



SYMPOSIUM ESSAY

## Delegalization

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The lack of resources available to assist low-income litigants as they navigate the legal system has been widely documented.<sup>1</sup> In the civil context—where a majority of cases involve eviction, debt collection, and family matters<sup>2</sup>—various solutions have been offered to address the problem. These include expanding the civil right to counsel,<sup>3</sup> increasing funding for civil legal aid,<sup>4</sup> providing for greater availability and accessibility of self-help services,<sup>5</sup>

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1. See, e.g., MARY C. SLOSAR, LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18-19 (2022), <https://perma.cc/3RGT-DXHA> (to locate, select “View the live page”); Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), <https://perma.cc/42H4-3VD6>; see also Jabeen Adawi, *Changing Every Wrong Door Into the Right One: Reforming Legal Services Intake to Empower Clients*, 29 GEO. J. ON POVERTY L. & POL’Y 361, 365 (2022) (“With one in four low-income households having experienced six or more civil legal problems in the past year, 86% of low-income Americans reported receiving inadequate or no legal help with these problems.”).
  2. Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1130, 1140 (2023); NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at iii-iv (2015), <https://perma.cc/J789-X8BG>.
  3. See NAT’L COAL. FOR CIV. RIGHT TO COUNS., <https://perma.cc/3ZAS-VHRM> (archived May 14, 2023); AM. ACAD. OF ARTS & SCIS., CIVIL JUSTICE FOR ALL: A REPORT AND RECOMMENDATIONS FROM THE MAKING JUSTICE ACCESSIBLE INITIATIVE 1, 4-5 (2020), <https://perma.cc/635Y-BENN> (recommending “increas[ing] the number of legal services lawyers who focus on the needs of low-income Americans”); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132-33 (2009) (noting that states’ efforts to expand the civil right to counsel “emanate from the failure of the legal system to provide access to civil legal aid for the overwhelming majority of low-income people”).
  4. See *Standing Committee on Legal Aid and Indigent Defense*, AM. BAR ASS’N, <https://perma.cc/AW8E-LQEE> (archived May 14, 2023); *Civil Resources*, NAT’L LEGAL AID & DEF. ASS’N, <https://perma.cc/G74G-TRVC> (archived May 14, 2023) (advocating
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adopting a more flexible approach to the provision of legal services (including, for example, unbundled and limited legal services options);<sup>6</sup> scaling back unauthorized-practice-of-law regulation and allowing for higher utilization of other service providers;<sup>7</sup> and placing an emphasis on active judging.<sup>8</sup> The range of possible reforms spans the supply-demand divide: Some focus on external resources, often in the form of increased lawyer provision, while others focus on procedural and judicial reforms.<sup>9</sup> Yet another option is the creation of rights that would provide a stronger foundation for legal advocacy, such as a right to housing.<sup>10</sup>

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for increased funding for “federal and state programs providing legal assistance to low-income people”).

5. See, e.g., D. James Greiner, Dalié Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1120-22, 1125 (2017).
6. See, e.g., Mark Hansen, *Helping Self-Helpers*, A.B.A. J., Sept. 2004, at 72, 72 (2004) (describing growing interest in unbundled legal services and limited representation approaches).
7. See, e.g., Lauren Sudeall, *The Overreach of Limits on “Legal Advice”*, 131 YALE L.J.F. 637, 637-39, 647-48 (2022); John M. Greacen, *Legal Information vs. Legal Advice: A 25-Year Retrospective*, JUDICATURE, Summer 2022, at 48, 56-59 (providing examples of regulatory schemes that allow for nonlawyer assistance); AM. ACAD. OF ARTS & SCI., *supra* note 3, at 5 (recommending “bring[ing] many new advocates—service providers who are not lawyers—into the effort to solve civil justice problems” and “foster[ing] greater collaboration among legal services providers and other trusted professionals—such as doctors, nurses, and social workers”).
8. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649-51 (2017) (defining “active judging” as “a model of judging that sets aside traditional judicial passivity in favor of some form of judicial intervention or activity to assist people without counsel”); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 556-57 (2022) (finding that judges across “three diverse jurisdictions” consistently offered little assistance to pro se litigants, instead “maintain[ing] legal complexity and exercis[ing] tight control over hearings and party testimony,” and arguing that these results ultimately point to flaws in the design of the civil justice system); see also Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1061 (2017).
9. Compare Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 251-52 (2009) (arguing that the “absence of counsel for the indigent is a national disgrace and undermines the effectiveness of the courts as a legitimate check on the power of the state,” and that “the indigent, like the wealthy, must have access to counsel in order to protect their interests”), with Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 746 (2015) (arguing that “demand side reform would revise the procedural and evidentiary rules that commonly cause pro se litigants to stumble and require judges to develop facts that support established claims and defenses, thus enabling meaningful participation in the court system by those who appear without counsel”).
10. See, e.g., Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 131-32 (2023) (describing efforts to secure a positive “right to shelter”—by which the government provides shelter for individuals—and proposing an alternative negative

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All of these suggestions require prolonged affirmative investment and rely on other parties—whether legislators, judges, or court personnel—to be effective and engaged partners in reform. Thus, they remain reliant on, and retain a certain degree of faith in, a well-functioning legal system.<sup>11</sup> To date, most discussions about civil justice reform have stopped short of the “ultimate” demand-side solution: decreasing the number of cases in the civil legal system by removing them from the system altogether. In the criminal law context, support for shrinking the system has manifested in decriminalization<sup>12</sup>—particularly with respect to the crimes most likely to impact the poor. In this Essay, I explore how we might expand the logic of decriminalization beyond the criminal sphere—including to parts of the civil legal system, which is also plagued by severe resource needs and other systemic shortcomings. I term this approach to legal reform—which transcends the traditional civil and criminal siloes—“delegalization.”

For purposes of this Essay, I focus on cases in which poor, marginalized people are typically defendants (without legal representation) and wealthy individuals or corporations are plaintiffs, as in most eviction and debt-collection cases.<sup>13</sup> In this segment of the civil legal system, we tolerate deviation from the traditional legal framework in almost every respect other than the basis for the claim and the remedy: We allow self-represented litigants to navigate the system and attempt to defend themselves without any legal expertise, we allow for selective implementation of the law,<sup>14</sup> and we allow for a high degree of procedural informality (and for informal power structures to

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right to shelter by which individuals have a right to self-shelter “without government interference”).

11. *But see* Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49, 50 (characterizing the “problem” not as “unmet legal needs,” but as “unresolved justice issues,” creating a wider range of possible solutions).
12. In some cases, this has meant a shift to the civil system, *see infra* note 38, and in others, it has resulted in no penalty at all. Here, I am focused not on shifting cases to some other part of the legal system, but instead on moving them out of the legal system as it is currently structured.
13. *See* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Essay, Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246-47, 1247 n.14 (2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1711, 1724 (2022). There are likely strong arguments for why certain family matters, like divorce or child custody, could be handled differently and possibly outside of the traditional legal system. Given that the considerations in such cases are significantly different, however, I do not attempt to address them here.
14. *See, e.g.*, Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 217 (2020) (noting judges’ unwillingness to entertain certain claims); *see also* Lauren Sudeall & Daniel Pasciuti, *Praxis & Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1391 (2021) (noting the unlikelihood that courts will engage with tenant counterclaims).

control and dictate outcomes).<sup>15</sup> Thus, when it comes to the management of regular civil issues faced by the poor, the system has already demonstrated a one-sided appetite for delegalization.

Rather than trying to level up treatment on the litigant side of the equation—for example, by focusing on the development of more robust procedural protections or the provision of counsel—delegalization would carve out a different path altogether. Decreasing the numbers of these types of cases in the civil legal system—to reduce state-facilitated harm and oppression—is not an inconceivable possibility, but it will require a significant shift in how we conceive of harm, liability, and remedies.

### **I. Criminal and Civil Reform: Parallels in Premise**

Decriminalization's increased traction in the U.S. legal system has been motivated in part by a recognition that the existing criminal legal system is over-punitive and has grown too large—leading, among other things, to mass incarceration, overtaxed judicial and law-enforcement systems, and the entrenched subordination of poor and racialized communities.<sup>16</sup> The effects of this overextended criminal legal system go beyond those resulting from direct interactions; the collateral consequences of these interactions extend both the time and range of the system's impact.

Decriminalization suggests that to lessen the burdens on and harm created by the legal system, we should reduce the number of cases in the system.<sup>17</sup> We can do so by declassifying certain “criminal” acts, thus ensuring that they never enter the legal system at all. Thus, decriminalization addresses the reality that the resources available to assist lower-income individuals in navigating the system, and to provide for adequate and fair presentation of the relevant issues, fall far short of what is required for the system to function properly.<sup>18</sup> In

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15. See Sudeall & Pasciuti, *supra* note 14, at 1371-72 (describing higher degree of informality often present in state and local courts); *id.* at 1429 (explaining how informal legal processes may reflect and exacerbate existing power dynamics among parties).

16. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (10th anniversary ed. 2020) (“[T]he current system of control permanently locks a huge percentage of the African American community out of the mainstream society and economy. The system operates through our criminal justice institutions, but it functions more like a caste system than a system of crime control.”); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 326-27 (2014).

17. See Logan, *supra* note 17, at 326-27 (pointing to several factors motivating decriminalization, including the costs of incarceration, “a desire to loosen government control over victimless crimes,” the “racial disparities in arrest and conviction rates,” and “the long-term negative consequences of continued criminalization”).

18. See, e.g., Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 461 (noting that “the vast majority of  
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addition, decriminalization might be seen as a more general acknowledgement that the legal system has become the default repository for a wide range of social problems that it is not well-designed to resolve.<sup>19</sup> Decriminalization might also indicate the desirability of limiting the state's role in policing the actions of poor and marginalized individuals and communities. Lastly, decriminalization reflects the evolution of society's morality and values, creating pressure to change the "criminal" classification of certain actions and behaviors.<sup>20</sup>

Making a direct analogy between decriminalization and the civil system can be difficult because the paths to entry are different: Civil cases often arise because of disputes between private parties,<sup>21</sup> who look to the civil system as a means for providing redress. In other words, the civil system often operates not to address wrongdoing against the state (or some other centralized body), but to adjudicate disputes *between* individuals or private entities.<sup>22</sup> Thus, reducing the number of cases in the system seems infeasible and, for many, undesirable. In addition, when crimes like loitering or possession of marijuana are statutorily eliminated and certain conduct is no longer defined as "criminal," the "harm" to the state (which was in some sense legally constructed) is legally eliminated.<sup>23</sup> In contrast, harms committed in the civil

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criminal defendants are indigent" and that the right to counsel is illusive in most cases, with 90% of defendants pleading out "with no factual investigation on their case"); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1198 (2013) (noting the many factors—including underfunding, excessive caseloads, and a lack of oversight and training—that have led to a "two-tier system of justice," in which indigent defendants are denied effective representation and a fair trial).

19. See, e.g., Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1586-87 (2018) (noting that criminal courts are faced with a host of social problems, such as drug use, that traditional judicial processes have failed to effectively resolve).
20. See Richard Lempert, *Toward a Theory of Decriminalization* 3-4 (Univ. of Mich. L. Sch. Pub. L. & Legal Theory Working Paper Series, Working Paper No. 209, 2010), <https://perma.cc/NY9W-GL37>; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 237-38, 253 (2007).
21. Although many civil lawsuits are initiated by corporations, and in some cases, the state. See *infra* note 41 and accompanying text.
22. In the civil context, harm is decentralized, unlike in the criminal sphere, where the state is, in theory, both the centralized repository for harm and the entity responsible for pursuing a remedy.
23. Redefining conduct as no longer "criminal" may not eliminate other negative social externalities (or harms)—for example, the public harm resulting from widespread marijuana use or the harm to the public fisc resulting from turnstile jumping. Yet any action or behavior may result in a range of effects, both targeted and wide-ranging; the relevant point here is that, through the process of decriminalization, behavior that was once seen as harm to the state demanding recourse in the form of punishment is no longer seen as such. Crimes like those provided as examples here are distinguishable

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arena do not disappear if the basis for legal recourse is eliminated; contractual obligations between parties that originated in the legal realm remain unrealized.

Yet many of the shortcomings detailed above are mirrored across the civil-criminal divide. To the extent the civil legal system provides a framework of rights and procedures to ensure parties receive redress based on proven wrongs, that framework is rarely enforced in all directions in the areas most affecting the poor, given low rates of legal representation, lack of legal expertise among pro se litigants, and uneven distribution of resources. Civil courts operating in these contexts often fail to thoroughly adjudicate factual disputes to ensure just outcomes; instead, they churn cases through a process driven by simplified inquiries and underdeveloped narratives.<sup>24</sup> For example, although landlord-tenant law could, in theory, provide an evidence-based model for determining possession, courts are more likely to function as a vehicle for rent collection,<sup>25</sup> with very little process;<sup>26</sup> counterclaims brought by tenants to address wrongs by the landlord are rarely raised or addressed.<sup>27</sup> In other cases—as demonstrated by Colleen Shanahan, Jessica Steinberg, Alyx Mark, and Anna Carpenter—the civil courts serve as an ill-suited repository for addressing social needs that other branches of government have failed to adequately meet.<sup>28</sup> And in the case of people suffering from poverty, the

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from crimes that inflict specific harm against another person, like assault or murder. As those crimes are far less likely to be decriminalized, they are not the focus here—although, even in those cases, it is the state (or “the people”) that serves as instigator and plaintiff.

24. See Wilf-Townsend, *supra* note 13, at 1709, 1743-56 (noting the lack of probing and analysis that flows from the manner in which courts process high volumes of low-value claims); see also Kathryn A. Sabeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 302 (describing the drawbacks of oversimplification of process with respect to legal issues affecting the poor).
25. Sudeall & Pasciuti, *supra* note 14, at 1419; see also Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 639 (2019) (arguing that the eviction process “shifts the landlord-tenant relationship from owner-renter to creditor-debtor,” and that “filing [an action in court] assists in rent collection by leveraging the police power of the state to materially and symbolically support the landlord’s collection efforts”). For a more in depth discussion of the civil courts’ role in supporting racial capitalism, see generally Brito et al., *supra* note 13.
26. This practice was effectively sanctioned by the Supreme Court in *Lindsey v. Normet*. See 405 U.S. 56, 72-73 (1972) (reinforcing the summary nature of the eviction process and concluding that “[s]peedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss”).
27. Sudeall & Pasciuti, *supra* note 14, at 1391; see also Summers, *supra* note 14, at 199 (describing study results demonstrating that most tenants with meritorious warranty-of-habitability claims do not benefit from the law).
28. Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, Essay, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1474-75 (2022); see also *id.* at 1501 (observing that “quantitative and qualitative data paint a picture of state

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remedies imposed often do little to address the underlying problem or avoid short-term recurrence.<sup>29</sup> As in the criminal context, the brunt of these civil justice failings often falls on poor and racially minoritized individuals and communities.<sup>30</sup>

Lessons from decriminalization can help provide a foundation and chart a path forward for broader legal reform—particularly for those who aim to reduce the legal system’s power to police poor people and people of color.<sup>31</sup> Like crimes rooted in or punished more harshly because of poverty—such as lower-level drug and property crimes—many civil legal problems are borne of social and economic problems that the current civil legal system is poorly designed and too under-resourced to address.<sup>32</sup> In other words, we have invested in and rely on a legal system to process a large volume of problems that may not be rooted in legal questions at all. Just as the criminal legal system is not the best tool to resolve every criminal “problem,” the civil legal system is not always suited to address the complex set of circumstances that lead to civil legal problems as we have defined them.

## II. A Theory of Delegalization

In both the civil and criminal spheres, the conundrum of how to address failings of the legal system—which has expanded beyond its appropriate reach, lacks adequate resources for the volume of cases it generates, disproportionately harms poor and racialized people, and is simply ineffective in accomplishing many of its goals—could, in theory, be resolved by reducing the number of cases within its scope. Because the criminal legal system

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civil courts largely occupied with social needs and their consequences rather than resolving private disputes”).

29. The prevalence of serial evictions underscores this point. *See* Garboden & Rosen, *supra* note 25, at 650 (noting that experienced landlords in the study’s sample “used serial eviction filings as a process designed to shape tenant behavior and coerce resources from a tenant”). The legal process does not provide a true remedy or effectively resolve the underlying cause of the legal action—for example, the tenant’s inability to pay rent, conditions issues, the need for the landlord to maintain their income, and a lack of affordable housing.
30. *See* Brito et al., *supra* note 13, at 1244.
31. *See* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1478-79 (2020) (arguing that criminalization punishes people for aspects of their lived experience, such as poverty, and creates a mechanism for state surveillance and control). This phenomenon is not limited to the criminal sphere. *See generally* Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847 (2023) (demonstrating how certain aspects of eviction law can result in extensive control over low-income and racialized communities).
32. *See* Shanahan et al., *supra* note 28, at 1527 (“Courts are not designed for social provision, yet they are attempting to do so with a range of consequences.”).

addresses harm to society, if society chooses to no longer deem an action harmful—or at least not worthy of legal sanction—it can simply undo the “criminal” characterization and eliminate cases altogether, preventing the state from imposing punishment. The question remains how to achieve a similar end when the harm is committed against an individual or private entity.

As Benjamin Levin has written, issues of power relations, social domination and hierarchy, and punitiveness—which define our responses to harm—are not unique to the criminal context; they transcend the civil-criminal divide and are present in many of our civil institutions, including housing policy and employment law.<sup>33</sup> For those reasons, Levin argues, criminal law may not be exceptional but instead illustrative of broader social dynamics.<sup>34</sup> Thus, the project of decarceration—and also, I would suggest, decriminalization—might be conceived of as a larger social transformation.<sup>35</sup>

In this Part, I discuss two fundamental aspects of decriminalization that might be translated into a broader theory of delegalization and start us down the path to answering the question posed above. The first aspect looks at how decriminalization operates beyond the specifics of any given statutory offense. Ultimately, decriminalization reflects a societal choice to view and respond to behavior differently. The “harm” may remain, but whether and how we choose to respond to it, and who bears the burden for those choices, are no longer fixed. Second, decriminalization and delegalization both involve a choice to limit the state’s role in policing individuals and communities.

### A. Reframing Action and Response

Upon initial consideration, it might seem simpler to eliminate the basis for a criminal charge than a civil claim. In both realms, however, removing the basis for legal action does not *eliminate* the underlying issue or behavior. People are likely to engage in the same behavior regardless of how it is classified or what litigious response it may elicit, particularly when they are forced into certain behaviors out of poverty or a lack of other available options. As a society, we have less control over whether behavior occurs than how we *conceive of* and *respond* to it, and whether we wish to treat it as something to be addressed through the legal system. In either case, the key shift is redefining

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33. See Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385-87 (2022). Others have demonstrated that civil measures can have a punitive element. See, e.g., Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PA. J.L. & SOC. CHANGE 175, 185-86 (2014); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

34. See Levin, *supra* note 33, at 1385-86.

35. See Benjamin Levin, *Rethinking the State*, INQUEST: FOUNDS. (May 26, 2022), <https://perma.cc/6SB7-TA2N>.



the trigger for legal action such that certain actions or failures to act do not alone elicit the same system response—whether it be the filing of criminal charges or the filing of a civil lawsuit.<sup>36</sup>

Just as decriminalization serves to reframe wrongdoing against the state, delegalization might reframe certain harms or wrongdoing committed against individuals or corporations such that, by definition, the legal system is no longer the appropriate venue for resolution.<sup>37</sup> In the context of decriminalization, for many of the reasons described above, society decides that conduct once deemed criminal is no longer worthy of the same response. In some cases, we might change the nature of the response—for example, recategorizing certain actions as civil instead of criminal<sup>38</sup>—or eliminate any legal response or penalty. There is no actual barrier to society making a similar determination in the civil realm about how we conceive of certain behaviors, and whether they can trigger legal action, in areas such as housing or debt collection. In those situations, it is simply another party, not the state, that loses the ability to engage the system. One party will always be left carrying the initial burden of whatever action (or inaction) has transpired; yet there are myriad ways to remove that burden aside from allowing one party to use the power of the state to punish another individual. The choice of which path to take hinges on our understanding of who or what is or should be responsible for resolution; that understanding need not be static, just as our understanding of whether behavior is “criminal” can evolve.

In reframing how we see the underlying behavior, and identifying the source of harm, we need not see the fault or responsibility to provide redress as individual. For example, a tenant’s inability to pay rent or a parent’s inability to pay child support might be reframed not as wrongdoing committed by one individual against another—and thus an appropriate trigger for legal machinery aimed at extracting a remedy from the “wrongdoer”—but instead as something driven by external circumstances that must be addressed as a preliminary or underlying matter. If we take the latter approach, the dispute may be better addressed through the provision of social services or community-based resolution mechanisms than the legal process. Such a shift

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36. Because the path into the system is different, the civil response must be different: Rather than redefining the nature of an action as “non-criminal,” we must redefine the nature of “legal” entitlement.

37. *Cf.* Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 506-07, 506 n.25 (1990) (arguing for the “medicalization” of drug-related issues and an expanded role for the public health system, rather than the criminal legal system, in drug abuse treatment and prevention).

38. *See, e.g.*, Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 4 (2016) (discussing the conversion of certain misdemeanor offenses into civil infractions).

might be driven by viewing relevant behaviors as driven primarily by societal or structural forces,<sup>39</sup> or by a determination that insufficient resources are available to guarantee a fair hearing on the definition of harm and whether it has occurred. If the failing at issue is not viewed as purely individual but instead as largely structural, or if we lack confidence in the existing system's ability to accurately identify individual wrongdoing, we might not look to the *individual* to resolve the problem or make the claimant whole, but instead to a different set of societal remedies.<sup>40</sup>

### B. Reducing the State's Role in Policing (and Punishing) Behavior

Civil cases are often thought to involve disputes between private individuals—typically to provide compensation to the harmed individual or make them “whole.” Yet in many civil cases, an individual is sued by the state or a corporation;<sup>41</sup> and in all civil cases, the courts serve as an arm of the state, wielding a significant degree of state power. The persistent belief that the civil system is meant to compensate for harm committed between individuals suggests that in the civil context—in contrast to the criminal—the harm cannot simply be eliminated or recategorized without leaving one party un-whole. Yet that view assumes a fixed interpretation of harm and a remedial—and, in some cases, punitive—role for the state in addressing such harm. Where the shared elements (and systemic shortcomings) described above are present, it is worth questioning how many of these assumptions are static.

As my co-authors and I have argued in our recent article, *Racial Capitalism in the Civil Courts*, rather than serving as a neutral forum for dispute resolution, civil courts operate as an arm of the state to both actively and passively maintain the social order necessary for the capitalist structure to survive and thrive.<sup>42</sup> Thus, although the state's role in reinforcing racial oppression and subordination has been more thoroughly explored in the criminal context, we argue that the state plays a similar role in the civil legal system.<sup>43</sup> Here too, even though incarceration is often not at stake, the state wields great power—

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39. See generally SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 153-63 (2013) (reframing individual failures as inevitable results of poverty and scarcity).

40. For example, we might favor the implementation of state-funded rental assistance programs over the universal requirement that an individual tenant pay delinquent rent or face eviction. See also *infra* note 52 and accompanying text.

41. Brito et al., *supra* note 13, at 1247 & n.14.

42. In this piece, my co-authors and I argue that through their interpretation and application of the law, and the processes they develop and impose, civil courts support and perpetuate the social inequality required for racialized systems of exploitation and extraction to generate and accumulate capital. *Id.* at 1245-52.

43. *Id.* at 1255-56.

often of a coercive or punitive nature—over the daily lives of individuals subjected to the system and the opportunities available to them.<sup>44</sup> As in the criminal context, the negative effects of bestowing such power on the state are felt primarily by poor and racialized individuals and generate collateral consequences, both formal and informal, lasting far beyond the immediate action and continually penalizing respondents in future civil and/or criminal interactions.<sup>45</sup>

A desire to minimize the state’s punitive role in resolving civil legal problems might be motivated by the belief that state power is particularly coercive; that policing such conduct is not a good or effective use of state resources, in part because of the external dynamics involved; and that the state is not able to exercise such power fairly (due in part to the uneven allocation of resources). In the context of the civil system, the state might be seen as particularly ill-suited to impose an effective remedy. In the criminal context, the state can at the very least guarantee some form of recompense (if not rehabilitation or deterrence); in the civil context, it is unclear whether the courts alone can provide any “fix” to address the underlying problem.<sup>46</sup>

Decriminalization seeks to minimize or eliminate the state’s role by limiting cases in which the state can police or punish individual conduct. Delegalization achieves similar ends by removing certain cases from the ambit of courts or changing the nature of courts’ role in the resolution process. In doing so, it limits the state’s ability to use the legal system as a means to control or punish individuals for certain behaviors and prevents private entities or other individuals from invoking state power to the same end (and perhaps for their own advantage or profit).<sup>47</sup> Delegalization need not, however, prevent the state from serving a different, non-punitive role. Instead of serving as a facilitator of extraction or imposing consequences, the state might direct individuals to other resources through the courts or provide assistance itself. In

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44. See *id.* at 1254-56; see also Lauren Sudeall, *Rethinking the Civil-Criminal Distinction*, in *TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM* 268, 281-82 (Jon B. Gould & Pamela R. Metzger eds., 2022) [hereinafter Sudeall, *Rethinking the Civil-Criminal Distinction*]; Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL’Y DEBATE 98, 113 (2017) (finding that states adopt one of three different approaches to landlord-tenant legislation: protectionist, pro-business, and contradictory, leading to differing outcomes in housing quality, affordability, and eviction rates across states).

45. See Sudeall, *Rethinking the Civil-Criminal Distinction*, *supra* note 44, at 270-72; Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 912-14 (2015) (describing the types of collateral consequences that follow from civil judgment).

46. See Shanahan et al., *supra* note 28, at 1475-76.

47. See, e.g., Summers, *supra* note 29, at 900-01 (detailing how landlords use civil probation agreements in the eviction context to exert extensive control over tenants).

the absence of state intervention, inequality (racial and otherwise) will surely continue to pervade and direct the private sphere—and should be countered accordingly. But perhaps we must ask ourselves whether courts currently help to mitigate (or exacerbate) inequality in the civil sphere in addition to branding existing inequalities with the state’s imprimatur.<sup>48</sup>

### III. Delegalization in Practice

In its purest form, delegalization can be understood as removing matters from the legal system altogether by eliminating either the legal basis for the claim or the legal framework for dispute resolution.<sup>49</sup> Thus, delegalization could lead to certain forms of civil abolition, including eviction abolition.<sup>50</sup> This form of abolition would eliminate landlords’ ability to use the courts to evict tenants, at least for nonpayment.<sup>51</sup> But again, this does not necessarily equate to no recourse at all; it merely reflects a decision to respond to the underlying behavior in a different way. If the consensus is that landlords must still be paid, that could be accomplished in other ways, such as the provision of governmental rental insurance or a social insurance structure that would give landlords the ability to protect themselves against the possibility of nonpayment.<sup>52</sup> Thus, state intervention is still possible, but it may be of an affirmative and non-punitive nature.

A narrower approach might simply eliminate certain types of filings—for example, mass filings by large corporations in the eviction or debt contexts.

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48. See Shanahan et al., *supra* note 28, at 1484.

49. Cf. Allegra M. McLeod, Essay, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) (offering “abolitionist justice,” which favors “accountability and repair . . . [and] practices addressing the systemic bases of inequality, poverty, and violence” as an alternative to “legal justice,” which “emphasize[s] the administration of justice through individualized adjudication and corresponding punishment or remuneration”).

50. See Larisa Bowman, *Eviction Abolition 2-3* (Mar. 28, 2022) (unpublished manuscript) (on file with author).

51. Even within the existing legal structure, this could be done by redefining the failure to comply or meet one’s contractual obligation—i.e., under certain circumstances, “failure to pay” alone would no longer be an adequate basis to bring a claim.

52. Cf. Catherine R. Albiston & Catherine L. Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 BERKELEY J. EMP. & LAB. L. 257, 307-19 (2021) (proposing improved social insurance models that are universally available, based on citizenship rather than employment). Such a solution has the potential to make housing more expensive by passing the costs on to renters; yet a greater role for government, combined with the recognition that the existing system is not without similar costs, could minimize or mitigate this objection. See STOUT RISIUS ROSS, INC., *THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A*, at 3-5 (2016), <https://perma.cc/EH5G-72FF> (detailing costs of eviction to the municipal government, including homeless shelter, medical, and law enforcement costs).

Yet other solutions might include bars to new filings where plaintiffs face existing claims based on violative management practices—for example, maintaining substandard or dangerous housing conditions. Selective delegalization could create space for participatory and cost-shifting tools that alter the dynamics of cases remaining within the system—for example, using fees imposed for conditions violations or cost savings from delegalized cases to create a mutual aid fund.<sup>53</sup>

While not necessarily abolitionist—given its willingness to consider solutions that retain elements of or operate within the existing system—the delegalization argument I articulate here aligns with several guiding principles of abolition: (1) power shifting; (2) defunding and reinvesting; and (3) transformation.<sup>54</sup> Delegalization is non-reformist in that it argues not for the expansion, but rather for the shrinking of existing legal systems,<sup>55</sup> yet it stops short of requiring complete dismantling.<sup>56</sup> Even for abolitionists, however, such an incremental approach might be seen as an aligned and even necessary step toward their ultimate goal, serving to “reduce the system’s size, scope, [and] power.”<sup>57</sup> Moreover, as Allegra McLeod has argued in the context of decarceration, courts may have a critical role to play given their position as a present (and sometimes only) forum for currently hearing such issues.<sup>58</sup> Yet, as long as they aim to reduce the courts’ footprint, both delegalization and abolition will ultimately require greater investment in the institutions and

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53. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 39 (2022).

54. *Id.* at 25.

55. See Bowman, *supra* note 50, at 39; see also Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://perma.cc/Q7CD-733P> (arguing that non-reformist measures “reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates”).

56. For a discussion of concerns regarding abolition’s political challenges, see Rachel E. Barkow, *Promise or Peril? The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. (forthcoming) (manuscript at 5-7) (discussing potential for counterproductive political backlash and the danger of sacrificing reforms that would benefit many in the present in favor of a utopian alternative unlikely to materialize).

57. Zohra Ahmed & Rachel Foran, *No More Courts*, INQUEST (Aug. 2, 2022), <https://perma.cc/WYA5-REWV>; cf. Clair & Woog, *supra* note 53, at 26 (“[T]he work of abolition may require short-term or modest efforts that remove components of systems but maintain the goal of facilitating their eventual abolition and replacement by democratic and capacity-building institutions of care and robust social provision.”).

58. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1660 (2012); see also Shanahan et al., *supra* note 28, at 1528 (noting the “need for more intellectual and political investment in identifying, developing, and prioritizing structures that support a ‘rightsized’ role for state civil courts”).

mechanisms that help individuals meet their basic needs, including housing, healthcare, safety, and food security.<sup>59</sup>

As appealing as it might be to wholly eliminate the legal basis for certain claims, such a response is likely infeasible in the near-term, given the issues that would be raised within, and significant reworking required of, wide swaths of contract and property law, as well as political obstacles. A second possibility would be to allow cases into the system initially but create an off-ramp for some cases—depending on the nature of the defendant’s response or another actor’s decision to divert—or to provide for a parallel resolution track. Like some forms of decriminalization, this secondary solution is a compromise; instead of complete displacement, it retains (and accepts) the legal system in part “as a governance mechanism for a wide range of social behaviors and environments,”<sup>60</sup> yet attempts to limit its ultimate reach. In this sense, delegalization might be understood as encouraging decreased reliance on the legal system or limiting uses of the legal system to its most appropriate and effective uses—managing legal disputes rather than unaddressed social needs.<sup>61</sup> Jessica Steinberg, Colleen Shanahan, Anna Carpenter, and Alyx Mark have recently made similar arguments, calling for increased social welfare provision and removing cases that drive inequality from the civil courts, so that courts can focus on what they do best: “resolving two-party adversarial disputes.”<sup>62</sup>

This partial solution could take several forms, including diversion programs that move cases from the more traditional court forum to mediation or alternative court models,<sup>63</sup> or shifting simpler, level-party cases out of the

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59. See Ahmed & Foran, *supra* note 57; McLeod, *supra* note 58, at 1633 (noting that “a shift away from current carceral practices will be enabled by bolstering opportunities for social integration and institutional involvement, particularly for those persons with otherwise limited access to such conventional social institutions”).

60. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1061 (2015).

61. Cf. Shanahan et al., *supra* note 28, at 1476-77 (observing that although state civil courts are “designed as sites of dispute resolution,” they spend significant time addressing litigants’ social needs).

62. 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, 369 (2022). In making this argument, the authors draw on the divest/invest framework, borrowed “from the grassroots movement to defund the police.” *Id.* at 361, 370.

63. Jessica Steinberg has written about problem-solving courts’ potential in the civil context, noting that some of the pitfalls accompanying that approach in the criminal realm might not apply in the civil setting. See Steinberg, *supra* note 19, at 1626-27 (demonstrating, for example, that under the civil problem-solving court model, the onus may be more on powerful private parties to comply with the law, rather than on more vulnerable parties to change their behavior). Yet, at least in the criminal context, some would likely categorize such models as reformist. See Bowman, *supra* note 50, at 39 (noting that in problem-solving courts and diversion programs, “[p]unishment shifts in form from incarceration to surveillance, but the exercise of carceral power over

*footnote continued on next page*

traditional court system into an administrative or alternative framework. One example of the latter is the “divorce by affidavit” model, through which simple, uncontested divorce cases where both parties are on equal footing and agree on the outcome can execute a divorce with little to no judicial involvement.<sup>64</sup> Another example is the government ombudsman model found in some countries, including the United Kingdom.<sup>65</sup> Under this model, independent experts can resolve disputes about matters such as debts and contract terms;<sup>66</sup> some ombudsman decisions are binding, while others can be further addressed through court action.<sup>67</sup> One obvious concern with this set of solutions is that the parties may suffer from incomplete knowledge or imbalanced power dynamics and, as a result, injustice will result. In the case of off-ramping solutions, self-represented litigants may be unaware of necessary or possible off-ramp triggers, thus setting a system that is primed to work incorrectly or at least unevenly. In response, procedural safeguards might be built into the system itself,<sup>68</sup> or the selective use of automated processes might bake in relevant knowledge and require little affirmative action on the part of litigants (for example, default calculations of support based on a pre-set algorithm or automatic case closing if the filing party does not comply with certain requirements). The belief that our current system avoids these same issues is based on a set of false assumptions, including that all parties have access to legal representation or otherwise necessary information about how to navigate the system effectively.

A third option—similar in some ways to the narrower version of the first—would consist of narrowing on-ramps into the system through additional pre-filing requirements including, for example, requiring proof of ownership of debt.<sup>69</sup> Imposing a higher bar for entry through heightened filing or other initiation requirements could not only lower volume and ensure compliance with existing law and procedure, but could also decrease individuals’ or corporations’ ability to leverage state power against vulnerable

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people’s lives remains constant”); Clair & Woog, *supra* note 53, at 39 (describing abolitionist skepticism of reforms “tied to state-sanctioned systems of social control”).

64. See Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 142 (1993).

65. See Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 963-64 (2009).

66. *Id.* at 959-60.

67. *Complaining to an Ombudsman*, CITIZENS ADVICE, <https://perma.cc/FT2H-AQSK> (last visited Dec. 22, 2022).

68. See, e.g., Murphy, *supra* note 64, at 140-42 (reviewing safeguards that might be imposed in pro se uncontested divorce cases).

69. See, e.g., Wilf-Townsend, *supra* note 13, at 1769.

individuals through the courts.<sup>70</sup> Limited on-ramping could be combined with some version of off-ramping that would direct non-qualifying claims elsewhere. For example, if a landlord seeks a monetary judgment and the tenant claims they can't pay (and no evidence of willfulness is proffered by the landlord), the case might be off-ramped to social services, rental assistance sources, or mediation.<sup>71</sup>

### Conclusion

Through conversations about decarceration, decriminalization, and abolition, criminal legal system reformers have questioned and pushed back on fundamental assumptions about the operation of our legal system. These discussions can help us rethink what belongs within the legal system, what the purpose and role of that system should be, how we as a society respond to the actions of others, and what other institutions and approaches might fill the void left by legal retrenchment.<sup>72</sup> Such innovative thinking need not be limited to the criminal sphere; similar leaps are possible across the legal landscape, including in the portions of the civil legal sphere that most impact the everyday lives of poor people.

Questions of implementation are admittedly daunting, but a necessary first step in a radical conversation about systemic reform is asking why the cases in the system are there, whether the system is fulfilling its intended purposes, and whether the courts are the proper forum for—or even capable of reaching—effective resolution of all the issues before them. From there, we can rethink the nature of harm and remedy, change the way courts and other institutions respond to certain actions (or inactions), and shift resources away from the legal system to address underlying problems so that legal recourse is no longer necessary. Doing so will require creativity, and may need to occur incrementally, but is possible where the will exists.

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70. See, e.g., *id.* at 1758 (suggesting the adoption of congestion pricing, through which a surcharge is imposed on plaintiffs with disproportionately large shares of court civil filings); see also *id.* at 1768-69 (recommending closer scrutinization of claims through alternative modes of adjudication).

71. As I have noted elsewhere, some of these off-ramp destinations—including mediation and other informal dispute resolution mechanisms—may suffer from their own problems, including unequal power dynamics. See Sudeall & Pasciuti, *supra* note 25, at 1429. In defining such alternative paths, therefore, reformers should take care to implement necessary safeguards and not replicate the problems of the current court process or merely substitute one set of problems for another.

72. See McLeod, *supra* note 58, at 1587, 1644-57, 1674 (writing about decarceration's potential to cognitively reframe shared understandings of crime and punishment, engage in institutional reinvention and reconfiguration, and facilitate systemic change by initiating conceptual shifts and redistributing resources from criminal law administration to other sectors).