

COLUMBIA LAW REVIEW



SYMPOSIUM

THE OTHER 98%: RACIAL, GENDER, AND ECONOMIC INJUSTICE IN STATE CIVIL COURTS

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COLUMBIA LAW REVIEW

VOL. 122

JUNE 2022

NO. 5

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ABSTRACTS

ESSAYS

A TALE OF TWO CIVIL PROCEDURES

Pamela K. Bookman & 1183
Colleen F. Shanahan

In the United States, there are two kinds of courts: federal and state. Civil procedure classes and scholarship largely focus on federal courts but refer to and make certain assumptions about state courts. While this dichotomy makes sense when discussing some issues, for many aspects of procedure this breakdown can be misleading. Two different categories of courts are just as salient for understanding American civil justice: those that routinely include lawyers and those where lawyers are fundamentally absent.

This Essay urges civil procedure teachers and scholars to think about our courts as “lawyered” and “lawyerless.” Lawyered courts include federal courts coupled with state court commercial dockets and the other pockets of state civil courts where lawyers tend to be paid and plentiful. Lawyerless courts include all other state courts, which hear the vast majority of claims. This Essay argues that this categorization reveals fundamental differences between the two sets of court procedures and much about the promise and limits of procedure. The Essay also discusses how this dichotomy plays out in three of today’s most contentious topics in civil procedure scholarship: (1) written and unwritten procedure-making, (2) the role of new technology, and (3) the handling of masses of similar claims. This categorization illuminates where and how lawyers are essential to procedural development and procedural protections. They also help us better understand when technology should assist or replace lawyers and how to reinvent procedure or make up for lawyers’ absence. Finally, they reveal that fixing court procedure may simply not be enough.

RACIAL CAPITALISM IN THE CIVIL COURTS

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Jessica K. Steinberg & Lauren Sudeall

This Essay explores how civil courts function as sites of racial capitalism. The racial capitalism conceptual framework posits that capitalism requires racial inequality and relies on racialized systems of expropriation to produce capital. While often associated with traditional economic systems, racial capitalism applies equally to nonmarket settings, including civil courts.

The lens of racial capitalism enriches access to justice scholarship by explaining how and why state civil courts subordinate racialized groups and individuals. Civil cases are often framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants enter the civil legal system involuntarily, and the state plays a central role in their subordination through its judicial arm. A major function of the civil courts is to transfer assets from these individual defendants to corporations or the state itself. The courts accomplish this through racialized devaluation, commodification, extraction, and dispossession.

Using consumer debt collection as a case study, we illustrate how civil court practices facilitate and enforce racial capitalism. Courts forgo procedural requirements in favor of speedy proceedings and default judgments, even when fraudulent practices are at play. The debt spiral example, along with others from eviction and child support cases, highlights how civil courts normalize, legitimize, and perpetuate the extraction of resources from poor, predominately Black communities and support the accumulation of white wealth.

JUDGING WITHOUT A J.D.

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One of the most basic assumptions of our legal system is that when two parties face off in court, the case will be adjudicated before a judge who is trained in the law. This Essay begins by showing that, empirically, the assumption that most judges have legal training does not hold true for many low-level state courts. Using data we compiled from all fifty states and the District of Columbia, we find that thirty-two states allow at least some low-level state court judges to adjudicate without a law degree, and seventeen states do not require judges who adjudicate eviction cases to have law degrees. Since most poor litigants are unrepresented in civil legal cases, this sets up an almost Kafkaesque scene in courtrooms across the country: Legal cases that have a profound effect on poor families, such as whether they will lose their home to eviction, are argued in courtrooms where either no one knows the law or only one party—the attorney for the more powerful party—does.

Considering data collected from a case study of North Carolina, where over 80% of magistrates do not have J.D.s, this Essay argues that allowing a system of nonlawyer judges perpetuates long-standing inequalities in our courts. It further argues that the phenomenon of lay judges is a symptom of a much larger problem in our justice system: the devaluation of the legal problems of the poor, who are disproportionately Black and Latinx. This devaluation stems in part from an enduring cultural history in the United States of blaming the poor for their poverty and its associated problems. A change is in order, one that intentionally considers the expertise of judges and adopts creative solutions to incentivize specially qualified adjudicators to serve as low-level state court judges.

Local organizations that lie outside of the scope of legal aid nonetheless engage legal processes. Such organizations draw on courts, lawyers, and legal problems as a basis for mobilizing and power building in racially and economically marginalized communities. They work within such communities to provide support navigating courts, obtaining legal representation, contesting unfair legal practices, and much more. These activities position local organizations as critical—yet too easily overlooked—civil legal institutions. Unlike other civil legal institutions (e.g., legal aid organizations and courts), nonlegal local organizations (e.g., tenant organizations) can operate inside and outside the formal civil legal system. Consequently, they have a distinctive vantage point and a pivotal role in developing power resources that are integral in a democratic polity. This Essay draws on in-depth qualitative interviews with tenant groups to offer an account of how local organizations engage civil legal processes and function as important institutional nodes in a larger civil legal infrastructure. By advancing knowledge of an imperative avenue through which race-class subjugated communities can exercise agency within civil legal processes, this Essay illuminates linkages between civil justice and local organizations and raises questions about how to better support tenant organizations as they undertake work that vitally enhances democracy.

The discovery process is the most distinctive feature of American civil procedure. Discovery has been referred to as procedure's "backbone" and its "central" axis. Yet 98% of American cases take place in state judiciaries where there is little to no discovery. Most state court cases involve unrepresented parties litigating debt collection, eviction, family law, and employment claims. And the state rules of procedure rarely give these parties the power to make discovery requests. This "missing discovery" means, then, that discovery is not a fundamental part of states' legal traditions.

This Essay presents a study of America's missing discovery system in state civil courts. It begins with a brief survey of state discovery rules that shows how discovery is often inaccessible and opaque. It then argues that while discovery has been key to the progress of federal law, it has not been an important tool for state law reform. Still, the Essay highlights that discovery is a double-edged sword: It can empower small claimants but may also impose costs and complexity that these litigants cannot handle. Accordingly, the Essay proposes an experiment in access-oriented discovery, focusing on disclosure obligations on sophisticated litigants. The Essay's main goal, however, is to work toward a theory of discovery in state civil courts.

Jessica K. Steinberg,
Alyx Mark & Anna E. Carpenter

State civil courts are central institutions in American democracy. Though designed for dispute resolution, these courts function as emergency rooms for social needs in the face of the failure of the legislative and executive branches to disrupt or mitigate inequality. We reconsider national case data to analyze the presence of social needs in state civil cases. We then use original data from courtroom observation and interviews to theorize how state civil courts grapple with the mismatch between the social needs people bring to these courts and their institutional design. This institutional mismatch leads to two roles of state civil courts that are in tension. First, state civil courts can function as violent actors. Second, they have become unseen, collective policymakers in our democracy. This mismatch and the roles that result should spur us to reimagine state civil courts as institutions. Such institutional change requires broad mobilization toward meeting people's social needs across the branches of government and thus rightsizing state civil courts' democratic role.

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COLUMBIA LAW REVIEW

VOL. 122

JUNE 2022

NO. 5

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The *Columbia Law Review* dedicated this symposium Issue to examining justice and injustice in state civil courts. The *Law Review* thanks the faculty organizers—Professors Colleen F. Shanahan, Anna E. Carpenter, Alyx Mark, and Jessica K. Steinberg—and the contributing authors for their excellent contributions to this subject.

FOREWORD

THE FIELD OF STATE CIVIL COURTS

*Anna E. Carpenter**, *Alyx Mark*** *Colleen F. Shanahan**** & *Jessica K. Steinberg*****

INTRODUCTION

This symposium Issue of the *Columbia Law Review* marks a moment of convergence and opportunity for an emerging field of legal scholarship focused on America's state civil trial courts. Historically, legal scholarship has treated state civil courts as, at best, a mere footnote in conversations about civil law and procedure, federalism, and judicial behavior. But the status quo is shifting. As this Issue demonstrates, legal scholars are examining our most common civil courts as sites for understanding law, legal institutions, and how people experience civil justice. This engagement is essential for inquiries into how courts shape and respond to social needs and structural inequality and what all of this means for the present and future of American democracy.

Two key motivations drive scholarly interest in state civil courts. One motivation is generating knowledge. Historically, legal scholarship has largely ignored the most common and ordinary aspects of American civil justice in favor of studying the uncommon and the extraordinary. Thus, many of our core premises and assumptions—in civil procedure, administrative law, contracts, torts, and even constitutional law—are based on an understanding of only a sliver of formal civil justice activity. By case count, that slice is roughly two percent, the percentage of civil cases handled by federal courts each year, creating a glaring existential problem for legal scholarship. We need to know about the institutions that handle the other ninety-eight percent of civil matters to answer the most basic questions about civil law and the civil justice system, to say nothing of exploring broader social, economic, and political questions that intersect with civil courts' work.

Reform is another motivation. We live in a moment of collective concern and outrage about institutions, systems, and practices that perpetuate

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structural inequality and injustice. State civil courts are one of those institutions; civil justice is one of those systems. Many of those who choose to study state civil courts are committed to generating insights that help make our civil justice system more accessible, fair, and supportive of shared prosperity and human flourishing.

We acknowledge a tension between knowledge generation and reform goals. We have much to learn and the need for reform is pressing—human lives and our democracy are on the line. In navigating this tension, empirical research on state civil courts ought to be theoretically driven, but it need not always include prescriptions or reform proposals to be valuable and vital. Given all we need to learn about state civil courts and the gravity and scope of their work, it may be too early for quality, data-driven prescriptions to flow from some research projects. Likewise, we need fresh frameworks and perspectives from critical and theoretical scholarship. The field of state civil courts should celebrate and elevate scholarship that describes what state civil courts *do* (through empirical methods) and *why* (through theory and critique). This does not mean state civil courts scholarship should be devoid of normative commitments. Indeed, like much of legal scholarship, scholars' work will be driven by explicit and implicit views of what *should be*.¹

While this Issue focuses on academic legal scholarship about state civil courts, we owe a tremendous debt to the foundational work of law and society scholars,² to the National Center for State Courts for years of

1. For legal scholarship about legal scholarship, including the relationship between and role of normative, empirical, critical, and theoretical work, see generally Danielle K. Citron & Robin West, *On Legal Scholarship* (2014), <https://www.aals.org/wp-content/uploads/2014/08/OnLegalScholarship-West-Citron.pdf> [<https://perma.cc/S8QZ-CZ2L>] (assessing the value and role of legal scholarship and categorizing it); Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. Pa. L. Rev. 117 (2013) (discussing how legal empiricists can bridge the gap between "is" and "ought"); Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. Legal Educ. 65 (2013) (categorizing approaches to legal scholarship); see also Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. Chi. L. Rev. 213, 214–17 (2017) (calling for a systematic, rigorous approach to qualitative analyses in doctrinal scholarship).

2. Sociological scholars have produced much of what we know about state-level civil trial courts and the public's experiences with civil justice more broadly. For an authoritative summary, see generally Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 Wis. L. Rev. 101 ("[W]e outline a framework for a research agenda that interrogates the premises of the policy model . . . [I]t is our hope that scholars *and* policy makers will come to understand access to justice in a different and more comprehensive way and . . . forge major new solutions to address poverty and inequality." (emphasis added)). For examples of key topics, such as how grievances become disputes, see generally Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 Ann. Rev. L. & Soc. Sci. 105 (2014) (proposing the "dispute tree" framework); Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid*, 32 Law & Soc. Inquiry 233 (2007) (reviewing David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans With Disabilities* (2003)); William L.F. Felstiner, Richard L. Abel

dogged data collection,³ and to the scholars, research organizations, and court leaders who have been steadily raising the volume on calls to improve state civil courts' data collection and analysis.⁴ To celebrate the

& Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631 (1980) (offering a framework for understanding how experiences become disputes and follow particular paths to resolution); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 *Mo. J. Disp. Resol.* 25 (examining the dispute paradigm from the perspective of lawyers). For further discussion of legal consciousness, see Patricia Ewick & Susan S. Silbey, *The Common Place of Law 15–23* (1998) (“Our analysis of commonplace legality builds on a tradition of research on the social construction of law [T]hese accounts describe how legal actors respond to particular situations.”); Lynette J. Chua & David M. Engel, *Legal Consciousness Reconsidered*, 15 *Ann. Rev. L. & Soc. Sci.* 335, 336 (2019) (tracing the development of legal consciousness research); Kathleen E. Hull, *Legal Consciousness in Marginalized Groups: The Case of LGBT People*, 41 *Law & Soc. Inquiry* 551 (2016) (focusing on sexual and gender identity minorities in legal consciousness research). For a discussion of procedural justice, see generally John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (1975); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 *Ann. Rev. L. & Soc. Sci.* 171 (2005) (surveying major empirical findings on procedural justice).

3. The National Center for State Courts offers the best available national estimates of key civil court data points like case volume, type, outcome, and representation status. The Court Statistics Project, Nat'l Ctr. for State Cts., <https://www.courtstatistics.org/> [<https://perma.cc/6EGZ-XFZD>] (last visited Feb. 7, 2022); see also Nat'l Ctr. for State Cts., *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, at iii–vi (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/7AJB-SHUD>] (reviewing data on state civil courts). Despite the National Center's longstanding efforts, state civil court data remain difficult to access and analyze. For a summary of the challenges, see Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 *Wis. L. Rev.* 249, 265–71. For a summary of the data, see *id.* at 257–65. For a new perspective on state civil court data, see Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 *Colum. L. Rev.* 1471 (2022).

4. See Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 *Stan. J. C.R. & C.L.* 261, 267–68 (2020) (describing the Utah Supreme Court's efforts to address access to justice challenges); Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 *Yale L.J. Forum* 175, 178 (2021) (arguing that judges have an ethical obligation to advocate for justice system improvements); Erika Rickard, *The Agile Court: Improving State Courts in the Service of Access to Justice and the Court User Experience*, 39 *W. New Eng. L. Rev.* 227, 246 (2017) (describing the relationship between judicial administration and access to justice and offering recommendation for change); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 *S.C. L. Rev.* 295, 295 (2016) (describing civil justice data gaps and identifying possible solutions); Tanina Rostain & Erika Rickard, *Understanding State Courts: A Preliminary List of Data Needs 1* (Mar. 28, 2019) (unpublished manuscript) (on file with the *Columbia Law Review*) (identifying essential data to be collected about civil justice activity and entities best placed to collect that data); Civil Justice Data Commons, Geo. L., *Inst. for Tech. L. & Pol'y*, <https://www.law.georgetown.edu/tech-institute/programs/civil-justice-data-commons> [<https://perma.cc/5C5X-XR2R>] (last visited Feb. 7, 2022) (describing the Civil Justice Data Commons, a repository for civil legal data); *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, Pew (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> [<https://perma.cc/G9FU-T4YE>] (recommending that courts use data to guide

blossoming field of state civil courts in legal scholarship and encourage future scholars, we review the field using three intentionally broad and overlapping analytical lenses that drive research questions and methodological approaches: law, institutions, and people.

First, scholars using law as a lens focus on courts' adjudicatory and law development functions and ask questions about the nature and consequences of the substantive and procedural law that courts create, develop, and enforce. Second, scholars using an institutional lens examine courts from two perspectives. One is internal and studies courts as organizations with their own structures, norms, cultures, and roles. Another is external and examines courts in the context of their role in our broader government system, including how courts relate to other branches of state and federal governments and how courts' institutional design connects to systemic economic and social outcomes. Third, scholars using people as a lens explore how individuals and social groups experience courts and the resulting consequences.

The law, institutions, and people categories are not mutually exclusive; they overlap and contain cross-cutting issues. One example is a key theme running through many works in this Issue: inequality. Legal scholars writing about state civil courts interrogate racial, gender, and economic inequality and injustice through different frames within and across the categories of law, institutions, and people. Another example is the judicial role, which connects to law via civil procedure and judicial ethics rules, informs institutional questions via design choices that shape the judicial function, and affects people whose experiences of justice can be shaped by judicial behavior. For each category below, we highlight representative work and preview the contributions of papers in this Issue. We begin with a focus on law.

LAW

Understanding the content and implications of substantive and procedural law as enforced, developed, and created by state civil courts is

technology decisions); How Debt Collectors Are Transforming the Business of State Courts, Pew (May 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> [<https://perma.cc/RU7Z-AVKG>] (calling on states to improve the handling of debt collection cases with data); Law Technology Now, Model for Change: Utah's Data-Driven Approach to Closing the Justice Gap, Legal Talk Network (Sep. 16, 2020), <https://legaltalknetwork.com/podcasts/law-technology-now/2020/09/model-for-change-utahs-data-driven-approach-to-closing-the-justice-gap/> [<https://perma.cc/HNA6-DWN8>] (discussing Utah's approach to access to justice reform); Bridget McCormack, Opinion, Justice McCormack: Michigan Needs Better Court Data System, Detroit News (Jan. 6, 2021), <https://www.detroitnews.com/story/opinion/2021/01/07/opinion-justice-mccormack-michigan-needs-better-court-data-system/4139395001/> [<https://perma.cc/KKN9-USDB>] (calling for improved civil justice data collection).

a significant challenge and opportunity for legal scholars. Legal scholarship on civil law has long focused on federal courts' work, particularly in the contexts of constitutional issues, business litigation, and administrative law. As a result, legal scholarship has had relatively little to say about the substantive and procedural legal issues ordinary people face in courts, such as divorce, custody, guardianships, protective orders, debt, eviction, foreclosure, and small claims. By studying law in state civil courts, legal scholars can help us interpret civil law and understand how it affects people, institutions, and systems across our society. Scholars can also advance novel legal theories to improve substantive and procedural civil law and the social, political, and economic systems it supports and shapes—contributions that legal scholars are uniquely positioned to make.

Emerging work exploring the operation and development of law in state civil courts includes transsubstantive syntheses, analyses, and theories that help us understand broader forces that shape state civil law and explore their ramifications.⁵ For example, Kathryn Sabbeth has offered an expansive argument that the civil justice system is intertwined with a market-based system of law development. In her account, the energy and attention of lawyers and courts focus disproportionately on developing law that aligns with the interests of wealthy people and corporations while mainly ignoring the evolution of law that affects low-income people.⁶

Scholars are describing, interpreting, and criticizing written law and law in action across the spectrum of state civil court jurisdiction, including child support,⁷ domestic violence,⁸ child welfare and parental rights,⁹

5. See, e.g., Annie Decker, *A Theory of Local Common Law*, 35 *Cardozo L. Rev.* 1939, 1991–92 (2014) (theorizing how common law develops in trial courts); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 *Hastings L.J.* 1367, 1372–83 (2016) (discussing the results and implications of an empirical study showing that nonlawyer advocates do not engage in law reform and law development activities and proposing how they might be trained to do so).

6. Kathryn A. Sabbeth, *Market-Based Law Development*, *The L. & Pol. Econ. Project* (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/5UQ8-BRZT>].

7. See, e.g., Tonya L. Brito, *The Child Support Debt Bubble*, 9 *U.C. Irvine L. Rev.* 953, 955 (2019) (describing the nature and consequences of child support debt and calling for reform).

8. See, e.g., Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 *Ky. L.J.* 483, 492 (2012) (applying the “Stages of Change Model” to legal representation for domestic violence survivors).

9. See, e.g., Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 *Fam. Ct. Rev.* 453, 455 (2002) (presenting a vision of family court reform that centers social justice).

guardianship,¹⁰ eviction,¹¹ and debt.¹² For example, Nicole Summers has leveraged a rigorous empirical study of housing law to develop grounded theory on the effectiveness of the warranty of habitability¹³ and revealed a shadow system of “civil probation” enacted via eviction settlement agreements that operates parallel to formal law.¹⁴ In the wage theft context, Llezlie Green’s study of wage and hour litigation shows that courts often apply incorrect substantive legal standards and argues that informal procedure undercuts the goals of substantive wage and hour laws.¹⁵ And in child welfare, Dorothy Roberts’s extensive work has uncovered the punitive and carceral aspects of this ostensibly civil law.¹⁶

Civil procedure scholars are also turning toward state courts. Emerging work reveals new insights about written procedural law and its development, such as Zachary Clopton’s study of how states make civil procedure rules.¹⁷ Other work examines how civil procedure operates on the ground, including the insight that traditional adversary procedure has largely disappeared in state civil courts given the absence of lawyers.¹⁸ Scholars are discussing the wisdom of altering civil procedure and judicial ethics to create a more active or managerial role for courts and judges,¹⁹

10. See, e.g., Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 *Geo. J. on Poverty L. & Pol’y* 315, 321–22 (2009) (exposing the reality of the guardianship process through a study of twenty adult guardianship cases in New York City).

11. See, e.g., Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants’ Experiences With Civil Legal Needs*, 52 *U.C. Davis L. Rev.* 2105, 2129–34 (2019) (“Many tenants are also unaware that landlords cannot engage in ‘self-help’ evictions outside of the normal court process.”); Kathryn A. Sabbeth, *Eviction Courts*, 18 *U. St. Thomas L.J.* 359, 389–95 (2022) (on file with the *Columbia Law Review*) [hereinafter Sabbeth, *Eviction Courts*] (describing how the formal and informal law of eviction courts distorted the interpretation of federal eviction moratoria).

12. See, e.g., Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 *Stan. L. Rev.* 1093, 1098–99 (2019) (critiquing credit as a tool of social provision for low-income Americans); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 *Va. L. & Bus. Rev.* 257, 262 (2011).

13. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 *U. Chi. L. Rev.* 145, 178–81 (2020); see also Kathryn Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 *Geo. J. Poverty L. & Pol’y* 97, 119 (2019) (“The right to safe housing is an established right for poor tenants. Yet neither the private legal market nor the public sector enforces it. The reason is that the affected tenants are poor.”).

14. Nicole Summers, *Civil Probation*, 75 *Stan. L. Rev.* (forthcoming 2023) (manuscript at 3–4), <https://ssrn.com/abstract=3897493> [<https://perma.cc/7NAA-Z6QH>].

15. Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 *Calif. L. Rev.* 1303, 1307 (2019).

16. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. Rev.* 1474, 1476 (2012) (describing how the U.S. prison and foster care systems together have a punitive effect on Black mothers while preserving inequality).

17. Zachary D. Clopton, *Making State Civil Procedure*, 104 *Cornell L. Rev.* 1, 5 (2018).

18. See, e.g., Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 *BYU L. Rev.* 899, 901–03.

19. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 653–54 (2017); Russell Engler, *And Justice for All—Including the Unrepresented*

offering empirical evidence of how judges themselves are confused about the procedural, substantive, and ethical law guiding their work,²⁰ and debating whether state civil courts should embrace procedural simplification and informality to accommodate pro se litigants, including whether such “delegalization” of court procedure ultimately harms low-income litigants.²¹ Other critical issues include procedural due process,²² service of process,²³ ad hoc procedure,²⁴ assembly-line justice in debt collection²⁵ and eviction,²⁶ and how lessons from family court reform might translate to other areas of law.²⁷

In this Issue, Pamela Bookman and Colleen Shanahan’s *A Tale of Two Civil Procedures* builds a bridge between civil procedure scholarship that has traditionally focused on federal courts and this emerging civil procedure scholarship focused on state courts.²⁸ Bookman and Shanahan argue

Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 *Fordham L. Rev.* 1987, 1989–90 (1999); Russell G. Pearce, Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 *Fordham L. Rev.* 969, 970 (2004); Jessica K. Steinberg, Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court, 42 *Law & Soc. Inquiry* 1058, 1060–61 (2017) [hereinafter Steinberg, Informal, Inquisitorial, and Accurate].

20. See, e.g., Anna E. Carpenter, Colleen F. Shanahan, Jessica Steinberg & Alyx Mark, Judges in Lawyerless Courts, 110 *Geo. L.J.* 509, 557–61 (2022), [hereinafter Carpenter et al., Lawyerless Courts].

21. See Elizabeth L. MacDowell, Reimagining Access to Justice in the Poor People’s Courts, 22 *Geo. J. on Poverty L. & Pol’y* 473, 485 (2015); Kathryn A. Sabbeth, Simplicity as Justice, 2018 *Wis. L. Rev.* 287, 288; Jessica Steinberg, Demand Side Reform in the Poor People’s Court, 47 *Conn. L. Rev.* 741, 793 (2015) [hereinafter Steinberg, Demand Side Reform]; Steinberg, Informal, Inquisitorial, and Accurate, supra note 19, at 1062.

22. See, e.g., Jason Parkin, Dialogic Due Process, 167 *U. Pa. L. Rev.* 1115, 1117–18 (2019) (analyzing the divergence between due process doctrine and practice).

23. See, e.g., Andrew C. Budzinski, Reforming Service of Process: An Access-to-Justice Framework, 90 *U. Colo. L. Rev.* 167, 170 (2019) (surveying service of process challenges for plaintiffs without lawyers); Jane K. Stoever, Access to Safety and Justice: Service of Process in Domestic Violence Cases, 94 *Wash. L. Rev.* 333, 340 (2019) (showing how service of domestic violence protection orders is an access to justice and safety issue and proposing reforms including alternative service).

24. Pamela Bookman & David Noll, Ad Hoc Procedure, 92 *N.Y.U. L. Rev.* 767, 776 (2017) (describing ad hoc procedure-making and discussing the legitimacy of ad hoc procedural statutes).

25. See, e.g., Daniel Wilf-Townsend, Assembly-Line Plaintiffs, 135 *Harv. L. Rev.* 1704, 1708–09 [hereinafter Wilf-Townsend, Assembly-Line Plaintiffs] (offering empirical evidence of corporate repeat filers in debt claims and proposing reforms).

26. See, e.g., Lauren Sudeall & Daniel Pasciuti, Praxis and Paradox: Inside the Black Box of Eviction Court, 74 *Vand. L. Rev.* 1365, 1368 (2021) (drawing on a mixed-method study of Georgia’s dispossessory courts to reveal the processes and practices that govern eviction court proceedings and assessing implications).

27. See, e.g., Rebecca Aviel, Family Law and the New Access to Justice, 86 *Fordham L. Rev.* 2279, 2279 (2018) (discussing how family courts’ pioneering reforms may have some transferability to other courts).

28. Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 *Colum. L. Rev.* 1183, 1188 (2022).

that focusing on the division between federal and state courts as a conceptual framework for civil procedure, scholarship, and teaching can obscure the importance of lawyerless adjudication. They instead argue in favor of framing the field in terms of the distinction between lawyered courts (where most cases involve represented parties, such as federal courts or state business trial courts) and lawyerless ones (where at least one side routinely proceeds without a lawyer, such as family or housing courts).²⁹ Using this framing, they explore three major themes in current federal civil procedure scholarship and state civil courts scholarship: written and unwritten procedure-making, mass claims, and technology. Bookman and Shanahan make two vital theoretical and pragmatic points to help shape the future of civil procedure scholarship, teaching, and reform across lawyered and lawyerless courts. First, they argue that scholars should consciously distinguish between lawyered and lawyerless courts to determine whether and how the distinction is meaningful, especially when procedural rules or reforms build off a presumptively adversarial posture between parties. Second, they urge scholars and reformers to design procedures that “take advantage of lawyers’ presence while also functioning in their absence.”³⁰

Diego Zambrano’s contribution to this Issue explores a core aspect of America’s civil procedure regime: discovery.³¹ In *Missing Discovery in Lawyerless Courts*, Zambrano finds discovery is “nearly nonexistent and opaque” in state civil courts.³² Zambrano examines the law on the books, comparing written state discovery procedures with the federal context. He shows, for example, that many states have rejected the transsubstantive model of federal law and developed specialized (and often limited) discovery rules for lawyerless cases such as housing, family law, or small claims. His theoretical inquiry identifies discovery’s positive and negative potential and suggests how lawyerless courts might leverage the upsides. Ultimately, he offers a potential prescription: imposing heightened disclosure requirements on represented, wealthy, and corporate parties, a burden that could mirror prosecutors’ obligations in the criminal context.

State civil courts scholarship focused on substantive and procedural law recognizes and reflects that much of American law is made, enforced, and experienced outside the federal context. This body of work illuminates areas of law most relevant to the lives of ordinary people, surfaces obscured truths about vast swaths of American civil law, and consistently shows that we must reexamine fundamental assumptions about civil procedure and litigation in the state court context.

29. Carpenter et al., *Lawyerless Courts*, supra note 20, at 509.

30. Bookman & Shanahan, supra note 28, at 1241.

31. Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 *Colum. L. Rev.* 1423, 1428 (2022).

32. *Id.* at 1426.

INSTITUTIONS

Using an institutional lens, state civil courts scholars are working to develop and update accounts of courts as institutions. In contrast, legal scholarship has traditionally centered on federal courts and the federal system as the starting point for such institutional analyses. Some state civil courts scholars take a broad, external view, including examining questions of state courts' place in a three-branch system of democratic governance at federal and state levels and as government entities with relationships to civil society groups. Other scholars take an internal perspective, understanding courts as organizations with internal structures, cultures, and norms staffed by people who inhabit particular roles, exercise discretion, and shape court operations. Scholars are also interrogating cross-cutting questions of how court design and courts' institutional procedures reinforce social, racial, and economic power structures and inequality.

Beginning with the external perspective, legal scholarship on the judiciary's role in our democracy has paid limited attention to states. Leading theories of courts and democracy, including those of judicial legitimacy, tend to study or assume a federal, idealized version of adjudication, and they tend to present courts as democracy-enhancing in ways that do not map onto the state court context. For example, take the comments of a leading legal theorist:

The quotidian activities of ordinary litigation oblige disputants to treat each other as equals and to provide one another with information Public courts demonstrate government commitments to forms of self-restraint and explanation, to the equality of all persons, and to transparent exercises of authority in the face of conflicting claims of right.³³

American legal and political theory has long held that a core aspect of courts' social value rests on their accessibility and transparency as democratic sites for contesting political values, protecting legal rights, and examining government operations (including scrutinizing judges' work firsthand and in real time). Leading theories emphasize courts' publicness. Many theorists implicitly or explicitly assume that parties and the public can observe courts' adjudicative work, that judges routinely produce clear statements of who has won a case and why, and that court rulings are available to parties or any interested observer.

Scholarship focused on state civil courts underscores the need for revisiting and revising these theories. Instead of courts that uphold equal access and transparency, state civil courts scholarship reveals courts characterized by procedural mazes and informational opacity. Rather than promoting party engagement and information sharing, powerful plaintiffs

33. Judith Resnik, *Reinventing Courts as Democratic Institutions*, 143 *Daedalus* 9, 10, 21 (2014).

in state civil courts routinely obtain near-automatic judgments against low-income litigants.

Updated theories of courts' role in democratic governance can inform critical public conversations. We live in a time of social and political upheaval and waning trust across democratic institutions, including courts, which depend on public trust and confidence to maintain the rule of law.³⁴ It matters that there is a chasm between American courts' promise of justice and the justice they ultimately deliver. Recent polling suggests falling levels of confidence in the judiciary and finds that a majority of the public may have concerns about courts as sites where racial and gender biases drive decisions or where people are treated differently based on their financial circumstances or personal qualities.³⁵ Yet we know very little of how state civil courts relate to public trust in the judiciary or civic engagement. The field of state civil courts is poised to develop a more accurate, bottom-up account that confronts weaknesses and disconnects in the existing system. We urge scholars to advance such accounts and imagine a future where civil courts are places that deliver on promises of democratic engagement and the fair resolution of disputes.

Intending to rethink civil courts' institutional role in America's democratic system, our contribution to this Issue, *The Institutional Mismatch of State Civil Courts*, offers a theory of civil courts' institutional role rooted in the mismatch between what courts are designed to do—dispute resolution—and what they actually do—confront people's pressing social needs.³⁶ Courts are not designed to deliver access to justice interventions, to say nothing of addressing the crushing effects of poverty and racial inequality. We show how state civil courts confront social needs in the face of executive and legislative branch failures to provide a social safety net and other systems of care. And we show how this mismatch underscores two roles for state civil courts: policymaking bodies and violent institutions. Our theory of state civil courts' policymaking underscores the hidden shift in the democratic balance of power that occurs as state courts are experimenting without the benefit of experimentalism. Our theory of the violence of state civil courts is in conversation with that of others who engage questions of violence as a tool of social control, including this Issue's *Racial Capitalism in the Civil Courts*, discussed further below, and work by Shirin Sinnar that draws on evidence from eviction courts to argue

34. See, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 *Yale L.J.* 1784, 1789–94 (2020) (offering a framework for a “law-and-political-economy” approach to legal scholarship).

35. Logan Cornett & Natalie Anne Knowlton, Inst. for the Advancement of the Am. Legal Sys., Public Perspectives on Trust & Confidence in the Courts 1, 5 (2020), https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trus_t_and_confidence_in_the_courts.pdf [<https://perma.cc/2YXE-ADU9>].

36. Shanahan et al., *supra* note 3, at 1475–76.

that civil courts use the threat of force to shape the “rights and relative advantage” of different groups.³⁷

Conversations about federalism tend to leave state courts in the margins and focus on federal–state parity and federal supremacy questions. Recent exceptions include Ezra Rosser’s volume on poverty law in the federalist system³⁸ and Zambrano’s exploration of the relationship between the historical “rise” of federal courts and the “decay” of state courts.³⁹ Justin Weinstein-Tull has also explored updating theories of judicial federalism by drawing on a description of how state courts are structured, including how they are shaped by forces at varying levels of government from the federal to the local level and how institutional arrangements differ across states.⁴⁰ This emerging work underscores the importance of understanding, empirically, how courts and court systems are designed, organized, and funded, while also updating theories of state civil courts as institutions—positing state and local courts as the starting point for analysis rather than mere footnotes.

In addition to relationships with other state and federal government entities, courts also have connections with nongovernmental organizations. Jamila Michener explores such interactions in this Issue’s *Civil Justice, Local Organizations, and Democracy*.⁴¹ Drawing on a study of local tenant organizations, Michener presents an account of how nonlegal organizations engage with the civil legal system and argues that these organizations should be understood as civil legal institutions with democracy-enhancing qualities. Michener shows how local organizations help people navigate civil legal systems, advocate for reform of those systems, and build political power within racially and economically marginalized communities.

Scholars employing an internal perspective on state civil courts have produced a body of work concerned with understanding how courts are designed and how they operate, the consequences of growing numbers of unrepresented people, and the work of those charged with keeping the wheels of justice spinning, including judges, lawyers, and court staff. An important strain of this research comes from scholars focused on courts in

37. Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in *A Guide to Civil Procedure: Integrating Critical Legal Perspectives* (Portia Pedro, Brooke Coleman, Liz Porter & Suzette Malveaux eds., forthcoming 2022) (on file with the *Columbia Law Review*).

38. See generally *Holes in the Safety Net: Federalism and Poverty* (Ezra Rosser ed., 2019) (offering “a grounded look at how states and the federal government provide assistance to poor people”).

39. See generally Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101 (2019) (arguing that “federal expansion may be contributing to the decay of state courts and has reinforced a plaintiff-defendant divergence between the two systems”).

40. Justin Weinstein-Tull, *The Structures of Local Courts*, 106 Va. L. Rev. 1031, 1058 (2020).

41. Jamila Michener, *Civil Justice, Local Organizations, and Democracy*, 122 Colum. L. Rev. 1389, 1392 (2022).

the access to justice tradition, exploring how courts enhance or impede access, the relationship between courts and legal services, and the implications for courts and the people they serve. Some scholars, such as Russell Engler, focus on understanding and critiquing how courts have dealt with the rise of unrepresented people on their dockets. Engler has been a leading voice in documenting courts' responses to self-represented litigants and in advocating for reform, with a particular focus on how the roles of various court actors are (or are not) evolving in response to the new reality of lawyerless civil dockets.⁴²

More recently, Tonya Brito's ethnographic research in child support cases surfaces four models of institutional actors—navigators, bureaucrats, zealots, and reformers—and explores how each makes sense of their work and achieves justice in lawyerless child support cases.⁴³ Our work has revealed judges in the breach, relying on a shadow network of staff employed by nonprofit organizations to process claims and as substitutes for some of lawyers' traditional functions.⁴⁴ Other scholarship examines how courts' institutional design interacts with lawyer services and self-help to produce or hinder substantive and procedural justice.⁴⁵

42. See Engler, *supra* note 19, at 1988–90 (outlining and reexamining the roles that court actors—including judges, clerks, and lawyers—play in their interactions with unrepresented litigants).

43. Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 *Lewis & Clark L. Rev.* 145, 148 (2020).

44. Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and Deregulation of the Lawyer's Monopoly*, 89 *Fordham L. Rev.* 1315, 1316 (2021).

45. See Laura Abel, *Designing Access: Using Institutional Design to Improve Decision Making About the Distribution of Free Civil Legal Aid*, 7 *Harv. L. & Pol'y Rev.* 61, 62–63 (2013) (applying an institutional design lens to the decisionmaking process that affects access to civil legal aid); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *Harv. L. Rev.* 901, 904–05 (2013) (pointing to empirical data that suggests the U.S. legal system has become more complex and flooded with pro se litigants, a confluence of circumstances which has frustrated access to justice for many); Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 *Yale L.J. Forum* 45, 46 (2012) (arguing that, in light of the growing demand for legal services and their shrinking supply, empirical research on service delivery, resource allocation, and access to justice questions has become imperative); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 *Denv. U. L. Rev.* 469, 469–71 (2016) (studying represented and unrepresented litigants with a focus on institutional considerations like the balance of power, the ability to navigate civil procedures, and the role that formal legal training can play in achieving substantive justice); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *Geo. J. on Poverty L. & Pol'y* 453, 454–57 (2011) (studying the impact of unbundled legal services on otherwise unrepresented litigants and highlighting the benefits and considerations of introducing such services into the legal system more broadly). For an important meta-study of lawyers' work, see Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 *Am. Socio. Rev.* 909 (2015).

In their contribution to this Issue, Sara Sternberg Greene and Kristen Renberg explore court design and the judicial role through a mixed-methods empirical study that challenges the common and often implicit assumption that judges are lawyers.⁴⁶ Greene and Renberg show that states permit nonlawyer judges in some cases, trace the history of nonlawyer judges in America, and explore arguments for and against the practice.⁴⁷ They show how the practice links to a historical pattern of undervaluing legal issues most commonly experienced by low-income people, argue that it perpetuates a lack of law development around these issues, and conclude that it serves to entrench economic inequality.⁴⁸ Finally, they advance a proposal increasingly common in civil justice scholarship: the need for more financial resources, including federal resources, to support higher-quality justice in state courts.⁴⁹

Using an institutional lens, state civil courts scholars can place our state courts at the center of conversations about democratic governance, court legitimacy, and federalism. Institutional perspectives also help us understand courts' internal organization and the consequences of court design for users and courts. This growing body of knowledge holds the promise of insights that will improve court operations, courts' relationship with other government institutions, and courts' role in our democracy.

PEOPLE

Using people as a lens, a significant strain of state civil courts scholarship has documented and theorized how state civil courts affect people as individuals, another body of work examines system-level questions, and emerging reform-focused contributions apply human-centered design methods to civil legal services and courts. Such people-centered perspectives build on a legacy of sociolegal scholarship exploring ordinary people's legal needs and experiences. A review of sociolegal scholarship reveals the urgent need for insights from the emerging field of state civil courts: It turns out that we know a lot more about how people experience civil legal problems *outside* of the courthouse than we know about what happens *inside* the courthouse.

While there is still much to learn about the nature and consequences of ordinary people's interactions with formal civil justice, we do know some things. The view is grim. Existing research tells a consistent story of people

46. Sara Sternberg Greene & Kristen M. Renberg, Judging Without a J.D., 122 Colum. L. Rev. 1287, 1291 (2022).

47. *Id.* at 1295.

48. *Id.*

49. *Id.* at 1343–44. See, e.g., Daniel Wilf-Townsend, The Great Democracy Initiative, National Civil Justice Reform: A Proposal for New Federal-State Partnerships 3 (2020), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_National-Civil-Justice-Reform_202003.pdf [<https://perma.cc/W3TG-C9GE>] (proposing a “broad grant of federal money to support and improve the operations of civil justice systems around the country”).

without legal training struggling and failing to navigate the civil justice maze, often with life-altering effects. Over the past two decades, a small group of legal scholars focused on access to justice have labored to show how people without lawyers experience formal civil justice. This work includes first-hand accounts of the routine tragedies that result when people without legal training or representation are pulled into civil litigation. Much of this scholarship focuses on the experiences of low-income litigants, which comprise the majority of litigants in civil courts. It explores how social power dynamics shape courts' work and how courts, in turn, reinforce existing hierarchies both in how they treat litigants and process claims and through their ultimate substantive judgments.

A canonical example is Barbara Bezdek's thirty-year-old study of a high-volume Baltimore housing court. Bezdek's searing exploration describes how tenants, most of whom were Black women, were systematically silenced by judges who refused to hear their affirmative claims or defenses, their voicelessness covered in a "veneer of due process and the ordered resolution of disputes."⁵⁰ In the intervening years, other scholars have cataloged how powerful, represented litigants wield legal tools with ease. In contrast, unrepresented people routinely face insurmountable logistical, procedural, and substantive legal hurdles that lead to disproportionately negative outcomes.⁵¹ Deborah Rhode, a leading figure in access

50. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 534 (1992).

51. See Laura K. Abel, *Language Access in State Courts*, 44 Clearinghouse Rev. 43, 43–44 (2010) (highlighting that unrepresented litigants, especially those with limited proficiency in English, face particular struggles in navigating state court proceedings); Paris R. Baldacci, *Access to Justice Is More Than the Right to Counsel: The Role of the Judge in Assisting Unrepresented Litigants*, in 2 *Impact: Collected Essays on Expanding Access to Justice* 122, 123 (2016), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1004&context=impact_center [<https://perma.cc/6TBL-YU6Z>] ("Without the assistance of the judge in helping her articulate her claims . . . the unrepresented litigant is generally incapable of mustering her evidence according to a cognizable legal theory that might demonstrate her right to the relief she seeks."); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37, 49–50 (2010) (describing how represented tenants fare better in housing court proceedings and how unrepresented tenants are "steamrolled" by the courts' operation); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 Lewis & Clark L. Rev. 439, 440–41, 449 (2009) (reviewing empirical data and concluding that the modern judicial system has seen an explosion of pro se litigation, which poses individualized challenges for unrepresented litigants and systemic challenges such as increasing docket pressure, slowing case resolution, and testing traditional perceptions of judges, rulemakers, and attorneys); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 Law & Soc'y Rev. 661, 662 (1985) (describing the challenges that unrepresented litigants face in small claims court when they attempt to use everyday methods of conversation and storytelling to communicate with judges who are accustomed to legal formalism); Steinberg, *Demand Side Reform*, supra note 21, at 743–44 (noting that "[u]nrepresented parties face challenges at every step of the litigation, from properly filing and serving an action to gathering and presenting admissible evidence to a judge"); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the*

to justice, spent her career documenting how courts and lawyers fail people. In her definitive book, Rhode took lawyers to task for creating and perpetuating “procedures of excessive and bewildering complexity, and forms with archaic jargon left over from medieval England.”⁵² Today, Bezdek’s findings and Rhode’s arguments still resonate in narratives appearing in journalism and public scholarship.⁵³

Scholars have also explored the human, relational, and emotional dynamics that play out in courts, including patterns of intimidation, feelings of powerlessness, and a sense that unfairness is baked into the system. Sara Sternberg Greene collected people’s experiences with formal justice and found a pattern of painful, fear-inducing experiences that pushed people, particularly Black people, to avoid formal law. As one interviewee stated, “To me it’s all law and courts and bad. Stay away from the law, that is my MO. It’s good advice.”⁵⁴ Greene also explores how experiences with criminal justice can shape views about civil justice, intersections which Lauren Sudeall and Ruth Richardson have also examined.⁵⁵

Turning to systemic perspectives on people’s experiences of civil justice, forty years ago, leading sociological scholar Marc Galanter showed that “haves” tend to come out ahead, while the “have-nots” are consistently on the losing end of civil litigation.⁵⁶ Today, scholars describe, theorize, and criticize how civil courts support unequal and unjust systems, market forces, and social arrangements. A growing evidence base shows little sign of courts offering redemption or redress for people without significant wealth. Emerging work shows how the collective consequences of state court action reinforce existing hierarchies and inequities with the most pernicious and punitive effects falling disproportionately on women and people of color.

For example, recent research documents civil courts’ role in supporting inequality through the lens of debt and eviction cases and shows how powerful corporate interests use courts for predictable, assembly-line

Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 *Geo. J. Legal Ethics* 423, 425 (2004) (suggesting a “theoretical approach for how a judge might obtain the benefits of engagement and true neutrality without running the risk of creating the appearance of non-neutrality,” particularly in the pro se context).

52. Deborah L. Rhode, *Access to Justice* 14 (2004).

53. See, e.g., Matthew Desmond, *Evicted: Poverty and Profit in the American City* 304 (2016); Editorial Board, *Opinion, You Can Lose Your Kids, Home and Freedom Without Ever Seeing a Lawyer. It’s a Profound Injustice.*, *Wash. Post* (Feb. 26, 2021), <https://www.washingtonpost.com/opinions/2021/02/26/noncriminal-cases-right-to-lawyer-representation/> (on file with the *Columbia Law Review*).

54. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 *Iowa L. Rev.* 1263, 1289 (2016).

55. *Id.*; Sudeall & Richardson, *supra* note 11 (exploring how criminal defendants experience and respond to civil legal problems).

56. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95, 97 (1974).

wealth extraction from low-income defendants, often via questionable or fraudulent practices.⁵⁷ Using gender as a lens for understanding civil courts, Kathryn Sabbeth and Jessica Steinberg show that women are likely the majority of litigants in civil matters and argue that America has a gendered justice system: In this system, men in criminal cases have access to representation, whereas women who go to civil court have none. Sabbeth and Steinberg point to a history of Supreme Court doctrine that favors men's interests while devaluing or outright ignoring women's interests as a leading cause of this disparity.⁵⁸

Race is a vital lens for understanding state civil courts. Scholars have revealed a disproportionate lack of access and persistent negative outcomes for racialized people and communities and explored how court staff and parties negotiate race and racial inequality.⁵⁹ In this Issue's *Racial Capitalism in the Civil Courts*, Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, and Lauren Sudeall draw on theories of racial capitalism to show that racial subordination is baked into civil courts' role in our society and economy. The authors argue that state civil courts should be understood as sites in which private capital holders leverage a system of race-based oppression central to American capitalism. Brito, Sabbeth, Steinberg, and Sudeall use the example of consumer debt collection to demonstrate the racialized nature of seemingly formalist court interventions in the civil legal landscape.⁶⁰

57. On debt, see, e.g., Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 Harv. J. on Legis. 41, 118 (2015) (examining the “broken” process of debt collection); Wilf-Townsend, *Assembly-Line Plaintiffs*, supra note 25, at 1716–24 (telling the story of “assembly-line litigation” and describing the litigation “explosion” in the debt-collection context). On eviction, see Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J.L. Pottenger Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. Urb. Health 1, 6 (2021) (exploring the relationship between housing and health in the pandemic); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 Geo. J. on Poverty L. & Pol’y 59, 64–65 (2016) (describing relationships between eviction, class, race, and health outcomes). See generally Sabbeth, *Eviction Courts*, supra note 11 (examining how eviction courts operated during the pandemic and raising the broader question of what social functions eviction courts serve).

58. Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. Rev. (forthcoming 2022) (manuscript at 28), <https://ssrn.com/abstract=3807349> [<https://perma.cc/6SGG-YN47>].

59. See, e.g., Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, “I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 Fordham L. Rev. 3027, 3036–51 (2015) (using original data to explore how legal actors and litigants without counsel negotiate race in family court); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 Ann. Rev. Socio. 339, 349–52 (2008) (reviewing data on the relationships between race, class, gender, and access to civil justice and arguing that existing research has focused too heavily on formal legal systems and the experiences of low-income people, making it difficult to compare civil justice experiences across populations and social groups).

60. See generally Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 Colum. L. Rev. 1243 (2022) (exploring

Finally, a small but growing body of work comes from the legal design movement, which seeks to reform legal systems in response to the needs and preferences of court users—a movement deeply connected to experiential learning courses, including clinics, labs, and practicums located in law schools and universities.⁶¹ Here, scholars advocate for (and often practice) human-centered design methodology to understand and redesign state civil courts. Margaret Hagan and Victor Quintanilla are leading scholarly voices and practitioners.⁶² In the field, Stacy Butler is using human-centered design frameworks to build new legal services delivery models and redesign court processes.⁶³

Today's legal scholars build on a rich history of sociolegal scholarship to describe and theorize how people experience civil law and courts. The works noted above consistently reveal the manifest unfairness facing people—most of whom are lawyerless—from the moment they receive a complaint or enter the doors of a courthouse. A growing body of work shows how state civil courts reflect economic, racial, and gender inequality and how these courts reinforce or magnify these structures. At the same time, scholars offer hope for reform that places people at the center of state civil courts' work.

CONCLUSION

This Issue is rooted in legal scholarship's growing field of state civil courts and is an essential step toward its future. It reflects the collective nature of this field, the value of collaboration across institutions and areas of expertise, and the urgency of the scholarly project.

In this moment of opportunity, researchers willing to tackle the challenge of studying state civil courts can make definitive contributions, shape new lines of empirical and theoretical inquiry, and produce original and actionable insights. The field of state civil courts is ripe for contributions from legal and sociolegal scholars—including empiricists, theorists, methodologists, and critical scholars—to begin filling the yawning gaps in

how the civil legal system—and civil courts specifically—function as a tool of racial capitalism).

61. See Innovation for Justice, i4J, <https://www.innovation4justice.org/> [<https://perma.cc/FLJ3-X6DJ>] (last visited Feb. 7, 2022); We Envision a World Where Everyone Is Empowered to Use the Law., NuLawLab, <https://www.nulawlab.org/> [<https://perma.cc/8GMY-3TTC>] (last visited Feb. 7, 2022); Stanford Legal Design Lab, <https://www.legaltechdesign.com/> [<https://perma.cc/2EAR-FBWB>] (last visited Feb. 7, 2022).

62. Margaret Hagan, A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly, 6 *Ind. J.L. & Soc. Equal.* 199 (2018); Victor D. Quintanilla, Human-Centered Civil Justice Design, 121 *Penn. St. L. Rev.* 745 (2017); see also Dan Jackson, Miso Kim & Jules Rochielle Sievert, The Rapid Embrace of Legal Design and the Use of Co-Design to Avoid Enshrining Systemic Bias, 36 *Design Issues* 16 (2020); Emily S. Taylor Poppe, Institutional Design for Access to Justice, 11 *U.C. Irvine L. Rev.* 781 (2021).

63. See Innovation for Justice, *supra* note 61.

knowledge left by common approaches to legal scholarship. A vital project is developing a baseline of solid empirical research to support critical inquiry, theoretical developments, and prescriptions for change. It is our hope that many more scholars will embark on this journey to understand our most common and vital civil courts.

ESSAYS

A TALE OF TWO CIVIL PROCEDURES

Pamela K. Bookman & Colleen F. Shanahan***

In the United States, there are two kinds of courts: federal and state. Civil procedure classes and scholarship largely focus on federal courts but refer to and make certain assumptions about state courts. While this dichotomy makes sense when discussing some issues, for many aspects of procedure this breakdown can be misleading. Two different categories of courts are just as salient for understanding American civil justice: those that routinely include lawyers and those where lawyers are fundamentally absent.

This Essay urges civil procedure teachers and scholars to think about our courts as “lawyered” and “lawyerless.” Lawyered courts include federal courts coupled with state court commercial dockets and the other pockets of state civil courts where lawyers tend to be paid and plentiful. Lawyerless courts include all other state courts, which hear the vast majority of claims. This Essay argues that this categorization reveals fundamental differences between the two sets of court procedures and much about the promise and limits of procedure. The Essay also discusses how this dichotomy plays out in three of today’s most contentious topics in civil procedure scholarship: (1) written and unwritten procedure-making, (2) the role of new technology, and (3) the handling of masses of similar claims. This categorization illuminates where and how lawyers are essential to procedural development and procedural protections. They also help us better understand when technology should assist or replace lawyers and how to reinvent procedure or make up for lawyers’ absence. Finally, they reveal that fixing court procedure may simply not be enough.

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** Clinical Professor of Law, Columbia Law School. This Essay benefited from conversations at the 2020 Civil Procedure Workshop and at Fordham Law School. Thanks to Elizabeth Burch, Anna Carpenter, Zachary Clopton, Nestor Davidson, Matthew Diller, Robin Efron, David Engstrom, Howie Erichson, Kellen Funk, Russell Gold, Andrew Hammond, Clare Huntington, Alexandra Lahav, Ethan Leib, Alyx Mark, Merritt McAlister, David Noll, Russ Pearce, Teddy Rave, Kathryn Sabbeth, Jessica Steinberg, Lauren Sudeall, Nicole Summers, David Udell, Daniel Wilf-Townsend, Maggie Wittlin, and Diego Zambrano. We are grateful to Fordham Law students Leila Witcher and Luis del Rosario and Columbia Law student Amanda Yang for excellent research assistance and to Domenic Canonico and the staff of the *Columbia Law Review* for expert editing. Professor Bookman’s scholarship was generously supported by the Fordham University Fordham-Columbia Research Grant. Professor Shanahan’s scholarship was generously supported by the William S. Friedman Faculty Research Fund at Columbia Law School.

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INTRODUCTION

This Essay argues in favor of examining civil procedure in American civil justice not just as divided between state and federal courts, but as between lawyered and lawyerless courts. In civil procedure and federal courts scholarship, state and federal courts represent a natural dividing line for understanding American civil justice. Compared to the better-known and easier-to-study federal courts, state courts are either more or less accessible, fair, plaintiff friendly, or efficient than federal courts. In a subset of state civil courts¹—those that have commercial dockets or that

1. We use the term “state civil court” to include state and local civil courts that hear adversarial cases between two or more parties before a judge, including specialized courts like family court and housing court. This category omits traffic court, where a vast number of cases are filed, but under a different posture and different circumstances. See Colleen F. Shanahan, Jessica K.

routinely hear full trials, for example—these comparisons make sense. The procedures and the personnel include experienced lawyers and somewhat resemble what one might find in federal court. But in the vast majority of state courts today—those that hear family, housing, small claims, and debt collection cases, for example—procedures operate very differently. It is these lawyerless courts² that hear most of the 98% of civil cases that are the focus of this groundbreaking *Columbia Law Review* symposium.³

Steinberg, Alyx Mark & Anna E. Carpenter, The Institutional Mismatch of State Civil Courts, 122 Colum. L. Rev. 1471, 1486 & n.56 (2022) [hereinafter Shanahan et al., Institutional Mismatch]; Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, Nat'l Ctr. for State Cts. & State Just. Inst., The Landscape of Civil Litigation in State Courts iii–iv (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/D343-FTLJ>] (using a similar definition but omitting domestic relations cases). For scholarship focusing on local courts, see generally Ethan J. Leib, Local Judges and Local Government, 18 N.Y.U. J. Legis. & Pub. Pol'y 707 (2015) (examining the relationships between local judges, the public, and the executive and legislative branches of that local government); Alexandra Natapoff, Criminal Municipal Courts, 134 Harv. L. Rev. 964 (2021) (providing a framework for studying and analyzing municipal courts); Justin Weinstein-Tull, The Structures of Local Courts, 106 Va. L. Rev. 1031 (2020) (analyzing how local courts work within the broader justice system). This Essay also omits discussion of state administrative agencies and private dispute resolution. See, e.g., Nora Freeman Engstrom, A Dose of Reality for Specialized Courts: Lessons from the VICP, 163 U. Pa. L. Rev. 1631, 1633–35 (2015) (noting enthusiasm among advocates and politicians for specialized health courts); Nora Freeman Engstrom, Sunlight and Settlement Mills, 86 N.Y.U. L. Rev. 805, 809–10 (2011) [hereinafter Engstrom, Sunlight and Settlement Mills] (discussing “[s]ettlement mills’ ‘assembly-line’ resolution of claims”); Dana A. Remus & Adam S. Zimmerman, The Corporate Settlement Mill, 101 Va. L. Rev. 129, 130 (2015) (“[C]orporate defendants have increasingly relied on their own mass settlement programs . . . to resolve claims with large groups of people who cannot afford the cost of counsel.”); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, Lawyers, Power, and Strategic Expertise, 93 Denv. L. Rev. 469, 474–84 (2016) [hereinafter Shanahan et al., Lawyers, Power, and Strategic Expertise] (describing unemployment case proceedings before a District of Columbia administrative court). Future work might consider these fora in light of the lawyered/lawyerless distinction as well.

2. One of us with co-authors has elsewhere defined lawyerless courts as “those where more than three-quarters of cases involve at least one unrepresented party.” Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, Judges in Lawyerless Courts, 110 Geo. L.J. 509, 511 (2022) [hereinafter Carpenter et al., Lawyerless Courts]; see also Hannaford-Agor et al., *supra* note 1, at 6–8 (for the best available and most recent nationally representative data).

3. The symposium provides a much-needed focus on state courts, as scholars increasingly urge. See, e.g., Anne E. Carpenter, Jessica K. Steinberg, Colleen Shanahan & Alyx Mark, Studying the “New” Civil Judges, 2018 Wis. L. Rev. 249, 272–74, 285 [hereinafter Carpenter et al., “New” Civil Judges] (“[S]uch courts are almost entirely ignored as sites for scholarly research, most notably by legal scholars.”); Ethan J. Leib, Localist Statutory Interpretation, 161 U. Pa. L. Rev. 897, 900 (2013) (noting that state and local trial courts “are the face of law and justice to citizens in our democracy”); Norman W. Spaulding, The Ideal and the Actual in Procedural Due Process, 48 Hastings Const. L.Q. 261, 265–66 (2021) (lamenting that “[s]cholarly and pedagogic attention . . . remains fixed on federal litigation and the Federal Rules of Civil Procedure,” and urging that “the reality of how procedure works for ordinary people, including how it often fails them, must be studied more closely and taught more frequently”).

Federal civil courts are lawyered. In 70% of federal civil cases, both sides are represented.⁴ In the other 30% of cases, the self-represented party is typically the plaintiff suing a represented defendant with greater access to resources, often the government or an employer. By contrast, state courts are predominantly lawyerless. Available data suggests 25% of state civil cases have representation on both sides.⁵ In some areas of state court, like family law, “nearly all cases involve two unrepresented parties.”⁶ In other areas, like evictions and debt collection, there may be one represented party. In these asymmetrical cases in lawyerless courts, the plaintiff—for example, the landlord or debt collection agency—is more likely to be the represented, better-financed, repeat player suing a self-represented, individual defendant. But in all lawyerless cases, the absence of the lawyer on at least one side affects how procedure works and how civil justice is administered.⁷

Studies about American civil procedure too often examine the 2% of cases in federal courts,⁸ and not state courts, where 98% of cases take place.⁹ As Brooke Coleman has noted, the Federal Rules and procedural doctrine develop in response to an elite (metaphorical) “one percent” of that two percent of cases that appear in federal court—the cases with the

4. Pro se plaintiffs who are not incarcerated file 10% of federal cases. These are typically social security appeals and employment discrimination matters. Pro se plaintiffs who are incarcerated file an additional 20% of federal cases. See Mark D. Gough & Emily S. Taylor Poppe, (Un)Changing Rates of Pro Se Litigation in Federal Courts, 45 *Law & Soc. Inquiry* 567, 574–80 (2020) (describing variation by case type and circuit of filing); Andrew Hammond, The Federal Rules of Pro Se Procedure, 90 *Fordham L. Rev.* 2689, 2691 & nn.1 & 5 [hereinafter Hammond, Pro Se Procedure].

5. Carpenter et al., *Lawyerless Courts*, supra note 2, at 511; Hannaford-Agor et al., supra note 1, at iv.

6. Carpenter et al., *Lawyerless Courts*, supra note 2, at 512; see also Hannaford-Agor et al., supra note 1, at vii. Many studies show that 80% to 90% of family law cases that do not involve the government involve two self-represented parties. See, e.g., Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 *Conn. L. Rev.* 746, 751 (2015) [hereinafter Steinberg, Demand Side Reform].

7. Consistent with other scholarship, this Essay uses “lawyerless” to capture cases with no representation and cases with asymmetrical representation because the same collection of challenges arises in both situations. See *infra* section II.C.1. Of course, even in cases with symmetrical representation—that is, where represented parties are on both sides—the lawyers may not be evenly matched. See Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* 70–106 (2019) (documenting the problem of unequal legal representation and proposing a deprivatization of the market for legal services).

8. See, e.g., Paul MacMahon, Proceduralism, Civil Justice, and American Legal Thought, 34 *U. Pa. J. Int’l L.* 545, 567 (2013) (discussing the importance of procedure—particularly in federal courts—to American concepts of civil justice).

9. See Shanahan et al., *Institutional Mismatch*, supra note 1, at 1486; Diego A. Zambrano, Federal Expansion and the Decay of State Courts, 86 *U. Chi. L. Rev.* 2101, 2103 (2019) [hereinafter Zambrano, Federal Expansion] (“Federal courts host less than three hundred thousand civil cases a year while state courts bear the brunt of nearly seventeen million civil cases.”).

highest amounts in controversy, litigated by the most elite lawyers.¹⁰ Meanwhile, the vast majority of American cases are filed in lawyerless state courts—that is, in neither federal court nor their lawyered state court rough equivalents.¹¹ Although these cases do not individually involve the largest sums of money, they involve some of the most important aspects of human life—family relationships, caring for children and elders, and housing—and their sheer volume demonstrates their importance. Collectively, moreover, a lot of money is at stake.¹²

This Essay urges civil procedure scholars and teachers not only to incorporate state courts into their understanding of procedure, but also to look at procedure through the lens of lawyered courts and lawyerless courts. While the state/federal divide is a logical one for studying many subjects, including some civil procedure stalwarts like subject matter jurisdiction, the lawyered/lawyerless distinction provides additional and important insights about American civil justice and procedure.

To appreciate and study American civil procedure, it is necessary to consider the full picture of American civil justice, and that includes state courts. Nevertheless, state courts contain multitudes.¹³ Some state courts capture the cases that are being edged out of federal courts, but state and local courts also handle small claims, debt collection, housing, family law, and other fallout of our social ills. This latter category of claims disproportionately burdens lower-income litigants who cannot afford lawyers and who often do not even recognize their problems as having a legal dimension.¹⁴ It is important to appreciate the differences between the two

10. Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1007 (2016) [hereinafter Coleman, *One Percent Procedure*] (“When put in the context of state court litigation—indeed, the place where most civil litigation happens—and in the context of the remaining types of federal civil litigation, this elite and peculiar litigation is hardly dominant.”).

11. See Shanahan et al., *Institutional Mismatch*, supra note 1, at app. tbls.1A, 1B & 3.

12. Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 Colum. L. Rev. 1243, 1273 (2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704, 1707 (2022) (“State courts backstop the bread-and-butter transactions that make up the consumer economy, overseeing litigation over contracts and providing the ultimate enforcement mechanism for the trillions of dollars of consumer debt in the United States.”).

13. We do not endorse “lump[ing]” all “litigation involving unrepresented parties . . . together as a matter of either diagnosis or treatment.” See Wilf-Townsend, supra note 12, at 1716 (cautioning against this approach). Instead, as Wilf-Townsend understands, lawyerless courts present civil procedure challenges that should be compared and contrasted with those in lawyered courts when considering reforms in either context and while evaluating U.S. civil justice.

14. See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. Legal Educ. 531, 531 (2013) (noting the extent to which the legal needs of poor and middle-income Americans go unmet); Rebecca L. Sandefur, *Access to What?*, 148 *Daedalus* 49, 51 (2019) [hereinafter Sandefur, *Access to What?*] (explaining that access to legal services is severely restricted to privileged populations); Rebecca L. Sandefur & James Teufel, *Assessing America’s Access to Civil Justice Crisis*, 11 U.C. Irvine L. Rev. 753, 755

kinds of litigation and the effect of the presence, or absence, of lawyers on these institutions.

To illustrate the importance and the fruitfulness of this perspective, this Essay examines three themes in civil procedure that are among the most important issues in both federal *and* state civil courts. The parallels within these themes are not commonly recognized because they manifest and are studied under different labels: (1) procedural rulemaking, (2) the role of technology in procedure, and (3) mass claims and aggregate litigation. These three areas are prominent topics in federal civil procedure scholarship and classrooms and are discussed in scholarship about state courts. But to date these topics have been siloed and are barely in conversation at all.¹⁵ One aim of this Essay is to unite these conversations.

Thus, for each topic, this Essay considers the related federal civil procedure and state civil court scholarship on these issues and identifies the similarities and differences between their manifestations in lawyered and lawyerless courts. These comparisons reveal important insights about the role of lawyers, the potential for reform, and the limits of procedure.

First, examining formal and informal rulemaking through this lens reveals that, while formal procedural rules should be simplified for self-represented litigants, adversarial representation is crucial to maintaining the fairness of informal procedures. Lawyers do not only object to opponents' procedural manipulations; they can also counter judges' exercise of procedural power and provide a check on both by observing proceedings, demanding reasoned explanations, and filing appeals. Additionally, lawyers are instrumental in the feedback loop through which ad hoc procedures spur more systematic procedural changes. Without that process of procedural law development, ad hocery can become the norm, signaling the need for more structural reform. Second, examining technology reveals areas where lawyered and lawyerless courts should be considered separately—for example, when technology assists lawyers as opposed to when it replaces them. But in other areas, like e-notice, the

(2021) (describing the access to justice crisis as one of unserved legal needs and unrepresented litigants in eviction and family cases); Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, in *Beyond Elite Law: Access to Civil Justice in America* 3, 7–9 (Samuel Estreicher & Joy Radice eds., 2016) (“People in low-income households were less likely to perceive themselves as having a legal problem, less likely to address it themselves, less likely to seek legal assistance, and less likely to access the civil justice system than those in homes with greater financial resources.”).

15. See, e.g., Spaulding, *supra* note 3, at 262 (“[T]he discourse of procedure, even among those who see glaring problems of access to justice, is idealized, abstract, and ossified—unconnected to the actual.”); Weinstein-Tull, *supra* note 1, at 1038–39 (“The legal academy’s failure to account for local courts . . . has essentially divorced legal theory from the most fundamental and common experiences of our justice system.”); cf. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 518–21 (describing recent reform proposals among access-to-justice advocates); Wilf-Townsend, *supra* note 12, at 1714 (“Although much legal scholarship focuses on federal courts, this shift in state courts is extremely consequential for how civil justice is administered and perceived throughout the country.”).

similarities call for more united theoretical and reform efforts. Finally, this Essay examines mass claims—first, as they are aggregated in lawyered courts, and then, as they are resolved individually (but en masse) in lawyerless courts. This approach shows that we typically frame discussions of class action or multi-district litigation (MDL) settlements as debates about the functioning of the lawyer–client relationship and about whether mass tort claimants in federal courts can be considered lawyered or lawyerless.

These are not the only possible takeaways, or the only three topics in which this division is important and revealing. Our case studies are meant to be illustrative and informative, but not exhaustive. The emerging application of critical race theory approaches to civil procedure would benefit from examining courts not as state and federal, but as lawyered and lawyerless.¹⁶ Subjects ranging from default judgments to poverty law to alternative dispute resolution (ADR) are likewise too often discussed in federal or state court scholarly silos. We could greatly enhance our understanding of these subjects if we viewed them through the lens of lawyered and lawyerless courts. For example, one might examine state courts alongside federal courts when discussing issues related to arbitration or mediation in complex litigation, while separately considering these mechanisms in lawyerless state courts as raising different concerns. This Essay focuses on these three areas because each illustrates the tacit divide between lawyered and lawyerless courts scholarship. Yet, each also reveals a different kind of relationship between the two. Procedure-making illustrates the lessons of comparing and contrasting the two realms. Technology represents the potential for unifying the divergent scholarship. Mass claims demonstrate the limits of procedure, manifested differently in the two realms in a way that the comparison helps to illuminate.¹⁷

Together, these case studies provide further insights into the roles of lawyers and judges in civil justice, not just as advocates or neutrals, but also as actors and architects of the civil justice system. They provide insights for doctrine—especially doctrine that bridges state and federal courts—like

16. See generally *A Guide to Civil Procedure: Integrating Critical Legal Perspectives* (Brooke D. Coleman, Suzette M. Malveaux, Portia Pedro & Elizabeth Porter eds., forthcoming 2022) (on file with the *Columbia Law Review*) (revealing ways that civil procedure privileges some and silences others within our justice system); Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 *Va. L. Rev. Online* 143 (2021) (advocating for the use of critical race theory to analyze civil procedure); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 *UCLA L. Rev.* (forthcoming 2022), <https://ssrn.com/abstract=3807349> [<https://perma.cc/56XA-4JBN>] (arguing that *Gideon v. Wainwright*'s constitutional guarantee of counsel accrues largely to the benefit of men).

17. In this sense, comparing lawyered and lawyerless courts presents a combination of comparing two systems that are similar, but also choosing specific examples to highlight differences. See, e.g., Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 *Colum. J. Transnat'l L.* 283, 292 (2019) (using a similar approach to select three examples of courts for comparison); cf. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *Am. J. Comp. L.* 125, 139 (2005) (discussing the “most different cases” approach in comparative constitutional law).

personal jurisdiction, notice, and due process. For example, personal jurisdiction arises predominantly in lawyered courts. In contrast, there is a shared challenge of providing notice to masses of unrepresented litigants in both aggregate lawyered litigation and lawyerless courts. And these case studies showcase the failings of a due process doctrine that values lawyers, and more process, as the ideal guarantors of the opportunity to be heard.

This Essay unfolds as follows: Part I describes the differences between state and federal courts in terms of their dockets, their litigants, their procedural rules, and the values they pursue. It then reframes those differences in terms of courts dominated by lawyers representing both sides and those where lawyers are predominantly absent. Part II explores three areas of current scholarship where the lawyered/lawyerless divide can help illuminate ongoing debates: (1) procedure-making, (2) the role of technology, and (3) treatment of masses of claims. Part III discusses implications of focusing on the lawyered/lawyerless divide on our understanding of the roles of judges and lawyers, doctrine, teaching procedure, and the power and the limits of procedure in the American civil justice system. Among other implications, this Essay shows the importance of lawyers for certain kinds of procedural development as actors and as architects. It urges scholars and reformers across lawyered and lawyerless courts to communicate with each other and potentially collaborate on research and reforms about using technology to effect notice, because the two kinds of courts face similar challenges. Finally, this Essay argues that this lens supports arguments about the limits of procedure's ability to ensure justice and the need for more dramatic change—crafted by lawyers but ultimately designed for use without them.¹⁸

I. LAWYERED AND LAWYERLESS COURTS

This Part lays out background understandings of the similarities and differences between state and federal courts.¹⁹ It evaluates four common assumptions about state and federal courts in terms of the kinds of cases, the similarity of written procedures, the roles of lawyers and judges, and the values of merits and efficiency. In each case, scholars' foundational

18. See, e.g., Benjamin H. Barton & Stephanos Bibas, *Rebooting Justice* 100 (2017) [hereinafter *Barton & Bibas, Rebooting Justice*] (insisting that “it is time . . . to pursue simpler, swifter alternatives to lawyers” and that “[a]dvocating yet again for more lawyers will not result in more justice”); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 *Wis. L. Rev.* 287, 288 [hereinafter *Sabbeth, Simplicity as Justice*] (arguing that the “limits and unintended consequences” of the simplification project should “receive careful scrutiny”); Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1530 (urging “the collective exercise of reimaging state civil courts as democratic institutions”).

19. This description relies on the best available data, which is admittedly incomplete and difficult to compile. What data exists, however, paints a clear picture, and it appears to be improving as scholars work tirelessly to analyze and add to it. See Carpenter et al., “New” Civil Judges, *supra* note 3, at 265–71 (discussing the barriers and progress in research on state civil courts).

assumptions about civil courts are federal-court-centric. They tend to define state courts and what happens in them with reference to their similarities to federal courts. To the extent these assumptions apply to state courts, however, they apply only to the limited subset of state civil courts where lawyers represent both sides and actively drive the litigation, as lawyers tend to do in federal court. This reveals a divide between civil litigation in this country not as between state and federal courts, but as between lawyered courts (federal courts and certain divisions of state trial and appellate courts) and lawyerless courts (the rest of civil courts where at least one party is almost always self-represented). While federal courts have some self-represented parties and state courts have some cases with representation on both sides, this Essay seeks to highlight the institutional and procedural-rule-based differences. It therefore focuses on the courts rather than the individual cases. It is in this latter category of “lawyerless” courts in which the vast majority of civil litigation actually takes place.²⁰ They differ from lawyered courts in terms of the types of cases they hear, their written procedures, the roles of lawyers and judges, and their understanding of the pursuit of efficient, merits-based adjudication.

A. *Types of Cases*

When federal civil procedure scholars think of state courts, they may think of a less structured, more chaotic, more plaintiff-friendly, elected-judge-ruled courtroom where plaintiff-lawyer-led litigation vaguely resembles what takes place in federal court but takes longer and yields higher jury awards. This image has been carefully cultivated and promoted by the Chamber of Commerce and other like-minded organizations, who rank state court systems as “judicial hellholes” when they are conducive to class actions and other kinds of suits against business defendants.²¹ In this telling, plaintiff’s lawyers are opportunistic “bad guys.”²² The image is

20. See *supra* notes 3–9 and accompanying text.

21. See, e.g., Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. Va. L. Rev. 1097, 1098 (2008) [hereinafter *Thornburg, Judicial Hellholes*]; Florida Surpasses California to Become Worst ‘Judicial Hellhole’, Fla. Chamber of Com. (Dec. 5, 2017), <https://www.flchamber.com/florida-surpasses-california-to-become-worst-judicial-hellhole/> [https://perma.cc/HPX6-KTG8]; The U.S. Chamber Institute for Legal Reform Commends Judicial Hellholes for Highlighting Nation’s Worst Civil Justice Jurisdictions, U.S. Chamber Inst. for Legal Reform (Dec. 5, 2018), <https://instituteforlegalreform.com/the-us-chamber-institute-for-legal-reform-commends-judicial-hellholes-for-highlighting-nations-worst-civil-justice-jurisdictions/> [https://perma.cc/CA68-3MKA]; 2020–2021 Judicial Hellhole Report, Everlasting Judicial Hellholes 2020/2021, ATR Found., <https://www.judicialhellholes.org/reports/2020-2021-executive-summary/> [https://perma.cc/K7B8-CBKP] (last visited Mar. 20, 2022); cf. Megan M. La Belle, *Influencing Juries in Litigation “Hot Spots”*, 94 Ind. L.J. 901, 930 (2019).

22. See, e.g., Thornburg, *Judicial Hellholes*, *supra* note 21, at 1100 (explaining the campaign to scapegoat plaintiffs’ lawyers and paint them “as greedy parasites trying to make an easy buck by scaring companies into settling frivolous claims”).

federal-court-centric, depicting state courts as a wild west version of what happens in federal court.

Even if one rejects the negativity of this imagery, one may still imagine state courts as a rough corollary to federal court—at least in terms of many of the kinds of cases heard, if not the amount of money at stake. Federal courts have exclusive jurisdiction over few cases. Most federal court cases could be heard in state court, and there are some state courts that do resemble federal courts along these metrics. Discussion of state courts in civil procedure scholarship and curricula tends to focus on these state courts, often while considering how state courts relate to federal courts.²³ For example, in studying the law of removal, one learns that state courts of general jurisdiction provide an alternative forum for federal claims. In these state courts, parties file suits that could plausibly be removed to federal court. Such litigation would likely involve questions of federal law or high monetary stakes (and thus potentially satisfy the federal amount-in-controversy requirement) and parties from different states—cases similar to the ones that federal courts handle.²⁴

Thinking of state litigation in terms of whether it could proceed in federal court focuses one's attention on certain kinds of cases. Those cases—business or insurance disputes, for example—exist in state courts. Indeed, many states have established separate commercial divisions.²⁵ These cases tend to involve higher monetary stakes, the parties are likely to be able to afford zealous lawyers, and the courts in which these cases unfold often do follow procedures that roughly resemble the Federal Rules.

23. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 295–303 (7th ed. 2015) (discussing the relationship between federal and state courts); Zachary D. Clopton, *Making State Civil Procedure*, 104 *Cornell L. Rev.* 1, 4–5 (2019) [hereinafter Clopton, *Making State Civil Procedure*] (providing a comprehensive study of state court procedure-making, in part to understand the relationship between state court procedure and federal procedural retrenchment); cf. Weinstein-Tull, *supra* note 1, at 1034–35 (analyzing lawyerless state courts to draw conclusions about federalism).

24. Other federal civil procedure and federal court topics that involve state courts include abstention doctrines, exclusive jurisdiction, and state courts' obligation to enforce federal law. See Fallon et al., *supra* note 23, at 1101–71 (abstention doctrines); *id.* at 418–22 (exclusion of state court jurisdiction); *id.* at 440–60 (obligation to enforce federal law).

25. Pamela K. Bookman, *New York's International Commercial Courts*, in *New Specialised Commercial Courts and Their Role in Cross-Border Litigation* (forthcoming 2022–2023) (manuscript at 6) (on file with the *Columbia Law Review*); John F. Coyle, *Business Courts and Interstate Competition*, 53 *Wm. & Mary L. Rev.* 1915, 1918 (2012) (listing nineteen states that have established dedicated business courts). Part of the impetus is to attract the business of business litigation into the state by creating a court that commercial parties want to choose in their forum selection clauses. For an overview of these trends in the United States and around the world, see Pamela K. Bookman, *The Adjudication Business*, 45 *Yale J. Int'l L.* 227, 233–39 (2020) (discussing the rise of specialized commercial courts in London and New York).

But the vast majority of state court cases raise issues of state law and could not be filed in federal court.²⁶ “The state courts are flooded with cases related to consumer debt, divorce, child custody and support, paternity, wage and hour, landlord–tenant, abuse and neglect, probate, and domestic violence.”²⁷ Relatedly, the litigants do not have the funds and do not stand to benefit financially from the litigation to support legal fees—especially if the claims cannot be aggregated.²⁸ Indeed, the courts we describe as lawyerless are often known as “poor people’s courts.”²⁹

The result is often a bifurcated justice system within state courts: between resourced parties or parties with claims large enough to support paying an attorney, and the rest of the people with legal problems.³⁰ In some states, like New York, these courts are literally different places and different divisions (e.g., Commercial Court and Family Court).³¹ In other

26. See, e.g., Hannaford-Agor et al., *supra* note 1, at 8 (reporting that, of civil cases in seventeen states’ courts of general jurisdiction, 61% were contract cases, 11% probate, and 11% small claims); Shanahan et al., *Institutional Mismatch*, *supra* note 1, at app. tbl.2.

27. Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 *BYU L. Rev.* 899, 919 [hereinafter Steinberg, *Adversary Breakdown*].

28. Significant reductions in the availability of class actions have also reduced low-income litigants’ access to federal *and* state courts (and to lawyers) through aggregation of small-value claims. See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 *Emory L.J.* 1531, 1536 (2016) [hereinafter Gilles, *Low-Income Litigants*] (“[I]n recent decades, access to class-wide relief for low-income groups has declined precipitously.”). Gilles describes how class action restrictions especially limit low-income litigants’ class actions, and the title of her essay presumably applies to the disappearance of low-income litigants from the civil dockets of federal courts, or perhaps lawyered courts. See *id.* at 1535–37. The inability to aggregate small-value claims, of course, often effectively deters bringing such claims individually. Moreover, as discussed below, federal legislation granting federal courts jurisdiction over class actions that otherwise might be brought in state courts has resulted in the application of the stricter federal court standards that have effectively eliminated many of these class actions altogether. See *infra* notes 185–192 and accompanying text (discussing the Class Action Fairness Act of 2005).

29. See Vicki Lens, *Poor Justice: How the Poor Fare in the Courts* x–xi (2016) (describing “how the lives of poor people are disrupted or helped by the judicial system”); Tonya L. Brito, *Producing Justice in Poor People’s Courts: Four Models of State Legal Actors*, 25 *Lewis & Clark L. Rev.* 145, 147 (2020) (using the term “poor people’s courts” to refer to “state courts hearing family, housing, administrative, and consumer cases”); Elizabeth L. MacDowell, *Reimagining Access to Justice in Poor People’s Courts*, 22 *Geo. J. on Poverty L. & Pol’y* 473, 475 (2015) (“[T]his article uses the term ‘poor people’s courts’ to refer to state civil courts serving large numbers of low-income, unrepresented litigants . . .”).

30. This dynamic exists to a lesser extent, and in different ways, in federal courts. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2695 (discussing the “shadow system of civil procedure” that applies to federal pro se litigants); Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 *Wake Forest L. Rev.* (forthcoming 2022) (manuscript at 5), <https://ssrn.com/abstract=3931568> [<https://perma.cc/8FQU-NNYC>].

31. *N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70* (2021) (Uniform Rules of the Commercial Division of the Supreme Court); *id.* at § 205 (Uniform Rules of the Family Court); see also Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 *Law & Soc. Inquiry* 1058, 1060–61 (2017)

states, like California, there is a unified court system, although parties with different kinds of cases are directed to different courthouses.³²

But while some states' commercial divisions are busier than others, all states have some courts or courtrooms that have far more cases than they can reasonably handle and that suffer from chronic funding shortages, "with budget cuts sparked by recessions and many state legislatures declining to restore funding in times of economic growth."³³ They have become the government of last resort for a host of social problems, from consumer debt to housing issues to domestic violence.³⁴ Indeed, although lawyerless state courts are overflowing with more cases than they can handle, a proportionally small number of legal problems become legal cases.³⁵ As discussed below, in these courts, procedures differ starkly from those in federal court.³⁶

B. *Variation in Written Procedure*

It is commonly assumed, as a rough generalization, that civil courts in the United States, whether federal or state, have similar written procedures.³⁷ Specifically, there is first the "assumption of equivalence"—the assumption that state codes of procedure either copy or effectively parallel

(noting that District of Columbia housing court's "inquisitorial regime . . . departs sharply from traditional adversarial procedure").

32. See Nat'l Ctr. for State Cts. Data Visualizations, Courts of Limited Jurisdiction, Tableau Pub. (July 8, 2019), <https://public.tableau.com/app/profile/ncscviz/viz/CourtsOfLimitedJurisdiction/Story1> (on file with the *Columbia Law Review*).

33. Wilf-Townsend, *supra* note 12, at 1713–14; see also Kathryn A. Sabbeth, Market-Based Law Development, LPE Project (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/VM94-VVFA>] [hereinafter Sabbeth, Market-Based Law Development]; Zambrano, Federal Expansion, *supra* note 9, at 2103 (discussing the budget struggles of many state judicial systems).

34. Colleen F. Shanahan & Anna E. Carpenter, Simplified Courts Can't Solve Inequality, 148 *Daedalus* 128, 130, 133 (2019).

35. The leading scholar on access to justice, Rebecca Sandefur, uses the iceberg metaphor to describe the scope of civil justice problems in the United States: The percentage of cases that end up in court represent only the tip of the iceberg of civil legal problems. See Sandefur, *Access to What?*, *supra* note 14, at 50. For a visualization, where the vast number of civil justice problems are represented by the bulk of an iceberg beneath the water's surface, see William D. Henderson, Rule Makers vs. Risk Takers, Univ. of Denver Inst. for the Advancement of the Am. Legal Sys. (Mar. 25, 2020), <https://iaals.du.edu/blog/rule-makers-vs-risk-takers> [<https://perma.cc/9EAL-PHSH>] (providing a visualization of Sandefur's *Access to What?*).

36. There is a related, but distinct, phenomenon in administrative agency proceedings. While agency adjudications are typically lawyerless, they are also by definition executive branch processes designed to implement government action, and their procedural rules and norms follow from this structural difference. See Shanahan et al., *Lawyers, Power, and Strategic Expertise*, *supra* note 1, at 476–81 (describing the hearing procedures of a District of Columbia administrative tribunal).

37. See, e.g., Scott Dodson, The Gravitational Force of Federal Law, 164 *U. Pa. L. Rev.* 703, 705 (2016) (arguing that states "routinely follow[] federal law even when adherence is not compelled").

the Federal Rules.³⁸ This rough assumption³⁹ has some purchase in some state courts—often those that hear business trial cases or class actions, for example.⁴⁰ But equivalence can be difficult to measure on a formal basis (even when a state has copied the Federal Rules of Civil Procedure)⁴¹ and may change over time—especially as the Supreme Court’s interpretations of the Federal Rules evolve and states choose whether to follow course.⁴² More important for our purposes is the fact that, however true this assumption of equivalence might be for lawyered state courts, it is less true, if not decidedly false, when it comes to lawyerless ones.

The assumption of equivalence fails both because lawyerless courts are sometimes separate court divisions with their own written rules of procedure and also because of informal and unwritten rules of procedure. First, written procedure does not only vary from state to state; it also varies *within* state court systems.⁴³ As noted, many states have subject-matter-specific courts dedicated to addressing certain kinds of social problems,

38. See, e.g., Coleman, *One Percent Procedure*, *supra* note 10, at 1049 (noting that “[a]bout half of the states have adopted the Federal Rules of Civil Procedure verbatim,” and in those that have not, “at least one study has determined that procedural practice in those state courts often lines up with federal court practice”); *id.* (arguing that elite litigation by elite lawyers in federal court has an outsized influence on procedural rules and development in state and federal court). But see Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 *Case W. Rsv. L. Rev.* 501, 512–16 (2016) (describing studies in 1986 and 2003 showing an absence of intra-state procedural uniformity, even among so-called “replica states”).

39. There is a longstanding debate on the “parity” of state and federal courts—a debate that tends to assume or rebut the argument that federal courts provide a superior kind of procedure that state courts should emulate. But this debate, again, focuses on the comparison between federal courts and those state trial courts that perform a similar function and entertain somewhat comparable kinds of cases litigated predominantly by represented litigants. See, e.g., Burt Neuborne, *Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1115–30 (1977). Erwin Chemerinsky has concluded, “[U]ltimately the issue of parity is an empirical question for which no empirical measure is possible.” Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. Rev.* 233, 256 (1988).

40. See, e.g., Spaulding, *supra* note 3, at 265 (“For a few decades in the twentieth century there may have been parallels between federal procedural law and the procedural law of the states, but there are arguably more divergences than similarities now in some of the most consequential areas of pretrial litigation.”).

41. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 *Calif. L. Rev.* 411, 424 n.108 (2018) [hereinafter Clopton, *Retrenchment*] (“There is considerable difficulty in measuring the degree of overlap between federal and state systems of procedure. The prevailing view seems to be that the Federal Rules had a marked impact on the form of state procedure . . . [and] on content, though that trend has slowed, if not reversed.”); see also *id.* (showing that states have deviated from federal procedural rules and recommending that they do so more in response to federal procedural retrenchment).

42. See, e.g., *id.* at 465 (documenting a “hodgepodge of state procedural choices”); Hannaford-Agor, *supra* note 1, at 11 (charting the organization of state court jurisdiction over general civil cases); Subrin & Main, *supra* note 38, at 516 (cautioning against evaluating intra-state uniformity based solely on textual uniformity).

43. See Nat’l Ctr. for State Cts. Data Visualizations, *supra* note 32.

like housing court, family court, or domestic violence court.⁴⁴ These courts often have their own procedural codes, with important differences from the Federal Rules of Civil Procedure. For example, as compared to the federal system, New York has fewer constraints on discovery, more liberal appeals, and more flexibility with regard to jury trials.⁴⁵ Within New York, a general civil matter heard in the Supreme Court is subject to more formal filing requirements and procedural rules as well as the rules of evidence. A matter heard in Family Court has more litigant-friendly filing requirements and procedures, as well as statutory exceptions to the rules of evidence.⁴⁶

Second, not all procedure is encapsulated in a set of written rules.⁴⁷ Related to the equivalence assumption is another underlying assumption: that the development and interpretation of written procedure in state civil courts resembles development and interpretation in federal court.⁴⁸ To the extent that federal–state procedural equivalence is judged by reading state court judicial opinions about procedural issues,⁴⁹ the very conversation assumes the existence of lawyers arguing these points and judges writing opinions about them. This assumption does not hold in lawyerless courts where the absence of lawyers on both sides and of written opinions, especially about procedure, make it nearly impossible to test the assumption using common tools. Practitioners and clinical professors, however, provide extensive data and testimonies demonstrating that procedure on

44. In New York, for example, the trial-level Supreme Court only hears those cases which fall outside the jurisdiction of more specialized courts such as the Family Court, the Surrogate's Court, and the Court of Claims. See Janet DiFiore & Lawrence K. Marks, *New York State Unified Court System, New York State Courts: An Introductory Guide* 2–3 (2016), <http://ww2.nycourts.gov/sites/default/files/document/files/2019-06/NYCourts-IntroGuide.pdf> [<https://perma.cc/453X-J226>].

45. See N.Y. Comp. Codes R. & Regs. tit. 22, §§ 205.1–205.86 (2021).

46. *Id.* §§ 202.1–202.72 (Supreme Court Rules); *id.* § 205.1–205.86 (Family Court Rules).

47. In Georgia, for example, the state law governing eviction proceedings “leaves interstitial gaps that local jurisdictions must fill out of necessity,” such that localized courts use “local norms, demographics, and court culture . . . to adapt their own process in ways that shape outcomes and the experience of those using the system.” Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 *Vand. L. Rev.* 1365, 1379 (2021).

48. Compare Dodson, *supra* note 37, at 706 (arguing that states “follow federal law” even when “state actors have authority to craft regimes and render interpretations different from—even contrary to—federal law”), with Clopton, *Making State Civil Procedure*, *supra* note 23, at 3 (“Unnoticed by virtually all procedure scholars, the states are pursuing a different course [from the federal rulemaking process].”).

49. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 *Vill. L. Rev.* 311, 470–79 (2001) (discussing pleading); *id.* at 363 (discussing discovery).

the ground in lawyerless courts varies considerably from procedure in federal court or even in lawyered state trial courts.⁵⁰ Indeed, some clinical professors have described lawyerless courts as unrecognizable to students who have studied only federal courts.⁵¹

To study civil procedure in federal courts, scholars look at the Federal Rules of Civil Procedure, local rules, statutes, judicial opinions, and sometimes interviews with lawyers, judges, and even parties. The Rules receive significant scholarly attention.⁵² But scholars also acknowledge that there is more to procedure than the Rules alone.⁵³ By contrast, in lawyerless

50. See Carpenter et al., “New” Civil Judges, *supra* note 3, at 261–65 (“[S]tudies have found differences in how judges apply substantive and procedural law, with some judges refusing to follow existing law at all. Our own research has shown that some judges routinely depart from adversary procedures when dealing with pro se litigants, while others hew to the passive norm.”); Steinberg, Adversary Breakdown, *supra* note 27, at 938 (“[I]t has become routine for judges to employ a range of unsanctioned adversary departures.”); Sabbeth, Market-Based Law Development, *supra* note 33 (“When arguments are raised (and certainly when they are not), judges routinely disregard the plain letter of the law.”).

51. See, e.g., Andrea M. Seielstad, Unwritten Laws and Customs, *Local Legal Cultures, and Clinical Legal Education*, 6 *Clinical L. Rev.* 127, 128–29 (1999) (“[M]any students are genuinely shocked by the extent to which unwritten rules and local customs—including relationships, power dynamics, and shared understanding between certain participants in the legal process—play a role in American judicial systems.”).

52. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the Procedural Efficacy*, 87 *Geo. L.J.* 887, 890 (1999) (arguing that Congress should step back from statutory rulemaking and allow courts to form “a model of principled deliberation akin to common law reasoning” because “congressional intervention can easily distort the principled coherence of the rule system as a whole”); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1132 (1982) (examining how the Advisory Committee on Rules for Civil Procedure interpreted the Rules Enabling Act); Brooke D. Coleman, *The Efficiency Norm*, 56 *B.C. L. Rev.* 1777, 1778 (2015) [hereinafter Coleman, *Efficiency Norm*] (arguing that a “faulty conception of efficiency is not producing high-value procedure, but is instead resulting in cut-rate procedural rules and doctrines”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L. Rev.* 494, 498 (1986) (examining “the Rules and the litigation context in which they have operated over the past fifty years” since their enactment); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 *UCLA L. Rev.* 654, 656 (2019) (“Many scholars have wrestled with the [Rules Enabling Act’s] language in an attempt to understand the precise contours of its constraints. Of particular concern has been how we should understand the nature of its directive that the rules may not alter substantive rights . . .”).

53. See, e.g., Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 *N.Y.U. L. Rev.* 767, 774 (2017) [hereinafter Bookman & Noll, *Ad Hoc Procedure*] (noting that civil procedure “can also be established while litigation is pending, in response to problems that arise in specific disputes, resulting in ad hoc procedure”); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 *Mercer L. Rev.* 757, 763 (1995) (noting that “substantial areas of procedure are covered by local rules, and these rules differ enormously across the country”); David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 *U. Pa. L. Rev.* 1001, 1005 (2021) (arguing that “it is not a stretch to say that legal tech will, in time, remake the adversarial system, not by replacing lawyers and judges with robots, but rather by unsettling, and even resetting, several of its procedural cornerstones”); Laurens Walker, *The Other Federal*

courts, the nature of proceedings, the number of proceedings, the absence of lawyers, and the changing role of judges all make it challenging even to *observe* procedure.

C. *The Presence and Roles of Lawyers and Judges*

A third common assumption is that lawyers and judges play roughly equivalent roles in state and federal civil procedure. This may be true to some extent in state courts populated by lawyers on both sides of the “v,” but the assumption does not hold where lawyers are largely absent.

Federal courts are heavily lawyered spaces, with 70% of filed cases involving representation on both sides.⁵⁴ A few prototype cases break this mold: prisoner cases, employment discrimination cases, and social security appeals.⁵⁵ In 75% of cases in state civil courts, at least one party does not have a lawyer.⁵⁶ And the state judicial institutions that hear these cases are often separated from the lawyered courts and divisions that hear the quarter of symmetrically lawyered cases (such as business-to-business disputes, state court class actions, and MDLs).⁵⁷

In lawyered courts, lawyers facilitate their client’s use of the adversarial system by identifying legal problems, presenting them in the context of the law, navigating the court system, and directly advocating for their client. Lawyers zealously bring claims for plaintiffs and protect defendants from these cases. Rules of civil procedure harness and enable this role for lawyers and keep lawyers in check by structuring the adversarial posture.

In federal courts, *pro se* litigants tend to be plaintiffs; the greater-resourced parties in federal litigation are often defendants, though they are also regularly plaintiffs in business-to-business disputes.⁵⁸ In lawyerless state courts, however, the greater-resourced and represented parties (like a landlord, a debt collector, or the government) often appear as plaintiffs, rather than the beleaguered defendants that they paint themselves as in federal litigation.⁵⁹ Because they are plaintiff’s counsel and because they

Rules of Civil Procedure, 25 Rev. Litig. 79, 80 (2006) (describing the development of common law procedural rules that “interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules”).

54. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2691.

55. *Id.* at 2691, 2697–98.

56. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 511–17.

57. See Nat’l Ctr. for State Cts. Data Visualizations, *supra* note 32.

58. Cf. Russell M. Gold, *Power Over Procedure*, 57 *Wake Forest L. Rev.* (forthcoming 2022) (manuscript at 1–4), <https://ssrn.com/abstract=3799298> [<https://perma.cc/7ZN3-S98B>] (characterizing federal civil procedure as governing a world “where wealthy White defendants are disproportionately powerful”).

59. See, e.g., Nicole Summers, *Civil Probation*, 75 *Stan. L. Rev.* (forthcoming 2023) (manuscript at 51–52), https://ssrn.com/abstract_id=3897493 [<https://perma.cc/PSD5-UBSJJ>] [hereinafter Summers, *Civil Probation*] (describing litigation and settlement dynamics between landlords and unrepresented tenants); Wilf-Townsend, *supra* note 12, at 1711 (“[I]n state courts, these roles are reversed: the most common cases pit a better-resourced

are unopposed, those lawyers who do appear in lawyerless courts play a different role than they would in fully lawyered contexts. There is no defense lawyer to keep an aggressively represented plaintiff in check or to advocate to the judge, nor are there incentives to press the court to document, develop, or constrain procedure—whether “pro-plaintiff” or “pro-defendant.”⁶⁰

One might expect the judges in lawyerless courts to serve as replacements for lawyers in helping self-represented litigants navigate the adversarial system. This can happen. But judges play a variety of roles in state courts, some more politicized than others.⁶¹ And in some instances, judges are not even lawyers.⁶² Moreover, state civil courts, unlike administrative agencies, remain rooted in adversarial dispute resolution as their fundamental structural design. As a result, “[m]illions of low- to middle-income people without counsel or legal training must protect and defend their rights and interests in courts designed by lawyers and for lawyers.”⁶³ These parties often prepare for, navigate, and sometimes resolve their cases in the hallways, drawing on guidance from informal and formal sources of assistance, and facing either represented, more powerful opponents or just an inscrutable system.⁶⁴

plaintiff, often a corporation with lawyers, against an unrepresented individual defendant.”).

60. Cf. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 110–11 (2018) [hereinafter Sabbeth, *Housing Defense*] (describing the inherent structural disadvantages of litigating from a defensive position).

61. Clopton, *Making State Civil Procedure*, supra note 23, at 19 n.102 (“One area where states differ markedly from the federal system, and from each other, is in their method of selecting judges.” (citing Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 *Vand. L. Rev.* 1729, 1733 (2017) (discussing judicial selection methods and partisanship))); see also Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 4 (2012) (“[J]udicial elections reduce state judges’ willingness to apply the law or protect rights in the face of public opposition or special interests.”).

62. See, e.g., Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 *Colum. L. Rev.* 1287, 1290 (2022); Nolan Anderson, Randy Kreider & Kristen Schnell, *Injustice in the Lowest Courts: How Municipal Courts Rob America’s Youth*, *Colum. L. Sch. Juv. L. Ctr.* 9 (2021), https://jlc.org/sites/default/files/attachments/2021-02/Municipal%20Fines_Final.pdf [<https://perma.cc/B6GN-JV74>] (“[Some] states do not require municipal judges to be lawyers, sometimes requiring just a high school degree.”).

63. Carpenter et al., *Lawyerless Courts*, supra note 2, at 512.

64. See Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer’s Monopoly*, 89 *Fordham L. Rev.* 1315, 1317 (2021) [hereinafter Steinberg et al., *Judges and Deregulation*] (“Nonlawyer advocates often meet with litigants in courthouse hallways or in private court-based interviews—underscoring their formalized institutional role—and yet they rarely appear during court proceedings and their role is not . . . delineated by local rule.”); Summers, *Civil Probation*, supra note 59 (manuscript at 13) (“Landlords and their attorneys leverage these profound [power] disparities to pressure tenants into signing settlement agreements. These settlements are typically signed in the court hallways Hallway negotiations are entirely unmonitored”).

Indeed, these courts are so overburdened with massive numbers of filings that cases may receive just a few minutes of a judge's attention at most.⁶⁵ When they do conduct proceedings, judges sometimes adhere to the adversarial archetype of a "neutral arbitrator," but increasingly, and as directed by some ethical rules, they intervene to assist self-represented parties in developing their cases and navigating procedures that may seem labyrinthine even if designed with the hope of being simple.⁶⁶ These interventions range from explaining legal concepts (which often maintains or exacerbates complexity) to eliciting information and otherwise controlling the presentation of evidence from litigants.⁶⁷ This kind of "active judging" may encourage settlement, as "managerial judges" in federal court do,⁶⁸ but they may also abandon their traditional neutrality and help guide the self-represented litigant, or favor the represented. As discussed below in section II.A.2, these interventions tend to be ad hoc, inconsistent, and potentially fleeting. These courts rarely produce written judicial opinions that might develop these procedures—nor are there lawyers asking them to do so.

Legal scholarship's poor systemic understanding of lawyerless courts is sometimes explained by the difficulty of studying these courts.⁶⁹ Over the past few decades, boots-on-the-ground scholars, often social scientists and clinical law professors who practice in these courts, have overcome these obstacles and produced empirical and theoretical scholarship about state civil courts, enriching our understanding. But the point is that the absence of lawyers itself alters both the procedures and our ability to observe and understand them.

65. See, e.g., Steinberg et al., *Judges and Deregulation*, supra note 64, at 1337 (calculating seven minutes per case in some jurisdictions but indicating that "most hearings are much shorter").

66. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 667–72 (2017) [hereinafter Carpenter, *Active Judging*] (discussing arguments for active judging); Carpenter et al., *Lawyerless Courts*, supra note 2, at 521–24 (discussing the judicial canons for supporting pro se litigants); Steinberg, *Adversary Breakdown*, supra note 27, at 903 ("[A]ctive judging has become routine in many small, two-party cases . . .").

67. See, e.g., Carpenter et al., *Lawyerless Courts*, supra note 2, at 551 (describing research findings in which "judges exerted tight control over evidence presentation by asking leading questions—including questions based on the petition—and constricting parties' opportunity to present testimony, particularly narrative testimony").

68. See Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 376–77 (1982).

69. See, e.g., Spaulding, supra note 3, at 270 ("Meaningful empirical studies of state courts can be conducted, but this work is far more time and resource intensive than studying federal court litigation."); Stephen Campbell Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 *Daedalus* 129, 134 (2014) (noting the deep political reasons for "[o]ur ignorance" of state courts).

D. *Merits and Efficiency*

Traditionally, scholars understand courts—or rather, lawyered, federal courts—as sites of dispute resolution and law development.⁷⁰ As just noted, lawyerless courts engage in vanishingly little law development, whether substantive or procedural, in part because of the absence of lawyers prompting them to do so (by requiring written explanations or by filing motions or appeals challenging their decisions, for example).⁷¹

But another set of assumptions underlies this discussion of lawyered and lawyerless courts as sites of dispute resolution: that they similarly balance the sometimes competing values of, on the one hand, reaching (and deliberating) the merits of a case and, on the other, promoting efficiency. One goal of the Federal Rules was to make the resolution of federal court litigation less about lawyers' manipulation of procedural "technicalities" and more about getting to the merits of the case.⁷² Civil procedure reforms have also long chased "efficiency."⁷³ Much civil procedure scholarship laments the fading away of the "ideal" of using trials to engage the merits of a dispute, through the rise of pleading standards, easier access to summary judgment, less discovery, increased managerial judging leading to settlement, rising class action certification requirements, and arbitration.⁷⁴

70. E.g., Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 671–72 (2012) (discussing dispute resolution and law declaration models of adjudication). Litigation also serves other purposes in a democratic society. See Alexandra Lahav, *In Praise of Litigation 1–2* (2017) ("Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency . . . ; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard.").

71. See Llezlie Green, *Wage Theft in Lawless Courts*, 107 *Calif. L. Rev.* 1303, 1330 (2019) (noting that the "absence of nuanced legal doctrine in small claims court" is the result of the small financial value of those cases); Sabbeth, *Market-Based Law Development*, *supra* note 33 ("Investment in courts and lawyers in rough proportion to economic power results in the self-perpetuating underdevelopment of law for poor people.").

72. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, *Duke L.J.* 1, 4–5 (2010) ("[R]ather than eliminating claims based on technicalities, the Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits." (footnotes omitted)).

73. See generally Coleman, *Efficiency Norm*, *supra* note 52 (discussing and critiquing the pursuit of efficiency in federal civil procedure).

74. See *id.* at 1778 (criticizing a view of efficiency that defines costs narrowly as the amount litigants must pay at each litigation moment, without taking into account the costs of, for example, "mistakenly filtering out meritorious claims"); see also Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 *Vand. L. Rev.* 1119, 1142–50 (2019) ("In cases involving issues ranging from personal jurisdiction and pleading standards to class certification, discovery, and trials, the [Roberts] Court has turned litigation into an obstacle course for civil plaintiffs." (footnotes omitted)); Maureen Carroll, *Class Action Myopia*, 65 *Duke L.J.* 843, 880 (2016) ("Heightened evidentiary burdens increase the transaction costs associated with class treatment"); Brooke Coleman, *The Vanishing Plaintiff*, 42 *Seton Hall L. Rev.* 501, 512 (2012) (noting that pressure from "organizational defendants" has resulted

This lament typically focuses on federal litigation's failure to allow cases to get to the merits, not the other failure: the requirement of quality representation to have any hope that reaching the merits is equivalent to obtaining justice.⁷⁵ At the same time, procedure reforms, including those that make merits-based determinations more elusive, are often justified as promoting efficiency. Mr. Twombly will never "get to the merits" of whether Bell Atlantic colluded with other telecommunications companies to stifle competition, in part because allowing his lawyers to investigate the merits was deemed an inefficient use of judicial resources.⁷⁶

While these dynamics exist in varying degrees in lawyered state courts, "getting to the merits" and the notion of efficiency have a different salience in these courts. In many cases, there is no dispute to resolve as defined by the relevant law—for example, it may be uncontested that rent or another debt is owed.⁷⁷ Those cases are routinely resolved summarily or as default judgments, which are technically merits decisions but involve no deliberation—and no law development. It can be true that efficient default procedures have the benefit of sparing the debtor the additional expense of hiring a lawyer.⁷⁸ This cost-saving may also motivate the absence of discovery in many lawyerless courts, but it has downsides that Diego

in the move toward "a restrictive procedural regime"); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375 (2005) ("[C]lass actions will soon be virtually extinct."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 161–66 (2011) (discussing the consequences of *Iqbal's* heightened pleading standard); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1108 (2006) (describing the Rehnquist Court's "hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 368 (2010) (describing the Supreme Court's "capitulation to defendant requests for more restrictive pleading standards" as "the clearest evidence of procedure's tilt towards restrictiveness"); Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 142 (2007) (arguing that summary judgment is unconstitutional under the Seventh Amendment); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1030 (2013) ("Judges are regularly called upon to exercise their discretion to shape the boundaries of litigation within the open-textured provisions of the Federal Rules.").

75. See Sabbeth, *Simplicity as Justice*, supra note 18, at 296 ("[F]or parties disadvantaged by the surrounding economic system and the underlying substantive law, procedural protections are the most that the disadvantaged can expect from the system.").

76. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (cautioning that antitrust discovery imposes significant costs on both the courts and the parties).

77. As one of us describes elsewhere with Anna Carpenter, Alyx Mark, and Jessica Steinberg, a meaningful proportion of state civil cases are ones involving children or relationships. In these cases, there may be a dispute as to facts or underlying law, but the foundational framing of people's problems as a dispute—rather than a social need—is flawed. Shanahan et al., *Institutional Mismatch*, supra note 1, at 1477–79, 1492.

78. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in the Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 J. Empirical Legal Stud. 591, 602 (2004) (discussing Charles E. Clark's similar views, reflected in the Federal Rules of Civil

Zambrano discusses elsewhere in this symposium.⁷⁹ Indeed, many of these courts are not even trying to discover the truth as between litigants' competing accounts of facts.

Recent state civil procedure scholarship, however, explores how procedural rules designed with these efficiency benefits in mind lead to courts doling out speedy injustice. This scholarship focuses on the massive numbers of default judgments and the rules that facilitate them, the dysfunction of notice, and "assembly-line litigation" where "courts transfer assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of the case."⁸⁰ Default judgments can skip important due process guarantees, like making sure the debtor is even aware that she has been accused of owing a debt.⁸¹ Moreover, a growing scholarship challenges the injustice of certain debts, even if owed.⁸² Lawyerless state civil courts are a locus for collecting on such debts without evaluating whether they are owed or the injustice behind them. This role provides another example of how lawyerless courts serve as a government of last resort when other parts of government have failed citizens.⁸³

Procedure); Kellen Richard Funk, *The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938*, at 268–72 (Nov. 2018) (Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*) (discussing New York State's Field Code).

79. Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 *Colum. L. Rev.* 1423, 1451–53 (2022) [hereinafter Zambrano, *Missing Discovery*].

80. Wilf-Townsend, *supra* note 12, at 1709. See also Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 *Ala. L. Rev.* 893, 922–23 (2020) (noting the increasing "reliance on informal, flexible processes . . . and managerial judging practices in the name of judicial efficiency," and explaining "that many, if not most, judges—especially in state courts—face incessant pressure to streamline their case processing in the face of an ever-growing docket").

81. See Robin J. Efron, *The Invisible Circumstances of Notice*, 99 *N.C. L. Rev.* 1521, 1522 (2021) [hereinafter Efron, *Invisible Circumstances*] ("The due process right of notice is among the most neglected and understudied of constitutional rights.").

82. See, e.g., Abbye Atkinson, *Borrowing Equality*, 120 *Colum. L. Rev.* 1403, 1410 (2020) ("Because debt affects marginalized groups disproportionately and more severely, its invocation as a source of equality and mobility may simply further entrench the very inequality it is offered to ameliorate."); Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 *Harv. L. Rev. Forum* 374, 376 (2022) (proposing "a federal law that would 'kill' the ability of debt collectors to pursue a debt (in a lawsuit or outside of it) after a statutory period"); Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 *Harv. L. Rev. Forum* 359, 370–73 (2022) (using an invest/divest framework to propose transformation of debt collection courts). For advocacy work on this issue, see generally *The Debt Collective*, <https://debtcollective.org/> [<https://perma.cc/G7HN-TYEJ>] (last visited Feb. 3, 2021) (discussing various factors that have collectively led to debt).

83. See Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1523–26 ("Where courts shift their role to provide resources to meet litigants' needs, the courts are squarely assuming the roles of the executive and legislative branches in social provision."). Tonya Brito argues that there are multiple ways of interpreting justice unrelated to the merits of a case. For example, in cases obligating low- and no-income fathers to pay child support, justice is not about determining whether the fathers are really in arrears. Brito, *supra* note

Lawyerless state courts thus hear cases, follow procedures, involve judges and lawyers, and weigh values in ways that are quite different from the state courts discussed in Hart and Wechsler's Federal Courts casebook, or those that are depicted by Chambers of Commerce as "judicial hellholes."⁸⁴ Yet the vast majority of cases in the United States are filed in state civil courts. Some of these cases roughly parallel those brought in federal court. But most are even more different from federal courts than what civil procedure scholarship typically assumes.

II. LAWYERED AND LAWYERLESS PROCEDURE

This Part uses the lens of the lawyered/lawyerless divide to examine three illustrative, common themes in modern civil procedure scholarship: (1) procedural rulemaking, (2) the role of technology, and (3) the treatment of mass claims. Each of these areas represents a recent focus of civil procedure scholarship and of recommendations for reform in both the federal and state realms, but the conversations tend not to interact across the typical state/federal divide. We use these examples to engage similarities and differences across lawyered and lawyerless courts, not just state and federal. This examination reveals the importance of lawyers in maintaining the fairness of informal procedures; the commonality of notice challenges, and the potential for technology to meet those challenges, across lawyered and lawyerless contexts; and the role of lawyers in capitalizing on the power of aggregating masses of claimants against mass tortfeasors, or masses of claims against disparate individuals. This Part also seeks to lead by example, highlighting the fruitfulness of this kind of examination.

A. *Procedural Rules and Rulemaking*

In this section, we discuss recent scholarship on formal and informal procedure, first through the lens of the federal/state court divide. We then reexamine them through the lens of the lawyered/lawyerless divide and draw lessons from these comparisons for civil procedure more generally. This comparison suggests, for example, that the ratio of written to unwritten procedure diverges significantly between lawyered and lawyerless courts. Even though lawyers are especially necessary to navigate unwritten procedures, unwritten procedures represent an extraordinary amount of procedure in lawyerless courts. Ironically, the absence of lawyers creates a fertile space for judges and sometimes one-sided lawyers to generate more unwritten procedures or to fail to check judges' unwritten procedure-making by requiring written explanations or seeking appeal. The

29, at 153–54; see also Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 10 (2001) (“[The foster care system] is a system designed to deal with the problems of minority families—primarily Black families—whereas the problems of white families are handled by separate and less disruptive mechanisms.”).

84. See *supra* notes 21–23 and accompanying text.

comparison suggests that lawyered and lawyerless courts alike can learn from each other's development of best practices on simplifying procedures to accommodate self-represented litigants, but also that lawyers may be needed for effective informal procedural experimentation. Without the opportunity for effective reform from within the existing system, lawyerless courts demand more transformative reform.

1. *Making Formal Procedure.* — Federal procedure-making has been the subject of extensive scholarship,⁸⁵ while state procedure-making seems opaque and understudied.⁸⁶ Scholars have also examined other ways of making procedure outside of the Federal Rules, debating the roles of parties and judges,⁸⁷ the common law nature of procedure-making,⁸⁸ and the proliferation of local rules.⁸⁹

On the state procedure-making side, Zachary Clopton has heroically surveyed the formal procedural rulemaking structures in all fifty states, exploring the similarities and differences between them and comparing those to the federal system.⁹⁰ Clopton documents considerable variation in procedure-making across states and differences between state and federal rulemaking bodies.⁹¹ His is an exemplar of scholarship on studies of what state and federal court procedure can learn from each other.⁹² The study reveals that state rulemaking can be more accessible than federal rulemaking, while federal rulemaking can be more diverse.⁹³ The article

85. See *supra* notes 52–53.

86. See, e.g., Clopton, *Making State Civil Procedure*, *supra* at 23, at 3 (noting the difficulty in accessing information about state civil procedure-making); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 *J. Empirical Legal Stud.* 755, 756–57 (2004) (“The perennial difficulty in compiling accurate and comparable data at the state level can in large measure be pinned on the fact that there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation.”).

87. Compare Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 *B.U. L. Rev.* 127, 170 (2018) (arguing that contractual agreements that alter normal procedural rules turn litigants into co-managers of litigation with judges), with Scott Dodson, *Party Subordination in Federal Litigation*, 83 *Geo. Wash. L. Rev.* 1, 13 (2014) (arguing that the power hierarchy in courts of law leaves parties with the least control of their litigation).

88. See, e.g., Walker, *supra* note 53, at 80 (describing “common law procedural rules” that operate in conjunction with the Federal Rules).

89. See, e.g., Chemerinsky & Friedman, *supra* note 53, at 758–59 (criticizing the increase in local rules that vary from the Federal Rules).

90. Clopton, *Making State Civil Procedure*, *supra* note 23, at 8–17, 36–45.

91. *Id.*

92. For another example of scholarship that puts state and federal procedure in dialogue, see Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 *Stan. L. Rev.* 1805, 1867–75 (2018) (explaining how states' participation in federal procedure can improve procedural rulemaking).

93. Clopton, *Making State Civil Procedure*, *supra* note 23, at 36–43.

shows both sets of rulemakers how they can benefit from the others' experiences.⁹⁴

His impressive study, however, focuses on the procedural rules that govern primarily lawyered state trial courts—that is, those that hear cases roughly similar to the kinds of cases heard in federal courts.⁹⁵ Some of those same rules may apply in lawyerless state courts, especially in states with a unified court system, like California. But in states like New York with differentiated court divisions, there is more variety—and frankly more chaos—to procedural rules, even those that are written.⁹⁶

Further, the distinction between lawyered and lawyerless courts reveals an assumption about the importance of formal rulemaking: that it will be applied and interpreted by the relevant courts, largely reflected in written decisions. As explained above, the development of case law regarding procedural rules in lawyerless courts can be limited.⁹⁷ This is a result of the relative dearth of written decisions (and pleadings) at the trial level, coupled with fewer lawyers pursuing appellate law development. The point is not that written procedures favor either represented or unrepresented parties. Rather, the point is that the lawyered court model depends on written legal development to develop the law, and in its absence, it is difficult to know what happens in lawyerless courts.

2. *Informal and Ad Hoc Procedure.* — In both state and federal courts, moreover, not all procedure is written. As if it were not important enough to have a lawyer to help navigate written procedures, lawyers are crucial for parties to navigate unwritten procedures—those known only to repeat players “in the know.” Lawyers' expertise in procedures on the ground (and in judges' idiosyncratic practices) is a critical piece of the value they offer clients.⁹⁸

One subset of these unwritten procedures is what one of us with David Noll has coined “ad hoc” procedures.⁹⁹ They are procedures that are

94. *Id.* at 44.

95. Indeed, Clopton views state courts as a possible antidote to the retrenchment of federal courts and encourages “those interested in the vigorous enforcement of important rights [to] . . . look to state courts for redress.” *Id.* at 4.

96. For example, proceedings in New York City Housing Court are governed by the Real Property Actions and Proceedings Law. N.Y. Real Prop. Acts. Law §§ 101–2111 (McKinney 2022).

97. See *supra* note 71 and accompanying text.

98. See Shanahan et al., *Lawyers, Power, and Strategic Expertise*, *supra* note 1, at 510–12 (describing the value of lawyers' “strategic expertise” and “relational expertise,” including knowledge of particular judges' inclinations and idiosyncrasies); see also Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 *Am. Socio. Rev.* 909, 915–16 (2015) [hereinafter Sandefur, *Elements of Professional Expertise*] (providing an empirical look at how lawyers affect court decisions).

99. Bookman & Noll, *Ad Hoc Procedure*, *supra* note 53. Ad hoc procedures are often, though not always, unwritten. Cf. *id.* at 775 (discussing ad hoc procedural statutes); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*,

designed in the midst of ongoing events to address a perceived inadequacy in established procedures and then applied to the case at hand.¹⁰⁰ The article *Ad Hoc Procedure* examined complex litigation (largely in federal courts) involving mass claims with nontraditional compensation needs and documented instances when ad hoc procedures developed to overcome procedural problems in those extraordinary cases were ultimately codified in statutes.¹⁰¹ In lawyerless state civil courts, however, ad hoc procedure is not the mechanism for the exceptional case. It is the norm.

As Nora Freeman Engstrom wrote in a study of *Lone Pine* orders, ad hoc procedure's propriety "is arguably the biggest question currently brewing in civil procedure scholarship."¹⁰² But thus far, scholars have studied ad hoc procedure in state and federal courts largely in isolation from each other. A comparison of these two situations can enhance our understanding of ad hoc procedure and its role in securing or thwarting justice in lawyered and lawyerless contexts.

The recent *Opiate* MDL¹⁰³ provides a federal court case study in ad hoc procedure.¹⁰⁴ The *Opiate* MDL faced a seemingly intractable procedural problem: the challenge of binding potential future claimants to any

63 Notre Dame L. Rev. 693, 715 (1988) (noting that "the trend of modern procedural law has been . . . towards [rules] that confer on trial courts a substantial amount of normative discretion").

100. Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 784. Not all ad hoc procedure is unwritten; indeed, the first *Ad Hoc Procedure* article discussed ad hoc procedural statutes that retroactively applied procedural changes to pending litigation. See id.

101. Id. at 774–77.

102. Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 Yale L.J. 2, 72 (2019); see also *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at *1–2 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (setting out the "basic facts" the court expected plaintiffs to present at a case management conference in a toxic tort case).

103. See, e.g., *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020). The MDL statute endows judges with "plenary power" to manage litigations and extensive flexibility to innovate with procedures in order to do so. See Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 790; Andrew D. Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831, 838 (2017). MDL judges "develop their own special procedures, often in collaboration with specialist lawyers, which build on previous MDLs or analogous actions. As a result, what has emerged is essentially a federal common law of MDL procedure, with many judges adopting a discernible 'cowboy-on-the-frontier' mentality that is not as apparent in other contexts but has become an accepted norm in MDLs." Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 20 (2021).

104. The *Opiate* MDL has been the subject of extensive interest in civil procedure scholarship and in the news. See, e.g., Andrew Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019) [hereinafter Bradt & Rave, *It's Good to Have the "Haves" on Your Side*] (pointing to the opioid epidemic as an example of how national product liability scandals find their way into MDLs); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2131 (2020) (using the *Opiate* MDL as an example of judges "parcel[ing] their authority out" to judicial adjuncts); Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 Ga. L. Rev. 1287, 1289 (2019) (discussing the *Opiate* MDL in the context of sidestepping litigation); David L. Noll,

proposed settlement plan. Many of the thousands of the individual and government entity plaintiffs had claims valuable enough to pursue independently, increasing the risk of claimants dropping out of negotiations and proceeding solo. The defendants, meanwhile, “steadfastly refused to settle without the promise of more complete closure.”¹⁰⁵ The solution, crafted by appointed academics and counsel, was a new form of class action—the “negotiation settlement class,” modeled on the class action framework from Rule 23, but applied to negotiating settlement.¹⁰⁶ The MDL judge adopted a narrower version of the procedure, emphasizing that the process would not be coercive on the parties; opting-out plaintiffs could follow other settlement processes, and the rest of the MDL could continue through litigation.¹⁰⁷ On appeal, the Sixth Circuit held that the negotiation class procedure exceeded the district court judge’s authority under Rule 23.¹⁰⁸ It criticized the negotiation class as “a new form of class action, wholly untethered from Rule 23, [which] may not be employed by a court.”¹⁰⁹

This is classic ad hoc procedure—a procedure developed in the context of a particular litigation, applied mid-stream while the case was pending, designed for that litigation. It is informal procedure, in that it is articulated in a district court opinion rather than in the Federal Rules, local rules, or a congressional statute. Notably, the negotiation class structure was developed by and for lawyers (primarily by two law professors, one who served as a special master and the other as a court-appointed expert) and implemented by a judge eager to balance both sides’ interests and to

MDL as Public Administration, 118 Mich. L. Rev. 403, 411 & n.37 (2019) (placing MDL procedure-making within the broader context of ad hoc procedure); Jennifer D. Oliva, Opioid Multidistrict Litigation Secrecy, 80 Ohio St. L.J. 663, 665 (2019) (examining the secret nature of opioid MDL proceedings and its effect on undermining public health outcomes).

105. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 536–37 (N.D. Ohio 2019), rev’d and remanded, 976 F.3d 664 (6th Cir. 2020) (“The Defendants have insisted throughout on the need for a ‘global settlement,’ that is, a settlement structure that resolves most, if not all, lawsuits against them arising out of the opioid epidemic.”); Gluck & Burch, *supra* note 103, at 26.

106. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73, 90–120 (2020) (mapping out this procedure and describing its benefits).

107. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 537.

108. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 671 (“[T]he Supreme Court has warned that district courts do not have the liberty to invent a procedure with ‘no basis in the Rule’s text,’ even absent language expressly prohibiting it.” (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997))); but see *id.* at 667 (Moore, J., dissenting) (arguing that the district court “breathed life into a novel concept” and that appellate courts should be “encouraging, not exterminating, such resourcefulness”); Pamela K. Bookman & David L. Noll, *The Many Faces of Ad Hoc Procedure* 35–36 (Feb. 16, 2022) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Bookman & Noll, *The Many Faces of Ad Hoc Procedure*] (discussing the case and Judge Moore’s defense of ad hoc procedure).

109. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 672.

promote a settlement he knew would receive public and press examination.¹¹⁰ Arguing that the judge had stretched the boundaries of his authority, however, lawyers for some defendants convinced the appellate court to restrain the district court based on the constrictions of existing procedure.¹¹¹ Lawyers and judges thus created an innovative ad hoc procedure. Different lawyers and judges also prevented its implementation. This all happened via a thorough, public, written record.

Meanwhile, in state courts, informal procedures are difficult to observe. Judges in these courts routinely adjust procedures to accommodate the particular litigants before them (what scholars have called “unwritten law”¹¹²), often in inconsistent or unpredictable ways (making the unwritten law “ad hoc” as it is developed in and applies to a pending case). As lawyers report, “[i]nstead of a well-established and respectful order of presentation, the manner of presenting cases may seem haphazard and inconsistent from one case to the next. Formal rules of procedure may appear to be nonexistent or entirely ignored.”¹¹³ Judges routinely “invent procedures” in ways that are “ad hoc, variable, and inconsistent.”¹¹⁴ For example, in a case where the sheriff was unable to effectuate service and in the absence of any authorizing procedure, a judge in open court telephoned a defendant to notify him of a case against him and a hearing date and declared “you’re served.”¹¹⁵ This apparent chaos is unrecognizable to those accustomed to the relative predictability of federal court procedure, though the informal procedure and conventions may be familiar to those who inhabit the particular lawyerless court.¹¹⁶

More investigation is needed to understand why informal and ad hoc procedure is so pervasive in lawyerless courts, but this Essay offers three potential explanations: (1) the quantity and nature of procedural problems, (2) the absence of lawyers, and (3) the nature of the litigants. These

110. Gluck & Burch, *supra* note 103, at 29–32 (describing the ad hoc procedural innovations proposed by Professors Francis McGovern and William Rubenstein).

111. Bookman & Noll, *The Many Faces of Ad Hoc Procedure*, *supra* note 108, at 34.

112. See, e.g., Seielstad, *supra* note 51, at 135–38 (describing the phenomenon of unwritten law, rules, and customs).

113. Steven K. Berenson, *Preparing Clinical Law Students for Advocacy in Poor People’s Courts*, 43 *N.M. L. Rev.* 363, 364 (2013); see also Seielstad, *supra* note 51, at 129 (noting law students’ shock at “the extent to which unwritten rules and local customs . . . play a role in American judicial systems”).

114. Steinberg, *Adversary Breakdown*, *supra* note 27, at 938.

115. See Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1511.

116. See, e.g., Berenson, *supra* note 113, at 128–29 (describing the differences between popular depictions of courtroom advocacy and poor people’s courts, e.g., those courts that handle family, housing, and consumer cases). In the face of these challenges, judges sometimes attempt “to ‘hear’ the pro se narrative and to do ‘justice’ in the few minutes given to each case.” Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 *Cardozo Pub. L. Pol’y & Ethics J.* 659, 664–65 (2006); see also Steinberg, *Adversary Breakdown*, *supra* note 27, at 943–44 (describing an incident where Judge Weinstein offered this assistance and later recused himself from the case).

three features combine to create both the need for ad hoc procedure and the extensive and unchecked judicial discretion to create it.

First, ad hoc procedures typically respond to procedural problems, which are rampant in lawyerless state courts because the adversarial system was not designed to be used by self-represented parties.¹¹⁷ Accommodations for particular cases seem necessary to ensure the functioning of the system.¹¹⁸ Indeed, experts suggest most civil court dockets “would grind to a halt if judges did not find ways to assist the unrepresented parties who appear before them.”¹¹⁹ Judges adjust procedures in state civil courts to cope with daily system failure.

Second, when judges then rely on a range of “ad hoc and inconsistent” strategies, there are no lawyers to observe, let alone challenge them.¹²⁰ Traditionally, lawyers play a watching role in court, supervising the real-time decisionmaking of trial courts.¹²¹ In lawyerless courts there is either no lawyer in the room other than the judge, or there is a lawyer only for the more powerful party. In either event, there is no lawyer with an incentive to challenge the judge’s improvisation or suggest an alternative consistent with formal procedure. More likely, the single lawyer might propose or coordinate the informal procedure with the judge, as happens when judges rubber stamp landlord-lawyer-negotiated settlement agreements with tenants.¹²² Further, the absence of symmetrical representation means there is no collective exercise of observation and reform, no lawyers to suggest rules should be revised or supplemented.¹²³ This interacts with

117. Pew Charitable Trs., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations* (2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> (on file with the *Columbia Law Review*) (“Although courts clearly recognize the need to be useful to all litigants, they were designed by and for lawyers and have historically had difficulty meeting the needs of people without counsel—and even more so certain subpopulations within that group.”).

118. See, e.g., Carpenter, *Active Judging*, *supra* note 66, at 667–69 (reviewing academic and policy literature supporting procedural accommodations of pro se litigants); Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *COVID, Courts, and Crisis*, 99 *Tex. L. Rev. Online* 10, 14–16 (2020) (discussing ad hoc procedural responses to the COVID-19 crisis in state courts); Steinberg, *Demand Side Reform*, *supra* note 6, at 747 (arguing that in poor people’s courts, judges, rather than litigants, should have a duty “to advance and manage cases, and develop legally relevant factual narratives”).

119. Steinberg, *Adversary Breakdown*, *supra* note 27, at 938.

120. *Id.* at 906.

121. See, e.g., Sandefur, *Elements of Professional Expertise*, *supra* note 98, at 910, 925 (discussing lawyers’ effectiveness as including how their presence makes courts follow their own rules).

122. See Summers, *Civil Probation*, *supra* note 59, at 13 (observing that judges exercise minimal oversight over the landlord–tenant settlement process, which is often dominated by landlords’ attorneys).

123. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 *Hastings L.J.* 1367, 1375 (2016) (arguing that “potential law reform never happens” because litigants “do not have a representative who asks the judge to modify, expand, or apply novel interpretations of the law”).

the limited written procedure, a characteristic that is deeply tied to the absence of symmetrical lawyers to make use of, argue about, and appeal procedural decisions. Relatedly, limited opportunities for appeal themselves limit appellate engagement with procedural development and reduce incentives for lawyers that do appear from ensuring a process that abides by formal procedure.¹²⁴

The third contributing explanation is about the litigants themselves. Litigants in lawyerless courts generally have limited knowledge of written procedure, and they behave accordingly in the courtroom. Faced with these circumstances, judges in lawyerless courts are less likely to adhere to written procedure. Trial judges in lawyerless courts thus have enormous discretion to create unwritten and ad hoc procedure as well as incentives to do so because of the system's ill-suitedness to meet litigants' needs, the absence of lawyers, and the limited knowledge of litigants—all in the context of overflowing dockets.¹²⁵

The consequences of this phenomenon are as ad hoc and unpredictable as the procedures themselves. Some ad hoc procedures tend to benefit repeat players or represented parties, like relaxing procedural requirements for landlords to demonstrate their eligibility to start eviction proceedings in Baltimore's rent courts¹²⁶ or passive judicial processing of debt collection actions by debt-buyer plaintiffs.¹²⁷ These procedures have disproportionately negative effects on poor people and people of color, especially Black women.¹²⁸

124. In the federal court context, MDL critics argue for more appellate review of MDL procedures. Although lawyers are omnipresent, "few MDL issues ever reach the appellate courts," in part because MDL judges "try to do everything by consensus." Gluck & Burch, *supra* note 103, at 20 (internal quotation marks omitted) (quoting Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1706 (2017) (quoting an unnamed judge)). Appellate review and other transparency guarantees, like written opinions, are likely more available when the adversarial system pits the lawyers on either side against each other.

125. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 515 ("In lawyerless courts, a lack of party control over procedure collides with nearly unfettered and unreviewed judicial discretion."); see also Green, *supra* note 71, at 1307, 1323–31 (discussing procedural informality and litigants' lack of knowledge in the context of small claims court); Sudeall & Pasciuti, *supra* note 47, at 1379 (discussing areas of housing law "where statutory law does not address a necessary part of the dispossessory process and where local jurisdictions have been given autonomy to fill in the gaps," such as where the statute requires a hearing, but courts have discretion to determine the form it takes).

126. Pub. Just. Ctr., *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court* 36–37 (2015), <https://abell.org/sites/default/files/files/cd-justicediverted216.pdf> [<https://perma.cc/8DQM-33ZU>] ("While the court demonstrates close scrutiny of tenants' defense, it customarily affords wide latitude to landlords, making it even harder for renters to defend themselves.").

127. Wilf-Townsend, *supra* note 12, at 1723.

128. See Brito, *supra* note 29, at 187 ("[T]he informality of lower courts, especially in situations where parties are unrepresented, contributes to courts not following their own rules. This practice can disadvantage low-income, pro se litigants . . ."); Sabbeth & Steinberg, *supra* note 16, at 6–7 (observing that "most women who confront the legal system

Other ad hoc procedures seek to accommodate less experienced, pro se litigants.¹²⁹ Indeed, as one of us has written with Anna Carpenter, Alyx Mark, and Jessica Steinberg, this accommodation is encouraged in many states' judicial ethics canons.¹³⁰ Judges confronting such litigants often seek to provide procedural accommodations, but in doing so, they "must rely on instinct, discretion, and knee-jerk reaction in crafting their procedural methods, which can result in 'active' practices that fail to achieve an accurate outcome."¹³¹ As Jessica Steinberg explains, "[a] single judge might treat two unrepresented litigants in back-to-back proceedings entirely differently, or offer more assistance to certain parties than to others similarly situated."¹³² The result, even if well-intentioned, seems palpably unfair in a way that lawyers—if pervasive—might be able to mitigate.¹³³

3. *Simplification, Experimentation, Transformation.* — Examining both formal and informal procedure-making across lawyered and lawyerless courts reveals familiar themes around accommodation of self-represented parties. But it also reveals the importance of lawyers in spheres dominated by informal, ad hoc procedural experimentation and helps identify where more transformative structural reform is needed. First, comparing written procedures in lawyered and lawyerless contexts often reveals a perhaps obvious need for simplification in the lawyerless context and opportunities for cross-court learning.¹³⁴ Differentiation between written procedures for

are routinely unrepresented by counsel despite the enormity of what they stand to lose" and arguing that "the civil courts have become netherworlds of lawlessness where women's individual rights are routinely disregarded").

129. Carpenter, *Active Judging*, supra note 66, at 655–56 (discussing findings in a study of judges who saw themselves "as playing a role in facilitating fairness and access for pro se parties"); Carpenter et al., *Lawyerless Courts*, supra note 2, at 517–24 (noting the emergence of "a revised judicial role where judges cast away traditional passivity to assist and accommodate litigants without lawyers").

130. Carpenter et al., *Lawyerless Courts*, supra note 2 (manuscript at 5–9).

131. Steinberg, *Adversary Breakdown*, supra note 27, at 937.

132. *Id.* at 906.

133. See, e.g., Sabbeth, *Housing Defense*, supra note 60, at 79–80 (explaining that empirical studies suggest that the presence of counsel can counteract judges' "systemic bias against tenants").

134. See, e.g., Benjamin H. Barton, *Against Civil Gideon* (and for Pro Se Court Reform), 62 Fla. L. Rev. 1227, 1273–74 (2010); Richard Zorza, *Some First Thoughts on Court Simplification, The Key to Civil Access and Justice Transformation*, 61 Drake L. Rev. 845, 857–64 (2013). For examples of efforts at court simplification, see also Am. Bar Ass'n Comm'n on the Future of Legal Servs., *Report on the Future of Legal Services in the United States* 34 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WE_B.pdf [<https://perma.cc/Q8FW-YVBK>]; Ill. Sup. Ct. Comm'n on Access to Just., *Advancing Access to Justice in Illinois: 2017–2020 Strategic Plan* 12 (2017), <https://www.illinoiscourts.gov/Resources/8b247871-22b1-4684-b241-a39b6606f8a4/2017%20-%202020%20Strategic%20Plan.pdf> [<https://perma.cc/3PM9-8JFF>]; Jud. Council of Cal., *Elkins Family Law Task Force: Final Report and Recommendations* 19–37 (2010), <https://www.courts.ca.gov/documents/elkins-finalreport.pdf> [<https://perma.cc/B6CT-YUYG>]; D. James Greiner, Dalié Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119, 1151–65 (2017); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access*

pro se and represented litigants occurs sporadically in both state and federal courts.¹³⁵ As Andrew Hammond has argued, some lawyerless state courts, which have extensive experience with self-represented litigants, can show the way for other lawyerless courts—or federal courts accommodating self-represented litigants—to make more accessible rules in the absence of lawyers.¹³⁶

As for informal procedure, the lawyered/lawyerless comparison provides some perspective on the balance between formal and informal procedures and the price tag of increased percentages of informal procedures. Informal procedures require knowledgeable guides, usually repeat-player lawyers, to navigate them lest the litigants risk getting lost at sea. In lawyered courts, this price is part of the cost of admission—which is assumed to involve hiring a lawyer. Informal procedures are common in federal court; they are also more readily observable and contestable because of the presence of lawyers. But informal procedures work to the detriment of the self-represented. Even routinized, “predictable” informal procedure is extremely difficult for the self-represented to ascertain and navigate. As other research has illustrated, something theoretically straightforward—like a judge’s opening speech at the start of a docket call describing the rules and practices of the court—ends up being complex and confusing.¹³⁷

Ad hoc procedures exacerbate these costs. In their respective circles, informal and ad hoc procedure in both federal and state court have received extensive criticism. Federal court critics argue that such procedures “lack transparency, do not reflect democratic values, and ultimately damage judicial legitimacy”—and “[t]hese same concerns apply to the evolving judicial role in state civil trial courts.”¹³⁸

to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 *Fordham L. Rev.* 969, 970 (2004); but see Shanahan & Carpenter, *supra* note 34, at 130–32 (exploring several reasons “why court simplification will not necessarily lead to more substantive justice for low-income litigants”). For a broad summary of the simplification literature and a critique that the simplification project is insufficient, see generally Sabbeth, *Simplicity as Justice*, *supra* note 18.

135. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2704–21 (surveying “the universe of pro se specific local rules and practices in operation in all of the federal district courts”); see also Andrew Hammond, *Pleading Poverty in Federal Court*, 128 *Yale L.J.* 1478, 1507–14 (2019) [hereinafter Hammond, *Pleading Poverty*] (comparing poverty pleading procedures in state and federal courts).

136. Hammond, *Pleading Poverty*, *supra* note 135, at 1483 (recommending comparisons between state and federal court systems when evaluating specialized procedures for poor litigants); Hammond, *Pro Se Procedure*, *supra* note 4, at 2726 (encouraging federal courts to learn from “best practices in other district courts in the federal system or state courts”).

137. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 540–42 (recounting observations of judges’ opening speeches which “describ[ed] protective order cases’ legal and procedural framework” in “technical, inaccessible language”).

138. *Id.* at 514.

Ad hoc procedures often reflect good-faith efforts to fix procedural problems in the course of pending litigation. For example, judges in lawyerless courts may “adjust procedures”¹³⁹ to assist self-represented clients and make up for the problems created by dropping self-represented people into an adversarial system designed to be navigated by lawyers. By some accounts, the ad hoc procedures created for the negotiation class in the *Opiate* MDL were likewise a good-faith effort to facilitate a settlement that could benefit all parties involved.

Even assuming good faith, however, lawyers (or, more broadly, balanced assistance or resources) seem crucial to maintaining fairness in ad hoc procedure. With its inconsistency and, by definition, poor planning, ad hoc procedure can result in unfairness and inequality and can just as easily hinder, rather than assist, lawyerless courts’ provision of justice. In MDL, by contrast, the presence of lawyers helps to protect and balance the interests at least of the represented parties, although not without controversy.¹⁴⁰ This role is easier to see when compared to the lawyerless context. In lawyered courts, if a judge’s ad hoc procedures exceed their discretionary authority or seek to completely overhaul the litigation system, lawyers can provide a check either through direct advocacy, motion practice, or appellate review. In the absence of lawyers, these checks are lost, and indeed, it is difficult even to measure the full extent of ad hocery that may be taking place in lawyerless courts.

Lawyers are also instrumental in transforming ad hoc procedure into more formal, generally applicable procedure and in preventing ad hocery itself from becoming the rule rather than the exception. Ad hoc procedures are not just opportunities to fix procedural problems that arise in individual cases. They can also be canaries in the coal mine. The presence of ad hoc procedure sometimes *identifies* procedural problems. Some of these problems are arguably unanticipated, like how to address mountains of litigants with a particular set of diverse characteristics, as happened in the *Opiate* MDL in federal court.¹⁴¹ These ad hoc procedures can be seen as justifiable in part because of their perceived necessity and because, although ad hoc procedure as a phenomenon may be pervasive, any given example is exceptional. If an ad hoc procedure develops into a generally applicable rule, lessons from the situation that generated that procedure

139. Carpenter, *Active Judging*, *supra* note 66, at 684.

140. Compare Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 *Cornell L. Rev.* 1445, 1458–63 (2017) [hereinafter Burch & Williams, *Repeat Players*] (arguing that judges’ preference for repeat players “may erode dissent and the adequate representation that follows from it”), with Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, *supra* note 104, at 76–79 (arguing that critiques of the repeat players phenomenon in MDLs “underplay[] the benefits to plaintiffs of having repeat players on their side”).

141. See Bookman & Noll, *The Many Faces of Ad Hoc Procedure*, *supra* note 108, at 33–36.

should, for the sake of democratic legitimacy, be integrated into more regular procedure-making—whether through transparent common law procedure, amendments to procedural rules, or formal legislation. Indeed, this often happens: For example, the settlement class developed in the asbestos litigation was later approved by the Supreme Court and is now regularly used,¹⁴² and the trust mechanism from that same litigation was ultimately integrated into the Bankruptcy Code as section 524(g).¹⁴³

In lawyerless courts, however, the circumstances that prompt ad hoc procedure are not usually unique to a particular litigant; they are typical. In theory, this kind of ad hoc procedure, adapted to individual litigants but addressing a systemic problem, should spur a feedback loop for more systemic procedural change. But lawyers may be a necessary ingredient—or at least a very important catalyst—for ad hoc procedure to spur this kind of feedback loop, as well as to check ad hoc procedure’s worst tendencies in other ways. As noted, lawyers were involved in developing and restraining the development of the negotiation settlement class in the *Opiate* MDL. Likewise, the current movement to instantiate more formalized rules to govern those proceedings is led by defense-side lawyers.¹⁴⁴ Without lawyers “on the other side” to balance such efforts, they are more likely to lead to unbalanced results, favoring the represented interests.

Ad hoc procedure’s dominance in lawyerless courts is both caused by and revealing of a design flaw that has been noted throughout the state court literature: A system set up as adversarial breaks down in the absence of lawyers on both sides.¹⁴⁵ What has not yet been fully appreciated is that the absence of lawyers also hinders informal and ad hoc procedure from creating iterative feedback loops within the system for procedural reform. Lawyerless courts must be designed to accommodate lawyerless parties. Some judges have made such reforms under the radar. For example, a recent study reveals that in certain courts, judges have begun to enlist non-lawyers from court-adjacent organizations to help litigants navigate civil procedure.¹⁴⁶

142. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997) (noting with approval that district courts since the late 1970s had been certifying classes in mass tort cases and setting forth requirements for class certification in such cases—for example, requiring that class members’ interests be aligned with their putative representative). For a survey of lower courts’ attempts to implement the Supreme Court’s jurisprudence on class certification requirements, see Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. 785, 788 (2017).

143. See 11 U.S.C. § 524(g) (2018); Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 769–73.

144. See Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 Ga. L. Rev. 1375, 1376 n.4 (2019) [hereinafter Bradt, *Multidistrict Litigation*] (discussing the advocates behind www.rules4mdls.com).

145. See, e.g., Steinberg, *Adversary Breakdown*, supra note 27, at 903–04 (“[W]hen parties lack skill and cannot harness the norm of party control to develop or present their claims, the passive judging model no longer functions . . . effective[ly] . . .”).

146. Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316.

But to the extent that the pervasiveness of ad hoc procedure reveals deeper problems, it calls for other reforms that are—and should be—more transformative, recognizing that lawyerless forums do not “fit the fuss.”¹⁴⁷ Lawyerless courts—and the ad hoc justice they dole out—reveal not only a host of procedural problems, but also social problems that procedure alone may be unfit to repair. In federal courts, the benefits of ad hoc procedure are clearer in the 70% of cases with represented parties and are more complicated in cases with pro se litigants. Thus, the insight for ad hoc procedure in lawyerless courts may be that transformation is necessary, that lawyers are a necessary ingredient in this transformation, and that the role of lawyers is not to convert lawyerless courts to lawyered ones by representing parties, but rather by participating in redesigning lawyerless courts in ways that serve lawyerless litigants. This engages the broader role of lawyers in society as legislators, policymakers, advocates, organizers, and voters.

B. *Technology and Procedure*

This section explores the role of technology in driving or responding to changes in civil procedure. Examining recent themes in this scholarship again reveals a noticeable divide between lawyered and lawyerless courts. But there are also issues that transcend any such divide, whether lawyered/lawyerless or state/federal, and collectively frustrate or advance the pursuit of justice in courts across the United States.

This section discusses three sets of issues that have animated recent scholarship on procedure and technology. The first includes issues like e-discovery and outcome prediction that focus on how technology can help lawyers. This set of issues primarily concerns *lawyered* courts, whether federal or state. The second is recent scholarship on how to use technology instead of lawyers, when they are absent from the legal system. This scholarship focuses primarily—indeed exclusively—on *lawyerless* state courts.

The third is an emerging topic that bridges the distinctions between both state and federal courts and lawyered and lawyerless courts: notice. This discussion demonstrates how topics in procedure transcend perceived distinctions between different kinds of courts. Some e-notice issues seem particular to lawyered courts, like those concerning class actions. Other issues regarding notice seem particular to lawyerless courts, such as those concerned with high default rates that leverage technology. In both contexts, technology is reorienting the legal community’s understanding of notice and how it relates to due process, fairness, and justice.

1. *Technology to Assist Lawyers.* — A growing body of scholarship on the future of technology and procedure focuses on technology’s potential

147. See Frank E. A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 *Negot. J.* 49, 66 (1994).

impact on the role of the lawyer in federal courts.¹⁴⁸ David Engstrom and Jonah Gelbach, for example, have studied the ways that legal technology tools like e-discovery and outcome predictors affect the future of the legal profession and civil procedure rules.¹⁴⁹ Their research predicts that the rise of e-discovery, for example, will lead to a decline in discovery costs— evening the playing field between plaintiffs and defendants in federal court.¹⁵⁰ The availability of effective outcome-prediction tools, on the other hand, they predict, could increase these costs.¹⁵¹ The deeper pocketed parties, with access to such tools, could manipulate forum shopping techniques or settlement practices in a way that compromises the foundation of (theoretically) even-sided adversarialism. Their work engages ongoing debates about the use of these technologies as an asset or a hindrance to the legal profession.

These debates focus on implications of legal technology on legal practice in federal court. Tools like e-discovery and outcome prediction require substantial funds and a litigation worth that kind of investment; they require litigation where lawyers recognize the value of this technology. But the lessons could be applied to lawyered state courts encountering similarly heavily represented parties, for example in the New York commercial division. By contrast, the issues created by these new tools are largely absent from lawyerless courts, where parties are self-represented and claims tend to be less complex and of smaller monetary value.¹⁵²

2. *Technology as Replacing Judges or Mitigating the Absence of Lawyers.* — In the lawyerless realm, scholars examine not how technology can assist lawyers, but how it can replace lawyers and even courts themselves.

The focus is on technology as a tool to assist *litigants* in the absence of lawyers (or absence of enough time or resources for a “full” lawyer).¹⁵³

148. See, e.g., Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. Rev. 821, 825–26 (2018) (reviewing the academic literature and case law on the use of predictive coding in civil discovery); Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 Iowa L. Rev. 1691, 1710–11 (2014) (cautioning that, in adopting predictive-coding technologies, “judges and lawyers are privileging the values of commercial vendors over those of the legal profession and the court system”).

149. Engstrom & Gelbach, *supra* note 53, at 1002–08; see also Neel Guha, Peter Henderson & Diego A. Zambrano, *Vulnerabilities in Discovery Tech*, 35 Harv. J.L. & Tech. (forthcoming 2022) (manuscript at 1–8), <https://ssrn.com/abstract=3921838> [<https://perma.cc/P9KU-37DT>] (investigating “the possibilities of abuse and gamesmanship in technology-assisted discovery”).

150. Engstrom & Gelbach, *supra* note 53, at 1006 (“[C]ivil litigation may well see a steady decline in overall discovery costs and, by extension, a narrowing of the litigation cost asymmetries that have motivated decades of litigation reforms.”).

151. *Id.*

152. See Zambrano, *Missing Discovery*, *supra* note 79, at 1423 (“98% of American cases take place in state judiciaries where there is little to no discovery.”).

153. See generally Ray Brescia, *Using Technology to Improve Rural Access to Justice*, 17 Gov’t L. & Pol’y J. 58 (2018) (describing technology to assist litigants directly and to assist lawyers in providing limited services to more litigants).

One strain of thought casts technology as a quasi-lawyer.¹⁵⁴ For example, self-represented litigants can use self-help or limited legal assistance tools ranging from a kiosk in the courthouse lobby to an interactive website.¹⁵⁵ Another intervention is apps or websites that do the work of lawyers.¹⁵⁶ Some of these technological interventions are market driven, and indeed interact with the deregulatory reform that is bubbling up around the country.¹⁵⁷ Perhaps the best known, and relatively early example, is LegalZoom, a website that allows users to create transactional and court-based legal documents on their own, while offering additional legal assistance if needed. Other interventions are explicitly directed at access to justice concerns. For example, JustFix.nyc is a non-profit entity that builds free legal tools to support housing justice, with apps to help individuals navigate eviction and housing repair proceedings in state courts without a lawyer.¹⁵⁸ In

154. Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 Va. J.L. & Tech. 394, 398–402 (2016).

155. See generally Margaret Hagan, *The Justice Is in the Details: Evaluating Different Self-Help Designs for Legal Capability in Traffic Court*, J. Open Access to L., Oct. 17, 2019 (examining the effectiveness of self-help offerings in assisting unrepresented parties in traffic court); Ass'n Fam. & Conciliation Cts., *Innovations for Self-Represented Litigants* (Bonnie Rose Hough & Pamela Cardullo Ortiz eds., 2011), <https://www.afccnet.org/Portals/0/PublicDocuments/ProfessionalResources/Innovation%20for%20Self-Represented%20Litigants%20-%20Merged.pdf> [<https://perma.cc/J7MY-K2QK>] (describing various approaches taken by courts, local governments, and legal services agencies to assist self-represented litigants); Legal Help FAQs on Eviction and Landlord-Tenant Problems, <https://legalfaq.org/> [<https://perma.cc/752K-B3CR>] (last visited Feb. 3, 2022) (offering an interactive help menu for self-represented parties in landlord-tenant disputes); Stanford Legal Design Lab, <https://www.legaltechdesign.com/> [<https://perma.cc/9ACG-QSCE>] (last visited Feb. 3, 2022) (describing organizational work to “build a new generation of legal products and services” that “make the civil justice system more equitable and accessible”).

156. See, e.g., JustFix.nyc, <https://www.justfix.nyc/> [<https://perma.cc/JEM7-UFNB>] (last visited Feb. 10, 2022); LegalZoom, <https://www.legalzoom.com/> [<https://perma.cc/4HGW-W7DG>] (last visited Feb. 10, 2022); Upsolve, <https://upsolve.org/> [<https://perma.cc/38WH-URU5>] (last visited Feb. 10, 2022). For discussion of these websites, see also James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 241, 319–21 (2012) (discussing LegalZoom); Benjamin P. Cooper, *Preliminary Thoughts on Access to Justice in the Age of COVID-19*, 56 Gonz. L. Rev. 227, 237 & n.63 (2021) (discussing JustFix.nyc); Chrystin Ondersma, *Small Debts, Big Burdens*, 103 Minn. L. Rev. 2211, 2247 (2019) (discussing Upsolve); Dalié Jiménez, *Can a Nonprofit Startup Fix the Pro Se Problem in Bankruptcy?*, Credit Slips (Aug. 1, 2016), <http://www.creditslips.org/creditslips/2016/08/can-a-startup-fix-the-pro-se-problem-in-bankruptcy.html> [<https://perma.cc/7D49-FKT9>] (same).

157. See Engstrom & Gelbach, *supra* note 53, at 1018–30; Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come from Lawyers?*, N.Y. Times (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html> (on file with the *Columbia Law Review*) (reporting on Upsolve’s lawsuit against the New York Attorney General to allow advice from nonlawyers).

158. See Daniel W. Bernal & Margaret D. Hagan, *Redesigning Justice Innovation: A Standardized Methodology*, 16 Stan. J. C.R. & C.L. 335, 351–55 (2020) (summarizing the goals and principles of JustFix.nyc); Lois R. Lupica, Tobias A. Franklin & Sage M. Friedman,

another strain of thought, technology is a tool that can replace court actors or even courts themselves, thereby reshaping dispute resolution.¹⁵⁹ This approach is generally known as “online dispute resolution” (ODR), though it captures a range of technological interventions. ODR differs from and predates the explosion of online court proceedings. Rather than placing existing state civil court processes on a videoconferencing platform, ODR allows online mechanisms, including artificial intelligence, to resolve disputes.¹⁶⁰ Some ODR interventions involve a lawyerless state civil court using an online algorithm to resolve disputes, effectively replacing the judge.¹⁶¹ In another version, private companies develop their own internal dispute resolution system, thereby removing themselves and their customers from the government-based justice system entirely.¹⁶²

3. *E-Notice and the Future.* — While technologies that affect lawyers and the profession relate primarily, if not exclusively, to lawyered courts, and other technologies that seek to revolutionize the court system have been

The Apps for Justice Project: Employing Design Thinking to Narrow the Access to Justice Gap, 44 *Fordham Urb. L.J.* 1363, 1373 (2017) (same).

159. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 *Vand. L. Rev.* 1993, 1999–2000 (2017) (discussing advancements in online platform technology that make it possible to “reimagine ‘going to court’”); Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 *Buff. L. Rev.* 89, 98–104 (2019) (describing the ODR programs used by eBay, PayPal, Facebook, and Alibaba).

160. Moving regular court proceedings online raises a host of issues—for example, questions of how to assess witness credibility or whether due process requires in-person adjudication—that apply across state and federal courts and lawyered and lawyerless courts. Because scholarship and empirical studies are only recently emerging, this Essay doesn’t address those questions. In keeping with the focus of this Essay, however, we hope that future scholarship embraces questions of how “Zoom” litigation can expand or restrict access to justice—in ways that can transcend the division between federal and state civil procedure but that perhaps reflect on any relevant differences between lawyered and lawyerless courts. See, e.g., Scott Dodson, Lee H. Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 *Judicature* 13, 16 (2020); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 *DePaul L. Rev.* 701, 714–15 (2022); Elizabeth G. Thornburg, *Observing Online Courts: Lessons From the Pandemic*, 54 *Fam. L.Q.* 181, 222 (2020).

161. Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 *Mich. J. Race & L.* 205, 240–41 (2016) (“[J]ustice . . . might be automated, with no judge whatsoever behind the wheel.”); see also Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 *Ala. L. Rev.* 893, 897 (2020) (explaining the potential advantages and limitations of a more technology-based approach to court proceedings).

162. The most famous of these is eBay. Resolution Center, eBay, <https://resolutioncenter.ebay.com> (on file with the *Columbia Law Review*); see also Rechtwijzer, Rechtwijzer, rechtwijzer.nl [<https://perma.cc/45GV-FJ32>] (last visited Feb. 10, 2022) (providing a third-party platform to resolve legal disputes). For discussion of these systems, see Barton & Bibas, *Rebooting Justice*, *supra* note 18, at 111–15; Schmitz, *supra* note 159, at 98–100; Roger Smith, *Goodbye, Rechtwijzer: Hello, Justice42, Law Tech. & Access to Just.* (Mar. 31, 2017), <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/> [<https://perma.cc/7CKV-VVXC>].

contemplated only with respect to solving seemingly intractable problems with lawyerless state civil courts, some studies of technology and civil procedure bridge both the lawyered/lawyerless divide and the state/federal court divide. For example, David Engstrom has thoughtfully considered the impact of the future of technology on procedure and access to justice by identifying the complex trade-offs of ODR in terms of efficiency, empathy, and access.¹⁶³

Another salient example is e-notice. Using technology to provide notice of proceedings and service of process is a topic of growing concern that affects all U.S. courts, albeit in different ways. Some scholarship has addressed the opportunities that e-notice creates in the context of “opt-out” class actions.¹⁶⁴ Other scholarship has focused on e-notice or e-service as a way of improving poor service in state courts, especially among the self-represented.¹⁶⁵ These two areas of scholarship can and should be in conversation with each other, across any state/federal or lawyered/lawyerless divide.¹⁶⁶ Doctrinally and in practice, state and federal courts already coordinate understandings of notice because the Federal Rules allow state law to dictate valid methods of service, subject to the standards of constitutional due process.¹⁶⁷ Moreover, state courts that handle class actions can benefit from e-notice innovations developed in federal courts, and vice versa. Lawyerless courts are also innovating with ways to effect service on the self-represented.

163. David Freeman Engstrom, *Digital Civil Procedure*, 169 U. Pa. L. Rev. 2243, 2260–67 (2021) [hereinafter Engstrom, *Digital Civil Procedure*].

164. See, e.g., Christine P. Bartholomew, *E-Notice*, 68 Duke L.J. 217, 221–24 (2018) (analyzing the extent to which federal courts are open to using technology like social media platforms to notify class members and arguing that “fear of change, imperfection, and technology leave some courts clinging to mail and publication notice”); Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Vand. L. Rev. 1817, 1862–66 (2019) (discussing some benefits and risks of automation in securities class action settlements); Robert H. Klonoff, Mark Hermann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 730 (2008) (arguing that use of the internet in class actions has been “limited and sporadic” and proposing that the internet be “integrat[ed] . . . into virtually every aspect of the class action process”); Amanda M. Rose, *Classaction.gov*, 88 U. Chi. L. Rev. 487, 491–93 (2021) (proposing the creation of a federally run class action website).

165. See, e.g., Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. Colo. L. Rev. 167, 170 (2019) (encouraging use of e-service in courts hearing predominantly pro se cases); Adrian Gottshall, *Solving Sewer Service: Fighting Fraud With Technology*, 70 Ark. L. Rev. 813, 819–20 (2018) (discussing the widespread problem of process servers falsely claiming to have served defendants and urging that notice should require “independent and reliable technological verification tools”); Paul Fling, *Case Note, Civil Procedure: Notifying Justice: “Reasonable Actual Notice” in Service of Process—DeCook v. Ohmstead Medical Center*, 43 Mitchell Hamline L. Rev. 181, 211–16 (2017) (arguing that technology could aid the effectiveness of notice by publication).

166. Cf. Effron, *Invisible Circumstances*, supra note 81, at 1524 (arguing that notice should be a core access-to-justice issue).

167. See Fed. R. Civ. P. 4(e)(1).

In lawyerless courts, forms of e-notice have garnered attention because of their appeal as a potential solution to the vexing problem of high default rates. Default rates in eviction, debt collection, and other cases that are typical of lawyerless courts are very high—with devastating consequences for litigants.¹⁶⁸ One explanation for these default rates is that litigants are not receiving notice, or sufficient notice, to spur participation in the litigation.¹⁶⁹ To address the problem of default, scholarship and reform efforts have focused on alternative forms of notice that leverage technology such as social media or text messaging.¹⁷⁰

The failure of notice poses similar challenges for individual class action plaintiffs, though perhaps with less dire consequences. As Robin Effron has explained, understanding federal class action notice as a category of notice rather than an exceptional circumstance would “allow lawmakers to view class action notice practices as equally valid, and thus presumptively instructive to the promulgation and evaluation of notice and service procedures in other types of litigation.”¹⁷¹ Comfort with e-notice in federal class actions, she argues, should beget more comfort with e-notice in other circumstances, including potentially in lawyerless courts, where access-to-justice advocates urge its use.¹⁷² It is this kind of cross-

168. See, e.g., Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?*, DCist (Oct. 5, 2020), <https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/> [<https://perma.cc/W6GU-RDLV>] (“Between 2014 and 2018, almost 20,000 tenants in the District of Columbia lost their landlord–tenant cases by default simply because they didn’t appear at their court hearings.”). Effron notes that this “exposé led to action by the D.C. Council strengthening notice requirements in eviction cases.” Effron, *Invisible Circumstances*, *supra* note 81, at 1533 n.47 (citing *The Fairness in Renting Emergency Amendment Act of 2020*, 67 D.C. Reg. 13949 (Nov. 27, 2020)).

169. This is not the only explanation for default rates. Indeed, meaningful scholarship suggests it reflects a shallow understanding of the experiences of litigants in lawyerless courts. See, e.g., Sandefur & Teufel, *supra* note 14, at 757–63 (discussing how people’s perceptions of justiciable events and legal needs lead to choices to engage (or not) in civil cases).

170. John M. Greacen, *Eighteen Ways Courts Should Use Technology to Better Serve Their Customers*, 57 *Fam. Ct. Rev.* 515, 533 (2019) (advocating steps to bring “service of process into the twenty-first century,” such as allowing service by social media); Katherine L.W. Norton, *The Middle Ground: A Meaningful Balance Between the Benefits and Limitations of Artificial Intelligence to Assist With the Justice Gap*, 75 *U. Miami L. Rev.* 190, 245 (2020) (“[C]ourts use messaging to remind litigants of their hearings, due dates, and other court related matters.”).

171. Effron, *Invisible Circumstances*, *supra* note 81, at 1563; see also *id.* at 1528 (“Once one understands how the new circumstances of notice no longer fit the old framework, it becomes far easier to evaluate and promote newer and more technologically advanced methods of notice because they need not be evaluated against antiquated benchmarks that reflect older circumstances.”).

172. *Id.* at 1563; see also Budzinski, *supra* note 165, at 212–26 (“Permitting electronic service will help deconstruct the access barriers posed by personal and residential service requirements while increasing actual notice to defendants.”).

pollination between procedures in state and federal courts, and lawyered and lawyerless contexts, that this Essay aims to encourage.

C. *Mass Claims and the Limits of Procedure*

A third and related topic currently animating federal and state civil procedure scholarship—but under different labels—is the challenge of how to handle large volumes of similar cases.¹⁷³ In federal courts, this conversation focuses on class actions, and more recently, on MDL, with scholars routinely noting that over a third of federal cases are now in MDL.¹⁷⁴ Class actions often seek to address certain kinds of claims en masse in the face of concerns that small claims lose their value and thus access to federal court if not aggregated.¹⁷⁵ MDL can aggregate similar litigations, including large and small claims, often arising from a common mass tort.¹⁷⁶ Lawyerless state civil courts likewise face multitudes of similar cases, but these cases are usually not aggregated (and are not torts).¹⁷⁷ Instead, “[b]y necessity,” these courts often “become specialists more in the art of

173. This research includes recent symposia in the *University of Pennsylvania Law Review* and the *New York University Law Review* on the fiftieth anniversary of Rule 23 and a symposium in the *Georgia Law Review* on MDL, as well as many standalone articles about class actions and MDL. See Ga. L. Rev., Symposium, 2019: MDL Turns 50: A Look Back and the Way Forward, <https://www.georgialawreview.org/issue/1697> [<https://perma.cc/DX8H-LQE2>] (last visited Feb. 3, 2022); N.Y.U. L. Rev., Law Review and the Center on Civil Justice Present “Rule 23 @ 50: The 50th Anniversary of Rule 23” Conference (Nov. 29, 2016), <https://www.nyulawreview.org/news-and-events/law-review-and-the-center-on-civil-justice-present-rule-23-50-the-50th-anniversary-of-rule-23-conference/> [<https://perma.cc/MVA4-Y26H>]; U. Pa. L. Rev., Symposium, 1966 and All That: Class Actions and Their Alternatives After Fifty Years (Nov. 2, 2016), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1026&context=symposia> [<https://perma.cc/K6G6-D8AG>]; see also *supra* note 104 (listing research on the *Opiate MDL*).

174. See, e.g., Andrew D. Bradt & D. Theodore Rave, Aggregation on Defendants’ Terms: *Bristol-Myers Squibb* and the Federalization of Mass-Tort Litigation, 59 B.C. L. Rev. 1251, 1261 (2018) (“MDL . . . makes up more than one-third of the entire federal civil docket.”); Zachary D. Clopton, MDL as Category, 105 Cornell L. Rev. 1297, 1305 & n.36 (2020) (collecting scholarship citing “the large proportion of the federal civil docket occupied by MDL cases”).

175. Gilles, Low-Income Litigants, *supra* note 28, at 1535 (explaining the benefits of aggregation in situations where “individual lawsuits often cost more to bring than the victim would recover”); David Marcus, The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 593 (2013) (“Economies of scale reaped from claim joinder enable an independent, well-financed cadre of private attorneys general to compensate for the inadequacies of government regulators and individual litigants.”).

176. Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation 1–2 (2019) (“In theory, multidistrict proceedings enable many ‘Davids’ . . . to pool their resources to efficiently litigate against Goliaths . . .”).

177. Shanahan et al., Institutional Mismatch, *supra* note 1, at app. tbl.2 (showing torts as 2.25% of state civil cases nationally).

processing cases in volume than in resolving fine points of justice in individual cases.”¹⁷⁸

Civil procedure scholarship tends to focus on the issues of mass claims in one of three silos—studying either aggregated adjudication in federal courts,¹⁷⁹ aggregated adjudication in lawyered state courts,¹⁸⁰ or overburdened lawyerless state courts where judges handle individual claims in large volumes.¹⁸¹ While these divisions can, of course, allow scholars to focus on particular details of civil procedure, understanding U.S. courts as divided among the lawyered and the lawyerless again offers insights about the promise and limitations of civil procedure—and about the role of lawyers. First, there are commonalities between aggregate litigation in state and federal courts, and indeed, a historical fluidity between the two, as federal courts and Congress have reorganized the boundaries of federal subject matter jurisdiction, including the recent shift of high-stakes class actions into federal court.¹⁸² Second, recognizing the similarities and differences between the challenges of adjudication of masses of claims in lawyered and lawyerless contexts suggests that we may need to look beyond procedure to find remedies for the ills manifested by the masses of cases in lawyerless state courts. If, as Andrew Bradt has argued, MDL “works” because it fits within the American tradition of adversarial legalism,¹⁸³ state civil courts fail because they do not.¹⁸⁴ But this may also imply that MDL fails if the adversarial posture fails. Identifying

178. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 *Calif. L. Rev.* 389, 414 (2011).

179. See, e.g., Burch, *supra* note 176, at 8–34 (examining mass torts in the federal court system). Cf. Marcus, *supra* note 175, at 591 n.14 (acknowledging that his account of federal class actions omits the study of state court class actions).

180. See, e.g., Zachary D. Clopton, *Clifford Symposium: Opioid Cases and State MDLs*, 70 *DePaul L. Rev.* 245, 246 (2021) (looking at opioid litigation “to consider the role of state MDLs in resolving national controversies”); Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 *Nw. U. L. Rev.* 1649, 1652 (2021) (“[T]he various ways that states handle MDL-like litigation have been virtually absent from the scholarly literature.”); Zambrano, *Federal Expansion*, *supra* note 9, at 2104 (“[F]ederal expansion may be contributing to the decay of state courts.”).

181. See, e.g., Super, *supra* note 178, at 414–15 (“Some of the skills and techniques useful for efficient processing of large numbers of cases were antithetical to the goal of finding facts, even relatively simple ones, in each case.”); Wilf-Townsend, *supra* note 12, at 1717 (“[T]here is a serious risk of courts functioning essentially as rubber stamps for litigation mills, taking in masses of claims[] [and] spending little time testing their validity”); Zambrano, *Federal Expansion*, *supra* note 9, at 2147 (describing warnings from legal organizations of “overburdened and underfunded state judiciaries”).

182. See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 *U. Pa. L. Rev.* 1823, 1865 (2008) (noting that the federal Class Action Fairness Act brought most multistate class actions into the federal courts and imposed “a de facto federal certification requirement on state court class actions within its coverage”).

183. Bradt, *Multidistrict Litigation*, *supra* note 144, at 1381.

184. See Steinberg, *Adversary Breakdown*, *supra* note 27, at 921 (“The unrepresented majority in the civil justice system has ruptured adversary norms”).

litigation postures as lawyered and lawyerless can itself help to diagnose procedural failings and point towards potential reforms—whether to substitute for the lawyer–client relationship or to restructure the need for it entirely.

1. *Aggregated Mass Claims in Lawyered Courts.* — First, the commonalities between aggregate procedure in lawyered state and federal courts make it useful to study civil procedure in those two contexts together. For decades, state courts have been painted as sites of abuse by plaintiff’s lawyers, especially in the class action context. Advocates like the Chamber of Commerce have complained about the flood of class actions in state courts, bemoaned that state court “judicial blackmail forces settlement of frivolous cases,” and lamented that state court class actions are expensive, lengthy, and end with “the award of large, unmerited fees to plaintiff class attorneys.”¹⁸⁵ Although plaintiff’s lawyers in federal court can be subject to similar opprobrium, these narratives helped fuel Congress’s adoption of the Class Action Fairness Act of 2005 (CAFA), which created federal subject matter jurisdiction for state court class actions where the amount in controversy collectively equaled more than \$5 million and minimal diversity was satisfied.¹⁸⁶ Scholars have noted that the jurisdictional shift has—like so many efforts at procedural retrenchment—had the effect of thwarting these kinds of cases from the start.¹⁸⁷ But the shift also showcases the commonality between the kinds of cases that can be (or could have been) heard in state and federal court.

A crucial point of commonality is the involvement of lawyers on both sides of the “v.” Both civil procedure scholarship and legal reforms on class actions and other aggregating procedures often focus on regulating lawyer behavior. As Howard Erichson has written, CAFA’s “message of mistrust was aimed squarely at the lawyers.”¹⁸⁸ Critics of lawyers in class actions and MDLs focus on the ways that lawyers manipulate the lawyer–client relationship to the lawyers’ advantage.¹⁸⁹ Indeed, many argue that class

185. Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 *UMKC L. Rev.* 133, 152 (2013).

186. 28 U.S.C. § 1332(d)(2) (2018).

187. See, e.g., Gilles, *Low-Income Litigants*, *supra* note 28, at 1538 (arguing that restrictions on class actions have made “low-income claims disappear from the docket”); Purcell, *supra* note 182, at 1864 (noting CAFA supporters’ hope that the federal courts would be more likely to deny class certification and “quickly and abruptly end” class action suits); *id.* at 1856–60 (describing the strategies employed in CAFA to manipulate diversity jurisdiction).

188. Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 *U. Pa. L. Rev.* 1593, 1593 (2008).

189. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. Chi. L. Rev.* 877, 882–83 (1987) (identifying characteristics of class litigation that make it susceptible to manipulation by lawyers); Erichson, *supra* note 188, at 1593 (“CAFA . . . was born amidst snide remarks about lawyers’ inventing lawsuits . . . to enrich themselves at others’ expense.”); Jonathan R. Macey

action lawyers so inadequately represent class members that judges must intervene, acting in a fiduciary capacity toward absent class members, to protect their interests, especially in settlement negotiations.¹⁹⁰ On the flip-side, class action advocates recognize the importance of lawyers in finding and pursuing aggregated claims and achieving results.¹⁹¹ Our point, for now, is that these are debates about the successes or failures of lawyers and of the lawyer–client relationship. Thus, federal courts and the kinds of state courts that hear class actions and state MDL proceedings can be understood as presenting similar lawyered aggregation challenges—questions of adequate representation, protections against perceived abuses like forum shopping, and more.¹⁹²

On the back end, aggregation in lawyered contexts also becomes highly settlement oriented. Considerable civil procedure scholarship studies these lawyers and their ethical obligations in this context.¹⁹³ Similarly, ad hoc procedure in MDL proceedings is driven by lawyers (and judges) towards settlement. The “[p]ractical administration” of an MDL, then, “lead[s] to heavy-handed and highly creative case management and nearly inescapable pro-settlement stances.”¹⁹⁴

As in lawyerless contexts, the lawyers and judges, rather than the litigants themselves, wield most of the power in these situations. But the adversarial structure is intended to leverage this power towards some kind of balanced equilibrium upon which both sides can meaningfully agree. The presence of lawyers on opposing sides makes all the difference. MDL critics decry the procedure as being a product of the elites, questioning,

& Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. Chi. L. Rev.* 1, 7–8 (1991) (“[Class action attorneys] operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities.”).

190. See, e.g., Brian T. Fitzpatrick, *A Fiduciary Judge’s Guide to Awarding Fees in Class Actions*, 89 *Fordham L. Rev.* 1151, 1152 & n.8 (2021).

191. See, e.g., Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, *supra* note 104, at 93–98 (discussing the benefits of repeat-player lawyers to plaintiffs); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 *U. Pa. L. Rev.* 103, 103–04 (2006) (refuting the conventional wisdom that plaintiff’s lawyers’ self-interested motivations are a problem and arguing instead that the “one valid normative measure” of class action practice is whether it “causes the defendant-wrongdoer to internalize the social costs of its actions”).

192. See, e.g., Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 *Lewis & Clark L. Rev.* 469, 473–76 (2020) (discussing the dynamics in MDLs between individual counsel and court-appointed leadership counsel); Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, *supra* note 104, at 76–77 (challenging the conventional narrative that repeat-player lawyers are likely to “sell out individual plaintiffs”); Burch & Williams, *Repeat Players*, *supra* note 140, at 1516–26 (“Nonclass aggregation has long fostered an uneasy union between the individual and the collective.”); Clopton & Rave, *supra* note 180, 1703–06 (“[S]tate MDL rules have consequences for the ability of plaintiffs and defendants to shop for judges.”).

193. See, e.g., *supra* note 140.

194. Gluck & Burch, *supra* note 103, at 20.

in a sense, whether the lawyers on either side of the “v.” are in a truly adversarial posture or whether they are in fact seeking a common goal that furthers their own ends rather than their clients’. Sculpting procedure to accommodate issues that arise in MDL is an example of Brooke Coleman’s “one percent procedure.”¹⁹⁵ In her extensive MDL work, Elizabeth Chamblee Burch has criticized the elite, repeat-player phenomenon of both MDL judges and MDL counsel for both sides.¹⁹⁶ But those who defend MDL defend the reliance on lawyers to work together and represent the masses of litigants and their claims.¹⁹⁷ While critics question how effective these lawyers are at representing the individuals behind the masses of claims in an MDL, defenders counter that having repeat-player attorneys on both sides of the “v.” provides balance and a more effective adversarial system, ultimately resulting in settlements that are more fair than they might have been without lawyers’ involvement.¹⁹⁸

While MDL obviously leaves much room for improvement, the presence and role of lawyers, especially when contrasted with lawyerless courts, provides some support for Bradt and Rave’s argument that “it’s good to have the ‘haves’ on your side.”¹⁹⁹ That is, the lawyered/lawyerless lens highlights the fact that lawyers, especially the elite, repeat-player plaintiff’s lawyers who specialize in MDLs, can and do get results for large numbers of plaintiffs, and can and do serve as an institutional check on collaboration between the only other elite specialists in the courtroom: the judge and the lawyers for the repeat-player defendants—the scenario in so many asymmetrical cases in lawyerless courts. The lawyered/lawyerless lens also sharpens the criticism of MDL, framing it as a criticism of a breakdown of the adversarial process, even though MDL is a highly “lawyered” space.²⁰⁰ Productive representation is critical to the functioning of collective action, including, indeed especially, when it deviates from “regular” litigation.

2. *High Volume of Cases in Lawyerless Courts.* — In lawyerless courts, cases are handled not in an aggregated procedure, but in mass resolution.

195. Coleman, *One Percent Procedure*, supra note 10, at 1008.

196. See, e.g., Burch, supra note 176, at 2 (describing the “troubling pattern” of “repeat plaintiff and defense attorneys persistently benefit[ing] from the current system”); Burch & Williams, *Repeat Players*, supra note 140, at 1521 (arguing that it is cause for concern that “the same players appear in the vast majority of [MDL] cases, resulting in remarkably similar settlements that benefit the people designing them”).

197. See, e.g., Bradt, *Multidistrict Litigation*, supra note 144, at 1381 (arguing that MDL “works” because it “fits” within the broader American system of “adversarial legalism”). Scholars debate the value to MDL plaintiffs of having repeat-player lawyers represent them and whether they offer effective representation. See supra note 140.

198. Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, supra note 104, at 93–98 (“Adding repeat players on the plaintiffs’ side can help balance the power in mass litigation.”).

199. See *id.*

200. Cf. Gluck & Burch, supra note 103, at 5 & n.6 (noting the tension in MDL “between the individual and the collective”); *id.* at 10 (noting that MDL “disrupt[s] traditional adversarial and hierarchical relationships among . . . judges and lawyers”).

These cases are often high in volume and similar in substance. As a matter of course, jurisdictions organize their dockets so that a single judge is hearing many cases of the same type at the same time. Functionally, this means a judge spends a morning hearing several dozen cases, all of which could be, for example, about landlords trying to evict tenants for nonpayment of rent. These masses of cases overburden lawyerless state courts just like mass claims inundate lawyered courts, but they do so individually, without aggregation.

Lawyerless courts are defined as courts where there is at least one self-represented party.²⁰¹ As noted in the Introduction, this category includes two kinds of cases in lawyerless courts: those where only one party is represented, and those where neither party is. The result is two distinct versions of mass handling of cases—asymmetrical cases where lawyers may, among other things, facilitate collective treatment to their client’s advantage, and cases where both parties fend for themselves. As noted above, however, in lawyerless courts, the asymmetrical representation favors the better-heeled *plaintiffs*, in cases including debt collection and some housing cases, often in what Daniel Wilf-Townsend has called “assembly-line litigation.”²⁰² Cases where neither party has a lawyer are common in family and domestic relationships matters, but also arise in housing matters.²⁰³

In both kinds of lawyerless courts, however, the absence of lawyers drives procedures towards informal or alternative resolution, often resulting in settlement. In cases with asymmetrical representation, settlement procedures develop as a result of plaintiffs’ repeat-player status and broader profit-generating strategy.²⁰⁴ The rhetoric about lawyered state courts depicts plaintiff’s lawyers suing large corporate defendants as “bad

201. Carpenter et al., *Lawyerless Courts*, supra note 2, at 511–12; Hannaford-Agor et al., supra note 1, at iv (noting that these cases make up roughly 75% of the docket in state civil courts).

202. Wilf-Townsend, supra note 12, at 1716–23 (defining “assembly-line litigation”).

203. Baldacci, supra note 116, at 661 (noting the problem of pro se parties having to litigate their cases in housing court); Carpenter et al., *Lawyerless Courts*, supra note 2, at 511–12 (“In some areas of law, such as debt or eviction, imbalance representation is the norm—plaintiffs have counsel, defendants do not.”). In housing court, institutional landlords are often represented, while smaller landlords may not be. See, e.g., Summers, *Civil Probation*, supra note 59 (manuscript at 5, 12) (discussing the power advantages of “represented, institutional, and subsidized landlords”); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. Chi. L. Rev. 145, 171 (2020) (“Nearly all tenants in eviction proceedings are unrepresented . . .”); Sudeall & Pasciuti, supra note 47, at 1384 (discussing this phenomenon in Fulton County, Georgia).

204. Wilf-Townsend, supra note 12, at 1717 (describing debt collection cases characteristic of repeat-player, represented plaintiffs). This result is not surprising, and some may argue it is inevitable. See Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 Vand. L. Rev. 1571, 1575–76 (2019) (“[T]ort law’s ostensible commitment to individual litigant autonomy seems inevitably to produce settlement markets in tort claims characterized by aggregating bureaucracies.”).

guys” and courts as “judicial hellholes.”²⁰⁵ In lawyerless state courts, on the other hand, represented corporate parties (debt collectors or landlords) are the plaintiffs suing unrepresented masses. Because the claims are so similar, it can be economical for these parties (and their lawyers) to pursue them quasi-collectively, but the individual defendants have little hope of finding the resources to hire a lawyer or otherwise to defend themselves. Thus, lawyered parties drive the masses of similar cases against self-represented individuals.²⁰⁶ The represented plaintiffs leverage their advantage to extract either default judgments or favorable settlements, and in the extreme example, this context breeds fraudulent practices.²⁰⁷

Even when plaintiffs are not represented, docket pressures on lawyerless court actors mean practices evolve to allow for fast settlement. Eviction proceedings famously take only a few minutes of a judge’s time—handled individually.²⁰⁸ As Nicole Summers has documented in Boston housing court, for example, a third of cases are channeled into a hallway-negotiated settlement agreement between tenants and (typically represented) landlords where the tenants surrender their rights to complain about housing conditions and landlords allow them to stay in their homes, with the ability to evict them for *any* lease or settlement agreement

205. See *supra* note 21.

206. Wilf-Townsend, *supra* note 12, at 1742 (“[Assembly-line plaintiffs] bring massive numbers of cases — tens or hundreds of thousands per year — against individual defendants who are almost entirely unrepresented and who largely do not show up in court to defend themselves.”).

207. See Effron, *Invisible Circumstances*, *supra* note 81, at 1533, 1545 & n.101 (noting the prominence of “sewer service—a practice of falsifying service affidavits for process that has been thrown in a figurative ‘sewer’ rather than delivered to the intended party”—and its contributions to high default judgment rates); *id.* at 1564 (noting a three-decade-long “marked increase in default judgments in state court” coupled with “a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments”); *id.* at 1566 (discussing cognovit, or “confession of judgment” clauses, a note that allows a creditor to obtain a default judgment without serving the defendant with notice); Claudia Wilner, Senior Staff Att’y, Neighborhood Econ. Dev. Advoc. Project, Comments at the Federal Trade Commission Roundtable: Debt Collection: Protecting Consumers (Jan. 8, 2010), https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00022.pdf [<https://perma.cc/5S8J-2BQR>] (“In New York City, the default judgment rate is approximately 75% and the answer rate hovers around 10%. We believe that sewer service . . . is the primary reason that most defendants do not appear in court.”).

208. See, e.g., Cmty. Action for Safe Apartments & Cmty. Dev. Project, *Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court 18* (2013), https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB_.doc_Report_CASA-TippingScales-full_201303.pdf [<https://perma.cc/9GUG-BRDT>] (“Housing Court judges face a daunting number of cases every day and are realistically unable to personally attend to every case on their calendars.”); Kathryn A. Sabbeth, *Eviction Courts*, 18 *U. St. Thomas L.J.* 359, 384 (2022) (on file with the *Columbia Law Review*) (explaining that eviction courts are designed to make eviction proceedings quick and cheap); Sandefur, *Elements of Professional Expertise*, *supra* note 98, at 925 (observing that cases can last as little as two minutes); Steinberg, *Adversary Breakdown*, *supra* note 27, at 957 (describing judges’ failure to “interrogate the veracity of the landlords’ claims” in eviction proceedings).

violation, no longer limited to non-payment of rent.²⁰⁹ While civil probation settlements are often a product of asymmetrical representation, Jessica Steinberg has suggested that even the addition of a lawyer for the tenant in that hallway may not overcome the challenges of high volume dockets.²¹⁰

In cases where neither party is represented, courts drive settlement in more unconventional ways. Sometimes formal mediation programs require a mediator rather than a judge to resolve the matter outside the bounds of courts' traditional adversarial design. While these do not exclusively apply to cases where neither party is represented, they are common in domestic violence, divorce, custody and child support, and eviction matters.²¹¹ In other situations, individual judges informally resolve cases as a mediator would, outside the formal bounds of a case. Informal resolution can also be spurred by other court actors like clerks and nonlawyer advocates.²¹² This phenomenon is harder to identify without direct observation of courts because of the broader structural challenge of lawyerless courts mentioned earlier: Without lawyers as informed witnesses to the proceedings, with limited written law, and with the pressures of high volume dockets, it is difficult to see, at a collective level, what is happening in most lawyerless courtrooms.²¹³ But the existing data reveal that in lawyerless courts, when there is no formal alternative dispute resolution tool available, judges and other actors step into that role.²¹⁴ Docket and other pressures on judges play the same role as plaintiff's lawyers: They drive settlement.

209. Summers, *Civil Probation*, supra note 59 (manuscript at 12–13). As to the balance of the cases, “[t]here are non-trivial numbers of voluntary dismissals (24%), move-out agreements (19%), default judgments (15%), and even trials (4%).” Pamela Bookman, *Circumventing Procedure in Eviction Court*, Jotwell (Dec. 3, 2021), <https://courtslaw.jotwell.com/circumventing-procedure-in-eviction-court/> [<https://perma.cc/Q4SM-QM26>] (reviewing Summers, *Civil Probation*, supra note 59).

210. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *Geo. J. on Poverty L. & Pol’y* 453, 456 (2011).

211. See, e.g., Natalie Anne Knowlton, Alicia Davis & Melissa Sickmund, *The Family Justice Initiative: A Work in Progress*, in *Nat’l Ctr. for State Cts., Trends in State Courts 34* (Charles Campbell & John Holtzclaw eds., 2020), https://www.ncsc.org/__data/assets/pdf_file/0018/42156/Trends_2020_final.pdf [<https://perma.cc/5Y3T-HB3L>] (discussing family court); Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316 (discussing domestic violence); Karen Tokarz, Samuel Hoff Stragand, Michael Geigerman & Wolf Smith, *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 *Wash. U. J.L. & Pol’y* 243, 244 (2020) (discussing housing court).

212. See Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316 (describing the increasingly powerful role nonlawyer advocates play in judicial proceedings and outcomes).

213. See Carpenter et al., “New” Civil Judges, supra note 3, at 252–54 (describing the lack of data on many civil court cases, particularly when parties are not represented).

214. See, e.g., Baldacci, supra note 116, at 665–67 (describing the judicial behavior and structural elements that encourage self-represented litigants in housing court to settle).

3. *Lawyers and the Power of Aggregation.* — The foregoing discussion reveals that the procedural challenge of case volume is universal—it exists across state and federal, lawyerless and lawyered courts. When advocates are facing masses of claims and coordinating the interests of masses of people, aggregation can be power. It can provide efficiencies and other benefits, and it tends to push the parties toward settlement. As a class, claimants can band together to demand payment from mass tortfeasors more effectively than they would have done on their own; likewise, debt collectors and landlords can process their claims in a collective fashion efficiently enough to collect massive sums through assembly-line litigation. But these collective actions require organization, typically provided by lawyers. Once lawyers take the reins of aggregation, however, they then direct that power. In lawyered courts, civil procedure, working within the adversarial system, strives to ensure that they wield that power for the benefit of those they represent. In lawyerless courts, it is typically much harder for David to fend off Goliath because often neither civil procedure, nor judges, nor counsel assist in David's defense. This is especially true when Goliath wields the power of aggregation (as in assembly-line litigation).

The comparison reveals common trends in calls for reform: In both settings, observers suggest that the judge needs to step in to protect the unrepresented or imperfectly represented litigant—whether they are imperfectly represented because of a breakdown in their relationship with the individual who should be their lawyer (class counsel) or because they lack a lawyer altogether. These are not identical tasks for the judge, but they have certain similarities. Once again, aggregation seems key: A judge is far more capable of serving in this fiduciary role for an aggregated mass of claimants than for a disaggregated mass of self-represented defendants in state civil courts. Even before court resources are considered, there are structural barriers to a judge behaving consistently and transparently across a large number of individual cases.²¹⁵ Even those judges who seek to help these self-represented defendants will almost inevitably do so in an informal, ad hoc fashion—risking the critiques of unfairness and arbitrary application of the law discussed in Part I.

III. BRIDGING LAWYERED AND LAWYERLESS CIVIL PROCEDURE

By examining rulemaking, technology, and mass claims through the lens of lawyered and lawyerless courts, this Essay has identified themes that the traditional federal/state divide tends to obscure. This Part expands on these lessons by examining their implications across four areas: (1) the role of lawyers and judges; (2) the development of doctrine; (3) teaching

215. Sabbeth, *Market-Based Law Development*, supra note 33 (“[D]ifferences [in court resources] influence the quantity (and arguably quality) of personnel—including judges, judicial law clerks, clerks’ offices’ staff, other employees—and the time and attention such personnel expend on each case. . . . All of these differences in forum investments shape the handling of each individual litigant’s case.”).

civil procedure; and (4) the need for more wholesale structural change. The role of lawyers as both creators and subjects of civil procedure becomes clearer when viewed through the lens of the lawyered/lawyerless divide. Whether or not lawyers representing clients are present in a courtroom, lawyers in society are considered the experts in procedural design. This perspective also helps to identify overarching questions of deep democratic import about the role of lawyers in our courts and our society.

A. *Lawyers and Judges*

The lawyered/lawyerless lens is particularly helpful for understanding civil procedure and the roles of lawyers and judges across both contexts in at least three respects. First, examining lawyers' impact on procedural development in lawyered contexts can also reveal the impact on procedural development of the *absence* of symmetrical lawyers in lawyerless contexts. Second, a similar examination highlights the parallels between judge's roles when lawyers are absent and when their ability to faithfully represent their clients is compromised. Third, this analysis helps rebut common assumptions that lawyers might have less of a role to play in addressing the problems of lawyerless courts. To the contrary, lawyers in their roles as policy makers and public citizens, not just in representing clients, are crucial to the success or failure of lawyerless courts.

First, the role of lawyers who represent clients—either on both sides of the “v.” or on only one side—is central to the understanding of civil procedure in any court. Lawyers' strengths lie both in helping their clients access justice and in protecting their interests in an adversarial posture. For example, lawyers facilitate accessing justice by helping clients identify that they have a legal problem, presenting it to a court in a legal frame, navigating the system, and advocating on behalf of the client. Relatedly, lawyers serve important roles in an adversarial system. As plaintiff's counsel, they zealously pursue claims against defendants; as defense counsel, they protect defendants from these assaults. Many civil procedure and ethics rules and structures are intended to harness these strengths and also to keep lawyers in check in an adversarial posture, including by pitting them against each other. Empowered in this way, lawyers can have positive effects on procedure: They can mold written and unwritten procedure, innovate (sometimes in collaboration with the judge or with judges' blessings), and constrain judges' ad hoc procedures. In lawyered courts, this setup can break down if the lawyer–client relationship breaks down—for example, if the lawyer's incentives are not to zealously represent the client, as some argue can happen in class actions or MDL.

The setup breaks down entirely, however, in lawyerless courts. In asymmetrically lawyerless contexts, the one side with representation goes unchecked. In the worst-case scenario, the lawyered side is aligned with the judge in using the power of the state against the self-represented individual; in the best case, the judge tries to assist the self-represented litigant

to navigate the system or advocate for herself in legal terms. But doing so is inevitably inconsistent, extremely time- and resource-intensive, and antithetical to the adversarial system design. In symmetrically lawyerless cases, many of these same obstacles remain. Litigants are already in the least-well-funded sectors of the judicial system, and they present cases disparaged (often unfairly) as too simple to require a lawyer, to merit law development, or even to deserve more than a few minutes of a judge's time.²¹⁶ As a result, self-represented litigants struggle to navigate a system designed for lawyers.

Second and relatedly, examining judges across the lawyered/lawyerless divide likewise reveals more about judges in each context. Across the scholarship, there are investigations of the role of the active judge in federal court procedure²¹⁷ and in state court procedure.²¹⁸ In lawyered courts, "managerial judges" often re-direct the adversarial process toward settlement.²¹⁹ But in lawyerless courts, active judging can mean standing in as a representative for self-represented litigants, or facilitating settlements engineered by the more powerful, represented party and in the absence of an advocate for the self-represented individual.

By comparing the roles of lawyers and judges across lawyered and lawyerless courts, we can see that similar concerns from lawyerless courts appear when the lawyer-client relationship is stressed in lawyered courts, as in debates about whether lawyers truly represent class members. The question is to what extent class actions and MDL—where lawyers abound—actually create spaces where litigants are lawyerless by virtue of inadequate representation by lawyers whose personal interests (toward

216. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (reasoning that the Constitution does not guarantee a lawyer in a child custody removal proceeding in part because the case was insufficiently complex and the outcome would not have changed even if the litigant had a lawyer); Sabbeth, *Market-Based Law Development*, *supra* note 33 (observing that in lawyerless courts, "[j]udges do not genuinely engage in the process of interpreting, let alone developing, legal doctrine").

217. See, e.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 *Calif. L. Rev.* 1259, 1262–63 (2017) (discussing the "fiduciary" role of judges reviewing class action settlements under Rule 23); Resnik, *supra* note 68, at 379 (describing a federal trial judge's role as encompassing mediator, negotiator, planner, and adjudicator).

218. See, e.g., Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 512–13 (discussing the literature); Carpenter et al., "New" Civil Judges, *supra* note 3, at 253 ("[J]udges are routinely departing from the traditional, passive judicial role in varied and ad hoc ways when they deal with pro se parties."); Steinberg, *Adversary Breakdown*, *supra* note 27, at 901 (calling for a "framework to enlarge the role of the judge in the 'small case' civil justice system"); Steinberg et al., *Judges and Deregulation*, *supra* note 64, at 1316 (describing some judges' active reliance on nonlawyer advocates to assist parties with procedural issues).

219. See, e.g., Resnik, *supra* note 68, at 379 ("[J]udges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle . . ."); Wolff, *supra* note 74, at 1027 (noting the role of "managerial judges" in the early phases of litigation, including the settlement process).

settlement that maximizes their fees) conflict with the litigants'. The solutions posed have usually been either about reforming the lawyers' obligations or incentives, or about transforming the judges' role into something more like their role in lawyerless courts: to act as fiduciaries for the (un)represented litigants. Aggregation is again power—this fiduciary role is easier to accomplish en masse in a class settlement proceeding in a lawyered court than individually in separate proceedings in lawyerless courts. To spell out the intricacies of this comparison is beyond the scope of this Essay. Nevertheless, the similarities and differences between the challenges should inform reforms in both spaces.

Finally, there is another role for lawyers and judges: that of reformers and public citizens. As Deborah Rhode reminds us, lawyers' civic obligations are not only to their clients, but also to a system that affords access to justice.²²⁰ The procedure-making discussed in Parts I and II—whether written or unwritten, deliberated or ad hoc—is done by lawyers in different capacities (judges, practitioners, or law professors). The role of lawyers as architects and engineers of legal structures is essential to any consideration of lawyers' role, including how we teach in law schools, which we discuss more below. Some law students will become lawyers who represent clients; if so, they may never see the inside of a lawyerless court. But that does not mean they have no obligations with regard to those courts. Moreover, those that go on to be judges, policy makers, legislators, and more, will directly influence the design of lawyerless courts. They should do so in an informed way.

B. *Doctrine*

Viewing civil procedure through the lawyered/lawyerless lens also has implications for key questions of civil procedure doctrine. To illustrate these implications, this Essay applies the insights of lawyered and lawyerless courts to three key topics: personal jurisdiction, notice, and due process.

First, personal jurisdiction questions have animated civil procedure scholars and classrooms, especially as the Supreme Court has recently refocused on the subject.²²¹ These questions arise in state and federal court. Scholars fear that an overly narrow constitutional personal jurisdiction doctrine will unduly burden the available forum options for plaintiffs, potentially limiting them to zero.²²²

220. See Deborah Rhode, *Lawyers as Citizens*, 50 *Wm. & Mary L. Rev.* 1323, 1324 (2009) (noting lawyers' responsibility to "sustain[] legal frameworks," promote "the quality of justice that results from legal assistance," and "support a system that makes legal services widely available to those who need them most").

221. See *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (revisiting specific personal jurisdiction).

222. See Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 *Ala. L. Rev.* 455, 458

But personal jurisdiction issues arise primarily, if not exclusively, in lawyered courts. The personal jurisdiction defense tends to be raised by well-heeled, lawyered defendants or otherwise in cases involving large monetary values, and interstate disputes, which tend to involve lawyers. Personal jurisdiction is rarely if ever contested in lawyerless state courts. Rather, it tends to be a pro forma matter recited by the judge at the outset of a case. This is in part because lawyerless courts typically involve local cases like housing disputes, domestic violence, or debt collection proceedings against local defendants. It is simply not an issue in the vast number of “assembly-line” cases where defendant debtors are sued in their home jurisdictions.²²³ Moreover, personal jurisdiction is a sophisticated defense, one that is waivable if not raised (usually by knowledgeable counsel). Thus, even if a pro se defendant had a viable personal jurisdiction defense, she might waive it unknowingly. In short, personal jurisdiction can be a big issue in lawyered courts (state or federal), but it is unlikely to be in dispute in lawyerless ones.

Notice—and due process—on the other hand, present the opposite balance: They are rarely litigated (with some exceptions) in lawyered courts, in part because of the presence of lawyers and the robust procedural framework; but they pose serious problems in lawyerless courts. Notice is regularly taken for granted in federal procedural scholarship; to the extent it receives attention, it is mostly in the context of efforts to expand notice to class action plaintiffs.²²⁴

But lack of notice is a huge and seemingly intractable problem in the run-of-the-mill cases of lawyerless courts.²²⁵ Lawyerless debt defendants are rarely able to raise notice defenses (in part because they lacked notice and lawyers), and courts even more rarely write opinions and develop law on

(2022) (“Limiting general jurisdiction to defendants’ home courts, as today’s law does, will predictably lead to defendant-friendly substantive law.”); Adam N. Steinman, Access, Rationality, and Personal Jurisdiction, 71 *Vand. L. Rev.* 1401, 1406 (2018) (“The [Supreme] Court’s narrowing of general jurisdiction . . . threatens to create an access-to-justice blind spot.”).

223. See Wilf-Townsend, *supra* note 12, at 1711, 1723 (noting that personal jurisdiction is a “salient” issue in federal courts and intimating that it is not as salient in state courts, where “passive” judges “do not go out of their way to assist the unrepresented debtor” in debt collection cases); cf. John F. Coyle & Robin Effron, Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction, 97 *Notre Dame L. Rev.* 187, 200–08 (2021) (documenting instances where forum selection clauses are used to establish personal jurisdiction over out-of-state non-signatories to consumer contracts); John F. Coyle & Katherine C. Richardson, Enforcing Inbound Forum Selection Clauses in State Court, 53 *Ariz. St. L.J.* 65, 68 (2021) (describing the “end result” of forum selection clauses as “a legal regime where distant courts assert personal jurisdiction over weaker contracting parties”).

224. See Robin J. Effron, The Lost Story of Notice and Personal Jurisdiction, 74 *N.Y.U. Ann. Surv. Am. L.* 23, 80 (2018) (“[S]tarting in the 1980s, notice began to fade away. By the post-*Asahi* era of Supreme Court jurisprudence, notice had vanished [from personal jurisdiction analysis] altogether.”); see also *supra* section II.B.3 (discussing notice literature).

225. Effron, *Invisible Circumstances*, *supra* note 81, at 1549 & n.121 (discussing the problems of notice for low-income individuals who often lack permanent addresses).

the subject. In fact, the core of scholarship around notice in state civil courts is reaching an empirical understanding of the status quo: Are litigants receiving any (let alone legally sufficient) notice?²²⁶ What do litigants do in response to this notice, and does that require a reexamination of our understanding of sufficient notice?²²⁷ And are the appallingly high default rates in lawyerless courts a consequence of problems with notice?²²⁸ In contrast to the highly litigated nuance of notice to class members in the federal system, notice in lawyerless courts is part of the machinery of “justice”: Default is a pervasive feature of the system. The recent focus on this issue may expand our understanding of what constitutionally sufficient notice actually requires.²²⁹

Finally, the perennial object of scholarly attention—due process—reinforces the import of the distinction between lawyered and lawyerless procedure. Consider *Lassiter v. Department of Social Services*, the case in which the Supreme Court decided that the federal Constitution does not guarantee a mother faced with termination of parental rights proceedings a right to counsel.²³⁰ This case, as Brooke Coleman has argued, reveals the inequality, sexism, and racism in the Supreme Court’s analysis of due process.²³¹ As Kathryn Sabbeth and Jessica Steinberg have demonstrated more recently, the constitutional guarantee of the right to counsel “accrues largely to the benefit of men” because *Gideon* has been applied primarily in the criminal context; women, and disproportionately women of color,

226. See supra note 168 and accompanying text.

227. See, e.g., The Problem of Default, A2J Lab, <https://a2jlab.org/default/> [<https://perma.cc/S8UY-2QGU>] (last visited Jan. 15, 2022) (measuring “what kinds of mailings from legal services providers to defendants are effective in reducing default rates in debt collection cases”); see also D. James Greiner & Andrea J. Matthews, The Problem of Default 6 (2015) (unpublished manuscript) (on file with the *Columbia Law Review*) (“[This] study is the first of its kind to evaluate an intervention intended to reduce default rates in civil cases using a randomized control trial.”).

228. For more data on default rates, see, e.g., Paula L. Hannaford-Agor, Nat’l Ctr. for State Cts., Trends: Close Up Civil Justice Myths 2 (2017), <https://ncsc.contentdm.oclc.org/digital/collection/civil/id/155> (on file with the *Columbia Law Review*); Hannaford-Agor et al., supra note 1, at 23; Peter Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers, 26 *Loy. Consumer L. Rev.* 179, 184 (2014); Wilf-Townsend, supra note 12, at 1721–22; How Debt Collectors Are Transforming the Business of State Courts, Pew Trs. (May 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> [<https://perma.cc/FC33-BN3G>]. See also Effron, Invisible Circumstances, supra note 81, at 1564 (noting that there has been “a three-decade . . . marked increase in default judgments in state court, and a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments”).

229. See Engstrom, Digital Civil Procedure, supra note 163, at 2265 n.79.

230. 452 U.S. 18, 33 (1981); see also Elizabeth G. Thornburg, The Story of *Lassiter*: The Importance of Counsel in an Adversary System, in *Civil Procedure Stories* 509, 511–21 (Kevin M. Clermont ed., 2d ed. 2008) (discussing the social, legal, and factual background to the case).

231. Brooke D. Coleman, *Lassiter v. Department of Social Services*: Why Is It Such a Lousy Case?, 12 *Nev. L. Rev.* 591, 591–92 (2012).

encounter the law in compulsory and punitive ways, but more often in the civil system, where lawyers are not guaranteed.²³² *Lassiter* thus doubles down on the message that lawyers are the primary guarantors of due process.

These perspectives highlight not only the perversity of due process doctrine but also its inadequacy to the task of protecting justice and civil rights. While “the Fourteenth Amendment’s imposition of equal protection and due process guarantees on the states” is a point of connection between the doctrine of civil procedure and the realities of state civil courts, just as important—if not more so—is a recognition that these guarantees have proven wholly inadequate to achieving their stated goals.²³³ In other words, if “the essence of procedural due process is a meaningful opportunity to be heard,”²³⁴ and if lawyers are key to our understanding of what that meaningful opportunity means, then the reality of lawyerless state courts may belie the possibility of ensuring due process for all of the cases currently in these courts.

In short, operationalizing due process in state civil courts faces considerable challenges. If litigants cannot participate in adversarial proceedings at the most basic level—because they lack notice or understanding of the proceedings, because the courts are too overwhelmed by the number of cases, or because judges are adjusting procedures in an ad hoc manner that makes courts nearly impossible to navigate—then there is no remote approximation of due process. In addition to the absence of lawyers, the presence of the adversarial system design (and sometimes the lopsided presence of lawyers only on the plaintiff’s side) keeps lawyerless state civil courts stuck at an early step. State court scholars and reformers often discuss how to get more lawyers involved, reintroduce civil *Gideon*, and redesign the system. These are conversations about due process. But these are old debates—*Goldberg* simply no longer captures the status quo of “poverty law” due process.²³⁵

Something has got to give, and it may be our staid understanding of due process. As Jason Parkin has argued, innovations in lawyerless courts driven from the ground up, including experimentation with e-notice and active judging in cases with pro se litigants, challenge traditional understandings of due process.²³⁶ But these innovations also may suggest that

232. Sabbeth & Steinberg, *supra* note 16, at 3–4; *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (establishing a constitutional right to counsel for criminal defendants).

233. Spaulding, *supra* note 3, at 293.

234. *Id.* at 267.

235. See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Due Process Clause entitles a recipient of public welfare benefits to an evidentiary hearing before termination of benefits).

236. Jason Parkin, *Dialogic Due Process*, 167 U. Pa. L. Rev. 1115, 1116–19 (2019) (“The recent wave of procedural experimentation is generating precisely the kind of evidence that can influence future due process balancing.”).

the thing that must change is due process doctrine.²³⁷ Our consideration of due process therefore should move beyond current doctrine.²³⁸ It must also encompass the questions of how to return to the goal of providing justice.

C. *The Classroom*

The challenges of doctrine in the face of two civil procedures in lawyered and lawyerless courts translate directly to the classroom. Teaching civil procedure is not just about teaching lawyers to implement civil procedure; it is also about teaching lawyers to be the architects of these legal structures, whether as future judges, leaders of the bar, or democratic citizens.²³⁹ The lawyered/lawyerless perspective is important for understanding the role of lawyers in society, regardless of the particular role the law student will play in the future. This section briefly suggests structural and granular approaches to certain common topics in the civil procedure class that could be taught with a lawyered/lawyerless emphasis.

First, one can teach about lawyered and lawyerless courts through the structure or framing of the issues. Several popular topics of civil procedure teaching—like personal jurisdiction, notice, and due process—apply across courts. While many instructors break down the civil procedure course into two general categories—jurisdictional questions and the Federal Rules—the course could instead be divided into those principles that apply in all U.S. courts (personal jurisdiction, notice, and due process) and those that are specific to federal court (subject matter jurisdiction and the Rules).²⁴⁰ This approach would highlight the state/federal divide, a first step towards illuminating the lawyered/lawyerless divide.

Second, when teaching those topics that also apply in state courts, instructors might emphasize the differences between lawyered and lawyerless courts. Incorporating the distinction between the role of personal jurisdiction in lawyered and lawyerless courts would, in a straightforward way, highlight when personal jurisdiction matters and encourage students to question the universality of doctrine. Similarly, the modern challenges of notice could be incorporated into the civil procedure curriculum to encourage students to think about the topic more pragmatically and expansively.

237. *Id.* at 1148–59 (providing “a justification and a roadmap for reinvigorating procedural due process doctrine” in light of on-the-ground procedural experimentation).

238. *Cf.* Spaulding, *supra* note 3, at 291 (“The Supreme Court’s increasingly cramped view of both due process and the right to trial under the Seventh Amendment is relevant, but . . . has so monopolized attention of proceduralists as to have obscured analysis of these other forces and the startling consequences for ordinary people litigating outside federal courts.”).

239. See Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 518–21 (discussing judges as agents of change); Shanahan & Carpenter, *supra* note 34, at 131–32 (discussing lawyers as agents of change).

240. Thanks to Lauren Ouziel, who suggested structuring the class this way.

As an example of this approach, the study of due process provides particularly fertile ground for students to explore the implications of the lawyered/lawyerless divide. Due process is often taught by framing the trial as providing the “ideal,” most adversarial opportunity to be heard. This is true even though vanishingly few cases go to trial: In lawyered courts, judges and lawyers alike push for settlements, and in lawyerless state courts, even courtroom activity bears almost no resemblance to the idealized trial. The trial-focused lens, moreover, tends to highlight the right to a lawyer as the Rolls Royce of due process protections.²⁴¹ And many casebooks teach due process through the example of the *Lassiter* case, which, as discussed above, provides an entry point into a discussion of the assumptions about the presence of lawyers and the implications of lawyered and lawyerless civil procedure.

One might also teach *Turner v. Rogers*, another civil *Gideon* case, in which a defendant was sentenced to a year in jail for contempt because he was behind in his child support payments.²⁴² The Supreme Court held that the Due Process Clause did not guarantee Turner the right to a lawyer, especially since the custodial parent entitled to the support was unrepresented.²⁴³ The Court conceived of the adversarial posture as being between the parents, and it saw their lawyerless status as marking a level playing field; although Turner was facing incarceration, the Court somehow could not see this proceeding as one between the state and the defendant. As Alexandra Lahav has explored, *Turner* illustrates an all-too-familiar dynamic where the courts do not recognize unsavory civil defendants as “a person deserving a basic form of respect: the opportunity to make a claim or defense.”²⁴⁴ Nevertheless, the Supreme Court seems to focus on an unspecified requirement for “more procedure,” although not a state-appointed lawyer, to ensure due process protections. The case raises questions of the judicial role, ad hoc procedure, and asymmetrical representation in lawyerless courts; it also tees up questions of whether more procedure is always the answer to due process inadequacies.²⁴⁵ While some

241. Spaulding, *supra* note 3, at 263 (“Academic and classroom discussions . . . tend to gravitate around two issues: whether certain key features of adversarial justice (such as access to a lawyer) are constitutionally mandatory even though a full trial is not, and what exceptional government interests can justify dispensing with either notice or a hearing (or both).”).

242. 564 U.S. 431, 436–37 (2011).

243. *Id.* at 448.

244. Alexandra Lahav, *The Roles of Litigation in American Democracy*, 65 *Emory L.J.* 1657, 1675 (2016).

245. See *Turner*, 564 U.S. at 447 (“‘[S]ubstitute procedural safeguards,’ . . . if employed together, can significantly reduce the risk of an erroneous deprivation of liberty . . . , without incurring some of the drawbacks inherent in recognizing an automatic right to counsel.” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))); *id.* at 446–47 (arguing that, because the custodial parent is also often unrepresented, “[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation”).

have argued that a “critical starting point” for introducing state civil courts more prominently into the civil procedure classroom and scholarly discourse is the Fourteenth Amendment,²⁴⁶ this topic similarly exposes the challenges of due process in lawyerless courts.²⁴⁷ These are important questions to raise in classrooms.

D. *Limits of Procedure*

This Essay’s discussion leads to questions of wholesale structural change. It is rarely suggested that the Federal Rules should be torn up and completely re-written, perhaps because they work, or are worked by lawyers, with some amount of satisfaction or at least satisfying familiarity.²⁴⁸ If anything, it is argued that the Rules—or other rules—should be applied more rigidly.

Scholars of lawyerless state courts, by contrast, have a more radical discourse, although change remains challenging to implement.²⁴⁹ Two other contributions to this symposium provide examples of proposals for radical change. One of us with Jessica Steinberg, Alyx Mark, and Anna Carpenter, argues for wholesale reconsideration of state civil courts as democratic institutions.²⁵⁰ And Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, and Lauren Sudeall examine and critique state civil courts as sites of racial capitalism.²⁵¹ As a matter of course, scholarship on lawyerless state courts engages questions of new procedures,²⁵² new roles for court

246. Spaulding, *supra* note 3, at 293.

247. See generally Helen Hershkoff, Access to Justice: Enforcing Rights and Securing Protection, *in* Getting By: Economic Rights and Legal Protections for People With Low Income 785 (Helen Hershkoff & Stephen Loffredo eds., 2019) (discussing more broadly the opportunities for teaching due process).

248. A notable exception is *A Guide to Civil Procedure: Integrating Critical Legal Perspectives*. The editors of that collection note in their introduction, “Each chapter shows how the seemingly dry and technocratic tone of the civil rules and process may conceal—or perpetuate—apathy, injustice, brutality, poverty, abuse of power, or discrimination.” Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter, Introduction, *in* *A Guide to Civil Procedure: Integrating Critical Legal Perspectives*, *supra* note 16, at 1, 1–2.

249. See generally Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, “I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 *Fordham L. Rev.* 3027 (2015) (analyzing race and racial inequality in the legal system); Sabbeth & Steinberg, *supra* note 16 (reconsidering right to counsel doctrine to argue that its benefits accrue largely to men).

250. Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1528–30.

251. Brito et al., *supra* note 12, at 1285–86.

252. D. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, Using Random Assignment to Measure Court Accessibility For Low-Income Divorce Seekers, *Proc. Nat’l Acad. Sci.*, Jan. 25, 2021, at 2 (discussing and proposing a measure of the accessibility of divorce procedures); Hammond, *Pleading Poverty*, *supra* note 135, at 1514–26 (advocating for a new standard for in forma pauperis determinations); Sabbeth, *Simplicity as Justice*, *supra* note 18, at 287–88 (describing reform efforts to “simplify[] proceedings to obviate the need for . . . representation,” including by “creating form pleadings, introducing technology, and relaxing formal rules”).

actors,²⁵³ and even wholesale redesign of civil courts.²⁵⁴ Some calls are broad, like for abolition of child welfare dockets.²⁵⁵ Others are more disparate and require state-by-state, area-by-area, boots-on-the-ground reform.²⁵⁶ But the fact that they are challenging is not a reason not to consider them, or indeed not to do them.

CONCLUSION

This Essay has argued in favor of examining civil procedure in American civil justice not just as divided between state and federal courts, but as between lawyered and lawyerless contexts. In both lawyered and lawyerless contexts, there are complex institutional democratic questions. Scholars in both camps would do well to pay attention to them. This collective attention will help us comprehend the magnitude of the challenges

253. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 987–90 (2012) (praising the use of “nonlawyer advocates” and arguing that “court personnel must adopt a more managerial posture”); Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 512–13 (describing “a revised judicial role where judges cast away traditional passivity to assist and accommodate litigants without lawyers”).

254. Barton & Bibas, *Rebooting Justice*, *supra* note 18, at 145–57 (describing a range of options for redesigning courts, from modest reforms promoting active judging to the adoption of inquisitorial-style judicial proceedings or ODR systems); Shanahan & Carpenter, *supra* note 34, at 129 (“[I]f people do not have access to the help they need to navigate the court system as it is designed, why not redesign the court system so that people can navigate it on their own?”); Steinberg, *Demand Side Reform*, *supra* note 6, at 746 (“Fundamental changes to the way disputes are processed and decided in the poor people’s courts are needed to bring the operation of the legal system into alignment with the capabilities of the litigants who use it.”).

255. See, e.g., Dorothy E. Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World* 46 (2022) (“We should be asking why the government addresses [Black childrens’] needs in such a violent way. Even if Black children require more services, why is the main ‘service’ being provided the forced breakup of their families?”); Jane M. Spinak & Nancy D. Polikoff, *Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-Being*, 11 Colum. J. Race & L. 427, 430 (2021) (arguing that it is necessary to “abolish[] the system that allows [family] separations to continue” and to “reimagin[e] and replac[e] it with policies and practices that facilitate the flourishing of all children within their families, tribes, and communities”).

256. See, e.g., Logan Cornett, Natalie Anne Knowlton, James Swearingen & Michael Houlberg, *Redesigning Divorce: User-Driven Design for a Better Process*, Inst. for the Advancement of the Am. Legal Sys. 1 (2019), https://iaals.du.edu/sites/default/files/documents/publications/redesigning_divorce.pdf [<https://perma.cc/YCP9-KP3Q>] (describing a national study that “explore[d] the firsthand experience of self-represented litigants in family court . . . , with the goal of moving from litigant input in identifying problems to user engagement on solutions”); Dimarie Alicea-Lozada, *New Tools to Help Self-Represented Litigants*, NCSC Blog (Nov. 10, 2021), <https://www.ncsc.org/information-and-resources/info-and-res-page-card-navigation/trending-topics/trending-topics-landing-pg/new-tools-to-help-self-represented-litigants> [<https://perma.cc/QL7X-9JN7>] (describing software developed by Maryland and Minnesota state courts to help self-represented litigants produce pleadings).

facing the U.S. civil justice system as a whole²⁵⁷ and will also arm us with better tools to confront these challenges—together.

Comparing these themes—procedural rulemaking, the role of technology, and mass claims—across federal and state civil procedure and across lawyered and lawyerless contexts reveals a need for flexibility and accountability in procedure; a deep dependence on lawyers that is, and should be, challenged by modern legal problems; and the importance of reimagining procedures to take advantage of lawyers' presence while also functioning in their absence.

Moreover, these studies reveal that courts and justice—and access to courts and access to justice—are not always synonymous. Procedure must strive to ensure that courts provide justice, but it must also accommodate the realities of civil legal problems. As courts as institutions and the actors within them adapt to these realities, so too must civil procedure in the state and federal courts, whether lawyered or lawyerless.

257. Spaulding, *supra* note 3, at 290 (“No modern court system and no alternative adjudicative body appears to have the structure and capacity to efficiently, accurately, and fairly adjudicate the claims that regularly arise in the lives of ordinary people who appear before it.”).

RACIAL CAPITALISM IN THE CIVIL COURTS

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This Essay explores how civil courts function as sites of racial capitalism. The racial capitalism conceptual framework posits that capitalism requires racial inequality and relies on racialized systems of expropriation to produce capital. While often associated with traditional economic systems, racial capitalism applies equally to nonmarket settings, including civil courts.

The lens of racial capitalism enriches access to justice scholarship by explaining how and why state civil courts subordinate racialized groups and individuals. Civil cases are often framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants enter the civil legal system involuntarily, and the state plays a central role in their subordination through its judicial arm. A major function of the civil courts is to transfer assets from these individual defendants to corporations or the state itself. The courts accomplish this through racialized devaluation, commodification, extraction, and dispossession.

Using consumer debt collection as a case study, we illustrate how civil court practices facilitate and enforce racial capitalism. Courts forgo procedural requirements in favor of speedy proceedings and default judgments, even when fraudulent practices are at play. The debt spiral example, along with others from eviction and child support cases, highlights how civil courts normalize, legitimize, and perpetuate the extraction of resources from poor, predominately Black communities and support the accumulation of white wealth.

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INTRODUCTION

The relationship between race and civil courts has been understudied and undertheorized. Those who research and practice in those courts—and certainly those individuals who are subjected to them—have long been aware of the pervasive influence of race. Yet the myriad ways in which race influences the operation, structure, and design of civil courts require far more attention in the scholarly literature. This need is particularly acute in the case of state civil courts, where most civil cases are litigated.¹

While the dearth of race-based data from state civil courts has made it difficult to construct a full picture, existing data show that racialized individuals and communities are impacted disproportionately by civil justice issues.² Racialized litigants are less likely to have access to critical

1. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 *Harv. L. Rev.* 1704, 1715–16 (2022).

2. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 *Ann. Rev. Soc.* 339, 349–50 (2008) [hereinafter Sandefur, *Access to Civil Justice*]. Although there is relatively little scholarship focusing on the influence of race on the civil legal system as a whole, several scholarly works have taken an in-depth look at the influence of race in a particular legal context. See, e.g., Dorothy E. Roberts, *Shattered Bonds: The Color of Child Welfare* 267–76 (2002) [hereinafter Roberts, *Shattered Bonds*]; Tonya L. Brito, David J. Pate, Jr., & Jia-Hui Stefanie Wong, “I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 *Fordham L. Rev.* 3027, 3027–30 (2015) [hereinafter Brito et al., *I Do for My Kids*]; Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 *Socio. Sci.* 649, 653–56 (2020); Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board*, 59 *Am. Soc. Rev.* 890, 894–905 (1994); Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 89, 95–96 (2018) [hereinafter Sabbeth, *Housing Defense as the New Gideon*] (arguing that creation of a right to eviction defense counsel promotes race and gender equality); Paul Keil & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*,

resources and more likely to receive negative results.³ And, as in all systems, the ability to access justice in the civil legal system is influenced by multiple factors, including societal discrimination, economic inequality, and race-based behaviors of individual system actors.⁴ The civil court system is characterized by racial disparities in access, treatment, and outcomes, all of which deserve increased attention. At the same time, we view the observation of these disparities as the beginning of a larger and sustained inquiry about how and why such disparities exist. Racial disparities in the civil courts serve as a miner's canary—an invitation to further question the role that race plays in the design, structure, and operation of the civil court system.⁵ The responses to that inquiry are critical not only to our understanding of how race affects the administration of civil justice, but also as part of a necessary foundation for contemplating systemic change.

This Essay contributes to the above conversation—and offers one possible response to the above inquiry—by exploring how civil courts, as an arm of the state, function as sites of racial capitalism. It argues that theories of racial capitalism help to explain how and why state civil courts are designed and operate to subordinate racialized groups and individuals. In doing so, it also makes an important contribution to the growing racial capitalism literature by expanding its application in legal scholarship. This Essay strengthens the existing literature by examining the racial capitalism conceptual framework in state civil courts, a site commonly understood as nonmarket.⁶ More broadly, it advances still nascent conversations about race and access to civil justice that require not

ProPublica (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/DW2R-Y782>] (exploring an in-depth study that highlights the disproportionate frequency of debt collection lawsuits in black neighborhoods); see also Kathryn A. Sabbeth, *Eviction Courts*, 18 U. St. Thomas L.J. 359, 368–71 (2022) (on file with the *Columbia Law Review*) [hereinafter Sabbeth, *Eviction Courts*] (describing why eviction disproportionately impacts people of color); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. Rev. (forthcoming 2022) (manuscript at 13–34), <https://ssrn.com/abstract=3807349> [<https://perma.cc/55SF-878F>] (summarizing empirical literature on women of color facing eviction, debt, and family law matters).

3. See *infra* Part I.

4. See *infra* Part I; see also Kathryn A. Sabbeth, *Market-Based Law Development*, LPE Project: L. & Pol. Econ. Blog (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/WXE6-BKWG>] [hereinafter Sabbeth, *Market-Based Law Development*] (arguing that access to the system is based on capital).

5. See Lani Guinier & Gerald Torres, *The Miner's Canary* 11 (2002) (“Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.”).

6. See Angela P. Harris, *Foreword: Racial Capitalism and Law*, in *Histories of Racial Capitalism* vii, xi (Destin Jenkins & Justice Leroy eds., 2021) [hereinafter Harris, *Foreword*] (distinguishing “government” and sources of state power (such as courts) from governance exercised by economic markets).

only more empirical data on racial demographics but also more theoretical analysis of the social significance of race.

Racial capitalism is a relatively new concept in legal academia and has its roots in several other disciplines, including Black studies, history, political science, sociology, and cultural studies, where the term has been defined and used differently by a wide range of scholars.⁷ While critical race theorists have demonstrated that race is fundamental to and deeply embedded in U.S. law,⁸ scholars of racial capitalism have emphasized how racial subordination is fundamental, rather than incidental, to economic exploitation.⁹ From a legal perspective, racial capitalism can be understood as a system of racialized “dispossession, extraction, accumulation, and exploitation” for power and profit in which human elements are both commodified and devalued.¹⁰ We argue that through their interpretation and implementation of the law and the processes they impose, the civil courts function as instruments of racial capitalism, facilitating its goals and assisting in its entrenchment.

Civil cases are typically framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants, particularly Black individuals, enter the civil legal system involuntarily, often in a defensive or vulnerable posture.¹¹ Even in cases where marginalized plaintiffs initiate litigation, they enter the civil courts due to a lack of other feasible options. They are forced to subject themselves and others to a system designed to devalue them, commodify their needs, and maximize financial extraction. Most of the cases in the civil system involve eviction, debt collection, or family law matters¹²—legal matters likely to

7. Michael Ralph & Maya Singhal, *Racial Capitalism*, 48 *Theory & Soc’y* 851, 851–74 (2019).

8. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 *Harv. L. Rev.* 518 (1980); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1348, 1370–72 (1988) (emphasizing that racism is formally entrenched in U.S. law and plays a “hegemonic” role in the institutional oppression of Black people).

9. See, e.g., Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* 9–10 (3d ed. 2020) (illuminating that “the nonobjective character of capitalist development” exists at the intersection of racism and economic exploitation).

10. See Harris, *Foreword*, supra note 6, at vii.

11. See Sabbeth & Steinberg, supra note 2, at 10–11; Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 *Colum. L. Rev.* 1471, 1478–87 (2022) [hereinafter Shanahan et al., *Institutional Mismatch*].

12. See Sabbeth & Steinberg, supra note 2, at 10 (“The civil courts churn through 20 million cases per year, most of which are evictions, debt collections, and family law matters of all types—divorce, custody, child support, parental rights, and domestic violence.”); Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *Civil Justice Initiative, The Landscape of Civil Litigation in State Courts*, Nat’l Ctr. for State Cts., 17, 19 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/9AJ3-TN84] (noting that almost two-thirds of state civil court caseloads

target poor and racialized litigants.¹³ And in many of those cases, an individual has been sued by the state or a corporation.¹⁴ It is those cases that are the focus of this Essay, where the ability of the party initiating court action to extract capital and exercise control over racialized people is strongest. And it is in these cases that the role of the courts in facilitating the transfer and accumulation of assets from racialized individuals to majority-white corporations or the state itself is most visible.

Courts have long played a role in defining race and policing racial order, contributing to the perpetuation of racial inequality and, more specifically, white dominance.¹⁵ The civil courts that are the focus of this Essay are very much a part of that story. They oversee and process case

consist of contract cases and that, of those, the large majority are debt collection and landlord–tenant cases); see also Wilf-Townsend, *supra* note 1, at 1717.

13. See, e.g., Brito et al., *I Do for My Kids*, *supra* note 2, at 3029–30 (describing the predominance of Black male defendants in child support cases); Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 *Fam. Ct. Rev.* 72, 73 (2019) (noting the disproportionate representation of African Americans in the child welfare system and how institutional factors exacerbate the hardships experienced by poor Black families); Andrew Roesch-Knapp, *The Cyclical Nature of Poverty: Evicting the Poor*, 45 *Law & Soc. Inquiry* 839, 852 (2020) (citing Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 *Soc. Forces* 303, 303–27 (2013)) (noting that “black tenants have a significantly higher likelihood of receiving an eviction notice than white tenants”); Wilf-Townsend, *supra* note 1, at 1750–51 (noting the disproportionate impact of debt collection and eviction cases on communities of color); see also Sabbeth, *Housing Defense as the New Gideon*, *supra* note 2, at 89–96 (highlighting that eviction disproportionately impacts Black women). For more on the impact of the child welfare system on Black communities, see *infra* note 41 and accompanying text (various sources describing impact of child welfare system on Black communities).

14. See Wilf-Townsend, *supra* note 1, at 1711 (“[I]n state courts . . . the most common cases pit a better-resourced plaintiff, often a corporation with lawyers, against an unrepresented individual defendant.”); *id.* at 1724 (“[T]he majority of civil cases pit a business plaintiff against a natural person defendant, often in a contract dispute involving an alleged debt.”). In the eviction context, several recent studies have evidenced the dominance of large, corporate landlords and their relative likelihood to file for eviction. See Henry Gomory, *The Social and Institutional Contexts Underlying Landlords’ Eviction Practices*, *Soc. Forces*, June 16, 2021, at 1, 2–3 (finding that corporate landlords are two-to-three times more likely than non-corporate landlords to file for evictions); Elora Lee Raymond, Richard Duckworth, Benjamin Miller, Michael Lucas & Shiraj Pokharel, *From Foreclosure to Eviction: Housing Insecurity in Corporate-Owned Single-Family Rentals*, 20 *Cityscape* 159, 162 (2018) (showing that “[l]arge corporate owners in the single-family rental business are 68 percent more likely than small landlords to evict tenants”); Devin Q. Rutan & Matthew Desmond, *The Concentrated Geography of Eviction*, 693 *Annals Am. Acad. Pol. & Soc. Sci.* 64, 65, 76–78 (2021) (noting that a small number of large landlords were found to be responsible for a significant percentage of all evictions in 17 cities).

15. See, e.g., Ian Haney López, *White By Law: The Legal Construction of Race* (1996) (“[T]he courts were responsible for deciding not only who was White, but *why* someone was White. Thus, the courts had to wrestle in their decisions with the nature of race in general and of White racial identity in particular.”); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *Yale L.J.* 109, 112–14 (1998) (“[The] law, broadly defined, played an important role in constituting the cultural meaning of racial identities. . . . [In] the antebellum period, law made the ‘performance’ of whiteness increasingly important to the determination of racial status.”).

dockets filled by poor people and, as limited available data have shown, disproportionately Black people.¹⁶ In addition, the racialization of poverty in U.S. society has made it impossible to disentangle narratives of the “undeserving poor” from those of Black America.¹⁷ This entwinement of racial and economic status—and the imposition of beliefs and traits suggesting that these individuals are appropriate subjects for state-sponsored discipline¹⁸—is operationalized through the work of civil courts and provides additional justification for the extraction that racial capitalism requires.

The courts administering these cases are often characterized by mass adjudication, speed, and a lack of procedural protections.¹⁹ The systematic and low-cost way in which these civil courts process cases—devaluing and commodifying the individuals subject to them and disregarding their procedural and substantive rights—contributes to the narrative that these individuals are not worthy of the justice system that society upholds as the ideal. Instead, the courts interpret and apply law and procedure in ways that facilitate and maintain a racialized underclass that can be used to generate profit for dominant individuals and corporations.²⁰ In doing so, courts normalize, legitimize, and perpetuate a system of racial

16. While we acknowledge that matters handled by the civil courts harm people of all races—and marginalized communities in particular—the literature has highlighted the particular harm committed in Black communities. See, e.g., Benjamin F. Teresa, *The Geography of Eviction in Richmond: Beyond Poverty*, RVA Eviction Lab 1, <https://cura.vcu.edu/media/cura/pdfs/cura-documents/GeographiesofEviction.pdf> [<https://perma.cc/W8LE-6H6G>] (observing the correlation between the share of African American population and eviction rate); Raymond et al., *supra* note 14, at 16 (demonstrating that the highest levels of eviction filings in Atlanta are in “predominantly black neighborhoods”); Wilf-Townsend, *supra* note 1, at 1750 (noting the high rates of default judgments in debt collection cases in Black (and Latinx) neighborhoods); Keil & Waldman, *supra* note 2.

17. See, e.g., Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* 9 (1994); Martin Gilens, *How the Poor Became Black: The Racialization of Poverty in the Mass Media*, in *Race and the Politics of Welfare Reform* 101, 101–02 (Sanford S. Schram, Joe Soss & Richard S. Fording eds., 2003) (describing the entwinement of race and poverty and the “association of African Americans with the ‘undeserving poor’”); John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *Law & Ineq.* 355, 396 (2007) (“Race and class are mutually constitutive.”).

18. Cf. Kaaryn S. Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* 1–2 (2011); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *Yale J.L. & Feminism* 317, 336 (2014) (describing use of the “hyperregulatory state” to control and subordinate people targeted by race, class, place, and gender); see also Joe Soss, Richard C. Fording & Sanford F. Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* 2–3 (2011).

19. See *infra* Part III; see also Sabbeth, *Eviction Courts*, *supra* note 2, at 376–85 (describing the speed and volume of eviction case dispositions and the lack of procedural protections available to tenants); Wilf-Townsend, *supra* note 1, at 1716–23 (describing the high-volume nature of assembly-line litigation of debt collection lawsuits).

20. This phenomenon is not exclusive to procedural aspects of the law; much of the substantive law practiced and implemented in civil courts also favors those in power and is used to similar effect.

subordination for profit. The role of the state in driving this process should not be underestimated. Framing the civil courts as neutral and passive arbiters of private civil disputes—rather than as agents of the state helping to maintain the social order necessary for racial capitalism to function²¹—diminishes courts’ responsibility for the harm they perpetuate and undermines the ability to address it.

In Part I of this Essay, we examine various perspectives that have been offered to date on the relationship between race and civil justice. As we demonstrate, although there are some notable exceptions,²² much of the literature relating to the civil legal system has focused on disproportionate racial impact—including disparities in access and treatment—rather than theorizing about the court system’s role in creating or maintaining those disparities. In contrast, the relationship between race and systemic design—including relevant court processes and procedures—has been more thoroughly explored in the context of the criminal legal system. We suggest that the justifications for this imbalance are inadequate and highlight several important examples of deeper theorizing as to how race and racism have shaped the civil legal system.

In Part II, we begin with an overview of the scholarly literature on racial capitalism, highlighting the aspects most relevant to state civil courts. Theories of racial capitalism show us not only that racism and capitalism are fundamentally intertwined, but also that capitalism requires inequality and relies on racialized systems of exploitation and extraction to generate and accumulate capital. While often associated with traditional economic systems, racial capitalism is both dynamic and malleable and applies equally to nonmarket forums, including state courts.

After examining racial capitalism in broader terms, we translate these concepts to the civil court context and show how civil courts serve as sites of racial capitalism, carrying forward the historical role of white supremacy. Through a broad-strokes discussion of civil court processes, we demonstrate how the courts assist in capital accumulation through patterns of racialized extraction and dispossession; these processes are, in turn, facilitated and justified through racialized devaluation and commodification of elements critical to human survival. The courts create opportunities for the extraction of financial assets and products of labor from subordinated people and for their transfer to entities that become more powerful as a result; it is racial subordination that makes this process tolerable and allows the courts to subjugate individuals’ humanity to their role in a larger capitalist structure. Ultimately, we argue that a primary function of the civil courts is to produce profit for those with capital; to do

21. Cf., e.g., *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (emphasizing the court’s role as an arm of the state in enforcing private contracts that restricted property ownership to white persons); see *id.* at 20 (“The judicial action in each case bears the clear and unmistakable imprimatur of the State.”).

22. See, for example, the discussion in Part I of work done by Dorothy E. Roberts and others in the family and child welfare contexts.

so, they must maintain the racialized social and economic order that role requires.

Using consumer debt collection as a case study, Part III of the Essay illustrates how civil court structures and practices facilitate and enforce racial capitalism. In the spiraling world of debt collection, where poor and racialized defendants borrow money for necessities that then costs them far more to repay, courts issue default judgments en masse.²³ The courts forgo procedural requirements in favor of speedy proceedings and financial extraction, even when fraudulent practices such as “robo-signing” and “sewer service” are at play.²⁴ The way in which courts process debt collection cases—and their use of default judgments in particular—facilitates extraction from poor, predominately Black communities and the accumulation of capital by powerful corporate interests; and it does so to a broader degree than the substantive law alone would require. Many aspects of the courts’ approach to civil adjudication are not required by the law itself, but instead reflect choices made based on the premise that racialized people are less valuable and that economic values outweigh basic human needs. The common racialized identity of the people targeted by the debt collection industry feeds the narrative that they are lesser and undeserving of better treatment while ensuring an oppressed class that can support the capitalist structure;²⁵ it also renders their existing treatment tolerable rather than fodder for moral outrage.

In sum, we use the conceptual framing of racial capitalism to demonstrate how the civil courts operate to reinforce and perpetuate systems of social and economic injustice against racialized communities, who are, in many instances, Black men, women, and families. While we argue that civil courts contribute to and facilitate racial capitalism, we also acknowledge that the inequality and subordination integral to racial capitalism run far deeper and the forces fueling racial capitalism range far wider than the reach of courts. Therefore, although we support various court reforms for reasons beyond the scope of this Essay,²⁶ we do not

23. See *infra* Part III.

24. See *infra* Part III.

25. We want to acknowledge the role that intersectionality may play in the relationship between the courts and racial capitalism. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal Forum 139, 139. In courts where a large number of affected individuals are Black women, multiple forms of disadvantage may interact to produce particular dynamics of subordination (distinct from that applied to all Black people or all women).

26. See, e.g., Tonya L. Brito, *The Right to Civil Counsel*, 148 *Daedalus* 56 (2019) (advocating for a civil right-to-counsel that is national in scope, adequately funded, and protected from political influence); Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 *S.C. L. Rev.* 223 (2016) [hereinafter Brito et al., *Civil Gideon*] (identifying additional research needed for an effective implementation of civil *Gideon*); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 *Wis. L. Rev.* 287, 288–89 [hereinafter Sabbeth, *Simplicity as Justice*] (critiquing overemphasis on

suggest that court-driven changes, such as the provision of additional procedural protections, would lead to systems change of the order that challenging racial capitalism requires.

The application of the racial capitalism framework in this Essay is not intended to generate solutions, but it helps us to understand how and why civil courts operate as they do. Racial subjugation is not incidental or external, but central to the economic exploitation facilitated by courts through the processing of cases involving housing, debt, and family relationships. Eviction is not only about repossession of a home, but also about seizing the products of racialized tenants' labor²⁷ and instilling fear to prevent resistance.²⁸ Child support is less about transferring funds to custodial parents than it is about the state seizing pennies from Black fathers as payback for public benefits received by the custodial parent.²⁹ Debt collection is less about ensuring debts are repaid than about ensuring the smooth, one-directional flow of capital from Black communities to powerful corporations.³⁰ Courts orchestrate the handling of these cases so that the people involved are devalued and their needs rendered mere commodities; the process is swift and easy for powerful, repeat actors. By engaging in these practices, the civil courts normalize, legitimize, and

simplification in the context of pro se court reform); Kathryn A. Sabbeth, (Under)Enforcement of Poor Tenants' Rights, 27 *Geo. J. Poverty L. & Pol'y* 97, 139–44 (2019) [hereinafter Sabbeth, (Under)Enforcement] (proposing a mix of public and private enforcement schemes to better protect tenants' rights); Jessica K. Steinberg, A Theory of Civil Problem-Solving Courts, 93 *N.Y.U. L. Rev.* 1579, 1594–85 (2018) (explaining how the problem-solving court model might be adapted to the civil context); Jessica K. Steinberg, Demand Side Reform in the Poor People's Court, 47 *Conn. L. Rev.* 741, 747 (2015) (advocating for court-driven rather than party-driven reform efforts); Lauren Sudeall, Rethinking the Civil–Criminal Distinction, in *Transforming Criminal Justice: An Evidence-Based Agenda for Reform* (NYU Press, forthcoming) (manuscript at 20–21) (on file with the *Columbia Law Review*) [hereinafter Sudeall, Rethinking the Civil–Criminal Distinction] (arguing that courts should eschew a rigid civil–criminal distinction in favor of a more holistic and litigant-focused approach); Lauren Sudeall, The Overreach of Limits on “Legal Advice,” 131 *Yale L.J. Forum* 637, 653–55 (2022) (advocating for courts to employ narrower definitions of legal advice and thus relay critical information to litigants about the law and legal process); Lauren Sudeall & Daniel Pasciuti, Praxis and Paradox: Inside the Black Box of Eviction Court, 74 *Vand. L. Rev.* 1365, 1427–31 (2021) (suggesting that courts should develop forms and procedures that better inform and elicit the most relevant information from litigants).

27. Rent eats more than fifty percent of many household incomes. Millions of Americans Burdened by Housing Costs in 2015, Joint Ctr. for Hous. Stud. Harv. Univ., <https://www.jchs.harvard.edu/son2017-housing-cost-burdens-table> [<https://perma.cc/34L6-DABC>] (last visited Feb. 11, 2022).

28. See Philip Garboden & Eva Rosen, Serial Filing: How Landlords Use the Threat of Eviction, 18 *Cty. & Cmty.* 638, 640 (2019) (“The daily threat of eviction subjugates poor tenants, stripping them of their consumer rights.”); Sabbeth, *Eviction Courts*, *supra* note 2, at 402 (arguing that eviction courts function “to enforce the existing social order”).

29. See *infra* section II.B.1.

30. See *infra* Part III.

perpetuate a racialized social and economic order that allows racial capitalism to thrive.

I. THE LANDSCAPE OF RACE AND CIVIL JUSTICE

Civil justice scholarship has focused relatively little on the influence of race on state civil courts and the processes they employ.³¹ This is due in part to a dearth of race-specific empirical data, which can be difficult to obtain in state courts and is tracked much more pervasively in the criminal legal system.³² Regardless of the cause, the range of available literature provides ample room for more theoretical engagement with the relationship between race and the design, structure, and operation of the civil legal system. This Part aims to illustrate several perspectives that have been covered by existing race and civil justice scholarship and demonstrate how this Essay seeks to advance the conversation.

Rebecca Sandefur noted more than a decade ago that while civil access-to-justice literature touched on racial differences in how individuals experience legal problems and the legal process, there was little to no research on how race influences the frequency with which those problems arise, how they are handled, and what outcomes result.³³ While the literature has since expanded to cover more ground, a related distinction remains: Much of scholarly writing on the relationship between race and civil justice has focused on civil claims of race-based discrimination or how the civil legal system disproportionately impacts racialized individuals and communities. Less has been written about the relationship between race and the structure and design of legal structures and processes that, in theory, provide a means of attaining civil justice.

A survey of the existing literature on race and the civil legal system supports this distinction. Much of that literature focuses on one of several areas: (1) racially disproportionate participation and outcomes;³⁴ (2)

31. Brito et al., *I Do for My Kids*, *supra* note 2, at 3028 (“Although the population of low-income Americans most affected by the civil justice gap is disproportionately minority, race and racial inequality are understudied areas of inquiry in the access to justice literature.”).

32. See Scott DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-In-Controversy Requirement, and Black Alienation from U.S. Civil Courts*, 13 *Geo. J.L. & Mod. Critical Race Persps.* 1, 5–6 (2021) (pinpointing a primary difficulty of conducting empirical research on race and the civil justice system to the lack of data identifying the race of litigants in the civil justice system); cf. Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 *Minn. L. Rev.* 541, 549 (2016) (“Data on individuals has long been the lifeblood of the criminal justice system.”).

33. Sandefur, *Access to Civil Justice*, *supra* note 2, at 350.

34. See, e.g., Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 *Am. J. Socio.* 88, 102 tbl.3 (2012) (describing the overrepresentation of Black men and women as tenants in eviction court); Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 *Ala. L. Rev.* 893, 953 (2020) (discussing findings that Black litigants receive higher court fines and lower rates of charge reductions in civil-infraction proceedings, but

attitudes toward the civil legal system;³⁵ (3) how race affects actors present in the civil legal system;³⁶ (4) racial inequalities with respect to civil legal resources, such as access to counsel,³⁷ and (5) claims based on racial discrimination.³⁸ To the extent empirical access-to-justice research has

that these disparities diminish in online proceedings); Kathryn Ramsey Mason, *Crime-Free Housing Ordinances and Evictions*, 36 *Inst. for Rsch. on Poverty Focus* 12, 19–20 (2020) (discussing the disproportionate number of Black women facing eviction).

35. Several articles have explored how racial minorities view the civil legal system—largely influenced by negative experiences and feelings of disillusionment—and how those views affect their future actions with respect to civil legal issues, including their likelihood to seek out assistance or engage with the system. See, e.g., Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 *Iowa L. Rev.* 1263, 1268 (2016) (explaining how distrust and narratives of self-sufficiency lead to a decreased likelihood that Black respondents seek out legal assistance for their civil legal problems); Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 *N.Y.U. J. Legis. & Pub. Pol’y* 705, 751–52 (2012) (describing negative experiences and impressions of minority litigants); see also David McElhattan, Laura Beth Nielsen & Jill D. Weinberg, *Race and Determinations of Discrimination: Vigilance, Cynicism, Skepticism, and Attitudes About Legal Mobilization in Employment Civil Rights*, 51 *Law & Soc’y Rev.* 669, 669–70, 686–88 (2017) (noting minimal scholarship on the legal cynicism of civil justice institutions but finding a “higher legal confidence held by African Americans and Latinos compared to whites,” indicating that these groups “may hold views of the legal system that are more amenable to mobilizing law in response to workplace disputes”); Stephen S. Meinhold & David W. Neubauer, *Exploring Attitudes About the Litigation Explosion*, 22 *Just. Sys. J.* 105, 107 (2001) (hypothesizing that “African-Americans [are] more supportive than whites of using the courts to redress grievances”).

36. See, e.g., Brito et al., *I Do for My Kids*, *supra* note 2, at 3049 (“Each of these poor, Black citizens is present in [family court] but, neither seen nor heard by the legal actors present, is rendered invisible in that space.”); Geneva Brown, *Ain’t I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 *Cardozo J.L. & Gender* 147, 147, 150 (2012) (noting that “African American women who seek protection from . . . the courts encounter a legal system that has fixed notions of African Americans as more susceptible and amenable to violence,” thus rendering the process of seeking redress more difficult for them); Victor D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 *DePaul L. Rev.* 543, 583 (2020) (noting that unrepresented parties are viewed differently by court officials and lawyers due to bias; for example, educated white men are viewed as “empowered, self-represented parties and treated with more respect” than an African American disabled woman would be); see also Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, *N.Y.U. Rev. L. & Soc. Change* 555, 557 (2012) (noting that scholars have questioned “whether the family law system itself is inherently discriminatory toward persons of color”).

37. Myrick et al., *supra* note 35, at 708 (demonstrating and exploring reasons for differential representation rates); see also Martha F. Davis, *Race and Civil Counsel in the United States: A Human Rights Progress Report*, 64 *Syracuse L. Rev.* 447, 451–54 (2014) (highlighting the existence and impact of racial disparities in access to civil counsel). Cf. Sabbeth, *Housing Defense as the New Gideon*, *supra* note 2, at 95–96 (arguing that creation of a right to counsel for tenants promotes race and gender equality).

38. See, e.g., Ellen Berrey, *Sociology Finds Discrimination in the Law*, 8 *Contexts* 28, 29 (2009) (discussing strengths of employment law in adjudicating “flagrant acts of racism” but its simultaneous weakness of failing to remedy unintentional and implicit discrimination ingrained in networks and organizational practices); McElhattan et al., *supra* note 35, at 688

expanded its scope in exploring connections between racial inequality and civil justice, it has focused primarily on how racial prejudice and other related forms of discrimination influence the legal process.³⁹ For example, the work of Tonya L. Brito, David J. Pate, Jr., and Jia-Hui Stefanie Wong explores how racialized litigant experiences and court actors' insistence on ignoring race-based inequalities impact the family court process.⁴⁰

Several scholars—particularly in the family law arena—have taken on the task of not only highlighting racial disparities in access and impact but also theorizing about the role of race in creating such disparities and why those disparities exist and persist. For example, Dorothy Roberts, Khiara Bridges, and Peggy Cooper Davis have written about how racism has shaped the civil legal systems that regulate families, children, and pregnancy.⁴¹ Roberts has painstakingly detailed how racism and the legacy of slavery have not only informed the development of the law, but also explain why society is willing to tolerate such a destructive and punitive system.⁴² Roberts's work clearly demonstrates how civil legal systems have the power to both implement and perpetuate racial subordination.⁴³ Just as these scholars have done for systems of family and reproductive regulation, there is far more probing to be done with respect to how the civil

(finding that African American individuals perceive more anti-Black discrimination than do other racial groups); Myrick et al., *supra* note 35, at 707–08 (discussing disproportionate percentage of plaintiffs in employment discrimination lawsuit filing pro se, which tends to lead to “significantly worse litigation outcomes,” such as failing to survive summary judgment); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *Ann. Rev. Socio.* 181, 185–86 (2008) (noting discrimination claims from 1970 through 1997 shifted from an emphasis on racial discrimination toward emphasis on gender and disability discrimination).

39. See Brito et al., *I Do for My Kids*, *supra* note 2, at 3049.

40. See *id.* at 3028.

41. We provide here just a few examples of the many relevant works these scholars have produced. See Khiara M. Bridges, *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* 10–11 (2011); Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 66 (1997); Roberts, *Shattered Bonds*, *supra* note 2, at 276; Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 *Harv. L. Rev.* 770, 776–77 (2020); Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 *N.Y.U. L. Rev.* 1229, 1235–38 (2020); Peggy Cooper Davis, *Loving v. Virginia and White Supremacy*, 92 *N.Y.U. L. Rev. Online* 48, 50–52 (2017); Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 *J. Soc. Welfare & Fam. L.* 426, 427–29 (2014); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. Rev.* 1474, 1478–83 (2012). See also Tonya L. Brito & Sofia Jonas, *Breastfeeding, Race and Mutual Aid*, 57 *Cal. W. L. Rev.* 257, 264–65 (2021).

42. Roberts, *Shattered Bonds*, *supra* note 2, at 276 (“Why would Americans prefer a punitive system that needlessly separates thousands of children from their parents and consigns millions more to social exclusion and economic deprivation? . . . Only by coming to terms with child welfare’s racial injustice can we turn from the costly path of family destruction.”).

43. *Id.* at viii (arguing that the child welfare system is “a state run program that disrupts, restructures, and polices Black families”).

court system design incorporates, relies upon, and intentionally maintains racial hierarchies.

In contrast, there has been a significant amount of theorizing about how racially oppressive social and economic systems—including, most prominently, the institution of slavery—have influenced the criminal legal system's purpose and design.⁴⁴ This imbalance between civil and criminal is driven by several factors—but is also unjustified. As some of us have touched on in our own scholarship, doctrinal and constitutional distinctions between civil and criminal foster persistent conceptual differences. For example, the emphasis on incarceration serves as a touchstone for rights provision and the increased level of procedural protections afforded to criminal matters, suggesting higher stakes and greater importance.⁴⁵ Relatedly, there is a distinction in how the harms perpetuated by the criminal and civil legal systems are understood and valued—a distinction we would argue is disputed by how these systems have evolved and now operate in practice.⁴⁶ Criminal law is often characterized as involving violence by the state and the deprivation of physical liberty, in contrast to civil law, which is thought to relate primarily to disputes between private actors and unlikely to result in incarceration.⁴⁷ Thus, civil harm may be thought of as more removed from the types of state action that are typically actionable

44. See generally, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black People in America From the Civil War to World War II* (2008); Matthew Clair, *Privilege and Punishment: How Race and Class Matter in Criminal Court* (2020); David D. Cole, *No Equal Justice* (1999); James Forman, Jr., *Locking Up Our Own: Crime and Punishment of Black Americans* (2017); Randall Kennedy, *Race, Crime, and the Law* (1997); Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (2015).

45. Sudeall, *Rethinking the Civil–Criminal Distinction*, supra note 26 (describing common understandings of the differences between criminal and civil and how rights and procedural protections are distributed according to those labels); Brito et al., *Civil Gideon*, supra note 26, at 227–28 (describing how the *Turner v. Rogers* holding, denying a constitutional right to counsel in a civil contempt proceeding, exposing the defendant to incarceration, departs from the *Lassiter v. Department of Social Services* precedent, which established a presumption that a right to counsel would attach when there is a risk of loss of physical liberty); Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 Fla. St. U. L. Rev. 889, 905–16 (2015) [hereinafter, Sabbeth, *Prioritization of Criminal Over Civil Counsel*] (describing the view that incarceration and the stigma of criminal conviction make criminal matters uniquely deserving of a right to counsel, but questioning “whether the interests at stake for criminal defendants are categorically of higher value than the interests of civil litigants”).

46. See Sabbeth, *Prioritization of Criminal Over Civil Counsel*, supra note 45, at 912–16, 920–21, 923–27, 930–34; Sudeall, *Rethinking the Civil–Criminal Distinction*, supra note 26, at 2; see also Lauren Sudeall, *Integrating the Access to Justice Movement*, 87 Fordham L. Rev. Online 172, 172 (2019) [hereinafter Sudeall, *Integrating the Access to Justice Movement*] (noting that individuals' experiences often do not fall cleanly along criminal and civil lines).

47. See Sabbeth, *Prioritization of Criminal Over Civil Counsel*, supra note 45, at 905, 916; Sudeall, *Rethinking the Civil–Criminal Distinction*, supra note 26, at 2, 12. But see Sabbeth, *Simplicity as Justice*, supra note 26, at 297 (“The state creates, maintains, adjudicates, and enforces all law. Ultimately the state's force is at play in all adjudication.”).

under the law.⁴⁸ In the modern era, however, these lines are far more blurred: The state plays a prominent role in many civil proceedings—particularly those involving economically and racially marginalized individuals—and financial penalties can result in the criminal sphere just as deprivation of liberty can occur in the civil.⁴⁹ Civil issues affecting poor people of color are also often seen as simple or nonlegal in nature;⁵⁰ this delegitimation of such claims leads to subsequent delegitimation and, thus, less urgency to fully understand how race impacts the systems that process such claims.

Portia Pedro recently underscored this distinction between civil and criminal by observing that there is less “comprehensive theoretical description of the mutually constitutive and reinforcing relationship” between civil law and racial subjugation or white supremacy than in other areas, such as constitutional and criminal law.⁵¹ Pedro emphasizes the importance of thinking about how doctrine, and procedural rules and mechanisms, can be used to reinforce racial subordination, even in areas of the law that are often cast as objective and substantively distinct from issues of race, like civil procedure.⁵² And she rightly observes that the underdevelopment (and underapplication) of Critical Race Theory in civil procedure is likely due to a flawed understanding of civil procedure as

48. See, e.g. Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. Rev.* 503, 507–09 (1985) (discussing the requirement of state action to benefit from constitutional protections); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *Calif. L. Rev.* 323, 341 (2016) (discussing the Supreme Court’s unwillingness to recognize wealth distinctions as a basis for legal challenge). But see Chemerinsky, *supra*, at 524 (suggesting “state action is present in all private violations of constitutional rights”).

49. See Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 923–28 (identifying civil cases in which the state is the individual’s adversary, and explaining how the role of the state and the role of private power have evolved over time); *id.* at 907 (noting that loss of liberty no longer provides a clear distinction between civil and criminal cases); Sudeall, *Integrating the Access to Justice Movement*, *supra* note 46. See also Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Fathers and Their Families*, 15 *Iowa J. Gender Race & Just.* 617, 618–20 (2012); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253, 1256–58 (2009).

50. Sabbeth, *Simplicity as Justice*, *supra* note 26, at 302 (arguing that “the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop” whereby the Supreme Court denies the right to counsel to litigants with purportedly “simple” claims, thereby decreasing the availability of lawyers who could develop the common law governing those claims); Sabbeth, *Market-Based Law Development*, *supra* note 4 (“Assumptions about whose cases are worthy of attention legitimize the simplification of entire bodies of law and de-legalization of lower status courts.”). See also Sabbeth, *(Under)Enforcement*, *supra* note 26, at 135–37 (arguing that courts “underdevelop” tenants’ rights through “snowballing underenforcement”).

51. Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 *Va. L. Rev. Online* 143, 158 (2021).

52. *Id.* at 145, 159.

“technical,” “neutral,” “objective,” or “perspectiveless[.]”⁵³ We argue that the same is true of civil courts and court procedures, where connections not only to race, but also—given their association with the private realm—to the role of the state and to the maintenance of social order are less likely to be drawn.

The civil courts govern fundamental aspects of daily life—including housing, employment, financial obligations, personal safety, and family relationships. As Colleen Shanahan, Jessica Steinberg, Anna Carpenter, and Alyx Mark have argued, state civil courts are confronted with social needs they are ill-equipped to handle, and in this context “can play the role of violent actor when exercising their dispute resolution function.”⁵⁴ Civil court cases impose on tens of millions of people devastating legal and financial consequences, as well as physical, social, and emotional harm.⁵⁵ Thus, more thorough exploration of how the processes and procedures these courts use in adjudicating such claims rely on and advance racial subordination is critical. In this Essay, we aim to build upon and complement the above literature by exploring how the procedures developed and maintained by state civil courts facilitate and maintain racial capitalism.

II. RACIAL CAPITALISM AND CIVIL JUSTICE

The state’s use of the civil legal system as a tool to legitimize and enforce racial exploitation is a phenomenon as old as this nation. Civil courts repeatedly legitimized slavery, an openly violent institution that ensured a racialized subordinate workforce. The U.S. Supreme Court’s *Dred Scott* decision may be among the most infamous, ruling that Black people were not citizens so did not have standing to bring claims, and ultimately the plaintiff’s claims to freedom failed.⁵⁶ But this was one of many decisions to reserve for white people the privileges of citizenship.⁵⁷

53. *Id.* at 159, 164. Likewise, legal scholars have begun to examine the significance of race in other seemingly neutral areas of law, such as tax, see generally Dorothy A. Brown, *Race and Class in Tax Policy*, 107 *Colum. L. Rev.* 790 (2007), and banking, see generally Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2019).

54. Shanahan et al., *Institutional Mismatch*, *supra* note 11, at 1516–17; see Sabbath, *Simplicity as Justice*, *supra* note 26, at 297 (“The state literally *enforces* those judgments parties refuse or are unable to satisfy The violence of economic force can be as important as violence to the physical body, and, ultimately, the latter is always available to back up the former.”).

55. See Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings From the Community Needs and Services Survey 7–10* (2014).

56. 60 U.S. (19 How.) 393, 475–76 (1857), superseded by constitutional amendment, U.S. Const. amend. XIV.

57. See *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (ruling on the question of who was white enough to become a naturalized citizen); *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (ruling that “only a person of what is popularly known as the Caucasian race” was a “white person[.]” entitled to naturalized citizenship); López, *supra* note 15, at 35–77 (describing court decisions that evaluated and ruled on parties’ races as a prerequisite to their entitlement to naturalize as citizens); Cheryl I. Harris, *Whiteness as Property*, 106

Like the U.S. Supreme Court, the lower civil courts, too, have engaged in the social construction of race and guarded the rights of citizenship for people identified as white. Cheryl Harris demonstrated in *Whiteness as Property* that civil courts have a long history of resolving everyday contract and property disputes in ways that solidify and entrench the power of white supremacy.⁵⁸ Even after slavery formally ended, the lower civil courts continued to play an important role in policing the boundaries of whiteness and the rights that go with it. The work of Ian Haney López and Ariela Gross describes how courts considered in detail how to construct the race of the individuals before them. Courts parsed physical characteristics, other markers of social belonging, and so-called common expectations, and they debated how race should be determined, ultimately deciding the races of the parties before them, with serious consequences.⁵⁹

Race-making practices like these, which perpetuate ideologies of racial inferiority and exaggerate racial differences, serve to facilitate and justify social inequality.⁶⁰ It is not simply that the courts have allowed racial categories to mark the groups of people who are exploited and those who profit, but also that the courts have actively constructed race and thereby made systemic racial exploitation appear rational.⁶¹ With the legitimacy and enforcement that the courts offer, explicit and implicit hierarchies of racial difference—which recognize some people as more fully human than others—then justify the looting of communities of color in plain sight.⁶²

Harv. L. Rev. 1707, 1716–23 (1993) [hereinafter Harris, *Whiteness as Property*]; see also Angela Onwuachi-Willig, *According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family* 2–4 (2013).

58. Harris, *Whiteness as Property*, *supra* note 57, at 1716–23.

59. López, *supra* note 15, at 3 (“From the first prerequisite case in 1878 until racial restrictions were removed in 1952, fifty-two racial prerequisite cases were reported, including two heard by the U.S. Supreme Court.”); Gross, *supra* note 15, at 178 (“After emancipation, courtrooms continued to be the fora for determining people’s racial status. Voting restrictions, segregated school systems, and laws prohibiting interracial marriage and fornication guaranteed that courts would still be adjudicating people’s racial status well into the twentieth century.”).

60. Destin Jenkins & Justin Leroy, Introduction: The Old History of Capitalism, in *Histories of Racial Capitalism* 1, 7–8 (Destin Jenkins & Justin Leroy eds., 2021) (citing Barbara Jeanne Fields, *Slavery, Race, and Ideology in United States History*, 181 *New Left Rev.* 95, 115 (1990)).

61. See K-Sue Park, *Race, Innovation, and Financial Growth: The Example of Foreclosure*, in *Histories of Racial Capitalism* 27, 34 (arguing that colonial practices of dispossession preceded racial ideologies, which colonists then created to explain the coexistence of the foundational American values of equality and freedom with the foundational American practices of colonial pillaging and slavery).

62. *Id.* at 30 (“This license to use racial violence presented an especially malleable and nearly inexhaustible resource for colonists, as it cost little beyond their willingness to transgress familiar boundaries placed on the treatment of other humans . . .”).

Through the courts, the state maintains the racial order, framing its tools as civilized while wielding power with a thinly veiled threat of force.⁶³ Officers of the law regularly exert that force to arrange compliance with court decisions.⁶⁴ The connection between the criminal legal system and the racist violence of the state has received significant attention,⁶⁵ as it should, but the civil courts, too, perpetuate racialized violence. The lens of racial capitalism helps to reveal how the criminal and civil legal systems work in concert, maintaining a racialized underclass through the force of the state. Capitalists rely on the power of the civil courts to maintain fear and discipline, and to authorize the extraction of significant sums.

Recognizing that the concept of racial capitalism has thus far received limited space on law review pages, in this Part, we first synthesize prior literature theorizing racial capitalism before we turn to how it applies in the civil courts.

A. *Racial Capitalism*

Scholarly engagement with racial capitalism is multidisciplinary and interdisciplinary in nature, with widespread and increasing interest across the humanities and social sciences.⁶⁶ We draw from the robust body of scholarship that has emerged over the past couple of decades to understand its legal dimensions.⁶⁷ Scholars attribute the conceptual frame of racial capitalism to political theorist Cedric Robinson, who introduced it in his groundbreaking book, *Black Marxism: The Making of the Black Radical Tradition*, published in 1983.⁶⁸ Widespread scholarly interest in racial capitalism as a conceptual frame took off following the republication of *Black Marxism* in 2000.⁶⁹

The term racial capitalism originated in South Africa in the 1970s.⁷⁰ South African scholars used racial capitalism to describe how the

63. See Mark Golub, Racial Capitalism and the Rule of Law, Soc. Sci. Rsch. Council: Items (Feb. 19, 2019), <https://items.ssrc.org/race-capitalism/racial-capitalism-and-the-rule-of-law/> [<https://perma.cc/VYH3-7LSP>].

64. See Shirin Sinnar, Civil Procedure in the Shadow of Violence, in *A Critical Guide to Civil Procedure* (forthcoming 2022) (manuscript at 1–5) (on file with the *Columbia Law Review*); Sabbeth, Simplicity as Justice, *supra* note 26, at 297 (“If a losing party fails to pay a monetary judgment, a sheriff will forcibly seize her assets. If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession of the property.”).

65. See *supra* Part I.

66. See Charisse Burden-Stelley, Modern U.S. Racial Capitalism: Some Theoretical Insights, 72 *Monthly Rev.* 8, 8 (2020).

67. See *id.*

68. Laura Pulido, Geographies of Race and Ethnicity II: Environmental Racism, Racial Capitalism and State-Sanctioned Violence, 41 *Progress Hum. Geography* 524, 526 (2017).

69. See Burden-Stelley, *supra* note 66, at 8; Pulido, *supra* note 68, at 526.

70. See Robin D.G. Kelley, What Did Cedric Robinson Mean by Racial Capitalism?, *Bos. Rev.* (Jan. 12, 2017), <https://bostonreview.net/articles/robin-d-g-kelley-introduction-race-capitalism-justice/> [<https://perma.cc/6NP5-HBC6>] [hereinafter Kelley, Racial Capitalism].

apartheid state structured relations of race, class, and accumulation.⁷¹ Robinson developed the concept of racial capitalism, advancing it from a description of a specific system—the political economy of apartheid South Africa—to a framework for understanding modern capitalism.⁷²

Robinson argued that racism was a structuring logic of capitalism.⁷³ According to Robinson, racism and capitalism are mutually constitutive.⁷⁴ In *Black Marxism*, he critiques conventional Marxism for mistakenly treating racism as separate from and incidental to capitalism.⁷⁵ Capitalism is “racial,” Robinson argues, “because racialism had already permeated Western feudal society.”⁷⁶ With this claim, he refutes the Marxist notion that capitalism was a revolutionary break from feudalism.⁷⁷ Instead, Robinson contends that capitalism was forged from a European feudal system rife with racial hierarchies.⁷⁸

European civilization differentiated its peoples by “exaggerat[ing] regional, subcultural and dialectical differences into racial ones.”⁷⁹ According to Robinson, the first modern racialized subjects were European, including the Catholic Irish, Roma, Slavs, and Jews.⁸⁰ Racialization within Europe was a colonial process, one involving processes of invasion, settlement, and expropriation.⁸¹ Plunder and violence were legitimated by a logic of hierarchical racial difference in which racialized subjects at the bottom of the hierarchy have been and continue to be seen as less human than those at the top, and, consequently assigned lower status and less value.⁸²

The analytical framework of racial capitalism has become prevalent in the disciplines of history, Black Studies, and cultural and ethnic studies. The frame also has been used by scholars in such diverse fields as political

71. See *id.*

72. See *id.*

73. See Robinson, *supra* note 9, at 2.

74. *Id.*

75. See Kelley, *Racial Capitalism*, *supra* note 70.

76. See *id.*

77. See *id.*

78. See Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 *Oñati Socio-Legal Series* 108, 114 (2021) [hereinafter Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*].

79. See Robinson, *supra* note 9, at 26.

80. See Satnam Virdee, *Racialized Capitalism: An Account of Its Contested Origins and Consolidation*, 67 *Socio. Rev.* 3, 6 (2019).

81. Recognizing the relationship between capitalism and colonialism, this article focuses on the former in a way that we see as complementary to the scholarly work being done by Indigenous scholars or those using a decolonial or settler colonial frame. See generally, e.g., Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Settler Colonialism Persists* (2020) (arguing that colonialism is the foundation of U.S. racial inequities).

82. See Desiree Fields & Elora Lee Raymond, *Racialized Geographies of Housing Financialization*, 45 *Progress Hum. Geography* 1624, 1628–29 (2021).

science,⁸³ sociology,⁸⁴ public health,⁸⁵ education,⁸⁶ geography,⁸⁷ international relations,⁸⁸ energy geographies,⁸⁹ philosophy, labor relations,⁹⁰ and law,⁹¹ though it is still relatively new within legal academia.⁹²

The academic literature instructs that “racism and capitalism are fundamentally intertwined.”⁹³ The precise phrasing regarding this feature differs slightly among scholars. For example, some scholars explain that “racism and capitalism are inextricably intertwined”⁹⁴ and others use the term to describe a “symbiotic relationship between racism and

83. See, e.g., Siddhant Issar, *Listening to Black Lives Matter: Racial Capitalism and the Critique of Neoliberalism*, 20 *Contemp. Pol. Theory* 48, 49 (2020); Inés Valdez, *Socialism and Empire: Labor Mobility, Racial Capitalism, and the Political Theory of Migration*, 49 *Pol. Theory* 902, 904 (2020).

84. See, e.g., Tressie McMillan Cottom, *Where Platform Capitalism and Racial Capitalism Meet: The Sociology of Race and Racism in the Digital Society*, 6 *Socio. Race & Ethnicity* 441, 441 (2020); Zawadi Rucks-Ahidian, *Theorizing Gentrification as a Process of Racial Capitalism*, *City & Community* 2 (2021); Prentiss A. Dantzler, *The Urban Process Under Racial Capitalism: Race, Anti-Blackness, and Capital Accumulation*, 2 *J. Race Ethnicity & City* 113, 113–14 (2021).

85. See, e.g., Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 *Health Educ. Behav.* 504, 504 (2020); Olufemi O. Taiwo, Anne E. Fehrenbacher & Alexis Cooke, *Material Insecurity, Racial Capitalism, and Public Health*, 51 *Hasting Ctr. Rep.* 17, 17–18 (2021).

86. See, e.g., Jessica Gerrard, Arathi Sriprakash & Sophie Rudolph, *Education and Racial Capitalism*, 25 *Race Ethnicity & Educ.* 425, 425 (2021); Lauren Anderson, *Private Interests in a Public Profession: Teacher Education and Racial Capitalism*, 121 *Tchrs. Coll. Rec.* 1, 3 (2019); Lauren N. Irwin, *Service-Learning and Racial Capitalism: On the Commodification of People of Color for White Advancement*, 44 *Rev. Higher Edu.* 419, 420 (2021).

87. See, e.g., Kendra Strauss, *Labour Geography III: Precarity, Racial Capitalisms and Infrastructure*, 44 *Progress Hum. Geography* 1212, 1215 (2019).

88. See, e.g., Nadya Ali & Ben Whitman, *Racial Capitalism, Islamophobia, and Austerity*, 15 *Int'l Pol. Socio.* 190, 193 (2021); David Wearing, *The Myth of the Reforming Monarch: Orientalism, Racial Capitalism, and UK Support for the Arab Gulf Monarchies*, *Politics* 2 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/026339572111041547> [<https://perma.cc/438X-QK3L>].

89. See Nikki Luke, *Powering Racial Capitalism: Electricity, Rate-Making, and the Uneven Energy Geographies of Atlanta*, *Env't & Plan. E: Nature & Space*, June 17, 2021, at 2–3.

90. See, e.g., Rose Lenehan, *Reparations, Racial Exploitation, and Racial Capitalism* 53 (2019) (Ph.D. dissertation, Massachusetts Institute of Technology) (DSpace@MIT), <https://dspace.mit.edu/handle/1721.1/124099> [<https://perma.cc/L7Q6-ZLGU>]; Jessica M. Otto, *Philosophy's Dirty Little Secret: Are We Trading on Racial Capitalism* 1–2 (unpublished manuscript), https://www.academia.edu/29943071/Philosophy_s_Dirty_Little_Secret_Are_We_Trading_on_Racial_Capitalism [<https://perma.cc/M2F5-R7FA>].

91. See, e.g., Nancy Leong, *Racial Capitalism*, 126 *Harv. L. Rev.* 2151, 2153–54 (2013).

92. See Harris, *Foreword*, *supra* note 6, at 1–2.

93. See Fields & Raymond, *supra* note 82, at 1625.

94. See Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, *supra* note 78, at 114.

capitalism.”⁹⁵ In his review of the literature, sociologist Julian Go concludes that, despite the existence of competing definitions of racial capitalism across the wide variety of academic disciplines that are utilizing the framework, one of the “shared features” is that “*racial capitalism* implies that there are deep connections between racism or racial inequality and capitalism.”⁹⁶

Scholars have deployed racial capitalism as a conceptual framework to understand the inextricable link between capitalism and racialization in global terms as well as on a national scale. One strand of the scholarship has “explor[ed] histories of colonial conquest, imperialism, and dispossession to make visible capitalism’s relation to race.”⁹⁷ Recent work also demonstrates how racial capitalism exploits and degrades nonhuman natural resources contributing to ecological crises,⁹⁸ climate-change-induced displacement of communities of color,⁹⁹ and the accelerated demise of racialized communities through the “slow violence” inflicted by the fossil fuel industry.¹⁰⁰ Other scholars use the frame to understand how capitalism’s racial hierarchies bolster systems of dispossession through gentrification and neoliberal urban governance,¹⁰¹ caste education in public schooling,¹⁰² labor extraction in the carceral state,¹⁰³ unequal access to affordable electricity that produces pollution, poverty, and utility shut-offs,¹⁰⁴ and the emergence and spread of COVID-19.¹⁰⁵

95. *Id.*

96. See Julian Go, *Three Tensions in the Theory of Racial Capitalism*, 39 *Socio. Theory* 38, 39 (2020); see also, Jenkins & Leroy, *supra* note 60, at 3 (explaining that although “definitional debates” exist, many scholars “place an emphasis on explaining how capitalism works rather than setting out to define precisely what capitalism is”).

97. See Go, *supra* note 96, at 40.

98. See Bikrum Singh Gill, *A World in Reverse: The Political Ecology of Racial Capitalism, Politics*, Dec. 19, 2020, at 2 (“Engaging the racial capitalism framework, with its premise of race as a constituting condition of possibility for the emergence of capitalism . . . accords a more foundational significance to race as a structuring relation of power driving planetary ecological crises.”).

99. See Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, *supra* note 78, at 113–19.

100. See Carmen G. Gonzalez, *Racial Capitalism and the Anthropocene*, in *The Cambridge Handbook of Environmental Justice and Sustainable Development* 72, 78 (Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck eds., 2021) [hereinafter Gonzalez, *Racial Capitalism and the Anthropocene*].

101. See Rucks-Ahidiana, *supra* note 84, at 2.

102. See Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling From Reconstruction to Jim Crow*, 54 *Ame. Edu. Rsch. J.* 25, 27–29, 33–35 (2017).

103. See William Calathes, *Racial Capitalism and Punishment Philosophy and Practices: What Really Stands in the Way of Prison Abolition*, 20 *Contemp. Just. Rev.* 442, 448–49 (2017).

104. See Luke, *supra* note 89, at 2–3.

105. See Alexander Liebman, *Kevon Rhiney & Rob Wallace, To Die a Thousand Deaths: COVID-19, Racial Capitalism, and Anti-Black Violence*, 13 *Hum. Geography* 331, 332–33 (2020).

One strand of scholarship that bears directly on issues we take up examines racialized debt within contemporary sites of extraction through domination and dispossession, including systems of educational debt servitude,¹⁰⁶ predatory inclusion in housing financialization,¹⁰⁷ and state-imposed predatory fees and fines.¹⁰⁸ Noting a focus on debt in the work of racial capitalism scholars, historians Destin Jenkins and Justin Leroy suggest that “it is the coercive terms, extended temporality, and redistributive consequences of debt that make credit and debt particularly revealing in transitions between different moments in racial capitalism’s history.”¹⁰⁹

Racialized debt extraction is so prevalent and supported that it thrives even in nonmarket systems intended to be socially beneficial, including higher education and public welfare. In their article examining the student debt crisis in the United States through the lens of racial capitalism, Jalil B. Mustafa and Caleb Dawson demonstrate how student loans are a form of predatory inclusion for Black students rather than a “good debt” that fulfills higher education’s promise of upward social and economic mobility.¹¹⁰ The federal and state governments play an interlocking role with the private student loan industry in a profit-making scheme that leaves far too many Black students with unpayable debts and no college credentials.¹¹¹ Government promotion of broader college access for disadvantaged groups took place alongside decades of increasing public disinvestment in higher education made possible by a dramatic shift from grants to student loans.¹¹² Thus, “[t]hrough student loans, the government [has] reconfigure[d] the costs of ‘providing’ access or justice for Black people into a lucrative economic market more than a benevolent social investment.”¹¹³

Likewise, public welfare programs meant to alleviate poverty can be sites of racialized debt extraction. In her ethnographic study, Erin Torkelson documents the phenomenon whereby monthly cash assistance in the form of family maintenance grants provided by the South African government to poor caregivers were racially expropriated by the multinational corporation contracted to distribute grants.¹¹⁴ The

106. See Ali Mir & Saadia Toor, *Racial Capitalism and Student Debt in the U.S.*, *Organization*, Feb. 24, 2021, at 2.

107. See Fields & Raymond, *supra* note 82, at 1637–39.

108. See Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 *Science* 291, 291–293 (2021).

109. Jenkins & Leroy, *supra* note 60, at 18.

110. See Jalil B. Mustafa & Caleb Dawson, *Racial Capitalism and the Black Student Loan Debt Crisis*, 123 *Tchrs. Coll. Rec.* 1, 9 (2021).

111. *Id.*

112. *Id.*

113. *Id.* at 11.

114. See Erin Torkelson, *Sofia’s Choice: Debt, Social Welfare, and Racial Finance Capitalism*, 39 *Env’t & Plan. D: Soc’y & Space* 67, 73–76 (2021).

corporation took complete control of recipients' grants; it distributed the grants, aggressively marketed high-interest loans on the grants, engaged recipients in other costly financial transactions without their consent, and repaid itself and other lenders before providing grant funds to the intended recipients.¹¹⁵ According to Torkelson, grant recipients contested the debt and "offered trans-generational critiques of indebtedness, explaining how debt has been attached to particular racialized people in South Africa across time."¹¹⁶

Along with the inextricable connection between racism and capitalism, this Essay draws from several key features of racial capitalism to inform our analysis of how racial capitalism operates in state civil courts.

First, racial capitalism is a system of capital accumulation that requires racialized systems of exploitation and extraction.¹¹⁷ According to legal scholar Athena Mutua, "exploitation involves the commodification of labor and its free exchange on markets for incomes that are at least theoretically sufficient to meet life's basic needs."¹¹⁸ Capitalists extract surplus value from laborers by not paying workers the full value of their effort.¹¹⁹ This mechanism of capital accumulation is exploitative because the exchange is not one of equivalents.¹²⁰ Expropriation, which exists alongside exploitation, is a more extreme and oppressive form of capital expansion that involves the outright theft, confiscation, and commandeering of resources and capacities.¹²¹ Expropriation is an ongoing and often violent capitalist process.¹²² In the context of labor relations, some scholars describe expropriation as a form of super-

115. *Id.* at 76.

116. *Id.* at 81.

117. See Nancy Fraser, *Is Capitalism Necessarily Racist?*, *Politics/Letters* (May 20, 2019), <http://quarterly.politicsslashletters.org/is-capitalism-necessarily-racist/> [<https://perma.cc/NJ5J-3FVW>]. Scholars use the terms extraction and expropriation interchangeably.

118. See ClassCrits, *ClassCrits 2020–2021 Workshop #7: Racial Capitalism*, YouTube, at 09:30 (Mar. 10, 2021), <https://youtu.be/47aKTJ1YxJw> [<https://perma.cc/2LN6-UGJA>].

119. See Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 *Critical Hist. Stud.* 163, 164–164 & n.1 (2016) [hereinafter *Fraser, Expropriation and Exploitation*] (citing Karl Marx, *1 Capital*, at 781–802, 854–70, 914–26, 931–40 (Ben Fowkes trans., 1976)).

120. See Nancy Fraser, *Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism*, 86 *New Left Rev.* 55, 60–61 (2014) [hereinafter *Fraser, Behind Marx's Hidden Abode*] ("[A]ccumulation proceeds via exploitation. Capital expands . . . not via the exchange of equivalents, as the market perspective suggest, but through its opposite: via the non-compensation of a portion of workers' labour-time.").

121. See Nancy Fraser, *Expropriation and Exploitation*, *supra* note 119, at 166–69 (highlighting the different forms expropriation takes and the structural reasons capitalistic society resorts to expropriation).

122. *Id.*

exploitation involving below-subsistence wages.¹²³ Slavery, genocide, and colonial settlement are commonly cited as historical instances of expropriation. While less physically violent, contemporary forms of expropriation abound, including dispossession of land and housing through foreclosures on predatory subprime loans, commandeering human capacities through uncompensated prison labor, underfunding racially segregated schools, extracting money from low-income communities through excessive municipal fees and fines, and the perpetual indebtedness of payday loans.

There exist political distinctions between exploitation and expropriation in addition to the economic distinctions described above.¹²⁴ In the political realm, a “hierarchical ordering of society” similarly serves capitalism’s aims.¹²⁵ Capitalism depends on a status distinction between free individuals who are “rights bearing” and those who are “subject peoples, unfree chattel, and dependent members of families and subordinated groups.”¹²⁶ Individuals who have the legal status of free individuals have the right to sell their labor for wages.¹²⁷ Exploitation is the mode of capital accumulation used to extract value from these free, rights-possessing individuals.¹²⁸ Expropriation, by contrast, confiscates value in the form of “labor, property and/or persons”¹²⁹ from defenseless groups, including subject peoples and subordinated groups.¹³⁰ Nancy Fraser stresses the importance of the differing political status of these groups, emphasizing that because subject peoples and subordinated groups lack adequate protection from the state, they are capable of being expropriated over and over again.¹³¹

Second, race-making practices are central to the capitalist social order because “capitalism requires inequality and racism enshrines it.”¹³² The

123. See Burden-Stelley, *supra* note 66, at 17 (“Labor superexploitation[’s] effects are so extreme that it pushes racialized, particularly Black, labor effectively below the level of sheer physical subsistence.”).

124. See Fraser, *Expropriation and Exploitation*, *supra* note 119, at 169 (noting that expropriation and exploitation differ not just economically but also politically and legally).

125. See Fields & Raymond, *supra* note 82, at 1629.

126. See Fraser, *Expropriation and Exploitation*, *supra* note 119, at 169.

127. See *id.*

128. See Go, *supra* note 96, at 43.

129. See Fraser, *Expropriation and Exploitation*, *supra* note 119, at 169.

130. See Go, *supra* note 96, at 43–44 (“[E]xpropriation, which includes slavery and colonialism, extracts value from racialized ‘dependent subjects’ and is what enables exploitation to happen in the first place.”).

131. See Fraser, *Expropriation and Exploitation*, *supra* note 119, at 169 (“[E]xploited workers have the legal status of free individuals . . . [Thus,] their status differs sharply from those whose labor, property, and/or persons are still subject to confiscation on the part of capital; far from enjoying protection, the latter populations are defenseless, fair game for expropriation—again and again.”).

132. See Go, *supra* note 96, at 43 (citing Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, Soc. Just. (Feb. 23, 2015), <http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/> [<https://perma.cc/YDT8-T7MH>]); see also Jenkins

process of racialization involves creating “racial” hierarchies of superior and inferior groups, which are premised on a set of markers, including ethnicity, language, religion, indigenosity, and culture, as well as physical characteristics, such as skin color.¹³³ Capitalism, Robinson explains, is an extension of feudalism’s race-making practices into the modern world’s political and economic relations.¹³⁴ Capitalism’s survival depends on “the elaboration, reproduction and exploitation of racial difference,” which produces a lesser, inferior population that is treated as “surplus, expandable and disposable.”¹³⁵ Hierarchical racial differentiation is intrinsic to capitalism in all its manifestations, extending from earlier eras of slavery and imperialism, to industrial capitalism, and including present day financial capitalism.¹³⁶ Racial capitalism is and has always been capitalism, not simply a form of capitalism.¹³⁷

All workers and individuals—Black, brown, white, indigenous, Asian, and more—are targets of racial capitalism and made available for exploitation and extraction under this system.¹³⁸ Because work and society are organized around racialized hierarchies and domination, however, not all workers and individuals receive equal treatment. Looking back to the colonial era, for example, the fact that white indentured servants held a superior social, legal, and political status to Black slaves did not exempt them from experiencing exploitation in the labor market.¹³⁹ White workers in the contemporary capitalist system continue to be subjected to exploitative labor market practices, including stagnant wages, right to work laws, and the elimination of union protections, and many struggle to survive. That said, this Essay’s emphasis is primarily on Black communities that are subject to race-making practices and social caste norms that identify racialized groups as lesser and that subject them to extreme and relentless forms of extraction.

Third, racial capitalism is “a highly malleable structure” that is “dynamic and changing” and manifests differently in different times and contexts.¹⁴⁰ As historians Jenkins and Leroy explain:

& Leroy, *supra* note 96, at 3 (“[R]ace serves as a tool for naturalizing the inequalities produced by capitalism, and this racialized process of naturalization serves to rationalize the unequal distribution of resources, social power, rights, and privileges.”).

133. See Virdee, *supra* note 80, at 18–19; see also Gonzalez, *Racial Capitalism and the Anthropocene*, *supra* note 100, at 73.

134. See Burden-Stelley, *supra* note 66, at 9.

135. See Ida Danewid, *The Fire This Time: Grenfell, Racial Capitalism and the Urbanisation of Empire*, 26 *Eur. J. Int’l Rels.* 289, 297 (2019).

136. See Fields & Raymond, *supra* note 82, at 1628–29; see also Robin D.G. Kelley, *Foreword to Cedric J. Robinson, Black Marxism*, at xii–xiii (3d ed. 2020).

137. See Danewid, *supra* note 135, at 297–98; see also Jodi Melamed, *Racial Capitalism*, 1 *Critical Ethnic Stud.* 76, 77 (2015) (“[T]he term ‘racial capitalism’ requires its users to recognize that capitalism *is* racial capitalism.”).

138. See Virdee, *supra* note 80, at 6, 22.

139. See Harris, *Whiteness as Property*, *supra* note 57, at 1716–18.

140. See Jenkins & Leroy, *supra* note 60, at 3, 12.

[Racial capitalism] has at times relied on open methods of exploitation and expropriation that wrench racialized populations into capitalist modes of production and accumulation, such as slavery, colonialism, and enclosure. But racial capitalism also relies on exclusion from those same modes of production and accumulation in the form of containment, incarceration, abandonment, and underdevelopment for a racial surplus population. The maintenance of racial capitalism can even rely on the limited inclusion and participation of racially marked populations; by extending credit and political rights to these populations, the pervasive “racial” of racial capitalism recedes, entrenching itself through obfuscation.¹⁴¹

And, finally, the racial capitalism frame is relevant to sites commonly understood as nonmarket,¹⁴² including state institutions such as public schools,¹⁴³ prisons, and, for our purposes, state courts. Racial capitalism scholars utilize an expanded view of capitalism as an institutionalized social order, not simply an economic system.¹⁴⁴ The racial capitalism frame explodes the idea that economic and political spheres are separate and distinct forms of governance where the “economic” is assumed to be a space where free and equal individuals come together.¹⁴⁵ Racial capitalism insists that this assumption is an ideological obfuscation that, in fact, perpetuates racialized expropriation and exploitation. Further, racial capitalism is made possible by the state, which operates in tandem with the market and supplies the “legal framework underpinning private enterprise and market exchange.”¹⁴⁶ For example, in her case study of the electrical utility, Georgia Utility, and its electrification of Atlanta, Nikki Luke demonstrates the critical role of the state in allowing energy capital to extract disproportionate profits from devalued racialized communities, contributing to debt accumulation, utility shutoffs, and pollution exposure.¹⁴⁷ Whether or not we conceive of state institutions as existing outside the market, states also regularly engage in racialized governing, profit-making, and predation, and their practices ought to be problematized.¹⁴⁸ More specifically for our purposes, the legal system is neither neutral nor merely complicit in the operations of racial capitalism. “In [law’s] capacity as a tool for maintaining ‘order,’” Angela Harris

141. See *id.* at 3–4.

142. See Harris, Foreword, *supra* note 6, at xi.

143. See Leong, *supra* note 91, at 2155 (describing “the premium that privileged segments of American society place upon diversity, both within and beyond institutions of higher education”); Pierce, *supra* note 102, at 24 (providing an account of “Du Bois’s caste analysis of schooling in racial capitalist society”).

144. See Fraser, Expropriation and Exploitation, *supra* note 119, at 173.

145. See Harris, Foreword, *supra* note 6, at ix–x.

146. See Fraser, Behind Marx’s Hidden Abode, *supra* note 120, at 64.

147. See Luke, *supra* note 89, at 3–9.

148. See, e.g., Bernadette Atuahene, Predatory Cities, 108 *Calif. L. Rev.* 107, 119–24 (2020) (detailing aspects of a “longer history of state actors using racially biased laws and policies to construct vulnerability in Detroit and other African-American communities”).

explains, it has, “in partnership with economics, ruthlessly adopted commitments that have fostered and protected racial capitalism.”¹⁴⁹

B. *A Theory of Racial Capitalism in the Civil Courts*

As an arm of the state, the civil courts both enforce and legitimize racial capitalism. They redistribute assets through a pattern of racialized extraction and dispossession, thereby growing profit for those with capital. Through the seizure of assets by force, combined with the threat of force against those who do not comply, the civil courts impose fear, maintain social control, and enforce the social order.

Take, for example, eviction courts, in which a disproportionate number of defendants are Black women¹⁵⁰ and the forum functions more as a vehicle for rent collection than to ferret out facts, interpret the law, or reach a just outcome.¹⁵¹ Nicole Summers has shown how eviction courts serve to discipline tenants through settlements that produce a system of “civil probation.”¹⁵² As several social scientists have demonstrated, eviction courts function primarily to extract wealth, impose fear, and enforce existing power dynamics.¹⁵³ One of us has further argued that eviction courts operate to “enforce the existing social order, specifically the hierarchical relations between landlords and tenants,” which are inextricable from the racialized assignment of property rights.¹⁵⁴ In eviction cases and beyond, we argue, a primary function of the civil courts is the racialized production of profit.

The design features of the courts support this system of exploitation. The largest categories of civil cases—debt collection, eviction, and family law—fill lower state court dockets, and these courts’ processes share certain features: speed, lack of evidence, lack of discovery, high rates of default judgments, the routine absence of legal representation for the vast majority of defendants, the common presence of legal representation for select groups (creditors and landlords in particular), and others.¹⁵⁵

149. Harris, Foreword, *supra* note 6, at xiv; see also Virdee, *supra* note 80, at 9 (“[T]he state intervenes and comes to serve as stabilizer and enforcer of the capitalist order . . .”).

150. See *supra* note 2.

151. See Sabbeth, *Eviction Courts*, *supra* note 2, at 396, 401–02; Sudeall & Pasciuti, *supra* note 26, at 1368.

152. Nicole Summers, *Civil Probation*, 75 *Stanford L. Rev.* (forthcoming 2023) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493 [<https://perma.cc/T2L7-B3SR>] [hereinafter Summers, *Civil Probation*] (relying on an empirical investigation of 1,000 eviction cases to demonstrate that eviction settlements—which represent the most common case resolution—constitute a form of financial and behavioral surveillance akin to criminal probation).

153. Garboden & Rosen, *supra* note 28, at 640–41; Gomory, *supra* note 14, at 2.

154. Sabbeth, *Eviction Courts*, *supra* note 2, at 368–71, 402–03.

155. See Sabbeth, *Eviction Courts*, *supra* note 2, at 376–85; Wilf-Townsend, *supra* note 1, at 1709–10.

In Part III, we will draw on examples from one of the most common civil legal issues litigated in state courts—debt collection—to illustrate the mechanics of how this operates. But first this subpart presents how the theoretical framework of racial capitalism sheds light on our understanding of the civil courts.

1. *Racial Commodification*. — A primary ingredient of the civil legal system is racial commodification. This includes the translation of people into monetary values, division of people into categories of racial hierarchy, and racialized (de)valuation of personhood. Slavery was perhaps the original commodification of people in the United States.¹⁵⁶ Shauna J. Sweeney explains:

[On slave ships, enslaved people were treated as] numerical abstractions that filled shipping logs, manifests, and margins as exchange values Next, enslaved Africans encountered the auction block, a site at which value was once again affixed to their souls, with considerations taken for age, sex, and (dis)ability. The violence of sale was accompanied by extreme alienation and dislocation as this economic system attempted to wrest commodity from human form. Race came to function as both a transatlantic currency and a theology, tethering physiognomy and a belief in intrinsic difference to the concept of enslaveability.¹⁵⁷

Further, “black women’s wombs were the incubators of capital accumulation,”¹⁵⁸ and were regulated as such, with “planter-legislators [who] looked to enslaved women to enlarge their profits.”¹⁵⁹

While slavery epitomized it, systems of racialized valuation and extraction continue today.¹⁶⁰ Some scholars have argued that abolition itself did not yield full freedom but rather legitimized domination in a different form, as a system based on contracts and the illusion of choice; former slaves were denied access to material resources, so abolition created a “formal equality” of “white entitlement and black subjection.”¹⁶¹ Sweeney observes that with abolition Black women’s children lost value, and they are now treated as “a surplus, disposable population subject to judicial murder or the slow death of incarceration and poverty.”¹⁶²

156. Harris, *Whiteness as Property*, supra note 57, at 1720 (“[T]he critical nature of social relations under slavery was the commodification of human beings.”).

157. Shauna J. Sweeney, *Gendering Racial Capitalism and the Black Heretical Tradition*, in *Histories of Racial Capitalism*, supra note 10, at 53, 59 (footnotes omitted).

158. *Id.*

159. *Id.* at 59–60 (describing slave laws that drew on the law of property, rather than of family lineage, for precedent); Harris, *Whiteness as Property*, supra note 57, at 1719–20 (explaining that Thomas Jefferson “viewed slaves as economic assets, noting that their value could be realized more efficiently from breeding than from labor”).

160. Jenkins & Leroy, supra note 60, at 3–4 (noting methods of racial capitalism change over time).

161. Golub, supra note 63 (quoting Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* 115–17 (1997)).

162. Sweeney, supra note 157, at 63.

The civil courts play a fundamental role in that treatment, serving as state-run sites of racialized commodification. The process of racialized commodification stamps out the human elements of people's lives and replaces them with monetary values.¹⁶³ In child support cases, for example, noncustodial fathers, disproportionately Black men, are not even permitted to raise issues related to maintaining relationships with their children.¹⁶⁴ When a Black father attempts to raise such claims, he is shut down, as the courts in such cases will consider only his obligation to pay child support, and the father would need to file an entirely separate action to address access to and custody of his children.¹⁶⁵ In this way, Black fathers are commodified as sources of labor to produce payments instead of humanized as parents seeking to nurture their children. The courts' devaluation of Black families also extends to the devaluation of Black children, whose need for their dads' love and support are hardly served by the state hunting down and locking up their fathers for failure to pay.¹⁶⁶

Child support courts also devalue the custodial parents, usually mothers, in whose name the state purports to pursue payment. If a mother receives public benefits, she is required as a condition of those benefits to assign to the state any right to sue for child support *and* to cooperate with the state's efforts to do so.¹⁶⁷ This cooperation mandate includes showing up for and participating in enforcement proceedings, even if the mother does not want to do so or believes it is contrary to her or her children's best interests.¹⁶⁸ Rather than balancing the needs of one parent against those of the other, child support courts involve the government exerting force on both parents for the purposes of collecting past payments (and shockingly large amounts of interest on those payments)¹⁶⁹ for its own coffers. Whether the plaintiff is a private actor or the state itself, the court processes commodify and devalue the human beings involved.

To be sure, much of civil law could be said to commodify human experience in that it translates harms and remedies into monetary terms. Yet the process of racialized commodification also involves courts' exploitation and devaluation of the claims of people raced as inferior. This

163. See, e.g., Sabbeth, (Under)Enforcement, *supra* note 26, at 121–27 (describing how damage calculations devalue claims based on race, class, and gender biases, and noting in particular that rent abatements based on “analyzing housing as a contracted-for commodity fail[] to capture the reality of housing as a place to live”).

164. Tonya L. Brito, Nonmarital Fathers in Family Court, 99 Wash. U. L. Rev. (forthcoming 2022) (manuscript at 15) (on file with the *Columbia Law Review*) [hereinafter Brito, Nonmarital Fathers in Family Court].

165. *Id.*

166. See *Turner v. Rogers*, 564 U.S. 431, 436 (2011) (describing a series of jail terms for failure to pay child support).

167. Tonya L. Brito, The Welfarization of Family Law, 48 U. Kan. L. Rev. 229, 265–67 (2000).

168. *Id.*

169. *Id.* See also Tonya L. Brito, The Child Support Debt Bubble, 9 UC Irvine L. Rev. 953, 956–67 (2019).

allows the courts to facilitate the increased accumulation of capital by those with social and economic power.

2. *Accumulation of Capital*. — A major function of the civil courts is to facilitate the routine transfer of assets from individuals, disproportionately people of color, to white-controlled corporations.¹⁷⁰ In Daniel Wilf-Townsend's recent empirical analysis of civil court cases, he summarized his findings as follows:

[A] significant portion of courts' dockets are dedicated to the near-automatic processing and granting of the claims of large corporations [The courts operate] as a site for private companies to petition the state for permission to redistribute others' assets to themselves—permission which appears to be granted frequently without much, if any, scrutiny.¹⁷¹

The corporations accumulating assets through the courts are largely white-dominated.¹⁷² The boards of major corporations are predominantly white men, and the boards control corporate decisions.¹⁷³ As for who benefits from the profits of large corporations, the corporate form distributes profits not to stakeholders, like employees, but to shareholders and secondarily, to managers, two groups that are overwhelmingly white.¹⁷⁴

Other than the state, the most frequent plaintiff in the civil courts is a corporation, and the largest corporations use the courts the most frequently.¹⁷⁵ This bears repeating: Corporations are the social actors that

170. Wilf-Townsend, *supra* note 1, at 1743, 1750–51.

171. *Id.*

172. Jenkins & Leroy, *supra* note 60, at 4 (quoting Neville Alexander, *An Illuminating Moment: Background to the Azanian Manifesto*, in *Biko Lives!: Contesting the Legacies of Steve Biko* 157 (Andile Mngxitama, Amanda Alexander & Nigel C. Gibson eds., 2008)).

173. Deloitte, *Missing Pieces Report: The Board Diversity Census of Women and Minorities on Fortune 500 Boards* 35 (6th ed. 2021), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/missing-pieces-fortune-500-board-diversity-study-6th-edition-report.pdf> [<https://perma.cc/594W-2WZJ>]; Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long.*, *N.Y. Times* (Jan. 3, 2022), <https://www.nytimes.com/2022/01/03/business/corporate-board-diversity.html> (on file with the *Columbia Law Review*) (“With their ability to steer companies’ biggest decisions and pick key executives, boards wield crucial power in American business and society. They have long been overwhelmingly white and male.”).

174. See Abbye Atkinson, *Commodifying Marginalization*, 71 *Duke L.J.* 773, 823–24 (2022) (“[T]he increasing privatization of public welfare has pitted one vulnerable group against another By sending individual workers and pension funds alike into the market to procure their own retirement security, the state has created a new breed of capitalist”); Jacob Greenspon, *How Big a Problem Is It That a Few Shareholders Own Stock in So Many Competing Companies?*, *Harv. Bus. Rev.* (Feb. 19, 2019), <https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies> [<https://perma.cc/2S25-F2XQ>] (noting that large investment firms, not individuals, control most shares and that ownership is increasingly concentrated into fewer and fewer hands).

175. Wilf-Townsend, *supra* note 1, at 1708.

make the most use of the courts to press claims.¹⁷⁶ We highlight the role of corporations in the courts for three reasons. First, we do so in an effort to turn the “gaze”¹⁷⁷ on not only blackness but also whiteness,¹⁷⁸ studying not only those from whom land and labor are stolen but also those doing the stealing.

Second, it is notable that the courts serve corporations—nonhuman instruments constructed to generate profit—more frequently than any human party seeking to meet human needs. Corporations’ role as the courts’ biggest private users is particularly interesting in the context of developing doctrine denying standing to human beings.¹⁷⁹

The corporate structure functions to separate corporate activities from the people who own and control them. The presence of any of those people in a case before the courts is filtered through the corporate instrument, depersonalizing the conflict with the humans who appear before the court. To put a finer point on it, underlying each case is a conflict over resources, but the corporate form launders the social relations such that the individuals who benefit never appear, and they can credibly claim no involvement in the violence perpetrated on their behalf. This mystification and abstraction is another form of the commodification of racial capitalism: Just as poor people of color are treated as commodities, through the corporate structure, the humanity of the

176. See, e.g., Gomory, *supra* note 14, at 2 (finding that corporate landlords file for eviction and evict at rates two to three times higher than non-corporate landlords); Rutan & Desmond, *supra* note 14, at 71–76 (finding that a small number of landlords were responsible for a significant percentage of all evictions).

177. bell hooks, *Black Looks: Race and Representation* 122 (2015) (identifying the role of “oppositional gaze” among practices of resistance to the dominant order); Robtel Neajai Pailey, *De-Centring the ‘White Gaze’ of Development*, 51 *Dev. & Change* 729, 733 (2019) (highlighting how development literature has assumed a “white gaze” that “measures the political, socio-economic and cultural processes of Southern black, brown, and other people of colour . . . and finds them incomplete, wanting, inferior or regressive”); Verónica Caridad Rabelo, Kathrina J. Robotham & Courtney L. McCluney, “Against a Sharp White Background”: How Black Women Experience the White Gaze at Work, 28 *Gender Work Org.* 1840, 1854–55 (2020) (“By identifying the white gaze as the mechanism by which whiteness manifests and its associated practices, we *reverse the gaze*—that is, invert it onto whiteness—to spotlight how racism frames Black women’s everyday work experiences and illuminate the otherwise invisible role that whiteness assumes in organizations.”).

178. See generally Harris, *Whiteness as Property*, *supra* note 57 (examining whiteness as a form of property and advocating for its delegitimization through affirmative action); Erika K. Wilson, *Monopolizing Whiteness*, 134 *Harv. L. Rev.* 2382 (2021) (analyzing white-student segregation through different frameworks and arguing for its regulation).

179. See, e.g., *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2201, 2214 (2021) (ruling that plaintiffs improperly flagged as potential terrorists and drug traffickers lacked standing to pursue claims against the credit reporting companies). While standing doctrine has taken a particularly sharp turn, it reflects a longstanding tradition of preventing subordinated people from using the courts to pursue their needs. Recall how *Dred Scott* was deemed not to possess the standing to use the courts at all, let alone to bring claims that would grant him freedom. See *supra* note 151 and accompanying text.

majority-white owners also disappears, and in its place is simply the abstract pursuit of maximum profit.

A third reason to spotlight the prominence of corporations in the court system is that it reflects the significance of the profits the courts generate.¹⁸⁰ Wilf-Townsend's study is particularly useful because, while most access-to-justice literature concerns itself with what defendants stand to lose, his paper demonstrates what plaintiffs gain.¹⁸¹ To be clear, the civil courts impose disproportionate *burdens* according to race, and we want to underscore that this reality deserves far greater attention, but also we believe it is vitally important to keep an eye on the significant *benefits* the system produces, and for whom. Although the individual cases have been described as "relatively small-value,"¹⁸² in the aggregate, they generate large sums of money.¹⁸³ Indeed, money making is their aim.¹⁸⁴ To state the obvious, by law, corporations are entities whose primary if not sole purpose is to generate profit. Through the courts, the state assists these private parties in that endeavor.

3. *Extraction and Dispossession.* — Powerful private actors can use the courts to transfer and generate wealth because courts engage in racialized (de)valuation of the parties and claims. To take an example that occurs daily, even when residences are in shockingly dangerous condition,¹⁸⁵ courts evict people for nonpayment of rent without consideration of whether the obligation to pay was superseded by the owner's failure to provide a habitable home.¹⁸⁶ As sociologist Matthew Desmond has noted,

180. Jenkins & Leroy, *supra* note 60, at 7–8 (citing Barbara Fields, *Slavery, Race, and Ideology in United States History*, 181 *New Left Rev.* 95, 115 (1990)) (echoing Fields' critique of those who focus on slavery as a system of race relations and miss that it was a system for the generation of huge profits through the production of cotton, sugar, rice, and tobacco).

181. This point is limited to state courts, as is the scope of this Essay generally. As Wilf-Townsend observes, in federal courts "these roles are reversed"; federal courts host defendants with far more resources and federal judges create many more obstacles for plaintiffs to overcome. See Wilf-Townsend, *supra* note 1, at 1711.

182. *Id.* at 13.

183. See *infra* section III.B.

184. See Fred Tuomi, Chief Executive Officer, Colony Starwood Homes, Q4 2016 Results – Earnings Call (Feb. 28, 2017) (transcript available at <https://seekingalpha.com/article/4050611-colony-starwood-homes-sfr-ceo-fred-tuomi-on-q4-2016-results-earnings-call-transcript>) (describing profits in quarterly earnings phone call).

185. Conditions include toxic mold or lead paint that causes or exacerbates asthma; the absence of heat or running water necessary to maintain basic hygiene and health; electrical wiring that results in fires; structural defects that result in broken bones; and other hazardous conditions. See Sabbeth, (Under)Enforcement, *supra* note 26, at 105.

186. Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord–Tenant Reform*, 69 *Rutgers U. L. Rev.* 1, 5 (2016) (describing how infrequently the defense of the warranty of habitability is raised); Sabbeth, *Eviction Courts*, *supra* note 2, at 381 (describing limits on consideration of substandard conditions); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 *U. Chi. L. Rev.* 145, 194 (2020) ("Tenants with meritorious warranty

purchasing real estate in poor Black neighborhoods and treating such properties as cash cows for rent, while allowing them to deteriorate without maintenance, is a too-common model of exploitation for profit.¹⁸⁷

Our point is that this racialized profit model—one that reaps enormous sums for owners of capital, at the expense of the dignity and safety of those it exploits—works for those who pursue it *because of how the courts operate*.¹⁸⁸ Courts reliably assist with extracting profit from these investments. The civil courts devalue the interests of people of color to prioritize economic gain over human values.¹⁸⁹ Courts treat the inability to pay rent as a more serious violation of law than refusal to maintain a home in safe condition.¹⁹⁰ This exemplifies how the courts operate as sites of racialized commodification, dramatically devaluing claims to human life to pave the way for the right to make a profit.

a. *Extraction.* — Courts redistribute resources by legitimizing the extraction of assets from subordinate people. Courts authorize the collection of financial assets through orders and judgments subject to enforcement by officials. They also authorize private parties to engage in seizure of assets, such as garnishment of wages or bank accounts after judgment.¹⁹¹ Importantly, the courts provide a quick and cheap mechanism, making it cost-effective for corporations to pursue thousands of individuals for small amounts of money that they may not owe.¹⁹²

The courts also increase the extraction of wealth from subordinated communities by inflating the amounts that plaintiffs can claim. Landlords list court costs and attorneys' fees as justifications for inflated amounts.¹⁹³

claims were statistically just as likely to receive a possessory judgment as tenants without warranty claims.”).

187. Matthew Desmond, *Evicted: Poverty and Profit in the American City* 148–51 (2016); see also Suzannah Cavanaugh, *Bronx Building Where Deadly Fire Occurred Had Faulty Doors, Heat Issues*, RealDeal (Jan. 10, 2022), <https://therealdeal.com/2022/01/10/bronx-building-where-deadly-fire-occurred-had-complaints-of-faulty-door-heat-issues/> [https://perma.cc/UL4K-YXYS] (noting the roughly twenty-five-million-dollar investment used to purchase a group of buildings in disrepair and identifying the property's substandard conditions, which caused the fire deaths of seventeen people).

188. See, e.g., Sabbeth, *Eviction Courts*, *supra* note 2, at 376–85, 395 (describing the law and culture of eviction courts).

189. See *id.* at 400; see, e.g., *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (holding that the balance of equities did not favor continuing an eviction moratorium during the COVID-19 pandemic because the possibility of missed or delayed rent payments constituted “irreparable harm” for landlords and outweighed public health risks including that of tenant and community deaths).

190. See, e.g., Sabbeth, *(Under)Enforcement*, *supra* note 26, at 142–43; Summers, *Civil Probation*, *supra* note 152, at 49.

191. Wilf-Townsend, *supra* note 1, at 1741–42.

192. *Id.* at 14–16 (describing debt collection as a “business model centered around litigation, developing highly routinized, low-cost-per-case systems to file complaints, obtain judgments, and proceed with garnishment” that relies on “a presumption of uninspected claims”).

193. See, e.g., Tuomi, *supra* note 184 (noting profits made from such fees).

In serial eviction proceedings against the same tenant, corporate landlords repeatedly allege nonpayment and then use the courts to extract not just rent but also these additional charges.¹⁹⁴ The courts thereby assist in increasing profits for those with capital.

The extraction process in the courts also perpetuates the racialized subordination of labor.¹⁹⁵ Courts sanction patterns of indentured servitude that structure people's lives and livelihoods. For too many, rent takes the majority of their income.¹⁹⁶ Subordinated people are literally killing themselves to earn enough money to pay the rent. They are working in dangerous jobs, or three jobs.¹⁹⁷ They are risking child protection services going after them for leaving kids unattended.¹⁹⁸ They are putting up with harmful and counterproductive work requirements, invasions of privacy, and abuse as conditions of public assistance.¹⁹⁹ Meanwhile,

194. Garboden & Rosen, *supra* note 28, at 649 (describing the “[s]tate as a [c]ollection Agency” for fees); Hepburn et al., *supra* note 2, at 656 (indicating that people of color are more likely to be subject to serial evictions); Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 *Soc. Forces* 316, 316 (2021) (estimating fees assessed and collected); Sudeall & Pasciuti, *supra* note 26, at 1369.

195. See Frederick Cooper, Thomas C. Holt & Rebecca J. Scott, *Beyond Slavery: Explorations of Race, Labor and Citizenship in Postemancipation Societies* 287 (2000) (noting that freedom from formal slavery “did not break the association between race and labor, but in some ways deepened the racialization of the labor question”).

196. See Whitney Airgood-Obrycki, Alexander Hermann & Sophia Wedeen, *Joint Ctr. for Hous. Stud., The Rent Eats First* 1 (2021), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_rent_eats_first_airgood-obrycki_hermann_wedeem_2021.pdf [<https://perma.cc/RX8V-HB6G>] (“Even before the COVID-19 pandemic . . . [n]early a quarter of renter households were spending more than half of their incomes on rent each month, leaving little income to cover other expenses.”); Nat’l Low Income Hous. Coal., *Out of Reach 6* (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf [<https://perma.cc/BX9G-LGK8>] (“Black and Latino workers face larger gaps between their wages and the cost of housing than white workers.”).

197. Matthew Desmond, *Opinion, The Rent Eats First, Even During a Pandemic*, *N.Y. Times* (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/coronavirus-evictions-superspreader.html> (on file with the *Columbia Law Review*).

198. Roberts, *Shattered Bonds*, *supra* note 2, at 36 (“A common ground for neglect is leaving a child unattended for long enough to endanger the child’s health or welfare Yet many poor mothers have had their children taken away by the state when they have left them alone . . . so that they could keep their jobs.”).

199. Public assistance has always been racialized, gendered, and coercive in the United States. See Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in *Women, the State, and Welfare* 92, 93–96 (Linda Gordon ed., 1990). Recent investigative journalism shows the forms this takes today: In New Mexico and other states, single mothers applying for public assistance are forced to identify the father of their child (and his eye color and license plate number) and recall the exact date when they got pregnant. Eli Hager, *The Cruel Failure of Welfare Reform in the Southwest*, *ProPublica* (Dec. 30, 2021), <https://www.propublica.org/article/the-cruel-failure-of-welfare-reform-in-the-southwest> [<https://perma.cc/XDR2-UZ4K>]. In Utah, families seeking aid are subtly pushed to the Church of Jesus Christ of Latter-day Saints, where they’re pressured to get baptized or perform other religious activities, like reading aloud

unrealistic child support rulings push Black men into substandard, racialized labor markets.²⁰⁰ Such exploitation of Black communities as “workers and consumers” has too often been an essential component of capitalist development.²⁰¹

Today, through court judgments, and the threat thereof, the state redistributes income and assets from people lacking material resources to entities whose purpose is to accumulate such resources for white capital.

b. *Dispossession*. — Court practices that generate and support the accumulation of profit rely on the violence of dispossession²⁰²—the confiscation and commandeering of resources and freedoms by force.²⁰³ Across the three largest categories of cases in state courts—eviction, debt, and family law—dispossession is almost universally the express purpose. What is at stake may be the loss of a home, financial capital, or family ties. In each case, the plaintiff seeks to take something away from the defendant, and the state provides tools with which to make that happen. Racially subordinated people are overrepresented among those whose homes, finances, and families are compromised, and the vulnerability to dispossession is itself racialized.

The dispossession goes beyond the material. As K-Sue Park has observed, “The association of indebtedness with the subordination of being nonwhite in America appears to have become a lasting American discursive tradition.”²⁰⁴ So too is the judgment that Black mothers and fathers are not fit to parent.²⁰⁵ Whether an eviction, debt collection, or family law decision, judgments also take away and reserve for others the privileges of a “good” record, which becomes equated with whiteness.²⁰⁶

from the Book of Mormon, in order to get help. *Id.* And in Arizona, poor moms who could have benefited from welfare are instead investigated, at nationally unparalleled rates, by a child services agency funded by welfare dollars. *Id.*

200. See Noah D. Zatz & Michael A. Stoll, Working to Avoid Incarceration: Jail Threat and Labor Market Outcomes for Noncustodial Fathers Facing Child Support Enforcement, 6 *Russell Sage Found. J. Soc. Sci.*, at 55, 55–58 (2020).

201. Manning Marable, *How Capitalism Underdeveloped Black America: Problems in Race, Political Economy, and Society* 61 (3d ed. 2015).

202. See Fields & Raymond, *supra* note 82, at 1628.

203. See *supra* section II.A (describing expropriation as “a more extreme and oppressive form of capital expansion that involves the outright theft, confiscation and commandeering of resources and capacities”).

204. K-Sue Park, *supra* note 61, at 40.

205. See Dorothy Roberts, The Value of Black Mothers’ Work, in *Critical Race Feminism* 312, 313–14 (Adrien Katherine Wing ed., 1997); Brito, Nonmarital Fathers, *supra* note 164, at 9; Molly Schwartz, Do We Need to Abolish Child Protective Services?, *Mother Jones* (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services> (on file with the *Columbia Law Review*) (“As [caseworker] Sarah reflects on her experience [working at a child welfare agency], she concludes that the racial disparity in the numbers of children who were removed came from a deep-seated assumption that many Black parents are incapable of parenting.”).

206. See Harris, Whiteness as Property, *supra* note 57, at 161–62; Kathryn A. Sabbeth, Erasing the “Scarlet E” of Eviction Records, Appeal: The Lab

The judgment that one has failed to pay debts is deemed personal failure.²⁰⁷ The determination that one is not fit to parent is even worse.²⁰⁸ All of these civil judgments create stigma,²⁰⁹ which then marks the dispossessed as inferior.

Compounding the injury, the production of stigma is not merely an accidental byproduct of the court system but a special source of profit. Credit scores and rental histories, based largely on civil judgments and eviction filings, are batched and sold as part of a billion-dollar industry that the civil courts make possible.²¹⁰ Once marked with the “Scarlet E” of eviction or bad credit, people are deemed undesirable, dispossessed of access to housing, education, and other fundamentals of civic life.²¹¹

Through these processes of racialized commodification, dispossession, and extraction, courts facilitate the accumulation of wealth and perpetuate racial inequality.

III. DEBT COLLECTION, DEFAULTS, AND THE COURTS

The preceding sections have taken a macro view of racial capitalism, showing how civil courts, purportedly an institution in which private parties litigate contractual and family law disputes, can be viewed instead as sites of racial capitalism, in which the state and a small group of powerful capital holders extract and accumulate hard-earned wealth from marginalized communities, dispossess families of their income and assets, and devalue life sustaining needs such as housing stability, financial security, and family coherence.

This Part explores civil courts as participants in this endeavor. Courts have implemented an adjudicatory framework that appears legal in name, and at least formally in terms of structure, but that, as a practical matter, provides a means for dominant actors, primarily corporations and other arms of the state, to strip racialized groups of housing, shelter, wealth, and

(Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records> [<https://perma.cc/VFU2-HSLP>] [hereinafter Sabbeth, Erasing the “Scarlet E”].

207. See Abbye Atkinson, *Borrowing Equality*, 120 *Colum. L. Rev.* 1403, 1448–54 (2020) [hereinafter Atkinson, *Borrowing Equality*] (describing the social construction of debtors’ subordinated social status); Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16, 916 n.193 (summarizing literature on shame associated with debt); cf. Louise Seamster, *Black Debt, White Debt*, 18 *Contexts* 30, 31–35 (2019) (arguing that “good debt” and “bad debt” are correlated with race, and Black debt is socially constructed as “morally stigmatizing,” while white debt can be a positive “status marker”).

208. See Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915, n.192 (collecting literature).

209. Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16.

210. See Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, *supra* note 206; Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16.

211. See Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, *supra* note 206 (describing how “the dissemination of eviction records pushes already marginalized populations into substandard . . . markets,” increases housing segregation, and “entrenches inequality”).

critical family relationships. In doing so, civil court processes legitimize, normalize, and perpetuate a centuries-old capitalist racial hierarchy. The courts' role is both passive and active in this regard. The pervasive use of specific practices across thousands of local courts lends credence to the view that courts are willing to play this role, and that race is a critical element in determining when, how, and where these frameworks are enforced.²¹²

The courts utilize a variety of mechanisms that support and maintain a system of racial capitalism. Courts could conceive of themselves as sites of protection for basic human rights and racial justice. Instead, they are highly malleable institutions that capital holders can manipulate to their advantage. We attribute courts' perpetuation of racial subjugation to a devaluation of the lives of marginalized people, a discounting of their humanity, and a commodification of their basic needs.

While a full examination of the courts' role in legitimizing racial capitalism is beyond the scope of this Essay, we begin the project of calling attention to this phenomenon by illuminating one example of how civil courts perpetuate the racialized pillage of wealth. We rely on the example of consumer debt collection to demonstrate how destructive court practices infuse the civil legal system and contribute to racial capitalism. Far from exhaustive, this is but a single illustration of a plethora of court practices, utilized in a wide range of case types, that position civil courts as a site of racial capitalism. We do not suggest that correction of these practices would suffice to reverse courts' participation in racial subordination; we intend only to illustrate how courts contribute to this societal problem.

A. *Debt and the Racialization of Debt Delinquency*

Debt collection is the cornerstone of the civil legal system. The civil courts collect many types of debt—rent debt, child support debt, and mortgage debt, among others. The collection of consumer debt, in particular, accounts for roughly fifteen to thirty percent of civil dockets.²¹³ This poorly understood sector of the civil courts includes aggressive collection of healthcare debt, educational debt, credit card debt, and debt taken on to

212. Dantzer, *supra* note 84, at 126 (“Black neighborhoods are sites of spatial exploitation where predatory development, segrenomics, and exploitation dominate[.]” (citing Henry Louis Taylor Jr., *Disrupting Market-Based Predatory Development: Race, Class, and the Underdevelopment of Black Neighborhoods in the U.S.*, 1 *J. Race Ethnicity & City* 16, 17 (2020))).

213. Shanahan et al., *Institutional Mismatch*, *supra* note 11, at 1495 (analyzing eight years of data collected by the National Center for State Courts and roughly estimating that debt collection comprises fifteen percent of civil court dockets); Pew Charitable Trs., *How Debt Collectors Are Transforming the Business of State Courts 1* (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/NGZ9-WHFH>] [hereinafter *Pew Charitable Trs., Debt Collectors*] (reporting that in Texas, the only state maintaining aggregate data on debt collection, these matters make up thirty percent of the civil caseload).

meet basic living expenses. To understand how the courts' role in debt collection perpetuates racialized harms, it is important to first examine how race is baked into the process by which debt accumulates and overwhelms families.

Debt itself is not inherently harmful,²¹⁴ but as Abbye Atkinson has argued, the process by which debt becomes delinquent is racialized and responsible for deepening cycles of racial subjugation.²¹⁵ Access to credit has long been lionized as a pathway to financial mobility. Credit creates opportunities to purchase homes and pursue higher education. For decades, however, the benefits of lending largely accrued to white men. When credit opportunities opened to Black communities, predatory lending practices, subprime loans, and structural inequality twisted credit into a false promise that, instead of opening up access to homes and education, drowned people in mountains of debt they were unable to repay.²¹⁶

As Atkinson describes, the extension of credit is beneficial only if the borrower's future self has the resources to repay the loan. However, loans are not divorced from the social context within which they are extended. Louise Seamster points to core differences between what she calls "White debt" and "Black debt."²¹⁷ For example, Black consumers are offered higher-risk financial products and less favorable terms on the same products.²¹⁸ As a result, "White debt promotes agency and grants opportunities," while "Black debt . . . represents the negative balance sheet that must be worked through just to get to the starting line."²¹⁹ In addition, race-based decisions by private institutions to impose discriminatory interest rates for Black borrowers, or treat their collateral as less valuable, has meant that "debt burden becomes a means of reverse interpersonal redistribution in which wealth is funneled out of already vulnerable economic spaces and into the coffers of lenders."²²⁰

Debt becomes even more dangerous when it spirals into additional borrowing to pay back prior loans at escalating interest rates. As Atkinson shows, Black individuals are targeted for this type of borrowing, with lenders' business models built on the premise that loans will go unpaid, and this will permit the extraction of wealth from individuals in delinquency.²²¹

The debt collection process begins when a consumer defaults on repayment of a loan. In the wake of default, the original creditor or a third-party debt buyer pursues collection of the debt, often relentlessly. If

214. Seamster, *supra* note 207, at 32–33 (2019) (arguing that debt, for white people, is often an asset and a marker of status).

215. Atkinson, *Borrowing Equality*, *supra* note 207, at 1452–53 (2020).

216. *Id.* at 1439–46.

217. Seamster, *supra* note 207, at 31.

218. *Id.*

219. *Id.* at 32.

220. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 *Stan. L. Rev.* 1093, 1104 (2019) [hereinafter Atkinson, *Rethinking Credit*].

221. *Id.* at 1101–02.

unsuccessful, the debt collector may sue the consumer in court. Debt delinquency, and the threat of litigation, plagues an alarming number of Americans: nine million borrowers are in default on educational debt²²² and twenty-five percent of Americans have medical debt in collections.²²³ With delinquency comes harassment by debt collectors, exposure of financial woes to one's employer, negative impact on credit, and court involvement.²²⁴

One illustration of the racialized system of credit-to-default is the payday loan market. Payday loans are loans taken out, typically by low-income Americans, and disproportionately by Black Americans, to cover basic human needs such as rent, food, clothing, and other essential items.²²⁵ The loan is due on the date of the borrower's next paycheck, but more often than not, the borrower does not have sufficient funds to repay the loan when it comes due.²²⁶ Payday loans are intended to cover emergencies, but according to research by Pew Charitable Trusts, most people use them for essential recurring expenses such as electricity, running water, and phone service—what Chrystin Odersma has called “survival debt.”²²⁷ These borrowers live in entrenched, often intergenerational, poverty—even though they work—and are unlikely to transcend their financial circumstances by the time of their next paycheck.²²⁸

Lenders are well aware of this vicious cycle and capitalize on it by offering payday loan recipients the opportunity to roll over their loans

222. There are forty-five million student loan borrowers who owe 1.7 trillion dollars in educational debt. Zach Friedman, Student Loan Debt Statistics in 2021: A Record \$1.7 Trillion, *Forbes* (Feb. 20, 2021), <https://www.forbes.com/sites/zackfriedman/2021/02/20/student-loan-debt-statistics-in-2021-a-record-17-trillion/?sh=1e758f814310> (on file with the *Columbia Law Review*). Approximately twenty percent of these borrowers are delinquent on this debt. Pew Charitable Trs., Student Loan Default Has Serious Financial Consequences (Apr. 7, 2020), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2020/04/student-loan-default-has-serious-financial-consequences> [<https://perma.cc/NL4Q-577H>].

223. Nearly fifty percent of Americans carry medical debt, and approximately half of them are in default. Deb Gordon, 50% of Americans Now Carry Medical Debt, A New Chronic Condition for Millions, *Forbes* (Oct. 13, 2021), <https://www.forbes.com/sites/debgordon/2021/10/13/50-of-americans-now-carry-medical-debt-a-new-chronic-condition-for-millions/?sh=13fcc5865e5d> (on file with the *Columbia Law Review*).

224. Paul Kiel & Annie Waldman, Debt Collection Lawsuits Squeeze Black Neighborhoods, *ProPublica* (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/DY53-HVWK>].

225. Pew Charitable Trs., Payday Lending in America: Who Borrows, Where They Borrow, and Why 11 (2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewpaydaylendingreportpdf.pdf [<https://perma.cc/9475-DBFG>] [hereinafter Pew Charitable Trs., Payday Lending] (finding that Black people are twice as likely as white people to take out a payday loan).

226. *Id.* at 5 (reporting that the average payday loan borrower takes out eight loans).

227. Chrystin Odersma, Borrowing Equality: Dispossession and the Need for an Abolitionist Approach to Survival Debt, 120 *Colum. L. Rev. Forum* 299, 301 (2020).

228. Pew Charitable Trs., Payday Lending, *supra* note 225, at 13.

multiple times while interest rates soar into the triple or quadruple digits.²²⁹ According to the Center for Responsible Lending, payday lenders have low losses and high profits, averaging a thirty-four percent return on their investment despite lending to low-income borrowers.²³⁰ Holding a borrower's paycheck as collateral gives lenders "strong collateral and leverage over a borrower who, when faced with the threat of criminal prosecution and penalty fees, will keep paying renewal fees every two weeks when they cannot afford to repay the loan in full."²³¹ This race-laden wealth accumulation rests on the reality that Black people are much more likely than white people to serve the ranks of the working poor and require emergency loans on a recurring basis.²³² Typically, delinquent debt is sold to third-party debt buyers on the secondary debt market, providing a cash infusion for the original lenders. Professional debt collectors, part of a thirteen-billion-dollar industry,²³³ specialize in using the courts to initiate mass collection efforts, often across multiple states at once. All of this occurs with little intervention from the state. In all likelihood, the society-wide devaluation of Black lives has insulated the debt market from proper regulation or oversight.

B. *Debt Collection in the Courts*

Within this setting, in which race plays an inextricable role, civil courts are inundated with lawsuits seeking recoupment of debt. Courts contend with millions of debt collection cases a year, with small claims courts now believed to be the forum of choice for debt collectors.²³⁴ As Dalié Jiménez has detailed, debt buyers who bring suit typically purchase a ledger that provides little information on the individual account, often nothing more than the amount of debt allegedly owed.²³⁵ As debts are bundled and re-sold multiple times, information on the amount of the principal, the date of default, and even the name of the original creditor is often missing.²³⁶ Mass lawsuits are brought on the basis of these flimsy ledgers, allowing debt

229. Atkinson, *Rethinking Credit*, supra note 220, at 1106–07.

230. *Fact v. Fiction: The Truth About Payday Lending Industry Claims*, Ctr. for Responsible Lending (Jan. 1, 2001), <https://www.responsiblelending.org/research-publication/fact-v-fiction-truth-about-payday-lending-industry-claims> [<https://perma.cc/QA9M-AQEP>].

231. *Id.*

232. Bureau of Labor Statistics, DOL, Report 1087, *A Profile of the Working Poor*, 2018, at 5 (2020), <https://www.bls.gov/opub/reports/working-poor/2018/pdf/home.pdf> [<https://perma.cc/L2ZY-GE5Z>].

233. Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 8 (2016), https://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf [<https://perma.cc/97NV-B4XV>].

234. Hannaford-Agor et al., supra note 12, at v, 17, 33.

235. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 *Harv. J. on Legis.* 41, 80–81 (2015).

236. *Id.* at 64–69, 80–81.

collectors to reap enormous profits from predatory lending practices that have caused the debt to balloon over a period of months or years.²³⁷

Debt collectors could not extract and accumulate wealth without the courts' implementation of particular adjudicatory practices. Debt courts involve a host of highly problematic features. For one, almost all debt collectors—but virtually no consumers—are represented by counsel.²³⁸ Furthermore, some courts show their disregard for power imbalances and racial inequality in debt matters by setting up “judgeless courtrooms,” in which consumers are coerced into unsupervised negotiations with debt buyers and their attorneys.²³⁹ In addition, cases are processed rapidly and judges may handle hundreds of cases in a single day.²⁴⁰

We focus in this section, however, on a particularly pernicious practice—the mass production of default judgments.²⁴¹ A default judgment is a judgment entered when the defendant-debtor does not appear at a scheduled court hearing. Since 2010, the Federal Trade Commission and the Consumer Financial Protection Bureau (CFPB) have exposed dubious and illegal tactics in collections lawsuits, with debt buyers openly pursuing meritless debt claims or filing false affidavits in support of their suits.²⁴² Despite the findings of regulatory agencies, courts award judgments to well over ninety percent of the debt collectors that appear before them, most of them defaults.²⁴³ These default judgments are entered despite growing evidence that most people sued do not owe the debt

237. Wilf-Townsend, *supra* note 1, at 1745–46.

238. Steinberg, *A Theory of Civil Problem-Solving Courts*, *supra* note 26, at 1596–97. While lack of representation for consumers is largely the product of constitutional and legislative decisions not to guarantee counsel in civil cases, many trial courts have inherent authorities to appoint counsel that they rarely invoke. Clare Pastore, *A Civil Right to Counsel: Closer to Reality*, 42 *Loyola L.A. L. Rev.* 1065, 1076 (2009).

239. Hum. Rts. Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* 3–4 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf [<https://perma.cc/LAQ3-48Z8>].

240. *Id.*

241. Steinberg, *supra* note 238, at 1598–1600; see also Sabbeth, *Eviction Courts*, *supra* note 2, at 380–81.

242. Consumer Fin. Prot. Bureau, *Monthly Complaint Report: December 2016*, at 11–13 (2016), https://files.consumerfinance.gov/f/documents/201612_cfpb_MonthlyComplaintReport.pdf [<https://perma.cc/7FXN-F6N2>]; FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, at ii (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/U5C4-EL3L>].

243. Legal Aid Soc’y, *Neighborhood Econ. Dev. Advoc. Project*, MFY Legal Servs., Urb. Just. Ctr. & Cmty. Dev. Project, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 1–2 (2010), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf [<https://perma.cc/6KXG-QDFJ>].

amount named in the lawsuit or may not have received notice of the lawsuit against them.²⁴⁴ In mass-processing defaults, courts enrich billion-dollar publicly traded companies earning profits of up to 200 million dollars a year²⁴⁵ on the backs of poor, racialized groups. Courts enter default judgments without inquiry into the underlying claim and without the defendant ever stepping foot into the courtroom.

The example of Chase Bank illustrates the pervasive and uncontrolled nature of unlawful collections practices and highlights why default judgments are problematic.²⁴⁶ In the wake of the 2008 financial crisis, Chase Bank was accused of fraudulent practices in its debt collection lawsuits and signed a ten-year consent decree that effectively ended its reign of terror over tens of thousands of credit cardholders. Notably, during the effective period of the consent decree, Chase Bank pursued far fewer collections lawsuits, as they were no longer profitable when compliance with due process was required. As soon as the consent decree expired, however, Chase swiftly resumed its old ways. A ProPublica investigation discovered that, in 2021, Chase began filing mass lawsuits again, relying on only six employees in an office in San Antonio to “robo-sign” affidavits vouching for the accuracy of the company’s lawsuits.²⁴⁷ Robo-signing is a common practice in debt suits involving false attestation of the origins of the debt and its repurchase, when in fact the employees who sign the affidavits have no records substantiating the debt and know nothing of who initially owned it, how interest accrued, or how the debt has been packaged and purchased over time.²⁴⁸

Courts have erected a façade of willful blindness to the tactics of debt collectors like Chase Bank despite multiple class action lawsuits brought by the CFPB and various attorneys general against debt buyers over the past decade.²⁴⁹ The fraudulent practices are not limited to “robo-signing,”

244. Andy Newman, They Need Legal Advice on Debt. Should It Have to Come From Lawyers?, *N.Y. Times* (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html> (on file with the *Columbia Law Review*).

245. Paul Kiel & Jeff Ernsthausen, Debt Collectors Have Made a Fortune This Year. Now They’re Coming for More., *ProPublica* (Oct. 5, 2020), <https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more> [<https://perma.cc/DGP5-GF2D>].

246. Patrick Rucker, A Return to Robo-Signing: JPMorgan Chase Has Unleashed a Lawsuit Blitz on Credit Card Customers, *ProPublica* (Jan. 5, 2022), <https://www.propublica.org/article/a-return-to-robo-signing-jpmorgan-chase-has-unleashed-a-lawsuit-blitz-on-credit-card-customers> [<https://perma.cc/5KQQ-DUMD>].

247. *Id.*

248. Lisa Stifler, Debt in the Courts: The Scourge of Abusive Debt Collection and Possible Policy Solutions, 11 *Harv. L. & Pol’y Rev.* 91, 93, 104–05 (2017).

249. See, e.g., Consent Order, Portfolio Recovery Assocs., LLC, CFPB No. 2015-CFPB-0023 (Sept. 8, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf [<https://perma.cc/7DWY-ZS7M>]; Consent Order, Encore Capital Grp., CFPB No. 2015-CFPB-0022 (Sept. 3, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore

but also include, among other tactics, “sewer service,” in which debt buyers hire process servers who sign sworn statements that personal service was achieved, when in fact it was never attempted.²⁵⁰ Despite this type of fraud, civil courts issue heaps of default judgments in favor of debt collectors, obliterating financial security for vulnerable families.

Default judgments represent a close form of collusion between corporate interests and the courts. Notably, defaults are unique to the civil courts. The criminal legal system produces a host of troubling outcomes, but the concept of default does not exist in criminal courts. It would be unthinkable for a prosecutor to “win” a case and send the defendant to prison simply because the defendant did not appear at his hearing. Civil courts, however, have turned default judgments into a routine way of conducting business. Defaults resolve somewhere between sixty and ninety percent of debt cases, but they are not limited to debt matters.²⁵¹ Default judgments are also entered in as many as fifty percent of eviction cases.²⁵² Families can lose their homes by default in a week, flung into homelessness by a sheriff who, backed by a court order, throws their belongings into the street—sometimes with young children observing the traumatic experience.

The extraction of wealth from racialized communities is made possible by the courts’ systemic use of default judgments. These judgments are difficult to undo, rendering them essentially permanent even if a consumer later notifies the court that she did not receive notice of the lawsuit or that her due process rights were otherwise violated. In addition, default judgments arm debt collectors with a host of tools that can be used to accumulate capital and further harm already-poor communities.²⁵³ With the default judgment, the court assigns to the debt collector the right to reclaim the debt through multiple legal avenues. As indebtedness is inherently racialized, these harms are overwhelmingly imposed on communities of color. To satisfy a default judgment, a single Black mother might lose her car pursuant to an order for asset seizure, or she might experience garnishment of her wages—and continue to be subjected to this garnishment week after week until the debt is fully satisfied. These court-

capital-group.pdf [<https://perma.cc/8JVQ-VVU5>]; Press Release, Andrew Cuomo, N.Y. State Att’y Gen., The New York State Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010), <https://ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server> [<https://perma.cc/5MRR-J58F>].

250. Hum. Rts. Watch, *supra* note 239, at 36–38.

251. FTC, *supra* note 242, at 7.

252. William E. Morris Inst. for Just., *Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts* 8 n.22 (2005), <https://morrisinstituteofjustice.org/helpful-information/landlord-and-tenant/4-final-eviction-report/file> [<https://perma.cc/P3RL-RSCP>]; Sabbeth, *Eviction Courts*, *supra* note 2, at 380–81 (describing how eviction courts rely on high default rates to speed through large dockets).

253. Pew Charitable Trs., *Debt Collectors*, *supra* note 213, at 18.

backed collection efforts can persist for years, with snowballing consequences. The mother who loses her car may also lose her job if she has no transportation to get to work. Garnishment of wages may make it even more difficult for this mother to feed or clothe her children, which may force her to take out a payday loan, starting the cycle anew, and contributing to the rapid and exponential growth of debt delinquency, and ultimately, more civil legal involvement.

Civil courts are admittedly overwhelmed by the volume of case filings.²⁵⁴ And it is clear that the rules of civil procedure permit courts to enter default judgments when a person fails to appear at a hearing.²⁵⁵ Courts are arguably functioning in accordance with the rule of law, and this complicates the critique of their institutional role as partners in racial capitalism. Nonetheless, courts have special authority to legitimize or repudiate injustices, and their practices, especially when viewed at a macro level, empower the debt industry with a cheap and easy means of extracting wealth from poor, predominately Black communities. This legitimizing role distorts the democratic function of courts and instead places courts in the position of enforcing racially hierarchical relationships and normalizing the racialized accumulation of capital by powerful corporate interests. Courts cannot solve racial inequality on their own, but nor should they facilitate extraction.

This depiction of mass adjudication by default judgment may appear to imply that eliminating the practice of default judgments and requiring judges to scrutinize claims would absolve the courts of their role in racial capitalism. That is not the case. Courts are intimately connected to systems of racial and social control in ways that are difficult, if not impossible, to undo. Default judgments are but one expression of the depth of courts' involvement in systems of racial subordination. In providing this illustration of the courts and their relationship to racial capitalism, we do not intend to suggest a solution but rather to illuminate one example of how civil courts enforce and perpetuate racial hierarchies in much the same way that criminal courts do.

CONCLUSION

By engaging in the practices described above—and many others not touched upon in this Essay—civil courts are both passive participants and active perpetrators in a system of racial capitalism. In some ways, through a formalist approach to decisionmaking, they might be seen as merely facilitating exploitative and oppressive social and economic dynamics with roots far beyond the judicial system. To end the story there, however, diminishes the importance of the courts' role, the agency courts have in

254. Nat'l Ctr. for State Cts., *Problems and Recommendations for High-Volume Dockets 2*, https://www.ncsc.org/__data/assets/pdf_file/0017/25721/ncsc-cji-appendices-i.pdf [<https://perma.cc/JUL2-4YZU>] (last visited Mar. 26, 2022).

255. See, e.g., Fed. R. Civ. P. 55.

allowing those dynamics to flourish, and the power courts wield as an arm of the state. Civil courts have developed unique processes and procedures that facilitate racial capitalism and have chosen not to actively identify, let alone root out, the racial dynamics influencing their operation. Thus, they are not neutral bystanders, but supporters in maintaining the racialized systems on which capitalism relies. Similarly, race is not merely an external factor that inevitably colors the results of the civil court system but is integral to its design and operation—as well as to our collective national tolerance of state civil courts operating as sites of injustice and oppression. With this Essay, we hope to contribute to a much broader conversation about the role that civil courts play in incorporating, facilitating, and perpetuating racial inequality.

JUDGING WITHOUT A J.D.

Sara Sternberg Greene* & Kristen M. Renberg**

One of the most basic assumptions of our legal system is that when two parties face off in court, the case will be adjudicated before a judge who is trained in the law. This Essay begins by showing that, empirically, the assumption that most judges have legal training does not hold true for many low-level state courts. Using data we compiled from all fifty states and the District of Columbia, we find that thirty-two states allow at least some low-level state court judges to adjudicate without a law degree, and seventeen states do not require judges who adjudicate eviction cases to have law degrees. Since most poor litigants are unrepresented in civil legal cases, this sets up an almost Kafkaesque scene in courtrooms across the country: Legal cases that have a profound effect on poor families, such as whether they will lose their home to eviction, are argued in courtrooms where either no one knows the law or only one party—the attorney for the more powerful party—does.

Considering data collected from a case study of North Carolina, where over 80% of magistrates do not have J.D.s, this Essay argues that allowing a system of nonlawyer judges perpetuates long-standing inequalities in our courts. It further argues that the phenomenon of lay judges is a symptom of a much larger problem in our justice system: the devaluation of the legal problems of the poor, who are disproportionately Black and Latinx. This devaluation stems in part from an enduring cultural history in the United States of blaming the poor for their poverty and its associated problems. A change is in order, one that intentionally considers the expertise of judges and adopts creative solutions to incentivize specially qualified adjudicators to serve as low-level state court judges.

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** Ph.D. (Political Science), Duke University, 2020; J.D., Duke University School of Law, 2022. For insightful feedback at different stages of this project, the authors thank Jamie Boyle, Guy Charles, George Hausen, Charles Holton, Jack Knight, Josh Lerner, and Jesse McCoy. The authors also thank Mandy Boltax, Adam Golden, Courtney Kobren, and Tom Murphy for extraordinary research assistance. Thank you also to Domenic Canonico, Anna Carpenter, Colleen Shanahan, Jessica Steinberg, and Alyx Mark for organizing this symposium, and to Nicole Castillo, Xin Wang, and the staff of the *Columbia Law Review* for their invaluable editorial work on this Essay. We could not have written this Essay without all of our informants who allowed us to better understand the low-level court system in North Carolina, and we thank them for their time and insight. Finally, a special thank you to Mat McCubbins, who brought the authors together and, although no longer with us, continues to inspire by his dedication to the social sciences and mentorship.

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INTRODUCTION

Maya, a single mother of two, spent hours preparing for her court date in a rural county of North Carolina.¹ Even before court, Maya knew the stakes were high—she would find out whether she would be evicted from the apartment she had lived in for six years, the apartment her children called home. She did not have an attorney, but, after conducting online research, she felt relatively confident that her landlord had violated the “implied warranty of habitability” he owed her family, and thus, she believed she would prevail and avoid eviction.

1. In order to protect the identity of respondents, Maya’s experience is based on a combination of experiences. Greene conducted both a qualitative research project in the summer of 2019 that studied the Eviction Diversion Program in Durham, North Carolina and a case study of North Carolina magistrate courts in 2020 and 2021 for this project. The first study included one-to-two-hour interviews with fifty respondents who had been evicted or were at risk of eviction and had either inquired about or received help from the Eviction Diversion Program. The second study, a case study of North Carolina magistrate-run courts, involved interviews with a diverse panel of key informants on the North Carolina magistrate court system. For further explanation and details about these key informant interviews, see *infra* Part III.

Maya lost her case. About two weeks later, her possessions were removed from the apartment, and she was evicted. Maya was confused after court and wondered if she had not quite understood the law. What Maya assumed, of course, was that she was the one who was confused about the law. What Maya did not know was that the magistrate judge she had just appeared before might also have been confused about the law. In fact, the judge was in his first six months on the job and had received exactly zero hours of legal training of any kind: no webinar, no training session, nothing.

Low-level state court judges like the one Maya appeared before wield substantial power over the lives of millions of people, people who are disproportionately poor and disproportionately Black and Latinx.² Indeed, these judges, often called magistrate judges or justices of the peace (depending on the state), decide critical issues such as whether families are evicted, whether someone owes a debt collector thousands of dollars, and whether someone's car is repossessed. These judges make profoundly important decisions that alter the life courses of millions of Americans each year.³ Yet a little recognized fact is that the judge's lack of

2. See Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 *Lewis & Clark L. Rev.* 145, 147 (2020) (noting that state civil court cases include a disproportionate number of socioeconomically disadvantaged litigants); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 *Geo. L.J.* 509, 512 (2022) [hereinafter Carpenter et al., *Judges in Lawyerless Courts*] (noting that issues in state civil trial courts are typically "deeply connected to fundamental human needs such as safety, intimate relationships, housing, and financial security" and that "[m]any people . . . pulled into civil court . . . are already suffering the consequences of America's frayed"—or nonexistent—"social and economic safety nets"); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 *Wis. L. Rev.* 249, 257–59 [hereinafter Carpenter et al., *Studying the "New" Civil Judges*] (detailing how legally sophisticated individuals and corporations generally bypass the civil justice system, rendering the docket of these courtrooms to be primarily concerned with "low-value" contract disputes and family law disputes); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 *Geo. J. on Poverty L. & Pol'y* 473, 493–94 (2015) (discussing how Black men and women are disproportionately represented in "poor people's courts" and how they are disadvantaged in these courts); Lauren Sudeall & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, *The Conversation* (Sept. 21, 2017), <https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159> [<https://perma.cc/6DMM-KF8G>] (detailing how millions of litigants, often unrepresented, interact with the civil justice system each year).

3. In 2018, there were 16.4 million nontraffic related civil cases filed in state civil courts. Ct. Stats. Project, *State Ct. Adm'rs & Nat'l Ctr. for State Cts., State Court Caseload Digest: 2018 Data*, at 7 (2020), https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf [<https://perma.cc/5RXH-VVTJ>]. Many studies have noted the importance of low-level state court issues in the lives of people who have low incomes. See Rebecca L. Sandefur, *Am. Bar Found., Accessing Justice in the Contemporary USA: Findings From the Community Needs and Services Study 9–10* (2014), https://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [<https://perma.cc/QMY6-A85D>] (discussing findings regarding civil justice's impact on social inequality); Carpenter et al., *Judges in*

credentials in Maya's case is not unusual.⁴ In well over half of the states, judges are making at least some of these decisions without a law degree and sometimes with no legal training at all.⁵

This fact is counter to one of the most basic assumptions of our legal system—when two parties go to court, the case will be adjudicated before a judge who is trained in the law. Legal scholars have long been interested in whether specific characteristics of judges—such as political views, implicit biases, gender, or religion, among others—might affect

Lawyerless Courts, *supra* note 2, at 512–13 (noting the importance of the issues at stake in state civil courts for lower-income Americans); Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263, 1271 (2016) (“Investigations into access-to-justice issues for different groups can provide a lens into how our civil legal institutions may aid in the perpetuation of inequality and how different groups are integrated into—and excluded from—public institutions.”).

4. A few recent articles have noted the phenomenon of judges without J.D.s in passing, but the analysis of the issue of nonlawyer judges in much of this scholarship is very limited since the articles focus on other important topics. See Alexandra Natapoff, Criminal Municipal Courts, 134 Harv. L. Rev. 964, 979 (2021) (offering the first comprehensive analysis of the municipal court phenomenon and noting that the majority of states with municipal courts do not require municipal judges to hold law degrees and that the training requirements for such judges vary significantly); Lauren Sudeall & Daniel Pasciuti, Praxis and Paradox: Inside the Black Box of Eviction Court, 74 Vand. L. Rev. 1365, 1385 n.93 (2021) (studying rural and urban eviction courts in Georgia—showing that law is highly localized—and noting that Georgia law does not require magistrate judges to have law degrees and some of the judges in the study did not have law degrees); Justin Weinstein-Tull, The Structures of Local Courts, 106 Va. L. Rev. 1031, 1053–55 (2020) (examining the relationship between local court systems and administrative bodies within state judicial branches, reevaluating theories of judicial federalism in light of local courts, and noting that “a surprising number of states and jurisdictions permit people with no legal training to serve as local-court judges”). Professor Weinstein-Tull’s article uses data collected by the National Center on State Courts to find that twenty-six states allow nonlawyer judges in low-level state courts. *Id.* at 1053 n.95. However, our more recently collected data after an exhaustive search of state statutes and websites finds that thirty-two states allow nonlawyer judges at some level of court, including some differences (both inclusions and exclusions) with Weinstein-Tull’s data. See *infra* Appendix. A 2018 student note by Jason Neal focuses on nonlawyer magistrate judges. It is the only recent article or note we know of to focus on this topic, but it does not take a national perspective and instead focuses only on West Virginia. See Jason Neal, Note, Who Decides Justice: The Case for Legally Trained Magistrate Judges in West Virginia, 121 W. Va. L. Rev. 727, 729–30 (2018). Further, he focuses on the constitutional issues surrounding nonlawyer judges in West Virginia, analyzing both West Virginia’s constitution and federal cases on the issue. *Id.* In contrast to Neal’s note, our Essay takes empirical, national, and access-to-judge lenses when analyzing the issue. Additionally, Professor Cathy Lesser Mansfield has written a comprehensive article that focuses on lay judges. Cathy Lesser Mansfield, Disorder in the People’s Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases, 29 N.M. L. Rev. 119, 133–34 (1999). However, Mansfield’s piece is over twenty years old and focuses only on civil jurisdiction for lay judges. Finally, thirty-five years ago, in 1986, Professor Doris Marie Provine took up the issue of nonlawyer judges in the book *Judging Credentials*, arguing against requiring judges to have law degrees. Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* 168–70, 177–81 (1986). Our study of course considers more contemporary access to justice and inequality issues and provides recent data on the issue of nonlawyer judges.

5. See *infra* section II.B.

outcomes.⁶ Indeed, numerous articles consider whether judges consistently (and fairly) apply the law.⁷ But the underlying assumption is that judges know the law—the question is usually how they interpret and apply it and why.⁸

This Essay begins by showing that empirically, the assumption that most judges have legal training does not hold true for low-level state courts in many states. Using data compiled from all fifty states and the District of Columbia, this survey finds that thirty-two states allow at least some low-level state court judges to adjudicate without a law degree, and indeed, there are hundreds of magistrates and justices of the peace in these states wielding substantial legal authority who have never been trained in the law.⁹ In seventeen states, judges with no law degree are permitted to adjudicate eviction cases.¹⁰

At first glance, it may appear that this system of noncredentialed judges is efficient, or even necessary, given the limited resources of the judiciary. But allowing a system of nonlawyer judges perpetuates longstanding inequalities in how litigants experience courts. This Essay rejects efficiency justifications and argues that the phenomenon of judges without J.D.s is a symptom of a much larger problem in our justice system: the devaluation of the legal problems of the poor, who are disproportionately

6. See Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 *Cornell L. Rev.* 1023, 1027 (2020) (analyzing the role that political party and timing of judicial nomination played in circuit judges' use of legislative history); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 *Wash. U. L. Rev.* 1117, 1141 (2009) (finding that, even after controlling for political affiliations, federal judges of different races rule on racial harassment cases differently—and these differences are statistically meaningful); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 *Fla. L. Rev.* 63, 68 (2017) (detailing a series of empirical tests that demonstrate how negative implicit biases manifest in both state and federal judges); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *Yale L.J.* 1759, 1776–79 (2005) (detailing empirical findings on the direct and indirect impact a judge's gender has on their decisionmaking and collegial behavior on appellate panels).

7. Chew & Kelley, *supra* note 6; Levinson et al., *supra* note 6; Peresie, *supra* note 6.

8. See *supra* note 7. One interesting consideration for further study is the comparative perspective. Lay judging is common in several countries around the world, with different countries employing very different systems and configurations of judges. Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder, *Introduction in Juries, Lay Judges, and Mixed Courts: A Global Perspective 2–11* (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder eds., 2021). In future work, we hope to compare and contrast these different systems to that in the United States in order to better understand how culture and history contribute to different judicial structures concerning lay judges.

9. See *infra* Appendix, tbls.1 & 2.

10. Connecticut, Idaho, Indiana, Iowa, New Hampshire, and Washington are not included in this count, even though they technically allow lay judges in certain circumstances. See *infra* note 146 and accompanying text and Appendix.

Black and Latinx.¹¹ We argue that this devaluation stems in part from an enduring cultural history of blaming the poor for their poverty and the associated problems of poverty.¹² Many of the legal problems of the poor that end up in low-level courts are problems of poverty (such as eviction and debt collection), and inadequate resources are devoted to courts that address them. The implication is that these problems of poverty do not deserve access to well-run and well-resourced institutions. In other words, an overriding response to the problems of the poor throughout American history—whether legal problems or otherwise—has been that the State should not, and cannot, devote substantial resources to these problems and the institutions meant to address them, in part due to a cultural narrative around the “undeserving poor” that implicates those who are poor in the problems of poverty.¹³

Consider the message that is sent to both poor litigants and those who bring them to low-level state courts, such as landlords and debt collectors. The types of cases state courts hear have obvious gravity on the lives of millions of poor Americans each year; indeed, a litigant can lose their home in an eviction case or be subject to wage garnishment in a debt collection case. Despite the weight of these cases on the lives of poor litigants, however, the State has deemed such cases unworthy of the necessity of a legally trained adjudicator. This reality is experienced by thousands of poor Americans each day, as well as by thousands of powerful landlords and debt collectors. The symbolic nature of such a determination by the State should not be lost. Allowing judges to adjudicate without J.D.s illustrates the degree to which low-level state courts do not even pretend to engage with the legal rights of the poor, let alone enforce such rights. Instead, these institutions are in fact designed so that those with power and resources can, and do, prevail.¹⁴

11. John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/V43J-5AP2>] (last updated Dec. 9, 2021) (“Blacks and Hispanics continue to be over-represented in the population in poverty relative to their representation in the overall population.”).

12. See, e.g., Maia Szalavitz, *Why Do We Think Poor People Are Poor Because of Their Own Bad Choices?*, *Guardian* (July 5, 2017), <https://www.theguardian.com/us-news/2017/jul/05/us-inequality-poor-people-bad-choices-wealthy-bias> (on file with the *Columbia Law Review*) (discussing how perceptions and cultural phenomena intersect and lead to the belief that the poor deserve what they get).

13. See Joel F. Handler & Yeheskel Hasenfeld, *Blame Welfare, Ignore Poverty and Inequality* 151–52 (2007) (detailing the long history in America of blaming the poor for their condition and conceiving of poverty as a “moral fault”).

14. See Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* 4–5 (2018) (noting that the misdemeanor system in the United States “often violates basic legal principles of justice and fairness,” leaving those without resources particularly vulnerable); Marc Galanter, *Why the Haves Come Out Ahead: Speculation on the Limits of Legal*

This situation is even more concerning when considered in light of a related critical issue that Professors Anna Carpenter, Alyx Mark, Colleen Shanahan, Jessica Steinberg, and others have identified: Low-level state courts are essentially pro se courts, where the vast majority of litigants appear before the court with no attorney to represent them because there is no right to counsel in civil cases.¹⁵ These scholars and others have explored, sometimes empirically, the dynamic between judges and unrepresented litigants in state courts, studying judges' behavior in pro se courts, noting important problems, and suggesting blueprints for reform.¹⁶ They have found that the phenomenon of pro se courts leads to

Change, 9 *Law & Soc'y Rev.* 95, 97–101 (1974) (detailing how “repeat players” (those who have resources and anticipate engaging in repeat litigation of the same type in the legal system) are able to shape the development of law in their favor, as opposed to “one-shotters” (those who have infrequent dealings with the legal system and less resources)); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 *U. Chi. L. Rev.* 145, 190–91 (2019) (finding that the majority of tenants with a meritorious warranty of habitability claim do not prevail in court).

15. See *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (finding that the Due Process Clause does not automatically guarantee a right to counsel in a civil contempt hearing, even if the individual is ultimately imprisoned); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–25 (1981) (finding that a “presumption” of the right to appointed counsel exists only in cases where litigants may lose their physical liberty as a result of losing the litigation). Because of a lack of resources, legal aid and other such organizations do not have the capacity to provide a lawyer to all (or even close to all) litigants who want or need one. Legal Servs. Corp. (LSC), *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 13 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/B55X-4YWZ>] (“In 2017, low-income Americans will approach LSC-funded legal aid organizations for help with an estimated 1.7 million civil legal problems . . . but are expected to receive enough help to fully address their legal needs for only 28% to 38% of them.”). Of the problems low-income Americans bring to LSC grantees, “[m]ore than half (53% to 70%) . . . will receive limited legal help or no legal help at all.” *Id.*

16. See Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 2, at 512–13. Several other scholars have also examined different dimensions of the importance of lawyers in low-level state court proceedings, though few have specifically focused on the role of judges. See Lauren Sudeall Lucas, *Am. Const. Soc'y, Deconstructing the Right to Counsel 2* (2014), https://www.acslaw.org/wp-content/uploads/2014/08/Lucas_-_Deconstructing_the_Right_to_Counsel.pdf [<https://perma.cc/43SF-QP8L>] (introducing “an organizational framework for evaluating the proposals emerging from the access to civil justice debate” in order to examine the right to counsel and explore why it is needed in both criminal and civil contexts); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *Yale L.J.* 2118, 2121–22 (2012) (studying the difference that an offer, and actual use, of legal representation made to low-income clients in civil cases); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 *Loy. Consumer L. Rev.* 179, 182, 185–87 (2014) (examining litigation outcomes for junk debt plaintiffs and finding that defendants represented by a lawyer achieved far better outcomes than those without representation); Cassandra Wolos Pattanayak, D. James Greiner & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *Harv. L. Rev.* 901, 906–07 (2013) (examining “whether limited legal assistance is sufficient to approximate a

an “ethically ambiguous” role for judges.¹⁷ Judges are faced with two different paths: They can either maintain their traditionally passive and neutral role while leaving unrepresented litigants to figure things out for themselves, which is often very difficult for them to do; or, they can take a much more active role in cases, such as “simplifying courtroom procedures, filling information gaps for unrepresented people, actively developing the factual record in trials, [and] identifying legal issues.”¹⁸ In their recent work studying domestic violence courts, where the judges were all legally trained, Carpenter, Mark, Shanahan, and Steinberg found that judges almost universally lean toward the first path—“judges exercised process control and wielded legal jargon in ways that maintained legal and procedural complexity in their courtrooms.”¹⁹

We build on this existing work but consider a different set of related problems: those that arise in courts where judges themselves are not legally trained, yet preside over cases with mostly unrepresented litigants. In such cases, the judge is often unable to “fill[] information gaps for unrepresented people, actively develop[] the factual record in trials, [and] identify[] legal issues,”²⁰ or “maintain[] legal and procedural complexity in their courtrooms”²¹ because the judge does not know the law or legal procedures.

The situation is Kafkaesque: In such courtrooms, sometimes no one has in-depth knowledge of the law or, often even more problematic, sometimes only one attorney for one party, the more powerful and

traditional attorney-client relationship in summary eviction proceedings”); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 *Wis. L. Rev.* 287, 288–89 (arguing that seeking to simplify proceedings to obviate the need for legal representation can carry potential downsides and unintended consequences); Sudeall & Pasciuti, *supra* note 4, at 1368 (studying suburban and rural eviction courts in Georgia and finding that applying and enforcing laws is a highly localized process).

17. See Carpenter et al., *Studying the “New” Civil Judges*, *supra* note 2, at 279–82.

18. See Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 2, at 513. Several scholars have focused reform suggestions on the role of judges in pro se courts, most arguing that judges should take a more active role in proceedings to ensure fairness. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 653, 686–87 (2017) (discussing findings regarding variation in active judging and exploring why and when judges use active judging); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987, 2029–31 (1999) (arguing judges should take an active role in helping unrepresented litigants develop a factual record and with matters of procedural and substantive law); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *Fordham L. Rev.* 969, 970, 977–78 (2004) (arguing that judges should be required to play an active role in ensuring justice in cases with unrepresented litigants).

19. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 2, at 513.

20. *Id.* at 513.

21. *Id.* at 516, 539.

resourced party, has such knowledge.²² This attorney, of course, is ready to school the (untrained) judge on why his client should prevail. The inequality of the situation is glaring. There is no real illusion of a fair legal process, as those who experience courts with these dynamics know all too well.²³

This Essay proceeds as follows: Part I traces the history of lay judging in the United States back to the colonial era, when it was common for nonlawyer justices of the peace to preside over legal cases.²⁴ Following state law and practice changes over time, including challenges to the constitutionality of nonlawyer judges, we note key moments of potential reform and why they failed. We also trace the long history of this country's neglect of the poor and the institutions that serve them, providing a roadmap to understanding how a similar trajectory has played out in the court system. In Part II, we define the scope of judging without a J.D. based on our data, describing our data-gathering process and sharing details of our survey findings. In Part III, we consider the prognosis of nonlegally trained judges, in part by exploring a case study of North Carolina and key informant interviews that we gathered. This part discusses some of the arguments for lay judging but also explores the pitfalls of the practice and how these problems play out for litigants involved in the courts. We also show how the practice is consistent with U.S. historical patterns of devaluing the problems of the poor and underresourcing institutions that serve them, ultimately perpetuating inequalities in our justice system. Finally, this Essay concludes by offering thoughts about a potential roadmap to begin the process of reform while being mindful of economic pressures on state court systems.

22. See Heidi Schultheis & Caitlin Rooney, Ctr. for Am. Progress, *A Right to Counsel Is a Right to a Fighting Chance: The Importance of Legal Representation in Eviction Proceedings* 1 (2019), <https://americanprogress.org/wp-content/uploads/2019/10/Right-To-Counsel.pdf> [<https://perma.cc/SEZ6-WE9G>] (“When it comes to evictions, tenants are set up to fail. In eviction lawsuits nationwide, an estimated 90 percent of landlords have legal representation, while only 10 percent of tenants do.”); Editorial Board, *Opinion: In Our System, Landlords Have Lawyers. Tenants Often Don’t. So Tenants Lose.*, *Wash. Post* (Apr. 22, 2021), <https://www.washingtonpost.com/opinions/2021/04/22/tenants-eviction-cases-lawyers-cleveland-euclid/> (on file with the *Columbia Law Review*).

23. See Barbara Bezdeck, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 *Hofstra L. Rev.* 533, 534–35 (1992) (illustrating that Baltimore’s rent court systematically excludes litigants who are members of socially subordinated groups from legal protections); Summers, *supra* note 14, at 205 (demonstrating through empirical research that tenants with meritorious warranty of habitability claims and representation were at least nine times more likely to prevail than unrepresented tenants with meritorious warranty of habitability claims).

24. Alexis de Tocqueville observed the trend of nonlawyer judges in colonial America and defended the practice, remarking: “A justice of the peace is a well-informed citizen, though he is not necessarily versed in the knowledge of the laws. His office simply obliges him to execute the police regulations of a society, a task in which good sense and integrity are of more avail than legal science.” Alexis de Tocqueville, *Democracy in America* 93 (1898).

I. HISTORY OF NONLAWYER JUDGES

There is an extensive history of lay adjudicators in the United States.²⁵ This Part summarizes this history, focusing specifically on the aspects that are important to the current lay-judge scheme in the United States. Thus, we devote particular attention to lower-level state court judges. In addition, we provide an overview of how our country has long neglected to invest in the poor and the institutions that serve them, and we begin to connect this history to the court system.

A. *Seventeenth-Century Colonial America*

There were few lawyers in seventeenth-century colonial New England.²⁶ The court system of the colonies mirrored those in England, relying almost entirely on laymen. In the early-to-mid-1600s, courts that functioned in the same manner as English justice of the peace courts developed in many colonies, though the specifics varied from colony to colony. The Colony of Virginia, for example, was divided into counties in 1634, and the local government was administered by a board of commissioners who functioned almost identically to justices of the peace in England. By 1661, these commissioners were officially given the title “justice of peace” and broad jurisdiction to hear all civil cases with no monetary restrictions and all but capital criminal cases.²⁷ Similarly, in Massachusetts, “Inferior Quarter Courts” were held in various towns by magistrates and assistants, and by 1648 were being called “county courts” and hearing all civil cases and most criminal cases.²⁸

Throughout all of the colonies, religion dominated and Puritan clergy and magistrates held significant power over the colonists. Not surprisingly, this religious influence infiltrated the courts.²⁹ Magistrates in Massachusetts were directed to adjudicate cases “as neere the law of God [or of Moses] as they can.”³⁰ Citations to scripture were common in legal arguments, to the point where “it was said that the early Massachusetts courts occasionally resembled a heated theological disputation where an opinion allegedly voiced by Moses or the Prophets counted infinitely more than a decision of the Lord High Chancellor.”³¹ Magistrates saw themselves as accountable to God, and thus believed that their actions

25. See Larry M. Boyer, *The Justice of the Peace in England and America From 1506 to 1776: A Bibliographic History*, 34 Q.J. Libr. Cong. 315, 322 (1977).

26. *Id.* at 323 (“In the new land lawyers were scarce, and the few that were available were largely mistrusted.”).

27. *Id.* at 322.

28. *Id.*

29. Anton-Hermann Chroust, *The Rise of the Legal Profession in America* 7 (1965) (explaining how in colonial America Puritan clergy and magistrates held considerable power and colonists believed that religious principles should dominate how magistrates decided cases).

30. *Id.*

31. *Id.* at 8.

needed to have Biblical authority.³² Those who worked in courts as judges or other court personnel were typically “wealthy merchants, clergymen, governors or governor’s deputies, politicians, favorites,” and, more generally, influential people.³³

There is certainly some debate among historians as to just how much influence religion versus the laws of England had on legal outcomes in early colonial America.³⁴ There is no doubt that there was some influence from the laws of England, but overall the Puritans did not see the English common law as binding on the colonial courts, even though it may have influenced some of their procedures and laws.³⁵ Indeed, there were many settlers who wanted relief from the strict and formal laws (and courts) of England, which were “profoundly distrusted” by the settlers who had been dissenters punished by such laws and courts.³⁶ The colonies were seen as a fresh start—a new society that needed its own laws and procedures.³⁷

This anti-English law sentiment was relatively easy for colonial courts to carry out during the early colonial era because there was little direction from England, who governed the colonies with a “light hand.”³⁸ For the most part, England stayed out of colonial legal arrangements, and whatever similarities were present, such as a reliance on lay justices of the peace and magistrates, occurred simply because colonists borrowed those aspects of the English legal system as they created their new colonial system.³⁹

Part of the fervor of colonists to distinguish themselves from England and establish a new start included a suspicion and, indeed, sometimes outright hostility toward lawyers.⁴⁰ In his history of colonial America, Professor and historian Daniel Boorstin noted that the “[d]istrust of lawyers became an institution.”⁴¹ In Massachusetts, Thomas Lechford arrived in Boston in 1638 and practiced law in the colony as a courtroom attorney and documents draftsman. His “attempts to practice law won him no friends among the magistrates,” and he “was made quite uncomfortable in the colony, and eventually went back to England.”⁴² About fifteen years later, Article 26 of the Massachusetts Body of Liberties of 1641 explicitly

32. *Id.*

33. *Id.* at 26.

34. *Id.* at 10.

35. *Id.* at 10–11.

36. *Id.* at 11–12.

37. *Id.* at 12.

38. Provine, *supra* note 4, at 4.

39. *Id.*

40. See Lawrence M. Friedman, *A History of American Law* 81 (1973) (noting that “[t]he first years of the colonial experience were not friendly years for lawyers” and documenting various actions taken against lawyers in the colonies).

41. *Id.* (quoting Daniel J. Boorstin, *The Americans: The Colonial Experience* 197 (1958)).

42. *Id.* at 82.

prohibited anyone from accepting a fee to assist another person in court.⁴³ And in 1663, the legislature enacted a provision prohibiting anyone from joining the legislature who “is an usual and Common Attorney in any Inferior Court.”⁴⁴ Several other colonies also explicitly prohibited lawyers from their courts, like Virginia in 1645 and Connecticut soon after.⁴⁵ The Fundamental Constitutions of the Carolinas, dated 1669, stated that it was “a base and vile thing to plead for money or reward.”⁴⁶ Overall, lay judges with a strong religious backing prevailed, particularly because lawyers were scorned.

B. *Early Eighteenth Century—A Time of Transition*

After many years of being hands-off, England became more interested in colonial legal proceedings in the 1700s as the economy in the colonies grew.⁴⁷ England’s new interest in the colonial legal system included judicial appointments, and some judges began serving “upon the pleasure of the crown.”⁴⁸ However, similar to Justices of the Peace in England, English-appointed judges in the colonies were not generally lawyers. In fact, in several respects colonial courts (both those controlled by England and those not) leaned more in the direction of lay justice than even English courts. First, in England, lay justices of the peace established the practice of hiring law-trained clerks to assist them, but this did not happen in the colonies.⁴⁹ Additionally, lay judges in the colonies ultimately heard both criminal and civil cases, whereas in England they heard only criminal cases.⁵⁰

Courts in the colonies remained lay-judge-based throughout the early 1700s, but during that time lawyers practicing law became more common. This change was due in part to the fact that emerging legal questions and procedures were increasingly complex as the colonies began to prosper in the 1700s and the economy grew. This meant the need for lawyers became more urgent despite some remaining opposition.⁵¹ Trained lawyers from England began moving to the Northeast colonies to take advantage of the increased economic opportunities for lawyers.⁵² At the same time, colonial men began to consider legal careers in higher numbers, either traveling to Europe for training or becoming an apprentice with an already

43. John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in *Colonial America: Essays in Politics and Social Development* 415, 417 (Stanley Katz ed., 1971).

44. *Id.*

45. Friedman, *supra* note 40, at 81.

46. *Id.*

47. Provine, *supra* note 4, at 5.

48. *Id.*

49. *Id.* at 27.

50. *Id.* at 28.

51. In two New Jersey counties, mobs rioted against lawyers in 1769 and 1770. Friedman, *supra* note 40, at 83.

52. Provine, *supra* note 4, at 5.

successful colonial lawyer.⁵³ Lawyers began gaining wealth and social power, and the bar as an institution began to develop as well.⁵⁴

A combination of English policies and this newfound influence of lawyers led to protective policies in certain colonies meant to safeguard lawyers and restrict legal practice to “trained” lawyers.⁵⁵ During this time, as lawyers began to defend their own profession, there was also a new movement to restrict judging only to trained lawyers. James Otis Jr., a member of the Massachusetts Provincial Assembly and a practicing lawyer in Boston, said that one could take “all the Superior Judges and every Inferior Judge in the Province, and put them all together, and they would not make one half of a Common Lawyer.”⁵⁶

Prior to the Revolution, despite some urging toward lawyer-judges, most judges (at all levels of courts) remained laymen. For example, of the eleven men who served as justices of the superior court of Massachusetts between 1760 and 1774, nine had never practiced law and six had never studied law.⁵⁷ All eleven justices were, however, prominent and wealthy.⁵⁸ Lower court judges were even more likely to be laymen, and their backgrounds varied considerably.

C. *Post-Revolution and the Nineteenth Century*

Contempt for lawyers resurfaced after the Revolution in part because many lawyers had been loyalists.⁵⁹ Ultimately, however, the Revolution brought more opportunities for lawyers and over time their status rose exponentially in early America. Lawyers, like other high-status and high-wealth occupations such as doctors, were disproportionately represented in the Continental Congress, the Federal Constitutional Convention, the First Congress, and state Legislatures.⁶⁰

As the status of lawyers continued to rise, they used their influence to professionalize the judiciary. State by state, lawyers began attempting to push nonlawyer judges out of the judiciary with varying degrees of success.⁶¹ Massachusetts enacted education requirements for judges as early as 1782, and the legislature also raised judicial salaries in order to encourage lawyers to become judges.⁶² Other states followed, but states

53. *Id.* at 6.

54. *Id.*

55. *Id.*

56. *Id.* at 7.

57. Friedman, *supra* note 40, at 109–10.

58. *Id.* at 110.

59. *Id.* at 265.

60. Provine, *supra* note 4, at 9.

61. *Id.* at 11–12. For an interesting history of how the Framers initially determined state versus federal jurisdiction, see Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 *U. Chi. L. Rev.* 2101, 2113–16 (2019) (“The Framers instead placed the burden of judicial work in the new nation on state courts, expecting they would hear most state and federal claims.”).

62. Provine, *supra* note 4, at 10–11.

with small bars were holdouts, keeping laymen as judges for longer, even in higher courts.⁶³

Throughout the early 1800s, there was an emerging consensus that only lawyers should hold high judicial offices. Even reformers attempting to curtail judicial power by advocating for judicial elections and less judicial power did not challenge the idea of a legally qualified judiciary.⁶⁴ This transition came in part due to arguments for an independent judiciary and the separation of powers, as a legally trained judiciary provided a rationale for independent judicial power.⁶⁵

Higher court judicial positions became increasingly reserved for lawyers only, but it took longer for lower courts to transition, and many did not transition at all, particularly in rural areas where “a more tradition-based vision of the role of courts and law continued to prevail.”⁶⁶ In many of these rural areas, the idea of community justice was appealing. There was a sense that nonlawyer, community-member judges were better than schooled lawyers because community judges understood the dynamics, customs, and culture of their community and were less constrained by formal law.⁶⁷

Indeed, there was great tension in many states between traditionalists wanting to preserve this community justice model and those wanting to move forward. In post-Revolution Virginia, for example, historian A.G. Roeber noted that “in many respects, not much had changed since the old days of the Court-Country battle, when country justices resented Williamsburg Lawyers and General Court orders that integrated with the running of country life.”⁶⁸ He continued:

Part of the burden that fell on republican lawyers had been to argue that more professional law would actually help the moral tenor of society by expediting debt causes and securing predictable, rational, scientific procedures to deal with the chaotic disorder of the 1780s. They had succeeded in establishing a streamlined court system, and the luster of the superior court bench bar had attracted large numbers of young Virginians to seek their fortunes in the practice of law. But the lawyers had not quite succeeded in convincing Virginia farmers and planters that the older, moral vision of law rooted in concepts of natural justice had survived the rise of the legal profession.⁶⁹

63. *Id.* at 11–12 (“The political prominence of lawyers in post-Revolutionary politics was not sufficient to win over judicial offices in every state . . . Especially where the bar was small, as in New Hampshire, Maine, and Rhode Island, nonlawyers continued to be appointed to top judicial posts into the early 1800s.”).

64. *Id.* at 17.

65. *Id.* at 21.

66. *Id.*

67. See Mansfield, *supra* note 4, at 142.

68. A.G. Roeber, *Faithful Magistrates and Republican Lawyers* 252 (1981).

69. *Id.* at 255.

The question was whether “a modern judicial system could be easily reconciled with the Country traditions of the past.”⁷⁰ Ultimately, federal courts and high-level state courts took the form of a more modern and formal judicial system where judges were lawyers.⁷¹ In contrast, lower-level state and local courts, particularly those in rural areas, remained less formal and controlled by laymen. In many ways, the architecture of these courts continued to mirror the English justice of the peace courts which they were originally modeled after, although their names evolved and they were called many different things (including, for example, magistrate court, orphan court, and common pleas court).⁷² Borrowed from England, many of these courts continued to maintain a fee system, where the judge position was not salaried, but instead the judge was paid based on fees he collected via cases before him.⁷³ This fee system became a point of contention in the twentieth century and indeed was ultimately found unconstitutional in 1927 by the Supreme Court in *Tumey v. State of Ohio*.⁷⁴

D. *Twentieth Century Court Reform Movement*

Efforts to reform and study nonlawyer courts in the twentieth century have been well-documented by others.⁷⁵ This section summarizes the key voices and arguments for reform. One of the earliest twentieth-century calls for reform was from Professor Simeon Baldwin, who called nonlawyer justices of the peace “the weakest point in this system of judicial organization” in his 1906 book on the American judiciary.⁷⁶ In the same year, Professor Roscoe Pound, who eventually became dean of Harvard Law School, argued in a speech to the American Bar Association that “the notion that anyone is competent to adjudicate the intricate controversies

70. *Id.* at 257.

71. It was during this transition that jurisdictional tensions between state and federal courts grew. Before this era, state courts dominated and federal courts were allowed only very limited jurisdiction. See Zambrano, *supra* note 61, at 2113–16. But beginning in 1875, when the Reconstruction Congress granted federal courts the plenary power to hear all cases involving federal law, tensions mounted between those supporting state court power and “Republican disenchantment with state courts” due to the belief that “local judges were trying to thwart national policy.” *Id.* at 2116–17 (citing William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–75*, 13 *Am. J. Legal Hist.* 333, 333 (1969)). For further details about the fight for federal verses state jurisdiction from 1875 to 1980, see *id.* at 2116–24.

72. Provine, *supra* note 4, at 25.

73. *Id.* at 33–34.

74. 273 U.S. 510, 531 (1927) (finding Ohio’s fee system to support its limited jurisdiction courts, where judges received “costs” only if they found defendants guilty, a violation of the Due Process Clause and thus unconstitutional).

75. Mansfield, *supra* note 4, at 136–41; Provine, *supra* note 4, at 24–26, 30–60.

76. See Mansfield, *supra* note 4, at 136 (citing Simeon Baldwin, *The American Judiciary* 129 (1906)).

of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States.”⁷⁷

Throughout the early 1900s, there were further calls from academics to reform the justice of the peace and magistrate systems. Most of these arguments were for the abolition of nonlawyer judges.⁷⁸ The arguments were strikingly similar, recognizing the class implications of the court system that had developed as it was reformed in the 1800s. Recall that higher-level state courts and federal courts were ultimately dominated almost entirely by judges who were lawyers, while many lower-level state courts and municipal courts continued to rely on lay judges.⁷⁹ As the judicial system developed, amount-in-controversy rules along with diversity jurisdiction requirements in federal courts (currently set at \$75,000) meant that federal courts and high-level state courts ended up primarily with cases involving businesses and people with higher incomes, while the legal problems of the poor were primarily allocated to low-level state courts.⁸⁰ This system persists today, but it was well-formed by the 1900s, and reformers began highlighting the inequalities of the system. For example, in his well-known 1929 book *Principles of Judicial Administration*, W.F. Willoughby argued that lay judges were “moved in the performance of their duties by political and other improper considerations” and that by allowing such a system to persist, the government was discriminating against the poor, who were entitled to the same level of adjudication as “those better provided with the goods of this world.”⁸¹

Reformers’ calls for change also revolved around the notion that most of the early justifications for nonlawyer judges were moot given new technology and infrastructure such as roads and automobiles.⁸² Some reformers noted that these arguments held in all but “the remotest rural communities.”⁸³ Chicago was the first city to heed the suggestion for change, and in 1906 it replaced more than two hundred justice of the peace and specialized courts with a united metropolitan court system that employed full-time lawyer-judges.⁸⁴

77. Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, Address at the Twenty-Ninth Annual Meeting of the American Bar Association (Aug. 29, 1906), reprinted in 46 *J. Am. Judicature Soc’y* 55, 58 (1964).

78. Mansfield, *supra* note 4, at 136; see also Austin W. Scott, *Small Causes and Poor Litigants*, 9 *ABA J.* 457, 457–58 (1923); Reginald Heber Smith, *Denial of Justice*, 3 *J. Am. Judicature Soc’y* 112, 112 (1919); Milton Strasburger, *A Plea for the Reform of the Inferior Court*, 22 *Case & Comment* 20 (1915).

79. Provine, *supra* note 4, at 21.

80. Kathryn A. Sabbeth, *Market-Based Law Development*, *The L. & Pol. Econ. Project* (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/5UQ8-BRZT>] [hereinafter Sabbeth, *Market-Based Law Development*].

81. Provine, *supra* note 4, at 32 (quoting W.F. Willoughby, *Principles of Judicial Administration* 304 (1929)).

82. Chester H. Smith, *The Justice of the Peace System in the United States*, 15 *Calif. L. Rev.* 118, 118 (1927).

83. *Id.*

84. Provine, *supra* note 4, at 30.

By the 1930s, organizations and commissions such as the National Commission on Law Observance and Enforcement, the American Bar Association, and later the American Judicature Society called for the abolition of nonlawyer judges, and indeed several major cities began to eliminate nonlawyer judges from their municipal courts.⁸⁵ At the state level, it was harder to entirely eliminate nonlawyer judges in part because most states listed justices of the peace in their state constitutions, so a constitutional amendment, rather than simply a statute, would be necessary to eliminate the position.⁸⁶ Overall, change was uneven, with some states eliminating nonlawyer judges completely and others adopting a mix of rules depending on the amount in controversy or the subject matter at hand, or in some cases the population of a given district.⁸⁷

Throughout the twentieth century, the issue of the constitutionality of lay judges came before courts numerous times. The 1960s saw a particular surge of such cases.⁸⁸ Some have theorized this surge came because of the Warren Court's general concern with due process in a variety of contexts.⁸⁹ All of the legal cases challenging lay judges involved criminal issues, rather than civil issues, and courts at all levels almost uniformly upheld the constitutionality of lay judges.⁹⁰ The most notable case, and one that ultimately came before the Supreme Court, was *North v. Russell*.⁹¹

North v. Russell was a Kentucky case. At that time, Kentucky had a two-tier court system, where the police courts (first tier) heard misdemeanor cases, but a defendant had a right to appeal a police judge's decision to the circuit court (second tier), where a trial de novo would take place.⁹² Kentucky law stated that in cities of less than a certain population, police court judges need not be lawyers, but in larger cities (and all circuit courts), judges must be lawyers.⁹³

In *North*, the defendant, Lonnie North, was arrested and charged with driving while intoxicated in a city that did not require lawyer-judges due to population size.⁹⁴ North appeared before a police court judge who was not a lawyer and pleaded not guilty. North requested a jury trial, and the judge denied this request, even though North was entitled to a jury trial upon request under Kentucky law. North was found guilty and sentenced to thirty days in jail, a fine of \$150, and revocation of his driver's license.⁹⁵

85. *Id.* at 33.

86. *Id.* at 34.

87. *Id.* at 34–36.

88. *Id.* at 63.

89. *Id.*

90. *Id.* at 65–71.

91. 427 U.S. 328, 329 (1976).

92. *Id.* at 331.

93. *Id.* at 330.

94. *Id.* at 329–30.

95. *Id.* at 330.

North did not appeal the police court decision, but instead brought a writ of habeas corpus, arguing that the fact that his judge was not a lawyer was unconstitutional.⁹⁶ After a series of lower court opinions and remands, the case ended up before the Supreme Court, where the issues were: (1) whether an “accused, subject to possibly imprisonment, is denied due process when tried before a nonlawyer police court judge with a later trial de novo available under a State’s two-tier court system”; and (2) whether “a State denies equal protection by providing law-trained judges for some police courts and lay judges for others, depending upon the State Constitution’s classification of cities according to population.”⁹⁷

In its analysis of the due process claim, the Court said it recognized the “wide gap between the functions of a judge of a court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical ‘drunk’ driver case or other traffic violations.”⁹⁸ The Court noted, however, that when jail time is involved, the process deserves a review with scrutiny.⁹⁹

On the due process claim, North had argued that the right to counsel established in other Court cases was essentially meaningless if one did not have a lawyer-judge to understand the arguments of counsel, and he also argued that the complexity of substantive and procedural criminal law requires lawyer-judges so that they could “rule correctly on the intricate issues lurking even in some simple misdemeanor cases.”¹⁰⁰ The Court rejected both claims.¹⁰¹ The Court discussed the various justifications for nonlawyer-led tribunals, including the “interest of both the defendant and the State, to provide speedier and less costly adjudications” than those provided in courts “where the full range of constitutional guarantees is available.”¹⁰² The Court also noted that “state policy takes into account that it is a convenience to those charged to be tried in or near their own community, rather than travel to a distant court where a law-trained judge is provided, and to have the option, as here, of a trial after regular business hours.”¹⁰³

Ultimately, the Court was persuaded that there were no due process violations because defendants are guaranteed a de novo trial before a lawyer-judge if they so desire. The Court said it “assumed[d] that police court judges in Kentucky recognize their obligation” to inform defendants of this right.¹⁰⁴ The Court further noted that if a defendant really wants to

96. *Id.* at 331–32.

97. *Id.* at 329.

98. *Id.* at 334.

99. *Id.*

100. *Id.*

101. *Id.* at 339.

102. *Id.* at 336.

103. *Id.*

104. *Id.* at 335 (“The appellee judge testified that informing defendants of a right to counsel was ‘the standard procedure.’”).

bypass a lay judge and have an initial trial before a lawyer-judge, he can “plead[] guilty in the police court, thus bypassing that court and seeking the *de novo* trial, ‘erasing . . . any consequence that would otherwise follow from tendering the [guilty] plea.’”¹⁰⁵

The Court also rejected *North*’s equal protection claim involving the issue that based on population only some cities are required to have lawyer-judges.¹⁰⁶ The Court noted that “all people within a given city and within cities of the same size are treated equally.”¹⁰⁷ The Court further explained that the State’s reasons for requiring lawyer-judges in certain cities with larger populations but not those with smaller populations appropriately justified the statute.¹⁰⁸ These reasons included that: (1) the greater volume of court business in larger cities meant a need for lawyer-judges who could enable courts to run more efficiently and expeditiously (though not necessarily with more fairness and impartiality); (2) larger cities would have more access to lawyers to staff judge positions; and (3) larger cities would have more economic resources to draw upon in order to pay personnel, including lawyer-judges.¹⁰⁹

Even after *North*, calls for reform by lawyer organizations, academics, and politicians continued into the 1980s, when Professor and political scientist Doris Provine wrote a book about nonlawyer judges providing a detailed history of their existence and a study of such judges in New York.¹¹⁰ Provine argued in favor of maintaining nonlawyer judging.¹¹¹ Since Provine’s book, there have been a small number of articles taking up the issue of nonlawyer judges,¹¹² but overall, attention to the matter has significantly waned over the last forty years as the legal academy and bar associations have focused more on federal courts and, to a lesser degree,

105. *Id.* at 337.

106. *Id.*

107. *Id.* at 338.

108. *Id.* at 338–39 (referencing *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972), appeal dismissed, 414 U.S. 885 (1973), a Kentucky Court of Appeals case that articulated the reasons for differing qualifications of judges).

109. *Id.* at 328–29. Lisa Pruitt has written extensively about how courts consider the rural—urban justice division and justify different resource allocations among such courts. See Lisa R. Pruitt, *The Rural Lawscape: Space Tames Law Tames Space*, in *The Expanding Spaces of Law: A Timely Legal Geography* 190, 206 (Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar eds., 2014) (“Courts have lamented the practical limits of rural justice systems, but they have rarely shown sensitivity to equal protection arguments based on county-to-county variations of either funding levels or justice system amenities.”); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 *Ariz. L. Rev.* 219, 230–31 (2010) (describing disparities in funding and delivery of indigent defense in Arizona based on population and noting more generally that “[c]ourts have typically been deferential to state and local governments by holding that differences between rural and urban places justify different justice systems”).

110. Provine, *supra* note 4.

111. See *id.* at 190 (“To eliminate nonlawyer judges, however, is to institutionalize the very self-doubts that rob the laity of political power, for the elimination of nonlawyer judges suggests the incapacity of lay persons to comprehend the rules they must live by.”).

112. See *supra* note 4.

high-level state courts.¹¹³ In the next Part, we describe our study, a survey that provides an up-to-date profile of lay judging in the United States. But first, in the next section, we detail why the issue of nonlawyer judges has been relatively dormant for the last forty years.

E. *Disregard for the Problems of the Poor*

As detailed above, lay judging emerged and persisted because there was a belief that to have a professional legal class was to introduce an inherently corrupting force into the body politic, an organized group whose self-interest lay in obscurity, and that local custom and piousness should pervade the law. The current reality, however, relies on no such true Protestant faith in the power of the citizenry to interpret the sacred text themselves, but rather on a long history of blaming the poor for their problems and then underresourcing institutions that serve people who are poor and disproportionately Black and Latinx.¹¹⁴

Going all the way back to the sixteenth- and seventeenth-century Poor Laws of England that many of the American colonies adopted,¹¹⁵ “[p]overty was perceived not as a social or economic problem but as an individual problem.”¹¹⁶ In colonial America, blaming the poor and denying them material relief prevailed. As Professors Joel Handler and Yeheskel Hasenfeld note: “During the Colonial period, several themes are noted that will endure throughout welfare history. Despite significant

113. See Carpenter et al., *Studying the “New” Civil Judges*, supra note 4, at 251 (“The state court knowledge deficit is no secret; a smattering of scholars have identified and bemoaned it over the past thirty years. Yet legal scholarship continues to focus almost exclusively on federal courts, federal judges, and a particular judicial function in those courts: decision making in appellate cases.” (citations omitted)); Annie Decker, *A Theory of Local Common Law*, 35 *Cardozo L. Rev.* 1939, 1943–44 (2014) (citing the lack of empirical studies about local courts); Ethan J. Leib, *Localist Statutory Interpretation*, 161 *U. Pa. L. Rev.* 897, 898–99 (2013) (“[L]egal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts.”); Weinstein-Tull, supra note 4, at 1034 (“Despite these massive stakes, despite the place of local courts at the heart of the justice system . . . we know very little about them.”).

114. Roughly half of all Americans believe that people who are poor are poor because they do not work hard enough. Pew Rsch. Ctr., *Emerging and Developing Economies Much More Optimistic Than Rich Countries About the Future* 5 (2014), <https://www.pewresearch.org/global/2014/10/09/emerging-and-developing-economies-much-more-optimistic-than-rich-countries-about-the-future/> [https://perma.cc/WK6M-C7HS] (“Fifty-seven percent of Americans *disagree* with the statement ‘Success in life is pretty much determined by forces outside our control,’ a considerably higher percentage than the global median of 38%.”); Roberto A. Ferdman, *One in Four Americans Think Poor People Don’t Work Hard Enough*, *Wash. Post* (Oct. 9, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/09/one-in-four-americans-think-poor-people-dont-work-hard-enough/> (on file with the *Columbia Law Review*).

115. Juliet M. Brodie, Clare Pastore, Ezra Rosser & Jeffrey Selbin, *Poverty Law, Policy, and Practice* 63 (2d ed. 2021).

116. William P. Quigley, *Backwards Into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 *Stan. L. & Pol’y Rev.* 101, 103 (1998).

adverse structural conditions—wars, depression, accidents, disease, sickness—the poor were judged as morally blameworthy.”¹¹⁷ While some relief was granted to widowed women with children, people of color were excluded from relief and deemed the “undeserving” poor—women of color “were not deserving of relief; it was denied or they were expelled from the community.”¹¹⁸

Throughout the eighteenth, nineteenth, and early twentieth centuries, notions of the “deserving” and “undeserving” poor persisted. By the late nineteenth century “welfare work had become more of a private or voluntary matter than a public one.”¹¹⁹ Assistance that was available to the poor was provided through localities, and it was doled out based on notions of “deserving” versus “underserving” recipients.¹²⁰ And similar to the colonial period, with few exceptions “African Americans were simply excluded from welfare. They were the most underserving of the undeserving poor.”¹²¹

The Great Depression and the New Deal that followed was a time of some degree of transition. As the Great Depression persisted, the federal government increased investment in programs and institutions for the poor through the Social Security Act of 1935,¹²² largely because localities ran out of money to support aid programs and called on the federal government for help.¹²³ The Social Security Act created a national pension system and a national unemployment system (partnered with states).¹²⁴ It also created a federal program, then called Aid to Dependent Children (ADC), that provided aid to poor mothers and their children.¹²⁵ The goal was to provide for children whose fathers were deceased, absent, or unable to work.¹²⁶

An array of other federal welfare programs was passed as part of the New Deal, and for some poor Americans, there was significant (though

117. Handler & Hasenfeld, *supra* note 13, at 154.

118. *Id.* at 154–55.

119. Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 214 (1998).

120. Ezra Rosser, *Holes in the Safety Net 2* (2019) (“Until the New Deal, assistance to the poor was traditionally a local matter. . . . [T]he colonies, and later the states, distinguished between the deserving and undeserving poor and provided different forms of relief depending on that classification.”).

121. Joel F. Handler, “Constructing the Political Spectacle”: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 *Brook. L. Rev.* 899, 913 (1990).

122. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

123. Kathryn J. Edin & H. Luke Shaefer, *\$2.00 a Day: Living on Almost Nothing in America* 11 (2015).

124. Social Security Act §§ 1–2, 201, 301–303; Rosser, *supra* note 120, at 2.

125. Social Security Act §§ 401–402; Rosser, *supra* note 120, at 2.

126. Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 *Future Child.* 28, 29 (1997).

temporary) improvement in their situation.¹²⁷ Similar to earlier aid programs, however, some states—in this case, Southern states—carved out exceptions that excluded Black people from coverage.¹²⁸ As Professor Ezra Rosser notes, these states were “concerned that generous socioeconomic rights would undermine the Jim Crow economic structure of the South,” thus while “[t]he New Deal might have created federal welfare rights,” the “benefited population largely did not include poor African Americans, Latinos, or Native Americans.”¹²⁹

The American appetite for serious investment in the poor was short-lived, particularly for targeted aid programs such as ADC. Backlash soon emerged, particularly as welfare numbers grew.¹³⁰ President Ronald Reagan popularized the infamous, though disproven, concept of the “welfare queen” into the American consciousness. Welfare queens were portrayed primarily as single Black women who took advantage of the welfare system, bringing in a large amount of money to buy luxury goods without working.¹³¹ During this time, support for programs that aided the poor and the institutions they frequented waned. ADC (renamed Aid to Families and Dependent Children (AFDC) in 1968) was ultimately reformed in 1996.¹³² The heart of the new program, Temporary Assistance to Needy Families (TANF), was an emphasis on “personal responsibility” and “self-sufficiency.”¹³³ Cash welfare was no longer an entitlement for poor families, and time limits and other barriers were put into place to exclude families from aid.¹³⁴

Just as the United States has limited aid programs for the poor, it also has limited support for the institutions that serve the poor. The government has, in fact, allowed such institutions to struggle with

127. Rosser, *supra* note 120, at 2 (listing various New Deal programs and noting that “[t]he New Deal changed things, to a point”).

128. *Id.* (“Southern states . . . were allowed—through carve outs for agricultural and domestic workers, as well as through deference to state administration—to exclude blacks from coverage.”).

129. *Id.* In the early years of the ADC program, for example, states had significant discretion to determine eligibility, and they would decide that only children living in “suitable homes” would receive benefits. Some states used this discretion to exclude families deemed “undesirable,” such as Black families and children of never-married women. Blank & Blum, *supra* note 129, at 30.

130. ADC numbers grew from only a few hundred cases in the late 1930s to 3.6 million cases by 1962. Edin & Shaefer, *supra* note 123, at 11.

131. *Id.* at 15; Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* 1–32 (2000) (detailing how the media contributed to the negative public perception of welfare).

132. Linda Gordon & Felice Batlan, *Aid to Dependent Children: The Legal History*, VCU Librs. Soc. Welfare Hist. Project, <https://socialwelfare.library.vcu.edu/public-welfare/aid-to-dependent-children-the-legal-history/> [https://perma.cc/TV3F-CHTP] (last visited Feb. 25, 2022).

133. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 Pub. Papers 1328 (Aug. 22, 1996).

134. Edin & Shaefer, *supra* note 124, at 15.

inadequate funding, contributing to poverty and inequality. Consider the trajectory of funding for the Legal Services Corporation. The Legal Services Corporation grew out of President Lyndon B. Johnson's "war on poverty" and the creation of the Office of Economic Opportunity (OEO) in 1964.¹³⁵ The OEO worked on establishing local legal services offices around the country to serve the legal needs of the poor for free, and by 1966 federal funding for this program hit \$25 million.¹³⁶ In 1974, President Richard Nixon signed a law creating the Legal Services Corporation (LSC), which formalized funding for these neighborhood legal service organizations.¹³⁷

Beginning in the late 1970s, however, funding for LSC was almost constantly under fire, and LSC suffered significant budget cuts several times.¹³⁸ At some points the entire budget for LSC was threatened, most recently under President Donald Trump in 2018 and 2019.¹³⁹ Even though LSC was ultimately funded in 2019, its funding levels are well below where they were when LSC was started. The 2021 appropriation for LSC was 55% below its 1979 level (accounting for inflation).¹⁴⁰

Governmental disregard and neglect of institutions that serve the poor is widespread. This phenomenon has been well studied and documented as it relates to institutions such as housing and neighborhoods¹⁴¹

135. Our History, Legal Servs. Corp., <https://www.lsc.gov/about-lsc/who-we-are/our-history> [<https://perma.cc/4ZWB-JAAR>] (last visited Feb. 3, 2022).

136. Alan Houseman & Linda E. Perle, Ctr. for L. & Soc. Pol'y, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 14 (2018), https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf [<https://perma.cc/3DH9-HXEN>].

137. See Legal Servs. Corp., *supra* note 135.

138. See Houseman & Perle, *supra* note 136, at 29–30.

139. *Id.* at 50–51.

140. David Reich, *Additional Funding Needed for Legal Service Corporation*, Ctr. on Budget & Pol'y Priorities (Feb. 1, 2021), <https://www.cbpp.org/blog/additional-funding-needed-for-legal-service-corporation> [<https://perma.cc/62G3-UHUC>] (“[T]he LSC is chronically underfunded. . . . [T]he LSC’s budget peaked in 1979 Later years brought several rounds of big budget cuts, followed by only a partial rebuilding of funding. In inflation-adjusted terms, the 2021 appropriation is 55 percent below its 1979 level.”).

141. See Matthew Desmond, *Evicted* 301–03 (2016) (discussing how American social policy and a lack of investment in affordable housing has led to mass evictions and instability for poor families); Eva Rosen, *The Voucher Promise* 236–37 (2020) (noting that “[t]he federal government—unable (or unwilling) to fund public housing at a level sufficient to maintain its upkeep—outsourced the problem of housing the poor to private landlords through housing vouchers” and discussing the pitfalls of such a policy); Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* 117–18 (2013) (discussing how both political decisions and social policies have led to disinvestment from Black neighborhoods, which in turn led to persistent segregation and declining opportunities for Black families, and showing how these political decisions have resulted in multigenerational inequality for Black families); William Julius Wilson, *The Truly Disadvantaged* (1987) (detailing how American social policy on poverty led to deteriorating conditions and a lack of employment and other opportunities in American inner-city ghettos, ultimately resulting in persistent poverty in these neighborhoods).

and schools.¹⁴² Yet we are much further behind when it comes to understanding the specific ways in which the government has financially neglected courts¹⁴³—and specifically the very courts that primarily serve poor people, who are disproportionately people of color.¹⁴⁴ Despite the calls for change beginning in the early 1900s as our stratified system of judging became apparent, following in the footsteps of so many other calls for investment and change when it comes to the poor, there was only minimum movement and the stratified system of judging for the most part persisted. In the next two Parts, we document this aspect of neglect of courts that serve the poor, showing where the system currently stands.

II. SURVEY STUDY METHODS, SCOPE, AND FINDINGS

A. *Survey Methods and Scope*

We conducted a comprehensive survey of low-level courts in each state. We sought to answer the following questions through our survey:

1. Does the state allow any level of judge to adjudicate without legal credentials?
2. If the state allows some, but not all, judges to adjudicate without legal credentials, which judges fall into each category, and what types of cases do they hear?
3. Which court in each state adjudicates eviction cases, and does that court require legal credentials?

In order to answer these questions, we engaged a variety of sources, including state statutes, state judicial webpages, and other sources (that varied for each state) that provided information on judge credentials for the particular state.

142. See Bruce D. Baker, *Educational Inequality and School Finance: Why Money Matters for America's Students* 3–4 (2021) (noting the historical and persistent relationship between school funding and inequality in schools across the United States); Ivy Morgan & Ary Amerikaner, *The Educ. Tr., Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State 2018*, at 2, 6, 10 (2018), https://edtrust.org/wp-content/uploads/2014/09/FundingGapReport_2018_FINAL.pdf [<https://perma.cc/DN49-45NX>] (finding that in twenty-seven states, districts with the highest poverty rates do not receive more funding to account for that increased need and in fourteen states, districts with the most students of color get less funding than districts with the lowest percentage of students of color); Barbara T. Bowman, James P. Comer & David J. Johns, *Addressing the African American Achievement Gap: Three Leading Educators Issue a Call to Action*, 73 *Young Child*, 14, 15 (2018) (presenting several findings on the relationship between educational opportunities and school performance with future opportunities).

143. Some scholars have certainly begun to study low-level courts and the lack of government investment in them. See generally Sabbeth, *Market-Based Law Development*, *supra* note 80 (detailing the variable funding within court systems and its impact on the development of law and equitable outcomes).

144. See *supra* notes 2–3.

We of course found significant variation in the judicial systems of each state, particularly in their lowest-level courts. When statutes and other information did not clearly answer our questions, we supplemented our searches with emails to legal aid organizations in order to clarify state practices. We decided to contact legal aid organizations because their attorneys disproportionately practice in low-level state courts.

B. *State Survey Findings*

The upper-level courts of each state are fairly consistent, at least in name (most states have district courts, for example), but particularly among low-level courts, each state integrates its own unique court system with different names, jurisdictions, and procedures. The first question we sought to answer was how many states allow any level of judge to adjudicate without a J.D. Overall, thirty-two states allow lay judges at some level of court.¹⁴⁵ Five states, Connecticut, Idaho, Indiana, Iowa, and Washington, passed statutes requiring all judges to be lawyers, but lay judges who were judges at the time of the statutory change were allowed to continue in their jobs until they resigned or lost a judicial election.¹⁴⁶ Further, New Hampshire technically allows lay judges at any level of judgeship in the state, but in practice, due to the nomination and appointment process for judges, all judges in the state are members of the bar.¹⁴⁷ Thus, we did not

145. These states include Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. For a chart detailing the requirements for each state, see *infra* Appendix, tbl.1.

146. In Connecticut, as of January 5, 2011, all probate judges elected must be attorneys admitted to practice law in Connecticut. Conn. Gen. Stat. §§ 45a-18(e) (2021). In Idaho, as of July 1, 2019, magistrates were required to be active or judicial members of the bar and be a lawyer or hold judicial office for the five years preceding appointment. Idaho Code § 1-2206 (2021). Lay magistrates who did not meet these requirements at the time the statute was changed, however, have been allowed to continue in their magistrate positions. *Id.* In 2015, a state law in Indiana was passed requiring all judges in the state to be licensed attorneys. Ind. Code § 33-35-5-7 (2021). However, town and city judges who were serving in 2015 but were not attorneys were allowed to continue in their jobs. They are allowed to serve until they resign or lose an election for their post. *Id.* § 33-35-5-7.5. As of April 1, 2009, all judges in Iowa were required to be attorneys licensed to practice law in the state. Iowa Code § 602.6404 (2021). Those who were lay judges currently sitting as of that date, however, were allowed to be reappointed for subsequent successive terms. *Id.* Washington State previously allowed lay judges to serve as district judges for districts with populations under 5,000 people if the judges took qualifying examinations with the state supreme court. 2002 Wash. Sess. Laws 552. In 2002, however, that rule was phased out (beginning in 2003), but existing lay judges were grandfathered in and allowed to continue in their jobs. *Id.*

147. Paul J. Kline, *Judges*, John W. King N.H. L. Libr. (June 1, 2020), <https://courts-state-nh-us.libguides.com/c.php?g=1045296> [<https://perma.cc/YLE7-YCND>] (noting that the New Hampshire Judicial Selection Commission compiles a list of qualified candidates and that although judges in New Hampshire need not have a law degree nor be a member of the New Hampshire Bar Association, in current practice, all judges are members of the Bar Association).

include Connecticut, Idaho, Indiana, Iowa, Washington, or New Hampshire in our count.

Among the states that do not require a J.D. degree or admission to the bar, there is significant variation in the requirements for judges. In Alaska, for example, the only requirements for magistrate judges are that they need to be at least twenty-one years of age, citizens of the United States and the State of Alaska, and residents of Alaska for at least six months immediately preceding the appointment.¹⁴⁸ Thus, in Alaska, magistrate judges are not even required to have a high school diploma. Delaware has similar requirements for its justices of the peace, only requiring that they be twenty-five years of age or older and a resident of Delaware.¹⁴⁹ Several other states have only age (usually twenty-one) and residency requirements.¹⁵⁰ A few of these states put additional restrictions on the type of jobs magistrates can have. In Virginia, for example, there are restrictions on jobs not only for magistrate candidates themselves but also for the parents, children, spouse, and siblings of the candidates (these restrictions focus on affiliations with courts).¹⁵¹

Georgia has a few more requirements for their magistrates: They must be twenty-five years of age and must have earned a high school diploma or a general educational development (GED) diploma.¹⁵² In addition, they must be registered to vote, have been a resident of the county where they are going to serve for two years preceding the term and remain a resident of that county throughout their service, and finally be a citizen of the United States.¹⁵³

148. Alaska Stat. § 22.15.160(b) (2021). The statute notes that additional requirements may be imposed by the State Supreme Court, but we did not find any additional requirements imposed, and a current job announcement for State Magistrates does not list any additional requirements. See, e.g., Magistrate Judge II (Alaska Court System 41-8401), Workplace Alaska: State of Alaska Online Recruitment Sys., <https://agency.governmentjobs.com/alaska/default.cfm?action=jobbulletin&JobID=692861> [<https://perma.cc/7WD6-TXYV>] (last visited Feb. 4, 2022).

149. Magistrate Screening Committee, Del. Cts., <https://courts.delaware.gov/jpcourt/screening.aspx> [<https://perma.cc/6XXD-D3ZW>] (last visited Feb. 4, 2022).

150. See *infra* Appendix, tbl.1.

151. Va. Code § 19.2-37(C) (2021). A person is ineligible for appointment as a magistrate judge:

- (a) [I]f such person is a law-enforcement officer;
- (b) if such person or his spouse is a clerk, deputy or assistant clerk, or employee of any such clerk of a district or circuit court, provided that the Committee on District Courts may authorize a magistrate to assist in the district court clerk's office on a part-time basis;
- (c) if the parent, child, spouse, or sibling of such person is a district or circuit court judge in the magisterial region where he will serve; or
- (d) if such person is the chief executive officer, or a member of the board of supervisors, town or city council, or other governing body for any political subdivision of the Commonwealth.

Id.

152. Ga. Code Ann. § 15-10-22(a) (2021).

153. *Id.*

Some states, such as West Virginia, restrict people with criminal backgrounds from being magistrates: Magistrates must never have been convicted of a felony or a misdemeanor involving “moral turpitude.”¹⁵⁴ The requirements in West Virginia are not otherwise high. Magistrate candidates must be at least twenty-one years of age, must have a high school education or its equivalent, must reside in the county of their election, and must not be an immediate family member of another magistrate in the county.¹⁵⁵ Notably, West Virginia’s state constitution prohibits requiring magistrates to be attorneys, stating:

[T]he Legislature shall not have the power to require that a magistrate be a person licensed to practice the profession of law, nor shall any justice or judge of any higher court establish any rules which by their nature would dictate or mandate that a magistrate be a person licensed to practice the process of law.¹⁵⁶

In a few states, lay people are allowed to be magistrate judges, but the requirements for the job are otherwise quite high. In Massachusetts, for example, magistrates are not required to have a J.D., but they must have an undergraduate education or at least fifteen years of experience.¹⁵⁷ Further, non-bar magistrate candidates are required to demonstrate at least five years of experience in the court applied for, five years of experience in a court of comparable jurisdiction, or five years of relevant experience.¹⁵⁸

There are at least five states (Colorado, Nevada, New Mexico, Oklahoma, and Utah) that determine legal training requirements for judges based on the population size of specific counties within the state. In higher population areas of these states, judges are required to have J.D.s, but in lower population areas, J.D.s are not required. The exact population requirements vary significantly by state. In Colorado, for example, qualifications for county court judges depend on what “class” is assigned to the county where the judge serves.¹⁵⁹ Counties can be assigned to a class ranging from A to D. All counties with a population of less than 30,000 people are either Class C or D counties. In Class A or B counties, county court judges must be admitted to the practice of law in the state. In Class C or D counties, county court judges do not need to have J.D.s and in fact only need to have a high school diploma or equivalent.¹⁶⁰ There is,

154. W. Va. Code Ann. § 50-1-4 (LexisNexis 2021).

155. *Id.*

156. W. Va. Const. art. VIII, § 10.

157. Mass. Exec. Order No. 558, § 2.2 (Feb. 5, 2015), <https://www.mass.gov/executive-orders/no-558-reconstituting-the-judicial-nominating-commission-and-establishing-a-code-of-conduct-for-commission-members-and-nominees-to-judicial-office> [<https://perma.cc/2AK5-93RJ>] (amending the Judicial Nominating Commission and establishing a Code of Conduct for Commission members and nominees to judicial office).

158. *Id.*

159. Colo. Rev. Stat. § 13-6-203 (2021).

160. *Id.*

however, a requirement of attendance at a training institute for nonlawyer Class C and D county judges.¹⁶¹

In Nevada, the system for determining whether a county has a J.D. requirement is a bit different—a population of 100,000 is the cutoff, where justices of the peace are not required to have J.D.s in counties with a population over 100,000,¹⁶² however, justices of the peace must be licensed attorneys admitted to practice law for not less than five years preceding their ascension to the bench.¹⁶³ In New Mexico, the cutoff is even higher. Lay judges are allowed to serve in judicial districts (also referred to as magistrate districts) with a population below 200,000.¹⁶⁴ But in districts with a population over 200,000, a magistrate must be a member of the New Mexico Bar and licensed to practice law.¹⁶⁵ These population-based schemes are significant in the context of historical concerns about the ability of rural areas to staff judgeships if a law degree is required, as discussed further in Part III.

All states have some kind of training requirement for lay judges, but these vary considerably. In Georgia, for example, magistrate judges who are not members of the bar must complete eighty hours of training during their first two years after becoming a magistrate.¹⁶⁶ Further, all nonlawyer magistrates must complete “orientation activities” conducted under the supervision of someone experienced, such as a mentor magistrate or judge.¹⁶⁷ The statute also notes that additional training hours may be required each year.¹⁶⁸ Nebraska, on the other hand, requires only eight hours of training annually,¹⁶⁹ and Tennessee requires only three hours of training annually.¹⁷⁰ And in Colorado, whenever an individual who is not licensed to practice law in the state becomes a county court judge, they must attend “an institute on the duties and functioning of the county court to be held under the supervision of the supreme court, unless such attendance is waived by the supreme court.”¹⁷¹ As we discuss further below in Part III, the timing of training programs for magistrates can result in magistrates adjudicating cases for half a year or more with no legal or administrative training at all.¹⁷²

161. *Id.*

162. Nev. Rev. Stat. § 4.010 (2021).

163. *Id.* § 4.010(3).

164. N.M. Stat. Ann. § 35-2-1 (West 2021).

165. *Id.* § 35-2-1(C)–(D).

166. Ga. Code Ann. § 15-10-137 (2021).

167. *Id.*

168. *Id.*

169. Neb. Sup. Ct. R. § 1-503; see also Neb. Rev. Stat. § 24-508(3) (2021) (“A clerk magistrate shall comply with the Supreme Court judicial branch education requirements as required by the Supreme Court.”).

170. Tenn. Code Ann. § 16-18-309 (2021).

171. Colo. Rev. Stat. § 13-6-203(5) (2021).

172. See *infra* Part III.

There is also significant variation in the types of cases states allow lay judges to adjudicate. As part of our survey, we collected data specifically on which states allow lay judges to adjudicate landlord–tenant disputes (including eviction cases). Of the thirty-two states that allow non-J.D. judges, seventeen allow such judges to adjudicate eviction cases.¹⁷³ In most of these states, the power to hear eviction cases stems from a statutory allowance for magistrate judges to hear civil cases that involve amounts in controversy below a certain amount of money. Appendix Tables One and Two detail the requirements for each state that allow lay judges to adjudicate eviction cases. Other common civil matters handled by lay judges involve contract disputes and debt collection cases.

As evidenced in the Appendix, most states that allow lay judges allow them to handle limited criminal matters such as issuing search warrants, issuing arrest warrants, handling simple misdemeanors, handling traffic-related violations, and setting bail. In some states, such as Mississippi, lay judges (there called county judges) can handle preliminary hearings in felony criminal cases.¹⁷⁴

III. DISCUSSION AND NORTH CAROLINA CASE STUDY

This Part discusses the implications of a lay-justice system—a system the survey results show is alive and well in many lower-level state courts in the United States. It begins by painting a picture of key differences between federal court and high-level state court judgeships on the one hand, and low-level state court judgeships on the other hand. With these factors at the ready, it then considers some of the main arguments for lay judging and also provides a discussion of existing scholarship relevant to assessing the potential upsides, as well as the pitfalls, of lay judging. Weaved into these discussions are findings from a case study of North Carolina, which is taken up in depth at the end of this Part. The case study provides a lens into how a system that relies heavily upon lay judging functions and identifies some of the problems of such a system. North Carolina was an ideal case study because it is a state that employs a large number of lay magistrates to adjudicate both civil and criminal issues: Currently, over 80% of magistrate judges in North Carolina do not have

173. These states include Arizona, Colorado, Delaware, Georgia, Kansas, Louisiana, Montana, Nevada, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wyoming. Idaho, Indiana, Iowa, and Washington also allow lay judges to oversee eviction cases if they were already judges when the state passed legislation requiring all judges to be lawyers. Further, New Hampshire technically allows lay judges to oversee eviction cases, but in practice all judges in the state are admitted to the bar. See *supra* note 145 and accompanying text.

174. About the Courts, State of Miss. Judiciary, <https://courts.ms.gov/aboutcourts/aboutthecourts.php> [<https://perma.cc/WY7E-VE7H>] (last visited Feb. 4, 2022); see, e.g., Justice Court, Adams Cnty. Miss., <https://www.adamscountymiss.net/justice-court> [<https://perma.cc/MA2B-X6VV>] (last visited Feb. 5, 2022).

law degrees,¹⁷⁵ and up until January 2022, the only requirement for magistrate judges was that by the six-month mark of their judgeship they receive forty hours of training.¹⁷⁶ As of January 2022, they must also complete twelve hours of continuing education each year after their first year of service.¹⁷⁷ As discussed in section III.E.1, we interviewed several key informants, attended meetings about the low-level court system in North Carolina, and visited two different courthouses, one with primarily lay judges and one with primarily lawyer-judges.

A. *What Does It Mean to Be a “Judge” in the United States?*

In order to frame the discussion around arguments for and against lay judging in the United States, it is useful to consider the contrast between higher-level state courts and federal courts, on the one hand, and lower-level state courts on the other hand. To begin, consider the credentials required for different types of judges. As discussed in Part II, several states that allow lay judges require only a high school diploma and state citizenship to serve.¹⁷⁸

Contrast this with what it takes to get appointed to a federal judgeship or elected or appointed (depending on the state) to a high-level state judgeship. Serving as such a judge is considered an honor generally reserved for only the highest-credentialed lawyers in the country. When presidents nominate people to serve as federal judges, the credentials of those nominated are considered newsworthy by the media.¹⁷⁹ Competition is fierce, and the rewards are high. Federal judges generally command much respect, are well-compensated, and are provided many resources to do their jobs well, such as law clerks, who are some of the top recent law school graduates in the country.¹⁸⁰ Judgeships for top state court positions

175. E-mail from Lori Cole, Ct. Mgmt. Specialist, N.C. Jud. Branch, to Charles Holton, Supervising Att’y, Civ. Just. Clinic at Duke Univ. Sch. of L. (June 3, 2020) (on file with authors) (noting that only 120 of the 669 (18%) North Carolina magistrates in the 2019–2020 fiscal year have law degrees and only 105 of the 120 with J.D.s are licensed to practice law).

176. N.C. Gen. Stat. § 7A-177 (2021).

177. *Id.* § 7A-171.2(c).

178. See *infra* Appendix, tbl.1.

179. See, e.g., Ariane de Vouge & Betsy Klein, Biden Unveils First Slate of Judicial Nominees Featuring Diverse and History-Making Selections, CNN (Mar. 30, 2021), <https://www.cnn.com/2021/03/30/politics/joe-biden-judicial-nominees/index.html> [<https://perma.cc/8UY9-NKRF>] (“This trailblazing slate of nominees draws from the very best and brightest minds of the American legal profession,” Biden said in a statement.”).

180. See Mark C. Miller, Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward, 39 *Law & Soc. Inquiry* 741, 742 (2014) (reviewing *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (Todd C. Peppers & Artemus Ward eds., 2012) (“Today, the clerks at the Supreme Court are almost always recent law school graduates from the best law schools in the country who have already spent a year clerking, usually on one of the US Courts of Appeals.”); see also Todd C. Peppers, *Couriers of the Marble Palace: The Rise and Influence of the Supreme Court Law*

(usually state supreme courts and the courts of appeals immediately below the state supreme court) are also coveted positions that usually enjoy many of the perks of high-level federal judgeships, though many of these judgeships are elected, rather than appointed.¹⁸¹

B. *Judging Financials*

Connected with the discussion above about differences in the credentials required for judges of different levels, it is also important to consider the financial aspects of judging in different types of courts in the United States. This consideration helps to paint a fuller picture of the contrast between low-level state courts and other courts in the United States. For the past several decades, all court systems in the United States have been under financial pressure during a time of increasingly high caseloads.¹⁸² Indeed, Supreme Court Justices have testified before

Clerk 1–2 (2006) (noting that “the best and brightest law school students” are given the opportunity to serve as Supreme Court law clerks); Artemus Ward & David L. Weiden, *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court* 55 (2006) (describing “a portrait of Supreme Court law clerks as a relatively homogeneous legal elite who matriculate at top law schools, secure prestigious clerkships with prominent judges and justices, and embark on careers of power and reward”).

181. See Kristen M. Renberg, *The Impact of Retention Systems on Judicial Behavior: A Synthetic Controls Analysis of State Supreme Courts*, 41 *Just. Sys. J.* 292, 295–96 (2020); *Choosing State Court Judges*, Brennan Ctr. for Just., <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/choosing-state-court-judges> [<https://perma.cc/R5XM-NWHC>] (last visited Feb. 25, 2022) (reporting that thirty-eight states select their supreme court justices through a public election). Even between federal and state courts (generally), there is a well-documented perception, since at least 1980, that state courts are inferior to federal courts. See Zambrano, *supra* note 61, at 2145–46 (documenting scholarly articles that suggest that federal courts had higher competence due to “higher caliber judges and a better institutional setting” and also that litigant surveys show that “litigants consider federal courts to be more competent than state courts”).

182. Chief Justice John Roberts wrote that the “impact of the sequester was more significant on the courts than elsewhere in the government, because virtually all of their core functions are constitutionally and statutorily required . . . Unlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts.” Tal Kopan, *Roberts: More Money for Courts*, *Politico* (Jan. 1, 2014), <https://www.politico.com/story/2014/01/roberts-calls-for-more-money-for-courts-101656> [<https://perma.cc/MT3V-SD3R>] (internal quotation marks omitted); see also Tal Kopan, *At Sequestration Hearing, Breyer, Kennedy Say Cameras in the Courtroom Too Risky*, *Politico* (Mar. 14, 2013), <https://www.politico.com/blogs/under-the-radar/2013/03/at-sequestration-hearing-breyer-kennedy-say-cameras-in-the-courtroom-too-risky-159328> [<https://perma.cc/A3UK-Z9EC>] (“[T]he 0.2 percent of the federal budget for the . . . third branch of the federal government is more than reasonable. What’s at stake here is the efficiency of the courts, and they are . . . not only part of the constitutional structure, they are part of the economic structure of the country . . .”); Tal Kopan, *87 Federal Judges Write Congress on ‘Devastating’ Sequester Cuts*, *Politico* (Aug. 15, 2013), <https://www.politico.com/blogs/under-the-radar/2013/08/87-federal-judges-write-congress-on-devastating-sequester-cuts-170617> [<https://perma.cc/3FZS-5EA4>] (“In a rare appearance before Congress[,] . . . Supreme Court Justices Anthony Kennedy and

Congress requesting more funds for federal courts, and federal judges have banded together to write to Congress warning of the dire consequences of budget cuts for the federal judiciary.¹⁸³ But the differences between what qualifies as true budgetary constraints for federal versus state courts are stark.¹⁸⁴ While the federal judiciary certainly has budget needs, state courts have been described as “mired in relative decay”¹⁸⁵ and “financially bankrupt,”¹⁸⁶ experiencing “layoffs, hiring freezes and cutbacks in services.”¹⁸⁷ In a few states, courts were even consolidated or closed due to budget issues.¹⁸⁸

Perhaps the most useful metric to consider for this Essay is judicial salary (and benefits), as salary is, of course, an important recruiting measure for any job. All federal judges are paid salaries above \$200,000.¹⁸⁹ In 2021, district court judges made \$218,600, circuit court judges made \$231,800, Associate Justices on the Supreme Court made \$268,300, and the Chief Justice of the Supreme Court made \$280,500.¹⁹⁰ Of course these

Stephen Breyer made a similar plea for the judicial branch, saying courts operate on a minimal budget and consume a small fraction of overall federal spending.”).

183. See *supra* note 182.

184. In an essay for the *Boston Review*, Professor Daniel Wilf-Townsend describes how the state civil court system has suffered significant budgetary struggles, particularly since the 2008 recession. He explains:

The Los Angeles Superior Court system alone faced annual shortfalls between \$80 million and \$140 million; in Florida, court budget shortfalls amounted to more than \$100 million, and almost 300 court staff positions were lost. Waiting times and case backlogs increased; in New York, caseloads grew to an average of 3,500 per judge.

Daniel Wilf-Townsend, *The Urgent Need for Civil Justice Reform*, *Bos. Rev.* (Apr. 21, 2020), <http://bostonreview.net/law-justice/daniel-wilf-townsend-urgent-need-civil-justice-reform> [<https://perma.cc/5JDW-EXX5>]. The National Center for State Courts has documented the cost-cutting measures state courts have taken since March 2020. Twenty-nine states have instituted hiring freezes, thirteen states have instituted salary freezes, eight states enacted furloughs, seven states offered early retirements, four states reduced the hours of their courts, and a few states even closed and consolidated courts and instituted layoffs. Budget Resource Center, Nat’l Ctr. for State Cts., <https://www.ncsc.org/information-and-resources/budget-resource-center> [<https://perma.cc/GVY8-PCGP>] (last updated Nov. 30, 2020).

185. Zambrano, *supra* note 61, at 2103.

186. *Id.* (quoting Don J. Debenedictis, *Struggling Toward Recovery: Courts Hope that Belt-Tightening Lessons From the Recession Will Help Them Make It Through the ‘90s*, 80 *ABA J.* 50, 51 (1994)).

187. *Id.* (quoting Don J. Debenedictis, *Struggling Toward Recovery: Courts Hope that Belt-Tightening Lessons From the Recession Will Help Them Make It Through the ‘90s*, 80 *ABA J.* 50, 50 (1994)). See also *supra* note 184.

188. Zambrano, *supra* note 61, at 2103.

189. *Judicial Compensation, U.S. Cts.*, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/XGJ7-MUVR>] (last visited Feb. 25, 2022).

190. *Id.*

judges often have other opportunities to make money that stem from their prestigious judgeships, such as book deals.¹⁹¹

State court judge salaries vary significantly by state, but the mean and median salaries for (higher-level) state court judges of general jurisdiction courts, intermediate appellate courts, and courts of last resort are all over \$150,000.¹⁹² In 2021, the median salary for general jurisdiction judges was \$161,829, for intermediate appellate court judges it was \$178,763, and \$183,653 for courts of last resort.¹⁹³ The difference between these salaries and the salaries of magistrate judges (or their equivalents) is significant.¹⁹⁴ Take North Carolina, for example, which pays higher-level state court judges a bit below the median for all states.¹⁹⁵ In 2021, higher-level North Carolina state court judges all made over \$100,000, a generally comfortable salary, even for someone encumbered by significant student loan debt.¹⁹⁶ Specifically in 2021, North Carolina superior court judges made \$142,082, appellate court judges made \$150,184, and supreme court judges made \$156,664.¹⁹⁷

In contrast, North Carolina magistrate judges, whose salaries are set by statute, all make well below \$100,000, no matter how many years they are on the job and whether or not they are lawyers.¹⁹⁸ The entry rate salary for a full-time magistrate (someone who works at least forty hours per week) is \$42,630; step one is \$45,777; step two is \$49,171; step three is \$52,764; step four is \$57,072; step five is \$62,259; and step six is \$68,072.¹⁹⁹ Nonlawyer magistrates enter at the entry-level salary, no matter their past job, and their salaries increase to the next step every two years from steps

191. See, e.g., Stephen Breyer, *The Authority of the Court and the Peril of Politics* (2021); Daniel Lippman, William Barr, Amy Coney Barrett Land Book Deals, *Politico* (Apr. 19, 2021), <https://www.politico.com/news/2021/04/19/bill-barr-amy-coney-barrett-book-deals-483028> [<https://perma.cc/XY4G-5V62>] (reporting on Justice Amy Coney Barrett's \$2 million book deal).

192. Nat'l Ctr. for State Cts., *Survey of Judicial Salaries 1–2* (2021), https://www.ncsc.org/__data/assets/pdf_file/0022/66307/Survey-of-Judicial-Salaries-July-2021.pdf [<https://perma.cc/Z4KD-6BNV>] [hereinafter *Survey of Judicial Salaries*].

193. *Id.*; see also Jeff Welty, *Compensation of North Carolina Judges*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Mar. 4, 2019), <https://nccriminallaw.sog.unc.edu/compensation-of-north-carolina-judges/> [<https://perma.cc/567N-9X44>].

194. See, e.g., Welty, *supra* note 195 (noting the significant differences in judicial and magistrate salaries).

195. *Survey of Judicial Salaries*, *supra* note 192, at 1–2.

196. See, e.g., Steven Chung, *Public Interest Organizations Must Use Their Surge in Donations to Pay Their Lawyers a Living Wage, Above the L.* (Jan. 8, 2020), <https://abovethelaw.com/2020/01/public-interest-organizations-must-use-their-surge-in-donations-to-pay-their-lawyers-a-living-wage/> [<https://perma.cc/M2SH-Y2YP>] (noting how the salary of public interest lawyers, which is similar to the salary of magistrates in North Carolina, is usually not enough to cover basic living expenses and other student loan repayment plans).

197. *Survey of Judicial Salaries*, *supra* note 192, at 1–2.

198. See Welty, *supra* note 193.

199. 2021 N.C. Sess. Laws 522 (to be codified as amended at N.C. Gen. Stat. § 7A-171.1 (2021)).

one through three, and then every four years (from date of appointment) for increases from steps four through six.²⁰⁰ Lawyers who start as magistrates start at a step four salary, \$57,072, but their opportunity for growth is no more than a non-J.D. magistrate (capped at step six).²⁰¹ One magistrate said of the starting magistrate salary, “[Y]ou can go . . . work [as] . . . a manager of most, any fast food restaurant and make more than that.”²⁰²

Not only are North Carolina magistrates paid significantly less than other state court judges (and, of course, federal court judges), but they also do not accrue paid vacation time or get retirement benefits, something most professionals have come to expect. Magistrates only get vacation time if the resident superior judge they work under gives it to them.²⁰³ As the same magistrate interviewee said when describing magistrate salaries and benefits, “[W]e’re the lowest . . . person on the totem pole.”²⁰⁴ In addition, the hours magistrates are expected to work are nontraditional and vary, with all magistrates on the criminal side having to take overnight shifts of “night court” at the local jail.²⁰⁵ Magistrates also often have to work weekends, holidays, and evenings.²⁰⁶ In section III.C below, we discuss why these differing salaries and benefits matter.

C. *Considerations in Support of Lay Judging*

So why are these pay and benefit differences relevant to the conversation about lay judges? The answer lies in arguments in support of lay judging: One of the key historical arguments that persisted throughout much of the twentieth century against requiring magistrate judges to have a law degree (particularly in rural areas) is that states would not be able to fill the positions. Indeed, this is why some states have different credential requirements for magistrates depending on county population, as discussed in Part II.²⁰⁷

But what the salary and benefits differentials show is states’ lack of willingness to invest in making magistrate positions (or their equivalent) attractive to lawyers as a career path. High-level judgeships come not only with prestige but also with a sizable salary and benefits package that is lacking for magistrates. It is no wonder, then, that those with law degrees might not be attracted to the magistrate job and might not be willing to

200. *Id.*

201. *Id.*

202. Telephone Interview with Magistrate C (Nov. 23, 2021).

203. See *id.*

204. *Id.*

205. Telephone Interview with Magistrate A (Nov. 2, 2021).

206. See Job Listing: Magistrate, State of N.C., https://agency.governmentjobs.com/northcarolina/job_bulletin.cfm?jobID=1008793&sharedWindow=0 [<https://perma.cc/GXG6-H3BN>] (last visited Feb. 4, 2022) (“Must be able to work irregular hours including nights, weekends, and holidays.”).

207. See *supra* section II.B.

move to rural areas for the job. Indeed, a starting salary in the mid-\$50,000s with a growth opportunity only up to the mid-\$60,000s might be very difficult for a lawyer with significant law school student loan debt to comfortably take on.²⁰⁸ This lack of investment by states in making magistrate jobs appealing, in contrast to higher-level judgeships, is a commentary on how states value the people and the types of cases that go through their lowest-level courts. These salaries put a price tag on these courts, and the lack of high valuation is evident. Of course, budgets are tight, but how governments allocate budgets largely showcases the degree to which governments value (or don't value) certain institutions and programs.

Some may argue that there is no need to raise salaries and make magistrate judgeships more attractive because it is in fact preferable for cases in these low-level courts to be adjudicated by connected and known (nonlawyer) community members, rather than by trained lawyers. As Professor Cathy Lesser Mansfield wrote in her 1999 article, "One of the images that underlies much of the non-lawyer judge discourse is that of the wise and experienced member of the community, unrestrained by the formality of court rules, and informed by his knowledge of local custom, and perhaps even the knowledge of individuals before him."²⁰⁹

There are two problems, however, with this argument. First, while this is a romantic notion of what community justice might look like, a notion that might have some historical truth,²¹⁰ the notion of a "community" is complex on the ground in 2021. In North Carolina, for example, one of the most common careers prior to a magistrate judgeship is law enforcement.²¹¹ Indeed, in the rural county where the magistrates we interviewed worked, all of the sitting magistrates (roughly fifteen total) with the exception of one were former probation officers (at the time of the interviews).²¹²

Police and probation officers have unique positions in the community, but they do not necessarily fill the romantic notions of wise and trusted community members. There are significant power differentials between citizens and these officers, and the notion that it is in fact a plus that a former police or probation officer might even have "knowledge of individuals before him"²¹³ is problematic, delegitimizing, and likely harmful for some community members. Given recent empirical research

208. See Chung, *supra* note 196 (noting how the salary of public interest lawyers, which is similar to the salary of magistrates in North Carolina, is usually not enough to cover basic living expenses).

209. Mansfield, *supra* note 4, at 142.

210. See *id.* ("James A. Gazell commented that '[t]he persons elected as justices of the peace, however, were usually the most trusted members in frontier communities.'" (citation omitted)).

211. Telephone Interview with Key Informant 3 (June 4, 2021).

212. *Id.*

213. Mansfield, *supra* note 4, at 142.

about law enforcement and Black communities, a judge with a background as a police or probation officer is unlikely to be perceived as a reassuring presence or an impartial adjudicator who understands and appreciates the local community and culture.²¹⁴ Such research has shown that law enforcement personnel engage in racial profiling and stereotyping²¹⁵ and disproportionately subject Black and low-income communities to proactive policing practices, including heightened criminal surveillance, stop-and-frisks, and traffic stops.²¹⁶ These practices, combined with a slow response to Black neighborhoods when assistance via 911 is called,²¹⁷ fosters a common belief in Black communities that law enforcement merely “operates to protect the advantaged.”²¹⁸ Further, “feelings of distrust and fear of the police . . . have become cultural norms” in Black communities.²¹⁹

The second problem with the community ties argument for lay judges is the assumptions such an argument makes about the legal issues that come before magistrate judges. For a community-based system to work, it must be that the matters of law adjudicated are simple enough that a lay judge could effectively and efficiently understand and work through these

214. See *infra* notes 215–219 and accompanying text.

215. See Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 *Harv. L. Rev.* 1, 80 n.477 (2019) (citing numerous empirical sources showing that Black men are more likely than white men to be stopped or killed by police).

216. See Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 *Yale L.J.* 2054, 2060–61 (2017) [hereinafter Bell, *Legal Estrangement*] (highlighting scholarship that shows stop-and-frisk tactics led to higher incarceration of Black men even though there was not necessarily an increase in actual crime); Monica C. Bell, Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism, 50 *Law & Soc’y Rev.* 314, 318 (2016) (“In the early and mid-twentieth century, widely accepted, disproportionate police harshness in predominantly black communities contributed to blacks’ greater likelihood of being arrested, charged, and sentenced more severely for crimes than whites.” (citing Chicago Commission on Race Relations (1922))); Aziz Z. Huq, The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing, 101 *Minn. L. Rev.* 2397, 2413–14 (2017) (showing that advocates of stop-and-frisks openly recognize that minority communities will be affected disproportionately by the policy’s implementation); Tracey Meares, The Legitimacy of Police Among Young African-American Men, 92 *Marq. L. Rev.* 651, 654 (2009) (“No one is surprised to learn that black men have long faced a higher arrest probability than white men.”); L. Song Richardson, Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks, 15 *Ohio St. J. Crim. L.* 73, 87 (2017) (“Empirical evidence consistently demonstrates that Black individuals bear the brunt of stops and frisks and other similar investigatory proactive policing practices.”).

217. See Huq, *supra* note 216, at 2425 (“In Chicago, for example, African-American and Hispanic neighborhoods are subject to [stop-and-frisk] on the one hand, but on the other hand experience substantially longer delays than non-minority neighborhoods when seeking police aid via 911 calls.”).

218. Bell, *Legal Estrangement*, *supra* note 216, at 2071 (quoting Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation With the Police and Courts 108–09 (2002)).

219. Mikah K. Thompson, A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police, 85 *UMKC L. Rev.* 697, 698 (2017).

legal issues.²²⁰ Consider eviction as an example. The most common basis for eviction in North Carolina is “nonpayment of rent.”²²¹ The legal requirements for failure to pay rent are fairly simple—demand plus a ten-day waiting period before a landlord can file suit.²²² However, there are several defenses to nonpayment of rent, such as insufficient demand, retaliatory eviction, and habitability claims.²²³ Each of these defenses require the interpretation of language and legal principles.

For example, under insufficient demand, a landlord must make a “clear, unequivocal statement, either oral or written” for rent—an indirect expression of a desire to have a tenant catch up on rent is insufficient.²²⁴ Another example is a landlord’s duty to deliver and maintain “fit and habitable” premises.²²⁵ This duty involves complying with applicable building codes, and thus a magistrate must interpret such codes. Further, there is a statute protecting tenants from retaliatory evictions.²²⁶ There are several “good faith” actions on the part of a tenant that are protected, such as a request for repairs or a complaint to a government agency about a landlord’s violation of any health or safety law, building code, or any other applicable regulation.²²⁷ Interpretations of each of these clauses are complex and may involve case and statutory interpretation—something trained lawyers learn during their three years in law school.

Ultimately, the very notion that the types of cases heard before low-level state courts are somehow conducive to community judging is more of a value judgment about the types of issues that come before low-level courts than a true assessment of the complexity of the legal issues at hand. Many, if not most, of these issues stem from consequences of poverty, and thus are largely legal problems of the poor (eviction,²²⁸ debt collection,²²⁹

220. As discussed in *supra* section I.C, there has long been advocacy for the idea of community justice in the United States.

221. North Carolina Eviction Process, Nat’l Evictions, <https://nationalevictions.com/home/welcome/states-eviction-process/north-carolina-eviction-process/> [<https://perma.cc/3682-TP25>] (last visited Feb. 28, 2022).

222. N.C. Gen. Stat. § 42-3 (2021).

223. See, e.g., *id.* § 42-37.1 (providing an affirmative defense against retaliatory evictions).

224. *Snipes v. Snipes*, 286 S.E.2d 591, 595 (N.C. Ct. App. 1982), *aff’d per curiam*, 293 S.E.2d 187 (N.C. 1982).

225. N.C. Gen. Stat. § 42-42.

226. *Id.* § 42-37.1(a)(1)–(2).

227. *Id.*

228. *Desmond*, *supra* note 141, at 296 (explaining that eviction is commonplace among people in poverty and also one of the most significant drivers in perpetuating poverty).

229. Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers, The Legal Aid Soc’y, MFY Legal Servs., Neighborhood Econ. Dev. Advoc. Project & Urb. Just. Ctr., Cmty. Dev. Project 1 (2010), <http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [<https://perma.cc/AT4S-9ETC>] (“Virtually all (95%) of people with default judgments entered against them by debt buyers resided in low- or moderate-income neighborhoods . . .”).

child abuse and neglect cases,²³⁰ and many criminal justice matters²³¹ that come before magistrates).²³² As the data in the Appendix shows, many states base the civil jurisdiction of magistrates on the amount in controversy in a case. Magistrates in these states have jurisdiction if the amount in controversy of the case is below a certain amount. This amount varies but is often somewhere between \$5,000 and \$10,000.²³³ This means that if a contract dispute, for example, falls below this amount of money, the matter is adjudicated before a nonlawyer judge, but if the matter involves a multi-million-dollar deal between two companies, it will most certainly be heard by a legally credentialed judge.

The key issue is the amount of money involved, rather than the complexity of the legal issue. There is an inherent value judgment in this way of doling out legal expertise: Contracts between two companies generally should not be subjected to nonlawyer magistrates because matters that involve a lot of money are somehow more worthy of legal expertise than matters involving smaller dollar amounts.

Should the importance of legal issues come down to the money involved? Consider the implications of a landlord–tenant contract dispute resulting in an eviction for the life course of an individual.²³⁴ The stakes,

230. Maren K. Dale, Addressing the Underlying Issue of Poverty in Child-Neglect Cases, A.B.A. (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/> (on file with the *Columbia Law Review*) (“While poverty can lead to increased rates of actual maltreatment, poverty itself is often mistaken for neglect, resulting in increased rates of child-maltreatment reports.”).

231. Poverty and Debt, Prison Pol’y Initiative, <https://www.prisonpolicy.org/poverty.html> [<https://perma.cc/ELK2-ZJUG>] (last visited Feb. 25, 2022) (“Far from offering people a ‘second chance,’ our criminal justice system frequently punishes those who never had a *first* chance: people in poverty. By focusing law enforcement on low-level offenses and subjecting criminal defendants to money bail and other fees, our country effectively punishes people for being poor.”).

232. See Russell Engler, Connecting Self-Representation to Civil *Gideon*: What Existing Data Reveal About When Counsel Is Most Needed, 37 *Fordham Urb. L.J.* 37, 40–41 (2015) (exploring the unmet legal needs of the poor and noting that many of such unmet needs involve housing, family, and consumer issues); MacDowell, *supra* note 2, at 475 (defining “poor people’s courts” as state civil courts that serve large numbers of poor people, such as “family, housing, and small claims and other consumer courts”); see also *infra* Appendix, tbl.1.

233. See *infra* Appendix, tbl.1 (reporting that the “Amount in Controversy Cutoff?” can range between \$3,000 and \$25,000).

234. See Robert Collinson & Davin Reed, The Effects of Evictions on Low-Income Households 3 (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [<https://perma.cc/R8L7-F4UB>] (finding that those who are evicted are more likely to become homeless); see also Matthew Desmond & Rachel Tolbert Kimbro, Eviction’s Fallout: Housing, Hardship, and Health, 94 *Soc. Forces* 295, 295–96, 299 (2015) (noting that prolonged periods of homelessness can follow eviction, that there is a correlation between housing uncertainty and depression along with other negative health outcomes, and that “the blemish of an eviction can significantly influence one’s experiences on the housing market”); Barbara Kiviat & Sara Sternberg Greene, Opinion, Losing a Home Because of the Pandemic Is Hard

in many ways, could not be higher. Evictions uproot families, causing them to lose most of their possessions. Children who are evicted often must change schools and sleep in unstable and even unsafe conditions.²³⁵ Further, being evicted has been shown to cause long-term health problems.²³⁶

Yet in many states, North Carolina included, evictions are heard in small claims courts. Evictions are deemed “small claims,” and they are treated as such—unimportant and incidental. The symbolic nature of this term should not be lost. The term “small claims” inherently implies a small, relatively unimportant matter. Being evicted, however, is anything but small for the families involved. The decision to evict someone is not inherently less important than a seven-figure contract deal between two companies. Instead, by using amount in controversy as a proxy for determining importance, our legal system has embedded judgments about importance within it, valuing money over health, safety, and children’s life courses.

Another justification often made in favor of lay judging, including in *North v. Russell* (discussed in Part II), is that litigants usually have the right to a de novo trial or appeal before a lawyer-judge. Indeed, in *North v. Russell*, the majority relied in part on the fact that the defendant had a right to a de novo appeal of the decision by the nonlawyer judge to rule that lay judging is constitutional.²³⁷ At first glance, this argument appears to have validity, particularly given the volume of cases lower-level state courts hear (roughly sixteen million filings annually).²³⁸ Perhaps relying on a litigant to appeal if she wants her case heard before a legally credentialed judge is prudent. In theory, such a process is efficient, economical for strapped state judicial budgets, and potentially fair. In practice, however, such a system is anything but fair. To start, recall that the vast majority of litigants in low-level state courts are unrepresented.²³⁹ Now, consider the example of evictions in North Carolina again. Once a magistrate rules against a tenant, the tenant can appeal to the district court for a trial de novo if the notice of appeal is filed within ten days of the magistrate’s judgment.²⁴⁰ The tenant must post a rent bond if they wish to

Enough. How Long Should It Haunt You?, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/opinion/eviction-records-crisis.html> (on file with the *Columbia Law Review*).

235. See Desmond, *supra* note 141, at 299 (noting several health and developmental challenges for young children experiencing eviction); *supra* note 234 and accompanying text.

236. See Desmond & Kimbro, *supra* note 234, at 300–01 (noting the correlation between housing uncertainty and depression along with other negative health outcomes).

237. See 427 U.S. 328, 329 (1976).

238. Ct. Stats. Project, *supra* note 3.

239. See Schultheis & Rooney, *supra* note 22.

240. Landlord/Tenant Issues, N.C. Jud. Branch, <https://www.nccourts.gov/help-topics/housing/landlordtenant-issues> [<https://perma.cc/Z8JF-7SJ2>] (last visited Feb. 3, 2022).

remain in the property during the appeal process unless they file a form to be found indigent.²⁴¹

First, the appeals process assumes that tenants know they have the right to appeal. While magistrates are supposed to inform tenants of this right, our interviews with attorneys suggest that not all magistrates do. The attorneys we interviewed noted that in their experience, magistrates who are not lawyers are generally less familiar with the appeals procedure and thus are less likely to advise litigants of their appellate rights.²⁴² Since the majority of tenants before magistrates do not have an attorney, without a magistrate informing them of their right to appeal, they may never know.

Even if all magistrates always inform tenants of their right to appeal, the unrepresented tenant faces an upward, almost impossible, battle on the appeal. A ten-day window to file an appeal is quite short, particularly for someone who concurrently has to prepare to be kicked out of their home, potentially left homeless. During the ten-day process, the tenant must file the appropriate paperwork for appeal, including providing the other party with notice of the appeal. These steps require time, literacy, and procedural knowledge.

There are also fees associated with filing an appeal, though tenants may file an additional form to be found “indigent,” and thus unable to pay the appeals fee (and back rent due).²⁴³ However, in order to remain in their home during the appeals process, they still must sign and file an undertaking “Bond to Stay Eviction,” “agreeing to pay the tenant’s share of contract rent as it becomes due.”²⁴⁴ Further, “in actions based upon alleged nonpayment of rent where the magistrate’s judgment is entered more than five business days before the next rent due date, a tenant is also required to pay prorated rent under the terms of the undertaking.”²⁴⁵ If a tenant fails to pay prorated rent during the appeals process, the tenant can be evicted before the appeal is even heard.²⁴⁶

Most tenants brought to court for an eviction proceeding are in crisis, where money is short, and they need time to potentially plan for a new living arrangement, increase work hours to try to cover rent, and more. Even if the tenant manages to successfully file all needed paperwork to appeal, to obtain bonds and other necessary money to stay in their home during the appeals process, and to provide notice of appeal to the other party, the tenant will need to be able to take time off from work or potentially find childcare for the new trial at the district court. And the tenant has no say in when this trial will be held. The tenant will simply be mailed a notice of when that trial is and then must appear ready to litigate

241. *Id.*

242. Videoconference Interview with North Carolina Attorneys (June 2, 2020). The interview was conducted with both attorneys present.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

in front of the district court judge at the assigned time.²⁴⁷ This can be difficult for low-income litigants, since low-wage service sector jobs are notorious for difficult and last-minute work schedules and provide few opportunities for employees to adjust their schedules.²⁴⁸

Given these procedural and practical hurdles with an appeal, it is not surprising that the rate of appeals for eviction cases is extremely low.²⁴⁹ The right to a *de novo* trial is theoretically important, but in practice is futile in promoting equity.

D. *Existing Research and the Consequences of Judging Without a J.D.*

Scholars have only just begun to document the consequences of the unequal state and local court systems, making important headway on the consequences of fines and fees in low-level courts²⁵⁰ as well as the conse-

247. N.C. Super. & Dist. Cts. R. 2.

248. See Maria E. Enchautegui, *Nonstandard Work Schedules and the Well-Being of Low-Income Families* 6 (2013), <https://www.urban.org/sites/default/files/publication/32696/412877-Nonstandard-Work-Schedules-and-the-Well-being-of-Low-Income-Families.PDF> [<https://perma.cc/H8MK-22BQ>] (discussing the commonality of nonstandard hours in the U.S. workforce, particularly among low-wage workers); Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low Wage Work*, 50 *Harv. C.R.-C.L. L. Rev.* 1, 8 (2015) (discussing the prevalence of nonstandard hours in the workforce, especially in the service industry); Julia R. Henly, H. Luke Schaefer & Elaine Waxman, *Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs*, 80 *Soc. Serv. Rev.* 609, 610 (2006) (“The growth of the U.S. service economy has fueled an increasing demand for evening, weekend, and variable-hour workers . . .”). See generally Sara S. Greene, *Working to Fail*, 27 *Duke J. Gender L. & Pol’y* 167 (2020) (detailing how low-wage jobs often require nonstandard work hours and make it difficult for workers to adjust their schedules).

249. See, e.g., Riley B. Foster, *Eviction Diversion: A Community-Based Approach to Addressing High Rates of Eviction in Durham County, North Carolina* 56–58 (Apr. 2018) (B.A. thesis, University of North Carolina at Chapel Hill) (on file with the *Columbia Law Review*) (noting that the number of evictions in Durham County averaged about 460 per month between 2015 to 2017, and, on average, about seventeen of these evictions were appealed each month, implying that less than 5% of evictions are appealed).

250. One area of the state court system that contributes to inequality and has been recently studied is that of fines and fees. The imposition of mandatory fines and fees on the indigent, regardless of an individual’s ability to pay, has become a subject of mounting judicial, legislative, and public concern. Brandon L. Garrett, Sara S. Greene & Marin K. Levy, *Fees, Fines, Bail, and the Destitution Pipeline*, 69 *Duke L.J.* 1463, 1464 (2020). The Ferguson Report, released by the U.S. Department of Justice in 2015, sparked national attention for these issues through its documentation of a particular county courthouse’s unreasonable methods of criminalizing poverty through fines and fees. See, e.g., William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver’s License Suspension in North Carolina*, 69 *Duke L.J.* 1585, 1589–90 (2020) (“What makes these findings particularly relevant, however, is not just the scale of the driver’s license suspensions, but that they are disparately imposed on minorities and poorer communities.”). Over time, court-imposed fines and fees can multiply, resulting in intensifying debt. In turn, individuals may lose their employment, driver’s license, housing, and public assistance. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *Criminology & Pub. Pol’y* 509, 516 (2011) (“It thus appears that tens of millions of U.S. residents have been assessed financial penalties by

quences of having primarily pro se litigants.²⁵¹ Further, Professor Kathryn Sabbeth's recent essay on lower-level courts and the civil justice system made an important point: The lack of investment in state lower courts has resulted in what she calls the "underdevelopment of poor people's law."²⁵² The idea is that because resources are not spent on poor people's legal issues, justified by a notion that these issues are not legal in nature or are simple, the legal doctrine related to these issues is not well-developed. She argues that "[w]ithout lawyers to support them, time to prepare, or the opportunity to participate in defining the scope of issues before the court," poor litigants are denied the "benefits of law development."²⁵³ Ultimately, her larger argument is that "[a]ssumptions about whose cases

the courts and other criminal justice agencies."); Garrett et al., *supra*, at 1464; Sandra G. Mayson, *Detention by Any Other Name*, 69 *Duke L.J.* 1643, 1645 (2019) (noting how unaffordable bail functionally detains thousands each year); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 *J.L. Econ. & Org.* 511, 534–35 (2018) (detailing empirical findings suggesting that required pretrial detention and fees lead to an increased overall length of incarceration and nonbail fees owed); see also Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 *Duke L.J.* 1473, 1475–76 (2019) (describing substantive policy implications underlying the criminalization of poverty).

251. See Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 2, at 512–13 (detailing how a lack of social and economic safety nets leaves many pro se litigants vulnerable under current civil justice systems and leads to inequitable access to justice); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 *Wis. L. Rev.* 215, 217–18 (detailing the role of judges in low-level courts and their relationship with pro se litigants while identifying ways that judges may facilitate access to justice); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 *Conn. L. Rev.* 741, 749 (2015) (finding that in some states 80 to 90% of those who appear in the "people's court" are unrepresented and challenged with navigating a complex legal system in order to successfully access the courts); Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Marks, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 *Fordham L. Rev.* 1315, 1315–16 (2020) (identifying how courts have come to rely on a "shadow network of nonlawyer professionals" as a substitute for traditional legal counsel and discussing how this impacts the substantive and procedural information provided to many pro se litigants); Sudeall & Meals, *supra* note 2 (describing how millions of unrepresented litigants interact with the civil justice system each year).

252. Sabbeth, *Market-Based Law Development*, *supra* note 80. Others have also long voiced the concern about state courts losing their ability to shape law, although courts are not necessarily focused on shaping law for low-income individuals specifically. See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 *U. Ill. L. Rev.* 371, 413 ("Put simply: law cannot grow in the darkness with which arbitration shrouds its activities, and when law ceases to grow, it stagnates and eventually ceases to be (or be relevant)."); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. Rev.* 1353, 1419–20 (2006) (describing how the CAFA (Class Action Fairness Act) will cease nonfederal courts from shaping substantive law); Owen M. Fiss, *Comment, Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984) (describing how increases in settlements have detracted from courts' ability to shape the law); see also Zambrano, *supra* note 61, at 2176–80 ("Federal Monopolization of state claims also removes the ability of state courts to shape the common law.").

253. Sabbeth, *Market-Based Law Development*, *supra* note 80.

are worthy of attention legitimize the simplification of entire bodies of law and de-legalization of lower status courts.”²⁵⁴

Sabbeth focuses on the development of doctrine, and it seems likely that the issue we focus on in this Essay, nonlawyer judges, further perpetuates the underdevelopment of doctrine for poor people’s law. But this Essay suggests, in addition to Sabbeth’s point, that the existing doctrine is already quite complicated—to the extent that allowing lay judges to adjudicate cases involving the existing doctrine delegitimizes the legal process and, as discussed below, potentially leads to unjust outcomes.

Past research about procedural justice is also important to the problem of nonlawyer judging. Procedural justice scholars have found that when people perceive a lack of procedural justice, they are less likely to view the law as legitimate and as something that should be obeyed.²⁵⁵ On the flip side, when people experience procedural justice and are treated with respect, they view the law and legal authorities as more legitimate and entitled to be obeyed.²⁵⁶ In turn, people increase their self-regulation, taking on personal responsibility to follow social rules.²⁵⁷

Research suggests that different factors are important in shaping procedural justice judgments: perceptions of justice in the quality of the decisionmaking procedures (neutrality) and perceptions of justice in the treatment people receive in the process (status recognition).²⁵⁸ Professors Tom Tyler, Steven Blader, and Yuen Huo have argued that when people believe they have experienced these forms of justice, they tend to accept social rules and voluntarily engage in self-regulatory behavior.²⁵⁹

There is no doubt that many litigants who appear before lay judges may be unaware their judge is not a lawyer, and thus the experience may not feel inherently unjust. But regardless of whether poor litigants are aware of the credentials of the judge they appear before, there are important reasons procedural justice concerns still come into play. First, as we discuss below, both magistrates and attorneys who practice in their courts in North Carolina told us of clear procedural errors in magistrate

254. *Id.*

255. See, e.g., Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation With the Police and Courts 49–51 (2002); Tom R. Tyler & Robert J. Bies, Beyond Formal Procedures: The Interpersonal Context of Procedural Justice, *in* *Applied Soc. Psych. & Organizational Settings* 77, 78 (John S. Carroll ed., 1990).

256. See Tyler & Bies, *supra* note 255, at 78.

257. Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 *Crime & Just.* 283, 283–84 (2003).

258. See Tom R. Tyler and Steven L. Blader, Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement 8–10 (2000) (detailing how procedural justice causes people to evaluate their statuses and values which, in turn, leads to self-regulatory behavior); Tyler & Huo, *supra* note 255, at 52 (describing a model to help evaluate how procedural justice correlates to self-regulation of behavior).

259. Tyler & Huo, *supra* note 255, at 175–76; see also Tyler & Blader, *supra* note 258, at 8–10 (discussing the role of the perception of fair outcomes and fair processes in self-regulation).

courts, errors that litigants would feel and experience and may affect their perceptions of the justice system.²⁶⁰ These errors, among others, include failing to tell litigants of their right to appeal, failing to consider legal issues in eviction cases, incorrectly revoking a litigant's driver's license, setting inappropriate bail, and incorrectly issuing warrants.²⁶¹ A case study of South Carolina magistrates found similar (and even more substantial) procedural problems, as did an older study of lay judges in New York State.²⁶² Second, putting aside noticeable procedural problems, the inherent underlying message of a system of nonlawyer judges for the poor is one of disregard, unimportance, and blame. Even if poor people are unaware of the injustices they are experiencing or only have some sense of injustice rather than concrete knowledge of the injustice, this does not justify an inequitable system.

It is also important to note that in some cases, those coming before magistrates may very much know their judge is not a lawyer. For example, in North Carolina, those coming before magistrates on the criminal side may, in fact, recognize the magistrates as former police officers or even probation officers the community member may have interacted with. In such cases, it is difficult to imagine litigants would feel the process is fair, neutral, and legitimate, though further research on this point is needed.

E. *North Carolina Case Study and the Problems of Judging Without a J.D.*

1. *Case Study Methods.* — North Carolina was an ideal case study because it is a state that relies heavily on lay magistrate judging. Thus, studying North Carolina provided a window into better understanding the workings of a low-level judicial system where the majority of the adjudicators are not legally trained but also allowed for some degree of comparison since it has some lawyer-judges. As previously noted, North Carolina has a large percentage of lay magistrates—over 80% of current sitting magistrates (civil and criminal combined) do not have law degrees,²⁶³ and up until January 2022, the only requirement for magistrate judges was that by the six-month mark of their judgeship they receive forty hours of training.²⁶⁴ As of January 2022, they must also complete twelve hours of continuing education each year after their first year of service.²⁶⁵

260. See *infra* section III.E.

261. See *infra* section III.E.

262. See *infra* section III.F and note 331.

263. E-mail from Lori Cole to Charles Holton, *supra* note 175 (noting that only 120 of the 669 (18%) North Carolina magistrates in the 2019–2020 fiscal year have law degrees and only 105 of the 120 with J.D.s are licensed to practice law).

264. N.C. Gen. Stat. § 7A-177 (2021).

265. *Id.* § 7A-171.2(c).

As part of our case study, we attended meetings and conferences about the eviction system in North Carolina,²⁶⁶ we reviewed and conducted a content analysis of statutes, websites, and blogs geared toward magistrate judges in the state,²⁶⁷ and we visited the courthouses of two different counties in North Carolina—one where the majority of magistrates have a J.D. (Durham County) and the other where few of the magistrates have a J.D. (Alamance County). We randomly sampled (and then photocopied) recent eviction case files at each courthouse, which allowed us to compare orders of lawyer and nonlawyer magistrates.²⁶⁸

We also interviewed a variety of informants involved in the low-level court system in North Carolina. Because we were not trying to study a particular group of people, but rather an institutional system, constructing a representational sample did not make sense.²⁶⁹ Instead, we created a “panel of informants” by conducting interviews with key informants who could bring forth different perspectives on the lower-level court system in North Carolina, providing us with an overview of the factual and practical ways the system works.²⁷⁰

A key informant can be “a knowledgeable insider willing to serve as an informant on informants[,] . . . a retiree, a person who has a career’s experience with the system and now has time to reminisce,” or an “informed insider.”²⁷¹ In order to get key informants to “comfortably be candid” with an interviewer, it is often useful for the interviewer to be “vouched for by a mutual acquaintance.”²⁷²

With these methodological considerations in mind, we sought out interviews using our networks based on past research Greene has done on eviction in North Carolina. We interviewed the Executive Director of Legal Aid of North Carolina, who supplied us with important factual and observational information about lower-level courts in North Carolina. We

266. Greene attended the Statewide Summary Ejection Roundtable on June 14, 2019 at the North Carolina Judicial Center. She also attended several other informal meetings with key eviction stakeholders across the state.

267. See, e.g., Archive of Blog Posts by Dona Lewandowski, On the Civil Side: A UNC Sch. of Gov’t Blog, <https://civil.sog.unc.edu/contributors/> [https://perma.cc/QG66-23UJ] (last visited Feb. 23, 2022).

268. Renberg visited the Alamance County Courthouse on October 12, 2021 and the Durham County Courthouse on November 12, 2021.

269. Robert S. Weiss, *Learning From Strangers: The Art and Method of Qualitative Interview Studies* 20 (1994) (describing representational samples as useful when “we want to interview not a panel of people in peculiarly good positions to know but, rather, a sample of people who together can adequately represent the experiences of a larger group”). Our research was also additionally informed by a different study Greene conducted in the summer of 2019, which involved interviewing fifty respondents who had been evicted or were at risk of eviction in North Carolina. For a further description of this project, see *supra* note 1.

270. For a further description of the interviewing methods used to construct the sample panel of informants, see Weiss, *supra* note 269, at 18–20.

271. *Id.* at 20.

272. *Id.*

also connected with a magistrate judge in a rural county in North Carolina.²⁷³ We then used snowball sampling to interview two more magistrate judges (one who was currently a judge and one who had recently left a judgeship) from the same county.²⁷⁴ Further, using our contacts, we interviewed two attorneys who were able to provide a broad perspective, having both practiced in low-level courts across the state and also both having been involved in state-wide access to justice and court and law reform efforts. For further background and perspective, we also interviewed a former chief justice of the North Carolina Supreme Court, those involved with the training of magistrate judges in North Carolina, and individuals who are part of access to justice efforts across the state.²⁷⁵ Overall, combining all of the information our key informants provided along with the additional research conducted, we were able to develop a deep understanding of the magistrate system in North Carolina (and also determine areas ripe for further study).

2. *Case Study Findings.* — Our case study of North Carolina provides insight into how the system works through the eyes of personnel who work within it. We found that those we interviewed who work in the system and are legally trained believe that procedural justice is disrupted by nonlawyer judges. One of the attorneys we interviewed emphasized that his experiences with nonlawyer judges were different from his experiences

273. To protect the identity of our magistrate respondents, we use gender-neutral pronouns when referring to them and only provide general information about the county where they served as judges. In the county where these three magistrates served, there are currently about fifteen magistrate judges and the vast majority of the magistrates do not have law degrees. Most are former police or probation officers. See Telephone Interview with Magistrate A, *supra* note 205.

274. By using snowball sampling, a standard qualitative research technique, we gained the trust of our participants and access to further magistrate interviews. See Michèle Lamont & Patricia White, Workshop on Interdisciplinary Standards for Systematic Qualitative Research 10 (2005), https://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf [<https://perma.cc/YEF6-WTTZ>]. Professor Michèle Lamont and sociologist Patricia White explain:

Since the purpose of a qualitative study is to acquire new, more detailed knowledge on a topic, selection methods and interviewing styles need to be suited to that purpose. Snowball sampling allows the researcher to enter into networks of individuals and identify respondents that they might not otherwise be able to identify. However, participants tend to be more honest and willing to divulge personal information to researchers who have been validated by someone they know, enabling the researcher both to gather more accurate data and speak to individuals who otherwise may have declined to participate in research with a complete stranger. Furthermore, particularly in the case of expert and elite interviews, referrals can help the researcher pinpoint those participants who are most appropriate for the study at hand.

Id.

275. We interviewed these individuals in their professional capacities and designed questions to glean factual information about how the North Carolina lower-level court system works.

with lawyer-judges.²⁷⁶ He noted that in his experience, magistrates without law degrees frequently fail to inform tenants of their rights and also that nonlawyer magistrates are less comfortable applying appropriate legal remedies, such as rent abatement (which requires legal analysis).²⁷⁷ In a similar vein, both attorneys noted that in their experience nonlawyer magistrates are less likely to rule in favor of tenants on implied warranty of habitability claims, again because legal analysis is required.²⁷⁸ Further, the attorneys said that because there are more magistrates without law degrees in rural areas, it tends to be in those areas specifically that tenants have the most difficulty succeeding with legal claims.²⁷⁹ The attorneys said they believe these differences are due to untrained magistrates simply not understanding legal claims and assuming the legal argument can be hashed out on appeal, if the tenant so desires.²⁸⁰ Yet the attorneys noted that lay magistrates also appear to be less familiar with appellate procedure and often do not advise litigants of their right to appeal.²⁸¹

The views of these two attorneys were, of course, based only on their experiences and perceptions, but they were consistent with what we heard from magistrates themselves as well as others involved in magistrate-led courts in North Carolina. One nonlawyer magistrate we interviewed, Lay Magistrate C, began their²⁸² term in August of one year and did not have any training until February of the next year, since the trainings run only every six months.²⁸³ In North Carolina, magistrates are required to attend what is called “Basic School” within the first six months of their appointment. Basic School is “a course of basic training of at least forty hours in the civil and criminal duties of a magistrate.”²⁸⁴

What this means is that the magistrate we interviewed, and many other magistrates, began adjudicating with no training at all. In fact, magistrates may adjudicate for over five months with no training. As one key informant involved in magistrate training said, “[T]here’s no training. It’s just on-the-job training . . . until they come to basic school.”²⁸⁵ They called the training situation “scarily insufficient” and said, “My metaphor really is, it’s like asking someone to decorate a tree when they don’t have a tree. And you’re lobbing ornaments at them. And they don’t know where to put them. So, they’re just trying to hold ‘em while they figure [it] out.”²⁸⁶

276. Videoconference Interview with North Carolina Attorneys, *supra* note 242.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. As noted previously, we use gender-neutral pronouns when discussing the magistrates we interviewed in order to protect their identity. See *supra* note 273.

283. Telephone Interview with Magistrate C, *supra* note 202.

284. N.C. Gen. Stat. § 7A-177 (2021).

285. Telephone Interview with Key Informant 3, *supra* note 211.

286. *Id.*

Aside from the potential goodwill of fellow magistrates to informally help, guide, and advise, new magistrates are given only two resources when they start their jobs: one book for civil cases and one for criminal cases. Attorney Magistrate B described these books:

[T]here's a big book that's nicknamed the Crimes Book, the NC Crimes Book. It's about 4 or 500 pages long and it breaks down crimes by element and issues There's a book called North Carolina Small Claims Law that's written by the Institute of Government and that's available as well [for civil issues].²⁸⁷

Once magistrates finally attend Basic School, they do have to pass a test, which is open book and untimed.²⁸⁸ We were told that the objective is for magistrates to pass and that it is not a particularly hard test.²⁸⁹ Magistrates are allowed to take the test multiple times, and they are even allowed to repeat Basic School classes in order to try to pass the test.²⁹⁰

What we learned through our key informant interviews is that during training, trainers emphasize to magistrates that their lack of legal training is not a problem, in part because it is possible to correct almost anything they do. Lay Magistrate C said that “the best thing they tell magistrates when you begin, is that most nine times out of ten, there's nothing you can do to screw up that can't be corrected at the courthouse.”²⁹¹ This magistrate further noted, “[Y]ou're gonna make mistakes, and I've sure made some mistakes. But there's not a mistake that's gonna cost anybody their life or anything, so . . . (laughs).”²⁹²

The stakes of mistakes, however, are of course very high in both civil and criminal cases. Civil cases such as evictions can result in homelessness, job loss, instability for children, and health problems.²⁹³ In criminal cases, an extra night in jail can mean being fired from one's job, having one's children taken into state custody, and a host of other issues. Lay Magistrate C gave an example of a mistake a magistrate might make—inappropriately revoking someone's driver's license due to a lack of understanding of the laws that govern driver's license revocation. Lay Magistrate C did not deem this mistake important because it could later be cleared up. They said, “[W]hen you take . . . somebody's license for a civil revocation for thirty days . . . and in fact, they shouldn't have had their license taken, um, you know, you can make that mistake. But then, the Clerk's Office will give it back to them . . . at the courthouse.”²⁹⁴

287. Telephone Interview with Magistrate B (Nov. 22, 2021).

288. Telephone Interview with Key Informant 3, *supra* note 211.

289. *Id.*

290. *Id.*

291. Telephone Interview with Magistrate C, *supra* note 202.

292. *Id.*

293. See generally *supra* note 234 and accompanying text (describing the relationship between eviction and homelessness).

294. Telephone Interview with Magistrate C, *supra* note 202.

While Lay Magistrate C is correct that this mistake could eventually be cleared up, they underestimate the effects such a mistake could have on someone. As a person waits to “clear up” the mistake, there are a myriad of potential collateral consequences of losing her license: She may not be able to get to work (which sometimes results in job loss); she may not be able to pick her children up from school or bring them to daycare; and she may not be able to go to the store to get food. Thus, the collateral consequences of these seemingly small mistakes are in fact quite significant.

Our interviews also revealed another hidden consequence of lay judges for defendants, one that we did not anticipate but came up organically in our interviews: the inappropriate influence of district attorneys (DAs) and law enforcement. How this plays out is somewhat different for DAs than for law enforcement. Regarding DAs, we learned that some magistrates view DAs as a resource for times when they are confused. Indeed, one of the questions in our interview guide for magistrates asked what they do when a tricky case or issue comes up. Lay Magistrate C responded without any hesitation saying, “I’ll call the district attorney.”²⁹⁵ But of course the DA is the attorney for the state—not the defendant—and the judge is seeking advice from him. In fact, this magistrate notes that another magistrate was related to a DA, and, “[s]o, I won’t hesitate to call [that DA].”²⁹⁶

While this lay magistrate did not seem to view law enforcement as a resource for complex legal problems, several of the magistrates suggested that police officers have close relationships with nonlawyer magistrates and often try to take advantage of these relationships. Attorney Magistrate B said that in “some of the areas . . . law enforcement are very much accustomed to just telling magistrates what . . . they want us to do.”²⁹⁷ They went on to explain, “[I]f you don’t do what they want to do they will, they will find a way to complain and to make your life difficult.”²⁹⁸

The magistrate then gave an example of a situation where police were clearly engaging in illegal conduct to avoid being subpoenaed.²⁹⁹ Attorney Magistrate B, in their capacity as an attorney, went to the Chief District Court Judge to complain about the practice, saying it was “not lawful” and that “we really shouldn’t be doing this as the favor of people who just don’t want to be subpoenaed.”³⁰⁰ Eventually, the practice was stopped, but as Attorney Magistrate B said, “[We] also, in smaller or more rural counties, have a lot of magistrates who are former policeman or probation officers. And I think sometimes they have a hard time separating their positions

295. Id.

296. Id.

297. Telephone Interview with Magistrate B, *supra* note 287.

298. Id.

299. Id.

300. Id.

from one another, what they used to do from what they currently do.”³⁰¹ Attorney Magistrate A, from the same rural county said, “I would say that the majority, if not the vast majority [of their colleagues], were some kind of law enforcement.”³⁰² Following up on that point, they said, “I would say that, without hesitation, I would say that . . . they’re far too willing to believe the police Um, far too unwilling to believe anything someone who . . . is wearing handcuffs has to say.”³⁰³ Further, Attorney Magistrate A noted that “[v]ery few questions were asked of the police and they didn’t like it when you did ask questions.”³⁰⁴

On the civil side, Attorney Magistrate A said, “[W]hen it came to sort of the inequities of a case . . . they were almost always gonna land on the landlord’s side I think a lot of that just comes down to a relationship. They see the landlords every day.”³⁰⁵ Another key informant was quite direct about how nonlawyer magistrates can disadvantage tenants in small claims court. They noted that “landlords, in particular, tend to be . . . locally influential . . . and have political power . . . Chief District Court Judges and clerks are both elected locally.”³⁰⁶ The implication is that the Chief District Court Judge and the clerks are incentivized to keep landlords happy. This key informant noted that they have heard that “the high volume landlord attorneys are extremely and, I believe, very deliberately intimidating.”³⁰⁷ They went on to explain the problem with this dynamic in the context of lay judges: “And that is a place . . . where not being a lawyer does matter because magistrates are acutely aware that . . . they’re not attorneys. So, if they have an attorney who is aggressive about . . . ‘I know the law, and you don’t[,]’ [m]any of them will back down.”³⁰⁸

This informant described a situation where a magistrate did not rule in the attorney’s favor, and “[t]he attorney left the courtroom, went directly to chief district court judge . . . with a complaint about how the magistrate was conducting court She wasn’t reappointed the next time.”³⁰⁹ Further, they noted that “if landlords are filing complaints against [magistrates], um, . . . It’s not true in all counties, but in a lot of counties, they’re not gonna get reappointed.”³¹⁰ Magistrates are well aware of this dynamic, and as Key Informant 3 noted, magistrates are sometimes “summoned to the chief district court judge’s office to explain their ruling against a landlord.”³¹¹

301. *Id.*

302. Telephone Interview with Magistrate A, *supra* note 205.

303. *Id.*

304. *Id.*

305. *Id.*

306. Telephone Interview with Key Informant 3, *supra* note 211.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

The magistrates and key informants we interviewed are of course not the first to recognize that repeat players in courts are often influential and disproportionately likely to succeed in their local state court.³¹² Others have also suggested that judges are subject to political influence and “can be seen as laborers who seek to maximize their popularity, prestige, and reputation.”³¹³ None of these other considerations of influence on judges have yet to contemplate the additional dimension of the degree to which powerful repeat players may particularly be able to influence nonlawyer judges.

A particularly troubling aspect about the commentary on complaints and the power of landlords and their attorneys is that we were told of at least one chief district court judge who intentionally creates barriers meant to prevent less powerful parties from complaining about magistrate judges. Lay Magistrate C told us that the Chief District Court Judge in their district requires that all complaints about magistrates and the process be made in writing.³¹⁴ As Lay Magistrate C said, “That knocks down 99% of them.”³¹⁵ They further noted that the Chief District Court Judge was explicit with the magistrates that he implemented this complaint procedure to make it more cumbersome for litigants to complain.³¹⁶ Given potential literacy issues, language barriers, and the like, the litigants for whom writing a complaint would be a barrier are often going to be the least powerful litigants. Powerful repeat players see their complaints potentially block the reappointment of magistrate judges, while poor litigants experience significant, purposeful roadblocks preventing them from even filing a complaint.

Issues of race also came up in our interviews, and further exploration of these issues is warranted. Attorney Magistrate A was always met with dismissal when they raised concerns about racial issues related to magistrate judging. They said:

What bonds do I give to Hispanic people? But any indication of different treatment between Black people, Hispanic people, white people, men, women, older, younger, whatever. Any—any sort of, you know, ‘Hey, you gave that white guy a \$50,000 bond, you gave \$100,000 to the Black guy’ ‘They seemed like the

312. See, e.g., Lauren B. Edelman & Mark C. Suchman, When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law, 33 *Law & Soc’y Rev.* 941, 942–43 (1999) (detailing a theory of how “repeat players” have internalized areas of the legal system in distinct ways that have allowed them to become structurally privileged actors in the system); Galanter, *supra* note 14, at 119–21 (identifying the ways in which underlying procedures within the legal system can act as limitations for those who wish to use the legal system as a venue for systemically equalizing change).

313. Zambrano, *supra* note 61, at 2159 (citing William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 *J. Legal Stud.* 235, 236–40 (1979)).

314. Telephone Interview with Magistrate C, *supra* note 202.

315. *Id.*

316. *Id.*

same crime.’ . . . ‘What’s going on?’ Was met with absolute resistance.³¹⁷

Attorney Magistrate A said of race that “it was very much not talked about . . . and bringing it up was very much frowned upon. . . [b]y the magistrates, by the cops, by whoever.”³¹⁸ They further said this type of data is very purposefully not recorded (disparities in bond, for example), and when they pushed to try to document such data, they were met with resistance.³¹⁹ As they said, race “definitely was an off-limits topic to talk about.”³²⁰

On the criminal side, magistrates are given a sheet from the Chief District Court Judge with recommended bond amounts for their district, but magistrates are under no obligation to follow these recommendations.³²¹ Lay Magistrate C said, “[W]e give high bonds in [our] County . . . ‘cause we have a lot of gang activity down here.”³²²

In contrast, Lay Magistrate C also said that there are a group of (private) attorneys who frequently work in their court.³²³ This group, Lay Magistrate C explained, will sometimes ask judges to make special exceptions for their clients, which usually involves asking for an unsecured bond.³²⁴ Lay Magistrate C said that they “try to work with them” when one of these attorneys is involved because “bond is to just make sure they go to court and . . . [t]hey’re represented by an attorney . . . so you know they’re gonna go to court most of the time. Some of them don’t, but . . . most [of the] time they do.”³²⁵ The implication should not be lost: Those with “gang activity” require high bonds, while those who have hired an attorney can be given unsecured bonds, because somehow, the fact that they had the money to hire an attorney implies they are less of a flight risk.

Ultimately, both of the attorney magistrates we interviewed said if there was one thing they would change about the system, it would be for there to be an attorney requirement for magistrates.³²⁶ Attorney Magistrate B said, when asked what she would change about the whole magistrate judging system (separately on the civil and criminal side): “I would say that

317. Telephone Interview with Magistrate A, *supra* note 205.

318. *Id.*

319. *Id.*

320. *Id.*

321. Telephone Interview with Magistrate C, *supra* note 202.

322. *Id.*

323. We asked the magistrates about their experiences with public defenders, but public defenders almost never appear before magistrates because of the nature of the issues magistrates adjudicate—it is too early in the criminal process for a public defender to be appointed to these matters. Magistrates issue arrest warrants, set bail, and deal with preliminary issues in criminal cases. *Id.*

324. *Id.*

325. *Id.*

326. Telephone Interview with Magistrate B, *supra* note 287; Telephone Interview with Magistrate C, *supra* note 202.

magistrates need to be attorneys.”³²⁷ They said this held for both the civil and criminal sides.³²⁸

Taken together, this panel of experts, along with the other data we collected, provides an important first step in helping to understand the magistrate system in North Carolina. Of course, the interviews conducted were limited in number, and generalizations about any subjective experiences of the interviewees cannot be made. The interviews, however, provide many factual insights that apply to the magistrate system as a whole in North Carolina, as well as other provocative insights into the lay judging system in North Carolina that can serve as a basis for a comprehensive, mixed-methods empirical study of low-level state courts that employ lay judges, not only in North Carolina, but across the country.³²⁹ Existing research already suggests the North Carolina experience does not rest alone, as detailed below.³³⁰

F. *It’s Not Just North Carolina—A South Carolina Inquiry*

One of the difficult parts of studying low-level state courts is that local legal culture is different in each state. While there are no extensive, recent studies of magistrate courts in a large number of other states,³³¹ a recent study of South Carolina’s magistrate court system found similar concerns to those raised in our North Carolina case study—and some even more troubling concerns. ProPublica, together with The Post and Courier (collectively “the investigators”), conducted this investigation into magistrates in South Carolina, a state which also utilizes magistrate judges without a J.D. requirement in lower-level courts.³³² Similar to North

327. Telephone Interview with Magistrate B, *supra* note 287.

328. *Id.*

329. Greene and Guy-Uriel Charles have begun to design such a study, which will systematically study a number of different actors involved in lower-level state court systems in the United States.

330. See, e.g., Neal, *supra* note 4, at 729–30 (detailing similar issues within the West Virginia court system).

332. In 2006, after conducting a one-year investigation, the *New York Times* published an extensive story about New York’s 1,250 town and village courts, otherwise known as justice courts. The *Times* found that three-quarters of judges on these courts were not lawyers and many had a limited education (several with only high school diplomas). The story documented egregious violations of legal rights in these courts, as well as overt racism and sexism by the judges. While the article is sixteen years old and we are unsure if there have been subsequent reforms since publication, it is further evidence that the problems associated with lay judging extend well beyond North Carolina. William Glaberson, In Tiny Courts of N.Y., Abuses of Law and Power, *N.Y. Times* (Sept. 25, 2006), <https://www.nytimes.com/2006/09/25/nyregion/25courts.html> (on file with the *Columbia Law Review*).

332. S.C. Bar, Your Guide to Magistrate’s Court 4 (2016), https://www.scbars.org/media/filer_public/9c/29/9c290707-9ff2-4780-a78e-6928b9f57a22/magistrate_court_guide_2016.pdf [https://perma.cc/B29U-9743] (detailing the scope of a magistrate’s responsibilities, including conducting civil hearings in landlord–tenant disputes).

Carolina, “[t]hese courtrooms, the busiest in the state, dispose of hundreds of misdemeanor criminal cases and civil disputes each year.”³³³ Also, like North Carolina, magistrates in South Carolina are appointed through a political process, emphasizing connections rather than credentials.³³⁴ Magistrates in South Carolina, three-quarters of whom do not have law degrees, come from a variety of professions such as construction workers, pharmacists, and insurance agents, and they receive minimal training.³³⁵

The investigation found instances of “serious judicial errors or misconduct in thirty of the state’s forty-six counties.”³³⁶ Over the past two decades, the investigation found magistrates have “accepted bribes,” “flubbed trials,” and “mishandled even the most basic elements” of the criminal cases before them.³³⁷ The investigative project developed a profile of all 319 South Carolina magistrates, and the results show that more than a dozen of the sitting magistrates had been disciplined for misconduct.³³⁸ Further, since 2005 there had been over thirty magistrates from South Carolina that were reprimanded, suspended, or removed entirely.³³⁹ However, magistrates are not required to disclose their offenses when seeking a new term, and few do so.³⁴⁰ This has resulted in many magistrates with misconduct offenses on their records nonetheless being reappointed for additional terms.³⁴¹

The investigation focused primarily on criminal matters handled by magistrates, and the offenses documented by the investigators were troubling. South Carolina allows magistrates to hear misdemeanor cases, and in one case, a magistrate did not ask a defendant whether she wanted an attorney appointed, even though she was entitled to one (the ACLU has filed a suit, arguing this violated the defendant’s constitutional rights).³⁴² The judge also did not allow the defendant to defend herself, another violation of the defendant’s rights.³⁴³ This offense appears to stem from a lack of legal knowledge—others are simply corrupt.

333. Joseph Cranney, *These Judges Can Have Less Training Than Barbers but Still Decide Thousands of Cases Each Year*, ProPublica (Nov. 27, 2019), <https://www.propublica.org/article/these-judges-can-have-less-training-than-barbers-but-still-decide-thousands-of-cases-each-year> [<https://perma.cc/44VS-BW5M>].

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* (detailing how the South Carolina Supreme Court’s Disciplinary Office has commented that it is keeping a close eye on the state’s magistrates).

341. *Id.* (noting how this gap in the law has allowed magistrates who have abused their position to continue on in their career).

342. *Id.*

343. See *id.* (“In an April 12, 2016, hearing, Brown tried explaining her situation to Adams, but the judge cut her off in an exchange captured by courtroom microphones.”).

For example, the investigators found that one magistrate was accused of forging a title to a Rolls Royce for a fellow judge, and another once threatened to beat up a defendant who had questioned his veracity in court.³⁴⁴ The situation in South Carolina was dire enough that from 2014 to 2015, a team of attorneys from the ACLU and the National Association of Criminal Defense Lawyers observed cases in South Carolina's local courts.³⁴⁵ They reported that "magistrates blocked people's right to counsel and shuttled unwitting defendants through an assembly line of guilty pleas."³⁴⁶

The investigation also detailed many other problems with the magistrate process similar to those we found in North Carolina. First, the appointment of magistrates is largely determined by political connections rather than qualifications. State senators control the process and have "stocked the courts with friends, political allies and legal novices."³⁴⁷ The investigators noted that the state's criminal codes have grown increasingly complex, yet the magistrate system has not adjusted in light of the increased complexity. Another problem, similar to North Carolina, is the lack of training for magistrates. As the investigators said, "Once selected, [magistrates] undergo fewer hours of mandated training than the Palmetto State requires of its barbers, masseuses and nail salon technicians."³⁴⁸ One of the requirements for South Carolina magistrates is for them to pass a competency exam. The exam requires a sixth-grade reading level and a basic knowledge of mathematics, how to tell time, and days of the week.³⁴⁹ The investigators found that out of a sample of thirty-one sitting magistrates, three took the test multiple times in order to pass,³⁵⁰ and separately, another four also required multiple attempts.³⁵¹ The investigators noted there may be more magistrates who required multiple attempts, but this information was not released to them.

CONCLUSION

The historical arguments for lay judges are out of touch with current reality, but they can and do serve as a convenient cover for the need to transform lower-level courts in order to promote legitimacy, fairness, and equality. The intention of the existing system in many states does not appear to be legitimacy, fairness, or equality. Instead, poor people's

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*; see also S.C. App. Ct. R. 510(b)(1).

350. Cranney, *supra* note 333.

351. See *id.* (citing Michael Smith, Doubts Cast on Transparency and Legality of Magistrate Selection Process, *The Voice of Blythewood & Fairfield Cnty.* (June 13, 2019), <https://www.blythewoodonline.com/2019/06/doubts-cast-on-transparency-and-legality-of-magistrate-selection-process/> [https://perma.cc/WF9D-WD8H]).

problems are simply dismissed, deemed unimportant and unworthy of legal expertise. The two-tiered court system has persisted for long enough that any expectation of equality has been essentially forgotten. Justifications, such as a lack of funding, start to seem reasonable, with inequalities between different types of courts largely forgotten.

To be clear, the purpose of this Essay is not to provide an empirical assessment of adjudicative outcomes of lay judges as compared to lawyer-judges, and the Essay does not provide the data to support such an assessment.³⁵² Instead, this Essay argues that the message states are sending by allowing lay judging in low-level state courts—the very courts that poor people, who are disproportionately people of color, are most likely to interact with³⁵³—is one of disregard, unimportance, and blame. There is a sense, as there has been throughout history, that poor people’s problems are problems of their own making, and thus true investment in such problems is not the responsibility of the State.³⁵⁴ Instead, the State does the minimum necessary to mechanically process and dispose of such problems.³⁵⁵

Shifting the cultural norms and conversation around the problems of the poor is of course not easy. Calling attention to the problems of lower-level courts generally,³⁵⁶ and in the case of this Essay specifically the problem of lay judging, can lead to a resurgence of conversation around this issue—an important first step.

But taking a broader view, how we staff magistrate-led courts (and their equivalent) needs to be rethought. As the case study of North Carolina showed, currently many lay magistrates come from law enforcement and probation, careers that (by design) at times treat citizens they interact with in an adversarial way. These norms may pervade how magistrates then act on the bench. Part of the problem with the lay magistrate system is that there is a pretense of an impartial, formal, and rule-bound system of justice. Yet lay judges are not schooled in that system of law. Litigants are left to experience a courtroom of supposed “law,” but they do not actually experience the law. Instead, they experience a courtroom in which often no one, not even the judge, is aware of the law, or the one

352. The authors believe that this question and others, such as how litigants experience lay-judge courtrooms versus lawyer-judge courtrooms, are important and ripe for further empirical study. Indeed, as noted in *supra* note 329, Greene is undertaking such a study with Professor Guy-Uriel Charles.

353. See *supra* note 2.

354. See *supra* note 232.

355. See generally Desmond, *supra* note 141, at 304 (“The principle of due process has been replaced by mere process: pushing cases through Every housing court would need to be adequately funded so that it could function like a court, instead of an eviction assembly line: stamp, stamp, stamp.”); Wilf-Townsend, *supra* note 184 (detailing the recent financial troubles of state courts and detailing how the system fails to serve those that frequent it).

356. *Columbia Law Review’s* 2022 Symposium “The Other 98%: Racial, Gender, and Economic Injustice in State Civil Courts” is an important contribution to raising awareness of these problems.

person in the courtroom who is aware of the law is the attorney for the more powerful party (such as a landlord).

This system cannot and should not persist. There needs to be an increased focus on who staffs low-level state court judgeships and what type of training they receive. Creative solutions to consider how states might attract a particularly qualified new crop of judges who could best serve the needs of the poor are needed.³⁵⁷ One idea is for law schools to invest in joint social work and J.D. programs, which may spur interest and increase the availability of law graduates uniquely trained to work within the social contexts of low-level state courts. In order to incentivize enrollment in such programs (and graduates choosing state court work), a state court job corps program could be created at the federal level. Such a program could provide funding, training, and housing, among other resources, to participants who agree to work in certain types of state courts throughout the country.³⁵⁸ Of course, for

357. Other solutions also may help relieve some of the problems of lay judging. For example, Professors Shanahan and Carpenter have argued that many of the problems state courts hear may be better addressed in a more holistic, social service, problem-solving way (through both increased funding to solve problems of poverty outside of courthouses and through a more problem-solving approach within courthouses). See Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 *Daedalus* 128, 132–34 (2019). Professor Steinberg has argued that adopting a problem-solving framework on the civil side may help combat many of the inequities seen in low-level civil courts. See Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 *N.Y.U. L. Rev.* 1579, 1581–82 (2018). But all of these problem-solving focused solutions depend on the availability of qualified judges and that is what our solution is aimed at addressing. Another potential solution may involve videoconferencing, which the COVID-19 pandemic brought into the mainstream for courts. See, e.g., *The Pew Charitable Trs., How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations* 7–9 (2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf> [<https://perma.cc/LA4B-BDXG>] (detailing how the adoption of technology and other remote digital tools in civil courts during the pandemic significantly improved access to courts for thousands of litigants); Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *COVID, Crisis, and Courts*, 99 *Tex. L. Rev. Online* 10, 17 (2020) (arguing that the nimbleness state courts displayed during the COVID-19 pandemic can be used to innovate in the long term).

358. South Dakota has piloted a program that seeks to incentivize more law graduates to practice in rural areas (with populations below 10,000). The program pays lawyers \$13,000 on top of their salaries if they practice in such areas. The funding for the program is split between local governments, the South Dakota Bar Foundation, and the state. As of 2019, twenty-four lawyers were involved with the program. April Simpson, *Wanted: Lawyers for Rural America*, *The Pew Charitable Trs.* (June 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/26/wanted-lawyers-for-rural-america> [<https://perma.cc/5T7C-GSE2>]. The problem of the dearth of lawyers available in rural areas has been well-documented by others. See generally Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 *Harv. L. & Pol'y Rev.* 15, 120–28 (2018) (detailing the problems many states have in providing attorneys to poor litigants due to the lack of attorneys in rural areas and discussing potential solutions); Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 *S.D. L. Rev.* 466 (2014) (discussing the lack of rural attorneys across America and South

there to be the will to fund such programs,³⁵⁹ there needs to be a better understanding among state and federal policymakers about how low-level states courts fit into the broader historical story of neglecting institutions that serve the poor. We need to acknowledge how that neglect has led to inequities in the legal system and the perpetuation of inequality in our justice system.

Ultimately, if change can be made in the court system, perhaps that reform can be an important step in tackling, more broadly, the structures and institutions in our society that promote inequality.

Dakota in particular, describing the challenges rural attorneys face, and examining existing and potential programs to increase access to justice in rural communities). To the extent that lay judging is more common in rural areas, a focus on location may be necessary. Our proposal, however, focuses on staffing all low-level court positions with qualified individuals, irrespective of whether the positions are in rural areas. The salaries of all magistrates in, for example, North Carolina are low, no matter the population of the county. See *supra* section III.B.

359. Others have advocated for general federal funding of state courts as a means to generally relieve state court budgets. See Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 *Notre Dame L. Rev.* 1831, 1866–67 (2016); Zambrano, *supra* note 61, at 2189 (“Increased federal funding for state courts may help remedy the overburdened and underfunded nature of state judiciaries.”). While federal money funds hundreds of millions of dollars toward state criminal justice programs each year, money for state court civil justice improvement is limited to roughly \$5 million per year—an almost undetectable amount when it is split between states. Wilf-Townsend, *supra* note 184. The program we suggest would provide specific funding to attract lawyers to judgeships that are often hard to fill due to salary, location, or both.

APPENDIX

TABLE 1: STATES THAT ALLOW NON-J.D.S TO SERVE AS JUDICIAL OFFICERS

Jurisdiction	Amount in Controversy Cutoff?	Prerequisites, Initial Training, and Continuing Education Requirements
Alabama		
District Court Magistrate Jurisdiction: ³⁶⁰ <ul style="list-style-type: none"> • Issue arrest warrants and set bail in accordance with the discretionary bail schedule • Receive guilty pleas in minor misdemeanors (where there is a fines schedule) Probate Court Jurisdiction: ³⁶¹ <ul style="list-style-type: none"> • Probate of wills • Grant, administration, and repeal or revocation of letters testamentary • All controversies in relation to the right of executorship or of administration • Settlement of accounts of executors and administrators • Sale and disposition of the real and personal property belonging to and the distribution of intestate's estates • Appointment and removal of guardians for minors and persons of unsound mind • All controversies as to the right of guardianship and the settlement of guardians' accounts • Allotment of dower in land in the cases provided by law 	N/A	District Court Magistrate Training: ³⁶² <ul style="list-style-type: none"> • Must enroll in a magistrates' orientation and certification program approved by the Administrative Office of Courts within twelve months of taking office Probate Judge Prerequisites: ³⁶³ <ul style="list-style-type: none"> • Citizen of Alabama • Resided in county for one year preceding election or appointment Probate Training and Continuing Education Requirements: ³⁶⁴ <ul style="list-style-type: none"> • Six-hour orientation program for new probate judges in first twelve months in office • Twelve credits in approved judicial education each calendar year thereafter³⁶⁵

360. Ala. R. Jud. Admin. 18; see also Ala. Code § 12-17-251 (2021).

361. Ala. Code § 12-13-1.

362. Ala. R. Jud. Admin. 18.

363. Ala. Code § 12-13-31; see also Alabama Appellate Courts, Ala. Jud. Sys., <https://judicial.alabama.gov/Appellate/JudgeQualification> [<https://perma.cc/N97F-QLTC>] (last visited Feb. 26, 2022) (“All justices and judges, with the exception of judges of the probate courts, must be licensed to practice law in the state of Alabama.”).

364. Ala. Mandatory Jud. Educ. R. 4(2)(b) (“Judicial-education credits shall be earned by attending conferences or courses approved by or offered through the ALI, the APJA, and the National Probate Judges Association (‘the NPJA’). Each calendar year, all probate judges must earn a minimum of six judicial-education credits at courses offered by the ALI.”).

365. Ala. Mandatory Jud. Educ. R. 4(2)(b)–(c) (“When a probate judge earns more than 12 judicial-education credits in a year, a maximum of 8 of those credits may be carried

Alabama (cont.)		
<ul style="list-style-type: none"> • Partition of lands within their counties • Chief election official of their counties • May issue show cause orders and attachment for contempts offered to the court or its process by any executor, administrator, guardian, or other person and may punish the person by a maximum fine of \$20 and/or imprisonment for at most twenty-four hours³⁶⁶ 		
Alaska		
<p>Magistrate Civil Jurisdiction:³⁶⁷</p> <ul style="list-style-type: none"> • Issue a protective order in cases involving domestic violence or stalking • Review the revocation or refusal to issue a driver's license • Referee all actions referred to the magistrate with powers over contempts, bench warrants, and witnesses <p>Magistrate Criminal Jurisdiction:³⁶⁸</p> <ul style="list-style-type: none"> • Issue writs of habeas corpus • Issue warrants of arrest, summons, and search warrants • Set, receive, and forfeit bail • Order temporary detention of a minor 	\$10,000 ³⁶⁹	<p>Magistrate Prerequisites:³⁷⁰</p> <ul style="list-style-type: none"> • Citizen of the United States • At least twenty-one years old • Resident of Alaska for at least six months immediately preceding appointment <p>Training and Continuing Education Requirements:³⁷¹</p> <ul style="list-style-type: none"> • Initial training and ongoing education are not specified in statute • There is a training judge assigned to each district to inspect, train, and report on the magistrates³⁷²

forward and applied toward that probate judge's judicial-education requirements for the following year.").

366. *Id.* § 12-13-9. Where a probate judge is a licensed attorney in Alabama, the power to punish for civil contempt is equivalent to that of a circuit court judge. *Id.*

367. Alaska Stat. § 22.15.100 (2021); see also *id.* § 22.15.040 (small claims actions); *id.* § 22.15.110(a) (noting additional duties of magistrates). Graduation from an accredited law school and active membership in the Alaska Bar Association are preferred but not required for appointment as a magistrate. Alaska Court System Class Specification: Magistrate Judge IV, Alaska Ct. Sys., <https://courts.alaska.gov/hr/classspecs/4106.pdf> [<https://perma.cc/LVF8-A9EW>] (last visited Feb. 4, 2022).

368. Alaska Stat. § 22.15.100. Magistrates may give judgment without action upon the confession of the defendant during misdemeanor criminal proceedings; hear, try, and enter judgment upon agreement in writing by the defendant for misdemeanors that are not minor offenses, and provide post-conviction relief in specified cases. *Id.* § 22.15.120(a). A minor offense is a statutory offense which cannot result in incarceration, loss of a valuable license, or a fine greater than \$300; an offense classified as an infraction or violation; or an offense for which a bail forfeiture amount is authorized by statute and established by the supreme court. *Id.* § 22.15.120(c).

369. *Id.* § 22.15.120.

370. *Id.* § 22.15.160(b). Notably, district judges need not have a J.D. either. After seven years, a magistrate is eligible for appointment to a district judge position. *Id.* § 22.15.160(a).

371. See *id.* § 22.15.160; see also Alaska R. of Admin. 19.2 (2017).

372. Alaska R. of Admin. 33.

Arizona		
<p>Justice Court Civil Jurisdiction:³⁷³</p> <ul style="list-style-type: none"> • All civil actions when amount in controversy does not exceed \$10,000 (including forcible entry and detainer) • Forcible entry • Hear civil traffic, domestic violence, and harassment cases • Issue orders of protection and injunctions prohibiting harassment <p>Justice Court Criminal Jurisdiction:³⁷⁴</p> <ul style="list-style-type: none"> • Petty offenses, misdemeanors, and criminal offenses punishable by fines not exceeding \$2,500 and/or imprisonment in county jail not exceeding six months • Assault or battery • Felonies only for purposes of issuing warrants and conducting preliminary hearings <p>Municipal Court Jurisdiction:³⁷⁵</p> <ul style="list-style-type: none"> • Municipal court judges hear civil traffic cases, violations of city ordinances and codes, and issue search warrants • Municipal court judges hear misdemeanor criminal traffic offenses where no serious injuries occur and issue search warrants 	<p>\$10,000³⁷⁶</p>	<p>Justice of the Peace Prerequisites:³⁷⁷</p> <ul style="list-style-type: none"> • At least eighteen years old • Resident of Arizona • Qualified voter in precinct where duties are performed • Read and write English <p>Municipal Court Judge Prerequisites:³⁷⁸</p> <ul style="list-style-type: none"> • Qualifications established on a local basis by city charters or ordinances <p>Training Requirements:³⁷⁹</p> <ul style="list-style-type: none"> • All full-time judges required to complete at least sixteen credit hours of judicial education including: <ul style="list-style-type: none"> ◦ Ethics ◦ Computer and network security ◦ Live training

373. Ariz. Rev. Stat. § 22-201 (2021). In Arizona, “magistrate” refers to any court officer with the power to issue a warrant for arrest of individuals charged with a public offense and includes “justices of the supreme court, judges of the superior court, judges of the court of appeals, justices of the peace and judges of a municipal court.” Id. § 1-215(18).

374. Id. § 22-301.

375. Municipal court judges do not hear civil lawsuits. Limited Jurisdiction Courts, Ariz. Sup. Ct., <https://www.azcourts.gov/guidetoazcourts/Limited-Jurisdiction-Courts> [<https://perma.cc/C8PU-WEJ8>] [hereinafter Ariz. Limited Jurisdiction Courts] (last visited Feb. 4, 2022).

376. Id. § 22-201. The Arizona judicial system also includes a small claims division which has concurrent jurisdiction with the justice court in specified matters where the amount in controversy does not exceed \$3,500. Id. § 22-503. In landlord–tenant disputes, justice courts have no jurisdiction over disputes involving greater than \$10,000 and also lack jurisdiction in matters regarding title to (as opposed to possession of) real property. For disputes involving damages between \$5,000 and \$10,000, jurisdiction is concurrent with superior courts, see Ariz. Limited Jurisdiction Courts, *supra* note 375.

377. Ariz. Limited Jurisdiction Courts, *supra* note 375.

378. Id. Some cities do not require municipal court judges to be attorneys. Id.

379. Ariz. Rev. Stat. § 1-302.

Colorado		
<p>(Small) County Court Civil Judges:³⁸⁰</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with district courts in civil actions, including: <ul style="list-style-type: none"> ○ Actions to foreclose liens ○ Cases seeking rent or damages for injury to property and unlawful detention ○ Petitions for change of name ○ Temporary and permanent civil restraining orders • Original jurisdiction in hearings concerning the impoundment of motor vehicles <p>(Small) County Court Criminal Judges:³⁸¹</p> <ul style="list-style-type: none"> • Concurrent jurisdiction in criminal matters in: <ul style="list-style-type: none"> ○ Misdemeanors and petty offenses (other than those involving children) ○ Issuing warrants and bindover orders ○ Conducting preliminary examinations and dispositional hearings ○ Admitting bail in felonies and misdemeanors <p>Municipal Court Judges:</p> <ul style="list-style-type: none"> • Jurisdiction over municipal ordinance violations only³⁸² 	<p>\$25,000³⁸³</p>	<p>Smaller County and Municipal Judge Requirements:³⁸⁴</p> <ul style="list-style-type: none"> • High school graduate or equivalent • Some counties require a judge to be a qualified elector of the municipality or county in which the judge presides <p>Training Requirements:³⁸⁵</p> <ul style="list-style-type: none"> • County judges not admitted to the practice of law must attend an institute on the duties and functions of the court

380. Colo. Rev. Stat. § 13-6-104 (2021).

381. *Id.* § 13-6-106.

382. *Id.* § 13-10-104.

383. *Id.* § 13-6-104(2).

384. *Id.* § 13-6-203(4). In Class C and D counties only, county judges may be appointed with a high school equivalency and without license to practice law in Colorado. *Id.* But preference is to be given to the appointment of a municipal judge who is licensed to practice law in Colorado or trained in the law. *Id.* § 13-10-106(2).

385. *Id.* § 13-6-203(5). The obligation to attend an institute for judicial training may be waived by the state supreme court. *Id.*

Delaware		
Justice of the Peace Civil Jurisdiction: ³⁸⁶ <ul style="list-style-type: none"> • Contractual disputes • Replevin actions • Negligence cases (not involving physical injury) • Landlord–tenant cases³⁸⁷ 	\$25,000 ³⁹⁴	Justice of the Peace Eligibility Requirements: ³⁹⁵ <ul style="list-style-type: none"> • Resident of Delaware • At least twenty-five years old • Resides in county in which the justice of the peace serves
Justice of the Peace Criminal Jurisdiction: ³⁸⁸ <ul style="list-style-type: none"> • All criminal misdemeanor cases unless specifically excluded by law³⁸⁹ • Most traffic offenses not involving physical injury or death³⁹⁰ • Violations of any “ordinance, code or regulation of the governments of their respective counties and municipalities”³⁹¹ • Truancy cases³⁹² • For all criminal offenses:³⁹³ <ul style="list-style-type: none"> ◦ Issue summonses and search warrants, based upon finding of probable cause, and issue and execute capiases ◦ Conduct initial appearances to set bond and bond review hearings 		Justice of the Peace Training and Education Requirements: ³⁹⁶ <ul style="list-style-type: none"> • Basic legal education program • Minimum of thirty hours of actual instruction in approved continuing legal education over each two-year period of service, including at least two hours of instruction on judicial or legal ethics

386. In Delaware, Justices of the Peace are also called “magistrates.” Magistrate Screening, Delaware.gov: Div. of Prof. Reg., <https://dpr.delaware.gov/boards/magistrate/> [<https://perma.cc/T8ZA-B583>] (last visited Mar. 2, 2022). Jurisdiction extends only where amount in controversy does not exceed \$25,000. Del. Code tit. 10, § 9301 (2021).

387. Jurisdiction in landlord–tenant cases includes summary proceedings for possession for which jury trials are authorized and appeals to special courts consisting of a three-judge panel. Justice of the Peace Court: Jurisdiction, Del. Cts., <https://courts.delaware.gov/jpcourt/jurisdiction.aspx> [<https://perma.cc/NWY3-U88A>] [hereinafter Del. Justice of the Peace Court: Jurisdiction] (last visited Feb. 4, 2022).

388. *Id.*

389. The Delaware Code provides: “The Justice of the Peace Court shall have original jurisdiction to hear, try and finally determine all misdemeanors created in Chapter 5 of this title, and any attempt, conspiracy or solicitation to commit such misdemeanors unless such jurisdiction is excluded by subsection (b) of this section or is otherwise excluded by law.” Del. Code tit. 11, § 2702.

390. Del. Justice of the Peace Court: Jurisdiction, *supra* note 387.

391. Del. Code tit. 11, § 5917.

392. *Id.* tit. 14, § 2733; see also *id.* tit. 10, § 921 (“Justice of the Peace Court shall have original and exclusive jurisdiction over truancy matters . . .”). In other cases, Justices of the Peace have only limited jurisdiction over juvenile offenses. Del. Justice of the Peace Court: Jurisdiction, *supra* note 387.

393. Del. Justice of the Peace Court: Jurisdiction, *supra* note 387 (noting that capiases are bench or arrest warrants issued by a judge for a defendant who has failed to appear for arraignment, trial, or sentencing or who has failed to pay a court-ordered fine).

394. Del. Code tit. 10, § 9301.

395. Magistrates need not know the law, and the Delaware magistrate screening examinations do not include questions on Delaware law. Magistrate Screening Committee, Del. Cts., <https://courts.delaware.gov/jpcourt/screening.aspx> [<https://perma.cc/6XXD-D3ZW>] (last visited Feb. 4, 2022) (“Legal knowledge is not tested.”); see also Del. Code tit. 10, § 9206 (stating that judges must reside in county in which the justice of the peace sits).

396. Del. Just. Peace Ct. Civ. R. 108.

Georgia		
<p>Magistrate Court Jurisdiction:³⁹⁷</p> <ul style="list-style-type: none"> • Civil claims including garnishment and attachment, unless exclusive jurisdiction vested in superior court • Issuing arrest and search warrants • Issuing subpoenas to compel attendance of witnesses and for the production of documentary evidence before the magistrate court • Holding of courts of inquiry • Violations of “county ordinances and penal ordinances of state authorities” • Punishment of contempt with fines not greater than \$200 and/or imprisonment not exceeding ten days • Granting bail, unless power to do so is “exclusively committed to some other court or officer” • Foreclosure of liens on abandoned mobile homes and animals • Trial and sentencing of misdemeanor violations in certain cases concerning marijuana possession, shoplifting, alcohol violations relating to minors, and criminal trespass³⁹⁸ 	<p>\$15,000³⁹⁹</p>	<p>Magistrate Eligibility:⁴⁰⁰</p> <ul style="list-style-type: none"> • Citizen of the United States • Resident of the county in which the individual seeks the office of judge of the probate court for at least two years prior to qualifying for election and throughout term of office • Registered voter • At least twenty-five years old • High school graduate or equivalent <p>Magistrate Judge Training Requirements:⁴⁰¹</p> <ul style="list-style-type: none"> • Complete eighty hours of training specified by the Georgia Magistrate Courts Training Council “concerning the performance of his or her duties” within two years of becoming a magistrate⁴⁰² • Complete “a program of orientation activities” supervised by an experienced magistrate or judge within the first year of office • Complete a minimum number of continuing education training hours annually after the first year of service as a magistrate

397. Ga. Code Ann. § 15-10-2 (2021).

398. Id. § 15-10-260. Jurisdiction only exists where the misdemeanor violation occurred in the “unincorporated area of the county” in which the magistrate sits and where the defendant has “waive[d] in writing a trial by jury.” Id. §§ 15-10-260, -261.

399. Id. § 15-10-2.

400. Id. § 15-10-22 (“Additional qualifications for the office of chief magistrate or magistrate or both may be imposed by local law.”).

401. Id. § 15-10-137.

402. Any magistrate who is also an active member of the State Bar of Georgia is not required to complete these eighty hours of training as a condition to certification for office. Id. § 15-10-137(d).

Georgia (cont.)		
<p>Probate Court Judge Civil Jurisdiction:⁴⁰³</p> <ul style="list-style-type: none"> • Probate of wills • Administration of estates • Traffic cases • Appointment of guardians and conservators of minors and incapacitated adults <p>Probate Court Judge Criminal Jurisdiction:⁴⁰⁴</p> <ul style="list-style-type: none"> • Violations of game and fish laws • Criminal commitment hearings • Miscellaneous misdemeanors • Traffic and truancy in some counties • Holding of courts of inquiry • Issuance of search and arrest warrants in some cases 		<p>Probate Court Judge Eligibility:⁴⁰⁵</p> <ul style="list-style-type: none"> • Same qualifications as magistrates • Must never have been convicted of “a felony offense or any offense involving moral turpitude” contrary to federal law or the laws of any state <p>Probate Judge Training Requirements:⁴⁰⁶</p> <ul style="list-style-type: none"> • New judge orientation training course and yearly additional training prescribed by the Probate Judges Training Council and the Institute of Continuing Judicial Education of Georgia

403. Id. § 15-9-30.

404. Id.; see also id. §§ 17-7-20, 17-7-72, 17-10-3.

405. In counties with populations greater than 90,000, no person can be appointed as a probate court judge unless that person has been admitted to practice law for seven years preceding the election, is “a member in good standing with the State Bar of Georgia,” and is at least thirty years of age. Id. § 15-9-4. Notwithstanding these requirements, probate court judges “holding such office on or after June 30, 2000, shall continue to hold such office and shall be allowed to seek reelection for such office.” Id.

406. Id. § 15-9-1.1.

Kansas		
District Magistrate Civil Jurisdiction: ⁴⁰⁷ <ul style="list-style-type: none"> • All civil actions (concurrent with district judges), unless explicitly excluded • Uncontested actions for divorce District Magistrate Criminal Jurisdiction: ⁴⁰⁸ <ul style="list-style-type: none"> • Violations of state laws or rules and regulations adopted thereunder • Cigarette or tobacco infractions or misdemeanors • Felony first appearance hearings, preliminary examination of felony charges, and misdemeanor or felony arraignments Municipal Jurisdiction: ⁴⁰⁹ <ul style="list-style-type: none"> • Jurisdiction over violations of city ordinances⁴¹⁰ • Administration of matters relating to sentencing, parole, and release on probation 	\$10,000 ⁴¹¹	District Magistrate and Municipal Judge Eligibility: ⁴¹² <ul style="list-style-type: none"> • High school or secondary school graduate or equivalent • Resident of the county “for which elected or appointed to serve at the time of taking the oath of office and shall maintain residency in the county while holding office” • Either admitted to practice law in Kansas, or certified by the Supreme Court as qualified to serve as a district magistrate judge or municipal judge⁴¹³ District Magistrate and Municipal Judge Training and Continuing Education: <ul style="list-style-type: none"> • Thirteen hours of continuing judicial education credit each calendar year, including a minimum of two hours accredited for judicial ethics credit⁴¹⁴

407. Kan. Stat. Ann. § 20-302b (West 2021) (stating that district magistrates have no jurisdiction over the following actions: against state officers, contested divorce and custody of minor children, habeas corpus, receiverships, declaratory judgments, mandamus and quo warranto, injunctions, class actions, and certain real estate actions).

408. *Id.*

409. *Id.* § 12-4104.

410. Municipal judges have concurrent jurisdiction to hear and decide cases concerning ordinance violations with the same elements of enumerated state statutes, which would constitute and be punished as a felony if charged in district court: (1) driving under the influence; (2) domestic battery; (3) theft; (4) writing a worthless check; and (5) marijuana possession. *Id.*

411. Applies as to the jurisdiction of district magistrate judges. *Id.* § 20-302b.

412. *Id.* § 20-334 (district magistrate judge qualifications); *id.* § 12-4105 (municipal judge qualifications).

413. A district magistrate judge, who has not been regularly admitted to practice law in Kansas, will be granted a temporary certification to hold a temporary certificate permitting them to hold office, conditioned that such district magistrate passes an exam to ensure the judge “possesses the minimum skills and knowledge necessary to carry out the duties of such office” within eighteen months of the date that judge takes office. *Id.* § 20-337 (district magistrate judge alternative to licensed attorney requirement); *id.* § 12-4114 (municipal judge alternative to licensed attorney requirement). However, in “first class” cities, a municipal judge must be an attorney regularly admitted to practice law in the state of Kansas. *Id.*

414. Kan. Ct. R. 501 (requiring continuing judicial education for appellate and district judges). Municipal court judges who are also district magistrate judges are governed by Rule 501. Kan. Ct. R. 502(a)(1). Municipal court judges who are not licensed to practice law are governed by the same annual continuing education requirement to complete thirteen credit hours (including two credit hours of judicial ethics). Kan. Sup. Ct. R. 502(a)(2).

Louisiana		
<p>Justice of the Peace Civil Jurisdiction:⁴¹⁵</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with parish or district courts in certain civil matters, including suits: <ul style="list-style-type: none"> ○ Over the ownership or possession of movable property, of a manufactured home not exceeding \$5,000 in value⁴¹⁶ ○ By landowners or lessors for the eviction of occupants or tenants of: <ul style="list-style-type: none"> ▪ Leased commercial premises or farmlands, where monthly rent does not exceed \$5,000 ▪ Leased residential premises, “regardless of the amount of monthly or yearly rent or the rent for the unexpired term of the lease” • Original jurisdiction over the enforcement and collection of garnishments, debtor examinations, and the issuance of writs to enforce its judgments 	<p>\$5,000⁴¹⁷</p>	<p>Justice of the Peace and Constable Eligibility:⁴¹⁸</p> <ul style="list-style-type: none"> • “Good moral character” • Qualified elector⁴¹⁹ • Resident of “the ward and district from which elected” • English literacy • High school or secondary school graduate or equivalent <p>Justice of the Peace and Constable Training and Continuing Education:⁴²⁰</p> <ul style="list-style-type: none"> • Attend the first Justice of the Peace training course available after appointment • Attend the training course once every two years thereafter

415. La. Stat. Ann. § 13:2586 (2021). Local ordinances in certain parishes expand or contract the jurisdiction of justice of the peace courts. See *id.* A justice of the peace court has jurisdiction over actions where “a title to real estate is involved, when the state or any political subdivision is a defendant, or in successions or probate matters.” JP-C Duties and Requirements, Att’y Gen. Jeff Landry: La. DOJ, [https://www.ag.state.la.us/Article/178/\[https://perma.cc/T265-EGQY\]](https://www.ag.state.la.us/Article/178/[https://perma.cc/T265-EGQY]) (last visited Feb. 4, 2022).

416. La. Stat. Ann. § 13:2586; La. Code Civ. Proc. Ann. art. 4911–4912 (2021). The jurisdiction of a justice of the peace court is limited by the amount in controversy and the nature of the proceeding and does not extend to actions involving: title to immovable property; civil or political rights arising under the federal or state constitutions; annulment, divorce, separation, child support, or child custody; “adoption, tutorship, emancipation, or partition proceeding”; a “succession, interdiction, receivership, liquidation, habeas corpus, or quo warranto proceeding”; cases against state or local government, or other political corporations; executory proceedings; nor an in rem or quasi in rem proceeding. La. Code Civ. Proc. Ann. art. 4913.

417. La. Code Civ. Proc. Ann. art. 4911.

418. La. Stat. Ann. §§ 13:2582–2583.

419. Constables must be an “elector and resident of the ward or district from which elected.” *Id.* § 13:2583.

420. *Id.* § 49:251.1.

Louisiana (cont.)		
Justice of the Peace Criminal Jurisdiction: ⁴²¹ <ul style="list-style-type: none"> • Criminal jurisdiction as magistrates within parish that the justice of the peace holds office • Power to bail or discharge in noncapital cases • Concurrent jurisdiction with district court over state and local ordinances concerning the prosecution of litter violations⁴²² and of “removal, disposition, or abandonment” violations⁴²³ Constable Powers and Duties: ⁴²⁴ <ul style="list-style-type: none"> • Carry out the orders of, and serve citations ordered by, the Justice of the Peace Court • Enforce evictions and garnishments ordered by the Justice of the Peace Court 		
Maryland		
Orphans’ Court Jurisdiction: <ul style="list-style-type: none"> • Power to “secure the rights of a minor whose estate is being administered by a guardian under its jurisdiction”⁴²⁵ 	N/A	Orphans’ Court Judge Eligibility: ⁴²⁶ <ul style="list-style-type: none"> • Citizen of Maryland • Residency in the jurisdiction where the judge sits for twelve months preceding taking office Orphans’ Court Judge Training and Continuing Education: ⁴²⁷ <ul style="list-style-type: none"> • Attend an orientation program for new Orphans’ Court judges • Register for and attend annually one or more courses with an aggregate scheduled length of twelve hours

421. La. Stat. Ann. § 13:2586.

422. Id. § 13:2587.1.

423. Id. § 13:2586.

424. Id. § 13:2154.

425. Md. Code Ann., Est. & Trusts §§ 13-106, 2-101 to -105 (West 2021). Jurisdiction exists only where expressly conferred by law, according to which orphans’ courts are authorized to: conduct judicial probate; direct a personal representative; summon witnesses; and issue orders necessary in the administration of a decedent’s estate or trust. Id.

426. Frequently Asked Questions, Maryland Courts: Maryland Orphans’ Court, <https://mdcourts.gov/orphanscourt/faqs> [<https://perma.cc/6TZ8-43GC>] (last visited Feb. 4, 2022).

427. Administrative Order on Continuing Education of Judges, Magistrates, and Commissioners (Md. Ct. App. June 6, 2016), <https://mdcourts.gov/sites/default/files/admin-orders/20160606continuingeducationofjudgesmagistratescommissioners.pdf> [<https://perma.cc/6PBW-ABJ7>].

Massachusetts		
<p>Clerk-Magistrate Civil Jurisdiction:⁴²⁸</p> <ul style="list-style-type: none"> • Grant uncontested continuances • Hear and rule on uncontested nonevidentiary motions • Gauge trial readiness and set trial date via pretrial conferences • Mediate actions • Receive citations and hold hearings related to the operation of vehicles by nonresidents, vehicle registrations, and license suspensions and revocations⁴²⁹ • Receive petitions and review orders relating to nuisance and dangerous dogs⁴³⁰ • Small claims court⁴³¹ <p>Clerk-Magistrate Criminal Jurisdiction:⁴³²</p> <ul style="list-style-type: none"> • Issue warrants, search warrants, and summonses⁴³³ • Hold preliminary hearings to determine probation violations • Set bail on arraignments when a justice is unavailable • Determine probable cause for detention after a warrantless arrest via ex parte proceedings⁴³⁴ 	<p>Claim Depend-ent⁴³⁵</p>	<p>Clerk-Magistrate Eligibility:⁴³⁶</p> <ul style="list-style-type: none"> • Resident of Massachusetts • Citizen of the United States • Education: <ol style="list-style-type: none"> (1) Graduate of an accredited undergraduate institution; or (2) Demonstrate fifteen years of experience in the court applied for or comparable court • Experience: <ol style="list-style-type: none"> (1) Membership in the Massachusetts Bar for at least three years preceding application; or (2) Nonattorney applicants must have at least five years of experience in the court applied for or comparable court, or five years of otherwise “relevant experience” <p>Training and Continuing Education Requirements:⁴³⁷</p> <ul style="list-style-type: none"> • Initial training and ongoing education are not specified in statute • Receive trainings from the Trial Court’s Judicial Institute and Association of Magistrates and Assistant Clerks of the Trial Courts of Massachusetts⁴³⁸

428. Mass. Gen. Laws Ann. ch. 221, § 62C (West 2021).

429. Id. ch. 90, § 3.

430. Id. ch. 140, § 157.

431. See id. ch. 218, §§ 21–25.

432. Clerk-magistrates are distinct from “special magistrates.” Special magistrates have broader criminal jurisdiction with authority to assign counsel, preside at arraignments, mark up pretrial motions, and perform some fact-finding. Mass. R. Crim. P. 47. Because of these “quasi-judicial responsibilities,” special magistrates are meant to “be at the least attorneys admitted to practice before the bar and preferably . . . be retired judges.” Id.

433. Mass. Gen. Laws Ann. ch. 218, § 33.

434. See id. ch. 218, § 34; Mass. R. Crim. P. 3.1(b) (reporter’s notes).

435. Mass. Gen. Laws Ann. ch. 218, § 21. Small claims jurisdiction extends over actions arising in contract and tort (other than slander and libel) in which a plaintiff claims \$7,000 or less. Id. A city or town may bring an action to collect “unpaid taxes on personal property” or an action “which shall not exceed \$15,000.” Id. The jurisdictional amount does not apply to actions for property damage caused by a motor vehicle. Id.

436. Mass. Exec. Order No. 558, § 2.2 (Feb. 5, 2015), <https://www.mass.gov/executive-orders/no-558-reconstituting-the-judicial-nominating-commission-and-establishing-a-code-of-conduct-for-commission-members-and-nominees-to-judicial-office> [https://perma.cc/2AK5-93RJ].

437. Id.

438. Anne Johnson Landry, The Appointment and Training of Clerk Magistrates and Assistant Clerk Magistrates (Nov. 1, 2018), <https://willbrownsberger.com/the-appointment-and-training-of-clerk-magistrates-and-assistant-clerk-magistrates/> [https://perma.cc/K7UL-BFG4].

Michigan		
<p>Nonattorney District Court Magistrate Civil Jurisdiction:⁴³⁹</p> <ul style="list-style-type: none"> • In civil infraction actions:⁴⁴⁰ <ul style="list-style-type: none"> ◦ Hear and preside over admissions ◦ Conduct informal hearings ◦ Impose sanctions in traffic, municipal, and state civil infractions • Perform marriages⁴⁴¹ • Suspend payment of court fees by indigent parties in civil, small claims, or summary proceedings actions, until after judgment has been entered⁴⁴² • Administer oaths and affirmations and take acknowledgments in writing⁴⁴³ <p>Nonattorney District Court Magistrates Criminal Jurisdiction:⁴⁴⁴</p> <ul style="list-style-type: none"> • Conduct arraignments and sentence upon guilty plea or nolo contendere for specified violations⁴⁴⁵ • Accept guilty or nolo contendere pleas and impose sentences for misdemeanor or ordinance violations punishable by only fines⁴⁴⁶ • Issue search and arrest warrants and summonses⁴⁴⁷ • Conduct probable cause conferences • Fix bail and accept bond in all criminal cases • Conduct first appearances of defendants in criminal and ordinance violation cases⁴⁴⁸ • Approve and grant petitions for the appointment of attorneys to represent indigent clients accused of misdemeanors 	N/A	<p>Nonattorney District Court Magistrate Prerequisites:⁴⁴⁹</p> <ul style="list-style-type: none"> • Registered elector in the county in which appointed • Take a “constitutional oath of office and file a bond with the treasurer of a district funding unit of that district in an amount determined by the state court administrator” <p>Training and Continuing Education Requirements:</p> <ul style="list-style-type: none"> • Initial training and on-going education are not specified⁴⁵⁰ • District court magistrate cannot conduct an informal hearing in a civil infraction action involving a traffic or parking violation until successful completion of a special traffic law adjudication training course⁴⁵¹

439. See Mich. Jud. Inst., District Court Magistrate Manual—Revised Edition (2022), <https://mjieducation.mi.gov/documents/benchbooks/421-dcmm/file> [<https://perma.cc/5FT6-SYBH>]; Mich. State Ct. Admin. Off., Model Local Administrative Order 3a—Appointment of Non-Attorney Magistrate (2021). Although district court magistrates are judicial officers and perform limited judicial functions, “they are not judges for purposes of Const 1963, art 6, § 19 (requiring ‘judges of courts’ to be licensed attorneys).” Mich. Jud. Inst., *supra*, at 2-16. A district court magistrate “may only exercise the jurisdiction expressly provided by law and authorized by the chief judge of the district or division.” *Id.* at 1-4; Mich. Ct. R. 4.401(B).

440. Mich. Comp. Laws Ann. §§ 600.8512, .8719, .8819 (West 2021). A district court magistrate may only conduct informal hearings involving traffic and parking civil infractions upon successful completion of a “special training course in traffic law adjudication and sanctions.” *Id.* § 600.8512(2).

441. *Id.* § 600.8516.

442. *Id.* § 600.8513(2)(b).

443. *Id.* § 600.8517.

444. See generally Mich. Jud. Inst., *supra* note 439 (describing the role).

445. Mich. Comp. Laws Ann. § 600.8511(a)–(d).

446. *Id.* § 600.8512a(b).

447. *Id.* § 600.8511.

448. *Id.* § 600.8513.

449. *Id.* § 600.8507(1).

450. See *id.* § 600.8507; see also *id.* § 600.8512.

451. *Id.* § 600.8512(2).

Mississippi		
<p>Justice Court Jurisdiction:⁴⁵²</p> <ul style="list-style-type: none"> • All civil actions small claims cases involving amounts not exceeding \$3,500 • Misdemeanor criminal cases • Certain traffic offenses • First appearance felony cases⁴⁵³ <p>Municipal Court Jurisdiction:⁴⁵⁴</p> <ul style="list-style-type: none"> • Misdemeanor crimes • Municipal ordinances and city traffic violations • Conduct “initial appearances in which defendants are advised of the charges being filed, as well as bond hearings and preliminary hearings”⁴⁵⁵ 	<p>\$3,500⁴⁵⁶</p>	<p>Justice Court Judge Eligibility:⁴⁵⁷</p> <ul style="list-style-type: none"> • High school graduate or equivalent • Resident of county in which the justice court judge serves for two years preceding election to office <p>Justice Court Judge Training and Continuing Education:</p> <ul style="list-style-type: none"> • Successfully complete, within six months of election to office: a basic course of “training and education conducted by the Mississippi Judicial College of the University of Mississippi Law Center”; and “a minimum competency examination administered by the Mississippi Judicial College of the University of Mississippi Law Center”⁴⁵⁸ • Each year thereafter complete a course of continuing education conducted by the Mississippi Judicial College⁴⁵⁹ <p>Municipal Court Judges Eligibility (in municipalities with populations under 10,000):⁴⁶⁰</p> <ul style="list-style-type: none"> • Qualified elector of the county where the municipality is located

452. Miss. Code Ann. § 9-11-9 (2021).

453. See, e.g., Justice Court, Adams Cnty. Miss., <https://www.adamscountymiss.net/justice-court> [<https://perma.cc/MA2B-X6VV>] (last visited Feb. 5, 2022).

454. Miss. Code Ann. §§ 21-23-3, -5, -7. Among other powers and duties, municipal court judges have jurisdiction to: (1) hear and determine, without a jury or record of testimony, all cases concerning violations of municipal ordinances, city traffic offenses, and state misdemeanors; (2) conduct preliminary hearings in all violations of Mississippi state criminal laws occurring within the municipality over which the judge presides; and, in certain circumstances, sentence defendant; (3) “solemnize marriages, take oaths, affidavits and acknowledgments, and issue orders, subpoenas, summonses, citations, warrants for search and arrest upon a finding of probable cause”; and (4) expunge records in certain cases of misdemeanors, where charges were dropped, or where the person was found not guilty at trial. See *id.* § 21-23-7.

455. Municipal Court, State of Miss. Judiciary, <https://courts.ms.gov/trialcourts/municipalcourt/municipalcourt.php> [<https://perma.cc/NPF4-KRAF>] (last visited Feb. 5, 2022).

456. Miss. Code Ann. § 9-11-9.

457. Miss. Const. art. VI, § 171 (West 2022); see also Miss. Jud. Coll. & Univ. of Miss., Manual for Mississippi Justice Courts 2021 (2021), <https://mjc.olemiss.edu/wp-content/uploads/sites/134/2020/06/Manual-for-Mississippi-Justice-Courts-2021.pdf> [<https://perma.cc/DJJ7-762K>].

458. Miss. Code Ann. § 9-11-3. The basic “Justice Court Judge Training Course” consists of eighty hours of training. *Id.* § 9-11-4.

459. *Id.* § 9-11-4. The “Continuing Education Course for Justice Court Judges” consists of twenty-four hours of training. *Id.*

460. *Id.* §§ 21-23-3, -5. In general, justice court judges in counties with a population of over 10,000 must be attorneys at law. *Id.*

Missouri		
<p>Municipal Judge:⁴⁶¹</p> <ul style="list-style-type: none"> • Hear and determine violations of municipal ordinances • Issue warrants⁴⁶² • Administer oaths, enforce orders, and punish contempt to the same extent as a circuit judge⁴⁶³ • Certain traffic offenses⁴⁶⁴ • Grant and set conditions of parole or probation⁴⁶⁵ 	N/A	<p>Municipal Judge Eligibility (in municipalities with populations under 7,500):⁴⁶⁶</p> <ul style="list-style-type: none"> • Resident of Missouri⁴⁶⁷ • At least twenty-one years old and younger than seventy-five years old <p>Municipal Judge (Nonattorney) Training and Continuing Education:⁴⁶⁸</p> <ul style="list-style-type: none"> • Complete instructional course prescribed by the Missouri Supreme Court within six months of selection for office • Complete “New Municipal Judge Orientation”⁴⁶⁹ • Annually earn and report fifteen hours of continuing legal education, including three credit hours of Judicial Ethics and Professionalism⁴⁷⁰

461. Mo. Ann. Stat. § 479.020(1) (West 2021).

462. Id. § 479.100.

463. Id. § 479.070.

464. See id. §§ 479.050, .172.

465. Id. § 479.190.

466. Id. § 479.020. In municipalities with a population of 7,500 or greater, municipal judges must be licensed to practice law in Missouri. Id. § 479.020(3).

467. A municipal judge need not be resident of the municipality or circuit in which the judge serves (unless an ordinance or charter provides otherwise). Id. § 479.020(4).

468. Id. § 479.020(8).

469. This requirement applies for both lawyer and nonlawyer municipal judges. Municipal Judge Education, Mo. Cts., <https://www.courts.mo.gov/page.jsp?id=1805> (on file with the *Columbia Law Review*) (last visited Feb. 5, 2022).

470. Id.; see also Mo. Sup. Ct. R. 18.05(a)(2) (“[A]t least one of the three ethics credit hours required under Rule 18.05(a)(1) must be devoted exclusively to explicit or implicit bias, diversity, inclusion, or cultural competency.”). Lawyer municipal judges need only complete five hours of continuing education annually. Mo. Sup. Ct. R. 18.05(b).

Montana		
<p>Justice of the Peace Civil Jurisdiction:</p> <ul style="list-style-type: none"> • In civil actions where amount in controversy does not exceed \$15,000 in the following actions:⁴⁷¹ <ul style="list-style-type: none"> ○ Contract actions ○ Damages for personal injury or injury to personal property⁴⁷² ○ Actions to recover personal property ○ In certain actions for a fine, penalty, or forfeiture ○ Actions upon bonds or undertakings • Take and enter judgment for recovery of money upon confession of defendant • Issue temporary restraining orders and orders of protection⁴⁷³ • Issue orders relating to the restoration of streams (within monetary jurisdiction)⁴⁷⁴ • Concurrent jurisdiction with district courts in actions of “forcible entry, unlawful detainer, rent deposits, and residential and residential mobile home landlord–tenant disputes”⁴⁷⁵ <p>Justice of the Peace Criminal Jurisdiction:⁴⁷⁶</p> <ul style="list-style-type: none"> • All misdemeanors punishable by imprisonment not exceeding six months and/or fines not exceeding \$500 • Fish and game statute misdemeanor offenses punishable by imprisonment not exceeding six months and/or fines not exceeding \$1,000 • Preliminary hearings in criminal cases • Certain vehicle offenses⁴⁷⁷ • Misdemeanor violations relating to livestock markets and dealers⁴⁷⁸ 	<p>Justice Court: \$15,000⁴⁷⁹</p>	<p>Justice of the Peace Eligibility:⁴⁸⁰</p> <ul style="list-style-type: none"> • Citizen of the United States • Resident of county in which justice’s court is held for at least one year preceding election or appointment <p>Justice of the Peace Training and Continuing Education:⁴⁸¹</p> <ul style="list-style-type: none"> • As soon as practical following election, complete a course of study under supervision of Montana Supreme Court • Annually attend two mandatory training sessions

471. Mont. Code Ann. § 3-10-301 (West 2021).

472. But justices of the peace have no jurisdiction in actions for “false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, determination of paternity, and abduction” or where issues are raised involving title to or possession of real property. Id. § 3-10-301(1)(b)–(c).

473. Id. § 3-10-301(1)(i).

474. Id. § 3-10-301(1)(j).

475. Id. § 3-10-302.

476. Id. § 3-10-303.

477. Id. §§ 3-10-303(1)(f), 61-10-107.

478. Id. §§ 3-10-303(1)(g), 81-8-2.

479. Id. § 3-10-301.

480. Id. § 3-10-204.

481. Id. § 3-10-203.

Montana (cont.)		
<p>City Court Jurisdiction:</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with justice court of misdemeanors and for preliminary hearings in felony cases⁴⁸² • Civil and criminal violations of city or town ordinances⁴⁸³ • Actions for collections of license fees • Within monetary jurisdiction of \$9,500, actions when city or town is party or “is in any way interested”:⁴⁸⁴ <ul style="list-style-type: none"> ○ Breach of official bonds or contracts ○ Damages ○ Enforcement of forfeited recognizances ○ Collection on bonds ○ Recovery of personal property (belonging to city or town) ○ Collection of money due to city or town ○ Collections of taxes or assessments on certain cases 	<p>City Court: \$9,500⁴⁸⁵</p>	<p>City Judge Eligibility:⁴⁸⁶</p> <ul style="list-style-type: none"> • Meet qualifications of justice of the peace <p>City Judge Training and Continuing Education:⁴⁸⁷</p> <ul style="list-style-type: none"> • Annually attend two mandatory training sessions
Nebraska		
<p>Clerk Magistrate Jurisdiction:⁴⁸⁸</p> <ul style="list-style-type: none"> • Conduct proceedings based on: <ul style="list-style-type: none"> ○ Misdemeanors ○ Traffic infractions ○ Violations of city or village ordinances ○ State law infraction or traffic violation (except where the defendant pleads not guilty) • Issue warrants for arrest, searches, or seizure when no district judge is available • Adjudicate nonfelony proceedings (including determining probable cause or release on bail) • Determine temporary custody of juvenile • Determine noncontested proceedings relating to decedents’ estates, inheritance tax matters, and guardianship or conservatorship⁴⁸⁹ • Entering orders for hearings and trials (including for garnishment) 	<p>N/A</p>	<p>Clerk Magistrate Eligibility:⁴⁹⁰</p> <ul style="list-style-type: none"> • High school graduate or equivalent <p>Clerk Magistrate Continuing Education:</p> <ul style="list-style-type: none"> • Annually earn at least eight judicial branch credits⁴⁹¹

482. Id. § 3-11-102.

483. Id. § 3-11-103.

484. Montana city courts have no jurisdiction in civil actions that “might result in a judgment against the state for the payment of money.” Id. § 3-11-104.

485. Id. § 3-11-103.

486. Id. § 3-11-202.

487. Id. § 3-11-204.

488. Neb. Rev. Stat. § 24-519 (2021).

489. But clerk magistrates have no jurisdiction for matters relating to construction of wills and trusts, determining title to real estate, or authorizing sale or mortgaging of real estate. Id. § 24-519(5).

490. Id. § 24-508.

491. Neb. Sup. Ct. R. § 1-503; see also Neb. Rev. Stat. § 24-508(3) (“A clerk magistrate shall comply with the Supreme Court judicial branch education requirements as required by the Supreme Court.”).

Nevada		
Justice Courts: ⁴⁹² <ul style="list-style-type: none"> • Nontraffic misdemeanors • Traffic cases • Small claims disputes and other civil matters less than \$15,000 • Temporary protective orders against domestic violence • Evictions and other landlord–tenant proceedings 	\$15,000 ⁴⁹³	Justice of the Peace Eligibility (in townships of 100,000 or less): ⁴⁹⁴ <ul style="list-style-type: none"> • Qualified elector • Resident of township • Never removed or retired from judicial office • High school graduate or equivalent Justice Court Training and Continuing Education Requirements: ⁴⁹⁵ <ul style="list-style-type: none"> • Two-week initial training session • Complete thirteen hours of ongoing training

492. Justice Courts, Sup. Ct. of Nev. & Nev. Ct. of Appeals, https://nvcourts.gov/Find_a_Court/Justice_Courts/ [https://perma.cc/57EW-WY3N] (last visited Feb. 4, 2022).

493. Nev. Rev. Stat. § 4.370 (2021).

494. Id. § 4.010. In counties with a population of at least 100,000, a justice of the peace must, at the time of election or appointment to office, be an attorney who is licensed and admitted to practice law in Nevada and have been licensed and admitted to practice law in a U.S. jurisdiction for at least five years preceding election or appointment. Id.

495. Id. § 4.035; see also Sup. Ct. of Nev.: Admin. Off. of the Cts., Judicial Education Overview, https://nvcourts.gov/AOC/Programs_and_Services/Judicial_Education/Overview/ [https://perma.cc/E6JW-HHCJ] (last visited Feb. 4, 2022).

New Mexico		
<p>Magistrate Judge Civil Jurisdiction:</p> <ul style="list-style-type: none"> • Civil actions in contract, quasi-contract, and tort (with limited exceptions) where amount in controversy does not exceed \$10,000⁴⁹⁶ • Administer oaths and affirmations and take acknowledgements of instruments in writing⁴⁹⁷ • Solemnize marriages⁴⁹⁸ <p>Magistrate Judge Criminal Jurisdiction:⁴⁹⁹</p> <ul style="list-style-type: none"> • Misdemeanors and petty misdemeanors • Violations of county and municipal ordinances (including issuing subpoenas and warrants and punishing contempt) • Conduct preliminary examinations in criminal actions • In actions beyond criminal jurisdiction, a magistrate “may commit to jail, discharge or recognize the defendant to appear before the district court” <p>Municipal Court Jurisdiction:⁵⁰⁰</p> <ul style="list-style-type: none"> • All offenses and complaints under municipal ordinances • Issue subpoenas and warrants and punish contempt • Certain traffic violations • Criminal DUI cases 	<p>\$10,000⁵⁰¹</p>	<p>Magistrate Eligibility (districts with populations of less than 200,000):⁵⁰²</p> <ul style="list-style-type: none"> • Elector and resident of district in which appointed • High school graduate or equivalent <p>Magistrate Training and Continuing Education:</p> <ul style="list-style-type: none"> • Within forty-five days of election or appointment attend a qualification training program conducted by the administrative office of the courts⁵⁰³ • Annually attend at least one magistrate training program (“designed to inform magistrates with reference to judicial powers and duties and to improve the administration of justice”)⁵⁰⁴ <p>Municipal Judge Training and Continuing Education:⁵⁰⁵</p> <ul style="list-style-type: none"> • Annually attend a judicial training program

496. N.M. Stat. Ann. § 35-3-3 (West 2021). Magistrates have no jurisdiction in civil actions for malicious prosecution, libel, or slander; against public officers for misconduct in office; specific performance in the sale of real property; in which title or land-boundaries are disputed; affecting domestic relations; or to grant injunctive relief or habeas corpus. Id. § 35-3-3(c).

497. Id. § 35-3-1.

498. Id. § 35-3-2.

499. Id. § 35-3-4.

500. Id. § 35-14-2.

501. Id. § 35-3-3.

502. Id. § 35-2-1. In districts with a population greater than 200,000, magistrates must either be a member of the New Mexico Bar and licensed to practice law in New Mexico or have held office as a magistrate continuously since the publication of the federal decennial census. Id.

503. Id. § 35-2-3.

504. Id. § 35-2-4.

505. Id. § 35-14-10. Qualifications otherwise vary by municipality. Id. § 35-14-3.

New York		
Town and Village Court Civil Jurisdiction: ⁵⁰⁶ <ul style="list-style-type: none"> • Traffic cases • Small claims • Landlord–tenant matters including eviction proceedings⁵⁰⁷ • Summary proceedings⁵⁰⁸ • Certain statutory violations⁵⁰⁹ Town and Village Court Criminal Jurisdiction: ⁵¹⁰ <ul style="list-style-type: none"> • Misdemeanors and violations committed within the jurisdiction of the town or village • Vehicle and traffic law misdemeanors and felony infractions • Arraignments and preliminary hearings in felony matters 	\$3,000 ⁵¹¹	Town and Village Judge Eligibility: ⁵¹² <ul style="list-style-type: none"> • Resident within the town or village in which elected • Town judges must be electors of town at time of election and throughout term of office • Never been convicted of felony • Citizen of the United States • At least eighteen years old Town and Village Judge (Nonattorney) Training and Continuing Education: <ul style="list-style-type: none"> • Attend first available certification course after appointment or election⁵¹³

506. City, Town & Village Courts, NYCourts.gov, <https://www.nycourts.gov/courts/townandvillage> [<https://perma.cc/E395-CJUK>] (last visited Feb. 3, 2022).

507. N.Y. Real Prop. Acts. Law § 701 (McKinney 2021).

508. See N.Y. Const. art. VI, §§ 15(a), 16, 17(a); N.Y. Uniform Just. Ct. Act § 204 (McKinney 2021); N.Y. Real Prop. Acts. Law § 701.

509. See, e.g., N.Y. Agric. & Mkts. Law § 123 (McKinney 2021) (including proceedings to destroy or securely confine dangerous dogs); N.Y. Env't Conserv. Law § 71-0513 (McKinney 2021); N.Y. Gen. Bus. Law § 271 (McKinney 2021); N.Y. Mental Hyg. Law § 9.43 (McKinney 2021).

510. N.Y. Crim. Proc. Law § 10.30 (McKinney 2021); N.Y. Uniform Just. Ct. Act § 2001.

511. N.Y. Uniform Just. Ct. Act § 201. There is no limitation on monetary jurisdiction in landlord–tenant actions. *Id.* § 204.

512. N.Y. Town Law § 23 (McKinney 2021); N.Y. Village Law § 3-300 (McKinney 2021). The requirements apply unless a village has a population of less than 3,000 and allows for justices to reside in the county in which the village is located. See N.Y. Village Law § 3-300(2)(b).

513. N.Y. Uniform Just. Ct. Act § 105; see also N.Y. Town Law § 31(2).

North Carolina		
<p>Magistrate Civil Jurisdiction:⁵¹⁴</p> <ul style="list-style-type: none"> • Perform marriages • Hear small claims cases⁵¹⁵ • Enter orders for summary ejection (evictions) • Determine involuntary commitment • Administer oaths • Conduct hearings for driver's license revocations⁵¹⁶ <p>Magistrate Criminal Jurisdiction:⁵¹⁷</p> <ul style="list-style-type: none"> • Hear certain infractions, misdemeanors, and statutory offenses • Conduct initial proceedings • Set conditions of release (noncapital offenses) • Issue arrest and search warrants • Issue subpoenas 	<p>\$10,000⁵¹⁸</p>	<p>Magistrate Eligibility:⁵¹⁹</p> <ul style="list-style-type: none"> • Must have <ol style="list-style-type: none"> (1) four-year college degree; or (2) eight years of experience as clerk of superior court; or (3) two-year associate degree and four years of experience "in a job related to the court system, law enforcement, or other public service work" <p>Magistrate Required Training and Continuing Education:⁵²⁰</p> <ul style="list-style-type: none"> • Must complete courses in basic training and annual in-service training to be eligible for renomination • Must annually complete at least twelve hours of training in civil and criminal areas, including, but not limited to, subjects on conditions of pretrial release, impaired driving laws, issuing criminal processes, issuing search warrants, technology, and orders of protection

514. The Important Role of the North Carolina Magistrate, N.C. Jud. Branch: Gen. Ct. of Just. 2 (2018), https://www.nccourts.gov/assets/documents/publications/Magistrates_FactSheet_2018.pdf?qsTgXG13Z8LM68un15bwTNR.fjV1vcsW#:~:text=While%20magistrates%20are%20not%20under,the%20same%20mandatory%20retirement%20age [https://perma.cc/3FQQ-65H8].

515. N.C. Gen. Stat. § 7A-210 (2021).

516. *Id.* § 20-16.5.

517. *Id.* § 7A-273.

518. *Id.* § 7A-210.

519. *Id.* § 7A-171.2.

520. 2021 N.C. Sess. Laws 146.

North Dakota		
Municipal Court Jurisdiction: ⁵²¹ <ul style="list-style-type: none"> • Violations of municipal ordinances 	N/A	Municipal Judge Eligibility (only in cities with populations under 5,000): ⁵²² <ul style="list-style-type: none"> • Need not be resident of the city nor licensed to practice law in North Dakota Municipal Judge Required Training and Continuing Education: ⁵²³ <ul style="list-style-type: none"> • Orientation within first three months of office⁵²⁴ • Eighteen hours of approved coursework over each three-year period in office⁵²⁵
Oklahoma		
Municipal Court Jurisdiction: ⁵²⁶ <ul style="list-style-type: none"> • Violations of any ordinance of the municipality in which the court sits • Traffic offenses (including prescribing bail or arrests in misdemeanor violations of traffic ordinances)⁵²⁷ • Issue arrest warrants⁵²⁸ • Make arraignments⁵²⁹ • Set terms of sentence⁵³⁰ • Punish contempt⁵³¹ 	N/A	Municipal Court Judge Eligibility: <ul style="list-style-type: none"> • Resident of county in which municipality is located⁵³² Municipal Court Training and Continuing Education Requirements: ⁵³³ <ul style="list-style-type: none"> • Annually complete twelve hours of continuing education

521. N.D. Cent. Code § 40-18-01 (2021).

522. *Id.* In cities with populations greater than 5,000, municipal judge must be licensed to practice law “unless no person so licensed is available in the city.” *Id.*

523. *Id.* § 40-18-22.

524. N.D. Sup. Ct. Admin. R. 36.4(b).

525. N.D. Cent. Code § 40-18-22.

526. Okla. Stat. tit. 11, § 27-103 (2021).

527. *Id.* § 27-117.1.

528. *Id.* §§ 27-113–117.

529. *Id.* § 27-116.

530. See *id.* §§ 27-122.1–122.2.

531. *Id.* § 27-125.

532. *Id.* § 27-104. In general, a municipal court judge must be licensed to practice law in Oklahoma. *Id.* § 27-104(A). In municipalities with a population of less than 7,500, however, such judges may be “any suitable person who resides in the county in which the municipality is located or in an adjacent county.” *Id.* § 27-104(B). Similarly, in municipalities with a population greater than 7,500 but where no attorney licensed to practice law in Oklahoma who is willing to accept appointment as judge resides in the county or an adjacent county, a municipality may appoint as judge “any suitable and proper person.” *Id.* § 27-104(C).

533. *Id.* tit. 5, ch. 1, app. 4-B, r. 4 (2021).

Oregon		
<p>Justice Court Civil Jurisdiction:⁵³⁴</p> <ul style="list-style-type: none"> • Civil actions where amount in controversy does not exceed \$10,000 • Judgment without action upon confession of defendant • Small claims jurisdiction <p>Justice Court Criminal Jurisdiction:⁵³⁵</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with circuit court over criminal and traffic offenses committed and triable within the jurisdiction (except felony trials) <p>Municipal Court:⁵³⁶</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with circuit and justice courts over violations and misdemeanors committed and triable in city where court is located (except felonies and drug-related misdemeanors) 	<p>\$10,000⁵³⁷</p>	<p>Justice of the Peace Eligibility:⁵³⁸</p> <ul style="list-style-type: none"> • Citizen of the United States • Resident of Oregon for at least three years preceding appointment or candidacy • Resident in peace district in which justice court located <p>Municipal Judge and Justice of the Peace (Nonattorney) Required Training and Continuing Education:⁵³⁹</p> <ul style="list-style-type: none"> • Within twelve months of appointment or election complete a course “on courts of special jurisdiction offered by the National Judicial College” or an equivalent course • Annually complete thirty hours of continuing education⁵⁴⁰

534. Or. Rev. Stat. § 51.080 (2021).

535. Id. § 51.050.

536. Id. § 221.339.

537. Id. § 51.080.

538. Id. § 51.240.

539. Id. §§ 51.240 (justices of the peace), 221.142 (municipal judges).

540. Id. § 51.245.

Pennsylvania		
<p>Magisterial District Judges:⁵⁴¹</p> <ul style="list-style-type: none"> • Civil claims where amount of controversy does not exceed \$12,000⁵⁴² • Summary offenses • Matters arising under the Landlord Tenant Act of 1951⁵⁴³ • Preside at arraignments • Issue warrants and accept bail in noncapital offenses • Hear certain DUI cases <p>Traffic Court:⁵⁴⁴</p> <ul style="list-style-type: none"> • Offenses arising under the Motor Vehicle Code and related ordinances 	<p>Magisterial District Court: \$12,000⁵⁴⁵</p>	<p>Magisterial and Traffic Judge Eligibility:⁵⁴⁶</p> <ul style="list-style-type: none"> • Citizen of Pennsylvania • At least twenty-one years old • Resident of district in which appointed for at least one year preceding election or appointment and throughout term of office <p>Magisterial District Judge Required Training and Continuing Education:</p> <ul style="list-style-type: none"> • Minimum forty-hour training in “civil and criminal law, including evidence and procedure, summary proceedings, motor vehicles and courses in judicial ethics”⁵⁴⁷ • Annually complete thirty-two hours of continuing education courses, including one course in matters related to children and child abuse⁵⁴⁸ <p>Traffic Court Required Training and Continuing Education:⁵⁴⁹</p> <ul style="list-style-type: none"> • Minimum twenty-hour training on “summary proceedings and laws relating to motor vehicles”⁵⁵⁰

541. 42 Pa. Cons. Stat. § 1515 (2021).

542. Magisterial district judge jurisdiction extends only to cases: (1) in assumpsit, unless involving real contract where title to real property comes into question; (2) in trespass; and (3) for fines and penalties by any government agency. Id. § 1515(a)(3). Jurisdiction does not extend to claims against a Commonwealth party. Id.

543. 68 Pa. Cons. Stat. §§ 250.101–.602 (2021).

544. 42 Pa. Cons. Stat. § 1302.

545. Id. § 1515. However, plaintiffs may waive a portion of their claim to bring the claim within monetary jurisdiction. Id.

546. Id. § 3101.

547. Id. § 3113(b); 201 Pa. Code § 601 (2021).

548. Every six years the course “shall include the identification of mental illness, intellectual disabilities and autism and the availability of diversionary options for individuals with mental illness, intellectual disabilities or autism.” 42 Pa. Cons. Stat. § 3118.

549. Id. § 3101.

550. Id. § 3113(b).

South Carolina		
<p>Magistrate Court Civil Jurisdiction:⁵⁵¹</p> <ul style="list-style-type: none"> • Concurrent jurisdiction in actions:⁵⁵² <ul style="list-style-type: none"> ○ Arising on contracts ○ For damages for injury to rights to person or real property ○ For penalty, fine, or forfeiture ○ Upon surety bond taken by them ○ Commenced by property attachment ○ Upon a bond for payment of money ○ To take and enter judgment upon the confession of defendant ○ To recover personal property ○ Of interpleader arising from real estate contracts ○ Regarding landlord–tenant matters <p>Magistrate Court Criminal Jurisdiction:</p> <ul style="list-style-type: none"> • Exclusive jurisdiction in all criminal cases charging offenses committed in which punishment does not exceed thirty-day imprisonment or fine of \$100⁵⁵³ • Admit bail, conduct bond hearings, and determine conditions of release⁵⁵⁴ • Issue search warrants in gambling offenses⁵⁵⁵ • Issue arrest warrants⁵⁵⁶ • Examine into treasons, felonies, grand larcenies, high crimes, and misdemeanors⁵⁵⁷ • Expunge criminal records in certain cases⁵⁵⁸ 	<p>\$7,500⁵⁵⁹</p>	<p>Magistrate Eligibility:⁵⁶⁰</p> <ul style="list-style-type: none"> • Citizen of the United States and South Carolina • Resident of South Carolina for at least five years • At least twenty-one years old and younger than seventy-two years old⁵⁶¹ • High school graduate or equivalent • Received a four-year bachelor's degree⁵⁶² <p>Magistrate Required Training and Continuing Education:</p> <ul style="list-style-type: none"> • Must complete training program and pass certification exam within one year of taking office⁵⁶³ and recertification exam every eight years thereafter⁵⁶⁴ • Two-year continuing education program providing "extensive instruction in civil and criminal procedures"⁵⁶⁵

551. S.C. Code Ann. § 22-3-10 (2021). Magistrates have no civil jurisdiction in actions in which the state is a party (unless for a penalty not exceeding \$100), or when title to real property comes into question (with limited exceptions). *Id.* § 22-3-20.

552. *Id.* § 22-3-10.

553. *Id.* § 22-3-540. However, criminal jurisdiction is abolished in all counties in which a county court is established. *Id.* § 22-3-510. In these counties, magistrates are to issue warrants and hold preliminary examinations. *Id.* § 22-5-710. In criminal matters beyond their jurisdiction to try, magistrates have jurisdiction to examine, commit, discharge, and (except in capital cases) recognize individuals charged with such offenses. *Id.* § 22-3-310.

554. *Id.* § 22-5-510.

555. *Id.* § 22-5-10.

556. *Id.* §§ 22-5-110(A)(1), -150.

557. *Id.* § 22-5-110(A)(2).

558. *Id.* §§ 22-5-910 (general), 22-9-520 (youth offenders), 22-5-930 (first offense drug convictions).

559. *Id.* § 22-3-10.

560. *Id.* § 22-1-10.

561. See *id.* §§ 22-1-10, -25.

562. Applies only to magistrates appointed on and after July 1, 2005. *Id.* § 22-1-10(B)(2). Magistrates appointed on and after July 1, 2001 must have a two-year associate degree. *Id.*

563. *Id.* §§ 22-1-10(C), 22-2-5.

564. *Id.* § 22-1-10(D).

565. *Id.* § 22-1-17; see also S.C. App. Ct. R. 510(b)(1) (noting that of the required eighteen continuing education hours at least six shall be devoted to civil law issues, six shall be devoted to criminal law issues, and two shall be devoted to ethical issues).

South Carolina (cont.)	
<p>Both civil and criminal:</p> <ul style="list-style-type: none"> • Punish contempt⁵⁶⁶ • Issue summonses⁵⁶⁷ • Take testimony de bene esse⁵⁶⁸ • Grant new trials for cases tried in the magistrate's court⁵⁶⁹ <p>Municipal Court:⁵⁷⁰</p> <ul style="list-style-type: none"> • All cases arising under municipal ordinances • Equivalent powers in criminal cases conferred upon magistrates • Punish contempt • No jurisdiction in civil matters <p>Probate Court:⁵⁷¹</p> <ul style="list-style-type: none"> • Issue marriage licenses • Perform duties of clerk of court in certain proceedings in eminent domain • Adjudicate matters concerning involuntary commitment of people suffering from "mental illness, intellectual disability, alcoholism, drug addiction, and active pulmonary tuberculosis" 	<p>Municipal Eligibility:⁵⁷²</p> <ul style="list-style-type: none"> • Need not be resident of municipality in which holds office <p>Municipal Required Training and Continuing Education:⁵⁷³</p> <ul style="list-style-type: none"> • Complete training program and pass certification exam upon first appointment • Annually attend specified number of continuing education hours in criminal law and other relevant subject hours as required by Supreme Court of South Carolina⁵⁷⁴ <p>Probate Eligibility:⁵⁷⁵</p> <ul style="list-style-type: none"> • Citizen of the United States and South Carolina • At least twenty-one years old • Qualified elector in county in which office is held • Four-year bachelor's degree from accredited institution or four years' experience as employee in probate judge's office

566. S.C. Code Ann. § 22-3-950.

567. Id. § 22-3-930.

568. Id. § 22-3-940.

569. Id. § 22-3-990.

570. Id. § 14-25-45.

571. Id. § 14-23-1150.

572. Id. § 14-25-25.

573. Id. § 14-25-15.

574. S.C. App. Ct. R. 510(b)(1) (noting that of the required eighteen continuing education hours at least six shall be devoted to civil law issues, six shall be devoted to criminal law issues, and two shall be devoted to ethical issues).

575. S.C. Code Ann. § 14-23-1040.

South Dakota		
<p>Clerk Magistrate Civil Jurisdiction:⁵⁷⁶</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with circuit courts in civil actions or noncontested small claims proceedings within monetary jurisdiction⁵⁷⁷ • Solemnize marriages⁵⁷⁸ • Administer oaths and take acknowledgments and depositions⁵⁷⁹ <p>Clerk Magistrate Criminal Jurisdiction:</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with circuit courts to: <ul style="list-style-type: none"> ○ Commit and conduct preliminary hearings⁵⁸⁰ ○ Issue summonses, warrants of arrest, and warrants for searches and seizures⁵⁸¹ ○ Fix bonds or take personal recognizance⁵⁸² ○ Adjudicate matters concerning petty offenses if the punishment does not exceed a fine of \$500 and/or thirty-day imprisonment⁵⁸³ ○ Forfeiture of bonds for violations of any ordinance, bylaw, or other police regulation⁵⁸⁴ 	<p>\$12,000⁵⁸⁵</p>	<p>Clerk Magistrate Eligibility:⁵⁸⁶</p> <ul style="list-style-type: none"> • High school graduate or equivalent <p>Clerk Magistrate Training and Education:⁵⁸⁷</p> <ul style="list-style-type: none"> • Complete training on evidence-based practices • Annually attend judicial conference

576. A clerk magistrate need not be licensed to practice law but has more limited jurisdiction than a magistrate judge who must be licensed to practice law in South Dakota. See S.D. Codified Laws § 16-12A-1.1 (2021).

577. Id. § 16-12C-13.

578. Id. § 16-12C-5.

579. Id. § 16-12C-6.

580. Jurisdiction is concurrent with circuit courts to commit where informed waiver of preliminary hearing is given and is concurrent to conduct preliminary hearings unless defendant expressly demands hearing be conducted before a magistrate or circuit judge. Id. § 16-12C-9.

581. Id. § 16-12C-7.

582. Id. § 16-12C-10.

583. Id. § 16-12C-11.

584. Id. § 16-12C-12.

585. Id. § 16-12C-13.

585. Id. § 16-12C-5.

586. Id. § 16-12C-2. While a magistrate judge must be licensed to practice law, a clerk magistrate need not be. Id. § 16-12A-1.1.

587. Id. § 16-14-4.

Tennessee		
City (or “Municipal” ⁵⁸⁸) Court Jurisdiction: ⁵⁸⁹ <ul style="list-style-type: none"> • Laws and ordinances of the municipality⁵⁹⁰ • Traffic violations 	N/A	City Judge Eligibility: ⁵⁹¹ <ul style="list-style-type: none"> • At least thirty years old • Resident of Tennessee for five years preceding election • Resident of circuit or district in which office is held for one year preceding election City Judge Training and Continuing Education: ⁵⁹² <ul style="list-style-type: none"> • Annually attend three hours of training or continuing education courses approved by the administrative office of courts consisting of material concerning issues, procedures, and new developments relevant to city judges⁵⁹³

588. A municipal court is also called a “city court.” Tenn. Code Ann. § 16-18-301(2) (2021); see also About Municipal Courts, TNCourts.gov, <https://www.tncourts.gov/courts/municipal-courts/about> [<https://perma.cc/74WE-B2EE>] (last visited Feb. 5, 2022).

589. Tenn. Code Ann. § 16-18-302. In municipalities with a population greater than 150,000, jurisdiction also extends to additional enumerated misdemeanors and other offenses. Id. § 16-18-302(b).

590. This power includes jurisdiction over municipal laws and ordinances that duplicate or incorporate the language of state criminal statutes that are Class C misdemeanors with a maximum penalty of a civil fine not more than \$50. Id. § 16-18-302(a)(2).

591. Id. § 16-18-202; Tenn. Const. art VI, § 4. In cities with a population of more than 160,000, city judges must be lawyers authorized to practice law in Tennessee. Tenn. Code Ann. § 17-1-106(d).

592. Id. § 16-18-309.

593. If a municipal judge is an attorney authorized to practice law in Tennessee then such judge may complete three hours of training required for practicing attorneys instead. Id. § 16-18-309(a)(4).

Texas		
Justice Courts: ⁵⁹⁴ <ul style="list-style-type: none"> • Civil matters where amount in controversy does not exceed \$20,000⁵⁹⁵ • Cases relating to forcible entry and detainer⁵⁹⁶ • Enforce deed restrictions⁵⁹⁷ • Issue writs of sequestration, garnishment, and attachment⁵⁹⁸ • Foreclosure of mortgages and enforcement of liens on personal property⁵⁹⁹ • Conduct hearings relating to driver's license suspensions⁶⁰⁰ • Issue arrest and search warrants • Conduct court for minor misdemeanor offenses • Examine witnesses regarding labor act violations⁶⁰¹ • Concurrent civil jurisdiction with municipal court for minor misdemeanors (Class C) • Marriage ceremonies⁶⁰² • Ex officio notary public • Conduct justice court • Variety of civil process • Judge of small claims court⁶⁰³ • Administer and certify oaths and affidavits⁶⁰⁴ 	Justice: \$20,000 ⁶⁰⁵	Justice of the Peace Eligibility: ⁶⁰⁶ <ul style="list-style-type: none"> • No specific requirements Justice of the Peace Required Training and Continuing Education: Initially: <ul style="list-style-type: none"> • Within one year of election, an "eighty-hour course in the performance of the justice's duties"⁶⁰⁷ • Eight-hour initial training course in criminal case matters⁶⁰⁸ Annually: <ul style="list-style-type: none"> • Twenty-hour judicial course including at least ten hours of instruction on "substantive, procedural, and evidentiary law in civil matters"⁶⁰⁹ • Two-hour continuing education course relating to criminal matters⁶¹⁰

594. See generally Tex. Gov't Code § 27 (2021) (justice courts); David B. Brooks, Tex. Ass'n of Counties, 2021 Guide to Texas Laws for County Officials 1 (2021), <https://www.county.org/TAC/media/TACMedia/Legal/Legal%20Publications%20Documents/2021/2021-Guide-to-Laws-for-County-Officials.pdf> [<https://perma.cc/D9LN-64SQ>] ("This guide is a compilation of current statutes affecting the administration and operation of the principal county offices [I]t is primarily intended to provide . . . a convenient reference source for questions regarding the scope of their individual duties.").

595. Tex. Gov't Code § 27.031(a).

596. *Id.*

597. *Id.* § 27.034.

598. *Id.* § 27.032.

599. *Id.* § 27.031.

600. Tex. Transp. Code §§ 521.291–.320 (2021).

601. Tex. Rev. Civ. Stat. Ann. art. 5202 (West 2021).

602. Tex. Fam. Code § 2.202 (2021).

603. Tex. Gov't Code § 27.060.

604. *Id.* § 602.

605. *Id.* § 27.031.

606. See Judge Qualifications and Selection in the State of Texas, Tex. Cts., https://www.txcourts.gov/media/48745/Judge-Qualifications-6_26_14.pdf [<https://perma.cc/QTb9-4PXP>] (last visited Feb. 5, 2022).

607. Tex. Gov't Code § 27.005.

608. Tex. Code Crim. Proc. Ann. arts. 17.024, 17.0501 (West 2021).

609. Tex. Gov't Code § 27.005.

610. Tex. Code Crim. Proc. Ann. arts. 17.024, 17.0501.

Texas (cont.)		
<p>Constitutional County Courts:⁶¹¹</p> <ul style="list-style-type: none"> • Concurrent jurisdiction with justice courts where amount in controversy is greater than \$200 and less than \$20,000⁶¹² • Juvenile jurisdiction⁶¹³ <p>Municipal Courts:⁶¹⁴</p> <ul style="list-style-type: none"> • Violations of city ordinances • Search and arrest warrants • Airport-related matters • Concurrent jurisdiction with justice courts in criminal cases: <ul style="list-style-type: none"> ◦ Punishable only by fines ◦ Arising under the Alcoholic Beverage Code • Judgment of all bail and personal bonds in criminal cases 	<p>County: \$20,000⁶¹⁵</p> <p>Municipal: \$500⁶¹⁶</p>	<p>County Judge Eligibility:⁶¹⁷</p> <ul style="list-style-type: none"> • Citizen of the United States • Resident of Texas for at least twelve consecutive months • Resident of county for at least six consecutive months • Qualified voter in county • Never have been convicted of felony • Not have been determined to be mentally incapacitated <p>County Judge Required Training and Continuing Education:⁶¹⁸</p> <ul style="list-style-type: none"> • Thirty credit hours in first twelve months • Sixteen hours annually thereafter <p>Municipal (Nonattorney) Judge Required Training and Continuing Education:⁶¹⁹</p> <ul style="list-style-type: none"> • Thirty-two hours of continuing judicial education within one year of appointment or election • Annually attend regional seminar

611. See Brooks, *supra* note 594, at 64–72.

612. Tex. Gov't Code § 26.042.

613. Id. § 23.001.

614. Tex. Gov't Code § 29.003.

615. Id. § 26.042. Civil jurisdiction is concurrent with justice courts between \$200 and \$20,000 and concurrent with district courts between \$500 and \$5,000. Id.

616. The municipal court jurisdictional amount is \$500 generally; \$2,000 in matters relating to fire safety, zoning, or public health and sanitation; and \$4,000 in matters concerning dumping of refuse. Id. § 29.003(a)(2).

617. Tex. Const. art. V, § 15 (amended 1954); Tex. Elec. Code § 141.001 (2021).

618. Texas County Judge, Tex. Ass'n of Counties, <https://www.county.org/About-Texas-Counties/About-Texas-County-Officials/%e2%80%8bTexas-County-Judge> [<https://perma.cc/7QZ2-UCFG>] (last visited Feb. 5, 2022).

619. Judges, Tex. Mun. Ct. Educ. Ctr., <https://www.tmcec.com/programs/judges/> [<https://perma.cc/M6VJ-K9MM>] (last visited Feb. 26, 2022).

Utah		
<p>Justice Court Criminal Jurisdiction:⁶²⁰</p> <ul style="list-style-type: none"> • Class B and C misdemeanors • Violations of ordinances • Infractions <p>Justice Court Civil Jurisdiction:⁶²¹</p> <ul style="list-style-type: none"> • Small claims when either defendant resides or debt arose within territorial jurisdiction of justice court 	<p>\$11,000⁶²²</p>	<p>Justice Court Judge Eligibility:⁶²³</p> <ul style="list-style-type: none"> • Citizen of the United States • At least twenty-five years old and younger than seventy-five years old • Utah resident for a minimum of three years immediately preceding appointment • Resident of county in which court located for a minimum of six months immediately preceding appointment • Qualified voter in county in which judge resides • A high school graduate or equivalent⁶²⁴ <p>Justice Court Judge Training and Education:⁶²⁵</p> <ul style="list-style-type: none"> • Attend the first designated orientation program upon taking office⁶²⁶ • Be certified as meeting the continuing education requirements of judicial council including instruction regarding: <ul style="list-style-type: none"> ○ Understanding of constitutional provisions ○ Laws relating to the jurisdiction of the court ○ Rules of evidence ○ Rules of civil and criminal procedure

620. Utah Code § 78A-7-106 (2021). In general, justice court jurisdiction extends only to offenses committed within the justice court's territorial jurisdiction by offenders ages eighteen and older. *Id.* Jurisdiction also extends to the following offenses committed within the justice court's territorial jurisdiction by individuals ages 16 and 17: certain offenses relating to the Driver Licensing Act, Wildlife Resources Code, Motor Vehicle Act, Traffic Code, Financial Responsibility of Motor Vehicle Owners and Operators Act, Off-Highway Vehicles, State Boating Act, Boating—Litter and Pollution Control, Water Safety, and Financial Responsibility of Motorboat Owners and Operators Act. *Id.* § 78A-7-106(2).

621. *Id.* § 78A-7-106(5). Small claims actions are civil actions where amount in controversy does not exceed \$11,000. *Id.* § 78A-8-102.

622. *Id.* § 78A-8-102.

623. *Id.* § 78A-7-201.

624. As of May 10, 2016, this only applies in third, fourth, fifth, or sixth class counties; in first and second class counties a judge must have a degree from a law school and be bar eligible in any state. *Id.* § 78A-7-201(2). Justice court judges in first and second class counties holding office on May 10, 2016, who did not have a J.D., were grandfathered in and were allowed to continue to hold office until they resign, retire, or are removed from office or not reelected in a subsequent election. *Id.* § 78A-7-201(7).

625. *Id.* § 78A-7-205. Justice court judges must complete thirty hours of preapproved education annually. Utah Code Jud. Admin. R. 3-403(3).

626. Utah Code Jud. Admin. R. 3-403(3).

Virginia		
Magistrate Civil Jurisdiction: ⁶²⁷ <ul style="list-style-type: none"> • Issue civil warrants • Administer oaths and take acknowledgments • Act as conservators of the peace • Issue attachment summonses, distress warrants, and detinue seizure orders⁶²⁸ • Issue emergency custody orders⁶²⁹ • Issue emergency protective orders⁶³⁰ • Issue subpoenas duces tecum⁶³¹ Magistrate Criminal Jurisdiction: ⁶³² <ul style="list-style-type: none"> • Issue search warrants • Issue process of arrest • Issue warrants and subpoenas⁶³³ • Admit bail • Issue temporary detention orders⁶³⁴ • Conduct probable cause and bail hearings and issue warrants for federal criminal cases⁶³⁵ 	N/A	Magistrate Eligibility: ⁶³⁶ <ul style="list-style-type: none"> • Citizen of the United States • Resident of Virginia • Bachelor's degree from accredited institution⁶³⁷ Magistrate Training and Continuing Education: <ul style="list-style-type: none"> • Complete minimum training standards established by the Committee on District Courts within nine months of appointment⁶³⁸ • Annually obtain twenty continuing legal education credits⁶³⁹

627. Va. Code § 19.2-45 (2021).

628. Id. §§ 8.01-54, 8.01-114, 55-230, 55-232.

629. Id. §§ 19.2-182.9, 37.2-808, 37.2-913.

630. Id. §§ 16.1-253.4, 19.2-152.8.

631. Id. §§ 16.1-69.25, 19.2-45.

632. Id. § 19.2-45.

633. “The same power to issue warrants and subpoenas as is conferred upon district courts and as limited by the provisions of §§ 19.2-71 through 19.2-82.” Id. § 19.2-45(4).

634. Id. §§ 19.2-182.9, 37.2-808, 37.2-913; see also Off. of the Exec. Sec’y, Dep’t of Magistrate Servs., *Magistrate Manual: Introduction to the Magistrate System of Virginia 14* (2021),

<https://www.vacourts.gov/courtadmin/aoc/mag/resources/magman/chapter01.pdf> [<https://perma.cc/48FD-YYE8>] [hereinafter *Va. Magistrate Manual*].

635. Va. Code § 2.2-2801(A) (21); see also *Va. Magistrate Manual*, supra note 634, at 14 (“Va. Code § 2.2-2801 specifically allows Virginia magistrates to perform acts and functions with respect to United States criminal proceedings.”).

636. Va. Code § 19.2-37. An individual is ineligible for appointment as a magistrate if that person is a law enforcement officer; is on any governing body for any political subdivision of Virginia; “if such person or his spouse is a clerk, deputy or assistant clerk, or employee of any such clerk of a district court or circuit court”; or if such person’s parent, child, spouse, or sibling is a district or circuit court judge in the region in which that person would be appointed. Id.

637. A bachelor’s degree is not required for magistrates appointed and continuing to hold office since July 1, 2008. Id. § 19.2-37(B).

638. Id. § 19.2-38.1.

639. *Va. Magistrate Manual*, supra note 634, at 11–12.

West Virginia		
<p>Magistrate Civil Jurisdiction:⁶⁴⁰</p> <ul style="list-style-type: none"> • All civil actions where amount in controversy does not exceed \$10,000 • Eviction-related matters • Administer oaths or affirmation • Take affidavits or depositions <p>Magistrate Criminal Jurisdiction:⁶⁴¹</p> <ul style="list-style-type: none"> • All misdemeanor offenses • Conduct preliminary examinations on warrants charging felonies and probation violations • Issue arrest warrants in all criminal matters and warrants for search and seizure (in cases not involving capital offenses) • Set and admit bail⁶⁴² • Suspend sentences and impose unsupervised probation⁶⁴³ <p>Municipal Court Jurisdiction:⁶⁴⁴</p> <ul style="list-style-type: none"> • Cases involving municipal violations 	<p>\$10,000⁶⁴⁵</p>	<p>Magistrate Eligibility:⁶⁴⁶</p> <ul style="list-style-type: none"> • At least twenty-one years old • High school graduate or equivalent • Never convicted of felony or misdemeanor involving “moral turpitude” • Resident in county in which elected <p>Magistrate Training and Continuing Education:⁶⁴⁷</p> <ul style="list-style-type: none"> • Attend and complete course instruction on “rudimentary principles of law and procedure” • Attend courses of continuing education “as may be required by supervisory rule of the Supreme Court of Appeals” <p>Municipal Judge Training and Continuing Education:⁶⁴⁸</p> <ul style="list-style-type: none"> • Must “attend and complete the next available course of instruction in rudimentary principles of law and procedure” • Annually attend a course “for the purpose of continuing education”

640. W. Va. Code Ann. § 50-2-1 (LexisNexis 2021).

641. Jurisdiction extends only over misdemeanors and felonies committed within the county and over probation violations “upon order of referral from the circuit courts.” Id. § 50-2-3 (LexisNexis).

642. Id. (“[I]n cases punishable only by the fine, such bail or recognizance shall not exceed the maximum amount of the fine and applicable court costs permitted or authorized by statute to be imposed in the event of conviction.”).

643. This jurisdiction is limited for certain offenses including offenses for which the penalty includes mandatory incarceration. Id. § 50-2-3a (LexisNexis).

644. Id. § 8-10-2 (LexisNexis).

645. Id. § 50-2-1 (LexisNexis).

646. Id. § 50-1-4 (LexisNexis).

647. Id.

648. Training and continuing education requirements do not apply to “attorneys admitted to practice in this state.” Id. § 8-10-2(c) (LexisNexis).

Wisconsin		
<p>Municipal Judge Jurisdiction:⁶⁴⁹</p> <ul style="list-style-type: none"> • Cases concerning traffic offenses and ordinance violations⁶⁵⁰ • Issue subpoenas, inspection warrants, and, in certain cases, civil warrants⁶⁵¹ • Issue summonses cases concerning municipal ordinance violations⁶⁵² • Order payments of restitution in violations of nontraffic ordinances⁶⁵³ • Punish contempt of court⁶⁵⁴ • Concurrent jurisdiction with juvenile court of children in certain cases⁶⁵⁵ • Perform marriages⁶⁵⁶ • Preside over depositions in certain cases⁶⁵⁷ 	N/A	<p>Municipal Judge Eligibility:⁶⁵⁸</p> <ul style="list-style-type: none"> • Qualified elector at time of election or appointment • Resident of jurisdiction during term <p>Municipal Judge Training and Continuing Education:⁶⁵⁹</p> <ul style="list-style-type: none"> • Immediately following appointment or election, new municipal judges must attend the Municipal Judge Orientation and Institute • Earn four credits each year at a “municipal judge orientation institute, review institute or graduate institute developed by the judicial education office”

649. Wis. Stat. § 755.045 (2021); see also Wis. Sup. Ct., Dir. of State Cts. & Off. of Jud. Educ., Wisconsin Municipal Judge Benchbook 1-7 to 1-9 (2020), <https://www.wicourts.gov/publications/guides/docs/munibenchbook.pdf>

[<https://perma.cc/W5Z3-GCGC>] [hereinafter Wis. Municipal Judge Benchbook].

650. Jurisdiction is exclusive when the penalty is a forfeiture. Wis. Stat. § 755.045(1).

651. Id. §§ 755.045(2), 800.02(5), 885.04.

652. Id. § 800.02(4).

653. This power applies where ordinances prohibit the same or similar conduct to state statutes which are punishable by a fine and/or imprisonment. Id. §§ 755.045(3), 800.093.

654. Id. § 800.12.

655. This jurisdiction is concurrent with children twelve years or older who allegedly violated a municipal ordinance and children of any age alleged to be “habitually truant.” Id. § 938.17(2)(a).

656. Id. § 765.16(1m)(f).

657. Id. §§ 13.24(1), 887.20, 887.23.

658. Wis. Municipal Judge Benchbook, *supra* note 649, at 1-10.

659. Wis. Stat. § 755.18; Wis. Sup. Ct. R. 33.04; Wis. Municipal Judge Benchbook, *supra* note 649, at 1-10.

Wyoming		
Circuit Court Magistrate Civil Jurisdiction: ⁶⁶⁰ <ul style="list-style-type: none"> • Administer oaths • Acknowledge deeds and mortgages • Perform marriages • Subpoena witnesses and mandate appearances • Handle eviction matters⁶⁶¹ and all civil actions where the jurisdictional amount is \$5,000 or less⁶⁶² • Try actions concerning “any instrument payable in installments” or disposal of an abandoned vehicle • Issue attachments, executions, and garnishments of debtors in certain cases, and executions on judgments rendered by the magistrate⁶⁶³ 	\$5,000 ⁶⁶⁸	Circuit Court Magistrate Eligibility (Full-Time): ⁶⁶⁹ <ul style="list-style-type: none"> • Full-Time: Qualified elector and resident in county • Part-Time: Qualified elector and resident in “district within which the circuit is located”⁶⁷⁰
Circuit Court Magistrate Criminal Jurisdiction: ⁶⁶⁴ <ul style="list-style-type: none"> • Issue warrants or summonses • Set bail⁶⁶⁵ • Arraign, try, and sentence defendants for misdemeanors punishable by one year or less of imprisonment, regardless of any fine imposed⁶⁶⁶ • Correct an illegal sentence or reduce sentences • Hear and issue orders in peace bond, stalking, and domestic violence cases 		Municipal Judge Eligibility: <ul style="list-style-type: none"> • Qualified elector of Wyoming⁶⁷¹
Municipal Court Judge Jurisdiction: <ul style="list-style-type: none"> • All offenses arising under municipal ordinances⁶⁶⁷ 		Magistrate and Municipal Judge Training and Continuing Education: <ul style="list-style-type: none"> • Annually complete at least fifteen hours of accredited continuing judicial or legal education⁶⁷²

660. Wyo. Stat. Ann. § 5-9-208 (2021). A full-time magistrate, authorized to practice law in Wyoming, enjoys broader jurisdiction and with limited exception may exercise “all of the powers of a circuit court” as authorized by law or with consent of all parties. Id.

661. Id. § 5-9-208(c)(v) (“Try the action for forcible entry and detainer . . .”). A magistrate not licensed to practice law may preside over cases against tenants “holding over their terms or . . . fail[ing] to pay rent for three (3) days after it is due,” and renters who are not “current on all payments required by the rental agreement” or fail to comply “with all lawful requirements of the rental agreement.” Id. §§ 1-21-1002(a)(i), 1204, 1205.

662. Within the jurisdictional amount, powers include entering judgments by default, on the pleadings, and on a confession of a party, as well as summary judgment, setting aside default judgments, and issuing any order a circuit judge can enter. Id. § 5-9-208(c)(xiii).

663. Magistrates can also try the rights of claimants to property taken in execution, garnishment, or attachment. Id. §§ 5-9-208(c)(vii), (viii), (ix), (xii), (xiv).

664. Id. § 5-9-208.

665. This includes the power to set bail for witnesses. Id. § 5-9-208(c)(xvi).

666. This includes the power to: (1) accept pleas; (2) order examinations of defendants who claim mental illness, and order presentence investigations, substance abuse evaluations, and pretrial conferences; (3) impose sentences and terms of probation; (4) issue orders to show cause and conduct related hearings; and (5) enter other orders within the power of circuit judges when the judge is unavailable, recused, or disqualified. Id. § 5-9-208(c)(xviii).

667. Id. § 5-6-101.

668. Id. § 5-9-208(c)(x).

669. Id. §§ 5-9-201(a), 5-9-206.

670. Id. §§ 5-9-201(b)(2), -210.

671. Id. § 5-6-103 (“Municipal judges . . . shall be qualified electors of the state *unless otherwise provided by ordinance.*”) (emphasis added).

672. Wyo. R. for Continuing Jud. Educ. 2.

TABLE 2: SUMMARY OF STATES THAT ALLOW NON-J.D.S TO SERVE AS JUDICIAL OFFICERS

State	Are lay judges required to complete, or are they provided with, some sort of training?	Are lay judges authorized to hear eviction cases?	Are lay judges authorized to hear criminal cases?
Ala.	YES (initial orientation program required within the first twelve months of taking office and continuing education requirement)	NO	YES (district court magistrate judges may issue arrest warrants and set bail amounts)
Alaska	YES (not specified in statute; a training judge is assigned to each judicial district to inspect, train, and report on the magistrates)	NO	YES (jurisdiction includes issuing writs of habeas corpus; issuing arrest warrants, summons, and search warrants; and can set, receive, and forfeit bail)
Ariz.	YES (must complete at least sixteen hours of judicial education in ethics, technology training, and live training)	YES	YES (justice court judges have jurisdiction over petty offenses, misdemeanors, and criminal offenses punishable by fines not exceeding \$2,500 and/or imprisonment in jail not exceeding six months)

Colo.	YES (nonlawyer county judges must attend a state-run institute on duties and function of court system)	YES	YES (county court judges have jurisdiction over misdemeanors and petty offenses (other than those involving children); issuing warrants and bindover orders; conducting preliminary examinations and dispositional hearings; and setting bail in felonies and misdemeanors)
Del.	YES (required to attend a basic legal education program and must complete thirty hours of continuing legal education and training every two years)	YES	YES (jurisdiction over all criminal misdemeanor cases (except for those specifically excluded by law); issue summonses and warrants, and search warrants, based upon finding of probable cause, and issue and execute capiases; and conduct initial appearances to set bond and conduct bond review hearings upon request)
Ga.	YES (must complete an orientation program within the first year of office and eighty hours of training specified by the Georgia Magistrate Courts Training Council within two years of becoming a magistrate, along with other continuing education requirements)	YES	YES (jurisdiction over violations of game and fish laws; criminal commitment hearings; miscellaneous misdemeanors; and traffic and truancy in some counties; and issuance of search and arrest warrants in some cases)

Kan.	YES (must complete at least thirteen hours of continuing legal education annually, with at least two hours concerning judicial ethics)	YES	YES (jurisdiction over violations of state law, cigarette or tobacco infractions or misdemeanors; and first appearance hearings in felonies, preliminary examination of felony charges, and misdemeanor or felony arraignments)
La.	YES (required to attend an initial training course and an additional training course once every two years thereafter)	YES	YES (jurisdiction over setting bail or discharge in noncapital cases; and concurrent jurisdiction with district court over specified state and local ordinances concerning the prosecution of litter violations and of “removal, disposition, or abandonment” violations)
Md.	YES (must attend an orientation program for new judges and obtain at least twelve hours of continuing education annually)	NO	NO
Mass.	YES (not specified in statute; magistrates receiving training through a collaboration between the Trial Court’s Judicial Institute and Association of Magistrates and Assistant Clerks of the Trial Courts of Massachusetts)	NO	YES (jurisdiction to issue warrants, search warrants, and summonses; hold preliminary hearings to determine probation violations; set bail on arraignments when a justice is unavailable; and conduct an ex parte proceeding to determine probable cause for detention after a warrantless arrest)

Mich.	YES (not specified in statute; must successfully complete a special training course in traffic law adjudication and sanctions prior to overseeing these claims)	NO	YES (jurisdiction to issue search warrants, and arrest warrants and summonses; conduct probable cause conferences; fix bail and accept a bond in all criminal cases; conduct first appearances of defendants in criminal and ordinance violation cases; and approve and grant petitions for the appointment of attorneys to represent indigent clients accused of misdemeanors)
Miss.	YES (must complete a basic training course and a competency exam within six months of election and annually complete a continuing education course thereafter)	NO	YES (jurisdiction over misdemeanor crimes, municipal ordinances, and city traffic violations; and can oversee initial appearances as well as bond hearings and preliminary hearings and first appearances in felony cases)
Mo.	YES (must complete an instructional course within six months of becoming a magistrate and complete at least fifteen hours of continuing legal education annually)	NO	YES (jurisdiction to hear and determine violations of municipal ordinances; issue warrants; certain traffic offenses; and grant and set conditions of parole or probation)

Mont.	YES (must complete an initial training course as soon as possible after obtaining position and attend two training sessions each year thereafter)	YES	YES (justices of the peace have jurisdiction over all misdemeanors punishable by imprisonment not exceeding six months and/or fines not exceeding \$500; preliminary hearings in criminal cases; and certain vehicle offenses)
Neb.	YES (must earn at least eight hours of judicial education credits annually)	NO	YES (jurisdiction to adjudicate nonfelony proceedings, including determining probable cause or release on bail; determining temporary custody of juvenile; determining noncontested proceedings relating to decedents' estates, inheritance tax matters, and guardianship or conservatorship; and entering orders for hearings and trials)
Nev.	YES (must complete a two-week long initial training session and must complete thirteen hours of continuing education annually)	YES	YES (jurisdiction over criminal, traffic, and nontraffic misdemeanors)

N.M.	YES (must attend a training program within forty-five days of initial appointment and attend at least one training program annually)	YES	YES (magistrate judge jurisdiction includes misdemeanors and petty misdemeanors; violations of county and municipal ordinances (including issuing subpoenas and warrants and punishing contempt); and conducting preliminary examinations in criminal actions)
N.Y.	YES (must attend the first available certification course after initial appointment)	YES	YES (jurisdiction over misdemeanors and violations committed within the jurisdiction of town or village; vehicle and traffic law misdemeanors and felony infractions; arraignments and preliminary hearings in felony matters)
N.C.	YES (must complete courses in basic training and annual in-service training in order to be eligible for renomination and must annually complete at least twelve hours of training in civil and criminal law)	YES	YES (jurisdiction to hear certain infractions, misdemeanors, and statutory offenses; conduct initial proceedings; set conditions of release (noncapital offenses); issue arrest, search warrants, and subpoenas)
N.D.	YES (must attend orientation within the first three months of initial appointment and earn eighteen hours of credit in judicial education classes every three years)	NO	YES (jurisdiction over violations of municipal ordinances)

Okla.	YES (must complete at least twelve hours of continuing education annually)	NO	YES (jurisdiction over traffic offenses (including prescribing bail or arrests in misdemeanor violations of traffic ordinances); issue arrest warrants; make arraignments; set terms of sentence; and punish contempt)
Or.	YES (must complete an orientation course within the first twelve months of appointment and annually complete thirty hours of continuing education)	NO	YES (justice courts have concurrent jurisdiction with circuit court over criminal and traffic offenses committed or triable within the jurisdiction (except felony trials))
Pa.	YES (must complete an initial forty-hour course on civil and criminal law and annually complete at least thirty-two hours of continuing education courses including a course related to children and child abuse)	YES	YES (issue warrants and accept bail in noncapital offenses and has jurisdiction to hear certain DUI cases)

S.C.	YES (must attend an initial training program and pass certification exam within twelve months of taking office; also must attend a continuing education program along with passing a recertification exam every eight years thereafter)	YES	YES (exclusive jurisdiction in all criminal cases charging offenses committed within magistrate's jurisdiction, in which punishment does not exceed thirty-day imprisonment or fine of \$100; admit bail, conduct bond hearings, and determine conditions of release; issue arrest warrants; examine treasons, felonies, grand larcenies, high crimes, and misdemeanors)
S.D.	YES (must complete training program on evidence-based practices and attend annual judicial conferences thereafter)	NO	YES (conducts preliminary hearings; concurrent jurisdiction with circuit court to issue summonses, warrants of arrest, and warrants for searches and seizures; fix bonds or take personal recognizance; and adjudicate matters concerning petty offenses if the punishment does not exceed a fine of \$500 and/or thirty-day imprisonment)

Tenn.	YES (must attend three hours of training or continuing education courses annually)	NO	YES (jurisdiction over the laws and ordinances of the municipality; and in municipalities with a population greater than 150,000, jurisdiction also extends to additional enumerated misdemeanors and other offenses)
Tex.	YES (county judges must earn thirty credit hours of judicial education in the first twelve months of appointment and must attend sixteen hours of continuing education training annually thereafter)	YES	YES (justice courts can issue arrest and search warrants and can hear minor misdemeanor offenses)
Utah	YES (must attend orientation program upon taking office and obtain certification in several areas via continuing education course)	NO	YES (jurisdiction over Class B and C misdemeanors; violations of ordinances and other infractions)
Va.	YES (must complete minimum initial training standards as established by state's committee within nine months of appointment and obtain at least twenty hours of continuing legal education annually)	YES	YES (can issue search warrants, process of arrest, warrants and subpoenas; may also admit bail; issue temporary detention orders; and conduct probable cause and bail hearings and issue warrants for federal criminal cases)

W. Va.	YES (must attend annual course on principles of law and procedure; and must attend any additional judicial education courses as required by the Supreme Court of Appeals)	YES	YES (jurisdiction over all misdemeanor offenses; conduct preliminary examinations on warrants charging felonies and probation violations; issue arrest warrants in all criminal matters, and warrants for search and seizure (in cases not involving capital offenses); and set and admit bail)
Wis.	YES (must attend orientation program immediately following appointment and must earn at least four credits each year through judicial education programs)	NO	YES (oversee cases concerning traffic offenses and ordinance violations; issue subpoenas, inspection warrants and, in certain cases, civil warrants; issue summonses for cases concerning municipal ordinance violations)
Wyo.	YES (must annually complete at least fifteen hours of continuing legal education)	YES	YES (jurisdiction to issue warrants or summonses; set bail; arraign, try, and sentence defendants in misdemeanor cases punishable by not more than one year imprisonment, regardless of any fine imposed)

CIVIL JUSTICE, LOCAL ORGANIZATIONS, AND DEMOCRACY

Jamila Michener*

Local organizations that lie outside of the scope of legal aid nonetheless engage legal processes. Such organizations draw on courts, lawyers, and legal problems as a basis for mobilizing and power building in racially and economically marginalized communities. They work within such communities to provide support navigating courts, obtaining legal representation, contesting unfair legal practices, and much more. These activities position local organizations as critical—yet too easily overlooked—civil legal institutions. Unlike other civil legal institutions (e.g., legal aid organizations and courts), nonlegal local organizations (e.g., tenant organizations) can operate inside and outside the formal civil legal system. Consequently, they have a distinctive vantage point and a pivotal role in developing power resources that are integral in a democratic polity. This Essay draws on in-depth qualitative interviews with tenant groups to offer an account of how local organizations engage civil legal processes and function as important institutional nodes in a larger civil legal infrastructure. By advancing knowledge of an imperative avenue through which race–class subjugated communities can exercise agency within civil legal processes, this Essay illuminates linkages between civil justice and local organizations and raises questions about how to better support tenant organizations as they undertake work that vitally enhances democracy.

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INTRODUCTION

“[E]ven if you know all your rights and you are 100% on the right side of the law, it’s not really going to matter if your landlord has four attorneys and you show up in court against them, right? Even if you get a Legal Aid lawyer, like bless them, they’re doing the Lord’s work, but you know, they’re just out gunned. So, in terms of the legal system . . . [it’s] woefully inadequate”

— Tom, Tenant Organizer¹

In the United States, the civil legal system is underfunded and overwhelmed.² There is no constitutional right to legal representation in civil courts.³ Nevertheless, the Charter of the Organization of American States contains rights to civil legal aid.⁴ Moreover, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have found that full protection of human rights requires states to guarantee adequate access to counsel and civil legal aid.⁵ Notwithstanding such directives, in 2017, low-income Americans received limited or no legal help for more than one million eligible civil legal problems, even after

1. Interview with Tom, Tenant Organizer, Cal. (Apr. 2021). Throughout this Essay, the identities of interviewees are protected by omitting their names, specific organizational affiliations, and other potential identifying information.

2. See Legal Servs. Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 9 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/AZD3-YLYR>] [hereinafter LSC, *The Justice Gap*] (“This ‘justice gap’—the difference between the civil legal needs of low-income Americans and the resources available to meet those needs—has stretched into a gulf. State courts across the country are overwhelmed with unrepresented litigants.”).

3. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (denying a right to counsel in civil cases); cf. *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (guaranteeing a right to counsel for indigent criminal defendants).

4. See Charter of the Organization of American States art. 45, opened for signature Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (entered into force Dec. 13, 1951); see also Zachary H. Zarnow, *Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the United States Is Doing Instead, and How Legal Empowerment Can Help*, 20 *Am. U. J. Gender Soc. Pol’y & L.* 273, 281 (2011) (highlighting that the United States is bound by the Charter of Organization of American States to provide civil legal aid).

5. See *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.129, doc. 4 ¶¶ 51–65 (2007); see also Jamila Michener, *Power From the Margins: Grassroots Mobilization and Urban Expansions of Civil Legal Rights*, 56 *Urb. Affs. Rev.* 1390, 1393 (2020) [hereinafter Michener, *Power From the Margins*].

seeking help from legal aid organizations.⁶ The vast majority of these problems (85–97%) remained unaddressed because legal aid organizations lacked available resources.⁷ Signaling the extent and severity of this problem, the World Justice Project’s Rule of Law Index 2021 ranked the United States 41 out of 139 countries with respect to the access and affordability of civil courts.⁸

As the opening epigraph suggests, even while civil legal attorneys are “doing the Lord’s work,” they contend with resource deficiencies that leave them “outgunned.”⁹ In the face of these limitations, grassroots organizations emerge as fundamental institutions that navigate within the civil legal system and push for change outside of it.¹⁰ These community-based organizations work to expand civil legal rights, provide support to people with civil legal problems, and build power within racially and economically marginalized communities.¹¹ This Essay examines the ways that local tenant organizations engage the civil legal system. Though tenant groups do not primarily focus on legal aid, the people they organize face housing problems that are marked by clear legal dimensions.¹² As such, tenant organizations operate in relation to courts, lawyers, and the law.¹³

6. See LSC, *The Justice Gap*, *supra* note 2, at 13–14.

7. *Id.*

8. World Justice Project: Rule of Law Index 2021, at 171 (2021), <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> [<https://perma.cc/Y3V3-XD36>].

9. Interview with Tom, *supra* note 1.

10. See Michener, *Power From the Margins*, *supra* note 5, at 1391.

11. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 *Yale L.J.* 552, 553–54 (2021) (noting the influence of grassroots organizations on the law); Jamila Michener & Mallory SoRelle, *Politics, Power, and Precarity: How Tenant Organizations Transform Local Political Life*, 11 *Int. Grps. & Advoc.* 209, 210 (2022) (“[C]ollective organizing among people fighting precarious and insecure housing is occurring in localities across the country. Not only does this organizing produce political opportunities for individuals, it also structures the realities of local politics.”); Michener, *Power From the Margins*, *supra* note 5, at 1414 (arguing that grassroots community organizations can expand access to the civil legal system).

12. For example, tenant organizations work with renters facing eviction, substandard housing conditions, inadequate disability accommodations, and other housing problems often adjudicated through legal processes. See, e.g., Hassan Kanu, *D.C. Renters’ Lawsuit is a Blueprint for Tenant Organizing*, *Reuters* (July 22, 2021), <https://www.reuters.com/legal/transactional/dc-renters-lawsuit-is-blueprint-tenant-organizing-2021-07-22/> (on file with the *Columbia Law Review*).

13. See Richard H. Caulfield, *Tenant Unions: Growth of a Vehicle for Change in Low-Income Housing*, 3 *U.C. Davis L. Rev.* 1, 1 (1971) (“Tenants have been organizing into unions in order to strengthen their position in relation to their landlords. . . . The common law has long been heavily weighted in favor of the landlord as opposed to the residential tenant. . . [and] [s]tate courts have long adhered to . . . the common law.”); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 *Calif. L. Rev.* 2133, 2137–40 (2007) (describing how nonlegal local organizations use the law and lawyers—often outside of the traditional legal process—to effectuate change).

This Essay demonstrates the five main mechanisms through which tenant organizations engage the civil legal system: (1) partnerships and collaborations with lawyers and legal organizations, (2) the provision of court support to tenants in need, (3) oversight of court processes, (4) interaction with court and government officials, and (5) direct action to disrupt court practices and outcomes. Identifying and understanding these mechanisms advances knowledge of an important avenue through which ordinary people within race–class subjugated communities¹⁴ can exercise agency within civil legal processes that can be alienating, difficult, and disempowering.¹⁵ Going beyond these five mechanisms of direct engagement with civil legal processes, tenant organizations also pick up where the civil legal system leaves off,¹⁶ filling some of the gaping chasms that civil law leaves exposed,¹⁷ and pushing toward structural change in policy.¹⁸ In these ways, local organizations build toward new possibilities and plant seeds of transformed power dynamics in the American political economy.¹⁹ Ultimately, tenant organizations participate in civil legal processes in ways that buttress democracy.²⁰

The remainder of this Essay proceeds as follows: As background, Part I contextualizes the role of (nonlegal) local organizations in civil legal processes and posits housing as a key arena for understanding how such organizations engage the civil legal system. Part II draws on in-depth qualitative interviews to detail the five ways that local organizations work within the civil legal system and to mark the limits of their ability to do so. Part III considers the democratic implications of local organizations as key institutions operating within and beyond the civil legal structures.

14. Professors Joe Soss and Vesla Weaver coined the phrase “race–class subjugated.” Such language recognizes that “race and class are intersecting social structures . . . that defy efforts to classify people neatly.” Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities*, 20 *Ann. Rev. Pol. Sci.* 565, 567 (2017).

15. See Jamila Michener, *You Planted a Seed: Legal Problems as Power Building Possibilities*, Law & Pol. Econ. Project (July 15, 2020), <https://lpeproject.org/blog/you-planted-a-seed-legal-problems-as-power-building-possibilities/> [<https://perma.cc/77WD-EPT9>] [hereinafter Michener, *Legal Problems as Power Building*].

16. Caulfield, *supra* note 13, at 2 (“Tenant unions are enabling tenants to work within the common law, using the housing codes, to improve their living conditions.”).

17. See Stephen C. Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 4–13* (1995) (explaining the limitations of federal statutes in effectuating structural change).

18. See Michener, *Power From the Margins*, *supra* note 5, at 1414 (arguing that grassroots community organizations can expand access to the civil legal system).

19. Michener, *Legal Problems as Power Building*, *supra* note 15.

20. See Michener & SoRelle, *supra* note 11, at 214 (“[T]enant organizations carve out a distinctive space in local politics by building power around the concerns of economically and racially marginalized communities.”).

I. BACKGROUND

A. *The Organizational Infrastructure of the Civil Legal System*

A variety of organizations play primary roles in civil legal processes. Most centrally, legal aid organizations provide services to people with civil legal problems.²¹ Though access to civil legal representation in the United States remains painfully insufficient,²² the scant access that does exist is largely delivered through legal aid organizations funded by Legal Services Corporation (LSC).²³ Prior to the development of LSC, civil legal assistance to low-income people flowed through a hodgepodge of under-resourced and inadequate channels, including individual lawyers working on a pro bono basis, philanthropic legal aid societies, and municipal funding.²⁴ In 1974, Congress passed the Legal Services Corporation Act to create LSC, a private, nonprofit corporation tasked with ensuring equal access to justice under the law for all Americans.²⁵ LSC is the largest funder of civil legal aid for low-income Americans in the nation.²⁶ It operates as an independent nonprofit entity that distributes federal funds to “132 independent nonprofit legal aid programs with more than 800 offices.”²⁷

LSC directs vital legal resources to low-income Americans across the country. Though LSC-funded organizations occupy a significant place in the civil legal system, they are also severely constrained by a variety of federal decrees.²⁸ For example, LSC grantees are restricted in the cases they can pursue (e.g., class action lawsuits are not permitted).²⁹ They are also limited in the clients they can take on (e.g., undocumented immigrants

21. See generally Michael Givel, *Legal Aid to the Poor: What the National Delivery System Has and Has Not Been Doing*, 17 *St. Louis U. Pub. L. Rev.* 369, 369–75 (1998) (discussing legal aid organizations’ evolving goals and funding sources).

22. See LSC, *The Justice Gap*, supra note 2, at 6 (reporting that LSC lacks the resources to assist with a majority of low-income Americans’ civil legal problems).

23. See Legal Servs. Corp., *By the Numbers: The Data Underlying Legal Aid Programs* 11 (2020), <https://www.lsc.gov/our-impact/publications/numbers> [<https://perma.cc/8AK3-BE6G>] [hereinafter LSC, *Legal Aid Programs 2020*] (reporting that LSC provided funding grants to 132 different legal service organizations in 2020).

24. See Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863–1945*, at 4–5 (2015) (describing the proliferation of legal aid organizations in the United States in the late 1800s); Gary Bellow, *Legal Aid in the United States*, 14 *Clearinghouse Rev.* 337, 337–45 (1980); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 *Fordham Urb. L.J.* 1213, 1213–44 (2002).

25. *Legal Services Corporation Act*, Pub. L. No. 93-355, 88 Stat. 378 (1974).

26. LSC, *Legal Aid Programs 2020*, supra note 23, at 11.

27. *Who We Are*, Legal Servs. Corp., <https://www.lsc.gov/about-lsc/who-we-are> [<https://perma.cc/AJS3-F9MB>] (last visited Feb. 19, 2022).

28. See infra notes 29–31 and accompanying text.

29. William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960’s to the 1990’s*, 17 *St. Louis U. Pub. L. Rev.* 241, 261 (1998).

are excluded except under specific conditions).³⁰ Similarly, the resources at their disposal are also minimal since congressional appropriations to LSC vary from year to year and local legal organizations must apply for funding on a competitive basis.³¹

Beyond LSC-funded legal aid, other kinds of legal organizations play smaller but critical roles in the civil legal system. Public interest law organizations (PILOs) use law as an instrument for social justice by providing legal representation to marginal and unrepresented interests in court or administrative agency proceedings concerning important public policy issues.³² PILOs are civil society institutions with an explicitly legal focus that operate on a wide scale to catalyze change through legal structures.³³ PILOs help to enforce civil rights law,³⁴ use legal strategies to put otherwise neglected issues on the public agenda,³⁵ and forefend against oppression of disadvantaged minority groups.³⁶ Importantly, PILOs work alongside and sometimes within larger social movements.³⁷

Social movement organizations (SMOs) are another distinct organizational form that can be inclusive of PILOs but also extend beyond them.³⁸ Social movements, organizations, and civil law are interconnected

30. Amanda Baran, *The Violence Against Women Act Now Ensures Legal Services for Immigrant Victims*, 40 *Clearinghouse Rev.* 534, 534 (2007).

31. See Quigley, *supra* note 29, at 241–61.

32. See Catherine Albiston, Su Li & Laura Beth Nielsen, *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 42 *Law & Soc. Inquiry* 990, 990 (2017) (noting the importance of PILOs in “providing access to justice in the United States”); Laura Beth Nielsen & Catherine R. Albinston, *The Organization of Public Interest Practice: 1975–2004*, 84 *N.C. L. Rev.* 1591, 1595 (2006) (suggesting that PILOs “provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process”).

33. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *Stan. L. Rev.* 2027, 2029 (2007) (“[P]ublic interest legal organizations . . . use law to achieve social objectives.”).

34. See Catherine Albiston, *Democracy, Civil Society, and Public Interest Law*, 2018 *Wis. L. Rev.* 187, 187 [hereinafter Albiston, *Democracy*] (“Public interest law organizations . . . have vindicated public values by enforcing civil rights laws.”).

35. *Id.* at 189.

36. *Id.* (“They also help prevent majoritarian oppression of disfavored and disadvantaged groups, such as welfare recipients, LGBT individuals, and religious and ethnic minorities.”).

37. See Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 *Law & Soc. Inquiry* 62, 70 (2014) (noting “public interest law [is] . . . a legitimate and powerful means for political interests and social movements to further their goals”); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *Calif. L. Rev.* 1879, 1922 (2007) (noting that public interest organizations “act as intermediaries between movements and the state”).

38. Albiston, *Democracy*, *supra* note 34, at 188 (suggesting that such organizations can help shape civil society through legal influence).

in manifold ways.³⁹ Social movement groups use test-case litigation to prompt legislative change, often make legal change the centerpiece of their mobilization efforts, and can help to generate the social conditions that make legal claims politically salient and legible.⁴⁰

Taken together, legal aid organizations, PILOs, and SMOs are distinct (though sometimes overlapping) components of the organizational infrastructure of the civil legal system.⁴¹ Yet, these do not capture the full range of organizational types in the civil legal sphere. This Essay highlights an additional organizational form: nonlegal local organizations that engage civil legal processes while working in communities where civil legal problems are a significant challenge. Such organizations are different from legal aid organizations, PILOs, and SMOs because they are not primarily focused on law⁴² and they work within but also outside of social movements.⁴³

This Essay highlights a specific set of nonlegal local organizations: tenant groups. Tenant organizations are distinguished by a constellation of characteristics including an emphasis on: (1) building power at the grass-roots level (as opposed to legal or political advocacy within elite institutions), (2) financial autonomy from government and philanthropic sources, and (3) organizing for political change within and outside of formal legal channels.⁴⁴ Tenant groups are an apt example of how local organizations engage civil legal processes and to what democratic end.

B. *Housing and the Civil Legal System*

Tenant organizations are an instructive lens through which to examine civil legal processes because housing is a major civil legal domain. Problems with rental housing are among the most common civil legal

39. See Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 *Am. J. Socio.* 1201, 1202 (1991) (discussing the use of equal employment opportunity laws in the struggle for racial and gender equality); Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 *Ann. Rev. L. & Soc. Sci.* 653, 654 (2010) (examining the “complex interplay among social movements, organizations, and law”); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 *Ann. Rev. L. & Soc. Sci.* 17, 17 (2006) (discussing the general legal mobilization approach that describes the relationship between law and social movements).

40. See Burstein, *supra* note 39, at 1202 (discussing how litigation is used to fight for equal opportunity employment); Edelman et al., *supra* note 39, at 657 (commenting that test-case litigation is an important tool for lobbying by movement activists); McCann, *supra* note 39, at 23 (noting that litigation is often used as a tool for political movement).

41. See *supra* notes 21–40 and accompanying text.

42. See Michener & SoRelle, *supra* note 11, at 226–30 (illustrating how tenant organizations are focused on influencing local politics).

43. *Id.* at 226–28.

44. *Id.* at 214 (identifying key characteristics of tenant organizations as “emphasizing power building over advocacy, autonomy over financial security, and deep organizing over superficial activism”).

problems.⁴⁵ Roughly 29% of households surveyed experienced at least one housing-related legal issue in 2017.⁴⁶ In 2020, contract cases made up over 41% of all civil cases.⁴⁷ Landlord–tenant disputes are generally one of the most common types of contract cases.⁴⁸ Beyond these numbers, the fundamental significance of housing as a civil legal arena stems from its pivotal role in everyday life and its predominant place in a larger political economy rife with precarity, inequity, and contestation.⁴⁹

There are more than forty-four million renter households in the United States; for many of them, housing is the single largest expense.⁵⁰ Housing costs have been on a steep years-long incline.⁵¹ Rental markets have seen a rising number of high-cost units, while low-cost units have declined.⁵² As a result, rental prices have peaked while vacancy rates have bottomed out.⁵³ These market realities have severe repercussions in the lives of renters. In 2019, 46% of renter households (20.4 million) were cost burdened, paying in excess of 30% of their incomes toward rent and nearly a quarter of renter households (10.5 million renters) were severely cost burdened, spending more than half their incomes on housing.⁵⁴ People living in or near poverty were hit the hardest: More than 80% of renters

45. See LSC, *The Justice Gap*, *supra* note 2, at 22 (noting that “common categories of civil legal problems include rental housing”).

46. *Id.*

47. CSP STAT Civil: Incoming Caseload Composition—Civil, Ct. Stat. Project, <https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil> [<https://perma.cc/8MML-MXVH>] (last visited Feb. 19, 2022).

48. See Nat’l Ctr. for State Cts., *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, at iii (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/7AJB-SHUD>] (noting that landlord–tenant cases made up 29% of contract cases between 2012 and 2013).

49. Peter Marcuse & David Madden, *In Defense of Housing: The Politics of Crisis* 5, 48 (2016) (noting that “[h]ousing inevitably raises issues about power, inequality, and justice in capitalist society”).

50. Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Owns in the U.S.*, *Pew Rsch. Ctr.* (Aug. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-us/> [<https://perma.cc/GX9X-55E2>]; see also *Pew Charitable Trs., Household Expenditures and Income: Balancing Family Finances in Today’s Economy* 5 (2016), https://www.pewtrusts.org//media/assets/2016/03/household_expenditures_and_income.pdf [<https://perma.cc/N6WC-JN7J>] (noting that housing obligations accounted for the largest share of household pretax income).

51. See *Joint Ctr. for Hous. Stud. of Harv. Univ., The State of the Nation’s Housing 2021*, at 4 (2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf [<https://perma.cc/EXE7-XTP6>] (noting that despite ten years of growth and low unemployment rates, the share of renter households with cost burdens remained close to the 2011 high).

52. *Id.* at 26.

53. *Id.* at 26–27.

54. *Id.* at 4.

earning less than \$25,000 were cost burdened in 2019.⁵⁵ People of color were also disproportionately affected: 54% of Black renters and 52% of Latino renters were cost burdened in 2019, compared to 42% of white renters.⁵⁶ The pandemic brought the precarity and volatility of the rental housing market into even sharper relief: Nearly a quarter of renters earning less than \$25,000 fell behind on rent in the year following March 2020, including 29% of Black renters, 21% of Latino renters, and 11% of white renters.⁵⁷

The scarcity and cost of housing inhibits tenants from exiting predatory, substandard, or otherwise adverse housing conditions.⁵⁸ Such circumstances reflect a political economy marked by unequal “relationships of power” between those who profit from housing (landlords, speculators, investors, etc.) and those who rely on it for their survival (tenants).⁵⁹ At the same time, housing can foster solidarity and collective action. Tenants are a recognizable class of people who are relatively easy to locate and regularly come into contact with one another.⁶⁰ Tenancy creates opportunities to develop social bonds and communicate grievances, while it embeds people in specific places where they can be found by groups seeking to mobilize and organize them.⁶¹ This renders residential spaces sites for “organizing citizenship, . . . solidarities, and politics.”⁶²

Given this context, it is not surprising that local organizations get involved in processes of obtaining, retaining, protecting, and securing housing with tenants. For example, one body of research has examined the role of nonprofit advocacy organizations.⁶³ Another focus of scholar-

55. *Id.*

56. *Id.*

57. *Id.*

58. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 416–24 (1956).

59. Marcuse & Madden, *supra* note 49, at 89 (“Housing preeminently creates and reinforces connections between people, communities, and institutions, and thus it ultimately creates relationships of power.”).

60. See *id.* at 12 (“[H]ousing structures the way that individuals interact with others, with communities, and with wider collectives. Where and how one lives decisively shapes the treatment one receives by the state and can facilitate relations with other citizens and with social movements.”).

61. See Michener & SoRelle, *supra* note 11, at 212.

62. Marcuse & Madden, *supra* note 49, at 12.

63. See David J. Erickson, *Community Capitalism: How Housing Advocates, the Private Sector, and Government Forged New Low-Income Housing Policy*, 18 *J. Pol. Hist.* 167, 168–95 (2006) (tracing “the history of how the federal government began to use decentralized funding tools to finance local networks of nonprofits and private businesses to build housing for low-income tenants”); Anaid Yerena, *Strategic Action for Affordable Housing: How Advocacy Organizations Accomplish Policy Change*, *J. Plan. & Rsch.*, Sept. 2019, at 1 (describing how “advocacy organizations (AOs) have grown to play a prominent role in coming up with proposals to address the lack of affordable housing and become more adept at navigating between sectors”); Anaid Yerena, *The Impact of Advocacy Organizations on Low-Income Housing Policy in U.S. Cities*, 51 *Urb. Affs. Rev.* 843, 844

ship has been on the organized activities of residents within public housing.⁶⁴ Yet other literature studies tenant organizations.⁶⁵ This Essay picks up on the latter corpus by bringing knowledge about the activities of tenant organizations to bear on understanding civil legal processes.

Civil legal institutions are profoundly affected by the political economy of housing detailed in this section. For example, civil courts see increasing caseloads and overflowing dockets when tight housing markets create conditions that spike evictions or when policy decisions circumscribe such possibilities (i.e., eviction moratoria).⁶⁶ Similarly, legal aid organizations have increased capacity when Congress appropriates more funds to LSC, and they may see increased demand when states or localities expand civil legal rights (e.g., right to counsel).⁶⁷ Civil legal institutions must deal with and respond to changing political, economic, and policy contexts.⁶⁸ Yet, they have limited levers to directly influence those contexts.⁶⁹ Tenant organizations set their sights on systems change, often with

(2015) (discussing how advocacy organizations address affordable housing needs through social mobilization).

64. See Roberta M. Feldman & Susan Stall, *The Dignity of Resistance: Women Residents' Activism in Chicago Public Housing* 3 (2004) (illustrating the struggles of tenants in South Side, Chicago); Amy L. Howard, *More Than Shelter: Activism and Community in San Francisco Public Housing*, at xix (2014) (investigating how "groups of low-income residents refashioned federal housing, rebuked stigmas, and fought for a modicum of control to create homes for themselves and their families"); Akira Drake Rodriguez, *Diverging Space for Deviants: The Politics of Atlanta's Public Housing* 3 (2021) (examining the role of public housing tenant associations in Atlanta); Rhonda Y. Williams, *The Politics of Public Housing: Black Women's Struggles Against Urban Inequality* 8 (2004) (examining "the texture and changing nature of poor black women's activist experiences"); Danya E. Keene, "We Need to Have a Meeting": Public Housing Demolition and Collective Agency in Atlanta, Georgia, 26 *Hous. Pol'y Debate* 210, 211–12 (2016) ("[U]sing in-depth interviews to examine accounts of civic engagement and tenant activism among former public housing residents in Atlanta.").

65. See, e.g., Stella Capek & John I. Gilderbloom, *Community Versus Commodity: Tenants and the American City* 6–8 (1992); Ronald Lawson, *The Tenant Movement in New York City: 1904–1984*, at 1–2 (1986); Peter Marcuse, *The Rise of Tenant Organizations*, in *Housing Urban America* 51, 51–56 (Jon Pynoos, Robert Schafer & Chester W. Hartman eds., 2d ed. 1980); Peter Dreier, *The Status of Tenants in the United States*, 30 *Soc. Probs.* 179, 179–81 (1982); Peter Dreier, *The Tenants' Movement in the United States*, 8 *Int'l J. Urb. & Reg'l Rsch.* 255 (1984); Michener & SoRelle, *supra* note 11, at 211–13; Anne B. Shlay & Robert R. Faulkner, *The Building of a Tenants Protest Organization: An Ethnography of a Tenants Union*, 12 *Urb. Life* 445, 445–48 (1984).

66. See, e.g., Kelsy Kershaw, *Evictions Ramp Up in States as Pandemic Moratoriums Come to an End*, NBC News (Jan. 12, 2022), <https://www.nbcnews.com/news/us-news/evictions-ramp-states-pandemic-moratoriums-come-end-rcna11953> [<https://perma.cc/3EFQ-XM5X>].

67. See, e.g., Marco Poggio, *Eviction Crisis Will Put NYC's Right to Counsel to the Test*, Law360 (Aug. 22, 2021), <https://www.law360.com/articles/1407852/eviction-crisis-will-put-nyc-s-right-to-counsel-to-the-test> [<https://perma.cc/26HW-QZ9F>].

68. See *supra* notes 66–67.

69. PILOs are an exception insofar as they focus on effecting policy change. See *supra* notes 34–36.

a particular emphasis on the local level.⁷⁰ But while pursuing such change, they encounter people who are traversing civil courts and Legal Aid offices: people being threatened with the loss of their homes, harassed by their landlords, refused disability accommodations, relegated to substandard living conditions, and much more.⁷¹ Though tenant organizations aim to build collective power for large scale change, they cannot ignore the tangible legal needs of the tenants they work with. As a result, they become involved in civil legal processes.⁷² This makes them critical yet easily overlooked civil legal institutions. To support that claim, Part II delineates and illustrates the precise mechanisms through which tenant organizations engage civil legal processes.

II. MECHANISMS OF ENGAGING THE CIVIL LEGAL SYSTEM—AND BEYOND

A. *Overview of Mechanisms*

The subsequent sections of this Essay underscore and elaborate on five mechanisms by which tenant organizations engage civil legal processes: (1) by collaborating with legal aid organizations, (2) by providing court support to tenants facing eviction or other legal problems, (3) by observing and collecting data on court processes to provide oversight and accountability, (4) by interacting with court officials (e.g., judges) and law enforcement officials (e.g., sheriffs who enforce evictions) to influence their decisions, and (5) by taking direct action to disrupt court practices and outcomes.

B. *Identifying the Ways Local Organizations Engage Civil Legal Processes*

The five mechanisms described in this Essay were identified through extensive in-depth interviews with people from tenant organizations around the country. This “bottom-up” approach to generating knowledge privileges the voices of people and organizations in race–class subjugated

70. The proximate setting of contestation over housing is local. In the larger scheme of U.S. federalism, housing policy is historically the prerogative of local actors. States sometimes use their power to place constraints on localities (e.g., preemption of local rent control laws) and the federal government offers “people-based” housing resources to support low-income denizens (e.g., the Housing Choice Voucher Program), but many of the most consequential decisions about housing are local. See Jessica Trounstine, *Segregation by Design: Local Politics and Inequality in American Cities* 3–5 (2018); Prentiss Dantzer, *Exclusionary Zoning: State and Local Reactions to the Mount Laurel Doctrine*, 48 *Urb. Law.* 653, 653–73 (2016); John Kincaid, *From Cooperation to Coercion in American Federalism: Housing, Fragmentation, and Preemption, 1780–1992*, 9 *J.L. & Pol.* 333, 333 (1992).

71. See Michener, *Power From the Margins*, *supra* note 5, at 1398–407 (citing examples).

72. Michener & SoRelle, *supra* note 11, at 229–30 (describing tenant groups shutting down eviction court).

communities.⁷³ To stress the imperative of “centering the voices of those at the margins,”⁷⁴ the following sections of this Essay quote tenant organizers at length in their own words.⁷⁵ Instead of attempting to be a “voice for the voiceless” by paraphrasing the sentiments of tenant organizers, this Essay leverages the voice that tenants already have by directly conveying their statements.⁷⁶ This general method is consistent with a vision of drawing on the knowledge of people and organizations with lived experiences in an effort to “shape problem solving around community knowledge.”⁷⁷

The interview quotes referenced in the pages to follow are based on in-depth conversations with forty-six people from thirty-eight tenant organizations spread across twenty-one states and thirty-three localities.⁷⁸ Interview participants were selected via a multi-step process that began with identifying a wide range of tenant organizations through systematic searches across several platforms (Facebook, Twitter, GuideStar, Google) using the words “tenant” and “renter.” After finding a baseline set of organizations (approximately fifty), a virtual snowball technique led to additional organizations.⁷⁹ Upon identifying and contacting 134 tenant organizations across the country, interviews were conducted with members of thirty-eight organizations.⁸⁰ This means that 30% of identified organizations were part of the final pool of participants.⁸¹

73. Jamila Michener, Mallory SoRelle & Chloe Thurston, *From the Margins to the Center: A Bottom-Up Approach to Welfare State Scholarship*, 20 *Persps. on Pol.* 154, 155–57 (2020).

74. *Id.* at 161.

75. *Infra* sections II.B.1–5.

76. See Tyler Huckabee, *The Trouble With Being a ‘Voice for the Voiceless’*, (Apr. 27, 2021), <https://relevantmagazine.com/current/stop-being-voice-voiceless/> [<https://perma.cc/QBJ9-RNEA>].

77. Gerald P. Lopez, *Shaping Community Problem Solving Around Community Knowledge*, 79 *N.Y.U. L. Rev.* 59, 59 (2004).

78. The states spanned a wide geographic range including the Northeast, Southeast, Northwest, Southwest, Midwest, and Mid-Atlantic. Similarly, the localities in the study were heterogeneous, ranging from big cities like New York, Los Angeles, Philadelphia, and Chicago to mid-sized cities like Oakland, to smaller cities, counties, and localities. Most of the organizations were in urban areas, but a handful (approximately six) were in areas with significant rural populations.

79. This involved reviewing organizations’ websites and social media for any mention of additional organizations. For an explanation (and evaluation) of this technique, see Mario Luis Small, *‘How Many Cases Do I Need?’: On Science and the Logic of Case Selection in Field-Based Research*, 10 *Ethnography* 5, 14 (2009).

80. The list of identified organizations is not complete in its coverage, but it is wide-ranging and thorough. Since tenant organizations are oriented toward building power, many of them want to be found. This gives them an incentive to be visible on the internet and on social media. It is likely that many tenant organizations doing discernable work in local communities were sufficiently visible to be identified via our systematic sweep of a wide variety of platforms.

81. While these numbers may sound low from a sampling-based statistical perspective, they are sufficient for in-depth qualitative research. This research is based on case study

The interviews occurred via Zoom or over the phone, whichever method the participants preferred—the vast majority opted for Zoom—and lasted an average of fifty-six minutes.⁸² They were semi-structured and based on a short interview guide that left leeway so that conversations could unfold organically. Interviewees were asked about organizational origins, activities, structure, and challenges. Most importantly for the purposes of this Essay, interviewees were asked how their tenant organizations engaged with legal and political systems. All interviews were recorded and transcribed. The transcripts were then uploaded into a web-based, qualitative software program called Dedoose,⁸³ which facilitated several rounds of systematic coding.⁸⁴

Coding the qualitative interviews revealed five mechanisms through which tenant organizations participated in civil legal processes. The rest of this Part draws directly on the interviews to elaborate on and explore the core logics of each of these mechanisms.

1. *Collaboration.* — One of the most common responses that tenant organizations gave when asked about their relationship(s) to the civil legal system was to highlight collaborations with legal aid organizations. While legal scholars have considered the relevance and role of collaboration from the vantage point of lawyers engaging in “collaborative lawyering,” these conversations with tenant organizations surfaced the significance of collaboration from the vantage point of tenants living in race–class subjugated communities.⁸⁵ For example, Ali, a tenant leader in a large

logic as opposed to sampling logic. See Small, *supra* note 79, at 11–15, 25 (“Sampling logic is superior when asking descriptive questions about a population; case study logic is probably more effective when asking how or why questions about processes unknown before the start of the study.”). The goal was not to get a “representative sample” of tenant organizations; the aim was to get a range of organizational cases. *Id.* at 13 (“For many questions of interest to interview-based researchers in the social sciences, sampling for range is more effective.”). A key indicator that there were enough interviews was reaching the point of saturation—where additional cases did not reveal new information. *Id.* at 25.

82. Most interviews were with one participant, but sometimes multiple organization members would join the Zoom call (up to four at one time). Moreover, some people would refer other members of their organization to speak to us, so on numerous occasions different people from the same organization were interviewed separately.

83. Dedoose allows for comprehensive and systematic coding to identify main themes and catalogue interview excerpts. See Features, Dedoose, <https://www.dedoose.com/home/features> [<https://perma.cc/3XJT-G4UG>] (last visited Mar. 14, 2022).

84. The first round of coding was based on an original list of very broad codes drawn from the main questions asked in the interviews. These codes included things like: “origins” (how organizations began), “activities” (what organizations did), “challenges” (what difficulties organizations faced), “political context” (how organizations understood and responded to the political system), and “organizational structure” (how organizations described their own structures). Subsequent rounds of coding included selective coding that attended specifically to any mention of law, courts, and the legal system. All the coding for this project was done by a single researcher, so intercoder reliability was not a concern.

85. See Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 *Clinical L. Rev.* 541, 544 (2006) (noting that collaborative lawyering is “an approach to prac-

southern city noted the following about the role of legal aid when her group was putting together guidelines to help tenants who were being evicted:

We had like [City] Legal Aid to help us with the legal jargon of it and all of that. So, they would tell us you can't put that in there. You can say this, but you can't say that. That's illegal. We can't say this, you know, all of that.⁸⁶

To stay on the right side of the law, tenant organizations must toe the line between offering help to people with civil legal problems and offering legal advice—the latter is restricted.⁸⁷ Collaboration with legal aid helped them to find the proper balance. Aria, a tenant organizer from Texas toed a similar line and recognized some of the complexities in her organizations' collaboration with legal aid:

So [the Legal Aid] connection is very tricky, of course, because of all the rules they have to follow and all the [federal] money they get. And so our first connection with Legal Aid was just a legal aid lawyer who just cares and he would do like a couple talks about you know, like what's happening with the eviction crisis, like explaining certain state programs. He did that as like a private citizen. He couldn't really attach Legal Aid's name to it. And then, there's one specific court in [a big city] county that almost a third of evictions go through, because it's a court with a lot of low income areas and Legal Aid actually has an office at the Court building . . . [T]hey're there every day, setting up, and so I had a lot of contact with them in the sense that I was like going with tenants to court and shoving them into the Legal Aid room being like "I'm sure this person qualifies please help them because I can't give them the legal advice . . ."⁸⁸

Notwithstanding the legally proscribed limits of LSC-funded attorneys (e.g., there are substantial restrictions concerning how they can practice law),⁸⁹ community organizations found consistent and wide-ranging ways of collaborating with them. For example, in addition to the courthouse lawyering described in the quote above, Aria further explains the involve-

ment in which lawyers work collaboratively with lower-income, working-class, and of-color clients and communities in joint efforts to make social change").

86. Interview with Ali, Tenant Organizer, large southern city (Jan. 2020). Again, specific locations are sometimes masked to protect the confidentiality of research interviewees.

87. Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 *Stan. J. C.R. & C.L.* 283, 287 (2020) (noting that "legal advice in the U.S. is an activity typically restricted to licensed lawyers engaged in a lawyer-client relationship with the recipient of that advice"); see also Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *Fordham L. Rev.* 2587, 2587–88 (2014) (providing the "first comprehensive overview of [unauthorized practice of law] enforcement practices since . . . 1981").

88. Interview with Aria, Tenant Organizer, Tex. (May 2021).

89. For details on the limitations of attorneys federally funded through LSC, see Omnibus Consolidated Reversions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

ment of Legal Aid in tenant-organization meetings and eviction defense training events:

So they were kind of hands off for a while but we started working with a Legal Aid community liaison and so he would come to a few of our meetings and explain “this is how we’re able to work with you. Like we can do educational events, but it has to be several other organizations, it can’t look like we’re favoring you with your socialist leaning.” And so next weekend they’re going to do an eviction event training for us and teach organizers how to represent tenants in eviction court.⁹⁰

Aria’s organization built a deeper and more multifaceted collaboration with Legal Aid over time, with both parties remaining cognizant of the constraints of their work together. Sometimes, however, legal aid attorneys are more strident in their support—this is contextually contingent—and are willing to collaborate in ways that enable tenant organizations to pursue new and potentially risky strategies. For example, a large (hundreds of members) tenant union on the West Coast was looking for ways to make progress in pushing landlords to address substandard housing conditions.⁹¹ Tenant organizers from the union noted that landlords would often refuse to repair or improve units, leaving housing conditions barely habitable (if at all).⁹² At the same time, courts were very slow to address the problem, leaving tenants languishing in unlivable circumstances for long periods.⁹³ Juan, a tenant organizer, described it this way:

This question of habitability, particularly in [this city] where disinvestment is a necessary part of speculation [I]t takes so fucking long for the city and the courts to rectify a habitability situation [M]eanwhile [tenants] have to live in those situations [A]t what point will we get to the point where to be a tenants association means to collectively pool your money, stop

90. Interview with Aria, *supra* note 88.

91. Notes of Meeting with Tenant, large West Coast city (Feb. 2021). See generally Elinor Chisholm, Philipa Howden-Chapman & Geoff Fougere, *Tenants’ Responses to Substandard Housing: Hidden and Invisible Power and the Failure of Rental Housing Regulation*, 37 *Hous. Theory & Soc’y* 139 (2020) (exploring the power dynamic between landlords and tenants, which makes it difficult for tenants to report unsafe and unhealthy housing conditions).

92. See Interview with Juan, Tenant Organizer, large West Coast city (Feb. 2021); Interview with Tanya, Tenant Organizer, large West Coast city (Feb. 2021). For more on habitability as a key issue facing tenants and motivating tenant organizing, see Julian Francis Park, *Tenant Organizing When Rising Rent Isn’t the (Main) Issue*, Shelterforce (Jan. 22, 2020), <https://shelterforce.org/2020/01/22/tenant-organizing-when-rising-rent-isnt-the-main-issue/> [https://perma.cc/S9EN-29QS].

93. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 *Calif. L. Rev.* 389, 389 (2011) (“[A] set of obscure yet powerful doctrines deem these tenants unworthy to claim the [implied warranty of habitability] protection. Moreover, reformers left implementation to courts with neither the resources nor the inclination to transform landlord–tenant relations.”).

paying your landlord and invest in the habitability . . . [?] [T]he city is not going to do it for us, the local [tenant union] is going to do it for us.⁹⁴

One way tenants might fight habitability deficiencies is by withholding rent. However, withholding rent poses a significant risk.⁹⁵ If a tenant withholds rent and uses that money to make repairs, they could be evicted for failure to pay and lose their home as well as the funds they invested in fixing what was broken.⁹⁶ But a collective withholding strategy was one potential pathway to mitigating that risk. Tanya, another tenant organizer from the same union, explained it this way:

Landlords hate it when you do your own repairs, they get really angry [E]ach of us have tried individually to do that in the past and our landlord gets really angry and [aggressive] but this is the first time we're trying to do it collectively, how do we overcome that fear together by working together? We have the legal right to make certain repairs and deduct them from our rent. The reason we haven't done that isn't because we don't know our rights it's because we haven't been organized before and we've been scared to do it.⁹⁷

Most crucially, collective action was not the only thing necessary for taking this potentially perilous step to confront habitability issues. Collaboration with Legal Aid was also required for informing the substance and strategy underlying collective action strategies. For example, Tanya stressed this point as she talked about how her landlord removed all but one washing machine from her large apartment building. She and other tenants in the building were planning to pool their resources to buy additional washing machines and then deduct the costs from their rent payments. Tanya believed that such steps were justified because:

[Having so few washing machines for the building] is illegal and it's really tough during COVID. Everyone has been sick and they don't want to go out to wash their laundry [W]e have a lawyer who is willing to argue the case for that in court [W]e are no longer waiting for permission [W]e are building the confidence and trust to take risks.⁹⁸

Juan echoed similar sentiments, saying:

[T]his is the first time we're talking about doing this collectively. We know we have the legal right to make certain repairs and deduct rent. And one reason we haven't done it is because of fear. And we don't really know how this is going to play out in court. We have an attorney who said he would argue it—and it's up to us whether we're going to take this risk. One of things we're

94. Interview with Juan, *supra* note 92.

95. See Super, *supra* note 93, at 389 (“[D]eliberately withholding rent to challenge a landlord’s failure to repair is not viable for many tenants in ill-maintained dwellings . . .”).

96. *Id.*

97. Interview with Tanya, *supra* note 92.

98. *Id.*

talking about is laundry machines: there's one in the building and it's always broken, and there used to be more, but they took them away—which is illegal. For most of the pandemic, everyone has been sick. The idea we have to go out and do laundry while we're sick because the landlord is cheap is insane.⁹⁹

As tenant organizers, Juan and Tanya decided on a strategy of collective risk in collaboration with a lawyer who appraised them of that risk, while also offering to represent them in court as a means of risk mitigation. In this case, Juan and Tanya approached a Legal Aid attorney for help and received enough support to embolden them to take a different strategy. Absent the support of Legal Aid, the avenue of collective action that they pursued might have been untenably risky or entirely out of reach. In this way, collaboration with Legal Aid facilitated collective action by giving tenants legal backing as they considered, managed, and confronted the risks of withholding rent to rectify habitability violations.

At times, Legal Aid initiates collaborations with tenant organizations. When civil legal attorneys exhaust their ability to help tenants using legal tools, they sometimes turn to local tenant organizations to pass the baton so that organizations can help through alternative means. Aria, the tenant organizer in Texas quoted earlier, described precisely such a situation:

[T]he complex that's going to be demolished, legal aid is actually the one who contacted us about that one. Because [the lawyer] said there's only so much [they] can do, they need a tenant association to ask for more time and for more money, because you know the lease termination bonus is only 350 and because there's a lot of people at that complex with low credit or a felony . . . 350 will not even be a fraction of the security deposit required elsewhere, and then you have two weeks to find it, you know.¹⁰⁰

In this way, although “the lawyer is not the protagonist” in the sense that community organizations remain central, autonomous actors, lawyers do engage in reciprocal and collaborative relationships with local tenant unions, opening up space for them to act in ways they might not otherwise have acted.¹⁰¹

Relatedly, many interviewees emphasized how lawyers and tenant unions worked together through community lawyering arrangements.¹⁰² Under such conditions, lawyers follow instead of leading. So, instead of

99. Interview with Juan, *supra* note 92.

100. Interview with Aria, *supra* note 88.

101. See Gordon, *supra* note 13, at 2133 (“Attorneys appear as supporting players rather than main characters These lawyers . . . open up spaces for community voice and action . . .”).

102. See Angelo N. Ancheta, *Community Lawyering*, 81 *Calif. L. Rev.* 1363, 1366 (1993) (exploring “the idea of community lawyering” within the Asian Pacific American community); Charles Elssesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 *Loy. J. Pub. Int. L.* 375, 376 (2013) (highlighting the varied descriptions of community lawyering).

going to a tenant union and telling them what needs to be done, community lawyering brings lawyers into deep connection with tenants and deploys them to follow the lead of tenants.¹⁰³ A tenant organizer from a large organization in Massachusetts described it in these terms:

[W]e work with standard legal services entities and also legal services that are connected with universities But, those lawyers have developed a practice they refer to as “Community Lawyering.” So, not only are they kind of on the right side of the issue, they’re representing the tenant not the real estate corporation, but they’re representing the tenant in a way that’s making the tenant a protagonist in their own drama. So, they’re saying, “look . . . I’m the lawyer and I’m here to advise you about your legal rights and maybe even represent you, in some cases. But, mainly I am deferring to the tenant association, I’m deferring to the members I’m deferring to the organizers to let us know what you want us to do.” And so, the law students are taught to not only bring their game because they’re [law students] . . . but to bring their good, bring their humility to working with our members and with organizers who are former members. And that is a profound thing which keeps getting renewed every year¹⁰⁴

Collaboration between Legal Aid and tenant organizations takes numerous forms: advising on language in a document for tenants, enabling new organizing strategies, alerting tenant groups to problems they were not aware of, and community lawyering. Legal Aid works with tenant organizations in ways that leverage their complementary but distinct roles in relation to the civil legal system.¹⁰⁵ As the interviews quoted in this section show, such arrangements facilitate deeper engagement of tenant organizations with civil legal processes, allowing such organizations to collaborate with lawyers to help tenant group members with legal problems that they do not have the legal expertise to handle alone.

2. *Court Support*. — A second common mechanism that tenant organizations described as a pathway for engaging civil legal processes was court support. Courtrooms are confusing, alienating, and demoralizing places for many tenants.¹⁰⁶ Tenant organizations support their members (and would-be members) by helping them navigate courts and providing emotional, material, and informational resources along the way.¹⁰⁷ For example, Audra, a tenant organizer in Wisconsin observed the following:

103. See Gordon, *supra* note 13, at 2137 (explaining that, in community lawyering, a lawyer’s role is not to “elbow the community group protagonist aside” but rather “to figure out how legal tactics could bolster and protect the group’s efforts to carry out the larger strategy”).

104. Interview with Tenant Organizer, Mass. (Apr. 2021).

105. See *supra* note 104 and accompanying text.

106. See Michener, *Power From the Margins*, *supra* note 5, at 10.

107. See, e.g., Mark H. Anbinder, *Ithaca Tenants Union Hopes to “Pack the Court” for Eviction Hearings Thursday*, 14850.com (Dec. 1, 2021), <https://www.14850.com/120122716>

We don't have like a lawyer in our organization, but we do have a legal advocate, and we do provide advocacy, which sometimes is just showing up to court which is on Zoom now. But sometimes just like having an advocate there from [the tenant union] can be beneficial. So, we've been doing that. And then we sometimes refer out to Legal Aid society which can provide income based legal help. And then there was a recent one that we helped a gentleman with through Legal Aid Society [W]e can refer out when needed.¹⁰⁸

Audra points out two resources that the tenant union offered to support members in court: (1) the emotional support that comes with simply having someone present and (2) the tangible support of a referral to legal services.¹⁰⁹ Similarly, an organizer in Kentucky coupled different forms of court support, not just for members of the tenant organization but also for whomever organizers encountered in court:

In the fall I started going to eviction court. And what we would do was sit in on the court processing and wait outside the courtroom for tenants to come outside, where we would, you know, talk to them and the first thing we would do was offer to help them apply for rental assistance. The two—first, the statewide fund, and then, the [local] fund—that were available. And then we would also get their contact information, so we could follow up with them and see how they were navigating that whole process. And then also just giving them our contact information so that, in case they were having a housing emergency, they could contact us or in case they needed more resources or more help down the line. And also just kind of working with tenants, where people would tell us their stories if they were going through a really stressful time. And we would kind of see where we could potentially have an “in” to go and assist further.¹¹⁰

In this example, court support involves at least three components: (1) connecting tenants to options for financial assistance, (2) emotional support, and (3) bringing tenants into the fold of the tenant organization so that they could receive follow-up help and potentially be brought into tenant organizing work.

Going even further, sometimes tenant organizations offer support strategically. For instance, some organizations prioritized supporting tenants facing particularly egregious landlords. An organizer from Ohio offered this context:

The landlord we're dealing with right now, he's kind of like a national problem, I would say, he operates under, I mean, I couldn't even count all the LLCs he works through He had

tenants-eviction-2112/ [https://perma.cc/K2BJ-LWSQ] (providing an example of how a tenants union supported renters facing eviction).

108. Interview with Audra, Tenant Organizer, Wis. (Mar. 2021).

109. *Id.*

110. Interview with Tenant Organizers, Ky. (Mar. 2021).

150 or more properties in [another city], and they were all put into receivership, basically taken away from him because he was just neglecting the buildings, and you know, the city just didn't want to deal with that. And one of his tenants reach[ed] out to us, and he basically had tried to set up a deal with her where, you know, she would work on the apartment and—because it was just in bad shape and it needed to pass inspection for Section Eight, she did a bunch of work on it, and then, when she was done, he refused to give her compensation, and then he went to evict her and somehow—I don't know how it happened—he got a favor from the court to get all her stuff set out early, and . . . this past Monday, we went to the courthouse with her because she's finally she filed a countersuit. But we just got a continuance on Monday for the case, and after that, we can, we had a like a demonstration outside the courthouse, and we're just going to keep supporting her there at the courts.¹¹¹

Depending on the state context, court support can be an especially critical and strong form of intervention. Aria, the organizer from Texas, explained why Texas legal structures made court support a central part of the work of her tenant organization:

The way it works in Texas is you . . . don't have to be a lawyer to represent a tenant in an eviction hearing And then they don't make it easy at all I went to an eviction hearing yesterday with the tenant and the judge [I]t's just another world like it's so hard to understand what's going on. So we are sort of trying to help break down that process for people, because I mean, I'm nine months in, and I still have a hard time explaining . . . this new complex that I was at on Monday and up until that point like I hadn't known the difference between a notice to vacate and the lease termination notice but they're like two separate documents and you know there's like such a specific order for evicting someone. So trying to explain that, even in English and then there's tenants that English is not their first language.¹¹²

Altogether, tenant organizations articulated the logic of court support in at least four ways. First, the courtroom presence of tenant organizations was symbolically and emotionally meaningful. An organizer in Michigan underscored this by noting that “the way the law is right now, it definitely weighs in favor of landlords . . . but even if you don't have the law behind you, you still have the community and the sense of right and wrong behind you.”¹¹³ The implication here is that even in the face of laws that favor landlords, the support of tenant organizations was meaningful to those navigating civil legal processes.

111. Interview with Tenant Organizer, Ohio (Apr. 2021).

112. Interview with Aria, *supra* note 88.

113. Interview with Tenant Organizer, Mich. (Jan. 2021).

Second, having a supporter in court could also have instrumental value in terms of attempts to influence legal processes. For example, the same Michigan tenant organizer quoted above noted that “what’s really powerful is to pack the courtroom, not only does that send a message to the judge but it sends a tremendous message of support to the folks who are facing eviction.”¹¹⁴

Third, court support was viewed as a form of solidaristic mutual aid. Again drawing on Michigan as an example, organizers there exhorted tenants to “be available and present for folks faced with this awful possibility [of eviction].”¹¹⁵ They encouraged members of the tenant union to show “radical hospitality.”¹¹⁶ These sentiments aligned with many organizers’ recognition of mutual aid as a “form of political participation in which people take responsibility for caring for one another and changing political conditions.”¹¹⁷

Finally, court support was an organizing tool used to bring new people into tenant groups. Organizers made this clear by continually noting that courthouses were fertile ground for identifying people with legal problems and inviting them into the ranks of tenant members.¹¹⁸ For example, organizers in one Kentucky tenants union describe how they made decisions about where to canvas for new group members: “[We] look on the court dockets to find people’s addresses . . . [T]hat’s one of the ways that we find people’s addresses. We’ll look where all the evictions have been and we’ll be, like, okay, we’re going to hit those neighborhoods.”¹¹⁹

As the examples offered in this section make clear, the logic of tenant organizations providing court support was motivated by ends ranging from symbolism to instrumental calculation to solidaristic aid to organizational expansion. For these and other reasons, tenant organizations invested time in legal processes despite being nonlegal organizations aimed at building power largely outside of legal systems.¹²⁰

3. *Oversight, Accountability, Awareness.* — A less common but still notable mechanism through which tenant organizations engaged civil legal processes was by taking on an oversight role by heightening awareness of court activities and thus creating conditions for accountability. Accountability is a primary concern with judicial institutions.¹²¹ Civil soci-

114. *Id.*

115. *Id.*

116. *Id.*

117. Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 38 *Soc. Text* 131, 136 (2020).

118. See *supra* note 110 and accompanying text.

119. Interview with Tenant Organizers, Ky., *supra* note 110.

120. See Michener & SoRelle, *supra* note 11, at 228.

121. See James L. Gibson, *Judicial Institutions*, in *The Oxford Handbook of Political Institutions* 514, 523–29 (R.A.W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2006) (noting that accountability is crucial attribute of many judicial institutions).

ety organizations can play a role in processes of judicial accountability.¹²² Many tenant organizations interviewed noted that they learned much about court practices while offering court support and collaborating with Legal Aid. Such knowledge equipped them to act in an oversight capacity, generating information useful for shaping public awareness of court processes. For example, two organizers from Kentucky laid out the rationale of oversight this way:

[R]ight now, eviction court in [our] county is online, so [C] and I were going in person and now like, we have a team of [C] and . . . three other people . . . who are observing online every week [T]he data for evictions in [our] county isn't publicly available, like is true in a lot of places. And they're not responsive to open records requests. So we've been the only source of public information about what's happening in eviction court. So, like, we started tracking data about how many evictions there are per day, how many judgments, how many are for failure to appear, that sort of stuff, and publishing it on our website. And that's the only way that the news knows what numbers to report. That's the only way that anyone in the public is tracking what's actually going on with eviction court [O]ne thing that I think we've been really successful about is we've impacted the local narrative around evictions pretty strongly. And one thing that we try to emphasize is that, like, you know, a lot of the times, like when—when a lot of the times in smaller towns, smaller cities and mid-sized cities . . . that space is kind of held by kind of professional service-based organizations, rather than, like, grassroots tenant organizing spaces. And, like, you get a very different narrative depending on who is influencing that narrative.¹²³

Organizers in Kentucky thus viewed courtroom data collection as oversight because collecting, compiling, and publicizing court patterns could produce information useful for heightening the transparency of otherwise neglected civil legal proceedings and raising public/media awareness of evictions. What's more is that tenant organizers like those from Kentucky believed that the collection and dissemination of data contributed to a distinct narrative.¹²⁴ Indeed, Kentucky organizers were so con-

122. See generally Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 *Am. Crim. L. Rev.* 1573 (2003) (exploring the community court model by observing the development of the Red Hook Community Justice Center to extrapolate lessons for improving community courts).

123. Interview with Tenant Organizers, Ky., *supra* note 110.

124. See Manissa M. Maharawal & Erin McElroy, *The Anti-Eviction Mapping Project: Counter Mapping and Oral History Toward Bay Area Housing Justice*, 108 *Annals Am. Ass'n Geographers* 380, 384 (2018) (noting that journalists' "media interviews tended to reduce [tenants] stories to simple narratives about victimhood and loss, producing tenants as subjects of processes happening to them, rather than as actors who are intentionally contesting, resisting, and thereby also shaping such processes"); *id.* (noting that the Anti-Eviction Mapping Project, a data collecting organization/political collective sought to "counter such

vinced of the value of data collection that they were exploring alliances to make the practice possible long term:

We have recently had a meeting with an ally at another nonprofit that wants to help us, or has the vision of developing sort of a long term way . . . a long term court observation. So . . . we've kind of been collecting data as we can, just on a volunteer basis, like the data that we list on the website has a "greater-than" symbol next to it just because . . . many more evictions have taken place than we've been able to record based on just our own capacity, not being able to show up every single day, and also because of difficulties that aren't specifically our issue, so in accessibility with the courts. And so we have been trying to think of a way to make a sort of a long-term way to collect all that data. And so we've kind of been working with other allies to see if we can make that a thing.¹²⁵

Beyond Kentucky, other tenant organizations were similarly pushing to improve data collection practices for the purposes of generating knowledge of civil legal processes so that tenant groups and other relevant actors could have evidence to support their claims. For example, Aria from Texas noted this:

[W]e started out wanting to jump straight into the eviction defense but we found out that eviction data is very hard to get a hold of in [this city] and when we finally got to talk to the county judge's office about it they said it's a technological issue. Like they don't have a system, they don't even know what's on the docket . . . [E]ach court maintains their own docket and they'll post it on the wall each day, but unless you physically go to the court, you don't know who's going to be evicted that day . . . [S]o that's definitely a goal of mine is to get the county judge to have a better handle [on] what's going on in his courts and be able to pull the eviction data and have the evidence to really prove what you already know is happening, you know. And we have eviction data from January 2020 until April 2021 but that took months to get and it was kind of like a private firm that did all the heavy lifting to find it because you have to harass the courts, which I don't feel bad about, but you know that's a lot of time and energy.¹²⁶

As the examples throughout this section demonstrate, tenant organizations understood data collection as a mechanism for oversight insofar as organizational data production and dissemination heightened awareness of civil legal problems, contributed to public narratives, and provided evidence necessary to push for change.

representations, cocreating and fomenting collective political analyses while building resistance").

125. Interview with Tenant Organizers, Ky., *supra* note 110.

126. Interview with Aria, *supra* note 88.

4. *Interaction With Court/Government Officials.* — The fourth mechanism identified through organizational interviews was formal interactions with political actors who play important roles in the civil legal processes. These interactions exemplify the ways civil legal organizations affect change within the legal system. Ali, the tenant organizer from a large southern city quoted earlier, described meeting with court officials in her county:

We've met with the court mediators and then we met with the chief magistrate judge of [the county] to talk about [evictions] It was very contentious I don't say that in a very aggressive like verbally contentious way. I mean the relationship of not understanding what this movement of housing justice is all about, which could have been very confusing to her. So, we came in there with people [telling us to ask] . . . so we came in there first asking, and at the end of the thing, we were like okay, when we go back and have our second meeting, there have to be some demands. But anyway, her staff was very accommodating to us and they were willing to answer the questions that we had and a lot of the questions were around all these different other entities that are involved with the whole process of eviction, you know, all the city codes, all the town codes, all the state codes that we would really have to get changed before we could even talk about changing what happens in eviction court. So, I want to say that after that meeting though, there were some options open and I think that she was a little bit more . . . open minded about this whole process. So, we had to really talk to them and open their eyes and put the real personal impact on what is this system and what eviction really means for families . . . [W]e have to put the real impact of it at the doorsteps of what happens and how do we change what happens.¹²⁷

As this example demonstrates, interactions with court officials were meant to inform, educate, and influence those officials—all with an eye toward highlighting the concrete realities of legal processes in the lives of tenants.

Going further, organizers sought to make moral pleas in exerting pressure on officials, pointing beyond the details of legal doctrine to implore officials to deploy their power differently. For example, Ali also relayed meeting with the sheriff deputy who handles evictions: “We also wanted to change the way they evicted. The mamas were out. You can't put them out in inclement weather, whether it's cold or whether it's raining . . . so we also met with the sheriff deputy.”¹²⁸ It's notable that Ali's claim here is not about the bounds of the law but about the fundamental ethics of putting mothers outside during inclement weather.

Finally, it's also worth noting that tenant organizations sometimes met with political officials not directly related to the court or law enforcement

127. Interview with Ali, *supra* note 86.

128. *Id.*

systems to address housing issues more broadly. Anyone with leverage over housing is a potential target. For example, one tenant group in a mid-sized midwestern city had regular meetings with mayoral candidates and ultimately the mayor. They convinced “both mayoral candidates in the end, to come to one of the worst apartment complexes in the city and sit with tenants in their home and make commitments to like be in solidarity with them” and they later “had the mayor on his first night in office sleep over in that same apartment complex.”¹²⁹ In this way, tenant organizations worked outside of civil legal processes in an effort to affect systemic changes that were germane to civil legal outcomes but not specific to processes that happened within courtrooms. Taken together, the different ways of and reasons for engaging political officials elaborated in this section speak to the versatility, adaptability, and creativity of tenant organizations as they responded to civil legal realities.

5. *Direct Action.* — Nonviolent direct action was the fifth mechanism that tenant organizations used to engage the civil legal system. Direct action involves participatory tactics that push beyond traditional modes of advocacy and political engagement (e.g., voting, lobbying, signing a petition, talking to a politician, doing media campaigns) by deploying the disruptive power of people in nonviolent efforts to challenge injustice and demand change.¹³⁰ Examples of direct action include protests, rallies, sit-ins, boycotts, strikes, and more.¹³¹ Direct action is intentionally contentious: It relies on both legal and illegal “methods of noncooperation, obstruction or defiance.”¹³² Direct action leverages “people power” to “exert pressure on governments or other powerful institutions.”¹³³ Nearly all tenant organizations used direct action as a tactic. It is notable that tenant groups mobilized this way in relation to courts and legal processes because these groups are nonlegal organizations with aims that revolve around building tenant power, not changing legal structures.¹³⁴ The fundamental emphasis of tenant organizations was not on reforming or improving legal processes per se, it was on advancing policies and political transformations that enable access to affordable, quality housing.¹³⁵ Still, because eviction is a legal process mitigated through courts¹³⁶ and other housing problems similarly have legal dimensions, tenant organizations

129. Interview with Tenant Organizers, mid-sized midwestern city (Mar. 2021).

130. See George Lakey, *How We Win: A Guide to Nonviolent Direct Action Campaigning* ix (2018).

131. *Id.*

132. April Carter, *Direct Action and Democracy Today 1* (2005).

133. *Id.* at 3, 9.

134. See Michener & SoRelle, *supra* note 11, at 219–20 (explaining that many tenant organizers were motivated by “viewpoints about power relations and social class”).

135. *Id.*

136. On some of the legal dimensions of eviction, see Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 *Soc. Forces* 316, 319–20, 323, 331 (2021).

had to orient themselves toward the law in order to be responsive to the realities of their members. For instance, an organizer in Michigan talked about being “out in front of the courthouse protesting evictions.”¹³⁷ Similarly, an organizer in Massachusetts described how they:

Constantly hark back to this demonstration we had on March 12th last year [2020] in front of the housing court where we demanded that the housing court be closed . . . [T]he housing court is cheek to jowl people squeezed into rooms. And most of the people squeezed into those rooms are people of color and are putting themselves at huge danger of COVID. So, two days later they did close down the housing court. And so, then we looked for a moratorium law which we worked with various officials to get passed, and we passed what we think are the strongest moratorium law [sic] in the country.¹³⁸

In these and other ways, tenant organizations targeted courts when they perceived them as a salient and central source of harm to tenants.

Organizations were creative and innovative, making both courthouses and government buildings the targets of anti-eviction direct action. Phil, an organizer in a large southern city described what his group did this way:

Some of our more militant members were like “we just got [to] shut it down . . . [W]hat other strategy do we have, the federal government’s not coming to help us.” . . . [T]hat was also when the \$600 a week unemployment bonus was going to end so we chose late July in part because we were responding to eviction court reopening and seeing nearly 100 people being evicted every day for the first week . . . [T]here were two components [to our action] one street theater piece to demonstrate what was going on, we wanted the media seeing us ripping the assholes of our city and state officials and actually laying out why they are responsible for any deaths to come, for anything that comes from these evictions, because they have the power to stop things . . . [S]o basically folks said let’s do a street theater piece and afterwards let’s just pretend like we’re doing some artsy fartsy street theater piece, and then we’ll immediately go and lock up. So after we did a street theater piece people immediately went to all the entrances to chain themselves to the gates to prevent anyone from going in . . . [W]e did that before eviction court opened . . . [I]t was perfect timing and then basically people are chained . . . [T]he mayor did not want something rowdy because everything that happened with George Floyd . . . so she was just like don’t mess with them, don’t mess with them, and so, we were able also shut down City Hall . . . [P]eople went and blocked the entrance to City Hall, so we shut down the entire city government that day.¹³⁹

137. Interview with Tenant Organizer, Mich. (Apr. 2021).

138. Interview with Tenant Organizer, Mass., *supra* note 104.

139. Interview with Phil, Tenant Organizer, large southern city (May 2021).

Phil's organization was creative (using street theatre as a way of masking their intentions to shut down the court) and strategically savvy (timing their action well so that they blocked the building before court hearings began). They also believed that these tactics were effective. On this latter score, Phil detailed a shift in power as a result of the action:

We definitely heard less things from tenants about landlords just being A-holes. I think a lot more landlords were willing to negotiate [I]t also had an impact we believe on illegal evictions . . . because [landlords] were like wait there's this group of crazy people who are willing to do that and they got away with it. I think it had an impact on discourse about how people think about housing. Also, the judges became more open [T]here was an election for an eviction court seat . . . [and] they were all pandering to us, they were pandering out of their asses [S]o that was an interesting power switch, where now we know the judges are actively aware of what we're doing and what we're putting out into the universe.¹⁴⁰

The tenant organizers that were interviewed offered many examples of direct action, drawing a connection between that activity and their attempts to influence civil legal processes. A wide array of popular media accounts also corroborates the use of this tactic.¹⁴¹ Generally, the goal of such direct action was to slow down or entirely halt court processes so that evictions could not occur.¹⁴² It was also to draw media attention to court processes.¹⁴³ These goals centered on mitigating a direct harm tenants faced (displacement through eviction) and were thus most proximately about helping tenants, not fixing courts. At the same time, because courts and law were perceived as part of the problem, tenant groups intentionally and strategically engaged civil legal processes through direct action.

III. BEYOND THE LAW

Examples laid out in this Essay thus far point to how tenant organizations work within the civil legal system (e.g., by providing court support), alongside civil legal actors (e.g., by collaborating with Legal Aid attorneys), and even in opposition to civil legal practices (e.g., through protest and

140. *Id.*

141. Media coverage of tenant groups disrupting courts abounds. For just a few examples, see David Brand, Bronx Tenant Group Considers 'Eviction Blockades' as Court Filings Mount, City Limits (Feb. 24, 2022), <https://citylimits.org/2022/02/24/bronx-tenant-group-considers-eviction-blockades-as-court-filings-mount/> [<https://perma.cc/R8AD-TAR5>]; Michelle Conlin, 'This is Not Justice.' Tenant Activists Upend U.S. Eviction Courts, Reuters (Feb. 8, 2021), <https://www.reuters.com/article/us-health-coronavirus-usa-evictions-ansi/this-is-not-justice-tenant-activists-upend-u-s-eviction-courts-idUSKBN2A8112> [<https://perma.cc/UR35-EL7B>]; Louis Hansen, South Bay Protesters Block Courthouse, Rally Against Evictions, Mercury News (Jan. 27, 2021), <https://www.mercurynews.com/2021/01/27/protesters-block-courthouse-rally-against-evictions/> [<https://perma.cc/WD3B-M8ZK>] (last updated Jan. 28, 2021); Park, *supra* note 92.

142. Brand, *supra* note 141.

143. *Id.*

other forms of direct action). It is also important to flag that tenant organizations worked squarely, and often primarily, outside the immediate purview of the civil legal system. Indeed, most of the tenant organizations that were interviewed had very little faith in the civil legal system and did not view it as a promising locus of deeper change for tenants. Cynical views of civil law were common. Even as tenant organizations committed energy to working within the legal system to help tenants in the short term, they understood that more liberatory goals would require transforming, imploding, or transcending the civil legal system altogether.

Tom, a tenant organizer from California, expressed precisely this perspective:

Our tenant [legal] counseling is really like, it's designed to be like a backdoor into actual organizing. So, it's not that we tell people don't get a lawyer or don't go to court. But, really, the role of that interaction is to highlight the deficiencies in the system. It shows people that even if you're right, even if you know all your rights and you are 100% on the right side of the law, it's not really going to matter if your landlord has four attorneys and you show up in court against them, right? Even if you get a Legal Aid lawyer, like bless them, they're doing the Lord's work, but you know, they're just out gunned. So, in terms of the legal system, we have done a couple direct actions at the courthouse [W]e want to offer people like court support . . . but . . . you know, San Francisco, you look up tenant attorney in San Francisco, you've got like 150 hits, because they've had rent control since 1978. So, there's a whole history of lawyers like learning about the tenant laws, and defending tenants here. There is no such thing [here]. There literally are no tenant attorneys and we have one legal aid organization So, if you're looking for an attorney and you don't have any money, really, we tell people organizing is your best option and we don't even mean that in terms of like our own ideology, we mean that literally like if you call legal services, nine times out of ten you're not getting a call back because they got 1200 calls that day. So, that's sort of our, that's our relationship, I'd say, to the legal system. Woefully inadequate and uh, we've tried battling it from the outside, and again, we've just been humiliated and disappointed every single time.¹⁴⁴

A broad orientation toward systemic change combined with an acute awareness of the deficiencies of civil legal processes pushed Tom to focus on organizing as the "best option." He was convinced that a legal approach simply would not suffice given the realities of the context, and he surmised that only building power would be effective for achieving substantial change in the conditions tenants faced.

Many organizers perceived a tension between these options. They preferred to focus on organizing and power building, even while recognizing the need to engage civil legal processes, and they struggled to find a

144. Interview with Tom, *supra* note 1.

balance that prioritized the former despite the immediacy and urgency of the latter.

Aria, the organizer from Texas, conveyed it this way:

Evictions are happening, at like a crazy speed [The court] was scheduling thirty to seventy eviction hearings a day, like just steamrolling through them, you know, so there's this huge need . . . this really emergency crisis happening, and then you know also this side of it, of trying to build people power so it's kind of like this play between the two I've kind of struggled to bring the eviction defense side of it along with the organizing but you really can't have one without the other because tenants have so few rights in Texas that even with a lawyer, you can get thrown out [Y]ou really do have to have outside pressure on a complex to stop evicting people¹⁴⁵

This push-and-pull was one of the most common ways that tenant organizations framed the relationship between power building and legal work. A tenant organizer in Ohio conveyed it this way:

[W]e're not spending all our time at the courts because we don't really think that's where liberation is actually going to happen, but also, I mean, we got to realize that the courts do exist, and people are going to be there and people need help there, so you know, if a tenant wants our help . . . our support is, I would say unconditional, you know? We're not going to say, we're not going to go to the court with you because we don't think it's worth it, or that's not what's going to be effective [A]t the end of the day, we want to keep people in their homes, and we're not going to do that without engaging with the courts in some way because that's just how things are right now.¹⁴⁶

An organizer from a large West Coast tenant union echoed these comments, asserting that:

We are at our strongest when we can do things ourselves, when we are not focused on some other mediator like the courts to do things for us [N]obody wants to be in a pathetic, supplicant position We've been talking for years and years about working with politicians and the courts versus doing everything else but tenants facing evictions have to deal with the courts [S]o we have to figure out a way to synthesize these things [H]ow do we make it so that once you're in a position where you have to deal with the court and the lawyers, we're doing it on our terms [H]ow do we get to the point where it's not just the schematic either/or [H]ow can we synthesize those?¹⁴⁷

Balancing such practical perspectives, organizations also took special care to ensure that legal prerogatives did not take over or dominate their

145. Interview with Aria, Tenant Organizer, Tex., *supra* note 88.

146. Interview with Tenant Organizer, Ohio, *supra* note 111.

147. Interview with Juan, *supra* note 92.

organizational agendas. For example, a group in Philadelphia that works directly with lawyers nonetheless remained sensitive to the risk of placing organizing on the back burner:

We have been really careful around like legal work to make sure it doesn't lead in our organizing. Once a month we do these renters rights clinics, which are like a chance for people to like meet one-on-one with a lawyer, like in a private Zoom breakout room and you know, we really see the law as like a tactic as another tactic to us and the organizing. And we haven't been jumping it, we've been pretty timid around like bringing out lawsuits [W]e try to think about how do we collectivize the legal process as much as possible, so it's not so expert driven by the lawyer. And [the lawyer] is in most of our meetings, but like we try not to let her speak too much we try not to let her facilitate too much—especially when we have new members and new meetings with lots of people—we really make sure not to emphasize the legal aspects, the legal tactics too much. Because, you know, often we will ask people “what do you think it's going to take [this corporate landlord] to change” [and] maybe about a third of the time, people say “I don't know, maybe a lawsuit” which could be true, but that's not our theory of how political power is built. So we don't go down that road [W]e have a whole power analysis, like a whole strategy chart that we use or we map, who has the power to get us what we want, and you know the politicians are on there, because they have influence over our targets And we've met with a couple city council people to get them to put pressure on landlords and it's worked to get some concessions and keep the pressure on.¹⁴⁸

Similarly, a tenant organizer in Michigan suggested that:

Although paralegal work is useful and it kind of helps with the immediate problems up front, I think the choice to move to tenant organizing was to do a longer structural build of tenant power in the area. And so, uh, that's I think, that's why we're trying to do that transition away from that. I still think that we will still try to do things like that like . . . a little bit of paralegal work. We still have that committee going on. But, also, we'll still do things like, if some bad things happen at a courthouse, we'll still do protests and stuff like that. But, uh, I see us moving more in that direction of building power through organizing.¹⁴⁹

At the heart of tenant organizations' desire to move beyond the legal system, even as they are constrained in their ability to do so, is an abiding belief that such systems are engines of racial and class oppression that cannot be readily reformed. Tanvee, a tenant organizer from a midwestern city, explained her journey to realizing this:

We were trying to move them by writing letters lobbying people doing vigils—blah blah blah. [I]t didn't work. And we had to sit

148. Interview with Tenant Organizer, Pa. (Apr. 2021).

149. Interview with Tenant Organizer, Mich., *supra* note 137.

with ourselves . . . and be like, we can either keep doing this shit and it's not going to work or we can figure out how to shut the system down because our goal right—we had to really meditate on this—like our goal was not to win an eviction moratorium, our goal was to end evictions and a moratorium would have been a great way to get there but they weren't going to let us have it right, so we had to figure out another way to do that So folks I think in our base have become radicalized in the last year around the fact that, like these existing power structures are oppressive, were designed to be, it's not like a broken system, it's working, it's a system working as it was designed to and it's our job to either change it or if we can't change it shut it down.¹⁵⁰

Aria offered resonant comments, contemplating a strategy of disruptive protest in the vein seminally proposed by social activists Frances Fox Piven and Richard Cloward, two scholars who famously strategized about forcing change by overwhelming welfare institutions with beneficiary claims:¹⁵¹

One thing that evictions during a pandemic make you realize is that policy and the legal system is the only protection that tenants have by themselves . . . and because that's hard to navigate and hard to understand—it's actually very hard to win [in] court—[so] there's definitely an aspiration of like having the people power to block lawyers from getting into a courthouse, that would be amazing. Like to really throw a wrench in the system and really make it difficult to evict people. Like we've talked about you know, like if all the people that had an eviction hearing on that they actually showed up they wouldn't be able to have court . . . so like even just one day of everybody showing up, that could change how that court [and] how that judge does his docket I believe in power, and . . . in pressuring someone with so much more power just by sheer coming together like there's all of these policies in play that just is a thumb just pressing down on them [T]his is the power dynamic that people don't realize is going on.¹⁵²

The tenant organizers interviewed believed that civil legal systems involved power imbalances that did not favor tenants. As a result, they were not content to engage civil legal processes on their own terms—such terms would leave tenants wanting. Instead, tenant organizers looked beyond courts, even as they carefully managed how to operate within and alongside them in order to meet the needs of tenants while building power to upend existing power imbalances.

150. Interview with Tanvee, Tenant Organizer, midwestern city (Mar. 2021).

151. See Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, Nation (Mar. 8, 2010), <https://www.thenation.com/article/archive/weight-poor-strategy-end-poverty/> (on file with the *Columbia Law Review*) (reprinting a 1966 article by the authors).

152. Interview with Aria, *supra* note 88.

CONCLUSION

Local organizations working within race–class subjugated communities are an important aspect of the American democracy.¹⁵³ Such organizations are essential components of civil society.¹⁵⁴ Tenant organizations, in particular, act as a crucial power resource, fostering a more inclusive polity that incorporates the voices of marginalized groups.¹⁵⁵ This Essay argues that the work of tenant organizations intersects with the operation of civil legal institutions because such groups take part in civil legal processes. The preceding pages elucidate five key mechanisms through which tenant organizations engage civil legal actors or institutions. Calling attention to the interplay between tenant organizations and civil legal processes underscores another important way that these organizations buttress democratic citizenship¹⁵⁶ and provide some level of relief to tenants struggling to navigate a profoundly unequal and exclusionary civil legal system.

Acknowledging tenant organizations as civil legal institutions has important implications. Other vital civil legal institutions like courts and legal aid organizations are funded (if inadequately) and supported (legislatively) by federal, state, and local governments. Tenant organizations plug the gaps of those institutions with no equivalent support. While government funding is not the only, nor necessarily the best, way to support tenant organizations,¹⁵⁷ these groups' central role as institutional players in the civil legal system does warrant consideration of what forms of support (e.g., legal, financial) are useful for reinforcing their work. Given the importance of voice and power, specific policy proscriptions are not an appropriate step forward without directly relevant input from tenant organizations. Federal, state, and local governments would do well to invite (interested and willing) tenant organizations to the table to discuss ways to support the vital work they do for democracy. Perhaps creating a legal basis for growing the power of tenant organizations through a national tenant bill of rights would provide legal momentum and ease their work.¹⁵⁸ Perhaps the conferral of collective bargaining rights would

153. See Hahrie Han, Elizabeth McKenna & Michelle Oyakawa, *Prisms of the People: Power and Organizing in Twenty-First-Century America* 2 (2021).

154. *Id.*

155. Michener & SoRelle, *supra* note 11, at 213–14.

156. See Jennifer Sigafoos & James Organ, 'What About the Poor People's Rights?': The Dismantling of Social Citizenship through Access to Justice and Welfare Reform Policy, 48 *J.L. & Soc'y* 362, 362 (2021); Hilary Sommerlad, *Some Reflections on the Relationship Between Citizenship, Access to Justice, and the Reform of Legal Aid*, 31 *J.L. & Soc'y* 345, 345 (2004).

157. See Michener & SoRelle, *supra* note 11, at 222 (noting that tenant organizations value financial independence and take "great care to protect their autonomy, prioritizing it even over resources that might afford them greater capacity").

158. For more on the possibility of a national tenants bill of rights, see Nia Johnson, *Hear Us: A National Tenants' Bill of Rights Is Foundational for Race Equity*, Next City (Nov.

best position tenant organizations to build power.¹⁵⁹ There are certainly other strategies that tenant organizations could lay out. Regardless of the specifics, it is imperative to name tenant organizations as pivotal civil legal actors, to acknowledge their democratic benefits, and to forge a path forward that strengthens their place in the polity.

18, 2021), <https://nextcity.org/urbanist-news/hear-us-a-national-tenants-bill-of-rights-is-foundational-for-race-equity> [<https://perma.cc/69ZX-EFN7>].

159. For an example of conferral of collective bargaining power for tenants, see Sarah Klearman, The S.F. Board of Supervisors Just Passed Unprecedented Protections for Tenants' Unions, S.F. Bus. Times (Feb. 16, 2022), <https://www.bizjournals.com/sanfrancisco/news/2022/02/16/peskin-tenant-organizations-rights.html> [<https://perma.cc/DMG9-4YQW>].

MISSING DISCOVERY IN LAWYERLESS COURTS

Diego A. Zambrano*

The discovery process is the most distinctive feature of American civil procedure. Discovery has been referred to as procedure’s “backbone” and its “central” axis.¹ Yet 98% of American cases take place in state judiciaries where there is little to no discovery.² Most state court cases involve unrepresented parties litigating debt collection, eviction, family law, and employment claims. And the state rules of procedure rarely give these parties the power to make discovery requests. This “missing discovery” means, then, that discovery is not a fundamental part of states’ legal traditions.

This Essay presents a study of America’s missing discovery system in state civil courts. It begins with a brief survey of state discovery rules that shows how discovery is often inaccessible and opaque. It then argues that while discovery has been key to the progress of federal law, it has not been an important tool for state law reform. Still, the Essay highlights that discovery is a double-edged sword: It can empower small claimants but may also impose costs and complexity that these litigants cannot handle. Accordingly, the Essay proposes an experiment in access-oriented discovery, focusing on disclosure obligations on sophisticated litigants. The Essay’s main goal, however, is to work toward a theory of discovery in state civil courts.

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* Associate Professor, Stanford Law School. My deepest thanks to Pam Bookman, Colleen Shanahan, Jessica Steinberg, and others for excellent conversations and comments. I also owe a debt of gratitude to Julia Gleason and Donovan Hicks for fabulous research assistance.

1. Diego A. Zambrano, *Discovery as Regulation*, 119 Mich. L. Rev. 71, 72, 80 (2020) [hereinafter Zambrano, *Discovery as Regulation*].

2. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2103 (2019) [hereinafter Zambrano, *Federal Expansion*].

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INTRODUCTION

Debates over the health of state courts and the treatment of unrepresented parties are heating up, and the state courts system is approaching a critical moment. A new class of scholars argues that civil procedure in small claims looks radically distinct from traditional practice in federal courts and fails to vindicate full access to justice.³ Jessica Steinberg, for

3. See, e.g., Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 *Geo. L.J.* 509, 511–13 (2022) [hereinafter Carpenter et al., *Judges in Lawyerless Courts*] (noting that most state civil court participants have to defend their rights and interests without legal representation in a system designed by and for lawyers); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 *Wis. L. Rev.* 249, 257–61 [hereinafter Carpenter et al., *Studying*] (highlighting the changed landscape in state court litigation in which the majority of litigants are unrepresented and, as a result, tend to fare poorly even in meritorious cases); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 *Wis. L. Rev.* 215, 219–23 [hereinafter Shanahan, *Keys*] (observing that state civil courts are not providing adequate remedies or justice for litigants,

instance, argues that a “crisis” is brewing in more than nineteen million civil cases involving low-income parties who are often lawyerless.⁴ Unlike the well-represented cases that populate the federal courts, more than 75% of state court claims involve at least one party without legal representation.⁵ Without experienced counsel, most low-income litigants cannot manage the complex procedures used by state courts. And, in a reversal of the federal norm, a large percentage of these state court cases involve large landlords or debt collectors as plaintiffs against low-income and unrepresented defendants.⁶

Despite reform efforts oriented at encouraging state judges to simplify procedures and embrace inquisitorial techniques, Colleen Shanahan and co-authors found in a path-breaking study that “[j]udges [have] maintained legal and procedural complexity in their courtrooms.”⁷ They conclude that civil courts were “not designed for people without counsel” and are therefore failing to promote access to justice.⁸ Even more, Lauren Sudeall and Daniel Pasciuti found in a study of eviction courts that unwieldy processes have turned state courts into nothing more than “a vehicle for rent collection.”⁹ This growing chorus of commentators agrees that the status quo is harming unrepresented parties, and it has, in turn, offered an array of reforms ranging from empowering active judges¹⁰ and providing more unbundled legal aid,¹¹ all the way to engaging in deeper experimentation in state courts.¹²

especially under-resourced litigants in cases with asymmetrical power relationships); Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 Conn. L. Rev. 741, 743–45 (2015) [hereinafter Steinberg, Demand Side] (commenting that pro se litigants in state courts lack the same access to justice as represented parties). See also Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court, 3 Cardozo Pub. L. Pol’y & Ethics J. 659, 661–69 (2006) (exploring problems that pro se litigants face).

4. Steinberg, Demand Side, supra note 3, at 741.

5. Carpenter et al., Judges in Lawyerless Courts, supra note 3, at 511.

6. See Daniel Wilf-Townsend, Assembly-Line Plaintiffs, 135 Harv. L. Rev. 1704, 1716–17 (2022).

7. Carpenter et al., Judges in Lawyerless Courts, supra note 3, at 516.

8. See id. at 511–13, 557.

9. See Lauren Sudeall & Daniel Pasciuti, Praxis and Paradox: Inside the Black Box of Eviction Court, 74 Vand. L. Rev. 1365, 1368 (2021).

10. See, e.g., Benjamin H. Barton, Against Civil *Gideon* (and for Pro Se Court Reform), 62 Fla. L. Rev. 1227, 1272 (2010) (arguing that “judges in pro se courts should replace the traditional role of neutral arbiter with active questioning aimed at ensuring that procedural and substantive justice prevails”); Steinberg, Demand Side, supra note 3, at 801 (arguing that judges should “be active, frame legal issues, and question parties and witnesses in order to develop legal claims”).

11. See Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 Geo. J. Legal Ethics 209, 229–30 (1990) (“[R]estricting the profession’s monopoly should be seen as part of an overall strategy for expanding access to legal assistance.”); Steinberg, Demand Side, supra note 3, at 748 (explaining the benefits of unbundled legal services).

12. See Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, COVID, Crisis, and Courts, 99 Tex. L. Rev. Online 10, 17–19 (2020) [hereinafter Shanahan

Behind this developing maelstrom and buried in this emergent scholarship is a surprising obstacle for unrepresented parties: a nearly non-existent and opaque discovery system. Steinberg, for instance, observed that unrepresented litigants “find it nearly impossible to manage . . . discovery.”¹³ Likewise, Shanahan found in a large study of unemployment claims that “[d]iscovery procedures are limited[] and rarely used.”¹⁴ Part of the reason for this missing discovery system is that some states have streamlined low-stakes litigation by explicitly prohibiting discovery. For instance, in eviction cases, Michigan, Pennsylvania, Texas, and arguably New York bar any discovery.¹⁵ Even in contexts where motions to compel discovery are more common, one empirical study found that “judge[s] infrequently ruled on these motions.”¹⁶ Indeed, one major teaching of this entire literature is that “the law of state civil courts is largely unwritten” and heavily “informal”¹⁷ and most of the work “happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings.”¹⁸

These studies, however, leave open the question of whether discovery is an important and potentially underutilized reform tool or, by contrast, a mechanism that increases costs and ultimately harms unrepresented litigants. On the one hand, if the scholarship on federal discovery is right, missing discovery in state courts leaves aside a potential tool that can promote pro-consumer or pro-employee changes in the law. And, without discovery, litigants who may need documents to assert claims or defenses are disempowered. Even more, litigants may miss discovery’s potential as an offensive weapon—to gain leverage in settlement negotiations, delay proceedings, or support counterclaims.¹⁹ In line with this thinking, Steinberg noted that in habitability cases, discovery could “play a central role . . . making it unlikely that tenants can succeed without attorney representation.”²⁰

On the other hand, some scholars of the civil *Gideon* literature and state reformers have long advocated for procedural simplification and a

et al., COVID] (arguing that experimentation in state civil courts is essential to respond to “this moment of social change”).

13. Steinberg, Demand Side, supra note 3, at 744.

14. Shanahan, Keys, supra note 3, at 226.

15. See infra notes 139–151. New York requires leave of court for any discovery requests. See infra notes 143–147.

16. See D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, 126 Harv. L. Rev. 901, 919–20, 927, 934 (2013).

17. Shanahan et al., COVID, supra note 12, at 14.

18. Carpenter et al., Judges in Lawyerless Courts, supra note 3, at 514.

19. Greiner et al., supra note 16, at 965.

20. Jessica K. Steinberg, Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court, 42 Law & Soc. Inquiry 1058, 1065 (2017) [hereinafter Steinberg, Informal] (noting that discovery and pretrial motions play a key role in habitability cases, which place unrepresented tenants at a distinct disadvantage as they are forced to navigate these complex procedures alone).

rejection of complex practices like discovery.²¹ Some state legislatures have explicitly banned discovery “in an effort to reduce costs and level the playing field for unrepresented litigants.”²² For instance, setting aside the states that have eliminated discovery in eviction cases, California, New York, and Pennsylvania seriously limit discovery in cases involving claims for less than \$10,000.²³ A committee of lawyers once advised Massachusetts family courts to create a simplified process for domestic relations cases that “would eliminate most formal discovery” because the process was a “stumbling block[] faced by pro se litigants.”²⁴ To these states, discovery increases the complexity of a case, gives represented parties an upper-hand, and further unbalances litigation in their favor. Worse, it may empower sophisticated parties—debt collectors, landlords, employers, and corporations—with bargaining leverage and the threat of increased costs. Besides, whatever regulatory benefits discovery may bring in federal court are likely not achievable in small-stakes cases with straightforward fact patterns.

While scholars have identified important gaps in state court systems and potential problems, they have not defined with precision what the role of discovery should be in lawyerless courts, furnished a clear outline of discovery’s potential effects on these cases, or set the appropriate boundaries of debate. The stakes, moreover, are significant as reforms to state courts hang in the balance. The resulting questions are clear: What, exactly, should the role of discovery be in lawyerless courts? Does “missing discovery” damage the development of state law? Or are state legislatures right that discovery harms unrepresented litigants? And, if so, what can reformers do about it?

21. See, e.g., Barton, *supra* note 10, at 1272–74 (arguing that procedural simplification is an alternative to civil *Gideon*); Russell Engler, Connecting Self-Representation to Civil *Gideon*: What Existing Data Reveal About When Counsel Is Most Needed, 37 *Fordham Urb. L.J.* 37, 75–76 (2010) (arguing in favor of a right to civil counsel and exploring the importance of having skilled advocates); Richard Zorza, Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation, 61 *Drake L. Rev.* 845, 857–64 (2013) (arguing that simplifying the legal dispute resolution system is in the best interest of all civil litigants).

22. Steinberg, *Demand Side*, *supra* note 3, at 797 n.309.

23. See *infra* notes 94–106. Colorado and Texas also limit discovery for cases under \$100,000 and \$250,000, respectively. Colo. R. Civ. P. 16.1(b), (k)(4); Tex. R. Civ. P. 169(a), 169(d)(1), 190.2. See also Seymour Moskowitz, Rediscovering Discovery: State Procedural Rules and the Level Playing Field, 54 *Rutgers L. Rev.* 595, 613 (2002) (noting that many states have limited the amount of discovery available to parties); Seymour Moskowitz, What Federal Rulemakers Can Learn From State Procedural Innovations 5–10 (May 10, 2010) (unpublished manuscript), https://www.uscourts.gov/sites/default/files/seymour_moskowitz_what_federal_rulemakers_can_learn_from_state_0.pdf [https://perma.cc/GWG2-BVHV] [hereinafter Moskowitz, Federal Rulemakers] (explaining that “[t]he volume and type of allowable discovery in the states are now often differentiated by the amount in controversy”).

24. Charles P. Kindregan, Jr. & Patricia A. Kindregan, Pro Se Litigants: The Challenge of the Future 21, 39 (1995), <https://www.mass.gov/doc/pro-se-litigants-the-challenge-of-the-future/download> [https://perma.cc/TX5P-M4KN].

This Essay takes on the task of answering these questions, providing an examination of discovery in state courts, and a detailed analysis of where discovery would have a positive or negative impact. Part I summarizes how state discovery differs in important respects from the federal system. It then provides a detailed catalogue of state discovery rules in three categories of lawyerless cases: landlord–tenant, debt collection, and family law disputes. This Essay places special emphasis on debt collection and eviction claims because they represent around 45% of all state cases and mostly involve unrepresented parties.²⁵

Part II then steps back to provide a theoretical framework to evaluate discovery, its potential benefits and costs, and whether there is room for discovery reform. At its core, this Part addresses the discovery catch-22: While discovery can bring benefits to lawyerless cases, it can also increase complexity to the point that it actively harms the interests of unrepresented litigants. That is why Part II explores the characteristics of cases in which discovery is most likely to promote fairness and accuracy without increasing complexity. There may well be a sweet spot for discovery reform, especially in areas where sophisticated plaintiffs—large landlords, debt collection companies, and banks with experienced counsel—litigate against lawyerless parties who allege serious and systematic wrongdoing. States should only impose disclosure obligations on sophisticated plaintiffs in complex cases, including warranty of habitability claims and violations of the Fair Debt Collection Practices Act (FDCPA). In this manner, this Essay highlights several design principles for any discovery reform effort.²⁶

Finally, Part III introduces an experimental proposal: a civil open file statute that would force sophisticated landlords and debt collectors to assemble and produce a full record of relevant documents at the outset of litigation. These statutes would draw on the example of criminal open file statutes that force prosecutors to disclose to defendants their full investigatory record. But a civil analogue would be narrowly applied only to cases involving a significant asymmetry in resources and complex defenses or counterclaims by unrepresented parties. The idea follows a call from scholars to embrace a spirit of experimentation in state courts.²⁷ And the idea also aligns with the civil *Gideon* literature that embraces legal assistance

25. See generally Nat'l Ctr. for State Cts., Civil Justice Initiative: The Landscape of Civil Litigation in State Courts (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/7AJB-SHUD>] (providing a comprehensive report on state civil litigation).

26. Some of these include a few actionable items: States should not expand discovery across-the-board; small claims cases involving two unsophisticated parties should not enjoy broader discovery; most debt collection claims and any other cases that hinge on a single contract (without potential statutory defenses) should also retain either no discovery or few discovery obligations. See *infra* section II.D.

27. See, e.g., Shanahan et al., COVID, *supra* note 12, at 17–19 (arguing that transparent experimentation is needed for state civil courts to respond to the COVID-19 crisis).

only for a subset of cases that involve significant interests, such as housing or child custody.²⁸

I. AN INTRODUCTION TO STATE DISCOVERY

This Part explores the basics of discovery in state courts and how it differs in important respects from the federal system. Section I.A summarizes a few ways in which state discovery diverges from the federal system. Section I.B then examines discovery in a subset of lawyerless cases: debt collection, employment claims, evictions, and family law cases. This section finds that discovery is often informal but that there are formal approaches that can be categorized into the following: full adversarial, streamlined (with strict time limits), court managed through pre-filled forms, and no formal discovery at all. Still, this Essay cannot fully explore whether judges improvise discovery on the go or craft procedures that are tailored to each case.²⁹

Before delving into the state rules, a very brief discussion of federal discovery is appropriate here. The federal discovery process is at the center of the Federal Rules of Civil Procedure (FRCP). More than a dozen rules³⁰ build a process that is expansive, broad, thorough, and transsubstantive. The system empowers any plaintiff, regardless of the amount in controversy or cause of action, to seek relevant documents that are proportional to the needs of the case.³¹ Parties can also schedule depositions and issue interrogatories, involving parties or nonparties.³² This makes federal discovery “extremely broad,” covering “any matter, not privileged, that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible.”³³ This process gives plaintiffs a potent subpoena power that is analogous to administrative agency investigative tools.³⁴

A. *State Discovery Rules and Variants*

Most states have traditionally followed the FRCP, mimicking the scope and breadth of pleading, discovery, summary judgment, joinder, and related rules. A 1986 study by John Oakley found that nearly two dozen

28. See *supra* note 21 and accompanying text.

29. Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767, 784 (2017) (seeking to “define the phenomenon of ad hoc procedure-making”); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 Colum. L. Rev. 1183, 1209 (2022) (noting that state court judges “routinely adjust procedures to accommodate the particular litigants before them”).

30. See Fed. R. Civ. P. 26–37.

31. See Fed. R. Civ. P. 26.

32. See Fed. R. Civ. P. 30, 33.

33. Zambrano, *Discovery as Regulation*, *supra* note 1, at 80.

34. *Id.* at 102–18 (discussing the resemblance between administrative subpoenas and civil discovery).

state rules of civil procedure were “replicas” of the federal rules and six more were near replicas.³⁵ But a handful of states have long retained a distinct set of procedural rules, including an important subset of large states like California, Michigan, Pennsylvania, New York, and Texas.³⁶ And many states’ procedural rules are increasingly diverging from the FRCP, refusing to embrace a federal trend of procedural retrenchment.³⁷ Florida, for example, has rejected every single amendment to the federal discovery rules since the early 1990s.³⁸

For these reasons, this Essay largely focuses on the “variant” states that have not mimicked the federal rules: California, Florida, Michigan, New York, Pennsylvania, and Texas. This Essay also contrasts these states’ approaches to other states that have experimented with discovery, including Arizona, Massachusetts, and Utah. As discussed below, the variant states give us a good sample of how state rules can differ from the federal system and present an alternative model of discovery that may be relevant for lawyerless courts. While the federal rules are transsubstantive, emphasize the exchange of material in litigation, and are generally party led, the variant states diverge in, among other things, three respects: an emphasis on substance-specific rules, expansive disclosure requirements partnered with limited depositions and interrogatories, and increasing court management of discovery.

1. *Substance- or Amount-Specific Discovery.* — Many of the variant states reject transsubstantive discovery.³⁹ While the federal discovery rules provide for a single system for all cases, several states—including Arizona, California, Illinois, Texas, and Utah—divide cases according to the amount in controversy.⁴⁰ California, for instance, provides for discovery tracks that depend on the size of damages requested.⁴¹ California Rule 85 defines “limited civil cases” as those involving less than \$25,000 and limits the number of depositions, interrogatories, and document requests.⁴²

35. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1377–78 (1986).

36. See *id.* at 1378 (exploring how state rules have not followed federal rules in adopting changes that make access more difficult).

37. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Calif. L. Rev. 411, 414 (2018) (exploring how state courts have not embraced changes that make it more difficult to access federal courts); Zambrano, *Federal Expansion*, *supra* note 2, at 2163–64 (same).

38. 11 Seymour Moskowitz & Janet Capurro Graham, *Bender’s Forms of Discovery Treatise* app. B (2021).

39. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 Vand. L. Rev. 1167, 1186 (2005) (highlighting that states such as Arizona, Colorado, Illinois, and Texas adopted discovery rules that depart from the federal rules, which are transsubstantive).

40. See Ariz. R. Civ. P. 26.2(c)(3); Ill. Sup. Ct. R. 222; *infra* notes 42–47.

41. Koppel, *supra* note 39, at 1214–15.

42. Cal. Civ. Proc. Code § 85 (2021).

Additional discovery in these cases is strictly limited.⁴³ Along the same lines, Texas provides for discovery tracks depending on the amount in controversy.⁴⁴ For instance, so-called “expedited action” cases cover claims seeking relief for less than \$250,000.⁴⁵ These cases alter the regular discovery rules, providing a limit of 180 days to complete the entire process and a cap of fifteen interrogatories, twenty-five requests for production, and fifteen requests for admission.⁴⁶ Utah, too, has adopted discovery tiers based on the amount in controversy, with categories for \$50,000 or less, between \$50,000 and \$300,000, and for more than \$300,000.⁴⁷

Beyond differences based on the amount in controversy, variant states reject transsubstantivity through specialized courts or substance-specific dockets. Kentucky, for instance, offers a separate track for cases that qualify as “economic litigation.”⁴⁸ Typically, these cases involve contract, torts, and other run-of-the-mill claims. For these cases, Kentucky requires a discovery conference and mandatory disclosures and creates other limits.⁴⁹ Over twenty states have business courts focused on commercial disputes between sophisticated entities.⁵⁰ For example, while New York does not have separate tracks based on the amount in controversy, it does have specialized courts—like the Commercial Division—that apply different discovery rules.⁵¹ Among other differences, the Commercial Division requires “strict adherence” to a discovery schedule crafted by the court

43. Cal. Civ. Proc. Code § 95. California also makes use of discovery “forms.” *Id.* See also Greiner et al., *supra* note 16, at 915, 918 (discussing the use of “standardized forms” that are created by courts or other entities). And there have been proposals to further segment cases. See Jud. Council of Cal., Invitation to Comment: Judicial Council—Sponsored Legislation: Civil Discovery Tiers 1 (2018), <https://www.courts.ca.gov/documents/SP18-17.pdf> [<https://perma.cc/QS99-9RGL>].

44. Tex. R. Civ. P. 169.

45. *Id.*; Final Approval of Amendments to Texas Rules of Civil Procedure 47, 99, 169, 190, 192, 193, 194, 195, 196, 197, and 198, No. 20-9153 (Tex. Dec. 23, 2020), <https://www.txcourts.gov/media/1450176/209153.pdf> [<https://perma.cc/6CMD-QAY5>].

46. Tex. R. Civ. P. 190.2; David Slayton, Tex. Off. of Ct. Admin., Deciphering Texas Rule of Civil Procedure 169: Expedited Actions, <https://www.txcourts.gov/media/636893/Deciphering-TRCP-169-Expedited-Trials.pdf> [<https://perma.cc/L3DP-HKPW>].

47. Utah R. Civ. P. 26(c)(5); Brittany Kauffman, Civ. Just. Improvements Comm., Call to Action: Achieving Civil Justice for All app. D (2016), https://www.ncsc.org/__data/assets/pdf_file/0022/25681/ncsc-cji-appendices-d.pdf [<https://perma.cc/K6F7-7XBL>]; see also Linda Sandstrom Simard, Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity, 71 *Vand. L. Rev.* 1919, 1942–43 (2018).

48. C. Lynn Oliver, Note, Economical Litigation: Kentucky’s Answer to High Costs and Delay in Civil Litigation, 71 *Ky. L.J.* 647, 648 (1982); Richard H. Underwood, Discovery in Kentucky: An Overview, 72 *Ky. L.J.* 727, 778 (1984).

49. Underwood, *supra* note 48, at 778.

50. Diego A. Zambrano, The States’ Interest in Federal Procedure, 70 *Stan. L. Rev.* 1805, 1811–12 (2018).

51. See N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70.11 (2022).

and parties.⁵² Similarly, California has specialized complex litigation courts and also specific rules that govern sexual harassment and elder abuse cases.⁵³ Michigan, too, requires additional disclosures in no-fault and personal injury cases.⁵⁴ These states are representative of a broader trend against transsubstantive discovery.

2. *Disclosures and Specific Limits on Depositions, Interrogatories, and Requests.* — Most states have also recently adopted both expansive disclosure requirements and numerical limits to depositions and interrogatories.⁵⁵ The federal rules impose a “narrowly focused duty to disclose witnesses and documents”⁵⁶ that the “disclosing party may use to support its claims or defenses.”⁵⁷ Many states have gone beyond that narrow standard to expand disclosures over relevant documents. For instance, Alaska, Illinois, and Utah require the disclosure of “[r]elevant documents and electronically stored information . . . together with a list of all materials withheld and the reasons for nonproduction. None of this is required in federal court.”⁵⁸ Still more, Arizona, Colorado, Michigan, Minnesota, New Hampshire, Texas, and other states have all endorsed early disclosures of potentially relevant documents.⁵⁹ While federal disclosure rules require only a description of potentially relevant documents, New Hampshire rules require “parties to actually produce copies of documents without a discovery request In addition, the federal rule only requires parties to list the ‘subjects’ about which a witness would testify, while the

52. Andrew Morrison & Anthony Staltari, *We Are All Commercial Litigators Now: NY Commercial Division Rules Become Agents of Change*, *JD Supra* (Feb. 2, 2021), <https://www.jdsupra.com/legalnews/we-are-all-commercial-litigators-now-ny-7357375/> [<https://perma.cc/8D3X-MYW7>].

53. See, e.g., Cal. Civ. Proc. Code §§ 2017.310–.320, 2032.340 (2004).

54. Mich. Ct. R. 2.302(A)(2)–(3).

55. Koppel, *supra* note 39, at 1217–20.

56. *Id.* at 1229.

57. Fed. R. Civ. P. 26(a)(1)(A).

58. Moskowitz, *Federal Rulemakers*, *supra* note 23 (manuscript at 12); see also *Initial Disclosures*, Utah Cts., https://www.utcourts.gov/howto/courtprocess/initial_disclosures.html [<https://perma.cc/EE2K-7HQ4>] (last visited Feb. 6, 2022).

59. Civ. Just. Improvements Comm., *Call to Action: Achieving Civil Justice for All 4–5* (2016), https://www.ncsc.org/_data/assets/pdf_file/0029/19289/call-to-action_achieving-civil-justice-for-all.pdf [<https://perma.cc/8P2P-ETKQ>]; see also Kauffman, *supra* note 47; Kimberly Daily, Kelsey Machado & Matthew Rawlinson, *A New Legal Frontier: Navigating the 2021 Texas Rules of Civil Procedure*, *JD Supra* (Jan. 25, 2021), <https://www.jdsupra.com/legalnews/a-new-legal-frontier-navigating-the-8579180/> [<https://perma.cc/9KBP-U5YV>]; *Key Amendments to Texas Rules of Civil Procedure, Effective January 2021*, McGuiresWoods (Mar. 23, 2021), <https://www.mcguireswoods.com/client-resources/Alerts/2021/3/key-amendments-texas-rules-civil-procedure-effective-january-2021> [<https://perma.cc/6KGG-SZJY>].

[New Hampshire] rule requires a specific disclosure of the facts and information that person possesses.”⁶⁰ Arizona is another example of a state that adopted a robust disclosure system that became popular among attorneys. Indeed, over “seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.”⁶¹

Many of these states have partnered disclosure reform with limits on other forms of discovery. New York, for instance, recently imposed a series of new limitations on general discovery, capping interrogatories at twenty-five and depositions to ten per party, and each deposition is limited to seven hours per witness.⁶² The deposition time limit mirrors Federal Rule 30(d),⁶³ but it is notably different because it mandates an extension of time only “[f]or good cause shown.”⁶⁴ Michigan, Missouri, and New Hampshire have all similarly limited the number of interrogatories and depositions.⁶⁵ And “unlike federal procedure, a party under Massachusetts procedure must obtain leave of court to depose a testifying expert That relief is warranted . . . only if an expert deposition is ‘reasonable and necessary.’”⁶⁶

3. *Court Management and Miscellaneous Rules.* — Finally, a range of states have adopted detailed provisions that differ from the federal discovery rules, including the following: managerial discovery rules that

60. Robert Fojo, *New Rules Modernize New Hampshire Civil Procedure*, Fojo L. (Nov. 6, 2014), <https://fojolaw.com/2014/11/06/nh-pad-rules-modernize-new-hampshire-civil-procedure/> [https://perma.cc/J6MX-5LD6].

61. Comm. on Rules of Prac. & Proc., U.S. Cts., Meeting of January 8–9, 2015, at 16 (2015), https://www.uscourts.gov/sites/default/files/st01-2015-min_0.pdf [https://perma.cc/Q8V5-DNCE].

62. Gizele Rubeiz & Jacqueline L. Bonneau, *Commercial Division Rules Expanded to General Civil Practice in New York Effective February 1, 2021*, Patterson Belknap: NY Com. Div. Blog (Feb. 3, 2021), <https://www.pbwt.com/ny-commercial-division-blog/commercial-division-rules-expanded-to-general-civil-practice-in-new-york-effective-february-1-2021> [https://perma.cc/PH7Q-BHQ2].

63. Fed. R. Civ. P. 30(d).

64. Robert Kelner, Gail Kelner & Joshua Kelner, *New Rules of Engagement: Major Changes to NY’s Rules of Court*, N.Y.L.J. (May 24, 2021), <https://www.law.com/newyorklawjournal/2021/05/24/new-rules-of-engagement-major-changes-to-nys-rules-of-court/?slreturn=20211117224659> [https://perma.cc/5XYS-LDKY].

65. Daniel D. Quick, *The New Civil Discovery Rules*, 98 Mich. Bar J. 16, 18 (2019); Fojo, *supra* note 60; Rachel Harris, *What You Need to Know About Missouri’s Updated Discovery Rules*, Thompson Coburn LLP (Sept. 17, 2019), <https://www.thompsoncoburn.com/insights/publications/item/2019-09-17/what-you-need-to-know-about-missouri-s-updated-discovery-rules> [https://perma.cc/D9YR-84UF]; see also N.H. Sup. Ct. R. 23, 26.

66. Eric P. Magnuson, *Practice Pointer: Under Massachusetts Procedure, There’s No Right to Expert Depositions*, Nutter: BLS Blog (Dec. 11, 2020), <https://www.nutter.com/bls/practice-pointer-under-massachusetts-procedure-theres-no> [https://perma.cc/P89E-QTLQ] (citation omitted) (quoting *Lubin & Meyer, P.C. v. Manning*, No. 1784CV02352-BLS2, at 2 (Mass. Super. Ct. Mar. 3, 2020) (order denying plaintiff’s motion for leave to depose defendant’s expert)).

empower judges to assemble evidence,⁶⁷ supervise the details of the process, and provide for court-initiated forms;⁶⁸ automatic stays of discovery pending a motion to dismiss;⁶⁹ and pre-complaint discovery.⁷⁰ Empowering judges has been popular in a few states like Michigan. In a recent set of reforms, Michigan sought to increase “court management” by empowering judges to “control the scope, order and amount of discovery.”⁷¹ Along the same lines, Utah has empowered judges by radically shifting “the presumption from one where discovery is allowable unless the rules or a judge say otherwise to a scheme where discovery is prohibited unless the rules or a judge say otherwise.”⁷² Minnesota and Kentucky both have mandatory discovery conferences.⁷³ Some states have enjoyed variable success with discovery reform, with attorneys praising active judicial management in some states, while other state governments have abandoned such reforms.⁷⁴ Relatedly, states like Massachusetts have also used standardized discovery forms. This means that, in eviction litigation, Massachusetts courts provide pre-filled discovery forms to unrepresented parties who can then indicate what kind of information they seek from the landlord.⁷⁵

B. *Discovery in Lawyerless Courts*

Most states have developed specific rules for discovery in the “lawyerless” cases at the center of this Essay: small claims, debt collection, family law, and landlord–tenant disputes. Sometimes state or local rules cover only small-stakes claims or family law disputes, while others have specific regimes for eviction claims. If the goal is to address the possibility of missing discovery in these cases, we have to first understand the status quo in lawyerless courts.

As explained below, while discovery is usually limited in lawyerless cases, there are common approaches that can be categorized into the following: full adversarial, streamlined (with strict time limits), court-

67. See, e.g., Quick, *supra* note 65, at 17 (describing Michigan court rules that vest courts with case management tools that control the scope, order, and amount of discovery).

68. See Greiner et al., *supra* note 16, at 915, 918 (describing Massachusetts courts’ use of standardized forms in eviction proceedings).

69. New York Supreme Court Motion to Dismiss, SmartRules (Apr. 12, 2020), <https://blogs.smartrules.com/new-york-supreme-court-motion-to-dismiss-cheat-sheet/> [<https://perma.cc/ZW4B-6Y2T>].

70. Pa. R. Civ. P. 4003.8; Moskowitz & Graham, *supra* note 38, at 14.

71. Quick, *supra* note 65, at 17.

72. Kauffman, *supra* note 47, at 8.

73. See, e.g., Minn. R. Civ. P. 26; What Is a Rule 26 Discovery Conference in Minnesota Court Cases?, Aaron Hall, <https://aaronhall.com/what-is-a-rule-26-discovery-conference-in-minnesota-court-cases/> [<https://perma.cc/4T9P-3QQ4>]; see also Ky. R. Civ. P. 90; Oliver, *supra* note 48, at 654.

74. Kauffman, *supra* note 47, at 2–9 (discussing how some pilot projects ended while others were met with “success” and received “positive feedback”).

75. Greiner et al., *supra* note 16, at 915.

managed through pre-filled forms, and no formal discovery at all. Still, one question here is whether judges improvise discovery on the go through “ad hoc” procedures that are tailored to each case.⁷⁶

76. Bookman & Shanahan, *supra* note 29, at 1206–09; see also Bookman & Noll, *supra* note 29, at 784.

TABLE 1: CLASSIFICATION OF STATE DISCOVERY REGIMES

Case Type	Purpose of Discovery and the Proceeding	Case Complexity	Discovery Choice by State
Small Claims and Debt Collection	Reveal basic documents for offense or defense. But balanced against need for informality and simplicity.	Low Medium: FDCPA offensive claims, contract defenses, state consumer protection	Full discovery (FL) No discovery at all (CA, PA, MI, NY) Court-managed and reversed default: need judge approval (CA, TX) Streamlined: disclosures/trial (PA)
Landlord-Tenant, Eviction	Reveal basic documents for offense or defense. But balanced against need for efficiency and speed (for repossession).	Low: eviction Medium: habitability and other defenses	No discovery at all (MI, PA, TX) Limited requests and short timelines: subject to court management, approval, and/or showing of ample need (CA, FL, NY) Evidence at trial (All)
Family Court	Reveal basic documents for offense or defense. But balanced against need for informality and conciliation.	Low: domestic relations Medium: complex divorces, etc.	Mostly full discovery (AZ, CA, FL, MI, NY, PA, TX) Extensive disclosures (CA, FL, TX) Court management (MI)

1. *Small Claims and Debt Collection.* — Small claims courts adjudicate most civil cases in the United States. The defining features of these courts are a low amount in controversy, streamlined procedures, flexibility, and an emphasis on conciliation. Dozens of states adopted the small claims model in the early 1900s to avoid problems with delays, high costs, and the legal complexity of traditional courts.⁷⁷ One ingredient of the reform wave was eliminating the need for lawyers.⁷⁸ Even today, although most states allow lawyers in small claims proceedings, at least eight states prohibit it.⁷⁹ Every state's small claims court eschews the idea of formal rules of procedure—emphasizing instead the need for pragmatic decisionmaking by a mediating judge.⁸⁰ Small claims systems tend to be quite straightforward: An unrepresented party often files a short complaint, and the court then schedules a hearing.⁸¹

Within small claims courts, the most common cases involve debt collection lawsuits. These cases are overwhelmingly comprised of a consumer debt company as plaintiff against an unrepresented defendant over a loan of less than five or ten thousand dollars.⁸² The debt collection industry is dominated by a few large companies that individually file tens of thousands of claims every year.⁸³ Common debts include “medical, auto loan, or credit card bills.”⁸⁴ These cases represent an astounding 24% of all claims

77. See John C. Ruhnka, Steven Weller & John A. Martin, *Small Claims Courts: A National Examination 189–91* (1978) (finding that “[s]mall claims courts were developed to provide quick, inexpensive, even-handed and effective resolution of smaller civil claims”).

78. See Arthur Best, Deborah Zalesne, Kathleen Bridges, Kathryn Chenoweth, Lisa Fine, Jonathan L. Miller & Kimberly White, *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 *Fordham Urb. L.J.* 343, 354 (1994) (noting that not permitting attorneys in small claims “encourage[s] immediate dispute resolution and prevent[s] procedural technicalities from overpowering the interest of achieving justice”); James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 *U.D.C./DCSL L. Rev.* 177, 178–79 (2000) (“The primary goals of the original small claims courts were to reduce expenses and fees by eliminating the use of a lawyer, and to reduce delay by simplifying pleadings and eliminating procedural steps.”).

79. Turner & McGee, *supra* note 78, at 180–82 (noting that Arkansas, California, Colorado, Idaho, Michigan, Nebraska, Virginia, and Washington all prohibit use of lawyers in small claims proceedings).

80. See *id.* at 179 (noting that small claims courts “work under rules that are less complex than the procedures of other trial courts,” use “less legal jargon,” and sometimes require or offer alternative dispute resolution).

81. *Id.*

82. The Pew Charitable Trs., *How Debt Collectors Are Transforming the Business of State Courts: Lawsuit Trends Highlight Need to Modernize Civil Legal Systems 1* (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/8EPE-XP3Q>].

83. Wilf-Townsend, *supra* note 6, at 1731 (“[T]en companies, a mix of debt collectors and financial services companies, accounted for . . . about 84% of all of the cases filed by all top filers in the sample.”).

84. The Pew Charitable Trs., *supra* note 82, at 8.

in state civil courts.⁸⁵ Indeed, debt claims were the most common type of civil case in nine of the twelve states for which at least some court data were available.⁸⁶ They also carry significant consequences for low-income borrowers.⁸⁷

Most debt collection cases never reach formal litigation. Pew researchers found less than 10% of consumer debt defendants have counsel and, perhaps relatedly, more than 70% of these cases end in default.⁸⁸ In fact, in some states “85% of defendants who were served with a complaint never filed a written response.”⁸⁹ In the minuscule 2% of cases when defendants actually appear in court, “they are largely unrepresented.”⁹⁰ Indeed, in California, 98% of debt collection defendants have no legal representation.⁹¹ And most pro se parties do not draw on available defenses or counterclaims,⁹² including claims under the Fair Debt Collection Practices Act.

Even when debt collection claims reach actual litigation, they take place in small claims courts that offer little to no discovery.⁹³ Unlike federal courts—where discovery is available in every case—most variant states bar discovery in these courts, including Michigan, New York, and Pennsylvania. In New York, the process for claims below \$10,000 provides

85. *Id.*

86. *Id.* at 10, fig.6.

87. See, e.g., The Legal Aid Soc’y, Neighborhood Econ. Dev. Advoc. Project, MFY Legal Servs. & Urb. Just. Ctr., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 1* (2010), <http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [https://perma.cc/H7NT-E5CR] (“Armed with default judgments, debt buyers can seize people’s assets, freeze their bank accounts, or garnish their wages to collect the debts. Judgments also appear on credit reports, preventing people from being able to secure housing, obtain credit, and even find employment.”); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 *J. Bus. & Tech. L.* 259, 264 (2011) (describing how many low-income Americans rely on credit cards to pay for basic living expenses and many have consumer loans that are “impossible to repay”); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 *N.D. L. Rev.* 269, 272 (1994) (“[S]mall claims courts merely provide an inexpensive collection method for businesses.”).

88. The Pew Charitable Trs., *supra* note 82, at 2.

89. Wilf-Townsend, *supra* note 6, at 1721.

90. *Id.* at 1722.

91. Julia Barnard, Kiran Sidhu, Peter Smith & Lisa Stifler, *Court System Overload: The State of Debt Collection in California After the Fair Debt Buyer Protection Act 2* (2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf> [https://perma.cc/MK3S-3G45].

92. Defenses can include contractual defenses, bankruptcy discharge, fraud, statute of limitations, other limitations on garnishments, and more. See Wilf-Townsend, *supra* note 6, at 1746–48.

93. *Id.* at 1746–47; see also Nat’l Ctr. for State Cts., *supra* note 25, at 33.

no formal discovery at all.⁹⁴ According to a New York court, “[t]he informality and convenience of small claims practice is necessarily frustrated by requiring pro se litigants to respond to formal motion practice . . . prior to the hearing of their case.”⁹⁵ So too in Michigan, where the rules state that “discovery is not permitted in actions in the small claims division of the district court.”⁹⁶ While Pennsylvania also provides no formal discovery mechanisms, it does instruct small claims litigants to disclose a series of “required documents,” including correspondence, agreements, photographs, and invoices.⁹⁷ And Minnesota bars pre-trial discovery in “conciliation court” but allows subpoenas at trial.⁹⁸

California takes a unique approach to debt collection cases, providing no discovery in small claims courts but diverting repeat debt collectors to regular courts that allow limited discovery.⁹⁹ While California provides limited discovery for cases under \$25,000, “there is no discovery in connection with the proceeding in small claims court” that are typically under \$10,000.¹⁰⁰ But judges are still empowered to “investigate the controversy” and “consult witnesses.”¹⁰¹ The California approach traces back to reforms in the 1970s that identified discovery costs as a significant problem.¹⁰² There is, however, a major limitation in civil courts: “[N]o person may file more than two small claims actions” of over \$2,500 “anywhere in the state in any calendar year.”¹⁰³ Repeat debt collectors must file their claims as “economic litigation for limited civil cases” that provide some discovery, including disclosures (e.g., lists of witnesses, physical evidence, and documents), interrogatories, document requests, requests for admissions, and one deposition.¹⁰⁴ Additionally, “[t]he court may, on noticed motion and subject to such terms and conditions as are just, authorize a party to conduct additional discovery, but only upon a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery.”¹⁰⁵ Most importantly, the California Fair Debt Buying

94. N.Y. City Civ. Ct. Act § 1801 (McKinney 2021); *Gotbetter v. Grinberg*, 872 N.Y.S.2d 690, 2008 WL 2928507, at *2–3 (Civ. Ct. July 29, 2008).

95. *Gotbetter*, 2008 WL 2928507, at *2 (quoting *Williams v. Friedman Mgmt. Corp.*, 816 N.Y.S.2d 702, 2006 WL 929230, at *1 (App. Term Apr. 10, 2006)).

96. Mich. Ct. R. 2.301.

97. Phila. Mun. Ct., Information for Small Claims Court 1–2, <https://www.courts.phila.gov/pdf/brochures/mc/SMALL-CLAIMS-PAMPHLET.pdf> [<https://perma.cc/9YUP-KV7Q>] (last visited Feb. 11, 2022).

98. See Minn. Gen. R. Prac. 512 advisory committee’s comment to 2007 amendment.

99. See Cal. Civ. Proc. Code § 116.231(a) (2021).

100. *Bruno v. Superior Court*, 269 Cal. Rptr. 142, 144 (Ct. App. 1990).

101. *Id.* at 145 (quoting Cal. Civ. Proc. Code § 117 (1983) (repealed 1990)).

102. See Norman L. Epstein, *Reducing Litigation Costs for Small Cases*, 20 *Judges’ J.*, no. 2, 1981, at 9, 9–10.

103. Cal. Civ. Proc. Code § 116.231(a). It is possible that other states provide similar limitations. Such findings are currently outside the scope of this Essay.

104. Cal. Civ. Proc. Code §§ 94–96.

105. Cal. Civ. Proc. Code § 95(a).

Practices Act (CFDBPA) imposes on debt collectors a duty to disclose—attached to each complaint—extensive details about the debt, including related documents, chain of ownership, dates, and names and addresses of entities that purchased the debt.¹⁰⁶

A few other states create a narrow discovery process in small claims courts that is almost completely court managed. In Texas, for instance, small claims courts permit discovery but limit it to what “the judge considers reasonable and necessary. Any requests . . . must be presented to the court for approval by written motion.”¹⁰⁷ This approach reverses the default from automatic discovery to one in which plaintiffs need court approval. Still, the rules note that “the judge shall develop the facts of the case, and for that purpose may question a witness or party and may summon any party to appear as a witness as the judge considers necessary.”¹⁰⁸ Texas rules still provide for automatic disclosures at the outset of litigation.¹⁰⁹

106. Cal. Civ. Code § 1788.58 (2022).

107. Tex. R. Civ. P. 500.9(a).

108. Tex. R. Civ. P. 194.5.

109. Tex. R. Civ. P. 194.5.

TABLE 2: DISCOVERY IN VARIANT SMALL CLAIMS COURTS

State	Small Claims	Discovery Available	Court Managed	Available Tools
TX ¹¹⁰	\$20,000	Yes	Yes	Disclosures, subpoenas, etc.
CA ¹¹¹	\$10,000	No	Judge may investigate controversy	Subpoenas
	\$25,000	Yes	No	All tools
NY ¹¹²	\$5,000	No	N/A	Subpoenas
PA ¹¹³	\$12,000	No	N/A	Disclosures
MI ¹¹⁴	\$6,500	No	N/A	N/A
FL ¹¹⁵	\$8,000	Yes	No	All

110. Small Claims Cases, Tex. State L. Libr., <https://guides.sll.texas.gov/small-claims> [<https://perma.cc/S4NW-D4CN>] (last updated Jan. 27, 2022).

111. Cal. Civ. Proc. Code § 116.210 (2021); Bruno v. Superior Court, 269 Cal. Rptr. 142, 144–45 (Ct. App. 1990).

112. N.Y. State Cts., Your Guide to Small Claims & Commercial Small Claims in: New York City, Nassau County, Suffolk County 1 (2019), <https://nycourts.gov/COURTS/nyc/smallclaims/pdfs/smallclaims.pdf> [<https://perma.cc/XCR7-TNNU>].

113. 42 Pa. Cons. Stat. § 1515(a) (2010); Phila. Mun. Ct., *supra* note 97.

114. Mich. Comp. Laws Ann. § 600.8401 (West 2022).

115. Fla. Small Cl. R. 7.020.

2. *Landlord–Tenant and Eviction.* — Landlord–tenant disputes account, by one measure, for around 20% of all state court cases.¹¹⁶ The largest subset of disputes—eviction cases—tend to involve fact patterns that are almost always centered on failure to pay rent.¹¹⁷ Plaintiff-landlords bring eviction claims to secure speedy repossession of occupied rental units.¹¹⁸ Many states provide for three types of evictions: failure to pay rent, violations of the lease (unrelated to rent payment), and lease expiration.¹¹⁹ The stakes for all three types of evictions, however, are enormous—the most basic human need for shelter. Indeed, a significant number of evicted tenants end up homeless.¹²⁰ Making matters more complicated, most defendants cannot afford legal representation, and there are only limited legal aid or pro bono services available for them. That means that even straightforward cases present low-income tenants with a difficult and impenetrable encounter with the legal system.¹²¹ Critics of this system present it as a cruel “eviction mill[]” that “routinely produc[es] swift judgments in landlords’ favor.”¹²²

The most complex eviction cases can involve statutory provisions on property safety, habitability, rent controls, subsidies, and other protections, including COVID-19-specific provisions.¹²³ For example, most states have warranties of habitability which make “the landlord’s right to receive payment . . . contingent on maintaining the premises according to the laws of health and safety.”¹²⁴ While tenants could make out warranty claims both offensively and as a defense to eviction proceedings, most researchers find that tenants “lack access to timely legal advice and have insufficient

116. See Nat’l Ctr. for State Cts., *supra* note 25, at 17–19 (showing that contract cases comprise 64% of state court cases and landlord–tenant cases comprise 29% of contract cases).

117. See, e.g., Pub. Just. Ctr., *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court 4* (2015), <https://abell.org/sites/default/files/files/cd-justicediverted216.pdf> [<https://perma.cc/M5YB-Q6NP>].

118. *Id.*

119. Nicole Summers, *Civil Probation 18* (Aug. 3, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3897493> [<https://perma.cc/69MN-6W36>].

120. See Pub. Just. Ctr., *supra* note 117, at 49 (noting that preventing evictions reduced homeless shelter costs). See also Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 64–66 (2018) (discussing the concept of housing as a primary need).

121. See Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 *Harv. C.R.-C.L. L. Rev.* 557, 570–72 (1988) (discussing how the poor are often subject to summary evictions and default judgments in eviction cases due to lack of legal representation).

122. Engler, *supra* note 21, at 77.

123. For a discussion of changes to state civil courts due to COVID-19, see generally Shanahan et al., *COVID*, *supra* note 12 (providing a multijurisdictional, mixed-methods study of state civil courts and their responses to the COVID-19 pandemic).

124. Steinberg, *Informal*, *supra* note 20, at 1059.

knowledge to navigate the process.”¹²⁵ Beyond habitability protections, there is a thick “‘patchwork’ of legislation that has responded to decades of social, economic and political pressure” which can present “an ‘impenetrable thicket confusing not only to laymen but to lawyers.’”¹²⁶ Some of these include the “warranty of quiet enjoyment, retaliatory eviction, and constructive eviction.”¹²⁷ Indeed, “a wide range of defenses are now typically available to tenants faced with eviction,” but unrepresented parties are “generally unable to take advantage of them.”¹²⁸ Eviction cases could involve an array of relevant facts and evidence that could be outcome determinative.

Most states provide a “summary process” for evictions that aims to be quick, informal, and procedurally streamlined.¹²⁹ The process is geared toward helping landlords quickly repossess their property and often devolves into a single question: “whether or not a landlord has the right to immediate possession of leased premises.”¹³⁰ The Supreme Court has recognized that “such circumstances call for special procedures . . . ‘inapplicable to other litigants Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment.’”¹³¹ That is why almost every state has created a streamlined process. For instance, eviction claims in Texas take place in a special court called the “Justice of the Peace Court.” Within these courts, Texas Rule 510.1 provides for special procedures that apply “to a lawsuit to recover possession of real property.”¹³² The rules bar counterclaims, streamline the process, and provide for a quick trial. Despite the simplified nature of eviction proceedings, however, California, Florida, Michigan, New York, Pennsylvania, and Texas allow a defendant to raise several defenses: illegal self-help eviction (i.e., physical attempts to remove a tenant),¹³³ improper eviction procedure,¹³⁴ paying the rent in full within a

125. See Pub. Just. Ctr., *supra* note 117, at 19–20 (revealing the results of a survey that showed that most respondents were unaware of their rights and available defenses in housing court); Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 *Rutgers L. Rev.* 1, 3 (2016) (“[F]ew tenants actually plead breach of the implied warranty of habitability, whether affirmatively or defensively.”); Kathryn A. Sabbeth, (Under)Enforcement of Poor Tenants’ Rights, 27 *Geo. J. Poverty L. & Pol’y* 97, 119–30 (2019) (explaining why public and private enforcement of the warranty of habitability is limited).

126. *La Guardia v. Cavanaugh*, 423 N.E.2d 9, 10 (N.Y. 1981) (citing 89 *Christopher Inc. v. Joy*, 318 N.E.2d 776, 780 (N.Y. 1974)).

127. Scherer, *supra* note 121, at 574.

128. *Id.* at 572.

129. Pub. Just. Ctr., *supra* note 117, at 5–6.

130. *Greene v. Lindsey*, 456 U.S. 444, 457 (1982) (O’Connor, J., dissenting).

131. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 72–73 (1972)).

132. *Tex. R. Civ. P.* 510.1.

133. See, e.g., *N.Y. Real Prop. Acts. Law* §§ 235, 853 (McKinney 2019); *Tex. Prop. Code* §§ 92.008, .0081, .009 (2013).

134. See *Tex. Prop. Code* § 24.005.

certain period,¹³⁵ breach of implied warranty of habitability,¹³⁶ retaliation,¹³⁷ general denial of allegations, and discrimination.¹³⁸ These defenses potentially open the door to a more complex dispute.

Despite evictions' potentially more complex nature, many states provide almost no discovery in summary eviction proceedings, including Michigan, Pennsylvania, and Texas. The Texas rules for eviction cases provide only for an application (complaint), answer, request for immediate possession, and trial.¹³⁹ The rules say nothing about discovery and do not give the time or tools necessary for it. However, an eviction case on appeal to a Texas county court opens up the possibility of discovery at that stage.¹⁴⁰ Similarly, neither Michigan nor Pennsylvania explicitly allow discovery in summary eviction proceedings.¹⁴¹ There may be some room in these states to coax the judge to allow document subpoenas or disclosures, but in the overwhelming number of cases there is probably no attempt to discover relevant materials. Still, parties can always bring evidence to present at trial or hearings.

By contrast, California, Florida, and New York allow eviction-related discovery in narrow circumstances. California permits discovery in summary proceedings so long as a request contains a five-day notice and is issued after a notice of eviction.¹⁴² In most New York eviction cases, discovery is "unwarranted" and "unavailable" but, at least formally, it is "not prohibited per se."¹⁴³ Requests for documents or depositions are "unavailable as a matter of right in summary proceedings," and "[l]eave of the court must be obtained to conduct disclosure."¹⁴⁴ However, New

135. See *id.* § 24.005(i).

136. See *id.* §§ 92.052, .056; *Kuriger v. Cramer*, 498 A.2d 1331, 1336–37 (Pa. Super. Ct. 1985); *Pugh v. Holmes*, 384 A.2d 1234, 1240–41 (Pa. Super. Ct. 1978); *Wofford v. Vavreck*, 22 Pa. D. & C.3d 444, 451 (1981).

137. See *id.* § 92.331.

138. See Cal. Civ. Code §§ 789.3, 1941, 1942.5 (2021); Cal. Civ. Proc. Code § 1161(2) (2020); Fla. Stat. §§ 51.011(2), 83.56(3)–(5), 83.60(1), 83.64, 83.67 (2013); Mich. Comp. Laws Ann. §§ 554.139, 600.2918, 600.5711–.5759 (West 2022); N.Y. Real Prop. Acts. Law §§ 235, 711(2), 731–741, 744, 835; 66 Pa. Cons. Stat. § 1531 (1993); Pa. R. Civ. P. 503–514. See also Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 Wis. L. Rev. 287, 302 [hereinafter Sabbeth, *Simplicity*] (arguing that "the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop").

139. See Tex. Prop. Code § 92.201; Tex. R. Civ. P. 510.

140. Ross Brenton Russell, *An Eviction Case From Start to Finish*, *Avvo* (June 9, 2016), <https://www.avvo.com/legal-guides/ugc/an-eviction-case-from-start-to-finish> [<https://perma.cc/9SRU-BCYN>].

141. Pennsylvania does not provide for explicit discovery, but it does note that a magistrate judge is bound by the "rules of evidence," which allow parties to present whatever evidence they may have during the hearing. See Pa. R. Civ. P. 512. Michigan does not technically note that discovery is explicitly allowed. But it does allow a state court all necessary tools to "hear and determine summary proceedings." Mich. Comp. Laws Ann. § 600.5732.

142. See Cal. Civ. Proc. Code § 1170.8.

143. See N.Y. Real Prop. Acts. Law § 745 practice cmts.

144. *Smilow v. Ulrich*, 806 N.Y.S.2d 392, 395 (Civ. Ct. 2005).

York courts have recognized that disclosure may be granted when there is a sufficient showing by the party of “ample need” and that the information sought is necessary to enable it to establish its asserted defenses or counterclaims.¹⁴⁵ In determining whether there is “ample need,” New York courts consider whether “the information requested is ‘carefully tailored and is likely to clarify the disputed facts,’ . . . and whether the court can structure discovery to protect pro se tenants against any adverse effects of a landlord’s discovery requests.”¹⁴⁶ In a string of decisions, New York courts have granted tenants access to landlord documents and depositions, including a deposition related to the racial, ethnic, and religious demographics of the landlord’s building.¹⁴⁷ Finally, Florida allows depositions to be taken at “any time” and allows other discovery tools by court order.¹⁴⁸ Importantly, to avoid delays, Florida rules specifically note that “[n]o discovery postpones the time for trial except for good cause shown or by stipulation of the parties.”¹⁴⁹

By contrast to the variants, Massachusetts is an example of a state that grants tenants generous discovery tools. After a landlord serves a summons and complaint, the “tenant then has a right to file an answer and discovery requests” that are due “seven days after the entry day.”¹⁵⁰ While discovery is narrower than in other civil cases, tenants can issue interrogatories, requests for admissions, requests for documents, and even seek depositions (with court approval).¹⁵¹

145. *Id.* (quoting *N.Y.U. v. Farkas*, 468 N.Y.S.2d 808, 811 (Civ. Ct. 1983)).

146. *Id.* (quoting *Farkas*, 468 N.Y.S.2d at 812).

147. *Id.* at 395–96. See, e.g., *Teichman v. Ciapi*, 612 N.Y.S.2d 293, 294 (App. Term 1994) (per curiam).

148. Fla. Stat. § 51.011(2) (2021).

149. *Id.*

150. *Summers*, supra note 119, at 19.

151. *Id.* at 19 n.90.

TABLE 3: DISCOVERY IN EVICTION CASES

State	Summary Proceedings	Discovery Available	Court Managed	Limits or Other Provisions
TX ¹⁵²	Yes	No	N/A	N/A
CA ¹⁵³	Yes	Yes	Yes	Five-day notice
NY ¹⁵⁴	Yes	Yes	Yes	Showing of ample need
PA ¹⁵⁵	Yes	No	N/A	N/A
MI ¹⁵⁶	Yes	No	N/A	N/A
FL ¹⁵⁷	Yes	Yes	Yes	Depositions at any time; no postponement
MA ¹⁵⁸	Yes	Yes	Yes/No	Nearly full discovery

152. Texas requires landlords to disclose certain facts about ownership and management. And this could be actionable in an eviction proceeding, but it is not discovery as it pertains to an eviction suit. See Tex. Prop. Code § 92.201 (2021).

153. See Cal. Civ. Code §§ 789.3, 1941, 1942.5 (2021); Cal. Civ. Proc. Code § 1161(2) (2020); California Eviction and Unlawful Detainer, Forberglaw, <http://forberglaw.com/real-estate-litigation-and-transactions/california-eviction-and-unlawful-detainer/> [https://perma.cc/DY44-B67T] (last visited Feb. 6, 2022).

154. See N.Y. Real Prop. Acts. Law §§ 235, 711(2), 731–741, 744, 835 (McKinney 2019).

155. See Pa. R. Civ. P. 512.

156. See Mich. Comp. Laws Ann. § 600.5732 (West 2022).

157. See Fla. Stat. § 51.011(2) (2021).

158. Summers, *supra* note 119, at 19–20.

3. *Other Cases: Family Courts and Agency Appeals.* — The last significant category of lawyerless cases covers family law disputes and appeals from state agency decisions (covering, for instance, unemployment insurance). By some measures, these two contexts are responsible for around 9% of all cases in state civil courts.¹⁵⁹ And the rate of these cases that are pro se can be surprising. For instance, in family law disputes, “nearly all cases involve two unrepresented parties.”¹⁶⁰ Some studies of employment insurance appeals in the District of Columbia have found high rates of pro se cases.¹⁶¹ Given the diversity of disputes, procedural posture, and state laws, it would be nearly impossible to survey all of the discovery rules in these cases. But a sample gives an idea of the realm of possibilities.

Begin, then, with a sampling of discovery in family courts. The trend in almost all the variant states is toward extensive early disclosures. In California, Florida, and Texas among others, discovery statutes provide the full array of discovery devices for family cases.¹⁶² But the California Family Code also sets forth specific disclosure requirements in divorce cases, mandating the early exchange of “disclosure with current income and expense declarations.”¹⁶³ Even more, the code “requires a continuing duty of each party to update and augment that disclosure” and attempts to reduce the adversarial nature of the proceedings.¹⁶⁴ Texas also mandates extensive disclosures, especially for divorce and child or spousal support cases.¹⁶⁵ Like California, Texas also allows for a formal process of requests for production, interrogatories, depositions, and other tools.¹⁶⁶ The same applies for Florida, which allows not just full discovery¹⁶⁷ but also initial mandatory

159. See Nat’l Ctr. for State Cts., *supra* note 25, at 17 n.53 (showing that 9% of civil cases involve “appeals from administrative agencies and cases involving criminal or domestic-related matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, and bond claims)”).

160. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 3, at 512; Steinberg, *Demand Side*, *supra* note 3, at 751.

161. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 *Denv. L. Rev.* 469, 481–82 (2016) [hereinafter Shanahan et al., *Lawyers*].

162. See, e.g., Cal. Civ. Proc. Code § 2016.080 (2018); Fla. Fam. L.R.P. 12.280–.285; Tex. R. Civ. P. 192.3–4; Schnabel v. Superior Court, 854 P.2d 1117, 1123 (Cal. 1993) (“[E]ach spouse is entitled to complete disclosure of all relevant information to allow an independent review of the marital property and financial status of the spouses.”).

163. Luisa Bigornia, *Discovery Rules in Divorce Litigation* (California Family Code §§ 2100-13), 11 *J. Contemp. Legal Issues* 196, 197 (2000); see also Glen L. Rabenn, *Fiduciary Duties of Disclosure in Family Law Cases*, CaliforniaDivorce.com, <https://www.californiadivorce.com/divorce-procedures/fiduciary-duties-of-disclosure-in-family-law-cases/> [<https://perma.cc/W6BQ-WXKQ>] (last visited Feb. 6, 2022).

164. See Bigornia, *supra* note 163, at 197.

165. See Tex. R. Civ. P. 192.3(a), 194.2(c)(1). These disclosures have to be made within thirty days of the respondent’s initial pleading. Tex. R. Civ. P. 192.1, 194.2(c)(2).

166. Tex. R. Civ. P. 192.1.

167. See Fla. Fam. L.R.P. 12.280, .281, .285.

disclosures except in “proceedings involving adoption, simplified dissolution, enforcement, contempt, injunctions for protection against domestic, repeat, dating, or sexual violence, or stalking, and uncontested dissolutions when the respondent is served by publication and does not file an answer.”¹⁶⁸

At least three of the variant states allow a narrower degree of discovery in family courts, limiting its reach and scope. New York, for instance, allows discovery in family law disputes, but it does not specify the different tools available to parties other than requests for specific documents.¹⁶⁹ Pennsylvania, too, allows different types of discovery “in alimony, equitable distribution, counsel fee and expense proceedings and complex support cases.”¹⁷⁰ But Pennsylvania allows the full array of discovery tools for a broader set of family law cases.¹⁷¹ Michigan similarly allows several different types of discovery in family disputes, but it appears that courts have greater discretion to control its scope.¹⁷²

* * *

Part I explored the discovery rules across several variant states in both general civil litigation courts and small claims, eviction, and family law courts. It appears that many of the variant states have rejected the federal transsubstantive approach by creating discovery tracks tied to the amount in controversy in a particular case, substance of the claim (especially business courts), higher disclosure requirements that exceed those in Federal Rule 26, and an increasing emphasis on judicial case management. These are important departures that attempt to tailor discovery more closely to the facts of each case. Moreover, the variant states also show how radically distinct discovery is in small claims, eviction, and family law cases. For instance, several states provide no discovery at all in debt collection and eviction cases, and many of them embrace a streamlined approach. In short, state discovery is increasingly diverging from the federal approach, and discovery in lawyerless cases is nearly unrecognizable to federal eyes.

II. THE BENEFITS AND COSTS OF LAWYERLESS DISCOVERY

This Part steps back to provide an analysis of the costs and benefits of discovery in state courts and whether there is any room for discovery

168. Fla. Fam. L.R.P. 12.285. These disclosures must be made within forty-five days of service of the initial respondent’s pleading. *Id.*

169. N.Y. Fam. Ct. Act §§ 330.1–335.2 (McKinney 2010).

170. Pa. R. Civ. P. 1930.5(a) (“There shall be no discovery in a simple support, custody, Protection from Abuse, or Protection of Victims of Sexual Violence or Intimidation proceedings unless authorized by order of court.”); Pa. R. Civ. P. 1930.5(b) (“Discovery shall be available without leave of court in accordance with Pa.R.C.P. Nos. 4001–4025 in alimony, equitable distribution, counsel fee and expense, and complex support proceedings.”).

171. See Pa. R. Civ. P. 4004, 4007.1.

172. Mich. Ct. R. 2.301(A), (C).

reforms. The discovery catch-22 is a serious problem in lawyerless cases: While discovery can theoretically promote benefits for unrepresented parties and small litigants, it can also impose unwieldy complexity that these litigants cannot handle. Perhaps state governments are not properly balancing these costs and benefits, leaving the system in a suboptimal state. This Part ends by suggesting a potential “sweet spot” of simplified but open discovery.

A. *Discovery’s Benefits in Theory*

At the federal level, the traditional view is that discovery promotes a trilogy of benefits: fairness, accuracy, and negotiated settlements—values or outcomes that are central to a civil justice system.¹⁷³ By forcing parties to engage in a full exchange of information, discovery gives the decisionmaker the full facts necessary to make an accurate determination.

173. Zambrano, *Discovery as Regulation*, supra note 1, at 89–94. For the fairness and accuracy rationales, see *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 392 (2004) (Stevens, J., concurring) (“Broad discovery should be encouraged when it serves the salutary purpose of facilitating the prompt and fair resolution of concrete disputes.”); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (“Modern instruments of discovery . . . together with pretrial procedures make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”); *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir. 1968) (“The purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice.”); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev.* 1295, 1302 (1978) (characterizing the disclosure of data needed to ascertain the truth as the paramount objective of discovery); E. Donald Elliott, *How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery*, 71 *Vand. L. Rev.* 1785, 1788 (2018) (describing the goal of discovery as giving the parties enough discovery to reach a just result in settlement or trial); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 *Mich. L. Rev.* 205, 205–06 (1942) (describing discovery as a useful tool for narrowing the issues at trial and obtaining evidence for use at trial); Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 *Vand. L. Rev.* 2037, 2045 (2018) (describing discovery as a process which provides information to parties, the public, and to regulators); Jay Tidmarsh, *Opting Out of Discovery*, 71 *Vand. L. Rev.* 1801, 1811 (2018) (“Principally, [discovery] ensures a rational and accurate process for adjudicating or settling claims.”).

For a discussion of the relationship between discovery and settlement, see John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *Yale L.J.* 522, 526 (2012) (mentioning that discovery has caused more pretrial disposition of cases, including settlement); James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 *U. Chi. L. Rev.* 297, 297 (1940) (endorsing the 1938 Rules on the grounds that discovery procedures reduce burdens at trial); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure* (pt. 1), 38 *Colum. L. Rev.* 1179, 1180 (1938) (same); Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 *Tenn. L. Rev.* 737, 737–38 (1939) (describing a system that waits for trial to flush out information as “economically extravagant” and a “wasteful method of civil litigation” and distinguishing the Federal Rules); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 *J. Empirical Legal Stud.* 943, 950–54 (2004) (discussing how discovery both facilitates and encourages parties to reassess their chances of success at trial, with a tendency to produce fewer trials).

Importantly, it also empowers one-shot plaintiffs to “obtain critical information from repeat player defendants.”¹⁷⁴ In this manner, discovery serves as a leveler: It gives small litigants an opportunity to fully take advantage of the court system, uncover misfeasance, assert rights of participation in the legal process, and remedy informational asymmetries.¹⁷⁵

By promoting a fair adjudication process, discovery also taps into people’s perceptions of procedural justice.¹⁷⁶ As Tom Tyler has argued, “[p]eople . . . feel that procedures are fairer when they believe they have had some control in the decision-making procedure. Such control includes having the opportunity to present one’s arguments, being listened to, and having one’s views considered.”¹⁷⁷ Discovery does this by giving ordinary citizens the power to investigate wrongdoing, to control the relevant documents and search process, and, ultimately, present their full arguments without any leaf left unturned. In short, discovery can promote participation and procedural justice.

On settlements, discovery can counterintuitively save costs by rendering the need for a trial superfluous. Indeed, Edson Sunderland, the drafter of the rules of discovery, argued that “[d]iscovery before trial may thus make unnecessary the trial itself.”¹⁷⁸ Trials are notoriously the most expensive process in litigation because they require a full commitment by lawyers, judges, supporting staff, and experts. Discovery, by contrast, empowers parties to uncover information on a more relaxed timeline and constantly informs settlement negotiations. Even more, discovery can force the parties to reach a quick settlement to avoid further costs, further allowing the parties to “share the trial transaction costs as bargaining surplus.”¹⁷⁹

A more recent theory of discovery also claims that empowering plaintiffs with depositions, interrogatories, and document requests creates the equivalent of administrative subpoena power and, therefore, serves as a regulatory tool. By forcing the disclosure of large amounts of information, “the discovery system deters harmful behavior . . . and, most importantly, shapes the primary behavior of regulated entities.”¹⁸⁰ The key to this “regulatory” role for discovery is that it serves two main purposes: deterrence and an information infrastructure for regulated entities. Discovery, in one sense, is an audit: It discloses the private functioning of a regulated entity to litigants, judges, and the outside world. By doing so, it forces

174. Zambrano, *Discovery as Regulation*, *supra* note 1, at 90.

175. *See id.* at 75, 77, 91–92.

176. Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. Davis L. Rev. 1317, 1328–34 (2019) (discussing the relationship between procedural justice and discovery).

177. Tom R. Tyler, *Why People Obey the Law* 137 (2006).

178. Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 *Annals Am. Acad. Pol. & Soc. Sci.* 60, 75 (1933).

179. Zambrano, *Discovery as Regulation*, *supra* note 1, at 94.

180. *Id.* at 75.

entities to create and regularize the production of information, in expectation of future litigation. And it informs competitors in the market and regulators about current events in an industry.

Bringing all of this together, the question is whether the discovery values or outcomes of fairness, accuracy, settlement, and regulation can translate in lawyerless state courts. More fundamentally, can discovery even be useful in lawyerless cases? The most important problem, of course, is that lawyerless parties, for the most part, would not know how to take advantage of discovery tools. But, assuming just for the purposes of this section that defendants understood how to navigate discovery, there would be several potential benefits at hand.

First, by far the most important role for discovery in lawyerless cases would be to help pro se parties craft defenses against eviction or debt collection claims. Observers of the eviction legal process have long noted that “[p]roving defenses in an eviction action may require the use of discovery devices such as the subpoena of various witnesses and documents.”¹⁸¹ As discussed above, this is partly because eviction defenses—like violations of the warranty of habitability or constructive evictions—can actually require digging into the facts and records. For instance, proceedings can involve not only simple “factual disputes such as whether the ceiling leaks or whether rent was paid” but also complex statutory provisions under state or federal law.¹⁸² And a case with a fully developed record can result in not just avoiding eviction but also “rent abatements and apartment repairs.”¹⁸³ Similarly, discovery could aid some debt collection defenses, including those under the Fair Debt Collections Practices Act. The FDCPA gives defendants offensive claims over “threat of violence to collect a debt, the public shaming of debtors, or frequent communication with the intent to harass a debtor,” as well as imposing prohibitions on false representations in connection with debt collection.¹⁸⁴

Beyond directly empowering litigants to defend against claims, discovery could shape settlement terms and informal discussions. As the literature on civil litigation often remarks, discovery is often a deterrent—shaping sophisticated parties’ calculations of whether to proceed based on their assessment of what the opposing party might uncover.¹⁸⁵ That in turn shapes settlement offers. A defendant’s credible threat to use discovery would change a landlord or debt collector’s calculations of their likelihood of success and settlement strategy. Along with this purpose, discovery

181. Scherer, *supra* note 121, at 587.

182. *Id.*

183. See Rachel Kleinman, Comment, Housing *Gideon*: The Right to Counsel in Eviction Cases, 31 *Fordham Urb. L.J.* 1507, 1516 (2004) (“[T]he presence of legal representation for indigent tenants contributes to case resolutions that include fewer evictions and more rent abatements and apartment repairs.”).

184. Wilf-Townsend, *supra* note 6, at 1707–09.

185. See, e.g., Zambrano, *Discovery as Regulation*, *supra* note 1, at 94.

could also be a pro-settlement, offensive weapon that allows lawyerless litigants to delay proceedings to increase bargaining leverage.¹⁸⁶ In Massachusetts eviction courts, for instance, a discovery request triggers a two-week postponement of trial.¹⁸⁷ In this sense, discovery is not serving the purpose of promoting accuracy or fairness at all. Instead, it is merely a tool that structures settlement negotiations.

Second, discovery could have positive externalities by empowering one-shot litigants to uncover corporate misdeeds, landlord abuses, or employer violations. An FDCPA counterclaim against a debt collector could disclose the common use of violent threats “to collect a debt,” as well as any financial frauds perpetrated by debt collection companies or banks.¹⁸⁸ In the eviction context, take again, for instance, Massachusetts’s robust discovery rules in eviction cases. These rules “grant tenants extensive written discovery rights” that can probe “the landlord’s basis for eviction as well as to any defenses or counterclaims they assert.”¹⁸⁹ In other words, Massachusetts fully empowers tenants to investigate potential wrongdoing in the eviction process, in compliance with a lease, or in relation to the warranty of habitability. This use of discovery, of course, aligns with its core goal of promoting accuracy and fairness. More importantly, however, is that it would promote positive externalities, uncovering wrongdoing that can benefit the broader public.

There is a related benefit for discovery here in promoting a sense of meaningful participation in the legal system. Litigants could feel empowered knowing that they can uncover the true facts behind every case. As discussed above, expanding litigants’ sense of control over their cases can make “[p]eople . . . feel that procedures are fairer.”¹⁹⁰ Discovery can do this by giving tenants or debtors a meaningful power to search for any potential evidence that can help their case. At best, this would promote a sense of procedural justice.

Third, even in small cases, one could imagine a regulatory role for discovery. With it in place, legislators could adopt more ambitious labor or consumer laws that rely on private enforcement. Suppose, for instance, that state legislators wanted more robust habitability protections. As discussed below, one way to enforce those requirements is to force large landlords to maintain records of any habitability violations and, in turn, obligate them to disclose those records in litigation.¹⁹¹ Similarly, state legislators could provide for significant employee protections that can be

186. Greiner et al., *supra* note 16, at 965; Sabbeth, *Simplicity*, *supra* note 138, at 299–300 (discussing the utility of intentional delay in tenant-related proceedings).

187. Mass. Unif. Summary Process R. 7(b).

188. Wilf-Townsend, *supra* note 6, at 1764.

189. Summers, *supra* note 119, at 33.

190. Tyler, *supra* note 177, at 137.

191. See *infra* section III.B.2.

enforced through capacious discovery obligations. In these cases, discovery works as an enforcement mechanism for regulatory policies, allowing state legislatures or regulators to craft rules in the shadow of litigation. In order to serve these purposes, however, discovery would have to be easily accessible for unrepresented parties, relatively cheap and quick, and actually useful in lawyerless cases with small-stakes claims.

B. *Discovery Costs in Lawyerless Claims*

Despite its potential benefits, the problem is that discovery can also clog the justice system, delaying cases and increasing costs for all parties. And where discovery does not provide regulatory benefits, these increased costs are not warranted. Most importantly, lawyerless parties would likely struggle to take advantage of discovery without expert advice. As argued below, this probably means that broad discovery rights are best only under narrow circumstances explored in Part III.

The first drawback is, of course, costliness. The sources of cost have long been outlined in the literature: taking depositions, assembling documents in response to requests, and soliciting and producing answers takes significant time and work hours.¹⁹² These costs are directly contradictory to the simplifying purpose of small claims and summary eviction processes. That is why a California Superior Court once found that discovery was not available in small claims cases, noting the following:

We are convinced that the Legislature did not intend that formal discovery procedures should be permitted in either the small claims action itself or the *de novo* proceeding on appeal. Obviously, formal discovery procedures in the original small claims actions would be completely inconsistent with the goals and procedures of the small claims court and would impose an unacceptable burden on unrepresented litigants.¹⁹³

Increased costs are not only antithetical to the lawyerless enterprise; they would actually turn many cases into negative claims where the costs outweigh the amount in controversy. Costliness and time commitment are especially problematic in that small claims litigants already default at high rates because they have no time to attend trials. They certainly have no time to prepare subpoenas either.

192. Cf. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 637 (1989) (describing the cost-benefit analysis of taking additional discovery relative to the stakes of a case); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 774 (2011) (discussing the allocation of discovery costs between the producing party and the opponent); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299, 300 (2002) (“In cases where discovery was actively used, it was thought to be unnecessarily expensive and burdensome.” (quoting Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 523 (1998))).

193. *Bruno v. Superior Court*, 269 Cal. Rptr. 142, 144 (Ct. App. 1990).

A related but distinct problem is increased complexity. Some of the civil *Gideon* literature along with many legal aid organizations have long advocated for procedural simplification and a rejection of complexity.¹⁹⁴ Even in simplified small claims courts, “poorer claimants routinely are steamrolled during the course of the process.”¹⁹⁵ A discovery system almost by definition depends on technical assistance by attorneys. But part of the problem is that even when pro se litigants want experienced counsel, there is a lack of supply and funding for legal aid lawyers. Inexperienced litigants often do not know where to look for attorneys or how to decide whether to litigate on their own.¹⁹⁶ An older report from New York City’s Housing Court notes the following about eviction cases:

[It is] a process that happens so quickly that many tenants are left wondering if the case is actually over or not; when most tenants have no legal training and are confronted with documents full of legal jargon; when the landlord’s attorneys are so at home in the court that they appear to tenants to be court personnel . . .¹⁹⁷

Without an attorney present, discovery would only increase the complexity of a case and, in a sense, punish unrepresented parties. Indeed, a study by Shanahan and co-authors found that represented claimants that used evidentiary procedures in unemployment claims actually had worse outcomes than those who did not use the same procedures.¹⁹⁸ The authors suggest that use of evidentiary procedures by itself can be ineffective without broader strategic expertise.¹⁹⁹ So it may be that what matters in litigation is not access to discovery or evidence per se but, rather, access along with good representation. As Steinberg has noted in the context of court procedures:

Although never made explicit, the system, in effect, depends upon the skill of an attorney to transform a party’s grievance into a highly stylized set of allegations, evidence, and arguments,

194. See Deborah L. Rhode & David Luban, *Legal Ethics* 737 (2d. ed. 1995) (“The gap between the aspirations and the operation of our legal system has prompted efforts along three basic lines: strategies that reduce the need for legal intervention and assistance; initiatives that minimize the cost of legal procedures and services; and attempts to expand the provision of subsidized aid.”); Engler, *supra* note 21, at 75 (“Simplification has become an important theme, with the increased focus on self-representation and the changes within the court system over the past decade.”).

195. Engler, *supra* note 21, at 76.

196. For example, 50% of individuals seeking representation are turned away because the Legal Services Corporation lacks sufficient resources. Legal Servs. Corp., *Justice Gap Report: Measuring the Unmet Civil Legal Needs of Low-Income Americans 10* (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/7ZBY-3BQV>]. The Legal Services Corporation reported that litigants have a number of reasons for not seeking professional help. *Id.* at 59.

197. Scherer, *supra* note 121, at 574 (quoting *The City Wide Task Force on Hous. Ct., 5 Minute Justice or “Ain’t Nothing Going on but the Rent!”* 34 (1986)).

198. Shanahan et al., *Lawyers*, *supra* note 161, at 473 (attributing this counterintuitive outcome to a few factors, including a lawyer’s strategic expertise).

199. *Id.* at 508–09.

upon which a judge or jury can base a ruling. Unrepresented parties face challenges at every step of the litigation, from properly filing and serving an action, to gathering and presenting admissible evidence to a judge.²⁰⁰

The category of cases discussed above—debt collection, landlord-tenant, and others—mostly involve lawyerless parties, making discovery unattainable or even counterproductive in the mine-run of small disputes. By themselves, unrepresented parties already have difficulty assembling complaints. Indeed, “pro se parties routinely flunk basic procedural entrance exams,” even on the most basic tasks like “filing a pleading in the proper format, serving opponents with key legal documents, and scheduling necessary hearings with the court.”²⁰¹ It would seem almost impossible to add on top of current procedures the burden of drafting document requests, interrogatories, subpoenas, and depositions. And, even when there are forms that parties can simply fill in, it isn’t clear that unrepresented parties know how to take advantage of them. One added feature of complexity is that it invites court involvement. This is especially true when pragmatic managerial judges may want to help unrepresented parties.

Finally, costliness and complexity combine to form the third problem of delay. Discovery can be a notoriously slow process, breaking down into disclosures, a slow exchange of relevant materials, depositions, and renewed document requests. In the meantime, the process can involve lengthy negotiations or litigation in front of judges.

All of these problems challenge the foundational value of speediness embedded in lawyerless cases. These problems add up to a major reason to avoid discovery. As one court described, “The informality and convenience of small claims practice is necessarily frustrated by requiring pro se litigants to respond to formal motion practice . . . prior to the hearing of their case.”²⁰²

C. *The Discovery Status Quo Might Be Suboptimal*

Given that discovery may be too complex for lawyerless parties, is the status quo optimal? What would an ideal discovery system even provide for unrepresented parties in most cases? One place to start is to recognize two critiques of the status quo: a practical one and a theoretical one. The literature on lawyerless courts offers a practically grounded critique of the status quo based on the observation that local and state courts are currently in “crisis” and that new tools are needed to help unrepresented parties.²⁰³ A second critique recognizes that while discovery is a bundle of tools that forms a spectrum of information seeking, many states—although

200. Steinberg, *Demand Side*, supra note 3, at 744.

201. *Id.*

202. *Friedman v. Seward Park Hous. Corp.*, 639 N.Y.S.2d 648, 649 (App. Term 2006).

203. See, e.g., *Carpenter et al., Studying*, supra note 3, at 260.

not all—have approached it as an either–or switch: full discovery or none at all.

Both of these critiques expose how current systems are not experimenting enough and may be missing a sweet spot where discovery (a) gives lawyerless claimants a tool to uncover misfeasance; (b) offers lawyerless claimants increased bargaining leverage in settlement negotiations; and (c) allows state legislators to further rely on private enforcement or private defenses as a regulatory policy. Such a system could both change case outcomes and also promote a real sense of procedural justice. But, at the same time, such a system would have to avoid increasing costs beyond the typical amount in controversy, reliance on attorneys, and delays that, ultimately, deny access to justice.

1. *The Practical Critique.* — Some state governments, academics, and reformers seem to agree that there is something close to a “crisis” in lawyerless courts.²⁰⁴ Some data show that “more than three-quarters of [state civil] cases involve at least one unrepresented party.”²⁰⁵ These lawyerless cases cover fundamental rights in society: rights to housing, financial security, and family relationships. Yet, by many accounts, the legal system is not providing a fair shot to these litigants. One major teaching of the literature on lawyerless courts is not only that discovery is “impossible to manage” in these cases but that most of the work “happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings.”²⁰⁶

For three decades, civil justice reformers have focused on judicial case management and legal aid organizations as solutions to pro se problems. As Carpenter, Shanahan, Steinberg, and Mark note, “legal scholars concerned with access to justice have consistently argued for an end to traditional judicial passivity in favor of an active, interventionist role in lawyerless cases.”²⁰⁷ Reformers have also emphasized the importance of legal aid organizations as forms of “unbundled” legal assistance.²⁰⁸ Advocates have argued not just that organizations can provide free counsel but that they can provide limited assistance at different litigation stages. Legal aid providers in the past few decades have constructed programs to assist pro se litigants by, among other things, providing “assistance in filling out answer and discovery forms.”²⁰⁹ This type of discovery assistance involves attorneys who draft subpoenas, draft motions, or collect “answers to discovery requests.”²¹⁰

While these reforms have long been on the table, judicial management and legal aid have not solved pro se problems for several reasons.

204. *Id.*

205. Carpenter et al., *Judges in Lawyerless Courts*, supra note 3, at 511.

206. *Id.* at 514; Steinberg, *Demand Side*, supra note 3, at 744.

207. Carpenter et al., *Judges in Lawyerless Courts*, supra note 3, at 516.

208. Greiner et al., supra note 16, at 904.

209. *Id.* at 908.

210. *Id.* at 918.

First, courts and legal aid organizations simply lack sufficient resources to invest in procedural complexities like discovery. Even if judges wanted to engage in more inquisitorial discovery, heavy caseloads mean that judges have no time to fully explore the facts of each case.²¹¹ Moreover, as the civil *Gideon* literature has discussed, even appointing counsel to assist with discovery can “replicate the problems that already exist on the criminal defense side,” including lack of expertise in the particular subject matter.²¹² This is why, despite a decade of calls for judicial case management, “[j]udges [have] maintained legal and procedural complexity in their courtrooms by offering only the most limited explanations of court procedures.”²¹³ There are other structural barriers, including the judicial norms at the state level that push judges to seek quick settlements rather than a fuller investigation of the case. That and other structural problems mean that attempts to move toward inquisitorial discovery have not been successful. Second, legal aid has also been no panacea and probably only of limited use in discovery. The most relevant empirical study has found that unbundled discovery assistance is “not enough to assure outcomes a competent attorney could produce.”²¹⁴ One teaching of most of this literature is that the current system is not working.

Operating under a suboptimal discovery process can, by any realistic account of litigation, heavily affect the broader performance of the litigation system. Indeed, if decades of scholarship on federal courts is anywhere near correct, then missing a fundamental block of pretrial litigation increases information asymmetries, unfairness, and inequality. In line with this thinking, Steinberg has noted that in habitability cases, discovery could “play a central role in . . . making it unlikely that tenants can succeed without attorney representation.”²¹⁵

The behavior of state governments in this context also suggests that discovery can affect case outcomes and the litigation system’s performance. For decades, states have experimented with discovery reform, either banning discovery entirely, creating the use of “forms” that pro se parties can use, or relying on judicial management. At every stage of that reform process, state legislators have argued that discovery is a significant and influential part of the litigation process. Even states that eliminated discovery did so because it was a “stumbling block[] faced by pro se litigants.”²¹⁶ To these states, discovery increased case complexity and actually helped sophisticated parties against pro se litigants. The point is that no one doubts that discovery can be important. If the system is in “crisis,” we should consider the role of discovery in contributing to such a crisis.

211. Kleinman, *supra* note 183, at 1516.

212. *Id.* at 1518.

213. Carpenter et al., *Lawyerless Courts*, *supra* note 3 (manuscript at 7).

214. Greiner et al., *supra* note 16, at 935.

215. Steinberg, *Informal*, *supra* note 20, at 1065.

216. Kindregan & Kindregan, *supra* note 24, at 39.

2. *The Either–Or Critique.* — As discussed above, many states have chosen discovery systems that are at the polar ends of the spectrum: either full discovery powers or none at all. But there is no reason to believe either of those are optimal when there may be ways to capture the benefits of discovery while minimizing costs. In other words, a maximal discovery system may well be inappropriate for lawyerless cases. But probably so is a system where all discovery is out of the question. Some states have tried to avoid the categorical choice by leaving it up to judges through a standard (i.e., empowering judges to “investigate the controversy”²¹⁷). But these systems, too, avoid more granular choices. Small claims judges are asked to act as mediators and promote settlement—so they have no reason to allow for any actual discovery at all. Judges are expected to solve cases expeditiously and without complications. That may be why even when motions to compel discovery are available, one empirical study found that “judge[s] infrequently ruled on these motions.”²¹⁸ But states have not fully experimented with intermediate approaches toward discovery. For instance, no state that provides for discovery “if the judge so approves” has attempted to enforce such a standard with sharp obligations on judges to investigate cases.

D. *The Sweet Spot for Discovery Reform*

The question, then, is whether reforms to discovery and lawyerless courts can achieve the best-case benefits without the associated costs in discovery. In the words of the Supreme Court, can states develop procedures that are helpful for unrepresented parties but also “sufficiently straightforward” and without “a degree of formality or delay” that can frustrate the whole project?²¹⁹ In order to tackle this question, we must address several analytic axes that are relevant to any discovery regime: the relevant actor who would bear the costs of discovery, the situs of information or knowledge, and the relationship between discovery and the substantive claim. Any potential discovery reforms—discussed further in Part III—should focus on (1) discovery obligations only on sophisticated parties that (2) may hold the relevant information in complex cases and (3) only in cases that can make use of that information, usually cases where unrepresented defendants allege wrongdoing by large plaintiffs (landlords and debt collectors above some revenue threshold).

This section uncovers a set of design principles that can guide policymakers in implementing state court reforms. Armed with the insights of Parts I and II, we can begin to draw conclusions about how to expand or contract discovery in state courts. Still, a word of caution is due: There is no all-things-considered best option for all states in all circumstances. To the contrary, discovery design will be highly contextual and far from the

217. Cal. Civ. Proc. Code § 116.520 (1990).

218. Greiner et al., *supra* note 16, at 919–20, 927, 934.

219. *Turner v. Rogers*, 564 U.S. 431, 446–47 (2011).

transsubstantive federal model. In the real world, judges should shape discovery depending on the needs of the case. While discovery may serve a regulatory role in employment or eviction cases, deviations may be necessary in debt collection claims.

1. *The Relevant Actor: Impose Discovery Only on Sophisticated Parties or Government.* — The first and most obvious design principle for any discovery reform is to avoid imposing any new complex procedures on lawyerless parties. Discovery reforms must begin by taking into account the relevant parties in any lawyerless case. The average case will usually involve a few actors: a landlord or debt collector plaintiff, a lawyerless defendant, and the judge. These are direct actors in the sense that they participate in the actual litigation. But there are also peripheral actors—especially governments (local, state, or federal) and legal aid organizations. These peripheral actors could potentially enter the case to assist the resolution of a particular litigation.

Once we understand that there are several potential actors in any lawyerless case, the focus should be on the actor best positioned to conduct or aid in the operation of discovery. As discussed above, lawyerless parties find it difficult to navigate the complexities of discovery. But governments, repeat players, and sophisticated entities (large landlords or debt collectors) can do so. The system cannot be blind to the resources and sophistication of the potential actors involved in litigation. Any expansion of discovery should not apply equally to both one-shot litigants and repeat players—it must take into account the resources of the parties. Moreover, the system currently performs well for parties who can afford experienced counsel. The beneficiary of discovery reforms has to be parties who are now shut out of the system. In landlord–tenant cases, that means potentially empowering tenants without giving landlords more thorough discovery powers. In debt collection cases, that would mean focusing on the discovery obligations of large debt companies.

Lawyerless cases in the context of landlord–tenant and small claims have several commonalities. First, there is often a sophistication asymmetry whereby one-shot litigants litigate against experienced repeat players. For instance, in the small claims context it appears that most claims are filed by large debt collectors against low- or middle-income litigants.²²⁰ Similarly, property cases involve low-income tenants facing claims from larger landlords. But in both of these claims, the unsophisticated party is a defendant, not a plaintiff. This presents an unusual inversion of the typical problems in federal court, involving small one-shot plaintiffs (in consumer protection or employment claims) against sophisticated defendants. Second, tenants and debtors are usually unrepresented. This means they lack the resources and know-how to effectively navigate complex procedures. Both of these commonalities mean that lawyerless parties cannot navigate

220. Wilf-Townsend, *supra* note 6, at 1706–07.

broader discovery and cannot even take advantage of enhanced discovery powers in their favor.

Setting aside discovery obligations on lawyerless parties, reforms must focus on imposing obligations on sophisticated plaintiffs, judges, the government, and legal aid organizations.

2. *The Situs of Knowledge: Impose Obligations Only on Parties With Actually Relevant Information.* — A second design principle is that whatever discovery reforms can do, they should always focus on the location of relevant information. Consider again the typical lawyerless cases discussed above, landlord–tenant claims and debt collection. In most of these cases, when plaintiffs sue, the key issue is whether (a) the tenant has paid rent or (b) the debtor has failed to pay by a due date.²²¹ These relatively simplistic scenarios involve information that plaintiffs have at hand, mostly a lease or a contract. But counterclaims over warranty of habitability or fraud (as well as claims under the FDCPA or bankruptcy defenses) would require further information that, again, only plaintiffs have. It is only in these circumstances that it makes sense to impose discovery obligations on large landlords and debt collectors.

3. *The Substance of the Case: Expand Discovery Only When Unrepresented Parties Allege Serious Wrongdoing.* — A final design principle is that discovery will only be useful in some lawyerless cases involving complex counterclaims, corporate misdeeds, landlord abuses, or employer wage violations. Most of the time this means that a pro se defendant (a tenant or debtor) will allege serious wrongdoing by plaintiff landlords or collectors. It bears repeating that discovery's benefits are important only when there is an asymmetry of information that could, conceivably, impact the outcome of a case. As discussed above, discovery can promote fairness, accuracy, settlement, and regulatory goals.²²² But in most straightforward landlord–tenant or debt collection cases, discovery will be unnecessary. The focus should be on cases where pro se parties allege significant harms or illegal actions—for instance, cases where slum lords routinely violate habitability requirements. Or cases where a debtor argues that a debt collection company engages in violent threats or widespread fraudulent practices. In these claims, discovery may either change the outcome of the case or promote procedural justice by giving pro se parties full participation rights in litigation. At best, discovery will promote state or local regulatory goals, like better provision of housing services. One relevant variable is whether there are multiple available defenses under state or federal law. Discovery will be more helpful when pro se parties can actually put forth defenses in lawyerless cases. On one end of the spectrum, landlord–tenant cases are likely to benefit from discovery because defendants have an array of defenses: warranty of habitability, warranty of quiet enjoyment, construc-

221. See notes 116–119 and accompanying text.

222. See *supra* section II.A.

tive eviction, and others. All of these defenses hinge on discoverable information about the conditions of a property or performance of a lease. That might be true of debt collection cases that involve violations of the FDCPA (via fraud or violent threats). Discovery could actually be outcome determinative. On the other end of the spectrum are some debt collection cases where the allegations are over nonpayment of a debt and there are no potential counterclaims. Most likely, these cases will involve one key document and no complex defenses. Discovery would not change the case and would only add unnecessary complexity.

* * *

These three design principles lead to several early conclusions. States and localities should only expand discovery in cases that involve at least one sophisticated party, potentially relevant information (in the form of a record or documents), and available arguments under federal or state law that hinge on discoverable information. From this, we can infer areas where states should not expand discovery: (a) in a transsubstantive manner; (b) in small claims cases involving two individuals; and (c) in most debt collection claims and any other cases that hinge on a single contract (without potential statutory defenses). But, beyond these conclusions, Part III addresses how discovery should expand.

III. A NEW EXPERIMENT: A CIVIL OPEN FILE STATUTE?

Given all of the above, this Part focuses on a novel experiment borrowed from criminal discovery: a civil open file statute. Such a statute would obligate sophisticated landlords, debt collectors, and other plaintiffs to assemble and disclose at an early stage a complete record of relevant documents. And the statute would embrace the three design principles developed in section II.D, applying only to sophisticated landlords or debt collectors in narrow contexts. The proposal follows recent scholars who have advocated for a spirit of experimentation in state courts. States should innovate and try out new methods to increase fairness, access to justice, and participation in the legal system. Below, this section explores how criminal discovery may be an example before exploring a potential civil analogue.

Before delving into the details, however, a clarification on other discovery alternatives is in order. Given the realm of possibilities discussed above, reforms should be limited to either an expansion of existing disclosure regimes, further emphasis on inquisitorial discovery, or reliance on outside legal aid organizations. But there is no reason to believe that judicial case management or legal aid would resolve existing problems, especially because most states have already tried that route. To be sure, states could continue pushing on this approach, expanding discovery rights but subjecting them to judicial approval or active case management. That is, in a sense, California's approach in small claims cases, in which the rules

provide that the judge may “investigate the controversy.”²²³ Continuing down this path might include more detailed obligations on judges to investigate cases. Perhaps changing statutory language from “may” investigate to “must” would be a start. That, in turn, would bring the complication of how to enforce such an obligation on judges.²²⁴ Alternatively, the rules could empower one-shot defendants to request judicial intervention, especially in cases where tenants and debtors have potential defenses against plaintiffs’ claims. But, as explored below, rather than insisting on outdated solutions, states could reconsider the disclosure route.

A. *Disclosures and Criminal “Open File” Statutes*

One potential avenue of reform is to emphasize early disclosures. By way of reminder, disclosure rules obligate parties to reveal relevant documents as early as possible. By potentially forcing repeat players to show their hand, disclosure avoids the expenses and delay of discovery. In that sense, disclosures seem to resolve the potential catch-22 of discovery in lawyerless cases—expanding available materials without an increase in complexity. That is why several recent reforms have increased the scope of early disclosures, including the FRCP.²²⁵ Some scholars of lawyerless cases have similarly suggested that “[d]iscovery should be mandatory and automatic, requiring the parties to exchange key documents—such as a list of income and assets . . . at the outset of the litigation.”²²⁶

Despite the focus on civil disclosures, one potential model regime has gone unnoticed: open file discovery statutes in the criminal context. While traditional criminal discovery is limited, dozens of states have recently expanded a defendant’s right to discovery through modern “open file” statutes.²²⁷ These statutes often force the government to reveal the entire investigatory file on a particular case, including inculpatory and exculpatory evidence. For example, Minnesota’s expansive open file statute “guarantees the defendant access to ‘all matters within the prosecutor’s possession or control that relate to the case.’”²²⁸ Courts have interpreted North Carolina’s version to cover “‘everything’ collected and produced,

223. Cal. Civ. Proc. § 116.520 (1990).

224. It would also bring the potential downsides of ad hoc procedure. Bookman & Shanahan, *supra* note 29, at 1209–12 (discussing both the need for ad hoc procedure and the unchecked judicial discretion behind it).

225. Fed. R. Civ. P. 26(a) (including a disclosure process added in 1993).

226. Steinberg, *Demand Side*, *supra* note 3, at 797.

227. To attempt to resolve the informational asymmetry between prosecutors and defendants, the constitutional “*Brady* disclosure” forces prosecutors to reveal only exculpatory evidence that is “material either to guilt or to punishment” of a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But that rule does not cover inculpatory materials. For a comprehensive discussion of open file statutes, see Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 Conn. L. Rev. 771, 774 nn.7–9 (2017) (citing other sources).

228. Grunwald, *supra* note 227, at 789–90 (quoting Minn. R. Crim. P. 9.01(1)).

including handwritten and electronic notes, video recordings, and even emails and text messages exchanged between officers.”²²⁹ Open file statutes sometimes apply only to serious cases, like felonies or misdemeanors that carry long sentences.²³⁰ States have developed several mechanisms to increase compliance with open file statutes. Massachusetts, for instance, obligates prosecutors to “submit a ‘certificate of compliance’ stating that ‘to the best of [their] knowledge and after reasonable inquiry, the[y] ha[ve] disclosed’ all necessary materials.”²³¹ To avoid deliberate failure to collect evidence, many open file statutes also obligate governments to collect evidence.²³²

Most importantly, many open file statutes radically simplify discovery by forcing prosecutors to disclose their files by certain deadlines. That means defendants need not prepare complex subpoenas, maneuver around difficult rules, or comply with opaque timelines. Prosecutors often have to disclose their files even if defendants have not asked for it.²³³ In order to accommodate confidentiality or witness protections, some open file statutes carve out some kinds of evidence or allow defendants to examine and make copies of the record at their own expense.²³⁴ Older criminal law rules sometimes permitted defendants to review the record “in the prosecutor’s office but not to make copies or photographs.”²³⁵ But some states force prosecutors to prepare copies of their files for defendants at no cost.²³⁶

B. *Civil “Open File” Statutes*

1. *Why Lawyerless Civil Cases May Be Analogous to Criminal Prosecutions.* —

There are three reasons why criminal open file statutes could serve as a model for a civil equivalent. First, like lawyerless cases, criminal cases often involve a gargantuan asymmetry in sophistication between prosecutors and one-shot defendants. While prosecutors have the expertise and resources to fully investigate a case, defendants and even their counsel are often inexperienced and underresourced—unable to even begin to understand or fully explore relevant facts. Second, the resource asymmetry means that there is a similar bind between increasing defendants’ access to the file and reducing complexity. Open file statutes resolve this by placing the weight on the well-resourced and sophisticated party, the

229. *Id.* at 790 (quoting N.C. Gen. Stat. § 15A-903(a)(1) (2016)).

230. *Id.* (“Minnesota limits open-file to charges punishable by more than ninety days of jail time and North Carolina limits it to felonies.”).

231. *Id.* at 791 (alterations in original) (quoting Mass. R. Crim. P. 14(a)(3)).

232. *Id.* (“Some open-file statutes impose collection and recording obligations on investigative agencies for certain evidence and information.”).

233. See *id.* at 790–92 (discussing various open file statutes that increase prosecutorial disclosure).

234. *Id.* at 793–95.

235. *Id.* at 794.

236. *Id.* at 794–95.

government. Third, open file statutes operate under a principle of fairness. The basic idea is that it would be unfair to subject the defendant to significant consequences (i.e., imprisonment) without giving them access to the underlying materials in the case, exculpatory or inculpatory. This is also true in the civil context where even if a lawyerless party is unlikely to defeat a landlord or debt collector's claim, access to a full file can still promote participation, fairness, and equality. Moreover, open file statutes influence plea bargaining negotiations by imposing high costs on the prosecution and giving the defendant tools to lessen their potential sentence. In that sense, access to an open file is not supposed to affect a binary outcome (conviction or not) but can influence a full spectrum of potentially negotiated outcomes.

The idea of a civil open file also matches some existing proposals. As discussed above, the California Fair Debt Buying Practices Act imposes on debt collectors a duty to disclose extensive details about the debt in the complaint and certainly prior to obtaining any form of judgment.²³⁷ Similarly, Steinberg has proposed an "information conduit" model whereby courts:

[S]erve as information conduits that connect pro se litigants to relevant government agencies to facilitate the transfer of necessary documents. City building inspectors and local police departments are two obvious examples. A tenant should have easy access to a list of building code violations. A domestic violence victim should have easy access to recordings of 911 calls she placed to report the alleged abuse.²³⁸

As discussed below, all of these documents would be part of an open file.

To be sure, one major difference between the criminal and civil context is the right to counsel. Open file statutes are useful because represented criminal defendants can count on expert assistance to examine those files. In the lawyerless civil context, there is no similar right. Moreover, as Shanahan and co-authors have found, mere access to evidentiary procedures in some claims does not ensure better outcomes for low-income parties even when they are represented.²³⁹ Still, most of the effect of an open file statute would not actually be in litigation. Rather, a civil open file would increase costs on sophisticated parties and would therefore deter landlords and debt collectors from bringing offensive cases or offering weak settlement terms. Going forward, those parties would have to account for potential expenditures in discovery and exposure of confidential information that could prompt lawsuits by actually represented parties. Even more, sophisticated repeat plaintiffs may actually be generally deterred from engaging in violations of housing codes or the FDCPA.

237. Cal. Civ. Code §§ 1788.50–.66 (2022).

238. Steinberg, *Demand Side*, supra note 3, at 797 n.308.

239. Shanahan et al., *Lawyers*, supra note 161, at 473 (finding worse outcomes even with representation).

It is in the shadows of litigation that an open file statute would make a difference.

It's important to recognize that there is a potential risk that repeat players would nevertheless take advantage of a defendant's lack of sophistication regarding how best to interpret and use the evidence. In other words, landlords or debt collectors might just take the chance that the average defendant would not understand the evidentiary requirements of a habitability or constructive eviction case. If so, this would mean that, in the aggregate, there would still be a strong financial incentive to bring these claims even if a few defendants successfully make use of the evidence. But even in this scenario, there would be a marginal impact on plaintiffs' choices that may well justify a civil open file statute.

2. *How to Draft a Civil Open File Statute.* — A civil open file statute should follow a few design principles: (1) Impose disclosure obligations only on sophisticated landlords and debt collectors that (2) have already compiled—under new regulatory requirements—a record of documents on housing violations and debt collection methods and (3) only in cases where pro se defendants allege violations of the warranty of habitability or counterclaims under the FDCPA. Moreover, the statute has to rely on active judicial inquiry to determine if the unrepresented defendant does indeed have available defenses or potential counterclaims. Here's a first sketch to implement these design principles:

a. *Impose Obligations Only on Large Landlords and Debt Collectors.* — Unlike the criminal context where government is involved, a civil open file statute would be directed at sophisticated plaintiffs, especially large landlords and debt collectors. Such a statute, for instance, could obligate those sophisticated plaintiffs to disclose at an early stage a full file on the defendant. In the landlord-tenant context, that would mean a file that includes not just the lease and evidence of failure to pay but any related complaints about habitability or any other evidence of conversations between landlord and tenant. Part of the file should include records of any building code violations. This could give tenants a powerful voice in litigation without requiring legal representation or legal drafting skills. Importantly, it would incentivize better negotiated outcomes. So too in the debt collection context, where the evidence indicates that a handful of massive repeat plaintiffs account for most cases. The California Fair Debt Buying Practices Act presents a good model, requiring that debt collectors disclose details about the debt, including related documents, chain of ownership, dates, and names and addresses of entities that purchased the debt.²⁴⁰

A civil open file statute might also require the compilation and production of any communications between the plaintiff and defendant and any other evidence of wrongdoing by the plaintiff (related to the case). Again, such a statute should be limited to large debt collectors, imposing an obligation only on parties that are above a certain size (perhaps

240. Cal. Civ. Code §§ 1788.50–.66.

measured by revenues). One complication would be that an open file statute would disincentivize record keeping. And, as with all regulatory requirements, there is always the possibility of misfeasance, especially the concealment of materials from an open file. But just like in the criminal context, such a statute should be paired with record-keeping requirements that sanction failures to comply. Criminal open file statutes deal with this problem by requiring that producers submit a “certificate of compliance,” or imposing punishing sanctions for noncompliance.²⁴¹ Drafters of a civil open file should consider these options, including the types of practical sanctions and standards governing this record-keeping duty.

As to how to draft the precise text of such a disclosure requirement, a civil open file statute would be able to draw on already existing discovery approaches. As discussed above, California imposes disclosure requirements in the debt collection context and other states impose extensive early disclosures in family law claims. The California Fair Debt Buying Practices Act provides that each debt complaint must attach documents covering details about the debt buyer, the debt, the chain of transactions on the debt, and a series of other details.²⁴² The California Family Code also requires detailed disclosures in divorce cases, including documents covering “current income and expense declarations.”²⁴³ Even more, the code “requires a continuing duty of each party to update and augment that disclosure.”²⁴⁴ Texas and Florida similarly require extensive disclosures, especially for divorce and child or spousal support cases.²⁴⁵ These provide a model for a requirement in eviction or debt collection cases—a full disclosure of compiled documents along with a “continuing duty” to update it.

b. *Impose a Regulatory Obligation to Maintain a Record of Habitability or Repair Requests and Debt Collection Complaints.* — In order to minimize delays and complexity, sophisticated landlords and debt collectors should only be required to produce a record of documents that they are already obligated to maintain on an ongoing basis. State housing and consumer protection statutes require the maintenance of a wealth of documents. An open file statute might expand landlord requirements to include, as mentioned above, repair requests from any tenants, notes of conversations with tenants, building code violations, and any documents produced to building inspectors on the state of the relevant property. Many of the documents in this record will actually be in the hands of local governments—but landlords should be required to maintain and update copies on an ongoing basis. The same is true for debt collectors, who should be

241. Grunwald, *supra* note 228, at 792.

242. *Id.*

243. Bigornia, *supra* note 163, at 197.

244. *Id.*

245. See Cal. Civ. Proc. Code § 116.231(a) (2021); Tex. Gov’t Code § 27.060(b)(6) (2021).

required to maintain data about their business. As discussed above, that is exactly what the California Fair Debt Buying Practices Act requires from debt collectors.²⁴⁶ In addition, regulators might also want to require records on default rates, collection rates, consumer complaints, other legal cases, and the like. Once an open file request is triggered, these large defendants should produce the full record in a short period of time. An open file statute should also take into account confidentiality for tenants or debtors. A developed literature on eviction courts highlights both the lack of public accountability for landlords as well as the consequences of evictions for tenants, including in their permanent records.²⁴⁷ Reformers should therefore take into account the potential disclosure of tenants' confidential or private information, perhaps in specific provisions that protect the identities of defendants in some eviction proceedings or debt claims.

c. *Limit the Open File Statute to When Pro Se Defendants Allege Violations of the Warranty of Habitability or Other Counterclaims.* — Even more, there are also good existing examples of how to textually limit a broad disclosure requirement. For instance, New York courts have recognized in the eviction context that “[d]isclosure may be granted when there is a sufficient showing by the party [of ample need and] that the information sought is necessary to enable it to establish its asserted defenses or counterclaims.”²⁴⁸ Following this principle, New York courts have granted tenants access to landlord documents and depositions related to how landlords treat other tenants and how they maintain apartment buildings.²⁴⁹

A civil open file statute might grant access to a full record produced by the plaintiff only when defendants can show “ample need” and that the information will “enable it to establish defenses or counterclaims.”²⁵⁰ In order to make this accessible to pro se parties, a judge should ask a defendant in a hearing if they are alleging serious wrongdoings by a landlord or debt collector. Simple affirmative answers should be able to trigger the open file statute.

d. *Rely on Judicial Management to Establish the Need for an Open File and to Supervise Its Production.* — A civil open file statute should also rely on judicial case management to “tag” cases that could actually benefit from further discovery. In these cases, judges should both supervise the disclosure of a full record and manage the process. As mentioned above, under an “information conduit” model it is courts that have to supervise how lawyerless parties utilize the record produced under an open file statute.

246. Cal. Civ. Code §§ 1788.50–.66 (2022).

247. See, e.g., Rudy Klevsteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 *Yale L.J.* 1344, 1347 (2007).

248. N.Y. Real Prop. Acts. Law § 745 practice cmts. (McKinney 2019).

249. See supra note 145 and accompanying text.

250. See supra note 145 and accompanying text.

Some potential avenues of experimentation should include the use of discovery tracks. Judges can assign certain cases into different tracks depending on the substance or amount in controversy. Some tracks would involve more discovery or disclosures while others would be simplified. Judges could also “tag” certain cases as particularly important and subject to expansive disclosure obligations.

3. *Two Examples of How a Civil Open File Statute Could Help.* — Outside of its main purpose of deterrence (and increased costs for sophisticated litigants), even in litigation some cases may go through the following pattern:

a. *Open File in an Evictions Case.* — A large landlord files an eviction claim against a low-income tenant. In a hearing, the tenant complains to the judge that the landlord has not repaired ceiling leaks or toilet plumbing in months. The judge orders the landlord to produce an open file of all outstanding repair requests and all other relevant documents. The landlord agrees to delay the eviction and settles with the tenant out of court.

b. *Open File in a Debt Collection Case.* — A large debt collector files a small claim against a low-income borrower. In a hearing, the borrower complains to the judge that the debt collector has threatened violence several times. The judge orders the debt collector to produce an open file of any and all allegations of fraudulent claims and all data regarding default rates and collection efforts. The debt collector offers better settlement terms to the defendant.

One of the advantages of this open file system is that, even initially, it does not require legal representation to use it. Since judge-ordered disclosure does not require a formal motion, one could easily imagine an unrepresented party obtaining such disclosures. But even if this fails because unrepresented parties cannot take advantage of an open file, there will still be some represented parties who can bring the claims and take advantage of an open file. That, in turn, could make representation of parties more expeditious, lowering the cost of representation in such proceedings (and potentially increasing the availability of representation or the impact of pro bono services). And perhaps the production of an open file in a handful of cases where defendants do enjoy the assistance of counsel would have a ripple effect on all other cases. It would allow attorneys to draw on that open file and assist other parties. After all, an open file would be useful probably in cases where pro se parties allege serious wrongdoing by a sophisticated landlord or debt collector that affects other parties.

CONCLUSION

Although it has long been vaunted as the key procedure in federal court, there is little to no discovery in most state court cases. Even when it is available, discovery is often inaccessible and opaque in lawyerless courts.

Part of the problem is that discovery is a double-edged sword: It can empower small claimants but may also impose costs and complexity that these litigants cannot handle. But there is some room for discovery to help lawyerless parties, at least in cases where there are allegations of wrongdoing by a landlord or debt collector. For that reason, this Essay has introduced a new potential approach: a civil open file statute that would obligate sophisticated landlords, debt collectors, and others, to prepare and produce a full record of materials relevant to the case. Still, this potential avenue must be adapted by judges to each specific case.

THE INSTITUTIONAL MISMATCH OF STATE CIVIL COURTS

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Anna E. Carpenter****

State civil courts are central institutions in American democracy. Though designed for dispute resolution, these courts function as emergency rooms for social needs in the face of the failure of the legislative and executive branches to disrupt or mitigate inequality. We reconsider national case data to analyze the presence of social needs in state civil cases. We then use original data from courtroom observation and interviews to theorize how state civil courts grapple with the mismatch between the social needs people bring to these courts and their institutional design. This institutional mismatch leads to two roles of state civil courts that are in tension. First, state civil courts can function as violent actors. Second, they have become unseen, collective policymakers in our democracy. This mismatch and the roles that result should spur us to reimagine state civil courts as institutions. Such institutional change requires broad mobilization toward meeting people's social needs across the branches of government and thus rightsizing state civil courts' democratic role.

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Thank you to stellar research assistants Meir Blesofsky, Adia Davis, Renyang Gao, Michelle Gomez-Reichman, Aarti Goyal, Tanner Lockhead, Seojin Park, Ashton Ruff, Catherine Twigg, Mason Walther, and Amanda Yang. Thank you to Pamela Bookman, Lincoln Caplan, Russell Engler, Kellen Funk, Emily Taylor Poppe, Kathryn Sabbeth, Rebecca Sandefur, Jane Spinak, Susan Sturm, the participants in the American Academy of Arts & Sciences Access to Justice Authors' Conference, and the participants in the Columbia Law School and Georgetown University Law Center Faculty Workshops for feedback. Thank you to our institutions, and specifically the William S. Friedman Faculty Research Fund at Columbia Law School, for research support. We are grateful to Alison Hung and the staff of the *Columbia Law Review* for expert editing.

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INTRODUCTION

Across the country, the courtroom door marked “Housing Court” reveals a judge listening to hour after hour of people on the verge of losing their homes because they have lost a job, had an unexpected medical expense, cannot afford childcare, have a family member engaged in the criminal legal system, complained about the condition of their home, or because the rent will always be too high. The litigants in housing court are disproportionately Black, though the racial and ethnic background of those facing the loss of their home varies across the country.¹ Most of the people facing this life-altering consequence are women,² almost none of whom have a lawyer, though many of their landlords do,³ and losing their home will immediately harm their economic security, family integrity, and

1. Peter Hepburn, Renee Louis & Matthew Desmond, Racial and Gender Disparities Among Evicted Americans, 7 *Socio. Sci.* 649, 653–58 (2020) (showing that “for every 100 eviction filings to white renters, . . . there were nearly 80 eviction filings to black renters” and that the percentage of eviction filings against Black renters in the ten largest counties studied ranged from 16.6% in Middlesex, Massachusetts to 61.3% in Philadelphia, Pennsylvania); see also Deena Greenberg, Carl Gershenson & Matthew Desmond, Discrimination in Evictions: Empirical Evidence and Legal Challenges, 51 *Harv. C.R.-C.L. L. Rev.* 115, 120 (2016) (“Studies from different cities have found that people of color comprise about eighty percent of those facing evictions.”).

2. See Kathryn Sabbeth & Jessica K. Steinberg, The Gender of *Gideon*, 69 *UCLA L. Rev.* (forthcoming 2022) (manuscript at 11), <https://ssrn.com/abstract=3807349> [<https://perma.cc/6SGG-YN47>].

3. Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 *Conn. L. Rev.* 741, 750 (2015) (“In landlord-tenant matters . . . it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.”).

mental and physical health.⁴ The litigants in housing court do not end up behind that door by coincidence. Rather, this is a foreseeable consequence of the absence of affordable and adequate housing, health care, childcare, and education, the absence of fair and equal wages, and the presence of mass incarceration in our society. State civil cases involving debt, family relationships, and children have different names on the courtroom door but similar stories behind those doors. The millions of people who come to state civil courts each year in the United States are in crisis, and so, too, are the courts that hear their cases.

When scholars and reformers talk about this problem, we acknowledge its overwhelming breadth and depth and then fix our gaze on a particular group of institutional actors. We theorize their role, quantify behavior and its impact, consider different roles for actors, or contemplate the role of technology instead. We might look closely at the experience of litigants,⁵ the dominance of certain plaintiffs,⁶ a lack of lawyers,⁷ judicial behavior,⁸

4. Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequality and Social Injustice*, 65 *Am. U. L. Rev.* 275, 308–12 (2015) (“[C]onsequences of eviction often include prolonged periods of homelessness, job loss, depression, and subsequent deterioration of health.”).

5. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants*, 20 *Hofstra L. Rev.* 533, 541 (1992) (“At [the] root [of the standard view of legal institutions] is the acculturated belief that the individual is the proper unit to scrutinize when analyzing disputes about performance under a lease agreement.”); Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, *Clearinghouse Rev. J. Poverty L. & Pol’y* 377, 377 (2009) (approaching ethical issues by focusing first on interactions with unrepresented adverse parties).

6. See, e.g., Kathryn Sabbeth, *(Under) Enforcement of Poor Tenants’ Rights*, 27 *Geo. J. on Poverty L. & Pol’y* 97, 119–28 (2019) (explaining why the private market fails to represent tenants as plaintiffs); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 *Harv. L. Rev.* 1704, 1728–33 (2022) (examining the repeat-player plaintiffs behind debt collection cases).

7. See, e.g., Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 61 (2018) [hereinafter Sabbeth, *Housing Defense as the New Gideon*] (arguing that New York City legislation’s focus on defense lawyering limits the impact of appointment of counsel); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 *Am. Soc. Rev.* 909, 912–16 (2015) (“Unrepresented litigants are common, with an average of 73 percent of the focal parties in each study appearing without any representation, and no representation characterizing 85 percent of the observed cases.”).

8. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 651–55 (2017) (examining the impact of active judging on unrepresented litigants); Anna E. Carpenter, Colleen F. Shanahan, Jessica Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 *Geo. L.J.* 509, 512–13 (2022) [hereinafter Carpenter et al., *Judges in Lawyerless Courts*] (examining the “unfettered discretion” judges have in lawyerless courts with unrepresented litigants); Michael C. Pollack, *Courts Beyond Judging*, 46 *BYU L. Rev.* 719, 724, 730–58 (2021) (“State court judges engage in decisionmaking in a whole host of non-adversarial settings outside of the traditional context of dispute resolution.”); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 *BYU L. Rev.* 899, 906, 919–26 [hereinafter Steinberg, *Adversary Breakdown*] (“[J]udges are responding to an inflexible passive norm by abandoning it entirely. In some matters, judges extensively question parties and witnesses. In others, they relax or eliminate

the power of court staff,⁹ or technological intervention.¹⁰ This actor-focused view of state civil courts obscures the depth of the problem. The crisis of state civil courts is an institutional one, grounded in these courts' role in democratic governance.¹¹

We aim to steady our gaze with a theory of state civil courts as they are now, using a new analysis of quantitative data and our own original qualitative data. We begin with two key elements of state courts' institutional context. First, the judicial branch is designed for dispute resolution. Second, the executive and legislative branches have failed to meet society's social needs.¹²

Within this context, we use national data about the caseloads of state civil courts to refine our understanding of what these courts do. We would expect to see these courts resolving disputes between parties, but they do not. Instead, we see an institutional mismatch: State civil courts are institutions where people bring their social needs more than their disputes. The work of state civil courts is a daily manifestation of the failure of the executive and legislative branches to disrupt structural inequality or invest in systems of care to mitigate it.¹³ These courts operate in the breach to address social needs because they cannot decline the cases presented to them. Thus, the social needs people bring to court are framed as disputes

procedural and evidentiary rules. In still others, they raise new legal theories to fit the parties' facts or order relief not requested.”).

9. See, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987, 1988 (2005) (examining the role of the judges, mediators, and clerks in cases involving unrepresented litigants); Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 *Fordham L. Rev.* 1315, 1327–36 (2021) [hereinafter Steinberg et al., *Judges and Deregulation*] (describing judges and their reliance on nonlawyer actors who ultimately shape facts, arguments, and outcomes).

10. See David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 *U. Pa. L. Rev.* 1001, 1004–05 (2021) (describing the transformative effect of “legal tech” on litigation and civil procedure); Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 *Va. J.L. & Tech.* 394, 399–402 (2016) (examining how the internet is currently insufficient as a legal help resource and discussing best practices for improving it as such; Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 *Daedalus* 93, 95 (2019) (“Self-help technologies can play a useful role in assisting low- and moderate-income people, but they may not be the most effective means to redress power imbalances produced by income, racial, and other forms of inequality.”).

11. See Kathryn A. Sabbeth, *Market-Based Law Development*, *The L. & Pol. Econ. Project* (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/5UQ8-BRZT>] [hereinafter Sabbeth, *Market-Based Law Development*] (explaining how the stratification of courts affects the development of law).

12. See *infra* note 19 and accompanying text regarding our use of “social need.”

13. See Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 *Daedalus* 128, 129 (2019) (“The executive and legislative branches have aggressively pared back social safety net programs, and the judicial branch is required to hear the cases that result.”).

in order to access social provision.¹⁴ For example, a grandmother—seeking mental health care and stable housing for her daughter and stability for her grandchildren—may end up in domestic violence court because framing her social need as a dispute with her daughter in need of a protective order is a chance to access support. This leaves state civil courts attempting to address—within the constraints of their dispute resolution design—the social needs of litigants. Though invoking incarceration only rarely, state civil courts grapple with life-sustaining and life-altering social needs: housing, employment, family, and economic security.

We then use qualitative data from around the country to see how courts grapple with this mismatch: How do courts designed for dispute resolution face litigants' social needs in the courtroom? The data reveal that state civil courts are responding in four related ways to this mismatch. First, courts avoid the social needs presented and hold tight to their dispute resolution design. Second, courts try to provide services to meet litigants' social needs. Third, courts develop new, ad hoc law or procedure to meet litigants' social needs. Fourth, courts develop new institutions within or adjacent to the court to meet litigants' social needs.

State civil courts' responses to people's social needs are diffuse and varied, yet the data allow us to theorize these courts' actual institutional role. Our theory captures two institutional roles that are in tension and reflective of the dissonance of the institutional mismatch. First, the mismatch between state civil courts' institutional design and social needs casts these institutions as violent actors. Decades ago, Professor Robert Cover warned us that “[w]hen [legal] interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.”¹⁵ These observations originate in criminal courts, and we extend them to civil courts and argue that the institutional mismatch exacerbates a violent institutional role of state civil courts. This includes government violence supplanting private violence, such as the history of eviction matters described by Professor Shirin Sinar.¹⁶ This violence appears when courts hew to their institutional design, avoiding social needs but also compounding them in the context of state control. This role includes the ways in which state civil courts intersect with mass incarceration, specifically when civil cases can lead to incarceration as a penalty, such as in child support or domestic violence matters. At the same time, state civil courts attempting to meet social needs by providing services can lead to government control and violence in the guise of these

14. We use the term social provision to capture “the range of state policies implemented to improve general welfare.” Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 *Stan. L. Rev.* 1093, 1096 n.2 (2019).

15. Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1601 (1986).

16. Shirin Sinar, *Civil Procedure in the Shadow of Violence*, in *A Guide to Civil Procedure: Integrating Critical Legal Perspectives* (Portia Pedro, Brooke Coleman, Liz Porter & Suzette Malveaux eds.) (forthcoming 2022) (manuscript at *2-*5).

needs being met, such as in child welfare matters. It also includes the violence of the experience of appearing in state civil court.

Second, this mismatch casts state civil courts as policymaking institutions, in a distinct variation from the policymaking courts that scholars traditionally worry about. Here, the institutional mismatch between courts' dispute resolution design and the social needs of litigants has led to a diffuse, ad hoc, and unmeasured—but nonetheless large-scale—response by courts. Faced with social needs, courts are attempting social provision, either by stepping into the void left by the executive branch and providing direct social services—such as housing resources tied to obtaining a protective order—or by behaving like legislatures by allocating funding to programs for social provision, often going as far as building new institutions. In addition, courts create unseen law and procedure to facilitate these choices in ways that raise concerns about transparency and process. These small-scale choices are repeating themselves in diffuse ways across jurisdictions. Collectively, state civil courts have become a branch of government that develops policy to grapple with social needs without the institutional design or resources to do so.

From this analysis, we see that institutional—not just operational—change for state civil courts is imperative, and we begin to imagine a way forward for state civil courts as democratic institutions.¹⁷ We acknowledge the importance of incremental, actor-focused change to meet the immediate needs of millions of litigants each year. We also see the imperative of imagining broad, institutional change that will relieve the tension between the social needs people bring to court and courts' dispute resolution design. Where we now see a social need from one litigant in a dispute, we challenge ourselves to imagine a world where social provision is completely realized and the needs of both litigants are met.

I. WHAT STATE CIVIL COURTS DO

*"This courtroom is like the emergency room."*¹⁸

We begin with two observations about the institutional context of state civil courts in American democracy. First, our courts are designed as sites of dispute resolution. Second, the executive and legislative branches have failed to avoid or mitigate inequality. Though we would expect to see state civil courts resolving disputes, in the face of inequality, state civil courts do

17. For a different conception of courts as democratic institutions, see Judith Resnik, *Reinventing Courts as Democratic Institutions*, 143 *Daedalus* 9, 10 (2014) (describing courts as "sites of democracy because the particular and peculiar practices of adjudication produce, redistribute, and curb power among disputants who disagree in public about the import of legal rights").

18. Notes of Hearing 22, Centerville (Judge 1) (addressing litigants in open court). See also *infra* notes 116–123 and accompanying text for more on the underlying data.

not necessarily resolve disputes. Rather, they actually face and respond in different ways to people's social needs.

We use the term "social need" consistent with scholarly literature and note that it captures the range of needs (including those that some might characterize as economic) that are inextricable from racial, economic, and gender inequality.¹⁹ We are intentionally not using the term "legal need." The concept of "legal need" itself reflects assumptions about the role of law in people's lives, which research shows is not consistent with people's lived experiences.²⁰ Our examination takes an institutional view of state civil courts and the problems people bring to them—and resists any underlying assumption that people should engage the legal system to resolve their problems.

In this context, we engage in a mixed-methods empirical examination of state civil courts. We take a novel approach to national data on state civil caseloads, recategorizing cases to reflect the problems people are bringing to court, not just the formal legal labels for these cases. This reveals the breadth and depth of social needs presented to state civil courts. We then examine qualitative data from observations and interviews in state civil courtrooms to understand how people's social needs appear in the courtroom. In the following sections, we analyze how state civil courts respond to the institutional mismatch.

19. See Jonathan Bradshaw, A Taxonomy of Social Need, *in* Problems and Progress in Medical Care: Essays on Current Research 71, 71–74 (Gordon McLachlan ed., 1972); Mohsen Asadi-Lari, Chris Packham & David Gray, Need for Redefining Needs, 34 Health Quality Life Outcomes 1, 4 (2003) (distinguishing social needs from physical needs, satisfaction, informational needs, and concern); Giandomenica Becchio, Social Needs, Social Goods, and Human Associations in the Second Edition of Carl Menger's *Principles*, 46 Hist. Pol. Econ. 247, 249–51 (2014) (describing how economic goods can satisfy social needs, including common needs (needs shared by many individuals that a common supply can satisfy, such as drinking water), collective needs (needs demanded by individuals and shared by the community, such as schools), and needs of human association (needs demanded by an entity other than individuals)); Erica Hutchins Coe, Jenny Cordina, Danielle Feffer & Seema Parmar, Understanding the Impact of Unmet Social Needs on Consumer Health and Healthcare, McKinsey & Co. (Feb. 20, 2020), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/understanding-the-impact-of-unmet-social-needs-on-consumer-health-and-healthcare> [<https://perma.cc/BUY5-B79G>] (summarizing findings from a McKinsey survey). Applying the distinctions in Professor Jonathan Bradshaw's taxonomy of "normative need," "felt need," "expressed need," and "comparative need" to state civil courts is beyond the scope of this Essay, though it engages many of the questions raised by Professor Rebecca Sandefur's work. We also note that narrower definitions of social needs appear in other contexts, including public benefits legislation. See, e.g., 42 U.S.C. § 3002(24) (2018) ("The term 'greatest social need' means the need caused by noneconomic factors . . .").

20. Professor Sandefur's research shows that people regularly do not perceive their problems as legal and believe they are able to help themselves, and she theorizes the implications of these perceptions for the legal system. Rebecca L. Sandefur, Accessing Justice in the Contemporary USA: Findings From the Community Needs and Services Study 14–16 (2014); Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 443, 443–44 (2016).

A. *The Institutional Context*

1. *Courts Designed for Dispute Resolution.* — The substantive law and procedure of state civil courts rest on the premise that they are sites of dispute resolution. We assume parties will come with a dispute, and the court will resolve it.²¹ That dispute might get resolved in a formalized, adversarial way that involves lawyers. Or it might get resolved by party-driven settlement. Or the dispute might be resolved in a collaborative way involving a third-party facilitator. Regardless of where the process falls on a continuum of adversarialism, the premise remains: State civil courts are in the business of resolving disputes between parties.

This dispute resolution assumption is present in the law and procedure of state civil courts and permeates legal scholarship, including our own. Legal scholarship's focus on federal courts and the idealized, represented, adversarial system is well documented.²² Scholarship regarding state civil courts is largely focused on particular actors or characteristics of dispute resolution.²³ Even the most full-throated calls for reconsideration of adversarialism still accept that courts are sites of dispute resolution.²⁴

Sociolegal research regarding legal problems and experiences similarly relies on the premise of dispute resolution to examine questions of civil courts. The classic sociolegal “dispute pyramid” and its progeny, including the “dispute tree,” as well as the classic framing of legal engagement as “naming, blaming, and claiming,” all take as a starting point that the business of courts is dispute resolution.²⁵ The extensive work of leading

21. Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 3 (2d ed. 2019).

22. Pamela Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 *Colum. L. Rev.* 1183, 1186–88 (2022); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 *Wis. L. Rev.* 249, 268–74 [hereinafter Carpenter et al., “New” Civil Judges].

23. See Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 8, at 530 (“[U]nderstanding judges’ within-case decisions about role implementation, procedure, and offers of assistance to pro se litigants is a critical contribution . . .”); Carpenter et al., “New” Civil Judges, *supra* note 22, at 256 (“In this article, we make the case for a research agenda focused on state courts and the judges who manage and work within them.”); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 *Wis. L. Rev.* 215, 218 (focusing on the role of judges in state civil and administrative courts); Steinberg et al., *Judges and Deregulation*, *supra* note 9, at 1316 (drawing on interviews to demonstrate that “state court judges are leading the charge, out of necessity, toward de facto deregulation of the legal profession, at least in certain pro se courts”).

24. See, e.g., Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 *Wm. & Mary L. Rev.* 5, 5–6 (1996) (noting that the adversary system is no longer the “best method for our legal system”); Steinberg, *Adversary Breakdown*, *supra* note 8, at 899 (“Though adversary theory continues to represent the guiding framework for criminal and civil cases, it is now widely recognized that the traditional depiction of the passive judge is incomplete.”).

25. See Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 *Ann. Rev. L. & Soc. Sci.* 105, 107 (2014); William L.F. Felstiner,

scholars like Professors Hazel Genn and Rebecca Sandefur concerning how people understand and act on their own legal problems still takes as a core premise that the matters handled by civil courts are disputes to be resolved by the court in some way. Professor Genn's early work regarding legal problems in the United Kingdom illustrated that people are less likely to engage the law in disputes involving purchases of goods and services and more likely to go to court in disputes based in relationships or family.²⁶ Professor Sandefur's work, among other contributions, defines justiciable events, legal needs, and cases.²⁷ These definitions lend needed clarity to access to justice research, yet reflect the pervasiveness of the dispute resolution construct. Collectively, this research is commonly characterized as telling us that people take their "more serious" disputes to court, that poor people "perceive" fewer legal problems in their lives, or that many people "do nothing" in the face of a justiciable event or legal case.²⁸ We suggest an alternate explanation: People have problems to be resolved that are social needs more than disputes, and this difference underlies their interaction with civil courts. But before we reach that analysis, we observe that, even in an analysis of underlying problems, the construct of dispute resolution is pervasive.

The premise of dispute resolution also characterizes the predominant approaches to reform. In some instances, our reaction to the dysfunction of state civil courts is to change the actors involved in dispute resolution. This includes alternative dispute resolution methods and approaches like community courts. Another approach is to change the nature of how disputes are resolved, such as shifting to inquisitorial or problem-solving court models. Yet all of these approaches stay within the boundaries of dispute resolution: The court engagement begins with two parties presenting the court with a dispute and ends with the court offering some method of resolution.

2. *Inequality*. — The premise that civil courts are sites of dispute resolution coexists with the underlying circumstances of inequality in the United States. Thus, our examination of state civil courts rests on the collective, scholarly understanding of inequality in the United States and the

Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631, 632 (1980).

26. Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 *Yale J.L. & Humans.* 397, 405–06 (2012).

27. See, e.g., Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 *U.C. Irvine L. Rev.* 753, 755–63 (2021) (noting that a justiciable event is a circumstance shaped by civil law, a legal need is a justiciable event that needs legal expertise to be handled "properly," and a case is a circumstance that ends up in court or a legal service system).

28. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *Transforming Lives: Law and Social Process* 112, 112–17 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007).

failure of the executive and legislative branches of government to address it.

Income and wealth inequality in the United States is significant and growing.²⁹ Our historical arc of growing inequality is bound up in the country's history of racial inequality.³⁰ In 2019, the net worth of a typical white family was nearly ten times that of the average Black family.³¹ Scholars have extensively documented the historical underpinnings of this inequality.³² Economic and social scientific research documents how

29. In 2021, the top 1% of U.S. citizens owned 32% of the country's household wealth, while the bottom half owned only 2%. Distribution of Household Wealth in the U.S. Since 1989, Fed Rsrv., <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:128;series:Net%20worth;demographic:networth;population:1,3,5,7;units:shares> [<https://perma.cc/VLE9-E9R2>] (last updated Dec. 17, 2021).

30. The wealth gap between America's richest and poorest families has more than doubled from 1989 to 2016. Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, Pew Rsch. Ctr., *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority 18–19* (2020), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT_01.09.20_economic-inequality_FULL.pdf [<https://perma.cc/S5KV-LX7A>] (documenting the percent change in median family wealth over time by quintile).

31. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, Brookings (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/2MTX-JS7P>] (comparing wealth for median white and median Black households); see also Ana Hernández Kent & Lowell Ricketts, *Has Wealth Inequality in America Changed Over Time? Here Are Key Statistics*, Fed. Rsrv. Bank of St. Louis (Dec. 2, 2020), <https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics> [<https://perma.cc/AJ73-GFGR>] (noting that the median white family owns \$184,000 in assets, while Black families own \$23,000, and Hispanic families own \$38,000). Income statistics reveal similarly stark disparities: The median Black household earned \$23,800 less than white households in 1970, but \$33,000 less in 2018, amounting to just 61% of the income of the median white family. Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, Pew Rsch. Ctr. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-us/> [<https://perma.cc/7TYB-8YTM>] (measuring changes in relative income in constant 2018 dollars).

32. See, e.g., Robert S. Browne, *The Economic Basis for Reparations to Black America*, 2 *Rev. Black Pol. Econ.* 67, 73 (1971) (noting that income produced by enslaved people for their white owners before 1860 amounted to between \$448 and \$995 billion). See generally Brittany Danielle Rawlinson, *The Legacy of Slavery and Black-White Wealth Inequality in the Southern United States* (Apr. 6, 2017) (Ph.D. dissertation, Florida State University), <https://diginole.lib.fsu.edu/islandora/object/fsu:507725/datastream/PDF/view> [<https://perma.cc/N45B-ZUX5>] (offering an empirical analysis of home ownership, business ownership, anti-Black lynchings, and incarceration as contributory factors to the wealth gap, and connecting these practices to the legacy of slavery); Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-us-government-segregated-america> [<https://perma.cc/P2NY-MEG9>] (documenting America's history of discrimination in housing).

discrimination in employment,³³ housing,³⁴ education,³⁵ and criminal justice³⁶ combine to produce vastly unequal conditions on account of race—and how intergenerational poverty perpetuates this history.³⁷ These conditions are not just abstract. They translate to specific problems for individuals and communities: unaffordable housing, limited access to health care, childcare and elder care, insufficient employment opportunities and income, and an absence of pathways to build wealth or benefit from credit.

Scholars have explored how the actions and inactions of U.S. political institutions—legislatures and executives—have amplified American inequality.³⁸ Some literature describes this connection in terms of institutional decisions and outcomes. For example, many scholars emphasize decreases in the real minimum wage and accompanying increases in wage inequality.³⁹ Other research describes weakened labor protections

33. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *Am. Econ. Rev.* 991, 1101 (2004) (showing that African Americans face differential treatment when searching for jobs); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (providing an example of widespread discriminatory employment practices deployed in the post-Jim Crow era to harm Black workers).

34. See, e.g., Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, *Econ. Pol’y Inst.* (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/> [<https://perma.cc/8P2U-C53C>] (describing the significance of home equity for wealth accumulation and the structural barriers to homeownership for Black Americans).

35. See Graziella Bertocchi & Arcangelo Dimico, *Slavery, Education, and Inequality 1* (Inst. for the Study of Lab., Working Paper No. 5329, 2010), <https://www.econstor.eu/bitstream/10419/51891/1/66886687X.pdf> [<https://perma.cc/2WPQ-MBXD>] (“[T]he current degree of educational inequality, along the racial dimension, can be traced to the intensity of slavery before the Civil War.”); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, *Brookings* (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [<https://perma.cc/3SKW-C9S4>] (describing persistent patterns of discrimination in education, especially financing and school resources).

36. See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012) (describing the financial, social, and cultural implications of mass incarceration on Black communities in the United States).

37. See Scott Winship, Christopher Pulliam, Ariel Gelrud Shiro, Richard V. Reeves & Santiago Deambrosi, *Long Shadows: The Black-White Gap in Multigenerational Poverty 2* (2021), https://www.brookings.edu/wp-content/uploads/2021/06/Long-Shadows_Final.pdf [<https://perma.cc/2VPR-7M95>].

38. For visualizations of wealth and income inequality in the United States and around the world, see *Income Inequality, USA, 1913–2021*, *World Inequality Database*, <https://wid.world/country/usa/> [<https://perma.cc/6RJN-MAK7>] (last visited Mar. 2, 2022).

39. See, e.g., Tali Kristal & Yinon Cohen, *The Causes of Rising Wage Inequality: The Race Between Institutions and Technology*, 15 *Socio-Econ. Rev.* 187, 188–90 (2017) (finding that between 1968 and 2012, declining unions and reductions in the real minimum wage accounted for approximately half of the increase in wage inequality in the United States).

and its implications for income inequality.⁴⁰ Some scholars emphasize increasingly regressive state and federal tax codes, favorable treatment of capital over income, and increasingly unequal distributions of wealth.⁴¹ Others tell of the varied role of American government in social provision over time and in different eras of social welfare design.⁴² Still others chronicle how the privatization of public services has exacerbated inequality, focusing most intensely on state legislative inaction to secure access to affordable healthcare,⁴³ state divestment from public education,⁴⁴ and failures to invest in affordable housing.⁴⁵

40. *Id.* at 189; see also Richard B. Freeman, *Union Wage Practices and Wage Dispersion Within Establishments*, 36 *Indus. & Lab. Rels. Rev.* 3, 19–20 (1982) (describing how labor unionization reduces wage inequality).

41. See Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* 6–7, 9 (2019) (describing how capital, disproportionately owned by wealthy people, is taxed more favorably than income, and describing increasing regression in the U.S. tax system); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence From Capitalized Income Tax Data 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20625, 2014), https://www.nber.org/system/files/working_papers/w20625/w20625.pdf [<https://perma.cc/2UG9-93JU>] (providing an account of increased wealth inequality).

42. See, e.g., Theda Skocpol, *Protecting Soldiers and Mothers* 4–11 (1995) (tracing the history of U.S. government provision of social services over time).

43. Many states refused to expand Medicaid after the passage of the Affordable Care Act, despite significant federal incentives to do so, thereby increasing inequality. See Robert Kaestner & Darren Lubotsky, *Health Insurance and Income Inequality*, 30 *J. Econ. Persps.* 53, 55 (2016) (finding that public investment in Medicare and Medicaid “clearly [has] the effect of reducing inequality”); Olena Mazurenko, Casey P. Balio, Rajender Agarwal, Aaron E. Carroll & Nir Menachemi, *The Effects of Medicaid Expansion Under the ACA: A Systematic Review*, 37 *Health Affs.* 944, 946 (2018) (noting that Medicaid expansion under the ACA increased insurance coverage); *Status of State Action on the Medicaid Expansion Decision*, Kaiser Fam. Found., <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/2ZZR-7ST9>] (last updated Feb. 24, 2022) (documenting state decisions on whether to expand Medicaid after the ACA and identifying dozens of states declining Medicaid expansion).

44. See Michael Mitchell, Michael Leachman & Matt Saenz, *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, *Ctr. on Budget & Pol’y Priorities* 1 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/10-24-19sfp.pdf> [<https://perma.cc/D3RD-PG9P>] (finding that state fiscal divestment increased inequality); Michelle Jackson & Brian Holzman, *A Century of Educational Inequality in the United States*, 117 *PNA* 19108, 19114 (2020) (finding that “collegiate inequalities and income inequality are, in fact, rather strongly associated over the twentieth century”).

45. Joint Ctr. for Hous. Stud. of Harv. Univ., *The State of the Nation’s Housing 2020*, at 7 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf [<https://perma.cc/4FGG-6XQ4>] (showing a sustained increase in cost-burdened households since 2000 and describing significant decreases in housing assistance as a share of nondefense discretionary spending over the same period).

Other literature describes how the American political process has produced inequality. For example, scholars point to how permissive campaign finance laws permit the rich to exercise disproportionate influence over legislative, electoral, and regulatory processes⁴⁶ and to how policy-making itself is structurally designed to favor capture by monied interests.⁴⁷ Others argue that state legislative gerrymandering reduces political responsiveness and accountability, empowering special interests to exacerbate inequality.⁴⁸ Scholars note that the failure to address inequality is caused by legislative gridlock—itsself the result of a policymaking process that involves multiple veto points⁴⁹ and must function amid increasing political polarization.⁵⁰ Another field of literature highlights how ideological shifts that increasingly favor free-market capitalism and individual responsibility undergird political inaction on inequality.⁵¹

46. Kay Lehman Schlozman, Henry E. Brady & Sidney Verba, *Growing Economic Inequality and Its (Partially) Political Roots*, Religions, May 18, 2017, at 1, 2, <https://www.mdpi.com/2077-1444/8/5/97/htm> [<https://perma.cc/QR6L-QXKV>] (“Those who are economically well-off speak more loudly in politics by giving more money and by engaging more frequently in . . . political participation Not only is money a critical resource for both individual and organizational input into politics, but economic disparities shape the content of political conflict.”).

47. See, e.g., Scott H. Ainsworth, *The Role of Legislators in the Determination of Interest Group Influence*, 22 *Legis. Stud. Q.* 517, 517 (1997). And, of course, this is a reflection of straightforward collective action problems. See generally Mancur Olson, *The Logic of Collective Action* (rev. ed. 1971) (noting that although all members of a group have “a common interest in obtaining [some kind of] collective benefit, they have no common interest in paying the cost of providing that collective good,” because “[e]ach would prefer that the others pay the entire cost”).

48. Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Why Hasn’t Democracy Slowed Rising Inequality?*, 27 *J. Econ. Persps.* 103, 103–05 (2013) (describing five reasons why the U.S. political system failed to ameliorate rising income inequality: ideological shifts, low voter participation by poor people, an increase in real income and wealth that blunts redistributive movements, political influence by the rich, and a reduction in democratic accountability).

49. John Voorheis, Nolan McCarty & Boris Shor, *Unequal Incomes, Ideology, and Gridlock: How Rising Inequality Increases Political Polarization* 5 (Aug. 21, 2015) (unpublished manuscript), <https://ssrn.com/abstract=2649215> [<https://perma.cc/U6JK-6KFB>] (claiming that “[i]ncreases in political polarization may . . . reduce the capacity of legislators to (a) enact policies which might constrain further increases in inequality . . . or (b) engage in redistribution to directly reduce inequality . . . or (c) modernize and reform welfare state institutions”).

50. *Id.* at 2–3.

51. See Bonica et al., *supra* note 48, at 105–10 (“The Democratic party pushed through the financial regulation of the 1930s, while the Democratic party of the 1990s undid much of this legislation in its embrace of unregulated financial capitalism”); Sara Sternberg Greene, *The Bootstrap Trap*, 67 *Duke L.J.* 233, 243–51 (2017) (describing how “the cultural and accompanying policy shift in American society that emphasized personal responsibility and work as the basis for a reduced safety net” influenced “policy and law surrounding safety net programs”); Vicki Lens, *Public Voices and Public Policy: Changing the Social Discourse on “Welfare”*, 29 *J. Socio. & Soc. Welfare* 137, 141–46 (2002) (discussing the politicized language that comprised the discourse on welfare reform).

The literature on American inequality places heavy responsibility for people's social needs on the political branches of government. While it is not our current purpose to evaluate the explanatory power of these lines of research, we leverage this body of scholarship as a foundation of our examination of state civil courts. We acknowledge that we do not capture the full political dynamics of inequality in the United States, the consequences of this structural problem, or even the range of institutions wrapped up in these challenges. Rather, we contribute to those conversations by examining state civil courts in this context. How do dispute resolution design and American inequality simultaneously appear in state civil courts, and what does that mean for the institutional role that these courts are actually playing?

B. *State Civil Case Data Reconsidered*

In this context of dispute resolution design and social inequality, what are state civil courts doing? A reexamination of national caseload data from state civil courts provides a baseline empirical understanding of their work. We resist traditional scholarly and court management classifications of cases based on area of law and instead examine the nature of the problem that people face in each case. We might expect to find that people are asking courts to resolve disputes, consistent with their institutional design. Our reexamination of the case data reveals otherwise. Instead, we see the overwhelming presence of social needs in state civil courts.

We use National Center for State Courts (NCSC) data from 2012 to 2019.⁵² These are approximately 400 million state court matters filed over eight years. This is not a complete picture of state civil courts, as described more fully in the Appendix, but it captures the work of these courts in states where the vast majority of the population lives.⁵³ NCSC categorizes

52. As described in the Appendix, our analysis is based on publicly available data from the National Center for State Courts from 2012–2019. The data have meaningful variation among states in both data reporting practices and underlying court structures and functions. Nonetheless, the data are sufficient to explore the theoretical questions we engage and, we hope, for broader exploration by others of other questions of state courts as institutions.

53. A chorus has described the challenges of empirical research in state courts. See Carpenter et al., “New” Civil Judges, *supra* note 22, at 266 (“Unlike the federal courts, where data can be downloaded with a few mouse clicks, information from state civil court dockets remains much less accessible, and in some cases inaccessible, to researchers.”); Sandefur & Teufel, *supra* note 27, at 771 (“No consistently collected, nationally representative information exists to inform on cases, their distributions, or their impacts.”); see also Nat’l Ctr. for State Cts., *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, at iii (2015), https://www.nsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/7AJB-SHUD>] [hereinafter NCSC, *Landscape of Civil Litigation in State Courts*] (“Differences among states concerning data definitions, data collection priorities, and organizational structures make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers.”); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. Empirical Legal

state cases by category—civil, criminal, juvenile, domestic relations, and traffic—and by case type within each category—such as the “intentional tort” case type within the “civil” category.

We start by asking which cases are civil justice matters, independent of NCSC categories. Our categorization differs from traditional approaches in a core way: We include domestic relations and some matters related to children, including civil offenses and dependency matters, as civil matters. What is generally referred to as “family law” is often treated as separate from analysis of state civil courts.⁵⁴ Our approach is consistent with our theoretical perspective. All of the matters in our civil justice needs category that are designated as case types “Personal Relationships” and “Children” are matters handled in a civil court in the relevant jurisdiction, in most states by the same judges who hear (by eligibility or in fact) the breadth of civil cases. They are adjudicated based on the same dispute resolution design, resting on the same conventions of procedure and evidence. We believe this categorization most closely tracks the theoretical argument we engage here. It also presents an intentional contrast with the categorizations used in NCSC’s commonly cited and pathbreaking 2015 *Landscape of Civil Litigation in State Courts* report and work that builds on it.⁵⁵ This approach also allows us to create a separate “juvenile delinquency” category that more closely parallels adult criminal dockets and reflects the different institutional structure and role of juvenile courts.

Stud. 755, 756 (2004) (“The perennial difficulty in compiling accurate and comparable data at the state level can in large measure be pinned on the fact that there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation.”); Rebecca L. Sandefur, Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection, 68 S.C. L. Rev. 295, 297 n.6 (2016) (noting a lack of sufficient detail in electronic case records).

54. We cannot claim a definite explanation for this, but we can observe that state court dockets are often divided by subject matter, with different judges rotating among case types clustered around family law, criminal law, and other civil matters. We can also observe that family law matters are generally about women and children and matters historically undervalued by the legal system and legal scholarship. See Sabbeth & Steinberg, *supra* note 2 (manuscript at 3–4). Finally, we can observe that this distinction gathers its own momentum in legal scholarship as one scholar builds on the work of another. See, e.g., Yonathan A. Arbel, Adminization: Gatekeeping Consumer Contracts, 71 Vand. L. Rev. 121, 131 & n.42 (2018) (noting that most civil litigation consists of claims for consumer credit); Richard M. Hynes, Broke but Not Bankrupt: Consumer Debt Collection in State Courts, 60 Fla. L. Rev. 1, 21–24 (2008) (same); Wilf-Townsend, *supra* note 6, at 1715 n.41 (noting that family and traffic cases are excluded from data in analysis).

55. The Landscape report is a source for recent scholarly work (including our own). It poses two key differences from our analysis. The first is the categorization of case types and ultimately what is a “civil” case. The second is that the Landscape report relies on a small sample (cases from ten counties that are complete reporters in 2012), and we are relying on aggregate national, multiyear data. We note the consequential distinctions, where relevant, below. See NCSC, *Landscape of Civil Litigation in State Courts*, *supra* note 53, at iii; see also Family Justice Initiative, *The Landscape of Domestic Relations Cases in State Courts*, at i (2015), <https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf> [<https://perma.cc/U85Y-Y4V6>].

As captured in Table 1B in the Appendix, in these data, around eighty-six million cases involve civil justice needs, forty-four million are adult criminal matters, two million are juvenile delinquency matters, and over 300 million are noncriminal traffic cases.⁵⁶ But these overall numbers undercount the country's civil caseloads because they are the sum of states' case type reporting, and states report by case type inconsistently and incompletely. In addition to reporting by case types, states also report their overall caseloads in a particular category, and this reporting is more complete. For example, as illustrated in the Appendix, from 2012 to 2019, an average of forty-four states reported their total civil caseloads but an average of only twenty-two states reported across all civil justice needs case types.⁵⁷ This second average captures a wide variation within and across case type reporting. For example, a range of four to thirteen states reported in the fraud case type, while a range of thirty-four to forty-three states reported in the adoption case type.⁵⁸ If we apply our categorization and proportions to the total category caseload reporting and extrapolate, a more accurate count of our civil justice needs category would be an average of almost twenty million cases per year (or approximately 157 million cases in the eight years of data).⁵⁹ As context, over the same eight years that state courts saw an annual average of twenty million civil cases, federal courts saw an annual average of approximately 300,000 civil cases.⁶⁰

With this understanding of the scope of civil cases, we turn to types of cases within the civil justice needs category. Typically, cases are classified using traditional norms of doctrinal law or court management.⁶¹ For example, a case is labeled a "Contract" matter if the dispute arises out of a contract, regardless of the nature of the parties or their relationship. This

56. See *infra* Appendix, tbl.1B. The volume and nature of traffic cases is worthy of its own empirical inquiry. We exclude traffic cases from our definition of "civil justice matters" because these cases are generally not handled in a dispute resolution framework but rather as administrative citations, sometimes with judges who are not lawyers. See Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 *Colum. L. Rev.* 1287, 1315 (2022). We note also that these traffic dockets implicate questions of local courts. See Ethan Leib, *Local Judges and Local Government*, 18 *N.Y.U. J. Legis. & Pub. Pol'y* 707, 730–31 (2015) ("Almost every judge reported that there is locality-state competition for money that comes from the fines levied by the courts."); Alexandra Natapoff, *Criminal Municipal Courts*, 134 *Harv. L. Rev.* 964, 1038 (2021) ("[T]raffic offenses dominate most municipal court dockets."); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 *Va. L. Rev.* 1031, 1069 (2020) ("State law gives municipalities the option to create municipal courts, which handle minor criminal cases as well as local ordinances and traffic violations.").

57. See *infra* Appendix, tpls.1A & 1B.

58. See *infra* Appendix, tbl.2.

59. See *infra* Appendix, tpls.1A & 2. This is the sum of the average annual (2012–2019) NCSC total civil (14,805,679) + NCSC domestic relations (4,487,066) + NCSC juvenile case types noted in Table 1B (293,522) = 19,586,267.

60. See *infra* Appendix, tbl.3.

61. Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 *Wash. U. L. Rev.* 297, 339–40 (2019) ("State court case management systems were developed for operational use, rather than research.").

approach assumes that the problems people bring to court are disputes with others and categorizes those problems based on their legal constructs. Through this approach, a dispute between two corporations over a manufacturing contract is conflated with a suit by a debt collection company against a low-income individual who could not pay her medical debt. Or an eviction suit where a landlord is trying to evict a tenant in need of mental health services for hoarding is counted as a “Property” case in the same way as a dispute regarding the boundaries between two pieces of corporate-owned real estate.

We take a different approach, grounded in the substance of the problem people bring to court. These different subcategories of civil cases reveal social needs in state civil courts, ultimately telling a different story of these courts’ institutional role. Eight of our categories are substantive: Personal Relationships, Children, Housing, Contract (distinguishing Debt Collection), Tort, Tax, Property, and Employment. Two are not, reflecting the limitations of the data: Small Claims matters and Writs and Appeals. We describe these subcategories from largest to smallest, as reflected in Table 2.

1. *Personal Relationships*. — “Personal Relationships” are the biggest category of cases in state civil courts. These are the cases that involve personal, often familial, relationships rather than purely economic ones. In total, “Personal Relationships” cases comprise approximately 30% of state civil court dockets.⁶² These include divorce, protective orders, guardianship, estates, and personal trusteeship. The common thread in these cases as they generally appear in state civil court is that they implicate personal relationships and involve problems that, with more resources, the parties might not bring to state civil court or would only bring in a ministerial fashion.⁶³ As the discussion below illustrates, the absence of resources appears across the types of “Personal Relationships” cases. For example, a couple seeking divorce but without the resources to retain counsel for negotiations requires more from the court. An individual seeking to arrange guardianship for an elderly relative, or resolving an estate after the death of a loved one, will engage the court in a more limited way if they can retain counsel to help them navigate the law. And those people who do need more state civil court involvement are correspondingly making themselves more vulnerable to state control.

Another factor in many of these cases is that parties seek government assistance in some way, and that assistance then requires state civil court involvement. We discuss this phenomenon in the context of our qualita-

62. See *infra* Appendix, tbl.2. This is an estimated six million cases per year (30.28% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

63. Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, “I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 *Fordham L. Rev.* 3027, 3029–30 (2015) (“[T]he adjudication of child support cases shows a judicial colorblindness that ignores contemporary realities concerning racial inequality in the labor market.”).

tive data in section I.C below, and it is also apparent in the general substance of these matters. For example, a marital dispute where one party calls the police to make the other party leave the home, because neither individual has sufficient resources to stay somewhere else, would appear as a protective order in state court. Or a case in which an elderly person with dementia requires health care might show up as a guardianship proceeding so that a family member can access legal power and health care services for the individual.

The largest subset of the “Personal Relationships” category is divorce, comprising a third of “Personal Relationships” matters.⁶⁴ The available data do not show how many of these cases are substantive proceedings and how many are pro forma proceedings required by law, though recent research suggests that the latter is a meaningful proportion of these cases.⁶⁵ Divorce is paradigmatic of relationship-related civil court matters. People who can afford counsel are nearly four times more likely to settle divorce-related matters without involving the court in more than a ministerial fashion.⁶⁶ For poor families, “more litigation means the stress and expense of court involvement continues.”⁶⁷ Many of those families stay “trapped in marriage” or are mired in resulting litigation (e.g., protective orders or contract disputes).⁶⁸ In many states, the legal process for determining child custody, child support, spousal support, and protection orders is handled separately from divorce, exacerbating access issues.⁶⁹ Socioeconomic status also impacts “how families fare in divorce and custody cases” which in turn “impacts how [those families] weather the transition the litigation represents.”⁷⁰

Another major subset of the “Personal Relationships” cases is protective orders, commonly known as domestic violence cases, which constitute about a quarter of the “Personal Relationships” cases. As we illustrate using qualitative data in section I.C below, these cases are deeply intertwined with manifestations of inequality, including housing instability, need for

64. See *infra* Appendix, tbl.2.

65. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, *Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers*, PNAS, Mar. 30, 2021, at 1, 5 (noting that while divorces could sometimes be emotionally complicated, low-income divorce cases ordinarily involved straightforward legal issues).

66. Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 *Just. Sys. J.* 163, 171 (2003) (noting that representation is a proxy for litigant wealth and finding that in “cases in which both parties were self-represented . . . less than 7 percent resulted in a settlement,” indicating that “[t]he appearance of an attorney for either party increased the settlement rate substantially”).

67. Pamela Cardullo Ortiz, *How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America’s Inner Cities*, 25 *Stan. L. & Pol’y Rev.* 163, 188 (2014).

68. Greiner et al., *supra* note 65, at 5.

69. *Id.*

70. Ortiz, *supra* note 67, at 187 (using representation as a proxy for socioeconomic status).

health care, need for child or other familial care, and general lack of resources. The vast majority of those seeking protective orders are experiencing poverty, which “limits options, creates stressors and conditions that promote abuse, and makes it more difficult to escape abuse.”⁷¹ Wealthier people have better access to resources to leave abusive relationships and secure safety, using nonjudicial means to escape violence.⁷²

The two remaining major subsets of “Personal Relationships” cases are probate/wills/intestate cases (14% of “Personal Relationships” cases)⁷³ and mental health cases, which are cases where court intervention is sought to place or keep an individual in mental health treatment (12% of “Personal Relationships” cases). Wills and probate matters also implicate socioeconomic status. Wills themselves often cost over \$1,000,⁷⁴ and those from upper income households are almost twice as likely to have a will.⁷⁵ Without one, judicially assigned executors administer estates—again increasing civil court control over those without the resources needed to preempt court involvement. This court involvement compounds as parties initiate additional litigation, especially over assets⁷⁶ and guardianship.⁷⁷

71. Jane K. Stoeber, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 Wash. L. Rev. 333, 387 (2019); see also Lisa Shannon, TK Logan & Jennifer Cole, *Intimate Partner Violence, Relationship Status, and Protective Orders: Does “Living in Sin” Entail a Different Experience?*, 22 J. Interpersonal Violence 1114, 1119 (2007) (finding that in a sample of women with protective orders, 58% had annual incomes of less than \$15,000).

72. Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 Ky. L.J. 483, 531 (2012) (“Economic dependence is a substantial impediment to separating from an abusive partner, but financial relief in the form of child support, maintenance, housing payments, and compensation for medical expenses, lost wages, and damaged property is enumerated in only a small number of state statutes.”).

73. NCSC collection protocols and categories leave some ambiguity as to the underlying problems within the Probate/Estate categories. It would be valuable but is beyond our scope to pair local-level research with NCSC data to better understand who is using probate court and how. See, e.g., David Horton, *In Partial Defense of Probate: Evidence From Alameda County, California*, 103 Geo. L.J. 605, 624–27 (2014) (reporting a survey of cases in Alameda County).

74. David Dierking, *What’s the Average Cost of Making a Will?*, Investopedia (Feb. 4, 2022), <https://www.investopedia.com/ask/answers/033116/what-average-cost-making-will.asp#:~:text=Drafting%20the%20will%20yourself%20is,it%20will%20be%20error%20Dfree> [https://perma.cc/BT84-LXQD].

75. Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, Gallup (May 18, 2016), <https://news.gallup.com/poll/191651/majority-not.aspx> [https://perma.cc/786H-CDJG] (“Of Americans whose annual household income is \$75,000 or greater, 55% have a will, compared with 31% of those with incomes of less than \$30,000.”).

76. See, e.g., Andrew Stimmel, *Note, Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 Ohio St. J. Disp. Resol. 197, 197 (2002) (observing that legal attacks on a will can result in lengthy litigation and explaining why mediation is a “particularly suitable method of dispute resolution for will contests”).

77. See, e.g., Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 413–16

Appointed guardianship also implicates socioeconomic status. Although court-appointed guardianship for those who have not executed power of attorney is determined by mental capacity, impoverished elders are nearly five times more likely to receive court-appointed guardians than those living above the poverty line.⁷⁸ Guardianships are often the result of a lack of “resources to pay for access to common alternatives to guardianship like help with drafting powers of attorney.”⁷⁹ For older adults in poverty, “[a] bare cupboard or home in disrepair may be attributed to a decline in mental capacity due to age instead of other problems: poverty, physical disability, lack of access to physical and mental healthcare, and a lack of a social safety net.”⁸⁰

2. *Children.* — A second category of cases, “Children,” occupies 15% of state civil court dockets.⁸¹ These are all of the civil matters necessarily involving children. As reflected in Table 1B, we exclude juvenile delinquency matters because, while not officially categorized as “criminal,” they are functionally closer to criminal cases than they are to civil ones. Socioeconomic status significantly affects court involvement among children, especially in child welfare matters: “Families involved in the child welfare system overwhelmingly draw from impoverished households.”⁸² For example, custody and termination of parental rights deeply implicate poverty and racial inequality. Higher rates of child abuse and neglect may emanate from the hardships of low socioeconomic status.⁸³ Poor families are also disproportionately referred to child welfare,⁸⁴ often inappropriately as the

(1997) (noting that guardianship and property disputes are two primary sources of probate disputes).

78. Joseph Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly*, *Geo. J. on Poverty L. & Pol’y* 315, 339 (2009) (finding, in a small sample, that 47% of those over sixty-five with guardians fell below the poverty line, compared to 10.1% of the total population).

79. Nicole Shannon, Emily Miller & Emma Holcomb, *Defending Older Clients in Guardianship Proceedings*, *Mich. Bar J.*, Dec. 2020, at 30, 32, <http://www.michbar.org/file/barjournal/article/documents/pdf4article4063.pdf> [<https://perma.cc/TXS8-HWVW>].

80. *Id.*

81. See *infra* Appendix, tbl.2. This is an estimated three million cases per year (15.45% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

82. Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review With Implications for Child Welfare Status*, 54 *Fam. Ct. L. Rev.* 221, 222 (2016); see also Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 7–10, 74–92 (2002).

83. Mary Russell, Barbara Harris & Annemarie Gockel, *Parenting in Poverty: Perspectives of High-Risk Parents*, 14 *J. Child. & Poverty* 83, 83–85 (2008); Zilberstein, *supra* note 82, at 222 (citing Leroy H. Pelton, *The Continuing Role of Material Factors in Child Maltreatment and Placement*, 41 *Child Abuse & Neglect* 30, 30–31 (2015)).

84. Colleen E. Janczewski, *The Influence of Differential Response on Decision-Making in Child Protective Service Agencies*, 39 *Child Abuse & Neglect* 50, 51–52 (2015); Pelton, *supra* note 83, at 35–36; Jacqueline Stokes & Glen Schmidt, *Race, Poverty and Child Protection Decision Making*, 41 *Brit. J. Soc. Work* 1105, 1107 (2011).

result of racial and class bias.⁸⁵ Moreover, the “physical, emotional, behavioral, cognitive, and environmental problems” experienced by poor children can “result in delinquent behavior or status offending,”⁸⁶ especially in truancy matters where poverty leads to absence or misbehavior at school.⁸⁷ Poor parents also “may turn to the court for help they could not otherwise afford.”⁸⁸ Together, these dynamics of racism and poverty land children and their families in court.

The “Children” category captures cases that are theoretically distinct: those that involve two private parties and those that involve the state. The government is directly involved in more than half of the “Children” cases in the following ways. First, child support matters where the custodial parent receives government benefits and thus support payments go to the government (these are approximately 40% of “Children” cases).⁸⁹ Second,

85. For example, bias may arise in custody disputes, divorce proceedings, or visitation when reporting abuse or assessing parental behavior. See Alice M. Hines, Kathy Lemon, Paige Wyatt & Joan Merdinger, *Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System: A Review and Emerging Themes*, 26 *Child. & Youth Serv. Rev.* 507, 521–24 (2004) (“Differential treatment based on ethnicity and/or [socioeconomic status], is clearly a factor that may likely contribute to the disproportionate representation of children of color in the [child welfare system].”); Pelton, *supra* note 83, at 34 (finding bias where child welfare workers report abuse on the basis of dirty houses or other indicia of low income, not the parenting itself).

86. Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 *Ohio St. L.J.* 1225, 1237 (1999). Status offenses are acts that are not criminal and only subject to penalty because of the individual’s age. This includes things like violating curfew, being repeatedly absent from school, or being present in spaces in ways that have been labeled “loitering.” See David J. Steinhart, *Status Offenses*, 6 *Future Child.* 86, 86 (1996).

87. See Steinhart, *supra* note 86, at 94.

88. Federle, *supra* note 86, at 1244.

89. See Jacquelyn L. Boggess, *Ctr. for Fam. Pol’y & Prac., Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems* 9 (2017), https://cffpp.org/wp-content/uploads/CFFPPpaper_BOGGESS_forscreen.pdf [<https://perma.cc/Z2X4-FK98>] (highlighting the problems inherent to the U.S. child support system due to racial inequity and disparities in poverty and unemployment); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 *J. Gender Race & Just.* 617, 625 (2012) (describing the distribution scheme for child support established by the 1984 amendments to the Child Support Act); Tonya L. Brito, *The Child Support Debt Bubble*, 9 *U.C. Irvine L. Rev.* 953, 965 (2019) (“[I]n the majority of IV-D contempt cases, the noncustodial parents’ circumstances involve unemployment and below poverty wages.”); Eleanor Pratt, *Child Support Enforcement Can Hurt Black, Low-Income, Noncustodial Fathers and Their Kids*, *Urb. Inst.* (June 16, 2016), <https://www.urban.org/urban-wire/child-support-enforcement-can-hurt-black-low-income-noncustodial-fathers-and-their-kids> [<https://perma.cc/75QM-PXY3>] (“Studies have estimated that low-income, noncustodial fathers are disproportionately black, and . . . black men are more likely to be poor, face labor market discrimination, and have more limited social networks to help them stay employed and able to pay their child support orders.”). For a qualitative study on how fathers are affected by financial support requirements, see Elizabeth Clary, Pamela Holcomb, Robin Dion & Kathryn Edin, *Off. of Plan., Rsch. & Eval., Providing Financial Support for Children: Views and Experiences of Low-Income Fathers in the PACT Evaluation* 3–4 (2017), <https://www.mathematica.org/publications/>

dependency cases involving abuse, neglect, and termination of parental rights have the relevant child welfare agency as a party (these are collectively 16% of “Children” cases).⁹⁰ An additional collection of cases may involve the government but in a less direct capacity, such as paternity matters (14% of “Children” cases) where the government requires a finding of paternity to justify a child support case.⁹¹ The cases that involve solely private parties include adoption, custody, paternity, visitation, and guardianship and support where the government’s child welfare role is not involved.

Together, “Personal Relationships” and “Children,” which collectively capture social needs of families, make up about 46% of state civil court dockets each year in our data.⁹²

providing-financial-support-for-children-views-and-experiences-of-low-income-fathers
[<https://perma.cc/VD4N-NMYW>].

90. In re Smith, 601 N.E.2d 45, 55 (Ohio 1991) (“A termination of parental rights is the family law equivalent of the death penalty in a criminal case.”); see also Michele R. Forte, Note, Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings, 28 Nova L. Rev. 193, 193–94 (2003) (calling the termination of parental rights “the ‘death penalty’ of juvenile law” as “[i]t constitutes a direct interference by the state into a parent’s ‘essential’ right to conceive and raise one’s child” (first quoting Appellant’s Initial Brief on the Merits at 3, N.S.H. v. Fla. Dep’t of Child. & Fam. Servs., 843 So. 2d 898 (Fla. 2003) (No. SC02-261), 2002 WL 32131297; then quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))). A 2020 study analyzed data from children in the U.S. foster care system since 2000. The study found that “African American children are 2.4 times more likely than White children to experience the termination of parental rights.” Christopher Wildeman, Frank R. Edwards & Sara Wakefield, The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016, 25 Child Maltreatment 32, 33 (2020). Additionally, the study provides that “[t]ermination of parental rights . . . is likely far more consequential because it signals the end of attempts to reunify parents and children and . . . leads to immediate attempts to place children in adoptive homes.” *Id.*; see also Child’s Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 1–23 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [<https://perma.cc/8M6T-YZX8>] (providing an “overview on the issue of racial disproportionality and disparity in the child welfare system and the factors that contribute to the problem”).

91. See Stacy Brustin, More Than a Witness: The Role of Custodial Parents in the IV-D Child Support Process, 26 Child’s Legal Rts. J. 37, 37–39 (2006) (discussing the federal requirement that states mandate that recipients assign any right to benefits to the state who then enforces the obligation on the noncustodial parent); Paula Roberts, In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System, 18 Clearinghouse Rev. 1407, 1408 (1985) (“This cooperation [between the IV-D agent and the custodial parent] includes identifying and locating the absent parent, establishing paternity, and obtaining support or any other payments due [T]he parent may be required to go to the IV-D office for appointments . . . , appear as a witness . . . and provide information under oath.”); Paternity, Legal Assistance Ctr., <https://legalassistancecenter.org/get-help/paternity/> [<https://perma.cc/632D-ZBZS>] (last visited Feb. 10, 2022) (outlining the prerequisite of paternity and its process before the court can order child support from the father).

92. See *infra* Appendix, tbl.2. This is an estimated nine million cases per year (45.73% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

3. *Housing*. — A third category of cases, “Housing,” is 15% of state civil court dockets.⁹³ These are landlord–tenant matters, including eviction, and mortgage foreclosure cases. This category is likely an undercount of the number of people facing eviction or foreclosure, as it does not capture those housing-debt-related cases that appear on small claims dockets.⁹⁴

Collectively, the substance of these cases involves either people at risk of losing their homes or people trying to improve the conditions of their homes. Eviction and foreclosure as causes and consequences of economic inequality are well-documented.⁹⁵ This research demonstrates, and current policy conversations echo, how interwoven housing instability is into the fabric of social inequality in this country. Similarly, disparate involvement in housing cases reflects the country’s racial inequality and corresponding starker social needs.⁹⁶ Housing conditions cases—where tenants are trying to get landlords to make repairs—are similarly concentrated among low-income tenants.⁹⁷ This, too, is both a cause and

93. See *infra* Appendix, tbl.2. This is an estimated three million cases per year (14.95% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

94. Housing data suggest as many as five million people a year are subject to eviction. Housing Loss in the United States: Our National Rankings and Maps, New Am., <https://www.newamerica.org/future-land-housing/reports/displaced-america/housing-loss-in-the-united-states-our-national-rankings-and-maps/> [<https://perma.cc/KD3L-KMFR>] (last visited Feb. 10, 2022) (pointing out that U.S. housing data is poor and incomplete but providing a 2014 to 2016 average rate with available data); see also National Estimates: Eviction in America, Eviction Lab (May 11, 2018), <https://evictionlab.org/national-estimates/> [<https://perma.cc/8HTR-42DJ>] (showing data that the number, but not necessarily the rate, of evictions has increased, though their sample excludes California and New York).

95. Regarding eviction, see Monica Bell & Matthew Desmond, Housing, Poverty, and the Law, 11 *Ann. Rev. L. & Soc. Sci.* 15, 19 (2015) (suggesting that “[t]enant screening on the basis of previous evictions and convictions” may “foster inequality”); Matthew Desmond, Eviction and the Reproduction of Urban Poverty, 118 *Am. J. Socio.* 88, 91 (2012) (listing negative consequences of eviction); Matthew Desmond & Carl Gershenson, Housing and Employment Insecurity Among the Working Poor, 63 *Soc. Probs.* 46, 60 (2016) (“Forced removal from housing may serve as a crucial turning point in the lives of poor working families, with eviction leading to job loss, which in turn can result in durable earnings losses and nontrivial negative health outcomes.”). Regarding foreclosure, see Antwan Jones, Gregory D. Squires & Cynthia Ronzio, Foreclosure Is Not an Equal Opportunity Stressor: How Inequality Fuels the Adverse Health Implications of the Nation’s Financial Crisis, 37 *J. Urb. Affs.* 505, 519–20 (2015) (concluding that “foreclosures, health, and income inequality are intricately interrelated”); Gregory D. Squires, Inequality, Advocacy, and the Foreclosure Crisis, 8 *J. Applied Soc. Sci.* 85, 87 (2014) (asserting that “[c]hanges in home equity largely account for the spike in wealth inequality” in recent years); see also *supra* notes 1, 32, 45.

96. For empirical studies capturing stark racial disparities in housing cases, see *supra* note 1.

97. James Krieger & Donna L. Higgins, Housing and Health: Time Again for Public Health Action, in *Urban Health: Readings in the Social, Built, and Physical Environments of U.S. Cities* 101, 106 (H. Patricia Hynes & Russ Lopez eds., 2009); see also David E. Jacobs, Environmental Health Disparities in Housing, 101 *Am. J. Pub. Health* 115, 116 (2011) (“Clearly, the prevalence rates [of people living in moderately substandard housing] are higher among racial and ethnic minorities . . .”).

consequence of inequality rooted in the country's history of segregation and health inequities.⁹⁸

4. *Small Claims (Including Debt Collection)*. — A fourth category is difficult to parse: “Small Claims” cases. This is 19% of the state civil court dockets and is a mix of tort, contract, and property matters.⁹⁹ This proportion varies by state, and there is limited data disaggregating these case types.¹⁰⁰

What we do know suggests that “Debt Collection” matters dominate this part of state civil courts. The limited data suggest that “Small Claims” dockets are roughly 40 to 60% “Debt Collection” matters, involving a corporate debt buyer suing a low-income individual, with some additional meaningful proportion including landlord–tenant disputes over payment of rent or return of security deposits.¹⁰¹ We can extrapolate two things from the available data. First, the dearth of “Small Claims” data means the “Housing” proportion reported above does not include “Small Claims” cases and thus is likely an undercount.

98. See Dayna Bowen Matthew, Edward Rodrigue & Richard V. Reeves, *Time for Justice: Tackling Race Inequalities in Health and Housing*, Brookings (Oct. 19, 2016), <https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/> [<https://perma.cc/BU2K-DFVB>] (describing the housing disparities' negative consequences and disproportionate effect on Black families).

99. See *infra* Appendix, tbl.2. This is an estimated four million cases per year (18.92% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

100. The only (near) national report, using 2013 data, is Paula Hannaford-Agor, Ct. Stat. Project, *The Landscape of Civil Litigation in State Courts: Examining Debt Collection, Landlord/Tenant and Small Claims Cases* (2019), https://www.ncsc.org/__data/assets/pdf_file/0022/26671/caseload-highlights-examinint-debt-collection.pdf [<https://perma.cc/W8LK-ACAJ>]. In addition, there are a few state- and city-level reports. See Ricardo Lillo, *Access to Justice and Small Claims Courts: Supporting Latin American Civil Reforms Through Empirical Research in Los Angeles County, California*, 43 R. Ch. D. 955, 973 (2016); Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 Univ. S.F. L. Rev. 334, 335 n.121 (2003) (noting that in 2000, Ventura County had a population of 742,000, making it the twelfth most populous county in California); Jennifer Clendening & Katie Martin, *Pew Charitable Trs., How Philadelphia Municipal Court's Civil Division Works: Small Claims Cases Can Have a Big Impact on City Residents' Lives 1–2* (2021), https://www.pewtrusts.org/-/media/assets/2021/02/philadelphia_municipal_courts_civil_division_works.pdf [<https://perma.cc/374R-WNRT>]; see also Arthur Bestf, Deborah Zalesne, Kathleen Bridges & Kathryn Chenoweth, *Peace, Wealth, Happiness and Small Claim Courts: A Case Study*, 21 *Fordham Urb. L.J.* 343, 360–62 (1994); Suzanne Elwell & Christopher Carlson, *Comment, The Iowa Small Claims Court: An Empirical Analysis*, 75 *Iowa L. Rev.* 433, 489 (1990); Hynes, *supra* note 54, at 41–42; Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 *Hastings L.J.* 1427, 1429–32 (2016).

101. Hynes, *supra* note 54, at 49 (estimating that in Virginia actions seeking the payment of money account for approximately 60% of civil filings); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 *Va. L. & Bus. Rev.* 257, 273 (2011) (finding that in Texas “suits on debt” accounted for 43.8% of civil cases filed in county courts statewide).

Second, we can piece together a view of “Debt Collection” matters using “Small Claims” and other case types that reveals “Debt Collection” matters are as big a part—if not bigger—of state civil court business as “Personal Relationships,” “Children,” and “Housing.” About 5% of the overall docket (that is, more than half of “Contract” cases) are explicitly identified as “Debt Collection” matters.¹⁰² If we combine these cases and the very rough estimates of “Small Claims” dockets, “Debt Collection” matters (excluding housing-related debt collection) are in the range of 15% of state civil court dockets.¹⁰³ If we include housing-related debt collection, this grows to about 24% of state civil court business.¹⁰⁴ As other research has shown, these cases are closely related to inequality.¹⁰⁵

5. *The Rest of Civil Justice Needs Cases.* — The remaining approximately one-third of state civil court dockets is spread among many case types, none constituting more than 10% of civil justice needs cases. Among these cases is a fourth category of cases: “Contract” cases, making up 8% of the docket overall.¹⁰⁶ As discussed above, this category has meaningful variation within it for our purposes, with about half of “Contract” cases being “Debt Collection” matters.¹⁰⁷ An additional 8% of state civil court cases are

102. In NCSC data, this is called “Seller/Plaintiff” contract cases. See *infra* Appendix, tbl.2. This is an estimated one million cases per year (5.06% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

103. See *infra* Appendix, tbl.2. This is an estimated three million cases per year (combining 50% of small claims cases with Seller/Plaintiff cases). See *infra* Appendix, tbl.2. We note recent scholarship with different estimates of debt collection matters. One repeated statistic is that there are eight million debt collection cases a year in the United States. See Arbel, *supra* note 54, at 130; Wilf-Townsend, *supra* note 6, at 1753. The eight million figure arises from applying proportional findings from a single state sample to national caseload data to estimate totals, resulting in a blunter estimate than ours. See Arbel, *supra* note 54, at 131 n.42 (applying Hynes and Spector’s 40 to 60% estimate to NCSC total of fifteen million civil cases per year).

104. If we also include eviction for nonpayment of rent (“landlord tenant unlawful detainer”) cases, this balloons to 23% of civil justice needs and approximately five million cases per year. Note that this estimate may not fully capture eviction matters that appear on small claims dockets, which other data suggest could add another one million cases per year. See Ashley Gromis, Princeton Univ. Eviction Lab, *Eviction: Intersection of Poverty, Inequality, and Housing* 5 (2019), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf [<https://perma.cc/T3N7-BL9R>]; see also Jenifer Warren, Pew Charitable Trs., *How Debt Collectors Are Transforming the Business of State Courts* 6, 8 (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/HLJ2-4JMP>].

105. See Pamela Foohey, Dalié Jiménez & Christopher K. Odet, *The Debt Collection Pandemic*, 11 *Calif. L. Rev. Online* 222, 225–27 (2020) (noting that “income inequality and depressed wages have exacerbated people’s inability to accumulate any meaningful savings” such that they have turned to consumer credit for “unexpected emergency expense[s]”); Spector, *supra* note 101, at 273–74 (noting reports from Dallas County and other jurisdictions finding that “civil litigation [comprising debt collection claims] is concentrated in cities and counties with significant minority populations, lower median income, and lower home ownership”).

106. See *infra* Appendix, tbl.2.

107. See *infra* Appendix, tbl.2.

miscellaneous appeals from administrative and limited jurisdiction courts.¹⁰⁸ These are not appeals of otherwise counted cases but rather cases that are appealed from these miscellaneous subsidiary courts directly to the state civil trial court. A fifth category is “Tort” cases, comprising 2% of the docket and capturing the full range of intentional torts, malpractice, and other torts.¹⁰⁹ Two-thirds of these matters are automobile-related torts.¹¹⁰ Finally, “Tax” matters (1%), remaining non-housing “Property” matters (0.5%), and “Employment” matters (0.1%) round out the dockets.¹¹¹

These data describe trial courts. While there are also state appellate courts in each jurisdiction, state appellate courts are largely insulated from the matters we describe above. This is due to the nature of appellate proceedings: Appellate courts receive predetermined facts in a written record and have almost no interaction with litigants. It is also because the overwhelming number of state civil trial matters involve lawyerless litigants who do not appeal. As we hope to pursue in future work, this means that these matters—the individual cases but also the collective substance of these cases—never make it to the appellate courts.¹¹² We note that, in the same way trial courts rest on assumptions about dispute resolution, appellate courts rest on a corollary set of assumptions about institutional design that do not hold true.

6. *Quantifying Cases With Social Needs.* — Using these civil case types based on the nature of people’s problems, we categorize cases as “Social Need Presented” and “Underlying Social Need” cases. In some types of cases, the social need is squarely presented in the legal system’s definition of a case. For example, an eviction matter is plainly about whether a person

108. See *infra* Appendix, tbl.2. This is an estimated one and a half million cases per year (8.1% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

109. See *infra* Appendix, tbl.2. This is an estimated 440,000 cases per year (2.25% of 19,586,267 total civil justice needs cases per year). See *supra* note 59.

110. See *infra* Appendix, tbl.2.

111. See *infra* Appendix, tbl.2. Tax is an estimated 260,000 cases per year; Property an estimated 94,000 cases per year; and Employment an estimated 18,000 per year (1.33%, 0.48%, and 0.09% of 19,586,267 total civil justice needs cases per year, respectively). See *supra* note 59.

112. See Carpenter et al., “New” Civil Judges, *supra* note 22, at 273–74 & n.103 (noting that “cases involving pro se parties are unlikely to be appealed”); Llezlie L. Green, Wage Theft in Lawless Courts, 108 Calif. L. Rev. 1303, 1336 (2019) (explaining that it is unreasonable to expect a pro se litigant in small claims court to engage successfully in the process of “crafting a compelling narrative and case theory . . . , particularly where the litigant must use a narrative process to educate the judge about various statutory legal protections”); Sabbeth, Housing Defense as the New *Gideon*, *supra* note 7, at 85 (“[T]enants who are represented are three, six, ten, or even nineteen times more likely than pro se tenants to prevail.”); Sabbeth & Steinberg, *supra* note 2 (manuscript at 55–56); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, Can a Little Representation Be a Dangerous Thing?, 67 Hastings L.J. 1367, 1376 (2016) (pointing out the risks of a lack of legal representation of less resourced litigants in the form of “second-class legal assistance” and lacking “the benefit of law reform”).

remains in housing. Housing is plainly a social need. An eviction matter can also be—though it is not always—about a landlord needing financial stability. This additional social need reinforces our categorization. Or a sister seeking to place a brother under compulsory mental health care is plainly seeking health (and familial) care. Thus, we can identify these cases as ones in which social needs are presented in state civil courts. For some case types, we can imagine a range of problems, some presenting social needs and some not. Thus, we categorize each subcategory of cases in Table 2 as presenting a social need, not presenting a social need, or a mix. Our categorization yields a low estimate of 31% and a high estimate of 90% of state civil court cases in our data presenting a social need.¹¹³

Other cases require a deeper understanding of both the substantive law and the goings-on in the courtroom to identify a social need. For example, a domestic violence protective order case as defined by the existing legal system is about two people with a relationship in conflict involving violence. There may not be an obvious social need presented in the case type but, as we discuss using qualitative data below, just below the surface we can identify social needs such as housing, health care, and childcare. In another example, a defendant in a debt collection action is on the face of the case defending against a contract claim. One can easily imagine, however, a case where the facts reveal that the debt in question is a high-interest, high-fee payday loan, which the defendant needed to pay her family's expenses between paychecks.¹¹⁴ In this type of case, we then see social needs such as childcare, housing support, or better wages related to the defendant's contractual liability. We label these "Underlying Social Need" cases.

Adding the second layer of categorization to the first, the proportion of state civil cases that include social needs ranges from 46% to 95% of the cases. Thus, even with our most conservative estimates, 46% of state civil dockets (or roughly ten million cases per year) present social needs to state civil courts. This is the equivalent of thirty-five times the average civil docket of the federal courts.¹¹⁵

C. *Social Needs in the Courtroom*

While caseload data illuminate the volume of social needs that arise in state civil courts, what happens inside these courts illustrates the depth of the mismatch between people's needs and courts designed for dispute

113. See *infra* Appendix, tbl.2.

114. See, e.g., Aimee Picchi, Payday Loans Are Landing People in Jail, CBS News (Feb. 20, 2020), <https://www.cbsnews.com/news/payday-loans-dickensian-system-is-landing-borrowers-in-jail-group-says/> [<https://perma.cc/TJK9-HZ7J>].

115. It is worth pausing to note the comparison with federal courts. As Table 3 shows, 24% of federal court cases are tort actions, 9% are contracts, 3% are property disputes, and 64% are actions falling under federal statutes (with the bulk of statutory actions being prisoner petitions (20%) and civil rights actions (14%)).

resolution. Our own mixed-methods, multijurisdictional study of state civil courts sheds further light on how state civil courts distort litigants' social needs into narrow legal disputes requiring judicially led resolution.¹¹⁶ These data capture courtroom observations of 350 hearings as well as interviews with judges and other actors in those courtrooms. These data are drawn from three jurisdictions we refer to as Centerville, Townville, and Plainville.¹¹⁷ Qualitative analysis reveals that many of these disputes constitute "Social Need Presented" or "Underlying Social Need" cases.

Our study focused on protective order cases: domestic violence, stalking, and harassment. These cases have a number of characteristics that are generalizable to the broader state civil caseload. Parties are generally unrepresented, as they are across state civil courts.¹¹⁸ The law in these cases is relatively static, and informal procedure abounds.¹¹⁹ Though conventional academic wisdom about civil courts is that the trial is "disappearing,"¹²⁰ the opposite is true in state civil courts. The bulk of case-dispositive interactions between largely lawyerless litigants and the courts occur inside courtrooms, including in the cases in our study.¹²¹ Finally, there is some, but uneven, assistance for parties outside the courtroom, including efforts at negotiated resolutions.¹²²

Protective order law generally requires evidence of (1) an existing relationship between the parties, (2) a previous incident of violence or fear

116. We discuss the details and methodology of this study in Carpenter et al., *Judges in Lawyerless Courts*, supra note 8, at 529–34; Steinberg et al., *Judges and Deregulation*, supra note 9, at 1327–28.

117. "The three jurisdictions in our study vary economically, demographically, and politically. Centerville is a relatively wealthy, politically liberal, and diverse urban center with appointed judges. Townville is also urban, politically liberal, and diverse, with a very high poverty rate, a history of economic stagnation and appointed judges. Plainville is majority white, politically moderate, and sits in a fiscally and socially conservative state where social and government services of all kinds are under-funded, including the courts." Carpenter et al., *Judges in Lawyerless Courts*, supra note 8, at 531.

118. *Id.* at 511.

119. *Id.* at 511 n.4, 521–24.

120. Carpenter et al., "New" Civil Judges, supra note 22, at 274; Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *Stan. L. Rev.* 1255, 1255 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. Empirical Legal Stud.* 459, 459–60 (2004).

121. Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials"*, 63 *DePaul L. Rev.* 413, 430 (2013); Shanahan, *Keys to the Kingdom*, supra note 23, at 217 ("In state civil and administrative courts, the hearing—the in-person interaction that occurs between self-represented litigants and judges in the courtroom—is the focal point of the justice system . . ."); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 *Law & Soc. Inquiry* 1058, 1060 (2017) [hereinafter Steinberg, *Informal, Inquisitorial, and Accurate*] (offering evidence that the inquisitorial procedures in the Housing Conditions Court in the District of Columbia "have the potential to contribute to accurate outcomes for tenants").

122. Carpenter et al., *Judges in Lawyerless Courts*, supra note 8, at 514; Carpenter et al., "New" Civil Judges, supra note 23, at 257–61, 277–78.

of violence, and (3) an ongoing fear of harm.¹²³ These cases are plainly built on a dispute resolution construct, yet the issues that appear in our data go far beyond this substantive law. These issues include child custody and support between parents and other family members, child welfare proceedings involving the state and one or both parents, elder care and estate concerns, housing instability, mental health care, addiction, immigration law, career licensing, criminal law matters, and reentry and probation matters. These issues were not presented in the courtroom as collateral but were intertwined in the evidence and relief sought in the course of the protective order cases. We begin in this section with how social needs are presented in the courtrooms in our data. We save courts' reactions to these needs as distinct analysis in the following section.

We saw numerous cases where an underlying issue is money to support children, including paying for housing, between parents who do not live together. For example, in one case, parents cross-filed for protective orders against each other after a long history of arguments over custody of their child and who paid particular expenses. Each party alleged physical violence by the other during arguments over money, in amounts like fifty dollars for a babysitter.¹²⁴ This is an example of our "Underlying Social Need" category where we can plainly observe that litigants have underlying social needs that are broader and deeper than the bounds of the legally constructed dispute. Here, those needs might include accessible and affordable childcare, higher wages, or employment hours compatible with parenting.

There were a range of cases about caring for family members beyond minor children, including elder care, and the associated financial burdens. For example, one case involved a petitioner grandmother, her nonparty granddaughter, and a respondent grandson. The grandson had used the grandmother's funds to pay for repairs to her home, made her stay at his home so he could care for her, and reimbursed himself with the grandmother's funds to pay for costs of housing her.¹²⁵ The granddaughter actively participated in the hearing in support of her grandmother. Again, the legal system constructed these parties' problems as about a dispute between a grandmother and her grandson. Yet if we look beyond the rigid construct of the legal dispute, we see social needs, including accessible and affordable elder care and affordable housing.

The data also show cases with roommates presenting disputes over rent or disagreements about their living situation. One particularly complicated example is a case where a likely mentally ill respondent illegally sublet one of her bedrooms to the petitioner. When the petitioner learned of his invalid lease and contacted the actual landlord to protect himself, the respondent tried to lock him out of the apartment, and there was a

123. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 8, at 535.

124. Notes of Hearing 7, Townville (Judge 4).

125. Notes of Hearing 23, Townville (Judge 2).

physical altercation. The respondent was arrested and remained incarcerated (due to inability to post bail) at the time of the civil court hearing on the protective order.¹²⁶ This case, while consistent with the design of protective order cases due to the violent conflict between the parties, nonetheless also reveals underlying social needs. Here, those social needs may involve adequate mental health care, affordable housing, and sufficient income or social supports (including for the respondent to be released from pretrial detention).

Across the cities we observed, addiction and mental health needs were pervasive. For example, in one case a petitioner was recovering from cancer surgery and her respondent brother, who was addicted to drugs, broke into her home and assaulted her while looking to steal her pain medication. After the sister reported the robbery and assault to the police, the brother called the sister's doctor's office, supportive housing, and disability providers trying to obtain another prescription, jeopardizing her benefits and services.¹²⁷ In another case, a grandmother sought a protective order against her daughter who had been released from a mental health facility and was plainly agitated in court. The grandmother's core problem was that her daughter kept coming to her house and behaving violently, which jeopardized the grandmother's visitation rights with her grandchildren.¹²⁸ In each of these examples the parties had conflicts involving violence, and the need for sufficient addiction and mental health services are also immediately apparent.

Though we do not have this depth of data across all case types in state civil courts, other research illustrates underlying social needs in other types of cases. For example, Professor Matthew Desmond's research gives us the story of Arleen and how a confluence of social needs brought her to eviction court.¹²⁹ As housing costs increased and welfare payments and public housing assistance remained stagnant, Arleen had to devote the vast majority of her welfare check to rent, leaving her with little money to provide for her family or cope with emergent financial needs. Toward the end of 2008, Arleen was at her fourth apartment since the beginning of the year. After a welfare sanction for a missed appointment and expenses for a friend's funeral, she was \$870 behind on rent, and her landlord filed to evict her. In another example, from a report about Philadelphia's debt collection docket, a 50-year-old Black woman with an annual income of \$19,200 was the defendant in two collection actions for credit card debt

126. Notes of Hearing 16, Townville (Judge 2).

127. Notes of Hearing 12, Townville (Judge 2).

128. Notes of Hearing 21, Plainville (Judge 1).

129. Matthew Desmond, *Evicted: Poverty and Profit in the American City* 63, 94 (2016).

accrued when she was hospitalized and lost her job, resulting in damaged credit and a lien on her home.¹³⁰

Taken together, the quantitative and qualitative data paint a picture of state civil courts largely occupied with social needs and their consequences rather than resolving private disputes. These social needs capture the range of dimensions of inequality: financial means, housing, health care, and care for children and family members. Further, when we look at particular subcategories of cases, we see how these needs for social provision become intertwined with other dynamics of American law and society.

For example, the relationship between social provision and policing of Black families appears in state civil court dockets. As others have theorized, the conflation of poverty with neglect is intertwined with racism—especially perceptions of Black mothers—and drives state intervention through the child welfare, foster care, and juvenile detention systems.¹³¹ Even more pointedly, these structures explicitly wield state power—through state civil court proceedings—to control access to social provision. As Professor Dorothy Roberts aptly describes, in the child welfare system “[p]arents must often relinquish custody of their children to the state in exchange for the services and benefits their families need.”¹³² The breadth of mass incarceration exacerbates these

130. Reinvestment Fund, Debt Collection in Philadelphia 18 (2021), https://www.reinvestment.com/wp-content/uploads/2021/03/ReinvestmentFund_2021_PHL-Debt-Collection.pdf [<https://perma.cc/G8T6-EYNJ>].

131. Jessica Horan-Block & Elizabeth Tuttle Newman, Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation, 22 CUNY L. Rev. 382, 396 (2019) (“[P]oor parents of color who bring their young babies and children to Bronx hospitals with certain injuries are often met with interrogation rather than consolation and compassion. The[se] case anecdotes . . . describe parents repeatedly being charged with abuse based exclusively on injuries that litigation reveals are plausibly accidental.”); Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1493 (2012) [hereinafter Roberts, Systemic Punishment] (“Because they perceive black single mothers as incapable of providing adequate supervision of their children, officials believe they are justified in placing these children under state control [S]tate officials apply the myth of black maternal irresponsibility to justify placing African American children in both juvenile detention and foster care.”); Dorothy E. Roberts, The Racial Geography of Child Welfare: Toward a New Research Paradigm, 87 Child Welfare 125, 126 (2008) (presenting a case study on the effects of the high involvement of child welfare agencies in Black communities); Jane M. Spinak, Reflections on a Case (of Motherhood), 95 Colum. L. Rev. 1990, 2008 (1995) (arguing that conceptions of motherhood are informed by racist policies and stereotypes that serve to demean Black women and cast them as unfit mothers); Christina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 Nw. J.L. & Soc. Pol’y 303, 315 (2006) (arguing that Black children are especially susceptible to state intrusion).

132. Dorothy E. Roberts, Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement, 34 U.C. Davis L. Rev. 1005, 1014 (2001) [hereinafter Roberts, Criminal Justice and Black Families]; see also Wendy Bach, Prosecuting Poverty, Criminalizing Care, 60 Wm. & Mary L. Rev. 809, 814 (2019) (describing a Tennessee statute

dynamics.¹³³ In this part of state civil courts' work, the presence of government leads to regulation, punishment, and violence rather than to litigants' social needs being met.

In some of these cases dispute resolution is well-matched to the needs of powerful parties. In such cases, state civil courts directly serve the interests of wealthy parties in extracting or maintaining wealth, in conflict with the litigant's need for social provision. For example, state civil courts are an effective mechanism for debt collection companies to maximize the value of their investments.¹³⁴ Historical research suggests this is an intentional feature of these courts' design.¹³⁵

Of course, there are social needs that we are not seeing in our data or in courtrooms more generally because people do not conceptualize their problems as legal problems and do not engage courts with those problems they do see as legal.¹³⁶ Professor Sandefur's work further questions whether this small proportion of engagement with courts is problematic or whether it reflects that problems we define as legal are better solved outside of court.¹³⁷ Ultimately, this means that, despite state civil courts drinking from a fire hose of social needs, the apparent needs are only a subset of those present in society.

II. HOW COURTS RESPOND TO THE INSTITUTIONAL MISMATCH

*"It weighed on me, but I kept thinking, 'you're a judge. That's not your part.'"*¹³⁸

that created a crime "not to punish or to exact retribution but to provide care to the defendants prosecuted for the offense"). As we discuss below, in our data, Centerville has tied access to housing and other resources to the presence of a protective order. See *infra* note 176.

133. See Roberts, *Criminal Justice and Black Families* *supra* note 132, at 1006 ("Because most prison inmates are parents, incarceration breaks up families by depriving children of their parents' emotional and financial support. Juvenile detention and imprisonment also splinter families because they remove children from their homes, transferring custody from the parents to the state.").

134. Wilf-Townsend, *supra* note 6, at 1712–13. Courts are not the only branch of government susceptible to being well-suited to pursuing corporate financial interests. See, e.g., Liz Day, *The TurboTax Trap: How the Maker of TurboTax Fought Free, Simple Tax Filing* (Mar. 26, 2013), <https://www.propublica.org/article/how-the-maker-of-turbotax-fought-free-simple-tax-filing> [<https://perma.cc/399J-PGVM>] (describing how Intuit, the maker of TurboTax, has spent millions lobbying against free, simple, government-filed tax returns).

135. See Kellen Funk, *Chapter 5: The Swearer's Prayer: Oathtaking and Witness Testimony 17* (May 12, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3599032> [<https://perma.cc/HJ8S-CYW9>] (discussing New York State's Field Code).

136. See *supra* note 20 and accompanying text.

137. See *supra* note 20 and accompanying text.

138. Interview with Judge 1, Plainville.

Our interview data reflect that the judges, advocates, and other actors involved in these dockets are well aware of litigants' social needs and that court's dispute resolution design does not fit these needs. One judge put it plainly: "So, we'd find a lot of people in [protective order court] really needed to be in [landlord-tenant], or sometimes, bills, financial planning, is what they need, not family court."¹³⁹ An advocate drew the contrast between the assumptions about these cases and the reality:

[Y]ou would think that literally every case in [protective order] court was a man beating a woman with a bat, but that couldn't be further from the truth [T]hat's not at all what we see in [protective order] court. We've represented a sister versus her brother. We've represented an elderly parent, a grandmother versus a younger nephew who was trying to get the upper hand in [a] probate case. We've represented a tenant where the petitioner was an abusive, mentally ill landlord."¹⁴⁰

When state civil courts are faced with social needs, they must respond in some way. Our data show that these responses fall into four categories. We discuss these categories to frame a deeper theoretical understanding of the role of state civil courts and acknowledge that these categories raise new questions. For example, how do these responses appear across jurisdictions and case types? Why might one court avoid social needs while another attempts to meet them? What disposes a court system to build new institutions in the face of these needs? We hope future work will address these questions.¹⁴¹

In the first type of response, courts avoid social needs presented by the litigant. They either do this altogether or by shaping the needs to fit the design of the legal system. This type of court response reveals the potential for state civil courts to be violent actors in the face of the mismatch between social need and dispute resolution. In the second category, courts try to meet litigants' social needs at the individual actor level. What this means in the courtroom is not that courts are acting as agents of social provision in a social welfare state, but rather that courts address the social needs of litigants just enough to resolve the dispute as wedged into the institutional design—and hopefully to keep litigants from returning to court again. The third category is where courts develop informal

139. Interview with Judge 1, Centerville.

140. Interview with Court Actor 1, Centerville.

141. One particular area for further investigation is when statutes creating courts or specific areas of jurisdiction acknowledge or allow for engagement with broader litigant needs. For instance, a New York statute provides:

This act defines the conditions on which the family court may intervene in the life of a child, parent and spouse. Once these conditions are satisfied, the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it. The judges of the court are thus given a wide discretion and grave responsibilities.

N.Y. Fam. Ct. Act § 141 (McKinney 2022).

procedures to address social needs at an institutional level. A final category of court response is where courts develop new institutions to meet social needs.

A. *Avoid Social Needs*

When courts avoid the social needs that arise in the courtroom, despite a litigant's social need that is plainly within the frame of the case or revealed by the underlying facts, the court hews to its design as a site of dispute resolution. At a minimum, this means the litigant's need is ignored and not met. Sometimes the litigant's need is distorted by dispute resolution so that the outcome of the case is that the litigant needs more or different social provision. In other cases, as we discuss below, the court's avoidance leads to the court imposing a violent outcome, such as the loss of a home or a child.

In the protective order discussed above, brought by a grandmother against her mentally ill daughter who was jeopardizing her visitation, the grandmother told the judge that what she wanted was to get her daughter into court-ordered treatment. The judge cut off her testimony, entered a protective order, and ended the hearing.¹⁴² In doing so, the judge was avoiding the social need articulated by the grandmother and hewing to the legal definition of the dispute as defined by domestic violence law. In another case, a mother sought a protective order against a daughter who kept trying to break into her home to get food. The testimony revealed that the daughter was mentally ill and addicted to drugs. In the mother's words, "Her mind is gone. She thinks she lived there. She can't do it. She hasn't lived there since February." The judge entered a protective order. In response, the mother asked whether the daughter could receive treatment. The judge told her, "You can file with [another court] to admit her to treatment, but it's going to be expensive. The police can bring her to crisis, maybe they can care for her there. That's the key word, crisis treatment." The judge then ended the hearing with the protective order in place.¹⁴³ Despite explicitly understanding the social need in each of these cases (here, mental health or addiction care), the court proceeded with the matter as one of dispute resolution.

Courts do not just avoid the need for social provision; they also compound it by entering protective orders. Each of these petitioners presented a respondent's social need, requested some kind of social provision, but each court avoided those needs and then added a layer of risk of even more punitive consequences for the respondents' behavior.¹⁴⁴

142. See Notes of Hearing 21, Plainville (Judge 1); *supra* note 128 and accompanying text.

143. Notes of Hearing 8, Townville (Judge 4).

144. There are also examples of cases where judges avoid the social need and decline to enter protective orders. See Notes of Hearing 18, Centerville (Judge 1) (recounting proceedings in which a petitioner sought, but was ultimately denied, a protective order against

In each of these cases, by avoiding the underlying need of health care and imposing the legal solution of a protective order, the court facilitates violent state action—here, the respective daughters are now subject to arrest and incarceration if they violate the protective orders.¹⁴⁵

In another example from our data, the plaintiff and respondent were two women who reached an agreement to resolve the matter through a mandatory prehearing mediation program.¹⁴⁶ They appeared before the judge to enter the corresponding order. The hearing is four minutes long:

- Judge: I see you've come to agreement which is good. But it's important that you stick with the agreement. The court finds that it has jurisdiction, and that Respondent agrees without admitting allegations to entry of this order. For next year, don't harass, assault, threaten, or stalk. Also, Respondent shall follow all treatment recommendations from her mental health provider, including medications. That is a critical component.
- Judge: (*To Respondent*) Is that your signature? Did you sign it voluntarily?
- Respondent: Yes (speaks angrily).
- Judge: One last thing, I have no reason to believe you have a gun but I must read this. [Judge reads standard prohibition regarding possession of firearm].
- Respondent: (*To Petitioner, while the judge is speaking*): See what you do?
- Judge: (*The Judge ignores the Respondent.*) Any questions?
- Respondent: No.
- Judge: I hope this order will help and that you'll continue to see your doctor and take your meds.

his nephew who has uncontrolled schizophrenia and had violent outbursts while living with him).

145. See generally Nat'l Ctr. on Prot. Ords. & Full Faith & Credit, Protection Order Violations Matrix (2015), <https://www.bwjp.org/assets/documents/pdfs/ncpoffc-protection-order-violations-matrix.pdf> [<https://perma.cc/5X93-BYTG>] (summarizing consequences for violations of protection orders in all fifty states); Plain-Language Legal Information for Victims of Abuse, WomensLaw.org, <https://www.womenslaw.org> [<https://perma.cc/4JVE-YY97>] (last visited Mar. 3, 2022) (including an interactive legal information tool summarizing statutes in each state).

146. Notes of Hearing 35, Centerville (Judge 1). Because the case is filtered through the mediation program, we do not know how the parties presented their needs or case to the court.

In this jurisdiction, there is a required meeting with a mediator before a hearing—a step generally perceived as an innovation that mitigates the rigidity of the adversarial system.¹⁴⁷ Yet the litigants' problems remained social needs, and the court resolved them as a dispute. Even in a four-minute, perfunctory hearing to enter the agreed-upon resolution, the mismatch between the social needs and the court's design is stark. The judge's closing comment acknowledged the mismatch and the court's choice to hew to its dispute resolution design, even with an "alternative" resolution procedure in place.

Our study site is not the exclusive context for courts avoiding social needs. Eviction courts are classic examples. The most straightforward version of this is when a tenant cannot pay rent because of insufficient income, and the housing court evicts the tenant.¹⁴⁸ Other eviction causes of action are for tenant behavior such as disruptive noise or fighting. These cases reveal social needs including mental health care and caregiving support in housing court. Where a court does not outright evict a tenant, the case is often resolved by agreement where the tenant promises to comply with certain additional financial or behavioral conditions. These outcomes allow courts to avoid the social needs presented and, as Professor Nicole Summers shows, create an additional mechanism of control over tenants, often leading to more "swift and certain" eviction.¹⁴⁹ These cases distort litigants' social needs, not by meeting and eliminating them but by compounding the original needs by making the tenant more vulnerable to the violence of eviction.

The examples above are ones where the litigants are private parties. This type of distortion also occurs where the government is a party to a case. For example, in the child welfare context, a mother may be defending an action brought by the government for abuse or neglect because of the poor living conditions of the family. In this circumstance, the mother needs better housing (or other social provision that would allow her to afford better housing) yet the dispute brought to court by the government is not to comprehensively address the underlying social

147. See Menkel-Meadow, *supra* note 24, at 36 (describing mediation as an "[i]ntermediate space[.] . . . without formal or complexly facilitated rules"); Jane Murphy, *Rethinking the Role of Courts in Resolving Family Conflicts*, 21 *Cardozo J. Conflict Resol.* 625, 634–35 (2020) (describing the role of mediation in family law generally).

148. Sabbeth, *Housing Defense as the New Gideon*, *supra* note 7, at 64–66 (collecting sources regarding underlying economic inequality of housing courts).

149. Nicole Summers, *Civil Probation*, 75 *Stan. L. Rev.* (forthcoming 2023) (manuscript at 7), <https://ssrn.com/abstract=3897493> [<https://perma.cc/7NAA-Z6QH>]. Professor Summers has shown how the outcomes of these cases are often settlements crafted to control tenant behavior rather than resolution of disputes regarding the housing agreement. *Id.*; see also Carolyn Reinach Wolf & Jamie A. Rosen, *Alternatives to Eviction: Legal Remedies When Faced With a Mentally Ill Tenant*, 48 *N.Y. Real Prop. L.J.* 14, 15–17 (2020) (suggesting that rather than evicting tenants who struggle with mental health—which can present problems for both tenants and landlords—landlords should pursue alternative options like guardianship, assisted outpatient treatment, or temporary hospitalization and care).

need.¹⁵⁰ In cases where the government has an active role, the mismatch between dispute resolution and social needs is even more complex because it is not just that government services are inadequate, but rather that the government's role compounds the absence of social provision with a violent remedy, here the loss of a child.

B. *Attempt to Meet Social Needs*

A second category of court response to litigants' social needs is to try to meet those needs. For analytic clarity, this category captures when actors connect litigants with resources but not when actors create new institutional structures to provide those resources.

In our data, these attempts to meet social needs vary. One way judges try to meet social needs is to not resolve the matter in their own court but to instead send a litigant to a court the judge perceives as better able to meet the litigant's need. For example, judges can dismiss or stay the protective order case and tell litigants to go to another court to address their needs, including telling litigants to go to family court for custody matters,¹⁵¹ to family court to force the co-parent into alcohol treatment,¹⁵² or to landlord-tenant court.¹⁵³ An example from our data is a case where the litigants were roommates who got into a fistfight. The roommates had been placed together by a social services program and each had underlying mental health diagnoses and a history of housing instability.¹⁵⁴ During the hearing, the judge recognized these needs for social provision, stayed the case, and referred each party to mental health treatment resources and a housing counseling center to identify potential alternative housing. Setting aside the procedural choice to stay the case, which we

150. See Maren K. Dale, Addressing the Underlying Issue of Poverty in Child-Neglect Cases, A.B.A. (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/> [<https://perma.cc/F9G2-F4QA>] (citing a Tennessee case in which the state brought an action to terminate the parental rights of a poor family with a disabled mother and low-IQ father, with a judge dissenting on the grounds that while the state should have custody, the parents' rights should not have been terminated); see also Marta Beresin, Reporting Homeless Parents for Child Neglect: A Case Study From Our Nation's Capital, 18 UDC L. Rev. 14, 16 (2015) ("[T]he D.C. Department of Human Services and Child and Family Services Agency's policy of reporting homeless families for neglect rather than assisting them with shelter or housing is both financially irresponsible and counter to the fundamental goals of the child welfare system.").

151. Notes of Hearing 7, Townville (Judge 4) (denying the protective order); Notes of Hearing 14, Townville (Judge 2) (denying the protective order and telling litigants "family issues need to be resolved on the family division docket").

152. Notes of Hearing 35, Plainville (Judge 1) (staying the protective order proceeding so petitioner can file in family court).

153. Notes of Hearing 5, Townville (Judge 2) ("Let me tell you something. I'm not involved with the landlord-tenant dispute. Let her come get her stuff. Don't have contact. I'm not getting involved in it. I'm dissolving both [protective orders].").

154. *Id.* at 24.

discuss below in the context of informal procedure, this is a classic example of a state civil court actor trying to meet a social need. The difference in these examples from those where courts avoid social needs is that the judge is choosing not to impose the dispute resolution design of protective order law on the social needs but rather to only engage the underlying need.

Another variation is when judges tell litigants to try to access social services or benefits outside the courts. For example, a judge denied a protective order for a mother who was living in a shelter after leaving the home where the father lived, telling her to file for Temporary Assistance for Needy Families and welfare benefits so that the government would then seek child support from the father.¹⁵⁵ This is particularly true in jurisdictions like Centerville, where funding ties access to housing, services, and victim compensation to a party having a protective order.¹⁵⁶ In this circumstance, judges can attempt to meet social needs by granting a protective order and informing litigants of the resources they can then access. Finally, sometimes courts will directly order social provision. For example, a judge entered a protective order for a sister against her brother who was addicted to drugs and ordered the brother to complete a drug treatment program.¹⁵⁷ In these instances of courts attempting to meet social needs, they introduced an element of state control that was not previously present. While the brother in this instance then had access to drug treatment, he also was subject to punishment—including financial penalty and incarceration—if he failed to comply with the order. When courts try to meet social needs, whether inside or outside courtrooms, they can introduce an element of state control that was not previously present in a way that is similar to critiques of the state as a party in civil matters.¹⁵⁸

C. *Create Law or Procedure*

A third response to the mismatch between social needs and dispute resolution design is for individual actors to create informal law or procedure to meet social needs. This is a diffuse phenomenon and captures behavior that ranges from a court clerk's behavior in an individual case to informal practices shared among judges in the same court.¹⁵⁹ What distinguishes this phenomenon in state civil courts from

155. Notes of Hearing 9, Townville (Judge 4).

156. Interview with Court Actor 3, Centerville.

157. Notes of Hearing 12, Townville (Judge 2).

158. See *supra* notes 131–133.

159. One of us has written about this “ad hoc judging” as a judicial coping mechanism for resolving disputes in lawyerless courts. Steinberg, *Adversary Breakdown*, *supra* note 8, at 898–99; see also Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 *NYU. L. Rev.* 767, 774 (2017) (“Ad hoc procedure overcomes problems that cannot be solved using the existing procedural structures, and may be necessary to ensure that the civil justice system is able to provide the ordinary desiderata of civil litigation in cases that defy customary judicial management.”).

traditional theories of law development is that this phenomenon is unseen on a systemic level. This is in part because of the limited development of written law in lawyerless courts.¹⁶⁰ For the purposes of this analysis, we are interested in the subset of this informal law or procedure that shifts courts' institutional goal from dispute resolution to social provision.

Drawing on our data, one way courts do this is by shaping law to meet litigant needs within the confines of dispute resolution. For example, a protective order matter was brought by an uncle against a nephew with newly diagnosed schizophrenia who had been violent with the uncle. After a hearing and evidentiary findings that the petitioner had met his burden, the judge *sua sponte* added petitioner's husband as a party to the protective order. The husband had not sought such an order, had not presented evidence in support of one, and the law regarding who could seek such an order (based on the nature of the parties' relationship, past incidents between them, and fear of future harm) had not been engaged at all. Yet the judge decided that the respondent's mental illness was such that both the uncle and his husband should be protected and implicitly created law to provide for that.¹⁶¹

Judges also develop new remedies outside the written law to meet litigant needs or disregard written law to the same end. For example, in one case the judge declared, without any request or question from the petitioner, "I'll waive monetary relief because you don't want contact," yet there is no definition of these two remedies that makes them mutually exclusive.¹⁶² In another case with cross-petitions by co-parents, the judge asked the clerk in open court, "I want them to go to a custody parenting seminar—can I do that if it's a dismissal? Can I order that onto the Family Division docket?" The clerk got on the phone, called someone else to ask the same question, then told the judge that "they will put it in the system." The judge then dismissed the case and said "there's an order to go to the custody parenting seminar" and told the parties to go to the custody and support office in the courthouse.¹⁶³ This example is distinct from a pure referral to another court because this judge created jurisdictional law allowing a remedy where, despite dismissing the case on one docket, the judge entered an order on a different case between the parties on another judge's docket.

In another matter involving a dispute between a grandmother and a grandson over the costs of her care (which the grandson had taken from the grandmother's funds), the judge articulated a distinction between

160. Green, *supra* note 112, at 1307 (noting that much of the law actually applied in small claims court is informal and diverges from the written statutes, and thus arguing for the injection of legal standards); Sabbeth, *Market-Based Law Development*, *supra* note 11 (discussing the disproportionately limited development of law and precedent in "lower status courts").

161. Notes of Hearing 18, Centerville (Judge 1).

162. Notes of Hearing 12, Townville (Judge 2).

163. *Id.* at 26.

what he “can” do and what he “can’t” do. He “can” ask the grandson to return all the money he took except for the already paid for expenses, but he “can’t” consider what the expenses were and what should be returned.¹⁶⁴ There is no substantive law, evidentiary rule, or procedure that aligns with this articulation by the judge; the judge simply created a new legal distinction. At the end of the same hearing, after the judge decided not to issue a protective order, the grandmother said she didn’t want the grandson near her, to which the judge responded, “[H]e’s on notice, you can call the cops.” But, in the absence of a protective order, there is no legal remedy that flows from calling the police. Though our data do not capture any subsequent interactions with the police, one wonders whether the grandmother ever tried to do this and whether the police in fact acted consistent with the remedy suggested by the judge. Regardless, this is also an example of courts as violent actors, where the judge’s articulated remedy introduced the potential for police intervention and the grandson’s arrest, even in the absence of a protective order, if the grandson went to the grandmother’s house.

Judges also explicitly create new procedure. As Professors Pamela Bookman and David Noll have theorized, in contrast to traditional procedure developed in advance of disputes by legislative action, ad hoc procedure is developed in the midst of a matter in controversy to achieve specific outcomes.¹⁶⁵ Our data are replete with examples of this behavior, by judges but also occasionally by other actors.¹⁶⁶ In the example of roommates with mental health and housing needs discussed above, the judge decided to stay the case for ninety days to allow the litigants to access services.¹⁶⁷ There is no law or procedure in this jurisdiction about a continuance to seek social services, nor did the parties request a stay. Nonetheless, the judge recognized that the litigants were less in need of dispute resolution by the court and more in need of services outside the court and improvised a procedure to accommodate their needs.

In another example, a defendant had not been served with notice of the protective order matter. In this jurisdiction, petitioners can ask the police department to serve, and this petitioner had done so, but the police had not accomplished service. As a result, even though the petitioner appeared for her hearing, the judge could not proceed. Visibly frustrated by the ongoing delays, the judge asked if the petitioner knew how to contact the defendant and the petitioner said she had the defendant’s phone number. In open court, and without any written procedure that allows such an approach to service, the judge used her speakerphone to dial the defendant, who picked up the phone:

164. *Id.* at 23.

165. Bookman & Noll, *supra* note 159, at 767–68.

166. Steinberg et al., *Judges and Deregulation*, *supra* note 9, at 1316.

167. Notes of Hearing 24, Townville (Judge 2).

Judge: This is Judge [Two], we're on the record in [Townville] court. Are you aware of the restraining order?

Defendant: Yes.

Judge: Are you aware you need to be in court?

Defendant: I thought it was tomorrow

Judge: All I want to know is will you be in court?

Defendant: Yes-

Judge: At 8:30 at [Townville] court.

Defendant: Yes, I will be there.

Judge: We got no letters, nothing, none of it means anything. Be here at 8:30. You're served.

Then the judge hung up the phone.¹⁶⁸ In addition to the sheer human drama of this judge-created procedure, this example is remarkable because this jurisdiction's law does not allow for service by phone.

Our data also reveal ad hoc procedure created by a clerk or by the judge's reliance on a clerk's advice, often in response to questions about how to meet social needs. One variation on this is when clerks give instructions to litigants off the record. For example, in Townville, the clerks were trained specifically in protective order procedure in a way the judges were not. They were also physically seated between the door to the courtroom and the bench and litigant tables. As a matter of course, we observed litigants approach clerks to ask questions and the clerks tell litigants to adjust what they had written on a form or to go to a different location for mediation or to access a service. On the record across the jurisdictions in our study, judges would ask clerks what a procedural rule was, and the clerks' responses were not always in line with the law.¹⁶⁹ A related phenomenon appears in judges' reliance on nonlawyer advocates in court adjacent programs, which we discuss in a separate paper.¹⁷⁰ For example, a judge might interrupt a formal court hearing to "ask [an advocate] . . . to call the [pro se] person and maybe have them come in and amend something."¹⁷¹

Another example in our data is in protective order cases with related housing issues. Here, protective order judges in our data dispose of the landlord-tenant matter without any law or procedure providing that a protective order controls the housing question. In our data, this

168. *Id.* at 13.

169. See *id.* at 16 (waiving a civil penalty on a clerk's initiative and asking if there is anything else the judge needs to do); Notes of Hearing 35, Plainville (Judge 1) (relying on a clerk's statement that family court cases will be consolidated to stay a protective order). Interviews confirmed that judges relied on clerks to make procedural choices. Interview with Court Actor 3, Plainville.

170. Steinberg et al., *Judges and Deregulation*, *supra* note 9, at 1328 ("Judges are quietly collaborating with a network of nonlawyer advocates who carefully curate protective petitions, develop facts and evidence, counsel pro se petitioners, and influence the judge's performance in court and, presumably, the outcome of cases.").

171. Interview with Court Actor 2, Plainville.

sometimes happens without any inquiry as to whether there is a pending housing court matter.¹⁷² Judges are effectively creating law that allows their decisions to preempt a housing court matter. This could be seen as avoiding a social need by avoiding the underlying housing law questions and issues by summarily disposing of the housing issue. It also could be seen as addressing a social need by meeting an underlying housing need for one party.

D. *Create New Institutions*

A final version of courts' reactions to litigants' needs is the most explicit structural change: creating new institutions that attempt to provide for social needs. This captures a range of institutional innovation, but the hallmark is that it is court actors creating new institutions outside the normal modes of dispute resolution.

Sometimes the new institution is adjacent to the courtroom. This is the case in the protective order cases that are the subject of our study, where domestic violence organizations operate as separate institutions but are integrated into procedure in formal and informal ways. For example, in Townville, before a petitioner can agree to dismiss a case, they must meet with a domestic violence advocate to review information about protective order procedure (a type of legal counseling) and domestic violence generally (a type of social work counseling). Once this happens, the petitioner appears before the judge who does a formal colloquy about whether this counseling has happened. In this jurisdiction, the advocates are judicial branch employees who themselves do not provide social services but are robustly equipped to refer petitioners to outside organizations and do so as a matter of course. They are the same parties who assist petitioners in filling out initial requests for protective orders at the start of the process.¹⁷³ Effectively, the state civil court in this jurisdiction has built a new court structure within the judicial branch: an office that provides counseling and assistance within the civil process that petitioners are required to engage with if they wish to achieve certain outcomes in the dispute resolution process.

In Plainville, the domestic violence advocates are employees of a separate nonprofit entity but have offices in the courthouse and are present in the courtroom for every protective order hearing. The judges

172. An advocate for respondents in Centerville told us:

If I'm a landlord and I live with my tenant, I can just get a [protective order] and get you out. It supersedes landlord-tenant law [I]t shouldn't if there's an active landlord tenant case. But unless the respondent brings it up and it is affirmatively raised, [the] judge isn't aware that there's a landlord tenant case. Judges only deal with what's before them and what they've been told by parties. So they just put the [protective order] into effect and then the tenant has to get out.

Interview with Court Actor 1, Centerville.

173. Interview with Court Actor 1, Townville.

send petitioners to them as a matter of course for assistance with their cases, and the advocates explicitly understand their role to be to connect litigants with social services.¹⁷⁴ Here, advocates are separate from the court, but litigants likely do not perceive that distinction. And while formal procedure does not require petitioners to engage with them, the judges' instructions are functionally a requirement.

In Centerville, the domestic violence advocates are a robust part of the judicial branch, actively provide social services, and are also legal advocates before the court on particular cases and on systemic matters.¹⁷⁵ This jurisdiction is the most complete exercise of institution building, as the new institution wields meaningful power in the court ecosystem. This is true in direct interactions with petitioners, where the adjacent domestic violence advocate institution effectively controls access to social services and funding for petitioners, which are conditioned on the presence of a protective order.¹⁷⁶ In contrast, Centerville does not offer these same resources to respondents. The presence of resources and services for petitioners has led to efforts to even this imbalance, including the formation of a respondent advocacy organization whose origin includes the recognition that respondents were losing their housing because of the *de facto* preemption of eviction proceedings by protective order proceedings.¹⁷⁷ It has also become true in terms of political power in this jurisdiction, where this newly created institution is consulted about institutional questions of the court, including legislation.¹⁷⁸

In protective order cases, the proliferation of these institutions is a direct result of the Violence Against Women Act (VAWA), which provides federal funding for assistance to petitioners in these cases.¹⁷⁹ The institutional development that has resulted from these choices, however, is a matter of state and local control.¹⁸⁰ The same advocacy organizations that are part of local institution building in state civil courts are also advocating for federal funding for these institutions. This institutional

174. Interview with Judge 1, Plainville.

175. Steinberg et al., *Judges and Deregulation*, *supra* note 9, at 1330.

176. Interview with Court Actor 3, Centerville; Follow-up Telephone Interview with Court Actor 3, Centerville.

177. Interview with Court Actor 1, Centerville.

178. *Id.*

179. See OYW Grants and Programs, DOJ, <https://www.justice.gov/ovw/grant-programs> (listing nineteen grant programs funded by VAWA) [<https://perma.cc/P3PK-HLS7>] (last updated Sept. 8, 2021).

180. See Office on Violence Against Women (OVW): About the Office, DOJ, <https://www.justice.gov/ovw/about-office> [<https://perma.cc/EGG9-NPG8>] (last updated Mar. 16, 2022) (“[VAWA] [f]unding is awarded to local, state and tribal governments, courts, non-profit organizations, [and] community-based organizations . . . to develop effective responses to violence against women through activities that include direct services, . . . court improvement, and training for law enforcement and courts.”).

development is a line of research unto itself.¹⁸¹ For purposes of this discussion, each of these examples is one in which the social needs presented in state civil court spurred the development of new institutions, sited in the court to differing degrees, to meet the needs that courts' dispute resolution design fails to address.

We can see this phenomenon in other types of cases. For example, in Philadelphia, a local mortgage foreclosure diversion program began in 2008 (building on work begun in 2004). This program was spearheaded by court leadership and administered by a combination of judges, clerks, pro bono attorneys (acting as both advocates for homeowners and as mediators), financial counselors, and legal services providers. It required a prehearing conference between homeowners and lenders that was supplemented by court and legal assistance at first and ultimately by access to state and federal subsidies.¹⁸² One study of this program includes an example that identifies the homeowners' underlying social needs beyond housing. In this case, the homeowner refinanced her mortgage to "settle credit card debts while taking care of a disabled mom, a niece, and a nephew."¹⁸³ This institutional development is the predecessor to the current eviction diversion program in Philadelphia (and similar ones around the country).¹⁸⁴

This institution building also captures what have been dubbed "civil problem-solving courts." As one of us has discussed in depth, "outside of family law matters, the problem-solving model has barely cracked the civil sphere."¹⁸⁵ Problem-solving courts originated in the criminal justice

181. For example, is the VAWA example unique or indicative of the history and potential for the relationship between federal funding and state civil court innovation? Do the court-based actors responsible for these institutions see themselves as expanding courts? As bringing social services into courts? As offloading social needs to an institution that is extra-judicial? What is the historical and political perspective on the evolution of these institutions?

182. The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report of Findings 3 (2011), https://www.reinvestment.com/wp-content/uploads/2015/12/Foreclosure_Diversion_Initial_Report-Report_2011.pdf [<https://perma.cc/L8C4-MTRN>].

183. *Id.* at 15.

184. See Reinvestment Fund, Words From the Field: Practitioner Perspectives on Eviction Process Improvements in Philadelphia 14 (2021), https://www.reinvestment.com/wp-content/uploads/2022/02/ReinvestmentFund_Brief_PHL-Eviction-Process-Improvements.pdf [<https://perma.cc/9HFB-QN5R>] (describing Philadelphia's "Eviction Diversion Program," which "requires landlords to apply for emergency rental assistance and participate in mediation prior to filing an eviction case in Municipal Court"); Michaelle Bond, Philly's Program for Preventing Evictions Is a National Model. Lawmakers Want to Make It Permanent., *Phila. Inquirer* (Dec. 8, 2021), <https://www.inquirer.com/real-estate/housing/rental-assistance-philadelphia-eviction-diversion-program-20211208.html> [<https://perma.cc/CD43-CEA2>].

185. Jessica K. Steinberg, A Theory of Problem-Solving Courts, 93 *N.Y.U. L. Rev.* 1579, 1582 (2019); see also Douglas B. Marlowe, Carolyn D. Hardin & Carson L. Fox, *Nat'l Drug Ct. Inst.*, Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States 7, 9, 12 (2016) (explaining how as of 2016,

context and carry with them a host of challenges related to government coercion and control.¹⁸⁶ These same concerns are well-described in the family law context and others.¹⁸⁷ In child welfare cases, problem solving courts are championed “as a place where a team of professionals led by the judge can provide a range of assistance,” but as Professor Jane Spinak tells us, “If courts are not recognized as instruments of coercion and control but as places to solve problems, there is a [destructive] domino effect on families, particularly vulnerable families.”¹⁸⁸ Research shows that situating assistance within courts diminishes funding for upstream public health and harm-reduction interventions at lower cost.¹⁸⁹

In the broader civil context, these are “new” courts, designed to address a particular type of case or collection of claims in the existing system using a new configuration of roles or resources.¹⁹⁰ For example, one

there were nearly 3,000 drug courts, as well as more than 1,000 problem-solving courts devoted to various issues, including mental health, reentry, domestic violence, veterans’s affairs, and homelessness).

186. Bach, *supra* note 132, at 828 (citing a “worry that problem-solving courts inevitably draw social welfare resources out of communities and voluntary settings and into inevitably coercive courts”); see also Richard Abel, Introduction, *in* 1 *The Politics of Informal Justice: The American Experience* 1, 5 (Richard L. Abel ed., 1982) (describing how informal processes are cheap and thus permit an enormous expansion of control); Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 *U. Md. L.J. Race Religion Gender & Class* 73, 84 (2010) (“[W]elfare-oriented sentencing alternatives create the risk of net widening, expanding the scope, breadth, depth and duration of government monitoring and control over the lives of citizens . . .”); Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York*, 95 *Tex. L. Rev.* 915, 947–51 (2017) (“[T]he primary business of informal institutions is social control[,]. . . [which] expand[s] the reach of the state into the lives of the poor and marginalized through discourses of care.”); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 *Stan. L. & Pol’y Rev.* 417, 425 (2009) (arguing that the therapeutic methodology adopted by courts “cannot address social features of urban drug use that have an economic and racial impact”); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 *Wash. U. J.L. & Pol’y* 63, 91–92 (2002) (“[C]ommunity residents may prefer to resolve issues without the threat of the criminal justice system hanging in the balance.”).

187. Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 *Fla. L. Rev.* 1333, 1382–83 (2016); Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?*, 10 *U. Md. L.J. Race Religion Gender & Class* 89, 103–04 (2010); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 *U. Md. L.J. Race Religion Gender & Class* 113, 119–24 (2010).

188. Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 *CUNY L. Rev.* 171, 175–76 (2016).

189. See Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 *Va. J. Soc. Pol’y & L.* 590, 619–25 (2005) (discussing cost efficiency of community-based preventative programs); Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 *J.L. & Pol’y* 73, 82–88 (2012) (discussing the effectiveness and value of community-based organizations in differential response programs).

190. See Marvin S. Swartz & Jeffrey W. Swanson, *Mandated Community Treatment in Services for Persons With Mental Illness*, *in* *The Palgrave Handbook of American Mental Health Policy* 171, 176, 179–82 (Howard H. Goldman, Richard G. Frank & Joseph P. Morrissey eds., 2020) (discussing civil court procedures governing compulsory community

of us has written about the District of Columbia's Housing Conditions Court and its inquisitorial model of judicially controlled investigation and enforcement of housing code violations by landlords.¹⁹¹ In this example, a single judge hears all housing condition complaints by tenants, has a dedicated investigator who goes to the property to investigate and substantiate the presence of violations, and then uses both inquisitorial courtroom processes and the investigator to enforce ongoing compliance with the court's disposition.¹⁹² Another example is in the Red Hook Community Justice Center in New York, where a partnership between the Center for Court Innovation (a nonprofit) and New York courts created a neighborhood-based community court addressing housing cases.¹⁹³ This institution includes the actual civil housing docket, consisting of a designated judge and a clerk who work in an integrated way with housing advocates (who are hybrid employees of the nonprofit and the court) to address housing problems and cases.¹⁹⁴ In practice, this institutional structure involves informal problem solving outside of court by the judge and clerk to help litigants address underlying social needs, and active participation by housing advocates within court processes to achieve the same goal.¹⁹⁵

III. A THEORY OF STATE CIVIL COURTS' INSTITUTIONAL ROLE

With this fuller picture of social needs in state civil courts, how do courts' reactions to the mismatch between their dispute resolution design and litigants' social needs inform our institutional theories of state civil courts? The four categories of court responses in the data—avoiding social needs, meeting social needs, creating informal law and procedure, and creating new institutions—give us two core theoretical insights into state civil courts as institutions. The first is that state civil courts can play the role of violent actor when exercising their dispute resolution function and either avoiding or meeting social needs. Less directly, state civil courts can be violent actors through new law and institutions. The second is that when we look at the diffuse, small-scale actions of state civil courts as a collective phenomenon, we see that state civil courts are acting as

treatment for adults with debilitating psychiatric illnesses and the ethics of compulsory care in a civil court context, arguing that properly targeted mandatory community treatment is a less restrictive alternative to hospitalization or arrest, and challenging other institutional criticisms).

191. Steinberg, *Informal, Inquisitorial, and Accurate*, *supra* note 121.

192. *Id.* at 1064–69.

193. Cynthia G. Lee, Fred L. Cheesman, II, David B. Rottman, Rachel Swaner, Suvilambson, Mike Rempel & Ric Curtis, Nat'l Ctr. for State Cts., *A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center I* (2013), https://www.ncsc.org/_data/assets/pdf_file/0031/18967/11012013-red-hook-final-report.pdf [<https://perma.cc/B82F-U73W>].

194. *Id.*

195. *Id.*

policymakers. In the absence of action by executive and legislative branches to meet social needs and the absence of development of formal law by the judicial branch, the collective actions of individual state civil courts have become our social policy.

A. *Courts as Violent Actors*

Professor Robert Cover told us that “[l]egal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”¹⁹⁶ Though scholars and communities are now in active conversations about this violence, especially in the context of policing, we have not fully engaged Professor Cover’s insight as it relates to civil courts.¹⁹⁷ Courts’ reactions to social needs presented by litigants can transform courts into violent institutional actors, whether through attempts to meet needs or to avoid them. Considering state civil courts as violent actors also allows us to see the fluid boundary between criminal and civil law that litigants themselves describe.¹⁹⁸

There are important differences—including the explicitly legally sanctioned tool of violence in the role of police—between theories and activism around policing and criminal justice and our exploration of state civil courts. There is also a direct parallel, however, to the premise of policing and criminal justice, which is that the government is an appropriate actor to promote “safety” as a replacement for private violence. As violent actors in American society, courts are entangled in our history of slavery and racism. A historical exposition of the path from slavery to eviction (and other) courts is not the goal of our project, but others are building a range of insights into these historical paths, and we

196. Cover, *supra* note 15, at 1601; see also Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 57 (1983).

197. Cf. Pierre Schlag, Clerks in the Maze, 91 Mich. L. Rev. 2053, 2054 (1993) (expanding on Cover, observing that “judges conclude their work on a note of violence—a death sentence, an incarceration, a compulsory wealth transfer,” and arguing that “once we recognize [that] violence implicit . . . , we are poised to understand that judges . . . have . . . a highly interested, partial perspective on law”). Building on Cover, Harry Schwirck argues that law “determines and reflects what might be termed an economy of violence[.] . . . play[ing] a central role in defining what a society will recognize as violence.” Harry Schwirck, Law’s Violence and the Boundary Between Corporal Discipline and Physical Abuse in German South West Africa, 36 Akron L. Rev. 81, 82 (2002).

198. Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263, 1317 (2016) [hereinafter Greene, Race, Class, and Access to Civil Justice] (observing that respondents’ past negative experiences with the criminal justice system translate into reluctance to seek help for civil justice problems); Lauren Sudeall, Integrating the Access to Justice Movement, 87 Fordham L. Rev. 172, 172–73 (2019) (observing that individuals tend not to distinguish between civil and criminal justice systems).

hope that work continues in conversation with our deepening examination of state civil courts.¹⁹⁹

As Professor Sinnar has argued, the evolution of civil procedure can be told as a story of state violence supplanting and formalizing private violence.²⁰⁰ For example, eviction procedure in state civil court was a state response to mitigate and regulate the private violence of landlord “self-help” or throwing a tenant out of a home without consistent notice or process.²⁰¹ But state intervention did not remove violence; rather, it institutionalized and sanctioned it. This violent role of the state has evolved in the face of rising inequality, with state-sanctioned removal of people from their homes affecting millions per year nationally and some counties removing more than 15% of their residents from their homes.²⁰² As is the story with many harmful government functions in recent years, it includes the use of private eviction companies who inflict this violence in the name of the state.²⁰³ Using the case categories from above, we can see an analogous role of violence in cases where a state civil court action leads to the government forcefully taking property, most notably foreclosure and debt collection matters which can be executed forcibly through garnishment, liens, and asset seizure.²⁰⁴

199. See, e.g., Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 *Iowa L. Rev.* 2125, 2127 (2021) (studying how transportation policy has historically and currently been used to exploit and subjugate black communities); Maeve Glass, *Citizens of the State*, 85 *U. Chi. L. Rev.* 865, 869 (2018) (arguing that “in the decades prior to the Fourteenth Amendment, the lawyers who seized on the State Citizenship Clause of Article IV did so . . . by reframing the issue of American slavery from the rights of a black person to the sovereignty of a free state”); Kellen Funk, “Let No Man Put Asunder”: South Carolina’s Law of Divorce, 1895–1950, *S.C. Hist. Mag.*, July–Oct. 2009, at 134.

200. Sinnar, *supra* note 16, at *1.

201. *Id.* at *3.

202. See *supra* note 94.

203. See Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 *Soc. Forces* 316, 333, 337 (2021) (pointing to an example of “the many supplementary business offerings that facilitated evictions” and documenting the process of serial eviction filing, which threatens tenants with displacement multiple times from the same address and affects a population broader than only those in poverty); see also Editorial Board, *Philadelphia’s Eviction Process Blindsides Renters*, *Phila. Inquirer* (July 28, 2020), <https://www.inquirer.com/opinion/editorials/a/philadelphia-eviction-system-philly-renters-tenants-blindsided-20200728.html> (on file with the *Columbia Law Review*) (discussing the use of private firms to execute evictions and detailing how tenants rarely receive notice of such evictions).

204. See Laura Gottesdiener, *The Great Eviction*, *Nation* (Aug. 1, 2013), <https://www.thenation.com/article/archive/great-eviction/> (on file with the *Columbia Law Review*) (describing SWAT teams and armed police removing North Carolina and Atlanta residents from their homes which were foreclosed on); George Graham, *Crowd Protests Eviction of Father, Son From Foreclosed Home in Springfield’s Sixteen Acres* (Photos, Video), *Mass Live* (May 25, 2017), https://www.masslive.com/news/2017/05/watch_crowd_gathers_to_protest.html [https://perma.cc/AC4M-YNJP] (last updated Jan. 7, 2019) (depicting

Further, courts are well-theorized as violent actors in the child welfare system.²⁰⁵ It is hard to conceive of a more violent state act than the removal of a child from a parent, whether temporary (as in dependency or custody proceedings) or permanent (as in termination of parental rights proceedings). But the violence of state civil courts goes beyond a particular order in a case. As Professor Roberts has vividly told us, the legal system's role inflicts deep, intersectional punishment on subordinated communities and Black mothers in particular.²⁰⁶ Roberts describes how the intersectional relationship between foster care and incarceration relies on the history and societal stereotypes of reproductive regulation and maternal irresponsibility to “make[] excessive policing by foster care and prison seem necessary to protect children and the public from harm”²⁰⁷ and facilitates “[t]he simultaneous buildup and operation of the prison and foster care systems.”²⁰⁸

In other areas of the law where the role of state civil courts was intended to mitigate personal violence, the story is more complicated. Our qualitative data illustrates this complexity. In domestic violence cases, the explicit role of state civil courts is to protect one citizen from violence by another citizen. Yet as our data show, some state civil courts have responded to the complex needs of litigants by engaging services to meet social needs—but in the context of social control.²⁰⁹ In our data, for

mortgage foreclosure eviction in Massachusetts); Laurie Udesky, When Foreclosure Threatens Elder-Care Homes, *N.Y. Times* (Apr. 17, 2010), <https://www.nytimes.com/2010/04/18/us/18sfforeclose.html> (on file with the *Columbia Law Review*) (describing a sheriff conducting foreclosure on residential care facilities for the elderly in California).

205. See Susan L. Brooks & Dorothy E. Roberts, Social Justice and Family Court Reform, 40 *Fam. Ct. Rev.* 453, 453 (2002) (“Poor and minority families, on the other hand, are disproportionately compelled to appear before family court judges against their will. The state coercively intervenes in their lives and orders them to submit to the court’s jurisdiction because parents are charged with child maltreatment or children are charged with delinquency.”); Kristin Henning, Race, Paternalism, and the Right to Counsel, 54 *Am. Crim. L. Rev.* 649, 666 (2017) (pointing out the susceptibility of the “best interests” standard in child welfare cases to biases based on race and class views); Cortney E. Lollar, Criminalizing (Poor) Fatherhood, 70 *Ala. L. Rev.* 125, 131 (2018) (arguing that the child support system disproportionately affects poor men and showing that criminalization of failing to provide financially for a biological child is grounded in antiquated moral judgments about fatherhood); Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, 102 *Marq. L. Rev.* 1161, 1194 (2019) (arguing that the child removal process does not often employ proper vetting, thus unnecessarily inflicting harm on children and their families); Shanta Trivedi, The Harm of Child Removal, 43 *N.Y.U. Rev. L. & Soc. Change* 523, 579–80 (2019) (“[I]n most jurisdictions in America, courts fail to consider the trauma that children will suffer if they are removed from their parents[,] . . . as there is no legal requirement that judges take this information into account.”).

206. See Roberts, Systemic Punishment, *supra* note 131, at 1499–1500.

207. *Id.* at 1500.

208. *Id.* at 1476.

209. See *supra* notes 185–189 and accompanying text.

example, by virtue of the legal construct of a protective order, failure to engage in the offered social provision (such as mental health treatment) can subject a person to incarceration for failure to comply with terms of the protective order.²¹⁰ Ultimately, this approach places “care” in the context of violence rather than replacing violence with care.²¹¹ A similar phenomenon is captured by Professor Nicole Summers’s concept of civil probation as a mechanism of control, advantaging landlords and sanctioned by courts.²¹² In Professor Summers’s analysis of settlements in eviction cases, she identifies the overwhelming presence of landlords who use settlement agreements to impose additional terms on the social and economic problems that arise in the underlying eviction matter.²¹³ For example, where a tenant fails to pay rent, the settlement agreement imposes more burdensome obligations on payment going forward.²¹⁴ Professor Summers identifies a similarly pervasive but broader phenomenon of landlords using settlement agreements to more generally impose greater controls on tenants, unrelated to the underlying claims for eviction.²¹⁵ For example, in an eviction for nonpayment, the settlement agreement imposes stricter terms regarding the occupancy of the property.²¹⁶ All of these make tenants more vulnerable to losing their homes with the imprimatur of the state.

The experience of court itself can also be violent. Professor Barbara Bedzek’s rich description of housing court as “violence in the form of spirit-murder” captures this phenomenon.²¹⁷ It is more recently explained by work examining trauma and the law. Research describes the retraumatization of survivors of intimate partner violence in both civil and criminal courts.²¹⁸ Others have analyzed how civil court notions of

210. See *supra* note 145.

211. See Bach, *supra* note 132, at 814 (“[W]hen the law merges care and punishment, it both draws more individuals into punitive institutions . . . and compromises the quality of the care overall.”); Cohen, *supra* note 186, at 916–17 (“But we have not simply witnessed the retrenchment of particular welfare state programs alongside the intensification of carceral ones. Today, the criminal justice system provides its own welfarist institutions.”).

212. Summers, *supra* note 149 (manuscript at 42).

213. See *id.* (manuscript at 3) (finding that “the majority of settlement agreements impose a series of interlocking terms that amount to . . . civil probation”).

214. *Id.* (manuscript at 42).

215. See *id.* (manuscript at 42–43).

216. *Id.* (manuscript at 43).

217. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 *Hofstra L. Rev.* 533, 541 (1992) (citing Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 *U. Mia. L. Rev.* 127 (1987)).

218. Negar Katirai, *Retraumatized in Court*, 62 *Ariz. L. Rev.* 81, 93 (2020) (surveying advocates and finding that 83% of survivors reported retraumatization due to court procedures and outcomes).

adversarialism, judicial impartiality, and formalism affect retraumatization.²¹⁹

Sometimes the violence of state civil courts explicitly engages with the violence of mass incarceration. This occurs largely as a penalty for noncompliance with civil court orders. For example, a respondent subject to a protective order is subject to arrest for violating the order or its conditions (which, as discussed above, can include “care” such as a mandated addiction program).²²⁰ As in *Turner v. Rogers*, a parent who fails to pay child support can be incarcerated by a civil court.²²¹ Research done by Professors Lauren Sudeall and Sara Sternberg Greene shows us how litigants experience this fluid boundary between civil and criminal law.²²² Across the types of social needs presented in state civil courts, the mismatch between these needs and courts’ dispute resolution design exacerbates state civil courts’ violent role.

B. *Courts as Policymakers*

Thus far, we have discussed state civil courts as a constellation of institutions reacting to the mismatch between social needs and dispute resolution. Taking a broader view of these reactions, we posit that courts are functioning as policymaking bodies in three related ways. First, in attempting to provide services to meet litigant needs, courts have developed a patchy, underresourced role as a provider of social services. These choices about resource allocation are appropriate for the other branches of government, but courts have become de facto decisionmakers. Second, in creating and changing law and procedure, courts are engaging in ad hoc procedure and law development in ways that are not occasional or exceptional but are collectively shaping law and policy. Third, in creating new government institutions, courts are squarely performing the work of the executive and legislative branches via individual experiments without the benefit of experimentalism. Each of these policymaking roles

219. *Id.* at 101–07; see also Leigh Goodmark, *Decriminalizing Domestic Violence* 152 (2018) (“In order to minimize the trauma of incarceration it is also essential to enforce measures intended to protect prisoners from violence.”); Alesha Durfee, “Usually It’s Something in the Writing”: Reconsidering the Narrative Requirement for Protection Order Petitions, 5 *U. Mia. Race & Soc. Just. L. Rev.* 469, 482 (2015) (“However, the adversarial nature of the legal system, in combination with complex and confusing bureaucratic procedures and untrained court staff, may make the PO process an incredibly traumatizing experience—even with the ‘right’ support and in the ‘right’ environment.”); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 *U. Pa. L. Rev.* 399, 447–48 (2019) (“But she is also hoping for validation of the harm she has endured—in other words, to have her experience credited.”).

220. See generally Nat’l Ctr. on Prot. Ords. & Full Faith & Credit, *supra* note 145 (detailing the protective order laws in every state and the repercussions for violating them).

221. 564 U.S. 431, 435 (2011).

222. See Greene, *Race, Class, and Access to Civil Justice*, *supra* note 198; Sudeall, *supra* note 198.

for courts raises questions of legitimacy and rule of law, transparency and focus on litigants, and quality of outcomes and experimentalism.

Ours is a different conception of courts as policymakers than scholarship typically explores. As a general matter, critiques of courts as policymaking bodies exist in the context of represented, adversarial litigation and the final, merit-based decisions that emerge from this process. Scholars often criticize the idea of courts as policymakers—as activist judges attempting to legislate from the bench.²²³ These criticisms emphasize courts' lack of accountability to the public.²²⁴ Other scholars sharpen this critique, arguing that even agencies are more democratically accountable than courts and thus are more legitimate policymaking bodies.²²⁵ Some criticisms center on institutional competence of courts.²²⁶

223. For an overview of this critique, see Jack L. Landau, *The Myth of Judicial Activism*, 70 Or. St. Bar Bull. 26, 27 (2010) (arguing that “no one actually says what he or she means” when criticizing “judicial activism” and describing three ways in which people perceive that judges improperly use their power, including by assuming too much policymaking authority); Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, 11 Lewis & Clark L. Rev. 185, 189 (2007) (tracking criticisms of courts as activist policymakers and arguing some “legislating from the bench” is both inevitable and desirable); Paul Gewirtz & Chad Golder, *Opinion, So Who Are the Activists?*, N.Y. Times (July 6, 2005), <https://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html> (on file with the *Columbia Law Review*) (noting that the term “activist judge” is loosely defined in the public discourse, arguing that striking down acts of Congress is the most “activist” thing a judge can do, and tallying how often Justices voted to overturn acts of Congress).

224. See generally Thomas L. Jipping, *Legislating From the Bench: The Greatest Threat to Judicial Independence*, 43 S. Tex. L. Rev. 141, 158 (2001) (describing two “models of judicial power,” judicial restraint and judicial activism, and arguing judicial activism threatens America’s independent judiciary); H. Lee Sarokin, *Thwarting the Will of the Majority*, 20 Whittier L. Rev. 171 (1998) (challenging criticisms of the judiciary as a policymaking body); cf. Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DePaul L. Rev. 555, 555–56 (2010) (challenging two ways that Republicans use the term “judicial activism” and arguing that “equating judicial activism with the refusal to show deference to elected officials is inconsistent with much of modern Republican politics” and “presupposes an unsustainably sharp distinction between constitutional politics and constitutional law”). The debates over judicial activism, of course, have often ugly political histories. See Erwin Chemerinsky, *Federal Jurisdiction 148* (1989) (detailing the legislative branch’s attempts to prevent federal courts from hearing cases involving challenges to state laws permitting school prayers or state laws restricting access to abortions).

225. Agencies, even independent agencies, are typically viewed as more democratically responsive than courts. See Michael A. Fitts, *Retaining the Rule of Law in a Chevron World*, 66 Chi.-Kent L. Rev. 355, 356–57 (1990) (asserting that agencies are “under the informal control of either a democratically elected Congress or President”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2088 n.80 (1990) (“[T]he democratic pedigree of the agency is usually superior to that of the court.”).

226. See Eric Berger, *Comparative Capacity and Competence*, 2020 Wis. L. Rev. 215, 219–23 (collecting research discussing the comparative competence of courts to make policy determinations relative to legislatures and executives). This argument also features prominently in legal process theory. See, e.g., Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L.J. 1143, 1149–50 (2005) (arguing for “institutional settlement” within legal process theory, which looks at how society decided “that law should allocate decisionmaking to the institutions best suited to decide particular questions, and

Other scholars argue that policymaking is a legitimate enterprise for U.S. courts, for example in prison reform²²⁷ and mass tort litigation.²²⁸ Some scholars claim that this policymaking is unavoidable and discuss how courts actually influence policy change.²²⁹ In light of “the expansion of judicial review,” others call for elections of judges, formalizing their role as policymakers.²³⁰ Other scholarship considers the role of the judiciary in moderating the policymaking balance between the legislative and executive branches. Scholars consider how the judiciary moderates the separation of judicial and executive power.²³¹ Some scholars argue that no dominant institution exists among the various players in the federal policymaking process; instead, “all governing institutions can have a clear role in making public policy as well as enforcing and legitimizing it.”²³²

Rather than capturing (federal) courts playing a legislative (congressional) role via interpretation of (federal) statutes, we are theorizing a different policymaking role of state civil courts. In this formulation, state civil courts are acting in the void created by the failure of the executive and legislative branches to meet people’s social needs.²³³

that the decisions arrived at by those institutions must then be respected by other actors in the system”).

227. See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons 27–95* (1998) (arguing that policymaking is a standard and legitimate function of modern courts, using prison reform cases between 1965 and 1990 as an example of a high-water mark of U.S. judicial policymaking).

228. Sandra Nichols Thaim, Carol Adaire Jones, Cynthia R. Harris & Samuel F. Koenig, *Courts as Policymakers: The Uneven Justice of Asbestos Mass Tort Litigation*, in *Looking Back to Move Forward: Resolving Health & Environmental Crises* 133, 134–36 (2020) (noting that while mass tort law was inadequate to address the problem, the courts stepped in to play a larger role after Congress did not step in).

229. See generally Robert M. Howard & Amy Steigerwalt, *Judging Law and Policy: Courts and the Policymaking in the American Political System* (2012) (analyzing the role of the Court in policymaking in seven distinct policy areas and exploring both how courts interact with other branches of government and whether judicial policymaking is a form of activist judging).

230. See Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 *Ark. L. Rev.* 249, 260 (2011) (arguing that “the nature of judicial power has changed, necessitating popular control”).

231. See, e.g., Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 *Law & Contemp. Probs.* 46, 46 (1976) (discussing “three methods that the courts have used or might use to curb executive policy-making and recall Congress to a greater policy-making role”).

232. *Making Policy, Making Law: An Interbranch Perspective* 204 (Mark C. Miller & Jeb Barnes eds., 2004).

233. Our analysis here builds on a range of earlier work exploring how, in the absence of effective structural solutions at the highest level, informal regimes develop. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458, 461–63 (2001) (describing the “interesting and complex regulatory pattern” that has emerged, in which “normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including but not limited to the judiciary”).

And this activity is engaging the myriad within-case decisions that occur in lawyerless courts.²³⁴ This policymaking activity maps onto the four versions of courts' institutional role described above and is complicated by its diffuse and experimental nature. Each example of policymaking is individualized, though there are themes across state civil courts that have de facto become collective action.

Where courts shift their role to provide resources to meet litigants' needs, the courts are squarely assuming the roles of the executive and legislative branches in social provision. In some instances, courts are providing social services, traditionally an executive branch function. In other instances, courts behave like legislatures by deciding that a particular type of service provision is necessary and dedicating court system funding to this social provision. This captures those actions described above as courts "attempting social provision," such as the judges in our data who order drug treatment programs for respondents. It also captures those attempts at social provision that send litigants (with or without coercion) to access social services provided or funded by other branches of government. For example, when a court refers a litigant to a housing support organization, that court is making policy choices about who should use those services and ultimately how those services should be funded. Across these examples, the judicial branch is playing a policymaking role in how social services are created, funded, and delivered. Embedded in each of these individualized choices are decisions that collectively shape policy about social provision in a particular jurisdiction and across cities and states.

At least state civil courts—even if in limited, ad hoc ways—are trying to meet social needs in the face of stark inequality. Yet, this institutional role is fraught. This state civil court role operates in the absence of coherent or comprehensive resources. Sometimes this means a judge makes cold referrals that may or may not result in actual assistance. Other times, court actors are leveraging personal or institutional relationships to try to achieve results for litigants in need of services. Our data reflect self-awareness by court actors about their limits in this ad hoc activity.²³⁵ Taken

234. Carpenter et al., *Judges in Lawyerless Courts*, supra note 8, at 530; Carpenter et al., "New" Civil Judges, supra note 22, at 257.

235. One judge told us:

[Y]ou do the best you can do to do the job you were selected to do. You show up, you prepare, you set expectations for your courtroom, you try to keep people safe, and you try to do justice. But I don't know [] that any local judge would have the ability to answer that. Our courts have changed. You didn't have a protective order docket before. You have [DV Agency] and family and children's services, and they were set up to give these people justice. We have a system in place to help people get to court, the next step is what do you do for the defendants?

Interview with Judge 1, Plainville.

together, this shift in institutional role is resource constrained, institutionally limited, and inconsistent.

A second way of understanding state civil courts as policymakers is where courts create or change law or procedure to meet litigants' needs. This is closer to the traditional scholarly conception of courts as policymakers. However, the nature of the mismatch in state civil courts makes this policymaking role different from theories of federal courts. It is also less transparent because almost all of this activity is unwritten.²³⁶ In some circumstances, the court action to create unwritten law or procedure comes in the face of an affirmative choice by a legislature to not fund a particular service. For example, in our data, Plainville is in a state which has one of the weakest social safety nets in the country and ranks at or near the bottom of many measures of states' investments in social services, health care, and economic supports.²³⁷ We see the consequences of this in Plainville courts that are staying cases, dismissing cases, and sending cases to other dockets to avoid harmful outcomes in the absence of these social services. In other circumstances, state civil courts are acting in the face of inactivity by the executive and legislative branches. An example, in our data, is a judge who chooses not to issue a protective order because the absence of affordable housing means someone will become homeless.²³⁸ Or the judge who chooses to issue a protective order to keep a father from doing drugs with his daughter because the absence of addiction or mental health treatment means it is the only alternative.²³⁹ There is no law or procedure in these cases that provides an exception to protective order requirements when housing is not available. And there is no law or procedure that allows protective orders to prevent a parent from doing drugs with their child (in the absence of protective order criteria being met). Yet in these circumstances, courts are creating or changing law—in individualized, unwritten ways—to meet litigant needs in the absence of social provision by other branches of government.

When state civil courts create or change law and procedure, they confront the range of concerns articulated by Professors Bookman and Noll in *Ad Hoc Procedure*.²⁴⁰ In this environment, it is no longer possible to operate within “rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the [state] will use its

A domestic violence advocate told us, “I think the way [Centerville] sets up their process [is] really difficult. When they decided to tie resources to court outcomes it was a mistake in my opinion.” Interview with Court Actor 3, Centerville.

236. See *supra* notes 159–160 and accompanying text.

237. The Best and Worst States to Work in America—During COVID-19, OxFam, <https://www.oxfamamerica.org/explore/countries/united-states/poverty-in-the-us/covid-map/> [<https://perma.cc/N7UD-8ZR6>] (last visited Feb. 10, 2022).

238. Notes of Hearing 24, Townville (Judge 2).

239. Notes of Hearing 18, Plainville (Judge 1).

240. Bookman & Noll, *supra* note 159, at 829–35.

coercive powers in given circumstances.”²⁴¹ This activity by state civil courts engages questions of legal legitimacy (whether the action by the court is in fact lawful), sociological legitimacy (whether the action is seen by the public as appropriate in general), and moral legitimacy (whether the action is morally justifiable or worthy of respect).²⁴² State civil courts’ creation of law and procedure in the face of the clash between dispute resolution design and social needs is a direct, repeated expression of a “desire to address” a problem that the civil justice system provides in ordinary cases “as opposed to a desire to address systemic concerns.”²⁴³ This practice threatens the legitimacy that is traditionally part of civil procedure and thus civil litigation. Yet at the same time it is necessary in the context of state civil courts because—in the absence of ad hoc law and procedure—these courts’ dysfunction would undermine legitimacy even more.²⁴⁴ What this leads to in the context of state civil courts is a collective rather than exceptional phenomenon of ad hoc law and procedure. And this institutional function renders state civil courts policymakers.

Finally, the starkest version of courts as policymakers is when state civil courts create new institutions. As the examples above demonstrate, these new institutions are often the result of the sheer will of a few individuals trying to meet the deep need for social provision in a particular type of case.²⁴⁵ As with the other categories of courts as policymakers, this is not an objectively negative phenomenon. Yet a structural perspective reveals the problems with it.

First, this institution building is a collection of experiments without the benefit of experimentalism. There is often neither intention at the outset nor structure in the implementation that allows learning from these responses to social needs. But, the institution building continues, relying at best on the limited available research of prior experiments. As we have discussed more generally in the context of lawyerless courts, there are

241. Friedrich A. Hayek, *The Road to Serfdom* 72 (1944); see also Bookman & Noll, *supra* note 159, at 774 (“Designed to address specific problems, ad hoc procedure cannot rely on the fact that it is crafted behind a veil of ignorance in advance of concrete disputes as proof of its fairness.”).

242. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1796–1801 (2005) (explaining legitimacy as a moral concept); see also Bookman & Noll, *supra* note 159, at 835 (questioning whether ad hoc judging can be legitimate); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *Ann. Rev. Psych.* 375, 376, 379 (2006) (reviewing and summarizing the psychological literature on legitimacy, “a property that, when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangements”).

243. Bookman & Noll, *supra* note 159, at 784.

244. *Id.* at 845 (noting that although “ad hoc procedure presents a deep challenge to the traditional model of civil procedure . . . , ad hoc procedure-making *bolsters* the civil justice system’s legitimacy by ensuring that procedural problems do not prevent it from functioning”).

245. See Steinberg, *Informal, Inquisitorial, and Accurate*, *supra* note 121, at 1067–69 (describing Washington, D.C.’s Housing Conditions Court founded by an individual judge).

growing and valiant efforts underway to deepen our research into these courts. This institutional experimentation is a particular subset of that need: We need a systemic approach to experimentation to meet the systemic needs the experiments attempt to address.²⁴⁶

Second, this experimentation is a reaction by the judicial branch to the absence of social provision by the executive and legislative branches. And the absence of a systemic approach means that we are avoiding important institutional questions about the appropriate role for the judicial branch. These questions are about separation of powers and whether judicially created institutions in this role are consistent with our democratic aims. They also raise questions about courts' role as bureaucracies, with the attendant challenges of bureaucratic behavior.²⁴⁷

We are not arguing that courts should stop this activity but rather asking how courts' leadership in this institution building could motivate action by legislators.²⁴⁸ Courts are not designed for social provision, yet they are attempting to do so with a range of consequences. This may well be the best alternative in a political environment hostile to social provision. The assumption that courts are resolving disputes may provide political cover for social provision that a legislature would not support. At a minimum, courts are carrying a burden that is not part of their design as institutions. Courts cannot reasonably be expected to stop their ad hoc social provision in the face of persistent, serious social needs. Yet we need to ask whether courts' activity, and especially de facto policymaking, is preventing other parts of government from addressing these social needs head on.

In the end, courts are taking up the mantle of social provision in a range of ways, and this collective activity is shifting their institutional role. State civil courts are designed as sites of dispute resolution, yet in the face

246. See Monica Bell, Andrea Taverna, Dhruv Aggarwal & Isra Syed, *Laboratories of Suffering: Toward Democratic Welfare Governance*, in *Holes in the Safety Net: Federalism and Poverty* 40, 63–67 (Ezra Rosser ed., 2019) (“[T]o alleviate suffering, policy makers and scholars must take a holistic view of poor people’s lives to best design welfare policy.”). See generally Monica Bell, Stephanie Garlock & Alexander Nabavi-Noo, *Toward a Demosprudence of Poverty*, 69 *Duke L.J.* 1473 (2020) (surveying the structural and substantive impacts of the “criminalization of poverty”).

247. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L.J.* 1442, 1443 (1983) (noting that “in the context of the judiciary, bureaucratization poses a unique challenge to the legitimacy of governmental power”); Patrick G. Scott & Sanjay K. Pandey, *Red Tape and Public Service Motivation: Findings From a National Survey of Managers in State Health and Human Services Agencies*, 25 *Rev. Pub. Pers. Admin.* 155, 156 (2005) (observing that “one particular malady [of government bureaucracy] that remains resistant to reform efforts is red tape”); Patricia M. Wald, *Bureaucracy and the Courts*, 92 *Yale L.J.* 1478, 1483–85 (1983) (arguing that “judges ought to give more attention to managing the judicial process”).

248. See Bookman & Noll, *supra* note 159, at 787 (“Just as the problems presented by a particular case or type of litigation may prompt a court to develop a new form of procedure, they may motivate lawmakers to redirect claims to a new tribunal that is designed to work better than courts.”).

of social needs they are functioning as legislative and policy bodies in a way that is neither appropriate to their role as a coequal branch of government nor grounded in collective, experimental problem solving.

CONCLUSION

*“I mean the whole system is completely broken and needs to be fire-bombed.”*²⁴⁹

If the challenges of state civil courts are bigger than particular actors, we need to ask how we should engage with this new understanding of courts as democratic institutions. How do we imagine a different future where our democratic values are realized in the institutions of state civil courts? How do we imagine, where we currently see a social need from one litigant, a world where that social provision is completely realized such that the needs of both litigants are ultimately met? These questions flow from our institutional theory of state civil courts and also require more depth than we can offer here. We offer, in conclusion, some insights to frame our own—and we hope others’—imagination of a way forward.

We start with our need for more intellectual and political investment in identifying, developing, and prioritizing structures that support a “rightsized” role for state civil courts. There is a movement among scholars and institutional actors to fix the problems we and others name.²⁵⁰ Any change that meets these democratic challenges must focus on changing these structural, institutional dynamics, not just practicing within them. The current menu of incremental reforms, focused on actors in the system, may improve people’s lives and suppress immediate conflagrations in the system. And we also need a more audacious agenda.

Any structural change to state civil courts requires mobilization, including by actors within state civil courts. This is part of a much larger set of theoretical questions about such mobilization.²⁵¹ One component is

249. Interview with Court Actor 4, Plainville.

250. See Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 *Colum. L. Rev.* 1243, 1249–52 (2022); Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 *Va. L. Rev. Online* 143, 156 (2021) (“While some organizers are calling for police abolition, prison abolition, or both, there is not a widespread call for abolishing courts. Or at least there is not such a call yet.”); Jessica K. Steinberg, Colleen F. Shanahan, Alyx Mark & Anna Carpenter, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 *Harv. L. Rev. Forum* 358, 361 (2022) (“Drawing on an invest/divest framework, we propose that bold reform would focus on reestablishing the democratic legitimacy of state civil courts by increasing social provision to defendants economically ravished by assembly-line litigation and also by keeping courts squarely in the business of resolving two-party adversarial disputes.”).

251. For example, systems of social provision in the United States have been institutionalized in various ways that reinforce inequality in society. See Andrea Louise Campbell, *How Policies Make Citizens: Senior Political Activism and the American Welfare State* 10 (2003) (arguing that seniors’ welfare state programs have moderated political inequality among senior citizens but have exacerbated it between different age groups); Joe Soss, *Unwanted Claims: The Politics of Participation in the U.S. Welfare System* 1–2 (2000) (arguing that

that lawyers, judges, court clerks, and others who see the daily realities of state civil courts need to exercise their collective political power.²⁵² Another is that courts need to collaborate with communities to build political will. This requires a shift in thinking to see that, in many ways, state civil courts are well positioned to orient themselves more intentionally toward community needs.²⁵³

This mobilization explicitly requires engaging the legislative and executive branches. This engagement is certainly political: Judges should be collectively educating and motivating their state legislatures to act.²⁵⁴ It also requires deep investment in, and vulnerability to, research and data collection. The thicker our understanding of state civil courts, writ large and in particular examples, the better courts can make the case for reshaping themselves as institutions. Another component of this mobilization is intentional experimentation in how we “rightsize” state civil courts. This is not experimentation for its own sake but rather for choosing interventions that take inertia away from the status quo.²⁵⁵ Such experimentation yields information and iteration that demonstrates more legitimate, democratic, cost-effective roles for courts. And this in turn generates political power. As others have pointed out, poverty and inequality will necessarily require political consensus on some substance, and experimentation can be a tool to reach those goals.²⁵⁶

the welfare system is a political institution that has the potential to empower or marginalize its clients). Our concern is with reimagining state civil courts, but this necessarily engages the motivations of political actors more broadly. See, e.g., Vesla M. Weaver & Amy E. Lerman, Political Consequences of the Carceral State, 104 *Am. Pol. Sci. Rev.* 817, 829–32 (2010).

252. See Shanahan & Carpenter, *supra* note 13, at 133–34 (“Any change must begin with courts and lawyers refusing to blindly accept the courts as a last resort against the legislative and executive branches’ failures to address inequality.”).

253. Joanne Scott & Susan Sturm, Courts as Catalysts: Re-Thinking the Judicial Role in New Governance, 13 *Colum. J. Eur. L.* 565, 592–94 (2007) (“The judicial function ought to be—and in some important respects already is—able to work collaboratively with other actors in devising and promoting governance structures which are at once effective and legitimate in problem-solving.”); Massachusetts Trial Court, Ctr. for Institutional & Soc. Change, <https://change-center.law.columbia.edu/research-projects/massachusetts-trial-court> [<https://perma.cc/3DU5-UA6C>] (last visited Feb. 10, 2022).

254. See Carpenter et al., Judges in Lawyerless Courts, *supra* note 8, at 564 (noting that “researchers, policymakers, and court leaders can explore questions about how best to influence and shape the future of judging”).

255. See Mariame Kaba, We Do This ‘Til We Free Us: Abolitionist Organizing and Transforming Justice 127 (2021); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 *Calif. L. Rev.* 1781, 1788 (2020) (“Abolitionist demands speak to the fundamental crises of our times, challenge our siloed expertise as legal scholars, and invite us to reconsider our commitments to the status quo.”).

256. See Charles Sabel, Dewey, Democracy, and Democratic Experimentalism, 9 *Contemp. Pragmatism* 35, 44–45 (2012) (noting that “experimentalist lawmaking and administration . . . begin[] with agreement at the highest-level jurisdiction . . . on broad framework goals”); David A. Super, Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law, 157 *U. Pa. L. Rev.* 541, 547 (2008) (“[T]he lack of a

State civil courtrooms have become emergency rooms because people's social needs remain unmet. Each day courts around the country are forced to confront this institutional mismatch in the face of this broader democratic failure. The time has come to address this institutional challenge head on. We need to engage in the collective exercise of reimagining state civil courts as democratic institutions.

meaningful consensus about the substantive goals of antipoverty law prevents coherent evaluation of the results of policy experiments: without an agreed-upon set of goals, we cannot agree on what 'works' to accomplish them.").

APPENDIX

Our state level data come from the National Center for State Courts (NCSC) and are from all fifty states, the District of Columbia, Guam, and Puerto Rico for the years 2012 through 2019.²⁵⁷ The totals reported here are cases initiated in the calendar year. The data appear in two ways. First, NCSC collects overall caseload data from states, as reflected in Table 1A. Second, NCSC collects caseload data by case types, as reflected in Tables 1B and 2.

There is no discernible pattern—either within states or across time—in how states report categorical data. Sometimes a state does no reporting in a given year. Sometimes a state never reports a particular case type, suggesting either that the state does not collect that data or that case type is not applicable under the state’s law. Finally, there is inherent variation in how states report case types. For example, states have different thresholds for the value of claims in small claims court, and so the same exact case in one state would be in the “Small Claims” category and in another state in the “Seller/Plaintiff” category. Although the purpose of this study is not to explain why states may or may not have reported data in a given year, future research could investigate these trends.

We readily acknowledge this inconsistency in state-level reporting within the study period and know that court leadership and the NCSC are working to improve reporting. The estimates presented here represent these data to the best of our ability given the constraints of what is reported. For each case type in Table 2, we calculate the proportion of cases that the case type represented in a given year and then average that proportion across the years in the study period. We also list the average number of reporting states and range in annual reporting to offer information about the sensitivity in the results when different states report

257. For case reporting methodology and categories, see Ct. Stat. Project, *State Court Guide to Statistical Reporting* 3–9 (2020), https://www.courtstatistics.org/_data/assets/pdf_file/0026/23984/state-court-guide-to-statistical-reporting.pdf [<https://perma.cc/K45R-QF66>]. For the underlying data, see CSP STAT, Ct. Stat. Project, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat> [<https://perma.cc/YB3S-VSGT>] (last visited Feb. 10, 2022). We’d like to acknowledge the NCSC staff who contributed to each of the annual reports: Alice K. Allred, Brandan P. Collins, Kathryn A. Holt, Robert C. LaFountain, Kathryn J. Lewis, Diana McSpadden, Richard Y. Schaffler & Shauna M. Strickland (2012); Alice K. Allred, Kathryn A. Holt, Robert C. LaFountain, Kathryn J. Lewis, Richard Y. Schaffler & Shauna M. Strickland (2013); Alice K. Allred, Kathryn J. Genthon, Kathryn A. Holt, Robert C. LaFountain, Richard Y. Schaffler & Shauna M. Strickland, (2015); Alice K. Allred, Kathryn J. Genthon, Kathryn A. Holt, Robert C. LaFountain, Richard Y. Schaffler, Shauna M. Strickland, Olivia H. Underwood, Brittney M. Via & Nicole L. Waters (2016); Natasha C. Anderson, Kathryn J. Genthon, Robert C. LaFountain, Olivia H. Lyles, Diane Robinson, Brittney M. Via & Nicole L. Waters (2017); Alice K. Allred, Amanda N. Fisher Boyd, Kathryn J. Genthon, Sarah A. Gibson, Robert C. “Neil” LaFountain, Diane L. Robinson & Nicole L. Waters (2018); Kathryn J. Genthon, Sarah A. Gibson, Miriam Hamilton, B. Harris, Diane L. Robinson & Nicole L. Waters (2019).

in different years—investigating this variation may be another fruitful avenue for scholars. As perspective, the category level reporting in Tables 1B and 2 capture reporting by states representing a range of 73 to 96% of the population based on 2019 U.S. Census Bureau data.²⁵⁸

TABLE 1A: INCOMING STATE CASES AS REPORTED BY NCSC²⁵⁹

	2012–2019 Total	2012–2019 Annual Average	Average # States Reporting
Civil	118,445,434	14,805,679	44
Domestic Relations	35,896,527	4,487,066	44
Criminal	117,823,758	1,133,669	43
Juvenile	9,069,353	14,727,970	38
Traffic	330,980,859	41,372,607	38

TABLE 1B: INCOMING STATE CASES BASED ON REVISED CATEGORIES²⁶⁰

	2012–2019 Total	2012–2019 Annual Average	Average # States Reporting
Civil Justice Needs Cases	85,762,530	10,720,316	22
Criminal (Adult) Cases	44,358,919	5,544,865	17
Juvenile Delinquency Cases	2,348,174	293,522	19
Traffic Cases	307,927,304	38,490,913	25

258. See QuickFacts: United States, U.S. Census Bureau, <https://www.census.gov/quickfacts> [<https://perma.cc/26AY-G7TY>] (last visited Feb. 10, 2022).

259. This table captures all reporting from states that reported total incoming cases (e.g., “Civil Total”), regardless of whether they reported case types (e.g., “Small Claims”) in a given year. This table uses the same categories as the NCSC.

260. This table is the sum of all incoming cases that were reported by case type. It uses the categories developed in Table 2. Because fewer states report by case type than overall incoming cases, there are fewer cases reported here than in Table 1A.

TABLE 2: CIVIL JUSTICE NEEDS CASES²⁶¹

	2012–2019 Proportion of Civil Incoming Cases	Social Need Presented	Under- lying Social Need	Average # States Report- ing	Range in States Reporting (Range in Annual Proportion)
<i>Personal Relationships Total</i>	30.28%				
Dissolution/ Divorce*	10.03%	Mixed	Mixed	41	37–44 (8.52%– 11.44%)
Civil Protection Restraining Orders*	6.96%	Mixed	Yes	37	33–40 (6.71%–7.47%)
Probate/ Wills/ Intestate	4.22%	Mixed	Mixed	31	22–36 (2.93%–4.98%)
Mental Health	3.58%	Yes	Yes	38	31–42 (2.83%–3.97%)
Probate/ Estate (Other)	1.97%	Mixed	Mixed	22	16–28 (1.84%–2.09%)
Domestic Relations (Other)*	1.38%	Mixed	Mixed	19	12–25 (1.05%–1.57%)
Non-Domestic Relations Restraining Order	1.10%	Mixed	Mixed	22	14–26 (0.81%–1.25%)
Guardianship (Adult)	0.56%	Yes	Yes	27	19–36 (0.40%–0.70%)
Conservator- ship/ Trusteeship	0.38%	Yes	Yes	28	23–32 (0.17%–0.60%)
Guardianship (Unknown)	0.10%	Yes	Yes	16	9–21 (0.00%–0.19%)

261. The proportions in this table use the total incoming cases reflected in Table 1B as their denominator. Case types marked with * are ones NCSC categorizes as “Domestic Relations.” Case types marked with ** are ones NCSC categorizes as “Juvenile.” In addition, habeas corpus cases are included as “Criminal” and not “Civil” in our categorization.

Small Claims

Small Claims ²⁶² (Tort, Contract, and Property)	18.92%	Mixed	Mixed	38	36–40 (16.91%–21.91%)
Children Total	15.45%				
Support IVD*	6.17%	Yes	Yes	21	13–28 (5.46%–7.63%)
Paternity*	2.11%	Mixed	Yes	35	25–40 (1.66%–2.87%)
Dependency Abuse/ Neglect**	1.66%	Yes	Yes	31	20–36 (1.37%–1.96%)
Custody*	1.28%	Mixed	Mixed	25	18–30 (1.12%–1.65%)
Status Offense**	0.90%	Yes	Yes	28	23–32 (0.59%–1.18%)
Dependency Termination of Parental Rights**	0.82%	Yes	Yes	36	28–41 (0.74%–0.88%)
Adoption*	0.73%	Yes	Yes	40	34–43 (0.67%–0.80%)
Support (Other)*	0.55%	Mixed	Yes	14	7–19 (0.38%–0.80%)
Guardianship (Juvenile)	0.45%	Yes	Yes	25	19–31 (0.28%–0.55%)
Dependency (Other)**	0.34%	Yes	Yes	17	10–23 (0.13%–0.80%)
Support Private/ Non-IVD*	0.31%	Mixed	Yes	9	4–13 (0.16%–0.43%)
Visitation*	0.07%	Mixed	Yes	15	7–21 (0.06%–0.08%)
Dependency (No Fault)**	0.05%	Yes	Yes	12	4–16 (0.01%–0.07%)

262. See *supra* notes 99 and 102–107 and accompanying text regarding estimates of total debt collection matters across “Contract” and “Small Claims” case types.

<i>Housing Total</i>	<i>14.95%</i>				
Landlord/ Tenant (Unlawful Detainer)	8.83%	Yes	Yes	20	11–27 (2.69%– 11.96%)
Landlord/ Tenant (Other)	3.65%	Yes	Yes	13	8–17 (1.17%–5.49%)
Mortgage Foreclosure	2.48%	Yes	Yes	26	16–31 (1.84%–3.41%)
<i>Contract Total</i>	<i>8.15%</i>				
Seller/ Plaintiff (Debt Collection) ²⁶³	5.06%	No	Yes	18	12–23 (4.20%–5.98%)
Contract (Other)	3.01%	No	No	14	5–19 (0.25%–4.94%)
Buyer (Plaintiff)	0.09%	No	No	8	3–13 (0.01%–0.31%)
<i>Other Total</i>	<i>8.10%</i>				
Civil (Other)	4.54%	No	No	15	8–19 (2.76%–6.22%)
Writs	2.70%	No	No	19	12–23 (1.41%–4.47%)
Appeal From Administrative Agency	0.56%	No	No	32	28–37 (0.43%–0.81%)
Appeal From Limited Jurisdiction Court	0.25%	No	No	31	24–34 (0.17%–0.38%)
Civil Appeals (Other)	0.04%	No	No	19	16–21 (0.01%–0.08%)

263. See supra notes 99 and 102–107 and accompanying text regarding estimates of total debt collection matters across “Contract” and “Small Claims” case types.

<i>Tort Total</i>	2.25%				
Automobile Tort	1.57%	Mixed	Mixed	20	10–27 (1.15%–1.96%)
Tort (Other)	0.25%	No	No	14	6–19 (0.10%–0.32%)
Premises Liability	0.15%	No	No	13	5–18 (0.11%–0.19%)
Intentional Tort	0.11%	No	No	15	7–21 (0.08%–0.13%)
Malpractice (Medical)	0.07%	Yes	Yes	20	9–28 (0.05%–0.09%)
Product Liability	0.06%	No	No	19	11–27 (0.03%–0.11%)
Malpractice (Other)	0.02%	Yes	Yes	16	9–12 (0.02%–0.03%)
Slander/Libel/Defamation	0.01%	No	No	12	4–18 (0.01%–0.02%)
Fraud	0.01%	Mixed	Mixed	9	4–13 (0.00%–0.01%)
<i>Tax</i>					
Tax	1.33%	No	No	17	12–20 (0.72%–1.64%)
<i>Property Non-Housing Total</i>	0.48%				
Real Property (Other)	0.43%	No	No	21	15–27 (0.29%–0.51%)
Eminent Domain	0.05%	No	Yes	25	20–28 (0.04%–0.06%)

Employment Total	0.09%				
Employment (Other)	0.06%	Mixed	Yes	11	5–17 (0.02%–0.11%)
Employment Discrimination	0.03%	Mixed	Yes	14	7–20 (0.03%–0.03%)
Low Estimate of Social Needs, Total	31% (presented)–46% (presented/underlying)				
High Estimate of Social Needs, Total	90% (presented)–95% (presented/underlying)				

TABLE 3: FEDERAL CIVIL CASES²⁶⁴

	2012–2019 Total	2012–2019 Annual Average	2012–2019 Proportion
<i>Contract, Total</i>	211,118	26,390	9.30%
<i>Real Property, Total</i>	70,331	8,791	3.10%
<i>Tort Actions, Total</i>	544,183	68,023	23.97%
<i>Actions Under Statutes, Total</i>	1,445,036	180,630	63.64%
Prisoner Petitions	465,573	58,197	20.50%
Civil Rights	309,606	38,701	13.64%
Labor Laws	145,201	18,150	6.39%
Intellectual Property	100,187	12,523	4.41%
Social Security	149,645	18,706	6.59%
Consumer Credit	78,756	9,845	3.47%
Other Statutes	196,068	24,509	8.63%
TOTAL	2,270,668	283,834	100%

264. This data is drawn from the federal judiciary's annual reporting. Statistical Tables for the Federal Judiciary, U.S. Cts., <https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary> [<https://perma.cc/C78N-T72T>] (last visited Feb. 10, 2022).

Columbia Law Review. ISSN 0010-1958.

Published by Columbia Law School students monthly except for February, July, August, and September. Printed in Hanover, Pennsylvania. Editorial Office, 435 West 116th Street, New York, New York 10027. Subscription per volume \$60.00 domestic, \$85.00 foreign, single issues \$20.00 domestic, \$30.00 foreign. Prices for special/symposium issues may vary. These figures include postage. Prepayment requested on all orders. If a subscription is to be discontinued at expiration, notice to that effect should be sent; otherwise it will be renewed as usual. For issues prior to volume 105 inquire of William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571, <http://www.wshein.com>. Back issues are also available in PDF format through Hein Online, <http://www.heinonline.org>.

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