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### A Tale of Two Civil Procedures

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# ESSAYS

## A TALE OF TWO CIVIL PROCEDURES

Pamela K. Bookman\* & Colleen F. Shanahan\*\*

*In the United States, there are two kinds of courts: federal and state. Civil procedure classes and scholarship largely focus on federal courts but refer to and make certain assumptions about state courts. While this dichotomy makes sense when discussing some issues, for many aspects of procedure this breakdown can be misleading. Two different categories of courts are just as salient for understanding American civil justice: those that routinely include lawyers and those where lawyers are fundamentally absent.*

*This Essay urges civil procedure teachers and scholars to think about our courts as “lawyered” and “lawyerless.” Lawyered courts include federal courts coupled with state court commercial dockets and the other pockets of state civil courts where lawyers tend to be paid and plentiful. Lawyerless courts include all other state courts, which hear the vast majority of claims. This Essay argues that this categorization reveals fundamental differences between the two sets of court procedures and much about the promise and limits of procedure. The Essay also discusses how this dichotomy plays out in three of today’s most contentious topics in civil procedure scholarship: (1) written and unwritten procedure-making, (2) the role of new technology, and (3) the handling of masses of similar claims. This categorization illuminates where and how lawyers are essential to procedural development and procedural protections. They also help us better understand when technology should assist or replace lawyers and how to reinvent procedure or make up for lawyers’ absence. Finally, they reveal that fixing court procedure may simply not be enough.*

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## INTRODUCTION

This Essay argues in favor of examining civil procedure in American civil justice not just as divided between state and federal courts, but as between lawyered and lawyerless courts. In civil procedure and federal courts scholarship, state and federal courts represent a natural dividing line for understanding American civil justice. Compared to the better-known and easier-to-study federal courts, state courts are either more or less accessible, fair, plaintiff friendly, or efficient than federal courts. In a subset of state civil courts<sup>1</sup>—those that have commercial dockets or that

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1. We use the term “state civil court” to include state and local civil courts that hear adversarial cases between two or more parties before a judge, including specialized courts like family court and housing court. This category omits traffic court, where a vast number of cases are filed, but under a different posture and different circumstances. See Colleen F. Shanahan, Jessica K.

routinely hear full trials, for example—these comparisons make sense. The procedures and the personnel include experienced lawyers and somewhat resemble what one might find in federal court. But in the vast majority of state courts today—those that hear family, housing, small claims, and debt collection cases, for example—procedures operate very differently. It is these lawyerless courts<sup>2</sup> that hear most of the 98% of civil cases that are the focus of this groundbreaking *Columbia Law Review* symposium.<sup>3</sup>

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Steinberg, Alyx Mark & Anna E. Carpenter, The Institutional Mismatch of State Civil Courts, 122 *Colum. L. Rev.* 1471, 1486 & n.56 (2022) [hereinafter Shanahan et al., Institutional Mismatch]; Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, Nat'l Ctr. for State Cts. & State Just. Inst., *The Landscape of Civil Litigation in State Courts* iii–iv (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/D343-FTLJ>] (using a similar definition but omitting domestic relations cases). For scholarship focusing on local courts, see generally Ethan J. Leib, *Local Judges and Local Government*, 18 *N.Y.U. J. Legis. & Pub. Pol'y* 707 (2015) (examining the relationships between local judges, the public, and the executive and legislative branches of that local government); Alexandra Natapoff, *Criminal Municipal Courts*, 134 *Harv. L. Rev.* 964 (2021) (providing a framework for studying and analyzing municipal courts); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 *Va. L. Rev.* 1031 (2020) (analyzing how local courts work within the broader justice system). This Essay also omits discussion of state administrative agencies and private dispute resolution. See, e.g., Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 *U. Pa. L. Rev.* 1631, 1633–35 (2015) (noting enthusiasm among advocates and politicians for specialized health courts); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 *N.Y.U. L. Rev.* 805, 809–10 (2011) [hereinafter Engstrom, *Sunlight and Settlement Mills*] (discussing “[s]ettlement mills’ ‘assembly-line’ resolution of claims”); Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 *Va. L. Rev.* 129, 130 (2015) (“[C]orporate defendants have increasingly relied on their own mass settlement programs . . . to resolve claims with large groups of people who cannot afford the cost of counsel.”); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 *Denv. L. Rev.* 469, 474–84 (2016) [hereinafter Shanahan et al., *Lawyers, Power, and Strategic Expertise*] (describing unemployment case proceedings before a District of Columbia administrative court). Future work might consider these fora in light of the lawyered/lawyerless distinction as well.

2. One of us with co-authors has elsewhere defined lawyerless courts as “those where more than three-quarters of cases involve at least one unrepresented party.” Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 *Geo. L.J.* 509, 511 (2022) [hereinafter Carpenter et al., *Lawyerless Courts*]; see also Hannaford-Agor et al., *supra* note 1, at 6–8 (for the best available and most recent nationally representative data).

3. The symposium provides a much-needed focus on state courts, as scholars increasingly urge. See, e.g., Anne E. Carpenter, Jessica K. Steinberg, Colleen Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 *Wis. L. Rev.* 249, 272–74, 285 [hereinafter Carpenter et al., “New” Civil Judges] (“[S]uch courts are almost entirely ignored as sites for scholarly research, most notably by legal scholars.”); Ethan J. Leib, *Localist Statutory Interpretation*, 161 *U. Pa. L. Rev.* 897, 900 (2013) (noting that state and local trial courts “are the face of law and justice to citizens in our democracy”); Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 *Hastings Const. L.Q.* 261, 265–66 (2021) (lamenting that “[s]cholarly and pedagogic attention . . . remains fixed on federal litigation and the Federal Rules of Civil Procedure,” and urging that “the reality of how procedure works for ordinary people, including how it often fails them, must be studied more closely and taught more frequently”).

Federal civil courts are lawyered. In 70% of federal civil cases, both sides are represented.<sup>4</sup> In the other 30% of cases, the self-represented party is typically the plaintiff suing a represented defendant with greater access to resources, often the government or an employer. By contrast, state courts are predominantly lawyerless. Available data suggests 25% of state civil cases have representation on both sides.<sup>5</sup> In some areas of state court, like family law, “nearly all cases involve two unrepresented parties.”<sup>6</sup> In other areas, like evictions and debt collection, there may be one represented party. In these asymmetrical cases in lawyerless courts, the plaintiff—for example, the landlord or debt collection agency—is more likely to be the represented, better-financed, repeat player suing a self-represented, individual defendant. But in all lawyerless cases, the absence of the lawyer on at least one side affects how procedure works and how civil justice is administered.<sup>7</sup>

Studies about American civil procedure too often examine the 2% of cases in federal courts,<sup>8</sup> and not state courts, where 98% of cases take place.<sup>9</sup> As Brooke Coleman has noted, the Federal Rules and procedural doctrine develop in response to an elite (metaphorical) “one percent” of that two percent of cases that appear in federal court—the cases with the

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4. Pro se plaintiffs who are not incarcerated file 10% of federal cases. These are typically social security appeals and employment discrimination matters. Pro se plaintiffs who are incarcerated file an additional 20% of federal cases. See Mark D. Gough & Emily S. Taylor Poppe, (Un)Changing Rates of Pro Se Litigation in Federal Courts, 45 *Law & Soc. Inquiry* 567, 574–80 (2020) (describing variation by case type and circuit of filing); Andrew Hammond, The Federal Rules of Pro Se Procedure, 90 *Fordham L. Rev.* 2689, 2691 & nn.1 & 5 [hereinafter Hammond, Pro Se Procedure].

5. Carpenter et al., *Lawyerless Courts*, supra note 2, at 511; Hannaford-Agor et al., supra note 1, at iv.

6. Carpenter et al., *Lawyerless Courts*, supra note 2, at 512; see also Hannaford-Agor et al., supra note 1, at vii. Many studies show that 80% to 90% of family law cases that do not involve the government involve two self-represented parties. See, e.g., Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 *Conn. L. Rev.* 746, 751 (2015) [hereinafter Steinberg, Demand Side Reform].

7. Consistent with other scholarship, this Essay uses “lawyerless” to capture cases with no representation and cases with asymmetrical representation because the same collection of challenges arises in both situations. See *infra* section II.C.1. Of course, even in cases with symmetrical representation—that is, where represented parties are on both sides—the lawyers may not be evenly matched. See Frederick Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World 70–106 (2019) (documenting the problem of unequal legal representation and proposing a deprivatization of the market for legal services).

8. See, e.g., Paul MacMahon, Proceduralism, Civil Justice, and American Legal Thought, 34 *U. Pa. J. Int’l L.* 545, 567 (2013) (discussing the importance of procedure—particularly in federal courts—to American concepts of civil justice).

9. See Shanahan et al., *Institutional Mismatch*, supra note 1, at 1486; Diego A. Zambrano, Federal Expansion and the Decay of State Courts, 86 *U. Chi. L. Rev.* 2101, 2103 (2019) [hereinafter Zambrano, Federal Expansion] (“Federal courts host less than three hundred thousand civil cases a year while state courts bear the brunt of nearly seventeen million civil cases.”).

highest amounts in controversy, litigated by the most elite lawyers.<sup>10</sup> Meanwhile, the vast majority of American cases are filed in lawyerless state courts—that is, in neither federal court nor their lawyered state court rough equivalents.<sup>11</sup> Although these cases do not individually involve the largest sums of money, they involve some of the most important aspects of human life—family relationships, caring for children and elders, and housing—and their sheer volume demonstrates their importance. Collectively, moreover, a lot of money is at stake.<sup>12</sup>

This Essay urges civil procedure scholars and teachers not only to incorporate state courts into their understanding of procedure, but also to look at procedure through the lens of lawyered courts and lawyerless courts. While the state/federal divide is a logical one for studying many subjects, including some civil procedure stalwarts like subject matter jurisdiction, the lawyered/lawyerless distinction provides additional and important insights about American civil justice and procedure.

To appreciate and study American civil procedure, it is necessary to consider the full picture of American civil justice, and that includes state courts. Nevertheless, state courts contain multitudes.<sup>13</sup> Some state courts capture the cases that are being edged out of federal courts, but state and local courts also handle small claims, debt collection, housing, family law, and other fallouts of our social ills. This latter category of claims disproportionately burdens lower-income litigants who cannot afford lawyers and who often do not even recognize their problems as having a legal dimension.<sup>14</sup> It is important to appreciate the differences between the two

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10. Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1007 (2016) [hereinafter Coleman, *One Percent Procedure*] (“When put in the context of state court litigation—indeed, the place where most civil litigation happens—and in the context of the remaining types of federal civil litigation, this elite and peculiar litigation is hardly dominant.”).

11. See Shanahan et al., *Institutional Mismatch*, supra note 1, at app. tbls.1A, 1B & 3.

12. Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 Colum. L. Rev. 1243, 1273 (2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704, 1707 (2022) (“State courts backstop the bread-and-butter transactions that make up the consumer economy, overseeing litigation over contracts and providing the ultimate enforcement mechanism for the trillions of dollars of consumer debt in the United States.”).

13. We do not endorse “lump[ing]” all “litigation involving unrepresented parties . . . together as a matter of either diagnosis or treatment.” See Wilf-Townsend, supra note 12, at 1716 (cautioning against this approach). Instead, as Wilf-Townsend understands, lawyerless courts present civil procedure challenges that should be compared and contrasted with those in lawyered courts when considering reforms in either context and while evaluating U.S. civil justice.

14. See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. Legal Educ. 531, 531 (2013) (noting the extent to which the legal needs of poor and middle-income Americans go unmet); Rebecca L. Sandefur, *Access to What?*, 148 *Daedalus* 49, 51 (2019) [hereinafter Sandefur, *Access to What?*] (explaining that access to legal services is severely restricted to privileged populations); Rebecca L. Sandefur & James Teufel, *Assessing America’s Access to Civil Justice Crisis*, 11 U.C. Irvine L. Rev. 753, 755

kinds of litigation and the effect of the presence, or absence, of lawyers on these institutions.

To illustrate the importance and the fruitfulness of this perspective, this Essay examines three themes in civil procedure that are among the most important issues in both federal *and* state civil courts. The parallels within these themes are not commonly recognized because they manifest and are studied under different labels: (1) procedural rulemaking, (2) the role of technology in procedure, and (3) mass claims and aggregate litigation. These three areas are prominent topics in federal civil procedure scholarship and classrooms and are discussed in scholarship about state courts. But to date these topics have been siloed and are barely in conversation at all.<sup>15</sup> One aim of this Essay is to unite these conversations.

Thus, for each topic, this Essay considers the related federal civil procedure and state civil court scholarship on these issues and identifies the similarities and differences between their manifestations in lawyered and lawyerless courts. These comparisons reveal important insights about the role of lawyers, the potential for reform, and the limits of procedure.

First, examining formal and informal rulemaking through this lens reveals that, while formal procedural rules should be simplified for self-represented litigants, adversarial representation is crucial to maintaining the fairness of informal procedures. Lawyers do not only object to opponents' procedural manipulations; they can also counter judges' exercise of procedural power and provide a check on both by observing proceedings, demanding reasoned explanations, and filing appeals. Additionally, lawyers are instrumental in the feedback loop through which ad hoc procedures spur more systematic procedural changes. Without that process of procedural law development, ad hockery can become the norm, signaling the need for more structural reform. Second, examining technology reveals areas where lawyered and lawyerless courts should be considered separately—for example, when technology assists lawyers as opposed to when it replaces them. But in other areas, like e-notice, the

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(2021) (describing the access to justice crisis as one of unserved legal needs and unrepresented litigants in eviction and family cases); Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, in *Beyond Elite Law: Access to Civil Justice in America* 3, 7–9 (Samuel Estreicher & Joy Radice eds., 2016) (“People in low-income households were less likely to perceive themselves as having a legal problem, less likely to address it themselves, less likely to seek legal assistance, and less likely to access the civil justice system than those in homes with greater financial resources.”).

15. See, e.g., Spaulding, *supra* note 3, at 262 (“[T]he discourse of procedure, even among those who see glaring problems of access to justice, is idealized, abstract, and ossified—unconnected to the actual.”); Weinstein-Tull, *supra* note 1, at 1038–39 (“The legal academy’s failure to account for local courts . . . has essentially divorced legal theory from the most fundamental and common experiences of our justice system.”); cf. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 518–21 (describing recent reform proposals among access-to-justice advocates); Wilf-Townsend, *supra* note 12, at 1714 (“Although much legal scholarship focuses on federal courts, this shift in state courts is extremely consequential for how civil justice is administered and perceived throughout the country.”).

similarities call for more united theoretical and reform efforts. Finally, this Essay examines mass claims—first, as they are aggregated in lawyered courts, and then, as they are resolved individually (but en masse) in lawyerless courts. This approach shows that we typically frame discussions of class action or multi-district litigation (MDL) settlements as debates about the functioning of the lawyer–client relationship and about whether mass tort claimants in federal courts can be considered lawyered or lawyerless.

These are not the only possible takeaways, or the only three topics in which this division is important and revealing. Our case studies are meant to be illustrative and informative, but not exhaustive. The emerging application of critical race theory approaches to civil procedure would benefit from examining courts not as state and federal, but as lawyered and lawyerless.<sup>16</sup> Subjects ranging from default judgments to poverty law to alternative dispute resolution (ADR) are likewise too often discussed in federal or state court scholarly silos. We could greatly enhance our understanding of these subjects if we viewed them through the lens of lawyered and lawyerless courts. For example, one might examine state courts alongside federal courts when discussing issues related to arbitration or mediation in complex litigation, while separately considering these mechanisms in lawyerless state courts as raising different concerns. This Essay focuses on these three areas because each illustrates the tacit divide between lawyered and lawyerless courts scholarship. Yet, each also reveals a different kind of relationship between the two. Procedure-making illustrates the lessons of comparing and contrasting the two realms. Technology represents the potential for unifying the divergent scholarship. Mass claims demonstrate the limits of procedure, manifested differently in the two realms in a way that the comparison helps to illuminate.<sup>17</sup>

Together, these case studies provide further insights into the roles of lawyers and judges in civil justice, not just as advocates or neutrals, but also as actors and architects of the civil justice system. They provide insights for doctrine—especially doctrine that bridges state and federal courts—like

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16. See generally A Guide to Civil Procedure: Integrating Critical Legal Perspectives (Brooke D. Coleman, Suzette M. Malveaux, Portia Pedro & Elizabeth Porter eds., forthcoming 2022) (on file with the *Columbia Law Review*) (revealing ways that civil procedure privileges some and silences others within our justice system); Portia Pedro, A Prelude to a Critical Race Theoretical Account of Civil Procedure, 107 Va. L. Rev. Online 143 (2021) (advocating for the use of critical race theory to analyze civil procedure); Kathryn A. Sabbeth & Jessica K. Steinberg, The Gender of *Gideon*, 69 UCLA L. Rev. (forthcoming 2022), <https://ssrn.com/abstract=3807349> [<https://perma.cc/56XA-4JBN>] (arguing that *Gideon v. Wainwright*'s constitutional guarantee of counsel accrues largely to the benefit of men).

17. In this sense, comparing lawyered and lawyerless courts presents a combination of comparing two systems that are similar, but also choosing specific examples to highlight differences. See, e.g., Rosalind Dixon & Vicki Jackson, Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts, 57 Colum. J. Transnat'l L. 283, 292 (2019) (using a similar approach to select three examples of courts for comparison); cf. Ran Hirschl, The Question of Case Selection in Comparative Constitutional Law, 53 Am. J. Comp. L. 125, 139 (2005) (discussing the “most different cases” approach in comparative constitutional law).



personal jurisdiction, notice, and due process. For example, personal jurisdiction arises predominantly in lawyered courts. In contrast, there is a shared challenge of providing notice to masses of unrepresented litigants in both aggregate lawyered litigation and lawyerless courts. And these case studies showcase the failings of a due process doctrine that values lawyers, and more process, as the ideal guarantors of the opportunity to be heard.

This Essay unfolds as follows: Part I describes the differences between state and federal courts in terms of their dockets, their litigants, their procedural rules, and the values they pursue. It then reframes those differences in terms of courts dominated by lawyers representing both sides and those where lawyers are predominantly absent. Part II explores three areas of current scholarship where the lawyered/lawyerless divide can help illuminate ongoing debates: (1) procedure-making, (2) the role of technology, and (3) treatment of masses of claims. Part III discusses implications of focusing on the lawyered/lawyerless divide on our understanding of the roles of judges and lawyers, doctrine, teaching procedure, and the power and the limits of procedure in the American civil justice system. Among other implications, this Essay shows the importance of lawyers for certain kinds of procedural development as actors and as architects. It urges scholars and reformers across lawyered and lawyerless courts to communicate with each other and potentially collaborate on research and reforms about using technology to effect notice, because the two kinds of courts face similar challenges. Finally, this Essay argues that this lens supports arguments about the limits of procedure's ability to ensure justice and the need for more dramatic change—crafted by lawyers but ultimately designed for use without them.<sup>18</sup>

### I. LAWYERED AND LAWYERLESS COURTS

This Part lays out background understandings of the similarities and differences between state and federal courts.<sup>19</sup> It evaluates four common assumptions about state and federal courts in terms of the kinds of cases, the similarity of written procedures, the roles of lawyers and judges, and the values of merits and efficiency. In each case, scholars' foundational

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18. See, e.g., Benjamin H. Barton & Stephanos Bibas, *Rebooting Justice* 100 (2017) [hereinafter Barton & Bibas, *Rebooting Justice*] (insisting that “it is time . . . to pursue simpler, swifter alternatives to lawyers” and that “[a]dvocating yet again for more lawyers will not result in more justice”); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 *Wis. L. Rev.* 287, 288 [hereinafter Sabbeth, *Simplicity as Justice*] (arguing that the “limits and unintended consequences” of the simplification project should “receive careful scrutiny”); Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1530 (urging “the collective exercise of reimagining state civil courts as democratic institutions”).

19. This description relies on the best available data, which is admittedly incomplete and difficult to compile. What data exists, however, paints a clear picture, and it appears to be improving as scholars work tirelessly to analyze and add to it. See Carpenter et al., “New” Civil Judges, *supra* note 3, at 265–71 (discussing the barriers and progress in research on state civil courts).

assumptions about civil courts are federal-court-centric. They tend to define state courts and what happens in them with reference to their similarities to federal courts. To the extent these assumptions apply to state courts, however, they apply only to the limited subset of state civil courts where lawyers represent both sides and actively drive the litigation, as lawyers tend to do in federal court. This reveals a divide between civil litigation in this country not as between state and federal courts, but as between lawyered courts (federal courts and certain divisions of state trial and appellate courts) and lawyerless courts (the rest of civil courts where at least one party is almost always self-represented). While federal courts have some self-represented parties and state courts have some cases with representation on both sides, this Essay seeks to highlight the institutional and procedural-rule-based differences. It therefore focuses on the courts rather than the individual cases. It is in this latter category of “lawyerless” courts in which the vast majority of civil litigation actually takes place.<sup>20</sup> They differ from lawyered courts in terms of the types of cases they hear, their written procedures, the roles of lawyers and judges, and their understanding of the pursuit of efficient, merits-based adjudication.

#### A. *Types of Cases*

When federal civil procedure scholars think of state courts, they may think of a less structured, more chaotic, more plaintiff-friendly, elected-judge-ruled courtroom where plaintiff-lawyer-led litigation vaguely resembles what takes place in federal court but takes longer and yields higher jury awards. This image has been carefully cultivated and promoted by the Chamber of Commerce and other like-minded organizations, who rank state court systems as “judicial hellholes” when they are conducive to class actions and other kinds of suits against business defendants.<sup>21</sup> In this telling, plaintiff’s lawyers are opportunistic “bad guys.”<sup>22</sup> The image is

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20. See *supra* notes 3–9 and accompanying text.

21. See, e.g., Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 *W. Va. L. Rev.* 1097, 1098 (2008) [hereinafter *Thornburg, Judicial Hellholes*]; Florida Surpasses California to Become Worst ‘Judicial Hellhole’, *Fla. Chamber of Com.* (Dec. 5, 2017), <https://www.flchamber.com/florida-surpasses-california-to-become-worst-judicial-hellhole/> [<https://perma.cc/HPX6-KTG8>]; The U.S. Chamber Institute for Legal Reform Commends Judicial Hellholes for Highlighting Nation’s Worst Civil Justice Jurisdictions, *U.S. Chamber Inst. for Legal Reform* (Dec. 5, 2018), <https://instituteforlegalreform.com/the-u-s-chamber-institute-for-legal-reform-commends-judicial-hellholes-for-highlighting-nations-worst-civil-justice-jurisdictions/> [<https://perma.cc/CA68-3MKA>]; 2020–2021 Judicial Hellhole Report, *Everlasting Judicial Hellholes 2020/2021*, *ATR Found.*, <https://www.judicialhellholes.org/reports/2020-2021-executive-summary/> [<https://perma.cc/K7B8-CBKP>] (last visited Mar. 20, 2022); cf. Megan M. La Belle, *Influencing Juries in Litigation “Hot Spots”*, 94 *Ind. L.J.* 901, 930 (2019).

22. See, e.g., Thornburg, *Judicial Hellholes*, *supra* note 21, at 1100 (explaining the campaign to scapegoat plaintiffs’ lawyers and paint them “as greedy parasites trying to make an easy buck by scaring companies into settling frivolous claims”).

federal-court-centric, depicting state courts as a wild west version of what happens in federal court.

Even if one rejects the negativity of this imagery, one may still imagine state courts as a rough corollary to federal court—at least in terms of many of the kinds of cases heard, if not the amount of money at stake. Federal courts have exclusive jurisdiction over few cases. Most federal court cases could be heard in state court, and there are some state courts that do resemble federal courts along these metrics. Discussion of state courts in civil procedure scholarship and curricula tends to focus on these state courts, often while considering how state courts relate to federal courts.<sup>23</sup> For example, in studying the law of removal, one learns that state courts of general jurisdiction provide an alternative forum for federal claims. In these state courts, parties file suits that could plausibly be removed to federal court. Such litigation would likely involve questions of federal law or high monetary stakes (and thus potentially satisfy the federal amount-in-controversy requirement) and parties from different states—cases similar to the ones that federal courts handle.<sup>24</sup>

Thinking of state litigation in terms of whether it could proceed in federal court focuses one's attention on certain kinds of cases. Those cases—business or insurance disputes, for example—exist in state courts. Indeed, many states have established separate commercial divisions.<sup>25</sup> These cases tend to involve higher monetary stakes, the parties are likely to be able to afford zealous lawyers, and the courts in which these cases unfold often do follow procedures that roughly resemble the Federal Rules.

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23. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 295–303 (7th ed. 2015) (discussing the relationship between federal and state courts); Zachary D. Clopton, *Making State Civil Procedure*, 104 *Cornell L. Rev.* 1, 4–5 (2019) [hereinafter Clopton, *Making State Civil Procedure*] (providing a comprehensive study of state court procedure-making, in part to understand the relationship between state court procedure and federal procedural retrenchment); cf. Weinstein-Tull, *supra* note 1, at 1034–35 (analyzing lawyerless state courts to draw conclusions about federalism).

24. Other federal civil procedure and federal court topics that involve state courts include abstention doctrines, exclusive jurisdiction, and state courts' obligation to enforce federal law. See Fallon et al., *supra* note 23, at 1101–71 (abstention doctrines); *id.* at 418–22 (exclusion of state court jurisdiction); *id.* at 440–60 (obligation to enforce federal law).

25. Pamela K. Bookman, *New York's International Commercial Courts*, in *New Specialised Commercial Courts and Their Role in Cross-Border Litigation* (forthcoming 2022–2023) (manuscript at 6) (on file with the *Columbia Law Review*); John F. Coyle, *Business Courts and Interstate Competition*, 53 *Wm. & Mary L. Rev.* 1915, 1918 (2012) (listing nineteen states that have established dedicated business courts). Part of the impetus is to attract the business of business litigation into the state by creating a court that commercial parties want to choose in their forum selection clauses. For an overview of these trends in the United States and around the world, see Pamela K. Bookman, *The Adjudication Business*, 45 *Yale J. Int'l L.* 227, 233–39 (2020) (discussing the rise of specialized commercial courts in London and New York).

But the vast majority of state court cases raise issues of state law and could not be filed in federal court.<sup>26</sup> “The state courts are flooded with cases related to consumer debt, divorce, child custody and support, paternity, wage and hour, landlord–tenant, abuse and neglect, probate, and domestic violence.”<sup>27</sup> Relatedly, the litigants do not have the funds and do not stand to benefit financially from the litigation to support legal fees—especially if the claims cannot be aggregated.<sup>28</sup> Indeed, the courts we describe as lawyerless are often known as “poor people’s courts.”<sup>29</sup>

The result is often a bifurcated justice system within state courts: between resourced parties or parties with claims large enough to support paying an attorney, and the rest of the people with legal problems.<sup>30</sup> In some states, like New York, these courts are literally different places and different divisions (e.g., Commercial Court and Family Court).<sup>31</sup> In other

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26. See, e.g., Hannaford-Agor et al., *supra* note 1, at 8 (reporting that, of civil cases in seventeen states’ courts of general jurisdiction, 61% were contract cases, 11% probate, and 11% small claims); Shanahan et al., *Institutional Mismatch*, *supra* note 1, at app. tbl.2.

27. Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case”* *Civil Justice*, 2016 *BYU L. Rev.* 899, 919 [hereinafter Steinberg, *Adversary Breakdown*].

28. Significant reductions in the availability of class actions have also reduced low-income litigants’ access to federal *and* state courts (and to lawyers) through aggregation of small-value claims. See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 *Emory L.J.* 1531, 1536 (2016) [hereinafter Gilles, *Low-Income Litigants*] (“[I]n recent decades, access to class-wide relief for low-income groups has declined precipitously.”). Gilles describes how class action restrictions especially limit low-income litigants’ class actions, and the title of her essay presumably applies to the disappearance of low-income litigants from the civil dockets of federal courts, or perhaps lawyered courts. See *id.* at 1535–37. The inability to aggregate small-value claims, of course, often effectively deters bringing such claims individually. Moreover, as discussed below, federal legislation granting federal courts jurisdiction over class actions that otherwise might be brought in state courts has resulted in the application of the stricter federal court standards that have effectively eliminated many of these class actions altogether. See *infra* notes 185–192 and accompanying text (discussing the Class Action Fairness Act of 2005).

29. See Vicki Lens, *Poor Justice: How the Poor Fare in the Courts* x–xi (2016) (describing “how the lives of poor people are disrupted or helped by the judicial system”); Tonya L. Brito, *Producing Justice in Poor People’s Courts: Four Models of State Legal Actors*, 25 *Lewis & Clark L. Rev.* 145, 147 (2020) (using the term “poor people’s courts” to refer to “state courts hearing family, housing, administrative, and consumer cases”); Elizabeth L. MacDowell, *Reimagining Access to Justice in Poor People’s Courts*, 22 *Geo. J. on Poverty L. & Pol’y* 473, 475 (2015) (“[T]his article uses the term ‘poor people’s courts’ to refer to state civil courts serving large numbers of low-income, unrepresented litigants . . .”).

30. This dynamic exists to a lesser extent, and in different ways, in federal courts. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2695 (discussing the “shadow system of civil procedure” that applies to federal pro se litigants); Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 *Wake Forest L. Rev.* (forthcoming 2022) (manuscript at 5), <https://ssrn.com/abstract=3931568> [<https://perma.cc/8FQU-NNYC>].

31. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70 (2021) (Uniform Rules of the Commercial Division of the Supreme Court); *id.* at § 205 (Uniform Rules of the Family Court); see also Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 *Law & Soc. Inquiry* 1058, 1060–61 (2017)

states, like California, there is a unified court system, although parties with different kinds of cases are directed to different courthouses.<sup>32</sup>

But while some states' commercial divisions are busier than others, all states have some courts or courtrooms that have far more cases than they can reasonably handle and that suffer from chronic funding shortages, "with budget cuts sparked by recessions and many state legislatures declining to restore funding in times of economic growth."<sup>33</sup> They have become the government of last resort for a host of social problems, from consumer debt to housing issues to domestic violence.<sup>34</sup> Indeed, although lawyerless state courts are overflowing with more cases than they can handle, a proportionally small number of legal problems become legal cases.<sup>35</sup> As discussed below, in these courts, procedures differ starkly from those in federal court.<sup>36</sup>

#### B. *Variation in Written Procedure*

It is commonly assumed, as a rough generalization, that civil courts in the United States, whether federal or state, have similar written procedures.<sup>37</sup> Specifically, there is first the "assumption of equivalence"—the assumption that state codes of procedure either copy or effectively parallel

(noting that District of Columbia housing court's "inquisitorial regime . . . departs sharply from traditional adversarial procedure").

32. See Nat'l Ctr. for State Cts. Data Visualizations, Courts of Limited Jurisdiction, Tableau Pub. (July 8, 2019), <https://public.tableau.com/app/profile/ncscviz/viz/CourtsOfLimitedJurisdiction/Story1> (on file with the *Columbia Law Review*).

33. Wilf-Townsend, *supra* note 12, at 1713–14; see also Kathryn A. Sabbeth, Market-Based Law Development, LPE Project (July 21, 2021), <https://lpeproject.org/blog/market-based-law-development/> [<https://perma.cc/VM94-VVFA>] [hereinafter Sabbeth, Market-Based Law Development]; Zambrano, Federal Expansion, *supra* note 9, at 2103 (discussing the budget struggles of many state judicial systems).

34. Colleen F. Shanahan & Anna E. Carpenter, Simplified Courts Can't Solve Inequality, 148 *Daedalus* 128, 130, 133 (2019).

35. The leading scholar on access to justice, Rebecca Sandefur, uses the iceberg metaphor to describe the scope of civil justice problems in the United States: The percentage of cases that end up in court represent only the tip of the iceberg of civil legal problems. See Sandefur, *Access to What?*, *supra* note 14, at 50. For a visualization, where the vast number of civil justice problems are represented by the bulk of an iceberg beneath the water's surface, see William D. Henderson, Rule Makers vs. Risk Takers, Univ. of Denver Inst. for the Advancement of the Am. Legal Sys. (Mar. 25, 2020), <https://iaals.du.edu/blog/rule-makers-vs-risk-takers> [<https://perma.cc/9EAL-PHSH>] (providing a visualization of Sandefur's *Access to What?*).

36. There is a related, but distinct, phenomenon in administrative agency proceedings. While agency adjudications are typically lawyerless, they are also by definition executive branch processes designed to implement government action, and their procedural rules and norms follow from this structural difference. See Shanahan et al., *Lawyers, Power, and Strategic Expertise*, *supra* note 1, at 476–81 (describing the hearing procedures of a District of Columbia administrative tribunal).

37. See, e.g., Scott Dodson, The Gravitational Force of Federal Law, 164 *U. Pa. L. Rev.* 703, 705 (2016) (arguing that states "routinely follow[] federal law even when adherence is not compelled").

the Federal Rules.<sup>38</sup> This rough assumption<sup>39</sup> has some purchase in some state courts—often those that hear business trial cases or class actions, for example.<sup>40</sup> But equivalence can be difficult to measure on a formal basis (even when a state has copied the Federal Rules of Civil Procedure)<sup>41</sup> and may change over time—especially as the Supreme Court’s interpretations of the Federal Rules evolve and states choose whether to follow course.<sup>42</sup> More important for our purposes is the fact that, however true this assumption of equivalence might be for lawyered state courts, it is less true, if not decidedly false, when it comes to lawyerless ones.

The assumption of equivalence fails both because lawyerless courts are sometimes separate court divisions with their own written rules of procedure and also because of informal and unwritten rules of procedure. First, written procedure does not only vary from state to state; it also varies *within* state court systems.<sup>43</sup> As noted, many states have subject-matter-specific courts dedicated to addressing certain kinds of social problems,

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38. See, e.g., Coleman, *One Percent Procedure*, *supra* note 10, at 1049 (noting that “[a]bout half of the states have adopted the Federal Rules of Civil Procedure verbatim,” and in those that have not, “at least one study has determined that procedural practice in those state courts often lines up with federal court practice”); *id.* (arguing that elite litigation by elite lawyers in federal court has an outsized influence on procedural rules and development in state and federal court). But see Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 *Case W. Rsrv. L. Rev.* 501, 512–16 (2016) (describing studies in 1986 and 2003 showing an absence of intra-state procedural uniformity, even among so-called “replica states”).

39. There is a longstanding debate on the “parity” of state and federal courts—a debate that tends to assume or rebut the argument that federal courts provide a superior kind of procedure that state courts should emulate. But this debate, again, focuses on the comparison between federal courts and those state trial courts that perform a similar function and entertain somewhat comparable kinds of cases litigated predominantly by represented litigants. See, e.g., Burt Neuborne, *Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1115–30 (1977). Erwin Chemerinsky has concluded, “[U]ltimately the issue of parity is an empirical question for which no empirical measure is possible.” Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. Rev.* 233, 256 (1988).

40. See, e.g., Spaulding, *supra* note 3, at 265 (“For a few decades in the twentieth century there may have been parallels between federal procedural law and the procedural law of the states, but there are arguably more divergences than similarities now in some of the most consequential areas of pretrial litigation.”).

41. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 *Calif. L. Rev.* 411, 424 n.108 (2018) [hereinafter Clopton, *Retrenchment*] (“There is considerable difficulty in measuring the degree of overlap between federal and state systems of procedure. The prevailing view seems to be that the Federal Rules had a marked impact on the form of state procedure . . . [and] on content, though that trend has slowed, if not reversed.”); see also *id.* (showing that states have deviated from federal procedural rules and recommending that they do so more in response to federal procedural retrenchment).

42. See, e.g., *id.* at 465 (documenting a “hodgepodge of state procedural choices”); Hannaford-Agor, *supra* note 1, at 11 (charting the organization of state court jurisdiction over general civil cases); Subrin & Main, *supra* note 38, at 516 (cautioning against evaluating intra-state uniformity based solely on textual uniformity).

43. See Nat’l Ctr. for State Cts. Data Visualizations, *supra* note 32.

like housing court, family court, or domestic violence court.<sup>44</sup> These courts often have their own procedural codes, with important differences from the Federal Rules of Civil Procedure. For example, as compared to the federal system, New York has fewer constraints on discovery, more liberal appeals, and more flexibility with regard to jury trials.<sup>45</sup> Within New York, a general civil matter heard in the Supreme Court is subject to more formal filing requirements and procedural rules as well as the rules of evidence. A matter heard in Family Court has more litigant-friendly filing requirements and procedures, as well as statutory exceptions to the rules of evidence.<sup>46</sup>

Second, not all procedure is encapsulated in a set of written rules.<sup>47</sup> Related to the equivalence assumption is another underlying assumption: that the development and interpretation of written procedure in state civil courts resembles development and interpretation in federal court.<sup>48</sup> To the extent that federal–state procedural equivalence is judged by reading state court judicial opinions about procedural issues,<sup>49</sup> the very conversation assumes the existence of lawyers arguing these points and judges writing opinions about them. This assumption does not hold in lawyerless courts where the absence of lawyers on both sides and of written opinions, especially about procedure, make it nearly impossible to test the assumption using common tools. Practitioners and clinical professors, however, provide extensive data and testimonies demonstrating that procedure on

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44. In New York, for example, the trial-level Supreme Court only hears those cases which fall outside the jurisdiction of more specialized courts such as the Family Court, the Surrogate’s Court, and the Court of Claims. See Janet DiFiore & Lawrence K. Marks, *New York State Unified Court System, New York State Courts: An Introductory Guide 2–3* (2016), <http://ww2.nycourts.gov/sites/default/files/document/files/2019-06/NYCourts-IntroGuide.pdf> [<https://perma.cc/453X-J226>].

45. See N.Y. Comp. Codes R. & Regs. tit. 22, §§ 205.1–205.86 (2021).

46. *Id.* §§ 202.1–202.72 (Supreme Court Rules); *id.* § 205.1–205.86 (Family Court Rules).

47. In Georgia, for example, the state law governing eviction proceedings “leaves interstitial gaps that local jurisdictions must fill out of necessity,” such that localized courts use “local norms, demographics, and court culture . . . to adapt their own process in ways that shape outcomes and the experience of those using the system.” Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 *Vand. L. Rev.* 1365, 1379 (2021).

48. Compare Dodson, *supra* note 37, at 706 (arguing that states “follow federal law” even when “state actors have authority to craft regimes and render interpretations different from—even contrary to—federal law”), with Clopton, *Making State Civil Procedure*, *supra* note 23, at 3 (“Unnoticed by virtually all procedure scholars, the states are pursuing a different course [from the federal rulemaking process].”).

49. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 *Vill. L. Rev.* 311, 470–79 (2001) (discussing pleading); *id.* at 363 (discussing discovery).

the ground in lawyerless courts varies considerably from procedure in federal court or even in lawyered state trial courts.<sup>50</sup> Indeed, some clinical professors have described lawyerless courts as unrecognizable to students who have studied only federal courts.<sup>51</sup>

To study civil procedure in federal courts, scholars look at the Federal Rules of Civil Procedure, local rules, statutes, judicial opinions, and sometimes interviews with lawyers, judges, and even parties. The Rules receive significant scholarly attention.<sup>52</sup> But scholars also acknowledge that there is more to procedure than the Rules alone.<sup>53</sup> By contrast, in lawyerless

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50. See Carpenter et al., “New” Civil Judges, *supra* note 3, at 261–65 (“[S]tudies have found differences in how judges apply substantive and procedural law, with some judges refusing to follow existing law at all. Our own research has shown that some judges routinely depart from adversary procedures when dealing with pro se litigants, while others hew to the passive norm.”); Steinberg, *Adversary Breakdown*, *supra* note 27, at 938 (“[I]t has become routine for judges to employ a range of unsanctioned adversary departures.”); Sabbeth, *Market-Based Law Development*, *supra* note 33 (“When arguments are raised (and certainly when they are not), judges routinely disregard the plain letter of the law.”).

51. See, e.g., Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 *Clinical L. Rev.* 127, 128–29 (1999) (“[M]any students are genuinely shocked by the extent to which unwritten rules and local customs—including relationships, power dynamics, and shared understanding between certain participants in the legal process—play a role in American judicial systems.”).

52. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the Procedural Efficacy*, 87 *Geo. L.J.* 887, 890 (1999) (arguing that Congress should step back from statutory rulemaking and allow courts to form “a model of principled deliberation akin to common law reasoning” because “congressional intervention can easily distort the principled coherence of the rule system as a whole”); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1132 (1982) (examining how the Advisory Committee on Rules for Civil Procedure interpreted the Rules Enabling Act); Brooke D. Coleman, *The Efficiency Norm*, 56 *B.C. L. Rev.* 1777, 1778 (2015) [hereinafter Coleman, *Efficiency Norm*] (arguing that a “faulty conception of efficiency is not producing high-value procedure, but is instead resulting in cut-rate procedural rules and doctrines”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L. Rev.* 494, 498 (1986) (examining “the Rules and the litigation context in which they have operated over the past fifty years” since their enactment); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 *UCLA L. Rev.* 654, 656 (2019) (“Many scholars have wrestled with the [Rules Enabling Act’s] language in an attempt to understand the precise contours of its constraints. Of particular concern has been how we should understand the nature of its directive that the rules may not alter substantive rights . . .”).

53. See, e.g., Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 *N.Y.U. L. Rev.* 767, 774 (2017) [hereinafter Bookman & Noll, *Ad Hoc Procedure*] (noting that civil procedure “can also be established while litigation is pending, in response to problems that arise in specific disputes, resulting in ad hoc procedure”); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 *Mercer L. Rev.* 757, 763 (1995) (noting that “substantial areas of procedure are covered by local rules, and these rules differ enormously across the country”); David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 *U. Pa. L. Rev.* 1001, 1005 (2021) (arguing that “it is not a stretch to say that legal tech will, in time, remake the adversarial system, not by replacing lawyers and judges with robots, but rather by unsettling, and even resetting, several of its procedural cornerstones”); Laurens Walker, *The Other Federal*



courts, the nature of proceedings, the number of proceedings, the absence of lawyers, and the changing role of judges all make it challenging even to *observe* procedure.

C. *The Presence and Roles of Lawyers and Judges*

A third common assumption is that lawyers and judges play roughly equivalent roles in state and federal civil procedure. This may be true to some extent in state courts populated by lawyers on both sides of the “v,” but the assumption does not hold where lawyers are largely absent.

Federal courts are heavily lawyered spaces, with 70% of filed cases involving representation on both sides.<sup>54</sup> A few prototype cases break this mold: prisoner cases, employment discrimination cases, and social security appeals.<sup>55</sup> In 75% of cases in state civil courts, at least one party does not have a lawyer.<sup>56</sup> And the state judicial institutions that hear these cases are often separated from the lawyered courts and divisions that hear the quarter of symmetrically lawyered cases (such as business-to-business disputes, state court class actions, and MDLs).<sup>57</sup>

In lawyered courts, lawyers facilitate their client’s use of the adversarial system by identifying legal problems, presenting them in the context of the law, navigating the court system, and directly advocating for their client. Lawyers zealously bring claims for plaintiffs and protect defendants from these cases. Rules of civil procedure harness and enable this role for lawyers and keep lawyers in check by structuring the adversarial posture.

In federal courts, *pro se* litigants tend to be plaintiffs; the greater-resourced parties in federal litigation are often defendants, though they are also regularly plaintiffs in business-to-business disputes.<sup>58</sup> In lawyerless state courts, however, the greater-resourced and represented parties (like a landlord, a debt collector, or the government) often appear as plaintiffs, rather than the beleaguered defendants that they paint themselves as in federal litigation.<sup>59</sup> Because they are plaintiff’s counsel and because they

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Rules of Civil Procedure, 25 Rev. Litig. 79, 80 (2006) (describing the development of common law procedural rules that “interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules”).

54. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2691.

55. *Id.* at 2691, 2697–98.

56. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 511–17.

57. See Nat’l Ctr. for State Cts. Data Visualizations, *supra* note 32.

58. Cf. Russell M. Gold, *Power Over Procedure*, 57 *Wake Forest L. Rev.* (forthcoming 2022) (manuscript at 1–4), <https://ssrn.com/abstract=3799298> [<https://perma.cc/7ZN3-S98B>] (characterizing federal civil procedure as governing a world “where wealthy White defendants are disproportionately powerful”).

59. See, e.g., Nicole Summers, *Civil Probation*, 75 *Stan. L. Rev.* (forthcoming 2023) (manuscript at 51–52), [https://ssrn.com/abstract\\_id=3897493](https://ssrn.com/abstract_id=3897493) [<https://perma.cc/PSD5-UBSJ>] [hereinafter Summers, *Civil Probation*] (describing litigation and settlement dynamics between landlords and unrepresented tenants); Wilf-Townsend, *supra* note 12, at 1711 (“[I]n state courts, these roles are reversed: the most common cases pit a better-resourced

are unopposed, those lawyers who do appear in lawyerless courts play a different role than they would in fully lawyered contexts. There is no defense lawyer to keep an aggressively represented plaintiff in check or to advocate to the judge, nor are there incentives to press the court to document, develop, or constrain procedure—whether “pro-plaintiff” or “pro-defendant.”<sup>60</sup>

One might expect the judges in lawyerless courts to serve as replacements for lawyers in helping self-represented litigants navigate the adversarial system. This can happen. But judges play a variety of roles in state courts, some more politicized than others.<sup>61</sup> And in some instances, judges are not even lawyers.<sup>62</sup> Moreover, state civil courts, unlike administrative agencies, remain rooted in adversarial dispute resolution as their fundamental structural design. As a result, “[m]illions of low- to middle-income people without counsel or legal training must protect and defend their rights and interests in courts designed by lawyers and for lawyers.”<sup>63</sup> These parties often prepare for, navigate, and sometimes resolve their cases in the hallways, drawing on guidance from informal and formal sources of assistance, and facing either represented, more powerful opponents or just an inscrutable system.<sup>64</sup>

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plaintiff, often a corporation with lawyers, against an unrepresented individual defendant.”).

60. Cf. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 Harv. J.L. & Gender 55, 110–11 (2018) [hereinafter Sabbeth, *Housing Defense*] (describing the inherent structural disadvantages of litigating from a defensive position).

61. Clopton, *Making State Civil Procedure*, supra note 23, at 19 n.102 (“One area where states differ markedly from the federal system, and from each other, is in their method of selecting judges.” (citing Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 Vand. L. Rev. 1729, 1733 (2017) (discussing judicial selection methods and partisanship))); see also Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 4 (2012) (“[J]udicial elections reduce state judges’ willingness to apply the law or protect rights in the face of public opposition or special interests.”).

62. See, e.g., Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 Colum. L. Rev. 1287, 1290 (2022); Nolan Anderson, Randy Kreider & Kristen Schnell, *Injustice in the Lowest Courts: How Municipal Courts Rob America’s Youth*, Colum. L. Sch. Juv. L. Ctr. 9 (2021), [https://jlc.org/sites/default/files/attachments/2021-02/Municipal%20Fines\\_Final.pdf](https://jlc.org/sites/default/files/attachments/2021-02/Municipal%20Fines_Final.pdf) [<https://perma.cc/B6GN-JV74>] (“[Some] states do not require municipal judges to be lawyers, sometimes requiring just a high school degree.”).

63. Carpenter et al., *Lawyerless Courts*, supra note 2, at 512.

64. See Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer’s Monopoly*, 89 Fordham L. Rev. 1315, 1317 (2021) [hereinafter Steinberg et al., *Judges and Deregulation*] (“Nonlawyer advocates often meet with litigants in courthouse hallways or in private court-based interviews—underscoring their formalized institutional role—and yet they rarely appear during court proceedings and their role is not . . . delineated by local rule.”); Summers, *Civil Probation*, supra note 59 (manuscript at 13) (“Landlords and their attorneys leverage these profound [power] disparities to pressure tenants into signing settlement agreements. These settlements are typically signed in the court hallways . . . . Hallway negotiations are entirely unmonitored . . .”).

Indeed, these courts are so overburdened with massive numbers of filings that cases may receive just a few minutes of a judge's attention at most.<sup>65</sup> When they do conduct proceedings, judges sometimes adhere to the adversarial archetype of a "neutral arbitrator," but increasingly, and as directed by some ethical rules, they intervene to assist self-represented parties in developing their cases and navigating procedures that may seem labyrinthine even if designed with the hope of being simple.<sup>66</sup> These interventions range from explaining legal concepts (which often maintains or exacerbates complexity) to eliciting information and otherwise controlling the presentation of evidence from litigants.<sup>67</sup> This kind of "active judging" may encourage settlement, as "managerial judges" in federal court do,<sup>68</sup> but they may also abandon their traditional neutrality and help guide the self-represented litigant, or favor the represented. As discussed below in section II.A.2, these interventions tend to be ad hoc, inconsistent, and potentially fleeting. These courts rarely produce written judicial opinions that might develop these procedures—nor are there lawyers asking them to do so.

Legal scholarship's poor systemic understanding of lawyerless courts is sometimes explained by the difficulty of studying these courts.<sup>69</sup> Over the past few decades, boots-on-the-ground scholars, often social scientists and clinical law professors who practice in these courts, have overcome these obstacles and produced empirical and theoretical scholarship about state civil courts, enriching our understanding. But the point is that the absence of lawyers itself alters both the procedures and our ability to observe and understand them.

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65. See, e.g., Steinberg et al., *Judges and Deregulation*, supra note 64, at 1337 (calculating seven minutes per case in some jurisdictions but indicating that "most hearings are much shorter").

66. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 *Notre Dame L. Rev.* 647, 667–72 (2017) [hereinafter *Carpenter, Active Judging*] (discussing arguments for active judging); Carpenter et al., *Lawyerless Courts*, supra note 2, at 521–24 (discussing the judicial canons for supporting pro se litigants); Steinberg, *Adversary Breakdown*, supra note 27, at 903 ("[A]ctive judging has become routine in many small, two-party cases . . .").

67. See, e.g., Carpenter et al., *Lawyerless Courts*, supra note 2, at 551 (describing research findings in which "judges exerted tight control over evidence presentation by asking leading questions—including questions based on the petition—and constricting parties' opportunity to present testimony, particularly narrative testimony").

68. See Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 376–77 (1982).

69. See, e.g., Spaulding, supra note 3, at 270 ("Meaningful empirical studies of state courts can be conducted, but this work is far more time and resource intensive than studying federal court litigation."); Stephen Campbell Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 *Daedalus* 129, 134 (2014) (noting the deep political reasons for "[o]ur ignorance" of state courts).

D. *Merits and Efficiency*

Traditionally, scholars understand courts—or rather, lawyered, federal courts—as sites of dispute resolution and law development.<sup>70</sup> As just noted, lawyerless courts engage in vanishingly little law development, whether substantive or procedural, in part because of the absence of lawyers prompting them to do so (by requiring written explanations or by filing motions or appeals challenging their decisions, for example).<sup>71</sup>

But another set of assumptions underlies this discussion of lawyered and lawyerless courts as sites of dispute resolution: that they similarly balance the sometimes competing values of, on the one hand, reaching (and deliberating) the merits of a case and, on the other, promoting efficiency. One goal of the Federal Rules was to make the resolution of federal court litigation less about lawyers' manipulation of procedural "technicalities" and more about getting to the merits of the case.<sup>72</sup> Civil procedure reforms have also long chased "efficiency."<sup>73</sup> Much civil procedure scholarship laments the fading away of the "ideal" of using trials to engage the merits of a dispute, through the rise of pleading standards, easier access to summary judgment, less discovery, increased managerial judging leading to settlement, rising class action certification requirements, and arbitration.<sup>74</sup>

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70. E.g., Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 671–72 (2012) (discussing dispute resolution and law declaration models of adjudication). Litigation also serves other purposes in a democratic society. See Alexandra Lahav, *In Praise of Litigation 1–2* (2017) ("Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency . . . ; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard.").

71. See Llezlie Green, *Wage Theft in Lawless Courts*, 107 *Calif. L. Rev.* 1303, 1330 (2019) (noting that the "absence of nuanced legal doctrine in small claims court" is the result of the small financial value of those cases); Sabbeth, *Market-Based Law Development*, *supra* note 33 ("Investment in courts and lawyers in rough proportion to economic power results in the self-perpetuating underdevelopment of law for poor people.").

72. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, *Duke L.J.* 1, 4–5 (2010) ("[R]ather than eliminating claims based on technicalities, the Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits." (footnotes omitted)).

73. See generally Coleman, *Efficiency Norm*, *supra* note 52 (discussing and critiquing the pursuit of efficiency in federal civil procedure).

74. See *id.* at 1778 (criticizing a view of efficiency that defines costs narrowly as the amount litigants must pay at each litigation moment, without taking into account the costs of, for example, "mistakenly filtering out meritorious claims"); see also Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 *Vand. L. Rev.* 1119, 1142–50 (2019) ("In cases involving issues ranging from personal jurisdiction and pleading standards to class certification, discovery, and trials, the [Roberts] Court has turned litigation into an obstacle course for civil plaintiffs." (footnotes omitted)); Maureen Carroll, *Class Action Myopia*, 65 *Duke L.J.* 843, 880 (2016) ("Heightened evidentiary burdens increase the transaction costs associated with class treatment . . ."); Brooke Coleman, *The Vanishing Plaintiff*, 42 *Seton Hall L. Rev.* 501, 512 (2012) (noting that pressure from "organizational defendants" has resulted

This lament typically focuses on federal litigation's failure to allow cases to get to the merits, not the other failure: the requirement of quality representation to have any hope that reaching the merits is equivalent to obtaining justice.<sup>75</sup> At the same time, procedure reforms, including those that make merits-based determinations more elusive, are often justified as promoting efficiency. Mr. Twombly will never "get to the merits" of whether Bell Atlantic colluded with other telecommunications companies to stifle competition, in part because allowing his lawyers to investigate the merits was deemed an inefficient use of judicial resources.<sup>76</sup>

While these dynamics exist in varying degrees in lawyered state courts, "getting to the merits" and the notion of efficiency have a different salience in these courts. In many cases, there is no dispute to resolve as defined by the relevant law—for example, it may be uncontested that rent or another debt is owed.<sup>77</sup> Those cases are routinely resolved summarily or as default judgments, which are technically merits decisions but involve no deliberation—and no law development. It can be true that efficient default procedures have the benefit of sparing the debtor the additional expense of hiring a lawyer.<sup>78</sup> This cost-saving may also motivate the absence of discovery in many lawyerless courts, but it has downsides that Diego

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in the move toward "a restrictive procedural regime"); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375 (2005) ("[C]lass actions will soon be virtually extinct."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 161–66 (2011) (discussing the consequences of *Iqbal's* heightened pleading standard); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1108 (2006) (describing the Rehnquist Court's "hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo. Wash. L. Rev. 353, 368 (2010) (describing the Supreme Court's "capitulation to defendant requests for more restrictive pleading standards" as "the clearest evidence of procedure's tilt towards restrictiveness"); Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 142 (2007) (arguing that summary judgment is unconstitutional under the Seventh Amendment); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1030 (2013) ("Judges are regularly called upon to exercise their discretion to shape the boundaries of litigation within the open-textured provisions of the Federal Rules.").

75. See Sabbeth, *Simplicity as Justice*, supra note 18, at 296 ("[F]or parties disadvantaged by the surrounding economic system and the underlying substantive law, procedural protections are the most that the disadvantaged can expect from the system.").

76. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (cautioning that antitrust discovery imposes significant costs on both the courts and the parties).

77. As one of us describes elsewhere with Anna Carpenter, Alyx Mark, and Jessica Steinberg, a meaningful proportion of state civil cases are ones involving children or relationships. In these cases, there may be a dispute as to facts or underlying law, but the foundational framing of people's problems as a dispute—rather than a social need—is flawed. Shanahan et al., *Institutional Mismatch*, supra note 1, at 1477–79, 1492.

78. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in the Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 J. Empirical Legal Stud. 591, 602 (2004) (discussing Charles E. Clark's similar views, reflected in the Federal Rules of Civil

Zambrano discusses elsewhere in this symposium.<sup>79</sup> Indeed, many of these courts are not even trying to discover the truth as between litigants' competing accounts of facts.

Recent state civil procedure scholarship, however, explores how procedural rules designed with these efficiency benefits in mind lead to courts doling out speedy injustice. This scholarship focuses on the massive numbers of default judgments and the rules that facilitate them, the dysfunction of notice, and “assembly-line litigation” where “courts transfer assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of the case.”<sup>80</sup> Default judgments can skip important due process guarantees, like making sure the debtor is even aware that she has been accused of owing a debt.<sup>81</sup> Moreover, a growing scholarship challenges the injustice of certain debts, even if owed.<sup>82</sup> Lawyerless state civil courts are a locus for collecting on such debts without evaluating whether they are owed or the injustice behind them. This role provides another example of how lawyerless courts serve as a government of last resort when other parts of government have failed citizens.<sup>83</sup>

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Procedure); Kellen Richard Funk, *The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938*, at 268–72 (Nov. 2018) (Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*) (discussing New York State's Field Code).

79. Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 *Colum. L. Rev.* 1423, 1451–53 (2022) [hereinafter Zambrano, *Missing Discovery*].

80. Wilf-Townsend, *supra* note 12, at 1709. See also 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, 922–23 (2020) (noting the increasing “reliance on informal, flexible processes . . . and managerial judging practices in the name of judicial efficiency,” and explaining “that many, if not most, judges—especially in state courts—face incessant pressure to streamline their case processing in the face of an ever-growing docket”).

81. See Robin J. Efron, *The Invisible Circumstances of Notice*, 99 *N.C. L. Rev.* 1521, 1522 (2021) [hereinafter Efron, *Invisible Circumstances*] (“The due process right of notice is among the most neglected and understudied of constitutional rights.”).

82. See, e.g., Abbye Atkinson, *Borrowing Equality*, 120 *Colum. L. Rev.* 1403, 1410 (2020) (“Because debt affects marginalized groups disproportionately and more severely, its invocation as a source of equality and mobility may simply further entrench the very inequality it is offered to ameliorate.”); Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 *Harv. L. Rev. Forum* 374, 376 (2022) (proposing “a federal law that would ‘kill’ the ability of debt collectors to pursue a debt (in a lawsuit or outside of it) after a statutory period”); Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 *Harv. L. Rev. Forum* 359, 370–73 (2022) (using an invest/divest framework to propose transformation of debt collection courts). For advocacy work on this issue, see generally *The Debt Collective*, <https://debtcollective.org/> [https://perma.cc/G7HN-TYEJ] (last visited Feb. 3, 2021) (discussing various factors that have collectively led to debt).

83. See Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1523–26 (“Where courts shift their role to provide resources to meet litigants’ needs, the courts are squarely assuming the roles of the executive and legislative branches in social provision.”). Tonya Brito argues that there are multiple ways of interpreting justice unrelated to the merits of a case. For example, in cases obligating low- and no-income fathers to pay child support, justice is not about determining whether the fathers are really in arrears. Brito, *supra* note

Lawyerless state courts thus hear cases, follow procedures, involve judges and lawyers, and weigh values in ways that are quite different from the state courts discussed in Hart and Wechsler's Federal Courts casebook, or those that are depicted by Chambers of Commerce as "judicial hellholes."<sup>84</sup> Yet the vast majority of cases in the United States are filed in state civil courts. Some of these cases roughly parallel those brought in federal court. But most are even more different from federal courts than what civil procedure scholarship typically assumes.

## II. LAWYERED AND LAWYERLESS PROCEDURE

This Part uses the lens of the lawyered/lawyerless divide to examine three illustrative, common themes in modern civil procedure scholarship: (1) procedural rulemaking, (2) the role of technology, and (3) the treatment of mass claims. Each of these areas represents a recent focus of civil procedure scholarship and of recommendations for reform in both the federal and state realms, but the conversations tend not to interact across the typical state/federal divide. We use these examples to engage similarities and differences across lawyered and lawyerless courts, not just state and federal. This examination reveals the importance of lawyers in maintaining the fairness of informal procedures; the commonality of notice challenges, and the potential for technology to meet those challenges, across lawyered and lawyerless contexts; and the role of lawyers in capitalizing on the power of aggregating masses of claimants against mass tortfeasors, or masses of claims against disparate individuals. This Part also seeks to lead by example, highlighting the fruitfulness of this kind of examination.

### A. *Procedural Rules and Rulemaking*

In this section, we discuss recent scholarship on formal and informal procedure, first through the lens of the federal/state court divide. We then reexamine them through the lens of the lawyered/lawyerless divide and draw lessons from these comparisons for civil procedure more generally. This comparison suggests, for example, that the ratio of written to unwritten procedure diverges significantly between lawyered and lawyerless courts. Even though lawyers are especially necessary to navigate unwritten procedures, unwritten procedures represent an extraordinary amount of procedure in lawyerless courts. Ironically, the absence of lawyers creates a fertile space for judges and sometimes one-sided lawyers to generate more unwritten procedures or to fail to check judges' unwritten procedure-making by requiring written explanations or seeking appeal. The

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29, at 153–54; see also Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 10 (2001) (“[The foster care system] is a system designed to deal with the problems of minority families—primarily Black families—whereas the problems of white families are handled by separate and less disruptive mechanisms.”).

84. See *supra* notes 21–23 and accompanying text.

comparison suggests that lawyered and lawyerless courts alike can learn from each other's development of best practices on simplifying procedures to accommodate self-represented litigants, but also that lawyers may be needed for effective informal procedural experimentation. Without the opportunity for effective reform from within the existing system, lawyerless courts demand more transformative reform.

1. *Making Formal Procedure.* — Federal procedure-making has been the subject of extensive scholarship,<sup>85</sup> while state procedure-making seems opaque and understudied.<sup>86</sup> Scholars have also examined other ways of making procedure outside of the Federal Rules, debating the roles of parties and judges,<sup>87</sup> the common law nature of procedure-making,<sup>88</sup> and the proliferation of local rules.<sup>89</sup>

On the state procedure-making side, Zachary Clopton has heroically surveyed the formal procedural rulemaking structures in all fifty states, exploring the similarities and differences between them and comparing those to the federal system.<sup>90</sup> Clopton documents considerable variation in procedure-making across states and differences between state and federal rulemaking bodies.<sup>91</sup> His is an exemplar of scholarship on studies of what state and federal court procedure can learn from each other.<sup>92</sup> The study reveals that state rulemaking can be more accessible than federal rulemaking, while federal rulemaking can be more diverse.<sup>93</sup> The article

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85. See *supra* notes 52–53.

86. See, e.g., Clopton, *Making State Civil Procedure*, *supra* at 23, at 3 (noting the difficulty in accessing information about state civil procedure-making); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 *J. Empirical Legal Stud.* 755, 756–57 (2004) (“The perennial difficulty in compiling accurate and comparable data at the state level can in large measure be pinned on the fact that there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation.”).

87. Compare Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 *B.U. L. Rev.* 127, 170 (2018) (arguing that contractual agreements that alter normal procedural rules turn litigants into co-managers of litigation with judges), with Scott Dodson, *Party Subordination in Federal Litigation*, 83 *Geo. Wash. L. Rev.* 1, 13 (2014) (arguing that the power hierarchy in courts of law leaves parties with the least control of their litigation).

88. See, e.g., Walker, *supra* note 53, at 80 (describing “common law procedural rules” that operate in conjunction with the Federal Rules).

89. See, e.g., Chemerinsky & Friedman, *supra* note 53, at 758–59 (criticizing the increase in local rules that vary from the Federal Rules).

90. Clopton, *Making State Civil Procedure*, *supra* note 23, at 8–17, 36–45.

91. *Id.*

92. For another example of scholarship that puts state and federal procedure in dialogue, see Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 *Stan. L. Rev.* 1805, 1867–75 (2018) (explaining how states’ participation in federal procedure can improve procedural rulemaking).

93. Clopton, *Making State Civil Procedure*, *supra* note 23, at 36–43.



shows both sets of rulemakers how they can benefit from the others' experiences.<sup>94</sup>

His impressive study, however, focuses on the procedural rules that govern primarily lawyered state trial courts—that is, those that hear cases roughly similar to the kinds of cases heard in federal courts.<sup>95</sup> Some of those same rules may apply in lawyerless state courts, especially in states with a unified court system, like California. But in states like New York with differentiated court divisions, there is more variety—and frankly more chaos—to procedural rules, even those that are written.<sup>96</sup>

Further, the distinction between lawyered and lawyerless courts reveals an assumption about the importance of formal rulemaking: that it will be applied and interpreted by the relevant courts, largely reflected in written decisions. As explained above, the development of case law regarding procedural rules in lawyerless courts can be limited.<sup>97</sup> This is a result of the relative dearth of written decisions (and pleadings) at the trial level, coupled with fewer lawyers pursuing appellate law development. The point is not that written procedures favor either represented or unrepresented parties. Rather, the point is that the lawyered court model depends on written legal development to develop the law, and in its absence, it is difficult to know what happens in lawyerless courts.

2. *Informal and Ad Hoc Procedure.* — In both state and federal courts, moreover, not all procedure is written. As if it were not important enough to have a lawyer to help navigate written procedures, lawyers are crucial for parties to navigate unwritten procedures—those known only to repeat players “in the know.” Lawyers' expertise in procedures on the ground (and in judges' idiosyncratic practices) is a critical piece of the value they offer clients.<sup>98</sup>

One subset of these unwritten procedures is what one of us with David Noll has coined “ad hoc” procedures.<sup>99</sup> They are procedures that are

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94. *Id.* at 44.

95. Indeed, Clopton views state courts as a possible antidote to the retrenchment of federal courts and encourages “those interested in the vigorous enforcement of important rights [to] . . . look to state courts for redress.” *Id.* at 4.

96. For example, proceedings in New York City Housing Court are governed by the Real Property Actions and Proceedings Law. N.Y. Real Prop. Acts. Law §§ 101–2111 (McKinney 2022).

97. See *supra* note 71 and accompanying text.

98. See Shanahan et al., *Lawyers, Power, and Strategic Expertise*, *supra* note 1, at 510–12 (describing the value of lawyers' “strategic expertise” and “relational expertise,” including knowledge of particular judges' inclinations and idiosyncrasies); see also Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 *Am. Socio. Rev.* 909, 915–16 (2015) [hereinafter Sandefur, *Elements of Professional Expertise*] (providing an empirical look at how lawyers affect court decisions).

99. Bookman & Noll, *Ad Hoc Procedure*, *supra* note 53. Ad hoc procedures are often, though not always, unwritten. *Cf. id.* at 775 (discussing ad hoc procedural statutes); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*,

designed in the midst of ongoing events to address a perceived inadequacy in established procedures and then applied to the case at hand.<sup>100</sup> The article *Ad Hoc Procedure* examined complex litigation (largely in federal courts) involving mass claims with nontraditional compensation needs and documented instances when ad hoc procedures developed to overcome procedural problems in those extraordinary cases were ultimately codified in statutes.<sup>101</sup> In lawyerless state civil courts, however, ad hoc procedure is not the mechanism for the exceptional case. It is the norm.

As Nora Freeman Engstrom wrote in a study of *Lone Pine* orders, ad hoc procedure's propriety "is arguably the biggest question currently brewing in civil procedure scholarship."<sup>102</sup> But thus far, scholars have studied ad hoc procedure in state and federal courts largely in isolation from each other. A comparison of these two situations can enhance our understanding of ad hoc procedure and its role in securing or thwarting justice in lawyered and lawyerless contexts.

The recent *Opiate MDL*<sup>103</sup> provides a federal court case study in ad hoc procedure.<sup>104</sup> The *Opiate MDL* faced a seemingly intractable procedural problem: the challenge of binding potential future claimants to any

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63 Notre Dame L. Rev. 693, 715 (1988) (noting that "the trend of modern procedural law has been . . . towards [rules] that confer on trial courts a substantial amount of normative discretion").

100. Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 784. Not all ad hoc procedure is unwritten; indeed, the first *Ad Hoc Procedure* article discussed ad hoc procedural statutes that retroactively applied procedural changes to pending litigation. See id.

101. Id. at 774–77.

102. Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 Yale L.J. 2, 72 (2019); see also *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at \*1–2 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (setting out the "basic facts" the court expected plaintiffs to present at a case management conference in a toxic tort case).

103. See, e.g., *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020). The MDL statute endows judges with "plenary power" to manage litigations and extensive flexibility to innovate with procedures in order to do so. See Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 790; Andrew D. Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831, 838 (2017). MDL judges "develop their own special procedures, often in collaboration with specialist lawyers, which build on previous MDLs or analogous actions. As a result, what has emerged is essentially a federal common law of MDL procedure, with many judges adopting a discernible 'cowboy-on-the-frontier' mentality that is not as apparent in other contexts but has become an accepted norm in MDLs." Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 20 (2021).

104. The *Opiate MDL* has been the subject of extensive interest in civil procedure scholarship and in the news. See, e.g., Andrew Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019) [hereinafter Bradt & Rave, *It's Good to Have the "Haves" on Your Side*] (pointing to the opioid epidemic as an example of how national product liability scandals find their way into MDLs); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2131 (2020) (using the *Opiate MDL* as an example of judges "parcel[ing] their authority out" to judicial adjuncts); Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 Ga. L. Rev. 1287, 1289 (2019) (discussing the *Opiate MDL* in the context of sidestepping litigation); David L. Noll,

proposed settlement plan. Many of the thousands of the individual and government entity plaintiffs had claims valuable enough to pursue independently, increasing the risk of claimants dropping out of negotiations and proceeding solo. The defendants, meanwhile, “steadfastly refused to settle without the promise of more complete closure.”<sup>105</sup> The solution, crafted by appointed academics and counsel, was a new form of class action—the “negotiation settlement class,” modeled on the class action framework from Rule 23, but applied to negotiating settlement.<sup>106</sup> The MDL judge adopted a narrower version of the procedure, emphasizing that the process would not be coercive on the parties; opting-out plaintiffs could follow other settlement processes, and the rest of the MDL could continue through litigation.<sup>107</sup> On appeal, the Sixth Circuit held that the negotiation class procedure exceeded the district court judge’s authority under Rule 23.<sup>108</sup> It criticized the negotiation class as “a new form of class action, wholly untethered from Rule 23, [which] may not be employed by a court.”<sup>109</sup>

This is classic ad hoc procedure—a procedure developed in the context of a particular litigation, applied mid-stream while the case was pending, designed for that litigation. It is informal procedure, in that it is articulated in a district court opinion rather than in the Federal Rules, local rules, or a congressional statute. Notably, the negotiation class structure was developed by and for lawyers (primarily by two law professors, one who served as a special master and the other as a court-appointed expert) and implemented by a judge eager to balance both sides’ interests and to

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MDL as Public Administration, 118 Mich. L. Rev. 403, 411 & n.37 (2019) (placing MDL procedure-making within the broader context of ad hoc procedure); Jennifer D. Oliva, Opioid Multidistrict Litigation Secrecy, 80 Ohio St. L.J. 663, 665 (2019) (examining the secret nature of opioid MDL proceedings and its effect on undermining public health outcomes).

105. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 536–37 (N.D. Ohio 2019), rev’d and remanded, 976 F.3d 664 (6th Cir. 2020) (“The Defendants have insisted throughout on the need for a ‘global settlement,’ that is, a settlement structure that resolves most, if not all, lawsuits against them arising out of the opioid epidemic.”); Gluck & Burch, *supra* note 103, at 26.

106. See Francis E. McGovern & William B. Rubenstein, The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders, 99 Tex. L. Rev. 73, 90–120 (2020) (mapping out this procedure and describing its benefits).

107. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 537.

108. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 671 (“[T]he Supreme Court has warned that district courts do not have the liberty to invent a procedure with ‘no basis in the Rule’s text,’ even absent language expressly prohibiting it.” (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997))); but see *id.* at 667 (Moore, J., dissenting) (arguing that the district court “breathed life into a novel concept” and that appellate courts should be “encouraging, not exterminating, such resourcefulness”); Pamela K. Bookman & David L. Noll, The Many Faces of Ad Hoc Procedure 35–36 (Feb. 16, 2022) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Bookman & Noll, The Many Faces of Ad Hoc Procedure] (discussing the case and Judge Moore’s defense of ad hoc procedure).

109. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 672.

promote a settlement he knew would receive public and press examination.<sup>110</sup> Arguing that the judge had stretched the boundaries of his authority, however, lawyers for some defendants convinced the appellate court to restrain the district court based on the constrictions of existing procedure.<sup>111</sup> Lawyers and judges thus created an innovative ad hoc procedure. Different lawyers and judges also prevented its implementation. This all happened via a thorough, public, written record.

Meanwhile, in state courts, informal procedures are difficult to observe. Judges in these courts routinely adjust procedures to accommodate the particular litigants before them (what scholars have called “unwritten law”<sup>112</sup>), often in inconsistent or unpredictable ways (making the unwritten law “ad hoc” as it is developed in and applies to a pending case). As lawyers report, “[i]nstead of a well-established and respectful order of presentation, the manner of presenting cases may seem haphazard and inconsistent from one case to the next. Formal rules of procedure may appear to be nonexistent or entirely ignored.”<sup>113</sup> Judges routinely “invent procedures” in ways that are “ad hoc, variable, and inconsistent.”<sup>114</sup> For example, in a case where the sheriff was unable to effectuate service and in the absence of any authorizing procedure, a judge in open court telephoned a defendant to notify him of a case against him and a hearing date and declared “you’re served.”<sup>115</sup> This apparent chaos is unrecognizable to those accustomed to the relative predictability of federal court procedure, though the informal procedure and conventions may be familiar to those who inhabit the particular lawyerless court.<sup>116</sup>

More investigation is needed to understand why informal and ad hoc procedure is so pervasive in lawyerless courts, but this Essay offers three potential explanations: (1) the quantity and nature of procedural problems, (2) the absence of lawyers, and (3) the nature of the litigants. These

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110. Gluck & Burch, *supra* note 103, at 29–32 (describing the ad hoc procedural innovations proposed by Professors Francis McGovern and William Rubenstein).

111. Bookman & Noll, *The Many Faces of Ad Hoc Procedure*, *supra* note 108, at 34.

112. See, e.g., Seielstad, *supra* note 51, at 135–38 (describing the phenomenon of unwritten law, rules, and customs).

113. Steven K. Berenson, *Preparing Clinical Law Students for Advocacy in Poor People’s Courts*, 43 *N.M. L. Rev.* 363, 364 (2013); see also Seielstad, *supra* note 51, at 129 (noting law students’ shock at “the extent to which unwritten rules and local customs . . . play a role in American judicial systems”).

114. Steinberg, *Adversary Breakdown*, *supra* note 27, at 938.

115. See Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1511.

116. See, e.g., Berenson, *supra* note 113, at 128–29 (describing the differences between popular depictions of courtroom advocacy and poor people’s courts, e.g., those courts that handle family, housing, and consumer cases). In the face of these challenges, judges sometimes attempt “to ‘hear’ the pro se narrative and to do ‘justice’ in the few minutes given to each case.” Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 *Cardozo Pub. L. Pol’y & Ethics J.* 659, 664–65 (2006); see also Steinberg, *Adversary Breakdown*, *supra* note 27, at 943–44 (describing an incident where Judge Weinstein offered this assistance and later recused himself from the case).

three features combine to create both the need for ad hoc procedure and the extensive and unchecked judicial discretion to create it.

First, ad hoc procedures typically respond to procedural problems, which are rampant in lawyerless state courts because the adversarial system was not designed to be used by self-represented parties.<sup>117</sup> Accommodations for particular cases seem necessary to ensure the functioning of the system.<sup>118</sup> Indeed, experts suggest most civil court dockets “would grind to a halt if judges did not find ways to assist the unrepresented parties who appear before them.”<sup>119</sup> Judges adjust procedures in state civil courts to cope with daily system failure.

Second, when judges then rely on a range of “ad hoc and inconsistent” strategies, there are no lawyers to observe, let alone challenge them.<sup>120</sup> Traditionally, lawyers play a watching role in court, supervising the real-time decisionmaking of trial courts.<sup>121</sup> In lawyerless courts there is either no lawyer in the room other than the judge, or there is a lawyer only for the more powerful party. In either event, there is no lawyer with an incentive to challenge the judge’s improvisation or suggest an alternative consistent with formal procedure. More likely, the single lawyer might propose or coordinate the informal procedure with the judge, as happens when judges rubber stamp landlord-lawyer-negotiated settlement agreements with tenants.<sup>122</sup> Further, the absence of symmetrical representation means there is no collective exercise of observation and reform, no lawyers to suggest rules should be revised or supplemented.<sup>123</sup> This interacts with

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117. Pew Charitable Trs., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations* (2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> (on file with the *Columbia Law Review*) (“Although courts clearly recognize the need to be useful to all litigants, they were designed by and for lawyers and have historically had difficulty meeting the needs of people without counsel—and even more so certain subpopulations within that group.”).

118. See, e.g., Carpenter, *Active Judging*, *supra* note 66, at 667–69 (reviewing academic and policy literature supporting procedural accommodations of pro se litigants); Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *COVID, Courts, and Crisis*, 99 *Tex. L. Rev. Online* 10, 14–16 (2020) (discussing ad hoc procedural responses to the COVID-19 crisis in state courts); Steinberg, *Demand Side Reform*, *supra* note 6, at 747 (arguing that in poor people’s courts, judges, rather than litigants, should have a duty “to advance and manage cases, and develop legally relevant factual narratives”).

119. Steinberg, *Adversary Breakdown*, *supra* note 27, at 938.

120. *Id.* at 906.

121. See, e.g., Sandefur, *Elements of Professional Expertise*, *supra* note 98, at 910, 925 (discussing lawyers’ effectiveness as including how their presence makes courts follow their own rules).

122. See Summers, *Civil Probation*, *supra* note 59, at 13 (observing that judges exercise minimal oversight over the landlord–tenant settlement process, which is often dominated by landlords’ attorneys).

123. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 *Hastings L.J.* 1367, 1375 (2016) (arguing that “potential law reform never happens” because litigants “do not have a representative who asks the judge to modify, expand, or apply novel interpretations of the law”).

the limited written procedure, a characteristic that is deeply tied to the absence of symmetrical lawyers to make use of, argue about, and appeal procedural decisions. Relatedly, limited opportunities for appeal themselves limit appellate engagement with procedural development and reduce incentives for lawyers that do appear from ensuring a process that abides by formal procedure.<sup>124</sup>

The third contributing explanation is about the litigants themselves. Litigants in lawyerless courts generally have limited knowledge of written procedure, and they behave accordingly in the courtroom. Faced with these circumstances, judges in lawyerless courts are less likely to adhere to written procedure. Trial judges in lawyerless courts thus have enormous discretion to create unwritten and ad hoc procedure as well as incentives to do so because of the system's ill-suitedness to meet litigants' needs, the absence of lawyers, and the limited knowledge of litigants—all in the context of overflowing dockets.<sup>125</sup>

The consequences of this phenomenon are as ad hoc and unpredictable as the procedures themselves. Some ad hoc procedures tend to benefit repeat players or represented parties, like relaxing procedural requirements for landlords to demonstrate their eligibility to start eviction proceedings in Baltimore's rent courts<sup>126</sup> or passive judicial processing of debt collection actions by debt-buyer plaintiffs.<sup>127</sup> These procedures have disproportionately negative effects on poor people and people of color, especially Black women.<sup>128</sup>

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124. In the federal court context, MDL critics argue for more appellate review of MDL procedures. Although lawyers are omnipresent, "few MDL issues ever reach the appellate courts," in part because MDL judges "try to do everything by consensus." Gluck & Burch, *supra* note 103, at 20 (internal quotation marks omitted) (quoting Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1706 (2017) (quoting an unnamed judge)). Appellate review and other transparency guarantees, like written opinions, are likely more available when the adversarial system pits the lawyers on either side against each other.

125. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 515 ("In lawyerless courts, a lack of party control over procedure collides with nearly unfettered and unreviewed judicial discretion."); see also Green, *supra* note 71, at 1307, 1323–31 (discussing procedural informality and litigants' lack of knowledge in the context of small claims court); Sudeall & Pasciuti, *supra* note 47, at 1379 (discussing areas of housing law "where statutory law does not address a necessary part of the dispossession process and where local jurisdictions have been given autonomy to fill in the gaps," such as where the statute requires a hearing, but courts have discretion to determine the form it takes).

126. Pub. Just. Ctr., *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court* 36–37 (2015), <https://abell.org/sites/default/files/files/cd-justicediverted216.pdf> [<https://perma.cc/8DQM-33ZU>] ("While the court demonstrates close scrutiny of tenants' defense, it customarily affords wide latitude to landlords, making it even harder for renters to defend themselves.").

127. Wilf-Townsend, *supra* note 12, at 1723.

128. See Brito, *supra* note 29, at 187 ("[T]he informality of lower courts, especially in situations where parties are unrepresented, contributes to courts not following their own rules. This practice can disadvantage low-income, pro se litigants . . ."); Sabbeth & Steinberg, *supra* note 16, at 6–7 (observing that "most women who confront the legal system

Other ad hoc procedures seek to accommodate less experienced, pro se litigants.<sup>129</sup> Indeed, as one of us has written with Anna Carpenter, Alyx Mark, and Jessica Steinberg, this accommodation is encouraged in many states' judicial ethics canons.<sup>130</sup> Judges confronting such litigants often seek to provide procedural accommodations, but in doing so, they “must rely on instinct, discretion, and knee-jerk reaction in crafting their procedural methods, which can result in ‘active’ practices that fail to achieve an accurate outcome.”<sup>131</sup> As Jessica Steinberg explains, “[a] single judge might treat two unrepresented litigants in back-to-back proceedings entirely differently, or offer more assistance to certain parties than to others similarly situated.”<sup>132</sup> The result, even if well-intentioned, seems palpably unfair in a way that lawyers—if pervasive—might be able to mitigate.<sup>133</sup>

3. *Simplification, Experimentation, Transformation.* — Examining both formal and informal procedure-making across lawyered and lawyerless courts reveals familiar themes around accommodation of self-represented parties. But it also reveals the importance of lawyers in spheres dominated by informal, ad hoc procedural experimentation and helps identify where more transformative structural reform is needed. First, comparing written procedures in lawyered and lawyerless contexts often reveals a perhaps obvious need for simplification in the lawyerless context and opportunities for cross-court learning.<sup>134</sup> Differentiation between written procedures for

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are routinely unrepresented by counsel despite the enormity of what they stand to lose” and arguing that “the civil courts have become netherworlds of lawlessness where women’s individual rights are routinely disregarded”).

129. Carpenter, *Active Judging*, supra note 66, at 655–56 (discussing findings in a study of judges who saw themselves “as playing a role in facilitating fairness and access for pro se parties”); Carpenter et al., *Lawyerless Courts*, supra note 2, at 517–24 (noting the emergence of “a revised judicial role where judges cast away traditional passivity to assist and accommodate litigants without lawyers”).

130. Carpenter et al., *Lawyerless Courts*, supra note 2 (manuscript at 5–9).

131. Steinberg, *Adversary Breakdown*, supra note 27, at 937.

132. *Id.* at 906.

133. See, e.g., Sabbeth, *Housing Defense*, supra note 60, at 79–80 (explaining that empirical studies suggest that the presence of counsel can counteract judges’ “systemic bias against tenants”).

134. See, e.g., Benjamin H. Barton, *Against Civil Gideon* (and for Pro Se Court Reform), 62 Fla. L. Rev. 1227, 1273–74 (2010); Richard Zorza, *Some First Thoughts on Court Simplification, The Key to Civil Access and Justice Transformation*, 61 Drake L. Rev. 845, 857–64 (2013). For examples of efforts at court simplification, see also Am. Bar Ass’n Comm’n on the Future of Legal Servs., *Report on the Future of Legal Services in the United States* 34 (2016), [https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WE\\_B.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WE_B.pdf) [<https://perma.cc/Q8FW-YVBK>]; Ill. Sup. Ct. Comm’n on Access to Just., *Advancing Access to Justice in Illinois: 2017–2020 Strategic Plan* 12 (2017), <https://www.illinoiscourts.gov/Resources/8b247871-22b1-4684-b241-a39b6606f8a4/2017%20-%202020%20Strategic%20Plan.pdf> [<https://perma.cc/3PM9-8JFF>]; Jud. Council of Cal., *Elkins Family Law Task Force: Final Report and Recommendations* 19–37 (2010), <https://www.courts.ca.gov/documents/elkins-finalreport.pdf> [<https://perma.cc/B6CT-YUYG>]; D. James Greiner, Dalíé Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 Ind. L.J. 1119, 1151–65 (2017); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access*

pro se and represented litigants occurs sporadically in both state and federal courts.<sup>135</sup> As Andrew Hammond has argued, some lawyerless state courts, which have extensive experience with self-represented litigants, can show the way for other lawyerless courts—or federal courts accommodating self-represented litigants—to make more accessible rules in the absence of lawyers.<sup>136</sup>

As for informal procedure, the lawyered/lawyerless comparison provides some perspective on the balance between formal and informal procedures and the price tag of increased percentages of informal procedures. Informal procedures require knowledgeable guides, usually repeat-player lawyers, to navigate them lest the litigants risk getting lost at sea. In lawyered courts, this price is part of the cost of admission—which is assumed to involve hiring a lawyer. Informal procedures are common in federal court; they are also more readily observable and contestable because of the presence of lawyers. But informal procedures work to the detriment of the self-represented. Even routinized, “predictable” informal procedure is extremely difficult for the self-represented to ascertain and navigate. As other research has illustrated, something theoretically straightforward—like a judge’s opening speech at the start of a docket call describing the rules and practices of the court—ends up being complex and confusing.<sup>137</sup>

Ad hoc procedures exacerbate these costs. In their respective circles, informal and ad hoc procedure in both federal and state court have received extensive criticism. Federal court critics argue that such procedures “lack transparency, do not reflect democratic values, and ultimately damage judicial legitimacy”—and “[t]hese same concerns apply to the evolving judicial role in state civil trial courts.”<sup>138</sup>

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to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 *Fordham L. Rev.* 969, 970 (2004); but see Shanahan & Carpenter, *supra* note 34, at 130–32 (exploring several reasons “why court simplification will not necessarily lead to more substantive justice for low-income litigants”). For a broad summary of the simplification literature and a critique that the simplification project is insufficient, see generally Sabbeth, *Simplicity as Justice*, *supra* note 18.

135. See Hammond, *Pro Se Procedure*, *supra* note 4, at 2704–21 (surveying “the universe of pro se specific local rules and practices in operation in all of the federal district courts”); see also Andrew Hammond, *Pleading Poverty in Federal Court*, 128 *Yale L.J.* 1478, 1507–14 (2019) [hereinafter Hammond, *Pleading Poverty*] (comparing poverty pleading procedures in state and federal courts).

136. Hammond, *Pleading Poverty*, *supra* note 135, at 1483 (recommending comparisons between state and federal court systems when evaluating specialized procedures for poor litigants); Hammond, *Pro Se Procedure*, *supra* note 4, at 2726 (encouraging federal courts to learn from “best practices in other district courts in the federal system or state courts”).

137. Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 540–42 (recounting observations of judges’ opening speeches which “describ[ed] protective order cases’ legal and procedural framework” in “technical, inaccessible language”).

138. *Id.* at 514.



Ad hoc procedures often reflect good-faith efforts to fix procedural problems in the course of pending litigation. For example, judges in lawyerless courts may “adjust procedures”<sup>139</sup> to assist self-represented clients and make up for the problems created by dropping self-represented people into an adversarial system designed to be navigated by lawyers. By some accounts, the ad hoc procedures created for the negotiation class in the *Opiate* MDL were likewise a good-faith effort to facilitate a settlement that could benefit all parties involved.

Even assuming good faith, however, lawyers (or, more broadly, balanced assistance or resources) seem crucial to maintaining fairness in ad hoc procedure. With its inconsistency and, by definition, poor planning, ad hoc procedure can result in unfairness and inequality and can just as easily hinder, rather than assist, lawyerless courts’ provision of justice. In MDL, by contrast, the presence of lawyers helps to protect and balance the interests at least of the represented parties, although not without controversy.<sup>140</sup> This role is easier to see when compared to the lawyerless context. In lawyered courts, if a judge’s ad hoc procedures exceed their discretionary authority or seek to completely overhaul the litigation system, lawyers can provide a check either through direct advocacy, motion practice, or appellate review. In the absence of lawyers, these checks are lost, and indeed, it is difficult even to measure the full extent of ad hocery that may be taking place in lawyerless courts.

Lawyers are also instrumental in transforming ad hoc procedure into more formal, generally applicable procedure and in preventing ad hocery itself from becoming the rule rather than the exception. Ad hoc procedures are not just opportunities to fix procedural problems that arise in individual cases. They can also be canaries in the coal mine. The presence of ad hoc procedure sometimes *identifies* procedural problems. Some of these problems are arguably unanticipated, like how to address mountains of litigants with a particular set of diverse characteristics, as happened in the *Opiate* MDL in federal court.<sup>141</sup> These ad hoc procedures can be seen as justifiable in part because of their perceived necessity and because, although ad hoc procedure as a phenomenon may be pervasive, any given example is exceptional. If an ad hoc procedure develops into a generally applicable rule, lessons from the situation that generated that procedure

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139. Carpenter, *Active Judging*, supra note 66, at 684.

140. Compare Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 *Cornell L. Rev.* 1445, 1458–63 (2017) [hereinafter Burch & Williams, *Repeat Players*] (arguing that judges’ preference for repeat players “may erode dissent and the adequate representation that follows from it”), with Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, supra note 104, at 76–79 (arguing that critiques of the repeat players phenomenon in MDLs “underplay[] the benefits to plaintiffs of having repeat players on their side”).

141. See Bookman & Noll, *The Many Faces of Ad Hoc Procedure*, supra note 108, at 33–36.

should, for the sake of democratic legitimacy, be integrated into more regular procedure-making—whether through transparent common law procedure, amendments to procedural rules, or formal legislation. Indeed, this often happens: For example, the settlement class developed in the asbestos litigation was later approved by the Supreme Court and is now regularly used,<sup>142</sup> and the trust mechanism from that same litigation was ultimately integrated into the Bankruptcy Code as section 524(g).<sup>143</sup>

In lawyerless courts, however, the circumstances that prompt ad hoc procedure are not usually unique to a particular litigant; they are typical. In theory, this kind of ad hoc procedure, adapted to individual litigants but addressing a systemic problem, should spur a feedback loop for more systemic procedural change. But lawyers may be a necessary ingredient—or at least a very important catalyst—for ad hoc procedure to spur this kind of feedback loop, as well as to check ad hoc procedure’s worst tendencies in other ways. As noted, lawyers were involved in developing and restraining the development of the negotiation settlement class in the *Opiate* MDL. Likewise, the current movement to instantiate more formalized rules to govern those proceedings is led by defense-side lawyers.<sup>144</sup> Without lawyers “on the other side” to balance such efforts, they are more likely to lead to unbalanced results, favoring the represented interests.

Ad hoc procedure’s dominance in lawyerless courts is both caused by and revealing of a design flaw that has been noted throughout the state court literature: A system set up as adversarial breaks down in the absence of lawyers on both sides.<sup>145</sup> What has not yet been fully appreciated is that the absence of lawyers also hinders informal and ad hoc procedure from creating iterative feedback loops within the system for procedural reform. Lawyerless courts must be designed to accommodate lawyerless parties. Some judges have made such reforms under the radar. For example, a recent study reveals that in certain courts, judges have begun to enlist non-lawyers from court-adjacent organizations to help litigants navigate civil procedure.<sup>146</sup>

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142. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997) (noting with approval that district courts since the late 1970s had been certifying classes in mass tort cases and setting forth requirements for class certification in such cases—for example, requiring that class members’ interests be aligned with their putative representative). For a survey of lower courts’ attempts to implement the Supreme Court’s jurisprudence on class certification requirements, see Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. 785, 788 (2017).

143. See 11 U.S.C. § 524(g) (2018); Bookman & Noll, *Ad Hoc Procedure*, supra note 53, at 769–73.

144. See Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 Ga. L. Rev. 1375, 1376 n.4 (2019) [hereinafter Bradt, *Multidistrict Litigation*] (discussing the advocates behind [www.rules4mdls.com](http://www.rules4mdls.com)).

145. See, e.g., Steinberg, *Adversary Breakdown*, supra note 27, at 903–04 (“[W]hen parties lack skill and cannot harness the norm of party control to develop or present their claims, the passive judging model no longer functions . . . effective[ly] . . .”).

146. Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316.

But to the extent that the pervasiveness of ad hoc procedure reveals deeper problems, it calls for other reforms that are—and should be—more transformative, recognizing that lawyerless forums do not “fit the fuss.”<sup>147</sup> Lawyerless courts—and the ad hoc justice they dole out—reveal not only a host of procedural problems, but also social problems that procedure alone may be unfit to repair. In federal courts, the benefits of ad hoc procedure are clearer in the 70% of cases with represented parties and are more complicated in cases with pro se litigants. Thus, the insight for ad hoc procedure in lawyerless courts may be that transformation is necessary, that lawyers are a necessary ingredient in this transformation, and that the role of lawyers is not to convert lawyerless courts to lawyered ones by representing parties, but rather by participating in redesigning lawyerless courts in ways that serve lawyerless litigants. This engages the broader role of lawyers in society as legislators, policymakers, advocates, organizers, and voters.

#### B. *Technology and Procedure*

This section explores the role of technology in driving or responding to changes in civil procedure. Examining recent themes in this scholarship again reveals a noticeable divide between lawyered and lawyerless courts. But there are also issues that transcend any such divide, whether lawyered/lawyerless or state/federal, and collectively frustrate or advance the pursuit of justice in courts across the United States.

This section discusses three sets of issues that have animated recent scholarship on procedure and technology. The first includes issues like e-discovery and outcome prediction that focus on how technology can help lawyers. This set of issues primarily concerns *lawyered* courts, whether federal or state. The second is recent scholarship on how to use technology instead of lawyers, when they are absent from the legal system. This scholarship focuses primarily—indeed exclusively—on *lawyerless* state courts.

The third is an emerging topic that bridges the distinctions between both state and federal courts and lawyered and lawyerless courts: notice. This discussion demonstrates how topics in procedure transcend perceived distinctions between different kinds of courts. Some e-notice issues seem particular to lawyered courts, like those concerning class actions. Other issues regarding notice seem particular to lawyerless courts, such as those concerned with high default rates that leverage technology. In both contexts, technology is reorienting the legal community’s understanding of notice and how it relates to due process, fairness, and justice.

1. *Technology to Assist Lawyers.* — A growing body of scholarship on the future of technology and procedure focuses on technology’s potential

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147. See Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *Negot. J.* 49, 66 (1994).

impact on the role of the lawyer in federal courts.<sup>148</sup> David Engstrom and Jonah Gelbach, for example, have studied the ways that legal technology tools like e-discovery and outcome predictors affect the future of the legal profession and civil procedure rules.<sup>149</sup> Their research predicts that the rise of e-discovery, for example, will lead to a decline in discovery costs—evening the playing field between plaintiffs and defendants in federal court.<sup>150</sup> The availability of effective outcome-prediction tools, on the other hand, they predict, could increase these costs.<sup>151</sup> The deeper pocketed parties, with access to such tools, could manipulate forum shopping techniques or settlement practices in a way that compromises the foundation of (theoretically) even-sided adversarialism. Their work engages ongoing debates about the use of these technologies as an asset or a hindrance to the legal profession.

These debates focus on implications of legal technology on legal practice in federal court. Tools like e-discovery and outcome prediction require substantial funds and a litigation worth that kind of investment; they require litigation where lawyers recognize the value of this technology. But the lessons could be applied to lawyered state courts encountering similarly heavily represented parties, for example in the New York commercial division. By contrast, the issues created by these new tools are largely absent from lawyerless courts, where parties are self-represented and claims tend to be less complex and of smaller monetary value.<sup>152</sup>

2. *Technology as Replacing Judges or Mitigating the Absence of Lawyers.* — In the lawyerless realm, scholars examine not how technology can assist lawyers, but how it can replace lawyers and even courts themselves.

The focus is on technology as a tool to assist *litigants* in the absence of lawyers (or absence of enough time or resources for a “full” lawyer).<sup>153</sup>

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148. See, e.g., Seth Katsuya Endo, Technological Opacity & Procedural Injustice, 59 B.C. L. Rev. 821, 825–26 (2018) (reviewing the academic literature and case law on the use of predictive coding in civil discovery); Dana A. Remus, The Uncertain Promise of Predictive Coding, 99 Iowa L. Rev. 1691, 1710–11 (2014) (cautioning that, in adopting predictive-coding technologies, “judges and lawyers are privileging the values of commercial vendors over those of the legal profession and the court system”).

149. Engstrom & Gelbach, *supra* note 53, at 1002–08; see also Neel Guha, Peter Henderson & Diego A. Zambrano, Vulnerabilities in Discovery Tech, 35 Harv. J.L. & Tech. (forthcoming 2022) (manuscript at 1–8), <https://ssrn.com/abstract=3921838> [<https://perma.cc/P9KU-37DT>] (investigating “the possibilities of abuse and gamesmanship in technology-assisted discovery”).

150. Engstrom & Gelbach, *supra* note 53, at 1006 (“[C]ivil litigation may well see a steady decline in overall discovery costs and, by extension, a narrowing of the litigation cost asymmetries that have motivated decades of litigation reforms.”).

151. *Id.*

152. See Zambrano, Missing Discovery, *supra* note 79, at 1423 (“98% of American cases take place in state judiciaries where there is little to no discovery.”).

153. See generally Ray Brescia, Using Technology to Improve Rural Access to Justice, 17 Gov’t L. & Pol’y J. 58 (2018) (describing technology to assist litigants directly and to assist lawyers in providing limited services to more litigants).

One strain of thought casts technology as a quasi-lawyer.<sup>154</sup> For example, self-represented litigants can use self-help or limited legal assistance tools ranging from a kiosk in the courthouse lobby to an interactive website.<sup>155</sup> Another intervention is apps or websites that do the work of lawyers.<sup>156</sup> Some of these technological interventions are market driven, and indeed interact with the deregulatory reform that is bubbling up around the country.<sup>157</sup> Perhaps the best known, and relatively early example, is LegalZoom, a website that allows users to create transactional and court-based legal documents on their own, while offering additional legal assistance if needed. Other interventions are explicitly directed at access to justice concerns. For example, JustFix.nyc is a non-profit entity that builds free legal tools to support housing justice, with apps to help individuals navigate eviction and housing repair proceedings in state courts without a lawyer.<sup>158</sup> In

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154. Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 Va. J.L. & Tech. 394, 398–402 (2016).

155. See generally Margaret Hagan, *The Justice Is in the Details: Evaluating Different Self-Help Designs for Legal Capability in Traffic Court*, J. Open Access to L., Oct. 17, 2019 (examining the effectiveness of self-help offerings in assisting unrepresented parties in traffic court); Ass'n Fam. & Conciliation Cts., *Innovations for Self-Represented Litigants* (Bonnie Rose Hough & Pamela Cardullo Ortiz eds., 2011), <https://www.afccnet.org/Portals/0/PublicDocuments/ProfessionalResources/Innovations%20for%20Self-Represented%20Litigants%20-%20Merged.pdf> [<https://perma.cc/J7MY-K2QK>] (describing various approaches taken by courts, local governments, and legal services agencies to assist self-represented litigants); Legal Help FAQs on Eviction and Landlord-Tenant Problems, <https://legalfaq.org/> [<https://perma.cc/752K-B3CR>] (last visited Feb. 3, 2022) (offering an interactive help menu for self-represented parties in landlord-tenant disputes); Stanford Legal Design Lab, <https://www.legaltechdesign.com/> [<https://perma.cc/9ACG-QSCE>] (last visited Feb. 3, 2022) (describing organizational work to “build a new generation of legal products and services” that “make the civil justice system more equitable and accessible”).

156. See, e.g., JustFix.nyc, <https://www.justfix.nyc/> [<https://perma.cc/JEM7-UFNB>] (last visited Feb. 10, 2022); LegalZoom, <https://www.legalzoom.com/> [<https://perma.cc/4HGW-W7DG>] (last visited Feb. 10, 2022); Upsolve, <https://upsolve.org/> [<https://perma.cc/38WH-URU5>] (last visited Feb. 10, 2022). For discussion of these websites, see also James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 241, 319–21 (2012) (discussing LegalZoom); Benjamin P. Cooper, *Preliminary Thoughts on Access to Justice in the Age of COVID-19*, 56 Gonz. L. Rev. 227, 237 & n.63 (2021) (discussing JustFix.nyc); Chrystin Ondersma, *Small Debts, Big Burdens*, 103 Minn. L. Rev. 2211, 2247 (2019) (discussing Upsolve); Dalié Jiménez, *Can a Nonprofit Startup Fix the Pro Se Problem in Bankruptcy?*, Credit Slips (Aug. 1, 2016), <http://www.creditslips.org/creditslips/2016/08/can-a-startup-fix-the-pro-se-problem-in-bankruptcy.html> [<https://perma.cc/7D49-FKT9>] (same).

157. See Engstrom & Gelbach, *supra* note 53, at 1018–30; Andy Newman, *They Need Legal Advice on Debts. 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*) (reporting on Upsolve’s lawsuit against the New York Attorney General to allow advice from nonlawyers).

158. See Daniel W. Bernal & Margaret D. Hagan, *Redesigning Justice Innovation: A Standardized Methodology*, 16 Stan. J. C.R. & C.L. 335, 351–55 (2020) (summarizing the goals and principles of JustFix.nyc); Lois R. Lupica, Tobias A. Franklin & Sage M. Friedman,

another strain of thought, technology is a tool that can replace court actors or even courts themselves, thereby reshaping dispute resolution.<sup>159</sup> This approach is generally known as “online dispute resolution” (ODR), though it captures a range of technological interventions. ODR differs from and predates the explosion of online court proceedings. Rather than placing existing state civil court processes on a videoconferencing platform, ODR allows online mechanisms, including artificial intelligence, to resolve disputes.<sup>160</sup> Some ODR interventions involve a lawyerless state civil court using an online algorithm to resolve disputes, effectively replacing the judge.<sup>161</sup> In another version, private companies develop their own internal dispute resolution system, thereby removing themselves and their customers from the government-based justice system entirely.<sup>162</sup>

3. *E-Notice and the Future.* — While technologies that affect lawyers and the profession relate primarily, if not exclusively, to lawyered courts, and other technologies that seek to revolutionize the court system have been

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The Apps for Justice Project: Employing Design Thinking to Narrow the Access to Justice Gap, 44 *Fordham Urb. L.J.* 1363, 1373 (2017) (same).

159. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 *Vand. L. Rev.* 1993, 1999–2000 (2017) (discussing advancements in online platform technology that make it possible to “reimagine ‘going to court’”); Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 *Buff. L. Rev.* 89, 98–104 (2019) (describing the ODR programs used by eBay, PayPal, Facebook, and Alibaba).

160. Moving regular court proceedings online raises a host of issues—for example, questions of how to assess witness credibility or whether due process requires in-person adjudication—that apply across state and federal courts and lawyered and lawyerless courts. Because scholarship and empirical studies are only recently emerging, this Essay doesn’t address those questions. In keeping with the focus of this Essay, however, we hope that future scholarship embraces questions of how “Zoom” litigation can expand or restrict access to justice—in ways that can transcend the division between federal and state civil procedure but that perhaps reflect on any relevant differences between lawyered and lawyerless courts. See, e.g., Scott Dodson, Lee H. Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 *Judicature* 13, 16 (2020); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 *DePaul L. Rev.* 701, 714–15 (2022); Elizabeth G. Thornburg, *Observing Online Courts: Lessons From the Pandemic*, 54 *Fam. L.Q.* 181, 222 (2020).

161. Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 *Mich. J. Race & L.* 205, 240–41 (2016) (“[J]ustice . . . might be automated, with no judge whatsoever behind the wheel.”); see also 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, 897 (2020) (explaining the potential advantages and limitations of a more technology-based approach to court proceedings).

162. The most famous of these is eBay. Resolution Center, eBay, <https://resolutioncenter.ebay.com> (on file with the *Columbia Law Review*); see also Rechtwijzer, Rechtwijzer, [rechtwijzer.nl](https://rechtwijzer.nl) [<https://perma.cc/45GV-FJ32>] (last visited Feb. 10, 2022) (providing a third-party platform to resolve legal disputes). For discussion of these systems, see Barton & Bibas, *Rebooting Justice*, supra note 18, at 111–15; Schmitz, supra note 159, at 98–100; Roger Smith, *Goodbye, Rechtwijzer: Hello, Justice42*, *Law Tech. & Access to Just.* (Mar. 31, 2017), <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/> [<https://perma.cc/7CKV-VVXC>].

contemplated only with respect to solving seemingly intractable problems with lawyerless state civil courts, some studies of technology and civil procedure bridge both the lawyered/lawyerless divide and the state/federal court divide. For example, David Engstrom has thoughtfully considered the impact of the future of technology on procedure and access to justice by identifying the complex trade-offs of ODR in terms of efficiency, empathy, and access.<sup>163</sup>

Another salient example is e-notice. Using technology to provide notice of proceedings and service of process is a topic of growing concern that affects all U.S. courts, albeit in different ways. Some scholarship has addressed the opportunities that e-notice creates in the context of “opt-out” class actions.<sup>164</sup> Other scholarship has focused on e-notice or e-service as a way of improving poor service in state courts, especially among the self-represented.<sup>165</sup> These two areas of scholarship can and should be in conversation with each other, across any state/federal or lawyered/lawyerless divide.<sup>166</sup> Doctrinally and in practice, state and federal courts already coordinate understandings of notice because the Federal Rules allow state law to dictate valid methods of service, subject to the standards of constitutional due process.<sup>167</sup> Moreover, state courts that handle class actions can benefit from e-notice innovations developed in federal courts, and vice versa. Lawyerless courts are also innovating with ways to effect service on the self-represented.

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163. David Freeman Engstrom, *Digital Civil Procedure*, 169 U. Pa. L. Rev. 2243, 2260–67 (2021) [hereinafter Engstrom, *Digital Civil Procedure*].

164. See, e.g., Christine P. Bartholomew, *E-Notice*, 68 Duke L.J. 217, 221–24 (2018) (analyzing the extent to which federal courts are open to using technology like social media platforms to notify class members and arguing that “fear of change, imperfection, and technology leave some courts clinging to mail and publication notice”); Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Vand. L. Rev. 1817, 1862–66 (2019) (discussing some benefits and risks of automation in securities class action settlements); Robert H. Klonoff, Mark Hermann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 730 (2008) (arguing that use of the internet in class actions has been “limited and sporadic” and proposing that the internet be “integrat[ed] . . . into virtually every aspect of the class action process”); Amanda M. Rose, *Classaction.gov*, 88 U. Chi. L. Rev. 487, 491–93 (2021) (proposing the creation of a federally run class action website).

165. See, e.g., Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. Colo. L. Rev. 167, 170 (2019) (encouraging use of e-service in courts hearing predominantly pro se cases); Adrian Gottshall, *Solving Sewer Service: Fighting Fraud With Technology*, 70 Ark. L. Rev. 813, 819–20 (2018) (discussing the widespread problem of process servers falsely claiming to have served defendants and urging that notice should require “independent and reliable technological verification tools”); Paul Fling, *Case Note, Civil Procedure: Notifying Justice: “Reasonable Actual Notice” in Service of Process—DeCook v. Olmstead Medical Center*, 43 Mitchell Hamline L. Rev. 181, 211–16 (2017) (arguing that technology could aid the effectiveness of notice by publication).

166. Cf. Effron, *Invisible Circumstances*, supra note 81, at 1524 (arguing that notice should be a core access-to-justice issue).

167. See Fed. R. Civ. P. 4(e)(1).

In lawyerless courts, forms of e-notice have garnered attention because of their appeal as a potential solution to the vexing problem of high default rates. Default rates in eviction, debt collection, and other cases that are typical of lawyerless courts are very high—with devastating consequences for litigants.<sup>168</sup> One explanation for these default rates is that litigants are not receiving notice, or sufficient notice, to spur participation in the litigation.<sup>169</sup> To address the problem of default, scholarship and reform efforts have focused on alternative forms of notice that leverage technology such as social media or text messaging.<sup>170</sup>

The failure of notice poses similar challenges for individual class action plaintiffs, though perhaps with less dire consequences. As Robin Effron has explained, understanding federal class action notice as a category of notice rather than an exceptional circumstance would “allow lawmakers to view class action notice practices as equally valid, and thus presumptively instructive to the promulgation and evaluation of notice and service procedures in other types of litigation.”<sup>171</sup> Comfort with e-notice in federal class actions, she argues, should beget more comfort with e-notice in other circumstances, including potentially in lawyerless courts, where access-to-justice advocates urge its use.<sup>172</sup> It is this kind of cross-

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168. See, e.g., Josh Kaplan, Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?, DCist (Oct. 5, 2020), <https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/> [https://perma.cc/W6GU-RDLV] (“Between 2014 and 2018, almost 20,000 tenants in the District of Columbia lost their landlord-tenant cases by default simply because they didn’t appear at their court hearings.”). Effron notes that this “exposé led to action by the D.C. Council strengthening notice requirements in eviction cases.” Effron, *Invisible Circumstances*, supra note 81, at 1533 n.47 (citing The Fairness in Renting Emergency Amendment Act of 2020, 67 D.C. Reg. 13949 (Nov. 27, 2020)).

169. This is not the only explanation for default rates. Indeed, meaningful scholarship suggests it reflects a shallow understanding of the experiences of litigants in lawyerless courts. See, e.g., Sandefur & Teufel, supra note 14, at 757–63 (discussing how people’s perceptions of justiciable events and legal needs lead to choices to engage (or not) in civil cases).

170. John M. Greacen, Eighteen Ways Courts Should Use Technology to Better Serve Their Customers, 57 Fam. Ct. Rev. 515, 533 (2019) (advocating steps to bring “service of process into the twenty-first century,” such as allowing service by social media); Katherine L.W. Norton, The Middle Ground: A Meaningful Balance Between the Benefits and Limitations of Artificial Intelligence to Assist With the Justice Gap, 75 U. Miami L. Rev. 190, 245 (2020) (“[C]ourts use messaging to remind litigants of their hearings, due dates, and other court related matters.”).

171. Effron, *Invisible Circumstances*, supra note 81, at 1563; see also *id.* at 1528 (“Once one understands how the new circumstances of notice no longer fit the old framework, it becomes far easier to evaluate and promote newer and more technologically advanced methods of notice because they need not be evaluated against antiquated benchmarks that reflect older circumstances.”).

172. *Id.* at 1563; see also Budzinski, supra note 165, at 212–26 (“Permitting electronic service will help deconstruct the access barriers posed by personal and residential service requirements while increasing actual notice to defendants.”).



pollination between procedures in state and federal courts, and lawyered and lawyerless contexts, that this Essay aims to encourage.

C. *Mass Claims and the Limits of Procedure*

A third and related topic currently animating federal and state civil procedure scholarship—but under different labels—is the challenge of how to handle large volumes of similar cases.<sup>173</sup> In federal courts, this conversation focuses on class actions, and more recently, on MDL, with scholars routinely noting that over a third of federal cases are now in MDL.<sup>174</sup> Class actions often seek to address certain kinds of claims en masse in the face of concerns that small claims lose their value and thus access to federal court if not aggregated.<sup>175</sup> MDL can aggregate similar litigations, including large and small claims, often arising from a common mass tort.<sup>176</sup> Lawyerless state civil courts likewise face multitudes of similar cases, but these cases are usually not aggregated (and are not torts).<sup>177</sup> Instead, “[b]y necessity,” these courts often “become specialists more in the art of

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173. This research includes recent symposia in the *University of Pennsylvania Law Review* and the *New York University Law Review* on the fiftieth anniversary of Rule 23 and a symposium in the *Georgia Law Review* on MDL, as well as many standalone articles about class actions and MDL. See Ga. L. Rev., Symposium, 2019: MDL Turns 50: A Look Back and the Way Forward, <https://www.georgialawreview.org/issue/1697> [<https://perma.cc/DX8H-LQE2>] (last visited Feb. 3, 2022); N.Y.U. L. Rev., Law Review and the Center on Civil Justice Present “Rule 23 @ 50: The 50th Anniversary of Rule 23” Conference (Nov. 29, 2016), <https://www.nyulawreview.org/news-and-events/law-review-and-the-center-on-civil-justice-present-rule-23-50-the-50th-anniversary-of-rule-23-conference/> [<https://perma.cc/MVA4-Y26H>]; U. Pa. L. Rev., Symposium, 1966 and All That: Class Actions and Their Alternatives After Fifty Years (Nov. 2, 2016), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1026&context=symposia> [<https://perma.cc/K6G6-D8AG>]; see also *supra* note 104 (listing research on the *Opiate MDL*).

174. See, e.g., Andrew D. Bradt & D. Theodore Rave, Aggregation on Defendants’ Terms: *Bristol-Myers Squibb* and the Federalization of Mass-Tort Litigation, 59 B.C. L. Rev. 1251, 1261 (2018) (“MDL . . . makes up more than one-third of the entire federal civil docket.”); Zachary D. Clopton, MDL as Category, 105 Cornell L. Rev. 1297, 1305 & n.36 (2020) (collecting scholarship citing “the large proportion of the federal civil docket occupied by MDL cases”).

175. Gilles, Low-Income Litigants, *supra* note 28, at 1535 (explaining the benefits of aggregation in situations where “individual lawsuits often cost more to bring than the victim would recover”); David Marcus, The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 593 (2013) (“Economies of scale reaped from claim joinder enable an independent, well-financed cadre of private attorneys general to compensate for the inadequacies of government regulators and individual litigants.”).

176. Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation 1–2 (2019) (“In theory, multidistrict proceedings enable many ‘Davids’ . . . to pool their resources to efficiently litigate against Goliaths . . .”).

177. Shanahan et al., Institutional Mismatch, *supra* note 1, at app. tbl.2 (showing torts as 2.25% of state civil cases nationally).

processing cases in volume than in resolving fine points of justice in individual cases.”<sup>178</sup>

Civil procedure scholarship tends to focus on the issues of mass claims in one of three silos—studying either aggregated adjudication in federal courts,<sup>179</sup> aggregated adjudication in lawyered state courts,<sup>180</sup> or overburdened lawyerless state courts where judges handle individual claims in large volumes.<sup>181</sup> While these divisions can, of course, allow scholars to focus on particular details of civil procedure, understanding U.S. courts as divided among the lawyered and the lawyerless again offers insights about the promise and limitations of civil procedure—and about the role of lawyers. First, there are commonalities between aggregate litigation in state and federal courts, and indeed, a historical fluidity between the two, as federal courts and Congress have reorganized the boundaries of federal subject matter jurisdiction, including the recent shift of high-stakes class actions into federal court.<sup>182</sup> Second, recognizing the similarities and differences between the challenges of adjudication of masses of claims in lawyered and lawyerless contexts suggests that we may need to look beyond procedure to find remedies for the ills manifested by the masses of cases in lawyerless state courts. If, as Andrew Bradt has argued, MDL “works” because it fits within the American tradition of adversarial legalism,<sup>183</sup> state civil courts fail because they do not.<sup>184</sup> But this may also imply that MDL fails if the adversarial posture fails. Identifying

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178. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 *Calif. L. Rev.* 389, 414 (2011).

179. See, e.g., Burch, *supra* note 176, at 8–34 (examining mass torts in the federal court system). Cf. Marcus, *supra* note 175, at 591 n.14 (acknowledging that his account of federal class actions omits the study of state court class actions).

180. See, e.g., Zachary D. Clopton, *Clifford Symposium: Opioid Cases and State MDLs*, 70 *DePaul L. Rev.* 245, 246 (2021) (looking at opioid litigation “to consider the role of state MDLs in resolving national controversies”); Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 *Nw. U. L. Rev.* 1649, 1652 (2021) (“[T]he various ways that states handle MDL-like litigation have been virtually absent from the scholarly literature.”); Zambrano, *Federal Expansion*, *supra* note 9, at 2104 (“[F]ederal expansion may be contributing to the decay of state courts.”).

181. See, e.g., Super, *supra* note 178, at 414–15 (“Some of the skills and techniques useful for efficient processing of large numbers of cases were antithetical to the goal of finding facts, even relatively simple ones, in each case.”); Wilf-Townsend, *supra* note 12, at 1717 (“[T]here is a serious risk of courts functioning essentially as rubber stamps for litigation mills, taking in masses of claims[] [and] spending little time testing their validity . . . .”); Zambrano, *Federal Expansion*, *supra* note 9, at 2147 (describing warnings from legal organizations of “overburdened and underfunded state judiciaries”).

182. See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 *U. Pa. L. Rev.* 1823, 1865 (2008) (noting that the federal Class Action Fairness Act brought most multistate class actions into the federal courts and imposed “a de facto federal certification requirement on state court class actions within its coverage”).

183. Bradt, *Multidistrict Litigation*, *supra* note 144, at 1381.

184. See Steinberg, *Adversary Breakdown*, *supra* note 27, at 921 (“The unrepresented majority in the civil justice system has ruptured adversary norms . . .”).

litigation postures as lawyered and lawyerless can itself help to diagnose procedural failings and point towards potential reforms—whether to substitute for the lawyer–client relationship or to restructure the need for it entirely.

1. *Aggregated Mass Claims in Lawyered Courts.* — First, the commonalities between aggregate procedure in lawyered state and federal courts make it useful to study civil procedure in those two contexts together. For decades, state courts have been painted as sites of abuse by plaintiff’s lawyers, especially in the class action context. Advocates like the Chamber of Commerce have complained about the flood of class actions in state courts, bemoaned that state court “judicial blackmail forces settlement of frivolous cases,” and lamented that state court class actions are expensive, lengthy, and end with “the award of large, unmerited fees to plaintiff class attorneys.”<sup>185</sup> Although plaintiff’s lawyers in federal court can be subject to similar opprobrium, these narratives helped fuel Congress’s adoption of the Class Action Fairness Act of 2005 (CAFA), which created federal subject matter jurisdiction for state court class actions where the amount in controversy collectively equaled more than \$5 million and minimal diversity was satisfied.<sup>186</sup> Scholars have noted that the jurisdictional shift has—like so many efforts at procedural retrenchment—had the effect of thwarting these kinds of cases from the start.<sup>187</sup> But the shift also showcases the commonality between the kinds of cases that can be (or could have been) heard in state and federal court.

A crucial point of commonality is the involvement of lawyers on both sides of the “v.” Both civil procedure scholarship and legal reforms on class actions and other aggregating procedures often focus on regulating lawyer behavior. As Howard Erichson has written, CAFA’s “message of mistrust was aimed squarely at the lawyers.”<sup>188</sup> Critics of lawyers in class actions and MDLs focus on the ways that lawyers manipulate the lawyer–client relationship to the lawyers’ advantage.<sup>189</sup> Indeed, many argue that class

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185. Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 *UMKC L. Rev.* 133, 152 (2013).

186. 28 U.S.C. § 1332(d)(2) (2018).

187. See, e.g., Gilles, *Low-Income Litigants*, *supra* note 28, at 1538 (arguing that restrictions on class actions have made “low-income claims disappear from the docket”); Purcell, *supra* note 182, at 1864 (noting CAFA supporters’ hope that the federal courts would be more likely to deny class certification and “quickly and abruptly end” class action suits); *id.* at 1856–60 (describing the strategies employed in CAFA to manipulate diversity jurisdiction).

188. Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 *U. Pa. L. Rev.* 1593, 1593 (2008).

189. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. Chi. L. Rev.* 877, 882–83 (1987) (identifying characteristics of class litigation that make it susceptible to manipulation by lawyers); Erichson, *supra* note 188, at 1593 (“CAFA . . . was born amidst snide remarks about lawyers’ inventing lawsuits . . . to enrich themselves at others’ expense.”); Jonathan R. Macey

action lawyers so inadequately represent class members that judges must intervene, acting in a fiduciary capacity toward absent class members, to protect their interests, especially in settlement negotiations.<sup>190</sup> On the flip-side, class action advocates recognize the importance of lawyers in finding and pursuing aggregated claims and achieving results.<sup>191</sup> Our point, for now, is that these are debates about the successes or failures of lawyers and of the lawyer–client relationship. Thus, federal courts and the kinds of state courts that hear class actions and state MDL proceedings can be understood as presenting similar lawyered aggregation challenges—questions of adequate representation, protections against perceived abuses like forum shopping, and more.<sup>192</sup>

On the back end, aggregation in lawyered contexts also becomes highly settlement oriented. Considerable civil procedure scholarship studies these lawyers and their ethical obligations in this context.<sup>193</sup> Similarly, ad hoc procedure in MDL proceedings is driven by lawyers (and judges) towards settlement. The “[p]ractical administration” of an MDL, then, “lead[s] to heavy-handed and highly creative case management and nearly inescapable pro-settlement stances.”<sup>194</sup>

As in lawyerless contexts, the lawyers and judges, rather than the litigants themselves, wield most of the power in these situations. But the adversarial structure is intended to leverage this power towards some kind of balanced equilibrium upon which both sides can meaningfully agree. The presence of lawyers on opposing sides makes all the difference. MDL critics decry the procedure as being a product of the elites, questioning,

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& Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7–8 (1991) (“[Class action attorneys] operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities.”).

190. See, e.g., Brian T. Fitzpatrick, *A Fiduciary Judge’s Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1152 & n.8 (2021).

191. See, e.g., Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, supra note 104, at 93–98 (discussing the benefits of repeat-player lawyers to plaintiffs); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 103–04 (2006) (refuting the conventional wisdom that plaintiff’s lawyers’ self-interested motivations are a problem and arguing instead that the “one valid normative measure” of class action practice is whether it “causes the defendant-wrongdoer to internalize the social costs of its actions”).

192. See, e.g., Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 Lewis & Clark L. Rev. 469, 473–76 (2020) (discussing the dynamics in MDLs between individual counsel and court-appointed leadership counsel); Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, supra note 104, at 76–77 (challenging the conventional narrative that repeat-player lawyers are likely to “sell out individual plaintiffs”); Burch & Williams, *Repeat Players*, supra note 140, at 1516–26 (“Nonclass aggregation has long fostered an uneasy union between the individual and the collective.”); Clopton & Rave, supra note 180, 1703–06 (“[S]tate MDL rules have consequences for the ability of plaintiffs and defendants to shop for judges.”).

193. See, e.g., supra note 140.

194. Gluck & Burch, supra note 103, at 20.

in a sense, whether the lawyers on either side of the “v.” are in a truly adversarial posture or whether they are in fact seeking a common goal that furthers their own ends rather than their clients’. Sculpting procedure to accommodate issues that arise in MDL is an example of Brooke Coleman’s “one percent procedure.”<sup>195</sup> In her extensive MDL work, Elizabeth Chamblee Burch has criticized the elite, repeat-player phenomenon of both MDL judges and MDL counsel for both sides.<sup>196</sup> But those who defend MDL defend the reliance on lawyers to work together and represent the masses of litigants and their claims.<sup>197</sup> While critics question how effective these lawyers are at representing the individuals behind the masses of claims in an MDL, defenders counter that having repeat-player attorneys on both sides of the “v.” provides balance and a more effective adversarial system, ultimately resulting in settlements that are more fair than they might have been without lawyers’ involvement.<sup>198</sup>

While MDL obviously leaves much room for improvement, the presence and role of lawyers, especially when contrasted with lawyerless courts, provides some support for Bradt and Rave’s argument that “it’s good to have the ‘haves’ on your side.”<sup>199</sup> That is, the lawyered/lawyerless lens highlights the fact that lawyers, especially the elite, repeat-player plaintiff’s lawyers who specialize in MDLs, can and do get results for large numbers of plaintiffs, and can and do serve as an institutional check on collaboration between the only other elite specialists in the courtroom: the judge and the lawyers for the repeat-player defendants—the scenario in so many asymmetrical cases in lawyerless courts. The lawyered/lawyerless lens also sharpens the criticism of MDL, framing it as a criticism of a breakdown of the adversarial process, even though MDL is a highly “lawyered” space.<sup>200</sup> Productive representation is critical to the functioning of collective action, including, indeed especially, when it deviates from “regular” litigation.

2. *High Volume of Cases in Lawyerless Courts.* — In lawyerless courts, cases are handled not in an aggregated procedure, but in mass resolution.

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195. Coleman, *One Percent Procedure*, supra note 10, at 1008.

196. See, e.g., Burch, supra note 176, at 2 (describing the “troubling pattern” of “repeat plaintiff and defense attorneys persistently benefit[ing] from the current system”); Burch & Williams, *Repeat Players*, supra note 140, at 1521 (arguing that it is cause for concern that “the same players appear in the vast majority of [MDL] cases, resulting in remarkably similar settlements that benefit the people designing them”).

197. See, e.g., Bradt, *Multidistrict Litigation*, supra note 144, at 1381 (arguing that MDL “works” because it ‘fits’ within the broader American system of ‘adversarial legalism’). Scholars debate the value to MDL plaintiffs of having repeat-player lawyers represent them and whether they offer effective representation. See supra note 140.

198. Bradt & Rave, *It’s Good to Have the “Haves” on Your Side*, supra note 104, at 93–98 (“Adding repeat players on the plaintiffs’ side can help balance the power in mass litigation.”).

199. See *id.*

200. Cf. Gluck & Burch, supra note 103, at 5 & n.6 (noting the tension in MDL “between the individual and the collective”); *id.* at 10 (noting that MDL “disrupt[s] traditional adversarial and hierarchical relationships among . . . judges and lawyers”).

These cases are often high in volume and similar in substance. As a matter of course, jurisdictions organize their dockets so that a single judge is hearing many cases of the same type at the same time. Functionally, this means a judge spends a morning hearing several dozen cases, all of which could be, for example, about landlords trying to evict tenants for nonpayment of rent. These masses of cases overburden lawyerless state courts just like mass claims inundate lawyered courts, but they do so individually, without aggregation.

Lawyerless courts are defined as courts where there is at least one self-represented party.<sup>201</sup> As noted in the Introduction, this category includes two kinds of cases in lawyerless courts: those where only one party is represented, and those where neither party is. The result is two distinct versions of mass handling of cases—asymmetrical cases where lawyers may, among other things, facilitate collective treatment to their client’s advantage, and cases where both parties fend for themselves. As noted above, however, in lawyerless courts, the asymmetrical representation favors the better-heeled *plaintiffs*, in cases including debt collection and some housing cases, often in what Daniel Wilf-Townsend has called “assembly-line litigation.”<sup>202</sup> Cases where neither party has a lawyer are common in family and domestic relationships matters, but also arise in housing matters.<sup>203</sup>

In both kinds of lawyerless courts, however, the absence of lawyers drives procedures towards informal or alternative resolution, often resulting in settlement. In cases with asymmetrical representation, settlement procedures develop as a result of plaintiffs’ repeat-player status and broader profit-generating strategy.<sup>204</sup> The rhetoric about lawyered state courts depicts plaintiff’s lawyers suing large corporate defendants as “bad

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201. Carpenter et al., *Lawyerless Courts*, supra note 2, at 511–12; Hannaford-Agor et al., supra note 1, at iv (noting that these cases make up roughly 75% of the docket in state civil courts).

202. Wilf-Townsend, supra note 12, at 1716–23 (defining “assembly-line litigation”).

203. Baldacci, supra note 116, at 661 (noting the problem of pro se parties having to litigate their cases in housing court); Carpenter et al., *Lawyerless Courts*, supra note 2, at 511–12 (“In some areas of law, such as debt or eviction, imbalance representation is the norm—plaintiffs have counsel, defendants do not.”). In housing court, institutional landlords are often represented, while smaller landlords may not be. See, e.g., Summers, *Civil Probation*, supra note 59 (manuscript at 5, 12) (discussing the power advantages of “represented, institutional, and subsidized landlords”); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 *U. Chi. L. Rev.* 145, 171 (2020) (“Nearly all tenants in eviction proceedings are unrepresented . . .”); Sudeall & Pasciuti, supra note 47, at 1384 (discussing this phenomenon in Fulton County, Georgia).

204. Wilf-Townsend, supra note 12, at 1717 (describing debt collection cases characteristic of repeat-player, represented plaintiffs). This result is not surprising, and some may argue it is inevitable. See Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 *Vand. L. Rev.* 1571, 1575–76 (2019) (“[T]ort law’s ostensible commitment to individual litigant autonomy seems inevitably to produce settlement markets in tort claims characterized by aggregating bureaucracies.”).

guys” and courts as “judicial hellholes.”<sup>205</sup> In lawyerless state courts, on the other hand, represented corporate parties (debt collectors or landlords) are the plaintiffs suing unrepresented masses. Because the claims are so similar, it can be economical for these parties (and their lawyers) to pursue them quasi-collectively, but the individual defendants have little hope of finding the resources to hire a lawyer or otherwise to defend themselves. Thus, lawyered parties drive the masses of similar cases against self-represented individuals.<sup>206</sup> The represented plaintiffs leverage their advantage to extract either default judgments or favorable settlements, and in the extreme example, this context breeds fraudulent practices.<sup>207</sup>

Even when plaintiffs are not represented, docket pressures on lawyerless court actors mean practices evolve to allow for fast settlement. Eviction proceedings famously take only a few minutes of a judge’s time—handled individually.<sup>208</sup> As Nicole Summers has documented in Boston housing court, for example, a third of cases are channeled into a hallway-negotiated settlement agreement between tenants and (typically represented) landlords where the tenants surrender their rights to complain about housing conditions and landlords allow them to stay in their homes, with the ability to evict them for *any* lease or settlement agreement

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205. See *supra* note 21.

206. Wilf-Townsend, *supra* note 12, at 1742 (“[Assembly-line plaintiffs] bring massive numbers of cases — tens or hundreds of thousands per year — against individual defendants who are almost entirely unrepresented and who largely do not show up in court to defend themselves.”).

207. See Effron, *Invisible Circumstances*, *supra* note 81, at 1533, 1545 & n.101 (noting the prominence of “sewer service—a practice of falsifying service affidavits for process that has been thrown in a figurative ‘sewer’ rather than delivered to the intended party”—and its contributions to high default judgment rates); *id.* at 1564 (noting a three-decade-long “marked increase in default judgments in state court” coupled with “a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments”); *id.* at 1566 (discussing *cognovit*, or “confession of judgment” clauses, a note that allows a creditor to obtain a default judgment without serving the defendant with notice); Claudia Wilner, Senior Staff Att’y, Neighborhood Econ. Dev. Advoc. Project, Comments at the Federal Trade Commission Roundtable: Debt Collection: Protecting Consumers (Jan. 8, 2010), [https://www.ftc.gov/sites/default/files/documents/public\\_comments/protecting-consumers-debt-collection-litigation-and-arbitrationseries-roundtable-discussions-august/545921-00022.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitrationseries-roundtable-discussions-august/545921-00022.pdf) [<https://perma.cc/5S8J-2BQR>] (“In New York City, the default judgment rate is approximately 75% and the answer rate hovers around 10%. We believe that sewer service . . . is the primary reason that most defendants do not appear in court.”).

208. See, e.g., Cmty. Action for Safe Apartments & Cmty. Dev. Project, *Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court* 18 (2013), [https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB\\_.doc\\_Report\\_CASA-TippingScales-full\\_201303.pdf](https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB_.doc_Report_CASA-TippingScales-full_201303.pdf) [<https://perma.cc/9GUG-BRDT>] (“Housing Court judges face a daunting number of cases every day and are realistically unable to personally attend to every case on their calendars.”); Kathryn A. Sabbeth, *Eviction Courts*, 18 U. St. Thomas L.J. 359, 384 (2022) (on file with the *Columbia Law Review*) (explaining that eviction courts are designed to make eviction proceedings quick and cheap); Sandefur, *Elements of Professional Expertise*, *supra* note 98, at 925 (observing that cases can last as little as two minutes); Steinberg, *Adversary Breakdown*, *supra* note 27, at 957 (describing judges’ failure to “interrogate the veracity of the landlords’ claims” in eviction proceedings).

violation, no longer limited to non-payment of rent.<sup>209</sup> While civil probation settlements are often a product of asymmetrical representation, Jessica Steinberg has suggested that even the addition of a lawyer for the tenant in that hallway may not overcome the challenges of high volume dockets.<sup>210</sup>

In cases where neither party is represented, courts drive settlement in more unconventional ways. Sometimes formal mediation programs require a mediator rather than a judge to resolve the matter outside the bounds of courts' traditional adversarial design. While these do not exclusively apply to cases where neither party is represented, they are common in domestic violence, divorce, custody and child support, and eviction matters.<sup>211</sup> In other situations, individual judges informally resolve cases as a mediator would, outside the formal bounds of a case. Informal resolution can also be spurred by other court actors like clerks and nonlawyer advocates.<sup>212</sup> This phenomenon is harder to identify without direct observation of courts because of the broader structural challenge of lawyerless courts mentioned earlier: Without lawyers as informed witnesses to the proceedings, with limited written law, and with the pressures of high volume dockets, it is difficult to see, at a collective level, what is happening in most lawyerless courtrooms.<sup>213</sup> But the existing data reveal that in lawyerless courts, when there is no formal alternative dispute resolution tool available, judges and other actors step into that role.<sup>214</sup> Docket and other pressures on judges play the same role as plaintiff's lawyers: They drive settlement.

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209. Summers, *Civil Probation*, supra note 59 (manuscript at 12–13). As to the balance of the cases, “[t]here are non-trivial numbers of voluntary dismissals (24%), move-out agreements (19%), default judgments (15%), and even trials (4%).” Pamela Bookman, *Circumventing Procedure in Eviction Court*, Jotwell (Dec. 3, 2021), <https://courtslaw.jotwell.com/circumventing-procedure-in-eviction-court/> [https://perma.cc/Q4SM-QM26] (reviewing Summers, *Civil Probation*, supra note 59).

210. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *Geo. J. on Poverty L. & Pol’y* 453, 456 (2011).

211. See, e.g., Natalie Anne Knowlton, Alicia Davis & Melissa Sickmund, *The Family Justice Initiative: A Work in Progress*, in *Nat’l Ctr. for State Cts., Trends in State Courts 34* (Charles Campbell & John Holtzclaw eds., 2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0018/42156/Trends\\_2020\\_final.pdf](https://www.ncsc.org/__data/assets/pdf_file/0018/42156/Trends_2020_final.pdf) [https://perma.cc/5Y3T-HB3L] (discussing family court); Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316 (discussing domestic violence); Karen Tokarz, Samuel Hoff Stragand, Michael Geigerman & Wolf Smith, *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 *Wash. U. J.L. & Pol’y* 243, 244 (2020) (discussing housing court).

212. See Steinberg et al., *Judges and Deregulation*, supra note 64, at 1316 (describing the increasingly powerful role nonlawyer advocates play in judicial proceedings and outcomes).

213. See Carpenter et al., *“New” Civil Judges*, supra note 3, at 252–54 (describing the lack of data on many civil court cases, particularly when parties are not represented).

214. See, e.g., Baldacci, supra note 116, at 665–67 (describing the judicial behavior and structural elements that encourage self-represented litigants in housing court to settle).



3. *Lawyers and the Power of Aggregation.* — The foregoing discussion reveals that the procedural challenge of case volume is universal—it exists across state and federal, lawyerless and lawyered courts. When advocates are facing masses of claims and coordinating the interests of masses of people, aggregation can be power. It can provide efficiencies and other benefits, and it tends to push the parties toward settlement. As a class, claimants can band together to demand payment from mass tortfeasors more effectively than they would have done on their own; likewise, debt collectors and landlords can process their claims in a collective fashion efficiently enough to collect massive sums through assembly-line litigation. But these collective actions require organization, typically provided by lawyers. Once lawyers take the reins of aggregation, however, they then direct that power. In lawyered courts, civil procedure, working within the adversarial system, strives to ensure that they wield that power for the benefit of those they represent. In lawyerless courts, it is typically much harder for David to fend off Goliath because often neither civil procedure, nor judges, nor counsel assist in David's defense. This is especially true when Goliath wields the power of aggregation (as in assembly-line litigation).

The comparison reveals common trends in calls for reform: In both settings, observers suggest that the judge needs to step in to protect the unrepresented or imperfectly represented litigant—whether they are imperfectly represented because of a breakdown in their relationship with the individual who should be their lawyer (class counsel) or because they lack a lawyer altogether. These are not identical tasks for the judge, but they have certain similarities. Once again, aggregation seems key: A judge is far more capable of serving in this fiduciary role for an aggregated mass of claimants than for a disaggregated mass of self-represented defendants in state civil courts. Even before court resources are considered, there are structural barriers to a judge behaving consistently and transparently across a large number of individual cases.<sup>215</sup> Even those judges who seek to help these self-represented defendants will almost inevitably do so in an informal, ad hoc fashion—risking the critiques of unfairness and arbitrary application of the law discussed in Part I.

### III. BRIDGING LAWYERED AND LAWYERLESS CIVIL PROCEDURE

By examining rulemaking, technology, and mass claims through the lens of lawyered and lawyerless courts, this Essay has identified themes that the traditional federal/state divide tends to obscure. This Part expands on these lessons by examining their implications across four areas: (1) the role of lawyers and judges; (2) the development of doctrine; (3) teaching

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215. Sabbeth, *Market-Based Law Development*, supra note 33 (“[D]ifferences [in court resources] influence the quantity (and arguably quality) of personnel—including judges, judicial law clerks, clerks’ offices’ staff, other employees—and the time and attention such personnel expend on each case. . . . All of these differences in forum investments shape the handling of each individual litigant’s case.”).

civil procedure; and (4) the need for more wholesale structural change. The role of lawyers as both creators and subjects of civil procedure becomes clearer when viewed through the lens of the lawyered/lawyerless divide. Whether or not lawyers representing clients are present in a courtroom, lawyers in society are considered the experts in procedural design. This perspective also helps to identify overarching questions of deep democratic import about the role of lawyers in our courts and our society.

#### A. *Lawyers and Judges*

The lawyered/lawyerless lens is particularly helpful for understanding civil procedure and the roles of lawyers and judges across both contexts in at least three respects. First, examining lawyers' impact on procedural development in lawyered contexts can also reveal the impact on procedural development of the *absence* of symmetrical lawyers in lawyerless contexts. Second, a similar examination highlights the parallels between judge's roles when lawyers are absent and when their ability to faithfully represent their clients is compromised. Third, this analysis helps rebut common assumptions that lawyers might have less of a role to play in addressing the problems of lawyerless courts. To the contrary, lawyers in their roles as policy makers and public citizens, not just in representing clients, are crucial to the success or failure of lawyerless courts.

First, the role of lawyers who represent clients—either on both sides of the “v.” or on only one side—is central to the understanding of civil procedure in any court. Lawyers' strengths lie both in helping their clients access justice and in protecting their interests in an adversarial posture. For example, lawyers facilitate accessing justice by helping clients identify that they have a legal problem, presenting it to a court in a legal frame, navigating the system, and advocating on behalf of the client. Relatedly, lawyers serve important roles in an adversarial system. As plaintiff's counsel, they zealously pursue claims against defendants; as defense counsel, they protect defendants from these assaults. Many civil procedure and ethics rules and structures are intended to harness these strengths and also to keep lawyers in check in an adversarial posture, including by pitting them against each other. Empowered in this way, lawyers can have positive effects on procedure: They can mold written and unwritten procedure, innovate (sometimes in collaboration with the judge or with judges' blessings), and constrain judges' ad hoc procedures. In lawyered courts, this setup can break down if the lawyer–client relationship breaks down—for example, if the lawyer's incentives are not to zealously represent the client, as some argue can happen in class actions or MDL.

The setup breaks down entirely, however, in lawyerless courts. In asymmetrically lawyerless contexts, the one side with representation goes unchecked. In the worst-case scenario, the lawyered side is aligned with the judge in using the power of the state against the self-represented individual; in the best case, the judge tries to assist the self-represented litigant

to navigate the system or advocate for herself in legal terms. But doing so is inevitably inconsistent, extremely time- and resource-intensive, and antithetical to the adversarial system design. In symmetrically lawyerless cases, many of these same obstacles remain. Litigants are already in the least-well-funded sectors of the judicial system, and they present cases disparaged (often unfairly) as too simple to require a lawyer, to merit law development, or even to deserve more than a few minutes of a judge's time.<sup>216</sup> As a result, self-represented litigants struggle to navigate a system designed for lawyers.

Second and relatedly, examining judges across the lawyered/lawyerless divide likewise reveals more about judges in each context. Across the scholarship, there are investigations of the role of the active judge in federal court procedure<sup>217</sup> and in state court procedure.<sup>218</sup> In lawyered courts, "managerial judges" often re-direct the adversarial process toward settlement.<sup>219</sup> But in lawyerless courts, active judging can mean standing in as a representative for self-represented litigants, or facilitating settlements engineered by the more powerful, represented party and in the absence of an advocate for the self-represented individual.

By comparing the roles of lawyers and judges across lawyered and lawyerless courts, we can see that similar concerns from lawyerless courts appear when the lawyer-client relationship is stressed in lawyered courts, as in debates about whether lawyers truly represent class members. The question is to what extent class actions and MDL—where lawyers abound—actually create spaces where litigants are lawyerless by virtue of inadequate representation by lawyers whose personal interests (toward

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216. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (reasoning that the Constitution does not guarantee a lawyer in a child custody removal proceeding in part because the case was insufficiently complex and the outcome would not have changed even if the litigant had a lawyer); Sabbeth, *Market-Based Law Development*, *supra* note 33 (observing that in lawyerless courts, "[j]udges do not genuinely engage in the process of interpreting, let alone developing, legal doctrine").

217. See, e.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 *Calif. L. Rev.* 1259, 1262–63 (2017) (discussing the "fiduciary" role of judges reviewing class action settlements under Rule 23); Resnik, *supra* note 68, at 379 (describing a federal trial judge's role as encompassing mediator, negotiator, planner, and adjudicator).

218. See, e.g., Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 512–13 (discussing the literature); Carpenter et al., "New" Civil Judges, *supra* note 3, at 253 ("[J]udges are routinely departing from the traditional, passive judicial role in varied and ad hoc ways when they deal with pro se parties."); Steinberg, *Adversary Breakdown*, *supra* note 27, at 901 (calling for a "framework to enlarge the role of the judge in the 'small case' civil justice system"); Steinberg et al., *Judges and Deregulation*, *supra* note 64, at 1316 (describing some judges' active reliance on nonlawyer advocates to assist parties with procedural issues).

219. See, e.g., Resnik, *supra* note 68, at 379 ("[J]udges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle . . ."); Wolff, *supra* note 74, at 1027 (noting the role of "managerial judges" in the early phases of litigation, including the settlement process).

settlement that maximizes their fees) conflict with the litigants'. The solutions posed have usually been either about reforming the lawyers' obligations or incentives, or about transforming the judges' role into something more like their role in lawyerless courts: to act as fiduciaries for the (un)represented litigants. Aggregation is again power—this fiduciary role is easier to accomplish en masse in a class settlement proceeding in a lawyered court than individually in separate proceedings in lawyerless courts. To spell out the intricacies of this comparison is beyond the scope of this Essay. Nevertheless, the similarities and differences between the challenges should inform reforms in both spaces.

Finally, there is another role for lawyers and judges: that of reformers and public citizens. As Deborah Rhode reminds us, lawyers' civic obligations are not only to their clients, but also to a system that affords access to justice.<sup>220</sup> The procedure-making discussed in Parts I and II—whether written or unwritten, deliberated or ad hoc—is done by lawyers in different capacities (judges, practitioners, or law professors). The role of lawyers as architects and engineers of legal structures is essential to any consideration of lawyers' role, including how we teach in law schools, which we discuss more below. Some law students will become lawyers who represent clients; if so, they may never see the inside of a lawyerless court. But that does not mean they have no obligations with regard to those courts. Moreover, those that go on to be judges, policy makers, legislators, and more, will directly influence the design of lawyerless courts. They should do so in an informed way.

#### B. *Doctrine*

Viewing civil procedure through the lawyered/lawyerless lens also has implications for key questions of civil procedure doctrine. To illustrate these implications, this Essay applies the insights of lawyered and lawyerless courts to three key topics: personal jurisdiction, notice, and due process.

First, personal jurisdiction questions have animated civil procedure scholars and classrooms, especially as the Supreme Court has recently refocused on the subject.<sup>221</sup> These questions arise in state and federal court. Scholars fear that an overly narrow constitutional personal jurisdiction doctrine will unduly burden the available forum options for plaintiffs, potentially limiting them to zero.<sup>222</sup>

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220. See Deborah Rhode, *Lawyers as Citizens*, 50 *Wm. & Mary L. Rev.* 1323, 1324 (2009) (noting lawyers' responsibility to "sustain[] legal frameworks," promote "the quality of justice that results from legal assistance," and "support a system that makes legal services widely available to those who need them most").

221. See *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (revisiting specific personal jurisdiction).

222. See Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 *Ala. L. Rev.* 455, 458

But personal jurisdiction issues arise primarily, if not exclusively, in lawyered courts. The personal jurisdiction defense tends to be raised by well-heeled, lawyered defendants or otherwise in cases involving large monetary values, and interstate disputes, which tend to involve lawyers. Personal jurisdiction is rarely if ever contested in lawyerless state courts. Rather, it tends to be a pro forma matter recited by the judge at the outset of a case. This is in part because lawyerless courts typically involve local cases like housing disputes, domestic violence, or debt collection proceedings against local defendants. It is simply not an issue in the vast number of “assembly-line” cases where defendant debtors are sued in their home jurisdictions.<sup>223</sup> Moreover, personal jurisdiction is a sophisticated defense, one that is waivable if not raised (usually by knowledgeable counsel). Thus, even if a pro se defendant had a viable personal jurisdiction defense, she might waive it unknowingly. In short, personal jurisdiction can be a big issue in lawyered courts (state or federal), but it is unlikely to be in dispute in lawyerless ones.

Notice—and due process—on the other hand, present the opposite balance: They are rarely litigated (with some exceptions) in lawyered courts, in part because of the presence of lawyers and the robust procedural framework; but they pose serious problems in lawyerless courts. Notice is regularly taken for granted in federal procedural scholarship; to the extent it receives attention, it is mostly in the context of efforts to expand notice to class action plaintiffs.<sup>224</sup>

But lack of notice is a huge and seemingly intractable problem in the run-of-the-mill cases of lawyerless courts.<sup>225</sup> Lawyerless debt defendants are rarely able to raise notice defenses (in part because they lacked notice and lawyers), and courts even more rarely write opinions and develop law on

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(2022) (“Limiting general jurisdiction to defendants’ home courts, as today’s law does, will predictably lead to defendant-friendly substantive law.”); Adam N. Steinman, Access, Rationality, and Personal Jurisdiction, 71 Vand. L. Rev. 1401, 1406 (2018) (“The [Supreme] Court’s narrowing of general jurisdiction . . . threatens to create an access-to-justice blind spot.”).

223. See Wilf-Townsend, *supra* note 12, at 1711, 1723 (noting that personal jurisdiction is a “salient” issue in federal courts and intimating that it is not as salient in state courts, where “passive” judges “do not go out of their way to assist the unrepresented debtor” in debt collection cases); cf. John F. Coyle & Robin Effron, Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction, 97 Notre Dame L. Rev. 187, 200–08 (2021) (documenting instances where forum selection clauses are used to establish personal jurisdiction over out-of-state non-signatories to consumer contracts); John F. Coyle & Katherine C. Richardson, Enforcing Inbound Forum Selection Clauses in State Court, 53 Ariz. St. L.J. 65, 68 (2021) (describing the “end result” of forum selection clauses as “a legal regime where distant courts assert personal jurisdiction over weaker contracting parties”).

224. See Robin J. Effron, The Lost Story of Notice and Personal Jurisdiction, 74 N.Y.U. Ann. Surv. Am. L. 23, 80 (2018) (“[S]tarting in the 1980s, notice began to fade away. By the post-*Asahi* era of Supreme Court jurisprudence, notice had vanished [from personal jurisdiction analysis] altogether.”); see also *supra* section II.B.3 (discussing notice literature).

225. Effron, *Invisible Circumstances*, *supra* note 81, at 1549 & n.121 (discussing the problems of notice for low-income individuals who often lack permanent addresses).

the subject. In fact, the core of scholarship around notice in state civil courts is reaching an empirical understanding of the status quo: Are litigants receiving any (let alone legally sufficient) notice?<sup>226</sup> What do litigants do in response to this notice, and does that require a reexamination of our understanding of sufficient notice?<sup>227</sup> And are the appallingly high default rates in lawyerless courts a consequence of problems with notice?<sup>228</sup> In contrast to the highly litigated nuance of notice to class members in the federal system, notice in lawyerless courts is part of the machinery of “justice”: Default is a pervasive feature of the system. The recent focus on this issue may expand our understanding of what constitutionally sufficient notice actually requires.<sup>229</sup>

Finally, the perennial object of scholarly attention—due process—reinforces the import of the distinction between lawyered and lawyerless procedure. Consider *Lassiter v. Department of Social Services*, the case in which the Supreme Court decided that the federal Constitution does not guarantee a mother faced with termination of parental rights proceedings a right to counsel.<sup>230</sup> This case, as Brooke Coleman has argued, reveals the inequality, sexism, and racism in the Supreme Court’s analysis of due process.<sup>231</sup> As Kathryn Sabbeth and Jessica Steinberg have demonstrated more recently, the constitutional guarantee of the right to counsel “accrues largely to the benefit of men” because *Gideon* has been applied primarily in the criminal context; women, and disproportionately women of color,

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226. See supra note 168 and accompanying text.

227. See, e.g., The Problem of Default, A2J Lab, <https://a2jlab.org/default/> [<https://perma.cc/S8UY-2QGU>] (last visited Jan. 15, 2022) (measuring “what kinds of mailings from legal services providers to defendants are effective in reducing default rates in debt collection cases”); see also D. James Greiner & Andrea J. Matthews, The Problem of Default 6 (2015) (unpublished manuscript) (on file with the *Columbia Law Review*) (“[This] study is the first of its kind to evaluate an intervention intended to reduce default rates in civil cases using a randomized control trial.”).

228. For more data on default rates, see, e.g., Paula L. Hannaford-Agor, Nat’l Ctr. for State Cts., Trends: Close Up Civil Justice Myths 2 (2017), <https://nscs.contentdm.oclc.org/digital/collection/civil/id/155> (on file with the *Columbia Law Review*); Hannaford-Agor et al., supra note 1, at 23; Peter Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers, 26 Loy. Consumer L. Rev. 179, 184 (2014); Wilf-Townsend, supra note 12, at 1721–22; How Debt Collectors Are Transforming the Business of State Courts, Pew Trs. (May 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> [<https://perma.cc/FC33-BN3G>]. See also Effron, Invisible Circumstances, supra note 81, at 1564 (noting that there has been “a three-decade . . . marked increase in default judgments in state court, and a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments”).

229. See Engstrom, Digital Civil Procedure, supra note 163, at 2265 n.79.

230. 452 U.S. 18, 33 (1981); see also Elizabeth G. Thornburg, The Story of *Lassiter*: The Importance of Counsel in an Adversary System, in *Civil Procedure Stories* 509, 511–21 (Kevin M. Clermont ed., 2d ed. 2008) (discussing the social, legal, and factual background to the case).

231. Brooke D. Coleman, *Lassiter v. Department of Social Services*: Why Is It Such a Lousy Case?, 12 Nev. L. Rev. 591, 591–92 (2012).

encounter the law in compulsory and punitive ways, but more often in the civil system, where lawyers are not guaranteed.<sup>232</sup> *Lassiter* thus doubles down on the message that lawyers are the primary guarantors of due process.

These perspectives highlight not only the perversity of due process doctrine but also its inadequacy to the task of protecting justice and civil rights. While “the Fourteenth Amendment’s imposition of equal protection and due process guarantees on the states” is a point of connection between the doctrine of civil procedure and the realities of state civil courts, just as important—if not more so—is a recognition that these guarantees have proven wholly inadequate to achieving their stated goals.<sup>233</sup> In other words, if “the essence of procedural due process is a meaningful opportunity to be heard,”<sup>234</sup> and if lawyers are key to our understanding of what that meaningful opportunity means, then the reality of lawyerless state courts may belie the possibility of ensuring due process for all of the cases currently in these courts.

In short, operationalizing due process in state civil courts faces considerable challenges. If litigants cannot participate in adversarial proceedings at the most basic level—because they lack notice or understanding of the proceedings, because the courts are too overwhelmed by the number of cases, or because judges are adjusting procedures in an ad hoc manner that makes courts nearly impossible to navigate—then there is no remote approximation of due process. In addition to the absence of lawyers, the presence of the adversarial system design (and sometimes the lopsided presence of lawyers only on the plaintiff’s side) keeps lawyerless state civil courts stuck at an early step. State court scholars and reformers often discuss how to get more lawyers involved, reintroduce civil *Gideon*, and redesign the system. These are conversations about due process. But these are old debates—*Goldberg* simply no longer captures the status quo of “poverty law” due process.<sup>235</sup>

Something has got to give, and it may be our staid understanding of due process. As Jason Parkin has argued, innovations in lawyerless courts driven from the ground up, including experimentation with e-notice and active judging in cases with pro se litigants, challenge traditional understandings of due process.<sup>236</sup> But these innovations also may suggest that

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232. Sabbeth & Steinberg, *supra* note 16, at 3–4; *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (establishing a constitutional right to counsel for criminal defendants).

233. Spaulding, *supra* note 3, at 293.

234. *Id.* at 267.

235. See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Due Process Clause entitles a recipient of public welfare benefits to an evidentiary hearing before termination of benefits).

236. Jason Parkin, *Dialogic Due Process*, 167 U. Pa. L. Rev. 1115, 1116–19 (2019) (“The recent wave of procedural experimentation is generating precisely the kind of evidence that can influence future due process balancing.”).

the thing that must change is due process doctrine.<sup>237</sup> Our consideration of due process therefore should move beyond current doctrine.<sup>238</sup> It must also encompass the questions of how to return to the goal of providing justice.

### C. *The Classroom*

The challenges of doctrine in the face of two civil procedures in lawyered and lawyerless courts translate directly to the classroom. Teaching civil procedure is not just about teaching lawyers to implement civil procedure; it is also about teaching lawyers to be the architects of these legal structures, whether as future judges, leaders of the bar, or democratic citizens.<sup>239</sup> The lawyered/lawyerless perspective is important for understanding the role of lawyers in society, regardless of the particular role the law student will play in the future. This section briefly suggests structural and granular approaches to certain common topics in the civil procedure class that could be taught with a lawyered/lawyerless emphasis.

First, one can teach about lawyered and lawyerless courts through the structure or framing of the issues. Several popular topics of civil procedure teaching—like personal jurisdiction, notice, and due process—apply across courts. While many instructors break down the civil procedure course into two general categories—jurisdictional questions and the Federal Rules—the course could instead be divided into those principles that apply in all U.S. courts (personal jurisdiction, notice, and due process) and those that are specific to federal court (subject matter jurisdiction and the Rules).<sup>240</sup> This approach would highlight the state/federal divide, a first step towards illuminating the lawyered/lawyerless divide.

Second, when teaching those topics that also apply in state courts, instructors might emphasize the differences between lawyered and lawyerless courts. Incorporating the distinction between the role of personal jurisdiction in lawyered and lawyerless courts would, in a straightforward way, highlight when personal jurisdiction matters and encourage students to question the universality of doctrine. Similarly, the modern challenges of notice could be incorporated into the civil procedure curriculum to encourage students to think about the topic more pragmatically and expansively.

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237. *Id.* at 1148–59 (providing “a justification and a roadmap for reinvigorating procedural due process doctrine” in light of on-the-ground procedural experimentation).

238. *Cf.* Spaulding, *supra* note 3, at 291 (“The Supreme Court’s increasingly cramped view of both due process and the right to trial under the Seventh Amendment is relevant, but . . . has so monopolized attention of proceduralists as to have obscured analysis of these other forces and the startling consequences for ordinary people litigating outside federal courts.”).

239. See Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 518–21 (discussing judges as agents of change); Shanahan & Carpenter, *supra* note 34, at 131–32 (discussing lawyers as agents of change).

240. Thanks to Lauren Ouziel, who suggested structuring the class this way.



As an example of this approach, the study of due process provides particularly fertile ground for students to explore the implications of the lawyered/lawyerless divide. Due process is often taught by framing the trial as providing the “ideal,” most adversarial opportunity to be heard. This is true even though vanishingly few cases go to trial: In lawyered courts, judges and lawyers alike push for settlements, and in lawyerless state courts, even courtroom activity bears almost no resemblance to the idealized trial. The trial-focused lens, moreover, tends to highlight the right to a lawyer as the Rolls Royce of due process protections.<sup>241</sup> And many casebooks teach due process through the example of the *Lassiter* case, which, as discussed above, provides an entry point into a discussion of the assumptions about the presence of lawyers and the implications of lawyered and lawyerless civil procedure.

One might also teach *Turner v. Rogers*, another civil *Gideon* case, in which a defendant was sentenced to a year in jail for contempt because he was behind in his child support payments.<sup>242</sup> The Supreme Court held that the Due Process Clause did not guarantee Turner the right to a lawyer, especially since the custodial parent entitled to the support was unrepresented.<sup>243</sup> The Court conceived of the adversarial posture as being between the parents, and it saw their lawyerless status as marking a level playing field; although Turner was facing incarceration, the Court somehow could not see this proceeding as one between the state and the defendant. As Alexandra Lahav has explored, *Turner* illustrates an all-too-familiar dynamic where the courts do not recognize unsavory civil defendants as “a person deserving a basic form of respect: the opportunity to make a claim or defense.”<sup>244</sup> Nevertheless, the Supreme Court seems to focus on an unspecified requirement for “more procedure,” although not a state-appointed lawyer, to ensure due process protections. The case raises questions of the judicial role, ad hoc procedure, and asymmetrical representation in lawyerless courts; it also tees up questions of whether more procedure is always the answer to due process inadequacies.<sup>245</sup> While some

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241. Spaulding, *supra* note 3, at 263 (“Academic and classroom discussions . . . tend to gravitate around two issues: whether certain key features of adversarial justice (such as access to a lawyer) are constitutionally mandatory even though a full trial is not, and what exceptional government interests can justify dispensing with either notice or a hearing (or both).”).

242. 564 U.S. 431, 436–37 (2011).

243. *Id.* at 448.

244. Alexandra Lahav, *The Roles of Litigation in American Democracy*, 65 *Emory L.J.* 1657, 1675 (2016).

245. See *Turner*, 564 U.S. at 447 (“[S]ubstitute procedural safeguards, . . . if employed together, can significantly reduce the risk of an erroneous deprivation of liberty . . . , without incurring some of the drawbacks inherent in recognizing an automatic right to counsel.” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))); *id.* at 446–47 (arguing that, because the custodial parent is also often unrepresented, “[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation”).

have argued that a “critical starting point” for introducing state civil courts more prominently into the civil procedure classroom and scholarly discourse is the Fourteenth Amendment,<sup>246</sup> this topic similarly exposes the challenges of due process in lawyerless courts.<sup>247</sup> These are important questions to raise in classrooms.

#### D. *Limits of Procedure*

This Essay’s discussion leads to questions of wholesale structural change. It is rarely suggested that the Federal Rules should be torn up and completely re-written, perhaps because they work, or are worked by lawyers, with some amount of satisfaction or at least satisfying familiarity.<sup>248</sup> If anything, it is argued that the Rules—or other rules—should be applied more rigidly.

Scholars of lawyerless state courts, by contrast, have a more radical discourse, although change remains challenging to implement.<sup>249</sup> Two other contributions to this symposium provide examples of proposals for radical change. One of us with Jessica Steinberg, Alyx Mark, and Anna Carpenter, argues for wholesale reconsideration of state civil courts as democratic institutions.<sup>250</sup> And Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, and Lauren Sudeall examine and critique state civil courts as sites of racial capitalism.<sup>251</sup> As a matter of course, scholarship on lawyerless state courts engages questions of new procedures,<sup>252</sup> new roles for court

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246. Spaulding, *supra* note 3, at 293.

247. See generally Helen Hershkoff, *Access to Justice: Enforcing Rights and Securing Protection, in Getting By: Economic Rights and Legal Protections for People With Low Income 785* (Helen Hershkoff & Stephen Loffredo eds., 2019) (discussing more broadly the opportunities for teaching due process).

248. A notable exception is *A Guide to Civil Procedure: Integrating Critical Legal Perspectives*. The editors of that collection note in their introduction, “Each chapter shows how the seemingly dry and technocratic tone of the civil rules and process may conceal—or perpetuate—apathy, injustice, brutality, poverty, abuse of power, or discrimination.” Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter, Introduction, *in A Guide to Civil Procedure: Integrating Critical Legal Perspectives*, *supra* note 16, at 1, 1–2.

249. See generally 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 (2015) (analyzing race and racial inequality in the legal system); Sabbeth & Steinberg, *supra* note 16 (reconsidering right to counsel doctrine to argue that its benefits accrue largely to men).

250. Shanahan et al., *Institutional Mismatch*, *supra* note 1, at 1528–30.

251. Brito et al., *supra* note 12, at 1285–86.

252. D. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, Using Random Assignment to Measure Court Accessibility For Low-Income Divorce Seekers, *Proc. Nat’l Acad. Sci.*, Jan. 25, 2021, at 2 (discussing and proposing a measure of the accessibility of divorce procedures); Hammond, *Pleading Poverty*, *supra* note 135, at 1514–26 (advocating for a new standard for in forma pauperis determinations); Sabbeth, *Simplicity as Justice*, *supra* note 18, at 287–88 (describing reform efforts to “simplify[] proceedings to obviate the need for . . . representation,” including by “creating form pleadings, introducing technology, and relaxing formal rules”).

actors,<sup>253</sup> and even wholesale redesign of civil courts.<sup>254</sup> Some calls are broad, like for abolition of child welfare dockets.<sup>255</sup> Others are more disparate and require state-by-state, area-by-area, boots-on-the-ground reform.<sup>256</sup> But the fact that they are challenging is not a reason not to consider them, or indeed not to do them.

#### CONCLUSION

This Essay has argued in favor of examining civil procedure in American civil justice not just as divided between state and federal courts, but as between lawyered and lawyerless contexts. In both lawyered and lawyerless contexts, there are complex institutional democratic questions. Scholars in both camps would do well to pay attention to them. This collective attention will help us comprehend the magnitude of the challenges

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253. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 987–90 (2012) (praising the use of “nonlawyer advocates” and arguing that “court personnel must adopt a more managerial posture”); Carpenter et al., *Lawyerless Courts*, *supra* note 2, at 512–13 (describing “a revised judicial role where judges cast away traditional passivity to assist and accommodate litigants without lawyers”).

254. Barton & Bibas, *Rebooting Justice*, *supra* note 18, at 145–57 (describing a range of options for redesigning courts, from modest reforms promoting active judging to the adoption of inquisitorial-style judicial proceedings or ODR systems); Shanahan & Carpenter, *supra* note 34, at 129 (“[I]f people do not have access to the help they need to navigate the court system as it is designed, why not redesign the court system so that people can navigate it on their own?”); Steinberg, *Demand Side Reform*, *supra* note 6, at 746 (“Fundamental changes to the way disputes are processed and decided in the poor people’s courts are needed to bring the operation of the legal system into alignment with the capabilities of the litigants who use it.”).

255. See, e.g., Dorothy E. Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World* 46 (2022) (“We should be asking why the government addresses [Black childrens’] needs in such a violent way. Even if Black children require more services, why is the main ‘service’ being provided the forced breakup of their families?”); Jane M. Spinak & Nancy D. Polikoff, *Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-Being*, 11 *Colum. J. Race & L.* 427, 430 (2021) (arguing that it is necessary to “abolish[] the system that allows [family] separations to continue” and to “reimagin[e] and replac[e] it with policies and practices that facilitate the flourishing of all children within their families, tribes, and communities”).

256. See, e.g., Logan Cornett, Natalie Anne Knowlton, James Swearingen & Michael Houlberg, *Redesigning Divorce: User-Driven Design for a Better Process*, *Inst. for the Advancement of the Am. Legal Sys.* 1 (2019), [https://iaals.du.edu/sites/default/files/documents/publications/redesigning\\_divorce.pdf](https://iaals.du.edu/sites/default/files/documents/publications/redesigning_divorce.pdf) [<https://perma.cc/YCP9-KP3Q>] (describing a national study that “explore[d] the firsthand experience of self-represented litigants in family court . . . with the goal of moving from litigant input in identifying problems to user engagement on solutions”); Dimarie Alicea-Lozada, *New Tools to Help Self-Represented Litigants*, *NCSC Blog* (Nov. 10, 2021), <https://www.ncsc.org/information-and-resources/info-and-res-page-card-navigation/trending-topics/trending-topics-landing-pg/new-tools-to-help-self-represented-litigants> [<https://perma.cc/QL7X-9JN7>] (describing software developed by Maryland and Minnesota state courts to help self-represented litigants produce pleadings).

facing the U.S. civil justice system as a whole<sup>257</sup> and will also arm us with better tools to confront these challenges—together.

Comparing these themes—procedural rulemaking, the role of technology, and mass claims—across federal and state civil procedure and across lawyered and lawyerless contexts reveals a need for flexibility and accountability in procedure; a deep dependence on lawyers that is, and should be, challenged by modern legal problems; and the importance of reimagining procedures to take advantage of lawyers' presence while also functioning in their absence.

Moreover, these studies reveal that courts and justice—and access to courts and access to justice—are not always synonymous. Procedure must strive to ensure that courts provide justice, but it must also accommodate the realities of civil legal problems. As courts as institutions and the actors within them adapt to these realities, so too must civil procedure in the state and federal courts, whether lawyered or lawyerless.

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257. Spaulding, *supra* note 3, at 290 (“No modern court system and no alternative adjudicative body appears to have the structure and capacity to efficiently, accurately, and fairly adjudicate the claims that regularly arise in the lives of ordinary people who appear before it.”).

