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## Racial Capitalism in the Civil Courts

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RACIAL CAPITALISM IN THE CIVIL COURTS

Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg,  
& Lauren Sudeall

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## RACIAL CAPITALISM IN THE CIVIL COURTS

Tonya L. Brito,\* Kathryn A. Sabbeth,\*\* Jessica K. Steinberg\*\*\*  
& Lauren Sudeal\*\*\*\*

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

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

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

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#### INTRODUCTION

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

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

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

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

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

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

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

3. See *infra* Part I.

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

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

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

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

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

Civil cases are typically framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants, particularly Black individuals, enter the civil legal system involuntarily, often in a defensive or vulnerable posture.<sup>11</sup> Even in cases where marginalized plaintiffs initiate litigation, they enter the civil courts due to a lack of other feasible options. They are forced to subject themselves and others to a system designed to devalue them, commodify their needs, and maximize financial extraction. Most of the cases in the civil system involve eviction, debt collection, or family law matters<sup>12</sup>—legal matters likely to

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

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

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

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

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

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

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

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

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

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

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

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

dockets filled by poor people and, as limited available data have shown, disproportionately Black people.<sup>16</sup> In addition, the racialization of poverty in U.S. society has made it impossible to disentangle narratives of the “undeserving poor” from those of Black America.<sup>17</sup> This entwinement of racial and economic status—and the imposition of beliefs and traits suggesting that these individuals are appropriate subjects for state-sponsored discipline<sup>18</sup>—is operationalized through the work of civil courts and provides additional justification for the extraction that racial capitalism requires.

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

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

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

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

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

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



subordination for profit. The role of the state in driving this process should not be underestimated. Framing the civil courts as neutral and passive arbiters of private civil disputes—rather than as agents of the state helping to maintain the social order necessary for racial capitalism to function<sup>21</sup>—diminishes courts' responsibility for the harm they perpetuate and undermines the ability to address it.

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

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

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

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

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

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

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

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

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23. See *infra* Part III.

24. See *infra* Part III.

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

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

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

The application of the racial capitalism framework in this Essay is not intended to generate solutions, but it helps us to understand how and why civil courts operate as they do. Racial subjugation is not incidental or external, but central to the economic exploitation facilitated by courts through the processing of cases involving housing, debt, and family relationships. Eviction is not only about repossession of a home, but also about seizing the products of racialized tenants' labor<sup>27</sup> and instilling fear to prevent resistance.<sup>28</sup> Child support is less about transferring funds to custodial parents than it is about the state seizing pennies from Black fathers as payback for public benefits received by the custodial parent.<sup>29</sup> Debt collection is less about ensuring debts are repaid than about ensuring the smooth, one-directional flow of capital from Black communities to powerful corporations.<sup>30</sup> Courts orchestrate the handling of these cases so that the people involved are devalued and their needs rendered mere commodities; the process is swift and easy for powerful, repeat actors. By engaging in these practices, the civil courts normalize, legitimize, and

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

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

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

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

30. See *infra* Part III.

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

### I. THE LANDSCAPE OF RACE AND CIVIL JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. See *id.* at 3028.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52. *Id.* at 145, 159.



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

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

## II. RACIAL CAPITALISM AND CIVIL JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### A. *Racial Capitalism*

Scholarly engagement with racial capitalism is multidisciplinary and interdisciplinary in nature, with widespread and increasing interest across the humanities and social sciences.<sup>66</sup> We draw from the robust body of scholarship that has emerged over the past couple of decades to understand its legal dimensions.<sup>67</sup> Scholars attribute the conceptual frame of racial capitalism to political theorist Cedric Robinson, who introduced it in his groundbreaking book, *Black Marxism: The Making of the Black Radical Tradition*, published in 1983.<sup>68</sup> Widespread scholarly interest in racial capitalism as a conceptual frame took off following the republication of *Black Marxism* in 2000.<sup>69</sup>

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

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

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

65. See *supra* Part I.

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

67. See *id.*

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

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

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

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

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

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

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

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71. See *id.*

72. See *id.*

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

74. *Id.*

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

76. See *id.*

77. See *id.*

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

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

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

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

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

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

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

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

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

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

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

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

88. See, e.g., Nadya Ali & Ben Whitman, *Racial Capitalism, Islamophobia, and Austerity*, 15 *Int'l Pol. Socio.* 190, 193 (2021); David Wearing, *The Myth of the Reforming Monarch: Orientalism, Racial Capitalism, and UK Support for the Arab Gulf Monarchies*, *Politics* 2 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/02633957211041547> [<https://perma.cc/438X-QK3L>].

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

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

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

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

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

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

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

Scholars have deployed racial capitalism as a conceptual framework to understand the inextricable link between capitalism and racialization in global terms as well as on a national scale. One strand of the scholarship has “explor[ed] histories of colonial conquest, imperialism, and dispossession to make visible capitalism’s relation to race.”<sup>97</sup> Recent work also demonstrates how racial capitalism exploits and degrades nonhuman natural resources contributing to ecological crises,<sup>98</sup> climate-change-induced displacement of communities of color,<sup>99</sup> and the accelerated demise of racialized communities through the “slow violence” inflicted by the fossil fuel industry.<sup>100</sup> Other scholars use the frame to understand how capitalism’s racial hierarchies bolster systems of dispossession through gentrification and neoliberal urban governance,<sup>101</sup> caste education in public schooling,<sup>102</sup> labor extraction in the carceral state,<sup>103</sup> unequal access to affordable electricity that produces pollution, poverty, and utility shut-offs,<sup>104</sup> and the emergence and spread of COVID-19.<sup>105</sup>

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95. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

111. *Id.*

112. *Id.*

113. *Id.* at 11.

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

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

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

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

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115. *Id.* at 76.

116. *Id.* at 81.

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

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

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

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

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

122. *Id.*



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

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

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

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

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

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

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

127. See *id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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141. See *id.* at 3–4.

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

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

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

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

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

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

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

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

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

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

Take, for example, eviction courts, in which a disproportionate number of defendants are Black women<sup>150</sup> and the forum functions more as a vehicle for rent collection than to ferret out facts, interpret the law, or reach a just outcome.<sup>151</sup> Nicole Summers has shown how eviction courts serve to discipline tenants through settlements that produce a system of “civil probation.”<sup>152</sup> As several social scientists have demonstrated, eviction courts function primarily to extract wealth, impose fear, and enforce existing power dynamics.<sup>153</sup> One of us has further argued that eviction courts operate to “enforce the existing social order, specifically the hierarchical relations between landlords and tenants,” which are inextricable from the racialized assignment of property rights.<sup>154</sup> In eviction cases and beyond, we argue, a primary function of the civil courts is the racialized production of profit.

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

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

150. See *supra* note 2.

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

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

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

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

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

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

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

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

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

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

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

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

158. *Id.*

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

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

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

162. Sweeney, supra note 157, at 63.

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

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

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

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

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

165. *Id.*

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

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

168. *Id.*

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

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

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

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

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

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

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

171. *Id.*

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

182. *Id.* at 13.

183. See *infra* section III.B.

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

185. Conditions include toxic mold or lead paint that causes or exacerbates asthma; the absence of heat or running water necessary to maintain basic hygiene and health; electrical wiring that results in fires; structural defects that result in broken bones; and other hazardous conditions. See Sabbath, (Under)Enforcement, *supra* note 26, at 105.

186. Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord–Tenant Reform*, 69 *Rutgers U. L. Rev.* 1, 5 (2016) (describing how infrequently the defense of the warranty of habitability is raised); Sabbath, *Eviction Courts*, *supra* note 2, at 381 (describing limits on consideration of substandard conditions); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 *U. Chi. L. Rev.* 145, 194 (2020) ("Tenants with meritorious warranty

purchasing real estate in poor Black neighborhoods and treating such properties as cash cows for rent, while allowing them to deteriorate without maintenance, is a too-common model of exploitation for profit.<sup>187</sup>

Our point is that this racialized profit model—one that reaps enormous sums for owners of capital, at the expense of the dignity and safety of those it exploits—works for those who pursue it *because of how the courts operate*.<sup>188</sup> Courts reliably assist with extracting profit from these investments. The civil courts devalue the interests of people of color to prioritize economic gain over human values.<sup>189</sup> Courts treat the inability to pay rent as a more serious violation of law than refusal to maintain a home in safe condition.<sup>190</sup> This exemplifies how the courts operate as sites of racialized commodification, dramatically devaluing claims to human life to pave the way for the right to make a profit.

a. *Extraction.* — Courts redistribute resources by legitimizing the extraction of assets from subordinate people. Courts authorize the collection of financial assets through orders and judgments subject to enforcement by officials. They also authorize private parties to engage in seizure of assets, such as garnishment of wages or bank accounts after judgment.<sup>191</sup> Importantly, the courts provide a quick and cheap mechanism, making it cost-effective for corporations to pursue thousands of individuals for small amounts of money that they may not owe.<sup>192</sup>

The courts also increase the extraction of wealth from subordinated communities by inflating the amounts that plaintiffs can claim. Landlords list court costs and attorneys' fees as justifications for inflated amounts.<sup>193</sup>

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claims were statistically just as likely to receive a possessory judgment as tenants without warranty claims.”).

187. Matthew Desmond, *Evicted: Poverty and Profit in the American City* 148–51 (2016); see also Suzannah Cavanaugh, *Bronx Building Where Deadly Fire Occurred Had Faulty Doors, Heat Issues*, RealDeal (Jan. 10, 2022), <https://therealdeal.com/2022/01/10/bronx-building-where-deadly-fire-occurred-had-complaints-of-faulty-door-heat-issues/> [https://perma.cc/UL4K-XYYS] (noting the roughly twenty-five-million-dollar investment used to purchase a group of buildings in disrepair and identifying the property's substandard conditions, which caused the fire deaths of seventeen people).

188. See, e.g., Sabbeth, *Eviction Courts*, supra note 2, at 376–85, 395 (describing the law and culture of eviction courts).

189. See *id.* at 400; see, e.g., *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (holding that the balance of equities did not favor continuing an eviction moratorium during the COVID-19 pandemic because the possibility of missed or delayed rent payments constituted “irreparable harm” for landlords and outweighed public health risks including that of tenant and community deaths).

190. See, e.g., Sabbeth, *(Under)Enforcement*, supra note 26, at 142–43; Summers, *Civil Probation*, supra note 152, at 49.

191. Wilf-Townsend, supra note 1, at 1741–42.

192. *Id.* at 14–16 (describing debt collection as a “business model centered around litigation, developing highly routinized, low-cost-per-case systems to file complaints, obtain judgments, and proceed with garnishment” that relies on “a presumption of uninspected claims”).

193. See, e.g., Tuomi, supra note 184 (noting profits made from such fees).

In serial eviction proceedings against the same tenant, corporate landlords repeatedly allege nonpayment and then use the courts to extract not just rent but also these additional charges.<sup>194</sup> The courts thereby assist in increasing profits for those with capital.

The extraction process in the courts also perpetuates the racialized subordination of labor.<sup>195</sup> Courts sanction patterns of indentured servitude that structure people's lives and livelihoods. For too many, rent takes the majority of their income.<sup>196</sup> Subordinated people are literally killing themselves to earn enough money to pay the rent. They are working in dangerous jobs, or three jobs.<sup>197</sup> They are risking child protection services going after them for leaving kids unattended.<sup>198</sup> They are putting up with harmful and counterproductive work requirements, invasions of privacy, and abuse as conditions of public assistance.<sup>199</sup> Meanwhile,

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194. Garboden & Rosen, *supra* note 28, at 649 (describing the “[s]tate as a [c]ollection Agency” for fees); Hepburn et al., *supra* note 2, at 656 (indicating that people of color are more likely to be subject to serial evictions); Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 Soc. Forces 316, 316 (2021) (estimating fees assessed and collected); Sudeall & Pasciuti, *supra* note 26, at 1369.

195. See Frederick Cooper, Thomas C. Holt & Rebecca J. Scott, *Beyond Slavery: Explorations of Race, Labor and Citizenship in Postemancipation Societies* 287 (2000) (noting that freedom from formal slavery “did not break the association between race and labor, but in some ways deepened the racialization of the labor question”).

196. See Whitney Airgood-Obrycki, Alexander Hermann & Sophia Wedeen, *Joint Ctr. for Hous. Stud., The Rent Eats First 1* (2021), [https://www.jchs.harvard.edu/sites/default/files/research/files/harvard\\_jchs\\_rent\\_eats\\_first\\_airgood-obrycki\\_hermann\\_wedeen\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_rent_eats_first_airgood-obrycki_hermann_wedeen_2021.pdf) [<https://perma.cc/RX8V-HB6G>] (“Even before the COVID-19 pandemic . . . [n]early a quarter of renter households were spending more than half of their incomes on rent each month, leaving little income to cover other expenses.”); Nat’l Low Income Hous. Coal., *Out of Reach 6* (2021), [https://nlihc.org/sites/default/files/orr/2021/Out-of-Reach\\_2021.pdf](https://nlihc.org/sites/default/files/orr/2021/Out-of-Reach_2021.pdf) [<https://perma.cc/BX9G-LGK8>] (“Black and Latino workers face larger gaps between their wages and the cost of housing than white workers.”).

197. Matthew Desmond, *Opinion, The Rent Eats First, Even During a Pandemic*, N.Y. Times (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/coronavirus-evictions-superspreader.html> (on file with the *Columbia Law Review*).

198. Roberts, *Shattered Bonds*, *supra* note 2, at 36 (“A common ground for neglect is leaving a child unattended for long enough to endanger the child’s health or welfare . . . . Yet many poor mothers have had their children taken away by the state when they have left them alone . . . so that they could keep their jobs.”).

199. Public assistance has always been racialized, gendered, and coercive in the United States. See Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in *Women, the State, and Welfare* 92, 93–96 (Linda Gordon ed., 1990). Recent investigative journalism shows the forms this takes today: In New Mexico and other states, single mothers applying for public assistance are forced to identify the father of their child (and his eye color and license plate number) and recall the exact date when they got pregnant. Eli Hager, *The Cruel Failure of Welfare Reform in the Southwest*, ProPublica (Dec. 30, 2021), <https://www.propublica.org/article/the-cruel-failure-of-welfare-reform-in-the-southwest> [<https://perma.cc/XDR2-UZ4K>]. In Utah, families seeking aid are subtly pushed to the Church of Jesus Christ of Latter-day Saints, where they’re pressured to get baptized or perform other religious activities, like reading aloud

unrealistic child support rulings push Black men into substandard, racialized labor markets.<sup>200</sup> Such exploitation of Black communities as “workers and consumers” has too often been an essential component of capitalist development.<sup>201</sup>

Today, through court judgments, and the threat thereof, the state redistributes income and assets from people lacking material resources to entities whose purpose is to accumulate such resources for white capital.

b. *Dispossession.* — Court practices that generate and support the accumulation of profit rely on the violence of dispossession<sup>202</sup>—the confiscation and commandeering of resources and freedoms by force.<sup>203</sup> Across the three largest categories of cases in state courts—eviction, debt, and family law—dispossession is almost universally the express purpose. What is at stake may be the loss of a home, financial capital, or family ties. In each case, the plaintiff seeks to take something away from the defendant, and the state provides tools with which to make that happen. Racially subordinated people are overrepresented among those whose homes, finances, and families are compromised, and the vulnerability to dispossession is itself racialized.

The dispossession goes beyond the material. As K-Sue Park has observed, “The association of indebtedness with the subordination of being nonwhite in America appears to have become a lasting American discursive tradition.”<sup>204</sup> So too is the judgment that Black mothers and fathers are not fit to parent.<sup>205</sup> Whether an eviction, debt collection, or family law decision, judgments also take away and reserve for others the privileges of a “good” record, which becomes equated with whiteness.<sup>206</sup>

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from the Book of Mormon, in order to get help. *Id.* And in Arizona, poor moms who could have benefited from welfare are instead investigated, at nationally unparalleled rates, by a child services agency funded by welfare dollars. *Id.*

200. See Noah D. Zatz & Michael A. Stoll, Working to Avoid Incarceration: Jail Threat and Labor Market Outcomes for Noncustodial Fathers Facing Child Support Enforcement, 6 *Russell Sage Found. J. Soc. Sci.*, at 55, 55–58 (2020).

201. Manning Marable, *How Capitalism Underdeveloped Black America: Problems in Race, Political Economy, and Society* 61 (3d ed. 2015).

202. See Fields & Raymond, *supra* note 82, at 1628.

203. See *supra* section II.A (describing expropriation as “a more extreme and oppressive form of capital expansion that involves the outright theft, confiscation and commandeering of resources and capacities”).

204. K-Sue Park, *supra* note 61, at 40.

205. See Dorothy Roberts, The Value of Black Mothers’ Work, in *Critical Race Feminism* 312, 313–14 (Adrien Katherine Wing ed., 1997); Brito, Nonmarital Fathers, *supra* note 164, at 9; Molly Schwartz, Do We Need to Abolish Child Protective Services?, *Mother Jones* (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services> (on file with the *Columbia Law Review*) (“As [caseworker] Sarah reflects on her experience [working at a child welfare agency], she concludes that the racial disparity in the numbers of children who were removed came from a deep-seated assumption that many Black parents are incapable of parenting.”).

206. See Harris, Whiteness as Property, *supra* note 57, at 161–62; Kathryn A. Sabbeth, Erasing the “Scarlet E” of Eviction Records, *Appeal: The Lab*

The judgment that one has failed to pay debts is deemed personal failure.<sup>207</sup> The determination that one is not fit to parent is even worse.<sup>208</sup> All of these civil judgments create stigma,<sup>209</sup> which then marks the dispossessed as inferior.

Compounding the injury, the production of stigma is not merely an accidental byproduct of the court system but a special source of profit. Credit scores and rental histories, based largely on civil judgments and eviction filings, are batched and sold as part of a billion-dollar industry that the civil courts make possible.<sup>210</sup> Once marked with the “Scarlet E” of eviction or bad credit, people are deemed undesirable, dispossessed of access to housing, education, and other fundamentals of civic life.<sup>211</sup>

Through these processes of racialized commodification, dispossession, and extraction, courts facilitate the accumulation of wealth and perpetuate racial inequality.

### III. DEBT COLLECTION, DEFAULTS, AND THE COURTS

The preceding sections have taken a macro view of racial capitalism, showing how civil courts, purportedly an institution in which private parties litigate contractual and family law disputes, can be viewed instead as sites of racial capitalism, in which the state and a small group of powerful capital holders extract and accumulate hard-earned wealth from marginalized communities, dispossess families of their income and assets, and devalue life sustaining needs such as housing stability, financial security, and family coherence.

This Part explores civil courts as participants in this endeavor. Courts have implemented an adjudicatory framework that appears legal in name, and at least formally in terms of structure, but that, as a practical matter, provides a means for dominant actors, primarily corporations and other arms of the state, to strip racialized groups of housing, shelter, wealth, and

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(Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records> [<https://perma.cc/VFU2-HSLP>] [hereinafter Sabbeth, Erasing the “Scarlet E”].

207. See Abbye Atkinson, *Borrowing Equality*, 120 *Colum. L. Rev.* 1403, 1448–54 (2020) [hereinafter Atkinson, *Borrowing Equality*] (describing the social construction of debtors’ subordinated social status); Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16, 916 n.193 (summarizing literature on shame associated with debt); cf. Louise Seamster, *Black Debt, White Debt*, 18 *Contexts* 30, 31–35 (2019) (arguing that “good debt” and “bad debt” are correlated with race, and Black debt is socially constructed as “morally stigmatizing,” while white debt can be a positive “status marker”).

208. See Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915, n.192 (collecting literature).

209. Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16.

210. See Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, *supra* note 206; Sabbeth, *Prioritization of Criminal Over Civil Counsel*, *supra* note 45, at 915–16.

211. See Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, *supra* note 206 (describing how “the dissemination of eviction records pushes already marginalized populations into substandard . . . markets,” increases housing segregation, and “entrenches inequality”).

critical family relationships. In doing so, civil court processes legitimize, normalize, and perpetuate a centuries-old capitalist racial hierarchy. The courts' role is both passive and active in this regard. The pervasive use of specific practices across thousands of local courts lends credence to the view that courts are willing to play this role, and that race is a critical element in determining when, how, and where these frameworks are enforced.<sup>212</sup>

The courts utilize a variety of mechanisms that support and maintain a system of racial capitalism. Courts could conceive of themselves as sites of protection for basic human rights and racial justice. Instead, they are highly malleable institutions that capital holders can manipulate to their advantage. We attribute courts' perpetuation of racial subjugation to a devaluation of the lives of marginalized people, a discounting of their humanity, and a commodification of their basic needs.

While a full examination of the courts' role in legitimizing racial capitalism is beyond the scope of this Essay, we begin the project of calling attention to this phenomenon by illuminating one example of how civil courts perpetuate the racialized pillage of wealth. We rely on the example of consumer debt collection to demonstrate how destructive court practices infuse the civil legal system and contribute to racial capitalism. Far from exhaustive, this is but a single illustration of a plethora of court practices, utilized in a wide range of case types, that position civil courts as a site of racial capitalism. We do not suggest that correction of these practices would suffice to reverse courts' participation in racial subordination; we intend only to illustrate how courts contribute to this societal problem.

#### A. *Debt and the Racialization of Debt Delinquency*

Debt collection is the cornerstone of the civil legal system. The civil courts collect many types of debt—rent debt, child support debt, and mortgage debt, among others. The collection of consumer debt, in particular, accounts for roughly fifteen to thirty percent of civil dockets.<sup>213</sup> This poorly understood sector of the civil courts includes aggressive collection of healthcare debt, educational debt, credit card debt, and debt taken on to

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212. Dantzer, *supra* note 84, at 126 (“Black neighborhoods are sites of spatial exploitation where predatory development, segrenomics, and exploitation dominate[.]” (citing Henry Louis Taylor Jr., *Disrupting Market-Based Predatory Development: Race, Class, and the Underdevelopment of Black Neighborhoods in the U.S.*, 1 *J. Race Ethnicity & City* 16, 17 (2020))).

213. Shanahan et al., *Institutional Mismatch*, *supra* note 11, at 1495 (analyzing eight years of data collected by the National Center for State Courts and roughly estimating that debt collection comprises fifteen percent of civil court dockets); Pew Charitable Trs., *How Debt Collectors Are Transforming the Business of State Courts 1* (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/NGZ9-WHFH>] [hereinafter *Pew Charitable Trs., Debt Collectors*] (reporting that in Texas, the only state maintaining aggregate data on debt collection, these matters make up thirty percent of the civil caseload).

meet basic living expenses. To understand how the courts' role in debt collection perpetuates racialized harms, it is important to first examine how race is baked into the process by which debt accumulates and overwhelms families.

Debt itself is not inherently harmful,<sup>214</sup> but as Abbye Atkinson has argued, the process by which debt becomes delinquent is racialized and responsible for deepening cycles of racial subjugation.<sup>215</sup> Access to credit has long been lionized as a pathway to financial mobility. Credit creates opportunities to purchase homes and pursue higher education. For decades, however, the benefits of lending largely accrued to white men. When credit opportunities opened to Black communities, predatory lending practices, subprime loans, and structural inequality twisted credit into a false promise that, instead of opening up access to homes and education, drowned people in mountains of debt they were unable to repay.<sup>216</sup>

As Atkinson describes, the extension of credit is beneficial only if the borrower's future self has the resources to repay the loan. However, loans are not divorced from the social context within which they are extended. Louise Seamster points to core differences between what she calls "White debt" and "Black debt."<sup>217</sup> For example, Black consumers are offered higher-risk financial products and less favorable terms on the same products.<sup>218</sup> As a result, "White debt promotes agency and grants opportunities," while "Black debt . . . represents the negative balance sheet that must be worked through just to get to the starting line."<sup>219</sup> In addition, race-based decisions by private institutions to impose discriminatory interest rates for Black borrowers, or treat their collateral as less valuable, has meant that "debt burden becomes a means of reverse interpersonal redistribution in which wealth is funneled out of already vulnerable economic spaces and into the coffers of lenders."<sup>220</sup>

Debt becomes even more dangerous when it spirals into additional borrowing to pay back prior loans at escalating interest rates. As Atkinson shows, Black individuals are targeted for this type of borrowing, with lenders' business models built on the premise that loans will go unpaid, and this will permit the extraction of wealth from individuals in delinquency.<sup>221</sup>

The debt collection process begins when a consumer defaults on repayment of a loan. In the wake of default, the original creditor or a third-party debt buyer pursues collection of the debt, often relentlessly. If

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214. Seamster, *supra* note 207, at 32–33 (2019) (arguing that debt, for white people, is often an asset and a marker of status).

215. Atkinson, *Borrowing Equality*, *supra* note 207, at 1452–53 (2020).

216. *Id.* at 1439–46.

217. Seamster, *supra* note 207, at 31.

218. *Id.*

219. *Id.* at 32.

220. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 *Stan. L. Rev.* 1093, 1104 (2019) [hereinafter Atkinson, *Rethinking Credit*].

221. *Id.* at 1101–02.

unsuccessful, the debt collector may sue the consumer in court. Debt delinquency, and the threat of litigation, plagues an alarming number of Americans: nine million borrowers are in default on educational debt<sup>222</sup> and twenty-five percent of Americans have medical debt in collections.<sup>223</sup> With delinquency comes harassment by debt collectors, exposure of financial woes to one's employer, negative impact on credit, and court involvement.<sup>224</sup>

One illustration of the racialized system of credit-to-default is the payday loan market. Payday loans are loans taken out, typically by low-income Americans, and disproportionately by Black Americans, to cover basic human needs such as rent, food, clothing, and other essential items.<sup>225</sup> The loan is due on the date of the borrower's next paycheck, but more often than not, the borrower does not have sufficient funds to repay the loan when it comes due.<sup>226</sup> Payday loans are intended to cover emergencies, but according to research by Pew Charitable Trusts, most people use them for essential recurring expenses such as electricity, running water, and phone service—what Chrystin Odersma has called “survival debt.”<sup>227</sup> These borrowers live in entrenched, often intergenerational, poverty—even though they work—and are unlikely to transcend their financial circumstances by the time of their next paycheck.<sup>228</sup>

Lenders are well aware of this vicious cycle and capitalize on it by offering payday loan recipients the opportunity to roll over their loans

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222. There are forty-five million student loan borrowers who owe 1.7 trillion dollars in educational debt. Zach Friedman, Student Loan Debt Statistics in 2021: A Record \$1.7 Trillion, *Forbes* (Feb. 20, 2021), <https://www.forbes.com/sites/zackfriedman/2021/02/20/student-loan-debt-statistics-in-2021-a-record-17-trillion/?sh=1e758f814310> (on file with the *Columbia Law Review*). Approximately twenty percent of these borrowers are delinquent on this debt. Pew Charitable Trs., Student Loan Default Has Serious Financial Consequences (Apr. 7, 2020), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2020/04/student-loan-default-has-serious-financial-consequences> [<https://perma.cc/NL4Q-577H>].

223. Nearly fifty percent of Americans carry medical debt, and approximately half of them are in default. Deb Gordon, 50% of Americans Now Carry Medical Debt, A New Chronic Condition for Millions, *Forbes* (Oct. 13, 2021), <https://www.forbes.com/sites/debgordon/2021/10/13/50-of-americans-now-carry-medical-debt-a-new-chronic-condition-for-millions/?sh=13fcc5865e5d> (on file with the *Columbia Law Review*).

224. Paul Kiel & Annie Waldman, Debt Collection Lawsuits Squeeze Black Neighborhoods, *ProPublica* (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/DY53-HVWK>].

225. Pew Charitable Trs., Payday Lending in America: Who Borrows, Where They Borrow, and Why 11 (2012), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2012/pewpaydaylendingreportpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewpaydaylendingreportpdf.pdf) [<https://perma.cc/9475-DBFG>] [hereinafter Pew Charitable Trs., Payday Lending] (finding that Black people are twice as likely as white people to take out a payday loan).

226. *Id.* at 5 (reporting that the average payday loan borrower takes out eight loans).

227. Chrystin Odersma, Borrowing Equality: Dispossession and the Need for an Abolitionist Approach to Survival Debt, 120 *Colum. L. Rev. Forum* 299, 301 (2020).

228. Pew Charitable Trs., Payday Lending, *supra* note 225, at 13.



multiple times while interest rates soar into the triple or quadruple digits.<sup>229</sup> According to the Center for Responsible Lending, payday lenders have low losses and high profits, averaging a thirty-four percent return on their investment despite lending to low-income borrowers.<sup>230</sup> Holding a borrower's paycheck as collateral gives lenders "strong collateral and leverage over a borrower who, when faced with the threat of criminal prosecution and penalty fees, will keep paying renewal fees every two weeks when they cannot afford to repay the loan in full."<sup>231</sup> This race-laden wealth accumulation rests on the reality that Black people are much more likely than white people to serve the ranks of the working poor and require emergency loans on a recurring basis.<sup>232</sup> Typically, delinquent debt is sold to third-party debt buyers on the secondary debt market, providing a cash infusion for the original lenders. Professional debt collectors, part of a thirteen-billion-dollar industry,<sup>233</sup> specialize in using the courts to initiate mass collection efforts, often across multiple states at once. All of this occurs with little intervention from the state. In all likelihood, the society-wide devaluation of Black lives has insulated the debt market from proper regulation or oversight.

#### B. *Debt Collection in the Courts*

Within this setting, in which race plays an inextricable role, civil courts are inundated with lawsuits seeking recoupment of debt. Courts contend with millions of debt collection cases a year, with small claims courts now believed to be the forum of choice for debt collectors.<sup>234</sup> As Dalié Jiménez has detailed, debt buyers who bring suit typically purchase a ledger that provides little information on the individual account, often nothing more than the amount of debt allegedly owed.<sup>235</sup> As debts are bundled and re-sold multiple times, information on the amount of the principal, the date of default, and even the name of the original creditor is often missing.<sup>236</sup> Mass lawsuits are brought on the basis of these flimsy ledgers, allowing debt

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229. Atkinson, *Rethinking Credit*, supra note 220, at 1106–07.

230. *Fact v. Fiction: The Truth About Payday Lending Industry Claims*, Ctr. for Responsible Lending (Jan. 1, 2001), <https://www.responsiblelending.org/research-publication/fact-v-fiction-truth-about-payday-lending-industry-claims> [<https://perma.cc/QA9M-AQEP>].

231. *Id.*

232. Bureau of Labor Statistics, DOL, Report 1087, *A Profile of the Working Poor*, 2018, at 5 (2020), <https://www.bls.gov/opub/reports/working-poor/2018/pdf/home.pdf> [<https://perma.cc/L2ZY-GE5Z>].

233. Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 8 (2016), [https://files.consumerfinance.gov/f/201603\\_cfpb-fair-debt-collection-practices-act.pdf](https://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf) [<https://perma.cc/97NV-B4XV>].

234. Hannaford-Agor et al., supra note 12, at v, 17, 33.

235. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 *Harv. J. on Legis.* 41, 80–81 (2015).

236. *Id.* at 64–69, 80–81.

collectors to reap enormous profits from predatory lending practices that have caused the debt to balloon over a period of months or years.<sup>237</sup>

Debt collectors could not extract and accumulate wealth without the courts' implementation of particular adjudicatory practices. Debt courts involve a host of highly problematic features. For one, almost all debt collectors—but virtually no consumers—are represented by counsel.<sup>238</sup> Furthermore, some courts show their disregard for power imbalances and racial inequality in debt matters by setting up “judgeless courtrooms,” in which consumers are coerced into unsupervised negotiations with debt buyers and their attorneys.<sup>239</sup> In addition, cases are processed rapidly and judges may handle hundreds of cases in a single day.<sup>240</sup>

We focus in this section, however, on a particularly pernicious practice—the mass production of default judgments.<sup>241</sup> A default judgment is a judgment entered when the defendant-debtor does not appear at a scheduled court hearing. Since 2010, the Federal Trade Commission and the Consumer Financial Protection Bureau (CFPB) have exposed dubious and illegal tactics in collections lawsuits, with debt buyers openly pursuing meritless debt claims or filing false affidavits in support of their suits.<sup>242</sup> Despite the findings of regulatory agencies, courts award judgments to well over ninety percent of the debt collectors that appear before them, most of them defaults.<sup>243</sup> These default judgments are entered despite growing evidence that most people sued do not owe the debt

237. Wilf-Townsend, *supra* note 1, at 1745–46.

238. Steinberg, *A Theory of Civil Problem-Solving Courts*, *supra* note 26, at 1596–97. While lack of representation for consumers is largely the product of constitutional and legislative decisions not to guarantee counsel in civil cases, many trial courts have inherent authorities to appoint counsel that they rarely invoke. Clare Pastore, *A Civil Right to Counsel: Closer to Reality*, 42 *Loyola L.A. L. Rev.* 1065, 1076 (2009).

239. Hum. Rts. Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* 3–4 (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/us0116\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf) [<https://perma.cc/LAQ3-48Z8>].

240. *Id.*

241. Steinberg, *supra* note 238, at 1598–1600; see also Sabbeth, *Eviction Courts*, *supra* note 2, at 380–81.

242. Consumer Fin. Prot. Bureau, *Monthly Complaint Report: December 2016*, at 11–13 (2016), [https://files.consumerfinance.gov/f/documents/201612\\_cfpb\\_MonthlyComplaintReport.pdf](https://files.consumerfinance.gov/f/documents/201612_cfpb_MonthlyComplaintReport.pdf) [<https://perma.cc/7FXN-F6N2>]; FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, at ii (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/U5C4-EL3L>].

243. Legal Aid Soc’y, *Neighborhood Econ. Dev. Advoc. Project*, MFY Legal Servs., *Urb. Just. Ctr. & Cmty. Dev. Project*, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 1–2 (2010), [https://www.neweconomy.org/wp-content/uploads/2014/08/DEBT\\_DECEPTION\\_FINAL\\_WEB-new-logo.pdf](https://www.neweconomy.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf) [<https://perma.cc/6KXG-QDFJ>].

amount named in the lawsuit or may not have received notice of the lawsuit against them.<sup>244</sup> In mass-processing defaults, courts enrich billion-dollar publicly traded companies earning profits of up to 200 million dollars a year<sup>245</sup> on the backs of poor, racialized groups. Courts enter default judgments without inquiry into the underlying claim and without the defendant ever stepping foot into the courtroom.

The example of Chase Bank illustrates the pervasive and uncontrolled nature of unlawful collections practices and highlights why default judgments are problematic.<sup>246</sup> In the wake of the 2008 financial crisis, Chase Bank was accused of fraudulent practices in its debt collection lawsuits and signed a ten-year consent decree that effectively ended its reign of terror over tens of thousands of credit cardholders. Notably, during the effective period of the consent decree, Chase Bank pursued far fewer collections lawsuits, as they were no longer profitable when compliance with due process was required. As soon as the consent decree expired, however, Chase swiftly resumed its old ways. A ProPublica investigation discovered that, in 2021, Chase began filing mass lawsuits again, relying on only six employees in an office in San Antonio to “robo-sign” affidavits vouching for the accuracy of the company’s lawsuits.<sup>247</sup> Robo-signing is a common practice in debt suits involving false attestation of the origins of the debt and its repurchase, when in fact the employees who sign the affidavits have no records substantiating the debt and know nothing of who initially owned it, how interest accrued, or how the debt has been packaged and purchased over time.<sup>248</sup>

Courts have erected a façade of willful blindness to the tactics of debt collectors like Chase Bank despite multiple class action lawsuits brought by the CFPB and various attorneys general against debt buyers over the past decade.<sup>249</sup> The fraudulent practices are not limited to “robo-signing,”

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244. Andy Newman, They Need Legal Advice on Debt. Should It Have to Come From Lawyers?, N.Y. Times (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html> (on file with the *Columbia Law Review*).

245. Paul Kiel & Jeff Ernsthause, Debt Collectors Have Made a Fortune This Year. Now They’re Coming for More., ProPublica (Oct. 5, 2020), <https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more> [<https://perma.cc/DGP5-GF2D>].

246. Patrick Rucker, A Return to Robo-Signing: JPMorgan Chase Has Unleashed a Lawsuit Blitz on Credit Card Customers, ProPublica (Jan. 5, 2022), <https://www.propublica.org/article/a-return-to-robo-signing-jpmorgan-chase-has-unleashed-a-lawsuit-blitz-on-credit-card-customers> [<https://perma.cc/5KQQ-DUMD>].

247. *Id.*

248. Lisa Stifler, Debt in the Courts: The Scourge of Abusive Debt Collection and Possible Policy Solutions, 11 Harv. L. & Pol’y Rev. 91, 93, 104–05 (2017).

249. See, e.g., Consent Order, Portfolio Recovery Assocs., LLC, CFPB No. 2015-CFPB-0023 (Sept. 8, 2015), [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consultation-order-portfolio-recovery-associates-llc.pdf](https://files.consumerfinance.gov/f/201509_cfpb_consultation-order-portfolio-recovery-associates-llc.pdf) [<https://perma.cc/7DWY-ZS7M>]; Consent Order, Encore Capital Grp., CFPB No. 2015-CFPB-0022 (Sept. 3, 2015), [https://files.consumerfinance.gov/f/201509\\_cfpb\\_consultation-order-encore](https://files.consumerfinance.gov/f/201509_cfpb_consultation-order-encore)

but also include, among other tactics, “sewer service,” in which debt buyers hire process servers who sign sworn statements that personal service was achieved, when in fact it was never attempted.<sup>250</sup> Despite this type of fraud, civil courts issue heaps of default judgments in favor of debt collectors, obliterating financial security for vulnerable families.

Default judgments represent a close form of collusion between corporate interests and the courts. Notably, defaults are unique to the civil courts. The criminal legal system produces a host of troubling outcomes, but the concept of default does not exist in criminal courts. It would be unthinkable for a prosecutor to “win” a case and send the defendant to prison simply because the defendant did not appear at his hearing. Civil courts, however, have turned default judgments into a routine way of conducting business. Defaults resolve somewhere between sixty and ninety percent of debt cases, but they are not limited to debt matters.<sup>251</sup> Default judgments are also entered in as many as fifty percent of eviction cases.<sup>252</sup> Families can lose their homes by default in a week, flung into homelessness by a sheriff who, backed by a court order, throws their belongings into the street—sometimes with young children observing the traumatic experience.

The extraction of wealth from racialized communities is made possible by the courts’ systemic use of default judgments. These judgments are difficult to undo, rendering them essentially permanent even if a consumer later notifies the court that she did not receive notice of the lawsuit or that her due process rights were otherwise violated. In addition, default judgments arm debt collectors with a host of tools that can be used to accumulate capital and further harm already-poor communities.<sup>253</sup> With the default judgment, the court assigns to the debt collector the right to reclaim the debt through multiple legal avenues. As indebtedness is inherently racialized, these harms are overwhelmingly imposed on communities of color. To satisfy a default judgment, a single Black mother might lose her car pursuant to an order for asset seizure, or she might experience garnishment of her wages—and continue to be subjected to this garnishment week after week until the debt is fully satisfied. These court-

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capital-group.pdf [https://perma.cc/8JVQ-VVU5]; Press Release, Andrew Cuomo, N.Y. State Att’y Gen., The New York State Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010), <https://ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server> [https://perma.cc/5MRR-J58F].

250. Hum. Rts. Watch, *supra* note 239, at 36–38.

251. FTC, *supra* note 242, at 7.

252. William E. Morris Inst. for Just., *Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts* 8 n.22 (2005), <https://morrisinstituteforjustice.org/helpful-information/landlord-and-tenant/4-final-eviction-report/file> [https://perma.cc/P3RL-RSCP]; Sabbeth, *Eviction Courts*, *supra* note 2, at 380–81 (describing how eviction courts rely on high default rates to speed through large dockets).

253. Pew Charitable Trs., *Debt Collectors*, *supra* note 213, at 18.

backed collection efforts can persist for years, with snowballing consequences. The mother who loses her car may also lose her job if she has no transportation to get to work. Garnishment of wages may make it even more difficult for this mother to feed or clothe her children, which may force her to take out a payday loan, starting the cycle anew, and contributing to the rapid and exponential growth of debt delinquency, and ultimately, more civil legal involvement.

Civil courts are admittedly overwhelmed by the volume of case filings.<sup>254</sup> And it is clear that the rules of civil procedure permit courts to enter default judgments when a person fails to appear at a hearing.<sup>255</sup> Courts are arguably functioning in accordance with the rule of law, and this complicates the critique of their institutional role as partners in racial capitalism. Nonetheless, courts have special authority to legitimize or repudiate injustices, and their practices, especially when viewed at a macro level, empower the debt industry with a cheap and easy means of extracting wealth from poor, predominately Black communities. This legitimizing role distorts the democratic function of courts and instead places courts in the position of enforcing racially hierarchical relationships and normalizing the racialized accumulation of capital by powerful corporate interests. Courts cannot solve racial inequality on their own, but nor should they facilitate extraction.

This depiction of mass adjudication by default judgment may appear to imply that eliminating the practice of default judgments and requiring judges to scrutinize claims would absolve the courts of their role in racial capitalism. That is not the case. Courts are intimately connected to systems of racial and social control in ways that are difficult, if not impossible, to undo. Default judgments are but one expression of the depth of courts' involvement in systems of racial subordination. In providing this illustration of the courts and their relationship to racial capitalism, we do not intend to suggest a solution but rather to illuminate one example of how civil courts enforce and perpetuate racial hierarchies in much the same way that criminal courts do.

#### CONCLUSION

By engaging in the practices described above—and many others not touched upon in this Essay—civil courts are both passive participants and active perpetrators in a system of racial capitalism. In some ways, through a formalist approach to decisionmaking, they might be seen as merely facilitating exploitative and oppressive social and economic dynamics with roots far beyond the judicial system. To end the story there, however, diminishes the importance of the courts' role, the agency courts have in

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254. Nat'l Ctr. for State Cts., Problems and Recommendations for High-Volume Dockets 2, [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0017/25721/ncsc-cji-appendices-i.pdf](https://www.ncsc.org/__data/assets/pdf_file/0017/25721/ncsc-cji-appendices-i.pdf) [<https://perma.cc/JUL2-4YZU>] (last visited Mar. 26, 2022).

255. See, e.g., Fed. R. Civ. P. 55.

allowing those dynamics to flourish, and the power courts wield as an arm of the state. Civil courts have developed unique processes and procedures that facilitate racial capitalism and have chosen not to actively identify, let alone root out, the racial dynamics influencing their operation. Thus, they are not neutral bystanders, but supporters in maintaining the racialized systems on which capitalism relies. Similarly, race is not merely an external factor that inevitably colors the results of the civil court system but is integral to its design and operation—as well as to our collective national tolerance of state civil courts operating as sites of injustice and oppression. With this Essay, we hope to contribute to a much broader conversation about the role that civil courts play in incorporating, facilitating, and perpetuating racial inequality.