

MISSING DISCOVERY IN LAWYERLESS COURTS

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The discovery process is the most distinctive feature of American civil procedure. Discovery has been referred to as procedure’s “backbone” and its “central” axis.¹ Yet 98% of American cases take place in state judiciaries where there is little to no discovery.² Most state court cases involve unrepresented parties litigating debt collection, eviction, family law, and employment claims. And the state rules of procedure rarely give these parties the power to make discovery requests. This “missing discovery” means, then, that discovery is not a fundamental part of states’ legal traditions.

This Essay presents a study of America’s missing discovery system in state civil courts. It begins with a brief survey of state discovery rules that shows how discovery is often inaccessible and opaque. It then argues that while discovery has been key to the progress of federal law, it has not been an important tool for state law reform. Still, the Essay highlights that discovery is a double-edged sword: It can empower small claimants but may also impose costs and complexity that these litigants cannot handle. Accordingly, the Essay proposes an experiment in access-oriented discovery, focusing on disclosure obligations on sophisticated litigants. The Essay’s main goal, however, is to work toward a theory of discovery in state civil courts.

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1. Diego A. Zambrano, *Discovery as Regulation*, 119 Mich. L. Rev. 71, 72, 80 (2020) [hereinafter Zambrano, *Discovery as Regulation*].

2. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2103 (2019) [hereinafter Zambrano, *Federal Expansion*].

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INTRODUCTION

Debates over the health of state courts and the treatment of unrepresented parties are heating up, and the state courts system is approaching a critical moment. A new class of scholars argues that civil procedure in small claims looks radically distinct from traditional practice in federal courts and fails to vindicate full access to justice.³ Jessica Steinberg, for

3. See, e.g., Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 *Geo. L.J.* 509, 511–13 (2022) [hereinafter Carpenter et al., *Judges in Lawyerless Courts*] (noting that most state civil court participants have to defend their rights and interests without legal representation in a system designed by and for lawyers); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 *Wis. L. Rev.* 249, 257–61 [hereinafter Carpenter et al., *Studying*] (highlighting the changed landscape in state court litigation in which the majority of litigants are unrepresented and, as a result, tend to fare poorly even in meritorious cases); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 *Wis. L. Rev.* 215, 219–23 [hereinafter Shanahan, *Keys*] (observing that state civil courts are not providing adequate remedies or justice for litigants,

instance, argues that a “crisis” is brewing in more than nineteen million civil cases involving low-income parties who are often lawyerless.⁴ Unlike the well-represented cases that populate the federal courts, more than 75% of state court claims involve at least one party without legal representation.⁵ Without experienced counsel, most low-income litigants cannot manage the complex procedures used by state courts. And, in a reversal of the federal norm, a large percentage of these state court cases involve large landlords or debt collectors as plaintiffs against low-income and unrepresented defendants.⁶

Despite reform efforts oriented at encouraging state judges to simplify procedures and embrace inquisitorial techniques, Colleen Shanahan and co-authors found in a path-breaking study that “[j]udges [have] maintained legal and procedural complexity in their courtrooms.”⁷ They conclude that civil courts were “not designed for people without counsel” and are therefore failing to promote access to justice.⁸ Even more, Lauren Sudeall and Daniel Pasciuti found in a study of eviction courts that unwieldy processes have turned state courts into nothing more than “a vehicle for rent collection.”⁹ This growing chorus of commentators agrees that the status quo is harming unrepresented parties, and it has, in turn, offered an array of reforms ranging from empowering active judges¹⁰ and providing more unbundled legal aid,¹¹ all the way to engaging in deeper experimentation in state courts.¹²

especially under-resourced litigants in cases with asymmetrical power relationships); Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 Conn. L. Rev. 741, 743–45 (2015) [hereinafter Steinberg, Demand Side] (commenting that pro se litigants in state courts lack the same access to justice as represented parties). See also Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court, 3 Cardozo Pub. L. Pol’y & Ethics J. 659, 661–69 (2006) (exploring problems that pro se litigants face).

4. Steinberg, Demand Side, supra note 3, at 741.

5. Carpenter et al., Judges in Lawyerless Courts, supra note 3, at 511.

6. See Daniel Wilf-Townsend, Assembly-Line Plaintiffs, 135 Harv. L. Rev. 1704, 1716–17 (2022).

7. Carpenter et al., Judges in Lawyerless Courts, supra note 3, at 516.

8. See id. at 511–13, 557.

9. See Lauren Sudeall & Daniel Pasciuti, Praxis and Paradox: Inside the Black Box of Eviction Court, 74 Vand. L. Rev. 1365, 1368 (2021).

10. See, e.g., Benjamin H. Barton, Against Civil *Gideon* (and for Pro Se Court Reform), 62 Fla. L. Rev. 1227, 1272 (2010) (arguing that “judges in pro se courts should replace the traditional role of neutral arbiter with active questioning aimed at ensuring that procedural and substantive justice prevails”); Steinberg, Demand Side, supra note 3, at 801 (arguing that judges should “be active, frame legal issues, and question parties and witnesses in order to develop legal claims”).

11. See Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 Geo. J. Legal Ethics 209, 229–30 (1990) (“[R]estricting the profession’s monopoly should be seen as part of an overall strategy for expanding access to legal assistance.”); Steinberg, Demand Side, supra note 3, at 748 (explaining the benefits of unbundled legal services).

12. See Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, COVID, Crisis, and Courts, 99 Tex. L. Rev. Online 10, 17–19 (2020) [hereinafter Shanahan

Behind this developing maelstrom and buried in this emergent scholarship is a surprising obstacle for unrepresented parties: a nearly non-existent and opaque discovery system. Steinberg, for instance, observed that unrepresented litigants “find it nearly impossible to manage . . . discovery.”¹³ Likewise, Shanahan found in a large study of unemployment claims that “[d]iscovery procedures are limited[] and rarely used.”¹⁴ Part of the reason for this missing discovery system is that some states have streamlined low-stakes litigation by explicitly prohibiting discovery. For instance, in eviction cases, Michigan, Pennsylvania, Texas, and arguably New York bar any discovery.¹⁵ Even in contexts where motions to compel discovery are more common, one empirical study found that “judge[s] infrequently ruled on these motions.”¹⁶ Indeed, one major teaching of this entire literature is that “the law of state civil courts is largely unwritten” and heavily “informal”¹⁷ and most of the work “happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings.”¹⁸

These studies, however, leave open the question of whether discovery is an important and potentially underutilized reform tool or, by contrast, a mechanism that increases costs and ultimately harms unrepresented litigants. On the one hand, if the scholarship on federal discovery is right, missing discovery in state courts leaves aside a potential tool that can promote pro-consumer or pro-employee changes in the law. And, without discovery, litigants who may need documents to assert claims or defenses are disempowered. Even more, litigants may miss discovery’s potential as an offensive weapon—to gain leverage in settlement negotiations, delay proceedings, or support counterclaims.¹⁹ In line with this thinking, Steinberg noted that in habitability cases, discovery could “play a central role . . . making it unlikely that tenants can succeed without attorney representation.”²⁰

On the other hand, some scholars of the civil *Gideon* literature and state reformers have long advocated for procedural simplification and a

et al., COVID] (arguing that experimentation in state civil courts is essential to respond to “this moment of social change”).

13. Steinberg, Demand Side, *supra* note 3, at 744.

14. Shanahan, Keys, *supra* note 3, at 226.

15. See *infra* notes 139–151. New York requires leave of court for any discovery requests. See *infra* notes 143–147.

16. See D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, 126 Harv. L. Rev. 901, 919–20, 927, 934 (2013).

17. Shanahan et al., COVID, *supra* note 12, at 14.

18. Carpenter et al., Judges in Lawyerless Courts, *supra* note 3, at 514.

19. Greiner et al., *supra* note 16, at 965.

20. Jessica K. Steinberg, Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court, 42 Law & Soc. Inquiry 1058, 1065 (2017) [hereinafter Steinberg, Informal] (noting that discovery and pretrial motions play a key role in habitability cases, which place unrepresented tenants at a distinct disadvantage as they are forced to navigate these complex procedures alone).

rejection of complex practices like discovery.²¹ Some state legislatures have explicitly banned discovery “in an effort to reduce costs and level the playing field for unrepresented litigants.”²² For instance, setting aside the states that have eliminated discovery in eviction cases, California, New York, and Pennsylvania seriously limit discovery in cases involving claims for less than \$10,000.²³ A committee of lawyers once advised Massachusetts family courts to create a simplified process for domestic relations cases that “would eliminate most formal discovery” because the process was a “stumbling block[] faced by pro se litigants.”²⁴ To these states, discovery increases the complexity of a case, gives represented parties an upper-hand, and further unbalances litigation in their favor. Worse, it may empower sophisticated parties—debt collectors, landlords, employers, and corporations—with bargaining leverage and the threat of increased costs. Besides, whatever regulatory benefits discovery may bring in federal court are likely not achievable in small-stakes cases with straightforward fact patterns.

While scholars have identified important gaps in state court systems and potential problems, they have not defined with precision what the role of discovery should be in lawyerless courts, furnished a clear outline of discovery’s potential effects on these cases, or set the appropriate boundaries of debate. The stakes, moreover, are significant as reforms to state courts hang in the balance. The resulting questions are clear: What, exactly, should the role of discovery be in lawyerless courts? Does “missing discovery” damage the development of state law? Or are state legislatures right that discovery harms unrepresented litigants? And, if so, what can reformers do about it?

21. See, e.g., Barton, *supra* note 10, at 1272–74 (arguing that procedural simplification is an alternative to civil *Gideon*); Russell Engler, Connecting Self-Representation to Civil *Gideon*: What Existing Data Reveal About When Counsel Is Most Needed, 37 *Fordham Urb. L.J.* 37, 75–76 (2010) (arguing in favor of a right to civil counsel and exploring the importance of having skilled advocates); Richard Zorza, Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation, 61 *Drake L. Rev.* 845, 857–64 (2013) (arguing that simplifying the legal dispute resolution system is in the best interest of all civil litigants).

22. Steinberg, *Demand Side*, *supra* note 3, at 797 n.309.

23. See *infra* notes 94–106. Colorado and Texas also limit discovery for cases under \$100,000 and \$250,000, respectively. Colo. R. Civ. P. 16.1(b), (k)(4); Tex. R. Civ. P. 169(a), 169(d)(1), 190.2. See also Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 *Rutgers L. Rev.* 595, 613 (2002) (noting that many states have limited the amount of discovery available to parties); Seymour Moskowitz, *What Federal Rule-makers Can Learn From State Procedural Innovations* 5–10 (May 10, 2010) (unpublished manuscript), https://www.uscourts.gov/sites/default/files/seymour_moskowitz_what_federal_rulemakers_can_learn_from_state_0.pdf [<https://perma.cc/GWG2-BVHV>] [hereinafter Moskowitz, *Federal Rulemakers*] (explaining that “[t]he volume and type of allowable discovery in the states are now often differentiated by the amount in controversy”).

24. Charles P. Kindregan, Jr. & Patricia A. Kindregan, *Pro Se Litigants: The Challenge of the Future* 21, 39 (1995), <https://www.mass.gov/doc/pro-se-litigants-the-challenge-of-the-future/download> [<https://perma.cc/TX5P-M4KN>].

This Essay takes on the task of answering these questions, providing an examination of discovery in state courts, and a detailed analysis of where discovery would have a positive or negative impact. Part I summarizes how state discovery differs in important respects from the federal system. It then provides a detailed catalogue of state discovery rules in three categories of lawyerless cases: landlord–tenant, debt collection, and family law disputes. This Essay places special emphasis on debt collection and eviction claims because they represent around 45% of all state cases and mostly involve unrepresented parties.²⁵

Part II then steps back to provide a theoretical framework to evaluate discovery, its potential benefits and costs, and whether there is room for discovery reform. At its core, this Part addresses the discovery catch-22: While discovery can bring benefits to lawyerless cases, it can also increase complexity to the point that it actively harms the interests of unrepresented litigants. That is why Part II explores the characteristics of cases in which discovery is most likely to promote fairness and accuracy without increasing complexity. There may well be a sweet spot for discovery reform, especially in areas where sophisticated plaintiffs—large landlords, debt collection companies, and banks with experienced counsel—litigate against lawyerless parties who allege serious and systematic wrongdoing. States should only impose disclosure obligations on sophisticated plaintiffs in complex cases, including warranty of habitability claims and violations of the Fair Debt Collection Practices Act (FDCPA). In this manner, this Essay highlights several design principles for any discovery reform effort.²⁶

Finally, Part III introduces an experimental proposal: a civil open file statute that would force sophisticated landlords and debt collectors to assemble and produce a full record of relevant documents at the outset of litigation. These statutes would draw on the example of criminal open file statutes that force prosecutors to disclose to defendants their full investigatory record. But a civil analogue would be narrowly applied only to cases involving a significant asymmetry in resources and complex defenses or counterclaims by unrepresented parties. The idea follows a call from scholars to embrace a spirit of experimentation in state courts.²⁷ And the idea also aligns with the civil *Gideon* literature that embraces legal assistance

25. See generally Nat'l Ctr. for State Cts., Civil Justice Initiative: The Landscape of Civil Litigation in State Courts (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/7AJB-SHUD>] (providing a comprehensive report on state civil litigation).

26. Some of these include a few actionable items: States should not expand discovery across-the-board; small claims cases involving two unsophisticated parties should not enjoy broader discovery; most debt collection claims and any other cases that hinge on a single contract (without potential statutory defenses) should also retain either no discovery or few discovery obligations. See *infra* section II.D.

27. See, e.g., Shanahan et al., COVID, *supra* note 12, at 17–19 (arguing that transparent experimentation is needed for state civil courts to respond to the COVID-19 crisis).

only for a subset of cases that involve significant interests, such as housing or child custody.²⁸

I. AN INTRODUCTION TO STATE DISCOVERY

This Part explores the basics of discovery in state courts and how it differs in important respects from the federal system. Section I.A summarizes a few ways in which state discovery diverges from the federal system. Section I.B then examines discovery in a subset of lawyerless cases: debt collection, employment claims, evictions, and family law cases. This section finds that discovery is often informal but that there are formal approaches that can be categorized into the following: full adversarial, streamlined (with strict time limits), court managed through pre-filled forms, and no formal discovery at all. Still, this Essay cannot fully explore whether judges improvise discovery on the go or craft procedures that are tailored to each case.²⁹

Before delving into the state rules, a very brief discussion of federal discovery is appropriate here. The federal discovery process is at the center of the Federal Rules of Civil Procedure (FRCP). More than a dozen rules³⁰ build a process that is expansive, broad, thorough, and transsubstantive. The system empowers any plaintiff, regardless of the amount in controversy or cause of action, to seek relevant documents that are proportional to the needs of the case.³¹ Parties can also schedule depositions and issue interrogatories, involving parties or nonparties.³² This makes federal discovery “extremely broad,” covering “any matter, not privileged, that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible.”³³ This process gives plaintiffs a potent subpoena power that is analogous to administrative agency investigative tools.³⁴

A. *State Discovery Rules and Variants*

Most states have traditionally followed the FRCP, mimicking the scope and breadth of pleading, discovery, summary judgment, joinder, and related rules. A 1986 study by John Oakley found that nearly two dozen

28. See *supra* note 21 and accompanying text.

29. Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767, 784 (2017) (seeking to “define the phenomenon of ad hoc procedure-making”); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 Colum. L. Rev. 1183, 1209 (2022) (noting that state court judges “routinely adjust procedures to accommodate the particular litigants before them”).

30. See Fed. R. Civ. P. 26–37.

31. See Fed. R. Civ. P. 26.

32. See Fed. R. Civ. P. 30, 33.

33. Zambrano, *Discovery as Regulation*, *supra* note 1, at 80.

34. *Id.* at 102–18 (discussing the resemblance between administrative subpoenas and civil discovery).

state rules of civil procedure were “replicas” of the federal rules and six more were near replicas.³⁵ But a handful of states have long retained a distinct set of procedural rules, including an important subset of large states like California, Michigan, Pennsylvania, New York, and Texas.³⁶ And many states’ procedural rules are increasingly diverging from the FRCP, refusing to embrace a federal trend of procedural retrenchment.³⁷ Florida, for example, has rejected every single amendment to the federal discovery rules since the early 1990s.³⁸

For these reasons, this Essay largely focuses on the “variant” states that have not mimicked the federal rules: California, Florida, Michigan, New York, Pennsylvania, and Texas. This Essay also contrasts these states’ approaches to other states that have experimented with discovery, including Arizona, Massachusetts, and Utah. As discussed below, the variant states give us a good sample of how state rules can differ from the federal system and present an alternative model of discovery that may be relevant for lawyerless courts. While the federal rules are transsubstantive, emphasize the exchange of material in litigation, and are generally party led, the variant states diverge in, among other things, three respects: an emphasis on substance-specific rules, expansive disclosure requirements partnered with limited depositions and interrogatories, and increasing court management of discovery.

1. *Substance- or Amount-Specific Discovery.* — Many of the variant states reject transsubstantive discovery.³⁹ While the federal discovery rules provide for a single system for all cases, several states—including Arizona, California, Illinois, Texas, and Utah—divide cases according to the amount in controversy.⁴⁰ California, for instance, provides for discovery tracks that depend on the size of damages requested.⁴¹ California Rule 85 defines “limited civil cases” as those involving less than \$25,000 and limits the number of depositions, interrogatories, and document requests.⁴²

35. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 *Wash. L. Rev.* 1367, 1377–78 (1986).

36. See *id.* at 1378 (exploring how state rules have not followed federal rules in adopting changes that make access more difficult).

37. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 *Calif. L. Rev.* 411, 414 (2018) (exploring how state courts have not embraced changes that make it more difficult to access federal courts); Zambrano, *Federal Expansion*, *supra* note 2, at 2163–64 (same).

38. 11 Seymour Moskowitz & Janet Capurro Graham, *Bender’s Forms of Discovery Treatise* app. B (2021).

39. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 *Vand. L. Rev.* 1167, 1186 (2005) (highlighting that states such as Arizona, Colorado, Illinois, and Texas adopted discovery rules that depart from the federal rules, which are transsubstantive).

40. See *Ariz. R. Civ. P.* 26.2(c)(3); *Ill. Sup. Ct. R.* 222; *infra* notes 42–47.

41. Koppel, *supra* note 39, at 1214–15.

42. *Cal. Civ. Proc. Code* § 85 (2021).

Additional discovery in these cases is strictly limited.⁴³ Along the same lines, Texas provides for discovery tracks depending on the amount in controversy.⁴⁴ For instance, so-called “expedited action” cases cover claims seeking relief for less than \$250,000.⁴⁵ These cases alter the regular discovery rules, providing a limit of 180 days to complete the entire process and a cap of fifteen interrogatories, twenty-five requests for production, and fifteen requests for admission.⁴⁶ Utah, too, has adopted discovery tiers based on the amount in controversy, with categories for \$50,000 or less, between \$50,000 and \$300,000, and for more than \$300,000.⁴⁷

Beyond differences based on the amount in controversy, variant states reject transsubstantivity through specialized courts or substance-specific dockets. Kentucky, for instance, offers a separate track for cases that qualify as “economic litigation.”⁴⁸ Typically, these cases involve contract, torts, and other run-of-the-mill claims. For these cases, Kentucky requires a discovery conference and mandatory disclosures and creates other limits.⁴⁹ Over twenty states have business courts focused on commercial disputes between sophisticated entities.⁵⁰ For example, while New York does not have separate tracks based on the amount in controversy, it does have specialized courts—like the Commercial Division—that apply different discovery rules.⁵¹ Among other differences, the Commercial Division requires “strict adherence” to a discovery schedule crafted by the court

43. Cal. Civ. Proc. Code § 95. California also makes use of discovery “forms.” *Id.* See also Greiner et al., *supra* note 16, at 915, 918 (discussing the use of “standardized forms” that are created by courts or other entities). And there have been proposals to further segment cases. See Jud. Council of Cal., Invitation to Comment: Judicial Council—Sponsored Legislation: Civil Discovery Tiers 1 (2018), <https://www.courts.ca.gov/documents/SP18-17.pdf> [<https://perma.cc/QS99-9RGL>].

44. Tex. R. Civ. P. 169.

45. *Id.*; Final Approval of Amendments to Texas Rules of Civil Procedure 47, 99, 169, 190, 192, 193, 194, 195, 196, 197, and 198, No. 20-9153 (Tex. Dec. 23, 2020), <https://www.txcourts.gov/media/1450176/209153.pdf> [<https://perma.cc/6CMD-QAY5>].

46. Tex. R. Civ. P. 190.2; David Slayton, Tex. Off. of Ct. Admin., Deciphering Texas Rule of Civil Procedure 169: Expedited Actions, <https://www.txcourts.gov/media/636893/Deciphering-TRCP-169-Expedited-Trials.pdf> [<https://perma.cc/L3DP-HKPW>].

47. Utah R. Civ. P. 26(c)(5); Brittany Kauffman, Civ. Just. Improvements Comm., Call to Action: Achieving Civil Justice for All app. D (2016), https://www.ncsc.org/__data/assets/pdf_file/0022/25681/ncsc-cji-appendices-d.pdf [<https://perma.cc/K6F7-7XBL>]; see also Linda Sandstrom Simard, Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity, 71 *Vand. L. Rev.* 1919, 1942–43 (2018).

48. C. Lynn Oliver, Note, Economical Litigation: Kentucky’s Answer to High Costs and Delay in Civil Litigation, 71 *Ky. L.J.* 647, 648 (1982); Richard H. Underwood, Discovery in Kentucky: An Overview, 72 *Ky. L.J.* 727, 778 (1984).

49. Underwood, *supra* note 48, at 778.

50. Diego A. Zambrano, The States’ Interest in Federal Procedure, 70 *Stan. L. Rev.* 1805, 1811–12 (2018).

51. See N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70.11 (2022).

and parties.⁵² Similarly, California has specialized complex litigation courts and also specific rules that govern sexual harassment and elder abuse cases.⁵³ Michigan, too, requires additional disclosures in no-fault and personal injury cases.⁵⁴ These states are representative of a broader trend against transsubstantive discovery.

2. *Disclosures and Specific Limits on Depositions, Interrogatories, and Requests.* — Most states have also recently adopted both expansive disclosure requirements and numerical limits to depositions and interrogatories.⁵⁵ The federal rules impose a “narrowly focused duty to disclose witnesses and documents”⁵⁶ that the “disclosing party may use to support its claims or defenses.”⁵⁷ Many states have gone beyond that narrow standard to expand disclosures over relevant documents. For instance, Alaska, Illinois, and Utah require the disclosure of “[r]elevant documents and electronically stored information . . . together with a list of all materials withheld and the reasons for nonproduction. None of this is required in federal court.”⁵⁸ Still more, Arizona, Colorado, Michigan, Minnesota, New Hampshire, Texas, and other states have all endorsed early disclosures of potentially relevant documents.⁵⁹ While federal disclosure rules require only a description of potentially relevant documents, New Hampshire rules require “parties to actually produce copies of documents without a discovery request In addition, the federal rule only requires parties to list the ‘subjects’ about which a witness would testify, while the

52. Andrew Morrison & Anthony Staltari, *We Are All Commercial Litigators Now: NY Commercial Division Rules Become Agents of Change*, *JD Supra* (Feb. 2, 2021), <https://www.jdsupra.com/legalnews/we-are-all-commercial-litigators-now-ny-7357375/> [<https://perma.cc/8D3X-MYW7>].

53. See, e.g., Cal. Civ. Proc. Code §§ 2017.310–.320, 2032.340 (2004).

54. Mich. Ct. R. 2.302(A)(2)–(3).

55. Koppel, *supra* note 39, at 1217–20.

56. *Id.* at 1229.

57. Fed. R. Civ. P. 26(a)(1)(A).

58. Moskowitz, *Federal Rulemakers*, *supra* note 23 (manuscript at 12); see also *Initial Disclosures*, Utah Cts., https://www.utcourts.gov/howto/courtprocess/initial_disclosures.html [<https://perma.cc/EE2K-7HQ4>] (last visited Feb. 6, 2022).

59. Civ. Just. Improvements Comm., *Call to Action: Achieving Civil Justice for All 4–5* (2016), https://www.ncsc.org/_data/assets/pdf_file/0029/19289/call-to-action_achieving-civil-justice-for-all.pdf [<https://perma.cc/8P2P-ETKQ>]; see also Kauffman, *supra* note 47; Kimberly Daily, Kelsey Machado & Matthew Rawlinson, *A New Legal Frontier: Navigating the 2021 Texas Rules of Civil Procedure*, *JD Supra* (Jan. 25, 2021), <https://www.jdsupra.com/legalnews/a-new-legal-frontier-navigating-the-8579180/> [<https://perma.cc/9KBP-U5YV>]; Key Amendments to Texas Rules of Civil Procedure, *Effective January 2021*, McGuireWoods (Mar. 23, 2021), <https://www.mcguirewoods.com/client-resources/Alerts/2021/3/key-amendments-texas-rules-civil-procedure-effective-january-2021> [<https://perma.cc/6K GK-SZJY>].

[New Hampshire] rule requires a specific disclosure of the facts and information that person possesses.”⁶⁰ Arizona is another example of a state that adopted a robust disclosure system that became popular among attorneys. Indeed, over “seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.”⁶¹

Many of these states have partnered disclosure reform with limits on other forms of discovery. New York, for instance, recently imposed a series of new limitations on general discovery, capping interrogatories at twenty-five and depositions to ten per party, and each deposition is limited to seven hours per witness.⁶² The deposition time limit mirrors Federal Rule 30(d),⁶³ but it is notably different because it mandates an extension of time only “[f]or good cause shown.”⁶⁴ Michigan, Missouri, and New Hampshire have all similarly limited the number of interrogatories and depositions.⁶⁵ And “unlike federal procedure, a party under Massachusetts procedure must obtain leave of court to depose a testifying expert That relief is warranted . . . only if an expert deposition is ‘reasonable and necessary.’”⁶⁶

3. *Court Management and Miscellaneous Rules.* — Finally, a range of states have adopted detailed provisions that differ from the federal discovery rules, including the following: managerial discovery rules that

60. Robert Fojo, *New Rules Modernize New Hampshire Civil Procedure*, Fojo L. (Nov. 6, 2014), <https://fojolaw.com/2014/11/06/nh-pad-rules-modernize-new-hampshire-civil-procedure/> [<https://perma.cc/J6MX-5LD6>].

61. Comm. on Rules of Prac. & Proc., U.S. Cts., Meeting of January 8–9, 2015, at 16 (2015), https://www.uscourts.gov/sites/default/files/st01-2015-min_0.pdf [<https://perma.cc/Q8V5-DNCE>].

62. Gizele Rubeiz & Jacqueline L. Bonneau, *Commercial Division Rules Expanded to General Civil Practice in New York Effective February 1, 2021*, Patterson Belknap: NY Com. Div. Blog (Feb. 3, 2021), <https://www.pbwt.com/ny-commercial-division-blog/commercial-division-rules-expanded-to-general-civil-practice-in-new-york-effective-february-1-2021> [<https://perma.cc/PH7Q-BHQ2>].

63. Fed. R. Civ. P. 30(d).

64. Robert Kelner, Gail Kelner & Joshua Kelner, *New Rules of Engagement: Major Changes to NY’s Rules of Court*, N.Y.L.J. (May 24, 2021), <https://www.law.com/newyorklawjournal/2021/05/24/new-rules-of-engagement-major-changes-to-nys-rules-of-court/?slreturn=20211117224659> [<https://perma.cc/5XYS-LDKY>].

65. Daniel D. Quick, *The New Civil Discovery Rules*, 98 Mich. Bar J. 16, 18 (2019); Fojo, *supra* note 60; Rachel Harris, *What You Need to Know About Missouri’s Updated Discovery Rules*, Thompson Coburn LLP (Sept. 17, 2019), <https://www.thompsoncoburn.com/insights/publications/item/2019-09-17/what-you-need-to-know-about-missouri-s-updated-discovery-rules> [<https://perma.cc/D9YR-84UF>]; see also N.H. Sup. Ct. R. 23, 26.

66. Eric P. Magnuson, *Practice Pointer: Under Massachusetts Procedure, There’s No Right to Expert Depositions*, Nutter: BLS Blog (Dec. 11, 2020), <https://www.nutter.com/bls/practice-pointer-under-massachusetts-procedure-theres-no> [<https://perma.cc/P89E-QTLQ>] (citation omitted) (quoting *Lubin & Meyer, P.C. v. Manning*, No. 1784CV02352-BLS2, at 2 (Mass. Super. Ct. Mar. 3, 2020) (order denying plaintiff’s motion for leave to depose defendant’s expert)).

empower judges to assemble evidence,⁶⁷ supervise the details of the process, and provide for court-initiated forms;⁶⁸ automatic stays of discovery pending a motion to dismiss;⁶⁹ and pre-complaint discovery.⁷⁰ Empowering judges has been popular in a few states like Michigan. In a recent set of reforms, Michigan sought to increase “court management” by empowering judges to “control the scope, order and amount of discovery.”⁷¹ Along the same lines, Utah has empowered judges by radically shifting “the presumption from one where discovery is allowable unless the rules or a judge say otherwise to a scheme where discovery is prohibited unless the rules or a judge say otherwise.”⁷² Minnesota and Kentucky both have mandatory discovery conferences.⁷³ Some states have enjoyed variable success with discovery reform, with attorneys praising active judicial management in some states, while other state governments have abandoned such reforms.⁷⁴ Relatedly, states like Massachusetts have also used standardized discovery forms. This means that, in eviction litigation, Massachusetts courts provide pre-filled discovery forms to unrepresented parties who can then indicate what kind of information they seek from the landlord.⁷⁵

B. *Discovery in Lawyerless Courts*

Most states have developed specific rules for discovery in the “lawyerless” cases at the center of this Essay: small claims, debt collection, family law, and landlord–tenant disputes. Sometimes state or local rules cover only small-stakes claims or family law disputes, while others have specific regimes for eviction claims. If the goal is to address the possibility of missing discovery in these cases, we have to first understand the status quo in lawyerless courts.

As explained below, while discovery is usually limited in lawyerless cases, there are common approaches that can be categorized into the following: full adversarial, streamlined (with strict time limits), court-

67. See, e.g., Quick, *supra* note 65, at 17 (describing Michigan court rules that vest courts with case management tools that control the scope, order, and amount of discovery).

68. See Greiner et al., *supra* note 16, at 915, 918 (describing Massachusetts courts’ use of standardized forms in eviction proceedings).

69. New York Supreme Court Motion to Dismiss, SmartRules (Apr. 12, 2020), <https://blogs.smartrules.com/new-york-supreme-court-motion-to-dismiss-cheat-sheet/> [<https://perma.cc/ZW4B-6Y2T>].

70. Pa. R. Civ. P. 4003.8; Moskowitz & Graham, *supra* note 38, at 14.

71. Quick, *supra* note 65, at 17.

72. Kauffman, *supra* note 47, at 8.

73. See, e.g., Minn. R. Civ. P. 26; What Is a Rule 26 Discovery Conference in Minnesota Court Cases?, Aaron Hall, <https://aaronhall.com/what-is-a-rule-26-discovery-conference-in-minnesota-court-cases/> [<https://perma.cc/4T9P-3QQ4>]; see also Ky. R. Civ. P. 90; Oliver, *supra* note 48, at 654.

74. Kauffman, *supra* note 47, at 2–9 (discussing how some pilot projects ended while others were met with “success” and received “positive feedback”).

75. Greiner et al., *supra* note 16, at 915.

managed through pre-filled forms, and no formal discovery at all. Still, one question here is whether judges improvise discovery on the go through “ad hoc” procedures that are tailored to each case.⁷⁶

76. Bookman & Shanahan, *supra* note 29, at 1206–09; see also Bookman & Noll, *supra* note 29, at 784.

TABLE 1: CLASSIFICATION OF STATE DISCOVERY REGIMES

Case Type	Purpose of Discovery and the Proceeding	Case Complexity	Discovery Choice by State
Small Claims and Debt Collection	Reveal basic documents for offense or defense. But balanced against need for informality and simplicity.	Low Medium: FDCPA offensive claims, contract defenses, state consumer protection	Full discovery (FL) No discovery at all (CA, PA, MI, NY) Court-managed and reversed default: need judge approval (CA, TX) Streamlined: disclosures/trial (PA)
Landlord-Tenant, Eviction	Reveal basic documents for offense or defense. But balanced against need for efficiency and speed (for repossession).	Low: eviction Medium: habitability and other defenses	No discovery at all (MI, PA, TX) Limited requests and short timelines: subject to court management, approval, and/or showing of ample need (CA, FL, NY) Evidence at trial (All)
Family Court	Reveal basic documents for offense or defense. But balanced against need for informality and conciliation.	Low: domestic relations Medium: complex divorces, etc.	Mostly full discovery (AZ, CA, FL, MI, NY, PA, TX) Extensive disclosures (CA, FL, TX) Court management (MI)

1. *Small Claims and Debt Collection.* — Small claims courts adjudicate most civil cases in the United States. The defining features of these courts are a low amount in controversy, streamlined procedures, flexibility, and an emphasis on conciliation. Dozens of states adopted the small claims model in the early 1900s to avoid problems with delays, high costs, and the legal complexity of traditional courts.⁷⁷ One ingredient of the reform wave was eliminating the need for lawyers.⁷⁸ Even today, although most states allow lawyers in small claims proceedings, at least eight states prohibit it.⁷⁹ Every state’s small claims court eschews the idea of formal rules of procedure—emphasizing instead the need for pragmatic decisionmaking by a mediating judge.⁸⁰ Small claims systems tend to be quite straightforward: An unrepresented party often files a short complaint, and the court then schedules a hearing.⁸¹

Within small claims courts, the most common cases involve debt collection lawsuits. These cases are overwhelmingly comprised of a consumer debt company as plaintiff against an unrepresented defendant over a loan of less than five or ten thousand dollars.⁸² The debt collection industry is dominated by a few large companies that individually file tens of thousands of claims every year.⁸³ Common debts include “medical, auto loan, or credit card bills.”⁸⁴ These cases represent an astounding 24% of all claims

77. See John C. Ruhnka, Steven Weller & John A. Martin, *Small Claims Courts: A National Examination 189–91* (1978) (finding that “[s]mall claims courts were developed to provide quick, inexpensive, even-handed and effective resolution of smaller civil claims”).

78. See Arthur Best, Deborah Zalesne, Kathleen Bridges, Kathryn Chenoweth, Lisa Fine, Jonathan L. Miller & Kimberly White, *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 *Fordham Urb. L.J.* 343, 354 (1994) (noting that not permitting attorneys in small claims “encourage[s] immediate dispute resolution and prevent[s] procedural technicalities from overpowering the interest of achieving justice”); James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 *U.D.C./DCSL L. Rev.* 177, 178–79 (2000) (“The primary goals of the original small claims courts were to reduce expenses and fees by eliminating the use of a lawyer, and to reduce delay by simplifying pleadings and eliminating procedural steps.”).

79. Turner & McGee, *supra* note 78, at 180–82 (noting that Arkansas, California, Colorado, Idaho, Michigan, Nebraska, Virginia, and Washington all prohibit use of lawyers in small claims proceedings).

80. See *id.* at 179 (noting that small claims courts “work under rules that are less complex than the procedures of other trial courts,” use “less legal jargon,” and sometimes require or offer alternative dispute resolution).

81. *Id.*

82. The Pew Charitable Trs., *How Debt Collectors Are Transforming the Business of State Courts: Lawsuit Trends Highlight Need to Modernize Civil Legal Systems 1* (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/8EPE-XP3Q>].

83. Wilf-Townsend, *supra* note 6, at 1731 (“[T]en companies, a mix of debt collectors and financial services companies, accounted for . . . about 84% of all of the cases filed by all top filers in the sample.”).

84. The Pew Charitable Trs., *supra* note 82, at 8.

in state civil courts.⁸⁵ Indeed, debt claims were the most common type of civil case in nine of the twelve states for which at least some court data were available.⁸⁶ They also carry significant consequences for low-income borrowers.⁸⁷

Most debt collection cases never reach formal litigation. Pew researchers found less than 10% of consumer debt defendants have counsel and, perhaps relatedly, more than 70% of these cases end in default.⁸⁸ In fact, in some states “85% of defendants who were served with a complaint never filed a written response.”⁸⁹ In the minuscule 2% of cases when defendants actually appear in court, “they are largely unrepresented.”⁹⁰ Indeed, in California, 98% of debt collection defendants have no legal representation.⁹¹ And most pro se parties do not draw on available defenses or counterclaims,⁹² including claims under the Fair Debt Collection Practices Act.

Even when debt collection claims reach actual litigation, they take place in small claims courts that offer little to no discovery.⁹³ Unlike federal courts—where discovery is available in every case—most variant states bar discovery in these courts, including Michigan, New York, and Pennsylvania. In New York, the process for claims below \$10,000 provides

85. *Id.*

86. *Id.* at 10, fig.6.

87. See, e.g., The Legal Aid Soc’y, Neighborhood Econ. Dev. Advoc. Project, MFY Legal Servs. & Urb. Just. Ctr., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 1* (2010), <http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [<https://perma.cc/H7NT-E5CR>] (“Armed with default judgments, debt buyers can seize people’s assets, freeze their bank accounts, or garnish their wages to collect the debts. Judgments also appear on credit reports, preventing people from being able to secure housing, obtain credit, and even find employment.”); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 *J. Bus. & Tech. L.* 259, 264 (2011) (describing how many low-income Americans rely on credit cards to pay for basic living expenses and many have consumer loans that are “impossible to repay”); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 *N.D. L. Rev.* 269, 272 (1994) (“[S]mall claims courts merely provide an inexpensive collection method for businesses.”).

88. The Pew Charitable Trs., *supra* note 82, at 2.

89. Wilf-Townsend, *supra* note 6, at 1721.

90. *Id.* at 1722.

91. Julia Barnard, Kiran Sidhu, Peter Smith & Lisa Stifler, *Court System Overload: The State of Debt Collection in California After the Fair Debt Buyer Protection Act 2* (2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf> [<https://perma.cc/MK3S-3G45>].

92. Defenses can include contractual defenses, bankruptcy discharge, fraud, statute of limitations, other limitations on garnishments, and more. See Wilf-Townsend, *supra* note 6, at 1746–48.

93. *Id.* at 1746–47; see also Nat’l Ctr. for State Cts., *supra* note 25, at 33.

no formal discovery at all.⁹⁴ According to a New York court, “[t]he informality and convenience of small claims practice is necessarily frustrated by requiring pro se litigants to respond to formal motion practice . . . prior to the hearing of their case.”⁹⁵ So too in Michigan, where the rules state that “discovery is not permitted in actions in the small claims division of the district court.”⁹⁶ While Pennsylvania also provides no formal discovery mechanisms, it does instruct small claims litigants to disclose a series of “required documents,” including correspondence, agreements, photographs, and invoices.⁹⁷ And Minnesota bars pre-trial discovery in “conciliation court” but allows subpoenas at trial.⁹⁸

California takes a unique approach to debt collection cases, providing no discovery in small claims courts but diverting repeat debt collectors to regular courts that allow limited discovery.⁹⁹ While California provides limited discovery for cases under \$25,000, “there is no discovery in connection with the proceeding in small claims court” that are typically under \$10,000.¹⁰⁰ But judges are still empowered to “investigate the controversy” and “consult witnesses.”¹⁰¹ The California approach traces back to reforms in the 1970s that identified discovery costs as a significant problem.¹⁰² There is, however, a major limitation in civil courts: “[N]o person may file more than two small claims actions” of over \$2,500 “anywhere in the state in any calendar year.”¹⁰³ Repeat debt collectors must file their claims as “economic litigation for limited civil cases” that provide some discovery, including disclosures (e.g., lists of witnesses, physical evidence, and documents), interrogatories, document requests, requests for admissions, and one deposition.¹⁰⁴ Additionally, “[t]he court may, on noticed motion and subject to such terms and conditions as are just, authorize a party to conduct additional discovery, but only upon a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery.”¹⁰⁵ Most importantly, the California Fair Debt Buying

94. N.Y. City Civ. Ct. Act § 1801 (McKinney 2021); *Gotbetter v. Grinberg*, 872 N.Y.S.2d 690, 2008 WL 2928507, at *2–3 (Civ. Ct. July 29, 2008).

95. *Gotbetter*, 2008 WL 2928507, at *2 (quoting *Williams v. Friedman Mgmt. Corp.*, 816 N.Y.S.2d 702, 2006 WL 929230, at *1 (App. Term Apr. 10, 2006)).

96. Mich. Ct. R. 2.301.

97. Phila. Mun. Ct., Information for Small Claims Court 1–2, <https://www.courts.phila.gov/pdf/brochures/mc/SMALL-CLAIMS-PAMPHLET.pdf> [<https://perma.cc/9YUP-KV7Q>] (last visited Feb. 11, 2022).

98. See Minn. Gen. R. Prac. 512 advisory committee’s comment to 2007 amendment.

99. See Cal. Civ. Proc. Code § 116.231(a) (2021).

100. *Bruno v. Superior Court*, 269 Cal. Rptr. 142, 144 (Ct. App. 1990).

101. *Id.* at 145 (quoting Cal. Civ. Proc. Code § 117 (1983) (repealed 1990)).

102. See Norman L. Epstein, Reducing Litigation Costs for Small Cases, 20 *Judges’ J.*, no. 2, 1981, at 9, 9–10.

103. Cal. Civ. Proc. Code § 116.231(a). It is possible that other states provide similar limitations. Such findings are currently outside the scope of this Essay.

104. Cal. Civ. Proc. Code §§ 94–96.

105. Cal. Civ. Proc. Code § 95(a).

Practices Act (CFDBPA) imposes on debt collectors a duty to disclose—attached to each complaint—extensive details about the debt, including related documents, chain of ownership, dates, and names and addresses of entities that purchased the debt.¹⁰⁶

A few other states create a narrow discovery process in small claims courts that is almost completely court managed. In Texas, for instance, small claims courts permit discovery but limit it to what “the judge considers reasonable and necessary. Any requests . . . must be presented to the court for approval by written motion.”¹⁰⁷ This approach reverses the default from automatic discovery to one in which plaintiffs need court approval. Still, the rules note that “the judge shall develop the facts of the case, and for that purpose may question a witness or party and may summon any party to appear as a witness as the judge considers necessary.”¹⁰⁸ Texas rules still provide for automatic disclosures at the outset of litigation.¹⁰⁹

106. Cal. Civ. Code § 1788.58 (2022).

107. Tex. R. Civ. P. 500.9(a).

108. Tex. R. Civ. P. 194.5.

109. Tex. R. Civ. P. 194.5.

TABLE 2: DISCOVERY IN VARIANT SMALL CLAIMS COURTS

State	Small Claims	Discovery Available	Court Managed	Available Tools
TX ¹¹⁰	\$20,000	Yes	Yes	Disclosures, subpoenas, etc.
CA ¹¹¹	\$10,000	No	Judge may investigate controversy	Subpoenas
	\$25,000	Yes	No	All tools
NY ¹¹²	\$5,000	No	N/A	Subpoenas
PA ¹¹³	\$12,000	No	N/A	Disclosures
MI ¹¹⁴	\$6,500	No	N/A	N/A
FL ¹¹⁵	\$8,000	Yes	No	All

110. Small Claims Cases, Tex. State L. Libr., <https://guides.sll.texas.gov/small-claims> [<https://perma.cc/S4NW-D4CN>] (last updated Jan. 27, 2022).

111. Cal. Civ. Proc. Code § 116.210 (2021); Bruno v. Superior Court, 269 Cal. Rptr. 142, 144–45 (Ct. App. 1990).

112. N.Y. State Cts., Your Guide to Small Claims & Commercial Small Claims in: New York City, Nassau County, Suffolk County 1 (2019), <https://nycourts.gov/COURTS/nyc/smallclaims/pdfs/smallclaims.pdf> [<https://perma.cc/XCR7-TNNU>].

113. 42 Pa. Cons. Stat. § 1515(a) (2010); Phila. Mun. Ct., supra note 97.

114. Mich. Comp. Laws Ann. § 600.8401 (West 2022).

115. Fla. Small Cl. R. 7.020.

2. *Landlord–Tenant and Eviction.* — Landlord–tenant disputes account, by one measure, for around 20% of all state court cases.¹¹⁶ The largest subset of disputes—eviction cases—tend to involve fact patterns that are almost always centered on failure to pay rent.¹¹⁷ Plaintiff-landlords bring eviction claims to secure speedy repossession of occupied rental units.¹¹⁸ Many states provide for three types of evictions: failure to pay rent, violations of the lease (unrelated to rent payment), and lease expiration.¹¹⁹ The stakes for all three types of evictions, however, are enormous—the most basic human need for shelter. Indeed, a significant number of evicted tenants end up homeless.¹²⁰ Making matters more complicated, most defendants cannot afford legal representation, and there are only limited legal aid or pro bono services available for them. That means that even straightforward cases present low-income tenants with a difficult and impenetrable encounter with the legal system.¹²¹ Critics of this system present it as a cruel “eviction mill[]” that “routinely produc[es] swift judgments in landlords’ favor.”¹²²

The most complex eviction cases can involve statutory provisions on property safety, habitability, rent controls, subsidies, and other protections, including COVID-19-specific provisions.¹²³ For example, most states have warranties of habitability which make “the landlord’s right to receive payment . . . contingent on maintaining the premises according to the laws of health and safety.”¹²⁴ While tenants could make out warranty claims both offensively and as a defense to eviction proceedings, most researchers find that tenants “lack access to timely legal advice and have insufficient

116. See Nat’l Ctr. for State Cts., *supra* note 25, at 17–19 (showing that contract cases comprise 64% of state court cases and landlord–tenant cases comprise 29% of contract cases).

117. See, e.g., Pub. Just. Ctr., *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court 4* (2015), <https://abell.org/sites/default/files/files/cd-justicediverted216.pdf> [<https://perma.cc/M5YB-Q6NP>].

118. *Id.*

119. Nicole Summers, *Civil Probation 18* (Aug. 3, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3897493> [<https://perma.cc/69MN-6W36>].

120. See Pub. Just. Ctr., *supra* note 117, at 49 (noting that preventing evictions reduced homeless shelter costs). See also Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 *Harv. J.L. & Gender* 55, 64–66 (2018) (discussing the concept of housing as a primary need).

121. See Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 *Harv. C.R.-C.L. L. Rev.* 557, 570–72 (1988) (discussing how the poor are often subject to summary evictions and default judgments in eviction cases due to lack of legal representation).

122. Engler, *supra* note 21, at 77.

123. For a discussion of changes to state civil courts due to COVID-19, see generally Shanahan et al., *COVID*, *supra* note 12 (providing a multijurisdictional, mixed-methods study of state civil courts and their responses to the COVID-19 pandemic).

124. Steinberg, *Informal*, *supra* note 20, at 1059.

knowledge to navigate the process.”¹²⁵ Beyond habitability protections, there is a thick “‘patchwork’ of legislation that has responded to decades of social, economic and political pressure” which can present “an ‘impenetrable thicket confusing not only to laymen but to lawyers.’”¹²⁶ Some of these include the “warranty of quiet enjoyment, retaliatory eviction, and constructive eviction.”¹²⁷ Indeed, “a wide range of defenses are now typically available to tenants faced with eviction,” but unrepresented parties are “generally unable to take advantage of them.”¹²⁸ Eviction cases could involve an array of relevant facts and evidence that could be outcome determinative.

Most states provide a “summary process” for evictions that aims to be quick, informal, and procedurally streamlined.¹²⁹ The process is geared toward helping landlords quickly repossess their property and often devolves into a single question: “whether or not a landlord has the right to immediate possession of leased premises.”¹³⁰ The Supreme Court has recognized that “such circumstances call for special procedures . . . ‘inapplicable to other litigants Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment.’”¹³¹ That is why almost every state has created a streamlined process. For instance, eviction claims in Texas take place in a special court called the “Justice of the Peace Court.” Within these courts, Texas Rule 510.1 provides for special procedures that apply “to a lawsuit to recover possession of real property.”¹³² The rules bar counterclaims, streamline the process, and provide for a quick trial. Despite the simplified nature of eviction proceedings, however, California, Florida, Michigan, New York, Pennsylvania, and Texas allow a defendant to raise several defenses: illegal self-help eviction (i.e., physical attempts to remove a tenant),¹³³ improper eviction procedure,¹³⁴ paying the rent in full within a

125. See Pub. Just. Ctr., *supra* note 117, at 19–20 (revealing the results of a survey that showed that most respondents were unaware of their rights and available defenses in housing court); Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 *Rutgers L. Rev.* 1, 3 (2016) (“[F]ew tenants actually plead breach of the implied warranty of habitability, whether affirmatively or defensively.”); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 *Geo. J. Poverty L. & Pol’y* 97, 119–30 (2019) (explaining why public and private enforcement of the warranty of habitability is limited).

126. *La Guardia v. Cavanaugh*, 423 N.E.2d 9, 10 (N.Y. 1981) (citing *89 Christopher Inc. v. Joy*, 318 N.E.2d 776, 780 (N.Y. 1974)).

127. Scherer, *supra* note 121, at 574.

128. *Id.* at 572.

129. Pub. Just. Ctr., *supra* note 117, at 5–6.

130. *Greene v. Lindsey*, 456 U.S. 444, 457 (1982) (O’Connor, J., dissenting).

131. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 72–73 (1972)).

132. *Tex. R. Civ. P.* 510.1.

133. See, e.g., *N.Y. Real Prop. Acts. Law* §§ 235, 853 (McKinney 2019); *Tex. Prop. Code* §§ 92.008, .0081, .009 (2013).

134. See *Tex. Prop. Code* § 24.005.

certain period,¹³⁵ breach of implied warranty of habitability,¹³⁶ retaliation,¹³⁷ general denial of allegations, and discrimination.¹³⁸ These defenses potentially open the door to a more complex dispute.

Despite evictions' potentially more complex nature, many states provide almost no discovery in summary eviction proceedings, including Michigan, Pennsylvania, and Texas. The Texas rules for eviction cases provide only for an application (complaint), answer, request for immediate possession, and trial.¹³⁹ The rules say nothing about discovery and do not give the time or tools necessary for it. However, an eviction case on appeal to a Texas county court opens up the possibility of discovery at that stage.¹⁴⁰ Similarly, neither Michigan nor Pennsylvania explicitly allow discovery in summary eviction proceedings.¹⁴¹ There may be some room in these states to coax the judge to allow document subpoenas or disclosures, but in the overwhelming number of cases there is probably no attempt to discover relevant materials. Still, parties can always bring evidence to present at trial or hearings.

By contrast, California, Florida, and New York allow eviction-related discovery in narrow circumstances. California permits discovery in summary proceedings so long as a request contains a five-day notice and is issued after a notice of eviction.¹⁴² In most New York eviction cases, discovery is "unwarranted" and "unavailable" but, at least formally, it is "not prohibited per se."¹⁴³ Requests for documents or depositions are "unavailable as a matter of right in summary proceedings," and "[I]eave of the court must be obtained to conduct disclosure."¹⁴⁴ However, New

135. See *id.* § 24.005(i).

136. See *id.* §§ 92.052, .056; *Kuriger v. Cramer*, 498 A.2d 1331, 1336–37 (Pa. Super. Ct. 1985); *Pugh v. Holmes*, 384 A.2d 1234, 1240–41 (Pa. Super. Ct. 1978); *Wofford v. Vavreck*, 22 Pa. D. & C.3d 444, 451 (1981).

137. See *id.* § 92.331.

138. See Cal. Civ. Code §§ 789.3, 1941, 1942.5 (2021); Cal. Civ. Proc. Code § 1161(2) (2020); Fla. Stat. §§ 51.011(2), 83.56(3)–(5), 83.60(1), 83.64, 83.67 (2013); Mich. Comp. Laws Ann. §§ 554.139, 600.2918, 600.5711–5759 (West 2022); N.Y. Real Prop. Acts. Law §§ 235, 711(2), 731–741, 744, 835; 66 Pa. Cons. Stat. § 1531 (1993); Pa. R. Civ. P. 503–514. See also Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 Wis. L. Rev. 287, 302 [hereinafter Sabbeth, *Simplicity*] (arguing that "the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop").

139. See Tex. Prop. Code § 92.201; Tex. R. Civ. P. 510.

140. Ross Brenton Russell, *An Eviction Case From Start to Finish*, Avvo (June 9, 2016), <https://www.avvo.com/legal-guides/ugc/an-eviction-case-from-start-to-finish> [<https://perma.cc/9SRU-BCYN>].

141. Pennsylvania does not provide for explicit discovery, but it does note that a magistrate judge is bound by the "rules of evidence," which allow parties to present whatever evidence they may have during the hearing. See Pa. R. Civ. P. 512. Michigan does not technically note that discovery is explicitly allowed. But it does allow a state court all necessary tools to "hear and determine summary proceedings." Mich. Comp. Laws Ann. § 600.5732.

142. See Cal. Civ. Proc. Code § 1170.8.

143. See N.Y. Real Prop. Acts. Law § 745 practice cmts.

144. *Smilow v. Ulrich*, 806 N.Y.S.2d 392, 395 (Civ. Ct. 2005).

York courts have recognized that disclosure may be granted when there is a sufficient showing by the party of “ample need” and that the information sought is necessary to enable it to establish its asserted defenses or counterclaims.¹⁴⁵ In determining whether there is “ample need,” New York courts consider whether “the information requested is ‘carefully tailored and is likely to clarify the disputed facts,’ . . . and whether the court can structure discovery to protect pro se tenants against any adverse effects of a landlord’s discovery requests.”¹⁴⁶ In a string of decisions, New York courts have granted tenants access to landlord documents and depositions, including a deposition related to the racial, ethnic, and religious demographics of the landlord’s building.¹⁴⁷ Finally, Florida allows depositions to be taken at “any time” and allows other discovery tools by court order.¹⁴⁸ Importantly, to avoid delays, Florida rules specifically note that “[n]o discovery postpones the time for trial except for good cause shown or by stipulation of the parties.”¹⁴⁹

By contrast to the variants, Massachusetts is an example of a state that grants tenants generous discovery tools. After a landlord serves a summons and complaint, the “tenant then has a right to file an answer and discovery requests” that are due “seven days after the entry day.”¹⁵⁰ While discovery is narrower than in other civil cases, tenants can issue interrogatories, requests for admissions, requests for documents, and even seek depositions (with court approval).¹⁵¹

145. *Id.* (quoting *N.Y.U. v. Farkas*, 468 N.Y.S.2d 808, 811 (Civ. Ct. 1983)).

146. *Id.* (quoting *Farkas*, 468 N.Y.S.2d at 812).

147. *Id.* at 395–96. See, e.g., *Teichman v. Ciapi*, 612 N.Y.S.2d 293, 294 (App. Term 1994) (per curiam).

148. Fla. Stat. § 51.011(2) (2021).

149. *Id.*

150. *Summers*, supra note 119, at 19.

151. *Id.* at 19 n.90.

TABLE 3: DISCOVERY IN EVICTION CASES

State	Summary Proceedings	Discovery Available	Court Managed	Limits or Other Provisions
TX ¹⁵²	Yes	No	N/A	N/A
CA ¹⁵³	Yes	Yes	Yes	Five-day notice
NY ¹⁵⁴	Yes	Yes	Yes	Showing of ample need
PA ¹⁵⁵	Yes	No	N/A	N/A
MI ¹⁵⁶	Yes	No	N/A	N/A
FL ¹⁵⁷	Yes	Yes	Yes	Depositions at any time; no postponement
MA ¹⁵⁸	Yes	Yes	Yes/No	Nearly full discovery

152. Texas requires landlords to disclose certain facts about ownership and management. And this could be actionable in an eviction proceeding, but it is not discovery as it pertains to an eviction suit. See Tex. Prop. Code § 92.201 (2021).

153. See Cal. Civ. Code §§ 789.3, 1941, 1942.5 (2021); Cal. Civ. Proc. Code § 1161(2) (2020); California Eviction and Unlawful Detainer, Forberglaw, <http://forberglaw.com/real-estate-litigation-and-transactions/california-eviction-and-unlawful-detainer/> [https://perma.cc/DY44-B67T] (last visited Feb. 6, 2022).

154. See N.Y. Real Prop. Acts. Law §§ 235, 711(2), 731–741, 744, 835 (McKinney 2019).

155. See Pa. R. Civ. P. 512.

156. See Mich. Comp. Laws Ann. § 600.5732 (West 2022).

157. See Fla. Stat. § 51.011(2) (2021).

158. Summers, *supra* note 119, at 19–20.

3. *Other Cases: Family Courts and Agency Appeals.* — The last significant category of lawyerless cases covers family law disputes and appeals from state agency decisions (covering, for instance, unemployment insurance). By some measures, these two contexts are responsible for around 9% of all cases in state civil courts.¹⁵⁹ And the rate of these cases that are pro se can be surprising. For instance, in family law disputes, “nearly all cases involve two unrepresented parties.”¹⁶⁰ Some studies of employment insurance appeals in the District of Columbia have found high rates of pro se cases.¹⁶¹ Given the diversity of disputes, procedural posture, and state laws, it would be nearly impossible to survey all of the discovery rules in these cases. But a sample gives an idea of the realm of possibilities.

Begin, then, with a sampling of discovery in family courts. The trend in almost all the variant states is toward extensive early disclosures. In California, Florida, and Texas among others, discovery statutes provide the full array of discovery devices for family cases.¹⁶² But the California Family Code also sets forth specific disclosure requirements in divorce cases, mandating the early exchange of “disclosure with current income and expense declarations.”¹⁶³ Even more, the code “requires a continuing duty of each party to update and augment that disclosure” and attempts to reduce the adversarial nature of the proceedings.¹⁶⁴ Texas also mandates extensive disclosures, especially for divorce and child or spousal support cases.¹⁶⁵ Like California, Texas also allows for a formal process of requests for production, interrogatories, depositions, and other tools.¹⁶⁶ The same applies for Florida, which allows not just full discovery¹⁶⁷ but also initial mandatory

159. See Nat’l Ctr. for State Cts., *supra* note 25, at 17 n.53 (showing that 9% of civil cases involve “appeals from administrative agencies and cases involving criminal or domestic-related matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, and bond claims)”).

160. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 3, at 512; Steinberg, *Demand Side*, *supra* note 3, at 751.

161. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 *Denv. L. Rev.* 469, 481–82 (2016) [hereinafter Shanahan et al., *Lawyers*].

162. See, e.g., Cal. Civ. Proc. Code § 2016.080 (2018); Fla. Fam. L.R.P. 12.280–.285; Tex. R. Civ. P. 192.3–.4; Schnabel v. Superior Court, 854 P.2d 1117, 1123 (Cal. 1993) (“[E]ach spouse is entitled to complete disclosure of all relevant information to allow an independent review of the marital property and financial status of the spouses.”).

163. Luisa Bigornia, *Discovery Rules in Divorce Litigation* (California Family Code §§ 2100-13), 11 *J. Contemp. Legal Issues* 196, 197 (2000); see also Glen L. Rabenn, *Fiduciary Duties of Disclosure in Family Law Cases*, *CaliforniaDivorce.com*, <https://www.californiadivorce.com/divorce-procedures/fiduciary-duties-of-disclosure-in-family-law-cases/> [https://perma.cc/W6BQ-WXKQ] (last visited Feb. 6, 2022).

164. See Bigornia, *supra* note 163, at 197.

165. See Tex. R. Civ. P. 192.3(a), 194.2(c)(1). These disclosures have to be made within thirty days of the respondent’s initial pleading. Tex. R. Civ. P. 192.1, 194.2(c)(2).

166. Tex. R. Civ. P. 192.1.

167. See Fla. Fam. L.R.P. 12.280, .281, .285.

disclosures except in “proceedings involving adoption, simplified dissolution, enforcement, contempt, injunctions for protection against domestic, repeat, dating, or sexual violence, or stalking, and uncontested dissolutions when the respondent is served by publication and does not file an answer.”¹⁶⁸

At least three of the variant states allow a narrower degree of discovery in family courts, limiting its reach and scope. New York, for instance, allows discovery in family law disputes, but it does not specify the different tools available to parties other than requests for specific documents.¹⁶⁹ Pennsylvania, too, allows different types of discovery “in alimony, equitable distribution, counsel fee and expense proceedings and complex support cases.”¹⁷⁰ But Pennsylvania allows the full array of discovery tools for a broader set of family law cases.¹⁷¹ Michigan similarly allows several different types of discovery in family disputes, but it appears that courts have greater discretion to control its scope.¹⁷²

* * *

Part I explored the discovery rules across several variant states in both general civil litigation courts and small claims, eviction, and family law courts. It appears that many of the variant states have rejected the federal transsubstantive approach by creating discovery tracks tied to the amount in controversy in a particular case, substance of the claim (especially business courts), higher disclosure requirements that exceed those in Federal Rule 26, and an increasing emphasis on judicial case management. These are important departures that attempt to tailor discovery more closely to the facts of each case. Moreover, the variant states also show how radically distinct discovery is in small claims, eviction, and family law cases. For instance, several states provide no discovery at all in debt collection and eviction cases, and many of them embrace a streamlined approach. In short, state discovery is increasingly diverging from the federal approach, and discovery in lawyerless cases is nearly unrecognizable to federal eyes.

II. THE BENEFITS AND COSTS OF LAWYERLESS DISCOVERY

This Part steps back to provide an analysis of the costs and benefits of discovery in state courts and whether there is any room for discovery

168. Fla. Fam. L.R.P. 12.285. These disclosures must be made within forty-five days of service of the initial respondent’s pleading. *Id.*

169. N.Y. Fam. Ct. Act §§ 330.1–335.2 (McKinney 2010).

170. Pa. R. Civ. P. 1930.5(a) (“There shall be no discovery in a simple support, custody, Protection from Abuse, or Protection of Victims of Sexual Violence or Intimidation proceedings unless authorized by order of court.”); Pa. R. Civ. P. 1930.5(b) (“Discovery shall be available without leave of court in accordance with Pa.R.C.P. Nos. 4001–4025 in alimony, equitable distribution, counsel fee and expense, and complex support proceedings.”).

171. See Pa. R. Civ. P. 4004, 4007.1.

172. Mich. Ct. R. 2.301(A), (C).

reforms. The discovery catch-22 is a serious problem in lawyerless cases: While discovery can theoretically promote benefits for unrepresented parties and small litigants, it can also impose unwieldy complexity that these litigants cannot handle. Perhaps state governments are not properly balancing these costs and benefits, leaving the system in a suboptimal state. This Part ends by suggesting a potential “sweet spot” of simplified but open discovery.

A. *Discovery’s Benefits in Theory*

At the federal level, the traditional view is that discovery promotes a trilogy of benefits: fairness, accuracy, and negotiated settlements—values or outcomes that are central to a civil justice system.¹⁷³ By forcing parties to engage in a full exchange of information, discovery gives the decisionmaker the full facts necessary to make an accurate determination.

173. Zambrano, *Discovery as Regulation*, supra note 1, at 89–94. For the fairness and accuracy rationales, see *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 392 (2004) (Stevens, J., concurring) (“Broad discovery should be encouraged when it serves the salutary purpose of facilitating the prompt and fair resolution of concrete disputes.”); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (“Modern instruments of discovery . . . together with pretrial procedures make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”); *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir. 1968) (“The purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice.”); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev.* 1295, 1302 (1978) (characterizing the disclosure of data needed to ascertain the truth as the paramount objective of discovery); E. Donald Elliott, *How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery*, 71 *Vand. L. Rev.* 1785, 1788 (2018) (describing the goal of discovery as giving the parties enough discovery to reach a just result in settlement or trial); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 *Mich. L. Rev.* 205, 205–06 (1942) (describing discovery as a useful tool for narrowing the issues at trial and obtaining evidence for use at trial); Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 *Vand. L. Rev.* 2037, 2045 (2018) (describing discovery as a process which provides information to parties, the public, and to regulators); Jay Tidmarsh, *Opting Out of Discovery*, 71 *Vand. L. Rev.* 1801, 1811 (2018) (“Principally, [discovery] ensures a rational and accurate process for adjudicating or settling claims.”).

For a discussion of the relationship between discovery and settlement, see John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *Yale L.J.* 522, 526 (2012) (mentioning that discovery has caused more pretrial disposition of cases, including settlement); James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 *U. Chi. L. Rev.* 297, 297 (1940) (endorsing the 1938 Rules on the grounds that discovery procedures reduce burdens at trial); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure* (pt. 1), 38 *Colum. L. Rev.* 1179, 1180 (1938) (same); Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 *Tenn. L. Rev.* 737, 737–38 (1939) (describing a system that waits for trial to flush out information as “economically extravagant” and a “wasteful method of civil litigation” and distinguishing the Federal Rules); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 *J. Empirical Legal Stud.* 943, 950–54 (2004) (discussing how discovery both facilitates and encourages parties to reassess their chances of success at trial, with a tendency to produce fewer trials).

Importantly, it also empowers one-shot plaintiffs to “obtain critical information from repeat player defendants.”¹⁷⁴ In this manner, discovery serves as a leveler: It gives small litigants an opportunity to fully take advantage of the court system, uncover misfeasance, assert rights of participation in the legal process, and remedy informational asymmetries.¹⁷⁵

By promoting a fair adjudication process, discovery also taps into people’s perceptions of procedural justice.¹⁷⁶ As Tom Tyler has argued, “[p]eople . . . feel that procedures are fairer when they believe they have had some control in the decision-making procedure. Such control includes having the opportunity to present one’s arguments, being listened to, and having one’s views considered.”¹⁷⁷ Discovery does this by giving ordinary citizens the power to investigate wrongdoing, to control the relevant documents and search process, and, ultimately, present their full arguments without any leaf left unturned. In short, discovery can promote participation and procedural justice.

On settlements, discovery can counterintuitively save costs by rendering the need for a trial superfluous. Indeed, Edson Sunderland, the drafter of the rules of discovery, argued that “[d]iscovery before trial may thus make unnecessary the trial itself.”¹⁷⁸ Trials are notoriously the most expensive process in litigation because they require a full commitment by lawyers, judges, supporting staff, and experts. Discovery, by contrast, empowers parties to uncover information on a more relaxed timeline and constantly informs settlement negotiations. Even more, discovery can force the parties to reach a quick settlement to avoid further costs, further allowing the parties to “share the trial transaction costs as bargaining surplus.”¹⁷⁹

A more recent theory of discovery also claims that empowering plaintiffs with depositions, interrogatories, and document requests creates the equivalent of administrative subpoena power and, therefore, serves as a regulatory tool. By forcing the disclosure of large amounts of information, “the discovery system deters harmful behavior . . . and, most importantly, shapes the primary behavior of regulated entities.”¹⁸⁰ The key to this “regulatory” role for discovery is that it serves two main purposes: deterrence and an information infrastructure for regulated entities. Discovery, in one sense, is an audit: It discloses the private functioning of a regulated entity to litigants, judges, and the outside world. By doing so, it forces

174. Zambrano, *Discovery as Regulation*, *supra* note 1, at 90.

175. See *id.* at 75, 77, 91–92.

176. Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. Davis L. Rev. 1317, 1328–34 (2019) (discussing the relationship between procedural justice and discovery).

177. Tom R. Tyler, *Why People Obey the Law* 137 (2006).

178. Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 *Annals Am. Acad. Pol. & Soc. Sci.* 60, 75 (1933).

179. Zambrano, *Discovery as Regulation*, *supra* note 1, at 94.

180. *Id.* at 75.

entities to create and regularize the production of information, in expectation of future litigation. And it informs competitors in the market and regulators about current events in an industry.

Bringing all of this together, the question is whether the discovery values or outcomes of fairness, accuracy, settlement, and regulation can translate in lawyerless state courts. More fundamentally, can discovery even be useful in lawyerless cases? The most important problem, of course, is that lawyerless parties, for the most part, would not know how to take advantage of discovery tools. But, assuming just for the purposes of this section that defendants understood how to navigate discovery, there would be several potential benefits at hand.

First, by far the most important role for discovery in lawyerless cases would be to help pro se parties craft defenses against eviction or debt collection claims. Observers of the eviction legal process have long noted that “[p]roving defenses in an eviction action may require the use of discovery devices such as the subpoena of various witnesses and documents.”¹⁸¹ As discussed above, this is partly because eviction defenses—like violations of the warranty of habitability or constructive evictions—can actually require digging into the facts and records. For instance, proceedings can involve not only simple “factual disputes such as whether the ceiling leaks or whether rent was paid” but also complex statutory provisions under state or federal law.¹⁸² And a case with a fully developed record can result in not just avoiding eviction but also “rent abatements and apartment repairs.”¹⁸³ Similarly, discovery could aid some debt collection defenses, including those under the Fair Debt Collections Practices Act. The FDCPA gives defendants offensive claims over “threat of violence to collect a debt, the public shaming of debtors, or frequent communication with the intent to harass a debtor,” as well as imposing prohibitions on false representations in connection with debt collection.¹⁸⁴

Beyond directly empowering litigants to defend against claims, discovery could shape settlement terms and informal discussions. As the literature on civil litigation often remarks, discovery is often a deterrent—shaping sophisticated parties’ calculations of whether to proceed based on their assessment of what the opposing party might uncover.¹⁸⁵ That in turn shapes settlement offers. A defendant’s credible threat to use discovery would change a landlord or debt collector’s calculations of their likelihood of success and settlement strategy. Along with this purpose, discovery

181. Scherer, *supra* note 121, at 587.

182. *Id.*

183. See Rachel Kleinman, Comment, Housing *Gideon*: The Right to Counsel in Eviction Cases, 31 *Fordham Urb. L.J.* 1507, 1516 (2004) (“[T]he presence of legal representation for indigent tenants contributes to case resolutions that include fewer evictions and more rent abatements and apartment repairs.”).

184. Wilf-Townsend, *supra* note 6, at 1707–09.

185. See, e.g., Zambrano, *Discovery as Regulation*, *supra* note 1, at 94.

could also be a pro-settlement, offensive weapon that allows lawyerless litigants to delay proceedings to increase bargaining leverage.¹⁸⁶ In Massachusetts eviction courts, for instance, a discovery request triggers a two-week postponement of trial.¹⁸⁷ In this sense, discovery is not serving the purpose of promoting accuracy or fairness at all. Instead, it is merely a tool that structures settlement negotiations.

Second, discovery could have positive externalities by empowering one-shot litigants to uncover corporate misdeeds, landlord abuses, or employer violations. An FDCPA counterclaim against a debt collector could disclose the common use of violent threats “to collect a debt,” as well as any financial frauds perpetrated by debt collection companies or banks.¹⁸⁸ In the eviction context, take again, for instance, Massachusetts’s robust discovery rules in eviction cases. These rules “grant tenants extensive written discovery rights” that can probe “the landlord’s basis for eviction as well as to any defenses or counterclaims they assert.”¹⁸⁹ In other words, Massachusetts fully empowers tenants to investigate potential wrongdoing in the eviction process, in compliance with a lease, or in relation to the warranty of habitability. This use of discovery, of course, aligns with its core goal of promoting accuracy and fairness. More importantly, however, is that it would promote positive externalities, uncovering wrongdoing that can benefit the broader public.

There is a related benefit for discovery here in promoting a sense of meaningful participation in the legal system. Litigants could feel empowered knowing that they can uncover the true facts behind every case. As discussed above, expanding litigants’ sense of control over their cases can make “[p]eople . . . feel that procedures are fairer.”¹⁹⁰ Discovery can do this by giving tenants or debtors a meaningful power to search for any potential evidence that can help their case. At best, this would promote a sense of procedural justice.

Third, even in small cases, one could imagine a regulatory role for discovery. With it in place, legislators could adopt more ambitious labor or consumer laws that rely on private enforcement. Suppose, for instance, that state legislators wanted more robust habitability protections. As discussed below, one way to enforce those requirements is to force large landlords to maintain records of any habitability violations and, in turn, obligate them to disclose those records in litigation.¹⁹¹ Similarly, state legislators could provide for significant employee protections that can be

186. Greiner et al., *supra* note 16, at 965; Sabbeth, *Simplicity*, *supra* note 138, at 299–300 (discussing the utility of intentional delay in tenant-related proceedings).

187. Mass. Unif. Summary Process R. 7(b).

188. Wilf-Townsend, *supra* note 6, at 1764.

189. Summers, *supra* note 119, at 33.

190. Tyler, *supra* note 177, at 137.

191. See *infra* section III.B.2.

enforced through capacious discovery obligations. In these cases, discovery works as an enforcement mechanism for regulatory policies, allowing state legislatures or regulators to craft rules in the shadow of litigation. In order to serve these purposes, however, discovery would have to be easily accessible for unrepresented parties, relatively cheap and quick, and actually useful in lawyerless cases with small-stakes claims.

B. *Discovery Costs in Lawyerless Claims*

Despite its potential benefits, the problem is that discovery can also clog the justice system, delaying cases and increasing costs for all parties. And where discovery does not provide regulatory benefits, these increased costs are not warranted. Most importantly, lawyerless parties would likely struggle to take advantage of discovery without expert advice. As argued below, this probably means that broad discovery rights are best only under narrow circumstances explored in Part III.

The first drawback is, of course, costliness. The sources of cost have long been outlined in the literature: taking depositions, assembling documents in response to requests, and soliciting and producing answers takes significant time and work hours.¹⁹² These costs are directly contradictory to the simplifying purpose of small claims and summary eviction processes. That is why a California Superior Court once found that discovery was not available in small claims cases, noting the following:

We are convinced that the Legislature did not intend that formal discovery procedures should be permitted in either the small claims action itself or the *de novo* proceeding on appeal. Obviously, formal discovery procedures in the original small claims actions would be completely inconsistent with the goals and procedures of the small claims court and would impose an unacceptable burden on unrepresented litigants.¹⁹³

Increased costs are not only antithetical to the lawyerless enterprise; they would actually turn many cases into negative claims where the costs outweigh the amount in controversy. Costliness and time commitment are especially problematic in that small claims litigants already default at high rates because they have no time to attend trials. They certainly have no time to prepare subpoenas either.

192. Cf. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 637 (1989) (describing the cost-benefit analysis of taking additional discovery relative to the stakes of a case); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773, 774 (2011) (discussing the allocation of discovery costs between the producing party and the opponent); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299, 300 (2002) (“In cases where discovery was actively used, it was thought to be unnecessarily expensive and burdensome.” (quoting Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 523 (1998))).

193. *Bruno v. Superior Court*, 269 Cal. Rptr. 142, 144 (Ct. App. 1990).

A related but distinct problem is increased complexity. Some of the civil *Gideon* literature along with many legal aid organizations have long advocated for procedural simplification and a rejection of complexity.¹⁹⁴ Even in simplified small claims courts, “poorer claimants routinely are steamrolled during the course of the process.”¹⁹⁵ A discovery system almost by definition depends on technical assistance by attorneys. But part of the problem is that even when pro se litigants want experienced counsel, there is a lack of supply and funding for legal aid lawyers. Inexperienced litigants often do not know where to look for attorneys or how to decide whether to litigate on their own.¹⁹⁶ An older report from New York City’s Housing Court notes the following about eviction cases:

[It is] a process that happens so quickly that many tenants are left wondering if the case is actually over or not; when most tenants have no legal training and are confronted with documents full of legal jargon; when the landlord’s attorneys are so at home in the court that they appear to tenants to be court personnel¹⁹⁷

Without an attorney present, discovery would only increase the complexity of a case and, in a sense, punish unrepresented parties. Indeed, a study by Shanahan and co-authors found that represented claimants that used evidentiary procedures in unemployment claims actually had worse outcomes than those who did not use the same procedures.¹⁹⁸ The authors suggest that use of evidentiary procedures by itself can be ineffective without broader strategic expertise.¹⁹⁹ So it may be that what matters in litigation is not access to discovery or evidence per se but, rather, access along with good representation. As Steinberg has noted in the context of court procedures:

Although never made explicit, the system, in effect, depends upon the skill of an attorney to transform a party’s grievance into a highly stylized set of allegations, evidence, and arguments,

194. See Deborah L. Rhode & David Luban, *Legal Ethics* 737 (2d. ed. 1995) (“The gap between the aspirations and the operation of our legal system has prompted efforts along three basic lines: strategies that reduce the need for legal intervention and assistance; initiatives that minimize the cost of legal procedures and services; and attempts to expand the provision of subsidized aid.”); Engler, *supra* note 21, at 75 (“Simplification has become an important theme, with the increased focus on self-representation and the changes within the court system over the past decade.”).

195. Engler, *supra* note 21, at 76.

196. For example, 50% of individuals seeking representation are turned away because the Legal Services Corporation lacks sufficient resources. Legal Servs. Corp., *Justice Gap Report: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 10 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/7ZBY-3BQV>]. The Legal Services Corporation reported that litigants have a number of reasons for not seeking professional help. *Id.* at 59.

197. Scherer, *supra* note 121, at 574 (quoting The City Wide Task Force on Hous. Ct., 5 Minute Justice or “Ain’t Nothing Going on but the Rent!” 34 (1986)).

198. Shanahan et al., *Lawyers*, *supra* note 161, at 473 (attributing this counterintuitive outcome to a few factors, including a lawyer’s strategic expertise).

199. *Id.* at 508–09.

upon which a judge or jury can base a ruling. Unrepresented parties face challenges at every step of the litigation, from properly filing and serving an action, to gathering and presenting admissible evidence to a judge.²⁰⁰

The category of cases discussed above—debt collection, landlord-tenant, and others—mostly involve lawyerless parties, making discovery unattainable or even counterproductive in the mine-run of small disputes. By themselves, unrepresented parties already have difficulty assembling complaints. Indeed, “pro se parties routinely flunk basic procedural entrance exams,” even on the most basic tasks like “filing a pleading in the proper format, serving opponents with key legal documents, and scheduling necessary hearings with the court.”²⁰¹ It would seem almost impossible to add on top of current procedures the burden of drafting document requests, interrogatories, subpoenas, and depositions. And, even when there are forms that parties can simply fill in, it isn’t clear that unrepresented parties know how to take advantage of them. One added feature of complexity is that it invites court involvement. This is especially true when pragmatic managerial judges may want to help unrepresented parties.

Finally, costliness and complexity combine to form the third problem of delay. Discovery can be a notoriously slow process, breaking down into disclosures, a slow exchange of relevant materials, depositions, and renewed document requests. In the meantime, the process can involve lengthy negotiations or litigation in front of judges.

All of these problems challenge the foundational value of speediness embedded in lawyerless cases. These problems add up to a major reason to avoid discovery. As one court described, “The informality and convenience of small claims practice is necessarily frustrated by requiring pro se litigants to respond to formal motion practice . . . prior to the hearing of their case.”²⁰²

C. *The Discovery Status Quo Might Be Suboptimal*

Given that discovery may be too complex for lawyerless parties, is the status quo optimal? What would an ideal discovery system even provide for unrepresented parties in most cases? One place to start is to recognize two critiques of the status quo: a practical one and a theoretical one. The literature on lawyerless courts offers a practically grounded critique of the status quo based on the observation that local and state courts are currently in “crisis” and that new tools are needed to help unrepresented parties.²⁰³ A second critique recognizes that while discovery is a bundle of tools that forms a spectrum of information seeking, many states—although

200. Steinberg, Demand Side, *supra* note 3, at 744.

201. *Id.*

202. *Friedman v. Seward Park Hous. Corp.*, 639 N.Y.S.2d 648, 649 (App. Term 2006).

203. See, e.g., Carpenter et al., *Studying*, *supra* note 3, at 260.

not all—have approached it as an either–or switch: full discovery or none at all.

Both of these critiques expose how current systems are not experimenting enough and may be missing a sweet spot where discovery (a) gives lawyerless claimants a tool to uncover misfeasance; (b) offers lawyerless claimants increased bargaining leverage in settlement negotiations; and (c) allows state legislators to further rely on private enforcement or private defenses as a regulatory policy. Such a system could both change case outcomes and also promote a real sense of procedural justice. But, at the same time, such a system would have to avoid increasing costs beyond the typical amount in controversy, reliance on attorneys, and delays that, ultimately, deny access to justice.

1. *The Practical Critique.* — Some state governments, academics, and reformers seem to agree that there is something close to a “crisis” in lawyerless courts.²⁰⁴ Some data show that “more than three-quarters of [state civil] cases involve at least one unrepresented party.”²⁰⁵ These lawyerless cases cover fundamental rights in society: rights to housing, financial security, and family relationships. Yet, by many accounts, the legal system is not providing a fair shot to these litigants. One major teaching of the literature on lawyerless courts is not only that discovery is “impossible to manage” in these cases but that most of the work “happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings.”²⁰⁶

For three decades, civil justice reformers have focused on judicial case management and legal aid organizations as solutions to pro se problems. As Carpenter, Shanahan, Steinberg, and Mark note, “legal scholars concerned with access to justice have consistently argued for an end to traditional judicial passivity in favor of an active, interventionist role in lawyerless cases.”²⁰⁷ Reformers have also emphasized the importance of legal aid organizations as forms of “unbundled” legal assistance.²⁰⁸ Advocates have argued not just that organizations can provide free counsel but that they can provide limited assistance at different litigation stages. Legal aid providers in the past few decades have constructed programs to assist pro se litigants by, among other things, providing “assistance in filling out answer and discovery forms.”²⁰⁹ This type of discovery assistance involves attorneys who draft subpoenas, draft motions, or collect “answers to discovery requests.”²¹⁰

While these reforms have long been on the table, judicial management and legal aid have not solved pro se problems for several reasons.

204. *Id.*

205. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 3, at 511.

206. *Id.* at 514; Steinberg, *Demand Side*, *supra* note 3, at 744.

207. Carpenter et al., *Judges in Lawyerless Courts*, *supra* note 3, at 516.

208. Greiner et al., *supra* note 16, at 904.

209. *Id.* at 908.

210. *Id.* at 918.

First, courts and legal aid organizations simply lack sufficient resources to invest in procedural complexities like discovery. Even if judges wanted to engage in more inquisitorial discovery, heavy caseloads mean that judges have no time to fully explore the facts of each case.²¹¹ Moreover, as the civil *Gideon* literature has discussed, even appointing counsel to assist with discovery can “replicate the problems that already exist on the criminal defense side,” including lack of expertise in the particular subject matter.²¹² This is why, despite a decade of calls for judicial case management, “[j]udges [have] maintained legal and procedural complexity in their courtrooms by offering only the most limited explanations of court procedures.”²¹³ There are other structural barriers, including the judicial norms at the state level that push judges to seek quick settlements rather than a fuller investigation of the case. That and other structural problems mean that attempts to move toward inquisitorial discovery have not been successful. Second, legal aid has also been no panacea and probably only of limited use in discovery. The most relevant empirical study has found that unbundled discovery assistance is “not enough to assure outcomes a competent attorney could produce.”²¹⁴ One teaching of most of this literature is that the current system is not working.

Operating under a suboptimal discovery process can, by any realistic account of litigation, heavily affect the broader performance of the litigation system. Indeed, if decades of scholarship on federal courts is anywhere near correct, then missing a fundamental block of pretrial litigation increases information asymmetries, unfairness, and inequality. In line with this thinking, Steinberg has noted that in habitability cases, discovery could “play a central role in . . . making it unlikely that tenants can succeed without attorney representation.”²¹⁵

The behavior of state governments in this context also suggests that discovery can affect case outcomes and the litigation system’s performance. For decades, states have experimented with discovery reform, either banning discovery entirely, creating the use of “forms” that pro se parties can use, or relying on judicial management. At every stage of that reform process, state legislators have argued that discovery is a significant and influential part of the litigation process. Even states that eliminated discovery did so because it was a “stumbling block[] faced by pro se litigants.”²¹⁶ To these states, discovery increased case complexity and actually helped sophisticated parties against pro se litigants. The point is that no one doubts that discovery can be important. If the system is in “crisis,” we should consider the role of discovery in contributing to such a crisis.

211. Kleinman, *supra* note 183, at 1516.

212. *Id.* at 1518.

213. Carpenter et al., *Lawyerless Courts*, *supra* note 3 (manuscript at 7).

214. Greiner et al., *supra* note 16, at 935.

215. Steinberg, *Informal*, *supra* note 20, at 1065.

216. Kindregan & Kindregan, *supra* note 24, at 39.

2. *The Either–Or Critique.* — As discussed above, many states have chosen discovery systems that are at the polar ends of the spectrum: either full discovery powers or none at all. But there is no reason to believe either of those are optimal when there may be ways to capture the benefits of discovery while minimizing costs. In other words, a maximal discovery system may well be inappropriate for lawyerless cases. But probably so is a system where all discovery is out of the question. Some states have tried to avoid the categorical choice by leaving it up to judges through a standard (i.e., empowering judges to “investigate the controversy”²¹⁷). But these systems, too, avoid more granular choices. Small claims judges are asked to act as mediators and promote settlement—so they have no reason to allow for any actual discovery at all. Judges are expected to solve cases expeditiously and without complications. That may be why even when motions to compel discovery are available, one empirical study found that “judge[s] infrequently ruled on these motions.”²¹⁸ But states have not fully experimented with intermediate approaches toward discovery. For instance, no state that provides for discovery “if the judge so approves” has attempted to enforce such a standard with sharp obligations on judges to investigate cases.

D. *The Sweet Spot for Discovery Reform*

The question, then, is whether reforms to discovery and lawyerless courts can achieve the best-case benefits without the associated costs in discovery. In the words of the Supreme Court, can states develop procedures that are helpful for unrepresented parties but also “sufficiently straightforward” and without “a degree of formality or delay” that can frustrate the whole project?²¹⁹ In order to tackle this question, we must address several analytic axes that are relevant to any discovery regime: the relevant actor who would bear the costs of discovery, the situs of information or knowledge, and the relationship between discovery and the substantive claim. Any potential discovery reforms—discussed further in Part III—should focus on (1) discovery obligations only on sophisticated parties that (2) may hold the relevant information in complex cases and (3) only in cases that can make use of that information, usually cases where unrepresented defendants allege wrongdoing by large plaintiffs (landlords and debt collectors above some revenue threshold).

This section uncovers a set of design principles that can guide policymakers in implementing state court reforms. Armed with the insights of Parts I and II, we can begin to draw conclusions about how to expand or contract discovery in state courts. Still, a word of caution is due: There is no all-things-considered best option for all states in all circumstances. To the contrary, discovery design will be highly contextual and far from the

217. Cal. Civ. Proc. Code § 116.520 (1990).

218. Greiner et al., *supra* note 16, at 919–20, 927, 934.

219. *Turner v. Rogers*, 564 U.S. 431, 446–47 (2011).

transsubstantive federal model. In the real world, judges should shape discovery depending on the needs of the case. While discovery may serve a regulatory role in employment or eviction cases, deviations may be necessary in debt collection claims.

1. *The Relevant Actor: Impose Discovery Only on Sophisticated Parties or Government.* — The first and most obvious design principle for any discovery reform is to avoid imposing any new complex procedures on lawyerless parties. Discovery reforms must begin by taking into account the relevant parties in any lawyerless case. The average case will usually involve a few actors: a landlord or debt collector plaintiff, a lawyerless defendant, and the judge. These are direct actors in the sense that they participate in the actual litigation. But there are also peripheral actors—especially governments (local, state, or federal) and legal aid organizations. These peripheral actors could potentially enter the case to assist the resolution of a particular litigation.

Once we understand that there are several potential actors in any lawyerless case, the focus should be on the actor best positioned to conduct or aid in the operation of discovery. As discussed above, lawyerless parties find it difficult to navigate the complexities of discovery. But governments, repeat players, and sophisticated entities (large landlords or debt collectors) can do so. The system cannot be blind to the resources and sophistication of the potential actors involved in litigation. Any expansion of discovery should not apply equally to both one-shot litigants and repeat players—it must take into account the resources of the parties. Moreover, the system currently performs well for parties who can afford experienced counsel. The beneficiary of discovery reforms has to be parties who are now shut out of the system. In landlord–tenant cases, that means potentially empowering tenants without giving landlords more thorough discovery powers. In debt collection cases, that would mean focusing on the discovery obligations of large debt companies.

Lawyerless cases in the context of landlord–tenant and small claims have several commonalities. First, there is often a sophistication asymmetry whereby one-shot litigants litigate against experienced repeat players. For instance, in the small claims context it appears that most claims are filed by large debt collectors against low- or middle-income litigants.²²⁰ Similarly, property cases involve low-income tenants facing claims from larger landlords. But in both of these claims, the unsophisticated party is a defendant, not a plaintiff. This presents an unusual inversion of the typical problems in federal court, involving small one-shot plaintiffs (in consumer protection or employment claims) against sophisticated defendants. Second, tenants and debtors are usually unrepresented. This means they lack the resources and know-how to effectively navigate complex procedures. Both of these commonalities mean that lawyerless parties cannot navigate

220. Wilf-Townsend, *supra* note 6, at 1706–07.

broader discovery and cannot even take advantage of enhanced discovery powers in their favor.

Setting aside discovery obligations on lawyerless parties, reforms must focus on imposing obligations on sophisticated plaintiffs, judges, the government, and legal aid organizations.

2. *The Situs of Knowledge: Impose Obligations Only on Parties With Actually Relevant Information.* — A second design principle is that whatever discovery reforms can do, they should always focus on the location of relevant information. Consider again the typical lawyerless cases discussed above, landlord–tenant claims and debt collection. In most of these cases, when plaintiffs sue, the key issue is whether (a) the tenant has paid rent or (b) the debtor has failed to pay by a due date.²²¹ These relatively simplistic scenarios involve information that plaintiffs have at hand, mostly a lease or a contract. But counterclaims over warranty of habitability or fraud (as well as claims under the FDCPA or bankruptcy defenses) would require further information that, again, only plaintiffs have. It is only in these circumstances that it makes sense to impose discovery obligations on large landlords and debt collectors.

3. *The Substance of the Case: Expand Discovery Only When Unrepresented Parties Allege Serious Wrongdoing.* — A final design principle is that discovery will only be useful in some lawyerless cases involving complex counterclaims, corporate misdeeds, landlord abuses, or employer wage violations. Most of the time this means that a pro se defendant (a tenant or debtor) will allege serious wrongdoing by plaintiff landlords or collectors. It bears repeating that discovery's benefits are important only when there is an asymmetry of information that could, conceivably, impact the outcome of a case. As discussed above, discovery can promote fairness, accuracy, settlement, and regulatory goals.²²² But in most straightforward landlord–tenant or debt collection cases, discovery will be unnecessary. The focus should be on cases where pro se parties allege significant harms or illegal actions—for instance, cases where slum lords routinely violate habitability requirements. Or cases where a debtor argues that a debt collection company engages in violent threats or widespread fraudulent practices. In these claims, discovery may either change the outcome of the case or promote procedural justice by giving pro se parties full participation rights in litigation. At best, discovery will promote state or local regulatory goals, like better provision of housing services. One relevant variable is whether there are multiple available defenses under state or federal law. Discovery will be more helpful when pro se parties can actually put forth defenses in lawyerless cases. On one end of the spectrum, landlord–tenant cases are likely to benefit from discovery because defendants have an array of defenses: warranty of habitability, warranty of quiet enjoyment, construc-

221. See notes 116–119 and accompanying text.

222. See *supra* section II.A.

tive eviction, and others. All of these defenses hinge on discoverable information about the conditions of a property or performance of a lease. That might be true of debt collection cases that involve violations of the FDCPA (via fraud or violent threats). Discovery could actually be outcome determinative. On the other end of the spectrum are some debt collection cases where the allegations are over nonpayment of a debt and there are no potential counterclaims. Most likely, these cases will involve one key document and no complex defenses. Discovery would not change the case and would only add unnecessary complexity.

* * *

These three design principles lead to several early conclusions. States and localities should only expand discovery in cases that involve at least one sophisticated party, potentially relevant information (in the form of a record or documents), and available arguments under federal or state law that hinge on discoverable information. From this, we can infer areas where states should not expand discovery: (a) in a transsubstantive manner; (b) in small claims cases involving two individuals; and (c) in most debt collection claims and any other cases that hinge on a single contract (without potential statutory defenses). But, beyond these conclusions, Part III addresses how discovery should expand.

III. A NEW EXPERIMENT: A CIVIL OPEN FILE STATUTE?

Given all of the above, this Part focuses on a novel experiment borrowed from criminal discovery: a civil open file statute. Such a statute would obligate sophisticated landlords, debt collectors, and other plaintiffs to assemble and disclose at an early stage a complete record of relevant documents. And the statute would embrace the three design principles developed in section II.D, applying only to sophisticated landlords or debt collectors in narrow contexts. The proposal follows recent scholars who have advocated for a spirit of experimentation in state courts. States should innovate and try out new methods to increase fairness, access to justice, and participation in the legal system. Below, this section explores how criminal discovery may be an example before exploring a potential civil analogue.

Before delving into the details, however, a clarification on other discovery alternatives is in order. Given the realm of possibilities discussed above, reforms should be limited to either an expansion of existing disclosure regimes, further emphasis on inquisitorial discovery, or reliance on outside legal aid organizations. But there is no reason to believe that judicial case management or legal aid would resolve existing problems, especially because most states have already tried that route. To be sure, states could continue pushing on this approach, expanding discovery rights but subjecting them to judicial approval or active case management. That is, in a sense, California's approach in small claims cases, in which the rules

provide that the judge may “investigate the controversy.”²²³ Continuing down this path might include more detailed obligations on judges to investigate cases. Perhaps changing statutory language from “may” investigate to “must” would be a start. That, in turn, would bring the complication of how to enforce such an obligation on judges.²²⁴ Alternatively, the rules could empower one-shot defendants to request judicial intervention, especially in cases where tenants and debtors have potential defenses against plaintiffs’ claims. But, as explored below, rather than insisting on outdated solutions, states could reconsider the disclosure route.

A. *Disclosures and Criminal “Open File” Statutes*

One potential avenue of reform is to emphasize early disclosures. By way of reminder, disclosure rules obligate parties to reveal relevant documents as early as possible. By potentially forcing repeat players to show their hand, disclosure avoids the expenses and delay of discovery. In that sense, disclosures seem to resolve the potential catch-22 of discovery in lawyerless cases—expanding available materials without an increase in complexity. That is why several recent reforms have increased the scope of early disclosures, including the FRCP.²²⁵ Some scholars of lawyerless cases have similarly suggested that “[d]iscovery should be mandatory and automatic, requiring the parties to exchange key documents—such as a list of income and assets . . . at the outset of the litigation.”²²⁶

Despite the focus on civil disclosures, one potential model regime has gone unnoticed: open file discovery statutes in the criminal context. While traditional criminal discovery is limited, dozens of states have recently expanded a defendant’s right to discovery through modern “open file” statutes.²²⁷ These statutes often force the government to reveal the entire investigatory file on a particular case, including inculpatory and exculpatory evidence. For example, Minnesota’s expansive open file statute “guarantees the defendant access to ‘all matters within the prosecutor’s possession or control that relate to the case.’”²²⁸ Courts have interpreted North Carolina’s version to cover “‘everything’ collected and produced,

223. Cal. Civ. Proc. § 116.520 (1990).

224. It would also bring the potential downsides of ad hoc procedure. Bookman & Shanahan, *supra* note 29, at 1209–12 (discussing both the need for ad hoc procedure and the unchecked judicial discretion behind it).

225. Fed. R. Civ. P. 26(a) (including a disclosure process added in 1993).

226. Steinberg, *Demand Side*, *supra* note 3, at 797.

227. To attempt to resolve the informational asymmetry between prosecutors and defendants, the constitutional “*Brady* disclosure” forces prosecutors to reveal only exculpatory evidence that is “material either to guilt or to punishment” of a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But that rule does not cover inculpatory materials. For a comprehensive discussion of open file statutes, see Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 *Conn. L. Rev.* 771, 774 nn.7–9 (2017) (citing other sources).

228. Grunwald, *supra* note 227, at 789–90 (quoting *Minn. R. Crim. P.* 9.01(1)).

including handwritten and electronic notes, video recordings, and even emails and text messages exchanged between officers.”²²⁹ Open file statutes sometimes apply only to serious cases, like felonies or misdemeanors that carry long sentences.²³⁰ States have developed several mechanisms to increase compliance with open file statutes. Massachusetts, for instance, obligates prosecutors to “submit a ‘certificate of compliance’ stating that ‘to the best of [their] knowledge and after reasonable inquiry, the[y] ha[ve] disclosed’ all necessary materials.”²³¹ To avoid deliberate failure to collect evidence, many open file statutes also obligate governments to collect evidence.²³²

Most importantly, many open file statutes radically simplify discovery by forcing prosecutors to disclose their files by certain deadlines. That means defendants need not prepare complex subpoenas, maneuver around difficult rules, or comply with opaque timelines. Prosecutors often have to disclose their files even if defendants have not asked for it.²³³ In order to accommodate confidentiality or witness protections, some open file statutes carve out some kinds of evidence or allow defendants to examine and make copies of the record at their own expense.²³⁴ Older criminal law rules sometimes permitted defendants to review the record “in the prosecutor’s office but not to make copies or photographs.”²³⁵ But some states force prosecutors to prepare copies of their files for defendants at no cost.²³⁶

B. *Civil “Open File” Statutes*

1. *Why Lawyerless Civil Cases May Be Analogous to Criminal Prosecutions.* — There are three reasons why criminal open file statutes could serve as a model for a civil equivalent. First, like lawyerless cases, criminal cases often involve a gargantuan asymmetry in sophistication between prosecutors and one-shot defendants. While prosecutors have the expertise and resources to fully investigate a case, defendants and even their counsel are often inexperienced and underresourced—unable to even begin to understand or fully explore relevant facts. Second, the resource asymmetry means that there is a similar bind between increasing defendants’ access to the file and reducing complexity. Open file statutes resolve this by placing the weight on the well-resourced and sophisticated party, the

229. *Id.* at 790 (quoting N.C. Gen. Stat. § 15A-903(a)(1) (2016)).

230. *Id.* (“Minnesota limits open-file to charges punishable by more than ninety days of jail time and North Carolina limits it to felonies.”).

231. *Id.* at 791 (alterations in original) (quoting Mass. R. Crim. P. 14(a)(3)).

232. *Id.* (“Some open-file statutes impose collection and recording obligations on investigative agencies for certain evidence and information.”).

233. See *id.* at 790–92 (discussing various open file statutes that increase prosecutorial disclosure).

234. *Id.* at 793–95.

235. *Id.* at 794.

236. *Id.* at 794–95.

government. Third, open file statutes operate under a principle of fairness. The basic idea is that it would be unfair to subject the defendant to significant consequences (i.e., imprisonment) without giving them access to the underlying materials in the case, exculpatory or inculpatory. This is also true in the civil context where even if a lawyerless party is unlikely to defeat a landlord or debt collector's claim, access to a full file can still promote participation, fairness, and equality. Moreover, open file statutes influence plea bargaining negotiations by imposing high costs on the prosecution and giving the defendant tools to lessen their potential sentence. In that sense, access to an open file is not supposed to affect a binary outcome (conviction or not) but can influence a full spectrum of potentially negotiated outcomes.

The idea of a civil open file also matches some existing proposals. As discussed above, the California Fair Debt Buying Practices Act imposes on debt collectors a duty to disclose extensive details about the debt in the complaint and certainly prior to obtaining any form of judgment.²³⁷ Similarly, Steinberg has proposed an "information conduit" model whereby courts:

[S]erve as information conduits that connect pro se litigants to relevant government agencies to facilitate the transfer of necessary documents. City building inspectors and local police departments are two obvious examples. A tenant should have easy access to a list of building code violations. A domestic violence victim should have easy access to recordings of 911 calls she placed to report the alleged abuse.²³⁸

As discussed below, all of these documents would be part of an open file.

To be sure, one major difference between the criminal and civil context is the right to counsel. Open file statutes are useful because represented criminal defendants can count on expert assistance to examine those files. In the lawyerless civil context, there is no similar right. Moreover, as Shanahan and co-authors have found, mere access to evidentiary procedures in some claims does not ensure better outcomes for low-income parties even when they are represented.²³⁹ Still, most of the effect of an open file statute would not actually be in litigation. Rather, a civil open file would increase costs on sophisticated parties and would therefore deter landlords and debt collectors from bringing offensive cases or offering weak settlement terms. Going forward, those parties would have to account for potential expenditures in discovery and exposure of confidential information that could prompt lawsuits by actually represented parties. Even more, sophisticated repeat plaintiffs may actually be generally deterred from engaging in violations of housing codes or the FDCPA.

237. Cal. Civ. Code §§ 1788.50–.66 (2022).

238. Steinberg, *Demand Side*, *supra* note 3, at 797 n.308.

239. Shanahan et al., *Lawyers*, *supra* note 161, at 473 (finding worse outcomes even with representation).

It is in the shadows of litigation that an open file statute would make a difference.

It's important to recognize that there is a potential risk that repeat players would nevertheless take advantage of a defendant's lack of sophistication regarding how best to interpret and use the evidence. In other words, landlords or debt collectors might just take the chance that the average defendant would not understand the evidentiary requirements of a habitability or constructive eviction case. If so, this would mean that, in the aggregate, there would still be a strong financial incentive to bring these claims even if a few defendants successfully make use of the evidence. But even in this scenario, there would be a marginal impact on plaintiffs' choices that may well justify a civil open file statute.

2. *How to Draft a Civil Open File Statute.* — A civil open file statute should follow a few design principles: (1) Impose disclosure obligations only on sophisticated landlords and debt collectors that (2) have already compiled—under new regulatory requirements—a record of documents on housing violations and debt collection methods and (3) only in cases where pro se defendants allege violations of the warranty of habitability or counterclaims under the FDCPA. Moreover, the statute has to rely on active judicial inquiry to determine if the unrepresented defendant does indeed have available defenses or potential counterclaims. Here's a first sketch to implement these design principles:

a. *Impose Obligations Only on Large Landlords and Debt Collectors.* — Unlike the criminal context where government is involved, a civil open file statute would be directed at sophisticated plaintiffs, especially large landlords and debt collectors. Such a statute, for instance, could obligate those sophisticated plaintiffs to disclose at an early stage a full file on the defendant. In the landlord-tenant context, that would mean a file that includes not just the lease and evidence of failure to pay but any related complaints about habitability or any other evidence of conversations between landlord and tenant. Part of the file should include records of any building code violations. This could give tenants a powerful voice in litigation without requiring legal representation or legal drafting skills. Importantly, it would incentivize better negotiated outcomes. So too in the debt collection context, where the evidence indicates that a handful of massive repeat plaintiffs account for most cases. The California Fair Debt Buying Practices Act presents a good model, requiring that debt collectors disclose details about the debt, including related documents, chain of ownership, dates, and names and addresses of entities that purchased the debt.²⁴⁰

A civil open file statute might also require the compilation and production of any communications between the plaintiff and defendant and any other evidence of wrongdoing by the plaintiff (related to the case). Again, such a statute should be limited to large debt collectors, imposing an obligation only on parties that are above a certain size (perhaps

240. Cal. Civ. Code §§ 1788.50–66.

measured by revenues). One complication would be that an open file statute would disincentivize record keeping. And, as with all regulatory requirements, there is always the possibility of misfeasance, especially the concealment of materials from an open file. But just like in the criminal context, such a statute should be paired with record-keeping requirements that sanction failures to comply. Criminal open file statutes deal with this problem by requiring that producers submit a “certificate of compliance,” or imposing punishing sanctions for noncompliance.²⁴¹ Drafters of a civil open file should consider these options, including the types of practical sanctions and standards governing this record-keeping duty.

As to how to draft the precise text of such a disclosure requirement, a civil open file statute would be able to draw on already existing discovery approaches. As discussed above, California imposes disclosure requirements in the debt collection context and other states impose extensive early disclosures in family law claims. The California Fair Debt Buying Practices Act provides that each debt complaint must attach documents covering details about the debt buyer, the debt, the chain of transactions on the debt, and a series of other details.²⁴² The California Family Code also requires detailed disclosures in divorce cases, including documents covering “current income and expense declarations.”²⁴³ Even more, the code “requires a continuing duty of each party to update and augment that disclosure.”²⁴⁴ Texas and Florida similarly require extensive disclosures, especially for divorce and child or spousal support cases.²⁴⁵ These provide a model for a requirement in eviction or debt collection cases—a full disclosure of compiled documents along with a “continuing duty” to update it.

b. *Impose a Regulatory Obligation to Maintain a Record of Habitability or Repair Requests and Debt Collection Complaints.* — In order to minimize delays and complexity, sophisticated landlords and debt collectors should only be required to produce a record of documents that they are already obligated to maintain on an ongoing basis. State housing and consumer protection statutes require the maintenance of a wealth of documents. An open file statute might expand landlord requirements to include, as mentioned above, repair requests from any tenants, notes of conversations with tenants, building code violations, and any documents produced to building inspectors on the state of the relevant property. Many of the documents in this record will actually be in the hands of local governments—but landlords should be required to maintain and update copies on an ongoing basis. The same is true for debt collectors, who should be

241. Grunwald, *supra* note 228, at 792.

242. *Id.*

243. Bigornia, *supra* note 163, at 197.

244. *Id.*

245. See Cal. Civ. Proc. Code § 116.231(a) (2021); Tex. Gov’t Code § 27.060(b)(6) (2021).

required to maintain data about their business. As discussed above, that is exactly what the California Fair Debt Buying Practices Act requires from debt collectors.²⁴⁶ In addition, regulators might also want to require records on default rates, collection rates, consumer complaints, other legal cases, and the like. Once an open file request is triggered, these large defendants should produce the full record in a short period of time. An open file statute should also take into account confidentiality for tenants or debtors. A developed literature on eviction courts highlights both the lack of public accountability for landlords as well as the consequences of evictions for tenants, including in their permanent records.²⁴⁷ Reformers should therefore take into account the potential disclosure of tenants' confidential or private information, perhaps in specific provisions that protect the identities of defendants in some eviction proceedings or debt claims.

c. Limit the Open File Statute to When Pro Se Defendants Allege Violations of the Warranty of Habitability or Other Counterclaims. — Even more, there are also good existing examples of how to textually limit a broad disclosure requirement. For instance, New York courts have recognized in the eviction context that “[d]isclosure may be granted when there is a sufficient showing by the party [of ample need and] that the information sought is necessary to enable it to establish its asserted defenses or counterclaims.”²⁴⁸ Following this principle, New York courts have granted tenants access to landlord documents and depositions related to how landlords treat other tenants and how they maintain apartment buildings.²⁴⁹

A civil open file statute might grant access to a full record produced by the plaintiff only when defendants can show “ample need” and that the information will “enable it to establish defenses or counterclaims.”²⁵⁰ In order to make this accessible to pro se parties, a judge should ask a defendant in a hearing if they are alleging serious wrongdoings by a landlord or debt collector. Simple affirmative answers should be able to trigger the open file statute.

d. Rely on Judicial Management to Establish the Need for an Open File and to Supervise Its Production. — A civil open file statute should also rely on judicial case management to “tag” cases that could actually benefit from further discovery. In these cases, judges should both supervise the disclosure of a full record and manage the process. As mentioned above, under an “information conduit” model it is courts that have to supervise how lawyerless parties utilize the record produced under an open file statute.

246. Cal. Civ. Code §§ 1788.50–.66 (2022).

247. See, e.g., Rudy Klevsteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 *Yale L.J.* 1344, 1347 (2007).

248. N.Y. Real Prop. Acts. Law § 745 practice cmts. (McKinney 2019).

249. See *supra* note 145 and accompanying text.

250. See *supra* note 145 and accompanying text.

Some potential avenues of experimentation should include the use of discovery tracks. Judges can assign certain cases into different tracks depending on the substance or amount in controversy. Some tracks would involve more discovery or disclosures while others would be simplified. Judges could also “tag” certain cases as particularly important and subject to expansive disclosure obligations.

3. *Two Examples of How a Civil Open File Statute Could Help.* — Outside of its main purpose of deterrence (and increased costs for sophisticated litigants), even in litigation some cases may go through the following pattern:

a. *Open File in an Evictions Case.* — A large landlord files an eviction claim against a low-income tenant. In a hearing, the tenant complains to the judge that the landlord has not repaired ceiling leaks or toilet plumbing in months. The judge orders the landlord to produce an open file of all outstanding repair requests and all other relevant documents. The landlord agrees to delay the eviction and settles with the tenant out of court.

b. *Open File in a Debt Collection Case.* — A large debt collector files a small claim against a low-income borrower. In a hearing, the borrower complains to the judge that the debt collector has threatened violence several times. The judge orders the debt collector to produce an open file of any and all allegations of fraudulent claims and all data regarding default rates and collection efforts. The debt collector offers better settlement terms to the defendant.

One of the advantages of this open file system is that, even initially, it does not require legal representation to use it. Since judge-ordered disclosure does not require a formal motion, one could easily imagine an unrepresented party obtaining such disclosures. But even if this fails because unrepresented parties cannot take advantage of an open file, there will still be some represented parties who can bring the claims and take advantage of an open file. That, in turn, could make representation of parties more expeditious, lowering the cost of representation in such proceedings (and potentially increasing the availability of representation or the impact of pro bono services). And perhaps the production of an open file in a handful of cases where defendants do enjoy the assistance of counsel would have a ripple effect on all other cases. It would allow attorneys to draw on that open file and assist other parties. After all, an open file would be useful probably in cases where pro se parties allege serious wrongdoing by a sophisticated landlord or debt collector that affects other parties.

CONCLUSION

Although it has long been vaunted as the key procedure in federal court, there is little to no discovery in most state court cases. Even when it is available, discovery is often inaccessible and opaque in lawyerless courts.

Part of the problem is that discovery is a double-edged sword: It can empower small claimants but may also impose costs and complexity that these litigants cannot handle. But there is some room for discovery to help lawyerless parties, at least in cases where there are allegations of wrongdoing by a landlord or debt collector. For that reason, this Essay has introduced a new potential approach: a civil open file statute that would obligate sophisticated landlords, debt collectors, and others, to prepare and produce a full record of materials relevant to the case. Still, this potential avenue must be adapted by judges to each specific case.

