TURNER V. ROGERS: IMPROVING DUE PROCESS FOR THE SELF-REPRESENTED

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The U.S. Supreme Court's decision in Turner v. Rogers *(2011) stresses the due-process rights of self-represented litigants. Courts should see this decision as an opportunity to improve their services and programs for such litigants.*

On June 20, 2011, the United States Supreme Court, in its first trip to the self-represented courtroom in 25 years, issued a groundbreaking opinion in *Turner v. Rogers* (2011) about the due-process rights of the self-represented and what courts must do to ensure that they are given true access to justice. The decision challenges judges and court administrators to build consensus around innovations and improvements. This article briefly summarizes the core holding of *Turner*, including its broader due-process elements, suggests the approaches that courts and access-to-justice institutions might consider to deal with the broad implications of the decision, and offers concrete resources to assist in that process. The good news is that many of the needed access innovations are already being deployed and have now been effectively endorsed by the Supreme Court in this decision.

The *Turner* Decision

Significantly, the case as it came to the Supreme Court was in a posture that did little to suggest the ultimate broad reach of its holding—one very different from that sought by either of the parties. In the South Carolina Supreme Court, a child support obligor sought reversal of his civil-contempt-incarceration order on the grounds that he had lacked counsel. (The party seeking the incarceration order was not the state and also did not have counsel.) After South Carolina had rejected the claim, certiorari was granted. During briefing of the case, the solicitor general, representing the United States, urged rejection of both the self-represented litigant's right-to-counsel claim and the respondent's urging of affirmance. The solicitor general urged that although there was no categorical right to counsel in such cases, the failure of the trial court to follow available alternative procedures that would have protected the litigant's due-process rights required reversal.

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The Supreme Court agreed:

> And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." . . .
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> [A]s the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews*, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (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 by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. . . . The record indicates that *Turner* received neither counsel nor the benefit of alternative procedures like those we have described. . . . The court nonetheless found *Turner* in contempt and ordered him incarcerated. Under these circumstances

Turner's incarceration violated the Due Process Clause (*Turner v. Rogers*, 2011: slip opinion at 11, 14, 16).

There are a number of important points about the opinion as a whole that should be emphasized:

- While the decision itself focuses on incarceration (and, indeed, states the importance of the private interest at stake in such situations), it relies on the due-process clause, which is implicated in every case dealing with the potential deprivation by a court of a constitutionally protected interest—which means almost every nontrivial self-represented-litigant case.
- Moreover, since the case discusses the needs of the party seeking the deprivation, the decision supports the idea that due process applies to the person seeking the deprivation as well as the party potentially subject to it *Turner v. Rogers*, 2011: slip opinion at 13-14).
- The touchstone for whether procedures satisfy due process is whether they provide sufficient fairness and accuracy—in this case in determining the capacity to pay (*Turner v. Rogers*, 2011: slip opinion at 14-15)—thus potentially raising that key question in every self-represented litigant case.
- The Supreme Court explicitly approved—indeed in some cases required—the use of forms in self-represented-litigant cases, thereby putting to final rest any claim of their inappropriateness (*Turner v. Rogers*, 2011: slip opinion, 14-16).
- The Supreme Court similarly approved, and in some situations required, engaged judicial questioning, also shutting off any objection that such neutral questioning is forbidden (*Turner v. Rogers*, 2011: slip opinion, 14-16).
- The Court reached out to endorse the concept of neutral court staff providing assistance to litigants, even though the facts did not include such staffing (*Turner v. Rogers*, 2011: slip opinion, 14-15).
- The Court made clear that, notwithstanding its decision in *Turner*, there might well be situations in which there was a right to counsel. The court gave as possible examples situations similar to *Turner*, but in which the other side had counsel, or was the state itself (*Turner v. Rogers*, 2011: slip opinion, 15).
- Moreover, in what may be of greater immediate day-to-day significance for trial courts, the Court acknowledged that there might well be particular factual situations in which appointment of counsel is required to ensure fairness and accuracy (*Turner v. Rogers*, 2011: slip opinion, 16).

Some state court systems might respond to the decision by a cursory review of their procedures and conclude that since a) they do not use civil-contempt incarceration in child support cases, b) they provide counsel in such cases, or c) provide the notice, forms, questioning, and fact finding required in *Turner* in such cases, they do not need to pay attention to the case.

In the opinion of this writer, such an approach would be seriously flawed. It would fail to recognize the broad legal import of the decision, particularly its groundbreaking application of the due-process clause to the rights of the self-represented, and would fail to embrace the opportunity for expanding the already launched systemic access-to-justice improvements upon which the decision implicitly relies. Moreover, the Supreme Court's effective endorsement of innovations that are already being broadly deployed—such as greater judicial engagement and user-friendly forms—should reassure the states that their access-innovation efforts will find support at the highest judicial levels.

Implications for Judges and for Judicial Education

The decision, and its endorsement of an engaged role for judges in self-represented cases, provides clear permission for judges to continue on their current path of experimenting with ways to make sure that the self-represented are fully heard. Those who have felt inhibited in doing so for fear of being perceived as non-neutral should be reassured that they have received both Department of Justice (DOJ) and Supreme Court imprimatur for such engagement, provided, of course, that it is neutral and consistent with ethical rules. Those who have believed that their lack of engagement is required by the Constitution would be advised to reconsider their position.

It may be that part of the reason that DOJ felt able to support, and the Supreme Court endorsed, such judicial questioning is that there are now extensive research-based protocols for such neutral engagement. In any event, these protocols

demonstrate that questioning, particularly when carefully structured in an engaged context, runs little if any risk of being, or even appearing, non-neutral. Examples of such best practices are making clear in the "framing" of the case that questions are likely, but not an indication of sympathy or leanings, as are follow-up questions that elicit the detail needed to decide the case on sufficiently full information.

More generally, judges might be wise to bear in mind the teaching of *Turner* that in self-represented cases the procedures of the case as a whole must be sufficient to provide the accuracy and fairness appropriate to the stake and situation. *Turner* encourages judges to consider how their discretion in applying governing procedural rules can be used to ensure that there is such sufficient accuracy and fairness. Implicit in *Turner* is the perhaps obvious point that the many court opinions reiterating that the same rules must be applied, regardless of whether someone has a lawyer, do not and cannot mean that those rules have to be applied without taking into account the representation status of the parties. It must always be remembered that to refuse to consider an exercise of discretion is an abuse of discretion.

Moreover, judges might decide to remain alert in all cases to the possibility of insufficiency in meeting due-process standards. Moreover, to the extent that they viewed this (with good reason) as placing an impossible sua sponte burden on them, they might wish to ensure that the court has in place services and procedures sufficient to ensure that such standards are met, thereby freeing them of the ongoing review obligation.

Finally, they might find it constitutionally advisable to take appropriate action when they find, as suggested by *Turner*, that the facts, circumstances, and required procedures are such that without counsel it is not possible for them to manage the case in such a way as to provide the sufficient fairness and accuracy required by *Turner*. In such cases an appointment of counsel, using whatever inherent or other authority, and whatever financing mechanisms are available, is called for, and surely will be given deference by the rest of the system.

Judges and others responsible for judicial education might well regard *Turner* as an opportunity for a renewed focus on the many challenges involved in self-represented cases and for a sustained and multicomponent initiative on helping judges deal with those challenges. Such an initiative might, building on model resources already available, include developing state-specific bench books on the topic, presenting customized judicial educational programs, making videos about best practices, performing educational role playing of problems and best-practice solutions, and establishing judicial support networks for further discussion of these issues.

Implications for the Management of Cases in the Courthouse

While *Turner* identifies as "available" only two specific nonjudicial procedures that were desirable but absent in the facts of that case—notice of the key issue and forms—the analysis is clear that the totality of the procedures are to be considered in the due-process fairness-and-accuracy analysis.

Thus, the good news for court administrators is that there is already available and tested a wide range of effective innovations that can enhance fairness and accuracy. Many of these can be implemented at low or zero cost. *Turner* provides an opportunity to analyze court operations and to assess whether such innovations could enhance accuracy and fairness of outcomes in accordance with the requirements of the decision. Specifically:

- The deployment of plain-language forms, including easy-to-use, interactive online versions of those forms, can help ensure that needed information is provided to the court. This is far cheaper, both to deploy and maintain, if forms are standardized statewide. (In a time of financial crisis, statewide nonuniformity of such forms should be among the first casualties.)
- The provision or expansion of neutral, court-based, informational self-help services, already provided in some form in most states, can give litigants the kind of information and forms-completion assistance envisioned by *Turner* as helping ensure access and fairness. Such systems are most cost-effective when provided statewide through phone hotlines supplemented by online tools, as in Minnesota and Alaska.
- Courtroom-based services, integrated with the flow of the case, can help litigants focus on what is needed to move the case forward and provide the additional information needed by the court. Such assistance is now routine in states such as California and New Hampshire.

- The provision of unbundled or discrete task representation can be facilitated by the courts, in cooperation with the bar, through rules changes, training programs, and general promotion. The effect is low-cost representation for those cases in which it is most critical, responding to the concern of *Turner* that there may be cases in which attorney assistance is needed. Such programs cost the court nothing. Such programs are routine in Massachusetts and Maine, among many other states. New York is one state that has been effective in facilitating pro bono representation using this model.

Many of these innovations could easily be built into the reengineering programs that many courts are now starting. Indeed, they would help ensure that these reengineering efforts improve access as well as efficiency. (See the "Resources" section.)

Implications for Justice System Coordination and Innovation

The process of review and innovation envisioned by this article will not occur without leadership. For states with access-to-justice commissions, the choice of who should lead the process may be simple. The commissions have the credibility of being creatures of the court system, but also the leverage that comes from having members from a wide variety of constituencies. Moreover, they may be found to be more appropriate review vehicles than the state supreme court, given that the Court might ultimately be asked to rule on the sufficiency of the state's procedures under *Turner* due-process standards.

In such states, indeed, the state supreme court might find it appropriate to formally ask the access-to-justice commission to work with the state administrative office of the courts to conduct such a comprehensive *Turner* review of key case types for the self-represented, with a particular focus on those in which the stake for the litigants is greatest, such as loss of home or family integrity. In states without a commission, the court might find it appropriate to create a special body, one which might indeed evolve into a commission.

Conclusion

Turner v. Rogers may turn out to be a highly significant decision for the day-to-day operations of the courts, one that plays a major role in fulfilling the core promise of courts as institutions that offer access to justice for all. Court leaders and staff at all levels have the opportunity to participate in giving life and meaning to this vision and these values.

RESOURCES

Alaska Court System. *Self-Help Center: Family Law*. www.courts.alaska.gov/shcabout.htm

American Bar Association. *Resource Center for Access to Justice Initiatives*. www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html

Broccolina, F., and R. Zorza (2008). "Ensuring Access to Justice in Tough Economic Times," 92 *Judicature* 124.

Minnesota Judicial Branch. *Self-Help Center*. www.mncourts.gov/selfhelp/?page=2861

Self-Represented Litigation Network (2008a). "Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources," 2nd ed. National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/item.223550-2008_edition_of_Best_Practices_in_CourtBased_Programs_for_the_SelfRepresent (requires a free membership for access)

— (2008b). "Court Leadership Package." National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/folder.208521-2008_Court_Solutions_Conference (requires a free membership for access)

— (2008c). "Handling Cases Involving Self-Represented Litigants: A National Bench Guide for Judges." National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/folder.177582-National_Bench_Guide (requires a free membership for access)

Self-Represented Litigation Network, National Center for State Courts, and National Judicial College (2007). "Curriculum Resource Materials: Access to Justice in the Courtroom for the Self-Represented." www.selfhelpsupport.org/library/folder.169512-CURRICULUM_RESOURCE_MATERIALS (requires a free membership for access)

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— (2011b). "A New Day for Judges and the Self-Represented: The Implications of *Turner v. Rogers*," 50:4 *Judges' Journal* 16.