

National Civil Justice Reform:

A Proposal for New
Federal-State Partnerships

REPORT BY **DANIEL WILF-TOWNSEND**
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Executive Summary

The United States is currently facing widespread failures in its civil justice system. Americans routinely experience civil legal problems, but they are often unable to effectively enforce their legal rights or find the legal assistance necessary to defend their interests, even in serious disputes. Given the high cost of legal assistance, lackluster public investment in civil justice systems, and the rise of forced arbitration, it is common for Americans to have their legal rights violated and be left without a feasible remedy.

This report argues that the time is right for a sweeping investment in our nation's civil justice infrastructure—a national civil justice reform bill. Although federal funding for civil justice issues has focused historically on federal courts, the vast majority of civil disputes in the US are resolved in state and local courts. This report therefore proposes that a cornerstone of a national civil justice reform bill should be a new commitment by the federal government to invest in state and local civil justice systems, helping protect individuals' rights and ensuring that all Americans have access to the foundational public good of dispute resolution. The report proposes a broad grant of federal money to support and improve the operations of civil justice systems around the country. Federal money should be made available both via broad grants to support existing state operations and via specific project grants to foster innovation and take advantage of the many civil justice reforms that have been developed at the state and local level in recent years. Finally, to ensure that people around the country are able to benefit from this revitalized infrastructure, the report proposes restoring federal legal aid funding to its levels in prior years and abolishing forced arbitration in employment and consumer contracts.

Introduction: The Case For A National Civil Justice Reform Bill

The US faces a crisis of civil justice. Tens of millions of Americans experience legal problems every year but are unaware that the law can provide help, are unable to afford a lawyer, or both. Courts, meanwhile, are underfunded and overburdened, generating wait times and congestion for an essential public service. To top it all off, the rise of forced arbitration over the last decade has meant that many people aren't even able to go to court when they're wronged by their employer, their bank, or any other company they have a contractual relationship with. The net result is that the protections that the law is supposed to provide have become illusory or out of reach in many circumstances.

This gap between what Americans need and what our legal system provides is particularly severe for marginalized groups such as people of color or individuals and families with low incomes. Our current methods of financing and resolving civil disputes do a poor job of handling disputes in which smaller amounts of money are at stake, like a few hundred dollars or a sum in the low thousands—numbers that might arise in a dispute over a paycheck or a payment for rent or an auto loan. For the many Americans with low wages and low savings, that amount of money can determine whether a family is able to put food on the table or keep a roof over its head. And for those same people, the possibility of affording a lawyer is also the most remote—even though lawyers are often a necessity for effectively navigating our courts.

Many of the most significant problems that Americans face in life, such as wrongful evictions or unfair debt collection practices, are civil justice problems.

An underfunded civil justice system worsens preexisting disparities because many of the most significant problems that Americans face in life, such as wrongful evictions or unfair debt collection practices, are civil justice problems—even though the individuals facing them may not realize at the time that the civil justice system can provide recourse. Unlike the criminal justice system, which hears cases brought by the government against individuals for violating criminal laws, the civil justice system hears disputes between private parties and enforces our many non-criminal laws. The

civil justice system determines the legal rights of family members during a divorce; hears civil rights cases brought against employers or government officials; and protects consumers against dangerous products and unfair or deceptive corporate practices. In any given year, about 70 percent of low-income households experience at least one civil legal problem.ⁱ Collectively, this makes civil justice disputes numerous and common. In 2016 alone, for instance, an estimated 2.3 million evictions were filed in the US—a new eviction filing every four minutes.ⁱⁱ

Like all public infrastructure, the civil justice system needs active maintenance and attention. But in recent years, the provision of civil justice across the country has been seriously underfunded. The result is that courts have been struggling to respond adequately to changes that have emerged in how most civil disputes are resolved. As recently as the 1990s, most parties in civil disputes had lawyers. But the days of traditional adversarial proceedings, in which both sides can afford a lawyer to pursue their case in a court of law, are over. Now about three-quarters of cases have at least one unrepresented party—usually a defendant who cannot afford a lawyer being pursued by a plaintiff who can. Nevertheless, state civil justice systems are still generally structured around the old adversarial model, giving little advice or guidance to unrepresented parties. Unsurprisingly, the result is that not having a lawyer often results in much worse outcomes, even in serious cases where a person’s home, savings, or livelihood are in jeopardy.

An estimated 16 million Americans go through the civil justice system without a lawyer every year.

Despite these potentially devastating consequences, people with civil legal problems receive little or no legal help. One recent survey found that low-income Americans receive no legal help or inadequate legal help for 86 percent of the civil legal problems they face in a given year.ⁱⁱⁱ Many people who experience civil legal problems simply do not recognize their problems as ones the law can help with, or, if they do, nonetheless do not seek out legal help.^{iv} This problem is particularly severe for people of color, who are less likely than white people to turn to the courts when confronted with civil legal issues.^v And when people do attempt to use the courts to resolve their problems, public support is often inadequate. The Legal Services Corporation, which is the main conduit for federal funding to state and local legal aid organizations, reports that in 2017 its grantees were unable to provide any legal assistance for about 700,000 legal problems that were brought

to them, primarily due to a lack of resources.^{vi} It is now routine for people to try to navigate courts with no legal assistance whatsoever, with an estimated 16 million Americans going through the civil justice system without lawyers every year.^{vii}

It is time to reinvest in our nation's civil justice infrastructure. This report outlines the contours of a national civil justice reform bill that aims to address the civil justice gap in the US. The cornerstone of the proposal is a new program of federal funding for state civil justice systems that is designed both to support the operations and maintenance of these key public institutions and to fund innovations in court management and service delivery. Improving civil justice is not simply a question of increasing funding for lawyers: Improvements can, and should, come from many directions—increasing courts' accessibility and navigability; experimenting with new legal service delivery models; reforming court rules, practices, and procedures; and more. Recognizing this, federal funding should take advantage of the well of new ideas that have been built up in recent years by state and local access-to-justice commissions, legal aid organizations, and other government agencies and advocates, all of whom seek to improve the administration of civil justice but are often stymied by a lack of resources.

In addition to improving our nation's courts, a national civil justice reform bill should aim to ensure that everyone is able to take advantage of those courts. This report therefore also proposes reforms to the Federal Arbitration Act that would get rid of forced arbitration for workers and consumers so that federal law does not prevent anyone from having their day in court. It also recommends restoring funding for legal aid to its prior levels so that more people in need will have access to legal representation.

In recent years, there have been several significant calls for national civil justice reform, most notably other calls to end the growing and troublesome practice of forced arbitration. This proposal adds to those by pointing out the serious need for funding support and innovation in state civil justice systems around the country. Ending forced arbitration for workers and consumers is a necessary first step for ensuring that Americans have the ability to go to court and enforce their legal rights. And it is also essential to make sure that when Americans find themselves in court, the civil justice system is efficient and effective for everyone, regardless of their income or wealth. The underfunding of our state civil justice systems is a national problem, and calls for a national solution. This report provides one possible response—a national civil justice reform bill that creates a new broad base of funding for state courts.

The Problems Of Civil Justice

There is a gap between what Americans need and what the civil legal system provides. The causes and manifestations of this gap are complex and multifaceted. But there are four basic, interrelated components of the civil justice gap that are worth focusing on: the lack of legal representation for many who need it; the way that our civil justice system is nevertheless designed for people who are represented by lawyers; the shortage of public funding for basic civil justice services; and the ways federal law both neglects state civil justice systems and thwarts their efficacy.

A LACK OF LEGAL REPRESENTATION

Over the last 30 years, US courts have seen a massive increase in the presence of unrepresented parties. As recently as the 1990s, most parties in court had lawyers representing them.^{viii} But now, defendants in state-court civil suits have lawyers representing them only about one-quarter of the time.^{ix} Plaintiffs, in contrast, are represented by lawyers in about 92 percent of cases. These cases are mostly contract cases, a category that in recent years has been primarily composed of debt collection cases, landlord-tenant disputes, and foreclosure cases. The picture painted by the data is that a typical case in the state civil justice system is one in which a landlord, bank, or debt collector has a lawyer and is pursuing claims against an individual debtor or tenant who has no lawyer and is left to fend for themselves.

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This lack of representation matters. Having a lawyer makes a real difference to how likely you are to win your case. Although good data are hard to come by, a review of more than 12 studies found a general consensus that represented parties are more likely to win cases than unrepresented parties, at rates ranging from 20 percent more likely to 14 times more likely.^x A recent analysis of eviction cases in Philadelphia found that

approximately 78 percent of tenants who were unrepresented experienced a disruptive displacement from eviction, while only 5 percent of tenants who were represented faced a disruptive displacement.^{xi} As a result, in the words of one set of scholars focused on these issues, the “human, social, and economic cost of the pro se crisis in our state courts is hard to overstate.”^{xii}

A SYSTEM DESIGNED FOR LAWYERS

The negative outcomes experienced by the many litigants without lawyers are unsurprising given how most of the current civil justice system is organized. Civil justice proceedings are often designed based on an adversarial model that assumes that both parties are represented by trained lawyers. A company trying to collect a debt, for instance, may bring a suit that has a variety of legal problems—it is beyond the statute of limitations, or the company has insufficient documentation about whether they are truly entitled to payment. But these kinds of legal problems are often technical and difficult to investigate or recognize for someone who is not trained. So if the defendant is unable to afford a lawyer, the company is more likely to press its claim successfully, obtaining a judgment against the defendant. And much of the law that might be relevant to the case at hand—case law that establishes relevant precedents and discusses how to interpret the statutes and legal principles at issue—is difficult or impossible to find without access to expensive legal databases that require training and time to use.

In addition to being disadvantaged when it comes to the substance of their dispute, unrepresented litigants may have trouble navigating courts’ procedures. Necessary filings and forms are often hard to find or complete correctly. And getting them wrong can have negative consequences, ranging from delayed and rescheduled hearings to lost opportunities to contest a claim or prove a point. In addition, unrepresented litigants often do not know where and how to find the most basic kinds of legal information, such as information about the kinds of evidence and arguments that will allow them to win their case and how to present that evidence and argument in court.

In some circumstances, judges respond to unrepresented parties in court by helping them understand and manage their case and the court’s procedures, offering more support and guidance than would be normal for a party who has the help of a lawyer. But such judicial assistance for unrepresented parties is essentially a stopgap, remaining largely ad hoc and dependent on the particular court or particular judge that a litigant finds themselves in front of.^{xiii}

CHRONIC FUNDING SHORTAGES

The difficulties of affording a lawyer or navigating court without one would be bad enough on their own. But the problems described here have been exacerbated in recent years by the serious underfunding of state civil courts. Courts facing budget shortfalls in recent years have removed security precautions in courthouses; suspended support for pro bono programs; eliminated advocates for minors; and more.^{xiv} Access to courts is a particular problem in rural America, where budget cuts have caused courthouses to close, and people often must travel long distances to go to court or to find an attorney.^{xv}

In some areas, court underfunding has reached a crisis point that raises serious concerns about the ability of state governments to provide the basic public good of legal dispute resolution. In Kansas, for instance, budgets have become so low in recent years that almost a third of justice-system employees are paid below the poverty level. One courthouse opened a food pantry to support its own staff members who could not afford enough food.^{xvi}

A lack of court funding directly impacts communities by causing long delays before cases are resolved and causing courts to cut back on essential programs. It also limits the ability of courts to respond to the struggles of unrepresented parties. Across the country, civil justice systems have worked in recent years to find new ways of helping litigants who are unable to afford lawyers, and a variety of “shovel-ready” proposals are waiting in the wings or in the early stages of testing. But without adequate funding to try new solutions and implement what works, the civil justice gap facing Americans around the country is likely to persist or worsen.

FORCED ARBITRATION AND FEDERAL NEGLECT

Over the last few decades, federal law has done more to worsen these problems than to solve them. A series of sweeping Supreme Court decisions has resulted in the widespread expansion of forced arbitration, a privatized form of dispute resolution that companies put into their contracts with consumers and employees to make it difficult or impossible to hold them accountable for violating the law. Forced arbitration means that many people can be wronged by their bank or employer without any effective recourse. And for the cases that do make it to court, the federal government has allowed legal aid funding to erode over time, to the point where federal legal aid funding is now less than half of what it was in 1980. As a result, millions of Americans receive little or no legal assistance in their civil disputes—a problem that is worst for low-income Americans, for whom the law’s protections often matter most.

A New Approach To National Civil Justice Reform

Historically, federal legislation regarding civil justice has focused primarily on federal courts. And in the public eye, the federal government's main role in civil justice is centered in the federal courts. Media portrayals of the civil justice system often focus on high-value, complex cases: high-profile lawsuits against public officials, such as when the president is sued for violating the Constitution; or high-dollar litigation against large, name-brand companies, like when a major car company is sued for a manufacturing defect. Some of these cases may occur in state court, but such large and complex cases will often be federal. Similarly, academic scholarship tends to focus on federal courts, and much legal training is oriented toward federal courts.

But the federal court system hears only a small fraction of the disputes that wind up in court nationwide. Depending on how you count, there were about 21 million civil cases filed in state courts in 2017.^{xvii} In contrast, there were only about 320,000 civil filings in federal courts in 2017—about 65 state court cases for every federal case.^{xviii} In Texas alone, there were about five times as many new civil cases filed in 2018 as in the entire federal judiciary the year before.^{xix} And federal courts have a much lower rate of unrepresented parties. Outside of cases filed by prisoners, only about 10 percent of cases filed in federal court are filed by unrepresented plaintiffs, and only about 2 percent of defendants in federal court are unrepresented.^{xx}

Forty percent of state courts were not in better financial shape in 2018 than in 2008.

As these numbers demonstrate, when it comes to ensuring that everyone gets the protections they are due under the law, it is essential to focus on whether state courts have adequate resources to provide civil justice to everyone. But despite the growing numbers of unrepresented court users, the last decade has seen slashed budgets for many courts. In the wake of the 2008 financial crisis, state court funding was reduced substantially nationwide. Although the economy has recovered since then, many state court budgets have not. According to the National Center for State Courts, 40 percent of state courts were not in better financial shape in 2018 than in 2008.^{xxi}

A national effort to address the civil justice problems of the US must address the funding of civil justice in state courts. State courts have more cases, hear disputes affecting more people, and see a higher rate of unrepresented parties. But that does not mean that there is no room for federal legislation. Federal policy plays a major role in supporting many state programs, including health care, public transportation, education, job training, housing, and more.^{xxii} A national civil justice reform package could be modeled after these kinds of cooperative federalism programs, leveraging federal funding to assist states and incentivize them to provide more and better help to individuals with civil legal problems.

Like many federal-state partnerships, federal funding for state civil justice reform could take advantage of the federal government's funding capacity to leverage state and local knowledge and democratic responsiveness. If there is a silver lining to state courts' budgetary problems and the rise of mostly-unrepresented civil litigants, it is that state courts, bar associations, and other stakeholders have worked hard in recent years to develop ideas for how to assist parties without lawyers and how to use technology to improve access to courts' services. Much like the 2008 American Recovery and Reinvestment Act took advantage of "shovel-ready" projects that had already been conceived and were ready to receive financing, a national civil justice reform bill can leverage this important recent work by providing funding support for ideas that have already been researched, discussed, and developed.

Federal funding would help make sure that these ideas don't go to waste for a lack of financing. Such funding could help incubate these ideas by supporting pilot programs; could help incentivize states to adopt programs that work; and could help ensure that new systems are motivated by a desire to improve services rather than simply to cut costs. Making federal funding available for state implementation also avoids any constitutional questions that might be raised by direct federal regulation of state civil justice systems, and allows for important civil-justice goals to be advanced on a national basis without new national laws or regulations.

Historically, federal funding support for state civil justice systems has been scant. The main federal funding to assist state civil justice systems is the State Justice Institute (SJI), a federal entity created in 1984 to help promote good administration in state judicial systems. But it awards only a small amount of money—\$4 million to \$5 million each year—and as a result sometimes sees a large number of proposed projects from state courts go unfunded.^{xxiii} Additionally, SJI's funding goes to discrete projects and is not

generally designed to help states with general operational expenditures. Where state court budgets collectively total over \$18 billion, SJI's funding amounts essentially to a drop in the bucket.

In contrast, funding for the federal government's primary assistance for state and local criminal justice programs has ranged from \$335 million to \$519 million in recent years.^{xxiv} And as a general matter, state budgets overall receive about 30 percent of their funding from federal grants.^{xxv} The existing federal support for state civil justice initiatives is thus a small fraction of what you might expect—about 1 percent of the federal support for state criminal justice, and even less than 1 percent of what it would be if federal support for state civil justice programs rose to the typical levels of federal support for other state activities.

How we spend our public dollars reflects our priorities as a society. And no matter how you slice it, federal funding support for state civil justice is meager. State civil justice is an area of intense need nationwide, but one that receives far less than the usual level of federal funding support for state programs—despite the lack of adequate funding at the state and local levels. A national civil justice reform bill could fix that gap by providing federal funding for state civil justice improvements.

Federal Funding For State Civil Justice Programs

This report proposes two main categories of federal funding. First, a federal categorical grant program would provide operational funding support for states to use across all aspects of their civil justice system. Such a program would provide a broad grant of money from the federal government for states to improve their civil justice system and increase public access to electronic court records. Second, a federal project grant system would allow states or their subdivisions to apply for funding for specific initiatives that align with a set of policy priorities geared toward improving access to justice.

FEDERAL CATEGORICAL GRANT PROGRAM

To support the development and maintenance of high-quality civil justice programs, a national civil justice reform bill should create a dedicated federal grant program to provide a stable source of ongoing federal assistance. Existing federal funding is made available to states only on an ad hoc, short-term basis to assist with specific projects. A categorical grant program would allow longer-term support for improved civil justice operations, by creating a funding stream that states would be able to access on an ongoing and dependable basis and use to support a wide variety of activities.

While the primary goal of a federal grant program should be to provide states with the funding and support they need to improve civil justice services, two subsidiary goals should help guide the design of federal civil justice grants. First, federal money should go to improve the delivery of civil justice services and not simply to replace existing state funding. Second, federal dollars should promote transparency and accessibility in state civil justice systems to advance the public understanding of the law and to help measure outcomes and ensure that public dollars are being spent responsibly.^{xxvi}

Federal Operational Grants for State Civil Justice Improvements

The cornerstone of a new federal funding stream for state civil justice initiatives should be a federal categorical grant program that provides states with largely discretionary money to use to improve their civil justice programs and services. This money would come with few restrictions other than that it be spent on public services designed to adjudicate, prevent, or otherwise help resolve civil legal disputes. Additionally, to avoid

the possibility that federal dollars simply cannibalize existing state spending, the federal grant should come with a “no supplanting” condition that requires states to use the money to add to, rather than substitute for, their existing spending. Such a framework would give states the flexibility to ensure that money is spent where it is most needed while ensuring that the federal dollars improve upon the status quo. These conditions—that spending be focused on civil justice programs and not supplant existing funds—should be implemented with an eye toward minimizing burdensome reporting requirements to encourage state uptake of funds. Federal funding should be made available up to a 10 percent increase above the baseline established by any given state’s recent civil justice spending.^{xxvii}

An important caveat is that these grant dollars should not have the effect of furthering a troubling trend in recent years: the funding of public court services in large part through fees and fines. This method of court funding often ends up being highly regressive, with lower-income individuals paying disproportionate amounts into the court system. Civil fines and fees can also cause perverse incentives for public entities to be excessively punitive when it comes to assessing and enforcing fines and when it comes to setting fees for essential public services. It is not feasible to restrict federal funding only to systems that are not financed through fines and fees. Some civil justice systems depend so heavily on this form of financing for existing programs that such a restriction could seriously limit the uptake of federal funds in states that have significant need. But where federal funding goes to support new programs within state civil justice systems, it should prioritize funding new programs that are financed primarily through general tax revenues rather than programs that are paid for by fines and fees.

Federal Grants for Public Access to Electronic Court Records

In addition to these open-ended grants, the federal government should make available a specific grant of funding for state civil justice systems to develop and improve publicly accessible electronic court records.

Preserving court records in an electronic format and making them publicly accessible is a key way to help ensure that civil justice systems are transparent and publicly accountable. Transparent court records also bolster broader civil society efforts at holding individuals, corporations, and governments accountable by providing an important window into alleged wrongdoing. Transparent and accessible court records

can also help individuals who do not have lawyers and so are unable to use private databases or other professional tools to access court documents that are not clearly and easily made available to the public.

Transparent and accessible court records also would help ensure that the other federal dollars discussed in this proposal are being well spent. It is often difficult for journalists, lawyers, policymakers, and others to get a window into the court system to diagnose its problems and evaluate the efficacy of different interventions. Accessible court records are thus both desirable in their own right and also instrumentally useful for examining the value of other policy initiatives.

Federal grants for the creation and maintenance of publicly accessible electronic court records should be made available on a renewable basis in amounts of up to \$5 million, depending on the needs of the state civil justice system applying for funding. To receive federal funding, state civil justice systems must commit to making computerized court records available free of charge to the general public wherever doing so is permitted by privacy laws or other laws that might limit the disclosure of court records. And as with the operational grants described above, this money should come with a “no supplanting” condition to ensure it does not merely substitute for existing state spending.

In addition to this money, the federal government has other resources that it should make available to advance the goal of publicly accessible records. The federal government currently has its own software, PACER, that it uses to make electronic court records publicly available. The federal government should make its PACER software available for use and adaptation by state governments to lower the costs of developing state electronic records systems.

Finally, the State Justice Institute, a federal entity tasked with disbursing funds to state court systems, should create a set of common standards for how case information may be electronically stored, accessed, and reported. These common standards would be voluntary for states to adopt, but could create economies of scale that incentivize their adoption. A common system would facilitate research between state court systems and encourage the development of third-party software to help users navigate multiple court systems.

FEDERAL PROJECT GRANTS FOR ACCESS TO JUSTICE

In addition to these broad grants, which would be relatively unrestricted, a national civil justice reform bill should reserve significant funding—on the order of \$100 million—to be awarded on a project-by-project basis. This funding should aim to incentivize and assist state courts in adopting particular kinds of programs that reduce the costs of legal services and increase the efficacy of the civil justice system for unrepresented parties. These project grants can be used to improve civil justice systems nationwide both by providing direct assistance to underfunded state programs and by encouraging state and local justice systems to experiment with new ways of serving the public and to adopt the tools that have been found to work best in similar experiments around the country.

Project grants will fall into two general categories. First, innovation grants will be designed to encourage experimenting with new kinds of policies and practices, building on the proposals for access-to-justice reforms that have emerged at the state and local levels around the country in recent years. Second, service-delivery grants will help fund the adoption of specific projects whose efficacy has already been demonstrated. These grants can be administered by the State Justice Institute. Because the amount of funding currently distributed by the State Justice Institute is relatively small, a funding bill should also ensure that the State Justice Institute's capacity is increased proportionately to administer these new grant programs.

Even though the lack of affordable legal advice is a problem for many, the solution for how to manage the many civil justice problems facing low-income Americans does not always need to involve increased funding for lawyers. The cost of hiring lawyers is high, particularly when compared with the monetary value of most disputes. Three-quarters of the judgments in civil courts are smaller than \$5,200.^{xxviii} Several thousand dollars can be a very significant amount of money for many, but such amounts are often small relative to the price of hiring a lawyer to see a matter through to a judgment. This fact—the relatively low monetary value of civil judgments compared to the cost of lawyers—is true whether the lawyer is paid by the party to the lawsuit or via public funding.

Because of the high cost of lawyers relative to the value of many civil disputes, policy solutions for access-to-justice problems should include assistance to individuals that comes in forms other than traditional legal representation by a lawyer. This might include assistance by paraprofessionals who charge less than lawyers, or assistance by

court staff when it comes to navigating legal forms and procedures. Because of ethical and legal concerns regarding the provision of legal advice by nonlawyers, it may be necessary to revise existing regulations regarding the practice of law to balance the potential benefits of increasing the scope of nonlawyer assistance with the need to protect consumers of legal services.

Federal grant money should focus on a set of specific policy priorities, outlined here. These goals reflect the areas in which state and local civil justice reformers have identified both significant need and the potential for meaningful reform. By targeting areas that reformers have already identified and begun to work on, federal funding will be able to leverage the investments that access-to-justice advocates have made in recent years and the knowledge they have been developing.

The State Justice Institute should also be authorized to create new policy priorities for grantmaking in future years after consulting with state and local civil justice stakeholders, to ensure that today's priorities do not turn into tomorrow's constraints. And grants should be awardable on both a short-term, annual basis and a long-term basis of as long as five to seven years. Given the long-term nature of certain kinds of proposals discussed below—such as developing new licensing and training regimes for nonlawyer professionals—long-term funding cycles are necessary to encourage states to think ambitiously about plans to reshape the provision of legal and adjudicatory services.

In addition to providing much-needed funding support, the federal government can also serve as a clearinghouse for information regarding which reform efforts around the country have been successful and which have not. Federal funding can subsidize studies regarding the effects of rules changes and require that those studies be made available via a central database. Federal grants should also be used to support periodic multistate and national convenings at which stakeholders from different civil justice systems can compare notes and learn from each other's efforts.

Direct Assistance for Unrepresented Parties in Civil Disputes

As discussed above, it is now the case that in most civil proceedings in state courts at least one party is not represented by a lawyer. The absence of lawyers affects every aspect of a legal proceeding, from determining what is necessary to start a legal proceeding to understanding the arguments and evidence necessary to successfully advance or defend against a claim. But some promising efforts suggest that there are

ways that courts can effectively invest in staff assistance for unrepresented litigants. Assisting litigants on the front end with forms and case initiation, for instance, saves time at hearings, and reduces the need for hearing continuances—all of which saves both courts and litigants time and money.^{xxxix}

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One of the most successful programs can be found in New York City’s courts, which have piloted efforts to provide “navigators” to unrepresented civil litigants. Navigators are trained nonlawyers who assist unrepresented litigants in getting through court procedures, providing both information and moral support and accompanying litigants into the courtroom to assist with answering judges’ questions.^{xxx} Parties assisted by navigators are more likely to assert relevant legal defenses and are more likely to report that they were able to tell their side of the story to the court. In landlord-tenant disputes, for instance, tenants with navigators were able to get court orders for needed repairs 50 percent more often; they were also much less likely to be evicted.^{xxxi} Federal project grants could support the development of such assistance for unrepresented parties. Court-based help for unrepresented litigants can take many forms, from “help centers” within courts to staff who go into proceedings with litigants and assist them with understanding and responding to inquiries from the court.

It is important to recognize that many legal disputes may never make it to court; or, by the time they make it to court, it may be too late for court staff or procedures to make a meaningful difference for a litigant who lacks legal resources. One pervasive problem, for instance, is that debt owners are represented by lawyers while debtors are not, and default judgments are entered against debtors who are unable to defend themselves legally and may not even make it to court. For that reason, federal funding should be made available for projects that aim to reach people in their communities and assist them with recognizing and addressing legal disputes before they develop into court cases. This could involve funding partnerships between courts and other institutions or funding projects by non-court entities like community groups and legal aid organizations that have a focus on assisting individuals with resolving legal disputes.

Many different models are possible. In the United Kingdom, thousands of “Citizens Advice Bureaus” staffed by nonlawyer volunteers provide advice for a wide range of civil disputes, including advice on how to deal with housing, debt, and consumer issues.^{xxxii} In the US, libraries report that individuals often ask librarians for help navigating legal issues, and libraries are a promising point of assistance for those whose civil justice needs often go unmet.^{xxxiii} Federal funding could support legal resources—including literature, forms, and legally trained staff—at local community libraries. Communities in the US have also piloted “legal resource days” in which a combination of attorneys, judicial officers, and government agency representatives come together in a particular geographic area to provide free and streamlined information and services.^{xxxiv} And funding for all of these initiatives can also support language assistance programs to ensure that language does not pose a barrier to individuals’ ability to successfully navigate new forms of outreach and services.

Using Technology to Increase Access to Civil Justice Resources and Civil Legal Services

Court budget cuts in recent years have resulted in courthouses closing down, making it more difficult for people in many rural areas to get to court. Even where people live relatively near to a court, mobility issues or work schedules can also make it difficult to make it to court in person. But there are a variety of options for helping people access many court services remotely. Hearings can be conducted via phone or video conference; help for unrepresented parties can also be made available online or over the phone. Perhaps most basically, forms and schedules can be made available online, to help ensure that litigants are prepared for their hearings and know where and when to go.

Courts and other agencies have begun piloting a wide range of online tools that show that online civil justice systems can both increase access and reduce the time and effort necessary to obtain legal advice or resolve a dispute. In Michigan, for instance, courts using online portals to allow defendants in traffic court to present their defenses found that the average case duration dropped from 50 days to 14 days.^{xxxv} In Ohio, allowing individuals to resolve their income tax disputes online decreased the default rate from 49 percent of disputes to 25 percent. Although these programs have indicated some success, funders and grantees alike should be sure that technology-based solutions operate only to increase access, rather than becoming additional hurdles for those who might have limited access to computers, the internet, or other infrastructure.^{xxxvi}

Some pilot programs have also suggested that technology can help deliver legal services directly. The American Bar Association has endorsed a model of online legal services delivery in which legal aid clients submit legal questions through confidential online portals, and pro bono lawyers respond online. Several states have adopted this kind of program.^{xxxvii}

Expanding the Scope of Who May Practice Law

In addition to assisting litigants who are unrepresented, federal funding should support state efforts to expand the ability of nonlawyers to provide legal services. One of the reasons legal costs are high is because lawyers have a monopoly on the provision of legal services. Experiments with allowing nonlawyers to provide some types of legal assistance are a promising potential avenue to reduce the cost of legal services and expand access. The state of Washington, for instance, has experimented with Limited-License Legal Technicians (LLLT), independently licensed legal paraprofessionals who are able to take on some (but not all) of the tasks of a traditionally licensed lawyer. The total cost of education and licensing for an LLLT is less than \$15,000, much less than it costs to become a lawyer.^{xxxviii} The Utah Supreme Court has adopted rules to allow for the licensure of paralegal practitioners, who may assist clients in specific practice areas (family law, debt collection, and landlord-tenant disputes).^{xxxix} A recent task force of the State Bar of California also adopted a recommendation to allow nonlawyers to provide limited delivery of legal advice and services.^{xl}

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Although these programs hold promise, the startup costs can be significant. If Washington's program is any guide, for a state to create a new kind of independently licensed professional, it must design licensing requirements, develop an educational and/or training curriculum, create an accreditation and monitoring process, and more. Utah was able to ramp up a program more quickly than Washington, based in part on learning from Washington's experience.^{xli} Federal funding can help encourage states to undertake the long-term investment of developing new pathways for legal services by helping with the up-front costs necessary to build these programs, as well as by funding studies that examine the successes and failures of existing efforts.

Reforming Rules, Practices, and Procedures in Courts and Bar Associations to Advance Access to Justice

The civil justice system as a whole has a long way to go to adapt fully to the reality of ubiquitous unrepresented parties, and it has yet to take advantage of the possibilities of technology and remote access for streamlined dispute resolution. Some of the changes will need to come at the level of courts' rules, practices, and procedures, which ultimately govern how disputes are managed and resolved. There is a wide range of potentially beneficial changes, from changes to ethics rules that would allow judges to more directly assist unrepresented parties with case management to changes to evidentiary rules that make it easier for parties without legal training to support their case. There may also be room for beneficial changes in the rules of professional conduct governing lawyers, such as allowing lawyers to provide "unbundled" or limited-scope services—a change that could enable lawyers to charge lower fees by committing to handle only a defined set of discrete tasks for individual clients.

Changes to these kinds of rules are complex and should only be undertaken by stakeholders who have a deep understanding of both community needs and state and local institutions. But federal funding can help. Particularly in the last decade, many states have established access to justice commissions, which are often composed of judges, lawyers, court staff, and other legal community stakeholders. These commissions have gathered data, sometimes at the level of individual courthouses, about the challenges to access faced by communities throughout the country. But these commissions are often thinly funded, with most having fewer than one full-time staffer.^{xiii} Federal funding for access-to-justice commissions could take advantage of the local knowledge built by these commissions and subsidize the expansion of their valuable work, with an eye toward reforming rules, practices, and procedures to make courts more navigable by unrepresented parties.

Subsidizing the Cost of Civil Legal Services for Underserved Communities

Rural and low-income communities have particular difficulty accessing lawyers. Via the public service loan forgiveness program, federal policy currently subsidizes lawyers whose practice falls into certain limited categories; but more targeted interventions, as well as subsidies for a wider range of public-interest legal practice, are possible. Some states have begun experimenting with more specific policies designed to encourage

lawyers to serve underserved communities; South Dakota, for instance, has adopted a pilot project offering lawyers an annual subsidy to live and work in rural areas.^{xliii} Federal funding could encourage states to experiment with different models of encouraging lawyers to serve underserved communities, such as with grants, subsidies, or loan repayment programs. This funding should be available for experiments conducted by a variety of stakeholders, including courts, bar associations, legal aid organizations, and other community organizations.

Ending Forced Arbitration For Consumers And Employees

Increased funding for state civil justice systems will not be useful to those who are legally prevented from taking their disputes to court in the first place. Unfortunately, that describes an increasing number of people in recent years, as the rise of forced arbitration has limited the ability of workers and consumers to go to court when they have been wronged. A national civil justice reform bill should reverse this trend, banning forced arbitration in consumer and employment contracts and restoring the right to go to court.

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Arbitration clauses are provisions in contracts in which people give up their ability to go to court to enforce their legal rights. They are given their force by the Federal Arbitration Act, a law that was passed nearly a century ago and was originally designed to assist businesses that wanted to streamline the procedures used to resolve their disputes with each other.^{xiv} Private arbitration was generally intended as a form of privatized dispute resolution in which commercial parties of equal bargaining power and sophistication agree to take any disagreements that might arise out of the realm of public courts. When the Federal Arbitration Act was passed, private arbitration was not intended to become a wholesale substitute for civil justice systems en masse, in which individual consumers and employees would give up hope of effective relief in public courts.

But for many, that is what arbitration has become. Although the Federal Arbitration Act did not have much significance for most consumers and employees through most of the 20th century, over the last few decades, the US Supreme Court has interpreted the Federal Arbitration Act expansively to cover consumers and employees. The Court has also held that arbitration clauses must be enforced even where they have the effect of preventing individuals from asserting their legal rights. The Supreme Court has read the Federal Arbitration Act as creating a federal policy favoring the use of arbitration

and preempting state law, making it difficult or impossible for state laws to preserve the ability of Americans to use state courts to resolve their civil disputes in the presence of a contract with an arbitration agreement.

Companies, in turn, have picked up on these legal changes by adopting forced arbitration clauses in vast numbers. In some industries, these clauses appear in nearly every contract—meaning that consumers who want a cell phone, for instance, often are unable to avoid signing a contract with an arbitration clause. At this point, an estimated half of all nonunion employees in the private sector are covered by an arbitration clause.^{xlv} As the number of clauses proliferate, and consumers and employees are left with few or no alternatives, the notion that they have freely and knowingly agreed to waive their rights to go to court—which was a stretch to begin with—becomes farcical.

These clauses empower a form of privatized adjudication, wherein consumers and employees can take their disputes only to private arbitration companies, whose rules and procedures usually differ from public courts. Arbitration clauses often require disputes to be resolved in secret, limiting the ability of an employee or a consumer to bring public pressure to bear on a company that is breaking the law. They also often do not allow individuals to bring their claims together, as in a class action—which is often the only feasible way for individuals with smaller claims to bring a case against large companies. The net result is that arbitration clauses prevent people from enforcing the law against their employers, banks, cell phone companies, internet service providers, or other companies with whom they have a contractual relationship.

Because arbitration clauses prevent consumers and employees from suing for compensation when they are wronged, they have the effect of redistributing income and wealth upward, from consumers and employees to the companies that they do business with.^{xlvi} They also significantly decrease the deterrent value of civil lawsuits, potentially increasing the likelihood that employers and merchants will violate the law in the first place when doing so can help the bottom line. As one federal judge appointed by President Ronald Reagan has described it, forced arbitration gives businesses “a good chance of opting out of the legal system altogether and misbehaving without reproach.”^{xlvii}

But forced arbitration is only so widespread because it is empowered by federal law—and that means that a new federal civil justice reform bill could render these arbitration clauses

null and void. A national civil justice reform bill should declare that there is no federal policy favoring arbitration over the use of public courts, and should amend the Federal Arbitration Act to no longer apply to consumer contracts or employment contracts. The House of Representatives has already passed the FAIR Act (for “Forced Arbitration Injustice Repeal”), which contains language that would effectively amend the Federal Arbitration Act and could be used in a national civil justice reform bill as well. Exempting consumer and employment contracts from arbitration clauses would mean that those clauses would not apply to disputes over housing, personal finance, workplace discrimination, and more—ensuring that people can enforce their rights in court, individually and collectively, against the companies that they interact with on a daily basis.

Restoring Funding To Legal Aid

As discussed above, much of the focus of a national civil justice reform bill should be to make our nation's civil legal system more manageable for people who are unable to afford lawyers. But for some disputes, particularly those with high stakes, meaningful access to justice will require a trained lawyer looking out for their clients' interests. In recent years, the "civil *Gideon*" movement has renewed calls to guarantee access to lawyers in civil cases that could deprive one or more parties of fundamental goods such as shelter, health care, food, and child custody. The movement, named after the case that provided a constitutional right to an attorney in criminal proceedings, has received strong and widespread support, including a unanimous resolution in support from the American Bar Association's House of Delegates. Some state and local governments have begun attempting to expand access rights to counsel in civil cases, but funding remains a challenge.

The primary federal program to provide lawyers for those in need is the Legal Services Corporation (LSC), which distributes federal money to legal aid offices in communities around the country. But LSC funding has fluctuated significantly over the years, and the effective amount of funding has decreased over time due to inflation. In inflation-adjusted terms, the LSC today receives less than half of the money it received in 1980.^{xlviii} But the population of the country has grown significantly since 1980, and the need for legal aid remains high.

The communities that LSC grantees serve are often highly vulnerable and have a wide variety of legal needs. Two-thirds of households with survivors of domestic violence or sexual assault report experiencing six or more civil legal problems in a one-year period;^{xlix} 71 percent of households with veterans or other military personnel have experienced a civil legal problem in the past year. Most adults who meet the income profile served by LSC grantees do not have any college education. About 6.4 million of these adults are seniors; about 10 million of these adults live in rural areas; and more than 11 million have a disability.

Existing funding levels are not nearly adequate to assist these communities with their legal needs. LSC grantees report that, of the civil legal problems that people come to them with, about two-thirds receive inadequate or no legal assistance. Nearly all of this shortfall is due to budget constraints among LSC grantees.¹ A national civil justice reform

bill should restore full funding to the Legal Services Corporation, commensurate with its inflation-adjusted peak funding in 1980, and should peg annual appropriations for LSC to inflation to ensure that LSC funding does not again erode over time.

Additionally, political disapproval of certain kinds of lawsuits has led to counterproductive restrictions on how LSC-funded entities may spend their money. Sometimes, these restrictions mean that LSC-funded lawyers are prevented from using more cost-effective forms of litigation such as class actions. Other times, these restrictions prevent LSC-funded lawyers from helping individuals who are greatly in need of legal help, such as noncitizens or individuals involved in the criminal justice system. Congress has also limited the ability of LSC-funded entities to participate in restricted activities even when such activities are funded by other sources, generating costly red tape and further diminishing the effectiveness of public legal aid spending.^{li}

In addition to restoring past funding levels for legal aid, a national civil justice reform bill should also ensure that this money can be used effectively, by lifting restrictions on the ability of LSC-funded entities to engage in class actions and allowing LSC-funded entities to participate in activities that are funded by other sources. Finally, the bill should remove restrictions on *who* LSC-funded entities are allowed to help, which would enable local legal aid organizations to determine the individuals in each community most in need of services and structure their assistance accordingly.

Potential Objections

Potential objections to a new federal funding plan for state civil justice are most likely to be based on the cost of providing such funding or a sense that the federal government should not become involved in an area traditionally left to state and local governments.

In terms of cost, the funding programs suggested here are well in line with other federal funding initiatives that support important state government programs. The federal government's primary grant assistance program for state criminal justice initiatives, for instance, has been funded between \$300 million and \$500 million per year in recent years—compared with roughly \$5 million for state civil justice programs. And, more broadly, states generally receive about 30 percent of their total funding from the federal government. Compared with these numbers, a \$100 million project grant fund and operational grants up to 10 percent of state civil justice budgets are well in line with other federal programs. If anything, the fact that the federal government spends almost nothing supporting state civil justice programs, which are in serious need of help, suggests that current spending levels on state civil justice are far too low when compared with other federal grants to states.

In addition, federal funding also has the possibility of returning economic dividends to local communities. Research in a variety of contexts indicates that money invested in legal aid can have significant financial returns to communities and governments. One report on civil legal aid spending in Massachusetts, for instance, concluded that every additional dollar spent on civil legal services in the areas of homelessness, domestic violence, and public benefits returned between two and five dollars to the public fisc.^{lii} A report on civil legal aid in Philadelphia found that because civil legal assistance is effective at reducing evictions and homelessness, which cost the government significant money, \$3.5 million in public representation for tenants facing eviction could save the city up to \$45 million annually.^{liii}

Money invested in legal aid can have significant financial returns to communities and governments.

As for the potential objection to the federal government's involvement in state affairs, the policies described here are designed to be highly respectful of state and local institutions and expertise. The operational grant program is a source of money for states

to use in civil justice programs with very few restrictions. And the project grant program is designed to give leverage to existing efforts at the state and local levels to come up with innovative ways of improving access to justice. These programs would not involve federal regulation of state programs or highly prescriptive and coercive grants of money. To the contrary, they are based on the idea that state and local courts, lawyers, and policymakers have many good ideas that are often stymied for lack of financial support. The amendments to the Federal Arbitration Act, meanwhile, will return much more authority to state courts and state law, as federal law currently preempts state restrictions on arbitration and keeps claims out of state court. The policies described here are thus ones that are designed to be state-friendly, creating a new federal-state partnership in which the federal government's financial strength is made available for many different state-level programs and objectives.

Conclusion

Without an effective civil justice system, the law's protections for workers, consumers, tenants, children, and everyone else risk becoming illusory. But our civil justice system is currently failing in many respects. Most cases involve at least one unrepresented party, as hiring a lawyer is too expensive. Public funding for legal aid lawyers, meanwhile, is stagnant. And many state courts are still struggling with budget cuts from an economic downturn that occurred more than a decade ago.

Recognizing these problems, there have been renewed calls for attention to civil justice reform nationwide. In particular, the last few years have seen strong advocacy for ending forced arbitration^{liv} and for government officials at all levels to pay more attention to access to justice.^{lv} This report adds to these proposals by calling for a new federal funding regime that would support improvements and innovation in state courts nationwide. Federal funding supports core budget areas for many state government programs, but there is little federal funding for state civil justice institutions. A national civil justice reform bill could fix that gap, providing necessary funding for courts and legal aid while eliminating the problem of forced arbitration and spurring innovation to bring down the cost of legal services. Such a package promises to be more than the sum of its parts, tackling the problems of civil justice from multiple angles to make the law's protections more accessible to everyone.

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