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## Studying the "New" Civil Judges

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## STUDYING THE “NEW” CIVIL JUDGES

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We know very little about the people and institutions that make up the bulk of the United States civil justice system: state judges and state courts. Our understanding of civil justice is based primarily on federal litigation and the decisions of appellate judges. Staggeringly little legal scholarship focuses on state courts and judges. We simply do not know what most judges are doing in their day-to-day courtroom roles or in their roles as institutional actors and managers of civil justice infrastructure. We know little about the factors that shape and influence judicial practices, let alone the consequences of those practices for courts, litigants, and the public. From top to bottom, we can describe and theorize about our existing civil justice system in only piecemeal ways. Given legal scholarship’s near-complete focus on federal civil courts, the stories we tell about the civil justice system may be based on assumptions and models that only apply in the rarefied world of federal court. Meanwhile, state judges and courts—which handle ninety-nine percent of all civil cases—are ripe for theoretical and empirical exploration.

In response, we call for more research aimed at increasing our understanding of state civil courts and judges and offer a theoretical framework to support this work, one that reflects how state courts differ from federal courts. This framework is grounded in a core fact of American civil justice, one both easily observed and largely overlooked: the majority of parties in state civil courts are unrepresented. Given this new pro se reality, our theoretical framework identifies four novel assumptions to guide future research: (1) the adversary process is disappearing; (2) most state court business is still conducted through in-person interactions between judges and parties; (3) the judicial role is ethically ambiguous in pro se cases; and (4) a largely static body of written law has not kept pace with the evolving and dynamic issues facing state courts. Building on the growth of empiricism and empirically grounded theory in traditional legal scholarship

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and access to justice research, we call on scholars to develop theory and gather data to map the new reality of civil justice and judging in America, and suggest questions to guide future research.

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## INTRODUCTION

Americans turn to state courts to manage personal and business problems of all types. We rely on state courts to end failing relationships, manage the custody of children, and gain protection from violence. We often turn to these courts when faced with broken commitments, failed deals, or damaged property. Increasingly, people are pulled into state court litigation because they have fallen behind on credit card, mortgage, or rent payments. State civil courts are the primary place where most Americans interact with the civil justice system; these courts and the judges who preside over and administer them sit at the heart of our civic, economic, and social life.

Unlike other fundamental systems like health care and education, we know very little about our state courts—from what goes on in local courtrooms and clerks' offices to court administration at the state level.<sup>1</sup> We lack even the most rudimentary knowledge of the most powerful

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1. Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DÆDALUS, J. AM. ACAD. ARTS & SCI. 129, 129 (2014).

actors in this system—judges, including what happens inside their courts, and why. This lack of knowledge persists, despite legal scholarship’s ongoing investments and interest in empiricism and the recent burst of access to justice research across multiple disciplines.

The lack of information about state civil courts and judges makes it difficult to develop theoretical expectations about how they operate, to evaluate those expectations empirically, and to develop policies and practices to improve the justice system. The state court knowledge deficit is no secret; a smattering of scholars have identified and bemoaned it over the past thirty years.<sup>2</sup> 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.<sup>3</sup> Though federal courts decide complex cases and articulate the

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2. Since the early 1980s, legal scholars have intermittently noted and critiqued the lack of information about state civil justice systems. *See, e.g.*, Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 L. & SOC. INQUIRY 275, 278 (1994) (“We know, for example, much more about tort cases filed in federal court than we do about such cases in state court.”); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835 n.17 (2008) (“[S]tate courts are a fertile place for study, and little has been done to date.”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2011) (citing a lack of empirical data about the effects of given procedures in a civil justice context); Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2251–52 (2017) (noting civil procedure scholars “focus intensely and almost exclusively on the bare fraction of civil cases decided in federal courts, leaving largely unexamined the norms and rules governing the tens of millions of cases affecting the lives of ordinary Americans in state courts”). In 1983, Herbert Jacob described a burst of scholarly activity focused on state criminal courts following the ascendance of legal realism but noted that “[b]y contrast, our knowledge of the way trial courts deal with civil matters is scant.” Herbert Jacob, *Trial Courts in the United States: The Travails of Exploration*, 17 L. & SOC’Y REV. 407, 408–13 (1983). Jacob’s nearly forty-year-old observations hold true today.

3. Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013).

[L]egal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts. Much like the drunk man who looks under the lamppost for his lost keys at night because it is the only place he has the light to see, so too the legal scholar often studies published cases because they are available from databases at her fingertips. *Id.* at 898–99.

*See also* RICHARD A. POSNER, *HOW JUDGES THINK* 19 (2010) (“There are many positive . . . theories of judicial behavior. Their primary focus is, as one would expect, on explaining judges’ decisions.”); Michele Cotton, *When Judges Don’t Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 57–58 (2015); Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1734; Miles & Sunstein, *supra* note

final word on essential doctrinal and procedural questions, these courts currently handle less than one percent of America's annual civil caseload.<sup>4</sup> To ignore state civil courts is to ignore ninety-nine percent of the cases in our civil justice system. When legal scholars (and social scientists) do turn to state courts and judges, they tend to focus on criminal dockets and state appellate courts.<sup>5</sup>

The data we *do* have about state courts point to a radical and ongoing transformation in the civil justice system, a transformation both easy to observe and largely overlooked.<sup>6</sup> State civil court dockets are now dominated by lay people who manage their civil justice problems without the assistance of a lawyer, a group one of us has called the “unrepresented majority.”<sup>7</sup> An estimate based on recent data suggests that three-quarters of all state civil cases—at least 15.5 million

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2, at 837 (noting much of the New Legal Realist empirical scholarship focuses on federal court decisions).

4. In 2015, 20.4 million civil cases were filed in state courts (this includes 15.4 million general civil and 5 million domestic relations cases). See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 3 (2016) [hereinafter NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS], [<https://perma.cc/6CKF-BF72>]. The same year, 281,608 civil cases were filed in federal district courts. See *Federal Judicial Caseload Statistics 2015*, U.S. CTS., [<https://perma.cc/SF62-FAZX>]. Thus, federal civil filings make up just over one percent of all civil filings in the United States.

5. See Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUDS. 100, 1011 (2015) (study of state civil appeals and reversal rates where the authors note, “[w]e know comparatively little about the relation between trial and appellate court outcomes”); Jacob, *supra* note 2, at 408–13; Leib, *supra* note 3, at 898–99.

6. Jessica Steinberg made this point in a previous article that was the first to comprehensively describe the breakdown in adversary procedure in state courts, with a particular focus on the ethical conundrum facing state court judges. See Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899 [hereinafter Steinberg, *Adversary Breakdown*]. Peter Holland's groundbreaking study of debt buyer lawsuits makes a similar point in the context of this specific class of cases. As he argues, the data suggest there is no adversary system in these cases, instead, there is a “shadow system” with little judicial oversight, a system characterized by “mass produced” default judgments. See Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 179 (2014).

7. For rates of unrepresented parties in state courts, see NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv, 31–33 (2015) [hereinafter THE LANDSCAPE OF CIVIL LITIGATION], [<https://perma.cc/6FYL-XWNP>]. For a review of recent research, see Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749–51 (2015) [hereinafter Steinberg, *Demand Side*]; Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 481–82, 508–12 (2016) [hereinafter *Lawyers, Power, and Strategic Expertise*].

per year—involve at least one unrepresented party.<sup>8</sup> This massive figure reflects a complete reversal in the representation status of state court litigants in less than three decades. Twenty-five years ago, nearly every party in state court had a lawyer.<sup>9</sup> Today, the vast majority represent themselves.<sup>10</sup>

In response to the rise of unrepresented parties, the adversary system in state courts has fundamentally changed. The leading authority on state courts has called the adversary system in these courts an “idealized picture” and an “illusion.”<sup>11</sup> Our own research shows that party control of litigation has fallen away and that judges are routinely departing from the traditional, passive judicial role in varied and ad hoc ways when they deal with pro se parties.<sup>12</sup> One of us was the first to point out that judges are behaving in ways that neither the law nor ethical rules authorize.<sup>13</sup> One was the first to create a formal taxonomy of active judging behaviors.<sup>14</sup> Another was the first to examine how judges’ treatment of pretrial procedural requests defines pro se parties’ access to the hearing room.<sup>15</sup> We have also studied the role judges play in shaping how advocates develop and exercise legal expertise.<sup>16</sup>

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8. This estimate is based on National Center for State Courts data. It includes civil and domestic cases and excludes traffic cases. Traffic cases make up by far the largest portion of state court matters. In 2015, 15.4 million civil cases and 5 million domestic relations/family cases were filed in state courts, for a total of 20.4 million cases. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, *supra* note 4, at 3. The most recent National Center data suggest at least 76% state civil matters involve one unrepresented party. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at iv. We arrive at the 15.5 million estimate by taking 76% of 20.4 million.

9. See *infra* note 28 and accompanying text.

10. See *infra* note 28 and accompanying text.

11. THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at vi.

12. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649–50, 655–56 (2018) [hereinafter Carpenter, *Active Judging*] (presenting data showing that, in a District of Columbia administrative court, judges routinely depart from the passive norm but that practices vary in meaningful ways within the court); Steinberg, *Adversary Breakdown*, *supra* note 6, at 901–03, 938, 940–43 (arguing legal scholars have long studied and critiqued the active judicial role in complex and public law litigation while ignoring the development of similar practices in state civil courts; presenting examples on judicial departures from the passive role).

13. See Steinberg, *Adversary Breakdown*, *supra* note 6.

14. See Carpenter, *supra* note 12.

15. Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215 [hereinafter Shanahan, *Keys to the Kingdom*].

16. Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023 (2017) [hereinafter Carpenter, Mark & Shanahan, *Trial and Error*] (study of lawyer and nonlawyer

Judicial departures from the passive role, which we call “active judging,” range from procedural adjustments, like asking questions to authenticate evidence, to moves with substantive implications for case outcomes, like raising new legal claims or defenses where parties have failed to do so.<sup>17</sup> It also includes judicial behavior outside the confines of a hearing, from informal party interactions to judicial participation in redefining court systems. At the same time, some state courts (led by judges) are developing new programs and practices that empower other actors (including nonlawyers) to assist unrepresented parties, often in strong collaboration with outside organizations.<sup>18</sup>

We know that the adversary system and the judicial role are changing in courts across the country, but we do not have the data to say with any certainty how widespread such changes are, let alone to understand their nature and effect. We cannot meaningfully describe what most state civil court judges actually do in their day-to-day work, much less the causes and consequences of this behavior. Our ignorance stretches from the courtroom to the clerk’s office and beyond. Only by piecing together disparate strands of research can we even begin to identify the questions we should be asking. An entire field of study sits almost completely unexplored.

In this article, we are intentionally pushing back on prevailing wisdom about the study of courts and judges, which implicitly, and sometimes explicitly, holds that only nonroutine or idiosyncratic cases

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advocates representing employers in unemployment compensation appeals, finding judges play a powerful role in shaping nonlawyer expertise).

17. For early articles discussing the dilemma judges face in pro se cases and suggesting techniques for handling these cases, see, e.g., Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES’ J., Winter 2003, at 16, 18, 48 (2003); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987, 2014, 2017 (1999) [hereinafter Engler, *And Justice for All*]; Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36, 45–53 (2002).

18. For the first national survey of civil legal services, see REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, at v (2011), [<https://perma.cc/2XJQ-URD9>] (“The existing civil legal assistance infrastructure is, in effect, the output of many public-private partnerships, most of them on a small scale . . . . Funding for civil legal assistance comes from a wide range of public and private sources.”). For the most well-developed court-based lay assistance program, see REBECCA L. SANDEFUR, & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS, AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS (2016), [<https://perma.cc/53HX-CQPV>].

are worthy of study.<sup>19</sup> Instead, we argue that ignoring the routine, daily work of our nation’s courts has left a massive gap in our understanding of the civil justice system, a system that has real effects on the people whose lives and well-being are at stake within it.<sup>20</sup> Researchers have not evaluated existing theories of judging and civil justice in state courts. Our current theoretical models may be inadequate to explain the vast majority of judicial and civil court activity in the United States.

The stories we tell about civil justice in America are likely based on assumptions and models that may only apply in the rarefied world of federal court. For example, current legal scholarship emphasizes the “vanishing trial” and the rise of “privatized procedure.”<sup>21</sup> While trials are on the decline in state courts just as they are in federal courts, state court litigation differs in important ways. In-person interactions between judges and parties are still the primary means of conducting business in state courts. Judges and parties routinely interact in open court to process and dispose of litigation; few cases are resolved based on written pleadings and motions.

Privatized procedure—where parties develop out-of-court contractual arrangements to alter standard procedural regimes—belongs almost exclusively to the realm of federal courts. The majority of lay people who find themselves engaged in state court litigation are simply not equipped to strategically manage procedures to advance their interests. In the courtrooms we have observed, judges exert tight control over procedure and case processing.<sup>22</sup> In courts with few lawyers, there is simply no one else with the requisite expertise to wield the necessary procedural tools. The limited available research

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19. POSNER, *supra* note 3, at 19 (describing the author’s goal as the creation of a “cogent, unified, realistic, and appropriately eclectic account of how judges actually arrive at their decisions in nonroutine cases”). See also Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213, 214 (2017) (arguing that doctrinal tools lead scholars to analyze pathbreaking cases, but noting that “sound generalizations about law and society” should not be based on an analysis of such cases because they are “idiosyncratic,” and encouraging legal scholars to use qualitative social science methods in their research on law and the legal system).

20. Other scholars have noted the lack of data about the civil justice system and its consequences. See, e.g., Eisenberg, *supra* note 3, at 1734; Resnik, *supra* note 2, at 158.

21. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDS. 459, 459 (2004) (documenting the decline of civil trials in federal and state court); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014) (describing and critiquing the privatization of process in federal court).

22. See Carpenter, *supra* note 12, at 687–90; Shanahan, *supra* note 15 at 103; Steinberg, *Adversary Breakdown*, *supra* note 6, at 938–40.



suggests prevailing stories about the evolving civil justice system do not neatly map onto the state court context.

Even the recent growth of empirical access to justice research has not reached the study of state civil judges and courts. Instead, researchers have focused on legal needs and services.<sup>23</sup> Access to justice scholars have been the loudest voices regarding the plight of unrepresented parties in state courts and promoting reform of courts and judicial practices. But we have not seen calls for research aimed at increasing our understanding of how judges behave and courts operate in the existing civil justice system, or at analyzing the implementation and effect of reforms. Instead, most scholars have focused on making the normative case for change and offering prescriptions for reform.<sup>24</sup>

In this article, we make the case for a research agenda focused on state courts and the judges who manage and work within them. In Part I, we present a brief overview of the state civil justice landscape and make the critical and often-overlooked point that state courts *are* pro se courts; the majority of civil matters in the United States now involve at least one unrepresented party. We then review what we know about how courts and judges are responding to this new pro se reality. In Part II, we ask why so little research focuses on state civil courts and judges, particularly at a time when empirical analysis is a regular part of legal scholarship and access to justice research is on the rise. We identify and discuss barriers to knowledge and access; a federal court

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23. See, e.g., Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, 298–99 (2009) (proposing approaches to research on low-income individuals' legal needs); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (setting out an expansive agenda for research on the demand for and supply of legal services); Elizabeth Chambliss et al., *Introduction: What We Know and Need to Know About the State of "Access to Justice" Research*, 67 S.C. L. REV. 193 (2016) (assessing access to justice research); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 61–64 (2012), [<https://perma.cc/S89K-VJ7M>] (articulating a research agenda focused on civil legal services in the context of clinical legal education).

24. Access to justice scholars have been calling for court and judicial reform for decades, and evidence suggests such reform is happening. However, the focus of this work has been on the need for reform, rather than the need to study courts and how they are changing. See, e.g., Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1269–74 (2010) (proposing court reform as a solution to the pro se crisis, including an active role for judges); Engler, *And Justice for All*, *supra* note 17, at 2028–31 (calling for pro se court reform and active judging); 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, 976–78 (2004) (arguing for changes in the judicial role); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 899–902 (2009) (calling for pro se court reform).

bias in legal scholarship; a lack of interdisciplinary coordination in state court research; and a trend of lawyer-centric research. In Part III, we offer a framework for future research on state civil courts, with an emphasis on the judicial role. Here, we develop a four-part theory of how state courts differ from federal courts (the default focus of most civil justice scholarship) and identify research questions based on this theory. Specifically, we theorize that state courts differ because the adversary process is in decline; most state court business is still conducted through in-person interactions; the judicial role in pro se cases is increasingly ethically ambiguous; and written substantive and procedural law has largely not kept pace with the evolving and dynamic issues facing state courts. In conclusion, we call for scholars to invest in research on state civil courts and judges and briefly describe our own ongoing research project.

## I. WHAT WE DO KNOW ABOUT STATE CIVIL COURTS AND JUDGES

In this Section, we explore what existing data tell us about state civil justice systems. Here, we focus on a critical and timely issue that influences how courts and judges perform their work: the new unrepresented majority. The composition of state court dockets has changed dramatically over the past three decades, most notably in a complete reversal of representation status for the majority of parties.<sup>25</sup> Evidence, including our previous research, suggests judges respond in varied and potentially ad hoc ways to unrepresented parties and that traditional adversarial process no longer guides many proceedings in our state civil courts.<sup>26</sup>

### A. *New Reality of State Civil Courts*

Much of what we know about state civil justice, particularly the national, comparative picture, comes from the National Center for State Courts (“National Center”), an organization that has worked for

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25. See LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at 31. Steinberg, *Demand Side*, *supra* note 7, at 751–52.

26. See Carpenter, *supra* note 12, at 661–69; Shanahan, *supra* note 15 (manuscript at 120–22); *Lawyers, Power, and Strategic Expertise*, *supra* note 7, at 481–83 (study examining party power, expertise, and representation in a District of Columbia unemployment compensation court, where representation rates are similar to national numbers, and more powerful and sophisticated parties—employers—are much more likely to be represented than less powerful parties—claimants seeking benefits); Steinberg, *Adversary Breakdown*, *supra* note 6, at 940–43.

decades to organize and analyze state court data, while pushing states to improve their data collection procedures. Notably, even the National Center's reports are filled with caveats about the limitations of its datasets.<sup>27</sup>

The National Center's data describe a United States civil justice system that has transformed steadily and substantively in fundamental ways over the past three decades. Twenty-five years ago, nearly every party in state court litigation was represented.<sup>28</sup> Today, the vast majority of people who appear in state court have no counsel and defendants are the party least likely to be represented.<sup>29</sup> In seventy-six percent of cases, at least one party lacks counsel.<sup>30</sup> Thanks to the National Center, we know of this widespread change in the representation status of state court litigants, but we have little data to understand or explain the causes and consequences.

The picture that emerges from existing data has led a number of scholars to call our state courts "the poor people's courts."<sup>31</sup> Today, wherever individuals and corporations with legal sophistication can bypass the civil justice system, they do.<sup>32</sup> Thus, we are left with a state

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27. See, e.g., THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at iii. The report states:

Differences among states concerning data definitions, data collection priorities, and organizational structure make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers. *Id.*

28. In National Center data from 1992, both parties were represented in approximately 95% of the tort cases disposed of in general jurisdiction courts. See CIVIL JUSTICE SURVEY OF STATE COURTS, 1992 (1995) [hereinafter CIVIL JUSTICE SURVEY 1992].

29. The National Center's 2015 *Landscape* study found that while plaintiffs were represented in 92% of matters, the representation rate for defendants was 26%, with both parties represented in only 24% of cases. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at 31. Numerous studies have found that upwards of 80%–90% of all litigants in family law cases lack counsel. See Steinberg, *Demand Side*, *supra* note 7, at 751.

30. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at iv.

31. See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 83 (1997); see also Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473, 475 (2015); Steinberg, *Demand Side*, *supra* note 7, at 746.

32. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at v; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PA. ST. L. REV. 165, 181–84 (2003); Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 166–67 (2013); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Decks of*

civil justice caseload primarily concerned with relatively low-value (in monetary terms) contract and family law disputes.<sup>33</sup> In both case types, lack of representation is the norm, with an important exception: plaintiffs in contract disputes.<sup>34</sup>

In family law cases, such as those involving domestic violence, divorce, child support, child custody, and paternity, numerous studies show pro se rates as high as eighty to ninety percent of all litigants.<sup>35</sup> Outside of family law, the bulk of state court work now involves represented plaintiffs (often corporations) suing unrepresented defendants (typically low-income) in debt collection, landlord/tenant, foreclosure, and small claims matters.<sup>36</sup> Seventy-four percent of defendants in these cases lack representation, while plaintiffs are almost always represented.<sup>37</sup>

Our modern civil justice system was not designed—outside of the small claims context—for lay people. It was designed by and for lawyers, with a baseline assumption of party control over litigation. Unsurprisingly, substantial evidence suggests unrepresented lay people fare poorly when they attempt to navigate this system on their own.<sup>38</sup>

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*Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

33. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7. This study is based on a sample of ten urban courts and these courts’ non-family civil caseloads, for a total of 925,344 cases or 5% of the national number of civil filings. *Id.* at iii. The dataset is not a nationally representative sample, and for many reasons the National Center discusses in the report, the quality of the data is not ideal. However, the *Landscape* report still offers the strongest existing comparative picture of our state civil courts. On the non-family civil side, at least one party lacks counsel, most often the defendant, in 76% of cases. *Id.* at iv. Three quarters of all judgments in non-family civil cases involved less than \$5,200. *Id.* at iv, 35. As the National Center found, the cost of litigating such cases with representation would, for most litigants, exceed the monetary value of the case. *Id.* at iv. As the National Center notes, though big tort and commercial contract cases are the focus of many current debates about the civil justice system, these are only a tiny portion of the overall dataset. Only 6% of the cases were tort matters and 2% involved real property disputes. *Id.* at 8. Just .2% of the cases involved judgments exceeding \$500,000 and less than .1% of cases had judgements over \$1 million. *Id.* at 24. Contract cases dominate civil caseloads, at 61%. *Id.* at 8.

34. See *id.* at 31–33; CIVIL JUSTICE SURVEY 1992, *supra* note 28.

35. See Steinberg, *Demand Side*, *supra* note 7, at 751.

36. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at 31–33.

37. *Id.* at 32.

38. A significant body of literature explores how lay people fare when navigating the civil justice system. See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 AM. SOC. REV. 909 (2015) [hereinafter Sandefur, *Elements*] (meta-analysis of existing studies on the impact of representation in civil matters). We have previously discussed research on the experiences of pro se litigants and have conducted original

At the outset, lay people may lose a case simply because they do not understand the need to show up. If they do make it to the courthouse, they struggle with basic procedures and paperwork and may never make it to the hearing room.<sup>39</sup> They lose meritorious cases due to procedural challenges or because they misunderstand substantive law. Some courts have self-help centers or other access to justice interventions outside the courtroom, but many do not. Though we lack a full, nationally representative picture, it is safe to say that many, if not most, unrepresented parties have no access to legal information or assistance before they set foot in a courtroom.

In previous articles, we have discussed the dynamics of pro se litigation in depth and reported the results of our empirical research.<sup>40</sup> The picture is grim. The human, social, and economic cost of the pro se crisis in our state courts is hard to overstate. Tenants facing eviction routinely appear in court with no knowledge of the defenses available to them.<sup>41</sup> Mothers and fathers engage in custody and child support disputes with no appreciation of the legal issues at play.<sup>42</sup> Victims of domestic violence may fail to obtain necessary protection.<sup>43</sup> Low-income workers facing debt collection suits never file answers or show up to court.<sup>44</sup>

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empirical research in this area. See *Lawyers, Power, and Strategic Expertise*, *supra* note 7, at 481–82, 508–12; Steinberg, *Adversary Breakdown*, *supra* note 6, at 925; Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. POVERTY L. & POL'Y* 453, 456–58 (2011) [hereinafter Steinberg, *In Pursuit of Justice?*].

39. Shanahan, *Keys to the Kingdom*, *supra* note 15.

40. See Carpenter, *Active Judging*, *supra* note 12; Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 16; Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation be a Dangerous Thing?*, 67 *HASTINGS L.J.* 1367 (2016) [hereinafter Shanahan, Carpenter & Mark, *A Dangerous Thing?*] (arguing that legal services short of full lawyer representation, such as services provided by nonlawyer advocates, may result in less law reform activity and proposing solutions); Shanahan, *Keys to the Kingdom*, *supra* note 15; *Lawyers, Power, and Strategic Expertise*, *supra* note 7; Steinberg, *Adversary Breakdown*, *supra* note 6; Steinberg, *Demand Side*, *supra* note 7; Steinberg, *In Pursuit of Justice?*, *supra* note 38.

41. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 *HOFSTRA L. REV.* 533, 535 (1992).

42. See Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 *YALE L.J.* 2106, 2108–12 (2013); Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 *S.C. L. REV.* 223 (2016).

43. See Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 557, 567–68 (2006).

44. See HUMAN RIGHTS WATCH, *RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR* 33–34 (2016), [<https://perma.cc/V8RB-YPQT>];

For a person without counsel in state court, even an act as fundamental and common as serving process on the other party can be an insurmountable barrier.<sup>45</sup> In these situations, a judge may be the sole civil court actor available to provide assistance, as in the example that follows:

In one hearing . . . in a local domestic violence court, a petitioner had returned to court eighteen times without successfully completing service of process. The judge continued to hear her case in open court, but would not direct her on the procedure for pursuing an alternative form of service. A judge’s refusal to assist is, therefore, not cost-neutral, as the same parties may return to court again and again in pursuit of the same relief.<sup>46</sup>

Service of process in state courts may seem a prosaic topic, particularly when compared to complex doctrinal matters in federal appellate cases, but the implications are no less grave, particularly when multiplied by the millions of unrepresented parties who appear in state court each year. In the next Section, we discuss how state courts and judges are responding to the demands of increased pro se litigation.

### *B. How Judges are Responding in the Courtroom*

As we have shown, though we know lower courts and judges have changed in the face of the new pro se composition of civil dockets, we are far from a comprehensive comparative or longitudinal picture of this new reality. We can, however, piece together the findings of often-disconnected research efforts to observe trends, perhaps most notably a fundamental change in the role of the civil judge.

For decades, and in the face of rising rates of pro se litigation, scholars have assumed that the norms of party control and judicial passivity still reign in the majority of our nation’s courtrooms. An exception is the active management of pre-trial matters by judges in complex litigation, a phenomenon that has been the subject of substantial scholarly attention.<sup>47</sup> But outside of the complex litigation

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Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 953–54 (2009).

45. See Andrew Budzinski, *Reforming Service of Process: An Access-to-Justice Approach 2* (unpublished manuscript) (on file with authors).

46. See Steinberg, *Adversary Breakdown*, *supra* note 6, at 954 n.236.

47. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the rise of public law litigation in

context, the scholarly consensus to date has been that our system “generally lives up to [the] adversarial ideal.”<sup>48</sup> The vast majority of legal scholarship on the civil justice system rests on this premise.

We have accepted that premise without really taking a hard look, and today meaningful evidence questions the conventional wisdom about how our civil justice system operates. We have good reason to believe that the norms and processes of the adversary system have broken down in our state civil courts and that the role of the civil court judge is shifting away from traditional passivity and toward active engagement.<sup>49</sup> The notion of judges as passive umpires calling balls and strikes, and the related norm of party control over litigation, may no longer accurately describe much state civil court litigation.

The growth and prevalence of pro se litigation has put tremendous pressure on judges to assist, guide, and support those without counsel.<sup>50</sup> Despite the continued development of self-help, limited scope legal assistance, and other access to justice interventions (and the tireless work of many judges, clerks, court administrators, and legal services providers who develop these programs), the need for legal information and advice far exceeds available resources.<sup>51</sup> In the courtroom, judges are often the only source of legal information for confused, frustrated pro se litigants.<sup>52</sup>

State civil court judges face the pressure of unrepresented parties on their dockets every day.<sup>53</sup> Given this, it is unsurprising that many of these judges have written and spoken extensively about the challenge of judging in pro se matters. Typically, judges have argued that the justice system is failing unrepresented parties and called for various types of reform, such as judicial training, increased funding for legal services,

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the federal courts and the role of judges in this context); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing against the rise of managerial judging).

48. Steinberg, *Adversary Breakdown*, *supra* note 6, at 916 (quoting Brienne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3 (2011)). Steinberg makes the point that scholars have widely assumed the adversarial ideal is alive and well in state civil courts.

49. For discussions of what we know about state civil justice and judges in particular, see Carpenter, *supra* note 12; Steinberg, *Adversary Breakdown*, *supra* note 6; Steinberg, *Demand Side*, *supra* note 7.

50. See Albrecht et al., *supra* note 17, at 16, 43, 45–48 (recommending specific active judging practices in response to the increase in pro se litigants).

51. See Steinberg, *Demand Side*, *supra* note 7, at 748–52.

52. See Carpenter, *Active Judging*, *supra* note 12, at 662; Engler, *And Justice for All*, *supra* note 17, at 2011–16; Steinberg, *Adversary Breakdown*, *supra* note 6, at 938.

53. See LINDA KLEIN, ABA COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 10–15 (2010), [<https://perma.cc/6AV9-9QD8>].

self-help programs, and a civil right to counsel.<sup>54</sup> State court judges are also leaders in the movement to develop statewide access to justice commissions, typically created and supported by state supreme courts, which are charged with finding solutions to the pro se litigation crisis.<sup>55</sup> Finally, judges, courts, advocates, and scholars have called for new approaches to judging and developed a significant body of trainings, guides, curricula, and other materials to inform and educate court staff and judges.<sup>56</sup>

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54. For just a few examples from around the country in recent years, see, e.g., Shirley S. Abrahamson, *Access to Justice: The Wisconsin Way*, JUDGES' J., Fall 2008, at 36, 36 (“The very integrity of our justice system is compromised when legal representation for critical needs is available only to those with financial means.”); Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers have left the Building*, 51 FAM. CT. REV. 28, 29 (2013) (“Most judges agree that the shift to self-represented litigants has posed an enormous challenge for the judicial system.”); John T. Broderick, Jr., *The Choice is Ours: Remarks to the 2008 Equal Justice Conference*, JUDGES' J., Fall 2008, at 5, 7 (“It is my firm belief that the public will not long entrust its confidence to a system of justice it often cannot navigate, afford, or understand.”); Peter D. Houk & Donald L. Resig, *Facing the Challenge of Unrepresented Parties: Pro Se Assistance Relies on Bench-Bar Cooperation*, 78 MICH. B.J. 1126 (1999) (“[T]he influx of *pro se* representation often poses challenges to the judiciary, . . . many of the judges currently assigned to the family court had little prior experience with divorce procedures, forms, and the problems encountered by the lay people representing themselves.”); Judith L. Kreeger, *To Bundle or Unbundle? That is the Question*, 40 FAM. CT. REV. 87, 87 (2002) (“We judges wrestle daily with the dilemma of our role in the process: where to strike the delicate balance between holding represented and self-represented litigants to the same rules, yet, at the same time, equalizing the playing field so that the process is fair.”); Scott W. Skavdahl, *Access to Justice: A Judge's Perspective*, WYO. LAW., Feb. 2009, at 1 (“What is wrong with this increasing trend of *pro se* litigants? Justice is being lost along with respect for our legal system and the value of legal counsel.”); Ron Spears, *An Adversary System Without Advocates*, 101 ILL. B.J. 592, 592–93 (2013) (“[J]udges are uncomfortable assuming activist and inquisitorial roles. The judge in a *pro se* case walks the dangerous tightrope of providing guidance to the parties without becoming an advocate and losing impartiality.”); Nathan “Tod” Young, *The Bench, the Bar and the Unrepresented: One Judge's View*, NEV. LAW., Sept. 2014, at 11, 13 (“The litigants don't know what evidence they need, how to present that evidence or how to test the other side's case. They almost never possess a clear understanding of the burdens of proof or the standards by which a court makes its decision”).

55. For more on state access to justice commissions, see *Access to Justice Commissions*, AM. B. ASS'N, [<https://perma.cc/RM68-CU8Z>]; *Access to Justice Commissions*, CTR. ON CT. ACCESS TO JUST. FOR ALL, [<https://perma.cc/M2Z6-YRWY>].

56. For a small sampling of materials, see, e.g., JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC'Y, *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* (1998); SELF-REPRESENTED LITIG. NETWORK, *HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A NATIONAL BENCH GUIDE FOR JUDGES* (2008), [<https://perma.cc/T4RS-KM8D>]; THE COURT PERS. WORKING GRP. OF THE SUPREME JUDICIAL COURT STERRING COMM'N ON SELF-



Research, including our own, supports the idea that active judging in state courts is far more widespread than legal scholars have previously acknowledged and also suggests practices may vary widely across judges, even within the same court.<sup>57</sup> As a baseline matter, studies have found differences in how judges apply substantive and procedural law, with some judges refusing to follow existing law at all.<sup>58</sup> 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.<sup>59</sup>

We have studied judicial behavior in pro se matters in general jurisdiction civil courts,<sup>60</sup> administrative courts,<sup>61</sup> and problem-solving courts.<sup>62</sup> In each of these settings, we found judges who were silent, passive umpires and judges who took an active, interventionist role in

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REPRESENTED LITIGANTS, SERVING THE SELF-REPRESENTED LITIGANT: A GUIDE BY AND FOR MASSACHUSETTS COURT STAFF (2010), [<https://perma.cc/99WZ-EBYG>]; *Best Practices in Handling Cases with Self-Represented Litigants*, NAT'L JUD. C. (2015), [<https://perma.cc/2SLN-PG2M>] (judicial training course); Richard Zorza, *Curricula: Access to Justice for the Self-Represented*, SELF-REPRESENTED LITIG. NETWORK (2013), [<https://perma.cc/YV3E-S5DQ>] (a collection of learning modules for judges); Dorothy J. Wilson & Miriam B. Hutchins, *Practical Advice from the Trenches: Best Techniques for Handling Unrepresented Litigants*, 51 CT. REV. 54 (2015) (article by judges outlining approaches to pro se litigation).

57. See generally Bezdek, *supra* note 41; Carpenter, *Active Judging*, *supra* note 12; John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1988) (studying judges in an informal court and finding variation in how they behave and decide cases); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. & SOC'Y 61, 88 (2014) (in a case study of housing dispute, the author found that the behavior of two judges in two separate hearings during the same dispute differed markedly); Vicki Lens et al., *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, 40 J.L. & SOC'Y 199, 200 (2013) (observing two dominant judging styles in administrative law judges, "bureaucratic" and "adjudicatory," and analyzing how each style affects litigants); Steinberg, *Adversary Breakdown*, *supra* note 6.

58. Bezdek, *supra* note 41, at 571 (noting how judges in a Baltimore housing court failed to follow laws designed to protect tenants); Conley & O'Barr, *supra* note 57, at 468 ("[J]udges vary so much . . . that it becomes difficult to appreciate that they are operating within the same legal system . . ."); Cotton, *supra* note 3, at 67 (detailing how various judges within the Maryland District Court failed to enforce landlord-tenant law). See also Shanahan, *Keys to the Kingdom*, *supra* note 15.

59. See Carpenter, *Active Judging*, *supra* note 12; Steinberg, *Adversary Breakdown*, *supra* note 6.

60. See Steinberg, *Adversary Breakdown*, *supra* note 6.

61. See Carpenter, *Active Judging*, *supra* note 12; Shanahan, *Keys to the Kingdom*, *supra* note 15.

62. See Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 L. & SOC. INQUIRY 1058 (2017) [hereinafter Steinberg, *Informal*].

assisting pro se litigants. This research tells us judges vary in how they deal with unrepresented parties, but we need much more work to understand the prevalence and nature of passive and active judging in state courts.

### *C. How Courts are Responding*

In addition to changes in judicial behavior in the courtroom, court operations are changing in fundamental ways inside and outside the courtroom. Though we lack a strong national picture, we know that some courts are responding to the pro se crisis by developing interventions meant to help unrepresented parties navigate civil litigation. These interventions include pro se court forms,<sup>63</sup> self-help centers,<sup>64</sup> court navigator programs,<sup>65</sup> and limited scope lawyer assistance.<sup>66</sup> Outside of the courthouse, some states are developing licensing programs that allow lay people to give limited forms of legal assistance.<sup>67</sup> Given the judiciary’s role in managing courts, judges have initiated and led many of these programs, yet we lack understanding of how common and effective such interventions are, let alone the forms they take and judges’ motivations for developing them.

## II. WHY WE KNOW SO LITTLE ABOUT STATE CIVIL COURTS AND JUDGES

How did we get to this point? How is it possible that we lack basic information about the courts and judges that handle the vast majority of

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63. See Engler, *And Justice for All*, *supra* note 17, at 2000.

64. See Rachel Ekery, *Court Facilitation of Self-Representation*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 413 (Sam Estreicher & J. Radice eds., 2016).

65. See Editorial, *Bold Plans for New York Courts*, N.Y. TIMES (Feb. 20, 2015), <https://www.nytimes.com/2015/02/21/opinion/bold-plans-for-new-york-courts.html>.

66. Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563 (2007); Louis S. Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. PA. J.L. & SOC. CHANGE 347, 360 (2014).

67. For a discussion of Washington State’s groundbreaking program that licenses nonlawyers to provide limited scope legal services, including the judicial role in developing the program, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 77 (2013), [<https://perma.cc/7G4M-WJST>]. See also Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 2015), [<https://perma.cc/SGU3-S3NR>].

American civil litigation? Why the dearth of scholarship on state courts in a time of legal empiricism?<sup>68</sup> A number of forces at work in government and the academy have led to the current state of affairs.<sup>69</sup> In this Section, we describe four major impediments to research on state civil courts and judges: knowledge and access barriers; the federal court bias in legal scholarship; a lack of interdisciplinary coordination; and the tendency toward lawyer-centric research.

*A. Knowledge and Access Barriers*

For scholars, the practical barriers to studying state courts are real and substantial, but, we argue, not insurmountable. 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. Even the most basic information about state courts is generally difficult to obtain, if it exists at all, as state court data collection is diffuse and inconsistent.<sup>70</sup> States have different case management and data collection systems, many of which are relatively unsophisticated and were created merely to track cases' progress through the court, record filings and events, and schedule hearings. Such systems rarely capture other case-specific or substantive information.<sup>71</sup>

The data infrastructure that exists in the United States for other major social institutions like education or healthcare does not exist for state courts. This lack of quality data is connected to court funding mechanisms.<sup>72</sup> Unlike schools or healthcare facilities, where funding is tied to meeting federal reporting requirements, state courts are funded and managed primarily by state and local governments. Absent national standards or reporting requirements, data about state courts are collected and managed at the state and county level and shaped by local

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68. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 (2013) (Noting the flurry of data-driven scholarship in response to the *Twiqbal* decisions, Engstrom says, "it sometimes seems as if a hundred empirical flowers have bloomed").

69. For an in-depth discussion, see Yeazell, *supra* note 1.

70. "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." See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at iii. See also Leib, *supra* note 3, at 907–08; Yeazell, *supra* note 1.

71. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at 7–8.

72. See Yeazell, *supra* note 1, at 137.

concerns and idiosyncrasies.<sup>73</sup> In some states, different counties collect data in different ways, making even intra-state comparisons difficult.<sup>74</sup>

And this is to say nothing about data beyond dockets and decisions. A meaningful amount of state court business takes place in face-to-face human interactions, which are obviously labor-intensive to systematically capture. State court matters do not lend themselves to the traditional methods of analysis used in federal courts. For example, a common method of studying the federal courts, reading final decisions, is generally either logistically impossible or not substantively useful in the majority of state civil litigation. Many state cases do not result in written final orders with findings of law and fact, and where such written orders do exist, they may not be available electronically.

We must study much more than final orders and decisions if we are interested in judicial behavior and court processes at the state level. For example, the National Center estimates that somewhere between twenty and forty-six percent of cases end in default judgment.<sup>75</sup> The real number is impossible to ascertain with existing data given that courts do not consistently record the nature of a final judgment.<sup>76</sup> But whether the default number is on the high or low end of that estimate, we clearly need to know more about the role of courts—and judges—in helping or hindering defendants’ appearance rates, a question of more limited importance in the federal court context given that most parties have representation.

The upshot of these dynamics is that the study of state civil courts is logistically challenging and often requires original data collection and coding efforts, including hand-collection of data from case files, in-person field research, and live interviews.<sup>77</sup> Of course, this presents an incredible opportunity for scholars to forge new ground by taking up the work of data-gathering and analysis in state courts. The study of state civil courts also allows researchers to ask different types of

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73. *Id.*

74. *Id.* at 136.

75. THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at iv, 20. In the National Center data, courts recorded 46% percent of cases as ending in a final judgment. The researchers speculate that most of these are likely default judgments. As the researchers explain, 20% of cases were explicitly recorded as ending in default judgments. However, another 26% of cases were recorded as having a judgment entered, but without specifying the nature of the disposition. A significant number of this latter 26% may be defaults.

76. *Id.*

77. *See* Carpenter, *Active Judging*, *supra* note 12, at 651–52; Leib, *supra* note 4, 898–99.

questions and to focus on aspects of judging and court operation that extend beyond the limited scope of voting patterns and decisions.

*B. Federal Court Bias in Legal Scholarship*

When legal scholars speak about the civil justice system, they most often speak about the federal system and appellate courts, whether they note this explicitly or not.<sup>78</sup> Legal scholars have examined the work of lower civil court judges in only a relatively minuscule number of published studies.<sup>79</sup> Though we are decades into the empirical revolution in legal scholarship, state courts and judges have been left out of the explosion of empirical activity, but scholars rarely acknowledge this absence.<sup>80</sup> It seems likely that practical considerations play a large role in the legal academy's focus on federal and appellate courts. It cannot be true that the dearth of scholarship on state civil courts reflects a principled choice.

A review of existing work reveals not only a focus on appellate courts, but on a small slice of appellate court work: published decisions.<sup>81</sup> When legal scholars do write about state courts, they focus primarily on criminal law and litigation.<sup>82</sup> Assuming the dearth of scholarship on state civil courts is not based in principle, there is at least one obvious explanation for it: people tend to write about what they know and most legal scholars simply have little to no experience with lower level civil courts. Most law faculty start their careers as elite

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78. See *supra* notes 3 & 5 and accompanying text.

79. See, e.g., 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 (2006); Bezdek, *supra* note 41, at 540; Carpenter, *Active Judging*, *supra* note 12; Lee Harris, *Judging Tenant Protections: The Evidence from Enforcement of Landlord Penalties*, 42 U. MEM. L. REV. 149 (2011); Shanahan, *Keys to the Kingdom*, *supra* note 15; Steinberg, *Informal*, *supra* note 62.

80. On the growth of legal empiricism, see Engstrom, *supra* note 68, at 1204–05.

81. See *supra* note 3 and accompanying text. See also Linos & Carlson, *supra* note 19.

82. See, e.g., Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011); Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439 (2003); Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521 (1998); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2012).

law firm associates or federal court clerks.<sup>83</sup> Even those faculty who have practiced in state courts have likely practiced criminal, rather than civil, law.

In addition, legal scholarship on judges draws heavily on theory and tools from political science and judicial decision making is the main focus of this literature. Here, decision making is almost always analyzed through the lens of appellate, mostly federal, decisions, with a major focus on the U.S. Supreme Court. Indeed, a review of the research suggests the study of judges and judicial behavior is synonymous with understanding how appellate judges interpret and apply the law.<sup>84</sup> Judges’ votes and written decisions are the main units of observation in the bulk of studies, with a major focus on published decisions.<sup>85</sup> The research typically attempts to identify and understand the factors, including and in addition to the law, that might explain how and why judges make decisions.<sup>86</sup>

### *C. Lack of Interdisciplinary Coordination*

In the face of legal scholarship’s focus on federal courts, much of what the academy has to say about state courts and judges comes from fields outside of law, including the work of political science,<sup>87</sup>

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83. See Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J.L. EDUC. 594, 601 (2003) (Finding that of the 86.6% of professors who had some type of previous practice experience, 57% had a judicial clerkship and 44.7% had worked in firms or as corporate counsel).

84. See, e.g., Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, in THE PSYCHOLOGY OF JUDICIAL DECISIONMAKING 3, 4 (David Klein & Gregory Mitchell eds., 2010).

85. Exceptions include, for example, studies that examine broader political and institutional dynamics, such as how judges perceive and respond to threats to judicial independence and power. See, e.g., Alyx Mark & Michael Zilis, *Blurring Institutional Boundaries: Judges’ Perceptions of Threats to Judicial Independence*, J.L. & CTS. (forthcoming).

86. See, e.g., Brian H. Bix, *Doctrine, Data, and High Theory*, 6 U.C. IRVINE L. REV. 137, 142–43 (2016); Michael J. Gerhardt, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733 (2003).

87. See, e.g., Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges’ Sex and Race*, 69 POL. RES. Q. 788 (2016) (study of judicial diversity and its effect on trial court decision making); Victor E. Flango & David B. Rottman, *Research Note: Measuring Trial Court Consolidation*, 16 JUST. SYS. J. 65 (1992) (review of research on changes to court structure); Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208 (2011) (study of state trial court election contestation rates). For an overview of political science research on state supreme courts, see, e.g., Chris W. Bonneau & Brent

anthropology,<sup>88</sup> sociology,<sup>89</sup> social work,<sup>90</sup> and psychology.<sup>91</sup> But even this work tends to focus on state criminal, as opposed to civil, dockets.<sup>92</sup> In addition, there is a significant body of socio-legal scholarship on lower-level courts and judges outside of the United States.<sup>93</sup> However, it is rare to see American legal scholars cite this work.

The nature of and need for interdisciplinary coordination in the study of law and legal systems is sufficient fodder for a much more in-

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D. Boyea, *State Courts, Past Present, and Future*, in *THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT* 343 (Donald P. Haider-Markel ed., 2014).

88. See Conley & O'Barr, *supra* note 57, at 481–82 (identifying five judicial typologies—the strict adherent, the lawmaker, the mediator, the authoritarian, and the proceduralist).

89. See JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 174 (1999) (setting out a typology of judges in domestic violence cases); Eisenberg, *supra* note 3.

90. Vicki Lens, *Confronting Government After Welfare Reform: Moralists, Reformers, and Narratives of (Ir)responsibility at Administrative Fair Hearings*, 43 *J.L. & Soc'y* 563 (2009); Vicki Lens et al., *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, 40 *J.L. & Soc'y* 199 (2013).

91. See, e.g., *THE PSYCHOLOGY OF JUDICIAL DECISIONMAKING*, *supra* note 84, at xi, 5; Peter David Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 *IND. L.J.* 1119 (1993) (study of the effect of extra-legal judicial behaviors on trial outcome); Gillian M. Pinchevsky, *Understanding Decision-Making in Specialized Domestic Violence Courts: Can Contemporary Theoretical Frameworks Help Guide These Decisions?*, 23 *VIOLENCE AGAINST WOMEN* 749, 751, 755 (2017) (discussing how judges develop "pattern responses" to cases with stereotypical attributions); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *L. & Soc'y REV.* 103 (1988) (seminal study examining procedural justice).

92. For examples of social science work on criminal and problem solving courts, see Blanck, *supra* note 91; Ursula Castellano, *The Politics of Benchcraft: The Role of Judges in Mental Health Courts*, 42 *L. & SOC. INQUIRY* 398 (2017); Marc Galanter et al., *The Crusading Judge: Judicial Activism in Trial Courts*, 52 *S. CAL. L. REV.* 699 (1979); Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 *L. & Soc'y REV.* 473, 473, 475, 523 (1971) (early study of lower courts that presents typology of judicial demeanor); Suzanna Fay Ramirez, *Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms over Time*, 40 *L. & SOC. INQUIRY* 205 (2015).

93. See, e.g., Jeanne Hersant & Cécile Vigour, *Judicial Politics on the Ground*, 42 *L. & SOC. INQUIRY* 292 (2017) (introducing a symposium featuring bottom-up approaches to studying judicial politics, as compared to traditional top-down approaches); Kathy Mack & Sharyn Roach Anleu, *'Getting Through the List': Judgecraft and Legitimacy in the Lower Courts*, 16 *SOC. & LEGAL STUDS.* 341 (2007) (study of Australian lower court judges); Richard Young, *Managing the List in the Lower Criminal Courts: Judgecraft or Crafty Judges*, 41 *COMMON L. WORLD REV.* 29, 30 (2012) (study examining judicial behavior through a lens of "craftiness," arguing that past studies of "judgecraft" have failed to capture the moral implications of docket management practices).

depth treatment than we can give it here. The key point we want to make is this: in the study of state civil courts, as in other areas of research on law and legal systems, disciplinary differences have been a barrier to establishing a shared body of knowledge, particularly one that accounts for the role of legal rules and legal meaning.<sup>94</sup> Scholars from different fields bring their own perspectives and tools to bear on the study of civil courts, often without considering previous work in a similar setting but from a different field, and often applying a “purely social science approach” to the study of judges and legal systems, and are thus failing to account for the role of law.<sup>95</sup> Law and society literature includes many important studies on lower courts, both domestically and internationally, but most existing studies do not share theoretical frameworks, research questions, or methodological approaches, making comparisons between studies and the development of shared knowledge challenging.<sup>96</sup> We hope future research will acknowledge and wrestle with these dynamics.

#### *D. Lawyer-Centric Research*

In the access to justice field, a growing area of interdisciplinary scholarship, we have seen surprisingly little research on judges and courts. Access to justice research is in a boom period, with scholars, foundations, and government making substantial investments in a range of efforts from retrospective studies to randomized control trials. A number of leading access to justice scholars have articulated thoughtful research agendas to shape theory, identify critical questions, and guide the field.<sup>97</sup> However, the bulk of existing work (and calls for research) has focused on legal services delivery and needs, and most research has

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94. This phenomenon extends beyond the study of state courts and judges; the need for greater interdisciplinary integration in the study of law is a core argument of the new legal realists. *See, e.g.*, Michael McCann, *Preface* to *THE NEW LEGAL REALISM, VOLUME I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE*, at xv (Elizabeth Mertz et al. eds., 2016); Bix, *supra* note 86, at 138; Hanoch Dagan & Roy Kreitner, *The New Legal Realism and the Realist View of Law*, *L. & SOC. INQUIRY* (manuscript at 5) (forthcoming); Bryant Garth & Elizabeth Mertz, *Introduction: New Legal Realism at Ten Years and Beyond*, 6 *U.C. IRVINE L. REV.* 121, 123 (2016); Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 *SMU L. REV.* 141, 142 (2014); Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 *ANN. REV. L. & SOC. SCI.* 555, 556 (2010).

95. *THE NEW LEGAL REALISM, VOLUME II: STUDYING LAW GLOBALLY 2* (Heinz Klug & Sally Engle Merry eds., 2016) [hereinafter *THE NEW LEGAL REALISM*].

96. *See, e.g., id.* at 4 (noting that “[s]tudents of judicial behavior in law and political science do not always make their theoretical premises explicit”).

97. *See supra* note 23.



addressed whether and how a given legal service or intervention is effective.

The majority of access to justice scholars who have written about courts and judges have focused on two projects: first, making the normative case that courts and judges should change in response to the needs of pro se parties, and second, offering prescriptions for such reform.<sup>98</sup> We hasten to add that access to justice scholarship is, by definition, focused on the civil legal needs of low- and middle-income people and their experiences within civil justice systems. As scholars who have conducted legal services evaluation studies, we value and encourage this research. However, as the access to justice research agenda expands, we believe it must make room for the study of courts and judges.

### III. A THEORETICAL FRAMEWORK FOR STUDYING STATE CIVIL COURTS AND JUDGES

The work of state courts and judges touches on every aspect of American civic, economic, and family life.<sup>99</sup> These vital institutions and people are worthy of critical and thoughtful scholarly attention, which has been sorely lacking to date. In this Section, we call for research focused on state courts and, in particular, on the role of judges. Such research should take a broad view of the judicial role, encompassing the work judges do in trials, in the courtroom more broadly, and beyond the courtroom. It is time to expand our notions of judicial behavior, power, and decision making beyond outdated assumptions about the traditional adversary process. The time has come to study how judges operate in the new pro se reality and explore the factors that influence their choices, such as written law, informal norms, extra-judicial pressures, and personal preferences.

To support future research, this Part offers a theoretical framework grounded in a fundamental observation about our civil justice system: the vast majority of parties in our state civil courts are unrepresented. With the new pro se reality as the backdrop, this framework identifies four key ways state civil justice systems differ from federal systems and thus from prevailing understandings about the nature and operation of civil justice. Based on existing research, including our own, we posit that research on America's civil justice system must respond to, and wrestle with, the four factors that follow.

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98. See *supra* note 24.

99. See Galanter, *supra* note 21; Yeazell, *supra* note 1.

First, the adversary process no longer guides many proceedings in our state civil courts. The quiet crumbling of adversary norms casts judges, not parties, as the central actors in state civil litigation.<sup>100</sup> Research must consider how judges respond, both inside and outside the courtroom, to the outsized demands placed upon their time and expertise by the pro se majority. For example, in the absence of lawyer-driven adversarial process, research must examine the processes that have taken its place, including how they have developed. And in the face of new access to justice interventions, research must contemplate how judges may be serving as architects and managers of complex court ecosystems that outsource a portion of their role to emerging self-help and lay advocacy programs.

Second, unlike in the federal courts, a substantial amount of state court business is still conducted through direct judge-to-party interactions. Most case events occur in live court, not through the exchange of paper. These in-person interactions often have the function and effect of hearings, but are not formally labeled as such. The dominance of court-based adjudication in state courts challenges the relevance of the “vanishing trial”<sup>101</sup> descriptor, and suggests that research on in-court interactions, case dispositions, and formal and informal judicial decision making are necessary to understand how most of the civil justice system actually operates.

Third, the judicial role in state courts is ethically ambiguous in pro se cases and lacks strong guideposts.<sup>102</sup> Traditional canons, such as the prescription of impartiality, are difficult to reconcile with the type of active judging that is occurring in state civil courts. Research that seeks to chart the varying forms of active judging would be particularly useful, as would research that considers how active judging practices may be forging new ethical ground. How judges learn to balance competing obligations to ethical canons and pro se litigants is also an important area of inquiry, including whether judges are learning to strike this balance in formal or informal ways.

Fourth, written law is relatively static in state courts, but judges must apply the law in highly dynamic legal and factual scenarios. In the areas of law that dominate state court dockets, such as debt collection, landlord-tenant, and family law, few state appellate decisions contribute to the growth of substantive law,<sup>103</sup> and little attention is devoted to the

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100. See Steinberg, *Adversary Breakdown*, *supra* note 6.

101. See Galanter, *supra* note 21.

102. See *infra* note 116 and accompanying text.

103. This is not a critique of state appellate courts. Instead, we are noting that cases involving pro se parties are unlikely to be appealed. For more discussion on the

development of contextually appropriate procedural rules.<sup>104</sup> Thus, state court judges must often make decisions in contexts where substantive and procedural law have not kept pace with evolving conditions on the ground, a reality that crystallizes these judges' significance. While law at the federal level evolves through formal rule-making and higher court precedent, state court judges are far more reliant on off-the-books experimentation to develop legal standards and are more responsive to highly local needs and norms.<sup>105</sup> The mismatch between static formal law development in the state courts and dynamic judicial application of law should be an important facet of future civil justice research.

Inevitably and ideally, future research will suggest refinements and additions to the framework we present below. As we have noted throughout this article, we simply lack sufficient empirical information to comprehensively understand how state civil justice operates. Our theory is based on existing research, including our own, and is a starting point for thinking about the study of state civil courts and judges. Below, we flesh out our claims about the four defining features of state civil justice that should inform future research, identify the implications, and offer research questions.

#### *A. Disappearing Adversary Process*

The statistical picture of state courts proves an undeniable, but too often ignored, reality: state courts are pro se courts. To study state civil judges is to study judges who primarily interact with unrepresented parties. Old assumptions about the adversarial process and party-driven litigation cannot shape our approach to understanding the civil justice system writ large. These assumptions may hold true in federal court, where most parties have representation, but the study of state courts and judges must be grounded in new theoretical models and deploy research questions tailored to courts with few lawyers. As the National Center has written, “[t]he idealized picture of an adversarial system in

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relationship between pro se litigation and appeals, see Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1968–69 (2014) (discussing factors that make appeals from lower courts unlikely); Shanahan, Carpenter & Mark, *A Dangerous Thing?*, *supra* note 40 (discussing the importance of law reform activity, including appeals, in state civil courts and arguing that such activity is rare where parties lack full lawyer representation); Kathryn A. Sabeth, *Simplicity as Justice*, 2018 WIS. L. REV. 305 (arguing that the cost of pursuing litigation deters pro se parties from enforcing their rights).

104. See *infra* note 134 and accompanying text.

105. See Decker, *supra* note 103, at 1978.

which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.”<sup>106</sup>

Rather than assuming the adversary system is functioning as it should, future research should ask what processes are actually in place in state courts today. State civil judges bear the daily burden of upholding the rule of law and fidelity to procedure while facing courtrooms filled with unrepresented people. Only the rare case involves lawyers on both sides. In this context, do judges apply formal procedural rules to pro se parties? Or have they developed alternative procedural systems? If so, how are the new rules developed? Are they formal or informal? And do they apply only to pro se parties, or to lawyers as well?

Research should also account for differences in party and case type, including the balance of power and expertise on either side of a case. In the non-family civil matters that dominate state court dockets (debt collection, foreclosure, and landlord/tenant cases), unrepresented defendants are likely to be low-income or at least temporarily struggling financially. On the other side of the case, these defendants face sophisticated parties (landlords, banks, credit card companies, and debt holders) represented by lawyers. We should explore how judges respond when they are a key source, if not the only source, of information, assistance, and guidance for pro se defendants facing repeat player lawyers. Do they adhere to formal procedures, maintain a passive posture, or develop new procedures? How do they manage cases where only one party is capable of engaging in meaningful factual development and legal argument? Do they help pro se defendants develop defenses? Right now, the questions are nearly limitless, as we know almost nothing of how judges manage dockets with one-sided representation. The socio-economic reality of state court dockets calls for research that accounts for imbalances of power and resources and examines how judges navigate these dynamics.

Family cases raise other important questions. In these cases, litigants come to court to deal with issues including relationship dissolution, domestic violence, and child custody—it goes without saying that family law litigation is inherently stressful, painful, and sometimes dangerous. Here, research suggests the majority of parties are pro se. Thus, in most family law cases, neither party is positioned to engage in the adversary process. There are no lawyers to file appropriate paperwork, raise factual issues, or brief the judge on the law. Instead, judges must find a way to move cases along and make factual and legal determinations in matters where the human stakes are

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106. THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at vi.

high and there are no lawyers to act as buffers. How do judges manage cases when neither of the parties is equipped to advance their own interests? How do they make decisions when neither party can assist with the basic (or what is basic to lawyers) tasks of identifying relevant factual and legal issues? What would we find if we compared judicial behavior in debt and family law cases within the same court?

Research should also examine new access to justice interventions, such as lay advocacy or self-help programs, and how these interventions relate to judges' work. For example, we suspect the pro se crisis is prompting some judges to outsource their role to other actors outside of or adjacent to the civil justice system. For instance, in our research, we have observed that judges in domestic violence courts ask lay advocates employed by nonprofit organizations to explain legal processes and substantive legal decisions to litigants.<sup>107</sup> Research in this area could examine how the advent of court-based self-help and other assistance programs shapes what judges do inside the courtroom, as well as how judges shape such programs. A party who has received some form of legal assistance before speaking with a judge may be better or differently prepared for that interaction. Judges may also have heightened expectations of parties who they know or believe to have received some sort of assistance.

The limited available evidence strongly supports the notion that traditional adversarialism no longer controls much litigation in state courts, yet we have only limited data and theory to describe and conceptualize the systems and processes that have replaced it. Without substantially more information about the new normal in pro se courts, we cannot begin the critical project of understanding the relationship between this on-the-ground reality and formal law. We hope future research will explore this ongoing transformation, the role judges play in it, and what it means for civil justice outcomes and the rule of law more broadly.

### *B. Prevalence of In-Person Interactions*

A deeper consideration of the nature and day-to-day reality of state court litigation suggests that the prevailing “vanishing trial” narrative of federal courts does not map neatly onto the state court context.<sup>108</sup>

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107. Carpenter, Steinberg, Shanahan & Mark, Research Notes (unpublished) (on file with authors) [hereinafter Research Notes].

108. Mark Galanter first described the “vanishing trial” phenomenon in federal and state courts, pointing out that the overall number of bench and jury trials has declined in both contexts, *supra* note 21. Subsequently, Herbert Kritzer pushed back on Galanter’s claims, pointing out the challenges in analyzing state court statistics on the

The most recent state court data do show an overall decline in the number of cases recorded as disposed via bench or jury trials,<sup>109</sup> but unlike federal courts, state court business is primarily still conducted through live, in-person interactions, most often in public courtrooms. Many of these interactions are decidedly trial-like in substance and outcome, though they may not be recorded as formal trials.<sup>110</sup>

In many state court cases, parties, including the majority who are unrepresented, routinely appear in court and interact with judges who may, short of an evidentiary hearing, enter a default judgment or negotiated settlement, dismiss a case based on a procedural defect, or merely continue a matter for a later date. Beyond this, our research has uncovered many interactions, short of formal trials, that involve informal fact development and evidence-taking and implicate fundamental rights.<sup>111</sup> Given that a basic reality of pro se litigation is a lack of quality pleadings, most fact development must take place live, in the courtroom. At the initial hearings that commence many state court matters, judges typically collect facts, discuss legal issues, and may even make dispositive decisions related to case outcomes, though formal trial protections are not triggered. Such interactions may seem trivial or routine to lawyers, but for unrepresented people, they can be frightening and may have life-altering consequences.<sup>112</sup>

In-person interactions are common and likely have some of the most serious implications in the fact-intensive, short-term, emergency litigation that many vulnerable, unrepresented people find themselves involved in, such as landlord/tenant and domestic violence cases. Such matters are handled on an expedited basis dictated by statute, involve essentially no motion practice, and often do not result in final, written

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number of bench or jury trials, given wide variation in how states and individual courts define “trial.” Kritzer argues that we need more clarity about what counts as a trial and that getting such clarity requires a clear understanding of why we care about the number of trials in the first place. Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials,”* 62 DEPAUL L. REV. 415, 429–36 (2013).

109. See THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 7, at 37.

110. For a discussion of variations in how state courts count trials and the implications of these variations, see Kritzer, *supra* note 108, at 430.

111. Research Notes, *supra* note 107. See also Shanahan, *Keys to the Kingdom*, *supra* note 15 (discussing the importance of a litigant’s ability to gain access to the hearing room); Steinberg, *Informal*, *supra* note 62 (study of a housing court where the judge routinely considers evidence and makes informal rulings without following a traditional adversarial process).

112. Going to court is often an experience of fear and intimidation for those without counsel. In a recent study, the words “scary,” “confusing,” and “afraid” were used consistently when respondents described their experiences with administrative hearings. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1296 (2016).

orders. Instead, cases are processed and resolved, and decisions are rendered, live, in the courtroom. Research on state courts may reveal a previously unappreciated number of substantive and consequential interactions between judges and parties, despite the low number of formal evidentiary hearings. If this is true, we need to understand the nature and consequences of such interactions and the processes by which judges engage in decision-making.

For example, settlement should be a focus of this work. As Russell Engler has argued, given the potential for pro se parties to be confused, coerced, or merely misinformed, the role judges play in state court settlement talks warrants deep examination.<sup>113</sup> In addition, we can examine how judges might encourage or discourage parties to negotiate in the first place, including incentives that might motivate judicial intervention and the other court actors who might be involved in pre-settlement interactions.

Beyond settlement, we need to understand how judges act in other formal aspects of litigation, including default hearings, initial and status hearings, and cases with procedural and substantive legal defects. We need to examine how judges in these cases apply the law and interact with parties like plaintiffs who fail to serve process or plead relevant facts, or defendants who are unaware of possible defenses. Such routine and basic elements of litigation have real, substantive effects on the people and businesses that rely on civil courts to resolve disputes.

An examination of judging in state courts can also explore the range of quasi-formal and informal interactions judges have with parties on a daily basis. Anyone who spends an hour sitting in a state civil court is sure to witness a party asking a judge a substantive legal, procedural, or logistical question outside of the time when their matter is being formally heard. What is the nature and range of such interactions? How and why might they bleed into dispositive issues?

More than twenty million cases are filed in state civil courts each year.<sup>114</sup> Most of these cases involve some form of in-person interaction between judges and parties, but we know almost nothing about the nature and consequences of these interactions for judges, parties, or the administration of justice. Studying these interactions undoubtedly requires in-person observations by scholars, or at a minimum, interviews with judges and litigants. This requires the use of research

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113. See, e.g., Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 376–78, 385 (2008) [hereinafter Engler, *Ethics in Transition*].

114. See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, *supra* note 4, at 3.

methods not common in legal scholarship, which creates opportunities for interdisciplinary collaboration. Such research will inevitably offer new and novel insights about our civil justice system, insights that could never be revealed through an examination of electronic or paper court records.

### *C. Ethically Ambiguous Judicial Role*

State court judges face a massive area of ambiguity, one they are currently forced to resolve on a daily basis: the legal and ethical bounds of their role in pro se litigation. Some authorities have taken a permissive stance on judicial departures from the passive norm, most notably the Model Code of Judicial Conduct, which now states that a judge does not violate her duty of impartiality if she makes “reasonable accommodations” for a pro se party.<sup>115</sup> Of course, this language is broad, vague, and entirely open to interpretation. As a general matter, there is little in the way of specific guidance on the scope, nature, and objectives of a judge’s role in pro se litigation.<sup>116</sup> To make matters worse, many authorities have issued conflicting dictates.<sup>117</sup>

Given that lay people are not trained to manage litigation, whether and how judges apply law and procedure in the courtroom, including whether and how they actively depart from the norms of party control and judicial passivity, should be a major focus of inquiry. We have previously called such departures “active judging.”

In our past research in lower courts, we identified four categories of behavior judges engage in that depart from the traditional norms of passive judging and party control; (1) adjusting procedures; (2) explaining law and process; (3) eliciting information; and (4) raising new legal issues not previously raised by parties.<sup>118</sup> In the course of

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115. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (AM. BAR ASS’N 2007).

116. Indeed, Russell Engler and Jessica Steinberg, among others, have tackled these ethical and legal questions. *See, e.g.*, Albrecht et al., *supra* note 17, at 43–45; Engler, *And Justice for All*, *supra* note 17, at 2043; Engler, *Ethics in Transition*, *supra* note 113, at 370; GOLDSCHMIDT ET AL., *supra* note 56, at 55–57; Pearce, *supra* note 24, at 978; Steinberg, *Adversary Breakdown*, *supra* note 6, at 926–31.

117. For a full discussion of this issue, see Steinberg, *Adversary Breakdown*, *supra* note 6, at 927.

118. In previous work, we have discussed these four key areas of active judicial engagement in pro se matters. For a three-dimensional theory of active judging, which captures a judge’s role in adjusting procedures, eliciting information, and explaining law and process, see generally Carpenter, *Active Judging*, *supra* note 12, at 667–72. For a discussion of a judge’s role in raising new legal issues and a normative



ongoing research in state courts, we have identified additional potential categories of judicial activity, including: (5) referring parties to court-based and non-profit service providers; and (6) facilitating negotiation between parties.

In this research, we have found variation in whether and how judges engage in active judging.<sup>119</sup> Some judges still hew to the passive norm, leaving parties to fend for themselves.<sup>120</sup> Others conceptualize their role in pro se matters as entirely active, even as a matter of principle.<sup>121</sup> We have interviewed judges who believe that remaining passive is, in fact, a breach of their duties of fairness and impartiality.<sup>122</sup> We have found judges who routinely explain law and process to parties, but believe that asking questions to complete the factual record is inappropriate.<sup>123</sup> This work suggests a wide range of judicial behavior in the context of pro se litigation and the need for more research.

Potential research questions on active judging include how, and how frequently, judges adjust procedures, explain law and process, elicit information, raise new legal issues, and refer or facilitate negotiation when interacting with self-represented parties. Do judicial strategies differ across judges, parties, or issues? Do these categories adequately capture active judging across contexts? How is judicial behavior shaped by law, procedure, or informal norms?

Pro se litigation appears to have shaped judicial behavior in other ways that are uncommon in lawyer-dominated federal courtrooms and ripe for exploration in state courts. For example, judges often make blanket announcements about law, procedure, and courtroom norms at the start of, or during, pro se dockets.<sup>124</sup> A judge might inform the courtroom that she will not accept certain types of evidence, or she might explain to parties how cases are typically resolved, offering a menu of choices such as a hearing, settlement, or continuance. We should understand how common such statements are, what they include, and how they relate to judicial ethics. We can examine what effect these announcements might have on a judges' expectations for parties in

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argument that courts should have an affirmative duty to assist pro se litigants, see generally Steinberg, *Adversary Breakdown*, *supra* note 6, at 947.

119. Carpenter, *Active Judging*, *supra* note 12; Steinberg, *Adversary Breakdown*, *supra* note 6, at 916–17.

120. Steinberg, *Adversary Breakdown*, *supra* note 6.

121. *Id.* at 912; Carpenter, *Active Judging*, *supra* note 12, at 686.

122. Carpenter, *Active Judging*, *supra* note 12, at 658.

123. *Id.* at 672.

124. Research Notes, *supra* note 107.

subsequent interactions and explore how they affect parties’ choices and experiences.

In addition to a lack of understanding about what judges are actually doing in their daily work, we know next to nothing of how judges learn and understand their duties and roles in the new pro se reality. How do judges perceive their obligations to advance access to justice or reach merits-based decisions? How do judges gain and exercise expertise in handling pro se cases? Are they formally trained or do they learn informally, through peer review mechanisms?<sup>125</sup> In addition to written law, other contextual factors may influence how judges behave, including training, other judges, unwritten norms, and institutional resources. This area is almost completely unexplored by current scholarship.

Many judges are required, or choose, to engage in some form of training and education. How does judicial training and education shape judicial behavior, if at all? In previous research, we found that almost all judges in an administrative court were required to attend a training on “Fair Hearings” at the National Judicial College.<sup>126</sup> We know of no scholars who have examined the content, value, and impact of such training on judicial behavior, let alone how this training might affect how judges manage pro se dockets and interact with unrepresented parties.

Our research suggests judges learn from one another, whether through formal court-run training programs and peer observations, or through informal interactions.<sup>127</sup> What role do other judges play in teaching new judges how to do their job? How much influence do judges have on one another in their day-to-day work? In some courts, the most challenging dockets are run by unelected magistrates appointed by elected judges. How do these magistrates view the scope of their authority given their appointed positions? To what extent do other judges, intentionally or unintentionally, constrain or shape their behavior? Are there collectively accepted norms that supplement written laws and rules?

Today, we have sufficient data to suggest, at a minimum, meaningful variation in how state court judges understand and execute their ethical duties in the new pro se reality, even within the same courthouse. But we are far away from a comprehensive picture of judicial behavior, and even further from understanding of how changes

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125. For a study that examines judicial peer review in a pro se court, see Carpenter, *Active Judging*, *supra* note 12, at 700.

126. Research Notes, *supra* note 107.

127. Carpenter, *Active Judging*, *supra* note 12, at 700.

to the judicial role have affected litigants, procedural justice, or substantive case outcomes. We hope future research will examine the nature, prevalence, variation, and causes of judicial departures from the passive norm. Such data can support a meaningful and necessary normative conversation about judicial ethics, a conversation currently stymied by a lack of information about conditions on the ground.

#### *D. Static Written Law and Dynamic Courts*

At the state level, written law is relatively static, particularly in the areas of substantive law where most parties are pro se. In contrast, state courts and the cases they handle are dynamic. Law develops differently in state court than it does in federal court.<sup>128</sup> Though we lack solid empirics, we and others posit that at the state and local level, it is likely that law evolves through local norms, local needs, and experimentation, with limited reliance on the dictates of appellate courts.<sup>129</sup> This is not to say that appellate decisions do not matter to state court judges (though it is possible this is true in some cases), but to point out that appellate courts simply have not spoken on many of the legal and procedural issues state court judges face on a daily basis.<sup>130</sup> At least one reason for appellate court silence is that, in areas of law primarily concerned with the lives and fortunes of low-income people, appeals are exceedingly rare.<sup>131</sup>

State court dockets are busy and demanding while the cases are factually varied. Even substantively “simple” cases can involve complex facts and raise novel legal issues. Judges regularly face situations where substantive law does not adequately guide their decision making, but they must decide issues and cases (often under time-pressure) nonetheless.<sup>132</sup> The sheer volume and range of cases state court judges handle makes this situation inevitable, and, we suspect research would reveal, common. Legislatures and appellate

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128. See Decker, *supra* note 103, at 1968–69; Leib, *supra* note 3, at 907 (discussing “localist” statutory interpretation).

129. See Decker, *supra* note 103, at 1978 (discussing experimentalism in local common law); Leib, *supra* note 3, at 907.

130. See Decker, *supra* note 103, at 1968–69 (discussing factors that make appeals from lower courts rare).

131. See *id.* at 1968; Shanahan, Carpenter & Mark, *A Dangerous Thing?*, *supra* note 40, at 1373 (discussing the importance of law reform activity, including appeals, in state civil courts and arguing that such activity is rare where parties lack full lawyer representation).

132. See, e.g., EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 3 (2008).

courts cannot anticipate the breadth of legal and factual situations faced by state court judges, and a low level of appellate activity in many areas of law likely compounds the problem.<sup>133</sup>

Procedural law can also be static at the state level. Many states modeled their civil procedure codes after the Federal Rules of Civil Procedure, a framework that clearly does not contemplate pro se litigation.<sup>134</sup> We know of no state that has updated its civil procedure code to account for the new pro se majority.

The mismatch between static formal law and the dynamic needs of the state courtroom means we must re-think how to study the way law shapes judicial behavior, and how judges in turn shape the law. This includes fundamental questions about what law is, and about the roles of common law and unwritten norms in our modern court system. While some have argued that common law judging is fading in federal courts, research may reveal a very different story in state courts, where highly local common law may be the major form of law development.<sup>135</sup> Thus, a core area for future research is understanding the interplay between static formal law and dynamic informal law in state civil courts. Do judges perceive a need for more attuned formal law? Has informal law taken on a quasi-formal role with characteristics of transparency and consistency, or is the landscape one of individual ad hoc judicial behavior? How do the questions about judicial learning posed above interact with this process?

Questions about state court decision making should focus not only on how judges apply existing law, but also on how they make choices

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133. See Decker, *supra* note 103, at 1968–69; Leib, *supra* note 3, at 907.

134. A comprehensive analysis from 1986 found 23 jurisdictions had wholly replicated the Federal Rules and another ten had adopted them in modified form, while 18 states’ procedural rules were “substantially dissimilar” from the Federal Rules. An updated analysis published in 2003 showed that many of the 33 states with civil procedure codes modeled after the Federal Rules had not chosen to keep up with the evolution of the Federal Rules by adopting amendments. The study concluded that “[f]ederal influence on state procedure . . . remains substantial, and important.” See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356–58, 383 (2002/2003) (citing 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 (1986)). See also 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. RES. L. REV. 501, 516 (2016) (“Because states have not adopted the amendments to the Federal Rules, navigating the procedure in the state courts is like walking through a time machine that transports one to an earlier era of federal procedure.”). For an example of a state court where formal civil procedure rules apply but are not followed by the court, see Steinberg, *Informal*, *supra* note 62.

135. See Neal Devins & David Klein, *The Vanishing Common Law Judge*, 165 U. PA. L. REV. 595, 600 (2017).

in the absence of law. Another variation of these questions is how judges face the pro se reality of not being briefed on applicable law by lawyers on both sides of the case.<sup>136</sup> The absence of this informational mechanism may mean that, in some cases, judges simply may not know (or may misunderstand) what the law is and how it applies in a given case, and there is no person in the system to observe or challenge that outcome. This also raises questions about how other actors in the court ecosystem may play different, unexpected roles in the face of static written law.

Though some scholars, notably Annie Decker and Ethan Lieb, have written on the development of law in lower trial courts, the volume of work in this area is miniscule in comparison to the need for theory and research.<sup>137</sup> In the application and development of law in state civil courts, a massive field of potential scholarship is almost entirely unexplored. We hope scholars will take up the task of describing and theorizing the relationship between formal law, judicial decision making, and the work of state courts.

#### CONCLUSION

We hope many readers are curious enough to head down to their local courthouse for a first-hand glimpse of the mostly unexplored and largest side of our civil justice system. In this article, we have sketched the outlines of what you will find on that court's civil dockets—swaths of unrepresented people, the occasional lawyer, and busy, under-resourced judges. We have also identified elements you may not see at all, such as traditional adversary process, well-developed legal and factual arguments, extensive motion practice, and rigorous application of formal law. In drawing attention to state civil courts and judges, our core goal is to critique and call for an end to the status quo, where such courts are almost entirely ignored as sites for scholarly research, most notably by legal scholars.

Without question, state civil courts have fundamentally transformed over the past three decades. Where nearly every party was once represented by counsel, today, the vast majority of litigants are pro se. The adversary system, which depends on lawyers to drive litigation, does not function as intended in courts where lawyers are mostly absent. Even the core work of civil courts has shifted, with an

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136. Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 490 (2007).

137. See Decker, *supra* note 103, at 1969; Leib, *supra* note 3, at 907–08.

increase in the proportion of cases involving debt collection, foreclosure, and landlord/tenant disputes.

The transformation of state courts is astonishingly easy to observe, but our ignorance about its nature, causes, and effects, is hard to overstate. Legal scholarship is ripe with a range of empirical and normative work on courts and judges, but this work focuses almost exclusively on federal courts and appellate matters. And in most states and localities, data collection is spotty at best. In fact, a single nonprofit organization, the National Center, has (through dogged efforts) generated almost all of the available data on state courts.

If most of what we believe about civil courts and judges is based on the federal model, it follows that we know too little about the operation of law and justice on the ground, to say nothing of the courts that are most relevant and important to ordinary people. Most people will go a lifetime without setting foot in a federal court or being involved in any way in federal litigation, but in more than 16 million cases each year, Americans face the complexity of civil litigation without a lawyer—all of them in state courts.

Given the dearth of scholarship on state civil courts and judges, particularly in a time of growing legal empiricism and burgeoning access to justice research, we have called for a new research agenda focused on state courts and judges and suggested a theoretical framework to guide this work. This framework is grounded in the new pro se reality and recognizes four critical ways that this reality should inform the study of state courts, with a focus on the judicial role: (1) the adversarial system has broken down; (2) in-person interactions with judges are commonplace; (3) the judicial role is ethically ambiguous; and (4) written law is largely static while state courts are dynamic. Finally, we have offered research questions based on this framework.

As we call for others to engage in this research, we perform the work ourselves. Each of us has a history of studying state courts, and we are now working together on a long-term, multi-jurisdictional research project aimed at gaining a comparative picture of judicial behavior in majority pro se state courts. The study, which is the first of its kind, collects comparative data from state trial courts in three U.S. cities. The data include courtroom observations and interviews with judges, court staff, and staff from nonprofit organizations who work in court-based pro se assistance programs.

In calling for more research, we do not wish to stifle the ongoing development of access to justice interventions and other court reform efforts. Reform and experimentation aimed at improving our civil justice system can and should continue. Our hope is that future research will inform the conversation around access to justice and state court

reform. Ideally, we will see an ongoing, iterative process of research, program development, implementation, and testing in the arena of access to justice reform.

In addition to informing the access to justice conversation, the implications of future research on state courts and judges will surely reach beyond the pro se state court context to address broader concerns about governance, law, and justice. Future learning from state court research should inform discussions about institutional design, the role of courts in democracy, federalism, and the rule of law, to name a few.

We urge scholars to join in the critical project of data collection and theoretical development focused on state civil courts and judges. Existing theories about judging, the development of law, and the operation of civil justice can and should be re-evaluated through rigorous, ongoing research in state civil courts. Such scholarship holds the promise of advancing knowledge and understanding about American civil justice while informing new policies and practices to improve it.

Nearly all judicial activity in the United States takes place in state civil courts. Individuals and businesses of all types—from a corporation seeking payment on a debt, to a tenant facing eviction, to victim of violence in need of protection from abuse—depend on state courts and judges for conflict resolution and rights enforcement. Today, as state courts face unprecedented pressure from the growing pro se majority, it is time for a new focus on understanding these essential civil justice institutions and decision makers. We have neglected this project for far too long.