

## TURNER V. ROGERS AND THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS

LAURA K. ABEL<sup>†</sup>

The Supreme Court's opinion last term in *Turner v. Rogers* was a new take on an old question: what is meaningful access to the courts, and how do we know when a litigant has it?<sup>1</sup> In *Turner*, a man sent to prison for a year for civil contempt for willful failure to pay court-ordered child support claimed that his due process rights had been violated because he lacked legal representation at his contempt hearing.

The Court held that a litigant does not have meaningful access to the courts if all he can do is file initial papers or walk into the courthouse door. Rather, the Court held, for a litigant to have meaningful access, he must be able to identify the central issues in the case and present evidence and arguments regarding those issues.<sup>2</sup> In so holding, the Court implicitly rejected the definition of meaningful access used by the Court in its 1996 opinion *Lewis v. Casey*,<sup>3</sup> which encompassed only the ability to present grievances to the Court, and embraced a broader definition from its 1977 opinion in *Bounds v. Smith*<sup>4</sup> that litigants must be able to engage in "an adversary presentation." This portion of the opinion thus holds promise for a reinvigorated federal constitutional role in ensuring that people who lack counsel nonetheless are able to participate meaningfully in their civil cases.

At the same time, the Court's application of its meaningful access standard threatens to rob that standard of any real meaning. The Court adopted a suggestion by a nonparty, presented for the first and only time in a Supreme Court amicus brief, that civil contempt defendants can obtain meaningful access to the courts if they are provided with minimal assistance: a notice identifying the ability to pay as the central issue in the case, a form requesting information about their ability to pay, a hearing at which they are questioned about the information on the form, and a finding on whether the defendant had the ability to pay.<sup>5</sup> The Court's embrace of this extra-record information resembles the Court's analyses of the abilities of pro se litigants in two other cases, *Lassiter v. Department of Social Services*<sup>6</sup> and *Walters v. National Association of Radia-*

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<sup>†</sup> Deputy Director, National Center for Access to Justice at Cardozo Law School

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

2. See discussion *infra* Part II.

3. 518 U.S. 343, 346 (1996).

4. 430 U.S. 817, 826 (1977).

5. See discussion *infra* Part III.

6. 452 U.S. 18 (1981).

*tion Survivors*,<sup>7</sup> which likewise rely on the Justices' intuitions regarding the abilities of pro se litigants, even in the face of evidence to the contrary.

This Article proceeds as follows. Part I describes the Court's opinion in *Turner* and how the legal academy has reacted to it so far. Part II describes the Court's holding regarding the definition of meaningful access, compares that definition to the definitions used in *Lewis* and *Bounds*, and posits that what emboldened the *Turner* Court to broaden the right of meaningful access were innovations in pro se assistance that are cheaper than providing counsel. Part III describes how the *Turner* Court relied on facts not in evidence to conclude that measures short of counsel could provide meaningful access to the courts, notes that appellate courts generally do not rely on extra-record evidence, and points to similarities between the Court's treatment of the facts in this case and in *Lassiter* and *Walters*. Finally, the Article concludes that the only way to make the meaningful access standard meaningful is for the courts to rely on empirical evidence regarding the capabilities of pro se litigants.

#### I. THE *TURNER* OPINION

In *Turner*, the Court considered the plight of Michael Turner, who spent a year in prison for civil contempt for failure to pay child support.<sup>8</sup> He had no lawyer at his civil contempt hearing.<sup>9</sup> Mr. Turner argued that his due process rights were violated when he was incarcerated for over a year without being represented by counsel.<sup>10</sup> Justice Breyer, writing for a five-justice majority, held that Mr. Turner did not have a categorical right to counsel under the federal Constitution.<sup>11</sup> The Court applied the *Mathews v. Eldridge*<sup>12</sup> test for due process violations, which considers:

- (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]."<sup>13</sup>

The Court acknowledged that the first factor "argues strongly" in favor of the appointment of counsel because Mr. Turner faced the potential loss of his liberty.<sup>14</sup> However, the Court held that the second factor weighed against appointment of counsel because the "critical question," which the Court identified as the defendant's "ability to pay," is often

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7. 473 U.S. 305 (1985); see discussion *infra* Part III.

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

9. *Id.*

10. *Id.* at 2515–16.

11. *Id.* at 2520.

12. 424 U.S. 319 (1976).

13. *Id.* at 2517–18 (quoting *Eldridge*, 424 U.S. at 335).

14. *Id.* at 2518.

“straightforward” when “the right procedures are in place.”<sup>15</sup> To identify those procedures, the Court relied on a suggestion by the Solicitor General, appearing as amicus curiae, that:

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.<sup>16</sup>

The Court also held that the second and third *Mathews* factors weighed against appointing counsel because Rebecca Rogers, the mother of Mr. Turner’s child and his opposing party, lacked representation, so that “[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would ‘alter significantly the nature of the proceeding.’”<sup>17</sup> In fact, the Court concluded, providing Mr. Turner with counsel “could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive.”<sup>18</sup>

To some observers, the decision holds the promise of expanded access to the courts.<sup>19</sup> For instance, if the Court relies on *Turner* to hold that there is a right to counsel in civil cases in which there is counsel on the other side, or in which the government is on the other side, then the case may ultimately be viewed as expanding the right to counsel in civil cases.<sup>20</sup> Additionally, *Turner* may come to be seen as requiring trial courts to provide unrepresented litigants with assistance short of full representation, such as forms, information about court processes, and questions from the bench about essential issues.<sup>21</sup>

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15. *Id.* at 2518–19.

16. *Id.* at 2519.

17. *Id.* at 2519 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973)).

18. *Id.*

19. See, *e.g.*, Richard Zorza & David Udell, *A Final Turner Post From Your Co-Hosts*, CONCURRING OPINIONS (June 28, 2011, 12:20 PM), <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers>; Jeanne Charn, *Turner v. Rogers*, CONCURRING OPINIONS (June 27, 2011, 7:07 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-2.html>.

20. See Mark Noferi, *‘Turner’ Could Support Appointed Counsel for Immigrants*, 246 N.Y. L.J. 15, (2011) (“In short, although the Court sidestepped arguments regarding immigrant detainees, its reasoning might one day support a groundbreaking right to counsel for immigrants detained pending deportation proceedings . . .”).

21. See Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES’ J., Fall 2011, at 16, 16 (“Before *Turner*, it was not yet fully settled for all whether judges can appropriately intervene in such civil cases. After *Turner*, the issues are when must they do so, and how they can most effectively do so in the situations in which they are either required or choose to intervene.”); Michael Millemann, *Turner—Implications for Civil Gideon, the Use of Unbundled Legal Services to Provide Access, and the Lawyers’ Practice Monopoly*, CONCURRING OPINIONS (June 26, 2011 8:28 PM),

The *Turner* opinion has also been criticized on many grounds. It represents a dangerous incursion into the principle that people should not be sent to prison until they have had the benefit of a lawyer making the strongest possible case for their freedom.<sup>22</sup> It understates the difficulty of the willfulness determination at the heart of the case, in part by characterizing the central issue as “ability to pay,” not willfulness.<sup>23</sup> The Court’s claim that providing Mr. Turner with a lawyer would make the proceeding less fair is odd, given that the judge is the ultimate decider of the facts and the law, whether or not there is a lawyer.<sup>24</sup> And, the Court did not adequately acknowledge that while Mr. Turner’s freedom was at stake his opponent’s was not, a situation that could justify providing representation to him but not her.<sup>25</sup> In Part III below, this Article describes another flaw in the decision: the Court’s reliance on facts not in the record to determine the level of assistance that unrepresented litigants need in order to have meaningful access to the courts.

## II. *TURNER* HOLDS THAT LITIGANTS MUST BE ABLE TO IDENTIFY CRITICAL ISSUES AND PRESENT RELEVANT EVIDENCE FOR ACCESS TO BE MEANINGFUL

The *Turner* Court held that while Mr. Turner did not necessarily have a right to counsel, he did have a right to meaningful access to the courts, and that the right had been violated in his case. Specifically, the Court held, Mr. Turner should have been provided with notice that the key issue in his case was whether he was able to pay child support, a form eliciting relevant information about his ability to pay, and a hearing at which he could answer any remaining questions about his ability to pay.<sup>26</sup> Thus, the Court held that in order for Mr. Turner to have meaningful access, he should have been able to identify the critical issues in his case and present relevant evidence regarding those issues.

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<http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers> (“[D]epending on the three *Mathews* factors, some of the forms of limited assistance that many legal services projects provide to indigent litigants in family law cases may be constitutionally required in some of those and other civil cases, thus validating the access to court right.”).

22. Joy Moses, *With Turner, Access to Justice Efforts Must Expand*, CONCURRING OPINIONS (June 27, 2011 4:39 PM), <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers>.

23. Norman Reimer, *Turner v. Rogers: The Right to Counsel Haunted by the Ghost of Gagnon*, CONCURRING OPINIONS (June 27, 2011, 4:51 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-the-right-to-counsel-haunted-by-the-ghost-of-gagnon.html>; John Pollock, *Turner v. Rogers: Why the Supreme Court Is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011, 6:05 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html#more-46984>.

24. Bruce Green, *A Professional Responsibility Perspective on Turner v. Rogers*, CONCURRING OPINIONS (June 22, 2011, 8:45 PM), <http://www.concurringopinions.com/archives/2011/06/a-professional-responsibility-perspective.html>.

25. *Id.*

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

The *Turner* Court's definition of meaningful access echoes the definition the Court used in *Bounds* in 1977.<sup>27</sup> In *Bounds*, prisoners claimed that their right of access to the courts was being violated because they lacked adequate access to law libraries and as a result had difficulty filing lawsuits challenging their criminal convictions and the conditions of their confinement. Justice Marshall, writing for the majority, held that the Constitution guaranteed the prisoners "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."<sup>28</sup> While the Court's focus was on prisoners' ability to file petitions and complaints,<sup>29</sup> the Court also held that prisoners needed access to legal materials in order to cite cases in "an adversary presentation" to respond to arguments made by the state.<sup>30</sup>

Twenty years later, in *Lewis*, the Court severely limited *Bounds*'s interpretation of the requirements of meaningful access. *Lewis* concerned a class action brought by people incarcerated in Arizona state prisons, claiming that they were unable to exercise their right of meaningful access to the courts because the law libraries in their prisons contained outdated materials, law library staff were insufficiently trained, and access to photocopying was limited.<sup>31</sup> Justice Scalia, writing for the majority, characterized the right of meaningful access as "a right to bring to court a grievance that the inmate wished to present."<sup>32</sup> He specifically criticized *Bounds* for implying "that the State must enable the prisoner to discover grievances, and to litigate effectively once in court."<sup>33</sup>

The meaningful access envisioned by Justice Breyer in *Turner*—the ability to identify the critical issues in the case and present relevant evidence regarding those issues—is similar to the view of meaningful access specifically rejected in *Lewis*—the ability "to discover grievances, and to litigate effectively once in court." The *Turner* Court does not discuss or even cite *Lewis* and *Bounds*. Thus, the Court gives no explanation for departing from *Lewis*'s narrow definition, and we can only speculate.

The political climate surrounding the cases may be one reason. At the time *Lewis* was decided, anti-prisoner sentiment was high. Members of Congress had touted horror stories regarding frivolous prisoner litigation, warning that the litigation was overwhelming the courts, unduly interfering with state control of penal institutions, and impoverishing

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27. *Bounds v. Smith*, 430 U.S. 817 (1977).

28. *Id.* at 825.

29. *Id.* at 828 n.17.

30. *Id.* at 826.

31. *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

32. *Id.* at 354.

33. *Id.* The *Lewis* Court also imposed a stringent "actual injury" requirement on prisoners seeking meaningful access, and held that in prisoner cases courts must weigh meaningful access claims against the prison's legitimate penological interests. *Id.* at 348–49, 361.

state governments.<sup>34</sup> The Gingrich Congress had responded in 1996 both by passing the Prison Litigation Reform Act,<sup>35</sup> which made it more difficult both for prisoners to find attorneys and for them to represent themselves, and by placing Legal Services Corporation (LSC)-funded civil legal aid attorneys off limits to prisoners.<sup>36</sup> *Lewis* was decided the same year.

But *Lewis* was a product of its times in another way, too: it was based on the premise that providing prisoners with lawyers was the only way to empower prisoners to “discover grievances, and to litigate effectively once in court.” The Court warned: “To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.”<sup>37</sup> Thus, the *Lewis* Court’s rejection of a broader reading of the right of meaningful access was based on a tautology: the only way to satisfy the broader right would be to provide counsel, and the Constitution does not require the appointment of counsel in civil cases.

In the years that have elapsed since *Lewis*, there has been a revolution in assistance for pro se litigants. Forty years after LSC’s founding, it is well established that the supply of civil legal aid attorneys is, and always has been, grossly inadequate to meet the demand. LSC-funded programs turn away half the people who seek their help; study after study shows that, at most, 20% of the legal needs of low-income communities are satisfied; and in civil cases concerning the lives of low-income people, the vast majority of litigants are unrepresented.<sup>38</sup>

As a result, courts, civil legal aid programs, and community organizations are experimenting with techniques to help unrepresented litigants in court. These include websites and computer kiosks with online information and forms, self-help centers, attorney-for-a-day programs, and more.<sup>39</sup> Justice Breyer’s idea that Michael Turner should have been provided with a “form” is an apparent nod to this spectrum of services.<sup>40</sup>

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34. Amy Petre Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California’s Substandard Prison Health Care System*, 13 HASTINGS WOMEN’S L.J. 223, 236-37 (2002).

35. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321(1995); see also David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454-55, 1458-59 (2010).

36. See Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to -56 (1996).

37. *Lewis*, 518 U.S. at 354.

38. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 1-3, 25-26 (2009).

39. Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 882-83 (2009).

40. See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice* 989 (Univ. Penn. L. Sch., Public Law Research Paper No. 11-36, Univ.

The *Turner* Court's statement that Mr. Turner should have been provided with "an opportunity at the hearing . . . to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form)"<sup>41</sup> echoes another innovation in pro se assistance: the notion that judges sometimes need to affirmatively question pro se litigants who have no other way of raising critical issues.<sup>42</sup> Here, the Court is adopting the Solicitor General's suggestion that "[t]o the extent the court had questions about the information on the form or disbelieved it, the court could question the contemnor about his finances at the contempt hearing."<sup>43</sup> Unlike the Solicitor General, the Court does not specify that it is the judge who must ask the parent questions about his financial status raised by his responses on the form. But if the judge does not ask, who will? It is unlikely that opposing counsel would ask because the *Turner* ruling is limited to cases in which there is no attorney on the other side. An opposing parent is not likely to ask because he is not likely to be more knowledgeable about the law than the defendant is. And an opposing attorney or parent is unlikely to have an incentive to ask Mr. Turner to clarify unclear responses in a way that would elicit evidence favorable to Mr. Turner.

Thus, the *Turner* Court's suggestion resembles the notion, embraced by the American Bar Association in a 2008 resolution, that a judge may have an affirmative duty to question a pro se litigant in order to elicit relevant information.<sup>44</sup> As Stephen Gillers and Russell Engler noted in a 2007 report, there has been "a consistent trend to encourage judges to make reasonable accommodations to unrepresented litigants as a matter of fairness."<sup>45</sup> Admittedly, the ABA resolution is a suggestion,

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Tenn. Legal Studies Research Paper No. 157, 2011), available at <http://ssrn.com/abstract=1919534> ("*Turner* invites forward-looking, flexible *pro se* alternatives."); Charn, *supra* note 19.

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

42. See *Zorza*, *supra* note 21, at 16 (characterizing *Turner* as an "effective endorsement of judicial engagement as helping ensure, and indeed sometimes required to ensure, fairness and accuracy, and to meet the requirements of due process").

43. Brief for the United States as Amicus Curiae Supporting Reversal at 25, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10).

44. AMERICAN BAR ASSOCIATION, BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT, sec. II.D.8 (2008) ("[I]t may be necessary for the Judge to ask open-ended questions regarding specific elements of the landlord's claims or the unrepresented tenant's defenses or counterclaims to assist the unrepresented litigant in articulating the elements of her/his claims, defenses or counterclaims."); see also Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L., ETH. & PUBLIC POL'Y 367 (2010); N.Y. CNTY. LAWYERS' ASS'N, BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT 11 (2008), available at [http://www.nycla.org/siteFiles/Publications/1166\\_1.pdf](http://www.nycla.org/siteFiles/Publications/1166_1.pdf); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2017 (1999).

45. Russell Engler & Stephen Gillers, *Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial in Cases Involving Unrepresented Litigants*, in New York County Lawyers' Association, REPORT ON PROTOCOLS FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS app. A at 2 n.6 (2006), available at [http://www.nycla.org/siteFiles/News/News59\\_2.pdf](http://www.nycla.org/siteFiles/News/News59_2.pdf); see also Russell Engler, *The Toughest Nut*:

not a requirement, and it is hardly embraced in all courts by all judges.<sup>46</sup> But the salient point is that the idea of an affirmative judicial obligation to question pro se litigants was gaining ground just as the *Turner* decision came down.

The spectrum of self-help services is a necessary innovation in light of the extreme shortage of counsel for low-income communities. At the same time, we lack an evidence base to determine the scope and efficacy of self-help services.<sup>47</sup> Some worry that self-help services will provide the appearance of a solution to the pro se crisis when in fact pro se litigants still cannot effectively assert their claims.<sup>48</sup> To some extent, the *Turner* opinion provides evidence for these fears. The Solicitor General's contention that there were adequate alternatives to counsel was clearly a basis for the *Turner* Court's rejection of the right to counsel in *Turner*'s case. Jo-Ann Wallace, President and CEO of the National Legal Aid and Defender Association, warns that *Turner* "could potentially be interpreted to lessen the need for attorneys in cases in which they are essential."<sup>49</sup>

At the same time, the case demonstrates that while government, including the judiciary, is often paralyzed by policies that appear too expensive or unwieldy, it can be persuaded to act when the solution appears more manageable. The *Lewis* Court developed a narrow view of "meaningful access" in the belief that truly meaningful access—enabling pro se litigants to litigate effectively—would require the appointment of counsel and be prohibitively expensive.<sup>50</sup> Believing that cheaper pro se help options would suffice to enable pro se litigants to litigate effectively, the *Turner* Court was able to embrace a definition of meaningful access that encompassed the ability to litigate.

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*Handling Cases Pitting Unrepresented Litigants Against Represented Ones*, 62 JUVENILE & FAMILY CT. J. 10 (2011) (tracing the chronology of guidelines regarding judicial engagement in cases involving pro se litigants).

46. See Engler & Gillers, *supra* note 45, at 21 (acknowledging the need for judicial education and training to "embolden judges who might otherwise feel isolated and fearful to use these techniques").

47. DEBORAH RHODE, ACCESS TO JUSTICE 120–21 (2004); Laura Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, 297 (2010); Sande Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 993 (2009).

48. See, e.g., Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 871–73 (2004).

49. Jo-Ann Wallace, *Turner v. Rogers Is a Watershed Moment for Civil Justice Guidance*, CONCURRING OPINIONS (June 27, 2011, 3:03 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-is-watershed-moment-for-civil-justice-guidance.html#more-47345>.

50. See RHODE, *supra* note 47, at 9–10 ("As law professor Geoffrey Hazard has noted, no 'politically sober judge, however anguished by injustice unfolding before her eyes,' could welcome the battles involved in trying to establish some broadly enforceable right to counsel.").

III. THE *TURNER* COURT OVERSTEPS THE APPELLATE ROLE WHEN IT FOUND THAT NOTICE, A FORM, A HEARING, AND A FINDING WOULD PROVIDE MEANINGFUL ACCESS

What *Turner* gives with one hand, it takes away with the other. As the previous section discussed, the Court signals a possible willingness to demand that courts do more to provide meaningful access. However, the *Turner* Court relies on supposition regarding the types of assistance that will enable a pro se litigant to obtain meaningful access, rather than engaging in an evidence-based examination of what it would take for a litigant to have such access.<sup>51</sup> As a rule, federal appellate courts decide cases based on the facts in the record. Ideally, the trial court will have made findings of fact. The appellate court then reviews most factual findings deferentially, asking only whether they are clearly erroneous.<sup>52</sup> When, as in *Turner*, the factual findings are made by a state court and concern a claimed violation of a federal constitutional right, however, the appellate court may scrutinize the factual findings more closely, and will apply particular scrutiny to whether the trial court attached the proper significance to the facts.<sup>53</sup> Even then, however, appellate courts tend to accept the trial court's findings. And, appellate courts tend to refrain from making new findings based on facts that were not before the trial court.<sup>54</sup>

The *Turner* Court departed from this method of review quite dramatically. It accepted as true a claim presented by the Solicitor General for the first time in an amicus brief: that notice, a form, a hearing at

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51. See 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, 93 (2011) (characterizing *Turner* as “predicated on Justices’ own impressionistic senses of both the costs and the benefits of using particular procedures”); *id.* at 158 (criticizing the *Mathews v. Eldridge* test used in *Turner* because “[n]either 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. . . . While one can state the equation, one cannot do the math because the data are missing. Interpretative choices abound.”); Norman Reimer, *Turner v. Rogers and the Ghost of Gagnon v. Scarpelli*, THE CHAMPION, July-Aug. 2011, at 7, <http://www.nacdl.org/champion.aspx?id=20800> (“From the criminal defense practitioner’s standpoint, the Court’s decision betrays naïve simplicity and a breathtaking disconnect from the real world.”).

52. FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571 (3d ed. 2012); see, e.g., *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111–12 (1980) (“[W]e customarily accept the factual findings of state courts in the absence of ‘extraordinary circumstances.’”) (quoting *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952)).

53. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567–68 (1995) (stating that Supreme Court would “make a fresh examination of crucial facts” presented to the trial court in First Amendment case).

54. WRIGHT & MILLER, *supra* note 52 § 2577 (3d ed. 2012); see, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 648–49 (2000) (conducting “independent review” of the “factual record” in First Amendment case, without adding facts not already in the record). *But see* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 26–35 (2011) (describing cases in which Supreme Court relied on facts not in the record).

which the judge could question the defendant, and a finding “can assure the ‘fundamental fairness’ of the proceeding even where the State does not pay for counsel for an indigent defendant.”<sup>55</sup> There was no evidence on this question before the trial court, and the parties themselves did not brief it at the Supreme Court.<sup>56</sup> If the Court were following usual appellate procedure, it would have sent the case back to the trial court for an assessment of the facts.<sup>57</sup> Or, because Mr. Turner himself could not benefit from such a factual assessment because he had already served his prison term, the appellate court would have described the legal standard and left it to trial courts in future cases to determine what measures would enable litigants to adequately present a defense, given the litigants’ educational background, cognitive abilities, and the complexity of the case.<sup>58</sup>

To be sure, courts are not required to hear evidence regarding facts that are self-evident or are a matter of common sense.<sup>59</sup> The Supreme Court has a long tradition of relying on common sense or intuition, rather than empirical evidence, to determine whether a particular type of help is needed to provide meaningful access to court.<sup>60</sup> That is entirely appropriate when a litigant claims that a particular type of help is needed to overcome an absolute roadblock to meaningful participation. For instance, common sense is all that is required to determine whether a person confined to a wheelchair needs help getting to a second-floor courtroom.<sup>61</sup> Common sense suffices to determine whether imposition of a fee at a particular stage in a case will preclude an indigent litigant from participating in that stage.<sup>62</sup> The same is true of the cases in which indigent litigants argue that the state should pay for tests, experts, and other types

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55. *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011); *see also id.* at 2524 (Thomas, J., dissenting) (“‘The record is insufficient’ regarding alternative procedures because ‘[t]hey were raised for the very first time at the merits stage here; so, there’s been no development’” (quoting Tr. of Oral Arg. 49, 43)).

56. *Barton & Bibas*, *supra* note 40, at 989 n.108 (“[T]he Court, reaching the issue *sua sponte*, did not have the benefit of research or briefing on the various procedures with which states are experimenting to facilitate *pro se* access to civil justice.”).

57. *See, e.g.*, *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380–81 (2008) (chiding court of appeals for balancing probative value of evidence against possible prejudicial effect, and remanding case for trial court to make that determination in the first instance); *Pullman-Standard v. Swint*, 456 U.S. 273, 291–93 (1982) (holding that court of appeals should not have considered evidence that trial court failed to consider, and remanding to trial court for consideration of that evidence in the first instance).

58. *See, e.g.*, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31–32 (1981).

59. *See* Fed. R. Evid. 702 (permitting expert testimony only when “specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue”).

60. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

61. *See* *Tennessee v. Lane*, 541 U.S. 509, 529 (2004).

62. *See* *M.L.B. v. S.L.J.*, 519 U.S. 102, 106–07 (1996) (record preparation fee in appeal of termination of parental rights); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (right to waiver of court costs on basis of indigence in divorce case); *Griffin v. Illinois*, 351 U.S. 12, 17–19 (1956) (right to free transcript for first appeal from criminal conviction).

of necessary evidence.<sup>63</sup> Likewise, common sense may suffice when a litigant seeks an opportunity to present documentary evidence or live testimony.<sup>64</sup>

But intuition is inadequate to the task of determining whether counsel is necessary for a litigant to have meaningful access, and whether less expensive types of assistance along the spectrum of pro se help will suffice to allow a pro se litigant to participate meaningfully in his case. The *Turner* Court wrote that for many defendants facing civil contempt for failure to pay child support, a form would enable them to demonstrate their inability to pay.<sup>65</sup> But will just any “form” enable the average litigant to provide the court with necessary information? Depending on font, sentence and word length, and line spacing, as well as on the education levels and cognitive capacities of the particular litigants, the form may be incomprehensible to a large percentage of litigants.<sup>66</sup>

Intuition is not only an insufficient tool for determining whether a pro se litigant has meaningful access; it is a biased one. That is to say, it will not only render the wrong result, but more often than not it will result in pro se litigants being denied the assistance they need for meaningful access. Judges are more likely to believe that the substance and procedures of the cases they hear are comprehensible to the average person than they are to believe that the cases are complicated and incomprehensible.<sup>67</sup> Judges, after all, have received three years of legal training aimed at instilling familiarity with law and procedure.<sup>68</sup> They have experience

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63. See *Little v. Streater*, 452 U.S. 1, 16–17 (1981) (state must pay for blood grouping tests sought by an indigent litigant).

64. See *Richardson v. Wright*, 405 U.S. 208, 209 (1972) (declining to reach merits after Social Security Administration began providing benefits recipients with notice and an opportunity to submit rebuttal evidence).

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

66. See Nat'l Cancer Inst., *Simplification of Informed Consent Documents*, CANCER.GOV (Aug. 8, 2011), <http://www.cancer.gov/clinicaltrials/patientsafety/simplification-of-informed-consent-docs/page2> (“Use of active voice, short sentences, personal pronouns, clear page layout with ‘white space’ borders, and large fonts make documents easier to read.”).

67. SELF-REPRESENTATION LITIG. NETWORK, TOUR GUIDE: A SELF-GUIDED TOUR OF YOUR COURTHOUSE FROM THE PERSPECTIVE OF A SELF-REPRESENTED LITIGANT 5 (2008), available at <http://www.courts.ca.gov/partners/documents/tourguide.pdf> (“[A] judge or administrator may not even observe barriers that may exist for uninitiated members of the public in an environment that is so familiar to him or her . . . .”); JOHN M. GRAECEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE “STATE OF THE ART” 23 (National ed. 2011) (“[S]tate level forms committees made up of judges and attorneys are incapable of achieving the objective of third grade forms comprehension without the assistance of language experts. . . . The inherent bias of legally trained professionals is towards the use of familiar and precise legal terminology because specific legal terms are used in statutes and case law and have acquired an accretion of accepted meaning and nuance that seems difficult or impossible to convey in a few words of plain English. The legally trained mind seems invariably to favor precision in legal meaning over general understandability when choosing the words to use in a form.”), available at <http://www.msbf.org/selfhelp/GraecenReportNationalEdition.pdf>. Of course, there are many judges who have a deep understanding of the problems faced by pro se litigants. My point here is simply that judges have a tendency to underestimate the difficulty of self representation.

68. WILLIAM M. SULLIVAN ET AL., SUMMARY, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5 (2007), available at

in the workings of their own courtrooms and the case law, laws, and rules used therein. And they do not have a large stake in the cases before them, unlike the litigants, who may have difficulty thinking clearly in a case involving the potential loss of a child, home, or livelihood.<sup>69</sup>

There are two types of empirical data that courts could consider to more rigorously assess whether a particular type of assistance is sufficient to provide a litigant with meaningful access. First, courts could assess the tasks litigants need to perform in that type of case, the obstacles to performing those tasks, and the interventions that would suffice to enable litigants to overcome those obstacles. This Article will use the term “process analysis” to describe that method. Second, courts could consider “outcome” studies, which compare the outcomes of those cases in which the intervention was provided with those in which the intervention was not provided.<sup>70</sup>

As the Article describes below, *Turner*'s reliance on intuition in lieu of empirical data to determine whether a litigant has meaningful access is of a piece with the Court's analytical style in two other seminal cases in which unrepresented people sought attorney assistance: *Lassiter v. Department of Social Services* and *Walters v. National Association of Radiation Survivors*.<sup>71</sup> As this section shows, taken together, the cases evince a willingness to reach conclusions that certain litigants have meaningful access even in the absence of reliable evidence.

#### A. Process Analysis

Courts could rely on process analysis to assess claims that a certain type of assistance is necessary to allow a litigant to obtain meaningful access. Using this method, a researcher would compile a list of all the tasks that a litigant must perform in that type of case, and then assess the obstacles that litigants face in performing those tasks and whether the assistance requested will allow a litigant to perform the tasks.<sup>72</sup> Michael Turner presented this type of evidence when he argued that the willfulness or ability to pay determination can be complex.<sup>73</sup> For example, a

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[http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf) (“Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules.”).

69. See Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 625 (2010) (“When a pro se litigant's income, assets, healthcare and well-being are on the line, he or she faces formidable emotional barriers to articulating a clear case and proving facts. In the best circumstances it is difficult to keep a clear head and an objective view of the strengths and weaknesses of the case.”).

70. See Abel, *supra* note 47, at 299–300 (using this typology).

71. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–25 (1981); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

72. Abel, *supra* note 47, at 304.

73. Brief for Petitioner at 35–36, 46, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10).

defendant may have to show not only that he is unemployed, but that he has not made any unwise choices about how to spend his money.<sup>74</sup> The *Turner* Court also had before it evidence that many parents facing civil contempt have little education,<sup>75</sup> and that defendants often fail to assert meritorious defenses in these cases.<sup>76</sup>

However, as described above, there was no evidence before the Court regarding whether the Court's solution—notice, a form, a hearing at which the judge could question the defendant, and a finding—would enable either Mr. Turner or the typical litigant to adequately present a defense, given the litigant's educational background, cognitive abilities, and the complexity of the case. Thus, to complete the process analysis by determining that the solution would in fact provide meaningful access, the Supreme Court relied solely on unsupported contentions offered in an amicus brief.

In *Walters*, the Supreme Court rejected the district court's explicit factual findings regarding the difficulty of self-representation. In that case, veterans who were injured in U.S. atomic bomb tests challenged a statute barring attorneys from accepting more than \$10 to represent veterans seeking disability benefits from the Veterans Administration. Considering this claim, the district court reviewed what it characterized as “a full factual presentation as to the actual operation and effect of the \$10.00 limit.”<sup>77</sup>

Holding that the plaintiffs were highly likely to succeed on their claim that the \$10 cap violated the veterans' due process rights, the district court judge found that “[t]he undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting [disability] claims to the VA are extremely complex.”<sup>78</sup> He also found that “neither the VA officials themselves nor the [non-attorney] service organizations are providing the full array of services that paid attorneys might make available to claimants.”<sup>79</sup> He concluded that “[i]t is highly unlikely that veterans or their families will,

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74. *Id.* at 35 n.20.

75. *Id.* at 47; Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 9 *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10) (“A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma—double the rate for those whose income was not below the poverty threshold.”).

76. Brief for the National Association of Criminal Defense Lawyers et al., *supra* note 75, at 14 (2002 HHS study showed that low-income parents are typically ordered to pay a greater proportion of their income than is statutorily allowed).

77. *Nat'l Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1312 (N.D. Cal. 1984), *rev'd*, 473 U.S. 305 (1985).

78. *Id.* at 1307–08, 1319–20 (citing numerous depositions and affidavits).

79. *Id.* at 1310, 1320–23 (characterizing this conclusion as being based on “a great deal of evidence regarding . . . the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims”).

without the use of an attorney, prove able to build and present their cases as ably as an attorney.”<sup>80</sup>

The Supreme Court reversed, concluding that in most cases an attorney was unnecessary, faulting the district court’s process analysis as incorrect. The Supreme Court held that while some cases might be complex, the district court had not attempted to calculate how often that was the case.<sup>81</sup> Defining “complex” as involving tricky legal questions, the Court stated that such cases were only “a tiny fraction of the total cases pending.”<sup>82</sup> Most cases, the Court stated, concerned “simple questions of fact, or medical questions relating to the degree of a claimant’s disability.”<sup>83</sup> The Court thus disagreed with the district court’s reading of the evidence, substituting its own judgment about the difficulty of the tasks involved in litigating veterans’ disability cases for the district court’s factual findings.<sup>84</sup>

Taken together, *Turner* and *Walters* evince a view of judicial intuition as being sufficient to assess both a pro se litigant’s ability to conduct litigation tasks and the utility of various types of legal assistance. The *Turner* Court viewed the issue as so straightforward that it held that the Constitution *required* trial courts to provide forms and other sorts of assistance to pro se litigants, even though there was no evidence in the record regarding the utility of that assistance. The *Walters* Court baldly stated that the district court judge who had reviewed a voluminous record was simply wrong in his assessment of the difficulty of veterans’ benefits litigation.

### B. Outcome Analysis

Another method to determine the value of a potential type of legal assistance is outcome analysis, which compares the outcomes in cases in which the intervention is used with those cases in which the intervention is not used. Apparently, there were no outcome studies before the Court in *Turner*. While such evidence was considered in *Lassiter* and *Walters*, the evidence in both cases had serious flaws, and in the end the Court did not rest its opinions in either case on the outcome evidence before it.

The gold standard in outcome comparison studies involves randomly assigning some subjects to a control group (which does not receive the intervention) and others to a treatment group (which does receive the

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80. *Id.* at 1323.

81. *Walters*, 473 U.S. at 329.

82. *Id.* at 329–30.

83. *Id.*

84. And, as Justice Brennan’s dissent noted, instead of merely holding that the district court had abused its discretion and returning the case to that court for a full trial on the merits, the Supreme Court decided the case on the merits, “bootstrapping its way past the rule that we may ‘intimate no view as to the ultimate merits’ in preliminary-injunction cases.” *Id.* at 356 (Brennan, J., dissenting).

intervention).<sup>85</sup> Randomization allows researchers to attempt to ensure that the effects they are observing result from the intervention itself rather than from some other factor.<sup>86</sup> For instance, without random assignment, researchers comparing the outcomes of cases in which litigants had legal representation with cases in which litigants did not have such representation cannot know whether the litigants with lawyers had stronger cases to begin with. Perhaps the litigants with stronger cases tried harder to find lawyers, or perhaps the lawyers accepted only the strong cases. Either instance would be an example of what statisticians call selection bias.<sup>87</sup>

A possible selection bias problem plagued studies proffered by the parties in *Lassiter*.<sup>88</sup> There, the Court held that Abby Gail Lassiter's due process rights were not violated when South Carolina terminated her right to a relationship with her infant son William, in a proceeding in which she was not represented by counsel.<sup>89</sup> In a footnote, the Court acknowledged that both the state defendant and a law journal had conducted "surveys purporting to reveal whether the presence of counsel reduces the number of erroneous determinations in parental termination proceedings." The Court dismissed both studies as "unilluminating."<sup>90</sup>

As Justice Brennan noted in his dissent, both studies found that parents who were represented by counsel had a significantly higher success rate than parents who were not represented by counsel.<sup>91</sup> These results could have been the consequence of selection bias because they were not based on random samples.<sup>92</sup> Justice Brennan found them persuasive, however. He rejected the possibility of selection bias, writing that because "no evidence in either study indicates that the defendant parent who can retain or is offered counsel is less culpable than the one who appears unrepresented, it seems reasonable to infer that a sizable number of cases against unrepresented parents end in termination solely because of the absence of counsel."<sup>93</sup> The majority did not respond to this line of reasoning. It made no attempt to grapple in any real way with the studies, or to determine whether the cases in which counsel makes a difference are the vast majority or are outliers.

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85. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. (forthcoming 2012); Abel, *supra* note 47, at 299–300.

86. Greiner & Pattanayak, *supra* note 85.

87. *Id.*

88. See Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 742–43 (2006) (noting that in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court underestimated the "risks of error . . . in most contested and litigated cases when litigants are unrepresented").

89. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981).

90. *Id.* at 29 n.5.

91. *Id.* at 46 n.15.

92. See discussion *supra* note 85 and accompanying text.

93. *Lassiter*, 452 U.S. at 46 n.15.

In contrast to the *Lassiter* majority's cursory dismissal of the outcome studies presented in that case, the *Walters* majority harshly criticized the trial court's refusal to rely on outcome studies. The district court judge noted that the plaintiffs had gathered "a great deal of evidence" through "extensive discovery."<sup>94</sup> Both sides had presented outcome comparison studies—"statistics comparing the relative success of those few attorneys who represent . . . claimants before the VA notwithstanding the \$10.00 fee limit with that of other representatives."<sup>95</sup> The veterans claimed that the statistics demonstrated that veterans with attorneys were more successful while the government claimed they showed that veterans with attorneys were no more successful than those without.<sup>96</sup> The judge declined to decide who was right. Instead, he dismissed the statistical evidence as irrelevant, writing:

The success rate of those few attorneys who are now taking [disability] cases on essentially a pro bono basis is a completely inadequate predictor of the success rate of paid attorneys. Not only may paid attorneys be able to devote more time and resources to the cases, but they may also develop substantial expertise in the complicated legal areas involved with SCDD claims.<sup>97</sup>

The Supreme Court chided the district court for rejecting the outcome data proffered by the parties, stating:

We have the most serious doubt whether a competent lawyer taking a veteran's case on a *pro bono* basis would give less than his best effort, and we see no reason why experience in developing facts as to causation in the numerous other areas of the law where it is relevant would not be readily transferable to proceedings before the VA.<sup>98</sup>

The Supreme Court's critique was apparently based entirely on the Court's intuition; the Court did not point to any evidence to support its claim. According to the Court's reading of the statistics, "[r]eliable evidence before the District Court showed that claimants represented by lawyers have a slightly better success rate before the [Board of Veteran Appeals] than do claimants represented by service representatives, and that both have a slightly better success rate than claimants who were not represented at all."<sup>99</sup> In the end it did not matter, however. The Court concluded that under the *Mathews v. Eldridge* test for due process violations, the government's interest in keeping the proceedings non-

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94. Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1310 (D. Cal. 1984).

95. *Id.* at 1317. Apparently, neither study relied on random assignment or used any other technique to deal with selection bias.

96. *Id.*

97. *Id.* (relying on deposition testimony by director of Compensation and Pension Service for the Department of Veterans Benefits).

98. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 328 (1985).

99. *Id.* at 331.

adversarial outweighed any advantage the veterans might obtain from having a lawyer.<sup>100</sup>

There are some striking similarities between the treatment of outcome studies in *Lassiter* and *Walters*. First, in both cases, at least one of the parties offered an outcome study as evidence of the extent to which attorneys do or do not make a difference in particular types of cases. However, there were serious flaws in the studies. None of the studies used randomization, so it was impossible to know whether the outcomes observed were the result of attorney representation or of some other factor. In *Walters*, the outcome studies had another potential problem: while the plaintiffs were seeking the ability to pay attorneys at a market rate, there were no attorneys yet handling those cases at a market rate. As a result, the studies could not assess the efficacy of market rate representation.

Second, at least some of the judges in both cases attempted to determine whether the studies were probative of the difference an attorney would make. However, the judges do not appear to have had testimony from any statistical experts to help them make this determination. As a result, they were forced to use their own intuitions about the difference that legal representation would make in the case.

Third, in the end, the Court did not base its holdings on the statistical evidence. The *Lassiter* Court held that no matter how much difference a lawyer might make, Ms. Lassiter could not show that she was prejudiced by the lack of counsel; the *Walters* Court held that the value of keeping the proceedings non-adversarial outweighed any increase in accuracy that a lawyer might impart.

#### IV. CONCLUSION

We do not yet know how courts will apply *Turner*; too little time has elapsed since it was issued. The choices are clear, however: *Turner* may come to stand for a definition of meaningful access to the courts as including the ability to identify and present arguments and evidence regarding the central issues in a case. Or, it may come to stand for the proposition that the meaningful access standard is toothless, given the instinctive belief of many judges that self-representation is easier than it really is.

The outcome may depend on whether future cases involve empirical evidence. Unfortunately, there is a shortage of reliable data concerning what kind of legal assistance various types of litigants need to obtain meaningful access.<sup>101</sup> A few social scientists are attempting to fill the

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100. *Id.*

101. Greiner & Pattanayak, *supra* note 85; Jeffrey Selbin et al., *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*,

void. A randomized study by University of California at Irvine law professor Carroll Seron found that lawyer representation made a large difference in whether tenants facing eviction in New York City kept their homes.<sup>102</sup> Harvard law professor James Greiner and statistician Cassandra Wolos Pattanyak are working their way through an ambitious agenda of randomized outcome studies examining the effects of offers of attorney representation and other types of legal assistance.<sup>103</sup> They report that offers of representation in unemployment insurance cases by a Harvard Law School clinic did not affect the likelihood that the claimants would prevail, although they were unable to reach a conclusion about whether the actual use of representation affected the outcome.<sup>104</sup> Preliminary results from another of their studies, involving full-fledged lawyers handling eviction cases in a Massachusetts district court (a court of general jurisdiction), found that the clients were far more likely to retain possession of their homes when they received full representation than when they received only limited legal assistance involving advice and help filling out forms.<sup>105</sup> In a third study, however, full-fledged lawyers handling eviction cases in a specialized housing court in Massachusetts had no greater effect on their clients' ability to retain possession whether they provided full legal representation or just limited assistance.<sup>106</sup> American Bar Foundation researcher Rebecca Sandefur has conducted a meta-analysis of the existing studies regarding the effects of attorney representation, leading her to conclude that attorneys have a larger effect on the outcome of their clients' cases in procedurally complex cases than in cases in which the procedures are relatively straightforward.<sup>107</sup> These and similar studies hold out a promise that some day we may have enough outcome studies for courts to conclude confidently that a particular type of assistance is or is not necessary for a litigant to obtain meaningful access in a civil case.

We are not yet there, though. There simply are too few reliable outcome studies to be able to reach conclusions extending much beyond the specific findings of each study. The outcomes of these particular studies

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AMERICAN PROGRESS 6 (June 2011), <http://www.americanprogress.org/issues/2011/06/pdf/evidence.pdf>; Abel, *supra* note 47, at 301–02.

102. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001).

103. Greiner & Pattanyak, *supra* note 85.

104. *Id.*

105. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* (Mar. 29, 2012) (forthcoming Harvard Law Review), available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1300384#show1948286](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1300384#show1948286).

106. D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in Massachusetts Housing Court* (Mar. 12, 2012) (unpublished paper) available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1300384#show1880078](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1300384#show1880078).

107. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 51–52 (2010).

may well depend on the characteristics of the particular lawyers who handled the cases, the substantive law in that particular jurisdiction, or procedures in the courts in which the cases were handled.<sup>108</sup> In contrast to the small number of rigorous outcome studies that have examined the effect of attorney representation, a recent New Jersey Supreme Court opinion regarding the reliability of eyewitness identifications rested on the conclusions of a special master who had reviewed “testimony by seven experts and . . . more than 2,000 pages of transcripts along with hundreds of scientific studies.”<sup>109</sup>

For now, courts may have to rely more on careful process analysis to assess litigants’ abilities. The expertise psychiatrists have amassed regarding the capabilities of criminal defendants may be helpful here.<sup>110</sup> The expertise of the many court officials, legal aid attorneys, and others who staff self-help centers may prove useful, too.<sup>111</sup> Only when meaningful access cases start focusing on these types of hard data can we expect that the courts will begin providing truly meaningful access.

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108. Greiner & Pattanayak, *supra* note 85 (cautioning “that studies of the kind we conduct here are heavily dependent on context,” and writing that “with numerous studies, we could begin to make more informed guesses as to which aspects of context matter most, and to base policy and funding decisions on these more informed guesses”).

109. *State v. Henderson*, 208 N.J. 208, 217-18 (2011).

110. *See generally* Brief for Am. Psychiatric Assoc & Am. Acad. of Psychiatry and the Law as Amicus Curiae in Support of Neither Party, *Indiana v. Edwards* 554 U.S. 164 (2008) (No. 07–208), 2008 WL 405546.

111. *See* John D. Graecen, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of “State of the Art”* MICHIGAN STATE BAR FOUND. (2011), <http://www.msbf.org/selfhelp/GraecenReportNationalEdition.pdf> (describing self-help programs and insights that the people who staff them have gained).