

# A THEORY OF CIVIL PROBLEM-SOLVING COURTS

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*This Article is the first to develop a problem-solving theory for the civil justice system. Drug courts pioneered the problem-solving model in the 1990s to pursue therapeutic goals as an alternative to “assembly line” jail-based sentencing. This Article explores the potential for migration of the drug court framework into the two most commonly adjudicated private law cases: rental housing and consumer debt.*

*Three structural conditions in the civil courts—systemic lack of counsel, high-volume dockets, and corporate capture of the small claims process—routinely position vulnerable classes of individuals on the losing end of litigation. In the aggregate, these conditions have rendered the civil justice system predictably ineffective in combatting recurring social issues such as substandard housing and unscrupulous debt collection. The heart of the problem-solving theory in drug courts is the availability of an alternative remedy: treatment over prison. In civil courts, the remedy itself is not necessarily deficient; it is access to the remedy that is compromised. Relying on two years of field research in an experimental court, this Article demonstrates how core drug court principles, such as naming the purpose of the court as solving a social problem, interdisciplinary collaboration, and a strong judicial role, can be manipulated to address process failures in the civil justice system and reimagine the courts as proactive institutions responsible for the pursuit of socially beneficial outcomes.*

*The Article also argues that a civil problem-solving theory survives many of the valid critiques levied against drug courts. In particular, drug courts have come under fire for playing a moralizing role and using compulsory treatment as a form of social control. A civil problem-solving court, however, would not exacerbate the negative impact of state power on already over-burdened groups. Instead, the targets of monitoring and behavior modification are the more powerful private actors to the litigation, such as property owners and debt buyers, who otherwise have been known to manipulate the courts—an instrument of the state—to evade their legal obligations and suppress individual rights.*

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## INTRODUCTION

In the 1990s, judges dissatisfied with the mass processing of criminal cases launched the problem-solving movement following the

introduction of the first drug court.<sup>1</sup> The drug court model is now firmly embedded within the criminal justice system and has spawned a range of problem-solving courts serving low-level offenders in areas such as mental health, veteran's affairs, and community reentry for formerly incarcerated citizens.<sup>2</sup> This Article explores the potential for migration of the drug court framework into the civil arena. It demonstrates that, with certain adaptations, the drug court philosophy may be an effective tool in bringing the judicial system to bear on some of the unique structural injustices that pervade private law cases and have impaired the civil courts' ability to disrupt recurring social problems. A civil problem-solving model may also sidestep many of the legitimate critiques that have plagued drug courts and provide a forum for much-needed innovation in the role of the civil judge.

Drug courts are grounded in principles of therapeutic jurisprudence, a theory centered on the consequences of a legal decision or the relationship of the law to social effects.<sup>3</sup> Typically, a defendant charged with a low-level drug offense is diverted away from the conventional court process, where punishment is the focus, and instead opts into an alternative process where treatment is the focus.<sup>4</sup>

Every drug court is unique and adapted to the population it serves, but the model embraces a number of common principles. The first is that the court names its primary purpose as addressing the underlying social problem of drug use that is seen as a contributory factor in recidivism.<sup>5</sup> A second common principle is the interdisciplinary team approach.<sup>6</sup> Outside experts, treatment providers, and service providers often work together with the judge to develop goals and implement a drug treatment regimen. Last, drug courts are outcome driven, rather than focused on formal procedures. Judges closely monitor cases with regular hearings and often employ a system of

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<sup>1</sup> Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1605 (2012).

<sup>2</sup> DOUGLAS B. MARLOWE, CAROLYN D. HARDIN & CARSON L. FOX, NAT'L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES* 7, 9 (2016).

<sup>3</sup> See Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 446 (1999) (contrasting therapeutic jurisprudence with "traditional" jurisprudence, which is insensitive to the consequences of a decision).

<sup>4</sup> See McLeod, *supra* note 1, at 1605-07 (describing the origins and common characteristics of drug courts).

<sup>5</sup> See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 131 (2001).

<sup>6</sup> MARLOWE, HARDIN & FOX, *supra* note 2, at 11, 28, 66.

graduated sanctions and rewards to promote compliance.<sup>7</sup> The problem-solving approach pioneered by drug courts is intended to address root causes of crime in ways that “assembly line” adjudication has failed to do.<sup>8</sup>

Notably, outside of family law matters, the problem-solving model has barely cracked the civil sphere. Traditional adjudication retains a near-exclusive grip on the resolution of private law disputes despite the fact that, much like the criminal courts, the civil courts contend with a range of intractable social problems that are often left unsolved by conventional processes.<sup>9</sup>

To take one example, tenants have long struggled to challenge substandard housing conditions in the courts.<sup>10</sup> Landlords prosecute claims for unpaid rent with ease, but tenants are rarely successful in enforcing their corollary rights to habitable living conditions. In a second example, fraud and abuse in consumer debt matters run rampant in the civil courts.<sup>11</sup> Debt buyers aggressively pursue collection on debt that is of unknown origin, is barred by time limitations, or has already been discharged through bankruptcy or other means.<sup>12</sup> Even where the law should ostensibly protect their assets, consumers are often subject to judgments that destroy their credit and result in garnishment of their wages and bank accounts.

This Article contends that a set of structural forces unique to the civil courts renders traditional adjudication predictably ineffective in resolving certain recurring social problems. Relying on substandard housing and consumer protection as two prominent illustrations, this Article examines three systemic issues that undermine the courts’ ability to address significant social issues. First, the civil courts are now beset by an unrepresented majority. While criminal defendants are constitutionally entitled to counsel, civil parties are not, and publicly funded attorneys are increasingly scarce. As an aggravating condition, lopsided representation, in which one party has counsel and the other does not, is increasingly common. Tenants and consumers,

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<sup>7</sup> Berman & Feinblatt, *supra* note 5, at 131–32.

<sup>8</sup> *Cf. id.* at 130 (quoting Patrick McGrath, a deputy district attorney, as expressing dissatisfaction with the “assembly line” approach to adjudication).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See, e.g., PUB. JUSTICE CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 14–23 (2015); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 406–07 (2011).

<sup>11</sup> See LISA STIFLER & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, DEBT COLLECTION AND DEBT BUYING: THE STATE OF LENDING IN AMERICA AND ITS IMPACT ON U.S. HOUSEHOLDS 8–14 (2014).

<sup>12</sup> See Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 263–73 (2011) (providing an overview of the consumer debt collection industry and its history).

for example, are typically represented by counsel in less than ten percent of matters, while property owners and debt collectors have counsel in up to ninety percent of cases.<sup>13</sup> Unrepresented parties struggle immensely with issues of procedure and legal relevance, and often cannot compete with their represented counterparts in developing the evidence necessary to vindicate meritorious claims. With consistently low representation rates among defined classes of litigants, the civil courts become unreliable forums for the enforcement of particular rights.

Second, the explosion of high-volume dockets in the civil courts parallels the crush of cases in the criminal courts, and perhaps is even a more pressing problem. Partly as a result of high caseloads, most civil litigants never see a judge or have any genuine access to an adjudicatory process. In housing cases, for example, default judgments resolve up to fifty or sixty percent of matters, subjecting tenants to forcible eviction and substantial damages without any consideration of valid defenses such as the poor condition of the rental unit.<sup>14</sup> In addition, most tenants who “litigate” their claims are directed to the hallway of the courthouse to sign a perfunctory settlement with their landlord’s attorney, typically without any judicial oversight or exchange of evidence.<sup>15</sup> Furthermore, the courts are ill-equipped to handle even the volume of cases that survive both default judgment and unbalanced settlement negotiations. A number of researchers have documented trials that last less than five minutes,<sup>16</sup> as well as crowded dockets in which one hundred housing matters are heard by a single court in a single day.<sup>17</sup>

Last, small claims courts within the civil justice system have been captured by powerful corporations, undermining the promise of a flexible procedural regime to protect the rights of ordinary litigants.<sup>18</sup>

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<sup>13</sup> Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 750 (2015).

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See LAWYERS’ COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 11–12 (2003) (finding that the average time per case was one minute and forty-four seconds); THE WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 9 (2005) (stating that the typical court would dispose of thirty to sixty eviction cases in sixty minutes or less).

<sup>17</sup> Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1065 (2017) (up to 100 cases a day are docketed on the District of Columbia’s landlord-tenant calendar). Similar conditions plague consumer matters. See BRIAN STAUFFER, HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 3–4 (2016).

<sup>18</sup> See *infra* Part II.

Small claims judges have broad powers to elicit facts and interrogate the authenticity of claims, but only rarely exercise that power.<sup>19</sup> In the debt context, for example, the deep-seated adversarial tradition of a passive judge, coupled with the procedural informality of the small claims system, has laid the groundwork for debt collectors to perpetrate consumer fraud with impunity. One common tactic is “sewer service,” a practice in which the debt collector intentionally fails to serve the consumer with court papers, but then asserts to the court that service has been perfected in order to secure an uncontested default judgment.<sup>20</sup> A second is “robo-signing,” a practice in which the debt collector attests to facts about an underlying debt in an affidavit without any verification of the veracity of the claims.<sup>21</sup> Judges, trained by adversary culture to “referee” rather than examine, rarely question the legitimacy of such practices, even in informal courts that may permit such intervention.

This Article argues that the structural failings of traditional civil adjudication invite consideration of drug court principles. At its best, the drug courts’ problem-solving philosophy reimagines the courts as proactive institutions responsible for the pursuit of socially beneficial outcomes. This Article argues that implementation of a problem-solving framework, in certain appropriate circumstances, may position the civil courts to more effectively address a series of social problems that arise repeatedly in the private law arena.

This Article proceeds in four parts. Part I discusses the conditions that gave rise to the drug court movement in the criminal courts and describes the key characteristics of the problem-solving model. Using the lens of the two most commonly adjudicated civil issues—rental housing and consumer debt—Part II then reveals different, but analogous, conditions in the civil courts that may justify importation of problem-solving principles into private law matters.

Part III develops a theory for adapting drug court methods to the civil arena. In criminal courts, the heart of the problem-solving model is the availability of an alternative remedy: treatment over prison. In civil courts, the remedy itself is not necessarily deficient; indeed, housing codes and consumer protection laws are already, in many ways, quite robust. Instead, it is *access* to available remedies that is lacking. A civil problem-solving court must therefore exploit the drug court philosophy to address process failure and achieve three goals:

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<sup>19</sup> See *infra* Part II.

<sup>20</sup> See Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL’Y REV. 91, 107 (2017) (defining “sewer service”).

<sup>21</sup> See *id.* at 104–05 (defining “robo-signing”).

(1) motivate judges to protect vulnerable court users; (2) attack information asymmetry; and (3) monitor liable parties to induce performance. Relying on extensive field work in an experimental housing court in the District of Columbia, this Part demonstrates how core problem-solving principles—a named intent to solve a social problem, interdisciplinary collaboration, and a strong judicial role—can further these process-oriented goals and create a model for civil problem-solving experimentation. Notwithstanding legitimate challenges to scaling and sustaining civil problem-solving courts, which Part III also addresses, the model offers an opportunity to pilot much-needed innovation in the role of the civil judge and holds promise for improving process legitimacy in private law matters.

In Part IV, I argue that problem-solving courts in the civil law setting may sidestep many of the long-standing critiques of the drug court model in the criminal arena, including responsabilization,<sup>22</sup> net widening, and diminished procedural protections. In criminal courts, drug courts play a moralizing role and may inadvertently expand the reach of the criminal justice system while at the same time disposing of defendants' constitutional rights. In civil cases, however, the problem-solving model would not exacerbate the negative impact of state power on already over-burdened groups. Instead, the targets of monitoring and behavior modification are powerful private actors, such as landlords and debt buyers, who may otherwise manipulate the courts—an instrument of the state—to evade their legal obligations and suppress individual rights.

## I

### DRUG COURTS AND THE PROBLEM-SOLVING PHILOSOPHY

The first drug court opened in Miami in 1989, and since then, the problem-solving model has risen to prominence in criminal courts throughout the country.<sup>23</sup> Now, there are nearly 3000 drug courts, as well as more than a thousand problem-solving courts devoted to mental health, veteran's affairs, reentry, domestic violence, and homelessness.<sup>24</sup> Although drug courts vary in philosophy and execution,<sup>25</sup>

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<sup>22</sup> See *infra* Section IV.A (discussing “responsibilization,” a term critiquing the government for playing a moralizing role in its approach to substance abuse by foisting responsibility on the defendant to treat his own addiction).

<sup>23</sup> James L. Nolan, Jr., *Therapeutic Adjudication*, 39 *SOC'Y* 29, 29 (2002).

<sup>24</sup> MARLOWE, HARDIN & FOX, *supra* note 2, at 7, 9, 12.

<sup>25</sup> See McLeod, *supra* note 1, at 1611–44 (discussing various philosophies and approaches employed by drug courts, including therapeutic justice, judicial monitoring, order maintenance, and decarceration).

certain core principles apply.<sup>26</sup> First, drug courts name their purpose as solving a social problem and fulfill this mission by offering treatment to low-level offenders instead of a conventional sentence.<sup>27</sup> The goal is to address the underlying cause of criminal activity, namely drug use, and by doing so to reduce recidivism and promote healthier communities.<sup>28</sup> Second, the judge typically works with an interdisciplinary team to devise a treatment plan.<sup>29</sup> And third, the judge, as leader of the “treatment team,” monitors the defendant’s compliance with the treatment regimen.<sup>30</sup> Individuals who successfully complete drug treatment are rewarded with dismissal or expungement of the original charge, while those who fail may serve a traditional jail-based sentence.<sup>31</sup> The drug court model has been linked to David Wexler’s theory of therapeutic jurisprudence, which emphasizes “the law’s influence on emotional life and psychological well-being.”<sup>32</sup>

Drug courts are often described as an alternative to “assembly line” justice and an effort to close the “revolving door” that cycles criminal defendants in and out of the justice system.<sup>33</sup> The movement is “essentially . . . judge-led”<sup>34</sup> and grew out of frustration that traditional criminal law administration had transformed most courtrooms into plea bargain factories where cases were disposed of quickly and little thought was given to the root causes of crime.<sup>35</sup> Greg Berman

<sup>26</sup> See Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1122 (2014).

<sup>27</sup> McLeod, *supra* note 1, at 1590–91.

<sup>28</sup> See Denise C. Gottfredson, Stacy S. Najaka & Brook Kearley, *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL’Y 171, 172 (2003).

<sup>29</sup> MARLOWE, HARDIN & FOX, *supra* note 2, at 11, 28, 31.

<sup>30</sup> See Berman & Feinblatt, *supra* note 5, at 131–32; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 843 (2000); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 423 (2009).

<sup>31</sup> MARLOWE, HARDIN & FOX, *supra* note 2, at 11; JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 40 (2001); Berman & Feinblatt, *supra* note 5, at 126; Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1211–12 (1998).

<sup>32</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 45 (Dennis P. Stolle et al. eds., 2000).

<sup>33</sup> See Berman & Feinblatt, *supra* note 5, at 130, 135 (discussing judges, defense attorneys and prosecutors as working on an “assembly line” and presiding over “McJustice” courts); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1502 (2004) (claiming that traditional courts create a “revolving door”); see also Nolan, *supra* note 23, at 36 (noting that drug offenders were simply “recycled through the criminal justice system”).

<sup>34</sup> NOLAN, *supra* note 31, at 42.

<sup>35</sup> See Berman & Feinblatt, *supra* note 5, at 129 (describing traditional courts as “plea bargain mills”).



and John Feinblatt, two architects of the drug court model, frame its problem-solving approach as a response to “rising caseloads and increasing frustration—both among the public and among system players—with the standard approach to case processing in state courts.”<sup>36</sup> The Conference of Chief Justices, the highest policy-making body of judges in the United States, has endorsed the model as a way of responding to complex social issues, such as substance abuse, that traditional adjudication has failed to address.<sup>37</sup>

The crux of the drug court model is the treatment alternative to incarceration. Rather than ordering jail time for minor offenses such as drug possession, shoplifting, or loitering, drug courts aim to address the social problems that drive criminal conduct.<sup>38</sup> By offering treatment for drug addiction, or by connecting defendants to appropriate public services or benefits,<sup>39</sup> the model seeks to prevent repeated interaction with the criminal justice system.<sup>40</sup> In general, the drug court mission is outcome focused, with far less emphasis on formal procedure.<sup>41</sup> When evaluated, success is measured by completion of

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<sup>36</sup> *Id.* at 128. According to the National Center for State Courts, criminal caseloads rose by nearly fifty percent between 1984 and 1998. See BRIAN J. OSTROM, NEAL B. KAUDER & ROBERT C. LAFOUNTAIN, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS, 1999–2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 14, 60 (2001). From 1993 to 2002, criminal caseloads rose by nineteen percent. DAVID B. ROTTMAN, THE COUNCIL OF STATE GOV’TS, TRENDS IN STATE COURTS: RISING CASELOADS AND VANISHING TRIALS 300 (2005). Since the early 2000s, caseloads have achieved greater stability, with no major rise reported. See ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 20 (2012).

<sup>37</sup> Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 771–72 (2008).

<sup>38</sup> Nolan, *supra* note 23, at 36; Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 130 (2007).

<sup>39</sup> GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS 4 (2002) (“[M]any [drug court] participants find themselves linked to an array of services (job training, health care, education, housing) designed to insure their successful transition from addiction to sobriety.”); Jim Dwyer, *A Court Keeps People Out of Rikers While Remaining Tough*, N.Y. TIMES (June 11, 2015), <https://nyti.ms/2BAdtZG> (describing the Red Hook Community Court, which connects defendants with social services on the spot); see also MARLOWE, HARDIN & FOX, *supra* note 2, at 11–12, 14 (describing the array of services often provided to problem-solving court participants).

<sup>40</sup> See Berman & Feinblatt, *supra* note 5, at 131; Gottfredson, Najaka & Kearley, *supra* note 28, at 172 (“Drug treatment courts are designed to increase the likelihood that drug-addicted offenders will seek and persist longer in drug treatment, which is expected to help these individuals reduce their drug dependence and develop healthier, more productive, and crime-free lifestyles.”); Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13.

<sup>41</sup> See Boldt, *supra* note 26, at 1129 (describing problem-solving courts as “offer[ing] the promise of informal, individualized engagement by judges and other court officials in

treatment programs and lower rates of recidivism.<sup>42</sup> This orientation stands in stark contrast to conventional court systems, where substantive outcome measures are rarely imposed, and the focus instead is on rapid case resolution<sup>43</sup> and the application of law to facts irrespective of the impact of the court's decision on the defendant's life and future prospects.<sup>44</sup> Indeed, traditional courts derive their legitimacy from the perception that the judge is impartial and dispassionate with regard to the outcome.<sup>45</sup> Drug court judges are not neutral in the same way; they name particular outcome-based goals and use the authority of the court to motivate defendants to remain in treatment.

Interdisciplinary teams are an important component of drug courts' problem-solving model. Judges collaborate with social workers, treatment providers, probation workers, and lawyers to develop and supervise treatment plans.<sup>46</sup> In place of an adversary process, the various actors in the legal system work together to promote the defendant's compliance with the prescribed program. Some commentators have criticized the team approach, noting that it can erode the defendant's due process rights as well as defense counsel's advocacy role.<sup>47</sup> However, the interdisciplinary team also offers a distinct advantage in providing the court with expertise on specific social issues such as addiction and mental illness, and in educating the court on the challenges faced by specific population subgroups, such as vet-

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order to find 'what works' instead of settling for the operation of formal, rule-based procedures that do not").

<sup>42</sup> Cf. Berman & Feinblatt, *supra* note 5, at 131 (describing reduced recidivism as a goal of problem-solving courts).

<sup>43</sup> See Berman & Feinblatt, *supra* note 5, at 135 ("[F]or a long time, my claim to fame was that I arraigned 200 cases in one session. That's ridiculous. . . . I'd be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant." (quoting an administrative judge for New York City's criminal courts)).

<sup>44</sup> Judge Ferdinand recalls that, as a traditional criminal trial judge, she said on "many, many occasions . . . 'I am constrained by the law not to grant that motion' or 'I am unable to reach some conclusion despite the obvious fairness of that result.'" Jo Ann Ferdinand et al., *The Judicial Perspective*, 29 FORDHAM URB. L.J. 2011, 2013 (2002).

<sup>45</sup> Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1499 (2004).

<sup>46</sup> See DRUG POLICY ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 6 (2011); Berman & Feinblatt, *supra* note 5, at 131–32; Miller, *supra* note 30, at 423; Michael L. Perlin, "The Judge, He Cast His Robe Aside": *Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J., no. 1, 2013, at 1, 12.

<sup>47</sup> See Boldt, *supra* note 31, at 1255–60 (noting criticisms of defense counsel's role in drug court treatment programs); Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 129 (2007) (noting concern about lack of due process); Perlin, *supra* note 46, at 18–19 (noting concern about erosion of advocacy role); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 56–58 (2000) (same).

erans, homeless individuals, or returning citizens.<sup>48</sup> This expertise can be invaluable in formulating appropriate and individualized treatment plans that take into account the nature of the underlying issue, the behavioral patterns that courts may witness as defendants engage with treatment and the need to develop constructive responses to relapse.<sup>49</sup>

Perhaps most importantly, drug courts rely heavily on an active judge to monitor the defendant's progress.<sup>50</sup> In the drug court context, Michael Dorf and Charles Sabel describe the "central innovation" of the problem-solving model as the requirement that each defendant "appear in court regularly" accompanied by the treatment provider's report.<sup>51</sup> The judge is the leader of the treatment team and interacts directly with defendants to discuss progress or setbacks in treatment.<sup>52</sup> Praise, applause, token prizes, and graduation ceremonies are offered to defendants who exhibit good performance.<sup>53</sup> For those who fail drug tests, or otherwise refuse to comply with treatment goals, judges issue warnings, reprimands, or sanctions that may include community service, more frequent hearings, or even short stints in jail.<sup>54</sup> Direct

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<sup>48</sup> See McLeod, *supra* note 1, at 1613 (characterizing "therapeutic judges" as "active and engaged, invested in acquiring expertise regarding the problems they address"); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 75 (2002) ("[T]he intense focus on drug addiction by professionals in the justice system and medical field through drug courts has helped increase the courts' understanding of the nature of addiction.").

<sup>49</sup> See BERMAN & FEINBLATT, *supra* note 39, at 5; Thompson, *supra* note 48, at 75 (noting that drug court judges "have come to expect that an individual will relapse during the process of recovery" and have designed a system of incentives and treatment that evidence a "depth of understanding of the pull of addiction . . . not evident among judges before the advent of drug courts").

<sup>50</sup> GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 35 (2005); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 84, 87 n.21 (2000); Casey, *supra* note 45, at 1462.

<sup>51</sup> See Dorf & Sabel, *supra* note 30, at 843.

<sup>52</sup> DRUG POLICY ALL., *supra* note 46, at 5–6.

<sup>53</sup> See Dorf & Sabel, *supra* note 30, at 846–48 (discussing ceremonies, applause, and tokens of progress); Gottfredson, Najaka & Kearley, *supra* note 28, at 172 (discussing judicial praise for successful program performance); Nolan, *supra* note 23, at 29 (describing use of "praise, applause, and prizes" for defendants who stay committed to drug treatment).

<sup>54</sup> See Dorf & Sabel, *supra* note 30, at 846–48 (discussing sanctions, demotions to an earlier program phase, and short period of incarceration); Gottfredson, Najaka & Kearley, *supra* note 28, at 177; Nolan, *supra* note 23, at 29. Although much scholarly and media attention has been devoted to the use of jail time as a sanction in drug courts, the director of the National Association of Drug Court Professionals stated on *This American Life* that "[a]ny drug court that relies primarily on jail, or punishment generally, is operating way outside our philosophy and just does not understand addiction." *Very Tough Love: Act One* at 15:21, *THIS AMERICAN LIFE* (Mar. 25, 2011), <https://www.thisamericanlife.org/430/very-tough-love>. He reported that most drug courts use jail very infrequently, and for short timeframes like "12 hours, 24 hours." *Id.* at 16:30.

and immediate accountability to the judge is a hallmark of the drug court model<sup>55</sup> and is thought to have a positive impact on retention in the program.<sup>56</sup>

As a condition of federal funding, problem-solving courts have been subject to rigorous evaluation by social scientists.<sup>57</sup> The mechanics and outcomes of drug courts, in particular, have been studied extensively. While the data are not entirely consistent, the efficacy of the drug court model is largely supported by empirical data. A number of randomized trials and meta-analyses of observational studies have concluded that drug courts lower recidivism rates and promote abstention from drug use.<sup>58</sup> There is also evidence that the model reduces reliance on incarceration as a way to manage drug-addicted or mentally ill individuals.<sup>59</sup> There is reason, therefore, to

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<sup>55</sup> See BERMAN & FEINBLATT, *supra* note 39, at 5 (“Instead of passing off cases after rendering a sentence—to other judges, to probation departments, to community-based treatment programs or, in all too many cases, to no one at all—judges at problem-solving courts stay involved with each case over the long haul.”).

<sup>56</sup> See U.S. DEPT’ OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 15 (1997); Steven Belenko, *Research on Drug Courts: A Critical Review—1999 Update*, NAT’L DRUG CT. INST. REV., Winter 1999, at 1, 23 (noting that in one study, drug court graduates reported that one of the most important elements of drug court helping them stay drug-free was the close judicial monitoring); Douglas B. Marlowe, David S. Festinger & Patricia A. Lee, *The Judge Is a Key Component of Drug Court*, 4 DRUG CT. REV., no. 2, 2004, at 1, 5 (finding that high-risk defendants fared better when they had to make regular appearances before a judge).

<sup>57</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-53, *ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS* 2 (2011).

<sup>58</sup> See, e.g., *id.* at 19 (finding the re-arrest rate for drug court participants was lower than for comparison group members by six to twenty-six percent); Belenko, *supra* note 56, at 5 (reviewing twenty-nine evaluations of thirty different drug courts, and finding that drug courts reduce drug use and criminal behavior while offenders are participating in drug court, and also that drug courts reduce recidivism for participants after they leave the program); Gottfredson, Najaka & Kearley, *supra* note 28, at 188–89 (reporting a fourteen percent reduction in recidivism for drug court participants in Baltimore arising out of a randomized experiment); Deborah Koetzle et al., *Treating High-Risk Offenders in the Community: The Potential of Drug Courts*, 59 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 449, 450 (2015) (citing many major studies conducted from 2000 to 2011); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459, 459 (2006) (describing a meta-analytical review in which “[t]he overall findings tentatively suggest that drug offenders participating in a drug court are less likely to reoffend than similar offenders sentenced to traditional correctional options”). *But see* Elizabeth Piper Deschenes et al., *Drug Court or Probation? An Experimental Evaluation of Maricopa County’s Drug Court*, 18 JUST. SYS. J., no. 1, 1995, at 55, 55 (randomly assigning 630 defendants to either drug court or routine probation, and finding no statistically significant difference between the control and treatment groups in terms of new arrests, although drug court participants had a lower overall rate of drug violations).

<sup>59</sup> See McLeod, *supra* note 1, at 1642 n.224, 1650–51 (citing various studies demonstrating that problem-solving courts can successfully divert defendants with mental

consider the extension of drug courts' problem-solving principles to the civil courts, where thorny social issues also arise and are ill-suited to resolution through traditional case processing.

## II

### UNRESOLVED SOCIAL ISSUES IN THE CIVIL COURTS—AND THE STRUCTURAL FORCES TO BLAME

Outside of family law matters, the civil courts have been left largely untouched by the drug court movement's pioneering problem-solving philosophy.<sup>60</sup> Very little experimentation has entered the civil justice realm, and traditional methods of case resolution remain the only option for most litigants and judges. However, much like the criminal courts, the civil courts also confront a number of entrenched social problems that conventional adjudication has proven powerless to address. Relying on illustrations from the two most commonly adjudicated disputes in the civil arena, rental housing and consumer debt, this Part highlights the social issues at stake, and examines three structural forces that allow powerful interests to co-opt the courts as institutional partners in the perpetuation of unjust and socially detrimental outcomes. In the same way that overcrowded dockets and the inefficiency of traditional process led to the drug court movement in the criminal justice system, analogous structural conditions in the civil courts invite adaptation of the drug court's problem-solving model to civil justice matters.

#### A. *Unresolved Social Problems in the Civil Courts*

Together, eviction and debt collection comprise nearly half of all litigation in the civil courts.<sup>61</sup> While these cases are often construed as matters of individual contract, they also invoke, in the aggregate, a

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health and substance abuse issues to alternative programming). *But see* Richard C. Boldt, *Problem-Solving Courts*, in 3 REFORMING CRIMINAL JUSTICE 273, 285–86 (Erik Luna ed., 2017), <http://academyforjustice.org/volume3/> (characterizing the “scorecard for drug-treatment court success” as “guardedly optimistic,” but pointing out that most drug court studies measure recidivism, whereas outcomes on housing and employment status are considerably more mixed).

<sup>60</sup> For examples of similarities between drug court and family court, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 507 (1998) (offering a new framework for family court reform based on mental health); Boldt & Singer, *supra* note 50, at 91–95 (comparing and contrasting unified family courts to drug courts).

<sup>61</sup> Excluding family courts, forty-three percent of civil cases are debt collection or eviction. *See* PAULA HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at iii (2015).

number of pressing social problems that the courts have not been able to address.

### 1. *Substandard Housing Conditions*

Renters are the subject of aggressive and relentless eviction actions in many areas of the country.<sup>62</sup> In Baltimore, for example, the number of eviction actions exceeds the number of renter-occupied households by a significant margin,<sup>63</sup> and evictions make up the majority of district court litigation.<sup>64</sup> In cost-burdened households the impact is greatest, with families sometimes subject to three evictions per year.<sup>65</sup> In Cleveland, for example, more than ten percent of renters are summoned to eviction court each year,<sup>66</sup> and even in New Jersey, where tenant protections are among the strongest in the country, one in six renters defended against an eviction in court in the 2013–2014 fiscal year.<sup>67</sup> These figures do not even take into account the number of “forced moves” that occur in the shadow of the law.<sup>68</sup>

The landlord’s allegations in an eviction suit typically charge the tenant with violating the terms of the lease, most often by failing to pay rent.<sup>69</sup> And while the contractual breach may be easy to prove and even uncontested, lurking below the surface is the tenant’s mutually enforceable right to safe and sanitary housing conditions.

The implied warranty of habitability, enacted by ordinance or developed through common law in every jurisdiction in the country, makes mutually enforceable the landlord’s right to demand rent payment and the tenant’s right to seek repairs of defective housing condi-

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<sup>62</sup> The number of evictions may even undercut the overall figure of forced moves. See Andrew Flowers, *How We Undercounted Evictions by Asking the Wrong Questions*, FIVETHIRTYEIGHT (Sept. 15, 2016), <http://fivethirtyeight.com/features/how-we-undercount-ed-evictions-by-asking-the-wrong-questions/> (reporting on data from the Milwaukee Area Renters Study which demonstrated that “forced moves” outside of the courts occurred twice as often as formal evictions).

<sup>63</sup> See PUB. JUSTICE CTR., *supra* note 10, at 56 (reporting that, in 2013, there were 124,782 renter-occupied units and 156,476 evictions filed, for an average of 1.25 evictions per household, and identifying similar statistics for 2000 and 2009).

<sup>64</sup> See *id.* at 4 (noting that Baltimore’s District Court had 278,809 annual filings in 2014, and 148,189 were evictions).

<sup>65</sup> *Id.* at 5.

<sup>66</sup> See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 296 & n.10 (2016).

<sup>67</sup> Shaila Dewan, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES (Aug. 28, 2014), <https://nyti.ms/2C5gnqC>.

<sup>68</sup> See generally DESMOND, *supra* note 66 (documenting extreme housing instability among renters due to the ever-present threat of eviction).

<sup>69</sup> For instance, in New York City, eighty-one percent of residential evictions during 2013 alleged nonpayment of rent. See N.Y.C. CIVIL COURT, STATISTICAL REPORT OF ACTIVITY OF LANDLORD & TENANT CLERK’S OFFICE, 2013 TERM 1 (2014).

tions.<sup>70</sup> Therefore, when courts process evictions, they also—whether explicitly or not—come into contact with one of the most intractable social problems facing low-income communities: the prevalence of substandard housing. A recent community listening project in the District of Columbia identified housing as the single most pervasive concern among the survey’s respondents.<sup>71</sup> More than a third of individuals who participated in the study felt their housing conditions were unsafe, and forty percent experienced problems keeping up with rent increases and seeking repairs from their landlords.<sup>72</sup> In Milwaukee, ethnographic work shows that nearly half of renters lived with a long and lasting habitability problem between 2009 and 2011.<sup>73</sup>

Regulatory bodies, such as code enforcement agencies, are charged with improving the housing stock, but many such agencies have been plagued by inefficiencies, underfunding, mismanagement, and even corruption.<sup>74</sup> As a result, the courts have become a critical forum of last resort for administering the implied warranty of habitability. In a well-functioning adjudication system, tenants would raise defective housing conditions as a defense against eviction, or to lower their rent obligation, and the courts would regularly enforce such rights as a matter of substantive law. Instead, the courts churn through housing cases at breakneck speed, typically authorizing eviction while ignoring the ever-present and interconnected problem of substandard housing.<sup>75</sup>

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<sup>70</sup> *E.g.*, Super, *supra* note 10, at 394.

<sup>71</sup> See FAITH MULLEN & ENRIQUE PUMAR, D.C. CONSORTIUM OF LEGAL SERVS. PROVIDERS, THE COMMUNITY LISTENING PROJECT 1–2, 8 (2016), <https://scholarship.law.edu/scholar/948/>.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> DESMOND, *supra* note 66, at 76 (noting that almost half of renters experienced housing problems like a broken window, a non-functioning appliance, or vermin).

<sup>74</sup> See Debbie Cenziper & Sarah Cohen, *The Profit in Decay: Landlords Who Empty Buildings of Tenants Reap Extra Benefit Under Law*, WASH. POST (Mar. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/03/08/ST2008030803137.html> (finding city officials in Washington, D.C. improperly granted housing code exemptions to landlords converting rental units to condominiums); Benjamin Mueller, *New York City Buildings Inspectors Charged in Bribe Schemes*, N.Y. TIMES (Feb. 10, 2015), <https://www.nytimes.com/2015/02/11/nyregion/new-york-city-buildings-inspectors-charged-with-bribery.html> (reporting on charges that more than a dozen New York City buildings inspectors accepted bribes to clear complaints, expedite inspections, and improperly remove tenants); David Zahniser, *Los Angeles Building Inspector Gets Prison in Felony Bribery Case*, L.A. TIMES (Mar. 25, 2014), <http://articles.latimes.com/2014/mar/25/local/lame-building-inspector-corruption-20140325> (reporting on sentencing of former building inspector in Los Angeles who accepted bribes for more than a dozen properties he was responsible for).

<sup>75</sup> See PUB. JUSTICE CTR., *supra* note 10, at 14, 36 (reporting that seventy-eight percent of renters experienced serious habitability issues, but only eight percent successfully raised their defective housing conditions in court); Kathryn A. Sabbeth, *Housing Defense as the*

## 2. Consumer Protection

Debt collection is the other dominant source of litigation in the civil courts. In New York City, for example, creditors sued 135,000 individuals for defaulting on consumer debt in 2011, accounting for nearly four out of ten civil filings.<sup>76</sup> In some jurisdictions, the deluge of debt collection litigation is even greater. The Texas Office of Court Administration reports that “suits on debt” account for 43.8% of cases in county-level courts statewide.<sup>77</sup> The rate of debt collection litigation is subject to rapid growth in times of economic volatility. In three San Francisco Bay Area counties, consumer debt cases increased by eighty percent from 2007 to 2009.<sup>78</sup>

High levels of debt drive poverty and income inequality, and collection litigation can deepen the effects of both.<sup>79</sup> A creditor who obtains a court judgment for unpaid debt may garnish wages and attach liens on real property, making it more difficult for cash-strapped families to pay bills or sell existing assets to support their needs.<sup>80</sup> In addition, collection suits may impede recovery from a period of financial instability, as big data companies often bundle and sell information on recent judgments to prospective landlords and employers, exposing otherwise private economic struggles and potentially complicating efforts to find new housing or a job.<sup>81</sup> The Federal

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*New Gideon*, HARV. J.L. & GENDER 56, 103–04, 107–09 (2018); Super, *supra* note 10, at 437–38 (referring to Cleveland and Detroit, two cities in which landlords won eviction judgments in nearly all cases despite evidence that housing conditions were substantially worsening).

<sup>76</sup> SUSAN SHIN & CLAUDIA WILNER, NEW ECON. PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 6 (Sarah Ludwig & Josh Zinner eds., 2013) (reporting that, in New York City in 2011, of the 370,924 civil court filings in New York City Civil Court, 134,980 were debt collections).

<sup>77</sup> Spector, *supra* note 12, at 273.

<sup>78</sup> RACHEL TERP, EAST BAY COMMUNITY L. CTR., PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW (2011), [https://consumersunion.org/pdf/Past\\_Due\\_Report\\_2011.pdf](https://consumersunion.org/pdf/Past_Due_Report_2011.pdf).

<sup>79</sup> See ADP RESEARCH INST., GARNISHMENT: THE UNTOLD STORY 6 (2014) (describing the financial and psychological stresses associated with garnishment); Aimee Constantineau, Comment, *Fair for Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities*, 66 AM. U. L. REV. 479, 486–87 (2016) (describing how garnishment compounds inequality); Paul Kiel, *Old Debts, Fresh Pain: Weak Laws Offer Debtors Little Protection*, PROPUBLICA (Sept. 16, 2014), <https://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection> (describing, *inter alia*, the expense of litigation).

<sup>80</sup> FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5–6 (2010).

<sup>81</sup> MAUREEN MAHONEY, CONSUMERS UNION, ERRORS AND GOTCHAS: HOW CREDIT REPORT ERRORS AND UNRELIABLE CREDIT SCORES HURT CONSUMERS 11, 19 (2014) (describing the impact of such information on the ability to procure loans and employment); James A. Francis, *The FCRA: A Double-Edged Sword for Consumer Data*



Reserve estimates that, in April 2016, consumer debt reached 3.6 trillion dollars, up nearly fifty percent from 2.41 trillion in January 2011.<sup>82</sup>

Protection against consumer fraud is vitally important to fair debt collection. Empirical research suggests that fraudulent practices fuel the collection of debt nationwide.<sup>83</sup> In one study, debt buyers prevailed in ninety-four percent of consumer debt cases, despite widespread evidence that many collections suits were premised on procedural and substantive law violations.<sup>84</sup> Another study found that eighty percent of debt cases examined involved consumer protection violations that were never raised, ultimately resulting in judgments for creditors.<sup>85</sup> In yet a third study, up to seventy-eight percent of collections complaints did not meet pleading and proof standards, and yet almost half of creditors still won their cases.<sup>86</sup> Debt collectors also obtain quick and easy judgments against consumers even where the right to recover on the unpaid account may have been encumbered by the staleness of the debt or the discharge of the debt through bankruptcy.<sup>87</sup> Following a series of roundtable discussions with advocates, judges, and collections industry personnel, the Federal Trade

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*Sellers*, GPSOLO, Nov.–Dec. 2012, at 36, [https://www.americanbar.org/publications/gp\\_solo/2012/november\\_december2012privacyandconfidentiality/fcra\\_double\\_edged\\_sword\\_consumer\\_data\\_sellers.html](https://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/fcra_double_edged_sword_consumer_data_sellers.html) (describing how credit data threatens consumer privacy).

<sup>82</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATISTICAL RELEASE: CONSUMER CREDIT—APRIL 2016 (2016) (putting total outstanding seasonally adjusted consumer debt in April 2016 at 3.601 trillion); BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATISTICAL RELEASE: CONSUMER CREDIT—JANUARY 2011 (2011) (putting total outstanding seasonally adjusted consumer debt in January 2011 at 2.412 trillion).

<sup>83</sup> See generally STIFLER & PARRISH, *supra* note 11 (describing how debt collection and misinformation expose American households to harassment and other illegal conduct); Stifler, *supra* note 20, at 107 (describing how deceptive practices like inadequately proven or time-barred debt go unchallenged).

<sup>84</sup> THE LEGAL AID SOC'Y ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1–2 (2010) (asserting that debt buyers prevailed in 94.3% of lawsuits, and of these, 35% of cases were clearly meritless, and 71% of people sued were either not served or served improperly).

<sup>85</sup> Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. L. REV. 357, 384 (1990).

<sup>86</sup> See Spector, *supra* note 12, at 293–96 (finding that, despite 78% of the cases studied having only one affidavit, filed by an employee of the plaintiff, plaintiffs still obtained default or agreed judgments in 39.46% and 4.93% of cases, respectively).

<sup>87</sup> FED. TRADE COMM'N, *supra* note 80, at ii (noting the Commission's concerns about the high rate of default judgments and the practice of bringing actions on time-barred debts); see also RICK JURGENS & ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 18 (2010) (discussing how debtors may face years of badgering from creditors for claims discharged in bankruptcy); RACHEL TERP, E. BAY CMTY. LAW CTR., & LAUREN BROWNE, CONSUMERS UNION, PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW 4–5 (2011).

Commission concluded that, on the measure of consumer protection, the court process was “broken.”<sup>88</sup>

### B. *Structural Failings in Civil Adjudication*

This Section argues that three structural conditions may explain why the civil courts produce poor social outcomes on critical and recurring issues such as substandard housing and consumer protection. Specifically, I identify low rates of attorney representation, high-volume dockets, and the capture of small claims tribunals by corporate interests as forces that weaken the capacity of traditional courts to solve social problems for particular groups of litigants. The account of civil adjudication offered in this Section suggests structural conditions in the civil courts that parallel those in the criminal courts and may justify consideration of problem-solving methods.

#### 1. *Hardly Any Lawyers*

According to the National Center for State Courts, seventy-six percent of cases in the civil courts now involve an unrepresented party.<sup>89</sup> In 1992, the last time comprehensive national data were collected, the pro se rate was just twenty-four percent.<sup>90</sup> This sea change over the past twenty-five years has resulted in a state civil justice system defined by the effects of systemic lack of counsel.

In rental housing and consumer debt cases, low rates of attorney representation are particularly problematic for two reasons. First, representation rates for tenants and consumers are among the lowest of all groups in the civil justice system. In New York, Maryland, and the District of Columbia, among many other jurisdictions, the representation rate for tenants hovers at around ten percent or less.<sup>91</sup> Consumers fare no better, with the pro se rate sometimes reported to be as high as ninety-nine percent.<sup>92</sup> Second, lopsided representation in housing and consumer matters is standard, meaning that the more powerful

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<sup>88</sup> FED. TRADE COMM’N, *supra* note 80, at i–ii, 17; *see also* THE LEGAL AID SOC’Y ET AL., *supra* note 84, at 1 (describing a deluge of frivolous lawsuits filed by debt buyers); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 233 (2014) (referring to a “broken debt collection system”); Stifler, *supra* note 20, at 93 (listing common debt-collecting abuses like insufficient evidence, time-barred collection, and robo-signing).

<sup>89</sup> HANNAFORD-AGOR ET AL., *supra* note 61, at iii–iv (basing this figure on a survey of almost one million cases in 152 general jurisdiction courts).

<sup>90</sup> *Id.* at 28.

<sup>91</sup> Steinberg, *supra* note 13, at 750.

<sup>92</sup> THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010); *see also* Spector, *supra* note 12, at 297 (finding over ninety percent of defendants in consumer debt cases in Texas were either pro se or made no appearance).

party to the litigation is highly likely to have an attorney, while the less powerful party almost never does. In many courts, landlord representation rates are around ninety percent.<sup>93</sup> Similar statistics are often cited for debt buyers and other creditors.<sup>94</sup> In some jurisdictions, corporations are required to appear in court through attorneys, ensuring that virtually all plaintiffs in consumer debt cases will be represented.<sup>95</sup>

High rates of lopsided representation have had an enormous impact on case adjudication in the civil courts. The side without counsel is likely to have difficulty identifying legally cognizable claims and parsing through the procedural thicket of case presentation.<sup>96</sup> Without attorney guidance, for instance, tenants may be unaware of their rights to raise substandard housing as a defense to an eviction.<sup>97</sup> Similarly, consumers may not be familiar with the procedural and evidentiary rules required to stave off the collection of stale debt.<sup>98</sup> As a result, it is not uncommon for landlords or creditors to control entirely the facts and evidence considered by the judge, and to do so across an entire docket. This type of information asymmetry compromises accurate judicial decision-making and leads to the gross under-enforcement of rights for particular classes of litigants.

## 2. *High-Volume Dockets*

High-volume dockets present a second structural problem in the civil courts. With millions of rental housing and consumer cases to

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<sup>93</sup> D.C. ACCESS TO JUSTICE COMM'N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY 74 (2008) (revealing ninety percent of landlords had counsel in a survey of Washington, D.C.); WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 8 (2005) (finding eighty-seven percent of cases in study were brought by represented landlords); Rashida Abuwala & Donald J. Farole, *The Perceptions of Self-Represented Tenants in a Community-Based Housing Court*, 44 CT. REV., no. 1/2, 2007, at 56 (reporting that ninety-eight percent of landlords were represented, according to one report of New York City).

<sup>94</sup> See STAUFFER, *supra* note 17, at 4 (describing the plaintiffs in debt collection cases as “large corporations represented by top-tier collections attorneys,” while “hardly any of the defendants in debt buyer lawsuits have legal representation”).

<sup>95</sup> For example, corporations must be represented by counsel in both Arkansas and Arizona. See ARK. CODE § 16-22-211(a)–(d) (2018); see also *Boydston v. Strole Dev. Co.*, 969 P.2d 653 (Ariz. 1998).

<sup>96</sup> See Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 489–504 (2016) (surveying the effect of expertise in representation); Steinberg, *supra* note 13, at 755–56, 794–95 (describing the difficulties faced by those litigants who represent themselves at trial and arguing for reform).

<sup>97</sup> See PUB. JUSTICE CTR., *supra* note 10, at 19.

<sup>98</sup> See Spector, *supra* note 12, at 280–82.

contend with, courts struggle to offer litigants a genuine opportunity to adjudicate their claims.

To winnow caseloads to a manageable figure, the civil justice system tolerates, and perhaps even promotes, a high rate of default.<sup>99</sup> In consumer matters, for example, many jurisdictions have reported default rates as high as sixty to ninety-five percent.<sup>100</sup> Unique to the civil courts, default judgments effectively preclude defendants from participating in the litigation brought against them, instead awarding all requested relief to the plaintiff, often without requiring testimony or proof on the asserted claims. Research conducted by Human Rights Watch describes the casual way in which courts process default judgments in collections matters, typically without requiring the debt collector to testify, appear in court, or otherwise establish a valid claim: “Some judges routinely enter hundreds of default judgments for debt buyers in the space of just a few hours. One judge [said] that he does this at home while relaxing on a Sunday afternoon.”<sup>101</sup>

To further manage high-volume dockets, the civil courts encourage a substantial portion of non-defaulting cases to be resolved through unmonitored settlement negotiations.<sup>102</sup> Russell Engler has described the pressure tenants face to enter quick agreements in the courthouse hallways without legal advice or judicial oversight.<sup>103</sup> In

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<sup>99</sup> See Jonathan I. Rose & Martin A. Scott, “Street Talk” *Summonses in Detroit’s Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 U. DETROIT J. URB. L. 967, 988 n.88 (1975) (quoting a judge as saying that housing court is so packed “the clerk calls defaults as soon as possible to ease the congestion . . . [thereby working] hardship on the tenants”) (alterations in original); Super, *supra* note 10, at 434–35 (“Courts depend on default judgments to control their dockets and design procedures to obtain them whenever possible, typically requiring no motion or affidavit . . . before entering a default judgment.”).

<sup>100</sup> FED. TRADE COMM’N, *supra* note 80, at 7; see also SHIN & WILNER, *supra* note 76, at 6 (listing the default rate for Syracuse City Court as sixty-two percent). Even in Dallas County, Texas, which boasts among the lowest reported default rates in debt collection suits, the figure still rose to nearly forty percent. Spector, *supra* note 12, at 263. Default rates are also high in housing matters. See Erik Larson, *Case Characteristics and Defendant Tenant Default in a Housing Court*, 3 J. EMPIRICAL LEGAL STUD. 121, 130 (2006) (studying a housing court in Hennepin County, Minnesota with a default rate of 40.4%).

<sup>101</sup> STAUFFER, *supra* note 17, at 3–4.

<sup>102</sup> The inherently unbalanced nature of many settlement negotiations in the civil setting parallels the way in which criminal defendants are so often cajoled into striking unfair plea deals with prosecutors.

<sup>103</sup> See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 104, 109 (1997); see also Sabbeth, *supra* note 75, at 79–80 (similarly describing rushed, unfavorable hallway settlements). For discussion of a similar dynamic in consumer cases, see STAUFFER, *supra* note 17, at 3–4 (discussing the common judicial practice in consumer debt matters to “push defendants into unsupervised ‘discussions’ with debt buyer attorneys” in the hallways of the courthouse “in hopes that the parties will settle and obviate the need for a trial”).

the District of Columbia, judges in housing court routinely abort hearings to instruct pro se tenants to barter directly with their represented adversaries outside the courtroom.<sup>104</sup>

While settlement is promoted across the civil spectrum, and often can be in the parties' best interests,<sup>105</sup> it reliably produces pernicious results for unrepresented litigants—particularly those who must negotiate with an attorney.<sup>106</sup> In a study I conducted in a Silicon Valley housing court in 2009,<sup>107</sup> tenants who settled their eviction lawsuits fared even worse as a group than those who defaulted. How, one might ask, is this even possible? In the study, on average, those who defaulted lost their homes but usually avoided liability for unpaid rent, as most landlords chose not to pursue a separate damages award after winning possession of the unit.<sup>108</sup> By contrast, the settling tenants lost their homes *and* agreed to pay at least a portion of back rent—meaning they “negotiated” for the worst possible outcome.<sup>109</sup> This illustration highlights how unmonitored settlements often promote the interests of landlords to the exclusion of tenants' rights.<sup>110</sup>

Finally, even the cases that outlive both default judgment and unmonitored settlement negotiations face overburdened courts unable to offer a meaningful adjudicatory process.<sup>111</sup> Trials are typi-

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<sup>104</sup> This is drawn from my personal observations in D.C.'s landlord-tenant court.

<sup>105</sup> See Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1339, 1340, 1350–51 (1994) (describing the growing sentiment among the judiciary that settlement is part of the judicial role, and listing the many perceived benefits of settlement).

<sup>106</sup> See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 47–48 (2010); Erica L. Fox, Note, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 *HARV. NEGOT. L. REV.* 85, 102–03 (1996). Similar conditions plague negotiated agreements in the consumer setting. Holland, *supra* note 88, at 213–14, 224–25.

<sup>107</sup> See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. ON POVERTY L. & POL'Y* 453 (2011).

<sup>108</sup> See *id.* at 487, 491, 493.

<sup>109</sup> See *id.*

<sup>110</sup> See 144 *Woodruff Corp. v. Lacrete*, 585 N.Y.S.2d 956, 958 (Civ. Ct. 1992) (vacating a stipulation reached by a landlord and a tenant in New York City partially on the grounds that tenant was unrepresented and case provided a “textbook example of a one-sided stipulation unadvisedly signed by a pro se litigant who lacked knowledge of a defense which would have substantially defeated petitioner's claims”); see also *PUB. JUSTICE CTR.*, *supra* note 10, at 28–29 (relating the difficulty tenants experienced when trying to negotiate); Engler, *supra* note 103, at 113 (discussing how tenants may unwittingly waive rights during settlements).

<sup>111</sup> In consumer matters, trials are arguably even scarcer than in housing cases. Judith L. Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 *LOY. CONSUMER L. REV.* 355, 370, 379 (2012) (reporting that in the author's study of 640 consumer cases, not a single matter involved a trial); Holland, *supra* note 88, at 186–87.

cally handled by judges, not juries, and a number of commentators have pointed to the condensed interval in which testimony and evidence is gathered and weighed. Hearings lasting only a few minutes are not uncommon,<sup>112</sup> and judges may preside over as many as one hundred cases in a single day.<sup>113</sup> An Indiana appellate decision recently chided an eviction court for having a court reporter—rather than a judge—preside over a hearing, and for presenting the tenant “with a pre-signed order requiring her to vacate the premises” and no opportunity to defend against the ejection.<sup>114</sup>

This system of defaults, settlements, and abbreviated hearings exacerbates the imbalance in party power created by lopsided representation and creates a procedural structure that—almost by design—privileges the rights of more powerful actors.

### 3. *Capture of Small Claims Courts*

The capture of small claims courts by corporate interests presents a third structural force that undermines the effectiveness of existing adjudication models in resolving entrenched social problems. In its heyday, the small claims movement was hailed as a potential fix for the cost and complexity of traditional proceedings.<sup>115</sup> With relaxed rules of evidence and procedure, the idea was that ordinary laymen could share their stories in narrative fashion, interact directly with judges, and generally participate more actively in their cases.<sup>116</sup> While most proponents of the model focused on the prospect of efficient and accurate dispute resolution in individual cases, had the small claims

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<sup>112</sup> See *144 Woodruff Corp.*, 585 N.Y.S.2d at 960 (reporting that housing cases are often “disposed of at an average rate of five to fourteen minutes per case”); *LAWYERS’ COMM. FOR BETTER HOUS.*, *supra* note 16, at 4 (reporting on the results of an eleven-week study of 763 eviction cases in Chicago’s eviction courts, which “revealed problematic trends in a number of areas” including “hearings [that] last an average of 1 minute and 44 seconds, a decrease of nearly 50% from the 3 minutes observed in 1996”); *WILLIAM E. MORRIS INST. FOR JUSTICE*, *supra* note 93, at 9 (discussing a 2004 study of evictions cases in Maricopa County, Arizona, in which a “call for evictions can have at least 30 to 60 cases for disposition in 60 minutes or less” and noting that, “[i]n some courts, the evictions are set one each minute”).

<sup>113</sup> See Fox, *supra* note 106, at 91 (noting that Boston Housing Court judges preside over 250 to 300 cases per day); Robert Rubinson, *There Is No Such Thing as Litigation: Access to Justice and the Realities of Adjudication*, 18 J. GENDER, RACE & JUST. 185, 200 (2015) (noting that Baltimore’s rent court, which has one judge assigned per day, hears 1050 cases per day); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 969 (2016) (noting that a judge may interact with over 100 pro se litigants per day).

<sup>114</sup> *Reynolds v. Capps*, 968 N.E.2d 789, 792 (Ind. Ct. App. 2012). Similar processes are common in debt collection cases. See Stifler, *supra* note 20, at 114–15.

<sup>115</sup> See Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC’Y REV. 219, 221–22 (1975).

<sup>116</sup> See *id.*; see also JURGENS & HOBBS, *supra* note 87, at 12–13.

system fulfilled its promise, a positive systemic effect on social issues certainly would have been felt.

Instead, the small claims system is gripped by the same power dynamics that control the traditional courts, and has largely replicated the same results. As one prominent example, small claims tribunals have become the preferred venue for corporate creditors prosecuting unpaid debt claims.<sup>117</sup> A 2006 investigation by the Boston Globe revealed that, in Boston, 40,000 debt collection suits accounted for eighty-five percent of all cases in the state's busiest small claims court.<sup>118</sup> The National Center for State Courts reports that three-quarters of plaintiffs in small claims cases are represented by an attorney, raising "troubling concerns" that the system, which was originally developed as a forum in which primarily self-represented litigants could use a simplified process to resolve civil cases quickly and fairly, now "provide[s] a much less evenly balanced playing field than was originally intended."<sup>119</sup>

Judges have allowed corporate parties to exploit the informal regime of small claims courts to their advantage. Creditors, for example, often rely on flimsy hearsay evidence and bad faith procedural wrangling to pursue lawsuits of dubious merit.<sup>120</sup> One common practice is "robo-signing," a tactic in which employees of debt collectors "sign affidavits attesting that they have personally reviewed and verified debtors' records, when in fact they have only looked at basic account information on a computer screen."<sup>121</sup> Furthermore, the debt buyers often "have no proof that the debt even existed, let alone that the person they are suing was responsible for it."<sup>122</sup> Mary Spector explains that consumer debt is often bundled and sold several times; at the time of sale, the debt buyer rarely receives more than a computer record summarizing the names of the consumers and the total amount each owes.<sup>123</sup> Despite this exchange of limited information, in Professor Spector's study of Texas debt collection practices, more than

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<sup>117</sup> HANNAFORD-AGOR ET AL., *supra* note 61, at v, 33; *see also* JURGENS & HOBBS, *supra* note 87, at 12 ("To observe the reach and power of the modern debt machine, one need only pay a visit to a local small claims court. Every day hundreds of these low-level state courts mass produce judgments against debtors. . . . The debt machine has transformed the character of many small claims courts.").

<sup>118</sup> *See* Beth Healy, *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE (July 31, 2006), <https://www.bostonglobe.com/metro/2006/07/31/dignity-faces-steamroller/Sok0TBVHzOzjLEpNqNrVYN/story.html>.

<sup>119</sup> HANNAFORD-AGOR ET AL., *supra* note 61, at 33.

<sup>120</sup> *See* FED. TRADE COMM'N, *supra* note 80, at ii (discussing the many practices in consumer debt litigation and arbitration that raise consumer protection concerns).

<sup>121</sup> TERP & BROWNE, *supra* note 87, at 4.

<sup>122</sup> *Id.*

<sup>123</sup> Spector, *supra* note 12, at 266–67.

seventy-eight percent of all cases involved affidavits in which the debt buyer claimed to have personal knowledge as to the creation of the debt and the accuracy of the amount owed.<sup>124</sup>

Robo-signing is compounded by “sewer service,” a tactic in which the debt collector intentionally fails to serve notice of the collection suit and then files a false affidavit of service claiming the defendant has been properly notified of the pending action.<sup>125</sup> In New York state, the Attorney General’s office sued multiple debt collectors after an investigation of 100,000 cases revealed acts of fraudulent service.<sup>126</sup> In some instances, process servers claimed to have been at more than one residence at the exact same time; in others, claimed attempts to serve court papers would have required the process server to drive more than 10,000 miles in a single day.<sup>127</sup> Rampant reports of sewer service exist in other areas of the country as well.<sup>128</sup> In one California case, a debt collector claimed to have served a defendant personally in her home when in fact she was hospitalized.<sup>129</sup> In a second California case, the wife of a debtor was reportedly served at the couple’s Santa Clara home, even though she had died two years earlier.<sup>130</sup> One study of process service in New York’s King and Queens Counties found

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<sup>124</sup> *Id.* at 293–94 (reporting on the results of a study involving 400 cases). Spector further reports that in 97.22% of cases where affidavits were filed, the affidavit was the only evidence of the validity of the account. *Id.* at 294; *see also* Stifler, *supra* note 20, at 105 (discussing robo-signing as a rampant practice).

<sup>125</sup> Stifler, *supra* note 20, at 107 (defining sewer service as “the practice of intentionally filing false affidavits of service of process in court”). Like in all civil actions, creditors are required to provide debtors with proper notice of a lawsuit filed against them prior to obtaining a judgment. *E.g.*, FED. TRADE COMM’N, *supra* note 80, at 8.

<sup>126</sup> *See* Press Release, N.Y. State Attorney Gen., The N.Y. State Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010), <https://ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server>. For a similar action filed by private litigants, *see* Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), <https://nyti.ms/2mB3Pg8>.

<sup>127</sup> *See* Sykes v. Mel S. Harris & Assocs., 780 F.3d 70, 76–77 (2d Cir. 2015) (discussing a district court’s findings that there was substantial support for a finding of sewer service based on these factors); Press Release, N.Y. State Attorney Gen., *supra* note 126.

<sup>128</sup> *See* U.S. Fed. Trade Comm’n, Debt Collection: Protecting Consumers Roundtable 25–26, 30–33, 58 (Dec. 4, 2009) (discussing incidents and suspicions of sewer service in Connecticut and Florida).

<sup>129</sup> Ctr. for Investigative Reporting, *Bay Area Residents Sue Process Servers for Failing to Deliver Lawsuits*, SAN DIEGO UNION-TRIB. (May 24, 2012), <http://www.sandiegouniontribune.com/g00/sdut-bay-area-residents-sue-process-servers-for-failing-2012may24-htlmstory.html>.

<sup>130</sup> *Id.*



that personal service was achieved in only six percent of civil debt collection cases.<sup>131</sup>

In theory, judges in small claims courts are liberated from the traditional adversarial paradigm and authorized to interrogate parties as to the veracity of their claims.<sup>132</sup> However, these affirmative powers are discretionary and not required,<sup>133</sup> and in practice, many judges do not seize on the opportunity to scrutinize the more powerful party's assertions.<sup>134</sup> Robo-signing and sewer service are not regularly challenged by small claims judges.<sup>135</sup> And in rental housing cases, which are also commonly litigated in small claims tribunals, judges do not take action to surface and address the tenant's right to quality housing, even though it is an integral component of many eviction actions, and could potentially lower the amount of the disputed contract rent.<sup>136</sup>

Judicial training and habit may explain this sort of capture. The adversary system acculturates judges to allow parties to control the facts and issues in a case. When a debt collector or landlord, typically a repeat player accompanied by a lawyer, puts forward a lawsuit,

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<sup>131</sup> MFY LEGAL SERVS., INC., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 6 (2008). Reviewing its own case data, MFY reports that of the 350 individuals assisted with debt collection matters over a twelve-month period, “[i]n nearly every case” the client first learned of the debt action brought against them “when their bank account was restrained as a result of a default judgment . . . .” *Id.* at 11.

<sup>132</sup> See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2016–18 (1999) (discussing state small claims court rules allowing judges to relax procedural rules and assist unrepresented parties).

<sup>133</sup> For one example, see the Massachusetts small claims rules, which authorize judges to “conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice in the case.” MASS. SMALL CLAIMS R. 7(g) (West 2018); see also CAL. CIV. PROC. CODE § 116.520 (West 2017) (providing that small claims judges “may consult witnesses informally and otherwise investigate the controversy”) (emphasis added); OR. REV. STAT. ANN. § 55.090 (West 2016) (allowing that the court “may informally consult witnesses or otherwise investigate the controversy”) (emphasis added).

<sup>134</sup> See Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC’Y REV. 339, 353 (1976) (noting that judges in small claims courts do not often actively develop facts, despite authorization to do so); Yngvesson & Hennessey, *supra* note 115, at 251–53 (detailing judges’ confusion concerning their role in small claims court and explaining that they did not actively question litigants due to their belief that they must remain and appear neutral).

<sup>135</sup> This is evident by the high rate at which judges enter default judgments despite the fact that research reveals a high percentage of cases involving robo-signing or sewer service that could have been detected upon judicial examination. See STAUFFER, *supra* note 17, at 3–4.

<sup>136</sup> See Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. SOC’Y 61, 72–74 (2014).

many judges may simply hesitate to interfere on behalf of the floundering opponent.<sup>137</sup>

Some commentators also note that plain old-fashioned bias, or at least preferentialism, may be at play. Judges may simply identify more closely with the powerful actor's predicament, or side with the party most likely to benefit a re-election campaign—or, in a rental housing matter, they may even implicitly reject the notion that substandard housing should excuse rent payments.<sup>138</sup>

In short, these three structural forces—systemic lack of representation, overcrowded dockets, and corporate capture of small claims tribunals—place the courts in a position of aggravating, rather than solving, particular social issues. Through multiple mechanisms, the adjudicatory process virtually guarantees that landlords and creditors can obtain quick and easy judgments that further rent and debt collection, while leaving social problems (and reciprocal rights) such as protection against substandard housing and consumer fraud unaddressed.

### III

#### A FRAMEWORK FOR CIVIL PROBLEM-SOLVING COURTS

This Part develops a theory for adapting the drug court model to the civil arena. In criminal courts, the heart of the problem-solving model is the availability of an alternative remedy: treatment over prison. In civil courts, the remedy itself is not necessarily deficient; the law affords important protections against substandard housing and unfair debt collection. Instead, it is *access* to the remedy that is compromised. This Part will demonstrate how core drug court principles—an intent to solve a social problem, interdisciplinary collaboration, and a strong judicial role—can be harnessed to address the unique process failures in the civil justice system. Specifically, the drug court framework can be exploited in the civil private law setting to achieve

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<sup>137</sup> See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 579 (1992) (exploring “the paradigm of civil disputes, where the judge expects each party to set forth pertinent claims, defenses, counterclaims, and evidence”).

<sup>138</sup> See WILLIAM E. MORRIS INST. FOR JUSTICE, *supra* note 93, at 10 (observing a friendliness between judges and landlord attorneys, such that vacation plans were discussed in open court); Bezdek, *supra* note 137, at 571–75 (positing that judges’ “world view” and “professional station” may cause them to discount tenant hardship); Sabbeth, *supra* note 75, at 78–79 (noting that judicial bias may favor landlords because judges are more likely to be property owners and discussing how the law and culture of housing courts has been influenced over time by disproportionate attorney representation of landlords); Super, *supra* note 10, at 389, 415–16 (discussing judges’ “symbiotic[,] cooperative relationships with landlords and their lawyers,” and noting that “[e]lected judges may have come to expect the support of the landlords’ bar,” making them vulnerable to capture).

three process-oriented goals: (1) motivate judges to protect vulnerable court users, (2) attack information asymmetry, and (3) monitor liable parties to induce performance.

Relying on extensive field work I conducted in an experimental Housing Conditions Court (HCC) in the District of Columbia, this Part highlights the relevance and suitability of the problem-solving philosophy to attack distinct civil justice problems. Elsewhere, I have evaluated the HCC's inquisitorial features and their correlation to substantive justice in the court.<sup>139</sup> Here, based on court observations in nearly 300 cases and a longitudinal review of 73 matters, I catalogue the HCC's problem-solving characteristics and evaluate the role each might play in mitigating process distortions in the civil courts. Despite significant differences with the drug court model, a set of the HCC's adjudicatory features may be stitched together to shape an emergent problem-solving model in the private law sphere.

#### A. *Motivating Judges to Protect Vulnerable Court Users*

Drug courts advance their therapeutic goal by naming the purpose of the court as solving the social problem of addiction. This naming function allows judges to apply an alternative remedy to criminal conduct: compulsory treatment.

An important difference in civil courts is that the existing remedy may be adequate and not in need of reform. Housing codes, for instance, enshrine substantial protections against unsafe dwellings, and subject property owners to fines, damages, and rent abatements for violations ranging from broken windows to rodent infestations.<sup>140</sup> A robust collection of consumer protection laws exist as well and require debt collectors to adhere to rigid standards when seeking repayment in court.<sup>141</sup>

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<sup>139</sup> See Steinberg, *supra* note 17 (finding that the HCC's "inquisitorial" procedures can lead to accurate outcomes for tenants and court success).

<sup>140</sup> See, e.g., D.C. Mun. Regs. tit. 14, §§ 4, 8 (2018).

<sup>141</sup> Creditors are barred from many forms of illegal debt collection in court. These include prohibitions on the collection of debt that is time-barred ("zombie" debt), is of unknown origin (due to bundling and resale of debt to third party debt buyers), violates state usury laws, violates service of process laws, or is not owed ("phantom" debt). See STIFLER & PARRISH, *supra* note 11, at 8–17 (discussing common practices in debt collection litigation and federal and state efforts to regulate them). Debtors may also raise protections through the Fair Debt Collection Practices Act, which governs the manner in which a creditor can pursue debt collection, but does not provide any defenses to collection actions. *Id.* at 2; see also 15 U.S.C. § 1692(k) (2012) (establishing a private right of action against debt collectors who violate the FDCPA, but not providing for defenses in individual collection lawsuits).

However, the naming function that is so critical to drug courts can be engineered in the civil setting to achieve a different goal: motivating judges to protect vulnerable court users.

### 1. *The Existing Judicial Paradigm*

Civil courts tend to espouse neutral, proceduralist missions that emphasize impartial decision making. For instance, a civil court mission might announce the court's intention to "protect rights and liberties, uphold and interpret the law, and resolve disputes peacefully, fairly and effectively."<sup>142</sup> While such a pronouncement is hardly controversial, it tends to reinforce the primacy of a neutral judge who is agnostic as to outcomes. In tribunals where both parties are adequately represented, a passive judge might indeed be the ideal. But on the pro se dockets that now dominate the civil courts, a judge who is not particularly attuned to the rights of vulnerable parties may inadvertently allow powerful private actors to control the means and objectives of the forum.

In rental housing and consumer courts, for instance, judges tend to adopt rent and debt collection as their assigned purpose, and then conform their conduct to meet the perceived or actual expectations of their role.<sup>143</sup> In a fascinating case study, Michele Cotton presents judge-to-party dialogue capturing how, even in a rental housing matter presenting egregious housing code violations, the judge is intently focused on the amount of rent owed to the landlord—to the exclusion of the tenant's equally significant housing quality claims.<sup>144</sup> This judicial orientation is likely the product of the judge's reflexive, learned behavior over time in a courtroom where only landlords wield the expertise and professional assistance to control the issues, facts, and evidence in each case. In other words, a "neutral" judicial posture that permits parties to direct case presentation will, in a pro se court, enable the represented group to undermine the legitimacy of opposing claims, and ultimately, to define the goals of adjudication for the tribunal at large.

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<sup>142</sup> JOINT COMM. ON JUDICIAL ADMIN., STRATEGIC PLAN OF THE DISTRICT OF COLUMBIA COURTS: 2013–2017, at 13 (2013), [https://www.dccourts.gov/sites/default/files/matters-docs/Open-to-All-Trusted-by-All-Justice-for-All-Strategic-Plan-of-the-District-of-Columbia-Courts-2013-2017\\_internet.pdf](https://www.dccourts.gov/sites/default/files/matters-docs/Open-to-All-Trusted-by-All-Justice-for-All-Strategic-Plan-of-the-District-of-Columbia-Courts-2013-2017_internet.pdf).

<sup>143</sup> For a discussion of this phenomenon in the debt context, see Healy, *supra* note 118. See also Holland, *supra* note 88, at 183, 185–86 (contending that his empirical data on 4400 consumer cases confirms the "widespread belief that, in our broken system, small claims courts have become an extension of the debt collection industry").

<sup>144</sup> Cotton, *supra* note 136, at 72–74.

## 2. “Naming” and Judicial Conduct

The drug court principle of “naming” can be imported into the civil justice system to encourage a shift in judicial behavior and attitudes. For instance, a civil problem-solving court might name its purpose as promoting housing quality, or combatting unlawful debt collection, or preserving affordable housing. By redefining the objective of adjudication, the civil problem-solving court would not open the gateway to a new remedy, as occurs in drug courts; it would instead aim to influence the judges’ behavior, and in turn, their state of mind. The idea is that, if judges were to view the purpose of the tribunal as, say, improving substandard housing, they would approach their work with an eye toward affording tenants the benefit of existing substantive and procedural protections—thereby serving as a shield against the dominance of powerful private actors.

The drug court experiment has made plain the connection between renaming the purpose of the court and consequent judicial behavior in those forums. In furtherance of the treatment goal, drug court judges abandon their detached and formal demeanor and work actively with defendants to overcome addiction.<sup>145</sup> James L. Nolan, Jr., a sociologist who conducted an ethnographic study of two-dozen drug courts, describes judges who shed their robe and gavel, hug graduates upon completion of the program, and generally work to convey a message of “care, concern, and interest” so that defendants are motivated to stay committed to sobriety.<sup>146</sup> Not without a note of critique, Nolan chronicles these efforts as part of the “deliberately and consciously” orchestrated “theater” of the model, in which the judge adopts a caring persona in order to build trust and produce certain therapeutic outcomes.<sup>147</sup> However, even if the role is scripted, as Nolan suggests, judges who have had drug court assignments report a feeling of liberation at being able to “mak[e] a difference.”<sup>148</sup> Because of the role they are asked to play, drug court judges are invested in the success of the treatment regimen,<sup>149</sup> rather than resigned to performing a bureaucratic function such as arraigning 200 cases in one

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<sup>145</sup> Berman & Feinblatt, *supra* note 5, at 131–32; Miller, *supra* note 30, at 423.

<sup>146</sup> NOLAN, *supra* note 34, at 11, 72–73, 101–02. The judges do this by studying defendants’ files in advance of court dates and then demonstrating extensive knowledge of their case histories from hearing to hearing. *Id.* at 73.

<sup>147</sup> *Id.* at 72–75.

<sup>148</sup> *Id.* at 108–10.

<sup>149</sup> Nolan discusses the example of a judge approaching a defendant’s employer to help him get his job back. This kind of judicial conduct has been criticized for overreaching, but also lauded for offering needed assistance to a defendant beyond the four corners of a case. *Id.* at 95.

day<sup>150</sup> or, in their words, issuing sentences that might as well have been programmed by a computer.<sup>151</sup>

If renaming the goal of adjudication affects judicial behavior—as the drug court model demonstrates is possible—a cyclical loop also becomes possible in which behavior affects judicial attitudes. This is the thrust of a counterintuitive insight from social psychology: “the primacy of behavior on attitudes.”<sup>152</sup> One might assume the opposite—that attitudes predict behavior. But behavioral science literature over the past century has consistently found, to the contrary, “that people’s behavior is often more predictive of their attitudes than their attitudes are of their behavior.”<sup>153</sup>

Victor Quintanilla relies on this research to suggest that, if judges are required to mold their behavior to positively affect socially disadvantaged users of the courts, their attitudes toward those groups will shift accordingly.<sup>154</sup> And, indeed, the drug court model may illustrate the potency of this theory. A survey of 355 judges conducted by Deborah Chase and the Honorable Peggy Fulton highlights the power of simple behavioral changes to impact judicial attitudes.<sup>155</sup> In their study, drug court judges were compared to judges who preside over traditional dockets and evaluated on, among other factors, their attitudes toward litigants.<sup>156</sup> The drug court judges were significantly “more positive in their attitudes toward the litigants than the other judges.”<sup>157</sup> Fifty-one percent of drug court judges reported positive attitudes toward litigants on metrics such as the litigants’ motivation and ability to address their own problems, while only fifteen percent of judges on traditional dockets felt the same way.<sup>158</sup> This research suggests that charging judges with the duty to transform their court-

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<sup>150</sup> See Berman & Feinblatt, *supra* note 5, at 135.

<sup>151</sup> NOLAN, *supra* note 34, at 105 (quoting a judge who argues against mandatory sentencing schemes in traditional courts because of their machine-like nature).

<sup>152</sup> Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745, 803 (2017).

<sup>153</sup> *Id.* at 774; see also John T. Cacioppo et al., *Rudimentary Determinants of Attitudes II: Arm Flexion and Extension Have Differential Effects on Attitudes*, 65 J. PERSONALITY & SOC. PSYCHOL. 5 (1993); Jesse Chandler & Norbert Schwarz, *How Extending Your Middle Finger Affects Your Perception of Others: Learned Movements Influence Concept Accessibility*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 123 (2009); Gary L. Wells & Richard E. Petty, *The Effects of Overt Head Movements on Persuasion: Compatibility and Incompatibility of Responses*, 1 BASIC & APPLIED SOC. PSYCHOL. 219 (1980).

<sup>154</sup> Quintanilla, *supra* note 152, at 789–803 (making recommendations to apply a human-centered civil justice design to the court system).

<sup>155</sup> Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209 (2009).

<sup>156</sup> *Id.* at 221.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

room conduct may prompt an attitudinal shift that, cyclically, reinforces the problem-solving mission of the court.

Applying this theory to the civil justice system, a civil problem-solving court might exploit the drug court principle of “naming” to immunize judges against capture by powerful classes of litigants. In the model I envision, a civil problem-solving court would name its purpose as addressing a social problem, and judges would then intentionally tailor their courtroom practices to protect the rights of vulnerable parties. If social psychology proves prescient, behavioral changes among judges may ultimately spur attitudinal changes, which would strengthen the capacity of the court to solve the named social problem. As will be discussed in the next subsection, field work I conducted in an experimental Housing Conditions Court (HCC) in the District of Columbia illustrates how these sequential effects might unfold.<sup>159</sup>

### 3. *The Naming Function and the HCC*

Launched in 2011, the HCC is an experimental calendar housed within the District of Columbia’s Superior Court system and designed to adjudicate affirmative habitability claims.<sup>160</sup> Essentially, the HCC has taken substandard housing claims out of the exclusive domain of the court’s traditional landlord-tenant division—which is besieged by all of the systemic conditions described in Part II—and created an alternative venue for tenants seeking repairs.

The HCC’s specialized docket was created in the wake of a 2008 series of articles published by the Washington Post that exposed the substandard condition of local rental housing.<sup>161</sup> The series docu-

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<sup>159</sup> The methods and results of this field work are described and analyzed extensively elsewhere. See Steinberg, *supra* note 17.

<sup>160</sup> See Zoe Tillman, *Housing Conditions Calendar Creates a New Forum for Tenants*, NAT’L L.J. (July 4, 2011), [http://sokolowlaw.com/wp-content/uploads/2014/02/TenantForm-7-4-2011LawJournalArticle\\_MelWright.pdf](http://sokolowlaw.com/wp-content/uploads/2014/02/TenantForm-7-4-2011LawJournalArticle_MelWright.pdf) (describing the newly-created HCC).

<sup>161</sup> See Debbie Cenziper & Sarah Cohen, *A Failure in Enforcement: Agency’s Ineffectiveness Has Helped Landlords Profit from Neglect*, WASH. POST (Mar. 11, 2008) [hereinafter Cenziper & Cohen, *Failure in Enforcement*], <http://www.washingtonpost.com/wp-dyn/content/story/2008/03/10/ST2008031003243.html> (detailing the failure of the Department of Consumer and Regulatory Affairs to adequately investigate, prosecute, and enforce decisions against landlords); Debbie Cenziper & Sarah Cohen, *Fund Gives Tenants Little Relief*, WASH. POST (May 4, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/05/03/ST2008050302298.html> (describing how the Department of Consumer and Regulatory Affairs used its multimillion-dollar repair fund to support a computer system and repair single-family homes instead of repairing complexes with rampant code violations); Debbie Cenziper, *Little to Show for the Price*, WASH. POST (Aug. 14, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/13/AR2008081303650.html> (explaining how the Department of Consumer and Regulatory Affairs failed to use its multimillion-dollar fund to truly help tenants in “squalid conditions”).

mented “decrepit and dangerous” conditions at properties across the city, and chided the local enforcement agency, the Department of Consumer and Regulatory Affairs, for willfully ignoring tenant complaints at the expense of public health and safety.<sup>162</sup> While the District’s existing landlord-tenant branch is ostensibly tasked with adjudicating substandard housing issues, it, too, was deemed ineffective in combating this entrenched social problem.<sup>163</sup>

On its face, the HCC, in many ways, resembles a classic informal tribunal.<sup>164</sup> Formal testimony, the rules of evidence, and most procedural norms are eschewed by the court.<sup>165</sup> With the exception of service of process—which the HCC requires—judges enforce very few of the courtroom formalities typically observed in traditional courts.<sup>166</sup> One might expect, then, that the HCC would fall victim to the same corporate capture that other small claims and informal tribunals have experienced. However, the court has interrupted this cycle with the same rhetorical device employed by drug courts: naming the court’s purpose as solving an identifiable social problem.

The Administrative Order that created the HCC named the express and exclusive mission of the court as solving the social issue of substandard housing. The Order identified the impetus for the new court as “a need to quickly address conditions which constitute violations of the District of Columbia’s housing code . . . .”<sup>167</sup> Regarding the decision to develop the HCC as a specialized calendar outside the existing court structure, the Administrative Order reiterated its intent to “expedite actions for enforcement of housing code regulations.”<sup>168</sup> This targeted emphasis—focusing on one particular class of litigants whose rights have typically gone unaddressed—is quite different from the broader civil court’s neutral mission to apply and interpret the law.<sup>169</sup>

The HCC’s naming function had a powerful effect on the court’s early development. While the authorizing Administrative Order did not establish the HCC as aligned with any particular philosophy of adjudication, the founding judge and others began to discuss the court

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<sup>162</sup> Cenziper & Cohen, *Failure in Enforcement*, *supra* note 161.

<sup>163</sup> *See id.* (detailing how the branch failed to inspect buildings, collect landlord fines and enforce housing codes).

<sup>164</sup> *See* Steinberg, *supra* note 17, at 1062.

<sup>165</sup> *See id.* at 1067.

<sup>166</sup> *Id.* at 1067–69.

<sup>167</sup> Superior Court of D.C., Administrative Order No. 10-07, Housing Conditions Civil Calendar 1 (Apr. 28, 2010).

<sup>168</sup> *Id.*

<sup>169</sup> *See supra* note 142 and accompanying text.



in public forums as embracing a problem-solving style.<sup>170</sup> The judge who led the court's initial efforts held town hall style community meetings promoting the HCC as a "fix it" court that "gets repairs done."<sup>171</sup> A veteran tenant advocate echoed the problem-solving nature of the HCC, saying, "[i]t's very 'roll up your sleeves and get the job done'"—a nod to the court's focus on finding and remedying housing code violations.<sup>172</sup>

The HCC's named purpose also appears to have impacted the judicial approach to case management and dispute resolution. While the HCC does not have the case volume of many urban landlord-tenant courts it is still recognizable as a system of mass justice due to several defining features: Parties wait for up to three hours for their cases to be called, hearings are held in a particularly public manner, and most case events occupy no more than eight to ten minutes of the court's time.<sup>173</sup> Given these characteristics, one might predict that the HCC depends on hallway settlements to conclude most or many proceedings. However, the HCC has turned the typical model of judicial triage on its head: Rather than steering tenants toward quick and unmonitored agreements, an active judge works to ensure that legitimate grievances are investigated and addressed—not swept aside by tainted methods of early case resolution.

HCC cases commence in the same way they do in many traditional civil justice matters—with an initial hearing before the judge at which the parties air their complaints. Unlike in a typical housing court, however, the HCC judge does not automatically urge hallway settlement as a means of winnowing their dockets. Instead, the judge presses the landlord to respond to the tenant's allegations, and if an admission of liability is not obtained, orders a housing inspector to investigate the property. By concentrating judicial resources on fact-gathering rather than early case resolution, pro se parties receive encouragement to remain engaged in the court process. Indeed, in my

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<sup>170</sup> See Jessica Gould, *Town Hall Airs Tenant Concerns*, NW. CURRENT, Aug. 4, 2010, at 1 (quoting a judge describing how the court "talk[s] with landlords and tenants to determine what the problems are and see[s] if [it] can get the problems resolved"); Tillman, *supra* note 160 (explaining that the creators of the HCC "[took] a cue from the successes of targeted 'problem-solving courts,' like Drug Court and Fathering Court").

<sup>171</sup> Micki Bloom, *Assessing the District's "Fix It" Court*, BREAD FOR THE CITY BLOG (July 15, 2011) (on file with author).

<sup>172</sup> Tillman, *supra* note 170.

<sup>173</sup> The HCC's docket is held once a week for half a day. Based on my field observations, during the three- to four-hour docket, approximately twenty to twenty-five cases are heard. Steinberg, *supra* note 17, at 1063.

longitudinal review of seventy-three HCC case matters, only six percent were ultimately resolved by settlement.<sup>174</sup>

In the HCC, this change in judicial case management considerably expands tenant access to available civil remedies. My longitudinal data revealed that, when claims of housing code violations were investigated, ninety-seven percent of tenant cases resulted in at least one substantiated allegation.<sup>175</sup> While a tribunal dominated by out-of-court settlements is likely to leave valid grievances unaddressed due to the power gap between landlords and tenants, a judicial focus on surfacing meritorious claims instead lays the groundwork for the enforcement of appropriate remedies.

One might imagine other areas—principally consumer debt—where a specialized docket might also redefine its mission to confront a social issue that has been impervious to traditional adjudication. Anna Carpenter describes this as a “principles over procedures” approach.<sup>176</sup> The redefined objective need not involve a new remedy, but could focus squarely on rights protection for a vulnerable class of litigants. Judges would then adjust their conduct to meet the expectations of the forum, but with a different-than-usual beneficiary: the less powerful party. In this way, the core drug court principle of “naming” might form the first building block of a civil problem-solving model.

### B. *Attacking Information Asymmetry*

A second core principle of drug courts is collaboration with interdisciplinary actors. In a drug court, the judge is the head of the treatment team, but regularly relies on the expertise of social workers, probation officers, and addiction specialists to design the treatment plan and motivate the defendant to stay engaged in the program.<sup>177</sup>

In the civil justice system, the borrowed principle of interdisciplinary collaboration might form the second building block of a private law problem-solving model. While the civil courts do not require specialized expertise in designing an alternative remedy, a partnership with outside government actors could prove useful in facilitating access to, and enforcement of, existing remedies. In particular, incorporating the expertise and investigatory skills of regulatory actors into

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<sup>174</sup> *Id.* at 1080.

<sup>175</sup> *Id.* at 1071 (finding that the housing inspector substantiated at least one allegation in all but two of seventy-three cases studied).

<sup>176</sup> Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 687 (2017). In Carpenter’s research, certain Administrative Law Judges revealed that their judging style in pro se cases was shaped by a sense of duty to reach a fair outcome. *Id.* at 687–88.

<sup>177</sup> See *supra* notes 46–49 and accompanying text.

civil proceedings can address the information asymmetry that results from lopsided representation.

### 1. *Information Asymmetry in Traditional Courts*

Systemic lack of counsel, and specifically lopsided representation, is responsible for many of the poor justice outcomes in the civil courts. Powerful private actors such as property owners and debt buyers weaponize procedure to suppress pro se evidence by objecting to their collection or authentication methods.<sup>178</sup> And these same actors can simultaneously dodge compliance with legal requirements, such as personal knowledge of the debt owed, that, if adhered to, would make their claims harder to bring.<sup>179</sup> Pro se parties lack the power to overcome a represented opponent's procedural wrangling in order to propel their case information and arguments in front of a judge.<sup>180</sup> As a result, judicial decision making in the civil justice system is often infected by information asymmetry, leading to skewed results.<sup>181</sup>

### 2. *Interdisciplinary Collaboration and Information Asymmetry*

The drug court principle of interdisciplinary collaboration has great potential in the civil sphere for overcoming the information asymmetry that arises from lopsided representation. The HCC, for example, has adopted the problem-solving tactic of appointing an independent government actor to conduct fact investigations. As in most civil courts, the majority of cases in the HCC involve unrepresented parties and just under half involve asymmetrical representation, with one party represented and the other not.<sup>182</sup> If the HCC mimicked other civil tribunals, the unavailability of counsel would greatly complicate tenants' efforts to navigate procedures and present evidence, ultimately leading to an under-enforcement of rights. Instead, the inspector is deputized as responsible for providing the

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<sup>178</sup> See Steinberg, *supra* note 113, at 923–24 (describing an illustrative landlord-tenant case in which the tenant fails to satisfy the notice and authentication requirements of which she is unaware).

<sup>179</sup> See *supra* notes 120–31 and accompanying text (discussing robo-signing and sewer service).

<sup>180</sup> See *supra* Section II.B.1.

<sup>181</sup> For examples of how some judges make conscious efforts to overcome this information asymmetry without providing an unfair advantage to pro se litigants, see Carpenter, *supra* note 176, at 688–89 (presenting interviews with judges who stated that they selectively excuse formal procedural rules in order to ensure that pro se litigants are fully heard).

<sup>182</sup> Tenants are pro se in seventy percent of HCC matters, and forty-three percent of cases involve asymmetrical representation. Steinberg, *supra* note 17, at 1084.

court with important and accurate case information, therefore unburdening the pro se party from the task of doing so.

The HCC's collaboration model involves a strategic partnership with the District of Columbia's Department of Consumer and Regulatory Affairs, the governmental body charged with code inspections.<sup>183</sup> A designated city housing inspector has been assigned to the HCC and is dispatched to inspect every unit in which a dispute exists over the presence of code violations.<sup>184</sup> The inspector is an institutionalized part of the court and is charged with reporting back to the judge on the quality of the unit.<sup>185</sup> The inspector may visit the unit only once, or may visit several times, depending on the intractability of the party conflict.<sup>186</sup> By providing the judge with information about the parties' out-of-court conduct, the inspector remediates the information asymmetry that so often taints proceedings without counsel.

### 3. *Three Informational Dimensions to the Interdisciplinary Role*

As is the case with all HCC procedures, the inspector's role is not formalized, or even made known, by written rule.<sup>187</sup> And yet my field research reveals that HCC inspectors have a breadth and depth to their position that arguably even exceeds the standing of interdisciplinary actors in drug courts. Indeed, the inspector appears to occupy three distinct informational functions in the HCC, which together suggest guiding principles for the interdisciplinary component of a civil problem-solving court.

First, the inspector fulfills the adjudicatory function of determining the merit of the tenant's claims. Second, the inspector fulfills the regulatory function of inspecting for law violations not raised by the tenant. And last, the inspector fulfills the managerial function of facilitating communication between the relevant system players to advance the enforcement of remedies. Although the inspector's role in the HCC evokes the role that probation officers, social workers, and drug treatment providers play in drug courts, it is squarely tailored to address the specific process failures that plague the civil justice system—and is not ordered around implementation of an alternative remedy, as is the bedrock of interdisciplinary collaboration in drug courts.

The inspector's adjudicatory function in the HCC is carried out by evaluating the merit of the tenant's claims. Armed with the

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<sup>183</sup> *Id.* at 1066–67.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1066.

<sup>186</sup> *Id.* at 1067.

<sup>187</sup> *Id.* at 1063–64.

tenant's complaint, inspectors conduct an initial visit to the premises, investigate the alleged housing code violations, and convey their findings to the court both in writing and orally.<sup>188</sup> In this way, a tenant's claims are either substantiated or invalidated. This fact-finding role can be enormously beneficial for pro se tenants, who may be unable to prove a cockroach infestation, for instance, without the inspector's observation of physical evidence.<sup>189</sup>

As part of the adjudicatory function, inspectors also play a crucial role in determining mixed questions of law and fact. When a property owner disputes liability for a broken shower, for example, the inspector makes a determination as to whether structural conditions or the tenant's misconduct is the primary cause for the substandard condition.<sup>190</sup> Interdisciplinary cooperation is leveraged to dissolve the influence of procedural and substantive know-how on the outcome of civil matters, and to produce information that is reliable and relevant to the court's decision-making.

Turning to the inspector's regulatory function, this part of the role is fulfilled by surveilling homes for the presence of code violations the tenant did not allege. That is, the inspector does not simply operate within the adversarial framework of the litigation, in which the issues are confined to those raised by the parties, but instead pursues full compliance with the housing code.<sup>191</sup> This regulatory role is critical to reducing the role of information asymmetry in producing unbalanced civil justice outcomes. Indeed, in my field research, thirty-five percent of defective conditions addressed by HCC judges were independently discovered by the inspector and not raised by the tenant.<sup>192</sup> In this way, the inspectors supplant some of the informational expertise that attorneys traditionally offer: They bring value to the case, in part, by identifying issues and sources of relief not previously understood by the client.

Finally, the housing inspector fulfills a managerial function in the HCC. Cases in the HCC do not conclude upon a finding of liability; instead, continuous hearings are held until the property owner completes repairs.<sup>193</sup> The inspector's managerial role focuses on this enforcement period. In essence, the inspector's position in the field is utilized to gather information about conflicts that arise as the parties work to address the judge's finding of liability. As illustration, at one

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<sup>188</sup> *Id.* at 1066.

<sup>189</sup> Field Observations (Jan. 14) (on file with author).

<sup>190</sup> Field Observations (Aug. 5) (on file with author).

<sup>191</sup> Steinberg, *supra* note 17, at 1066.

<sup>192</sup> *Id.* at 1071.

<sup>193</sup> *Id.* at 1084–85.

HCC hearing, a tenant expressed dissatisfaction with progress on repairs, and the landlord himself admitted to uncertainty over the quality of his contractor's work, noting that he did not have the expertise to evaluate his contractor's assurances that repairs were complete.<sup>194</sup> The inspector visited the unit to determine the adequacy of repairs, and brought the information back to the judge; following this inspection, the parties reached agreement over the scope of needed work. This ongoing managerial function is key to facilitating an exchange of information among system actors so that judicial directives are fulfilled.

The inspector's managerial role comes closest to replicating the function of interdisciplinary actors in drug courts. Probation officers and treatment professionals meet regularly to review a defendant's progress in treatment, and to communicate drug testing results to the judge. The defendant's engagement in treatment is closely monitored, and rewards or sanctions may be doled out depending on the nature of the reports from interdisciplinary collaborators. Similarly, the inspector in the HCC serves as a liaison to the court on the parties' activities and allows the judge to calibrate punitive measures against noncompliant landlords, if appropriate.<sup>195</sup> In the civil problem-solving setting, however, the inspector's investigations contribute critical case information to determinations of liability as well as enforcement. It is this aspect of their role that does the most to address the information asymmetry that so often subverts the claims-making process for pro se parties.

#### 4. *Challenges to Interdisciplinary Collaboration*

It is important to acknowledge that while interdisciplinary collaboration is a powerful tool that a developing civil problem-solving court might put to use in battling the impact of systemic lack of counsel on justice outcomes, the role is rife with complications and challenges that must be considered. Most significantly, an inspector's competence and neutrality are central to the effective undertaking of the role. The court and the parties must trust that the inspector is thorough in examining the unit, objective in identifying violations and assigning blame, and balanced in negotiating interparty conflict.<sup>196</sup> In addition, the inspector's role can become so dominant as to usurp judicial power and undermine party autonomy. This latter concern

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<sup>194</sup> Field Observations (Oct. 7) (on file with author).

<sup>195</sup> Steinberg, *supra* note 17, at 1066. HCC judges may order rent abatements or daily fines when the conduct of property owners is particularly egregious in flouting a judicial order regarding repairs. Field Observations (Oct. 17) (on file with author).

<sup>196</sup> *Id.* at 1070.

may threaten an independent judiciary, and would be particularly worrisome where the interdisciplinary actor is not considered impartial.<sup>197</sup>

The evolving distrust of guardians ad litem (GALs) in family courts is evidence of the perils that can accompany an independent investigator's role. The GAL model in family courts involves the appointment of a third-party actor who conducts investigations into the "best interests of the child."<sup>198</sup> The results of the GAL's investigation are then communicated to the judge to inform the court's ultimate decisions on custody, visitation, and mandated mental health or substance abuse treatment.<sup>199</sup> When the model rose to prominence in the 1970s, it was seen as a significant safeguard for the best interests of children.<sup>200</sup> Now, the model is often harshly critiqued, with concerns raised over GAL's broad investigatory powers, minimal training, invasion into family privacy, and selective reporting of child abuse.<sup>201</sup> Without mechanisms to ensure accountability and impartiality, the role of an independent inspector may at best be ineffective, and at worst corrupted.

Challenges like those that now accompany the GAL role must be recognized, and, were an inspector's role to be scaled as part of a broadly adopted civil problem-solving framework, may even prove unavoidable. However, the interdisciplinary model also offers unrealized promise in dissolving the information asymmetry that results from the clash of procedural complexity and systemic lack of counsel in the civil justice system. The inspector assigned to the HCC during the study period was lifted from a local code agency widely criticized for incompetence and even corruption,<sup>202</sup> and yet has been praised for excellence and trustworthiness in her work with the court.<sup>203</sup> This sug-

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<sup>197</sup> See generally Ursula Castellano, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484 (2011), for a discussion of the relationship between judges and interdisciplinary actors in criminal problem-solving courts devoted to mental health.

<sup>198</sup> Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1788–89 (1996).

<sup>199</sup> *Id.*

<sup>200</sup> See Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 25–28 (1976).

<sup>201</sup> See Mary Grams, Note, *Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn*, 22 LAW & INEQ. 105, 105–06 (2002).

<sup>202</sup> Cenziper & Cohen, *Failure in Enforcement*, *supra* note 161 (reporting that the District agency "entrusted with protecting tenants has routinely overlooked decrepit and dangerous conditions"); Cenziper, *supra* note 161 (reporting that the District's code enforcement agency has struggled to account for millions of dollars that were supposed to be spent on rehabilitating dilapidated properties).

<sup>203</sup> See *Performance Oversight Hearing on the Department of Consumer and Regulatory Affairs: Hearing Before the Comm. on Bus., Consumer & Regulatory Affairs, Council of the*

gests that a court's organizational dynamics may play a significant role in creating and preserving an effective interdisciplinary partnership. To avoid reinforcing existing power hierarchies, judicial appraisal of the interdisciplinary actor's neutrality and competence must be carefully carried out.

##### 5. *Interdisciplinary Collaboration in Consumer Debt Cases*

Interdisciplinary collaboration in the consumer debt setting cannot mimic the HCC's model since there is no obvious local agency available to conduct on-the-ground investigations in this sphere. However, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau (CFPB) and broadened oversight of the debt collection industry, creates a fresh opportunity to contemplate data sharing as the interdisciplinary mechanism for targeting illegal debt collection practices within a problem-solving framework.<sup>204</sup>

Since its inception in 2010, the CFPB has amassed national data on unscrupulous debt collectors and made use of its authority to prosecute unfair, deceptive, and abusive practices. For example, in 2013, the CFPB successfully sued Cash America, one of the largest payday lenders in the United States, for various collection abuses, including the robo-signing of court documents. The lawsuit resulted in a \$14 million refund to the affected consumers.<sup>205</sup> In addition, in 2015, the CFPB filed suit against two companies that bought improperly vetted personal data from loan applications and then re-sold the data to fraudulent third-party debt buyers, thus subjecting millions of consumers to unlawful collection.<sup>206</sup>

While the CFPB has no involvement in individual collection actions, its data could be enormously beneficial to problem-solving judges. To shape its enforcement priorities, the CFPB maintains a "complaint database," a sizeable and organized information repository that invites consumers to report on their challenges in the mar-

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*District of Columbia* (2015) (written testimony of Beth Mellen Harrison, Supervising Attorney, Housing Unit, Legal Aid Society of the District of Columbia).

<sup>204</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>205</sup> *Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing*, CONSUMER FIN. PROTECTION BUREAU (Nov. 20, 2013), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/>.

<sup>206</sup> *CFPB Takes Action Against Lead Aggregators for Online Trafficking of Personal Information*, CONSUMER FIN. PROTECTION BUREAU (Dec. 17, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-lead-aggregators-for-online-trafficking-of-personal-information/>.



ketplace.<sup>207</sup> Currently, the CFPB's existing data is not shared through any formal mechanism with local courts and judges. Similarly, local courts do little to share with the CFPB the egregious collection practices they encounter on a regular basis. An informational feedback loop between local judges and the CFPB could effectively serve as the interdisciplinary collaboration prong of a consumer problem-solving court.

A snapshot of the CFPB's database reveals a high volume of complaints that mirror many of the issues arising in everyday litigation. For instance, the December 2016 monthly complaint report reveals that thirty-nine percent of complaints submitted about debt collection have to do with "phantom debt," or debt the consumers allege is not owed.<sup>208</sup> In addition, the database tracks which debt buyers top the average monthly complaint list.<sup>209</sup> These statistics could inform the local courts which cases are appropriate for problem-solving scrutiny.

At its best, a consumer problem-solving model would build reciprocal communication channels between courts and the CFPB, so that not only are judges apprised of the activities of known law-breakers, but the CFPB can expand its data collection to include case information from the courts. A formalized informational feedback loop would encourage judges to contribute case data to the CFPB's information repository. Local case data would expand the volume of reliable information maintained by the CFPB—currently limited to consumer complaints—which would then concomitantly grow the data accessible to other judges.

The interdisciplinary model proposed, premised on the exchange of data, and especially if coupled with curated information analysis and presentation from both sides, could greatly assist the courts in attacking information asymmetry. While consumers are often unaware of a debt collector's national practices, judges attuned to such trends might use data to make informed decisions about when to impose a demand for more evidence or require additional court monitoring. A "big data" approach to judicial information gathering may not be as finely tuned as case-specific fact investigation, but certainly could advance more vigorous scrutiny of habitual bad actors. The consumer example demonstrates the elasticity of problem-solving methods and

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<sup>207</sup> The Dodd-Frank Act established the handling of consumer complaints as an essential part of the CFPB's work. *See, e.g.*, CONSUMER FIN. PROTECTION BUREAU, MONTHLY COMPLAINT REPORT: DECEMBER 2016, at 2 (2016), [https://files.consumerfinance.gov/f/documents/201612\\_cfpb\\_MonthlyComplaintReport.pdf](https://files.consumerfinance.gov/f/documents/201612_cfpb_MonthlyComplaintReport.pdf).

<sup>208</sup> *Id.* at 11.

<sup>209</sup> *Id.* at 16–19.

the flexibility of the model to adapt its core components to a variety of existing circumstances and regulatory actors.

### C. *Motivating Liable Parties to Perform*

A strong and central judicial role is the third element of a drug court. As Greg Berman and John Feinblatt have written, drug courts “make aggressive use of a largely untapped resource: the power of judges to promote compliance with court orders.”<sup>210</sup>

In civil justice matters, this essential principle might form the final building block of a problem-solving court. Much like in drug courts, a civil problem-solving judge would be placed at the center of dispute resolution. Through the exercise of both formal and informal authority, this reimagined judge would leverage the findings of the interdisciplinary actor to actively promote the enforcement of existing civil remedies. The problem-solving judging task evokes a small-scale version of structural reform litigation in which performance is eked out over a long stretch of time through an arduous process of setting modest benchmarks and then relying on the judge’s authority to hold the parties accountable for progress.

#### 1. *Judicial Monitoring as a Problem-Solving Tool*

If a civil problem-solving model is different from its criminal counterpart in its engagement with liability, it closely mirrors the drug court example in its monitoring function. In the HCC, upon the inspector’s discovery of defective housing conditions, judges schedule hearings at two- to three-week intervals to monitor the property owner’s repairs.<sup>211</sup> This monitoring role takes a simple yet consistent form: Following a report on the status of repairs, the judge engages the parties in dialogue, surfaces barriers to enforcement, and stakes out specific obligations that the parties must fulfill at both interim and long-term deadlines.<sup>212</sup>

In one characteristic illustration, the tenant and property owner bickered in court over the proper way to repair a broken window.<sup>213</sup> The judge ordered the landlord to hire a window contractor within four days, have a plan for repairs in two and a half weeks, and clearly communicate that plan to the tenant.<sup>214</sup> To be sure, the tenant’s conduct may be the target of judicial enforcement efforts as well. Where a landlord complained that a tenant had obstructed access to the prop-

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<sup>210</sup> BERMAN & FEINBLATT, *supra* note 50, at 35.

<sup>211</sup> Steinberg, *supra* note 17, at 1068, 1070.

<sup>212</sup> *Id.* at 1084–86.

<sup>213</sup> Field Observations (Oct. 7) (on file with author).

<sup>214</sup> *Id.*

erty on the scheduled day for repairs, the judge issued a directive instructing the tenant to vacate certain rooms in the unit at particular times.<sup>215</sup> In my longitudinal study of the HCC's substantive outcomes, nearly eighty percent of substantiated violations were ultimately repaired, lending credibility to the theory that judicial monitoring can motivate liable parties to perform legal obligations that have traditionally gone under-enforced.<sup>216</sup>

In the consumer setting, a judicial monitoring regime could be informed by the CFPB's national data and imposed against collectors with a reported history of unfair or deceptive practices. One might imagine a judge requiring suspect debt collectors to appear in court and provide reliable evidence to support the legitimacy of their collection efforts. Such monitoring would eliminate rushed default judgments and force creditors to face early judicial interrogation on the veracity of their claims. The critical importance of early judicial engagement is supported by Colleen Shanahan's research, which demonstrates that "access-friendly" judges—who strive to avoid defaults and reach substantive decisions—produce more favorable outcomes for vulnerable litigants.<sup>217</sup>

## 2. *Forms of Judicial Authority*

While some exercise of formal judicial authority is required to manage power imbalances and motivate parties to fulfill their legal obligations, the drug court example demonstrates that charismatic authority is also a critical element of a problem-solving judging model. Formal authority bestows on the judge the convening power to hold hearings; and provides the judge with a set of sticks that can be used to punish a noncompliant party.<sup>218</sup> For instance, HCC judges may schedule additional enforcement hearings or impose sanctions where the conduct of property owners is particularly egregious. A problem-solving judge may be reluctant to rely too heavily on the exercise of formal authority, however, as a heavy-handed approach may under-

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<sup>215</sup> *Id.*

<sup>216</sup> Steinberg, *supra* note 17, at 1072–78.

<sup>217</sup> In Shanahan's study, conducted with her research team, she found that unemployment insurance claimants were more likely to achieve a favorable outcome when judges were "access-friendly," as she terms it. Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215, 233, 242–43 (2018). In Shanahan's study, access-friendliness was measured by the likelihood that a judge would grant a claimant's request for a continuance. *Id.* at 239–40. Shanahan's findings support the notion that judicial action in pre-hearing processes is critical to reaching merits-based substantive decisions and protecting vulnerable court users. *Id.* at 243.

<sup>218</sup> See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 945–46 (2003).

mine the cooperative spirit of the enterprise. This is certainly true in drug courts, where judges often hold back on imposing punishments, such as jail time, even when a defendant underperforms in treatment.<sup>219</sup>

Underpinning the use of formal authority, then, is the judge's effective exercise of charismatic authority. Coined by Max Weber, charismatic authority is not derived from law or tradition, but rather from the force of the judge's character or personality.<sup>220</sup> Drug court judges are known to exhibit tremendous charismatic authority, often using plainspoken language and expressive gestures to develop a relationship with defendants that, they hope, will later translate to completion of the treatment regimen. HCC judges demonstrate the potential of charismatic authority in the civil justice sphere by engaging the parties in similar blunt-but-respectful dialogue about their actions. Like in drug courts, HCC judges adopt a folksy persona and largely choose to speak directly to parties, even when lawyers are present.<sup>221</sup>

Timothy Casey argues that the charismatic authority so essential to the problem-solving judging model makes for an "inherently unstable" regime, as a tribunal relying on an extraordinary and dedicated judge will last "only as long as the life or reign of the individual leader."<sup>222</sup> However, charismatic authority does not have to manifest itself in theatrical gestures or heroic individuals; it can emerge in subtler ways and nonetheless be influential.

For instance, HCC judges forge a more intimate connection with the parties by maintaining their accessibility outside the courtroom. A judge may say to a tenant, "Here is my number in chambers. Call me directly if the landlord does not show up."<sup>223</sup> The judges also go to great lengths to accommodate parties who face barriers to case participation. At one hearing, the judge announced in open court that the landlord had just given birth and would therefore be conferenced into the proceeding on speaker phone.<sup>224</sup> Even when parties fail to appear for hearings without notifying the court in advance, the HCC judge typically picks up the phone and attempts to include the missing litigant in the hearing.<sup>225</sup> These gestures are small, but a flexible judicial

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<sup>219</sup> See *supra* note 54 and accompanying text.

<sup>220</sup> See Casey, *supra* note 45, at 1490–504 (discussing Weberian forms of authority and how they are carried out in a problem-solving setting).

<sup>221</sup> See, e.g., Field Observations (Oct. 28) (on file with author).

<sup>222</sup> Casey, *supra* note 45, at 1491.

<sup>223</sup> I have observed judges make statements to this effect in the HCC on multiple occasions.

<sup>224</sup> Field Observations (Oct. 7) (on file with author).

<sup>225</sup> Field Observations (Sept. 16) (on file with author).

style is an embodiment of charismatic authority, and it may later influence parties to heed the judge's directives.<sup>226</sup>

### 3. *Challenges and Opportunities with Judicial Monitoring*

A challenge of the problem-solving judging style is striking the right balance of formal and charismatic authority. Overuse of sanctions may lead to backlash against the model, with parties less inclined to participate in the continuous enforcement hearings. Indeed, fourteen percent of property owners in my longitudinal review of HCC cases disappeared from the process without making repairs, revealing that paper sanctions may actually expel a party from the court's orbit.<sup>227</sup> At the same time, an under-reliance on formal authority may result in enforcement efforts that are slow and plodding, with the court's convening power not robust enough to compel performance. In one HCC matter on its *eighth* hearing, I observed a judge reprimanding the landlord for her lackadaisical approach to making repairs—and yet sanctions were still not imposed.<sup>228</sup>

Compounding the difficulty of striking the right balance is that first generation drug court judges are known to bring an enthusiasm and energy to the role that future judges may not always match.<sup>229</sup> Therefore, like in any organizational setting, training, management, and incentives are likely to be critical components of problem-solving judging. Drug courts, for example, employ regular evaluation and peer review to encourage positive judicial performance.<sup>230</sup> These are measures that a civil problem-solving court might do well to consider in developing an effective and exportable judging model.

Despite the inherent challenges, problem-solving experimentation has the potential to ignite much-needed innovation in the judicial role, a benefit that may accrue to other sectors of the civil justice system. Traditional conceptions of the role of the judge have been slow to evolve through common law or ethical canons.<sup>231</sup> The duty to remain impartial remains largely equated with passive judicial con-

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<sup>226</sup> See Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L.J.* 473, 482–83, 488 (2010) (discussing research showing that compliance with court orders is higher when the process is perceived as fair and the judge demonstrates respect toward the parties).

<sup>227</sup> Steinberg, *supra* note 17, at 1076–77.

<sup>228</sup> Field Observations (Oct. 7) (on file with author).

<sup>229</sup> Casey, *supra* note 45, at 1488; Caroline S. Cooper, *Drug Courts: Current Issues and Future Perspectives*, 38 *SUBSTANCE USE & MISUSE* 1671, 1696 (2003).

<sup>230</sup> Dorf & Sabel, *supra* note 30, at 846.

<sup>231</sup> See Steinberg, *supra* note 113, at 926–31 (discussing case law and ethics opinions that heavily favor a passive judicial role without accounting for the ways in which a pro se majority may demand a more active judge).

duct.<sup>232</sup> Problem-solving courts function as sites of experimentation where judges can play an active role, collaborate with non-court actors, and seek fair outcomes. Indeed, the Model Code of Judicial Conduct allows for the regulation of problem-solving judges through specialized local court rules, exempting them from some of the confining strictures of traditional judging and enabling an active judicial role as part of a problem-solving process.<sup>233</sup> If adopted in the civil courts, the problem-solving framework could have reverberating effects throughout the judiciary by piloting new models of judging that ultimately can be implemented more broadly.<sup>234</sup>

#### IV

#### RESPONDING TO CRITIQUES OF CRIMINAL PROBLEM-SOLVING COURTS

Having made the case that a civil problem-solving theory has the capacity to address some of the unique and pervasive structural failings present in the civil justice system, this Part responds to some of the common critiques of drug courts and considers whether the same critiques might apply in the civil setting. I conclude that private law problem-solving courts may sidestep many of the pitfalls of the drug court model.

First, a civil problem-solving court does not engage in “responsibilization,” in which the onus is on a disadvantaged individual to modify his behavior rather than on the government to improve inequality. Second, a civil problem-solving model avoids “net widening,” or over-enforcement of the targeted behavior, as no alternative remedy is imposed against the offending actor. And finally, the prospect of diminished procedural protections—a significant concern in drug courts—is less troublesome in the civil justice context since parties are afforded few constitutional rights in need of protection and there are hardly any lawyers to enforce them.

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<sup>232</sup> *Id.*

<sup>233</sup> See MODEL CODE OF JUD. CONDUCT, APPLICATION § 1 cmt. 3 (AM. BAR ASS'N 2011).

<sup>234</sup> Allegra McLeod argues that the drug court model might be transferrable to conventional criminal courts if judges were to rotate in and out of both experimental and traditional assignments. See McLeod, *supra* note 1, at 1649–50. Certainly a similar vision might apply to the civil justice system.

### A. *Responsibilization*

Some commentators object to drug courts as embracing a “responsibilization” strategy.<sup>235</sup> These commentators find it troubling that the drug court model holds the defendant accountable for treating his addiction while letting the government off the hook for failing to provide adequate access to education, job training, housing and health care in the first instance.<sup>236</sup> On this critique, the defendant’s addiction is viewed as the product of societal failings and compulsory treatment is simply one more measure that puts undue pressure on the individual to fix his own problems, despite forces out of his control that may make this difficult.<sup>237</sup> Victoria Malkin argues that, in this way, drug courts are reformulating the social contract between the state and certain citizens. In her words, “[t]he state and social responsibility is now replaced with empowerment talk . . . individual responsibility and participation.”<sup>238</sup> Eric Miller argues that the treatment regimen is less aimed at promoting good health and more aimed at regulating the defendant’s conduct. He asserts that drug court judges are not managing medical opportunities, but are rather promoting discipline-as-treatment.<sup>239</sup>

For these commentators, the responsibilization paradigm is paternalistic and morally bankrupt. They believe addiction services, in addition to other government benefits, should be offered outside the judicial system and without the accompanying threat of punishment. Instead, drug court judges go to great lengths to coerce treatment and mold the defendant’s conduct to conform to particular social norms. Richard Boldt criticizes problem-solving courts as a paternalistic form of social control, highlighting frequent urine testing, parenting classes, and detailed reporting to the court as “potentially more invasive and coercive than a traditional sentence of incarceration.”<sup>240</sup> James Nolan depicts drug court judges as regularly engaged in “extra-judicative

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<sup>235</sup> See Miller, *supra* note 30, at 425–27; see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 124 (2001); Victoria Malkin, *The End of Welfare as We Know It: What Happens When the Judge Is in Charge*, 25 *CRITIQUE OF ANTHROPOLOGY* 361, 367–68, 382–84 (2005).

<sup>236</sup> See GARLAND, *supra* note 235, at 124; Malkin, *supra* note 235, at 368; Miller, *supra* note 30, at 425–27.

<sup>237</sup> GARLAND, *supra* note 235, at 118, 124; Malkin, *supra* note 235, at 379; Miller, *supra* note 30, at 425–27.

<sup>238</sup> Malkin, *supra* note 235, at 368.

<sup>239</sup> Miller, *supra* note 30, at 420.

<sup>240</sup> Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, in *PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* 13, 17 (Paul Higgins & Mitchell B. Mackinem eds., 2009). As further evidence that contemporary drug courts should be viewed with skepticism, Boldt examines earlier reform movements, such as juvenile courts, to support his contention that the “therapeutic impulses” of “virtually all

activism” to promote treatment goals, including meddling in a defendant’s work and personal life, and employing “tough love” measures such as brief jail stints<sup>241</sup>—all in an effort to induce a defendant to “voluntarily” engage in the treatment program.

The responsabilization critique is a valid one and situates drug courts within a larger movement to attach onerous conditions to anti-poverty programs. As the most prominent example, welfare recipients do not automatically receive benefits based on need, but must earn those benefits through work and job training contributions.<sup>242</sup> Welfare reform has been heavily critiqued as adding to the burden of poverty and complicating access to government services, and similar notes are rung in the compulsory treatment model.<sup>243</sup>

Further legitimizing the responsabilization critique is the contention that the drug courts’ strong-arm tactics work at cross purposes to successful treatment. Policy experts point out that drug courts are premised on two contradictory theories: the “disease model,” which understands that addicts are compulsive and use drugs despite negative consequences; and the “rational actor” model, which presumes that a defendant can overcome addiction if faced with sufficiently negative consequences.<sup>244</sup> The Drug Policy Alliance argues that these “dueling models” are ineffective because they “result in people being ‘treated’ through a medical lens while the symptoms of their condition—chiefly, the inability to maintain abstinence—are addressed through a penal one.”<sup>245</sup> Some social science research also disputes the notion that drug treatment can be successful if performed under duress,<sup>246</sup> which adds additional heft to the argument that responsabilization is an unproductive strategy.

The civil problem-solving theory I propose not only sidesteps the responsabilization critique but directly responds to it. Instead of subjecting the disadvantaged individual to intrusive governmental moni-

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treatment/punishment hybrids . . . tend over time to collapse into punitive practices.” Boldt, *Problem-Solving Courts*, *supra* note 59, at 294.

<sup>241</sup> NOLAN, *supra* note 34, at 94–96.

<sup>242</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 824, 110 Stat. 2105, 2323 (1996) (codified as amended at 7 U.S.C. § 2015(o) (2012)).

<sup>243</sup> See Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 245–46 (2010).

<sup>244</sup> DRUG POLICY ALL., *supra* note 46, at 16.

<sup>245</sup> *Id.*

<sup>246</sup> See, e.g., Boldt, *supra* note 240, at 15 (discussing literature that has found mixed or negative results in treatment programs that utilize coercive measures); David Farabee et al., *The Effectiveness of Coerced Treatment for Drug Abusing Offenders*, FED. PROB., June 1998, at 3, 4 (reviewing eleven studies on the effects of compulsory treatment and acknowledging mixed results).



toring and behavior modification, the HCC places the onus on the more powerful private party to come into compliance with the law. On the civil model, low-income parties gain access to much-needed government services, such as housing inspections, that are virtually inaccessible without the court's facilitation.<sup>247</sup> There are no contingencies attached to the receipt of government benefits within the civil problem-solving framework, and no system of carrots and sticks to ensure that services are utilized in a particular manner. While drug courts chase treatment goals by foisting enormous responsibility on individuals to regulate their own behavior, their civil counterparts relieve vulnerable parties from the personal persistence that would otherwise be necessary to goad regulatory and private actors into meeting their legal obligations.

### B. Net Widening

Another major critique of the drug court model is that it can result in net widening, or an unintended increase in criminal justice system involvement.<sup>248</sup> This net widening may occur if drug courts result in more overall prosecution of low-level crimes, and may also occur if drug courts result in more jail time than defendants would have received by virtue of traditional prosecution.<sup>249</sup>

Adriaan Lanni discusses the potential for net widening of prosecutions, noting that drug courts generally address low-level, quality-of-life offenses that were previously left unprosecuted.<sup>250</sup> The concern, shared by others, is that minor crimes may be prosecuted instead of ignored if local law enforcement begins to view the judicial system—rather than social services agencies—as integral to the therapeutic process.<sup>251</sup> As one concrete example of a drug court ensnaring a much wider population than perhaps originally intended, one judge

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<sup>247</sup> Cf. Cenziper & Cohen, *Failure in Enforcement*, *supra* note 161 (noting that “the Department of Consumer and Regulatory Affairs . . . regularly failed to conduct even the most cursory investigations”).

<sup>248</sup> See DRUG POLICY ALL., *supra* note 46, at 14.

<sup>249</sup> *Id.* The net-widening critique has long been levied against informal systems of justice. Well before the drug court movement exploded, Richard Abel observed that alternative dispute resolution (ADR) may “seek to review behavior that presently escapes state control.” Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 272 (1982). He argued that ADR programs may disguise state coercion through a veneer of informalism and ultimately target behavioral changes that would otherwise have gone unregulated by the state. *Id.* at 270–75.

<sup>250</sup> See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R. & C.L. L. REV. 359, 362 (2005).

<sup>251</sup> See Boldt, *supra* note 240, at 17; McLeod, *supra* note 1, at 1614.

in Colorado contends that the number of drug cases in Denver nearly tripled two years after the implementation of its drug court.<sup>252</sup>

Drug courts can also result in net widening if the penalty for unsuccessful treatment outstrips the punishment the defendant would have faced in a traditional court. The Drug Policy Alliance claims, for instance, that “people who do not complete drug court may actually face longer sentences—up to two to five times longer, according to one study—than if they had been conventionally sentenced in the first place.”<sup>253</sup> Although admittedly an outlier, NPR’s *This American Life* ran a two-part story on Lindsey Dills, a seventeen-year-old first-time offender who was diverted to drug court after forging two checks totaling one hundred dollars.<sup>254</sup> Due to failed drug tests during treatment, she served multiple jail stints, at least one of them in solitary confinement for ninety days.<sup>255</sup> Local criminal defense attorneys confirmed that, in the traditional criminal justice system, she would have likely been sentenced to probation, at most.<sup>256</sup>

In some respects, the phenomenon of net widening may be present in a private law problem-solving model as well. Certainly, a court such as the HCC expands enforcement of the housing code. However, context is critical in considering whether net widening is harmful or beneficial to a system of justice. The criminal justice system is already expansive and disproportionately brings to bear the state’s greatest power on low-income communities of color. Any alternative program or court that broadens the reach of the criminal justice system should therefore be viewed with suspicion and implemented with the utmost care.

A civil problem-solving court, by contrast, would not exacerbate the negative impact of state power on already overburdened groups. Instead, it uses government resources to prevent powerful private parties from exercising unchecked power over the lives of vulnerable individuals. As Kathryn Sabbeth has argued persuasively, the danger that private parties pose to low-income communities is often discounted, when in fact, it can be as corrosive as the abuse of state

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<sup>252</sup> MORRIS B. HOFFMAN, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2071 (2002).

<sup>253</sup> DRUG POLICY ALL., *supra* note 46, at 14.

<sup>254</sup> See *Very Tough Love: Act One*, *supra* note 54; *Very Tough Love: Act Two*, THIS AM. LIFE (Mar. 25, 2011), <https://www.thisamericanlife.org/430/very-tough-love/act-two-0>.

<sup>255</sup> *Very Tough Love: Act One*, *supra* note 54; *Very Tough Love: Act Two*, *supra* note 254.

<sup>256</sup> *Very Tough Love: Act One*, *supra* note 54.

power.<sup>257</sup> Through their actions, property owners and debt collectors can destabilize a family's shelter, wreck financial security, and limit future housing and employment opportunities.<sup>258</sup> The civil justice system has fared poorly in curtailing the power of private actors, and a problem-solving framework offers one way of leveling the playing field.

Net widening in a drug court is especially suspect because both the defined "problem" (addiction) and the "remedy" (treatment) involve controversial moralizing that may unjustly punish the very population it aims to protect. In the civil setting, the problem and the remedy are already recognized by law, which helps insulate the model from the net-widening critique. The HCC, for instance, targets offending individuals and conduct within the bounds of existing law. While drug courts insist on a standard of conduct not otherwise required by law—coerced sobriety—the HCC stays squarely within the lines drawn by legislatures and courts, exacting no extralegal price from property owners for their bad faith conduct. The HCC fills a process void, but does not expand the substantive power of tenants or reduce the agency of landlords.

### *C. Fewer Procedural Protections and Diminished Role for Counsel*

A third and final critique of the drug court model is that it results in fewer procedural protections for defendants and a diminished role for counsel. Critics point first and foremost to the erosion of constitutional rights for defendants who enroll in drug courts. Defendants generally must waive their Fourth Amendment right against unreasonable searches and seizures and their Sixth Amendment rights to a jury trial and to cross-examine adversaries, to name just a few of the lost procedural protections.<sup>259</sup> In addition, because of the "treatment team" approach, defense counsel must cooperate with the prosecutor and the judge instead of serving as a protective shield for clients.<sup>260</sup>

Compounding the lack of procedural protections in drug courts is vast judicial discretion in ordering the proceedings. Even supporters of the drug court model acknowledge that it places "judges with extraordinary power in a position where they act in what they per-

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<sup>257</sup> Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 891, 924–28 (2015).

<sup>258</sup> *Cf. id.* at 915–16 & n.193 (noting that "[a] finding of civil liability for the inability to pay one's debts" can not only "damage one's credit and cut off avenues to the economy, but it also imposes a public condemnation of one's incapacity to meet one's responsibilities").

<sup>259</sup> See Hora, Schma & Rosenthal, *supra* note 3, at 521.

<sup>260</sup> Quinn, *supra* note 47, at 46–47.

ceive to be defendants'/clients' therapeutic interests but with unchecked, potentially punitive effects, unimpeded by principles of proportionality characteristic of a retributive theory of punishment."<sup>261</sup> Others raise concerns that the model is particularly worrisome because "the defendant is encouraged to waive various rights and disclose criminal conduct to the judge as a condition of treatment."<sup>262</sup>

In traditional criminal proceedings, counsel's role is (theoretically) robust and intended to safeguard important procedural rights. Indeed, counsel's main objective is to hold the prosecution to its burden and assist the defendant in avoiding self-incrimination. In drug courts, however, defense attorneys are coopted by the treatment team and expected to share information about their clients' progress and setbacks.<sup>263</sup> At hearings, judges communicate directly with defendants and reject the filtering effect of counsel.<sup>264</sup> Some advocates have concluded that counsel's role in the drug court setting serves more to assist the court in its enforcement efforts than to protect the defendant from state overreach.<sup>265</sup>

Mae Quinn details a number of legal and ethical issues that can arise for public defenders practicing in drug court. From a realist perspective, she contends that the theoretical "team-based" approach does not exist in practice.<sup>266</sup> Instead, the prosecutor has exclusive control over who is admitted to the court, who gets treatment, and who graduates.<sup>267</sup> Prosecutors can dump weak cases in drug court, knowing that defendants cannot avail themselves of procedural protections in that setting, and such a strategy is difficult for defense attorneys to counter.<sup>268</sup> While cooperation among treatment professionals might be a utopian goal, Quinn suggests that counsel's diminished role in drug courts only ends up concentrating the prosecutor's power.

While a civil problem-solving model may involve similar dynamics, in which procedural protections are few and an attorney does not play a substantial role in mitigating the power and discretion of the judge, the key difference lies in considering the traditional

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<sup>261</sup> McLeod, *supra* note 1, at 1617.

<sup>262</sup> Miller, *supra* note 47, at 129.

<sup>263</sup> Cf. Hora, Schma & Rosenthal, *supra* note 3, at 522.

<sup>264</sup> Casey, *supra* note 45, at 1497 (arguing that problem-solving courts "cannot operate without unfiltered communication between defendants and the court").

<sup>265</sup> See DRUG POLICY ALL., *supra* note 46, at 5–6 (noting that drug court judges are granted unprecedented levels of discretion, and defense counsel, "no longer an advocate for the participant's rights," simply "assists the participant to comply with court rules").

<sup>266</sup> Quinn, *supra* note 47, at 57–58.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.* at 58–60 (discussing the practice of "case dumping").

regime that serves as the alternative. In civil cases, constitutional protections are sparse and procedural rules often do not protect individuals involved in low-value mass-justice matters. For example, many landlord-tenant and debt collection courts do not permit jury trials or discovery.<sup>269</sup> In addition, even where procedural protections exist, there are hardly any lawyers available to assert them. Therefore, a problem-solving model, where procedures are expressly waived in favor of a strong and active judge, does less to compromise due process in the civil realm simply because litigants in that setting start out with a comparatively less favorable procedural framework. While existing procedural protections in the civil courts may not constitute our ideal benchmark, they must be taken into account when crafting alternatives. As Deborah Rhode has continually exhorted, when we consider the efficacy of any new civil access to justice intervention, we must always ask, “compared to what?”<sup>270</sup>

### CONCLUSION

For at least a generation, there has been a deepening awareness of structural deficiencies in the civil justice system that undermine the courts’ ability to address major social problems. These structural forces—systemic lack of representation, high-volume dockets, and the corporate capture of small claims tribunals—often place the courts in a position of aggravating, rather than solving, particular social problems for defined classes of litigants.

In the criminal setting, drug courts have responded to assembly-line justice by creating alternative forums in which the goal is treatment and the judicial role is refashioned as a tool for positive social outcomes. As the District of Columbia’s experimental Housing Conditions Court represents, problem-solving methods may be currently underutilized in the civil law sphere. By naming the court’s purpose as resolving a social problem, employing other governmental actors to assist in investigation, and expanding the judicial role to include a monitoring function, the HCC addresses some of the unique structural issues in the civil courts and roadmaps a civil problem-solving model that can be employed in other areas.

The adoption of problem-solving methods in the commonly adjudicated civil matters of rental housing and consumer debt would target law-breaking private actors for governmental monitoring, rather than further subjecting low-income individuals to behavioral

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<sup>269</sup> See, e.g., MO. ANN. STAT. § 441.540 (West 2017) (“Trial shall be by the court without a jury.”).

<sup>270</sup> Deborah Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1812 (2001).

modification, as drug courts do. Moreover, many of the advocacy critiques lodged against drug courts may be sidestepped by the civil version since fewer procedural entitlements are available to litigants who use the traditional civil justice system, and hardly any lawyers are available to enforce those that exist.

There is an argument to be made that the problem-solving model simply replicates agency function under the aegis of the court.<sup>271</sup> Perhaps courts should not be charged with resolving complex social problems, and a legislative fix that creates the ideal institutions with the appropriate funding, authority, and incentives to do their jobs would be a better solution.<sup>272</sup> Although not impervious to such critique, the civil problem-solving model offers a window into the possibilities of employing drug court principles to mitigate the structural conditions that reliably position vulnerable parties on the losing side of private law litigation. If the civil courts are, as they have become, sites of last resort for resolving pressing social issues, a model that empowers judges to name and tackle the problems they encounter, coordinate fact-finding with interdisciplinary partners, and use their authority to monitor bad-faith actors, must invite serious consideration.

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<sup>271</sup> For a longer discussion of how problem-solving courts transcend the efficacy/accountability cycle that agencies face, see Dorf & Sabel, *supra* note 30, at 852–59.

<sup>272</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS (forthcoming 2019) (on file with author).