



NOTE

Revisiting *Turner v. Rogers*

Ashley Robertson*

Abstract. This Note examines the practical consequences of the Supreme Court's decision in *Turner v. Rogers*. In 2011, the Supreme Court held that there is no constitutional right to counsel for parents who face civil contempt for failure to pay child support. Although those parents face incarceration, the Court believed that "substitute procedural safeguards" could adequately reduce the risk of wrongful incarceration. Five years have passed since *Turner*, and although commentators have spilled much ink debating the right to counsel in civil contempt cases, virtually no research exists on *Turner's* real-world impact or the effectiveness of the Court's suggested safeguards.

This Note attempts to fill that gap by documenting how states, judges, and practitioners have responded to the decision. It begins by providing the first comprehensive catalogue of states that actually guarantee the right to counsel for civil contempt hearings. From there, it surveys sixty practitioners in forty-four states to learn how states handle representation in contempt cases. Finally, it draws on extensive interviews with eight current and former family court judges in South Carolina to assess how the state has implemented *Turner's* mandate. Using those sources, this Note concludes that the Supreme Court was correct that the right to counsel is no panacea for procedural unfairness—but the Court's substitute procedural safeguards do not adequately offset the risk of wrongful incarceration. It suggests how the Court can modify its suggested procedural reforms as well as how states and private practitioners can compensate for the representation gap.

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Introduction

South Carolina incarcerated Michael Turner four separate times for failure to pay child support.¹ The state uses civil contempt to enforce child support orders and authorizes a jail sentence of up to one year for failure to pay.² During Turner's most recent contempt hearing, the clerk of court informed him that he was nearly \$6000 behind in child support payments.³ The presiding judge asked Turner if there was "anything [he] want[ed] to say."⁴ Turner gave a quick response about his drug addiction and disability before concluding, "I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me."⁵ The judge responded, "[O]kay."⁶ After a brief exchange with the custodial parent, the judge summarily found Turner in willful contempt of court.⁷ He sentenced Turner to twelve months in Oconee County Detention Center and set the payment to purge civil contempt at the full balance owed.⁸

Despite facing incarceration, Turner did not have an attorney for any of his contempt hearings. Indeed, South Carolina had no statutory or constitutional requirement that judges appoint counsel in civil contempt cases. Turner challenged that policy, arguing that the Due Process Clause of the Fourteenth Amendment required the state to provide representation.⁹ The Supreme Court disagreed.¹⁰

In 2011, the Court held that there is no right to counsel in civil contempt proceedings so long as the state provides "substitute procedural safeguards" to reduce the risk of wrongful incarceration.¹¹ Specifically, the Court identified four such safeguards:

- (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to

1. See *Turner v. Rogers*, 564 U.S. 431, 436-37 (2011).

2. *Id.* at 435-36 (citing S.C. CODE ANN. § 63-3-620 (Supp. 2010)).

3. *Id.* at 437.

4. *Id.*

5. *Id.* (quoting Petition for a Writ of Certiorari app. D at 17a, *Turner*, 564 U.S. 431 (No. 10-10), 2010 U.S. S. Ct. Briefs LEXIS 1173, at *71-72).

6. *Id.* (quoting Petition for a Writ of Certiorari, *supra* note 5, app. D at 17a).

7. See *id.*

8. See *id.*

9. See *id.* at 435.

10. *Id.*

11. *Id.* at 447 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

respond to statements and questions about his financial status . . . ; and (4) an express finding by the court that the defendant has the ability to pay.¹²

The Court determined that Turner did not receive procedural safeguards that were equivalent to those mentioned and thus held that Turner's incarceration violated the Due Process Clause.¹³

In *Turner*, the Supreme Court drew a sharp line between civil and criminal cases.¹⁴ If Turner had faced criminal contempt charges, the Sixth Amendment would have guaranteed him the right to counsel.¹⁵ But the Sixth Amendment did not govern Turner's *civil* case,¹⁶ even though the threat of jail was far from theoretical. A 2005 survey showed that on any given day, South Carolina jails housed over 1500 parents for nonpayment of child support.¹⁷ In 2009, one out of every eight inmates in the state was incarcerated for failing to pay child support.¹⁸ And South Carolina is not an anomaly. Although the state may be an extreme on the continuum, the use of incarceration for nonpayment of child support is widespread. For example, in 2002, an Indiana prosecutor reported that each year the state incarcerated 2400 to 3300 noncustodial parents for nonpayment.¹⁹ In 2010, Georgia jailed 3500 parents for failure to pay child support.²⁰ States like Georgia and South Carolina do not guarantee the right to counsel,²¹ so parents facing jail time must bank on procedural safeguards to "substitute" for an attorney.

Five years have passed since *Turner*, and virtually no research exists on the real-world consequences or effectiveness of the Court's suggested procedural safeguards. The Court believed that civil contempt hearings are often relatively "straightforward,"²² such that its four suggested safeguards (or their equivalents) could adequately substitute for the right to counsel.²³ But it declined to provide "empirical evidence to support assertions about the

12. *Id.* at 447-48.

13. *Id.* at 449.

14. *See id.* at 441.

15. *Id.*

16. *Id.*

17. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 116-17 (2008).

18. Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <http://nyti.ms/1H59YYd>.

19. Patterson, *supra* note 17, at 117.

20. Robles & Dewan, *supra* note 18.

21. *See infra* notes 96, 104 and accompanying text.

22. *See Turner v. Rogers*, 564 U.S. 431, 446 (2011).

23. *Id.* at 448.

complexity of procedures and fairness of alternatives.”²⁴ Instead, the Court borrowed each suggestion from an amicus brief filed by the U.S. Solicitor General’s Office.²⁵ Likewise, commentators have spilled much ink debating the right to counsel in civil contempt cases in the abstract,²⁶ but no scholar thus far has investigated how state courts have implemented the Court’s decision. Neither *Turner*’s supporters, who “cheered” the decision as a positive step forward for access-to-justice reform,²⁷ nor its critics, who champion a “civil *Gideon*,”²⁸ have examined how *Turner*’s safeguards actually work or whether a right to counsel is feasible in practice.

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24. See Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1236 (2014); see also 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, 158 (2011) (arguing that *Mathews*’s “veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism”).
25. *Turner*, 564 U.S. at 447-48 (citing Transcript of Oral Argument at 26-27, *Turner*, 564 U.S. 431 (No. 10-10), 2011 WL 1043624; and Brief for the United States as Amicus Curiae Supporting Reversal at 23-25, *Turner*, 564 U.S. 431 (No. 10-10), 2011 WL 108380).
26. See sources cited *infra* notes 27-28.
27. See, e.g., Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2233 (2013); Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES’ J., Fall 2011, at 16, 16 (asserting that “the duty imposed on judges” after *Turner* “takes the place of the far more expensive and constitutionally complicated alternative of requiring counsel for the parties in all such proceedings”). Some analysts have characterized a civil right to counsel as an “impossible dream,” believing it “far more important to fund appointed lawyers in serious felony cases.” See, e.g., Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972 (2012). Likewise, other scholars applauded the Court for refusing to perpetuate the adversarial system “in the face of growing evidence that this framework does more harm than good for most domestic-relations litigants.” See, e.g., Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2110 (2013).
28. These scholars mourned *Turner* as a blow to the civil right to counsel—the so-called civil *Gideon*, after the Supreme Court’s landmark criminal right-to-counsel decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See, e.g., David J. Dreyer, *Déjà Vu All Over Again: Turner v. Rogers and the Civil Right to Counsel*, 61 DRAKE L. REV. 639, 665 (2013) (“Nothing can replace a lawyer; triage cannot substitute for due process.”). In a symposium held immediately after *Turner*, Norman Reimer, the Executive Director of the National Association of Criminal Defense Lawyers, lamented the Court’s decision as betraying a “breathtaking disconnect from the real world.” Norman Reimer, *Turner v. Rogers: The Right to Counsel Haunted by the Ghost of Gagnon*, CONCURRING OPINIONS (June 27, 2011), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-the-right-to-counsel-haunted-by-the-ghost-of-gagnon.html>. Another commentator noted, “I don’t think the [C]ourt understands what it’s like to go into court without a lawyer.” Mark Walsh, *A Sour Note from Gideon’s Trumpet*, A.B.A. J. (Sept. 1, 2011, 8:10 AM CDT), http://www.abajournal.com/magazine/article/a_sour_note_from_gideons_trumpet (quoting Peter B. Edelman, Professor, Georgetown Univ. Law Ctr.); see also John Pollock, *Turner v. Rogers: Why the Supreme Court Is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011), <https://concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short/>
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This Note attempts to fill that gap by documenting how states, judges, and practitioners have responded to the *Turner* decision. It begins by providing the first comprehensive catalogue of states that guarantee the right to counsel for civil contempt hearings.²⁹ From there, it surveys sixty practitioners in forty-four states to learn how states handle representation in contempt cases. Finally, it draws on extensive interviews with eight current and former family court judges in South Carolina to assess how the state has implemented *Turner's* mandate.

This Note proceeds in five Parts. Part I summarizes the Court's decision in *Turner* in more detail and then discusses subsequent developments in state court cases. Part II catalogues the right to counsel in civil contempt proceedings on a state-by-state level. Before *Turner*, sixteen state courts had held that the federal Constitution requires appointment of counsel in civil contempt cases.³⁰ This Note finds that many of those states have continued to guarantee counsel despite lacking a constitutional imperative to do so.³¹ On the other hand, this Note also concludes that a full twenty states and the District of Columbia do *not* appoint counsel in these cases despite numerous news reports suggesting that number is five.³²

Part III drills down into how representation in each state operates as well as what happens when parents proceed pro se. It relies on interviews with sixty legal aid providers, public defenders, and contract attorneys, each of whom has witnessed *Turner's* impact first-hand. First, it surveys the practitioners who handle these cases to evaluate how much of an impact their representation makes. Second, Part III examines states that do not guarantee the right to counsel and asks legal aid providers whether they are able to fill the representation gap. It concludes that many organizations are not. Accordingly, parents in these states must fend for themselves, relying only on *Turner's* "procedural safeguards" to ensure fair outcomes.

Part IV uses South Carolina as a case study to evaluate how those safeguards operate in practice. It recounts in-depth interviews with eight current

.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html (criticizing the Court for "gloss[ing] over the complex realities of contempt cases").

29. See *infra* Part II.

30. See *infra* note 112 and accompanying text.

31. See *infra* Part II.

32. See, e.g., Mike Bruner, *Unable to Pay Child Support, Poor Parents Land Behind Bars*, NBC NEWS (Sept. 12, 2011, 6:11 AM ET), http://www.nbcnews.com/id/44376665/ns/us_news-crime_and_courts/t/unable-pay-child-support-poor-parents-land-behind-bars; Christopher Mathias, *One-Eighth of South Carolina Inmates Were Jailed over Child Support Payments. Walter Scott Was One of Them.*, HUFFINGTON POST (Apr. 10, 2015, 4:41 PM ET), http://www.huffingtonpost.com/2015/04/10/walter-scott-child-support-_n_7036174.html.

and former family court judges. Together, those judges have handled thousands of child support contempt cases and offer significant institutional knowledge about how family courts have implemented the *Turner* decision.

Part V draws on the interviews, survey responses, and other published sources to recast the debate between a right to counsel and substitute procedural safeguards. First, this Note concludes that the Supreme Court was correct: the right to counsel does not guarantee procedural fairness and may in fact create a false sense of security, particularly where public defenders and contract attorneys lack the resources to provide meaningful representation. Nevertheless, the Court's suggested safeguards, including the "use of a form" to elicit a contemnor's "ability to pay,"³³ do not adequately offset the risk of wrongful incarceration. Thus, this Note advocates that the Court revisit *Turner* and adopt several ready fixes to fulfill its promise. Failing that, this Note also offers states and the private bar more targeted approaches for providing counsel, such as prioritizing representation in modification proceedings.

Ultimately, this Note concludes that *Turner* took a step in the right direction but that its procedural safeguards have proven insufficient. Unless and until the Court revisits those safeguards, states and practitioners should pay renewed attention to the thousands of parents facing jail sentences without access to representation.

I. *Turner v. Rogers* and Its Progeny

In *Turner v. Rogers*, the Supreme Court considered whether due process requires states to appoint counsel to parents facing incarceration for nonpayment of child support.³⁴ The Court held that it does not, provided the other party is also unrepresented and the state provides substitute procedural safeguards to reduce the risk of erroneous incarceration.³⁵

The Court began by determining that the state's use of incarceration did not automatically entitle the contemnor to counsel.³⁶ In doing so, the Court drew a bright line between criminal and civil cases. For criminal cases, the Sixth Amendment grants indigent defendants the right to state-appointed counsel.³⁷ But civil contempt attempts only to coerce the defendant to comply with a court order, and once the contemnor does so, "he is purged of the

33. *Turner v. Rogers*, 564 U.S. 431, 447 (2011).

34. *Id.* at 435.

35. *Id.* at 448.

36. *Id.* at 441-43.

37. *Id.* at 441. Technically, the Sixth Amendment's right to counsel is violated only when the defendant is actually imprisoned. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

contempt and is free.”³⁸ The Court emphasized that in civil contempt cases, the contemnor “carr[ies] the keys of [his] prison in [his] own pockets.”³⁹ Consequently, *Turner* held that the state could use alternative procedural protections in civil contempt proceedings.⁴⁰

The Court then applied the *Mathews v. Eldridge* balancing test to determine whether due process requires the state to appoint counsel when civil contemnors face incarceration.⁴¹ *Mathews* balances (1) the private interest at stake, (2) the “comparative ‘risk’ of an ‘erroneous deprivation’ of that interest” with additional procedural safeguards, and (3) “the nature and magnitude of any countervailing interest in not providing” those safeguards.⁴²

The Court conceded that the private interest at stake—Turner’s liberty from jail—“argue[d] strongly for the right to counsel.”⁴³ But the Court ultimately rejected the right to counsel for three key reasons: First, the “critical question” in these cases was “ability to pay,” which marked the line between criminal punishment and civil contempt.⁴⁴ The majority thought this inquiry could be “sufficiently straightforward” such that the marginal benefit of counsel was small.⁴⁵ Second, the custodial parent opposing the defendant was often unrepresented.⁴⁶ The Court worried that providing counsel to the noncustodial parent would create an “asymmetry of representation,” which would slow down needed child support payments and make the contempt proceeding “less fair overall.”⁴⁷ Third, the Court believed that “substitute procedural safeguards” would “reduce the risk of an erroneous deprivation of liberty.”⁴⁸ The Court, drawing on the Solicitor General’s amicus brief, suggested the following four safeguards:

- (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered

38. *Turner*, 564 U.S. at 441-42.

39. *Id.* at 442 (alterations in original) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988)).

40. *Id.*

41. *Id.* at 444-45 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

42. *See id.* (quoting *Mathews*, 424 U.S. at 335).

43. *Id.* at 445.

44. *Id.* at 446.

45. *Id.*

46. *Id.*

47. *Id.* at 447.

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

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by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.⁴⁹

The Court acknowledged that those safeguards were not the only possible alternatives, but it determined that a contemnor must receive those safeguards or their “equivalent.”⁵⁰ It concluded that Turner did not receive representation or the equivalent of those alternative procedures, and thus his incarceration violated the Fourteenth Amendment’s Due Process Clause.⁵¹

The Court also expressly reserved two corollary questions. First, it did not address civil contempt cases in which the contemnor owes payments to the state, as the “government is likely to have counsel or some other competent representative” in those proceedings.⁵² Likewise, it did not address whether due process would require counsel “in an unusually complex case.”⁵³

Since *Turner*, only two states have considered the former question: whether parents have a right to counsel when the state is on the other side of the aisle.⁵⁴ Although *Turner* hinted that the Court might find a right to counsel in such cases, which “more closely resemble debt-collection proceedings,”⁵⁵ both states decided against a categorical right to counsel. In *Miller v. Deal*, the Georgia Supreme Court considered a class action challenging the state’s child support practices, which frequently pit state lawyers against unrepresented obligors.⁵⁶ The court denied class certification.⁵⁷ It held that the plaintiffs could not demonstrate commonality or typicality because their arguments hinged on a “categorical constitutional right to appointed counsel.”⁵⁸ The court interpreted *Turner* as making “perfectly clear” that due process does not automatically require provision of counsel in civil contempt cases.⁵⁹ It acknowledged that the plaintiffs asserted a right to counsel in cases brought by the state—“a circumstance that the [U.S.] Supreme Court explicitly declined to address in

49. *Id.* at 447-48 (citing Transcript of Oral Argument, *supra* note 25, at 26-27; and Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 25, at 23-25).

50. *Id.* at 448.

51. *Id.* at 449.

52. *Id.*

53. *Id.*

54. See *Miller v. Deal*, 761 S.E.2d 274, 277-80 (Ga. 2014); *State, Dep’t of Family Servs. v. Currier*, 295 P.3d 837, 842-43 (Wyo. 2013). As to the latter question, some states decided before *Turner* to appoint counsel when legal or factual complexities required the assistance of an attorney. See *infra* notes 107-08 and accompanying text.

55. *Turner*, 564 U.S. at 449.

56. 761 S.E.2d at 277-80.

57. *Id.* at 277, 280.

58. *Id.* at 277.

59. *Id.*

Turner.⁶⁰ As such, the court “suppose[d] that due process sometimes may require the appointment of counsel” and that there may even be a “presumptive’ right to appointed counsel” if government lawyers opposed the parent.⁶¹ Nevertheless, the U.S. Supreme Court had “*never* found in the Due Process Clause a categorical right to appointed counsel,” and the Georgia Supreme Court also declined to do so also.⁶²

Likewise, the Wyoming Supreme Court held that there is no constitutional right to counsel in civil contempt proceedings, even when the state’s Department of Family Services brings the case.⁶³ Again, the court acknowledged that *Turner* had left the question unanswered.⁶⁴ But it conducted its own *Mathews* analysis and determined that due process did not require appointment of counsel.⁶⁵ The court found that the trial-level procedures afforded the contemnor notice and an opportunity to be heard.⁶⁶ It also instructed district courts to use “less formal courtroom procedures” so that unrepresented contemnors could fully address their ability to pay.⁶⁷ Given those procedures, the court found it “hard to imagine what more appointed counsel could bring to the dialogue.”⁶⁸

II. The Right to Counsel at the State Level

Fully gauging *Turner’s* impact requires looking at the state level. Yet there is currently no comprehensive database of which states appoint counsel in child support cases or even use civil contempt as an enforcement technique. Without that basic groundwork, any attempt to assess *Turner’s* impact is effectively dead on arrival. This Part supplies that foundation by cataloguing which states guarantee appointed counsel in civil contempt proceedings.

The Supreme Court decided *Turner* without a record of which states actually appoint counsel in like cases. In his petition for a writ of certiorari, Michael Turner identified fifteen state supreme courts that had held there is such a right to appointed counsel under the federal Constitution if the

60. *Id.*

61. *Id.* at 279.

62. *See id.* at 278 (emphasis added) (quoting *Turner v. Rogers*, 564 U.S. 431, 453 (2011) (Thomas, J., dissenting)).

63. *State, Dep’t of Family Servs. v. Currier*, 295 P.3d 837, 843 (Wyo. 2013).

64. *See id.* at 842.

65. *Id.* at 842-43.

66. *Id.* at 843.

67. *Id.*

68. *Id.*

defendant is at risk of incarceration.⁶⁹ He also listed another five state courts that had come down the other way.⁷⁰ But his discussion gave no indication of which states provided a statutory right to counsel; nor did it show which states had never considered the issue at all. Neither the respondent nor amici supplemented that information. One amicus brief included a survey of eighteen states about their child support practices.⁷¹ But the survey was limited and unreliable. For example, the survey reported that after the Supreme Court of New Jersey found a state right to counsel, the state was severely limited in its use of incarceration as an enforcement tool.⁷² To the contrary, New Jersey regularly incarcerates parents for nonpayment of child support, and in 2013, two New Jersey counties alone incarcerated or gave ankle monitors to 1800 parents.⁷³

After *Turner*, the scope of the right to counsel remained unclear. Vicky Turetsky, then-Commissioner of the OCSE, reported that the agency did not keep track of which states provide counsel or how often states use incarceration.⁷⁴ There is no other national database that collects this information. The National Coalition for a Civil Right to Counsel (NCCRC) provides the most helpful existing resource.⁷⁵ Even that site, however, does not explain whether all states that previously found a *federal* due process right to counsel in civil contempt cases have continued to do so after *Turner*.⁷⁶ Moreover, the site relies at times on general contempt statutes, which do not always correlate with whether states appoint counsel in child support cases.

69. Petition for a Writ of Certiorari, *supra* note 5, at 16-17.

70. *Id.* at 18.

71. Brief of Senators DeMint et al. as Amici Curiae in Support of Respondents at 20-21, *Turner v. Rogers*, 564 U.S. 431 (2011) (No. 10-10), 2011 WL 525740. The brief included a table containing information from the Office of Child Support Enforcement (OCSE), which “collect[ed] responses to a survey conducted by the National Council of Child Support Directors.” *Id.* at 21 n.2.

72. *Id.* app. A at 8a.

73. Robles & Dewan, *supra* note 18.

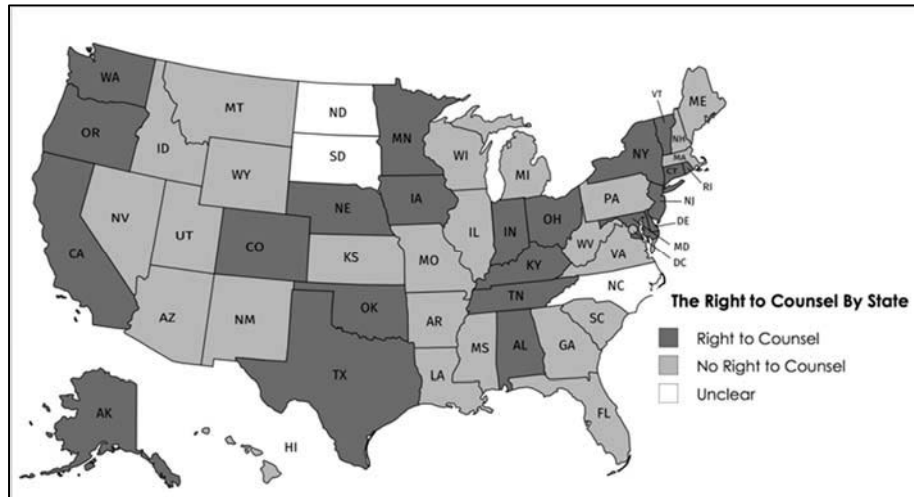
74. Telephone Interview with Vicki Turetsky, Comm’r, Office of Child Support Enf’t (Mar. 9, 2016). The OCSE is a division of the Department of Health and Human Services and partners with state and local governments to promote child support payments and parental responsibility. See *Policy*, OFF. CHILD SUPPORT ENFORCEMENT, <https://www.acf.hhs.gov/css/policy> (last visited May 5, 2017). As discussed below, the OCSE issued guidance after *Turner v. Rogers* to help states comply with the decision. See *infra* notes 319-20 and accompanying text.

75. See *Status Map*, NAT’L COALITION FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> (last visited May 5, 2017). The NCCRC offers interactive maps to compare the provision of counsel across states. *Id.* (to locate, select “Right to Counsel Status”). The maps can be divided by “subject area,” including one for “Child Support Enforcement (Civil Contempt).” See *id.*

76. See *id.*

Relying on state statutes, case law, and surveys,⁷⁷ this Note catalogues which states guarantee the right to counsel in civil contempt cases for nonpayment of child support. Figure 1 below maps the right to counsel by state.

Figure 1



This map illustrates which states currently guarantee the right to counsel in civil contempt cases for nonpayment of child support.

Twelve states guarantee the right to counsel based on statute or the state constitution: Alabama,⁷⁸ Alaska,⁷⁹ Connecticut,⁸⁰ Kentucky,⁸¹ New Jersey,⁸²

77. For states with a right to counsel, survey questions were sent by e-mail to the organizations that would represent indigent contemnors. For states without a right to counsel, survey questions were sent to the executive directors or managing attorneys of legal aid organizations funded by the Legal Services Corporation. In all, eighty organizations (from all fifty states) were surveyed, and fifty-six organizations (from forty-four states) responded. The response rate (70%) was relatively high, but it was infeasible to consult all possible stakeholders, and the survey results are necessarily limited by the sample size.

78. See *Leftwich v. Vansandt*, 995 So. 2d 172, 174 (Ala. Civ. App. 2008) (noting that Alabama provides for appointment of counsel in “civil . . . nonsupport cases which may result in the jailing of the defendant” (alteration in original) (quoting ALA. CODE § 15-12-20)).

79. See *Otton v. Zaborac*, 525 P.2d 537, 538-39 (Alaska 1974) (finding a right to counsel on both state and federal constitutional grounds), *abrogated in part by* *Turner v. Rogers*, 564 U.S. 431 (2011); see also E-mail from Nikole Nelson, Exec. Dir., Alaska Legal Servs. Corp., to Ashley Robertson (Mar. 14, 2016, 3:28 PM) (on file with author).

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New York,⁸³ Ohio,⁸⁴ Oklahoma,⁸⁵ Oregon,⁸⁶ Tennessee,⁸⁷ Texas,⁸⁸ and Washington.⁸⁹ Additionally, the Rhode Island judiciary contracts with Rhode Island Legal Services to provide representation for noncustodial parents in civil contempt cases.⁹⁰ Likewise, the Minnesota Supreme Court used its supervisory powers to establish a right to appointed counsel.⁹¹ *Turner*, which spoke only to the federal constitutional floor, has no legal effect on the right to counsel in those fourteen states.

Twenty states and the District of Columbia do not provide a statewide right to counsel for civil contempt proceedings. In fourteen states and the

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80. CONN. GEN. STAT. ANN. § 46b-231(m)(7) (West 2017); *see also* E-mail from Krista Hess, Program Manager, Superior Court Operations Div., Conn. Judicial Branch, to Ashley Robertson (Mar. 3, 2016, 7:23 PM) (on file with author) (explaining that private lawyers “contract with the Judicial Branch to provide representation”).
 81. *Lewis v. Lewis*, 875 S.W.2d 862, 865 (Ky. 1993) (finding a right to counsel on statutory grounds); *see also* E-mail from Neva-Marie Polley, Exec. Dir., Legal Aid Soc’y, to Ashley Robertson (Mar. 4, 2016, 4:19 PM) (on file with author) (reporting that Kentucky courts appoint public defenders to represent defendants in these cases).
 82. *Pasqua v. Council*, 892 A.2d 663, 676 (N.J. 2006), *abrogated in part by Turner*, 564 U.S. 431.
 83. N.Y. FAM. CT. ACT § 262(a)(vi) (McKinney 2017).
 84. *Liming v. Damos*, 979 N.E.2d 297, 302, 306-07 (Ohio 2012) (recognizing a statutory right to counsel at the original contempt hearing but holding that such a right does not exist at the purge stage).
 85. OKLA. STAT. tit. 12, ch. 2, app., r. 29 (2016); *see also* E-mail from Michael G. Figgins, Exec. Dir., Legal Aid Servs. of Okla., Inc., to Ashley Robertson (Mar. 4, 2016, 5:53 AM) (on file with author) (confirming that the Tulsa court appoints contract attorneys for cases involving nonpayment of child support).
 86. OR. REV. STAT. ANN. § 33.055(8) (West 2016); *see also* E-mail from Keith B. Rogers, Exec. Dir., Multnomah Defs., Inc., to Ashley Robertson (Mar. 8, 2016, 6:36 PM) (on file with author) (noting that Oregon contracts with nonprofit law firms to represent noncustodial parents charged with contempt).
 87. TENN. SUP. CT. R. 13, § 1(d)(1)(B) (requiring representation in civil contempt cases where “the defendant is in jeopardy of incarceration”); *see also* E-mail from Katelyn E. Zeno, Intern, Memphis Area Legal Servs., to Ashley Robertson (Mar. 21, 2016, 1:14 PM) (on file with author) (citing TENN. SUP. CT. R. 13, § 1(d)(1)(B)).
 88. TEX. FAM. CODE ANN. § 157.163(b) (West 2015); *see also* E-mail from Julie Balovich, Att’y, Tex. RioGrande Legal Aid, Inc., to Ashley Robertson (Apr. 7, 2016, 11:14 PM) (on file with author) (noting that her organization does not generally handle contempt cases for failure to pay child support because there is a statutory right to counsel under section 157.163 of the Texas Family Code).
 89. *Tetro v. Tetro*, 544 P.2d 17, 19-20 (Wash. 1975) (finding a right to counsel under the federal and state constitutions), *abrogated in part by Turner v. Rogers*, 564 U.S. 431 (2011); *see also* E-mail from César E. Torres, Exec. Dir., Nw. Justice Project, to Ashley Robertson (Mar. 4, 2016, 10:34 AM) (on file with author) (noting that public defenders in Washington handle these cases).
 90. *See* E-mail from Robert Barge, Exec. Dir., R.I. Legal Servs., to Ashley Robertson (Apr. 2, 2016, 11:00 PM) (on file with author).
 91. *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984).

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District of Columbia,⁹² there is no right to counsel at all. The states are Arizona,⁹³ Arkansas,⁹⁴ Florida,⁹⁵ Georgia,⁹⁶ Hawaii,⁹⁷ Idaho,⁹⁸ Louisiana,⁹⁹ Maine,¹⁰⁰ Massachusetts,¹⁰¹ Mississippi,¹⁰² Montana,¹⁰³ South Carolina,¹⁰⁴ Utah,¹⁰⁵ and Wyoming.¹⁰⁶ In an additional three states—Nevada, New Hampshire, and New Mexico—a right to counsel exists only on a case-by-case basis.¹⁰⁷ For example, Nevada will appoint an attorney when there exist “such legal and factual complexities so as to require the aid of counsel.”¹⁰⁸ In three

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92. See Stacy L. Brustin, *Making Turner a Reality—Improving Access to Justice Through Court-Annexed Resource Centers and Same Day Representation*, 20 TEX. J. C.L. & C.R. 17, 31-33 (2014).
93. See E-mail from Patricia Madsen, Managing Att’y, Family Law Unit, Cmty. Legal Servs., to Ashley Robertson (Apr. 7, 2016, 3:14 PM) (on file with author).
94. Telephone Interview with Gregg Parrish, Exec. Dir., Ark. Pub. Def. Comm’n (Mar. 4, 2016).
95. *Andrews v. Walton*, 428 So. 2d 663, 666 (Fla. 1983).
96. *Miller v. Deal*, 761 S.E.2d 274, 280 (Ga. 2014).
97. See Am. Bar Ass’n, *Directory of Law Governing Appointment of Counsel in State Civil Proceedings: Hawaii* 9 (2014), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_hi.authcheckdam.pdf.
98. Am. Bar Ass’n, *Directory of Law Governing Appointment of Counsel in State Civil Proceedings: Idaho* 12 (2016), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_id.authcheckdam.pdf.
99. See LA. STAT. ANN. § 46:236.6 (2010).
100. *Colson v. State*, 498 A.2d 585, 586-89 (Me. 1985).
101. See *L.B. v. Chief Justice of the Prob. & Family Court Dep’t*, 49 N.E.3d 230, 239-40, 239 n.18 (Mass. 2016) (noting that although indigent parents had a right to counsel in cases involving changes to provisions of guardianship, cases involving child support “will not necessarily implicate the same” concerns); cf. *In re Birchall*, 913 N.E.2d 799, 814 (Mass. 2009) (noting that a person facing civil contempt has only the right “to retain private counsel” (emphasis added)).
102. See E-mail from Sam H. Buchanan, Jr., Exec. Dir., Miss. Ctr. for Legal Servs., to Ashley Robertson (Mar. 21, 2016, 3:51 PM) (on file with author).
103. See E-mail from Amy Hall, Supervising Att’y, Mont. Legal Servs. Ass’n, to Ashley Robertson (Mar. 21, 2016, 12:11 PM) (on file with author).
104. *Price v. Turner*, 691 S.E.2d 470, 472 (S.C. 2010), *vacated and remanded sub nom. Turner v. Rogers*, 564 U.S. 431 (2011).
105. See E-mail from Anne Milne, Exec. Dir., Utah Legal Servs., to Ashley Robertson (Mar. 17, 2016, 2:29 PM) (on file with author).
106. *State, Dep’t of Family Servs. v. Currier*, 295 P.3d 837, 843 (Wyo. 2013).
107. *Rodriguez v. Eighth Judicial Dist. Court*, 102 P.3d 41, 51 (Nev. 2004); *Duval v. Duval*, 322 A.2d 1, 4 (N.H. 1974); *State ex rel. Dep’t of Human Servs. v. Rael*, 642 P.2d 1099, 1103-04 (N.M. 1982).
108. *Rodriguez*, 102 P.3d at 51.

states—Pennsylvania,¹⁰⁹ Virginia,¹¹⁰ and West Virginia¹¹¹—the right to counsel varies by location, and some judges or jurisdictions appoint counsel while others do not.

Finally, before *Turner*, sixteen states had case law that required them to provide counsel in civil contempt cases based on the *federal* Constitution.¹¹² *Turner* removed any requirement that those states provide counsel, yet eight states continue to do so. Practitioners in California,¹¹³ Colorado,¹¹⁴

109. See E-mail from Victoria Coyle, Exec. Dir., N. Penn Legal Servs., to Ashley Robertson (Mar. 4, 2016, 1:27 PM) (on file with author) (explaining that each of Pennsylvania’s judicial districts sets its own local rules); Telephone Interview with Susan Pearlstein, Supervising Att’y, Family Law Unit, Phila. Legal Assistance (Mar. 3, 2016) (noting that courts in Philadelphia appoint on-call contract attorneys).

110. E-mail from Larry T. Harley, Exec. Dir., Sw. Va. Legal Aid, to Ashley Robertson (Mar. 7, 2016, 8:43 AM) (on file with author) (“Virginia gives the court discretion as to whether or not to appoint counsel in these cases.”); E-mail from John E. Whitfield, Exec. Dir., Blue Ridge Legal Servs., to Ashley Robertson (Mar. 3, 2016, 3:35 PM) (on file with author) (noting that after *Turner*, the judges in Virginia’s twenty-sixth judicial district “decided to appoint counsel in all . . . cases where the defendant is indigent and facing civil contempt of court and incarceration”).

111. Telephone Interview with Dee-Ann Burdette, Deputy Comm’r, W.V. Bureau for Child Support Enf’t (Apr. 7, 2016) (noting that judges vary in whether they appoint counsel).

112. Twelve state supreme courts had held there was a constitutional right to counsel in these cases. See *People v. Lucero*, 584 P.2d 1208, 1214 (Colo. 1978) (holding that there is such a right in all civil contempt cases that may result in imprisonment), *abrogated in part* by *Turner v. Rogers*, 564 U.S. 431 (2011); *Black v. Div. of Child Support Enf’t*, 686 A.2d 164, 168 (Del. 1996), *abrogated by Turner*, 564 U.S. 431; *Sanders v. Shephard*, 645 N.E.2d 900, 906 (Ill. 1994) (stating that the court below “correctly” resolved the issue when it held that an indigent parent was entitled to counsel during a contempt proceeding), *abrogated in part by Turner*, 564 U.S. 431; *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982), *abrogated in part by Turner*, 564 U.S. 431; *Rutherford v. Rutherford*, 464 A.2d 228, 234-37 (Md. 1983), *abrogated in part by Turner*, 564 U.S. 431; *Mead v. Batchlor*, 460 N.W.2d 493, 504 (Mich. 1990), *abrogated by Turner*, 564 U.S. 431; *Allen v. Sheriff of Lancaster Cty.*, 511 N.W.2d 125, 127 (Neb. 1994), *overruled on other grounds by Smeal Fire Apparatus Co. v. Kreikemeier*, 782 N.W.2d 848 (Neb. 2010), *abrogated in part by Turner*, 564 U.S. 431; *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993), *abrogated by Turner*, 564 U.S. 431; *Peters-Riemers v. Riemers*, 663 N.W.2d 657, 664-65 (N.D. 2003), *abrogated by Turner*, 564 U.S. 431; *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 724-25, 725 n.3 (S.D. 2003) (holding that there is a right to counsel in all civil contempt cases that may result in imprisonment), *abrogated in part by Turner*, 564 U.S. 431; *Choiniere v. Brooks*, 660 A.2d 289, 289 (Vt. 1995), *abrogated by Turner*, 564 U.S. 431; *State v. Pultz*, 556 N.W.2d 708, 713 (Wis. 1996), *abrogated by Turner*, 564 U.S. 431. Intermediate appellate courts in four additional states had held or acknowledged the same. See *County of Santa Clara v. Cty. Superior Court*, 5 Cal. Rptr. 2d 7, 8 (Ct. App. 1992), *abrogated in part by Turner*, 564 U.S. 431; *In re Marriage of Stariha*, 509 N.E.2d 1117, 1119-21 (Ind. Ct. App. 1987), *abrogated in part by Turner*, 564 U.S. 431; *Johnson v. Johnson*, 721 P.2d 290, 294 (Kan. Ct. App. 1986), *abrogated in part by Turner*, 564 U.S. 431; *Hunt v. Moreland*, 697 S.W.2d 326, 328-30 (Mo. Ct. App. 1985), *abrogated in part by Turner*, 564 U.S. 431.

113. The Fresno County Public Defender Office reported that judges still automatically appoint the office to handle child support contempt cases any time the noncustodial
footnote continued on next page

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Delaware,¹¹⁵ Indiana,¹¹⁶ Iowa,¹¹⁷ Maryland,¹¹⁸ Nebraska,¹¹⁹ and Vermont¹²⁰ all indicated that their states still appoint counsel, even without a constitutional mandate. The right to counsel in those states seemingly relies on inertia rather than current statutory or case law. In Wisconsin, the state supreme court previously held that the federal Constitution guaranteed a right to counsel for civil contempt proceedings, at least when “an arm of government” initiated the case.¹²¹ The state has maintained that practice even after *Turner* expressly left open the question whether the Constitution requires states to do so.¹²²

In contrast, practitioners in four states—Illinois, Kansas, Michigan, and Missouri—noted that their states no longer guarantee counsel, at least when

parent cannot afford private counsel. See Telephone Interview with Patty Micheli, Legal Assistant, Fresno Cty. Pub. Def. Office (Jan. 20, 2017); see also *Family Law-Child Support*, FRESNO COUNTY, <http://www.co.fresno.ca.us/DepartmentPage.aspx?id=1732> (last visited May 5, 2017). Other California counties report the same. See, e.g., *Public Defender*, GLENN COUNTY SUPERIOR CT., http://www.glenncourt.ca.gov/general_info/whoswho/public_defender.html (last visited May 5, 2017) (“[T]he public defender’s office represents individuals who are subject to contempt proceedings for violation of court orders, such as child support”); *Public Defender Services*, LAW OFF. L.A. COUNTY PUB. DEFENDER, http://pd.co.la.ca.us/About_Services.html (last visited May 5, 2017) (“[W]e represent individuals who are subject to contempt proceedings for violation of court orders, such as child support”).

114. Telephone Interview with Jonathan Asher, Exec. Dir., Colo. Legal Servs. (Mar. 25, 2016).
115. E-mail from Douglas B. Canfield, Exec. Dir., Legal Servs. Corp. of Del., to Ashley Robertson (Mar. 3, 2016, 3:05 PM) (on file with author).
116. Telephone Interview with Tom Frohman, Staff Att’y, Ind. Legal Servs., Inc. (Mar. 8, 2016).
117. The Executive Director of Iowa Legal Aid confirmed that Iowa continued to provide counsel in civil contempt cases for nonpayment of child support. See E-mail from Dennis Groenenboom, Exec. Dir., Iowa Legal Aid, to Ashley Robertson (Mar. 10, 2016, 11:40 AM) (on file with author). That right, however, may be in jeopardy. On June 24, 2016, the Supreme Court of Iowa cited *Turner* in holding that there is no federal right to counsel in civil contempt hearings for failure to provide visitation. *Spitz v. Iowa Dist. Court*, 881 N.W.2d 456, 466-67 (Iowa 2016). It is unclear what, if any, effect the decision will have on child support cases.
118. E-mail from Jeanine Scott, Supervising Att’y, Md. Legal Aid, to Ashley Robertson (Mar. 22, 2016, 3:52 PM) (on file with author).
119. E-mail from Muirne Heaney, Managing Att’y, Legal Aid of Neb., to Ashley Robertson (Mar. 3, 2016, 5:19 PM) (on file with author).
120. E-mail from Tom Garrett, Exec. Dir., Legal Servs. Law Line of Vt., Inc., to Ashley Robertson (Mar. 3, 2016, 2:57 PM) (on file with author).
121. *State v. Pultz*, 556 N.W.2d 708, 713 (Wis. 1996), *abrogated by Turner v. Rogers*, 564 U.S. 431 (2011).
122. See E-mail from Corey C. Lundin, Staff Att’y & Family Law Priority Coordinator, Legal Action of Wis., Inc., to Ashley Robertson (Feb. 7, 2017, 6:12 PM) (on file with author).

the opposing party is also unrepresented. In Kansas, the right to counsel now varies at the county level. As one example, the courts in Sedgwick County appoint counsel when the state brings the case but not when an unrepresented custodial parent initiates the action.¹²³ In both Michigan and Illinois, the courts may provide attorneys in civil contempt cases, but they are not required to do so by law.¹²⁴ Missouri does not provide attorneys at all, although one prosecuting attorney's office reports that "counties have gone away from using civil contempt at all, partially for that reason."¹²⁵ Finally, I could not determine whether three states—North Carolina, North Dakota, and South Dakota—continued to provide counsel after *Turner*.

III. Representation (and the Lack Thereof) in Civil Contempt Hearings

This Part documents the experiences of states that do and do not guarantee a right to counsel in civil contempt hearings for nonpayment of child support. Part III.A draws on interviews with attorneys who handle those cases and outlines the benefits and potential pitfalls of representation. Part III.B assesses what happens when states do not provide counsel. Specifically, it evaluates whether legal aid organizations in those states might fill the representation gap. It concludes that almost no organizations do so, and serious obstacles—such as conflicts of interest and funding shortfalls—make their future involvement unlikely.

A. States That Provide Counsel

In total, twenty-two states appoint counsel to indigent contemnors facing incarceration for failure to pay child support. Those states, however, vary in their formality and consistency of representation. This Subpart is based on interviews with eight practitioners from states that have handled these cases. The lawyers split on the effectiveness of the right to counsel. When the state provided adequate funding, the practitioners spoke highly of the appointed

123. See E-mail from Rhonda Sullivan, Managing Att'y, Kan. Legal Servs.-Wichita, to Ashley Robertson (Mar. 17, 2016, 3:27 PM) (on file with author).

124. See E-mail from Jennifer Payne, Supervisory Att'y, Children & Families Practice Grp., Legal Assistance Found., to Ashley Robertson (Apr. 7, 2016, 2:18 PM) (on file with author) (noting that most judges in the Chicago area tend to appoint attorneys if the proceeding could lead to incarceration); E-mail from Regina Daniels Thomas, Deputy Chief Counsel, Cmty. Relations & Gov't Affairs, Legal Aid & Def. Ass'n, Inc., to Ashley Robertson (Mar. 4, 2016, 3:30 PM) (on file with author).

125. Telephone Interview with Pamela Sides, Manager, Child Support Unit, Prosecuting Att'y's Office of Jefferson Cty. (Mar. 10, 2016).

counsel model. But many practitioners worried that states could not or would not provide sufficient resources for meaningful representation.

1. Positive experiences

Practitioners in only two states—Minnesota and Oregon—reported that their representation had a meaningful impact on clients in proceedings for nonpayment of child support. Those states shared two key features: (1) adequately funded representation and (2) limited use of incarceration. Together, those factors allowed the public defenders to devote the necessary time to each client’s case.

Minnesota. Mary Moriarty is the Chief Public Defender for Hennepin County, the largest county in Minnesota.¹²⁶ Her office took over representation of civil contempt cases in August 2015, and she believes her attorneys are already “making a huge difference in these clients’ lives.”¹²⁷ Previously, the judiciary in Hennepin County had contracted directly with private attorneys to provide representation.¹²⁸ In 2015, the county decided to shift this structure by providing funding directly to the public defender’s office, which took over representation.¹²⁹ Moriarty purposefully hired attorneys with a “client-centered” approach who would devote the necessary time to each case.¹³⁰ Her office supplements the attorneys’ representation with law clerks, who develop a preliminary sketch of each client’s story.¹³¹

Moriarty asserted that judges in Hennepin County were never particularly “fond of” this type of civil contempt case, and her office has capitalized on that predisposition.¹³² The attorneys “spend the time to talk to the client[s] . . . and find out what their financial circumstances are.”¹³³ She said, “[W]e brought these issues to [the] judges’ attention, and that wasn’t happening before.”¹³⁴ Moreover, her office and the courts developed an agreement that allows the presiding child support magistrate or referee to revisit the underlying child support order during the contempt hearing.¹³⁵ Even though child support

126. Telephone Interview with Mary F. Moriarty, Chief Pub. Def., Hennepin Cty. Pub. Def. Office (Mar. 30, 2016); see *Hennepin County*, WELCOME! TWIN CITIES, <http://welcometwincities.com/hennepin-county> (last visited May 5, 2017).

127. Telephone Interview with Mary F. Moriarty, *supra* note 126.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

modifications are not “directly part of the contempt [process],” Moriarty thought they were critical to ensuring that the person does not “keep coming back” to court.¹³⁶

Oregon. Keith Rogers is the Executive Director of the Multnomah Defenders, “which contracts with the State of Oregon to provide public defense services to indigent clients in Portland.”¹³⁷ He reported that the office’s representation in civil contempt cases is “critical.”¹³⁸ But he also acknowledged that the state rarely pursued incarceration, and thus the caseload was not particularly burdensome on his attorneys.¹³⁹ In 2015, his office handled 167 such cases, which were only a “relatively small part” of the office’s work.¹⁴⁰

He also reported that the adjudications are “less adversarial than most cases brought by the State,” as the government’s “overriding goal” is to facilitate child support payments rather than punish the parent for contempt.¹⁴¹ Thus, the state rarely seeks incarceration for an initial contempt ruling.¹⁴² Eventually, the Multnomah County courts might impose jail sanctions “when repeated court interventions have failed,” but the court uses jail only as a “last resort.”¹⁴³

Rogers said his attorneys have the funding to “devote as much time as is necessary to adequately represent [their] clients.”¹⁴⁴ In some cases, representation might require a brief client interview and negotiations with the district attorney.¹⁴⁵ Other cases involve “extensive investigation” in preparation for a contested hearing.¹⁴⁶ But in all cases, Rogers thinks the “assistance by [his] lawyers is critical” and aids the court in “crafting solutions to the non-compliance with their orders.”¹⁴⁷ For example, his lawyers might identify defenses—such as a statute of limitations bar or a mistake in the record—or justify noncompliance through inability to pay.¹⁴⁸ More importantly, his office steers clients toward modifying their ongoing child support obligations so they can avoid recurring contempt hearings moving forward.¹⁴⁹

136. *Id.*

137. E-mail from Keith B. Rogers to Ashley Robertson, *supra* note 86.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

2. Negative experiences

Other practitioners in several states highlighted some of the drawbacks of a right to counsel. Those problems included: (1) a lack of time and funding to provide meaningful representation, (2) limited room for effective advocacy, and (3) lawyers creating an illusion of fairness when serious problems persisted.

Time and funding. Even the best-intentioned attorneys often lack the time or funding to provide meaningful representation. For example, Delaware contracts with private attorneys to provide representation to noncustodial parents facing civil contempt for nonpayment of child support.¹⁵⁰ Patrick Boyer is one of those contract attorneys and handles roughly five to ten child support arrears cases per month.¹⁵¹ He reported that he can typically devote about thirty to sixty minutes to each case.¹⁵² Likewise, David Eskin is a private contract attorney in New York and represents noncustodial parents in the Bronx.¹⁵³ He estimated that he met with about half his clients only on the day of the hearing, and the clients might bring “a couple of pieces of paper and fumble through” them.¹⁵⁴ Similarly, courts in Philadelphia have private on-call attorneys that handle contempt hearings.¹⁵⁵ Susan Pearlstein, of Philadelphia Legal Assistance, has observed the hearings and found that most attorneys only spoke with the clients “for a few minutes” before the hearing and typically just gave the defense that the client “can’t work.”¹⁵⁶

The same is true for states that rely on an already overworked public defender system. For example, Indiana appoints public defenders to represent noncustodial parents facing civil contempt.¹⁵⁷ Tom Frohman, who has worked at Indiana Legal Services for more than thirty years, often handles appeals in these cases.¹⁵⁸ He observed that when an indigent contemnor is brought in on contempt, the court will immediately assign him counsel.¹⁵⁹ The court might allow the contemnor to meet with the public defender for roughly ten minutes before resuming the case.¹⁶⁰ To Frohman, there is simply “not enough time” for

150. See E-mail from Patrick J. Boyer, Assoc., MacElree Harvey, Ltd., to Ashley Robertson (Mar. 6, 2016, 10:16 AM) (on file with author).

151. *Id.*

152. *Id.*

153. Telephone Interview with David Eskin, Att’y, Eskin & Eskin (Mar. 10, 2016).

154. *Id.*

155. Telephone Interview with Susan Pearlstein, *supra* note 109.

156. *Id.*

157. Telephone Interview with Tom Frohman, *supra* note 116.

158. *Id.*

159. *Id.*

160. *Id.*

an attorney to evaluate these cases “in the *same day*.”¹⁶¹ The attorneys have no ability to develop the facts regarding ability to pay.

Arkansas does not have a statewide right to counsel, but Gregg Parrish, the Executive Director of the Arkansas Public Defender Commission, reported that several judges had tried to appoint his defenders to handle these cases.¹⁶² He vigorously opposed those appointments and said that it would be a “nightmare” if his organization were responsible for civil contempt cases.¹⁶³ Parrish has handled contempt cases pro bono and expressed concern at “an arm of the state . . . trying to lock someone up without representation.”¹⁶⁴ But in his role as head of the public defenders, he simply did “not have the manpower to do it.”¹⁶⁵ His attorneys regularly handle three hundred active felony cases at one time, and he thought the “system [would] shut down” if contempt cases were added to his office’s workload.¹⁶⁶

Limited room for advocacy. Attorneys also often felt that there was limited room for advocacy in these cases. For example, Patrick Boyer thought his representation as a contract attorney had only a “marginally positive impact on the outcomes.”¹⁶⁷ He stressed that he “can’t change [the] facts, which are usually pretty damning.”¹⁶⁸ Thus, Boyer did not think that there should be a right to counsel in these cases.¹⁶⁹ In his experience, “it is usually pretty cut and dry that [the parents] are in contempt,” and the judicial officer exercises significant discretion over the remedy.¹⁷⁰ He believed that very few parents actually went to jail, so “[t]here is no need to hire an attorney at the expense of the taxpayer to represent individuals who refuse to pay child support.”¹⁷¹

Likewise, David Eskin thought that in a “perfect system,” judicial staff could meet with noncustodial parents on a weekly basis to review the parents’ efforts to get a job.¹⁷² He said, “[I]t’s not like the advocacy is sophisticated”—his representation usually entails telling the judge that his client is “poor,” and he thought “anybody” could make that argument.¹⁷³ In New York, Eskin saw the

161. *Id.*

162. Telephone Interview with Gregg Parrish, *supra* note 94.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. E-mail from Patrick J. Boyer to Ashley Robertson, *supra* note 150.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Telephone Interview with David Eskin, *supra* note 153.

173. *Id.*

most room for advocacy in his ability to push for continuances.¹⁷⁴ He described the process as a “song and dance”: he presents evidence and requests an adjournment for his closing statement.¹⁷⁵ After a couple of months, he returns to issue his closing statement, and if the magistrate issues a finding of willfulness, he requests another adjournment for the disposition.¹⁷⁶ If the magistrate recommends incarceration, the case is referred to the intake family court judge, which requires yet another continuance.¹⁷⁷ These continuances allow the contemnor more chances to purge his contempt, but they also create a significant delay for custodial parents seeking needed child support.

A false sense of security. Finally, a right to counsel may create the illusion of fairness and obscure serious substantive problems. In Indiana, for example, the state does not always train its public defenders on the difference between civil and criminal contempt.¹⁷⁸ Tom Frohman noted that the public defenders “are used to plea bargaining,” so they frequently agree to a suspended jail sentence on condition of payment.¹⁷⁹ Many times, the payments are nearly impossible for the parent to meet.¹⁸⁰

Similarly, in Oklahoma, the court has a list of attorneys to appoint for child support contempt cases.¹⁸¹ Michael Figgins, the Executive Director at Legal Aid Services of Oklahoma, observed that the representation usually consists of working out a payment agreement with the state.¹⁸² In that agreement, the client admits that he willfully did not pay and can then avoid jail by following the payment schedule.¹⁸³ If the client does not follow the schedule, he must then pay the full amount owed to avoid jail. Figgins reported that “[p]urge fees up near [\$]30,000 are not unusual.”¹⁸⁴

The state’s guarantee of counsel, however, apparently does not ensure that litigants are represented at that crucial juncture.¹⁸⁵ Figgins observed that people *without* attorneys “will enter into agreements to pay monthly fees that they cannot pay.”¹⁸⁶ Often, the parents could have proved an inability to pay,

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Telephone Interview with Tom Frohman, *supra* note 116.

179. *Id.*

180. *Id.*

181. E-mail from Michael G. Figgins to Ashley Robertson, *supra* note 85.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

but they nevertheless assume a binding obligation to make unrealistic payments.¹⁸⁷

B. States with No Right to Counsel

Twenty-five states and the District of Columbia have no statewide right to counsel in civil contempt cases. Because the states do not formally assign any organization to handle these cases, this Subpart uses surveys of legal aid organizations in each state to assess (1) whether the organizations prioritize these cases and (2) how *Turner's* safeguards have been implemented. It reveals that very few legal aid organizations have handled these cases *at all*. The organizations that did take them on did so only in rare circumstances where the representation overlapped with other priorities like reentry, veteran aid, or disability assistance.¹⁸⁸

1. Organizations that do not represent noncustodial parents

Legal aid organizations gave three primary reasons for why they do not handle these cases: (1) their states rarely pursued incarceration, (2) conflicts of interest, and (3) limited resources.

No threat of incarceration. Four organizations said that their states simply did not pursue incarceration in child support cases or did so exceedingly rarely. For example, Utah Legal Services reported that “incarceration for civil contempt is rarely sought and even more infrequently ordered.”¹⁸⁹ The co-chair of Utah Legal Service’s domestic task force believed that judges ordered incarceration only when arrears were especially egregious, rising to \$25,000 or more.¹⁹⁰ According to her, attorneys in the state attorney general’s office say they typically avoid seeking incarceration because “the goal is to get

187. *Id.*

188. *See, e.g.*, E-mail from Victoria Coyle, Exec. Dir., N. Penn Legal Servs., to Ashley Robertson (Mar. 4, 2016, 11:41 AM) (on file with author) (stating that her organization may represent noncustodial parents in disability cases); E-mail from M. Nalani Fujimori Kaina, Exec. Dir., Legal Aid Soc’y of Haw., to Ashley Robertson (Mar. 3, 2016, 4:10 PM) (on file with author) (stating that her organization may represent noncustodial parents in “exceptional” cases like those involving people with disabilities); E-mail from Liam McGivern, Staff Att’y, Legal Servs. of Greater Miami, Inc., to Ashley Robertson (Mar. 6, 2016, 12:24 PM) (on file with author) (stating that his organization represents noncustodial parents who are veterans); E-mail from Laura Tuggle, Exec. Dir., Se. La. Legal Servs., to Ashley Robertson (Mar. 19, 2016, 7:14 PM) (on file with author) (noting her organization’s plans to start handling these cases through its “reentry project”).

189. E-mail from Anne Milne to Ashley Robertson, *supra* note 105.

190. *Id.*

money[,] and that is hard to do if [the parents] are in jail.”¹⁹¹ Moreover, according to the other co-chair, the state’s judges show patience with obligors and have “a tendency to suspend any jail time or just give them a weekend.”¹⁹²

The same is true for Hawaii, Montana, and New Hampshire. M. Nalani Fujimori Kaina, the Executive Director of the Legal Aid Society of Hawaii, said that contempt cases are “exceedingly rare” and that her office had not “heard of [the] state pursuing jail time for poor people who are unable to pay their child support.”¹⁹³ Likewise, Montana Legal Services investigated the issue in 2013 and determined that the state rarely used incarceration for nonpayment of child support.¹⁹⁴ In 2012, the state filed only twelve contempt actions, and out of those, just one person was actually jailed.¹⁹⁵ Finally, Breckie Hayes-Snow, the Interim Executive Director at the New Hampshire Legal Advice & Referral Center, reported that during her twenty years with the organization she has seen only “a small handful” of cases involving incarceration for failure to pay child support.¹⁹⁶ She suspected that courts were reluctant to use incarceration absent “significant aggravating factor[s]”; she did not believe that courts were “improperly employing incarceration.”¹⁹⁷

Conflicts of interest. Second, many legal aid organizations reported that they had conflicts of interest that precluded representation of noncustodial parents. For example, Coast to Coast Legal Aid of South Florida focuses on representing victims of domestic violence.¹⁹⁸ As such, its clients were frequently the ones *seeking* child support as part of litigation.¹⁹⁹ Likewise, Community Legal Aid in Massachusetts prioritizes services to custodial parents and “almost all of [its] family law clients are domestic violence victims.”²⁰⁰ Ed Marks, the Executive Director at New Mexico Legal Aid, also said that his organization had a “high demand” for these cases but assigned them “low priority” due to frequent conflicts of interest from past or current representation of custodial parents.²⁰¹

191. *Id.*

192. *Id.*

193. E-mail from M. Nalani Fujimori Kaina to Ashley Robertson, *supra* note 188.

194. E-mail from Amy Hall to Ashley Robertson, *supra* note 103.

195. *Id.*

196. E-mail from Breckie Hayes-Snow, Interim Exec. Dir., N.H. Legal Advice & Referral Ctr., to Ashley Robertson (Mar. 21, 2016, 9:28 AM) (on file with author).

197. *Id.*

198. E-mail from Lisa G. Goldberg, Supervising Att’y, Family Law Unit, Coast to Coast Legal Aid of S. Fla., to Ashley Robertson (Mar. 4, 2016, 10:18 AM) (on file with author).

199. *Id.*

200. E-mail from Jonathan L. Mannina, Exec. Dir., Cmty. Legal Aid, to Ashley Robertson (Mar. 5, 2016, 8:43 AM) (on file with author).

201. E-mail from Ed Marks, Exec. Dir., N.M. Legal Aid, Inc., to Ashley Robertson (Mar. 4, 2016, 7:10 PM) (on file with author); *see also* E-mail from Patricia A. Madsen, Managing
footnote continued on next page

Limited resources. Third, legal aid organizations lacked the resources to handle these cases. Raymond Macchia, the Executive Director of Legal Aid of Wyoming, reported that his organization seriously considered providing representation after the Supreme Court issued its decision in *Turner*.²⁰² But none of the organization's grantors would allow it to use funds to represent noncustodial parents in civil contempt cases.²⁰³ As he described, "[i]t is not a popular cause."²⁰⁴ Still, the state reports using incarceration sparingly. Tammy Hudson, with Child Support Services of Wyoming, reported that her office handles an average of 240 contempt actions per year and approximately 1% of contemnors go to jail directly after the initial contempt hearing.²⁰⁵ At the time of the interview, her county had five noncustodial parents in jail based on child support arrears, but each contemnor also had concurrent sentences for other charges.²⁰⁶

2. Organizations that represent noncustodial parents

Only a few attorneys in these states actually had experience representing noncustodial parents post-*Turner*. For example, Liam McGivern of Legal Services of Greater Miami often represented noncustodial parents who were veterans or recipients of Supplemental Security Income.²⁰⁷ He observed that the state had "absolutely not effectively employed safeguards for noncustodial parents."²⁰⁸ In his experience, the noncustodial parents "simply don't understand the legal process to modify their child support obligations."²⁰⁹ To do so, parents must petition for a modification outside of the contempt proceedings, but McGivern frequently saw parents trying to change the orders

Att'y, Family Law Unit, Cmty. Legal Servs., to Ashley Robertson (Apr. 8, 2016, 9:38 PM) (on file with author) ("Our primary concern about providing representation in nonpayment of child support cases would be conflicts of interest, considering our focus on [domestic violence] victims in child custody cases.").

202. E-mail from Raymond D. Macchia, Exec. Dir., Legal Aid of Wyo. Inc., to Ashley Robertson (Mar. 4, 2016, 10:16 AM) (on file with author).

203. *Id.*

204. *Id.*

205. E-mail from Tammy M. Hudson, Att'y, Child Support Servs. of Wyo., to Ashley Robertson (Mar. 10, 2016, 4:28 PM) (on file with author).

206. *Id.* Likewise, North Penn Legal Services in Pennsylvania typically does not provide representation because it does "not have the resources to become involved." E-mail from Vicki Coyle to Ashley Robertson, *supra* note 188.

207. E-mail from Liam McGivern to Ashley Robertson, *supra* note 188.

208. *Id.*; *see also* E-mail from Phyllis J. Holmen, Exec. Dir., Ga. Legal Servs. Program, to Ashley Robertson (Mar. 3, 2016, 1:56 PM) (reporting, based on conversations with practicing attorneys, that the state does not effectively employ alternative safeguards).

209. E-mail from Liam McGivern to Ashley Robertson, *supra* note 188.

at their contempt hearings.²¹⁰ He conceded that the cases are “generally pretty simple” but still believed that “having a trained advocate who knows the process makes a huge difference.”²¹¹

Likewise, Kansas Legal Services-Wichita represents noncustodial parents in contempt of court cases.²¹² Rhonda Sullivan, the organization’s managing attorney, believes that its representation makes a difference.²¹³ She found that her clients’ “idea of how the system works” often came “from watching [television].”²¹⁴ The legal services attorneys could clear up technical issues, advise the parents of their rights and options, and assist clients who “are not sophisticated enough to stop or modify their child support.”²¹⁵

Outside of those testimonials, however, very few legal aid organizations had a sense of how contempt hearings operate. Because almost no organizations actually handle these cases, there is necessarily little information from practitioners on how *Turner’s* procedural safeguards have functioned. Thus, the next Part explores *Turner’s* impact through an in-depth examination of South Carolina, the state at the center of the case.

IV. South Carolina Case Study

Turner v. Rogers involved a direct challenge to South Carolina’s civil contempt policy, so the state provides a useful case study in assessing the decision’s impact. The U.S. Supreme Court made its decision against the backdrop of South Carolina’s child support practices, and the Court tailored its procedural safeguards to the state’s perceived shortfalls. As the Court noted, in South Carolina, family court clerks review outstanding child support payments each month and issue show cause orders to any noncustodial parent who has fallen more than five days behind.²¹⁶ Vicki Turetsky, the Commissioner of the OCSE, believes that South Carolina is the only state that automatically orders show cause hearings as soon as noncustodial parents fall behind on their payments.²¹⁷ Given that family court clerks have no discretion about when to initiate contempt proceedings, it is likely that South Carolina processes a disproportionate number of these cases. At the time *Turner* reached the Court in 2011, South Carolina regularly incarcerated unrepresented

210. *Id.*

211. *Id.*

212. E-mail from Rhonda Sullivan to Ashley Robertson, *supra* note 123.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Turner v. Rogers*, 564 U.S. 431, 435-36 (2011).

217. Telephone Interview with Vicki Turetsky, *supra* note 74.

parents for civil contempt. County jail surveys in 2005 and 2009 estimated that 13-16% of the *total* jail population was serving time for missed child support payments.²¹⁸ Thousands of parents were held in contempt each year, and 98% of parents held in contempt were not represented by counsel.²¹⁹ Accordingly, the threat of incarceration without representation is especially acute in South Carolina.

This Part draws on interviews with those most familiar with the decision's impact—family court judges—to document whether and how *Turner* changed South Carolina's child support practices. Eight current and former family court judges from six of South Carolina's sixteen judicial circuits²²⁰ were interviewed.²²¹ The judges requested anonymity so they could speak candidly about their approaches to active civil contempt hearings. To accommodate, I have assigned each judge an identifying number, which I use consistently throughout this Note.

Six of the seven sitting judges agreed that the procedural reforms have made a “big difference” to the contempt hearings.²²² This Part examines how *Turner* made a difference. Part IV.A provides a brief background on the structure of South Carolina's contempt proceedings. Part IV.B examines the impact of *Turner's* “procedural safeguards”: (1) the use of forms to elicit relevant financial information and (2) the increased focus on ability to pay. Part IV.C highlights the decision's indirect consequences. Specifically, judges reported that they are more reluctant to use incarceration as an enforcement tool. Additionally, the state has implemented a screening process to limit the number of cases that reach contempt hearings in the first place. Finally,

218. See Brief of Elizabeth G. Patterson & South Carolina Appleseed Legal Justice Center as Amici Curiae in Support of Petitioner at 4, *Turner*, 564 U.S. 431 (No. 10-10), 2011 WL 141223 [hereinafter Brief of Elizabeth G. Patterson].

219. *Id.* at 3; see also Patterson, *supra* note 17, at 116-17 (stating that a 2005 survey found that South Carolina's jails “averaged over 1,500 child support contemnors at any given time”).

220. See *Circuit Court*, S.C. JUD. DEP'T, <http://www.sccourts.org/circuitCourt> (last visited May 5, 2017).

221. Unless otherwise noted, the information in this Part comes from a series of telephone interviews with South Carolina family court judges conducted from March 3, 2016 to March 14, 2016. On average, each conversation lasted about forty-five minutes. Among these judges was the Author's father, who is a family court judge in Greenville, South Carolina.

222. See Telephone Interview with Judge 2 (Mar. 8, 2016); see also Telephone Interview with Judge 1 (Mar. 8, 2016) (“[I]t has made a big difference.”); Telephone Interview with Judge 3 (Mar. 6, 2016) (“There has been an improvement . . .”); Telephone Interview with Judge 4 (Mar. 10, 2016) (“It's had a significant impact . . .”); Telephone Interview with Judge 5 (Mar. 3, 2016) (noting that the safeguards were “definitely” effective and “[e]veryone has been asking more questions”); Telephone Interview with Judge 6 (Mar. 8, 2016) (“It's had a tremendous impact . . .”).

Part IV.D presents the judges' evaluations of whether the Supreme Court should have guaranteed the right to counsel.

A. The Structure of Civil Contempt Hearings for Nonpayment of Child Support

South Carolina enforces child support orders through civil contempt proceedings.²²³ The vast majority of cases come through the clerk's office.²²⁴ As discussed above, the family court clerk identifies any noncustodial parent who has fallen more than five days behind on his child support.²²⁵ The clerk then sends those parents "an order to 'show cause' why [they] should not be held in contempt."²²⁶

When a parent receives a show cause order, the order includes the amount of money owed (the arrearage) and a date for the court hearing (the show cause hearing).²²⁷ If the parent fails to appear at the hearing, the clerk can issue a bench warrant for his arrest.²²⁸ Each week, family courts have a designated morning for show cause hearings, known colloquially as "deadbeat dad day."²²⁹ On that morning, one or two family court judges are assigned to hear show cause cases.²³⁰ These cases proceed one after another, and family court judges report spending between five and ten minutes on each case.²³¹ If the family court finds the obligor in contempt, the court can order the defendant incarcerated for up to one year unless he meets the required purge payment.²³² South Carolina does not require the court to appoint attorneys in these cases,

223. See *Turner*, 564 U.S. at 435.

224. Telephone Interview with Judge 1, *supra* note 222.

225. See *supra* notes 216-17 and accompanying text.

226. *Turner*, 564 U.S. at 435-36.

227. *Id.* at 436.

228. See Telephone Interview with Judge 5, *supra* note 222.

229. See Telephone Interview with Judge 4, *supra* note 222; see also *Turner*, 564 U.S. at 459 & n.5 (Thomas, J., dissenting) (explaining the origin of the phrase "deadbeat dads"). Although some mothers also owe child support, the judges reported that the overwhelming majority of noncustodial parents are fathers.

230. See, e.g., *The Family Court Trial Docket*, GREENVILLE COUNTY, <https://www.greenvillecounty.org/familycourtdocket/SearchResults.asp?CourtRoom=ALL&docketDates=20160412&buttonSearch=> (providing information about the court's docket).

231. Telephone Interview with Judge 2, *supra* note 222 (reporting that hearings last about ten minutes each); Telephone Interview with Judge 3, *supra* note 222 (reporting that hearings last about five minutes each); Telephone Interview with Judge 4, *supra* note 222 (reporting that hearings last between five and ten minutes each).

232. S.C. CODE ANN. § 63-3-620 (Supp. 2010).

and the judges estimated that only 1% of contemnors have legal representation.²³³

B. *Turner's* "Procedural Safeguards"

The facts in *Turner* were startling to many advocates. *Turner* was sentenced to twelve months in jail after a short hearing and virtually no interaction with the judge.²³⁴ Yet *Turner's* case was not anomalous. Judge 5, who previously spent a decade working as an attorney for the Child Support Division of South Carolina's Department of Social Services (DSS), reported that the procedure was standard for show cause hearings: "I love Judge Cain [the judge in *Turner's* contempt proceeding], but I saw him in Oconee County, and he didn't ask [any] questions. He'd just say, 'Is there anything you'd like to tell the court?'"²³⁵ Judge Cain was not alone. Judge 5 said, "That's how most judges did it [before *Turner*]."²³⁶ In fact, a 2010 study of hundreds of show cause hearings in South Carolina observed that the "hearings had an assembly-line pace, lasting only about three minutes on average, with few hearings lasting more than six minutes."²³⁷

In *Turner*, the Court suggested four procedural safeguards to make show cause hearings more meaningful. The safeguards revolved around helping the judge determine a contemnor's ability to pay child support. As the Court emphasized, a contemnor's "ability to pay" his child support marks the "dividing line between civil and criminal contempt."²³⁸ In theory, if a contemnor has the ability to comply with the child support order, his failure to do so is nothing more than the willful violation of a court order. As mentioned above, the Supreme Court suggested the following safeguards to ensure that contempt is actually willful: (1) states provide notice to the contemnor that his "ability to pay" is a critical issue, (2) states use a form to elicit the contemnor's relevant financial information, (3) judges inquire about ability to pay at the hearing and give the contemnor an opportunity to respond to questions about his financial status, and (4) judges make an express finding that the contemnor has the ability to pay.²³⁹

This Subpart assesses how effective those procedural reforms have been in practice. The interviewed judges reported spending additional time eliciting

233. See, e.g., Telephone Interview with Judge 5, *supra* note 222.

234. See *Turner*, 564 U.S. at 437.

235. Telephone Interview with Judge 5, *supra* note 222.

236. *Id.*

237. Brief of Elizabeth G. Patterson, *supra* note 218, at 14.

238. *Turner*, 564 U.S. at 445.

239. *Id.* at 447-48.

information about ability to pay. But all seven sitting judges attested that they had rarely received financial declarations, and when they did, the forms were “absolutely worthless.”²⁴⁰ Without meaningful hard evidence, most judges agreed that it was difficult to make fully accurate assessments of an obligor’s ability to pay.

1. The use of forms

Turner required courts to employ “a form (or the equivalent) to elicit relevant financial information.”²⁴¹ In response, South Carolina began issuing a financial declaration form with every order to show cause. The state purposefully simplified its child support financial declaration into a five-page “short form.” The short form includes three areas: (1) “Gross Monthly Income” like earnings and social security; (2) “Assets” like cash and money in bank accounts; and (3) “Monthly Expenses,” including twenty-five different categories like cell phone, rent or mortgage, and food.²⁴²

In practice, however, the forms are rarely used or helpful. All seven sitting judges reported that they almost never receive these forms.²⁴³ As Judge 3 summarized, he frequently travels to other counties, but no matter where he goes he does not “see the financial declaration.”²⁴⁴ He reasoned that the use of forms breaks down at multiple steps. First, someone must ensure that the noncustodial parent actually receives the form. Second, the parent must take the time to fill out the form. Third, the parent must figure out how to report his income, assets, and expenses accurately.²⁴⁵

When judges do receive these forms, they often find them “absolutely worthless.”²⁴⁶ Judge 3 said that financial declarations are “the biggest problem with the Court sitting in Washington” and dictating practice in the South

240. Telephone Interview with Judge 7 (Mar. 14, 2016); *see also infra* note 243.

241. *Turner*, 564 U.S. at 447.

242. S.C. Judicial Dep’t, Financial Declaration Form 1-3 (n.d.), <http://www.sccourts.org/forms/pdf/SCCA430.pdf>.

243. Telephone Interview with Judge 1, *supra* note 222 (“Most people don’t have them. . . . They don’t bother to do it.”); Telephone Interview with Judge 2, *supra* note 222 (“I don’t get many of those. They don’t have it before the hearing.”); Telephone Interview with Judge 3, *supra* note 222 (“I don’t see a lot of [the financial declaration forms].”); Telephone Interview with Judge 4, *supra* note 222 (“I’ve received zero of these forms.”); Telephone Interview with Judge 5, *supra* note 222 (“We are still not getting documentation.”); Telephone Interview with Judge 6, *supra* note 222 (“I hardly ever see [the financial declaration forms].”); Telephone Interview with Judge 7, *supra* note 240 (“Financial declarations are worthless. . . . [They do] not help one little bit.”).

244. Telephone Interview with Judge 3, *supra* note 222.

245. *Id.*

246. Telephone Interview with Judge 7, *supra* note 240.

Carolina family court.²⁴⁷ Judge 3 said that when he does receive a financial declaration, “[T]he net income is zero. That doesn’t help me at all. They won’t fill out the page that shows expenses. It just doesn’t really work the way the Supreme Court [thought] it would.”²⁴⁸

In some cases, the use of forms actually backfires. Judge 4 reported that a colleague *did* require everyone in his courtroom to fill out a form.²⁴⁹ But in addition to financial information, the form solicited information about the obligor’s drug use.²⁵⁰ Judge 4’s colleague then used that information in setting jail sentences. Judge 4 understood the frustration of a parent paying for drugs instead of child support, but he argued that “the parent also has a right not to incriminate themselves, and we shouldn’t be soliciting information about criminal activity.”²⁵¹

2. Focus on the ability to pay

The judges agreed that *Turner* made them more sensitive to the ability to pay. When she was a DSS attorney, Judge 5 saw everyone begin asking more questions.²⁵² Judge 1 agreed. He noted that he now begins every hearing by informing parents that their ability to pay is a critical issue, and he focuses on uncovering the parents’ reasons for nonpayment.²⁵³ He admits that before *Turner*, he did not ask those questions.²⁵⁴ Likewise, Judge 3 acknowledged that he now makes a more sustained inquiry.²⁵⁵ Only one judge, Judge 7, reported that the decision “didn’t really change anything” for him, but he also said that he asked “a series of questions” even before *Turner*.²⁵⁶

Several judges provided details about how they have implemented *Turner*’s mandate. Judge 2 said he is “now very careful” to make the distinction between civil and criminal contempt clear on the record.²⁵⁷ He recited the standard warning he uses to open each hearing:

This is not a criminal case, and I am not here to decide if you should be punished.
This is a civil contempt proceeding, and the purpose is for me to determine

247. Telephone Interview with Judge 3, *supra* note 222.

248. *Id.*

249. Telephone Interview with Judge 4, *supra* note 222.

250. *Id.*

251. *Id.*

252. Telephone Interview with Judge 5, *supra* note 222.

253. Telephone Interview with Judge 1, *supra* note 222.

254. *Id.*

255. Telephone Interview with Judge 3, *supra* note 222.

256. Telephone Interview with Judge 7, *supra* note 240.

257. Telephone Interview with Judge 2, *supra* note 222.

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whether you have intentionally failed to comply with the child support order. Because of that distinction, your ability to pay is an important factor for me to consider.²⁵⁸

He found that the warning “seems to focus [the noncustodial parent] more on the financial aspect” of the inquiry.²⁵⁹ Before *Turner*, noncustodial parents often used the hearing to list grievances with the custodial parent. Now, the noncustodial parents hear the warning and tell the judges about losing jobs and searching for employment.²⁶⁰

Judge 7 also provided the list of questions he typically asks during a hearing. He starts by asking about the parent’s age and education level in the hopes of getting the parent “comfortable talking to the judge.”²⁶¹ Once he has established a rapport with the parent, he asks: “Where are you working? How long have you been working? What is your rate of pay?”²⁶² If the noncustodial parent reports being unemployed, he asks: “When were you working last? What happened to that job?”²⁶³

The judges were more mixed, however, about how effective the colloquies are in actually assessing ability to pay. In part, judges are limited by docket constraints, which allow only a short window to inquire into the contemnor’s finances. For example, Judge 3 is “very willing to go through a long discourse with” the contemnor, but he conceded that “long” is a “relative term,” and he “really [does not] have a lot of time.”²⁶⁴ In all, judges said they spend about five to ten minutes on each case.²⁶⁵

Sometimes, judges can readily assess ability to pay, even in that short timeframe. Judges have the clerk’s record, so they can see whether contemnors have been in court before, what their stories were, and whether they were able to make payments.²⁶⁶ At one extreme, the record may show that the contemnor paid regularly until a sudden interruption, which suggests that the person lost his job.²⁶⁷ At the other extreme, the contemnor may admit that he has been working for two years and paid nothing.²⁶⁸ As Judge 4 explained, he

258. *Id.*

259. *Id.*

260. *Id.*

261. Telephone Interview with Judge 7, *supra* note 240.

262. *Id.*

263. *Id.*

264. Telephone Interview with Judge 3, *supra* note 222.

265. *See, e.g., id.*

266. *See id.*

267. Telephone Interview with Judge 6, *supra* note 222.

268. *Id.*

might find a case where the custodial parent “could not have complied with the full terms of the order” but had the ability to pay more than “zero.”²⁶⁹

Without the use of financial declarations, however, determining ability to pay can be difficult. Judges have started hearing the same story repeatedly, and it can be difficult to separate truth from fiction without corroborating evidence. As Judge 3 said, “[t]hey always tell you that they will have a new job in two weeks and they would be out interviewing if they weren’t here. You get that crap all the time. You try to figure out if they are being honest.”²⁷⁰ Sometimes, Judge 3 admitted that he sometimes relied on “gut feeling” to assess veracity.²⁷¹ Likewise, Judge 6 said, “You know when you’re dealing with a scoundrel and when you’re not.”²⁷² Judge 4, however, questioned the use of gut feelings. He noted, “We often trust our intuition, and our intuition is often completely wrong. They’ve researched gut feelings, and gut feelings are wrong as much as they are right.”²⁷³

Given that judges struggle to assess ability to pay, it is especially difficult to set the purge amount for those held in contempt. When setting a purge payment, judges try to “connect [the] payout to what [the parent] actually could have paid.”²⁷⁴ Judge 7 noted that he was always “searching for that number . . . that they can and will pay.”²⁷⁵ He explained that if the contemnor owes \$50,000 and the judge sets the purge at that amount, the contemnor will “serve his year.”²⁷⁶ But if he sets the purge at \$3000 per month, contemnors can often pay out.²⁷⁷ Again, though, this “magic number” can be elusive. Judge 3 described setting the purge amount as “playing poker”: he tries to determine how much the contemnor could pay without going too high.²⁷⁸

Frequently, the judges will rely on the noncustodial parent to volunteer a purge amount. If Judge 5 thinks that the parent is in contempt, she will ask the

269. Telephone Interview with Judge 4, *supra* note 222.

270. Telephone Interview with Judge 3, *supra* note 222; *see also* Telephone Interview with Judge 7, *supra* note 240 (“Most of us . . . bend over backwards to try to be fair and listen, but we do not have a lot of patience for the BS stuff. It did not take but a few weeks on the bench to learn that everyone who is in jail on a bench warrant has a job waiting for them on Monday.”).

271. Telephone Interview with Judge 3, *supra* note 222.

272. Telephone Interview with Judge 6, *supra* note 222; *see also* Telephone Interview with Judge 7, *supra* note 240 (“A lot of that [intuition] comes through experience on the bench, and you get sharper about who is credible and who is not.”).

273. Telephone Interview with Judge 4, *supra* note 222.

274. *Id.*

275. Telephone Interview with Judge 7, *supra* note 240.

276. *Id.*

277. *Id.*

278. Telephone Interview with Judge 3, *supra* note 222.

parent how much he is capable of paying and is often surprised at how high they go.²⁷⁹ Likewise, Judge 3 noted that he is “amaz[ed]” at what noncustodial parents volunteer to pay.²⁸⁰

But Judge 5 worried that when contemnors volunteer a purge amount, “they might be borrowing from Peter to pay Paul.”²⁸¹ In fact, most judges acknowledged that the contemnor was often relying on his family or girlfriend for the money. The judges were largely unconcerned with where the money came from. To them, any money could help support a needy child. But two judges acknowledged the limitations of this approach. Judge 5 explained, “They might be getting money from a grandmother, and then grandmother’s lights are turned off.”²⁸² Judge 4 corroborated that intuition with a particularly extreme anecdote:

There was a man that had spent three years in jail. When he got out, he went to the eye doctor, who confirmed that he was legally blind and could not work. But within two weeks of his release, he was brought in for failure to pay child support. [The judge] told him he would need to serve a year or pay a ridiculous balance. . . . Eventually, the man’s mother mortgaged her house to pay him out of jail.²⁸³

That episode happened before *Turner* and is less likely to occur today. But it illustrates the dangers in relying on relatives to foot the purge amount.

Ultimately, Judge 5 admitted that she was simply “guessing” on some purge payments.²⁸⁴ She candidly acknowledged that she “hate[s] bench warrant day and contempt days” and would be more effective if she had a better sense of the underlying evidence.²⁸⁵ Judge 3 said that *Turner* did not provide judges with any “profoundly wonderful ways” of determining ability to pay, but the inquiry “ensures [he is] thinking through the things [he] should be thinking about.”²⁸⁶ Judge 1 similarly said, “It’s not a perfect system, but the bottom line for me and all the judges is to try to figure out what [we] can do to get them paying.”²⁸⁷

279. Telephone Interview with Judge 5, *supra* note 222.

280. Telephone Interview with Judge 3, *supra* note 222.

281. Telephone Interview with Judge 5, *supra* note 222.

282. *Id.*

283. Telephone Interview with Judge 4, *supra* note 222.

284. Telephone Interview with Judge 5, *supra* note 222.

285. *Id.*

286. Telephone Interview with Judge 3, *supra* note 222.

287. Telephone Interview with Judge 1, *supra* note 222.

C. *Turner's* Indirect Impact

Turner's procedural safeguards may not be fully effective, but the decision had at least two notable indirect consequences. *Turner* emphasized that the contemnor “carr[ies] the keys of [his] prison in [his] own pockets.”²⁸⁸ As a result of that directive, judges report being “more sensitive to the idea that people shouldn’t sit in jail.”²⁸⁹ Moreover, judges largely found that the “biggest difference” after *Turner* is in the procedures that occur before the case even reaches the judge.²⁹⁰ Specifically, South Carolina’s DSS now screens cases for ability to pay before the hearing.²⁹¹

1. Reluctance to use incarceration

When Judge 3 first took the bench, he modeled his incarceration philosophy on that of a senior judge who used a formula to determine jail sentences.²⁹² According to Judge 3, the senior judge thought she was treating everyone equally because for every \$1000 that a contemnor owed, she would sentence him to a month in jail.²⁹³ As such, the senior judge never asked any questions at the hearing, and “people just got stuck” in jail.²⁹⁴ Judge 3 argued that *Turner* improved the status quo because it made judges more reluctant to order jail time.²⁹⁵

Moreover, when judges do use incarceration, they exercise “a little more caution in handing out a lengthy sentence.”²⁹⁶ Judge 7 said that in his experience, judges “are more careful and are more lenient than they were before.”²⁹⁷ On a personal level, Judge 7 admitted that he previously gave one-year contempt sentences, but now he usually maxes out sentences at six months.²⁹⁸ He attributed part of that change to *Turner*.²⁹⁹ Likewise, Judge 5

288. See *Turner v. Rogers*, 564 U.S. 431, 442 (2011) (alterations in original) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988)).

289. Telephone Interview with Judge 3, *supra* note 222.

290. Telephone Interview with Judge 2, *supra* note 222.

291. See *infra* Part IV.C.2.

292. Telephone Interview with Judge 3, *supra* note 222.

293. *Id.*

294. *Id.*

295. See *id.*

296. Telephone Interview with Judge 7, *supra* note 240.

297. *Id.*

298. *Id.*

299. *Id.*

observed: “[J]udges are shortening the time [in jail] and lowering the [purge amount]. They won’t require thousands of dollars to purge like they used to.”³⁰⁰

The judges’ hesitance to use incarceration follows naturally from *Turner’s* focus on ability to pay. The judges recognize that if the contemnor did not actually carry the keys to his prison, his incarceration “really doesn’t help anyone.”³⁰¹ Judge 3 explained, “If I put someone in jail, and they can’t come up with the money to get out, that’s not helping the child; their arrearages are growing, and taxpayers are footing the bill. It doesn’t make sense to send people to jail for child support if you can avoid it.”³⁰² Similarly, Judge 7 explained, “We all know incarcerating them for nonpayment is not helping anybody because mama’s not getting paid, he’s not working, and the government is paying for the incarceration.”³⁰³

That said, not all judges have reduced the use of incarceration. Judge 3 acknowledges that there are a few judges who send people to jail “much more freely than [he] do[es].”³⁰⁴ Judge 5 agreed that judges in smaller counties “still lock [parents] up” frequently.³⁰⁵ She said that one judge “does it to every single person. He feels it is effective. . . . [H]e can get away with it because nobody is going to appeal it.”³⁰⁶

Judge 6 admitted that he was “probably considered one of the strong judges,” in terms of using incarceration as an enforcement tool.³⁰⁷ He asserted, “This is one of the things I like least about family court. . . . I do not like putting people in jail. You just know it has be done.”³⁰⁸

Judge 8, who served on the family court for almost thirty years, had a reputation as the strongest child support enforcement judge in the state during his tenure. Judge 8 retired the year before *Turner*, and he saw the decision as out of touch with the “real world,” where there are “people who refuse to pay unless they are forced.”³⁰⁹ To Judge 8, “the proof was in the pudding.”³¹⁰ After a friend accused him of operating a “debtors’ prison,” he conducted a year-long study of every case where he sentenced someone to incarceration for failure to

300. Telephone Interview with Judge 5, *supra* note 222.

301. Telephone Interview with Judge 3, *supra* note 222.

302. *Id.*

303. Telephone Interview with Judge 7, *supra* note 240.

304. Telephone Interview with Judge 3, *supra* note 222.

305. Telephone Interview with Judge 5, *supra* note 222.

306. *Id.*

307. Telephone Interview with Judge 6, *supra* note 222.

308. *Id.*

309. Telephone Interview with Judge 8 (Mar. 11, 2016).

310. *Id.*

pay child support.³¹¹ His sample consisted of nearly 3000 cases during the year, and each time, he sentenced the contemnor to the one-year maximum.³¹² He found that some people were “out by lunch time.”³¹³ In total, 80% paid within the first two weeks.³¹⁴

Judge 8 summed up his overriding philosophy: “I always kept in my mind [that] the person I’m concerned about is not in the courtroom: it is the child.”³¹⁵ That said, he recognized that *Turner* represented a sea change for the use of incarceration in child support cases.³¹⁶ He admits that he “would have been reversed in every case [he] had if it had gone to the Supreme Court” and is “glad [he] retired before *Turner*.”³¹⁷

2. Screening process

After *Turner* came down, South Carolina suspended enforcement of child support rules for a month until the state could devise procedures in response to the opinion and accompanying federal guidance.³¹⁸ The OCSE issued guidance to all state agencies administrating child support enforcement plans, which included a list of best practices.³¹⁹ Those best practices suggest that agencies screen cases before calling them into court.³²⁰ Judge 5, who was working at the South Carolina DSS at the time, said that the guidance prompted the DSS to shift course and determine a contemnor’s financial circumstances *before* each hearing.³²¹ Now, the DSS evaluates whether each case should be brought before the judge at all and settles most cases, such that obligors never face incarceration.³²²

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. See Lillian B. Koller, S.C. Dep’t of Soc. Servs., Annual Accountability Report: July 1, 2011-June 30, 2012, at 18 (2012), <https://dss.sc.gov/resource-library/statistics/mgmt/acct1112.pdf>; see also Telephone Interview with Judge 1, *supra* note 222.

319. Letter from Vicki Turetsky, Comm’r, Office of Child Support Enf’t, to State Agencies Administering Child Support Enf’t Plans Under Title IV-D of the Soc. Sec. Act & Other Interested Individuals (June 18, 2012), <http://www.acf.hhs.gov/css/resource/turner-v-rogers-guidance>.

320. *Id.*

321. Telephone Interview with Judge 5, *supra* note 222.

322. *Id.*

To the judges, *Turner* has made the “biggest difference” through those screening procedures.³²³ Before the screening mechanisms were implemented, judges reported nearly unmanageable dockets for child support. Judge 6 provided a particularly disturbing example:

[I]n 1999, I went to Newberry for a DSS rule day. When I got there, people were lined up outside the building. . . . We were working to get first downs: we would try to reduce the line by ten yards at a time. By 6:30 PM, there was a couple that was arguing about who had custody of the child, and I finally realized that I [hadn’t heard] a word they said. I had reached the point where I just couldn’t listen anymore. At the end of the day, I had signed 146 orders. That’s not justice. When you’re looking at putting somebody in jail for needing to pay child support, something certainly needed to be done.³²⁴

Judge 3 had a similar experience. When he was in Charleston, South Carolina, he once heard 123 contempt cases in a day.³²⁵ He described the experience as “horrible”: “Every hour, I had a whole new shift of defendants coming through the court room. I was as tired as I’ve ever been.”³²⁶

The DSS screenings provided an answer to an “almost impossible” number of contempt hearings.³²⁷ As Judge 2 described, the screening helped reduce the number of contemnors facing jail time.³²⁸ Judge 6 agreed that it “certainly was necessary to streamline” the process,³²⁹ and Judge 3 found that the negotiations were a “very, very effective tool.”³³⁰

If the noncustodial parents and the DSS reach an agreement, the case never goes to court.³³¹ Instead, the judge simply signs their consent order.³³² Notably, the negotiated agreements do not include bench warrant provisions.³³³ If the parent fails to meet the terms of the agreement, he is simply called back in for another show cause hearing.³³⁴ Judge 5, who was with the DSS when it first implemented the screenings, reported that the DSS’s position in these cases has shifted “100%” since *Turner*.³³⁵ Before the decision, caseworkers were trained to

323. Telephone Interview with Judge 2, *supra* note 222.

324. Telephone Interview with Judge 6, *supra* note 222.

325. Telephone Interview with Judge 3, *supra* note 222.

326. *Id.*

327. Telephone Interview with Judge 6, *supra* note 222.

328. *See* Telephone Interview with Judge 2, *supra* note 222.

329. Telephone Interview with Judge 6, *supra* note 222.

330. Telephone Interview with Judge 3, *supra* note 222.

331. *See id.*

332. *Id.*

333. *Id.*

334. *See id.*

335. Telephone Interview with Judge 5, *supra* note 222.

favor the custodial parent and had “deadbeat dad syndrome”—they “wanted to put them all in jail.”³³⁶ After *Turner*, the DSS abandoned that prosecutorial mindset.

The judges’ only criticism of this program was that the custodial parents might miss out on needed payments. Judge 6 felt that he could “extract a whole lot more child support” with the threat of incarceration, so without that threat, “deserving mothers” and “the children themselves” go without support that a judge could have secured.³³⁷ Judge 3 agreed that the custodial parents were the only parties likely to complain, but he had not yet heard concerns from them.³³⁸

D. Right to Counsel?

Despite the obstacles under the current system, seven out of the eight judges agreed that the Court should not require states to provide appointed counsel in these civil contempt proceedings. The judges admitted that there is no foolproof way to determine ability to pay under the current system. But *Mathews* asks about the relative value of an additional safeguard,³³⁹ and the judges believed that lawyers would add only marginal value at substantial cost.

1. The majority view

The judges all agreed that lawyers added value to civil contempt proceedings. As Judge 2 explained, he “would never say that it wouldn’t be a benefit to the person to be represented.”³⁴⁰ On a substantive level, lawyers are better able to present the case than their clients, who are often “marginally educated” and inexperienced in the courtroom.³⁴¹ Moreover, Judge 6 noted that an attorney with a reputation as a “straight shooter” might have more credibility than the parent.³⁴² Represented clients also enjoy a clear procedural benefit: judges almost always call cases with counsel first.³⁴³ Thus, the represented parents get the judge fresh while other noncustodial parents wait in the lobby for their hearing.

The judges, however, were adamant that outcomes did not vary based on whether the noncustodial parent was represented. As a matter of procedure,

336. *Id.*

337. Telephone Interview with Judge 6, *supra* note 222.

338. Telephone Interview with Judge 3, *supra* note 222.

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

340. Telephone Interview with Judge 2, *supra* note 222.

341. Telephone Interview with Judge 6, *supra* note 222.

342. *Id.*

343. Telephone Interview with Judge 2, *supra* note 222.

the judges insisted that they ask the lawyers the same questions they ask the litigants.³⁴⁴ As a matter of substance, they argued that the question of ability to pay is typically straightforward. As Judge 2 noted, the average case is usually “a matter of whether the person is working or not, or whether [that person is] intentionally unemployed.”³⁴⁵ By the time the case reaches the contempt proceeding, most of the record is set and there is little room for advocacy.

Although the answer to the “ability to pay” question is not always straightforward, the judges were skeptical that attorneys would clarify the matter. Judge 3 theorized that if the state guaranteed counsel, lawyers still would not be able to meet with clients before the hearing: “We’ve had lawyers who are appointed by the court . . . , and they’d talk to the clients for about two minutes.”³⁴⁶ He asked, “How is that meaningful?”³⁴⁷

The judges thought that those limited benefits did not justify the costs. Just as the Supreme Court recognized in *Turner*, the judges noted that custodial parents were almost always unrepresented. Therefore, they thought appointing lawyers to the noncustodial parents would “creat[e] an imbalance” and “leave petitioners helpless.”³⁴⁸ Judge 8, for example, argued that fairness would require the state to provide counsel for the custodial parent as well, and “taxpayers will ache [from] provid[ing] lawyers in all of these cases.”³⁴⁹

Moreover, the judges worried that lawyers would significantly prolong the hearings. One judge noted that instead of hearing fifteen or twenty cases in a morning, he might be able to hear only three or four.³⁵⁰ They worried that this delay would have costs beyond the financial. First, the family court docket is crowded with other high-priority cases like termination of parental rights hearings, child custody disputes, and juvenile delinquency adjudications.³⁵¹ If contempt hearings consumed more of the judges’ docket, those other cases would suffer.³⁵² Second, judges worried that the delay would leave “parents with children who are not supported and cannot get into court.”³⁵³

344. *Id.* (“I ask the exact same questions and give the exact same spiel.”); Telephone Interview with Judge 3, *supra* note 222 (“I ask the questions the same way I do with any other person.”).

345. Telephone Interview with Judge 2, *supra* note 222.

346. Telephone Interview with Judge 3, *supra* note 222.

347. *Id.*

348. Telephone Interview with Judge 1, *supra* note 222.

349. Telephone Interview with Judge 8, *supra* note 309.

350. Telephone Interview with Judge 1, *supra* note 222.

351. Telephone Interview with Judge 4, *supra* note 222.

352. *See id.*

353. Telephone Interview with Judge 8, *supra* note 309.

2. The dissenting view

Judge 5, the only judge with experience at the DSS, was also the only judge who thought that South Carolina should appoint counsel. First, she believed that the noncustodial parents cannot articulate their reasons for failing to pay.³⁵⁴ She observed, “[A] lot of them are nervous and emotional. For a bench warrant, you’re shackled. You might forget to say something that would be critical They are shackled, and they are so scared of going to jail.”³⁵⁵

Judge 5 felt that she could not get the full financial picture from a colloquy with the noncustodial parent.³⁵⁶ She thought judges were “guessing a lot of times,” but an attorney could help the clients fill out the financial declarations.³⁵⁷ She also thought attorneys could actually save the court time.³⁵⁸ Currently, she continues cases when the noncustodial parent does not have the relevant information, but a prepared lawyer could avoid those constant continuances.³⁵⁹ On a more fundamental level, Judge 5 believed that noncustodial parents facing jail time should have legal representation.³⁶⁰ She summed up, “We have more people in handcuffs than regular court. Are we in criminal court here? We’re family court!”³⁶¹

V. Reevaluating *Turner v. Rogers*

Drawing on the surveys and interviews, this Part evaluates the Supreme Court’s decision in *Turner* as well as how states and private practitioners should respond. Part V.A begins with *Turner* itself. Taking the Court on its own terms, that Subpart reexamines the Court’s application of the *Mathews* balancing test. It concludes that although the Court was correct not to require states to provide counsel, it should strengthen the alternative safeguards. Part V.B encourages states to provide counsel of their own volition and to do so with adequate funding and training. Part V.C examines the role that private practitioners can play to further ensure access to justice.

354. Telephone Interview with Judge 5, *supra* note 222.

355. *Id.*

356. *See id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *See id.*

361. *Id.*

A. The Supreme Court

1. The right to counsel

Accepting the *Mathews* balancing test as a given, the Court was right not to require states to provide counsel. This is true largely for one reason: the Court can force states to provide representation, but it has never forced states to fund attorneys in any meaningful sense.³⁶² The abovementioned surveys with practitioners reveal serious problems when states nominally guarantee counsel but do not adequately fund these attorneys.³⁶³

First, even the best-intentioned attorneys can lack the time and resources to provide meaningful representation. Practitioners in multiple states reported that attorneys only meet with the client on the day of the hearing.³⁶⁴ Thus, although attorneys might be especially useful in tracking down documentation of the client's inability to pay, those court-appointed attorneys have no functional ability to do so.

Second, the state does not always train its public defenders on the difference between civil and criminal contempt. The public defenders may be more likely to "plead" out of civil contempt cases without addressing the underlying problem: the child support order.³⁶⁵ Thus, noncustodial parents may take on unworkable agreements and end up facing a bench warrant with no defense.³⁶⁶

Third, attorneys may instill in judges a false sense of security and cause them to assume that the attorneys can adequately protect their clients' rights. As other commentators have noted, "rights to legal counsel coupled with inadequate resources for implementation produce the illusion rather than the reality of effective assistance of counsel."³⁶⁷ In South Carolina, the judges were highly conscious of their role in determining ability to pay, and they also reported being more reluctant to use incarceration in these cases.³⁶⁸ But *Turner* required the use of substitute procedural safeguards only when the state did not

362. Recently, the Department of Justice has taken the position that the Court *could* force states to fund meaningful representation. See Statement of Interest of the United States at 1, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Aug. 14, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf. The Court has yet to adopt that stance, but if it did, that position would necessarily change the calculus in this Note.

363. See *supra* Part III.A.2.

364. See, e.g., Telephone Interview with David Eskin, *supra* note 153; Telephone Interview with Tom Frohman, *supra* note 116.

365. See Telephone Interview with Tom Frohman, *supra* note 116.

366. See *id.*; see also E-mail from Michael G. Figgins to Ashley Robertson, *supra* note 85.

367. DEBORAH L. RHODE ET AL., LEGAL ETHICS 840 (6th ed. 2013).

368. See *supra* Parts IV.B.2, IV.C.1.

already provide representation.³⁶⁹ Notably, some states and counties that provide attorneys still have judges who routinely incarcerate noncustodial parents for failure to provide child support.³⁷⁰

Fourth, providing attorneys comes at a cost in terms of both dollars and time. The family court hears many high-stakes disputes, and the court's docket is often a zero-sum game: more time on child support cases means less time on other important disputes.³⁷¹ More fundamentally, a delay in child support cases means a delay in families receiving support. One attorney who handled these cases said that he had the "most room for advocacy" in pushing for continuances.³⁷² But as the cases drag on for months, needy custodial parents and their children go without critical payments.

There is potentially another cost to providing counsel: it perpetuates an adversarial system that can be harmful in domestic relations cases. Vicki Turetsky said that the OCSE worked with the Solicitor General in filing its amicus brief in *Turner*.³⁷³ Her office's "vision is not more lawyers with the same number of hearings, [but] less need for lawyers because there are less hearings."³⁷⁴ In part, her view stems from years as a legal aid attorney, where she witnessed how the "pain and conflict" from litigation hurt parents and children alike.³⁷⁵ At least in South Carolina, Turetsky's vision is becoming reality, as the state frequently negotiates these cases rather than resorting to hearings.³⁷⁶

2. Alternative safeguards

The Court may have been justified in not guaranteeing counsel, but its substitute safeguards do not go far enough. This Subpart provides three important fixes for the *Turner* safeguards: (1) actually ensure the "use of forms," (2) clarify what "ability to pay" entails, and (3) promote judicial compliance.

369. See *Turner v. Rogers*, 564 U.S. 431, 449 (2011) (noting that *Turner* had "neither counsel nor the benefit of alternative procedures," which suggests that *either* would satisfy due process (emphasis added)).

370. See *supra* note 73 and accompanying text; see also Telephone Interview with Susan Pearlstein, *supra* note 109 (noting that judges routinely incarcerate noncustodial parents in Philadelphia despite the presence of counsel).

371. See *supra* notes 350-52 and accompanying text.

372. Telephone Interview with David Eskin, *supra* note 153.

373. Telephone Interview with Vicki Turetsky, *supra* note 74.

374. *Id.*

375. *Id.*

376. See *supra* Part IV.C.2.

The use of forms. As discussed above, judges in South Carolina almost never receive financial declarations.³⁷⁷ When judges do receive those forms, they are usually filled out in a perfunctory manner.³⁷⁸ Other states report similar problems. For example, Wyoming’s Child Support Services began serving noncustodial parents with a “simple financial affidavit.”³⁷⁹ In theory, the staff members could review the declarations and dismiss cases “if they felt there was truly an inability to pay.”³⁸⁰ In the majority of cases, however, the office never received the forms.³⁸¹

Fortunately, there is a simple fix: the Supreme Court can clarify that “the use of a form (or the equivalent) to elicit relevant financial information” means what it says.³⁸² That is, states must actually *use* these forms and make sure the forms elicit the relevant financial information. If noncustodial parents are consistently unable to use these forms in a meaningful way, states must step in to ensure the forms’ efficacy.

As one judge recommended, the state might do so by hiring low-level staff to help contemnors prepare appropriate declarations.³⁸³ Another judge believed that the state could use a “\$10-per-hour clerk” to elicit the relevant financial history.³⁸⁴ Indeed, the Supreme Court suggested in *Turner* that “assistance other than purely legal assistance,” including “that of a neutral social worker,” might help states meet their constitutional obligations.³⁸⁵

Courts across the country are already experimenting with using clerks or assistants to aid unrepresented litigants.³⁸⁶ Some jurisdictions have instituted “information tables staffed by non-lawyers, court clinics staffed by law students, and ‘lawyers-for-the-day’ programs staffed by volunteer lawyers.”³⁸⁷ For example, New York City requires a “sufficient” number of pro se clerks to assist unrepresented litigants in housing court, and the New York City Housing Courts employ a “pro se attorney” in each borough.³⁸⁸ In Tallahassee,

377. *See supra* Part IV.B.1.

378. *See supra* Part IV.B.1.

379. E-mail from Tammy M. Hudson, Att’y, Child Support Servs. of Wyo., to Ashley Robertson (Mar. 9, 2016, 8:27 PM) (on file with author).

380. *Id.*

381. *Id.*

382. *Turner v. Rogers*, 564 U.S. 431, 447 (2011).

383. Telephone Interview with Judge 3, *supra* note 222.

384. Telephone Interview with Judge 7, *supra* note 240.

385. *Turner*, 564 U.S. at 448.

386. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1999-2000 (1999).

387. *Id.*

388. *Id.* at 1999 nn.51-52 (quoting N.Y. CITY CIV. CT. ACT § 110(o) (McKinney 1989)).

Florida, a court has established a “full-time assistant for family law cases” who reviews all “required documentation submitted by pro se litigants.”³⁸⁹ Similarly, states could provide staff members to help pro se contemnors fill out financial forms. Doing so would cost the state far less than providing licensed attorneys, and it would better ensure that judges could ground their decisions in hard evidence.

The “ability to pay.” The Supreme Court should also clarify what the “ability to pay” entails. When the Court distinguished between civil and criminal contempt, it emphasized that in civil cases, the contemnor “carr[ies] the keys of [his] prison in [his] own pockets.”³⁹⁰ But for a contemnor to truly control his own fate, he must actually have the ability to pay the ordered support as well as the present ability to purge himself of contempt. Accordingly, the Court should instruct judges that the contemnor himself should be able to pay the child support and purge amount.

Most of the interviewed judges thought that the contemnor had the ability to pay if he could borrow money to do so. As one judge said, “[e]ven if it is borrowing money from employers, relatives, or friends, that’s still an ability to pay. If they can borrow it now, they should have taken it earlier.”³⁹¹ Other judges, however, pushed back on that definition and worried about courts holding parents hostage in jail until relatives could bail them out.³⁹² The latter view seems more in line with *Turner*. The Court imagined in *Turner* that a contemnor would carry the keys to release “in [his] own pockets,” such that he would personally control his freedom.³⁹³ The Court never considered the toll on friends or family members if courts considered their ability to pay in a contemnor’s stead.

For similar reasons, the Court should clarify that purge amounts ought to be set by assessing the contemnor’s ability to pay *at the time of the hearing*. Judge 2 noted that the “Supreme Court failed to distinguish between the ability to pay the support as it became due” and the ability to pay at the hearing.³⁹⁴ He observed that South Carolina jurisprudence has long defined contempt as the ability to pay the balance as it became due.³⁹⁵ While that inquiry may indeed be relevant to whether the parent willfully violated a court order, Judge 2

389. *Id.* at 1999 n.53.

390. See *Turner*, 564 U.S. at 442 (alterations in original) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988)).

391. Telephone Interview with Judge 2, *supra* note 222.

392. See Telephone Interview with Judge 4, *supra* note 222; Telephone Interview with Judge 5, *supra* note 222.

393. See *Turner*, 564 U.S. at 442 (alteration in original) (quoting *Feiock*, 485 U.S. at 633).

394. Telephone Interview with Judge 2, *supra* note 222.

395. *Id.*

suggested that judges should focus on what contemnors “can do now” when setting the purge amount.³⁹⁶ Otherwise, judges “are converting civil contempt into a criminal sanction.”³⁹⁷ Judge 2’s observation follows logically from *Turner*. Again, if the contemnor does not have the present ability to purge contempt, he cannot possibly carry the keys to his jail cell. And if he cannot secure his own release, the sentence is effectively criminal rather than civil.

Promote judicial compliance. The Court should require states to create safeguards that ensure judges are following *Turner’s* mandate. Typically, attorneys act as a check on arbitrary judicial decisions, as they can appeal when a judge flouts the law.³⁹⁸ But when litigants are routinely unrepresented, judges can jail them with relative impunity. Of course, most judges are conscientious, and states should expect their judicial officers to uphold the law. But the problem is not hypothetical: one judge reported that her colleague frequently jailed litigants *because* he did not fear appeal.³⁹⁹ Moreover, many practitioners worried that judges were simply too removed from poverty to always make reasoned decisions about ability to pay. For example, one public defender of twenty-six years said, “There are so many judges that have no idea where our clients come from. They have no idea what poverty is.”⁴⁰⁰

Solving this problem requires real structural reform. One South Carolina judge suggested that the state should hire a monitor to randomly observe child support cases.⁴⁰¹ He believed that the threat of appeal alone would keep judges honest.⁴⁰² And if the monitor had concerns, he could approach the pro se litigant about appealing the decision and provide the appropriate resources to do so.⁴⁰³

Ensuring judicial compliance may be especially critical *outside* South Carolina. One of the major limitations of this Note’s survey is that judges in South Carolina were all intimately familiar with *Turner* and took its reforms to heart. Many of the judges knew Judge Cain personally, so his reversal by the Supreme Court resonated with them. It is not clear, however, that judges in other states are as familiar with the decision. Thus, states that do not provide

396. *Id.*

397. *Id.*

398. *Cf. Harris v. Deveaux*, 780 F.2d 911, 916 (11th Cir. 1986) (justifying the judicial immunity doctrine in part because “alternative remedies such as appeal . . . reduce the need for private rights of action against judges” (quoting *Dykes v. Hosemann*, 776 F.2d 942, 949 (11th Cir. 1985) (en banc) (per curiam))).

399. Telephone Interview with Judge 5, *supra* note 222.

400. Telephone Interview with Mary F. Moriarty, *supra* note 126.

401. Telephone Interview with Judge 4, *supra* note 222.

402. *See id.*

403. *Id.*

counsel should make sure their judges receive training on *Turner*. South Carolina again provides an example. In the wake of *Turner*, South Carolina sent each of its judges a copy of the decision and a list of best practices.⁴⁰⁴ Other states can follow suit to ensure their judges are well informed and take *Turner's* mandate equally seriously.

B. State-Level Reforms

Multiple commentators have suggested potential state-level reforms for child support contempt cases.⁴⁰⁵ Additionally, the OCSE—the federal agency that coordinates with states to promote child support payments and parental responsibility—has proposed regulations that would require states to overhaul certain aspects of their child support collection processes.⁴⁰⁶ According to Turetsky, those changes (1) focus on the front-end process for setting child support and (2) encourage issuing realistic initial orders and early intervention.⁴⁰⁷ If enacted, the regulations would be a positive step toward addressing the root cause of contempt. As Judge 5 explained, “the reason *Turner* came around is because [courts were] setting the child support so high [that] people couldn’t pay it.”⁴⁰⁸ The OCSE regulations provide a model for breaking that pattern.

Given the pending regulations, this Subpart does not explore every possible avenue for reform. Instead, it focuses on whether states should consider supplementing their procedural safeguards with the right to counsel. It answers yes, but with the important caveat that states commit to adequately funding those lawyers. Surveys of practitioners revealed that attorneys have a meaningful impact when they have sufficient resources.

404. See Telephone Interview with Judge 1, *supra* note 222.

405. For one of the most useful lists of best practices, see Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012). For example, Brito argues that “child support enforcement efforts must be coupled with measures designed to improve the employment prospects and overall financial security of poor fathers.” *Id.* at 665. She also suggests “a child support floor—a publicly funded benefit that, coupled with court-ordered child support payments, ensures a minimum safety net.” *Id.* at 673.

406. See Telephone Interview with Vicki Turetsky, *supra* note 74; see also Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68,548 (proposed Nov. 17, 2014) (to be codified in scattered sections of the Code of Federal Regulations). Under Title IV-D of the Social Security Act, every state operates a child support enforcement program in partnership with the federal government and is eligible to receive federal funding if it operates in conformance with federal guidance. See 42 U.S.C. §§ 651-669b (2015).

407. Telephone Interview with Vicki Turetsky, *supra* note 74.

408. Telephone Interview with Judge 5, *supra* note 222.

Minnesota and Oregon provide two useful models.⁴⁰⁹ In Hennepin County, Minnesota, the Public Defender's Office purposefully hired "client-centered" attorneys who could devote significant time to each case.⁴¹⁰ Likewise, Oregon's defenders provide extensive representation to every client facing incarceration.⁴¹¹ Most importantly, the lawyers do not settle for one-and-done representation. They not only help clients handle contempt charges but are also cognizant of modifying the underlying child support order. By modifying the child support order, the attorneys help break an otherwise vicious cycle of incarceration. Whereas Michael Turner received six separate jail sentences for the same unworkable child support order, attorneys in Minnesota and Oregon help their clients set up more manageable payment schedules.⁴¹²

Of course, providing the right to counsel comes at a cost. But Minnesota and Oregon could afford to adequately fund their counsel because they used civil contempt sparingly. In Multnomah County, Oregon, prosecutors rarely sought incarceration, and it was ordered even less frequently.⁴¹³ In Hennepin County, Minnesota, the judges were also reluctant to order jail.⁴¹⁴ Funding representation in these counties is less expensive because there are simply fewer cases to handle. For example, the Multnomah Defenders handled 167 contempt cases in one year.⁴¹⁵ Meanwhile, South Carolina judges handled up to 146 contempt cases in *one day*.⁴¹⁶ While representation in the latter system might significantly strain state budgets, representation in the former system is far more affordable.

Notably, states can cut back on contempt sanctions without necessarily handicapping their child support collection. Turetsky is adamant that jail can be counterproductive. If a court wrongly orders incarceration and the contemnor cannot purge, he will leave jail with reduced earning capacity and "the cycle begins again."⁴¹⁷ Turetsky cited Illinois as a model for overhauling a child support enforcement system. She provided data that showed the state reduced the use of incarceration to almost one-third of the previous level and

409. See *supra* Part III.A.1.

410. See *supra* notes 126-31 and accompanying text.

411. See *supra* note 137 and accompanying text.

412. See *supra* Part III.A.1.

413. See *supra* notes 141-43 and accompanying text.

414. See *supra* note 132 and accompanying text.

415. See *supra* note 140 and accompanying text.

416. Telephone Interview with Judge 6, *supra* note 222.

417. Telephone Interview with Vicki Turetsky, *supra* note 74.

actually saw an *increase* in total collections.⁴¹⁸ Table 1 below illustrates the results:

Table 1

Year	Contempt Cases	Contempt Collections	Administrative Collections
2010	7796	\$806,379	\$105,000,000
2013	2783	\$486,533	\$119,800,000

This table shows the change in contempt cases and child support collections after Illinois reduced its use of incarceration for nonpayment of child support.

As Table 1 illustrates, Illinois saw a dip of about \$320,000 in contempt collections, but the state more than compensated for that loss by channeling resources toward other administrative forms of collection. In total, it collected \$14.8 million more in 2013 than in 2010 despite initiating 5000 fewer contempt cases.

Moreover, the OCSE estimates that states can save significantly by reducing the use of jail time.⁴¹⁹ Turetsky's office calculated the cost of job training programs at \$5 per day per person compared to \$186 per day required to keep a parent in jail.⁴²⁰ With these savings, states would have not only the funding to provide lawyers but also the resources to focus on more sustainable practices like job placement and job search programs.⁴²¹

C. Practitioners

In many states, *Turner* created a black hole for representation in civil contempt cases. On the one hand, the contempt cases are civil, so the court does not guarantee counsel despite the threat of incarceration.⁴²² Typically, legal aid organizations help fill the representation gap for civil cases, such as when impoverished people face evictions or termination of government benefits.⁴²³ But civil legal aid organizations frequently lack resources to handle

418. Vicki Turetsky, *New Directions in Federal Child Support* (2015) (on file with author).

419. See Office of Child Support Enf't, *Jobs Not Jail* (2015), https://www.acf.hhs.gov/sites/default/files/programs/css/jobs_not_jail_final_10_02.pdf.

420. *Id.*

421. *Id.*

422. See *Turner v. Rogers*, 564 U.S. 431, 441-43 (2011).

423. See, e.g., *Who We Are*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are> (last visited May 5, 2017) (describing the services provided by legal aid organizations funded by the Legal Services Corporation).

“unpopular” civil contempt cases,⁴²⁴ and they are often conflicted out of these cases because they represent the custodial parent.⁴²⁵ Thus, because these litigants fall just short of a constitutional right to counsel, they frequently end up with no representation at all.

This Note illustrates, however, that even with procedural safeguards, civil contemnors still face some risk of wrongful incarceration.⁴²⁶ The private bar can help fill that representation gap, and indeed, private attorneys’ ethical obligations favor providing pro bono assistance.

The American Bar Association (ABA) Committee passed a resolution in 2006 supporting the right to counsel in “adversarial proceedings where basic human needs are at stake.”⁴²⁷ Although the ABA specifically included “shelter, sustenance, safety, health, [and] child custody” among basic rights,⁴²⁸ liberty is an equally fundamental right that deserves representation. Moreover, these cases cut to the core of why the legal profession exists at all. As Deborah Rhode—a professor and the Director of the Center on the Legal Profession at Stanford Law School—argues, lawyers “serve[] as indispensable guardians of our lives, liberties[,] and governing principles.”⁴²⁹

Admittedly, there is a pro bono deficit across a variety of areas. As Rhode reports, “[m]ost lawyers make no contributions, and the average for the bar as a whole is less than half an hour a week and fifty cents a day.”⁴³⁰ Moreover, many of those “pro bono” hours are spent helping family and friends rather than the indigent.⁴³¹ Esther F. Lardent, the president of the Pro Bono Institute, notes that mandatory pro bono representation can make only a “very small dent in a very large problem.”⁴³²

But when the problem is loss of liberty, a small dent is better than none at all. Very few of the surveyed legal aid practitioners handle these cases, but the

424. See *supra* notes 202-06 and accompanying text.

425. See *supra* notes 198-201 and accompanying text.

426. See *supra* Part IV.C.1.

427. ABA House of Delegates, Resolution 112A, at 1 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.authcheckdam.pdf.

428. *Id.*

429. RHODE ET AL., *supra* note 367, at 879 (emphasis added) (quoting Comm. to Improve the Availability of Legal Servs., Final Report to the Chief Judge of the State of New York (1990), in 19 HOFSTRA L. REV. 755, 782 (1991)).

430. DEBORAH L. RHODE, ACCESS TO JUSTICE 145 (2004).

431. *Id.*

432. RHODE ET AL., *supra* note 367, at 885 (quoting Esther F. Lardent, *Pro Bono in the 1990's: The Uncertain Future of Attorney Voluntarism*, in AM. BAR ASS'N, CIVIL JUSTICE: AN AGENDA FOR THE 1990S, at 425, 433 (Esther F. Lardent ed., 1991)).

ones who do all attested that their representation makes a difference.⁴³³ Moreover, many of the “best practices” for child support include a common thread: the attorneys help the noncustodial parent modify the underlying child support order.⁴³⁴ Private practitioners could make a difference by doing the same. These cases should require a minimal time commitment, as practitioners can often recycle the underlying modification motion. But modifications can make a significant difference by reducing the chance that noncustodial parents will face incarceration in the first place.

In fact, private practitioners can go one step further than court-appointed attorneys. Whereas states only provide counsel after initiating civil contempt proceedings, private attorneys can theoretically become involved at any stage, including when the court initially sets the terms of the child support order. By making sure that the payments are workable on the front end, attorneys can help avoid the need for civil contempt on the back end.

Conclusion

Each year, states initiate thousands of civil contempt actions to enforce child support orders. This Note has tried to flesh out what happens in those hearings and examine the day-to-day realities for noncustodial parents facing incarceration. It concludes that *Turner* improved the previous system. More judges engage with the noncustodial parent’s ability to pay and are sensitive to using incarceration as a last resort rather than a first impulse. South Carolina has significantly narrowed the scope of its contempt sanctions by allowing the DSS to screen cases before they even reach the contempt stage. The OCSE could bring change at a national level by issuing regulations that require states to focus on facilitation rather than incarceration.

But states have not yet gone far enough to protect the rights of vulnerable noncustodial parents. For states that do not appoint counsel, there is still too little use of hard evidence when judges determine ability to pay and too few checks on arbitrary judicial action. For states that do provide counsel, there is often too little funding for appointed counsel to act as a true safeguard. This Note offers suggestions for how to fix those problems, but more importantly, it provides first-hand testimony that the problems still exist after *Turner*. Hopefully, identifying the pressure points will inspire relevant actors—whether the Supreme Court, the states, or private practitioners—to revisit *Turner* and craft additional solutions.

433. See *supra* notes 208-15 and accompanying text.

434. See *supra* notes 126-36 and accompanying text.