

# Simplified Courts Can't Solve Inequality

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*Abstract: State civil courts struggle to handle the volume of cases before them. Litigants in these courts, most of whom are unrepresented, struggle to navigate the courts to solve their problems. This access-to-justice crisis has led to a range of reform efforts and solutions. One type of reform, court simplification, strives to reduce the complexity of procedures and information used by courts to help unrepresented litigants navigate the judicial system. These reforms mitigate but do not solve the symptoms of the larger underlying problem: state civil courts are struggling because they have been stuck with legal cases that arise from the legislative and executive branches' failure to provide a social safety net in the face of rising inequality. The legal profession and judiciary must step back to question whether the courts should be the branch of government responsible for addressing socioeconomic needs on a case-by-case basis.*

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State civil courts are at the core of the modern American justice system and they are overwhelmed. These courts handle 98 percent of the tens of millions of civil legal cases filed each year, including those concerning people's homes, family relationships, and finances.<sup>1</sup> About 75 percent of these cases involve at least one party without a lawyer, and there is little possibility this reality will change anytime soon.<sup>2</sup> As a result, millions of people each year struggle to navigate state civil courts to solve their problems.

In the face of this crisis, there are many calls for change. One is for more and different assistance for litigants. These reforms include creating a civil right to counsel, or allowing paralegals or others to represent individuals in legal matters just as lawyers do now. They include improving information through explanatory documents or other materials to explain court processes. Another approach to reform seeks to simplify courts themselves: reducing the complexity of legal processes and systems so that ordinary people can navigate

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them without lawyer assistance. Called *court simplification*, this approach is a logical, compassionate response to this quandary: if people do not have access to the help they need to navigate the court system as it is designed, why not redesign the court system so that people can navigate it on their own? If unrepresented litigants could successfully navigate the procedures, forms, and interactions with clerks and judges in state courts, it would be an improvement on the status quo. The more modern-sounding versions of these ideas – like “legal design” or “legal tech” – have visceral appeal. Courts, state bars, and other institutions are investing in this approach.<sup>3</sup>

The need is real: the volume of cases in state civil courts overwhelms their resources. The number of civil cases brought to state courts hovers around twenty million per year.<sup>4</sup> This number would be even greater if all civil problems were brought to court, but millions of Americans do not even attempt to resolve their problems through the court system.<sup>5</sup> In some court systems, 80 to 90 percent of litigants appear without lawyers.<sup>6</sup> The system is an adversarial one, designed for represented parties. But there is no right to an attorney in civil cases. There are not, nor are there likely to be in the future, the resources to provide a lawyer in every civil matter before the courts. An enormous number of Americans appear in state civil courts without any assistance to navigate the litigation process, and courts have no choice but to serve these litigants despite the mismatch between design and reality.

State civil courts were not always so overwhelmed. In the 1970s, and even in the 1980s and 1990s, reported rates of pro se litigants were much lower, from the single digits to around 20 percent.<sup>7</sup> Around the turn of the century, scholars and judges started to call attention to the

“dramatic increase” of pro se litigation.<sup>8</sup> There are some common explanations for this change.

The first is the growth of poverty and inequality in the United States. There are over forty million Americans in poverty, almost double the number in the mid-1970s and a significant increase from the approximately thirty million people in poverty in 2000.<sup>9</sup> Some types of civil cases can be logically tied to growing inequality, such as dealing with family matters, housing, and consumer debt.<sup>10</sup> These types of cases directly reflect the problems an individual encounters when she struggles economically: she misses rent payments and her landlord attempts to evict her, her marriage or custody arrangements are unstable, and her unpaid bills are subject to collection. In each of these circumstances, a state civil court case is the ultimate result. In addition, litigants appearing without lawyers often explain that they do so because they cannot afford attorneys, so these same cases are likely to be ones in which the litigants are navigating the court system on their own.<sup>11</sup>

A second explanation is that the problem is not only an increase in the number of poor people and accompanying state civil court cases but also, because other branches of government have failed to respond to growing inequality, changes in the kinds of cases that state courts see. The executive and legislative branches have aggressively pared back social safety net programs, and the judicial branch is required to hear the cases that result. For example, since the welfare reform efforts of 1996, fewer welfare benefits are available for poor families with children. For poor families, child support now replaces rather than supplements welfare benefits.<sup>12</sup> The number of custodial parents with a support order has risen 44 percent since 1999.<sup>13</sup> As a result, state courts – as the ones that handle child support issues

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– see far more support cases than they did two decades ago. As another example, federal funds for public housing are as low as they were four decades ago.<sup>14</sup> Only one in four of the nineteen million families that qualify for housing assistance receive it.<sup>15</sup> Median rent has doubled over the past twenty years.<sup>16</sup> Increasing inequality, higher rent, and less public-housing assistance mean that millions of Americans face eviction each year, a process handled by state civil courts. Further, eviction triggers a cascade of other problems that lead people back to state civil court, such as additional housing disputes, consumer debt, divorce and child custody, and child welfare cases.

Courts cannot decline cases presented to them, so the absence of action by the legislative and executive branches leaves courts managing litigants' socioeconomic needs, which courts are neither designed nor equipped to address. A state family court judge in any county in America is likely to hear a case today in which a wife (who has no lawyer) seeks a divorce from her husband (who has no lawyer), custody of their child (who has no lawyer), and a protective order asking the husband to stay away from her because of threats and violence. Under state law, this is a dispute about domestic violence, divorce, and custody, appropriately resolved in a state civil court.

If you sat in the preliminary hearing for this case, you would recognize many other problems wrought by inequality and the absence of safety net programs. You would hear allegations that the husband struggles with substance abuse. You might infer that the wife suffers from untreated mental illness. You would hear that the wife cannot access affordable child care and cannot find a job with hours to accommodate this challenge. You would hear that both parties have housing instability, rotating staying with

family and friends. You would hear that the family's consumer debt is growing. You would hear that neither the husband nor the wife completed education beyond high school.

The case is a matter of civil law, yet it presents a range of socioeconomic needs intertwined with inequality and its consequences – problems that are not being addressed by the services and resources of other branches of government. The husband does not have access to affordable substance abuse treatment, affordable housing, or adequate educational opportunities. The wife does not have access to mental health care, affordable child care or flexible employment hours, affordable housing, or adequate educational opportunities. Judges and courts faced with cases like these attempt to meet the challenge out of a combination of compassion, pragmatism, and legal obligation. State civil courts have been forced to expand their roles significantly.

**B**ut are state civil courts the appropriate institution to address individual socioeconomic needs like untreated substance abuse and mental illness, domestic violence, and unstable housing that manifest in a society with stagnant wages and rising inequality? Court simplification and related access-to-justice reforms rest on the premise that more accessible courts would allow litigants to achieve justice or otherwise solve the problems they grapple with in state civil courts. This might be true if state civil courts were not being asked to play their new, expansive role. But they are, and it is worth exploring why courts might not be the appropriate institution to play this role, and why court simplification will not necessarily lead to more substantive justice for low-income litigants.

First, the core purpose of civil courts is to resolve disputes between parties and,

as the legal scholar Frederick Schauer wrote, to “get the facts right.”<sup>17</sup> In state civil courts, the judges are the key actors in a context in which the “fact finder is at the mercy of the parties.”<sup>18</sup> But the reality of state civil court litigation is often entirely different from this ideal. The adversarial process breaks down when parties lack skilled legal counsel, as occurs in most state cases, especially when an unrepresented, poor individual faces a represented party such as a landlord or a bank. Even if the less powerful party receives more information or a simpler process, the more powerful party is still advantaged by representation and the expertise, relationships, and resources that come with it. Further, the less powerful party will continue to have the burden of the related social problems entangled with the legal dispute, which exacerbate the power imbalance.

For example, a tenant in an eviction matter will surely benefit from information that explains that lack of proper notice is a defense against eviction and also explains the use of a standardized court form that elicits related facts from the tenant. At the same time, a landlord’s lawyer with expertise in this area of law who is a repeat player in this courthouse, with all the benefits that flow from that and with economic resources to devote to the eviction proceeding, will still have more power in the dispute than the tenant. One indicator of this dysfunction in the system is the default rates in state courts, which show that large numbers of cases are resolved through one party not participating in the process. According to the National Center for State Courts, the results in 18 percent of landlord-tenant cases, 24 percent of debt-collection cases, and 29 percent of small-claims cases were default judgments.<sup>19</sup> Court simplification might address some of this lack of participation, yet it does not address the

inequality that underlies the asymmetric power in state civil courts.

Second, many of the problems that civil courts handle are symptoms of inequality. The design of civil courts constrains the substantive law and procedural tools at their disposal to address these symptoms. By the time the tenant comes to a state civil court, she has already lost her job and failed to pay her rent, which the law says she can be evicted for. Court simplification might make the legal process of eviction easier to navigate for the tenant, and perhaps allow her to identify a defense that delays her eviction or reduces the amount of money she owes her landlord, but the underlying problem remains. Even in this improved scenario, the court’s capacity is limited. It could give the tenant thirty additional days before she loses her home because the landlord failed to provide sufficient notice, but it cannot help her with the other challenges related to her eviction, such as finding affordable child care, health care, or employment that leads to savings to protect against future eviction. Courts cannot create and fund social safety net programs, expand the availability of affordable housing, or fulfill other functions of the legislative and executive branches. The socioeconomic needs that flow from inequality and push parties into civil courts cannot be simplified away within the judicial branch.

To the extent that courts have historically and could in the future play a meaningful role in addressing larger questions of inequality, that role has taken the form of adjudicating issues of rights writ large, and not addressing individual socioeconomic needs in the absence of a social safety net. A focus on rights and systemic reform necessarily involves lawyers as core players who identify, build, and litigate these resource-intensive and complex cases. Court simplification – especially the

version that contemplates a parallel set of rules and procedures for unrepresented parties – undermines lawyers' ability to identify individual disputes from which these systemic cases emerge.<sup>20</sup> This risks losing the collective law development that leads to systemic equality or equity for these same litigants. In trying to improve the litigants' ability to navigate the overwhelmed state civil courts, court simplification may risk making inequality worse.

Finally, pursuing court simplification without challenging the idea that state civil courts should address socioeconomic needs case by case runs the risk of contributing to dissatisfaction with the judicial system. If the structural problems underlying the civil access-to-justice crisis persist, unrepresented litigants will continue to struggle in both the courts and society. Americans, regardless of party affiliation, are already skeptical of courts' enforcement of public policy.<sup>21</sup> Public dissatisfaction increases the challenges for state courts: low public opinion of courts will not help convince legislatures that courts are underresourced. Low public opinion of courts, in its most extreme form, also risks undermining the balance of power in our democratic government by lowering the credibility of courts as a coequal branch of government.

What if courts rose to the challenge presented by the failure of other branches of government by developing the expertise, systems, and resources to address litigants' socioeconomic needs so that their civil legal needs could be successfully met? In the criminal court system, alternative or problem-solving courts have tried something similar to this approach. Problem-solving courts are specialized courts focusing on a subset (often a very small number) of criminal defendants with shared needs for social services, on the belief that addressing these needs will

increase compliance with the law. The court functions as a clearinghouse and catalyst for individuals to obtain services and address those needs. The goal of a problem-solving court shifts from punishment and incarceration to treatment of a social problem, like drug addiction or mental illness. Problem-solving courts have been heralded as great successes and proposed as a model for civil courts.<sup>22</sup>

The success of problem-solving courts reveals why state civil courts are ill-suited, even in an idealized version, to address litigants' socioeconomic needs. Criminal problem-solving courts have been successful because they can offer defendants the chance to choose social services over incarceration. While criminal and civil litigants share unmet needs for social services, the punishment framework of criminal courts shapes both the courts' role and the definition of success. Success is staying in drug treatment and thus not returning to jail (for noncompliance with treatment or the commission of a new crime). This message of success would hardly satisfy a civil problem-solving court. As New York's former Chief Judge Judith Kaye, a pioneer of problem-solving courts, put it,

the innovations discussed here – enhanced treatment, special staffing, and judicial monitoring – can accomplish only so much in an individual's life. They are not going to make up for problems like chronic poverty, substandard education, shoddy housing, and inferior health care.<sup>23</sup>

Problem-solving courts create miniature or partial versions of executive branch functions in the court systems. For example, criminal problem-solving courts shift the location of care for the core service (such as drug treatment) from a social service agency in the executive branch to the judicial branch. An unfair aspect of this shift, with systemic consequences in the

age of mass incarceration, is that it criminalizes care: if a court participant does not use the care, the individual is subject to a criminal penalty to which they would not be subject if they had not participated in the problem-solving court.<sup>24</sup> Problem-solving courts have been praised for saving state and local governments money by doing work that other branches of government used to do less successfully.<sup>25</sup> If the benefit of problem-solving courts is that they are functionally relieving the other branches of government of responsibility for meeting social service needs, this new role is less a long-term solution than a short-term mitigation, which masks yet does not solve the problems of an insufficient social safety net in the face of growing inequality.

Problem-solving courts were motivated by the belief that judges have an obligation to solve the problems people bring to court. Judges – and the legal profession – do have an obligation to litigants who are forced to present state civil courts with their socioeconomic needs in the absence of other alternatives. But the judiciary and the legal profession should fulfill this obligation outside the courthouse. Rather than accepting the theoretical, institutional, and political shifts that have cast state civil courts as the agencies responsible for addressing individuals' socioeconomic needs, courts – and the legal profession as a whole – must actively question whether they should be playing this role. The profession must resist the temptation to address the consequences of this change without also insisting that the other branches of government provide a social safety net to deal with the consequences for individuals of poverty and inequality.

About a decade ago, state courts used theories of inherent judicial power to stand up to state legislatures over issues

of court funding. These same theories could prove useful in calling attention to the inappropriateness of the expansion of the role of state civil courts. If a state court system insisted on adequate funding to provide the services that state courts are implicitly being asked to provide, it could expose the flaws in this model and reveal that courts should not be playing this role.

The most disadvantaged individuals in society are also those most hurt by state courts that are pressed into service as the government branch of last resort. It might seem inappropriate and politically untenable for the legal profession to focus on better mental health care or housing support for low-income Americans, but there is a broader structural problem that threatens the profession's self-interest. If the civil court system continues to be asked to play this role, it will continue to struggle to function at all. By resetting the balance of obligations among the branches of government, courts would have the opportunity to function as they are intended to.

Changing the narrative of the role of courts in this era of crisis will require revealing facts that are hard to come by. Much is hidden about the work of state civil courts. Court systems and scholars have begun to partner to research state court systems, and that research should include examination of the role that state civil courts are playing in addressing socioeconomic needs. Understanding that role will help illuminate the path forward.<sup>26</sup>

Any change must begin with courts and lawyers refusing to blindly accept the courts as a last resort against the legislative and executive branches' failures to address inequality. As a profession, lawyers need to accept that court simplification, self-help, unbundled legal services, design thinking, and similar ideas

address only short-term symptoms and perpetuate the underlying problems. It is in the profession's self-interest and consistent with lawyers' role as stewards of

law and justice to resist the theoretical shift, and to advocate for courts doing less of what they are not well-suited to do and more of what they are.

#### ENDNOTES

- <sup>1</sup> In 2015, 20.4 million civil cases—comprising 15.4 million general and 5 million domestic relations cases—were filed in state courts. Richard Schauffler, Robert LaFountain, Shauna Strickland, et al., *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* (Washington, D.C.: National Center for State Courts, 2016), 3. And 281,608 civil cases were filed in federal district courts in 2015. United States Courts, “Federal Judicial Caseload Statistics 2015,” <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (accessed May 8, 2018).
- <sup>2</sup> National Center for State Courts, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (Williamsburg, Va.: National Center for State Courts, 2015), iv.
- <sup>3</sup> Illinois Supreme Court Commission on Access to Justice Commission, *Advancing Access to Justice in Illinois: 2017–2020 Strategic Plan* (Chicago: Illinois Supreme Court, 2017); American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016), 34; and Judicial Council of California, Elkins Family Law Task Force, *Elkins Family Law Task Force: Final Report and Recommendations* (San Francisco: Judicial Council of California, 2010).
- <sup>4</sup> Richard Y. Schauffler, *The Rise and Fall of State Court Caseloads* (Williamsburg, Va.: National Center for State Courts, 2017).
- <sup>5</sup> Rebecca L. Sandefur, “The Impact of Counsel: An Analysis of Empirical Evidence,” *Seattle Journal for Social Justice* 9 (51) (2010): 60.
- <sup>6</sup> See National Center for State Courts, *Civil Justice Initiative*; and Jessica Steinberg, “Demand Side Reform in the Poor People’s Court,” *Connecticut Law Review* 47 (741) (2015): notes 23–33.
- <sup>7</sup> Steinberg, “Demand Side Reform in the Poor People’s Court,” notes 34–35.
- <sup>8</sup> New Hampshire Supreme Court Task Force on Self-Representation, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts* (Concord: State of New Hampshire Judicial Branch, 2004), 2; and Stephan Landsman, “The Growing Challenge of Pro Se Litigation,” *Lewis and Clark Law Review* 13 (439) (2009): 440.
- <sup>9</sup> U.S. Census Bureau, “Figure 4: Number in Poverty and Poverty Rate: 1959 to 2016,” 1960 to 2017 Annual Social and Economic Supplements, <https://www.census.gov/content/dam/Census/library/visualizations/2017/demo/p60-259/figure4.pdf> (accessed May 8, 2018).
- <sup>10</sup> Consumer debt and foreclosure cases doubled in New York between 2001 and 2011. Jonathan Lippman, *The State of the Judiciary 2011: Pursuing Justice* (New York: New York Court of Appeals, 2011), 1, 6. The increase in family law cases is attributed to population growth, expanded rights, and new child support collection programs. Judicial Council of California, Elkins Family Law Task Force, *Elkins Family Law Task Force*, 19.
- <sup>11</sup> Sixty-nine percent of unrepresented litigants interviewed confirmed that the cost of an attorney either had or would prevent them from accessing the court system. David B. Rottman, *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys* (Williamsburg, Va.: National Center for State Courts, 2005), 19.
- <sup>12</sup> Elaine Sorensen and Chava Zibman, *Child Support Offers Some Protection against Poverty* (Washington, D.C.: The Urban Institute, 2000). In 1998, the Government Accountability Office issued a report showing that child support enforcement procedures needed to be improved if

those moving off of Temporary Assistance for Needy Families were to access this form of financial support. U.S. General Accounting Office, *Welfare Reform: Child Support an Uncertain Income for Families Leaving Welfare*, GAO/HEHS-98-168 (Washington, D.C.: U.S. General Accounting Office, 1998).

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- <sup>13</sup> The U.S. Office of Child Support Enforcement reported that, in 2015, 86 percent of child support cases had an order, up from 59 percent in 1999. Elaine Sorensen, "Census Decline vs. IV-D Increase in Child Support Orders," Office of Child Support Enforcement, June 17, 2016, <https://www.acf.hhs.gov/css/ocsedatablog/2016/06/census-decline-vs-iv-d-increase-in-child-support-orders>.
- <sup>14</sup> Douglas Rice, "Chart Book: Cuts in Federal Assistance Have Exacerbated Families' Struggles to Afford Housing," Center of Budget and Policy Priorities, April 12, 2016, 12, <https://www.cbpp.org/research/housing/chart-book-cuts-in-federal-assistance-have-exacerbated-families-struggles-to-afford>.
- <sup>15</sup> Harvard Joint Center for Housing Studies, *America's Rental Housing 2017* (Cambridge, Mass.: Harvard Joint Center for Housing Studies, 2017), 6.
- <sup>16</sup> U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership*, CB18-107 (Suitland, Md.: U.S. Census Bureau, 2018), 2.
- <sup>17</sup> Frederick Schauer, "Our Informationally Disabled Courts," *Daedalus* 143 (3) (Summer 2014).
- <sup>18</sup> *Ibid.*
- <sup>19</sup> National Center for State Courts, *Civil Justice Myths* (Williamsburg, Va.: National Center for State Courts, 2017).
- <sup>20</sup> Colleen F. Shanahan, Anna E. Carpenter, and Alyx Mark, "Can a Little Representation Be a Dangerous Thing?" *Hastings Law Journal* 67 (2016).
- <sup>21</sup> Quinn Mulroy and Shana Gadarian, "Off to the Courts? Or the Agency? Public Attitudes on Bureaucratic and Legal Approaches to Policy Enforcement," *Laws* 7 (2) (2018).
- <sup>22</sup> Jessica Steinberg, "A Theory of Civil Problem-Solving Courts," *NYU Law Review* 93 (2018).
- <sup>23</sup> Judith S. Kaye, "Delivering Justice Today: A Problem-Solving Approach," *Yale Law and Policy Review* 22 (125) (2004): 144.
- <sup>24</sup> Wendy Bach, "Prosecuting Poverty, Criminalizing Care," *William and Mary Law Review* 60 (forthcoming 2019).
- <sup>25</sup> Jonathan Lippman, "Judith S. Kaye: The Great Reformer," *NYU Law Review* 92 (1) (2017): 88.
- <sup>26</sup> Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan, and Alyx Mark, "Studying the New Civil Judges," *Wisconsin Law Review* (249) (2018).