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Vulnerability, Access to Justice, and the Fragmented State

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VULNERABILITY, ACCESS TO JUSTICE, AND THE FRAGMENTED STATE

Elizabeth L. MacDowell*

This Article builds on theories of the fragmented state and of human and institutional vulnerability to create a new, structural theory of “functional fragmentation” and its role in access to justice work. Expanding on previous concepts of fragmentation in access to justice scholarship, fragmentation is understood in the Article as a complex phenomenon existing within as well as between state institutions like courts. Further, it is examined in terms of its relationship to the state’s coercive power over poor people in legal systems. In this view, fragmentation in state operations creates not only challenges for access, but also opportunities for resistance, resilience, and justice. Focusing on problem-solving courts, and family courts in particular, the Article examines the intersection of human and institutional vulnerability within legal institutions and provides a framework for identifying ways to create greater access to justice. The Article contributes to state theory and the feminist theory of vulnerability, while providing a new way to understand and address an increasingly coercive state and its punitive effects on low-income people.

INTRODUCTION	52
I. DELEGALIZATION AND SOCIAL CONTROL	56
A. <i>The Family Court Example</i>	56
B. <i>Due Process in Delegalized Settings</i>	64
II. THEORETICAL FRAMEWORK	72
A. <i>The Fragmented State</i>	72
B. <i>Vulnerability Theory</i>	76
III. APPLYING THE FRAMEWORK	81
A. <i>Reduced Fragmentation Within Systems</i>	81
1. System Roles	81
2. Ideology	84
3. Targets	86
B. <i>Reduced Fragmentation Between Systems</i>	88
1. Perceived Vulnerability	88

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2. Privacy and Autonomy	91
IV. FUNCTIONAL FRAGMENTATION	93
A. <i>Centering the Experiences of Low-Income People of Color</i>	94
B. <i>(Re)considering Partiality and Impartiality</i>	96
1. Revisiting Mediation	98
2. Fragmentation and Accountability	101
CONCLUSION	103

INTRODUCTION

Informal justice proliferates as a way to solve the everyday legal problems experienced by low-income people and to address barriers to access to justice.¹ Consolidating social and legal services in courts, integrating civil and criminal procedures, and making court procedures less formal have long been popular mechanisms for addressing the problems faced by low-income litigants in adversary systems.² Proponents seek to modify traditional legal responses in order to address what are viewed as social rather than legal problems; they also respond to what are viewed as problems with adversarial systems, especially for unrepresented parties.³ To that end, specialized civil forums such as family, housing, and consumer courts use simplified and informalized procedures; family courts also aim to address the underlying causes of legal issues through treatment models and ongoing judicial supervision.⁴ This problem-solving court model also proliferates in the criminal legal system, where specialized courts have developed in part to ameliorate the impacts of expanding criminalization and increasingly draconian sentencing schemes.⁵

Despite their good intentions, problem-solving courts in both the criminal and civil systems tend to expand the breadth and scope of state interventions into poor people's lives while doing nothing to transform underlying problems in the existing legal regime.⁶ Moreover, while they

1. See generally 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (Richard L. Abel ed., 1982); Richard L. Abel, *Delegalization: A Critical Review of Its Ideology, Manifestations and Social Consequences*, in 6 ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT: JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE 27, 27–47 (Erhard Blankenburg et al. eds., 1980) (detailing the pervasive and historical character of this approach).

2. See *infra* Part I (describing these features of family courts).

3. *Id.*

4. *Id.*

5. See, e.g., Eric J. Miller, *Drugs, Courts, and the New Penology*, 10 STAN. L. & POL'Y REV. 101, 101 (2009) (describing specialty drug courts as “designed to ameliorate the impact of drug sentencing policy on individual drug users”). Miller notes that such courts gain support because they “appear to reintroduce a rehabilitative ideal that had all but disappeared from mainstream American penal practice.” *Id.* at 109.

6. See *id.* at 109–10 (discussing how specialty problem-solving courts suppress consideration of race and class in criminal legal policy).

modify or replace the adversarial system with alternative practices and perspectives, they do not provide substitute protective functions. Problem-solving courts also obscure the ways in which state encroachment on civil society and advocacy resources is linked to lessening due process protections for low-income litigants in “delegalized” courts.⁷

In my article *Reimagining Access to Justice in the Poor People’s Courts* I argued that reformers should draw on social justice lawyering and lay advocacy traditions to create legal services programs that help low-income litigants resist oppressive institutional practices.⁸ That article lays out the essential elements of a program that is counter-hegemonic in nature: one that seeks to expose and transform existing power relationships that are unequal and subordinating, including those between individuals, and between individuals and institutions.⁹ In this Article, I lay the theoretical foundation for this access to justice project. To accomplish this, the Article will focus on one central feature of the state—that of fragmentation—and trace its operation in relation to access to justice.

In legal scholarship about access to justice, fragmentation in the legal system has been analyzed primarily with regard to access to court services and has generally been viewed solely as an access to justice problem.¹⁰ A classic example of the issue of fragmentation from this perspective is when multiple courts have jurisdiction over different aspects of a legal problem impacting the same individuals, potentially resulting in inconsistent judgments or incomplete relief.¹¹ While not discounting the problems posed by some forms of fragmentation, this Article conceives of fragmentation in the legal system in a new and more comprehensive way. Here, fragmentation is understood as existing not only between different courts, or between courts and other arms of the state, but as a complex structural feature within state institutions. Internal fragmentation includes ideologies, roles, and other organizational features. Additionally, fragmentation both within and between institutions is examined broadly in terms of its function, particularly with regard to the coercive power of the state over poor and low-income people.¹² The role of access to justice interventions in this view includes not only curtailing forms of fragmentation that are problematic for poor people (such as those that impede access to services or remedies), but also preserving, restoring, or building forms of fragmentation

7. See *infra* Part IV.B (discussing research on self-help programs).

8. Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. POVERTY L. & POL’Y 473 (2015) [hereinafter MacDowell, *Reimagining*].

9. *Id.* at 525–41.

10. See *infra* Part III.B (discussing rationales for interventions such as integrated courts that reduce fragmentation).

11. *Id.*

12. See *infra* Part II (establishing the theoretical framework and defining fragmentation).

that can foster greater justice.¹³ I build this new conception, which I refer to as functional fragmentation, from two sources.

First, theories of the state as consisting of coordinated fragmentation—or layered or “loosely coupled” parts¹⁴—are particularly useful for analyzing the role of fragmentation in facilitating (or conversely, reducing or eliminating) justice.¹⁵ Using this theory, scholars have shown how the state increases its power over targeted groups by tightening linkages among or between its parts. Scholars have also used the theory to show the opportunities for advocacy that exist within the loosely coupled state.¹⁶ This Article picks up and expands on this strand of political theory to analyze how access to justice interventions can recognize and utilize the state’s capacity for greater and lesser degrees of fragmentation in ways that are positive for poor people.¹⁷

Second, vulnerability theory helps us analyze how linked institutions and organizations are susceptible to policies and practices that reduce functional fragmentation.¹⁸ I will explore vulnerability along two dimensions: institutional vulnerability, and the resulting challenges for human subjects who are vulnerable to state interventions. Institutional vulnerability in this analysis includes the vulnerability of legal institutions to shifts in the nature of their couplings that are destructive to public interests, and the vulnerability of both state institutions and nongovernmental organizations (“NGOs”) to be coopted, jeopardizing their roles and missions.¹⁹ While vulnerability theory is generally used to argue for strong state interventions (viewed as necessary to address the inevitable condition of human vulnerability), it is also useful for showing how the vulnerability of litigants becomes a rationale for more coercive state practices.²⁰

Discerning the characteristics and conditions of functional fragmentation is especially urgent given the increasingly punitive treatment of the poor by the state, or what has come to be called the criminalization of poverty.²¹ Tightening of the linkages between state agencies, institutions,

13. See *infra* Part IV (setting forth the foundational principles for achieving functional fragmentation).

14. See generally Elizabeth Ben-Ishai, *The Autonomy-Fostering State: “Coordinated Fragmentation” and Domestic Violence Services*, 17 J. POL. PHIL. 307 (2008); Lynne A. Haney, *Feminist State Theory: Applications to Jurisprudence, Criminology, and the Welfare State*, 26 ANN. REV. SOC. 641 (2000); John Hagan, *The Everyday and the not so Exceptional in the Social Organization of Criminal Justice Practices*, in EVERYDAY PRACTICES AND TROUBLE CASES (Austin Sarat et al. eds., 1990).

15. See *infra* Part II.A (discussing theories of the fragmented state).

16. *Id.*

17. See *infra* Part IV (applying principles of functional fragmentation to problem-solving courts).

18. See *infra* Part III (applying the theoretical framework).

19. *Id.*

20. See *infra* Part II (establishing the framework).

21. See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) [hereinafter Gustafson, *Criminalization of Poverty*].

and processes—including through the blending of ostensibly supportive processes with punitive ones—has dire consequences for marginalized groups.²² In particular, the erosion of the divide between civil and criminal processes has both widened and tightened nets entrapping poor people in coercive or punitive state systems, especially poor women and men of color.²³ This erosion also exacerbates inequalities in ostensibly private, non-state relationships, as the state increasingly expands its reach into civil society.²⁴ These conditions are the context in which access to justice initiatives take place. Moreover, access to justice initiatives themselves can operate as vehicles for coercive state practices, conducted under the guise of helping vulnerable populations.²⁵ Thus, a theory of access to justice that can help reformers and activists distinguish helpful from harmful interventions is urgently needed.

By way of example, I will focus on the policies and practices of family courts and linked administrative agencies that reduce fragmentation and produce tightening. Family courts exemplify the relationship between informalized justice, interventionist state policies, and the tightening of constituent parts within the state that characterizes the consolidation of state power in the modern era, which I refer to collectively as “delegalization.”²⁶ To analyze litigant vulnerability, I will show how family courts help to maintain hierarchies relating to race, class, and gender.²⁷ Vulnerability theory will strengthen the analysis of how the advantages of functional fragmentation are jeopardized in family courts, why that is a concern for low-income people engaging with the courts, and how principles of functional fragmentation can be utilized to build resilience to unwanted state interventions among marginalized communities.²⁸

The Article proceeds as follows: Part I explores the long-standing relationship between initiatives intended to increase access to justice and state efforts at social control within delegalized courts. Using the family court example, I focus on two types of cases for this analysis, each with

22. See, e.g., Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 *YALE J.L. & FEMINISM* 2 (2014); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 *U.C. IRVINE L. REV.* 297 (2013) [hereinafter Gustafson, *Degradation Ceremonies*]; Gustafson, *Criminalization of Poverty*, *supra* note 21.

23. Examples include linkages that condition access to social services on criminal legal involvement as a victim or offender, the use of criminal penalties rather than administrative ones to punish violation of administrative rules, and the criminalization of the conditions and consequences of poverty. See Bach, *supra* note 22; Gustafson, *Degradation Ceremonies*, *supra* note 22.

24. See, e.g., NOAH KATZ ET AL., *UCLA INST. FOR RESEARCH ON LABOR & EMP'T, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT* (2016) (detailing linkages between punitive state systems and ostensibly private work relationships).

25. See *infra* Part IV.B (discussing self-help programs).

26. See *infra* Part I.A (analyzing the history and culture of family courts).

27. *Id.*

28. See *infra* Part II.B (proposing a theoretical framework for analyzing fragmentation within family and other problem-solving courts).

gendered as well as other particularities: domestic violence and child support. Next, I show how delegalization in problem-solving courts has influenced the development of constitutional doctrine. This Part shows how the Supreme Court's analysis of due process uses the conditions of delegalization to limit procedural due process rights for poor people.

Part II presents the theoretical framework, drawing on scholarship on the fragmented state and vulnerability theory. This Part also incorporates amendments to vulnerability theory proposed by critical race and other theorists.²⁹ The resulting framework synthesizes and expands on the strengths of both theories to better analyze operation of the fragmented state and its potential for fostering justice.

Part III applies this framework to problem-solving courts to show how tightening of the loosely coupled state happens in legal systems characterized by informality and intervention. This Part identifies the mechanisms of reduced fragmentation, and shows how conventional notions of vulnerability are used to justify these changes. This Part also examines how low-income people are impacted by reduced fragmentation in specifically raced and gendered ways that are often detrimental to their well-being.

Part IV establishes a framework for functional fragmentation—namely, state fragmentation that is functional for poor people. This Part lays out the foundational principles of this approach, which requires centering the experiences of low-income people of color and maintaining partiality to social justice values in all aspects of system design and implementation. This Part then applies these foundational principles to suggest priorities and possible directions for court reform.

The Article concludes with some preliminary remarks on the concept of “justice space”: my term for the space within a functionally fragmented state where a reimagined vision of access to justice can take form.

I. DELEGALIZATION AND SOCIAL CONTROL

A. *The Family Court Example*

Delegalization in family courts is sometimes characterized as a modern development, but has long been part of the experience of low-income populations when dealing with so-called minor disputes in the family.³⁰ Delegalization in family courts consists of three interrelated features: informality, including the use of informal dispute resolution and the simplification of procedures and forms in ways that deemphasize law; interventionism, such as the use of psychologists, social workers, and other

29. See, e.g., Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1373–78 (2015); Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 21–23 (2014).

30. See Christina B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE, *supra* note 1, at 52–54 (describing the origins of family courts in the Progressive era).

experts as an extension of judicial fact-finding; and intersecting state systems, including criminal, civil, and child welfare systems, and administrative arms of the state.³¹ Justified with the rhetoric of crisis and participatory justice, and fueled by competing goals of social control and access to justice, each of these features has worked to expand the reach of the state.³²

The historical roots of delegalization in family courts can be traced to the emergence of domestic relations courts (DRCs) during the Progressive Era, using a juvenile court model expressly intended to offer social rather than legal justice.³³ DRCs emerged as criminal courts of law with jurisdiction over cases such as wife abandonment, illegitimacy, failure to support, offenses against minors, and custody disputes.³⁴ Like juvenile courts, domestic relations courts were staffed with probation officers, social workers, and sometimes medical and psychiatric professionals who performed investigative and supervisory roles.³⁵ DRCs also offered conciliation, defined broadly as efforts by any court personnel to resolve disputes between family members, as a distinguishing feature from divorce courts.³⁶ Conciliation was seen as a service to keep families together but also as essential to

31. See MacDowell, *Reimagining*, *supra* note 8, at 488–91 (analyzing these features of family courts).

32. *Id.* at 492–94.

33. See Paul W. Alexander, *Legal Science and the Social Sciences: The Family Court*, 21 *MO. L. REV.* 105, 106 (1956) (“The family court also strives to wed the legal and social sciences. It lifts bodily the main features of the philosophy, methodology and procedure of the juvenile court and adapts them to the family court”). For a discussion of the juvenile court movement philosophy of “socialized” courts, see Frederic L. Faust & Paul J. Brantingham, *The Socialized Juvenile Court*, in *JUVENILE JUSTICE PHILOSOPHY* 143–46 (Frederic L. Faust & Paul J. Brantingham eds., 1978).

34. These issues were criminalized in the early nineteenth century through statutes such as the American Uniform Desertion Act of 1910. See REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 75 (1919). See also NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, *AMERICAN UNIFORM DESERTION ACT: BEING THE DRAFT OF AN ACT RELATING TO DESERTION AND NON-SUPPORT OF WIFE BY HUSBAND, OR OF CHILDREN BY EITHER FATHER OR MOTHER, AND PROVIDING PUNISHMENT THEREFOR; AND TO PROMOTE UNIFORMITY BETWEEN THE STATES IN REFERENCE THERETO* (1910), <http://hdl.handle.net/2027/hvd.32044053412987>.

35. See WALTER GELLHORN ET AL., *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* 6 (1954) (arguing that “proper disposition of many [family court] cases requires the discovery of the root cause and an effort to eradicate it rather than merely treating the symptom by punitive or purely legal remedies” and advocating for harmonizing jurisprudence with “sociological and therapeutic knowledge”). See also Louise Stevens Bryant, *Department of Diagnosis and Treatment for a Municipal Court*, 9 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 198, 198 (1918) (describing the issues in DRCs as “overwhelmingly dependent upon medical and psychological interpretations”).

36. Harrington, *supra* note 30, at 54.

processing the large numbers of cases handled by the courts, which justified an interventionist stance.³⁷

As reformers subsequently sought and won decriminalization of these family-related disputes, the practice of conciliation moved to civil courts, including those handling divorce, as another feature of delegalized dispute management.³⁸ Family law courts of equity were created in order to expand judicial discretion, and thus power.³⁹ The belief in science as a more rational basis than law for dealing with human problems, along with shifts away from fault-based determinations toward an emphasis on protecting children, justified increasing and accelerated government intervention into even middle class families.⁴⁰ However, the impacts of delegalization began much earlier, and have always been harsher, for low-income families.

At the turn of the 20th century, when family courts emerged, Blacks migrating to Northern cities from the South and an influx of southern European immigrants worried white reformers and eugenics-based theories about inherent criminality and social deviance still held influence.⁴¹ For reformers, the new family courts increased access to justice by reducing the need for lawyers, increasing efficiency, and making courts more accessible.⁴² However, the belief that fair courts were necessary to socialize new populations of urban poor and working class and stave off political insurrection lent urgency to calls for court reforms.⁴³ Thus, the paradoxical

37. *Id.*

38. See Robert J. Levy, *Custody Investigations in Divorce Cases*, 1985 AM. B. FOUND. RES. J. 713, 718–28 (1986) (blaming the practice of custody investigations on divorce reformers who have adopted the rhetoric of nineteenth century juvenile court “child savers”).

39. *Id.*

40. See generally Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 241–45 (1983) (describing how, beginning in the 19th Century, judges used the shift from paternal control over children to the best interest of the child standard to consolidate power and police female behavior).

41. Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1365–68 (2013) (describing the persistence of eugenics-based theories of Black inferiority in the juvenile court system). See also Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 22 (1969) (describing the influence on “child savers” of “ideas about the biological and environmental origins of crime”).

42. See SMITH, *supra* note 34, at 78 (describing how simplified procedures and forms in family court help to eliminate the need for lawyers).

43. As opined by Henry S. Pritchett, then-President of the Carnegie Foundation (which funded Smith’s report, JUSTICE AND THE POOR): “For no group in the citizenship of this country is [a fair administration of justice] more needed than in the case of the great mass of citizens of foreign birth, ignorant of the language, and helpless to secure their rights unless met by an administration of the machinery of justice that shall be simple, sympathetic, and patient. To such, the apparent denial of justice forms the path to disloyalty and bitterness.” SMITH, *supra* note 34, at xi–xii. See also *id.* at ix (then-Senator of New York Elihu Root opining in the foreword,

cal effects of the problem-solving court emerged as poor and low-income families were funneled into state systems that sought to both provide assistance and exert control.

Following the criminalization of matters like desertion and nonsupport, for example, reformers claimed sums collected from absent fathers on behalf of their needy wives and children as examples of success.⁴⁴ However, criminalization of these issues also swelled the number of low-income families caught in the criminal legal system, with lower-income families of color disproportionately affected.⁴⁵ Informality, including the use of social workers to investigate families in custody cases, and the broadening discretion of judges in family court cases, also facilitated the imposition of White middle-class values and stereotypes on low-income families.⁴⁶

There is no evidence that the situation has improved.⁴⁷ While issues like support became civil matters handled in family courts with civil jurisdiction, the failure to pay support remains a crime in every state. This leaves the decision of whether to file charges and pursue support through criminal enforcement as a matter of prosecutorial discretion.⁴⁸ Civil courts can also use jail time to enforce child support orders through the civil contempt process.⁴⁹ Furthermore, while (unlike during the Progressive

“[Smith’s report] should be of great value to the multitude of Americans who are interested in the Americanization of the millions of foreigners who have immigrated to this country, and who fail to understand or who misunderstand American institutions”). Smith underscores the concern that the failure to prioritize Americanization will lead to political instability. *See id.* at 6 (warning that “[t]he inhabitants of the American colonies learned from the tyrannies and arbitrary conduct of George III and the Royal Governors what denial of justice meant, and it incited them to rebellion”). *See also* MARTHA DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* at 16 (1993) (observing that “Americanization rather than class injustice became the central focus when the American Bar Association considered Smith’s report”).

44. *See* Charles Zunsler, *The Domestic Relations Courts*, 124 *ANNALS AM. ACAD. POL. & SOC. SCI.* 114, 118 (1926).

45. By 1923, 68.4 percent of people on probation in all magistrate courts in New York City were “non-supporters.” A study of nonsupport cases in Philadelphia from 1916 to 1920 found that Black husbands were represented at rates that were double their presence in the city’s general adult population. S. Howard Patterson, *Family Desertion and Non-Support*, 5 *J. DELINQ.* 249, 271 (1922).

46. *See* Butler, *supra* note 41, at 1358–61 (discussing operation of White middle class norms in the juvenile justice system during this era).

47. *See, e.g.*, Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 *U. CINN. L. REV.* 891, 894–97 (2010) (describing the expanding use of informal and interventionist procedures, including use of child custody investigations and mediation, in private party cases); *see also* Levy, *supra* note 38, at 716–17).

48. *See* NAT’L CONFERENCE OF STATE LEGISLATURES, 50 *STATE CRIMINAL NON-SUPPORT LAWS*, <http://ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx>.

49. *See infra* Part I.B (describing the use of civil contempt in child support cases).

era) there are now public benefits available to assist custodial parents with needy children, the state will enforce a support order against the noncustodial parent to reimburse benefit payments whether the custodial parent wants a support order or not.⁵⁰

Additionally, unlike married couples, unmarried parents are compelled to go to family court to legally establish paternity and child support obligations.⁵¹ And marriage is increasingly a class and race-based phenomenon. Noting that education is a rough proxy for income level, Jane Murphy and Jana Singer report that, “more than 60 percent of new mothers with a high school education or less” are unmarried, compared to less than 10 percent of new mothers who are college-educated.⁵² Additionally, marriage rates among low-income African Americans have declined so sharply in recent decades that, as Murphy and Singer observe, “marriage has effectively disappeared from some low-income communities of color.”⁵³ Unsurprisingly then, given the prevalence of punitive child support enforcement policies and a biased system, low-income fathers are still more likely to owe support and be imprisoned for it, and low-income men of color are still disproportionately jailed for not paying child support.⁵⁴

White middle class values also continue to predominate in the family court system, with detrimental results for low-income families.⁵⁵ Scholars such as Dorothy Roberts have detailed the ongoing prevalence of class and racial bias in juvenile and child-welfare cases where the state is a party.⁵⁶

50. Incarceration may also result from failure to pay such orders. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2009).

51. Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 804 (2015).

52. JANE MURPHY & JANA SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 61 (2015).

53. *Id.*

54. According to the Federal Office of Child Support Enforcement, “70 percent of child support arrearages are owed by noncustodial parents with no annual earnings or earnings less than \$10,000. Only 4 percent are owed by noncustodial parents with an annual income of \$40,000 or more.” Patterson, *supra* note 50, at 118. See also *infra* Part I.B (discussing the likelihood of wrongful incarceration of low-income obligors). Additionally, “African Americans fathers comprise nearly 80% of those incarcerated by the child support enforcement system and are incarcerated at a rate ten times higher than other fathers.” KATZ ET AL., *supra* note 24, at 3.

55. Moreover, racial and class disparities persist. See, e.g., Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L & PSYCHOL. REV. 55, 70 (2010) (describing the stark disparity between the people served by family courts, who are disproportionately low-income people of color, and the bench and bar, who are overwhelmingly White and middle class).

56. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 59 (2001) (describing studies showing that child protection caseworkers evaluate families based on an ideal of a “white, middle-class family composed of married parents and their children”; see also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,”*

Subordinating impacts such as loss of rights and invasion of privacy are also prevalent in cases where the state is not a party.⁵⁷ For example, domestic violence protection orders may result in state interventions that impact poor families differently. Applying for a protection order often brings survivors in contact with individuals with child abuse reporting obligations.⁵⁸ As a result, revealing details of abuse on a protection order application may result in intervention by a child welfare agency and charges being brought against the survivor for failure to protect her children from the abuse.⁵⁹ Additionally, protection orders are enforceable by police and violation of a protection order is a crime in every state.⁶⁰ While such orders are unevenly enforced to protect survivors, they sometimes result in undesired contact with law enforcement when they are enforced against survivors' wishes.⁶¹ Being subject to a protection order can also adversely impact employment and have other collateral consequences, which is a problem for survivors who are dependent on the adverse party's income.⁶²

Despite such problems, survivors who are low-income may be particularly reliant on protection orders. Studies show protection orders are the most common way to engage with the state in response to domestic

Family and Criminal Law, 83 CORNELL L. REV. 688, 707 (1998) (explaining that caseworkers have biases about bad mothering that are based on race and class). In cities such as Chicago, over 95 percent of children in foster care are non-White. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 205 (2005); see also ROBERTS, *supra* (reporting that one out of every ten children from central Harlem in New York City is placed in foster care, compared to a total of only 200 children from the wealthy Upper East Side).

57. See generally Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 2 n.1 (1996) (reporting findings of gender bias task forces from more than thirty states, Puerto Rico, the Ninth Circuit, and the District of Columbia Circuit). See also Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996) (providing a bibliography of task force reports). For links to racial and gender fairness task forces and reports, see also NAT'L CTR. FOR STATE COURTS, GENDER AND RACIAL FAIRNESS STATE LINKS, <http://ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx?cat!Gender%20Fairness%20Task%20Forces%20and%20Reports>.

58. See Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 BUFF. WOMEN'S L.J. 171, 183 (2004) (describing risks to survivors from their exposure to mandatory child abuse reporters in domestic violence courts).

59. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 557 (2005) (describing that "numerous state and local agencies have adopted policies of removing children from their mothers' custody because the children witnessed or could have witnessed their mothers being abused by husbands, boyfriends, or other intimates").

60. TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 676 (2009).

61. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 19-34 (2009). Violation of some protection order provisions is also a deportable offense. Immigration and Nationality Act 8 U.S.C. § 1227(a)(2)(E)(ii) (2012).

62. See, e.g., *Putman v. Kennedy*, 900 A.2d 1256, 1261-63 (Conn. 2006) (identifying the possibility of "significant collateral consequences" as a result of a protection order, including employment and immigration consequences, and social stigma).

violence after calling 911—perhaps in part because they are, practically speaking, the only game in town.⁶³ Additionally, an application for a protection order may be necessary to obtain other types of assistance like access to battered women’s shelters, and obtaining emergency cash assistance such as Temporary Assistance for Needy Families (“TANF”), even when not officially required.⁶⁴ A protection order may also be demanded by child welfare agencies (and required to defend against charges of failure to protect) whether the applicant believes an order will increase her safety or not.⁶⁵ For undocumented survivors, a protection order may be required to support application for immigration relief based on the abuse.⁶⁶

The reliance on protection orders, whether due to a lack of viable alternatives or because they are required by other “helping” agencies, also exposes applicants to additional deleterious impacts of gender and racial bias. Women bringing claims of domestic violence in family court have been found to have worse outcomes in their child custody case, especially

63. Logan & Walker, *supra* note 60, at 685. See also Susan Keilitz, *Improving Judicial System Responses to Domestic Violence: The Promises and Risks of Integrated Case Management and Technology Solutions*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 147, 149 (Albert R. Roberts ed., 2002) (reporting that domestic violence survivors are more likely to seek protection through civil protection orders than the criminal justice system); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (characterizing civil protection orders as the “most commonly used legal remedy for domestic violence”); PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000) (reporting that as many as 20 percent of the 1.5 million annual survivors of domestic violence obtain civil protection orders).

64. See TIMOTHY CASEY ET AL., *Legal Momentum, Not Enough: What TANF Offers Family Violence Victims* 11 (2010) (describing how survivor’s reports of victimization are treated with disbelief by some welfare case workers). One study found that “Forty percent of respondents indicated that victims granted an extension, exemption, or specialized response are likely to face other requirements or conditions. Respondents listed the following examples of mandated requirements for victims: work, contact a domestic violence program, make a police report, receive counseling or mental health treatment, waive confidentiality, obtain a protective order, cooperate with child protection, attend support group, notify TANF of any relocations, go into a domestic violence shelter, leave the family home, or not allow the abusive partner to have contact with the children.” *Id.* at 13. The study concluded that such requirements made survivors less safe. *Id.*

65. See Kim, *supra* note 59, at 591.

66. See generally Rebecca Orloff et al., *Introduction to Immigration Relief for Immigrant Victims of Domestic Violence and Sexual Assault*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (Kathleen Sullivan & Leslye Orloff eds., 2013). Conversely, an undocumented survivor’s immigration status may result in a family court judge denying the protection order based on the false belief that the order will confer status on the survivor. Leslye Orloff et al., *Ensuring Access to Protection Orders for Immigrant Victims of Family Violence*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS, *id.* at 1.

if the father seeks custody.⁶⁷ This is true despite statutes that disfavor granting custody to parents who are found to have committed domestic violence.⁶⁸ These outcomes suggest the strong and ongoing influence of gender bias against women in these cases.⁶⁹ Additionally, the outcome may depend on whether survivor conforms to raced as well as gendered stereotypes about victims, and whether the adverse party is a “perceivable perpetrator.”⁷⁰ The interplay of tropes about race, gender, and victimization creates additional barriers to justice for women of color, and allows White men to more easily benefit from gender bias against women when abuse is alleged.⁷¹ The absence of attorneys and the use of informal processes to gather information increase the likelihood that biases will come into the case unopposed.

Most litigants in family court are unrepresented by counsel because they cannot afford a lawyer, with higher rates of pro se litigants in child support and domestic violence cases.⁷² Studies show that only fifty percent

67. See LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 142–43 (2012) (noting that fathers who batter seek and obtain custody at higher rates than commonly realized).

68. At least twenty-five states have statutory presumptions that custody of minor children should not be awarded to a parent who has committed domestic violence. See Amy Levin & Linda G. Mills, *Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws*, 48 SOC. WORK 463, 466 (2003) (summarizing state statutes). However, researchers report that 40 percent of fathers adjudicated as having committed domestic violence against the mother were still awarded joint custody in states with such a presumption. See Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1101 (2005). In states where there is both a presumption against granting custody to abusers and another in favor of joint custody, survivors seeking custody fared even worse: sole custody was awarded to abusive fathers more often than to survivors. *Id.* Survivors also received sole physical custody less frequently than in states with no statutory presumption. *Id.* at 1093.

69. See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 686–87 (2003) (observing that gender bias cannot be ruled out in understanding judges’ reluctance to withhold custody from batterers).

70. See generally Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531 (2013) [hereinafter MacDowell, *Theorizing from Particularity*].

71. See *id.* at 544–45 (describing stereotypes about women of color that distance them from tropes about the “perfect victim”); *id.* at 557 (describing stereotypes that associate men of color with the perpetration of violence).

72. See JUDICIAL COUNSEL OF CAL. TASK FORCE ON SELF-REPRESENTED LITIGANTS, *STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS* 2 (2004) (reporting up to 72 percent of family law litigants in California courts are unrepresented at filing; up to 96 percent are unrepresented at disposition); OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, *SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES: THE RESULTS OF TWO SURVEYS* 1 (2005) (reporting that 75 percent of litigants appearing in New York City Family Court were unrepresented). See also Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 125 (1993) (reporting the results of a District of Columbia study finding 93 percent of defendants in child support enforcement cases,

of applicants for legal aid services receive the assistance they need, and less than one in five people have their legal needs met.⁷³ The lack of attorneys for poor people is exacerbated by federal funding restrictions for legal aid, which prohibit services for incarcerated people and others at the nexus of punitive regulatory systems like immigration, family, and criminal law.⁷⁴ Other service providers, like public defenders, are also unprepared to meet the needs of clients who are facing the many civil consequences of criminal convictions.⁷⁵ Thus, the erosion of distinctions between legal regimes, including through the use of criminal punishments to enforce civil schemes like child support, not only creates new legal needs for poor people, it has tremendous implications for procedural due process. This is particularly true in the “poor people’s courts”—courts whose dockets are populated in large part by low-income, unrepresented litigants on one or both sides of the case. The next Section describes the doctrinal foundations of this system.

B. *Due Process in Delegalized Settings*

Procedural due process protects individuals against government action that deprives them of liberty or property interests established under the Due Process Clause of the Fifth or Fourteenth Amendment.⁷⁶ Due process is a flexible standard that requires “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’.”⁷⁷ The test for procedural due process is set forth in *Mathews v. Eldridge*, and balances (1) the importance of the interest at stake for the person or persons seeking additional protection; (2) the risk of an erroneous deprivation of the interest because

where potential sanctions include incarceration, were unrepresented); JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 3–6 (2002). A majority of tenants in housing court, and consumers in small claims courts, are also without counsel for economic reasons. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 35, 41–43 (2009) (summarizing data from studies of self-representation in housing, small claims, and family law cases).

73. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 12 (2009), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

74. See Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687, 693 (2009) (describing restrictions on practice by legal aid organizations receiving federal funds). Restrictions include providing any legal services for inmates related to litigation, even on family law matters. *Id.* See also Elizabeth L. MacDowell & Ann Cammett, *Models of Invisibility: Rendering Domestic and Other Gendered Violence Visible to Students through Clinical Law Teaching*, 22 VIOLENCE AGAINST WOMEN 1438, 1442 (2016) (observing that even privately funded legal aid providers direct limited resources to clients unlikely to appeal to funders’ conceptions about the deserving poor).

75. See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Cesney-Lind, eds., 2002).

76. *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

77. *Id.* at 334.

of the procedures currently used, and the probable value of additional procedural safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."⁷⁸ The Supreme Court has on occasion criticized the informalism of family court procedures.⁷⁹ However, the *Mathews* test has been applied to limit access to counsel in cases in the poor people's courts, including cases involving termination of parental rights,⁸⁰ and most recently, in *Turner v. Rogers*, incarceration based on civil contempt for failure to pay child support.⁸¹ Observers have noted that the *Mathews* test is weighted against individuals seeking additional due process protection.⁸² Indeed, the Court's analysis in these cases reinforces the hegemonic functions of the poor people's courts—not only because it limits access to counsel for indigent litigants, but because it fails to fully acknowledge or interrogate the operation of the state in these forums. The Court's analysis is lacking in this regard in at least three broad, interrelated aspects.

First, in applying the *Mathews* test, the Court characterizes the public and private interests at stake in ways that obscure their true nature. For example, in *Turner*, the Court is particularly concerned with the potential unfairness of appointing counsel to an indigent noncustodial parent (who owes child support) in a contempt proceeding where the custodial parent (who is owed child support) is unrepresented by counsel.⁸³ The Court opines that appointing counsel to the noncustodial parent in such a case would "create an asymmetry of representation" that could make the proceeding less fair for families that seek support.⁸⁴ The Court further notes that "[t]he needs of such families play an important role in our analysis."⁸⁵ The Court's framing presumes an alignment between the state's interest in adjudicating cases involving nonpayment of child support and the interest

78. *Id.* at 334–35.

79. *See, e.g., Sandusky v. Kramer*, 455 U.S. 745, 774 (1982) (the fair preponderance of the evidence standard violates the due process rights of parents in termination of parental rights cases); *In re Gault*, 387 U.S. 1, 4 (1967) (juveniles accused of crimes in delinquency proceedings must be afforded the due process protections of adults, such as the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel); *Kent v. United States*, 383 U.S. 541, 543 (1966) (waiver of jurisdiction from a juvenile court to a district court must be voluntary and knowing).

80. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981).

81. *Turner v. Rogers*, 564 U.S. 431 (2011).

82. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Mashaw argues that the *Mathews* test can be restated as the following formula: "Void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational." *Id.* at 48.

83. *Turner*, 564 U.S. at 446–47.

84. *Id.* at 447.

85. *Id.*

of the custodial parent who is not receiving support owed to her pursuant to a child support order. This line of analysis ignores the potential conflicts between the interest of the custodial parent in securing financial support for her children (an interest shared by the public) and the interest of the welfare arms of the state in avoiding financial responsibility (which the public has also been encouraged to share).⁸⁶ The former interests are not well-served by sentencing an indigent parent to jail, where he will likely be unable to find employment, and which will decrease his chances of finding work once he is released.⁸⁷ Arguably, the latter interests are not well served, either. However, maintaining the onus of responsibility (and the blame of policy failure) on noncustodial parents does serve the state's interests (and indirectly, those of the public) by deflecting government responsibility for the financial well-being of children.⁸⁸ Moreover, the state interest as embodied by the family court is to manage its docket by processing cases quickly; the family court is not involved in policy-setting at the macro level of child support enforcement.⁸⁹ None of these governmental interests corresponds with protecting the procedural due process rights of defendants in family courts, or even collecting child support for custodial parents. This is a problem that the Court's analysis utterly fails to acknowledge.⁹⁰

86. See e.g., Gustafson, *Degradation Ceremonies*, *supra* note 22, at 344–48 (describing how degradation ceremonies justify state policies that create material deprivation for poor Black families).

87. Notably, this is true irrespective of the custodial parent's desire to enforce the order and collect support or punish the noncustodial parent for failure to pay—a narrow set of options established by means largely outside of the custodial parent's control. See, e.g., Turner, 564 U.S. at 447 (observing that the custodial parent asked the court to incarcerate the noncustodial parent due to his pattern of nonpayment).

88. See, e.g., Gustafson, *Degradation Ceremonies*, *supra* note 22, at 344–48 (describing how degradation ceremonies legitimize conditions of subordination maintained by state policies).

89. See *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 28 (1981), 452 U.S. at 28 (acknowledging “[t]he State's interests . . . clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause”). See also Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 703–04 (2006) [hereinafter Engler, *Shaping a Context-Based Civil Gideon*] (describing the primary concern of the poor people's court as moving the docket along).

90. The Court also ultimately minimized the extent and significance of opposing interests in *Lassiter*. There, the majority asserted that individuals facing termination of parental rights share a common interest with the child welfare agency in an accurate and just decision. *Lassiter*, 452 U.S. at 28. With this assertion, the majority ignored the state's interest in avoiding error as measured by children who are harmed after being returned to their families. Such cases subject state officials and institutions to public ridicule and are in tension with a concurrent interest in accuracy and fairness. Indeed, from the point of view of state institutions, the best way to avoid mistakenly returning children to abusive homes may be to not return any children once they have been removed.

The complex and conflicting nature of public and private interests is further obscured by the Court's deference to administrative expertise.⁹¹ In *Turner*, the majority relies on the federal government's "considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders" in determining the existence of adequate procedural safeguards other than appointment of counsel.⁹² In accordance with suggestions from the Solicitor General, the majority finds that alternatives to representation, including the use of pleading forms to elicit the defendant's financial information, and active judicial questioning, would be sufficient in private civil contempt proceedings where the opposing party is unrepresented.⁹³ Because the defendant in *Turner* did not have the benefit of counsel or these alternatives, his due process rights were violated; however, the Court holds that there is no absolute right to appointment of counsel for indigent litigants in civil contempt proceedings.⁹⁴ Thus, the majority in *Turner* relies on the conditions of delegalization itself—that is, on the absence of counsel and the existence of informal procedures—to justify further curtailment of procedural due process rights in what remains an adversarial proceeding.⁹⁵ In so doing, the Court unjustifi-

91. See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (stating "[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals"). In *Mathews*, the Court granted deference to SSA procedures for termination of benefits without an evidentiary hearing, despite evidence of high rates of reversal of termination decisions after trial. *Id.* at 346–47, 349. See also *Turner v. Rogers*, 564 U.S. 431, 447–48 (2011) (relying on representations made in the amicus curiae brief of the United States Solicitor General in reaching its judgment); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 828 (2002); *Vernonia Sch. Dist. 473 v. Acton*, 515 U.S. 646, 652 (1995) (granting deference to factual conclusions by school districts about drug use among school children).

92. *Turner*, 564 U.S. at 448.

93. *Id.* It remains to be seen, however, whether the Court would require counsel to be provided in all cases where the moving party is represented, even if counsel is appearing for a state agency. See *Lassiter*, 452 U.S. at 32 (holding the trial court did not abuse its discretion in failing to appoint counsel for the defendant where the child protection agency was represented by counsel, but "the case presented no especially troublesome points of law, either procedural or substantive").

94. *Turner*, 564 U.S. at 448–49.

95. Blackmun's dissent in *Lassiter* notes that a proceeding with the following characteristics is adversarial: "Notice and a trial-type hearing before the State on its own initiative. . . [where] [t]he decisionmaker is a judge, the rules of evidence are in force, and the State is represented by counsel." *Lassiter*, 452 U.S. 37, 42–43. See also *id.* at 42–43 (comparing the proceeding in *Lassiter* to a criminal proceeding, which is adversarial). In *Turner*, all but the last characteristic (representation of the state or opposing party by counsel) was in place, albeit with relaxed evidentiary rules in effect. See *Turner*, 564 U.S. at 449. Moreover, unlike in a termination of parental rights proceeding, where the burden of proof is on the state, the burden of proof in a civil contempt case like *Turner* is on the defendant. See *Hicks v. Feiock*, 485 U.S. 624, 637–641 (1988) (holding that the Fourteenth Amendment does not prohibit placing the burden of proof on the defendant in a civil contempt proceeding).

ably weights the test against additional due process protection, while reinforcing a fallacy that public, private, and state interests are not in potential conflict in the poor people's courts.⁹⁶

Second, the Court's analysis in the due process cases minimizes the role of the state and related power imbalances present in cases in the poor people's courts, reinforcing the fiction that the state is not involved in an ostensibly private party case. This occurs both in how the Court characterizes cases in terms of relative complexity, and when the court identifies the case as involving state action. These are often interrelated issues. For example, in the Court's analysis, if the complexity of the case is limited, then the potential benefit of additional protections is diminished.⁹⁷ This approach disregards the ways in which the state controls the scope and complexity of the cases before it, particularly those involving unrepresented parties, who are typically not well equipped to defend their legal rights.⁹⁸

In *Lassiter*, for example, the Court characterizes the case before it as routine, due in part to the absence of expert witnesses.⁹⁹ The Court then relies on this characterization to determine that due process does not require the appointment of counsel in all termination of parental rights cases, only those that are not routine.¹⁰⁰ Yet, it is the agency or the court that would likely call an expert witness, not the unrepresented, indigent parent facing termination of parental rights, regardless of whether the parent might actually benefit from such a witness. Moreover, given the odds stacked against an unrepresented parent in a termination case, it is unlikely that the agency would feel the need for expert testimony—or would choose to up the ante by calling an expert given the Court's indication that doing so would require appointment of counsel for the defen-

96. Similarly, in *Mathews*, the Court granted deference to SSA procedures for termination of benefits without an evidentiary hearing, despite evidence of high rates of reversal of termination decisions after trial. See *Mathews*, 424 U.S. at 346 (putting the reversal rate at 60%); see also Mashaw, *supra* note 82, at 38–39 (discussing calculation of termination reversals). See also *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty.*, 536 U.S. at 828 (2002); *Vernonia Sch. Dist.* 473, 515 U.S. at 652 (granting deference to factual conclusions by school districts about drug use among school children, in a case reviewing the district's safety-related procedures).

97. See, e.g., *Lassiter*, 452 U.S. at 32–33 (holding counsel need not be appointed in a routine termination of parental rights case).

98. See *id.* at 30 (observing that parents facing termination of parental rights cases tend to have little education, have uncommon difficulty dealing with life, and are in a distressing and disorienting situation). See also Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, in *CIVIL PROCEDURE STORIES* 509 (Kevin M. Clermont ed., 2004) (describing the defendant in the *Lassiter* case). Thornburg writes, “Abby Gail Lassiter first became a mother when she was fourteen years old. She was poor, black, single, and largely uneducated. Juvenile court records suggest that she was of low intelligence.” *Id.*

99. *Lassiter*, 452 U.S. at 32–33.

100. *Id.*; *Mathews*, 424 U.S. at 344 (characterizing medical evidence used in determining ongoing eligibility for disability benefits as “routine, standard, and unbiased”). See also *Turner*, 564 U.S. at 446 (rationalizing that the case involves a “straightforward” question of the defendant's indigence).

dant.¹⁰¹The Court's approach disregards these inequalities of power between the state and unrepresented parties in controlling the litigation.¹⁰²

The Court's analysis also underestimates the level of state action involved in proceedings in poor people's courts. For example, in *Turner*, the Court's ruling specifically exempts circumstances where the government is collecting child support owed for reimbursement of welfare payments made to the child's custodian and is represented by counsel. Thus, the Court implies that the state was not involved in the case before it.¹⁰³ However, unlike a traditional private party case initiated by a private litigant, the family court clerk initiated the contempt proceedings in *Turner*, which it did as a routine matter.¹⁰⁴ Moreover, the family court judge actively questioned and discussed the evidence with the unrepresented litigants before him.¹⁰⁵ Indeed, the Supreme Court's ruling relies on an active role for the state, requiring the family court to question the defendant in order to discern the relevant facts, and to make express findings in the event that counsel is not appointed.¹⁰⁶ However, the issue triggering appeal in the case (the incarceration of the defendant for twelve months without a finding of ability to pay) also arose most directly from the actions of the trial court judge, who demonstrated an alarming inability or unwillingness to follow the law.¹⁰⁷ Thus, the Court's analysis also disregards the way the state can (and did in *Turner*) operate to actively inhibit justice for litigants.¹⁰⁸

101. See, e.g., Thornburg, *supra* note 98, at 503 (discussing the state's case against Lassiter). Moreover, the state can avoid formally calling expert witnesses by having social workers give what amounts to expert opinion testimony and get away with it if the defendant does not have the knowledge or wherewithal to object. See *id.* at 523–24 (explaining that the state's only witness in *Lassiter*, a social worker with limited knowledge of the case, gave her opinion that termination of Lassiter's parental rights was in her son's best interest—a type of testimony that is generally only permissible by a qualified expert).

102. In *Mathews*, the Court's characterization of medical evidence also disregards the ways in which seemingly objective, clinical-based decisionmaking incorporates subjective judgments, especially in the disability determination processes set forth by the Social Security Act. See Mashaw, *supra* note 82, at 41–42 (describing the disability determination process).

103. See *Turner*, 564 U.S. at 449.

104. *Id.* at 435–36.

105. *Id.* at 436–37 (describing the exchange between the judge and the parties).

106. *Id.* at 449. See also *Mathews*, 424 U.S. at 345 (noting in reaching its decision that due process was not violated that the SSA provides individuals receiving disability benefits assistance with completing questionnaires aimed at determining their continued eligibility for the program).

107. See *Turner*, 564 U.S. at 437–38 (explaining that the trial court failed to make any findings about the defendant's ability to pay his arrearages, to ask any follow-up questions about the issue, or to complete a prewritten "Order for Contempt of Court" form that provided boxes for the judge to indicate whether the defendant was employed or had the ability to make support payments).

108. See Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158–59 (2012) (argu-

Third, the Court's reasoning in the due process cases disregards the potential role of counsel in making delegatized forums more accountable by bringing state practices that hurt poor people to light. It is true, as noted earlier, that the informality of procedural rules creates challenges for protecting rights through adversarial models, even for represented parties. However, *Turner* illuminates the sorts of judicial misconduct that routinely occur in courts where attorneys seldom appear, and its consequences.¹⁰⁹ The failure of the Court to provide more robust procedural protections for the poor in response to such misconduct reflects a persistent distortion, manifest in governing decisions, of the role of advocacy for individuals subject to state action.

Indeed, the Court's due process analysis involves a pervasive assumption that the presence of attorneys will hinder a tribunal in reaching fair and timely decisions on the matters before it, particularly when only one party is represented. For example, in *Turner* the Court asserts that appointment of counsel might "unduly slow payment [of child support] to those in immediate need", and "increase[e] the risk of a decision that would erroneously deprive a family of the support it is entitled to receive."¹¹⁰ How appointment of counsel might achieve undue delay or erroneous results is not explained. The assumption underlying adversarial process is that a legal contest between equally armed opponents, represented by counsel, will result in the presentation of the most complete body of relevant evidence possible for the fact finder to reach a correct conclusion.¹¹¹ It does

ing that the performance of the trial judge in *Turner* suggests the inadequacies of those responsible for procedural fairness under the Supreme Court's due process formulation). See also Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 *FORDHAM URB. L.J.* 1227, 1231–32 (2014) (questioning whether family courts have the ability to protect litigants' due process rights).

109. The potential for wrongful incarceration of child support obligors who, like the defendant in *Turner*, cannot actually pay their arrears, is high. See *Turner*, 564 U.S. at 445 (acknowledging that the vast majority of arrears are owed "by parents with either no reported income or income of \$10,000 per year or less"). See also Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 *J. GENDER RACE & JUST.* 617, 646–47 (2012) (reporting that "[a]bout twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) . . . earn an average of \$5627 annually"). Brito cites to findings that "sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of interview." *Id.* at 647. "Only forty-three percent of men not in prison were working, and those employed in 1996 worked an average of just twenty-nine weeks and earned \$5,627 that year." *Id.*

110. *Turner*, 564 U.S. at 447.

111. See *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 28 (1981) (observing that "our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests). See also *Gagnon v. Scarpelli*, 411 U.S. 778, 787–88 (1973) (noting, "lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views").

not follow that the opposite result would occur where only one party is represented, and thus the parties are unequally armed. Attorneys have a duty of candor to tribunals in which they appear on behalf of a client.¹¹² Moreover, the trial court must still make a determination based on admissible evidence sufficient to make applicable findings of law and fact. Thus, the court could presumably benefit from presentation of evidence by counsel for the defendant, whose income is the pertinent issue, and who bears the burden of proof.¹¹³ While participation of attorneys might conceivably slow the resolution of certain types of cases, the Court in *Turner* offers no evidence that this is an issue in child support cases.¹¹⁴ Moreover, this goes to the speed with which the trial court can clear its docket, not its accuracy in resolving cases.

It is worth reiterating here the context in which the Court's analysis occurs here: one in which large percentages of litigants (parents with child support arrears) are indigent. It is hard to see how any increase in the time needed for adjudication caused by additional procedural protections for

112. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983); see also *id.* r. 3.3 cmt. (explaining "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false").

113. See *United States v. Rylander*, 460 U.S. 752 (1983) (holding that the defendant in a contempt action must overcome a presumption of his or her ability to comply with the court order at issue). The Court's analysis of procedural due process also distinguishes between informal and adversarial proceedings, and expresses the concern that the presence of counsel will alter the nature of proceedings. See *Turner*, 564 U.S. at 447 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). In *Gagnon*, the court distinguished the role of the hearing body in probation revocation matters from that of a judge at trial, characterizing the former's role as "'predictive and discretionary' as well as factfinding," and focused on rehabilitative rather than retributivist concerns. 411 U.S. at 787. In that context, the court reasoned, the presence of counsel "will alter significantly the nature of the proceeding." *Id.* Expressing concern for the possibility of negative consequences for probationers from more formal procedures, the uncontested nature of some revocation proceedings (e.g., where the violation is admitted to by the defendant), and the increased costs to the state of a blanket requirement for counsel, the court ruled that whether due process required appointment of counsel in a probation revocation hearing depended on a case-by-case analysis. *Id.* at 788. In contrast, the family court judge in *Turner* was in fact a trial judge whose role as factfinder and responsibility for applying the law to the facts was neither predictive nor discretionary, and this was true regardless of whether the parties were represented. *Cf.* *Lassiter*, 452 U.S. at 43 (Blackmun J. dissenting) (distinguishing the adversary termination of parental rights proceeding from the proceeding in *Gagnon*). However, in rather circular logic, the court seems to characterize the nature of the proceeding based in part on the presence or absence of counsel. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976) (characterizing the steps leading up to termination of disability benefits as non-adversarial based in part on the SSA not being represented by counsel). The characterization of administrative proceedings as non-adversarial when the agency is not represented by counsel is now codified in the federal Equal Access to Justice Act, 5 U.S.C. § 504 (2012).

114. See, e.g., D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013) (reporting the impacts of counsel on the speed with which the court resolved cases).

indigent defendants would unduly delay collection of support owed to needy families. If the court's docket were slowed, however, it might serve to highlight the unworkability of current child support policies in a way that got the attention of state officials.¹¹⁵ Moreover, while the presence of counsel does not mean that the defendant's procedural due process rights are guaranteed, the routine absence of counsel or other effective advocacy for poor litigants leaves state power unchecked. Alternative procedural safeguards provided by the state, such as those recommended by the Court in *Turner*, do not necessarily provide this power-checking function.¹¹⁶ In fact, alternatives to representation may allow for the appearance of meeting legal needs while falling short of countering the subordinating impacts of poor people's courts.¹¹⁷ For that matter, given the insufficient resources provided to publicly funded legal aid and the inadequacies of traditional approaches to legal representation, even providing counsel, as important a role as representation can play, may have the same effect.¹¹⁸

Nonetheless, the Court's approach obscures the relationship between court practices and regulation of the poor, and the potential for advocacy that effectively challenges state power. The result is to encourage the illusion that process dangers and abuses are not endemic to the poor people's courts, and that access to justice interventions of any kind do not, therefore, have to account for state power in order to be effective. The next Section develops a theoretical framework to counter this approach and lays the groundwork for a new theory of access to justice. The point of this theory is to better account for the structural dimensions of advocacy for poor people. That will require more than attorneys; it will require a different perspective on the purpose and potential of access to justice.

II. THEORETICAL FRAMEWORK

A. *The Fragmented State*

Political scientist John Hagan originally proffered the concept of the fragmented state within a structural-contextual theory of criminal justice.¹¹⁹ In this view, state apparatuses consist of macro and micro-level

115. See Engler, *Shaping a Context-Based Civil Gideon*, *supra* note 89, at 704–06 (arguing that access to justice strategies must take into account the self-interests of court staff and other stakeholders in order to effectuate desired change; only if the status quo becomes too onerous will courts and others embrace change).

116. See Judith Resnick, *Fairness in Numbers*, 125 HARV. L. REV. 78, 158 (2011) (noting the lack of empirical evidence about the costs or efficacy of alternative procedural safeguards).

117. See Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM & MARY J. WOMEN & L. 203, 244–252 (2016) [hereinafter MacDowell, *Politics of Self-Help*] (detailing how self-help staff members regulate litigants and restrict access to remedies).

118. See MacDowell, *Reimagining*, *supra* note 8, at 504–10 (describing the limitations of current access to justice models).

119. Hagan, *supra* note 14, at 110–11. Other theorists have described or conceptualized the state as consisting of multiple parts and functions. These include Martha Fineman, whose

subsystems that are loosely coordinated, often in conflict, and highly responsive to political forces.¹²⁰ The tendency of the system is to remain loosely coupled unless and until political goals (emanating from within or outside a given apparatus) result in a tightening—characterized as greater coordination among the system’s constituent parts—in order to achieve the desired ends.¹²¹ The result of tightening is a shift from unpredictability and seemingly random consequences to “an increase [in] the certainty of outcomes” for targeted groups.¹²²

Importantly, Hagan found that tightening across criminal justice operations in highly politicized settings have “ominous implications” for targets of the (now more highly coordinated) state.¹²³ Hagan associates this phenomenon with the “new penology”: a shift from “an individualized conception of justice that is characteristic of loosely coupled system operations. . . . [to] a concentration on *subgroups* or *aggregations* of individuals and their *risks* of crime, which are to be *managed* efficiently by means of *selective incapacitation*.”¹²⁴ Hagan argues that “[t]he italicized terms form the language of a new penology that is used to target categories and subpopulations rather than individuals for penal attention,” including young Black males targeted by the War on Drugs.¹²⁵ Thus, the theory suggests the structural mechanisms through which varying levels of state domination occurs.

Hagan’s theory has been proposed as a framework for explaining operations across as well as within systems (for example, across the legal system and the welfare system).¹²⁶ It was also used by political scientist Elizabeth Ben-Ishai to theorize about opportunities for advocacy and activism within criminal legal systems by non-governmental community actors.¹²⁷ This formulation is particularly instructive for thinking about access to justice efforts more broadly.

vulnerability thesis—which I discuss next—understands the state as consisting of “intersecting and overlapping” parts. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 269 (2010) [hereinafter Fineman, *Responsive State*]. Political theorist Michel Foucault might go farther and object to use of the term “state” at all, referring instead to the conditions of which I speak as problems of “governmentality”, which is inherently diffuse in nature. See, e.g., Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87, 103–04 (Graham Burchell et al. eds., Rosi Braidotti trans., 1991) (describing the modern state form as “a composite reality and a mythicized abstraction”).

120. Hagan, *supra* note 14, at 110–12.

121. *Id.* at 122.

122. *Id.*

123. *Id.*

124. *Id.* (emphasis in original).

125. *Id.*

126. See Ben-Ishai, *supra* note 14, at 307.

127. *Id.* at 313.

Ben-Ishai is one of the many scholars who have weighed in on the impacts of mandatory arrest and prosecution schemes on domestic violence survivors; she was particularly concerned about the potential impacts of mandatory policies on survivors' autonomy.¹²⁸ Using Hagan's theory (as adopted by sociologist Lynne Haney), Ben-Ishai opined that "coordinated fragmentation" within the state allows for creative service provision on behalf of battered women, such as that provided by "coordinated community response" ("CCR") programs.¹²⁹ Services provided through CCR programs, she contends, mitigate against the impartiality of mandatory schemes and their potentially autonomy-inhibiting effects of mandatory schemes in at least three ways. First, CCR programs allow advocates to support victims during their engagement with the state (for example, during encounters with police and prosecutors) and help maintain focus on their safety.¹³⁰ Second, they allow advocates to educate state actors about the dynamics of abuse that impact victims' behavior, such as the desire to return to the abuser and drop the case, which (absent advocacy) leads prosecutors and others to view battered women as "bad victims."¹³¹ In this role, CCR program advocates help contextualize the experiences of individual women within larger issues of gender inequality.¹³² Third, CCR programs facilitate coordination among arms of the state with different functions that, absent coordinated service provision, can be exploited by batterers to the detriment of victims.¹³³ In other words, the CCR programs help bridge a fragmented system, and exploit fragmentation to achieve advocacy goals.

Ben-Ishai also believes coordination creates the potential for "immanent self-critique" within the system—a type of institutionalized feedback loop between differing perspectives that reside within a fragmented state.¹³⁴ These perspectives include those within the legal system requiring greater impartiality, and those belonging to "arms of the state that are outside the 'ethic of justice'."¹³⁵ In her view, feedback among these parts holds the potential to make the overall system more sympathetic and responsive to women's needs. This potential for productive critique is made possible by both the existence of fragmentation in the state, and the presence of "outsiders" in the system who strategically represent a different viewpoint—in this case, the CCR program.¹³⁶ Thus, the benefits of coor-

128. *Id.* at 315–17 (detailing feminist analyses of the impact of mandatory policies on survivor autonomy).

129. *Id.* at 317.

130. *Id.* at 325.

131. *Id.* at 313–14.

132. *See* Ben-Ishai, *supra* note 14, at 314.

133. *Id.*

134. *Id.* at 323.

135. *Id.*

136. *Id.*

minated fragmentation to battered women, in Ben-Ishai's view, depend on a careful balance wherein advocates have access to state actors in critical positions and can influence their views, yet neither representatives of the state nor advocates are coopted to the other's viewpoint.¹³⁷

This analysis must be contrasted with the extensive critique of service providers who engage with the state. First, critical race feminists and others have shown how such state-engaged efforts to provide services to battered women are often not particular enough.¹³⁸ This critique holds that feminists in these partnerships fail to adequately represent the interests of women of color, who suffer disproportionately from the negative impacts of mandatory policies and other more generalized responses.¹³⁹ Second, activists and researchers report that state systems often impact partnering service providers in negative ways (for example, consuming resources and compromising missions, as system concerns supplant partiality for battered women) while doing little to change the state response.¹⁴⁰ Third, to the extent that arms of the state adopt feminist ideologies about domestic violence, they may do so selectively to further their own aims, which may not coincide with those of battered women.¹⁴¹ As a result, CCR programs may allow the coordinated state to both tighten (around a shared ideology and narrative about abuse) and extend its grip (into civil society) in a way that further marginalizes particularly affected survivors (and defendants), while appearing responsive to community input.

The main point is not that Ben-Ishai might be too optimistic in her analysis of CCR programs. Her insight about the ways that fragmentation can be exploited to benefit outsiders engaging the state is a critical one. The spaces within the fragmented state (including those created by differing or conflicting viewpoints) create opportunities for strategic action on behalf of marginalized people. The question is under what conditions such efforts might succeed with the least unintended negative consequences. Ben-Ishai's focus on issues of partiality and impartiality suggests the important relationship of fragmentation to the roles of system participants and their ability to carry out their functions.

137. *Id.* at 327–28.

138. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1246–50 (1991) (explaining the importance of examining intersections of race, gender, and immigration status in developing domestic violence laws, services, and policies).

139. *Id.* See also Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801, 811 (2001) (describing how a lack of insight about the experiences of low-income women of color results in harmful policies).

140. Ellen Pence, *Advocacy on Behalf of Battered Women*, in *SOURCEBOOK ON VIOLENCE AGAINST WOMEN* 329, 336 (Claire M. Renzetti et al. eds., 2001).

141. *Id.* at 335 (describing how engagement with the criminal justice system by advocates for abuse survivors ultimately benefited law enforcement agencies and prosecutors).

For example, returning to Hagan's analysis of tightening in the criminal legal system in response to political pressure, we can notice that heightened coordination among police, prosecutors, and judges calls into question whether these linked subsystems of law enforcement, executive, and judiciary functions are exercising their duties with appropriate independence. Thus, an important question is how to distinguish among types of fragmentation for the purpose of advocating for marginalized communities—what linkages are helpful, which are problematic; how much coordination or detachment is productive in a given context? The central issues involved in answering these questions arise at what can be characterized as the nexus of institutional and human vulnerabilities.

B. *Vulnerability Theory*

Vulnerability theory derives from legal theorist Martha Fineman's efforts to provide a more egalitarian and holistic alternative to the classic "autonomous liberal subject" of liberal political theory; one which would justify a strong, responsive, and accountable state. Fineman argues that "by relying on the myth of the autonomous individual, the formal equality model fails to address substantive inequalities and differential allocations of privilege produced by our institutions."¹⁴² Therefore, Fineman advocates for a new view of the human legal subject: an embodied individual who faces a life trajectory inevitably marked by biological vulnerability (including infancy, old age and death, and the possibility of illness) and the other multiple forms of harm that can befall one during a lifetime (including social, economic, and environmental harm).¹⁴³ These shared vulnerabilities interact with one another to produce additional, complex forms of vulnerability, which vary among individuals and social groups. Fineman notes that vulnerability is thus universal, constant, and complex. But vulnerability is also, paradoxically, particular in nature. This is true because, "our individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command."¹⁴⁴ Moreover, because it cannot be eradicated, human vulnerability requires a strong state to "mediate, compensate, and lessen our vulnerability through programs, institutions, and structures."¹⁴⁵

As Fineman explains, "Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual. The nature of human vulnerability forms the basis for a claim that the state must be more

142. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 11 (2008) [hereinafter Fineman, *Human Condition*].

143. Fineman, *Responsive State*, *supra* note 119, at 267–68.

144. *Id.* at 269.

145. *Id.*

responsive to that vulnerability.”¹⁴⁶ However, Fineman views societal and state institutions as vulnerable as well. This includes institutional vulnerability “to a variety of internal and external corruptions and disruptions, and this realization is the basis for the further claim that these institutions must be actively monitored by the state in processes that are both transparent and inclusive.”¹⁴⁷

Vulnerability theorists conceive of resources to combat vulnerability as “assets.”¹⁴⁸ Cumulatively, assets constitute our resilience, which is our ability to combat vulnerability and address misfortune.¹⁴⁹ Drawing on the work of political economist Peadar Kirby, Fineman identifies three kinds of assets, provided by institutions, that are sources of support and strength: physical assets (those that “impart physical or material goods through the distribution of wealth and property”), human assets (innate and developed assets, such as those pertaining to health and education), and social assets (including cultural networks such as family and political associations such as trade unions and political parties).¹⁵⁰ These assets have both present value in terms of our quality of life, and future value in the sense that they help determine our ability to collect material resources and our future resilience in the face of vulnerability.¹⁵¹

In this regard, vulnerability theorists recognize that individuals and groups have differing levels of vulnerability and assets due to personal circumstances and conditions of societal discrimination, including those based on race and gender. As Fineman describes, “Important to the consideration of privilege is the fact that these systems [of discrimination] interact in ways that further affect these inequalities. Privileges and disadvantages accumulate across systems and can combine to create effects that are more devastating or more beneficial than the weight of each separate part.”¹⁵² However, Fineman advocates vigorously for replacing identity categories like race and gender with what she views as the more universal experience of vulnerability. In her view, the universality of human vulnerability is more descriptively accurate than identity, and more strategically useful. “Sometimes privileges conferred within certain systems,” Fineman writes, “can mediate or even cancel out disadvantages conferred in others. A good early education may triumph poverty, particularly when coupled with a supportive family and progressive social network.”¹⁵³ She concludes, therefore, that “with respect to the assets any one person possesses,

146. *Id.* at 255–56.

147. *Id.* at 256.

148. Fineman, *Human Condition*, *supra* note 142, at 13.

149. *Id.*

150. *Id.* at 13–14.

151. *Id.* at 14.

152. *Id.* at 15.

153. Fineman, *Human Condition*, *supra* note 148, at 15–16.

it is not multiple identities that intersect to produce compounded inequalities, as has been posited by some theorists, but rather systems of power and privilege that interact to produce webs of advantages and disadvantages.” In her view, then, what is imperative is to account not for “multiple intersecting identities,” but for “the institutional practices that produce the identities and inequalities in the first place.”¹⁵⁴

Vulnerability theory offers a number of benefits to analyzing structural inequality in institutional contexts. Vulnerability theorists’ focus on institutions contextualizes and concretizes the analysis of how inequality and power operates. The focus on shared (institutionally created) vulnerabilities may also lend itself to coalition-building as we move toward solutions.¹⁵⁵ However, Fineman’s “post-identity” approach to theorizing state responses to inequality has some weaknesses. First, it does not tell us how to prioritize our response to different vulnerabilities. Are all vulnerabilities equally important? Or is there a starting point that makes more sense? Second, it does not suggest an appropriate response by the state to vulnerability. Indeed, the perception of vulnerability can lead to responses that reinforce inequalities.¹⁵⁶ In the context of family courts, for example, we have seen that the perceived vulnerability of children to abuse, neglect, and poverty has supported policies resulting in the disproportionate removal of poor children of color from their homes and the incarceration of their fathers for child support arrears. Moreover, calls for a strong state may help justify making courts responsible for securing access to justice interests when, as we have seen, they have a weak interest in protecting the rights of unrepresented litigants.

Two interventions have been suggested to address these issues. First, legal scholar Frank Rudy Cooper argues for a modification of vulnerability theory to incorporate the theory of relative privilege.¹⁵⁷ As discussed above, Fineman includes the notion of privilege in her articulation of vulnerability theory.¹⁵⁸ But she does so through her emphasis on how social institutions contribute to relative vulnerability.¹⁵⁹ In contrast, Cooper advocates for a notion of relative privilege based on intersecting identities such as race and gender that travel with individuals across institutional rela-

154. *Id.* at 16.

155. *Id.* at 17; Cooper, *supra* note 29, at 1371, 1377.

156. Kohn, *supra* note 29 at 14–21 (analyzing suggested reforms to old age polices).

157. Cooper adopts Stephanie Wildman’s definition of privilege as “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste.” Cooper, *supra* note 29, at 1345–46 (citing STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 13 (1996), quoted in Danielle Kie Hart, *Revealing Privilege—Why Bother*, 42 WASH. U. J.L. & POL’Y 131, 134 (2013).

158. *See supra* notes 158–60 and surrounding text.

159. *Id.* *See also* Fineman, *Human Condition*, *supra* note 142, at 16 (arguing that a focus on how institutions confer privilege will allow for a more “complex and particular” analysis than can be obtained with a focus on “identity and discrimination”).

tionships through social norms.¹⁶⁰ Without acknowledging how identities inform social norms as well as institutional practices, Cooper argues, vulnerability theory loses coherence and explanatory power to describe the cumulative impacts of intersecting systems.¹⁶¹ By way of example, he analyzes American policing practices, showing that the invisible way that social norms operate renders African American males “always already suspect” to police.¹⁶² Because of social norms, the disproportionate targeting of young Black men by police seems perfectly rational, and—validated by higher arrest rates of Blacks than Whites—makes sense. Cooper argues that to address all the ways that inequality is reproduced through identity-based norms, vulnerability theory should incorporate an understanding of how identities are differently privileged in various contexts and settings.¹⁶³ Such an understanding would help explain, for example, how aggressive law enforcement programs like broken windows policing tend to result in high arrest rates of young Black men.

A second intervention into vulnerability theory, proposed by legal scholar Nina Kohn, is to take autonomy into account. Kohn argues that “Fineman’s concern about privileging autonomy is a concern about . . . allow[ing] individuals to behave in ways that have negative externalities or perpetuate resource imbalances.”¹⁶⁴ Thus, Kohn believes it is consistent with vulnerability theory to value preserving autonomy when to do so does not involve these types of negative consequences. Feminist concepts of autonomy help support this view. Unlike the independent liberal subject, feminist accounts view autonomy as developed “in the context of relations to others”, and as subject to constraint.¹⁶⁵ Ben-Ishai, for example, adopts feminist philosopher Marilyn Friedman’s definition of autonomy as a person with the capacities for autonomy that exercises them at least occasionally.¹⁶⁶ Legal theorist Kathryn Abrams goes further, preferring the term “agency” to distinguish her conception from the liberal subject, and the conceptions of other (liberal) feminists who in her view utilize too great a degree of individualism in their articulations of autonomy. While retaining the concept of self-definition and self-direction in liberal feminist theory, Abrams further “understand[s] agency to emerge in a context of group-based oppressions,” and describes “such agency as emerging

160. Cooper, *supra* note 29, at 1372 (noting that “identities have themselves been a means of distributing resources that cut across social institutions”).

161. *Id.* at 1364–65 (describing why the problem of racial profiling cannot be adequately explained without identities).

162. *Id.* at 1363–64.

163. *Id.* at 1373.

164. Kohn, *supra* note 29, at 22.

165. Ben-Ishai, *supra* note 14, at 310.

166. *Id.*

through collective action as well as individual self-reflection, and being directed toward cultural and political, as well as individual targets.”¹⁶⁷

It is important to note in this context the potentially protective functions of privacy as well as autonomy. Privacy doctrines and concepts have rightly been criticized, especially by feminists, for shielding privilege (for example, of men and parents) and fostering subordination (such as of women and children). However, more recently, some theorists have distinguished the role of privacy when used to cloak privilege from situations where it protects subordinated groups from the state, and from subordinating private relationships. For example, legal scholar Suzanne Kim describes how judicial recognition of privacy can protect battered women from child welfare officials by insulating their decision-making about how to best protect themselves and their children from abuse.¹⁶⁸ Applying privacy doctrine in this way, a federal district court found that a child welfare agency’s routine removal of children from low-income mothers who were seeking help for domestic violence violated the mothers’ constitutional rights.¹⁶⁹ Kim concludes that there is a role for privacy doctrines in providing a protective space for women.¹⁷⁰ Similarly, Fineman has observed that “[s]ome concept of privacy is necessary for resisting assertions about the appropriateness of collective control.”¹⁷¹ Indeed, there cannot be autonomy without privacy. Fineman calls for a reconceptualization of family privacy that would focus on function rather than form, and “would not be a right to separation, secrecy, or seclusion, but rather the right to autonomy or self-determination for the family, even as it is firmly located within a supportive and reciprocal state.”¹⁷² Such a formulation would address concerns about models for privacy that leave vulnerable family members under-protected.

Putting these interventions together and folding them into vulnerability theory, I would further argue that both institutions and human beings are relatively privileged in terms of the distribution of assets and thus have greater and lesser degrees of resilience. This is not to equate the operation of identity-based social norms for humans with the conditions of inequality among institutions. But, in order to fully analyze, prioritize, and devise interventions meant to address vulnerability, the relative privilege and inequality between institutions (for example, courts and NGOs) must

167. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806–07 (1999). Fineman herself has acknowledged the desirability of autonomy in the carrying out of family functions. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 294 (2004) [hereinafter *AUTONOMY MYTH*] (calling for the protection of family *functions*, not *form*).

168. See Kim, *supra* note 59, at 565–66.

169. See *id.* at 565.

170. See *id.* at 593.

171. FINEMAN, *AUTONOMY MYTH*, *supra* note 167, at 293.

172. *Id.* at 294.

also be taken into account. Taking relative privilege seriously also requires analyzing vulnerability in a context-specific manner.¹⁷³ This specificity should include the value of autonomy for individuals and groups, especially those for whom autonomy has historically been limited.¹⁷⁴ The impact of institutions on autonomy in the context of relative privilege is therefore an important consideration.

Using this modified vulnerability theory in conjunction with insights of the fragmented, interlocking state we can move toward a working theory of functional fragmentation. This theory understands the propensity of legal institutions, made up of linked subsystems and involving linkages with other arms of the state and NGOs, to tighten in response to political pressures, including those emanating from or bolstered by the perception that vulnerable populations require access to legal remedies. Furthermore, this tightening may result in an increase of coercive state power being directed at targeted individuals, including those whom the intervention is intended to help; it may also result in the erosion of advocacy support from NGOs for targeted populations. This tendency to tighten and its consequences are the result of institutional vulnerabilities, including those that threaten institutional roles. This includes cooptation; it also includes belief in the problem-solving court paradigm itself, with its attendant conviction that courts can and should solve social problems.

The next Section applies this theoretical framework to further deconstruct the dynamics of fragmentation within problem-solving courts. This Part shows how reduced fragmentation, or tightening, is implicated in the exercise of state power over low-income litigants in these settings.

III. APPLYING THE FRAMEWORK

A. *Reduced Fragmentation Within Systems*

1. System Roles

In an adversarial context, the resolution of disputes is through a process designed to discover the truth of the relevant facts and their legal significance. The onus is on the parties to raise and shape the issues of the case through legal argument and factual development;¹⁷⁵ the role of the judge is one of impartial arbiter and fact finder.¹⁷⁶ In contrast, the

173. See Fineman, *Human Condition*, *supra* note 142, at 25–26.

174. See Abrams, *supra* note 167, at 805 (calling for more empirically grounded claims about how autonomy actually manifests and functions).

175. See, e.g., Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L. J. 301, 301–02 (1988) (describing the value of party control in adversary proceedings); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 457–58 (2009).

176. See STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2–4 (1988); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1038 (1975) (explaining the norm of the uninvolved and impartial factfinder).

problems that come before delegalized courts are understood as primarily social—not legal—in nature.¹⁷⁷ In this context, the roles of the judge and the parties are transformed. Rather than a neutral arbiter in a largely latent role, dependent on the parties to develop the facts, the problem-solving court judge is an impassioned participant in a highly interactive process.¹⁷⁸ Instead of being more or less limited to the information provided by the parties or their lawyers, the judge is privy to information provided by others such as caseworkers, therapists, and recovery treatment providers.¹⁷⁹ Moreover, the judge may receive this information before disposition of the case and subject it to lower evidentiary standards.¹⁸⁰ The goal of the proceeding is not to discover truth through contest, *per se*, but for one or both parties to accept and internalize a desired social role.¹⁸¹ For the parties, this not only erodes their traditional roles as opposing contestants in a battle for truth, but also complicates their ability to protect or enforce their respective rights.

One way of looking at this situation, from an access to justice standpoint, is that problem-solving courts are characterized by reduced fragmentation, or tightening, that occurs through the collapse or elimination of roles that can be beneficial to advocacy for poor people. These roles include those of the primary participants in the adversary system: the impartial judge and the parties opposing one another—whether represented by lawyers or appearing *pro se*. Such roles are reconfigured in problem-solving courts as parts of a team, which may include additional supporting parts, including social workers and other professionals.¹⁸² As noted previously, all of these roles are vulnerable to cooptation or corruption.¹⁸³ Delegalization of the fact-finding process exacerbates this vulnerability. Indeed, one function of due process norms within the legal system is to help maintain the roles associated with the coordinated but fragmented state. The availability of those protections gives substance to defense counsels' role as an advocate and places limits on those participants representing the state. Problem-solving courts not only reduce the availability of due pro-

177. See *supra* Part I.A.

178. RACHEL PORTER ET AL., CTR. FOR COURT INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING?: UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-SOLVING JUSTICE 13 (2010), http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf, (citing “a proactive and interactive judge” as one of four critical factors distinguishing problem-solving courts from ordinary courts).

179. See *id.*

180. See *id.*

181. See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and United Family Courts*, 65 MD. L. REV. 82, 96 (2006) (noting that “problem-solving judges are concerned not merely with resolving disputes or assigning responsibility but with achieving desirable behavioral change”).

182. See *id.* (discussing the team aspect of problem solving court case management); see also *supra* Part I.A. (identifying the components of delegalization).

183. See *supra* Part II.A.

cess protections, but also dissuade litigants from asserting what rights they may have by discouraging rights talk.¹⁸⁴ Indeed, rights talk is antithetical to the problem-solving court model, and can lead to harsher treatment for those who fail to pay heed, whether or not they have a lawyer.¹⁸⁵ This undercutting of due process norms also exacerbates the problem of gender and racial bias in problem-solving courts.¹⁸⁶ That parties can suffer (or benefit) from race and gender bias in adversarial systems is without question.¹⁸⁷ However, such biases are not subject to adversarial testing in problem-solving courts to the same extent they would be otherwise, due to the combined effects of diminished procedural protections.

As we saw, one avenue for bias to enter the court unchallenged is the involvement of social workers and other “helping professionals.” Family court judges, for example, rely on mediators to settle cases and psychologists and social workers to investigate custody disputes.¹⁸⁸ In some jurisdictions, even mediators—who normally operate as “neutrals” and do not take sides in a case—provide their opinion on custody outcomes to the judge when the parties do not settle during the mandatory mediation session.¹⁸⁹ In criminal problem-solving courts, helping professionals enter the equation as part of diversion or sentencing, and sometimes as a condition of release from pre-trial detention.¹⁹⁰ In each of these examples, the result is the same: helping professionals are absorbed into the adjudicatory system, transforming it in the process. Specifically, the roles of these professionals are merged with the judicial function.

In the civil system, judges in most cases will order whatever the evaluating professional recommends, essentially eliminating the distinction between helping professionals and the judge.¹⁹¹ Similarly, compliance with ordered treatment is a condition for successful resolution of diversion in a criminal case.¹⁹² At the same time, the role of counsel is hampered by procedures that allow for the introduction of hearsay and opinion evidence

184. Amy Sinden, “*Why Won’t Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*,” 11 *YALE J.L. & FEMINISM* 339, 343–44 (1999).

185. *See id.* at 355 (discussing how a parent’s perceived failure to be cooperative leads to negative perceptions of parenting in family court).

186. *See supra* Part II.A.

187. *See* MacDowell, *Theorizing from Particularity*, *supra* note 70, at 541 (describing how racial and gender bias can hurt or help parties in domestic violence cases).

188. *See, e.g.*, Sinden, *supra* note 184, at 353 (describing influence of social workers in family law cases).

189. *See* CAL. FAM. CODE § 3183 (West 2011) (called “reporting counties” in California).

190. *See* Tamar M. Meekins, “*Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*,” 40 *SUFFOLK U. L. REV.* 1, 31–33 (2006) (describing a deferred sentencing program).

191. *See* Sinden, *supra* note 184, at 353 (describing how judges defer to case workers).

192. *See* Meekins, *supra* note 190, at 18–21 (explaining the operation of diversion programs).

that cannot be easily challenged.¹⁹³ These arrangements reduce fragmentation and tighten linkages among arms and subsystems of the state.¹⁹⁴ Tightening also results from the complex functions of ideology and partiality associated with problem-solving courts.

2. Ideology

While problem-solving courts vary by specialization, internally they share the dynamic of reduced fragmentation within their constituent parts based on the shared belief that modifications to adversarial processes are necessary. In addition to expression through procedures that allow for informality and interventionism, this ideology is expressed through language and rhetoric. The specific expression of ideology depends on the specialization of the court. However, the function overall is to increase tightening by knitting system participants together in particular ways. Martha Fineman provides an example of this dynamic in her influential article, *Dominant Discourse: Professional Language and Legal Change*, which describes the operation of social work discourse in family courts.¹⁹⁵

As Fineman explains, social work discourse has informed contemporary interpretations of the “best interests of the child” standard that governs custody decisions.¹⁹⁶ While judges have used the standard since the nineteenth century, Fineman argues that its inherently indeterminate nature was initially limited by two factors: the presumption that mothers were the best custodians for young children and the influence of fault-based divorce rules on custody decisions.¹⁹⁷ By the midtwentieth century, however, gender-based presumptions gave way to gender-neutral standards, and most states replaced their fault-based regime with no-fault divorce.¹⁹⁸ In this shifting landscape, Fineman credits social work ideology with redefining the divorce experience. Whereas previously social work had viewed divorce as something to be discouraged through focused efforts at reconciliation, contemporary social work theories understood divorce as a crisis requiring family reorganization.¹⁹⁹ This redefinition changed the concep-

193. See Sinden, *supra* note 184, at 349 (noting that many states allow hearsay evidence to be admitted into evidence in family court proceedings).

194. In some cases, these linkages are also between the state and nongovernmental service and treatment providers. See Meekins, *supra* note 190, at 29–30, n.142 (discussing problems associated with privatization of state mandated services).

195. See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Discourse in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) [hereinafter Fineman, *Dominant Discourse*].

196. See *id.* at 742.

197. See *id.* at 741–43; see generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (G. Edward White ed., 1985) (discussing the rise of the best interest standard in the 19th Century).

198. See Fineman, *Dominant Discourse*, *supra* note 195, at 744.

199. See *id.* at 744–45.

tualization of the family court's role (at least when children were involved) from a legal experience involving the severing of legal ties to one of managing ongoing relationships within families engaged in a process of reconstituting themselves.²⁰⁰ As Fineman describes:

In this framework, the role of the system is to be therapeutic to facilitate and assist the family in adapting to a new post-divorce family structure. Attorneys, in this context, are viewed as ill-equipped to handle the crisis because of their adversarial orientation and the ways in which they impede or defeat the therapeutic ideal. By contrast, social workers and others in the helping professions are in possession or control of the therapeutic process.²⁰¹

In Fineman's view, the direct result of this take-over included creation of the "mediation ideal" and preferences for joint custody, both of which expanded the role of social work and other "helping professions" in divorce cases.²⁰² However, her focus on divorce emphasizes changes affecting the middle class and misses the earlier, related developments in DRCs—and their influence on divorce courts in jurisdictions where divorce was separated from issues such as nonsupport and paternity.²⁰³ Thus, while she is correct in identifying the central role of social work ideology in helping to construct and justify the problem-solving court enterprise, her account underplays judges' ready adoption of therapeutic ideologies as a mode for expanding, not ceding, their fact-finding abilities and overall discretionary power.²⁰⁴

The family court bench is not alone in expanding its reach—and thus, the reach of the state—through multi-disciplinarianism. The development of drug, mental health, and other problem-solving courts demonstrates the close relationship of problem-solving courts to related treatment conventions. Moreover, the shared nature of ideology within problem-solving courts dampens whatever creative or productive differences might arise from the multidisciplinary setting.²⁰⁵ This shared ideology, insofar as

200. *Id.* at 745.

201. *Id.*

202. *Id.* at 743. Social work ideology also worked to expand (and itself reflected) the influence of father's rights groups on shared parenting norms. *See id.* at 758.

203. *See supra* Part I.A (describing the DRCs).

204. *See supra* Part I.A.

205. Law professor Melissa Breger argues that the melding of perspectives within family courts court leads to systemic decisional weakness called "groupthink". Breger, *supra* note 55, at 55–56. The antecedents of groupthink, which Breger finds prevalent in family courts, are: group cohesiveness; an insular environment and lack of impartial leadership and methodologies, social and ideological homogeneity; and "a provocative situational context, which often encompasses high external stress and moral dilemmas." *Id.* at 60. Breger also identifies the following groupthink symptoms: "(1) overestimation of the group's invulnerability or belief in inherent

it is anti-legalistic and anti-adversarial, also plays a part in undermining procedural due process.

First and most obviously, commitments to individual rights are suspect in an anti-adversarial regime. As noted above, this suppresses the assertion and protection of rights. Second, in the ideologically charged environment of a problem-solving court, the commitment is to something other than the integrity of the adversarial process; it is to solving what is perceived as the problem underlying the case. In this context, the goals of the problem-solving court broaden beyond the legally dispositive facts of a given case in a potentially limitless way. As a drug court judge and leader in the problem-solving court movement described, “We’re not just looking at the offense any more. We’re looking more and more at the best interests, not just of the defendant, but of the defendant’s family and the community.”²⁰⁶ Thus, invoking Hagan’s discussion of “the new penology,” the problem-solving court model not only expands on what issues will be adjudicated, but moves past individual cases to classes of persons, or targets.

3. Targets

The problem-solving court requires a population with a problem. As we have seen, proponents of these courts seek to address what are viewed as social rather than legal problems; they also respond to what are viewed as problems with adversarial systems for particular types of cases or groups.²⁰⁷ Thus, in family courts, the needs of unrepresented litigants and children have justified and fueled reform movements, along with belief in the socializing influence of the court for low-income populations.²⁰⁸ In the criminal legal system, groups considered especially undeserving of a punitive response due to their status (such as veterans, addicts, youthful first-time offenders, and the mentally ill) and/or type of offense (primarily non-violent offences) are redirected toward courts that offer treatment in exchange for deferred sentencing or other alternative sentencing arrangements.²⁰⁹ These criminal courts, too, are fueled by a belief that courts can and should fix social problems like addiction and domestic vio-

morality and insulation of the group from the judgments of outsiders; (2) close-minded, stereotyped images of outgroups; and (3) pressure towards uniformity or the leader’s promotion of her preferred solution.” *Id.* at 62.

206. Colloquium, *What is a Traditional Judge Anyway?: Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000).

207. See *supra* Part I.A (describing rationales for DRCs).

208. *Id.*

209. See JANE DONOGHUE, TRANSFORMING CRIMINAL JUSTICE?: PROBLEM-SOLVING AND COURT SPECIALISATION 8 (2014) (noting the critique that “the most sympathetic and appealing class of criminal cases are isolated for attention” in problem-solving courts, while more challenging and complex cases are given insufficient resources).

lence, in addition to addressing crime.²¹⁰ In this way, problem-solving courts remain dependent on the idea of a needful population toward whom the court's activities are directed.

Some theorists, such as sociologist James Nolan, have focused on the way in which problem-solving courts use the vulnerability of target populations to justify therapeutic intervention, in the mode of Foucauldian governmentality.²¹¹ In this mode, the state extends its reach through the characterization of individuals as victims rather than as bad actors or sinners, such as in the illness model of addiction that underlies drug courts.²¹² Others argue that problem-solving courts also engage in practices geared toward the more traditional criminal justice goal of individual accountability, and—more radically—social change. For example, sociologist Rekha Mirchandani argues that practices she observed among judges in a domestic violence court, including public shaming of defendants, are aimed at challenging social attitudes about patriarchy among spectators in the courtroom audience as well as encouraging defendants to take responsibility for their conduct.²¹³

A more comprehensive view, I suggest, is that problem-solving courts engage in all of these modes of state action, which need not be mutually exclusive. For example, the judges in Mirchandani's study also engaged in the common practice of sentencing defendants to batterer intervention classes, demonstrating therapeutic as well as personal accountability and social change goals.²¹⁴ Similarly, recent developments in child support enforcement include alternative sentencing schemes that require defendants with arrears to attend court-ordered vocational and parenting classes, and offer voluntary drug treatment and other services.²¹⁵ The group nature of these programs, where defendants believed to share similar issues are placed together for classes or training, underscores the fact that

210. See Jane M. Spinak, *Romancing the Court*, 46 *FAM. CT. REV.* 258, 258 (2008) (noting that “[a]ll of the [problem-solving] court professionals are committed to resolving the underlying problems that bring the litigants to court”). See also Morris B. Hoffman, *Problem-Solving Courts and the Psycholegal Error*, 160 *U. PA. L. REV. ONLINE* 129, 134–38 (2011) (describing the belief of problem-solving court judges that they can solve social or personal problems from the bench as a form of misguided, wishful thinking).

211. See generally JAMES L. NOLAN, *THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END* (1998).

212. Others note such interventions also allow the state to widen its net by focusing on lower level offenses. See DONOGHUE, *supra* note 209, at 8 (summarizing critiques).

213. Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 *L. & SOC. INQUIRY* 853, 880 (2008) (hereinafter Mirchandani, *Beyond Therapy*).

214. See Rekha Mirchandani, “Hitting is not Manly”: *Domestic Violence Court and the Re-Imagination of the Patriarchal State*, 20 *GENDER & SOC'Y* 781, 798–91 (2006) (describing practices in a misdemeanor domestic violence court).

215. See Aaron Arnold, *The Parent Support Program: A Problem-Solving Court Approach to Child Support Enforcement*, 61 *CHILD SUPPORT Q.* 25, 25–26 (2009).

broader cultural change within the group is also a goal.²¹⁶ These problem-solving court practices also demonstrate the permeability of legal systems to ideologies associated with social change movements and shifting therapeutic models.

Some theorists take an optimistic view of the porous relationship between courts and outside ideologies, including those of social movements. For example, at a colloquium at the Center for Court Innovation, it was argued that problem-solving courts are democratizing when they “try to channel the energies of social change into the judicial branch.”²¹⁷ However, a review of the racial and gender dynamics of the lower courts shows little reason for optimism. The absorption of ideology is a mechanism for identifying or creating targets for state action. Moreover, the legal system is continuing to treat low-income people who are overwhelming people of color as pathological and in need of reform, rather than seriously considering the redistribution of resources or systemic reform of legal institutions.

Indeed, existing legal and social structures are reified through the very fact that special conduct (such as successful completion of treatment) is required for individuals in the targeted group to escape the default system, and by the fact that the default system continues to apply to others. At the same time, resources are diverted from efforts to change the default system or to provide social supports outside of the courts or the state. In these ways, the status quo—including hierarchies of gender, race, and class—is maintained for targeted groups. This effect is greatly exacerbated by the tightening of linkages between, as well as within, state systems.

B. *Reduced Fragmentation Between Systems*

The procedural dangers posed by problem-solving courts for low-income litigants are magnified when these systems or their subparts intersect. Yet they often do. And in many cases these intersections, like problem-solving courts themselves, are forged in the name of addressing the needs of litigants and their perceived vulnerabilities. Two prime examples of this problem are integrated domestic violence courts, and child support enforcement. The tightening of linkages among state entities in these examples shows how reduced fragmentation between systems can exacerbate vulnerabilities for litigants.

1. Perceived Vulnerability

As noted in the introduction of this Article, fragmentation in court systems is typically regarded solely as an access to justice problem. These concerns have been particularly persuasive when litigants perceived as es-

216. See *id.* at 26 (describing group parenting classes).

217. Colloquium, *supra* note 206, at 82; see also Mirchandani, *Beyond Therapy*, *supra* note 213, at 877 (arguing that problem-solving courts embody ideals of Habermasian deliberative democracy).

pecially vulnerable are involved. For example, arguments for “one stop shopping” as a way to increase access to justice for domestic violence survivors have informed the creation of integrated courts combining civil and criminal jurisdiction over domestic violence cases, while consolidating services.²¹⁸ Because an incident of domestic violence can result in multiple legal actions, the concern is that having to attend court hearings in different locations makes it harder for survivors to obtain legal remedies. Another concern is that having more than one judge involved in the case can lead to conflicting court orders, which may endanger victims and allow perpetrators to game the system and evade accountability.²¹⁹ Similar arguments have informed the proliferation of family justice centers for domestic violence and sexual assault survivors, combining specialized law enforcement and prosecutorial teams with social and legal services in one location.²²⁰

Child support is another area where perceived vulnerabilities fuel consolidation of civil and criminal processes, diminishing the distinctions between legal systems. This includes the use of incarceration to enforce child support orders, through both civil contempt proceedings and criminal prosecutions brought under felony nonsupport laws.²²¹ As we have seen, these interventions are driven by concerns for needy children, potentially dependent on the state, and the background trope of deadbeat dads—images and metaphors that also have been used to justify denying indigent noncustodial parents counsel as a matter of right in enforcement proceedings.²²²

While neither the civil nor criminal system works according to its ideal for low-income families, bringing them together exacerbates the problems with each. For example, litigants in family courts already face increased exposure to the child welfare system, particularly when domestic

218. See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 29 (1999).

219. Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 *TEX. J. WOMEN & L.* 95, 103 (2011) [hereinafter MacDowell, *When Courts Collide*]; see Epstein, *supra* note 218, at 23–28; see also Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 *KY. L. J.* 613, 637 (2004–05) (asserting that “[l]ack of communication among various systems impedes batterer accountability”).

220. Jane K. Stoeber, *Mirandizing Family Justice*, 39 *HARV. J.L. & GENDER*, 189 201–05 (2016).

221. See *supra* Part I.A (describing the origins of the family court system); see also *supra* Part I.B (discussing the problem of civil contempt proceedings in child support cases).

222. See *supra* Part I.B (discussing the *Turner v. Rogers* case and observing that state interests are served by blaming child support policy failures on noncustodial parents). See also Ann Cammett, *Deadbeat Dads and Welfare Queens: How Metaphor Shapes Poverty Law*, 34 *B.C.J.L. & SOC. JUST.* 233, 237–38 (2014) (detailing how racially laden metaphors, including that of the “deadbeat dad,” justify legal and social policies that harm low-income families of color).

violence claims are raised.²²³ However, there is a heightened risk of being reported to child protective services when using integrated courts, due to greater exposure to government workers and other mandated child abuse reporters.²²⁴ As noted previously, this can lead to the survivor being charged with failure to protect her child, and the child being removed from the home; awareness of these risks might also discourage survivors from disclosing information that could help their case, or from seeking legal help at all.²²⁵ Additionally, survivors using integrated courts are more likely to be steered to unwanted services or induced to make a criminal complaint, despite how these steps might impact their safety.²²⁶ More generally, the influence of informalized civil systems on criminal procedures in integrated courts may further erode due process norms over the long term.²²⁷ The implications of this erosion for domestic violence cases should be of particular concern, due to the deeply entwined nature of survivor safety and defendants' perceptions of procedural justice. The lack of procedural protections in informalized criminal court settings can lead defendants to feel they are being victimized by the legal process—perceptions that weaken compliance with court orders and endanger survivors.²²⁸ Consequently, while integrated courts may further the interests of the consolidated state in efficiency, they are not well suited to the interests of the low-income women of color who frequently rely on the courts for assistance in these cases.

Similarly, child support enforcement procedures may serve state interests better than those of poor families. As noted previously, enforcement procedures frequently defeat the goal shared by the state, public, and custodial parents of providing support to children—for example, by incarcerating parents who cannot pay support or causing a working parent to lose their job.²²⁹ However, as also noted, the welfare state has another interest: minimizing unreimbursed welfare expenses.²³⁰ Maintaining the threat of incarceration as a way to compel support payments thus remains appealing. Moreover, since incarceration often operates as a funding mechanism for

223. Reports to child welfare agencies may be made by judges or any mandated reporter with whom the survivor has contact about the abuse. See Elizabeth L. MacDowell, *From Victims to Litigants*, 67 HASTINGS L.J. 1329, 1324 (2016) [hereinafter MacDowell, *Victims to Litigants*] (discussing contact with mandated reporters at courthouse self-help centers).

224. See MacDowell, *When Courts Collide*, *supra* note 219, at 117; Epstein, *supra* note 218, at 34–35.

225. See MacDowell, *When Courts Collide*, *supra* note 219, at 117.

226. Epstein, *supra* note 218, at 38.

227. MacDowell, *When Courts Collide*, *supra* note 219, at 128.

228. *Id.* at 125–26.

229. See *supra* Part I.B (analyzing the interests at stake in child support enforcement).

230. *Id.*

the state, incarceration serves state fiscal interests in this way as well.²³¹ More generally, maintaining procedures that blame child poverty on dead-beat dads benefits the state as a collective entity by distracting the public from structural social problems like declining employment opportunities, decreasing social mobility for low-wage workers, and inadequate state welfare policies, all of which more directly contribute to child poverty.

For low-income families, these tightening links among civil, administrative, and criminal legal systems are at the heart of the maintenance of intersecting systems of poverty and inequality. The role of child support enforcement in this regard was highlighted by the death of Walter Scott in 2015. Scott, an African-American man, was fatally shot in the back by police officers who had pulled him over for a broken taillight after he scuffled with one of them and ran away on foot—possibly because he feared they were going to send him back to jail for unpaid child support.²³² Although Scott was working at the time of his death, he had stopped paying support and there was an outstanding warrant for nonpayment that was issued for his arrest. His family believed that warrant was on his mind when he ran from the police. “Every job [Scott] has had, he has gotten fired from because he went to jail because he was locked up for child support,” explained Scott’s brother.²³³ The culmination of this vicious cycle in Scott’s death by police violence illustrates all too well the stakes of tightening linkages among civil and criminal arms of the state for low-income families, and Black families in particular.

2. Privacy and Autonomy

Intersecting civil and criminal court responses also have implications for autonomy. As a system of private law, the civil system is available to address the concerns of private individuals and groups who can take legal action and seek remedies for injuries independent of the state.²³⁴ In contrast, the criminal system is reserved for government action on behalf of the public, and is intended to serve public aims.²³⁵ Whereas the plaintiff in a civil action determines when and where to bring an action, and what remedies to seek (subject of course to applicable legal rules and doctrines), the prosecution directs a criminal case.²³⁶ Accordingly, the distinction between criminal and civil responses is typically characterized as one of rela-

231. See generally LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUSTICE, CHARGING INMATES PERPETUATES MASS INCARCERATION (2015), https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf.

232. Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES, April 19, 2015, at A1.

233. *Id.*

234. MacDowell, *When Courts Collide*, *supra* note 219, at 115–16.

235. *Id.* at 102.

236. *Id.* at 115–16.

tive autonomy for plaintiffs, with greater autonomy available in civil forums.²³⁷

The autonomy-enhancing aspects of civil systems have been viewed as especially valuable for litigants for whom those conditions are in short supply. For example, domestic violence survivors, whose privacy and autonomy is often restricted as part of the abuse, are thought to benefit from civil processes because of the relative control they are able to exert over the process.²³⁸ Studies have found that giving survivors a sense of control over their lives increases their sense of security and well-being, and empowers them to make additional, positive life changes.²³⁹ Additionally, advocates argue that survivors have superior knowledge about what measures will ensure their safety. For these reasons, choice is viewed as a valuable commodity available to survivors in civil but not criminal courts.

As we have seen, however, this distinction between civil and criminal legal systems is curtailed in delegatized court settings. The vulnerabilities of domestic violence survivors are used to justify interventionist policies and programs such as integrated courts and family justice centers that increase their exposure to coercive arms of the state.²⁴⁰ Similarly, while a legal system that promotes privacy and autonomy for low-income people in exercising family functions would be beneficial, these qualities are in short supply. Aggressive child support enforcement efforts alienate families and thwart more cooperative efforts to support children.²⁴¹ Efforts to collect child support to reimburse the state for welfare payments also redirects resources away from the poorest families. For families in which noncustodial parents cannot or will not provide support for their children, the options for custodial parents who are ineligible for cash assistance, or unwilling to seek it, are limited.²⁴² As in the first family courts at the turn of

237. *Id.* at 115–18.

238. See, e.g., Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 95 n.15 (2005) (opining that civil protective orders may be more effective than criminal protective orders “because the victim, not the government, is the petitioner”).

239. See Naomi Cahn & Joan Meier, *New Approaches to Poverty Law, Teaching, and Practice: Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 347 n.25 (1995) (observing that “[s]uccess stories of this kind do not appear in the press because the absence of violence is not considered a newsworthy event”). See SMITH, *supra* note 34, at 117 n.155, 121 n.176 (citing studies).

240. See *supra* Part III.B.1.

241. For example, research shows that African American families in particular often make informal arrangements that allow for low-income noncustodial fathers to stay involved in their children's lives and contribute to their welfare in ways other than through financial support, such as by providing child care or by providing necessities like diapers or school clothes that custodial parents cannot afford. See Jennifer M. Threlfall et al., *The Parenting Role of African American Fathers in the Context of Urban Poverty*, 19 J. CHILD POVERTY 46, 46–47 (2013).

242. In this context, it is important to note the extreme limits on access to welfare benefits and the social shaming of recipients. See BRYAN STRONG, CHRISTINE DeVULT & THEODORE COHEN, *THE MARRIAGE AND FAMILY EXPERIENCE: INTIMATE RELATIONSHIPS IN A CHANG-*

the twentieth century, these parents can pursue punitive and possibly counterproductive enforcement measures that may result in incarceration or do nothing.

The challenges faced by litigants in problem-solving courts demonstrate how tightening linkages within and between state subsystems simultaneously reduces the remedial or supportive aspects of these systems and lessens the autonomy of low-income families, with serious consequences for safety and family formation. The effects of tightening also suggest the positive role that fragmentation can have within the legal system. While dysfunctional fragmentation creates barriers to access by making remedies hard to obtain, functional fragmentation—such as separating punitive from potentially supportive state functions—can protect against the more coercive aspects of the regulatory state. Moreover, the value of functional fragmentation suggests that a strong state is not always desirable.

IV. FUNCTIONAL FRAGMENTATION

For vulnerability theorists, the purpose of a strong state is to provide the necessary social supports for individuals to thrive. However, conventional analyses of vulnerability often justify a more coercive state and obscure the ways in which the lack of adequate social supports contributes to tightening. For example, we have seen that inadequate economic support for families by the state as well as concern for child poverty underlies punitive approaches to child support enforcement.²⁴³ Similarly, a persistent disregard for the autonomy of domestic violence survivors as well as concerns about access to justice drives the consolidation of state resources in integrated courts and family violence centers.²⁴⁴

A structural analysis of the problem suggests the value of a prophylactic approach to the operation of state power. Taking into account the proclivity of the state to increase its coercive power through tightening and the limits of accountability measures such as those provided by attorney representation to prevent it, we should consider a strategic weakening, or fracturing of the state. However, reconfiguring the fragmented state to be more functional for poor people requires guiding principles to identify functional from dysfunctional fragmentation. This Part describes two foundational principles for achieving functional fragmentation: fully centering the experiences of low-income people of color in analyzing system problems and potential interventions and maintaining partiality to social justice values and the needs of poor people of color in system design and implementation.

ING SOCIETY 449 (2008) (discussing low benefit amounts and sharply curtailed time limits for receiving benefits, and the social stigma associated with receiving welfare).

243. See *supra* Part I.B (discussing competing interests in child support enforcement).

244. See *supra* Part III.B (describing how the benefits of coordination are used to justify consolidating state resources in integrated courts and family violence centers).

A. *Centering the Experiences of Low-Income People of Color*

As we have seen, a conventional analysis of the vulnerability (for example, one not taking relative privilege and institutionalized power and inequity into account) is often used to legitimate a more coercive and hyper-regulatory state. Such analyses tend to ignore the damaging impacts that converging regulatory systems can have on low-income people absent effective procedural protections. They also tend to demonstrate the validity of concerns about using vulnerability as a basis for state action without also considering possible impacts on the privacy and autonomy of particular groups. To counter these problems and fully assess the implications of access to justice interventions, an intersectional analysis—one that takes into account the ways in which social positions such as class, gender, and race interact to produce unique outcomes—is necessary.

Informed by intersectionality, consideration of proposed interventions should include a particularized analysis of the following: What are the likely consequences of the proposed intervention on low-income people of color, given the enduring nature of structural inequality and predictable impacts on the most subordinated community members? Is the risk to privacy, autonomy, and empowerment more than the benefit for those vulnerable to the coercive state? Are there alternative ways to achieve the desired end that present less risk? With the goal of creating a bulwark against the state in the context of problem-solving courts, and the benefits of an intersectional analysis, several priorities for a more functional fragmentation can be identified.

An obvious first step is untangling the aspects of the state that are primarily faultfinding and punitive from those intended to be primarily supportive or voluntary. In a prior article, I referred to the value of this type of fragmentation between civil and criminal courts as “court plurality.”²⁴⁵ Given the multiplicity of systems involved, however (including punitive civil family law systems such as child welfare), system plurality would be a better term. Using the proposed framework to review interventions that implicate system plurality may reveal that the value of consolidating systems to address dysfunctional fragmentation is overstated.

For example, as noted above, integrated courts proliferate due to the purported advantages of one stop shopping for low-income survivors, despite the harms posed by combining civil and criminal jurisdiction, especially for women of color. However, the assumptions behind integrated domestic violence courts do not hold up to scrutiny. Concerns about conflicting orders arising when related domestic violence cases are heard in separate civil and criminal courts can easily be resolved in other ways, such as by improving case management systems and by establishing rules that

245. See MacDowell, *When Courts Collide*, *supra* note 219, at 127.

prioritize criminal over civil orders.²⁴⁶ Hearing civil and criminal cases before the same judicial officer offers no strategic advantage to survivors in most cases, and may in fact present serious disadvantages.²⁴⁷ At the same time, problems with overly fragmented civil jurisdiction over related family law matters such as paternity, support, or child custody can be resolved through reforms to civil courts alone.²⁴⁸ Given the availability of these alternatives and in light of the potential harms to survivors (such as exposure to unwanted criminal and child welfare interventions), an intersectional analysis should result in a different outcome that retains the protective value of system plurality.

Additional steps would also be necessary to untangle system functions, some of which will require substantial legal reforms. For example, child welfare reporting laws create exposure for domestic violence victims in traditional as well as integrated courts. Thus, reporting guidelines and protocols need to be revised in order to fully address the problem. Additionally, parents will remain vulnerable to unwanted interventions in pro se courts with little accountability and vast discretion. For these reasons, family law scholars have called for changes in child custody laws that would both narrow the discretion of family court judges and make child custody decisions more amenable to the traditional judicial fact-finding role.²⁴⁹ Protecting litigants on the margins also involves creating rights, and removing barriers for the exercise of rights, such as removing sex/gender and immigration status as tools that can be used to enforce biases in family courts. Litigants also require the resources to enforce rights in recalcitrant systems. As discussed above, lawyers play an important role in maintaining functional fragmentation within problem-solving courts by enforcing due process norms. Thus, the strategic deployment of lawyers within the system is also needed as part of a concerted, multi-pronged effort at court reform.

More generally, reformers should work to limit the power of judges to extend beyond their role as arbiters of rights and resist the inclination to use the coercive power of courts where other modes of intervention are possible. As law professor Jane Spinak argues, “if the state is going to intervene in families’ lives via judicial proceedings, the court must add value to

246. *Id.* at 111–12 (explaining why consolidated civil and criminal actions do not result in advantages of strategy or efficiency).

247. *Id.* at 112–13 (describing problems that can result from having one judge hear a related criminal and custody case).

248. *Id.* Notably, problems stemming from having multiple courts handling related civil family matters is an issue in a relatively small and decreasing number of states. As of 2006, only thirteen states did not have a specialized or separate system for family law matters. Barbara A. Babb, *Where We Stand: An Analysis of America’s Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 46 *FAM. L.Q.* 230, 231 (2008).

249. *See, e.g.*, Fineman, *Dominant Discourse*, *supra* note 195, at 770–74 (proposing the “primary caretaker test” to replace the best interest of the child standard in custody cases).

the intervention beyond what a social service, child welfare, or probation agency can provide. That value or purpose is protection of the family's substantive due process right of family integrity."²⁵⁰ In particular, reformers should work to identify when and where social problems are being handled by courts that should be relocated to institutions that are better suited to address them. Indeed, a core counter-hegemonic strategy for reform involves recharacterizing as matters of social policy those issues that the state seeks to regulate through individualized court interventions. For example, problems related to child support enforcement involve child poverty for which the state fails to adequately provide; domestic violence implicates a lack of intersectional equality and economic justice. To the extent that a legal controversy exists that requires court action, it should be adjudicated according to due process norms.

The question of what is a legal issue requiring adjudication is obviously complex, however. Controversies are legal because they are defined as legal, and treated as legal problems. Moreover, poor people may insist on the legal nature of their claims in the face of state opposition—which is one crux of the problem in family courts, where the legal nature of disputes is downplayed but the coercive power of the court is maintained.²⁵¹ Families also need meaningful alternatives to adversarial litigation of disputes, however defined. This brings us to a second principle of functional fragmentation: the consideration of partiality and impartiality—or, as I advocate for below, reconsideration of these concepts.

B. *(Re)considering Partiality and Impartiality*

Disrupting the characteristics of problem-solving courts that are problematic for poor people requires attention to partiality and impartiality. As observed by Ben Ishai, the operation of partiality (such as among advocates) and impartiality (such as among finders of fact/adjudicators) is a defining feature of state fragmentation, and can be used to protect the interests of otherwise marginalized groups within the state.²⁵² As this suggests, the appropriate level of partiality or impartiality depends in part on where a given actor is located in the system, their function, and the values associated with that function.

Consider social workers and other non-legal professionals in family courts, for example. This Article has critiqued the negative role that these professionals play in family courts.²⁵³ Yet, non-lawyers are also potentially

250. Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 17–18 (2009).

251. For an in-depth exploration of lower-income people's struggle to establish the legal nature of their claims in the face of resistance from court personnel, see generally SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

252. See discussion Part II.A, *supra*.

253. See, e.g., Part I.A. (describing family court delegalization).

of great value in legal aid programs that aim to provide more holistic representation, where their different expertise can complement that of traditionally trained lawyers.²⁵⁴ How is this not a contradiction? The answer lies in how the non-legal professional is positioned in relation to the court and to litigants: is the professional functionally a part of the court's coercive power? Do they supplant rather than augment legal perspectives? Or are they working in support of a social justice informed, advocacy-based response? Only the former is associated with the hyper-regulatory nature of problem-solving courts.

As I have described elsewhere:

Social work advocacy is informed by values that are similar in many respects to those at the core of social justice lawyering. These values include respecting the dignity and rights of individuals (e.g., every human being is unique and deserving); addressing imbalances of power and injustice (e.g., by giving voice to marginalized groups and individuals); facilitating self-determination (e.g., by helping clients to identify their own needs and actions they will take to fulfill them); compassion and the desire to relieve suffering; empowering through action-oriented advocacy (e.g., to help clients take action to solve problems); and honoring social justice.²⁵⁵

However, like lawyers, social workers often work within the same institutional structures that harm their clients, which can lead to an erosion of social justice commitments and values.²⁵⁶ Thus, the issue is how to create the conditions that allow these professionals to operate in ways that are beneficial to poor people. Taking the fragmented state into account allows us to see some possibilities.

254. See MacDowell, *Reimagining*, *supra* note 8, at 521–24 (comparing and contrasting the expertise of lawyers and social workers and other lay advocates); *id.* at 536–38 (advocating for legal service models that combine the expertise of social workers and lawyers).

255. *Id.* at 516 (citing ROBERT L. SCHNEIDER & LORI LESTER, *SOCIAL WORK ADVOCACY: A NEW FRAMEWORK FOR ACTION* 78–79 (2001)). See also NAT'L ASS'N OF SOC. WORKERS, *CODE OF ETHICS*, Preamble 1 (2017) [hereinafter *NASW CODE OF ETHICS*], https://www.socialworkers.org/LinkClick.aspx?fileticket=ms_ArtLqzeI%3d&portalid=0 (identifying the core values of social work as service, social justice, dignity and worth of the person, importance of human relationships, integrity, and competence). The *CODE* further states, "Social workers promote social justice and social change with and on behalf of clients . . . Social workers are sensitive to cultural and ethnic diversity and strive to end discrimination, oppression, poverty, and other forms of social injustice." *Id.*

256. See Stephen M. Rose, *Advocacy/Empowerment: An Approach to Clinical Practice for Social Work*, 17 *J. SOC. & SOC. WELFARE* 41, 41 (1990); see also Anne Marie McLaughlin, *Clinical Social Workers: Advocates for Social Justice*, 10 *ADVANCES SOC. WORK* 51, 51 (2009) (noting critiques of social workers for a lack of attention to social justice issues).

1. Revisiting Mediation

Attention to structure allows us to reimagine the relationships within problem-solving courts, such as between family court mediators and judges—relationships currently characterized by ideological uniformity. Possibilities for more functional fragmentation include targeting the education, recruitment, and training of family court services staff members to shift their ideological commitments and practices in directions more aligned with the interests of low-income litigants as a class. One way to do so in the dispute resolution context is by promoting the use of social justice mediation.

Although the dominant approach to mediation is that of neutral mediator, social justice mediation teaches mediators how to address structural inequalities such as gender, race, and sexuality and how they shape the conflict.²⁵⁷ Much has been written on the process dangers of mediation for the more vulnerable party in relationships characterized by abuse and other power imbalances.²⁵⁸ Moreover, there is probably no reliable way to screen cases involving abuse from mediation, even if such screening were desirable.²⁵⁹ Thus, it is important in any mediation program to ensure that mediators can help balance inequalities of power. These concerns are even more acute in the largely pro se setting of family courts where litigants lack legal counsel and are subject to multiple forms of structural inequality. Social justice approaches also encourage the mediator to locate the relevance of their own social position within the mediation.²⁶⁰ Given the likelihood that many mediators and other legal and court services staff members are more privileged than the people they serve, and the predominance of negative stereotypes about low-income people and minorities, it is important to make consideration of such differences explicit.

Additionally, other mediation styles could be integrated into a social justice mediation approach to make alternative dispute resolution more useful for parties who do not have access to lawyers. These include mediation styles in which the mediator takes a more educative role with the

257. Leah Wing, *Whither Neutrality*, in RE-CENTERING: CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93, 107 (Mary Trujillo et al. eds., 2008); LEAH WING, SOCIAL JUSTICE AND MEDIATION 18 (2002). See also Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. DISP. RESOL. 1, 18–22 (2012) (describing models for social justice mediation).

258. Chief among these works is law professor Trina Grillo's seminal article, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991).

259. MacDowell, *When Courts Collide*, supra note 219, at 114 (reporting empirical evidence that courts often fail to identify cases involving domestic violence and that "intake processes established specifically to identify the existence of domestic violence have been unsuccessful").

260. Elli Nagai-Rothe, *Challenging Neutrality, Examining Privilege and Encouraging Practitioner Self-Reflexivity: A Social Justice Approach to ADR*, MEDIATE.COM (July 2010), <http://www.mediate.com/articles/NagaiRotheE1.cfm>.

parties in terms of explaining legal options.²⁶¹ Law professors Jane Murphy and Jana Singer also recommend expanding the availability of frameworks that operate outside of the two-party dyad, such as family conferencing, which might benefit families with extended and alternative family forms.²⁶²

Another possibility is moving family services such as alternative dispute resolution out of courts altogether. Murphy and Singer attribute several advantages to locating family dispute resolution services in communities rather than courts. They argue that it may help normalize divorce and parental separation as “not primarily legal events, but rather ongoing processes of family reorganization.”²⁶³ While this is precisely the view that subjects families to ongoing state interventions in family courts, Murphy and Singer hope that shifting the resolution of such issues to the community may encourage parents to take responsibility for the resolution of their current or future disputes rather than relying on third-party adjudication.²⁶⁴ They believe that community-based services may also be more accessible to low-income families wary of state bureaucracies such as courts, allow for better coordination with other community resources and programs, and act as a mechanism to coordinate families with multiple legal actions.²⁶⁵ Additionally, a community-based approach may be more responsive to cultural diversity than is typical of legal institutions while freeing up courts to focus on establishing legal norms and resolving issues in the most adversarial cases.²⁶⁶

While the case for community-based services is promising, consideration of partiality and impartiality within an intersectional analysis suggests that more steps are necessary to protect or advance the interests of low-income litigants. Community-based does not necessarily mean community-centered, and the hegemonic power of family courts can easily be extended to other sites. My research on self-help services programs run as partnerships between NGOs and courts, for example, shows how staff members sometimes discourage individuals from accessing legal remedies and often interact with litigants in ways that reinforce race and gender-based stereotypes.²⁶⁷ These problems arise when programs lack the resources and/or commitment to address systemic problems, including structural inequalities within family courts, and lack sufficient accountability

261. See MURPHY & SINGER, *supra* note 52, at 137 (discussing alternative models of mediation).

262. See *id.*

263. *Id.* at 130.

264. *Id.*

265. *Id.* at 130–31.

266. *Id.*

267. See MacDowell, *Politics of Self-Help*, *supra* note 117, at 246–51.

measures.²⁶⁸ These programs can also drain resources from partnering advocacy groups while failing to advance their missions.²⁶⁹ Thus, it will be important to find ways to support and protect the partiality of family services programs for the communities being served wherever they are located and whether they are run by the state, NGOs, or partnerships between the two.²⁷⁰ Studies of existing community-based family services programs in the United States and England also indicate a need to increase public interest or buy-in.²⁷¹

Murphy and Singer recommend strengthening programs and participation through improved research, pilot programs, and incentives for using community-based services.²⁷² However, the reality is that community-centered goals and objectives may be difficult to establish or sustain within agency-based models of service delivery. Such models tend to be centered on agency priorities rather than those of the community, and to encourage dependency on the agency rather than engendering community resourcefulness and independence.²⁷³ Moreover, research and experience suggest that social justice commitments are incompatible with hierarchical and bureaucratic organizational forms often associated with agency models.²⁷⁴ Reformers must therefore work diligently to make sure that services help build capacity and maintain accountability within the communities they serve. While a full discussion of this issue is beyond the scope of this Article, one way to strengthen program research and development is to involve

268. See MacDowell, *Victims to Litigants*, *supra* note 223, at 1318–24 (analyzing how the conditions and structure of self-help services impact staff members' demeanor toward survivors).

269. See *id.* at 1326–27.

270. I will address the complexities of fragmentation as it relates to relationships between the state and civil society in greater detail in a future article.

271. See MURPHY & SINGER, *supra* note 56, at 132 (discussing existing programs and observing that low participation rates might stem from a lack of knowledge or understanding about community-based alternatives). Community-based mediation is also available through legal aid in some areas. See, e.g., LEGAL AID ONTARIO, http://www.legalaid.on.ca/en/about/fact_family_mediationandILA.asp (last visited May 14, 2018) (Ontario, Canada); NATIONAL FAMILY MEDIATION, <http://www.nfin.org.uk/index.php/family-mediation/legal-aid> (last visited May 14, 2018) (Great Britain), and LEGAL AID NEW SOUTH WALES, <http://www.legalaid.nsw.gov.au/what-we-do/family-law/family-dispute-resolution> (last visited May 14, 2018) (New South Wales, Australia).

272. MURPHY & SINGER, *supra* note 52, at 132.

273. See Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in *THE POLITICS OF INFORMAL JUSTICE* 75, 83 (1985). See also *id.* at 95 (finding that most citizen dispute resolution programs follow an “agency model”). Wahrhaftig concludes that, “although [agency models] are more informal and humanistic, they preserve the existing relationship between the communities served and the justice system.” *Id.*

274. See, e.g., MacDowell, *Reimagining*, *supra* note 8, at 524–25, 538–39 (summarizing research showing how organizational form impacts advocates' ability to analyze and understand the relationship between individuals and social structures in the context of advocacy for domestic violence survivors).

communities meaningfully in these efforts.²⁷⁵ Accountability measures are another cornerstone of court reform and the development of community-based alternatives.

2. Fragmentation and Accountability

Vulnerability theorists advocate for rigorous monitoring and evaluation of institutional programs and policies to make sure they serve human needs. Within the fragmented state, accountability also derives from the “immanent self-critique” that opposing perspectives and roles bring to bear on a problem.²⁷⁶ One source of this form of accountability in the adversarial legal system is lawyers, who help enforce due process protections and maintain accountability of the state.²⁷⁷ However, as we have seen, both lawyers and due process are in short supply in problem-solving courts. Thus, strategic deployment of lawyers in problem-solving courts is essential. This includes securing their presence in cases where lawyers can most make a difference for structural reform.

As noted previously, there are limits on the availability of lawyers due to the underfunding of federal legal aid, and the doctrinal interpretations that limit the constitutional right to an attorney.²⁷⁸ There are also restrictions on legal aid practice imposed by federal law for those organizations receiving funding from the Legal Services Corporation, including restrictions that impact structural reform efforts such as lobbying.²⁷⁹ Also problematic, however, is the seeming lack of will to seek substantive legal change on the part of some legal aid organizations.

Most federally funded public interest law offices focus on individual services rather than social change.²⁸⁰ Moreover, federal funding restrictions alone cannot explain the abdication of structural reform work by many legal aid providers. Many legal aid programs abandoned structural reform efforts before federal restrictions; conversely, some manage to continue social justice-oriented work in full compliance with federal restrictions.²⁸¹ In

275. One way to do this is by utilizing participatory action research methods. For an overview of action research, see Bruce L. Berg, *Action Research*, in *QUALITATIVE METHODS FOR THE SOCIAL SCIENCES* 195–208 (2004). As explained by Berg, this method “is intended to uncover or produce information and knowledge that will be directly useful to a group of people (through research, education, and sociopolitical action) . . . [and to] enlighten and empower the average person in the group, motivating each one to take up and use the information gathered in the research.” *Id.* at 197 (citations and emphasis omitted).

276. See *supra* Part II.A.

277. See *supra* Part I.B.

278. See *supra* Part I.A and B.

279. See DILLER & SAVNER, *supra* note 74, at 688–89 (detailing restrictions on practice of law by legal aid offices receiving federal funding).

280. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1618 (2006).

281. Gary F. Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 34, 39 (2011). See also Richard L. Abel, *Law*

addition, non-federally funded programs have also moved away from poverty elimination work.²⁸² A modest intervention aimed at improving legal aid services is to incentivize structural reform goals by tying the existence of a plan for strategic structural reform and related accountability measures to funding opportunities. Additionally, planned partnerships between legal aid and state entities such as courts should explain how the nongovernmental partner will maintain independence from the state, and demonstrate its capacity to do so.²⁸³

Accountability for courts could also be encouraged through the use of ombudsman programs. Current processes for resolving complaints about judicial officers and other court personnel are inadequate. Pro se litigants face numerous barriers in bringing such complaints.²⁸⁴ Moreover, even if the litigant has representation, attorneys have disincentives for lodging complaints against judges.²⁸⁵ Furthermore, of the complaints about judicial conduct that are filed, almost all are dismissed without any action being taken.²⁸⁶ As observed by legal scholar Jane Stoever, “current processes tend to value judicial independence at the expense of judicial accountability.”²⁸⁷

In response, some courts in the United States have adopted ombudsman offices to investigate and resolve complaints.²⁸⁸ In England and Wales, the government went a step further by creating a Judicial Appointments Ombudsman to oversee the work done by the Office for Judicial Complaints (OJC).²⁸⁹ The Ombudsman constitutes another layer of oversight with a dual purpose: reviewing complaints about the OJC’s han-

Without Politics: Legal Aid Under Advanced Capitalism, 32 UCLA L. REV. 474, 576–77 (1985) (reporting that legal aid lawyers performed relatively little legal reform work in the 1980s, before the current federal restrictions).

282. Smith, *supra* note 281, at 39. However, they are more likely to do such work than their federally-funded counterparts. Nielsen & Albiston, *supra* note 280, at 1620.

283. See MacDowell, *Victims to Litigants*, *supra* note 223 at 1329 (arguing that capacity in this context should include “both capacity for analysis of legal issues and strategies, and capacity for systemic reform that benefits vulnerable litigants”).

284. See, e.g., Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 368–69 (2011) (detailing barriers).

285. *Id.* at 368.

286. *Id.* at 369.

287. *Id.*

288. See, e.g., Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 FORDHAM URB. L.J. 2099, 2103–05 (2002) (discussing ombudsman programs in Alaska and New Jersey).

289. See *Judicial Appointments & Conduct Ombudsman: About Us*, GOV.UK, <https://www.gov.uk/government/organisations/judicial-appointments-and-conduct-ombudsman/about> (last visited May 14, 2018).

dling of complaints (thereby increasing public confidence in the courts), and helping to ensure a robust judicial appointments process.²⁹⁰

From the standpoint of functional fragmentation, the British model is superior in that the ombudsman has greater independence from the courts. However, in the American federal system, there are obviously challenges in encouraging states to create new government entities, especially during fiscally limited times. Still, this is an area where the federal government could take the lead through rule of law programs, providing funding and guidance on best practices to support the research and development of ombudsman programs at the state level to increase judicial accountability.

CONCLUSION: BUILDING JUSTICE SPACE

This Article has advocated for a new view of fragmentation—one where state fragmentation can have a positive function for poor and low-income people. The notion of state fragmentation recognizes that the state is not monolithic. It also suggests that there are spaces where the state is not omnipresent, at least conceptually. I propose that this includes justice space. Justice space can be envisioned within the nooks and crannies of a fragmented state, and in spaces not fully occupied by the state, such as within civil society. These spaces afford opportunities for individuals to challenge state practices and maneuver strategically among state entities. Justice space can also be a place to foster the conditions and capacities necessary for resistance to subordination. This view of fragmentation both challenges and expands on prior theories of vulnerability and the state, and shows the need for new access to justice practices.

Vulnerability theorists want a strong and supportive state, capable of fostering resilience to vulnerability. Thus, their view might be that we should focus on the ability of the state to provide justice within the legal system. However, while one goal of functional fragmentation is a more just legal system, a second is to create the capacity for more justice. The latter includes the expansion of justice-oriented dispute resolution methods, including in civil society. It also includes developing the assets needed to engage in the pursuit of justice, which may be created in and outside of state institutions, or in resistance to them. Creating new spaces for justice work and for developing the assets needed for that work does not relieve the state of its responsibility to provide justice. Rather, it recognizes the need for spaces, including those located outside the state, from which individuals and communities pursue justice. These insights can inform further analysis by vulnerability theorists of the relationship between civil society, resilience, and state accountability as pertains to access to justice.

In turn, the insights of the revised vulnerability theory proposed here need to be incorporated more widely into conceptions of access to justice and the provision of legal services. Vulnerability theorists acknowledge that

290. *Id.*

concrete institutional structures shape social power relationships; therefore, they demand that institutions are structured to better serve human needs. Utilizing these insights, and taking relative privilege, privacy, and autonomy into account, interventions into poor people's courts should seek not merely to provide access to existing legal systems, but also to mitigate the harm caused to low-income people using those systems, foster accountability, and develop meaningful alternatives. This requires a broad approach to providing access, including the provision of opportunities for people to develop the assets necessary for social, legal, and political resilience and change. Attention to functional as well as problematic fragmentations in the state is one way to engage this project and create space for justice as well as access.

Ultimately, building justice space requires fostering equality and autonomy—not in the narrow or superficial sense of liberalism, but in the substantive, wide-ranging, yet attentive to particularities sense of an anti-subordination agenda. In the final analysis, as we develop new approaches to achieving these goals, the question will be: has justice space been increased or decreased through this intervention, and how? This in turn will involve deciding, within particular contexts, what human resilience within justice looks like.