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Recommended Citation

Forthcoming Texas L. Rev. Online (2020).

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COVID, CRISIS AND COURTS

*Colleen F. Shanahan, Alyx Mark, Jessica Steinberg & Anna E. Carpenter**

Our country is in crisis. The inequality and oppression that lie deep in the roots and are woven in the branches of our lives has been laid bare by a virus. Relentless state violence against black people has pushed protestors to the streets. We hope that the legislative and executive branches will respond with policy change for those who struggle the most among us: rental assistance, affordable housing, quality public education, comprehensive health and mental health care. We fear that the crisis will fade and we will return to more of the same. Whatever lies on the other side of this crisis, there is one part of our government that grapples with the individual consequences of inequality and oppression every day and will continue to do so with even more urgency in the future: the state civil courts.¹

Even before the pandemic, as other branches of government failed to address inequality, state civil courts became the government actor of last resort for the tens of millions of Americans each year who suffer the consequences of these failures.² Now these same courts—for the first time in history—have quickly and nimbly changed the way they provide justice. One of us is in the midst of a national study to analyze every state court order related to the coronavirus.³ These orders show courts have taken remarkable action in a very short period of time. They have scrambled to hear emergency cases by phone, video, and using social distance while pausing other parts of their dockets, all in the face of chronic underfunding. Now, as the pandemic amplifies inequality and courts resume functioning, state civil courts are being hit with a tidal wave of cases.

Courts' improvisation in the face of a global public health crisis creates a challenge and an opportunity. Though state civil courts must face the tidal wave of cases, they also have a historic chance to improve the way they address litigants' problems. Though these courts face and perpetuate our society's structural racism and inequality every day, they can also seize this opportunity for change. How state civil courts meet this moment will affect society for decades to come. Until now, in contrast to burgeoning attention to state criminal courts, this role for state civil courts was

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¹ This essay focuses on state civil trial courts, the site of 99% of civil cases in this country. Anna E. Carpenter, Jessica Steinberg, Colleen F. Shanahan, and Alyx Mark, *Studying the 'New' Civil Judges*, 2018 WIS. L. REV. 249, 252 (2018). These courts handle an average of 300,000 cases per day in the United States. *See, infra*, note 7.

² Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 133 (2019).

³ Alyx Mark, *Procedural Changes in State Courts During COVID-19*, National Science Foundation.

hidden from those not directly involved and largely ignored by scholars.⁴ Now it is unavoidable.

In recent years, a relatively small group of scholars and practitioners have been working to understand state civil courts.⁵ Though this work has gathered momentum in recent years, we could not know the urgency it would take on today. It is an enormous, long term project to understand and improve our under-resourced and understudied courts. But there is hope: our developing understanding of state civil courts—including our own research—can help courts embrace the current opportunity. This essay lays out a framework for change that state civil courts should embrace as they reopen to the tidal wave of litigants.

STATE CIVIL COURTS

State civil courts were overwhelmed by the consequences of inequality before the coronavirus. In a recent survey, almost half of American households had a civil legal problem in the past year and about a quarter had more than one.⁶ These problems translated to 83 million cases in state civil courts, with the bulk of these cases involving housing, debt, and family court matters.⁷ Litigants in these cases are overwhelmingly unrepresented.⁸ State courts have been consistently underfunded for years.⁹

The authors of this essay are engaged in a first of its kind multi-jurisdictional, mixed-methods study of state civil courts. The study includes data from court observation, interviews, legal mapping, and case data in domestic violence courts. This essay draws on this data,¹⁰ the authors' previous scholarship regarding state civil courts, and extensive experience practicing in state courts.

⁴ See, e.g., Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L. J., 1648, 1650-57 (2019).

⁵ See, e.g., Rebecca Sandefur, *Access to What?*, 148 DAEDALUS 49, 49-52 (2019); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2103-05, 2168-76, 2185-87, 2189 (2019); Rebecca Buckwalter-Poza, *New Sheriff, Old Problems: Advancing Access to Justice Under the Trump Administration*, 127 YALE L.J. F. 254, 255-260 (2017); Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2223-24, 2226, 2230, 2232 (2013); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 904-05, app. at 967-71 (2012).

⁶ Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW TRUSTS (November 19, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-families-faced-civil-legal-issues-in-2018> [<https://perma.cc/Q5SH-NZT9>]. This data undercounts the prevalence of legal problems. Sandefur, *supra* note 5, at 53-54.

⁷ Court Statistics Project, *State Court Caseload Digest 2017 Data*, NAT'L CTR. FOR ST. CTS. 2 (2019), http://www.courtstatistics.org/__data/assets/pdf_file/0011/24014/csp-2017-data-spreads-for-viewing.pdf [<https://perma.cc/VV4L-XQ87>].

⁸ *Id.* (estimating at least one party unrepresented in 76% of cases).

⁹ In 2009 state judicial budget deficits totaled approximately \$600 million. Nels Pearsall, Bo Shippen & Roy Weinstein, *Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation*, MICRONOMICS 9 (2012) http://www.micronomics.com/articles/Economic_Impact_of_Reduced_Judiciary_Funding_and_Resulting_Delays_in_State_Civil_Litigations.pdf [<https://perma.cc/SA5V-H5XC>].

¹⁰ This data is currently the subject of three working papers: *Comparing Access to Justice, Judges and the De Facto Regulation of Legal Services*, and *State Court Distortion*.

State civil courts were designed as adversarial processes for represented parties.¹¹ Today, this design does not fit the volume or breadth of litigants and problems presented to them. Our research shows that state civil courts have responded by informally developing broader and more flexible roles for the people working in the court ecosystem. In eclectic ways within and across jurisdictions, state civil court judges do more than play umpire or adjudicate disputes.¹² They elicit information from litigants, introduce evidence and create factual records, explain substantive law and procedure, negotiate and mediate among parties, raise legal issues, refer parties to other agencies and actors, and generate informal law to address litigants' problems.¹³ They also create new ways of doing justice, from developing alternative courts to conducting video hearings.¹⁴ Other people working in the court ecosystem—courtroom deputies, clerks, court staff in hallways, law enforcement personnel by the courtroom door—play flexible and influential roles in addressing litigants' problems. They explain law and procedure, advise on factual and evidentiary issues, raise issues to judges, and mediate and negotiate among parties.¹⁵

These roles in the court ecosystem are based on two realities of state civil courts. First, before the coronavirus, almost all interaction in state civil courts was face to face.¹⁶ Unrepresented litigants do not file motions or brief issues: they come to the courthouse and talk to the clerk and then the judge about their problem. Second, this in person process is non-adversarial by necessity.¹⁷ Unrepresented parties are not equipped to shape their lives into the form of the law and structure their problems as a counter-argument to the opposing party. Rather, court staff and judges engage with parties and try to resolve their issues in context. These efforts can allow state civil courts to help litigants solve their problems. They can also distort litigants' actual problems into new ones that fit the shape of the law.¹⁸

Across jurisdictions, our research shows people working in the court ecosystem take ad hoc approaches in the face of larger institutional resistance to change. In an illustrative example from our current study, two roommates got in a fight and filed for protective orders against each other.¹⁹ These individuals were formerly incarcerated, living in supportive housing with addiction and mental health services. This case was filed as a request for a protective order and appeared on the Family Court's domestic violence docket, but the legal framework did not match the parties' problems. Instead, the clerk and then the judge asked the parties about their needs and the facts, reviewed and relied on information not in the record like police

¹¹ Carpenter, Steinberg, Shanahan & Mark, *Studying the 'New' Civil Judges*, supra note 1, at 257, 262; Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3 (2011); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899, 901 (2016).

¹² Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 686-92 (2018); Steinberg, *Adversary Breakdown*, supra note 11, at 949-56.

¹³ *Id.* at 931. See also supra note 10.

¹⁴ See Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1060-64 (2017).

¹⁵ See supra note 10, Carpenter, *Active Judging*, supra note 12.

¹⁶ Carpenter, Steinberg, Shanahan & Mark, *Studying the 'New' Civil Judges*, supra note 1, at 277-79.

¹⁷ *Id.* at 273.

¹⁸ See supra note 10.

¹⁹ See supra note 10.

reports, notes of complaints, and personal knowledge of the relevant programs, and began to negotiate a resolution outside the formal law. Ultimately, the court issued no protective order that day and the parties were sent to resolve their disputes with the assistance of the clerk and another agency.

One outcome of this ad hoc approach is that the law and procedure of state courts is informal and opaque. As each person working in the court ecosystem attempts to solve the problems each litigant brings to court, she develops individual mechanisms that collectively generate law in practice.²⁰ This is not the formal law development envisioned by the design of our legal system.²¹ Our research shows litigants with cases like housing, family court, and consumer debt rarely pursue appeals and written appellate decisions are scarce.²² This means the law of state civil courts is largely unwritten and there is limited transparency that allows a litigant to predict how her problem will be addressed.²³

THE COVID CRISIS

The coronavirus has prompted more than 6,000 orders modifying the functioning of state civil courts, representing remarkable action in a very short period of time. State civil courts have suspended dockets,²⁴ allowed litigants to delay their cases,²⁵ shifted to remote operation by phone or video,²⁶ or are operating in person but with more limited contact.²⁷

While courts are adapting to the crisis, a tidal wave of cases is building.²⁸ The impending wave is the combination of three kinds of cases likely to hit courts at once. First, cases that were filed before public health closures and have not been heard by courts in the intervening weeks. Second, cases resulting from problems that have

²⁰ See Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 844-45 (2017).

²¹ See Walter F. Dodd, *The Problems of Appellate Courts*, 6 AM. L. SCH. REV. 681, 684-86, 690 (1930).

²² For example, in one jurisdiction, there have been about 750,000 protective order cases filed since the relevant statute was enacted, about 1300 appellate cases resulting in about 140 written opinions, and 21 decisions by the state supreme court regarding these cases. See *supra* note 10.

²³ See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999).

²⁴ See, e.g., Emergency Jud. Ord. No. 10 of 2020, 1st Jud. Dist. of Pa. <https://www.courts.phila.gov/pdf/regs/2020/10-of-2020-PJ-ORDER.pdf> [<https://perma.cc/KV8X-BMBA>] (suspending all functions at first).

²⁵ See, e.g., Admin. Ord. No. 5B of 2020, 4th Jud. Dist. of Mont. <https://www.missoulacounty.us/home/showdocument?id=71345> [<https://perma.cc/9HR2-ENL7>] (option to automatically continue case though courts open).

²⁶ See, e.g., *Zoom Information and Youtube Support*, TEX. JUD. BRANCH (June 3, 2020) <https://www.txcourts.gov/court-coronavirus-information/electronic-hearings-zoom> [<https://perma.cc/4KGM-AZJY>] (discussing remote hearing procedures).

²⁷ See, e.g., Admin. Ord. No. 6 of 2020, Sup. Ct. of Del. <https://courts.delaware.gov/rules/pdf/COVIDOrderCJS3.pdf> [<https://perma.cc/JT6Z-9TLN>] (“Access to the State courthouses is restricted to identified personnel and emergency and essential hearings and operations.”).

²⁸ Sarah Mervosh, *An ‘Avalanche of Evictions’ Could Be Bearing Down on America’s Renters*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/coronavirus-evictions-renters.html> [<https://perma.cc/VB23-MLQ2>]; Paige Peruso, *Community Advocates Worry about Courts Reopening June 1 as Thousands Face Evictions*, WBTV CHARLOTTE, NC (May 28, 2020) <https://www.wbvtv.com/2020/05/28/community-advocates-worry-about-courts-reopening-june-thousands-face-evictions> [<https://perma.cc/RWX7-QNA6>].

arisen during court closures, that would have arisen even if there had been no coronavirus, and will be filed all at once when the courts are fully open. Third, cases resulting from problems that have arisen due to the coronavirus, as the pandemic affects poor Americans harder than others, that will be filed when the courts are fully open.²⁹

In the meantime, while they cannot go to court in person, people are seeking legal help in different ways, including accessing online assistance portals. Even now, we can observe how the partial functioning of state civil courts is influencing the problems people are facing. For example, legal assistance portal data show a decline in inquiries regarding divorce and finding a lawyer and an increase in unemployment, custody, and housing issues.³⁰

Despite valiant improvisation by state civil courts, the absence of a robust social safety net leaves them in a place of tension in our governmental system. Before the pandemic, state civil courts were acting as the government branch of last resort for poor Americans.³¹ The pandemic, and the legislative and executive branches' limited responses to it, have exacerbated this tension. For example, even in jurisdictions that have paused evictions, there has been limited action at the state or federal level to develop robust rental assistance or affordable housing going forward.³² Thus, state civil courts continue to bear the burden of deciding on a mass scale whether people lose their housing.³³ As courts resume deciding whether thousands of people lose their housing, they now bear the consequence that eviction will immediately threaten the litigant's and the public's health.³⁴ In the absence of action by the legislative or executive branches, the way courts handle these individual cases becomes the policy for our unequal society.

²⁹ This surge also includes, but to a smaller extent and thus not the focus of our attention here, claims between businesses arising from the circumstances of coronavirus.

³⁰ Erika Rickard and Darcy White, *Illinois, Michigan, and Ohio Residents Seek Legal Information Amid the COVID-19 Pandemic*, PEW TRUSTS (May 19, 2020) <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/19/illinois-michigan-and-ohio-residents-seek-legal-information-amid-the-covid-19-pandemic> [<https://perma.cc/A9CL-NSCQ>]

³¹ Shanahan & Carpenter, *supra* note 2, at 133.

³² See, e.g., Philadelphia Releases Initial Outcomes for Covid-19 Emergency Rental Assistance Program, *CBS3 Philly* (May 30, 2020), <https://philadelphia.cbslocal.com/2020/05/30/philadelphia-releases-initial-outcomes-for-covid-19-emergency-rental-assistance-program> [<https://perma.cc/J2HM-SMUZ>] (Philadelphia received 13,000 applications for new rental assistance program and granted 4,000); Catherine Reagor, *About 26,000 Arizona Renters Ask for Help to Pay Landlords. Here's How to Apply and Avoid Eviction*, AZCENTRAL (April 16, 2020), <https://www.azcentral.com/story/money/real-estate/catherine-reagor/2020/04/16/26-000-arizona-renters-ask-help-pay-landlords-and-avoid-eviction/5146928002> [<https://perma.cc/NQ9G-V6VG>] (26,000 requests to Arizona state rental assistance fund).

³³ There are roughly an average of 3.6 million annual eviction filings, resulting in an average of 1.5 million evictions, each year. Ashley Gromis, *Eviction: Intersection of Poverty, Inequality, and Housing*, PRINCETON UNIVERSITY EVICTION LAB 5 (2019), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf [<https://perma.cc/T3N7-BL9R>].

³⁴ Even before the coronavirus, research showed housing insecurity can lead to a wide variety of negative health effects. Megan Sandel & Matthew Desmond, *Investing in Housing for Health Improves both Mission and Margin*, J. OF THE AM. MED ASS'N 1 (2017), https://childrenshealthwatch.org/wp-content/uploads/JAMA_Sandel_2017_HousingHealth.pdf [<https://perma.cc/WXB8-U28D>].

A PATH FORWARD

How does our research help courts cope with the immediate crisis and embrace its opportunity? Moving forward, courts will remain in their imperfect role. They will still be asked to solve social problems better addressed by other branches of government. Yet, courts can, at a minimum, do no harm to the litigants before them. More ambitiously, courts can embrace their role on the frontlines of inequality by engaging litigants with transparency and accountability that contributes to social change. Three approaches—all of which make explicit and transparent what our research shows is already happening—can help state civil courts meet this opportunity.

First, transparent experimentation is essential for state civil courts to respond to this moment of social change.³⁵ The current crisis shows that state civil courts—long perceived as complex and cumbersome institutions—can be nimble. Courts have quickly embraced a range of modalities to facilitate access. This flexibility in the face of crisis presents the opportunity to thoughtfully preserve and develop these approaches. In the short term, courts should continue to address litigants' problems in different ways—whether it is a clerk-resolved outcome or a video hearing. Any approach requires thoughtfulness, evaluation, and refinement, but if courts make their processes and decisions transparent with a singular focus on meaningful access for all litigants, experimentation is more reward than risk. In the long term, state civil courts can develop norms for fluidity and experimentation that are paired with transparency, formalization where appropriate, and predictability.

This overarching approach applies across methods of court engagement. Researchers, advocates, and court leaders have noted the need for litigants to access legal information before they have contact with the courts.³⁶ In our studies of judicial behavior, we observe the information-providing and explaining role as a core judicial function in the absence of information before a litigant enters the courtroom.³⁷ With a reduction of in person engagement due to the pandemic, this pre-court information has increased importance.

As noted above, our research has shown the broad range of in person engagement between litigants and people working in the court ecosystem. Expanding this engagement to web-based, app, mail, phone, and video contact with court staff provides an opportunity to maximize these roles in an explicit way. Other disciplines

³⁵ See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886-92, 1935, 1938-39 (2001). (Exploring structural considerations that support procedural experimentation); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 794-805 (2015) (Discussing opportunities for formal procedural, evidentiary, and judicial role reforms in state civil courts); Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1228, 1270-74 (2010) (Reviewing ongoing state court experiments to improve access for unrepresented litigants).

³⁶ See, e.g., John M. Graecen, *Resources to Assist Self-Represented Litigants, A Fifty State Review of the "State of the Art,"* MICH. ST. B. F. 13-18 (June 2011), <https://www.srln.org/system/files/attachments/Graecen50StateReviewReportNationalEdition2011.pdf> [<https://perma.cc/CU7S-4MJA>].

³⁷ See *supra* note 10.

provide models for thinking about this kind of engagement.³⁸ Litigants can no longer happen onto someone in the clerk's office or courtroom hallway who tells them which documents to show the judge, as we observe in the courts we study,³⁹ but they could go to an online forum with court staff to get the same information in a transparent and broadly accessible way. Similarly, phone and video hearings are happening during the pandemic, and they offer meaningful potential as a permanent means of access. The growing field of online dispute resolution also offers opportunities for considered and equitable engagement.⁴⁰ Finally, the lessons of new modalities can translate to in person interaction, even if limited, by understanding the value of equity of access and information.

Second, courts must make explicit that the goal of interaction with litigants is to solve a particular problem, which is different than resolving a two party adversarial dispute.⁴¹ This approach requires embracing rather than avoiding the informality of law and process in state civil courts. It also requires engaging transparently with resources outside the court system. And it can necessarily include using the power of the judicial branch to balance the economic, racial, or other disproportionate power of one party.⁴² None of this is new—it is what state civil courts have been doing on an individual scale—but it is making this role intentional, systemic, and transparent.

There is a tension in the approach we suggest. It accepts a reality that should change: that state civil courts are the government interaction of last resort, and an underfunded one at that.⁴³ Nonetheless, we believe state civil courts should embrace accountability and transparency in addressing this reality. In its aspirational version, this would generate institutional pressure towards legislative and policy action. This is happening on a small scale in some places as coronavirus eviction moratoriums are followed by legislative or executive creation of rental assistance funds.⁴⁴ Looking beyond the current crisis, a court changing its practice regarding evidence of consumer debt ownership could stimulate legislative action regulating the purchase and collection of consumer debt. Or a court that implements online no-contest divorces could prompt the legislature to change unnecessary and burdensome statutory requirements for divorce. In each of these examples, a court's explicit problem solving role creates pressure and opportunity, especially in partnership with advocates, for the broader system to change.

³⁸ See, e.g., Parker S, Prince A, Thomas L, Song H, Milosevic D, Harris M, *Electronic, Mobile and Telehealth Tools for Vulnerable Patients with Chronic Disease: A Systematic Review and Realist Synthesis*. BMJ OPEN (August 2018), <https://bmjopen.bmj.com/content/8/8/e019192> [<https://perma.cc/634A-2YMQ>]; Richard Stradling, *The Homeless Are Vulnerable to Coronavirus; Here's How They're Being Screened in Wake*, RALEIGH NEWS & OBSERVER, <https://www.newsobserver.com/news/coronavirus/article241799416.html> [<https://perma.cc/JYA7-XVKL>].

³⁹ See *supra* note 10.

⁴⁰ See, e.g., NAT'L CONSUMER L. CTR., *Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits*, July 2019, https://www.nclc.org/images/pdf/debt_collection/ib-odr-july2019.pdf [<https://perma.cc/QPL4-ZVY8>].

⁴¹ Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1582, 1610-12 (2018).

⁴² *Id.*, at 1613-14.

⁴³ Shanahan & Carpenter, *supra* note 2, at 133.

⁴⁴ See *supra* note 32.

Third, state civil courts must empower all of their actors to fully and flexibly engage in this problem solving role. This means giving judges and other court staff different roles than they have traditionally played. We need to acknowledge and support judges playing a problem solving role. We need to equally empower and support court staff other than judges who play crucial roles in providing information, explaining law, and shaping the outcome of cases. For example, some jurisdictions have given clerks the power to grant extended continuances, a function that as a judicial power in other contexts has posed access to justice barriers.⁴⁵ Finally, we need to explicitly support these duly empowered judges and court staff to collaborate with each other and with resources outside the courts.⁴⁶ In the words of one judge in our research, “we’d find a lot of people in [the protective order docket] really needed to be in [landlord tenant court], or sometimes, bills, financial planning, is what they need, not family court. So that’s where I think courts could do better. They get the legal part down, but [they’re not] getting people to the right areas quickly.”⁴⁷ Doing this in a way that preserves the protections of our justice system necessarily engages questions of ethics and professional regulation, as we address in our ongoing work.⁴⁸ It also necessarily requires additional and reformed training, evaluation, and transparency regarding the roles of these actors.⁴⁹

State civil courts have been in crisis for some time, and they are now being asked to respond to the consequences of a truly historic crisis for our country. These courts should not be the branch of government trying to help millions of Americans, but they have been and they continue to be. Our current national crisis may be a daunting challenge, but it holds true opportunity for change in our state civil courts.

⁴⁵ See *supra* note 25. See also Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215, 238-43 (2018).

⁴⁶ Steinberg, *supra* note 41, at 1625-27.

⁴⁷ See *supra* note 10.

⁴⁸ See *supra* note 10.

⁴⁹ Carpenter, *supra* note 10, at 706-708.