ARTICLE

DEFAULT PROCEDURES

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In vast numbers of debt-collection cases, defendants never appear. Courts then routinely issue default judgments, often rubber stamping complaints with little or no examination of the underlying facts, on the implied justification that absent defendants have waived their right to a hearing or effectively conceded to the plaintiff's case. Many other reasons likely cause these absences, however, and potentially meritorious defenses are never raised. Plaintiffs, meanwhile, are predominantly repeat-player debt buyers whose service efforts and proof of claim are sometimes inadequate. The resulting judgments can have devastating effects on people's credit, employment, and housing, reflecting and exacerbating social, economic, and racial inequality.

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Reforms to facilitate defendants' participation, for example, by improving notice, service, and access to legal advice, are essential to reducing rates of meritless default judgments. But even with such efforts, high rates of defendant non-appearance are likely to persist and to create challenges for the American adversarial system. On closer examination, default procedures reveal flaws in relying on participation in an adversarial dispute as the key to fair process. Courts must reconceptualize their task to achieve just, as well as accurate, outcomes that encourage and respect defendants' participation but also function in their absence. State courts are ripe for this kind of reform. Indeed, some states have already begun.

This Article draws on a broad set of sources—including procedural rules, case law, interviews, and empirical studies—to explore, analyze, and critique U.S. default procedures. It uses this analysis to reevaluate the role of participation in procedure, the social costs of having too much or not enough procedure, and the possibility of making courts too easily accessible. It then considers how these theoretical contributions can inform ongoing reform efforts.

INTRODUCTION

In 2016, Ms. Smith learned that she had been sued in New York City Civil Court three years earlier for a decade-old unpaid tuition debt.[1] A debt purchaser had bought the debt from a vocational school that New York had closed in 2006 for failing to meet academic standards. But the purchaser served Smith at an incorrect address. When Smith did not appear, the court granted the purchaser's motion for default judgment without further inquiry, effectively rubber stamping the complaint. Smith discovered this three years later, when a lawyer notified her that her wages would be garnished to satisfy the judgment. The garnishment eventually left her unable to pay rent, so in 2020, she found herself in landlord–tenant court. In New York City, that entitled her to a lawyer, from whom she learned for the first time that she could seek to vacate the default judgment due to the improper service. When she did this, however, the court denied her motion, finding that she had waived any objection to the original court's jurisdiction by making garnishment payments for over a year. Because the court determined she had been dilatory in asserting her rights, she was not entitled to relief from the default judgment.[2]

Smith had fallen victim to the vagaries of default procedures, the state and local laws that govern the issuance, setting aside, and enforcement of default judgments. While rare in federal court,[3] default judgments have become standard operating procedure for resolving cases in state and local courts.[4] Rates of default judgments as a percentage of total dispositions vary

1 These facts (and the name) differ only slightly from the real case. The debt purchaser, Esgro Capital Management, LLC, filed approximately 400 suits against former Taylor Business Institute (TBI) students, most of which ended in default judgments. Brief of Legal Services Providers as Amici Curiae Supporting Defendant-Appellant at 28, *Esgro Cap. Mgmt., LLC v. Banks*, 2023 WL 5444151 (N.Y. App. Div. Aug. 24, 2023).

2 Esgro Cap. Mgmt., LLC v. Banks, No. 570073/22, 2022 WL 2206546 (N.Y. App. Term June 17, 2022). In 2023, the First Department overturned an earlier decision's bright-line rule that being subject to wage garnishment for over a year constituted waiver of the right to object to jurisdiction. Esgro Cap. Mgmt., LLC v. Banks, 201 N.Y.S.3d 33, 34 (N.Y. App. Div. 2023).

3 Default-judgment rates in federal courts hover at under two percent. *See supra* Appendix, Figure 7; *see also* Charlotte S. Alexander, Nathan Dahlberg, Alexandra D. Lahav & Peter Siegelman, No Adjudication 21 (Nov. 1, 2024) (unpublished manuscript), https://ssrn.com/abstract=4909655; EMERY G. LEE III & JASON A. CANTONE, FED. JUD. CTR., DEFAULT AND DEFAULT JUDGMENT PRACTICES IN THE DISTRICT COURTS 24 fig. 1 (2024), https://www.fjc.gov/sites/default/files/materials/26/FJC_report_Rule_55_February_2024.pdf [https://perma.cc/73YB-VKSJ].

4 PEW, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 16 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf

by state, but they are often higher than seventy percent in debt-collection cases.[5] These statistics are down from rates possibly as high as ninety-five percent a decade ago.[6] But they may undercount. Few states consistently report small-claims courts data, which the National Center for State Courts has called "the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases."[7]

While procedure scholarship tends to focus on high-stakes and complex litigation in federal courts and higher-level state courts, a growing literature draws attention to the smaller claims that populate the lowest levels of state civil courts.[8] These courts hear ninety-eight percent of cases filed in the

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[https://perma.cc/N9VF-C8KJ]; Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1721 & nn.84–85 (2022); Casey Chiappetta, *Debt Collection Cases Continued to Dominate Civil Dockets During Pandemic*, PEW (Sept. 18, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/09/18/debt-collection-cases-continued-to-dominate-civil-dockets-during-pandemic [https://perma.cc/5P8S-253C].

5 *See, e.g.*, *Michigan Debt Collection Data Dashboard*, MICH. JUST. FOR ALL COMM'N, https://januaryadvisors.shinyapps.io/michigan-debt-app [https://perma.cc/5JLQ-H4DH] (last visited Feb. 13, 2024) (noting that default-judgment rates during 2020 and 2021 were 53.47% in Michigan district courts when the plaintiff was a bank or credit card company and 61.38% when the plaintiff was a debt buyer); REINVESTMENT FUND, POLICY BRIEF: DEBT COLLECTION IN PHILADELPHIA 7 (2021), https://clsphila.org/wp-content/uploads/2021/03/ReinvestmentFund_2021_PHL-Debt-Collection-Final-report.pdf [https://perma.cc/G9DQ-SQ37] (noting that the default-judgment rate was 65% in Philadelphia Municipal Court between January 2016 and April 2020); *see also supra* note 4. As others have noted, Texas appears to have a much lower default judgment rate "for reasons that remain unknown." Wilf-Townsend, *supra* note 4, at 1721 n.85; Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and Out of the Courts*, 67 HASTINGS L.J. 1427, 1449 (2016) (finding Texas' debt default-judgment rate was 31.6% in 2015). As in all state civil court studies, data is hard to find and imperfect. *See, e.g.*, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1484-87 (2022) [hereinafter Shanahan et al., *Institutional Mismatch*] (detailing the difficulties associated with state civil court data).

6 *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 & n.18 (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf [https://perma.cc/25B5-A6TU] ("Although no empirical data were presented or submitted, panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent.").

7 PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS at v (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/6CAE-WGSG]; *see also* PEW, *supra* note 4, at 19 (pointing out that the NCSC's 2015 report, despite looking at more than 925,000 cases from 152 courts in ten urban counties, examined only five percent of state civil case loads nationally). The accuracy of this statement likely varies by state and the comparative plaintiff-friendliness of small-claims and general-jurisdiction courts. *See infra* Part I (showcasing the variety and complexity of the default-judgment landscape).

8 I use the term "state civil court" to include state and local civil courts that hear adversarial cases between two or more parties before a judge, including municipal courts and specialized courts

United States.[9] These cases relate to people's fundamental needs—their ability to pay their bills, remain in their housing, and manage their familial relationships. As the institutions of last resort for resolving conflict over these issues, state civil courts operate as "the democratic emergency room" for these social needs.[10]

Debt-collection cases are the most common type of civil case filed in many jurisdictions,[11] and, as noted, they are commonly resolved by default judgment.[12] Nevertheless, the literature on these courts tends to focus on pro se litigants' experiences, the absence of lawyers, and judicial behavior in cases in which defendants appear.[13] Alternatively, some scholars argue for looking outside of state courts to address high-volume debt-collection litigation—by, for example, improving state agency oversight.[14]

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like family court and housing court, but not traffic court. *See* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1183 n.1 (2022). For more on local courts, see generally Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020); Ethan Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707 (2015).

9 Nationwide, ninety-eight percent of civil cases are filed in state civil courts. Anna E. Carpenter, Alyx Mark, Colleen F. Shanahan & Jessica K. Steinberg, *Foreword: The Field of State Civil Courts*, 122 COLUM. L. REV. 1165, 1165 (2022) [hereinafter Carpenter et al., *State Civil Courts*]. Debt-collection suits represent a significant portion of those dockets, constituting over fifty percent in some states. Chiappetta, *supra* note 4; HANNAFORD-AGOR ET AL., *supra* note 7, at v.

10 Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 362 (2022).

11 *See* Shanahan et al., *Institutional Mismatch*, *supra* note 5, at 1494 (noting that debt-collection cases make up the plurality of small claims in civil courts); Chiappetta, *supra* note 4 ("[In 2018], in states with available data, ten out of [twelve] jurisdictions saw debt collection lawsuits as the most common case type.").

12 Chiappetta, *supra* note 4; PEW, *supra* note 4, at 15-17; *see also* Wilf-Townsend, *supra* note 4, at 1768 (finding seventy to eighty percent default-judgment rates). By contrast, less than two percent of cases in federal courts are resolved by default judgment. LEE & CANTONE, *supra* note 3, at 24 fig. 1. These statistics do not fully account for municipal courts and small-claims courts, which hear significant numbers of lower-value debt-collection cases but keep poor records. *See generally* Natapoff, *supra* note 8, at 975 (noting a dearth of both third-party and state statistics on municipal court dockets). Older studies suggest high rates of default judgments in small-claims courts. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 198-203 (2014) (describing these older studies).

13 *See generally, e.g.*, Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022) [hereinafter Carpenter et al., *Lawyerless Courts*] (discussing judicial behavior in the absence of lawyers in civil trial courts); Carpenter et al., *State Civil Courts*, *supra* note 9; Bookman & Shanahan, *supra* note 8; Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1143-47 (2019) (discussing pro se litigants' experiences of due process); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018) (urging reform in state courts where structural conditions endanger vulnerable classes of litigants); *cf.* Wilf-Townsend, *supra* note 4 (studying the way that mass repeat filers transform state courts into one-sided claims processors).

14 *See, e.g.*, Wilf-Townsend, *supra* note 4, at 1769 (proposing an agency model to oversee and process claims at scale); Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND.

Given the high rates of defendants' absence, understanding default procedures—the rules that govern in courts when defendants do not appear—is vital to understanding state civil courts' bread and butter.[15] Focusing on default judgments also illuminates debates about the importance of defendants' appearance, what happens when defendants do appear, and the role of adversarialism in state courts.

This Article offers a reckoning of default procedures in state courts. It argues for understanding the problem with high default-judgment rates in terms of procedural-justice challenges in a broken adversarial system. Comprehensive catalogues of best practices are collected elsewhere.[16] This Article focuses on debt-collection cases, although the analysis illuminates

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L. REV. 121, 142-44 (2018) (proposing the integration of administrative oversight into civil litigation).

15 The literature directly on default procedure is sparse. *But see* Alexi Pfeffer-Gillett, *Unfair by Default: Arbitration's Reverse Default Judgment Problem*, 171 U. PA. L. REV. 459, 471-74 (2023) (arguing that arbitration allows defendants to evade liability by ignoring claims, shifting fees to plaintiffs, and forcing plaintiffs to pay excessive costs or abandon their cases); William Joseph Bearden, Note, *Employing the Prima Facie Standard in Third Party Debt Collection Default Judgments*, 48 URB. LAW. 365, 372-74 (2016) (criticizing creditor- and debt-buyer plaintiffs' practices of alleging unresearched facts or attesting in affidavits to facts "of which they have no personal knowledge" because they know many debtors will default).

16 Several reports, the Uniform Act, and other sources suggest best practices both for individual jurisdictions and the nation as a whole. *See* UNIF. CONSUMER DEBT DEFAULT JUDGMENTS ACT (UNIF. L. COMM'N 2023); *see also*, *e.g.*, PAULA HANNAFORD-AGOR & BRITTANY KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PREVENTING WHACK-A-MOLE MANAGEMENT OF CONSUMER DEBT CASES: A PROPOSAL FOR A COHERENT AND COMPREHENSIVE APPROACH FOR STATE COURTS 18-24 (2020), https://iaals.du.edu/sites/default/files/documents/publications/management_of_consumer_debt_cases.pdf [https://perma.cc/VK2U-2RCN] (identifying six procedural changes); MINN. STATE BAR ASS'N, MINNESOTA CONSUMER DEBT LITIGATION: A STATEWIDE ACCESS TO JUSTICE REPORT 35-45 (2023), https://mnbars.org/?pg=debt-litigation-report [https://perma.cc/C6AT-4MKC] [hereinafter MINNESOTA REPORT] (focusing on procedural reform as well as access to relevant resources and services); MICH. JUST. FOR ALL COMM'N, REPORT & RECOMMENDATIONS: ADVANCING JUSTICE FOR ALL IN DEBT COLLECTION LAWSUITS 3 (2022), https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa_advancing_justice_for_all_in_debt_collection_lawsuits.pdf [https://perma.cc/M2BU-F5EJ] [hereinafter MICHIGAN REPORT] (same, for Michigan, and adding research); NAT'L CTR. FOR STATE COURTS, KEY STEPS AND TOOLS TO IMPLEMENT NOW TO ENSURE THE FAIR AND EFFICIENT HANDLING OF CONSUMER DEBT ACTIONS (2020), https://www.ncsc.org/__data/assets/pdf_file/0032/55499/Ensure-Fair-and-Efficient-Handling-of-Consumer-Debt-Actions.pdf [https://perma.cc/2E7P-Z6FJ] (same, for all courts); GRACE SPULAK, NAT'L CTR. FOR STATE COURTS, DEBT COLLECTION REFORM IMPLEMENTATION TOOLKIT (2023), https://www.ncsc.org/__data/assets/pdf_file/0022/97132/NCSC-Debt-Collection-Reform-Implementation-Toolkit.pdf [https://perma.cc/CQ3X-9HJE] (outlining a toolkit for implementing debt-collection reform in four key areas); PRINCIPLES OF THE L.: HIGH-VOLUME CIV. ADJUDICATION (AM. L. INST., COUNCIL DRAFT NO. 2, 2024) (articulating principles to address the challenges arising from high-volume civil adjudication—predominantly debt-collection and eviction adjudication—in state courts).

challenges in other contexts, like eviction proceedings and traffic court.[17] A review of the modern landscape reveals that courts and procedures can be, and indeed already are, the locus of meaningful reform.

The Article's basic mission is threefold. First, it documents debt-collection litigation default procedure and reform efforts across several states. Second, it theorizes when default procedures are inadequate and why that inadequacy is problematic not just in terms of the due-process problems in individual cases, but also in terms of the costs to the courts' institutional integrity, fairness across multitudes of cases, and incentive structures for judges and litigants. Third, it considers how and why courts should function more effectively and fairly in defendants' absence. Doing so would enhance state courts' legitimacy and contributions to the rule of law.

Issuing default judgments without proper notice or without merit exacts high social costs on people's lives.[18] Default procedures cumulatively help fuel a billion-dollar debt-collection industry.[19] While state civil courts cannot themselves alleviate America's crisis of indebtedness,[20] they can choose whether their procedures facilitate efficient collections of meritorious debt claims or exacerbate social problems.

High default-judgment rates are not inherently problematic if they reflect high filing rates of uncontested, meritorious claims. But there is reason to believe that many small-dollar debt judgments are meritless,[21] frivolous,[22] or

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17 *Cf.* Justin Weinstein-Tull, *Traffic Courts*, 112 CAL. L. REV. 1183 (2024) (not mentioning default); Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 380-81 (2022) (discussing default judgments).

18 *See, e.g.*, Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond*, 107 MINN. L. REV. 2039, 2040-50 (2023) (describing the broad social and economic impacts of consumer law); PEW, *supra* note 4, at 17 ("Court and attorney fees can amount to hundreds of dollars, and consumers can face wage garnishment and liens or even civil arrest for failure to comply with court orders.").

19 *See generally* ABHAY ANEJA, LUIS FAUNDEZ, DALIÉ JIMÉNEZ, CLAIRE JOHNSON RABA, PRASAD KRISHNAMURTHY & MANISHA PADI, DEBT COLLECTION LAB, DEBT DOCUMENTATION REQUIREMENTS IN STATE COURTS AND ACCESS TO CREDIT 2 (2024), https://debtcollectionlab.org/research/debt-documentation-requirements-in-state-courts-access-to-credit [https://perma.cc/8L4C-75QN] ("In 2023, an estimated 6,431 debt collection agencies in the U.S. earned $20.9 billion in revenue.").

20 *See, e.g.*, David Straughan, *Americans Are Carrying Record Household Debt into 2024*, MARKETWATCH (Oct. 2, 2024), https://www.marketwatch.com/guides/banking/american-debt-2024 [https://perma.cc/HL44-JKE5] (noting that total U.S. household debt was $17.8 trillion as of Q2 2024).

21 I define a meritless claim as one to which there is a valid defense, whether that is a weakness in the prima facie case, an affirmative defense like a statute of limitations, or a procedural defense like improper service or venue. *Cf.* Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 653 (1997) (defining a claim as meritless where evidence, if presented to the court, would defeat it).

22 I borrow Robert Bone's definition of a frivolous lawsuit: "A suit is frivolous (1) when a plaintiff files knowing facts that establish complete (or virtually complete) absence of merit as an objective matter on the legal theories alleged, or (2) when a plaintiff files without conducting a

fraudulent,[23] involving debts that were never incurred or were paid, discharged in bankruptcy, expired, or inflated.[24] Some are invalid for other reasons, such as inadequate service, improper venue, or illegal debt-collection efforts.[25]

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reasonable investigation which, if conducted, would place the suit in prong (1)." Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 533 (1997) (emphasis removed). Both types of suits populate state civil courts, although it is hard to quantify their frequency. *Cf.* D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595, 1603-06 (2023) (identifying a similar issue in multidistrict litigation (MDL)).

23 *See, e.g.*, Raúl Carrillo, *Seeing Through Money: Democracy, Data Governance, and the Digital Dollar*, 57 GA. L. REV. 1207, 1256 (2023) (identifying data breaches and identity fraud as possible ways an individual could be exposed to a fraudulent debt judgment).

24 For recent examples of regulatory enforcement actions identifying misconduct underlying such judgments, see, for example, Press Release, Consumer Fin. Prot. Bureau, CFPB Orders Repeat Offender Portfolio Recovery Associates to Pay More Than $24 Million for Continued Illegal Debt Collection Practices and Consumer Reporting Violations (Mar. 23, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-portfolio-recovery-associates-to-pay-more-than-24-million-illegal-debt-collection-practices-reporting-violations [https://perma.cc/4ED3-KCL2] (pursuing regulatory enforcement against parties that had, inter alia, sued to collect on unsubstantiated and time-barred debt); Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action to Halt Debt Collection Mill From Bombarding Consumers with Junk Lawsuits (Jan. 11, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-halt-debt-collection-mill-from-bombarding-consumers-with-junk-lawsuits [https://perma.cc/YY7X-NYPL] (describing a CFPB settlement with a law firm for illegally suing consumers for debts without proper substantiating documentation); Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Debt Collector for Failing to Investigate Reports of Identity Theft and Misrepresenting Consumers' Debts (Aug. 17, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-actions-against-debt-collector-for-failing-to-investigate-reports-of-identity-theft-and-misrepresenting-consumers-debts [https://perma.cc/XN3F-LDNV] (describing proposed settlement against a debt-collection enterprise for providing false or unsubstantiated information to credit agencies).

Scholars also recognize the prevalence of meritless debt claims. *See* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1282-83 (2022) ("These default judgments are entered despite growing evidence that most people sued do not owe the debt amount named in the lawsuit or may not have received notice of the lawsuit against them."); Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 611-12 (2018) (proposing solutions to the problem of lawsuits suing over "zombie debts," which are expired and often also unsubstantiated by reliable evidence); Arbel, *supra* note 14, at 124 (discussing "unmeritorious claiming" of debts that are fraudulent, paid or settled, or expired); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 45 (2015) [hereinafter Jiménez, *Dirty Debts*] ("detail[ing] the alarming and systemic issues" with "the information in the current debt collection and debt buying system," and thereby "expos[ing] the difficulties consumers face in verifying that they are paying the right amount to the right party when contacted by a collector, as well as the hurdles debt buyers face in collecting").

25 *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, State Partners and CFPB Sue Prehired for Illegal Student Lending Practices (July 13, 2023), https://www.consumerfinance.gov/about-us/newsroom/state-partners-and-cfpb-sue-prehired-for-illegal-student-lending-practices [https://perma.cc/VQU5-FR7Y] (involving Fair Debt Collection Practices Act (FDCPA) violations including debt-collection suits brought in an improper venue). The FDCPA imposes many restrictions on debt-collection practices. *See, e.g.*, 12 C.F.R. § 1006.26 (2021) (prohibiting threats to bring legal action to collect time-barred debts); 15 U.S.C. § 1692e (prohibiting false or misleading

Such meritless default judgments happen in part because courts effectively rubber stamp complaints when defendants do not appear. The plaintiffs filing the high volumes of debt collection cases are repeat-player debt buyers who have developed efficiencies in pursuing high volumes of small debts.[26] Purchasing debts often means buying spreadsheets with limited (and sometimes inaccurate) information about the debts for pennies on the dollar, which debt buyers then turn into court filings.[27] These plaintiffs rely on defendants' non-appearance to keep litigation costs low.[28] Court judgments then provide the plaintiffs access to court-sanctioned debt-collection tools that enable them to garnish paychecks, bank accounts, or tax returns.[29]

In these cases, defendants' absence might reflect that they owe the debt and lack defenses. But their absence could also reflect poor service or incomprehensible notice.[30] This Article highlights additional explanations for non-appearance, including the impracticability of appearing, lack of understanding about the legal system, lack of access to legal advice, and obstacles to accessing and evaluating their own financial records held by creditors.[31] In such circumstances, absence should not constitute knowing, willing, intelligent waiver, and it is unreasonable for courts to rely on a

representations in the course of collecting debts). Although creditors are required to verify with the consumer that the debt is owed as represented, neither the FDCPA nor Regulation F articulate standards for the verification of debts, and courts have struggled to articulate them. ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS AND REGULATION 686 (2d ed. 2023).

26 *See* Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 380-83 (2022) (detailing the history of debt-collection abuses).

27 Jiménez, *Dirty Debts*, *supra* note 24, at 42-43. Debt buyers have inadequate information about debts due to, among other things, error-prone recordkeeping by firms that contract with consumers and limited record transfer when they later sell those unpaid debts. Danielle D'Onfro, *Error-Resilient Consumer Contracts*, 71 DUKE L.J. 541, 567-69 (2021).

28 *See, e.g.*, Wilf-Townsend, *supra* note 4, at 1721 (speculating that plaintiffs' economies of scale rely on defendant non-appearance).

29 *See, e.g.*, Jonathan Oosting, *Report: Debt Collection Cases Flood Michigan Courts, Hurt Low-Income Residents*, BRIDGE MICH. (Nov. 16, 2022), https://www.bridgemi.com/michigan-government/report-debt-collection-cases-flood-michigan-courts-hurt-low-income-residents [https://perma.cc/2MS8-2EMP].

30 *See, e.g.*, PEW, *supra* note 4, at 16, 20 (detailing notice deficiencies and reforms to address the issue); D. James Greiner & Andrea J. Matthews, The Problem of Default, Part I, at 4-5 (June 16, 2015) (unpublished manuscript), https://ssrn.com/abstract=2622140 (hypothesizing that informational and psychological barriers increase procedural default); Robin J. Effron, *The Invisible Circumstances of Notice*, 99 N.C. L. REV. 1521, 1533, 1545 & n.101 (2021) (discussing the impact of "sewer service," the practice of falsifying service affidavits, on default-judgment rates); Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167, 170 (2019) (arguing that pro se litigants experience procedural hurdles like service more acutely than represented litigants).

31 *See infra* Section I.B.

defendant's non-appearance as an indication of the merits of a plaintiff's claims.

It is difficult, however, to determine how often default judgments result from defendants conceding the merits and how often they result from these other explanations. To be clear, plaintiffs with meritorious cases should win. But whether or not the defendant appears, plaintiffs with meritless or frivolous cases should lose. One problem is that even when defendants owe some debt, there can be more to the merits of the case—money may be owed, for example, but less than the plaintiff asserts.[32] The merits have become more complicated as legislatures have passed more consumer and tenant-protection laws—but procedures have not always adjusted. Defendants' non-appearance in these contexts is simply not a reliable indicator that the plaintiff's case has merit. Moreover, rubber-stamp default procedures, still prevalent in many states, do not even purport to check the merits before entering judgment.[33] It is nearly impossible to tell how often this happens.[34]

The reason for high default-judgment rates informs whether they are seen as a problem and what can be done about it. If the problem is defendants' absence, the cause of that absence might be poor notice,[35] or other reasons that hinder defendants' meaningful participation, like insufficient access to legal advice, poor experiences in court, or inadequate opportunities to resolve debt disputes outside of court. Some see online dispute resolution (ODR) as the solution, although that comes with its own challenges.[36] To be sure, pro se litigants' negative experiences can lead to decreased engagement with the legal system; reform efforts to improve those experiences can decrease default

32 *See infra* subsection III.A.2.

33 *See infra* Section I.B (discussing procedures in Ohio, Michigan, and Pennsylvania).

34 PEW, *supra* note 4, at 19 ("[S]tate court data are scarce."). Due to high rates of indebtedness, some assume error rates must be low. Pointing to successful enforcement actions against sewer service, attempts to recover "zombie debts" and other practices, others assume error rates are high. Arbel, *supra* note 14, at 153-54; *cf.* Jon D. Fish, Note, *"Unfair or Unconscionable": A New Approach to Time-Barred Debt Collection Under the FDCPA*, 86 U. CHI. L. REV. 1941, 1946-47 & n.22 (2019) (detailing the rise in complaints to the FTC regarding the debt-collection industry—in 2013, one-third of complaints were about alleged fraudulent debts—which supports a high assumed error rate of default judgments). It is difficult to determine accurately. For various reasons, what constitutes "error" is also more complicated than it first appears. *See infra* Section II.B.

35 Greiner & Matthews, *supra* note 30; Effron, *supra* note 30, at 1544-55 & n.101.

36 *See, e.g.*, Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Legitimacy and Online Proceedings: Procedural Justice, Access to Justice, and the Role of Income*, 57 LAW & SOC'Y REV. 189, 190 (2023) (analyzing the perceived legitimacy of online proceedings and identifying tradeoffs between access and legitimacy); Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 122-31 (2015) (discussing dangers and ethical issues with ODR). *See generally* JOINT TECH. COMM., CASE STUDIES IN ODR FOR COURTS: A VIEW FROM THE FRONT LINES 10 (2017), https://www.ncsc.org/__data/assets/pdf_file/0023/18707/2017-12-18-odr-case-studies-revised.pdf [https://perma.cc/P8SK-6TG3] (providing multiple case studies in ODR implementation).

rates.[37] But these proposals are grounded in basic assumptions of adversarialism that see lack of participation itself as impeding justice. They therefore see participation as the solution. Even with reforms to increase participation rates, however, defendants are likely to be absent in large numbers.[38] Focusing on non-appearance as the core problem behind default, then, can hamper reforms to default procedures, which are and will likely continue to be the default mode of resolving vast numbers of cases in the American justice system.

Another set of scholars look past state civil courts, urging the creation of new state administrative agencies to process creditors' claims, pre-screen debt-collection filings before they can go to court, or otherwise provide oversight, since the rates of appeal are vanishingly low.[39] Calls for moving review to new agencies are innovative, but face heavy implementation headwinds and neglect the reform potential for internal state court administration and procedure, as well as the reality of today's reform efforts.

This Article contends that we should neither give up so quickly on state courts nor depend so heavily on defendants' participation. Reform is happening, with some success, in state courts that are reinventing themselves. Courts are taking on roles that in some ways eschew the strict confines of the restricted judicial role familiar from federal courts to account for the reality of low defendant participation. State courts can do this in part because they are not subject to the same constitutional restraints as federal courts; they have a broader mandate and broader institutional flexibility.[40]

Focusing on the current landscape of default procedures, this Article articulates how they can be reformed and why it is so important to do so. It first explains why participation in the context of high-volume, low-dollar debt claims should not be expected and cannot be relied upon. No theory of

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37 *See* Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 659 (2018) [hereinafter Carpenter, *Active Judging*] ("Many pro se parties enter the courthouse with the firm belief that the system is rigged and unfair, and that they have lost before the case has even begun."); Parkin, *supra* note 13, at 1146 (examining active judging as a solution to lawyerless courts); Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1348 (2021) (examining recent deregulation of the legal field as a solution to lawyerless courts); Steinberg, *supra* note 13, at 1604-05 (proposing a "problem-solving" court model to protect vulnerable parties and address information asymmetry to improve pro se litigants' experiences in court).

38 *See infra* Section II.B (describing reasons why defendants do not appear).

39 *See* Wilf-Townsend, *supra* note 4, at 1769 (suggesting creating a specialized entity that could abandon traditional case-by-case adjudication and instead use "tools such as batch processing, collective adjudication, and claim sampling"); Arbel, *supra* note 14, at 124 (proposing that an administrative agency with the power to levy large fines screen civil filings for unmeritorious claims against consumers); Shanahan et al., *Institutional Mismatch*, *supra* note 5, at 1521-28 (arguing that courts should assume policymaking roles).

40 *See* Gerald S. Dickinson, *Judicial Laboratories*, 27 U. PA. J. CONST. L. 75, 78 (2025).

procedural justice can justify default judgments in this context following such little review of the merits. Without reform, rubber-stamp default procedures compromise courts' integrity and commitment to merits-based adjudication, exacerbate inequality, and promote abusive plaintiff behavior.

There is an irony to the pervasiveness of a procedure that takes plaintiffs' complaints at face value. The arc of federal civil procedure over the last few decades has shown a retrenchment, raising barriers to court access through distrust of plaintiff's lawyers in a variety of defendant-friendly procedural moves, including federal preemption of traditional areas of state court jurisdiction, like mass-tort class actions.[41] State courts, however, have maintained easy access, yielding a growing procedural gulf between increasingly defendant-friendly federal courts and plaintiff-friendly state courts.[42] Repeat players—institutional creditors and debt buyers represented by counsel—have taken advantage of this friendliness in huge numbers of suits against pro se individuals.[43] A few "top filers" dominate the dockets.[44] State courts' plaintiff-friendliness, in short, helps the "haves" sue the "have-nots."[45]

Procedures in this context must approach default differently. Just as many access-to-justice scholars have moved on to solutions that do not rely on lawyers,[46] so too should courts structure procedures that do not rely on

41 *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 16 (2017) (arguing that the "counterrevolution" to the growth of the litigation state targeted infrastructure for private enforcement of substantive rights); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 413 (2018) (arguing that state courts present opportunities for private enforcement that the U.S. Supreme Court has foreclosed at the federal level); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1594-95 (2008) (identifying class-action reforms as part of broader retrenchment); Diego Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2104 (2019) (arguing that federal courts have become more pro-defendant while state courts are relatively pro-plaintiff).

42 Zambrano, *supra* note 41, at 2104.

43 *See* Wilf-Townsend, *supra* note 4, at 1708.

44 *See* REINVESTMENT FUND, *supra* note 5, at 2 (noting that eighty-four percent of all debt cases in Philadelphia were filed by ten plaintiffs); MICHIGAN REPORT, *supra* note 16, at 11 (noting that seventy-one percent of all debt cases in Michigan were filed by ten plaintiffs); MINNESOTA REPORT, *supra* note 16, at 18 (noting that two-thirds of all debt cases in Minnesota were filed by ten plaintiffs); CLAIRE JOHNSON RABA, DEBT COLLECTION LAB, ONE SIDED LITIGATION: LESSONS FROM CIVIL DOCKET DATA IN CALIFORNIA DEBT COLLECTION LAWSUITS 5 (2023), https://debtcollectionlab.org/research/one-sided-litigation [https://perma.cc/2UGE-A32B] (noting that five creditors accounted for a quarter of all debt claims).

45 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974) (analyzing repeat players and one-shotters and identifying that "haves" are typically in a position of advantage in the legal system).

46 *See, e.g.*, Parkin, *supra* note 13, at 1143-47 (discussing procedural reforms aimed at "accommodating pro se litigants by adjusting procedures, explaining the law and hearing process,

defendants. The goal should not be to perfect the adversarial system, but to refocus courts on accurate application of the law in a way that mitigates—or at least does not exacerbate—underlying inequality.[47] Achieving this goal would right-size burdens on plaintiffs, defendants, and courts without compromising the neutrality of judges.

Designing default procedures—like procedures in other adjudication contexts—requires balancing fairness, accuracy, and costs. Default procedures implicate familiar procedural debates about transsubstantivity, formalism, and court accessibility, and at scale they address procedural challenges that parallel those facing complex litigation and mass adjudication in administrative agencies.[48] These questions reach beyond processing debt-collection cases in state civil courts. But that problem alone is not small. Debt-collection default judgments have dominated state-court dockets for over a decade, with scholars differing on what problems they present and how to fix them. There is a growing consensus that the problems are formidable.

Part I describes default procedures in the United States, focusing on five states that showcase the variety and complexity of this landscape. Part II responds to arguments that rubber-stamp default procedures can be grounded in procedural justice. It contends that the importance of participation and adversarialism have overshadowed the values of accuracy and fairness and the social costs of rubber-stamp default procedures. Part III, the theoretical heart of the Article, unpacks these social costs, arguing that rubber-stamp procedures do not serve courts' basic functions (providing fair procedures, resolving cases on their merits, and developing and applying law), exacerbate inequality, and create perverse incentives for plaintiffs and courts. Part IV shows the anomalousness of rubber-stamp procedures by comparing them to procedures in analogous situations, which offer suggestions for reform. It then provides a framework for understanding existing procedural reform efforts, such as right-to-counsel movements and active judging, in terms of

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and eliciting information to develop the record"); Steinberg et al., *supra* note 37, at 1323 (describing efforts to allow legal professionals other than lawyers to give legal advice).

47 The ALI Principles of the Law project on High-Volume Civil Litigation calls for "mediated adversarialism," combining judicial, investigatory, and managerial approaches to adjudication. PRINCIPLES OF THE L.: HIGH-VOLUME CIV. ADJUDICATION, *supra* note 16, at 20. That seems to describe the system when defendants appear—where some kind of adversarialism, with added assistance for unrepresented defendants, is vital and preferable to a default. I, too, prefer meaningful participation. Defendant appearance can be essential to uncover certain kinds of fraud and misrepresentations. Improved notice, service, legal advice, and hearing practices must be included in any reforms. But when defendants' appearance is impracticable, reliance on adversarialism as an indicator of a case's merits puts a thumb on the scale for plaintiffs that feeds the worst of adversarialism's tendencies.

48 *See, e.g.*, Bookman & Shanahan, *supra* note 8, at 1188-90 (drawing parallels between debates in the access to justice and federal civil procedure literatures).

their effects on default rates, and considers procedural reforms targeting default problems more directly. It argues that such reforms are necessary, even if not sufficient, to address the procedural and social justice challenges facing state civil courts. The next step is to change court culture and internal administration of these procedures—a subject for future study.

I. DEFAULT PROCEDURES

This Part introduces the procedures governing default judgments in state civil courts in debt-collection cases.[49] The courts may be state courts of general jurisdiction, municipal courts, or small-claims courts.[50] Sometimes municipal courts have exclusive or overlapping jurisdiction to hear low-dollar cases below a certain threshold.[51] Across the country, procedures vary, but many adhere to an adversarial model that awards plaintiffs judgment, with little additional inquiry, if defendants do not appear.[52] Although it is often said that state procedures mirror federal procedures,[53] state civil courts'

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49 Debt-collection cases make up the bulk of state civil court dockets. *See* Shanahan et al., *Institutional Mismatch*, *supra* note 5, at 1494 (parsing data to estimate that, nationwide, low-value debt-collection matters make up between fifteen and twenty-four percent of state civil court dockets; and observing that the other three major categories of cases relate to personal relationships, children, and housing); PEW, *supra* note 4, at 1 (describing state-court dockets as "dominated" by "debt collection lawsuits"). This volume reflects both a rise in debt-collection cases and a drop in other kinds of cases that historically filled state courts. *Cf.* HANNAFORD-AGOR ET AL., *supra* note 7, at iii ("High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small proportion of the Landscape caseload.").

50 In municipal and small-claims courts, the amount-in-controversy maxima vary widely by state, from $2,500 to $25,000. PAULA HANNAFORD-AGOR, COURT STAT. PROJECT, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES 5 (2019), https://www.ncsc.org/__data/assets/pdf_file/0022/26671/caseload-highlights-examinint-debt-collection.pdf [https://perma.cc/TN6R-UD7K]. For an overview of states' approaches to small-claims courts, see Bill Raftery, *FAQ: How Small Is a Small Claims Case?*, NAT'L CTR. FOR STATE COURTS (Oct. 19, 2024), https://cdm16501.contentdm.oclc.org/digital/collection/civil/id/233 [https://perma.cc/AE3Z-VES9] (listing the minimum amount-in-controversy in several states).

51 In Houston (Harris County), for example, local Justice of the Peace courts hear debt claims for under $20,000, as well as eviction, misdemeanor, and other cases. TEX. GOV'T CODE ANN. § 27.031 (West 2023); *see also, e.g.*, LUKE MYERS, ELIZABETH NAPIERKOWSKI & JAVIER ZURITA, SHELLER CTR. FOR SOC. JUST., PREVENTING UNFAIR DEFAULT JUDGMENTS IN DEBT COLLECTION CASES: PROPOSALS FOR A COMPLIANCE CHECKLIST (2022), https://law.temple.edu/csj/wp-content/uploads/sites/3/2022/04/Preventing-Unfair-Default-Judgments-in-Consumer-Debt-Cases-Proposals-for-a-Compliance-Checklist.pdf [https://perma.cc/6PVN-79AL] (proposing reforms targeted at municipal court).

52 *See, e.g.*, Annotation, *Necessity of Taking Proof as to Liability Against Defaulting Defendant*, 8 A.L.R.3d 1070 § 2 (1966) ("The great weight of authority is to the effect that such proof is unnecessary, since the default is said to admit the truth of the allegations of the complaint.").

53 *See, e.g.*, Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707-10 (2016) (noting trend of states in the mid-to-late twentieth century changing their procedural rules to follow the Federal Rules' model); David Marcus, *The Collapse of the Federal Rules System*, 169 U.

default procedures and their implementation diverge markedly from federal courts'.[54] Indeed, a handful of states, including large states like California, Michigan, Pennsylvania, New York, and Texas, have long retained a distinct set of procedural rules that do not track the Federal Rules. This Part focuses on those five states and a few others that showcase the range of approaches to default procedures.[55] California, New York, and Texas are three of eighteen U.S. jurisdictions that have adopted specialized procedures targeting the debt-collection litigation crisis.[56] Michigan, like most other states, has not. Pennsylvania has not either, but its state legislature is currently considering a bill that would change that.[57]

Since 2010, reports have criticized the use of "rubber-stamp" procedures to issue judgments when defendants default.[58] In some states, rubber-stamp procedures are a result of procedural rules that do not require plaintiffs to submit itemized proof of their claims. In others, courts rubber-stamp default judgments despite such requirements.

Failure to require submission—and consideration—of proof before issuing a default judgment is just one piece of the interconnected web of procedures that fuel the default-judgment machines that many state courts have become. Inadequate service, inadequate notice, and inaccessible hearings can inhibit participation. The rules for set aside and protections against improper garnishment are also an inadequate safeguard against meritless

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PA. L. REV. 2485, 2506 (2021) ("Most states' procedural regimes resemble the Federal Rules System in key respects."); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377-78 (1986) (listing states whose procedural rules are replicas of federal rules).

54 Even when states copy the text of federal rules, the rules are not necessarily the same. Clopton, *supra* note 41, at 424 n.108; *see also* John J. Watkins, *Revised Rule 55, Five Years Later*, 49 ARK. L. REV. 23, 39-41 (1996) (noting that although rule makers intended Arkansas Rule 55 to be interpreted according to federal case law, the Arkansas Supreme Court had not embraced the federal approach).

55 *Cf.* Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1430 (2022) (following a similar methodology).

56 The other jurisdictions are Colorado, Connecticut, Delaware, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Vermont, and Washington, and Washington, D.C. *See infra* note 99.

57 *See* H.R. 801, 2025 Gen. Assemb., Reg. Sess. (Pa. 2025). Washington is considering a similar bill, which, like Pennsylvania's, would conform Washington law to the Uniform Act. *See* S.B. 5720, 69th Leg., 2025 Reg. Sess. (Wash. 2025).

58 *See, e.g.*, CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: U.S. COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 1, 3-4 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf [https://perma.cc/55PT-552N] ("Some judges routinely enter hundreds of default judgments for debt buyers in the space of just a few hours. One judge told Human Rights Watch that he does this at home while relaxing on a Sunday afternoon."). *See generally* John Oliver, *Debt Buyers*, YOUTUBE (June 6, 2016), https://www.youtube.com/watch?v=hxUAntt1z2c [https://perma.cc/HNX2-5DSU] (shedding light on unethical practices in debt collection and emphasizing the need for stricter regulation).

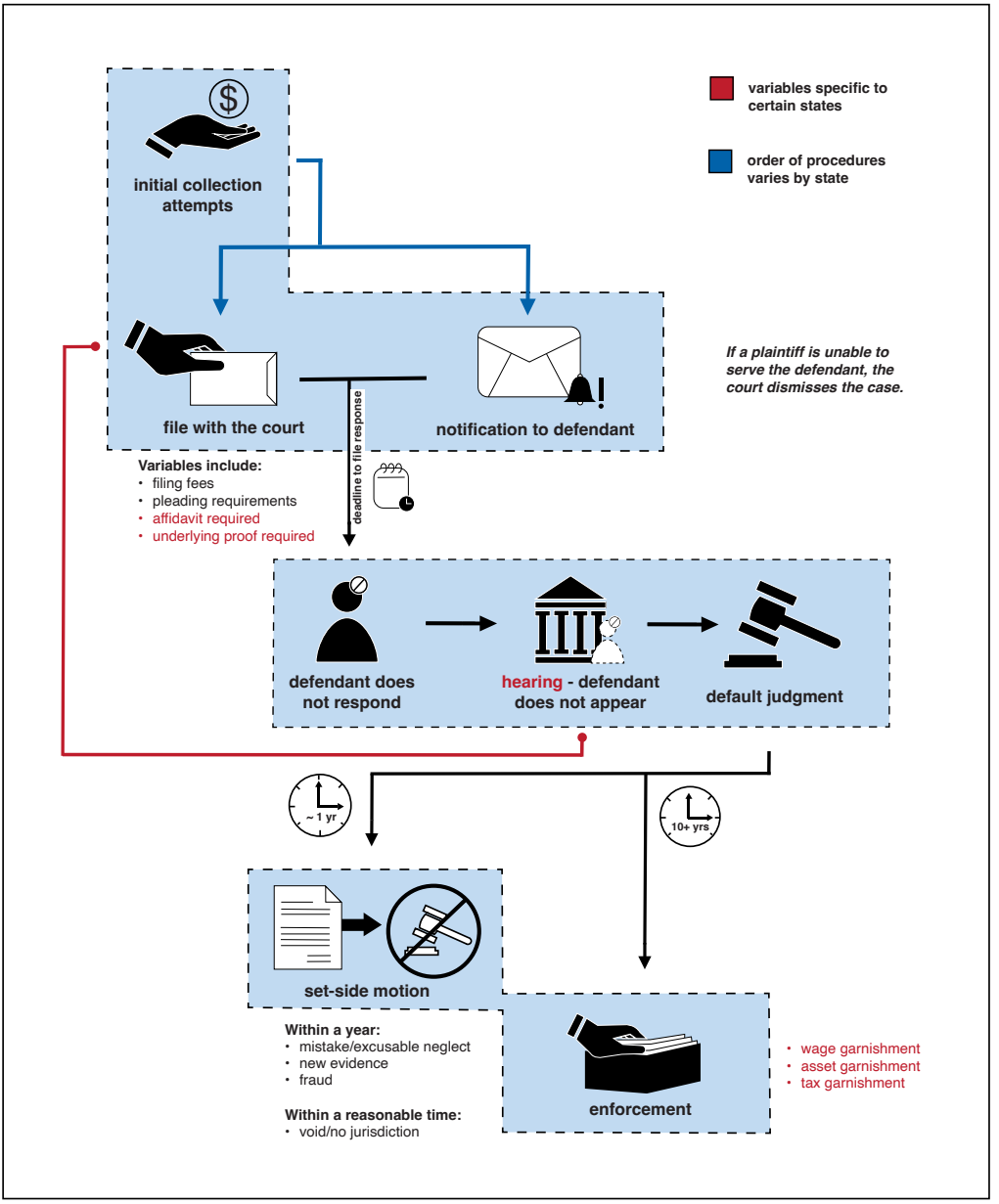
judgments, as they rely on more litigation. This network of rules—and their impact on default-judgment rates—demonstrates the importance of procedure. Consumer-protection efforts, in short, must consider default procedures.

In most states, as exemplified by Michigan and Pennsylvania, civil procedure rules strongly adhere to the adversarial model and adopt a version of rubber-stamp default procedures: when defendants do not appear, the courts enter a default judgment against them without considering the plaintiff's evidence or even requiring much in the way of substantiation of claims, relying instead on the defendant's absence as an indicator of the merits of the plaintiff's case.[59] These commitments to adversarialism work best, however, when parties are engaged in court processes. Figure 1 on the next page maps out the common trajectory from filing to default judgment to the possibility of set aside or enforcement.

In states that have not enacted debt-specific default-judgment rules, and even in some that have, issuing default judgments in debt-collection cases is routine, unscrutinized, and difficult to undo. This Part urges viewing the procedures that drive default-judgment rates in four interrelated stages, depicted below: (1) filing with the court and notifying the defendant, (2) the court's review of the case that leads to issuing the default judgment, (3) opportunities for reversing the default judgment through set-aside motions or vacatur, and (4) the judgment creditor's enforcement proceedings.

59 MICHIGAN REPORT, *supra* note 16; 231 PA. CODE § 1037 (2024).

Figure 1:
Common Steps in Default Procedures[60]



[60] The information in this Figure was compiled by the author. The Figure was designed by Jasmine Smalling.

A. *Avoiding Default Judgments*

Federal courts widely state that they disfavor default judgments because of the importance of resolving cases on the merits.[61] In theory, if procedures help guide parties to settlement or merits-based adjudication, then courts may reasonably assume that properly served absent defendants have conceded to the complaint, waived any right to a hearing, and accepted the consequences.[62] In practice, federal courts' low default and default-judgment rates are likely attributable to better service practices, better merits review upon motion for default judgment, higher-dollar disputes and higher costs of litigation (thus deterring frivolous filings and encouraging settlement), a meaningful opportunity to present defenses, and a significant risk of improper default judgments being set aside or reversed on appeal. Many of these features are absent in state civil courts.

A known problem, for example, is "sewer" service, which refers to a practice in which process servers file a fraudulent affidavit of service when in fact they have (sometimes metaphorically) thrown service in the sewer.[63] Precise rates of sewer service are difficult to track and courts may find it difficult to determine when such affidavits are fraudulent, but news reports, regulators, and class action lawsuits continue to identify the practice in New York, California, Pennsylvania, and other states.[64]

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61 *See* 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2681 (4th ed. 2023) ("[C]ontemporary procedural philosophy encourages trial on the merits."); *see also, e.g.*, Patray v. Nw. Pub., Inc., 931 F. Supp. 865, 868 (S.D. Ga. 1996) ("A motion for the *Court's* entry of judgment by default is not granted as a matter of right, and in fact is judicially disfavored.") (footnote omitted). Only the Seventh Circuit has "moved away from the position of disfavoring default judgments," making that court "increasingly reluctant to set them aside." Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 47 (7th Cir. 1994). Default judgments remain rare in federal court. *See* LEE & CANTONE, *supra* note 3, at 7.

62 *See* WRIGHT & MILLER, *supra* note 61, § 2681 ("[I]n the early practice of the common law, when defendant failed to appear on the day on which the cause was to be tried, it was deemed a confession of the action.").

63 *See* Effron, *supra* note 30, at 1533, 1545 & n.101 (discussing impact of sewer service on high default-judgment rates); *see also* Adrian Gottshall, *Solving Sewer Service: Fighting Fraud With Technology*, 70 ARK. L. REV. 813, 820 (2018) ("The current service practices are unreliable and unfair because proof of service relies on an 'honor system' by which a process server self-verifies an affidavit of service.").

64 *See, e.g.*, Jake Harper, *A California Debt Collector Has Sued Thousands of People—Some of Them Never Knew*, INEWSOURCE (Apr. 6, 2023), https://inewsource.org/2023/04/06/california-debt-collection-cases-lawsuits [https://perma.cc/P24C-5BZ3] ("In one morning in January 2020, [a process server] claimed to have driven to nine houses, which included a 49-mile trip completed in five minutes and another 30-mile leg driven in three minutes. In March 2020, he claimed to have attempted service in two places at once, 30 miles apart."); STACY BUTLER & MACKENZIE PISH, PEW, HOW DEBT COLLECTION WORKS IN PHILADELPHIA'S MUNICIPAL COURT 10 (2022), https://www.pewtrusts.org/-/media/assets/2022/10/how-debt-collection-works-in-philadelphias-municipal-court.pdf [https://perma.cc/9B8K-R92V] ("Despite court records indicating that they had been successfully served, many defendants who were interviewed or surveyed were not aware

Less egregious, but still problematic, are legal but ineffective methods of service. While in-hand service to the defendant is considered the gold standard, states allow various methods of "substitute" service as an alternative. For example, in New York, a process server (not a party) may serve a defendant by delivering the summons and complaint to a person of suitable age and discretion at a person's home and mailing the papers by first-class mail to the person to be served at his or her last known residence.[65] If this fails, "nail and mail" service is available.[66] Defendants may be served at an old or incorrect address because debt buyers often have stale or inaccurate information about the debts they bought.[67] These alternatives are often ineffective at notifying defendants.

Courts do, however, dismiss cases (without prejudice) for non-service. In California, courts dismissed almost forty percent of cases for non-service between 2012 and 2017.[68] In Michigan, courts are increasingly dismissing cases for non-service (seventeen percent of cases, up from nine percent ten years ago).[69] In Philadelphia between 2016 and 2020, about a quarter of cases

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that they had been sued. Subject matter experts attribute this outcome to questionable service methods and practices."); Tracey Read, *Quinn Emanuel Aids 'Sewer Service' Debt Collection Fight*, LAW360 (Jan. 5, 2024, 7:32 PM), https://www.law360.com/articles/1775407/quinn-emanuel-aids-sewer-service-debt-collection-fight [https://perma.cc/F3KD-3ZZK] (describing the "huge epidemic of sewer service" in New York courts); PEW, *supra* note 4, at 16 ("In California, Illinois, and New York, enforcement actions have been brought against debt claims plaintiffs for 'sewer service.'").

65 N.Y. C.P.L.R. § 308 (McKinney 2024). Other states in this study likewise allow "substituted service," such as service by leaving a summons at a person's usual place of business or at their home with a person of suitable age, or service by certified mail. *See, e.g.*, CAL. CIV. PROC. CODE § 415.20(a)–(b) (West 2024); TEX. R. CIV. P. 106(b); MICH. COMP. LAWS § 600.8405 (2024); 231 PA. CODE. R. 402 (2024) (allowing service by leaving a summons with the manager of the hotel, inn, or apartment house where the defendant resides). Plaintiffs must file an "Affidavit of Service" specifying how service requirements were satisfied, but courts often do not review these papers. MARIELE MCGLAZER, DEFAULT JUSTICE: DEBT BUYER LAWSUITS IN PHILADELPHIA MUNICIPAL COURT 12 (2020), https://www.fels.upenn.edu/sites/default/files/2023-04/Default-Justice_McGlazer-Capstone_FINAL.pdf [https://perma.cc/4YHX-3UL7].

66 N.Y. C.P.L.R. § 308 (McKinney 2024) (permitting service "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served" and by first class mail).

67 *See, e.g.*, Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 107 (2017) ("There are many reasons why individuals do not respond to or appear in court to defend a debt-collection lawsuit . . . . [including] because the debt collector used the wrong address due to inaccurate or outdated records.").

68 JULIA BARNARD, KIRAN SIDHU, PETER SMITH & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, COURT SYSTEM OVERLOAD: THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYER PROTECTION ACT 26 (2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf [https://perma.cc/MJU9-R8VD]; *see id.* at 33 ("Another case in San Diego was rejected by a clerk because the name on the proof of service did not match the name of the person being sued.").

69 MICHIGAN REPORT, *supra* note 16, at 23-24.

were dismissed for no service.[70] These statistics suggest that at least some of the time, courts are checking to make sure defendants were properly served and are dismissing cases when they were not.[71]

The form and content of notice also impede defendants' ability to fully understand the suits against them. In Michigan, for example, a recent report urged increasing the amount of information included in the complaint to inform the defendant of the evidence supporting the plaintiff's claim and creating court documents and forms that are easy for consumers to understand and use.[72] The Houston Chronicle reports that when served, many Texas debt defendants "don't know how to proceed."[73] Only a few states provide clear guidance for defendants in how to respond to complaints and what to do if they believe they owe the debt.[74] For instance, the California courts published a self-help guide online outlining how to respond to a debt lawsuit.[75] The New York City Civil Court published a similar resource.[76]

Reforms focused on improving experiences for pro se defendants—e.g., providing access to legal advice, online dispute resolution (ODR), and a meaningful opportunity to be heard in court—can also increase participation levels, avoiding default.[77] For example, in Michigan, Texas, and elsewhere,

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70 REINVESTMENT FUND, *supra* note 5, at 21; *see also id.* at 16 (finding that renter defendants were almost twice as likely to have a case dismissed for no service as homeowner defendants).

71 These cases may be refiled with proper service. *See id.* at 7 ("Attorneys familiar with debt collection cases report that many no-service cases are refiled until service can be made."); *see also* N.Y.C. CIV. CT. UNIF. RULES § 208.6(h)(2) (2025) (prohibiting default judgment from being entered where there was no additional mailing of notice by the clerk or where the same was returned as undeliverable, unless the address matches the address listed for the defendant by the DMV); TEX. R. CIV. P. 124 ("In no case shall judgment be rendered against any defendant unless upon service . . . .").

72 MICHIGAN REPORT, *supra* note 16, at 3.

73 Yamil Berard, *Loads of Debt*, HOUS. CHRON., May 1, 2022, at A1, https://www.houstonchronicle.com/projects/2022/debt-collection-process [https://perma.cc/Z82V-A4YV].

74 *See, e.g.*, *Answer & Counterclaim to Complaint to Collect a Debt*, ALASKA CT. SYS. SELF-HELP, https://public.courts.alaska.gov/web/forms/docs/civ-481.pdf [https://perma.cc/HE6N-VFWW] (last visited Feb. 13, 2024).

75 *See Respond to a Debt Lawsuit*, CAL. CTS. SELF-HELP GUIDE, https://selfhelp.courts.ca.gov/debt-lawsuits/respond [https://perma.cc/5Q3S-TCM5] (last visited June 22, 2024) (instructing readers on selecting available defenses and filling out the answer form).

76 *See Answering a Debt Collection Case*, N.Y.C. CIV. CT. (Aug. 2, 2013), https://www.nycourts.gov/courts/nyc/civil/consumercredit.shtml [https://perma.cc/FML7-769N] (same).

77 *See* David Freeman Engstrom & R.J. Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DEPAUL L. REV. 171, 172 (2023) (discussing the post-COVID boom in adoption of ODR); David Allen Larson, *Designing a State Court Small Claims ODR System: Hitting a Moving Target in New York During a Pandemic*, 22 CARDOZO J. CONFLICT RES., 569, 569-70 (2021) (chronicling considerations for designing a workable ODR system when the starting default rate hovers around ninety percent); *see also* Alex Sanchez & Paul Embley, *Access Empowers: How ODR Increased Participation and Positive Outcomes in Ohio*, *in* TRENDS IN STATE COURTS 14, 17 (Nat'l Ctr.

the use of ODR has been shown to increase access and decrease default rates.[78] Within the context of more traditional hearings, the ABA, advocates, and some state supreme courts (notably, Alaska's) urge "active judging," which involves assisting pro se litigants by adjusting procedures, explaining the law and process to them, and eliciting information from them to develop the record.[79] Many judges, however, resist these urgings, holding tight to their commitment to serving as a neutral arbiter between the two parties.[80] Reports from Houston and Philadelphia, for example, suggest few judges are taking this approach.[81]

It may seem that better access to counsel would solve these problems.[82] Many, however, recognize the practical and financial obstacles to relying on

for State Cts. ed. 2020) (finding that an ODR system in Ohio decreased defaults and was preferred by users). *See generally* Amy J. Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 FORDHAM L. REV. 2381 (2020) (identifying ways to scrutinize ODR systems to ensure they actually enhance access to justice efforts).

78 NAT'L CTR. FOR STATE CTS., THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD at ii, 10 (2021), https://www.ncsc.org/_media/_imported-ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf [https://perma.cc/HX8U-JH7L]; *see also* PEW, HOW COURTS EMBRACED TECHNOLOGY, MET THE PANDEMIC CHALLENGE, AND REVOLUTIONIZED THEIR OPERATIONS 1 (2021), https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf [https://perma.cc/255S-L4PS] (finding that defendants' default rates dropped, meaning that their participation increased); Orna Rabinovich-Einy, *Process Pluralism in the Post-COVID Dispute Resolution Landscape*, 10 TEX. A&M L. REV. 55, 65 (2022) (finding that remote proceedings in Texas increased access to the courts for parties, witnesses, and victims and reduced defaults).

79 HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 793-95 (2019); *id.* at 793 n.85 (citing MODEL CODE OF JUD. CONDUCT r. 2.2 cmt. (AM. BAR ASS'N 2020)); Parkin, *supra* note 13, at 1145-46; Carpenter, *Active Judging*, *supra* note 37, at 649-50; *cf.* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 429 (1982) (describing and evaluating the emerging role of federal judges as "case managers").

80 *See* Carpenter et al., *State Civil Courts*, *supra* note 13, at 557 ("The existing incentives for judges to behave in new ways that are helpful to both sides of a pro se case are much weaker than judges' incentives to behave in ways that are more consistent with their historical role in civil litigation."); Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 81-82 (2015) (citing judicial concern for impartiality as a potential reason for tenants' poor outcomes in enforcing the warranty of habitability); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899, 928 ("Some jurisdictions cling so stubbornly to the passive norm that judges have been discouraged from providing even the most basic information to an unrepresented party, lest they be seen as an advocate for one side.").

81 MYERS ET AL., *supra* note 51, at 4 (discussing Philadelphia); Berard, *supra* note 73 (quoting Houston judges describing their need to need to remain impartial to "follow[] [their] judicial role"); *see also, e.g.*, Carpenter et al., *Lawyerless Courts*, *supra* note 13, at 523 ("While most jurisdictions now explicitly permit judges to accommodate pro se litigants, formal law largely leaves the task of operationalizing this role up to individual trial judges.").

82 *See, e.g.*, Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1229 (2010) (documenting the Civil *Gideon* movement).

more lawyers as the answer.[83] Indeed, some see the excessive involvement of lawyers as part of the problem. Some small-claims courts bar lawyers from representing litigants.[84] Other jurisdictions are experimenting with deregulating the legal profession and improving self-help websites to provide more accessible, less expensive legal advice without lawyers.[85]

A third set of reforms turns even further away from adversarialism, seeking to encourage defendants' participation even where defendants concede they owe the debt. Doing so allows the court to connect them to the plaintiffs for settlement negotiations and to social and financial services for assistance.[86] Such programs, again, can lower default-judgment rates and potentially provide better outcomes for plaintiffs, who may avoid costs associated with enforcement efforts such as garnishment, as well as defendants, who may avoid the added fines and fees associated with default judgment as well as the stigma and other negative effects of garnishment. Such programs, unfortunately, are still rare.

B. *Getting Default Judgments*

The previous Section revealed that debt defendants are not reliably served and notified of litigation against them; that legal advice is often out of reach; and that hearings often do not afford a meaningful opportunity to be heard even when defendants appear, particularly when they lack access to counsel or aid to help them navigate court procedures. These procedures often do little to encourage participation and avoid default.

This Section introduces the state and local procedures that apply when defendants do not appear as well as the reforms in about a third of states that have adjusted procedures in such circumstances for debt-collection actions. In their particulars, there is considerable variety in default-judgment procedures. For example, different standards may govern when a defendant is deemed in default; plaintiffs face different requirements for proving their

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83 *See id.* at 1233-34 (arguing that reforming state civil courts would more effectively protect poor pro se litigants than additional lawyering).

84 *See, e.g.*, CAL. CIV. PRO. CODE § 116.320(c) (West 2024).

85 *See, e.g.*, Steinberg et al., *supra* note 37, at 1324-27 (describing moves by Utah, California, New Mexico, Illinois, Arizona, and Washington towards deregulation); Logan Cornett & Zachariah DeMeola, *Data from Utah's Sandbox Shows Extraordinary Promise, Refutes Fears of Harm*, IAALS (Sept. 15, 2021), https://iaals.du.edu/blog/data-utahs-sandbox-shows-extraordinary-promise-refutes-fears-harm [https://perma.cc/V8JU-QBYT] (describing how Utah's nontraditional legal services sandbox meets consumers' diverse legal needs).

86 Settlement should be approached with caution, as some studies show that debtors may overestimate what they would pay in court and therefore settle for more than what a court would order. Ing-Haw Cheng, Felipe Severino & Richard R. Townsend, *How Do Consumers Fare When Dealing with Debt Collectors? Evidence from Out-of-Court Settlements*, 34 REV. FIN. STUD. 1617, 1652-54 (2021).

case when requesting a default judgment; and entering default may be mandatory or discretionary and rendered by the clerk or the court. Moreover, debt-collection cases may be heard in general-jurisdiction state courts or in state or local courts of limited jurisdiction, like small-claims or municipal courts, which follow their own rules and practices.

Default procedures follow this basic path: First, the plaintiff files a complaint with the court and notifies the defendant of the suit.[87] The complaint typically alleges the plaintiff's basic claim—for example, stating that the defendant had a credit card debt that she never paid, and the credit card company sold the debt to the plaintiff. The complaint also states the claim for relief, typically articulated as a sum certain that includes calculated interest and fines.[88] After a specified number of days, if the defendant does not appear, upon plaintiff's showing proof of adequate service, the clerk or the court may find the defendant in default. If the defendant does not appear for another period, the plaintiff can request a default judgment. The rules typically authorize the clerk or the court to grant the judgment, which they routinely do.[89]

The first element of default judgment procedures is not the rules around how to obtain a default judgment (the equivalent of Federal Rule of Civil Procedure 55) but the rules around pleading standards. When pleading

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87 Depending on the state, these may both need to happen before the statute of limitations expires, or only one might be required to toll it. Five states allow "pocket service," where a plaintiff can commence a suit with service before filing in a court. The term refers to the fact that "a plaintiff may serve one or more defendants and keep the complaint 'in his pocket' rather than making a public filing." Harris v. Chase Bank USA, N.A., No. 12-669 JNE/AJB, 2012 WL 1948775, at *1 (D. Minn. May 30, 2021); *see also* Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1115, 1119 (2009) (stating that only Minnesota, North Dakota, and South Dakota permit pocket service).

88 Many default judgment rules have expedited procedures when plaintiffs request a calculable sum certain, like Federal Rule of Civil Procedure 55(b)(1). *See, e.g.*, DEL. R. CIV. P. 55(b)(1); CAL. CIV. P. CODE § 585 (West 2024) (directing court to "enter judgment for the principal amount demanded in the complaint" under certain circumstances when the defendant does not answer the complaint); N.Y. C.P.L.R. § 3215 (McKinney 2024); 231 PA. CODE § 1037 (2024); MICH. CT. R. 2.603 (2024).

89 *See, e.g.*, MICH. CT. R. 2.603(B)(2) (2024). Courts may retain discretion to hold a hearing or further inquire into the merits of the case, but they rarely do, particularly in light of the low amounts in controversy and the belief that defendants probably owe the debt. *See* David McClendon, Opinion, *5 Minutes per Eviction Hearing? Why Harris County Should Redraw Court Maps.*, HOUS. CHRON., Dec. 15, 2022, at A18 (discussing a municipal court judge's confidence "about his ability to make quick decisions" when working through hundreds of cases and spending less than five minutes per case); ALBIN-LACKEY, *supra* note 58, at 3-4 ("Some judges routinely enter hundreds of default judgments for debt buyers in the space of just a few hours. One judge told Human Rights Watch that he does this at home while relaxing on a Sunday afternoon."). A recent federal court study reveals that judges are often involved in issuing default judgments, even though the rule permits the clerks to so issue them. *See* LEE & CANTONE, *supra* note 3, at 4-5. There is no similar comprehensive study of state and local courts.

standards are low, as in Michigan, default can lead to judgment simply if plaintiffs satisfy those low standards.

Such procedures fail to require plaintiffs to provide proof and substantiation for their claims. This systemic problem began to attract attention in the wake of the 2008 financial crisis, when indebtedness rose dramatically, as did rates of debt-collection filings and default judgments.[90] Even today, many states continue to have rubber-stamp default procedures with minimal substantiation requirements. In many states, the default-judgment rules either require an affidavit—often a sworn version of the complaint—or state that courts may hold a hearing if they deem one necessary.[91] But these rules do little to drive merits review. In Ohio, for example, plaintiffs filing a complaint in a debt-collection (or any other) case must provide merely a general computation of damages—but no proof of an account number, an amount due, or ownership of the debt.[92] Michigan requires slightly more information—proof of an account number and the balance due to date.[93] But it does not require a debt buyer to show proof of the chain of title—so a creditor could sell the same debt to multiple buyers, all of whom could collect on it. Pennsylvania has not adopted debt-specific pleading rules, but the Philadelphia municipal court rules require attaching to the complaint proof of claims—for example, a copy of the writing on which the debt is claimed to be owed.[94] Nevertheless, studies show that when defendants default, courts often do not check to make sure these requirements are satisfied before rendering default judgments.[95] In Philadelphia, a Temple Law School study found that sixty-five percent of defendants in consumer debt cases did not appear and that fifty-nine percent of all consumer debt cases resulted in default judgment.[96] This result may suggest that courts are dismissing few cases involving default. Researchers in the same study found that "in many if not most cases, the [Philadelphia] Court enters default

90 *See, e.g.*, FED. TRADE COMM'N, *supra* note 6, at 14-17 (discussing evidence of inadequate notice pleading, and concluding that "many debt collection complaints do not provide [sufficient] information to consumers"); ALBIN-LACKEY, *supra* note 58, at 10 ("The debt buying industry has grown enormously during the past two decades."); *cf.* ROBERT A. KAGAN, ADVERSARIAL LEGALISM 234 (1st ed. 2001) (noting that debt-collection cases, which were historically the most common type of case in American courts, declined in the thirty years preceding 2001).

91 *See supra* Appendix, Figure 2.

92 OHIO R. CIV. P. 26(B)(3)(iii).

93 For a chart comparing the pleading requirements of several states, see MICHIGAN REPORT, *supra* note 16, at 20.

94 MYERS ET AL., *supra* note 51, at 4.

95 *Id.*

96 *Id.*; *see also* BUTLER & PISH, supra note 64, at 9.

judgments for the entire amount claimed, without determining whether the plaintiff has proved its entitlement to the damages claimed."[97]

Many studies recommend that state courts pass debt-specific procedural requirements for default judgments.[98] Seventeen states—including California, New York, and Texas, but not Michigan or Pennsylvania—and the District of Columbia require certain plaintiffs, often debt buyers, to satisfy additional requirements. For example, upon filing their complaint or seeking a default judgment, these states require plaintiffs to provide proof of the original debt and other documentation, showing, for example, effective service, the debt's chain of title, and the original debt instrument, even if the defendant is not in court.[99] Other states are considering similar reforms.[100] Indeed, in 2023, the Uniform Law Commission approved the Uniform Consumer Debt Default Judgments Act ("Uniform Act").[101] The Uniform Act requires simplified and clarified notice, particularized pleading, attachment

97 MYERS ET AL., *supra* note 51, at 4.

98 *See supra* note 16 and accompanying text.

99 UNIF. CONSUMER DEBT DEFAULT JUDGMENTS ACT (UNIF. L. COMM'N 2023); CAL. CIV. CODE § 1788.60 (West 2024); COLO. REV. STAT. § 5-16-111 (2024); CONN. GEN. STAT. §§ 36a-800, 813 (2024); Del. Admin. Dir. No. 2012-2 at 5-8 (Del. Super. Ct. Jan. 12, 2012); IND. CODE 24-5-15.5-5 (2024); IND. R. CIV. P. 9.2(A); IND. R. SMALL CL. CT. 2(B) (2024); MASS. R. CIV. P. 8.1, 55.1; MD. CODE ANN., CTS. & JUD. PROC. § 5-1203 (West 2023); MD. R. CIV. P. DIST. CT. 3-306(c)–(d); ME. REV. STAT. ANN. tit. 32, § 11019 (2024); MINN. STAT. ANN. § 548.101 (2024); N.C. GEN. STAT. § 58-70-155 (2024); NEV. REV. STAT. §§ 97A.160, .165 (2024); N.M. METRO. CTS. R. CIV. P. 3-201; N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14-A (2024); OR. REV. STAT § 646A.670 (2025); TEX. R. CIV. P. 508.3(b); VT. R. CIV. P. 55(c)(7), 55(f); WASH. REV. CODE § 19.16.260 (2024); D.C. CODE § 28-3814(m) (2024); DEANNA BAUMLE, CTR. FOR PUB. HEALTH L. RSCH., STATE LAWS GOVERNING DEBT COLLECTION LAWSUITS 2 (2024), https://phlr.org/sites/default/files/uploaded_images/PEW%20Debt%20Collection%20Policy%20Brief_Feb2024.pdf [https://perma.cc/YZP9-Z7C3]. For example, New York implemented court rules to strengthen proof requirements for default judgments in 2014 and expanded protections for defendants in consumer credit actions in 2021. 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 212.14-a (2024); Consumer Credit Fairness Act, S. Res. 153, 2021 Leg., Reg. Sess. §§ 10–12 (N.Y. 2021); Press Release, Off. N.Y. State Sen. Kevin Thomas, Governor Hochul Signs Consumer Credit Fairness Act into Law (Nov. 9, 2021), https://www.nysenate.gov/newsroom/press-releases/2021/kevin-thomas/governor-hochul-signs-consumer-credit-fairness-act-law [https://perma.cc/D8SJ-QH5Y].

100 *See, e.g.*, *supra* note 57; TEX. JUD. COUNCIL CIV. JUST. COMM., REPORT & RECOMMENDATIONS 3-4 (2020), https://txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf [https://perma.cc/4XUX-8AAK] (outlining proposed reforms to enhance access to justice in Texas consumer debt claim lawsuits); BRIANA GORDLEY, JESSI STAFFORD, ELLEN STONE & ANN BADDOUR, TEX. APPLESEED, IMPROVING ACCESS TO JUSTICE IN CONSUMER DEBT LAWSUITS (2023), https://www.texasappleseed.org/sites/default/files/2024-05/debt_collection_report_2023.pdf [https://perma.cc/JDY5-B2JQ] (testing and developing one of these reforms); MICHIGAN REPORT, *supra* note 16, at 3 (recommending reforms to increase access to justice in Michigan debt-collection lawsuits).

101 Press Release, Unif. L. Comm'n, Five New Acts Approved at ULC's 132nd Annual Meeting (July 26, 2023), https://www.uniformlaws.org/discussion/five-new-acts-approved-at-ulcs-132nd-annual-meeting [https://perma.cc/UNQ8-WZSX].

of authenticating documentation, and consideration of common affirmative defenses similar to, for example, California's Debt Collection Practices Act.[102] These states may also require plaintiffs who seek default judgments to anticipate and refute common defenses by, for example, providing proof establishing the date the debt was incurred to show the debt collection action is not time barred.[103] On the other hand, a recent Debt Collection Lab report found that twenty-five states have not made any changes to documentation requirements that affect debt collection since 2004.[104]

Texas has debt-specific default-judgment rules requiring proof of claims. Observers, however, describe vast inconsistencies in enforcement of these rules across the sixteen different Harris County Justice of the Peace (JP) courts that hear debt-collection cases.[105] The average statewide rate of default judgments in debt collection cases was about thirty percent in 2014 and 2015.[106] The sixteen JP courts, however, reported default-judgment rates ranging from zero to one hundred percent, leading researchers to conclude that "the individual court in which a case is heard is a determinant in its outcome."[107] As one consumer attorney remarked in 2022, "some courts require proof and some don't."[108]

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102 UNIF. CONSUMER DEBT DEFAULT JUDGMENTS ACT (UNIF. L. COMM'N 2023); CAL. CIV. CODE § 1788.50–.66 (West 2024).

103 UNIF. CONSUMER DEBT DEFAULT JUDGMENTS ACT § 4 (outlining pleading requirements); CAL. CIV. CODE § 1788.60 (West 2024); COLO. REV. STAT. § 5-16-111 (2024); CONN. GEN. STAT. §§ 36a-800, 813 (2024); Del. Admin. Dir. No. 2012-2, at 5-8 (Del. Super. Ct. Jan. 12, 2012); IND. CODE 24-5-15.5-5 (2024); IND. R. CIV. P. 9.2(A); IND. R. SMALL CL. CT. 2(B) (2024); ME. REV. STAT. ANN. tit. 32, § 11019 (2024); MD. R. 3-306 (2024), MD. CODE ANN., CTS. & JUD. PROC. § 5-1203 (West 2024); MASS. R. CIV. P. 8.1, 55.1; MINN. STAT. § 548.101 (2024); NEV. REV. STAT. §§ 97A.160, .165 (2024); N.M. METRO. CTS. R. CIV. P. 3-201; N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14-A (2024); N.C. GEN. STAT. § 58-70-155 (2024); OR. REV. STAT. § 646A.670 (2025); TEX. R. CIV. P. 508.3; VT. R. CIV. P. 55(c)(7); WASH. REV. CODE § 19.16.260 (2024); D.C. CODE § 28-3814 (2024).

104 ANEJA ET AL., *supra* note 19, at 7-8.

105 *See Harris County Justice of the Peace Courts*, COURT FINDER, https://thecourtfinder.com/Harris-County-Justice-of-the-Peace-Courts.html [https://perma.cc/73B8-ETNT] (last visited Sept. 25, 2024) (noting jurisdiction over disputes where "exclusive jurisdiction is not in the district or county court and the amount in controversy is $20,000 or less"). Rules 500 to 510 govern cases filed in the Justice Courts. TEX. R. CIV. P. 500–510.

106 Spector & Baddour, *supra* note 5, at 1449.

107 *Id.* at 1460. For similar analysis in New York housing court, see RYAN BRENNER, INGRID GOULD ELLEN, SOPHIE HOUSE, ELLIE LOCHHEAD & KATHERINE O'REGAN, HOUS. CRISIS RSCH. COLLAB., HALF THE BATTLE IS JUST SHOWING UP: NON-ANSWERS AND DEFAULT JUDGMENTS IN NON-PAYMENT EVICTION CASES ACROSS NEW YORK STATE, 2016–2022, at 9-10 (2023), https://furmancenter.org/files/publications/Half_the_Battle_is_Just_Showing_Up_V3_(1).pdf [https://perma.cc/D9F8-JN5Z].

108 Yamil Berard, *Texas Courts Are Slammed with Debt Collection Lawsuits, with Devastating Consequences*, HOUS. CHRON. (Apr. 28, 2022), https://www.houstonchronicle.com/news/investigations/article/texas-surge-debt-collection-lawsuits-courts-17119821.php [https://perma.cc/74XW-3AFP].

Small-claims or municipal courts often have their own procedures that may be more or less friendly to plaintiffs.[109] The existence, structure, and jurisdiction of such courts vary across states. In California and Michigan, debt-collection cases are heard predominantly in state courts of general jurisdiction;[110] in Pennsylvania, New York, and Texas, in municipal courts;[111] and in Minnesota and Indiana, debt-collection suits may be filed in small-claims courts or state courts, which have overlapping jurisdiction.[112]

The conventional wisdom is that most debt-collection actions are brought in small-claims courts,[113] which were established to increase access to justice for poor litigants through simplified procedures, relaxed evidence rules, and reduced fees.[114] These rules can help unrepresented defendants, but they can also benefit savvy plaintiffs in a system in which defendants routinely do not appear to contest the plaintiff's account of events. Thus, for decades, debt buyers without sufficient proof have won billions of dollars through default judgments in small-claims courts because defendants' non-appearance led to rubber-stamp judgments.[115]

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109 *See, e.g.*, PHILA. MUN. R. CIV. P. 109 (detailing what evidence must be contained in a complaint); TEX. R. CIV. P. 508.2 (detailing what evidence must be contained in a debt collection petition); N.Y.C. ADMIN. CODE § 20-493.2(a) (2024) (requiring collectors to provide an itemization of the alleged debt). In some states, like Texas, municipal small-claims courts hear cases up to a certain limit ($20,000), with a different local court available for cases up to $250,000, while also having a general-jurisdiction court for cases with more than $200 at stake. *See* TEX. GOV'T CODE ANN. § 25.0003 (2024) (stating that the maximum amount in controversy for county courts is $250,000); *see also id.* § 27.031 (stating that Justice Courts share concurrent original jurisdiction with county courts in civil cases where the amount in controversy exceeds $200 but does not exceed $20,000).

110 RABA, *supra* note 44, at 3 n.3; MICHIGAN REPORT, *supra* note 16, at 10.

111 JENNIFER CLENDENING & KATIE MARTIN, PEW, HOW PHILADELPHIA MUNICIPAL COURT'S CIVIL DIVISION WORKS 1 (2021), https://www.pewtrusts.org/-/media/assets/2022/04/philadelphia_municipal_courts_civil_division_works.pdf [https://perma.cc/M6X4-5T3A]; Berard, *supra* note 108; N.Y.C. BAR ASS'N, THE CONSUMER DEBT UNIFORMITY ACT 3 (2024), https://www.nycbar.org/wp-content/uploads/2024/02/20221201_ConsumerDebtUniformityAct-1.pdf [https://perma.cc/U9QB-KAT6] (noting that, in 2019, 101,643 consumer credit lawsuits were filed in New York City Civil Court alone).

112 Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 369 (2012); Charlotte Stewart, *How Minnesota's Dual System for Civil Debt Cases Harms Consumers*, PEW (Nov. 6, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/11/06/how-minnesotas-dual-system-for-civil-debt-cases-harms-consumers [https://perma.cc/7V7T-E9FX].

113 *See* HANNAFORD-AGOR ET AL., *supra* note 7, at v (noting how small-claims courts "have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases").

114 *See* Alexander Domanskis, *Small Claims Courts: An Overview and Recommendation*, 9 U. MICH. J.L. REFORM 590, 593 (1976); ROSCOE POUND, ORGANIZATION OF COURTS 260-63 (1940).

115 Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 263 (2011).

In some states, however, small-claims courts are more defendant-friendly than the trial courts. For example, to preserve small-claims courts for simpler disputes between lay people, small-claims courts in California ban lawyers[116] and limit plaintiffs (other than local public entities) to two cases per year for more than $2,500.[117] Other small-claims courts might require proof attached to initial filings or require parties to appear in person, or otherwise be more reluctant to enter default judgments, leading repeat-player creditors to prefer general-jurisdiction state courts.[118] For example, in Indiana, failure to appear is not grounds for default judgment in small-claims court.[119] To issue a default judgment, the court must "make [an] inquiry, under oath," that the defendant received notice, can understand the notice, is not entitled to Servicemembers Civil Relief Act protections from default judgment, and that the plaintiff has a prima facie case.[120]

Recent studies suggest that these reforms may be necessary but not sufficient to change the court culture of issuing default judgments without substantiation. In New York, a significant decrease in both filings and default judgments followed reforms that instituted documentation and other requirements.[121] In California, despite similar documentation requirements, a 2020 study showed that cases were dismissed for improper documentation only four percent of the time,[122] and almost twenty-five percent of default judgments were entered without required documentation even after the law changed in 2013.[123] That study recommended continued oversight of these practices.[124] In Minnesota, which was an early adopter of specific legislation requiring proof of creditors' claims, a recent study found that in nine percent of cases in which default judgments were entered, at least one required document was missing.[125] While this number should be zero, the requirements

116 CAL. CIV. PRO. CODE § 116.320 (West 2024).

117 *See id.* § 116.231; *see also, e.g.*, KAN. STAT. ANN. § 61-2704 (2024) (limiting plaintiffs to twenty small-claims filings in a year); KY. REV. STAT. ANN. § 24A.250 (West 2024) (limiting filings to twenty-five per year). Utah prohibits assignees from filing in small-claims courts. UTAH CODE ANN. § 78A-8-103 (West 2024).

118 *See* CAL. CIV. CODE § 1788.60 (West 2024) (requiring a debt buyer to present authenticated business records and contracts prior to any entry of default judgment); IND. R. SMALL CL. CT. 2(B) (mandating that the plaintiff provide an affidavit of debt or copy of the contract out of which the claim arises).

119 IND. R. SMALL CL. CT. 4(B).

120 IND. R. SMALL CL. CT. 10(B).

121 *See supra* Appendix, Figure 3.

122 BARNARD ET AL., *supra* note 68, at 2.

123 *See id.* at 3; *see also* CAL. CIV. CODE §§ 1788.58, 60 (West 2024) (describing documentation requirements). *See generally* RABA, *supra* note 44 (presenting more updated data on the impact of California's reform efforts).

124 BARNARD ET AL., *supra* note 68, at 37-38.

125 MINNESOTA REPORT, *supra* note 16, at 30.

seem to work in seventy-nine percent of cases (twelve percent were under seal and not available for review). These studies suggest that evidence requirements are an important, but not entirely adequate, step toward ensuring courts evaluate evidence before issuing default judgments.

C. *Getting Out of Default Judgments*

To protect against the risk of improper default judgment—e.g., if the defendant had no notice of the hearing—the Federal Rules and all states have set-aside procedures.[126] Thus, all states have some Rule 60(b) equivalent, although it may deviate from the federal model in terms of acceptable reasons for set aside and applicable time bars. In state and federal courts, adversarialism guides these procedures, which require judgment debtors to show not only that they have a cognizable defense that could have countered the plaintiff's claims in the original action, but also that they had a good reason for defaulting and that they were diligent in pursuing the set aside. As in the example that opened this Article, it may not be enough that the underlying debt may have been acquired fraudulently or that the court that issued the default judgment may have lacked jurisdiction because the plaintiff failed to properly serve and notify the defendant. To set aside the default judgment, Ms. Smith additionally needed to show that she did not evince intent to acquiesce to the judgment's validity.[127] On remand, she will have to show that notwithstanding her wages having been garnished for over a year while she determined how to challenge the default judgment against her, she did not intend to acquiesce.[128]

Set-aside procedures can place heavy procedural burdens on judgment debtors who may have struggled to navigate the civil justice system the first time around. Inevitably, some defendants come to understand the weight of the legal proceedings against them only upon judgment enforcement—often in the form of garnishment.[129] They may not have engaged in initial

126 *See, e.g.*, Joyce v. Pepsico, Inc., Nos. 2010AP2148, 2010AP2149, 2010AP2150, 2011AP117, 2012 WL 1033468, at *8 (Wis. Ct. App. Mar. 29, 2012) (affirming vacatur of a default judgment because plaintiffs never notified defendants of the amount of damages they sought ($1.26 billion)); FED. R. CIV. P. 60(b) (providing grounds for relief from a final judgment, order, or proceeding).

127 *See* Esgro Cap. Mgmt., LLC v. Banks, 201 N.Y.S.3d 33, 33 (N.Y. App. Div. 2023) (analyzing whether the defendant "evinc[ed] the intent to accept a judgment's validity").

128 *Id.*

129 *See* Scott L. Fulford & Éva Nagypál, *Using the Courts for Private Debt Collection: How Wage Garnishment Laws Affect Civil Judgments and Access to Credit* 6 (Consumer Fin. Prot. Bureau Off. of Rsch., Working Paper No. 02, 2023) ([D]efendants . . . are often unaware of the civil litigation at all until their wages start being garnished."); Karuna Patel, *Dismantling Unjust Interest Rates for Debt Collection Judgments*, REG. REV. (Mar. 30, 2022), https://www.theregreview.org/2022/03/30/patel-dismantling-unjust-interest-rates-for-debt-collection-judgments [https://perma.cc/49SM-4L4H] ("Garnishments hit low-wage households that have little or no wealth like a bomb. Because

proceedings because of faulty service or insufficiently clear notice; because of lack of access to counsel or understanding of the legal system; or because engaging with earlier court proceedings was overwhelming or overshadowed by other life challenges. Set-aside procedures may be an adequate procedural remedy for faulty service or notice, but they are not tailored to address other reasons for default (which may make sense in the context of more sophisticated litigants). Set-aside procedures as a remedy for meritless default judgments are also inadequate in those states where the limitations period for moving to set aside a default judgment begins to run when the judgment is rendered. The limitations period may then have expired by the time of the enforcement proceeding, when the judgment debtor becomes fully aware of the judgment's implications.[130]

Under these circumstances, set-aside procedures are an inadequate and leaky safeguard against improper default judgments because they create more procedural hurdles for pro se defendants. Filing a set-aside motion likely requires some understanding of legal standards.[131] These procedures can create another onerous procedural hurdle for pro se litigants. Even in states that have extended the time for consumer defendants to file a set-aside motion, moreover, consumers rarely assert this right.[132] It is possible to infer

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garnishments can be based on judgments that are 10 to 20 years old, the judgment balance has often multiplied by the time a person has recovered from a financial shock and has income again. Garnishments can plague middle and low-income working individuals for years."); *see also* BARAK RICHMAN, SARA STERNBERG GREENE, SEAN CHEN & JULIE HAVLAK, HOSPITALS SUING PATIENTS: HOW HOSPITALS USE N.C. COURTS TO COLLECT MEDICAL DEBT 5 (2023), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6961&context=faculty_scholarship [https://perma.cc/H8NY-ECDM] (describing how some hospitals have garnished former patients' wages to obtain payments from them); Michelle McGhee & Will Chase, *How America's Top Hospitals Hound Patients with Predatory Billing*, AXIOS, https://www.axios.com/hospital-billing#interactive [https://perma.cc/6GNU-LHWL] (last visited Jan. 1, 2024) (providing data on millions of dollars in wage garnishment by the country's top one hundred hospitals).

130 *See, e.g.*, UTAH R. CIV. P. 62 (no earlier than twenty-eight days after entry of judgment or order); CAL. CIV. CODE. § 473.5 (West 2024) (no later than the earlier of two years after entry of default judgment or 180 days after service of written notice that a default or default judgment has been entered); MICH. CT. R. 2.603 (2024) (before entry of default or within twenty-one days after the default was entered); 231 PA. CODE § 237.3 (2024) (ten days from entry of judgment); TEX. R. CIV. P. 505.3 (no later than fourteen days after the judgment is signed). *Cf.* N.Y. C.P.L.R. § 317 (McKinney 2024) (within one year of obtaining knowledge of the entry of judgment).

131 *See, e.g.*, CONN. GEN. STAT. § 52-212 (2023) (requiring the moving party to show reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of judgment, *and* that defendant was prevented by mistake, accident, or other reasonable cause from prosecuting the action or making the defense); N.Y. C.P.L.R. § 5015 (McKinney 2024) (articulating deadlines and rules that vary by the grounds for vacating a default judgment, such as excusable default, fraud, or lack of jurisdiction).

132 California's recent law to support the FDCPA gives consumer defendants subject to a default judgment entered in favor of a debt buyer a longer time—six years instead of two—to file a motion to set aside. But a recent study showed that few consumers have asserted this right. In fact,

from low rates of set-aside motions that many default judgments are meritorious but that conclusion, like similar assumptions about defendants' non-appearance, may be faulty. Successful state regulatory enforcement actions against frivolous filers should likewise result in high numbers of set-aside motions, but they do not.

D. *Enforcing Default Judgments*

Enforcement and garnishment procedures can also feed into the default-judgment machine, overwhelm pro se defendants, and favor plaintiffs. In most states, judgment creditors have many years to file enforcement proceedings.[133] They may wait until deadlines for set-aside motions have passed or simply for post-judgment interest, which can be as high as twelve percent, to accrue.[134]

For garnishment proceedings, there are again a variety of procedures across states. Defendants' failure to appear can effectively waive applicable defenses or exemptions.[135] States have various exceptions or limitations on garnishment. For example, some states prevent creditors from seizing so much of the debtor's wages that they are pushed below the poverty line or allow the debtor to keep a used car or a home of at least average value—but others do not.[136] While these laws exist, courts rarely have an affirmative

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filing rates for such set-aside motions decreased after the 2013 law was passed. RABA, *supra* note 44, at 9 (citing CAL. CIV. CODE §§ 1788.50–.66 (Deering 2023)).

133 *See, e.g.*, N.Y. C.P.L.R § 211(b) (McKinney 2024) (twenty years in New York); TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a) (West 2024) (ten years in Texas); 231 PA. CODE 3101.1 (2024) (five years in Pennsylvania); MICH. COMP. LAWS § 600.5809 (2025) (six years in Michigan small-claims courts); CAL. CIV. CODE. § 683.020 (West 2024) (ten years in California). In Michigan, seventy-eight percent of judgments result in garnishment proceedings. *See* MICHIGAN REPORT, *supra* note 16, at 2.

134 For example, as of January 1, 2025, California has a five percent post-judgment interest rate for debt claims valued at or under $50,000 (ten percent for all other types of money judgments). CAL. CIV. CODE §§ 685.010, .020 (West 2024); MICH. COMP. LAWS §§ 600.6013, .6455 (2025) (approximately five percent according to a formula that adds one percent to a rolling average yield on U.S. Treasury Notes). New York recently lowered its nine percent rate to two percent for consumer debt judgments. *See* N.Y. C.P.L.R. § 5004 cmt. 6 (McKinney 2024). Pennsylvania's post-judgment interest rate is six percent for all judgments. 41 PA. CONS. STAT. § 202 (2024); 42 PA. CONS. STAT. § 8101 (2024). Texas's rate is eighteen percent unless otherwise specified. *See* TEX. FIN. CODE ANN. § 304.002 (West 2023).

135 *See* Anthony A. DeFusco, Brandon M. Enriquez & Margaret B. Yellen, *Wage Garnishment in the United States: New Facts from Administrative Payroll Records* 4 (Nat'l Bureau Econ. Rsch., Working Paper No. 30724, rev. Feb. 2023), https://www.nber.org/system/files/working_papers/w30724/w30724.pdf [https://perma.cc/Y3UH-PY37].

136 *See, e.g.*, N.Y. C.P.L.R. 5231(b)(i) (McKinney 2024) (prohibiting garnishment where, after taxes, the defendant's salary is less than thirty times the minimum wage); MICHAEL BEST & CAROLYN CARTER, NAT'L CONSUMER L. CTR., NO FRESH START 2022: WILL STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY AS THE COST OF NECESSITIES SOARS? 9-23

obligation to demonstrate that they are inapplicable before issuing garnishment orders.[137] California, however, passed a law in 2019 making the statutory bank-account exemptions from garnishment essentially automatic.[138] In some states, courts issue arrest warrants for failure to appear at post-judgment hearings.[139] At the other end of the spectrum, four states—North Carolina, Pennsylvania, South Carolina, and Texas—have outlawed garnishment as a judgment-collection device.[140] Despite Pennsylvania's prohibition on paycheck garnishments, however, asset levies, including against bank accounts, are permitted.[141] Studies show that stronger

(2022), https://www.nclc.org/wp-content/uploads/2022/12/NoFreshStart-22_Rpt.pdf [https://perma.cc/BJG2-8DQP] (surveying the strength of protections provided by state garnishment laws).

137 When a bank receives a court order to garnish money from a judgment debtor's account, it will protect two months' worth of federally protected benefits, such as Social Security payments—but only if the money arrived in the bank account through direct deposit. If the debtor deposited the money by check, or if more than two months' worth of benefits are garnished—even if those are exempt from garnishment under other laws—debtors usually must alert the court of these applicable exemptions. *See Can a Debt Collector Take My Federal Benefits, Like Social Security or VA Payments?*, CONSUMER FIN. PROT. BUREAU (Jan. 29, 2024), https://www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-take-my-social-security-or-va-benefits-en-1157 [https://perma.cc/2UXG-98MA]; *see also* Natasha Khwaja, *Study of Debt Collection Lawsuits in California Shows Reforms' Impact*, PEW (July 25, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/07/25/study-of-debt-collection-lawsuits-in-california-shows-reforms-impact [https://perma.cc/B4CV-UD7V] (explaining that a 2023 California law made the bank account exemption essentially automatic, but to protect more than twenty-five percent of a debtor's wages, an exemption claim must still be filed); MICH. COMP. LAWS ANN. § 3.101(I) (West 2023) ("A bank or other financial institution, as garnishee, shall not withhold exempt funds of the debtor from an account into which only exempt funds are directly deposited and where such funds are clearly identifiable upon deposit as exempt Social Security benefits, Supplemental Security Income benefits, Railroad Retirement benefits, Black Lung benefits, or Veterans Assistance benefits.").

138 Khwaja, *supra* note 137; S.B. 616, 2019–2020 Reg. Sess. (Cal. 2019).

139 *See* AM. C.L. UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 15-18 (2018), https://assets.aclu.org/live/uploads/publications/022118-debtreport.pdf [https://perma.cc/XWU5-J3VY] (describing court watchers' observations of judges "rubber-stamp[ing] scores of [debtor] warrants in a single day," including Professor "Dalié Jiménez['s] . . . observ[ation of] a judge in the Boston Municipal Court stamp over 100 warrants for the arrest of debtors in a single day, so many that the stamp broke"); *see also* Weinstein-Tull, *supra* note 17, at 1193 (describing the issuance of arrest warrants by traffic courts).

140 *See* N.C. GEN. STAT. § 1-362 (2024) (so long as wages used to support family); 42 PA. CONS. STAT. § 8127 (2024); S.C. CODE ANN. § 15-39-420 (2024); TEX. CONST. art. 16, § 28 (except for child support or spousal payments). One in one hundred Americans is subject to a garnishment proceeding at any given time. Anthony DeFusco, Brandon Enriquez & Maggie Yellen, *Wage Garnishment in the U.S. Is More Common Than You Might Think*, KELLOGG INSIGHT (July 18, 2023), https://insight.kellogg.northwestern.edu/article/wage-garnishment-in-u-s [https://perma.cc/B5V3-YQJ8].

141 ADAM KARBELING & JESSIE HEMMONS, SHELLER CTR. FOR SOC. JUST., SIX PRACTICAL WAYS COURTS CAN REDUCE DEFAULT JUDGMENTS IN DEBT COLLECTION CASES 7 (2023), https://law.temple.edu/csj/wp-content/uploads/sites/3/2023/05/Six-Practical-Ways-Courts-Can-Reduce-Default-Judgments-in-Debt-Collection-Cases.pdf [https://perma.cc/HWL9-9QPB]; 42 PA. CONS. STAT. § 8127(a) (2024) (personal earnings exempt from attachment, execution, or

garnishment protections correlate with fewer civil debt judgments, and those that are sought are for greater amounts.[142]

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In sum, many state and local courts effectively permit ineffective service and notice—whether through fraud or because it technically satisfies legal requirements—and issue default judgments readily and frequently. Only a few states, like California, New York, and Texas, require judges to interrogate the plaintiff's claims before entering a default judgment or to consider the availability of affirmative defenses. Far more, like Pennsylvania and Michigan, follow an adversarial model that imposes few specific requirements on plaintiffs to carry pleading or production burdens early on, and grants default judgments automatically when defendants do not appear. As the California and Texas examples show, moreover, having proof requirements in procedural rules does not guarantee that courts render default judgments only when they are satisfied. Moreover, default judgments are difficult to set aside, and enforcement proceedings rarely consider potential exemptions from enforcement unless the defendant appears to assert them.

II. PARTICIPATION AND PROCEDURAL JUSTICE

In many states, the procedures that govern default judgments and their aftermath involve at least four procedural problems: party absence, massive caseloads, resource and information asymmetries, and incentives for abusive plaintiff behavior. This Part addresses the first problem—party absence—which fundamentally compromises the adversarial system's devotion to participation as a legitimating theory of adjudication.

The default procedures just described reflect an adversarial system that rewards superior advocacy and penalizes advocacy failings, like waiver. Critics of American adversarialism have long identified its excessive costs,[143] tendency to favor the haves over the have nots,[144] and preference for competitive justice over truth seeking.[145] But the adversarial system is also

other process); *see also* MICH. CT. R. 3.101(I)(6) (2024) (instructing banks and financial institutions not to withhold for garnishment exempt funds that have been directly deposited and are clearly identifiable as coming from an exempt source, like Social Security benefits).

142 *See* Fulford & Nagypál, *supra* note 129, at 4.

143 *See, e.g.*, KAGAN, *supra* note 90, at 182 (claiming that reliance on adversarialism "clearly makes American regulation more costly, more inefficient, and more inflexible").

144 *See, e.g.*, Galanter, *supra* note 45, at 103-4 (arguing that a facially neutral adversarial system may nonetheless "perpetuate and augment the advantages" of a party with greater wealth or status).

145 *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833 (1985) (discussing shortcomings present in America's lawyer-dominated system, such as the

hailed as a key to American democracy, and conceptions of due process and procedural justice are often tethered to adversarial notions about the importance of notice and an opportunity to be heard.[146] The adversarial system lays the foundation for psychological studies that ground courts' perceived legitimacy in parties' participation and sense that their voices were heard.[147] Access-to-justice scholarship likewise focuses on the importance of empowering participants through more meaningful participation, even though participants' perceptions of fairness cannot themselves mitigate injustice.[148] These studies, nevertheless, continue to focus on the experience of participating parties.

This Part considers these themes in the context of extraordinarily low rates of participation. An underlying theme is the argument that courts' role in supporting democracy lies in courts' sociological and legal legitimacy, not adversarialism per se. The known flaws in the adversarial model in lawyerless courts are a fortiori stronger in default-heavy courts where procedural incentives to prompt participation have failed. To be sure, adversarialism-based safeguards of due process are important. Notice and service procedures must inform defendants about cases so they can defend against them and set-aside procedures must be available for individuals to challenge improper judgments. But these systems do not ensure defendant participation and modern circumstances do not make non-appearance reliably linked to waiver. Thus, the question remains of what courts should do with dockets full of default.

Under any of the three theories of procedural justice that can shape the goals of a procedural system—accuracy, balancing, and participation—court

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preparation of fact and expert witnesses by biased parties); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035-41 (1975) (exploring the tension between judicial truth-seeking and advocate partisanship).

146 *See, e.g.*, Martin H. Redish & Victor Hiltner, *Adversary Democratic Due Process*, 75 FLA. L. REV. 483, 487-89 (2023) (defending American "liberal adversary democracy" as a system that harnesses conflict and dissent to protect individual liberties, mediated by robust due process).

147 *See, e.g.*, Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 SWISS J. ECON. & STAT. 219, 231 (1997) ("Dignified treatment matters because it shows that the civil justice system took the litigants and the dispute seriously.") (internal quotation marks omitted); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

148 *See* Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 290 (cautioning that simplification of the justice system to lessen the complexities litigants face means little if the substantive outcomes remain largely unjust); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1368-9, 1381 (2021) (describing as a paradox the dynamic in which housing court litigants feel they were treated fairly and reasonably when given additional process, even though that process did not lead to better substantive outcomes); *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 234 (1992) ("While litigant satisfaction is certainly desirable, it cannot support a broad participation right, standing alone. There is strong reason to doubt that achieving satisfaction has ever been, or indeed ought to be, the primary purpose of adjudication.").

systems should do more in debt collection cases to ensure procedural justice even when defendants do not participate.

As it stands, rubber-stamp default procedures fall short under each theory. None can justify such procedures because, in debt-collection cases, the reasons for defendants' non-appearance cannot reliably be assumed to reflect either a knowing, intelligent, voluntary waiver of rights or a concession to the merits of the plaintiff's case. Grappling with hard questions of how much procedure is required, how much is enough, and which actors (plaintiffs, defendants, or courts) should bear procedural burdens, this Part lays the theoretical groundwork for the Article and sets the stage for considering a path forward.

A. *Theories of Procedural Justice*

At the core of American due process[149] and procedural justice[150] are notice and the opportunity to be heard. Default procedures raise a challenge to these principles. How can they accommodate the importance of participation when parties do not or cannot participate in procedure?[151] Arguably, rubber-stamp default judgment values participation highly by incentivizing defendants' appearance lest they lose on plaintiff's terms. The justification for courts' ability to issue default judgments has changed over time. The absent defendant was once thought to have conceded to the complaint,[152] or at least waived any right to a hearing, by failing to appear (assuming proper service).[153] Later, the rule changed so a plaintiff "only obtained judgment in accordance with the truth of the case as established by an ex parte examination."[154] In 1885, the Supreme Court reinforced the original view, confirming the practice of issuing decrees pro confesso, whereby the court generally accepts that the defaulting party admits to well-pleaded allegations

149 *See* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1315 (2012) (describing the opportunity to be heard as a "central element of due process"); Goldberg v. Kelly, 397 U.S. 254, 258-59 (1970) (holding that discontinuance of welfare benefits requires notice to the recipient and the right to be heard at a "post-termination 'fair hearing'"). This Article is concerned with how states should structure their procedures, not how federal courts should supervise them.

150 *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004) (stating that the "Participation Principle" of procedural justice requires that civil disputes provide adequate opportunities to be heard). *See generally* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

151 "Do not" and "cannot" admittedly raise different questions, but the problem of default procedures addressed here may rest somewhere in the middle.

152 *See* WRIGHT & MILLER, *supra* note 61, § 2681 (recalling that, before the 1880s, failing to appear "was deemed a confession of the action").

153 *See id.* (noting that default decrees taken *pro confesso* were permitted "if defendant, on being served with process, failed to appear within the time required or, having appeared, defendant failed to plead, demur, or answer the bill within the imposed time limits").

154 Thomson v. Wooster, 114 U.S. 104, 110 (1885).

in the complaint, but the court may conduct a hearing and use other fact finding devices, especially with respect to damages.[155] The threat of default was thought to deter defendants from using delay as a litigation tactic, vindicate plaintiffs' rights, and promote judicial efficiency in the face of obstructionist defendants.[156]

Since then, scholars have developed three standard models or theories of procedural justice. First, the accuracy theory assumes that civil dispute resolution aims to achieve accurate results—the correct application of law to fact.[157] Second, the participation theory "assumes that the very idea of a correct outcome must be understood as a function of a process that guarantees fair and equal participation."[158] The participation theory has come to reflect the work of Tom Tyler and others, who ground the psychology of procedural justice and perceptions of fairness in individuals' consideration of four factors: "whether they had a voice and opportunity to be heard; whether they trusted the motives of the decision-maker; whether the process was neutral and unbiased; and whether they were treated with courtesy, respect, and dignity during the process."[159] Finally, the balancing theory, reflected in *Mathews v. Eldridge*, values accuracy, but aims primarily to fairly balance the costs and benefits of adjudication.[160]

From one perspective, rubber-stamp default procedures seem to forego accuracy in favor of valuing and incentivizing participation (and potentially punishing absence).[161] But they also include implicit rationales based on each theory. As to accuracy, if the non-appearing defendant has conceded the merits of the case, then judgment for the plaintiff is an accurate resolution. This rationale assumes that the properly notified defendant would appear if the plaintiff's case were meritless, and the possibility of indebtedness seems

155 *Id.*; *see also* WRIGHT & MILLER, *supra* note 61, § 2681 (comparing *pro confesso* to default by *nihil dicit* judgment).

156 WRIGHT & MILLER, *supra* note 61, § 2681.

157 *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307, 389 (1994) (theorizing why accuracy is valuable in legal settings). *See generally* Bone, *supra* note 148 (evaluating various theories for due process within accuracy theory metrics).

158 Solum, *supra* note 150, at 191.

159 Rebecca Hollander-Blumoff, *The Procedural Justice of Personal Jurisdiction*, 65 ARIZ. L. REV. 643, 645 (2023) (citing Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 118-20 (2000)).

160 See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (balancing the private interest in additional procedure against the risk of error and the government's pecuniary and administrative interests).

161 *See* Sudeall & Pasciuti, *supra* note 148, at 1429 (discussing circumstances in which court systems prioritize participation-based procedural justice "to the exclusion of substantive and distributive justice goals").

plausible enough so that the court need not blink at the allegation.[162] The participation theory may also be satisfied because the participation right can guarantee only the opportunity for participation. Thus, so long as proper notice is provided, the participation right, and its legitimating value, remains protected. On the balancing theory, rubber-stamp default procedures seem justified on the rationale that more process would come with costs that would not likely improve accuracy.

In the debt collection context, there are cracks in all three theories.

B. *Accuracy*

The assumption that the defendant's decision not to appear reflects the merits of the plaintiff's claim is misguided. A variety of reasons—including lack of access to financial records, lack of access to legal advice, practical obstacles to appearance, and beliefs that the cost of litigating outweighs the amount in controversy—often drive defendants' absence. These reasons all undermine the assumption that absence reflects knowing, intelligent, and voluntary waiver of participation rights or concession to the merits of the claim.[163]

First, a debtor may have little or cumbersome access to their own financial records with a particular creditor, and the plaintiff suing them may not be the original creditor, but instead a debt collection agency that purchased the debt.[164] Debt buyers themselves often have only limited information about

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162 It is not clear that preposterous complaints receive different treatment at the default-judgment stage. *See, e.g.*, Joyce v. Pepsico, Inc., Nos. 2010AP2148, 2010AP2149, 2010AP2150, 2011AP117, 2012 WL 1033468, at *8 (Wis. Ct. App. Mar. 29, 2012) (affirming vacatur of a default judgment against plaintiffs who asserted that, because they had invented bottled water, Pepsi was infringing on their trademark).

163 Much of the literature documenting why civil defendants do not appear in court parallels the studies around why criminal defendants do not appear. *See generally* Brian Nam-Sonenstein, *High Stakes Mistakes: How Courts Respond to "Failure to Appear,"* PRISON POL'Y INITIATIVE (Aug. 15, 2023), https://www.prisonpolicy.org/blog/2023/08/15/fta [https://perma.cc/MJN6-W58Z] (listing common reasons criminal defendants miss court and states' various responses to failure to appear); Alissa Fishbane, Aurélie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 682, 685 (2020) (discussing the impact of text-message reminders on rates of failure to appear); Lindsay Graef, Sandra G. Mayson, Aurélie Ouss & Megan T. Stevenson, *Systemic Failure to Appear in Court*, 172 U. PA. L. REV. 1, 7-8 (2023) (discussing when and how often criminal defendants fail to appear, and arguing that *police officers'* failure to appear is a systemic problem worthy of reform); Alex Albright, No Money Bail, No Problems? Trade-Offs in a Pretrial Automatic Release Program 1, 4, 26 (July 25, 2022) (unpublished manuscript), https://apalbright.github.io/pdfs/No_Money_No_Problems_July2022.pdf [https://perma.cc/4E4K-A97X] (discussing attempts to disincentivize non-appearance using bail reform).

164 *See* D'Onfro, *supra* note 27, at 567 (noting that the layers of debt-collection firms purchasing external contracts reduce clarity for the consumer); Jiménez, *Dirty Debts*, *supra* note 24, at 44-48 (citing arguments that attorneys representing clients in debt-collection suits are lacking the necessary information for a fair adversarial system).

the debts they seek to enforce. These realities also hamper consumers' (and defendants') ability to analyze the amount they owe. Data about the original debt may be with the original creditor, and individuals may have little means for assessing the validity of additional fees that collections firms often add to their bills. Proving the absence of a debt or the inadequacy of offered evidence, moreover, can be challenging even for sophisticated lawyers. Different kinds of debt pose different kinds of informational obstacles,[165] but the defendant is often not well positioned to access information to support a defense. The availability of rubber-stamp default judgments creates asymmetric evidentiary burdens.

Second, defendants often have inadequate information about the court process and inadequate access to legal advice to help them navigate it.[166] There can be failures in effectively serving defendants.[167] If notice reaches the defendant, it might come in a form that is legalistic or incomprehensible.[168] Non-appearance may be due to poor English-language proficiency, low education levels, or the unavailability of legal aid.[169] The notice might be accidentally (or intentionally) ignored amid large quantities of email or snail mail. In debt-collection cases, the plaintiff's name—if a third-party debt buyer—may be unfamiliar to the defendant. They may therefore reasonably believe the notice is not properly directed at them.[170] Thus, some defendants' absence reflects their understanding of the legal system. The defendant may not be best positioned to evaluate defenses and may not have access to legal counsel. Some may know they owe money but are not aware of potential

165 *See, e.g.*, RICHMAN ET AL., *supra* note 129, at 22-23 (discussing the opacity of hospital bills).

166 *See, e.g.*, SIX PRACTICAL WAYS, *supra* note 141, at 3 (describing common reasons why defendants do not appear).

167 *See, e.g.*, Effron, *supra* note 30, at 1533 (discussing sewer service).

168 *Cf. Filing Fairness Project*, STAN. L. SCH., https://filingfairnessproject.law.stanford.edu [https://perma.cc/EYD5-DEB7] (last visited Jan. 16, 2024) (identifying "indecipherable court forms" as a key contributor to a nationwide access to justice crisis); *Legal Design Lab*, STAN. L. SCH., https://www.legaltechdesign.com [https://perma.cc/DB3D-ANGC] (last visited Jan. 16, 2024) (describing "Wise Messenger," an app designed to provide clients with easier-to-read text messages, event reminders, and procedural coaching to combat opacity in legal process); *see also, e.g.*, Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. 817, 862-64 (2020) (collecting data in the immigration and criminal contexts that better education and notice improve appearance rates).

169 *See, e.g.*, RABA, *supra* note 44, at 21 (listing those three factors as contributing to an overall nine-percent rate of defendant response in debt-collection cases).

170 *See* Stifler, *supra* note 67, at 107-08 ("Consumers are frequently confused about the plaintiff who is suing, since the company is one with which they had not done business, or they are confused by the court process.").

benefits to appearing—like the potential availability of defenses or of negotiating a better payment schedule. Some lack faith in the legal system.[171]

Third, practical obstacles to appearing raise further doubts about the "voluntariness" of non-appearance.[172] Inaccessible public transportation to courthouses has measurable effects on appearance rates.[173] Defendants may not be able to secure childcare or to take a day off from work to appear.[174] Medical debt holders may be too sick to go to court.[175]

Finally, non-appearance can be rational. The costs of full participation often exceed the potential benefits.[176] Low-value debt-collection cases thus represent the inverse of the much maligned negative-value or small-value cases in the class action context, which are not worth enough for plaintiffs to litigate individually.[177] Here, the debt cases are not "worth" it to defendants to litigate individually. The costs of litigation—e.g., gaining access to and analyzing financial records, taking a day off from work, paying for travel or childcare, seeking and paying for legal advice or representation—often outweigh the perceived potential benefits of appearing to assert a defense, especially if one believes one has no defense or that they will likely lose for other reasons.[178] These costs, moreover, may further deplete individuals' resources to pay their debts.

In sum, the various reasons for defendants' absence make it more likely not only that they will not participate, but also that the accuracy theory's logical inferences from that non-appearance are inappropriate.

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171 *See, e.g.*, Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017) ("The existing police regulatory regime encourages large swaths of American society to see themselves as existing within the law's aegis but outside its protection.").

172 *See, e.g.*, Arbel, *supra* note 14, at 138-39 (discussing the practical obstacles of time, travel, and preparation costs for litigants that may make apathy in the face of summons a rational choice).

173 *See* David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions* 2 (U. PA. INST. FOR L. & ECON., Research Paper No. 229, 2022), https://ssrn.com/abstract=4130696 (finding that "excess public transit commuting time increases default rates").

174 *See* Stifler, *supra* note 67, at 108 (highlighting work as an obstacle to appearing in court); PEW, *supra* note 4, at 16 (childcare).

175 *See* RICHMAN ET AL., *supra* note 129, at 16 (reporting a cancer patient's inability to appear in court because of illness).

176 *See* Arbel, *supra* note 14, at 139 ("[C]onsumer apathy to the legal process . . . is often rational."); *see also* J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2004 (2004) ("When the stakes of a dispute are low, and despite the fact that millions of minor injustices can produce large systemic harms, individuals often do not find it worth their while to go to court in person.").

177 *See, e.g.*, Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance–Procedure Dilemma*, 47 S. CAL. L. REV. 842, 845-46 (1974) (suggesting that the legal system is broadly setup to deter litigation over small injuries).

178 *See* Arbel, *supra* note 14, at 139; *see also* Prescott, *supra* note 176, at 2004.

C. *Participation*

If valuing participation means valuing notice and an opportunity to be heard, then rubber-stamp procedure can vindicate participation values so long as defendants receive adequate notice and have access to a meaningful opportunity to be heard if they appear.[179] But lawyerless courts often do not provide meaningful opportunities to be heard, and even if they did, the multiple reasons for non-appearance undermine assumptions that non-appearance constitutes knowing, intelligent, and voluntary waiver of procedural rights.

First, standard procedures in lawyerless courts often do not provide a meaningful opportunity to be heard.[180] In these courts, adversarialism is demonstrably broken: it pits represented plaintiffs against unrepresented defendants in the presence of judges trained to be "neutral," where neutral means not intervening even to ensure pro se defendants understand court procedures and the consequences of not following them.[181] The adversarial model in the context of pro se litigants facing well-resourced repeat players (including the government) has long received substantial criticism,[182] including by scholars of the welfare system who questioned whether hearings in fact treated recipients with dignity or prevented erroneous deprivations of rights.[183]

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179 *See* Solum, *supra* note 150, at 292 ("[A] hearing in which one knows in advance that one will be ignored is not a hearing in which one has a meaningful opportunity to participate.").

180 *See* Carpenter et al., *Lawyerless Courts*, *supra* note 13, at 539 (observing that judges often maintained legal and procedural complexity and lacked the patience to explain legal concepts in lawyerless courts, making it difficult or impossible for defendants to navigate the court system).

181 *See* Steinberg, *supra* note 80, at 904 ("A judge who abides by the passive norm in presiding over a contemporary civil docket would likely spend the majority of her day briskly dismissing the claims of unrepresented parties—a result that hardly seems consistent with the adversary system's overarching goal to produce fair and merits-based decisions."); Arbel, *supra* note 14, at 131-32 (criticizing the passivity of judges as warping the legal process when parties systematically underparticipate).

182 *See, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1316 (1975) ("In the mass justice area the Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem . . . .").

183 *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 887 (1990) ("Constitutionalizing welfare procedures has not done very much to imbue the welfare system with the norms of human dignity that the *Kelly* decision rhetorically endorsed."); Parkin, *supra* note 149, at 1331 ("[F]air hearings provide 'a very un-systematic check on the quality of initial adjudications of claims,' and do not sufficiently deter improper or illegal welfare policies. And, of course, 'fair hearings are virtually useless where a claimant was denied in technical compliance with the agency's own rules.'").

This is not the only way to conceive of American due process. Federal and state courts alike give special treatment to pro se litigants.[184] One could imagine due process requiring similar preferential treatment for unrepresented or absent defendants. The Alaska Supreme Court, for example, has recognized courts' duty to "inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish."[185] Alaska's case law has supported a legal culture in which the judge recognizes she is not remaining neutral by keeping pro se defendants in the dark. In default judgment proceedings, this judicial attitude also demands fuller consideration of the plaintiff's case even in the defendant's absence.[186] But even though the ABA and others recognize that judges should help pro se defendants in this way, judges' ethical concerns for preserving "neutrality" often prevent them from doing so.[187]

Second, even if appearing in court does afford a meaningful opportunity to be heard, rubber-stamp procedures are still problematic in areas—like debt-collection suits—where the reasons for non-appearance may undermine the standard assumptions that defendants are waiving their procedural rights. Instead, various obstacles render their participation "impracticable."[188]

Procedural justice theorists have encountered situations of impracticable participation elsewhere. For example, Larry Solum grounds his theory of procedural justice in participation, but identifies aggregation of small claims in class-action suits as the paradigm case for impracticability. In such cases, instead of a day in court, parties need—in the Supreme Court's words—"structural assurance[s] of fair and adequate representation . . . ."[189]

In cases where participation is impracticable, Solum posits, procedural justice requires that "the absent interested individual shall be provided with an adequate legal representative and the proceeding shall be structured so as to give full and fair consideration to the interests of the absent individual."[190]

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184 *See, e.g.*, Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2692 (2022) (highlighting that nearly all federal district courts have at least one pro se-specific procedural rule).

185 Bush v. Elkins, 342 P.3d 1245, 1253 (Alaska 2015) (quoting Breck v. Ulmer, 745 P.2d 66, 74 (Alaska 1987)). This parallels the German judicial obligation to give hints and feedback. *See* OSCAR G. CHASE, HELEN HERSHKOFF, LINDA J. SILBERMAN, JOHN SORABJI, ROLF STÜRNER, YASUHEI TANIGUCHI & VICENZO VARANO, CIVIL LITIGATION IN COMPARATIVE CONTEXT 351-54 (2d ed. 2017).

186 *See, e.g.*, Bartels v. Bartels, No. S-13148, 2009 WL 2973557, at *3-4 (Alaska Sept. 16, 2009) (denying the plaintiff's default judgment request, conducting a trial, and requiring the plaintiff to present evidence when the defendant could not be located).

187 *See supra* notes 79–80 and accompanying text.

188 Solum, *supra* note 150, at 305-06.

189 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

190 Solum, *supra* note 150, at 305-06 (adding that "[r]epresented persons should be afforded practicable opportunities to challenge the adequacy of their representation").

In small-value debt cases, providing a lawyer for each defendant, present or absent, seems both impracticable and difficult to justify on a balancing theory. But the second half of Solum's solution—structuring the proceeding to consider the absent individual's interests—is not so fanciful and is necessary to protect the values of participation in the face of impracticability.

D. *Balancing*

While the realities of debt-collection litigation may undermine the accuracy and participation rationales, the balancing theory asks whether they undermine them enough to justify the additional costs of more procedure. Since procedures are necessarily imperfect,[191] how much more procedure beyond rubber stamping is required?[192]

The reasons for non-appearance undermine complete reliance on non-appearance as a validation of the accuracy of plaintiffs' complaints. Something more seems necessary for at least three reasons.[193]

First, if waiver cannot be relied upon as a concession, then accurate resolution of the dispute—and vindication of consumer-protection laws—may require not just a confirmation of the plaintiff's prima facie case, but also a rebuttal of the availability of common, potential affirmative defenses (e.g., that collecting on the debt is time-barred or that the debt has been paid off).[194] At a minimum, such confirmation seems to require attachment of the underlying documentation of the debt, not simply a bare-bones and potentially "robo-signed" affidavit.

The absence of such requirements has been shown to lead to rubber stamping regardless of technical affidavit requirements or possibilities for hearings.[195] For example, in 2010, Indiana amended Trial Rules 9.2 (Pleading and Proof of Witten Instruments) and 55 (Default) to require plaintiffs to

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191 *See id.* at 321 (describing the tension between procedural fairness and substantive accuracy).

192 *Cf.* Lindsey v. Normet, 405 U.S. 56, 64 (1972) (upholding the requirement of a trial no later than six days following service in an eviction case and the limitation of triable issues to the tenant's default as consistent with due process); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (upholding failure to appoint counsel for indigent parents in a termination of parental rights proceeding as consistent with due process).

193 *See infra* Part III.

194 Technically, the fact that a debt was discharged in bankruptcy is jurisdictional, not a substantive defense, and so such judgments may be void if the judgment debtor is sophisticated enough to challenge it. *See, e.g.*, DAVID G. EPSTEIN & STEVE H. NICKLES, PRINCIPLES OF BANKRUPTCY LAW 222 (2007).

195 *See, e.g.*, Holland, *supra* note 115, at 263; ALBIN-LACKEY, *supra* note 58, at 3-4; Sykes v. Mel S. Harris & Assocs., 780 F.3d 70 (2d Cir. 2015) (involving a putative class action against a debt-buying company, law firm, and process server alleging they had engaged in a fraudulent scheme to obtain default judgments against debtors in civil court by relying on automatically generated form affidavits of merit not based on personal knowledge and, in many instances, false affidavits of service).

attest to the underlying facts of their claims by affidavit to obtain a default judgment.[196] The affidavit requirements did not prevent debt buyers from filing robo-signed affidavits and the Indiana appellate courts offered no reprieve because technically robo-signed affidavits complied with the rule.[197] Only subsequent revisions to the filing requirements in Rule 9.2, which required attaching underlying documents forming the basis of the debt, and which were extended to also apply in small-claims courts, curbed this practice.[198] The fact that these changes were to filing requirements, not the default-judgment rules, further demonstrates the interconnectedness of the various parts of default procedures.

Second, given the impracticability of participation, someone should be considering the absent party's interests—for example, raising the possibility of the availability of affirmative defenses. The court can play that role.[199] Indeed, judges who rubber stamp plaintiffs' claims may be seen as relinquishing their decisionmaking role to the plaintiffs themselves, violating due process by allowing the plaintiffs to function as the judge in their own cases. This point finds a parallel in *Chrysafis v. Marks*, the case in which the Court provisionally struck down part of New York's COVID emergency response act.[200] According to the Court, under that act, if a tenant self-certifies financial hardship, the law "preclude[d] a landlord from contesting that certification and denie[d] the landlord a hearing."[201] The Court held that the law thereby violated its "longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause."[202] Here, imagine a plaintiff self-certifies that a debt is owed, with little more,

196 Westlaw provides the history. *See* IND. R. TRIAL P. 9.2, https://1.next.westlaw.com/Document/N05EE38C3EE7311EB998B905FA88E2D59/View/FullText.html (view the "History" tab); IND. R. TRIAL P. 55, https://1.next.westlaw.com/Document/N0DDC087071B711DC915D8FD30B191AE6/View/FullText.html (same).

197 *See* Miller v. LVNV Funding, LLC, 37 N.E.3d 564 (Ind. Ct. App. 2015), *transfer denied*, 41 N.E.3d 690 (Ind. 2015) (holding that a properly executed affidavit of debt, and nothing more, suffices in a small-claims proceeding). Judith Fox describes one case in which a pro se defendant appeared, alleging that he did not owe the debt, never had an account with the plaintiff, and his name was not the name of the accountholder in the claim. Fox, *supra* note 112, at 383. The attorney then withdrew his motion for judgment on the pleadings and said to the court "I'll just send him admissions and then do a summary judgment," because the pro se defendant was unlikely to properly respond to the admissions. *Id.*

198 IND. R. TRIAL P. 9.2(A)(1), (A)(2) (requiring that "the plaintiff shall provide an Affidavit of Debt that shall have attached . . . one or more Exhibits" and outlining additional requirements).

199 *See infra* Part IV.A.

200 Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021). Specifically at issue in *Chrysafis* was Part A of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, 2020 N.Y. Laws ch. 381.

201 *Chrysafis*, 141 S. Ct. at 2482.

202 *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

and the court does not question that claim because the defendant did not appear. In such circumstances, the less scrutiny the court gives that complaint, the closer the proceeding is to allowing the plaintiff to be the judge in his own case, which would violate due process.[203] This is especially true in the context of court systems where judges' neutrality is compromised by their incentives to accept plaintiff filing fees because they fund their positions and to issue judgments quickly to increase case volume and speed of case resolution.

The third reason that balancing requires more process regards the calculation of costs and benefits. To some, fixing the courts may seem too expensive to be worth the trouble.[204] Any increase in resources devoted to adjudicating debt-collection cases will seem excessive because there are so many cases and each involves such a small sum, although such considerations do not usually factor into a *Mathews*-style balancing test. Increasing the cost of filing, for example, through substantiation requirements, or making it more difficult to collect on judgments, could make debt more expensive, leading payday loans and other forms of debt to be offered on ever-worse terms, or not at all.[205]

In theory, accurate claims processing based on the plaintiff's submitted evidence should also provide benefits. It should improve accuracy as well as efficiency for plaintiffs, who have an interest in collecting provable debts, as well as in access to a court system that is not overrun with frivolous "assembly-line" suits. Moreover, increased filing requirements should reduce filings in the first instance and thus lighten court dockets. There is a clear

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203 *See* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 222 (2023) (describing how the structural design of a legal system can increase the probability of bias by the decisionmaker, thereby hindering due process); *see also id.* at 257 & n.309 (discussing *Chrysafis*).

204 *See* Wilf-Townsend, *supra* note 4, at 1710 (observing that the litigation of small claims "raises questions about whether paying for lawyers' and judges' time . . . is the most effective use of public funds").

205 *See, e.g.*, Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOY. CONSUMER L. REV. 167, 207-08 (2016) (explaining how collection restrictions on low-cost loans can cause borrowers to "lose access to credit completely or . . . shift to alternative types of loans such as payday loans"). Studies have shown that recent state efforts to tighten evidentiary and information requirements for debt-collection cases have not reduced the credit available to consumers. LESLIE PARRISH, BILL SERMONS & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, PAST DUE: DEBT-COLLECTION REFORMS THAT PROTECT CONSUMERS *NOT* FOUND TO RESTRICT CREDIT AVAILABILITY 2 (2016), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_past_due_debt_apr2016.pdf [https://perma.cc/EFM2-66RZ]. *See generally infra* notes 346–349 (discussing the alleged impact of default procedures on the cost of credit).

correlation in some jurisdictions, such as New York, between such filing requirements and decreased rates of both filings and default judgments.[206]

Proponents of adversarialism might still be reluctant to relinquish the model of "adversary democratic due process" and its unique role in American civil justice.[207] Shifting higher burdens to plaintiffs to prove their case and rebut certain affirmative defenses and to courts to supervise that proof might undermine a dignitary theory if it displaced the role of participation. The goal, one might argue, is a meaningful opportunity to be heard, not an inquisitorial system. But participation can be valued in other ways. Indeed, alternative resolutions like settlement and debt-diversion programs depend on participation and can lead to outcomes that are better than default procedures.

The challenge is how to design a system that confronts the inevitably high rates of default—especially given the low amounts of money at stake and individuals' calculus for whether to appear—and nevertheless heeds values of procedural justice. To do so, the costs of rubber-stamp default procedures to the judicial system should also be weighed. It is to these costs that we now turn.

III. THE COSTS OF DEFAULT PROCEDURES

This Part demonstrates and theorizes three sets of problems with default procedures that effectively rubber stamp plaintiffs' complaints. Making court access too easy in certain contexts has its own social costs.[208] In debt-collection cases, these procedures compromise the courts' institutional integrity when the courts fail to perform core and important court roles—providing fair process, resolution on the merits, and law development and application. The courts' massive caseloads make such functions more difficult. Second, these procedures perpetuate inconsistency and inequality. Here, these problems are exacerbated by asymmetrical access to information, legal

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206 *See supra Appendix*, Figures 3 & 4 (showing a reduction of court filings in New York and California following procedural reforms); *see also* Brief of Legal Services Providers, *supra* note 1, at 9 n.19 (citing N.Y.C. CIV. CT. DIRECTIVES & PROCS. 182) ("A decrease in filings and default judgments starting in 2009 may correlate with the May 13, 2009 court directive requiring a supplemental affidavit for default judgments in consumer credit actions."); BARNARD ET AL., *supra* note 68, at 21 (describing the decline in California debt-collection cases following the passage of the California Fair Debt Buying Practices Act).

207 *See* Redish & Hiltner, *supra* note 146, at 519 (emphasizing "the individual's unparalleled access to and understanding of their own interests relative to all others").

208 *See, e.g.*, Sabbeth, *supra* note 148 (articulating the downsides of court simplification for access to justice); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 189 (2005) (warning that the "*appearance* of fair procedure" can be exploited to take advantage of pro se litigants or can distract from other inadequacies in a justice system) (emphasis added).

advice, and resources. Third, default procedures can create perverse incentives for courts and plaintiffs. Any calculus balancing costs of additional procedures to account for defendants' absence must also account for these costs, which undermine courts and democracy.[209]

Enhancing default procedures—for example, by increasing notice or filing requirements for plaintiffs—also comes with costs, as noted in the previous Part. It may create more work for courts, which are already overworked and budget-sensitive, or impact the cost of credit. To some extent, any adjustments to court accessibility can affect private litigation behavior and even first-order behavior. But the costs of reform must also be weighed against the costs of doing nothing. This Part articulates a set of interests and social costs of doing nothing that must be balanced against these feared costs of reform in any assessment of procedural justice—in addition to considering the important interest of functioning and efficient credit markets.[210]

A. *Institutional Integrity*

Courts have multiple functions in a democracy.[211] Among others, they are generally thought to provide fair process, resolution of disputes on their merits, and law development and enforcement.[212] Extensive scholarship has wrestled with the tension between the Fullerian dispute-resolution model—wherein two private parties resolve their disputes through an adversarial presentation to an impartial and passive decisionmaker[213]—and the "public values" model advanced by scholars like Professors Chayes and Fiss, which emphasizes the importance of adjudication not only to resolve private disputes about private rights but also to vindicate legislative policies and give

209 *See* Steinberg et al., *supra* note 10, at 369 ("Assembly-line litigation is a delegitimizing force in civil courts due to the deep power imbalances it perpetuates.").

210 *See generally* FREDERICK WILMOT-SMITH, EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD (2019).

211 *See* Robert M. Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 911 (1979) ("A court not only resolves disputes, but also allocates resources, confers legitimacy, administers other institutions, promulgates norms, allocates costs, and records statistics, to mention but a few of its more commonly recognized functions.") (citations omitted). On the role of courts in authoritarian regimes, see generally Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 21 (2008).

212 *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1360 (2015) (describing core judicial functions); Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 743 (2018) (same).

213 *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

meaning to public values.[214] Theories of procedural justice can accommodate both perspectives, even if they are sometimes in tension.[215] State civil courts resolve private (often uncontested) disputes but rarely issue opinions or develop law in the traditional sense.[216] Their judgments are rarely appealed (even though the availability of appeal is the reason that municipal courts are subject to less strict due process requirements than other courts).[217] But that is not to say that these courts do not give meaning to, or reflect, public values. They have massive caseloads, millions interact with them, and they are poised to vindicate legal policies—or obstruct them. In sum, these courts are poised to perform core judicial functions. This Section explores how state civil courts fail when they do so, and the way that failure undermines public values.

1. Fair Process

In debt-collection litigation, where plaintiffs are overwhelmingly represented and defendants are not, the deficits in meaningful opportunity to be heard are well documented.[218] When a defendant does not appear, the court cannot hear her side—and courts may assume that she has waived her right to a hearing and any affirmative defenses.[219] As shown above, however, such an assumption is misguided.

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214 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) ("[T]he dominating characteristic of modern federal litigation is . . . the vindication of constitutional or statutory policies."); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (stating that "dispute resolution may be one *consequence* of the judicial decision," but the "*function* of the judge" is to "give the proper meaning to our public values").

215 *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 496 (2009) (explaining that "contrasting theories" of the adversarial system of justice "illustrate the tension between dispute resolution and law pronouncement").

216 *See* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 STAN L. REV. ONLINE 64, 65 (2023) [hereinafter Shanahan et al., *Lawyerless Law Development*] (highlighting that "written opinions are not the norm in lawyerless trial courts" and law development "does not happen in the way we traditionally assume"). Instead, these courts develop "informal law and shared practices." *Id.* at 71; *cf.* PRINCIPLES OF THE L.: HIGH-VOLUME CIV. ADJUDICATION, *supra* note 16, § 39-40 (urging state civil courts to "promote robust public elaboration of law" in more traditional ways).

217 Shanahan et al., *Lawyerless Law Development*, *supra* note 216, at 65 (noting that "appellate activity is minimal" in state civil courts); Natapoff, *supra* note 8, at 1003 (explaining that while appeals from municipal court judgments are rare in practice, the typical municipal court structure is "rendered constitutional by special appellate processes").

218 *See, e.g.*, Carpenter et al., *Lawyerless Courts*, *supra* note 13, at 511-12 (describing the deficits in America's civil justice system that stem from unequal representation in court).

219 Historically, default judgments were justified on the assumption that the defendant had conceded to the facts alleged in the complaint. *See* WRIGHT & MILLER, *supra* note 61, § 2681; *see also supra* Section II.A. Today, waiver is a better theory, as evidenced also by the bases for undoing default judgments. *See* FED. R. CIV. P. 60(b); *see also, e.g.*, Kirk S. Cheney & Risa Lynn Wolf-Smith, *Inaction as Implied Consent: Bankruptcy Courts' Authority to Enter Default Judgment on* Stern *Claims After*

This conclusion raises practical problems about what courts should do in defendants' absence, but provides clear guidance that they should not assume the defendant has conceded the case and waived defenses. Automatic dismissal is not appropriate, but neither is automatic judgment for the plaintiff. High-volume state civil courts confronting low-value claims must develop a proportional requirement for evidence examination.[220]

One might argue that any due-process failings with denying a hearing based on waiver can be remedied by allowing default-judgment debtors to set aside improperly issued default judgments. But set-aside procedures can penalize litigants for not understanding the legal system or not asserting their legal rights in a sophisticated and timely way through more litigation.[221] Set-aside motions require more litigation—and the sophistication and possible access to lawyers that entails. Moreover, of the reasons for non-appearance discussed above,[222] only some might qualify as a justification for set aside.

After-the-fact set-aside motions are therefore important, but they continue to be grounded in assumptions about a functioning adversarial system. Systemically, they are an insufficient remedy for improper default judgments, especially if the judgments' flaw is that they were unsubstantiated. According to available data, very few state civil court judgment debtors file set-aside motions.[223]

Assuming that set-aside procedures protect against problematic default judgments has a veneer of justice. But the veneer scratches easily because it places the burden of maintaining the justice of the system on defendants' shoulders. Such heavy reliance on the parties can be appropriate in a functioning adversarial system. But where defendants' participation is impracticable, courts need mechanisms for fair process besides reliance on the defendants themselves.[224]

Wellness, 35 AM. BANK. INST. J. 20, 21 (2016) (discussing bankruptcy courts' reasoning that, by failing to respond to a summons and complaint, a defendant implicitly consents to a bankruptcy court's authority to enter a default judgment and forfeits her right to an Article III judge).

220 *See infra* Part IV.

221 *See supra* Section I.C.

222 *See supra* Section II.B.

223 Many studies discuss sewer service and other notice problems, but none says that these defects were discovered by a flurry of set-aside motions. To the contrary, even enforcement actions revealing fraudulent practices do not typically lead to large numbers of set-aside motions. *See, e.g.*, RABA, *supra* note 44, at 28 (noting that, over an eleven-year period, an average of 0.55% of California defendants filed a motion to set aside a default judgment).

224 *See supra* Section II.C.

2. (Merits-Based) Dispute Resolution

In Fuller's traditional model, the court's core function is to resolve disputes before a neutral decisionmaker.[225] The Federal Rules embrace the view that "litigation ought to be settled on the merits and not upon some procedural ground."[226] This preference for merits-based resolution explains federal courts' tendency to disfavor default judgments and review plaintiffs' allegations even in defendants' absence.[227] Even while federal courts have moved away from resolving disputes at trial and towards managerial judging, case management, and promoting settlement,[228] these are moves that, at least in theory, try to push parties to understand the merits of disputes rather than resolving them on procedural technicalities.

In state civil courts, however, default procedures routinely convert the plaintiff's version of the facts into a court judgment with little or no verification. High rates of debt and other social facts may support judges' assumptions that plaintiffs' complaints contain truthful allegations and defendants indeed owe the money alleged.[229] But the reality of consumer financial contract record-keeping suggests that debt buyers may not be able to substantiate their ownership of the debt or their claims to certain fines, fees, or interest. In other contexts, moreover, procedural rules do not typically assume plaintiffs' trustworthiness in this way. Rather, they require plaintiffs to prove their allegations. Creditors may come to court seeking more money than a debtor owes, for example, even if the debtor indeed defaulted.[230] Other defenses may also be available. Especially as regulation of these legal areas increases, the merits are increasingly complicated in debt-collection cases.

There are thus many reasons to question whether plaintiffs' allegations of their entitlement to judgment are accurate. Debt cases can be rife with fraud

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225 Fuller, *supra* note 213, at 365.

226 James William Moore, *The New Federal Rules of Civil Procedure*, 6 INTERSTATE COM. COMM'N PRACS. J. 41, 42 (1938). *But see* David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1705-06 & n.281–85 (2023) (collecting scholarship questioning the FRCP's success).

227 *See, e.g.*, *supra* Section I.A.

228 *See, e.g.*, Resnik, *supra* note 79, at 376-77 (observing the judicial trend towards toward "adopt[ing] a more active, 'managerial' stance").

229 *See, e.g.*, McClendon, *supra* note 89 (discussing a municipal court judge's confidence "about his ability to make quick decisions" when working through 100s of cases and spending less than 5 minutes per case); Berard, *supra* note 108 (noting that, in debt cases, "decisions can be made solely on the basis of what the creditor says happened" with "no checks and balances to stop them"). The practical realities of the size of the courts' dockets impose a significant burden on the court. *See infra* Section III.C (discussing incentive structures for courts). The number of cases filed, however, should not be equated with their validity on the merits.

230 *See* Jiménez, *Dirty Debts*, *supra* note 24, at 75 fig. 5 (listing "[a]ttempted to collect wrong amount" as a common consumer complaint submitted to the CFPB); *id.* at 85-86 (noting the difficulties in ascertaining the correct amount owed by debtors).

and other abuses,[231] including by top filers.[232] Even where a defendant has incurred a debt, debt buyers may file with inadequate proof that they have good title to the debt, sometimes relying on robo-signed affidavits.[233] The debt may have been paid off, discharged in bankruptcy, or be time-barred by the statute of limitations.[234] The creditor may have filed in the wrong judicial district[235] or violated the Fair Debt Collection Practices Act (FDCPA) or state laws when trying to collect the debt.[236] In addition, there are questions of how much debtors owe, how to structure their repayment, and whether interest or additional fees apply. Default judgments often result in defendants having to pay significantly more than the debt owed to account for other costs, such as court costs, attorney fees, and interest.[237] States have drastically different (and changing) pre- and post-judgment interest rates, some of which differ for certain kinds of judgments (like consumer debt).[238] These must be

231 *See* Stifler, *supra* note 67, at 99-108 (examining the most common debt-collection abuses).

232 *See supra* note 44 and accompanying text.

233 *Cf.* Holland, *supra* note 115, at 263, 268 (noting how the practice of robo-signing, where affidavits are signed so quickly that the underlying information could not possibly have been verified, often results in "wrongly enter[ed] judgment[s] against unrepresented consumers"). While robo-signing practices seem to have subsided after a post-2008-crisis crackdown, some creditors may be resuming these practices. *See, e.g.*, Patrick Rucker, *A Return to Robo-Signing: JPMorgan Chase Has Unleashed a Lawsuit Blitz on Credit Card Customers*, PROPUBLICA (Jan. 5, 2022, 5:00 AM), https://www.propublica.org/article/a-return-to-robo-signing-jpmorgan-chase-has-unleashed-a-lawsuit-blitz-on-credit-card-customers [https://perma.cc/TN9L-LU62] (describing how JPMorgan Chase resumed robo-signing practices in debt collection cases in 2020); Press Release, U.S. Senate Comm. on Banking, Hous. & Urb. Affs., Brown, Colleagues Seek Answers on Reports of JPMorgan Robo-Signing (Feb. 7, 2022), https://www.banking.senate.gov/newsroom/majority/brown-colleagues-seek-answers-on-reports-of-jpmorgan-robo-signing [https://perma.cc/ZS4J-23G9] (same).

234 Jiménez, *Dirty Debts*, *supra* note 24, at 76-78. For recent examples, see *supra* note 24. On the history of and complications with time-barred debt, see Jiménez, *Dirty Debts*, *supra* note 24; Fish, *supra* note 34, at 1944-52; Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, 33 BANK & FIN. SERVS. POL'Y REP. 13, 13 (2014) (explaining that, in most states, a creditor can win a judgment on a debt after the statute of limitations has run if the debtor does not raise the statute of limitations as an affirmative defense).

235 *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692i (requiring debt collectors to bring legal actions "only in a judicial district or similar legal entity" in which the consumer signed the underlying contract, the consumer resides, or the real property at issue is located); Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 637-38 (7th Cir. 2014) (en banc).

236 *See* 15 U.S.C. § 1692n (noting that the FDCPA does not override state debt-collection laws); CAL. CIV. CODE §§ 1788.50–.66 (West 2024) (California's Fair Debt Buying Practices Act); N.Y. GEN. BUS. LAW §§ 600–03 (McKinney 2024) (New York's debt collection procedures law).

237 *See* PEW, *supra* note 4, at 17 (noting that consumers typically owe "interest on the money owed before the court judgment and on the judgment amount" in addition to the initial debt). Some states require consumers to cover court and collector's attorney's fees. *Id.* at 18. In North Carolina, more than thirty-five percent of the total debt patients owe hospitals is due to interest, attorney's fees, and other fees. RICHMAN ET AL., *supra* note 129, at 9.

238 PEW, *supra* note 4, at 17 ("All 50 states and the District of Columbia allow courts to award debt collectors pre- and post-judgment interest . . . . The rates vary dramatically across states—from

calculated accurately. Thus, even default judgments sought for a "sum certain" require attention to the merits.

3. Applying and Developing the Law

In addition to providing fair process and merits adjudication, courts also apply and develop law. As for application, if the law states that default judgments should issue against absent defendants, then rubber-stamp default judgments can reflect the law's application. Likewise, if a statute of limitations defense, for example, is waivable, then not applying a time bar if a defendant does not appear to assert that defense can be considered validly applying the law. By contrast, if default judgment rules require more substantiation but courts do not verify that the plaintiff submitted it, then rubber-stamping does not apply relevant law. Some states, meanwhile, authorize but do not mandate courts to check for substantiation.

As for law development, state civil courts rarely publish opinions and parties rarely appeal their judgments.[239] But these courts nevertheless develop law, albeit in a far less transparent manner that may be discerned from court practice. For example, rubber stamping complaints sets low burdens of proof for determining liability and amounts owed and can validate unsubstantiated claims for fees and interest.[240] As a result, the law that emerges from rubber-stamp default judgments routinely under-enforces substantive and procedural protections for debtors when these protections must be asserted as affirmative defenses.[241] Routine issuance of judgments that do not consider defenses should be understood as a form of law development that weakens these statutory protections.

As noted, many legal protections for debtors—for example, statutes of limitations or prohibitions on abusive debt collection practices—must be

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1.5 percent in New Jersey to 12 percent a year in Massachusetts . . . ."). In 2021, New York reduced the annual rate of interest on judgments arising out of a consumer debt where the defendant is a natural person from nine percent to two percent. *See* Karuna Patel, *Dismantling Unjust Interest Rates for Debt Collection Judgments*, REG. REV. (Mar. 30, 2022), https://www.theregreview.org/2022/03/30/patel-dismantling-unjust-interest-rates-for-debt-collection-judgments [https://perma.cc/EG67-NTN9] (discussing the context that compelled New York to lower the post-judgment interest rate); S. Res. 5724-A, 2021 Leg., Reg. Sess. (N.Y. 2021).

239 *See* Shanahan et al., *Lawyerless Law Development*, *supra* note 216, at 65 (observing that "written opinions are not the norm" and "appellate activity is minimal" in the state civil courts that process consumer debt litigation).

240 Pamela K. Bookman & Colleen F. Shanahan, How State Civil Courts Make Law (2026) (unpublished manuscript) (on file with author).

241 *See* Wilf-Townsend, *supra* note 4, at 1710 ("[S]ubstantive legal regimes whose efficacy depends on affirmative defenses are imperiled in many cases where no defenses are made at all.").

raised as an affirmative defense or be asserted in a separate lawsuit.[242] Ordinarily, defendants must raise affirmative defenses or they are waived. In debt cases, pro se defendants, and, a fortiori, absent defendants rarely raise consumer protection defenses like those available under the FDCPA.[243] These protections therefore go unenforced in state courts, leaving enforcement to regulators and class actions.[244]

B. *Inconsistency and Inequality*

Civil procedure scholarship increasingly situates problems of social inequality in the context of procedure and challenges claims of procedure's neutrality.[245] Much of this literature discusses rising procedural and jurisdictional obstacles to individuals suing corporate defendants, making it more difficult, for example, for workers to sue their employers for labor-law

242 *See, e.g.*, Marc C. McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debts*, 75 WASH. & LEE L. REV. 449, 471 (2018) (noting that affirmative defenses are waived if not asserted).

243 *See generally* 15 U.S.C. § 1692; Debt Collection Practices (Regulation F), 12 C.F.R. § 1006 (2021).

244 *See supra* note 24 (collecting enforcement actions). Recent Supreme Court decisions have strictly interpreted standing requirements for such private suits. *See* Spokeo v. Robins, 578 U.S. 330, 342 (2016) (holding that violating a procedural requirement of the Fair Credit Reporting Act does not necessarily cause a sufficiently concrete harm to confer standing); TransUnion v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (emphasizing that the asserted harm that supports standing must have a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts" such as physical, monetary, or reputational harm).

245 *See generally* Portia Pedro, Essay, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143 (2021); A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022). *See also* Brito et al., *supra* note 24, at 1249, 1286 (noting the problematic framing of civil court as "neutral and passive arbiters of private civil disputes" in light of their "unique processes and procedures that facilitate racial capitalism" and refusal to "root out[] the racial dynamics influencing their operation"); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1130, 1142-44 (2023) (analyzing empirical data to "highlight that women are heavily burdened by civil justice issues" and that they face problems "regularly and with highly punitive consequences").

violations or for consumers to bring class actions.[246] These procedural barriers protect corporate defendants from suit.[247]

Debt-collection cases flip this script by making access to courts and their enforcement power easier, not harder, and granting that access for Goliath (corporate plaintiffs) to use against David (individual defendants). The systemic asymmetry of access to information, resources, and legal advice gives plaintiffs the upper hand to such an extent that the starting baseline cannot be considered a place of neutrality between the parties. Default procedures can—but need not—further ease plaintiffs' access to court judgments in ways that do not just echo but exacerbate social inequality.

Irrespective of the default procedures on the books, judicial discretion in their application can also undermine both individuals' interests and the institutional integrity of state court systems.[248] For example, the Houston Chronicle describes a case where a JP judge issued a default judgment as "a favor" for the credit-card company attorney at a hearing that finally occurred after several continuances, even though the defendant had appeared at earlier proceedings where the plaintiff's attorney was absent.[249] According to consumer attorneys, the informalities in JP courts—which are justified by trying to make the courts less intimidating to unrepresented defendants—lead to both deep inconsistencies and ad hoc procedures.[250] The availability of such discretion provides fertile ground for implicit and other biases to work injustice.

Multiple studies of debt-collection judgments—whether obtained through default judgment or otherwise—document the disproportionate impact of these judgments on women, especially Black women, and communities of color.[251] Some studies show that in debt-collection cases,

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246 *See, e.g.*, Helen Hershkoff & Luke P. Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 11-12 (2023) (explaining developments in jurisdictional rules that strategically benefit corporate defendants, such as arbitration doctrine that prevents plaintiffs from suing in courts and removal rules that lock plaintiffs who would prefer friendlier state courts into suing in federal court to avoid a hearing on the merits while driving up litigation costs); Llezlie Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1306-07 (2019) (discussing how courts "often fail to enforce [statutory protections for workers] properly" and the problems of simplified procedures in wage theft disputes).

247 *See, e.g.*, Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171 (2022) (coining the phrase "catch and kill jurisdiction" to describe the ways procedure makes it harder to bring and maintain claims against corporate defendants).

248 *See* Steinberg, *supra* note 80, at 937-38 (explaining that, for pro se cases, "judges must rely on instinct, discretion, and knee-jerk reaction in crafting their procedural methods").

249 Berard, *supra* note 108.

250 *Id.*; *cf.* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 774-75 (2017) (describing potential problems with ad hoc procedure).

251 *See* David McClendon, *Measuring Racial Disparities in Consumer Debt Lawsuits*, JAN. ADVISORS (Aug. 26, 2024), https://www.januaryadvisors.com/debt-racial-disparities [https://perma.cc/L86F-7EDD] (documenting "racial and ethnic disparities in debt collection

Black and Latinx defendants are more likely to receive default judgments.[252] The overlap between the inconsistency and discretion afforded by the law and social inequality results in burdens falling unevenly across our society. Thus, both fraudulent and meritless debt-collection cases and the default judgments that rubber stamp them do not just reflect but also "exacerbate[e] poverty and inequity for marginalized groups."[253]

An additional aggravating factor is that default procedures are triggered when defendants do not appear in court. But the reasons for defendant non-appearance may be heightened in certain communities, for example where individuals have reason to trust the courts less or have had previous unsatisfactory (or worse) experiences with courts or government.[254] If underlying social and racial inequalities contribute to distrust or other reasons for non-appearance, then default procedures that further penalize non-appearance can intensify them.

C. *Incentives*

A third category of costs of rubber-stamp default procedures are the incentives that they create for defendants, courts, and especially plaintiffs.

Defendants. Traditionally, default procedure is thought to target defendants' behavior, threatening defendants with default to encourage them to appear. Courts must be empowered to enter default judgments under appropriate circumstances when plaintiffs have demonstrated their case and defendants will not engage. For such a process to work, one might believe,

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lawsuits"); Steinberg et al., *supra* note 209, at 363-64 ("Women, particularly Black women, bear the brunt of most punitive civil justice actions, with debt collection likely no exception."); *see also* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/5GM4-G2RF] ("[E]ven accounting for income, the rate of judgments was twice as high in mostly black neighborhoods as it was in mostly white ones."); Paul Kiel, *Why Small Debts Matter So Much to Black Lives*, PROPUBLICA (Dec. 31, 2015, 9:00 AM), https://www.propublica.org/article/why-small-debts-matter-so-much-to-black-lives [https://perma.cc/HD4Q-4L8W] (noting that Black people are more likely to be sued over a debt and to face the harshest consequences, such as an arrest warrant to compel payment); MICHIGAN REPORT, *supra* note 16, at 2 (identifying racial disparities in Michigan's debt-collection practices, including a higher filing rate and a higher chance of default judgment against people living in majority-Black communities); Henry Gomory, Douglas S. Massey, James R. Hendrickson & Matthew Desmond, *The Racially Disparate Influence of Filing Fees on Eviction Rates*, 33 HOUS. POL'Y DEBATE 1463, 1478 (2023) (finding that low filing fees have "a particularly pernicious effect" where "landlords file serially against Black tenants more often").

252 *See* Wilf-Townsend, *supra* note 4, at 1750 (finding that in New York City, ninety-five percent of people with default judgments against them in debt-collection cases lived in low- or moderate-income areas, most of which were in Black or Latinx neighborhoods).

253 Steinberg et al., *supra* note 209, at 361.

254 *See supra* notes 163–178 and accompanying text (discussing reasons defendants do not appear that are unrelated to the case's merits).

court process should be—and should appear to be—better than what would occur if the defendant does not appear, at a cost that does not outweigh the difference between the two outcomes.[255] But while improved notice, access to court hearings, and access to legal advice can reduce defendants' litigation costs, it remains challenging to lower these costs enough to incentivize defendants to exert considerable effort responding to low-value debt claims. The successes of ODR, by some accounts, may come closest to sufficiently providing meaningful opportunities for engagement, but ODR is not a simple cure-all.[256]

Reforms should focus on improving notice and court hearings to encourage defendants to appear as well as developing court-adjacent mechanisms and opportunities that encourage participation—even when defendants concede they owe the debt but need help paying it. But these reforms may still not do enough to ensure that defendants' appearance reliably reflects the merits of the plaintiffs' case.

Courts. Rubber-stamp procedures can fuel a perverse incentive to grant quick default judgments as a docket management approach. As with the plea-bargaining system,[257] some scholars predict that without default judgment, courts would capsize beneath the weight of cases.[258] Rubber-stamp default procedures can also make it easy for judges to encourage more filings[259]—and therefore more filing fees—in states where these fees fund the courts.[260] Similar incentives may be absent in a unified court system where fines and fees go to the state's general fisc.

Plaintiffs. While default procedures might usually be thought to create incentives for defendants to appear, they can also impact plaintiff behavior. Procedures can help drive plaintiffs to (a) sue more readily, (b) file more

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255 *Cf.* Bone, *supra* note 22, at 589-92 (discussing the costs and benefits of penalties as an enforcement mechanism to deter frivolous lawsuits); Hay, *supra* note 21, at 677-78 (identifying circumstances in which a cost-benefit analysis may justify departures from the general rule that the plaintiff has the burden of proof).

256 *See supra* notes 36, 77, and accompanying text.

257 *See* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2002 (2022) (noting that without plea bargaining, courts would be overwhelmed and unable to sustain a state of mass incarceration).

258 *See* Steinberg et al., supra note 209, at 362 ("[S]upercharged repeat players have the capacity to bury both courts and consumers with so many lawsuits that resolution of most claims by default becomes the only way to keep the system afloat.").

259 *Cf.* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016) (discussing how and why courts adjust procedures to encourage filing in certain contexts, including bankruptcy and patent litigation).

260 *See* Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 259, 271-72 (Katharine G. Young ed., 2019) (discussing court funding).

frivolous cases, and (c) engage in forum shopping with respect to where to do business and where to file suits.

First, rubber-stamp default procedures can increase filing rates generally. While most civil procedure literature assumes the cost of litigation renders lawsuits a plaintiff's last resort,[261] the ease of access to default judgments creates incentives to sue more readily.[262] When procedures make it fast and cheap to get default judgments and to garnish wages, plaintiffs make their filing decisions accordingly.[263]

Second, rubber-stamp default procedures can create incentives for plaintiffs to evade service requirements[264] and file insufficient claims.[265] If plaintiffs (and their lawyers) know their complaints will not be examined and defendants are not likely to appear, they may seek to enforce time-barred or discharged debt. In debt-collection cases especially, economies of scale mean that the loss of a particular case (for example if the defendant appears or challenges the claim) is likely to be inconsequential to the debt collector.

One might imagine difficulties in judgment enforcement would dissuade plaintiffs from such behavior. But debt buyers' economies of scale make it worth the effort, especially in states whose laws governing post-judgment interest rates and other aspects of enforcement are favorable to judgment

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261 *See, e.g.*, Landers, *supra* note 177, at 845 ("One can perceive the legal system as set up from a functional point of view to deter the bringing of small claims."); *id.* at 846 ("[S]uch matters are better handled by allowing the loss to lie where it falls than by trying to reallocate the loss through the legal system.").

262 *See, e.g.*, Wilf-Townsend, *supra* note 4, at 1746 ("The lack of legal assistance, the hands-off approach of judges, and the high rates of default judgments all contribute to a system in which repeat plaintiffs continue to make claims to which there may likely be valid defenses, because the odds that those defenses will be raised are extremely low.").

263 *See* Fulford & Nagypál, *supra* note 129, at 4-5 (discussing the impact of wage garnishments on rates of civil filings). *Cognovit* or "confession of judgment" clauses—which allow a creditor to obtain a default judgment without serving the defendant with notice—can also make access to default judgments fast and cheap. *See* Effron, *supra* note 30, at 1564-66 & n.186 (noting a three-decade-long "marked increase in default judgments in state court" coupled with "a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments").

264 *See* ALBIN-LACKEY, *supra* note 58, at 36-37 ("[D]ebt buyer lawsuits may be unusually prone to bad service" because "a default judgment is the cheapest and most efficient way to prevail[.]"); Steinberg, *supra* note 13, at 1602-03 (collecting studies showing "[r]ampant reports of sewer service" in New York and California); Effron, *supra* note 30, at 1545 (noting that defendants in marginalized communities are particularly likely to be victims of sewer service).

265 *See* Stifler, *supra* note 67, at 107 ("[D]ebt collectors obtain default judgments against consumers in cases that never should have been filed in the first instance, often based on questionable evidence, such as falsified court documents."); Bookman & Shanahan, *supra* note 8, at 1201-02 (differentiating state and federal pleading standards and other procedural devices which make it harder to file meritless claims in federal court than in state court).

creditors.[266] In these states, judgment creditors are well-positioned to collect, especially if judgment debtors come into an additional source of income.[267]

Third, the diversity of procedures both across and within jurisdictions creates opportunities for abusive forum shopping. In a land of a thousand legal jurisdictions, debt can be sold based on the ease of collectability—which can include access to default judgments.[268]

Within jurisdictions, moreover, plaintiffs have multiple courts to choose from when suing for small-value claims.[269] Federal law requires consumer debt collectors to sue in one of two places: the county where the debtor resides or the county where the debtor signed the contract being sued upon.[270] But depending on the debt amount—that is, the amount the plaintiff sues to recover, not necessarily the amount owed—plaintiffs can file in small-claims court, municipal court, or general-jurisdiction state court.[271]

There are meaningful differences between these types of court, although which is more favorable depends on the jurisdiction.[272] These courts tend to

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266 *See* Paul Kiel & Jeff Ernsthausen, *Debt Collectors Have Made a Fortune This Year. Now They're Coming for More.*, PROPUBLICA (Oct. 5, 2020, 5:00 AM), https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more [https://perma.cc/2CCM-FUAW] (documenting the profitability of debt collection); Stifler, *supra* note 67, at 98 ("The top three publicly-traded debt buyers together collected over one billion dollars annually in revenues from litigation in each of the past three years."). For example, while there are time bars on judgment debtors seeking set asides for certain reasons, many states allow judgment creditors to enforce judgments almost indefinitely. *See supra* note 133 and accompanying text; *see also infra* note 337 and accompanying text.

267 *See, e.g.*, Kiel & Ernsthausen, *supra* note 266 (noting that government COVID-relief programs, including stimulus checks and enhanced unemployment benefits, rewarded debt collectors because people had more financial resources to settle outstanding debts).

268 *Cf.* Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 840 (2020) (noting that there are almost 40,000 local jurisdictions in the United States).

269 *See* Jessica Silver-Greenberg, *In Debt Collecting, Location Matters*, WALL ST. J. (July 18, 2011), https://www.wsj.com/articles/SB10001424052702303365804576433763597389214 [https://perma.cc/PGE7-Z9P8] (explaining that plaintiffs may forum shop for favorable venues that allow for more aggressive debt-collection practices). While eviction cases often need to be brought in the local court where the housing is located, related cases for back rent can be brought in multiple courts, like other debt cases. *Compare* N.Y. REAL PROP. ACTS. LAW § 701 (McKinney 2024) (eviction cases), *with New York City Small Claims Court: In General*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/courts/nyc/smallclaims/general.shtml (last visited Feb. 6, 2025) (related cases for back rent).

270 *See* 15 U.S.C. § 1692i(a)(2)(A)–(B); Hess v. Cohen & Slamowitz LLP, 637 F.3d 117, 119 (2d Cir. 2011) (holding that it violates the FDCPA's venue provisions for a debt collector to sue a consumer in a different district from the one in which the consumer resides).

271 *See supra* notes 50, 109 (discussing jurisdictional maxima for small-claims courts).

272 *See supra* Section I.B; *see also, e.g.*, Fox, *supra* note 112, at 381 (hypothesizing that the reason plaintiff's attorneys file in Indiana civil court when they could file in small-claims court is because of the "mail-in" option in the former that doesn't exist in the latter). In Minnesota, the choice between district court or conciliation (small-claims) court for claims concerning amounts of $4,000 or less "creates confusion and different outcomes for [unrepresented] consumers." MINNESOTA REPORT, *supra* note 16, at 3.

have different filing requirements as well as different regulations about whether one can be represented by counsel,[273] whether one needs to appear in person or file a complaint by mail, and how much it costs to file a case.[274] Sometimes, the informality of small-claims courts can benefit defendants. Other times, however, informality favors plaintiffs, particularly when they are represented and defendants are not.

In sum, whereas the revolution in federal civil procedure has been pro-defendant,[275] state civil courts—especially those with rubber-stamp procedures—are remarkably pro-plaintiff. Traditional critiques of state-court tort litigation[276] that paint plaintiff's lawyers as opportunistic "bad guys"[277] resonate in the debt-collection cases that now dominate dockets.[278] State civil courts today have become ripe for the kind of forum shopping that critics long complained turned state courts into judicial hellholes. Instead of corporate defendants allegedly bullied into settling frivolous cases, the defendants now are individuals who usually cannot afford a lawyer and many of whom never appear. This plaintiff-friendliness creates incentives to file more cases, and more frivolous cases, contributing to overwhelming dockets and greater administrative incentives for courts to resolve cases as quickly as possible.

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273 For example, debt collectors usually do not file in small-claims court in California, because neither party is permitted to be represented by an attorney. *See* RABA, *supra* note 44, at 35 n.3.

274 *See supra* Appendix, Figures 6 & 8.

275 *See supra* notes 246–247 and accompanying text.

276 The Chamber of Commerce and others have cultivated the image of state court systems as plaintiff-friendly "[j]udicial [h]ellholes." *See* Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1098 (2008); *The U.S. Chamber Institute for Legal Reform Commends Judicial Hellholes for Highlighting Nation's Worst Civil Justice Jurisdictions*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Dec. 5, 2018), https://instituteforlegalreform.com/blog/the-u-s-chamber-institute-for-legal-reform-commends-judicial-hellholes-for-highlighting-nations-worst-civil-justice-jurisdictions [https://perma.cc/8QXA-5L45] ("Lisa A. Rickard, president of the U.S. Chamber Institute for Legal Reform . . . . applaud[s] the Judicial Hellholes report for shining a spotlight on some of the nation's worst lawsuit jurisdictions"); *cf.* Megan M. La Belle, *Influencing Juries in Litigation "Hot Spots"*, 94 IND. L.J. 901, 930 (2019) (noting reasons why courts become litigation hot spots, such as favorable procedural rules and judges that plaintiffs believe may be sympathetic).

277 *See, e.g.*, Thornburg, *supra* note 276, at 1100 (discussing the origins of anti-lawsuit rhetoric and the scapegoating of plaintiff's lawyers).

278 *See* Zambrano, *supra* note 41, at 2103-04, 2178 (noting that the majority of state court cases are contract disputes, often debt-collection cases, and highlighting that state courts remain largely pro-plaintiff); *cf.* Hershkoff & Norris, *supra* note 246, at 20 ("[D]efendants tend to prefer having their claims heard in federal court rather than state court. Federal courts are thought to be less solicitous of plaintiffs' claims than some state courts and federal courts' procedures are in many instances more restrictive than those in state court.").

IV. THE PATH FORWARD

Thus far, this Article has explored the range of default procedures in state civil courts, their procedural justice problems, and their social costs. How could we change default procedures to address these concerns?

Default procedure reform should be understood as a vital complement to other state civil court reform efforts, including those intended to prevent default in the first place. This Part first surveys other legal areas that have used procedural reforms to confront similar challenges. Next, it divides reform proposals for lawyerless courts handling debt cases into categories: notice reforms aimed at improving service and notice so that defendants appear, hearing reforms aimed at improving court procedures once defendants appear, and default procedure reforms, which include recent laws aimed at improving procedures when defendants do not appear. Finally, this Part also considers several implementation obstacles, both in terms of what form the legal changes can take and how to ensure that any legal changes transform into changes in practice.

This Part seeks to balance the importance of participation with the realities of nonparticipation and to design procedures that ensure fairness and bolster state civil courts' institutional integrity.

A. *Parallels in Other Procedures*

Thus far, this Article has shown that debt-collection litigation presents at least four procedural challenges: endemic party absence and the impracticability of participation; massive caseloads; asymmetrical access to resources, counsel, and information; and risks of abusive plaintiff tactics, such as frivolous filings and forum shopping.

These are familiar challenges from other areas of U.S. law. What is anomalous about rubber-stamp default procedure is that, in many states, the challenges remain unaddressed.[279] The analogous situations discussed in this Section offer lessons for how to address these challenges.[280] Specifically, in other circumstances, procedures have addressed the impracticability of party

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279 Since 2004, for example, about a quarter of states have adopted documentation requirements in debt-collection cases. Aneja et al., *supra* note 19, at 7-8.

280 There are, unfortunately, other areas where one can find rubber-stamp justice. Indeed, the insights here can be applied to other contexts, such as review of prisoner-mistreatment claims. *See generally, e.g.*, Melissa Ellin, Jake Neenan & Allison Pirog, *'Rubber Stamp' Justice? In Mass., Prison Officials Almost Always Deny Prisoners' Complaints of Abuse Behind Bars*, BOS. GLOBE (Dec. 29, 2021, 6:14 PM), https://www.bostonglobe.com/2021/12/29/metro/rubber-stamp-justice-mass-prison-officials-almost-always-deny-prisoners-claims-abuse-behind-bars [https://perma.cc/QE45-2V9G] ("Massachusetts officials fully corroborated only 9 prisoner complaints out of more than 1,500 filed over three years at the six largest prisons. Nearly 80 percent were rejected outright.").

appearance with increased judicial involvement and oversight of parties' proffers to the court. They have responded to massive caseloads with aggregation or routinization and oversight of decisionmaking practices. In response to similar asymmetries, courts and legislatures have increased pleading and evidentiary burdens on better-resourced parties and reduced burdens on the less-resourced. And faced with frivolous filings and forum shopping, courts have heightened pleading and production standards and limited venue options. Similar approaches should be adopted here.

First, courts respond to parties' absence in several ways, but rarely by foregoing merits review. In some contexts, participation is so essential that proceedings cannot go on—or should not go on—without it. Federal courts do not allow criminal trials in absentia.[281] In immigration law, in absentia removals, which are possible (though relatively rare), raise "serious due process concerns."[282]

Civil cases have never been held to this standard. Nevertheless, the federal courts tend to evaluate merits before issuing default judgments.[283] The Federal Rules require hearings notwithstanding defendants' absence in special circumstances, as in suits against the United States or foreign sovereigns.[284] Rule 19 contemplates dismissing an action if the absence of a party who cannot be joined "might prejudice that person or the existing parties."[285] In adversary proceedings, bankruptcy courts consider the plaintiff's evidence and hold a hearing before issuing a default judgment.[286]

Other procedures allow for more judicial oversight in contexts where parties are not expected to appear. As Jim Pfander and Daniel Birk's study of noncontentious proceedings in federal courts shows, inquisitorial judging and "judge-dominated procedures" are often viewed as misaligned with the adversarial court system, "[y]et, non-adverse proceedings account for a significant part of the dockets of federal courts."[287] Common ex parte

281 FED. R. CRIM. P. 43. Some state court systems treat failure to appear as a misdemeanor, adjudicated separately from the underlying case. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2506(A)(1), (B) (2024); CAL. PENAL CODE § 1320(a) (West 2024).

282 Eagly & Shafer, *supra* note 168, at 822.

283 *See supra* Section I.A; LEE & CANTONE, *supra* note 3, at 24 fig. 1.

284 *See, e.g.*, FED. R. CIV. P. 55(d); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608(e). For an example of a similar state statute requiring satisfactory evidence in order to enter a default judgment against the government, see ALASKA R. CIV. P. 55(g).

285 FED. R. CIV. P. 19(b).

286 *See, e.g.*, *In re* Hoku Corp., No. AP 15-08043, 2015 WL 8488949, at *1 (Bankr. D. Idaho Dec. 10, 2015) (granting a motion for default judgment after a hearing in which the plaintiff demonstrated that the defendant had been properly served); *In re* Moden, No. AP 20-01085, 2021 WL 5300020, at *3 (B.A.P. 10th Cir. Nov. 12, 2021) (affirming post-hearing entry of default judgment for the plaintiff on one claim and ruling in favor of the absent defendants on others).

287 *See* Pfander & Birk, *supra* note 212, at 1355.

proceedings include warrant applications, FISA court applications,[288] and ex parte trademark seizure applications.[289] In certified class actions, courts must oversee and approve settlement terms and hold a hearing to ensure the settlement is "fair, reasonable, and adequate" to protect both represented and absent class members.[290]

Outside of federal court, examples of non-adversarial approaches to adjudication abound. In states with less formalist approaches to separation of powers, courts perform many functions often associated with administrative adjudication in federal contexts.[291] In federal administrative adjudication, for example applications for Social Security benefits,[292] pro se applicants act like plaintiffs, bringing claims, and the ALJ investigates the facts—verifying eligibility requirements and sometimes arranging for additional examinations to obtain needed information[293]—and the applicable law without the appearance of the adverse party (the government).[294]

Such procedures are not without high costs. On average, disability benefits claimants had waited almost two years for a decision in 2017.[295] But these other contexts show that while many procedural rights are waivable,[296] a party's absence does not always translate into a concession of the other side's case, even though default is often so conceived. These examples of the ways that procedure in other contexts adjusts to one party's absence, moreover, demonstrate that such approaches are not "un-American" or prevalent only

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288 *See* Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125, 125 (2014) (discussing the FISC's high grant rate of federal agencies' ex parte requests).

289 *See generally* Pfander & Birk, *supra* note 212.

290 *Id.* at 1389 n.199 (quoting FED. R. CIV. P. 23(e)(2)).

291 *See* Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 725-26 (2021) ("[B]ecause states are not bound by the separation of powers constraints that exist at the federal level, they have the freedom to experiment with different allocations of roles.").

292 *See* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 12 (2020) (describing the Social Security disability benefit adjudication process); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 787 (1974) (explaining the ALJ's "obligation to develop facts adverse to the claimant" because the government is not represented).

293 *Disability Determination Process*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/determination.htm [https://perma.cc/VD4S-PFFM] (last visited Jan. 10, 2024); *see also* Ames et al., *supra* note 292, at 12 (describing the steps the ALJ takes to "'develop[] the record'" in Social Security disability benefit adjudications).

294 *See* Pfander & Birk, *supra* note 212, at 1354 (noting the lack of government appearance as the adverse party in administrative proceedings).

295 Ames et al., *supra* note 292, at 16.

296 *See, e.g.*, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2045 (2023) (Jackson, J., concurring) (describing how personal jurisdiction can be waived).

in foreign countries.[297] Courts can and often do still consider merits and the interests of absent parties.

Second, both courts and administrative agencies have tried to tackle massive caseloads in other contexts with aggregation, representation, and increased judicial oversight.[298] The first two of these are unfortunately a poor fit for debt-collection litigation. As for aggregation, some reformers recommend aggregating assembly-line plaintiffs' claims, but that approach works best when the underlying flaws in those claims come from a common source, for example a massive underlying fraud or the practice of sewer service.[299] In similar situations with large numbers of claims without a common underlying set of facts, administrative agencies recognize the need for case-by-case adjudication. These agencies, like the Social Security Administration, engage in judicial fact examination and provide an opportunity to be heard, often with quality review (QR) systems to ensure accuracy.[300]

As for representation, providing counsel for each debt-collection defendant would be a massive undertaking.[301] Representation in class actions

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297 In Germany, for example, parties provide the facts and judges apply the law. James R. Maxeiner, *Pleading and Access to Civil Procedure*, 114 PENN. ST. L. REV. 1257, 1283 (2010). Complaints must be substantiated—they must state facts and identify evidence to support them. *Id.* at 1284. If supporting evidence is not provided, plaintiffs cannot win their case, even if defendants default. *Id.* German judges ordinarily have an obligation to give litigants "hints and feedback" (similar to the active judging model), to ensure "an accurate decision, taking account of the substantive law and the need to ensure a complete factual record notwithstanding litigant maneuvers or errors." Helen Hershkoff & Rolf Stürner, *Judicial Case Management as a Democratic Practice: Procedural Convergence and the Constitutional Transplant Model*, *in* CONSTITUTIONAL TRANSPLANTATIONS (Anat Scolnicov ed., forthcoming 2025) (manuscript at 36) (on file with author); *see also* Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 139, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html [https://perma.cc/J6BQ-3AGR] (generally requiring judges to give parties hints and feedback). *See generally* Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 VAND. J. TRANSNAT'L L. 707 (2015). When considering a request for a default judgment, however, the judge may not suggest to the claimant how to substantiate an unsubstantiated claim. ZPO, § 331(1). Rather, a default judgment is strictly limited to the legal and factual assertions of record. *Id.* § 331(2). German procedure also offers an expedited path for "claims based solely on checks, other negotiable instruments, and similar documents" where the court reviews only written evidence. PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 425-27 (2004). Thanks to Giesela Rühl for assistance understanding German procedure.

298 *See* Bookman & Shanahan, *supra* note 8, at 1225 (discussing parallels between challenges from massive caseloads in federal aggregate litigation and in state civil courts).

299 *See, e.g.*, Wilf-Townsend, *supra* note 4, at 1763 (proposing that defendants should be able to assert their defenses as claims brought in aggregate through a class action); *cf.* FED. R. CIV. P. 23(a) (requiring commonality and typicality of claims for aggregation).

300 These systems, however, have also been recently shown to be "an all-but-meaningless measure of decisional quality" because their quality review does not rigorously identify errors. Ames et al., *supra* note 292, at 7.

301 The Feerick Center at Fordham Law School provides capable representation through its Civil Legal Advice and Resource Office (CLARO), but this program is likely not replicable across

is often paired with aggregation of claimants whose injuries arise out of a common transaction or occurrence, or where amounts in controversy can support lawyers' fees.[302] Neither of these circumstances hold true here. Other representation solutions, however, can involve nonlawyer advocates.[303] Increased court oversight has therefore emerged as one of the more attractive solutions to these challenges of aggregation and representation in the debt-collection context.

Third, debt-collection cases in particular showcase asymmetry of resources and access to counsel in a space where plaintiffs have access to much of the relevant information regarding both the prima facie case and potential defenses. In other contexts with similar asymmetries, courts place additional burdens on the better-resourced parties, especially when they are the party seeking relief, they have access to the information,[304] and the other side is unrepresented.[305]

Finally, fear of frivolous, abusive, or excessive litigation tends to prompt stricter procedural standards, placing higher burdens on plaintiffs. This response is evinced not only by the heightened pleading standards introduced by Twombly and Iqbal, but also by the heightened pleading standards in the Private Securities Litigation Reform Act (PSLRA) and the procedures surrounding habeas.[306] The Prison Litigation Reform Act (PLRA) goes so far

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the country because the number of filings probably far exceeds the capacity of volunteers. In 2019, more than 100,000 consumer-credit lawsuits were filed in New York City Civil Courts alone. N.Y.C. BAR ASS'N, *supra* note 111. *See generally CLARO*, FORDHAM UNIV. L. SCH., https://www.fordham.edu/school-of-law/centers-and-institutes/feerick-center-for-social-justice/programs/civil-legal-advice-and-resource-office [https://perma.cc/XR97-BJH7] (last visited Dec. 27, 2024).

302 A guaranteed right to counsel in some cities in the eviction court context has led to a massive shortage of lawyers and backlog of cases. Jennifer Ludden, *More Renters Facing Eviction Have a Right to a Lawyer. Finding One Can Be Hard*, NPR (July 8, 2023, 10:19 AM), https://www.npr.org/2023/07/08/1185888943/renters-tenant-rights-eviction-lawyer-right-to-counsel-court [https://perma.cc/3RJ7-2Y48].

303 *See, e.g.*, UPSOLVE, https://www.upsolve.org/learn [https://perma.cc/7MRY-23U6] (last visited Mar. 3, 2025); Chrystin Ondersma, *Small Debts, Big Burdens*, 103 MINN. L. REV. 2211, 2247 (2019) (describing Upsolve and other self-help startups designed to help debtors navigate the bankruptcy process); Dalié Jiménez, *Can a Nonprofit Startup Fix the Pro Se Problem in Bankruptcy?*, CREDIT SLIPS (Aug. 1, 2016, 2:55 PM), http://www.creditslips.org/creditslips/2016/08/can-astartup-fix-the-pro-se-problem-in-bankruptcy.html [https://perma.cc/J7DX-ZBT2] (same).

304 *See* Hay, *supra* note 21, at 660-61, 664, 676-77 (supporting placing the burden of proof on the plaintiff where it is likely she will file a claim after insufficient investigation of the merits).

305 *See, e.g.,* Hammond, *supra* note 184, at 2714-19 (describing the variety of accommodations for pro se litigants in federal courts); Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 419 (1997) ("Other things being equal, the lower one party's relative costs, the stronger the argument for giving him the burden of proof.").

306 *See* Solum, *supra* note 150, at 218-19 (describing the PSLRA's adopted pleading standards extending beyond those laid out by the Federal Rules of Civil Procedure); Marco Poggio, *The Great Writ in Danger: Where Is Habeas Corpus Headed?*, LAW360 (July 8, 2022, 8:22 PM),

as to implement a three-strikes rule for prisoners deemed overly litigious.[307] Some have argued for heightened standards for vetting claims in multidistrict litigation in response to similar concerns by MDL defendants, but MDL already has several of the elements that debt-collection litigation lacks, including representation and more judicial oversight.[308] These features favor merits-based review rather than rubber-stamping of MDL claims.

A familiar response to plaintiff forum-shopping abuse and overly-plaintiff-friendly state courts, meanwhile, is to narrow plaintiffs' venue options.[309] In its most favorable light, the expansion of federal jurisdiction over mass-tort class actions thwarts plaintiff's lawyers' ability to forum shop by exploiting multiple available venues.[310] While there may be constitutional and political hurdles to giving federal courts jurisdiction over debt-collection cases, the parallel illuminates the potential of limiting venue options.

B. *State Civil Court Reforms*

These approaches to similar procedural challenges provide important context for considering proposals to reform state courts. The extensive access-to-justice literature and studies by NGOs and states offer no shortage of reform proposals for the justice ills of state civil courts. These reforms can be understood in three categories: notice reforms, hearing reforms, and default-procedure reforms. The best option might be to improve notice and hearing procedures so much that parties can participate meaningfully and potentially

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https://www.law360.com/articles/1509640 [https://perma.cc/PJ6S-SX8K] (discussing the development of procedural and other hurdles to the availability of habeas corpus).

307 28 U.S.C. § 1915(g).

308 *See* Rave, *supra* note 22, at 1620 ("Many of the problems meritless claims raise can be handled through incremental changes in case management techniques (such as a tailored use of plaintiff fact sheets) or defendant self-help (like including claims-eligibility criteria in settlements) without the need for any radical overhaul of MDL procedures.").

309 *See* Class Action Fairness Act of 2005, 28 U.S.C. § 1453; Miller, *supra* note 212, at 760-61 (calling the Class Action Fairness Act "a misnomer if ever there was one"); *see also* Robert G. Bone, *Forum Shopping and Patent Law—A Comment on* TC Heartland, 96 TEXAS L. REV. 141 (2017) (examining the Court's recent jurisprudence restricting where patent holders are able to file infringement lawsuits); Klerman & Reilly, *supra* note 259, at 285-91 (describing the limits to the Class Action Fairness Act's curbing of state court jurisdiction over class actions); J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1544 (2018) (advocating for congressional tightening of venue requirements).

310 Not all forum shopping is nefarious. Here, however, plaintiffs may choose the forum in which a meritless suit has the highest likelihood of success. *Compare, e.g.*, Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 583 (2016) (highlighting forum shopping's capacity to facilitate access to justice and legal reform), *and* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1530 (1995) (arguing that transfer mechanisms ameliorate most harms associated with forum-shopping), *with* William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. 323, 325 (2018) (critiquing forum shopping through contractual choice of law clauses).

avoid default in the first place. While such notice and hearing reforms are vital, however, it is unrealistic to expect them to drive down rates of default sufficiently to lend credibility to rubber-stamp procedures. Default procedure reforms can incorporate lessons from other areas facing similar procedural challenges by creating legal structures that increase judicial involvement and oversight of parties' submissions in light of party absence; routinize review in light of massive caseloads; adjust burdens in light of asymmetries between parties; and heighten burdens and limit venue options to combat potential plaintiff abuses.

This Section discusses how each set of reforms can improve access to justice, potentially affect default rates, and interact with default procedures. Collectively, they have the potential to alter the landscape of American adversarialism.

1. Notice Reforms

The standard response to high default-judgment rates is better service and notice.[311] Proponents of these reforms view defendants' non-appearance as fixable at least in part through better communication. Indeed, such reforms are vital to increase participation rates and justify default procedures. They are essential not just at the initiation of the lawsuit but at each step, including before default judgment is entered and before garnishment proceedings.[312] Improper service, confusing notice documents, and other failures to communicate to defendants that they are being sued, by whom, and what to do about it all contribute to low appearance rates and unjust outcomes.[313]

Several recent reform efforts have made service more effective and notice more comprehensible.[314] Some reforms emphasize the importance of actual, not just constructive, notice and contemplate a more proactive role for courts

311 *See, e.g.*, *Why Civil Courts Should Improve Defendant Notification*, PEW (Mar. 3, 2023), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification [https://perma.cc/8DT9-XCSN].

312 *See* Sniadach v. Fam. Fin. Co. of Bay View, 395 U.S. 337, 339-40 (1969) (striking down a law that allowed prejudicial garnishment without notice and hearing); *cf.* MINNESOTA REPORT, *supra* note 16, at 3, 11, 32 (describing the challenges Minnesota faces with lack of service and notice at key moments in debt litigation).

313 *See, e.g.*, Effron, *supra* note 30, at 1533, 1545 & n.101 (discussing the impact of sewer service on high default-judgment rates); Budzinski, *supra* note 30, at 170 (encouraging use of e-service in courts with mostly pro se cases); Gottshall, *supra* note 63, at 819-20 (arguing for greater use of technological verification tools in service of process).

314 *See, e.g.*, Stephanie Ashe & Jessica Wu, *Stanford's Rhode Center and Legal Design Lab Work with Six States to Improve Court Access Using Readily Available Technology*, STAN. L. SCH. (Jul. 26, 2022), https://law.stanford.edu/press/stanfords-rhode-center-and-legal-design-lab-team-with-six-states-to-improve-court-access-using-readily-available-technology [https://perma.cc/SV9P-SXKS] (describing a project to streamline access to e-filing for pro se litigants).

in achieving such notice.[315] For example, a New York City law requires the court (not the plaintiff) to send supplemental notice and prohibits judges from issuing a default judgment where such notice is returned as undeliverable.[316] In a five-month period after this law was enacted, 28,422 notices were returned as undeliverable—preventing default judgments in cases that would have likely ended in such judgments.[317] Courts should be involved in at least keeping track of plaintiffs' efforts to notify defendants and ensuring that notice is sufficient and adequate.[318]

The content of the notice should also be comprehensible and effective at directing defendants what to do next. A positive example can be found in Alaska, where defendants receive not only the summons and complaint but also a check-box form answer,[319] which has reduced rates of default.[320]

Notice, however, is not enough. Other obstacles to defendants' appearance—such as lack of public transportation, inability to miss work, or inability to access one's own financial information—may be beyond courts' control. No amount of improved notice can create public transportation to courthouses—although Zoom hearings and ODR can improve access and decrease default-judgment rates.[321] Court notice, however, cannot improve the reliability and accessibility of consumer financial contract recordkeeping. And the focus on notice can make it seem as though notice, if fixed, could

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315 As Robin Effron notes, "*Patterns* of default judgments . . . . are a clue that constructive notice no longer reflects a constitutionally appropriate allocation of the risks and burdens of notice and service of process." Effron, *supra* note 30, at 1566; *see also, e.g.*, Greiner & Matthews, *supra* note 30 (describing notice-by-mail techniques that increase the rate of defendant participation).

316 HANNAFORD-AGOR & KAUFFMAN, *supra* note 16, at 18-19.

317 *See* Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 FORDHAM URBAN L.J. 1147, 1175 (2013) (analyzing the period between May 2008 and September 2009).

318 In "pocket service" jurisdictions—where a plaintiff can commence an action by serving the defendant without filing in court—defendants may default because notice does not come with proof explaining who the plaintiff is and the lack of a docket filing (which in Minnesota can come up to a year after service) can confuse defendants into believing there is no real court case pending. *See supra* note 87; MINNESOTA REPORT, *supra* note 16, at 13. This practice removes court involvement and should be prohibited in debt-collection cases.

319 *See Answer & Counterclaim to Complaint to Collect a Debt*, *supra* note 74 (describing a sample answer and counterclaim).

320 These successes can apply to other contexts where we want people to appear and engage with government and adjudication. *See, e.g.*, Parkin, *supra* note 13, at 1142 (discussing e-notice for food stamps).

321 *See, e.g.*, Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, *COVID, Crisis, and Courts*, 99 TEXAS L. REV. ONLINE 10, 10-11, 17 (2020) (highlighting what actions courts have taken to hear cases while following COVID guidelines); Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG L. NEWS (May 18, 2023), https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end [https://perma.cc/UG29-8486] (noting that Zoom hearings encourage participation from parties that otherwise might not have been able to attend).

make all defendants appear—or at least all defendants not conceding to the plaintiff's case. In Houston, for example, where judges worried that "an increasing number of defendants do not know their rights," "the Legislature ordered the state Supreme Court to publish new rules that will require debt collectors to provide additional notification to debtors of their rights."[322] A year later, it is unclear if this law has had much effect.[323]

In sum, service and notice are independently important and can help lower default rates, but they cannot prevent default or bring integrity to court processes when defendants do not appear.

2. Hearing Reforms

A second set of reform efforts target improving hearings and participating parties' interactions with the court system.[324] In debt-collection contexts, prominent proposals focus on legal assistance to pro se litigants, active judging, and alternatives to hearings, such as ODR and debt-diversion programs. These programs may correlate with decreased rates of default. To increase access to legal advice, reformers urge states to provide lawyers, deregulate the profession to offer a broader range of legal-service providers, build more accessible self-help websites, and simplify procedures. [325] While full representation might be ideal in an adversarial posture, it is an impractical and expensive solution in the context of small-value debt-collection cases[326] and may not be necessary.[327] The deregulation of the legal profession and self-

322 Berard, *supra* note 108. The law went into effect on May 1, 2022. *Id.*

323 *See* McClendon, *supra* note 229, at A18 (noting in December 2022 that in many debt-collection cases, "debt buyers and credit card companies often lack the necessary paperwork to prove they are suing the right person or that defendants owe the amount they are claiming"); Berard, *supra* note 108.

324 Jerry Mashaw noted in the 1970s that adversarial hearings protect parties only if they are aggressive and knowledgeable and "the hearing system works." Mashaw, *supra* note 292, at 815.

325 *See* Bookman & Shanahan, *supra* note 8, at 1218 (discussing apps and websites that do the work of lawyers); MICH. LEGAL HELP, https://michiganlegalhelp.org [https://perma.cc/AQ9F-Z7DN] (last visited Feb. 13, 2024) (one such website); Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 128-29 (2019) (discussing court simplification to reduce the complexity of procedures for unrepresented litigants); Sabbeth, *supra* note 148, at 290 (describing the limitations of simplification alone in providing better outcomes for pro se litigants).

326 *See, e.g.*, Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 787 (2015) (describing justice reforms that improve fairness for the unrepresented without increasing the presence of attorneys); Barton, *supra* note 82, at 1228 (advocating for court reform, rather than representation, as the solution to challenges faced by pro se litigants); Prescott, *supra* note 176, at 2003 (arguing that it is "probably socially optimal" for litigants in "minor . . . cases" to proceed without a lawyer because the monetary stakes would be outweighed by cost of representation).

327 *See* Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 368, 399 (2004) ("What Americans want is more justice, not necessarily more lawyering.

help websites can potentially cause legal advice to be more accessible, less expensive, and less reliant on lawyers, and may decrease rates of default.[328] As discussed in Part I, active judging encourages judges to assist pro se litigants to become more knowledgeable and prepared to meaningfully contribute to hearings.[329]

Alternatives to hearings, like debt-diversion programs, are also essential for encouraging participation by defendants who do owe the debt sought. A default judgment can be a worse outcome for a debtor than settlement, a payment plan, or financial assistance that could be offered if the defendant were willing and able to participate in some kind of resolution.[330] Such a resolution need not be adversarial because there is no dispute over the debt.

3. Default Procedure Reforms

Given the high rates of default judgments, some organizations—including Pew and the Uniform Law Commission—have begun to focus specifically on default-procedure reform.[331] Key proposals already being enacted in some states include (a) notice reforms discussed above, (b) raising pleading standards, and (c) heightening the requirements for obtaining a default judgment—including proof of service and proof substantiating the plaintiffs' claims. Hearing reforms are not always categorized as reforms that target default-judgment rates or the problem of meritless default judgments, but they, too, can help lower default rates. Other areas for default procedural reform include (d) the rules governing setting aside a default judgment and (e) the rules for enforcing default judgments. The availability of set-aside motions, however, cannot revive the procedural fairness of rubber-stamp default procedure. And one lesson for garnishment and other kinds of enforcement procedures is that procedures here must also function in defendants' absence.

They want a way of handling legal needs that is timely, fair, and affordable. In many contexts, the most cost-effective strategies are those that individuals can pursue themselves.").

328 *See, e.g.*, Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 975-76 (2004) (summarizing proposals to assist pro se litigants, including "providing them with basic information on the law and procedures, as well as with forms and sometimes assistance in drafting pleadings and other court papers"); Steinberg et al., *supra* note 37, at 1322 (summarizing arguments for deregulation, including that lifting restrictions on the unauthorized practice of law would allow more people to access legal advice).

329 *See generally* Carpenter, *Active Judging*, *supra* note 37, 649-50; *see also* Parkin, *supra* note 13, at 1145-46 (describing judicial interventions through active judging); *cf.* Resnik, *supra* note 79, at 424-30 (criticizing active or "managerial" judging for the risk of judicial overreach and erosion of due process).

330 *See* SPULAK, *supra* note 16, at 19 (describing diversion programs).

331 *See generally supra* note 16.

Considering the dynamics driving defendants' non-appearance, the goal should be to resolve cases on the merits and apply the law to the facts—even if the defendant does not appear. This goal addresses the current failings with respect to fair process, merits-based adjudication, and faithful application of the law discussed in Section III.A. A full set of fair procedures, operating at multiple levels and stages, is necessary to justify default judgments under such theories both before and after judgment is rendered. Fair procedures need not be complex, but they should take into account the interconnectedness of the different steps at which defendants might be absent.

Front-end procedures. A shift away from adversarialism must recognize that in a land of default, burdens are particularly significant. Procedural requirements should not only make sure that plaintiffs prove their affirmative case, but also shift the burden of proving certain issues traditionally categorized as affirmative defenses to the plaintiff's case.[332] For example, the plaintiff should bear the burden of pleading and production, supporting—by affidavit and ideally with other evidence—that the defendant is not in the military, the debt is not time-barred, the debt has not been discharged in bankruptcy, the venue is proper, and the creditor has not violated consumer protection laws in pursuing the debt. Placing these burdens on the plaintiff in these contexts is sensible because creditor plaintiffs should have access to the relevant information—sometimes better access than defendants. These procedures can thus be thought of as information-forcing rules.[333] Such burden shifting draws inspiration from other contexts in which heightened pleading standards and production burdens respond to problems of frivolous filings.[334]

As discussed above, courts today considering default-procedure design face at least four procedural challenges that have appeared in other contexts as well: endemic party absence; massive caseloads; asymmetrical access to resources, counsel, and information; and the risks of abusive plaintiff tactics, such as frivolous filings and forum shopping. The approaches adopted elsewhere can be adjusted to fit these circumstances as well.

First, increased judicial involvement and verification of plaintiffs' claims is appropriate here given the impracticability of participation.

Second, with respect to the massive caseloads state civil courts face, aggregation does not fit these circumstances well because, as discussed above,

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332 *Cf.* Hay, *supra* note 21, at 654-55 (analyzing circumstances in which it may be appropriate to shift the burden of proof to the plaintiff).

333 *Cf.* Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2170-72 (1997) (describing how information-forcing rules incentivize accurate disclosures and deter overstated claims to promote fairness and efficiency).

334 *See supra* note 306 and accompanying text (discussing *Twombly* and *Iqbal*).

there is no common transaction or occurrence underlying these cases. But routinization—through checklists and other technologies—can be used here to better effect.

Third, the problem of asymmetrical access to counsel can be addressed by increased judicial involvement in the form of checking plaintiffs' claims, not only helping defendants help themselves. Such review need not compromise courts' neutrality; instead, courts can approach the task as an administrative check on whether plaintiffs have satisfied the requirements for obtaining judgment, part of courts' essential role and protective of their own authority. In this sense, they may be acting more like administrative agencies evaluating a claim for benefits than courts evaluating a dispute between private parties—but the defendants' absence also suggests that there is no dispute in the traditional sense. Courts must decide what to do about the plaintiff's request for a default judgment. Background legal principles—default rules, if you will—dictate which legal requirements plaintiffs must affirmatively show they have satisfied, and which possible objections are considered waived by the defendants' absence.

Fourth, the structure of these default rules should be designed with an awareness of their potential impact on plaintiffs' behavior. In response to concerns about frivolous filings in other contexts, courts have likewise heightened pleading requirements, shifted burdens to plaintiffs, and created a more involved role for courts in evaluating the sufficiency of plaintiffs' claims. In response to concerns about forum shopping, courts have limited venue options. Similar approaches are appropriate here.

Back-end procedures. These front-end reforms are particularly important given the lifecycle of default procedures. As shown in Part I, the initial review (or lack thereof) before issuing default judgments is usually the best opportunity for courts to supervise these caseloads. It can be tempting to rely on set-aside motions to protect against improper default judgments. Set-aside motions are quite rare, however, and more importantly, they require a certain amount of legal savvy to bring.[335] That is, relying on set-aside motions piles more procedures and obligations of adversarial legalism on litigants who may have already shown that appearing in court is burdensome. Set-aside procedures cannot replace more just front-end default procedures, but it is possible that they may help jurisdictions transition from rubber-stamp procedures to more just default procedures, especially with two adjustments in light of the foregoing analysis of debt-litigation dynamics.

335 *See, e.g.*, RABA, *supra* note 44, at 9 (noting that few litigants exercise their right to file a motion to set aside a default judgment); MICHIGAN REPORT, *supra* note 16, at 22 (noting that setting aside default judgments rarely occurs in debt-collection cases).

First, to move set-aside proceedings away from adversarialism, they too should focus on merits more than diligence. The rules should show leniency in determining why defendants defaulted or delayed seeking a set aside. The rules are seldom invoked; waiver of the right to seek set aside is unnecessary. Time bars should likewise be relaxed. In many states, a judgment debtor has one year to file a set-aside motion,[336] but the judgment creditor may have a term of a decade or more, which is renewable, to enforce the judgment.[337] Accordingly, the creditor could wait to begin proceedings to garnish an individual's wages until after the time for set-aside motions had passed. Aligning these time limitations would help defendants undo improper default judgments once they have become a reality they can no longer ignore.

Second, in cases in which plaintiffs failed to properly notify the defendant in the original case, set-aside motions should be leniently granted to incentivize creditors to conduct proper service.

Another often-neglected piece of the default-judgment puzzle is enforcement procedures, which could be the subject of another article in their own right. The service, notice, and proactive evaluation of affirmative defenses discussed thus far should also apply in garnishment proceedings, to the extent that defenses—like exemptions from garnishment for certain kinds of income—are applicable. A first step, therefore, is to ensure that courts have a role in garnishment proceedings, unlike in Minnesota, where plaintiffs can garnish without the court's involvement.[338] Courts should consider and apply available exemptions as much as possible even if the judgment debtor does not participate. This may be more difficult if the exemptions involve information the creditors do not have. But state records about defendants' incomes and sources of income may be relevant and ascertainable.

In sum, default-procedure reform must address a broad constellation of procedures—it must combine with notice and hearing reform and encompass procedural rules governing not just default judgments but also service, notice, pleading, set aside, and enforcement. Experiences for participating defendants—including active judgment and diversion programs—may and should offer potentially better outcomes than non-appearance. But robust default-judgment procedure can improve hearing procedures as well, relieving some of the burdens on pro se defendants. Moreover, more stringent requirements can reduce filings, thus potentially relieving courts of some of the burdens of their high-volume dockets.[339]

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336 *See supra* Appendix, Figure 10.

337 *See supra* note 133 and accompanying text.

338 MINNESOTA REPORT, *supra* note 16, at 13.

339 *See, e.g.*, Appendix, Figures 4 & 5.

C. *Implementation Challenges*

Thus far, this Part has compared default-procedure reform to other kinds of procedural reform to see how they are separate but also interrelated, and how the former can draw ideas from the latter. This Section first reflects on the best practices that courts should adopt and then confronts the challenges they face in implementing them.

Best Practices. First, other sources have laid out a comprehensive list of reforms.[340] Included within these best practices, states should implement some form of the Uniform Consumer Debt Default Judgments Act, which requires simplified and clarified notice, particularized pleading, attachment of authenticating documentation, and consideration of common affirmative defenses similar to, for example, California's Debt Collection Practices Act. These requirements strike at the heart of the adversarialism problem by requiring judge-led inquiries into applying the law to the underlying facts of creditors' claims. States should do an internal audit of default procedures to discover particularities in their jurisdictions with unintended consequences.[341] This Article endorses those approaches. It also suggests that improving default procedures is particularly important when other procedures fail to ensure that defendants' non-appearance reflects the merits of the case.

These reforms should also be implemented in a way that reduces forum shopping, although that point is rarely on best-practices lists. Reforms are unlikely to curb the zealous adversarialism of plaintiffs and their lawyers. If these reforms are implemented in only one of two or three available courts in a jurisdiction, plaintiffs may file in the court without substantiation requirements or oversight. Reforms therefore either should be implemented consistently across state courts, small-claims courts, and municipal courts, or should funnel debt-collection cases into only one court, eliminating overlapping jurisdiction.[342]

Finally, courts should invest in technologies[343]—starting with simple checklists—that improve the efficiency of claims processing and also ground

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340 *See supra* note 16 (reviewing suggested best practices both for individual jurisdictions and nationwide).

341 Several states have started to tackle such projects. *See, e.g.*, MINNESOTA REPORT, *supra* note 16; MICHIGAN REPORT, *supra* note 16.

342 *Compare California Courts Self-Help Guide*, JUD. BRANCH OF CAL., https://selfhelp.courts.ca.gov/small-claims/before-you-start [https://perma.cc/D2YM-AAAE] (last visited Sept. 26, 2024) (funneling cases to state courts by limiting plaintiffs to two filings in small-claims courts per year), *with* MINNESOTA REPORT, *supra* note 16, at 35 (recommending giving conciliation (small-claims) courts exclusive jurisdiction over claims under $4,000).

343 More advanced technologies could include online dispute-resolution mechanisms and artificial intelligence. *See generally* Prescott, *supra* note 176; *see also* DAVID FREEMAN ENGSTROM,

it in fact-checking and assessment of the availability of defenses in ways that do not necessarily rely on defendants' participation. Courts can require plaintiffs to complete checklists, but also use them internally for accountability, claims processing, and recordkeeping.

Implementation challenges. Identifying best practices is necessary but not sufficient.[344] There remain questions about how to enact these rules into law, account for local differences, and ensure that courts follow them.[345] These questions will follow the political challenge of convincing relevant decisionmakers that these best practices are worth adopting. In addition to the procedural and fairness discussions addressed in this Article, there may be other concerns to address, including beliefs that cheaper and faster procedure in debt-collection cases keeps the cost of credit low.[346] Some studies seem to disabuse this concern, showing that recent state efforts to tighten evidentiary and information requirements for debt-collection cases have not reduced credit available to consumers.[347] Indeed, other studies link the cost of credit to other procedural rules. For example, studies suggest that the availability of post-judgment enforcement procedures, including post-judgment interest rates and exemptions from garnishment, may have a more likely downstream impact on credit rates.[348] The minimum wage also appears to affect both rates of indebtedness and debt-collection filing rates.[349]

Once a state has decided to enact reforms, it next faces the question of how to do so. A logical first step is to encourage all states to adopt the

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LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 271-74 (2023) (discussing the architecture of ODR platforms to promote efficient resolution).

344 *See* Ames et al., *supra* note 292, at 2.

345 As noted, a number of studies provide an extensive list of best practices along these lines. *See, e.g.*, HANNAFORD-AGOR & KAUFFMAN, *supra* note 16, at 13-26 (recommending best practices for state courts to implement consumer debt-collection reform). There is also a question of how regulators and other parts of government should oversee bad actors, like plaintiffs filing fraudulent claims. *See, e.g.*, Arbel, *supra* note 14, at 124-25 (proposing random audits); D'Onfro, *supra* note 27, at 575-80 (discussing the inadequacy of enforcement efforts). These efforts are welcome but beyond the scope of this Article, which focuses on reforms for actors within state courts.

346 *See, e.g.*, Zywicki, *supra* note 205, at 230 (arguing that increases in the cost or decreases in the effectiveness of debt collection will result in higher prices and less access to credit).

347 *See, e.g.*, ANEJA ET AL., *supra* note 19, at 14 (finding no evidence that more stringent debt-documentation requirements reduce consumer access to credit); PARRISH ET AL., *supra* note 205, at 2 (same).

348 *See* Fulford & Nagypál, *supra* note 129, at 40 ("[D]ecreases in the amount garnishable also appear to decrease access to credit . . . ."); PEW, *supra* note 4, at 17 (finding the consequences of default judgment, including post-judgment interest rates, "impede people's ability to secure housing, credit, and employment"). States have drastically different pre- and post-judgment interest rates, some of which differ for certain kinds of judgments (like consumer debt). *See* PEW, *supra* note 4, at 17 (noting dramatic variation in interest rates). States also have various exceptions or limitations on garnishment. *See* DeFusco et al., *supra* note 135, at 4-5 (summarizing state approaches).

349 *See* Fulford & Nagypál, *supra* note 129, at 40-41 ("[P]rotecting more wages for people earning the minimum wage . . . decreases the number of judgments.").

Uniform Act and other statutes designed to follow the principles articulated by the ALI Principles of the Law project on High-Volume Civil Adjudication.[350] This may not be practicable in all jurisdictions, however. Depending on the political economies of different states, default-procedure reform may be easiest to execute through statutes,[351] rule changes,[352] or case law developments.[353] These reforms may be implemented at the statewide or local level.

Uniformity in effect—for example, in requiring documentation rather than merely affidavits—may be accomplished even if different jurisdictions follow different routes to implementation. For example, a state that enacts reform through an amendment to its Rule 55 equivalent, another that does so through case law, and a third that enacts statutory reform may achieve a beneficial level of uniformity.

These efforts are for state and local actors, as the federal government is unlikely to help drive this uniformity.[354] Work by the Uniform State Law Commission or the ALI, already underway, can also help write state laws and promote adoption, whether by state legislatures or courts. Notably, both consumer-rights activists and debt-collection trade organizations profess support for uniformity in these areas.[355]

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350 *See supra* note 47.

351 *See, e.g.*, N.C. GEN. STAT. § 58-70-115(4)–(6) (2024) (prohibiting debt buyers from initiating litigation or arbitration on time-barred debts, requiring valid documentation of debt ownership and an itemized accounting before filing suit, and mandating thirty-day pre-suit notice to debtors); CAL. CIV. CODE §§ 1788.30(c), (f) (West 2024) (providing mandatory attorney's fees for prevailing debtors and a one-year statute of limitations for actions enforcing liability); N.Y.C. ADMIN. CODE §§ 20-493.1(b), .2 (2024) (requiring written confirmation of payment agreements, allowing verification of debts before collection, and providing for disclosure of expired statutes of limitations before contacting consumers).

352 *See, e.g.*, IND. R. TRIAL P. 55 (governing default judgments); *id.* 9.2(A) (affording additional protections in debt collection cases); *see supra* notes 196–198 and accompanying text (discussing the history of Indiana's amendments to Trial Rules 9.2 and 55).

353 *See, e.g.*, Bartels v. Bartels, No. S-13148, 2009 WL 2973557, at *4 (Alaska Sept. 16, 2009) (clarifying that a party's voluntary absence from trial does not automatically warrant default judgment and reinforcing courts' discretion in proceeding with trials despite a defendant's nonparticipation); CACH, LLC v. Askew, 358 S.W.3d 58, 62, 65 (Mo. 2012) (en banc) (holding that debt collectors must establish a clear chain of title to demonstrate standing and rejecting reliance on improperly authenticated business records as proof of assignment); Esgro Cap. Mgmt., LLC v. Banks, 201 N.Y.S.3d 33, 34 (N.Y. App. Div. 2023) (holding that wage garnishment alone does not constitute waiver of objection to the validity of service or personal jurisdiction, requiring affirmative action indicating intent to accept a judgment's validity).

354 Under a Democratic administration, one might imagine federal regulations—for example, regulations promulgated by the CFPB—to implement some of these reforms.

355 *See* Am. Bar Ass'n Section of C.R. & Soc. Just., *Taxes and Debt: Uniform Debt Collection Default Judgments Act | Economic Justice Summit*, YOUTUBE (Apr. 6, 2023), https://www.youtube.com/watch?v=zAY4S302OvY (featuring panelists from diverse professional backgrounds supporting requirements of additional proof that debt is owed); PEW, *supra* note 4, at 22 (supporting the same requirements); MICHIGAN REPORT, *supra* note 16, at 52 (judicial

To do this, jurisdictional rules should limit opportunities for intrastate forum shopping. For example, states could first channel relevant cases into one court—for example, the state court of general jurisdiction rather than the small-claims court or municipal courts—so that reforms can take effect uniformly and prevent forum shopping. California has accomplished this channeling by prohibiting lawyers from representing clients in small-claims courts and also by limiting plaintiffs to filing a maximum of two cases in small-claims courts per year.[356] Even a cap of fifty or one hundred cases would likely keep "assembly-line plaintiffs" out of small-claims courts. In Minnesota, a commission has recommended giving conciliation (small-claims) courts exclusive jurisdiction over claims for under $4,000.[357]

Once these laws are enacted, how can court systems ensure that judges and court administrators follow them? High case volumes raise serious challenges in court administration, due process, and procedural justice.[358] Routinization is key. Routinized court processes that help "'automatize' the application of law can improve both the speed and correctness of decision-making."[359] The application of the law to the cases should be made as straightforward as possible. For example, plaintiffs should be required to submit certain proofs up front to a clerk's office that verifies the materials are submitted properly and do not violate any laws—even legal requirements framed as affirmative defenses, like time bars—and which itself is subject to oversight. These efforts could change the baseline rules that courts follow when defendants do not appear.[360] Such rules should cabin courts' discretion to issue default judgments without further inquiry into the merits of the claim. Procedures have unfortunately become automatic but in the opposite direction. It is past time to reverse course.

Courts should therefore develop and use specific checklists for different kinds of debt actions.[361] These checklists should be used across the applicable jurisdiction. Thus, whereas studies in California show that clerks' offices inconsistently enforced recently enacted documentation requirements before

commission recommending uniformity across jurisdictions); FED. TRADE COMM'N, *supra* note 6, at 20-21 (FTC recommending the same).

356 *See supra* notes 116–118 and accompanying text.

357 MINNESOTA REPORT, *supra* note 16, at 35.

358 *See* Ames et al., *supra* note 292, at 20-25 (discussing the due process implications of mass adjudication); *cf.* Mashaw, *supra* note 292, at 816 (arguing that adjudicative management is a necessary safeguard for ensuring due process in social welfare adjudication).

359 Cotton, *supra* note 80, at 88.

360 *Cf.* Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 5-6 (2013) (arguing that default rules that shape preferences can be more effective at shifting behavior than incentives because such rules "tend to stick").

361 *See generally* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2009) (describing the value of using checklists in many contexts).

issuing default judgments, they also revealed inconsistency among counties as to the use of checklists.[362] Checklists are a low-cost, effective method of implementing such requirements and should be used statewide.

Continued oversight—both internal and external—is also essential. Internal oversight is unlikely to come in the form of appellate review.[363] Instead, court administrators themselves, or with collaborators, must periodically assess the effectiveness of these reforms.[364] For example, Yonathan Arbel has suggested the use of a state agency to conduct randomized checks with fines for abusive filings.[365] Recordkeeping and data collection must also be a priority.[366] Among other issues, civil judgments were removed from credit-bureau records in 2017, limiting the ability to research judgments.[367] They were removed because most civil judgments did not include properly identifying information about the defendant—such as date of birth or social security number—making it difficult to match judgments confidently to a particular consumer's credit file.[368] The solution, therefore, was that judgments no longer affected a consumer's credit score, not that creditors were required to identify the debtor who supposedly owed them money with greater accuracy.

Regulatory oversight should also be coordinated with court procedure. After regulators prosecute debt-collection fraud that results in masses of default judgments, for example, victims of these schemes in some jurisdictions must file individually to have their default judgments set aside—but it appears that few do so.[369] The regulatory action can extend the time bar for doing so, which has often already expired. Nevertheless, identifying the availability of the set aside, proving the case, and navigating the court

362 Khwaja, *supra* note 137; BARNARD ET AL., *supra* note 68, at 30.

363 *See* Shanahan et al., *Lawyerless Law Development*, *supra* note 216, at 65-66 (noting that limited adversarial process and lack of written opinions in state civil courts result in minimal appellate activity).

364 *See generally* MICHIGAN REPORT, *supra* note 16; MINNESOTA REPORT, *supra* note 16.

365 Arbel, *supra* note 14, at 124-25; *see also* Wilf-Townsend, *supra* note 4, at 1770-71 (proposing sampling plaintiffs' claims and penalizing those who engage in a pattern of fraudulent or abusive filings).

366 Researchers have long been calling for better data in this area. *See generally, e.g.*, Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129 (2014); AM. ACAD. OF ARTS & SCIS., MEASURING CIVIL JUSTICE FOR ALL: WHAT DO WE KNOW? WHAT DO WE NEED TO KNOW? HOW CAN WE KNOW IT? (2021), https://www.amacad.org/sites/default/files/publication/downloads/2021-Measuring-Civil-Justice-for-All.pdf [https://perma.cc/E6ZF-XM2T].

367 Jasper Clarkberg & Michelle Kambara, *Removal of Public Records Has Little Effect on Consumers' Credit Scores*, CONSUMER FIN. PROT. BUREAU (Feb. 22, 2018), https://www.consumerfinance.gov/about-us/blog/removal-public-records-has-little-effect-consumers-credit-scores [https://perma.cc/9GDY-Z5ZV].

368 *Id.*

369 *See supra* note 132 and accompanying text.

proceedings can be daunting for unrepresented litigants—even if the state has already demonstrated the plaintiff's fraud. Asking a party to navigate more procedure because the initial procedure was shoddy provides too little, too late.[370]

Mass vacatur of problematic judgments should occur after regulators or class actions have uncovered misconduct. One could imagine a process whereby, after a scheme is identified, a regulator can identify docket entries entering judgment for the fraudulent actor and add an entry vacating the judgment or otherwise indicating its presumptive invalidity to forestall subsequent enforcement. A state actor could trace those judgments to pending or completed enforcement actions to prevent or undo them. These would all require improved docketing and recordkeeping by state court systems and today may only be theoretical, but the possibility of such measures is yet another reason states should improve recordkeeping.[371]

The most challenging task, once the decision to improve default procedures has been made, may be to change the culture of state courts and clerks' offices so that they implement these changes. Court training, oversight, and cultural shifts may all be necessary to effectuate the changes that reformers are enacting into law. State civil court clerk's offices and judges rarely face consequences for not following the law. There are barely any appeals, little public embarrassment through media coverage, and few lawyers advocating for defendants to persuade them.[372] These are further arguments for routinizing procedures so that additional oversight, too, can be made more routine. Increased attention to these areas of procedure, on a local and national level, is vital.

CONCLUSION

This study of default procedures has revealed both procedure's importance and its inability, alone, to address the problems of meritless

370 *See* Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists* 17-18 (Ctr. for Interdisc. L. & Pol'y Stud., Working Paper No. 36, 2006) (explaining that ex post review of erroneous placements on a government watch list provides insufficient due process protections); *cf.* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 276-77 (1992) (arguing the point should be to minimize the time and money parties have to spend dealing with the court).

371 Procedures for mass vacatur are currently understudied and the subject of forthcoming work. N.Y. C.P.L.R. 5015 (McKinney 2024) provides an example of a potential procedure for mass vacatur. *See* Pamela K. Bookman & Robin J. Effron, Mass Vacatur (2026) (unpublished manuscript) (on file with author).

372 *See* Shanahan et al., *Lawyerless Law Development*, *supra* note 216, at 65-66 (noting minimal appellate activity in civil proceedings where parties are unrepresented); Cotton, *supra* note 80, at 83 (arguing judges are more likely to follow the law if subject to reversal on appeal, public embarrassment through media coverage, or legal argument by counsel).

adjudication and the injustices that can follow.[373] Fixing the procedures within state courts that process debt-collection claims is a necessary but insufficient first step in driving merit-based resolution in defendants' absence, and ultimately when they appear as well.

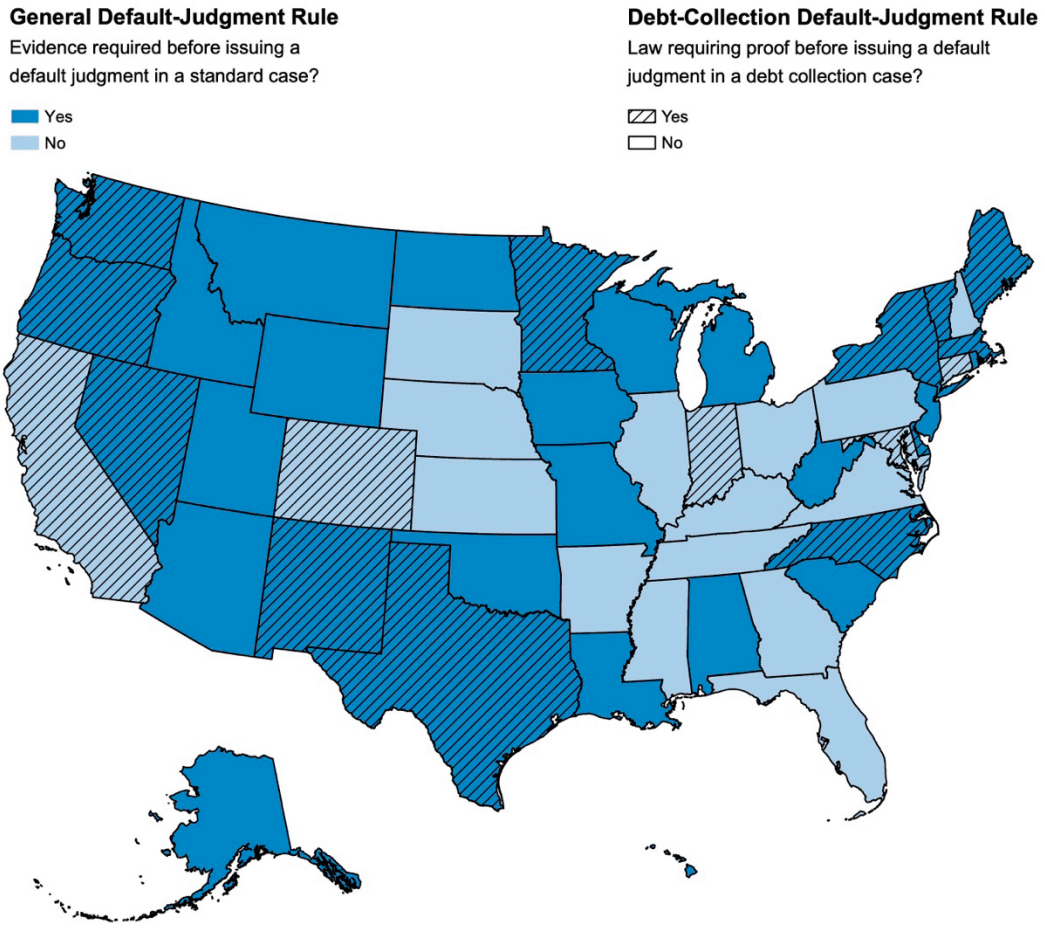
This Article has identified and analyzed the constellation of procedures that contribute to and can seek to address the high rates of default judgments in debt-collection cases in state civil courts. It has argued that rubber-stamp procedures—prevalent in either de jure or de facto form in most U.S. jurisdictions—cannot be justified under any theory of procedural justice and reflect procedural problems familiar from other circumstances but no less grave here. These procedures compromise courts' integrity, limit fair process, produce meritless judgments, and prevent courts from faithfully applying the law. They exacerbate social inequality and perpetuate inconsistencies among jurisdictions. And they prompt frivolous filings, forum shopping, and other ways for plaintiffs to exploit being the only party before the court. The path forward, supported by several nationwide and jurisdiction-specific reports, includes notice and hearing reforms as complements to default-judgment-specific reforms at both the front end and back end of litigation. Importantly, these reforms are not radical departures from the American adversarial tradition, but echo responses to similar challenges in other contexts.

Having developed these arguments as well as the procedures needed to respond to the crisis facing state courts, this Article has also raised questions about the challenges of implementation, which can be done in the form of statutes, court rule changes, or case law. Significant change may still be required to the internal law and culture of state civil courts themselves. In recommending external administrative oversight to the exclusion of procedural reform, some scholars seem to have given up on state civil courts as a locus for change. But they are the backstop for civil justice in this country and many have already taken up the challenges of changing procedures as addressed in this Article, suggesting that reform is not impossible. The next challenge will be not only to enact these procedural reforms as a matter of law across the country, but to make them effective on the ground.

373 *See also* Bookman & Shanahan, *supra* note 8, at 1230-40 (making this argument in the context of lawyerless courts).

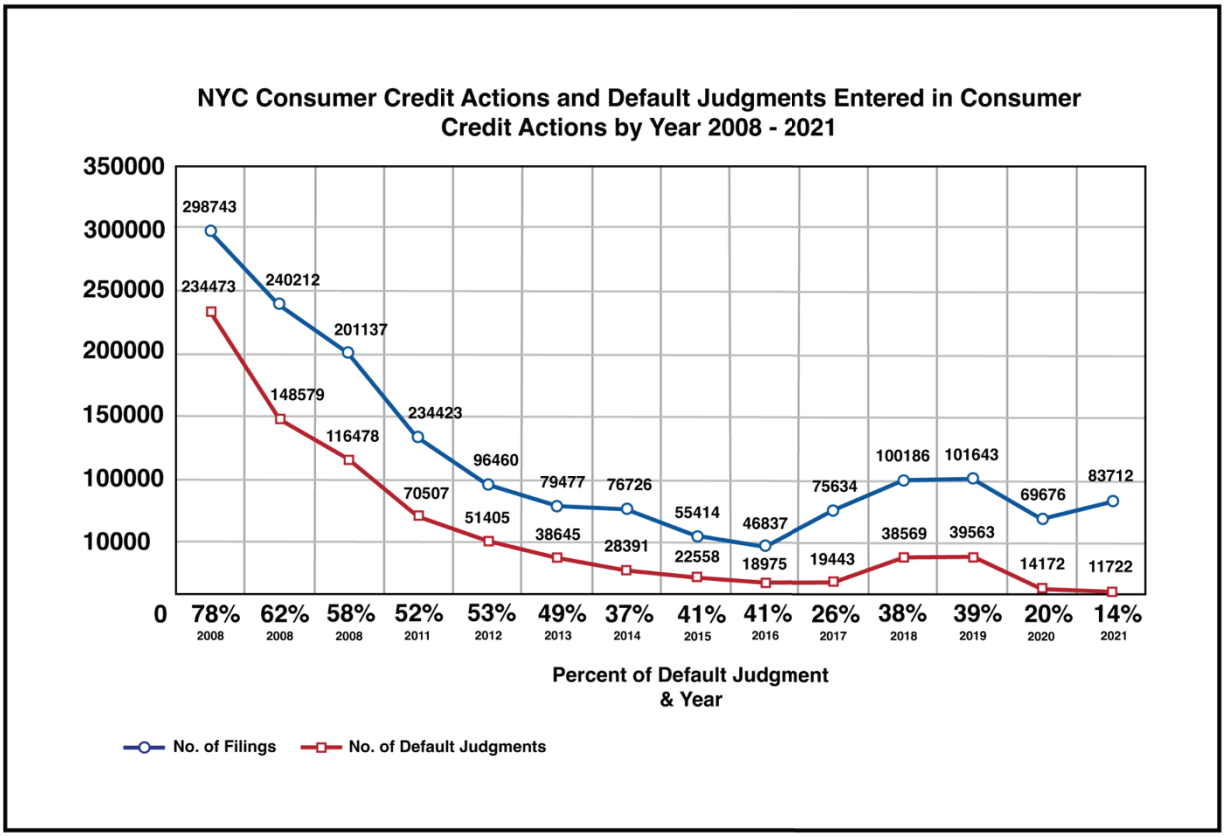
Appendix

Figure 2:
Proof Requirements for General and Debt-Specific Default Judgments



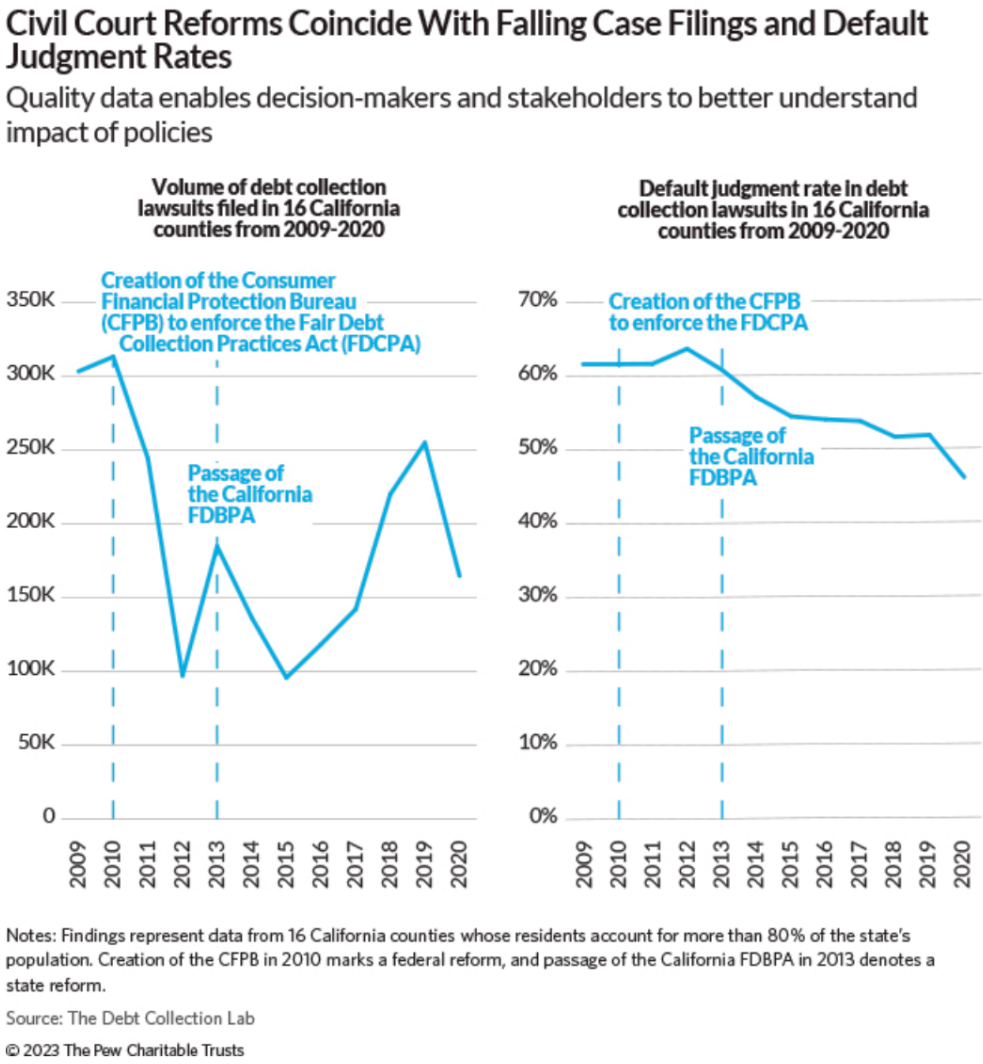
The information in this Figure was compiled by the author. Sources available upon request. The Figure was designed by Jasmine Smalling.

Figure 3:
Default-Judgment Rates in N.Y.C. Consumer-Credit Actions, 2008–2021



This Figure is copied directly from
Brief of Legal Services Providers, *supra* note 1, at 9.

Figure 4:
Default-Judgment Rates in California Debt-Collection Actions, 2009–2020



This Figure is copied directly from Khwaja, *supra* note 137.

Figure 5:
Pleading Requirements in the Great Lakes States

	Proof of Account	Proof of Amount	Proof of Ownership	Policy Applies to?	When Disclosed?
Illinois	Account number and agreement or any monthly statement showing activity	Charge off-balance and fees, last payment or default date	List chain of ownership	Consumer credit and debt buyers	With the complaint
Indiana	Account number and agreement or any monthly statement showing activity	Balance due to date and fees	Attach all assignments of claim *and* chronological list of prior owners	All consumer	With the complaint
Michigan	Account number	Balance due to date	None	All consumer	On complaint
Minnesota	Consumer's SSN, account number, and agreement or any monthly statement showing activity	Charge-off balance and fees, last payment or default date	Attach all assignments of claim	Debt buyers and collectors only	To obtain default judgment
New York	Account number and agreement or *most recent* monthly statement showing activity	Charge-off balance and fees, last payment or default date	Attach all assignments of claim *and* chronological list of prior owners	Consumer credit and debt buyers	To obtain default judgment
Ohio	General civil computation of damages	None	None	No specific policies	Not specified
Wisconsin	Agreement or any monthly statement showing activity	Charge-off balance and fees, last payment or default date	None	Consumer credit only	Upon consumer request

The text in this Figure is copied directly from MICHIGAN REPORT, *supra* note 16, at 20.

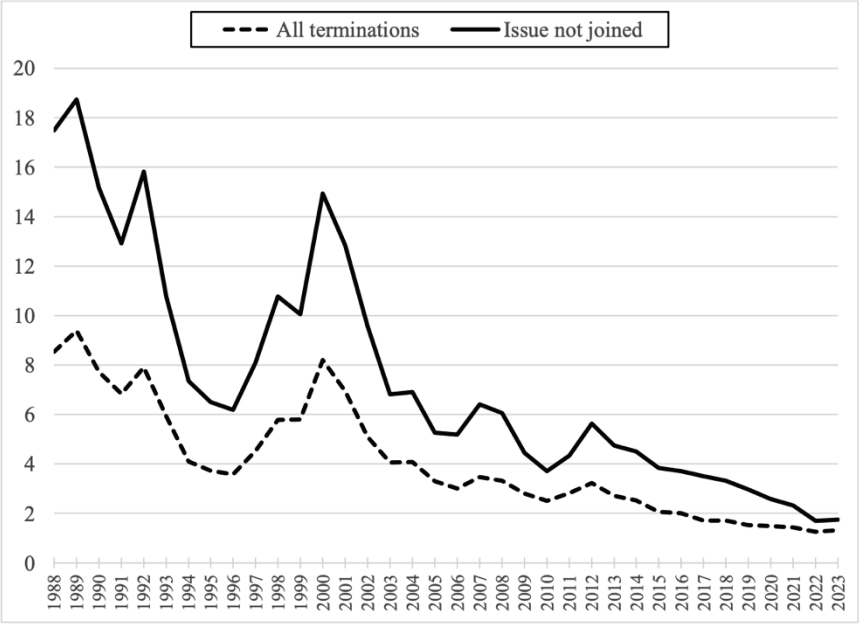
Figure 6:
How the Debtor's Costs Add Up
in a Typical Minnesota Debt-Collection Case

	$1,000	**Original claim**
+	$167.00	Pre-judgment interest and fees
+	$285.00	Filing and service fee
+	$479.16	Attorney fees (1/3 claim + interest + fee)
+	$96.56	Post-judgment interest (five percent)
+	$15.00	Garnishment filing fee
	$2,042.72	**Total judgment by the end of the year**

Minnesotans with debt cases face a host of costs and fees in addition to the amount in controversy. Because the typical debt lawsuit goes unanswered by the consumer, the $285 district court answer fee is not included in this table.

This text in this Figure is copied directly from
MINNESOTA REPORT, *supra* note 16, at 28.

Figure 7:
Default Judgments as a Percentage of Civil Terminations in Federal Courts, 1988–2023



The "all terminations" line represents default judgments as a percentage of all civil case terminations. The "issue not joined" line represents default judgments as a percentage of civil case terminations in which the defendant never filed a responsive pleading. This Figure is copied directly from LEE & CANTONE, *supra* note 3, at 24.

Figure 8:
Service and Time to Answer Rules in Selected States

	How many days after service does a defendant have to answer?		Which comes first: service or filing of the complaint with the court?	
	Civil Court	**Small-Claims Court**	**Civil Court**	**Small-Claims Court**
California	30 days for claims over $25,000. 180 days for claims under $25,000 ("Collections Cases").	Answer is not required. In-state defendants must appear in court within 15 days and out-of-state defendants within 20 days of receiving notice.	Filing first	Filing first
Michigan	21 days for service in-state. 28 days for service out-of-state.	Answer is not required. Date of appearance shall not be less than 15 days nor more than 45 days after the date of notice.	Filing first	Filing first
New York	20 days	Answer is not required, just appearance	Either	Filing first
Pennsylvania	20 days	Answer is not required, just appearance	Filing first	Filing first
Texas	By 10:00 AM on the next Monday following the expiration of 20 days after service.	End of the 14th day after service	Filing first	Filing first

This Figure was compiled by the author from state statutes, state rules of civil procedure, and other state materials. Sources available upon request.

Figure 9:
Entering Default Judgments in Selected States

	Is proof necessary for sum certain claims?		Once proof is submitted, is default judgment allowed or required?		For sum certain, does the clerk or the court enter judgment?	
	Civil Court	Small-Claims Court	Civil Court	Small-Claims Court	Civil Court	Small-Claims Court
California	Yes	Yes	Allowed	Allowed	Clerk	Court
Michigan	Yes (affidavit)	Yes (affidavit)	Allowed	Allowed	Clerk	Court
New York	Yes	Yes	Required	Required	Clerk	Court
Pennsylvania	Yes	Yes	Required	Required	Clerk	Court
Texas	Yes	Yes	Required	Required	Court	Court

This Figure was compiled by the author from state statutes, state rules of civil procedure, and other state materials. Sources available upon request.

Figure 10:
Setting Aside Default Judgments in Selected States

	On what grounds can the judgment debtor move for set aside?		When can a party move to set aside after default is entered?	
	Civil Court	**Small-Claims Court**	**Civil Court**	**Small-Claims Court**
California	Similar to FRCP 60(b)	Upon good reason	Within 6 months of judgment entered	Within 30 days of judge's decision being mailed to defendant
Michigan	Similar to FRCP 60(b)	Similar to FRCP 60(b)	Within reasonable time, and for 2.612(C)(a)–(c), 1 year after judgment entered	Within reasonable time, and for 2.612(C)(a)–(c), 1 year after judgment entered
New York	Similar to FRCP 60(b)	Similar to FRCP 60(b)	Within 1 year of service of judgment for excusable neglect; unclear for other grounds	Within 1 year of service of judgment for excusable neglect; unclear for other grounds
Pennsylvania	If 1 or more of the proposed preliminary objections has merit or the proposed answer states a meritorious defense	**Phila. Cts.:** Upon good reason and a valid excuse for failing to appear at the hearing **Magisterial Dist. Cts.:** Just a right to appeal	Within 10 days after entry of judgment	**Phila. Cts.:** "Act quickly" **Magisterial Dist. Cts.:** 30 days from the date of judgment
Texas	Good cause shown	Good cause shown	No later than 14 days after judgment is signed	No later than 14 days after judgment is signed

This Figure was compiled by the author from state statutes, state rules of civil procedure, and other state materials. Sources available upon request.