed to elicit relevant financial information from the defendant. Presumably this form would be filled out in advance of the hearing by the defendant and it would then serve as a basis for evaluating the defendant’s ability to pay. The first thing that should be considered when evaluating the effectiveness of this procedural safeguard is the defendant’s ability to understand and complete the form itself. This raises issues re-

105. Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges Mediators and Clerks*, *FORDHAM L. REV.* 1987, 1994 (1999).

106. See generally Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. ON POVERTY L. & POL’Y* 453, 453-54 (2011) (“The provision of ‘unbundled’ legal aid has been this decade’s response to the severe shortage of lawyers available to represent poor litigants. Hailed as an innovation in the delivery of legal services, ‘unbundling’ is a piecemeal lawyering model in which a lawyer provides assistance with a discrete legal task *only* and does not perform the full range of services expected from traditional legal representation. That is, while attorneys engaged in traditional representation commit to carry out a full ‘bundle’ of acts that take a client through the resolution of his legal problem, the term ‘unbundled’ refers to the disaggregation of those acts, with the attorney and client agreeing that only one, or a few, legal tasks will be undertaken. A recipient of unbundled aid does not typically enjoy the benefits of a lawyer’s advocacy before a tribunal or with an adversary. Rather, a limited form of help—an advice session or document preparation, for example—constitutes the entire lawyering relationship, and the recipient goes on to handle all remaining aspects of the litigation pro se.”) (footnotes omitted).

107. See *id.*; see also Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem with Navigating the System without Counsel*, 70 *FORDHAM L. REV.* 1573 (2002).

garding the literacy of the defendant. There is a well-established link between education and income, which would suggest that the defendants most likely to be in danger of going to jail for failing to pay child support—those with low income levels—are not highly educated, and thus less capable of understanding and successfully completing the forms in an effort to defend themselves.¹⁰⁸

Statistics from the U.S. Census Bureau demonstrate the correlation between income and education level: the mean income for people who did not graduate high school was \$20,241 per year in 2009; a high school graduate's mean income was \$30,627; people with an associate's degree had a mean income of \$39,771; and college graduates had a mean income of \$56,665 per year.¹⁰⁹ Based on these figures, it is safe to assume that the typical indigent defendant who is facing incarceration for failure to pay child support would have little more than a high school education. Of course, the fact that a defendant only has a high school diploma does not automatically mean that he or she is incapable of adequately representing him- or herself in court. Nevertheless, the correlation between income and educational level should raise serious doubts as to the ability of a defendant to effectively use substitute procedural safeguards.

A more nuanced view of the ability of defendants to use self-help guides and forms to ensure due process can be obtained by looking at the National Assessment of Adult Literacy conducted by the American Institutes for Research and the National Center for Education Statistics for the U.S. Department of Education. The report "Literacy in Everyday Life: Results from the 2003 National Assessment of Adult Literacy,"¹¹⁰ which was published in 2007, measured three types of literacy: prose, document, and quantitative. Each of these three areas was measured on a scale of zero to 500. Prose literacy refers to the knowledge and skills needed to perform prose tasks (i.e., to search, comprehend, and use information from continuous text). This type of literacy is particularly relevant to instructional brochures that could be distributed to defendants as procedural safeguards because it relates specifically to the ability to comprehend instructional materials. Document literacy is defined as the knowledge and skills needed to perform document tasks (i.e., to search,

108. *Turner*, 131 S.Ct. at 2518 ("And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of \$10,000 per year or less, the issue of ability to pay may arise fairly often.").

109. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 152, available at www.census.gov/compendia/statab/2012/tables/12s0232.pdf.

110. MARK KUTNER ET AL., LITERACY IN EVERYDAY LIFE: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY (2007), available at nces.ed.gov/Pubs2007/2007480.pdf.

comprehend, and use information from noncontinuous texts in various formats). Once again, this form of literacy bears directly on the ability of someone to accurately complete the type of form the Court proposes using as a procedural safeguard. This form of literacy correlates to someone's ability to fill out a job application form. Quantitative literacy is the knowledge and skills necessary to perform quantitative tasks (i.e., to identify and perform computations, either alone or sequentially, using numbers embedded in printed materials).

In regard to each of the three types of literacy, a person's level of literacy was characterized as below basic, basic, intermediate, or proficient. Below basic indicates no more than the most simple and concrete literacy skills. Basic indicates skills necessary to perform simple and everyday literacy activities. Intermediate indicates skills necessary to perform moderately challenging literacy activities, and proficient indicates skills necessary to perform more complex and challenging literacy activities. The study also assigned difficulty levels to specific tasks on a scale of zero to 500. Some examples include finding information in a pamphlet for prospective jurors that explains how citizens were selected for the jury pool, which is a score of 254 and is regarded as a basic prose literacy task; the ability to follow directions while using a clearly labeled map is scored 280 and is an intermediate document literacy task; calculating the total cost of ordering office supplies by using a page from an office supply catalogue and an order form is scored 301 and is an intermediate quantitative literacy task.

The study found that people who had failed to graduate high school had average literacy rates for prose of 207, which is considered "below basic;" for document of 208, which is only a few points above "below basic;" and for quantitative 211, which is also considered "below basic."¹¹¹ Therefore, a defendant who failed to graduate high school could be expected to have no more than the most simple and concrete literacy skills.

High school graduates had literacy rates for prose of 262, which is at the "basic" level; for document of 258, which is at the "intermediate" level; and for quantitative of 269, which is at the "basic" level. Those scores call into question the ability of a defendant to successfully navigate what for a lawyer would be considered a simple legal issue with the help of forms provided by the court. Not surprisingly, the study also found that people with "basic" or "below basic" literary skills had significantly lower rates of employment.¹¹²

111. *Id.* at 36.

112. *Id.* at 46–47.

3. The Defendant's Ability to Respond to Questions

Once someone has explained to the defendant that the issue the court must decide is his or her ability to pay child support and after the defendant fills out a form concerning his or her finances, he or she must be given an opportunity "to respond to statements and questions about his [or her] financial status."¹¹³ Because approximately one-half of all child support debt is not owed to the government,¹¹⁴ and because the assumption is that the custodial parent will be too poor to afford counsel, the only person in a position to ask the defendant questions will be the judge. Once again, it would seem that the presiding judge is being asked to abandon neutrality and to engage in some type of cross-examination of the defendant. There may be occasions where the presiding judge simply asks clarifying questions regarding the information provided by the defendant, but the questioning of the defendant by the presiding judge alters the fundamental nature of the proceeding from one that is adversarial into one that is inquisitorial.

Without defense counsel, "an opportunity at the hearing for the defendant to respond to statements and questions" is little more than an opportunity to be cross-examined. It is confounding that under the Sixth Amendment, the right to be heard is considered meaningless if it does not include the right to be heard with counsel, while under the Fourteenth Amendment, an indigent defendant facing incarceration only has a right to fill out a form and then be questioned by the court, without the aid of counsel.

One of the underlying assumptions that the Supreme Court makes is that a defendant will be adequately able to express him- or herself when brought before the Court. As anyone who has ever stood before a court to make an argument can attest, this is hardly a safe assumption. There are many lawyers who dread having to make an oral argument, and some go an entire career without setting foot inside a courtroom. The majority of people find public speaking to be intimidating. Law schools recognize that students must be taught legal rhetoric. During three years of law school, students are taught civil procedure, the rules of evidence, and trial practice; they participate in moot court programs, externships, and clinics. They do this in order to learn the skills associated with effective oral advocacy. *U.S. News and World Report* even ranks law schools based on the

113. *Turner*, 131 S.Ct. at 2519.

114. DEP'T OF HEALTH & HUMAN SVCS., UNDERSTANDING CHILD SUPPORT DEBT: A GUIDE TO EXPLORING CHILD SUPPORT DEBT IN YOUR STATE (2004), available at www.acf.hhs.gov/sites/default/files/ocse/dcl_04_28a.pdf.

quality of their trial advocacy programs.¹¹⁵ The National Institute for Trial Advocacy (NITA) teaches trial advocacy skills to both law students and practicing lawyers in an effort to support and promote the effective and fair administration of justice. Besides experiential learning programs, NITA publishes dozens of books on trial advocacy.¹¹⁶ With the extensive training that attorneys go through, it is ludicrous to assume a lay defendant will possess the knowledge, public speaking skills, and confidence to adequately protect his or her rights.

Another factor the Supreme Court failed to take into consideration is the stress that a defendant will be under while involved in a court proceeding. A noncustodial parent charged with a willful failure to pay child support can be arrested on a warrant and forcibly brought to court. He or she will then be informed of the reasons for arrest, ordered to fill out a form, and then subjected to questioning by a judge. The defendant's responses to the questions asked will determine whether or not he or she is sent to jail.¹¹⁷ Normally articulate defendants may find themselves overwhelmed by these circumstances. Psychological research has revealed that the likelihood that people will "choke under pressure" is increased when the skill they are attempting to perform includes a personally important performance-based incentive or their performance is monitored by other people.¹¹⁸ This is exactly the situation presented when a defen-

115. *Best Trial Advocacy Programs*, USNEWS.COM (2012), grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/trial-advocacy-rankings.

116. NAT'L INST. FOR TRIAL ADVOCACY, PUBLICATION CATALOGUE 15–20 (2012), available at www.lexisnexis.com/documents/pdf/20110707034204_large.pdf.

117. A comparison can be made to the type of custodial interrogation that the Supreme Court criticized in *Miranda v. Arizona*, 384 U.S. 436 (1966). The scenario described above bears a striking resemblance to the type of custodial interrogation which, under the Fifth and Sixth Amendment, would trigger the obligation to inform a defendant of his or her right to remain silent and right to an attorney—two rights that do not apply in a civil proceeding. In *Miranda*, the Court was so concerned about the psychological pressures that could be applied during custodial interrogation that it felt it necessary to craft a specific set of warnings designed to alleviate that pressure. It is difficult to see the difference, at least in terms of the level of psychological pressure, which is brought to bear on a defendant, between custodial interrogation by the police and questing by a judge during a contempt proceeding. It is certainly arguable that the judicial questioning of a defendant is more coercive because it is the judge who has the power to sentence the defendant to incarceration.

118. Marci S. Decaro et al., *Choking Under Pressure: Multiple Routes to Skill Failure*, 140 J. EXPERIMENTAL PSYCHOL.: GEN., 390, 403 (2011); see generally SIAN BEILock, *CHOKe: WHAT THE SECRETS OF THE BRAIN REVEAL ABOUT GETTING IT RIGHT WHEN WE HAVE TO* (2010).

dant is brought before a judge and is asked to adequately explain why he or she has failed to pay child support and risks being imprisoned.

A defendant may simply have difficulty articulating the reasons for the nonpayment of child support. A judge may interpret a defendant's silence or inability to respond to questions as an admission of willful refusal to pay support. The *Turner* decision means that someone can be jailed because they are inarticulate, which is why the right to be heard must include the right to be heard with counsel.

4. The Defendant's Right to a Written Decision

The final procedural safeguard proposed by the Supreme Court is a written decision by the presiding judge setting forth the reasons for the finding of contempt. This requirement would have the obvious advantage of requiring the presiding judge to obtain certain information from the defendant before rendering a judgment. It could serve as a kind of checklist showing what information was obtained by the Court, the weight it was given, and the burden of proof applied, which would ensure certain procedures were followed.¹¹⁹ Traditionally, it has been the role of attorneys to monitor proper procedure by the court and argue for adherence or safeguards where necessary. However, even if a court's written decision can be a substitute for an attorney when it comes to ensuring the regularity of the proceedings, it cannot replace a lawyer's skilled advocacy.

Presumably, the Supreme Court takes solace in the fact that requiring a record of the decision will allow for appellate review. Yet, without the assistance of counsel, it is unlikely a defendant will ever be made aware of the fact that he or she has a right to appeal the court's decision. And because there is no right to counsel at the contempt hearing, there cannot be a right to counsel on an appeal from a contempt decision.¹²⁰ The written decision is meaningless if the decision cannot be effectively reviewed.

Even assuming that the decision would be reviewed by a higher court, the record made in the lower court, which was made without the benefit of counsel, will not include evidence that could have only been

119. For information on how the use of checklists improves outcomes, see ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

120. See *Douglas v. California*, 372 U.S. 353 (1963) (where the Supreme Court held that states that provide for one appeal by right must provide the assistance of counsel to indigents and non-indigents alike); *Ross v. Moffitt*, 417 U.S. 600 (1974) (The Supreme Court held that the right to counsel afforded to indigents by *Douglas* did not extend to discretionary appeals in state courts and applications for review to the Supreme Court.).

elicited by a trained advocate. This is the same critique that has been leveled against the standard of review employed in cases where ineffective assistance of counsel is claimed: that the record the court is using to evaluate defense counsel's alleged deficient performance was made by the very attorney who is now alleged to have been ineffective.¹²¹ The record simply won't reveal an ineffective attorney's lack of investigation or preparation for the trial. In the same way, a judge's decision to find a defendant in contempt will be based on evidence that went unchallenged or unexplained because of the defendant's inability to adequately represent him- or herself. Under these circumstances, the requirement that the trial court issue a written decision is an ineffective procedural safeguard.

V. THE VALUE AND COST OF REPRESENTATION

Even before the Supreme Court's ruling in *Gideon*, the idea that lawyers make a difference in the outcomes of criminal cases was almost universally accepted.¹²² Yet, despite the necessity of counsel under the Sixth Amendment when a defendant is facing incarceration, the Court is

121. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 270–71 (1997) (explaining that “the consequences of a lawyer’s incompetence both pervade and exceed the scope of the record To limit scrutiny of counsel’s performance to a record made by counsel is for the reviewing court to don the very blinders worn by counsel.”); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 415–16 (1993) (arguing that reliance on the trial record to determine prejudice “is inherently flawed since any record of a trial in which counsel was ineffective is likely to be incomplete and not truly indicative of all that could have been done by a competent attorney”); see also *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (“[E]vidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.”).

122. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.”). But see Erica J. Hashimoto, *The Price of Misdemeanor Representation* 49 WM. & MARY L. REV. 461 (2007) (arguing that em-

satisfied that “erroneous deprivations of liberty” can be prevented by “alternative procedural safeguards” in civil contempt proceedings. Under the Fourteenth Amendment’s Due Process Clause, counsel is a luxury and not a necessity. The underlying assumption is that the presence of counsel will not have a measurable impact on the outcome of the case as long as there are other procedural safeguards in place.

What is abundantly clear from the studies that have examined the role counsel plays in determining the outcome of cases is that litigants achieve significantly better results if represented by counsel.¹²³ A study examined the impact representation had during the bail stage of criminal proceedings and found that nonviolent suspects who were provided lawyers at their bail review hearings fared substantially better than those without lawyers.¹²⁴ Suspects represented by counsel were substantially more likely to be released on their own recognizance, more likely to have affordable bail set, and served less time in jail than those suspects who went unrepresented. So, even in a relatively simple proceeding where the only issue before the trial court was the defendant’s risk of flight, the presence of counsel made a significant difference on the outcome.

A recent survey of existing data regarding the impact of representation on case outcomes concluded that “reports consistently show that representation is a significant variable affecting a claimant’s chances for success in eviction, custody, and debt collection cases.”¹²⁵ Even in what we can assume are relatively simple proceedings, such as the those that take place in small claims court, the presence of counsel had a significant impact on case outcomes.¹²⁶ With regard to the type of programs designed to facilitate self-representation, the same survey concluded that while “litigants and court personnel report high levels of satisfaction; the programs’ impact on case outcomes is less clear.”¹²⁷

pirical evidence suggests that counsel in misdemeanor cases do not typically provide significant benefits to their clients).

123. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L. J.* 37, 39 (2010).

124. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *CARDOZO L. REV.* 1719 (2002).

125. Engler, *supra* note 123.

126. “Relatively simple procedures do not, alone, provide a forum in which all claimants with meritorious claims prevail.” *Id.* at 76.

127. “The court-based programs, primarily serving litigants in the housing and family areas, seem to have their greatest success in terms of providing some access to litigants who otherwise would have none, easing the strain on the court system, and leaving its customers with a high level of satisfaction with the services received. The impact on case outcomes is harder to gauge, with successes more common in the fam-

It is worth pointing out that the presence of defense counsel does have a measurable impact on a defendant's perceptions of the fairness of the proceedings. There is a distinction to be made between procedural justice, defined as a litigant's satisfaction with the process, and distributive justice, defined as a litigant's satisfaction with the result. Two similarly situated defendants, one who has counsel and the other who does not, and both who wind up being sentenced to the same period of incarceration may perceive the fairness of the proceedings very differently. In addition, the public perception of the legitimacy of the process that leads to incarceration may be affected by the presence of counsel.¹²⁸ In this way, even if the presence of a defense attorney has a statistically negligible impact on case outcomes, there is value in having counsel present in the courtroom.

A. *The Costs Associated with the Failure to Provide Counsel*

The Supreme Court has been conscious of the financial burden placed upon the states by their decisions to extend the right to counsel.¹²⁹

ily area than in the housing area, absent a greater level of attorney involvement." *Id.* at 73.

128. See Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 *LAW & SOC'Y REV.* 483, 498 (1988) (finding positive correlation between defendants' perception of the fairness of the criminal process and the amount of time they spent with their lawyers); see also David Luban, *Lawyers As Upholders of Human Dignity (When They aren't Busy Assaulting It)*, 2005 *U. ILL. L. REV.* 815 (2005); Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *LAW & PSYCHOL. REV.* 97 (2002); Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney From the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 *LAW & PSYCHOL. REV.* 81 (2001); Geoffrey P. Aslper & Donald A. Hicks, *Prisoners' Attitudes Toward Components of the Legal and Judicial Systems*, 14 *CRIMINOLOGY* 461 (1977).

129. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 (1972) ("We do not share Mr. Justice POWELL's doubt that the Nation's legal resources are sufficient to implement the rule we announce today. It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdemeanants, excluding traffic offenders. Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 *Iowa L.Rev.* 1249, 1260-1261 (1970). These figures are relatively insignificant when compared to the estimated 355,200 attorneys in the United States (Statistical Abstract of the United States 153 (1971)), a number which is projected to double by the year 1985. See Ruud, *That Burgeoning Law School Enrollment*, 58 *A.B.A.J.* 146, 147. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the 'estimated 14,500 average annual openings.' *Id.*, at 148."); see also *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest,

Nevertheless, the Court felt that the presence of counsel was required in criminal proceedings to ensure fundamental fairness. Whatever the cost, it was money well spent. The Court would seem to have heard the words of Justice Learned Hand: “If we are able to keep our democracy, there must be one commandment: Thou shalt not ration justice.”¹³⁰

The decision in *Turner* not to require the presence of counsel at all civil contempt proceedings that could result in incarceration was undoubtedly influenced by the costs associated with providing counsel. In fact, the chronic failure of the states to adequately fund the right to counsel in criminal proceedings has been used as an argument for not extending the right to counsel to civil litigants.¹³¹ The fear seems to be that the expansion of the right to counsel by our courts will not result in a corresponding increase in funding from our legislatures. The result will be that even less money will be spent on indigent criminal defense since the overall budget for legal services will remain static, but there will be increased demand for indigent defense in civil proceedings.

While there is little doubt that indigent criminal defense is underfunded, the failure to provide the necessary resources to protect one constitutional right should not serve as a justification for the abandonment of other constitutional rights. The argument that the right to counsel should not be extended to civil proceedings because it will divert limited resources away from criminal cases is simply a form of appeasement. It presumes the continued underfunding of legal services for the poor and then uses that presumption as a justification for maintaining the status quo. It is as if the continued denial of a right makes it wrong to argue for additional rights.

What tends to be absent from a discussion of the costs of providing counsel is the economic benefits that the presence of counsel can provide. Typically, the “cost” of providing counsel is viewed as simply the amount of money that will have to be paid to the attorneys who provide the representation. This view ignores the costs associated with not providing counsel and the economic benefits that counsel can provide.

and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.”).

130. Address at the 75th Anniversary Celebration of the Legal Aid Society of New York (Feb. 16, 1951).

131. See Benjamin H. Barton, *Against Civil Gideon (And For Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010); see also Benjamin Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012).

It is worth pointing out that any increase in the cost of providing legal services necessitated by the expansion of the right to counsel must be viewed in light of the current level of spending on indigent legal services. In comparison to many other industrialized democracies, the United States spends very little on legal services. England spends eleven times more per capita on civil legal services than the United States; the Netherlands spends four times as much; Germany and France spend twice as much.¹³² The Legal Services Corporation (LSC) estimates that, on average, only one legal aid attorney is available for every 6,415 low income people. By comparison, there is one private attorney providing legal services for every 420 people in the general population.¹³³ In addition, the LSC reports that for every client it serves, another eligible applicant has to be turned away simply because LSC has insufficient resources. Finally, “the United States is the only major Western nation that does not provide a right to counsel in civil matters.”¹³⁴

B. The Choice between Representation and Incarceration

When it comes to the costs associated with not providing counsel in proceedings where a litigant can be incarcerated, the most obvious costs are those associated with increased levels of incarceration. The presence of lawyers at bail hearings has been shown to significantly reduce the rates of pretrial incarceration and consequently, the costs associated with pretrial incarceration.¹³⁵ In the State of Michigan, where calls for reform of a dysfunctional indigent defense system have led the governor to create an Indigent Defense Advisory Commission,¹³⁶ the Michigan State Appellate Defender Office estimates that it saves \$5 million each year in prison costs for the Michigan Department of Corrections when sentences are corrected to their proper levels.¹³⁷ Another report by the American

132. Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT'L L.J.* S83, S95 (2000).

133. THE LEGAL SERVICES CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA* 19 (2009), available at http://www.lafla.org/pdf/justice_Gap09.pdf.

134. Earl Johnson Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 *LOY. L.A. REV.* 341, 352–53 (1985).

135. Douglas Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 *CARDOZO L. REV.* 1719 (2002).

136. RICK SNYDER, *INDIGENT DEFENSE ADVISORY COMMISSION EXECUTIVE OFFICE OF THE GOVERNOR*, available at http://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf (executive order issued by the Governor of Michigan creating the indigent defense advisory commission).

137. “SADO’s appellate advocacy produces measurable outcomes for clients and the criminal justice system. Staff attorneys regularly obtain corrections in the

Civil Liberties Union of Michigan documented how the unjust convictions of thirteen people ultimately cost the state more than \$13 million in prison costs.¹³⁸ New Mexico spends approximately \$39,000 to incarcerate one adult for one year.¹³⁹ The failure to adequately resource indigent criminal defense leads to higher levels of pretrial incarceration, increased conviction rates, and longer sentences, all of which impose greater prison costs.¹⁴⁰ The choice is clear: either pay an attorney to provide competent representation to someone facing incarceration or pay to send that person to prison. It is really simply a matter of either adequately funding our justice system at the beginning of the process by expanding the right to counsel or at the end of the process by building more prisons.

While providing counsel to defendants reduces the rate of incarceration, and therefore, avoids the additional costs associated with incarceration, there are also positive economic benefits to providing representation to civil litigants. This is especially true in cases where the lawyer wins for the litigant an economic entitlement, such as in social security disability appeals.¹⁴¹ The representation of low income tenants has been shown to reduce the levels of homelessness and the economic costs associated with it.¹⁴² Any discussion of the “costs” associated with

sentences imposed on clients, often due to errors in computing complex sentencing guidelines. The resulting corrected sentences are accurate and just, as well as shorter in length. Shorter minimum sentences mean savings in the cost of incarcerating a defendant. From Jan. 1, 2011 to Dec. 1, 2011, SADO has saved taxpayers, and the Department of Corrections, \$5,550,100.00 in unnecessary prison costs.” *SADO Saved the Taxpayers and DOC \$5,872,727 in 2011*, MICHIGAN STATE APPELLATE DEFENDER OFFICE, <http://www.sado.org/Articles/Article/73> (last visited Oct. 16, 2012).

138. AM. CIVIL LIBERTIES UNION OF MICH. & MICH.CAMPAIGN FOR JUSTICE, *FACES OF FAILING PUBLIC DEFENSE SYSTEMS: PORTRAITS OF MICHIGAN’S CONSTITUTIONAL CRISIS* 5 (2011), available at <http://www.aclumich.org/sites/default/files/file/pdf/FacesofFailingPublicDefense.PDF>.

139. *Adult Prisons Division*, N. M. CORRECTIONS DEPT., <http://corrections.state.nm.us/prisons/intro.html> (last visited Oct. 16, 2012).

140. THE JUSTICE POLICY INSTITUTE, *SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE* (2011).

141. See *Economic Benefits of Meeting Civil Legal Needs*, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/DMS/Index/000000/000050/document_browse (last visited Oct. 16, 2012) (providing a compilation of state studies demonstrating the positive economic impact of representation in civil proceedings).

142. See Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 559–60 (1991) (“Providing counsel for indigent tenants may, in the end, actually save public resources. By appointing counsel in all eviction proceedings, many families who would have otherwise landed in welfare hotels, shelters or the streets will rightfully remain in their dwellings. Keeping people off the streets and out of publicly financed shelters saves emergency public assistance resources. When the other costs of homelessness

expanding the right to counsel to civil proceedings must take into account that the failure to provide counsel comes with very real costs and that the money spent on representation has a positive economic impact.

The Supreme Court recognized the important role that civil contempt proceedings play in the child support enforcement process.¹⁴³ It points to statistics that show when a person is threatened with incarceration for nonpayment of child support, he or she often begins making payments.¹⁴⁴ So while states like South Carolina make the argument that the threat of incarceration generates millions of dollars in delinquent support payments, they also claim that if counsel were appointed for those facing incarceration, they might have to abandon the practice altogether because of the increased cost of providing counsel and the consequent delay in the proceedings. For this argument to make any sense, the cost of providing counsel would have to outweigh the revenue generated by the threat of incarceration. But according to a December 2010 survey conducted by the U.S. Department of Health and Human Services Office of Child Support Enforcement, which was submitted to the Court as part of an amicus brief for the Respondents¹⁴⁵ and which the Court referenced in its decision,¹⁴⁶ South Carolina does not capture any data regarding how often civil contempt proceedings are used, how often defendants are sent to jail, how much is collected from defendants, or how effective civil contempt proceedings are in child support enforcement. All that the survey reveals about South Carolina's approach to child support enforcement is that it uses civil contempt proceedings and that it does not provide representation to defendants at those proceedings. Florida, which also responded to the survey and also refuses to provide representation to defendants at civil contempt proceedings to collect child support, reports that for every dollar it spends on enforcement, it collects anywhere from two to four dollars in child support payments.¹⁴⁷

are factored into the equation—lost employment, increased medical expenses, reduced school attendance, higher crime rates—the potential savings from appointing counsel may more than compensate for the costs. According to the Association of the Bar of the City of New York, city-wide provision of counsel to indigent tenants facing eviction would prevent 1,620 families from becoming homeless and save over \$44 million in emergency shelter outlays and other expenses related to homelessness.” (internal citations omitted)).

143. *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

144. *Id.* at 2526–27 (Thomas, J., dissenting).

145. See Brief for Senators Demint et al. as Amici Curiae Supporting Respondents, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10–10), 2011 WL 525740.

146. *Turner*, 131 S. Ct. at 2526–27 (Thomas, J., dissenting).

147. See Brief for Senators DeMint et al., *supra* note 145.

New Jersey is held up as an example of what can happen when a court imposes the requirement that counsel be provided for those facing incarceration for nonpayment of child support.¹⁴⁸ In 2006, the New Jersey Supreme Court held that noncustodial parents facing the threat of incarceration for nonpayment of child support were entitled to counsel.¹⁴⁹ While New Jersey reported in the survey that it has “no ability to fund a representation program” for those determined to be indigent following an arrest for nonpayment of child support, it also reported that its Child Support Warrant Program resulted in statewide child support collections of approximately \$13.73 million. So while the New Jersey State Legislature might be unwilling to appropriate funds for the representation of the indigent in child support enforcement proceedings, it appears that the ability to arrest those who have failed to pay child support and the threat of incarceration still generates a substantial amount of payments.

In order to get some sense of whether or not the appointment of counsel for noncustodial parents facing the possibility of incarceration for contempt actually reduces the effectiveness of civil collection proceedings, we can compare two reports. The first one is the Compendium of Responses Collected by the U.S. Department of Health and Human Services Office of Child Support Enforcement (December 28, 2010), which asked states to indicate if they used civil contempt proceedings to collect child support and if they provided counsel to indigent defendants in those proceedings. The second one is the U.S. Department of Health and Human Services, Administration for Children & Families, Child Support Enforcement 2009 Annual Report to Congress,¹⁵⁰ in which the Office of Child Support Enforcement tracks the cost-effectiveness ratio of expenditures for enforcement as well as the total amount of collections from 2005 through 2009 by state.¹⁵¹ The cost-effectiveness ratio represents the number of dollars of child support collected for every dollar spent on enforcement. If the appointment of counsel for noncustodial parents facing the threat of incarceration is cost-prohibitive, we would expect to see a lower cost-effectiveness ratio in states that provide counsel in civil contempt

148. See Adam Liptak, *Justices Grapple with Issue of Right to Lawyers in Child Support Cases*, N.Y. TIMES (Mar. 23, 2011), http://www.nytimes.com/2011/03/24/us/24scotus.html?_r=0.

149. *Pasqua v. Council*, 892 A.2d 663, 663 (N.J. 2006).

150. Office of Child Support Enforcement, *FY2009 Annual Report to Congress* (2009), available at http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009_annual_report.

151. Office of Child Support Enforcement, *FY2009 Annual Report Table 1* (2009), available at http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009_annual_report/table_1.html.

proceedings and a much higher cost-effectiveness ratio in states that do not provide counsel in such proceedings.

Thirty-eight of the fifty states surveyed failed to provide information regarding their use of civil contempt proceedings to collect child support or their practices regarding the appointment of counsel for indigent defendants at those hearings. Of the twelve states that did respond,¹⁵² Florida, Illinois, New Jersey, and South Carolina stated that they used civil contempt proceedings for child support enforcement and did not provide publicly funded counsel to indigent defendants at those proceedings. Eight states—Alabama, Colorado, Connecticut, Indiana, Kentucky, Oregon, Utah, and Virginia—responded that they also used civil contempt proceedings for child support enforcement and did provide, at least in some jurisdictions, publicly funded counsel to indigent defendants at those proceedings.

**Cost-Effectiveness Ratio for Five Consecutive Fiscal Years¹⁵³
States That Do Not Provide Counsel**

| States | 2005 | 2006 | 2007 | 2008 | 2009 |
|----------------|-------------|-------------|-------------|-------------|-------------|
| Florida | 4.80 | 4.60 | 4.80 | 4.42 | 4.85 |
| Illinois | 3.68 | 3.84 | 4.26 | 4.53 | 4.65 |
| New Jersey | 4.74 | 4.56 | 4.59 | 4.20 | 3.85 |
| South Carolina | 7.07 | 7.40 | 6.83 | 5.61 | 4.83 |
| Average | 5.07 | 5.10 | 5.12 | 4.69 | 4.55 |

As these statistics demonstrate, states that actually appoint counsel for indigent defendants in civil contempt proceedings have a higher rate of cost-effectiveness. The appointment of counsel clearly is not cost prohibitive.

In addition, since the Office of Child Support Enforcement Report to Congress also tracked the total distributed collections from 2005 through 2009, we can see what effect New Jersey’s decision to stop using the threat of incarceration on indigent noncustodial parents had on the amount of child support collected. If the New Jersey Supreme Court’s

152. New Mexico was not one of the states that responded.

153. Office of Child Support Enforcement, *FY2009 Annual Report Table 36* (2009), available at http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009_annual_report/table_36.html.

States That Do Provide Counsel

| States | 2005 | 2006 | 2007 | 2008 | 2009 |
|----------------|-------------|-------------|-------------|-------------|-------------|
| Alabama | 4.26 | 4.38 | 4.54 | 4.92 | 4.27 |
| Colorado | 3.68 | 3.94 | 4.12 | 4.25 | 4.56 |
| Connecticut | 3.68 | 3.74 | 3.47 | 3.83 | 3.62 |
| Indiana | 8.53 | 8.92 | 9.93 | 6.58 | 7.73 |
| Kentucky | 5.59 | 6.16 | 6.36 | 6.73 | 7.51 |
| Oregon | 5.39 | 5.86 | 5.98 | 6.01 | 5.46 |
| Utah | 4.03 | 4.28 | 3.97 | 4.11 | 3.96 |
| Virginia | 6.52 | 6.58 | 7.01 | 7.25 | 7.16 |
| Average | 5.21 | 5.48 | 5.67 | 5.46 | 5.53 |

decision in *Pasqua v. Council*¹⁵⁴ had a significant impact on New Jersey's ability to recover arrearages in child support enforcement proceedings, we would expect to see a decrease in the total distributed collection from 2006, the year of the decision, to 2007.

Total Distributed Collections for Five Consecutive Financial Years¹⁵⁵

| State | 2005 | 2006 | 2007 | 2008 | 2009 |
|--------------|-------------|-------------|---------------|---------------|---------------|
| New Jersey | 915,475,680 | 962,286,549 | 1,004,134,786 | 1,060,194,751 | 1,075,169,861 |

Instead, we see an increase in the total amount of collections from 2006 to 2007 as well as an uninterrupted trend of increased collections from 2004 to 2009 of approximately 5 percent per year. Although a claim was made during oral arguments before the court that New Jersey had "stopped trying to enforce child support orders through civil contempt,"¹⁵⁶ that is not entirely accurate. Following the decision in *Pasqua*, New Jersey adopted procedures to determine whether or not someone who is arrested on a Child Support Enforcement warrant is indigent. If, after an initial screening, the defendant is found to be indigent, then he or

154. See *Pasqua*, 892 A.2d at 663 (N.J. 2006).

155. Office of Child Support Enforcement, *FY2009 Annual Report Table 4* (Dec. 1, 2009), available at http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009_annual_report/table_4.html.

156. Liptak, *supra* note 148.

she is simply released.¹⁵⁷ The state continues the prosecution of non-indigent defendants accused of failing to pay child support. It is perhaps more accurate to state that New Jersey has stopped trying to place indigent defendants in jail for nonpayment of child support than it is to say that they have stopped using civil contempt to enforce child support orders.

C. *The Cost of Providing Counsel to Michael Turner*

Mr. Turner's civil contempt hearing occurred on January 3, 2008, and it resulted in him being found in contempt and sentenced to twelve months in jail.¹⁵⁸ According to the South Carolina Department of Corrections, its "cost per inmate" during the 2008 fiscal year was \$14,344.¹⁵⁹ The amount of child support actually owed by Mr. Turner at the time he was held in contempt was \$5,728.76.¹⁶⁰ It is also worth noting that Mr. Turner had previously been held in contempt for nonpayment of child support and had served six months in jail back in 2006¹⁶¹ when the South Carolina Department of Corrections had an estimated yearly cost per inmate of \$13,170.¹⁶² That would mean that between 2006 and 2008, the state of South Carolina spent approximately \$20,929 incarcerating Mr. Turner in an effort to recover \$5,728.76 in unpaid child support.

157. GLENN A. GRANT, ADMIN. OFFICE OF THE COURTS STATE OF N.J., DIRECTIVE #15-08 - USE OF WARRANTS AND INCARCERATION IN THE ENFORCEMENT OF CHILD SUPPORT ORDERS, (2008), available at http://www.judiciary.state.nj.us/directive/2008/dir_15_08.pdf (superseded by Directive #18-06) The alleged contemnor is required to fill out a form, CN:10819, "Probation Child Support Enforcement Obligor Questionnaire" *Id.* This questionnaire requires the noncustodial parent to answer ninety-three different questions regarding their residence, employment history, and financial resources. After the form is filled out, the noncustodial parent is then brought before a magistrate who must hold a hearing on his or her ability to pay. Five pages of instructions on how this hearing should be conducted, with specific questions to ask the noncustodial parent, are outlined in CN: 11212 which states "Conducting the Ability to Pay Hearing for an Obligor Held on a Support Warrant." *Id.* It would appear that the system New Jersey put in place to insure due process of law is somewhat similar to what the Justices envision in *Turner v. Rogers*, 131 S. Ct. 2507 (2011). However, it is hard to believe that the time it takes to fill out a form and to have a hearing in front of a judge is a more efficient use of resources than the appointment of counsel who could interview the noncustodial parent, ascertain the relevant information concerning employment and financial resources, and who could then put forth a defense to the magistrate.

158. *Turner*, 131 S. Ct. at 2513.

159. S.C. DEPT. OF CORRECTIONS, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS COST PER INMATE FISCAL YEARS 1988-2012, available at <http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2012.pdf>.

160. *Turner*, 131 S. Ct. at 2553.

161. *Id.*

162. S.C. DEPT. OF CORRECTIONS, *supra* note 159.

Let us assume that providing Mr. Turner with a lawyer would have spared him the eighteen months he spent in jail and also relieved the state of South Carolina from having to pay for the cost of his incarceration. Attorneys appointed to represent indigent defendants in South Carolina are compensated at a rate of \$40 for work outside of court, \$60 for work in court, and their total compensation may not exceed \$1,000 in misdemeanor cases.¹⁶³

A lawyer who was assigned to represent Mr. Turner would certainly have spent some time interviewing him and explaining to him the nature of the proceeding and what the relevant legal issue was, namely his ability to pay the arrears. The attorney might have sought some documentation regarding his application for public assistance and his medical records since he complained of a severe back injury.¹⁶⁴ The attorney might have obtained a record of his prior convictions and the time he had spent incarcerated or the time he had spent in a drug treatment facility. The attorney might have spoken with friends or family who could have testified that they were helping provide support to Mr. Turner. Even if the lawyer representing Mr. Turner took ten hours to accomplish all of these tasks, that would mean the state of South Carolina would have paid a \$400 fee to his assigned counsel. That \$400 fee potentially could have saved the state more than \$20,000 in incarceration costs and would have given Mr. Turner another eighteen months where he could have been making efforts to become gainfully employed.

VI. CONCLUSION

The independent development of a right to counsel under the Sixth Amendment in criminal proceedings and a right to counsel under the Fourteenth Amendment in civil proceedings has created a surreal legal landscape where a litigant facing a month in jail for a misdemeanor has the right to an attorney, while a litigant who may go to jail for a year for civil contempt because of a failure to pay child support goes unrepresented. Without the presence of counsel at trial, a judge in a criminal proceeding cannot sentence someone to even a single day in jail, but a judge in a civil proceeding can send a pro se litigant to jail for a year; can terminate the defendant's parental rights; can evict them; can even deport them without assigning them counsel.

163. S.C. CODE ANN. § 17-3-50(A) (1976).

164. *Turner*, 131 S. Ct. at 2513 (Mr. Turner stated at the hearing that "when I finally did get to working, I broke my back, back in September. I filed for disability and SSL.").

The Supreme Court should recognize that whether a proceeding is labeled criminal or civil, whether a defendant is unjustly convicted of a crime, or is found in contempt and suffers an “erroneous deprivation of liberty,” the end result is a denial of due process of law. The Court must also realize that the links between poverty and education suggest that “alternative procedural safeguards” will simply not protect the rights of the indigent. Concerns over the costs of expanding the right to counsel must also be viewed in the proper perspective. The United States lags far behind other nations in spending on indigent legal services. And any decision regarding the extension of the right to counsel that takes into account the potential economic impact must also take into consideration the costs associated with not providing counsel as well as the potential economic benefits associated with representation. But whatever the financial costs associated with the right to counsel, there is one thing that remains true: attorneys are necessities and not luxuries.

