Access to Justice in "Lawyerless" Housing Courts: A Discussion of Potential Systemic and Judicial Reforms

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INTRODUCTION

To no avail, James Caple, a 62-year-old formerly unhoused man living in Brooklyn, complained about mold and garbage smells in his rent-stabilized apartment. After twelve years in the apartment, Mr. Caple finally found himself in housing court with his landlord. The purpose of the appearance, however, was not to repair Mr. Caple's apartment. Instead, when a friend of a friend was arrested for drug possession in front of the building, Mr. Caple's landlord sued to evict Mr. Caple on the grounds that he was allegedly a drug dealer. The landlord told Mr. Caple that he "couldn't win" against the landlord's lawyer and pressured him into signing a settlement order.[1] Mr. Caple was again pushed to the brink of homelessness. It took two years and the help of a legal services organization to finally get the order reversed.

Judge Pamela Washington sits on the Anchorage, Alaska District Court. For her, eviction cases like Mr. Caple's look different. Judge Washington gives tenants who appear before her an overview of the process and provides them with an opportunity to speak. She helps them resolve their issues in what she terms an "open conversation," and makes sure that they understand the legal issues, the agreements they sign, and the resources to which they have access.[2] Since Judge Washington plays an active role in settling landlord-tenant disputes, she has days where she does not "enter a judgment of possession on anyone."[3] Litigants appearing before her report being more satisfied with the process overall.

But Judge Washington's active eviction court is the exception, not the rule. Most often, litigants appearing in housing court are underrepresented, and face serious hurdles as a result. Courthouses, especially in New York, are overcrowded.[4] Dockets are unmanageable. Litigants are forced to conduct sensitive settlement discussions in public hallways.[5] More importantly, housing courts are "lawyerless"—most of their cases "involve a

1. N. R. Kleinfield, *Where Brooklyn Tenants Plead the Case for Keeping Their Homes*, N.Y. TIMES (May 20, 2018), https://www.nytimes.com/interactive/2018/05/20/nyregion/landlord-tenant-disputes-housing-court.html.

2. *Webinar: Active Judging in Eviction Court*, NAT'L CTR. FOR STATE CTS., https://vimeo.com/showcase/10090740/video/829387413.

3. *Id.*

4. *See* Kleinfield, *supra* note 1 (discussing the "inadequate space" and "stress" at the Brooklyn housing court).

5. *See id.*

party without counsel."[6] While other lawyerless courts hear cases in which both parties are unrepresented, housing court is unique in that only *one* party is without counsel: "[t]he vast majority of landlords in eviction proceedings are represented, while the vast majority of tenants are *un*-represented."[7] The "majority of cases end in unfavorable settlements" for tenants as a result.[8]

In this lopsided system, judges play a unique role. In some respects, they are powerful—they oversee evictions, and grant equitable remedies that compel landlords to rectify problems with heating or pests.[9] They are also, however, constrained in significant ways. Judges "routinely face 40, 50, 60 cases a day,"[10] and are bound by procedural rules with which litigants struggle to comply.[11] In the access to justice context, scholarship has "advanced a key intervention [to address inequities in] lawyerless courts: a revised judicial role where judges cast away [this] traditional passivity to assist and accommodate litigants without lawyers."[12] This Comment discusses implementation and benefits of that intervention, using housing court as a case study. It concludes that the judicial role must be revised. Part I surveys the existing problems for litigants and judges in lawyerless housing courts. Next, Part II lays out which systemic changes to judicial powers might mitigate those problems, concluding that

6. Anna E. Carpenter et. al., *America's Lawyerless Courts Legal Scholars Work to Recommend Large-Scale Changes in Lawyerless Civil Courts*, 48 LAW PRAC. 48, 49 (2017). This Comment refers to housing courts and lawyerless courts similarly. The focus of the analysis is on housing court, but much of that analysis and the research that informs it apply to other types of lawyerless courts too.

7. Kathryn A. Sabbeth, *Housing Defense As the New Gideon*, 41 HARV. J. L. & GENDER 55, 78 (2018) (emphasis in original). Throughout this Comment, unrepresented litigants are referred to as "pro se."

8. *Id.* at 78.

9. *See* Kleinfield, *supra* note 1 (depicting a tenant who "would wind up homeless again" if a settlement he had signed was not vacated by a judge). Evidently, the definition of "power" is complex. This Comment discusses further empowering judges by expanding their procedural role, but it is important to note at the outset that housing judges' decisions may be the single thing preventing a tenant from homelessness, or a landlord from bankruptcy. In that sense, it is clear that they possess an incredible amount of power.

10. *Id.*

11. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 571 (1992) (discussing "procedural hurdle[s] . . . most often employed to bar tenants from successfully claiming redress for defective conditions"). As addressed *infra*, in Part I.C, judges are granted considerable latitude when it comes to applying procedural rules to pro se litigants—though it is unclear to what extent this is effective or that they do so. *See* Sabbeth, *supra* note 7, at 79 (arguing that "[j]udges regularly misapply rules of procedure" or do so unevenly).

12. Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 512–13 (2022).

active judicial engagement, along with more drastic reform proposals, is the best way to augment access to justice.[13] Part III addresses potential drawbacks and explains why they are outweighed. Finally, Part IV analyzes the feasibility of implementing or expanding the reforms discussed in this Comment in *all* instances wherein a litigant is pro se. Although some advocates convincingly argue that judges should play a more active role in all pro se contexts, that system may be difficult to implement; other reforms should be prioritized.

While much of this Comment discusses pro se litigants, its goal is not to propose a way to improve the system for only those parties. Rather, it discusses reforms to increase equality and access to justice for *all* litigants. Housing court typically has a winning represented side and a losing pro se side, and its system structurally advantages parties that do have lawyers. As such, an analysis of proposals detailing how better to protect pro se litigants provides insight for broader reforms that can increase access to justice more generally. A housing court that works better for pro se litigants is more just, comes to a more fact-based conclusion, and benefits the legal system as a whole—providing the "distributive good" of "equal respect and concern . . . [that] is the fundamental virtue of law."[14]

I. THE PROBLEMS WITH LAWYERLESS COURTS

A. STRONG POWER IMBALANCES EXIST AMONG THE PARTIES

The traditional housing court model magnifies systemic inequities—it is "the most lopsided court in [New York's] system."[15] Tenants are most frequently unrepresented or underrepresented,

13. The term "justice" is elusive. For the purposes of this Comment, justice is used to mean at least a fair opportunity to be heard, to present one's case, and to be given a decision that fully addresses the problems one faces and the arguments one makes. In addition, David Luban provides two workable definitions that influence the reforms this Comment addresses. First is his definition of "micro-justice[, or] justice between persons." David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495, 512–13 (2016). Second is his definition of "access to law . . . [as] a distributive good" that prevents injustice by stopping "America's neediest people . . . [from] losing their homes, apartments, and basic entitlements" and from being "deprive[d] of the equal respect and concern that Ronald Dworkin taught us is the fundamental virtue of law." *Id.*

14. *Id.*

15. Kleinfield, *supra* note 1.

but face represented landlords.[16] Historically, "roughly ninety percent of landlords in [New York] eviction proceedings have been represented, while ninety percent of tenants have not."[17] Of the represented tenants, many receive unbundled legal assistance, or have deficient representation such that they are able to stay in their dwellings less than fifty percent as often as litigants with full-service representation.[18] Lawyerless courts like housing courts were "designed to . . . solve legal disputes through lawyer-driven, adversarial litigation," and limited changes to that design have been made.[19]

Thus, a strong power imbalance exists in lawyerless courts—the implications of which are clear. Lawyers have a greater familiarity with the law, and a greater ability to discuss, research, and ideate solutions to the legal issues at hand; in some cases, they may be the only party with meaningful access to legal research tools at all.[20] More practically, landlords and their lawyers enjoy additional advantages as "repeat players" in the housing court system, lending them "specialized expertise, bargaining credibility, informal relationships with institutional representatives, the ability to play for rules instead of individual

16. As addressed by Kleinfield, *supra* note 1, New York housing cases generally fall into two categories: one category is "housing part" cases, "in which tenants bring actions against landlords for offenses like lack of heat, broken fixtures or vermin." Of the approximately 69,000 housing filings in Brooklyn in 2017, around 6% fell into this category. "Virtually all the rest were eviction actions" brought by the landlord. Also worth noting is that New York law allows for "special proceedings," a procedure "created to provide landlords with an efficient, equitable, and timely means to recover possession of real property" that lets landlords bring their disputes with tenants in front of a judge more quickly than they could otherwise. Moshe B. Nachum, *The Landlord Blues: Inequity, Inefficiency, and Untimeliness of Summary Proceedings in New York City*, 61 N.Y.L. SCH. L. REV. 509, 510 (2017).

17. Sabbeth, *supra* note 7, at 59–60 (citing Permanent Commission On Access To Justice, Report To The Chief Judge Of The State Of New York, Apps. 609 (2014)) (finding one percent of tenants and ninety-five percent of landlords represented and noting that, while this number decreased between 2013 and 2016, it had gone down to only around 75%). New York has implemented an access to counsel program in housing cases, but it has not been completely successful. *See infra*, notes 102, 124.

18. *See* Luban, *supra* note 13, at 511. Unbundled legal representation refers to a "piecemeal lawyering model in which a lawyer provides assistance with a discrete legal task only and does not perform the full range of services expected from traditional legal representation." In other words, instead of representing a tenant from start to finish of their eviction case, a lawyer may simply review a settlement agreement, or draft a single document in response to the landlord's complaint. 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, 454 (2011).

19. Carpenter et al., *supra* note 6, at 49.

20. *See* Luban, *supra* note 13, at 505–08.

results, and savings from economies of scale, all of which influence the dynamics of [h]ousing [c]ourt."[21] Pro se litigants in housing court are disadvantaged simply because they cannot navigate that system in the same way as lawyers.

B. COURT PROCEDURES ARE CONFUSING TO PRO SE LITIGANTS

Lawyerless courts are often confusing to pro se litigants. Court systems are "labyrinthine"; litigants must fill out forms and respond to motions filed in their case without help from court staff.[22] Housing court disputes proceed rapidly, and are filled with jargon that judges and lawyers either refuse to explain or may not realize need explaining.[23] While some judges aim to treat litigants "tenderly"[24]—by asking guiding questions from the bench or by offering "information sheets, booklets, and [simplified] court forms"[25]—these accommodations do not make up for the fact that courts are designed for "lawyer-driven . . . litigation."[26]

In housing court, the consequences of this confusion are dire. Pro se litigants frequently end up signing settlement stipulations—called "stips"—simply because "they're scared. Or bewildered. Or ashamed. . . . Or think they're speaking to an impartial court official when it's actually the landlord's lawyer."[27] While a judge typically reviews stips, judges can hear 100 cases per day and lack ample opportunity to review them in depth. Landlords thus use stips to foist unfair agreements onto pro se litigants without adequate judicial review.[28] These systemic problems strike at the heart of the justice these courts were created to provide.

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21. Sabbeth, *supra* note 7, at 78–9.

22. Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 661 (1988).

23. Carpenter et al. highlight some poignant examples: in a hearing for an order of protection, one litigant did not "know what the word 'oppose' mean[t]" and was "ridicule[d]" by a shocked judge, despite saying that they were "not sure why [they were] even in jail." In a child custody hearing, a "judge resist[ed] offering information [about legal procedure], even when the defendant asked." Carpenter et al., *supra* note 12, at 545–46.

24. Kleinfield, *supra* note 1.

25. Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2000 (1999).

26. Carpenter et al., *supra* note 6, at 49.

27. Kleinfield, *supra* note 1.

28. *See id.*

C. THE JUDICIAL ROLE IS AMBIGUOUS IN HOUSING COURT

The judicial role in lawyerless courts is ambiguous, and the power of judges in housing court is unequally exercised. Some scholars argue that judges have "unfettered, unchecked discretion in lawyerless courts[,] . . . a pervasive and troubling phenomenon with serious potential consequences for substantive and procedural justice—and judicial legitimacy."[29] This is only partially true. Judges do have wide latitude in crafting remedies, and often disputes are not accompanied by discovery or motions practice, so their decisions are less constrained by evidentiary issues or specific pleaded remedies by the parties. As a result, judges in housing court have an extreme amount of discretion.[30]

But in other ways, their power is limited. The sheer magnitude of cases in housing court often prohibits judges from digging into the facts of a case or crafting a comprehensive remedy. More importantly, "judicial ethics rules . . . generally require[] judges to be 'impartial' in their interactions with all parties . . . [and u]ntil 2010, . . . were silent about judicial behavior in pro se cases."[31] While some states follow 2010 American Bar Association (ABA) judicial code recommendations by allowing judges to "make 'reasonable accommodations' for unrepresented people," states do not generally require such assistance or specify its meaning.[32] Further, those recommendations are only a comment to a rule requiring judges to act "impartially,"[33] and thus do not officially "add to . . . the binding obligations set forth in the rules."[34] Appellate opinions discussing judges' assistance to pro se litigants are "limited, vague, and often contradictory."[35] The fact that judges are given *a* boundary, but an unclear one, as to the assistance they may provide to pro se litigants is constraining. Judges are put "in awkward positions of trying to give self-represented litigants a fair shot at raising the merits of their case

29. Carpenter et al., *supra* note 12, at 514.

30. *See* Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. B. Ass'n 2020) (allowing judges flexibility when dealing with pro se litigants); *see also* Kleinfield, *supra* note 1 (discussing both the judge's ability to do things like turn off the heat in an apartment building, and also the rapid pace at which these proceedings occur).

31. Carpenter et al., *supra* note 12, at 519.

32. *Id.* at 522 (quoting Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. B. Ass'n 2020)).

33. *Id.*

34. Model Code of Jud. Conduct, Scope [3] (Am. B. Ass'n 2020).

35. Carpenter et. al, *supra* note 12, at 523.

while not undermining the impartiality of the court."[36] They are "unclear about the ethical bounds of their role[, causing them] to fall back on . . . assumptions about how a civil judge should behave."[37] Many judges are silent when it comes to pro se litigants, or "refus[e] to provide the necessary help."[38] This mixed message means judges' ability to use their power in aiding pro se litigants' access to justice is limited.

II. INCREASED POWERS GIVEN TO JUDGES AND SYSTEMIC REFORM MITIGATES THESE PROBLEMS

A. ACTIVE JUDGING IS A BASIC, NECESSARY REFORM IN LAWYERLESS HOUSING COURTS

Scholars propose a variety of ways judges can play a more active role in order to alleviate the problems present in housing court. While reforms like increased funding for public representation are important, this Comment posits that judges are a good place to start.[39] Judges run the courtroom and can apply equitable procedures in real time to aid litigants; they have unique information about the legal system as an impartial courtroom actor whose experiences with litigants are "not [necessarily] mediated through attorneys" and thus best understand when and how to implement pro-pro se reforms; and the judicial conduct rules "leave open a vast educative function, where judges can inform" lawyers and litigants of their rights.[40] Finally, many judges recognize that they are "ethically obligated to improve the judicial system over which they preside."[41] There is a lack of clarity, however, as to what judges actually are permitted to do in pursuit of this ethical obligation. This Section therefore proposes

36. Daniel Richardson, *Civil Gideon: Balancing the Access for All*, 42 VT. B. J. 32, 33 (2016).

37. Carpenter et. al, *supra* note 12, at 557.

38. *Id.* at 522.

39. *See, e.g.*, Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010). The role of civil Gideon is discussed in more detail at the end of the Comment. Likewise, public defense is addressed below. *See also infra* notes 102, 124, 128.

40. Bridget McCormack, *Staying Off the Sidelines: Judges As Agents for Justice System Reform*, 131 YALE L.J. FORUM 175 (2021).

41. *Id.*

a codified increase in "active judging."[42] There are two key elements to this proposal: (1) clearly defining active judging, and (2) codifying active judging.

1. *Defining Active Judging*

The first necessary reform is a clear definition by judges, state high courts, and lawyers of what constitutes active judging, and what judges ought actually to do when confronted with a pro se litigant. As developed below, active judges: explain and clarify procedure and law to pro se litigants; actively question pro se litigants to elicit key information; implement flexible and liberalized pleading requirements; and implement evidentiary reform. Scholars differ in the extent to which they argue that judges should be active. There is agreement, though, that judges should at least serve an "explanatory role,"[43] helping pro se litigants to understand "what facts might be relevant, what legal claims they can assert, how to introduce evidence, or the procedural posture of a case."[44] Judges are already granted limited latitude to explain certain processes to pro se litigants, but many do not use it, and the shift and expansion to a formalized and mandatory explanatory judicial role helps ensure that pro se litigants do not succumb to procedural traps that a party represented by an experienced lawyer will not encounter.

Since active judges have a "responsibility for keeping the process fair," some propose "replacing . . . the paradigm of judge as passive umpire with the paradigm of judge as active umpire [such that judges] would have an obligation to ensure that the parties' procedural errors do not deprive the court of access to relevant evidence and legal arguments."[45] Judges would not only explain procedural requirements, but also ask questions to elicit facts and evidence from pro se litigants that might not otherwise enter the record. Without dictating the result, judges would "examine the papers in the case and talk to the unrepresented parties to ensure that possible claims and defenses are being articulated [and] . . .

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42. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017).

43. Carpenter et al., *supra* note 12, at 525–26.

44. *Id.*

45. Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970 (2004).

identify what advice the litigant received[] to correct for misinformation"; they would also "inquire into the substance of the negotiations with the opposing counsel [and even] ask the unrepresented litigants why they are signing [a settlement] and whether they think the agreement is fair."[46] This proposal does not give "free rein to ignore procedural requirements," but judges would be more flexible in waiving technical requirements, forgiving errors, eliciting facts, and construing pleadings.[47]

By implementing this change, two key problems are mitigated. First, the uneven litigation playing field is made more level. Because the judge helps ensure that pro se litigants understand basic procedure and legal relevance, there is less benefit to represented litigants from their lawyers having specialized legal and subject-matter expertise, informal relationships with judges and court staff, and the potential bias this creates.[48] The confusion that litigants experience in the face of a labyrinthine legal system is mitigated because the judge is required to explain the process to them. As a result, litigants feel less pressure to enter into unfair settlements; they better understand their own bargaining power due to the explanation of facts and the legal relevance of those facts to their case, and better understand the steps that will be followed if they do not agree to settle. Second, the role of the judge is clarified. Whereas active judging was previously sanctioned but not encouraged,[49] judges now know for certain that they can and should promote equal access to justice. When "judges in pro se courts . . . replace the traditional role of neutral arbiter with active

46. Engler, *supra* note 25, at 2029.

47. Carpenter et al., *supra* note 12, at 533. As discussed below, there is a distinction between active judging and inquisitorial judging. Unlike inquisitorial judging, active judging does not inherently alter the nature of judging. Litigation remains "party-controlled[,] unless process failures require judicial correction." Pearce, *supra* note 45, at 978. Judges simply ensure themselves a complete record. Access to justice literature more broadly emphasizes the importance to litigants of feeling heard. *See* Carpenter et al., *supra* note 12, at 527. In ensuring pro se litigants are heard, these changes would ensure an outcome based in all the facts and arguments, and also create a more symbolic access to justice.

48. *See* Sabbeth, *supra* note 7, at 78–9. *See also* Carpenter et al., *supra* note 12, at 560 (quoting Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015)) (judges often "privilege the legal profession in their decisions").

49. Again, judicial ethics codes and appellate-level decisions have not wholeheartedly endorsed active judging, despite hinting at the fact that judges have some level of unspecified latitude when dealing with pro se litigants. This lack of clarity is likely why many judges do not implement active judging techniques. Other judges may simply be reluctant to do so because of the counterarguments addressed below. *See infra* Part III. If active judging is codified in a clear and mandated way, judges will likely implement it.

questioning [they take large steps towards] ensuring that procedural and substantive justice prevails."[50]

2. *Codification of Active Judging*

The second key element to the active judging proposal is to codify these reforms.[51] There is already a "long list of common sense things that judges are allowed to do to help pro se litigants," including "making reasonable accommodations, being courteous, avoiding legal jargon and procedural snafus, explaining the process, avoiding over-familiarity with lawyers in the courtroom, and training court staff."[52] But judges may be unaware of this list, and many do not implement it.[53] Codifying an explicit set of required rules for judges would provide them with "a clear roadmap for meeting the needs of pro se litigants."[54] The ABA Model Code of Judicial Conduct contains a comment allowing judges to give reasonable accommodations, but a non-binding comment in the footnotes is not enough. By providing clear guidelines, the law can be evenly applied, and the inequity caused by uneven representation can be minimized. If a judge knows exactly when and to what extent she may (or must) loosen evidentiary rules for or explain procedure to a pro se litigant, for example, those adjustments are more likely to be made. Any concerns about judicial overreach are also assuaged by the clear delineation of the limits of that empowerment.

Active judging is the most effective, straightforward method to increase access to justice in lawyerless courts. It does not require any serious increase in funding to be implemented. There is "very

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50. Barton, *supra* note 39, at 1272.

51. For the purposes of this Comment, codification means a clear set of written guidelines for judges, as opposed to vague comments to model rules or vague allowances for some sort of flexibility. Judicial ethics rules are generally promulgated by state high courts, so codification would not necessarily encounter the same gridlock it would if subjected to the political process. *See* Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 PROF. LAW. 161 (2008) (discussing the important role that state high courts play in promulgating ethics rules and how they have done so successfully in the past).

52. Barton, *supra* note 39, at 1271.

53. While many of these actions are common sense, judges who operate in a legal landscape in which they are confronted with dozens of cases a day may only apply some of them, or apply them unevenly. Further, given the time constraints and the similarity of many of their cases, judges may not look to the suggested judging models from third party guides—again, indicating the importance of clear and mandated codified reform.

54. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 803 (2015).

little change in the courts . . . themselves"; judges need only to adjust the way in which they conduct their hearings and the methods they use to communicate with pro se litigants.[55] Ethical problems are unlikely, given the ABA's current allowance for reasonable accommodations when dealing with pro se litigants.[56] Most importantly, active judging works. While large-scale reforms have not yet occurred, anecdotal evidence is promising. Judges in unemployment cases, for example, find that "authoritative guidance" helps to "handle pro se cases fairly and impartially while also helping those parties navigate the complexities of civil litigation."[57] Active judging in peak-COVID-19 virtual proceedings helped judges to confront new problems brought to court by pro se litigants.[58] In comparison to the inactive judging faced by tenants like Mr. Caple, pro se litigants would likely access fairer outcomes when judges are more active.

B. FURTHER REFORMS ARE ALSO BENEFICIAL

1. *Active Judicial Questioning*

Other reforms that go further than active judging would be beneficial, too. One proposal contemplates a more extreme version of active judging, borrowing from procedure in contempt cases, in which judges "notify defendants of a key defense, seek out facts to support that defense, and question the litigant in open court."[59] Though more drastic than an expanded explanatory role for judges, this "active judicial questioning does not compromise impartiality if it is deployed in the same manner in every case," and does not make judges "fully inquisitorial."[60] They do not "embark . . . on independent investigation" but rather "use their own knowledge and expertise [which the pro se party is lacking] to

55. Barton, *supra* note 39, at 1273.

56. As for constitutional problems, the nonfrivolous arguments that some scholars have made regarding the constitutionality of this shifted approach are addressed below. While it may be more fraught, those problems likely do not exist either.

57. Carpenter, *supra* note 42, at 708.

58. Colleen F. Shanahan et al., *Covid, Crisis, and Courts*, 99 TEX. L. REV. ONLINE 10, 14 (2020).

59. Steinberg, *supra* note 54, at 804. Steinberg responds in part to *Turner v. Rogers*, 564 U.S. 431, 448 (2011), a watershed due process case where the ability to access a public defender was limited and the Supreme Court weighed the use instead of "alternative procedural safeguards." *Id.*

60. Steinberg, *supra* note 54, at 801–02.

get relevant testimony," as is already done in many "small claims and administrative tribunals."[61] It thus increases both judges' and litigants' knowledge and ensures that all key arguments are addressed.

2. *Procedural and Evidentiary Reform*

Next, judge-implemented procedural and evidentiary reform would simplify litigation for pro se litigants. "Nearly every procedural rule" can be adapted: "[p]leadings should be standardized and available in check-the-box format . . . [and] worksheets that solicit relevant factual information should be attached to both complaints and answers to facilitate the presentation of cognizable claims and defenses."[62] Turning pleadings into worksheets could eliminate some important nuances in housing court cases. But when litigants are "not [even] sure" why they are facing certain proceedings, and do not understand basic questions asked of them by the court, this simplified pleading would at a minimum crystallize the reasons for which a pro se litigant is in court (for both the judge and the litigant themselves).[63] A streamlined pleading process would also help make an overburdened system more efficient.[64]

Arguments for evidentiary reform are similar. Courts "aiming for maximum pro se accessibility should admit all non-privileged evidence. Rather than ruling on admissibility, a judge should scrutinize all available evidence, assign it the proper weight, and make clear and transparent findings as to its probative value."[65] While the rules of evidence play a critical role in preserving the legal system, it bears acknowledging that issues in housing court are customarily repeated ones; they are eviction cases, or cases

61. *Id.* Interestingly, this is a different, but equally persuasive, distinction from inquisitorial judging.

62. *Id.* at 796. *See also* Luban, *supra* note 13, at 501–02 (discussing the role of form-based technology, including TurboTax and "ingenious access-to-justice apps" that simplify and "improve quality and efficiency of legal services").

63. *See supra* note 23 (citing examples of litigants who fundamentally misunderstand the proceeding in which they are taking part).

64. Many Americans also struggle with illiteracy. *See* Adult Literacy in the United States, U.S. Dep't of Educ. N.C.E.S, https://nces.ed.gov/pubs2019/2019179/index.asp. A worksheet format would be simpler for those litigants than the current system, but it is worth noting that worksheets might still pose some problems. That said, active solicitation of information by judges, once illiterate pro se litigants are in court, could help solve this issue.

65. Steinberg, *supra* note 54, at 798–99.

where tenants sue for problems like pests, lack of heat, or broken appliances.[66] The evidentiary disputes in play may accordingly be less novel to the judge. A key part of evidentiary motion practice involves analysis of relevance and probative value; federal and state rules of evidence focus overwhelmingly on whether a piece of evidence's probative value outweighs any prejudice it might bring to the party.[67] Requiring housing judges to analyze the evidence and decide what within it is relevant is not a drastic or hindering shift, since they must balance relevance and probativeness in making evidentiary determinations anyway.

This change would increase access to justice, however, because it would mean that a pro se litigant would not forget, be unable, or otherwise decide not to bring important evidence. Represented parties would also be unable to take advantage of their institutional knowledge and their adversary's lack of it to prevent that evidence from being entered. This proposal does not necessitate a wholesale deletion of procedural and evidentiary rules. Rather, these practices should be "codified, so that judges and court personnel have a clear roadmap for meeting the needs of pro se litigants."[68] In doing so, judges can consistently approximate fairness and equity in their procedural and evidentiary rulings.

3. *Automatic Hearing Access*

Other scholars suggest granting tenants "automatic" access to a hearing, such that a pro se litigant who may not know how to get in front of a judge in the first place can easily do so.[69] This reform is especially helpful in housing court, where tenants often settle under "dubious stips" given only cursory judicial review.[70] In order

66. *See* Kleinfield, *supra* note 1.

67. *See, e.g.*, Mary Mikva, *An Indelicate Balance: Rule 403 of the Federal Rules of Evidence*, 30 LITIGATION 36 (2003).

68. Steinberg, *supra* note 54, at 803.

69. Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215, 246 (2018). Again, the problems of time and resource constraints this clearly presents are addressed below. Given the dire state of access to justice in courts today, some inefficiency may be worth the cost. Landlords already essentially have this right in New York under the special proceeding process, which could be modified easily to allow automatic and quick hearings for tenants too. Automatic access means a simplified procedure such that when a dispute arises between landlord and tenant, the tenant can go to housing court and automatically be heard by a judge, as opposed to the more formal complaint and cause of action requirements as they currently exist.

70. *See* Kleinfield, *supra* note 1.

to combat procedural delay tactics often employed by represented landlords in order to inconvenience litigants or undermine their claims,[71] "court rules could provide that every litigant, regardless of the reason for the request, receives one automatic hearing continuance or telephone hearing."[72] Again, the material access to justice implications are evident. Symbolically, focusing on the "value [of] access to the hearing room" is an important part of access to justice; in the face of landlords who often stand between tenants and homelessness, ensuring that a judge will hear a litigant's case emblematically recognizes that the rights of pro se litigants stand on equal footing with those of represented parties and that they, too, deserve access to justice.[73]

III. THE DRAWBACKS POSITED AGAINST REFORM DO NOT OUTWEIGH ITS BENEFIT

A. JUDICIAL NEUTRALITY AND THE JUDICIAL SYSTEM ARE MAINTAINED WITH REFORMS

Despite the benefits of reforming the judicial role discussed above, some argue that these reforms overly empower judges within a system that already disenfranchises many. They claim that the "movement to reinvent the judiciary from within . . . raises serious questions about the survival of personal liberty and representative government," given that it allows for judges to impose their "judicial values" that may not be moral or correct.[74]

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71. *See, e.g.*, Sabbeth, *supra* note 7, at 79–80 (discussing how "[l]andlords' lawyers can take advantage of the timing to extract concessions from tenants" and the generally effective use of procedural bias by landlords' lawyers); Chen et al., *He Runs a New York Real Estate Empire. Did He Steal It?*, N.Y. TIMES (July 24, 2022), https://www.nytimes.com/2022/07/24/us/deed-theft-ny.html (discussing a different procedural process by which landlords saddle tenants with debt). Tenants may also be responsible for childcare or work. Continuances allow them to fulfill those responsibilities or give them enough time to find coverage—time which, especially given special proceedings, they might not have otherwise. Continuances may also alleviate time constraints, since judges would not hear as many cases per day.

72. Shanahan, *supra* note 69, at 246. In New York, the special proceeding laws could also be modified for this purpose.

73. *Id.* at 245.

74. Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592 (2007). Williams advances prototypical arguments against judicial reform, which is why I include this Article. However, he also seems concerned about the imposition of judicial values in part because of the "demise of the Christian consensus" in America. *Id.* at 633. This is a point with which this Comment

That concern is misplaced, given the specifics of the reforms contemplated here.

Even without reform, judges already exercise their power based on their preferences, whether consciously or not.[75] Many authors have discussed the so-called "attitudinal model," which posits that judges make decisions based on "the[ir] ideological attitudes and values."[76] In the access to justice field, the same holds true; judges, who are former lawyers, "will frequently privilege the legal profession in their decisions,"[77] and also "may develop 'biases in favor of laws that they have repeatedly applied and justified in the past.'"[78] In short, "[j]udicial bias and incompetence are problems whether the judge is passive or active."[79] The goal of active judging reform is to put in place clear, codified rules regarding the role of a judge so that their biases play *less* of a role. The evidentiary and procedural reforms discussed here, for example, create an opportunity for judges to review all facts and hear all arguments such that they can come to a more explicated, reasoned, and fair decision. Requiring judges to ensure they hear pro se litigants' comprehensive arguments means they will be less likely simply to fall back on the pro-lawyer modes of decision-making they have

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does not engage, but it does make sure to include other authors whose criticisms may be less grounded in religious idiosyncrasies.

75. Legal realist theory dictates that "judgments inherently invite discretion because rules and standards are open to varied interpretations. In turn, that interpretation reflect[s] a judge's ideology." Ryan G. Thomas, *A Breath of Fresh Air: How Judges' Embrace of Legal Realism Can Aid in the Fight for Environmental Justice*, 64 HOW. L.J. 521, 530 (2021). More broadly, a burgeoning area of academic research into judicial decision-making espouses the "virtual truism . . . that judicial decisionmaking is [in large part based] upon [identity factors such as a] judge's political ideology," even if "judges usually deny that they are making political decisions." Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265, 266 (1997).

76. Harold J. Spaeth & Jeffrey A. Segal, The Supreme Court and the Attitudinal Model Revisited, at 86 (2002). *See also* C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981) (finding judges' liberal beliefs to impact decision-making); Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?*, 25 VA. TAX REV. 201, 230 (2005) (finding elite law school background to affect judging among appellate judges); Jared Ham & Chan Tov McNamarah, *Queer Eyes Don't Sympathize: An Empirical Investigation of Lgb Identity and Judicial Decision Making*, 105 CORNELL L. REV. 589 (2020) (discussing differences in voting behavior between "LGB" and non-LGB district court judges in New York).

77. Barton, *supra* note 39, at 1268.

78. Carpenter et al., *supra* note 12, at 560 (quoting Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015)).

79. Pearce, *supra* note 45, at 978.

used in the past, protecting the personal liberty of pro se litigants.[80]

Still, others maintain that "proponents of greater pro se assistance and accommodation are wrong [because their] 'separate but equal' justice systems . . . will be neither equal nor just" and will "only help parties" who are pro se.[81] In other words, if judges implement more pro se assistance, the result will be two different justice systems: one for pro se litigants that dispenses with procedure and fairness ideals to favor pro se litigants, and another with stricter, more formalized processes for those with representation. Active judging reforms, it is argued, might create such an altered judicial role vis-à-vis unrepresented parties that those litigants would exist in a completely different (and more friendly) legal system from lawyered litigants. This is misguided. While some formalistic procedures would change in name, judicial reform gives all litigants an equal opportunity to be heard, and affords pro se litigants due process—not a leg up. The "majority of cases end in unfavorable" results for pro se tenants, and "representation . . . makes a significant difference in [h]ousing [c]ourt outcomes."[82] Judicial reform does not create a *new* system that benefits pro se litigants. It reconfigures the current system (which disfavors pro se litigants) in a way that allows them to be heard. It develops the evidence and facts before the court, too, ensuring that basic due process ideals—that litigants are afforded the "meaningful opportunity to be heard"—are satisfied.[83] Active judging does not "abandon[] . . . the adversarial system of justice . . . when pro se litigants are before the court[.]" Rather, it addresses the abandonment of the truth-seeking, fact-based, iterative, and process-based goals of that adversarial system.[84]

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80. Pearce also argues that even if active judging were to increase judicial bias, "it will also make the problems more visible and therefore more susceptible of melioration," such that it is more likely that a biased judge would be rooted out more quickly and therefore removed or voted out more quickly than they would be if they were working in a system in which the rules of engagement were unclear and their biases were unconsciously affecting their decisions. *Id.* at 978.

81. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1538, 1584 (2005).

82. Sabbeth, *supra* note 7, at 80.

83. Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 57 (1981) (Blackmun, J., dissenting).

84. Swank, *supra* note 81, at 1571. If anything, New York's special proceedings create a separate judicial system for landlords. Reform would rid the court (which, contrary to

The adversarial system does not work fairly when housing courts proceed without lawyers.

Nor does judicial reform dispose of "judicial neutrality."[85] To be clear, judicial neutrality is not the same as judicial passivity. "In the pro se context, the appearance of neutrality and true neutrality are often very different, and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality."[86] Rather than allowing judges to base decisions off a scant record, the proposed reforms require active judges to dig for more facts, more evidence, and a deeper understanding of the parties. With clear, codified rules in place, they can do so consistently and with less influence from personal beliefs or entrenched judicial norms.[87] Opponents to judicial reform themselves recognize that "justice is often inaccessible even for those with representation."[88] The proposed reforms allow a judge to take a truly neutral, albeit not passive, position so justice can be approximated for those with representation *and* those without.

Nachum's assertion, clearly still ultimately favors landlords) of that artificial division while also mitigating the "[in]adequate support" he laments. Nachum, *supra* note 16, at 511.

85. Swank, *supra* note 81, at 1583. Given the attitudinal model of judging discussed above, judicial neutrality is an elusive term in any event.

86. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 426 (2004).

87. The current comment to the Code of Judicial Conduct says that "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. B. Ass'n 2020). A more effective codification would be to move this from a comment into the rule itself (or to create a new rule), and to strengthen the language such that it said something like "judges must make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard. This includes but is not limited to: eliciting information from pro se litigants, asking questions of parties from the bench, and explaining procedure to pro se litigants." In addition, further rules implementing the evidentiary and procedural reforms outlined above could be added to the rule, requiring judges to implement those procedures when a pro se litigant appears in front of them.

A helpful example is the Model Code of Judicial Conduct, which puts in place clear rules for judges in other contexts. Judges "shall not . . . manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Model Code of Jud. Conduct r. 2.3(B) (Am. B. Ass'n 2020). They "shall not initiate, permit, or consider ex parte communications," and must "notify all other parties of the substance of the ex parte communication, and give[] the parties an opportunity to respond." *Id.* at r. 2.9. In New York, judge behavior is regulated in terms of the people with whom they may communicate and when; they may not make public comments about cases, they may not commend jurors for a decision, and they may consult with other court personnel." 22 NYCRR § 100.3[B][6].

88. Swank, *supra* note 81, at 1577.

B. THE SHIFT IN THE ROLE OF THE LAWYER IS BENEFICIAL

One could also argue that removing the power from parties' lawyers (i.e., here, the landlord's lawyer) to drive litigation will be harmful, due to the benefits that lawyers bring.[89] This argument is without merit. First, that only one side is represented means taking this power away from the lone lawyer in the process puts all litigants at the same level, consistent with the traditionally adversarial nature of litigation. Second, when lawyers play such a large role, "the quality of their lawyering efforts undoubtedly has a major influence on the outcome." That is to say, since lawyers vary in their skill levels and resources, the outcome of cases can be affected by the quality of a lawyer that a litigant can afford.[90] In these cases, an adjustment of the power dynamic in lawyerless courts is beneficial for all parties involved. The judge and litigants need not depend on a singular lawyer of dubious capacity to propel litigation and discovery, and the landlord need not depend on that lawyer to protect his interests.[91] Pro se litigants are also not forced to face either a highly-talented lawyer with skills far surpassing theirs or an incompetent one who may cause procedural difficulty.

C. TIME CONSTRAINTS ARE A RISK BUT CAN BE MITIGATED

Last, there is a strong counterargument that proposed judicial reforms, especially active judging, will only worsen the severe time constraints already faced in housing court.[92] Judges hear dozens

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89. *See, e.g.,* Swank, *supra* note 81, at 1585 (arguing that lawyers are necessary because "a judge cannot effectively discharge both the role of being the judge and counsel for a party. A judge's role must be that of a judge, and not a combination of judge and advocate/representative/counsel.").

90. *See* Pearce, *supra* note 45, at 972 (where "lawyers differ in skill, knowledge, and the time they can devote to a case, . . . justice—actual outcomes in the legal system—is related to the quality of lawyering that a client can afford."); Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1112 (1983).

91. Obviously, it is important to note that landlords bring meritorious claims too. Especially post-COVID-19, many have been "unable to meet their obligations, such as mortgage payments, property taxes and repair bills, because of a falloff in rent payments," and they deserve a fair and functioning housing system to redress those problems as much as their tenants do. Drew Desilver, *As National Eviction Ban Expires, A Look At Who Rents And Who Owns In The U.S.*, PEW RESEARCH CTR. (Aug. 2, 2021), https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/.

92. *See, e.g.*, Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2721

of cases per day, and litigants must often wait outside in line to have their claims heard.[93] Requiring judges to play a more active role in fact-finding, evidence, procedure, and negotiation would only decrease the number of cases they could hear and increase wait times. There are, however, ways to avoid this outcome.

First, reforms like simplified forms and streamlined procedural process means that other time-consuming aspects of a case would be sped up, allowing more time for active judging. Second, if judges can derive more full and fair solutions due to their expanded role, leaving litigants on both sides more satisfied with the resolutions of their cases,[94] there might be fewer repeat players and thus fewer cases for judges to resolve in general. Relatedly, if these more considered resolutions lead to a decrease in current funding drains like so-called "one-shot deals"—one-time, rarely-paid-back loans provided by New York City's social services agency to alleviate pressing debts for tenants[95]—then that funding can be diverted to either an increased number of judges or increased resources for judges (like additional clerks or staff) and litigants (like better help for filling out paperwork). The time constraints and caseload factors affecting lawyerless courts and housing courts specifically are huge stressors on those systems[96] and are affected by broader political and social issues.[97] While judicial reform may impact them,[98] there are ways to mitigate that impact. In the face of the

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(2014) (recognizing that "limited court resources are used inefficiently when judges must spend significant time dealing with laypersons who are unfamiliar with civil court procedures, rules of evidence, and professional and judicial rules of conduct" in a similar pro se reform environment in housing court, but ultimately finding that reforms will mitigate time constraints faced by judges).

93. *See* Kleinfield, *supra* note 1.

94. *See, e.g.*, Christopher J. Peters, *Adjudication As Representation*, 97 COLUM. L. REV. 312, 347 (1997) (arguing that judicial decisions are respected most when they "represent[] the interests of the parties who will be bound by them").

95. *See* Kleinfield, *supra* note 1 ("one-shot [deals are] . . . emergency payments to extinguish the arrears of tenants facing eviction").

96. *See, e.g.*, Carpenter et al., *supra* note 12, at 556–57 (arguing that judges resist offering explanations and information to litigants, refuse to answer questions, limit the evidence they hear, and rely heavily on government attorney-submitted papers in large part because they are "under pressure to decide cases quickly in their high-volume dockets, which limited the amount of time they could spend offering pro se assistance").

97. *See, e.g.*, Jacob Kaye, *Top Judge Details the Court's Budget Needs*, QUEENS DAILY EAGLE (Feb. 8, 2023), https://queenseagle.com/all/2023/2/8/top-judge-details-the-courts-budget-needs (discussing the ongoing debate in the New York State legislature over increased court funding and reforms to bail and judicial procedures).

98. *See* Carpenter et al., *supra* note 12, at 561 ("recommendations for judicial role reform and pro se assistance are inherently time-consuming. . . . Judges in most lawyerless

huge benefits reform can bring,[99] these drawbacks are unconvincing.

Some argue that the easiest way to fix many of these problems is by increasing the number of judges on the bench, mitigating judges' heavy caseloads.[100] Though this proposal seems obvious, legal research does not focus on it because it is a broadly political topic. Also, increasing the number of judges entrenches the status quo existence of this malfunctioning system, and many believe that more wholesale reform is needed.[101] Though alluring at first glance, then, this solution is both under-developed and perhaps imprudent.[102]

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courts, like those in our study, face massive docket pressure from high-volume court calendars.").

99. *See* Shanahan et al., *supra* note 58, at 17 (highlighting that state courts' "embrace[of] a range of modalities to facilitate access" has made them more "nimble" in responding to crises faced by litigants).

100. *See, e.g.*, Kleinfield, *supra* note 1; The Fund for Modern Courts, Structure of the Courts (2023), https://moderncourts.org/ (discussing additions to New York's Court system); Minyvonne Burke, *Divorce and Civil Cases Halted in 6 New Jersey Counties Amid Judge Shortage*, NBC NEWS (Feb. 7, 2023), https://www.nbcnews.com/news/us-news/divorce-civil-cases-halted-6-new-jersey-counties-judge-shortage-rcna69568 (reporting that some counties in New Jersey had to stop "most divorce and civil cases" because there were "simply not enough judges").

101. *See, e.g.*, Barton, *supra* note 39, at 1234 ("Rather than seeing the plight of the poor as an opportunity to fund more lawyers, we should see it as an opportunity to make American law simpler, fairer, and more affordable."). I address this idea in more detail vis-à-vis civil Gideon below.

102. Similarly, many scholars point to programs like Legal Aid or other public defense programs as a solution to issues plaguing pro se litigants. This Comment is concerned with structural reforms to the judiciary and court system, and not external organizations and processes like Legal Aid. Those organizations provide valiant work, but are not part of the judiciary itself, and much of the scholarship around them discusses increased funding. *See, e.g.*, Natalie Gomez-Velez, *Structured Discrete Task Representation to Bridge the Justice Gap: CUNY Law School's Launchpad for Justice in Partnership with Courts and Communities*, 16 CUNY L. REV. 21 (2012). Many of the reforms discussed here exist such that those who still do not have lawyers despite these programs (and many of those eligible for free civil representation do not have lawyers because those programs are underfunded and operating under a crushing backlog) can more readily obtain access to justice. *See* Cliff Collins, *Two Anniversaries One Challenge Legal Aid Funding Sources Are Pinched at A Time of Great Need*, 71 OR. ST. B. BULL. 21, 22 (2010) (over 800,000 Oregonians are eligible for legal aid but "fewer than 20 percent of the legal needs of this population are . . . met"); James Barron, *In Housing Court, Tenants Are Being Evicted Again*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/nyregion/in-housing-court-tenants-are-being-evicted-again.html ("Several nonprofits tapped by the city to represent tenants are coping with staffing shortages and say they cannot meet the need."). As discussed *infra*, Part IV.C and note 124, New York theoretically provides housing court litigants with representation, but that system also faces a backlog. While the representation it does provide evidently improves outcomes, see *supra*, notes 13, 62 (discussing Luban's findings), this lawyer-based reform and its successes and failures are not within the scope of this Comment.

IV. LITIGATING COMPLETELY WITHOUT LAWYERS NEED NOT BE IMMEDIATELY IMPLEMENTED, BUT JUDICIAL REFORM ALLEVIATES PROBLEMS THAT EXIST WHEN ONE PARTY IS REPRESENTED

A. THE RAMIFICATIONS OF COMPLETELY LAWYERLESS COURTS ARE MIXED, AND THIS COMMENT DOES NOT ADVOCATE COMPLETE REMOVAL OF LAWYERS

The goal of these reforms is to make litigation easier for all parties, including pro se litigants. Thus, it might be suggested that once they are instituted, courts should transition to a purposely lawyerless court system; in other words, *all* parties in housing court should be pro se. While there may be some benefit to a completely pro se system, this Comment does not take a position in this debate, or go so far as to suggest that a pro se requirement be implemented along with these judicial reforms in light of the barriers it could impose. The system is already overburdened and "a little lawyer [often] goes a long way" to streamline the process; though reforms would help to minimize time constraints, a completely pro se process might put stress back on the system.[103] In Mr. Caple's case, the stip he signed was only reversed due to intervention by a pro bono attorney. Lawyers also have specialized expertise that can ideally highlight case law and necessary procedure, though research suggests that this does not always happen.[104] It is also unlikely that landlords would cast aside their lawyers completely. Requiring them to do so may cause them to resort to measures like private arbitration agreements instead, which cannot be reached by judicial reform and thus would further the injustice faced by unrepresented tenants.[105] Judges may

103. Luban, *supra* note 13, at 511.

104. *See* Sabbeth, *supra* note 7, at 78–9 (arguing that landlord attorneys' relationships with judges mean that judges often "misapply rules of procedure and do not require landlords to prove the basic elements of the prima facie case," and that "ruling[s] in the landlord's favor [often are handed down with] no evidence in support of" the landlord's legal argument"). *See also* Engler, *supra* note 25 ("court players [cannot] giv[e] legal advice to unrepresented litigants"). However, a more active judge might be able to elicit this information without it biasing the pro se party.

105. In the commercial context, arbitration agreements are already becoming increasingly common due to landlords' dissatisfaction with the way judges treat them, and real estate arbitration provisions may even be able to "'trump' (via the Supremacy Clause and the federal preemption doctrine) a right to a jury trial established by state law." Shorge

similarly not be as willing to shift to this completely different system rather than simply implementing clear rules within the system in which they already sit, and may feel more stress to develop the factual and evidentiary record.[106]

That said, some do argue that truly lawyerless "courts [could] operate . . . well [in contrast to] a lawyer-driven model that persists from 17th Century England."[107] A truly lawyerless system, it is argued, that fully implements the aforementioned reforms and includes technological advances like virtual forms and hearings[108] would likely "alleviate the pro se crisis, make more use of precious judicial resources, save money, and . . . produce better, fairer outcomes."[109] Many of the reforms to judging discussed above would help all parties and be inexpensive,[110] and if technology streamlining negotiation were implemented, judicial resources would be saved. More basically, this Comment is devoted to arguing that reforms should be implemented in large part *because of* the power dynamic that uneven representation in housing court creates—clearly, getting rid of lawyers completely would alleviate that dynamic. Thus, if the reforms discussed herein were implemented, a completely lawyerless system could in theory take an additional step towards creating more equality in the legal system.

B. COURTS WITH ONE LAWYER WOULD NONETHELESS BE EFFECTIVE WHEN REFORMED

A completely pro se court, therefore, has some value, but there are obvious reasons this goal might be difficult to execute. The reforms explored in this Comment nonetheless adequately ease the obstacles faced by pro se litigants in courts with lawyers as they exist today—meaning that removal of all lawyers is likely

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Sato, *Why Commercial Landlords Should Stop Worrying and Learn to Love Arbitration*, 99 ILL. B.J. 144, 145 (2011).

106. Indeed, pro se courts that currently exist are frequently created from whole cloth instead of emerging from a formerly-lawyered court. *See, e.g.*, Anita Davis, *A Pro Se Program That Is Also "Pro" Judges, Lawyers, and the Public*, 63 TEX. B.J. 896 (2000) (discussing the creation of a new, completely pro se court in Texas).

107. Barton, *supra* note 39, at 1273–74.

108. *See* Shanahan et al., *supra* note 58, at 15 (discussing virtual or telephonic hearings and "online assistance portals" for filing claims).

109. Barton, *supra* note 39, at 1274.

110. Though some, like abolishing lawyers, would be politically difficult. *See* Swank, *supra* note 81.

unnecessary. First, with a codified, formal way for judges to be more active, the negative impact of the uneven lawyer landscape is lessened. Judges receive equal information from both parties, and litigants are not disadvantaged by procedural missteps. Second, concerns about judicial overreach can also be lessened by codification as a check on judicial discretion, given that "in courts where lawyers are scarce, there are few to no mechanisms to check or influence judicial discretion."[111] Third, the lawyers who remain in a reformed system "will have the capacity to take on more work."[112] Again, this Comment does not endorse a shift to a completely lawyerless housing court system, though there is some scholarship that highlights some benefits it might bring in theory. Regardless of the efficacy or feasibility of removing lawyers from the system, the reforms discussed above are alone enough to mitigate the harm being done within it to pro se litigants.

C. CIVIL GIDEON IS NOT THE ANSWER, EITHER

At the opposite end of the spectrum from a completely pro se court is "civil Gideon," the idea that the landmark right-to-counsel decision *Gideon v. Wainwright*[113] should be expanded to civil cases. Civil Gideon is not addressed in the reforms above because this is a judicially-focused Comment; the goal of the proposed reforms is to change the role of the judge, not to change the requirements regarding who must appear in front of the judge. Nonetheless, the theory is important to note as an alternative to active judging. Different visions of civil Gideon have been proposed by scholars and practitioners. In 2007, the ABA's house of delegates called for a version through which "free legal counsel, paid for by the government, [would be provided] to 'low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.'"[114] Others take the proposal further, applying the "right to appointed counsel in a[ny] civil case" in which the

111. Carpenter, *supra* note 42, at 707. To be clear, judicial discretion has always played a role in decision-making, and these reforms would minimize its harmful impact. Even so, a repeat player who can quickly recognize egregious bias is helpful.

112. Steinberg, *supra* note 54, at 805.

113. 372 U.S. 335 (1963).

114. Judge Mark Juhas, *On the Anniversary of Gideon, an Argument for Free Civil Representation*, 36 L.A. LAW. 44, 44 (quoting Am. B. Assn. Res. 112A).

defendant cannot afford representation, just as would be done in any criminal case under the current regime.[115]

The appeal of civil Gideon is clear. As this Comment has demonstrated, those without lawyers most frequently lose in civil court.[116] There is often a disconnect caused by a lack of guaranteed civil representation in common civil disputes: in many domestic violence proceedings, counsel is appointed to defend an abuser against criminal charges, but not to the abused.[117] Similarly, a "poor person whose housing is wrongfully being taken from him is not entitled to counsel, even though the result may be homelessness for an entire family."[118] The *Gideon* court itself deemed it "an obvious truth" that a person "who is too poor to hire a lawyer[] cannot be assured a fair trial unless counsel is provided for him."[119] And many other countries provide poor people with counsel in civil litigation either statutorily or constitutionally, including England, Canada, Australia, New Zealand, France, Germany, Norway, Sweden, Denmark, Belgium, the Netherlands, Austria, Spain, Italy, Portugal, and Switzerland.[120]

That said, there are major problems with civil Gideon that indicate that other proposals might be more effective; indeed, scholars who propose judicial reform frequently do so *in lieu of* civil Gideon. First, the promise of *Gideon* has fallen short in the criminal context. There is a "general agreement that *Gideon* has not led to effective representation for all indigent defendants."[121] Public defenders are overloaded with cases and do not have time to effectively prepare; "[o]ver 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys."[122] Studies argue that "defective representation [i]s a recurring contributor to miscarriages of justice" in these cases.[123] Where civil Gideon has

115. Mary Deutsch Schneider, *Trumpeting Civil Gideon an Idea Whose Time Has Come?*, 63 BENCH & B. MINN. 22, 26 (2006).

116. *See supra*, note 8.

117. *See* Schneider, *supra* note 115, at 22.

118. *Id.*

119. *Gideon*, 372 U.S. at 344.

120. *See* Schneider, *supra* note 115, at 23.

121. Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 119–124 (2012).

122. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics (2000). Though judges would retain more responsibilities under the proposed reforms in this Comment, the mitigations regarding overwhelming caseloads discussed above would help minimize this problem.

123. Dripps, *supra* note 121, at 120. In one area of the law, about one-fifth of all DNA exoneration claims included a claim of ineffective assistance of counsel. *See* Emily M. West,

already been implemented, it has also faltered. New York codified "guarantee[d] legal representation to the city's poorest tenants facing eviction," but that law "has been falling short since the state eviction moratorium was lifted . . . [and] many still face housing court alone, given the similarly overwhelming nature of the caseload faced by appointed attorneys."[124] Given the stress criminal Gideon currently faces, and the lack of monetary assistance pledged to mitigate these problems, it seems unlikely that adding to public attorneys' caseloads would ultimately lead to effective representation for civil defendants.

Civil Gideon is unlikely from a budgetary standpoint, too. Between "1999 and 2007, state public defender offices experienced a 20% increase in caseload but only a 4% increase in resources."[125] While the federal government "spends about a hundred billion dollars annually on criminal justice, . . . only about 2% to 3% goes to indigent defense."[126] And while "[l]awyers have challenged both the funding levels for indigent defense and the large caseloads public defenders carry, . . . courts have generally demurred" and little legislative action has been taken.[127] These funding shortcomings counsel against an expansion of the *Gideon* rule instead of a broader court reform; it seems unlikely that the resulting system would be resourced enough to provide meaningful aid.[128]

Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals, Innocence Project 1 (Sept. 2010), http://www.innocenceproject.org/docs/Innocence_Project_IAC_Report.pdf.

124. Festa & Iezzi, *NYC's Floundering 'Right to Counsel' Fails to Keep Pace With Eviction Cases*, CITY LIMITS (Jan. 3, 2023), https://citylimits.org/2023/01/03/nycs-floundering-right-to-counsel-fails-to-keep-pace-with-eviction-cases/?https://citylimits.org/2023/02/13/wait-times-for-nycha-apartments-doubled-last-year-as-number-of-vacant-units-climb/&campaignid=20040558639&adgroupid=149021841032&adid=656667243482&gad_source=1&gclid=CjwKCAjw0YGyBhByEiwAQmBEWiOTPeluUzeg7s-YXAOxHNLdPXCuCnVFuELO1n_6zYtDeseySOBwAhoCTacQAvD_BwE. The law is not addressed in more depth for the reasons discussed supra, note 102.

125. Dripps, *supra* note 121, at 121.

126. Barton, *supra* note 39, at 1251.

127. *Id.* at 1255.

128. Carpenter discusses this pessimism in terms of what she calls the "justice gap," or the idea that different litigants have access to different levels of justice. Carpenter, *supra* note 42, at 661. She points out that "given the extent of the demand for legal services in the United States, increases in civil legal aid funding cannot possibly meet the need. On top of the economic barriers, efforts to secure a limited right to counsel in civil cases have also failed as a doctrinal matter. In light of existing fiscal and political challenges, it is unlikely that funding for civil legal services will increase anytime soon." *Id.*

Civil Gideon also works within the dysfunctional system, as opposed to getting rid of the dysfunction itself. It generally focuses on helping poor people afford a lawyer after being forced into an unfair system, without recognizing what makes the system unfair at its core. On the other hand, judicial reform aims to "radically reshape our justice system in ways that assist everyone," so as to create fuller access to justice, as opposed to simply access to a lawyer.[129] In other words, judicial reform works to change the problem itself—making court processes fair for unrepresented litigants—rather than to merely respond to it by implementing ways to make the experience of pro se litigants better in the existing system of judging.[130] While civil defendants gaining access to an attorney can help them avoid being treated unfairly, a better solution is to create a system that is fair to litigants in the first place.

D. SEPARATION OF POWERS ISSUES ARE NOT IMPLICATED

Finally, it might be argued that expanding the duties of the court when dealing with pro se litigants violates the basic constitutional principle of separation of powers because it allows the legislature to require judges to impose what could be seen as a form of judicial activism. However, this concern is overstated. First, many of the proposals suggested above already fall in line with the somewhat flexible standards outlined in judicial ethics rules like the Model Code of Judicial Conduct and New York Judicial Rules Governing Judicial Conduct.[131] Reform as outlined in this Comment would not be creating a new, activist judge. Instead, the proposals considered aim to maximize the power of judges as it exists by imposing new duties to act when dealing with pro se litigants. Reform, including reform imposed by legislation, would not create a novel type of judge or create new abilities from whole cloth, avoiding separation of powers implications.

Second, codifying active judging does not necessarily require legislation.[132] Indeed, judicial ethics rules are typically promulgated by state high courts.[133] A new judicial ethics rule

129. Barton, *supra* note 39, at 1228.
130. *See id.* at 1272–73.
131. *See supra*, note 87.
132. *See supra*, note 51.
133. *See id.*

could help to clarify the scope of active judging while avoiding any interference by another branch.[134] In the federal system, for instance, the Supreme Court promulgates rules of procedure and evidence.[135] Even if states pass rules through their legislatures, state bar associations and high courts frequently provide persuasive commentary and practice guides for the rules, and a similar method could be used to avoid any separation of powers concerns.[136] Further, state procedural and evidentiary law is already typically passed by legislatures—and these rules are often "changed or added to reflect . . . [increased discretion] by the judge" without any issue.[137] This legislative grant indicates that these reforms do not implicate separation of powers concerns and are accepted methods to create judicial reform.

CONCLUSION

Housing courts—and lawyerless courts more broadly—are broken. Only one side has access to lawyers. And given the institutional expertise, strategic knowledge, and unfair use of procedure that housing court lawyers bring, only one side has genuine access to justice. By changing the ways in which judges interact with pro se and represented litigants, reform can provide access to justice to *all* parties in housing court. Judicial reforms would decrease delay, elicit more facts, inject due process and procedural fairness into proceedings, and minimize bias. The most important of these reforms is active judging, including procedural reform, evidentiary reform, and easier access to hearings. As the effects of the active reforms taken by Alaska District Court Judge Washington indicate, the reforms are simple to implement and quickly make a tangible impact. More broadly, reforms would benefit pro se litigants and the judicial system as a whole: it is "more effective to train one judge on how to assist a self-represented litigant than to teach hundreds of [litigants] how to be

134. *See id.*; *see also supra*, note 87.

135. *See* 28 U.S.C. § 2071-2077.

136. *See, e.g.*, New York State Bar Association Committee on Civil Practice Law and Rules, https://nysba.org/committees/committee-on-civil-practice-law-and-rules/; Massachusetts Guide to Evidence (2024), https://www.mass.gov/guides/massachusetts-guide-to-evidence#-statement-from-the-supreme-judicial-court-and-introduction (discussing the guide promulgated by the Massachusetts Supreme Judicial Court).

137. Massachusetts Guide to Evidence (2024), https://www.mass.gov/guides/massachusetts-guide-to-evidence#-statement-from-the-supreme-judicial-court-and-introduction.

lawyers."[138] It is an "essential democratic goal" that the court system work fairly for all.[139] Reforming judging in lawyerless housing courts helps it do just that.

138. Carpenter et al., *supra* note 12, at 521 (quoting Nat'l Ctr. For State Cts., NCSC Justice For All Initiative Guidance Materials 32 (2019), https://www.ncsc.org/__data/assets/pdf_file/0021/25464/pdf-jfa-guidance-materials.pdf [https://perma.cc/ZC92-HYGG]).

139. Carpenter et al., *supra* note 6, at 50.