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Colleen F. Shanahan
Columbia Law School, colleen.shanahan@columbia.edu

Jessica K. Steinberg
George Washington University Law School, jsteinberg@law.gwu.edu

Alyx Mark
Wesleyan University, amark@wesleyan.edu

Anna E. Carpenter
The University of Utah S.J. Quinney College of Law, anna.carpenter@law.utah.edu

THE INSTITUTIONAL MISMATCH OF STATE CIVIL COURTS

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

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

* Clinical Professor of Law, Columbia Law School.
** Professor of Law, George Washington University Law School.
*** Assistant Professor of Government, Wesleyan University.
**** Professor of Law, University of Utah S.J. Quinney College of Law.

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INTRODUCTION

Across the country, the courtroom door marked "Housing Court" reveals a judge listening to hour after hour of people on the verge of losing their homes because they have lost a job, had an unexpected medical expense, cannot afford childcare, have a family member engaged in the criminal legal system, complained about the condition of their home, or because the rent will always be too high. The litigants in housing court are disproportionately Black, though the racial and ethnic background of those facing the loss of their home varies across the country.[1] Most of the people facing this life-altering consequence are women,[2] almost none of whom have a lawyer, though many of their landlords do,[3] and losing their home will immediately harm their economic security, family integrity, and

1. Peter Hepburn, Renee Louis & Matthew Desmond, Racial and Gender Disparities Among Evicted Americans, 7 Socio. Sci. 649, 653–58 (2020) (showing that "for every 100 eviction filings to white renters, . . . there were nearly 80 eviction filings to black renters" and that the percentage of eviction filings against Black renters in the ten largest counties studied ranged from 16.6% in Middlesex, Massachusetts to 61.3% in Philadelphia, Pennsylvania); see also Deena Greenberg, Carl Gershenson & Matthew Desmond, Discrimination in Evictions: Empirical Evidence and Legal Challenges, 51 Harv. C.R.-C.L. L. Rev. 115, 120 (2016) ("Studies from different cities have found that people of color comprise about eighty percent of those facing evictions.").

2. See Kathryn Sabbeth & Jessica K. Steinberg, The Gender of *Gideon*, 69 UCLA L. Rev. (forthcoming 2022) (manuscript at 11), https://ssrn.com/abstract=3807349 [https://perma.cc/6SGG-YN47].

3. Jessica K. Steinberg, Demand Side Reform in the Poor People's Court, 47 Conn. L. Rev. 741, 750 (2015) ("In landlord-tenant matters . . . it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.").

mental and physical health.[4] The litigants in housing court do not end up behind that door by coincidence. Rather, this is a foreseeable consequence of the absence of affordable and adequate housing, health care, childcare, and education, the absence of fair and equal wages, and the presence of mass incarceration in our society. State civil cases involving debt, family relationships, and children have different names on the courtroom door but similar stories behind those doors. The millions of people who come to state civil courts each year in the United States are in crisis, and so, too, are the courts that hear their cases.

When scholars and reformers talk about this problem, we acknowledge its overwhelming breadth and depth and then fix our gaze on a particular group of institutional actors. We theorize their role, quantify behavior and its impact, consider different roles for actors, or contemplate the role of technology instead. We might look closely at the experience of litigants,[5] the dominance of certain plaintiffs,[6] a lack of lawyers,[7] judicial behavior,[8]

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4. Emily Benfer, Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequality and Social Injustice, 65 Am. U. L. Rev. 275, 308–12 (2015) ("[C]onsequences of eviction often include prolonged periods of homelessness, job loss, depression, and subsequent deterioration of health.").

5. See, e.g., Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants, 20 Hofstra L. Rev. 533, 541 (1992) ("At [the] root [of the standard view of legal institutions] is the acculturated belief that the individual is the proper unit to scrutinize when analyzing disputes about performance under a lease agreement."); Russell Engler, Approaching Ethical Issues Involving Unrepresented Litigants, Clearinghouse Rev. J. Poverty L. & Pol'y 377, 377 (2009) (approaching ethical issues by focusing first on interactions with unrepresented adverse parties).

6. See, e.g., Kathryn Sabbeth, (Under)Enforcement of Poor Tenants' Rights, 27 Geo. J. on Poverty L. & Pol'y 97, 119–28 (2019) (explaining why the private market fails to represent tenants as plaintiffs); Daniel Wilf-Townsend, Assembly-Line Plaintiffs, 135 Harv. L. Rev. 1704, 1728–33 (2022) (examining the repeat-player plaintiffs behind debt collection cases).

7. See, e.g., Kathryn A. Sabbeth, Housing Defense as the New *Gideon*, 41 Harv. J.L. & Gender 55, 61 (2018) [hereinafter Sabbeth, Housing Defense as the New *Gideon*] (arguing that New York City legislation's focus on defense lawyering limits the impact of appointment of counsel); Rebecca L. Sandefur, Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact, 80 Am. Soc. Rev. 909, 912–16 (2015) ("Unrepresented litigants are common, with an average of 73 percent of the focal parties in each study appearing without any representation, and no representation characterizing 85 percent of the observed cases.").

8. See Anna E. Carpenter, Active Judging and Access to Justice, 93 Notre Dame L. Rev. 647, 651–55 (2017) (examining the impact of active judging on unrepresented litigants); Anna E. Carpenter, Colleen F. Shanahan, Jessica Steinberg & Alyx Mark, Judges in Lawyerless Courts, 110 Geo. L.J. 509, 512–13 (2022) [hereinafter Carpenter et al., Judges in Lawyerless Courts] (examining the "unfettered discretion" judges have in lawyerless courts with unrepresented litigants); Michael C. Pollack, Courts Beyond Judging, 46 BYU L. Rev. 719, 724, 730–58 (2021) ("State court judges engage in decisionmaking in a whole host of non-adversarial settings outside of the traditional context of dispute resolution."); Jessica K. Steinberg, Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice, 2016 BYU L. Rev. 899, 906, 919–26 [hereinafter Steinberg, Adversary Breakdown] ("[J]udges are responding to an inflexible passive norm by abandoning it entirely. In some matters, judges extensively question parties and witnesses. In others, they relax or eliminate

the power of court staff,[9] or technological intervention.[10] This actor-focused view of state civil courts obscures the depth of the problem. The crisis of state civil courts is an institutional one, grounded in these courts' role in democratic governance.[11]

We aim to steady our gaze with a theory of state civil courts as they are now, using a new analysis of quantitative data and our own original qualitative data. We begin with two key elements of state courts' institutional context. First, the judicial branch is designed for dispute resolution. Second, the executive and legislative branches have failed to meet society's social needs.[12]

Within this context, we use national data about the caseloads of state civil courts to refine our understanding of what these courts do. We would expect to see these courts resolving disputes between parties, but they do not. Instead, we see an institutional mismatch: State civil courts are institutions where people bring their social needs more than their disputes. The work of state civil courts is a daily manifestation of the failure of the executive and legislative branches to disrupt structural inequality or invest in systems of care to mitigate it.[13] These courts operate in the breach to address social needs because they cannot decline the cases presented to them. Thus, the social needs people bring to court are framed as disputes

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procedural and evidentiary rules. In still others, they raise new legal theories to fit the parties' facts or order relief not requested.").

9. See, Russell Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987, 1988 (2005) (examining the role of the judges, mediators, and clerks in cases involving unrepresented litigants); Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, Judges and the Deregulation of the Lawyer's Monopoly, 89 Fordham L. Rev. 1315, 1327–36 (2021) [hereinafter Steinberg et al., Judges and Deregulation] (describing judges and their reliance on nonlawyer actors who ultimately shape facts, arguments, and outcomes).

10. See David Freeman Engstrom & Jonah B. Gelbach, Legal Tech, Civil Procedure, and the Future of Adversarialism, 169 U. Pa. L. Rev. 1001, 1004–05 (2021) (describing the transformative effect of "legal tech" on litigation and civil procedure); Margaret Hagan, The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services, 20 Va. J.L. & Tech. 394, 399–402 (2016) (examining how the internet is currently insufficient as a legal help resource and discussing best practices for improving it as such; Tanina Rostain, Techno-Optimism & Access to the Legal System, 148 Daedalus 93, 95 (2019) ("Self-help technologies can play a useful role in assisting low- and moderate-income people, but they may not be the most effective means to redress power imbalances produced by income, racial, and other forms of inequality.").

11. See Kathryn A. Sabbeth, Market-Based Law Development, The L. & Pol. Econ. Project (July 21, 2021), https://lpeproject.org/blog/market-based-law-development/ [https://perma.cc/5UQ8-BRZT] [hereinafter Sabbeth, Market-Based Law Development] (explaining how the stratification of courts affects the development of law).

12. See infra note 19 and accompanying text regarding our use of "social need."

13. See Colleen F. Shanahan & Anna E. Carpenter, Simplified Courts Can't Solve Inequality, 148 Daedalus 128, 129 (2019) ("The executive and legislative branches have aggressively pared back social safety net programs, and the judicial branch is required to hear the cases that result.").

in order to access social provision.[14] For example, a grandmother—seeking mental health care and stable housing for her daughter and stability for her grandchildren—may end up in domestic violence court because framing her social need as a dispute with her daughter in need of a protective order is a chance to access support. This leaves state civil courts attempting to address—within the constraints of their dispute resolution design—the social needs of litigants. Though invoking incarceration only rarely, state civil courts grapple with life-sustaining and life-altering social needs: housing, employment, family, and economic security.

We then use qualitative data from around the country to see how courts grapple with this mismatch: How do courts designed for dispute resolution face litigants' social needs in the courtroom? The data reveal that state civil courts are responding in four related ways to this mismatch. First, courts avoid the social needs presented and hold tight to their dispute resolution design. Second, courts try to provide services to meet litigants' social needs. Third, courts develop new, ad hoc law or procedure to meet litigants' social needs. Fourth, courts develop new institutions within or adjacent to the court to meet litigants' social needs.

State civil courts' responses to people's social needs are diffuse and varied, yet the data allow us to theorize these courts' actual institutional role. Our theory captures two institutional roles that are in tension and reflective of the dissonance of the institutional mismatch. First, the mismatch between state civil courts' institutional design and social needs casts these institutions as violent actors. Decades ago, Professor Robert Cover warned us that "[w]hen [legal] interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."[15] These observations originate in criminal courts, and we extend them to civil courts and argue that the institutional mismatch exacerbates a violent institutional role of state civil courts. This includes government violence supplanting private violence, such as the history of eviction matters described by Professor Shirin Sinnar.[16] This violence appears when courts hew to their institutional design, avoiding social needs but also compounding them in the context of state control. This role includes the ways in which state civil courts intersect with mass incarceration, specifically when civil cases can lead to incarceration as a penalty, such as in child support or domestic violence matters. At the same time, state civil courts attempting to meet social needs by providing services can lead to government control and violence in the guise of these

14. We use the term social provision to capture "the range of state policies implemented to improve general welfare." Abbye Atkinson, Rethinking Credit as Social Provision, 71 Stan. L. Rev. 1093, 1096 n.2 (2019).

15. Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1601 (1986).

16. Shirin Sinnar, Civil Procedure in the Shadow of Violence, *in* A Guide to Civil Procedure: Integrating Critical Legal Perspectives (Portia Pedro, Brooke Coleman, Liz Porter & Suzette Malveaux eds.) (forthcoming 2022) (manuscript at *2–*5).

needs being met, such as in child welfare matters. It also includes the violence of the experience of appearing in state civil court.

Second, this mismatch casts state civil courts as policymaking institutions, in a distinct variation from the policymaking courts that scholars traditionally worry about. Here, the institutional mismatch between courts' dispute resolution design and the social needs of litigants has led to a diffuse, ad hoc, and unmeasured—but nonetheless large-scale—response by courts. Faced with social needs, courts are attempting social provision, either by stepping into the void left by the executive branch and providing direct social services—such as housing resources tied to obtaining a protective order—or by behaving like legislatures by allocating funding to programs for social provision, often going as far as building new institutions. In addition, courts create unseen law and procedure to facilitate these choices in ways that raise concerns about transparency and process. These small-scale choices are repeating themselves in diffuse ways across jurisdictions. Collectively, state civil courts have become a branch of government that develops policy to grapple with social needs without the institutional design or resources to do so.

From this analysis, we see that institutional—not just operational—change for state civil courts is imperative, and we begin to imagine a way forward for state civil courts as democratic institutions.[17] We acknowledge the importance of incremental, actor-focused change to meet the immediate needs of millions of litigants each year. We also see the imperative of imagining broad, institutional change that will relieve the tension between the social needs people bring to court and courts' dispute resolution design. Where we now see a social need from one litigant in a dispute, we challenge ourselves to imagine a world where social provision is completely realized and the needs of both litigants are met.

I. WHAT STATE CIVIL COURTS DO

"This courtroom is like the emergency room."[18]

We begin with two observations about the institutional context of state civil courts in American democracy. First, our courts are designed as sites of dispute resolution. Second, the executive and legislative branches have failed to avoid or mitigate inequality. Though we would expect to see state civil courts resolving disputes, in the face of inequality, state civil courts do

17. For a different conception of courts as democratic institutions, see Judith Resnik, Reinventing Courts as Democratic Institutions, 143 Daedalus 9, 10 (2014) (describing courts as "sites of democracy because the particular and peculiar practices of adjudication produce, redistribute, and curb power among disputants who disagree in public about the import of legal rights").

18. Notes of Hearing 22, Centerville (Judge 1) (addressing litigants in open court). See also infra notes 116–123 and accompanying text for more on the underlying data.

not necessarily resolve disputes. Rather, they actually face and respond in different ways to people's social needs.

We use the term "social need" consistent with scholarly literature and note that it captures the range of needs (including those that some might characterize as economic) that are inextricable from racial, economic, and gender inequality.[19] We are intentionally not using the term "legal need." The concept of "legal need" itself reflects assumptions about the role of law in people's lives, which research shows is not consistent with people's lived experiences.[20] Our examination takes an institutional view of state civil courts and the problems people bring to them—and resists any underlying assumption that people should engage the legal system to resolve their problems.

In this context, we engage in a mixed-methods empirical examination of state civil courts. We take a novel approach to national data on state civil caseloads, recategorizing cases to reflect the problems people are bringing to court, not just the formal legal labels for these cases. This reveals the breadth and depth of social needs presented to state civil courts. We then examine qualitative data from observations and interviews in state civil courtrooms to understand how people's social needs appear in the courtroom. In the following sections, we analyze how state civil courts respond to the institutional mismatch.

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19. See Jonathan Bradshaw, A Taxonomy of Social Need, *in* Problems and Progress in Medical Care: Essays on Current Research 71, 71–74 (Gordon McLachlan ed., 1972); Mohsen Asadi-Lari, Chris Packham & David Gray, Need for Redefining Needs, 34 Health Quality Life Outcomes 1, 4 (2003) (distinguishing social needs from physical needs, satisfaction, informational needs, and concern); Giandomenica Becchio, Social Needs, Social Goods, and Human Associations in the Second Edition of Carl Menger's *Principles*, 46 Hist. Pol. Econ. 247, 249–51 (2014) (describing how economic goods can satisfy social needs, including common needs (needs shared by many individuals that a common supply can satisfy, such as drinking water), collective needs (needs demanded by individuals and shared by the community, such as schools), and needs of human association (needs demanded by an entity other than individuals)); Erica Hutchins Coe, Jenny Cordina, Danielle Feffer & Seema Parmar, Understanding the Impact of Unmet Social Needs on Consumer Health and Healthcare, McKinsey & Co. (Feb. 20, 2020), https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/understanding-the-impact-of-unmet-social-needs-on-consumer-health-and-healthcare [https://perma.cc/BUY5-B79G] (summarizing findings from a McKinsey survey). Applying the distinctions in Professor Jonathan Bradshaw's taxonomy of "normative need," "felt need," "expressed need," and "comparative need" to state civil courts is beyond the scope of this Essay, though it engages many of the questions raised by Professor Rebecca Sandefur's work. We also note that narrower definitions of social needs appear in other contexts, including public benefits legislation. See, e.g., 42 U.S.C. § 3002(24) (2018) ("The term 'greatest social need' means the need caused by noneconomic factors . . . .").

20. Professor Sandefur's research shows that people regularly do not perceive their problems as legal and believe they are able to help themselves, and she theorizes the implications of these perceptions for the legal system. Rebecca L. Sandefur, Accessing Justice in the Contemporary USA: Findings From the Community Needs and Services Study 14–16 (2014); Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. Rev. 443, 443–44 (2016).

A. *The Institutional Context*

1. *Courts Designed for Dispute Resolution.* — The substantive law and procedure of state civil courts rest on the premise that they are sites of dispute resolution. We assume parties will come with a dispute, and the court will resolve it.[21] That dispute might get resolved in a formalized, adversarial way that involves lawyers. Or it might get resolved by party-driven settlement. Or the dispute might be resolved in a collaborative way involving a third-party facilitator. Regardless of where the process falls on a continuum of adversarialism, the premise remains: State civil courts are in the business of resolving disputes between parties.

This dispute resolution assumption is present in the law and procedure of state civil courts and permeates legal scholarship, including our own. Legal scholarship's focus on federal courts and the idealized, represented, adversarial system is well documented.[22] Scholarship regarding state civil courts is largely focused on particular actors or characteristics of dispute resolution.[23] Even the most full-throated calls for reconsideration of adversarialism still accept that courts are sites of dispute resolution.[24]

Sociolegal research regarding legal problems and experiences similarly relies on the premise of dispute resolution to examine questions of civil courts. The classic sociolegal "dispute pyramid" and its progeny, including the "dispute tree," as well as the classic framing of legal engagement as "naming, blaming, and claiming," all take as a starting point that the business of courts is dispute resolution.[25] The extensive work of leading

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21. Robert A. Kagan, Adversarial Legalism: The American Way of Law 3 (2d ed. 2019).

22. Pamela Bookman & Colleen F. Shanahan, A Tale of Two Civil Procedures, 122 Colum. L. Rev. 1183, 1186–88 (2022); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, Studying the "New" Civil Judges, 2018 Wis. L. Rev. 249, 268–74 [hereinafter Carpenter et al., "New" Civil Judges].

23. See Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 530 ("[U]nderstanding judges' within-case decisions about role implementation, procedure, and offers of assistance to pro se litigants is a critical contribution . . . ."); Carpenter et al., "New" Civil Judges, supra note 22, at 256 ("In this article, we make the case for a research agenda focused on state courts and the judges who manage and work within them."); Colleen F. Shanahan, The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice, 2018 Wis. L. Rev. 215, 218 (focusing on the role of judges in state civil and administrative courts); Steinberg et al., Judges and Deregulation, supra note 9, at 1316 (drawing on interviews to demonstrate that "state court judges are leading the charge, out of necessity, toward de facto deregulation of the legal profession, at least in certain pro se courts").

24. See, e.g., Carrie Menkel-Meadow, The Trouble With the Adversary System in a Postmodern, Multicultural World, 38 Wm. & Mary L. Rev. 5, 5–6 (1996) (noting that the adversary system is no longer the "best method for our legal system"); Steinberg, Adversary Breakdown, supra note 8, at 899 ("Though adversary theory continues to represent the guiding framework for criminal and civil cases, it is now widely recognized that the traditional depiction of the passive judge is incomplete.").

25. See Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, The Dispute Tree and the Legal Forest, 10 Ann. Rev. L. & Soc. Sci. 105, 107 (2014); William L.F. Felstiner,

scholars like Professors Hazel Genn and Rebecca Sandefur concerning how people understand and act on their own legal problems still takes as a core premise that the matters handled by civil courts are disputes to be resolved by the court in some way. Professor Genn's early work regarding legal problems in the United Kingdom illustrated that people are less likely to engage the law in disputes involving purchases of goods and services and more likely to go to court in disputes based in relationships or family.[26] Professor Sandefur's work, among other contributions, defines justiciable events, legal needs, and cases.[27] These definitions lend needed clarity to access to justice research, yet reflect the pervasiveness of the dispute resolution construct. Collectively, this research is commonly characterized as telling us that people take their "more serious" disputes to court, that poor people "perceive" fewer legal problems in their lives, or that many people "do nothing" in the face of a justiciable event or legal case.[28] We suggest an alternate explanation: People have problems to be resolved that are social needs more than disputes, and this difference underlies their interaction with civil courts. But before we reach that analysis, we observe that, even in an analysis of underlying problems, the construct of dispute resolution is pervasive.

The premise of dispute resolution also characterizes the predominant approaches to reform. In some instances, our reaction to the dysfunction of state civil courts is to change the actors involved in dispute resolution. This includes alternative dispute resolution methods and approaches like community courts. Another approach is to change the nature of how disputes are resolved, such as shifting to inquisitorial or problem-solving court models. Yet all of these approaches stay within the boundaries of dispute resolution: The court engagement begins with two parties presenting the court with a dispute and ends with the court offering some method of resolution.

2. *Inequality.* — The premise that civil courts are sites of dispute resolution coexists with the underlying circumstances of inequality in the United States. Thus, our examination of state civil courts rests on the collective, scholarly understanding of inequality in the United States and the

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Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 Law & Soc'y Rev. 631, 632 (1980).

26. Hazel Genn, What Is Civil Justice For? Reform, ADR, and Access to Justice, 24 Yale J.L. & Humans. 397, 405–06 (2012).

27. See, e.g., Rebecca L. Sandefur & James Teufel, Assessing America's Access to Civil Justice Crisis, 11 U.C. Irvine L. Rev. 753, 755–63 (2021) (noting that a justiciable event is a circumstance shaped by civil law, a legal need is a justiciable event that needs legal expertise to be handled "properly," and a case is a circumstance that ends up in court or a legal service system).

28. Rebecca L. Sandefur, The Importance of Doing Nothing: Everyday Problems and Responses of Inaction, *in* Transforming Lives: Law and Social Process 112, 112–17 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007).

failure of the executive and legislative branches of government to address it.

Income and wealth inequality in the United States is significant and growing.[29] Our historical arc of growing inequality is bound up in the country's history of racial inequality.[30] In 2019, the net worth of a typical white family was nearly ten times that of the average Black family.[31] Scholars have extensively documented the historical underpinnings of this inequality.[32] Economic and social scientific research documents how

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29. In 2021, the top 1% of U.S. citizens owned 32% of the country's household wealth, while the bottom half owned only 2%. Distribution of Household Wealth in the U.S. Since 1989, Fed Rsrv., https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:128;series:Net%20worth;demographic:networth;population:1,3,5,7;units:shares [https://perma.cc/VLE9-E9R2] (last updated Dec. 17, 2021).

30. The wealth gap between America's richest and poorest families has more than doubled from 1989 to 2016. Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, Pew Rsch. Ctr., Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority 18–19 (2020), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT_01.09.20_economic-inequailty_FULL.pdf [https://perma.cc/S5KV-LX7A] (documenting the percent change in median family wealth over time by quintile).

31. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, Examining the Black-White Wealth Gap, Brookings (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/2MTX-JS7P] (comparing wealth for median white and median Black households); see also Ana Hernández Kent & Lowell Ricketts, Has Wealth Inequality in America Changed Over Time? Here Are Key Statistics, Fed. Rsrv. Bank of St. Louis (Dec. 2, 2020), https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics [https://perma.cc/AJ73-GFGR] (noting that the median white family owns $184,000 in assets, while Black families own $23,000, and Hispanic families own $38,000). Income statistics reveal similarly stark disparities: The median Black household earned $23,800 less than white households in 1970, but $33,000 less in 2018, amounting to just 61% of the income of the median white family. Katherine Schaeffer, 6 Facts About Economic Inequality in the U.S., Pew Rsch. Ctr. (Feb. 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/ [https://perma.cc/7TYB-8YTM] (measuring changes in relative income in constant 2018 dollars).

32. See, e.g., Robert S. Browne, The Economic Basis for Reparations to Black America, 2 Rev. Black Pol. Econ. 67, 73 (1971) (noting that income produced by enslaved people for their white owners before 1860 amounted to between $448 and $995 billion). See generally Brittany Danielle Rawlinson, The Legacy of Slavery and Black-White Wealth Inequality in the Southern United States (Apr. 6, 2017) (Ph.D. dissertation, Florida State University), https://diginole.lib.fsu.edu/islandora/object/fsu:507725/datastream/PDF/view [https://perma.cc/N45B-ZUX5] (offering an empirical analysis of home ownership, business ownership, anti-Black lynchings, and incarceration as contributory factors to the wealth gap, and connecting these practices to the legacy of slavery); Terry Gross, A 'Forgotten History' of How the U.S. Government Segregated America, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/P2NY-MEG9] (documenting America's history of discrimination in housing).

discrimination in employment,[33] housing,[34] education,[35] and criminal justice[36] combine to produce vastly unequal conditions on account of race—and how intergenerational poverty perpetuates this history.[37] These conditions are not just abstract. They translate to specific problems for individuals and communities: unaffordable housing, limited access to health care, childcare and elder care, insufficient employment opportunities and income, and an absence of pathways to build wealth or benefit from credit.

Scholars have explored how the actions and inactions of U.S. political institutions—legislatures and executives—have amplified American inequality.[38] Some literature describes this connection in terms of institutional decisions and outcomes. For example, many scholars emphasize decreases in the real minimum wage and accompanying increases in wage inequality.[39] Other research describes weakened labor protections

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33. See Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 Am. Econ. Rev. 991, 1101 (2004) (showing that African Americans face differential treatment when searching for jobs); see also Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (providing an example of widespread discriminatory employment practices deployed in the post-Jim Crow era to harm Black workers).

34. See, e.g., Janelle Jones, The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth, Econ. Pol'y Inst. (Feb. 13, 2017), https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/ [https://perma.cc/8P2U-C53C] (describing the significance of home equity for wealth accumulation and the structural barriers to homeownership for Black Americans).

35. See Graziella Bertocchi & Arcangelo Dimico, Slavery, Education, and Inequality 1 (Inst. for the Study of Lab., Working Paper No. 5329, 2010), https://www.econstor.eu/bitstream/10419/51891/1/66886687X.pdf [https://perma.cc/2WPQ-MBXD] ("[T]he current degree of educational inequality, along the racial dimension, can be traced to the intensity of slavery before the Civil War."); Linda Darling-Hammond, Unequal Opportunity: Race and Education, Brookings (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/ [https://perma.cc/3SKW-C9S4] (describing persistent patterns of discrimination in education, especially financing and school resources).

36. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012) (describing the financial, social, and cultural implications of mass incarceration on Black communities in the United States).

37. See Scott Winship, Christopher Pulliam, Ariel Gelrud Shiro, Richard V. Reeves & Santiago Deambrosi, Long Shadows: The Black-White Gap in Multigenerational Poverty 2 (2021), https://www.brookings.edu/wp-content/uploads/2021/06/Long-Shadows_Final.pdf [https://perma.cc/2VPR-7M95].

38. For visualizations of wealth and income inequality in the United States and around the world, see Income Inequality, USA, 1913–2021, World Inequality Database, https://wid.world/country/usa/ [https://perma.cc/6RJN-MAK7] (last visited Mar. 2, 2022).

39. See, e.g., Tali Kristal & Yinon Cohen, The Causes of Rising Wage Inequality: The Race Between Institutions and Technology, 15 Socio-Econ. Rev. 187, 188–90 (2017) (finding that between 1968 and 2012, declining unions and reductions in the real minimum wage accounted for approximately half of the increase in wage inequality in the United States).

and its implications for income inequality.[40] Some scholars emphasize increasingly regressive state and federal tax codes, favorable treatment of capital over income, and increasingly unequal distributions of wealth.[41] Others tell of the varied role of American government in social provision over time and in different eras of social welfare design.[42] Still others chronicle how the privatization of public services has exacerbated inequality, focusing most intensely on state legislative inaction to secure access to affordable healthcare,[43] state divestment from public education,[44] and failures to invest in affordable housing.[45]

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40. Id. at 189; see also Richard B. Freeman, Union Wage Practices and Wage Dispersion Within Establishments, 36 Indus. & Lab. Rels. Rev. 3, 19–20 (1982) (describing how labor unionization reduces wage inequality).

41. See Emmanuel Saez & Gabriel Zucman, The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay 6–7, 9 (2019) (describing how capital, disproportionately owned by wealthy people, is taxed more favorably than income, and describing increasing regression in the U.S. tax system); Emmanuel Saez & Gabriel Zucman, Wealth Inequality in the United States Since 1913: Evidence From Capitalized Income Tax Data 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20625, 2014), https://www.nber.org/system/files/working_papers/w20625/w20625.pdf [https://perma.cc/2UG9-93JU] (providing an account of increased wealth inequality).

42. See, e.g., Theda Skocpol, Protecting Soldiers and Mothers 4–11 (1995) (tracing the history of U.S. government provision of social services over time).

43. Many states refused to expand Medicaid after the passage of the Affordable Care Act, despite significant federal incentives to do so, thereby increasing inequality. See Robert Kaestner & Darren Lubotsky, Health Insurance and Income Inequality, 30 J. Econ. Persps. 53, 55 (2016) (finding that public investment in Medicare and Medicaid "clearly [has] the effect of reducing inequality"); Olena Mazurenko, Casey P. Balio, Rajender Agarwal, Aaron E. Carroll & Nir Menachemi, The Effects of Medicaid Expansion Under the ACA: A Systematic Review, 37 Health Affs. 944, 946 (2018) (noting that Medicaid expansion under the ACA increased insurance coverage); Status of State Action on the Medicaid Expansion Decision, Kaiser Fam. Found., https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/2ZZR-7ST9] (last updated Feb. 24, 2022) (documenting state decisions on whether to expand Medicaid after the ACA and identifying dozens of states declining Medicaid expansion).

44. See Michael Mitchell, Michael Leachman & Matt Saenz, State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality, Ctr. on Budget & Pol'y Priorities 1 (2019), https://www.cbpp.org/sites/default/files/atoms/files/10-24-19sfp.pdf [https://perma.cc/D3RD-PG9P] (finding that state fiscal divestment increased inequality); Michelle Jackson & Brian Holzman, A Century of Educational Inequality in the United States, 117 PNA 19108, 19114 (2020) (finding that "collegiate inequalities and income inequality are, in fact, rather strongly associated over the twentieth century").

45. Joint Ctr. for Hous. Stud. of Harv. Univ., The State of the Nation's Housing 2020, at 7 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf [https://perma.cc/4FGG-6XQ4] (showing a sustained increase in cost-burdened households since 2000 and describing significant decreases in housing assistance as a share of nondefense discretionary spending over the same period).

Other literature describes how the American political process has produced inequality. For example, scholars point to how permissive campaign finance laws permit the rich to exercise disproportionate influence over legislative, electoral, and regulatory processes[46] and to how policymaking itself is structurally designed to favor capture by monied interests.[47] Others argue that state legislative gerrymandering reduces political responsiveness and accountability, empowering special interests to exacerbate inequality.[48] Scholars note that the failure to address inequality is caused by legislative gridlock—itself the result of a policymaking process that involves multiple veto points[49] and must function amid increasing political polarization.[50] Another field of literature highlights how ideological shifts that increasingly favor free-market capitalism and individual responsibility undergird political inaction on inequality.[51]

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46. Kay Lehman Schlozman, Henry E. Brady & Sidney Verba, Growing Economic Inequality and Its (Partially) Political Roots, Religions, May 18, 2017, at 1, 2, https://www.mdpi.com/2077-1444/8/5/97/htm [https://perma.cc/QR6L-QXKV] ("Those who are economically well-off speak more loudly in politics by giving more money and by engaging more frequently in . . . political participation . . . . Not only is money a critical resource for both individual and organizational input into politics, but economic disparities shape the content of political conflict.").

47. See, e.g., Scott H. Ainsworth, The Role of Legislators in the Determination of Interest Group Influence, 22 Legis. Stud. Q. 517, 517 (1997). And, of course, this is a reflection of straightforward collective action problems. See generally Mancur Olson, The Logic of Collective Action (rev. ed. 1971) (noting that although all members of a group have "a common interest in obtaining [some kind of] collective benefit, they have no common interest in paying the cost of providing that collective good," because "[e]ach would prefer that the others pay the entire cost").

48. Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, Why Hasn't Democracy Slowed Rising Inequality?, 27 J. Econ. Persps. 103, 103–05 (2013) (describing five reasons why the U.S. political system failed to ameliorate rising income inequality: ideological shifts, low voter participation by poor people, an increase in real income and wealth that blunts redistributive movements, political influence by the rich, and a reduction in democratic accountability).

49. John Voorheis, Nolan McCarty & Boris Shor, Unequal Incomes, Ideology, and Gridlock: How Rising Inequality Increases Political Polarization 5 (Aug. 21, 2015) (unpublished manuscript), https://ssrn.com/abstract=2649215 [https://perma.cc/U6JK-6KFB] (claiming that "[i]ncreases in political polarization may . . . reduce the capacity of legislators to (a) enact policies which might constrain further increases in inequality . . . or (b) engage in redistribution to directly reduce inequality . . . or (c) modernize and reform welfare state institutions").

50. Id. at 2–3.

51. See Bonica et al., supra note 48, at 105–10 ("The Democratic party pushed through the financial regulation of the 1930s, while the Democratic party of the 1990s undid much of this legislation in its embrace of unregulated financial capitalism . . . ."); Sara Sternberg Greene, The Bootstrap Trap, 67 Duke L.J. 233, 243–51 (2017) (describing how "the cultural and accompanying policy shift in American society that emphasized personal responsibility and work as the basis for a reduced safety net" influenced "policy and law surrounding safety net programs"); Vicki Lens, Public Voices and Public Policy: Changing the Social Discourse on "Welfare", 29 J. Socio. & Soc. Welfare 137, 141–46 (2002) (discussing the politicized language that comprised the discourse on welfare reform).

The literature on American inequality places heavy responsibility for people's social needs on the political branches of government. While it is not our current purpose to evaluate the explanatory power of these lines of research, we leverage this body of scholarship as a foundation of our examination of state civil courts. We acknowledge that we do not capture the full political dynamics of inequality in the United States, the consequences of this structural problem, or even the range of institutions wrapped up in these challenges. Rather, we contribute to those conversations by examining state civil courts in this context. How do dispute resolution design and American inequality simultaneously appear in state civil courts, and what does that mean for the institutional role that these courts are actually playing?

B. *State Civil Case Data Reconsidered*

In this context of dispute resolution design and social inequality, what are state civil courts doing? A reexamination of national caseload data from state civil courts provides a baseline empirical understanding of their work. We resist traditional scholarly and court management classifications of cases based on area of law and instead examine the nature of the problem that people face in each case. We might expect to find that people are asking courts to resolve disputes, consistent with their institutional design. Our reexamination of the case data reveals otherwise. Instead, we see the overwhelming presence of social needs in state civil courts.

We use National Center for State Courts (NCSC) data from 2012 to 2019.[52] These are approximately 400 million state court matters filed over eight years. This is not a complete picture of state civil courts, as described more fully in the Appendix, but it captures the work of these courts in states where the vast majority of the population lives.[53] NCSC categorizes

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52. As described in the Appendix, our analysis is based on publicly available data from the National Center for State Courts from 2012–2019. The data have meaningful variation among states in both data reporting practices and underlying court structures and functions. Nonetheless, the data are sufficient to explore the theoretical questions we engage and, we hope, for broader exploration by others of other questions of state courts as institutions.

53. A chorus has described the challenges of empirical research in state courts. See Carpenter et al., "New" Civil Judges, supra note 22, at 266 ("Unlike the federal courts, where data can be downloaded with a few mouse clicks, information from state civil court dockets remains much less accessible, and in some cases inaccessible, to researchers."); Sandefur & Teufel, supra note 27, at 771 ("No consistently collected, nationally representative information exists to inform on cases, their distributions, or their impacts."); see also Nat'l Ctr. for State Cts., Civil Justice Initiative: The Landscape of Civil Litigation in State Courts, at iii (2015), https://www.nsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/7AJB-SHUD] [hereinafter NCSC, Landscape of Civil Litigation in State Courts] ("Differences among states concerning data definitions, data collection priorities, and organizational structures make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers."); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, Examining Trial Trends in State Courts: 1976–2002, 1 J. Empirical Legal

state cases by category—civil, criminal, juvenile, domestic relations, and traffic—and by case type within each category—such as the "intentional tort" case type within the "civil" category.

We start by asking which cases are civil justice matters, independent of NCSC categories. Our categorization differs from traditional approaches in a core way: We include domestic relations and some matters related to children, including civil offenses and dependency matters, as civil matters. What is generally referred to as "family law" is often treated as separate from analysis of state civil courts.[54] Our approach is consistent with our theoretical perspective. All of the matters in our civil justice needs category that are designated as case types "Personal Relationships" and "Children" are matters handled in a civil court in the relevant jurisdiction, in most states by the same judges who hear (by eligibility or in fact) the breadth of civil cases. They are adjudicated based on the same dispute resolution design, resting on the same conventions of procedure and evidence. We believe this categorization most closely tracks the theoretical argument we engage here. It also presents an intentional contrast with the categorizations used in NCSC's commonly cited and pathbreaking 2015 *Landscape of Civil Litigation in State Courts* report and work that builds on it.[55] This approach also allows us to create a separate "juvenile delinquency" category that more closely parallels adult criminal dockets and reflects the different institutional structure and role of juvenile courts.

Stud. 755, 756 (2004) ("The perennial difficulty in compiling accurate and comparable data at the state level can in large measure be pinned on the fact that there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation."); Rebecca L. Sandefur, Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection, 68 S.C. L. Rev. 295, 297 n.6 (2016) (noting a lack of sufficient detail in electronic case records).

54. We cannot claim a definite explanation for this, but we can observe that state court dockets are often divided by subject matter, with different judges rotating among case types clustered around family law, criminal law, and other civil matters. We can also observe that family law matters are generally about women and children and matters historically undervalued by the legal system and legal scholarship. See Sabbeth & Steinberg, supra note 2 (manuscript at 3–4). Finally, we can observe that this distinction gathers its own momentum in legal scholarship as one scholar builds on the work of another. See, e.g., Yonathan A. Arbel, Adminization: Gatekeeping Consumer Contracts, 71 Vand. L. Rev. 121, 131 & n.42 (2018) (noting that most civil litigation consists of claims for consumer credit); Richard M. Hynes, Broke but Not Bankrupt: Consumer Debt Collection in State Courts, 60 Fla. L. Rev. 1, 21–24 (2008) (same); Wilf-Townsend, supra note 6, at 1715 n.41 (noting that family and traffic cases are excluded from data in analysis).

55. The Landscape report is a source for recent scholarly work (including our own). It poses two key differences from our analysis. The first is the categorization of case types and ultimately what is a "civil" case. The second is that the Landscape report relies on a small sample (cases from ten counties that are complete reporters in 2012), and we are relying on aggregate national, multiyear data. We note the consequential distinctions, where relevant, below. See NCSC, Landscape of Civil Litigation in State Courts, supra note 53, at iii; see also Family Justice Initiative, The Landscape of Domestic Relations Cases in State Courts, at i (2015), https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf [https://perma.cc/U85Y-Y4V6].

As captured in Table 1B in the Appendix, in these data, around eighty-six million cases involve civil justice needs, forty-four million are adult criminal matters, two million are juvenile delinquency matters, and over 300 million are noncriminal traffic cases.[56] But these overall numbers undercount the country's civil caseloads because they are the sum of states' case type reporting, and states report by case type inconsistently and incompletely. In addition to reporting by case types, states also report their overall caseloads in a particular category, and this reporting is more complete. For example, as illustrated in the Appendix, from 2012 to 2019, an average of forty-four states reported their total civil caseloads but an average of only twenty-two states reported across all civil justice needs case types.[57] This second average captures a wide variation within and across case type reporting. For example, a range of four to thirteen states reported in the fraud case type, while a range of thirty-four to forty-three states reported in the adoption case type.[58] If we apply our categorization and proportions to the total category caseload reporting and extrapolate, a more accurate count of our civil justice needs category would be an average of almost twenty million cases per year (or approximately 157 million cases in the eight years of data).[59] As context, over the same eight years that state courts saw an annual average of twenty million civil cases, federal courts saw an annual average of approximately 300,000 civil cases.[60]

With this understanding of the scope of civil cases, we turn to types of cases within the civil justice needs category. Typically, cases are classified using traditional norms of doctrinal law or court management.[61] For example, a case is labeled a "Contract" matter if the dispute arises out of a contract, regardless of the nature of the parties or their relationship. This

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56. See infra Appendix, tbl.1B. The volume and nature of traffic cases is worthy of its own empirical inquiry. We exclude traffic cases from our definition of "civil justice matters" because these cases are generally not handled in a dispute resolution framework but rather as administrative citations, sometimes with judges who are not lawyers. See Sara Sternberg Greene & Kristen M. Renberg, Judging Without a J.D., 122 Colum. L. Rev. 1287, 1315 (2022). We note also that these traffic dockets implicate questions of local courts. See Ethan Leib, Local Judges and Local Government, 18 N.Y.U. J. Legis. & Pub. Pol'y 707, 730–31 (2015) ("Almost every judge reported that there is locality-state competition for money that comes from the fines levied by the courts."); Alexandra Natapoff, Criminal Municipal Courts, 134 Harv. L. Rev. 964, 1038 (2021) ("[T]raffic offenses dominate most municipal court dockets."); Justin Weinstein-Tull, The Structures of Local Courts, 106 Va. L. Rev. 1031, 1069 (2020) ("State law gives municipalities the option to create municipal courts, which handle minor criminal cases as well as local ordinances and traffic violations.").

57. See infra Appendix, tbls.1A & 1B.

58. See infra Appendix, tbl.2.

59. See infra Appendix, tbls.1A & 2. This is the sum of the average annual (2012–2019) NCSC total civil (14,805,679) + NCSC domestic relations (4,487,066) + NCSC juvenile case types noted in Table 1B (293,522) = 19,586,267.

60. See infra Appendix, tbl.3.

61. Elizabeth Chambliss, Evidence-Based Lawyer Regulation, 97 Wash. U. L. Rev. 297, 339–40 (2019) ("State court case management systems were developed for operational use, rather than research.").

approach assumes that the problems people bring to court are disputes with others and categorizes those problems based on their legal constructs. Through this approach, a dispute between two corporations over a manufacturing contract is conflated with a suit by a debt collection company against a low-income individual who could not pay her medical debt. Or an eviction suit where a landlord is trying to evict a tenant in need of mental health services for hoarding is counted as a "Property" case in the same way as a dispute regarding the boundaries between two pieces of corporate-owned real estate.

We take a different approach, grounded in the substance of the problem people bring to court. These different subcategories of civil cases reveal social needs in state civil courts, ultimately telling a different story of these courts' institutional role. Eight of our categories are substantive: Personal Relationships, Children, Housing, Contract (distinguishing Debt Collection), Tort, Tax, Property, and Employment. Two are not, reflecting the limitations of the data: Small Claims matters and Writs and Appeals. We describe these subcategories from largest to smallest, as reflected in Table 2.

1. *Personal Relationships*. — "Personal Relationships" are the biggest category of cases in state civil courts. These are the cases that involve personal, often familial, relationships rather than purely economic ones. In total, "Personal Relationships" cases comprise approximately 30% of state civil court dockets.[62] These include divorce, protective orders, guardianship, estates, and personal trusteeship. The common thread in these cases as they generally appear in state civil court is that they implicate personal relationships and involve problems that, with more resources, the parties might not bring to state civil court or would only bring in a ministerial fashion.[63] As the discussion below illustrates, the absence of resources appears across the types of "Personal Relationships" cases. For example, a couple seeking divorce but without the resources to retain counsel for negotiations requires more from the court. An individual seeking to arrange guardianship for an elderly relative, or resolving an estate after the death of a loved one, will engage the court in a more limited way if they can retain counsel to help them navigate the law. And those people who do need more state civil court involvement are correspondingly making themselves more vulnerable to state control.

Another factor in many of these cases is that parties seek government assistance in some way, and that assistance then requires state civil court involvement. We discuss this phenomenon in the context of our qualita-

62. See infra Appendix, tbl.2. This is an estimated six million cases per year (30.28% of 19,586,267 total civil justice needs cases per year). See supra note 59.

63. Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, "I Do for My Kids": Negotiating Race and Racial Inequality in Family Court, 83 Fordham L. Rev. 3027, 3029–30 (2015) ("[T]he adjudication of child support cases shows a judicial colorblindness that ignores contemporary realities concerning racial inequality in the labor market.").

tive data in section I.C below, and it is also apparent in the general substance of these matters. For example, a marital dispute where one party calls the police to make the other party leave the home, because neither individual has sufficient resources to stay somewhere else, would appear as a protective order in state court. Or a case in which an elderly person with dementia requires health care might show up as a guardianship proceeding so that a family member can access legal power and health care services for the individual.

The largest subset of the "Personal Relationships" category is divorce, comprising a third of "Personal Relationships" matters.[64] The available data do not show how many of these cases are substantive proceedings and how many are pro forma proceedings required by law, though recent research suggests that the latter is a meaningful proportion of these cases.[65] Divorce is paradigmatic of relationship-related civil court matters. People who can afford counsel are nearly four times more likely to settle divorce-related matters without involving the court in more than a ministerial fashion.[66] For poor families, "more litigation means the stress and expense of court involvement continues."[67] Many of those families stay "trapped in marriage" or are mired in resulting litigation (e.g., protective orders or contract disputes).[68] In many states, the legal process for determining child custody, child support, spousal support, and protection orders is handled separately from divorce, exacerbating access issues.[69] Socioeconomic status also impacts "how families fare in divorce and custody cases" which in turn "impacts how [those families] weather the transition the litigation represents."[70]

Another major subset of the "Personal Relationships" cases is protective orders, commonly known as domestic violence cases, which constitute about a quarter of the "Personal Relationships" cases. As we illustrate using qualitative data in section I.C below, these cases are deeply intertwined with manifestations of inequality, including housing instability, need for

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64. See infra Appendix, tbl.2.

65. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers, PNAS, Mar. 30, 2021, at 1, 5 (noting that while divorces could sometimes be emotionally complicated, low-income divorce cases ordinarily involved straightforward legal issues).

66. Paula Hannaford-Agor & Nicole Mott, Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations, 24 Just. Sys. J. 163, 171 (2003) (noting that representation is a proxy for litigant wealth and finding that in "cases in which both parties were self-represented . . . less than 7 percent resulted in a settlement," indicating that "[t]he appearance of an attorney for either party increased the settlement rate substantially").

67. Pamela Cardullo Ortiz, How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America's Inner Cities, 25 Stan. L. & Pol'y Rev. 163, 188 (2014).

68. Greiner et al., supra note 65, at 5.

69. Id.

70. Ortiz, supra note 67, at 187 (using representation as a proxy for socioeconomic status).

health care, need for child or other familial care, and general lack of resources. The vast majority of those seeking protective orders are experiencing poverty, which "limits options, creates stressors and conditions that promote abuse, and makes it more difficult to escape abuse."[71] Wealthier people have better access to resources to leave abusive relationships and secure safety, using nonjudicial means to escape violence.[72]

The two remaining major subsets of "Personal Relationships" cases are probate/wills/intestate cases (14% of "Personal Relationships" cases)[73] and mental health cases, which are cases where court intervention is sought to place or keep an individual in mental health treatment (12% of "Personal Relationships" cases). Wills and probate matters also implicate socioeconomic status. Wills themselves often cost over $1,000,[74] and those from upper income households are almost twice as likely to have a will.[75] Without one, judicially assigned executors administer estates—again increasing civil court control over those without the resources needed to preempt court involvement. This court involvement compounds as parties initiate additional litigation, especially over assets[76] and guardianship.[77]

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71. Jane K. Stoever, Access to Safety and Justice: Service of Process in Domestic Violence Cases, 94 Wash. L. Rev. 333, 387 (2019); see also Lisa Shannon, TK Logan & Jennifer Cole, Intimate Partner Violence, Relationship Status, and Protective Orders: Does "Living in Sin" Entail a Different Experience?, 22 J. Interpersonal Violence 1114, 1119 (2007) (finding that in a sample of women with protective orders, 58% had annual incomes of less than $15,000).

72. Jane K. Stoever, Transforming Domestic Violence Representation, 101 Ky. L.J. 483, 531 (2012) ("Economic dependence is a substantial impediment to separating from an abusive partner, but financial relief in the form of child support, maintenance, housing payments, and compensation for medical expenses, lost wages, and damaged property is enumerated in only a small number of state statutes.").

73. NCSC collection protocols and categories leave some ambiguity as to the underlying problems within the Probate/Estate categories. It would be valuable but is beyond our scope to pair local-level research with NCSC data to better understand who is using probate court and how. See, e.g., David Horton, In Partial Defense of Probate: Evidence From Alameda County, California, 103 Geo. L.J. 605, 624–27 (2014) (reporting a survey of cases in Alameda County).

74. David Dierking, What's the Average Cost of Making a Will?, Investopedia (Feb. 4, 2022), https://www.investopedia.com/ask/answers/033116/what-average-cost-making-will.asp#:%7E:text=Drafting%20the%20will%20yourself%20is,it%20will%20be%20error%2Dfree [https://perma.cc/BT84-LXQD].

75. Jeffrey M. Jones, Majority in U.S. Do Not Have a Will, Gallup (May 18, 2016), https://news.gallup.com/poll/191651/majority-not.aspx [https://perma.cc/786H-CDJG] ("Of Americans whose annual household income is $75,000 or greater, 55% have a will, compared with 31% of those with incomes of less than $30,000.").

76. See, e.g., Andrew Stimmel, Note, Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code, 18 Ohio St. J. Disp. Resol. 197, 197 (2002) (observing that legal attacks on a will can result in lengthy litigation and explaining why mediation is a "particularly suitable method of dispute resolution for will contests").

77. See, e.g., Susan N. Gary, Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance, 32 Wake Forest L. Rev. 397, 413–16

Appointed guardianship also implicates socioeconomic status. Although court-appointed guardianship for those who have not executed power of attorney is determined by mental capacity, impoverished elders are nearly five times more likely to receive court-appointed guardians than those living above the poverty line.[78] Guardianships are often the result of a lack of "resources to pay for access to common alternatives to guardianship like help with drafting powers of attorney."[79] For older adults in poverty, "[a] bare cupboard or home in disrepair may be attributed to a decline in mental capacity due to age instead of other problems: poverty, physical disability, lack of access to physical and mental healthcare, and a lack of a social safety net."[80]

2. *Children.* — A second category of cases, "Children," occupies 15% of state civil court dockets.[81] These are all of the civil matters necessarily involving children. As reflected in Table 1B, we exclude juvenile delinquency matters because, while not officially categorized as "criminal," they are functionally closer to criminal cases than they are to civil ones. Socioeconomic status significantly affects court involvement among children, especially in child welfare matters: "Families involved in the child welfare system overwhelmingly draw from impoverished households."[82] For example, custody and termination of parental rights deeply implicate poverty and racial inequality. Higher rates of child abuse and neglect may emanate from the hardships of low socioeconomic status.[83] Poor families are also disproportionately referred to child welfare,[84] often inappropriately as the

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(1997) (noting that guardianship and property disputes are two primary sources of probate disputes).

78. Joseph Rosenberg, Poverty, Guardianship, and the Vulnerable Elderly, Geo. J. on Poverty L. & Pol'y 315, 339 (2009) (finding, in a small sample, that 47% of those over sixty-five with guardians fell below the poverty line, compared to 10.1% of the total population).

79. Nicole Shannon, Emily Miller & Emma Holcomb, Defending Older Clients in Guardianship Proceedings, Mich. Bar J., Dec. 2020, at 30, 32, http://www.michbar.org/file/barjournal/article/documents/pdf4article4063.pdf [https://perma.cc/TXS8-HWVW].

80. Id.

81. See infra Appendix, tbl.2. This is an estimated three million cases per year (15.45% of 19,586,267 total civil justice needs cases per year). See supra note 59.

82. Karen Zilberstein, Parenting in Families of Low Socioeconomic Status: A Review With Implications for Child Welfare Status, 54 Fam. Ct. L. Rev. 221, 222 (2016); see also Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 7–10, 74–92 (2002).

83. Mary Russell, Barbara Harris & Annemarie Gockel, Parenting in Poverty: Perspectives of High-Risk Parents, 14 J. Child. & Poverty 83, 83–85 (2008); Zilberstein, supra note 82, at 222 (citing Leroy H. Pelton, The Continuing Role of Material Factors in Child Maltreatment and Placement, 41 Child Abuse & Neglect 30, 30–31 (2015)).

84. Colleen E. Janczewski, The Influence of Differential Response on Decision-Making in Child Protective Service Agencies, 39 Child Abuse & Neglect 50, 51–52 (2015); Pelton, supra note 83, at 35–36; Jacqueline Stokes & Glen Schmidt, Race, Poverty and Child Protection Decision Making, 41 Brit. J. Soc. Work 1105, 1107 (2011).

result of racial and class bias.[85] Moreover, the "physical, emotional, behavioral, cognitive, and environmental problems" experienced by poor children can "result in delinquent behavior or status offending,"[86] especially in truancy matters where poverty leads to absence or misbehavior at school.[87] Poor parents also "may turn to the court for help they could not otherwise afford."[88] Together, these dynamics of racism and poverty land children and their families in court.

The "Children" category captures cases that are theoretically distinct: those that involve two private parties and those that involve the state. The government is directly involved in more than half of the "Children" cases in the following ways. First, child support matters where the custodial parent receives government benefits and thus support payments go to the government (these are approximately 40% of "Children" cases).[89] Second,

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85. For example, bias may arise in custody disputes, divorce proceedings, or visitation when reporting abuse or assessing parental behavior. See Alice M. Hines, Kathy Lemon, Paige Wyatt & Joan Merdinger, Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System: A Review and Emerging Themes, 26 Child. & Youth Serv. Rev. 507, 521–24 (2004) ("Differential treatment based on ethnicity and/or [socioeconomic status], is clearly a factor that may likely contribute to the disproportionate representation of children of color in the [child welfare system]."); Pelton, supra note 83, at 34 (finding bias where child welfare workers report abuse on the basis of dirty houses or other indicia of low income, not the parenting itself).

86. Katherine Hunt Federle, Child Welfare and the Juvenile Court, 60 Ohio St. L.J. 1225, 1237 (1999). Status offenses are acts that are not criminal and only subject to penalty because of the individual's age. This includes things like violating curfew, being repeatedly absent from school, or being present in spaces in ways that have been labeled "loitering." See David J. Steinhart, Status Offenses, 6 Future Child. 86, 86 (1996).

87. See Steinhart, supra note 86, at 94.

88. Federle, supra note 86, at 1244.

89. See Jacquelyn L. Boggess, Ctr. for Fam. Pol'y & Prac., Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems 9 (2017), https://cffpp.org/wp-content/uploads/CFFPPpaper_BOGGESS_forscreen.pdf [https://perma.cc/Z2X4-FK98] (highlighting the problems inherent to the U.S. child support system due to racial inequity and disparities in poverty and unemployment); Tonya L. Brito, Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families, 15 J. Gender Race & Just. 617, 625 (2012) (describing the distribution scheme for child support established by the 1984 amendments to the Child Support Act); Tonya L. Brito, The Child Support Debt Bubble, 9 U.C. Irvine L. Rev. 953, 965 (2019) ("[I]n the majority of IV-D contempt cases, the noncustodial parents' circumstances involve unemployment and below poverty wages."); Eleanor Pratt, Child Support Enforcement Can Hurt Black, Low-Income, Noncustodial Fathers and Their Kids, Urb. Inst. (June 16, 2016), https://www.urban.org/urban-wire/child-support-enforcement-can-hurt-black-low-income-noncustodial-fathers-and-their-kids [https://perma.cc/75QM-PXY3] ("Studies have estimated that low-income, noncustodial fathers are disproportionately black, and . . . black men are more likely to be poor, face labor market discrimination, and have more limited social networks to help them stay employed and able to pay their child support orders."). For a qualitative study on how fathers are affected by financial support requirements, see Elizabeth Clary, Pamela Holcomb, Robin Dion & Kathryn Edin, Off. of Plan., Rsch. & Eval., Providing Financial Support for Children: Views and Experiences of Low-Income Fathers in the PACT Evaluation 3–4 (2017), https://www.mathematica.org/publications/

dependency cases involving abuse, neglect, and termination of parental rights have the relevant child welfare agency as a party (these are collectively 16% of "Children" cases).[90] An additional collection of cases may involve the government but in a less direct capacity, such as paternity matters (14% of "Children" cases) where the government requires a finding of paternity to justify a child support case.[91] The cases that involve solely private parties include adoption, custody, paternity, visitation, and guardianship and support where the government's child welfare role is not involved.

Together, "Personal Relationships" and "Children," which collectively capture social needs of families, make up about 46% of state civil court dockets each year in our data.[92]

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providing-financial-support-for-children-views-and-experiences-of-low-income-fathers [https://perma.cc/VD4N-NMYW].

90. In re Smith, 601 N.E.2d 45, 55 (Ohio 1991) ("A termination of parental rights is the family law equivalent of the death penalty in a criminal case."); see also Michele R. Forte, Note, Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings, 28 Nova L. Rev. 193, 193–94 (2003) (calling the termination of parental rights "the 'death penalty' of juvenile law" as "[i]t constitutes a direct interference by the state into a parent's 'essential' right to conceive and raise one's child" (first quoting Appellant's Initial Brief on the Merits at 3, N.S.H. v. Fla. Dep't of Child. & Fam. Servs., 843 So. 2d 898 (Fla. 2003) (No. SC02-261), 2002 WL 32131297; then quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))). A 2020 study analyzed data from children in the U.S. foster care system since 2000. The study found that "African American children are 2.4 times more likely than White children to experience the termination of parental rights." Christopher Wildeman, Frank R. Edwards & Sara Wakefield, The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016, 25 Child Maltreatment 32, 33 (2020). Additionally, the study provides that "[t]ermination of parental rights . . . is likely far more consequential because it signals the end of attempts to reunify parents and children and . . . leads to immediate attempts to place children in adoptive homes." Id.; see also Child.'s Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 1–23 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/8M6T-YZX8] (providing an "overview on the issue of racial disproportionality and disparity in the child welfare system and the factors that contribute to the problem").

91. See Stacy Brustin, More Than a Witness: The Role of Custodial Parents in the IV-D Child Support Process, 26 Child.'s Legal Rts. J. 37, 37–39 (2006) (discussing the federal requirement that states mandate that recipients assign any right to benefits to the state who then enforces the obligation on the noncustodial parent); Paula Roberts, In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System, 18 Clearinghouse Rev. 1407, 1408 (1985) ("This cooperation [between the IV-D agent and the custodial parent] includes identifying and locating the absent parent, establishing paternity, and obtaining support or any other payments due . . . . [T]he parent may be required to go to the IV-D office for appointments . . . , appear as a witness . . . and provide information under oath."); Paternity, Legal Assistance Ctr., https://legalassistancecenter.org/get-help/paternity/ [https://perma.cc/632D-ZBZS] (last visited Feb. 10, 2022) (outlining the prerequisite of paternity and its process before the court can order child support from the father).

92. See infra Appendix, tbl.2. This is an estimated nine million cases per year (45.73% of 19,586,267 total civil justice needs cases per year). See supra note 59.

3. *Housing*. — A third category of cases, "Housing," is 15% of state civil court dockets.[93] These are landlord–tenant matters, including eviction, and mortgage foreclosure cases. This category is likely an undercount of the number of people facing eviction or foreclosure, as it does not capture those housing-debt-related cases that appear on small claims dockets.[94]

Collectively, the substance of these cases involves either people at risk of losing their homes or people trying to improve the conditions of their homes. Eviction and foreclosure as causes and consequences of economic inequality are well-documented.[95] This research demonstrates, and current policy conversations echo, how interwoven housing instability is into the fabric of social inequality in this country. Similarly, disparate involvement in housing cases reflects the country's racial inequality and corresponding starker social needs.[96] Housing conditions cases—where tenants are trying to get landlords to make repairs—are similarly concentrated among low-income tenants.[97] This, too, is both a cause and

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93. See infra Appendix, tbl.2. This is an estimated three million cases per year (14.95% of 19,586,267 total civil justice needs cases per year). See supra note 59.

94. Housing data suggest as many as five million people a year are subject to eviction. Housing Loss in the United States: Our National Rankings and Maps, New Am., https://www.newamerica.org/future-land-housing/reports/displaced-america/housing-loss-in-the-united-states-our-national-rankings-and-maps/ [https://perma.cc/KD3L-KMFR] (last visited Feb. 10, 2022) (pointing out that U.S. housing data is poor and incomplete but providing a 2014 to 2016 average rate with available data); see also National Estimates: Eviction in America, Eviction Lab (May 11, 2018), https://evictionlab.org/national-estimates/ [https://perma.cc/8HTR-42DJ] (showing data that the number, but not necessarily the rate, of evictions has increased, though their sample excludes California and New York).

95. Regarding eviction, see Monica Bell & Matthew Desmond, Housing, Poverty, and the Law, 11 Ann. Rev. L. & Soc. Sci. 15, 19 (2015) (suggesting that "[t]enant screening on the basis of previous evictions and convictions" may "foster inequality"); Matthew Desmond, Eviction and the Reproduction of Urban Poverty, 118 Am. J. Socio. 88, 91 (2012) (listing negative consequences of eviction); Matthew Desmond & Carl Gershenson, Housing and Employment Insecurity Among the Working Poor, 63 Soc. Probs. 46, 60 (2016) ("Forced removal from housing may serve as a crucial turning point in the lives of poor working families, with eviction leading to job loss, which in turn can result in durable earnings losses and nontrivial negative health outcomes."). Regarding foreclosure, see Antwan Jones, Gregory D. Squires & Cynthia Ronzio, Foreclosure Is Not an Equal Opportunity Stressor: How Inequality Fuels the Adverse Health Implications of the Nation's Financial Crisis, 37 J. Urb. Affs. 505, 519–20 (2015) (concluding that "foreclosures, health, and income inequality are intricately interrelated"); Gregory D. Squires, Inequality, Advocacy, and the Foreclosure Crisis, 8 J. Applied Soc. Sci. 85, 87 (2014) (asserting that "[c]hanges in home equity largely account for the spike in wealth inequality" in recent years); see also supra notes 1, 32, 45.

96. For empirical studies capturing stark racial disparities in housing cases, see supra note 1.

97. James Krieger & Donna L. Higgins, Housing and Health: Time Again for Public Health Action, *in* Urban Health: Readings in the Social, Built, and Physical Environments of U.S. Cities 101, 106 (H. Patricia Hynes & Russ Lopez eds., 2009); see also David E. Jacobs, Environmental Health Disparities in Housing, 101 Am. J. Pub. Health 115, 116 (2011) ("Clearly, the prevalence rates [of people living in moderately substandard housing] are higher among racial and ethnic minorities . . . .").

consequence of inequality rooted in the country's history of segregation and health inequities.[98]

4. *Small Claims (Including Debt Collection).* — A fourth category is difficult to parse: "Small Claims" cases. This is 19% of the state civil court dockets and is a mix of tort, contract, and property matters.[99] This proportion varies by state, and there is limited data disaggregating these case types.[100]

What we do know suggests that "Debt Collection" matters dominate this part of state civil courts. The limited data suggest that "Small Claims" dockets are roughly 40 to 60% "Debt Collection" matters, involving a corporate debt buyer suing a low-income individual, with some additional meaningful proportion including landlord–tenant disputes over payment of rent or return of security deposits.[101] We can extrapolate two things from the available data. First, the dearth of "Small Claims" data means the "Housing" proportion reported above does not include "Small Claims" cases and thus is likely an undercount.

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98. See Dayna Bowen Matthew, Edward Rodrigue & Richard V. Reeves, Time for Justice: Tackling Race Inequalities in Health and Housing, Brookings (Oct. 19, 2016), https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/ [https://perma.cc/BU2K-DFVB] (describing the housing disparities' negative consequences and disproportionate effect on Black families).

99. See infra Appendix, tbl.2. This is an estimated four million cases per year (18.92% of 19,586,267 total civil justice needs cases per year). See supra note 59.

100. The only (near) national report, using 2013 data, is Paula Hannaford-Agor, Ct. Stat. Project, The Landscape of Civil Litigation in State Courts: Examining Debt Collection, Landlord/Tenant and Small Claims Cases (2019), https://www.ncsc.org/__data/assets/pdf_file/0022/26671/caseload-highlights-examinint-debt-collection.pdf [https://perma.cc/W8LK-ACAJ]. In addition, there are a few state- and city-level reports. See Ricardo Lillo, Access to Justice and Small Claims Courts: Supporting Latin American Civil Reforms Through Empirical Research in Los Angeles County, California, 43 R. Ch. D. 955, 973 (2016); Bruce Zucker & Monica Her, The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System, 37 Univ. S.F. L. Rev. 334, 335 n.121 (2003) (noting that in 2000, Ventura County had a population of 742,000, making it the twelfth most populous county in California); Jennifer Clendening & Katie Martin, Pew Charitable Trs., How Philadelphia Municipal Court's Civil Division Works: Small Claims Cases Can Have a Big Impact on City Residents' Lives 1–2 (2021), https://www.pewtrusts.org/-/media/assets/2021/02/philadelphia_municipal_courts_civil_division_works.pdf [https://perma.cc/374R-WNRT]; see also Arthur Bestf, Deborah Zalesne, Kathleen Bridges & Kathryn Chenoweth, Peace, Wealth, Happiness and Small Claim Courts: A Case Study, 21 Fordham Urb. L.J. 343, 360–62 (1994); Suzanne Elwell & Christopher Carlson, Comment, The Iowa Small Claims Court: An Empirical Analysis, 75 Iowa L. Rev. 433, 489 (1990); Hynes, supra note 54, at 41–42; Mary Spector & Ann Baddour, Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts, 67 Hastings L.J. 1427, 1429–32 (2016).

101. Hynes, supra note 54, at 49 (estimating that in Virginia actions seeking the payment of money account for approximately 60% of civil filings); Mary Spector, Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257, 273 (2011) (finding that in Texas "suits on debt" accounted for 43.8% of civil cases filed in county courts statewide).

Second, we can piece together a view of "Debt Collection" matters using "Small Claims" and other case types that reveals "Debt Collection" matters are as big a part—if not bigger—of state civil court business as "Personal Relationships," "Children," and "Housing." About 5% of the overall docket (that is, more than half of "Contract" cases) are explicitly identified as "Debt Collection" matters.[102] If we combine these cases and the very rough estimates of "Small Claims" dockets, "Debt Collection" matters (excluding housing-related debt collection) are in the range of 15% of state civil court dockets.[103] If we include housing-related debt collection, this grows to about 24% of state civil court business.[104] As other research has shown, these cases are closely related to inequality.[105]

5. *The Rest of Civil Justice Needs Cases.* — The remaining approximately one-third of state civil court dockets is spread among many case types, none constituting more than 10% of civil justice needs cases. Among these cases is a fourth category of cases: "Contract" cases, making up 8% of the docket overall.[106] As discussed above, this category has meaningful variation within it for our purposes, with about half of "Contract" cases being "Debt Collection" matters.[107] An additional 8% of state civil court cases are

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102. In NCSC data, this is called "Seller/Plaintiff" contract cases. See infra Appendix, tbl.2. This is an estimated one million cases per year (5.06% of 19,586,267 total civil justice needs cases per year). See supra note 59.

103. See infra Appendix, tbl.2. This is an estimated three million cases per year (combining 50% of small claims cases with Seller/Plaintiff cases). See infra Appendix, tbl.2. We note recent scholarship with different estimates of debt collection matters. One repeated statistic is that there are eight million debt collection cases a year in the United States. See Arbel, supra note 54, at 130; Wilf-Townsend, supra note 6, at 1753. The eight million figure arises from applying proportional findings from a single state sample to national caseload data to estimate totals, resulting in a blunter estimate than ours. See Arbel, supra note 54, at 131 n.42 (applying Hynes and Spector's 40 to 60% estimate to NCSC total of fifteen million civil cases per year).

104. If we also include eviction for nonpayment of rent ("landlord tenant unlawful detainer") cases, this balloons to 23% of civil justice needs and approximately five million cases per year. Note that this estimate may not fully capture eviction matters that appear on small claims dockets, which other data suggest could add another one million cases per year. See Ashley Gromis, Princeton Univ. Eviction Lab, Eviction: Intersection of Poverty, Inequality, and Housing 5 (2019), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf [https://perma.cc/T3N7-BL9R]; see also Jenifer Warren, Pew Charitable Trs., How Debt Collectors Are Transforming the Business of State Courts 6, 8 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [https://perma.cc/HLJ2-4JMP].

105. See Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, The Debt Collection Pandemic, 11 Calif. L. Rev. Online 222, 225–27 (2020) (noting that "income inequality and depressed wages have exacerbated people's inability to accumulate any meaningful savings" such that they have turned to consumer credit for "unexpected emergency expense[s]"); Spector, supra note 101, at 273–74 (noting reports from Dallas County and other jurisdictions finding that "civil litigation [comprising debt collection claims] is concentrated in cities and counties with significant minority populations, lower median income, and lower home ownership").

106. See infra Appendix, tbl.2.

107. See infra Appendix, tbl.2.

miscellaneous appeals from administrative and limited jurisdiction courts.[108] These are not appeals of otherwise counted cases but rather cases that are appealed from these miscellaneous subsidiary courts directly to the state civil trial court. A fifth category is "Tort" cases, comprising 2% of the docket and capturing the full range of intentional torts, malpractice, and other torts.[109] Two-thirds of these matters are automobile-related torts.[110] Finally, "Tax" matters (1%), remaining non-housing "Property" matters (0.5%), and "Employment" matters (0.1%) round out the dockets.[111]

These data describe trial courts. While there are also state appellate courts in each jurisdiction, state appellate courts are largely insulated from the matters we describe above. This is due to the nature of appellate proceedings: Appellate courts receive predetermined facts in a written record and have almost no interaction with litigants. It is also because the overwhelming number of state civil trial matters involve lawyerless litigants who do not appeal. As we hope to pursue in future work, this means that these matters—the individual cases but also the collective substance of these cases—never make it to the appellate courts.[112] We note that, in the same way trial courts rest on assumptions about dispute resolution, appellate courts rest on a corollary set of assumptions about institutional design that do not hold true.

6. *Quantifying Cases With Social Needs.* — Using these civil case types based on the nature of people's problems, we categorize cases as "Social Need Presented" and "Underlying Social Need" cases. In some types of cases, the social need is squarely presented in the legal system's definition of a case. For example, an eviction matter is plainly about whether a person

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108. See infra Appendix, tbl.2. This is an estimated one and a half million cases per year (8.1% of 19,586,267 total civil justice needs cases per year). See supra note 59.

109. See infra Appendix, tbl.2. This is an estimated 440,000 cases per year (2.25% of 19,586,267 total civil justice needs cases per year). See supra note 59.

110. See infra Appendix, tbl.2.

111. See infra Appendix, tbl.2. Tax is an estimated 260,000 cases per year; Property an estimated 94,000 cases per year; and Employment an estimated 18,000 per year (1.33%, 0.48%, and 0.09% of 19,586,267 total civil justice needs cases per year, respectively). See supra note 59.

112. See Carpenter et al., "New" Civil Judges, supra note 22, at 273–74 & n.103 (noting that "cases involving pro se parties are unlikely to be appealed"); Llezlie L. Green, Wage Theft in Lawless Courts, 108 Calif. L. Rev. 1303, 1336 (2019) (explaining that it is unreasonable to expect a pro se litigant in small claims court to engage successfully in the process of "crafting a compelling narrative and case theory . . . , particularly where the litigant must use a narrative process to educate the judge about various statutory legal protections"); Sabbeth, Housing Defense as the New *Gideon*, supra note 7, at 85 ("[T]enants who are represented are three, six, ten, or even nineteen times more likely than pro se tenants to prevail."); Sabbeth & Steinberg, supra note 2 (manuscript at 55–56); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, Can a Little Representation Be a Dangerous Thing?, 67 Hastings L.J. 1367, 1376 (2016) (pointing out the risks of a lack of legal representation of less resourced litigants in the form of "second-class legal assistance" and lacking "the benefit of law reform").

remains in housing. Housing is plainly a social need. An eviction matter can also be—though it is not always—about a landlord needing financial stability. This additional social need reinforces our categorization. Or a sister seeking to place a brother under compulsory mental health care is plainly seeking health (and familial) care. Thus, we can identify these cases as ones in which social needs are presented in state civil courts. For some case types, we can imagine a range of problems, some presenting social needs and some not. Thus, we categorize each subcategory of cases in Table 2 as presenting a social need, not presenting a social need, or a mix. Our categorization yields a low estimate of 31% and a high estimate of 90% of state civil court cases in our data presenting a social need.[113]

Other cases require a deeper understanding of both the substantive law and the goings-on in the courtroom to identify a social need. For example, a domestic violence protective order case as defined by the existing legal system is about two people with a relationship in conflict involving violence. There may not be an obvious social need presented in the case type but, as we discuss using qualitative data below, just below the surface we can identify social needs such as housing, health care, and childcare. In another example, a defendant in a debt collection action is on the face of the case defending against a contract claim. One can easily imagine, however, a case where the facts reveal that the debt in question is a high-interest, high-fee payday loan, which the defendant needed to pay her family's expenses between paychecks.[114] In this type of case, we then see social needs such as childcare, housing support, or better wages related to the defendant's contractual liability. We label these "Underlying Social Need" cases.

Adding the second layer of categorization to the first, the proportion of state civil cases that include social needs ranges from 46% to 95% of the cases. Thus, even with our most conservative estimates, 46% of state civil dockets (or roughly ten million cases per year) present social needs to state civil courts. This is the equivalent of thirty-five times the average civil docket of the federal courts.[115]

C. *Social Needs in the Courtroom*

While caseload data illuminate the volume of social needs that arise in state civil courts, what happens inside these courts illustrates the depth of the mismatch between people's needs and courts designed for dispute

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113. See infra Appendix, tbl.2.

114. See, e.g., Aimee Picchi, Payday Loans Are Landing People in Jail, CBS News (Feb. 20, 2020), https://www.cbsnews.com/news/payday-loans-dickensian-system-is-landing-borrowers-in-jail-group-says/ [https://perma.cc/TJK9-HZ7J].

115. It is worth pausing to note the comparison with federal courts. As Table 3 shows, 24% of federal court cases are tort actions, 9% are contracts, 3% are property disputes, and 64% are actions falling under federal statutes (with the bulk of statutory actions being prisoner petitions (20%) and civil rights actions (14%)).

resolution. Our own mixed-methods, multijurisdictional study of state civil courts sheds further light on how state civil courts distort litigants' social needs into narrow legal disputes requiring judicially led resolution.[116] These data capture courtroom observations of 350 hearings as well as interviews with judges and other actors in those courtrooms. These data are drawn from three jurisdictions we refer to as Centerville, Townville, and Plainville.[117] Qualitative analysis reveals that many of these disputes constitute "Social Need Presented" or "Underlying Social Need" cases.

Our study focused on protective order cases: domestic violence, stalking, and harassment. These cases have a number of characteristics that are generalizable to the broader state civil caseload. Parties are generally unrepresented, as they are across state civil courts.[118] The law in these cases is relatively static, and informal procedure abounds.[119] Though conventional academic wisdom about civil courts is that the trial is "disappearing,"[120] the opposite is true in state civil courts. The bulk of case-dispositive interactions between largely lawyerless litigants and the courts occur inside courtrooms, including in the cases in our study.[121] Finally, there is some, but uneven, assistance for parties outside the courtroom, including efforts at negotiated resolutions.[122]

Protective order law generally requires evidence of (1) an existing relationship between the parties, (2) a previous incident of violence or fear

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116. We discuss the details and methodology of this study in Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 529–34; Steinberg et al., Judges and Deregulation, supra note 9, at 1327–28.

117. "The three jurisdictions in our study vary economically, demographically, and politically. Centerville is a relatively wealthy, politically liberal, and diverse urban center with appointed judges. Townville is also urban, politically liberal, and diverse, with a very high poverty rate, a history of economic stagnation and appointed judges. Plainville is majority white, politically moderate, and sits in a fiscally and socially conservative state where social and government services of all kinds are under-funded, including the courts." Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 531.

118. Id. at 511.

119. Id. at 511 n.4, 521–24.

120. Carpenter et al., "New" Civil Judges, supra note 22, at 274; Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 Stan. L. Rev. 1255, 1255 (2005); Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 459–60 (2004).

121. Herbert M. Kritzer, The Trials and Tribulations of Counting "Trials", 63 DePaul L. Rev. 413, 430 (2013); Shanahan, Keys to the Kingdom, supra note 23, at 217 ("In state civil and administrative courts, the hearing—the in-person interaction that occurs between self-represented litigants and judges in the courtroom—is the focal point of the justice system . . . ."); Jessica K. Steinberg, Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court, 42 Law & Soc. Inquiry 1058, 1060 (2017) [hereinafter Steinberg, Informal, Inquisitorial, and Accurate] (offering evidence that the inquisitorial procedures in the Housing Conditions Court in the District of Columbia "have the potential to contribute to accurate outcomes for tenants").

122. Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 514; Carpenter et al., "New" Civil Judges, supra note 23, at 257–61, 277–78.

of violence, and (3) an ongoing fear of harm.[123] These cases are plainly built on a dispute resolution construct, yet the issues that appear in our data go far beyond this substantive law. These issues include child custody and support between parents and other family members, child welfare proceedings involving the state and one or both parents, elder care and estate concerns, housing instability, mental health care, addiction, immigration law, career licensing, criminal law matters, and reentry and probation matters. These issues were not presented in the courtroom as collateral but were intertwined in the evidence and relief sought in the course of the protective order cases. We begin in this section with how social needs are presented in the courtrooms in our data. We save courts' reactions to these needs as distinct analysis in the following section.

We saw numerous cases where an underlying issue is money to support children, including paying for housing, between parents who do not live together. For example, in one case, parents cross-filed for protective orders against each other after a long history of arguments over custody of their child and who paid particular expenses. Each party alleged physical violence by the other during arguments over money, in amounts like fifty dollars for a babysitter.[124] This is an example of our "Underlying Social Need" category where we can plainly observe that litigants have underlying social needs that are broader and deeper than the bounds of the legally constructed dispute. Here, those needs might include accessible and affordable childcare, higher wages, or employment hours compatible with parenting.

There were a range of cases about caring for family members beyond minor children, including elder care, and the associated financial burdens. For example, one case involved a petitioner grandmother, her nonparty granddaughter, and a respondent grandson. The grandson had used the grandmother's funds to pay for repairs to her home, made her stay at his home so he could care for her, and reimbursed himself with the grandmother's funds to pay for costs of housing her.[125] The granddaughter actively participated in the hearing in support of her grandmother. Again, the legal system constructed these parties' problems as about a dispute between a grandmother and her grandson. Yet if we look beyond the rigid construct of the legal dispute, we see social needs, including accessible and affordable elder care and affordable housing.

The data also show cases with roommates presenting disputes over rent or disagreements about their living situation. One particularly complicated example is a case where a likely mentally ill respondent illegally sublet one of her bedrooms to the petitioner. When the petitioner learned of his invalid lease and contacted the actual landlord to protect himself, the respondent tried to lock him out of the apartment, and there was a

123. Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 535.

124. Notes of Hearing 7, Townville (Judge 4).

125. Notes of Hearing 23, Townville (Judge 2).

physical altercation. The respondent was arrested and remained incarcerated (due to inability to post bail) at the time of the civil court hearing on the protective order.[126] This case, while consistent with the design of protective order cases due to the violent conflict between the parties, nonetheless also reveals underlying social needs. Here, those social needs may involve adequate mental health care, affordable housing, and sufficient income or social supports (including for the respondent to be released from pretrial detention).

Across the cities we observed, addiction and mental health needs were pervasive. For example, in one case a petitioner was recovering from cancer surgery and her respondent brother, who was addicted to drugs, broke into her home and assaulted her while looking to steal her pain medication. After the sister reported the robbery and assault to the police, the brother called the sister's doctor's office, supportive housing, and disability providers trying to obtain another prescription, jeopardizing her benefits and services.[127] In another case, a grandmother sought a protective order against her daughter who had been released from a mental health facility and was plainly agitated in court. The grandmother's core problem was that her daughter kept coming to her house and behaving violently, which jeopardized the grandmother's visitation rights with her grandchildren.[128] In each of these examples the parties had conflicts involving violence, and the need for sufficient addiction and mental health services are also immediately apparent.

Though we do not have this depth of data across all case types in state civil courts, other research illustrates underlying social needs in other types of cases. For example, Professor Matthew Desmond's research gives us the story of Arleen and how a confluence of social needs brought her to eviction court.[129] As housing costs increased and welfare payments and public housing assistance remained stagnant, Arleen had to devote the vast majority of her welfare check to rent, leaving her with little money to provide for her family or cope with emergent financial needs. Toward the end of 2008, Arleen was at her fourth apartment since the beginning of the year. After a welfare sanction for a missed appointment and expenses for a friend's funeral, she was $870 behind on rent, and her landlord filed to evict her. In another example, from a report about Philadelphia's debt collection docket, a 50-year-old Black woman with an annual income of $19,200 was the defendant in two collection actions for credit card debt

126. Notes of Hearing 16, Townville (Judge 2).

127. Notes of Hearing 12, Townville (Judge 2).

128. Notes of Hearing 21, Plainville (Judge 1).

129. Matthew Desmond, Evicted: Poverty and Profit in the American City 63, 94 (2016).

accrued when she was hospitalized and lost her job, resulting in damaged credit and a lien on her home.[130]

Taken together, the quantitative and qualitative data paint a picture of state civil courts largely occupied with social needs and their consequences rather than resolving private disputes. These social needs capture the range of dimensions of inequality: financial means, housing, health care, and care for children and family members. Further, when we look at particular subcategories of cases, we see how these needs for social provision become intertwined with other dynamics of American law and society.

For example, the relationship between social provision and policing of Black families appears in state civil court dockets. As others have theorized, the conflation of poverty with neglect is intertwined with racism—especially perceptions of Black mothers—and drives state intervention through the child welfare, foster care, and juvenile detention systems.[131] Even more pointedly, these structures explicitly wield state power—through state civil court proceedings—to control access to social provision. As Professor Dorothy Roberts aptly describes, in the child welfare system "[p]arents must often relinquish custody of their children to the state in exchange for the services and benefits their families need."[132] The breadth of mass incarceration exacerbates these

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130. Reinvestment Fund, Debt Collection in Philadelphia 18 (2021), https://www.reinvestment.com/wp-content/uploads/2021/03/ReinvestmentFund_2021_PHL-Debt-Collection.pdf [https://perma.cc/G8T6-EYNJ].

131. Jessica Horan-Block & Elizabeth Tuttle Newman, Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation, 22 CUNY L. Rev. 382, 396 (2019) ("[P]oor parents of color who bring their young babies and children to Bronx hospitals with certain injuries are often met with interrogation rather than consolation and compassion. The[se] case anecdotes . . . describe parents repeatedly being charged with abuse based exclusively on injuries that litigation reveals are plausibly accidental."); Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1493 (2012) [hereinafter Roberts, Systemic Punishment] ("Because they perceive black single mothers as incapable of providing adequate supervision of their children, officials believe they are justified in placing these children under state control . . . . [S]tate officials apply the myth of black maternal irresponsibility to justify placing African American children in both juvenile detention and foster care."); Dorothy E. Roberts, The Racial Geography of Child Welfare: Toward a New Research Paradigm, 87 Child Welfare 125, 126 (2008) (presenting a case study on the effects of the high involvement of child welfare agencies in Black communities); Jane M. Spinak, Reflections on a Case (of Motherhood), 95 Colum. L. Rev. 1990, 2008 (1995) (arguing that conceptions of motherhood are informed by racist policies and stereotypes that serve to demean Black women and cast them as unfit mothers); Christina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 Nw. J.L. & Soc. Pol'y 303, 315 (2006) (arguing that Black children are especially susceptible to state intrusion).

132. Dorothy E. Roberts, Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement, 34 U.C. Davis L. Rev. 1005, 1014 (2001) [hereinafter Roberts, Criminal Justice and Black Families]; see also Wendy Bach, Prosecuting Poverty, Criminalizing Care, 60 Wm. & Mary L. Rev. 809, 814 (2019) (describing a Tennessee statute

dynamics.[133] In this part of state civil courts' work, the presence of government leads to regulation, punishment, and violence rather than to litigants' social needs being met.

In some of these cases dispute resolution is well-matched to the needs of powerful parties. In such cases, state civil courts directly serve the interests of wealthy parties in extracting or maintaining wealth, in conflict with the litigant's need for social provision. For example, state civil courts are an effective mechanism for debt collection companies to maximize the value of their investments.[134] Historical research suggests this is an intentional feature of these courts' design.[135]

Of course, there are social needs that we are not seeing in our data or in courtrooms more generally because people do not conceptualize their problems as legal problems and do not engage courts with those problems they do see as legal.[136] Professor Sandefur's work further questions whether this small proportion of engagement with courts is problematic or whether it reflects that problems we define as legal are better solved outside of court.[137] Ultimately, this means that, despite state civil courts drinking from a fire hose of social needs, the apparent needs are only a subset of those present in society.

II. HOW COURTS RESPOND TO THE INSTITUTIONAL MISMATCH

"It weighed on me, but I kept thinking, 'you're a judge. That's not your part.'"[138]

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that created a crime "not to punish or to exact retribution but to provide care to the defendants prosecuted for the offense"). As we discuss below, in our data, Centerville has tied access to housing and other resources to the presence of a protective order. See infra note 176.

133. See Roberts, Criminal Justice and Black Families supra note 132, at 1006 ("Because most prison inmates are parents, incarceration breaks up families by depriving children of their parents' emotional and financial support. Juvenile detention and imprisonment also splinter families because they remove children from their homes, transferring custody from the parents to the state.").

134. Wilf-Townsend, supra note 6, at 1712–13. Courts are not the only branch of government susceptible to being well-suited to pursuing corporate financial interests. See, e.g., Liz Day, The TurboTax Trap: How the Maker of TurboTax Fought Free, Simple Tax Filing (Mar. 26, 2013), https://www.propublica.org/article/how-the-maker-of-turbotax-fought-free-simple-tax-filing [https://perma.cc/399J-PGVM] (describing how Intuit, the maker of TurboTax, has spent millions lobbying against free, simple, government-filed tax returns).

135. See Kellen Funk, Chapter 5: The Swearer's Prayer: Oathtaking and Witness Testimony 17 (May 12, 2020) (unpublished manuscript), https://ssrn.com/abstract=3599032 [https://perma.cc/HJ8S-CYW9] (discussing New York State's Field Code).

136. See supra note 20 and accompanying text.

137. See supra note 20 and accompanying text.

138. Interview with Judge 1, Plainville.

Our interview data reflect that the judges, advocates, and other actors involved in these dockets are well aware of litigants' social needs and that court's dispute resolution design does not fit these needs. One judge put it plainly: "So, we'd find a lot of people in [protective order court] really needed to be in [landlord–tenant], or sometimes, bills, financial planning, is what they need, not family court."[139] An advocate drew the contrast between the assumptions about these cases and the reality:

> [Y]ou would think that literally every case in [protective order] court was a man beating a woman with a bat, but that couldn't be further from the truth . . . . [T]hat's not at all what we see in [protective order] court. We've represented a sister versus her brother. We've represented an elderly parent, a grandmother versus a younger nephew who was trying to get the upper hand in [a] probate case. We've represented a tenant where the petitioner was an abusive, mentally ill landlord."[140]

When state civil courts are faced with social needs, they must respond in some way. Our data show that these responses fall into four categories. We discuss these categories to frame a deeper theoretical understanding of the role of state civil courts and acknowledge that these categories raise new questions. For example, how do these responses appear across jurisdictions and case types? Why might one court avoid social needs while another attempts to meet them? What disposes a court system to build new institutions in the face of these needs? We hope future work will address these questions.[141]

In the first type of response, courts avoid social needs presented by the litigant. They either do this altogether or by shaping the needs to fit the design of the legal system. This type of court response reveals the potential for state civil courts to be violent actors in the face of the mismatch between social need and dispute resolution. In the second category, courts try to meet litigants' social needs at the individual actor level. What this means in the courtroom is not that courts are acting as agents of social provision in a social welfare state, but rather that courts address the social needs of litigants just enough to resolve the dispute as wedged into the institutional design—and hopefully to keep litigants from returning to court again. The third category is where courts develop informal

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139. Interview with Judge 1, Centerville.

140. Interview with Court Actor 1, Centerville.

141. One particular area for further investigation is when statutes creating courts or specific areas of jurisdiction acknowledge or allow for engagement with broader litigant needs. For instance, a New York statute provides:

> This act defines the conditions on which the family court may intervene in the life of a child, parent and spouse. Once these conditions are satisfied, the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it. The judges of the court are thus given a wide discretion and grave responsibilities.

N.Y. Fam. Ct. Act § 141 (McKinney 2022).

procedures to address social needs at an institutional level. A final category of court response is where courts develop new institutions to meet social needs.

A. *Avoid Social Needs*

When courts avoid the social needs that arise in the courtroom, despite a litigant's social need that is plainly within the frame of the case or revealed by the underlying facts, the court hews to its design as a site of dispute resolution. At a minimum, this means the litigant's need is ignored and not met. Sometimes the litigant's need is distorted by dispute resolution so that the outcome of the case is that the litigant needs more or different social provision. In other cases, as we discuss below, the court's avoidance leads to the court imposing a violent outcome, such as the loss of a home or a child.

In the protective order discussed above, brought by a grandmother against her mentally ill daughter who was jeopardizing her visitation, the grandmother told the judge that what she wanted was to get her daughter into court-ordered treatment. The judge cut off her testimony, entered a protective order, and ended the hearing.[142] In doing so, the judge was avoiding the social need articulated by the grandmother and hewing to the legal definition of the dispute as defined by domestic violence law. In another case, a mother sought a protective order against a daughter who kept trying to break into her home to get food. The testimony revealed that the daughter was mentally ill and addicted to drugs. In the mother's words, "Her mind is gone. She thinks she lived there. She can't do it. She hasn't lived there since February." The judge entered a protective order. In response, the mother asked whether the daughter could receive treatment. The judge told her, "You can file with [another court] to admit her to treatment, but it's going to be expensive. The police can bring her to crisis, maybe they can care for her there. That's the key word, crisis treatment." The judge then ended the hearing with the protective order in place.[143] Despite explicitly understanding the social need in each of these cases (here, mental health or addiction care), the court proceeded with the matter as one of dispute resolution.

Courts do not just avoid the need for social provision; they also compound it by entering protective orders. Each of these petitioners presented a respondent's social need, requested some kind of social provision, but each court avoided those needs and then added a layer of risk of even more punitive consequences for the respondents' behavior.[144]

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142. See Notes of Hearing 21, Plainville (Judge 1); supra note 128 and accompanying text.

143. Notes of Hearing 8, Townville (Judge 4).

144. There are also examples of cases where judges avoid the social need and decline to enter protective orders. See Notes of Hearing 18, Centerville (Judge 1) (recounting proceedings in which a petitioner sought, but was ultimately denied, a protective order against

In each of these cases, by avoiding the underlying need of health care and imposing the legal solution of a protective order, the court facilitates violent state action—here, the respective daughters are now subject to arrest and incarceration if they violate the protective orders.[145]

In another example from our data, the plaintiff and respondent were two women who reached an agreement to resolve the matter through a mandatory prehearing mediation program.[146] They appeared before the judge to enter the corresponding order. The hearing is four minutes long:

Judge:	I see you've come to agreement which is good. But it's important that you stick with the agreement. The court finds that it has jurisdiction, and that Respondent agrees without admitting allegations to entry of this order. For next year, don't harass, assault, threaten, or stalk. Also, Respondent shall follow all treatment recommendations from her mental health provider, including medications. That is a critical component.
Judge:	(*To Respondent*) Is that your signature? Did you sign it voluntarily?
Respondent:	Yes (speaks angrily).
Judge:	One last thing. I have no reason to believe you have a gun but I must read this. [Judge reads standard prohibition regarding possession of firearm].
Respondent:	(*To Petitioner, while the judge is speaking*): See what you do?
Judge:	(*The Judge ignores the Respondent.*) Any questions?
Respondent:	No.
Judge:	I hope this order will help and that you'll continue to see your doctor and take your meds.

his nephew who has uncontrolled schizophrenia and had violent outbursts while living with him).

145. See generally Nat'l Ctr. on Prot. Ords. & Full Faith & Credit, Protection Order Violations Matrix (2015), https://www.bwjp.org/assets/documents/pdfs/ncpoffc-protection-order-violations-matrix.pdf [https://perma.cc/5X93-BYTG] (summarizing consequences for violations of protection orders in all fifty states); Plain-Language Legal Information for Victims of Abuse, WomensLaw.org, https://www.womenslaw.org [https://perma.cc/4JVE-YY97] (last visited Mar. 3, 2022) (including an interactive legal information tool summarizing statutes in each state).

146. Notes of Hearing 35, Centerville (Judge 1). Because the case is filtered through the mediation program, we do not know how the parties presented their needs or case to the court.

In this jurisdiction, there is a required meeting with a mediator before a hearing—a step generally perceived as an innovation that mitigates the rigidity of the adversarial system.[147] Yet the litigants' problems remained social needs, and the court resolved them as a dispute. Even in a four-minute, perfunctory hearing to enter the agreed-upon resolution, the mismatch between the social needs and the court's design is stark. The judge's closing comment acknowledged the mismatch and the court's choice to hew to its dispute resolution design, even with an "alternative" resolution procedure in place.

Our study site is not the exclusive context for courts avoiding social needs. Eviction courts are classic examples. The most straightforward version of this is when a tenant cannot pay rent because of insufficient income, and the housing court evicts the tenant.[148] Other eviction causes of action are for tenant behavior such as disruptive noise or fighting. These cases reveal social needs including mental health care and caregiving support in housing court. Where a court does not outright evict a tenant, the case is often resolved by agreement where the tenant promises to comply with certain additional financial or behavioral conditions. These outcomes allow courts to avoid the social needs presented and, as Professor Nicole Summers shows, create an additional mechanism of control over tenants, often leading to more "swift and certain" eviction.[149] These cases distort litigants' social needs, not by meeting and eliminating them but by compounding the original needs by making the tenant more vulnerable to the violence of eviction.

The examples above are ones where the litigants are private parties. This type of distortion also occurs where the government is a party to a case. For example, in the child welfare context, a mother may be defending an action brought by the government for abuse or neglect because of the poor living conditions of the family. In this circumstance, the mother needs better housing (or other social provision that would allow her to afford better housing) yet the dispute brought to court by the government is not to comprehensively address the underlying social

147. See Menkel-Meadow, supra note 24, at 36 (describing mediation as an "[i]ntermediate space[] . . . without formal or complexly facilitated rules"); Jane Murphy, Rethinking the Role of Courts in Resolving Family Conflicts, 21 Cardozo J. Conflict Resol. 625, 634–35 (2020) (describing the role of mediation in family law generally).

148. Sabbeth, Housing Defense as the New *Gideon*, supra note 7, at 64–66 (collecting sources regarding underlying economic inequality of housing courts).

149. Nicole Summers, Civil Probation, 75 Stan. L. Rev. (forthcoming 2023) (manuscript at 7), https://ssrn.com/abstract=3897493 [https://perma.cc/7NAA-Z6QH]. Professor Summers has shown how the outcomes of these cases are often settlements crafted to control tenant behavior rather than resolution of disputes regarding the housing agreement. Id.; see also Carolyn Reinach Wolf & Jamie A. Rosen, Alternatives to Eviction: Legal Remedies When Faced With a Mentally Ill Tenant, 48 N.Y. Real Prop. L.J. 14, 15–17 (2020) (suggesting that rather than evicting tenants who struggle with mental health—which can present problems for both tenants and landlords—landlords should pursue alternative options like guardianship, assisted outpatient treatment, or temporary hospitalization and care).

need.[150] In cases where the government has an active role, the mismatch between dispute resolution and social needs is even more complex because it is not just that government services are inadequate, but rather that the government's role compounds the absence of social provision with a violent remedy, here the loss of a child.

B. *Attempt to Meet Social Needs*

A second category of court response to litigants' social needs is to try to meet those needs. For analytic clarity, this category captures when actors connect litigants with resources but not when actors create new institutional structures to provide those resources.

In our data, these attempts to meet social needs vary. One way judges try to meet social needs is to not resolve the matter in their own court but to instead send a litigant to a court the judge perceives as better able to meet the litigant's need. For example, judges can dismiss or stay the protective order case and tell litigants to go to another court to address their needs, including telling litigants to go to family court for custody matters,[151] to family court to force the co-parent into alcohol treatment,[152] or to landlord–tenant court.[153] An example from our data is a case where the litigants were roommates who got into a fistfight. The roommates had been placed together by a social services program and each had underlying mental health diagnoses and a history of housing instability.[154] During the hearing, the judge recognized these needs for social provision, stayed the case, and referred each party to mental health treatment resources and a housing counseling center to identify potential alternative housing. Setting aside the procedural choice to stay the case, which we

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150. See Maren K. Dale, Addressing the Underlying Issue of Poverty in Child-Neglect Cases, A.B.A. (Apr. 10, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/ [https://perma.cc/F9G2-F4QA] (citing a Tennessee case in which the state brought an action to terminate the parental rights of a poor family with a disabled mother and low-IQ father, with a judge dissenting on the grounds that while the state should have custody, the parents' rights should not have been terminated); see also Marta Beresin, Reporting Homeless Parents for Child Neglect: A Case Study From Our Nation's Capital, 18 UDC L. Rev. 14, 16 (2015) ("[T]he D.C. Department of Human Services and Child and Family Services Agency's policy of reporting homeless families for neglect rather than assisting them with shelter or housing is both financially irresponsible and counter to the fundamental goals of the child welfare system.").

151. Notes of Hearing 7, Townville (Judge 4) (denying the protective order); Notes of Hearing 14, Townville (Judge 2) (denying the protective order and telling litigants "family issues need to be resolved on the family division docket").

152. Notes of Hearing 35, Plainville (Judge 1) (staying the protective order proceeding so petitioner can file in family court).

153. Notes of Hearing 5, Townville (Judge 2) ("Let me tell you something. I'm not involved with the landlord-tenant dispute. Let her come get her stuff. Don't have contact. I'm not getting involved in it. I'm dissolving both [protective orders].").

154. Id. at 24.

discuss below in the context of informal procedure, this is a classic example of a state civil court actor trying to meet a social need. The difference in these examples from those where courts avoid social needs is that the judge is choosing not to impose the dispute resolution design of protective order law on the social needs but rather to only engage the underlying need.

Another variation is when judges tell litigants to try to access social services or benefits outside the courts. For example, a judge denied a protective order for a mother who was living in a shelter after leaving the home where the father lived, telling her to file for Temporary Assistance for Needy Families and welfare benefits so that the government would then seek child support from the father.[155] This is particularly true in jurisdictions like Centerville, where funding ties access to housing, services, and victim compensation to a party having a protective order.[156] In this circumstance, judges can attempt to meet social needs by granting a protective order and informing litigants of the resources they can then access. Finally, sometimes courts will directly order social provision. For example, a judge entered a protective order for a sister against her brother who was addicted to drugs and ordered the brother to complete a drug treatment program.[157] In these instances of courts attempting to meet social needs, they introduced an element of state control that was not previously present. While the brother in this instance then had access to drug treatment, he also was subject to punishment—including financial penalty and incarceration—if he failed to comply with the order. When courts try to meet social needs, whether inside or outside courtrooms, they can introduce an element of state control that was not previously present in a way that is similar to critiques of the state as a party in civil matters.[158]

C. *Create Law or Procedure*

A third response to the mismatch between social needs and dispute resolution design is for individual actors to create informal law or procedure to meet social needs. This is a diffuse phenomenon and captures behavior that ranges from a court clerk's behavior in an individual case to informal practices shared among judges in the same court.[159] What distinguishes this phenomenon in state civil courts from

155. Notes of Hearing 9, Townville (Judge 4).

156. Interview with Court Actor 3, Centerville.

157. Notes of Hearing 12, Townville (Judge 2).

158. See supra notes 131–133.

159. One of us has written about this "ad hoc judging" as a judicial coping mechanism for resolving disputes in lawyerless courts. Steinberg, Adversary Breakdown, supra note 8, at 898–99; see also Pamela K. Bookman & David L. Noll, Ad Hoc Procedure, 92 N.Y.U. L. Rev. 767, 774 (2017) ("Ad hoc procedure overcomes problems that cannot be solved using the existing procedural structures, and may be necessary to ensure that the civil justice system is able to provide the ordinary desiderata of civil litigation in cases that defy customary judicial management.").

traditional theories of law development is that this phenomenon is unseen on a systemic level. This is in part because of the limited development of written law in lawyerless courts.[160] For the purposes of this analysis, we are interested in the subset of this informal law or procedure that shifts courts' institutional goal from dispute resolution to social provision.

Drawing on our data, one way courts do this is by shaping law to meet litigant needs within the confines of dispute resolution. For example, a protective order matter was brought by an uncle against a nephew with newly diagnosed schizophrenia who had been violent with the uncle. After a hearing and evidentiary findings that the petitioner had met his burden, the judge sua sponte added petitioner's husband as a party to the protective order. The husband had not sought such an order, had not presented evidence in support of one, and the law regarding who could seek such an order (based on the nature of the parties' relationship, past incidents between them, and fear of future harm) had not been engaged at all. Yet the judge decided that the respondent's mental illness was such that both the uncle and his husband should be protected and implicitly created law to provide for that.[161]

Judges also develop new remedies outside the written law to meet litigant needs or disregard written law to the same end. For example, in one case the judge declared, without any request or question from the petitioner, "I'll waive monetary relief because you don't want contact," yet there is no definition of these two remedies that makes them mutually exclusive.[162] In another case with cross-petitions by co-parents, the judge asked the clerk in open court, "I want them to go to a custody parenting seminar—can I do that if it's a dismissal? Can I order that onto the Family Division docket?" The clerk got on the phone, called someone else to ask the same question, then told the judge that "they will put it in the system." The judge then dismissed the case and said "there's an order to go to the custody parenting seminar" and told the parties to go to the custody and support office in the courthouse.[163] This example is distinct from a pure referral to another court because this judge created jurisdictional law allowing a remedy where, despite dismissing the case on one docket, the judge entered an order on a different case between the parties on another judge's docket.

In another matter involving a dispute between a grandmother and a grandson over the costs of her care (which the grandson had taken from the grandmother's funds), the judge articulated a distinction between

160. Green, supra note 112, at 1307 (noting that much of the law actually applied in small claims court is informal and diverges from the written statutes, and thus arguing for the injection of legal standards); Sabbeth, Market-Based Law Development, supra note 11 (discussing the disproportionately limited development of law and precedent in "lower status courts").

161. Notes of Hearing 18, Centerville (Judge 1).

162. Notes of Hearing 12, Townville (Judge 2).

163. Id. at 26.

what he "can" do and what he "can't" do. He "can" ask the grandson to return all the money he took except for the already paid for expenses, but he "can't" consider what the expenses were and what should be returned.[164] There is no substantive law, evidentiary rule, or procedure that aligns with this articulation by the judge; the judge simply created a new legal distinction. At the end of the same hearing, after the judge decided not to issue a protective order, the grandmother said she didn't want the grandson near her, to which the judge responded, "[H]e's on notice, you can call the cops." But, in the absence of a protective order, there is no legal remedy that flows from calling the police. Though our data do not capture any subsequent interactions with the police, one wonders whether the grandmother ever tried to do this and whether the police in fact acted consistent with the remedy suggested by the judge. Regardless, this is also an example of courts as violent actors, where the judge's articulated remedy introduced the potential for police intervention and the grandson's arrest, even in the absence of a protective order, if the grandson went to the grandmother's house.

Judges also explicitly create new procedure. As Professors Pamela Bookman and David Noll have theorized, in contrast to traditional procedure developed in advance of disputes by legislative action, ad hoc procedure is developed in the midst of a matter in controversy to achieve specific outcomes.[165] Our data are replete with examples of this behavior, by judges but also occasionally by other actors.[166] In the example of roommates with mental health and housing needs discussed above, the judge decided to stay the case for ninety days to allow the litigants to access services.[167] There is no law or procedure in this jurisdiction about a continuance to seek social services, nor did the parties request a stay. Nonetheless, the judge recognized that the litigants were less in need of dispute resolution by the court and more in need of services outside the court and improvised a procedure to accommodate their needs.

In another example, a defendant had not been served with notice of the protective order matter. In this jurisdiction, petitioners can ask the police department to serve, and this petitioner had done so, but the police had not accomplished service. As a result, even though the petitioner appeared for her hearing, the judge could not proceed. Visibly frustrated by the ongoing delays, the judge asked if the petitioner knew how to contact the defendant and the petitioner said she had the defendant's phone number. In open court, and without any written procedure that allows such an approach to service, the judge used her speakerphone to dial the defendant, who picked up the phone:

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164. Id. at 23.

165. Bookman & Noll, supra note 159, at 767–68.

166. Steinberg et al., Judges and Deregulation, supra note 9, at 1316.

167. Notes of Hearing 24, Townville (Judge 2).

Judge:	This is Judge [Two], we're on the record in [Townville] court. Are you aware of the restraining order?
Defendant:	Yes.
Judge:	Are you aware you need to be in court?
Defendant:	I thought it was tomorrow . . . .
Judge:	All I want to know is will you be in court?
Defendant:	Yes-
Judge:	At 8:30 at [Townville] court.
Defendant:	Yes, I will be there.
Judge:	We got no letters, nothing, none of it means anything. Be here at 8:30. You're served.

Then the judge hung up the phone.[168] In addition to the sheer human drama of this judge-created procedure, this example is remarkable because this jurisdiction's law does not allow for service by phone.

Our data also reveal ad hoc procedure created by a clerk or by the judge's reliance on a clerk's advice, often in response to questions about how to meet social needs. One variation on this is when clerks give instructions to litigants off the record. For example, in Townville, the clerks were trained specifically in protective order procedure in a way the judges were not. They were also physically seated between the door to the courtroom and the bench and litigant tables. As a matter of course, we observed litigants approach clerks to ask questions and the clerks tell litigants to adjust what they had written on a form or to go to a different location for mediation or to access a service. On the record across the jurisdictions in our study, judges would ask clerks what a procedural rule was, and the clerks' responses were not always in line with the law.[169] A related phenomenon appears in judges' reliance on nonlawyer advocates in court adjacent programs, which we discuss in a separate paper.[170] For example, a judge might interrupt a formal court hearing to "ask [an advocate] . . . to call the [pro se] person and maybe have them come in and amend something."[171]

Another example in our data is in protective order cases with related housing issues. Here, protective order judges in our data dispose of the landlord–tenant matter without any law or procedure providing that a protective order controls the housing question. In our data, this

168. Id. at 13.

169. See id. at 16 (waiving a civil penalty on a clerk's initiative and asking if there is anything else the judge needs to do); Notes of Hearing 35, Plainville (Judge 1) (relying on a clerk's statement that family court cases will be consolidated to stay a protective order). Interviews confirmed that judges relied on clerks to make procedural choices. Interview with Court Actor 3, Plainville.

170. Steinberg et al., Judges and Deregulation, supra note 9, at 1328 ("Judges are quietly collaborating with a network of nonlawyer advocates who carefully curate protective petitions, develop facts and evidence, counsel pro se petitioners, and influence the judge's performance in court and, presumably, the outcome of cases.").

171. Interview with Court Actor 2, Plainville.

sometimes happens without any inquiry as to whether there is a pending housing court matter.[172] Judges are effectively creating law that allows their decisions to preempt a housing court matter. This could be seen as avoiding a social need by avoiding the underlying housing law questions and issues by summarily disposing of the housing issue. It also could be seen as addressing a social need by meeting an underlying housing need for one party.

D. *Create New Institutions*

A final version of courts' reactions to litigants' needs is the most explicit structural change: creating new institutions that attempt to provide for social needs. This captures a range of institutional innovation, but the hallmark is that it is court actors creating new institutions outside the normal modes of dispute resolution.

Sometimes the new institution is adjacent to the courtroom. This is the case in the protective order cases that are the subject of our study, where domestic violence organizations operate as separate institutions but are integrated into procedure in formal and informal ways. For example, in Townville, before a petitioner can agree to dismiss a case, they must meet with a domestic violence advocate to review information about protective order procedure (a type of legal counseling) and domestic violence generally (a type of social work counseling). Once this happens, the petitioner appears before the judge who does a formal colloquy about whether this counseling has happened. In this jurisdiction, the advocates are judicial branch employees who themselves do not provide social services but are robustly equipped to refer petitioners to outside organizations and do so as a matter of course. They are the same parties who assist petitioners in filling out initial requests for protective orders at the start of the process.[173] Effectively, the state civil court in this jurisdiction has built a new court structure within the judicial branch: an office that provides counseling and assistance within the civil process that petitioners are required to engage with if they wish to achieve certain outcomes in the dispute resolution process.

In Plainville, the domestic violence advocates are employees of a separate nonprofit entity but have offices in the courthouse and are present in the courtroom for every protective order hearing. The judges

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172. An advocate for respondents in Centerville told us:

> If I'm a landlord and I live with my tenant, I can just get a [protective order] and get you out. It supersedes landlord-tenant law . . . . [I]t shouldn't if there's an active landlord tenant case. But unless the respondent brings it up and it is affirmatively raised, [the] judge isn't aware that there's a landlord tenant case. Judges only deal with what's before them and what they've been told by parties. So they just put the [protective order] into effect and then the tenant has to get out.

Interview with Court Actor 1, Centerville.

173. Interview with Court Actor 1, Townville.

send petitioners to them as a matter of course for assistance with their cases, and the advocates explicitly understand their role to be to connect litigants with social services.[174] Here, advocates are separate from the court, but litigants likely do not perceive that distinction. And while formal procedure does not require petitioners to engage with them, the judges' instructions are functionally a requirement.

In Centerville, the domestic violence advocates are a robust part of the judicial branch, actively provide social services, and are also legal advocates before the court on particular cases and on systemic matters.[175] This jurisdiction is the most complete exercise of institution building, as the new institution wields meaningful power in the court ecosystem. This is true in direct interactions with petitioners, where the adjacent domestic violence advocate institution effectively controls access to social services and funding for petitioners, which are conditioned on the presence of a protective order.[176] In contrast, Centerville does not offer these same resources to respondents. The presence of resources and services for petitioners has led to efforts to even this imbalance, including the formation of a respondent advocacy organization whose origin includes the recognition that respondents were losing their housing because of the de facto preemption of eviction proceedings by protective order proceedings.[177] It has also become true in terms of political power in this jurisdiction, where this newly created institution is consulted about institutional questions of the court, including legislation.[178]

In protective order cases, the proliferation of these institutions is a direct result of the Violence Against Women Act (VAWA), which provides federal funding for assistance to petitioners in these cases.[179] The institutional development that has resulted from these choices, however, is a matter of state and local control.[180] The same advocacy organizations that are part of local institution building in state civil courts are also advocating for federal funding for these institutions. This institutional

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174. Interview with Judge 1, Plainville.

175. Steinberg et al., Judges and Deregulation, supra note 9, at 1330.

176. Interview with Court Actor 3, Centerville; Follow-up Telephone Interview with Court Actor 3, Centerville.

177. Interview with Court Actor 1, Centerville.

178. Id.

179. See OVW Grants and Programs, DOJ, https://www.justice.gov/ovw/grant-programs (listing nineteen grant programs funded by VAWA) [https://perma.cc/P3PK-HLS7] (last updated Sept. 8, 2021).

180. See Office on Violence Against Women (OVW): About the Office, DOJ, https://www.justice.gov/ovw/about-office [https://perma.cc/EGG9-NPG8] (last updated Mar. 16, 2022) ("[VAWA] [f]unding is awarded to local, state and tribal governments, courts, non-profit organizations, [and] community-based organizations . . . to develop effective responses to violence against women through activities that include direct services, . . . court improvement, and training for law enforcement and courts.").

development is a line of research unto itself.[181] For purposes of this discussion, each of these examples is one in which the social needs presented in state civil court spurred the development of new institutions, sited in the court to differing degrees, to meet the needs that courts' dispute resolution design fails to address.

We can see this phenomenon in other types of cases. For example, in Philadelphia, a local mortgage foreclosure diversion program began in 2008 (building on work begun in 2004). This program was spearheaded by court leadership and administered by a combination of judges, clerks, pro bono attorneys (acting as both advocates for homeowners and as mediators), financial counselors, and legal services providers. It required a prehearing conference between homeowners and lenders that was supplemented by court and legal assistance at first and ultimately by access to state and federal subsidies.[182] One study of this program includes an example that identifies the homeowners' underlying social needs beyond housing. In this case, the homeowner refinanced her mortgage to "settle credit card debts while taking care of a disabled mom, a niece, and a nephew."[183] This institutional development is the predecessor to the current eviction diversion program in Philadelphia (and similar ones around the country).[184]

This institution building also captures what have been dubbed "civil problem-solving courts." As one of us has discussed in depth, "outside of family law matters, the problem-solving model has barely cracked the civil sphere."[185] Problem-solving courts originated in the criminal justice

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181. For example, is the VAWA example unique or indicative of the history and potential for the relationship between federal funding and state civil court innovation? Do the court-based actors responsible for these institutions see themselves as expanding courts? As bringing social services into courts? As offloading social needs to an institution that is extrajudicial? What is the historical and political perspective on the evolution of these institutions?

182. The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report of Findings 3 (2011), https://www.reinvestment.com/wp-content/uploads/2015/12/Foreclosure_Diversion_Initial_Report-Report_2011.pdf [https://perma.cc/L8C4-MTRN].

183. Id. at 15.

184. See Reinvestment Fund, Words From the Field: Practitioner Perspectives on Eviction Process Improvements in Philadelphia 14 (2021), https://www.reinvestment.com/wp-content/uploads/2022/02/ReinvestmentFund_Brief-_PHL-Eviction-Process-Improvements.pdf [https://perma.cc/9HFB-QN5R] (describing Philadelphia's "Eviction Diversion Program," which "requires landlords to apply for emergency rental assistance and participate in mediation prior to filing an eviction case in Municipal Court"); Michaelle Bond, Philly's Program for Preventing Evictions Is a National Model. Lawmakers Want to Make It Permanent., Phila. Inquirer (Dec. 8, 2021), https://www.inquirer.com/real-estate/housing/rental-assistance-philadelphia-eviction-diversion-program-20211208.html [https://perma.cc/CD43-CEA2].

185. Jessica K. Steinberg, A Theory of Problem-Solving Courts, 93 N.Y.U. L. Rev. 1579, 1582 (2019); see also Douglas B. Marlowe, Carolyn D. Hardin & Carson L. Fox, Nat'l Drug Ct. Inst., Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States 7, 9, 12 (2016) (explaining how as of 2016,

context and carry with them a host of challenges related to government coercion and control.[186] These same concerns are well-described in the family law context and others.[187] In child welfare cases, problem solving courts are championed "as a place where a team of professionals led by the judge can provide a range of assistance," but as Professor Jane Spinak tells us, "If courts are not recognized as instruments of coercion and control but as places to solve problems, there is a [destructive] domino effect on families, particularly vulnerable families."[188] Research shows that situating assistance within courts diminishes funding for upstream public health and harm-reduction interventions at lower cost.[189]

In the broader civil context, these are "new" courts, designed to address a particular type of case or collection of claims in the existing system using a new configuration of roles or resources.[190] For example, one

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there were nearly 3,000 drug courts, as well as more than 1,000 problem-solving courts devoted to various issues, including mental health, reentry, domestic violence, veterans's affairs, and homelessness).

186. Bach, supra note 132, at 828 (citing a "worry that problem-solving courts inevitably draw social welfare resources out of communities and voluntary settings and into inevitably coercive courts"); see also Richard Abel, Introduction, *in* 1 The Politics of Informal Justice: The American Experience 1, 5 (Richard L. Abel ed., 1982) (describing how informal processes are cheap and thus permit an enormous expansion of control); Stacy Lee Burns, The Future of Problem-Solving Courts: Inside the Courts and Beyond, 10 U. Md. L.J. Race Religion Gender & Class 73, 84 (2010) ("[W]elfare-oriented sentencing alternatives create the risk of net widening, expanding the scope, breadth, depth and duration of government monitoring and control over the lives of citizens . . . ."); Amy J. Cohen, Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York, 95 Tex. L. Rev. 915, 947–51 (2017) ("[T]he primary business of informal institutions is social control[,] . . . [which] expand[s] the reach of the state into the lives of the poor and marginalized through discourses of care."); Eric J. Miller, Drugs, Courts, and the New Penology, 20 Stan. L. & Pol'y Rev. 417, 425 (2009) (arguing that the therapeutic methodology adopted by courts "cannot address social features of urban drug use that have an economic and racial impact"); Anthony C. Thompson, Courting Disorder: Some Thoughts on Community Courts, 10 Wash. U. J.L. & Pol'y 63, 91–92 (2002) ("[C]ommunity residents may prefer to resolve issues without the threat of the criminal justice system hanging in the balance.").

187. Aya Gruber, Amy J. Cohen & Kate Mogulescu, Penal Welfare and the New Human Trafficking Intervention Courts, 68 Fla. L. Rev. 1333, 1382–83 (2016); Corey Shdaimah, Taking a Stand in a Not-So-Perfect World: What's a Critical Supporter of Problem-Solving Courts to Do?, 10 U. Md. L.J. Race Religion Gender & Class 89, 103–04 (2010); Jane M. Spinak, A Conversation About Problem-Solving Courts: Take 2, 10 U. Md. L.J. Race Religion Gender & Class 113, 119–24 (2010).

188. Jane M. Spinak, Family Defense and the Disappearing Problem-Solving Court, 20 CUNY L. Rev. 171, 175–76 (2016).

189. See Marsha Garrison, Reforming Child Protection: A Public Health Perspective, 12 Va. J. Soc. Pol'y & L. 590, 619–25 (2005) (discussing cost efficiency of community-based preventative programs); Cynthia Godsoe, Just Intervention: Differential Response in Child Protection, 21 J.L. & Pol'y 73, 82–88 (2012) (discussing the effectiveness and value of community-based organizations in differential response programs).

190. See Marvin S. Swartz & Jeffrey W. Swanson, Mandated Community Treatment in Services for Persons With Mental Illness, *in* The Palgrave Handbook of American Mental Health Policy 171, 176, 179–82 (Howard H. Goldman, Richard G. Frank & Joseph P. Morrissey eds., 2020) (discussing civil court procedures governing compulsory community

of us has written about the District of Columbia's Housing Conditions Court and its inquisitorial model of judicially controlled investigation and enforcement of housing code violations by landlords.[191] In this example, a single judge hears all housing condition complaints by tenants, has a dedicated investigator who goes to the property to investigate and substantiate the presence of violations, and then uses both inquisitorial courtroom processes and the investigator to enforce ongoing compliance with the court's disposition.[192] Another example is in the Red Hook Community Justice Center in New York, where a partnership between the Center for Court Innovation (a nonprofit) and New York courts created a neighborhood-based community court addressing housing cases.[193] This institution includes the actual civil housing docket, consisting of a designated judge and a clerk who work in an integrated way with housing advocates (who are hybrid employees of the nonprofit and the court) to address housing problems and cases.[194] In practice, this institutional structure involves informal problem solving outside of court by the judge and clerk to help litigants address underlying social needs, and active participation by housing advocates within court processes to achieve the same goal.[195]

III. A THEORY OF STATE CIVIL COURTS' INSTITUTIONAL ROLE

With this fuller picture of social needs in state civil courts, how do courts' reactions to the mismatch between their dispute resolution design and litigants' social needs inform our institutional theories of state civil courts? The four categories of court responses in the data—avoiding social needs, meeting social needs, creating informal law and procedure, and creating new institutions—give us two core theoretical insights into state civil courts as institutions. The first is that state civil courts can play the role of violent actor when exercising their dispute resolution function and either avoiding or meeting social needs. Less directly, state civil courts can be violent actors through new law and institutions. The second is that when we look at the diffuse, small-scale actions of state civil courts as a collective phenomenon, we see that state civil courts are acting as

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treatment for adults with debilitating psychiatric illnesses and the ethics of compulsory care in a civil court context, arguing that properly targeted mandatory community treatment is a less restrictive alternative to hospitalization or arrest, and challenging other institutional criticisms).

191. Steinberg, Informal, Inquisitorial, and Accurate, supra note 121.

192. Id. at 1064–69.

193. Cynthia G. Lee, Fred L. Cheesman, II, David B. Rottman, Rachel Swaner, Suvi Lambson, Mike Rempel & Ric Curtis, Nat'l Ctr. for State Cts., A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center 1 (2013), https://www.ncsc.org/__data/assets/pdf_file/0031/18967/11012013-red-hook-final-report.pdf [https://perma.cc/B82F-U73W].

194. Id.

195. Id.

policymakers. In the absence of action by executive and legislative branches to meet social needs and the absence of development of formal law by the judicial branch, the collective actions of individual state civil courts have become our social policy.

A. *Courts as Violent Actors*

Professor Robert Cover told us that "[l]egal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[196] Though scholars and communities are now in active conversations about this violence, especially in the context of policing, we have not fully engaged Professor Cover's insight as it relates to civil courts.[197] Courts' reactions to social needs presented by litigants can transform courts into violent institutional actors, whether through attempts to meet needs or to avoid them. Considering state civil courts as violent actors also allows us to see the fluid boundary between criminal and civil law that litigants themselves describe.[198]

There are important differences—including the explicitly legally sanctioned tool of violence in the role of police—between theories and activism around policing and criminal justice and our exploration of state civil courts. There is also a direct parallel, however, to the premise of policing and criminal justice, which is that the government is an appropriate actor to promote "safety" as a replacement for private violence. As violent actors in American society, courts are entangled in our history of slavery and racism. A historical exposition of the path from slavery to eviction (and other) courts is not the goal of our project, but others are building a range of insights into these historical paths, and we

196. Cover, supra note 15, at 1601; see also Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 57 (1983).

197. Cf. Pierre Schlag, Clerks in the Maze, 91 Mich. L. Rev. 2053, 2054 (1993) (expanding on Cover, observing that "judges conclude their work on a note of violence—a death sentence, an incarceration, a compulsory wealth transfer," and arguing that "once we recognize [that] violence implicit . . . , we are poised to understand that judges . . . have . . . a highly interested, partial perspective on law"). Building on Cover, Harry Schwirck argues that law "determines and reflects what might be termed an economy of violence[,] . . . play[ing] a central role in defining what a society will recognize as violence." Harry Schwirck, Law's Violence and the Boundary Between Corporal Discipline and Physical Abuse in German South West Africa, 36 Akron L. Rev. 81, 82 (2002).

198. Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263, 1317 (2016) [hereinafter Greene, Race, Class, and Access to Civil Justice] (observing that respondents' past negative experiences with the criminal justice system translate into reluctance to seek help for civil justice problems); Lauren Sudeall, Integrating the Access to Justice Movement, 87 Fordham L. Rev. 172, 172–73 (2019) (observing that individuals tend not to distinguish between civil and criminal justice systems).

hope that work continues in conversation with our deepening examination of state civil courts.[199]

As Professor Sinnar has argued, the evolution of civil procedure can be told as a story of state violence supplanting and formalizing private violence.[200] For example, eviction procedure in state civil court was a state response to mitigate and regulate the private violence of landlord "self-help" or throwing a tenant out of a home without consistent notice or process.[201] But state intervention did not remove violence; rather, it institutionalized and sanctioned it. This violent role of the state has evolved in the face of rising inequality, with state-sanctioned removal of people from their homes affecting millions per year nationally and some counties removing more than 15% of their residents from their homes.[202] As is the story with many harmful government functions in recent years, it includes the use of private eviction companies who inflict this violence in the name of the state.[203] Using the case categories from above, we can see an analogous role of violence in cases where a state civil court action leads to the government forcefully taking property, most notably foreclosure and debt collection matters which can be executed forcibly through garnishment, liens, and asset seizure.[204]

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199. See, e.g., Deborah N. Archer, Transportation Policy and the Underdevelopment of Black Communities, 106 Iowa L. Rev. 2125, 2127 (2021) (studying how transportation policy has historically and currently been used to exploit and subjugate black communities); Maeve Glass, Citizens of the State, 85 U. Chi. L. Rev. 865, 869 (2018) (arguing that "in the decades prior to the Fourteenth Amendment, the lawyers who seized on the State Citizenship Clause of Article IV did so . . . by reframing the issue of American slavery from the rights of a black person to the sovereignty of a free state"); Kellen Funk, "Let No Man Put Asunder": South Carolina's Law of Divorce, 1895–1950, S.C. Hist. Mag., July–Oct. 2009, at 134.

200. Sinnar, supra note 16, at *1.

201. Id. at *3.

202. See supra note 94.

203. See Lillian Leung, Peter Hepburn & Matthew Desmond, Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement, 100 Soc. Forces 316, 333, 337 (2021) (pointing to an example of "the many supplementary business offerings that facilitated evictions" and documenting the process of serial eviction filing, which threatens tenants with displacement multiple times from the same address and affects a population broader than only those in poverty); see also Editorial Board, Philadelphia's Eviction Process Blindsides Renters, Phila. Inquirer (July 28, 2020), https://www.inquirer.com/opinion/editorials/a/philadelphia-eviction-system-philly-renters-tenants-blindsided-20200728.html (on file with the *Columbia Law Review*) (discussing the use of private firms to execute evictions and detailing how tenants rarely receive notice of such evictions).

204. See Laura Gottesdiener, The Great Eviction, Nation (Aug. 1, 2013), https://www.thenation.com/article/archive/great-eviction/ (on file with the *Columbia Law Review*) (describing SWAT teams and armed police removing North Carolina and Atlanta residents from their homes which were foreclosed on); George Graham, Crowd Protests Eviction of Father, Son From Foreclosed Home in Springfield's Sixteen Acres (Photos, Video), Mass Live (May 25, 2017), https://www.masslive.com/news/2017/05/watch_crowd_gathers_to_protest.html [https://perma.cc/AC4M-YNJP] (last updated Jan. 7, 2019) (depicting

Further, courts are well-theorized as violent actors in the child welfare system.[205] It is hard to conceive of a more violent state act than the removal of a child from a parent, whether temporary (as in dependency or custody proceedings) or permanent (as in termination of parental rights proceedings). But the violence of state civil courts goes beyond a particular order in a case. As Professor Roberts has vividly told us, the legal system's role inflicts deep, intersectional punishment on subordinated communities and Black mothers in particular.[206] Roberts describes how the intersectional relationship between foster care and incarceration relies on the history and societal stereotypes of reproductive regulation and maternal irresponsibility to "make[] excessive policing by foster care and prison seem necessary to protect children and the public from harm"[207] and facilitates "[t]he simultaneous buildup and operation of the prison and foster care systems."[208]

In other areas of the law where the role of state civil courts was intended to mitigate personal violence, the story is more complicated. Our qualitative data illustrates this complexity. In domestic violence cases, the explicit role of state civil courts is to protect one citizen from violence by another citizen. Yet as our data show, some state civil courts have responded to the complex needs of litigants by engaging services to meet social needs—but in the context of social control.[209] In our data, for

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mortgage foreclosure eviction in Massachusetts); Laurie Udesky, When Foreclosure Threatens Elder-Care Homes, N.Y. Times (Apr. 17, 2010), https://www.nytimes.com/2010/04/18/us/18sfforeclose.html (on file with the *Columbia Law Review*) (describing a sheriff conducting foreclosure on residential care facilities for the elderly in California).

205. See Susan L. Brooks & Dorothy E. Roberts, Social Justice and Family Court Reform, 40 Fam. Ct. Rev. 453, 453 (2002) ("Poor and minority families, on the other hand, are disproportionately compelled to appear before family court judges against their will. The state coercively intervenes in their lives and orders them to submit to the court's jurisdiction because parents are charged with child maltreatment or children are charged with delinquency."); Kristin Henning, Race, Paternalism, and the Right to Counsel, 54 Am. Crim. L. Rev. 649, 666 (2017) (pointing out the susceptibility of the "best interests" standard in child welfare cases to biases based on race and class views); Cortney E. Lollar, Criminalizing (Poor) Fatherhood, 70 Ala. L. Rev. 125, 131 (2018) (arguing that the child support system disproportionately affects poor men and showing that criminalization of failing to provide financially for a biological child is grounded in antiquated moral judgments about fatherhood); Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, 102 Marq. L. Rev. 1161, 1194 (2019) (arguing that the child removal process does not often employ proper vetting, thus unnecessarily inflicting harm on children and their families); Shanta Trivedi, The Harm of Child Removal, 43 N.Y.U. Rev. L. & Soc. Change 523, 579–80 (2019) ("[I]n most jurisdictions in America, courts fail to consider the trauma that children will suffer if they are removed from their parents[,] . . . as there is no legal requirement that judges take this information into account.").

206. See Roberts, Systemic Punishment, supra note 131, at 1499–1500.

207. Id. at 1500.

208. Id. at 1476.

209. See supra notes 185–189 and accompanying text.

example, by virtue of the legal construct of a protective order, failure to engage in the offered social provision (such as mental health treatment) can subject a person to incarceration for failure to comply with terms of the protective order.[210] Ultimately, this approach places "care" in the context of violence rather than replacing violence with care.[211] A similar phenomenon is captured by Professor Nicole Summers's concept of civil probation as a mechanism of control, advantaging landlords and sanctioned by courts.[212] In Professor Summers's analysis of settlements in eviction cases, she identifies the overwhelming presence of landlords who use settlement agreements to impose additional terms on the social and economic problems that arise in the underlying eviction matter.[213] For example, where a tenant fails to pay rent, the settlement agreement imposes more burdensome obligations on payment going forward.[214] Professor Summers identifies a similarly pervasive but broader phenomenon of landlords using settlement agreements to more generally impose greater controls on tenants, unrelated to the underlying claims for eviction.[215] For example, in an eviction for nonpayment, the settlement agreement imposes stricter terms regarding the occupancy of the property.[216] All of these make tenants more vulnerable to losing their homes with the imprimatur of the state.

The experience of court itself can also be violent. Professor Barbara Bedzek's rich description of housing court as "violence in the form of spirit-murder" captures this phenomenon.[217] It is more recently explained by work examining trauma and the law. Research describes the retraumatization of survivors of intimate partner violence in both civil and criminal courts.[218] Others have analyzed how civil court notions of

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210. See supra note 145.

211. See Bach, supra note 132, at 814 ("[W]hen the law merges care and punishment, it both draws more individuals into punitive institutions . . . and compromises the quality of the care overall."); Cohen, supra note 186, at 916–17 ("But we have not simply witnessed the retrenchment of particular welfare state programs alongside the intensification of carceral ones. Today, the criminal justice system provides its own welfarist institutions.").

212. Summers, supra note 149 (manuscript at 42).

213. See id. (manuscript at 3) (finding that "the majority of settlement agreements impose a series of interlocking terms that amount to . . . civil probation").

214. Id. (manuscript at 42).

215. See id. (manuscript at 42–43).

216. Id. (manuscript at 43).

217. Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 Hofstra L. Rev. 533, 541 (1992) (citing Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. Mia. L. Rev. 127 (1987)).

218. Negar Katirai, Retraumatized in Court, 62 Ariz. L. Rev. 81, 93 (2020) (surveying advocates and finding that 83% of survivors reported retraumatization due to court procedures and outcomes).

adversarialism, judicial impartiality, and formalism affect retraumatization.[219]

Sometimes the violence of state civil courts explicitly engages with the violence of mass incarceration. This occurs largely as a penalty for noncompliance with civil court orders. For example, a respondent subject to a protective order is subject to arrest for violating the order or its conditions (which, as discussed above, can include "care" such as a mandated addiction program).[220] As in *Turner v. Rogers*, a parent who fails to pay child support can be incarcerated by a civil court.[221] Research done by Professors Lauren Sudeall and Sara Sternberg Greene shows us how litigants experience this fluid boundary between civil and criminal law.[222] Across the types of social needs presented in state civil courts, the mismatch between these needs and courts' dispute resolution design exacerbates state civil courts' violent role.

B. *Courts as Policymakers*

Thus far, we have discussed state civil courts as a constellation of institutions reacting to the mismatch between social needs and dispute resolution. Taking a broader view of these reactions, we posit that courts are functioning as policymaking bodies in three related ways. First, in attempting to provide services to meet litigant needs, courts have developed a patchy, underresourced role as a provider of social services. These choices about resource allocation are appropriate for the other branches of government, but courts have become de facto decisionmakers. Second, in creating and changing law and procedure, courts are engaging in ad hoc procedure and law development in ways that are not occasional or exceptional but are collectively shaping law and policy. Third, in creating new government institutions, courts are squarely performing the work of the executive and legislative branches via individual experiments without the benefit of experimentalism. Each of these policymaking roles

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219. Id. at 101–07; see also Leigh Goodmark, Decriminalizing Domestic Violence 152 (2018) ("In order to minimize the trauma of incarceration it is also essential to enforce measures intended to protect prisoners from violence."); Alesha Durfee, "Usually It's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions, 5 U. Mia. Race & Soc. Just. L. Rev. 469, 482 (2015) ("However, the adversarial nature of the legal system, in combination with complex and confusing bureaucratic procedures and untrained court staff, may make the PO process an incredibly traumatizing experience—even with the 'right' support and in the 'right' environment."); Deborah Epstein & Lisa A. Goodman, Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences, 167 U. Pa. L. Rev. 399, 447–48 (2019) ("But she is also hoping for validation of the harm she has endured—in other words, to have her experience credited.").

220. See generally Nat'l Ctr. on Prot. Ords. & Full Faith & Credit, supra note 145 (detailing the protective order laws in every state and the repercussions for violating them).

221. 564 U.S. 431, 435 (2011).

222. See Greene, Race, Class, and Access to Civil Justice, supra note 198; Sudeall, supra note 198.

for courts raises questions of legitimacy and rule of law, transparency and focus on litigants, and quality of outcomes and experimentalism.

Ours is a different conception of courts as policymakers than scholarship typically explores. As a general matter, critiques of courts as policymaking bodies exist in the context of represented, adversarial litigation and the final, merit-based decisions that emerge from this process. Scholars often criticize the idea of courts as policymakers—as activist judges attempting to legislate from the bench.[223] These criticisms emphasize courts' lack of accountability to the public.[224] Other scholars sharpen this critique, arguing that even agencies are more democratically accountable than courts and thus are more legitimate policymaking bodies.[225] Some criticisms center on institutional competence of courts.[226]

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223. For an overview of this critique, see Jack L. Landau, The Myth of Judicial Activism, 70 Or. St. Bar Bull. 26, 27 (2010) (arguing that "no one actually says what he or she means" when criticizing "judicial activism" and describing three ways in which people perceive that judges improperly use their power, including by assuming too much policymaking authority); Bruce G. Peabody, Legislating From the Bench: A Definition and a Defense, 11 Lewis & Clark L. Rev. 185, 189 (2007) (tracking criticisms of courts as activist policymakers and arguing some "legislating from the bench" is both inevitable and desirable); Paul Gewirtz & Chad Golder, Opinion, So Who Are the Activists?, N.Y. Times (July 6, 2005), https://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html (on file with the *Columbia Law Review*) (noting that the term "activist judge" is loosely defined in the public discourse, arguing that striking down acts of Congress is the most "activist" thing a judge can do, and tallying how often Justices voted to overturn acts of Congress).

224. See generally Thomas L. Jipping, Legislating From the Bench: The Greatest Threat to Judicial Independence, 43 S. Tex. L. Rev. 141, 158 (2001) (describing two "models of judicial power," judicial restraint and judicial activism, and arguing judicial activism threatens America's independent judiciary); H. Lee Sarokin, Thwarting the Will of the Majority, 20 Whittier L. Rev. 171 (1998) (challenging criticisms of the judiciary as a policymaking body); cf. Neil S. Siegel, Interring the Rhetoric of Judicial Activism, 59 DePaul L. Rev. 555, 555–56 (2010) (challenging two ways that Republicans use the term "judicial activism" and arguing that "equating judicial activism with the refusal to show deference to elected officials is inconsistent with much of modern Republican politics" and "presupposes an unsustainably sharp distinction between constitutional politics and constitutional law"). The debates over judicial activism, of course, have often ugly political histories. See Erwin Chemerinsky, Federal Jurisdiction 148 (1989) (detailing the legislative branch's attempts to prevent federal courts from hearing cases involving challenges to state laws permitting school prayers or state laws restricting access to abortions).

225. Agencies, even independent agencies, are typically viewed as more democratically responsive than courts. See Michael A. Fitts, Retaining the Rule of Law in a *Chevron* World, 66 Chi.-Kent L. Rev. 355, 356–57 (1990) (asserting that agencies are "under the informal control of either a democratically elected Congress or President"); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2088 n.80 (1990) ("[T]he democratic pedigree of the agency is usually superior to that of the court.").

226. See Eric Berger, Comparative Capacity and Competence, 2020 Wis. L. Rev. 215, 219–23 (collecting research discussing the comparative competence of courts to make policy determinations relative to legislatures and executives). This argument also features prominently in legal process theory. See, e.g., Ernest A. Young, Institutional Settlement in a Globalizing Judicial System, 54 Duke L.J. 1143, 1149–50 (2005) (arguing for "institutional settlement" within legal process theory, which looks at how society decided "that law should allocate decisionmaking to the institutions best suited to decide particular questions, and

Other scholars argue that policymaking is a legitimate enterprise for U.S. courts, for example in prison reform[227] and mass tort litigation.[228] Some scholars claim that this policymaking is unavoidable and discuss how courts actually influence policy change.[229] In light of "the expansion of judicial review," others call for elections of judges, formalizing their role as policymakers.[230] Other scholarship considers the role of the judiciary in moderating the policymaking balance between the legislative and executive branches. Scholars consider how the judiciary moderates the separation of judicial and executive power.[231] Some scholars argue that no dominant institution exists among the various players in the federal policymaking process; instead, "all governing institutions can have a clear role in making public policy as well as enforcing and legitimizing it."[232]

Rather than capturing (federal) courts playing a legislative (congressional) role via interpretation of (federal) statutes, we are theorizing a different policymaking role of state civil courts. In this formulation, state civil courts are acting in the void created by the failure of the executive and legislative branches to meet people's social needs.[233]

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that the decisions arrived at by those institutions must then be respected by other actors in the system").

227. See Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 27–95 (1998) (arguing that policymaking is a standard and legitimate function of modern courts, using prison reform cases between 1965 and 1990 as an example of a high-water mark of U.S. judicial policymaking).

228. Sandra Nichols Thaim, Carol Adaire Jones, Cynthia R. Harris & Samuel F. Koenig, Courts as Policymakers: The Uneven Justice of Asbestos Mass Tort Litigation, *in* Looking Back to Move Forward: Resolving Health & Environmental Crises 133, 134–36 (2020) (noting that while mass tort law was inadequate to address the problem, the courts stepped in to play a larger role after Congress did not step in).

229. See generally Robert M. Howard & Amy Steigerwalt, Judging Law and Policy: Courts and the Policymaking in the American Political System (2012) (analyzing the role of the Court in policymaking in seven distinct policy areas and exploring both how courts interact with other branches of government and whether judicial policymaking is a form of activist judging).

230. See Rachel Paine Caufield, The Curious Logic of Judicial Elections, 64 Ark. L. Rev. 249, 260 (2011) (arguing that "the nature of judicial power has changed, necessitating popular control").

231. See, e.g., Paul Gewirtz, The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Probs. 46, 46 (1976) (discussing "three methods that the courts have used or might use to curb executive policy-making and recall Congress to a greater policy-making role").

232. Making Policy, Making Law: An Interbranch Perspective 204 (Mark C. Miller & Jeb Barnes eds., 2004).

233. Our analysis here builds on a range of earlier work exploring how, in the absence of effective structural solutions at the highest level, informal regimes develop. See, e.g., Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 461–63 (2001) (describing the "interesting and complex regulatory pattern" that has emerged, in which "normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including but not limited to the judiciary").

And this activity is engaging the myriad within-case decisions that occur in lawyerless courts.[234] This policymaking activity maps onto the four versions of courts' institutional role described above and is complicated by its diffuse and experimental nature. Each example of policymaking is individualized, though there are themes across state civil courts that have de facto become collective action.

Where courts shift their role to provide resources to meet litigants' needs, the courts are squarely assuming the roles of the executive and legislative branches in social provision. In some instances, courts are providing social services, traditionally an executive branch function. In other instances, courts behave like legislatures by deciding that a particular type of service provision is necessary and dedicating court system funding to this social provision. This captures those actions described above as courts "attempting social provision," such as the judges in our data who order drug treatment programs for respondents. It also captures those attempts at social provision that send litigants (with or without coercion) to access social services provided or funded by other branches of government. For example, when a court refers a litigant to a housing support organization, that court is making policy choices about who should use those services and ultimately how those services should be funded. Across these examples, the judicial branch is playing a policymaking role in how social services are created, funded, and delivered. Embedded in each of these individualized choices are decisions that collectively shape policy about social provision in a particular jurisdiction and across cities and states.

At least state civil courts—even if in limited, ad hoc ways—are trying to meet social needs in the face of stark inequality. Yet, this institutional role is fraught. This state civil court role operates in the absence of coherent or comprehensive resources. Sometimes this means a judge makes cold referrals that may or may not result in actual assistance. Other times, court actors are leveraging personal or institutional relationships to try to achieve results for litigants in need of services. Our data reflect self-awareness by court actors about their limits in this ad hoc activity.[235] Taken

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234. Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 530; Carpenter et al., "New" Civil Judges, supra note 22, at 257.

235. One judge told us:

> [Y]ou do the best you can do to do the job you were selected to do. You show up, you prepare, you set expectations for your courtroom, you try to keep people safe, and you try to do justice. But I don't know []that any local judge would have the ability to answer that. Our courts have changed. You didn't have a protective order docket before. You have [DV Agency] and family and children's services, and they were set up to give these people justice. We have a system in place to help people get to court, the next step is what do you do for the defendants?

Interview with Judge 1, Plainville.

together, this shift in institutional role is resource constrained, institutionally limited, and inconsistent.

A second way of understanding state civil courts as policymakers is where courts create or change law or procedure to meet litigants' needs. This is closer to the traditional scholarly conception of courts as policymakers. However, the nature of the mismatch in state civil courts makes this policymaking role different from theories of federal courts. It is also less transparent because almost all of this activity is unwritten.[236] In some circumstances, the court action to create unwritten law or procedure comes in the face of an affirmative choice by a legislature to not fund a particular service. For example, in our data, Plainville is in a state which has one of the weakest social safety nets in the country and ranks at or near the bottom of many measures of states' investments in social services, health care, and economic supports.[237] We see the consequences of this in Plainville courts that are staying cases, dismissing cases, and sending cases to other dockets to avoid harmful outcomes in the absence of these social services. In other circumstances, state civil courts are acting in the face of inactivity by the executive and legislative branches. An example, in our data, is a judge who chooses not to issue a protective order because the absence of affordable housing means someone will become homeless.[238] Or the judge who chooses to issue a protective order to keep a father from doing drugs with his daughter because the absence of addiction or mental health treatment means it is the only alternative.[239] There is no law or procedure in these cases that provides an exception to protective order requirements when housing is not available. And there is no law or procedure that allows protective orders to prevent a parent from doing drugs with their child (in the absence of protective order criteria being met). Yet in these circumstances, courts are creating or changing law—in individualized, unwritten ways—to meet litigant needs in the absence of social provision by other branches of government.

When state civil courts create or change law and procedure, they confront the range of concerns articulated by Professors Bookman and Noll in *Ad Hoc Procedure*.[240] In this environment, it is no longer possible to operate within "rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the [state] will use its

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A domestic violence advocate told us, "I think the way [Centerville] sets up their process [is] really difficult. When they decided to tie resources to court outcomes it was a mistake in my opinion." Interview with Court Actor 3, Centerville.

236. See supra notes 159–160 and accompanying text.

237. The Best and Worst States to Work in America—During COVID-19, OxFam, https://www.oxfamamerica.org/explore/countries/united-states/poverty-in-the-us/covid-map/ [https://perma.cc/N7UD-8ZR6] (last visited Feb. 10, 2022).

238. Notes of Hearing 24, Townville (Judge 2).

239. Notes of Hearing 18, Plainville (Judge 1).

240. Bookman & Noll, supra note 159, at 829–35.

coercive powers in given circumstances."[241] This activity by state civil courts engages questions of legal legitimacy (whether the action by the court is in fact lawful), sociological legitimacy (whether the action is seen by the public as appropriate in general), and moral legitimacy (whether the action is morally justifiable or worthy of respect).[242] State civil courts' creation of law and procedure in the face of the clash between dispute resolution design and social needs is a direct, repeated expression of a "desire to address" a problem that the civil justice system provides in ordinary cases "as opposed to a desire to address systemic concerns."[243] This practice threatens the legitimacy that is traditionally part of civil procedure and thus civil litigation. Yet at the same time it is necessary in the context of state civil courts because—in the absence of ad hoc law and procedure—these courts' dysfunction would undermine legitimacy even more.[244] What this leads to in the context of state civil courts is a collective rather than exceptional phenomenon of ad hoc law and procedure. And this institutional function renders state civil courts policymakers.

Finally, the starkest version of courts as policymakers is when state civil courts create new institutions. As the examples above demonstrate, these new institutions are often the result of the sheer will of a few individuals trying to meet the deep need for social provision in a particular type of case.[245] As with the other categories of courts as policymakers, this is not an objectively negative phenomenon. Yet a structural perspective reveals the problems with it.

First, this institution building is a collection of experiments without the benefit of experimentalism. There is often neither intention at the outset nor structure in the implementation that allows learning from these responses to social needs. But, the institution building continues, relying at best on the limited available research of prior experiments. As we have discussed more generally in the context of lawyerless courts, there are

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241. Friedrich A. Hayek, The Road to Serfdom 72 (1944); see also Bookman & Noll, supra note 159, at 774 ("Designed to address specific problems, ad hoc procedure cannot rely on the fact that it is crafted behind a veil of ignorance in advance of concrete disputes as proof of its fairness.").

242. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1796–1801 (2005) (explaining legitimacy as a moral concept); see also Bookman & Noll, supra note 159, at 835 (questioning whether ad hoc judging can be legitimate); Tom R. Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 Ann. Rev. Psych. 375, 376, 379 (2006) (reviewing and summarizing the psychological literature on legitimacy, "a property that, when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangements").

243. Bookman & Noll, supra note 159, at 784.

244. Id. at 845 (noting that although "ad hoc procedure presents a deep challenge to the traditional model of civil procedure . . . , ad hoc procedure-making *bolsters* the civil justice system's legitimacy by ensuring that procedural problems do not prevent it from functioning").

245. See Steinberg, Informal, Inquisitorial, and Accurate, supra note 121, at 1067–69 (describing Washington, D.C.'s Housing Conditions Court founded by an individual judge).

growing and valiant efforts underway to deepen our research into these courts. This institutional experimentation is a particular subset of that need: We need a systemic approach to experimentation to meet the systemic needs the experiments attempt to address.[246]

Second, this experimentation is a reaction by the judicial branch to the absence of social provision by the executive and legislative branches. And the absence of a systemic approach means that we are avoiding important institutional questions about the appropriate role for the judicial branch. These questions are about separation of powers and whether judicially created institutions in this role are consistent with our democratic aims. They also raise questions about courts' role as bureaucracies, with the attendant challenges of bureaucratic behavior.[247]

We are not arguing that courts should stop this activity but rather asking how courts' leadership in this institution building could motivate action by legislators.[248] Courts are not designed for social provision, yet they are attempting to do so with a range of consequences. This may well be the best alternative in a political environment hostile to social provision. The assumption that courts are resolving disputes may provide political cover for social provision that a legislature would not support. At a minimum, courts are carrying a burden that is not part of their design as institutions. Courts cannot reasonably be expected to stop their ad hoc social provision in the face of persistent, serious social needs. Yet we need to ask whether courts' activity, and especially de facto policymaking, is preventing other parts of government from addressing these social needs head on.

In the end, courts are taking up the mantle of social provision in a range of ways, and this collective activity is shifting their institutional role. State civil courts are designed as sites of dispute resolution, yet in the face

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246. See Monica Bell, Andrea Taverna, Dhruv Aggarwal & Isra Syed, Laboratories of Suffering: Toward Democratic Welfare Governance, *in* Holes in the Safety Net: Federalism and Poverty 40, 63–67 (Ezra Rosser ed., 2019) ("[T]o alleviate suffering, policy makers and scholars must take a holistic view of poor people's lives to best design welfare policy."). See generally Monica Bell, Stephanie Garlock & Alexander Nabavi-Noo, Toward a Demosprudence of Poverty, 69 Duke L.J. 1473 (2020) (surveying the structural and substantive impacts of the "criminalization of poverty").

247. See Owen M. Fiss, The Bureaucratization of the Judiciary, 92 Yale L.J. 1442, 1443 (1983) (noting that "in the context of the judiciary, bureaucratization poses a unique challenge to the legitimacy of governmental power"); Patrick G. Scott & Sanjay K. Pandey, Red Tape and Public Service Motivation: Findings From a National Survey of Managers in State Health and Human Services Agencies, 25 Rev. Pub. Pers. Admin. 155, 156 (2005) (observing that "one particular malady [of government bureaucracy] that remains resistant to reform efforts is red tape"); Patricia M. Wald, Bureaucracy and the Courts, 92 Yale L.J. 1478, 1483–85 (1983) (arguing that "judges ought to give more attention to managing the judicial process").

248. See Bookman & Noll, supra note 159, at 787 ("Just as the problems presented by a particular case or type of litigation may prompt a court to develop a new form of procedure, they may motivate lawmakers to redirect claims to a new tribunal that is designed to work better than courts.").

of social needs they are functioning as legislative and policy bodies in a way that is neither appropriate to their role as a coequal branch of government nor grounded in collective, experimental problem solving.

CONCLUSION

"I mean the whole system is completely broken and needs to be fire-bombed." [249]

If the challenges of state civil courts are bigger than particular actors, we need to ask how we should engage with this new understanding of courts as democratic institutions. How do we imagine a different future where our democratic values are realized in the institutions of state civil courts? How do we imagine, where we currently see a social need from one litigant, a world where that social provision is completely realized such that the needs of both litigants are ultimately met? These questions flow from our institutional theory of state civil courts and also require more depth than we can offer here. We offer, in conclusion, some insights to frame our own—and we hope others'—imagination of a way forward.

We start with our need for more intellectual and political investment in identifying, developing, and prioritizing structures that support a "rightsized" role for state civil courts. There is a movement among scholars and institutional actors to fix the problems we and others name.[250] Any change that meets these democratic challenges must focus on changing these structural, institutional dynamics, not just practicing within them. The current menu of incremental reforms, focused on actors in the system, may improve people's lives and suppress immediate conflagrations in the system. And we also need a more audacious agenda.

Any structural change to state civil courts requires mobilization, including by actors within state civil courts. This is part of a much larger set of theoretical questions about such mobilization.[251] One component is

249. Interview with Court Actor 4, Plainville.

250. See Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, Racial Capitalism in the Civil Courts, 122 Colum. L. Rev. 1243, 1249–52 (2022); Portia Pedro, A Prelude to a Critical Race Theoretical Account of Civil Procedure, 107 Va. L. Rev. Online 143, 156 (2021) ("While some organizers are calling for police abolition, prison abolition, or both, there is not a widespread call for abolishing courts. Or at least there is not such a call yet."); Jessica K. Steinberg, Colleen F. Shanahan, Alyx Mark & Anna Carpenter, The Democratic (Il)legitimacy of Assembly-Line Litigation, 135 Harv. L. Rev. Forum 358, 361 (2022) ("Drawing on an invest/divest framework, we propose that bold reform would focus on reestablishing the democratic legitimacy of state civil courts by increasing social provision to defendants economically ravished by assembly-line litigation and also by keeping courts squarely in the business of resolving two-party adversarial disputes.").

251. For example, systems of social provision in the United States have been institutionalized in various ways that reinforce inequality in society. See Andrea Louise Campbell, How Policies Make Citizens: Senior Political Activism and the American Welfare State 10 (2003) (arguing that seniors' welfare state programs have moderated political inequality among senior citizens but have exacerbated it between different age groups); Joe Soss, Unwanted Claims: The Politics of Participation in the U.S. Welfare System 1–2 (2000) (arguing that

that lawyers, judges, court clerks, and others who see the daily realities of state civil courts need to exercise their collective political power.[252] Another is that courts need to collaborate with communities to build political will. This requires a shift in thinking to see that, in many ways, state civil courts are well positioned to orient themselves more intentionally toward community needs.[253]

This mobilization explicitly requires engaging the legislative and executive branches. This engagement is certainly political: Judges should be collectively educating and motivating their state legislatures to act.[254] It also requires deep investment in, and vulnerability to, research and data collection. The thicker our understanding of state civil courts, writ large and in particular examples, the better courts can make the case for reshaping themselves as institutions. Another component of this mobilization is intentional experimentation in how we "rightsize" state civil courts. This is not experimentation for its own sake but rather for choosing interventions that take inertia away from the status quo.[255] Such experimentation yields information and iteration that demonstrates more legitimate, democratic, cost-effective roles for courts. And this in turn generates political power. As others have pointed out, poverty and inequality will necessarily require political consensus on some substance, and experimentation can be a tool to reach those goals.[256]

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the welfare system is a political institution that has the potential to empower or marginalize its clients). Our concern is with reimagining state civil courts, but this necessarily engages the motivations of political actors more broadly. See, e.g., Vesla M. Weaver & Amy E. Lerman, Political Consequences of the Carceral State, 104 Am. Pol. Sci. Rev. 817, 829–32 (2010).

252. See Shanahan & Carpenter, supra note 13, at 133–34 ("Any change must begin with courts and lawyers refusing to blindly accept the courts as a last resort against the legislative and executive branches' failures to address inequality.").

253. Joanne Scott & Susan Sturm, Courts as Catalysts: Re-Thinking the Judicial Role in New Governance, 13 Colum. J. Eur. L. 565, 592–94 (2007) ("The judicial function ought to be—and in some important respects already is—able to work collaboratively with other actors in devising and promoting governance structures which are at once effective and legitimate in problem-solving."); Massachusetts Trial Court, Ctr. for Institutional & Soc. Change, https://change-center.law.columbia.edu/research-projects/massachusetts-trial-court [https://perma.cc/3DU5-UA6C] (last visited Feb. 10, 2022).

254. See Carpenter et al., Judges in Lawyerless Courts, supra note 8, at 564 (noting that "researchers, policymakers, and court leaders can explore questions about how best to influence and shape the future of judging").

255. See Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice 127 (2021); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1788 (2020) ("Abolitionist demands speak to the fundamental crises of our times, challenge our siloed expertise as legal scholars, and invite us to reconsider our commitments to the status quo.").

256. See Charles Sabel, Dewey, Democracy, and Democratic Experimentalism, 9 Contemp. Pragmatism 35, 44–45 (2012) (noting that "experimentalist lawmaking and administration . . . begin[] with agreement at the highest-level jurisdiction . . . on broad framework goals"); David A. Super, Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law, 157 U. Pa. L. Rev. 541, 547 (2008) ("[T]he lack of a

State civil courtrooms have become emergency rooms because people's social needs remain unmet. Each day courts around the country are forced to confront this institutional mismatch in the face of this broader democratic failure. The time has come to address this institutional challenge head on. We need to engage in the collective exercise of reimagining state civil courts as democratic institutions.

meaningful consensus about the substantive goals of antipoverty law prevents coherent evaluation of the results of policy experiments: without an agreed-upon set of goals, we cannot agree on what 'works' to accomplish them.").

APPENDIX

Our state level data come from the National Center for State Courts (NCSC) and are from all fifty states, the District of Columbia, Guam, and Puerto Rico for the years 2012 through 2019.[257] The totals reported here are cases initiated in the calendar year. The data appear in two ways. First, NCSC collects overall caseload data from states, as reflected in Table 1A. Second, NCSC collects caseload data by case types, as reflected in Tables 1B and 2.

There is no discernible pattern—either within states or across time—in how states report categorical data. Sometimes a state does no reporting in a given year. Sometimes a state never reports a particular case type, suggesting either that the state does not collect that data or that case type is not applicable under the state's law. Finally, there is inherent variation in how states report case types. For example, states have different thresholds for the value of claims in small claims court, and so the same exact case in one state would be in the "Small Claims" category and in another state in the "Seller/Plaintiff" category. Although the purpose of this study is not to explain why states may or may not have reported data in a given year, future research could investigate these trends.

We readily acknowledge this inconsistency in state-level reporting within the study period and know that court leadership and the NCSC are working to improve reporting. The estimates presented here represent these data to the best of our ability given the constraints of what is reported. For each case type in Table 2, we calculate the proportion of cases that the case type represented in a given year and then average that proportion across the years in the study period. We also list the average number of reporting states and range in annual reporting to offer information about the sensitivity in the results when different states report

257. For case reporting methodology and categories, see Ct. Stat. Project, State Court Guide to Statistical Reporting 3–9 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0026/23984/state-court-guide-to-statistical-reporting.pdf [https://perma.cc/K45R-QF66]. For the underlying data, see CSP STAT, Ct. Stat. Project, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat [https://perma.cc/YB3S-VSGT] (last visited Feb. 10, 2022). We'd like to acknowledge the NCSC staff who contributed to each of the annual reports: Alice K. Allred, Brandan P. Collins, Kathryn A. Holt, Robert C. LaFountain, Kathryn J. Lewis, Diana McSpadden, Richard Y. Schauffler & Shauna M. Strickland (2012); Alice K. Allred, Kathryn A. Holt, Robert C. LaFountain, Kathryn J. Lewis, Richard Y. Schauffler & Shauna M. Strickland (2013); Alice K. Allred, Kathryn J. Genthon, Kathryn A. Holt, Robert C. LaFountain, Richard Y. Schauffler & Shauna M. Strickland, (2015); Alice K. Allred, Kathryn J. Genthon, Kathryn A. Holt, Robert C. LaFountain, Richard Y. Schauffler, Shauna M. Strickland, Olivia H. Underwood, Brittney M. Via & Nicole L. Waters (2016); Natasha C. Anderson, Kathryn J. Genthon, Robert C. LaFountain, Olivia H. Lyles, Diane Robinson, Brittney M. Via & Nicole L. Waters (2017); Alice K. Allred, Amanda N. Fisher Boyd, Kathryn J. Genthon, Sarah A. Gibson, Robert C. "Neil" LaFountain, Diane L. Robinson & Nicole L. Waters (2018); Kathryn J. Genthon, Sarah A. Gibson, Miriam Hamilton, B. Harris, Diane L. Robinson & Nicole L. Waters (2019).

in different years—investigating this variation may be another fruitful avenue for scholars. As perspective, the category level reporting in Tables 1B and 2 capture reporting by states representing a range of 73 to 96% of the population based on 2019 U.S. Census Bureau data.[258]

TABLE 1A: INCOMING STATE CASES AS REPORTED BY NCSC[259]

	2012–2019 Total	2012–2019 Annual Average	Average # States Reporting
Civil	118,445,434	14,805,679	44
Domestic Relations	35,896,527	4,487,066	44
Criminal	117,823,758	1,133,669	43
Juvenile	9,069,353	14,727,970	38
Traffic	330,980,859	41,372,607	38

TABLE 1B: INCOMING STATE CASES BASED ON REVISED CATEGORIES[260]

	2012–2019 Total	2012–2019 Annual Average	Average # States Reporting
Civil Justice Needs Cases	85,762,530	10,720,316	22
Criminal (Adult) Cases	44,358,919	5,544,865	17
Juvenile Delinquency Cases	2,348,174	293,522	19
Traffic Cases	307,927,304	38,490,913	25

258. See QuickFacts: United States, U.S. Census Bureau, https://www.census.gov/quickfacts [https://perma.cc/26AY-G7TY] (last visited Feb. 10, 2022).

259. This table captures all reporting from states that reported total incoming cases (e.g., "Civil Total"), regardless of whether they reported case types (e.g., "Small Claims") in a given year. This table uses the same categories as the NCSC.

260. This table is the sum of all incoming cases that were reported by case type. It uses the categories developed in Table 2. Because fewer states report by case type than overall incoming cases, there are fewer cases reported here than in Table 1A.

TABLE 2: CIVIL JUSTICE NEEDS CASES[261]

	2012–2019 Proportion of Civil Incoming Cases	Social Need Presented	Underlying Social Need	Average # States Reporting	Range in States Reporting (Range in Annual Proportion)
Personal Relationships Total	***30.28%***				
Dissolution/ Divorce*	10.03%	Mixed	Mixed	41	37–44 (8.52%–11.44%)
Civil Protection Restraining Orders*	6.96%	Mixed	Yes	37	33–40 (6.71%–7.47%)
Probate/ Wills/ Intestate	4.22%	Mixed	Mixed	31	22–36 (2.93%–4.98%)
Mental Health	3.58%	Yes	Yes	38	31–42 (2.83%–3.97%)
Probate/ Estate (Other)	1.97%	Mixed	Mixed	22	16–28 (1.84%–2.09%)
Domestic Relations (Other)*	1.38%	Mixed	Mixed	19	12–25 (1.05%–1.57%)
Non-Domestic Relations Restraining Order	1.10%	Mixed	Mixed	22	14–26 (0.81%–1.25%)
Guardianship (Adult)	0.56%	Yes	Yes	27	19–36 (0.40%–0.70%)
Conservatorship/ Trusteeship	0.38%	Yes	Yes	28	23–32 (0.17%–0.60%)
Guardianship (Unknown)	0.10%	Yes	Yes	16	9–21 (0.00%–0.19%)

261. The proportions in this table use the total incoming cases reflected in Table 1B as their denominator. Case types marked with * are ones NCSC categorizes as "Domestic Relations." Case types marked with ** are ones NCSC categorizes as "Juvenile." In addition, habeas corpus cases are included as "Criminal" and not "Civil" in our categorization.

Small Claims					
Small Claims[262] (Tort, Contract, and Property)	18.92%	Mixed	Mixed	38	36–40 (16.91%–21.91%)
Children Total	***15.45%***				
Support IVD*	6.17%	Yes	Yes	21	13–28 (5.46%–7.63%)
Paternity*	2.11%	Mixed	Yes	35	25–40 (1.66%–2.87%)
Dependency Abuse/ Neglect**	1.66%	Yes	Yes	31	20–36 (1.37%–1.96%)
Custody*	1.28%	Mixed	Mixed	25	18–30 (1.12%–1.65%)
Status Offense**	0.90%	Yes	Yes	28	23–32 (0.59%–1.18%)
Dependency Termination of Parental Rights**	0.82%	Yes	Yes	36	28–41 (0.74%–0.88%)
Adoption*	0.73%	Yes	Yes	40	34–43 (0.67%–0.80%)
Support (Other)*	0.55%	Mixed	Yes	14	7–19 (0.38%–0.80%)
Guardianship (Juvenile)	0.45%	Yes	Yes	25	19–31 (0.28%–0.55%)
Dependency (Other)**	0.34%	Yes	Yes	17	10–23 (0.13%–0.80%)
Support Private/ Non-IVD*	0.31%	Mixed	Yes	9	4–13 (0.16%–0.43%)
Visitation*	0.07%	Mixed	Yes	15	7–21 (0.06%–0.08%)
Dependency (No Fault)**	0.05%	Yes	Yes	12	4–16 (0.01%–0.07%)

262. See supra notes 99 and 102–107 and accompanying text regarding estimates of total debt collection matters across "Contract" and "Small Claims" case types.

Housing Total	***14.95%***				
Landlord/ Tenant (Unlawful Detainer)	8.83%	Yes	Yes	20	11–27 (2.69%–11.96%)
Landlord/ Tenant (Other)	3.65%	Yes	Yes	13	8–17 (1.17%–5.49%)
Mortgage Foreclosure	2.48%	Yes	Yes	26	16–31 (1.84%–3.41%)
Contract Total	***8.15%***				
Seller/ Plaintiff (Debt Collection)[263]	5.06%	No	Yes	18	12–23 (4.20%–5.98%)
Contract (Other)	3.01%	No	No	14	5–19 (0.25%–4.94%)
Buyer (Plaintiff)	0.09%	No	No	8	3–13 (0.01%–0.31%)
Other Total	***8.10%***				
Civil (Other)	4.54%	No	No	15	8–19 (2.76%–6.22%)
Writs	2.70%	No	No	19	12–23 (1.41%–4.47%)
Appeal From Administrative Agency	0.56%	No	No	32	28–37 (0.43%–0.81%)
Appeal From Limited Jurisdiction	0.25%	No	No	31	24–34 (0.17%–0.38%)
Court Civil Appeals (Other)	0.04%	No	No	19	16–21 (0.01%–0.08%)

263. See supra notes 99 and 102–107 and accompanying text regarding estimates of total debt collection matters across "Contract" and "Small Claims" case types.

Tort Total	***2.25%***				
Automobile Tort	1.57%	Mixed	Mixed	20	10–27 (1.15%–1.96%)
Tort (Other)	0.25%	No	No	14	6–19 (0.10%–0.32%)
Premises Liability	0.15%	No	No	13	5–18 (0.11%–0.19%)
Intentional Tort	0.11%	No	No	15	7–21 (0.08%–0.13%)
Malpractice (Medical)	0.07%	Yes	Yes	20	9–28 (0.05%–0.09%)
Product Liability	0.06%	No	No	19	11–27 (0.03%–0.11%)
Malpractice (Other)	0.02%	Yes	Yes	16	9–12 (0.02%–0.03%)
Slander/Libel/ Defamation	0.01%	No	No	12	4–18 (0.01%–0.02%)
Fraud	0.01%	Mixed	Mixed	9	4–13 (0.00%–0.01%)
Tax					
Tax	1.33%	No	No	17	12–20 (0.72%–1.64%)
Property Non-Housing Total	***0.48%***				
Real Property (Other)	0.43%	No	No	21	15–27 (0.29%–0.51%)
Eminent Domain	0.05%	No	Yes	25	20–28 (0.04%–0.06%)

Employment Total	***0.09%***				
Employment (Other)	0.06%	Mixed	Yes	11	5–17 (0.02%–0.11%)
Employment Discrimination	0.03%	Mixed	Yes	14	7–20 (0.03%–0.03%)
Low Estimate of Social Needs, Total	31% (presented)–46% (presented/underlying)				
High Estimate of Social Needs, Total	90% (presented)–95% (presented/underlying)				

TABLE 3: FEDERAL CIVIL CASES[264]

	2012–2019 Total	2012–2019 Annual Average	2012–2019 Proportion
Contract, Total	211,118	26,390	9.30%
Real Property, Total	70,331	8,791	3.10%
Tort Actions, Total	544,183	68,023	23.97%
Actions Under Statutes, Total	1,445,036	180,630	63.64%
Prisoner Petitions	465,573	58,197	20.50%
Civil Rights	309,606	38,701	13.64%
Labor Laws	145,201	18,150	6.39%
Intellectual Property	100,187	12,523	4.41%
Social Security	149,645	18,706	6.59%
Consumer Credit	78,756	9,845	3.47%
Other Statutes	196,068	24,509	8.63%
TOTAL	2,270,668	283,834	100%

264. This data is drawn from the federal judiciary's annual reporting. Statistical Tables for the Federal Judiciary, U.S. Cts., https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary [https://perma.cc/C78N-T72T] (last visited Feb. 10, 2022).