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## *ARTICLES*

### THE STRUCTURES OF LOCAL COURTS

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*Local courts are, by far, the most commonly used courts in our justice system. Cases filed in local courts outnumber those filed in federal court by a factor of over two hundred. Few litigants who receive local-court judgments appeal the matter further. The justice we possess is thus largely the justice created by local courts, but they are largely absent from the law school curriculum. We know astonishingly little about them.*

*This Article begins to remedy that absence by providing a structural account of local courts that situates them as distinct institutions within the justice system. Because local courts are influenced by all levels of government—federal, state, and local—they exhibit a radical diversity—not just between states but within them, and not just in the*

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way that they operate but in their organizing principles. The Article links the many problems experienced by local courts—chronic underfunding and a lack of oversight cause problems that run deep—with the state and federal structures that shape local-court function and administration. On the state side, the Article analyzes hand-coded, raw survey data from the National Center for State Courts to describe the interactions between local courts and administrative bodies within state judicial branches. Although states differ, administrative distance between state and local institutions joined with the rarity of appeals from local-court judgments makes local courts meaningfully independent from the state system. Federal law compounds this independence by sheltering local courts from external scrutiny. Judicial federalism doctrines like preclusion, abstention, and habeas corpus require federal courts to defer to the legal and factual findings of local courts. Federal enforcement doctrines like standing and immunity protect local courts from legal reform efforts.

The Article then reevaluates our theories of judicial federalism in light of the diversity and problems of local courts. It argues that the values of judicial federalism invoked by both courts and scholars rely on the fiction that state courts are monoliths. In fact, the reality of state courts—including the diversity and relative obscurity of local courts—frustrate these values. Instead, the Article argues that the more valuable conceptual function of local courts is not normative but rather descriptive: they provide us with an understanding of the justice we have, not the justice we aspire to or the justice required by law. They—and not federal courts—are the starting points from which we should define and evaluate our system of justice.

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#### INTRODUCTION

Ten years ago, I visited the courthouse in Wilkinson County, a small, majority-Black county in the southwest corner of Mississippi. It had an old and genteel Beaux-Arts façade and stood in the center of a town square, lending a sense of history to the diners and clothing stores around. Inside, dust yellowed the windows, blotches deepened the color of the carpets, holes in the ceilings exposed electrical wires. Marriage records labeled “White” and “Colored” through 1984 filled the county clerk’s bookcases. Many forms of history.<sup>1</sup>

Local courts like this one—including both general-jurisdiction trial-level courts and limited-jurisdiction hyperlocal courts like municipal and

<sup>1</sup> Courthouse architecture is a fascinating topic in its own right. See Judith Resnik & Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (2011); Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 *Yale J.L. & Human.* 311, 315 (2012) (“[T]he American concept of due process of law is itself intimately bound up with the location, design, and use of law’s administrative space.”). For recent images of local courts around the country, see *American Courthouses: A Photo Archive* by John Deacon, <http://www.courthouses.co/> (last visited Apr. 12, 2020) [<https://perma.cc/K2MQ-UYMN>].

Deteriorating physical conditions of local courthouses are not unique to Wilkinson County and go beyond “complaints about the color of the carpeting.” ISBA Special Comm. on Fair & Impartial Courts, Ill. State Bar Ass’n, *Report on the Funding Crisis in the Illinois Courts 20* (2013) [hereinafter *ISBA Report*], <https://www.isba.org/sites/default/files/-committees/Report%20on%20the%20Funding%20Crisis%20in%20the%20Illinois%20Court%20s.pdf> [<https://perma.cc/B54U-CMAP>]. An Illinois State Bar Association report, for example, describes local courthouses with “mold visibly growing on the ceilings” and courthouses with heating and air conditioning systems so ineffective that “some rooms . . . are almost as warm as a sauna and other rooms . . . are ridiculously cold all on the same day.” *Id.* at 20 & 20 n.45. For more examples, see generally *infra* Section I.B.

justice courts<sup>2</sup>—are overwhelmingly likely to have both the first and final words in any dispute within the justice system. Litigants file tens of millions of cases in local courts each year, outnumbering cases filed in federal court by a factor of over two hundred.<sup>3</sup> Few litigants who receive local-court judgments appeal the matter further.

The justice we possess is thus largely the justice created by local courts. It is a diverse justice. Because local courts are influenced by all levels of government—federal, state, and local—they exhibit a radical diversity—not just between states but within them, and not just in the way that they operate but in their organizing structures. We tolerate, even celebrate, that diversity. We believe it encourages the “creative ferment of experimentation.”<sup>4</sup> And sometimes, local courts vindicate this promise. At their best, local courts can be laboratories for innovative approaches to justice tailored to the communities they serve.<sup>5</sup>

But this innovation, when it exists, is matched—at times overmatched—by the injustice that takes place there. Chronic underfunding and a lack of oversight cause problems that run deep. Some local courts are full of violations of federal law, including overlong waits for trial, a dearth of interpreters, ineffective and non-existent public defense programs, inaccessible facilities, and fines and debtor’s prisons that have devastating impacts on indigent defendants. These problems are not only deep; they are vast: most states have some identified problem with their local courts.<sup>6</sup>

Despite these massive stakes, despite the place of local courts at the heart of the justice system, and despite even the compelling human stories that unfold in these courts, we know very little about them.<sup>7</sup> Their

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<sup>2</sup> The diversity of local courts makes defining the category an important part of the analysis. For a more detailed explanation, see *infra* Part I.

<sup>3</sup> See *infra* Part I.

<sup>4</sup> See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 *Wm. & Mary L. Rev.* 605, 634 (1981) (“Do we not derive enormous benefits from having a variety of institutional ‘sets’ within which issues of federal constitutional law are addressed? The creative ferment of experimentation which federalism encourages is *not* irrelevant to the task of constitutional adjudication.”).

<sup>5</sup> For examples of how local courts have piloted programs meant to improve justice for individuals, communities, and businesses, see generally *infra* Section I.A.

<sup>6</sup> See *infra* Section I.B.

<sup>7</sup> See Annie Decker, *A Theory of Local Common Law*, 35 *Cardozo L. Rev.* 1939, 1943–44 (2014) (noting a lack of empirical studies about local courts); Ethan J. Leib, *Localist Statutory Interpretation*, 161 *U. Pa. L. Rev.* 897, 898–99 (2013) (“[L]egal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts.”); Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About*

opinions are often unpublished and their proceedings are rarely transcribed.<sup>8</sup> They are completely absent from the core law school curriculum.<sup>9</sup>

This Article begins to remedy that absence by providing a structural account of local courts that situates them as distinct institutions within the justice system. It links the problems experienced by these courts with the state and federal laws that influence local-court function and administration. On the state side, the Article provides new accounts of the administrative and substantive relationships between local courts and state government. It describes how states create and shape the basic contours of local courts through policies that determine how local courts are funded and how local judges are selected.<sup>10</sup> It uses hand-coded, raw survey data from the National Center for State Courts (NCSC) to illustrate the kinds of formal and informal interactions that exist between local courts and state judicial administrative offices. Although states differ, legal and administrative distance between state and local institutions joined with the rarity of appeals from local-court judgments and the scarcity of other quality control mechanisms makes local courts meaningfully independent from their state systems.<sup>11</sup>

Federal law compounds this independence by sheltering local courts from external scrutiny. Judicial federalism doctrines—specifically preclusion, abstention, and habeas corpus—require federal courts to defer to the legal and factual findings of state courts. In practice, these doctrines

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Our Most Important Courts, 143 *Daedalus* 129, 129 (2014) (“[A]s we drown in data about everything else under the sun, we know remarkably little about how [local] courts actually work.”).

<sup>8</sup> See *infra* Subsection II.A.2.

<sup>9</sup> Others have offered explanations for this erasure. Annie Decker has speculated that the number and diversity of local courts overwhelm us with “anticipatory fatigue.” See Decker, *supra* note 7, at 1943. Ethan Leib has suggested that we ignore local courts because their opinions are unpublished and inaccessible. See Leib, *supra* note 7, at 907–08 (“Admittedly, it is not easy to ascertain what is occurring in these local courtrooms with a high level of confidence. Because local courts are much less likely to publish their decisions than state courts higher in the judicial hierarchy, a scholar would need to sit in local courtrooms for long periods of time and read reams of motion papers to discover with any degree of reliability what goes on in these halls of justice.”). As I describe later, these explanations are likely correct, but incomplete.

Though local courts are largely absent from doctrinal classes, they are not absent from clinical work, which often *takes place* within local courts.

<sup>10</sup> See *infra* Subsection II.A.1.

<sup>11</sup> See *infra* Subsection II.A.2.

require deference to *local courts*.<sup>12</sup> As a consequence, federal courts provide surprisingly little oversight of the workings of local courts. And federal enforcement doctrines like standing and immunity protect local courts from legal reform efforts.<sup>13</sup>

This structural analysis provides insights not only into local-court functioning but into scholarship on federalism, judicial federalism, and our justice system broadly. Theories of judicial federalism that promote state courts as useful administrators of federal law, invoked by both courts and scholars that draw from the general values of federalism, rely on the myth that state courts are monolithic institutions. In fact, the reality of state courts—including their diversity, relative obscurity, and independence from state institutions—frustrates these values and counsels against deference to local-court decision making.<sup>14</sup>

In addition, theories of judicial federalism miss what I believe is the principal conceptual function of local courts: providing us with an understanding of the justice we have, not the justice we aspire to or the justice required by law. If we look closely enough, we can see that where local courts fail, they fail in part because we allow them to fail. We underfund local courts; we tolerate state systems that do not supervise them; and we have declined to create a federal bureaucracy to monitor them. Local courts—and not federal courts—are the starting point from which we should define and evaluate our system of justice.<sup>15</sup>

This analysis requires some methodological novelty. To build a structural argument, the Article weaves together state and local laws, state judicial administration, federal courts doctrines, and federal enforcement laws. What might appear to be a motley collection of legal authorities actually underscores one reason why studying local courts has been such a challenge: no single discipline offers an analytic framework sufficient to capture the reality of local courts. Four areas deeply informed by these courts—federal courts, civil procedure, state government, and local government—all ignore them. The field of federal courts, for one, addresses jurisdictional questions that directly affect the reach of local courts. And yet to the extent federal courts scholarship acknowledges local courts at all, it describes them in generalities and fails to engage

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<sup>12</sup> See *infra* Subsection II.B.1.

<sup>13</sup> See *infra* Subsection II.B.2.

<sup>14</sup> See *infra* Section III.A.

<sup>15</sup> See *infra* Section III.B.

with, or even inquire into, their structural and experiential realities.<sup>16</sup> Civil procedure scholarship focuses “primarily, if not exclusively, on federal litigation and the Federal Rules of Civil Procedure.”<sup>17</sup> Scholarship on state law, including my own, has ignored local courts in favor of the state legislative and executive branches.<sup>18</sup> Even local government literature, the usual stomping grounds for vital but non-national issues otherwise overlooked by the academy, has ignored local courts.<sup>19</sup>

<sup>16</sup> By their own admission, federal courts scholars have treated local courts as “the neglected stepchild of the field.” Michael E. Solimine & James L. Walker, *Respecting State Courts: The Inevitability of Judicial Federalism* 141 (1999). As an example, consider the question of “parity,” a foundational concept in federal courts which refers to the relative competence of state and federal courts to adjudicate federal claims. Though parity directly bears upon the abilities of *local* courts, parity literature has never considered the diversity of local court ability, the particular challenges that local courts face, or the complex relationships these courts have with the rest of the state system. See, e.g., Bator, *supra* note 4, at 622–23 (calling state and federal courts “partners” in the endeavor to enforce federal constitutional principles and elaborating on federal-court competence); Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1105–06 (1977) (arguing that a belief in parity is “at best, a dangerous myth” and that jurisdictional decisions are not outcome-neutral).

<sup>17</sup> See Barbara A. Babcock, Toni M. Massaro & Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, in *A Critical Guide to Civil Procedure* (Brooke Coleman et al. eds., forthcoming 2020) (manuscript at 2) (on file with author); see also *id.* at 1–2 (“[T]he study of how due process works outside the federal courts in the spaces where the vast majority of ordinary people encounter the administration of justice generally does not resurface. . . . This is most unfortunate. . . . Students are increasingly taught ideal procedural justice. . . . Meanwhile, what most Americans experience is nothing like what the models of either administrative or judicial process describe, nothing like what we debate in studying procedure in the federal courts, whatever its defects.”).

<sup>18</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077 (2014) (situating state identity and partisanship within the larger system of federalism); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 *N.Y.U. L. Rev.* 107 (2018) (exploring the lack of transparency in state bureaucracy and its consequences); Miriam Seifter, *Gubernatorial Administration*, 131 *Harv. L. Rev.* 483, 484 (2017) (providing a history and functional analysis of gubernatorial power); Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 *U. Chi. L. Rev.* 1083 (2018) (describing the ways in which conflict between and among the state legislative and executive branches can undermine federal rights).

Scholarship on state courts and the benefits of state-court constitutionalism—“new judicial federalism” scholarship—has also ignored local courts. See, e.g., Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 *Hastings Const. L.Q.* 93, 94–98 (2000) (arguing for state supreme courts to embrace a new role in constitutional interpretation without mentioning local courts).

<sup>19</sup> Local government scholarship has “for too long failed to see local judges as the complex players they are in municipal governments.” Ethan J. Leib, *Local Judges and Local Government*, 18 *N.Y.U. J. Legis. & Pub. Pol’y* 707, 739 (2015); see also *id.* at 737 (“[L]ocal government scholars who spend time thinking about optimizing the relationships among different levels of government—federal, state, local—have much more work to do to situate local courts within this matrix.”).

The legal academy's failure to account for local courts—with two narrow exceptions<sup>20</sup>—has essentially divorced legal theory from the most

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Instead, local government theory has largely focused on the balance of policymaking authority between state and local governments, see, e.g., David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2255 (2003); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1 (1990); Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057 (1980), the liminal legal space occupied by local governments, see, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841 (1994); Richard C. Schragger, *The Limits of Localism*, 100 *Mich. L. Rev.* 371 (2001); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 *Wis. L. Rev.* 83, land use, urban planning, and governance problems unique to local government, see, e.g., Michelle Wilde Anderson, *The New Minimal Cities*, 123 *Yale L.J.* 1118 (2014); Nestor M. Davidson, *Localist Administrative Law*, 126 *Yale L.J.* 564 (2017); David Schleicher, *City Unplanning*, 122 *Yale L.J.* 1670 (2013), and federal-state-local relationships in various policy areas, see, e.g., Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 *Mich. L. Rev.* 1201 (1999); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567 (2008); Justin Weinstein-Tull, *Election Law Federalism*, 114 *Mich. L. Rev.* 747 (2016). This is not, of course, an exhaustive list of categories.

<sup>20</sup> The first exception is misdemeanor criminal process. Scholars have unearthed fascinating (and horrifying) details of how criminal procedure works in the context of minor offenses tried in local courts. See, e.g., Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1992); Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (2018) (describing the “procedural hassle” of criminal procedure in New York local courts); Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (2018); Alexandra Natapoff, *Misdemeanors*, 85 *S. Cal. L. Rev.* 1313, 1315 (2012) [hereinafter Natapoff, *Misdemeanors*] (“Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication.”). And a deep literature exists that probes the rise of pleas and the process surrounding them. See, e.g., Josh Bowers, *Punishing the Innocent*, 156 *U. Pa. L. Rev.* 1117 (2008); George Fisher, *Plea Bargaining's Triumph*, 109 *Yale L.J.* 857 (2000); Thea Johnson, *Fictional Pleas*, 94 *Ind. L.J.* 855 (2019); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *Yale L.J.* 1979 (1992).

The second exception is the response to Michael Brown's killing in Ferguson, Missouri. After Brown's death, the U.S. Department of Justice issued a report that detailed the failures of the Ferguson municipal court, including that the court handled criminal charges “not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue.” See U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 42 (2015) [hereinafter DOJ Ferguson Report] [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/26R9-AB4B]. Scholars have since done illuminating work on local-court reform using Ferguson as a case study. See, e.g., Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 *Wm. & Mary L. Rev.* 1171 (2017) (describing the many constitutional rights violated by Ferguson's local-court system and the impact of individual defense counsel on reform efforts); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 *Harv. L. Rev.*



fundamental and common experiences of our justice system. As a consequence, the study of local courts is unexpectedly nascent.<sup>21</sup> That status is perverse. Why should most litigants' primary experiences with the legal system be academic afterthoughts?

Part I of this Article explains the high stakes—both practical and conceptual—associated with local courts. Part II links these problems with the structures of local courts by arguing that the state and federal systems do not provide significant oversight of these courts. Section II.A provides new accounts of the administrative and substantive relationships between local courts and their states. Section II.B describes how federal law shelters local courts from external scrutiny. Whereas Part II examines the effects of the state and federal systems on the internal workings of local courts, Part III does the opposite: it looks outward and reevaluates our thinking on judicial federalism in light of the diversity and problems of local courts.

I conclude by arguing that local courts should not be relegated to the status of quirky hybrid within the academy. I speculate about what a field of local courts would look like and suggest that treating local courts as a fundamental building block within the law would both solve a number of problems and create a promising set of questions for further study.

## I. THE STAKES

Local courts are, by far, the most commonly used courts in our justice system. In 2015, litigants filed 86.2 million cases in local courts.<sup>22</sup> During

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2283 (2018) (arguing that the *Younger* abstention doctrine precludes meaningful oversight of local courts and governments).

<sup>21</sup> Although there is essentially no academic legal scholarship on *local courts as courts*, illuminating scholarship does exist on specific issues that *take place* in local courts, including problems relating to problem-solving and subject-matter courts. See, e.g., Richard C. Boldt, Problem-Solving Courts and Pragmatism, 73 Md. L. Rev. 1120 (2014) (considering how pragmatism informs the judicial process in problem-solving courts); Erin R. Collins, Status Courts, 105 Geo. L.J. 1481 (2017) (describing the promise and pitfalls of local courts that are tailored to certain types of defendants); 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 (2013) (empirically evaluating different kinds of legal services in Massachusetts district courts).

But in the same way that we don't consider the study of federal criminal law to satisfy our need to understand federal courts more broadly, neither does the study of specific legal issues that arise in local courts satisfy our need to understand local courts.

<sup>22</sup> Nat'l Ctr. for State Courts & Conference of State Court Adm'rs, Examining the Work of State Courts: An Overview of 2015 State Court Caseloads 1 (2016) [hereinafter Examining

that same year, they filed 343,176 cases in federal courts.<sup>23</sup> Local courts are thus overwhelmingly the point of contact between humans and our justice system. This Part describes what local courts do and how things go wrong.

First: the phrase “local court” requires some definition.<sup>24</sup> I define it as any non-appellate judicial court authorized or created by state law. This includes two subcategories: general-jurisdiction and limited-jurisdiction courts. General-jurisdiction courts tend to be called superior courts, district courts, or circuit courts and can hear any kind of claim: federal, state, or local. Limited-jurisdiction courts tend to be hyperlocal, like municipal courts and city courts. They hear local claims and/or a subset of state-law claims, limited either by subject matter (like family, drug, or tax) or seriousness (like criminal penalties of no longer than six months in jail or civil claims of up to \$10,000).

All states have general-jurisdiction courts, but only some have limited-jurisdiction courts. California, for example, calls its general-jurisdiction courts “superior courts” and has no other local courts.<sup>25</sup> Arizona also calls its general-jurisdiction trial-level state courts “superior courts,” but Arizona local governments also operate “municipal courts” and “justice of the peace courts” (often called “justice courts”), both of which possess limited jurisdiction over state law and local ordinances.<sup>26</sup>

Structurally, these courts draw their authority from different sources. General-jurisdiction courts are created and defined by state law.

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the Work of State Courts], <http://www.courtstatistics.org/~media/Microsites/Files/-CSP/EWSC%202015.ashx> [<https://perma.cc/AM4J-SA4F>].

<sup>23</sup> U.S. Courts, Federal Judicial Caseload Statistics, at tbls.C & D (2015), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables> [<https://perma.cc/8HJ4-TAGC>]. For a breakdown of the types of civil claims filed, see *id.* at tbl.C-2, [https://www.uscourts.gov/sites/default/files/c02mar15\\_1.pdf](https://www.uscourts.gov/sites/default/files/c02mar15_1.pdf) [<https://perma.cc/9Q-4M-6EAB>].

<sup>24</sup> One local judge told me that when he speaks with other local judges from different states, it takes some time to figure out whether they have anything in common.

<sup>25</sup> See About California Courts, Cal. Courts: Judicial Branch Cal., <https://www.courts.ca.gov/2113.htm> (last visited Feb. 12, 2020) [<https://perma.cc/3MAV-3E99>].

<sup>26</sup> See How Arizona Courts Are Organized, Ariz. Judicial Branch, <https://www.azcourts.gov/guidetoazcourts/How-Arizona-Courts-are-Organized> (last visited Feb. 12, 2020) [<https://perma.cc/3JVC-BSC9>]; Limited Jurisdiction Courts, Ariz. Judicial Branch, <https://www.azcourts.gov/guidetoazcourts/Limited-Jurisdiction-Courts> (last visited Feb. 12, 2020) [<https://perma.cc/ZZ2D-98X7>].

Hyperlocal courts are more varied: they tend to be authorized by state law but created and shaped locally.<sup>27</sup>

As this Part demonstrates, local courts adjudicate high-stakes claims. This is true even of limited-jurisdiction courts, which hear claims that are comparatively less serious than general-jurisdiction courts. Smaller claims and crimes can still have huge consequences for the people involved. Misdemeanors can carry heavy collateral consequences, like losing career licensing and even being removed from the country.<sup>28</sup> Spending even a short amount of time in jail can change a person's life.<sup>29</sup> And for most, \$10,000 is a huge sum.

I include both limited- and general-jurisdiction courts in my definition of "local courts" because I am primarily interested in studying the features of courts that provide entry to our vast system of federal and state laws.<sup>30</sup> That said, any label inevitably oversimplifies. Local courts are hybrid institutions with mixed identities, helmed by judges "with some very difficult and layered role responsibilities."<sup>31</sup> Both limited- and general-jurisdiction local courts experience an ongoing push and pull of state and local influence, and different courts experience these influences differently. I emphasize that the nature of these courts—whether state or local, or both simultaneously—is a discussion I welcome. Though I call general-jurisdiction trial-level courts "local courts" in this Article, they are also "state courts." That ambiguity is not a problem for my argument—in fact, any analysis that does not grapple with it is likely to problematically oversimplify.

Important differences do exist between limited- and general-jurisdiction courts, which I do not downplay: general-jurisdiction local

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<sup>27</sup> See generally *infra* Section II.A.

<sup>28</sup> Thea Johnson, *Measuring the Creative Plea Bargain*, 92 *Ind. L.J.* 901, 907–08 n.30, 927 (2017) ("[M]isdemeanors carry profound consequences.").

<sup>29</sup> JR Thorpe, *Short Term Incarceration Hurts Women and Mothers in Particular, & People Are Calling To End the Practice*, *Bustle.com* (Jan. 2, 2018), <https://www.bustle.com/p/short-term-incarceration-hurts-women-mothers-in-particular-people-are-calling-to-end-the-practice-7706903> [<https://perma.cc/W2NW-2FJF>] (noting that short sentences often result in the loss of housing and the displacement of children).

<sup>30</sup> The alternative categorizations are unworkable. To include only hyperlocal courts would exclude a number of states from the analysis altogether. To include only trial-level state courts would exclude thousands of courts that regularly administer state and federal law and serve as the first contact for millions of claims each year. Others who have studied local courts have made similar, but not identical, distinctions. See Leib, *supra* note 7, at 903–05.

<sup>31</sup> Leib, *supra* note 19, at 738. In this way, local courts track local governments generally, which themselves "exist[] in a netherworld of shifting and indeterminate legal status," answer to multiple sovereigns, and adopt plural identities. Ford, *supra* note 19, at 1864.

courts tend to be more closely connected with the state system than hyperlocal courts and often identify more as state institutions than local ones.<sup>32</sup> Nevertheless, even general-jurisdiction local courts have strong local ties. Many general-jurisdiction local-court judges are elected locally,<sup>33</sup> serve on courts that are funded locally,<sup>34</sup> and see themselves as important parts of the community where they reside.<sup>35</sup> The lack of administrative and appellate oversight by higher state authorities makes these courts more independent and local in nature than we might otherwise think given their official place within the state justice systems.<sup>36</sup> The truth is that these courts can be categorized in multiple ways, and general versus limited jurisdiction is just one meaningful categorization. Another is the difference between rural, suburban, and urban courts. General-jurisdiction courts in rural areas may look a lot more like limited-jurisdiction courts in those same areas than they do other general-jurisdiction courts in suburban and urban areas.

I ultimately believe that contesting the nature of these courts is itself a productive debate that can generate insights into the political ecosystems of local courts and the psychology of their judges. As between including or excluding that debate from the scope of this Article, I prefer to include it, with the understanding that a more inclusive definition of “local courts” requires a correspondingly nuanced set of conclusions about these courts, sensitive to the real differences contained within the category.

#### *A. What Local Courts Do*

Local courts resolve a high volume and variety of cases. Of the 86.2 million cases filed in 2015, for example, 46.4 million were traffic cases, 18.1 million were criminal cases, 15.4 million were civil cases, 5.0 million were domestic relations cases, and 1.3 million were juvenile

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<sup>32</sup> See generally *infra* Subsection II.A.1.

<sup>33</sup> See *infra* Part II.

<sup>34</sup> See *infra* Part II.

<sup>35</sup> See Leib, *supra* note 19, at 725 (noting that a majority of town and village judges surveyed in a New York district “felt primarily ‘of the locality,’ not of the state”).

<sup>36</sup> See *infra* Section II.A.

cases.<sup>37</sup> As a point of comparison, of the 343,176 cases filed in federal court, 61,568 were criminal<sup>38</sup> and 281,608 were civil.<sup>39</sup>

Local courts also adjudicate many federal issues. In fact, they hear more of them than federal courts do. Local courts hear the “vast majority” of federal constitutional claims, largely in the context of Bill of Rights defenses in state criminal proceedings.<sup>40</sup> These cases are, in theory, appealable to the U.S. Supreme Court via the state supreme court, but the reality is that the U.S. Supreme Court is able to review very few of these dispositions.<sup>41</sup>

Local courts perform their duties in a wide variety of ways, reflective of the diversity of state judicial structures. At their best, local courts can serve as laboratories for innovative approaches to the delivery of justice. Some consider them to be “compassionate courts,”<sup>42</sup> more in touch with the needs of their constituents than other state and federal courts. One judge in Ethan Leib’s interview study of New York local judges stated that “[s]ometimes what is great about the job is making a difference in people’s lives at the micro-level and showing them how to find a support system.”<sup>43</sup> These are “the people’s courts,” Leib states, “closest to the day-to-day life of the law that citizens experience, contributing a great deal to people’s sense of the legitimacy of their legal system.”<sup>44</sup>

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<sup>37</sup> Examining the Work of State Courts, *supra* note 22, at 3. Of the civil cases, most (51%) are contracts-related. The rest consist of small claims cases (16%), probate and estate claims (11%), tort claims (4%), real property claims (1%), and uncategorized other (18%). *Id.* at 6. Of criminal cases, approximately 20% are felonies and 77% are misdemeanors. *Id.* at 13.

<sup>38</sup> U.S. Courts, *supra* note 23, at tbls.C & D. The vast majority of those cases (87.9%) concerned felonies. See *id.* at tbl.D-1.

<sup>39</sup> *Id.* at tbl.C. For a breakdown of the types of civil claims filed, see *id.* at tbl.C-2.

<sup>40</sup> Michael E. Solimine, *The Future of Parity*, 46 *Wm. & Mary L. Rev.* 1457, 1473 & 1473 n.91 (2005); see also Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As “Law” and the Erie Doctrine*, 120 *Yale L.J.* 1898, 1960 (2011) (“[S]imply by virtue of their numbers, state courts hear more federal-question cases than do federal courts, and so these state cases have a significant effect on the meaning of federal law.”).

<sup>41</sup> See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 *Colum. L. Rev.* 1211, 1219–20 (2004) (“The Court’s jurisdiction extends to all state cases involving federal questions. Nonetheless, that jurisdiction is discretionary and caseload constraints make it impossible to hear the many cases in which a federal claim might be present.”).

<sup>42</sup> Leib, *supra* note 19, at 734 & 734 n.160.

<sup>43</sup> *Id.* at 734 n.161.

<sup>44</sup> *Id.* at 734 & 734 n.162. In addition to resolving judicial disputes, local-court judges also perform administrative functions, like presiding over name-change applications and regulating whether minors may access abortions. See Michael C. Pollack, *Courts Beyond Judging*, 2021 *BYU L. Rev.* (forthcoming 2021) (manuscript at 11, 15).

To meet these needs, some local courts design creative and humane programs that improve the delivery of justice. For example, local courts have designed programs that divert certain criminal defendants away from the criminal justice system and toward special purpose courts.<sup>45</sup> One Missouri county is piloting a family drug treatment court meant to ensure that parents can be reunited with their children after finishing their sentences and program requirements.<sup>46</sup> Local courts in Delaware have the authority to move juveniles to family court, even if they were charged as adults.<sup>47</sup> Local judges in Illinois have the discretion to remove juveniles from criminal court into juvenile court.<sup>48</sup> A community court in one Arizona county offers comprehensive social services and reduced sanctions to chronic offenders of low-level crimes.<sup>49</sup>

Local courts have also piloted programs meant to increase judicial efficiency. These include programs that increase court appearance rates by reminding litigants of their court schedule,<sup>50</sup> programs that reduce prison overcrowding by expanding ankle bracelet initiatives,<sup>51</sup> and programs that provide quicker resolution for complex corporate litigation by removing those cases to specially tailored commercial courts.<sup>52</sup> Local

<sup>45</sup> Drug courts, for example, seek to remove drug offenders from the criminal-court system and place them into rehabilitation programs. See generally Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 *Ohio St. L.J.* 1479 (2004).

<sup>46</sup> The program is a joint venture between the county juvenile court and a public behavioral health clinic, and one local judge hopes to “see long-term benefits to the community.” *Experimental Family Court Begins*, *Daily Journal Online* (Dec. 28, 2018), [https://dailyjournalonline.com/news/local/experimental-family-court-begins/article\\_ab5e9-140-cef4-5904-990b-3455507204ce.html](https://dailyjournalonline.com/news/local/experimental-family-court-begins/article_ab5e9-140-cef4-5904-990b-3455507204ce.html) [<https://perma.cc/B2Q7-9KKZ>].

<sup>47</sup> Zoë Read, *Delaware Juvenile Justice Reforms Signed into Law*, *WHYY* (Oct. 12, 2017), <https://whyy.org/articles/delaware-juvenile-justice-reforms-signed-law/> [<https://perma.cc/8AAM-NVCA>].

<sup>48</sup> Monique Garcia, *New Illinois Law Aims To Keep Teens out of Prison System*, *Chi. Trib.* (Dec. 31, 2015), <https://www.chicagotribune.com/news/local/politics/ct-illinois-juvenile-justice-new-laws-met-20151230-story.html> [<https://perma.cc/L9ZH-GEYR>].

<sup>49</sup> See *Mesa Community Court* (June 2018), <https://www.mesaaz.gov/home/show-document?id=30166> [<https://perma.cc/J5JG-95HZ>].

<sup>50</sup> *Pretrial Justice Ctr. for Courts, Use of Court Date Reminder Notices To Improve Court Appearance Rates 1* (2017), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0015/1635/pjcc-brief-10-sept-2017-court-date-notification-systems.ashx.pdf](https://www.ncsc.org/__data/assets/pdf_file/0015/1635/pjcc-brief-10-sept-2017-court-date-notification-systems.ashx.pdf) [<https://perma.cc/WC6Y-3S6E>].

<sup>51</sup> Mike Morris, *County Hopes Ankle Monitors Can Ease Jail Overcrowding*, *Hous. Chron.* (June 27, 2011), <https://www.chron.com/news/houston-texas/article/County-hopes-ankle-monitors-can-ease-jail-2077453.php> [<https://perma.cc/RJY4-RS3G>].

<sup>52</sup> Michael J. Aprahamian, *The Need for Speed: Commercial Court Open for Business*, *Wis. Law.* (Jan. 2018), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/-Article.aspx?Volume=91&Issue=1&ArticleID=26094> [<https://perma.cc/Y8LF-EGAV>]; Nick

courts have piloted programs meant to increase fairness, like improved pre-trial processes for incarcerated minority defendants<sup>53</sup> and pre-trial release reform.<sup>54</sup> And they have piloted programs aimed at increasing public access to the courts by putting court records<sup>55</sup> and applications online,<sup>56</sup> allowing litigants to handle small claims on their own laptops and smartphones,<sup>57</sup> introducing cameras to local courtrooms,<sup>58</sup> and improving transcripts of court sessions.<sup>59</sup>

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Watson, Judges To Explore Feasibility of Statewide Business Court, *Gainesville Times* (May 25, 2018, 6:39 PM), <https://www.gainesvilletimes.com/news/judges-explore-feasibility-statewide-business-court/> [<https://perma.cc/HB9J-US8K>].

<sup>53</sup> Emily Welker, Pilot Program Launched To Improve Legal Process for ND Minorities Behind Bars, *Grand Forks Herald* (July 10, 2015, 11:00 PM), <https://www.grandforksherald.com/news/crime-and-courts/3783758-pilot-program-launched-improve-legal-process-nd-minorities-behind-bars> [<https://perma.cc/UN7Z-DYPU>] (“The action was taken after a state minority justice commission found that minorities arrested in North Dakota may spend more time behind bars than their white counterparts.”).

<sup>54</sup> Peter Biello, New Hampshire Courts Launch Bail Reform Initiative, *N.H. Pub. Radio* (Mar. 19, 2018), <https://www.nhpr.org/post/new-hampshire-courts-launch-bail-reform-initiative> [<https://perma.cc/33PR-Q25R>]; Jessi Stone, Pretrial Release Program Comes to Western NC, *Smoky Mountain News* (Sept. 26, 2018), <https://www.smokymountainnews.com/news/item/25610-pretrial-release-program-comes-to-western-nc> [<https://perma.cc/E5XY-3VGJ>].

<sup>55</sup> Lee Filas, You Can Now Access Lake County Court Cases Online, *Daily Herald* (May 10, 2013, 7:04 AM), <https://www.dailyherald.com/article/20130510/news/705109931/> [<https://perma.cc/BHG9-XSZS>].

<sup>56</sup> Superior Court Clerk’s Office Announces New and Renewal Notary Public Online Application Process, *Calhoun Times* (Sept. 12, 2018), [http://www.northwestgeorgianews.com/calhoun\\_times/superior-court-clerk-s-office-announces-new-and-renewal-notary/article\\_2576235e-b68d-11e8-bec2-b75523aa729e.html](http://www.northwestgeorgianews.com/calhoun_times/superior-court-clerk-s-office-announces-new-and-renewal-notary/article_2576235e-b68d-11e8-bec2-b75523aa729e.html) [<https://perma.cc/8R43-6Q66>].

<sup>57</sup> Felicia Martinez, Pilot Program Brings Small Claims Court to Your Computer, *KSL TV* (Oct. 25, 2018, 7:00 PM), <https://www.ksl.com/article/46414369/pilot-program-brings-small-claims-court-to-your-computer> [<https://perma.cc/MC6R-ESJ2>]; Elle Thomas, From the Courtroom to Your Room, Utah Court System Pilot Program Brings Small Claims Cases Online, *Fox 13 Salt Lake City* (Oct. 25, 2018, 5:30 PM), <https://fox13now.com/2018/10/25/from-the-courtroom-to-your-room-utah-court-system-pilot-program-brings-small-claims-cases-online/> [<https://perma.cc/5QCW-D3C8>].

<sup>58</sup> Ryan Haggerty, Pilot Program To Allow Cameras in Circuit Court, *Chi. Trib.* (Jan. 23, 2012, 9:55 PM), <https://www.chicagotribune.com/news/local/breaking/chi-pilot-program-to-allow-cameras-in-circuit-court-20120123-story.html> [<https://perma.cc/8F22-KHEH>]; Tom Olsen, Considering Cameras in the Courtroom in Minnesota, *Duluth News Trib.* (Dec. 7, 2014, 8:00 AM), <https://www.duluthnewstribune.com/news/3629177-considering-cameras-courtroom-minnesota> [<https://perma.cc/5HUJ-KLGF>].

<sup>59</sup> Donald W. Beatty, Supreme Court of S.C., Administrative Order Re: Digital Courtroom Recorder Project Pilot Program, *Court News, S.C. Judicial Branch* (Jan. 8, 2019), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2366> [<https://perma.cc/G7GY-BMBA>].

*B. What Goes Wrong*

Injustice also takes place in local courts. Local-court problems comprise violations of federal statutory and constitutional law as well as state law, and include overlong waits for trial, a dearth of interpreters, ineffective or non-existent public defense systems, inaccessibility to the public, fewer staff (and all of the problems that entails), facilities that are inaccessible to people with disabilities, and systems of fines and debtors' prisons that can have a devastating impact on indigent defendants. As one advocate told me, local courts are often "constitution-free zones."<sup>60</sup>

These problems are widespread throughout the states—as illustrated by the voluminous footnotes in this Section. They also vary in severity. Some may violate the Constitution, while others may violate federal or state statutory law. Others do not rise to the level of illegal action but still reflect a failure to administer justice, with real consequences on litigants' lives.

*Delay and staff shortage.* Local courts often experience staffing shortages, which cause both delay in hearing and processing cases and limited access to court staff. Local courts delay trials<sup>61</sup> despite federal and

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<sup>60</sup> As a point of comparison, federal district courts do not experience anywhere near the depth or diversity of administrative problems experienced by local courts. When problems do arise, they often arise in districts with unusually large dockets and persistent judicial vacancies. California's Eastern District, for example, receives many pro se complaints from prisoners housed within the district. See John E. Dannenberg, Prisoner Litigation Swamps California Eastern District Court; Ninth Circuit Recruits Other Judges to Help, Prison Legal News (Feb. 15, 2009), <https://www.prisonlegalnews.org/news/2009/feb/15/prisoner-litigation-swamps-california-eastern-district-court-8232ninth-circuit-recruits-other-judges-to-help/> [<https://perma.cc/6EYT-C8YV>]. That understaffing, as in local courts, can cause trial wait times to increase. See Jim Schultz, This Federal Judge Feels Like He's in the "I Love Lucy" Chocolate Scene, Record Searchlight (June 20, 2018, 5:00 PM), <https://www.redding.com/story/news/local/2018/06/21/federal-judges-say-retirements-heavy-caseloads-threaten-civil-suits/717720002/> [<https://perma.cc/E6WS-X7BH>]; Sudhin Thanawala, Wheels of Justice Slow at Overloaded Federal Courts, Chi. Trib. (Sept. 28, 2015, 12:32 AM), <https://www.chicagotribune.com/news/nationworld/sns-bc-us-federal-case-backlog-20150927-story.html> [<https://perma.cc/LLF3-SHNZ>].

<sup>61</sup> ISBA Report, *supra* note 1, at 11–21 (finding that budget cuts had led to civil and criminal case delay, decreased probation services, and ailing courthouse conditions); BusinessNC, The Future of NC: Full Court Press, Bus. N.C. (Feb. 4, 2016), <http://businessnc.com/the-future-of-nc-full-court-press/> [<https://perma.cc/9YBK-QRUM>] (noting that the North Carolina justice system was understaffed by 536 positions, which resulted in increased adjudication times); Stephanie Clifford, For Victims, an Overloaded Court System Brings Pain and Delays, N.Y. Times (Jan. 31, 2016), <https://www.nytimes.com/2016/02/01/nyregion/for-victims-an-overloaded-court-system-brings-pain-and-delays.html> [<https://perma.cc/T2EY-X82Y>] (noting that "[t]his is a story of an overloaded system, where the schedules of judges and lawyers,



state speedy trial requirements.<sup>62</sup> Reduced staff causes local courts to abandon telephone hotlines, end support for diversion programs, and even close their doors during work hours.<sup>63</sup> Reduced legal clerk staff, and even sometimes a shortage of judges, can decrease the quality of adjudication.<sup>64</sup>

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records requests, medical examinations and simple errors can stretch cases out over years,” and that those delays can have devastating consequences for victims and their families); Maura Dolan, *Cutbacks in California Court System Produce Long Lines, Short Tempers*, L.A. Times (May 10, 2014, 5:23 PM), <http://www.latimes.com/local/la-me-court-cuts-20140511-story.html> [<https://perma.cc/F9AF-HBUZ>]; Jack Dura, *Order in the Court: Judges Balance Judicial Shortage amid Rising Caseload*, Bismarck Trib. (Mar. 3, 2018), [https://bismarcktribune.com/news/local/crime-and-courts/order-in-the-court-judges-balance-judicial-shortage-amid-rising/article\\_57c2fe84-d49e-557f-8f93-fc774a3cb8d3.html](https://bismarcktribune.com/news/local/crime-and-courts/order-in-the-court-judges-balance-judicial-shortage-amid-rising/article_57c2fe84-d49e-557f-8f93-fc774a3cb8d3.html) [<https://perma.cc/5LN2-FJ7F>] (noting that a shortage of judges in North Dakota leads to delays in hearing and resolving cases); Gregory Yee & Angie Jackson, *How a Shortage of Critical Employees Is Costing South Carolina’s Court System*, Post & Courier (Mar. 4, 2018), [https://www.postandcourier.com/news/how-a-shortage-of-critical-employees-is-costing-south-carolina/article\\_ec66d38c-1804-11e8-9e7e-33df152a2b09.html](https://www.postandcourier.com/news/how-a-shortage-of-critical-employees-is-costing-south-carolina/article_ec66d38c-1804-11e8-9e7e-33df152a2b09.html) [<https://perma.cc/JU-C3-GB7K>] (“A lack of court reporters in South Carolina—trained stenographers who transcribe verbatim records of proceedings—is causing last-minute cancellations of hearings ranging from divorces to criminal pleas. To officials and observers, this means time wasted, taxpayer money lost and added stress on victims, witnesses and families.”).

<sup>62</sup> See *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (incorporating the Sixth Amendment’s speedy trial provision against the states); Darren Allen, *Note, The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 Campbell L. Rev. 101, 105–06 (2004) (noting that states have enacted their own speedy trial provisions to supplement the federal Sixth Amendment right).

<sup>63</sup> Liles Burke, *Alabama’s Courts Are Severely Threatened by Underfunding*, AL.com (Mar. 7, 2016), [https://www.al.com/opinion/index.ssf/2016/03/alabamas\\_courts\\_are\\_severely\\_t.html](https://www.al.com/opinion/index.ssf/2016/03/alabamas_courts_are_severely_t.html) [<https://perma.cc/3NMA-BR8R>] (noting that “[t]he only way that the judiciary has been able to operate within the monies prescribed for it” is by eliminating bailiffs and clerk staffs, resulting in delayed trials and decreased clerk accessibility); Stephen Stock, Rachel Witte & Michael Horn, *Budget Cuts to Courts Now Affecting Criminal Cases; Creating Backlogs Similar to Civil Case Calendars*, NBC Bay Area (Feb. 12, 2018, 4:58 PM), <https://www.nbcbayarea.com/news/local/Budget-Cuts-to-Courts-Now-Affecting-Criminal-Cases-Creating-Backlogs-Similar-to-Civil-Case-Calendars-473857843.html> [<https://perma.cc/J7KF-UDZP>] (noting that the previous consequences of funding problems on civil cases, which had “forced courts across the Bay Area to reduce office hours, wean staffing, and close entire courtrooms,” had now spread to the criminal docket); Whitney Woodworth, *Oregon Judiciary Seeks \$5.3 Million or State Courts Could Cut Hours*, Statesman J. (Jan. 11, 2018, 6:01 PM), <https://www.statesmanjournal.com/story/news/2018/01/11/oregon-judiciary-seeks-million-state-courts-could-cut-hours/1026797001/> [<https://perma.cc/MR7C-Y6-DN>] (“Without the money, courts in Oregon’s 36 counties will be forced to limit hours, cut staff and reduce services, such as family law, drug courts and mental health court, judicial officials say.”).

<sup>64</sup> Ken Shigley, *Insights on Fulton Superior Court’s Docket Problems*, Atlanta Inj. L. Blog (Apr. 30, 2007), <https://www.atlantainjurylawblog.com/civil-litigation/insights-on-fulton-superior-courts-docket-problems.html> [<https://perma.cc/T58K-U9N3>] (describing an

The stories can feel surreal. A local-court clerk in California brought toys for children waiting in line with their parents because she “[couldn’t] stand babies crying and parents wanting to beat their children.”<sup>65</sup> A local-court judge in Alabama stated, in a court order, that court staff “literally had to beg for money to keep the Circuit afloat . . . to pay clerks in the Circuit Clerk’s office, and to pay our law clerks” and bemoaned that the reduction in available trial time affected trial scheduling.<sup>66</sup> In Wake County, North Carolina, assistant district attorneys took turns sitting at the front desk and answering phones rather than preparing cases, because they could not afford administrative staff.<sup>67</sup>

A shortage of interpreters is a particularly troublesome form of staff shortage. Limited English Proficiency (LEP) litigants are constitutionally entitled to interpreters in criminal cases.<sup>68</sup> They are additionally statutorily entitled to interpreters in any court that receives federal funding pursuant to Title VI of the Civil Rights Act of 1964.<sup>69</sup>

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interview with a local judge in Fulton Superior Court who would “tell new judges, ‘You don’t have time to get it perfect. There are X many new cases coming in each month, and we have to get X many out the door. We all want to get it right, but there is a tremendous crush of cases, and we simply cannot lose ground by not processing the number that comes in’”).

<sup>65</sup> Dolan, *supra* note 61.

<sup>66</sup> See Lorelei Laird, Judge’s Order Says Alabama Court ‘Literally Had to Beg for Money’ To Pay Staff, ABA J. (June 20, 2018, 10:00 AM), [http://www.abajournal.com/news/article/judges\\_order\\_says\\_alabama\\_court\\_literally\\_had\\_to\\_beg\\_for\\_money\\_to\\_pay\\_staff](http://www.abajournal.com/news/article/judges_order_says_alabama_court_literally_had_to_beg_for_money_to_pay_staff) [<https://perma.cc/FX3P-8RNM>] (“I hate that you lost your jury setting. You probably won’t get another this year, as we are booked through November, and there is no civil jury docket in December.”).

<sup>67</sup> BusinessNC, *supra* note 61.

<sup>68</sup> See U.S. Dep’t of Justice, Civil Rights Div., Language Access in State Courts 3, 20–21 n.23 (2016), <https://www.justice.gov/crt/file/892036/download> [<https://perma.cc/GGJ3-YVQ6>] (noting that “[f]ederal courts have found the constitutional right to language access services in criminal proceedings under the Fifth, Sixth, and Fourteenth Amendments” and compiling cases).

<sup>69</sup> See 42 U.S.C. § 2000d (2012) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); see also Laura Abel, Brennan Ctr. for Justice, Language Access in State Courts 8–10 (2009) [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Language-AccessinStateCourts.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Language-AccessinStateCourts.pdf) [<https://perma.cc/6BLN-8PTB>] (describing the various legal obligations on state and local courts to provide free interpreters for LEP litigants).

The Department of Justice has recently clarified this requirement in a guidance letter. Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to Chief Justices and State Court Administrators (Aug. 16, 2010), [https://www.lep.gov/final\\_courts\\_ltr\\_081610.pdf](https://www.lep.gov/final_courts_ltr_081610.pdf) [<https://perma.cc/A8RW-RDWF>].

Despite these obligations, and despite the catastrophic impact lacking an interpreter can have on litigants' lives—defendants wrongly incarcerated, children wrongly placed in foster care, migrants wrongly deported, just to name a few<sup>70</sup>—local courts in a number of states lack sufficient interpreters for LEP litigants.<sup>71</sup> Again, the stories are bizarre. A woman in California court applying for a restraining order against an abusive husband was forced to translate *for him*.<sup>72</sup> A local-court clerk in Queens, New York “ran to a Korean deli” nearby to persuade the owner to translate.<sup>73</sup> These are anecdotes, but quantitative research also shows that problems like these exist throughout the country.<sup>74</sup>

<sup>70</sup> See Letter from Laura K. Abel, Deputy Dir., Justice Program, Brennan Ctr. for Justice, to Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div. (Feb. 2, 2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/DOJ%20Letter%20with%20factsheets.pdf> [<https://perma.cc/UF4U-KW4K>].

<sup>71</sup> See generally Wendy N. Davis, Justice Moves Slowly for Those Who Need Interpreters, ABA J. (Mar. 1, 2016, 4:20 AM), [http://www.abajournal.com/magazine/article-justice\\_moves\\_slowly\\_for\\_those\\_who\\_need\\_interpreters](http://www.abajournal.com/magazine/article-justice_moves_slowly_for_those_who_need_interpreters) [<https://perma.cc/HVT9-XTRE>] (noting that many states do not require courts to provide interpreters in all courts and that even the ones who do often struggle to find and employ sufficient interpreters).

<sup>72</sup> Bernadine Racoma, Why Does California Face a Shortage of Courtroom Interpreters?, Day Translations (Nov. 27, 2017), <https://www.daytranslations.com/blog/2017/11/california-shortage-courtroom-interpreters-10174/> [<https://perma.cc/FD9B-DXBA>].

<sup>73</sup> Jan Hoffman, New York’s Court Interpreters: Overworked Link, N.Y. Times (Dec. 24, 1993), <https://www.nytimes.com/1993/12/24/news/new-york-s-court-interpreters-overworked-link.html> [<https://perma.cc/QS5D-P4P4>].

<sup>74</sup> See generally Abel, *supra* note 69, at 1 (noting that in a survey of thirty-five States, 46% failed to provide interpreters in all civil cases, 80% failed to provide free interpreters, and 37% failed to use credentialed interpreters even if they were available); see also Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div. to John W. Smith, Dir., N.C. Admin. Office of the Courts (Mar. 8, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2012/03/08/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/03/08/030812_DOJ_Letter_to_NC_AOC.pdf) [<https://perma.cc/3NEV-5D97>] (alleging that North Carolina’s failure to employ adequate interpreters created “longer incarceration as a result of continuances caused by the failure to locate an interpreter; serious conflicts of interest caused by allowing state prosecutors to interpret for defendants in criminal proceedings; requiring pro se and indigent litigants to proceed with domestic violence, child custody, housing eviction, wage dispute, and other important proceedings without an interpreter; and other barriers to accessing court proceedings and other court operations”); ACLU Files Complaint with Justice Department Over Lack of Court Interpreters for Defendants, ACLU (Jul. 19, 2004), <http://www.riaclu.org/news/post/aclu-files-complaint-with-justice-department-over-lack-of-court-interpreter> [<https://perma.cc/WL5G-MYTP>] (noting that “[t]he state’s Public Defender and Superior Court judges have acknowledged that LEP defendants have been kept in jail unnecessarily for days in order to await interpreters to translate proposed plea bargains”); Dolly A. Butz, Courts Struggle To Find Certified Interpreters, Sioux City J. (Feb. 6, 2009), [https://siouxcityjournal.com/news/courts-struggle-to-find-certified-interpreters/article\\_e20-7072b-2e0e-59a8-b539-b9e02914db89.html](https://siouxcityjournal.com/news/courts-struggle-to-find-certified-interpreters/article_e20-7072b-2e0e-59a8-b539-b9e02914db89.html) [<https://perma.cc/W2GM-HTAY>] (“Iowa, like

*Inaccessibility to people with disabilities.* The Americans with Disabilities Act (ADA) requires that public facilities, including local courts, be accessible to people with disabilities.<sup>75</sup> And yet scores of local courts are not accessible. In 2018, fourteen years after the Supreme Court said local courts could not force disabled criminal defendants to crawl up courthouse stairs to get to their courtrooms,<sup>76</sup> Idaho Supreme Court Chief Justice Roger Burdick admitted that “[i]n some courthouses, in the absence of even a simple elevator, witnesses with physical challenges must be carried up stairs by bailiffs or judges, just to be able to testify.”<sup>77</sup> Illinois judges have lamented that courthouses “are not compliant or are ‘barely’ compliant with the Americans with Disabilities Act creating a risk that citizens with mobility issues are unable to access the courts.”<sup>78</sup>

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many rural states, has struggled finding qualified interpreters.”); Maria Clark, Courts Struggle To Break Language Barriers in Louisiana, NOLA.com—The Times-Picayune (Oct. 20, 2017, 10:30 PM), [https://www.nola.com/news/crime\\_police/article\\_6f9344e7-4fb3-53ba-8d7e-59d1833eb676.html](https://www.nola.com/news/crime_police/article_6f9344e7-4fb3-53ba-8d7e-59d1833eb676.html) [<https://perma.cc/M2JX-L7XH>] (“The judicial system in Louisiana is still struggling to meet requirements to provide interpreters for people who do not speak English, especially in rural areas and in certain municipal courts—even though interpreting services are required by law.”); Sascha Cordner, Florida Courts Want More Funds To Get More Interpreters in Courtrooms, WFSU News (Oct. 12, 2017), <http://news.wfsu.org/post/florida-courts-want-more-funds-get-more-interpreters-courtrooms> [<https://perma.cc/K2D4-GP7W>] (quoting the state-courts administrator saying that “one major problem the courts are having is meeting the constitutional requirement of having enough interpreters in the courtroom”); Angela Shen & Alissiea Hernandez, Use of Uncertified Interpreters an Issue in NM Court System, NM News Port (Dec. 3, 2017), <http://www.newmexiconewsport.com/uncertified-interpreters-in-nm-court-system/> [<https://perma.cc/DJ2B-FLMN>] (noting that New Mexico is beginning to hire less qualified interpreters in order to conserve money); Dave Stafford, Judge: Court Discriminated Against Deaf Man by Denying Mediation Interpreter, Ind. Law. (May 31, 2016), <https://www.theindianlawyer.com/articles/40496-judge-court-discriminated-against-deaf-man-by-denying-mediation-interpreter> [<https://perma.cc/4368-BE6N>] (“A deaf Indianapolis man was discriminated against when a court denied providing him an interpreter during a mediation.”).

<sup>75</sup> See 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). The Supreme Court upheld this provision, stating that the ADA was an appropriate way to enforce not only the Fourteenth Amendment’s Equal Protection prohibition on irrational disability discrimination but also the basic right of access to the courts provided by the Due Process Clause, the Confrontation Clause, and the First Amendment’s right of access to legal proceedings. See *Tennessee v. Lane*, 541 U.S. 509, 513, 522–24 (2004).

<sup>76</sup> See *Lane*, 541 U.S. at 513–15.

<sup>77</sup> Betsy Z. Russell, Idaho Facing Rush of Judicial Vacancies, Including Two Idaho Judges’ Recent Deaths, *Spokesman-Rev.* (Jan. 24, 2018), <http://www.spokesman.com/blogs-boise/2018/jan/24/idaho-facing-rush-judicial-vacancies-including-two-idaho-judges-recent-deaths/> [<https://perma.cc/SE9L-RYTE>].

<sup>78</sup> ISBA Report, *supra* note 1, at 20.

An investigation into local courts in New York concluded that “New Yorkers with physical disabilities face an array of accessibility barriers in all areas of courthouses through New York City, denying them meaningful access to justice in a most fundamental way, in violation of federal, state and local laws.”<sup>79</sup>

*Penal fines and debtors’ prisons.* Many local courts, because they are not funded by their states, must raise money on their own through fines on litigants.<sup>80</sup> A single-minded focus on revenue generation can result in local-court systems that, through excessive monetary penalties, fail to administer justice fairly.

The municipal-court system in Ferguson, Missouri, provides an example of the human destruction caused by excessive penal fines. The U.S. Department of Justice, in its report on Ferguson’s Police Department, concluded that the municipal-court system handled criminal charges “not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue . . . undermin[ing] the court’s role as a fair and impartial judicial body.”<sup>81</sup> Beth Colgan, in analyzing Ferguson’s municipal-court practices, has argued that the revenue-maximizing design of these courts left Ferguson “in violation of long-standing due process limitations on pecuniary interests in economic sanctions.”<sup>82</sup>

Courts raise money (and sometimes turn profits<sup>83</sup>) by fining litigants in nearly every situation. Here is one example from Ferguson:

One woman . . . received two parking tickets for a single violation in 2007 that then totaled \$151 plus fees. Over seven years later, she still owed Ferguson \$541—after already paying \$550 in fines and fees,

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<sup>79</sup> Navin Pant, Kelly McAnnany & Maureen Belluscio, N.Y. Lawyers for the Pub. Interest, *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities 1* (2015), <http://www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf> [<https://perma.cc/E9DU-Z49L>].

<sup>80</sup> And sometimes garage sales. See Dolan, *supra* note 61.

<sup>81</sup> DOJ Ferguson Report, *supra* note 20, at 42.

<sup>82</sup> Colgan, *supra* note 20, at 1185.

<sup>83</sup> See Joseph Flaherty, 7 *Arizona Municipal Courts That Are Making Money From Your Fines*, *Phoenix New Times* (July 19, 2017, 8:00 AM), <https://www.phoenixnewtimes.com/news/arizona-municipal-courts-earn-big-profits-tempe-scottsdale-paradise-valley-9510105> [<https://perma.cc/VXJ5-LLLT>] (describing how some municipal courts use fines on litigants to make millions of dollars in net income, even taking court expenses into account).

having multiple arrest warrants issued against her, and being arrested and jailed on several occasions.”<sup>84</sup>

The Department of Justice found that flawed court practices, including providing incorrect appearance dates, requiring in-person visits to resolve financial penalties, and imposing unduly harsh penalties, created a justice system rife with constitutional error.<sup>85</sup>

*Public defender shortage and quality.* There has been and continues to be a crisis in local public defense systems throughout the country, and I won’t describe that crisis and its devastating impact on criminal defendants here.<sup>86</sup> But even when courts do have resources to provide indigent defense counsel, problems arise when local courts use contract counsel for indigent defense counsel, rather than state- or local-government supplied counsel. Many states without statewide indigent defense programs provide local-court judges with funding and discretion to assign defense counsel on a contract basis—this is in fact the most commonly used method of providing counsel in the country.<sup>87</sup> Under this system, the court appoints counsel “without benefit of a formal list or rotation method and without specific qualification criteria for attorneys.”<sup>88</sup> Counsel “must petition the court for funds for investigative services, expert witnesses, and other necessary costs of litigation,” subject to a budgetary maximum.<sup>89</sup>

This kind of indigent defense system creates troubling conflicts and incentives that result in worse outcomes for indigent clients.<sup>90</sup> Contract counsel systems are “criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed

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<sup>84</sup> DOJ Ferguson Report, *supra* note 20, at 42.

<sup>85</sup> *Id.* at 42–46.

<sup>86</sup> See generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 *Geo. Wash. L. Rev.* 1564, 1566 (2018) (exploring “whether there have been serious, positive changes to [the indigent defense] system” and concluding that “[t]he crisis remains and may even have become more severe in most parts of our country”); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 *N.Y.U. Rev. L. & Soc. Change* 427, 429 (2009) (“[D]espite voluminous documentation of the indigent defense crisis, the crisis persists.”).

<sup>87</sup> See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *Law & Contemp. Probs.*, Winter 1995, at 31, 33.

<sup>88</sup> *Id.* at 33.

<sup>89</sup> *Id.*

<sup>90</sup> See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 *Yale L.J.* 154, 178–79 (2012).

attorneys.”<sup>91</sup> In addition, requiring budgetary approval from courts incentivizes contract counsel to underrepresent their clients in the hopes that they will gain favor with the court and be assigned to additional cases.<sup>92</sup> According to one lawyer in Philadelphia, counsel is “routinely appointed because they don’t make trouble, they try cases quickly, they don’t do a huge amount of prep, they don’t bill huge. They’ve figured out what’s acceptable to the court.”<sup>93</sup> A lawyer in Galveston, Texas, sued the county court after being scolded for “overwork[ing] cases” and being the only lawyer “to routinely ask for a paid investigator.”<sup>94</sup>

*Lay judges.* Finally, a surprising number of states and jurisdictions permit people with no legal training to serve as local-court judges. According to current data from the National Center for State Courts, twenty-six states allow non-lawyers to preside over limited-jurisdiction courts.<sup>95</sup> Although we do not know exactly how many lay judges serve across the country, some data are available. In Arizona, for example,

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<sup>91</sup> Spangenberg & Beeman, *supra* note 87, at 33 (“It is not uncommon for many of the appointments to be taken by recent law school graduates looking for experience, and by more ‘experienced,’ but marginally competent attorneys who need the income.”).

<sup>92</sup> See Anderson & Heaton, *supra* note 90, at 193 (“This system of appointment may also create perverse incentives for lawyers who wish to continue to receive appointments. Aware of the caseload and fiscal pressures faced by judges, appointed lawyers may be more hesitant to request numerous experts or to employ time-consuming strategies in the course of representing a defendant.”); Richard A. Oppel Jr., *His Clients Weren’t Complaining. But the Judge Said This Lawyer Worked Too Hard*, N.Y. Times (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html> [<https://perma.cc/8P3R-55DQ>] (“Public defense providers internalize, and try to figure out what it takes to get the next contract,” said [the] executive director of the Sixth Amendment Center . . . ‘A judge doesn’t actually have to say, “Don’t file any motions in my courtroom.”’”).

<sup>93</sup> See Anderson & Heaton, *supra* note 90, at 193 n.104 (quoting Hillary E. Freudenthal, *The Effect of Indigent Defense Systems on Administration of the Death Penalty: A Case Study of Philadelphia County 67* (2001) (unpublished A.B. thesis, Princeton University) (brackets omitted)).

<sup>94</sup> See Oppel, *supra* note 92. A group of local judges in Travis County, Texas, actually requested that the Texas legislature change the statewide indigent defense system to take defense counsel appointment authority away from judges, because of the conflicts it creates. Jazmine Ulloa, *Big Changes Possible for Assigning Lawyers in Indigent Cases*, Austin Am.-Statesman (Sept. 25, 2018, 10:03 AM), <https://www.statesman.com/NEWS/20140412/Big-changes-possible-for-assigning-lawyers-in-indigent-cases> [<https://perma.cc/9JC5-DDSW>].

<sup>95</sup> Non-lawyers may preside over limited-jurisdiction courts in Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Maryland, Mississippi, Montana, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Methods of Judicial Selections: Limited Jurisdiction Courts*, Nat’l Ctr. for State Courts, [http://www.judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state=) [<https://perma.cc/Q2RY-Q4A2>].

justices of the peace need not have law degrees,<sup>96</sup> and many don't. A 2010 study found that only approximately thirty-two percent of justices of the peace held law degrees—largely clustered around the justice courts in metropolitan areas.<sup>97</sup> A *New York Times* survey of 1250 town and village courts in New York found that “[n]early three-quarters of the judges [were] not lawyers, and many—truck drivers, sewer workers or laborers—[had] scant grasp of the most basic legal principles.”<sup>98</sup>

Although the Supreme Court has held this practice to be constitutional,<sup>99</sup> both anecdotal and empirical evidence “indicate that lay justices are prone to ignoring the law.”<sup>100</sup> The *New York Times* survey concluded that in New York, “[m]any do not know or seem to care what the law is.”<sup>101</sup> One local-court judge in Dannemora, New York, stated: “I just follow my own common sense . . . . And the hell with the law.”<sup>102</sup> A lawyer recounted that in a different New York town court, a lay judge “chided a tenant’s attorney for muddling the proceedings with references to United States Supreme Court decisions which, she maintained, did not apply in her ‘small claims court.’”<sup>103</sup> And in another case, a lay judge

<sup>96</sup> Justice Courts, Ariz. Judicial Branch, <https://www.azcourts.gov/AZ-Courts/Justice-Courts> [<https://perma.cc/9882-2FPC>] (“The requirements to be a justice of the peace are that you be a registered voter in Arizona, reside in the justice court precinct and understand the English language. While some justices of the peace are attorneys, there is no requirement that a justice court judge be an attorney.”).

<sup>97</sup> See Anne E. Nelson, *Fifty-Eight Years and Counting: The Elusive Quest to Reform Arizona’s Justice of the Peace Courts*, 52 Ariz. L. Rev. 533, 538–39 (2010).

<sup>98</sup> William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. Times (Sept. 25, 2006), <https://www.nytimes.com/2006/09/25/nyregion/in-tiny-courts-of-ny-abuses-of-law-and-power.html> [<https://perma.cc/C29D-MNR6>].

<sup>99</sup> See *North v. Russell*, 427 U.S. 328, 339 (1976).

<sup>100</sup> See Colin A. Fieman & Carol A. Elewski, *Do Nonlawyer Justices Dispense Justice?*, N.Y. St. B.J. (Jan. 1997), at 20 & n.2 (citing empirical research from John Paul Ryan & James H. Guterman, *Lawyer Versus Nonlawyer Town Justices: An Empirical Footnote to North v. Russell*, 60 *Judicature* 272, 280 (1977), that “nonlawyer judges tend to tilt—slightly—the delicate standard of due process away from individual defendants”).

In a sense, lay judges represent a convergence between the judge and the jury, which has always been composed of laypeople and suspected of irrationality. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 *Cornell L. Rev.* 325, 325 (1995) (noting that the jury has long been “reviled as an agent of arbitrary injustice”).

<sup>101</sup> Glaberson, *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> Fieman & Elewski, *supra* note 100, at 20.



could not decide which party he believed, so made each party simply pay half.<sup>104</sup>

In sum, the problems that arise in local courts are widespread, varied, persistent, and deeply troubling.

### *C. Conceptual Stakes*

The stakes associated with studying local courts are not just practical, they are also conceptual. The place and value of state courts (and thus local courts) within the justice system has long been a source of debate in the legal academy.<sup>105</sup> The question is one of “judicial federalism”—the division of jurisdiction between state and federal courts—and it has generated a “weave of doctrines spun by the Supreme Court to allocate cases and controversies between the federal and state judicial systems.”<sup>106</sup>

Both scholars and courts have argued that state courts should play an important role in adjudicating federal law. Paul Bator, in his classic article *The State Courts and Federal Constitutional Litigation*,<sup>107</sup> made the affirmative case for state-court resolution of federal constitutional claims. Bator embraced state courts by drawing from the values of federalism. He posited that state courts contribute to “a different, richer, and more coherent account of lawmaking which asserts that it is a cooperative enterprise in which each participant, including the citizen, shares in the privilege and duty of principled elaboration.”<sup>108</sup> Favoring federal jurisdiction would “deny [state-court judges] *pro tanto* membership in this cooperative moral and legal community.”<sup>109</sup>

Bator and others also argue that we should value state-court adjudication of federal law because it can both inspire us to think about federal law differently and educate us about how local communities feel about federal law. Bator posits that we “derive enormous benefits from having a variety of institutional ‘sets’ within which issues of federal

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<sup>104</sup> John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. Rev. 467, 486 (1988).

<sup>105</sup> See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 236–37 (1988) (arguing that the relative competencies of federal and state courts are unknowable and instead setting out a place for federal courts based on other differences with state courts).

<sup>106</sup> Keith Werhan, *Pullman Abstention After Pennhurst: A Comment on Judicial Federalism*, 27 Wm. & Mary L. Rev. 449, 450 (1986).

<sup>107</sup> See Bator, *supra* note 4.

<sup>108</sup> *Id.* at 634.

<sup>109</sup> *Id.* at 635.

constitutional law are addressed,” and that “[t]he creative ferment of experimentation which federalism encourages” bears on “the task of constitutional adjudication.”<sup>110</sup> Ethan Leib has argued that state-court adjudication of federal issues is valuable because it communicates local preferences. “[S]tate courts [should] pursue ‘local’ preferences when federal law is unclear” because that adjudication “provide[s] valuable information to federal officials about how state residents would prefer federal law to be implemented when federal law otherwise does not provide clear text or reconstructions of legislative intent.”<sup>111</sup>

Justice O’Connor—herself the author of many influential judicial federalism opinions that defer to state courts<sup>112</sup>—has also promoted the idea that state-court adjudication of federal issues has normative, and not just practical, value. In a speech on “Our Judicial Federalism,” O’Connor argued that doctrines like abstention and habeas corpus “are designed to preserve the vitality and autonomy of the state court component of our judicial federalism.”<sup>113</sup>

Local courts directly bear on this debate, though you wouldn’t know it from the scholarship. Because local courts are such an important part of the state court system, any analysis that excludes them deploys what I call the myth of the state court: the idea that state courts are an analytically coherent concept that we can discuss as a single, monolithic alternative to federal courts. Any analysis that relies upon this myth is likely to be mistaken when viewed in light of the extraordinary diversity of local courts. Local courts provide us the opportunity to test the assumptions underlying theories of judicial federalism. As Part II demonstrates and as Part III argues, the realities of local courts both diminish some values of judicial federalism and demonstrate that other values invite considerable costs.

## II. THE STRUCTURES OF LOCAL COURTS

The number and variety of local courts make attempting to explain their vast problems a challenge; each individual problem is rooted in the specific political, budgetary, and legal circumstances of the court in

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<sup>110</sup> *Id.* at 634.

<sup>111</sup> Leib, *supra* note 7, at 921–22.

<sup>112</sup> See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991) (worrying that a lack of concern for federalism in the habeas context might lead to “an end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws”).

<sup>113</sup> Sandra Day O’Connor, *Our Judicial Federalism*, 35 *Case W. Res. L. Rev.* 1, 11 (1984).

question. But the thesis of this Article is that even while extraordinary diversity exists, local courts share underlying structural similarities that provide insight into the workings and troubles of local courts as a whole.

Once we begin to think of local courts as their own institution, and not as unimportant pieces of the state court system, the structural influences that they share become clearer. From states, local courts receive their initial charges and their basic shapes. States make legislative decisions about the structures of their judiciary. Two of the most fundamental are those that dictate funding source and those that dictate appointment and retention procedures, both of which alter the functioning and outputs of local courts. States also provide varied amounts of ongoing oversight of local-court administration and judicial outputs through their judicial administrative structures and the state appellate system. This oversight, depending upon how states actually administer it, further shapes local-court functioning.

The federal system provides still different inputs. One set of federal courts doctrines—preclusion, abstention, and habeas corpus—requires federal courts to defer to local-court decision making in some legal contexts rather than correct substantive or procedural errors. Federal enforcement doctrines—including standing and immunity—protect local courts from more direct reform efforts. These two sets of federal inputs have the effect of sheltering local courts from meaningful federal oversight.

This Part combines analysis of state and local law (Subsection II.A.1), state judicial administration (Subsection II.A.2), federal courts doctrines (Subsection II.B.1), and federal enforcement laws (Subsection II.B.2). Viewing the state and federal inputs to local courts together allows us to see that these structures interact with local courts in largely non-complementary ways. Neither the state nor the federal system provides comprehensive oversight of local courts. State oversight varies by state law and state administrative practice. The diversity of those laws and practices means that some local courts are well-monitored by the state system and many are not. Federal oversight, on the other hand, varies by seriousness of problem: only very serious federal-law deficiencies will survive the doctrines that otherwise require federal courts to protect, rather than reform, local courts. Understanding how these two kinds of oversight—first by law and second by severity of problem—work together sheds light on both the nature and the persistence of problems that appear throughout local courts.

*A. Shaping: Local Courts and the State System*

Across the political, legal, and cultural realms, local governments are sites of both independence from and integration with their states.<sup>114</sup> This variety of relationships creates a structural pluralism at the state-local level that, sometimes invisibly, shapes the role of government in our lives.

That same diversity of state-local relationships exists within the state judicial branch. At the broadest level, state-local judicial relationships vary by state. Nearly all states have administrative bodies within their judicial branches called the Administrative Office of the Courts (“AOC”) or similar. Each AOC is different, as described below, which creates a nationwide system of local courts that differ in the kind and degree of oversight they receive from their state administrative bodies.<sup>115</sup> Diversity also exists within states. A single state’s judicial branch may comprise multiple kinds of local courts. Each of these courts will have different relationships with the state judicial system both administratively (as relates to their relationship with the state AOC) and substantively (as relates to their jurisdiction and place within the court structure). Finally, even individual courts *of the same type* within a single state exhibit a diversity of relationships with the state judicial branch. As I describe below, the state-local judicial relationship varies across the state depending on the size and wealth of the community that the local court serves. Drawing any conclusions about a system with this kind of daunting three-dimensional diversity requires a structural approach that embraces and incorporates complexity in its analysis.

*1. Existential Complexity*

State laws call local courts into existence. They determine the cases local courts hear, how they are funded, and how local-court judges are

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<sup>114</sup> See generally Justin Weinstein-Tull, *Abdication and Federalism*, 117 *Colum. L. Rev.* 839, 894–97 (2017) (noting that courts have embraced both perspectives in different contexts).

<sup>115</sup> This Article focuses on the important relationships between local courts and state administrative offices of the courts, but local courts have structural ties to other state and local institutions as well. They regularly interact with state and local prosecutors and law enforcement agencies, state motor vehicle and social service agencies, local school officials in the context of juvenile cases, and state and local corrections institutions and probation offices. See Alexander B. Aikman, *The Art and Practice of Court Administration* 294–96 (2007). These are relationships that are driven by law, by politics, by the administrative structure of state government, by the litigation process, and by the hybrid state-local nature of local courts. *Id.* at 293.

selected. These laws create the scaffolding that fundamentally shapes local courts.

Decisions about funding source and judge selection and retention procedures determine the authorities that local courts answer to. The diversity of these decisions—even within a single state—make many local courts hybrid institutions. They may be funded by one government but staffed by judges selected by another government. They are part of a state system but animated by local disputes. They are bound to follow the law, but they are also political entities responsible for accumulating the political capital necessary to sustain themselves in a world of scarce resources.<sup>116</sup>

All of these state structural permutations affect how local courts function. In this Subsection, I use the Arizona court system to illustrate how even in a state with a moderately centralized judicial branch, local courts and judges display an incredible diversity of identities and loyalties. I focus on two primary sovereigns, both of which are existential for local courts—funding sources and appointment and retention authorities—and explain why and how they matter.

The Arizona judiciary takes a middle-ground approach to court administration. Unlike highly decentralized state judiciaries, Arizona's AOC plays an active role overseeing its local courts.<sup>117</sup> Unlike the most centralized judiciaries, Arizona has three kinds of local courts—superior, municipal, and justice of the peace—all of which have jurisdiction over at least some state law. Budgetary and line-of-authority distinctions between (and even within) those kinds of courts make the Arizona court system a helpful illustration of the ways state laws shape local-court identities and adjudication.

Arizona's superior courts are its general-jurisdiction courts. They may hear any state or federal claim<sup>118</sup> except for state civil claims of less than

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<sup>116</sup> Leib notes the hybrid nature of local courts and observes that local judges “serv[e] two different masters: the state constituency and the local constituency.” Leib, *supra* note 7, at 926. But the truth is more complicated. Local judges and local court administrators serve *many* masters, depending on the state policies and politics: local funding sources, state funding sources, state administrative bodies, local electorates, state or local judicial evaluation programs, nominating commissions, and local officials.

<sup>117</sup> The Arizona AOC leaves very few administrative tasks to local courts exclusively; it shares most responsibilities. See State Court Organization, Nat'l Ctr. for State Courts, at tbls. 1.13a–i, <https://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx> (last visited Apr. 12, 2020) [<https://perma.cc/H3KV-3KUA>].

<sup>118</sup> Ariz. Const. art. 6, § 14.

\$10,000, which justice courts have exclusive jurisdiction over,<sup>119</sup> and they share jurisdiction over misdemeanors punishable by a fine not exceeding \$2500 or imprisonment in the county jail not exceeding six months.<sup>120</sup> Municipal courts have concurrent jurisdiction with justice courts, but also have jurisdiction over local ordinances.<sup>121</sup> Every county in Arizona has a justice court by law, but municipal courts are discretionary, and only some localities have chosen to create them.<sup>122</sup>

The Arizona judiciary's funding structure is labyrinthine, which creates a diversity of relationships between local courts and funding authorities. For all superior courts but one, the State and the county where the court resides split court costs.<sup>123</sup> The superior court in Maricopa County, which contains Phoenix and is the state's largest and wealthiest county, was once fully funded by the County but will split costs with the State beginning in 2020.<sup>124</sup> Municipal courts are funded locally.<sup>125</sup> Justice courts are largely funded locally as well, but the State covers a small percentage of justice salaries and court expenses in non-Maricopa counties.<sup>126</sup>

The identity of the funding authority affects local-court administration and adjudication. Local courts are keenly aware that their continued existence depends upon their funding source (or sources).<sup>127</sup> Local courts lacking that awareness, including even of the "personalities of the key staff people" and their funding priorities, aren't likely to get the funding they need.<sup>128</sup> Alexander Aikman, in his study of court administration, has noted that by necessity, locally-funded courts have a greater "orientation" toward the locality. Local courts with that orientation do not see statewide judicial rules as "quite so compelling"; state authority to enforce new programs at the local level is limited without the "hammer" of funding.<sup>129</sup>

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<sup>119</sup> Ariz. Rev. Stat. § 22-201(B) (LexisNexis 2019).

<sup>120</sup> Id. § 22-301(A)(1).

<sup>121</sup> Id. § 22-402.

<sup>122</sup> Others may contract with their local justice courts to perform the functions of municipal courts. Id. § 22-402(C).

<sup>123</sup> Id. § 12-128.

<sup>124</sup> Id. § 12-128(1) (noting that state funding will increase through the end of fiscal year 2021).

<sup>125</sup> Id. § 22-403(A).

<sup>126</sup> Id. § 22-117(A)–(E). Justice of the peace salaries are determined by their productivity, as measured by the number of cases filed in their courts. Id. § 22-125.

<sup>127</sup> Aikman, *supra* note 115, at 297. The court's relationship with the funding authority is "mission critical." Id.

<sup>128</sup> Id.

<sup>129</sup> Id. at 89–90 ("Statewide rules promulgated by the court of last resort (or other policy-making body) are not seen as quite so compelling. . . . The issue may be procedural or one of

Instead, these courts see *locally*-developed rules, procedures, and forms as “necessary,” which increases the procedural and administrative diversity of local courts around the state.<sup>130</sup> These local rules and procedures can include abusive penal fines that provide funding for the court.<sup>131</sup>

State-funded courts, on the other hand, are “more removed from the tug-and-pull of local politics” and focus on developing good relationships with the state’s judicial leadership.<sup>132</sup> State officers foster that relationship by growing their AOCs and increasing contacts with local courts. Computer systems and data collection become standardized throughout local courts.<sup>133</sup> State funding also tends to create procedural and administrative uniformity throughout the state.<sup>134</sup>

The nature of the funding authority also affects the ways that local-court judges and administrators think about themselves. A survey of local-court judges in New York State found that those judges identified as local officers in part because they and their courts were funded locally.<sup>135</sup> Conversely, local-court judges funded by the State tended to see themselves as part of the state system.<sup>136</sup> Aikman has noted a similar connection between judge identity and funding source.<sup>137</sup>

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substantive law, but as local courts, trial courts do not feel a strong need to follow the lead of the state policy-making body and may actively oppose the state leadership’s position.”). This dynamic holds true anecdotally, as well. In a survey of local courts in New York, the *New York Times* observed that New York’s Office of Court Administration “makes little pretense of knowing much about what happens in the justice courts.” Glaberson, *supra* note 98. A court administrator told the *Times* that because New York local courts “are paid by the towns and loosely tied into the court system, [they] have limited administrative control, and very, very limited financial control.” *Id.*

<sup>130</sup> Aikman, *supra* note 115, at 89–90.

<sup>131</sup> See, e.g., Smith, *supra* note 20, at 2320 (describing extraordinary testimony by a local-court judge in a case brought by low-income probationers against a local-court system for excessive post-judgment fines in which, in response to a question from the federal judge about ending excessive fines, the local-court judge said that “[m]oney makes the world go round”).

<sup>132</sup> Aikman, *supra* note 115, at 93, 298.

<sup>133</sup> *Id.* at 92.

<sup>134</sup> *Id.* at 92–93.

<sup>135</sup> Leib, *supra* note 19, at 725 (“We aren’t funded by the state, so I am accountable mostly to the locality;” “I am of the community and paid by the locality”). But see *id.* at 727 (“I am part of a locally funded enterprise but take my lead from being part of a state system.”).

<sup>136</sup> *Id.* at 725.

<sup>137</sup> Aikman, *supra* note 115, at 90 (noting that locally funded judges and administrators “tend to see themselves as local officials rather than state officials”).

These identities matter. They have “real impact in the halls of the courtroom, even if unconsciously.”<sup>138</sup> Local judges who identify as state actors are more likely to adhere to state law because they are more concerned about being reversed or affirmed by state appellate courts.<sup>139</sup> Local-identifying local-court judges, on the other hand, may create what Annie Decker calls “local common law,” or a body of law responsive to local conditions that takes hold because of the relative independence of local courts from the rest of the state system.<sup>140</sup>

The second set of existential authorities within the local-court system are the bodies that appoint and retain local judges. Again using Arizona as an illustration, those authorities vary across the state by type of court and size of jurisdiction. For counties over 250,000 people (Maricopa, Pima, and Pinal counties), superior court judges are nominated by local nominating committees, are appointed by the governor, and stand for retention every four years.<sup>141</sup> They are regularly evaluated by the Arizona Commission on Judicial Performance before retention elections.<sup>142</sup> In smaller counties, superior court judges are elected by local electorates to four year terms<sup>143</sup> and are subject to no formal evaluation process.

As dictated by state law, municipal governing bodies determine the selection procedure for municipal court judges.<sup>144</sup> In all municipalities except Yuma, the city or town councils appoint municipal judges. In Yuma, municipal judges are elected,<sup>145</sup> and in Phoenix and Tucson, municipal judges are first nominated by a merit commission.<sup>146</sup> The

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<sup>138</sup> Leib, *supra* note 19, at 730.

<sup>139</sup> See *id.* at 727–28.

<sup>140</sup> See Decker, *supra* note 7, at 1945–56.

<sup>141</sup> Upholding Judicial Standards, Ariz. Judicial Branch <https://www.azcourts.gov/guidetoazcourts/Upholding-Judicial-Standards> [<https://perma.cc/E9LF-P3UY>].

<sup>142</sup> About JPR, Ariz. Comm’n on Judicial Performance Rev., <https://www.azcourts.gov/jpr/About-JPR> [<https://perma.cc/LTY6-XV4N>]; see also Judicial Performance Reports, Ariz. Comm’n on Judicial Performance Rev., <https://www.azcourts.gov/jpr/Judicial-Performance-Reports> [<https://perma.cc/2Q7L-SU7Q>] (providing reports for superior court judges in Maricopa, Pima, and Pinal Counties). Judges are evaluated on five categories: legal ability, integrity, communication skills, judicial temperament, and administrative performance. Judicial Performance Standards, Ariz. Comm’n on Judicial Performance Rev., <https://www.azcourts.gov/jpr/About-JPR/Judicial-Performance-Standards> [<https://perma.cc/KHC7-4BRC>].

<sup>143</sup> Ariz. Const. art. 6, § 12(A).

<sup>144</sup> Ariz. Rev. Stat. § 22-403(A) (LexisNexis 2019).

<sup>145</sup> Limited Jurisdiction Courts, *supra* note 26.

<sup>146</sup> Selection of Judges, Ariz. Judicial Branch, <https://www.azcourts.gov/guidetoazcourts/Selection-of-Judges> [<https://perma.cc/6FHU-BYBW>].



municipality may choose the length of the judges' terms, with a minimum of two years.<sup>147</sup> Justices of the peace are elected by qualified local electors for a four-year term, after which they may run for reelection.<sup>148</sup>

As with the funding authority, the identities of the appointment and retention authorities have real-world consequences for local courts. Local judges who are elected often campaign on a set of policy positions and gain endorsements from local officials.<sup>149</sup> Those judges may then hear claims that implicate their campaign promises, calling their impartiality into question. They may also be reluctant to rule against the local figures whose endorsements they will need to win reelection. The identity of the appointment and retention authorities affects accountability structures as well. Popular election of judges, rather than appointment by the state government, makes the state judiciary independent from the state executive and legislature and, under some circumstances, more accountable to the electorate.<sup>150</sup>

Being elected locally creates strong local identity as well. In Leib's survey, judges elected locally tended to see themselves as important parts of their local communities rather than as state officers. One judge stated: "I do not feel I am an arm of the state or an apparatus of the state. I am an elected official for the village. I don't identify as a state guy."<sup>151</sup> Another said: "The state does not have much say in my life at all. . . . I am more involved in the state as an attorney, not as a judge."<sup>152</sup> As above, these identities are more than just "fodder for psychological analysis"<sup>153</sup>—they drive local-court administration and adjudication.

<sup>147</sup> Limited Jurisdiction Courts, *supra* note 26.

<sup>148</sup> Ariz. Rev. Stat. § 22-111 (LexisNexis 2019).

<sup>149</sup> Leib, *supra* note 19, at 718–20.

<sup>150</sup> See Bertrall L. Ross II, *Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges: A Response to Aaron-Andrew P. Bruhl and Ethan J. Leib*, *Elected Judges and Statutory Interpretation*, 79 U. Chi. L. Rev. 1215 (2012), 80 U. Chi. L. Rev. Dialogue 53, 66 (2013) ("[P]artisan judicial elections, unlike elections to other political offices, were not adopted to make judges accountable to current popular preferences but instead to insulate judges from legislative power. . . . Judicial independence from the legislature through a separate base of power in the people provided state judges with the means to be accountable to the people in this way.").

<sup>151</sup> Leib, *supra* note 19, at 725.

<sup>152</sup> *Id.* at 725–26 (other quotes include "I don't think of myself as related to the state; I serve a local community;" "I am part of the town on parking, zoning, and building issues. There I want the town to thrive. I feel for the locals and want the town to thrive in tough economic times;" "I don't have much concern about 'the state' as such. I worry about the kids in our community;" and "I don't . . . consider myself a part of the state system").

<sup>153</sup> *Id.* at 730.

Understanding the state policies that underlie local courts, and the multiple authorities those courts serve, sheds light on the local-court problems described above as well as their persistence. Any effort to reform local courts must work in concert with the various lines of authority at play. For example, in a state where local courts receive no state funding and where local judges are not subject to appointment or removal by state officials, state-level court reform laws are not likely to be effective. Similarly, for local courts that largely serve state-level authorities, local efforts to reform these courts are likely to be frustrated by court officials with no incentive to change.<sup>154</sup>

The existential complexity of local courts thus makes local-court reform politically costly. The Arizona system makes it clear why that is: Arizona's superior courts alone exhibit three different kinds of structural arrangements that constrain and shape those courts. Municipal and justice courts exhibit still more structural diversity. Each of those arrangements creates a different set of political dynamics and accountabilities. Any effort to reform all of these courts at once would require buy-in not only from local governments across the state but from all levels and branches of government.

## 2. *State Oversight*

In addition to the ways that states shape local courts through these initial, existential policy decisions, states also play ongoing oversight roles. They oversee both local-court administration and substantive outputs but—like all things local—this oversight varies dramatically by degree of involvement and effectiveness.

### *a. Administrative*

In the 1950s, many states began an effort to unify their court systems in order to improve and standardize their administration of justice. As part of that effort, states created administrative bodies within their judicial branches (Administrative Offices of the Courts, or AOCs).<sup>155</sup> These

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<sup>154</sup> Cf. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 *Harv. J.L. & Pub. Pol'y* 801, 804–05 (1994) (noting the importance of understanding local legal culture in any reform effort).

<sup>155</sup> Yeazell, *supra* note 7, at 135–36 (describing the “drive for [court] ‘unification’” in the 1940s).

AOCs, responsible for managing state court systems, are rarely studied.<sup>156</sup> But how they operate bears directly on local-court conditions, many of which—funding problems, long delays, and other problems described above—have constitutional implications.

As is often the case with state and local institutions,<sup>157</sup> both conflict and cooperation animate the relationship between AOCs and local courts. Unsurprisingly, state and local officers feel differently about state oversight. As Robert Tobin put it, “[t]here is . . . a certain tension between state court administrators and trial court administrators.”<sup>158</sup> Whereas “[s]tate AOCs tend to think of their trial court outreach as a service[,] . . . trial court administrators . . . may regard the service as a form of control or interference.”<sup>159</sup> Conversely, whereas “trial court administrators often regard the state court administrative office as a nuisance operation staffed by persons ignorant of the real world of trial courts,” “state court administrators tend to see trial court administrators as parochial, idiosyncratic, and narrowly focused on minor local concerns.”<sup>160</sup> These conflicts may in part reflect personnel problems, as Aikman notes that “bright, eager people who have had no exposure to trial courts except through books, memoranda, reports, and committee meetings seem to predominate on many AOC staffs.”<sup>161</sup> Funding struggles between AOCs and local courts also cause conflict.<sup>162</sup> As you might expect, AOCs tend to have more control over local courts when the courts are funded by the state and less control when they are funded locally.<sup>163</sup>

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<sup>156</sup> See Robert W. Tobin, *Creating the Judicial Branch: The Unfinished Reform*, at ix (1999) (describing AOCs as “[a] less publicized but vitally important part of the unification movement” that sought to improve and standardize the experience of local courts throughout the mid-twentieth century). Neither administrative law scholars nor state law scholars have studied these state administrative bodies.

<sup>157</sup> See Weinstein-Tull, *supra* note 18, at 1104–08.

<sup>158</sup> Tobin, *supra* note 156, at 171.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Aikman, *supra* note 115, at 304.

<sup>162</sup> See Lawrence Specker, Judge, Clerk Warn of Circuit Court Crisis in Mobile, AL.com (May 29, 2018), [https://www.al.com/news/index.ssf/2018/05/judge\\_clerk\\_warn\\_of\\_circuit\\_co.html](https://www.al.com/news/index.ssf/2018/05/judge_clerk_warn_of_circuit_co.html) [<https://perma.cc/KQE4-UM9A>] (describing local-court officers who believed the state AOC was withholding money owed to the local court).

<sup>163</sup> Aikman, *supra* note 115, at 299.

Using coded data from the National Center for State Courts, we can get a sense for how state AOCs administer local courts.<sup>164</sup> These quantitative data are useful because they give a sense of the magnitude of possible differences among AOCs and therefore among local-court structures. Each state's AOC has a different permutation of responsibilities and procedures, creating an endlessly diverse set of local courts.<sup>165</sup> But the data are also necessary cognates to the set of problems that arise in local courts. That is, identifying local-court problems without situating them within the state-local administrative system might help to solve a problem in a single local court but is unlikely to lead to an effective statewide solution.

State AOCs generally perform some subset of the following functions:

*Management:* of records, emergencies, facilities, facilities security, and planning;

*Administrative:* purchasing, human resources, information technology, data processing, and technical assistance;

*Legal:* general counsel and other legal services, law library and legal research staffing;

*Public relations:* liaison to the legislature, liaison to an ombudsman, and liaison to the public;

*Appointments:* appointment responsibilities for sitting and supplemental judges;

*Quality control:* judicial education, judicial performance, court performance, and court statistics;

*Budgetary:* accounting, audits, and budget preparation;

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<sup>164</sup> One methodological note: the survey data compiled by the National Center for State Courts is the best and most comprehensive database on state judicial administration. It contains a tremendous amount of information about the functions of state judicial administrative bodies for the forty-two states (and the District of Columbia) that participated in the survey. As Professor Yeazell put it, the National Center for State Courts is the "hero" of state-court data collection. Yeazell, *supra* note 7, at 131. I have created my own knowledge base by coding and organizing the NCSC data.

That said, the NCSC data is not a complete, nationwide data set. Where I provide analysis from the data, it should be understood to come the forty-two states (and District of Columbia) included in NCSC's database. That we lack truly nationwide data on even basic information about state judicial systems shows how little we know about such an important piece of our national system of justice.

<sup>165</sup> See Aikman, *supra* note 115, at 299 ("[T]he range of activities and the effective power of AOCs vary greatly state to state.").

*Substantive:* foster care review, juvenile and adult probation, dispute resolution, and collection of legal financial obligations.<sup>166</sup>

Clear links exist between these categories and the set of local-court problems identified above. Facilities management affects failing local-court buildings and courthouse accessibility. Administrative assistance affects case processing delays and interpreter shortages. Legal services and quality control affects the quality of local adjudication and other local-court outputs. Budgetary management affects understaffing and hearing/trial delays.

In short, there is good reason to care about AOC management practices, and the National Center for State Courts survey data show a complex and varied picture across the country. Broadly, AOCs in different states take different approaches to partnership with local courts. Some AOCs work with local courts by sharing administrative responsibilities with them. The AOCs most likely to share administrative responsibilities with local courts are in Maryland, Illinois, New Jersey, New Mexico, Indiana, and South Dakota.<sup>167</sup> Others are more hands-off. The AOCs least involved with local-court administration (in other words, the most decentralized judicial branches) are in Texas, South Carolina, Nevada, Pennsylvania, and Louisiana.<sup>168</sup> Still others take a large role in directing local-court administration. The AOCs with the most sole responsibilities (in other words, the most centralized judicial branches) for local-court administration are in Connecticut, Vermont, Alabama, Rhode Island, and Hawaii.<sup>169</sup>

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<sup>166</sup> State Court Organization, *supra* note 117, at tbls. 1.13a–i.

<sup>167</sup> *Id.* AOCs in Illinois and Maryland, for example, share responsibilities for managing local-court facilities, records, research resources, public relations, HR and other administrative responsibilities, and even appointment responsibilities. *Id.* The only administrative responsibilities the Illinois AOC keeps for itself is accounting and budget preparations. *Id.* The Maryland AOC has no exclusive responsibilities. *Id.*

<sup>168</sup> *Id.* The Nevada AOC, for example, does little administrative work on its own without the participation of local courts. It has no exclusive responsibilities, but it does share some public relations, performance measurement, and data processing responsibilities with local courts. *Id.*

<sup>169</sup> *Id.* The Rhode Island and Vermont AOCs, for example, have sole responsibility for much court administration. The Rhode Island AOC has exclusive responsibility for court facilities and security, IT, judge education, court statistics and performance, and budgetary matters. *Id.* The Vermont AOC has sole responsibility for all budgetary matters, HR and other administrative assistance, and liaising with the public and the legislature. *Id.*

AOCs span a wide range of variance: the differences between centralized and decentralized AOCs are enormous. The Texas AOC, for example, plays no role in twenty-seven of the thirty-one functional categories recorded by the NCSC data. It does not manage court records, it does not manage court facilities or security, it plays no role in liaising with the public or the state legislature, it has no HR responsibilities, it plays no role in educating or evaluating judges, it plays no budgetary role, and it performs no substantive legal functions.<sup>170</sup> The New Jersey AOC, by contrast, shares responsibility with local courts over twenty-seven of the thirty-one categories and takes total control over the remaining four.<sup>171</sup> It is involved in every management, administrative, legal, public relations, budgetary, and quality control decision. Middle-ground states exist as well.<sup>172</sup>

Despite this diversity, trends exist. AOCs are more likely to act in some categories than in others. AOCs in most states perform at least some administrative, management, and budgetary tasks for their local courts.<sup>173</sup> Many fewer AOCs have responsibility for judicial appointments and substantive legal actions.<sup>174</sup>

But drilling even deeper down into individual functions yields insights into the source of some local-court problems. Though most AOCs perform some management roles, fifteen AOCs (just over a third of reporting AOCs) provide no management over local-court facilities whatsoever.<sup>175</sup> In those fifteen states, then, local-court conditions and accessibility are solely local decisions, left to court management and local government to decide what standards the facilities must meet. Similarly with budgetary management: although many AOCs do play a budgetary role, seven play no role in managing local-court budgeting<sup>176</sup> and eight play no role in auditing local-court budgeting.<sup>177</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> North Carolina's AOC, for example, has no responsibility for nine categories, shared responsibility for eleven, and total responsibility for another eleven. *Id.*

<sup>173</sup> *Id.* at tbls.1.13b–1.13d, 1.13h.

<sup>174</sup> See *id.* at tbls.1.13e, 1.13g.

<sup>175</sup> Those fifteen AOCs are in Florida, Georgia, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, and Washington. *Id.* at tbl.1.13d.

<sup>176</sup> Those seven AOCs are in Michigan, Nevada, Ohio, Pennsylvania, South Carolina, Texas, and Washington. *Id.* at tbl.1.13c.

<sup>177</sup> Those eight AOCs are in Arkansas, Georgia, Louisiana, Missouri, Pennsylvania, South Carolina, Texas, and Washington. *Id.*

AOC management of legal issues is also illuminating. Fifteen AOCs reported providing no legal counsel to local courts at all.<sup>178</sup> Even more AOCs reported no involvement in providing legal research assistance or maintaining a law library—eighteen and twenty-two, respectively.<sup>179</sup> These numbers suggest that the thousands of local courts in those fifteen states receive no input or insight from AOCs into the many legal issues that arise in administering local courts. The thousands of local judges in the eighteen and twenty-two states where AOCs provide no legal research assistance are limited to whatever legal resources their local courts possess.

It is of course impossible to diagnose every individual local-court problem through an analysis of AOC involvement. But these statistics do provide a fuller, national picture of a set of institutions that otherwise defy generalization. And they provide particular insight into problems that will occur in any given state.

To illustrate, consider South Carolina, which has a highly decentralized court system with serious problems. South Carolina's judicial system consists of a supreme court, a court of appeals, and a thicket of trial courts.<sup>180</sup> The circuit court is its general-jurisdiction trial court.<sup>181</sup> Family courts have exclusive jurisdiction over family-law matters.<sup>182</sup> Probate courts have jurisdiction over marriage licenses and estate matters.<sup>183</sup> Magistrate courts have jurisdiction over minor civil and criminal matters that arise in each of the 311 counties in South Carolina.<sup>184</sup> State law gives municipalities the option to create municipal courts, which handle minor criminal cases as well as local ordinances and traffic violations.<sup>185</sup> Magistrate judges are appointed by the governor upon the advice and consent of the state senate for four-year terms.<sup>186</sup> Municipal judges are

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<sup>178</sup> Those AOCs are in Alaska, Arizona, Delaware, Georgia, Iowa, Louisiana, Michigan, Mississippi, Missouri, New Hampshire, North Dakota, South Carolina, Texas, Washington, and Wisconsin. *Id.* at tbl.1.13b.

<sup>179</sup> *Id.* at tbl.1.13f.

<sup>180</sup> Overview of SC Judicial System, S.C. Judicial Branch, <https://www.sccourts.org/OverviewofSCJudicialSystem.cfm> [https://perma.cc/7QFT-FD2M].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

appointed by the governing council of each municipality for terms of between two and four years.<sup>187</sup>

The South Carolina judicial system is a “unified” system that all fits under the rubric of “state court.”<sup>188</sup> Despite this, the State does not fund most of the local courts. The State funds circuit-court judges’ salaries and provides some funding for interpreters and accessibility, but local governments fund the rest of the circuit court employees’ salaries and costs associated with courthouse facilities and security.<sup>189</sup> Magistrate and municipal courts are largely funded by local governments.<sup>190</sup>

South Carolina’s Office of Court Administration (OCA) does relatively little. Of the thirty-one functional categories that the National Center for State Courts tracks, South Carolina’s OCA plays no role in twenty-two of them, far higher than the average.<sup>191</sup> The OCA has twenty employees,<sup>192</sup> or approximately one OCA employee per 251,000 South Carolina residents.<sup>193</sup> Compare this to Connecticut’s Office of the Chief Court Administrator (“OCCA”), which is deeply involved in administering Connecticut’s local courts. Of the thirty-one functional categories, it has total responsibility for twenty-seven of them.<sup>194</sup> It has 141 employees,<sup>195</sup> or approximately one OCCA employee per 25,000 Connecticut residents.<sup>196</sup>

In 2016, the National Association of Criminal Defense Lawyers and the ACLU published a report that detailed numerous, serious problems in South Carolina’s local courts. It found that in many proceedings in municipal and magistrate courts, “not a single lawyer is involved in the entire criminal proceeding. Municipal and magistrate judges are not

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> State Court Organization, *supra* note 117, at tbl.1.14.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at tbl.1.13. The average state plays no role in approximately ten of the functional categories. *Id.*

<sup>192</sup> *Id.* at tbl.1.12b. This number is current as of January 9, 2017. *Id.* at tbl.1.12e.

<sup>193</sup> South Carolina had a population of 5,021,268 in 2017. Table, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019, State Population Totals: 2010–2019, U.S. Census Bureau, [hereinafter 2017 Census Data] [https://www.census.gov/data/datasets/time-series/demo/popest/2010s-state-total.html#par\\_textimage\\_500989927](https://www.census.gov/data/datasets/time-series/demo/popest/2010s-state-total.html#par_textimage_500989927) [https://perma.cc/3KDM-33GC] (last visited Apr. 13, 2020).

<sup>194</sup> State Court Organization, *supra* note 117, at tbl.1.13. The average state takes total control over seven functional categories. *Id.*

<sup>195</sup> *Id.* at tbl.1.12b. This number is current as of December 2, 2016. *Id.* at tbl.1.12e.

<sup>196</sup> Connecticut had a population of 3,573,297 in 2017. 2017 Census Data, *supra* note 193.



required to be lawyers, the police frequently function as the prosecutor, and defense attorneys are scarce.”<sup>197</sup> This is despite the fact that “individuals in these courts face criminal charges that carry serious consequences, including jail time.”<sup>198</sup> The report found that the courts denied basic requirements of due process. Local judges failed to inform defendants of their rights,<sup>199</sup> they discouraged defendants from requesting counsel,<sup>200</sup> and they rushed through bail proceedings. The report noted that in one court “observers witnessed a municipal judge complete bond setting for 23 defendants in approximately 30 minutes—that averages out to about 1 minute and 20 seconds per defendant.”<sup>201</sup>

South Carolina’s OCA’s distance from local courts manifests in the form of reform difficulties. The OCA offers no meaningful oversight. Although it does administer judicial education programs,<sup>202</sup> it provides no ongoing quality control. It provides no legal counsel or legal assistance, it does no evaluation of judicial or court performance, and it plays no role in local-court budget creation or oversight.<sup>203</sup> There is thus no other institution, aside from the local courts themselves, checking in on the functioning of these courts. In a story about South Carolina’s local courts, the *New York Times* came across a classic case of liability hot potato.<sup>204</sup> Although the South Carolina court system—including municipal courts—is “unified,”<sup>205</sup> the *New York Times* report found that it was “not clear

<sup>197</sup> Diane DePietropaolo Price et al., Nat’l Ass’n of Criminal Def. Lawyers & ACLU, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina’s Summary Courts 7 (2016), [https://www.aclu.org/sites/default/files/field\\_document/summaryinjustice-2016\\_nacdl\\_aclu.pdf](https://www.aclu.org/sites/default/files/field_document/summaryinjustice-2016_nacdl_aclu.pdf) [<https://perma.cc/6XA8-W5ZG>].

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 16–19.

<sup>200</sup> *Id.* at 18 (“Some judges also made statements to dissuade defendants from exercising their right to counsel. One judge told an observer that he often informs defendants interested in applying for indigency status for public defenders that it is a waste of their application fees if they seem to have a good job, since you need to be ‘dirt poor’ in order to qualify.”).

<sup>201</sup> *Id.* at 15. One year after issuing this report, the ACLU filed suit against two South Carolina localities alleging that these deficiencies violated the Constitution. Class Action Complaint at 1, *Bairefoot v. City of Beaufort*, No. 9:17-cv-2759 (D.S.C. Oct. 11, 2017).

<sup>202</sup> Overview of SC Judicial System, *supra* note 180, at 7–8.

<sup>203</sup> State Court Organization, *supra* note 117, at tbls.1.13b, 1.13c, 1.13f, 1.13g.

<sup>204</sup> See Weinstein-Tull, *supra* note 18, at 1104 (describing instances of interbranch “liability hot potato” within state government).

<sup>205</sup> See S.C. Const. art. V, § 4 (“The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. He shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State.”).

what entity has the ultimate authority for the state’s municipal courts.”<sup>206</sup> The OCA administrator said that “her office played no role in oversight of municipal courts and that the State Supreme Court was responsible. But the Supreme Court’s clerk, Daniel E. Shearouse, said that the Office of Court Administration was responsible.”<sup>207</sup>

This kind of inter-governmental abdication—although not uncommon<sup>208</sup>—makes reform extremely difficult and costly. When no single state body has responsibility, statewide reform can be impossible: winning a lawsuit that alleges unconstitutional conditions in a single local courtroom is difficult, let alone winning that same lawsuit in the hundreds of local courtrooms in South Carolina. Because of their contact with local courts throughout the state, state AOCs are far better equipped to monitor local-court conditions than are private oversight organizations. But, as South Carolina demonstrates, not all AOCs are interested in, or capable of, playing meaningful oversight roles.

*b. Substantive*

States also provide oversight of the substance of local-court outputs. Some oversight occurs through the appeals process. Appeals allow upper-level courts to “correct[] legal and factual errors” of the local courts below, “encourag[e] the development and refinement of legal principles; increase[e] uniformity and standardization in the application of legal rules; and promot[e] respect for the rule of law.”<sup>209</sup> But low appeal rates make that oversight minimal. States also sometimes administer judicial evaluation programs, but data show that these programs are not widespread.<sup>210</sup>

As a threshold matter, widespread substantive review of local-court decisions is difficult because only a very small number of those decisions are ever published and many are not even recorded. Although there is no national database that tracks publication practices for all local courts, Professors Solimine and Walker, in an empirical study on state courts,

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<sup>206</sup> Timothy Williams, *Courts Sidestep the Law, and South Carolina’s Poor Go to Jail*, N.Y. Times (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/south-carolina-jail-no-lawyer.html> [<https://perma.cc/8NFY-RN89>].

<sup>207</sup> *Id.*

<sup>208</sup> See generally Weinstein-Tull, *supra* note 114 (describing how states abdicate their federal responsibilities down to the local level, jeopardizing statewide compliance with those responsibilities).

<sup>209</sup> Cassandra Burke Robertson, *The Right To Appeal*, 91 N.C. L. Rev. 1219, 1225 (2013).

<sup>210</sup> See State Court Organization, *supra* note 117, at tbl.1.13b.

determined that in local courts, “[f]ull written opinions (as opposed to short orders or entries) are a rarity, and even the full opinions are rarely reported.”<sup>211</sup> As you might expect, these practices vary.<sup>212</sup> In some states, no local-court decisions are published at all.<sup>213</sup> In others, publication practices vary from local court to local court.<sup>214</sup> This variety can make practicing in local courts challenging. When one lawyer asked a court clerk in a limited-jurisdiction court for a transcript of the proceedings for appeals purposes, she “remember[ed] the court clerks acting as though they had never had such a request.”<sup>215</sup>

Even when published opinions do exist, those opinions rarely receive appellate review. Using data from the Bureau of Justice Statistics and the National Center for State Courts, Professors Heise and Eisenberg have concluded that state-court appeals are “comparatively rare events,” and so “[f]or all practical purposes, trial court decisions effectively terminate the bulk of legal disputes they address.”<sup>216</sup> From their data set of 8872

<sup>211</sup> Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 *Hastings Const. L.Q.* 213, 234–35 (1983).

<sup>212</sup> See Decker, *supra* note 7, at 1973; see also *State Trial Courts and Their Reporters*, Rinn L. Libr., DePaul U., <https://libguides.depaul.edu/c.php?g=253629&p=1691145> [<https://perma.cc/76SD-MS6Z>] (last updated Nov. 7, 2019) (noting that “[s]ome state trial courts do have reporters,” but that “[t]he trend for most states, however, is not to publish these materials” and that “Lexis and Westlaw will only carry these trial decisions if there is a paper counterpart”).

<sup>213</sup> See, e.g., *Research Cases, Cal. Courts: Judicial Branch Cal.*, <http://www.courts.ca.gov/1099.htm> [<https://perma.cc/55XN-MR4Z>] (“State trial courts (superior courts) do not publish opinions, so their decisions are not generally used as ‘legal precedent.’ The bulk of published opinions come from state and federal appellate courts and the Supreme Court.”); *South Carolina Case Law, Circuit Riders: Basic Legal Research Training, U.S.C. Sch. L.*, <https://guides.law.sc.edu/c.php?g=315482&p=2108374> [<https://perma.cc/2DJY-3V6Y>] (“The decisions of South Carolina trial courts are not published.”).

<sup>214</sup> See Decker, *supra* note 7, 1973 (“For example, decisions are only available for certain local civil actions in New York courts—specified civil cases, replevin actions, and transfers from supreme courts. Decisions also are available for commercial claim, landlord-tenant, and small claims cases in city courts in certain judicial districts; from other enumerated city courts; from the district courts in Nassau County; and from name changes in New York City civil courts, but not arbitration decisions.”); Fieman & Elewski, *supra* note 100, at 20 (noting that in New York’s justice of the peace courts, “while a justice may employ a stenographer for a contested criminal proceeding, most cases are resolved without a transcript. Consequently, while errors may be more likely to occur in a court where a lay justice presides, many of those errors are unlikely to be corrected on appeal”).

<sup>215</sup> Cathy Lesser Mansfield, *Disorder in the People’s Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 *N.M. L. Rev.* 119, 130 (1999).

<sup>216</sup> Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 *J. Emp. Legal Stud.* 100, 103 (2015); *id.* at 108–09 (describing the methodology).

completed state-court trials in general-jurisdiction courts, only 7.3% received a final appellate-court opinion.<sup>217</sup> Compare this to the percentage of federal-court trial dispositions that get appealed—28.7%<sup>218</sup>—and ultimately receive federal appellate-court dispositions—22.7%.<sup>219</sup>

General appeals rates from hyperlocal courts are not easy to come by, but the data that do exist suggest they are much lower even than general-jurisdiction, trial-level state-court rates. Annie Decker reports that 1.2% of cases from hyperlocal Texas courts (justice of the peace and county courts) are appealed<sup>220</sup> and 1.6% of Montana justice and city courts are appealed.<sup>221</sup> Decker attributes these low appeals rates to a mix of factors. Some hyperlocal courts actually prohibit appeals in some circumstances.<sup>222</sup> Other courts either do not record court sessions and thus

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<sup>217</sup> Id. at 103. Of the 8872 completed trials, 1027 initiated the appeal process, and 646 received a final appellate-court decision. Id.

These results largely confirmed their findings from a 2009 study, where of a data set of 8038 completed state-court trials, only 12% were appealed. Of those cases appealed, only half of them, or 6.8% of the original sample of completed trials, actually received a final appellate-court opinion. Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 *J. Legal Stud.* 121, 123 (2009) [hereinafter *Plaintiphobia* (2009)]. Removing traffic violations from the set of appealed cases yielded a slightly higher appeals rate of 16.3%. Id. at 132.

They also found that the trial court cases that “exhausted a state’s full appellate process, from the trial court to the highest appellate tribunal,” were “rarer still.” Id. at 123 “Of the 965 cases that initiated appeals, only 24 cases reached a state’s appellate court of last resort. . . . The 24 cases that reached a state’s appellate court of last resort represent 2.5 percent of the cases appealed and .3 percent of cases litigated through trial.” Id. at 123 & 123 n.2.

<sup>218</sup> Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 *U. Ill. L. Rev.* 947, 952 (examining cases from 1988 to 1997).

<sup>219</sup> Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 *J. Emp. Legal Stud.* 659, 664 (2004).

<sup>220</sup> See Decker, *supra* note 7, at 1969–70 (citing David Slayton, Office of Court Admin., *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2012*, at 84 (2013), [https://www.txcourts.gov/media/454873/2012-Annual-Report-2\\_1\\_13.pdf](https://www.txcourts.gov/media/454873/2012-Annual-Report-2_1_13.pdf) [<https://perma.cc/-WTB3-4CEJ>]).

<sup>221</sup> See Decker, *supra* note 7, at 1970 (citing Cynthia Ford, *Civil Practice in Montana’s “People’s Courts”: The Proposed Montana Justice and City Court Rules of Civil Procedure*, 58 *Mont. L. Rev.* 197, 202–03 (1997)).

<sup>222</sup> See Decker, *supra* note 7, at 1968 (“Parties only can appeal New York City’s BSA decisions to the state trial courts in cases of ‘illegality’ under the New York City administrative code. And sometimes states require extra steps to appeal decisions from the lowest-level courts, making it harder to get to the highest court and harder to obtain statewide law.”) (footnote omitted).

do not create transcripts or do create transcripts but will not provide them, even when transcripts are required to file an appeal.<sup>223</sup>

Appeals rates for misdemeanors specifically, which are often handled in hyperlocal courts, are even more miniscule. Professors King and Heise estimate that approximately eight misdemeanor convictions per *ten thousand* are appealed to higher state courts.<sup>224</sup> King and Heise explain that this number is so low in part because some states limit misdemeanor appeals from hyperlocal-court convictions to general-jurisdiction trial courts rather than state appellate courts. In those cases, the local-court system plays both trial and appellate roles, and no further appeal is possible.<sup>225</sup>

For a broader, national picture of all local court (including both general- and limited-jurisdiction) appeals rates, consider the following numbers. In 2015, litigants appealed 185,000 cases from local courts.<sup>226</sup> That number represents only 0.2% of the 86.2 million cases filed in state trial court that same year.<sup>227</sup> And again, compare that to similar numbers in federal courts. Whereas litigants filed 343,176 cases in federal trial courts in 2015,<sup>228</sup> they appealed 54,244 cases in that same year, or approximately 15.0%.<sup>229</sup> These numbers are not appeals rates, because they do not track specific cases through the appeals process. But they do provide a snapshot of the magnitude of local-court cases as compared with the paucity of state appeals.

Finally, even where local-court judgments do face appellate review, they do not always receive close scrutiny. State appellate courts give deference to evidentiary records created at the trial level. The “traditional

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<sup>223</sup> Id. at 1969 (“Arizona’s justice of the peace courts, are not ‘courts of record,’ which means that they need not provide transcripts to parties—yet, under Arizona law, a party cannot appeal a decision if she failed to ask for a transcript of the proceedings at the start of trial.”); see also id. (“A New York Times investigation of New York’s town and village courts (for which two-thirds of the state’s judges work) linked low appeal rates to inadequate recording of trials: With the town and village justices ‘not required to make transcripts or tape recordings of what goes on,’ ‘it is often difficult to appeal their decisions.’”); Dolan, *supra* note 61 (noting that in Kings County, California, “[c]ourt reporters who provide transcripts of hearings have been eliminated for civil cases in many counties, making it more difficult for the losing party to appeal”).

<sup>224</sup> See Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. Rev. 1933, 1938, 1942 (2019).

<sup>225</sup> Id. at 1942–43.

<sup>226</sup> Examining the Work of State Courts, *supra* note 22, at 18.

<sup>227</sup> Id. at 3.

<sup>228</sup> U.S. Courts, *supra* note 23, at tbls.C & D.

<sup>229</sup> Id. at tbl.B.

rule” of appellate review is that “an appellate tribunal should adhere to the findings of fact of the trial court and must avoid disturbing those findings unless the evidential record provides insufficient support for those findings.”<sup>230</sup>

External to the appeals system, state administrative bodies sometimes evaluate the performance of local courts and judges. Some states have instituted judicial evaluation programs, either in the form of independent commissions or as part of the state AOC, responsible for evaluating judicial quality at the local level.

The practice isn’t widespread. When the American Judicature Society undertook a study of these evaluation systems in 1989, only four states had them in place.<sup>231</sup> According to more recent data from the National Center for State Courts, of the forty-two states (plus the District of Columbia) that provided data, thirty reported that the state had no involvement whatsoever in evaluating local judicial performance. Nine states reported that they shared the task of local-court evaluation with the local courts themselves, and only four states had total control over evaluation.<sup>232</sup> More states reported having a role in both evaluating local-court performance more broadly (eleven states reported sole responsibility for that task, twenty-eight reported shared responsibility, and four reported no responsibility)<sup>233</sup> and compiling statistics on local-court caseload management (twenty states reported sole responsibility, twenty-three reported shared responsibility, and no state reported that it had no responsibility for that task)<sup>234</sup>—but that is oversight of local-court management generally rather than substantive, legal outputs.

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<sup>230</sup> *State v. Hubbard*, 118 A.3d 314, 325 (N.J. 2015); see, e.g., *Baileys v. Pa. Tpk. Comm’n*, 181 A.3d 324, 332 (Pa. 2018) (“[W]e accord deference to a trial court with regard to its factual findings . . . .”); *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 48 So. 3d 755, 761 (Fla. 2010) (“On appeal, this Court reviews the trial court’s findings of fact for substantial competent evidence . . . .” (internal quotation marks omitted)).

<sup>231</sup> Kevin M. Esterling & Kathleen M. Sampson, *Am. Judicature Soc’y, Judicial Retention Evaluation Programs in Four States: A Report with Recommendations*, at xiii (1998), [http://www.judicialselection.com/uploads/documents/Jud\\_Ret\\_Eval\\_Report\\_Full\\_1EB9F38566F5A.pdf](http://www.judicialselection.com/uploads/documents/Jud_Ret_Eval_Report_Full_1EB9F38566F5A.pdf) [<https://perma.cc/TD6Z-JY4W>].

<sup>232</sup> *State Court Organization*, *supra* note 117, at tbl.1.13e.

<sup>233</sup> *Id.* at tbl.1.13g.

<sup>234</sup> *Id.* at tbl.1.13h; see also Aikman, *supra* note 115, at 295 (noting that in most states, either the legislature or the state supreme court requires local courts to send caseload statistics to a state administrative body).

*B. Sheltering: Local Courts and the Federal System*

Where state law and administration shape local courts, federal courts shelter them. From the start, the Founders envisioned state and federal courts as pieces of a larger cooperation between the state and federal governments, two “parts of one whole” seen “in the light of kindred systems.”<sup>235</sup> This vision of partnership persists today. The Supreme Court has multiple times deferred to the “dignitary interests” of state courts<sup>236</sup> and has stated that “federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.”<sup>237</sup>

Given how few local cases are appealed to higher state courts and how little state oversight exists, our respect for the dignity of state courts and our commitment to federal-court/state-court partnership is more accurately a respect for and commitment to partnership with *local* courts. This Section describes how that commitment plays out in interactions between federal and local courts. First, it describes the federalism doctrines that require federal courts to defer to and protect local-court decision making. Second, it describes the federal enforcement structures that protect local courts from significant federal oversight.

*1. Deferring to Local Courts*

The Supreme Court has developed three doctrines—preclusion, abstention, and habeas corpus—that defer to and actively solicit local-court decision making. None of these doctrines considers local courts specifically: they all purport to vindicate federalism values by promoting *state* courts generally. As a consequence of treating state courts as one monolithic institution, rather than a complex set of extremely diverse courts, neither the Court nor scholars have considered the actual consequences of these doctrines, including which courts within the state system will end up having the final word.<sup>238</sup> In this Subsection, I re-read

<sup>235</sup> The Federalist No. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>236</sup> See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) (describing the state court’s interest in maintaining jurisdiction); *Coleman v. Thompson*, 501 U.S. 722, 738 (1991) (describing the state court’s interest in having its law followed by a federal habeas court).

<sup>237</sup> *Ruhrgas*, 526 U.S. at 586.

<sup>238</sup> See, e.g., Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1164–88 (1988) (describing federal courts doctrines that seek to protect state judicial

these three doctrines as not just protective of state courts but as a mandate that federal courts effectively defer to local courts in a wide range of circumstances.

*a. Preclusion*

The doctrine of preclusion requires federal courts to refrain from litigating an issue or a claim that has been litigated previously. Although the doctrine was crafted in the context of a federal claim previously heard by a state supreme court,<sup>239</sup> it also applies when the only state court to have reached a decision on the merits is a local court. In *Smith v. District of Columbia*, for example, the plaintiff had previously brought assault and battery claims against D.C. police officers. After losing those claims in the D.C. Superior Court on procedural grounds, the plaintiff brought Fourth and Fourteenth Amendment claims against the police in federal court.<sup>240</sup> The court held that because the plaintiff's federal claims arose from the same facts as his state claims, and he could have brought his federal claims in the D.C. proceeding, the superior court's judgment precluded federal consideration.<sup>241</sup>

Preclusion applies even when the only court to have reached a decision is a limited-jurisdiction court. Any state- or local-court decision with preclusive effect under state law also has preclusive effect on later federal claims.<sup>242</sup> So if state law gives preclusive effect to hyperlocal courts, which many do, judgments from those courts preclude federal-court consideration.<sup>243</sup> This rule includes judgments of small claims courts and

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proceedings without probing the content of "state courts" or how their non-monolithic structures bear on the federal courts doctrines).

<sup>239</sup> *Montana v. United States*, 440 U.S. 147, 164 (1979) (holding that where a contractor challenged a Montana construction tax on federal constitutional grounds, the Montana Supreme Court's decision that the law did not violate the Federal Constitution precluded the same plaintiff from re-challenging the constitutionality of the Montana tax in federal court).

<sup>240</sup> *Smith v. District of Columbia*, 629 F. Supp. 2d 53, 55–56 (D.D.C. 2009).

<sup>241</sup> *Id.* at 55. For an example of a local court having preclusive effect on a federal court, see *Schmidt v. County of Nevada*, 808 F. Supp. 2d 1243, 1250–53 (E.D. Cal. 2011) (holding a plaintiff's § 1983 claim precluded by a related decision on the merits by a California superior court dismissal).

<sup>242</sup> See *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

<sup>243</sup> See, e.g., *Machleid v. City of Issaquah*, No. C08-1629, 2010 WL 2292907, at \*2 (W.D. Wash. June 4, 2010) ("Res judicata and related preclusion doctrines dictate that the determinations of the Municipal Court bind this court. Principles of federalism and comity prevent this court from interfering with state court proceedings or making rulings contrary to those of the state court."); *Richard Johnson Honeyshine Shoe Express Servs. v. U.S. Equity*



justice of the peace courts,<sup>244</sup> even though these courts are often presided over by judges without law degrees. Nevada justice-court judgments have preclusive effect,<sup>245</sup> for example, even though in Nevada cities of under 100,000 people, a justice court judge need only be a qualified elector, a township resident, and in possession of a high school diploma.<sup>246</sup> No matter; “[p]rinciples of federalism and comity” prevent federal courts from disturbing even these proceedings.<sup>247</sup>

The principle of preclusion has special salience for local courts in the context of § 1983 suits. Section 1983 was designed to provide a federal check on state action and state judicial action in particular.<sup>248</sup> Gene Nichol has argued that “[i]t hardly overstates the case, in fact, to suggest that forcing state judicial officers to toe the constitutional mark was one of the *primary* motivations for the enactment of section 1983.”<sup>249</sup>

Despite that intention, § 1983 claims are also precluded by state-court decisions.<sup>250</sup> In *Allen v. McCurry*,<sup>251</sup> a criminal defendant in Missouri court had unsuccessfully made Fourth and Fourteenth Amendment arguments to suppress evidence used against him. After being convicted, the defendant brought a § 1983 claim in federal court against the police officers for violating his Fourth and Fourteenth Amendment rights. The Supreme Court held that his § 1983 claims were precluded by the state

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Realty, 125 F. Supp. 2d 695, 699 (E.D. Pa. 2000) (holding a federal claim precluded by a Pennsylvania municipal-court judgment on the same two parties).

<sup>244</sup> See *Pike v. Hester*, 891 F.3d 1131, 1137–38 (9th Cir. 2018) (“We decline to reach Hester’s other arguments because we determine that issue preclusion applies, and that we are bound by the justice court’s conclusion that Hester violated the Fourth Amendment.”); *Noel v. Hall*, 341 F.3d 1148, 1171 (9th Cir. 2003) (noting that “judgments from small claims court may still preclude later claims under judge-made Washington preclusion doctrine”) (citing *State Farm Mut. Auto. Ins. Co. v. Avery*, 57 P.3d 300, 305 (Wash. 2002)).

<sup>245</sup> See *Middleton v. Himes*, No. 2:15-CV-00076, 2015 WL 4078761, at \*1 (D. Nev. July 2, 2015) (holding that Nevada justice court judgments trigger res judicata and prevent the court “from creating a second judgment based on claims already adjudicated”).

<sup>246</sup> Nev. Legislative Counsel Bureau, Policy and Program Report: Nevada’s Court System 5 (2016), <https://www.leg.state.nv.us/Division/Research/Publications/PandPReport/26-NCS.pdf> [<https://perma.cc/L3CF-25CY>].

<sup>247</sup> *Machleid*, 2010 WL 2292907, at \*2; see also *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting the Court’s “expression of confidence” in the ability of state courts to uphold federal law).

<sup>248</sup> See Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 963 (1987).

<sup>249</sup> *Id.*

<sup>250</sup> See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (res judicata); *Allen*, 449 U.S. at 105 (collateral estoppel).

<sup>251</sup> 449 U.S. at 90.

court's previous decision on those claims—despite the fact that the defendant never had the ability to bring his original constitutional claims in federal court because he was charged in state court.<sup>252</sup>

Preclusion doctrine does contain an exception that permits federal courts to hear otherwise precluded claims if the state proceedings did not offer a “full and fair opportunity to litigate” the claims.<sup>253</sup> That exception is narrow, however. State proceedings “need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment’s Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.”<sup>254</sup> Those minimum procedural requirements amount to “notice and an opportunity for a hearing, appropriate to the nature of the case, before a person is deprived of life, liberty, or property.”<sup>255</sup> Not every civil case even requires a hearing on the merits in order to satisfy these requirements.<sup>256</sup>

Absent that narrow exception for serious procedural inadequacies, and because of the miniscule appeal rate from local to state appellate courts, preclusion doctrine means that local courts will have the final word on the vast majority of federal claims they resolve.<sup>257</sup> And where a defendant must raise federal constitutional defenses to a state criminal charge, the defendant will likely end up resolving those claims in local court.<sup>258</sup>

#### *b. Abstention*

Federal courts refrain from stepping into local proceedings in other instances as well. The *Younger* and *Rooker-Feldman* abstention doctrines prevent federal courts from hearing claims that parallel or review state-court action.<sup>259</sup>

*Younger* abstention prevents federal courts from interfering with ongoing state criminal proceedings<sup>260</sup> or state civil proceedings “akin to

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<sup>252</sup> Id. at 103–05.

<sup>253</sup> *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

<sup>254</sup> Id.

<sup>255</sup> *Schmidt v. County of Nevada*, 808 F. Supp. 2d 1243, 1253 (E.D. Cal. 2011).

<sup>256</sup> Id.

<sup>257</sup> Except in the extremely rare circumstance where a state supreme court resolution of a federal claim is taken up by the United States Supreme Court.

<sup>258</sup> See *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

<sup>259</sup> Other kinds of abstention exist as well, but they are not relevant here because they focus on legal questions likely resolved not by local courts, but by state supreme courts.

<sup>260</sup> *Younger v. Harris*, 401 U.S. 37, 56 (1971).

criminal prosecutions.”<sup>261</sup> The consequence of *Younger* abstention is that state defendants may not, during ongoing state proceedings, ask a federal court to stay those proceedings on the ground that they are violating a federal law. Like preclusion, abstention doctrine applies whether the ongoing state proceedings are at the state appellate or state trial levels, including both trial-level state courts<sup>262</sup> and hyperlocal courts.<sup>263</sup>

*Younger* abstention is largely driven by the notion of comity, or “a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”<sup>264</sup> This, according to the Supreme Court, is “Our Federalism,” and represents “a system in which there is sensitivity to the legitimate interests of both State and National Governments,” and where “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”<sup>265</sup>

Abstention doctrine has exceptions for when federal courts should accept a case despite ongoing state proceedings. But like the law of preclusion, they are “exceptional and extremely limited.”<sup>266</sup> Federal courts may sidestep *Younger* abstention only when “state officials are acting in bad faith or engaging in harassment, when state adjudicators have a real or reasonably perceived financial stake in the outcome, when there is no timely forum in which to raise constitutional claims, and when state officials are attempting to wield a patently unconstitutional law.”<sup>267</sup>

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<sup>261</sup> *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)).

<sup>262</sup> See, e.g., *Nolan v. Shulman, Rogers, Gandal, Pordy & Ecker, P.A.*, 270 F. Supp. 3d 167, 173 (D.D.C. 2017) (abstaining under *Younger* from interfering in an ongoing superior-court action).

<sup>263</sup> See, e.g., *Bey v. Passaic Mun. Court*, No. 13-2653, 2013 WL 1949856, at \*2 (D.N.J. May 9, 2013) (abstaining under *Younger* from interfering in an ongoing municipal-court action).

<sup>264</sup> *Younger*, 401 U.S. at 44.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 56 (Stewart, J., concurring) (“The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.”).

<sup>267</sup> See Smith, *supra* note 20, at 2296; *id.* at 2296–2303 (collecting cases and describing these exceptions).

Despite these exceptions, *Younger* abstention is an ongoing concern for criminal defense counsel and a limit on efforts to require fairness in local courts. One advocate I spoke with said that cases alleging systemic Sixth Amendment right-to-counsel violations had to be brought in state court because they would be dismissed pursuant to *Younger* in federal court. Bringing those cases in state court, however, “requires deferring to deeply defective hearings,”<sup>268</sup> and again protects local courts from federal review. Fred Smith, in his article *Abstention in the Time of Ferguson*, also notes the serious impact of *Younger* abstention on local-court reform efforts. Smith argues that because the existing exceptions to *Younger* are inadequate, courts should recognize additional exceptions for “structural” and “systemic” violations of constitutional rights in local courts.<sup>269</sup>

*Rooker-Feldman* abstention similarly protects local courts from federal oversight. It prevents federal courts from hearing cases brought by those who lost in state court and alleging injuries arising from those losses.<sup>270</sup> These challenges are “forbidden de facto appeal[s] from a judicial decision of a state court”<sup>271</sup> and impermissibly circumvent 28 U.S.C. § 1257, which provides for review of state-court decisions on federal law by the Supreme Court, and not lower federal courts.<sup>272</sup> Like preclusion and *Younger* abstention, *Rooker-Feldman* abstention applies no matter the type of local-court proceedings being challenged: trial-level state-court<sup>273</sup> and hyperlocal-court<sup>274</sup> proceedings alike.

These abstention doctrines expand the set of federal cases that, as a consequence of the primacy of local courts within state systems, and in the name of federalism and respect for state courts, require federal courts to defer to local-court decision making.

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<sup>268</sup> Id. at 2311.

<sup>269</sup> Id. at 2339–47.

<sup>270</sup> Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005).

<sup>271</sup> Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003).

<sup>272</sup> 28 U.S.C. § 1257 (2012).

<sup>273</sup> See, e.g., Araya v. Bayly, 875 F. Supp. 2d 1, 6 (D.D.C. 2012), aff’d, No. 12-7069, 2013 WL 500819 (D.C. Cir. Jan. 18, 2013) (applying *Rooker-Feldman* to abstain from disturbing a decision of the D.C. Superior Court).

<sup>274</sup> See, e.g., Roche v. CitiMortgage, Inc., No. 12-CV-10266, 2012 WL 4498520, at \*4 (E.D. Mich. Sept. 28, 2012) (“Defendants would like this Court to rule that the municipal court was wrong and further rule in Defendants’ favor. The Court refrains from making a decision that would have the effect of reversing the municipal court’s decision.”).

*c. Habeas*

Even habeas corpus, the writ designed to provide federal-court oversight of state-court criminal proceedings,<sup>275</sup> now only provides meaningful review of local-court action in rare and extraordinary circumstances. Unlike abstention and preclusion, where federal courts decline to consider legal issues already considered or being considered in state and local court, habeas is explicitly designed as a form of review of state- and local-court action. In fact, in part because of preclusion and abstention, habeas is often the only possible avenue for relief.

Despite that design, the Supreme Court has made habeas review extremely deferential to state courts in recent years. Habeas is now merely “a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.”<sup>276</sup> If the “standard [for issuing the writ] is difficult to meet, that is because it was meant to be.”<sup>277</sup> And it is meant to be because of federalism, or, as Justice O’Connor has written, “the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”<sup>278</sup>

Although habeas is meant to review state proceedings, it is explicitly not a review of local-court merits opinions. Habeas includes an exhaustion requirement that prevents a federal court from engaging in habeas review until a state litigant exhausts all possible state remedies, including with higher-level state courts.<sup>279</sup> Any case that gets federal

<sup>275</sup> See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1042 (1977) (noting that “habeas corpus ensured the active participation of federal courts in the protection and definition of constitutional rights”).

<sup>276</sup> *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

To be fair, this increased sheltering is not solely the Court’s doing. Congress contributed to it by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which limited the ways that federal courts may review state-court action. See *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (“As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner.”).

<sup>277</sup> *Harrington*, 562 U.S. at 102. The late Judge Stephen Reinhardt has described the shift in habeas doctrine “from independent review to near-total deference to state courts.” Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 *Mich. L. Rev.* 1219, 1224 (2015).

<sup>278</sup> *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

<sup>279</sup> See 28 U.S.C. § 2254(b)(1)(A) (2012) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

habeas review, therefore, will have proceeded in some manner through the entire state court system.

In an important way, however, habeas does protect uniquely local-court action from federal oversight. It does this by requiring federal courts to defer to the factual record developed in the state courts. A federal court sitting in habeas review is limited to considering only the record “before the state court that adjudicated the claim on the merits.”<sup>280</sup> It may not hold an evidentiary hearing to supplement the factual record created in the trial-level state court, even when habeas petitioners are unable to properly “develop the factual basis of their claims in state court through no fault of their own.”<sup>281</sup> In addition, federal habeas courts must presume correct any factual determination made by a local court, and an applicant may only rebut that presumption by clear and convincing evidence.<sup>282</sup>

Compounding these requirements is the fact that state appellate courts also defer to state trial-court fact-finding. As described above, state appellate courts take care not to displace trial-court fact-finding without compelling reason.<sup>283</sup> Once a local court develops a factual record and makes factual findings, therefore, both higher state courts and federal habeas courts defer to those findings. So despite the exhaustion requirement, both state appellate courts and federal habeas courts defer to the factual record and factual findings made by local courts.

## *2. Protecting Local Courts*

By requiring federal courts to defer to local-court decisions and proceedings, these doctrines ensure that local courts play a large role in our federal system of justice. Despite that role, both as factfinders and interpreters of the Constitution, local courts are out of reach of much federal oversight and not closely monitored for adherence to constitutional standards. First, local courts have limited visibility, and policing them is highly resource-intensive. There is no official, federal governmental body that monitors these courts; activists with limited resources play that role. Second, a set of federal courts doctrines converge to greatly limit the circumstances under which federal courts may review

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unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.”)

<sup>280</sup> *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

<sup>281</sup> *Id.* at 206 (Sotomayor, J., dissenting).

<sup>282</sup> 28 U.S.C. § 2254(e)(1) (2012).

<sup>283</sup> See *supra* Subsection II.A.2.

local-court action. These doctrines differ from the federalism doctrines described just above: whereas those require federal courts to defer to and promote the judgments of local courts, these require federal courts to protect local courts and their officials as defendants in direct suits.

State courts are not subject to oversight by the federal bureaucracy. This differs from other state institutions, like state elections systems,<sup>284</sup> state-run penal and social service institutions,<sup>285</sup> state police institutions,<sup>286</sup> and state education systems,<sup>287</sup> all of which are regulated by federal statutes enforced by the federal bureaucracy.

State- and local-court reform, on the other hand, tends to happen via constitutional litigation, and Congress has provided no federal lawyers to enforce constitutional rights against local courts.<sup>288</sup> The “Access to Justice” program that the Department of Justice once operated, which worked “within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance, and to improve the justice system that serves people who are unable to afford lawyers,”<sup>289</sup> was ended by the Trump administration.<sup>290</sup>

<sup>284</sup> The Voting Section of the U.S. Department of Justice Civil Rights Division enforces a set of federal voting laws, including the Voting Rights Act, the National Voter Registration Act of 1993, The Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Help America Vote Act of 2002. Statutes Enforced by the Voting Section, U.S. Dep’t of Justice, <https://www.justice.gov/crt/statutes-enforced-voting-section> (last visited Feb. 13, 2020) [<https://perma.cc/2JMY-9QD8>].

<sup>285</sup> The Special Litigation Section of the U.S. Department of Justice Civil Rights Division protects “the rights of people in state or local institutions, including: jails, prisons, juvenile detention facilities, and health care facilities for persons with disabilities” as well as “the rights of people who interact with state or local police or sheriffs’ departments.” Special Litigation Section, U.S. Dep’t of Justice, <https://www.justice.gov/crt/special-litigation-section> (last visited Feb. 13, 2020) [<https://perma.cc/6GL8-7TZR>].

<sup>286</sup> *Id.*

<sup>287</sup> The Educational Opportunities Section of the U.S. Department of Justice Civil Rights Division enforces Titles IV and VI of the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974, Title II of the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act. Educational Opportunities Section, U.S. Dep’t of Justice, <https://www.justice.gov/crt/educational-opportunities-section> (last visited Feb. 13, 2020) [<https://perma.cc/JX9N-TFYR>].

<sup>288</sup> See Weinstein-Tull, *supra* note 114, at 866.

<sup>289</sup> Accomplishments, Access to Justice, U.S. Dep’t of Justice Archives, <http://www.justice.gov/atj/accomplishments> (last visited Feb. 13, 2020) [<https://perma.cc/-7HL8-PY3U>]. The program’s efforts were modest and included producing best-practice reports and providing training and some grants. *Id.*

<sup>290</sup> See Katie Benner, Justice Dept. Office To Make Legal Aid More Accessible Is Quietly Closed, *N.Y. Times* (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/politics/office->

As a consequence, the task of policing state and local courts falls to advocates and criminal defense counsel, whose limited resources curtail both their abilities to find and to bring cases. The ACLU's Criminal Law Reform Project, for example, targets injustices in state and local courts and actively brings cases that hold local courts accountable to constitutional standards.<sup>291</sup> But one advocate told me that despite widespread local-court problems, finding an appropriate plaintiff is challenging and resource intensive because of the logistical difficulties of working with indigent clients.<sup>292</sup> State and local public defenders, on the other hand, who come by clients easily, are under-resourced and already struggle to spend adequate time representing each individual defendant. In addition, scholars debate whether individual defense representation is well-suited to systemic reform efforts.<sup>293</sup>

Even when counsel can find a suitable client to challenge local-court conditions and have the resources to do so, a set of federal courts doctrines makes policing local courts through litigation extremely burdensome and, in some cases, nearly impossible.

Preliminarily, strict standing requirements make any § 1983 challenge against a local institution difficult. In *O'Shea v. Littleton*, the Supreme Court held that former local-court defendants who alleged discriminatory conduct by a state attorney, a police commissioner, and local-court judges did not have standing to request structural change within the local court

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of-access-to-justice-department-closed.html [https://perma.cc/J24K-8GNY] (“The Justice Department has effectively shuttered an Obama-era office dedicated to making legal aid accessible to all citizens, according to two people familiar with the situation.”).

<sup>291</sup> See Criminal Law Reform, ACLU, <https://www.aclu.org/issues/criminal-law-reform> [https://perma.cc/G75D-HU7U] (last visited Feb. 14, 2020) (“The Criminal Law Reform Project (CLRP) focuses its work on the ‘front end’ of the criminal justice system—from policing to sentencing—seeking to end excessively harsh criminal justice policies that result in mass incarceration, over-criminalization, and racial injustice, and stand in the way of a fair and equal society.”).

<sup>292</sup> See Cynthia Godsoe, Perfect Plaintiffs, 125 Yale L.J.F. 136, 137 (2015) (describing both the difficulty and importance of finding a plaintiff). By contrast, when the federal government polices state institutions, it does not need private clients.

<sup>293</sup> Compare Colgan, *supra* note 20, at 1178 (arguing that “legal representation not only helps protect the rights of individual clients, but also has the potential to alter systems of governance and therefore should be understood as a mechanism of systemic reform”), with Smith, *supra* note 20, at 2311 (noting “the ways that federal civil rights actions are equipped to prevent and end systemic violations in a way that individual objections at criminal hearings simply are not” and observing that even when individual inmates successfully challenged “their lack of counsel and . . . lack of individualized hearings, it is unclear why this would stop other poor inmates from languishing in jail indefinitely, suffering from the same violation”).



because they could not show that they would come before the local court in the future.<sup>294</sup> The follow-up case *City of Los Angeles v. Lyons* held that a man who had been injured by a chokehold did not have standing to request injunctive relief because he could not show that he was likely to have that experience again or that the City had a policy of using chokeholds.<sup>295</sup> In both cases, the Court provided justifications sounding in federalism, comity, and the restraint federal courts must exercise when treading upon state courts' jurisdiction to administer their own laws.<sup>296</sup>

*Lyons* and *O'Shea* have limited the abilities of private citizens to police governmental institutions. Myriam Gilles has lamented that “[w]e have lost, in the post-*Lyons* world, the powerful force of the citizenry as a direct agent in effecting meaningful social change through America’s courts.”<sup>297</sup> “In the aftermath of *Lyons*, meaningful enforcement of rights guaranteed by the Fourteenth Amendment and federal civil rights statutes—at least so far as injunctive relief is concerned—is now left solely to the government.”<sup>298</sup> But there are no government lawyers watching local courts.

Other jurisdictional hurdles exist as well. As described above, *Younger* abstention means that any civil challenge to defective local-court process in federal court must wait until the state proceedings end.<sup>299</sup> But once state proceedings end, a new barrier arises: *Heck v. Humphrey*, which prevents individuals convicted of state crimes from bringing § 1983 claims against the state court if that claim would in effect invalidate the state conviction—until they succeed in getting the conviction overturned either

<sup>294</sup> 414 U.S. 488, 491–92, 496–97 (1974).

<sup>295</sup> 461 U.S. 95, 105–06 (1983).

<sup>296</sup> *Lyons*, 461 U.S. at 112 (noting “the normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities,” and holding that “[i]n exercising their equitable powers federal courts must recognize [t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law” (citation and internal quotation marks omitted)); *O'Shea*, 414 U.S. at 499 (noting that “the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding . . . preclude equitable intervention in the circumstances present here” (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972))).

<sup>297</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum. L. Rev. 1384, 1386 (2000).

<sup>298</sup> *Id.* Others in the academy have criticized *Lyons* and noted its effect on civil rights litigation. See, e.g., Gene R. Nichol, Jr., *Rethinking Standing*, 72 Calif. L. Rev. 68, 100–01 (1984) (arguing that the particularized injury analysis is warped as a “result[] of infusing federalism concerns into the standing calculus”).

<sup>299</sup> See *supra* Subsection II.B.1.

in higher state court or through habeas proceedings.<sup>300</sup> But since both higher state courts and federal courts sitting in habeas review defer to the factual findings of local courts,<sup>301</sup> *Heck* means that criminal defendants are forced to use evidentiary records created in potentially problematic local-court conditions to demonstrate that their convictions were improper.

Immunity doctrines create still more barriers. Local courts can avoid monetary liability by inheriting the Eleventh Amendment immunity of their parent states. States enjoy immunity from damages pursuant to the Eleventh Amendment,<sup>302</sup> they pass that immunity onto local institutions under some circumstances.<sup>303</sup> Local courts enjoy that immunity when they are part of a unified state judicial system:<sup>304</sup> courts have consistently found that general-jurisdiction trial courts inherit their state's immunity.<sup>305</sup> Courts are less consistent on hyperlocal-court immunity, but “[t]he balance in cases where municipal courts raise sovereign immunity, even when courts are locally funded, ‘has almost invariably been struck in favor of Eleventh Amendment immunity.’”<sup>306</sup>

Even if, in some circumstances, local courts do *not* enjoy their state's Eleventh Amendment immunity, they are only liable for the unconstitutional behavior of their employees where that behavior “implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.”<sup>307</sup> Local institutions, including local courts, may not be held liable for the

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<sup>300</sup> 512 U.S. 477, 486–87 (1994).

<sup>301</sup> See *supra* Subsection II.B.2.

<sup>302</sup> See *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974).

<sup>303</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (holding that only a local entity that was an “arm of the State” would inherit the State's immunity).

<sup>304</sup> Kevin Morrow, *Municipal Court Immunity and the Eleventh Amendment*, 17 *Appalachian J.L.* 111, 121–25 (2018) (collecting cases and noting that “[c]ourts are afforded Eleventh Amendment immunity because they are part of the state's judicial branch”).

<sup>305</sup> *Id.* at 119 & n.82.

<sup>306</sup> *Id.* at 121 (quoting *Dolan v. City of Ann Arbor*, 666 F. Supp. 2d 754, 764 (E.D. Mich. 2009)); see also *Tennessee v. Lane*, 541 U.S. 509, 527–28 n.16 (2004) (noting that “the provision of judicial services” is “an area in which local governments are typically treated as ‘arm[s] of the State’ for Eleventh Amendment purposes . . . and thus enjoy precisely the same immunity from unconsented suit as the States” and collecting cases).

<sup>307</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

unconstitutional actions of their employees merely because they employ them.<sup>308</sup>

To avoid this problem, litigants can sue local justice officials, rather than the local court or local government itself, but these suits open up still other immunities, all “fundamentally shaped” by federalism and state sovereignty.<sup>309</sup> Local judges and prosecutors, for example, have absolute immunity in the actions they take in the course of their judicial and prosecutorial duties.<sup>310</sup> They enjoy this civil immunity even when they are accused of acting “maliciously” or “corruptly.”<sup>311</sup> Other local actors, including judicial administrative actors who do not enjoy absolute immunity, still enjoy qualified immunity “so long as an official does not violate clearly established law that a reasonable person would have known at the time of the violation.”<sup>312</sup>

In sum, in multiple different ways and in the name of state sovereignty, federal enforcement laws protect local courts from rigorous legal oversight.

### III. THE VALUES OF LOCAL COURTS

I hope that I have by now convinced you of three things. First, that local courts are important parts of our justice system—perhaps the most important parts—and that they experience serious and systemic problems. Second, that the varied structures of state court systems, both administrative and substantive, result in an extreme diversity of local-court ability to administer justice—and that few states provide substantial

<sup>308</sup> *Id.* at 691 (“[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”).

<sup>309</sup> Fred Smith, *Local Sovereign Immunity*, 116 *Colum. L. Rev.* 409, 441 (2016). For a helpful description of these immunities generally and how they combine to form a sort of “local sovereign immunity,” see *id.* at 430–43.

<sup>310</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (holding that prosecutors enjoy absolute immunity from § 1983 claims); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (noting that “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*,” 80 U.S. (13 Wall.) 335, 347 (1872), and holding that absolute immunity applied to § 1983 claims as well).

<sup>311</sup> *Imbler*, 424 U.S. at 427 (“[T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”); *Pierson*, 386 U.S. at 554 (“This immunity applies even when the judge is accused of acting maliciously and corruptly . . .”).

<sup>312</sup> Smith, *supra* note 309, at 440–41.

oversight. And third, that a set of federal courts doctrines protect local courts from meaningful federal oversight in all but the most severe cases of local-court deficiency. In this way, state government and federal courts serve as inputs to local-court functions.

But local courts are themselves inputs: they provide the foundation for our federal system of justice and should bear on our theories of judicial federalism. This Part examines the role of local courts within the broader justice system. It argues that while local courts can vindicate some values of judicial federalism, like increased responsiveness to diverse needs, local courts can also channel parochialism and rights denial. It goes on to argue that theories of judicial federalism miss what I believe is a principal conceptual function of local courts: a descriptive function that provides us with an understanding of the justice we possess. Finally, it provides suggestions for structural reforms to state courts in light of the insights developed in this Article.

#### *A. Diversity, Obscurity, and the Myth of the State Court*

The Founders chose a system of joint federal/state sovereigns in part for the benefits it provided: greater sensitivity to the needs of a diverse society; increased opportunity for citizen involvement in the democratic process; greater innovation and experimentation in government; productive competition between states to attract a mobile citizenry; and increased personal liberty resulting from multiple governments that check each other's authority.<sup>313</sup> These are “the values of federalism,” and they have guided the Supreme Court as it has sought to protect states from federal intrusion in recent years.<sup>314</sup>

The conventional wisdom on state courts, as described in Section I.C, is that they vindicate these values. But a closer look demonstrates both that state courts do not promote the values of federalism as much as we thought and that the costs of relying on state courts are far higher than we thought. Assessing the traditional benefits of judicial federalism through the reality of local courts, rather than the myth of the monolithic “state court,” demonstrates that those benefits are themselves myths.

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<sup>313</sup> See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3–10 (1988).

<sup>314</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citing the values of federalism).

The problem is in the way we view decentralization. We tend to see decentralization as mediating our desires for uniformity on the one hand and diversity on the other.<sup>315</sup> But what we have spent much less time thinking about is the way that decentralization also mediates visibility and obscurity. Decentralizing a government function makes it much more difficult to monitor,<sup>316</sup> allowing state and local governments to skirt federal mandates in ways that elude detection. Obscurity does not necessarily flow from decentralization (just as diversity does not necessarily flow either), but it is the default that results unless we spend the necessary costs to monitor non-compliance.<sup>317</sup>

Judicial federalism implicates both diversity and obscurity. As demonstrated above, local courts demonstrate structural diversity. They are also diverse in their substance. One study of judges in limited-jurisdiction courts noted that these “judges vary so much with respect to their views of the law, their manner of dispensing justice, and the remedies they provide that it becomes difficult to appreciate that they are operating within the same legal system.”<sup>318</sup> They display obscurity as well: their judgments are rarely appealed to higher state courts, and they are sheltered from meaningful reform efforts by federal courts doctrines. Local courts are additionally obscured and safeguarded from accountability by the nature of their work: prisoners (who once came before a local court in some capacity) generally cannot vote, and many states also disenfranchise those previously convicted of felonies.<sup>319</sup> Those mistreated in local courts but either imprisoned or convicted of felonies will have difficulty holding their local officials accountable.

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<sup>315</sup> So where Bator and Leib might celebrate the virtues of diversity, see *supra* Section I.C, a scholar like Smith would likely be more inclined to celebrate the constitutional uniformity that would result from restricting state-court protective doctrines like *Younger* abstention. See generally Smith, *supra* note 20.

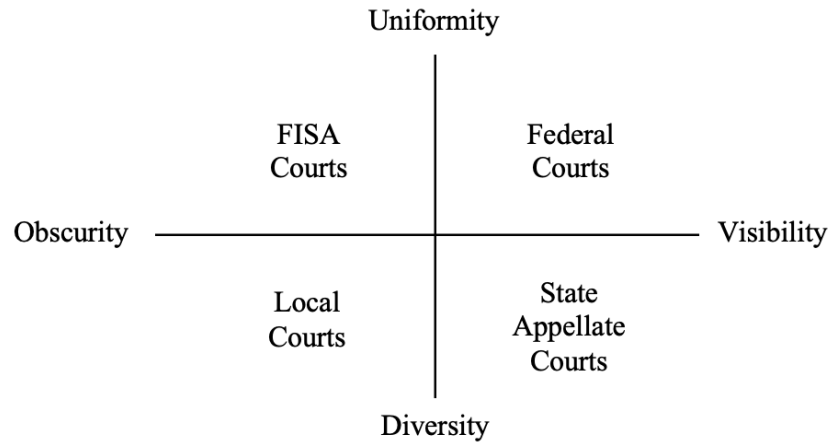
<sup>316</sup> See generally Weinstein-Tull, *supra* note 114, at 841 (describing how states “shelter noncompliance with federal law at the local level”).

<sup>317</sup> Take elections, for example. We have decentralized the administration of federal elections down to the local level. We have also declined to spend the costs necessary to monitor that administration; as a consequence, non-compliance with federal election laws exists across the country. See Weinstein-Tull, *supra* note 19, at 759–61 (demonstrating the “widespread noncompliance” with federal election laws that results from decentralization).

<sup>318</sup> Conley & O’Barr, *supra* note 104, at 468.

<sup>319</sup> See Felon Voting Rights, Nat’l Conf. St. Legislatures (Oct. 14, 2019), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/G894-C796>].

For some perspective, consider that whereas local courts are both diverse and obscure, federal courts are the opposite: comparatively uniform and relatively visible. There are middle grounds, as well. State appellate courts are diverse but highly visible. Federal FISA courts—United States Foreign Intelligence Surveillance Courts, which deal with foreign intelligence and operate at a high level of secrecy<sup>320</sup>—are both uniform and obscure.



Diversity with visibility is the sweet spot for judicial federalism. In that quadrant, the benefits of decentralization are high: we enjoy the “principled elaboration” of state courts, as Bator describes, as well as their understanding and channeling of local preferences, as Leib describes. The costs of decentralization are also low in that quadrant. State supreme-court judgments are publicized and easily available. Advocates can appeal matters of federal law to the U.S. Supreme Court. State voters are free to hold their supreme-court justices accountable, either through judicial retention elections or gubernatorial elections.

The problem is that this quadrant is very small. It represents only a microscopic portion of state-court cases. As Eisenberg and Heise found in their study of state-court appeals, only 0.3% of local-court cases

<sup>320</sup> See generally Jack Boeglin & Julius Taranto, Comment, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 *Yale L.J.* 2189 (2015) (describing the secretive nature of the FISA courts and the body of law they have created).

litigated through trial (or 24 of the 8038 cases they observed) received a state supreme-court opinion.<sup>321</sup>

Diversity with obscurity, on the other hand, is a much more common and a much more dangerous place to be. It is a space where we expect variance but cannot monitor it without significant cost or political will. First, the benefits of decentralization are uncertain there. We may believe that there are values to judicial federalism—like Bator’s “creative ferment of experimentation”<sup>322</sup>—but because those spaces are largely invisible to us, those benefits are just speculation. Second, in spaces that are both diverse and obscure, the costs of decentralization are particularly high. The number of local courts makes it costly to monitor non-compliance with federal law. And because institutions in this space are less receptive to democratic accountability, they require additional scrutiny.

Understanding decentralization in this way makes plain the errors of the conventional wisdom underlying theories of judicial federalism. As described above, Paul Bator, in his affirmative case for state-court resolution of federal constitutional claims, posited that state courts contribute to “a different, richer, and more coherent account of lawmaking which asserts that it is a cooperative enterprise in which each participant, including the citizen, shares in the privilege and duty of principled elaboration.”<sup>323</sup> Favoring federal jurisdiction would “deny [state-court judges] *pro tanto* membership in this cooperative moral and legal community.”<sup>324</sup>

This is wrong on all counts. Bator’s arguments promote the idea of state courts in the abstract but not state courts as they exist. On his affirmative argument for the value of state courts, Bator is wrong to suggest that state courts contribute to “the privilege and duty of principled elaboration.” *Some* state courts contribute to that principled elaboration, of course. But as described above, there is no real basis on which to make the more generalized statement about state courts as a whole. Most local-court opinions are unpublished and resolved without appeal. Many local-court decisions are not even recorded in any meaningful way. The idea that our justice system proceeds through “principled elaboration” is a romantic notion that draws from an unrealistic image of law that we foster in law schools, not the reality of justice as it exists in execution. At the very least,

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<sup>321</sup> *Plaintiphobia* (2009), *supra* note 217, at 123 & n.2.

<sup>322</sup> Bator, *supra* note 4, at 634.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 635.

the idea that justice is principled is a claim that requires support, not a conclusion.

Bator is similarly wrong when he argues that we should value state-court adjudication of federal law because it can both inspire us to think about federal law differently and educate us about how local communities feel about federal law. To Bator, “[t]he creative ferment of experimentation which federalism encourages” bears on “the task of constitutional adjudication.”<sup>325</sup>

These arguments are interesting in theory, but in practice they also rely on the flawed myth of the monolithic state court. How can the “creative ferment of experimentation” of state courts—including of local courts—benefit the practice of constitutional interpretation at large when no one knows about it? Bator’s argument that state-court constitutional interpretation benefits everyone is really an argument that *observed* state-court constitutional interpretation benefits everyone. The argument chooses to acknowledge only that miniscule percentage of published cases, rather than state-court decision making more broadly, which largely consists of unreported decisions.

Furthermore, Bator’s arguments fall prey to the same elitism that he himself denounces. In arguing that we benefit from a varied set of actors interpreting the Constitution, Bator seems to assume a specific “we.” Who benefits from this variety? Surely not the criminal defendants whose constitutional defenses to misdemeanor charges wrongly fail before local-court judges. Although Bator decries the “elitism” of the federal bench,<sup>326</sup> it is itself elitist to privilege the concerns of an abstract “we” over the concerns of those who end up serving as guinea pigs in this experiment. In fact, Bator has no basis for concluding that those affected by this constitutional interpretation enjoy any benefits from it.

Ethan Leib’s argument that state-court adjudication of federal issues is valuable because it communicates local preferences similarly relies on an understanding of decentralization that does not account for the realities of local courts. Leib argues that state courts should “pursue ‘local’ preferences when federal law is unclear” because that adjudication “provide[s] valuable information to federal officials about how state residents would prefer federal law to be implemented when federal law

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<sup>325</sup> *Id.* at 634.

<sup>326</sup> *Id.*



otherwise does not provide clear text or reconstructions of legislative intent.”<sup>327</sup>

Leib’s argument is narrower than Bator’s because it focuses on statutory interpretation rather than constitutional interpretation and thus excludes the massive number of constitutional defenses to criminal charges. It nevertheless suffers from a similar flaw. The benefits Leib advocates are the local preferences that get communicated to federal officials through state adjudication. But those local preferences are only communicated when they are visible, and because most state-court adjudication is local, only a small percentage of state-court adjudication is actually visible.

Even for the values of federalism that local courts do vindicate, scholars understate the costs required to achieve those values. Local courts do provide increased sensitivity to a diverse society: see, for example, commercial courts and family rehabilitation courts that are tailored to the needs of their communities.<sup>328</sup> State courts generally provide greater opportunities for citizen involvement in government: local courts are sources of employment and extend the judicial power beyond federal judges. And state courts can at times provide a check on federal power by providing an alternate source for individual rights and liberties from the federal system.

But these are not unqualified goods. They must be balanced against the costs associated with local courts. Bator attempts to minimize problems caused by unqualified state judges in multiple ways. He notes that in some contexts, including habeas corpus, the entire state justice system weighs in, which allows highly-qualified state supreme court judges to correct any errors caused at the local level.<sup>329</sup> And he suggests the problem of local errors that are “invisible on appeal” is not worth worrying about; if it were, “surely we would *require* trial de novo on habeas corpus.”<sup>330</sup>

But we know now that these arguments fail. Though habeas review may require the input of a state supreme court because of exhaustion requirements, neither preclusion nor abstention do.<sup>331</sup> And even in the

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<sup>327</sup> Leib, *supra* note 7, at 921–22.

<sup>328</sup> See generally *infra* Section I.A.

<sup>329</sup> Bator, *supra* note 4, at 630 (“In many cases the proper comparison is not between the federal courts and the state trial courts, but between the federal courts and the entire hierarchy of state courts, including the highest state appellate courts. This is most clearly visible in the case of habeas corpus . . .”).

<sup>330</sup> *Id.* at 631 & n.63.

<sup>331</sup> See *supra* Subsections II.B.1.a, II.B.1.b.

habeas context, upper-level state courts still defer to the fact-finding of the local courts.<sup>332</sup> Bator's confidence that state courts will not exhibit "invisible errors" is also misplaced. The miniscule appeals rate from local courts, the little state supervision and quality control, and the lack of published opinions guarantee that *most* errors at the local level will be invisible.

Leib similarly understates the cost of litigating in local courts. In exchange for the benefits of sensitivity to local needs, Leib admits that state courts require us to sacrifice some uniformity of federal law and to tolerate "moderate amounts of 'chaos.'"<sup>333</sup> The truth is that because most local-court adjudication is invisible, we have no measure of how chaotic things actually are—but we do have significant anecdotal evidence that the chaos that exists and the injustice it creates likely do not justify abstract ideals like the communication of local preferences to federal officials.

This blind spot around the downsides of judicial federalism is reflected in the doctrine as well, which contains only limited exceptions for state and local courts that are unable to adequately litigate federal issues.<sup>334</sup> In the same speech where Justice O'Connor argued that abstention and habeas corpus "are designed to preserve the vitality and autonomy of the state court component of our judicial federalism," she also perhaps unintentionally demonstrated the shortcomings of these doctrines:

I think it is clear that the Supreme Court of the United States has been increasingly sensitive to the role of state courts within the federal system. This recognition of the role of state courts, in my view, necessarily places a reciprocal burden and responsibility on state court judges to deal with federal issues in a thorough and receptive manner. Hearings on federal issues in criminal cases must be conducted with great care and with knowledge of the applicable principles. Adequate findings must be made and clearly articulated. This kind of careful attention by the state courts to their role in deciding questions of federal law is precisely what enables state courts to exercise the substantial degree of control they have over our dual judicial system.<sup>335</sup>

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<sup>332</sup> See *supra* Subsection II.B.1.c.

<sup>333</sup> Leib, *supra* note 7, at 921.

<sup>334</sup> See generally *supra* Subsection II.B.1.

<sup>335</sup> O'Connor, *supra* note 113, at 11–12.

What O'Connor seems to miss is that the judicial federalism doctrines she celebrates are not at all sensitive to the "reciprocal burden and responsibility on state court judges to deal with federal issues in a thorough and receptive manner." We are quick to celebrate the federalism values we believe we derive from these doctrines but somehow uncurious about the deep downsides created by a lack of federal oversight of local courts.

### *B. The Descriptive Function of Local Courts*

There is another way that local courts should inform our analysis of the justice system writ large. Local courts are the only institutions that describe both the justice we actually possess and the way that justice is created. Whereas federal courts serve a normative function by allowing us, as a nation, to hash out our differences in a national, public forum, local courts serve a descriptive function by putting on display, for anyone willing to look, the administration of justice. In this reading, the deeply parochial nature of local courts is a benefit, not a cost.

Scholars have traditionally noted the normative function of federal courts. Robert Cover observed that legal traditions are "part and parcel of a complex normative world."<sup>336</sup> He located the corpus juris within a set of myths and narratives, imposed and enacted by participants of the legal system, that establish "a lexicon of normative action."<sup>337</sup> Judith Resnik has noted that federal courts are "a powerful source of shared narratives" and that "[t]he normative role played by the federal courts has been understood since the country's inception."<sup>338</sup> And Reva Siegel has written that constitutional conflict—through what she has termed the "consent condition"—"channels dispute by requiring advocates to express disagreement within a shared tradition, rather than by withdrawal from it."<sup>339</sup>

In this telling, our federal courts unify opposing litigants within an agreed-upon form of dispute even as it sharpens those disagreements. In this way, federal courts and public disputes over legal issues are actually

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<sup>336</sup> Robert M. Cover, *The Supreme Court, 1982 Term—Foreward: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 9 (1983).

<sup>337</sup> *Id.*

<sup>338</sup> Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *Yale L.J.* 1564, 1575 & n.40 (2006).

<sup>339</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 *Calif. L. Rev.* 1323, 1353 (2006).

marks of deep normative integration between opponents as to the means of dispute and adjudication, rather than separation between those with specific legal disagreements. We disagree by issue, but each disagreement performs the normative and unifying work of legal change.

But local courts, unlike federal courts, do not perform and reinforce the norms of adjudication and legal traditions that unify us. The radical diversity of local courts, including the diversity of local judges, makes it impossible to generalize and decipher a norm-reinforcing message. Whereas agreeing to litigate an issue in federal court communicates a common belief in government and judicial resolution, taking an issue to local court means, at the very most, comfort with the structural arrangement that animates that particular local court.

The diversity and tentativeness of local courts also mutes the norm-reinforcing function of local-court opinions. Whereas even federal district courts may issue opinions that shape discourse around an issue going forward, local-court opinions are rarely even transcribed. Federal judges may claim to in some way represent national judicial decision making, having been nominated and confirmed by two separate national institutions; local judges may claim no mandate nearly so broad.

This is not to say, however, that local courts serve no conceptual function within the justice system as a whole. In my view, the most conceptually meaningful decisions that local courts make are not the opinions that serve as first takes on complex legal issues—issues that might channel norms and sharpen disputes. The most important decisions local courts make are those that aren't appealed and aren't published: decisions that are insignificant to the country at large but deeply affect litigants' lives. Those are the decisions that, if we cared to look, would provide a meaningful set of facts upon which we could construct both legitimate and useful theories of law. Local courts therefore serve not a normative but a descriptive function. Local courts reflect the justice we have, not the justice we aspire to or the justice required by written law. As such, they are the starting point from which we should define and evaluate our legal concepts.

Viewing local courts as descriptively useful also allows us to see that not only do local courts produce a justice we have failed to attend to, they also speak a language we do not yet comprehend. Consider the example, mentioned above, of the local judge who was unable to determine which

party was being truthful and decided to split the damages judgment between the parties.<sup>340</sup> This is how the judge articulated his judgment:

Listening to the case, I have to weigh the credibility of the witnesses. I have listened very carefully. I have taken numerous notes. I would find that the credibility is, um, as believable on one part as on the other. There are pros and cons in each testimony. Therefore, I am going to split the judgment and say that Mr. Jenkins should pay the defendant, um, the plaintiff, \$12.01—that’s exactly dividing the \$24.02. That he should pay \$12.01 plus the \$19 for court costs. This is the judgment of the court.<sup>341</sup>

The court’s decision does not follow the typical structure for credibility determinations and liability, but it isn’t arbitrary either. It offers a sort of fairness, just not the kind of fairness we expect from the judiciary. The court is still engaging with Cover’s *corpus juris*, but speaking in a non-doctrinal jurisprudential “lexicon” that the academy has not scrutinized.

Viewed in contrast with federal courts, the procedural informality of local courts and their varied and unfamiliar methods are shocking. But perhaps federal courts are not the proper comparator.<sup>342</sup> Though this Article has not described the history of local courts and how it informs current practices—the subject deserves its own space—that history is one of informal dispute resolution and community justice doled out in the light of scarce resources,<sup>343</sup> viewed in that context, a jurisprudential lexicon that splits \$24.02 into two makes more sense.

There is thus a deep tension between the existing adjudicatory functions and capabilities of local courts and the federal/state structures that surround them. Because local-court cases are rarely published and almost never appealed—especially from limited-jurisdiction courts—and because state quality control mechanisms are rare, states have no real

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<sup>340</sup> Conley & O’Barr, *supra* note 104, at 485–86.

<sup>341</sup> *Id.* at 486.

<sup>342</sup> See Davidson, *supra* note 19, at 610 (arguing that evaluating local-government administration requires looking beyond the values that motivate federal-government administration to the “distinctive nature of the local governmental structure”).

<sup>343</sup> See, e.g., Samuel P. Newton, Teresa L. Welch & Neal G. Hamilton, No Justice in Utah’s Justice Courts: Constitutional Issues, Systemic Problems, and the Failure To Protect Defendants in Utah’s Infamous Local Courts, 2012 Utah L. Rev. OnLaw 27, 29–43 (describing the long history of local courts, from English justices of the peace in thirteenth-century Jerusalem through frontier models of justice in Arizona and Utah); Spaulding, *supra* note 1, at 320 (noting that prior to the eighteenth century, “court sessions were held in rented houses, magistrates’ private houses, and taverns”).

sense for the kinds of judgments issued by local courts. But even if they did, there may be a fundamental incompatibility between the state appellate system, which focuses on specific legal issues, and some local courts, which administer a more holistic justice. There may be a lexicographic mismatch between the functioning of local and state appellate courts.

Similarly, federal courts doctrines may struggle to grapple with the reality of local courts because of the mismatch between the doctrinal, process-based fairness that judicial federalism cases rely on to create their exceptions to state-court deference and the helter-skelter reality of process in local courts. Little case law explains what a “full and fair opportunity to litigate”<sup>344</sup>—the exception to the general rule of preclusion—looks like in the context of the wild diversity of local-court process, for example, or what the “exceptional and extremely limited”<sup>345</sup> exception to *Younger* abstention consists of. Actually giving meaning to those exceptions would require engaging with the reality of local courts in a way that federal courts have as yet been unwilling to do.

The descriptive function of local courts thus extends beyond understanding the effects of these courts on the people they serve to understanding their methods and internal logic. In this sense, engaging with the judgments or outputs of local courts requires developing a new vocabulary of justice and the judicial function that more closely tracks the role of local courts, rather than importing the vocabulary of federal courts and state supreme courts.

What would such a vocabulary look like? I leave a full examination of this question to future work, but preliminarily, I suspect that vocabulary will sound more in theories of justice and jurisprudence broadly—accounting for the community-based purpose served by these courts—than in theories of doctrine and interpretation. Where the discourse of decentralization in the federal-courts context centers around the uniformity of federal law,<sup>346</sup> uniformity is already out the window in the context of local courts. The discourse of local-court decentralization will instead likely seek to establish a set of acceptable jurisprudences: the goal

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<sup>344</sup> *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

<sup>345</sup> *Younger v. Harris*, 401 U.S. 37, 56 (1971) (Stewart, J., concurring).

<sup>346</sup> See Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1568 (2008) (“Ensuring the uniform interpretation of federal law has long been considered one of the federal courts’ primary objectives, and uniformity is regularly cited in some of the most intractable debates about the structure and function of the federal court system.”).

becomes basic, contextual judicial legitimacy rather than legal uniformity. It is also likely that a language of local courts will need to incorporate an administrative-law bent. The high volume of local-court disputes invites fair questions about efficiency and oversight into the discussion of local-court outputs in a way that the more limited numbers of federal-court disputes do not.

Years ago, Judith Resnik used the metaphor of the self in describing tribal courts as the “other” of the federal court system.<sup>347</sup> Resnik’s insight was that understanding tribal courts was key to understanding the federal court system in the same way that understanding the “other” helps to better understand the self.<sup>348</sup> Extending the metaphor, if the federal system is the self, then local courts are our unconscious id: vast but hidden, unsupervised, unstructured, chaotic.<sup>349</sup> Like the id, local courts are also obscured—behind unpublished decisions, miniscule appeal rates, and federal courts doctrines.

Like the id, local courts help us understand our selves. From a political economy standpoint, local courts not only reflect the justice that we have, they reflect the justice that we want. If local courts create injustice, it is because we as civic participants have decided that we are comfortable with that injustice, or comfortable not knowing what kind of justice is administered, or at least not so uncomfortable to insist upon change. Local judges who misbehave are only re-elected because we don’t care enough about their misbehavior to remove them. Poorly funded local courts in low-income areas remain poorly funded because we as voters do not care enough to properly fund them. If local courts support racist outcomes, it is because we tolerate those outcomes. Penal fines and excessive bail hit racial minorities and low-income populations the hardest because a majority of voters don’t care enough to stop it.

Critiques of local courts are thus not indictments of those institutions so much as they are indictments of ourselves. This is true as a matter of public care, but it is also a truism—our policies reflect our priorities.

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<sup>347</sup> See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 734 (1989).

<sup>348</sup> *Id.* at 755 (“One way that the federal government can use the ‘other’ sovereign is to learn something about itself.”).

<sup>349</sup> See Sigmund Freud, *The Ego and the Id* (James Strachey ed., Joan Riviera trans., W.W. Norton & Co. 1962) (1923); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 331 (1987) (“The primary process, or Id, occurs outside of our awareness. It consists of desires, wishes, and instincts that strive for gratification. It follows its own laws, of which the supreme one is pleasure.”).

While our eyes and pens are trained upon federal and state appellate courts, the real work happens below. And the fact that it happens invisibly, in many cases, allows us to continue thinking about the judiciary as if it were sensible and just. In other words, the relative invisibility of local courts sustains good-faith but scope-limited research on the federal and state appellate judiciaries, which in turn recreates interest in those particular institutions.

Above, I hypothesized that one reason local courts have been so overlooked is that they do not fit neatly into any one existing field of study, but perhaps even that explanation is too charitable. Perhaps our decision not to look too closely at local courts is an act of self-preservation. Their radical diversity, their deep and vast potential for problems, and the strangeness of their jurisprudence too deeply unsettle our expectations about the justice system. Instead, we adopt a top-down approach to our analysis of the judiciary. That perspective comforts: we have a robust and well-trod constitution, honed rules of civil and criminal procedure, and so on. From the bottom up, though, things look different: they are more confusing, far more varied, and much more worrisome.

What if, instead of allowing the invisibility and obscurity of local courts to distance us from the administration of justice, we imposed transparency on local courts as radical as their diversity? Rather than allowing local courts to perform the invisible work of the judiciary by affording them undisturbed space to work, what if we took up residence in those spaces and faced, head-on, the reality that local courts present? Vindicating the descriptive function of local courts by paying more attention to them would mitigate the costs of obscurity, and we can accomplish increased transparency by leveraging the existing state and federal structures described above.<sup>350</sup>

On the state side, state AOCs must adapt to the reality that the appellate model for evaluating judicial decisions simply does not suffice in the context of local courts. As described above, neither state appeals nor federal courts provide meaningful oversight of these courts. As a consequence, states that want to improve the conditions of their local courts should take administrative steps to create more oversight.

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<sup>350</sup> This kind of reform stands in contrast with other kinds of reform that have been proposed for local courts—i.e., consolidation, funding increases and penal fine reform, and improved right to counsel, all of which are worthy and crucial reforms, but also likely require state legislative change.



They can do so in many ways, ranging from low to high involvement. A simple step would be to require all local courts to publish their judgments and make public the transcripts (or, at the very least, recordings) of all of their proceedings. That additional transparency would create the opportunity for more meaningful external oversight of local courts. Slightly more intensive reforms would include requiring judges to attend continuing training programs, tailored to both the judges' subject matter and their legal education backgrounds (by providing additional legal training for judges without law degrees, for example); regularly surveying counsel that appear frequently before local courts to try to identify problem judges and court procedures; or creating judge mentorship programs that pair new or struggling local judges with more experienced and high-performing judges. On the more intensive side, AOCs can fill the oversight gaps created by the lack of appeals by themselves playing a quasi-appellate role and taking more active responsibility for the quality of local-court decision making. They can create quality control committees that monitor local-court proceedings throughout the state on a rotating basis and evaluate local-court judgments and transcripts.

On the federal side, federal courts must be more sensitive to the reality, rather than the idea, of local courts. And, in fact, they are well-positioned to do so. The exceptions to judicial federalism doctrines provide an opportunity for information-forcing by giving federal courts the chance to probe the inner workings of local courts to ensure that they actually vindicate the values of federalism and deserve the deference those values justify. Holding evidentiary hearings that delve deeper into the workings of local courts would not only shine spotlights on local-court conditions and create a public record of local problems but also allow federal courts to generate a more nuanced set of doctrines that mediate federal-court and local-court relationships. Drawing from information gained through these more robust evidentiary hearings, federal courts should expand the judicial federalism exceptions in strategic ways that account for the parochialism of local courts. Federal courts should be particularly suspicious of local fact-finding, for example, which is not likely to receive meaningful review from either state appellate courts or state administrative bodies.

## CONCLUSION: THE DISCIPLINE OF LOCAL COURTS

If the study of federal courts is “an institution in quest of definition,”<sup>351</sup> the study of local courts is the opposite: a well-defined set of important issues in quest of a legal institution to study them. I have suggested reasons why we have no discipline of “local courts.”<sup>352</sup> I have also argued that the consequences of that absence—allowing us to believe we have a functioning justice system by training our eyes on federal and higher state courts—are catastrophic.<sup>353</sup> In this Conclusion, I make the case for a discipline of local courts, sketch out what it could look like, and argue that the structural approach set out in this Article can serve as a methodological model for future study. In short, the legal academy should embrace local courts as a field of study because the stakes are high, the questions are clear, and the methods are important. To the extent the academy claims to care about justice, it must also care about local courts.

I see four major sets of related questions that I believe fit together as a coherent whole. First is a set of structural questions. This Article begins the project of understanding the place of local courts within the justice system, both distinct from and related to the state and federal court systems, but many questions remain. For example, judicial federalism doctrines as currently applied to local courts perform the exact opposite function that they should: not only do they require federal courts to abdicate meaningful oversight responsibilities, but they also actively protect local courts from private oversight. We should think about how they could tailor their sheltering function to local courts that actually vindicate the values of federalism and cast suspicion over those that don’t. As distinct institutions situated within the shared political ecosystems of their state and local governments, local courts also pose interesting structural questions about political economy. What are the state and local debates around how much accountability to impose upon local courts?

Second is a set of jurisprudential questions. We proceed as if the doctrines created by federal courts and higher state courts govern local courts. But possessing few published local-court opinions and having no record of the jurisprudence in the vast number of unpublished local judgments, we have little basis on which to draw any conclusions about

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<sup>351</sup> Judith Resnik, Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century, 47 *Vand. L. Rev.* 1021, 1022 (1994).

<sup>352</sup> See *supra* Introduction, Section III.B.

<sup>353</sup> See *supra* Sections I.B, III.B.

the decision making of local judges. One study of judges in limited-jurisdiction courts found that local-court judgments were so varied in their methodologies that it was “difficult to appreciate that they are operating within the same legal system.”<sup>354</sup> What is the set of jurisprudential approaches we are comfortable with, and what falls outside that set?<sup>355</sup>

Even when local courts are faithful to governing doctrine, many criminal and civil doctrines require discretion on the part of the trial-court judge—and as described above, both the state and federal systems protect local-court discretion. But how do local judges exercise that discretion? We know that discretion is susceptible to incorporating prejudice, consciously or unconsciously.<sup>356</sup> Our lack of information about local-court judgments also leaves us underinformed about systematic racially disparate treatment. As Babcock et al. note about non-federal courts, “the more marginalized the relevant population involved, the more severe the procedural failure and abuse appears to be.”<sup>357</sup>

In the same way that we have little idea what forms the substance of local-court judgments, we have little idea what process local courts follow. A third set of questions would seek to update our understanding of procedure in light of the reality of local courts.<sup>358</sup> Criminal law scholars have done illuminating work on the procedural difficulties posed by local courts in the criminal context,<sup>359</sup> but many other questions remain, especially in the civil context.<sup>360</sup> What kind of notice do local courts

<sup>354</sup> Conley & O’Barr, *supra* note 104, at 468.

<sup>355</sup> In addition to Conley and O’Barr’s, I see Decker’s and Leib’s work as early insight into these more substantive questions. See Decker, *supra* note 7; Leib, *supra* note 7.

<sup>356</sup> See, e.g., Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 *Tul. L. Rev.* 1807, 1808 (1993) (“Racism in the criminal justice system hides behind discretion. Statistics show that race influences police, prosecutors, juries, and judges as they make decisions about arrest, prosecution, guilt and punishment.”).

<sup>357</sup> See Babcock et al., *supra* note 17, at 15.

<sup>358</sup> Professor Norman Spaulding has observed that “proceduralists focus intensely and almost exclusively on the bare fraction of civil cases decided in federal courts, leaving largely unexamined the norms and rules governing the tens of millions of cases affecting the lives of ordinary Americans in state courts and state and federal agencies.” Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 *Fordham L. Rev.* 2249, 2251–52 (2017).

<sup>359</sup> See, e.g., Kohler-Hausmann, *supra* note 20 (describing the “procedural hassle” of criminal procedure in New York local courts); Natapoff, *Misdemeanors*, *supra* note 20, at 1315 (“Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication.”).

<sup>360</sup> See, e.g., Mansfield, *supra* note 215, at 120–23 (describing a set of processes in local courts that is unusual at best, and unconstitutional at worse).

require? What is the range of local-court behavior on intervention and pleading standards?<sup>361</sup>

Finally, local courts raise a set of questions about the experience of using the court system and the nature of our justice. Walking into the Wilkinson County courthouse and seeing marriage records labeled “White” and “Colored” affects the experience of justice. The absence of lawyers in a courtroom (including even the judge) affects the experience of justice. These experiences do not even slightly resemble the visions of justice we teach in law schools. Shouldn’t the human experience of justice not only guide but also frame the way we think about and approach the study of law?

The diversity and number of local courts mean that methods for finding answers to these questions will not be straightforward. Studying local courts requires resisting existing legal categories in order to, ultimately, create new ones. A discipline of local courts will necessarily draw from a range of legal fields. The difficulty of engaging in a trans-substantive analysis that actually tracks our experience of the law demonstrates how our thinking about courts—and even public law more broadly—has become too removed from the law in our lives. Constructing a discipline of local courts will begin to reconnect us with that reality.

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<sup>361</sup> For an enlightening discussion of the local issues the field of civil procedure ignores, see generally Babcock et al., *supra* note 17.