

## Judging Debt: How Judges' Practices in Consumer-Credit Court Undermine Procedural Justice

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**ABSTRACT.** This Essay draws from on-the-ground interviews and procedural-justice theory to analyze judging practices in debt-collection courts. Current practices undermine courts' fairness and legitimacy. This Essay argues that courts must prioritize procedural justice by adopting judging practices that consider unrepresented litigants' circumstances and require a more active judicial role.

### INTRODUCTION

For most people in this country, their “day in court” will not take place in federal courtrooms with vaulted ceilings where lawyers make extensive, reasoned arguments before a judge. Rather, for the tens of millions of Americans with debt in collections, their day in court will involve a dilapidated courtroom crammed with fellow debtors, many of whom may owe only a few hundred dollars. If you're a defendant in this courtroom, you may only have learned of your situation because your wages were garnished, and you may not even recognize the company that's suing you. If you're a defendant in this courtroom, you probably don't have a lawyer, but you may be cornered by the other side's attorney in the hallway and pressured into a settlement you can't afford. And presiding over this court – often called the “poor people's court” – is a judge whose conduct that day could have enormous consequences for your case, your life, and how you view the legal system and its ability to deliver justice.

But despite the prominent role of judges in this process, there is a striking lack of literature on the way that judicial oversight can affect the landscape of debt-collection actions for millions of people. Nor is there much literature on how specific judging practices in these courts affect perceptions of the judiciary's legitimacy. As some scholars of state civil court judges have said:

Staggeringly little legal scholarship focuses on state courts and judges. We simply do not know what most judges are doing in their day-to-day courtroom roles or in their roles as institutional actors and managers of civil justice infrastructure. We know little about the factors that shape and influence judicial practices, let alone the consequences of those practices for courts, litigants, and the public.<sup>1</sup>

This Essay hopes to address this gap in the literature by focusing on the “poor people’s courts,” venues that lack the glamour of federal courts, yet where judges can affect the lives of thousands of the most vulnerable. While this Essay relies in part on my own litigation experience in New York City’s Civil Courts,<sup>2</sup> it adds new perspectives to the literature by drawing on lengthy and confidential interviews with half a dozen public-interest attorneys and one retired New York City Civil Court judge.<sup>3</sup> Each of these interviewees discussed their significant experience representing defendants in consumer-credit actions, or in the judge’s case, of hearing these cases. As it turns out, the observations and critiques made by other scholars of the debt-collection litigation process – that of assembly-line litigation, an epidemic of unrepresented litigants, and improper service of process – accurately reflect the day-to-day of practitioners on the ground.

These public-interest attorneys are in consumer-credit court day in and day out. They interact with unrepresented defendants and the courts, including multiple different judges, on a systematic and wide-ranging basis. As a result, these attorneys are uniquely situated to notice patterns of judicial oversight and see how these patterns affect defendants’ experience in court. And I was also able to hear one judge’s perspective from behind the bench, a viewpoint that allowed me

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1. Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Marx, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 249; see also *id.* at 251 n.2 (identifying scholars who have bemoaned the lack of information about state civil court judges for the past thirty years).
  2. I, as well as many of my interview subjects, drew on our experiences through the Volunteer Lawyer for the Day Consumer Credit Project (VLFD). All VLFD attorneys interviewed here participate through the legal-aid organizations where they work, such as the New York Legal Assistance Group (NYLAG), rather than on a volunteer basis. VLFD provides limited-scope representation to pro se debtor-defendants in consumer-credit cases in the New York Civil Courts on the day the individual has a court appearance. The project provides “unbundled legal services” in which litigants enter a limited-scope engagement to receive representation for only one day for the purposes of settlement-related negotiation. See *Access to Justice Volunteer Attorney Programs*, N.Y. ST. UNIFIED CT. SYS., [https://ww2.nycourts.gov/attorneys/volunteer/VAP/program\\_descriptions.shtml](https://ww2.nycourts.gov/attorneys/volunteer/VAP/program_descriptions.shtml) [<https://perma.cc/W33Y-JUFA>].
  3. I am deeply grateful to all those with whom I spoke. I interviewed each attorney or judge over Zoom for approximately an hour. Each was asked about judicial attitudes toward defendants, general motion practice, judicial oversight of settlements, differences between judges, and other suggestions they might have for the bench.

to better understand the systematic issues that influence the way judges perform their roles.

Together, these interviewees paint a picture of a court system besieged by the sheer number of debt-collection cases; the immense pressure creates an environment where judges' hands are tied by the overwhelming caseload, and where cynicism thrives. As one interviewee memorably stated, "If you were to look at everything that's wrong in society, you just walk into a court [that is] hearing consumer-debt cases, and you just see it."<sup>4</sup> Consumer-defendants pay the price.

This Essay draws on procedural-justice theory to suggest that courts may end up paying a price, too, through diminished public perceptions of the system's fairness and legitimacy. But this Essay also suggests that despite such pressures, individual judges have the power to implement practices and oversee cases in a way that mitigates harms. Indeed, judging plays an integral role in helping defendants feel that they were, no matter the outcome, treated fairly by the judicial system.

This Essay proceeds in three Parts. Part I of this Essay provides some necessary background about both the courts and the theoretical framework of this piece. First, Part I describes the consumer-credit courts lodged within the New York City Civil Courts and emphasizes that the lessons drawn from these venues are by no means unique to New York City. The pressures faced by these courts and the judges and advocates are applicable for courts hearing consumer-credit actions across the country. Part I also introduces the framework of procedural justice. Procedural-justice theory emphasizes how the quality of individuals' interactions with the legal system affects their perceptions of the legitimacy and fairness of that system. When litigants perceive the judicial system as fair and legitimate, they are more likely to feel that the courts carry out real justice. Procedural justice suggests that perceptions of legitimacy and fairness are determined based on four core factors: respect, voice, neutrality, and trustworthiness.<sup>5</sup>

Part II of this Essay seeks to describe the problems facing consumer-credit courts; depict how judging practices have been both shaped by and affect these existing issues; and frame those outcomes through the lens of procedural justice. Part II begins with an overview of some of the most pressing issues, including the driving factor of assembly-line litigation and related challenges like deficient pleadings, high numbers of pro se litigants, and rampant "sewer service." Part II then draws on extensive interviews with practitioners to show that individual judging practices do affect defendants' case outcomes and experiences, often

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4. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

5. Just. Collaboratory, *Procedural Justice*, YALE L. SCH., <https://law.yale.edu/justice-collaboratory/procedural-justice> [<https://perma.cc/GY2Q-6KTA>].

negatively. For example, whether insufficient pleadings are allowed to stand or whether pro se defendants are offered explanations varies widely on a judge-by-judge basis. As another example, judges are often skeptical of pro se defendants who raise arguments based on well-documented issues like sewer service. And overall, judicial practices overestimate the likelihood that pro se defendants are informed about the proceedings, and thus deprioritize procedural justice values that would encourage judges to provide necessary assistance.

Finally, Part III identifies some ways that judging practices can improve for the better, in line with procedural justice's core values. Part III begins by highlighting existing proposals for improving outcomes for defendants, then evaluates those proposals through the lens of procedural justice, based on on-the-ground interviews. That evaluation supports reforms that ensure that consumer-defendants understand the legal process and increase the judicial role in probing pleadings, sewer-service allegations, and settlements. Ultimately, despite the serious and damaging challenges posed by high-volume, assembly-line litigation, this Essay suggests that judges and courts have an opportunity to improve the experience of consumer-defendants by better aligning their practices with the principles of procedural justice.

## I. BACKGROUND

### A. Introduction to Consumer-Credit Court

This Essay focuses on the consumer-credit courts within the New York City Civil Courts. But the lessons learned in the NYC consumer-credit courts have applications beyond the city's five boroughs. NYC consumer-credit courts and consumer-credit courts across the country face similar pressures that have been well-documented by scholars.<sup>6</sup> These pressures include high caseloads, many unrepresented defendants, and, often, nationwide third-party debt buyers as plaintiffs.<sup>7</sup>

The NYC consumer-credit courts occupy a distinct role within the organization of New York City's judicial system. Each of the five boroughs of New York City has a Civil Court.<sup>8</sup> Civil Courts have jurisdiction over monetary claims,

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6. See, e.g., *infra* notes 13, 23, 45-46 and accompanying text.

7. See *infra* notes 13, 23, 45-46 and accompanying text.

8. The court structure within New York City is distinct from the rest of the state court system. The court system in New York City includes separate civil and criminal courts. On the other hand, outside New York City, a combination of City Courts, District Courts, and Town and Village Courts hear both civil cases over claims of \$15,000 or less and nonfelony criminal prosecutions. *Report from the Special Adviser on Equal Justice in the New York State Courts*, N.Y. ST. UNIFIED CT. SYS. 22-24 (Oct. 1, 2020) [hereinafter *Report from the Special Adviser*],

recovery of personal possessions, and relief related to real property, all with a claim limit of \$50,000.<sup>9</sup> Civil Court judges are elected for terms of ten years and are eligible to be appointed as acting New York Supreme Court judges.<sup>10</sup> The NYC consumer-credit courts are separate from the rest of the Civil Court’s calendar. Because the Civil Courts see such a high volume of unrepresented litigants, they utilize separate calendars, or “parts,” for these cases, known as the Personal Appearance or Pro Se Part.<sup>11</sup> The Civil Courts dedicate multiple mornings or days a week to hearing cases assigned to these Parts. Because most consumer-credit matters involve a represented plaintiff and a pro se defendant, the Pro Se Part docket primarily involves consumer-credit matters.<sup>12</sup> Throughout this Essay, I will refer to these Parts as the “NYC consumer-credit courts.”

Most defendants in consumer-credit courts are unrepresented people of color. A study examining over 457,000 lawsuits filed in the New York City Civil Courts between 2006 and 2008 found that only one percent of people sued by debt buyers were represented by counsel.<sup>13</sup> Sixty-nine percent of people sued by debt buyers were Black or Latino.<sup>14</sup> And these defendants almost invariably lose. Debt buyers prevailed in ninety-four percent of lawsuits.<sup>15</sup>

In short, to spend a morning in NYC consumer-credit court, whether in the Bronx, Queens, Manhattan, Brooklyn, or Staten Island, is to experience the judicial system at its lowest-dollar, highest-volume level: pro se defendants, some of whom do not speak English and many of whom are indigent, cycle through the courtroom doors, many returning week after week; attorneys, paid per diem by debt-collection companies, regularly win default judgments against debtors who never appear; and judges work through dockets of twenty or more cases a day.<sup>16</sup>

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<https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>  
[<https://perma.cc/RNJ6-WK8P>].

9. N.Y. CITY CIV. CT. ACT §§ 201-04 (McKinney 2022).
10. *Report from the Special Adviser*, *supra* note 8, at 22-23; N.Y. CONST. art. VI, § 15(a).
11. *Volunteer Lawyer for the Day Consumer Credit Project Guidebook*, N.Y. ST. CTS. ACCESS TO JUST. PROGRAM 5 (on file with author).
12. *Id.*
13. *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, LEGAL AID SOC’Y ET AL. 1 (May 2010) [hereinafter *Debt Deception*], <https://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [<https://perma.cc/26KP-8TEQ>].
14. *Id.* at 2.
15. *Id.* at 1.
16. The court calendars for the New York City Civil Courts can be found on their website. On one day in the Bronx, the 11C Part—nonjury, self-represented consumer debt—had twenty-two cases scheduled to be heard that day; the following day, twenty cases were scheduled. *WebCivil Local - Court Calendars*, N.Y. ST. UNIFIED CT. SYS., <https://iapps.courts.state.ny.us>

Both the courts and lawmakers have attempted to address the issues plaguing the NYC consumer-credit courts, notably through the New York state legislature's passage of the Consumer Credit Fairness Act (CCFA).<sup>17</sup> Prior to the passage of CCFA, the courts had spearheaded their own reforms in 2014.<sup>18</sup> In 2021, CCFA shored up those reforms by amending New York's Civil Practice Law and Rules (CPLR) so that the changes applied to all consumer-debt actions.<sup>19</sup> CPLR governs civil procedure across the state's judicial system, including in the NYC consumer-credit courts.<sup>20</sup>

CCFA was enacted to curb the worst of the unfair and abusive tactics used by debt collectors during the legal process. The Act enshrined meaningful changes to the notice and pleading requirements described throughout this Essay.<sup>21</sup> In 2022, the state legislature amended CPLR to lower the interest rate for money judgments in consumer-debt actions from nine percent to two percent.<sup>22</sup>

But while New York's CCFA marked an attempt to improve procedural rules governing debt-buyer litigation, most states have taken no steps to tackle the challenges that debt-buyer litigation poses to their courts, and many have gone in the wrong direction.<sup>23</sup> In fact, New York has taken steps to address widespread problems that other states have not. Yet New York's consumer-credit

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/webcivilLocal/LCCalendarSearch [https://perma.cc/7EVH-ZPAA] (accessed Sept. 16, 2023).

17. Consumer Credit Fairness Act, S.153 (2022) (codified in scattered sections of N.Y. C.P.L.R. & N.Y. JUD. LAW), <https://www.nycourts.gov/LegacyPDFS/rules/ccr/forms/ConsumerCreditFairnessAct-S153.pdf> [https://perma.cc/WH9R-KKQK].
18. *Consumer Credit Reform Resources*, N.Y. ST. UNIFIED CT. SYS., <https://ww2.nycourts.gov/rules/ccr/index.shtml> [https://perma.cc/YQZ2-CKBZ].
19. *See id.*; Moorari Shah & A.J. S. Dhaliwal, *New York Enacts Consumer Credit Fairness Act, Impacting Debt Collection Actions*, NAT'L L. REV. (Nov. 18, 2021), <https://www.natlawreview.com/article/new-york-enacts-consumer-credit-fairness-act-impacting-debt-collection-actions> [https://perma.cc/7Z]3-Y352]; *see also* Memorandum from Alec Webley, N.Y. Assistant Att'y Gen., to Major Debt Collectors Operating in N.Y. State (Mar. 23, 2022) [hereinafter *AG Memo re: CCFA*], [https://ag.ny.gov/sites/default/files/2022.03.23\\_-\\_debt\\_collector\\_letter\\_re\\_reg\\_f\\_ccfa.pdf](https://ag.ny.gov/sites/default/files/2022.03.23_-_debt_collector_letter_re_reg_f_ccfa.pdf) [https://perma.cc/35QY-6MKE] (regarding compliance with New York Consumer Credit Fairness Act and Consumer Financial Protection Bureau Regulation F).
20. N.Y. C.P.L.R. 101 (MCKINNEY 2022).
21. *See* Press Release, N.Y. State Att'y Gen., Attorney General James Warns Debt Collectors of New State Regulations Banning Lawsuits on Old Debts (Mar. 29, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-warns-debt-collectors-new-state-regulations-banning> [https://perma.cc/TA9Q-PB3S]; *Consumer Credit Reform Resources*, *supra* note 18.
22. *Consumer Credit Reform Resources*, *supra* note 18; N.Y. C.P.L.R. 5004 (MCKINNEY 2022).
23. Chris Albin-Lackey, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, HUM. RTS. WATCH 40 (Jan. 2016) [hereinafter *Rubber Stamp Justice*], [https://www.hrw.org/sites/default/files/report\\_pdf/us0116\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf) [https://perma.cc/TV3X-XNJS].

courts are representative of the problems facing consumer-debt courts across the country.<sup>24</sup> As this Essay – and my interviews – explain, reforms like these are probably not enough, even if aimed at addressing the worst debt-collection tactics.

### B. *The Procedural-Justice Framework*

This Essay looks at the NYC consumer-credit courts through the framework of procedural justice. Procedural-justice theory is a valuable framework for evaluating debt-collection litigation because it focuses on the litigant’s experience and whether they feel that justice has been carried out.<sup>25</sup> Given that defendants in the debt-collection courts are overwhelmingly low-income people of color,<sup>26</sup> centering these defendants’ experiences can illuminate reforms that better address the historical racial and social imbalances that plague the debt-collection system.<sup>27</sup> And while many scholars have suggested reforms to the debt-collection courts,<sup>28</sup> a procedural-justice lens allows us to evaluate these proposals based on how they impact, and improve, defendants’ experiences of justice.

As explained by Professor Tom R. Tyler, procedural justice centers on process and how process affects perceptions of fairness and legitimacy.<sup>29</sup> In the context of the courts, this theory examines the factors that affect people’s perceptions of “the fairness of the procedures through which . . . the courts exercise their

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24. See generally *id.* (addressing many of the issues raised in this Essay and showing the nationwide scope of the problems).
25. See Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L.J.* 473, 480 (2010).
26. See *Debt Deception*, *supra* note 13, at 1-2; *infra* note 113 and accompanying text; see also 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, 363-64 (2022) (noting that “pro se defendants in debt cases are disproportionately likely to be low-income people of color”).
27. See generally Steinberg et al., *supra* note 26 (describing the racial, gender, and class dynamics at play in debt-collection court and asserting that bold reforms that address these dynamics are essential for ensuring democratic legitimacy).
28. See *infra* Section III.A.
29. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (outlining principles of procedural justice and legitimacy); see also Zimerman & Tyler, *supra* note 25, at 482 (citing JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975)) (crediting John Thibaut and Laurens Walker with first making the argument that “procedural values play a significant role in people’s evaluations of, and satisfaction with, procedures in which they have participated”). While many works on procedural justice focus on the criminal justice system, procedural justice also has applications in the civil context. See, e.g., Zimerman & Tyler, *supra* note 25.

authority.”<sup>30</sup> When people feel that the process was fair, they are more likely to accept unfavorable outcomes as fair.<sup>31</sup> Tyler’s research suggests that the degree to which a process is procedurally just affects individual litigants’ perception of fairness regardless of socioeconomic status or race.<sup>32</sup>

Tyler has identified the quality of decision-making and interpersonal treatment as key elements of procedurally just processes. Decision-making enhances feelings of fairness when it is seen as even-handed and supported by transparency and explanation, while high-quality interpersonal treatment makes litigants feel respected and acknowledged.<sup>33</sup>

Whether individuals perceive a legal system as fair is shaped by “four central features of their interactions with legal authorities: (i) Whether they were treated with dignity and respect; (ii) Whether they were given voice; (iii) Whether the decision maker was neutral and transparent; and (iv) Whether the decision maker conveyed trustworthy motives.”<sup>34</sup> Decision makers can treat individuals with dignity and respect, the first factor, by behaving in ways that signal traits like empathy, care, cultural competency, and engagement.<sup>35</sup> The second factor, voice, focuses on whether individuals are allowed to tell “their side of the story,” and have their concerns considered during decision-making processes.<sup>36</sup> The third factor, neutrality, focuses on whether the decision maker was “unbiased and guided by consistent and transparent reasoning.”<sup>37</sup> Individuals perceive decision-making to be neutral when it is based on objective information, and when they get a chance to “present evidence and explain their situation.”<sup>38</sup> And the final factor, trustworthiness, requires legal decision makers to demonstrate “concern for the well-being of those impacted by their decisions.”<sup>39</sup> These four

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30. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

31. See *id.* at 292-93 (linking feelings of legal obligation and acceptance with judgments about the legitimacy of legal institutions and law enforcement).

32. See Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 318 (2006).

33. Tyler, *supra* note 30, at 298-99.

34. Just. Collaboratory, *supra* note 5.

35. Katrin Hohl, Kelly Johnson & Sarah Molisso, *A Procedural Justice Theory Approach to Police Engagement with Victim Survivors of Rape and Sexual Assault: Initial Findings of the ‘Project Blue-stone’ Pilot Study*, 2 INT’L CRIMINOLOGY 253, 252, 254 (2022) (describing how dignity and respect manifest in the context of victim-survivors of rape and sexual assault).

36. Just. Collaboratory, *supra* note 5.; see also Hohl et al, *supra* note 35, at 254 (describing voice as the opportunity to tell one’s side of the story).

37. Just. Collaboratory, *supra* note 5.

38. See Tyler, *supra* note 30, at 350.

39. *Id.*

factors—respect, voice, neutrality, and trustworthiness—make up the four pillars of procedural justice.

According to procedural-justice theory, whether individuals perceive legal institutions as fair and legitimate has wider-ranging consequences than any one person’s experience. Tyler writes, “[P]eople’s internal values have an important role in shaping their behavior.”<sup>40</sup> When people experience procedural justice, they are more likely to view institutions as fair and legitimate. As a result, such individuals are more likely to obey laws and constructively engage with society and social institutions.<sup>41</sup> When legal institutions are procedurally just, “the legal system gains.”<sup>42</sup> By evaluating existing proposals for debt-collection reform through the lens of procedural justice, and bolstering those evaluations with on-the-ground interviews, this Essay strengthens the arguments for reforms that make the courts more just.

### A. *The Problems Facing the Courts*

#### 1. *An Explosion of Assembly-Line Litigation, Brought by Third-Party Debt Collectors*

Debt litigation has exploded in recent years, the result of a perfect storm of increasing cost of living, stagnating wages, and skyrocketing consumer-debt loads.<sup>43</sup> As of 2021, 27.8% of adults with credit files have debt in collections.<sup>44</sup> Debt collectors often collect on these debts through litigation.

The consumer-debt litigation world is ruled by corporate debt collectors engaging in what scholar Daniel Wilf-Townsend has termed “assembly-line litigation.”<sup>45</sup> Wilf-Townsend defines assembly-line litigation as “litigation in which a

40. Tyler, *supra* note 32, at 312.

41. *See id.* at 308-09. *See generally* TYLER, *supra* note 29 (outlining principles of procedural justice and legitimacy).

42. Tyler, *supra* note 32, at 312.

43. *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, 94 (2017); Anika Singh Lemar, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor*, URB. JUST. CTR. 3 (Oct. 2007), <https://ssrn.com/abstract=3160600> [<https://perma.cc/5N9Q-5RR4>].

44. *Credit Health During the COVID-19 Pandemic*, URB. INST. (Mar. 8, 2022), <https://apps.urban.org/features/credit-health-during-pandemic> [<https://perma.cc/FT3Q-N8NW>].

45. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1709 (2022); *see also* Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 377-83 (2022) (placing Daniel Wilf-Townsend’s findings in historical context); Steinberg et al., *supra* note 26, at 360-68 (extending Wilf-Townsend’s findings to “question both the democratic legitimacy of debt collection courts and the adequacy of incremental

sophisticated corporate plaintiff brings a high volume of similar, small-value claims against individual natural-person defendants who are almost universally unrepresented and who often do not appear in court.”<sup>46</sup>

Across the country, experts have found that most assembly-line cases are brought by third-party debt collectors.<sup>47</sup> Third-party debt collectors, or debt buyers, purchase defaulted debts – ranging from credit-card debt to car and student loans to medical bills – for pennies on the dollar, usually from original creditors, but sometimes from other third-party debt buyers.<sup>48</sup> While a few debt buyers are publicly traded, most are privately owned, financed by private-equity firms and other financial-services companies, or even owned by the principals of debt-collection law firms.<sup>49</sup>

Third-party debt collection is a lucrative business model. As one scholar put it, “[i]f debt buyers can acquire debts cheaply enough, and develop efficient, low-cost methods of pursuing debtors, they can realize substantial profits by collecting even a small percentage of the debts they purchase.”<sup>50</sup> The assembly-line litigation model allows debt buyers to file thousands of small-dollar cases and turn a profit.<sup>51</sup> The volume is immense: one major debt-buying company filed over 2,700 suits in Maryland in August 2020; another filed over 3,000 suits in Chicago in July 2020.<sup>52</sup> Both companies exceeded their prepandemic filings.<sup>53</sup> Like other courts across the country, NYC consumer-credit courts must deal with the problem of high case volume: in 2014, eight of New York’s twenty most litigious plaintiffs were debt buyers, and that year, two leading debt-buyer companies filed hundreds of thousands of lawsuits and collected more than one billion dollars in debt.<sup>54</sup>

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reform”); *Debt Deception*, *supra* note 13, at 1-2 (summarizing findings from an analysis of lawsuits filed by debt buyers in New York City from January 2006 through July 2008).

46. Wilf-Townsend, *supra* note 45, at 1709.

47. *Id.* at 1718.

48. One 2013 study by the Federal Trade Commission found that debt buyers paid an average of 4.5 cents on the dollar. *Rubber Stamp Justice*, *supra* note 23, at 11; *see also* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 52-55 (2015) (describing the sale and resale of debts).

49. *Debt Deception*, *supra* note 13, at 4.

50. Stifler, *supra* note 43, at 97-98 (quoting *Rubber Stamp Justice*, *supra* note 23, at 11).

51. Wilf-Townsend, *supra* note 45, at 1708-09.

52. Paul Kiel & Jeff Ernsthansen, *Debt Collectors Have Made a Fortune this Year. Now They’re Coming for More*, PROPUBLICA (Oct. 5, 2020, 5:00 AM EDT), <https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more> [<https://perma.cc/2KUK-4ZWE>].

53. *Id.*

54. *Rubber Stamp Justice*, *supra* note 23, at 2.

## 2. Debt Lawsuits with Deficient Papers

Third-party debt buyers often obtain very little information about the debts they purchase, and thus file complaints that lack important substantiating information.<sup>55</sup> When buying accounts, debt buyers *might* receive the person’s name, social security number, last known address, amount allegedly owed, charge-off date, and date and amount of the last payment. But often, debt buyers do not receive even this minimal information. Indeed, third-party debt buyers frequently lack documentation of the debt, including the name of the original creditor, the breakdown of the charges, or the date of the last payment.<sup>56</sup> Debt collectors may file lawsuits even when they know that they are lacking sufficient documentation to establish ownership of the debt.<sup>57</sup> The former judge bemoaned, “There was just so [much] bad third-party debt.”<sup>58</sup>

Consumer-defendants may feel confusion upon encountering a lawsuit for a debt held by an entity that they have never heard of.<sup>59</sup> The former judge explained how the presence of third-party debt buyers complicated the filings: “[I]t’d be like five people in the chain of assignment [of the debt].”<sup>60</sup> Consumer-defendants may not even owe the debt in the first place – the largest category of complaints about debt collection to the Consumer Financial Protection Bureau in 2022 was for “[a]ttempts to collect debt not owed.”<sup>61</sup>

The New York City Civil Courts and the state legislature attempted to address the lack of sufficient information contained in complaints filed by debt collectors. The Civil Courts implemented reforms in 2014 requiring debt buyers to include affidavits from both the debt buyer and seller, including a chain of title.<sup>62</sup>

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55. Stifler, *supra* note 43, at 100 (“The agreements between debt sellers and debt buyers often dictate that accounts are sold ‘as is’ with limited information and documentation for the accounts.”).

56. *See id.* at 100-01. (“The agreements between debt sellers and debt buyers often dictate that accounts are sold ‘as is’ with limited information and documentation for the accounts. As a result, unreliable records are used to collect or bring suits on debts that cannot be substantiated, are inaccurate in amount, or may not be owed by the consumer being purchased.”).

57. *Id.* at 102.

58. Confidential Zoom Interview with Former Judge (May 23, 2023).

59. *See, e.g.*, Stifler, *supra* note 43, at 91 (describing the experience of a hypothetical consumer being sued by a third-party debt collector).

60. Confidential Zoom Interview with Former Judge (May 23, 2023).

61. *Consumer Response Annual Report, January 1 - December 31, 2022*, CONSUMER FIN. PROT. BUREAU 25 (Mar. 2023), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_2022-consumer-response-annual-report\\_2023-03.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf) [<https://perma.cc/8NKH-DPVK>].

62. *Consumer Credit Reform Resources*, *supra* note 18; N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14-a (2014).

The state legislature strengthened those reforms by passing CCFA. Under CCFA, as of 2022, complaints in consumer-debt lawsuits in New York must include the name of the original creditor, the last four digits of the account number, and the date and amount of the last payment. CCFA also requires that complaints itemize the debt sought and include more details about the chain of ownership of the debt, such as attaching the contract on which the debt is based.<sup>63</sup>

One interviewee who practiced before and after the 2014 reforms and passing of CCFA noted that the changes had made some difference, and that filings before the reforms had been particularly deficient.<sup>64</sup> But the interviewee noted that while there had been a drop in case filings right after CCFA, plaintiffs quickly adjusted. Data from other states indicates that debt-collector filings have matched or exceeded prepandemic volume.<sup>65</sup> In other words, CCFA may have resulted in an initial reduction of debt-collection lawsuits, a decline exacerbated by the pandemic. But reporting strongly suggests that, since then, debt collectors may have found ways to make up the difference. Indeed, despite these reforms, attorneys said the complaints that they reviewed on behalf of defendants in court often failed to include the chain of title.<sup>66</sup> “[N]ow they have all their form affidavits,” said one attorney, referencing plaintiffs’ practice of using boilerplate form affidavits to attest to the validity of the debt—“They’re better papered, but it’s still just a process . . . [a] thoughtless process.”<sup>67</sup>

### 3. *High Numbers of Pro Se Litigants*

The NYC Civil Courts see a high volume of unrepresented litigants, many of whom are defendants in consumer-credit cases. This epidemic of unrepresented consumer-defendants is familiar in debt-collection courts across the country.<sup>68</sup> A substantial body of literature suggests that unrepresented people fare poorly

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63. *AG Memo re: CCFA*, *supra* note 19, at 2; N.Y. C.P.L.R. §§ 3012(a), 3016(j) (McKinney 2022); see also N.Y. COMP. CODES R. & REGS. tit. 22, §§ 208.6(h), 208.14-a (2014) (identifying the requirements for summons and affidavits in cases involving consumer-credit transactions).

64. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

65. Kiel & Ernsthäuser, *supra* note 52.

66. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) (“[P]laintiffs don’t produce the chain of title when they file their summons and complaint, which I think is . . . really bizarre.”); Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (“[N]o one’s holding the plaintiffs to the task of properly papering their arguments . . .”).

67. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

68. See generally Hannah E. M. Lieberman & Paula Hannaford-Agar, *Meeting the Challenges of High-Volume Civil Dockets*, NAT’L CTR. FOR ST. CTS. (2016), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0027/25578/meeting-the-challenges.pdf](https://www.ncsc.org/_data/assets/pdf_file/0027/25578/meeting-the-challenges.pdf) [<https://perma.cc/BAA7-BZ2E>] (describing challenges facing state courts, including debt-collection courts); *Rubber Stamp Justice*, *supra* note 23 (describing issues with debt-collection litigation nationwide).

in our modern civil justice system, which was, for the most part, not designed for lay people.<sup>69</sup> As the former judge said, “If you’re self-represented, you’re really unrepresented.”<sup>70</sup>

#### 4. *Issues with Service of Process: The Problem of Sewer Service*

Debt-collection cases in consumer court frequently have serious deficiencies related to service of process. In many ways, the principles of notice and opportunity to be heard functionally fail to exist in the consumer-credit context. Sewer service, or fraudulent service of process, has been widespread for decades.<sup>71</sup> In 1968, for example, the U.S. Attorney’s Office for the Southern District of New York found that thirty percent of the judgments entered in New York County Civil Court were entered based on sewer service, without notice to the defendant.<sup>72</sup> Little has changed since then. One study found that seventy-one percent of people sued by debt collectors between 2006 and 2008 were either not served or served improperly.<sup>73</sup>

Process servers frequently lie on affidavits of service, while debt collectors continue to hire process servers with known disciplinary history. Process servers are incentivized to lie because they are often paid per completed service at rates so low that to make minimum wage, process servers must complete more services than are actually possible.<sup>74</sup> For example, in one lawsuit, my former organization, the New York Legal Assistance Group, alleged thousands of instances where two New York process servers, one of whom had already been disciplined for prior violations, lied on the affidavits of service and created fake relatives’

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69. See, e.g., Carpenter et al., *supra* note 1, at 259-60.

70. Confidential Zoom Interview with Former Judge (May 23, 2023).

71. See Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 844 (2018); James Stoddard Hayes, Jr., *Civil Procedure—A Possible Solution to the Problem of “Sewer Service” in Consumer Credit Actions*, 51 N.C. L. REV. 1517, 1518 (1973).

72. Jiménez, *supra* note 45, at 380.

73. *Debt Deception*, *supra* note 13, at 2; see also Consumer Rts. Project, *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, MFY LEGAL SERVS., INC. 6-7 (June 2008), [http://mobilization-forjustice.org/wp-content/uploads/reports/Justice\\_Disserved.pdf](http://mobilization-forjustice.org/wp-content/uploads/reports/Justice_Disserved.pdf) [<https://perma.cc/5YEB-NJL3>] (identifying deficiencies in the service of process by process servers for consumer-debt cases in New York).

74. See Gottshall, *supra* note 71, at 836.

names to “receive” the summons and complaint.<sup>75</sup> This problem exists in other areas of the country as well.<sup>76</sup>

The consequences are severe. Defendants do not know about the cases against them, do not show up in court, and unwittingly receive default judgments.<sup>77</sup> As a result, their wages can be garnished or their bank accounts frozen. Such misconduct sometimes occurs on a staggering scale. In a landmark 2009 class-action lawsuit over sewer service in New York City, plaintiffs alleged that debt collectors falsified affidavits of service; the settlement agreement resulted in a fifty-nine-million-dollar payout to about 75,000 victims and required the vacatur of 115,000 judgments – an enormous sum and number of victims.<sup>78</sup>

These consequences disproportionately impact low-income, Black, and Latino defendants in New York City.<sup>79</sup> A study of other major metropolitan areas suggests that nationwide, debt collectors disproportionately sue Black defendants.<sup>80</sup> That same study found that workers who earn between \$15,000 and \$25,000 per year are garnished at one of the highest rates among all earners.<sup>81</sup>

The state courts and legislature have acknowledged these service issues and made some attempts at reform. For instance, CCFA made changes to the rules of civil procedure to address widespread failure of process. In addition to serving

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75. See, e.g., *Court Grants Preliminary Approval to NYLAG’s \$1.35 Million Settlement with Process Servers, Process Serving Agency, and Debt Collection Law Firm, Providing Crucial Relief to More than 3,000 New York City Consumers*, NYLAG (2023), <https://nylag.org/gotham> [<https://perma.cc/65EX-D5CK>]; Amended Class Action Complaint at 1-3, *Burks v. Gotham Process, Inc.*, No. 20 Civ. 1001 (E.D.N.Y. July 17, 2020), <https://nylag.org/wp-content/uploads/2021/04/27-Amended-Complaint-filed-2020-07-17.pdf> [<https://perma.cc/XAJ5-4ZF7>].

76. See, e.g., Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1602-03 (2018).

77. See, e.g., Wilf-Townsend, *supra* note 45, at 1768 (“[D]efendants did not file appearances or motions in between 70% and 80% of all cases. Default judgments were rampant.”).

78. Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html> [<https://perma.cc/M47N-AC7B>].

79. *Debt Deception*, *supra* note 13, at 12.

80. 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-law-suits-squeeze-black-neighborhoods> [<https://perma.cc/8GT7-6K3M>].

81. *Id.*; *Garnishment: The Untold Story*, ADP RSCH. INST. 12-13 (2014), <https://s3.documentcloud.org/documents/1301187/adp-garnishment-report.pdf> [<https://perma.cc/5QBU-VWDA>].

process, plaintiffs must now provide an additional notice of lawsuit to the court clerk, which the clerk will then mail to the defendant.<sup>82</sup>

### B. *When Judging Practices Make the Problems Worse*

The impacts of high-volume litigation go beyond sardine-packed courtrooms and directly influence how judges do the work of judging. Each attorney I spoke with recognized and was sympathetic to the pressure that outsized dockets put on judges. Yet interviewees repeatedly suggested that judges overwhelmingly place responsibility for the workload on defendants, not the plaintiffs bringing the suits.<sup>83</sup> When the caseloads are unmanageable, judges may be more likely to see every action by a defendant as slowing down the system, rather than question why the system is so overloaded in the first place.<sup>84</sup>

But despite acknowledging such systemic pressures, every interviewee seemed to believe that individual judging practices affected outcomes in meaningful ways, and too often for the worse. Each interviewee recounted the ways that judicial oversight could result in the enforcement of illegitimate debts, undermine consumer-defendants' rights, damage defendants' impressions of the legal system, and worsen legal-aid attorneys' ability to provide adequate representation.

#### 1. *Allowing Insufficient Pleadings on a Judge-By-Judge Basis*

Judges are often reluctant to probe the filing papers for deficiencies, even when third-party debt-buyer complaints fail to include vital information, like proof of ownership of the debt or proof of the debt itself. Most attorneys said

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82. N.Y. C.P.L.R. § 306-D (MCKINNEY 2022); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 208.6(h) (2023) (describing the required summons for a consumer-credit action); *Consumer Credit Reform Resources*, *supra* note 18 (describing the changes made by CCFR to CPLR).

83. *See, e.g.*, Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (“[There’s] this sort of attitude [holding] the defendants [responsible for] causing this unmanageable volume of cases. It’s like it’s on the defendants and not the plaintiffs who are actually filing these cases, and not having any appreciation of how these cases came to be and why they’re [here] in the first place and the role that the court is playing in this debt-collection process, where they’re just like a cog in the wheel.”); *see also id.* (“[P]laintiffs will complain about going to trial or fight going to trial or . . . having to prove their case. And then [judges] always [say], ‘Well, why, Defendant, are you making them do that?’ [But the] defendant didn’t bring the case!”).

84. *See, e.g.*, Zimmerman & Tyler, *supra* note 25, at 479 (“From the courts’ side, pro se litigants are considered a burden; the need to deal directly with litigants (rather than professionals) requires modifications in routine processes and court personnel to deviate from their traditional roles and provide additional assistance. Therefore, pro se litigants are often attacked for clogging the courts and creating judicial inefficiencies.” (footnote omitted)).

that judges seemed to operate under the assumption that the third-party debt buyer could establish ownership over the debt, even if the complaint lacked that documentation.<sup>85</sup> Attorneys reported that even when defendants challenge the third-party debt buyers' standing, judges skip to asking whether the defendant owes the underlying debt.<sup>86</sup> One attorney recalled judges asking, "Well, did you have this card that I'm sure that Midland Funding owns?" and "[D]o you owe the money?"<sup>87</sup>

But when judges focus on whether the defendant owes the debt, they undervalue serious deficiencies in the filings. The former judge argued that "More judges [should] realize that there's more to the debt than meets the eye."<sup>88</sup> He believed that despite the pressures of a large caseload, "[W]e have an obligation to try to figure out what was going on."<sup>89</sup> Indeed, debt buyers have a history of winning legally deficient and improperly obtained judgments, such as lawsuits brought despite being barred by New York's statute of limitations.<sup>90</sup> In another study, up to seventy-eight percent of debt-collection complaints "did not meet pleading and proof standards," but nearly half of the creditors "still won their cases."<sup>91</sup> As New York Chief Judge Jonathan Lippman told Human Rights Watch:

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85. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) ("I think there's an automatic assumption made by the judges that if this defendant had this account, of course the third-party debt buyer bought the account, because how could they have bought the account of an account that didn't exist in the first place? But that's an assumption they're making that they should not be making, because that's something that needs to be proven in papers and by evidence, which a lot of times, probably debt buyers don't have this evidence. So you know, [judges are] jumping to legal conclusions that they shouldn't be jumping to because of their bias."); Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) ("Their assumption is that the third-party debt buyer can establish that they own the debt.").

86. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) ("[W]ith the exception of maybe one judge, I feel like every judge is always jumping to [] asking the defendant, 'Well, do you owe the money? Do you know this card is yours?' without addressing the fact that the court may not even have personal jurisdiction to ask this question.").

87. *Id.*

88. Confidential Zoom Interview with Former Judge (May 23, 2023).

89. *Id.*

90. See, e.g., *Rubber Stamp Justice*, *supra* note 23, at 28-29 ("In January 2015, New York State settled with debt buyer Encore Capital in a lawsuit alleging that the company had illegally sued consumers over debts that were time-barred by New York law. The settlement required Encore to vacate 4,500 judgments worth roughly \$18 million . . ."). New York also settled with debt buyers Portfolio Recovery Associates and Sherman Financial Group in 2014, requiring those debt buyers to vacate 3,000 judgments. *Id.*

91. Steinberg, *supra* note 76, at 1595.

We have all been remiss in letting these large purchasers of debt rule the day in court without ensuring the basic principles of setting court judgments based on evidence are met . . . . We get cases with the wrong debtor being sued, cases with the wrong amount of debt being sued for, and cases with no proof that should warrant a judgment.<sup>92</sup>

2. *Biased Attitudes Toward Pro Se Litigants and in Favor of Debt-Collector Attorneys*

All the interviewees with whom I spoke, including the former judge, said that individual judges' attitudes toward defendants have a significant and often negative impact. The interviewees highlighted judges' attitudes toward pro-se defendants: one attorney said, "I would say the judges that are sympathetic to me are not necessarily sympathetic to unrepresented litigants at all . . . ."<sup>93</sup>

My interviews suggested that judges often proceed as if the unrepresented defendant is an informed, rational actor, who understands court procedure and knows their options.<sup>94</sup> Judges frequently speak using legal language, using terms like "motion for summary judgment," without explaining the goal of such a motion or the standard by which it is decided.<sup>95</sup> Judges may also decline to assist defendants who fail to use the correct terminology when representing themselves. One attorney said that when defendants do communicate their defenses, "some of the judges try to understand and some of them don't, they just put all the burden on [the defendant]."<sup>96</sup> As another attorney put it, "If the defendant doesn't perfectly fit the argument, many times they're penalized."<sup>97</sup>

This approach is entrenched by judges' desire to preserve the appearance of neutrality, which makes them reluctant to provide greater assistance to pro se

92. *Rubber Stamp Justice*, *supra* note 23, at 39-40.

93. Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

94. *Cf.* Carpenter et al., *supra* note 1, at 264 ("Research, including our own, supports the idea that active judging in state courts is far more widespread than legal scholars have previously acknowledged . . . . Our own research has shown that some judges routinely depart from adversary procedures when dealing with pro se litigants, while others hew to the passive norm.").

95. Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) ("I've seen judges [presiding over] a motion for summary judgment, and the defender would have to do an opposition. And the judge explains it once. But of course [for] defendants . . . it's a lot of legal jargon in there. [For example, the judge says,] 'You have to do an opposition to refute their claims because they have [] prima facie evidence.' . . . [A] defendant will be like, 'I don't really understand,' and [the] judge will be like, 'What? I explained, what do you want to do? Okay, fully submitted . . . .'").

96. Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

97. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

litigants. The high volume of pro se litigants who don't understand the legal system puts judges in a sort of Catch-22. "You can't be an advocate for the unrepresented person," explained the former judge. "On the other hand, you can't let the credit card company and the lawyer beat them up, so you have to learn how to balance that out."<sup>98</sup> Faced with the challenges of judging cases with an overwhelming number of unrepresented defendants, judges are left to figure out the difficult balancing act on their own. In a sink-or-swim legal system, many judges, afraid of appearing to be a lifeguard, opt to let the pro se defendant sink.<sup>99</sup>

But the practitioners emphasized the inaccuracy of any portrayal of pro se defendants as informed decision makers. Every single interview I conducted emphasized that defendants are at an incredible disadvantage: they lack legal counsel, they face abusive and unscrupulous plaintiffs with often poorly evidenced cases, and they lack knowledge about their rights and about the legal system as a whole.<sup>100</sup> Consumer-debt court embodies the description put forth by one scholar, where the pro se defendant "is forced to make choices at every turn without understanding either the range of options available or the pros and cons of each option."<sup>101</sup> The pro se defendant is fundamentally "deprived of the opportunity to make informed choices,"<sup>102</sup> a status quo which enables the proliferation of poorly evidenced lawsuits that often lack notice and unequal and coerced settlements. As Jessica K. Steinberg writes, "on the pro se dockets that now dominate the civil courts, a judge who is not particularly attuned to the rights of vulnerable parties may inadvertently allow powerful private actors to control the

98. Confidential Zoom Interview with Former Judge (May 23, 2023).

99. See Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 98 (2007) ("Many judges otherwise sympathetic to the plight of self-represented litigants are reluctant to deviate from their usual procedures out of concern they will compromise their impartiality or make represented litigants feel they are helping the other side."); see also Richard Zorza, Esq., *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 428 (2004) (acknowledging the ideal judicial courtroom persona as a responsive, reactive, and neutral umpire rather than an engaged, non-neutral party).

100. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) ("[J]udges won't tell the defendants that you have this legal defense . . . it's just really disappointing that defendants will think that what they're getting is the best. [Defendants] think the judge in the court is supposed to be a fair, fair, neutral, unbiased party to this whole litigation, when in fact, judges don't give two shits and they'll do what they want to do. And you know, it's just really disappointing to impose these legal standards to pro se defendants without giving them knowledge of what it is. It's really disappointing.").

101. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999).

102. *Id.*

means and objectives of the forum.”<sup>103</sup> As one attorney said, “I know that judges aren’t supposed to give legal advice to defendants—but these are pro se litigants who don’t know the legal system . . . [F]or judges to hold them to the same standard as lawyers is really egregious.”<sup>104</sup>

One clear example of this phenomenon came up over and over in interviews—interviewees described instances where judges seemed to assume the defendant owed the debt and adopted debt collection as their assigned purpose.<sup>105</sup> Steinberg theorizes that such assumptions are “likely the product of the judge’s reflexive, learned behavior over time in a courtroom where only [plaintiffs] wield the expertise and professional assistance to control the issues, facts, and evidence in each case.”<sup>106</sup>

Nearly every attorney felt that judges tended to favor debt-collection attorneys;<sup>107</sup> all had stories to go along with their sentiments. One attorney recalled taking on a client’s case, then having to fight for additional time to file a supplemental affidavit—even though the judge had just granted the debt-collector attorney an equivalent extension.<sup>108</sup> Another attorney reported that it was uncommon for judges to “hold plaintiffs to . . . the same standard . . . they tend to be . . . more lenient with them.”<sup>109</sup> As one attorney said, “[I]t’s frustrating for me because the defendants see the discrepancy in the attitudes between [the debt-collection] attorneys and like themselves.”<sup>110</sup>

I have my own stories that echo those I heard in interviews. On one day in court, the opposing counsel for the creditor plaintiff hadn’t shown up, and I requested that the judge dismiss the case. Instead, the judge called the absent, opposing law firm and implored them to send someone down to the courthouse. We waited three hours for an attorney-for-hire who the firm had found on short notice. Because all parties were then present, the judge refused to dismiss the

103. Steinberg, *supra* note 76, at 1606.

104. Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023).

105. See *supra* notes 85–86, 88 and accompanying text; *infra* note 128 and accompanying text.

106. Steinberg, *supra* note 76, at 1606.

107. See Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (“[M]ost judges that I face are almost always plaintiff-friendly.”); Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (noting judges’ habits of “bending over backwards on morsels of whatever in the plaintiff’s papers”); Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) (noting that while “[a] positive behavior is when judges hold plaintiffs to . . . the same standards,” “[i]t’s not as common, they tend to be more lenient with them”). *But see* Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (noting that they generally had not noticed a stigma against pro se defendants in their borough).

108. Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

109. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

110. Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023).

case. Later, when a pro se defendant arrived a mere ten minutes late for the calendar call, the same judge entered a default judgment against the defendant, even though both the judge and the defendant were right there. The defendant certainly didn't get the same courtesy of a call, or the benefit of a delay, that the earlier debt-collector attorney had.<sup>111</sup> Similarly, both another attorney and I had heard judges dismissively refer to defendants' affidavits as "self-serving."<sup>112</sup> But such is the fundamental nature of an affidavit, sworn under penalty of perjury. Neither of us had seen debt collectors' affidavits denigrated in that way.<sup>113</sup>

Interviewees also discussed the way that judges' desire to be perceived as "fair" falls short when the court system is already structurally stacked against defendants. One attorney offered an example that they had witnessed: a judge insisted that "it wouldn't be fair" to give a defendant time to file a supplemental affidavit if the debt collector didn't receive the same extension.<sup>114</sup> But the attorney noted that this refusal further enshrined unfairness. Unlike debt collectors, pro se defendants often don't have access to the court files when they first file their answer. By allowing the pro se defendant time to file a supplemental affidavit, with the assistance of legal aid, the judge could have addressed the initial information imbalance that put the pro se defendant at a disadvantage.<sup>115</sup>

This issue of structural unfairness can be traced back, in part, to assembly-line litigation. For instance, only one interviewee—the only attorney I interviewed who practices in the Manhattan County Civil Court—reported feeling

111. See also Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (corroborating this story).

112. *Id.*

113. In addition, some attorneys raised other types of bias that judges exhibit towards defendants, such as bias related to race or socioeconomic class. Some attorneys noted the difference in treatment of non-white defendants and belittling remarks made toward defendants' appearances or possessions. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) ("[Y]ou have defendants who are not sure of how they should be dressing or what's appropriate or not . . . I think that there's . . . a list of things that judges will take into account . . . internally . . . [I]t's like one bias on top of the other, culminating to the defendant finally appearing in front of them and [judges think] this looks like a person who would owe money anyway."); Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) ("Some judges will point out defendants' attire or belongings and [ask], 'Why can't the client settle? They have Ugg boots, they have a nice phone.'"); Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) ("And debtors generally, there's a lot of bias. But I feel like there's a particular bias . . . on people of color, mostly Black . . . than other people. And you can see it and it's frustrating . . . The systemic racism, you can just see it's palpable."); Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (noting that in virtual appearances, judges sometimes exhibit stigma against defendants who are less adept with technology).

114. Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

115. See *id.*

like the court treated both sides fairly. When asked why, her answer was simple: “I actually think it’s because the calendars are smaller.”<sup>116</sup> And my interviewees suggested that assembly-line litigation also manifests itself through the appearance of “repeat players.” The sheer volume of cases filed by the same debt-collector plaintiffs means that the plaintiffs’ attorneys are always in court and often develop a rapport with the judges.<sup>117</sup> As one expert states, “When a debt collector . . . typically a repeat player accompanied by a lawyer, puts forward a lawsuit, many judges may simply hesitate to interfere on behalf of the floundering [defendant].”<sup>118</sup>

### 3. *Failure to Acknowledge the Problem of Sewer Service*

Judges may not always be amenable to a service of process defense, despite the judiciary and legislature’s implicit acknowledgment of the problem of sewer service via CCFA. One scholar describes the process nationwide as requiring defendants to bear an “unnecessarily difficult burden of proof,” as the defendant must “prove a negative—that he was not served.”<sup>119</sup> As mentioned earlier, I’ve witnessed multiple judges disparage a defendant’s sworn affidavit that they were not served as a “self-serving statement,” despite the fact that a self-serving statement is often the only way that a defendant can swear something never happened.<sup>120</sup> A few attorneys discussed the skeptical attitude that judges take toward defendants, despite well-documented evidence of the sewer-service problem.<sup>121</sup> As one attorney said, “[T]hese issues with service of

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116. Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023).

117. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (“I feel like a lot of per diem attorneys, in general, have been in the consumer credit part for a long time . . . . [T]his one attorney in Bronx Civil Court [has] been there for . . . twelve years. So . . . of course, she has familiarity with these judges.”); Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023) (“[T]he people that the judges see every day—they’re more likely to believe them, right? . . . [I]t gives you some credibility with the judge, you’re part of that system. And so, [judges will] believe you, but someone who’s unrepresented, it’s easier for [judges] to make a decision based on their stereotype of that person.”); Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (“I do understand that there is somewhat of a latitude given to people who are known.”).

118. Steinberg, *supra* note 76, at 1603-04.

119. Gottshall, *supra* note 71, at 834 (quoting Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 854 (1972)).

120. See Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

121. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (noting that the judicial attitude towards personal-jurisdiction arguments is “extremely negative”); Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023); Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

process . . . [are] so well documented. Everyone knows that [they] exist[.]. And all these defendants are just met with skepticism.”<sup>122</sup>

#### 4. *Limited Oversight of Settlements*

In the consumer-credit context, settlement can be a one-sided tool of debt collection. Studies have found that defendants who settle with debt collectors end up worse off.<sup>123</sup> The economies of scale in assembly-line litigation reduce debt-collector incentives to avoid further litigation. Default judgments – often obtained through means like sewer service – drive defendants to enter settlements to avoid wage garnishment and other severe consequences.

But attorneys reported that judges heavily favor settlement and go so far as to open proceedings with a statement encouraging the parties to settle. “[T]he judge’s goal is really to negotiate a settlement and sort of get the case off his or her desk,” said one attorney.<sup>124</sup> Another attorney said, “[E]very time I’ve gone to court and I’m speaking on behalf of a defendant . . . the first question out of a judge’s mouth will be like, ‘Well, do you know this debt? Is it yours? Does it sound about right? Did you talk about settlement?’”<sup>125</sup> Another agreed, saying that due to the caseload, judges often start out with asking, “How can we settle this?” rather than asking defendants, “Do you think you owe this money?”<sup>126</sup> Scholar Russell Engler confirms these observations on a nationwide scale: “The typical judge will encourage and even pressure the litigant to settle,” a standard short of that provided in other contexts, such as in administrative hearings.<sup>127</sup>

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122. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023). Other attorneys agreed with this characterization, but only to an extent. “[I]t takes a while to convince [the judges] that you’re entitled to review service, that you actually have a sufficient defense,” said one. “But once you do [convince the judge], then [the defendant] is in.” Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

123. See, e.g., 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. STUDS. 1617, 1620 (2021); see also Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 98-109 (using the theory of self-agency to describe how self-represented litigants are disempowered during hallway settlement negotiations).

124. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

125. Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023).

126. Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023). See also Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023); Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (“[S]ome [judges] will just say . . . right off the bench. ‘Well, don’t you owe this debt? Didn’t you use the card?’ It’s like, well, that’s not actually the legal standard.”).

127. Engler, *supra* note 101, at 2020.

Many attorneys, in addition, saw this pressure to settle as proof of bias against defendants: a baseline assumption that defendants do, indeed, owe the money. “[I]t is obvious that [a lot of judges] do not think that the defendant can prove their case in the way that [the judges] discuss settlement,” said one legal-aid attorney. For example, that attorney recounted judges regularly saying, “If this case goes to trial, you’re gonna lose.”<sup>128</sup>

But the judicial preference for settlement seemed to have a deeper root than bias against defendants: the need to avoid adding a trial to an already-staggering caseload. One attorney was blunt: “I think the frustration comes from the fact that [judges are] going to have to do more work [if they go to trial].”<sup>129</sup> When judges are swamped, a defendant who does not or cannot settle is seen as slowing down the system’s ability to process cases, rather than asserting their rights.<sup>130</sup> Unsurprisingly, attorneys frequently referenced receiving “pushback” from judges when defendants wished to go to trial.<sup>131</sup> For example, I represented a defendant who wanted to settle his \$1,400 debt but couldn’t agree to the debt-collector attorney’s offer; the initial up-front payment would have been fifty dollars a month more than the defendant could afford. Absent settlement, the next step was trial. “Oh my God, this is a \$1,400 case,” exclaimed the judge. “You’re kidding. You’re going to make me go to trial over \$1,400.” I admired the defendant’s ability to stay resolute in the face of such pressure from the bench: if he had agreed to a payment plan that he couldn’t afford, and later defaulted, he likely would have ended up right back in court. Trial, we hoped, would give him leverage to negotiate the plaintiffs to a monthly amount that he knew he could pay.

Interviewees even recounted cases where they believed that defendants had strong defenses, but judges still pushed for settlement. In one case, the defendant had extensive evidence of severe financial abuse suffered at the hands of her domestic partner. Despite the evidence, the court urged the defendant to settle.<sup>132</sup> The judicial preference for settlement may hold even when judges are convinced that the defendant can win. Rather than discontinuing the case, one

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128. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023); *see also id.* (noting judges telling defendants that the debt-collector attorneys “will be able to prove their case at trial”).

129. *Id.*

130. *See supra* notes 85-86.

131. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) (describing “pushback” when asking for oral argument rather than settling).

132. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023) (recounting how a fellow attorney “had a case in court the other day where the client, the defendant was basically going through the extensive financial abuse that she suffered at the [ ] hands of her ex and she had a police report. She was . . . credible, factual, well-documented . . . [and had] a police report. And the thing that the court attorney says is, ‘Well, do you want to settle? How much you want to settle for?’ . . . [W]hy would she settle when she has a defense to the case?”).

attorney noted that judges urge the debt collector to make an offer of settlement that is favorable to the defendant.<sup>133</sup>

But even when settlement does take place, the high number of cases results in a lack of judicial oversight of settlement in consumer-credit court. But the disparate power dynamics between the debt-collector attorney and the defendant can undermine the fairness of such settlements.<sup>134</sup> Without representation, negotiations between debt-collector attorneys and pro se defendants often take the form of hallway conferences. I have witnessed these myself, with a debt-buyer attorney often cornering a defendant— who may not even speak English— in the courtroom hallway and urging them to settle. I have even seen debt-buyer attorneys rush to negotiate settlements with pro se defendants before the volunteer lawyers could speak to the defendant. After all, for debt-buyer attorneys, these one-sided hallway conferences are a great opportunity. As one expert puts it, “contact between debt-collecting attorneys and unrepresented defendants provides collecting attorneys with an opportunity to push defendants to settle on terms they do not understand and cannot afford.”<sup>135</sup> The potentially abusive and deceptive nature of these negotiations is exacerbated by the fact that judges are not present for these interactions.<sup>136</sup>

When it comes time for judges to approve the settlements, judges may not probe the settlement terms at all.<sup>137</sup> Some judges ask defendants if they can afford the agreement but still approve the settlement when the defendant says no.<sup>138</sup> One attorney said, “I would say that the majority [of judges] . . . do ask the questions, but they’re not going to refuse to sign off on a settlement just because of that.”<sup>139</sup>

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133. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

134. Engler, *supra* note 101, at 2018-21.

135. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 224 (2014).

136. See *Rubber Stamp Justice*, *supra* note 23, at 55-58.

137. See Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023). But see Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (“I will say, more recently, I have seen judges be like, ‘Are you able to pay this?’ Sometimes they’ll ask an additional probing question. Like, ‘Are you working?’”).

138. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (noting that they’ve never seen a judge fail to approve a settlement, even after a defendant’s answer that casts doubt on the settlement).

139. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

### C. *How Judging Practices Undermine Procedural Justice*

Taken together, these structural issues and individual judging practices undermine the legitimacy of small-credit courts. Both consumer-defendants and their legal-aid attorneys often view the “poor people’s courts” as procedurally illegitimate. As mentioned in Part I, procedural-justice theory highlights four major factors that affect people’s perceptions of fairness and legitimacy. My interviews suggested that consumer-debt courts fail on every single factor, in no small part due to judging practices in those courts.

Assembly-line litigation undermines the respect pillar of procedural justice. Existing reports have identified the “dehumanizing” effect caused by the combination of high litigation volume and under-resourced courts in New York City. A report by a Special Adviser appointed to conduct a review of racial bias in New York’s state courts criticized the “demeaning cattle-call culture” that pervades the city’s high-volume Civil Courts, including the consumer-credit courts.<sup>140</sup> Because of the massive caseload, the feeling of mistreatment begins from the moment a defendant walks into the courtroom: “In Civil Courts hearing consumer-debt cases, litigants are shuffled into ‘overstuffed’ waiting rooms to wait for hours, only to have a few short minutes before the judge.”<sup>141</sup> Judges exacerbate the negative effects of assembly-line litigation by belittling and dismissing consumer-defendants.<sup>142</sup> As one attorney said of defendants in consumer-credit court, “[A] lot of people . . . are met with a lack of compassion.”<sup>143</sup>

And because many of the litigants in these courts are people of color, the Special Adviser noted that the high volume results in “a second-class system of justice for people of color in New York State.”<sup>144</sup> The downstream consequences of high litigation volume, like poor treatment of consumer-defendants who are primarily people of color, can result in those groups having less faith in the legitimacy of the Civil Courts, and perhaps, in the legal system overall.<sup>145</sup>

Structural features of debt-collection litigation like sewer service also deprive individuals of voice by denying consumer-defendants an opportunity to be heard in court. Once consumer-defendants get into court, judges often ignore consumers’ defenses when not phrased in legal language, dismiss consumers’

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<sup>140.</sup> *Report from the Special Adviser*, *supra* note 8, at 3.

<sup>141.</sup> *Id.* at 56.

<sup>142.</sup> *See, e.g., supra* note 113.

<sup>143.</sup> Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

<sup>144.</sup> *Id.* at 3.

<sup>145.</sup> Tyler, *supra* note 30, at 350-51.

statistically likely sewer-service arguments, and rush through cases.<sup>146</sup> Together, sewer service and rushed judging deprive defendants of voice at every step of the litigation process.

Time and time again, my interviews also underscored a perceived lack of neutrality and transparency in debt-collection judging practices. Achieving neutrality, which is related to the transparency of the decision maker's reasoning, is complicated when dealing with a pro se population that has a limited understanding of the legal system. Judges are subject to a tension: their attempts to appear impartial may systematically disadvantage defendants.<sup>147</sup> For example, judges may decline to explain the debt-collection litigation process, but that process is "Greek to most people."<sup>148</sup> Besides the legal jargon, defendants face real barriers to entry that are not addressed by the civil procedure reforms of CCFR. For example, defendants are not necessarily told how to access their own case files,<sup>149</sup> are not informed of the legal standards to successfully raise affirmative defenses, and do not receive explanations of their case's procedural posture — all information that affects their options. One attorney said they commonly encounter situations where a motion is being heard for the third time, but the defendant still does not understand the motion's purpose.<sup>150</sup>

When people do not understand the basic mechanisms of the system by which they are being judged, they are unlikely to perceive the decision maker as neutral or their decision as adequately justified and explained. The opacity of the debt-collection litigation processes and judges' attempt to maintain the appearance of impartiality undermine defendants' perceptions of the court's neutrality.

Insufficient complaints also implicate the neutrality pillar of procedural justice. When a court enforces a judgment against consumer-defendants based on a complaint lacking essential information, it fails to demonstrate decision-making based on objective information. To a consumer-defendant on the receiving end of such a judgment, it may be harder to believe that the judge acted transparently and neutrally in deciding for the debt collector.

Perceptions of biased outcomes also affect neutrality. When one group feels that the court consistently favors the other side, they are less likely to view the

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146. See, e.g., *supra* text accompanying notes 94-97 (describing judges ignoring defenses not framed in legal language), 122-122 (describing sewer service), 130 (describing how judges rush through cases).

147. See *supra* Section II.B.2; see also *supra* notes 114, 126-127 (explaining this tension).

148. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

149. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023) (discussing how defendants are not told how to access their case files).

150. Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) ("If a client is there, on the third time of the motion for summary judgment . . . how did we get this far without you understanding what is being asked of you at this time?").

courts as a legitimate and fair decision maker. Legal-aid attorneys repeatedly see judges rule favorably for third-party debt collectors with deficient claims, which can reinforce legal-aid attorneys' perception of the courts' bias. Attorneys may pass their perception on to their clients, which can undermine confidence in the courts. As one attorney said, "[N]o one seems to care about the fact that these cases are being filed without the intention of proving them."<sup>151</sup> All but one of the legal-aid attorneys with whom I spoke viewed these courts as biased against defendants, as well as against the attorneys themselves.<sup>152</sup>

Nor do judges prioritize "openness and explanation," potentially key to "communicat[ing] evidence that their decision making is neutral."<sup>153</sup> Studies also suggest that perceptions of neutrality are negatively impacted when legal authorities fail to treat individuals with "dignity and respect";<sup>154</sup> my interviews reflected the way that these two important factors are intertwined.

And finally, my interviews suggested that judging practices actively undermine trust in judges. At nearly every crucial point in the debt-collection litigation process, judges act in ways that undermine any perception of trustworthiness: from the very start, judges focus on consumer-defendants' culpability, regardless of the validity of the debt; they are dismissive of legitimate concerns over whether defendants' right to notice was violated; and they fail to ensure that settlements are fair to defendants.

These observed trends of consumer-court judging practices suggest that judges do not prioritize procedural justice. When judges focus on whether defendants owe the underlying debt, fail to examine the underlying filings, fail to take seriously defendants' allegations of improper service, and push for settlement, they adopt a view of justice that prioritizes debt collectors' ability to recoup money and efficiency in clearing dockets. In other words, the way that judges adjudicate debt frequently deprioritizes process-based legitimacy, prioritizes the court as a tool for debt-collection enforcement, and focuses on the management of an overwhelming caseload to the detriment of other goals.

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151. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

152. *See id.*; Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023); Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023); Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023). *But see* Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

153. Tyler, *supra* note 30, at 298.

154. Tyler, *supra* note 30, at 341.

## II. A DIFFERENT APPROACH TO JUDGING DEBT

### A. Scholarly Proposals to Reform the Role of Judges in Debt Courts

The ongoing conversation about reforms in the debt-collection litigation process has often focused on changes to civil procedure: take, for instance, CCFA, or other suggestions like lowering interest on judgments and decreasing the dollar amount that debt collectors can garnish from defendants' wages.<sup>155</sup> But these changes do not address the problems raised by my interviews, which paint a picture of a system where fair judging is stymied – even disincentivized – by structural problems. But my interviews also raised possibilities for reform that emphasize a different approach to pro se litigants and focus on the importance of procedural legitimacy. As one legal-aid attorney pointed out, “[T]he system can only keep going forward if we just keep moving in the same way.”<sup>156</sup>

State-court judges have typically argued for reforms like “increased funding for legal services, self-help programs, and a civil right to counsel,” as well as access-to-justice commissions.<sup>157</sup> Courts have also sought solutions like hiring more court staff to offer additional assistance to litigants.<sup>158</sup>

By contrast, other scholars have pointed to judges as the mechanism for change. Russell Engler suggests that judges can and should consider greater intervention when faced with pro se consumer-defendants, especially practices that account for the involuntary nature of pro se representation.<sup>159</sup> As previously discussed, when represented, debt-buyer parties prevail ninety-four percent of the time over pro se defendants,<sup>160</sup> the current approach to judging cannot be viewed as fair or impartial. When counsel is not a right and the represented

155. See, e.g., Paul Kiel, *What Can Be Done Right Now to Fix the Legal System for Debt Collection*, PROPUBLICA (Oct. 8, 2015, 11:00 AM EDT), <https://www.propublica.org/article/what-can-be-done-to-fix-the-debt-collection-right-now> [<https://perma.cc/G6GD-JSYC>].

156. Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023).

157. Carpenter et al, *supra* note 1, at 262-63.

158. See, e.g., Task Force on Self-Represented Litigants, *Statewide Action Plan for Serving Self-Represented Litigants*, JUD. COUNCIL CAL., 5, 13, 38, <https://www.courts.ca.gov/documents/selfreplitsrept.pdf> [<https://perma.cc/7WQK-7QAF>] (emphasizing additional staff support as a component of a plan to address the needs of self-represented litigants in the courts). Similarly, although courts can hire court staff to offer additional assistance to litigants, at least one study has suggested that similar reforms do not improve case outcomes for pro se litigants. However, that study left open the possibility that pro se litigants understood the process better and felt that they had been heard, an important factor of procedural justice. See Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1822 (2018).

159. Engler, *supra* note 101, at 2028-31.

160. *Debt Deception*, *supra* note 13, at 1-2.

defendant is the exception to the rule, Engler suggests that “a litigant’s appearance without counsel must be presumed to be coerced, rather than voluntary.”<sup>161</sup>

To that end, some scholars suggest that judges and courts should consider the possibility of assisting the unrepresented litigant on understanding court procedure. Courts and judges could institute more practices that help defendants understand the legal procedures at play in the courtroom, like standard announcements at the beginning of the day to explain the role of the parties, settlements, what requests defendants can make (like adjournments) and other key points.<sup>162</sup>

Another suggestion involves courts requiring judges to act more like fact-finders. A more hands-on approach is already standard procedure in other contexts: one scholar, Jessica K. Steinberg, suggests that civil courts could adopt principles similar to that of drug courts, which view the court as addressing a “social problem” through “a strong judicial role.”<sup>163</sup> Engler similarly points to the way that small-claims judges in Massachusetts and Florida hold a more investigatory role, as do judges in certain administrative courts.<sup>164</sup> In the context of consumer-credit court, this approach could allow judges to explain to consumer-defendants the legal standards at play; to suggest types of evidence that defendants could bring and how to bring it; and to raise potential issues on behalf of defendants. Scholars, including Engler, have pointed out the importance of this standardization, because current outcomes can vary judge-to-judge.<sup>165</sup>

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161. Engler, *supra* note 101, at 2027. For a similar opinion, see Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 669-70 (1988).

162. See, e.g., Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant’s Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1112 (1987) (“[J]udicial notification of the requirements of the summary judgment rule is a necessary element of the right of access to the courts.”).

163. See Steinberg, *supra* note 76, at 1584-85.

164. See Engler, *supra* note 101, at 2017 (“In Massachusetts, for example, judges presiding over small claims cases are required to ‘conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice in the case.’ In Florida small claims cases, ‘[i]n an effort to secure substantial justice, the court shall assist any party not represented by an attorney on: (1) procedure to be followed; (2) presentation of material evidence; and (3) questions of law.’” (footnotes and citations omitted)); *id.* (“The Administrative Law Judges (‘ALJs’) have a ‘basic obligation to develop a full and fair record’ which ‘rises to a special duty when an unrepresented claimant unfamiliar with hearing procedures appeals before him.’” (quoting *Lashley v. Sec’y of Health & Hum. Servs.*, 708 F.2d 1048, 1051 (6th Cir. 1983); *Clark v. Schweiker*, 652 F.2d 399, 404 (5th Cir. Unit B July 1981))).

165. See Carpenter et al., *supra* note 1, at 264 (“Research, including our own . . . suggests [active judging] practices may vary widely across judges, even within the same court.”); see also Engler, *supra* note 101, at 2013 (citing a 1997 study that found most surveyed courts lacked general guidelines for handling pro se litigants).

Finally, judges could also apply this stronger approach to settlement. For instance, Engler suggests inquiries that get at “why [defendants] are signing the agreement and whether they think it is fair,” to discover instances of “misinformation or coercion.”<sup>166</sup>

*B. On-The-Ground Perspectives in Support of Reforming Judges’ Roles*

My interviewees supported proposals, like Engler’s, that focus on judging practices, rather than increased legal aid or hiring additional court staff. The legal-aid attorneys emphasized their own limitations, especially when faced with judges disinclined to recognize the circumstances under which pro se consumer-defendants often appear in courts.<sup>167</sup> For example, one interviewee recalled a situation where a judge refused to grant an extension to allow a defendant to file a supplemental affidavit, even though the defendant accessed free legal advice for the first time that very day.<sup>168</sup> The same interviewee pointed out that when the courts fund the legal-aid programs, those legal-aid attorneys may face unique risks when it comes to challenging judges.<sup>169</sup> Increased legal-aid assistance does not overcome judging practices that operate to keep defendants from benefitting from that aid.

And because judges often are the decision makers with whom consumer-defendants interact, judges’ practices and conduct are especially important. Hiring additional court staff would not alleviate judges’ responsibilities. While some interviewees did mention the conduct and attitudes of court staff like clerks or court attorneys,<sup>170</sup> each still suggested that judges made consequential decisions or exhibited behaviors that impacted their perceptions of the courts’ fairness and legitimacy.<sup>171</sup>

My interviews also supported a more standardized approach to judging, such as that required by the drug-court or administrative contexts mentioned by Steinberg and Engler.<sup>172</sup> Interviewees raised the lack of court-wide standards

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166. Engler, *supra* note 101, at 2029.

167. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) (noting that judges seem to have “a complete lack of understanding of how these [legal-aid] programs work”).

168. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

169. *Id.*

170. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (discussing court clerks); Confidential Zoom Interview with Legal Aid Attorney (Apr. 28, 2023) (discussing court attorneys).

171. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (June 2, 2023); Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

172. See *supra* notes 163-165 and accompanying text.

and rules as a major issue that affected defendant outcomes. Interviewees often suggested that there are differences in court procedures from borough-to-borough, or even judge-to-judge.<sup>173</sup> In one instance where the judge dismissed a case for failing to show ownership over a debt, an attorney noted, “I don’t think any other judge would have really considered the case the way [the judge we got] does. We just got lucky that it was him today.”<sup>174</sup>

My interviews validated scholarly proposals to institute practices that help pro se litigants understand the legal process. For example, according to an interviewee, at least one judge in the state has instituted a practice of giving a speech at the beginning of every court session. Eschewing legal jargon, the judge explains who the different parties are, what their roles are, lets defendants know how to access legal assistance, and explains what procedures will take place that day.<sup>175</sup> As another example, the former judge noted that he “wrote a decision on every case that came before me . . . I felt it was my obligation as a judge, especially with unrepresented people, to explain why they won and lost and try to do it in as plain English as possible.”<sup>176</sup> Similarly, in the case of a summary-judgment motion heard for the third time, one attorney suggested that the judge could at least explain the nature of the motion.<sup>177</sup>

Scholarly proposals calling for a stronger judicial fact-finding role would also be welcome: interviewees praised judges who took a closer look at the filings. As interviewees discussed, in the context of pleadings, reforms such as CCFA are insufficient when debt collectors continue to paper over deficiencies without remedying the underlying problems.<sup>178</sup> Given this background, at least one active judge demands the chain of title in court and discontinues cases when the plaintiff cannot produce proof of ownership. Rather than allow the cases to

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173. See, e.g., Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023) (comparing judges in the Bronx to judges in Queens); *id.* (“[T]here are definitely some judges who feel that there’s . . . a lack of personal responsibility . . . for example, [one judge] assumes that every single person owes the debt and strongly implies that it’s their fault.”); *id.* (noting two judges as “good ones” because they are “more familiar with the issues that are typically seen in consumer court” and “tend to have more respect for pro se defendants”); Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (noting different judges’ practices regarding explaining legal procedures); Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023) (noting “more animosity” in other boroughs compared to the one in which they practice).

174. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

175. However, the one attorney who lauded this judge noted that the pressures of the caseload are still omnipresent: the judge, the attorney noted, had to talk quickly “to speed it up.” Confidential Zoom Interview with Legal Aid Attorney (May 31, 2023).

176. Confidential Zoom Interview with Former Judge (May 23, 2023).

177. Confidential Zoom Interview with Legal Aid Attorney (June 7, 2023).

178. See, e.g., *supra* notes 64-67 and accompanying text.

continue, the judge tells the plaintiffs that they can refile once they have proof of personal jurisdiction and a legal right to the debt.<sup>179</sup> Similarly, the former judge noted that unlike other judges on the court, he reviewed the filings with a checklist of potential defects, such as whether the statute of limitations had passed. He believed such a practice was fairer to defendants and served as a check on the worst excesses of debt collectors.<sup>180</sup>

Such practices could make a difference in combatting the epidemic of sewer service. The legal-aid attorneys I interviewed noted that judges often dismissed consumer-defendants' sewer-service arguments, especially when not couched in legal language.<sup>181</sup> Yet I once saw a judge point out, on his own initiative, that the address on the affidavit of service did not match the defendant's address. If judges took on a more robust fact-finding role, they could address sewer-service arguments by taking these arguments seriously and making sure that pro se defendants understood the standards for such arguments.

And my interviews demonstrated the positive difference that judges can make when they take on a stronger role in settlement, like that proposed by Engler. One attorney reported that some judges ask probing questions, and when defendants state they cannot afford the payments, the judge will respond, "Well, then I'm not going to sign off on this because you're saying you can't afford it," or "Let's come back and discuss it again, because I'm not sure you fully understand what you're committing to."<sup>182</sup> Beyond just declining to approve unfair settlements, my interviews demonstrated that individual judges can play a valuable role in encouraging fair settlements. The former judge recalled frequently urging plaintiffs to accept payment plans for low monthly amounts that defendants could afford or threatening to dismiss the case.<sup>183</sup> Similarly, one attorney expressed appreciation for judges who encourage the plaintiff to settle for an amount to which the defendant can agree.<sup>184</sup>

### C. *Taking Procedural Justice Seriously*

This Essay's previous suggestions would improve procedural legitimacy in the consumer-credit courts. Increased explanation and assistance to pro se litigants would not just even out the playing field; it would improve the sense that

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179. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

180. Confidential Zoom Interview with Former Judge (May 23, 2023).

181. See, e.g., *supra* notes 94-97 and accompanying text (discussing legal language), 122-122 (discussing sewer service).

182. Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

183. Confidential Zoom Interview with Former Judge (May 23, 2023).

184. See Confidential Zoom Interview with Legal Aid Attorney (May 17, 2023).

justice had been served. The same is true if judges adopted increased scrutiny for filings, a more involved role in fact-finding, and heightened inquiry into settlements. Far from resulting in partiality and bias, courts that adopt these standards could have a positive impact on every single one of the four factors considered by the theory of procedural legitimacy: voice, respect, neutrality, and trustworthiness.

First, this Essay's suggestions would likely result in improving the likelihood that consumer-defendants perceive consumer-credit judges as neutral. By ensuring that pro se consumer-defendants understand the legal process, judges support transparency in the consumer courts, which helps individuals to see how judicial reasoning is unbiased. Other actions—like probing the pleadings and sewer-service allegations—would demonstrate that judges care about determining the outcomes of debt-collection litigation based on objective facts, another component of neutrality.

These suggestions would also improve the likelihood that judges are perceived by consumer-defendants as trustworthy. By probing the validity of pleading papers and sewer-service allegations, judges would show consumer-defendants that they care that debt collectors bring cases properly and respect consumers' civil rights. And by further examining settlements, judges would show that they care that consumer-defendants are subject only to settlements that they can afford.

Finally, this Essay's suggestions would also improve the likelihood that consumer-defendants feel they have been given a voice and were “treated with dignity and respect.”<sup>185</sup> Rather than treating consumer-defendants' sewer-service arguments dismissively, or assuming from the start that consumer-defendants owe the debts, these practices would assist judges in behaving in ways that allow consumer-defendants to tell “their side of the story”<sup>186</sup> and feel respected.

After all, my interviews suggested that increased procedural legitimacy would make a difference for pro se defendants' experiences of the consumer-credit court. The former judge—the same former judge who wrote out explanations for all his rulings and delved into the filings—told me the moving story of a woman who had thanked him for ensuring that her settlement was fair and affordable. As the woman told the judge: “I want to thank you. I was before you . . . I didn't know what I was going to do . . . You made them settle all those cases with me for amounts that I can pay. I now have a job. I've straightened my life out, I wouldn't have without you having done that. I don't know what I

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185. *Id.*

186. *Id.*

would have done.”<sup>187</sup> While such stories were rare to hear from my interviewees, they need not be so rare at all.

## CONCLUSION

Judges in consumer-credit court are at a crossroads. Externally, they face the enormous pressure of ever-mounting caseloads, driven by third-party debt collectors and assembly-line litigation. These caseloads have serious consequences, such as high numbers of pro se litigants, low-quality filings, deficient service, and increased likelihoods of unfair settlements. And as my interviews suggested, such external pressures encourage practices that undermine procedural justice and the legitimacy of the very courts in which they serve. And of course, even if any judge or court were to adopt all the recommendations in this Essay, they would not necessarily staunch the tap of assembly-line litigation. Addressing assembly-line litigation is necessary if the civil courts hope to truly be a forum where all parties are heard and treated equally, rather than debt collectors’ enforcement arm.

But the existence of external pressures does not relieve judges of the obligations to act in ways that give consumer-defendants voice, that treat consumer-defendants with dignity and respect, that exhibit neutrality, and demonstrate trustworthiness. As my interviews made clear, judging does matter in the consumer-credit courts, especially when viewed through the lens of procedural justice. Again and again, I heard of instances where individual judges adopted practices that left parties feeling like they had been treated fairly, regardless of the outcome. Like my interviewees suggested, better judging practices—*more just* judging practices—are possible.

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<sup>187</sup>. Confidential Zoom Interview with Former Judge (May 23, 2023).