



## SYMPOSIUM ESSAY

**Lawyerless Law Development**

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**Introduction**

State civil courts are the object of growing scholarly attention converging from two directions: rapidly expanding research regarding lawyerless state civil trial courts,<sup>1</sup> and an increasing volume of voices calling for state supreme courts to serve as a balm for American democracy's wounds.<sup>2</sup> The challenges of lawyerless trial courts and the potential of state supreme courts converge when considering how law develops in state civil courts. We and others have asserted that law development is not happening in lawyerless courts, at least

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1. See, e.g., Symposium, *The Other 98%: Racial, Gender, and Economic Injustice in State Civil Courts*, 122 COLUM. L. REV. 1165 (2022). We define “lawyerless courts” as those where at least 75% of cases involve a party without counsel. See Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511-13 (2022) [hereinafter Carpenter et al., *Lawyerless Courts*] (defining “lawyerless courts” and reviewing available data). In some areas of law, such as debt or eviction, imbalanced representation is the norm—plaintiffs have counsel, defendants do not. *Id.* at 511-12. In other areas, such as family law, nearly all cases involve two unrepresented parties. *Id.* at 512. As high as 80% to 90% of family law cases not involving the government have two unrepresented parties. *Id.* at 512 n.8.
2. See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1359 (“[State courts] decidedly remain common law courts. In that capacity, state courts not only ‘play an accepted policymaking role in a broad range of complex areas,’ but often bring common-law sensibilities and methodologies into their constitutional interpretation—taking close account of context and circumstances in their rulings. They should do just that when confronted with the new election subversion.” (quoting G. ALAN TARR & CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 43-44 (1993))).

not in the way that American legal scholars conventionally understand law development.<sup>3</sup> This Essay explores the core theoretical assertion that the absence of law development is a characteristic of lawyerless courts. We define key areas of analysis, including questions for empirical inquiry, to advance our understanding of lawyerless law development.

An essential premise of American law is that the law develops through adversarial, lawyered cases that produce written opinions. The assumptions underlying this premise include that both parties are represented; that the parties—through their lawyers—engage in procedures such as motions, briefs, and oral arguments; that judges issue written opinions responding to this adversarial engagement; that parties engage in appeals in a subset of these cases; and that the case law that emerges governs subsequent cases. The assumptions of representation and adversarialism do not hold in state civil courts, where litigants are largely unrepresented and the breadth of social problems people bring to court belie the adversarial construct.<sup>4</sup> Further, written opinions are not the norm in lawyerless trial courts.<sup>5</sup> The combination of limited adversarial process and the absence of written opinions means that appellate activity is minimal, and thus law development in lawyerless courts does not happen in the way we traditionally assume.

We begin by analyzing what we know about the volume and nature of appeals in lawyerless courts. We then use our original data to conceptualize how lawyerless trial courts operate in the absence of law development. Finally, we place questions of lawyerless law development in the context of broader questions of democratic governance.

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3. Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1343-44 (2019) (arguing that small claims courts' simplification of both legal procedures and statutory analysis disadvantages workers in wage theft cases); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 273-74, 273 n.103 [hereinafter Carpenter et al., "*New" Civil Judges*]; Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367, 1375-76 (2016) [hereinafter Shanahan et al., *A Little Representation*].
  4. See Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1474-75 (2022) [hereinafter Shanahan et al., *Institutional Mismatch*]; Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 362 (2022) [hereinafter Steinberg et al., *Assembly-Line Litigation*].
  5. Carpenter et al., "*New" Civil Judges*, *supra* note 3, at 267.

## I. The Volume of Appeals from Lawyerless Courts

Examining the proportion of state court appeals relative to trial level cases reveals how law develops in state courts. While the data challenges associated with studying state civil courts are well-known,<sup>6</sup> existing data do provide a limited picture of how cases are appealed from state civil courts. As compared to federal courts, a greater proportion of civil cases go to trial in state courts,<sup>7</sup> a far smaller proportion of these cases are appealed,<sup>8</sup> and there is wide variation in state courts by case type on both counts. These findings are consistent with research on lawyerless state civil courts. In the absence of lawyers and thus the expertise to engage in procedures before or outside the courtroom, in-person courtroom disposition is the norm.<sup>9</sup> When litigants appear without lawyers to resolve their problems in person, the proceedings are less formal and under-memorialized, which generates less fodder for appeals. Further, litigants without lawyers are less likely to appeal from their initial dispositions due to the absence of procedural expertise, as well as financial and logistical barriers.<sup>10</sup>

In state civil courts, written opinions at the trial level that articulate a judge's reasoning and constrain the future choices of judges and others are not the norm. This runs contrary to the assumption scholars have that written opinions exist as a matter of course and play a central role in law development.<sup>11</sup> The absence of written opinions overlaps with the presence or absence of lawyers in specific ways, and also reflects institutional structures and practices.

These observations lead us to derive the following hypotheses: (1) rates of appeal will be lower in the housing, debt collection, and family relationships cases that dominate lawyerless courts as compared to fully lawyered cases; and (2) state appellate courts are not developing substantive law in proportion to the volume of cases, or the needs of parties in lawyerless courts.

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6. See Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 771 (2021); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295, 297 n.6 (2016).

7. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 tbl.1, 507 tbl.4 (2004) (comparing percentage of cases that went to trial in 22 state courts versus U.S. district courts).

8. Michael Heise & Martin T. Wells, *Revisiting Eisenberg and Plaintiff Success: State Court Civil Trial and Appellate Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 516, 534 (2016).

9. Carpenter et al., "New" Civil Judges, *supra* note 3, at 273.

10. Shanahan et al., *A Little Representation*, *supra* note 3, at 1377.

11. See Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1106 (2021); Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685-87 (2018).

Our recent study of lawyerless courts in three jurisdictions provides evidence that supports these hypotheses.<sup>12</sup> We looked at domestic violence case law in three states over the last three decades and found that the highest rate of appellate decisions (the number of published appellate decisions divided by the total number of cases filed at the trial level) within a year across our study period was 0.1%. In most years, zero appellate decisions in this area of law were issued. Though we do not have comparative data (across areas of law or beyond these three jurisdictions), this snapshot is consistent with the proposition that a low volume of appeals and limited appellate law are characteristics of lawyerless law development.

## II. The Nature of Appeals from Lawyerless Courts

If different case types have different appeal rates, we would expect that these areas of substantive law also have different patterns of law development. If patterns are different, is it problematic for one area of law to have more development than another?

This question raises two related issues. First is the connection between substantive case type and litigants' social and economic contexts. For example, the "substance" of eviction law is inextricably linked to the reality that litigation pits landlords against tenants who are disproportionately Black and have fewer resources.<sup>13</sup> Second is the mismatch between the design of state civil courts and the social needs that people bring to these institutions.<sup>14</sup> As we have shown, some courts try to avoid social needs, some try to meet social needs on a programmatic level, and others adjust law and procedure to meet social needs.<sup>15</sup> An optimistic view is that appellate law would motivate courts that are avoiding social needs to be more responsive to the needs of litigants. Yet, to the extent courts are acting in the absence of appellate law to try to meet social needs through informal law and procedure, more formal law development may stymie this activity.

Looking at the top of the procedural pyramid may help us understand law development in lawyerless state civil courts: How has the Supreme Court developed law that relates to or arises from lawyerless courts? We know that the volume of Supreme Court cases that originate in lawyerless courts is

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12. For a full description of the methodology and data in this study, see Carpenter et al., *Lawyerless Courts*, *supra* note 1, at 529-37.

13. See Tonya Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in Civil Courts*, 122 COLUM. L. REV. 1243, 1246, 1285 (2022); see also Kathryn A. Sabbeth & Jessica Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1130, 1145-49 (2023).

14. See Shanahan et al., *Institutional Mismatch*, *supra* note 3, at 1496-97.

15. See notes 10-11 and accompanying text.

limited, because the Court takes fewer state cases than federal ones.<sup>16</sup> For example, consider the Court's development of the law of procedural due process, an issue closely tied to lawyerless courts. Since *Mathews v. Eldridge*, the key case interpreting procedural due process,<sup>17</sup> state civil courts have changed dramatically, including high rates of unrepresented parties;<sup>18</sup> default judgments (as high as 90% of some debt collection dockets);<sup>19</sup> sewer service (false affidavits of service);<sup>20</sup> and the use of small claims courts by large corporations to collect debt or evict.<sup>21</sup> These changes implicate constitutional due process analysis, yet the Court has heard only a few cases regarding state civil courts and due process since *Mathews—Lassiter v. Department of Social Services*,<sup>22</sup> *Connecticut v. Doehr*,<sup>23</sup> and *Turner v. Rogers*<sup>24</sup>—and it has not evolved the *Mathews* test. A thorough analysis of Supreme Court jurisprudence arising from lawyerless courts could yield additional insights.

Our core claim is that the absence of law development is a characteristic of lawyerless courts. An open question is whether the type of case or area of law complicates lawyerless law development. Housing, debt collection, and lawyered contract cases are all “contract law,” but do these distinctions matter for law development if lawyerlessness is held constant? In addition, it may be that variations of lawyerless courts—i.e., those with a high frequency of asymmetrical representation or with occasional full representation—add complexity to lawyerless law development.<sup>25</sup> Does variation among these types of cases—in the subject matter or the role of lawyers—affect whether these courts are contributing to the social good? Finally, our conception of

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16. Jeffrey S. Sutton & Brittany Jones, Essay, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 169-70, 170 tbl.1 (2018).

17. See *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1322-23 (2012); Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1119-20 (2019).

18. Shanahan et al., *Institutional Mismatch*, *supra* note 3, at 1498.

19. Steinberg et al., *Assembly-Line Litigation*, *supra* note 4, at 369.

20. *Id.* at 364-65.

21. See Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1709-10, 1717 (2022).

22. 452 U.S. 18, 24 (1981).

23. 501 U.S. 1, 5-9 (1991).

24. 564 U.S. 431, 435 (2011).

25. See Susannah Camic Tahk, *Distributive Precedent and the Pro Se Crisis*, 108 IOWA L. REV. 745, 771-81 (2023) (arguing that successful cases argued pro se often rely on precedent established in cases where both original parties had lawyers); Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 634-35 (2020) (hypothesizing that the use of contractual clauses compelling arbitration and forbidding claim aggregation has depressed the development of publicly available opinions in contract law).

lawyerless law development as relatively stagnant still leaves room to explore whether this stagnation ultimately accrues to the benefit or detriment of the parties who continue to litigate claims.

Current or recent natural experiments in lawyerless courts are fertile ground for inquiry. For example, some jurisdictions have implemented right-to-counsel programs in eviction cases that could be fodder for research regarding the volume of appeals or substantive development of case law before and after this intervention and as compared to other case types.<sup>26</sup> Similar interventions in foreclosure matters around 2008 might provide interesting comparisons.<sup>27</sup> In addition, anecdotal claims suggest that legal aid organizations that intentionally cultivate appeals spur case law development that benefits unrepresented litigants.<sup>28</sup> These assertions could be investigated empirically.

### **III. How Lawyerless Courts Operate Without Appellate Law Development**

The absence of appellate law development in lawyerless courts also challenges assumptions about how lawyerless trial courts function, particularly the assumption that trial court judges are guided by case law. In earlier work regarding domestic violence dockets in three states, we uncovered how, in the absence of developed law regarding judicial ethics rules, judges develop their own substantive understanding of this area of law. As one judge told us, “I did look at the canons, but I did not find that it was helpful. I developed a ‘smell test.’”<sup>29</sup> Our research reveals five phenomena regarding how lawyerless courts operate in the absence of appellate law development, particularly how judges make substantive legal decisions without guiding case law.

First, law is skeletal despite the large volume of cases. While states have statutes that lay out the basic contours of domestic violence law, judges we interviewed said that the absence of higher court guidance is an omnipresent

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26. See NAT'L COAL. FOR A CIV. RIGHT TO COUNS., *THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION 3-4* (2022), <https://perma.cc/32U6-SZJZ>.

27. See Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368, 379 n.43 (2011); Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1916-17 (2013); Stephen Fehr, *Tracking the Recession: States Boost Foreclosure Programs*, PEW CHARITABLE TRS.: STATELINE (Mar. 9, 2009), <https://perma.cc/2BRZ-24A7>.

28. See Christian Huebner, *Pro Se Tenants to Benefit After Legal Aid Appellate Victory*, LEGAL AID D.C. (July 30, 2013), <https://perma.cc/8F6U-MVJP>.

29. Carpenter et al., *Lawyerless Courts*, *supra* note 1, at 559.

challenge in their high-volume courts.<sup>30</sup> And domestic violence advocates working in these courts spoke of attempts to increase the volume of appellate law.<sup>31</sup>

Second, judges are actively and necessarily improvising, and this ad hoc behavior can become formal and common practice. For example, judges in our study used internal institutional channels to share their understanding of particular legal questions. In one jurisdiction, judges met informally to discuss how they resolved particular legal questions.<sup>32</sup> In another jurisdiction, the state’s judicial conference provided an internal, online resource on particular legal topics that captured both written appellate law and individual judges’ entries about how they resolved different questions.

Third, judges’ informal practices are not transparent or accessible to litigants. For example, the trial courts we studied do not produce written or explanatory opinions, which is typical of lawyerless courts.<sup>33</sup> As a consequence, the public has limited opportunities to gain an understanding of court practices.

Fourth, informal law and judge-made practices are essentially never challenged in lawyerless courts. This contradicts how American law is supposed to develop and invokes recent work regarding how particular areas of substantive law do—or do not—help litigants in lawyerless courts.<sup>34</sup> It also complicates application of the law across substantive areas, as lawyerless courts’ work overlaps with areas of law handled by other courts.<sup>35</sup>

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30. See, e.g., Interview with Centerville Court Actor 1 (on file with authors) (“There’s no case law, so that’s a problem. The body of law in CPOs is very slim so there’s not a lot of guidance for the court in that regard.”). Beyond the trial judges, it also raises questions about how intermediate appellate judges are deciding cases. And this question overlaps with the context of the enormous caseloads of state civil courts. See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1111-13 (2011).

31. See, e.g., Interview with Townville Court Actor 1 (on file with authors) (describing the effort by a law school clinic to develop robust appellate representation to generate more appellate guidance in domestic violence cases).

32. See, e.g., Interview with Centerville Judge 1 (on file with authors) (“We obviously talk to each other. We’re really, incentivized isn’t the right word, but encouraged to discuss issues with each other.”); Interview with Centerville Judge 2 (on file with authors) (“I consider all that [local court rules, appellate cases, code of judicial conduct] and also speak to colleagues about their past experiences and what came of that.”); see also Michael J. Nelson, Morgan L. W. Hazelton & Rachael K. Hinkle, *How Interpersonal Contact Affects Appellate Review*, 84 J. POL. 573, 576-77 (2022) (discussing a similar dynamic in federal courts between trial and appellate judges).

33. See Carpenter et al., *Lawyerless Courts*, *supra* note 1, at 516, 530.

34. See, e.g., Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 210 (2020).

35. This is particularly true of overlap with criminal law, in which defendants have a right to counsel and commonly pursue more robust appeals. For example, inadequacies in protective order proceedings are a basis for quashing 18 U.S.C. § 922(g) prosecutions. See  
*footnote continued on next page*

Fifth, actors who are not judges influence lawyerless law development. Our existing understanding of court-based law development assumes that lawyers shape the law. This includes a range of views about the essential nature of lawyers and judges,<sup>36</sup> and research regarding the power dynamics between litigants.<sup>37</sup> Yet there are other actors in these courtrooms. Our data show clerks playing an explicit role in determining what the law is.<sup>38</sup> Our data also show court assistance programs influencing law development in ways that are consistent with our findings regarding trial level cases: In less transparent and potentially less equitable ways, these court actors are influencing case outcomes.<sup>39</sup> This runs against the historical understanding of the centrality of lawyers by revealing that, outside formal and public processes, actors adjacent to judges are influencing the application of law to particular cases. Absent formal, transparent case law, these actors may influence both the limited formal law that does develop and the informal law that is taking its place.

#### **IV. The Import of Understanding Lawyerless Law Development**

In the absence of traditional law development, lawyerless law development is happening in ways that challenge our assumptions about civil courts, subvert the design of these courts, and can be both beneficial and problematic. Our research shows that where appellate law is skeletal, judges and other actors in lawyerless courts often develop informal law and shared practices. Without transparency, predictability, and consistency of these informal practices, lawyerless law development risks deepening the inequities of these courts. On the other hand, where individual courts and court actors are operating in the breach, ad hoc and informal behavior can prove productive

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United States v. Heintz, No. CR-05-0109, 2005 WL 2875124, at \*3-4 (E.D. Wash. Oct. 31, 2005).

36. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-84, 391 (1978); Nancy Leong, *Gideon's Law-Protective Function*, 122 YALE L.J. 2460, 2462, 2471 (2013); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 492-93 (2009).

37. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98-101 (1974).

38. See, e.g., Interview with Plainville Judge 1 (on file with authors) ("I didn't really ask other judges what to do. But the clerk was helpful in saying what other judges would do. She would tell me not only what other judges did but would help me in knowing the law.").

39. 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, 1329-31 (2021) (discussing the unseen role of non-lawyer actors, facilitated by judges, in courtrooms and its relationship to the regulation of the practice of law).



for litigants. But the experiments require evaluation to be useful beyond an individual case or courtroom.<sup>40</sup>

Lawyerless law development may differ from our traditional assumptions of appellate law development, but is this a problem? Are there types of cases or areas of substantive law where traditional substantive law development is unnecessary? In some lawyerless courts, law development operates in the context of the political risks of appellate litigation or legislative action. More traditional law development may draw attention that in an unfavorable political climate is ultimately detrimental to litigants in lawyerless courts.

It may be that the litigants who bring their problems to these “democratic emergency room[s]” would benefit from more or different law development to guide these courts.<sup>41</sup> State supreme courts can be powerful sources of law, but until we better understand lawyerless law development, we will not know their potential for the broader democratic enterprise.<sup>42</sup> It may be that the informality of lawyerless courts is a tool of resistance in the face of political disdain for the social needs of the disproportionately low-income, Black, and female litigants in housing, debt collection, and family matters. It may be a false assumption that we need more formal law in lawyerless courts.<sup>43</sup> Amidst efforts to understand lawyerless courts and how they both reflect and realize our broader democratic systems, we would do well to better understand lawyerless law development in state civil courts.

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40. See Shanahan et al., *Institutional Mismatch*, *supra* note 3, at 1526-27.

41. See Steinberg et al., *Assembly-Line Litigation*, *supra* note 4, at 362.

42. See Elisha Carol Savchak & Jennifer Barnes Bowie, *A Bottom-Up Account of State Supreme Court Opinion Writing*, 37 JUST. SYS. J. 94, 97 (2016) (explaining that, compared to the federal system, state courts of last resort borrow more language from lower court opinions.); Robert M. Howard, Christine H. Roch & Susanne Schorpp, *Leaders and Followers: Examining State Court-Ordered Education Finance Reform*, 39 L. & POL’Y 142, 143, 161 (2017) (showing that state courts of last resort tend to adopt reasoning from other states that are similarly situated to them).

43. Comparative examination, internationally and in alternative dispute resolution systems, is a natural area of future inquiry.