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Access to Injustice: How Legal Reforms Reinforce Marginalization

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ACCESS TO INJUSTICE: HOW LEGAL REFORMS REINFORCE MARGINALIZATION

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ABSTRACT

Marginalized individuals are largely excluded from making rights claims in the courts because their stories of rights violations fall outside of prescribed legal categories. Framing this exclusion as a lack of knowledge and access, proponents of the access to justice movement have sought to improve outcomes for unrepresented and marginalized litigants through measures that help them understand and navigate the system. The access to justice movement seeks to make the justice system more accessible to these litigants by focusing on procedural fairness. This Article draws on empirical data and observations from Tulsa's eviction court to consider the limits of access to justice measures focused on process, including representation. It calls for an expanded understanding of access to justice that incorporates the rights claims of marginalized individuals. Asking how lawyers representing marginalized clients can best advocate for their clients' rights and achieve social change, it draws on the law and social change literature around legal mobilization.

The elevation of access to justice measures focused on process masks the underlying inequities embedded in the law. By failing to engage with societal patterns of marginalization, process-based access to justice reforms not only replicate social power imbalances and marginalization, but they also legitimize them through the aggrandizement of procedural fairness. Access to justice reforms continue to operate within the dominant normative universe that privileges particular legal categories and bounds the narrative scope. This approach both inhibits social change and perpetuates the continued exclusion of the narratives of

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marginalized individuals. An expanded conception of access to justice can challenge the dominant narrative and elevate the voices of marginalized individuals by deploying subversive stories. The use of these stories in mobilizing efforts both inside and outside the courtroom can help reshape the institutional and sociopolitical context to advance their rights.

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"Do they know I can't walk? I can't go on the street. I can't even stand up without help."[1]

Evicted tenant, Tulsa Eviction Court

INTRODUCTION

The legal system largely fails to acknowledge, much less reckon with, the experiences of marginalized individuals. Procedural rules often prevent such individuals from sharing perceived rights violations.[2] The

[1] Court Observation, Tulsa Eviction Court (Sept. 22, 2021) (on file with author). These documents contain court observations conducted by students in the Terry West Civil Legal Clinic at the University of Tulsa College of Law from August 2021 to May 2022. Additional observations are also contained in the clinic's 2020 report. *See* TERRY WEST CIV. LEGAL CLINIC, UNIV. OF TULSA COLL. OF L., ADVANCING HOUSING JUSTICE IN TULSA: AN EXAMINATION OF THE FED DOCKET (2020), https://perma.cc/Q4XV-HX5U.

[2] *See, e.g.*, Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (illustrating how the norms and language of procedural justice discount the speech of socially subordinated groups and deny them meaningful participation); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV.

following exchange during a hearing in Tulsa's eviction court, officially known as the Forced Entry and Detainer ("FED") docket, highlights this point, as a tenant tries to recount the plumbing issues in her apartment:

> Judge: Did you fail to pay your rent on time?
> Tenant: Yes, but only because he refused to fix my plumbing. I don't understand why I am being evicted for asking him to fix the plumbing first.
> Judge: Well, did you provide him notice?
> Tenant: Yes, I told him about it when he came that day to pick up the rent.
> Judge: Written notice. Did you provide him written notice?
> Tenant: Yeah, I texted the guy I thought was the landlord about the plumbing issue.
> Judge: No, that's not what I mean. You need to provide written notice to your landlord, and you didn't. If you had, don't you know that you could have taken him to court for reduced rent?
> Tenant: I don't understand how I can be evicted for asking a landlord to call a plumber.[3]

This exchange demonstrates the barriers that marginalized individuals face in the legal system when their experiences do not accord with prescribed legal categories. These categories define the dominant legal narrative, what Robert Cover characterized as the "nomos," or normative universe.[4] The nomos gives meaning to the legal space, defines understandings of right and wrong, and directs the kinds of stories the legal system will hear. For the tenant, the plumbing problems are an integral part of the legal conflict. The judge, however, eschewed any details on non-habitability to focus only on whether the tenant provided proper written notice. When the tenant tried to describe her communications with the landlord and his property manager, the judge shut down this narrative as irrelevant. Having established that the tenant did not follow the rules for written notice, the landlord's failure to maintain his property became immaterial; the focus shifted exclusively to the tenant's late rent payment. Although the late payment was in response to the landlord's refusal to address the plumbing issue, this context was not legally relevant. The legal fact of late payment displaced all other issues, doom-

533 (1992) (describing how the legal process silences tenants in Baltimore's eviction court, leaving them unable to exercise their legal rights).

[3] Court Observation, Tulsa Eviction Court (Sept. 2, 2021) (on file with author).

[4] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

ing the tenant's legal case and eliciting disbelief from the tenant: "I don't understand how I can be evicted for asking a landlord to call a plumber."

Often unable to frame their stories in the proper legal language, marginalized individuals are largely excluded from making rights claims in the courts. Framing this exclusion as a lack of knowledge and access, proponents of the access to justice movement have sought to improve outcomes for pro se—and usually marginalized—litigants by focusing on procedural fairness. These efforts can help marginalized litigants navigate the legal system. Without confronting the underlying inequities embedded in the law, however, they can only go so far in altering outcomes. Moreover, the exclusive focus on process may help to keep these inequities below the surface. The "procedure fetish"[5] extols the fairness of the process, even as outcomes remain unchanged. For the tenant in the above exchange, the *procedural fairness* of her eviction was rendered meaningless by the *fact* of her eviction: In the tenant's understanding, her eviction stemmed directly from her attempts to have her landlord address her apartment's habitability issues. By failing to engage with the underlying inequities of the legal system, process-based access to justice reforms not only replicate social power imbalances and marginalization, but also legitimize these outcomes through the aggrandizement of procedural fairness. Only by conceiving of access to justice more broadly can the approach start to confront some of these underlying power imbalances.

This Article uses a case study of Tulsa's eviction court to highlight the limits of the current access to justice approach, pointing to the importance of incorporating alternative advocacy strategies. Empirical data from Tulsa's eviction court show that while legal representation may affect the terms of the eviction, it often fails to prevent the eviction itself.[6] In the context of measures that do little to alter outcomes, this Article asks how lawyers can best advocate for their marginalized clients. Engaging with Lucie White's "humanist vision of procedural justice,"[7] which promotes meaningful participation to further equality, this Article considers how to advance more substantive rights claims. To overcome the barriers that accompany marginalization, lawyers advocating for clients facing eviction may need to engage in a strategic reframing of the law, deploying rights discourse to push for broader social change

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[5] *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

[6] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 11-12.

[7] White, *supra* note 2, at 2-3.

through "subversive stories."[8] Strategies of legal mobilization in the context of community lawyering suggest ways in which mobilization efforts both inside and outside the courtroom can work to challenge the dominant narrative and reshape the institutional context.

Reflecting on the limits of access to justice reforms focused on process, this Article engages with the law and social change literature to explore mechanisms for introducing habitability into the dominant legal narrative or nomos. Part I focuses on the practice of evictions, providing an overview of the general legal framework before turning to empirical data illustrating the legal process in Tulsa's eviction court. Several months of court observations by students from the Terry West Civil Legal Clinic at the University of Tulsa College of Law provide a picture of the experiences of marginalized tenants in eviction proceedings. Part II explores how existing access to justice measures serve as barriers to social change. It describes how underlying power dynamics play out in civil courts, and how access to justice measures focused on process enhance existing exclusionary dynamics. This Part also explores the structural limits to achieving social change in this context and the role that marginalization plays. Finally, Part III turns to an exploration of ways to expand and reconceptualize the existing access to justice framework to create opportunities around new narratives that give a voice to the experiences of marginalized individuals.

I. SMALL CLAIMS COURTS: THE "HAVES" STILL COME OUT AHEAD

As in many cities, Tulsa's eviction docket is housed in the small claims court. Designed as lawyer-free spaces, small claims courts were created to make civil justice more accessible to poor and unrepresented people by avoiding lawyers and costly trials.[9] However, small claims courts have long failed to fulfill this vision of justice.[10] Rarely, if ever, do marginalized individuals initiate actions to vindicate their rights;

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[8] *See* Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 217 (1995) (explaining how narratives can be liberatory by exposing the dominant modes of social organization).

[9] *E.g.*, Eric H. Steele, *The Historical Context of Small Claims Courts*, 6 AM. BAR FOUND. RSCH. J. 293, 302 (1981).

[10] *E.g.*, Beatrice A. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1668 (1969) ("[D]espite the original intention to establish a simple, inexpensive procedure that would 'operate for the rich and poor alike,' the small claims court has not lived up to its promise.").

more often, they appear as defendants.[11] They are forced to defend themselves against plaintiffs who are not only often more powerful, but also usually represented, exacerbating the power imbalance.[12]

Evictions also challenge the premise that small claims courts serve as an arena to settle relatively low-stakes claims. To be sure, monetary awards are relatively low: Data from Tulsa's eviction court in January 2019 show an average money judgment around $1,000.[13] For the individual facing eviction, however, the loss of one's home and the accompanying repercussions—which may include lost possessions, homelessness or substandard housing, work instability, and long-term negative physical and psychological outcomes[14]—are definitively not low-stakes. Individuals facing eviction are often confronting multiple concurrent challenges, including non-habitable housing, disability, illness, mental health struggles, and under- or unemployment.[15] Those who attend their

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[11] *See, e.g.*, Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 79, 103-06 (2018) (describing how tenants, the majority of whom are women of color, rarely assert affirmative claims in housing court).

[12] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103, 108, 114 (1974); *see also* TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 11 (providing statistics showing that, over a one-month period, 82% of landlords in Tulsa's eviction court were represented, as compared to 3.5% of tenants).

[13] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 22. Evictions may be based on a variety of reasons, including lease violations or criminal activity. This Article focuses primarily on evictions for unpaid rent, which make up the bulk of evictions. *Id.* at 18.

[14] *See, e.g.*, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295 (2015); Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS, Feb. 2018, at 1, 2; Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 230-33, 256 (2015); U.S. GEN. ACCT. OFF., GAO/HEHS-94-95, ELEMENTARY SCHOOL CHILDREN: MANY CHANGE SCHOOLS FREQUENTLY, HARMING THEIR EDUCATION 30-33 (1994), https://perma.cc/VT2B-8ADZ; *see also* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 12 (2015) (explaining that residential mobility produces a "loss of neighborhood ties"); Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 49-50 (2016) (arguing that forced moves can lead to job instability because, among other reasons, workers often relocate to less convenient locations, increasing the likelihood that they will be late or miss work entirely); Courtney Lauren Anderson, *You Cannot Afford to Live Here*, 44 FORDHAM URB. L.J. 247, 271-72 (2017) (describing how housing instability due to poor housing conditions and evictions can cause high turnover rates in local school districts).

[15] *See, e.g.*, TERRY WEST CIV. LEGAL CLINIC, UNIV. OF TULSA COLL. OF L., LEVELING THE PLAYING FIELD: LEGAL, ECONOMIC AND POLICY CONSIDERATIONS IN ESTABLISHING AN ACCESS TO COUNSEL PROGRAM FOR TULSA'S EVICTION DOCKET 8-11 (2021), https://perma.cc/KN5R-2569.

eviction hearings are frequently surprised to discover that the court is not interested in hearing about their living conditions and life struggles. Such appeals to humanity have no place in eviction proceedings.[16] Given the serious and lasting consequences of eviction, the exclusionary practices that render invisible the experiences of marginalized individuals in the legal system pose a serious challenge to the common story of small claims courts.

A. Housing Law and Evictions

Eviction laws vary by state. While some states' laws may be more tenant-friendly, landlord-tenant legislation is uniformly based on a shared set of legal principles rooted in property and contract law.[17] Proceedings in eviction court center on the contractual relationship expressed in the lease, and on protecting the landlord's property rights and right to possession in the event of a lease violation.[18] Most eviction hearings focus on the question of unpaid rent and the related question of how much money will be awarded to the landlord.[19] A smaller number of cases involve other lease violations,[20] such as threats to health and safety or illegal acts. To the extent that a lease includes both landlord and tenant obligations, the former are often not judicially recognized or enforceable in eviction proceedings, depending on the content of the state law.[21] This lack of enforceability leaves tenants with little recourse even when housing codes and local laws include provisions around habitability. The Supreme Court has confirmed that such claims may not be cognizable in certain jurisdictions and that, to the extent that they are, they must be framed through separate tort, contract, or civil rights actions.[22]

The Supreme Court has also denied equal protection claims rooted in the specific realities that poor and marginalized renters face, including violations of their rights as tenants and the barriers they face in enforcing these rights. In an equal protection challenge to Oregon's FED statute, the Supreme Court reasoned that the "statute potentially applies to all tenants, rich and poor . . . ; it cannot be faulted for over-

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[16] *See, e.g.*, Bezdek, *supra* note 2, at 586-90.

[17] *See generally* Edward Chase & E. Hunter Taylor Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571, 572-77 (1985).

[18] *See generally* Bezdek, *supra* note 2, at 540 (asserting that "the operational premise of rent court as an institution is to enforce the entitlement of the landlord to payment and possession, while it obscures the entitlements of tenants under the same governing law").

[19] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 12, 18. *See generally id.*

[20] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 18.

[21] *See* Lindsey v. Normet, 405 U.S. 56, 68-69 (1972).

[22] *Id.*

exclusiveness or under-exclusiveness."[23] The Court refused to acknowledge that tenants on the margins, because of their precarity, are more likely to rent properties with habitability issues while also lacking the resources to file a tort, contract, or civil rights action to assert their habitability rights. In doing so, the Court effectively silenced their rights claims in the formal legal system. Lacking the resources to bring independent court actions around habitability as plaintiffs, tenants generally appear in court as defendants in eviction actions. Once they find themselves in this formal legal space, they are barred in many states from raising affirmative defenses linked to rights around habitability.[24]

The Supreme Court ruling emphasized that while the Constitution protects private property, it does not protect a right to "decent, safe, and sanitary housing."[25] Accordingly, the purpose of the Oregon statute was to promote "prompt as well as peaceful resolution of disputes over the right to possession of real property."[26] In the Court's conception, the nomos determining legal rights includes the landlord's right to possession, but excludes the tenant's right to habitability. As a result, eviction proceedings in which tenants assert lease violations linked to habitability are often redirected towards violations that reassert the landlord's right to possession, as in the exchange recounted in the introduction. The requirement that habitability claims be framed through separate tort, contract, or civil rights actions pushes the issue into a formal legal space that excludes most marginalized populations who lack the resources to bring such claims. When they do enter the formal legal space as defendants in eviction proceedings, they are barred from raising these claims, as the next subsection illustrates. Access to justice measures cannot overcome these restrictions without also challenging the dominant nomos. Maintaining the current process-based focus risks adding a veneer of procedural fairness to these exclusionary dynamics.

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[23] *Id.* at 70, 74.

[24] According to the Legal Services Corporation's Eviction Laws Database, seventeen states (Alabama, Alaska, Arizona, California, Colorado, Florida, Kansas, Maine, Montana, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, and Tennessee) provide affirmative defenses linked to habitability in the law. *LSC Eviction Laws Database*, LEGAL SERVS. CORP., https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database (in the State and Territory Dataset's "Filter" tab, scroll to "23.1. What rebuttals available to a tenant are specified in the law?" and check "Property is uninhabitable" to view applicable states) (last visited Nov. 20, 2023).

[25] *Lindsey*, 405 U.S. at 74.

[26] *Id.* at 70.

B. Tulsa's Forced Entry and Detainer ("FED") Docket

As is true in many courts across the country, proceedings in Tulsa's eviction court do not reflect the reality of more informal conflict resolution—one of the defining motivations of the small claims court system.[27] The Tulsa court, like many eviction courts across the country, relies on a mix of formal proceedings and hallway negotiations.[28] Both practices depart from the foundational idea of small claims court and exploit existing power imbalances. While this imbalance plays out in multiple ways, most calls for reform focus on the imbalance in representation between the two sides, which often means that unrepresented tenants face landlord attorneys in a space designed to be less constrained by the formal legal process. Their presence reintroduces a level of formality into the process, enabling lawyers to capitalize on their legal knowledge to achieve outcomes that disadvantage the unrepresented tenant. The presence of lawyers on Tulsa's FED docket has made it a skewed forum for justice. Landlords are represented at significantly higher rates than tenants: 82% versus just 3.5%.[29] This imbalance is borne out in case outcomes, where only 2 out of 1,395 tenants received judgments in their favor in a one-month period.[30] Similar disparities can be found in eviction courts around Oklahoma[31] and around the country.[32]

The representation gap leaves tenants at a significant disadvantage. Tenants who appear for their hearings confront an opaque system of bewildering rules, players, and mechanisms.[33] In Tulsa's FED, the bail-

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[27] *See* Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359 (2022). For a description of the general features of eviction courts across jurisdictions, see generally *id.*

[28] *See* TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 6-8; *see also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46-51 (2010); Sabbeth, *supra* note 11, at 79 (on the prevalence of hallway negotiations in housing courts). *See generally* Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365 (2021) (describing eviction courts in Georgia).

[29] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 11.

[30] *Id.* at 15.

[31] *See* ADAM HINES, OKLA. ACCESS TO JUST. FOUND., CASE BY CASE: A STUDY OF OKLAHOMA'S EVICTION COURTS AND A PATH TOWARD EQUITY (2022), https://perma.cc/CUK8-UBU8.

[32] *See, e.g.*, Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast, Hidden Inequities of the Civil Legal System*, NEW REPUBLIC (June 22, 2020), https://perma.cc/K3EG-D827 (highlighting the lack of representation in civil cases, with 86% of low-income Americans receiving minimal or no legal assistance).

[33] The information on the Tulsa court contained in this Section is based on student court observations. *See supra* note 1. Although some of the specific procedures may have changed since a new judge took over in June 2022, the general practices are not new or unique. Bezdek, *supra* note 2 (describing similar practices and experiences in Baltimore's eviction

iff controls access to the courtroom. Tenants must check in with him and may only approach the courtroom under his direction.[34] Inside the courtroom, the bailiff and court staff direct tenants and landlords to opposite sides. A landlord who does not look the part may encounter a court representative who will inform them, with some hostility, that they are on the wrong side.[35] Reinforcing existing notions of marginality, these comments are based not on any actual knowledge of whether an individual is a landlord or a tenant, but solely on the individual's appearance and race. Legal Aid Services of Oklahoma attorneys are onsite at the courthouse, and the judge and other court staff instruct tenants to sign up for legal assistance only after they have checked in with the court. In some cases, they instruct tenants to speak with the landlord's attorney first, before consulting Legal Aid. The bailiff also sometimes takes tenants directly from the courtroom to their landlord's attorney, denying them the opportunity to access legal assistance.[36]

Inside the courtroom, the judge may inform tenants of the availability of legal assistance. Often, this information is conflated with directions to speak with opposing counsel, leading some tenants to believe they are accessing free legal assistance when speaking to their landlord's attorney.[37] When tenants are instructed to approach a particular attorney, they do not always understand that this is the attorney representing their landlord's interest. Moreover, as described above, some tenants are directed to opposing counsel before they have an opportunity to consult with an attorney.

The court process is largely designed to meet the needs of landlords and their attorneys. Landlords are not required to be present at the proceedings; their attorneys may appear on their behalf. No similar courtesy

court over thirty years ago); *see also* Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8, 17 (1973) (describing procedures in Detroit); Emily A. Benfer et al., Opinion, *The Eviction Moratorium Limbo Laid Bare the System's Extreme Dysfunction*, WASH. POST (Aug. 12, 2021, 9:15 AM), https://perma.cc/5HKT-MCEX (describing how procedural "dysfunction" negatively impacts tenants).

[34] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Nov. 8, 2021; Apr. 25, 2022) (on file with author).

[35] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Sept. 27, 2021; Feb. 15, 2022; Feb. 24, 2022) (on file with author).

[36] Court Observations, Tulsa Eviction Court (Jan. 20, 2022; Feb. 1, 2022; Mar. 22, 2022) (on file with author).

[37] Court Observations, Tulsa Eviction Court (Aug. 31, 2021; Sept. 1, 2021; Sept. 2, 2021; Sept. 3, 2021; Sept. 14, 2021; Sept. 16, 2021) (on file with author).

is extended to tenants.[38] A tenant whose attorney appears on their behalf will be defaulted. The hearing schedule accommodates repeat-player landlord attorneys, setting most of their hearings for the week on a single day.[39] As a result, docket sizes vary, with one hundred cases on one day and ten on another.[40] Because of the limited capacity of Legal Aid attorneys, many tenants who wish to access the free onsite legal assistance will not be able to do so on the days with larger dockets. Similarly, tenants who indicate that they have signed up and are waiting to consult with a free Legal Aid attorney may be forced to go forward without representation to accommodate the landlord attorney's schedule.[41]

In one case, a tenant who could not get representation on the day of his hearing because he had been exposed to COVID-19 was denied a continuance at the landlord attorney's urging.[42] In what court representatives deemed an "innovative" solution, the tenant was forced to proceed unrepresented in a hearing held on the sidewalk outside.[43] In another case, a tenant told the judge she was waiting to consult with a Legal Aid attorney. Upon hearing this, the landlord's attorney pushed the judge to start the trial, denying the tenant the opportunity to obtain legal assistance.[44] After the judge swore her in, the tenant repeated that she wanted legal advice before the trial and stated that she had a question about the proceedings.[45] The judge ignored her statements and started questioning her.[46] The tenant's disclosure that she was planning to leave her apartment but needed extra time because her aunt was quarantining in the apartment prompted the judge to order the eviction, giving the tenant four days to move out.[47] Although pushing for the hearing to go forward, the landlord's attorney played no part in it once it began.[48] When a volunteer approached the tenant afterward with information about poten-

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[38] Court Observations, Tulsa Eviction Court (Oct. 6, 2021; Oct. 21, 2021; Nov. 10, 2021) (on file with author).

[39] *See generally* Court Observations, Tulsa Eviction Court (on file with author).

[40] *See* TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 3.

[41] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Sept. 8, 2021; Sept. 16, 2021) (on file with author).

[42] Court Observation, Tulsa Eviction Court (Sept. 8, 2021) (on file with author).

[43] Kimberly Jackson, *Tulsa Judge Holds Eviction Court on Sidewalk Because of COVID Concerns*, KTUL (Sept. 8, 2021, 3:38 PM), https://perma.cc/74SP-4DXM.

[44] Court Observation, Tulsa Eviction Court (Sept. 8, 2021) (on file with author).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

tial resources, the tenant responded, "I don't want resources. All I wanted was time."[49]

While forcing tenants to forgo legal assistance in the interest of efficiency, the judge often denied Legal Aid requests for a trial to go forward if the landlord's attorney requested a continuance.[50] One tenant attended six hearings because of delays from her landlord's attorney. When the tenant indicated she was going out of town as the landlord's attorney sought to schedule a seventh hearing, the judge refused to accommodate her.[51] In another case, an unrepresented tenant waiting for the landlord to show up for the hearing was eventually told she could leave. When the landlord arrived fifteen minutes later, the court issued a default eviction judgment against the tenant.[52]

Where both sides are present, unrepresented tenants either negotiate with their landlord's attorney in the hallway or participate in a hearing. For tenants, both processes are inscrutable at best and, at worst, may be overtly misleading. As mentioned, the instructions given by the judge create confusion around the person with whom the tenant is negotiating. Some tenants do not understand they are negotiating with a lawyer who represents an adverse party, nor do they understand the outcome of these negotiations or the implications of what they sign.[53] Landlord attorneys may not provide clear explanations,[54] not make clear that they represent an adverse party,[55] and not provide tenants with copies of the documents they sign.[56]

Because many tenants have little understanding of what takes place during the negotiations, some still expect to have a trial following the negotiation.[57] Most negotiations end in a judgment under advisement ("JUA"), essentially a no-judgment eviction with agreed-upon terms around timing and payment. If the terms are met, meaning that the tenant self-evicts, no eviction judgment will be issued. The eviction filing, however, remains on the tenant's record and creates barriers for future rentals.[58] If the terms are not met, or if the landlord grows impatient, the

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[49] *Id.*

[50] Court Observation, Tulsa Eviction Court (Oct. 21, 2021) (on file with author).

[51] Court Observation, Tulsa Eviction Court (Nov. 17, 2021) (on file with author).

[52] Court Observation, Tulsa Eviction Court (Oct. 27, 2021) (on file with author).

[53] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 6-8.

[54] *Id.* at 7.

[55] *Id.*

[56] *Id.* at 7-8.

[57] *Id.* at 7.

[58] Tenant screenings generally include court records checks. *See, e.g.*, *Tenant Screenings and Background Checks*, APPLYCHECK, https://perma.cc/GE8N-QJRU (last visited Nov. 18, 2023). In Oklahoma, dismissed and settled cases show up on the publicly available court

landlord's representative may return to the court to seek an eviction order. In these cases, neither the tenant nor, if represented, their pro bono attorney receive notice, and the landlord generally is not required to provide any supporting evidence.[59] The landlord may even approach the court to convert the JUA into an order in advance of the agreed-upon date.[60] Many tenants do not understand what they are signing. One tenant went to the Landlord-Tenant Resource Center across the street from the courthouse to get rental assistance; he did not realize that he had already signed a JUA that included a money judgment against him.[61]

For those tenants who do get a trial, the process is equally cryptic. Many tenants face a landlord attorney who is a repeat player in these proceedings. Tenants, by contrast, are unfamiliar with the rules of the court, the legal language for presenting their cases, and the evidentiary standards. The judge shows little patience for this lack of knowledge, telling one tenant in exasperation during a trial, "You're never going to pay this money."[62] The landlord attorneys have a dual advantage. Not only are they familiar with these processes, but they also are not held to the same standard as the tenants. Landlords are not required to produce evidence,[63] may get assistance from the judge in trying their case,[64] may rely on hearsay,[65] and are allowed to raise claims not stated in the petition.[66] Tenants are forced to counter these arguments without the same dispensations. Often, tenants are not allowed to speak or are briefly indulged before being told that their statements are not relevant or constitute hearsay.[67] The process leaves tenants mystified. As one tenant

database. *See OSCN Docket Search*, OKLA. STATE CT. NETWORK, https://www.oscn.net/dockets/Search.aspx (select "Small Claims" under "District Court Case Type" dropdown box and press "Go," which will display Oklahoma's small claims cases, including FED cases) (last visited Dec. 17, 2023).

[59] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 5.

[60] *Id.*

[61] Court Observation, Tulsa Eviction Court (Aug. 31, 2021) (on file with author).

[62] Court Observation, Tulsa Eviction Court (Nov. 10, 2021) (on file with author).

[63] Court Observation, Tulsa Eviction Court (Mar. 31, 2022) (on file with author).

[64] Court Observations, Tulsa Eviction Court (Sept. 8, 2021; Sept. 16, 2021; Sept. 23, 2021; Oct. 27, 2021; Nov. 3, 2021) (on file with author).

[65] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Dec. 1, 2021; Feb. 15, 2022) (on file with author).

[66] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Feb. 14, 2022) (on file with author). Legal Aid attorneys also reported witnessing the judge give legal advice to landlord attorneys. Conversation between Author and Legal Aid (Oct. 8, 2020).

[67] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Sept. 8, 2021; Sept. 23, 2021; Nov. 10, 2021; Nov. 17, 2021; Dec. 1, 2021; Feb. 8, 2022; Feb. 14, 2022) (on file with author).

commented, "I didn't even know I had a trial until it was over."[68] Another tenant stopped arguing his case after confusion about the court process. The judge told him, "Ignorance is no defense to not knowing how the court works,"[69] a phrase that belies one of the defining features of small claims court. A third tenant came back a few minutes after her trial, during which the judge would not let her speak, to say that she did not understand why she got evicted.[70] The judge simply told her she had "no defense."[71]

Tenants raise issues about their housing that they reasonably assume to be relevant. The legal system, however, has deemed these facts, inextricably linked to their housing, to be irrelevant in proceedings that are fundamentally concerned with establishing property rights. In the exchange recounted at the beginning of this Article, the judge did not engage with the landlord's potential breach of contract around ensuring working plumbing in his property.[72] While the tenant reasonably focused on the habitability issues, the formal legal process provided no space for the tenant to hold the landlord accountable once the landlord initiated the legal proceedings. Instead, the court faulted the tenant for both remaining in a non-habitable property and for failing to provide the landlord with proper notice of the habitability issues.[73] In another example, a tenant attempted to present evidence of the landlord's harassment, which included pulling a gun on the tenant in the laundry room.[74] Again, the court remained focused on the issue of unpaid rent, a fact that rendered irrelevant all other evidence and claims.

Even as the court imposed formal legal processes on tenants that denied them the opportunity to hold landlords accountable, it gave landlords significant leeway to depart from these formal requirements. When a landlord's stated claim contained a deficiency, the court allowed the landlord and/or their attorney to introduce new claims that were not included in the petition.[75] If a landlord could not uphold a case for unpaid rent, for example, the landlord or their attorney would introduce a lease

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[68] Court Observation, Tulsa Eviction Court (Sept. 8, 2021) (on file with author).

[69] *Id.*

[70] Court Observation, Tulsa Eviction Court (Nov. 17, 2023) (on file with author).

[71] *Id.*

[72] *See supra* Introduction.

[73] Court Observation, Tulsa Eviction Court (Sept. 2, 2021) (on file with author); *see also* Court Observations, Tulsa Eviction Court (Sept. 23, 2021; Oct. 20, 2021; March 8, 2022) (on file with author).

[74] Court Observation, Tulsa Eviction Court (Feb. 8, 2022) (on file with author).

[75] Court Observations, Tulsa Eviction Court (Sept. 2, 2021; Feb. 14, 2022) (on file with author).

violation into the proceedings.[76] The judge generally allowed the introduction of these new claims without requiring evidence or sworn testimony from the landlord.

The judge also allowed landlords who refused to accept rental assistance to go forward with the eviction and then request a money judgment for the same money they had refused to accept.[77] For those landlords who did accept rental assistance, the acceptance terms prohibited them from filing evictions for the period covered by the rental assistance. The court often failed to enforce this requirement by, for example, refusing to wait for a tenant to go across the street to get confirmation that rental assistance had been paid to the landlord.[78] In one case, the judge acknowledged that a landlord had received double rent—once from the tenant, and once through the rental assistance program.[79] The judge held that the double payment could not be applied to a subsequent month, ruling that the tenant still owed money for the month.[80] At the same time, the judge refused to allow evidence that the fire chief had declared the property non-habitable because burst pipes had destroyed the ceiling and resulted in mold.[81]

The legal system consistently failed to hold landlords accountable for habitability issues, deeming, for example, that being without water for three to four days was reasonable.[82] One tenant with a Section 8 housing voucher faced eviction following a fire in her apartment complex that displaced many residents.[83] The building relocated some residents, including the tenant, to other apartments in the complex.[84] The tenant was not given a new lease or Section 8 voucher paperwork for the temporary apartment, and the landlord subsequently initiated eviction proceedings to rent the apartment to someone else.[85] The court took no notice of the fact that the landlord's actions would render the tenant homeless through no fault of her own and imposed no obligation on the landlord to house displaced tenants.[86] Instead, the judge commented on the fact that the tenant was on a Section 8 voucher, noting, "Well, you

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[76] *Id.*
[77] Court Observation, Tulsa Eviction Court (Sept. 2, 2021) (on file with author).
[78] Court Observation, Tulsa Eviction Court (Sept. 27, 2021) (on file with author).
[79] Court Observation, Tulsa Eviction Court (Sept. 24, 2021) (on file with author).
[80] *Id.*
[81] *Id.*
[82] Court Observation, Tulsa Eviction Court (Sept. 14, 2021) (on file with author).
[83] Court Observation, Tulsa Eviction Court (Dec. 1, 2021) (on file with author).
[84] *Id.*
[85] *Id.*
[86] *Id.*

don't actually pay rent, someone else pays it for you."[87] The judge also did not question the landlord's assertion that the tenant owed rent, nor did she hold him accountable for lying to the court when the tenant produced proof of payment.[88]

In general, court proceedings revealed a bias toward the landlord's version of events and a reflexive judgment to evict unless a tenant demonstrated great skill and tenacity and arrived equipped with evidence in the proper format. Representation did little to alter these dynamics, as the court and landlord attorneys viewed lawyers representing tenants as a barrier to court operations. The judge regularly complained that Legal Aid was slowing down the court process by taking time to consult with clients and opposing counsel.[89]

Generally, legal proceedings depend on lawyers who are familiar with complex procedural rules and legal arguments. Small claims courts, however, were envisioned as a departure from this formal juridical system, one where individuals could settle low-stakes disputes without turning to expensive lawyers.[90] Access to justice measures add an additional layer of accessibility and fairness to this vision. Despite rulings that maintain this legal fiction,[91] the reality is much different, as the case study of Tulsa demonstrates. Small claims courts are not lawyer-free zones. They remain "fundamentally lawyer-centric."[92] Far from experiencing a fair and impartial tribunal, tenants experience bewildering court processes that replicate societal patterns of marginalization. Access to justice measures continue to operate in a legal system that privileges property rights and denies habitability claims. Creating a space for these habitability claims would give marginalized individuals a voice, enabling them to move beyond the procedural confines that regularly exclude them.

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[87] *Id.*

[88] *Id.*

[89] Court Observations, Tulsa Eviction Court (Oct. 6, 2021; May 25, 2022) (on file with author); Conversations between Author and Legal Aid Attorneys (Jan. 27, 2021; April 29, 2021); *see also* Hallway Observation, Tulsa Eviction Court (Apr. 5, 2022) (on file with author) (describing a hallway negotiation in which a landlord attorney adopted a more aggressive negotiation stance when a Legal Aid attorney approached the tenant to offer legal assistance).

[90] *See, e.g.*, Steele, *supra* note 9.

[91] *See, e.g.*, Patterson v. Beall, 19 P.3d 839, 842-43, 845 (Okla. 2000) (holding that a motion for summary judgment is inconsistent with Oklahoma's Small Claims Procedure Act, whose goal is to provide a "people's court" for simple and uncomplicated justice).

[92] Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 516 (2022).

II. ACCESS TO JUSTICE AS A BARRIER TO SOCIAL CHANGE

As Part I demonstrates, tenants who attend their eviction hearings are often precluded from participating and having a voice in obtaining a just outcome. Access to justice reforms seek to overcome these exclusionary dynamics by focusing on procedural justice to increase accessibility for individuals who traditionally lack power and knowledge of the legal system. Access to justice commissions exist in over forty U.S. states and territories.[93] Made up of court representatives and other stakeholders, they focus on "overcoming specific barriers to civil justice created by inability to afford counsel" and the disadvantages stemming from being part of a marginalized group.[94] Designed by legal actors working in the civil justice system, access to justice remedies target the legal process.[95] They reflect the legal culture's understanding of the system and its deficiencies, viewed through the lens of procedural fairness. Because these actors are themselves part of the dominant legal narrative, their remedies continue to promote this nomos.

The dominance of the procedural focus is exemplified in the mission statements of access to justice institutions. The U.S. Department of Justice's Access to Justice Office defines its mission as working "to break down barriers" and "to ensure access . . . for all communities" so that "fair and efficient legal systems deliver just processes and outcomes."[96] The National Center for Access to Justice defines its goal as ensuring "the meaningful opportunity to be heard, secure one's rights and obtain the law's protection."[97] State access to justice commissions similarly define their missions around helping marginalized groups overcome barriers in the civil legal system. A sample of these statements includes the following goals: "creat[ing] solutions for those who lack the information, tools, and services necessary to resolve their civil legal

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[93] For a list of these commissions, see *Directory and Structure*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/atj-commissions/commission-directory/ (last visited Oct. 27, 2023) (on file with CUNY Law Review).

[94] *Definition of an Access to Justice Commission*, ABA RES. CTR. FOR ACCESS TO JUST. INITIATIVES 1 (2014) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_commission.pdf (on file with CUNY Law Review).

[95] *See* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS, Winter 2019, at 49, 50.

[96] *About ATJ*, U.S. DEP'T OF JUST.: OFF. FOR ACCESS TO JUST., https://perma.cc/E3AF-P5TS (Aug. 24, 2023).

[97] *Our Mission: Policy Solutions to Access to Justice Problems*, NAT'L CTR. FOR ACCESS TO JUST., https://perma.cc/29GH-25GZ (last visited Nov. 18, 2023).

problems fairly, quickly, and economically" (Colorado);[98] "improv[ing] the ability of low- and moderate- income residents to access the civil justice system" (D.C.);[99] "overcom[ing] barriers to justice and empower[ing] North Carolinians to meet legal needs" (North Carolina);[100] and "expand[ing] access and reduc[ing] barriers to justice in civil legal matters for the poor" (Texas).[101] These examples illustrate an approach that targets the legal process without engaging with the substance of the law.

Scholarship examining access to justice also often centers the "justice gap" created by the lack of representation in the civil justice system[102] and focuses on solutions designed to overcome this gap to advance a fair and equitable process. Remedies designed to promote procedural fairness focus on assisting individuals in navigating the otherwise opaque legal system by increasing access to the courts, to information, and to legal representation.[103] Specific measures targeting these goals include simplified self-help forms, court and other websites with information and forms, intake and referral systems, fillable forms, limited-scope or unbundled services, know-your-rights materials, courthouse navigators, and programs to provide legal representation.[104] These measures include an implicit assumption that measures targeting in-

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[98] COLO. ACCESS TO JUST. COMM'N, https://perma.cc/NW37-SQBY (last visited Nov. 18, 2023).

[99] D.C. ACCESS TO JUST. COMM'N, https://perma.cc/UJ6Y-YGCJ (last visited Nov. 22, 2023).

[100] *North Carolina Equal Access to Justice Commission*, N.C. JUD. BRANCH, https://perma.cc/83PD-DW92 (last visited Nov. 22, 2023).

[101] TEX. ACCESS TO JUST. COMM'N, https://perma.cc/9E64-T6AH (last visited Nov. 22, 2023).

[102] *See, e.g.*, Steven J. Knox, Letter from the Editor, 16 J.L. SOC'Y 1, 1 (2014); Marilyn Kelly, *Access to Justice*, 16 J.L. SOC'Y 3, 3 (2014); Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 499-500 (2017).

[103] Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391, 394-95 (2020); *see also* Katherine Alteneder & Linda Rexer, *Consumer Centric Design: The Key to 100% Access*, 16 J.L. SOC'Y 5, 7 (2014); Faith Mullen, *Narrowing the Gap Between Rights and Resources: Finding a Role for Law Students in Court-Annexed Resource Centers*, 16 J.L. SOC'Y 31, 60 (2014); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. SOC'Y 61, 98 (2014); Wayne Moore, *Increasing Access to Justice*, 16 J.L. SOC'Y 103, 158 (2014).

[104] *See, e.g.*, Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 600-02 (2019); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1804-05 (2001).

creased access to court processes result in fairer or more just outcomes.[105]

These process-based initiatives, however, target the individual's interaction with the legal system while ignoring the larger context in which this process unfolds. The coupling of fairness with process assumes that these measures will advance an individual's right to be heard. But the system of procedural justice does not provide marginalized individuals with meaningful participation in the legal system.[106] Rather, their voices continue to go unheard in a nomos that excludes legal categories that incorporate their concerns.

While represented tenants may reap some advantages in negotiating the terms of their departure, they remain fundamentally powerless in the legal system writ large. As described below, access to justice measures cannot overcome the structural advantages of the more powerful players. Rather than elevating the habitability claims of tenants, representation within an access to justice framework serves to legitimize this exclusion under the guise of fairness. Moreover, for both pro se and represented litigants, the focus on process at the expense of outcomes minimizes the prospects of mobilizing for social change. Social change is inhibited both because of the failure to consider systemic factors and because of the disillusionment engendered through the experiences of marginalized individuals in their interactions with the system.

A. Procedural Imbalances: Playing a Rigged Game

Small claims courts are characterized by legal rules and procedures that are inscrutable to the non-lawyer.[107] They operate within an adversarial system that rewards those who can exploit procedural and technical advantages as judges rule passively on litigant-driven motions.[108] This system creates a procedural imbalance in which pro se litigants, facing intimidating and unfamiliar courtroom practices, square off

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[105] *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, 2069 (1999); Rhode, *supra* note 104, at 1786; Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 49 (2003); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 404 (2004); Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 256 (2018) (discussing the deficit of empirical information about state court processes amidst the calls for access to justice).

[106] *See* White, *supra* note 2, at 4; Bezdek, *supra* note 2, at 538-39.

[107] *Cf.* Carpenter et al., *supra* note 92, at 556-57 (describing this phenomenon in civil courts more broadly).

[108] *See id.* at 562-63.

against more knowledgeable lawyers. These lawyers are not only familiar with legal rules and procedures but are also likely to be repeat players who have familiarity with the type of hearing, the courtroom, and the judge. In eviction court, a typical tenant embodies poverty and other forms of marginalization, lacks knowledge of the rules of the game, and plays the game one time in isolation. Their opponent is often a well-resourced attorney who plays the game repeatedly, knows how the game is played, and knows how to exploit the rules of the game to their side's advantage.

This knowledge advantage is usually accompanied by greater resources. Marc Galanter describes how the advantages that repeat players have in terms of resources and incentives ensure that "the 'haves' come out ahead."[109] Galanter's seminal article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, outlines why the poor, politically isolated, and marginalized "have nots" will always lose to the rich, mobilized, politically powerful "haves."[110] Legal representation cannot overcome these institutional limits because the system provides repeat players with structural advantages.[111] While process-based initiatives seek to ensure that everyone has access to the same rules, they ignore the unequal influence over how the rules are made and interpreted.[112]

Tulsa's eviction court exemplifies the process Galanter describes. As Section I.B demonstrates, landlord attorneys in that court have created a playing field that reflects their interests.[113] Judges do not require supporting evidence from landlords and may try the landlord's case for them while failing to elicit information from tenants that could potentially help their case. They do not require landlords to be in court, but will generally default a tenant who fails to appear.[114] Reflecting the landlord's perspective, the eviction court judge focuses on the issue of unpaid rent[115] or sends a tenant to the hall to negotiate with the landlord or

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[109] *See generally* Galanter, *supra* note 12.

[110] *Id.*

[111] *Id.*

[112] *See id.* at 118.

[113] *Supra* Section I.B.

[114] These processes are not unique to Tulsa. *See, e.g.*, Bezdek, *supra* note 2, at 555-56; *see also* 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, 502 (2011) (calling for the elimination or reform of default judgments to advance procedural justice).

[115] Bezdek also described this phenomenon. Bezdek, *supra* note 2, at 540.

their attorney,[116] a process that generally involves determining how much the tenant will pay and when they will leave the property.

Eviction court is designed to realize the purpose set out by the Supreme Court in *Lindsey v. Normet*,[117] that of enforcing the property owner's right to possession while closing off avenues for tenants to enforce habitability claims.[118] The court assumes the validity of an eviction filing unless the tenant provides evidence to refute it.[119] The landlord, by contrast, is not required to provide evidence of their claim against the tenant.[120] Additionally, the tenant is barred from raising counterclaims centered on habitability. By shifting the burden of proof to the defendant,[121] the court gives the benefit of the doubt to the more socially advantaged landlord while placing the evidentiary burden on the disempowered tenant. This hierarchy is reinforced by the fact that, in many eviction proceedings, the judge plays an active role in putting on the landlord's case.[122] The effect is to transform the courtroom from an arena of justice where the obligations of both sides are given equal weight to a mechanism for possession and debt collection.[123]

These inequities have continued unabated because small claims courts operate with little oversight or accountability.[124] There is rarely a record of proceedings[125] and, as a result, few challenges to them. The effect is "nearly unfettered and unreviewed judicial discretion."[126] As Judith Resnik highlights, the lack of accountability makes it impossible to assess the fairness of outcomes or the ways in which interactions with the legal system uphold the dignity of participants.[127] The absence of public oversight over the application of legal norms precludes any pathways for identifying what reforms are needed to make the system fairer.[128] Transparency and accountability are integral to advancing a more

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[116] TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 6.

[117] 405 U.S. 56 (1972).

[118] *See* Bezdek, *supra* note 2, at 540; *see also supra* Section I.B.

[119] *Supra* Section I.B.

[120] *Id.*; *see also* Bezdek, *supra* note 2, at 540; TERRY WEST CIV. LEGAL CLINIC, *supra* note 1, at 4; Steinberg, *supra* note 114.

[121] *See* Bezdek, *supra* note 2, at 570.

[122] *Id.*; *supra* Section I.B.

[123] TERRY WEST CIV. LEGAL CLINIC, *supra* note 15, at 7; Bezdek, *supra* note 2, at 570.

[124] Carpenter et al., *supra* note 92, at 514-15.

[125] *Id.* at 514.

[126] *Id.* at 515.

[127] Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 611 (2018).

[128] *Id.*

democratic process in the courts,[129] ensuring fairness and dignity for all participants.[130] Yet, existing reforms continue to reflect the interests of the dominant nomos and its framework of procedural justice. Participants who do not experience transparency and fairness are unlikely to view outcomes as legitimate.[131] Poor litigants have long expressed such sentiments in their interactions with the system.[132] Process-based access to justice remedies can do little to alter this fundamental feature. To the contrary, such initiatives advance an equality of process that may in fact perpetuate societal and procedural inequities under the guise of justice.

B. Procedural Justice as an Exclusionary Process

Tenants who navigate eviction proceedings on their own may be denied a real opportunity to be heard in a system designed to hear only the voices of those speaking the proper legal language.[133] Descriptions of eviction court are replete with examples of tenant pleas about habitability or other issues linked to human dignity falling on deaf ears because they fail to accord with the rules of evidence or are not framed in the proper legal terms.[134] In this situation, pro se litigants often get access without the justice.[135] Judicial attitudes toward marginalized litigants who fail to adhere to the rules of the game routinely thwart pro se litigants who have some knowledge of their rights or who receive limited scope representation.[136] Such limited representation may provide more procedural fairness but does little to affect outcomes within the system,[137] as even those tenants who have been advised of their legal defenses may be unable to assert them effectively.[138]

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[129] *Id.* at 617.

[130] *See id.* at 621.

[131] *Id.* at 611.

[132] *See generally* Austin Sarat, *The Law Is All Over: Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990) (describing how, for many welfare recipients, the law replicates their experiences of marginalization); Bezdek, *supra* note 2 (arguing that many tenants choose not to participate in the legal process as an act of resistance); Court Observations, Tulsa Eviction Court (on file with author) (in which tenants repeatedly express frustration with the court process, feeling that they did not have their day in court).

[133] Bezdek, *supra* note 2, at 586-90; *supra* Section I.B.

[134] *See* Bezdek, *supra* note 2, at 586-90; *supra* Section I.B.

[135] *See* Michele Statz et al., *"They Had Access, but They Didn't Get Justice": Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL'Y 321, 374 (2021) (describing this phenomenon specifically in rural America).

[136] *See* Bezdek, *supra* note 2, at 586-90; Colleen F. Shanahan et al., *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367, 1369-72 (2016).

[137] Shanahan et al., *supra* note 136, at 1371-72 (noting that, while studies on ultimate outcomes for individual tenants receiving limited representation are mixed, such representa-

Some calls for reform have focused not only on increasing representation,[139] but also on redesigning the court system and procedures.[140] The latter approach asks judges to take on a more active role in determining the validity of cases where the pro se litigant may not be able to raise relevant challenges on their own. This includes explaining and simplifying court procedures, allowing and guiding informal narratives to develop the facts, and employing discretion to address other imbalances and information gaps.[141] Yet, even in jurisdictions where judicial ethics rules encourage judges to adopt these reforms and allow them to assist pro se litigants without violating impartiality, judges have not significantly altered courtroom practices designed for lawyers.[142] Accordingly, pro se litigants continue to encounter barriers in presenting relevant facts or defenses, and the petitioner's version of facts often dominates.[143]

The result is judge-driven justice based on adherence to procedural rules that determine outcomes without full access to information.[144] Generally, this information gap comes from the tenant side. Their lack of familiarity with procedural rules means that tenants are regularly muted for failing to adhere to these rules, rules that judges choose to

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tion is ill-positioned to advocate for law reform more broadly); Steinberg, *supra* note 114, at 482-95 (finding that, while "the provision of unbundled legal services did advance procedural justice," limited representation still produced "grim substantive outcomes"); Jessica K. Steinberg, *Law School Clinics and the Untapped Potential of the Court Watch*, 6 IND. J.L. & SOC. EQUAL. 176, 181 (2018).

[138] *See* Rhode, *supra* note 104, at 1787 ("Procedural hurdles and burdens of proof may prevent the have-nots from translating formal rights into legal judgments."); *see also* Steinberg, *supra* note 114, at 494-95 (noting that while "provision of unbundled legal services was very effective at helping tenants raise cognizable defenses," tenants who raised these defenses did not fare any better than those who raised non-cognizable defenses).

[139] *See, e.g.*, Rhode, *supra* note 104, at 1816-18; Colleen F. Shanahan et al., *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 512-14 (2016) (finding that "representatives can and do help less powerful parties," but noting that "representation is not monolithic" and "different legal contexts call for different types of legal assistance and for representatives making different strategic choices").

[140] *See, e.g.*, Shanahan et al., *supra* note 139 (assessing the effectiveness of these reforms); *see also* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1898-1911 (2002) (providing recommendations to designers of alternative dispute resolution systems and legislators on incorporating "procedural equalities" into their work).

[141] Carpenter et al., *supra* note 92, at 513; *see also* Engler, *supra* note 105, at 2028-40 (calling for more active involvement by judges, as well as clerks and mediators, under an alternate conception of impartiality).

[142] Carpenter et al., *supra* note 92, at 516.

[143] *Id.*

[144] *See, e.g.*, *id.*; Sabbeth, *supra* note 11, at 78-79.

strictly impose on them.[145] These procedural rules also ensure the continuation of the dominant nomos focused on possession while faulting the individual for forfeiting their rights by failing to follow the court's rules. From the perspective of this dominant normative order, it is not the law that has failed to protect, but rather the individual who has failed to avail themself of the law's protections.[146]

This understanding masks the underlying reality described by Galanter: Due process protects the possessor because procedural rules create structural advantage.[147] Pro se litigants are unfamiliar with existing procedures, while lawyers going up against unrepresented litigants generally benefit from them. Tenants are forced to play by the rules of civil procedure that were not designed for them, resulting in formal law that is far removed from the needs of these litigants.[148] These rules are not just detached from the interests of pro se litigants, but have developed to favor the represented side.[149] In fact, judges may be unfamiliar with or ignore legal provisions favoring pro se litigants because either no one raises these provisions at all[150] or pro se litigants who raise them go unheard because they do not speak in the proper legal language.[151]

In recognition of the barriers pro se litigants face, many advocates promote access to counsel as a critical component of access to justice measures.[152] A handful of cities have established a right to counsel for eviction cases.[153] Proponents of increased representation depict the at-

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[145] *See* Bezdek, *supra* note 2, at 571-75.

[146] *Id.* at 567-68 (citing KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 1-10 (1988)).

[147] Galanter, *supra* note 12, at 124.

[148] *See* Carpenter et al., *supra* note 105, at 283 (explaining that procedural rules "clearly do[] not contemplate pro se litigation" and do not match "the dynamic needs of the state courtroom").

[149] *See, e.g.*, Sabbeth, *supra* note 11, at 78.

[150] *Id.*; *see also* Sabbeth, *supra* note 27, at 384 (describing this phenomenon in housing court, where tenants largely appear pro se).

[151] Bezdek, *supra* note 2, at 586; *see also* Steinberg, *supra* note 114, at 495 (explaining that tenants' cognizable defenses are "rarely asserted explicitly").

[152] *See, e.g.*, Risa E. Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014); Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J.C.R. & C.L. 63 (2020); *see also* Statz et al., *supra* note 135 ("Any [access to justice] initiative which ignores or attempts to supplant or remove the role of the attorney is doomed to only offer access—and to ultimately lose the 'to justice.'"); AM. ACAD. OF ARTS AND SCIS., CIVIL JUSTICE FOR ALL (2020), https://perma.cc/GQN7-ULPU (noting the civil justice gap and calling for the provision of legal services).

[153] These include New York City, San Francisco, Cleveland, Newark, and Philadelphia. AM. ACAD. OF ARTS AND SCIS., *supra* note 152, at 7. More recently, Providence, St. Louis, and the county of Milwaukee have all passed right to counsel programs for evictions. Press

torney as the "bridge between 'access' and 'justice.'"[154] In this view, only attorneys can guarantee that the right to be heard is a meaningful one, ensuring that due process is realized. This view, however, does not consider how context affects the role that legal representation can play.[155] A study of Manhattan's housing court highlights this divide between process-based and more contextual understandings of justice. The study found that representation did have a positive effect on procedural outcomes in terms of eviction orders and money judgments, but it contained no data on substantive results.[156] Accordingly, access to counsel may have increased procedural fairness while having no effect on outcomes.

An example from the South Bronx highlights how underlying power dynamics can limit the efficacy of increased representation. Legal aid attorneys there developed a strategy that relied on procedural challenges to delay eviction proceedings and gave tenants greater bargaining power against landlords.[157] Without a broader challenge to the legal framework around housing, however, the success of this strategy gave rise to a backlash undermining the early positive effects. At the urging of landlords, subsequent reforms eliminated some of these procedural requirements in favor of more informal proceedings, negating the bargaining power of tenants.[158]

The South Bronx reforms met many of the hallmarks of access to justice: Tenants had legal representation, they were able to access the

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Release, City of Providence, City of Providence Launches Eviction Defense Program in Partnership with Rhode Island Legal Services (Aug. 24, 2022), https://perma.cc/MCR2-NW4E (announcing the launch of Providence's Eviction Defense Program, which was set to run for a period of one year); *St. Louis Is 22nd Right to Counsel Jurisdiction*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (July 7, 2023), https://perma.cc/S3EF-XC6R; *Milwaukee County Provides Counsel for All Tenants Facing Eviction*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Mar. 23, 2023), https://perma.cc/UQ7A-QNV5. Additionally, three states have a categorical right to counsel, and another thirteen have a qualified right to counsel. *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/map (last visited Dec. 13, 2023).

[154] Statz et al., *supra* note 135, at 374.

[155] *See, e.g.*, Bezdek, *supra* note 2, at 538 n.16 (questioning whether more legal counsel is the answer); *see also* Emily Ryo & Ian Peacock, *Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings*, 55 LAW & SOC'Y REV. 634, 652-54 (2021) (questioning the effectiveness of access to counsel in immigration courts). Both articles argue that context affects the success of legal representation.

[156] *See* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 429-30 (2001).

[157] *See* Marc H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 119, 129-35 (Richard L. Abel ed., 1982).

[158] *Id.* at 131, 139.

legal system, and they invoked legal procedures to their benefit. But without a broader approach that considered contextual factors and power dynamics, the system remained fundamentally unchanged, and the rules were remade to benefit the "haves." Landlords regained their positions of power, while tenants remained vulnerable to homelessness and non-habitable housing.

Such power dynamics are not limited to eviction cases. Similar dynamics are at play in consumer debt and debt collection cases, which are dominated by debt collection businesses. These debt buyers use the courts to pursue their own economic gain.[159] Other research has highlighted that the effects of representation in immigration court depend on contextual factors, and access to counsel alone may not be enough to achieve fair outcomes.[160] By ignoring the sociopolitical context, legal representation may silence and disempower marginalized voices as it forces them into legal categories that do not fit their own lived realities and narratives. Lucie White provides a powerful description of this scenario in the case of Mrs. G, a poor single mother who faced fraud charges following an alleged overpayment of welfare benefits.[161] White shows how Mrs. G's legal options to combat these charges did not fit her lived experience of these events. Despite feeling fully justified in her actions, the legal options demanded that she either play the role of the poor welfare recipient begging for pity (the necessity argument) or blame her case worker with whom she had a relationship (the estoppel argument). In the end, Mrs. G ignored her lawyer's advice and imposed her own, non-legal narrative, which White characterizes as a form of political action.[162] Although the fraud charges were ultimately dropped for unknown reasons, White points out that Mrs. G was still a "Black, single mother on welfare" whose act of resistance did little to change the broader legal and sociopolitical context of her marginalization.[163]

Tenants in eviction court confront similar experiences of disempowerment because the legal process forces their experiences into fixed legal categories that obscure their lived realities. Because access to justice measures targeting procedural fairness continue to operate in the dominant nomos, they are incapable of transforming the tenant's eviction court experience into one based on equality and neutrality. Even

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[159] *See generally* THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS (2020), https://perma.cc/M75G-QDZG.

[160] *See* Ryo & Peacock, *supra* note 155; *see also* Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 457-60 (2023).

[161] *See generally* White, *supra* note 2.

[162] *Id.* at 46, 52.

[163] *Id.* at 52.

with full access and representation, litigants are participating in a game weighted against them. Tenants observe a courtroom where procedures favor landlords at their expense. They are held to formal requirements from which landlords are, at least informally, exempted. These include evidentiary standards, the introduction of new claims, and even their very presence at the proceedings.[164] Tenants are not afforded the same leeway to argue their case as landlords.[165] In short, they lack a voice in these proceedings—they are either silenced by the court, or they may silence themselves as an act of resistance.[166] Denied the opportunity to participate in the lawmaking process, they have no way to counter laws made to benefit the power holders and their property rights. Despite increased access, marginalized individuals are still playing by someone else's rules. Representation and other measures targeting process do little to alter this reality and instead serve to add a layer of legitimacy to a system where outcomes continue to reflect societal patterns of marginalization.

C. Procedural Justice and the Limits of Social Change

By not engaging directly with existing power dynamics, access to justice measures rely on a legal fiction around how the law operates in practice—what Galanter calls "the 'dualism' of the legal system."[167] This dualism refers to the gap between the lofty ideals and concepts of our legal system and the practices on the ground. These practices often reflect power dynamics within society and are based on the legal interpretations of frontline individuals acting autonomously.[168] Street level or frontline actors subject to institutional pressures employ a "selective application of rules in a context of parochial understandings and priorities," creating outcomes that are detached from universal or higher law principles.[169] This "dualism" creates symbolic universal principles alongside particularistic practices.[170] The gap between the "ideology of

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[164] *See supra* Section I.B.

[165] *See supra* Section I.B; Bezdek, *supra* note 2; Sabbeth, *supra* note 11; *see also* Carpenter et al., *supra* note 92, at 515 (showing how judicial discretion tends to disfavor pro se litigants).

[166] Bezdek, *supra* note 2, at 581, 585.

[167] Galanter, *supra* note 12, at 148.

[168] *Id.* at 147-48; *see also* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (explaining how street-level bureaucrats exercising their discretion in situations of ambiguity, combined with the pressures of high caseloads, effectively implement their own versions of public policy).

[169] Galanter, *supra* note 12, at 148.

[170] *Id.*

law" and the way the law functions on the ground limits the prospects for reforms targeting court processes to bring about fundamental social change through a redistribution of power.[171]

The institutional structure restricts the landscape of potential legal challenges and accompanying social change. A singular appeal does not challenge broader practices or change the rules of the game for everyone.[172] Additionally, marginalized litigants in proceedings such as evictions are defendants. As defendants, their opportunities for achieving social change are limited both because they do not control the proceedings, and because their individual defenses—to the extent they are able to raise such defenses—preclude opportunities for collective action and social mobilization.[173]

Other structural forces further exacerbate the powerlessness of the "have nots" to influence the rules. The system's inability to hear all of the cases on its docket creates pressures on parties to settle, limiting the opportunities to challenge the rules.[174] This reality reinforces a status quo that favors one side, a reality in which there are "more rights and rules 'on the books' than can be vindicated or enforced."[175] Not only does this reinforce a status quo favoring the rule-makers, it also forces decisionmakers to prioritize. As they engage in this prioritization, Galanter explains, these decisionmakers are likely to be more responsive to those constituents who already hold a resource advantage.[176]

Marginalized populations generally lack the resources and organization needed to mobilize to challenge the system.[177] Beyond these structural limitations, reforms targeting procedural fairness may inhibit social mobilization by masking and downplaying the underlying inequalities shaping the system. In the criminal law context, Paul Butler has characterized the right to counsel as a false vision of agency in the system.[178] For Butler, *Gideon v. Wainwright*, which established the right to counsel in criminal cases initiated in state courts,[179] has not only failed to alter outcomes, but has also created a misplaced sense of fairness that

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[171] *See* Laura Nader & David Serber, *Law and the Distribution of Power*, *in* THE USES OF CONTROVERSY IN SOCIOLOGY 273, 289 (Lewis A. Coser & Otto N. Larsen eds., 1976).

[172] *See* Galanter, *supra* note 12, at 137.

[173] Sabbeth, *supra* note 11, at 110-11.

[174] Galanter, *supra* note 12, at 121.

[175] *Id.* at 122.

[176] *Id.*

[177] *See id.* at 136 (explaining that litigation, particularly test cases initiated to change rules, is often not an option for the "have-nots").

[178] Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2194 (2013).

[179] Gideon v. Wainwright, 327 U.S. 335 (1963).

has impeded political mobilization and social change.[180] Angélica Cházaro has been similarly critical of the right to counsel movement in immigration law.[181] In eviction proceedings, an emphasis on procedural fairness and representation likewise conceal the underlying inequalities and sociopolitical hierarchies.[182] Representation creates a "formal equality between the rich and the poor" in the legal system[183] that does not exist outside of this system. In doing so, it ignores the ways in which the law affects marginalized populations.[184] Calling for more process and legal counsel as the solution undermines engagement with broader structural and systemic inequality while limiting opportunities for mobilization and social change. Under this approach, legal representation is no longer a means to an end, but becomes an end in itself.[185]

The emphasis on procedural fairness imposes social costs on marginalized individuals, further inhibiting social change by fostering disillusionment and disengagement. Process-based access to justice measures characterize a legal loss—in concrete terms, the loss of one's housing—as the outcome of a fair procedure that afforded individuals their day in court. This interpretation represents a dominant legal narrative that fails to engage with the lived experiences of marginalized individuals, promoting their disillusionment with the system. The disillusionment marginalized individuals experience may be exacerbated by their dependence on lawyers whom they perceive to be part of the system, bolstering its legitimacy[186] by continuing to promote the dominant nomos. Feeling that the system is stacked against them, marginalized individuals may simply submit to this reality, which closes off avenues for social change.[187] For tenants, access to justice measures do little to dispel the notion that courts are not an arena for rights realization, at least not for their rights. They represent the rules of the more powerful, and

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[180] Butler, *supra* note 178, at 2178.

[181] *See generally* Cházaro, *supra* note 160.

[182] *See* Butler, *supra* note 178, at 2195 (first citing Peter Gabel & Jay Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW 497, 498 (David Kairys ed., 3d ed. 1998) (describing the oppressive social hierarchies underlying contract law); then citing WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 124 (1995)) (observing that individual rights and entitlement obscure social problems).

[183] *Id.* at 2197.

[184] *See generally id.*

[185] *See id.* at 2191.

[186] *See* William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 388 (1985) (explaining that formal procedures can "mak[e] disadvantaged litigants feel incompetent and powerless," rendering them dependent on lawyers who promote "the fairness of the system").

[187] *See id.* ("Formal procedures can also subvert conflict and induce acquiescence.").

court proceedings cannot alter these power dynamics.[188] Based on their experiences with the legal system, marginalized tenants are all too familiar with the ways in which the "myth of rights" gives way to a "politics of rights"[189] directed by more powerful actors.

D. Marginalization

Access to justice measures focused on process do not account for any of the underlying dynamics of marginalization. As Barbara Bezdek points out, "[T]he standard view of access-dysfunction largely ignores the dimensions of social power" and the exclusion of the marginalized or socially powerless groups, including women, minorities, and the poor.[190] The focus on process fails to consider how this sociopolitical marginalization operates at the institutional level. Instead, it advances a façade of equality that overlooks the "institutional exclusion"[191] in the judicial arena. For the tenant, however, the judicial process merely replicates the subordination and exclusion they experience in the world.[192]

Under these circumstances, eviction proceedings are not simply about individual cases of overdue rent and the right to possession; they are about the exclusion of marginalized groups based on race, gender, and class.[193] In fact, women and minorities make up a disproportionate segment of defendants in civil proceedings as compared to criminal proceedings[194] and experience disproportionate rates of eviction.[195] Because of the barriers to achieving social change in these forums, the law continues to neglect the interests of these marginalized groups, reinforcing

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[188] *See generally* Galanter, *supra* note 12.

[189] *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 7 (2d ed. 2004).

[190] Bezdek, *supra* note 2, at 540-41.

[191] *Id.* at 570; *see also* White, *supra* note 2, at 4 (discussing the "disjuncture between the norm of at least *equal*—if not *meaningful*—participation opportunities for all citizens and a deeply stratified social reality [that] reveals itself when subordinated speakers attempt to use the procedures that the system affords them"). *See generally* BUMILLER, *supra* note 146 (examining the role of antidiscrimination laws in perpetuating victimhood, arguing that the law recreates social divisions and power dynamics, reproducing victims' feelings of powerlessness in the legal system).

[192] *See* Bezdek, *supra* note 2, at 596.

[193] *Id.* at 598-99 (noting that poor tenants appear in court as individuals, but also represent a shared experience of marginalization based on "race, gender, and class").

[194] Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1130, 1135 (2023).

[195] *See id.* at 1145; *see also* Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOC. SCI. 649 (2020).

their systemic marginalization.[196] The focus on process both perpetuates and legitimizes this continued subordination under the guise of procedural fairness.

Discussing the gendered nature of this dynamic, Kathryn A. Sabbeth and Jessica K. Steinberg point to the legal system's failure to adopt a broader understanding of justice that incorporates the well-being of families.[197] This failure transforms the court into an apparatus of the state acting punitively to reinforce particular values,[198] values that do not consider the dignity or well-being of the individual or their rights. Sabbeth and Steinberg attribute this deficit to the fact that issues like substandard housing primarily affect poor women, underscoring the anti-democratic nature of the legal system[199] and the categories it privileges. The access to justice approach promotes these anti-democratic outcomes by addressing procedural issues that do little to alter fundamental inequities while also blocking prospects for social change.

The elevation of process does not simply mask and perpetuate these underlying inequities. By promoting procedures that assert an equality of process in accordance with universal norms, process-based measures confer legitimacy on these institutions and patterns of practice.[200] The dominant conception of access to justice offers a legal pathway to influence individual outcomes while failing to engage with the inequities built into the system.[201] Accordingly, process-based access to justice reforms continue to operate within an adversarial system that relies on maximizing power within existing frameworks but leaves the marginalized structurally powerless.[202] Because these reforms do not fundamentally alter the system within which these claims are being brought, they provide largely symbolic changes that neither reallocate the distribution of advantage[203] nor address the underlying marginalization.

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[196] *See generally* Sabbeth & Steinberg, *supra* note 194 (analyzing the gendered nature of access to counsel); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97 (2019) (describing the intersections of poverty with class, race, and gender biases in the legal system and the enforcement of rights).

[197] *See* Sabbeth & Steinberg, *supra* note 194, at 1192.

[198] *Id.*

[199] *Id.* at 1197.

[200] Butler concludes that procedural rights are "especially prone to legitimate the status quo, because 'fair' process masks unjust substantive outcomes and makes those outcomes seem more legitimate." Butler, *supra* note 178, at 2201.

[201] *See* Galanter, *supra* note 12, at 148 (noting that "un-reform" is a foundation of the legal system).

[202] *Id.* at 150.

[203] *Id.* at 149.

III. MOBILIZATION, ADVOCACY, AND SUBVERSIVE STORIES

Access to justice measures operate within the court's own rule-oriented narratives, consisting of fixed rules dictating procedures and determining responsibility.[204] These narratives reinforce the exclusion of the voices of marginalized individuals, who rely on more relational accounts to describe their situation and understandings of justice.[205] Their relational accounts center on social relations and the expectations that accompany them,[206] expectations that include the provision of habitable housing. Such relational narratives fall outside of the dominant nomos and its prescribed legal categories. The dominant nomos renders more relational-oriented or personal stories irrelevant and the tellers incoherent and digressive in ways that waste the court's time.[207] In perpetuating this dichotomy, the process-oriented access to justice framework ensures that the stories of marginalized individuals continue to go unheard, inhibiting social change.

The exclusionary dynamics, reflecting hierarchies of power, are exacerbated by the fact that marginalized individuals and those who represent them are playing a one-shot game that limits the prospects for legal mobilization and the formation of social movements.[208] While process-based access to justice measures alone cannot overcome these barriers, that does not make them insurmountable. Law and social change scholars have pointed to the ways in which legal mobilization efforts connect with broader social movements and deploy rights rhetoric to shape the political debate.[209] These scholars have also highlighted that judicial decisions do not occur in isolation. Rather than driving social change, judicial decisions often respond to and reflect advocacy for broader socie-

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[204] JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 58-59 (1990).

[205] *See* Bezdek, *supra* note 2, at 587.

[206] *See* CONLEY & O'BARR, *supra* note 204, at 58.

[207] *See id.* at 58-59.

[208] *See, e.g.*, Galanter, *supra* note 12.

[209] *See, e.g.*, SCHEINGOLD, *supra* note 189; Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). *See generally* Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117 (Keith O. Boyum & Lynn Mather eds., 1983) (examining "the flow of influence outward from courts to the wider world of disputing and regulating").

tal changes.[210] Political struggles to expand rights recognition can thus help shape judicial outcomes.[211]

In the housing sphere, the dominant nomos of the legal system privileges the right to possession over the right to habitability, but rights are not static and unchallengeable concepts.[212] Instead, they are part of a mutually constitutive process through which the rights discourse and associated social movements shape and are shaped by the political struggle, giving meaning and context to particular rights.[213] Social movements seeking to privilege other values can both employ and reshape the rights discourse.[214] Litigation provides an arena for activists to articulate demands and put forth alternative normative orders based on the rights discourse.[215] The telling and retelling of subversive stories can begin to challenge the dominant legal frame, making visible social relations that are hidden by a process-focused approach.[216]

Moreover, the law can be mobilized to shape the institutional context[217] both inside and outside the courtroom, what Stuart Scheingold

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[210] *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

[211] *See, e.g.*, Anne Rebecca Newman, *Transforming a Moral Right into a Legal Right: The Case of School Finance Litigation and the Right to Education*, PHIL. EDUC., 2006, at 89 (explaining how pairing activism with rights litigation can lead to actualization of rights and "a political environment that allows courts and legislators to promote reform via rights").

[212] *See generally* Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984) (challenging critical legal theory's rejection of liberal rights theory and considering the connection between rights and legal protection).

[213] *See, e.g.*, Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); SCHEINGOLD, *supra* note 189; MCCANN, *supra* note 209; Zemans, *supra* note 209.

[214] *See* Schneider, *supra* note 213 (recognizing that having a "rights discourse" is essential to legal and political strategies to effect change); *see also* Sparer, *supra* note 212, at 560 (noting that "[v]arious kinds of legal rights and entitlements may be used in a manner that helps to develop social movement"); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) (acknowledging a relationship between the law and social change).

[215] *See* MCCANN, *supra* note 209, at 12.

[216] *See generally* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998) (describing how stories can be used to challenge as well as reproduce legal hegemony, making visible how social organizations play out in the daily lives of marginalized individuals); Ewick & Silbey, *supra* note 8 (describing how narratives can reveal and rewrite social dynamics and power relations).

[217] *See generally* Ewick & Silbey, *supra* note 8; MCCANN, *supra* note 209; MICHAEL W. MCCANN & GEORGE I. LOVELL, UNION BY LAW: FILIPINO AMERICAN LABOR ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM (2020).

termed the "politics of rights."[218] For example, Michael McCann has explored how Filipino-American labor activists deployed universal human rights to challenge the dominant capitalist order whose emphasis on market forces and property rights excluded their rights claims.[219] Like the tenants in eviction court, these activists could not rely on procedural rights "to challenge systematic, de facto racial hierarchy and class exploitation."[220] Such process-based reform efforts provide little support for more fundamental shifts in power and resource redistributions to benefit marginalized groups.[221] Under these constraints, McCann shows how these and other issue activists (e.g., wage equity, civil rights, and domestic violence prevention activists) "persistently mobilized conventional rights for reconstructive purposes and reconfigured familiar rights into new, substantively radical visions for action."[222] Anne Rebecca Newman highlights a similar process in the education rights context, arguing that advocacy outside the courtroom can expand the rights rhetoric beyond what is judicially cognizable, a process that ultimately reverberates inside the courtroom.[223]

These broad mobilization efforts, occurring in multiple forms and arenas (legal and non-legal), start to reshape legal consciousness and the institutional context. As a result, when judges engage in "jurispathic"[224] acts that suppress transformative rights claims in support of the dominant normative order or nomos,[225] they may not be able to quell the underlying nomos on which these claims were based. Rather than taking the dominant legal order as exogenous and unchanging, legal mobilization scholars have adopted a constructive understanding of the law in which individuals are both constrained by it, and also reshape legal meanings through their interactions with the law.[226] As embodied in Scheingold's "myth of rights," rights realization does not flow directly from rights recognition because rights are embedded in a sociopolitical

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[218] SCHEINGOLD, *supra* note 189, at 7-9.

[219] *See generally* MCCANN & LOVELL, *supra* note 217.

[220] *Id.* at 388.

[221] *E.g.*, *id.* at 381.

[222] *Id.* at 393.

[223] Newman, *supra* note 211.

[224] Cover, *supra* note 4, at 53.

[225] MCCANN & LOVELL, *supra* note 217, at 396.

[226] *Id.* at 12; *see also* Patricia Ewick & Susan S. Silbey, *Common Knowledge and Ideological Critique: The Significance of Knowing That the "Haves" Come Out Ahead*, 33 LAW & SOC'Y REV. 1025 (1999) (examining how people's understandings of the gap between law and practice can maintain the institution of legality and the power of the law); Ewick & Silbey, *supra* note 8.

context.[227] The politics of rights requires strategically deploying rights as a "contingent resource" within this context to achieve social change, acting through both political and legal avenues to challenge the dominant normative order.[228]

These interactions are not always forward moving, as McCann emphasizes in the Filipino labor activist struggle.[229] However, they provide a resource that can be deployed in seeking to disrupt the dominant normative order or nomos, reshaping the discourse, and giving marginalized groups a voice. These struggles may ultimately facilitate recognition that marginalized groups, including tenants facing eviction, have rights entitlements.[230] By doing so, they also may provide a resource and a voice to activate "idle rights,"[231] as public contestations serve as a resource for future actions and support continued mobilization.[232] Litigation, even where unsuccessful, can serve as a mobilizing force, providing opportunities to organize and move beyond the one-shot player to create a social movement.[233] In this mobilization strategy, rights are a strategic resource, while litigation is one of a host of tactics.[234]

Advocates and scholars have long called for strategies to get past the one-shot game and develop reform strategies to bring about institutional change based on a different normative order.[235] The advancement of this alternative nomos demands advocacy in multiple arenas of power while highlighting the socioeconomic context requiring a redistribution of power. Community lawyering, in which group interests and understandings shape the actions of lawyers, rather than letting legal options

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[227] SCHEINGOLD, *supra* note 189, at 148, 204 (observing that rights are a "political resource" deployed through litigation and potentially leading to political action and organization).

[228] *Id.* at xix, 148; *see* MCCANN, *supra* note 209, at 10-11.

[229] MCCANN & LOVELL, *supra* note 217, at 24.

[230] *See id.* at 398-99.

[231] Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 89 (2005).

[232] MCCANN & LOVELL, *supra* note 217, at 398.

[233] SCHEINGOLD, *supra* note 189, at 136-37; *see* MCCANN, *supra* note 209, at 12.

[234] SCHEINGOLD, *supra* note 189, at 204-05.

[235] *See, e.g.*, Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Mae C. Quinn, *Post-Ferguson Social Engineering: Problem-Solving Justice or Just Posturing*, 59 HOWARD L.J. 739 (2016); Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509 (1996); Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 LAW & SOC'Y REV. 911 (1999).

of the dominant nomos drive the response,[236] provides one such avenue for amplifying the voices of marginalized communities. Moving outside of traditional models of representation helps to mobilize and empower marginalized individuals while also shaping the public discourse and centering their concerns in the formal legal process.[237] Reconceptualizing or expanding the access to justice framework can help frame legal demands based on habitability, resulting in new litigation strategies. These legal efforts can both reinforce and be shaped by social mobilization efforts in a mutually constitutive relationship.

CONCLUSION

This Article has advocated for an expanded conception of access to justice, arguing that current process-based access to justice reforms do little to address the rights claims of marginalized individuals. The nomos of the legal system discounts the experiences of these individuals, told in relational rather than rule-based terms. The dominant narrative frame also excludes their rights claims, privileging property over habitability, the latter rooted in shared notions of humanity. Lawyers who operate in this dominant nomos often perpetuate these inequities under the guise of justice. By challenging the dominant narrative through mobilizing efforts both inside and outside the courtroom, advocates can begin to reshape the institutional and sociopolitical context. The community lawyering model provides one way for lawyers representing marginalized clients to begin to empower and mobilize these individuals, transforming one-shot "have not" players into more effective communities of resistance and reconstitution.

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[236] *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 7 (1992). *See generally* William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL'Y 101 (2006) (calling for "revolutionary lawyering" as an alternative to lawyering that supports the status quo).

[237] For more on these effects, see Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987).