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The Gender of Gideon

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ABSTRACT

This Article makes a simple claim that has been overlooked for decades and yet has enormous theoretical and practical significance: the constitutional guarantee of counsel adopted by the U.S. Supreme Court in *Gideon v. Wainwright* accrues largely to the benefit of men. In this Article, we present original data analysis demonstrating that millions of women face compulsory and highly punitive encounters with the justice system but do so largely in the civil courts, where no right to counsel attaches. The demographic picture that emerges is one in which the right to counsel skews heavily against women's interests. As this Article shows, the gendered allocation of the right to counsel has individual and systemic consequences that play an underappreciated role in perpetuating racial and gender inequality.

We revisit well-known doctrine, and, in contrast to all prior literature, we place gender at the center of the Court's jurisprudence on the right to counsel. Liberty principles have been paramount in the Court's opinions, but the liberty interests of women have been devalued. In *Lassiter v. Department of Social Services*, the Court refused to recognize the termination of a Black mother's relationship with her child as deserving the right to counsel. Prior scholars have shown that the *Gideon* Court aimed to protect Black men from abuses of state power but protecting Black women from such abuse is nowhere in the Court's jurisprudence.

Since *Lassiter*, the Court has refused to recognize a constitutional guarantee of representation for civil defendants with fundamental interests at stake, and, we argue, available data suggest that the largest categories of these cases—family law, eviction, and debt collection—disproportionately affect Black women. As we show, the gendered deprivation of a right to counsel relegates women to a secondary legal status and impinges on the functioning of American democracy. Drawing on the example of housing deprivation, a highly visible collateral effect of the pandemic, we illustrate how lawyerless defendants are now the norm in the civil justice system, with women most severely impacted by this crisis. First, in the absence of government-appointed counsel, women's individual rights are routinely trampled. Powerful governmental and private adversaries of these women have captured the civil courts, with the result that judges regularly fail to enforce even well-established law. Second, without lawyers, appeals are scarce, and the law fails to evolve in areas of particular importance to women's lives. Third, women's ability to act in the world, protected by the rule of law, has been disproportionately compromised by lack of access to representation, resulting in women's entrenched subordination. Finally, without lawyers to serve as watchdogs in the civil courts, constitutional doctrine has rendered women's most important legal problems invisible. This has undermined opportunities to identify the system's shortcomings and agitate for reform.

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INTRODUCTION

This Article introduces the phenomenon of the gendered right to counsel. The U.S. Supreme Court's famous decision in *Gideon v. Wainwright* guaranteed a federal constitutional right to counsel for criminal defendants facing incarceration.[1] Advocates have pressed for an extension of that right to civil matters in which fundamental interests are stake,[2] but the Supreme Court has demurred.[3] The American Bar Association and other prominent groups have since questioned the Supreme Court's conclusion that criminal defense is uniquely important, particularly in comparison with the defense of shelter, sustenance, safety, healthcare, and parental rights.[4] The economic fallout of the COVID-19 pandemic has put many of these interests at the center of national dialogue, and, increasingly, elected officials have acknowledged the importance of a right to counsel for those in distress.[5] In both advocacy and academic literature, however, one consideration that has received surprisingly little attention is gender.[6]

In this Article, we make a simple claim that has been overlooked for decades[7] and yet has enormous symbolic, theoretical, and real-world significance: the

1. 372 U.S. 335 (1963).
2. Russell Engler, *Shaping a Context-Based Civil* Gideon *From the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697, 698–700 (2006).
3. *See infra* Subpart II.B (describing development of doctrine).
4. AM. BAR ASS'N RESOL. 112A (2006) (advocating for the appointment of counsel in civil cases in which "basic human needs" are at stake); NAT'L COAL. FOR A CIV. RT. TO COUNS., http://civilrighttocounsel.org [https://perma.cc/LJ35-6C2Y].
5. *See, e.g.*, Katy O'Donnell, *Kamala Harris Unveils Housing Plan as Rent Deadline Looms*, POLITICO (July 17, 2020, 3:40 PM), https://www.politico.com/states/california/story/2020/07/16/kamala-harris-unveils-housing-plan-as-rent-deadline-looms-1301520 [https://perma.cc/SGK6-ZBHQ] (describing then-Senator Harris's proposed legislation, which included a right to legal assistance for tenants facing eviction); *The Biden Plan for Investing in Our Communities Through Housing*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/housing [https://perma.cc/CQ2D-YBTL] (stating that "Biden appreciates the difference legal representation can make for those facing eviction" and explaining that he would support the Legal Assistance to Prevent Evictions Act of 2020).
6. We focus our discussion of gender on the self-presentation and lived experience that maps onto a binary understanding of men and women. Relevant data does not currently include categories for other gender identities, such as people who are nonbinary or trans-identifying. *See* Jennifer Tseng, *Sex, Gender, and Why the Differences Matter*, 10 AM. MED. ASS'N J. ETHICS 427, 427 (2008) ("Gender refers to the continuum of complex psychosocial self-perceptions, attitudes, and expectations people have . . . . Being a man or a woman holds broader meaning, with cultural concepts of masculinity and femininity coming into play.").
7. One of us has hinted at this in prior work, but to our knowledge no full investigation of the subject has previously been conducted. *See* Kathryn A. Sabbeth, *Housing Defense as the New*

constitutional guarantee of counsel accrues largely to the benefit of men. The vast majority of criminal defendants with a constitutional right to counsel are men.[8] Women, in contrast, appear much more often as defendants in civil proceedings, where they enjoy no such right.

The absence of a right to counsel in civil cases has significant implications for racial justice as well as gender justice. Scholars have produced a great deal of important research on the role of race in the criminal justice system,[9] but the literature has devoted less attention to race in the civil justice system.[10] Why? Because, we argue, the individuals most affected are women.[11] As one of us has noted in previous work, in both criminal and civil proceedings, the defendants unable to afford counsel are disproportionately people of color.[12] Yet, in civil proceedings, these defendants are also disproportionately women.[13] In another paper, we focus on the issue of race in the civil justice system,[14] while here we focus on gender and, specifically, how it relates to the right to counsel. This Article is the first to present data showing that, across case types, gender is extremely significant with respect to who benefits from the right to counsel. We refer to this

Gideon, 41 HARV. J.L. & GENDER 55, 96 (2018) [hereinafter Sabbeth, *Housing Defense*] ("To the extent that appointment of counsel aims to serve the goal of equality, the principle of *gender* equality should also inform which segments of the population will enjoy the right."); Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 931 & n.289 (2015) [hereinafter Sabbeth, *Discounted Danger*] ("The communities of persons unable to afford counsel in civil and criminal proceedings overlap substantially. Both are disproportionately poor people of color . . . . The key difference between the populations may be one of gender.").

8. *See infra* Subpart I.A.
9. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2d ed. 2012); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016); MARC MAUER, RACE TO INCARCERATE (rev. ed. 2006); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (rev. ed. 2019).
10. *See* Tonya L. Brito, David J. Pate, Jr. & Jia-Hai Stefanie Wong, *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3028 (2015) ("Although the population of low-income Americans most affected by the civil justice gap is disproportionately minority, race and racial inequality are understudied areas of inquiry in the access to justice literature."); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 339 (2008) (surveying literature on "what we know about access to civil justice and race, social class, and gender inequality").
11. *See infra* Part I (summarizing empirical research).
12. Sabbeth, *Discounted Danger*, *supra* note 7, at 931.
13. *See infra* Part I.
14. *See* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243 (2022).

phenomenon, whereby one set of defendants enjoys a constitutionally guaranteed right while the other does not, as the gendered right to counsel, or the gender of *Gideon*.

The importance of *Gideon* can be seen in both formal rights and social values.[15] Indeed, *Gideon* and its progeny represent the only federal constitutional guarantee of counsel in our courts,[16] a fact whose salience becomes especially apparent when examining how legal representation is distributed within the civil justice system. The Supreme Court's action—or, more precisely, inaction—on a civil right to counsel has had a powerful influence on the evolution of the civil courts and their relationship to gender equality. Women are deeply embroiled in the courts, but their issues arise largely in the civil sphere.[17] Moreover, lawyers are scarce in that civil sphere.[18] Although legislatures and state courts could have stepped into *Gideon*'s breach by providing counsel through other means, they have largely failed to fill the void.[19] As a result, the vast majority of women who attempt to vindicate their rights in civil tribunals do so without lawyers. Specifically, in today's civil courts, 75 percent of cases involve a *pro se* party.[20] This carries significant consequences not only for individual women's rights but also for developing the law in areas of importance to women's lives.[21] Ultimately, the gendered deprivation of a right to counsel relegates women to a secondary legal status and, as this Article shows, impinges on the functioning of American democracy.

To be clear, this Article does not espouse the view that the criminal justice system functions as it should, nor that our existing fleet of public defenders should be redistributed to the civil sphere. In large part, the ideals of *Gideon* have not been upheld and the adverse consequences of this are well-known.[22] Nor does this Article espouse the view that a constitutional right to counsel is the only, or even

15. *See* Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 73–77 (2016) (describing change in law and culture after *Gideon*).
16. *See infra* Subpart II.
17. *See infra* Subpart I.B.
18. *See infra* Subpart I.C.
19. *See infra* Subpart I.C.
20. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY S. MILLER, NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION iv (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/PCY3-BP96].
21. *See infra* Part III.
22. BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW (2017); Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56, 56 (2019).

the optimal, mechanism for solving the racial and social inequities perpetuated by the civil courts.[23] In some circumstances, formal rights can be meaningless,[24] or worse, can legitimize a substantively unjust system.[25] Nonetheless, we argue that recognition of a federal right to counsel matters a great deal,[26] and this Article makes the claim that the gendered distribution of counsel undermines societal aspirations of equality.

In Part I we use empirical evidence to show that, because of how the right to counsel has been defined by the Supreme Court, men are disproportionately granted this right while women are deprived of it. Notably, it is extremely difficult to unearth gender data in the civil justice system. This itself is indicative of a system that has long been neglected. The data we have stitched together, however, show three interrelated phenomena. First, women's interactions with the justice system occur primarily in the civil sphere. We show that millions of women face compulsory encounters with the civil justice system each year, largely in eviction, debt collection, and family law matters—the three biggest categories of cases in the civil courts. Second, women are most likely overrepresented in the civil justice system as compared to men. And third, three-quarters of all civil matters today involve an unrepresented party. This means that the federal constitutional lawyering gap has not been filled by the private market nor by other government funding. Together, the demographic picture that emerges is one in which the right to counsel skews against women's interests. This allocation of a powerful social

23. Indeed, one of us has argued for pro se court reform that does not revolve around entitlement to counsel, including procedural reform, modifications to the judicial role, the inclusion of civil problem-solving methodologies, and removal of certain cases from the courts in their entirety. *See generally* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741 (2015) [hereinafter Steinberg, *Demand Side Reform*]; Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899 [hereinafter Steinberg, *Adversary Breakdown*]; Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018) [hereinafter Steinberg, *Problem-Solving Courts*]; Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471 (2022) .

24. *See, e.g.*, Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97 (2019) (highlighting one example of how enforcement is essential for making rights meaningful and its absence undermines them).

25. *See, e.g.*, Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE. L.J. 2176, 2178 (2013) (arguing that the rights that flow from *Gideon* may have played a role in legitimizing mass incarceration and diffusing political resistance to it). *But see* Abbe Smith, *Defending* Gideon, 26 U.C. DAVIS SOC. JUST. L. REV. 235 (2022) (responding to Butler's critique of *Gideon*).

26. *See* Mayeux, *supra* note 15.

resource has individual and systemic consequences that play an underappreciated role in perpetuating gender inequality.

Part II analyzes the doctrinal background of this phenomenon through a gendered lens. Notably, the right to counsel has received little attention from feminist constitutional scholars. Yet applying feminist theory to the right to counsel is highly revealing. The justices on the Supreme Court determined which interests were rights requiring articulation by appointed counsel, and which interests were not, by assessing the social value of those interests. Clarence Gideon, a white[27] man challenging his incarceration, was recognized as entitled to counsel at government expense because he faced a deprivation of liberty. Abby Gail Lassiter, a Black woman fighting to keep the state from permanently taking her child, was not. These two cases have shaped the doctrine from their inception to the present, and from the outset have placed greater social value on the deprivations most likely to be experienced by men. While multiple factors undoubtedly contributed to the difference in case outcomes, as Part II shows, the Court's decision in *Lassiter v. Department of Social Services* reflected a devaluation of interests associated with women, and specifically Black women.

It is particularly significant that, in its right-to-counsel jurisprudence, the Supreme Court has never once given consideration to gender equality. Liberty and equality principles have been front and center in the historical development of the doctrine, but only particular conceptions of liberty and equality have been recognized.[28] Scholars have demonstrated convincingly that the *Gideon* ruling and other criminal procedure decisions of its time were designed to protect Black men from governmental abuse in the criminal justice system.[29] Yet, despite the long and painful U.S. history of governmental destruction of Black mothers' bonds with their children, that abuse never figured into the Court's analysis of Ms. Lassiter's liberty interests. Part II unpacks the story of gender and suggests that it has been a pivotal, but untold, part of the contextual landscape of right-to-counsel doctrine all along. The liberty interest, defined as synonymous with incarceration, is a construct that reliably excludes most women from protection. This body of constitutional law has played a significant role in creating the current state of

27. We capitalize "Black," but not "white," for reasons recently articulated by the Columbia Journalism Review: "For many people, *Black* reflects a shared sense of identity and community. White carries a different set of meanings; capitalizing the word in this context risks following the lead of white supremacists." Mike Laws, *Why We Capitalize 'Black' (and Not 'White')*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/ analysis/capital-b-black-styleguide.php [https://perma.cc/T83L-GBVX].

28. *See infra* Part II.

29. *See infra* Part II.

affairs, one in which most women who confront the legal system are routinely unrepresented by counsel despite the enormity of what they stand to lose.

Part III turns to the democratic implications of disproportionately allocating publicly funded lawyers to men. We show how, nearly sixty years after *Gideon* was decided, the skewing effect of a gendered right to counsel has compounded over time to violate basic principles of equality and democracy. Few today would argue that women should be denied equal access to democratic institutions. Democracy demands that women participate in political and civic life, including the deliberative, adjudicative process of the judicial branch. And yet constitutional jurisprudence on the right to counsel undermines these goals in three important respects. First, in the absence of civil *Gideon*, the civil courts have become netherworlds of lawlessness where women's individual rights are routinely disregarded.[30] Without counsel to advance cognizable claims, women's rights are rarely even raised in the courts where women most frequently appear.[31] Second, as a result of the absence of counsel to articulate and enforce women's rights, the law governing women's claims fails to evolve.[32] While criminal justice doctrine on issues such as search and seizure and DNA testing has modernized to accord with changing social norms and forensic science, law development in civil justice subjects has stagnated. As a result, women are subjected to archaic laws constructed for a bygone era that do not reflect their current, lived reality. Third, women's ability to act in the world, protected by the rule of law, has been disproportionately compromised, resulting in the entrenched subordination of women.[33]

Part III concludes by raising questions about another, perhaps even broader, structural consequence of the gender of *Gideon*. We suggest that it is possible to draw a line from *Gideon* to today's bipartisan support for criminal justice reform. While the road has been long and twisted, the army of public defenders unleashed in the courts almost sixty years ago has served a function as public observers, reporting on the failings of the criminal justice system. Grassroots movements have been the primary catalysts in galvanizing support for reform, but there is no doubt that the observations of counsel have also played a part in raising public awareness and shifting the narrative. Meanwhile, in the civil courts—an equally

30. *See infra* Subpart III.A; *see also* Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 384–85 (2022); Steinberg, *Demand Side*, *supra* note 23, at 756–59.

31. We certainly do not intend to suggest that enforcement of individual rights is flourishing in the criminal courts, but we do think it is important that the shocking lack of constitutional and procedural protections in the civil courts goes almost entirely unquestioned.

32. *See infra* Subpart III.B; *see also* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 282–84.

33. *See infra* Subpart III.C.

large and heavily punitive part of our justice system—constitutional doctrine has cloaked women's legal problems so that they remain hidden. As a result, the vast majority of the civil justice system is nearly invisible to both the legal profession and the public. This has long prevented observers from identifying the system's shortcomings and agitating for reform.

I. THE GENDER OF THE JUSTICE SYSTEM

This Part names and illustrates the gender of the civil justice system. It also connects the gender of the civil justice system with the deprivation of *Gideon* rights. People of color are overrepresented among people unable to afford counsel in the civil and criminal courts, but the difference between the groups appearing in the two fora is one of gender. Relying on demographic data, we show that, because of how constitutional law defines it, men are disproportionately granted the right to appointed counsel while women are denied it. We begin with an examination of criminal justice data, which illustrate that men considerably outnumber women in the criminal courts. We then turn to gender data in the most common civil issues—eviction, family law, and debt collection—to demonstrate that women are heavily burdened by destructive legal problems as well, but those issues arise in the civil courts where no constitutional right to counsel has been recognized.

We utilize several sources of empirical evidence to support this claim: gender data from the courts; contextual data on the gender of civil legal problems; and, administrative datasets with gender information. We also demonstrate that only a small fraction of legal needs can be met with current levels of government funding. As a result, 75 percent of civil justice matters involve a pro se party, a phenomenon one of us (with co-authors) has defined elsewhere as a "lawyerless court."[34] From these empirically grounded claims, we argue that women's most numerous interactions with our justice system occur in civil cases about basic human needs—namely those involving shelter, the right to parent, and financial security—and that most women navigate these cases without a lawyer.

To be clear, in this Part, we can only marshal the available evidence to suggest a gender inequity. We concede that definitive empirics have not been gathered and much remains unknown. Based on our extensive research, however, we

34. 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, 1318 (2021) (defining a "lawyerless court"). *See* Carpenter, Steinberg, Shanahan & Mark, *supra* note 32, at 253 n.8 (using data derived from the Landscape study to assert that 15.5 million cases in the civil courts involve a pro se party). *Accord* HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, 31–33.

believe there is no room to doubt that the federal constitutional guarantee of counsel heavily favors men. To be sure, *Gideon*, in large measure, remains an unfulfilled mandate, but a federal constitutional right to appointment of counsel should nonetheless be appreciated as a coveted due process protection, one that is simply absent in the civil courts and largely unavailable to women in the fora where they are most likely to appear.[35]

A. The Gender of the Criminal Justice System

While the criminal courts are disproportionately filled with defendants of color, particularly Black defendants,[36] the gender statistics of criminal courts are even more pronounced than those of race. By any available metric, the vast majority of people defending criminal prosecutions are men. A wide and persistent gender divergence exists at every level of the criminal justice system. At the state level, where most criminal prosecutions occur, multiple data sources estimate that 83 to 86 percent of felony defendants are men.[37] The numbers are similar in federal criminal cases, in which roughly 86 percent of all prosecutions are brought against men.[38] Misdemeanors and juvenile adjudications are slightly less imbalanced, but the proportion of male defendants still dwarfs that of females. According to a recent study of eight diverse jurisdictions, men account for approximately 73 percent of misdemeanor prosecutions.[39] As for juvenile adjudications, data from more than

35. A voluminous literature documents *Gideon*'s many failures, none of which we dismiss. *See* Mayeux, *supra* note 15, at 86–87, 86 n.352 (collecting several literature sources on the subject).
36. *See, e.g.*, UNIV. OF ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006), https://www.albany.edu/sourcebook/pdf/t5522006.pdf [https://perma.cc/JU8N-4AZZ] (identifying "characteristics of felony defendants in 75 largest counties," as 45 percent Black, 24 percent Hispanic, 29 percent white, 2 percent "Other, non-Hispanic").
37. BRIAN A. REAVES, BUREAU JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 1 (2013), (indicating that an estimated 17 percent of felony defendants were female in 2009, a slight increase compared to 1990, when females represented 14 percent of defendants); UNIV. OF ALBANY, *supra* note 36 (reporting that, in 2006, 82 percent of all felony defendants in the 75 largest counties in state court were men and 18 percent were women).
38. MARK A. MOTIVANS, BUREAU JUST. STAT., FEDERAL JUSTICE STATISTICS, 2015–2016 9 (2019), (highlighting that, in 2016, 54,546 [86 percent] male and 8843 [14 percent] female defendants were charged in U.S. federal district court).
39. *See* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 997 (2020) (in eight jurisdictions for which the authors had misdemeanor case data from 2011–2016, men made up an approximate average of 73 percent of those charged with misdemeanors).

2000 jurisdictions estimate the percentage of male defendants at 73 percent as well.[40]

Even recognizing that not all criminal defendants are the recipients of government-appointed counsel,[41] the gender demographics make clear that men are the primary beneficiaries of appointed counsel. But to demonstrate a gender skewing effect—the distribution of a scarce social resource to one gender class over the other—we must also present empirical proof that women heavily populate the civil justice system and that many of their most critical interests are affected by civil court proceedings. This task proves significantly harder, as no central repository like the Bureau of Justice Statistics tracks demographic differences in the civil justice system, and the gender of civil cases has not been the subject of rigorous scholarly inquiry.[42] Despite this absence, the next Part shows that, each year, millions of women experience serious civil justice issues that carry negative and gender-specific consequences.

B. The Gender of the Civil Justice System

In amassing gender statistics about civil justice cases, we encounter an obstacle: the civil courts and agencies do not collect demographic data on litigants, nor does any governmental agency have this charge.[43] The dearth of civil data is

40. Based on data from 2284 jurisdictions in 41 states, the SOURCEBOOK OF CRIMINAL STATISTICS estimates that, in 2008, 73 percent of all defendants in cases adjudicated in juvenile courts were male and 27 percent were female. UNIV. OF ALBANY, *supra* note 36.

41. A small fraction of defendants can hire counsel with their own funds, and, even for those who are indigent, appointment of criminal defense counsel is not mandated in cases that do not involve actual imprisonment or in certain pretrial proceedings. *Compare* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (ruling that criminal defendants have a right to appointed counsel regardless of length of jail sentence), *with* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (limiting *Argersinger* by ruling that the right to counsel is only triggered by sentence of imprisonment). *See* Brandon Buskey & Lauren S. Lucas, *Keeping* Gideon*'s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2300–08 (2017); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 4–5 (2013) (arguing that judges and prosecutors can choose not to pursue incarceration and *Scott v. Illinois* thereby allows them to undercut the right to counsel).

42. Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295, 299 (2016) [hereinafter Sandefur, *Data Deficit*]; Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 444, 450–51 (2016) (describing how much is unknown about the civil legal needs of the public) [hereinafter Sandefur, *What We Know*].

43. In an effort to locate gender demographics in the civil courts, we searched the Annual Report published by each state court's administrative body as well as other publications on the data dashboard of the state court's website. We searched each publication for the words "gender,"

itself reflective of our resource allocation and policy choices.[44] The civil justice system is simply not prioritized as an important area of study or funding, with many negative downstream implications.[45] Not least among these problems is that it is impossible to measure with any precision the gender inequality in the distribution of constitutionally guaranteed counsel.

The absence of rigorous data collection is particularly notable since the civil justice system is larger in scope than the criminal system and ensnares at least as many low-income Americans of color in matters involving basic human needs. The civil courts churn through 20 million cases per year, most of which are evictions, debt collections, and family law matters of all types including divorce, custody, child support, parental rights, and domestic violence.[46] In addition, Rebecca Sandefur's research demonstrates that court cases only represent the "tip of the iceberg" when it comes to justiciable civil legal problems, as many housing, consumer, and family law issues arise outside of court and are never brought before a judge or any formal adjudicatory tribunal.[47]

Nonetheless, based on our own aggregation of data, we make an empirically grounded claim that women face civil justice issues regularly and with highly punitive consequences. At stake are "basic human needs" that include women's

"female," "sex," and "women." Not a single Annual Report or statistics-tracking publication includes information on the gender breakdown in civil cases.

44. Tanina Rostain & Erika Rickard, *Understanding State Courts: A Preliminary List of Data Needs*, *in* ABILITY TO PAY 159, 160, 162 (Judith Resnik, Anna VanCleave & Alexandra Harrington eds., Mar. 2019), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_combined_cover_march_21_2019.pdf [https://perma.cc/7YZV-77WK]. Rostain and Rickard note that, "[s]tate courts lack a centralized repository for data along the lines of federal Integrated Database (IDB), where case-level data on civil legal matters is publicly available." In reviewing all court records systems, they report that "fewer than ten state court systems make civil case-level data searchable to the general public, and most state public records request processes do not apply to state judiciaries." Specifically with regard to gender data, they state that "the civil legal system does not tend to specifically collect data on litigant demographics such as gender, sexual orientation, race, national origin, ethnicity, age, family status, or economic status."

45. *See* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 54 (2019) ("[T]here has been little investment in collecting meaningful data about civil justice in the United States for more than fifty years."); Sandefur, *Data Deficit*, *supra* note 42, at 298–99; Sandefur, *What We Know*, *supra* note 42, at 444, 450–51 (describing how much is unknown about the civil legal needs of the public).

46. It is a conservative estimate to put the number of civil justice cases at 20 million. The figure balloons if traffic offenses and administrative tribunals—both civil in nature—are included in the count. We exclude these case categories for purposes of this Article.

47. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7, 31 (2017); Sandefur, *Data Deficit*, *supra* note 42, at 299.

rights to shelter, to parent, to income security, to their children's welfare, and to safety.[48] To tackle the gender data gap, and support our claim about the gender of the civil justice system, this Part integrates empirics from several sources: data from formal civil justice tribunals, contextual data that highlight the gendered nature of particular legal problems, and administrative data that capture the legal vulnerabilities of women. We utilize these data to highlight that women are heavily burdened by civil justice issues in the areas of eviction, family law, and debt collection. Although mass torts and commercial contract disputes constitute the visible portion of the civil justice system, together they total less than 10 percent of court business.[49] These case categories are excluded from the analysis in this Part since they are more likely to involve parties that can either afford privately retained counsel or attract counsel through contingency awards or attorney's fees.[50] As a result, they are more insulated from *Gideon*'s skewing effect. Significantly, the authors have decades of experience researching everyday civil justice issues and litigating cases on behalf of low-income individuals and families. The data we present below are entirely consistent with our wealth of personal observations.[51]

1. Evictions—A Look at Court Data

We start with evictions, which constitute roughly 19 percent of matters adjudicated in the civil justice system.[52] To gather the demographics of housing

48. In 2006, the American Bar Association (ABA) House of Delegates unanimously passed a resolution supporting a civil right to counsel in categories of cases involving "basic human needs," which they defined as shelter, sustenance, safety, health, child custody, and parental rights. AM. BAR ASS'N RESOL. 112A, *supra* note 4, at 13–14.

49. *See* HANNAFORD-AGOR, GRAVES & MILLER,, *supra* note20, at iii–iv.

50. In addition to the courts, the civil justice system extends to a vast network of administrative tribunals operated by agencies at the local level. These tribunals decide eligibility for, and termination from, a range of government benefits programs that serve as safety net for the poorest Americans—most of them women. According to 2018 Census Bureau data, 56 percent of people in the U.S. living in poverty are women. *See* Robin Bleiweis, Diana Boesch & Cawthorne Gaines, *The Basic Facts About Women in Poverty*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/article/basic-facts-women-poverty. A gendered analysis of administrative adjudication is beyond the scope of this paper, but we suspect many of the same arguments would be applicable in the administrative realm.

51. In medical literature, a small dataset is viewed as more significant when it comports with clinical observation and biological plausibility. We find it significant that the data and research findings we present in this paper comport with the depth of our real-life experiences in observing the civil justice system.

52. HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, at 17–19 (reporting that 64 percent of the study sample of 925,344 were contract cases, and 29 percent of the contract cases were eviction matters). Sixty-four percent of 925,344 (total cases) is 590,828 (contract cases) and

courts, we must rely on a select number of enterprising researchers who have collected gender data through laborious processes, typically by pouring over paper court records or observing live proceedings. Sociologist Matthew Desmond has done pioneering work on evictions that offers our best view into gender disparities in the courts. In his most well-known review of data, conducted in the Milwaukee courts, he found that women constituted 72 percent of tenants in eviction cases.[53] The gender disparity was particularly acute for Black women: Evictions of Black women outnumbered those of Black men at a rate of 2.5 to one.[54] This research led Desmond to conclude that, in communities of color, eviction is a uniquely female issue akin to incarceration for men: "a typical but severely consequential occurrence contributing to the reproduction of urban poverty."[55] To put a finer point on it, Desmond states that "[i]f incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out."[56] This burden on Black women in particular is evident across much of the civil justice landscape and is a critically important part of the story of the gendered right to counsel.

Researchers in Baltimore's housing court corroborate Desmond's data. The Public Justice Center conducted a study of 300 people facing eviction in Baltimore courts in 2015 and discovered that women made up 79 percent of tenants brought to court.[57] This trend has been apparent for some time. In her seminal 1992 study of the Baltimore rent court, Barbara Bezdek also observed that "[t]he great

29 percent of 590,828 (contract cases) is 171,340 (eviction cases); 171,340 is 19 percent of the total sample of 925,344 cases. HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, at 17–19.

53. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 102 (2012). Note that Matthew Desmond's Eviction Lab, which is the only national effort to track eviction case processing, does not isolate gender as a variable.

54. *Id.* at 98–100. Latinx women were evicted at a rate of 1.78 to one, compared to Latinx men. Examining the percentages of the population affected overall, Desmond concluded that the eviction rate was 5.55 percent of women and 2.94 percent of men in Black neighborhoods, 2.51 percent of women and 1.16 percent of men in Latinx neighborhoods, and 1.05 percent of women and 1.14 percent of men in white neighborhoods. *Id.* at 99.

55. *Id.* at 120. *See also* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (2016) [hereinafter DESMOND, EVICTED]; MATTHEW DESMOND, MACARTHUR FOUND., POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014).

56. DESMOND, EVICTED, *supra* note 54, at 98.

57. PUB. JUST. CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 12–13 (2015) (reporting that in a study of 300 people facing eviction in Baltimore courts, 79 percent were women and 65 percent housed minor children).

proportion of tenants who appear are poor [B]lack women."[58] Bezdek found that the social demographics of eviction were significant not only because of the numbers of affected Black women, but also because their racial and social identities influenced the tone of proceedings. Judges silenced the voices of Black female tenants and gave landlords greater leeway to press their claims.[59]

Studies conducted in various additional locations support the findings by Desmond and the Baltimore researchers.[60] A team of economists studying Chicago's eviction docket found that women dominated proceedings. In a study of all eviction cases filed between 2000 and 2016—a total of 583,871 cases—64 percent of defendants were female.[61] In Philadelphia, a sample of eviction cases revealed that 70 percent were filed against women of color.[62] In New York City's public housing system, where a mere arrest (without conviction) of a family member can result in the eviction of the leaseholder, 85 percent of evicted leaseholders were women.[63] And in Washington, statewide data from 2004 to 2017 shows that women were forcibly evicted six percent more often than men.[64]

Finally, in 2020, Desmond joined co-authors Peter Hepburn and Renee Lewis in producing a new study of race and gender in eviction, which corroborated and enhanced his earlier findings.[65] Drawing on millions of court records from 39

58. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535 (1992).
59. *Id.* at 535–36.
60. For additional evidence of gender-based disparities in eviction proceedings see Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 534 (1991) (finding that, in New York housing court, two-thirds of tenants facing eviction were single women); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 421 (1995) (asserting that 80 percent of tenants in New Haven, Connecticut were female, from which we infer that most evicted renters are female as well).
61. John Eric Humphries, Nicholas Mader, Daniel Tannenbaum & Winnie van Dijk, *Does Eviction Cause Poverty? Quasi-Experimental Evidence From Cook County, IL* 8, 11 (Cowles Found., Discussion Paper No. 2186, 2019).
62. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE 461, 467 (2003).
63. Leora Smith, *The Gendered Impact of Illegal Act Eviction Laws*, 52 HARV. C.R.-C.L. L. REV. 537, 554–55 (2017).
64. Timothy A. Thomas, Ott Toomet, Ian Kennedy & Alex Ramiller, Univ. of Wash., *The State of Evictions: Results from the University of Washington Evictions Project*, THE EVICTIONS STUDY (Feb. 17, 2019), https://evictions.study/washington/index/html [https://perma.cc/9NF7-T23X] (reporting that, across Washington state, females were evicted six percent more than males—evictions affected 189,053 females, 178,500 males, and 30,143 individuals for whom gender was unknown).
65. Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649 (2020).

states, the authors concluded that Black renters were named disproportionately as defendants in eviction cases and had the highest rates of eviction filings.[66] Further, Black women and Latinx women faced higher eviction rates than their male counterparts.[67] Across all renters, the risk of eviction was two percent higher for women than men—which translates to thousands more evictions annually—and the gender disparity was higher for Latinx women and highest for Black women, when compared with the rates for white women.[68]

While the data on evictions remains limited, all studies thus far have reached the same conclusion: Evictions disproportionately affect Black women and their children.[69] There are multiple reasons why people of color face higher rates of eviction—some of these turn on income and wealth disparities and some are likely the product of race discrimination.[70] But why Black women? One of us has described these reasons in detail in a prior article,[71] so here we will just review the key factors.

The presence of children in a household is, as a statistical matter, the single most predictive factor in determining likelihood of an eviction judgment.[72] And women are more likely than men to be the primary custodial parents.[73] Living with children in the household increases the threat of eviction in a number of ways. Substandard conditions pose special dangers to children, and when parents seek to protect their children by raising those conditions with landlords or code enforcement agencies, they can trigger retaliatory eviction. Women with children may also violate occupancy limits because of their family size, and though landlords often let it slide at the application stage, that allows landlords to keep an advantage in their back pockets if they want to evict the tenant later on. Finally, older children, particularly teenagers of color, may—through no fault of their own—attract police attention that leads collaterally to eviction.[74]

66. *Id.* at 653.
67. *Id.* at 655–56.
68. *Id.* at 654–56.
69. *Id.* at 654.
70. *Id.* at 658–59; *see also* Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 115 n.1 (2016).
71. Sabbeth, *Housing Defense*, *supra* note 7, at 90–94.
72. *See* Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 SOC. FORCES 303, 303 (2013).
73. TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2013 1 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60–255.pdf [https://perma.cc/9M7J-G48M].
74. Desmond, *supra* note 53, at 109–10.

Caring for children is, however, only one part of the gender story of eviction. Gender also makes it harder for women to cover the rent. On average, Black women earn 63 cents for every dollar earned by white men,[75] and women of every race earn less than similarly situated men.[76] The pay gap is attributable partly to caregiving obligations and partly to overrepresentation in low-wage jobs and underrepresentation in high-wage jobs, although even in the same occupations, women are routinely paid less than men.[77] Women who encounter unexpected budget shortfalls may also have fewer opportunities than men to supplement their income. This is because unpaid labor, such as eldercare and childcare, consumes a massive quantity of women's waking hours, thereby preventing them from taking on additional paid labor that could allow them to save.[78] Furthermore, many more women than men receive public assistance, and earning additional income is prohibited or will count against future benefits in such programs.[79] If tenants do fall behind in rent, Desmond's research also shows that men, more often than women, get the option to work off rent arrears with labor, such as performing repairs.[80] Meanwhile, women are commonly subject to landlords' sexual harassment, and when rejected, landlords sometimes respond with retaliatory rent increases and eviction filings.[81] Additionally, the COVID-19 pandemic has revealed a widening crack in women's economic security. In December 2020, the U.S. economy experienced a net loss of 140,000 jobs. The vast majority were held by Black and Latinx women.[82] With schools and daycares closed, the pandemic has forced women to give up hard-won gains in the

75. Sharon Epperson, *Black Women Make Nearly $1 Million Less Than White Men During Their Careers*, CNBC (Aug. 3, 2021, 10:35 AM), https://www.cnbc.com/2021/08/03/ black-women-make-1-million-less-than-white-men-during-their-careers.html [https:// perma.cc/4GW3-DBB6] (summarizing literature).

76. AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 9 figs.3 & 4 (2018).

77. JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., WOMEN EXPERIENCE A PAY GAP IN NEARLY EVERY OCCUPATION 1 (2018), https://nwlc.org/wp-content/uploads/2018/04/Wage-Gap-Fact-Sheet-Occupation.pdf [https://perma.cc/8584-LBNW].

78. Annalisa Merelli, *There's a Mind-Boggling Amount of Work Women Do That We Literally Can't Quantify*, QUARTZ (May 18, 2016), https://qz.com/686075/we-still-have-literally-no-way-to-quantify-exactly-how-much-work-women-do [https://perma.cc/ZT6Y-9AZN].

79. Desmond, *supra* note 53, at 105.

80. Desmond, *supra* note 53, at 112–13.

81. *See* Sabbeth, *Housing Defense*, *supra* note 7, at 93–94 (synthesizing literature on sexual harassment of tenants).

82. Annalyn Kurtz, *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women*, CNN BUS. (Jan. 8, 2021, 9:25 PM), https://www.cnn.com/2021/01/08/ economy/women-job-losses-pandemic/index.html [https://perma.cc/5H37-A4W2].

workplace to care for children, who have been attending virtual school or no school at all.[83]

All these disadvantages can lead to eviction, and eviction then leads to increased disadvantage. Growing empirical research shows that eviction results in negative outcomes for physical and mental health, educational deficits for children, job losses, and homelessness.[84] Beyond the initial disruption and trauma of the displacement, tenants sued in eviction courts find themselves get marked with a "Scarlet E" that creates long-term damage to their rental records, credit, and opportunities to participate in the economy.[85] The COVID-19 pandemic has brought national attention to some of the ways in which eviction is corrosive to public health and economically devastating at both the individual and community level.[86] Desmond's Eviction Lab highlights eviction as a plague that affects millions of renters a year and hits female-headed households the hardest. Even before the pandemic, in some places, as many as 16 percent of renters were evicted in a single year,[87] a figure that undercounts the number of "forced moves" in which landlords pressure tenants to abandon their homes under threat of eviction.[88]

Eviction is one of the few civil justice issues in which court data on the gender of litigants has been explored, even in part. The following Subparts rely on contextual and administrative data from other areas to suggest a broader correlation between civil justice and gender.

83. *Id.*

84. Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1059 (2017); Sabbeth, *Housing Defense*, *supra* note 7, at 64–69; Sabbeth, *Discounted Danger*, *supra* note 7, at 913–14.

85. Kathryn A. Sabbeth, *Erasing the "Scarlet E" of Eviction Records*, APPEAL (Apr. 12, 2021), https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records [https://perma.cc/A78T-2WN9]. The term "Scarlet E" was derived from an NPR podcast on the eviction phenomenon. *See* On the Media, *The Scarlet E: Unmasking America's Eviction Crisis*, WNYC STUDIOS (June 6, 2019), https://www.wnycstudios.org/podcasts/otm/scarlet-e-unmasking-americas-eviction-crisis [https://perma.cc/LE4J-CPJ2].

86. Kathryn M. Leifheit, Sabriya L. Linton, Julia Raifman, Gabriel L. Schwartz, Emily A. Benfer, Federick Zimmerman & Craig Evan Pollack, Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality 4–6 (Nov. 30, 2020) (unpublished manuscript), https://ssrn.com/abstract=3739576 [https://perma.cc/9WYQ-QKEY].

87. *Eviction Rankings: Top Evicting Large Cities in the United States*, EVICTION LAB, https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en [https://perma.cc/6J7L-FPBF].

88. *See generally*, DESMOND, EVICTED, *supra* note 55, at 4–5.

2. Family Law—A Look at Contextual Data

Approximately five million family law cases are adjudicated in the civil justice system each year, and while one can assume that the gender balance is roughly equal—with women and men often (but certainly not always) pitted against one another in divorce, support, custody, and domestic violence cases—corroborating data are difficult to locate.[89] Still, three aspects of the family law landscape stand out and shed light on the significance of gender.

First, in the most consequential of family law matters—termination of parental rights—women dominate the dockets, almost to the exclusion of men.[90] In one study that reviewed all cases terminating parental rights over a 10-year period in San Francisco, researchers found that mothers were the primary caregivers in every single case.[91] To emphasize the point, zero fathers were subject to state action to terminate their parental rights. Other research confirms substantial gender disparities in such cases, with mothers representing 78 to 87 percent of defendants in termination of parental rights matters.[92]

As Dorothy Roberts's research on the child welfare system has shown, Black women are massively overrepresented in child welfare proceedings.[93] In major cities, "Black and brown families compose virtually all families under supervision

89. HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, at 3.

90. In its amicus brief in *Lassiter*, the ABA captured the intense nature of this deprivation, calling the termination of parental rights "the ultimate legal infringement upon the family." It went on to argue that there are "few, if any, state imposed deprivations more unyielding and personal than the permanent and irrevocable loss of one's children." Brief for the ABA as Amicus Curiae Supporting Petitioner at 7, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423).

91. Charlene Wear Simmons & Emily Danker-Feldman, *Parental Incarceration, Termination of Parental Rights and Adoption: A Case Study of the Intersection Between the Child Welfare and Criminal Justice Systems*, 7 JUST. POL'Y J. 1, 8–9 (2010).

92. David F. Bogacki & Kenneth J. Weiss, *Termination of Parental Rights: Focus on Defendants*, 35 J. PSYCHIATRY & L. 25, 34 (2007) (containing the results of a study of 300 termination of parental rights cases from New Jersey, in which 78 percent of defendants were female); Beth L. Green, Carrie Furrer, Sonia Worcel, Scott Burrus & Michael W. Finigan, *How Effective Are Family Treatment Drug Courts? Outcomes From a Four-Site National Study*, 12 CHILD MALTREATMENT 43, 44, 46, 50 (2007) (in a study of 450 participants of diversion courts meant to serve substance-abusing parents facing termination of parental rights, 89 percent of defendants were women).

93. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7–10 (2002) [hereinafter ROBERTS, SHATTERED BONDS] (summarizing statistics); *see also* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A BETTER WORLD (2021) [hereinafter ROBERTS, TORN APART] (compiling decades of research and arguing that the child welfare system is a "family policing system" that punishes and destroys Black families).

and virtually all the children in foster care."[94] Indeed, the child welfare system has been dubbed "Jane Crow,"[95] since it combines routine surveillance of Black women and punitive state action that terrorizes them and their families, and it continues a long tradition in the United States of ripping Black children from their mothers.[96] As discussed in Part II, these dynamics are especially noteworthy in light of the Supreme Court's landmark decision in *Lassiter v. Department of Social Services* to deny a constitutional right to counsel for a Black woman facing termination of parental rights.[97]

Second, women in family law matters face power imbalances that bring into focus the gendered impact of right-to-counsel doctrine. Domestic violence affects 15 million households per year,[98] with two million incidents severe enough to result in physical injury.[99] Women engaged in divorce or custody battles where domestic violence has occurred are particularly susceptible to unequal power dynamics in adversarial family law proceedings.[100]

Even without a domestic violence overlay, women are often at an economic disadvantage before, during, and after divorce proceedings.[101] As noted earlier, a significant pay gap results in women generally earning less than men. This economic disadvantage is then exacerbated during court proceedings, when judges and

94. Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e [https://perma.cc/SU84-W6DX].

95. Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 23, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/9EHZ-UR4U]. *See also* PAULI MURRAY, SONG IN A WEARY THROAT: MEMOIR OF AN AMERICAN PILGRIMAGE 236 (2018) (first coining the term "Jane Crow" to describe sex discrimination in education).

96. *See* ROBERTS, SHATTERED BONDS, *supra* note 93.

97. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

98. Bea Hanson, *Child Custody Decisions in Cases Involving Domestic Violence: Guiding Principles*, DEP'T JUST. ARCHIVES (Jan. 11, 2017), https://www.justice.gov/archives/ovw/blog/child-custody-decisions-cases-involving-domestic-violence-guiding-principles [https://perma.cc/6DVP-BJN7].

99. CTRS. FOR DISEASE CONTROL & PREVENTION, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence—United States, 2005*, 57 MORBIDITY & MORTALITY WKLY. REP. 113, 113 (Feb. 8, 2008), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm [https://perma.cc/3X2W-QRBY].

100. Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA J. GENDER & L. 41, 53–54, 58, 64 (2017); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657, 685 (2003).

101. Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857, 1869–70 (2019).

mediators may be unconsciously biased toward awarding men a larger share of marital assets, due to social and cultural constructions of women's proper role in the household.[102] This division of assets is particularly problematic since women typically assume primary custody of minor children in the wake of a separation, but with fewer resources to shoulder the costs and responsibilities.[103] Women's economic disadvantage is exacerbated by the absence of representation in family law proceedings, which would otherwise have the potential to level the playing field.

Third, a highly disproportionate number of women hold primary custody of minor children, and their rights are therefore much more severely affected by family law proceedings than are those of noncustodial fathers. Single mothers head a quarter of households in the United States with minor children.[104] According to 2014 U.S. Census data, mothers are the custodial parents in 83 percent of single-parent households.[105] Single mothers depend on the courts to adjudicate child support cases that provide critical income. But only about half of custodial mothers have formal child support agreements or awards.[106] And even for mothers with support agreements, approximately 77 percent are owed outstanding child support payments.[107] Many mothers end up shouldering greater financial responsibility for raising their children than do fathers.[108] A study

102. *Id.*

103. Daniel R. Meyer, Maria Cancian & Steven T. Cook, *The Growth in Shared Custody in the United States: Patterns and Implications*, 55 FAM. CT. REV. 500, 501 (2017) (for most of the last century, when parents divorced, physical custody was awarded to the mother); Maria Cancian, Daniel R. Meyer, Patricia R. Brown & Steven T. Cook, *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381, 1387 (2014) (although mothers are awarded sole custody in 42 percent of cases, a major decline compared to the 1980s, women continue to be awarded primary custody in 80 percent of shared custody cases).

104. PEW RSCH. CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 16 (2013), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/05/Breadwinner_moms_final.pdf [https://perma.cc/53FP-GLLY].

105. GRALL, *supra* note 73, at 1.

106. GRALL, *supra* note 73, at 5.

107. GRALL, *supra* note 73, at 9.

108. Although unsuccessful court intervention may be partly to blame, also to blame is the poor labor market for low-income fathers which makes it difficult for them to afford their child support obligations. *See* KATHERINE A. MAGNUSON, WIS. DEP'T OF WORKFORCE DEV. & INST. FOR RSCH. ON POVERTY, EXPLAINING THE PATTERNS OF CHILD SUPPORT AMONG UNMARRIED LOW-INCOME NONCUSTODIAL FATHERS IN CHICAGO, MILWAUKEE AND NEW YORK 11, 30 (2006), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.152.5554&rep=rep1&type=pdf [https://perma.cc/6AYS-V6B3]; Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 965 (2019) (discussing the relentless and counter-productive pursuit of low-income fathers for unpaid child support obligations).

conducted by the New York Federal Reserve during the COVID-19 pandemic underscored the grave results, finding that single parents were at greatest risk of job loss, leading to missed rent payments, food shortfalls, and general financial hardship.[109]

These factors make clear that women's interests are the core issues of family court, with court proceedings likely to have life-altering consequences for women's relationships with their children, as well as their physical and economic security. Context is significant for women's experiences in family law matters. Gender inequities distort case outcomes and upset the balance of power in court. Moreover, among the most devastating exercises of state power over women—permanent revocation of the right to parent one's children—arises in the civil justice sphere where no federal constitutional right to counsel is recognized.[110] Overwhelmingly, women are subject to the most invasive and punitive form of state scrutiny and too often must appear in court, and defend their right to remain a parent, on their own.[111]

3. Debt Collection—A Look at Administrative Data

Debt collection is the fastest rising case category in the civil justice system and possibly now the most prevalent.[112] The National Center for State Courts estimates that a quarter of cases in the civil courts involve lawsuits brought by debt collectors.[113] This figure does not even capture small claims courts, which are now

109. Jonnelle Marte, *Households With Children Taking the Biggest Financial Hit During Pandemic: New York Fed Report*, REUTERS (Aug. 13, 2020, 10:56 AM), https://www.reuters.com/article/us-usa-fed-parents/households-with-children-taking-the-biggest-financial-hit-during-pandemic-new-york-fed-report-idUSKCN2592MZ [https://perma.cc/Y2W6-DF5N].

110. Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2226 (2018) (calling termination of parental rights "the family law equivalent of the death penalty in a criminal case").

111. Vivek S. Sankaran, *Moving Beyond* Lassiter*: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 6–10 (2017) (explaining that many states provide counsel too late or not at all).

112. *See* PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 5–8 (2020) (offering evidence that debt claims are rising across state courts nationwide)*; see also* OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 4–7 (2018) (documenting an enormous spike in consumer debt claims across all civil justice tribunals).

113. HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, at 17–19 (we calculated the percentage of debt suits as follows: the National Center for State Courts reports that 64 percent of its sample of 925,344 were contract cases [592,220], and 37 percent of the contract cases were debt collection matters [219,121], making the 219,121 debt cases 24 percent of the total sample

believed to be dominated by corporate debt buyers suing consumers for low-value claims.[114] Despite the growing emergence of debt suits as highly prevalent in the civil justice system, it was difficult to locate court data regarding the gender of litigants. In a comprehensive survey of debt collection in the civil courts, Pew Charitable Trusts reports that eleven state court systems isolate data on debt claims.[115] We reviewed the data available from each of these courts and found that none track gender demographics.[116]

To explore the suspected impact of debt claims on women we must look to indicators that arise outside of court. Specifically, we turn to administrative data on both carried debt and delinquent debt. On both measures, we find evidence to suggest that women of color incur high levels of debt and are more likely than men to default on it. Although there are steps between debt delinquency and court—including aggressive out-of-court debt collection by debt buyers who purchase and bundle the delinquent debt—we draw the inference from the available administrative data that women of color are a prime target in debt collection lawsuits. We do not suggest that more women than men are sued in this area—the data are not precise enough to give rise to this conclusion, even if we suspect it. Rather, we assert that women comprise a highly significant portion of the litigant population in consumer debt cases. On their face, these matters involve only money; but scratch the surface and one can see that debt collection cases can cause immediate and cascading financial consequences, including asset seizure and wage garnishment, that quickly put meeting critical basic needs at risk.[117]

An estimated 71 million adults, 32 percent of those with credit history, have debt in collections.[118] The Federal Reserve examined credit histories for single men and women and found that, across age groups, women had more outstanding debt than men and had a greater incidence of delinquency.[119] Three common

of 925,344 cases in the Landscape study); *see also* PEW CHARITABLE TRUSTS, *supra* note 112, at 6.

114. Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1601; *see also* PEW CHARITABLE TRUSTS, *supra* note 112, at 7.

115. PEW CHARITABLE TRUSTS, *supra* note 112, at 22.

116. We conducted a review of the follow state court websites: Alaska, Arkansas, Colorado, Connecticut, Indiana, Maine, Pennsylvania, South Carolina, Texas, Utah, and Virginia.

117. *See* Sabbeth, *Discounted Danger*, *supra* note 7, at 913 n.172–82 (discussing damage to one's credit score as irreparable harm stemming from a civil judgment).

118. PEW CHARITABLE TRUSTS, *supra* note 112, at 3; *see also* Hannah Hassani & Signe-Mary McKernan, *71 Million US Adults Have Debt in Collections*, URB. INST.: URB. WIRE: INCOME & WEALTH (July 19, 2018), https://www.urban.org/urban-wire/71-million-us-adults-have-debt-collections [https://perma.cc/C799-3LF7].

119. Geng Li, *Gender Related Differences in Credit Use and Credit Scores*, BD. GOVERNORS FED. RES. SYS.: FEDS NOTES (June 22, 2018), https://www.federalreserve.gov/econres/notes/ feds-

types of debt—student loans, payday loans, and medical debt—highlight the nature of the gender disparity.

We look first at student loans. As of 2016, 44 million borrowers in the United States held $1.3 trillion in education debt.[120] The American Association of University Women estimates that women hold $833 billion of this debt while men hold $477 billion, about half as much.[121] Women take on more educational debt than men at almost every degree level and type, and begin incurring this debt at an earlier age.[122] Looking at race and gender together, on average, Black women take on a larger amount of debt than any other group.[123] Not only do women take on more debt than men, but women are also burdened with that debt for longer periods and have more difficulty repaying it.[124] In a study comparing college graduates by gender and race, 34 percent of women repaying student loans reported financial difficulties, compared to 24 percent of men.[125] In addition, four years after college graduation, 57 percent of Black women paying off student loans were unable to meet other essential expenses, such as rent, utilities, food, and other necessities, after accounting for loan payments.[126]

In addition to student loans, a great deal of delinquent debt is fueled by so-called payday loans—high-interest loans used for urgent financial matters that are intended to be repaid on the borrower's next payday. Here too, a gender disparity is apparent, and women of color are disproportionately likely to be affected. The Center for American Progress found in its 2009 report, based on the Federal Reserve's Survey of Consumer Finances, that 42 percent of families who borrowed from payday lenders were headed by single women, as compared with just 19

notes/gender-related-differences-in-credit-use-and-credit-scores-20180622.htm [https://perma.cc/ZU4P-5UUY]. In a survey of more than 7500 single men and women, the mean outstanding debt for women ages 21 to 30 was $50,597; for men it was $50,324. *Id.* For the 31 to 40 age range, women had a mean debt of $82,273 while men had a mean debt of $78,673. *Id.* For men aged 21 to 30, 25.5 percent had been delinquent, compared to 29.3 percent of women in the sample. *Id.* Similarly, 29.8 percent of men aged 31 to 40 reported delinquency, compared to 33.9 percent of women in the same age group. *Id.*

120. AM. ASS'N. OF UNIV. WOMEN, DEEPER IN DEBT: WOMEN AND STUDENT LOANS 35 (2017), https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf [https://perma.cc/5UJR-FQNM].
121. *Id.* at 34–36.
122. *Id.* at 2 (noting that women in college take on initial student loan balances that are about 14 percent greater than men's in a given year).
123. *Id.* at 26, fig.9.
124. *Id.* at 26–29.
125. *Id.*
126. *Id.* at 30.

percent of households headed by single men.[127] Multiple studies indicated that Black and Latinx households are far more likely to use payday loans than white households,[128] and women of color are especially likely to be targeted for such loans.[129] Studies also report that as many as 60 percent of payday loans are taken out by women, many of them single mothers, women who are between 25 to 44 years old, women who earn $40,000 or less, women who are renters, or women who are unable to work because of a disability.[130] Although the data were not broken down by race or gender, a study by the Center for Responsible Lending found that a large proportion of payday loan borrowers ultimately default after taking out their first payday loan: In a study of 1065 people who took out their first payday loan between October and December of 2011, 39 percent defaulted within one year of their first loan, and 46 percent did so within two years.[131] Multiple payday loans may lead to overwhelming debt, and eventually, bankruptcy. Indeed, more women than men file for bankruptcy, and Black women file a disproportionate number of bankruptcies.[132]

127. Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 75 (2014) (the remaining 39 percent of borrowers were married couples); *see also* Daniel P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, FED. RES. BANK N.Y.: LIBERTY ST. ECON. (Feb. 8, 2012), https://libertystreeteconomics.newyorkfed.org/2012/02/do-payday-lenders-target-minorities/ [https://perma.cc/8ZKP-37KV].

128. *See* Morgan & Pan, *supra* note 127; NICK BOURKE, ALEX HOROWITZ & TARA ROCHE, PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 11 (2012) (finding that 12 percent of Black households have used payday loans, compared to four percent of white households).

129. *See* Lara Sofia Romero, Rafael Romero & Sim Jonathan Covington, Jr., *Payday Lending Regulations and the Impact on Women of Color*, 11 ACCT. & TAX'N 83, 83 (2019) (explaining that women of color are targeted for payday loans); Carol Necole Brown, *Women and Subprime Lending: An Essay Advocating Self-Regulation of the Mortgage Lending Industry*, 43 IND. L. REV. 1217, 1221 (2010) ("[D]isparate subprime lending practices especially affected [B]lack and Hispanic women.").

130. SUPARNA BHASKARAN, PINKLINING: HOW WALL STREET'S PREDATORY PRODUCTS PILLAGE WOMEN'S WEALTH, OPPORTUNITIES, & FUTURES 18 (2016), https://d3n8a8pro7vhmx.cloudfront.net/acceinstitute/pages/1203/attachments/original/1578692684/acce_pinklining_VIEW.pdf?1578692684 [https://perma.cc/KJU5-48EB]; BOURKE, HOROWITZ & ROCHE, *supra* note 128, at 8 (finding that 52 percent of payday loan borrowers are women).

131. SUSANNA MONTEZEMOLO & SARAH WOLFF, CTR. FOR RESPONSIBLE LENDING, PAYDAY MAYDAY: VISIBLE AND INVISIBLE PAYDAY LENDING DEFAULTS 4 (2015).

132. Schmitz, *supra* note 127, at 68; GEOFF SMITH & SARAH DUDA, WOODSTOCK INST., BRIDGING THE GAP II: EXAMINING TRENDS AND PATTERNS OF PERSONAL BANKRUPTCY IN COOK COUNTY'S COMMUNITIES OF COLOR 8 (2011); *see also* Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573 (2022).

Finally, medical debt appears to haunt more women than men. In 2016, roughly 16 percent of consumers' credit reports included unpaid medical bills in collections, with more than $81 billion owed.[133] In one year alone, consumers borrowed $88 million to pay for medical bills.[134] A study by economists at the Consumer Financial Protection Bureau (CFPB), Federal Reserve, and the American Enterprise Institute, looking at data from the Census and CFPB Consumer Credit Panels collected between 2011 and 2015, found that, at nearly all ages, women have more medical bills in collection, even though the size of their medical bills is slightly lower than men's.[135] The Commonwealth Fund's biennial healthcare survey, based on a nationally representative sample of 3500 adults, found that one-third of women, but only one-quarter of men, had taken on credit card debt because of medical bills, had been unable to pay for basic necessities such as food, heat, or rent, had used up all their savings, or had taken out a mortgage or loan against their home.[136] A recent analysis of Census data indicated that 27.9 percent of Black households carried medical debt, compared to 17.2 percent of white households, and, importantly, households with children were nearly 50 percent more likely to carry medical debt than those without kids.[137] In addition to the disadvantageous financial circumstances that make it harder to pay their bills, women of color and women generally may also accumulate more medical expenses and bills. The risk of medical problems that can lead to bills and, ultimately, to debt vary significantly by race and gender. Women are at greater risk for high-cost medical conditions than men, Black and Latinx people are at a greater risk than whites, and Black people are at the greatest risk of those three racial groups.[138]

133. Michael Batty, Christa Gibbs & Benedic Ippolito, *Unlike Medical Spending, Medical Bills in Collections Decrease With Patients' Age*, 37 HEALTH AFFS. 1257, 1257 (2018).
134. WEST HEALTH & GALLUP, THE U.S. HEALTHCARE COST CRISIS 6 (2019), https://news.gallup.com/poll/248081/westhealth-gallup-us-healthcare-cost-crisis.aspx [https://perma.cc/ANY2-CA6N].
135. Batty, Gibbs & Ippolito, *supra* note 133, at 1257 (showing that before age 45, women have far more medical bills in collection than men, and while the disparity persists, it becomes smaller over time).
136. Sheila D. Rustgi, Michelle M. Doty & Sara R. Collins, *Women at Risk: Why Many Women Are Forgoing Needed Health Care*, COMMONWEALTH FUND, May 2009, at 1, 5.
137. Neil Bennett, Jonathan Eggleston, Laryssa Mykyta & Briana Sullivan, *Who Had Medical Debt in the United States?*, U.S. CENSUS BUREAU (Apr. 7, 2021), https://www.census.gov/library/stories/2021/04/who-had-medical-debt-in-united-states.html [https://perma.cc/J5HH-9PPP].
138. Michelle M. Doty, Jennifer N. Edwards & Alyssa L. Holmgren, *Seeing Red: Americans Driven Into Debt by Medical Bills*, COMMONWEALTH FUND, Aug. 2005, at 1, 3.

In sum, these data demonstrate that women carry debt and face debt delinquency in higher numbers than men in three of the most critical areas of debt: student debt, payday loan debt, and medical debt. Furthermore, individuals in the lowest income bracket are three times more likely to find themselves caught in debt collection than those in the highest income bracket—and female-headed households represent 55 percent of households in the lowest bracket (while male-headed households represent 28 percent).[139]

As noted above in the explanation for eviction rates, wage disparities are no doubt a primary driver of the consumer debt picture as well. The median annual earnings ratio, compared to men, is 62 cents on the dollar for Black women, 54 cents for Latinx women, and 79 cents for white women.[140] Women's paychecks may simply not be large enough to pay down their debt.[141] In addition, women often do not have equal access to higher paying jobs that protect against financial shocks. Seventy percent of low-wage jobs, in which the hourly pay is less than 10 dollars, are held by women.[142] Many of these jobs, including in-home health care, and childcare work, come with fewer benefits than jobs held by men.[143] Women of color are also more likely to work in industries that do not provide medical insurance and therefore may be more likely to get stuck with medical bills.[144] Lower earning power also results in less asset accumulation and weaker financial security as women age. Paradoxically, women are 14 percent more likely to participate in a workplace retirement plan but accrue only 60 percent of the savings

139. PEW CHARITABLE TRUSTS, *supra* note 112, at 3*; see also* CONSUMER FIN. PROT. BUREAU, CONSUMER EXPERIENCES WITH DEBT COLLECTION: FINDINGS FROM THE CFPB'S SURVEY OF CONSUMER VIEWS ON DEBT 15 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf [https://perma.cc/E5ZT-GX2W]; U.S. CENSUS BUREAU, PERCENT DISTRIBUTION OF HOUSEHOLDS, BY SELECTED CHARACTERISTICS WITHIN INCOME QUINTILE AND TOP 5 PERCENT (2018), https://www.census.gov/data/tables/time-series/demo/ income-poverty/cps-hinc/hinc-05.html [https://perma.cc/NN3Y-WLY2].

140. Linda C. McClain & Naomi R. Cahn, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 11 (2021).

141. *See* INST. FOR WOMEN'S POL'Y RSCH., THE GENDER WAGE GAP: 2018 EARNINGS DIFFERENCES BY RACE AND ETHNICITY 1 (2019), https://iwpr.org/wp-content/uploads/2019/03/C478_ Gender-Wage-Gap-in-2018.pdf [https://perma.cc/5RUU-YV6L]; Sabbeth, *Housing Defense*, *supra* note 7, at 92–93.

142. McClain & Cahn, *supra* note 140, at 11.

143. McClain & Cahn, *supra* note 140, at 11.

144. Sara R. Collins, Munira Z. Gunja & Gabriella N. Aboulafia, *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, COMMONWEALTH FUND (Aug. 19, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial [https://perma.cc/W5XW-8H44].

that men accrue.[145] The combination of these factors leave women financially vulnerable to delinquent debt as aging takes hold. Finally, there is evidence that women of color may disproportionately rely on payday loans because lenders steer them toward subprime and less-desirable mortgages, while similarly qualified white men are offered more attractive options.[146]

Debt delinquency does not necessarily lead to lawsuits since out-of-court collection tactics are typically pursued first. It is a proxy, however, by which we might estimate the gender of the debt collection machine in our civil courts. We argue that available administrative data on debt trends suggest that women are highly vulnerable to debt collection lawsuits and are the likely defendants in a large portion of civil cases, if not the majority. We strongly urge the adoption of data infrastructure systems that would render gender and race demographics in the courts more visible.

Debt collection lawsuits can wreak havoc on income security for years to come.[147] A judgment against the borrower creates barriers to future lending which may, for example, prevent a single mother from purchasing a car to drive to work. A judgment may also infringe on a woman's ability to rent a home since many landlords conduct credit background checks before authorizing a lease.[148] Finally, a debt suit can result in wage garnishment that persists for years, compromising one's ability to earn sufficient income to pay rent, medical expenses, and educational loans, all of which contributes to a vicious cycle in which future civil justice system involvement becomes more likely.

C. Gender and Lawyerless Litigants

As a result of the constitutional doctrine on the right to appointment of counsel, which is explored below in Part II, the civil courts have evolved in a very particular and predictable way. In today's civil justice system, no lawyer is present for at least one party in the bulk of matters. The absence of a federal constitutional

145. HEALTH VIEW SERVS., ADDRESSING THE WOMEN'S LONGETIVITY GAP 8 (2017), http://testing.hvsfinancial.com/hvsfinancial/wp-content/uploads/2020/03/Women_Retirement_Health_Care.pdf [https://perma.cc/Y792-3YXN] (women's retirement account balances averaged $79,572, compared to $123,262 for male participants).

146. Schmitz, *supra* note 127, at 68.

147. Joel Tay, Note, *Consumer Debt Collection in Massachusetts: Is Civil* Gideon *a Solution?*, 11 HARV. L. & POL'Y REV. S1, S4 (2017) (discussing debt suits' "devastating impact on debtors," including a negative mark on a credit report, a lien on property, property foreclosure or seizure, or wage garnishment).

148. Sabbeth, *Discounted Danger*, *supra* note 7, at 913–14 (discussing the many negative impacts of a low credit score).

right to counsel in civil courts does not foreclose the issue. Legislatures and state courts could have stepped into *Gideon*'s breach by creating alternative rights or funding for indigent women to access lawyers in civil matters. Moreover, civil judges could rely on their inherent powers to appoint counsel in individual civil cases, as needed. To a large extent, however, no governmental institution has taken strides to stop the downward spiral of civil courts into an impenetrable, lawyerless netherworld, where housing providers and financial services companies are almost always represented and defendants almost never are. At the macro level, in modern-day civil courts, at least one party is unrepresented in three-quarters of all cases.[149] This figure has risen sharply since the last national data were collected in 1992, when only 24 percent of civil cases involved a pro se party.[150] Since *Lassiter* was decided, the pro se rate has, at a minimum, tripled.

The number of unrepresented parties is even higher in eviction and debt collection—two of the largest case categories—and the matters most likely to involve poor Black women. Even more problematic, the representation rates in these case categories are asymmetrical, with the more vulnerable party lacking counsel while an attorney represents the powerful repeat-player.[151] Tenants typically appear pro se in 90 percent of eviction cases, while landlords have counsel in at least 90 percent of cases.[152] In debt collection cases, many jurisdictions report pro se rates up to 99 percent for consumers, while debt buyers enjoy a representation rate close to 100 percent.[153] Family law matters, by contrast, are more likely to involve pro se parties on both sides of the dispute.

The flood of pro se cases in the civil justice system is an underappreciated consequence of *Gideon* and the evolution of the constitutional doctrine on the right to counsel. Actors other than the courts might have mandated a different reality in the civil justice system. Congress might have chosen to appropriate sufficient funding to the Legal Services Corporation (LSC), which would then be disbursed to local legal aid offices in counties across the country to provide services to indigent individuals (and notably the majority of LSC clients are women and one-third are Black).[154] Instead, funding in real dollars for LSC has declined

149. HANNAFORD-AGOR, GRAVES & MILLER, *supra* note 20, at 31.
150. *Id.* at 28.
151. Sabbeth, *Housing Defense*, *supra* note 7, at 59–60, 78; Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1596–97.
152. Sabbeth, *Housing Defense*, *supra* note 7, at 59–60, 78; Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1596–97.
153. Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1596–97.
154. Seven out of every ten LSC clients are women, and approximately one in three are Black. LEGAL SERVS. CORP., BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 68

precipitously since the mid-1980s.[155] The 2008 recession further emptied the coffers of legal aid offices, with dramatic reductions in charitable donations and state-level funding that had supplemented meager federal dollars.[156] Finally, state or local law might have evolved to adopt a civil right to counsel. But apart from the states that have adopted appointment of counsel schemes for cases involving the termination of parental rights, and the handful of cities that have adopted a statutory right to counsel in cases involving eviction, state or local rights to appointed counsel have largely failed to develop in the civil justice system. LSC conducted a legal needs survey of the low-income population in 2016 and estimated that only 14 percent of the civil legal needs of the indigent population can be met by current levels of legal assistance.[157]

There is no obtainable data on the gender of pro se parties, but the figures we have amassed on the gender of the civil justice system leave little doubt that millions of women are stranded in attorney deserts, attending to evictions, debt collection, and family law cases on their own.[158] Post-*Lassiter*, with the obstruction of a federal constitutional right to counsel in cases involving critical civil justice deprivations, the following has played out to detriment of women: individual judges, left to their own devices, have opted not to appoint counsel in individual matters; Congress has chosen to defund the extensive legal aid network that once had a presence in every American county and a goal of serving all low-income people with legal needs; and state courts have elected to interpret their own constitutions largely in concert with the Supreme Court, denying a right to counsel in the vast majority of civil justice cases.[159] As will be discussed in Part III,

(2017), https://lsc-live.app.box.com/s/z0war4502dbngggwyd8h22ati36c8smr [https://perma.cc/3MPW-KMCT].

155. Steinberg, *Demand Side Reform*, *supra* note 23, at 769–70.

156. Steinberg, *Demand Side Reform*, *supra* note 23, at 770.

157. LEGAL SERVS. CORP., *supra* note 47, at 14.

158. Notably, in New York City courts, 48 percent of pro se parties are Black. OFF. OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUST. INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (2005), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/nyselfrepresentedlitigants.pdf [https://perma.cc/KZ3C-39N2], even though only 24 percent of New York City's population is Black. *QuickFacts: New York City, New York*, U.S. CENSUS, https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST120219 [https://perma.cc/3RSE-BWKH]. We suspect that a very high percentage of these pro se parties are also women.

159. Many states, although not all, now guarantee counsel in cases regarding termination of parental rights. Importantly, however, such appointment is often inconsistent and can be too late in the proceedings to make a difference. *See* Sankaran, *supra* note 111, at 2. Some state and local jurisdictions have also begun legislating a right to counsel in other subject areas, but these jurisdictions are limited and the rights are rights in name only; they are contingent on

relegating most court-involved women to a secondary legal status in which their rights are not protected by counsel has substantial implications for gender equality in the justice system and beyond.

In sum, this Part makes an important contribution toward demonstrating the gender of *Gideon*. Lauren Sudeall has made the argument that criminal and civil siloes in the justice system are artificial constructs because movement between the two spheres is quite fluid and the same people are often involved in both.[160] She uses the example of a criminal conviction precipitating eviction from public housing to illustrate how one act can lead to punitive consequences in both civil and criminal courts.[161] Our contention, however, is that we can make an educated guess about who incurs the criminal conviction and who is later evicted. More likely than not, it is the son, grandson, brother, boyfriend, or husband who is convicted of the criminal act while the woman herself is the public housing leaseholder who ends up evicted as a result.[162] The distinction we make is that men are subject to compulsory encounters with the justice system through criminal law while women are subject to compulsory encounters with the justice system through civil law. Granting a constitutional right to counsel in only criminal cases raises the troubling possibility of a skewing effect that subjugates women's legal rights and interests and has broader, democratic implications for the role of courts in society.

There are legitimate counterarguments that could be raised to undermine the claims made in this Part. How can we extrapolate gender data about civil litigants from a handful of studies? How can we be sure women in civil courts are indigent and would therefore be entitled to government-appointed counsel? The

political and financial capital. *See, e.g.*, Sabbeth, *Housing Defense*, *supra* note 7, at 83 (noting that New York City's pioneer legislation on the right to eviction defense counsel stated explicitly that it did not create any right that could be enforced against the city).

160. Lauren Sudeall, *Integrating the Access to Justice Movement*, 87 FORDHAM L. REV. ONLINE 172, 172–74 (2018). One of us previously made a similar observation:

> The communities of persons unable to afford counsel in civil and criminal proceedings overlap substantially. Both are disproportionately poor people of color, and their criminal justice and civil justice needs are interrelated. Lawyers have a role to play in supporting their clients' equal participation in, and access to the resources of, civil society. The prioritization of criminal over civil counsel exaggerates the divide between the functions these lawyers serve and neglects the significance of accessing economic and political resources for both client populations.

Sabbeth, *Discounted Danger*, *supra* note 7, at 931–32.

161. Sudeall, *supra* note 160, at 174.

162. Smith, *supra* note 63, at 555–56 (reporting that, in New York, 85 percent of public housing leaseholders evicted for someone else's criminal act are women). *See also* Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration*, 85 FORDHAM L. REV. 2579, 2583 (2017).

answer to all of these questions is simple: we cannot be sure. We intend to be provocative in raising questions about the gendered nature of *Gideon*. At a minimum, the data we present raise the specter of a serious gender issue that deserves much more exploration than it has received. We stress that rigorous, continued data collection on this issue should be of paramount importance, especially to courts. The Part that follows examines the constitutional doctrine that brought about the current state of affairs.

II. THE GENDERED JURISPRUDENCE

This Part examines the constitutional doctrine of the right to appointment of counsel from a feminist perspective. We revisit well-known doctrine, and, in contrast to all prior literature, we place gender at the center of the Court's jurisprudence. Surprisingly, the right to counsel has received relatively little attention from feminist scholars.[163] Application of feminist theory to the right to counsel is overdue and highly revealing. Along with critical race theory and critical legal studies,[164] feminist theory has challenged the notion of law's neutrality and exposed how choices of legal procedure reflect substantive values.[165] By highlighting the lived experiences of women,[166] feminist theory has contributed to

163. Notable exceptions include work by Martha F. Davis, Risa Kaufman, and Heidi Weidleitner. Martha F. Davis noted the gender disparity in *Participation, Equality, and the Civil Right to Counsel: Lessons From Domestic and International Law*, 122 YALE L.J. 2260, 2269 (2013), and all three made mention of it in *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 787 (2014).

164. *See, e.g.*, Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 749 (1994) (citing DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992)); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721, 740 (1993); Amna Akbar & Mari Matsuda, *Politics In, Of, and Through the Legal Academy: Akbar Interviews Matsuda, Part 1*, L. & Pol. Econ. Project (Jan. 18, 2021), https://lpeproject.org/blog/politics-in-of-and-through-the-legal-academy-akbar-interviews-mastuda-part-1 [https://perma.cc/7SY8-EGEV]; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 299 (1992).

165. *See, e.g.*, Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223, 1230 (1993) (describing relationship between feminist theory and civil procedure); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 297 (2013) (highlighting how legal processes can be used as "degradation ceremonies," whose functions include "the legitimation of material inequality, the perpetuation of social and economic myths, the policing of status quo distributions of property, and the satisfaction of the public's emotional desire for sadomasochistic ritual").

166. *See* Schneider, *supra* note 165, at 1226 ("Consciousness-raising begins with the lived experiences of women, uses personal experience to understand, create, and inform theory, and then reshapes theory based on the insights gained from exploring personal experience.").

unearthing law's perpetuation of injustice and its potential contributions to social change.[167] Its insights enrich our understanding of the Court's jurisprudence on the right to counsel and help us identify gender as a critical, but unexplored, feature of the doctrine.

The first and only time the Supreme Court considered a right-to-counsel argument advanced by a woman was in 1981, in *Lassiter v. Department of Social Services*.[168] The Court in that case evaluated whether termination of parental rights justified appointment of counsel and concluded that, as a general rule, it did not. As in the Court's prior right-to-counsel jurisprudence, the justices reached their decision by assessing the value of the interests at stake. They asked themselves: What was Ms. Lassiter at risk of losing, and was it as important as the liberty interests of the men who had come before her?[169] No, the majority ultimately decided, the liberty interests implicated by the state's complete destruction of Ms. Lassiter's relationship with her son did not necessitate the assistance of counsel.[170] In *Lassiter*, the majority authorized the State of North Carolina to deprive a Black woman of her role as a mother to her youngest child, without providing any legal representation prior to terminating the relationship. That decision defined the contours of the right to counsel and set the stage in the lower courts for thirty years.[171]

In 2011, the Court heard another case at the intersection of family law and the civil right to counsel, *Turner v. Rogers*.[172] The Court was then unanimous that a father facing civil contempt for failure to pay child support did not deserve a guarantee of representation.[173] Although this litigant was a man, by 2011, the *Lassiter* doctrine had so delegalized[174] the gendered sphere of family courts that even the Court's liberal justices could not envision constitutionalizing the right to counsel in the civil space. Indeed, the Court noted that counsel was not necessary because the female opponent was also unrepresented, evincing a race-

167. Robin West, *Introduction* to RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 1, 1 (Robin West & Cynthia Grant Bowman eds., 2019).
168. 452 U.S. 18 (1981).
169. *Compare Lassiter*, 452 U.S. at 25 ("[I]t is the defendant's interest in personal freedom . . . which triggers the right to appointed counsel."), *with* Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (explaining that the decision turned on "the possibility of a substantial prison sentence").
170. *Lassiter*, 452 U.S. at 26–27.
171. *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36 (2013) (summarizing developments that followed *Lassiter*).
172. 564 U.S. 431 (2011).
173. *Id.*
174. *See infra* note 202 and accompanying text (describing "delegalization" of poor people's courts); Subpart II.B.4 (describing *Turner* majority's treatment of poor people's concerns as simple and not appropriate for formal legal procedures).

to-the-bottom approach that condemned family disputes to a lawyerless process. As we will show, right-to-counsel doctrine has evolved to neglect interests associated with women, and this continues to distort the functioning of the civil justice system today.

We begin with a short discussion of the relationship between gender and law, and we then turn to how this manifests in the context of the right to counsel.

A. The Gender of Law

As numerous scholars have shown, law often subordinates women. Feminist legal theory "attempts . . . to map the contours of the ongoing legal supports for gender- and sex-based subordination in existing law and to explain the persistence of those supports in an era characterized by a liberal consensus on very basic norms of nondiscrimination and formal equality."[175] It also seeks to envision how the law can serve as a "potential vehicle for equalizing and improving the quality of life."[176] Feminist theory has taken myriad, diverse, and sometimes divergent forms,[177] but all share a "recognition that law is not neutral but rather carries the traces of political and economic exclusion and exploitation."[178]

One aspect of exclusion is the failure of dominant society to see the interests of marginalized people as important. In the field of law, this can take the form of the legal system failing to recognize the experiences of marginalized people as matters of law.[179] The transformation of grievances into legal claims, or interests into rights,

175. West, *supra* note 167, at 1.
176. West, *supra* note 167, at 1.
177. *See, e.g.*, Angela P. Harris, *Women of Color in Feminist Jurisprudence*, *in* FEMINIST JURISPRUDENCE, WOMEN, AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY 283, 283 (1999).

> Feminist jurisprudence examines law for what it has done to women and for women as a class: not just at the level of rules and policies, but at the level of procedure, concepts, and even language. The recognition that law is not neutral but rather carries the traces of political and economic exclusion and exploitation has increasingly led women of color to consider what the law has done for and to them as a class.

See also West, *supra* note 167, at 15–21 (describing "division and multiplicity" of feminist legal theories).
178. Harris, *supra* note 177, at 283.
179. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631, 636–37 (1981) (discussing recognition of injuries and injustices that can be transformed into legal claims, and noting the need to attend to equality in the "naming, blaming, and claiming" of grievances); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 741 (2002) (highlighting treatment of poor people's interests as needs to be met by charity, not as rights to be demanded).

requires that the legislature and courts appreciate the value of what is at stake. The recognition of a right to counsel connotes recognition of the imperative nature of the subject at issue.[180] Too often, the courts have failed to recognize the significance of the interests of women.[181]

1. Constitutional Origins

Feminist scholars have argued persuasively that U.S. constitutional law has never robustly protected women's rights.[182] As one example that persists today, sex discrimination is not subject to strict scrutiny.[183] The failure to prioritize women can be attributed in part to the underrepresentation of women in government.[184] The U.S. Constitution was designed by propertied white men, and they focused on promoting liberty for themselves. The original document sanctioned slavery and implicitly excluded women from the promise of equality.[185] Even when the Fourteenth Amendment was added, it referenced protection only for males.[186] The right to vote regardless of race was not recognized until the Fifteenth Amendment, and women's suffrage was not recognized until the Nineteenth.[187] Full constitutional inclusion was not intended for people other than those who resembled the drafters.

180. *See* Sabbeth, *Housing Defense*, *supra* note 7, at 95 (describing a local legislature's decision to provide counsel in eviction cases, and explaining how such recognition of "the potential loss of a home [as] a legal event important enough to warrant appointment of counsel . . . [recognizes] that Black women's problems deserve full recognition as legal claims").

181. *See* Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 152 (2012) ("African American women are invisible in the court system and American society.").

182. *See, e.g.*, Jill Elaine Hasday, *Women's Exclusion From the Constitutional Canon*, 2013 U. ILL. L. REV. 1715 (2013); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

183. Craig v. Boren, 429 U.S. 190, 197 (1976) (concluding that sex discrimination should be subject to intermediate scrutiny: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

184. Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337, 2342–45, 2361 (2019).

185. *See* Julie A. Nice, *The Gendered Jurisprudence of the Fourteenth Amendment*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 343, 344 (Robin West & Cynthia G. Bowman eds., 2019).

186. U.S. CONST. amend. XIV.

187. Scales-Trent, *supra* note 182, at 30–32 (describing the legal position of Black women in relation to the Fifteenth and Nineteenth Amendments).

The Supreme Court, populated disproportionately by men, has repeatedly subordinated women's interests. When presented with opportunities to interpret the Constitution more generously, the Court has too often rejected them. The Court entrenched the institution of slavery,[188] blessed the denial of the vote to women,[189] and stripped Congress of the ability to regulate private discrimination.[190] In the past century, the Court has sometimes come out on the side of equality,[191] but the constitutional precedent on which we rely is grounded in a long, deep history of discrimination against women and people of color.[192]

2. "Women's Sphere"[193]

For centuries, the exclusion of women from positions of economic and political power was justified, particularly for white women, by appeals to their natural fitness for domestic pursuits.[194] Families, children, and the home defined the private sphere, gendered as feminine and set apart from the roughness of

188. *E.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (ruling that Black people were not citizens so did not have standing to bring claims, and denying plaintiff's claim to freedom).

189. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (concluding that citizenship does not confer the right to vote, and upholding state legislation that barred women from voting).

190. *See* The Civil Rights Cases, 109 U.S. 3, 23–24 (1883) (ruling that the Thirteenth and Fourteenth Amendments regulated only state conduct, not private conduct, and permitting operation of white-only establishments).

191. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Obergefell v. Hodges, 576 U.S. 644 (2015); *cf.* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020) (arguing that over the past fifty years the Supreme Court has promoted inequality).

192. *See* ROBIN WEST, CARING FOR JUSTICE 97 (1997) ("[T]he substantive law . . . is the product of our legal history, and consequently bears the mark of its historic gender bias.").

193. NANCY COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND 1780–1835 (2d ed. 1977); *see* Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 16 (1993) (describing "the ideology of separate spheres for men and women").

194. Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, *in* WOMEN, THE STATE, AND WELFARE 92, 97 (Linda Gordon ed., 1990) ("Women's exile from the political community was premised on her natural vocation as wife and mother."); Judith Resnik, *Naturally Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1685 (1991) (explaining that women's association with domestic life has contributed to a view of federal courts as no place for women); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (concurrence explained that the state could deny a woman a license to practice law because the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a maximum-work-hours restriction for women because of women's weaker physique and maternal function).

public life and institutions.[195] Feminists have successfully challenged the notions that domesticity is naturally feminine and that women should avoid work outside the home.[196] Moreover, scholars have demonstrated that myths of domesticity have been grounded in racial constructs; poor women, women of color, and Black women in particular, have been neither expected nor permitted to occupy women's sphere.[197] Yet the association of women with matters of the family has retained resonance.[198]

Perhaps unsurprisingly, and related to *Gideon*'s gender, the legal academy and the courts have treated family law as a subject of low status.[199] Adjudication of family law matters has largely been relegated to special divisions of state courts called family courts,[200] which are marked by their informality and the discretion enjoyed by the judges.[201] As Elizabeth MacDowell has explained, the family courts are "delegalized."[202]

Although questions of constitutional law and family law can overlap, the U.S. constitutional system reserves the jurisdiction of the federal courts for matters recognized as important, and there is a common assumption that "prestigious, powerful, centralized, and federal institutions like the United States Supreme

195. *See* Mink, *supra* note 194, at 93–97 (describing gendered and racialized constructions of citizenship and political identity in U.S. history).

196. *But see* Roberts, *supra* note 193, at 22 ("[W]hite, middle-class women gained entry to the male public sphere by assigning female domestic tasks to Black women, rather than by demanding a fundamental change in the sexual division of labor.").

197. *See* Mink, *supra* note 194, at 93 (describing how "race anxiety" contributed to the social construct of white women as "the makers of men, as the wives and mothers of citizens"); Scales-Trent, *supra* note 169, at 27 (explaining that the "history of black women as workers followed slave history by reinforcing the view of black women as either domestic servants or manual laborers"); Roberts, *supra*, note 193, at 15 ("Black women can never attain the ideal image of motherhood, no matter how much we conform to middle-class convention, because ideal motherhood is white.").

198. *See* Natasha Geiling, *Men and Women Think on Family Matters Equally, but Women Get More Stressed*, SMITHSONIAN MAG. (Aug. 12, 2013), https://www.smithsonianmag.com/science-nature/men-and-women-think-on-family-matters-equally-but-women-get-more-stressed-27826920 [https://perma.cc/FKR5-EK34] ("[O]nly 21% of [people] surveyed believed that a working mother benefits the child . . . ."); Roberts, *supra*, note 193, at 17 ("The gendered division of labor continues to be an aspect of women's subordination.").

199. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 828 n.4 (2014) (collecting literature demonstrating the "low status" of family law).

200. *See* Elizabeth MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 485 (2015).

201. *Id.* at 484.

202. *See id.* at 485–98 (describing history and philosophy of family court as "delegalized" and arguing this is connected to the subordination of poor litigants of color); *see also id.* at 490 ("Rather than child protection, family court reformers were motivated by rejection of legalistic approaches to solving problems viewed as social in nature . . . .").

Court" do not engage in family law.[203] Indeed, the well-settled domestic relations exception provides that federal courts should not handle family matters, even when federal jurisdiction would otherwise attach.[204] Federal judges have in some cases applied this principle to exclude not only cases of diversity jurisdiction but also those raising federal questions.[205] The exclusion of these cases from federal question jurisdiction "manifests an attitude that federal family law questions and litigants are less important or worthy than other federal questions."[206]

Notably, feminist scholars have not typically extended their critiques of federal exclusion beyond family law. Yet other civil justice matters, such as eviction and debt collection, are also ignored by federal courts and relegated to informal and delegalized tribunals.[207] These fora possess limited jurisdiction and are staffed by judges who show little inclination to enforce the law.[208] The women who appear as defendants in these courts, disproportionately women of color, are hounded by legal matters related to housing stability and consumer debt, problems often arising from their entrenched domestic role as primary or sole caretakers for dependent children, with all the financial stress attendant to that role.[209] While these cases do not expressly invoke family law, their origin in the domestic sphere and significant impact on women's lives lurk right below the surface.[210] For a host of reasons connected directly to gender and race, women of color are particularly vulnerable to the type of financial shocks that lead to eviction and debt collection, and when they are dragged into court as a result, they are left

203. JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 7 (2014).
204. *See* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1125–26 (1994).
205. *See* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 134 (2009).
206. *Id.* at 139.
207. *See* Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls, in* THE POLITICS OF INFORMAL JUSTICE 119, 119–20 (Richard L. Abel ed., 1982) (describing eviction court); Sabbeth, *Housing Defense*, *supra* note 7, at 78–80 (same); Sabbeth, *supra* note 30 (same); HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR (2016) (describing debt collection courts), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor [https://perma.cc/2KGE-T9UV].
208. *See* Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 925 (2015) (highlighting empirical research demonstrating that judges often don't enforce the law on the books); Sabbeth, *Housing Defense*, *supra* note 7, at 79 (summarizing eviction court literature).
209. *See supra* Part I.
210. Sabbeth, *Housing Defense*, *supra* note 7, at 95–96 (arguing that eviction is an issue deserving feminist analysis).

without any promise of legal protection to guard against abuse by powerful adversaries.[211]

B. The Gendered Evolution of the Right to Counsel

We argue that right-to-counsel jurisprudence offers an important but overlooked illustration of the Supreme Court prioritizing the interests of men while marginalizing the interests of women, particularly Black women. The two key cases on the right to counsel are *Gideon v. Wainwright* and *Lassiter v. Department of Social Services*. In one, a white man fought for his physical liberty, and in the other, a Black woman fought to maintain a connection to her child. The former was celebrated but the latter dismissed. These cases have shaped modern doctrine from the inception of a constitutional right to counsel, to the present.

1. Clarence Gideon's Liberty Interest

The Supreme Court has historically approached the right to counsel as a question of liberty.[212] In 1932, the Supreme Court ruled in *Powell v. Alabama* that capital prosecution without appointed counsel violated the Fourteenth Amendment.[213] The opinion explained that "the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political

211. *See supra* Subpart I.B; *see also* Sabbeth, *Discounted Danger*, *supra* note 7.

212. This discussion is limited to Supreme Court cases explicitly considering a right to appointment of counsel, but the reader may also be interested in the broader topic of court access. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (arguably the high-water mark of court access doctrine); Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1480 (2008) ("The term 'access to the courts' can mean . . . physical access, ... individuals' ability to obtain representation by counsel and ability to pay filing fees and other litigation costs[,] . . . . the availability of a private right of action enabling a litigant to file a claim, the availability of a remedy enabling her to obtain relief . . . [, or] the power of courts to hear claims altogether."); Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) ("Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.") (internal citations omitted); Robert Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 840 (2002); Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons From Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1489 (2011). *See also* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 82–89 (2011).

213. 287 U.S. 45, 71 (1932).

institutions."[214] The Justices soon broadened the right beyond capital crimes to all federal criminal cases that threatened "fundamental human rights of life and liberty."[215] In 1963, in *Gideon v. Wainwright*, the Court extended the rule to state cases, solidifying the right to appointment of counsel across the land.

Although the Sixth Amendment of the U.S. Constitution references a right to counsel, the Fourteenth Amendment was the linchpin of *Gideon*. The majority explained that, because of the fairness and due process principles of the Fourteenth Amendment,[216] the right to appointed counsel applied to the states.[217] Even Justice Harlan, who disagreed with the majority as to whether the Fourteenth Amendment fully incorporated the Bill of Rights as applicable to the states, highlighted his "agree[ment] with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment."[218] *Gideon* was grounded in the Justices' conception of basic fairness.[219]

The decision reflected the judges' sympathy for Clarence Gideon's position. The State of Florida had charged Mr. Gideon, a poor white man, with a felony, specifically breaking into a pool hall with the intent to commit a misdemeanor.[220] Explaining regretfully that appointment of counsel was only for capital offenses, the trial judge apologized repeatedly to Mr. Gideon for the state of the law.[221] Mr. Gideon continued pro se and was convicted by a jury.[222] While serving his sentence, he filed a habeas corpus petition.[223] The Supreme Court chose to hear his case.

Importantly, the Justices not only granted certiorari—deeming the case worthy of a hearing—but also appointed counsel on appeal.[224] They provided representation for Mr. Gideon so that they, and he, would have the benefit of an

214. *Id.* at 67 (internal quotations omitted).
215. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
216. Gideon v. Wainwright, 372 U.S. 335, 340–41 (1963).
217. *Id.* at 342.
218. *Id.* at 352.
219. *Id.* at 343–44 (describing the appointment of counsel as fundamental to a "fair trial").
220. *Id.* at 336–37.
221. *Id.* at 337 ("Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.").
222. *Id.*
223. *Id.*
224. *Id.* at 338.

attorney to fully brief the issues they were to consider.[225] It is difficult to imagine how they would have handled the proceeding without first appointing an attorney. Yet they did appoint an attorney, and with that benefit, the Court ruled in his favor.[226]

Gideon established the rule familiar today: an indigent criminal defendant facing the threat of incarceration is entitled to appointment of counsel.[227] The *Gideon* Court's decision did not depend on weighing the defendant's liberty interest against countervailing factors.[228] Nor did it depend on the length of time of the contemplated prison sentence.[229] Rather, the Court concluded that the criminal defendant's right to appointment of counsel is fundamental.[230]

2. Abby Gail Lassiter's Liberty Interest

The Supreme Court has only once considered a right-to-counsel argument presented on behalf of a woman. It decided *Lassiter v. Department of Social Services* in 1981, half a century after *Powell v. Alabama*.[231] Like Clarence Gideon, Abby Gail Lassiter raised a Fourteenth Amendment due process argument, but the Court approached the two cases quite differently. That difference is not explained

225. *See* Shaun Ossei-Owusu, *The Sixth Amendment Facade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1205 (2019) ("[The appointment of counsel] was a very strong signal that important events were in the course of taking place.") (quoting interview by Victor Geminiani with Abe Krash (Mar. 17, 1993), *in* NAT'L EQUAL JUST. LIBR. ORAL HIST. COLLECTION 1, 6 (Geo. Univ. L. Libr. 1993)).

226. *See id.* (highlighting that the Justices "did not appoint an unknown, they appointed a very distinguished lawyer.").

227. *Gideon*, 372 U.S. at 342–45; *see also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"). In *Scott v. Illinois*, the Court retreated, ruling that counsel is required only if the defendant is actually incarcerated, not "whenever prison is an authorized penalty." 440 U.S. 367, 368; *see id.* at 373–74 (1979) (denying appointed counsel to a defendant fined 50 dollars, even though the statutory penalty for his conviction included the possibility of a year in jail).

228. *Gideon*, 372 U.S. at 342–45; *see also Scott*, 440 U.S. at 369, 372–73 (citing *Argersinger*, 407 U.S. at 32–33, 37 n.7, 41) ("In *Argersinger* the Court rejected arguments that social cost or a lack of available lawyers militated against its holding . . . [and] conclu[ded] that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant ha[s] been offered appointed counsel to assist in his defense . . . .").

229. *Gideon*, 372 U.S. at 342–45; *see also Argersinger*, 407 U.S. at 30–31 ("We reject . . . the premise that . . . crimes punishable by imprisonment for less than six months may be tried . . . without a lawyer.").

230. *Gideon*, 372 U.S. at 344–45.

231. 287 U.S. 45 (1932).

by the text of the Constitution but by the difference in who and what came before the Court.[232]

Ms. Lassiter, a Black woman, was the mother of five children. A social worker took her second youngest, Billy, when he was an infant.[233] The Durham County Department of Social Services then sought to terminate the mother-son relationship permanently.[234] At the hearing regarding termination, the Department of Social Services was represented by a practiced assistant district attorney, while Ms. Lassiter was pro se.[235] In contrast to Mr. Gideon's experience, the trial judge in Ms. Lassiter's case was not troubled by the defendant's lack of counsel.[236] The attorney for the state offered to postpone the matter so that Ms. Lassiter could seek representation, but the judge announced that if Ms. Lassiter had wanted a lawyer, she would have obtained one, and he began the process of terminating her parental rights without delay.[237] The hearing transcript reveals a family court judge alarmingly unconcerned about the evidentiary foundations missing from the state's case—the party with the burden of proof—while laser-focused on failures of form by the unrepresented, Black, female defendant.[238] Not surprisingly, when the hearing concluded, the judge announced from the bench that he would sign the termination order, and Ms. Lassiter's relationship with Billy ended immediately.[239] Ms. Lassiter appealed, contesting the denial of her right to appointed counsel.[240]

232. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel . . . ."); *see also* Sabbeth, *Discounted Danger*, *supra* note 7, at 903–04 (explaining that, although the text of the Sixth Amendment guarantees *a* right to counsel, the Fourteenth Amendment ensures appointment for those unable to pay counsel on their own).
233. Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, *in* CIVIL PROCEDURE STORIES 509, 517–18 (Kevin M. Claremont ed., 2nd ed. 2008).
234. *Id.* at 521.
235. *Id.* at 510.
236. *See id.* at 522–23 (describing the colloquy between the judge and the prosecuting attorney on the question of whether to postpone the hearing so Ms. Lassiter could obtain an attorney).
237. *See id.* (noting that the judge concluded, "[s]he had ample opportunity to seek counseling," despite the fact that Ms. Lassiter had been detained in state custody on unrelated criminal charges in the months before the hearing).
238. *See id.* at 523–25 (citing Transcript of Evidence at 14, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79–6423)) (demonstrating that the court permitted the state to rely entirely on witnesses' hearsay, while interrupting and criticizing Ms. Lassiter for improper form when she sought to cross-examine those witnesses or failed to understand questions asked of her).
239. *See id.* at 532.
240. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981).

When the case reached the Supreme Court, the majority of the Justices did not see in Ms. Lassiter's situation any of the unfairness that informed its prior right-to-counsel opinions, and it did not take up any consideration of gender equity in its deliberations. It decreed that "fundamental fairness" was implicated only "where the litigant may lose his physical liberty if he loses the litigation."[241] Moreover, the majority fashioned a new "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[242] As the key language in the opinion demonstrates, the decision was reached at a time when it was still acceptable for male pronouns to be used as if neutral.[243] Indeed, the presumption of a male subject taking center stage in constitutional law was so engrained that the opinion in *Lassiter* repeatedly (and awkwardly) refers to the female appellant as "he."[244] It is not a stretch to suppose that the Justices, all men, saw the prototypical beneficiary of constitutional rights as a man.[245]

After reemphasizing the newly constructed presumption that a man's physical liberty is the only interest important enough to trigger a right to counsel, the Court then weighed the costs and benefits of appointing a lawyer in Ms. Lassiter's case.[246] The use of a cost-benefit analysis for a fundamental right is itself worthy of critique,[247] but for our purposes what should be recognized is the establishment of a two-track system of analysis. In one set of cases, the right to counsel is guaranteed (to a white man) by what the Court identified as "fundamental principles of liberty and justice,"[248] while in a parallel set of cases, the right to counsel is only available (to a Black woman) if it outweighs other social

241. *Id.* at 25.
242. *Id.* at 26–27. *See also id.* at 40 (Blackmun, J., dissenting) (challenging majority's assertion that precedent supports this presumption).
243. *See* Dennis E. Baron, *The Epicene Pronoun: The Word That Failed*, 56 AM. SPEECH 83, 83 (1981) (explaining that use of male pronouns as gender neutral was an "approved construction").
244. *Lassiter*, 452 U.S. at 25–27.
245. *See* Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMPAR. L. 507, 509–10 (2013) ("[F]raming in language biases the way that people process thoughts . . . . [F]raming in language shapes intuitions, usually unconsciously, thereby influencing the way that people frame their thoughts.").
246. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27–31 (1981).
247. *See* Davis, *supra* note 163, at 2279 (citing Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52–54 (1976)) ("[T]he balancing test of *Mathews* [*v. Eldridge*] . . . . tends to reinforce hierarchies of economic privilege and the status quo of access to justice, as what process is due rests on the value of that process to society.").
248. Powell v. Alabama, 287 U.S. 45, 67 (1932).

concerns.[249] In Ms. Lassiter's case, when the majority invoked the three-factor test of *Mathews v. Eldridge*—comparing the individual's interests, the risk of error without the requested intervention, and the state's interests[250]—it was forced to acknowledge the social importance of parental rights.[251] Despite this acknowledgement, the Court nonetheless deprived Ms. Lassiter of appointed counsel.[252] In sum, the Court flatly concluded that the right to parent was categorically less important than physical liberty.[253]

3. Devaluing Women's Interests

While multiple factors undoubtedly contributed to the difference in the outcomes of *Gideon* and *Lassiter*,[254] the Court's decision in *Lassiter* suggests a devaluation of interests associated with women. This is not to say the Justices were motivated by animus toward women. Rather, in 1981 the majority of these men simply did not appreciate women's issues—neither as individual rights[255] nor as public priorities.[256] A few prior analyses of *Lassiter* have highlighted the decision's significance for mothers, but we argue that the problem went still deeper: the Justices' disregard for women's interests shaped the Court's entire logic.[257]

249. *See* Sabbeth, *Discounted Danger*, *supra* note 7, at 899–902 (describing *Lassiter* opinion in more detail).
250. *See Lassiter*, 452 U.S. at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) ("The case of *Mathews* . . . propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.").
251. *See id.* ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' Here the State has sought not simply to infringe upon that interest, but to end it." (citation omitted)); *see also id.* at 38–40 (Blackmun, J., dissenting) (describing the liberty interests implicated by families and the significance of loss of parental rights); *id.* at 59 (Stevens, J., dissenting) (arguing that deprivation of parental rights is potentially more significant than the liberty loss occasioned by imprisonment).
252. *See, e.g.*, *id.* at 49 (Blackmun, J., dissenting) ("[R]ather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel.").
253. *Id.* at 26 (majority opinion) ("[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.").
254. Change in the Court's composition is chief among them.
255. *See infra* Subpart II.B.3.a.
256. *See infra* Subpart II.B.3.b.
257. *See* Colene Flynn, *In Search of Greater Procedural Justice: Rethinking* Lassiter v. Department of Social Services, 11 WIS. WOMEN'S L.J. 327, 340 n.85 (1996) ("What about from the mother's perspective? 'Sir, how would you feel if someone came and got your child and took it away like that?' Ms. Lassiter asked the judge.") (quoting Trial Transcript at 41, *In re* William L.

In addition to devaluing Ms. Lassiter's private liberty interest,[258] the Court failed to see the preservation of her family as an interest of broader society. One could critique the *Lassiter* decision on various grounds,[259] but what is particularly telling is the majority's devaluation of the relationship between a Black mother and her child. The majority indicated, both explicitly and implicitly, that it did not view that relationship to be deserving of state support. The most basic demonstration was its conclusion: the state need not offer counsel at government expense to provide the relationship with a fully articulated defense.[260] Even before reaching that conclusion, however, in the process of weighing the *Mathews* factors,[261] the Court revealed its attitude: the government interest in the case did not include preservation of Ms. Lassiter's family.

a. Individual's Interest

The first and arguably most powerful prong of the *Mathews* balancing test is the private interest at stake for the individual, but the Court overlooked the importance of a mother's loss of her child.[262] As Robin West explains, the harms

Lassiter (N.C. Dist. Ct. Sept. 7, 1978) (No. 75-J-56)); Brooke D. Coleman, Lassiter v. Department of Social Services*: Why Is It Such a Lousy Case?*, 12 NEV. L.J. 591, 596 (2012) (highlighting the "dismissive view of mothering").

258. *See* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 342 (1999) ("[A] feminist critique of the value system that ranks autonomy over connection and the public over the domestic sphere supports the argument that the loss of the care and companionship of one's child constitutes as grievous a deprivation of liberty as imprisonment."); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIA. L. REV. 29, 45–46 (1987) ("I have suggested that the liberty interest in *Lassiter v. Department of Social Services* might have been interpreted differently if women had construed liberty to include the right to be connected to one's child, not just the right to be 'free' from governmental interference."); Sabbeth, *Discounted Danger*, *supra* note 7, at 910 (critiquing the majority's interpretation of liberty).

259. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 35–59 (1981) (Blackmun, J., dissenting); Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 364 (2005).

260. *Cf. supra* Subpart II.B.1 and sources cited therein (highlighting evidence that the Court recognized Mr. Gideon's position deserved a skillfully presented defense).

261. *See Lassiter*, 452 U.S. at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (describing the three-factor balancing test to include the private interest at stake, the government's interest, and the risk of error in the absence of the procedure requested).

262. *See* WEST, *supra* note 192, at 148 ("The harms mothers sustain when forced to separate from their children is also nowhere recognized, much less compensated, in family law norms."); *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting) ("A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term

women suffer "often do not 'trigger' legal relief in the way that harms felt by men alone or by men and women equally do. . . . [T]he rights and remedies universally available . . . are for . . . *those harms* which, historically, have been suffered by, recognized by, and taken seriously by, men."[263] Historically, the parent-child relationship has been associated with and maintained predominantly by women.[264] It is therefore unsurprising that U.S. jurisprudence has given less recognition to the destruction of that relationship than it has to harms, like imprisonment, experienced more often by men.

Moreover, government intervention in and destruction of Black women's relationships with their children has a particular history in the United States. The *Lassiter* Court's failure to recognize the liberty interest at stake for Ms. Lassiter suggests, at best, ignorance about that history. Since before the inception of the nation, and continuing to the present, Black women have borne the brunt of involuntary separation from their children.[265] As Dorothy Roberts and others have highlighted, this began with the forcible destruction of Black families and selling of children during slavery, and it continues up through today, as courts and caseworkers disproportionately find Black women unfit for mothering.[266] The value of caretaking activities has generally received inadequate financial and cultural recognition in the United States because of the devaluation of women's work, but the mothering work performed by Black women has been particularly devalued.[267]

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and also may permanently deprive her of her freedom to associate with her child. . . . Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.").

263. *See* WEST, *supra* note 192, at 96–97.

264. *Id.* at 128–29.

265. *See* Heron Greenesmith, *Best Interests: How Child Welfare Serves as a Tool of White Supremacy*, POL. RSCH. ASSOCS. (Nov. 26, 2019), https://www.politicalresearch.org/2019/11/26/best-interests-how-child-welfare-serves-tool-white-supremacy [https://perma.cc/5D7F-LRAJ] ("There can be no discussion of U.S. child welfare without an acknowledgment of the destruction of families that began with colonialism and the slave trade. . . . The impact of family destruction through slavery and genocide is still felt today . . . .").

266. *See* ROBERTS, SHATTERED BONDS, *supra* note 93, at 66–67; *see also* Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services [https://perma.cc/H5VA-Q5QN] ("As [caseworker] Sarah reflects on her experience [working at a child welfare agency], she concludes that the racial disparity in the numbers of children who were removed came from a deep-seated assumption that many Black parents are incapable of parenting.").

267. *See* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 96–107 (2d ed. 2000); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 45–68, 173–200 (2d ed. 2000); Dorothy Roberts, *The Value of Black Mothers'*

Further, the pain caused by the destruction of bonds between Black women and their children has been glossed over so that government actors have been able repeatedly to intrude on Black women's mothering without regret or restraint. As noted earlier in Part I, Black women and their children are dramatically overrepresented in the child welfare system, one which Roberts has argued persuasively functions primarily as a "family policing system" that destroys Black families.[268] Given the systematic, racialized trauma of the state ripping Black children from their families, it is abundantly clear that Ms. Lassiter's identity as a Black mother was especially relevant to interpreting her relationship to the state and her right to liberty from the state's intrusion. Yet that context never influenced the Court's valuation of what was at stake for her.[269]

In contrast, the *Gideon* decision was issued with keen awareness of context, specially about race. The case arose during the height of the Civil Rights Movement and reflected the justices' concern about Black men's encounters with racist police and prosecutors.[270] Scholars have described *Gideon*, and the line of cases of which it is a part, as motivated by a concern for racial justice.[271] Although Mr. Gideon was white, that arguably made it easier for the Justices to accomplish their objectives without stoking controversy.[272] As Shaun Ossei-Owusu notes, "race and notions of 'deservingness' simmered underneath the surface" of the popular response to the decision.[273] Mr. Gideon's status as an ordinary white man

Work, *in* CRITICAL RACE FEMINISM 312, 313–14 (Adrien Katherine Wing ed., 1997); Mink, *supra* note 194, at 92–122; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 650–51 (2009).

268. *See* ROBERTS, TORN APART, *supra* note 93.

269. Even the *Lassiter* dissent, which is more sympathetic, fails to grapple with the historic and gendered context of its opinion. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 35–59 (1981) (Blackmun, J., dissenting).

270. *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998) ("The need that gave birth to the existing criminal procedural regime was institutionalized racism. Law enforcement was a key instrument of racial repression . . . ."); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 85 ("It is hard to overstate the sense of urgency driving the Court's concern over racial discrimination in the enforcement of the criminal law.").

271. *See* Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2246 (2013) ("*Gideon* was not explicitly or obviously a case about race. Yet, scholars persuasively contend that *Gideon* was part of the Court's response to legal oppression faced by African Americans."); Ossei-Owusu, *supra* note 225, at 1204 ("[T]he Court was quite purposeful in picking this case as its vehicle to expand the right to counsel, in part because of race."); Sabbeth, *Housing Defense*, *supra* note 7, at 72–73 (summarizing similar literature).

272. *See* Ossei-Owusu, *supra* note 225, at 1204–07 (describing the sympathy that Mr. Gideon inspired as a white man and highlighting that his case was handpicked by the Court "as its vehicle to expand the right to counsel, in part because of race").

273. *Id.*

allowed for a "David-and-Goliath" story of "rugged individualism" that remains heralded in the "popular imagination" and "legal lore."[274] Mr. Gideon's whiteness made him an ideal vehicle for setting new precedent, but that precedent was aimed at racial equality. Indeed, multiple historians have concluded that *Gideon* and, more generally, the Supreme Court's criminal procedure jurisprudence of that time was developed largely to protect Black men from the Jim Crow justice system in the U.S. South.[275] Yet in *Lassiter*, protection for Black women was not a priority.[276]

b. State's Interest

The *Lassiter* majority also failed to recognize the preservation of Ms. Lassiter's family as an interest of the state. In weighing the three factors of the *Mathews v. Eldridge* test—the individual's interests, the risk of error without the requested intervention, and the state's interests—the *Lassiter* majority identified the state's interests as "the welfare of the child" and an "accurate and just decision," but it did not recognize the protection of parent-child relationships as a state interest.[277] The majority of the Court assumed that protecting the parent-child relationship was solely a personal concern.

Even Justice Blackmun's dissent did not explicitly recognize protecting the family unit as an interest of the state. Justice Blackmun marshaled the relevant statute for the proposition that "North Carolina is committed to 'protect[ing] all

274. *Id.* (citing KAREN HOUPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 63 (2013)).

275. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–77 (2000) (providing a historical account of criminal procedure developed in reaction to Jim Crow); Mayeux, *supra* note 15, at 18 (collecting literature); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1395–96 (2004) ("For a Court presumably interested in protecting [B]lack [people] from Jim Crow justice, extending the right to counsel to the states was attractive . . . . [I]t gave [B]lack defendants a sorely needed legal advocate to argue on their behalf. . . . and . . . it increased the opportunities for judicial oversight of suspect Southern courts.").

276. Nowhere in the Court's opinion or in any briefing for the case is gender raised as a central issue. The surprising lack of focus on gender extended even to amici that represent organizations promoting the interests of women. *See, e.g.*, Brief for the National Center on Women and Family Law, Inc. et al. as Amici Curiae Supporting Petitioner at 31, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423) (raising the right to counsel as effective in mitigating bias but glossing over the disproportionate gender impact). No other party or amicus brief raised gender at all.

277. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981). *Cf.* MacDowell, *supra* note 200, at 490–91 (highlighting that the state has historically promoted conciliation in divorce).

children from the unnecessary severance of a relationship with biological or legal parents.'"[278] Yet the statute refers to protection of children only. It does not mention protection of the parents, nor of other family members like siblings or grandparents,[279] nor does it say anything about the importance of keeping a family unit intact.

Extending Maxine Eichner's theory of a supportive state to appointment of counsel, we can see how the Court's analysis in *Lassiter* could have been different. In contrast to the traditional liberal view of the state primarily as a dangerous actor whose power must be restrained, Eichner paints a portrait of the state as supportive.[280] As she and Martha Fineman have suggested, the prioritization of physical independence over familial bonds reflects a mythologized autonomous subject and a failure to recognize the significance of the family as a core social institution in a democracy.[281] Eichner advocates for structuring society to account for the significance of caretaking work and the importance of families.[282] A supportive state would recognize the value of families and help them succeed.[283] Indeed, caretaking would be recognized and supported as essential to democracy.[284]

Notably, the Court's decisions appear to have recognized a greater liberty interest in the right not to care for one's family than the right to care for it. Perhaps by coincidence, on the same day that the Court issued the *Lassiter* decision regarding the due process right to be a mother, it issued a different decision

278. *Lassiter*, 452 U.S. at 47 (Blackmun, J., dissenting) (citing N.C. GEN. STAT. § 7A-289.22(2) (1980)).

279. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494, 509 (1977) (Brennan, J., concurring) (noting that extended family connections are of particular importance for Black families).

280. MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010).

281. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

282. EICHNER, *supra* note 280, at 10–12 ("[F]amilies properly form a vital part of the caretaking networks necessary for flourishing citizens and a flourishing society . . . . Meanwhile, the state bears responsibility for structuring societal institutions in ways that help families meet their caretaking needs and promote adequate human development.").

283. *See* EICHNER, *supra* note 280, at 123 (arguing that the state should provide economic and social support to aid the flourishing of healthy relationships, rather than punish families for failing to perform independently). *But see* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 319 (2014) (responding to feminist theories of the supportive state with a reminder of the punitive elements of the state, especially for poor women of color).

284. *See also* JOAN C. TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE 7 (2013) ("Democratic politics should center upon assigning responsibilities for care, and for ensuring that democratic citizens are as capable as possible of participating in this assignment of responsibilities.").

regarding the due process right not to be a father. The mother lost, while the father won.[285] In *Little v. Streater*, the Court ruled unanimously that requiring an indigent father in a paternity action to cover the cost of a paternity test violated due process. The justices were particularly concerned about the imposition of family ties: "Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship."[286]

The majority of the Justices concluded that preserving a mother's relationship with her child was less imperative than protecting a man's autonomy from such a relationship.[287] Dissenting in *Lassiter*, Justice Blackmun acknowledged this irony:

> I deem it not a little ironic that the Court on this very day *grants*, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity . . . . There is some measure of inconsistency and tension here, it seems to me. I can attribute the distinction the Court draws only to a presumed difference between what it views as the "civil" and the "quasi-criminal" . . . . Given the factual context of the two cases decided today, the significance of that presumed difference eludes me.[288]

To be fair, in comparing the putative father's interest protected in *Little* and the biological mother's interest not protected in *Lassiter*, one might surmise that the discrepancy reflects the larger expense of appointment of counsel, as compared to paternity tests. Yet the majority opinion explicitly denied that cost considerations shaped their decision.[289]

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285. *See* Gustafson, *supra* note 165, at 304 ("Both low-income men of color and low-income women of color are treated as marginal and are subject to degradation ceremonies. For women, however, the ceremonies are somewhat different, in part because the negative stereotypes and the behaviors labeled deviant are different for women and often revolve around motherhood.").
286. Little v. Streater, 452 U.S. 1, 13 (1981).
287. In other decisions, the Court has also recognized the due process rights of people seeking liberation from familial relationships but not those seeking support for familial caretaking. *Compare* Boddie v. Connecticut, 401 U.S. 371 (1971) (ruling that due process requires waiving the filing fee for indigent persons seeking to divorce), *with* United States v. Kras, 409 U.S. 434 (1973) (finding no due process violation for failure to waive filing fee for bankruptcy action, though father needed bankruptcy relief to care for sick child).
288. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 58 (1981) (Blackmun, J., dissenting).
289. *Id.* at 28 (majority opinion) ("But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the 'potential costs of appointed counsel

Other explanations also prove unsatisfying. One of the factors that the *Little* majority stated had influenced the holding was the state's role as a party in the proceeding,[290] but this significant factor did not move the Court in *Lassiter*, despite the fact that the state's role was even more direct there. Indeed, the assistant district attorney prosecuted the case against Ms. Lassiter, and the relief he obtained was the state taking her child away from her. In *Little*, the adversary of Mr. Little was not the state but the child's mother.[291] In both *Little* and *Lassiter*, the mothers' arguments lost.

Ultimately, the *Lassiter* majority simply determined that a Black woman losing her child was not important enough to warrant representation. Tellingly, Justice Burger's concurrence indicated that Ms. Lassiter's due process argument regarding her right to counsel was not even worthy of consideration. In disdainful tones, he complained that the Court should never have granted her petition to be heard.[292]

4. The Right to Counsel Today

The *Lassiter* decision has defined the field of the right to counsel for civil litigants.[293] It cemented a two-track system, whereby civil litigants' demands for representation are treated as interests to be considered among competing factors, in contrast to criminal defendants' rights that, as the Supreme Court explained in *Powell*, "cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[294] The Court did not return to the right to counsel for civil

in termination proceedings . . . is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions.'") (quoting Brief of Respondent).

290. *See Little*, 452 U.S. at 9.

291. Although the mother was the adverse party, the Court was concerned about the role of the state because Ms. Streater was compelled as a condition of receiving public benefits to name the child's father and participate in the case. *Id.* Ironically, the Court overlooked comparable dynamics in *Turner*. Compare *id.*, with *infra* note 304 (discussing how the Court in *Turner v. Rogers* neglected that Ms. Rogers, too, was compelled by the State to pursue that action).

292. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 34 (1981) (Burger, J., concurring) ("Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a 'candidate' for dismissal as improvidently granted.").

293. Before *Lassiter*, the Court recognized a right to counsel in select civil matters that were quasi-criminal and involved imprisonment, such as cases that threaten a juvenile with confinement, *In re* Gault, 387 U.S. 1 (1967), or a prisoner with transfer to a mental health facility, Vitek v. Jones, 445 U.S. 480 (1980).

294. Powell v. Alabama, 287 U.S. 45, 67 (1932); *see* Sabbeth, *Discounted Danger*, *supra* note 7, at 895–905 (describing "divergent doctrine on criminal and civil counsel").

litigants for many decades. By the time it did, the die had been cast. Criminal cases were understood to require counsel as a core principle of the American legal system. The civil side was left behind.

Thirty years after *Lassiter*, the Court heard *Turner v. Rogers*.[295] A trial judge had ordered a noncustodial father to pay child support and then held him in civil contempt, and sent him to jail for failure to pay.[296] On appeal, Mr. Turner argued that he should have been appointed counsel at the contempt hearing, which resulted in substantial jail time, but not one of the nine Justices agreed.[297] Instead, the Court doubled down on its insistence that civil matters be treated as categorically less important than criminal matters and less strictly governed by legal rights.

As in *Lassiter*, the majority in *Turner* avoided discussion of fundamental rights and instead used the balancing approach of *Mathews v. Eldridge*.[298] As in *Lassiter*, the Court fashioned a new twist for *Mathews* that overcame the individual interest at stake.[299] Even though here the interest at stake was precisely the one that the *Lassiter* Court had highlighted for its unique importance—the threat of incarceration—the *Turner* Court concluded that no lawyer was needed.

The Court reached this decision by depicting the case as simple and by prioritizing speedy adjudication. The majority stated that the case was "sufficiently straightforward"[300] such that "substitute procedural safeguards" could obviate the need for a lawyer.[301] In other words, the subject matter was so simple that it did not require an attorney's investigation or articulation. Notably, the Court made the bald assertion of the matter's simplicity without any support; the Justices did not think it necessary to undertake any analysis to reach this conclusion.[302]

295. 564 U.S. 431 (2011).
296. *See id.* at 436–38.
297. Four dissenting Justices would have preferred to rule against Mr. Turner entirely, while the majority ruled in his favor on different, narrow grounds. *See id.* at 448–50.
298. *See id.* at 444–45 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).
299. 564 U.S. at 448 ("While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day.").
300. *Id.* at 446.
301. According to the Court, such safeguards might have included: notice that ability to pay is a major focus of the contempt proceeding; a form to elicit relevant financial information; an opportunity to respond to questions about his financial status; an express finding by the court that the defendant has the ability to pay; or assistance of a "neutral social worker" or other appropriate layperson. *Id.* at 447–48.
302. *But see* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 816–17 (2012) (questioning the Court's assumptions about the lack of complexity and highlighting contrary evidence in the record); Kathryn A. Sabbeth, *Simplicity*

Beyond asserting that there was no need for representation, the Court concluded that introducing representation would be counterproductive, because appointed counsel "could mean a degree of formality or delay that would unduly slow payment to those immediately in need."[303] Here, poor people's procedural rights give way to the Court's patronizing assessment of poor people's needs.[304] The opinion expressed concern that, because the custodial parent, Ms. Rogers, was unrepresented, appointing counsel for Mr. Turner would create a problem of "fairness"—an "asymmetry of representation."[305]

To be sure, the unfairness of asymmetry of representation is a hugely significant concern. Indeed, it is one of the primary reasons that advocates have marshaled in favor of a right to counsel for civil litigants with fundamental interests at stake.[306] As noted in Part I and discussed further in Part III, tenants and debtors are overwhelmingly unrepresented, while their adversaries are represented, creating a systemic mismatch to the detriment of these defendants.[307] Moreover, the unfairness of such a mismatch is one of the reasons many find it

as Justice, 2018 WIS. L. REV. 287, 302 [hereinafter Sabbeth, *Simplicity as Justice*] ("[B]ut perhaps the issue is not simple; it is just underlitigated. If we find cases simple because lawyers have not handled them frequently enough to develop a complex body of case law, and then we deem those cases unworthy of appointment of counsel because of the lack of complexity, the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop."); *see also* Kathryn A. Sabbeth, *Market-Based Law Development*, L. & POL. ECON. PROJECT (July 21, 2021), https://lpeproject.org/blog/market- based-law-development [https://perma.cc/3DWC-F4EU] [hereinafter Sabbeth, *Market-Based Law*] ("[T]he distribution of lawyers and court resources are denied to poor people on the basis that their claims are too simple to justify them, and these denials then perpetuate the simplification of doctrine.").

303. *Turner*, 564 U.S. at 447.

304. The Court emphasized that the opposing party was Ms. Rogers, the custodial parent, and that its holding would not necessarily apply if child support were owed instead to the state, *see id.* at 449, but this distinction between private actors and the state is somewhat misleading. The state compelled Ms. Rogers to initiate the action: a combination of federal and state laws required mothers to initiate proceedings against fathers as a condition of maintaining public assistance benefits. *See* Resnik, *supra* note 194, at 97–98. Notably, in *Little v. Streater*, decided the same day as *Lassiter*, the Court recognized the significance of the state's role in precisely this kind of coercion. *Little*, 452 U.S. 1, 3 (1981) (explaining that Connecticut's public assistance laws required the mother to name and institute a paternity suit against the father). In ruling that requiring an indigent father in a paternity action to cover the cost of a paternity test violated due process, the Court in *Little* emphasized that public benefits laws forced Ms. Streater to bring a paternity suit to qualify for benefits, and on that basis the Court concluded that "the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty." *Id.* at 9; *see id.* ("'State action' has undeniably pervaded this case"); *see supra* Subpart II.B.3 (analyzing *Little*).

305. *Turner*, 564 U.S. at 447–48.

306. *See* Sabbeth, *Housing Defense*, *supra* note 7, at 98.

307. *See supra* Subpart I.C; *infra* Subpart III.B.2.

troubling that Ms. Lassiter, all alone, faced off against a district attorney. If the primary concern of the Court was "fairness,"[308] however, any "asymmetry of representation"[309] could have been resolved by providing counsel to both parties. But that is not what the Court did.

Instead, the role of Ms. Rogers in the *Turner* opinion seems to have been primarily that of a foil, a prop allowing the majority to conclude that introducing an attorney would make matters unnecessarily complicated. The Court did not see any reason to increase the legality of these family court proceedings. On the contrary, the Court was concerned about unnecessary "delay."[310] In a case such as this—the family law matter of a poor Black family—the justices did not believe that such "delay" and "formality" were justified.[311]

Underlying this perspective is the assumption that these litigants' concerns are not matters about which one should make a federal case, and perhaps these matters are not even properly handled by formal law.[312] This attitude of delegalization helps to explain why the *Turner* Court unanimously concluded no lawyer was required. The Court viewed the case as one governed more by needs than rights[313] and believed that lower court judges should be able to resolve the straightforward issues before them without the burden of robust legal processes that appointed counsel might demand.

In *Turner*, the justices again ignored social context, failing to appreciate or even name the pro se crisis that had spiked in family cases—and in civil justice matters more broadly—since the Court last took up the civil right to counsel in *Lassiter* a generation prior. The escalation of pro se rates has resulted in well-documented deterioration of the adjudicatory process. As Part III will describe, common occurrences include two-minute "trials" that determine basic needs, along with judicial reliance on default judgments (in which defendants are absent and the court automatically awards relief to plaintiffs) to get through their ballooning dockets. The *Turner* Court did not grapple with these realities and

308. *Turner*, 564 U.S. at 448.
309. *Id.* at 447.
310. *Id.* at 448.
311. *See* Sabbeth, *Simplicity as Justice*, *supra* note 302, at 294–300 (noting that delays can be essential to protection of rights and arguing that certain efforts to eliminate delays in the name of access to justice fail to account for what is lost); *see also* Sabbeth, *Housing Defense*, *supra* note 7, at 110 (describing how plaintiffs' control over timing of litigation can be used to pressure defendants).
312. *See supra* Subpart II.A (noting low status of family law and domestic relations exception to federal jurisdiction).
313. *See* Weissman, *supra* note 179 (treating legal services for poor people as charity or "largess," rather than as the fulfillment of human rights or protection of the rule of law).

instead perpetuated the notion that civil justice concerns belong in delegalized fora. As the next Part shows, this jurisprudential choice has imposed a growing, negative impact on women's rights, racial justice, and the rule of law.

III. IMPLICATIONS FOR EQUALITY AND DEMOCRACY

The delegalized civil justice system, our inheritance from *Lassiter* and *Turner*, carries significant consequences. A healthy democracy protects individual rights, the rule of law, and equality.[314] While democratic theorists vary widely in the meaning they attach to these concepts, a common denominator is the requirement of fair procedures.[315] Yet, in the absence of a right to counsel in the civil courts, individual rights are scarce and development of the law stagnates. The gendered right to counsel thereby threatens basic democratic values. By disproportionately excluding women of color from the benefits of individual rights and law development, the current doctrine exacerbates racial and gender inequality. Furthermore, failing to protect women and families casts the courts, an arm of the state, as a punitive actor that undermines housing access, income security, and children's interests.

To show how this plays out, this Part describes the dynamics of eviction court. While other subject areas offer similar stories—such as the infamous robo-signings in debt collection[316] and parents whose children are snatched by Child Protective Services without evidence[317]—given limited space, the eviction

314. Rachel A. Cichowski, *Introduction: Courts, Democracy, and Governance*, 39 COMPAR. POL. STUD. 3, 6–7 (2006); *see* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 10–13 (1996) (describing liberal commitment to individual rights and "equal respect"); SEYLA BENHABIB, DEMOCRACY AND DIFFERENCE (1996) (democratic deliberation necessary for legitimacy and rational decisions); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1721 (2006) (highlighting "the state's role in maintaining individual security, social stability, and the rule of law"); Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 C.U.N.Y. L. REV. 57, 61 (2015) (highlighting that when "the rule of law and equal justice under law" are not honored, "the damage is not simply to those who are misled and misused by the system, but also to the reputation and viability of the system itself").

315. *See* SANDEL, *supra* note 314, at 4 ("The political philosophy by which we live is a certain version of liberal political theory . . . . [T]his liberalism asserts the priority of fair procedural over particular ends, . . . the procedural republic.").

316. *See* Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 268 (2011).

317. *See* Emily Ramshaw, *For Accused, Long Waits to Appeal Child Abuse Allegations*, N.Y. TIMES (Apr. 28, 2011), https://www.nytimes.com/2011/04/29/us/29ttregistry.html?searchResultPosition=7 [https://perma.cc/9ZUT-5KD8] (describing a case where "Child Protective Services workers came to [a couple's] home and removed all of their children after a phone call from someone alleging emotional abuse").

example will suffice to demonstrate the mechanics of the phenomenon. Eviction has received increased attention from social scientists and the media in recent years, and this has created a small window into the vast operations of these dysfunctional courts.[318]

A. Individual Rights

Even under the traditional liberal framework, which privileges individual freedoms above all else, the deprivation of counsel for civil litigants raises serious concerns. Individual rights have been recognized as core building blocks of a liberal democracy.[319] The exalted place of individual rights in our jurisprudence and culture makes the acknowledgement or denial of such rights particularly significant. The right to counsel is one of the prized individual rights. Indeed, it should be, since the right to counsel is the supra-right that unlocks all the others.[320]

Lawyers serve as enforcers of individual rights.[321] In the criminal context, where procedure is constitutionalized, it is commonly understood that a key role of criminal defense attorneys is to defend their clients' right to fair procedures.[322] They push judges to enforce the boundaries set by law.[323] They push for exclusion of evidence seized in violation of the Fourth Amendment.[324] They obtain dismissals when prosecutors deny defendants the right to a speedy trial.[325] In these

318. *See* Sabbeth, *supra* note 30 (describing eviction courts); DESMOND, EVICTED, *supra* note 55, at 295–96 (describing social science literature on eviction).

319. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 193 (1977); John Rawls, *Distributive Justice*, *in* PHILOSOPHY, POLITICS, AND SOCIETY: 3RD SERIES 58 (Peter Laslett and WG Runcimann eds., 1967); SANDEL, *supra* note 314, at 4, 8–11.

320. *See* Kaley v. United States, 571 U.S. 320, 344 (2014) (stating that the right to counsel is "the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys" (citing United States v. 1187hronic, 466 U.S. 648, 653–54 (1984))).

321. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 20–21 (2002); *see* Sandefur, *supra* note 208, at 925 (noting that the presence of lawyers makes judges more likely to follow the law).

322. FREEDMAN & SMITH, *supra* note 321, at 20–21.

323. *See* Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1563 (2015) ("Every mundane motion to suppress evidence is a claim that the government has overstepped its power, and thus a claim about the appropriate scope of government power. It is a petition for the redress of core political grievances. . . . There is a value in that attempt, even when it fails.").

324. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1280 (2002) (arguing that defense attorneys are crucial to the enforcement of constitutional criminal procedure and the regulation of police, because suppression motions are the primary mechanism for enforcement of criminal procedure rights).

325. Sabbeth, *Discounted Danger*, *supra* note 7, at 930.

and other ways, defense counsel provides a vital check on the criminal justice system.

In contrast, lawyers are not present to represent the defendant in most civil cases, and the civil courts routinely disregard the rights of the unrepresented parties—a large percentage of whom are women. In modern law, eviction is supposed to be a legal process.[326] Landlords are forbidden from engaging in harassment, lock-changing, or physical force.[327] State laws require landlords who want to evict their tenants to bring their claims to a court of law.[328] The landlord must serve the tenant with notice of the suit and, to prevail, the landlord must demonstrate a legal basis to recover possession of the property.[329] Tenants possess procedural and substantive rights that may be presented as defenses or counterclaims.[330]

Yet, on a regular basis, tenants facing eviction are unable to vindicate those individual rights.[331] Judges do not require landlords to establish the basic elements of the prima facie case.[332] Judges actively elicit the prerequisite information to issue judgments for landlords and, at the same time, do not require the landlords to produce any supporting evidence.[333] On a massive scale, eviction judgments are issued without so much as a pause to acknowledge tenants' rights.[334]

326. *But see* Matthew Desmond & Tracey Shollenberger, *Forced Displacement From Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1754, 1761–62 (2015) (noting frequency of extralegal evictions).

327. *See* Lindsey v. Normet, 405 U.S. 56, 71 (1972) (discussing history of landlords ejecting tenants by force).

328. *See* Sabbeth, *supra* note 30.

329. See *LSC Eviction Laws Database*, LEGAL SERVS. CORP. (Jan. 1, 2021), https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database [https://perma.cc/S4R2-5EYD] (surveying notice requirements).

330. Sabbeth, *Housing Defense*, *supra* note 7, at 112–13 (describing use of defenses and counterclaims related to substandard housing conditions, harassment, and discrimination).

331. *Id.* at 78–80 (describing eviction court environment); Sabbeth, *supra* note 30, at 396–99 (arguing that eviction courts do not serve to maintain the rule of law); Sandefur, *supra* note 208, at 925 (summarizing empirical literature); *see also* Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365 (2021) (utilizing data from an empirical study of rural courts to demonstrate the absence of formal legal protections in eviction proceedings).

332. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46–48 (2010) (collecting literature).

333. *Id.*

334. Sandefur, *supra* note 208. To be sure, criminal cases often move quickly and plea agreements waive individual rights, but in many cases, lawyers spot and correct rights violations, and those corrections influence court culture. Indeed, merely the presence of lawyers in a courtroom makes a difference in whether judges respect individual rights. *See id.* at 910.

Moreover, the underenforcement of individual rights is baked into eviction proceedings from the start.[335] To initiate the lawsuit, the landlord must first accomplish service of process.[336] This is a due process requirement in any civil case and serves three critical functions: It makes the tenant aware of the legal action pending against them, provides notice of the trial date, and describes the landlord's claims so that the tenant can prepare a defense.[337] Service of process is such an established prerequisite for judicial action that one might assume plaintiffs routinely comply with its dictates and judges are vigilant in attending to it. Recent studies, however, have uncovered a disturbing trend of "sewer service," whereby plaintiffs knowingly fail to serve defendants but purport in court documents to have served them.[338] In the absence of counsel to catch these basic due process violations, the affected tenants never appear in court and never get the opportunity raise any defenses.[339] Instead, the landlords win by default.[340] Indeed, the default judgment rate for defendants in civil cases is alarmingly high. For tenants facing eviction, the default rate in the 20

335. *See* Sabbeth, *supra* note 30, at 376–83 (identifying ten substandard "design features" of eviction courts).

336. *Id*. at 379–80 (describing service requirements for eviction cases and explaining that they are generally less stringent than for other civil suits).

337. *See generally* Andrew C. Budzinki, *Reforming Service of Process: An Access to Justice Framework*, 90 COLO. L. REV. 167 (2019).

338. Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?*, DCIST (Oct. 5, 2020, 1:43 PM), 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/K3VG-F26P]. *See also* Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1601–03 (identifying debt collection cases in which process servers have claimed: to be present in more than one location at the same time; to have driven up to ten thousand miles in a single day to serve debtors in many different regions in the country; to have made personal contact with people known to be dead for years; and to have personally served the proper defendant even when the physical characteristics named in the service affidavit come nowhere close to matching the defendant's actual appearance).

339. In addition to sewer service, there are numerous other reasons tenants do not appear in court, such as childcare needs, work obligations, and transportation challenges. Many states require only three days' notice of a hearing, making it difficult to manage other obligations. *See LSC Eviction Laws Database*, *supra* note 328 (surveying notice requirements). Tenants may also anticipate, quite reasonably, that they have little chance of prevailing on their own, even if they do show up. *See* Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Problem*, 41 MITCHELL HAMLINE J. PUB. POL'Y & PRAC. 167, 191 (2020) ("Whenever I ask a tenant why he or she failed to appear at their eviction hearing, I get one of two answers: (1) I did not know about it, or (2) it would not matter because everyone gets evicted."); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1267 (2016) (noting that prior interactions with the courts left people feeling "'disrespected,' 'pathetic,' 'shameful,' 'lost,' and unsure how to navigate the system").

340. Sabbeth, *supra* note 30, at 380–81 (describing how eviction courts rely on defaults as a quick way to resolve cases without consideration of their merits).

largest cities ranges from 15 to 50 percent,[341] and some studies of particular jurisdictions have found the default rate to be closer to 70 or 80 percent.[342] Perhaps this would be less concerning if we were to assume that these defendants had no defenses and would have lost even if counsel had appeared. But that is not so. Studies of eviction defense have indicated that representation by counsel changes outcomes.[343] Particularly during this moment of pandemic-era eviction moratoriums, the availability of counsel has been shown to make an enormous difference in the enforcement of federal law, and specifically in whether or not tenants are apprised of and able to enforce their federal right to stay in their homes.[344] Even before the pandemic protections, a web of federal regulations and constitutional rights were potentially implicated but tenants were unable to navigate these subjects on their own.[345]

Even ordinary breach of lease or nonpayment evictions carry the potential for important defenses.[346] The implied warranty of habitability offers an example. In almost all states,[347] leases include an implied warranty that residential housing

341. *See* David Hoffman, *Evicted by Default* (manuscript data on file with authors).

342. *See* KANSAS CITY EVICTION PROJECT, EVICTIONS IN THE COURTS at 2 (2018) (finding about 70 percent default rate in Jackson County, Missouri); WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 8 n.22 (2005) (finding about 80 percent default rate in Maricopa County, Arizona), https://morrisinstituteforjustice.org/helpful-information/landlord-and-tenant/4-final-eviction-report/file [https://perma.cc/74VU-ZEJQ]. For debtors, the average is at least as stark as for tenants facing eviction: Over the past decade in states where data are available, more than 70 percent of debt collection cases resulted in the debtor's default. *See* PEW CHARITABLE TRUSTS, *supra* note 112, at 16.

343. Sabbeth, *Housing Defense*, *supra* note 7, at 84–85 (summarizing empirical research on the impact of lawyers for tenants). *See also* Engler, *supra* note 332, at 55–58 (summarizing research showing the difference lawyers make in debt cases); Sankaran, *supra* note 111, at 11–14 (summarizing research showing the difference lawyers make in parental termination proceedings).

344. *See, e.g.*, Annie Nova, *The CDC Banned Evictions. Tens of Thousands Have Still Occurred*, CNBC (Dec. 5, 2020, 9:45 AM), https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html [https://perma.cc/YRE7-N8H4]; Sabbeth, *supra* note 30, at 389–92 (arguing that the absence of counsel for tenants weakened the effectiveness of eviction moratoria enacted during the COVID-19 pandemic).

345. *See* NAT'L HOUS. L. PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (5th ed. 2018), https://www.nhlp.org/wp-content/uploads/2018/07/070818_NHLP_5.5x8.5-PRE-Release-SALE-FINAL.pdf [https://perma.cc/8MFJ-SM72] (summarizing a constellation of regulations governing federally subsidized tenancies).

346. Sabbeth, *Housing Defense*, *supra* note 7, at 112–13.

347. *Cf.* Benjamin Hardy, *No Vote on Landlord-Tenant Bill After Realtor Association Declares Opposition*, ARK. TIMES (Mar. 7, 2019, 10:03 AM), https://arktimes.com/arkansas-blog/2019/03/07/no-vote-on-landlord-tenant-bill-after-realtor-association-declares-opposition [https://perma.cc/V29Z-LQT2].

is fit for human habitation.[348] The landlord's breach of this warranty can negate the tenant's duty to pay rent.[349] Data from the Census shows that millions of poor tenants, primarily women, live in substandard conditions.[350] On a regular basis, however, judges treat evictions as rent collection matters, without ever considering the tenants' right to a habitable dwelling.[351] It seems obvious as a matter of individual rights and the rule of law that a tenant should not be evicted for failure to pay rent if the tenant does not in fact owe rent. Yet, even when substandard conditions of where they reside have been documented by city inspectors, tenants have been evicted with no attention paid to this or other outstanding defenses.[352]

The eviction story is meant to be illustrative, but the problem persists throughout the civil courts that poor people—disproportionately women of color—inhabit. The absence of appointed counsel creates an environment in which represented parties routinely steamroll over the rights of unrepresented women, without checks on their abuses of power. Even basic rights, well-settled for decades, have no impact. In a civil forum where judges do not apply the law, individual rights become irrelevant.

When individual rights are routinely disregarded, and *en masse*, in civil courts throughout the country, an entire population of women and families suffer

348. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074–77 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

349. *See id.* at 1071–82.

350. *See* U.S. CENSUS BUREAU, AM. HOUS. SURV. 2017, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLE1&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1 [https://perma.cc/5G95-VPVG] (click "Get Table"). These figures likely underrepresent the scale of the problem, because census data undercounts renters. *See* Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 257–58 (2018).

351. Paula Galowitz, *The Housing Court's Role in Maintaining Affordable Housing*, *in* HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 177, 194 (Michael H. Schill ed., 1999) (explaining that housing courts designed to remedy substandard conditions soon became "eviction mills"); Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 5 (2016) (describing empirical study showing that the warranty of habitability is rarely invoked); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 149–51, 163–68 (2020) (documenting the "warranty of habitability operationalization gap"); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392–97, 458–61 (2011). Some states explicitly forbid the defense of the warranty of habitability and instead require tenants to raise the claim affirmatively in a separate suit, *see* Lindsey v. Normet, 405 U.S. 56 (1972) (approving this jurisdictional limitation), but launching a new lawsuit is not a realistic option for most low-income, pro se tenants.

352. Summers, *supra* note 351. *Cf.* Steinberg, *supra* note 84, at 1060–63 (comparing traditional housing courts with an informal, specialized court where inspectors play an active role).

the collateral consequences. These include damaged social networks, lost income and wealth, obstacles to education, increased mental health problems, destabilized homes for children and adults, frayed family relationships, lost employment opportunities, and decreased ability to secure safe housing in the future.[353] Imagine if the state valued these women's interests as rights deserving protection. A supportive state would recognize the value of the rights at stake and the vital role of robust procedural protections. Such protections would also enhance families' wellbeing, which itself is essential to a healthy democracy.[354] But, because the state and the courts have discounted and delegalized women's problems, the state has abandoned a supportive role and embraced a punitive role. In its punitive role, the state regularly tramples on women's rights, disregarding both the rule of law and women's basic needs. This results in compounding inequalities, undermining not only individual rights and familial strength but also the robustness of our democracy.

B. Law Development

Law development is a core function of the courts and one of the primary mechanisms by which social norms can evolve to protect vulnerable populations.[355] In its ideal form, the adversary system is designed for members of society to participate in that evolution.[356] The court provides a forum for presenting concerns directly to the judicial branch of government. The airing of different views should promote a diversity of perspectives,[357] and the adjudicative process should generate an exchange of ideas.[358] Ultimately, the judiciary responds to complaints and issues decisions, creating law. Published opinions show the role of the public in creating common law. Even in the absence of a published opinion, the parties have participated in shaping a decision that "carries the force of law and orders social relations."[359] Law development has been essential

353. *See supra* Subpart I.B.
354. *See generally* TRONTO, *supra* note 284.
355. *See* Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict*, FOUND. FOR L., JUST. & SOC'Y 8 (2008) (describing courts as democratic institutions and "venues for debating and developing norms").
356. Sabbeth, *supra* note 212, at 1499–1501 (describing the ideal role of the adversary system in a system of self-government). *But see* Sabbeth, *Market-Based Law*, *supra* note 302 (arguing that the adversarial system in the United States was designed, and functions, to develop law in favor of socially powerful actors).
357. *See* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 149 (2017).
358. *See* Fuller, *supra* note 355.
359. Sabbeth, *supra* note 212, at 1501–02.

in recognizing some constitutional protections for women and people of color, such as formal race and gender equality, but it has stagnated almost completely when it comes to basic civil justice matters, such as eviction, that most commonly affect women and their children.

As we know from impact litigation suits that have changed our legal landscape, the development of law often occurs via individual litigants. In an ordinary criminal case, an appeal to the Supreme Court can result in a major development, such as the prohibition of capital punishment for juveniles.[360] Development of the law can also occur in less visible, less dramatic ways: in lower courts from which appeals are rare, judges develop their own "law of the courtroom"[361] and lawyers also influence that development.[362]

For poor civil litigants, the relative absence of representation means there is a relative absence of pressure toward law development in their favor. They and their interests are underrepresented.[363] This results in an underdevelopment of the law.[364] By this, we mean to capture two related phenomena: (1) the atrophy of doctrine, as a result of the sustained absence of counsel for parties in certain

360. Roper v. Simmons, 543 U.S. 551 (2005).

361. GARY BLASI, UCLA SCH. L., EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER FINAL REPORT 15 (2001).

362. *See* Sabbeth, *Housing Defense*, *supra* note 7, at 78 (explaining how "[l]andlords' disproportionate representation over time has influenced the law and culture of housing courts to favor the landlords' positions").]

363. Steven Wizner, *Rationing Justice*, 1997 N.Y.U. ANN. SURV. AM. L. 1019, 1019 (1997) ("When we deny legal representation to individuals because of their inability to pay for it, . . . we effectively deny those individuals the ability to defend or pursue their lawful personal, economic, and political interests.").

364. One of us has discussed this in prior work in relation to poor people's courts generally and tenants' rights in particular. *See* Sabbeth, *Simplicity as Justice*, *supra* note 303, at 302 ("[T]he underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop."); Sabbeth, *supra* note 24, at 135 ("The enforcement gap results in a snowball effect, which systematically excludes poor tenants from access to the legal system and 'underdevelops' the law in areas where it could protect them."). A brief summary of the underdevelopment concept was also provided in Sabbeth, *Market-Based Law*, *supra* note 302:

> In [*Turner v. Rogers*, *Lindsey v. Normet*, and *Walters v. Nat'l Assoc. Radiation Survivors*], the distribution of lawyers and court resources are denied to poor people on the basis that their claims are too simple to justify them, and these denials then perpetuate the simplification of doctrine. Without lawyers to support them, time to prepare, or the opportunity to participate in defining the scope of issues before the court, these litigants are excluded from the benefits of law development.
>
> Assumptions about whose cases are worthy of attention legitimize the simplification of entire bodies of law and de-legalization of lower status courts. These assumptions support the underdevelopment of poor people's law—i.e. the law that serves poor people's interests or would serve them if not actively underdeveloped.

categories of cases; and (2) the distortion of doctrine, as a result of the repeated mismatching of represented and unrepresented adversaries.

As the following subparts will show, there is a general cost for society when legal doctrine stagnates,[365] and there is a cost borne by certain members of society when the law develops in ways that disadvantage them. Because major categories of women's interests have not been recognized as constitutionally deserving of articulation and defense by counsel, huge numbers of women have been excluded from the benefits of law development.

1. Law Development as a Social Good

In the United States, courts serve multiple public functions in support of our deliberative democracy. Beyond resolving individual disputes, courts provide development of precedent (through reasoned opinions that interpret law as applied to facts and may be corrected by appeals courts), dialogue between the judiciary and legislative branches regarding how best to interpret statutes, and public education of potential bad actors regarding limits of the law or possible deterrents against its future violation.[366] Given the complexity of the legal system, parties cannot be expected to achieve these objectives without the aid of counsel.[367] Full exploration of the social purposes of courts is far beyond the scope of this Article, but we focus here on the development of law because it is particularly relevant for women of color, whom the law has historically not treated well. If there is to be any hope for law as a force for justice, it must develop to promote, rather than undermine, equality.

365. *See* Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 829–32 (2009) (costs of arbitration include loss of law development).

366. *See* LAHAV, *supra* note 357, at 6–9 (describing the "contribution of litigation to democracy"); Sabbeth & Vladeck, *supra* note 365, at 830–31 (describing societal benefits of public adjudication, in contrast to arbitration, as including development of precedent, dialogue between courts and legislatures, and public education of potential bad actors, potential victims, and citizenry).

367. *See* Nancy Leong, Gideon*'s Law Protective Function*, 122 YALE L.J. 2460, 2468 (2013) ("[T]he power of criminal defendants to shape the law via competent representation contributes to the overarching goal of furthering balanced and accurate law articulation by correcting for systemic flaws."); Colleen Shanahan, Anna Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367 (2017) (describing law reform activities that may atrophy in the absence of representation); Sabbeth, *supra* note 212, at 1502 (noting that, while commentators describe courts as democratic institutions that allow individuals to speak directly to the judicial branch, parties generally speak through attorneys).

As Nancy Leong has highlighted, one of the major contributions of *Gideon* was the development of law concerning the rights of criminal defendants.[368] This can be seen most clearly in the body of criminal procedure jurisprudence developed by the Supreme Court in recent decades.[369] The presence of counsel has been necessary for these questions to be considered thoroughly by the Court. Moreover, as Leong demonstrates, appointed counsel has in fact been responsible for a good portion of that advocacy.[370] Indeed, the Supreme Court appointed counsel for Mr. Gideon precisely so that the Justices could properly consider his case. The Supreme Court's guarantee of an appointed attorney for criminal defendants has resulted in the Court's ability to further develop the law that applies to those defendants.

The process of law development of course occurs over time. This means the Court can and does update legal principles as society changes. Jason Parkin has highlighted the significance of this dynamic process for criminal jurisprudence, explaining that the "Fourth Amendment's prohibition on 'unreasonable searches and seizures' depends on what constitutes a 'reasonable expectation of privacy,' which evolves over time."[371] This might, for example, include digital privacy, which could not have been contemplated by the Court's 20th century doctrine. "Similarly, courts interpreting the Eighth Amendment's prohibition on "cruel and unusual punishments" consider "evolving standards of decency that mark the progress of a maturing society."[372]

In contrast, the number of Supreme Court cases addressing the concerns of women in the vast majority of civil justice matters is quite limited.[373] Remarkably few eviction cases have even reached the Court.[374] Although the implied warranty of habitability is relevant to the lives of millions of tenants across the country,[375] advocates are forced to rely on a 1970 decision from a lower court for the

368. Leong, *supra* note 367, at 2473–74 (collecting empirical evidence regarding the number of cases presented by appointed counsel).
369. Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1556 (2015) ("The Fourth, Fifth, and Sixth Amendments have been among the most jurisgenerative provisions of the Constitution.").
370. Leong, *supra* note 367, at 2474.
371. Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1120 (2019).
372. *Id.* at 1120–21.
373. *See* JULIET M. BRODIE, CLARE PASTORE, EZRA ROSSER & JEFFREY SELBIN, POVERTY LAW, POLICY, AND PRACTICE 119 (2d ed. 2021).
374. The last time a tenant-defendant facing eviction reached the Court through the ordinary appeal process was 1974. *See* Pernell v. Southall Realty, 416 U.S. 363 (1974).
375. *See* U.S. CENSUS BUREAU, *supra* note 350.

elaboration of this doctrine.[376] In the areas of eviction, family law, and debt collection, even reaching a lower appeals court is unlikely.[377]

Not surprisingly, the law in these areas of civil justice tends to be relatively stagnant. Empirical evidence demonstrates that, in the decades[378] following the decision recognizing the implied warranty of habitability, the "definition of what constitutes a 'habitable' residence has remained remarkably consistent . . . with very little evolution even though society itself has changed dramatically."[379] Notably, legal aid attorneys pioneered the litigation that established the implied warranty of habitability, but, since those victories in the 1970s, funding for civil legal services dramatically decreased.[380] The number of litigants in court without lawyers has ballooned, and these litigants have been largely unable to move the needle on habitability or other protections for tenants.

Indeed, doctrines related to habitable housing have stagnated in a wide variety of areas related to claims, damages, evidence, and procedure. The sources of law protecting tenants' right to a habitable home are multiple: the implied warranty of habitability, common law torts, and, in some cases, federal or state statutes related to antidiscrimination or consumer protection.[381] Yet, without lawyers to represent the tenants, such claims are neglected, and the doctrine withers on the vine.[382] As one of us has discussed in prior work, the "underenforcement" of the right to a habitable home has resulted in the "underdevelopment" of law in this area.[383] Further, there is a "snowballing" effect,

376. *See* BRODIE ET AL., *supra* note 373, at 400 (citing *Javins*).

377. *See* Carpenter, Steinberg, Shanahan & Mark, *supra* note 32, at 273–74 ("In . . . debt collection, landlord-tenant, and family law, few state appellate decisions contribute to the growth of substantive law, and little attention is devoted to the development of contextually appropriate procedural rules . . . . [S]ubstantive and procedural law have not kept pace with evolving conditions on the ground . . . ."); *see also* Cotton, *supra* note 314, at 85 (highlighting the absence of appeals of housing conditions decisions); Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1968–69 (2014) (describing obstacles for pro se litigants bringing appeals).

378. It is now more than fifty years, but the empirical study pertained to the first forty. *See* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 836 (2013).

379. *Id.*

380. *Id.* at 820 (citing Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 416 (2005); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1223 (2002)).

381. *See* Sabbeth, *supra* note 24, at 111–15.

382. *See* Sabbeth, *supra* note 24, at 121–23.

383. Sabbeth, *supra* note 24, at 134–37.

in which the underenforcement of rights compounds over time to perpetuate the ossification of underdeveloped law.[384]

The law also fails to keep pace with changing societal attitudes and developments in scientific knowledge. Current medical evidence regarding the dangers of mold, lead paint, and other substandard housing conditions is not captured by the courts' treatment of these issues. Doctrine related to damages is sparse, and most courts award little monetary compensation—if any at all—even to tenants who demonstrate shocking violations of the implied warranty of habitability.[385] This trend persists even though our understanding of the nexus between housing quality and public health has grown exponentially in recent decades.[386]

The absence of law development is compounded by the fact that substandard housing is a problem specific to a population unlikely to retain counsel. The tenants are poor and disproportionately women of color.[387] Because poor women are particularly likely to experience substandard housing and particularly unlikely to hire counsel, the problems of substandard housing receive little legal analysis. Lawyers do not devote time and attention to raising, researching, or advocating for applicability of the laws protecting tenants' interests. They do not press judges to refine the doctrine with respect to these legal violations and the specific harms that flow from them. As noted above, they do not appeal to higher courts and therefore miss out on opportunities to strengthen existing doctrine and create precedent.

This is troubling for the all the reasons that law development is important to a democracy, but it is even more so because the absence of law development occurs in particular categories of cases occupied by a particular group of people who are already marginalized—namely poor women of color. This exclusion from one of the privileges of the courts carries ramifications for individuals, groups, and society. On the individual level, it means the courts are available to refine the rights of some people but not others.[388] In the aggregate, it results in systematic neglect

384. Sabbeth, *supra* note 24, at 135–38.
385. Sabbeth, *supra* note 24, at 111–15; Cotton, *supra* note 314; Summers, *supra* note 351.
386. Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 HARV. L. & POL'Y REV. ONLINE S1, S2-S15 (2017).
387. *See* Sabbeth, *supra* note 24, at 111–15.
388. *Cf.* Leong, *supra* note 367, at 2468 (describing the impact of the *Gideon* decision on "the ability of criminal defendants to shape the course of the law in a manner favorable to themselves and those similarly situated to them") (citing Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1333 n.22 (1964); Anthony

of the concerns of a group whose participation in democracy is already disadvantaged.[389] The legal system's devotion of proportionally less attention to the concerns of marginalized people perpetuates disadvantage and entrenches subordination.

The development of law is a fundamental social product of litigation in the United States. When such development occurs primarily for one category of citizens but not another, this creates significant harm. Inequality of access to the social good of developed doctrine undermines basic principles of democracy.

2. Law Development as a Social Advantage

There is another, perhaps even more pernicious, way in which women in the civil justice system are disadvantaged in the development of law. To the extent that the U.S. adversarial system was designed to produce truth, protect individual rights, and offer a forum for democratic deliberation,[390] the system's functioning depends on equal representation on both sides.[391] For much of the civil docket, however, one side is represented, while the other side is not. As Part I highlighted, massive numbers of civil defendants face litigation without counsel, and as we show here, that dynamic imposes particularly acute harms by extending relative advantages to their represented adversaries.

In specific, identifiable categories of cases—particularly eviction and debt collection—the plaintiffs are routinely represented while the defendants are routinely unrepresented. Multiple studies have indicated that, in evictions, approximately 90 percent of landlords are represented while 90 percent of tenants are unrepresented.[392] In debt collection, too, while the collectors enjoy representation by counsel, the vast majority of debtors are on their own.[393]

O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 723 (2011)).

389. *Cf.* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 (2004) (arguing that criminal defendants are the classic insular minority unlikely to find favor in legislatures).

390. *See* Sabbeth, *supra* note 212, at 1495; Steinberg, *Adversary Breakdown*, *supra* note 23, at 908 (describing norms of the adversarial system).

391. *See* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

392. *See* Engler, *supra* note 332, at 47 n.44 (collecting figures of jurisdictions ranging from Arizona to Massachusetts).

393. *Id.* at 55–58 (collecting studies).

These dynamics routinely occur in particular areas of law and thereby distort the development of law in those areas. Moreover, these areas of law happen to be those with particular significance for disadvantaged members of society. Lawyers appear on behalf of more powerful parties and advocate for their clients, thereby educating judges, establishing and entrenching customs and informal precedent, and otherwise shaping outcomes. Unlike the unrepresented defendants, the plaintiffs' lawyers are repeat players, which carries special advantages: expertise about the forum, relationships with institutional actors, credibility with judges, and the opportunity to "play for rules."[394] In this mismatched system, the more powerful litigants, like corporate landlords and debt buyers, enjoy a distinct advantage in a process that develops the "law of the courtroom" and that often overrides the laws written in books.[395]

The problem in the lowest courts is not simply the absence of lawyers but rather that, in particular areas of law, virtually all the lawyers appear on one particular side. In an adversary system of justice, this repeated mismatch of represented and unrepresented adversaries results in a structure that virtually ensures the distortion of the rules.[396] One side's disproportionate representation over time influences the legal culture of the courts to favor that side's positions.[397] Over time, distorted development of the law increasingly disfavors the social groups that are unrepresented.[398]

394. *See* MARC GALANTER, WHY THE HAVES COME OUT AHEAD 98–100 (2014).
395. BLASI, *supra* note 361, at 15.
396. Sabbeth, *Housing Defense*, *supra* note 7, at 78 ("In an adversary system of justice in which the judge's role is neutral and the parties are expected to compete in presenting their alternative versions of the case, the absence of counsel for one party raises basic concerns ranging from due process, fairness, and equality to accuracy of outcomes and legitimacy."); Steinberg, *Problem-Solving Courts*, *supra* note 23, at 1596–97 (explaining that "lopsided representation in housing and consumer matters is standard" and has "had an enormous impact on case adjudication in the civil courts").
397. Sabbeth, *Market-Based Law*, *supra* note 302 (arguing that courts develop law in favor of parties with economic power); Sabbeth, *Housing Defense*, *supra* note 7, at 78 ("Landlords' disproportionate representation over time has influenced the law and culture of housing courts to favor the landlords' positions.").
398. Sabbeth, *Market-Based Law*, *supra* note 302 ("Investment in courts and lawyers in rough proportion to economic power results in the self-perpetuating underdevelopment of law for poor people."); Sabbeth, *supra* note 24, at 135–37 ("The enforcement gap results in a snowball effect, which systematically excludes poor tenants from access to the legal system, and 'underdevelops' the law in areas where it could protect them."). Of course, the unrepresented litigant faces numerous disadvantages other than distorted law development.

C. Equality Under Law

Inequality in the courts exacerbates inequality in the streets. Conversely, confidence in the enforcement of rights and opportunities to participate in development of the law enhance parties' experiences in daily life. Expectations for what will happen in court shapes actors' conduct outside it.

Bad actors do what they can get away with. This is a basic premise of criminal procedure jurisprudence. For example, one purpose of limiting admissibility of improperly seized evidence is to incentivize police officers not to engage in improper seizures.[399] To the extent that defense lawyers protect individual rights, they also safeguard the rule of law beyond the courtroom. The job of a criminal defense attorney, among other things, is to "police the police."[400] The basic principle is that power dynamics on the streets depend, at least in part, on enforcement of the rules of the road.

One might argue that checking the power of government officials in criminal matters is more of a priority in a democracy than checking the private adversaries of civil defendants, but this is not so.[401] First, these categories overlap: the adversaries of civil litigants can be government actors, such as in eviction from public housing or state termination of parental rights.[402] Second, and perhaps even more critically, private actors wield increasing power over individuals' lives,[403] and

399. Ristroph, *supra* note 369, at 1557 ("On the prevailing account, the enterprise of constitutional criminal procedure is the regulation of the police. The Fourth Amendment, the Fifth Amendment privilege against compelled self-incrimination, and to a lesser extent, the Sixth Amendment right to counsel are understood to set minimal standards for police conduct.").

400. Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 957 n.158 (2000) (quoting Johnnie L. Cochran, Jr., *How Can You Defend Those People?*, 30 LOY. L.A. L. REV. 39, 42 (1996)).

401. Sabbeth, *Discounted Danger*, *supra* note 7, at 921–24 (engaging with and then dispelling the notion that state power is particularly dangerous in criminal matters).

402. Sabbeth, *Discounted Danger*, *supra* note 7, at 923 (highlighting examples to show that "the States power as an adversary is not limited to criminal prosecution").

403. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371–73 (2003) (highlighting the "new reality of privatized government" and collecting related literature); Sabbeth, *Discounted Danger*, *supra* note 7, at 924–27 (highlighting private control of water, electricity, internet access, and other basic needs).

can use that power to threaten basic freedoms.[404] Ensuring that such power is restrained by law is critical to promoting an equal society.[405]

Equality in the ability to act in the world, protected by laws, is jeopardized when there are no lawyers present to serve the checking function.[406] Not only can powerful actors misuse their power, but less powerful parties will not be free to engage in the full range of motion to which they are entitled. Imagine a counterfactual: a world with a right to appointed counsel for tenants facing eviction or individuals facing debt collection. Landlords might be less likely to engage in misconduct like retaliation against tenants who exercise their rights. Moreover, these tenants, disproportionately women of color, might be emboldened to exercise their rights more robustly. For example, these women might be more confident engaging in a rent strike to protest substandard conditions if they could rely on counsel to represent them should the landlord retaliate with eviction lawsuits. As Alice Ristroph has observed, the panoply of constitutional criminal procedure rights serves not only to regulate police misconduct but also to empower individuals to resist.[407]

To the extent that legal services and access to the legal system can be interpreted as societal goods, these goods should be allocated equally. Allocating resources equally does not necessarily mean each individual should receive the same quantity of resources at any given time, but that distribution design should promote equality and not entrench subordination. Resource allocation decisions might, for example, aim to equalize an uneven playing field. Given that women are, and have historically been, politically marginalized, it is therefore of particular

404. *See* Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 452 (1992) ("If we are truly concerned with the negative freedom of individuals, then we should be concerned with unnecessary limitations on our interference with those freedoms whatever the source, whether it be the state or some other form of organized social authority.").

405. *See* Natapoff, *supra* note 314. Courts can either restrain or support and legitimize the use of force by socially powerful actors. *See* Brito, Sabbeth, Steinberg & Sudeall, *supra* note 14 (describing how civil courts function to legitimize and perpetuate the violence of racial capitalism); Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 32, 35 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) ("Eviction procedures still operate in the shadow of violence, although it is now the state that is solely authorized to inflict it."); Sabbeth, *Simplicity as Justice*, *supra* note 302, at 297 ("If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession . . . ").

406. *See* Sabbeth, *Discounted Danger*, *supra* note 7, at 929–31 (describing lawyers' role as a "protector of [the] rule of law and check on the use of force").

407. *See* Ristroph, *supra* note 369 (arguing that constitutional criminal procedure functions to support resistance).

importance that the right to counsel promotes equality for women and fulfills basic notions of distributive justice.

D. Democratic Watchdogs

Despite its tremendous importance to millions of Americans, the civil justice system has attracted remarkably little attention, particularly compared to its criminal cousin. Indeed, the vast majority of the civil justice system is relatively invisible to the public and legal scholars alike.[408] Only a small band of scholars and practitioners are engaged in the critical enterprise of civil justice reform. We attribute this, in part, to the lawyerless courts that define civil justice, and to the fact that women occupy this sphere. A study conducted by Sara Greene offers a new theory about why the public so often refuses to engage the civil justice system: they do not understand it to be a distinct entity separate from the criminal justice system.[409] While eviction has recently become recognized as a problem affecting millions of Americans, few other civil justice problems receive mainstream media coverage, let alone attention from elected officials. Even scholars within the legal profession, who might be expected to investigate more deeply, have dismissed the bulk of civil justice issues as unworthy of study or discourse.[410] There might be other explanations, but we submit that at least some of the inattention stems from a simple lack of insider knowledge: there is no *Gideon*-equivalent corpus of lawyers to report on the daily horrors of the civil justice system.[411]

This means an important advocate is missing who could otherwise educate the public and demand reforms on the legal issues facing women. We believe *Gideon* and its progeny bear a direct relationship to public education and mobilization on criminal justice reform. There is no doubt that the watchdog army of public defenders *Gideon* released in the courts has played a critical role in shining attention on the many failings of the criminal justice system. This, in turn, has generated media attention and helped to marshal bipartisan support for criminal justice reform. While lawyers should support and not attempt to lead

408. Carpenter, Steinberg, Shanahan & Mark, *supra* note 32, at 250; Sabbeth, *Market-Based Law*, *supra* note 302 (describing hierarchies of courts and highlighting that those occupied by poor women of color are underfunded and neglected).

409. Greene, *supra* note 339, at 1289.

410. Carpenter, Steinberg, Shanahan & Mark, *supra* note 32, at 251.

411. *Cf.* Smith, *supra* note 25, at 270 ("Defenders can also speak out powerfully – and credibly – because we know more than most about the day-to-day reality of the system: the randomness of justice, pervasiveness of injustice, routine cruelty, entrenched racism, and the cost of over-criminalization and mass incarceration to individuals, families, and communities.").

social movements,[412] we are convinced that the lawyers who witness the injustices of the criminal justice system have helped raise the profile of these issues. The absence of that lawyer-witness in the courts handling the civil issues crucial to women has significant consequences. This lack of attention exacerbates the challenge to democratic equality that is created by the absence of a constitutional right to counsel.

CONCLUSION

The gender of the constitutional right to counsel has been overlooked for far too long. Two competing truths can be said to define *Gideon* and the rights it confers (largely) on men in the criminal courts. The first is that *Gideon* has not been a panacea. Public defenders are starved of the funding they need to investigate cases adequately and provide the type of robust legal representation that would effectuate justice. The criminal justice system is largely a plea bargain factory driven by prosecutorial upcharging and the public defense system is not equipped to counter it. The second truth is that *Gideon* matters quite a lot. Even without achieving its aspirations, *Gideon*'s accomplishments are many: it has spawned a rich body of constitutional doctrine that protects the rights of criminal defendants, it created a corps of lawyers that serve an essential watchdog function in the criminal courts, and in many cases it results in the enforcement of individual rights that limit abuses of government power.

The civil courts epitomize all of *Gideon*'s shortcomings and evidence almost none of *Gideon*'s positive attributes. Women, who are disproportionately present in the civil justice system and typically hauled into court to face highly punitive measures such as eviction, debt collection, and termination of their parental rights, face a lawyerless underworld captured by governmental and private power. There is virtually no protection of individual rights or dignity in the civil courts. Few lawyers are available to press the appellate courts for greater substantive and due process protections, resulting in the near-complete stagnation of law development. And there is no watchdog presence to hold judges accountable for enforcing the legal protections that *do* exist—most of them developed nearly fifty years ago—or to educate the public about the

412. *See* Scott Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 460 (2001) (describing growth of community organizing as an alternative to privileging lawyers in social change strategies); Sameer Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1468 (2017) (summarizing efforts to "put aside the grander visions of lawyer-centered social change").

troublesome way in which civil cases are adjudicated and how the lives of women are affected.

The gender of *Gideon* is no accident. Over decades, the federal courts have prioritized the interests of men and devalued the interests of women. Supreme Court jurisprudence on the right to counsel has focused on family law where the justices have shown an imperviousness to the unique challenges faced by women, who are overrepresented as single heads of household and earn far less money than men despite holding greater responsibility for raising minor children. Buried out of view are the multitude of other civil justice matters, specifically eviction and debt collection, that have been entirely neglected in the development of constitutional right-to-counsel jurisprudence and yet also exact an enormous toll on women.

The two-track justice system we now have, one occupied mostly by men, the other the province of women, has been defined, in part, by the absence or presence of *Gideon* and its corollary constitutional protections. If we aim to honor our basic democratic principles, such as equality, participation, and fairness in the distribution of a scarce social good, we must take into account the gendered nature of our courts and constitutionalize the interests and rights of women.