



# Uncivil Procedure: How State Court Proceedings Perpetuate Inequality

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## YALE LAW & POLICY REVIEW

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### Uncivil Procedure: How State Court Proceedings Perpetuate Inequality

Hannah Lieberman\*

#### INTRODUCTION

Rules of civil procedure presuppose a level playing field where litigants have structured opportunities to develop and present their claims to a neutral fact-finder. In millions of cases—the vast majority processed by state courts today—the field is neither level nor fair. Instead, enormous numbers of small dollar value cases are disposed of mechanically, without meaningful adjudication. High-volume state court dockets involve serious asymmetries of power and knowledge, where plaintiffs’ lawyers are able to manipulate or short-circuit the rules against unrepresented and generally unsophisticated low-income defend-

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\* Since September 2016, Hannah Lieberman has been Associate Dean for Clinical and Experiential Programs at the David A. Clarke School of Law of the District of Columbia. At the time she presented this Essay, she was the Executive Director of Neighborhood Legal Services Program (NLSP), a private, non-profit law firm in Washington, D.C. that provides free civil legal assistance to low-income residents of the District of Columbia. Prior to joining NLSP, she served as the Director of Advocacy in legal services programs in Arizona and Maryland and was a litigation Partner in the Washington, D.C. law firm of Shaw Pittman Potts & Trowbridge (now Pillsbury Winthrop Shaw Pittman). Ms. Lieberman was a Member of the Civil Justice Improvements Committee established by the Conference of Chief Justices (CCJ) to make recommendations regarding civil case processing in state courts, and she led a subcommittee that focused on challenges in high-volume dockets. Her research and analysis substantially shaped the Committee’s recommendations regarding high-volume courts. She drafted the “Report of the High Volume Case Working Group to the CCJ Civil Justice Improvements Committee, Problems and Recommendations for High-Volume Dockets,” from which her presentation at the American Constitution Society’s Law and Inequality Conference at Yale Law School, October 2015, and this Essay, were heavily drawn (with permission of the CCJ Committee Project Manager from the National Center of State Courts). See Hannah E. M. Lieberman et al., *Appendix I: Problems and Recommendations for High-Volume Dockets*, NAT’L CTR. FOR ST. CTS. (2016), <http://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-I.ashx> [<http://perma.cc/A99F-3UV7>]; see also CCJ Civil Justice Improvements Comm., *Call to Action; Achieving Civil Justice for All*, NAT’L CTR. FOR ST. CTS. ET AL. (2016), <http://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx> [<http://perma.cc/7DU3-A8MN>].

ants. As a recent study by the National Center for State Courts (NCSC) concluded, “[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.”<sup>1</sup>

Profoundly harmful consequences befall defendants who, caught in these overburdened, high-volume dockets, are too often unaware of and unable to protect their rights. Judgments are entered without meaningful scrutiny of their substantive or procedural correctness. Civil judgments carry long-term consequences. Evictions frequently lead to homelessness. Judgments that appear on credit reports or that surface as the result of professional data-mining lead prospective employers and landlords to deny jobs and housing.<sup>2</sup> Post-judgment enforcement includes wage garnishment and asset seizures.<sup>3</sup> Without significant reform, too many of the generally low-income defendants in these high-volume dockets suffer wholesale denials of justice, further exacerbating economic inequities.

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1. Paula Hannaford-Agor et al., *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR ST. CTS. & ST. JUST. INST. vii (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<http://perma.cc/5BVG-2F58>]. This study consisted of 925,344 non-domestic civil cases filed over a twelve-month period in ten urban counties, and represented approximately five percent of the national state civil caseload. See *id.* at iii; see also Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014) (examining a study of over 4,000 cases filed by high-volume debt buyers in Maryland collection courts in 2009–2010 and revealing pervasive procedural and substantive due process problems resulting in mass produced default judgments).
  2. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 914, 914 n.59, 916 (2013). Data-mining is a growing business. Some courts charge a fee for responding to bulk data requests, while others restrict its resale. See *Privacy/Public Access to Court Records: State Links*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx> [<http://perma.cc/R9C6-U46P>].
  3. See D. James Greiner et al., *Engaging Financially-Distressed Consumers*, FED. RES. BANK BOS. (2015), <http://www.bostonfed.org/commdev/c&b/2015/summer/greiner-jimenez-lupica-engaging-financially-distressed-consumers.htm> [<http://perma.cc/876Z-BW2R>]. Improper garnishments exacerbate the harmful economic consequences of improper practices. See *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, FED. TRADE COMMISSION ii (2010), <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<http://perma.cc/H49C-W8BA>].

## I. DISTINGUISHING FEATURES OF HIGH-VOLUME DOCKETS IN STATE COURTS

The volume is staggering. Approximately eighteen million civil cases are filed annually in state courts across the country.<sup>4</sup> The NCSC study reflects that approximately eighty percent—over fourteen million—involve consumer debt, landlord-tenant disputes, and other small civil claims.<sup>5</sup> Debt collection filings, which alone number in the millions nationally, reflect the burgeoning business of third-party debt buyers. In 2007, debt buyers employed over two-hundred thousand persons and reported annual revenue of \$58 billion from consumer collections.<sup>6</sup>

The amounts in controversy are small. Judgments in the vast majority of these high-volume cases are less than \$6,000.<sup>7</sup>

Representation is lopsided. Only one in four of the cases in the NCSC study had attorneys on both sides.<sup>8</sup> This imbalance is ubiquitous: whereas al-

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4. See Hannaford-Agor et al., *supra* note 1, at iii n.31. This estimate includes probate and mental health cases, and excludes domestic matters.
  5. *Id.* at 17–19. The Hannaford-Agor et al. study found that contract cases made up between 64% and 80% of the civil caseloads in the jurisdictions that were the subject of the study. Thirty-seven percent of those were debt collection cases, 29% were landlord/tenant, and another 17% were foreclosure matters. The study also notes that some of the small claims cases are likely debt collection matters. See also Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 749 n.22 (2015) (citing Rashida Abuwala & Donald J. Farole, *The Perception of Self-Represented Tenants in a Community-Based Housing Court*, 44 CT. REV. 56, 56 (2008) (estimating that approximately 300,000 eviction cases are filed in New York City annually)). Even courts in smaller jurisdictions grapple with high-volume dockets. A 2013 article reported that the Quincy Housing Court in Massachusetts handled 1,280 landlord-tenant cases annually. Greiner et al., *supra* note 2, at 917.
  6. See Mary Spector, *Litigating Consumer Debt Collection: A Study*, 31 BANKING & FIN. SERV. POL’Y REP. 1, 3 (2012). It is estimated that approximately 450 entities acquired more than \$100 million in distressed debt in 2009. *Id.* at 2. As the industry has grown, the number of cases has skyrocketed; one analysis cited a 2010 *Wall Street Journal* story reporting that a judge had limited a law firm’s bulk debt collection filings to no more than 500 new cases every two weeks. *Id.* at 2 n.26. While the phenomenon is nationwide, this litigation is concentrated in cities and counties with significant minority populations, lower-median income, and lower homeownership rates. See *id.* at 4; Terry Carter, *The Debt Buyers: Lax Court Review and a Ravenous Industry Are Burying Defendants in Defaults*, A.B.A. J. (Nov. 1, 2015), [http://www.abajournal.com/magazine/article/debt\\_buying\\_industry\\_and\\_lax\\_court\\_review\\_are\\_burying\\_defendants\\_in\\_default](http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default) [<http://perma.cc/9JML-WD27>].
  7. Hannaford-Agor et al., *supra* note 1, at iv, 37 (average judgments in the study were under \$5,200).
  8. See *id.* at 31–32 (noting that of almost 650,000 cases, plaintiffs were represented by counsel in 92% of cases compared with 24% of defendants); see also Greiner et al., *supra* note 2, at 908, n.26 (noting that 90% of evictors were represented by counsel); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants*

most all—ninety-five to ninety-eight percent—of landlords and debt collectors are generally represented, only between five and fifteen percent of defendants—consumer debtors and tenants—have attorneys. Attorneys representing debt collectors and landlords tend to be repeat players who maintain high-volume practices<sup>9</sup> and are intimately familiar with the formal and informal operations of court procedures, systems, and personnel. Their legal and practical insider knowledge enables them to wield control over the proceedings and achieve one-sided outcomes.

**Defendants are vulnerable.** Defendants in these millions of civil cases tend to be persons of low or modest income. This is not surprising, since so many of these cases—particularly consumer debt and landlord-tenant—are those that generally arise as a consequence of economic distress. Their ability to navigate the court system and present the facts of their cases may be thwarted by language and literacy barriers, cognitive impairments, and distrust of the courts due to confusing or intimidating processes. Discomfort with the adversarial process, including its highly linear approach to story narration can hamstring effective presentation for persons from other cultures.<sup>10</sup> Often defendants are low-wage workers, for whom coming to court means losing wages and potentially jeopardizing employment, or having to find childcare and transportation.

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*in New York City Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 421 (2001) (noting that 98% of landlords had legal representation compared to 12% of tenants). The vast majority of tenants are not represented by counsel. See Hannaford-Agor et al., *supra* note 1, at 32; see also Holland, *supra* note 1, at 187 (fewer than 2% of defendants in debt collection cases were represented by a lawyer and those who were secured far better results); Steinberg, *supra* note 5, at 749–50 nn.23–24 (referring to a 2008 study that revealed that 88% of tenants in New York City did not have counsel, while 98% of their landlords were represented, and citing similar statistics for other jurisdictions including Maine, California, New Hampshire and Illinois).

9. See, e.g., Mary Spector, *Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 285 (2011) (noting that a few high-volume law firms handle the vast majority of debt collection cases).
10. See Steinberg, *supra* note 5, at 758–59 (“Tenants with mental disabilities, victims of domestic violence, overwhelmed single mothers, non-English speakers, and the mentally ill flood the courts and exacerbate the inadequacy of self-representation.”); *id.* at 756 (“Even in courts where pro se litigants are the rule rather than the exception, judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants.”); *id.* (“[In Baltimore Housing Court] judges typically reject the way pro se litigants speak—through narrative—and automatically deem their stories legally irrelevant.”); see also Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. POL’Y & ETHICS J. 659, 662–65 (2006) (stating that pro se litigants are routinely silenced because, among other things, they are prohibited from presenting their position in a narrative style).

Few cases actually reach the merits. According to the NCSC study, only about four percent of cases are adjudicated on the merits.<sup>11</sup> Enormous numbers result in default judgments.<sup>12</sup> Yet the fact that these cases are not defended does not mean that defendants lack valid defenses. One study found that more than seventy percent of consumers against whom default judgments were entered may have had legitimate defenses to the action; over half had good faith defenses to collection.<sup>13</sup>

Court proceedings are generally formal, require specialized rules of evidence and procedure, and may involve complex or technical laws or rules related to standing, evidence, burdens of proof, the application of federal and/or state law, and the availability of a wide range of defenses, counterclaims, mitigating circumstances, or opportunities for negotiation or settlement.<sup>14</sup> They are therefore fraught with pitfalls for the unsophisticated. These problems are not merely incidental or anecdotal. They recur across the country on a massive scale and create a treacherous path for millions of litigants.<sup>15</sup>

While this Essay cannot catalogue all of the challenges facing defendants in all high-volume dockets, tracing the path of a consumer debt collection case illustrates an array of dangers facing unrepresented defendants, many of which also plague defendants in landlord-tenant, foreclosure, and small claims matters.<sup>16</sup>

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11. See Hannaford-Agor et al., *supra* note 1, at iv.
  12. See FED. TRADE COMMISSION, *supra* note 3, at 7 (estimating from 60% to 95% of cases result in default judgments).
  13. Spector, *supra* note 6, at 3 (citing Hilliard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 357–59 (1990)).
  14. For example, housing cases may raise questions far more complicated than whether a tenant paid rent timely. Substandard conditions, unmet needs for reasonable accommodations, retaliation for complaints, and the calculation or termination of state or federal subsidies are frequently at issue and require application of complex bodies of law. In many communities experiencing gentrification, tenants who are facing eviction may have rights of first purchase, entitlement to relocation assistance, or protections against rapid rent escalation—all rights or defenses that are difficult for an unrepresented lay person to raise and prove. See also Greiner et al., *supra* note 2, at 915 (“The substantive law applicable in summary eviction cases bears notable complexity. Sources of relevant law include federal statutes, federal regulations, state statutes, state regulations, and state common law. Content includes, for example, non-waivable warranties, allocations of duties that can be shifted only by means of written agreements, dependent covenants, and procedural requirements regarding the service and content of the ‘notice to quit,’ the initial document the would-be evictor must serve on the occupant as a precursor to a formal court action.”).
  15. See FED. TRADE COMMISSION, *supra* note 3.
  16. For a comprehensive, data-driven analysis of the substantive and procedural abuses associated with high-volume debt collection, see Holland, *supra* note 1.

## II. MINEFIELDS IN THE PATH OF A DEBT COLLECTION CASE

Debt collection cases start when a lender sells a portfolio of hundreds—sometimes thousands—of delinquent accounts to a third-party debt collector, who buys the portfolio for a fraction of its value. These portfolios may be sold repeatedly. Debt buyers typically work with specialized laws firms that file collection lawsuits in bulk—also hundreds at a time. And problems emerge from the outset.

### A. *Lack of Notice*

Adequate notice through formal service has always been a bedrock element of due process. Yet the NCSC study concluded that current methods of service are “functionally obsolete, especially in suits against individuals. Typical methods of serving process are riddled with inaccuracies and inadequacies.”<sup>17</sup>

These inaccuracies and inadequacies mean that defendants may not be notified that they have been sued. Successful prosecutions in New York (in 2009),<sup>18</sup> California (in 2013),<sup>19</sup> and Minnesota (in 2014),<sup>20</sup> for example, demonstrate the unfortunate continuing vitality of so-called “sewer service.” In these instances of massive fraud, hundreds or thousands of persons were not served with complaints against them.<sup>21</sup> Vigilant poverty lawyers regularly uncover sew-

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17. Hannaford-Agor et al., *supra* note 1, at 2.

18. Press Release, N.Y. State Office of Att’y Gen., Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (Apr. 14, 2009), <http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-arrest-long-island-business> [<http://perma.cc/FGV2-JKDN>].

19. Press Release, State of Cal. Dep’t of Justice, Office of Att’y Gen., Attorney General Kamala D. Harris Announces Suit Against JP Morgan Chase for Fraudulent and Unlawful Debt-Collection Practices (May 9, 2013), <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase> [<http://perma.cc/52WV-DZKT>].

20. Press Release, Office of Minn. Att’y Gen. Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in “Sewer Service” (Nov. 6, 2014), <http://web.archive.org/web/20150929034738/http://www.ag.state.mn.us/Office/PressRelease/20141106SewerService.asp> [<http://perma.cc/HEW2-WMVS>].

21. See also *People v. Zmod Process Corp. DBA Am. Legal Process & Singler*, Index No. 2009-4228 (Erie County Sup. Ct. Apr. 2009) (civil suit alleging more than 100,000 instances of sewer service in New York, wherein defendants lost their opportunity to defend and had default judgments entered against them); *People v. Singler & Zmod Process Corp. DBA Am. Legal Process, Inc.* (Apr. 2009) (felony complaint); *In re Pfau v. Forster & Garbus et al.*, Index No. 2009-8236 (Erie County Sup. Ct. July 2009) (civil petition to vacate default judgments obtained by a single process server in New York); *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court in the County of New York*, MFY LEGAL SERVS. (2008), [http://www.mfy.org/wp-content/uploads/reports/Justice\\_Disserved.pdf](http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf) [<http://perma.cc/>

er service in their daily practices.<sup>22</sup> Too often, it is only when wage garnishments, asset seizures, or evictions are attempted, or a judgment appears on a credit report, that defendants learn of the lawsuit, at which time they may be precluded from vacating the judgment and litigating the merits.

### B. *Complaints Do Not Meet Basic Pleading Requirements*

Complaints in these high-volume dockets frequently fail to meet either fact or notice pleading standards. Deficiencies are legion and are closely related to debt-buyer business practices. The bulk sale typically provides the debt buyer with minimal information that does not include a chain of title.<sup>23</sup> Without an articulated link between the original debt and the plaintiff, complaints frequently do not allege sufficient facts to support plaintiff's standing to bring the case.<sup>24</sup> Brought by an unknown entity for an equally unfamiliar amount, the

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9RUL-NWT3] (personal service achieved in six percent of debt collection cases in King and Queen Counties, New York).

22. See, e.g., *Capital Dev. Gr. LLC v. Jackson*, 142 Daily Wash. L. Rptr. 2645 (D.C. Super. Ct. Oct. 2014) (finding that false attestation of service constituted bad faith litigation and warranted dismissal of action and award of attorney's fees to prevailing defendant).
23. A 2009 study found that "less than six percent of debt buyers were willing or able to demonstrate proper chain of title of the debt being pursued." Holland, *supra* note 1, at 199. This is largely due to the fact that the debt buyer typically acquires a computerized record of often hundreds of transactions that contain only the names, addresses of consumers, account numbers, and total amount allegedly owed. See *id.* at 182, 191–95; Spector, *supra* note 9, at 259; Spector, *supra* note 6, at 1, 2; see also Jamie S. Hopkins, *Maryland Court Dismisses 3,168 Debt-Collection Cases*, BALT. SUN (Oct. 11, 2012) [hereinafter Hopkins, *Maryland Court Dismisses*], [http://articles.baltimoresun.com/2012-10-11/news/bs-bz-debt-collection-cases-dismissed-20121011\\_1\\_debt-collection-cases-judge-ben-c-clyburn-maryland-court](http://articles.baltimoresun.com/2012-10-11/news/bs-bz-debt-collection-cases-dismissed-20121011_1_debt-collection-cases-judge-ben-c-clyburn-maryland-court) [<http://perma.cc/2LDS-ZCHP>] (reporting that relief in a Maryland class action against a debt collection firm included dismissal of 3,168 debt collection cases, release of liens, penalties, and damages. The debt collection firm was alleged to have been unlicensed, sued for wrong amounts, sued for debt barred by limitations, and included private social security numbers in public filings); Jamie S. Hopkins, *A Push for More Proof in Debt Collection Lawsuits*, BALT. SUN (July 24, 2011) [hereinafter Hopkins, *A Push for More Proof*], [http://articles.baltimore.com/2011-07-24/business/bs-bz-debt-collection-overhaul-20110724\\_1\\_debt-buyers-debt-cases-past-due-consumer-debts](http://articles.baltimore.com/2011-07-24/business/bs-bz-debt-collection-overhaul-20110724_1_debt-buyers-debt-cases-past-due-consumer-debts) [<http://perma.cc/PEP5-GP26>]; Chief Judge Jonathan Lippman, *Law Day Remarks: Consumer Credit Reforms* (Apr. 30, 2014), <http://www.nycourts.gov/whatsnew/pdf/LawDay2014remarks.pdf> [<http://perma.cc/2C3X-AXYC>].
24. See, e.g., *Mun. Emps. Legal Servs., Debt Collection Abuse: 10 Tips for Working Families*, DISTRICT COUNCIL 37, 4 (2010), [http://www.dc37.net/benefits/health/pdf/MELS\\_DebtCollectionAbuse.pdf](http://www.dc37.net/benefits/health/pdf/MELS_DebtCollectionAbuse.pdf) [<http://perma.cc/86FL-Y9GS>] (finding that debt buyers failed to provide documentation in over 94% of the Municipal Employees Legal Services cases in an eighteen month period in which a debt buyer sued a



claim may be unrecognizable to the defendant, who then deems the complaint a mistake and does not respond.<sup>25</sup> Indeed, the Federal Trade Commission (FTC) found that the “complaints and attachments in debt collection cases often do not provide adequate information for consumers to answer complaints or for judges to rule on motions for default judgment.”<sup>26</sup>

More rigorous pleading requirements make a difference: one study showed that the provision of more information in the complaint through application of stricter pleading requirements—moving from notice to fact pleading—significantly reduced the default rate.<sup>27</sup> Conclusory statements without adequate factual context frequently conceal serious additional flaws:<sup>28</sup>

- They often name the wrong person;
- They may not identify the amount of the original debt or the basis for the amount sought;
- Affidavits attesting to the accuracy and personal knowledge of the facts asserted may, in actuality, be robo-signed;
- Collection on the debt is often barred by statutes of limitations;
- The debt may already have been collected by someone else in the chain of ownership;
- The debt may have been discharged in bankruptcy or paid off;

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consumer; 27% were not properly served, and 50% were beyond the statute of limitations).

25. See Lippman, *supra* note 23, at 2–3 (noting that debt buyers file lawsuits “based on little more than boilerplate language and a few fields of data from a spreadsheet. All too often, these credit card debts are several years old, have been resold multiple times, and critical documents like the original credit agreement and account statements are missing. By the time these so-called ‘zombie’ debts show up in court, it is extremely difficult for debtors—98% of whom are unrepresented—to assess the validity of the claims against them: whether they actually owe the debt at issue, whether the amount due is correct, and whether the plaintiff is the actual owner of the debt. As a result, many debtors who receive court papers fail to appear in court”); see also Holland, *supra* note 1, at 192 (noting that “consumers do not recognize the name of the debt buyer plaintiff,” which contributes to the high rate of default judgments).
26. FED. TRADE COMMISSION, *supra* note 3, at 2.
27. See Paula Hannaford-Agor et al., *New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules*, NAT’L CTR. FOR ST. CTS. 10–12 (2013), <http://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx> [<http://perma.cc/W9HC-XGF3>].
28. See Carter, *supra* note 6, at 56–57; Spector, *supra* note 6, at 1–2 (citing examples of reported procedural, substantive, and evidentiary deficiencies upon which judgments are ultimately based); see also Mun. Emps. Legal Servs., *supra* note 24, at 4–5 (citing illustrative examples of deficiencies including mistaken identity, sewer service, prior collection on the same debt and claims barred by limitations).

- The amounts sought may include questionable fees, penalties, and interest at rates that have dramatically increased the amount owed from the original amount;
- The case may be filed in an inconvenient or improper venue—requiring defendants to travel miles to a forum to which the person has no connection.<sup>29</sup>

### C. *Litigation Pitfalls*

#### 1. Loss of Defenses

Lack of legal assistance causes defendants to lose rights. Unrepresented defendants are unlikely to know the legal defenses or counterclaims they may have, much less how and when to raise them. Some affirmative defenses, including improper service or limitations, may be waived if not raised in the answer. Recognizing the difficulties facing unrepresented parties, some state courts provide space for volunteer or legal aid lawyers to help litigants navigate the system. However, concern about the extent to which such services can include legal advice, as opposed to “information,” often constrains the extent to which the assistance is tailored to the individual’s particular circumstances, and therefore these services often have limited utility for the defendant.

#### 2. Confusing Proceedings

Parties in cases pending in high-volume dockets are often all required to appear when court convenes. Before the judge takes the bench, these courtrooms are crowded and noisy, dominated by the repeat-lawyer players, and seemingly chaotic. Clerks frequently conduct a rapid-fire roll call, calling the case number, followed by the last names of the parties. In a noisy environment, where names are often mispronounced, and where the defendants may not know what to do, they may not respond. When defendants do not respond, plaintiffs’ counsel will seek entry of a judgment by default. Once the case is called, the litigants and lawyers are likely to have a long wait before their cases are heard. This is particularly burdensome to the elderly or frail, those with disabilities, persons who have child care needs or children in tow, and those who may lose wages or employment when they take time off from a job to sit in court. It can also make it difficult for court personnel to determine when interpreters are likely to be needed.

Defendants who appear are often accosted by plaintiffs’ lawyers in the courtroom prior to the commencement of proceedings or in the crowded hallways of the courthouse. The lawyers may use intimidating, high-pressure tactics to secure settlement agreements or confessed judgments. The interactions are

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29. See, e.g., Hopkins, *Maryland Court Dismisses*, *supra* note 23; Hopkins, *A Push for More Proof*, *supra* note 23; Marisa Kwiatkowski, *Judges Call for an End to Marion County’s Small Claims Court System*, INDIANAPOLIS STAR (July 12, 2014), <http://www.indystar.com/story/news/2014/07/12/judges-call-end-marion-countys-small-claims-court-system/12585307/> [<http://perma.cc/JW2S-C6H7>] (describing widespread choices of improper venue in consumer-debt filings).

often staged in a way that suggests to a layperson that the attorneys are an arm of the court. The attorneys may, for example, sit at desks in the well of the courtroom or place their files at the clerk's station. The defendant often lacks understanding of the consequences of the settlement to which he is agreeing. For example, a dismissal (with or without prejudice) does not carry the same inference of liability nor enable the plaintiff to undertake enforcement actions as might be possible following a settlement which is structured as an entry of judgment with a stay of execution. The plaintiff's lawyer, on the other hand, understands the very real advantages to her client of the latter alternative.<sup>30</sup>

Litigants may feel pressure to acquiesce to opposing counsel's settlement demands when judges encourage parties to explore settlement possibilities.<sup>31</sup> This pressure is exacerbated when plaintiffs' lawyers violate the ethical rules against advising unrepresented opponents or misrepresent the law in pushing for an agreement.<sup>32</sup> Court review of the settlement tends to be a perfunctory and dominated by the attorney,<sup>33</sup> running a serious risk that judges will lack the information necessary to support a legally correct result.

### 3. Trial Hurdles

Defendants who resist the strong-arm hallway tactics still face significant hurdles to fair adjudication. Often the debt buyer's counsel, who does not expect to actually litigate the many cases calendared for the particular day, seeks a

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30. See Holland, *supra* note 1, at 224 (citing comments of a Maryland Assistant Attorney General that settlement discussions between plaintiffs' attorneys and unrepresented defendants opens the door to settlements "on terms [defendants] do not understand and cannot afford"); *The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, N.Y. COUNTY LAW. ASS'N 13 (2005), [http://cwtfhc.org/wpcontent/uploads/2009/06/NYCLA\\_HC\\_in\\_21st\\_Cent.pdf](http://cwtfhc.org/wpcontent/uploads/2009/06/NYCLA_HC_in_21st_Cent.pdf) [<http://perma.cc/V752-BHJL>].
31. See, e.g., Baldacci, *supra* note 10, at 665 (noting how the primary conversation of pro se litigants in landlord-tenant court is a rushed interchange with the landlord's attorney in the hallway); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 120 (1997).
32. See, e.g., Baldacci, *supra* note 10, at 665; Greiner et al., *supra* note 2, at 942-43; Joe Lamport, *Hallway Settlements in Housing Court*, GOTHAM GAZETTE (Dec. 19, 2005), <http://www.gothamgazette.com/index.php/about/3083-hallway-settlements-in-housing-court> [<http://perma.cc/J69E-3FRL>]; N.Y. COUNTY LAW. ASS'N, *supra* note 30, at 12; see also Erica Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85 (1992) (observing hallway conferences between landlord representatives and unrepresented tenants, which demonstrate how power and knowledge disparities silence defendants and cause them to lose legal rights).
33. N.Y. COUNTY LAW. ASS'N, *supra* note 30, at 13.

continuance when the defendant appears.<sup>34</sup> The defendant, however, may have taken time off from work, lost wages, and incurred expenses to attend. Each time the defendant comes back the plaintiff's counsel may seek a continuance, until the defendant misses a date, at which time the lawyer seeks a default judgment.

But perhaps the day arrives when a judge hears the case. Even a litigant who has defenses can be quickly silenced. Outside of the courtroom, we tell stories through narrative. We contextualize the narrative, often through asides, parenthetical references, and a variety of associations. But that is not the way we try cases. Narration is expected to adhere to a narrow focus, constrained and ordered by technical rules of evidence. The narrative must on its face demonstrate "relevance"—a consistently tight relationship of facts to the claims or defenses. It is expected to present factual points in a linear sequence. The unrepresented litigants in these high-volume dockets may not be accustomed to presenting facts this way. They are often stymied by unfamiliar vocabulary, unable to overcome evidentiary objections, and are unable to conduct effective direct and cross-examinations or admit documents into evidence. Judges, afraid of seeming to be coaching or favoring one side, may be reluctant to guide the litigant to elicit facts that prove legitimate defenses. Ironically, defendants may fare just as poorly on the other end of the spectrum, in small claims venues where the rules of evidence are "relaxed," when the "relaxation" may result in even less scrutiny of the legitimacy of plaintiffs' claims and the adequacy of their proof.<sup>35</sup>

With judgment in hand, creditors proceed to garnish wages, seize assets, and attach bank accounts. Debt on the unpaid judgment continues to grow and blights future opportunities. In sum, the litigation process has left defendants unheard and trapped in a cycle of defeat.

### III. RECOMMENDATIONS FOR IMPROVEMENT

These problems are not unknown or unacknowledged. Both the FTC and the Consumer Financial Protection Bureau (CFPB) have documented the pervasiveness of these problems and the CFPB is expected to issue rules and guidance, which may reduce some of the problems generated by collection-related practices.<sup>36</sup> However, changes beyond those that are expected from the CFPB

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34. See FED. TRADE COMMISSION, *supra* note 3, at 14. This is not a new problem. See Engler, *supra* note 31, at 120 (reporting that plaintiffs' attorneys routinely continue cases when defendants appear, increasing the likelihood of default).

35. The Hannaford-Agor et al. study revealed that seventy-six percent of plaintiffs in small claims dockets were represented by attorneys. The report notes that this trend "suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases." Hannaford-Agor et al., *supra* note 1, at v.

36. See *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, CONSUMER FIN. PROTECTION BUREAU (2016), [http://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Outline\\_of\\_proposals.pdf](http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf) [<http://perma.cc/C5J3-56CN>] (present-

are needed to improve court operations, rules, and culture. The following are just a few examples of changes that courts could implement—generally without requiring legislation—to substantially reduce inequities and abuses.<sup>37</sup>

**Improve service of process and other notifications.** Technology, increased regulation and oversight can substantially improve effective notice and accountability regarding service of process. Verification through the use of inexpensive, common technology, such as GPS records and smartphone photographs, can help servers document the accuracy of their work and prevent fraud. New York City has implemented a simple protection—requiring that plaintiffs in consumer collection cases provide the court with a notice of the pendency of the lawsuit in a stamped envelope addressed to the defendant and returnable to the Clerk of the Court. The court will not enter a default judgment when the notice is returned as undeliverable. Additional penalties for improper service or enforced licensing or bonding of professional process servers may also reduce the likelihood of sloppy or fraudulent service.<sup>38</sup> Electronic notification for persons with known and verifiable email addresses may also be an effective alternative to outdated and more expensive forms of service.

**Require adequate pleading.** Standardized complaint forms and required initial disclosures could include mandatory fields to safeguard against the most common, recurrent defects in initial filings. Attachment of the original contract on which the claim is based—together with documentation of a clear chain of title—would establish plaintiff's standing, the presumptive date the claim arose, the bases for the amounts sought, and the legitimacy of the venue. Incomplete complaints would not be accepted for filing. Similarly, standardized Answer/Counterclaim forms, such as those a number of courts currently make available, could help identify and therefore preserve common defenses.

**Provide accessible and meaningful legal assistance to unrepresented persons.** Legal assistance, not just information, should be available to guide unrepresented litigants at every stage of the litigation. Meaningful legal assistance involves advice tailored to the case. It should include “unbundled” services such as pleading affirmative defenses and counterclaims, formulating and responding to discovery requests or motions, assistance with mediation or settlement conversations, review of mediated or other settlements, and basic trial prepara-

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ing the agency's proposals for regulations affecting many aspects of the debt collection lifecycle; proposals will be the subject of continued industry feedback and public comment).

37. Of course, access to counsel would provide significant procedural and substantive protections for litigants in high-volume dockets. Some courts have developed pilot projects that afford low-income litigants counsel, particularly in housing cases. Discussion of the benefits and challenges of such efforts are beyond the scope of this Essay.
38. A study that examined debt files in Dallas, Texas found that approximately twenty-five percent of debt buyers involved in the cases studied did not have active bonds filed with the state, in violation of state law. See Spector, *supra* note 6, at 6. A court rule to preclude entities that are not in compliance with applicable bonding laws from filing Affidavits of Service or conspicuously posting the names of those that are in compliance could also deter future violations.

tion. Such services should be available in languages that are spoken by significant numbers of litigants and community members, and cultural competency training should be provided to court staff to bridge cultural differences to better equip persons from other cultures to navigate and be heard in American courts.

**Provide remote capabilities.** Opportunities for remote access for filing court papers online, obtaining assistance, and, in appropriate circumstances, conducting hearings or conferences via Skype or other internet-based methods can reduce the cost and burden for litigants and lawyers, particularly those in rural communities. Courts can work with other stakeholders, including legal aid organizations and law schools, to provide clinics, workshops, and opportunities for assistance in the community. Partnerships with libraries may be useful for offering persons without computer access to online services, video conferencing, and the like. Trained laypersons could assist litigants with the use of such technology.

**Reduce overreaching “hallway” negotiations and heavy-handed settlement practices.** Clear separation of counsel from court personnel and services, helpful signage, a simple, automated check-in process, and staggered appearance times are simple changes that will reduce confusion, overreaching, and burdensome delays. Court personnel, including judges, should not discourage litigants who believe they have meritorious defenses from presenting their cases to the judge or instill a fear of going to trial.

Courts could provide guidelines for the place and manner of settlement discussions, including information about how litigants can ascertain the consequences of a proposed settlement. Standardized settlement agreement forms could incorporate explanations of common types of agreements to prevent overreaching. Judges should explore whether the parties understand the obligations and implications of a “hallway” agreement, to ensure that the settlement is not the result of coercion or misleading statements by the plaintiff’s lawyers. Their inquiry could follow a standardized set of questions and protocols to avoid an appearance of partiality.

New York City has instituted a “Court Navigator” program that includes providing assistance to unrepresented litigants in hallway settlement discussions.<sup>39</sup> Letting litigants know of the limits of permissible negotiation and

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39. For an overview of the “Court Navigator” program, see *Court Navigator Program*, N.Y. ST. UNIFIED CT. SYS. (Mar. 19, 2014), [http://www.nycourts.gov/courts/nyc/housing/rap\\_prospective.shtml](http://www.nycourts.gov/courts/nyc/housing/rap_prospective.shtml) [<http://perma.cc/RM72-ZMRQ>]. Early survey results indicate that litigants and judges found the program helpful. See Comm. on Nonlawyers and the Justice Gap, *Navigator Snapshot Report*, N.Y. ST. CT. NAVIGATOR PROGRAM (2014), <http://nylawyer.nylj.com/adgifs/decisions15/022415report.pdf> [<http://perma.cc/7TNY-BMTX>]. A recent evaluation of New York’s Court Navigator program found that it improved the experience and outcomes for unrepresented defendants in housing and consumer debt cases. See Rebecca L. Sandefur & Thomas M. Clarke, *Roles Beyond Lawyers: Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and Its Three Pilot Projects*, AM. B. FOUND. & NAT’L CTR. FOR ST. CTS. (2016), [http://www.americanbarfoundation.org/uploads/cms/documents/new\\_york\\_city\\_court\\_navigators\\_executive\\_summary\\_final\\_with\\_final\\_links\\_december\\_2016.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_executive_summary_final_with_final_links_december_2016.pdf) [<http://perma.cc/C32T-6Z6T>].

providing opportunities for complaints may also deter improper conduct. However, responsibility for overzealous lawyering is also the responsibility of the Bar. Local bar associations should consider adopting methods for assuring adherence to established ethics rules.

**Provide language accessibility.** Every communication or point of contact with the court, including signage and court forms, should be provided in English and the language of any significant non-English-speaking population. Every court should have access to interpreter services. Interpreter assistance should be available free of charge to all non-English-proficient litigants appearing without counsel.

**Provide judicial training.** There are many ways judges can more actively guide the fact-finding process to ensure that pro se litigants, particularly those for whom the process is different from, or at odds with, their cultural values or expectations, have a meaningful opportunity to tell their stories. Recommendations developed by the Pro Se Implementation Committee of the Minnesota Conference of Judges (2002) and the Idaho Committee to Increase Access to the Courts (2002), for example, include more explanations of the trial process, the elements of claims and defenses, burdens of proof, and evidentiary requirements. They support rules that emphasize weight to be given to evidence, rather than technical admissibility requirements. They permit litigants to offer narrative testimony and encourage questions from the judge to elicit information that is germane to claims and defenses.

**Protect against entry of default judgments and improper satisfactions of judgments.** It is inevitable that, even with the reforms outlined above, courts will continue to be faced with claims to which no defense has been entered. Simple, standardized forms can also be developed to require that default motions are not entered unless the supporting documentation reflects adherence to procedural and substantive standards, and that the amount sought is documented and appears accurate.

## CONCLUSION

Procedural court reform will not level the playing field nor provide all civil litigants who want and could use a lawyer with one. Procedural court reform will not alleviate systemic problems involving the business of debt collection which require a legislative response. But serious procedural reforms are necessary to ensure that our state civil courts do not perpetuate inequality under the guise of justice.