Can eighteenth-century constitutional commitments that “courts shall be open” for private rights enforcement be coupled with twentieth-century aspirations that democratic orders provide “equal justice under law”? That question sits at the intersection of three cases, AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, decided in the 2010 Supreme Court Term. In each decision, Justices evaluated the fairness of particular procedures (class arbitrations, class actions, or civil contempt processes) when making choices about the meaning of governing legal regimes—the Federal Arbitration Act (FAA) and state unconscionability doctrine in AT&T; Rule 23 and Title VII in Wal-Mart; and the Due Process Clause and child support obligations in Turner.

AT&T and Wal-Mart presented related questions about how the form of dispute resolution (individual or aggregate) and the place of dispute resolution (public or private, state or federal) affect the level of public regulation of consumer and
employment transactions predicated on boilerplate, rather than negotiated, terms. The issue in Turner was whether state-funded lawyers were required before a person could, at the behest of the child’s custodian, be incarcerated for contempt for failure to pay child support. The specific case involved two individuals, but their circumstances illustrated the challenges faced by millions of other lawyer-less litigants in state and federal courts.

Each case exemplifies the challenges that new rights, produced by twentieth-century social movements, pose for courts. When claimants such as consumers, employees, and household members presented themselves as entitled to equal treatment, jurists responded by interrogating their own procedural parameters. Relying on the Due Process Clause, courts developed distinct lines of analyses that—depending on the context—imposed criteria on decisionmaking procedures, mandated subsidies to address resource asymmetries between adversaries, shaped processes to reduce intra-litigant disparities, and facilitated access to courts. Requisite to those efforts was a practice that is intertwined with fairness—the *80 public quality of adjudication that endows an audience with the authority to watch, critique, and respond through democratic channels to the legal norms announced. A “fair and public hearing” became a touchstone of what democratic orders required their courts to provide.

But, as this trio of cases demonstrates, whether seeking to implement those egalitarian aspirations or simply to function, courts have to grapple with economically disparate claimants and a vast volume of eligible rights holders. If eighteenth-century constitutional entitlements to open courts are to remain relevant to ordinary litigants, the question is not whether to aggregate, subsidize, and reconfigure process but how to do so “fairly,” in terms of what groups, which claims, by means of which procedures, and offering what remedies. But without public disclosures and oversight of dispute resolution—in and out of court, single file and aggregated—one has no way to know whether fairness is either a goal or a result.

* * *

IV. The Substance of Procedural Due Process: Balancing Disparate Resources and Adjudicating Legitimacy in Turner v. Rogers

A requirement that the State provide counsel to the noncustodial parent [when the custodial parent lacks counsel] . . . could make the proceeding less fair overall . . . .

-- Turner v. Rogers (2011)455

At the outset, I sketched five kinds of fairness analyses—evaluating the quality of specific procedures, the resources of adversaries, the disparities of capacities within a set of similarly situated litigants, the ability to access court, and the role of publicity in ensuring the democratic *155 character of law application and generation. All inform Turner v. Rogers.

Michael Turner advanced a positive right—that the state had the obligation to provide him with counsel when seeking to impose the sanction of confinement. He lost that claim. Turner holds that the Due Process Clause “does not automatically require the provision of counsel at civil contempt proceedings” for an indigent facing incarceration of up to one year because of an unpaid child support order owed to a child’s custodian, who, the Court noted, was also likely to lack counsel.456 Resource asymmetries drove that result, as the Court concluded that mandating counsel for a noncustodial parent when the custodial parent lacked counsel “could make the proceeding less fair overall.”457 Thus, and despite the degree to which South Carolina was implicated in the pursuit of debtor parents, the majority specifically limited its no-lawyer rule to cases in which the opposing party is a private, not a public, actor.458

Although Turner lost his right-to-counsel claim, his civil contempt sentence was reversed because he won recognition of two other entitlements, both moored in a substantive understanding of procedural due process’s import.459 If a contemnor facing an unrepresented private opponent lacks a lawyer, the Due Process Clause requires “substitute procedural safeguards,”460 including clear notice that the legal question to be decided is the ability to pay and a method “to elicit information about his financial circumstances.”461 Further, as a predicate to detention for violation of child support payments due, the judge must
make an express evidentiary finding that the debtor “was able to pay his arrearage.” Absent such “alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question,” a state cannot send a debtor to jail.

Five Justices centered their ruling on a shared understanding of what was “fair.” That word is so often equated with due process, and the terms “fair hearing” and “fairness” are so commonplace in doctrine and statutes that one might expect to be able to trace fairness’s long pedigree in constitutional texts and case law. Indeed, the entailments of what modern constitutional law has brought within the rubric of due process reflect a set of concerns about justice that date back to Thomas Aquinas and invite discussions of the relationship between fairness and commutative and distributive justice.

While fairness is now commonplace (for example, the Class Action Fairness Act of 2005 and Article 6 of the European Convention on Human Rights), the term “fair” is absent from both federal and state constitutions of the founding era. Indeed, the word was relatively rarely invoked in case law before the twentieth century. Rather, as Justice Thomas discussed in his Turner dissent, due process once was viewed through the lens of customary practice. Procedures that accorded with “the law of the land” were all that the Constitution required. Thus, Justice Thomas argued that because “an original understanding of the Constitution” gave no right to counsel in civil cases and only a right to “employ counsel” under the Sixth Amendment, that Amendment had no role to play. Instead, due process governed Turner’s claim and, for Justice Thomas, required consideration only of processes sanctioned by “settled usage.” Since civil contemnors had historically not been afforded appointed counsel, Justice Thomas concluded that Turner had no right to a lawyer.

Yet, as the Turner majority reflects, the Court has repeatedly rejected that analysis. Instead, over the last several decades, the Court developed a test for procedural adequacy through a formula by which to decide the quantum of process “due.” The balancing test (known by the name of the case, Mathews v. Eldridge, that detailed it) identifies as factors to consider the private interest that will be affected, the government interest in the procedures provided, and the instrumental benefits and costs—in terms of the risk of error—of additional procedures argued to be constitutionally required.

This utilitarian calculation, absent from the Wal-Mart opinion, provides insight into how judges reason about what fairness entails. For example, had Wal-Mart deployed Mathews v. Eldridge to consider the merits of the competing claims about the impact of class certification on accuracy, economy, and justice, the factors to consider would have included the degree of commonality among co-plaintiffs and the nature of the claims to be decided, the level of alleged lack of compliance with the law in the marketplace, and the resources and incentives available for alternative forms of enforcement, as contrasted to the complexity of the alternative processes available, their costs, the risk and nature of the errors made by individual and group procedures, and which side ought to bear the risks of error.

Yet even as Mathews v. Eldridge prompts a judicial accounting of the bases for a due process ruling, its veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism. Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more, or different processes. In Wal-Mart, the sides offered warring hyperbole about the impact of class actions. In AT&T, the parties disagreed about the efficacy and accuracy of class arbitrations, and in Turner, the disputants debated whether lawyers slowed or facilitated decisionmaking and whether adding lawyers would enhance accuracy or produce more misguided results. While one can state the equation, one cannot do the math because the data are missing. Interpretative choices abound.

Moreover, the Mathews v. Eldridge formulation, focused on accuracy, does not take other goals that can be assigned to due process into account. As Jerry Mashaw explained, Mathews v. Eldridge addressed procedures for determining an individual’s continuing eligibility for disability benefits. Recipients had various interests as part of a class of claimants, all entitled by federal legislation to benefits if eligible. Mashaw argued that the due process prohibition against arbitrary state action encompassed values he catalogued as accuracy, dignity, and equality. Mashaw suggested that a trial-like proceeding might be less useful to effectuate those interests than would be management mechanisms, such as oversight, audits, and sanctions, to render consistent and correct decisions across the group. From that vantage point, administration and management could be a better way to produce fairness than adversarial adjudication.
Given the numbers of family members who are in courts but lack lawyers, the temptation to remove those issues from courts and take up the managerial approach Mashaw advocated could be powerful. In the Turner context of family support collection procedures, for example, the federal government has looked to national databases to enable property and income attachments rather than court sanctions of contempt. Yet what Turner reveals are the risks of moving to a completely bureaucratic or privatized regime.

Turner’s volunteer lawyer made an argument to the Court that the majority ignored when framing the problem as one of fact (did Turner have or could he get the money to pay?). Turner’s lawyer had asked the Court to recognize the embedded legal question of what constitutes an “ability to pay” and hence the need to explore the problems of when and how to impute income earning capacities to individuals. Administrative agencies, as currently constituted, are generally directed to apply facts to statutory criteria and not to interrogate those criteria. Further, whether in court or in administrative or private settings, resource asymmetries would remain a challenge; individuals would be faced with repeat-player adversaries, be they social welfare staff or lawyers employed by social services departments.

Several state and federal courts had drawn the line at liberty and held that jail time required that counsel be afforded to civil contemnors. Turner’s regulation of judges instead is a disquieting retrenchment. The many references in the majority and dissenting opinions to mothers as the likely custodial parents who were also unlikely to have retained lawyers, the holding is a frank due process / symmetry of resources ruling that elides the alternative form of equality--providing lawyers for both parties as well as for the child.

The Court’s imposition of adjudicatory standards could result in state court actions of different forms. One default would be that, in lieu of crafting “alternative procedures,” states could supply lawyers for indigent contemnors, paying that price for seeking incarceration. A yet more economical form of compliance would be not to seek jail time for debtors--and thereby save the costs of lawyers, procedures, and confinement (which, in Turner’s case, far outstripped the few thousand dollars owed). As presently formatted, however, the Turner rule is oddly incomplete. Although it imposes a regulatory regime on South Carolina, enforcement depends on and returns contemnors to the very judges who dealt with them too hastily.

But for lawyers who volunteered their services to Turner and “open court” obligations, we--third parties--would have no knowledge of how South Carolina struggles to staff its courts, the typewritten forms it uses (but which are not always completed), and the number of people the state sends, uncounseled, to jail. (Recall that Turner was en route to another six months after he had completed the twelve-month sentence.) What the public in-court process revealed were the inadequacies of the decider of fact. The trial judge spent less than five minutes, made no findings on the record, left the form incomplete, and sent Turner to jail for twelve months.

How in the future can one ascertain that the requisite findings are made and procedural alternatives installed? Current law on standing makes unlikely the potential for a class of potential contemnors to bring an affirmative federal action against states, and damages actions would be bounded by immunity doctrines. Further, while the majority argued that it needed to respect the bright line of “criminal/civil,” it might well have relied on another bright line of liberty/detention. Absent some public accounting and lawyer involvement, few mechanisms exist to police the fairness that Turner calls for, to elaborate the normative question of when the state ought to conclude that a parent has the “ability”--as a matter of fact and law--to pay, and to police the person making those judgments across sets of similarly situated litigants. But for the information-forcing function of courts (which could be a legal condition mandated for agencies and private providers if adjudicatory functions were devolved to them), the challenges facing the Turner and Rogers households and the judges of South Carolina become invisible.

Footnotes

a1 Arthur Liman Professor of Law, Yale Law School. All rights reserved, 2011. Intellectual friendship is a great gift. My thanks to Denny Curtis, Vicki Jackson, Reva Siegel, Sandy Baum, Emily Bazelon, Bill Eskridge, Abbe Gluck, Linda Greenhouse, John Langbein, Miguel Maduro, Daniel Markovits, Arthur Miller, Henry Monaghan, Robert Post,
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131 S. Ct. at 2519.

Id. at 2520. All members of the Court agreed that civil contemnors’ rights did not rest on the Sixth Amendment, which they limited to criminal defendants. Id. at 2516; id. at 2521 (Thomas, J., dissenting). The majority relied instead on the Fourteenth Amendment’s Due Process Clause. Id. at 2520 (majority opinion).

Id. at 2519.

Id. at 2520.

Both entitlements were also suggested by the Solicitor General of the United States in its amicus filing. U.S. Amicus, Turner, supra note 93, at 19-23.

Turner, 131 S. Ct. at 2518.

Id. at 2520.

Id. The majority was ambiguous as to whether judges are required to make such a finding whether or not a debtor has counsel, for as the dissent noted, the Court drew much of its ruling requiring “alternatives” to the counsel right that Turner pressed from the Solicitor General’s brief. See id. at 2521 (Thomas, J., dissenting). Support for an independent right to a finding of willful incapacity to pay could be analogized to the right to an evidentiary finding predicated on due process that has been recognized in the criminal context. See generally Jackson v. Virginia, 443 U.S. 307 (1979).

Turner, 131 S. Ct. at 2512.

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466 ECHR, supra note 2, art. 6.1 (“fair and public hearing”).

467 See generally Edward J. Eberle, Procedural Due Process: The Original Understanding, 4 Const. Comment. 339 (1987); Keith Jurow, Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law, 19 Am. J. Legal Hist. 265 (1975); Miller, Due Process, supra note 38. The term “fair” was not commonly invoked in published decisions by nineteenth-century English judges. Ian Langford, Fair Trial: The History of an Idea, 8 J. Hum. Rts. 37 (2009). Further, the word “fair” once referenced how one looked (fair as in “beautiful”) and then came to be read in law as “free from blemish.” Id. at 38, 40-46.

468 A search of a Supreme Court online database through 2008 found that the phrase “opportunity to be heard” gained currency after the Civil War and the Fourteenth Amendment, with 554 of the 556 opinions using the phrase issued after 1866. The Court did not often deploy the phrase “fundamental fairness” until the 1940s. See, e.g., Lisenba v. California, 314 U.S. 219, 236 (1941) (concluding that the “denial of due process” in a criminal trial “is the failure to observe that fundamental fairness essential to the very concept of justice”). After the 1960s, “fundamental fairness” was a more frequent referent, with 212 of 235 opinions invoking the phrase issued since 1960.

469 Turner, 131 S. Ct. at 2521 (Thomas, J., dissenting). Justice Thomas was joined in full by Justice Scalia and in some respects by Chief Justice Roberts and Justice Alito.

470 See Eberle, supra note 467, at 341-42. Eberle noted that the South Carolina Constitution of 1778 provided such protection and that none of the early state constitutions used the term “due process.” Id. His analysis of pre-Civil War case law focused on how often courts looked to “settled usages and modes of proceeding existing in the common and statute law of England” to determine the adequacy of procedures provided. Id. at 359 (quoting Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1855)) (internal quotation mark omitted). Further, since jury rights were customary, the concept of what process was due was often linked to civil jury rights. See id. at 362.


472 Id. at 2521-22. This portion of Justice Thomas’s dissent was joined by Justice Scalia but not by Chief Justice Roberts or Justice Alito.

473 When doing so in the early twentieth century, the Court relied on a formulation that the “essential elements of due process of law” were “notice and opportunity to defend.” Simon v. Craft, 182 U.S. 427, 436 (1901) (emphasis added). Within a few decades, the Supreme Court settled on the description that the “fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394 (1914); see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

474 424 U.S. 319, 335 (1976). While Mathews v. Eldridge is regularly invoked—including in cases evaluating procedures provided to detainees at Guantanamo, see, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 529-35 (2004)—it is not the only test deployed by the Supreme Court to assess procedural adequacy. As noted, historical practice is the metric that
some Justices have repeatedly embraced. See Burnham v. Superior Court, 495 U.S. 604, 608-19, 622-23 (1990). Another line of cases, involving burdens of proof in state criminal and quasi-criminal proceedings, is exemplified by Medina v. California, which defers to states on criminal procedures unless they “offend [...] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 505 U.S. 437, 445 (1992) (quoting, inter alia, Patterson v. New York, 432 U.S. 197, 202 (1977)) (internal quotation mark omitted). Before Turner, one could also have identified a special test for rights to counsel for civil litigants: the 1981 decision of Lassiter v. Department of Social Services cited the Mathews v. Eldridge formulation as creating a presumption against counsel for civil litigants, to be balanced in the individual case against the utility of providing a lawyer. 452 U.S. 18, 31 (1981).

For example, according to an amicus brief submitted in Turner, one “2010 observational study” of 326 parent/debtor contempt hearings found that 98% of the contemnors were unrepresented by counsel, 95% were sentenced to jail for an average of three months, 75% testified about problems of obtaining income and lacking the ability to pay, and parents without counsel were held in contempt “more than twice as often as” those represented by counsel. Patterson Amici for Turner, supra note 97, at 3. The study also recorded clerical errors and noted that “purge amounts” were not “tailored to” particular contemnors’ circumstances. Id. at 16, 19. As for the costs of error, in addition to wrongful incarceration, the state paid some $143 million to run its jails in 2009, and about 13% of those in jail came from family court. Id. at 25-27; infra note 482. But as Rogers’s law professor amici countered, the observational data were limited, and correlations were not necessarily evidence of causation. See Law Professors’ Amici for Rogers, supra note 105, at 7-8.

Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 46 (1976) [hereinafter Mashaw, Due Process Calculus]. As Mashaw also noted, the formulation in Mathews v. Eldridge marked a cut back from plaintiffs’ perspectives, in that the test was often used to uphold limited procedures. See, e.g., Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005).

Mashaw, Due Process Calculus, supra note 476, at 45-57.

See 131 S. Ct. at 2517.

Transcript of Oral Argument at 11, Turner, 131 S. Ct. 2507 (No. 10-10) [hereinafter Transcript of Oral Argument, Turner]. Underlying the question was whether contemnors had defenses and whether the procedures in place helped to inform judges of them. See Brief Amici Curiae of the National Ass’n of Criminal Defense Lawyers, the Brennan Center for Justice, the National Legal Aid & Defender Ass’n, the Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner at 16-19, Turner, 131 S. Ct. 2507 (No. 10-10), 2011 WL 160857. More generally, the claim is that lawyers are efficient for courts as well as for parties and enhance the quality of decisions. See ABA Amicus for Turner, supra note 60, at 7-11. Of course, raising such claims would alter the character of proceedings, such as those in South Carolina, that took but a few minutes of court time. As argued to the Court, “[g]iven the straightforward nature of child support enforcement proceedings...adding lawyers may do little more than increase the contentiousness and prolong the duration of the proceeding.” Law Professors’ Amici for Rogers, supra note 105, at 13.

See cases cited supra note 56.
Turner, 131 S. Ct. at 2519-20; id. at 2525-27 (Thomas, J., dissenting).

Specifically, Turner amici noted that jail administrators reported that 13%-16% of their population was “made up of family court contemnors,” see Patterson Amici for Turner, supra note 97, at 4, and that the state spent over $17,000 per detainee, id. at 24-27. More generally, South Carolina has not been an economically rational actor in its structuring of child support enforcement. As the Solicitor General informed the Court, South Carolina was the “only State that does not have a certified automated system” for child support enforcement, as required by federal law, and, by the time the case was argued, it had paid $72 million in fines. U.S. Amicus, Turner, supra note 93, at 6, 7 n.4; see also Transcript of Oral Argument, Turner, supra note 479, at 61; supra note 475. Rogers’s amici argued the utility of detention and the inappropriateness of imposing counsel rights and cited the experiences in New Jersey in support of that position. After that state’s supreme court required counsel for indigent parents facing incarceration, its use of the detention sanction stopped, as the state could not afford to provide counsel to all eligible. Senators’ Amici for Rogers, supra note 93, at 24-25.