

Making *Turner* a Reality—Improving
Access to Justice Through Court-Annexed
Resource Centers and Same Day
Representation

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I. INTRODUCTION

In *Turner v. Rogers*,¹ the Supreme Court returned, after many years, to the issue of whether there is a right to counsel in civil cases.² The case focused on the due process rights of litigants who face the possibility of incarceration in a civil contempt proceeding for failure to pay child support.³ The Court held that the Fourteenth Amendment's Due Process Clause does not require the state to appoint counsel for an indigent defendant facing incarceration in a civil contempt action so long as "alternative procedural safeguards" are in place.⁴ These alternative procedural safeguards must ensure that litigants have adequate notice of the "ability to pay standard,"⁵ a fair opportunity to present and dispute evidence, and a decision with clear findings on the issue of ability to pay.⁶ The Court limited its holding to cases in which a pro se petitioner initiates the contempt proceeding, and suggested that in cases brought by government attorneys, appointment of counsel may be required.⁷

While the right to appointed counsel for indigent defendants in criminal cases is a long established constitutional right,⁸ the question of whether indigent defendants in civil cases are entitled to appointment of counsel has been the subject of debate and concern.⁹ In *Lassiter v.*

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¹ 131 S.Ct. 2507 (2011).

² See *Lassiter v. Dep't. of Soc. Servs. of Durham Cnty., N.C.*, 101 S.Ct. 2153, 2162 (1981) (holding that the Due Process clause of the Fourteenth Amendment does not require courts to appoint counsel to indigents in every parental termination proceeding).

³ *Turner*, 131 S.Ct. at 2507.

⁴ *Id.* at 2520.

⁵ *Id.* at 2513.

⁶ *Id.* at 2520.

⁷ *Id.*

⁸ *Turner*, 131 S.Ct. at 2515.

⁹ See *id.* at 2514 (recognizing that various state and federal courts have conflicting holdings regarding the right to counsel in civil contempt proceedings).

Department of Social Services,¹⁰ the Supreme Court held that pro se indigent parents in termination of parental rights proceedings were not, as a constitutional matter, entitled to appointment of counsel.¹¹ *Lassiter* exemplifies the quandary that indigent litigants face when trying to represent themselves in court proceedings that affect matters of fundamental importance, such as whether they will lose their rights to parent their children.¹² The stakes of many civil cases are arguably much higher than those of criminal cases for which counsel is appointed.¹³ Yet, indigent litigants are left to advocate for themselves without the benefit of counsel, regardless of the complexity of the case or the stakes at issue. Lawyers who provide legal services and other advocates for low income communities have long argued for legislative and court reform that would guarantee indigent litigants the right to appointment of counsel in high stakes civil matters.¹⁴

The *Turner* case does not go so far as to hold that indigent defendants are entitled to counsel in civil child support contempt proceedings. However, the decision provides litigants more protection in high stakes civil matters by requiring that alternative procedural safeguards be in place to ensure a fair hearing.¹⁵ In addition, the Court recognized that balance of power is a consideration in determining whether appointment of counsel might be required and limited its holding in *Turner* to situations in which a pro se petitioner has initiated the child support contempt proceeding case as opposed to the state.¹⁶ The Court leaves open the possibility that if the state were initiating the case and government lawyers were litigating against a pro se defendant, due process might require appointment of counsel.¹⁷

¹⁰ 101 S.Ct. 2153 (1981).

¹¹ *Id.* at 2162 (“[We can not] say that the Constitution requires the appointment of counsel in every termination proceeding. . . . [We] leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered . . . by the trial court, subject, of course, to appellate review.”).

¹² See Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 638–40 (2005–2006) (noting the prejudicial effect arising out of Lassiter’s lack of understanding of legal concepts and proceedings while proceeding pro se).

¹³ John Pollock, *It’s All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS. MAG. 4 (2013), available at http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html, <<http://perma.cc/XW69-C22Q>> (“[I]n the end, litigants do not care whether their proceeding is labeled ‘criminal’ or ‘civil’; they care about what they stand to lose. And what they stand to lose in basic human needs civil cases is every bit as precious as that at stake in most criminal cases.”).

¹⁴ See Clare Pastore, *A Right to Civil Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1067–68 (2009) (noting the support by national, state, and local bar associations for a guaranteed right to counsel for indigent defendants in cases involving basic human needs).

¹⁵ *Turner*, 131 S. Ct. at 2519.

¹⁶ *Id.* at 2520.

¹⁷ See *id.* (observing that the average defendant lacks the legal knowledge and skill needed to protect himself against an experienced prosecutor).

In the wake of *Turner*, courts, legislatures, and state child support offices have grappled with the question of what constitutes adequate procedural safeguards in lieu of appointed counsel in civil contempt proceedings.¹⁸ In order to support pro se litigants in civil proceedings, states use a variety of approaches, ranging from providing standardized forms and written explanations, to limited-advice services and same-day representation models.¹⁹ In 2011, two non-profit legal service agencies in Washington D.C. instituted the Child Support Community Legal Services Project (“CSCLSP” or “Child Support Community Project”) to staff the Child Support Resource Center at the D.C. Superior Court.²⁰ Approximately 98% of respondents in paternity and child support matters appear pro se in D.C. Superior Court, yet almost all of these cases are initiated and prosecuted by the D.C. Office of the Attorney General.²¹ Historically, litigants were generally unaware of their rights and had minimal access to attorneys.²² The Child Support Community Project fills this critical gap by providing information, limited advice, and same-day representation to unrepresented individuals.²³ CSCLSP offers a model for providing the “alternative procedural safeguards” that the Court in *Turner* deemed necessary to protect the due process rights of pro se litigants.

This Article will propose recommendations for implementing meaningful “alternative procedural safeguards.” It will highlight a program that uses an innovative model of pro se assistance and limited representation, and will discuss the limitations that even the most innovative programs face in trying to offer adequate alternatives to full

¹⁸ See Action Transmittal, Office of Child Support Enforcement, to State Agencies Administering Child Support Enforcement Plans under Title IV-D of the Social Security Act and Other Interested Individuals, “*Turner v. Rogers* Guidance” (June 18, 2012), available at <http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance>, <<http://perma.cc/SE2T-E4ZA?type=source>> (describing changes to be implemented by state agencies administering child support enforcement plans under Title IV-D of the Social Security Act in response to *Turner*).

¹⁹ See *Child Support: Know Your Rights*, LAWHELPNY.ORG (2014), [http://www.lawhelpny.org/issues/family-juvenile/child-support?location=New%20York%20City%20\(all%205%20NYC%20boroughs](http://www.lawhelpny.org/issues/family-juvenile/child-support?location=New%20York%20City%20(all%205%20NYC%20boroughs), <<http://perma.cc/WL43-Q7BZ>> (providing information on child support proceedings in New York); *Family*, MARYLAND LEGAL AID (2014), <http://www.mdlab.org/get-help-services/family>, <<http://perma.cc/T2P6-JGBD>> (listing resources for family law matters, including a pro se self-help information center).

²⁰ *Special Projects*, LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA (2013), <http://www.legalaiddc.org/special-projects/>, <<http://perma.cc/G3XB-665A>>.

²¹ D.C. ACCESS TO JUST. COMM’N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY 7 (2008) available at <http://dcaccess DOJjustice.org/files/CivilLegalNeedsReport.pdf>, <<http://perma.cc/YN5K-H922>>.

²² See Meridel Bulle-Vu, *The Paternity and Child Support Courthouse Project in Pilot Phase*, MAKING JUSTICE REAL (Aug. 15, 2011), <http://www.makingjusticereal.org/the-paternity-and-child-support-courthouse-project-in-pilot-phase>, <<http://perma.cc/F5BY-KPD5>> (describing the prominence of pro se litigants who are often unaware of their legal rights).

²³ *Legal Assistance*, BREAD FOR THE CITY, <http://www.breadforthecity.org/services/legal-clinic/>, <<http://perma.cc/Q3NR-CTZT>>.

representation. The Article will also analyze the ethical obstacles that court-based assistance programs face, and offer strategies that attorneys can use to meet their ethical duties regarding confidentiality, competence, avoidance of conflicts of interest, and independence of professional judgment.

While the procedural safeguards that the Court suggests in *Turner* might, in theory, improve litigants' understanding and ability to participate in child support matters, they do not, in practice, provide the level of due process protection in lieu of appointed counsel that the Court suggests.²⁴ The Article concludes that the broad brush the Court uses in *Turner* to paint the concept of procedural safeguards is inadequate, and the legal community must develop guidelines and programs that offer progressive tiers of services tailored to litigants' circumstances to ensure that the due process rights of pro se litigants are protected.

II. THE *TURNER* DECISION AND RIGHT TO COUNSEL IN CIVIL MATTERS

The *Turner* case is the latest in a line of procedural due process cases focusing on representation of indigent litigants. In *Gideon v. Wainwright*,²⁵ the Supreme Court held that indigent criminal defendants are entitled to appointment of counsel at state expense under the Due Process Clause of the Fourteenth Amendment.²⁶ The holding was limited to criminal defendants and did not extend the right to appointed counsel to civil litigants.²⁷

Following *Gideon*, the Court clarified in *Argersinger v. Hamlin*²⁸ and *Scott v. Illinois*²⁹ that counsel must be appointed in criminal cases not only in which incarceration is an authorized or potential penalty, but also in which the defendant will actually be imprisoned if convicted.³⁰ In

²⁴ See Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 40 (2013) ("The cautious optimism flowing from the portions of *Turner* that lay the groundwork for increased access is tempered by the fear that the promise is illusory. . . . [the Court's analysis in *Turner*] can serve as a veneer 'to mask the lack of genuine empiricism.'") (quoting Judith Resnick, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2011)).

²⁵ 372 U.S. 335 (1963).

²⁶ *Id.* at 342.

²⁷ *Id.* at 348 ("[T]hat the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation.") (Douglas, J., concurring).

²⁸ 407 U.S. 25 (1972).

²⁹ 440 U.S. 367 (1979).

³⁰ See *id.* at 373. ("[W]e conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that

Scott, the defendant was charged with theft and fined \$50 at the conclusion of a bench trial.³¹ The Supreme Court held that “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”³²

In *Lassiter v. Department of Social Services*, the most prominent “civil *Gideon*” case preceding *Turner*, the Supreme Court held that the threshold issue for whether or not counsel must be appointed in civil proceedings is whether the physical liberty of the defendant is at risk.³³ If physical liberty is in jeopardy—that is, where the client may be at risk of being incarcerated—then there is a presumption that counsel must be appointed.³⁴ However, where physical liberty is not at issue, the trial court must engage in the *Mathews v. Eldridge*³⁵ balancing test to determine what level of process is due, weighing the interests of the individual, the interests of the state, and the risk of erroneous deprivation of rights absent appointment of counsel.³⁶ In *Lassiter*, the Court held that there is no blanket right to counsel in civil termination of parental rights cases—despite the gravity of the issue at stake—and that courts should make these determinations on a case-by-case basis.³⁷

In *Turner v. Rogers*, the Court turned to the question of whether the Due Process Clause of the Fourteenth Amendment requires the state to appoint counsel in a civil contempt hearing to an indigent defendant who is facing possible incarceration if found liable for failure to pay child support.³⁸ A South Carolina family court had issued an order requiring Michael Turner to pay \$51.73 per week in child support to Rebecca Rogers.³⁹ Over a period of three years, Turner failed to pay the support owed, and the court held him in civil contempt of the order five times.⁴⁰

the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”) (emphasis added).

³¹ *Id.* at 367.

³² *Id.* at 373–74. See also *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”) (quoting *Argersinger*, 407 U.S. at 40.) (internal quotation marks omitted) (emphasis added).

³³ *Lassiter v. Dep’t. of Soc. Servs. of Durham Cnty., N.C.*, 101 S.Ct. 2153, 2159 (1981).

³⁴ *Id.*

³⁵ 424 U.S. 319 (1976).

³⁶ *Lassiter*, 452 U.S. at 2159. See also *Mathews*, 424 U.S. at 335 (laying out the three factors of the due process balancing test: the private interest affected by the official action, the risk of an erroneous deprivation of the private interest, and the government’s interest).

³⁷ *Lassiter*, 452 U.S. at 2159.

³⁸ *Turner v. Rogers*, 131 S.Ct. 2507, 2512 (2011).

³⁹ *Id.* at 2513.

⁴⁰ *Id.*

On four of these occasions, the trial court sentenced Turner to ninety days of incarceration, but he paid the amount due and spent little or no time in jail.⁴¹ The fifth time he was held in contempt, Turner did not pay the amount owed and served a six-month sentence.⁴² Ms. Rogers initiated a sixth civil contempt action, which was adjudicated in 2008.⁴³ Neither Mr. Turner nor Ms. Rogers were represented by counsel.⁴⁴ During the brief hearing, Turner attempted to explain that he was unable to pay support on account of a drug addiction relapse, as well as an injury he sustained at his place of employment.⁴⁵ However, the trial court found Turner in civil contempt of court and sentenced him to twelve months in jail.⁴⁶ The court informed Turner that he could purge himself of the contempt and avoid going to jail if he paid close to \$6,000 in child support arrears.⁴⁷

However, the trial court failed to make a finding that Turner had the ability to pay the order.⁴⁸ The Supreme Court later pointed out that the trial court failed to engage in this “ability to pay” analysis and did not make an express finding that Turner had the ability to pay the purge amount set.⁴⁹ At trial, the judge issued a form order, which had a space to allow the fact-finder to indicate whether the defendant was employed and whether the defendant had the ability to pay.⁵⁰ However, the judge did not fill in this portion of the form order.⁵¹ Turner appealed the family court decision claiming that he had a constitutional right to appointment of counsel in the civil contempt proceeding.⁵² The South Carolina Supreme Court rejected this claim, and Turner appealed to the U.S. Supreme Court.⁵³

The Court clarified that in a civil contempt proceeding, an individual can only be held in contempt if the court finds that the person has the ability to comply with the order.⁵⁴ Further, the court must find that the contemnor has the means to purge himself of contempt and forego incarceration by complying with the terms of the court’s order.⁵⁵

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Turner v. Rogers*, 131 S.Ct. 2507, 2513 (2011).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2516 (citing *Hicks v. Feiock*, 485 U.S. 624, 638 (1988)).

⁵⁵ *Id.*

Therefore, “where civil contempt is at issue, the Fourteenth Amendment’s Due Process Clause allows a State to provide fewer procedural protections than in a criminal case.”⁵⁶

As in *Lassiter*, the *Turner* Court engaged in the balancing analysis outlined in *Mathews v. Eldridge*, to determine whether due process requires appointment of counsel in civil contempt proceedings.⁵⁷ The Court weighed the nature of the private interest at stake (here, the indigent litigant’s potential loss of physical liberty as a result of incarceration) with the risk of an “erroneous deprivation” with or without adequate procedural safeguards.⁵⁸ The Court also considered the nature of “any countervailing interest in not providing ‘additional or substitute procedural requirements’” (i.e. the interests of the pro se petitioner, Ms. Rogers, if counsel were appointed for Mr. Turner).⁵⁹

The Court acknowledged that the private interest at stake suggests the need for a right to counsel, particularly to ensure that the trial court has the means to carefully and accurately assess the key issue of whether the defendant has the ability to pay the order.⁶⁰ However, the Court emphasized that the Due Process Clause has not always required appointment of counsel in civil proceedings in which incarceration was a possible outcome,⁶¹ and therefore asserted that “opposing interests” and “the probable value of ‘additional or substitute procedural safeguards’” must also be taken into account.⁶²

In order to take account of opposing interests and the value of alternative procedural safeguards, the Court focused on three factors. First, the court examined the nature of the “ability to pay” standard and determined that it is largely a question of whether or not the defendant is indigent.⁶³ The Court posited that this determination is not unduly complex and, in fact, is a relatively straightforward issue to assess.⁶⁴

Second, the Court evaluated the impact that appointing an attorney for Mr. Turner would have on the pro se plaintiff, Ms. Rogers.⁶⁵ The Court noted that appointing an attorney for Turner could create “an

⁵⁶ *Turner v. Rogers*, 131 S.Ct. 2507, 2516 (2011).

⁵⁷ *Id.* at 2517. *See also* *Lassiter v. Dep’t. of Soc. Servs. of Durham Cnty., N.C.*, 101 S.Ct. 2153, 2159 (1981) (laying out the *Mathews* balancing test).

⁵⁸ *Turner*, 131 S.Ct. at 2517–18.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2518.

⁶¹ *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973) (holding that a defendant in a civil probation revocation hearing facing possible imprisonment was not entitled to appointment of counsel)).

⁶² *Turner v. Rogers*, 131 S.Ct. 2507, 2518 (2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁶³ *Id.* at 2518–19.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2519.

asymmetry of representation” that could delay the process and ultimately slow child support payments to the family in need of support.⁶⁶ According to the Court, appointment of counsel for alleged contemnors “could make the proceedings *less* fair overall”⁶⁷ because counsel would increase “the risk of a decision that would erroneously deprive a family of the support it is entitled to receive.”⁶⁸ The Court implies that if attorneys were appointed, they’ could use their knowledge of the substantive law and process to manipulate the result so that a defendant would prevail in the contempt action and avoid paying support.⁶⁹ There is no empirical evidence offered to support this proposition.⁷⁰ The Court also fails to acknowledge that one option for addressing this imbalance would be to appoint counsel for the plaintiff.⁷¹

The third factor the Court considered is whether there are alternative procedural safeguards available, which, “if employed together, can significantly reduce the risk of an erroneous deprivation of liberty.”⁷² The Court suggested that notice to the defendant explaining the “ability to pay” standard, preprinted forms designed to elicit information about the defendant’s financial resources, opportunities at the hearing for the defendant to answer questions related to his financial circumstances, and explicit findings by the court on the issue of the defendant’s ability to pay are the types of procedural safeguards necessary to satisfy due process.⁷³ However, while the Court accepted that “the Government . . . claim[s] that these alternatives can assure the ‘fundamental fairness’ of the proceeding even where the State does not

⁶⁶ *Id.* But see John P. Gross, *The True Benefits of Counsel: Why “Do-It-Yourself” Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1, 20–21 (2013) (pointing out that, in civil contempt proceedings 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.”).

⁶⁷ *Id.* The court does not explain the rationale behind this conclusion.

⁶⁸ *Turner v. Rogers*, 131 S.Ct. 2507, 2519 (2011).

⁶⁹ See *id.* (noting that appointment of attorneys for the defendant only could reduce overall fairness by erroneously eliminating a legitimate claim for child support); Bruce Green, *A Professional Responsibility Perspective on Turner v. Rogers*, CONCURRING OPINIONS (June 22, 2011), <http://www.concurringopinions.com/archives/2011/06/a-professional-responsibility-perspective.html>, <<http://perma.cc/3SWE-DU6X>> (stating that the *Turner* opinion brings to mind “the stereotype of the crafty lawyer engaging in sly tactics to distract jurors from the truth.”).

⁷⁰ See Judith Resnick, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 175 HARV. L. REV. 79, 93 (2011) (arguing that the *Turner* case is the product of “judge-made balances of procedural costs and benefits” in which the court “invoke[s] the resources of the opponent as a justification for limiting procedural rights for claimants.”); see also Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 805–06 (2012) (suggesting that *Lassiter* and *Walters*, like *Turner*, “rely on the Justices’ intuitions regarding the abilities of pro se litigants, even in the face of evidence to the contrary.”).

⁷¹ See Engler, *supra* note 24, at 33 (highlighting the Court’s reasoning that appointing counsel to the non-custodial parent respondent in a proceeding where petitioner is self-represented “could make the proceedings *less* fair overall.”).

⁷² *Turner v. Rogers*, 131 S.Ct. 2507, 2519 (2011).

⁷³ *Id.* at 2519.

pay for counsel for an indigent defendant,” it failed to recognize that the state often initiates contempt proceedings against pro litigants. The Court neither questions the reliability of the state’s position, nor relies on other empirical evidence in support of the state’s conclusion.⁷⁴

The Court held that the Due Process Clause does not “automatically” require appointment of counsel in civil contempt proceedings where incarceration is a possible remedy for a contempt finding.⁷⁵ The Court limited its holding to situations in which the opposing parent or party is proceeding pro se and where sufficient alternative procedural safeguards are provided.⁷⁶ The Court specifically noted that its decision does not address civil contempt proceedings where the child support is owed to the state and the state is likely to be prosecuting the action.⁷⁷ The Court also stated that it was not addressing “what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate.”⁷⁸ The Court then found that Michael Turner did not have access to adequate alternative procedural safeguards and, therefore, the contempt process in his case violated the Due Process Clause.⁷⁹ The decision of the South Carolina Supreme Court was vacated and the case remanded.⁸⁰

The *Turner* decision, while not mandating appointment of counsel in civil contempt cases, recognizes that due process requires that pro se litigants have access to alternative procedural safeguards and recognizes that there are complex cases in which appointed counsel would be required.⁸¹ The case advances the jurisprudence on appointment of counsel in civil matters: while *Lassiter* suggested that even in high-stakes civil cases (termination of parental rights), there is no due process requirement that counsel be appointed, the Court in *Turner* recognized that, at a minimum, procedures must be in place to ensure that defendants are informed of the threshold issues, given means to develop evidence, provided fuller opportunities for hearing, and assured of explicit findings in written decisions.⁸²

⁷⁴ *Id.* at 2520.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (internal quotation omitted).

⁷⁹ *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Lassiter v. Dep’t. of Soc. Servs. of Durham Cnty., N.C.*, 101 S.Ct. 2153, 2159 (1981); *Turner*, 131 S.Ct. at 2520. See also Resnick, *supra* note 70, at 82 (identifying “four distinct ideas” which have emerged from the Court’s due process jurisprudence, including “procedural inadequacies in decision[-]making, asymmetrical resources of adversaries, disparities among co-litigants, and lack of access to courts,” and adding that *Turner* and two other 2011 decisions added a fifth idea—“public processes”—to the factors being considered in due process cases).

The *Turner* case, however, leaves many questions unresolved about what constitutes an adequate procedural safeguard. The Court almost casually ticks off a list of proposed safeguards—such as standardized, fill-in-the-blank financial statements—without drawing on empirical evidence that such forms actually contribute to a full and fair hearing.⁸³ Further, the Court fails to define or identify criteria to determine what would constitute “an unusually complex case where a defendant can fairly be represented only by a trained advocate.”⁸⁴ The Court’s suggestion reflects that the threshold issue in *Turner* was straightforward reflects that the Court did not appreciate the complexity of many paternity and child support cases, including civil contempt actions for failure to pay support.⁸⁵ *Turner* leaves these questions to state legislatures and trial courts to resolve.⁸⁶

III. STATE INITIATIVES ON RIGHT TO COUNSEL IN CIVIL MATTERS

A number of state legislatures, courts, and bar associations have undertaken studies or implemented pilot programs to identify the types of legal assistance needed to ensure due process in civil matters.⁸⁷ States experimenting with a civil right to counsel have developed criteria to determine the degree of legal assistance needed given the complexity of the matter.⁸⁸

In 2009, for example, the California Legislature passed the Sargent Shriver Civil Counsel Act to address the issue of access to representation in civil cases.⁸⁹ The Act noted that “[e]ven if we have fair laws and an

⁸³ *Turner*, 131 S.Ct. at 2519.

⁸⁴ *Id.* at 2520 (internal quotation omitted). *See also* Gross, *supra* note 66, at 17 (“[T]he line between indigenc[e] 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.”)(quoting *Argersinger v. Hamlin*, 407 U.S. 25, 50 (1972) (Powell, J., concurring)).

⁸⁵ *Id.*

⁸⁶ *See id.* at 2512 (asserting that though “the State need not provide counsel to the noncustodial parent . . . we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question,” without specifying further what procedures are necessary).

⁸⁷ *See, e.g.*, Sargent Shriver Civil Counsel Act, CAL. GOV’T. CODE § 68651 (West 2012) (expanding civil litigants’ access to counsel); NEW HAMPSHIRE LEGAL ASSISTANCE, CIVIL LEGAL SERVICES AND THE “WORKING POOR” PILOT PROJECT (2006) available at <http://www.nlada.org/DMS/Documents/1236007823.5/Civil%20Legal%20Services%20%26%20Working%20Poor%20-%20Nov.%202006%20complete.pdf>, <<http://perma.cc/3KZ5-79W8>> (describing New Hampshire’s “Working Poor Pilot Project,” which looks to address the problem of a lack of access to counsel in civil matters).

⁸⁸ *E.g.*, Sargent Shriver Civil Counsel Act, CAL. GOV’T. CODE § 68651(b)(7) (West 2012) (identifying factors such as case complexity, the adversarial nature of the case, and literacy issues, among others, as criteria to be considered when determining the litigant’s need for representation).

⁸⁹ *Id.*; *see also* Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, October

unbiased judiciary to apply them, true equality before the law will be thwarted if people cannot invoke the laws for their protection.”⁹⁰ It recognizes that this imbalance fuels the corrosive perception that the judicial process is unfair and only available to those who can afford it.⁹¹

The Legislature suggested that access to representation is not simply a moral imperative but saves the state money and improves court efficiency.⁹² According to the statute, “[t]he fair resolution of conflicts through the legal system offers financial and economic benefits by reducing the need for many state services and allowing people to help themselves.”⁹³ The Legislature further notes that “[e]xpanding representation will not only improve access to the courts and the quality of justice obtained . . . but will allow court calendars that currently include many self-represented litigants to be handled more effectively and efficiently.”⁹⁴ The legislation provided funding for appointment of counsel to indigent, pro se litigants and directed the California Judicial Council to develop pilot projects providing counsel in child custody, housing, probate, guardianship, and domestic violence cases in selected courts.⁹⁵ These programs are currently underway, and evaluations of the projects will be available in 2016.⁹⁶

In Massachusetts, the Boston Bar Association recommended that state courts, in collaboration with legal services providers, initiate nine pilot projects providing counsel in housing, family, immigration and juvenile law matters.⁹⁷ The Boston Bar Foundation and the Boston Foundation then funded two Eviction Pilot Projects: one at the Quincy District Court staffed by attorneys from Greater Boston Legal Services, and the second at the Northeast Housing Court Division staffed by

17, 2009, <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17>, <<http://perma.cc/YL9Y-Z4CG>> (characterizing the pilot project embodied in the California legislation as “an unprecedented civil court experiment to pay for attorneys to represent poor litigants.”).

⁹⁰ Act effective 2009, ch. 457, § 1(f), 2009 Cal. Legis. Serv. (West 2009) (codified at CAL. GOV’T. CODE § 68651).

⁹¹ See *id.* (stating that “[f]or persons without access, our system provides no justice at all, a situation that may be far worse than one in which the laws expressly favor some and disfavor others.”).

⁹² *Id.* § 1(k).

⁹³ *Id.* § 1(d).

⁹⁴ *Id.* § 1(e).

⁹⁵ *Closing the Loop – Sargent Shriver Civil Counsel Act*, 2011 ONLINE EDITION OF INNOVATIONS IN THE CALIFORNIA COURTS, <http://www.courts.ca.gov/15583.htm>, <<http://perma.cc/XY65-F2UE>>; JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUER) 2 (2012), available at <http://www.courts.ca.gov/documents/AB-590.pdf>, <<http://perma.cc/549N-W9G3>>. See also CAL. GOV’T. CODE § 68651(b)(1) (West 2012) (authorizing the use of grant funding to create projects that provide representation for low-income persons who require legal services in civil matters).

⁹⁶ CAL. GOV’T. CODE § 68651(c) (West 2012).

⁹⁷ BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 2 (2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf, <<http://perma.cc/4ZHM-P68P>>.

attorneys from Neighborhood Legal Services.⁹⁸ Both projects confirmed that limited and full representation improved litigants' ability to stave off eviction, though the Quincy project study demonstrated that such representation did not necessarily avoid eviction in the long term or garner financial benefits for tenants such as damages.⁹⁹

Pennsylvania has undertaken similar initiatives.¹⁰⁰ The Philadelphia Bar Association has focused on cases in which individuals are under threat of losing custody or shelter.¹⁰¹ The Civil Gideon Task Force of the Philadelphia Bar recommended that the Bar support demonstration projects to be developed in housing and custody courts.¹⁰² In January 2012, the Task Force, through its Housing Working Group and in collaboration with the local courts, initiated the Philadelphia Landlord/Tenant Legal Help Center offering information, advice, and limited representation to tenants.¹⁰³ Meanwhile, the Texas Access to Justice Foundation announced special impact initiative grants in 2009 to fund pilot projects in two categories: "Expanding the Right to Civil Counsel 'Civil Gideon' Pilot Projects," and "Self-Represented Litigation Pilot Projects."¹⁰⁴

While these state and local initiatives have moved a few jurisdictions closer to making civil *Gideon* a reality, they are still the exception. Indeed, as a 2011 report on civil justice infrastructure across the United States noted, "[s]tates differ substantially in the resources available to support civil legal assistance, in the kinds of services that are available, and in the groups served by existing programs. Little coordination exists for civil legal assistance."¹⁰⁵ The report notes that most services

⁹⁸ BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION: A REPORT ON THE BBA CIVIL RIGHT TO COUNSEL HOUSING PILOTS i–ii (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>, <<http://perma.cc/UX59-FBEK?type=live>>.

⁹⁹ See *id.* at 2–3 (describing success of the pilot programs).

¹⁰⁰ See generally PHILADELPHIA BAR ASSOCIATION CHANCELLOR'S TASK FORCE ON CIVIL GIDEON, 2012 REPORT TO THE BOARD OF GOVERNORS (2012) available at <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/2012CivilGideonTaskForceReportBoardGov.pdf>, <<http://perma.cc/JXJ7-XUWT>>.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* at 5. See also *Landlord/Tenant Legal Help Center Opens Jan. 30*, PHILADELPHIA BAR ASSOCIATION NEWS, Jan. 23, 2013, <http://www.philadelphiabar.org/page/NewsItem?newsItemID=1001180>, <<http://perma.cc/74FV-SY5P>> (describing the scope of the Landlord/Tenant Legal Help Center).

¹⁰⁴ Press Release, Texas Access to Justice Commission, Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System (Sep. 15, 2009), available at <http://www.texasatj.org/node/347>, <<http://perma.cc/R3AS-HR52>>.

¹⁰⁵ REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT v (2011) available at http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf, <<http://perma.cc/GF2H-A5RF>>.

provided to pro se litigants are the result of small, public or private projects that are initiated locally and funded through small grants or donations.¹⁰⁶ This patchwork of services has resulted in a civil justice infrastructure whose “diversity and fragmentation . . . combine to create [a system] characterized by large inequalities both between states and within them.”¹⁰⁷

IV. REALIZING THE PROMISE OF THE *TURNER* MANDATE: THE D.C. CHILD SUPPORT COMMUNITY LEGAL SERVICES PROJECT

Scholars have proposed strategies for bolstering access to justice in civil courts that go beyond the *Turner* Court’s recognition of the need for alternative procedural safeguards.¹⁰⁸ Russell Engler, for example, has suggested a three-pronged approach:

- (1) [E]xpanding the roles of the key players in the court system to promote meaningful access, (2) utilizing an array of assistance programs short of full representation by counsel, paired with rigorous evaluation of the programs to identify the scenarios in which they can sufficiently protect the interests at stake, and (3) an expansion of a civil right to counsel where the lesser steps cannot afford meaningful access.¹⁰⁹

Implementing this approach is challenging; however, initiatives have developed across the country that utilize many of the strategies that Engler suggests.

Courts, bar associations and non-profits have developed limited legal assistance programs to support pro se litigants.¹¹⁰ These programs offer a range of services including self-guided online information or hotlines, online document-production services, interview and advice-only services, preparing or reviewing documents, coaching litigants through the litigation process without entering an appearance, and limited or

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 9.

¹⁰⁸ See generally Engler, *supra* note 24, at 32; Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006); Abel, *supra* note 70.

¹⁰⁹ Engler, *supra* note 24, at 32. See also Engler, *supra* note 108 (framing a three-pronged strategy for achieving a civil right to counsel).

¹¹⁰ *ABA Affordable Legal Services: Innovative Programs to Help People of Modest Means Obtain Legal Help*, AMERICAN BAR ASSOCIATION (July 11, 2014), http://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income.html, <<http://perma.cc/H38G-A5PA>>.

same-day representation.¹¹¹

One such project, the Child Support Community Legal Services Project in Washington D.C., offers a range of services, including the possibility of same-day representation, to unrepresented litigants.¹¹² This project provides true “alternative procedural safeguards” and demonstrates the labor-intensive, rigorous process needed to go further in order to achieve the three-pronged approach that Engler suggests. Through the project, the roles of local legal services providers, university-based legal clinics, the D.C. Bar Association, law firms, and the local courts have expanded “to promote meaningful access” to the paternity and child support courts.¹¹³

A. Paternity and Child Support Adjudication in Washington, D.C.

The District of Columbia uses a judicial model for adjudicating paternity and child support cases.¹¹⁴ Child support orders are established, modified, and enforced through evidentiary hearings in D.C. Superior Court.¹¹⁵ The majority of cases are initiated by the District of Columbia Child Support Services Division (“CSSD”).¹¹⁶ Custodial parents who receive TANF must assign their right to collect child support to the state as a condition of receiving cash assistance from the government.¹¹⁷ In addition, for a nominal fee, CSSD will initiate or enforce a child support case on behalf of any custodial parent seeking support for children.¹¹⁸ In all of these cases, CSSD is represented in court by attorneys from the

¹¹¹ *Id.*

¹¹² Tianna Terry, *Child Support Community Legal Services Project Expands Coverage, Receives Additional Assistance*, MAKING JUSTICE REAL (Dec. 2, 2011), <http://www.makingjusticereal.org/child-support-community-legal-services-project-expands-coverage-receives-additional-assistance>, <<http://perma.cc/K7NK-UL5X>>.

¹¹³ Engler, *supra* note 24, at 32.

¹¹⁴ See *Child Support Process: Administrative v. Judicial*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 2013), <http://www.ncsl.org/research/human-services/child-support-process-administrative-vs-judicial.aspx>, <<http://perma.cc/A65L-DEMX>> (comparing administrative processes with judicial processes and listing each state’s preference). In many states an administrative process is used in which state agencies establish and modify child support orders with appeals of these agency decisions directed to administrative courts. *Id.*

¹¹⁵ *Paternity and Child Support Branch*, DISTRICT OF COLUMBIA COURTS, http://www.dccourts.gov/internet/superior/org_family/patchild.jsf, <<http://perma.cc/G9CJ-XJLF>>.

¹¹⁶ *About CSSD*, CHILD SUPPORT SERVICES DIVISION, <http://cssd.dc.gov/page/about-cssd>, <<http://perma.cc/F7LJ-NAE8>>.

¹¹⁷ *Temporary Assistance for Needy Families*, CHILD SUPPORT SERVICES DIVISION, <http://cssd.dc.gov/page/temporary-assistance-needy-families>, <<http://perma.cc/JB8K-7862>>.

¹¹⁸ *Opening a Child Support Case*, CHILD SUPPORT SERVICES DIVISION, <http://cssd.dc.gov/service/opening-child-support-case>, <<http://perma.cc/3XY9-D4P7>>.

D.C. Office of the Attorney General (“OAG”).¹¹⁹ These attorneys represent the interest of the District in obtaining reimbursement for public assistance and, more generally, in obtaining financial and medical support for children. They do not represent either parent in paternity and support proceedings.¹²⁰ The vast majority of respondents do not have lawyers and appear pro se.¹²¹

Experienced OAG attorneys participate in a broad range of cases including paternity and child support establishment, modification, and civil contempt. The OAG attorneys and paralegals are assigned to each of the paternity and child support courtrooms. They interview the noncustodial parent in every case initiated by CSSD, gathering information about the pro se defendant’s income and work history. In many cases, these meetings take place inside the courtroom before the judge has taken the bench. The OAG staff usually attempt to reach a consent agreement with the defendant regarding paternity or support payments.¹²² If the defendant is willing to consent to the proposed terms, the OAG attorney drafts the agreement and has the defendant sign it. The case is then heard at the beginning of the calendar call and the defendant is able to leave earlier than those parties with contested matters.¹²³

In cases in which no consent agreement is reached between the defendant and the OAG, pro se defendants appear before one of three magistrate judges to contest their cases.¹²⁴ The OAG attorneys present the state’s position and, in many cases, the custodial parent is not present and does not provide testimony or documentary evidence. Given the high volume of cases on the paternity, support, and contempt calendars, cases move quickly, and defendants often do not make—and thereby waive—objections to jurisdiction and service of process. Pro se litigants in establishment and modification cases are generally not aware of their rights to request documentation of the other parent’s income, nor do they pursue their rights to additional discovery. Litigants in contested matters (including civil contempt) largely stumble through evidentiary hearings, while experienced government attorneys efficiently present the state’s

¹¹⁹ See *Child Support Services Division*, OFFICE OF THE ATTORNEY GENERAL, <http://oag.dc.gov/page/child-support-services-div>, <<http://perma.cc/AH6Y-J9DU?type=live>> (detailing the functions of the Child Support Services Division within the D.C. Office of the Attorney General).

¹²⁰ Bulle-Vu, *supra* note 22; *Temporary Assistance for Needy Families*, *supra* note 117.

¹²¹ Bulle-Vu, *supra* note 22.

¹²² SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY COURT, HANDBOOK FOR PEOPLE WHO REPRESENT THEMSELVES IN DIVORCE, CUSTODY AND CHILD SUPPORT CASES 15 (2014) available at <http://www.dccourts.gov/internet/documents/DR-Handbook-for-Self-Represented-Parties.pdf>.

¹²³ *Id.*

¹²⁴ One day per week each of the three judges hears civil contempt cases in a separate courtroom. The three paternity and child support courtrooms do not have lock-up facilities, so a different courtroom must be used to accommodate defendants who are found in contempt and held for incarceration processing. The OAG initiates most of the civil contempt actions.

case.

Most judges take a relatively active role in assisting pro se litigants through the hearing process.¹²⁵ The D.C. Superior Court has revised its judicial canon of ethics to permit judges to ensure that pro se litigants understand the adjudication process.¹²⁶ The rules permit trial and appellate court judges to provide “reasonable accommodations” to pro se litigants, including asking neutral questions designed to clarify issues, explaining rights and court procedures, altering the ordering of introduction of evidence, and making referrals to other resources.¹²⁷

Despite judicial intervention on behalf of pro se litigants, a significant power imbalance exists in the adjudication of paternity and child support matters. Experienced OAG attorneys represent the government in almost every case, while pro se respondents remain unaware of their rights, unfamiliar with defenses, and without a full understanding of the negotiation and adjudicatory processes.¹²⁸ Two community-based legal services providers, the D.C. Legal Aid Society and Bread for the City, developed the Child Support Community Legal Services Project to ameliorate this imbalance and enhance due process in paternity and child support cases.¹²⁹

B. Goals and Structure of CSCLSP

CSCLSP attorneys and paralegals provide information, legal counseling, assistance with negotiation, limited representation, and in some cases, full representation, to pro se litigants in the Paternity and

¹²⁵ See Zoe Tillman, *D.C. Courts System Adopts New Code of Judicial Conduct*, The BLT: THE BLOG OF LEGAL TIMES (Jan. 23, 2012, 1:58 PM), <http://legaltimes.typepad.com/blt/2012/01/dc-courts-system-adopts-new-code-of-judicial-conduct.html>, <<http://perma.cc/D2L6-UM4B>> (describing new judicial code in D.C. which encourages judges to take an “affirmative role” in assisting pro se litigants).

¹²⁶ *Id.*

¹²⁷ See D.C. CODE JUD. CONDUCT R. 2.6, cmt. 1A (2012) (“The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. . . . [J]udges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.”).

¹²⁸ See Bulle-Vu, *supra* note 22 (stressing that while the “OAG sets the calendar, negotiates consent agreements, and litigates disputed cases, sometimes without the custodial parent’s participation . . . non-custodial parents [who are unaware of their rights] often give up without a fight and consent to orders that do not reflect all the facts or which they cannot afford to pay. Those that do demand a hearing struggle to present necessary facts or make legal arguments. . . . [This forces] magistrate judges . . . to make sense of the imbalanced, often imperfect information presented as evidence in their attempt to impose fair support orders.”).

¹²⁹ *Id.*; *Special Projects*, *supra* note 20.

Child Support Branch of the D.C. Superior Court.¹³⁰ The CSCLSP staff offers services five mornings per week, and project attorneys are experts in the laws and procedures governing paternity and child support in the District.

The court has authorized CSCLSP to occupy a small witness room outside one of the child support courtrooms from which paralegals (volunteers from local law firms) screen potential clients for eligibility. Once they determine that a litigant is eligible for services, project attorneys leave the screening area and try to find an empty witness room in another courtroom to meet or, if there are no rooms available, they meet in the hallway outside of the child support courtrooms. The attorneys gather information from the litigant about the status and complexity of the case in order to determine the type of service needed.¹³¹ Project attorneys are available to assist custodial parents as well as non-custodial parents who have paternity and child support matters scheduled.¹³²

CSCLSP attorneys serve only D.C. residents due to restrictions imposed by the nature of the project's funding. However, many of the litigants in D.C. paternity and child support cases are residents of Maryland or Virginia.¹³³ In order to serve as many individuals as possible, the CSCLSP partners with the General Practice Clinic at The Catholic University of America and the D.C. Bar Pro Bono Program.¹³⁴ Law students and pro bono attorneys from these organizations staff the center and serve residents from outside the District.

CSCLSP aims to achieve several goals. The primary goal is to "break the cycle of inertia" that existed in child support adjudication before the project's inception, and to remedy the representation imbalance occurring in child support proceedings due to the presence of government attorneys in nearly all cases.¹³⁵ Attorneys working for the project aim to interrupt the way child support adjudication traditionally functioned in D.C. courts, and ensure that litigants understand their rights and potential defenses.¹³⁶

CSCLSP attorneys have begun to question and alter pre-hearing and hearing practices that had become routine in the paternity and

¹³⁰ *Legal Assistance*, *supra* note 23.

¹³¹ Interview with Tianna Gibbs, Attorney, and Ashley McDowell, Attorney, Legal Aid, in Wash. D.C. (Oct. 10, 2013).

¹³² Terry, *supra* note 112.

¹³³ Interview with Su Sie Ju, Attorney, Bread for the City, in Wash. D.C. (Oct. 7, 2013).

¹³⁴ *Community Outreach & Advocacy Projects*, THE CATHOLIC UNIVERSITY OF AMERICA (Feb. 15, 2013), <http://clinics.law.edu/Community.cfm>, <<http://perma.cc/K69F-5VW5>>.

¹³⁵ Interview with Stephanie Troyer, Attorney, and Meridel Bulle-Vu, Attorney, CSCLSP, in Wash. D.C. (Oct. 16, 2013).

¹³⁶ *Id.*

support courtrooms. They provide pro se litigants—both custodial and non-custodial parents—with information about their rights. Specifically, they explain the role of the Assistant Attorneys General and clarify that OAG attorneys are not judges but instead represent the interests of the state. They inform parties of the purpose of the pre-hearing meetings with OAG, and also advise litigants that they are entitled to receive information about the other parent's financial circumstances and are not required to sign a consent agreement. They gather information about the litigant's case and provide case-specific advice on a range of procedural and substantive issues. With these changes, CSCLSP has begun to shift the balance of power that OAG had long held in the adjudicative process.

The CSCLSP also offers services that require more intervention on behalf of a client.¹³⁷ Project attorneys negotiate on behalf of pro se litigants in the pre-hearing meetings with OAG.¹³⁸ This type of intervention enables the attorneys to clarify miscommunications that may have arisen between the government attorney and the litigant, and draft agreements that are more protective of the litigant's due process and substantive legal rights. In addition, the project attorneys enter a limited appearance to provide same-day representation in cases which are procedurally complex, raise questions of capacity, or in which the stakes are significant.¹³⁹

Although providing limited information, advice, negotiation, or same-day representation is often sufficient to enable pro se litigants to secure appropriate relief, there are cases in which only long-term representation will enable a full and fair hearing of disputed issues.¹⁴⁰ Over time project attorneys have learned that there are certain cases that require full representation regardless of the capacity of the litigant.¹⁴¹ These are cases in which the stakes or the rights at issue are weighty, and failure to present the argument satisfactorily could lead to significant and negative long-term consequences for the unrepresented litigant.¹⁴² Examples of these types of high stakes cases include: claims to

¹³⁷ PATERNITY AND CHILD SUPPORT BRANCH, EARLY REPORT ON THE DEVELOPMENT PHASE OF THE PROBLEM SOLVING COURT 5–6; interview with Su Sie Ju, *supra* note 133.

¹³⁸ Interview with Su Sie Ju, *supra* note 133.

¹³⁹ *Id.*

¹⁴⁰ Interview with Vanessa Batters-Thompson, Attorney, Bread for the City, in Wash. D.C. (Oct. 4, 2013).

¹⁴¹ *Id.* According to Batters-Thompson, project attorneys look at a number of criteria in determining what level of services a litigant may require, including the complexity of the legal issue, whether there is an opposing attorney in the case, and the capacity of the litigant.

¹⁴² *But see* Jack Londen, *A Right to Counsel in Which Civil Cases?*, CONCURRING OPINIONS (June 27, 2011), <http://www.concurringopinions.com/archives/2011/06/a-right-to-counsel-in-which-civil-cases.html>, <<http://perma.cc/RAK8-HQ7W>> (“*Turner v. Rogers* rejected the stakes of the interest involved as the sole selection criterion for invoking a due process right to counsel. All nine Justices agreed that even though the human interest in personal liberty was at stake, it was overridden by other considerations.”).

disestablish paternity or set aside a paternity judgment, arguments for reducing sizeable arrearages based on statute of limitations or other defenses, petitions to impute income, cases involving non-traditional employment or self-employment which would benefit from comprehensive discovery, and allegations of civil contempt in which the consequence of failing to adequately present a case include incarceration.¹⁴³

On the other hand, there are certain issues that routinely arise in paternity and child support cases that a litigant with the capacity to articulate a position can successfully resolve with limited advice and guidance.¹⁴⁴ For example, if neither parent has ever resided in D.C., and the respondent has proof of residency in another state, he can (with explanation and guidance from a project attorney) request that the case be dismissed. Similarly, if paternity has been established and the parties are scheduled for a hearing to set a child support order, a CSCLSP attorney or volunteer can review any documentation of income the client has brought, inform him of his rights to obtain information about the other parent's income, calculate the likely temporary guideline amount, and advise him not to agree to a permanent support order until there is information available about the other parent's income. Armed with this information, most pro se litigants can successfully proceed without representation.¹⁴⁵ Even in contempt cases, a lawyer may not be necessary for the first court appearance; most pro se litigants armed with limited advice to seek a continuance (to obtain counsel or gather additional evidence) can request—and are likely to receive—such continuance.¹⁴⁶

The CSCLSP offers a panoply of “alternate procedural safeguards,” whose adequacies are determined by considering the capacity of the litigant, the complexity of the legal issue, the stakes involved, and the role of the government.¹⁴⁷ Regardless of the level of service provided, the project attorneys are keenly aware that they must implement ethical

¹⁴³ Interview with Vanessa Batters-Thompson, *supra* note 140.

¹⁴⁴ *Id.* However, project attorneys noted that there are situations in which the litigant has mental health or cognitive issues that impair his capacity to represent himself, even if the legal issues are relatively straightforward. In these circumstances, project attorneys will attempt to provide representation and link the litigant with other social services. *Id.*

¹⁴⁵ These examples are based on experiences the author and her clinical students have had working with pro se litigants in the CSCLSP program.

¹⁴⁶ Interview with Vanessa Batters-Thompson, *supra* note 140. The initial stages of contempt hearings, however, still pose risks for self-represented litigants; if, for example, the self-represented respondent reveals information about his employment situation, he could be inadvertently admitting ability to pay, a critical element of a finding of contempt. See also Laura K. Abel, *Turner v. Rogers* and the Right of Meaningful Access to the Courts, 89 DENV. U. L. REV. 805, 805 (2012) (explaining the Court's decision in *Turner* that a litigant's meaningful access to the courts is not necessarily achieved through representation by counsel, but when the litigant is “able to identify the central issues in the case and present evidence and arguments regarding those issues.”).

¹⁴⁷ Interview with Vanessa Batters-Thompson, *supra* note 140.

measures to assure competence, protect client confidentiality, define the scope of representation, avoid conflicts of interest, and ensure independence of professional judgment.¹⁴⁸

C. Ethical Safeguards

The CSCLSP is structured to protect the interests of litigants who receive its services. Under the D.C. Rules of Professional Conduct, competent representation “requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹⁴⁹ A less experienced attorney may acquire competence through association with an attorney who has specialized knowledge or expertise in the field.¹⁵⁰ The CSCLSP project is supervised by an experienced managing attorney from each legal services agency.¹⁵¹ Initially, the supervisors hired and trained the project attorneys, several of whom already had a background in paternity and child support law. The supervising attorneys spent significant time onsite at the outset of the project to observe and guide new attorneys. As each CSCLSP staff attorney has gained expertise in child support and paternity law, the supervising attorneys remain available for consultation as needed. Similarly, project partners include experienced family law attorneys who supervise the law students and pro bono attorneys who provide services.¹⁵²

Substantive expertise is critical given that the CSCLSP project operates under significant time constraints. CSCLSP attorneys must gather information, identify critical legal issues, make judgments, and advise litigants in a time frame of approximately fifteen to twenty minutes. The ability to communicate effectively with litigants and explain complex concepts clearly requires facility with the law and significant client interviewing and counseling skills.¹⁵³ In addition,

¹⁴⁸ Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131; interview with Vanessa Batters-Thompson, *supra* note 140.

¹⁴⁹ D.C. RULES OF PROF'L CONDUCT R. 1.1(A) (2007).

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *All in the Family Court*, BREAD FOR THE CITY, <http://www.breadforthecity.org/tag/child-support/>, <<http://perma.cc/MVE4-Z5UZ>> (highlighting the work of a full-time staff attorney at the D.C.-based nonprofit assigned to child-support court).

¹⁵² Under the supervision of the author, law students from The General Practice Clinic of The Catholic University of America, Columbus School of Law, interview and counsel pro se litigants seeking assistance from the CSCLSP. See also Terry, *supra* note 112.

¹⁵³ D.C. RULES OF PROF'L CONDUCT R. 1.4 (2007). The capacity of the program to serve litigants who do not speak English is limited—while there is one attorney who speaks Spanish, and project attorneys have access to a language line which can be utilized to conduct interviews, the physical space constraints of the project make utilization of such services challenging. Interview with

project attorneys who enter a limited court appearance and undertake same-day representation must review court files, amass any evidence available, present arguments to the court, and, in some cases, conduct evidentiary hearings. This requires thorough familiarity with the law as well as oral advocacy skills.

In order to protect confidentiality, CSCLSP staff screen all cases and conduct all further communications in a private witness room. The CSCLSP attorneys and partners explain at the outset of the interaction that all communications are confidential. This builds trust and facilitates communication.

CSCLSP attorneys routinely consider the scope of their representation and memorialize the parameters of the services they are agreeing to provide.¹⁵⁴ At the outset of the interaction, attorneys explain that services will only be provided for that day. If the attorney offers limited advice, then the attorney gives the litigant a written document at the end of the interview that reiterates the limited scope of the services provided.¹⁵⁵ If the project attorneys agree to negotiate with government attorneys, or provide same-day representation in a hearing, then the litigant must sign a limited retainer.¹⁵⁶

The most complicated ethical issue that CSCLSP attorneys face is conflicts of interest. While the D.C. ethical rules on limited assistance have relaxed the conflicts prohibitions to enable pro bono attorneys to provide short-term, limited advice,¹⁵⁷ conflicts issues remain. The two legal services agencies operating the CSCLSP have developed slightly different conflicts procedures. One agency checks conflicts at the court-annexed screening office, before meeting with any individual seeking legal assistance, utilizing a web-based client database.¹⁵⁸ The other agency screens only for known conflicts in cases in which agency attorneys are providing information and limited advice. If the attorneys determine, however, that same-day representation is warranted, they contact their agency to check for conflicts before undertaking the representation.¹⁵⁹ Both agencies enter the names of all individuals who

Vanessa Batters-Thompson, *supra* note 140.

¹⁵⁴ Interview with Vanessa Batters-Thompson, *supra* note 140.

¹⁵⁵ *Id.* Project partners such as the General Practice Clinic at Catholic University use their own form, which explains the scope of the representation as well as the role of law students and attorney supervisors.

¹⁵⁶ *Id.*

¹⁵⁷ See D.C. RULES OF PROF'L CONDUCT R. 6.5 (2007) (stating that lawyers who "provide[] short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation" are subject to conflict of interest rules "only if the lawyer *knows* that the representation of the client involves a conflict of interest.") (emphasis added).

¹⁵⁸ E-mail from Su Sie Ju, Attorney, Bread for the City, in Wash. D.C. (Mar. 26, 2015) (on file with author).

¹⁵⁹ Interview with Su Sie Ju, *supra* note 133.

receive limited advice on any given day into their respective databases.¹⁶⁰ Whether or not this is required under the D.C. rules regarding limited-assistance, the supervising attorneys believe that such measures are necessary to preserve the perception of competence and fairness.¹⁶¹

Finally, the attorneys must preserve their independence of professional judgment.¹⁶² The CSCLSP attorneys recognize that the same institutional forces and imbalance of power that propelled the creation of CSCLSP could potentially lead to a weakening of their independence of judgment. Government attorneys who initially resisted the project now refer pro se litigants to the CSCLSP attorneys in hopes that project attorneys will explain the law to defendants and assist in resolving cases.¹⁶³ Government attorneys and project attorneys have developed relatively cordial relationships and the pressure to maintain this status quo builds over time.¹⁶⁴ Similarly, judges have come to rely on the project, referring litigants with thorny legal issues or seemingly obstinate personalities to the CSCLSP.¹⁶⁵ These judges can become concerned when the project attorneys are unable to assist a litigant, and sometimes inquire as to why attorneys are unable to accept a case. Answering these inquiries could cause project attorneys to reveal confidential information, yet they are under pressure to do so. The CSCLSP attorneys remain vigilant to vigorously challenge the government's position in pre-hearing negotiations, assert complex, often time-consuming procedural and substantive issues orally or in writing, and protect confidential information regarding eligibility decisions from inquiring judicial officers.¹⁶⁶

D. Successes and Challenges of the CSCLSP Model

CSCLSP demonstrates that different tools are needed to address the variable tasks that pro se litigants face in paternity and child support cases. The variety of approaches needed reflects the complexity of the

¹⁶⁰ Interview with Vanessa Batters-Thompson, *supra* note 140. The screener tracks the number of cases screened each day and sends aggregate figures to both agencies. The screener does not provide identifying information on particular cases. Each agency utilizes slightly different procedures to track particular matters.

¹⁶¹ Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁶² Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁶³ Interview with Su Sie Ju, *supra* note 133.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁶⁶ Interview with Vanessa Batters-Thompson, *supra* note 140.

tasks required, the fundamental nature of the interests at stake, and the capacity of individual litigants. As Engler points out, this is not a matter of drawing artificial lines but of making careful decisions about what type of resource and approach is needed to address specific litigation situations.¹⁶⁷

CSCLSP has markedly altered the balance of power in the D.C. paternity and child support courts, and has engendered a perception among litigants who use CSCLSP services that the adjudication process is generally a fair one.¹⁶⁸ On a daily basis, CSCLSP attorneys are assisting pro se litigants to raise procedural defenses such as lack of jurisdiction and improper service—defenses that were frequently waived or overlooked prior to CSCLSP involvement. Pro se custodial parents who seek assistance from CSCLSP receive clarification about the role of the OAG attorneys. Specifically, CSCLSP attorneys disabuse custodial parents of the notion that the OAG attorneys represent them, and instead encourage these parents to advocate more vigorously for themselves, particularly when the government has failed to undertake sufficient discovery to determine the financial resources available to the noncustodial obligor.¹⁶⁹ CSCLSP attorneys negotiate on behalf of pro se defendants and secure consent agreements that take full account of the various deductions and adjustments available under the D.C. Child Support Guideline.¹⁷⁰

When CSCLSP attorneys enter a same-day appearance in a contested case, they are able to assert claims and defenses, object to evidence, cross-examine witnesses, introduce documentary evidence, and elicit testimony to ensure a full and fair hearing of complex paternity and child support issues. This not only leads to improved hearings but also creates a clearer and more comprehensive record for appeal. Finally, in those cases in which CSCLSP attorneys determine that full representation is warranted, agency lawyers routinely file motions supported by comprehensive briefs. This full airing of procedural and substantive issues has improved the quality of practice and adjudication in these courts.

¹⁶⁷ Engler, *supra* note 24, at 52 (“The proper response to scarcity is not to draw artificial lines based on . . . a presumption that a criminal case is always more important than a custody or eviction case, but to have an explicit conversation as to which types of issues or interests are most important and why, paired with careful analysis of what levels of intervention are necessary to protect those interests. Both pro se reform and an expanded right to counsel are needed, rather than one or the other.”).

¹⁶⁸ Interview with Diane Brenneman, Magistrate Judge, D.C. Superior Court, in Wash. D.C. (Oct. 22, 2013).

¹⁶⁹ CSCLSP and volunteer attorneys often encourage pro se custodial parents to request subpoenas or send employer’s statements to the defendant’s employer to gather more detailed information about their income and financial resources. The author’s students frequently accompany parents to the proper court offices to obtain these documents and explain how they must be served.

¹⁷⁰ See generally D.C. CODE § 16-916.01 (2008).

The presence of CSCLSP attorneys, even if only for one day, allows judges in paternity and child support cases to focus on listening to the evidence, rather than having to interrupt the flow of testimony to explain concepts and arguments to pro se litigants.¹⁷¹ CSCLSP attorneys also eliminate the need for judges to ask questions of pro se litigants that could potentially be prejudicial.¹⁷² Even in cases in which CSCLSP attorneys do not enter a same-day appearance, the presence of project attorneys in other hearings has educated the court about defenses or affirmative arguments that defendants should routinely raise in cases involving complex issues such as disestablishment of paternity.¹⁷³ This has spurred judges, consistent with the judicial ethics rules,¹⁷⁴ to raise these issues when a pro se litigant does not have the capacity or knowledge to do so.¹⁷⁵

One important component contributing to the success of the CSCLSP project is the level of expertise of the attorneys and the quality of supervision that these attorneys receive. Staff attorneys and supervising attorneys have expertise in the areas of paternity, child support, and related areas of domestic relations law.

Contrary to the *Turner* Court's suggestion that appointment of counsel could impose unfairness into the process leading to less child support for children, the experience in the Child Support Community Project demonstrates that involvement of attorneys on behalf of pro se, non-custodial parents (NCPs) might actually assist in providing more support to families. Attorneys help NCPs understand their child support obligations and ensure that fair and reliable orders are entered.¹⁷⁶ For example, attorneys in limited assistance or same-day representation programs can: 1) explain how the child support guideline calculation works, 2) encourage the defendant to find employment, 3) urge the defendant to voluntarily make payments if engaged in underground employment, 4) assist in needed discovery to gather information regarding income of opposing party, 5) monitor compliance with conditions set in contempt proceedings, 6) facilitate payment of purge amounts in contempt cases, 7) explain consequences of acknowledging paternity, and 8) assist in accessing visitation rights.

While the CSCLSP is successfully shifting the balance of power and the perception of unfairness which have pervaded the paternity

¹⁷¹ Interview with Diane Brenneman, *supra* note 168.

¹⁷² *Id.*

¹⁷³ Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

¹⁷⁴ See D.C. CODE JUD. CONDUCT R. 2.6, cmt. 1A (2012) (noting that a judge may "provide[] brief information about the proceeding and evidentiary and foundational requirements" in facilitating a pro se litigant's right to be heard).

¹⁷⁵ Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁷⁶ Terry, *supra* note 112.

establishment and child support process, challenges remain. The demand for CSCLSP services has been lower than expected.¹⁷⁷ Announcements about the availability of attorneys are made to litigants several times throughout the morning, yet only a fraction of litigants avail themselves of the project's services.¹⁷⁸ The demand accelerates once those waiting for their proceedings observe other litigants receiving help from CSCLSP attorneys or when OAG attorneys and judges refer litigants to the CSCLSP. Even so, demand remains lower than expected.¹⁷⁹ The attorneys attribute this, in part, to the physical surroundings in which CSCLSP offers its services.¹⁸⁰ While the project is located near the paternity and support courtrooms, CSCLSP lacks an official-looking office with private meeting space.¹⁸¹ There is also no mechanism for informing litigants, in advance, that limited-assistance services will be available.¹⁸²

Attorneys have also encountered litigants who believe that they can successfully handle their own cases without the assistance of an attorney. Many litigants are frustrated by the long waits they experience in court and fear that meeting with project attorneys will further delay an already protracted process.¹⁸³ There is also a delay in identifying contested or complex cases in which a litigant would greatly benefit from legal counsel. By the time judges hear the case and identify that same-day representation is needed, CSCLSP attorneys have often left for the day or do not have adequate time to prepare for representation.¹⁸⁴ Finally, there remains a certain apathy among pro se litigants, given the longstanding perception that the court process is stacked against NCPs in paternity and child support court.¹⁸⁵ The culture of apathy and perception of futility in the child support process will take time to dissipate.

The project also faces funding restrictions, which limit the eligibility criteria for participation in the program and make long-term planning and expansion of the project precarious. While the court has provided a witness room for CSCLSP use, space is at a premium in the courthouse, and there is no guarantee that this arrangement will be a long-term one. An additional challenge CSCLSP confronts is program evaluation. While the project managers recognize the importance of

¹⁷⁷ Interview with Diane Brenneman, *supra* note 168.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁸⁰ Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁸¹ The CSCLSP screening room is on a different floor than the courtroom used for civil contempt hearings, which also makes it more difficult for litigants in contempt matters to seek assistance.

¹⁸² Interview with Diane Brenneman, *supra* note 168.

¹⁸³ Interview with Su Sie Ju, *supra* note 133.

¹⁸⁴ Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

¹⁸⁵ Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

undertaking empirical evaluation to ensure that the services it provides are reaching the intended audience and meeting the objectives of the program, such evaluations are labor intensive and expensive. Both agencies are exploring collaborations with local universities to undertake further evaluation.¹⁸⁶

V. GUIDELINES AND RECOMMENDATIONS: APPLYING LESSONS LEARNED FROM CSCLSP

Limited legal advice and other pro bono programs geared to assisting pro se litigants are burgeoning around the country.¹⁸⁷ As Engler points out, whether to implement pro se assistance projects or institute the right to counsel in civil cases is not an either-or proposition. Appointment of an attorney is just one component needed to enhance access to justice.¹⁸⁸ The CSCLSP project illustrates that calibration is possible and offers courts and legal service providers a model for implementing meaningful “alternative procedural safeguards” for pro se litigants.

A. Develop Procedural Safeguards That Take Account of Complexity, Capacity, Stakes, and Balance of Power

The definition and examples of “adequate procedural safeguards” articulated in *Turner* fail to account for the complexity of legal issues pro se litigants face, as well as the capacity of the litigants to utilize resources. Access to justice projects that provide progressive levels of service based on the complexity of the legal issues, the stakes involved

¹⁸⁶ Legal Aid Society of D.C. and Bread for the City are exploring the possibility of such an evaluation with the National Catholic School of Social Work at Catholic University.

¹⁸⁷ See AMERICAN BAR ASSOCIATION, *supra* note 110 (describing limited legal and pro se assistance programs across the country); see also SELF-REPRESENTED LITIGATION NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2008 ed.) available at http://www.americanbar.org/content/dam/aba/migrated/legal services/sclaid/atjresourcecenter/downloads/best_practices_7_08.authcheckdam.pdf, <<http://perma.cc/357S-EYSR>> (describing access to justice programs and effective court operations that facilitate services for pro se litigants).

¹⁸⁸ Engler, *supra* note 24, at 53 (“[R]epresentation is only one variable impacting case outcomes. The substantive law, the procedural law, the judge or decision maker, and the operation of the courts are other factors. Second, power matters greatly in interpreting the dynamics of cases. Identifying power imbalances and the sources of power are important steps in analyzing where full representation is more likely to be needed and where lesser forms of assistance might suffice. Finally, where representation is needed, a representative with specialized expertise in the area of law and the forum is likely to be needed, as opposed to merely any representative”).

for the litigant, the capacity of litigants to advocate for themselves, and the need to preserve balance of power, offer a true alternative to full-fledged civil *Gideon*.

The CSCLSP project highlights what the prior decisions in *Turner* and *Lassiter* failed to recognize: that deprivation of basic necessities and the financial means to garner such necessities may be equally significant—or of higher significance—than physical deprivation of liberty. *Turner*, like *Lassiter*, identifies potential deprivation of physical liberty as the ultimate trigger of due process protection.¹⁸⁹ The reality in the child support context, however, is that deprivation of the financial resources that pro se litigants need to subsist, or establishment of paternity, which obligates parents to pay child support for up to twenty-one years, involve stakes that are arguably equal to or greater than those at issue in civil contempt and many criminal cases.

As the demands on a court-annexed resource center increase, it becomes more critical to have clear guidelines as to what type of cases the project will handle, and what level of service is warranted in different circumstances. While it may be unrealistic and constraining to outline every type of situation that attorneys are likely to encounter, it is important to delineate criteria so that decisions about which matters to handle, how much time to spend on each matter, and whether to continue representation are not left solely to the discretion of individual attorneys. The ABA Handbook on Limited Scope Legal Assistance, for example, identifies the types of clients best suited for a limited-assistance model.¹⁹⁰ It suggests that individuals who have “a degree of emotional detachment, the willingness and ability to handle some ‘legal paperwork,’ some capacity to gather and analyze financial information, reasonable decisiveness, willingness and ability to handle details and follow through on obligations, and the necessary time to perform delegated tasks” are good candidates for limited-assistance services.¹⁹¹ Establishing case-selection criteria leads to consistency in program services, enable staff to justify decisions to decline service, and ensure continuity when there is staff turnover.

The *Turner* opinion highlights balance of power as a critical factor in determining what level of process is due to unrepresented litigants.¹⁹²

¹⁸⁹ See *Turner v. Rogers*, 131 S.Ct. 2507, 2517 (2011) (determining that a constitutional right to counsel exists only in cases involving incarceration).

¹⁹⁰ MODEST MEANS TASKFORCE, AMERICAN BAR ASSOCIATION, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 59–60 (2003) available at <https://apps.americanbar.org/litigation/taskforces/modest/report.pdf>, <<http://perma.cc/8SCK-4C99>>.

¹⁹¹ *Id.* (citing M. SUE TALIA, A CLIENT’S GUIDE TO LIMITED LEGAL SERVICES (1997)).

¹⁹² *Id.* at 2519. The Court notes that its decision is based, in part, on the fact that the petitioner in *Turner*, like the respondent, was also unrepresented by counsel, and that affording an attorney to the defendant would have inappropriately tilted the balance of power in favor of the alleged contemnor. *Id.*

In situations such as child support adjudication, where government attorneys are routinely representing the interests of the state, the ability to have experienced, skilled attorneys available to assist pro se litigants tilts the power balance back toward equilibrium. Identifying cases or recurring scenarios in which the balance of power is skewed and, as a result, the litigant's substantive rights are likely to be infringed if they do not receive assistance, is critical to determining which cases will be eligible for services and what level of services they will receive.¹⁹³

It is also critical to evaluate the methods used to implement the criteria to assess whether the project is achieving its goals. Nearly every state now offers pro bono limited advice services, yet there have been few empirical studies measuring the success of these programs.¹⁹⁴ Qualitative and quantitative evaluation can help courts and legal services providers to identify effective interventions as well as gaps in service. This information will enable providers to determine more precisely how to best deliver legal assistance in an environment of limited resources.¹⁹⁵ The ABA Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means [hereinafter "ABA Standards"], adopted in 2013, recommend that agencies identify objectives and periodically conduct evaluations to determine whether the agency's methods meet its stated objectives.¹⁹⁶ As Richard Zorza notes, "[i]f we identify 'safeguards' that work, and how best to use them, *Turner* may be seen as having prompted the research and analysis that assured 'fundamental fairness.'"¹⁹⁷

B. Develop Ethical and Professional Safeguards To Protect Litigants and Foster a Perception of Fairness

Access to justice projects offering graduated services to pro se litigants must develop policies and practices to address 1) competence, 2) confidentiality, 2) competence, 3) scope of representation, 4) conflicts of

¹⁹³ Interview with Vanessa Batters-Thompson, *supra* note 140.

¹⁹⁴ See D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 905 (2013) (noting the limited number of studies conducted to evaluate limited legal assistance programs).

¹⁹⁵ See Abel, *supra* note 70, at 816–23 (discussing the need for sound empirical study).

¹⁹⁶ AM. BAR ASS'N STANDARDS FOR PROGRAMS PROVIDING CIV. PRO BONO LEGAL SERVS. TO PERSONS OF LIMITED MEANS §§ 2.17, 2.18, 3.6 (2013) [hereinafter ABA STANDARDS FOR PROGRAMS], available at <http://www.americanbar.org/content/dam/aba/images/news/PDF/109.pdf>.

¹⁹⁷ Richard Zorza, *A Final Turner Post from Your Co-hosts*, Richard Zorza & David Udell, CONCURRING OPINIONS (June 28, 2011), <http://www.concurringopinions.com/archives/2011/06/a-final-post-from-your-co-hosts-richard-zorza-david-udell.html>, <<http://perma.cc/BSC8-DMWJ>>.

interest, and 5) independence of professional judgment. While the ABA Model Rules and ethical rules in several states have relaxed some of the requirements imposed on lawyers engaging in limited representation of clients,¹⁹⁸ maintaining safeguards to protect the interests of clients is critically important to foster trust with litigants and uphold the integrity of the limited assistance process.

The American Bar Association recognizes limited assistance as a legitimate and ethical alternative to full-scale representation in Model Rule 1.2,¹⁹⁹ Model Rule 6.5²⁰⁰ and in the ABA Standards.²⁰¹ Many states have adopted rules of professional conduct and issued ethics opinions which permit and offer guidance on limited representation.²⁰²

The quality of court-annexed limited assistance programs depends

¹⁹⁸ MODEL RULES OF PROF'L CONDUCT R. 6.5 (1983).

¹⁹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983); *see also* MODEST MEANS TASKFORCE, *supra* note 190, at 84–89.

²⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 6.5 (1983). Model Rule 6.5 provides that:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Id.

²⁰¹ ABA STANDARDS FOR PROGRAMS, *supra* note 196 (“[T]he American Bar Association recommends appropriate implementation of these Standards by entities providing civil pro bono legal services to persons of limited means.”). These standards supplement the American Bar Association (“ABA”) Standards for Provision of Civil Legal Aid, adopted in August 2006. AM. BAR ASS’N STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID (2006) [hereinafter ABA STANDARDS FOR CIVIL AID], *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_aba_civillegalaidstds2007.authcheckdam.pdf. *See also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446, 4 (2007) (concluding that “there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants.”).

²⁰² *See* Am. Bar Ass’n Standing Comm. on the Delivery of Legal Servs., *Pro Se Resources by State*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html (last visited Mar. 26, 2015) [hereinafter *Pro Se Resources by State*] (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services); *see also Unbundling Fact Sheet*, AMERICAN BAR ASSOCIATION (Jun. 2, 2011), http://www.americanbar.org/content/dam/aba/migrated/legal_services/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf, <<http://perma.cc/6CCJ-WEG6>> (reporting that forty-one states have adopted the Model Rule or some form of it); *see also* MODEST MEANS TASKFORCE, *supra* note 190, at 84–89.

upon the competence of the personnel who staff them. The expedited nature of the services requires that those providing legal advice, negotiation assistance, and same day representation be thoroughly versed in the substantive law and procedure. CSCLSP illustrates the importance of having experts in the field supervising staff attorneys and pro bono volunteers. In addition, as the ABA Standards recognize, program personnel should be diverse and culturally competent in order to gain the trust of and serve effectively a diverse client base.²⁰³

Court-annexed resource centers and other limited assistance projects must ensure that confidentiality is preserved.²⁰⁴ Principally, this means that there must be private space in which attorneys can conduct interviews and prepare for hearings. This can be difficult to accomplish in overcrowded and under-resourced courts. Limited-assistance projects that do not have a physical space in which lawyers can interview clients must maximize their ability to gather information and give advice in an environment that guarantees privacy and security of information.²⁰⁵ In addition, even if the interaction will be limited to gathering information and offering limited advice based on that information, attorneys should explain that the communication is confidential.²⁰⁶ The ABA Standards for the Provision of Civil Legal Aid recognize that a lawyer-client relationship is generally established through this type of individuated assistance.²⁰⁷ An explanation of confidentiality enables the lawyer to gain the client's trust and facilitates communication with the litigant. Such express discussions of confidentiality (along with communications outlining the scope of representation) also help demonstrate that a lawyer/client relationship, albeit limited, has formed and therefore the attorney/client privilege attaches to communications.²⁰⁸ This protects the litigant from having attorney's notes subject to discovery and prevents the attorney from being compelled to testify about the litigant's communications with the attorney.²⁰⁹

²⁰³ ABA STANDARDS FOR PROGRAMS, *supra* note 196, §§ 2.1, 3.2.

²⁰⁴ *Id.* § 3.4 ("Consistent with ethical and legal responsibilities, a pro bono program should preserve information regarding clients and prospective clients from any disclosure not authorized by the client or prospective client.").

²⁰⁵ Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

²⁰⁶ The guarantee of confidentiality is particularly important in programs such as CSCLSP, where attorneys meet with the litigants for a substantial period of time and gain extensive knowledge about the individual's situation.

²⁰⁷ ABA STANDARDS FOR CIVIL AID, *supra* note 201, § 3.5.

²⁰⁸ See *e.g.* *Feld v. Fireman's Fund Ins. Co.*, 292 F.R.D. 129, 137 (D.D.C. 2013) ("Under District of Columbia law, the attorney-client privilege applies only as follows: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.") (citing *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003)).

²⁰⁹ See ABA STANDARDS FOR CIVIL AID, *supra* note 201, § 3.5; see also Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY

The ABA has also suggested, via a formal ethics opinion, that an attorney who provides legal assistance in the drafting of pleadings or other matters does not need to sign the documents or inform the court that the litigant has received assistance from an attorney. In Formal Opinion 07-446, the ABA Standing Committee on Ethics and Professional Responsibility permitted attorneys to prepare documents or pleadings for a client without disclosing the attorneys' assistance to courts or opposing parties.²¹⁰ The committee found that "the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation."²¹¹ The committee concluded that litigants may receive limited assistance without revealing that they received this assistance, so long as there is no rule or statute requiring disclosure in the particular jurisdiction.²¹² States differ as to whether "ghostwriting" of pleadings is acceptable.²¹³

In order to avoid misunderstanding and prevent unrealistic expectations, court-annexed projects must make the scope of their representation clear to the pro se litigant, preferably in writing.²¹⁴ It may be, as it is in the CSCLSP model, that legal services providers and their law school or pro bono partners develop different forms to delineate attorney roles and obligations as well as client responsibilities.²¹⁵ As the ABA recognized in its extensive report on limited assistance practice, "[b]ecause the client-lawyer relationship is created by consent, "[t]he critical issue for the attorney in a limited scope representation is that the client fully understand and agree to what the attorney will do, and, more importantly, what the attorney will not do."²¹⁶

Although some jurisdictions such as the District of Columbia permit a relaxing of conflicts rules in the context of limited assistance,²¹⁷ court-annexed limited-advice and same-day representation projects must

L. & POL'Y 453, 467 (2011).

²¹⁰ Formal Op. 07-446, *supra* note 201, at 2–3.

²¹¹ *Id.* at 2.

²¹² *Id.* (discussing undisclosed legal assistance to pro se litigants).

²¹³ See *Pro Se Resources by State*, *supra* note 202 (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services).

²¹⁴ State rules differ as to whether the scope of representation must be in writing. See Am. Bar Ass'n Standing Comm. on the Delivery of Legal Servs., *An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants*, AMERICAN BAR ASSOCIATION 5–7 (Aug. 2014), http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/communication.html.

²¹⁵ See ABA STANDARDS FOR PROGRAMS, *supra* note 196, § 3.3.

²¹⁶ MODEST MEANS TASKFORCE, *supra* note 190, at 92 (citing LTD. REPRESENTATION COMM. OF THE CAL. COMM'N ON ACCESS TO JUST., REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 9 (2001)).

²¹⁷ See MODEL RULES OF PROF'L CONDUCT R. 6.5 (relaxing conflicts of interest rules for lawyers who provide short-term limited legal services).

be vigilant to maintain the appearance and reality that conflicts will be identified and avoided. The CSCLSP service providers have instituted more stringent conflicts checks and screening to minimize the appearance of impropriety and to ensure that individuals can access services from the agency unrelated to child support.

There are a number of ethical issues for attorneys engaged in these projects to consider, including whether the jurisdiction should adopt a rule of procedure regarding limited assistance if one does not already exist, whether the jurisdiction should adopt a rule addressing ghostwritten procedures, and whether the jurisdiction should adopt rules clarifying when attorneys may communicate with opposing parties who are partially represented or receiving limited assistance.²¹⁸

C. Forge Alliances with Partners who Can Build Infrastructure and Fill Gaps in Service

Court-annexed resource projects will not succeed without support and assistance from courts and other institutional players.²¹⁹ Court administrators must be willing to provide physical space for these projects. Judges must support resource projects by assisting pro se litigants within the ethical bounds of the law, referring appropriate cases, and respecting the ethical limits under which limited-assistance projects must operate. Attorneys and staff from government agencies or other institutional players must be willing to change practices and procedures that are prejudicial to pro se litigants. They must instead work with court-annexed resource centers to develop referral mechanisms and settlement practices that facilitate due process and resolution of high-stakes, pro se cases.

In addition, court-based resource projects are unlikely to be able to meet all of the needs of pro se litigants.²²⁰ Leveraging the resources of other partners such as pro bono attorneys and law school clinics can help fill these gaps.²²¹ When eligibility, funding, or other constraints limit the services a program or project can provide, third-party partners can address these community needs. At the same time, these partners need

²¹⁸ MODEST MEANS TASKFORCE, *supra* note 190, at 116–19; *see also Pro Se Resources by State*, *supra* note 202 (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services).

²¹⁹ Bruce A. Green, Foreword, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1743–44 (1999).

²²⁰ *See Engler*, *supra* note 24, at 42–43 (asserting the need for supplementing court-annexed assistance programs with other forms of aid to prevent a forfeiture of rights by pro se litigants).

²²¹ ABA STANDARDS FOR PROGRAMS, *supra* note 196, § 2.6.

sufficient training and supervision to ensure that they are sufficiently knowledgeable about the law and procedures to provide quality assistance in time-pressured situations.²²² Furthermore, it is important to set realistic limits on what services partners can provide. Law students, for example, may not have enough experience to do same-day hearings, but they may be very capable, with adequate supervision, of providing information, limited advice, and negotiation services.

D. Address Underlying Structural Gaps to Ensure Meaningful and Long-Term Assistance

The impact of projects such as the Child Support Community Legal Services Project is limited unless underlying structural problems are addressed.²²³ In the child support context, for example, barriers to employment must be rectified in order to reach long-term solutions.²²⁴ Without supportive services such as employment training, job placement, mental health counseling, drug rehabilitation, and educational opportunities for those owing child support, court-annexed resource centers may just be providing services that offer a superficial, short-term fix to a long-term, structurally complex problem.²²⁵

Some jurisdictions have developed court-based employment resource programs that lawyers providing limited assistance can access for their clients. The Philadelphia child support court, for example, has hired a case manager who meets with obligors, assesses their needs, directs them to appropriate services, and follows up to ensure that the individual is pursuing needed resources.²²⁶ Similarly, a circuit court in Northeast Indiana and the County Prosecutor's office have teamed up with a workforce development project to provide employment services to

²²² See *id.* §§ 4.7, 4.8.

²²³ Interview with Su Sie Ju, *supra* note 133; interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

²²⁴ See D.C. ACCESS TO JUST. COMM'N, *supra* note 21, at 60–61 (explaining that “those living in poverty are more likely to experience a number of different legal problems,” and noting that the areas of D.C. “with the highest poverty rates frequently experience higher unemployment rates. . . . [I]n order to avoid termination and to preserve possible [welfare] benefits in the event of future need, it is very important for families to transition from welfare to other income—such as a combination of wages and child support—at the earliest opportunity.”).

²²⁵ See, e.g., *id.* at 28 (proposing that problems faced by prisoners and ex-offenders in the civil justice system will only be solved with a wide-ranging approach to address problems in education, economic opportunities, access to drug and mental health treatment, housing, etc.).

²²⁶ See *Domestic Relations*, THE PHILADELPHIA COURTS (2014), <http://www.courts.phila.gov/common-pleas/family/dr/>, <<http://perma.cc/7HEK-A8K3>> (explaining the kinds of support provided by the court in custody, child support, and other domestic relations matters, including referral to a “Support Masters Unit” and a “Networking for Jobs Program”).

individuals who owe child support.²²⁷ These projects address the underlying causes of unemployment and enhance the potential for limited legal services to have lasting effects.

VI. STATUTES OR COURT RULES REQUIRING MANDATORY APPOINTMENT OF COUNSEL OR AUTHORIZING DISCRETIONARY APPOINTMENT

In order to protect the due process rights of pro se indigent litigants and ensure the integrity of the judicial process, states should mandate the appointment of counsel in certain circumstances. Counsel should be appointed in all civil contempt proceedings where incarceration is contemplated as a remedy and the state is the moving party.²²⁸ In cases in which the state is not involved, counsel should still be appointed for the defendant if incarceration is a possible outcome. If the court believes that appointment of counsel for the defendant unacceptably shifts the balance of power between the parties, then the court should be permitted to appoint counsel for a pro se indigent petitioner. A limited, same day appearance may be suitable in some contempt cases (*i.e.*, where issues are clear; witnesses or other evidence is available), whereas many cases will require full representation. Outside of the civil contempt context, states or courts should authorize discretionary appointment of counsel in paternity and child support matters when the complexity of the case, the stakes, or the capacity of the parties require it.²²⁹

A court-annexed limited legal assistance project can facilitate greater due process protections for pro se litigants; however, these limited services are not available or sufficient in all cases. A litigant may not meet eligibility criteria or may have a conflict that prevents the legal

²²⁷ Ellie Bogue, *New Collaboration Will Help Delinquent Child-Support Parents Train for the Workforce*, THE NEWS SENTINEL, Jan. 8, 2014, <http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20140108/NEWS/140109757/1005>, <<http://perma.cc/GL6R-8ZMU>>.

²²⁸ See *Price v. Turner*, 691 S.E.2d 470, 472 n.2 (S.C. 2010), *vacated*, 131 S.Ct. 2507 (2011) (noting that eleven states and five federal courts have held that counsel is required for civil contemnors facing incarceration, and that some state Supreme Courts have found counsel in civil contempt cases to be required as a matter of fair administration of justice); see also *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984) (“We do not deem it necessary to decide whether a non-custodial parent is entitled to counsel on constitutional grounds. Pursuant to our supervisory powers to ensure the fair administration of justice, we hold that counsel must be appointed for indigent defendants facing civil contempt for failure to pay child support.”); Resnick, *supra* note 70, at 92 (identifying several states which require appointment of counsel in civil contempt cases).

²²⁹ See, e.g., 750 ILL. COMP. STAT. 5/506 (2007) (“In any proceedings involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities [attorney, guardian ad litem, child representative] to address the issues the court delineates.”).

services provider from assisting that litigant.²³⁰ Limited advice or one-day representation may not be adequate due to the complexity of the claim or affirmative defenses, the investigation or discovery needed, and other complicating factors.²³¹ The CSCLSP, for example, offers a continuum of services that is simply inadequate to assist pro se, indigent litigants involved in complex contempt cases, particularly in cases where government attorneys are moving forward with a contested evidentiary hearing and imprisonment for failure to pay is probable unless further investigation and trial preparation is undertaken. Similarly, in contested cases in which a pro se defendant is attempting to vacate a paternity judgment or trying to defend against an arrearage enforcement action, limited advice or one-day representation will not suffice. There are also circumstances in which the capacity of a litigant is in question or the stakes are unusually high, even if the legal questions at issue are relatively straightforward, where more extensive representation may be necessary.²³² In these circumstances, if an attorney from a resource center is not able to provide full representation, then the court should be required, or at least have the discretion, to appoint an attorney.²³³

States have determined that indigent litigants in certain types of civil cases must be appointed attorneys.²³⁴ Most states, for example, require appointment of counsel for parents in termination of parental rights proceedings.²³⁵ Many of these states also require that courts appoint a guardian ad litem to represent the best interests of the child in termination of parental rights and other child welfare proceedings.²³⁶

²³⁰ See, e.g., D.C. ACCESS TO JUST. COMM'N, *supra* note 21, at 10 (identifying failure to meet eligibility criteria as one of the most common reasons for turning away clients).

²³¹ See Zoe Tillman, *Program a 'critical way' to level playing field*, NAT'L L.J. (July 23, 2012), available at <http://www.dccourts.gov/internet/documents/Premium-Access-Article-Legal-Times.pdf>, <<http://perma.cc/D3X5-437D>> (noting that same-day representation fills a void for pro bono representation, but cannot resolve cases where proceedings cannot be quickly completed); see also Administrative Order 14-10: Limited Appearances in the Civil Division, Probate Division, Tax Division, Family Court, and Domestic Violence Unit, Super. Ct. D.C. (prohibiting limited-scope representation in jury trials).

²³² Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97, 115 (2010).

²³³ Engler, *supra* note 24, at 49.

²³⁴ See Am. Bar Ass'n Standing Comm. on Legal Aid and Indigent Defendants, *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*, AMERICAN BAR ASSOCIATION (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_appendix.authcheckdam.pdf.

²³⁵ See, e.g., S.C. CODE ANN. § 63-7-2560(A) (West 2008) ("Parents, guardians, or other persons subject to a termination of parental rights action are entitled to legal counsel. Those persons unable to afford legal representation must be appointed counsel by the family court, unless the defendant is in default."); MONT. CODE ANN. § 41-3-425 (West 2013) ("Any party involved in a petition filed pursuant to [a neglect or abuse proceeding] has the right to counsel in all proceedings held pursuant to the petition.").

²³⁶ See, e.g., S.C. CODE ANN. § 63-7-2560(B) (West 2008) ("A child subject to any judicial proceeding under this article must be appointed a guardian ad litem by the family court. If a guardian

Congress and state legislatures have enacted laws giving judges the discretion to appoint counsel in other circumstances.²³⁷ Pursuant to the federal *in forma pauperis* statute, a federal court may approve a party's request to appoint counsel on the basis of indigence.²³⁸ Requests for appointed counsel frequently arise in federal civil rights cases.²³⁹ For example, in *Santiago v. Walls*,²⁴⁰ the United States Court of Appeals for the Seventh Circuit held that the trial court should have used its discretion to appoint counsel for an indigent inmate who had filed a Section 1983 action against a correctional institution and its prison guards.²⁴¹ The court found that the case required extensive discovery that the inmate could not conduct on his own.²⁴²

In many states, family court and probate judges have the discretionary authority to appoint guardians ad litem in custody, abuse and neglect, and guardianship cases.²⁴³ Judges in child custody cases, for example, may appoint a guardian ad litem when the court determines that the parents of the child are not adequately protecting or representing the child's interests.²⁴⁴ As part of the decision whether to appoint counsel, state statutes require that the judge consider factors such as the complexity of the issues presented, the nature of the evidence to be presented, and the ability to gather information about the case from other sources.²⁴⁵

ad litem who is not an attorney finds that appointment of counsel is necessary to protect the rights and interests of the child, an attorney must be appointed.”).

²³⁷ 28 U.S.C.A. § 1915(e)(1) (2012). See also Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL. 245 (July–Aug. 2006) (highlighting and categorizing hundreds of state statutes and court rules ensuring the right to counsel in civil matters).

²³⁸ 28 U.S.C.A. § 1915(e)(1) (2012).

²³⁹ See generally Luther M. Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel?*, 39 WASH. & LEE L. REV. 1267 (1982).

²⁴⁰ 599 F.3d 749 (7th Cir. 2010).

²⁴¹ *Id.* at 765.

²⁴² *Id.* at 762.

²⁴³ See, e.g., MINN. STAT. ANN. § 518.165(1) (West 2013) (“In all proceedings for child custody or for dissolution or legal separation where custody or parenting time with a minor child is in issue, the court may appoint a guardian ad litem to represent the interests of the child.”). See generally APPOINTMENT PROVISIONS FOR GUARDIANSHIP CASES, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/legalservices/probono/childcustody/guardianship_chart.pdf, <<http://perma.cc/TJ7V-39W6>> (last updated Jan. 2007).

²⁴⁴ See e.g., MINN. STAT. ANN. § 518.165 (West 2013) (granting the court discretion to appoint a guardian ad litem to represent the interests of the child in all proceedings for child custody or where custody or parenting time with a minor child is in issue); see also CAL. FAM. CODE § 7647.5 (West 2014) (“A guardian ad litem may be appointed for the child to represent the best interests of the child.”).

²⁴⁵ See, e.g., 750 ILL. COMP. STAT. 5/506(a-5) (West 2007) (“In deciding whether to make an appointment of an attorney for the minor child, a guardian ad litem, or a child representative, the court shall consider the nature and adequacy of the evidence to be presented by the parties and the availability of other methods of obtaining information, including social service organizations and evaluations by mental health professions, as well as resources for payment.”).

Court-annexed resource centers and other unbundled legal-assistance projects are not a panacea that eliminate the need for civil *Gideon*. These projects, as comprehensive and effective as they may be, cannot provide the due process protection that *Turner* requires by employing alternatives to full representation. A careful consideration of circumstances under which appointment of counsel is necessary, similar to the analysis that states such as California are undertaking, is needed to ensure that “due process” is accorded in civil contempt and other complex paternity and child support matters.²⁴⁶

VII. CONCLUSION

The vague concept of alternate procedural safeguards outlined in *Turner* ignores the complexities involved in high stakes civil matters involving pro se litigants. A written form or routine questioning by a judge cannot provide the procedural fairness required in a substantively complex matter, in a situation in which the stakes are grave, or when the pro se litigant is operating under an impairment. Courts and the legal community must develop resources that offer progressive tiers of services tailored to litigants’ circumstances, using qualified staff and incorporating practices that ensure ethical protection of clients.

Courts should not be lulled into a false security, however, that these legal resource centers will be sufficient to ensure efficient and effective administration of justice. Unless courts offer means for connecting to or partnering with community-based resources that can help address the underlying structural causes of issues such as failure to pay child support, then the impact of court-annexed resource centers is likely to be minimal. Similarly, courts and legislatures must recognize that there are circumstances which require same-day or full representation. In these circumstances, the court should be required to, or at least have the discretion to, appoint an attorney to ensure that the due process that *Turner* requires is realized.

²⁴⁶ See Sargent Shriver Civil Counsel Act, CAL. GOV’T. CODE § 68651(b)(7) (West 2012) (identifying factors such as case complexity, the adversarial nature of the case, and literacy issues, among others, as criteria to be considered when determining the litigant’s need for representation).