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America's Lawyerless Courts: Legal Scholars Work to Recommend Large-Scale Changes in Lawyerless Civil Courts

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AMERICA'S LAWYERLESS COURTS

**Legal scholars work
to recommend large-scale
changes in lawyerless
civil courts.**

By Anna E. Carpenter,
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Jessica K. Steinberg,
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At approximately 9:00 on most weekday mornings, thousands of state civil courts open their doors and begin hearing cases. These cases involve hundreds of thousands of people across the country. State civil courts are the core of America's civil justice system, whether measured by a raw number of cases or courts' impact on ordinary people's lives. These courts handle 98% of all civil matters filed each year—around 20 million cases.

Many people are pulled into civil court because they cannot pay their rent or debts. Many more come to court for help with intimate and family relationships, including those seeking a divorce, protection from abuse, custody of a child or guardianship of a family member with disabilities.

We are researchers, lawyers and professors who study civil justice. We have practiced in and studied state civil courts for almost two decades. We have observed court proceedings in multiple states for hundreds of hours; interviewed judges, court staff and lawyers; and analyzed case data. We have spoken with bar and judicial associations, researchers and policymakers from coast to coast. We have explored the impact of legal representation and its absence and the role of judges, paraprofessionals and court staff; we have also seen what happens when ordinary people represent themselves in court.

OUR BROKEN LAWYERLESS COURTS

Our research reveals an unavoidable truth: The civil justice system is broken in state civil courts. There is a massive disconnect between what courts were designed to do—solve legal disputes through lawyer-driven, adversarial litigation—and what these courts are asked to do today—help people without lawyers navigate complex social, economic and interpersonal challenges, most of which are deeply tied to structural inequality. As one judge we observed told a courtroom full of litigants, “This courtroom is like the emergency room.”

Five key findings from our work highlight the scope and nature of the crisis: State civil courts are primarily lawyerless, traditional adversary litigation has largely disappeared, the judicial role is not working, the law is not developing, and people's court experiences amplify inequality and human suffering.

First, the core feature of modern civil courts is that they are primarily lawyerless. We define a lawyerless court as one where at least three-quarters of cases involve a party without counsel. This describes most civil courts today. In fact, rates of self-representation are well above 90% on many dockets.

Second, traditional adversary litigation norms and processes have largely disappeared in lawyerless courts. The American system rests on the assumption that lawyers will drive litigation using the tools of civil procedure and evidence. But in today's civil courts, few cases involve lawyers on both sides, leaving many of these rules irrelevant and dormant. When a case does involve a lawyer, there is rarely anyone to respond on the other side. As a result, civil judges must make decisions without basic facts, legal analysis and legal argument.

Third, judges have become the central actors in state civil courts. The judge is often the only lawyer in the courtroom. Judges are not set up to succeed in this new role. They bear the daily burden of maintaining fidelity to neutrality and impartiality while handling dockets dominated by people in desperate need of advice, advocacy and resources—none of which judges can offer.

In recent years, many states have updated the canons of judicial ethics to clarify that judges may “accommodate” the needs of unrepresented people. We have completed a national review of ethics rules and cases pertaining to the scope of judges’ authority to assist unrepresented litigants. This analysis revealed that the relevant law is vague, often contradictory and unhelpful to working court judges.

In the face of courtrooms filled with unrepresented people whose lives, relationships, homes and jobs are on the line, judges have vast oceans of discretion and little concrete guidance in navigating their role. In determining how to handle lawyerless cases, a judge in one of our studies said, “I did look at the canons, but I did not find that it was helpful. I developed a ‘smell test.’” Judges also lack resources to solve the social problems they confront. Another judge told us, “We’d find a lot of people in [domestic violence court] really needed to be in [landlord-tenant court], or sometimes bills, financial planning is what they need, not family court.”

In lawyerless courts, the judicial role is in upheaval.

Fourth, the law is not developing as it should. In our common law system, appellate courts are meant to develop doctrine to clarify the law and guide lower court decisions. This is not happening in today’s civil system. The bulk of state court matters involve family issues, debt and housing—all case types where unrepresented people are in the majority. Research shows that most of these people never bring appeals. As a result, the law never modernizes, and judges lack guidance in the areas of law that dominate their dockets.

Finally, people’s experiences in court amplify inequality and human suffering. Behind courthouse doors, vulnerable people face impenetrable language, byzantine procedures and decisions they do not understand. The cases that many people are involved in are fundamentally about social needs like housing, income, physical safety and intimate relationships.

And research suggests people of color and women are disproportionately represented among litigants. In these courts, people are routinely evicted from their homes, lose custody of their children or have their wages garnished without ever speaking to someone who can help them understand and navigate the system. Sometimes these life-altering judgments are entered against people who never even step foot into the courtroom.

And sometimes, courts and judges fail to treat people with basic human decency, as in these examples from our research:

Judge: Do you oppose [the continuance]?

Unrepresented person: I am just not sure what you mean when you say oppose.

Judge: Are you seriously telling me you don’t know what the word “oppose” means?

Unrepresented person: Yes, ma’am. I am sorry.

Judge [speaking to two unrepresented people]: You think I’m going to take all this time with all these people here to go through [your evidence]? You are both adults. You don’t come here to the court to have your little disagreement. You don’t answer my questions, and you won’t get heard at all.

THE DEMOCRATIC IMPERATIVE

Civil courts are vital democratic institutions. In these courts, we aspire to hold one another accountable through fair, transparent procedures. We aim for just decisions and promoting the rule of law. But as our research shows, lawyerless courts fall far short of meeting these essential democratic goals.

Lawyerless courts’ status quo is no accident. It was created by systems design and

policy choices. Over the past few decades, poverty and inequality have grown in America. Many of the consequences have landed in our courts, but without attendant changes in support for courts’ work in most jurisdictions. Our existing state civil justice system simultaneously expects too much of individual judges and court staff, asking them to fill the gaps left by the absence of lawyers in a lawyer-centric system, while offering far too little justice to vulnerable people whose basic human needs are at risk.

A recent study by the National Center for State Courts shows the public’s trust

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in courts has declined. The researchers in that study speculate that the broader political climate—rather than direct experiences with courts—are driving the results. They also take pains to say they cannot say precisely what is driving the falling numbers.

We fear that people's direct experiences with lawyerless courts *do* affect public confidence in courts. When people have bad experiences in court, they have little reason to trust courts or courts' decisions. We worry that America's lawyerless courts may be eroding public confidence in the judicial branch and, consequently, damaging the fabric of our democracy.

Fortunately, we can change systems. We can make different policy choices. And lawyers can be part of the solution—but not by simply taking on more pro bono cases. We will not volunteer or fund our way out of this problem. We wish it were not so, but we will never have enough funding to provide lawyers for all. And civil courts' problems will not be solved by individual judges juggling the many competing pressures of their work.

RIGHTSIZING COURTS, REREGULATION AND COLLABORATION

Instead of making tweaks around the edges, civil justice reform must be systemic and institutional. We see three related approaches to reform: rightsizing the courts, reregulation and collaboration.

To rightsize the courts, we must start with three questions about what state civil courts are and what they should be doing. First, what problems are courts best positioned to solve today? Second, what kinds of problems could or should be solved by new or different institutions? And third, what would it look like to design civil courts for the people who use them?

Some of this work is already underway, largely in the context of reregulating the practice of law. In Utah, for instance, lawyers have collaborated with

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community members and allied professionals to reform the rules that govern court operations and legal practice. The results include three new features: a new regulatory space where lawyers and non-lawyers can work together to test new ways of delivering legal services, an online dispute resolution platform to keep people out of court and a paraprofessional licensing program. Arizona has taken similar steps, and other states are considering ways to reform court operations and legal practice. Our research in domestic violence courts shows that judges are already working closely with nonlawyer advocates to assist unrepresented parties and are doing so with favorable results.

To get reform right, lawyers, judges and courts must collaborate with ordinary people and experts from outside of the legal community. Historically, courts have been relatively closed institutions for many understandable reasons. But the crisis in our courts demands a cultural and operational shift: We must bring in community partners, from civil justice researchers to the people who use our courts. We need this collaboration because

lawyers have significant blind spots. For the past few decades, legal system insiders have worked in isolation to solve civil courts' problems. Our research shows that this approach has not worked.

However, many are beginning to pay attention to the crisis in lawyerless civil courts. Court and bar leaders are setting up working groups to recommend large-scale changes. Lawyers and judges currently hold the power to decide who gets a seat at the table in these reform conversations. Because human lives, and ultimately democracy, are on the line, we urge lawyers and judges to reimagine our civil courts. Because lawyers do not have all the answers, we also urge them to invite ordinary people and experts from outside the legal system to take leadership roles in reforming our courts. **LP**



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