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## Judges in Lawyerless Courts

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## JUDGES IN LAWYERLESS COURTS

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

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*The typical American civil trial court is lawyerless. In response, access to justice reformers have embraced a key intervention: changing the judge's traditional role. The prevailing vision for judicial role reform calls on trial judges to offer a range of accommodation, assistance, and process simplification to people without legal representation.*

*Until now, we have known little about whether and how judges are implementing role reform recommendations or how judges behave in lawyerless courts as a general matter. Our lack of knowledge stands in stark contrast to the responsibility civil trial judges bear – and the discretionary power they wield – in dispensing justice for millions of unrepresented people each year. While today's civil procedure scholarship focuses on documenting and analyzing growing judicial discretion in complex litigation, a much larger sphere of unexamined and largely unchecked judicial discretion has been hiding in plain sight in state civil trial courts.*

*At the intersection of civil procedure, judicial behavior, and access to justice, this Article presents a theoretically driven multijurisdictional study of judicial behavior. It examines three state civil courts in jurisdictions at the top, above the median, and near the median in the Justice Index (a ranking of state-level access to justice efforts). Despite significant jurisdictional differences, judges' behavior is surprisingly homogenous in the data. Rather than offering accommodation, assistance, and simplification as reforms suggest, judges maintained courts' legal complexity and exercised strict control over evidence presentation.*

*The Article theorizes that a fundamental structural problem drives this unexpected finding – civil courts were not designed for unrepresented people. And judicial behavior is shaped by three factors that result: ethical ambiguity and traditional assumptions about a judge's role in adversarial litigation, docket pressure, and systematic legal assistance provided to petitioners only. The Article concludes judicial role failure is but one symptom of lawyerless courts' fundamental ailment: the mismatch between courts' adversarial, lawyer-driven dispute resolution design and the complex social, economic, and interpersonal problems they are tasked with solving for users without legal training.*

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## INTRODUCTION

*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.<sup>1</sup>*

*It is so hard just to be the referee but also want to get involved.<sup>2</sup>*

State civil trial courts and judges have changed.<sup>3</sup> Thirty years ago, nearly every party in these courts had a lawyer.<sup>4</sup> At that time, lawyers were expected to drive litigation through adversarial procedures. Judges had a clear, specific role: passive umpire.<sup>5</sup>

Today, state civil trial courts are largely lawyerless.<sup>6</sup> Court data suggest more than three-quarters of all civil cases have at least one unrepresented party.<sup>7</sup> In some areas, such as family law, nearly all cases involve two unrepresented parties.<sup>8</sup> In America's civil justice system, millions of low- to middle-income people without

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<sup>1</sup> Quote from a judge interviewed for this study, Centerville Judge 4. *See* Part II *infra* for a description of this study's methods.

<sup>2</sup> Centerville Judge 1.

<sup>3</sup> Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan, & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WISC. L. REV. 249 (2018) (describing the access to justice crisis in state civil courts and offering a theoretical framework to support future research on trial judge behavior that includes four factors: disappearing adversary process, in-person interactions, an ethically ambiguous judicial role, and static written law)

<sup>4</sup> *See, e.g.*, CIVIL JUST. SURVEY OF ST. CTS, NAT'L CTR. FOR ST. CTS., 1992 (1995).

<sup>5</sup> *See* Norman W. Spaulding, Essay, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1391 (2008).

<sup>6</sup> We define lawyerless courts as those where more than three-quarters of cases involve at least one unrepresented party. For the best available and most recent nationally representative data, *see generally* Paula Hannaford-Agor et al., *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR ST. CTS. & ST. JUST. INST. (2015).

<sup>7</sup> *Id.* at iv.

<sup>8</sup> Many studies show that 80-90 percent of family law cases that do not involve the government involve two unrepresented parties. *See, e.g.*, Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN L. REV. 746, 751 (2015) [hereinafter Steinberg, *Demand Side Reform*].

counsel or legal training must protect and defend their rights and interests in courts designed by lawyers and for lawyers.<sup>9</sup>

To make matters worse, the issues at stake in these courts are deeply connected to fundamental human needs such as safety, intimate relationships, housing, and financial security.<sup>10</sup> Many people who find themselves pulled into civil court for issues ranging from medical debt to guardianship of an aging parent are already suffering the consequences of America's fraying—or nonexistent—social and economic safety nets.<sup>11</sup> Too many of those who must represent themselves in civil trial courts are already living at or close to the edge of any person's capacity for self-advocacy.

Over the past two decades, legal scholars, judges, and other experts have advanced a key intervention for lawyerless courts: a revised judicial role where judges cast away traditional passivity to assist and accommodate litigants without lawyers.<sup>12</sup> Proponents have highlighted the practicality and efficiency of judicial intervention in *pro se* cases, particularly when compared to the cost of providing legal assistance and services for every litigant before they enter the courtroom.<sup>13</sup> As this vision has taken

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<sup>9</sup> We and other scholars have written and conducted extensive empirical research to document the civil justice challenges facing low- to middle-income people, including those who end up involved in litigation and those whose legal problems never make it to a lawyer or see the inside of the courtroom. See, e.g., Rebecca Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016) [hereinafter Sandefur, *What We Know*]; Michele Statz, Robert Friday & Jon Bredeson, *Why Prevailing Access to Justice Initiatives Fail Rural Americans* (on file with authors); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Dispossessory Court in Suburban and Rural Georgia* (on file with authors); Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145 (2020); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 305; Llezlie Green, *Wage Theft in State Courts*, 107 CAL. L. REV. 1303 (2019); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1036 ("Local courts—and not federal courts—are the starting point from which we should define and evaluate our system of justice."); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1580 (2018); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income Tenants*, 24 GEO. J. POV. L. POL'Y 60 (2017); Victor Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN STATE L. REV. 745 (2017); Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 HASTINGS L.J. 1427 (2016); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1296 (2016); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation be a Dangerous Thing?*, 67 HASTINGS L. J. 1367 (2016); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473 (2015); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 179 (2014); Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DAEDALUS 93 (2019); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949 (2009). See also, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019) (positing that federal court expansion may lead to underinvestment in state-level courts).

<sup>10</sup> See Sandefur, *What We Know*, *supra* note 7, at 443–44.

<sup>11</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 133 (2019) (arguing that state civil courts have become the government institution of last resort in a system where the legislative and executive branches have either perpetuated or ignored growing economic and social inequality).

<sup>12</sup> See *infra* Part I for a full discussion of these arguments and this scholarship.

<sup>13</sup> See e.g., Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) [hereinafter Barton, *Against Civil Gideon*]; Benjamin H. Barton & Stephanos Bibas, *Triaging*

hold and rates of *pro se* cases have grown, judges have been charged with new expectations, including simplifying courtroom procedures, filling information gaps for unrepresented people, actively developing the factual record in trials, identifying legal issues, and otherwise exercising vast and nearly unfettered discretion to patch holes in our state-level civil justice systems.<sup>14</sup> In response to these calls for change, many states have altered judicial ethics rules to provide that “reasonable accommodations” for *pro se* litigants do not violate a judge’s duty of impartiality—a voluntary approach to judicial role reform. Such change has spurred state court systems and think-tanks to create training and guidance materials encouraging judges to assist people without counsel and offering best practices.<sup>15</sup>

Though this shift in the judicial role has been unfolding across the country for decades, few studies have documented how judges interact with unrepresented people in state trial courts.<sup>16</sup> And, until now, we have lacked comparative, empirical data about changes in judicial interactions with *pro se* litigants. Historically, as we have explained and analyzed in previous work, legal scholars have generally ignored state civil trial courts.<sup>17</sup> Today, most civil procedure and judicial behavior scholarship focuses on complex and appellate litigation in federal courts. In these courts, the bulk of case

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*Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012); NAT’L CTR. FOR ST. CTS., JUST. FOR ALL INITIATIVE GUIDANCE MATERIALS 32 (2019), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0021/25464/pdf-jfa-guidance-materials.pdf](https://www.ncsc.org/_data/assets/pdf_file/0021/25464/pdf-jfa-guidance-materials.pdf) [hereinafter JUSTICE FOR ALL MATERIALS].

<sup>14</sup> For previous work describing and defining the changing judicial role and the evolution of procedural norms in courts where most cases lack lawyers, see generally Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL’Y REV. 257 (2016) (critically reviewing the operation of civil procedure in consumer debt cases); Carpenter, Steinberg, Shanahan & Mark, *supra* note 3; Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899 (2016) [hereinafter Steinberg, *Adversary Breakdown*] (describing the breakdown of adversary procedure in ordinary, two-party cases including judges’ confusion about their proper role and calling for an affirmative duty for courts and judges to drive civil litigation in *pro se* courts); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215 (2018) (examining how judges can increase or decrease access to courts through pre-hearing procedures); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2018) (offering three possible dimensions of active judging behavior to assist *pro se* litigants in and presenting data on the prevalence of these behaviors).

<sup>15</sup> See *infra* Part I(C).

<sup>16</sup> For other examples from a small body of research, see *id.*; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1988); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. & SOC’Y 61 (2014); Vicki Lens et al., *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, 40 J.L. & SOC’Y 199 (2013).

<sup>17</sup> For discussions about and explanations of why legal scholarship has paid so little attention to state civil courts, see Carpenter, Steinberg, Shanahan & Mark, *supra* note 3; Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129 (2014). Today, this trend appears to be changing as more scholars have begun exploring state civil justice. See, e.g., Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VIRGINIA L. REV. 1031 (2020); Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2019); Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 707 (2015); Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939 (2014).

processing activity and party engagement with court procedures occurs outside the courtroom via the exchange of pleadings.<sup>18</sup> Scholars writing about federal courts are concerned with an expanding sphere of unreviewable judicial discretion and the phenomena of ad hoc, party-driven procedural rules.<sup>19</sup> Some critics argue these trends lack transparency, do not reflect democratic values, and ultimately damage judicial legitimacy.<sup>20</sup> These same concerns apply to the evolving judicial role in state civil trial courts.

The unfettered discretion of trial judges in lawyerless courts is a pervasive and troubling phenomenon. In these courts, most parties lack representation, appeals are rare, and court records are sparse and difficult to access.<sup>21</sup> Party engagement with judges and procedures happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings.<sup>22</sup> Often, no lawyer other than the judge is involved in observing, let alone driving, the litigation process. The oversight and advocacy functions normally performed by lawyers are absent. In lawyerless courts, a lack of party control over procedure collides with nearly unfettered and unreviewed judicial discretion.<sup>23</sup> Moreover, civil defendants are disproportionately women and people of color, which may influence how judicial discretion is implemented in these courts.<sup>24</sup>

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<sup>18</sup> Most legal scholarship that does engage with state-level civil justice focuses on state appellate courts. See e.g., Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020).

<sup>19</sup> See e.g., Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018); Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 125 (2018); David L. Noll, *What DO MDL Leaders Do?: Evidence from Leadership Appointment Orders*, 24 LEWIS AND CLARK L. REV. 433 (2020); Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017). For a seminal work on judicial intervention and management in complex litigation, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>20</sup> Robin Effron has made the case that, in the complex litigation context, the growing sphere of judicial discretion is linked to private procedural ordering, with parties increasingly co-managing litigation in collaboration with managerial judges. See Effron, *supra* note 18, at 169–174.

<sup>21</sup> See Decker, *supra* note 16, at 1968–69 (discussing factors that make appeals from lower courts unlikely); Kathryn A. Sabbeth, *Market-Based Law Development*, LPE Blog (July 21, 2021) available at <https://lpeproject.org/blog/market-based-law-development/> (comparing the experiences of litigants in federal and state and noting the lack of representation in state trial courts and the near-absence of appeals by people without counsel); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1387 (2016) (discussing the importance of law reform activity, including appeals, in state civil courts and arguing that such activity is rare where parties lack full lawyer representation). For related methodological discussions, see Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (2013) (setting out an expansive agenda for access to justice research and calling for scholars to make a range of theoretical and empirical contributions to better understand the operation of the civil justice system, including how everyday Americans experience law and the justice system); Carpenter, Steinberg, Shanahan & Mark, *supra* note 3.

<sup>22</sup> See Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 14–15 (2003).

<sup>23</sup> For example, see Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 40 HARV. J. L. & GENDER 55, 78–80 (2018) (describing the unrepresented tenants' lack of power in eviction matters).

<sup>24</sup> See generally Kathryn Sabbeth & Jessica Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022).

This Article presents findings from a study investigating judicial behavior in lawyerless courts through a comparative, multijurisdictional research design. The study leverages key similarities and distinctions among jurisdictions to examine our assumptions about judicial behavior. The jurisdictions are geographically, demographically, and politically varied and rank at the top, above the median, and near the median of the Justice Index – a measure of access to justice reform.<sup>25</sup> The data show how judges from different parts of the country use their discretion and responsibility as they manage civil litigation in live hearings, including whether and how they alter the traditional judicial role to assist or accommodate people without counsel.

The study data capture judges' courtroom behavior and perspectives in three U.S. jurisdictions while holding the law, in effect, constant.<sup>26</sup> The study focuses on a single area of law that varies relatively little across jurisdictions – protective orders – and includes 200 hours of live court observation, hand-collected transcripts of 357 hearings where at least one person lacked counsel, and interviews with observed judges.<sup>27</sup> With these data, we consider how geographic, political, and demographic variations across jurisdictions – as well as in their purported levels of commitment to ethics rules reform and judicial training – may or may not contribute to inter-jurisdictional differences in judicial behavior.

We expected to find significant differences in judges' behavior across study sites based on jurisdictional differences in formal law and guidance and the effects of judicial discretion in state civil trial courts. Instead, we found surprising homogeneity and a shared approach characterized not by simplicity and accommodation but by complexity and control. Judges maintained legal and procedural complexity in their courtrooms by offering only the most limited explanations of court procedures and legal terms and refusing to answer litigants' questions. Judges exercised control by tightly managing evidence presentation, relying heavily on petitioners' pleadings to shape fact development, and limiting the evidence they were willing to hear from either party, particularly from defendants.

Drawing on our data, we provide possible explanations for these results. Explanations include judges' self-reported confusion about ethical boundaries and assumptions about judges' traditional role in adversarial litigation, the pressure judges

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<sup>25</sup> Our assessment of each jurisdiction is based on our own original research, which we describe in Part II, as well as aggregating sources, such as the Justice Index, which ranks states' access to justice reform efforts, including reform of the judicial role. *See, e.g., State Scores and Rankings*, JUSTICE INDEX, <https://perma.cc/VB3L-PNP3> (last visited July 7, 2021).

<sup>26</sup> For a detailed discussion of this study's design and methodology, see Part II *infra*. To protect the confidentiality of study sites and research subjects, this Article reports no identifying information about the three jurisdictions, which we call Centerville, Townville, and Plainville. We describe the jurisdictions in Part II(A) *infra*.

<sup>27</sup> For more about protective orders cases and law see Part II (B) *infra*.



face to clear cases in crowded dockets, and pre-hearing case development assistance that court-connected nonprofit organizations offer to petitioners only. These results suggest that judicial role reform, currently a widely accepted access to justice intervention, is not being implemented in the way its proponents envision. The courts in this study may have been lawyerless, but they were still fundamentally lawyer-centric.

The Article proceeds as follows: Part I reviews the evolution of judicial role reform over the past few decades, including the formal law and judicial ethics rules governing judges' interactions with unrepresented litigants. This Part offers a novel categorization of state-level judicial ethics rules related to *pro se* assistance that shows ethics rules are either silent, permit such assistance, or encourage it. Part I also summarizes a body of advisory materials on role reform developed by scholars, courts, and access to justice think tanks. This guidance asks judges to help *pro se* parties in two key ways: offering explanations and information about legal standards, procedures, and technical terms and developing a full factual record through party testimony and judicial questioning. Part II presents our research design and methods and describes the cases and jurisdictions in the study sample. Importantly, this Part describes why understanding judicial behavior in civil trial courts requires a methodological approach specifically designed for a setting where live, in-person interactions between judges and litigants are common, written records are sparse or non-existent, and appeals are vanishingly rare. Part III presents the results of our study. Here, we draw on interviews and court observations to analyze how judges across jurisdictions maintained legal and procedural complexity and tightly controlled case presentation in the lawyerless courts where they preside. In Part IV, we discuss three possible factors that might shape behavior we observed: judges' ethical confusion and traditional assumptions, docket pressure, and robust pre-hearing assistance that court-connected nonprofit organizations provide to only one party. The Article concludes by theorizing that the judicial role failure this study reveals is one of many signs of the core structural flaw in state civil courts: these institutions were designed for lawyer-driven adversarial dispute resolution and not for unrepresented users untrained in law who are managing a range of complex social, economic, and interpersonal challenges.

## I. JUDICIAL ROLE REFORM

In this Part, we offer historical, conceptual, and legal context for the changing judicial role in lawyerless courts. We first briefly review the history of scholarship and expert commentary advocating for a changed judicial role as an access to justice intervention. We show how, for more than twenty years, legal scholars, judicial and court associations, court administrators, and other civil justice stakeholders have called for judges to let go of the traditional, passive judicial stance and actively assist people without counsel.

Second, we survey the status of formal law, including ethics rules, on the judicial role in lawyerless courts and find that judges are generally authorized to accommodate and assist *pro se* litigants in limited ways. However, formal law remains largely silent on the appropriate scope and depth of judicial interventions. Case law in this area is notably underdeveloped and sometimes contradictory. Reported cases include admonitions for judges to adhere to traditional roles while also carving out ambiguous terrain within which judges can make discretionary accommodations for *pro se* parties. Based on a national review of judicial ethics rules, we categorize states' judicial canons as taking one of three approaches to judicial assistance for *pro se* litigants: silence, permission, or encouragement.

Third, we review guidance on judging in lawyerless courts developed by scholars, state court systems, and non-profit access to justice organizations. We find that a significant body of informal, advisory guidance stands in the gulf between strong scholarly support for judicial role reform and anemic formal law, offering judges suggestions about how to perform their roles in lawyerless courts. In the past five years, the production of such guidance by state court administrative bodies and think-tanks has accelerated, reflecting a growing conventional wisdom that reforming the judicial role is a key access to justice intervention. Drawing on this guidance, we surface two core features of the role reform vision. First, judges are encouraged to offer transparent, accessible explanations of law and procedure throughout the litigation process. Second, judges are urged to elicit information, including narrative testimony, to build the factual record and ensure parties are fully heard. Ultimately, however, without formal law and ethical principles that require reform, individual judges are left with near-complete discretion and responsibility to implement this new role.

## A. CALLS FOR REFORM

More than twenty years ago, when rates of *pro se* litigation were on the rise, legal scholars began calling for and describing a new judicial role in trial courts.<sup>28</sup> Since then, civil trial courts have become lawyerless. Legal scholars concerned with access to justice have consistently argued for an end to traditional judicial passivity in favor of an active, interventionist role in lawyerless cases.<sup>29</sup> Many supporters have praised role reform as an efficient and pragmatic access to justice intervention.<sup>30</sup> Most scholars speaking on this topic have advocated for retraining, guidance, and voluntary action by individual judges, including encouraging judges to ask questions, offer information, and adjust procedural rules. At least two commentators have pushed for a mandatory approach that requires judges to offer certain types of assistance.<sup>31</sup> Today, the permissive, voluntary approach prevails.

Criticisms of the traditional, passive judicial role in *pro se* cases appeared in legal scholarship in the late 1990's and early 2000's. At that time, formal law, including judicial ethics rules, generally required judges to be "impartial" in their interactions with all parties, with the underlying assumption that most parties would be

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<sup>28</sup> Early work includes: JONA GOLDSCHMIDT ET. AL., *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* (1998) [hereinafter GOLDSCHMIDT, *MEETING THE CHALLENGE*]; RICHARD ZORZA, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (2002) [hereinafter ZORZA, *SELF-HELP FRIENDLY COURT*] (suggesting how to design a court for pro se litigants); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *FAM. CT. REV.* 36 (2002) (discussing judicial resistance to assistance for pro se litigants and asserting judicial obligations to provide assistance) [hereinafter Goldschmidt, *Pro Se Litigant's Struggle*]; Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 *JUDGES' J.* 16 (2003) (calling for judicial role reform and proposing best practices); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969 (2004); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 *GEO. J. LEGAL ETHICS* 423 (2004) [hereinafter Zorza, *The Disconnect*] (arguing judicial assistance to pro se parties is consistent with impartiality and fairness). *See also* Jane Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 *TENN. J. L. & POL'Y* 47 (2014) (discussing the current trends toward judicial problem solving roles in family court, and their historical antecedents).

<sup>29</sup> More recent work includes: Barton, *Against Civil Gideon*, *supra* note 12 (arguing an active role for judges is a key solution to the crisis facing state trial courts); Barton & Bibas, *supra* note 12, at 985 (arguing for pro se court reform, including judicial assistance, rather than civil Gideon); Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 *CASE W. L. REV.* 325 (2010) (charging judges with the responsibility to modify rigid roles); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999) [hereinafter Engler, *And Justice for All*] (calling for judicial intervention and assistance as a key element of access to justice court reform); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 *NOTRE DAME J. L. ETHICS & PUB. POL'Y*, 367, 368, 376 (2008) [hereinafter Engler, *Ethics in Transition*]; Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869 (2009) (asserting that closing the justice gap calls for concerted efforts from all stakeholders, including courts, and calling for pro se court reform); Steinberg, *Demand Side Reform*, *supra* note 8.

<sup>30</sup> *See infra* Part I(a). *Cf.* Kathryn Sabbeth, *supra* note 8 (arguing against remaking the courts via simplification reforms).

<sup>31</sup> *Id.*

represented. Until 2010, judicial canons were silent about judicial behavior in *pro se* cases.<sup>32</sup> Thus, early critics of judicial passivity focused on arguing that judges could, as a matter of ethics, actively engage with litigants—such as asking questions to develop the record or explaining a procedural step—while still maintaining their impartiality and neutrality under then-existing ethical rules.<sup>33</sup>

One of the first legal scholars to advocate for changes to the judge’s role, Russell Engler, began writing on the topic as early as 1999. Engler’s seminal work highlighted the then-increasing rates of unrepresented people in state courts, articulated the challenges they faced in navigating court processes and argued that judges, with the support of ethical guidance and retraining, could offer assistance and support to those without counsel.<sup>34</sup> Engler documented uncertainty among judges and other court staff about the permissible boundaries for their interactions with unrepresented people and noted the lack of guidelines to help judges “redefine” their roles.<sup>35</sup> He emphasized that, at the time, many trial judges assumed that appearing in court without counsel was a rational, considered choice as opposed to something forced upon some litigants by the unavailability or unaffordability of legal assistance.<sup>36</sup> As a result, some judges believed that people without counsel should “live with the consequences” of their decisions.<sup>37</sup> However, Engler also documented signs of shifts in judicial attitudes, including directives from some state courts instructing their trial judges to “set up different procedures” in *pro se* cases.<sup>38</sup>

In response to these dynamics, Engler and others writing at the time argued that being impartial does not inherently require judges to be passive.<sup>39</sup> Engler suggested that judicial assistance for people without counsel in trial courts could be modeled after the practices of small claims and administrative judges who, at the time, were more commonly expected to deal with unrepresented people and help them advance their cases while also maintaining impartiality.<sup>40</sup> Ultimately, Engler’s work asserted that judges could and should assist unrepresented people in a range of ways, including developing facts, identifying claims and defenses, assessing what sort of assistance or information the litigant might have received prior to coming to the

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<sup>32</sup> *Id.*; see also Engler, *Ethics in Transition*, *supra* note 25, at 370.

<sup>33</sup> See *supra* note 24; Engler, *And Justice for All*, *supra* note 25, at 2028 (noting unrepresented people are “forced to make choices at every turn without understanding either the range of options available or the pros and cons of each option”).

<sup>34</sup> Engler, *And Justice for All*, *supra* note 25, at 1988.

<sup>35</sup> *Id.* at 1991.

<sup>36</sup> *Id.* at 1988–89.

<sup>37</sup> *Id.* at 1998.

<sup>38</sup> Engler, *Ethics in Transition*, *supra* note 25, at 372–73.

<sup>39</sup> GOLDSCHMIDT, MEETING THE CHALLENGE, *supra* note 24; ZORZA, SELF-HELP FRIENDLY COURT; *supra* note 24; Goldschmidt, *Pro Se Litigant’s Struggle*, *supra* note 24; Albrecht, Greacen, Hough, & Zorza, *supra* note 24; Zorza, *The Disconnect*, *supra* note 24.

<sup>40</sup> Engler, *And Justice for All*, *supra* note 25, at 2017–2019, 2028–29 (“Far from offending notions of impartiality, the call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality.”).

courtroom, and correcting any misunderstandings, particularly in the context of settlement agreements with a represented opposing party.<sup>41</sup>

Following Engler's early work, Deborah Rhode's seminal book, *Access to Justice*, was published in 2004 and sparked a broader conversation about the growth of *pro se* parties in state courts, the lack of legal assistance for the public more broadly, and the legal profession's responsibility for these systemic challenges.<sup>42</sup> Russell Pearce explicitly cited Rhode's book as the inspiration for his argument that judges should be affirmatively required to assist unrepresented people, particularly by ensuring that procedural errors do not block people without counsel from presenting relevant evidence and arguments.<sup>43</sup> In Pearce's words, the "paradigm of judge as passive umpire" should be replaced with the "paradigm of judge as active umpire."<sup>44</sup>

Around the same time, Richard Zorza, scholar and founder of the Self-Represented Litigation Network (a clearinghouse for access to civil justice best practices), wrote a series of papers calling for judges to take an active role in cases involving unrepresented people.<sup>45</sup> Zorza emphasized the importance of transparency and judicial "engagement" with parties and detailed the downsides of judicial passivity with a strong emphasis on the risk that party confusion, intimidation, or lack of understanding would result in judges missing the chance to hear relevant evidence or legal arguments. Zorza, like others writing at the time, also argued that passive judging created risks for courts as institutions, potentially threatening their legitimacy in the eyes of the public.<sup>46</sup> To minimize risks to substantive justice and court legitimacy, Zorza asserted that judges should explain legal standards and the steps of the litigation process, regularly confirm understanding with litigants, ask questions of litigants to elicit relevant facts, and clearly explain the judge's decision and its consequences.<sup>47</sup>

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<sup>41</sup> *Id.*

Judges should conduct trials in the manner "best suited to discover the facts and do justice in the case." "In an effort to...secur[e] substantial justice," the court must assist the unrepresented litigant on procedure to be followed, presentation of evidence, and questions of law. Further, the court may call witnesses and conduct direct or cross examinations. The court has a "basic obligation to develop a full and fair record..." Each of these duties is not only wholly consistent with the notion of impartiality, but also necessary for the system to maintain its impartiality.

Engler, *And Justice for All*, *supra* note 25, at 2028–30 (internal citations omitted) (citing Mass. Unif. Sm. Cl. R. 7(c); Fla. Ct. Sm. Cl. R. 7.140(e); Ill. Sup. Ct. R. 286(b); *Lashley v. Secretary of Health and Human Servs.*, 708 F.2d 1048, 1051 (6th Cir. 1983) (quoting *McConnell v. Schweiker*, 655 F.2d 604, 606 (5th Cir. 1981))).

<sup>42</sup> DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

<sup>43</sup> Pearce, *supra* note 24, at 970–72.

<sup>44</sup> *Id.* at 970.

<sup>45</sup> See Zorza, *The Disconnect*, *supra* note 24, at 426–31; ZORZA, *SELF-HELP FRIENDLY COURT*, *supra* note 24, at 109–114; Richard Zorza, *Courts in the 21<sup>st</sup> Century: The Access to Justice Transformation*, 49 *JUDGES J.* 14 (2010) [hereinafter *Zorza, 21<sup>st</sup> Century*].

<sup>46</sup> See Zorza, *The Disconnect*, *supra* note 24, at 438–39.

<sup>47</sup> *Id.*; Zorza, *21<sup>st</sup> Century*, *supra* note 41, at 4.

In a paper comparing the possibility of *pro se* court reform to the alternative of a legal right to counsel for all civil litigants, Benjamin Barton called for retraining judges to assist people without counsel and asked readers to “imagine a world where the courts that deal with the poor are so simple, efficient, transparent, and pleasant that for once the justice system of the poor was the envy of the rich. *Pro se* court reform actually offers this possibility.”<sup>48</sup> Barton criticized calls for an expanded right to counsel in civil cases, comparing the promise of “civil Gideon” to the pragmatic reality of how the right to counsel operates in the criminal context and argued that the need for lawyers in civil courts could be eliminated in the first place if those courts became systematically more accessible to people without counsel, including through a rethinking of the judicial role.<sup>49</sup> Barton also asserted the pragmatic value of judicial role reform, a view that other scholars and advocates for role reform share.<sup>50</sup> As the National Center for State Courts states in its Justice for All Initiative Guidance Materials, “It is more effective to train one judge on how to assist a self-represented litigant than to teach hundreds of SRLs how to be lawyers.”<sup>51</sup>

A more recent proposal advanced by one of the authors of this Article, Jessica Steinberg, makes a more expansive argument about the type of judicial role reform needed to solve the crisis of lawyerless courts.<sup>52</sup> Steinberg’s ambitious proposal calls for fundamental changes to the judges’ role and judicial ethics but, critically, also for removing the norm of party-driven litigation in civil courts. Drawing on the model of Social Security Administration disability claim adjudication, where judges have affirmative case development duties, Steinberg proposes a new set of procedural and evidentiary rules that require courts and judges to bear the burden of moving cases through the litigation process, including providing form pleadings, serving process, scheduling hearings, developing the factual record, raising potential legal claims, and drafting orders.<sup>53</sup> To date, courts have not created affirmative requirements of judicial assistance in civil trial courts such as those advocated by Pearce and Steinberg.

## B. UNDERDEVELOPED FORMAL LAW

Today, formal law, including case law and judicial ethics, tends to be vague and underdeveloped and is sometimes contradictory. In this section, we briefly review the state of the law, categorize three different approaches found in states judicial ethics rules related to judicial assistance for people without counsel – silence, permission, or encouragement – and conclude that formal law generally offers judges little purchase

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<sup>48</sup> Barton, *Against Civil Gideon*, *supra* note 12, at 1228, 1273.

<sup>49</sup> *See id.* at 1227–28, 1233–34 (“If a systematic effort were made to simplify the law and procedure in courts with large *pro se* dockets, it could improve outcomes in those courts and do more for the poor than a guarantee of counsel, all at less cost.”).

<sup>50</sup> *See e.g., id.*; Barton & Bibas, *supra* note 12.

<sup>51</sup> *See e.g.,* JUSTICE FOR ALL MATERIALS, *supra* note 12, at 32.

<sup>52</sup> *See generally* Steinberg, *Adversary Breakdown*, *supra* note 13.

<sup>53</sup> *See id.* at 947–965.

in understanding what they should and should not be doing in their interactions with unrepresented people.

Early advocates of judicial role reform developed persuasive arguments that judges who affirmatively accommodated and assisted *pro se* litigants by asking questions, explaining legal standards, or modifying procedural rules, for example, were not violating ethical duties of impartiality and neutrality.<sup>54</sup> Such arguments, along with the pragmatic reality of the growing *pro se* crisis, influenced the American Bar Association (ABA) and many states to alter judicial ethics rules to reflect this new understanding of the legally permissible scope of judicial assistance.

In 2010, the ABA modified Model Code of Judicial Conduct Rule 2.2 to explicitly permit judges to make “reasonable accommodations” for unrepresented people, clarifying that doing so is not a violation of the duty of impartiality. Rule 2.2 states, “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” The revision appears in Comment 4 to Rule 2.2: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”<sup>55</sup> Many states, though not all, have followed suit.

Our review of judicial canons from all 50 states and the District of Columbia shows states have taken one of three approaches in the context of judicial assistance for people without counsel: silence, permission, or encouragement.<sup>56</sup> No state currently requires judicial assistance for people without counsel. Fifteen states have taken the approach we label “silence.” In these states, judicial ethics rules or comments to the rules have not been amended to add any language clarifying that assisting or accommodating people without counsel is not a violation of a judge’s duty of impartiality. A majority of states, 30, have followed the formula laid out by the ABA’s amendments to Rule 2.2 and added language clarifying that “reasonable accommodations” do not violate impartiality. We call this approach “permission.” Finally, eight states, including one of those in our study, have adopted ethical rules that go a step farther and urge judges to consider offering accommodations and assistance

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<sup>54</sup> See Engler, *Ethics in Transition*, *supra* note 25, at 372–73; see also Zorza, *supra* note 24; CYNTHIA GRAY, AMERICAN JUDICATURE SOCIETY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005) (argues active judging practices do not violate ethics or compromise the impartiality).

<sup>55</sup> MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS’N 2010). Also in 2010, the ABA also revised Rule 2.6, which states, “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” The update appears in Comment 2 and states, “Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are...whether the parties and their counsel are relatively sophisticated in legal matters....[or] whether any parties are unrepresented by counsel...” MODEL CODE OF JUD. CONDUCT r. 2.6 (AM. BAR ASS’N 2010).

<sup>56</sup> Data on file with authors.

by outlining specific actions a judge may take and explicitly urging judges to consider taking such actions.<sup>57</sup> We label this approach “encouraging.”

While most jurisdictions now explicitly permit judges to accommodate *pro se* litigants, formal law largely leaves the task of operationalizing this role up to individual trial judges. Appellate opinions discussing *pro se* assistance are limited, insufficient, and often contradictory, particularly considering the massive numbers of civil cases and trial court work that touches unrepresented parties.<sup>58</sup> A recent analysis found that appellate courts “often issue opinions laden with stock language advising judges to adhere to adversary procedure but also to ensure substantive justice is achieved,” but without instruction on how to strike this balance in practice.<sup>59</sup> Courts consistently decline to require judges to affirmatively assist *pro se* parties and often make a point of explicitly stating that judges have no such duty.<sup>60</sup> The most common framework that emerges from case law around the country has two components. First, *pro se* litigants are held to the same procedural and evidentiary standards as lawyers. Second, trial judges may, in some circumstances, waive or explain technical requirements, liberally construe pleadings, or give multiple opportunities to amend where such steps would not affect substantive justice or violate due process.<sup>61</sup>

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<sup>57</sup> The jurisdiction in this study that has adopted “encouraging” ethical rules is Centerville, as we describe in greater detail in Part II(a) *infra*. Here’s an example of such language from Maine:

A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.

Me. Code Jud. Conduct R. 2.6(C).

<sup>58</sup> Steinberg, *Adversary Breakdown*, *supra* note 13, at 904. This dearth of appellate treatment is related to a topic of the authors’ future work: the phenomenon of generally limited law development in substantive legal areas with *pro se* majorities.

<sup>59</sup> *Id.*

<sup>60</sup> See e.g., *Austin v. Ellis*, 408 A.2d 784, 785 (N.H. 1979); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); *Breck v. Ulmer*, 745 P.2d 66 (Alaska 1987); see also Steinberg, *Adversary Breakdown*, *supra* note 13, at 927 (citing *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. Ct. App. 2001), as “an example of the courts’ emphasis on the norm of party control,” where parties are expected to act like lawyers). The California Judicial Council offers this summary of California appellate cases on unrepresented litigant assistance:

The trial judge has broad discretion to adjust procedures to make sure a self-represented litigant is heard; 2. Judges will always be affirmed if they make these adjustments without prejudicing the rights of the opposing party to have the case decided on the facts and the law. 3. Judges will usually be affirmed if they refuse to make a specific adjustment, unless such refusal is manifestly unreasonable and unfair.

JUD. COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS 3–12 (2019).

<sup>61</sup> *Id.*



As a matter of law, it is clear that American civil trial judges generally have the discretion to accommodate and assist *pro se* litigants, including waiving procedural technicalities if they choose. In most jurisdictions, formal law offers little beyond this broad and vague authorization. As a result, most judges cannot look to formal law to identify the permissible bounds of any assistance they might offer. In the absence of formal law to guide individual judge behavior, civil justice reform experts, think tanks, and court administrative bodies have developed informal guidance aimed at shaping judges' behavior.

### C. GUIDANCE FOR JUDGES

As trial judges have wrestled with the challenge of *pro se* majorities filling their courtrooms – and absent much guidance from formal law – scholars, courts, judges, and other experts have produced a large body of guidance, best practices, and training materials aimed at shaping and influencing judges' behavior. Sources include the Conference of Chief Justices, state supreme courts, judicial leaders,<sup>62</sup> legal scholars, and think tanks such as the National Center for State Courts and the Self-Represented Litigation Network.<sup>63</sup> Over the past few decades, such sources have issued a range of

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<sup>62</sup> See e.g., CIV. JUST. IMPROVEMENTS COMM., CONF. OF CHIEF JUDGES', CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 16–18, 34 (2016), <https://perma.cc/5UJS-PAQZ>; JUD. COUNCIL OF CAL., *supra* note 56; MONT. JUDGES' DESKBOOK FOR MUN., JUST., & CITY CTS. 5 (John H. Duehr, ed., 2010), <https://perma.cc/TXN6-B6N4>; COMM. ON SELF-REPRESENTED LITIGATION, NEB. SUP. CT., STRATEGIC PLAN 2015–2020, at 11 (2015), <https://perma.cc/F8T5-U7BZ>; N.M. JUD. EDUC. CTR., UNIV. N.M. SCH. LAW, N.M. JUD. ETHICS HANDBOOK 49 (2011), <https://perma.cc/8DLD-RAHP>; MICH. BENCHBOOK (2020); MICH. JUD. INST., CIV. PROC. BENCHBOOK (2d ed., 2020), <https://perma.cc/Q9VR-QDFQ>; ACCESS TO JUST. COMM'N, TENN. SUP. CT., MEETING CHALLENGES OF SELF-REPRESENTED LITIGANTS: A BENCH BOOK FOR GEN. SESSIONS JUDGES' OF ST. OF TENN. 2, 6–12 (2013), <https://perma.cc/WC9S-LWQW>; BENCHBOOK COMM., ASS'N DIST. CT. JUDGES' VA., DIST. CT. JUDGES' BENCHBOOK 159–165 (2019), <https://perma.cc/95VM-CRWY>; ADVISORY GRP. SELF-REPRESENTATION N.J. COURTS, ENSURING AN OPEN DOOR TO JUSTICE: SOLUTIONS FOR ENHANCING ACCESS TO THE COURTS FOR SELF-REPRESENTED LITIGANTS 14, 31, 53–54 (2009), <https://perma.cc/FN7R-LXSK>; COLO. ACCESS TO JUST. COMM'N, JUST. CRISIS IN COLO. 2014: REPORT ON CIV. LEGAL NEEDS IN COLO. 26 (2014), <https://perma.cc/K7C2-UMFD>; KATHERINE ALTENEDER, EDUARDO GONZALES & FLA. COMM'N ON ACCESS TO CIV. JUST., LEARNING FROM SELF-REPRESENTED LITIGANTS AND THEIR TRUSTED INTERMEDIARIES 10–11 (2020), <https://perma.cc/EM7X-UU42>; ILL. JUD. BRANCH, BENCH CARD: SELF-REPRESENTED LITIGANTS & SCR 63(A)(4) (2019), <https://perma.cc/FTT3-HTPB>; MASS., JUD. GUIDELINES FOR CIV. HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS (WITH COMMENTARY) 1–3 (2019), <https://perma.cc/SUL4-WG2W>.

<sup>63</sup> See e.g., SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2D ED. 2008) [hereinafter SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES], <https://perma.cc/U3RF-4WP7>; JOHN M. GREACEN & MICHAEL HOULBERG, ENSURING RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS (2019), <https://perma.cc/9VBX-NAR7>; JUSTICE FOR ALL MATERIALS, *supra* note 12. The Self-Represented Litigation Network, the National Center for State Courts, and the American Judicature Society collaborated to develop curricula to train judges in best practices for handled *pro se* cases. See Nat'l. Ctr. St. Cts., Curriculum: Access to Justice for the Self-Represented, SELF-REPRESENTED LITIG. NETWORK (2013), <https://perma.cc/M4B7-BW3V> [hereinafter 2013 Curriculum on Access to Justice]; see also Curricula on Access to Justice for the Self-Represented at the Access to Justice for the Self-

articles, reports, bench guides, and training materials that recommend and define an accommodating, helpful, and interventionist role for judges in lawyerless courts.

This section reviews existing guidance and draws out two cross-cutting recommendations for how judges should alter traditional passivity and adversary procedures in *pro se* hearings.<sup>64</sup> First, guidance materials instruct judges to offer information and explanations to help *pro se* litigants understand the law, court process, and legal terms. Second, guidance emphasizes a judge's role in ensuring parties have their matters fairly and fully heard and urges judges to actively elicit factual information during hearings to develop a complete record.

### 1. Offering Information and Explanations

According to guidance literature, one of the most critical roles a judge plays in cases without lawyers involves promoting transparency through information-sharing and explanations.<sup>65</sup> The need for explanations is obvious from the perspective of an unrepresented person: most people do not have legal training and likely will not know what facts might be relevant, what legal claims they can assert, how to introduce evidence, or the procedural posture of a case.<sup>66</sup> In addition, as guidance from California notes, legal language is a “foreign language” for most people.<sup>67</sup>

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Represented Conference at Harvard Law School, SELF-REPRESENTED LITIG. NETWORK (Nov. 2007), <https://perma.cc/T6UT-N4C5> [hereinafter 2007 Curricula].

<sup>64</sup> See Carpenter, Steinberg, Shanahan & Mark, *supra* note 3 (reviewing guidance and identifying a range of possible judicial behavior, including explaining, eliciting, adjusting procedures, referring to litigants to resources, and facilitating negotiation); Steinberg, *Adversary Breakdown*, *supra* note 13 (discussing judges adjusting procedures and raising legal issues); Carpenter, *Active Judging and Access to Justice*, *supra* note 13 (discussing eliciting, explaining, and adjusting procedures).

<sup>65</sup> See Steinberg, *Adversary Breakdown*, *supra* note 13, at 931; Carpenter, *Active Judging and Access to Justice*, *supra* note 13, at 660–70; see e.g., ILL. JUD. BRANCH, BENCH CARD, *supra* note 58, at 1; 2013 Curriculum on Access to Justice, *supra* note 59, at Module D; JUSTICE FOR ALL MATERIALS, *supra* note 12, at 32; Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, 4 JUDGES' J. 16, 17–18 (2011) [hereinafter Zorza, *A New Day*]; GREACEN & HOULBERG, *supra* note 59, at 14; JUD. COUNCIL OF CAL., *supra* note 56, at 2–3; COLO. ACCESS TO JUST. COMM'N, JUSTICE CRISIS, *supra* note 58.

Throughout the process, the judge should have in place proactive processes to make sure that the parties do understand what is going on and why. This should include asking if they understand, and seeking confirmation of understanding at critical points.

Zorza, *The Disconnect*, *supra* note 24, at 443. For a robust discussion of how people without lawyers engage with legal information, see generally, David J. Greiner, Dalie Jimenez, and Lois Lupica, *Self-Help Reimagined*, 92 IND. L.J. 1119 (2017).

<sup>66</sup> See e.g., 2013 Curriculum on Access to Justice, *supra* note 59, at Module A, slide 4.

<sup>67</sup> JUD. COUNCIL OF CAL., *supra* note 56. In fact, California's guide notes that legal terms are, quite literally, sometimes a “mash-up” of foreign languages including Latin and French.

From a court or judge's perspective, guidance materials offer three common reasons why judges should serve in an explanatory role. First, a litigant who understands the legal standards, procedural steps, and court processes will, in turn, be more helpful to the judge, for example, by offering facts that help the judge render a decision. Second, psychological research on the concept of procedural justice research suggests parties who believe they understand the reasons for a judge's decision will be more likely to accept and follow the decision.<sup>68</sup> And third, a number of guidance sources stress that courts, as institutions, should be articulating the reasons for their decisions systematically to the people who bring their problems to courts for resolution, a principle also rooted in procedural justice research, which suggests that people are more likely to perceive courts and their decisions as legitimate when they understand the bases of those decisions.<sup>69</sup>

With these goals in mind, guidance pushes judges to take responsibility for explaining a wide range of information and confirming that litigants understand the information the judge has attempted to convey.<sup>70</sup> Judges are encouraged to offer clear, accessible explanations of court processes and procedures (such as the order of trial or how evidence should be offered), legal information (such as what elements must be proven in a case), and language (including translating legal terms and avoiding the use of jargon in the first place).<sup>71</sup>

Guidance materials suggest judges offer information at the beginning of a docket to explain the process litigants can expect, such as why a judge might hear certain cases first.<sup>72</sup> Judges are also encouraged to begin every hearing with a brief statement of the purpose of the hearing, the process that will be followed, and the legal issues that will be heard or decided.<sup>73</sup> During hearings, judges are instructed to explain the applicable law or legal standards when needed and offer sufficient explanations to help litigants understand what kind of factual information the court needs to render a decision, such as explaining why a judge might need testimony on

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<sup>68</sup> *Id.* at 6–19 (“Judges have wide discretion to admit or reject evidence in cases involving self-represented litigants, but should explain their thought process to the parties to maintain a sense of fairness.”). As a number of sources note, research suggests that perceptions of a decisionmaker’s trustworthiness are directly tied to whether a judge can justify, via explanation, the decisions she makes. *See e.g.*, 2013 Curriculum on Access to Justice, *supra* note 59, at Module A, slide 15; *see also* Tom Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCH. 117, 122 (2010); TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).

<sup>69</sup> SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES, *supra* note 59; GREACEN & HOULBERG, *supra* note 59.

<sup>70</sup> For examples, see Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 18 (2007) [hereinafter Burke & Leben, *Procedural Fairness*]; 2013 Curriculum on Access to Justice, *supra* note 59, at Module A, slide 7.

<sup>71</sup> *See e.g.*, SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES *supra* note 59, at 54.

<sup>72</sup> *Id.* at 54.

<sup>73</sup> *See e.g.*, 2013 Curriculum on Access to Justice, *supra* note 59, at Module B, slide 6.

an issue.<sup>74</sup> At the end of hearings, judges are urged to explain the content, meaning, and enforcement process of court orders.<sup>75</sup>

## 2. Fully Developing the Factual Record

According to guidance materials, judges should actively elicit facts from litigants to ensure a complete factual record and accurate legal decisions while increasing the likelihood that litigants perceive the court has heard them.<sup>76</sup> Recommended behavior includes asking “neutral” questions to develop facts, listening patiently to narrative testimony, modifying evidentiary and procedural rules to ensure relevant evidence is introduced.<sup>77</sup> *Pro se* guidance stresses the importance of this role because judges need legally relevant facts to render decisions. Getting such information in hearings involving unrepresented people is a persistent challenge given that litigants may have only a loose sense of what matters under the law and a strong sense of what matters in their own lives.

State courts systems tend to offer general guidance that judges may ask questions and adjust hearing procedures to elicit information but vary in the strength of their recommendations that judges actively intervene. Montana and California exemplify two approaches. Official guidance in Montana pushes judges to intervene as little as possible, stepping in only when necessary to clarify testimony, while California encourages judges actively to elicit information and ask questions.<sup>78</sup>

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<sup>74</sup> SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES, *supra* note 59, at 54; JUD. COUNCIL OF CAL., *supra* note 56, at 2–7.

<sup>75</sup> For examples, see e.g., NAT’L CTR. FOR ST. CTS., *supra* note 59, at 8 (“At the hearing, the judge grants [the] emergency protective order and explains the consequences of it as well as possible next steps [the litigant] might take to ensure her family’s safety.”); Burke & Leben, *Procedural Fairness*, *supra* note 66, at 18.

<sup>76</sup> See e.g., 2013 Curriculum on Access to Justice, *supra* note 59, at Module B, slide 8; JUD. COUNCIL OF CAL., *supra* note 56, at 50–53; ILL. JUD. BRANCH, BENCH CARD, *supra* note 58; MASS., JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS, *supra* note 58; COLO. ACCESS TO JUST. COMM’N, JUSTICE CRISIS, *supra* note 58.

<sup>77</sup> See e.g. MASS., JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS, *supra* note 58; 2013 Curriculum on Access to Justice, *supra* note 59, at Module A, slide 7; SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES, *supra* note 59, at 54, 59; Zorza, *A New Day*, *supra* note 61, at 17–18; GREACEN & HOULBERG, *supra* note 59, at 14.

To decide cases fairly, judges need facts, and to get those facts, judges often have to ask questions, modify procedure, and apply their common sense in the courtroom to create an environment in which all the relevant facts are brought out. Without a full understanding of the facts, judicial officers are at risk to either mis-apply the applicable law or apply the wrong law.

JUD. COUNCIL OF CAL., *supra* note 56, at 2-2.

<sup>78</sup> See JUD. COUNCIL OF CAL., *supra* note 56; MONT. JUDGES’ DESKBOOK, *supra* note 58.

Guidance language encouraging judges to help litigants develop the factual record is typically stated in broad terms.<sup>79</sup> For example, one judicial training curriculum urges judges to “...focus on what the litigants need,” which typically is “a process in which they feel the courts are engaged and in which they can tell their stories in meaningful ways.”<sup>80</sup> The curriculum goes on to say, “Active listening by the court assists in building the confidence of the litigants and permits the court to guide the proceedings without the litigants feeling frustrated by being limited in their presentations.”<sup>81</sup> Most guidance materials steer clear of offering granular protocols, substantive legal context, or step-by-step recommendations.<sup>82</sup>

Yet, all of this guidance is merely advisory. Absent more detailed, context-specific advice or clear legal standards, let alone an affirmative obligation to assist *pro se* litigants in some way, individual judges ultimately have vast responsibility and discretion in operationalizing reforms to the traditional, passive role. Many guidance sources explicitly note judges’ vast discretion in determining how best to interact with unrepresented people, and some even take pains to assure judges that they can reject

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<sup>79</sup> The following language comes from a two-page “Bench Card” from Illinois. The document offers a paragraph expanding on each of the points below:

Tips for ensuring SRLs are fairly heard: 1. Use simple, plain language; avoid legal jargon; and explain legal concepts. 2. Explain overall court processes (including evidentiary and foundational requirements) and what will happen in court. 3. Ask the SRL what questions they have and check for understanding throughout proceedings. 4. Liberally construe pleadings: look to the substance of a pleading rather than its title. 5. Ask neutral questions for clarification or to focus the proceedings and consider modifying the traditional order of taking evidence. 6. Explain why you are doing something and your basis for rulings. 7. Recognize that most SRLs may be scared and nervous. 8. Be courteous, patient, and an active listener to ease tension. 9. Remember procedural fairness principles: voice, neutrality, respect, trust, understanding, and helpfulness. 10. Appreciate your unconscious biases and increase cultural competencies. 11. Use certified interpreters for limited English proficient or hearing impaired litigants. 12. Provide SRLs with checklists, handouts, and other resources or referrals.

ILL. JUD. BRANCH, BENCH CARD, *supra* note 58. A statewide guide to handling *pro se* cases developed by the Judicial Council of California and released in 2019 is an exception and stands out among all the guidance documents we reviewed as by far the most comprehensive and detailed, clocking in at 280 pages. The first four chapters address judges’ behavior in evidentiary hearings, one chapter reviews California appellate decisions related to *pro se* assistance, another chapter explains the implications of procedural justice research, and another suggests a range of courtroom and hearing management techniques, including sample scripts for a range of situations. This guide offers more in-depth information about the challenges *pro se* litigants face when compared to other states. It also offers many more concrete steps judges can take, such as check-in procedures, organizing the order in which cases are called, clustering issues during evidentiary hearings, outlining which legal issues the court will be deciding in a hearing, and explaining which party has the burden of proof for each hearing. However, it is an open question whether this level of guidance, absent formal legal requirements for judges to help *pro se* litigants, will alter judges’ approach. See JUD. COUNCIL OF CAL., *supra* note 56.

<sup>80</sup> 2007 Curricula, *supra* note 59, at Curriculum 2, slide 6.

<sup>81</sup> *Id.*

<sup>82</sup> California is an exception in offering more detailed guidance. See JUD. COUNCIL OF CAL., *supra* note 56.

any suggestions that make them “uncomfortable.”<sup>83</sup> Some sources seem to acknowledge where recommendations will inevitably fall short. For example, one judicial training curriculum presents “Ten Key Techniques” for *pro se* cases, but before listing the techniques, includes this caveat:

Every case is different, and every litigant is different. In a particular case, some techniques may apply, some may not, and others may need modifying....The techniques are offered as tools to judges, not explicit directions. Every judge has to develop his or her style.<sup>84</sup>

As this section has shown, the backdrop of this study is one of formal law with general admonitions and limited requirements, informal guidance with more specific suggestions, and ultimately reliance on individual judicial behavior to improve access to justice in lawyerless courts. We turn next to the study itself.

## II. RESEARCH DESIGN AND METHODS

This Part describes the study’s research design, including methods, data collection processes, and study sites.

This study was designed to offer a theoretically driven and rigorous comparative description of how judges who preside in America’s lawyerless courts operationalize and conceive of their role, including whether and how they assist *pro se* litigants and implement role reform recommendations.<sup>85</sup> We approached this empirical project by selecting study sites that allowed us to control substantive law effects while varying other contextual factors that may relate to how a jurisdiction’s judges behave. We considered factors including geographical area, political culture, court administrative structure, judicial ethics rules, availability of *pro se* training for judges, and other investments in civil justice infrastructure aimed at increasing access to justice, and we assessed how jurisdictions varied through a review of primary documents and aggregating sources. This approach allowed us to examine

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<sup>83</sup> See e.g., 2013 Curriculum on Access to Justice, *supra* note 59, at Module B, slide 7, slide 14; JUD. COUNCIL OF CAL., *supra* note 56, at 2-2.

<sup>84</sup> 2013 Curriculum on Access to Justice, *supra* note 59, at Module B, slide 7. The ten key techniques are: Frame the subject matter of the hearing. Explain the process that will be followed. Elicit needed information from litigants. Involve litigants in decision making. Articulate the decision from the bench. Explain the decision and summarize the terms of the order. Anticipate and resolve issues with compliance. Provide a written order at the close of the hearing. Set litigant expectations for next steps. Use nonverbal communication effectively.

<sup>85</sup> One self-published study by the Self-Represented Litigation Network and John Greacen offers some data on judicial behavior in *pro se* family law cases. However, the study design has important limitations worth noting. For example, the study included only fifteen hearings and the researchers chose to study only courts that had reputations for providing high-levels of assistance to *pro se* litigants, see Self-Represented Litigation Network and John Greacen, *Effectiveness of Courtroom Communication in Hearings Missing “Involving Two Self-Represented Litigants: An Exploratory Study”* (2008), <https://perma.cc/Q5EW-HVYR>.

environments where the universe of judicial behavior was constrained by relatively fixed legal structures while varying the level of guidance and support for judges actively providing pro se assistance.<sup>86</sup>

Our methodological approach acknowledges that studying complex social phenomena requires researchers to describe and understand the conditions that underlie the phenomena they wish to analyze.<sup>87</sup> To engage in this type of research process, we needed to diverge from the typical empirical approach to the study of judicial behavior in legal scholarship, which tends to rely on case outcomes and written opinions to explore the factors that might shape judges' decisions in appellate cases.<sup>88</sup> While existing studies on judicial behavior provide valuable contributions to the scholarly understanding of how judges decide cases in appeals courts, the data such studies rely upon, and their resulting quantitative empirical approaches, cannot be a starting place for studying trial judges and their courts where written decisions are nearly non-existent and appeals are rare.<sup>89</sup> Even if written decisions were widely available, our interest does not lie in predicting or explaining case outcomes but instead in examining the myriad within-case decisions judges make that primarily go unrecorded, such as whether to allow lengthy, narrative testimony or whether to ask questions to affirmatively develop the factual record. Understanding how judges are implementing their role and enforcing procedural rules in civil trials thus requires capturing judges' live, in-person interactions with litigants, including contextual, environmental, and non-verbal information that a court transcript alone could not capture.

In addition to the value of our novel descriptive effort, our approach also allows us to generate theoretical propositions about the causes and consequences of judicial behavior for future analytical research. Because civil trial courts lack lawyers to mediate and influence judge behavior, understanding judges' within-case decisions about role implementation, procedure, and offers of assistance to *pro se* litigants is a critical contribution to the study of the factors which influence judicial behavior and

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<sup>86</sup> See John Gerring & Lee Cojocaru, *Selecting Cases for Intensive Analysis: A Diversity of Goals and Methods*, 45 SOCIO. METHODS & RSCH. 396, 397 (2016).

<sup>87</sup> <sup>87</sup> See ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., Routledge 2019); Howard S. Erlanger, Bryant Garth, Jane E. Larson, Elizabeth Mertz, Victoria Nourse, and David B. Wilkins, *Forward: Is it Time for a New Legal Realism?* 2005 WISC. L. REV. 335, 345-346 (2005); Rebecca Sandefur, *Access to Justice*, in RESEARCH HANDBOOK ON MODERN LEGAL REALISM (Shauhin Taleh, Elizabeth Mertz, and Heinz Klug, eds., forthcoming).

<sup>88</sup> See Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213 (2017).

<sup>89</sup> See Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1734; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835 n.17 (2008); Carpenter, Steinberg, Shanahan & Mark, *supra* note 3, at 265-71.

its consequences for litigants, case outcomes, the legitimacy of courts, and the rule of law.

Given that our research questions focus on examining judicial behavior, we collected observational data from hearings and interview data and conversations with judges. Our study sample – eleven judges across three jurisdictions that vary in their level of guidance and support for *pro se* judicial assistance – facilitates comparisons of behaviors of interest at the judge and jurisdiction level.<sup>90</sup> The jurisdictions include Centerville, a large, prosperous, coastal urban center; Townville, a small, economically depressed coastal city; and Plainville, a mid-size city located in the middle of the country.<sup>91</sup>

To focus our comparative efforts, we sought to minimize the influence of factors that would interfere with our ability to discuss judges' approaches across jurisdictions. As such, we chose an area of law that varies relatively little from state to state in substantive law and process: protective orders for victims of intimate partner abuse and stalking. Further, in this area of law, most parties are unrepresented, and the cases require in-person testimony. Therefore, we gathered data on judges' in-person interactions with *pro se* parties in an area of law that affords similar opportunities for judges to perform recommended behaviors and offer *pro se* assistance in dockets where unrepresented parties are the norm. We also sought to minimize the possibility that our sample would include judges who were systematically more likely than other judges to be outlier examples of poor or uncommon judicial behavior in lawyerless courts.<sup>92</sup>

We discuss our study sites, case selection methods, and data collection and analysis approach in more detail below.

#### A. THE JURISDICTIONS

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,

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<sup>90</sup> For a discussion of this approach, purposive sampling, see John Gerring, *Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques*, in THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY 645 (Janet Box-Steffensmeier, Henry E. Brady & David Collier eds., New York: Oxford University Press 2008); Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RSCH. Q. 294 (2008).

<sup>91</sup> To protect the confidentiality of our study sites and research subjects and to comply with Institutional Review Board requirements, this Article reports no identifying information, including omitting any identifiable language or direct references to jurisdiction-specific substantive or procedural rules.

<sup>92</sup> For more discussion on this point, see Part II(B)(c) *infra*.



including the courts. Most Plainville judges are elected.<sup>93</sup> As illustrated in Table 1, the jurisdictions also vary in their institutional commitments to, and history of, civil access to justice reform, including court funding, ethics rules, and guidance and training for judges. We conducted an independent review of each jurisdiction’s access to justice reform history and civil justice context, including reviewing primary documents and aggregating sources.<sup>94</sup> One of the aggregating sources, the Justice Index, regularly surveys and ranks U.S. states based on the strength of their access to justice reform efforts.<sup>95</sup> The paragraphs that follow present the results of this review.

**Table 1. Jurisdiction-Level Variation in Judges’ Environments**

Site	Justice Index	Ethics Rules	Guidance	Training	Governance
Centerville	Top 10%	Encouragement	Yes	Yes	Centralized
Townville	Above Median	Permission	Yes	Yes	Centralized
Plainville	Near Median	Permission	No	No	Local control

In the most recent Justice Index report, Centerville sits in the top 10% of national rankings. The jurisdiction is a recognized national leader in access to justice reform, including reform of the judicial role. Centerville has relatively robust legal scaffolding for judicial role reform that permits judges to assist people without counsel, encourages them to do so in limited ways, and requires them to assist in some circumstances. In addition, Centerville’s court administration has issued recommendations that encourage judges to offer assistance and accommodation to people without counsel voluntarily. Trial judges receive regular training on how to handle *pro se* cases.

Centerville is one of only a handful of jurisdictions in the country whose judicial ethics rules not only permit reasonable accommodations for *pro se* litigants and clarify that such accommodations do not violate impartiality but also offer a list of possible tactics judges may – but are not required – to employ, which we call the encouraging approach. Only a handful of other states have judicial canons with language that similarly encourages *pro se* assistance instead of merely stating a general rule that it is permitted. Specifically, Centerville’s ethical canons encourage judges to consider explaining their decisions, court process, and procedural rules. However, this encouragement is bounded by the suggestion that judges’ explanations should be brief,

<sup>93</sup> Some Plainville judges are appointed to limited roles by the elected bench.

<sup>94</sup> As we have noted, to preserve anonymity, we have omitted identifying details, which sometimes requires us to speak at a level of abstraction about certain issues and prevents us from quoting or citing law or primary documents directly.

<sup>95</sup> Our assessment of each jurisdiction is based on our own original research, as well as aggregating sources, such as the Justice Index. See JUSTICE INDEX, *supra* note 22.

revealing some of the contradictions and tensions inherent in judicial role reform. The rules also encourage judges to consider asking questions, eliciting facts, altering traditional trial procedures, and referring litigants to legal services.

Centerville's case law on *pro se* litigation goes two steps farther than the most common legal framework that shapes trial judge behavior in *pro se* cases. The common framework is that *pro se* litigants should generally be held to the same procedural and evidentiary standards as lawyers but that trial judges may, in some circumstances, waive or explain technical requirements, liberally construe pleadings, or give additional opportunities to amend. First, Centerville's case law carves out a zone of special circumstances where judges may have a duty to inform a *pro se* litigant of the fact of a given procedural rule and the potential consequences of violating it. At the same time, case law clarifies that *pro se* parties do not have free rein to ignore procedural requirements. Second, Centerville's case law recognizes the importance of protecting trial judge discretion while also recognizing some situations, including cases like protective orders that commonly involved unrepresented people, where trial judges may have additional duties. In some factual circumstances involving unrepresented litigants, Centerville judges have a duty to take affirmative steps, such as asking questions of witnesses, to ensure that all material facts are raised at a trial.

Centerville's court administration has issued additional guidance encouraging judges to take an active role in assisting *pro se* litigants. The guidance instructs judges to ensure litigants have an opportunity to be heard, understand court processes, decisions, and orders, and are treated with respect. Judges appointed to the bench receive regular training on handling *pro se* cases. In our experience studying civil courts, these judges receive more training on *pro se* assistance than most judges across the country. This training includes learning from peer judges. Centerville also has a unified court administration that exercises significant control over court processes and logistics, including judicial training and appointments.

According to the Justice Index, Townville falls above the median in national access to justice reform rankings. Townville's court administration is relatively strong, particularly compared to localized court control in Plainville. Its judicial canons permit judges to make reasonable accommodations for *pro se* litigants, but without the additional encouraging language Centerville and a few other jurisdictions offer. Case law is consistent with the general rule that preserves trial judge discretion to waive technical requirements while noting that all parties, regardless of representation, are held to the same procedural and evidentiary standards. State court administrators have issued additional advisory materials urging judges to explain procedures and court orders and make necessary referrals. Judges are appointed and receive ongoing training on handling *pro se* cases.

Our final jurisdiction, Plainville, sits near the median of the Justice Index rankings, having made only limited efforts at the time of our study to reform its civil justice system or the judicial role in that system in response to the rise of lawyerless courts. Its judicial canons permit reasonable accommodations. Case law is consistent with the common legal framework that holds *pro se* parties to the same standards as lawyers while preserving trial judges' discretion to waive procedural and evidentiary technicalities.

At the time of our study, Plainville's access to justice reforms consisted of standardized forms for some *pro se* litigants, including petitioners in protective order cases. There was no statewide guidance for judges in lawyerless courts at the time of our study and judges did not receive court-provided training on handling *pro se* cases. In contrast to the other two jurisdictions, Plainville's court administration is among the weakest in the country in terms of its power to influence trial court management. Trial courts are controlled at the local level by elected judges who are functionally unaccountable to state court administration and do not rely on the state to fund local court operations.

In sum, we selected these jurisdictions based on our expectations of finding significant cross-jurisdictional variation in whether and how judges assist *pro se* litigants. In Centerville and Townville, where judges receive training and strong court administrative bodies have signaled their support for *pro se* assistance, we expected judges to behave more consistently with the judicial role reform recommendations described in Part I(c). We particularly expected to see more of the recommended *pro se* assistance behaviors from judges in Centerville given the jurisdiction's long history of investments in access to justice reform and judicial canons that permit and encourage such assistance, relatively supportive case law, and strong judicial training programs. Our expectations were much different for Plainville, which lacks statewide guidance and training for judges and where the canons are merely permissive. We expected Plainville judges to offer far less help for *pro se* litigants than those in other jurisdictions.<sup>96</sup>

## B. PROTECTIVE ORDER CASES

We chose to study judicial behavior in a single area of law – protective orders for situations involving domestic abuse, harassment, stalking, or sexual assault. Three features of protective order cases make them a particularly useful site to explore our research questions. These features, which we describe below, include consistent

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<sup>96</sup> We also note that, while we are principally seeking to explore the relationship between jurisdiction-level commitments to civil justice reform and the utilization of active judging tactics, we do not foreclose the possibility that intra-jurisdictional differences may also inform judges' behavior. Future studies would do well to consider how these differences may manifest across a sample of judges that allow for such subset analyses.

substantive law, the opportunity for transferrable analysis, and a history of access to justice reforms.

a. Consistent Substantive Law

Protective order law is relatively straightforward and consistent across jurisdictions. Protective order statutes first originated in the 1970s and were originally designed as a remedy to protect victims of intimate partner violence. These laws directly responded to advocates for women who initially criticized the police response to domestic violence and sought to have it treated like any other crime. Later, advocates grew critical of states' responses under criminal law and successfully advocated for the creation of a civil law remedy that would protect victims from abuse, empower them to leave dangerous relationships, and most importantly, give them a measure of autonomy.<sup>97</sup>

Protective orders are a form of injunctive relief paired with discretionary court fees and monetary awards and the potential for criminal enforcement.<sup>98</sup> They offer relief provisions ranging from “no contact” or “stay away” provisions, property possession, and child custody.<sup>99</sup> In protective order cases, the core question is typically whether the defendant engaged in a particular behavior targeted toward the petitioner that either harmed the petitioner directly or threatened harm. There is a relationship test in most jurisdictions, usually looking at whether the parties are related through a dating relationship, marriage, or blood. Protective orders are also available for victims of stalking.

b. Transferrable Analysis

Our choice to study protective orders offers lessons that transfer to other types of civil cases in two notable ways. First, protective order cases reflect the racial, class, and gender inequalities that permeate our society and are an inescapable feature of state civil courts' work. As others have engaged more directly, we know that people without representation in civil court are disproportionately likely to be women and people of color.<sup>100</sup> And while existing data are woefully insufficient to understand the

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<sup>97</sup> See Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 127–8 (1999); Jane Stoever, *Mirandizing Family Justice* 39 HARV. J. GENDER & L. 189, 194; Leigh Goodmark, *Law Is the Answer-Do We Know That for Sure: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS UNIV. PUB. L. REV. 7, 18 (2004).

<sup>98</sup> For a description of the protective order legal framework, see Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protective Orders*, 72 OHIO ST. L. J. 303, 307-08, 320-21 (2011); see also Stoever, *supra* note 93, at 199.

<sup>99</sup> *Id.*

<sup>100</sup> See Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. \_\_\_ (forthcoming 2022); Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, and Lauren Sudeall, *A Theory of Race and Civil Justice*, \_\_\_ COL. L. REV. \_\_\_ (forthcoming 2022).

myriad ways that social inequality relates to courts' work, it is also critical to name these realities in this and any analysis of state civil courts.

Second, we acknowledge the reflexive critique that cases involving human relationships, including protective order cases and other family matters, are somehow “different” from “regular” civil cases. This critique rests on a set of assumptions that are inconsistent with empirical reality. National data tell us that relational and family cases are a huge proportion of state civil court business.<sup>101</sup> Theoretically and structurally, protective order cases are analogous to much of state civil courts' other work, including contract matters like eviction, consumer debt, and medical debt.<sup>102</sup> In protective orders and contract cases, representation is either absent for both parties or imbalanced, existing formal law ignores the complexity of the social problems driving litigants to court, appeals are rare, dockets are voluminous, and courts are under-resourced.

There is a meaningful difference in the rates of formal legal representation for parties in contract and protective order matters. In contract cases, plaintiffs are generally represented while defendants are not. In protective orders, both parties tend to lack counsel. However, as we discuss in more detail below and in Part III, the lack of formal representation for petitioners in protective order cases is not the whole story. Focusing on differences in formal representation rates conceals a robust system of legal assistance – short of full lawyer representation – for protective order petitioners. Petitioners in the jurisdictions we studied have reliable access to pre-hearing case development assistance provided by nonprofit domestic violence agencies. In addition, across protective order, debt, and eviction matters it is common for only one party to the case, the petitioner, to file any pleadings with the court. Finally, we note a much less discussed dynamic: conventional stories about eviction, debt, and protective order cases typically feature the notion that there is a “good” party and a “bad” party. Of course, the factual and legal realities of each case type is often more complex than this dualistic narrative suggests. Thus, despite what initial assumptions might suggest, the generalizability of these data is strong.

### c. Access to Justice Reform History

Protective order cases are an area of civil court operations that have seen significant investments in access to justice reform in recent years, including self-help, limited legal services, and judicial training. In many jurisdictions, including the three in our study at the time we were collecting data, courts and outside agencies have invested far more in improving how courts and judges process protective orders than other

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<sup>101</sup> Colleen F. Shanahan, Jessica K. Steinberg, Anna E. Carpenter, & Alyx Mark, *What State Civil Courts Do*, \_\_ COL. L. REV. \_\_ (forthcoming 2022).

<sup>102</sup> For the most recent national data, see *The Landscape of Civil Litigation*, *supra* note 8.

common civil court case types such as eviction and debt.<sup>103</sup> Thus, at a minimum, there is little reason to think that judges in protective order cases are in some systematic way performing their roles in lawyerless courts differently, or more importantly “worse,” than other civil judges in these courts. In fact, protective orders are an area of law where judges are likely to have been exposed to information about unrepresented people’s needs and the potential for judicial assistance to meet those needs.

Petitioners are the primary focus of service-based reforms connected to protective order dockets.<sup>104</sup> At the time of our study, there were no court-based or court-adjacent free legal services for defendants in our study jurisdictions. In each study jurisdiction, courts have developed and made available a set of court forms, including petitions, draft orders, and returns of service. And at least one domestic violence agency works collaboratively with the court to offer a broad menu of social and legal services, both inside and outside the courthouse. Domestic violence advocates who worked for or were trained by these agencies sat in the courtroom during dockets and assisted petitioners.<sup>105</sup> Providers help people decide whether to pursue a protective order, offer legal advice and information, and assist in completing and filing all necessary forms. In all three jurisdictions, petitioners file form pleadings with the court, but defendants do not. Instead, in these summary proceedings, a defendant’s only opportunity to respond happens live, in-court, during a hearing on the merits.

### C. DATA COLLECTION AND ANALYSIS

We observed approximately 200 hours of live court proceedings across the three sites. These proceedings include 357 protective order hearings involving at least one person without counsel. While in court, the research team took verbatim notes on

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<sup>103</sup> Investments in improving court processes and increasing access to legal services in debt and eviction cases – particularly in eviction – have been on the increase in recent years including a burst of activity in eviction in the context of the pandemic. *See e.g.*, DECEMBER 2020 INTERIM REPORT: LEVERAGING THE UTAH SANDBOX TO ADVANCE LEGAL EMPOWERMENT FOR UTAH COMMUNITY MEMBERS EXPERIENCING MEDICAL DEBT, INNOVATION FOR JUSTICE, THE UNIVERSITY OF ARIZONA JAMES E. ROGERS COLLEGE OF LAW, *available at* [https://docs.google.com/presentation/d/1Zkpb\\_Sq-xbmTFGQrs5nApmi9IBoa46fWHTg7Zp4DXo/edit?usp=sharing](https://docs.google.com/presentation/d/1Zkpb_Sq-xbmTFGQrs5nApmi9IBoa46fWHTg7Zp4DXo/edit?usp=sharing), (last visited August 8, 2021); Tiny Chat 49: Eviction Diversion, National Center for State Courts, *available at* <https://vimeo.com/542219208> (last visited August 8, 2021).

<sup>104</sup> This has been supported in large part by the 1994 initial enactment, subsequent revisions, and related funding of the Violence Against Women Act.

<sup>105</sup> For a fuller discussion of findings about the role of domestic violence advocates in our study, including the relationship between these advocates’ work and deregulation of the legal profession and practice of law, see Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and Deregulation of the Lawyers’ Monopoly*, 89 *FORDHAM L. REV.* 1315 (2021) [hereinafter *Judges and Deregulation*].

everything judges and litigants said.<sup>106</sup> Wherever possible, we made notes about the court environment beyond the case being heard at any given moment. We recorded exchanges we heard and things we saw around the courtroom, including interactions involving litigants in the audience, court clerks, domestic violence advocates, law students, and bailiffs, to name a few. We also conducted semi-structured interviews with the judges in Centerville and Plainville, which tapped the justifications and processes underlying the behavior we observed in the courtroom and included questions about the proper role of judge and how that role has evolved and adapted to accommodate a majority *pro se* docket.

Due to the dearth of empirical scholarship and theory development on trial judge behavior in state civil courts, we recognized that we needed to be flexible as we reviewed and defined the themes and phenomena we constructed from the data.<sup>107</sup> For example, at the beginning of data collection, we anticipated we would code a category of judicial behavior as “eliciting” when judges asked questions to elicit testimony. During observations, it became clear that the category was not sufficiently nuanced—there were two distinct forms of eliciting, leading and non-leading. As we explain in Part III, this difference has important consequences for how we think about the different ways judges elicit information from litigants and how these differences might alter development of the factual record.<sup>108</sup>

After we completed data collection, we converted our raw observation and interview notes to text files and used a qualitative coding platform, ATLAS.ti, for thematic analyses. Based on our review of existing literature and recommendations for judicial role reform, we then followed a theoretically informed qualitative coding

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<sup>106</sup> We sought and received Institutional Review Board approval to conduct this study (Protocol 17-28), which was found to be exempt. Throughout our data collection and analysis process, including drafting this Article, we seek to preserve the confidentiality of our study sites. We sought permission to conduct court observations and interviews and were able to observe all judges working in each jurisdiction at time of data collection, including five judges in Centerville, four in Townville, and two in Plainville. Of these, two judges in Centerville and two in Plainville consented to be interviewed. Unfortunately, none of the judges in Townville consented to an interview. Judge and court resistance to our research existed in different ways as we conducted our research. In Townville, though individual judges directly expressed varied willingness to be interviewed and some spoke “unofficially” to researchers, the administrative judge of the court instructed all of the observed judges that they may not be officially interviewed. In addition, a fourth jurisdiction was originally intended to be a site of research and while an individual judge welcomed observation and interview, the administrative judge of the relevant docket refused to allow either. Despite clear law in the jurisdiction that the court could not prohibit observation, we decided not to pursue data collection in that jurisdiction. In any situation where a case was called and at least one party was present and had an interaction with a judge, we counted it as a hearing.

<sup>107</sup> See Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, QUALITATIVE RESEARCH IN PSYCHOLOGY 3, 77-101 (2006).

<sup>108</sup> See Part III(A)(b) *infra* for a discussion of judges’ approaches to eliciting information from litigants.

protocol and analysis process.<sup>109</sup> All researchers reviewed the raw data files across study sites and identified a range of potential codes and broader themes. The researchers shared their initial codes and themes and refined them through an iterative process. Next, the full dataset was coded by one researcher for evidence of the utilization of the active judging tactics and the emergent nuances therein, beginning with our court observation field notes, followed by the interview data. In this process, we coded for both judicial behaviors that appeared in hearing transcripts and for the explanations judges gave about their approach during interviews. Through this process, we also recognized the importance of capturing missed opportunities for judges to assist *pro se* litigants and identifying mismatches between a judge's expressed interests and her courtroom behaviors. For example, in interviews, judges identified fairness as a principle guiding their work. During hearing observations, we identified opportunities for judges to advance that principle. We noted missed opportunities such as a judge who refused to answer basic questions or used jargon. We contend that these missed or even overtly rejected opportunities have consequences for substantive and procedural justice.

### III. RESULTS AND DISCUSSION

This section presents and discusses results from our comparative data about state civil trial court judges in lawyerless courts. This exploration includes whether and how judges have altered the traditional judicial role to assist *pro se* litigants in hearings. Our reporting and analysis of the key themes of judicial behavior in state civil courts is reflective of the pervasive, patterned behaviors we observed and categorized across judges and jurisdictions, as well as of the relevance of the themes to our central research questions.<sup>110</sup> Importantly, it does not foreclose the possibility that other researchers would identify additional or alternative themes in observations of these courts, or of other courts and judges.

As we described in Part I, scholars and access to justice reformers have painted a hopeful vision for judicial role reform as an access to justice intervention while courts and access to justice think-tanks have developed and disseminated guidance and best practices. But while law generally permits *pro se* assistance from judges, formal law on the scope and nature of such assistance remains underdeveloped and leaves individual judges with discretion and responsibility to decide whether and how to assist people without counsel.

Our primary finding is surprising – we did not observe meaningful variation across judges or jurisdictions. Judges in the sample approached *pro se* hearings in similar

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<sup>109</sup> See Jennifer Fereday & Eimear Muir-Cochrane, *Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development*, 5 INT'L J. QUALITATIVE METHODS 1, 4 (2006).

<sup>110</sup> See Braun & Clarke, *supra* note 107.



ways and consistently offered little assistance to *pro se* litigants. Our court observation data show two categories of similar behavior, which we describe in detail and illustrate with examples from the data in this Part. First, judges maintained legal and procedural complexity. Judges rarely explained court processes, legal concepts, and language as advocates for role reform have widely recommended. Instead, they used legal jargon consistently, often refused to answer litigants' questions, and sometimes criticized litigants for asking questions or expressing confusion. Second, in contrast to the vision of a judge who listens patiently to narrative testimony and asks questions to gather as much information as possible, judges tightly controlled the presentation of evidence and prevented parties from offering narratives or shaping the order and substance of their testimony. Judges also leaned heavily on one party's pleading, the petition, to guide their questioning.

#### A. SIMILARITIES IN JUDGES' COURTROOM BEHAVIOR

##### a. Maintaining Legal and Procedural Complexity

Across our observations, judges exercised process control and wielded legal jargon in ways that maintained legal and procedural complexity in their courtrooms. The judicial reform vision championed by scholars, court guidance, and access to justice advocates emphasizes the judges' role in providing explanations and sharing information with litigants. However, this behavior was uncommon in our data.

In this section, we illustrate how judges maintained legal and procedural complexity in their courtrooms. We first discuss the role of opening speeches as explanations. Rather than offering accessible, plain-language explanations to individual litigants and regularly checking in to confirm understanding as guidance recommends, we rarely observed judges offering information about substantive law, procedures, or legal terms beyond prepared opening speeches for the entire courtroom. We next show how, when we did observe judges giving explanations, the explanations were brief and judges consistently used legal jargon rather than accessible language. Finally, we show that when parties asked questions or sought explanations, judges often refused to answer. We observed seemingly frustrated judges criticizing or mocking litigants for their lack of legal expertise in some extreme examples.

##### *i. Opening Speeches as Explanations*

Judges consistently across our study jurisdictions began the court session with brief opening speeches to the entire courtroom. In some cases, judges gave live speeches. In others, the speeches were pre-recorded. Opening speeches had an efficient, check-the-box quality, consistent with some judges telling us they worked from a script received in training. In most hearings, judges did not repeat their opening

speeches, although court sessions involved multiple cases and many minutes or hours may have passed between the speech and a case being called.

Inevitably, some litigants were not present in the courtroom during opening speeches. In the busy courtrooms we observed, parties sometimes arrived late or moved in and out of the courtroom. Despite this, the judges seemed to assume that one opening speech was sufficient to convey the desired information to every litigant.

For example, Plainville Judge 1's opening speech emphasized how the judge expected litigants to behave in the courtroom and did not explain legal or procedural issues other than noting that a protective order comes with a \$200 fine and a firearms prohibition. These are just two of many possible consequences of a protective order, such as loss of physical liberty for the defendant. Plainville Judge 1's opening speech did not describe what a protective order is, whether functionally or as a matter of law and did not mention that criminal charges can result from a violation of an order:

I'll call cases in order they are listed. When I call your case, please stand, stay where you are, and remain standing until I address you. I'll ask plaintiffs if they want to proceed and are ready to proceed. For defendants, I'll ask if you object. If you object, we will need to have a hearing. If defendants don't object or if we have a hearing, there's a court fee of about \$200 if there's a permanent protective order, and there is a prohibition on having firearms. There's a federal law. So there are consequences to a protective order. This is a court of law, so there should be no eyerolling, no gestures to the opposing party. I expect and demand civility for everyone. We have resources for both parties in the courtroom. Representatives from [a domestic violence agency] are here to help you with resources or services.

In the example above, which varied little from day-to-day, the judge opens by stating the judge will call cases in the "order they are listed." However, litigants did not have access to a list of cases and thus had no way to know when their case would be called. Some litigants waited up to an hour or more for the judge to call their case.

The judge also refers litigants to staff from a domestic violence agency. Two of the agency's staff were always seated at the front of the courtroom near the judge's dais. Despite this, the judge's referral to these advocates was both substantively inaccurate and impossible for most litigants to operationalize without more specific guidance. The referral is inaccurate because the judge states that the agency can "help everyone," but the agency primarily serves petitioners and does not serve parties on two sides of the same case. Functionally, litigants had almost no way to access or communicate with the domestic violence agency staff given where they were seated in the courtroom. A person who wanted to speak to one of the agency staff would have

to walk up to the front of the courtroom in full view of everyone and pass directly in front of the judge and any litigants whose cases were being heard. Unsurprisingly, litigants generally did not approach the domestic violence agency staff during docket calls.<sup>111</sup>

In Townville, judges' opening speeches focused on describing protective order cases' legal and procedural framework. In these speeches, judges consistently used technical, inaccessible language. Townville judges' opening speeches usually included a vague reference to the controlling statute ("the Act") and legal jargon about the standard of proof, as in this example from Townville Judge 1:

Today, domestic violence cases will be heard. I will decide whether to issue a protective order where there has been an act of domestic violence. The applicable relationships are defined by the Act. This is a civil court. First, we apply the civil standard of proof, which is a preponderance of the evidence, not the criminal standard of proof, beyond a reasonable doubt. Preponderance of the evidence just means more likely than not...

Additional language from Townville judges' opening speeches included a robust warning about various civil and criminal consequences of a protective order. Unfortunately, like the statement above, the speech was rife with other jargon, such as, "The defendant may stipulate to the complaint and the court will issue a protective order." Notably, each of the Townville judges used variations of a statement provided to judges in their initial training program, suggesting that judges are willing to implement such guidance.

*ii. Limited Explanations and Frequent Use of Jargon*

Judicial role reform guidance emphasizes that the language of law and courts is unfamiliar for unrepresented people and urges judges to explain law, procedure, and language throughout the litigation process. In interviews, most of the judges in our study discussed the importance of offering information. But in court observations, explanations were rare. Outside of the routine opening speeches described above, judges typically offered litigants only the most limited explanations, commonly used legal jargon, and often seemed to ignore or dismiss litigants' obvious confusion.

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<sup>111</sup> As we describe in greater detail in another article based on this study, Plainville Judge 1 consistently relied on advocates to give petitioners information and guidance after the judge had called their case, particularly in cases with no service on the defendant. In these instances, the judge relied on advocates to affirmatively walk up to petitioners or point them in the right direction. This is the main way that we saw litigants make a connection with the advocates, as opposed to litigants seeking the advocates out without prompting. *See* Steinberg, Carpenter, Shanahan & Mark, *supra* note 97.

The following is a small sample of the jargon and technical terms we observed:

Centerville Judge 1:

Judge: When she files a protective order, the judge listens and if she makes a prima facie case, the judge issues it.

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Judge: You have the burden of proof. Provide me with the factual predicate for the relief you seek in this case. So, what happened and when, how it affected you, and what relief you're seeking.

Centerville Judge 2:

Judge: The defendant can file a motion to set aside the default, but just filing the motion doesn't automatically set it aside.

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Petitioner: My son was present when [the defendant] choked me. What is the appropriate age to be a witness? He's nine.

Judge: The Court will do *voir dire* to determine if the child knows the difference between truth and a lie and is competent.

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Judge: You may file a motion to set aside stating your reason for not appearing and meritorious defenses or reasons the court should vacate the order. That's it you've been served; you are free to go.

Defendant: So, now do I do the motion?

Judge: No, you have to file that.

Defendant: She told me to come down and ask and say I had filled out the paper, but it was wrong.

Judge: If you filed something today it will be calendared by the clerk's office, not today.

Defendant: She also told me that I should tell you I never received anything.

Judge: Well, if you have grounds to vacate the judgment, you need to file a motion. We have a full calendar.

Plainville Judge 1

Judge: So, you object because these are different days? So, you're telling me this is not relevant?

Townville Judge 1

Judge: This is a court of limited jurisdiction.

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Judge: This is not criminal court. It's civil. So, the standard is preponderance of the evidence, not reasonable doubt.

A longer example from Townville Judge 4 further illustrates judges' lack of explanations and use of jargon. In the excerpt, the judge makes a procedural decision without explanation in the face of an unrepresented defendant's clear attempt to advocate for himself by making an argument against admitting a photograph. In response, the judge seems to express frustration, uses jargon, and then simply admits the evidence without acknowledging the defendant's argument:

Judge: [To Defendant] Do you object [to these photographs being introduced]?

Defendant: Yes.

Judge: On what basis? [The judge does not give the defendant time to respond before turning to the petitioner, who offered the evidence, and asking:] Do these photographs accurately reflect the condition of you?

Petitioner: Yes.

Judge: [To the defendant] Why do you object?

Defendant: On May 13th, I did not touch her.

Judge: [Sounding frustrated] No, no. The photo. That's not the question. She's saying they show her condition. The question is are they admissible.

Defendant: She said November 2016. She's talking about May.

Judge: [Ignores the defendant and turns to the clerk] That should be marked as Petitioners #1.

We observed that even when judges seemed to make more significant attempts to offer information and explanations, they still consistently fell back on using technical language. In the next excerpt, Centerville Judge 1 explains protective order trial process to an unrepresented petitioner who is facing a lawyer on the other side of the case:

Judge: This is a trial. You have the burden of proving your case under the [formal name of state statute] and you have to do so by what's called a preponderance of the evidence, which means more than fifty-fifty. So, you tell me what happened to you. Why do you think it [violates the law]? Then the defendant will get a chance to present his case through cross-examination or just explaining his version of what happened. And I will hear brief closing arguments if either party has them. Begin when you're ready.

Petitioner: Ok, I am not a lawyer, so I don't know all the things that they may know [laughs nervously].

Judges' explanations about the process of a trial tended to follow the pattern in the excerpt above. Judges would name component parts of the trial process but without defining terms or explaining the legal standard and the type of facts that might be relevant.

### *iii. Refusing to Explain*

In interviews, most judges expressed awareness and empathy regarding how little the average person who appears in court knows about law and litigation processes. For example, Centerville Judge 2 spoke of litigants' general reluctance to ask questions and talked about the human tendency to be embarrassed when expressing what we do not know.

*Pro se* litigants often act like they know the law or the procedures, and they do not. They are embarrassed to say they don't know what is going on, or for example a word you use. They won't ask what it means...maybe not every judge wants to explain things. In my experience it is just worth the time to explain it. One who works with *pro se* litigants has to be very, very patient...I try to explain how my

courtroom operates. I try to give the lay of the land...I think you want it to be fair, particularly if one side is represented. It's not that you're helping them win, but you're explaining things slowly and carefully.

But contrary to this expressed intention, we observed that when litigants did find the courage to ask questions, judges most often explicitly refused to answer. Litigants asked judges to define terms, explain court processes, or explain legal standards. Judges most often responded to litigants' questions by, at a minimum, ignoring the question or, at worst, criticizing the litigant for asking the question.

Different phrases in the vein of "I'm not your lawyer" were a common refrain in Centerville and Townville, in particular. We also observed numerous examples of judges saying things like, "I can't try this case for you" or "I can't be your attorney, buddy." Such phrases were often followed by an admonition to get a lawyer's advice, something that is far outside the financial ability of most litigants. Judges made such dismissive statements when litigants appeared to be struggling the most to understand a legal concept, term, or procedural step.

In the example below, Centerville Judge 2 ridicules a defendant for not knowing a legal term and rebuffs his questions about the terms of a court order. This case involved a represented petitioner and an unrepresented, incarcerated defendant:

Judge: [To defendant] You heard the [request for a continuance from petitioner's counsel]. Do you oppose it?

Defendant: No, I am fine going ahead with that.

Judge: Are you saying you are consenting to the [protective order]?

Defendant: No, no. 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?

Defendant: Yes ma'am, I am sorry.

Judge: Oppose means you are against it.

Defendant: Oh, no, I am not against it. We can do it when she wants to.

Judge: So, that's with consent of Defendant... just make sure you have vacated the residence.

Defendant: What? Where did that come from?

Judge: This order has been in effect since October 26<sup>th</sup>.

Defendant: Well, how can I vacate the residence if I am in jail?

Judge: You were served with it. Did you read the order?

Defendant: That just doesn't make sense. So, you are telling me I can't talk to my mother?

Judge: That's all in the order.

Defendant: I never had the order read to me. I am not sure why I am even in jail. I haven't been able to cut my hair in jail. I am embarrassed to be outside like this.

In another example, Townville Judge 1 is attempting to reschedule a hearing. In the process, the judge faces a series of questions from both parties. Some questions are related to the case while some are not. The judge resists offering information, even when the defendant asks about terms of the court's temporary order and seemingly does not know what document to review to find those terms. Instead, the judge refers the defendant to an attorney:

Judge: How do you want to proceed?

Defendant: I don't want to lose seeing my kids or my job.

Judge: Do you want an attorney?

Defendant: I guess.

Judge: I will postpone to a date certain. With or without an attorney, we will try the case. The protective order is in full effect until then.

Judge: [To petitioner] Do you have anything to add?

Petitioner: I'm sorry about the phone earlier.

Judge: It's okay.



Petitioner: I want to say that when I filed for a temporary protective order I was revictimized by the hearing officer, [name]. I want a permanent protective order until I'm confident about lifting it. I'm okay with sharing custody. I want to fire my attorney [the petitioner mentions having an attorney, but there was no attorney present in court during this hearing].

Judge: I'll break it down. I can't make it permanent until a trial. If it's granted, there's always a way for you to lift it.

Petitioner: That's what I want.

Judge: That's what the hearing is about. I don't get involved with your attorney. You can do what you want in two weeks. We'll deal with custody at the hearing.

Defendant: Can you explain what you said? A lot just happened.

Judge: She wants an order until she feels safe.

Defendant: I don't want to lose the kids.

Judge: So, you have time to talk to an attorney. Whether you hire an attorney or not, I can't explain things. I can't give legal advice.

Defendant: I'm not a bad guy.

Judge: I don't judge good guy or bad guy. I judge the facts. Talk to a lawyer before the hearing in two weeks.

Defendant: Can I see the kids?

Judge: It's in the temporary order.

Defendant: Which one?

Judge: It says "Friday supervised."

Petitioner: It was modified.

Judge: What is it?

Petitioner: Supervised in his home on weekends, with curbside pickup. And they can't be with their granddad until there's a psych eval or a hearing.

Defendant: I'm confused. We were going to do something with holidays.

Petitioner: Can I speak to that? I'm firing my attorney because I was revictimized and got bad information. I was told by attorney and hearing officer that the case would be beat because I didn't have pictures of the harm he did and that the protective order would be lifted and not extended.

Judge: I know here at the beginning when we said we're having a trial...I won't comment on what the attorney and hearing officer said. I hear the evidence and decide. I will give you two weeks and you can get an attorney.

Defendant: If I have supervised visits, how does she drop them off?

Judge: Curbside. She drops the kids at the curb. The 8-year-old takes the 5-year-old to the front door. You don't come out.

Petitioner: My concern is not [defendant] and the kids. My concern is [defendant] and me.

Judge: Right. The final protective order will consider the kids interests and that parents are involved.

Petitioner: It's just me. Everything is in place.

Defendant: I don't want to lose my job and my kids.

Judge: We are adjourned.

A final example of judges' resistance to offering explanations involves Townville Judge 2 and an incarcerated defendant. During the hearing, the petitioner mentions another case she has with the defendant and states there will be a hearing in that case later in the week. The incarcerated defendant then asks how he can get to the hearing. The judge responds: "That's not my concern." A moment later, the defendant asks, "What am I in jail for?" The judge responds, "I didn't arrest you. I don't know." Moments later, the defendant was removed from the courtroom by law enforcement.

In contrast to the reform vision of a helpful judge who carefully explains law, process, and the language of the courtroom for people without legal training, the proceedings we observed lacked transparency and judges' behavior upheld court complexity. Rather than offering information or explanations, all judges in our sample consistently controlled and limited access to information, used legal jargon, and resisted direct questions. Occasionally, seemingly frustrated judges criticized litigants for asking questions and exhibiting lack of knowledge about the legal system. In these ways, judicial behavior kept the dockets we observed lawyer-centric and legalistic as opposed to *pro se* friendly.

#### b. Controlling and Constraining Evidence Presentation

In lawyerless courts, getting facts on the record inevitably requires deviations from traditional witness examination and evidence presentation—including narrative testimony and questioning by the judge, given that there are no lawyers to run the evidence presentation process. Guidance materials suggest judges should allow parties to offer narrative testimony, listen patiently, and ask neutral, non-leading questions. While we found that all judges engaged in eliciting behavior, the way they elicited information was in sharp contrast to guidance because judges limited narrative testimony, constrained parties' efforts to offer evidence, and relied heavily on the petition (the only pleading filed by either party) to determine what evidence they would consider.

In this section, we draw on examples from the data to show how judges tightly controlled and constrained evidence presentation. We first discuss how judges' approach was ultimately imbalanced in favor of petitioners because they relied heavily on the facts and legal claims in petitioners' pleadings to drive their questions. Second, we describe how judges consistently used a leading questioning style to develop facts and legal issues and constrained the amount of information parties were allowed to present, particularly defendants.

##### *i. Relying on the Petition*

In the protective order cases we observed, only one party makes legal and factual claims through pleadings—the petitioner, through standardized court forms. The petitioner is the only party who can put their claims in front of the judge prior to and during the hearing. Given that all petitioners use standard forms, the claims are presented in a way that is consistently organized and predictable across cases. By comparison, defendants must make their claims through verbal testimony, which is inevitably less clear, organized, and cognizable than claims made via written pleadings. Petitions played a pivotal role in shaping the legal and factual claims judges considered during hearings.

In all three jurisdictions at the time of our study, most petitioners received extensive pre-hearing legal assistance from court-connected domestic violence agencies.<sup>112</sup> The assistance domestic agencies offer includes meeting with potential petitioners to discuss facts, identify potential legal claims, and draft their petitions. As a result, many petitioners' cases were relatively well-developed before any hearing. All petitioners, whether they received individualized assistance or not, had the benefit of court-provided standardized forms complete with checkboxes for legal claims, lists of possible forms of relief with fill-in-the-blank options, and definitions of legal terms. There were no similar services or standardized forms for defendants.

Judges consistently and routinely referred to dates or events alleged in petitions at the beginning of and throughout the course of hearings. All judges in our study had the opportunity to review the petition in advance of and during every hearing, and they often relied on petitions to shape the scope and depth of evidence presentation, including the questions they asked litigants and scope of testimony they were willing to entertain. We consistently observed judges reading petitions and explicitly referring to these pleadings during hearings. We offer a few examples below.

#### Townville Judge 2

Judge: There are a bunch of allegations in the [petition]. Can you put them on the record? This incident, the daughter told school and [a child welfare agency] opened an investigation. Can you tell me some of the incidents?

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Judge: Has she hit you before?

Petitioner: Yes.

Judge: It says in the [petition] there's no history.

#### Townville Judge 4

Judge: What occurred on May 7<sup>th</sup> at 10:00 p.m. that caused you to get a protective order? [The judge says "get" a protective order but this is a hearing on the merits of that order being granted.]

Petitioner: You said May 7<sup>th</sup>?

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<sup>112</sup> For a robust description of the assistance available to petitioners, see Steinberg, Carpenter, Shanahan & Mark, *supra* note 97.

Judge: Your [petition] says May 7.

Plainville Judge 1

Judge: Ready to go? Let me look at your filing. [Reads petition then swears parties in and turns to petitioner] She's your former daughter in law, related by marriage, you filed a police report, you live in [Plainville], the facts occurred in [Plainville]. Is everything in this petition true and correct?

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Judge: [To petitioner, while reading from petition] [The defendant] is your aunt, you both reside in Plainville, the facts happened here, and July 25 is the date. Tell me why you need a protective order.

Petitioner: I need a protective order because on July 25 I was being picked up from my ex's house, and she called me and told me I'm going to end up in the hospital and she's going to end up in jail. And my worker heard her say it on the phone.

Judge: She used to yell at you in the morning every day? You feel she will make good on the threat and you don't feel safe [Doesn't wait for answer]?

Judge: [To petitioner's witness] Are you the co-worker who heard the call? Tell me what you heard.

At the time of our study, none of the jurisdictions offered standardized pleading forms or any systematic, court-based assistance for defendants. A defendant's only opportunity to raise defenses or counterclaims is in live court, where the judge is often the only lawyer the courtroom. We did not observe judges making any efforts to guide defendants in understanding the possible range and nature of their defenses. Across our observations, judges did not appear to take steps to account for defendants' lack of opportunity to answer allegations in writing or the fact that many petitioners, and few defendants, received substantial legal assistance from nonlawyer advocates.

In most evidentiary hearings, after taking testimony from the petitioner—guided by the petition—judges simply asked defendants a brief, open-ended question. We did not observe judges explaining legal or procedural issues to defendants, such as the burden of proof, the potential for incriminating themselves, or the legal elements at issue, as in the examples that follow.

Plainville Judge 1

Judge: [To defendant] What do you need to tell me?

Townville Judge 2

Judge: [To defendant] Anything you want to tell me?

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Judge: [To defendant] What would you like to tell me?

Centerville Judge 1

Judge: [To defendant] All right, you can ask him questions or tell your side of the story.

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Judge: [To defendant] Do you want to state your case then you can call your witnesses?

*ii. Tightly Controlling Evidence Presentation*

Across the data, judges exerted tight control over evidence presentation by asking leading questions—including questions based on the petition—and constricting parties' opportunity to present testimony, particularly narrative testimony. In the most common eliciting pattern we observed, judges would ask a litigant a relatively open-ended question to begin testimony, sometimes by referencing the date or description of an event in the petition. The judge would then allow the party a short narrative, often just a sentence or two. Beyond this point, judges showed little interest in or patience for narrative testimony or party control over the presentation of evidence. Judges tightly controlled most testimony via restrictive, leading questions and often shut down parties' attempts to offer evidence if judges perceived that they were not, as one judge said, "getting to the point."<sup>113</sup> Sometimes, judges decided cases after allowing one or both parties to say no more than a few sentences, as we illustrate with some striking examples below.

In interviews, most judges described confidence in their ability to get relevant facts on the record via questions, as well as their authorization as a matter of law to do so. In fact, more than one judge expressed a sentiment that the literature suggests is common among judges in lawyerless courts: the idea that lawyers make cases and

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<sup>113</sup> Plainville Judge 2.

hearings more complicated and time-consuming given that judges know how to get the information they need without lawyers' maneuvering.<sup>114</sup> As Plainville Judge 2 said:

If there are two lawyers, then it's gonna be a formal hearing, and it takes for-friggin'-ever, which is fine, but I can get to the truth...I can get to the facts... I read the petition, and then I ask 'em questions. I don't just say, "Tell me your story," which is why those protective order hearings, years ago, could take forever because the *pro ses* aren't good at getting to the point. They wanna talk about how the person treated them, stole their money, things that are irrelevant in my court.

Plainville Judge 1 expressed slightly less comfort with the role of an active questioner, describing it as a matter of necessity and efficiency:

I developed a learning curve advantage being on the protective order docket because you learn how vital it is to be fair...as a protective order judge, I had to examine them. I didn't want to have to, and the other attorneys don't like it because I'm in their business, but I always give the other attorney more time on direct. But you have to be efficient. You couldn't coddle people but you have to get the facts.

Some judges made statements about the importance of letting litigants present their case and suggested that they tried to do so in the courtroom. As Plainville Judge 1 put it: "[I ask] Why do you need the protective order? And then I let them tell their story." Centerville Judge 2 said, "Oftentimes respondents will say 'hey, they got to talk for ten minutes, can I?' And sure. That's some people's idea of fairness."

However, in contrast to the last two statements above, court observations showed most judges did not afford parties significant opportunities to give narrative testimony or shape the order and scope of evidence presentation. This was particularly true for defendants. Plainville Judge 2's perspective above about limiting "irrelevant" testimony and Plainville Judge 1's statement about "efficiency" and not "coddling" people are much more consistent with the approach we observed across judges. Indeed, in another part of the interview, Centerville Judge 2 acknowledged managing testimony when parties were saying "irrelevant" or "nonsensical" things:

You have good witnesses, you have very poor witnesses...they say things that are irrelevant or nonsensical. I try to get them on track because I know my job is to get enough facts to make the right decision.

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<sup>114</sup> JUD. COUNCIL OF CAL., *supra* note 56, at ix.

During hearings, we commonly heard judges say things akin to Townville Judge 4's statement when he told a litigant, "You have to follow my questions." In the example below, Centerville Judge 4 opens a hearing with a statement that appears designed to prepare parties for being directed and redirected:

Now, the way this hearing will be conducted because you don't have attorneys is I will ask the questions. Don't talk to each other. Everything you want to say might not be relevant under the law, so manage your expectations right now.

Another example of a judge controlling evidence presentation and limiting the evidence comes from another hearing conducted by Centerville Judge 4. In this case, the defendant had filed a motion for civil contempt alleging that the petitioner was not bringing their child to a visitation exchange point as required by the court's order. In a hearing that lasted only a few minutes, the judge suggested the parties were not answering the judge's questions but then gave them almost no opportunity to speak. He then asserted that the issue the defendant has raised—enforcement of a visitation order—does not belong in court at all. He then quickly decided the case, telling the parties to "follow the order."

Judge: [To petitioner] This provision is for your protection. Can you tell me what happened?

Petitioner: The paper says—

Judge: I don't care what the paper says. The question is are you bringing the child to the station as the order requires.

Petitioner: They said if he doesn't text, I don't have to bring my son.

Defendant: I have texts in my phone.

Judge: You think I'm going to take all this time with all these people here to go through that. You are both adults. [Both parties start to speak] I don't want to get in the middle of hearing you guys argue. 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. [To petitioner] So, you're telling me he doesn't text you.

Petitioner: Certain days he does text me.



Judge: Well, I'm denying your motion and everything stays as it is. Go home and follow the order.

In another example, Centerville Judge 1 presided over a hearing where both parties had filed petitions against one another. After hearing just a few minutes of testimony, the judge suddenly decided to dismiss both cases without hearing the facts that one of the litigants (Litigant 2) might have offered to support his claims. In the hearing, Centerville Judge 1 first allowed Litigant 1 to offer some evidence to meet her burden of proof. She alleged serious physical abuse. She also appeared to be experiencing mental illness:

Litigant 1: He is compulsive and abusive mentally and physically toward my son and I. He has been raping, abusing, manipulating, terrorizing. What are the words I'm looking for?

Judge: Words are important, but actions are more important.

Litigant 1: I'm not sure how this man can physically abuse me all these years and get away with it.

Judge: Whether the criminal justice system works is not at issue here. What's at issue is whether he committed an offense [under the statute].

The judge appears to assume the litigant knows the difference between the criminal and civil systems. He then asks if she has pictures, which she produces on a phone and hands to the judge's clerk. It is unclear what role the photos played in the judge's final decision as he did not mention them again. Next, Litigant 1 began to discuss her son and the judge responded, "Your relationship with your son has nothing to do with this case" and shut down Litigant 1's testimony on this topic.

After the judge's exchange with Litigant 1, Litigant 2 had only a limited opportunity to speak and no real opportunity to offer facts to support his petition. He only had a chance to deny, as a general matter, Litigant 1's allegations and assert that she was mentally ill. Soon after, the judge suddenly said to Litigant 2, "You filed a case. Why don't you present it?" Litigant 2's subsequent testimony was brief, only a few sentences, including two brief statements alluding to his claims: "her behavior became unmanageable. Police had been called, there were family disturbances. I've had them come to remove her." After this statement, Litigant 1 interrupted, saying "lies." The exchange below followed:

Judge: All right, I think I heard enough.

Judge: [To Litigant 1] Your affect and interruptions suggest to me that you're not mentally in a position to go forward with this case. Based on this, I don't find your testimony credible. Although I appreciate your apologies, they come with continued ill behavior. There's also constant murmuring.

Litigant 1: Really your honor? When your son has been raped by your baby dad, and when this man is getting away with it, I could care less what you think about me, but you may go on.

Judge: Accordingly, I am going to dismiss your case and hope you will seek medical attention.

Litigant 1: Thank you. I will. Thank you.

Judge: [To Litigant 2] I am also going to dismiss your petition. I don't think issuing a protective order is going to make things better. And I don't see enough evidence.

Litigant 2: What am I supposed to do? Keep calling the police?

Judge: Do the same thing you would do with or without a protection order. I understand, sir, but I don't think a protective order is the appropriate remedy.

In announcing a sudden dismissal of both cases, the judge cited Litigant 1's courtroom behavior "affect," and mental condition as the reason for dismissing her case. The judge did not address Litigant 1's claims of serious physical abuse. And while the judge told Litigant 2 that the judge did not "see enough violence" to support Litigant 2's claims, Litigant 2 did not have an opportunity to say more than a few sentences about his claims. Judge 1 simply never heard the facts Litigant 2 might have offered. The choice to bar Litigant 2 from offering evidence and argument in his case appeared to be based not on anything the judge learned from Litigant 2 himself but only on what the judge learned from Litigant 1 when she presented her case.

Judges often seemed to have specific ideas about the type of testimony they wanted to hear. Sometimes judges appeared to be searching for confirmation of the kind of facts they thought might be relevant in a given case, as the examples below illustrate:

Plainville Judge 1:

Judge: [Reading petition] All of these events occurred in front of children?

Petitioner: They were upstairs.

Judge: But they were present in the house and probably heard?

Townville Judge 2:

Judge: Were there marks on your neck?

Petitioner: No.

Judge: She just grabbed you by the neck and pushed you?

Petitioner: Yes.

Centerville Judge 2:

Judge: And what was [her] condition emotionally? And physically? Torn clothing, anything like that?

Townville Judge 4

Judge: He was throwing things. He kicked in the door. He's the owner of the house? He didn't really beat you up, did he?

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Judge: Did you listen to the question? Focus. You go there, you see his truck. He's in jail. They don't take your vehicle. Did you open the door?

Defendant: His truck was there. The police came. [Name] was not there. [Name] answered. The police said there was a protective order and he had to leave.

Judge: Did you break the door?

Defendant: No, the cops let me in.

Without knowing each case's underlying facts, we cannot say how often judges' controlling approach to hearing management caused them to miss critical information. However, it is undeniable that many litigants in our data, particularly defendants, had limited opportunities to offer narrative testimony and have their arguments fully heard

by the court. And of course, in the absence of counsel, litigants did not have the opportunity for anyone acting in their interests to do fact investigation that might produce evidence supportive of their case – evidence that they did not consider to be supportive of their case given their lack of legal training. The lack of opportunity for narrative and the tendency to ask leading questions cuts against recommendations in guidance literature, which urges judges to allow parties to be fully heard and encourages them to ask “neutral” questions.

#### IV. WHY DO JUDGES BEHAVE SIMILARLY?

This study reveals surprisingly homogeneous behavior by judges in lawyerless courts across three diverse jurisdictions, behavior that bears little resemblance to the vision for judicial role reform. Rather than offering the accommodation and assistance that guidance suggests, judges maintained legal complexity and exercised tight control over hearings and party testimony.

Why did the judges in our study behave in similar ways? Why did they resist offering explanations and information to litigants and refuse to answer questions? Why did they use so much jargon? Why did they limit the evidence they were willing to hear and consistently use leading questions to shape testimony? Why did they rely so heavily on petitions to drive information gathering? In this section, we suggest three possible explanations for judges’ similar behavioral choices.

Critically, we note that each of the factors we describe below are symptoms of the fundamental problem in lawyerless courts: civil justice system design.<sup>115</sup> American civil trial courts were designed for adversarial, procedural contests driven by lawyers on both sides of a case. These courts were not designed to be navigated by users who lack legal training and must advocate for themselves while facing potentially life-altering consequences based on the outcome of their cases. The judicial behavior we observed is rooted, more than anything else, in the core design and purpose of civil courts and the roles judges and lawyers are expected to play in this system. The existing incentives for judges to behave in new ways that are helpful to both sides of a *pro se* case are much weaker than judges’ incentives to behave in ways that are more consistent with their historical role in civil litigation.

With the backdrop of a civil justice system that was not designed for people without counsel, we suggest three factors that may shape the behavior we observed.

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<sup>115</sup> In previous and ongoing work, we examine broader structural perspectives on this issue. See Carpenter, Steinberg, Shanahan, and Mark, *supra* note 3; Shanahan and Carpenter, *supra* note 10; Shanahan, Mark, Steinberg, and Carpenter, *supra* note 116; Steinberg, *Problem-Solving Courts*, *supra* note 9; Steinberg, *Adversary Breakdown*, *supra* note 14; Carpenter, *supra* note 14; Steinberg, *Demand Side Reform*, *supra* note 8.

First and most important is the interaction between sparse formal law and judges' traditional assumptions about their role. Judges in our study consistently reported that they were unclear about the ethical bounds of their role. In the face of this ambiguity, they appeared to fall back on commonly shared assumptions about how a civil judge should behave, assumptions likely shaped by their acculturation and training in the legal profession.

Second, judges were under pressure to decide cases quickly in their high-volume dockets, which limited the amount of time they could spend offering *pro se* assistance. In addition, the incentives to "move" cases along appeared stronger and more concrete than the incentive to help people without counsel, incentives that included feedback from court administrators about docket management but not about *pro se* assistance.

Third, imbalanced pre-hearing legal assistance in protective order cases resulted in petitioners' having factually and legally well-developed cases while defendants did not. Judges' reliance on petitioners' pleadings, whether consciously or unconsciously, may have been influenced by docket pressure and seemed to limit the universe of facts judges were willing to consider. These three factors may have exerted independent pressure that shaped particular aspects of judges' behavior and may also have acted in concert to influence how judges operationalize their role in lawyerless courts. We discuss each of these factors in more detail below.

#### A. ETHICAL AMBIGUITY AND JUDICIAL ROLE ASSUMPTIONS

Previous research has suggested that state trial court judges face ethical ambiguity regarding the proper scope and nature of their role in lawyerless cases.<sup>116</sup> In prior studies, judges have described a process of on-the-job role development and a lack of clarity in how to implement ethical standards.<sup>117</sup> In interviews, the judges in our study confirmed their struggles to balance duties of impartiality and fairness with the practical task of assisting *pro se* parties in a system not designed for litigants without lawyers. In fact, despite the lack of assistance judges offered to litigants in the courts we observed, we show below that judges believed they were doing all that they could to assist people without counsel within the bounds of their role.

In the face of ethical ambiguity, judges may have defaulted to their original training as lawyers in an adversarial system, including baseline assumptions about the appropriate judicial role including the importance of appearing impartial and unbiased.

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<sup>116</sup> See Steinberg, *Adversary Breakdown*, *supra* note 13; Carpenter, Steinberg, Shanahan, and Mark, *supra* note 3; Carpenter, *supra* note 13.

<sup>117</sup> *Id.*

The judges in our study were all lawyers before they took the bench.<sup>118</sup> All were trained in a relatively homogenous legal education system.<sup>119</sup> The norms of adversary process and the tracks worn by years of legal training and practice may ultimately be far too ingrained in judges' minds and behaviors to be overcome by merely permissive ethical rules, the pressure of *pro se* dockets, or admonishments from judicial training programs.

In interviews, when we asked judges how they think about and approach their role in *pro se* cases, they described fairness as their touchstone principle and how this principle required them to intervene in and manage *pro se* cases, a finding consistent with previous research.<sup>120</sup> However, the judges also described their struggles with the ethical bounds of their role, articulating that they had to find their own, individualized approach to ensuring fairness in the courtroom, or as one judge put it, “go rogue.”<sup>121</sup> Notably, judges in Centerville, who were required to attend regular training programs about running dockets, described similar challenges as judges in Plainville, who received no such training.

Plainville Judge 1 said, “I did look at the canons, but I did not find that it was helpful. I developed a “smell test.” Judges in Centerville expressed similar ideas. Centerville Judge 1, for example, articulated a lack of sufficient guidance and did not think the judicial role in *pro se* courts was “particularly codified.” Judge 1 added, “I don’t see it as a developed jurisprudence. I think dealing with *pro se* litigants is in its nascent phase.” Centerville Judge 1 also said it is important to be “tethered by the law” and then went on to say:

In a few cases I think I made a difference. That’s what I want anyway, to make a difference for people. But it is so hard just to be the referee but also want to get involved...The natural inclination is to help the side that is unrepresented, but you are still cabined by judicial ethics...I’m good at violating—that’s not the right word—I’m good at

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<sup>118</sup> BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 14–15 (2010) (noting that judges have a shared background as lawyers and “tend to come from a very select group of individuals who have thrived within the institution of legal thought”). We note, though, the phenomenon of non-lawyer judges in the also under-researched field of municipal courts, which serve both criminal and civil functions. See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2020) (discussing the criminal law functions of municipal courts).

<sup>119</sup> Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 J.L. & POL’Y FOR INFO. SOC’Y 1, 40 (2012) (“Legal training is largely homogeneous – lawyers are trained in effectively identical law schools with the same curriculum and methods.”); Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO K. OF INT’L & COMP. LAW 295, 295–97, 300 (2010) (“The curriculum at most U.S. law schools follows a standard pattern.”); Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL’Y REV. 457, 464 (2013) (noting that U.S. law schools have a “somewhat standardized” curriculum, particularly in the first year).

<sup>120</sup> See Carpenter, *supra* note 13, at 685.

<sup>121</sup> For a discussion of similar findings from previous research, see Steinberg, *Adversary Breakdown*, *supra* note 13.

going rogue. The ends justify the means kind of thing...So I have to push hard on myself to say, “what are the rules, what am I allowed to do.” The rules say I can’t speak with [unrepresented people] for a particular reason, but I’ve always pushed that. I won’t do things I can’t do, but otherwise I’ll push. I’m not saying other judges are wrong, but they’ll say, “I can’t help you I’ve got my rules.”

Plainville Judge 2 also expressed the sense that a judge had to “bend” the rules or get close to a “limit” to help unrepresented people.

I’ll help [unrepresented people] out more than I should, and I know that. I bend over backwards to help them as much as I can, but, boy, there’s a limit to it. Technically, they’re supposed to be held to the same level. It’s kinda hard to do that and still believe that you’re running a fair court, ‘cause they don’t know how, so I bend it, and I shouldn’t. I know I shouldn’t, every time I do it, but I still do it.

To the extent judges fell back on traditional judicial behavior, they may have had good reason. Matthew Tokson’s empirical research on judicial decision-making draws on cognitive psychology to explain how unconscious biases, including preferences for the status quo, shape judges’ behavior.<sup>122</sup> His conclusions are instructive and consistent with our findings. Tokson suggests that judges may resist changes that increase the cost of their own decision making, for example, by “increasing the time and effort necessary to address a legal issue or by increasing the cognitive difficulty of decision making.” Tokson also suggests judges may develop “biases in favor of laws that they have repeatedly applied and justified in the past” along with “preferences for familiar doctrines and an aversion to any departure from a long-standing status quo.”<sup>123</sup>

As described in detail in Part I, although many court systems and access to justice advocates have recommended ways judges can help people without counsel, this guidance material is merely advisory and the gap between such recommendations and formal law is massive. Even in Centerville, which has gone farther than most other jurisdictions in the country, specific forms of assistance are merely “encouraged,” not required, and those encouraged behaviors are discussed in the most summary and general terms. The shared ethical confusion across judges in this study suggests that efforts like Centerville’s, which are among the strongest in the county, are still not sufficient to ensure judges implement recommended *pro se* assistance. Without more scaffolding to support the new judicial role, judges appear to fall back on their legal

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<sup>122</sup> See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 916–923 (2015).

<sup>123</sup> *Id.* at 903.

training and acculturation, which includes the historical role of judicial passivity as a marker of impartiality and judicial assistance for litigants as a marker of bias. These findings suggest future research drawing on fields including cognitive psychology and behavioral economics could develop our understanding of the role culture, cognition, and other mechanisms in creating and influencing judges' behavior in lawyerless courts.<sup>124</sup>

## B. DOCKET PRESSURE

A very pragmatic factor might have shaped the behavior we observed: time.<sup>125</sup> The recommendations for judicial role reform and *pro se* assistance are inherently time-consuming. The judges we observed may have had, or perceived that they had, very little time to spare. Judges in most lawyerless courts, like those in our study, face massive docket pressure from high-volume court calendars. In fact, commentators have drawn an analogy between lawyerless civil courts and emergency rooms.<sup>126</sup> Like the emergency department of a hospital, civil courts have no choice but to process the cases brought before them, no matter the resource-constraints they might face.<sup>127</sup> These pressures flow downstream and shape the day-to-day work of trial judges.

In interviews, judges discussed feeling time pressure from litigants—many of whom had to wait for long periods, sometimes hours, to have their cases called—and from court administrators who wanted to keep court calendars moving. The high-

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<sup>124</sup> Examples include Thaler and Sunstein's work on behavioral "nudges," *see generally* Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) and Lessig's work on how architecture shapes behavior, *see generally* Lawrence Lessig, *Code Version 2.0* (2006). A recent paper by Martha Gayoye, *Why Women Judges Really Matter: The Impact of Women Judges on Property Law Outcomes in Kenya*, 27 *SOCIAL AND LEGAL STUDIES* 1 (2021) makes vital methodological and substantive points relevant to the future study of civil trial court judges. First, Gayoye notes that many existing studies of judges use a lens of "methodological individualism" as opposed to "collectivism" – a critique deeply relevant to the U.S. context – and articulates how a focus on individual judges can obscure the "collective efforts, actions, and processes" of groups of judges, such as women. Second, she shows how women judges in Kenya collaborated to advance feminist jurisprudence in property disputes through informal interactions and training of their male colleagues and argues for the potential of networks of judges to bring about institutional change.

<sup>125</sup> *See* Tokson, *supra* note 122, at 912 (regarding judicial resistance to time and effort costs).

<sup>126</sup> *See e.g.*, Carrie Johnson, *Legal Help for the Poor in a 'State of Crisis'*, NAT'L PUB. RADIO (June 15, 2012), <https://www.npr.org/2012/06/15/154925376/legal-help-for-the-poor-in-state-of-crisis> ("This isn't a hospital. But it is a kind of emergency room, for people who need help, right away, with all kinds of legal problems.").

<sup>127</sup> *See* Shanahan & Carpenter, *supra* note 10, at 129 (noting that courts have "no choice" but to serve litigants and handle cases "despite the mismatch between design and reality"); *see also* Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *Covid, Crisis, and Courts*, 99 *TEXAS L. REV. ONLINE* 10 (2020) (describing the historical challenges of state civil courts and the pandemic-related intensification of these challenges and resulting innovation); Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 *MINN. L. REV. HEADNOTES* 154 (2020) (showing how lack of government assistance has exacerbated economic and racial inequality historically and how these negative consequences have and will continue to increase in the face of the pandemic).



volume and high-pressure nature of the dockets we observed may influence the extent to which judges are willing to take time to offer individualized explanations to individual litigants or to give every single litigant the chance to offer lengthy testimony.<sup>128</sup> As a matter of incentives, the judges in our study faced more external pressure to call and decide cases quickly than to offer *pro se* assistance.

Given the number of cases calendared each day, judges faced daily time pressure to call the case of every litigant waiting in the courtroom. They also faced longer-term time pressure to ensure cases did not linger on court calendars. In all three jurisdictions we observed dozens of protective order cases were calendared for a morning time block, typically between nine and early afternoon. The courtrooms were often too small for all litigants to sit down, which meant courtrooms could be standing room only, particularly at the beginning of a docket call in the morning. Some cases, such as those without service on the defendant, could be resolved in less than a minute. Evidentiary hearings took much more time.

In Centerville, judges described significant time pressure from court administrators. Judge 1 said, “In busy courthouses like this there’s always tension between justice and moving the calendar. There’s pressure from the—we call them the suits—to move the cases.”

This judge went on to describe how this pressure was systematic, with judges throughout the courthouse receiving statistics about docket management:

Yeah, we get these statistics about who’s moving cases, how we’re moving cases. We see stats every month, how many trials we’ve done. And it’s particular to judges, so you know how you’re doing. We’d always have these meetings about moving cases...

Centerville Judge 2 expressed similar sentiments about pressure from court administrators and also described a perception of impatience from litigants:

We are under a lot of pressure to get cases resolved. My own approach is to manage the issues of moving the case along but feeling I have given enough time to the case that I can make a good ruling...The litigants even are impatient. I tell them, think about this like going to the doctor. You can’t predict when you’ll get out. You have to wait sometimes.

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<sup>128</sup> As an analogy, one study of federal courts found that increased caseloads led to less scrutiny by appellate courts. See Bert Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011).

Plainville Judge 1 described “a huge pressure” to ensure parties had a swift resolution to their case and described starting dockets at nine in the morning and often staying on the bench until the afternoon to ensure all of the day’s cases were handled.

The baseline reality of constant pressure to resolve cases may play a key role in preventing judges from even attempting to offer *pro se* assistance. This may be particularly true where institutional pressure to “move” cases – such as the pressure placed on judges by court administrators in the form of regular reports on case statistics – is stronger, more systematic, and contains more feedback loops than any pressure they might face to offer assistance to *pro se* litigants. After all, while some of the judges in our study were trained on judicial role reform, none of them received routine feedback on how they performed in helping people without counsel. In contrast, they did receive feedback on how they were managing their busy, crowded dockets.

### C. LEGAL ASSISTANCE FOR PETITIONERS ONLY

Some of the behavior we observed, particularly judges’ tight control over evidence presentation and the constraints they placed on party testimony, could be shaped by differences in case development between petitioners and defendants. In the courts we studied, only petitioners received robust, systematic, pre-hearing case development assistance.<sup>129</sup> Defendants did not. As a result, petitioners’ pleadings were the only written articulation of factual and legal allegations in any given case. Judges leaned heavily on these pleadings to shape how they controlled and managed evidence presentation.

The fact that petitioners’ cases were succinctly and predictably presented in a form pleading may have, unconsciously or consciously, led judges to rely on them and constrained their thinking about the possible universe of claims or defenses in a given case. This possibility, combined with docket pressure, may have influenced judges to take the most straightforward, efficient route to put facts on the record: relying on the petition, asking leading questions, and limiting party narrative, a behavior that may not be ideal from a *pro se* assistance or due process perspective, but may be consistent with the tangible pressures judges face.<sup>130</sup>

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<sup>129</sup> For a complete discussion of petitioner assistance and the lack of defendant assistance in the courts we studied, as well as the implications of this imbalance, see Steinberg, Carpenter, Shanahan & Mark, *Judges and Deregulation*, *supra* note 105. In addition, the limited appellate case law on protective orders in our study has been powerfully shaped by the small group of legal services lawyers who systematically advocate for petitioners. Defendants have no such systematic advocacy.

<sup>130</sup> For a fuller discussion of due process issues for defendants in this study, see *id.* See also examples from the data in Part III(A)(b) *infra*.

Even as judges relied on pre-hearing case development for petitioners to share hearings, they did not offer counter-balancing assistance to defendants in developing defenses during hearings. A possible reason is that judges did not believe they were permitted to provide such support in their role as judges. Ethical confusion, assumptions about the judges' proper role, and lack of clarity about acceptable behavior may have stood in the way of judges offering case development support to defendants.

## CONCLUSION

This Article highlights a key symptom of what ails lawyerless courts: the judicial role's failings.<sup>131</sup> Both the vision for judicial role reform and the pragmatic, day-to-day reality of lawyerless courts asks state civil court judges to maintain fidelity to impartiality and adversarial procedures and deliver substantive justice while simultaneously assisting parties with no training in law and deep personal interests in litigation outcomes. Today's judges are asked to thread this needle in the context of a system designed for lawyers to drive all aspects of litigation from the most mundane document filings and the development of a factual record and legal arguments to the drafting, entering, and enforcement of a final order. In this context, it is no wonder that any judge would fail to deliver assistance, accommodation, and simplification – along with procedural and substantive justice – for all parties on a 30-case lawyerless docket that must be cleared in a single morning. The principles conflict, the rules are designed for a different purpose, and goals beyond closing cases are fuzzy at best. Today, state civil trial judges are being asked to do something that may not be possible given the facts on the ground, rules, cultural context, and structural incentives that currently shape their role.

Civil trial courts' troubles run much deeper than the symptoms of judicial role failure this Article reveals. The core problem in state civil trial courts is the disconnect between what state civil courts were designed to do—solve legal disputes through lawyer-driven, adversarial litigation—and what these courts are asked to do—help people without lawyers navigate complex social, economic, and interpersonal challenges, most of which are deeply tied to systemic inequality.<sup>132</sup> As we have argued in the past, there is a fundamental, unresolved mismatch between civil courts' adversarial, litigation-based dispute resolution design (which the principle of judicial

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<sup>131</sup> Shanahan & Carpenter, *supra* note 11, at 134. To be clear, the failure is embedded in the role and how it fits within the legal framework and culture of adversarial civil litigation. Our data do not suggest that any one individual judge is personally to blame or that our study reveals “bad apples” behavior. In fact, exactly the opposite. The similarity of judge behavior across three jurisdictions point to a systemic—not individual or personality-based—diagnosis for the problems we observed.

<sup>132</sup> Shanahan & Carpenter, *supra* note 11, at 129-31. For a critical view of the role lawyers and courts play in perpetuating inequality, including a critical analysis of the extent to which market power shapes how law is developed and deployed, and by whom, *see* Kathryn R. Sabbeth, *supra* note 21.

impartiality was designed to support) and the nature, scope, and depth of the actual problems litigants bring to the courthouse door.<sup>133</sup>

Based on our previous research and the findings of this study, we see multiple paths forward, including many important questions for future research and possibilities for reform.

The first is a long-term path that considers the broader structural challenges facing state civil courts as institutions within a democratic system of governance. This is a radical project of rethinking state courts' role. It requires reconsidering which problems belong in courts, which should be prevented or mitigated through upstream solutions and interventions, and which require new conceptions of problem-solving processes.

The second is a more immediate path that focuses on judges. Here, researchers, policymakers, and court leaders can explore questions about how best to influence and shape the future of judging. For example, future work could explore and test the relationship between formal legal and ethical guidance aimed at compelling behavior change, training that increases capacity for new or different behaviors, and resources that help other, non-judge actors play a role in supporting a changed role for judges and better experiences for litigants. Such work is necessarily empirical and grounded in real-world, real-time experimentation. Fortunately, state courts have arguably never been more motivated or invested in experimentation to improve civil justice systems.<sup>134</sup> The time is ripe for researchers, including socio-legal scholars, to partner with courts in this work.

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<sup>133</sup> *Id.*

<sup>134</sup> See Shanahan, Mark, Steinberg & Carpenter, *Covid, Crisis, and Courts*, *supra* note 127, at 11-12.