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Turner V. Rogers, the Right to Counsel, and the Deficiencies of Mathews V. Eldridge

Tom Pryor

Note

Turner v. Rogers, the Right to Counsel, and the Deficiencies of *Mathews v. Eldridge*

*Tom Pryor**

The three year stretch from 2005 through 2008 was a rough one for Michael Turner. He struggled with unemployment, substance abuse, and spent almost half that time in prison.[1] But while Turner's story sounds depressingly unremarkable, two details may come as a surprise to most Americans: Turner was not sentenced to prison because of a criminal conviction, and he was not represented by an attorney prior to being sentenced.[2] Instead, Turner was convicted of civil contempt of court for failure to pay arrears on child support.[3] Turner did not need an attorney because, in theory, his imprisonment was conditioned on his willful noncompliance with the court order to make child support payments.[4] Turner supposedly held "the keys to his cell."[5] Unfortunately, the court did not determine whether Turner actually had the ability to pay his debt, which he did not, leaving him helplessly imprisoned for the duration of his sentence.[6] Turner eventually secured pro bono counsel

* JD Candidate 2013, University of Minnesota Law School; Political Science graduate student, University of Minnesota. I would like to thank Sanjiv Laud, Jay Creagh and the Note and Comment Department of the *Minnesota Law Review* for their invaluable advice and assistance. I am also thankful for the tireless efforts of Paul Shneider and the staff members of Volume 97. I am grateful to President E. Tom Sullivan for his guidance and for inspiring me to write about this topic. Finally, I would like to thank Catherine Courcy for her support, her intelligent feedback, and her keen editorial eye. The credit for whatever merit this Note contains belongs to those individuals. Any errors remain mine.

1. Brief for Petitioner at 8–15, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 49898 at *8–15. Turner served a six month stretch in jail starting in 2005 and then a twelve month stretch in 2008. *Id.* at 10, 12.
2. *Id.* at 8–15.
3. *Id.*
4. *See* Price v. Turner, 691 S.E.2d 470, 472 (S.C. 2010).
5. *Id.*
6. *See* Brief for Petitioner, *supra* note 1, at 2–3, 12.

and appealed his sentence, arguing that imprisoning someone for debts that he cannot pay amounts to criminal punishment and that, in this light, he had a constitutional right to an attorney in his contempt hearings.[7]

The subsequent Supreme Court case, *Turner v. Rogers*,[8] raised an important and lingering question about what process is due prior to depriving someone of his liberty via a civil contempt hearing. In procedural due process cases like *Turner*, the Court typically balances the interests of the individual against society's interests in order to determine whether the costs of additional procedural protections are worth the decreased risk of an erroneous deprivation of rights.[9] The resulting procedural requirements vary depending on the nature of the interest and especially the context of the hearing.[10] For example, minors must receive counsel in juvenile detention hearings[11] but there is no constitutional requirement that attorneys participate in probation revocation hearings,[12] even though the minor and the probationer are both at risk of imprisonment. Ever since the Court recognized a Sixth Amendment right for an attorney in criminal cases in *Gideon v. Wainwright*,[13] it has expanded procedural protections—including rights to an attorney—in contexts outside the realm of traditional criminal trials.[14] Calls for a "Civil *Gideon*" that would secure a right to an attorney in all civil cases seemed to be making headway before the Supreme Court ruled on Michael Turner's case.[15] In *Turner v. Rogers*, the

7. *See id.* at 12–13, 40–41.

8. 131 S. Ct. 2507 (2011).

9. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing three factors to be balanced in determining the constitutionally mandated procedures in a deprivation hearing).

10. E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW (forthcoming 2013) (manuscript at 197–98) (on file with author) (demonstrating that the extent to which the Court defers to Congress's procedural framework is based more upon the context in which a protected interest was divested than on the type of interest).

11. *See In re* Gault, 387 U.S. 1, 34–42 (1967).

12. *See* Gagnon v. Scarpelli, 411 U.S. 778, 783–91 (1973).

13. 372 U.S. 335 (1963).

14. For an excellent source on procedural due process cases, see generally RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2004).

15. *See, e.g.*, Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003); Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998); Sarah Dina Moore Alba, Comment, *Searching for the "Civil* Gideon*": Procedural Due Process and the Juvenile*

divided Court was unanimous on one point: the Due Process Clause does not "*automatically*" require representation by counsel in a civil contempt hearing, even if the individual is subsequently imprisoned.[16]

This Note argues that the Supreme Court's analysis, as exemplified by *Turner*, strays from the original purpose of the Due Process Clause. The Note goes on to outline ways to secure representation for individuals like Michael Turner despite the Court's ruling. It does not argue that *Turner* was wrongly decided under current law, but that the framework used in the decision is inappropriate for due process cases. The proposed solution thus focuses on expanding protections of disadvantaged litigants while simultaneously moving the Court's procedural due process jurisprudence towards a more appropriate framework. Part I explores the history and application of the Due Process Clause to procedural matters, particularly the right to counsel. Part II discusses the *Turner v. Rogers* case and explains how the factual and legal context of civil contempt proceedings could easily have produced a constitutional finding of a right to counsel under the Due Process Clause. Part II also explains how the Court's procedural due process jurisprudence made it possible to rule otherwise in the *Turner* case and why that indicates a larger problem with the Court's approach to procedural due process cases. Part III argues for an alternative approach to procedural due process modeled on the Court's substantive due process cases and explains why it would be more appropriate for determining whether litigants have a constitutional right to counsel in civil contempt hearings that risk incarceration. To achieve that end or its equivalent, this Note suggests taking legislative and litigation-based steps. Because the Court's current procedural due process jurisprudence gives it wide latitude to pursue outcomes like the one in *Turner*, legislation and very careful litigation efforts may be the best and only means of securing counsel in civil contempt hearings in the short-term and a change to the Court's procedural due process analysis in the long-term.

Right to Counsel in Termination Proceedings, 13 U. PA. J. CONST. L. 1079 (2011).

16. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011). The four dissenting Justices agreed that there was no due process right to counsel in a civil contempt hearing but disagreed that the petitioner was due the enhanced protections provided for by the majority. *Id.* at 2521 (Thomas, J., dissenting).

I. BACKGROUND

Procedural due process jurisprudence has a venerable pedigree[17] but sometimes receives less than it is "due" in legal academia.[18] The rules that determine whether a litigant receives a hearing or an attorney prior to being deprived of a right are of obvious importance to anyone involved in a judicial hearing. This Part briefly outlines the original purpose of the Due Process Clause, some of its basic applications and frameworks, and the role that it has come to play in modern American case law. In particular, it explores why and in what way the Court's jurisprudence can appear inconsistent, particularly with regards to the right to counsel, and establishes the practical importance of an otherwise academic debate.

A. ORIGINS OF THE DUE PROCESS CLAUSE

The Due Process Clause derives from text in the Magna Carta that prohibited the government from depriving people of their rights except by the "law of the land."[19] Commentators disagree over the original English understanding of the clause,[20] but there is good evidence that American colonists un-

17. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

18. The entire discussion of Procedural Due Process takes up five of the 1395 pages in one textbook on constitutional law. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 495–99 (17th ed. 2010). Further, a Westlaw search as of February 7, 2013, for law review articles that have "procedural due process" in the title produces 153 documents; the same search for articles that have "substantive due process" in the title produces 234 documents, and a search for articles that have "free speech" or "first amendment" produce 1244 and 3744 articles, respectively.

19. *See Murray's Lessee*, 59 U.S. at 276; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–97 (2009) ("It is universally agreed that the concept of 'due process of law' is rooted in Magna Carta, or the 'Great Charter'. . . . Without doubt the most influential provision of Magna Carta has been the 'law of the land' clause of Chapter 29: 'No free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.'" (quoting Magna Carta (1215 & 1225), *reprinted in* RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES 226, 231 (2003)); *see also* E. Thomas Sullivan & Toni M. Massaro, *Due Process Exceptionalism*, 46 IRISH JURIST 117, 123–29 (2011).

20. *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95–96 (arguing that the "law of the land" simply meant that the monarch and the courts were bound by whatever laws and processes were passed by Parliament).

derstood the phrase to pronounce a judicial check on arbitrary government power and a promise that a "higher law" protected their natural rights.[21] Early cases confirmed this interpretation. In one of the first cases to deal with the application of the Due Process Clause, the Court ruled that legislative acts did not *define* the "law of the land" but instead were *constrained by* the requirement of "due process of law."[22] Eventually, the Court began to distinguish between laws that ran afoul of the Due Process Clause by abrogating fundamental rights and those that simply deprived rights without adequate procedures.[23] The former line of cases became known as "substantive due process" cases whereas the latter were deemed "procedural due process" cases. Although their doctrines and place in the law have diverged sharply since the nineteenth century, both maintain their pedigree by operating as checks against arbitrary or erroneous rights deprivations.[24]

The history and evolution of procedural due process jurisprudence demonstrate the original purpose of the Due Process Clause and also an underlying tension regarding how active the Court should be in applying it. For example, the Court at one point distinguished between "rights" and "privileges" and allowed the government to create whatever procedures it wanted for depriving interests that fell within the "privilege" category.[25] Because public employees had no "right" to their jobs un-

21. *See id.* at 96–97; Gedicks, *supra* note 19, at 611–21.

22. *See Murray's Lessee*, 59 U.S. at 276–77 (noting that the Due Process Clause constrains executive and legislative power and that due process is defined by the provisions of the Constitution as well as the "settled usages" of English common and statutory law prior to colonization).

23. The Supreme Court appears to have first used the term "substantive due process" in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting). "Procedural due process" was first used in *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting). The *Snyder* Court also drew a distinction between the use of due process to protect "substantial" rights and due process rules that govern the procedures of the courts. *Id.*

24. *See, e.g.*, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841 (2003) ("Ultimately, the substantive due process clause is a 'bulwark [] . . . against arbitrary' government action. But action can be arbitrary in more than one sense—and the Due Process Clause has been construed to provide protection against more than one type of arbitrary government action." (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)); *see also id.* at 847–48 (describing the similarities and differences of substantive and procedural due process).

25. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–42 (1968).

der this standard, for example, they could be dismissed with little to no procedural protections.[26] The Court eventually rejected the rights/privileges framework on the grounds that such a "wooden" distinction could not adequately account for the magnitude of the interest nor could it adequately adapt to evolving concepts of "liberty" and "property."[27]

Later, a faction on the Court attempted to establish a similar line of jurisprudence wherein a statute creating an interest could also define that interest by establishing the procedures by which it could be divested.[28] Someone who receives a government benefit, for example, must take the "bitter with the sweet" and submit to the statutorily established procedures for terminating that benefit.[29] The Court officially rejected the short-lived "bitter with the sweet" analysis, however, because allowing the legislature to define an interest by its procedures would be a "tautology" and would render the constitutional guarantee of due process meaningless.[30] Throughout these twists and turns of procedural due process jurisprudence, the Court thus has continually reestablished its role as an independent check on the government. In so doing, it reinforced the idea that the "law of the land" or "due process of law" is not merely the positive law as defined by Congress but includes more fundamental notions of justice and fairness and, importantly, a check against arbitrary or capricious government actions.

Substantive due process has played a similar if more (in)famous role in advancing the Due Process Clause's original purpose. Some have claimed that substantive due process has

26. *See id.* at 1439 (citing McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892)).

27. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972).

28. *See* Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (plurality opinion) (ruling that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet"); *see also* Bishop v. Wood, 426 U.S. 341, 355–61 (1976) (White, J., dissenting) (arguing that the majority opinion in *Bishop* implicitly upholds the principles of the *Arnett* plurality, principles that had been rejected by six members of the *Arnett* Court); Buhr v. Buffalo Pub. Sch. Dist. No. 38, 509 F.2d 1196, 1200 (8th Cir. 1975) (citing *Arnett* as authority for the claim that a statute that defines a property or liberty interest in public employment can also define the procedures by which it is divested).

29. *Arnett*, 416 U.S. at 153–54.

30. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540–43 (1985) (noting that the "bitter with the sweet" analysis was established by a three-vote plurality and was opposed by the other six justices in *Arnett*).

been used to invalidate more federal statutes than any other constitutional provision.[31] A full history of substantive due process is beyond the scope of this Note, but a brief exploration of its "fundamental rights" analysis will suffice to demonstrate why the doctrine has been such a potent component of the Due Process Clause. The Court has often ruled that the liberty interests protected by the Due Process Clause include certain fundamental rights which may not be abrogated absent a compelling government interest.[32] The exact formulation of the rule for whether a right can be considered "fundamental" varies,[33] but the general question is whether the right is essential to our American system of ordered liberty.[34] Using this formulation, the Court has determined that almost all of the rights protected in the Bill of Rights are "fundamental" and hence incorporated against the states via the 14th Amendment's Due Process Clause.[35] The Court has also found that certain unemunerated rights, like the right to privacy, are fundamental and hence deserve substantive due process protection.[36]

The government is generally prohibited from infringing upon a fundamental right, regardless of the process used.[37] The Court is willing to make exceptions to that general prohibition but only after using heightened scrutiny to assess the law: the law will be upheld only if the "infringement is narrowly tailored to serve a compelling state interest."[38] This two-part process neatly encapsulates the Due Process Clause's underlying purpose of checking against arbitrary government action for two reasons. First, it establishes whether a right is fundamental even if the right is not strictly established by positive law. Second, it places a heavy burden upon the government to prove that the right must be abridged, thus providing a judicial check against arbitrary government action.

31. See Rubin, *supra* note 24, at 835.

32. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 497 (1965); *see also* Rubin, *supra* note 24, at 841–42.

33. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3031–34 (2010); Rubin, *supra* note 24, at 841–42.

34. *See McDonald*, 130 S. Ct. at 3034 (citing Duncan v. Louisiana, 391 U.S. 145, 149, 149 n.14 (1968)).

35. *See id.* at 3034–35.

36. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) (citing cases in which the Court extended substantive due process protections to rights not explicitly enumerated in the Constitution, including the right to marry, to have children, and to use contraception).

37. *See id.* at 721.

38. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

B. CURRENT PROCEDURAL DUE PROCESS JURISPRUDENCE

Currently, when the Court determines that a state action threatens an interest protected by the Due Process Clause,[39] there is a dizzying array of procedural due process rules, precedents, and frameworks that the Court can use to reach a decision. As a result, there has been a proliferation of procedural due process rights over the past half century. In criminal cases, for example, the Court has established various "free-standing" due process rights that supplement protections explicitly established by the Bill of Rights.[40] The Court revolutionized the juvenile justice system by requiring, on procedural due process grounds, that minors receive similar procedural protections as their adult counterparts.[41] And the Court has required pretermination hearings for welfare recipients at risk of losing their benefits,[42] informal hearings for convicts at risk of losing their good-time credits,[43] and minimal standards for notice and hearings for suspended public school students,[44] to name a few.

In such cases, the Court has expanded procedural due process rights not by simply building on precedent but by applying context-sensitive frameworks that are capable of producing outcomes in tension with holdings of similar cases.[45] These frameworks demonstrate varying degrees of deference for the procedural balance struck by the government. For example, in the military context the court asks "whether the factors militat-

39. The Court has determined that a slew of interests, such as a property interest in continued employment or a liberty interest in one's reputation, are protected by the Due Process Clause. *See* Perry v. Sindermann, 408 U.S. 593, 599–603 (1972) (noting that an implicit guarantee of continued employment can create a protected interest for Due Process Clause purposes); Wisconsin v. Constantineau, 400 U.S. 433, 434–39 (1971) (ruling that official state actions that harm a person's reputation are unconstitutional without adequate process to protect against abuse or mistake).

40. *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18–20 (2006); *see also* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines,* 45 ST. LOUIS U. L.J. 303, 305 (2001) (defining free-standing due process rights).

41. *See In re* Gault, 387 U.S. 1, 27–31 (1967).

42. *See* Goldberg v. Kelly, 397 U.S. 254, 260–66 (1970).

43. *See* Wolff v. McDonnell, 418 U.S. 539, 563–72 (1974).

44. *See* Goss v. Lopez, 419 U.S. 565, 577–84 (1975).

45. *Compare* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (ruling that an evidentiary hearing is not required prior to terminating disability benefits), *with Goldberg*, 397 U.S. at 266–71 (ruling that a quasi-judicial hearing is necessary prior to terminating welfare benefits). *See also* SULLIVAN & MASSARO, *supra* note 10.

ing in favor of [additional procedural protections] are so extraordinarily weighty as to overcome the balance struck by Congress."[46] While these frameworks vary, on a basic level they always act as a check against legislative overreach by weighing the nature of the interest at risk against the interests of society to determine whether the existing procedures in question are adequate.[47]

The most famous procedural due process framework, one that applies to most civil and administrative proceedings, comes from *Mathews v. Eldridge*.[48] *Eldridge* dealt with the constitutionally required procedures for terminating Social Security benefits. In determining what procedural protections are required, the Court weighed three factors:

> *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[49]

Using this balancing approach, the *Eldridge* Court determined that a formal hearing was unnecessary prior to the termination of Social Security disability benefits partly because the procedures in place were adequate to ensure against an erroneous deprivation[50] and partly because the nature of the interest did not mandate more rigorous process.[51]

Outcomes in decisions employing the *Eldridge* balancing approach thus depend upon the careful weighing of many moving pieces and can appear to a casual observer to produce inconsistent rulings. Cases that deal with the right to counsel in

46. Weiss v. United States, 510 U.S. 163, 177–78 (1994) (quoting Middendorf v. Henry, 425 U.S. 25, 44 (1976) (internal quotation marks omitted)). For an analysis of the Court's deference to procedural protections extended to prisoners, see Claire Deason, Note, *Unexpected Consequences: The Constitutional Implications of Federal Prison Policy for Offenders Considering Abortion*, 93 MINN. L. REV. 1377, 1392–93 (2009).

47. For example, in *Medina v. California*, 505 U.S. 437 (1992), the Court claimed to use a more deferential standard for ruling on procedural due process questions in the criminal context. *Id.* at 445–46 (citing Patterson v. New York, 432 U.S. 197, 201–02 (1977)). The dissent pointed out, however, that the majority had essentially used the same balancing test as it had in noncriminal contexts. *Id.* at 461–63 (Blackmun, J., dissenting).

48. 424 U.S. 319 (1976).

49. *Id.* at 335 (emphasis added).

50. *Id.*at 344–47.

51. *Id.* at 340–43.

non-criminal hearings are a perfect example of such inconsistencies. Due process of law demands that people have a right to counsel in juvenile detention hearings[52] and in civil commitments of mentally ill prisoners,[53] but not in parental termination hearings,[54] good-time credit revocation hearings,[55] or civil contempt hearings.[56] Additionally, there is only a right to an attorney in parole and probation revocation hearings in complicated cases or as otherwise deemed necessary by a judge.[57] In determining whether due process demands that counsel be provided for a given deprivation hearing, the Court looks at many important factors, such as the state's interest in security, alternative procedural protections, and the nature and history of the system of law in question.[58] Importantly, the Court's conclusions do not necessarily correlate with the magnitude of the interests involved. A probationer at risk of being erroneously sent back to prison may have as much of a personal stake in his freedom as a criminal defendant. But unlike a criminal defendant, a probationer is not due counsel because the Court was concerned that attorneys would interfere with the state's administration of a system that is supposed to be focused on "nonpunitive rehabilitation."[59]

Given that the Due Process Clause is supposed to protect against the arbitrary deprivation of rights, it is somewhat ironic that the Court has produced an inconsistent line of jurisprudence that requires different procedural protections in seemingly identical situations.[60] The Court's most recent foray into this terrain in *Turner v. Rogers*[61] demonstrates the deficiencies and practical implications of this approach. The Court's decision

52. *See In re* Gault, 387 U.S. 1, 34–42 (1967).

53. *See* Vitek v. Jones, 445 U.S. 480, 496–97 (1980).

54. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32–34 (1981).

55. *See* Wolff v. McDonnell, 418 U.S. 539, 569–70 (1974).

56. *See* Turner v. Rogers, 131 S. Ct. 2507, 2516–20 (2011).

57. *See* Gagnon v. Scarpelli, 411 U.S. 778, 787–90 (1973).

58. *See, e.g.*, *id.* at 787–90 (voicing a concern that introducing attorneys to parole revocation hearings would make the hearing less focused on "nonpunitive rehabilitation" and more adversarial). *See generally* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the traditional three part test).

59. *See Gagnon*, 411 U.S. at 787–90.

60. *See* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 (1978) ("[T]he formulation of due process standards, especially in recent years, has lacked the degree of symmetry, continuity, and principled content that we have come to expect in the development of constitutional law.").

61. *Turner*, 131 S. Ct. 2507.

privileged practical considerations over the rights of the accused,[62] and in doing so the Court strayed into territory better left to the political branches. That the Court's decision deviated from its institutional competencies is demonstrated by the fact that its practically minded decision may, in fact, produce impractical results. In a time of perpetually high unemployment rates,[63] government deficits,[64] and overcrowded prisons,[65] the Court rejected a constitutional right to counsel that may have prevented many indigent defendants from being sent to prison for the "crime" of being unable to monetarily satisfy a court order.[66] The following sections will explore why the Court could have found a constitution right to counsel in civil contempt proceedings, why it did not do so, and what that says about the Court's procedural due process jurisprudence.

II. *TURNER V. ROGERS* AND THE *ELDRIDGE* APPROACH

A. A PRE-*TURNER* ANALYSIS OF THE RIGHT TO COUNSEL IN CIVIL CONTEMPT PROCEEDINGS

Prior to *Turner*, there was growing hope among some commentators that the Court would make positive steps toward establishing a right to an attorney in all civil proceedings.[67] For those advocating a due process right to counsel in civil contempt proceedings, this optimism was especially warranted

62. *See infra* Part II.B.1.

63. Between October of 2010 and October of 2011, the unemployment rate went down from 9.7% to 9.1%. *See* BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—OCTOBER 2011, at 4 (2011), *available at* http://www.bls.gov/news.release/archives/empsit_11042011.pdf.

64. As a percentage of GDP, the federal deficit in 2009, 2010, and 2011 was 10.1%, 9%, and 8.7%, respectively. ELIZABETH COVE DELISLE ET AL., CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW: FISCAL YEAR 2011, at 1 (2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2011_Nov_MBR.pdf.

65. The total number of incarcerated adults in America has grown from 1.93 million people in 2000 to 2.28 million people in 2009. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009, at 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf.

66. *See Turner,* 131 S. Ct. at 2520.

67. *See, e.g.*, Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 530–35 (2006) (noting that the factors that led the Supreme Court to overrule *Betts* in *Gideon*, creating a right to counsel in criminal cases, were also present should the Court revisit *Lassiter* with a desire to create a right to counsel in civil cases); Alba, *supra* note 15, at 1079–81 (arguing that a promising test case for a Civil *Gideon* is available in the context of parental termination proceedings).

given that the Court had indicated general support for such a right when deprivation of physical liberty was at stake.[68] *Turner* was in some ways a perfect test case for this optimistic prediction. The legal question before the Court was limited to whether Turner had a right to an attorney and the facts indicated that he had been erroneously deprived of his liberty precisely because he lacked legal guidance.[69] Leaving the delicate science of tea-leaf reading and vote predicting aside, there was a strong argument in favor of extending the right to counsel to civil contempt proceedings using the Court's *Eldridge* factors.

First, Turner clearly had an interest in his physical liberty that is protected by the Due Process Clause.[70] The question then becomes how this interest is balanced using the utilitarian *Eldridge* factors. A person's interest in physical liberty usually receives special consideration from the Court; in previous procedural due process cases, there was a presumption in favor of enhanced procedural protections that include the right to an attorney.[71] Only in those situations where the Court had determined that the liberty interest was diluted—for example where the individual was already subject to liberty limitations enforced through terms of parole or probation—did the Court determine that an attorney was unnecessary.[72] Turner's liberty interest, however, was absolute and one would predict that the Court would weigh the remaining *Eldridge* factors accordingly.

The second *Eldridge* factor looks at "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[73] The risk of an erroneous deprivation in civil contempt proceedings is high—especially in the child support context—because the litigants in such situations are likely to be less affluent and less educated than the general population.[74] Civil contempt hearings often deal with issues that lay-

68. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) (noting that previous due process cases provide a strong presumption that a risk of liberty deprivation through incarceration or commitment requires strong procedural safeguards like the right to counsel).

69. *See Turner*, 131 S. Ct. at 2513–14.

70. *See id.* at 2518.

71. *See Lassiter*, 452 U.S. at 26–27.

72. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 783–91 (1973) (ruling that there is no per se right to an attorney in parole or probation revocation hearings).

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

74. *See* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child*

people may struggle with.[75] The question is typically not as simple as quantifying the litigant's assets.[76] Rather, the Court must determine the litigant's *ability* to pay, something more akin to a legal question that is less easily answered than a purely financial question.[77] Turner himself demonstrates how an untrained litigant in a pseudo-adversarial proceeding is at risk of being found in contempt of court due to an incorrect assessment of his ability to pay.[78] Providing litigants with attorneys is an effective means of protecting their rights and preventing such erroneous deprivations because they speak the language of the court and provide competent, timely, and essential services before, during, and after the hearing.[79]

The third *Eldridge* factor—the government's interests—usually weighs against adding procedural protections because of the associated costs or risks to the state.[80] Here, the direct costs of paying for the attorneys and the indirect costs of creating further delay and litigation provide strong arguments against requiring publicly appointed attorneys in civil contempt proceedings.[81] These concerns are mitigated, however, by the government's very real interest in not feeding and housing a prisoner who does not deserve to be imprisoned. All else being equal, the government has a strong interest in keeping an in-

Support Obligor: The Silent Return of Debtor's Prison, 18 CORNELL J.L. & PUB. POL'Y 95, 106 (2008) (noting that large percentages of "poor non-custodial fathers lack a high-school degree or GED").

75. *See id.* at 138–39 (noting that seemingly simple cases can be "far beyond the abilities of the indigent layperson to effectively present").

76. Although for some this also can be a complicated task requiring third-party assistance. *See id.* at 107–08 (discussing the difficulties in obtaining accurate information about an indigent parent's income and assets).

77. *See id.* at 107–12.

78. *See* Turner v. Rogers, 131 S. Ct. 2507, 2513–14 (2011); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 103 (2011) (noting that Turner spoke less than 200 words during the proceeding, which lasted mere minutes).

79. *See* Robert Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326, 333 (1983) (claiming that an attorney can provide "factfinding, prepare and present defenses, present credible witnesses and evidence, monitor the actions of the court, make timely objections and motions, and take immediate actions if the court wrongfully confines his client").

80. *See, e.g.*, Berg v. Shearer, 755 F.2d 1343, 1347 (8th Cir. 1985) (stating that, although financial burdens on the government are not controlling, they are an important factor within the *Eldridge* framework).

81. *See* Gagnon v. Scarpelli, 411 U.S. 778, 787–90 (1973).

nocent person out of jail given the huge financial drain that the prison system already takes on state and federal coffers.[82]

It would be impossible to predict with certainty how the Court would balance these factors given the preceding arguments, but pro-Civil *Gideon* commentators and litigants like Turner can be excused for hoping that the decision would favor the right to an attorney. Considering the strong liberty interests in question, the traditional use of attorneys to protect against erroneous deprivations of liberty, and the somewhat mitigated counterbalancing government interests, *Turner* seemed like a good test case for expanding procedural due process protections. The next section details why the Court ruled against such an expansion and explores some counterarguments to the Court's ruling. The purpose of discussing *Turner* in depth is not to critique the decision per se—indeed, the above analysis admits that the outcome was never guaranteed—but instead to critique the Court's fundamental approach to such decisions. Only after understanding why the Court ruled as it did can we move to expand access to justice.

B. THE *TURNER* REJECTION OF THE RIGHT TO COUNSEL

The *Turner* decision was officially a five-four split, but the Court unanimously ruled that the Due Process Clause does not require that litigants have an attorney during a civil contempt proceeding even though they risk imprisonment as a result.[83] The five-Justice majority ruled that procedural protections above and beyond those afforded to Turner were required and thus remanded the case, whereas the four-Justice dissent would have declined to prescribe any additional protections.[84] This section analyzes how both the majority and dissent framed the issues and used the *Eldridge* balancing test and suggests brief counterarguments to their reasoning. In doing so, it demonstrates how easily manipulated the *Eldridge* factors are.

1. The Majority's *Turner* Analysis

The majority's opinion is notable because it takes a less methodical approach than is typical in applying the *Eldridge*

82. In 2001, the average annual cost of housing a prison inmate in a state prison was $22,650 per inmate. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, NCJ 202949, STATE PRISON EXPENDITURES, 2001, at 1 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf.

83. *See Turner*, 131 S. Ct. at 2520–21.

84. *See id.* at 2519–21.

factors.[85] First, the majority rephrased the *Eldridge* factors and omitted the portion of the third factor that refers explicitly to burdens on the government, styling it instead as a general "countervailing interests" prong.[86] Second, in explaining why Turner's liberty interests are insufficient to require appointed counsel, the Court combined the second two *Eldridge* factors—the comparative efficacy of the proposed procedural protection and the "countervailing interests" in requiring such protections—into one counterbalancing factor.[87] The Court's subsequent analysis was thus undertaken with a diluted version of the already lenient *Eldridge* factors, one that stacked the deck in favor of arguments against expanding the right to counsel.

The Court discussed three counterbalancing factors that, when combined, outweighed Turner's liberty interests and mandated against expanding the right to an attorney. First, it noted that an attorney is often unnecessary because the procedures used to determine if a litigant qualifies for a state-appointed attorney due to indigence are almost identical to the procedures that can prove he is unable to pay for child support.[88] In most civil contempt cases, if a litigant can show he *qualifies* for an attorney he likely does not *need* an attorney. Second, in many civil contempt proceedings the opposing litigant is not the government but is instead a private citizen who is also often unrepresented.[89] Providing an attorney to the litigant at risk of being found in contempt "could create an asymmetry of representation that would 'alter significantly the nature of the proceeding,'"[90] including slowing the proceedings and possibly making them less fair "by increasing the risk of a decision that would erroneously deprive a family of the support that it is entitled to receive."[91] Third, the Court determined that substitute procedures, including the use of forms "to elicit relevant financial information" or the assistance of a non-legal,

85. After introducing the balancing framework, the portion of the *Eldridge* opinion that analyzed the three factors stretched across six pages of the Supreme Court Reporter whereas the same portion of text in *Turner* consisted of three pages. *See Turner*, 131 S. Ct. at 2518–20; Mathews v. Eldridge, 96 S. Ct. 893, 905–10 (1976).

86. *See Turner*, 131 S. Ct. at 2518.

87. *See id.* at 2518–19.

88. *See id.* at 2519 (discussing the federal law requiring criminal defendants to evidence their indigence in order to receive counsel).

89. *Id.*

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

91. *Id.* at 2519.

neutral social worker would be sufficient to meet the requirements of the Due Process Clause.[92] The balance of these three considerations, according to the Court, outweighed Turner's interests in having counsel.[93]

Even with the lenient version of the *Eldridge* factors used by the Court, there are strong counterarguments to the majority's concerns. The Court's first and third arguments are both premised on the belief that alternative procedural protections are sufficient to protect against erroneous deprivations because the legal questions under review are relatively simple. First, with regard to whether the litigant is indigent, it is far from clear that procedural protections that fall short of providing an attorney would be adequate. As discussed above, many litigants in civil contempt proceedings are not only indigent but also uneducated and inexperienced in courtroom process and are possibly unaware of how relevant their indigence is to the outcome of the hearing.[94] And because the key question in these proceedings is not just the income of the litigant but is instead a qualitative question of the litigant's ability to pay, a mechanical process involving the completion of forms and nothing more is insufficient to protect the litigant's rights.[95] The mere fact that *Turner v. Rogers* made it to the Supreme Court to begin with shows that paper protections, which were present to a degree in Turner's original contempt proceeding, are not a panacea if there are no individuals willing and able to properly enforce them.[96] Judges face natural constraints on their time and ability and are subject to personal inclinations and external pressures that may be adverse to the obligor.[97] In the absence of zealous counsel, there remains always the potential that a judge will overlook important factors that are not easily quantifiable and mistakenly rule that the litigant is able to pay.[98]

The majority's second fundamental argument against providing counsel is that the presence of an attorney would

92. *Id.* at 2519–20.

93. *Id.* at 2520.

94. *See* Patterson, *supra* note 74, at 120–21.

95. *See id.* at 136–38 (suggesting alternative methods for assessing a litigant's credibility in making ability to pay determinations).

96. The judge in Turner's original hearing did not even fill out the one-statement, pre-written form to indicate whether Turner was able to make his support payments. *Turner*, 131 S. Ct. at 2514.

97. *See* Patterson, *supra* note 74, at 121–26 (describing concerns over judicial bias against obligors in civil contempt hearings).

98. *See id.*

change the dynamics of the hearing and potentially create an asymmetry of representation between the parties. Although the Court's concern for the rights of the custodial parent are laudable, the Court mischaracterizes the conflict and hence the remedy as being purely between two individuals. A civil contempt proceeding is designed to indirectly benefit the opposing litigant but is more directly a means of ensuring compliance with a court order.[99] As such, it can be more accurately characterized as the State using its monopoly on the legitimate use of force to coerce an individual to adhere to a state-sanctioned order. While it is important to be concerned about the asymmetry of representation between the litigants, the more relevant adversarial relationship in contempt proceedings is between the individual and the State.

Here it is essential to also remember that the original *Eldridge* factors require a balance between the individual's interest and the burdens on the government and not, as the *Turner* court phrased it, a balance of burdens generally. Using a faithful formulation of the *Eldridge* factors, the custodial parent's interests count, at best, as proxies for the government's interests. The Court impliedly recognized this fact when it stated that the hearing was "ultimately for [the custodial parent's] benefit" but that the parent can only "encourage" the court to "enforce its order through contempt" as she is not entirely in control of the proceeding.[100] But to the extent that the Court or government is concerned with the custodial parent's rights it should be noted that states are free to adopt rules that would provide indigent litigants on both sides with state-appointed attorneys.[101]

The appropriate question before the Court then is not what Turner's procedural due process rights are in light of Rogers's counterbalancing interests, but instead what Turner's rights are in light of the government's interests.[102] The government

99. *See Turner*, 131 S. Ct. at 2525–27 (Thomas, J., dissenting) (outlining the important role that civil contempt proceedings play in states' child support schemes).

100. *Id.* at 2519 (majority opinion).

101. *See* Resnik, *supra* note 78, at 160.

102. *See* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 50 (1992). Professor Rutherford argues that the Court frames conflicts as being between two relatively powerless groups in order to "conceal the benefit to the powerful." *Id.* In *Turner*, the Court framed the conflict as being between the relatively powerless groups of individual litigants in a child support hearing whereas the more relevant conflict is between an indigent litigant and the

bears the administrative costs of added litigation due to the presence of an attorney and the direct financial costs of providing an attorney in the first place. Comparing an individual's subjective interest in avoiding imprisonment to the state's objective fiscal interests is an inherently problematic exercise made more difficult by the majority's decision to avoid providing any estimate of the costs that would be incurred by a broad rule requiring attorneys in civil contempt hearings.[103] The majority instead refers to the "delay" associated with attorneys and obliquely mentions other "drawbacks inherent in recognizing an automatic right to counsel."[104] One would expect that, for a determination based on costs, the Court would provide at least some statistics about the cost of state-appointed attorneys or engage in a more detailed discussion of such fiscal considerations. Instead, we are left with a decision that downplays the importance of counsel without adequately establishing the social costs of providing attorneys.[105]

2. The Dissent's *Turner* Analysis

The majority's analysis on the right to counsel was supplemented by Justice Thomas's dissenting opinion. The dissent agreed with the majority's ruling that there is no categorical right to an attorney in civil cases that risk incarceration but dissented over what alternative remedies should be available.[106] The dissent added to the majority's arguments that the "settled usage" of contempt proceedings does not require counsel[107] and also argued that a rule requiring counsel in all proceedings that can result in incarceration would make the Sixth Amendment superfluous.[108]

government. *See supra* text accompanying note 100.

103. *See Turner*, 131 S. Ct. at 2518–20 (discussing the consequences of providing counsel in terms of delay of litigation rather than costs to the government).

104. *Id.* at 2519–20.

105. The Court ignores, for example, the opportunity costs of facilitating the alliance of a middle class interest group of attorneys with indigent litigants and the potential that such an alliance could lead to lobbying for more fair and just civil contempt procedures. *See* Rutherford, *supra* note 102, at 50; *see also supra* note 82 and accompanying text.

106. *Turner*, 131 S. Ct. at 2522–24 (Thomas, J., dissenting). Justice Thomas believed that the Court should not have even reached the question of alternative remedies. *Id.* at 2524.

107. *Id.* at 2521–22.

108. *Id.* at 2522.

The "settled usage" argument implicates a larger debate over the details of historical and contemporary practices. It would require that deprivation procedures be only as rigorous as those practices that are "firmly rooted" in the practices of our nation.[109] Although persuasive, the argument is not controlling because the Court has not adopted the "settled usage" approach.[110] Indeed, only Justices Thomas and Scalia support its use over the *Eldridge* factors.[111] The dissent's argument relating to the Sixth Amendment, however, deserves attention here.

First, the only factor that differentiated a civil contempt hearing from a criminal contempt hearing in Turner's case was whether he had the ability to avoid the remedy by paying his child support payments.[112] If Turner was unable to meet the court order and make the demanded payments, he was incapable of avoiding his sentence and was doomed to serve for a definite period of time, making his sentence more akin to a criminal contempt sanction.[113] But Turner did not receive any procedural protections that would have been afforded him in a criminal contempt hearing. Thus, Turner either *can* make his payments, at which point the hearing is civil and he does not get an attorney, or he *cannot* pay, at which point the technically civil contempt hearing is more aptly considered a criminal contempt hearing for which he should have counsel.[114] Without counsel or other enhanced procedural protections, neither Turner nor the judge reliably knows whether he can pay and thus whether he deserves an attorney. Turner is faced with the catch-22 of needing an attorney to prove that he has a right to an attorney.

Second, the concern that the Due Process Clause would subsume the Sixth Amendment is only relevant for as long as the Court interprets the Sixth Amendment to give defendants a

109. *See* Weiss v. United States, 510 U.S. 163, 197–99 (1994) (Scalia, J., concurring) (emphasizing the importance of considering historical practice in making due process determinations).

110. *See* Israel, *supra* note 40, at 407–09.

111. Aside from Justice Scalia, no dissenting Justice in *Turner* signed on to Part I-A in Justice Thomas's dissent where he discussed the "settled usage" approach. *See Turner*, 131 S. Ct. at 2520.

112. *See* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631–33 (1988) (explaining the factors by which relief is characterized as criminal or civil); *see also* Brief for Petitioner, *supra* note 1, at 38–40.

113. *See* Brief for Petitioner, *supra* note 1, at 38–42.

114. *See id.* at 42.

right to counsel only if they are at risk of being incarcerated.[115] The Due Process Clause and the Sixth Amendment would provide distinct protections, however, if the Court expanded the Sixth Amendment to provide a right to counsel in all criminal cases whether or not the punishment involved incarceration. The concern then is less over standard practices of statutory construction and more over juggling a constantly changing, piecemeal evolution of Court *interpretations* of the Constitution. A ruling on this ground alone would be the antithesis of a functional and reasonable application of constitutional rights.

Finally, the Sixth Amendment and the Due Process Clause have unique functions within the constitutional framework despite the possibility of their protections temporarily overlapping. The Sixth Amendment exists as a hard and fast threshold requirement for all criminal hearings, but the Due Process Clause exists as a flexible and permeable standard that can change over time, allow for exceptions, and mold its requirements to different contexts.[116] The Due Process Clause provides an important general check against the government and attempts to ensure that the nation continually strives to provide the fundamentals of a fair hearing even as the idea of "fairness" changes over time. The Sixth Amendment, in contrast, provides a very specific and durable check against the government that cannot change along with social conceptions of the importance of attorneys.

The dissent's arguments supplement but cannot replace the majority's opinion so long as the settled usage approach remains a minority doctrine. But despite the limitations of the dissent's and the majority's decision, it should be emphasized that the *Turner* Court did not use the *Eldridge* factors in an obviously impermissible fashion. The majority's decision treats the balancing framework as being somewhat more elastic and less demanding than previous decisions, but nothing in its ruling contradicts the spirit of the test. The *Turner* decision is an expression of *Eldridge* working as designed. The very fact that the *Eldridge* factors make such a decision possible illustrates how the Court's framework for most procedural due process

115. *See generally* Argersinger v. Hamlin, 407 U.S. 25, 30–38 (1972) (arguing that legal and practical factors of even petty criminal offenses mandate the "presence of counsel to insure the accused a fair trial" but refusing to rule on whether counsel is required when there is no risk of imprisonment).

116. *See* Powell v. Alabama, 287 U.S. 45, 65–67 (1932) (noting that rights protected by the Due Process Clause and the Sixth and First Amendments overlap without making any portion of the Constitution superfluous).

cases is not adequately representing the purpose and function of the Due Process Clause. The next section discusses more generally the pitfalls of the *Eldridge* factors using *Turner* and other right to counsel cases as examples and makes the case that an alternative, rights-based approach to due process questions would be preferable.

C. *TURNER*, THE RIGHT TO COUNSEL, AND THE DEFICIENCIES OF THE *ELDRIDGE* APPROACH

Given the interests at stake and the traditional importance of attorneys in the American court system, there are strong arguments in favor of extending the right to counsel to encompass civil contempt proceedings that risk incarceration on due process grounds. The *Turner* decision deviated from the hopes of reformers looking to expand the right to counsel. A closer look at the *Turner* ruling and the Court's use of the *Eldridge* factors demonstrates how the application of the Court's procedural due process jurisprudence strays from the original purpose of the Due Process Clause as well. A realistic if critical understanding of the Court's jurisprudence is necessary to formulate a practical approach to expanding the right to counsel.

Criticisms of the *Eldridge* approach are as old as the *Eldridge* case itself,[117] but the discussion over *Eldridge* should expand and evolve along with the doctrine itself. A review of the Court's decisions shows that the *Eldridge* factors allow too much flexibility to the Court because they give it wide latitude to define and characterize the interests at stake, to weigh those interests against each other, and to determine the appropriate procedures given the results of its balancing test. Because the Court has such great and self-proclaimed[118] flexibility along three axes, it can produce an outcome to which it is ideologically predisposed.[119]

117. *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

118. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

119. *But see id.* ("To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.").

If a given Court is predisposed to rule against expanding procedural protections, it can downplay the interest of the individual. In *Addington v. Texas*, for example, the Court ruled that a "beyond a reasonable doubt" standard was unnecessary for civil commitment hearings because the liberty interests of the individual were tempered by the importance of providing professional help to those mentally ill individuals who need it.[120] Similarly, the Court can diminish concerns over the risk of an erroneous deprivation by focusing on the procedures already in place or on the character of the system itself. In *Gagnon v. Scarpelli*, for example, the Court was persuaded that substitute procedures combined with the generally rehabilitative approach of the parole system would make the required presence of attorneys in all revocation hearings unnecessary and possibly harmful.[121] The Court can also place a premium on the state's interests, as it did in *Wolff v. McDonnell*. In *McDonnell*, the Court ruled that administrative costs and harms to "correctional goals" outweigh inmates' liberty interests such that only illiterate inmates or those facing "complex" issues are due the assistance of *other inmates* or staff members, not a trained attorney, in prison disciplinary hearings.[122]

These determinations bear a resemblance to the types of policy considerations more typically associated with the legislative branch. But unlike elected policy makers, the *Turner* case demonstrated that the Court need not engage in rigorous fact-finding much less provide any empirical support for its conclusions.[123] Finally, as the *McDonnell* ruling shows, even if the Court does determine that the balance of interests argue in favor of requiring the sought after procedures, it has great lati-

120. *See* Addington v. Texas, 441 U.S. 418, 428–31 (1979) (stating that it cannot be said "that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed").

121. *See* Gagnon v. Scarpelli, 411 U.S. 778, 783–91 (1973). Although the *Scarpelli* case was decided before the formalization of the *Eldridge* factors, the Court's approach remains similar. *See id.* at 788 (noting that "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed," a similar notion to the balancing of interests the Court completes using the *Eldridge* factors).

122. *See* Wolff v. McDonnell, 418 U.S. 539, 569–70 (1974).

123. *See* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 196 (1991) (noting that the Court actually discouraged the use of statistics and empirical evidence and that outcomes of *Eldridge* cases are "virtually impossible to predict").

tude in determining when and to what extent they are enforced.[124]

As implied above, the Court can selectively add weight to one or more aspects of the *Eldridge* factors to produce an outcome that it was predisposed to reach. As some members of the Court have cautioned, flexible decision-making frameworks invite judges to substitute their own policy preferences for those of the democratically elected branches in an arena where they are neither constitutionally entitled nor institutionally capable.[125] Using a basic (if blunt) assumption that an ideologically "conservative" judge is less likely to want to expand procedural due process whereas an ideologically "liberal" judge is more likely to want to expand procedural due process rights, the question becomes whether a multi-factored framework like *Eldridge* constrains such judges' ability to single-mindedly pursue those goals.[126] If the framework does not restrain such behavior, then judges hearing a procedural due process case would be less like neutral arbiters applying established rules to a given fact pattern and more like policymakers using their public authority to dictate their private will.

Anecdotal evidence of the application of the *Eldridge* factors shows that the framework is not restrictive. In *Vitek v. Jones*, for example, the Court ruled that an inmate has a statutorily-created liberty interest in not being involuntarily committed to a mental hospital without a fair hearing.[127] The controlling opinion on whether inmates were due counsel in such hearings, however, ruled that inmates are not due licensed counsel to represent their interest but instead that due process requires independent and competent assistance of the sort that can be provided by a mental health professional.[128] To give con-

124. *See Scarpelli*, 411 U.S. at 790–91 (identifying how the state authority should determine whether a parolee is due counsel on a case-by-case basis); Farina, *supra* note 123, at 195–96 (noting that "the question of *what* process is due is entirely separated from the question of *whether* process is due").

125. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 575–77 (2004) (Scalia, J., dissenting) (accusing the Court of engaging in "constitutional improvisation" that increases the power of the Court and arguing that judicial creation of procedures using the Due Process Clause "saps the vitality of government by the people").

126. *See generally* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–63 (1989) (measuring Justices' ideologies based on newspaper editorials about the Justices).

127. *See* Vitek v. Jones, 445 U.S. 480, 487–94 (1980).

128. *See id.* at 498–500 (Powell, J., concurring).

text to that ruling, one should remember that adults are generally due counsel in civil commitment hearings.[129] The plurality coalition in *Vitek*, which was in favor of providing legal assistance,[130] consisted of justices generally considered to be moderate or liberal[131] whereas the controlling opinion was authored by the slightly more conservative Justice Powell[132] and the dissenting Justices included the more moderate Justice Stewart and "conservative" Justice Rehnquist.[133] Powell also authored the *Scarpelli* decision in which the Court ruled that parolees and probationers are due counsel on only a case-by-case basis.[134] The liberal Justice Douglas, however, echoing his arguments in the related *Morrisey* case, argued that parolees and probationers are due counsel in revocation hearings.[135] And certainly the vote distribution in *Turner*, in which Justices Kennedy, Breyer, Ginsburg, Sotomayor, and Kagan held in favor of enhanced procedural protections over the dissent of Justices Thomas, Scalia, Roberts, and Alito, gives rise to similar concerns over the malleability of the *Eldridge* factors.[136]

Looking at *Turner v. Rogers* in this light, the problem is not with the *Turner* Court and whether it was wrong in how it applied the *Eldridge* framework. The problem is with the framework itself and how it is impossible to *prove* that it was used incorrectly. The purpose of the Due Process Clause is to prevent arbitrary government authority.[137] But given how difficult it would be to predict how the *Eldridge* factors will be applied[138]—much less establish that they had been applied wrongly—it seems clear that the Court's own test for the Due Process

129. *See* Parham v. J.R., 442 U.S. 584, 627 (1979) (citing Specht v. Patterson, 386 U.S. 605, 610 (1967)).

130. *See Vitek*, 445 U.S. at 496–97.

131. The plurality Justices were Justices Brennan, Marshall, and Stevens. *Id.* at 482. For analysis of and data on judges' ideological predispositions, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 145–52 (2002), *available at* http://mqscores.wustl.edu/media/pa02.pdf.

132. *See Vitek*, 445 U.S. at 497; Martin & Quinn, *supra* note 131, at 145–48.

133. *See Vitek*, 445 U.S. at 500; Martin & Quinn, *supra* note 131, at 145–48.

134. *See* Gagnon v. Scarpelli, 411 U.S. 778, 778, 783–91 (1973).

135. *See id.* at 791 (Douglas, J., dissenting); Martin & Quinn, *supra* note 131, at 145.

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

137. *See supra* notes 20–23 and accompanying text.

138. Farina, *supra* note 123, at 196.

Clause is itself arbitrarily applied. Worse yet, the *Eldridge* factors may mask what would otherwise be deemed inappropriate policy-making from an unelected branch.[139] Broader principles of the Rule of Law, of which procedural due process is a component, demand predictable decisionmaking and a legitimate source of power for creating new policy.[140] A judicial doctrine that creates unpredictable outcomes with broad policy implications fails to meet the Rule of Law aims of the Clause from which it is derived.

It is evident that the *Eldridge* test deviates from the original purpose of the Due Process Clause when one compares it to procedural due process approaches in other areas of law like the Court's jurisprudence on proper notice. In *Mullane v. Central Hanover Bank & Trust Co.*, for example, the Court ruled that notice of pending litigation is adequate if it is "reasonably certain to inform those affected."[141] This standard does not require actual notice,[142] but it also does not require the Court to engage in a careful balancing test and weigh the burdens of the entity charged with providing notice against the interests of the person to whom notice is due. The test is instead simple: was the form of notice reasonably likely to "inform those affected"?[143] If not, then the notice is constitutionally defective. Such an approach is more consistent with the underlying purpose of the Due Process Clause because it looks only to whether the government action is likely to deprive a citizen of a protected right arbitrarily and removes the extra element of *Eldridge* that asks whether protecting against an erroneous deprivation would be too costly.[144] A *Mullane*-style standard also has the advantage of putting the onus on the Court for justifying a de-

139. *See Turner*, 131 S. Ct. at 2524–25 (2011) (Thomas, J., dissenting) (chastising the majority for using the *Eldridge* factors to require procedural protections not briefed or argued by the parties to the suit); *see also* Farina, *supra* note 123, at 235 (noting that utility-driven analysis is better undertaken by the political branches and that the Court's *Eldridge* analysis can be construed as "undisciplined judicial interference in local and national governance").

140. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–101 (2004) (discussing several conceptions of the Rule of Law).

141. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

142. Dusenbery v. United States, 534 U.S. 161, 170–73 (2002).

143. *Mullane*, 339 U.S. at 315.

144. *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (stating that the "[g]overnments' interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed").

parture from an otherwise clear rule. Instead of weighing the equities de novo in each case, a standards-based approach is more likely to produce a stronger line of precedent and hence greater judicial restraint.[145]

Having established that the *Eldridge* approach is generally deficient in securing the promises of the Due Process Clause and specifically problematic in the case of expanding access to counsel in civil contempt hearings post-*Turner*, the next issue is whether taking tangible steps would improve either situation.

III. RESTORING THE PROMISE OF THE DUE PROCESS CLAUSE AND IMPROVING ACCESS TO JUSTICE

Part II argued that the *Turner* case demonstrates two related problems—that the *Eldridge* framework departs from purpose of Due Process Clause and that this framework was used to limit important procedural protections for litigants facing imprisonment in civil contempt hearings. The solutions to both problems are also related. The same steps that would expand the right to counsel may also help convince the Court to alter its approach to procedural due process cases to one that emphasizes the protection of individual rights from arbitrary government deprivations. Part III.A introduces an alternative to the *Eldridge* factors, one that is modeled after the Court's substantive due process cases and one that would provide more restrained and transparent decisionmaking in procedural due process cases. Part III.B gives practical suggestions for advancing the Court towards the new approach and, just as importantly, for expanding the right to counsel to people like Michael Turner.

A. AN ALTERNATIVE TO THE *ELDRIDGE* APPROACH

The Court's procedural due process framework should be replaced with something similar to the Court's substantive due process jurisprudence because doing so would create more consistent and principled rulings.[146] The Due Process Clause was

145. The *Dusenbury* Court, for example, used the seventy-two-year-old *Mullane* precedent as support for the argument that certified mail is an adequate means of service, citing a long line of case-precedent stemming from *Mullane* and dating back to 1956. *See Dusenbury*, 534 U.S. at 169–70.

146. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 624 (1997) (noting that others, including Professor Van Alstyne, have argued that due process itself should receive Due Process Clause protec-

intended to protect citizens against arbitrary government action, a goal that entails protecting both substantive and procedural rights.[147] There is little reason outside of historical accident why the Court should use different analytical frameworks for the two types of rights.[148] The *Eldridge* approach in particular has been inadequate to the task of protecting against arbitrary government deprivations both because the framework itself produces arbitrary or at least difficult to predict outcomes and because it gives too much weight to the interests of government when ruling on the rights and interests of individuals. Justices Scalia and Thomas are already on record as supporting an alternative, historically-grounded approach to procedural due process cases.[149] An approach modeled after substantive due process jurisprudence can accommodate their desires without stagnating the Court's jurisprudence in the procedures and customs of times past.

In contrast to the *Eldridge* approach, the Court's jurisprudence on substantive due process rights begins, appropriately, with an analysis of whether and to what extent the right is "fundamental" and, based on that finding, proceeds to apply the appropriate level of scrutiny to the law curtailing the right.[150]

tions). Others have argued that the Equal Protection Clause may offer support for procedural rights in that arbitrary procedures are likely to treat similarly situated people differently, but "to the extent that a decision maker treats all applicants in an arbitrary fashion, it is unlikely that courts would find an equal protection violation." Virginia T. Vance, Note, *Applications for Benefits: Due Process, Equal Protection, and the Right to be Free from Arbitrary Procedures*, 61 WASH. & LEE L. REV. 883, 912 (2004) (citing William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 451 (1977)).

147. *See supra* Part I.A.

148. *Cf.* Mashaw, *supra* note 117, at 47 n.61 (explaining that the Court's procedural due process jurisprudence was originally focused on traditions but that, due to an increase of government functions for which there were "no compelling historical analogies," the Court was forced to develop a more flexible approach so as to avoid being "a stumbling block to 'progress'" (citing Davidson v. New Orleans, 96 U.S. 97 (1877)).

149. *See* Turner v. Rogers, 131 S. Ct. 2507, 2521–22 (2011) (Thomas, J., dissenting) (claiming that an attorney is not due under the Due Process Clause because there is no evidence that attorneys are appointed in contempt hearings according to the "settled usage" of the "process of law" (quoting Weiss v. United States, 510 U.S. 163, 197 (1994) (Scalia, J., concurring))).

150. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (noting that the government can infringe upon a "fundamental liberty" interest only if the infringement is "narrowly tailored to serve a compelling state interest" and that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision making[]' that direct and restrain our exposition of the Due Process Clause" (citations omitted)).

Thus the first benefit in comparison to the *Eldridge* factors is that the fundamental rights approach "avoids the need for complex balancing of competing interests in every case."[151] If the individual interests are "fundamental," the government policies that curtail them must be "narrowly tailored to serve a compelling state interest."[152] If not, the government need only show that its policies have a reasonable relationship to a legitimate state interest in order to justify its actions.[153] The determination of whether the rights are fundamental lets the Court know whether to tip the scales in favor of the government or the individual, making the subsequent balancing inquiry more straightforward.[154] The *Eldridge* factors, in contrast, force the Court to undertake the same balancing approach in each case, relying on often contradictory precedent to determine how much weight to give to each particular interest in relation to each other.[155]

By providing two distinct stages of analysis—a determination of whether the right is fundamental and then balancing that right against the government's interests—the fundamental rights approach also produces more consistent and transparent jurisprudence.[156] As discussed above, the *Eldridge* factors present several analytical levers that the Court can manipulate to reach a conclusion, making the prediction and critique of the Court's decisions difficult.[157] In order to understand a procedural due process case or to appropriately apply or distinguish it as a precedential case, one must fully understand the value and relative weight that the Court ascribed to the individual rights in question, the government's interests, and the costs and efficacy of additional procedural safeguards.[158] The combination of those elements provides too many permutations to make for good, clear, and binding precedent.

151. *Id.* at 722.

152. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

153. *See id.* at 722 (creating "a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action").

154. *See id.*

155. *See supra* Part II.C.

156. *See Glucksberg*, 521 U.S. at 722 (noting that the Court's substantive due process "approach tends to rein in the subjective elements that are necessarily present in due process judicial review").

157. *See supra* Part II.C.

158. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining the need to weigh all three of these factors).

The fundamental rights approach is comparatively straightforward: certain rights are or are not fundamental, and the determination of whether a right is fundamental always leads to the application of either a very strict or a more lax level of scrutiny. The original determination of whether a right is fundamental is often politically charged and contentious, but the analysis itself is theoretically easier to understand and apply.

Cynical observers of the Court's behavior may feel that the doctrine makes little difference and that Justices will pursue ideologically driven and outcome-oriented rulings regardless of the doctrinal framework.[159] Regardless of whether the fundamental rights approach significantly alters the Court's rulings, it would at least refocus the narrative of its decisions to be more consistent with the origin and purpose of the Due Process Clause. The basic framework of fundamental rights analysis centers the discussion on the rights of the individual. The *Eldridge* factors, in contrast, make no distinction or priority between the government's and the individual's interests: the two are balanced simultaneously in a single-tiered test. The difference between the two approaches hearkens back to the original debate over whether the Congress can *define* the "law of the land" or if it is instead *constrained* by it.[160] The *Eldridge* approach allows the Court to define individual rights as a function of how expensive it would be to protect them; if it would be too onerous to provide attorneys to indigent civil litigants, then civil litigants do not have a right to attorneys.[161] The fundamental rights approach, in contrast, separately determines whether the right is fundamental and only then weighs the government's interests against that right.[162] Even if the Court rules that the government's interests outweigh the individual's rights, the Court is still acknowledging that such rights exist and deserve respect. Defining rights separately from the costs of protecting them is thus rhetorically more consistent with the original purpose of the Due Process Clause.

The Court should thus abandon the *Eldridge* factors and adopt an analytical framework that mirrors its substantive due

159. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 44–85 (2002) (critiquing the "legal model" of judicial decision making).

160. *See supra* Part I.A.

161. *See* Turner v. Rogers, 131 S. Ct. 2507, 2518–20 (2011) (finding that the Due Process Clause does not "*automatically* require the provision of counsel").

162. *See supra* note 153.

process approach. In a procedural due process case, the Court should consider whether a person has a fundamental right to a particular procedural protection given the interest in question. As with its substantive due process jurisprudence, the Court should consider whether the right is necessary for our ordered system of liberty using both logic and historical and contemporary evidence, evidence that would include common law traditions, rules in the states and other countries, and the existence of a growing social consensus on the issue.[163] For example, if most states provide an attorney for civil contempt hearings when the litigant is at risk of being imprisoned, and if such practice is growing nationally and internationally, the Court may determine that such a right is fundamental. Consequently, any legislation that curtails a right to an attorney in a civil contempt hearing would be analyzed using strict scrutiny.[164] This does not mean that the government cannot curtail the right, merely that it must use narrowly tailored means—in this context, likely alternative protections—and that the limitation must be driven by a compelling state interest.[165] If the government can show that providing an attorney would be prohibitively expensive and that the types of alternative protections outlined by the *Turner* majority are sufficient, the procedural balance struck by Congress may survive strict scrutiny.[166]

This type of analysis would not necessarily alter the outcomes of many of the Court's procedural due process cases. Inmates likely do not have a fundamental right to the full panoply of procedural protections during good-time credit revocation hearings, for example, and hence procedures in that context would only receive rational-basis review and would likely be upheld.[167] Similarly, regardless of historical practices the Court could determine that juveniles have a fundamental right to an attorney in juvenile detention hearings because such a right is

163. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) (weighing similar evidence).

164. *See id.* at 721 (applying the narrow tailoring requirement).

165. *See id.*

166. In one study of strict scrutiny analysis, 25% of laws across all doctrinal areas were ruled to be constitutional by the Supreme Court despite being analyzed using strict scrutiny, and 24% of laws that infringe upon fundamental rights survived strict scrutiny across all levels of federal courts. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 826, 862–63 (2006).

167. *See* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("[T]he full panoply of rights due a defendant in [a criminal prosecution] does not apply.").

logically necessary for an ordered system of liberty.[168] The fundamental rights approach would thus mimic, to a degree, the context-based approach that the Court currently uses for procedural due process cases.[169] Where logic, tradition and contemporary practice typically argue against providing rigorous procedural protections—as is the case in prison administrative hearings—the Court is unlikely to rule that litigants have a fundamental right to enhanced procedural protections in such situations. However, while procedural due process cases may discuss the legal or administrative context as a free-floating part of the decision,[170] the fundamental rights approach would require a more explicit and lengthy assessment in order to determine whether the right is fundamental.[171] In this way the fundamental rights approach would merely take something that the Court is already doing and make it more transparent and more analytically rigorous.

While this approach might not appreciably alter the outcomes of cases, it would improve the Court's process and legitimacy. A fundamental rights approach encourages better decision making because it places more importance on the rights that the Due Process Clause is designed to protect and puts the onus on the government to defend its procedural regimes—to prove, in effect, that it is not acting arbitrarily or capriciously to deprive a citizen of a protected interest.[172] The fundamental rights approach accomplishes this in distinct and logical steps: determining first whether the right is fundamental and then determining whether the balance struck by Congress is appropriate.[173] Any departures from precedent or indications of overreach by the Court would be more easily identified and restrained because of this methodical approach. In contrast, the

168. *See In re* Gault, 387 U.S. 1, 34–42 (1967).

169. *See supra* Part I.B.

170. *See, e.g.*, *Wolff*, 418 U.S. at 567–68 (discussing the states' practice of allowing cross-examination in prison disciplinary hearings).

171. *Compare* Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) (providing nine pages of analysis on the history of assisted suicide in order to determine whether there is a substantive due process right to assisted suicide), *with Wolff*, 418 U.S. at 567–68 (providing a three-paragraph discussion on the practice of cross-examination in prison disciplinary hearings to determine whether inmates have a right to cross-examine accusers).

172. *See* Mashaw, *supra* note 117, at 48–49 (arguing that the utilitarian *Eldridge* factors are inconsistent with the Due Process Clause because the Clause is intended to protect individual rights "in the face of contrary collective action"); *supra* note 156.

173. *See Glucksberg*, 521 U.S. at 722.

Eldridge framework asks the Court to weigh both the individual's and the government's interests in one balancing step, comparing the substantive rights of an individual to the typically economic interests of the government.[174] This kind of apples-to-oranges comparison lacks a common basis of measurement and is flexible enough that it can be abused and manipulated without the Court's analysis appearing grossly arbitrary.[175]

In short, the fundamental rights approach would force the Court to "show its work," making it easier to demonstrate why its answer is "wrong." A more transparent framework will constrain the Court to the extent that it is concerned with maintaining its legitimacy as a neutral arbiter.[176] Just as importantly, the Court's due process rulings would be driven by a concern for protecting individual rights and fundamental fairness. Instead of defining the boundaries of individual rights as a function of congressional policy, the Due Process Clause would be employed to check and constrain the legislature. Even if the results were the same, the discussion would be more consistent with the unique origins and purpose of the Due Process Clause.[177]

B. EXPANDING THE RIGHT TO COUNSEL AND ALTERING THE COURT'S PROCEDURAL DUE PROCESS FRAMEWORK

Persuading the Court to change its approach to a class of constitutional questions is a daunting task for which there is no established procedure. One approach that could work would be to establish that its *Eldridge* decisions are out of step with the national consensus. Doing so may demonstrate to the Court that it is not well-suited to engage in policy design or an independent balancing of equities and that it should instead recharacterize its analysis to something more limited and better aligned with its core competencies. As in the post-*Lochner* decisions, the Court may determine that a more constrained role is

174. *See* Mashaw, *supra* note 117, at 48 (describing the utilitarian *Eldridge* factors as narrow because they are too focused on costs and benefits as associated with accurate decisions rather than "soft variables," like the value of process itself, for which there are no measurement "techniques").

175. *See supra* notes 120–35 and accompanying text.

176. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

177. *See supra* Part I.A.

a better one.[178] The steps necessary to achieve this end are conveniently the same steps that would solve the more pressing problem of inadequate representation for litigants in civil contempt trials.

As discussed above, the Court's current approach to procedural due process questions provides it with wide latitude to reach outcomes to which it is already ideologically predisposed.[179] The *Eldridge* factors are malleable enough that there is very little hope, outside of an ideological shift in the Court, that new empirical evidence or innovative legal arguments could persuade the Court to expand the constitutional right to counsel to civil contempt proceedings in the near future. There is, however, a multi-faceted approach to securing short-term access to justice while laying the groundwork for a potential shift in the Court's jurisprudence on this issue over the long term.

In the short term, the most practical, although costly, method for ensuring access to justice is to pursue a state-by-state campaign to provide state-appointed attorneys in civil contempt proceedings. This would include lobbying for state laws that would guarantee attorneys in civil contempt hearings and litigating the issue in state courts on state constitutional grounds. Part of this lobbying effort would require reframing the issue away from negative portrayals of "deadbeat dads"[180] and to focus instead on the more general and fundamental question of rights protection. The Court in *Mapp v. Ohio*, for example, expanded the issues presented by the case beyond the narrow and less popular question of the right to possess obscene photographs and focused instead on the general question of security in one's home from unreasonable searches and seizures.[181] A similar framing of the right to counsel prior to being incarcerated would advance the cause in the public's eye. In a similar vein, proponents of the right to counsel could compile

178. *See Casey*, 505 U.S. at 861–62 (explaining the basis for abandoning well-established precedents and stating that "[t]he facts upon which [*Lochner*-era cases] had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle [announced later]").

179. *See supra* Part II.B.

180. *See* Turner v. Rogers, 131 S. Ct. 2507, 2526 (2011) (Thomas, J., dissenting) (referring to fathers who do not pay for child support as "deadbeat dads" and "deadbeats").

181. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).

and promulgate information on the inefficiencies and social costs associated with erroneously imprisoning people.[182] Finally, successful lobbying efforts can utilize examples set by other countries and support from sympathetic interest groups.[183] There are already several states that do provide attorneys in civil contempt proceedings[184] and several organized coalitions and advocacy groups like the National Coalition for a Civil Right to Counsel who are working on this issue.[185] A renewed campaign to expand access to counsel through legislation can use the experiences of those states who have already established a right to an attorney in civil contempt proceedings and the general enthusiasm of the Civil *Gideon* movement to persuade more states to adopt similar policies.[186]

A companion method of expanding the right to counsel would be to craft a litigation strategy that would whittle away at the *Turner* holding in federal courts. The *Turner* Court was careful to point out that while it was denying the right to an attorney in the case at hand, it was not passing any judgment on cases where the support payment is owed to the State or where the matters under consideration are "unusually complex."[187] The Court also implied that an attorney may be required in situations where the opposing litigant is represented by counsel.[188] Finding test cases that fit these exceptions may produce

182. In 2002, for example, men imprisoned for nonpayment of child support accounted for 1.7% of the jail population. Elaine Sorensen, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 20 J. POL'Y ANALYSIS & MGMT. 604, 605 (2010).

183. *See, e.g.*, Laura K. Abel & Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, JUDGES' J., Fall 2008, at 24, 24 (describing an ABA resolution calling for "a civil right to counsel in cases concerning basic human needs"); Alba, *supra* note 15, at 1088 ("Today, over fifty countries provide attorneys as a matter of right in many civil cases, including countries recently freed from oppressive regimes, such as Poland and South Africa." (citing Wade Henderson, Keynote Address, *The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71, 79 (2009)).

184. *See, e.g.*, Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31, 67–69 (2009) (noting that New York extends the right to counsel in most civil contempt hearings).

185. *See, e.g.*, NAT'L COALITION FOR CIV. RIGHT TO COUNS., http://civilrighttocounsel.org (last visited Apr. 1, 2013) (outlining the organization's mission).

186. *See generally* Sweet, *supra* note 15 (calling for a Civil *Gideon* movement).

187. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) ("Neither do we address what due process requires in an unusually complex case.").

188. *See id.* ("In particular, that Clause does not require the provision of

different results, quarantining the *Turner* ruling to an increasingly narrow range of situations. This method suffers from the risk that subsequent suits, no matter how well argued, would result in outcomes similar to *Turner*. Yet the *Turner* majority seemed to signal its willingness to consider more extreme factors than those present in *Turner*,[189] and considering that nothing ventured is nothing gained, a litigation-based strategy should be considered by pro-Civil *Gideon* attorneys.[190]

Finally, a long-term method of expanding the right to counsel would attempt to overrule the Court's decision in *Turner* outright. The Court is understandably reticent to overturn its precedent, but on the occasions when the Court reconsiders a previous ruling it usually cites several motivating factors: a growing movement among state legislatures and courts to adopt policies or state-specific doctrines that conflict with the Court's rule; the slow erosion of the previous rule's force and scope through Supreme Court decisions that distinguish and limit the rule; and broad consensus among scholars that the rule in question was wrongly decided.[191] Using the above two tactics in addition to establishing a broad consensus among academics and practitioners that *Turner* was incorrectly decided is perhaps the best long-term strategy to expanding the constitutional right to counsel for people facing incarceration in a civil contempt hearing. While each individual tactic can produce a tangible benefit in the short term, in tandem these efforts also provide a compelling argument to the Court that its precedent is ripe to be overturned.[192] This may be a difficult path with uncertain ends, but the goal makes it worthwhile. A constitutional right to counsel would be more durable and broader in reach than either of the first two options alone.

As part of this long-term strategy to overturn *Turner*, commentators and litigators should increasingly put pressure on the Court's use of the *Eldridge* framework and advocate for

counsel where the opposing party . . . is not represented by counsel.").

189. *See id.* (noting that the *Turner* case is not unusually complex or extreme).

190. *See, e.g.*, NAT'L COALITION FOR CIV. RIGHT TO COUNS., *supra* note 185.

191. *See* Arizona v. Gant, 556 U.S. 332, 338 (2009) ("The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court . . . ."); Lawrence v. Texas, 539 U.S. 558, 573–74 (2003) (citing changes in state laws on homosexual conduct and subsequent Supreme Court cases as reasons for overturning a seventeen-year-old precedent).

192. *See Gant*, 556 U.S. at 338 (showing how efforts from multiple areas can influence the Court).

an approach to procedural due process cases that would more effectively restrain the Court. Commentators should push for a unification of substantive and procedural due process jurisprudence. The *Eldridge* factors are a well-established doctrine, but the Court has changed its procedural due process cases in the past,[193] and two justices are currently on record as disagreeing with it.[194] If the nation continues to move beyond the procedural floor set by *Turner* and expand the right to counsel in civil contempt hearings and if criticism of the Court's current procedural due process approach is unified and determined, the Court may determine that the assumptions underlying *Eldridge* have been eroded enough to justify a novel approach to an old problem.

CONCLUSION

The *Turner* Court's disappointing decision was nonetheless a reasonable one given the Court's current approach to procedural due process cases. The *Eldridge* framework gives the Court wide latitude to pursue a predetermined outcome and hence provides ample cover for attempts to critique and overturn the Court's decision. Because the right to an attorney deserves to be extended to those at risk of incarceration through civil contempt proceedings and because the Court's current approach to such cases is inconsistent with the original purpose of the Due Process Clause, advocates, scholars, and other jurists should coordinate their steps to affect change. While the first step to change is the expansion of the right to counsel through legislation and state and federal test cases, in the long term these efforts could result in a major overhaul in the Court's approach to due process cases as well.

193. *See supra* notes 25–30 and accompanying text.
194. *See supra* notes 109–11 and accompanying text.