

# ADMINIZATION: GATEKEEPING CONSUMER LITIGATION

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*Large companies and debt collectors frequently file unmeritorious claims against consumers. Recent high-profile actions brought by the Consumer Financial Protection Bureau (CFPB) against JP Morgan, Citibank, and large debt collectors illustrate the breadth and importance of this phenomenon. Due to the limited financial power of individuals, consumers often do not defend against such baseless claims, which results in the entry of millions of default judgments every year. To combat this problem, policymakers and scholars have explored a variety of solutions that would make it easier for consumers to defend in court, but these prove ineffectual.*

*To solve the problem of unmeritorious claiming, this Article proposes a budget-neutral solution called “Adminization.” This novel approach uses an administrative agency, the CFPB, as a gatekeeper to civil litigation which screens out baseless claims. The main task of the agency is to select a sample of cases, audit them, and—where needed—issue fines. The sampling of cases for audit could rely on machine-learning algorithms—the same ones used by credit card companies to monitor fraud today—to effectively focus the agency’s attention. The audit will use agency investigators to gather and corroborate information relevant to the debt claim, and where wrongdoing is found, the agency will use its powers to fine abusive plaintiffs. Under this system, every plaintiff is subject to the risk of thorough investigation and large fines, thus undercutting the financial incentive to engage in wrongful behavior. The importance of this contribution lies in its cost-effectiveness, practicality, and political feasibility relative to “participation-based” approaches that dominate the discussion today.*

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## INTRODUCTION

When Margaret Donnelly, an 85-year-old widow suffering from a congestive heart disease, woke up that morning, she did not realize she was hours away from facing a warrant for her arrest.<sup>1</sup> When she opened her door to an unexpected visitor, she discovered the county sheriff standing there, holding court documents in his hands. He explained to her that a lawsuit was filed against her for a debt of \$1,471 in the local court.<sup>2</sup> And as Ms. Donnelly failed to appear in court, the judge entered a default judgment against her, which she now had to pay from her meager income. Ms. Donnelly was never notified of the lawsuit. Even if she had, she could not afford a lawyer. But most worrying is the fact that the case had no merit whatsoever: The debt in question was paid many years ago and the lawsuit lacked any supporting evidence. In fact, this lawsuit was part of a pattern of abusive lawsuits filed by a local law firm that targeted over a 100,000 consumers, a practice facilitated by the difficulty consumers like Ms. Donnelly face in accessing the courts and challenging these abusive lawsuits.<sup>3</sup> A large body of evidence shows that Ms. Donnelly's plight is hardly unusual; like her, there are millions of others who face today in the courts "a silent, shameful crisis that inflicts suffering and costs the nation money, legitimacy, and decency."<sup>4</sup>

Open doors, they say, may tempt the saints. Every year, about 8 million debt claims are filed by large companies and debt buyers against consumers.<sup>5</sup> Of those, over 6 million lawsuits turn into default judgment, with little, if any, judicial oversight.<sup>6</sup> One in three consumers is estimated to be at risk of facing such a lawsuit.<sup>7</sup> As with Ms. Donnelly's case, many

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<sup>1</sup> *Debtors' Hell*, BOSTON GLOBE, July 30, 2006, <http://www.boston.com/news/specials/debt>.

<sup>2</sup> *Id.*

<sup>3</sup> The case is known to have lacked merit because of its unusual circumstances: Ms. Donnelly decided to represent herself in court against this lawsuit. This required her to litigate the case for over a year and travel twice to the courthouse—not an easy task for a person in her circumstances—but finally the judge was at last convinced that the case lacked merit. *Id.* The same law firm that unsuccessfully sued her, had successfully sued thousands of others "by demanding money they had no right to collect and on the basis of debts they could not prove." See Press Release, Attorney General Maura Healey, AG Healey Sues Major Debt Collection Law Firm Over Widespread Consumer Abuses (Dec. 23, 2015) (alleging that this law firm has been "[taking] advantage of thousands of Massachusetts consumers by demanding money they had no right to collect and on the basis of debts they could not prove.").

<sup>4</sup> Martha Minow, *We Must Ensure Everyone Has Access to Equal Justice*, BOSTON GLOBE (Oct. 23, 2014). Dean Minow is the vice chair of the Legal Services Corporation, an independent nonprofit established by Congress to provide financial support for civil legal aid, [www.lsc.gov](http://www.lsc.gov).

<sup>5</sup> See *infra* note 45.

<sup>6</sup> See *infra* notes 94-96 and accompanying text.

<sup>7</sup> See *infra* note 45.

of these debt claims lack merit and involve debts that are resolved, expired, inflated, and in some cases, outright fraudulent.<sup>8</sup> A recent study found, for example, that debt buyers purchase debts that are well beyond the statute of limitations, with at least 12% of the debt portfolio of large debt buyers consisting of stale debt.<sup>9</sup> In 2016, Citibank and two of its affiliates were recently ordered to pay \$11 million and forego the collection of \$34 million in consumer debt for the filing of false affidavits which misstated both the size of the debt and its date.<sup>10</sup> JP-Morgan Chase reached a \$136 million settlement for its role in selling debts that are legally uncollectable to debt buyers.<sup>11</sup> The Consumer Financial Bureau (CFPB) also took action against a large debt buyer who was ordered to pay over \$2.5 million, for its attempt to knowingly collect on “fraudulent debts, debts that consumers had paid or settled, and debts that were so old that they could no longer be legally collected.”<sup>12</sup> The regulator itself concluded that “the system for resolving disputes about consumer debts is broken.”<sup>13</sup>

To solve the problem of unmeritorious claiming, this Article proposes the “Adminization” of civil litigation. Adminization places a gatekeeper administrative agency that is tasked with autonomously investigating and screening out bad cases before they reach the court, thus offsetting its costs. This system is applied to the consumer credit contracts—the most common form of all civil litigation—although many of its features can be applied more broadly. In the context of consumer credit contracts, the CFPB would be notified of every incoming lawsuit.<sup>14</sup> Using its powers under the Dodd-

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<sup>8</sup> See *infra* section I.A.

<sup>9</sup> See FEDERAL TRADE COMMISSION, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013) (reporting that 9.2 million cases, 12.1% of the debts in portfolios purchased by six large debt buyers, involved debts that are 6 years and older).

<sup>10</sup> See *In the Matter of Citibank, Department Stores National Bank, and Citi Financial Servicing, LLC*, 2016-CFPB-0004 (2016).

<sup>11</sup> See Press Release, Consumer Financial Protection Bureau, *47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents* (July 8, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/>

<sup>12</sup> See *CFPB v. Collecto, Inc. d/b/a EOS CCA*, No 1:15-cv-14024, 2015 (D. Mass., Dec. 12, 2015)

<sup>13</sup> See FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION i (2010) (“[T]he system for resolving disputes about consumer debts is broken”) [hereinafter, FTC, BROKEN SYSTEM].

<sup>14</sup> For a chart illustrating the process, see *infra* section II.A.

A similar system exists in employment discrimination cases, where plaintiffs (employees) file their claims first with an administrative agency. See 42 U.S.C. § 2000e-5 (1988); 29 U.S.C. § 626(d) (1994) (Age Discrimination in Employment Act); 42 U.S.C. § 12117(a) (1988 & Supp. V 1993) (Americans with Disabilities Act).

Frank Act,<sup>15</sup> the CFPB will audit and investigate claims, and where wrongdoing and abuse are found, it will use its aforementioned powers to levy fines against wrongdoers.<sup>16</sup> To manage the millions of cases that are filed every year, the CFPB will only sample for audit only a small fraction of the cases, in a process similar to that of the IRS.<sup>17</sup> The sampling technique developed here uses machine learning algorithms to identify cases where wrongdoing is statistically most likely, much like the methods used by credit card companies to detect suspicious transactions in real time.

Adminization employs administrative agency as a gatekeeper to civil litigation, thus departing from traditional jurisprudential approaches. Today, policy makers, legislators, and scholars rely on an exclusive court model for the screening of bad claims. Thinking about the problem through the lens of the court model channels scholars to solutions that critically depend on the elusive goal of increasing consumer participation in the process. This is because in the adversarial system, judges can only acquire information through the parties, thus limiting their ability to screen cases when participation is lacking.<sup>18</sup> This Article criticizes participation-based solutions for being prohibitively costly on the scale needed to address this problem,<sup>19</sup> costing tens of billions of dollars every year, requiring an immense expansion of the legal system, and for creating impossible delays to all other civil matters.<sup>20</sup> To illustrate, there are 8 million cases filed every

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<sup>15</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1089, 124 Stat. 1376, Title X (2010).

<sup>16</sup> See 12 U.S.C. § 5565 (2012). On the magnitude of fines, see *infra* note 119. In its years of operation, the CFPB issued over \$5 billion in penalties. Doug Johnson, Total CFPB Penalties Top \$5B, *INSIDEARM* (Mar. 24, 2016), <https://www.insidearm.com/news/00041798-total-cfpb-penalties-top-5b/>.

<sup>17</sup> The IRS audits only 0.8 percent of all individual filings, see *infra* note 114.

<sup>18</sup> See, e.g., Attorney General Eric Holder, Remarks at the Shriver Center Awards Dinner (Oct. 14, 2010) (“Today, the current deficiencies in . . . legal services for the poor and middle class constitute not just a problem, but a crisis. And this crisis appears as difficult and intransigent as any now before us.”); White House, *The White House Forum on Increasing Access to Justice*, YOUTUBE (APR. 19, 2016), <https://www.youtube.com/watch?v=162foSVT2Uk> (A conference at the White House with leading politicians, jurists, and businesspeople, aimed to explore avenues to increasing access to justice, emphasizing the need for innovation). See also *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015) (Ginsburg, J., dissenting) (choosing the contractual interpretation that would promote access to justice); Presidential Memorandum – Establishment of the White House Legal Aid Interagency Roundtable (Sep. 24, 2015) (Ordering the establishment of a large interagency work group designed to “enhance access to justice in our communities”).

<sup>19</sup> Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 *LOY. L.A. L. REV.* 869, 869 (2009) (“despite their efforts [of legal professionals], an estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet”).

<sup>20</sup> For a discussion and critique of participation oriented solutions and their limitations, see *infra* section III.

year today with about 80% resulting in a default judgment.<sup>21</sup> Any change that would lead to the screening of even half of the cases would require state courts—which are already clogged—to handle an additional 2.4 million cases *every year*.

The recent inauguration of President Trump puts tremendous pressure on the legal aid project as a whole, with a recent report suggesting that the new administration will halt funding to the Legal Services Corp—the agency tasked with supporting legal aid.<sup>22</sup> In contrast to the traditional legal aid model, Adminization avoids the need to subsidize consumer participation or to review millions of cases, thus presenting the most politically and economically feasible solution. The use of autonomous audits avoids the dependence on consumer participation, a notoriously difficult goal. In addition, sampling techniques—used extensively by agencies but almost never by courts—allows the managing of cases on a large scale with a limited budget. Finally, the use of fines—levied on these cases where wrongdoing is found—will provide the audit process with effective teeth, deterring the filing of wrongful claims in the first place, reducing and offsetting the costs of Adminization. By using the trinity of sampling-audits-fines, Adminization will reduce the volume of cases, thus freeing up the courts to screen more closely the cases that do come before them. That the CFPB already possesses the required legal powers to use audits, sampling, and fines promises easy implementation. Indeed, there is great suspicion among the current Administration towards the CFPB, yet the cost-effectiveness of Adminization and the ability to directly control its budget (compared with legal budgets that are harder to control), promises a real bipartisan appeal.<sup>23</sup>

This Article's contribution may be understood on four levels of abstraction. First, Adminization presents a normatively attractive and politically and practically feasible solution to the pressing problem of unmeritorious claiming. Second, Adminization provides a model for reducing abusive claiming in other areas of civil litigation that suffer from systemic power asymmetries, such as housing, immigration, social benefits, elder law, and employee rights. Third, the article explores a specific promising implementation of artificial intelligence that is well within our

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<sup>21</sup> See *infra* note 45.

<sup>22</sup> Charles Toutant, *Legal Services Worried That Trump Will Take Ax to Agency*, Law.com (Jan. 25, 2017), <http://www.law.com/sites/almstaff/2017/01/25/legal-services-worried-that-trump-will-take-ax-to-agency/?slreturn=20170109141618>.

<sup>23</sup> Dave Boyer, *Consumer Financial Protection Bureau in Jeopardy under Donald Trump*, WASH. TIMES (Nov. 29, 2016).

current technological abilities. Machine learning algorithms have made significant strides over the last decade, with the latest among many unfathomable advances being the triumph of software in the intractable game of Go.<sup>24</sup> Concurrently, there is a growing strain on judicial resources,<sup>25</sup> and full civil trials are becoming nearly extinct.<sup>26</sup> These two trends suggest the need, and promise, of combining algorithmic decision-making in the legal process.<sup>27</sup> The development of ‘smart sampling’ techniques, used to allocate human attention to the cases that most need them, is an application of big-data approaches to the ‘micro’ decisions of courts that conserves resources by implementing AI algorithms. Fourth, drawing on David Engstrom’s recent Litigation Gatekeeper theory,<sup>28</sup> business and startup theory,<sup>29</sup> and institutional economics, Adminization creates a new model of regulation and demonstrates the important, yet unexplored, synergies between courts and agencies. This is in contrast to a pervasive view, prominent in the writings of Jerry Mashaw for example,<sup>30</sup> that administration and private law are substitutes, inconsistent with each other.<sup>31</sup> By looking past this illusory dichotomy, it is possible to conceive

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<sup>24</sup> On recent applications of artificial intelligence to the law, see JUDICIAL APPLICATIONS OF ARTIFICIAL INTELLIGENCE, (Giovanni Sartor & Luther Branting eds., 2013).

<sup>25</sup> See I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221 (2013) (comparing methods of distributing access to legal assistance), Matthew J. B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79 (2015) (considering a method of distributing access to hearings).

<sup>26</sup> See *infra* note 94.

<sup>27</sup> See RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS, 154 (2016) (“there is a new generation of machines in action now, and these are systems . . . that can replace parts of, and sometimes all of, certain kinds of professional work.”)

<sup>28</sup> See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (developing a theory of the functions agencies can play in husbanding litigation). Importantly, his focus is not participation problems, but how agencies can address inefficiencies in private enforcement that would tend to result in *excessive* litigation. In an important sense, his perspective is plaintiff-centric and not, as in here, defendant-centric. Despite these differences, his view of symbiotic relationships of agencies and courts in private litigation and his core typology provides a foundation for the proposal outlined here.

<sup>29</sup> See ERIC RIES, THE LEAN STARTUP (2011). Recently, various government officials have started experimenting with methods inspired by the lean startup model. See Justine Brown, *Governments Take a Lean Startup Approach*, GOVERNMENT TECHNOLOGY, Aug. 23, 2012, <http://www.govtech.com/pcio/Governments-Take-a-Lean-Startup-Approach.html>.

<sup>30</sup> See generally JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 222 (1983).

<sup>31</sup> See, e.g., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 125 (2003) (arguing, critically, that the persistence of the adversarial system is due to a tradition of suspicion towards “any alternative that smacks of hierarchically organized bureaucratic legalism or expert judgment”). Furthermore, Lon Fuller argued that the morality of adjudication itself depends on procedural passiveness and on not considering any evidence not presented by the parties themselves. LON FULLER, THE PROBLEMS OF JURISPRUDENCE, 706-07 (1949). This is inconsistent

of solutions that will better serve both our individualistic and democratic ideals of justice.<sup>32</sup>

Adminization is a new mode of regulation-litigation and the design of the system is focused on avoiding some of the main challenges. By using the existing platform of the CFPB, most legal and constitutional concerns are mitigated. While adding tasks to the CFPB may seem to increase costs, the net effect is actually positive, as it will save the costs of greatly expanding the budgets and role of the judiciary required by participation-based solutions. The concern with regulatory capture is assuaged because the system diversifies regulatory activity between the court and the agency. Diversifying our modes of regulation has the benefit of requiring lobbyists to spread their efforts, thus reducing the effectiveness of their investments. Finally, certain aspects of the system are designed to appeal to creditors, thus promising the possibility of building a large supporting coalition. Creditors, at least those with a long-term view of the market, would find value in a system that garners greater consumer confidence and legitimacy in the credit market, as those could increase both borrowing and debt repayment. Whatever difficulties may remain tend to pale in comparison to the other alternatives currently considered or the status quo.

The Article unfolds in four main parts. Part I describes the problem of abuse in consumer credit litigation. Part II lays out the Adminization framework, outlines its general principles and applies it to consumer credit litigation. Part III explains why participation-based solution in the courts are unlikely to solve the problem at hand. Part IV examines some of the main challenges to Adminization. The Article concludes by reflecting on the contribution of Adminization to civil litigation and considers some future applications. Given the broad evidence on the crisis and its magnitude, it is incumbent upon members of the legal community to step outside the comfort zone of the litigation model and demand more comprehensive reform.<sup>33</sup> Adminization offers such a solution.

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with the active role of agencies as shall be elaborated. More recently, David Engstrom noted a tendency in recent scholarship to place “exclusively administrative regulation on the one hand and unbridled private enforcement on the other.” Engstrom, *supra* note 28, at 622.

<sup>32</sup> *Id.* Other leading examples of the view that litigation is the exclusive domain for private disputes include Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078-82 (1984) (rejecting out-of-court settlement of disputes on the grounds that they fail to respect procedural rights), and ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 10 (1995) (arguing that the harms individuals suffer must be resolved within private law institutions; deviating from that would be “fundamentally at odds with the nature of the entire [private law] enterprise.”).

<sup>33</sup> See KAGAN, *supra* note 31, at 117 (“adversarial legalism often transforms the civil justice system into an engine of injustice”); *infra* Part I.



## I. ABUSE AND FRAUD IN CONSUMER CREDIT CONTRACTS

The main failure mode of the adversarial system is lack of participation. In the adversarial system, judges are highly limited in their ability to screen cases when one party—here, the consumer—systemically under-participates. At its core, the adversarial system depends on active contest between parties in front of an impartial umpire-judge.<sup>34</sup> This “sporting theory of justice,”<sup>35</sup> in the words of Dean Pound, promises that truth will emerge from the clash of self-interested advocacy,<sup>36</sup> and it depends on parties’ initiative, production of evidence, cross-examination, and filing of motions.<sup>37</sup> The judge “views the case from a peak of Olympian ignorance . . . the ignorance and unpreparedness of the judge are intended axioms of the system.”<sup>38</sup> When consumers under-participate, this naturally invites abuse and fraud by financially motivated creditors and debt buyers.

Before documenting the scope of unmeritorious claiming in consumer financial contracts, it is useful to characterize these contracts. Consumer credit contracts are these ubiquitous agreements made between consumers and businesses that allow consumers to pay in the future for services or products, including credit cards, hospital bills, and utilities.<sup>39</sup> If a consumer

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<sup>34</sup> See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) (explaining that in the adversary system it is “parties, and not the judge, [that] have the major responsibility for and control over the definition of the dispute.”); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301-02 (1988) (“The adversary system is characterized by party control of the investigation and presentation of the evidence and argument . . . .”); RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH*, 1-2 (6<sup>th</sup> ed. 2013) (“the courts provid[e] an impartial forum for the resolution of private disputes in civil cases[;] . . . the parties (both plaintiff and defendant) are expected to prepare their cases and present them at trial with a minimum of judicial interference.”). See also Jessica K Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, BYU L. REV. (Forthcoming, 2016).

<sup>35</sup> See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 735 (1906).

<sup>36</sup> See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1874 (2002) (noting that in adversarial adjudication, equal participation is “important . . . because it is thought to contribute to accurate and acceptable dispute resolution.”).

<sup>37</sup> See Edward F Sherman, *Dean Pound’s Dissatisfaction with the “Sporting Theory of Justice”*: *Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 683 (2007) (arguing that reforms over the last decades attenuated some of the “sporting” elements of civil litigation).

<sup>38</sup> Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975).

<sup>39</sup> The most common sources of consumer debt are motor vehicle loans and credit card, student, and medical debts, see, e.g., MARINA VORNOVITSKY ET AL., *HOUSEHOLD DEBT IN THE U.S.: 2000 TO 2011* (2013), [https://www.census.gov/people/wealth/files/Debt\\_Highlights\\_2011.pdf](https://www.census.gov/people/wealth/files/Debt_Highlights_2011.pdf). The average consumer owes mostly mortgage debt and then student loans, auto loans, and credit card debts, See FEDERAL RESERVE BANK OF NEW YORK, *QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT*

fails to pay (‘defaults’), creditors will often engage in some type of informal collection methods before they file a claim, consisting of dunning letters,<sup>40</sup> phone calls, and quite rarely, face-to-face collection attempts.<sup>41</sup> The main leverages used at this stage are credit reporting,<sup>42</sup> psychological pressure, and social and peer pressure.<sup>43</sup> While not all uncollected debts result in a lawsuit, many do.<sup>44</sup> In fact, most of civil litigation consists of these lawsuits, with 8 million filings a year, and every third American facing a potential lawsuit.<sup>45</sup> It is this large system of law that we now move to explore.

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(2013).

<sup>40</sup> To dun is “[t]o demand payment from (a delinquent debtor).” *Dun*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>41</sup> As early as 1968, it was observed that: “Debt-collection involves the very minimum of face-to-face contact.” P. E. Rock, *Observations on Debt Collection*, 19 BRIT. J. SOC. 176, 178 (1968).

<sup>42</sup> The cost of a bad credit score can be substantial. To give an example, a 30-year-old consumer with a car loan of \$18,000, \$5,000 credit card debt, and a \$400,000 mortgage will pay \$250,000 more in interest if she has the worst credit score relative to a consumer with the best credit score. See Kathy Kristoff, *An Easy Way to Figure the Cost of Bad Credit*, CBS NEWS, Oct. 22, 2014, <http://www.cbsnews.com/news/new-tool-calculates-the-cost-of-bad-credit/>.

<sup>43</sup> Of course, abusive debt collection practices are illegal but the large volume of complaints suggests that the methods are often used in practice. See Consumer Financial Protection Bureau, Consumer Complaint Database, <http://www.consumerfinance.gov/data-research/consumer-complaints/>. There is some mixed evidence to suggest that the stigma associated with the inability to pay one’s debt is on the decline. See David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319, 345 (2002) (finding evidence suggestive of a decline in stigma). But see Kartik Athreya, *Shame As It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK OF RICH. ECON. Q. 1, 1 (2004) (arguing that the decline in stigma is not supported by an expected rise in interest rates).

<sup>44</sup> Payday lending is an industry that specializes in low-stakes, low-duration, high-risk loans to consumers without access to more formal credit. In this industry, where consumers are frequently underfunded and the stakes are low, about 10% of the cases go to litigation. See Amanda E. Dawsey et al., *Non-Judicial Debt Collection and the Consumer’s Choice Among Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1, 4 note12 (2013). See also Hynes, *supra* note 45, at 21-24 (arguing that civil lawsuits filings have been stable despite an increase in borrowing); Robert Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 L. & SOC’Y. REV. 323, 325-26 (1984) (showing a decline in debt collection litigation in various state supreme courts).

<sup>45</sup> In 2013, about 15 million lawsuits were filed in U.S. civil courts, with 1.8 in small claim courts alone. See COURT STATISTICS PROJECT, *Small Claims Fall Sharply in Last Two Years*, <http://www.courtstatistics.org/Civil/2012W5CIVIL.aspx>. The most common claims were for consumer credit, accounting for 40-60% of the docket. APPLESEED, *DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 1* (2010); THE URBAN JUSTICE CENTER, *DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 8* (2007) (reporting that over 50% of total filings in NYC were for consumer credit transactions); Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 49 (2008) (reporting rates of at least 60% in Virginia); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 273 (2011) (finding similar rates in Texas); *Debtor’s Hell*, *supra* note 1 (finding 60%). This rate amounts, in New York City alone, to at least 300,000 lawsuits annually, DEBT WEIGHT, *supra* (reporting 320,000 cases annually in five NYC boroughs); Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New*

### A. Abuse and Procedural Violations

The general view among specialists in the field is that abuse is pervasive and many lawsuits are fraudulent.<sup>46</sup> There are several indications that suggest the scope and depth of the problem. First, consistent regulatory action finds large banks and debt buyers filing abusive lawsuits on a mass-scale, forging affidavits, and engaging in various forms of abuse.<sup>47</sup> The pursuit of stale debt (sometimes called ‘zombie debt’) is far from accidental: debt buyers often purchase debts long after they have run the statute of limitations.<sup>48</sup> These practices involves hundreds of millions of dollars in debts and compromise the financial safety of millions of consumers. This is consistent with the fact that creditors frequently lose when their cases are adjudicated is also suggestive of lack of merit.<sup>49</sup>

Further contributing to the picture is the sheer number of informal complaints about debt collection practices.<sup>50</sup> Debt claims are normally first

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*York*, 40 *FORDHAM URB. L.J.* 1147, 1148 (2013) (finding a range of 100,000 to 300,000 lawsuits by debt buyers); Michael Virtanen, *New Rules Established for NY Debt Collection Cases*, *WASH. TIMES* (Sept. 16, 2014) (estimating 160,000 annual lawsuits in NYC in 2013). For context, the total amount of consumer debt in 2015 was \$3.4 trillion, which suggests the overall economic significance of this field of law. Board of Governors of the Federal Reserve System, *Consumer Credit-G.19* (2015), <http://www.federalreserve.gov/releases/g19/current/g19.pdf>. Additionally, one in three Americans has an account in collections and one in twenty has a credit obligation that is 30 days past due, see CAROLINE RATCLIFFE ET AL., . *URBAN INST., DELINQUENT DEBT IN AMERICA* 1, 9 (2014) (using data from Transunion); FEDERAL RESERVE BANK OF NEW YORK, *QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT* (2016) (reporting 5% of debts in delinquency, accounting for \$613 billion).

<sup>46</sup> See Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,4000 Lawsuits Filed by Debt Buyers*, 26 *LOY. CONSUMER L. REV.* 179, 198-203 (2014) [hereinafter, Holland, *Junk Justice*] (reviewing the literature); Judith Fox, *Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection*, 13 *FLA. ST. U. BUS. REV.* 37, 37 (2014) (“The shoddy evidence commonly presented to Indiana courts . . . is at the very least deceptive, and is often abusive.”); Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 *S. CAL. L. REV.* 711, 741-45 (2006) (lower standards in small claims courts “offer collection lawyers a swift sword of judgment against debtors and give lawyers leeway to file cases that would not survive in general civil court.”). Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans’ Due Process Rights?*, 35 *WM. MITCHELL L. REV.* 1115, 1117 (2009) (“Forty-one percent of the total default judgments . . . were filed by debt buyers who probably could not prevail on the merits in most, if not all, of those lawsuits.”).

<sup>47</sup> See *supra* notes 10-12 and accompanying text. Another recent example includes a recent action against two law firms who turned a large volume of unverified lawsuits into default judgments. See *In the Matter of New Century Financial Services, INC*, No. 2016-CFPB-0010 (2016).

<sup>48</sup> See *supra* note 9.

<sup>49</sup> Goldberg, *supra* note 46, at 745-46 (“The typical outcome when a debtor does contest a suit filed in small-claims court demonstrates that debt-collection companies are abusing the legal system.”). However, the evidence on the win-rates of creditors is mixed. Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Courts*, 7 *HASTINGS BUS. L. REV.* 77, 91 (2009) (presenting evidence from a large research project on a few thousand cases, in both arbitration and small claims courts, showing that creditors lose in 0-46% of the cases, depending on venue).

<sup>50</sup> Fred Williams, *FIGHT BACK AGAINST UNFAIR DEBT COLLECTION PRACTICES*, 5 (2010) (“The

pursued with an informal debt collection attempt. The process of informal debt collection is reported to be rife with abuse, fraud, and unfair practices.<sup>51</sup> There were about 85,000 consumer complaints to the Consumer Financial Protection Bureau (CFPB) in 2015,<sup>52</sup> and hundreds of thousands at the FTC.<sup>53</sup> The bulk of these complaints concerns allegedly invalid or unverified debts, abusive communications, and illegal threats.<sup>54</sup> Creditors and debt collectors are reported to resort to public shaming, threats, abusive language, communications at inconvenient times, and the presentation of false information about the debt, its source, creditor's legal rights of action, and debtor's duties. Worryingly, weak demographics, such as the elderly, are reported to be targeted specifically.<sup>55</sup> This is congruent with the results of a financial survey where 37% of respondents reported being overcharged or deceived by a financial institution.<sup>56</sup>

Another evidence for the level of abuse comes, ironically, from the lack of evidence in a large fraction of all lawsuits.<sup>57</sup> One judge estimated that plaintiffs lack necessary evidence in 90% of the cases,<sup>58</sup> and another judge

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number-one complaint is that collectors are demanding money that people do not even owe.”). *But see* Letter from Donald S. Clark, Secretary, Financial Trade Commission, to Richard Cordray, Director, Consumer Financial Protection Bureau (Feb. 21, 2014) (in 2013 misrepresentation of debt is second most common to repeated calls by debt collectors).

<sup>51</sup> See Goldberg, *supra* note 46, at 713 (“corruption is running rampant in the collection industry and federal collection law is ill-equipped to stop it.”); Justin P. Nichols, *Dumping the Fair Debt Collection Practices Act*, 16 J. CONSUM. COMM. L. 26, 26 (2012) (noting the corruption in the debt collection industry); Note, *Improving Relief from Abusive Debt Collection Practices*, 127 HARV. L. REV. 1447 (2014) (arguing that millions of Americans have been subject to predatory litigation techniques).

<sup>52</sup> CONSUMER FINANCIAL PROTECTION BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU, OCTOBER 1, 2014 – MARCH 31, 2015, 26 (2015). The CFPB database lists 39,194 complaints in 2014 regarding debt collection. *Consumer Complaint Database*, CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/complaintdatabase/>.

<sup>53</sup> The FTC reports 280,998 complaints in 2014. Press Release, Fed. Trade Comm'n, Tax ID Theft Tops FTC Complaints in 2014 (Feb. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/identity-theft-tops-ftcs-consumer-complaint-categories-again-2014> [hereinafter Press Release, FTC]. There have been some doubts raised as to the accuracy of the FTC reports, because they are unverified and may include multiple complaints made by the same debtor. Michael Klozotsky, *The Facts Behind the Fantasies About Debt Collection Complaints*, FORBES (June 22, 2012), <http://www.forbes.com/sites/insidearm/2012/06/22/the-facts-behind-the-fantasies-about-debt-collection-complaints/print/>.

<sup>54</sup> See Press Release, FTC, *supra* note 53.

<sup>55</sup> See Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 152-56 (2008) (detailing the targeted abuse of the elderly). See also Goldberg, *supra* note 46, at 736-739.

<sup>56</sup> CENTER FOR RESPONSIBLE LENDING, TELEPHONE SURVEY OF CONSUMER ATTITUDES 27 (2013).

<sup>57</sup> The lack of evidence is part of a broad industry practice of not producing evidence to support debts, see Duffy, *supra* note 45, at 1162 (“Portfolios often lack essential collection information”).

<sup>58</sup> See Holland, *Junk Justice*, *supra* note 46, at 179. This should not be read as saying that 90% of cases are fraudulent, only that creditors do not find it cost-effective to produce evidence in light of the

mused that many claims “lack a nano of a modicum of a scintilla of a *prima facie* case so as to be entitled to a judgment whether it be by default or otherwise.”<sup>59</sup> An empirical study found no evidence at all in 46% of cases,<sup>60</sup> and a recent study showed that many debt buyers do not bother to acquire evidence.<sup>61</sup> When evidence is produced, its quality tends to be very poor. One study found a breakdown of the claimed debt to its principal, interest, and other charges, in only 5% of the cases. Information regarding payment history and the date of default were likewise missing.<sup>62</sup> Moreover, much, arguably most, of the evidence that is brought, is “facially invalid”, as a study of 600 cases found.<sup>63</sup> This is congruent with the (potentially illegal) practice of “robo-signing,” namely the automated signing of mass volume of documents without actual review, which many view as a major concern.<sup>64</sup> Of course, absence of evidence is not evidence of absence.<sup>65</sup> After all, evidence is costly to produce and so it may not pay to produce it if cases are not scrutinized.<sup>66</sup> Nonetheless, the lack of evidence is more consistent

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low rates of defendant’s appearance.

<sup>59</sup> See *American Express Bank, FSB v. Dalbis*, (2011) NY Slip Op. 50366 - NY: City Court, Civil Court 2011 (internal quotes removed).

<sup>60</sup> Fox, *supra* note 46, at 45-46 (2014). Fox further notes that in the remaining cases, evidence was sometimes completely fabricated, *id.* at 46.

<sup>61</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, A STUDY OF THIRD-PARTY DEBT COLLECTION OPERATION 23 (2016) (finding in a survey of debt buyers that evidence beyond that required to identify the debtor is often not acquired). See also Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 260 (2011) [hereinafter, Holland, *Billion Dollar Problem*] (discussing the lack of evidence); RACHEL TERP & LAUREN BOWNE, PAST DUE : WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW (2011) (same).

<sup>62</sup> Spector, *supra* note 45, at 291. Even attorney fees were explicitly itemized in only 30% of the cases.

<sup>63</sup> DEBT WEIGHT, *supra* note 45, at 9 (reporting that in “99% of the cases where default judgments were entered, the materials underlying those applications constituted inadmissible hearsay.”) The main fault in most cases was affidavits signed by people with no personal knowledge of the underlying debt.

<sup>64</sup> See ROBERT J. HOBBS ET AL., NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION § 5.5.2.13.4 (7th ed. 2011 and 2013 Supp.) (Noting that courts are split on whether robo-signing violates the FDCPA); Matthew J. Petrozziello, *Who Can Enforce? The Murky World of Robo-Signed Mortgages*, 67 RUTGERS U. L. REV. 1061, 1082 (2015) (finding limited judicial acceptance of robo-signing as a serious violation of FDCPA). See also press release, *supra* note 11 (reporting on banks allegedly involved in Robo-signing) and Note, *Improving Relief*, *supra* note 51, at 1450 (“Robosigning represents a particularly significant threat to consumers.”).

<sup>65</sup> Indeed, lack of evidence may be *suggestive* of lack of merit and is obviously consistent with it. For similar reasoning, see, e.g., DEBT WEIGHT, *supra* note 45, at 7 (“[T]he debt buyers’ consistent failure to provide relevant evidence in support of their claims suggests that they do not possess such evidence.”). But this conclusion is too strong; evidence is costly to produce and if most consumers do not contest cases, it is not worthwhile to produce it, even for cases with merit.

<sup>66</sup> From an economic standpoint, evidence is only valuable instrumentally as measured by its ability to influence outcomes. Because evidence is costly to produce, when we require evidence from

with lack of merit than the existence of merit, it facilitates the filing of non-merit lawsuits, and is in violation of the rules of civil procedure.

Finally, there is strong evidence of abuse in the process of notifying consumers of lawsuits. A major component of civil due process is notice, which in this context entails service of the court summons on the defendant by the plaintiff.<sup>67</sup> However, this duty to serve gives rise to a structural problem of a moral hazard, as the plaintiff stands to gain from the defendant's failure to appear which could result in a default judgment in the plaintiff's favor. In consumer credit litigation, this moral hazard results in a widespread concern with "sewer service": figuratively dumping the summons in the sewer while signing an affidavit that alleges actual service. The exact scope of the sewer service is hard to measure,<sup>68</sup> but the evidence points at a broad problem. For example, the NY Bar estimates that each year the problem affects "tens of thousands" of New-Yorkers,<sup>69</sup> and a NY judge said that in his view, an "astonishing" amount of default judgments are the result of faulty service.<sup>70</sup> Indeed, a recent class action alleging sewer service in New York recently settled for \$59 million dollars.<sup>71</sup> More systematic studies found similar indications. In one study of 350 consumers, none was properly served.<sup>72</sup> Another found service in only 12% of the cases,<sup>73</sup> and a larger one found that faulty service was a cause for dismissal in 24% of the cases studied.<sup>74</sup> This problem is hardly new; a report from 1968 made by the U.S. Attorney's Office claims that at least half of all

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the parties, we face a trade-off between greater accuracy and greater costs. See Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?* 67 STAN. L. REV. 1303 (2015) (arguing that overall consequences of the judicial decisions, not the pursuit of truth, should be the primary goal of the legal system).

<sup>67</sup> FED. R. CIV. P. 4 ("The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service."). Notice is an essential part of due process. See Administrative Procedure Act, 5 U.S.C. § 554, §§ 556-557 (1946), *Goldberg v. Kelly*, 397 U.S. 254, 266-70 (1970).

<sup>68</sup> There is some difficulty in acquiring reliable information on this phenomenon, as consumers may have an incentive to exaggerate claims of service failures. Spector, *supra* note 45, at 287 ("Little information regarding non-service exists.").

<sup>69</sup> NEW YORK CITY BAR ASSOCIATION, A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY, 2 (2010).

<sup>70</sup> APPLESEED, *supra* note 45, at 12.

<sup>71</sup> Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES, Nov. 13, 2015. The relevant class action is *Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70 (2d Cir. 2015).

<sup>72</sup> See MFY LEGAL SERVS., INC, JUSTICE DISSERVED, 2 (2008). Another study found that four out of fifteen surveyed consumers were not served. Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 370 (1990).

<sup>73</sup> Spector, *supra* note 45, at 287 (studying a sample of 507 cases).

<sup>74</sup> Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,4000 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 210 (2014).

default judgments entered in New York City Court were supported by false affidavits of service.<sup>75</sup> Even when service takes place, it is poorly done. One study finds in a sample of 91 cases that almost no summonses were served in person. Instead, the vast majority of summons were served either by “nail and mail” (i.e., affixing the summons to the defendant’s door) or by delivery to a different individual in the household.<sup>76</sup> These methods were designed as last resort but apparently some servers practice them frequently. This study showed that while two law firms did not serve any debtor in person, another – which presumably tried harder – successfully served 18% of its sample cases personally.<sup>77</sup> Even when service is effective, the content of the summons often fails to meet all the requirements set out by law.<sup>78</sup>

### B. Justice, Inaccessible

Consumers often find the courts inaccessible, resulting in low levels of response to claims, appearance in court, and legal representation. Written response to claims made against consumers are given in only 5-23% of the cases,<sup>79</sup> compared with 72% in tort cases.<sup>80</sup> Similarly, consumers appear in only 6.7%-20% of the cases.<sup>81</sup> Representation rates stand at a much lower rate of only 2-8.7% overall (but 43% of cases where the defendant chose to

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<sup>75</sup> Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 849 (1972).

<sup>76</sup> MFY, JUSTICE DISSERVED, *supra* note 72, at 5.

<sup>77</sup> *Id.*, at 5. The study also indicates that creditors vary considerably in their service method, whether in person or by “nail and mail”.

<sup>78</sup> See Duffy, *supra* note 45, at 1172.

<sup>79</sup> The defendant normally has three weeks to file an answer. See FED. R. CIV. P. 12 (21 days) and Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 757 (2002) (noting a common 20-day period). This is viewed as an important right, see Nelson v. Adams USA, Inc., 529 U.S. 460, 461 (2000) (“[The] opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings secured under Rule 12(a)(1).”). On answer rates, see APPLESEED, *supra* note 45, at 2 (2010) (0.8-7.2%); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUM. L. REV. 355, at 377 (2011) (8-20%); Holland, *Junk Justice*, *supra* note 46, at 186 (less than 20%); Spector, *supra* note 45, at 288 (23%). In arbitration, consumers answer in roughly 70% of the cases, see STEVEN SMITH ET AL., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS, 1992 (1995).

<sup>80</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES I (1995)

<sup>81</sup> See Holland, *Junk Justice*, *supra* note 46, at 186. SUSAN SHIN & CLAUDIA WILNER, NEW ECONOMY PROJECT, THE DEBT COLLECTION RACKET: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 14 (Sarah Ludwig & Josh Zinner eds. 2013) (18% of consumers sued in New York appeared in court and only 7% of people sued outside of the city of New York). See also Sterling & Schrag, *supra* note 72, at 361 (22% participation rate). But see Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 HAST. L.J. 1427 (2016) (finding in Texas courts appearance in 52% of the cases).

appear).<sup>82</sup> For a sense of magnitude, there have 1.8 million pro-se litigants in 2014 in the state of New York alone.<sup>83</sup> Lack of defendant representation leads to adverse outcomes beyond the inability to litigate the case. Pro-se debtors are often taken advantage of by creditors that are almost always represented.<sup>84</sup> For example, Jeff Cook, an unemployed plumber, signed off \$651 out of his (legally protected and uncollectable) unemployment benefits due to ignorance of his legal rights and under pressure by the creditor.<sup>85</sup> Moreover, pro-se debtors also impose costs on the system, as the court has to deal with motions and requests which often deviate from the standards of filings common among lawyers.<sup>86</sup>

There are several complementary explanations for participation gaps: consumers' lack of resources, sophistication, and legal knowledge,<sup>87</sup> problems with service,<sup>88</sup> psychological barriers and biases,<sup>89</sup> power asymmetries, and the merit many of the cases have. Perhaps the one that runs the deepest is that consumer apathy to the legal process is often *rational*. That is, the costs of participation in those cases often exceed its

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<sup>82</sup> Spector, *supra* note 45, at 289 (2-8.7%); Holland, *Junk Justice*, *supra* note 46, at 187 (less than 2%); DEBT WEIGHT, *supra* note 45, at 16 (two out of 600 cases).

<sup>83</sup> PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 24 (2015).

<sup>84</sup> See Duffy, *supra* note 45, at 1175 (noting that in New York courts “100% of debt collector plaintiffs are represented by counsel”) and DEBT WEIGHT, *supra* note 45, at 16 (“100% of plaintiffs initiating consumer credit transaction cases reviewed in our study were represented by counsel.”). On abuse in settlements, see APPLESEED, *supra* note 45, at 18 (observing that “plaintiffs’ counsel may pressure unrepresented defendants into unfavorable settlements.”); Jessica Silver-Greenberg, *In Debt Collecting, Location Matters*, WALL ST. J., July 18, 2011, at A10 (citing Judge A. Douglas Stephens) (describing a debtor having an unsupervised meeting with the creditor attorney leading to the debtor letting the creditor tap into his unemployment benefits). See also Fiss, *supra* note 32, at 1078-82 (1984) (criticizing settlements in civil trials generally, partly on the ground of imbalance of powers between the parties).

<sup>85</sup> See Silver-Greenberg, *supra* note 84.

<sup>86</sup> See PROBATE AND FAMILY COURT DEPARTMENT, PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE 12-17 (1997) (discussing problems with *pro se* litigants).

<sup>87</sup> See KAGAN, *supra* note 31, at 122-24 (analyzing asymmetries in knowledge, wealth, and sophistication); David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305 (2014) (analyzing stake asymmetry and its distortive effects); Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 711 (2008) (arguing that the current adversarial system exacerbates power imbalances between represented creditors and unrepresented debtors). See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (arguing that litigation gives a systematic advantage to sophisticated players).

<sup>88</sup> See *supra* notes 67-76 and accompanying text.

<sup>89</sup> Sterling and Schrag tell of a case where a default judgment was entered despite the debtor being present in court: when her name was called, the debtor got too nervous and preferred to stay quiet, see Sterling & Schrag, *supra* note 72, at 369. One dominant psychological bias which may be of relevance here is the tendency to overly discount future outcomes. See David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997).



the benefits. To illustrate, taking a day off work to appear in court would cost the median American \$136; but of course, the employer may not be very willing to let the employee take a day off in the middle of the week. Besides this cost, one would have to pay for travel and representation. The costs of representation can be very substantial, with the average cost of a consumer law attorney at \$361.<sup>90</sup> Assuming a cheaper lawyer, costing only \$200, and expecting that most cases can be handled within 4-8 hours, then we can expect a total cost of \$800-\$1,600 for an average case. Of course, actual costs may be higher or lower, but on average, it should provide a rough estimate. On the side of benefits, those are quite small. The typical value of the case is relatively low – \$3,000 in civil courts and only \$820 in a small claim court.<sup>91</sup> But appearing in court does not guarantee winning the case; it only increases the probability of winning. If participation with a lawyer increases the odds by as much as 50% percentage points, this would imply an expected benefit of about \$400-\$1,500, which is very likely to exceed the cost. Importantly, the costs have to be paid upfront, which given the low liquidity and risk aversion of most consumers, this further limits the appeal of participation. Overall, these broad set of reasons suggests that the underlying causes of under-participation are complex, imperfectly correlated, and relate to deeper social facts.

### C. *Lack of Judicial Oversight*

In the current system, the main safeguard against the filing of abusive claims is the court.<sup>92</sup> In fact, judges rarely provide meaningful oversight, and even judges are increasingly disillusioned with the rationality of trying cases.<sup>93</sup> Trials are on the verge of extinction, with full trials taking place in

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<sup>90</sup> RONALD L. BURDGE, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2013-2014 (2015), 11, <https://www.nclc.org/images/pdf/litigation/fee-survey-report-2013-2014.pdf>. The typical fee charged by an attorney “can range from \$500 to negotiate a simple credit card debt to more than \$5,000 for more complex negotiations.” <http://www.nolo.com/legal-encyclopedia/how-much-will-lawyer-charge-negotiate-with-my-creditors.html>

<sup>91</sup> See Holland, *Junk Justice*, *supra* note 46, at 206 (\$3,000); Suzanne E. Elwell, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 510 (1990) (\$820 in small claims, CPI adjusted). The average value of debts in collection is \$1,310, Federal Reserve Bank of New York, Microeconomic Data, [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD\\_C\\_Report\\_2016Q2.xlsx](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD_C_Report_2016Q2.xlsx).

<sup>92</sup> Robert Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015-16 (2010) (considering the role of accuracy and procedural participation rights under various theories of procedure).

<sup>93</sup> One judge noted: “If someone owes a debt, which they generally do, how much more advantageous is it for a defendant to get in front of a judge?” Silver-Greenberg, *supra* note 84. To be clear, I do not argue that evidence should be produced in every case, rather I argue that the current system violates its own standards and that the choice of cases for hearings does not follow any systemic

0-2% of the cases.<sup>94</sup> Rates of default judgment vary considerably, but in some contexts, reach 95% of all cases, with most remaining cases being dismissed (commonly without prejudice), transferred, or settled.<sup>95</sup> To provide a sense of the magnitude of the phenomenon, a typical rate of default judgments is 80%, which implies that of the 8 million filings, about 6.4 million of the judgments entered every year in consumer credit contracts are default judgments.<sup>96</sup> Only a minority of cases are heard, and it is unclear whether those are the most deserving ones or simply ones where the consumer had sufficient resources, grit, or conviction to appear. Even in those cases, systemic under-participation severely limits oversight.

Three factors contribute to limited oversight: first, the adversarial nature of the process limits judges' investigative authority and exacerbates problems of consumer inexperience, rational apathy, and psychological barriers.<sup>97</sup> Second, creditors are repeat-players and can more effectively scale their experience and engage in forum-shopping.<sup>98</sup> Third, small claims courts, where much of consumer credit litigation is handled, relax traditional procedural safeguards, such as the prohibition of hearsay, while allowing the plaintiff legal representation.<sup>99</sup> Additionally, the overload of

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logic.

<sup>94</sup> On the “vanishing trial” phenomenon in civil litigation generally see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). See also John H. Langbein, *The Disappearance of Civil Trials in the United States*, 122 YALE L.J. 1 (2012) (noting the trend and claiming pre-trial procedure has made trials obsolete). Since the publication of Galanter's work, the rate of civil trials has declined from 0.6% in state courts to around 0.27%. See *Court Statistics Project Data Viewer*, COURT STATISTICS PROJECT, [www.courtstatistics.org](http://www.courtstatistics.org). In the consumer credit context, see LEGAL AID SOCIETY ET AL., *DEBT DECEPTION* 8 (2010) [hereinafter *DEBT DECEPTION*] (0 cases in a sample of 336 cases in NY courts); Holland, *Junk Justice*, *supra* note 46, at 213 (21/2947 cases); Spector, *supra* note 45, at 297 (1/446 cases); SHIN & WILNER, *supra* note 81 (0/200,000 cases); Fox, *supra* note 46, at 44 (0/1000 cases); taken together, this amounts to 22/204,729 cases where a trial was conducted.

<sup>95</sup> See FTC, *BROKEN SYSTEM*, *supra* note 13, at 7 (60-95%); *DEBT WEIGHT*, *supra* note 45, at 9 (80%). Spector & Baddour, *supra* note 81, at 1449 (31.6% in Texas).

<sup>96</sup> See *supra* note 45.

<sup>97</sup> See Haneman, *supra* note 87, at 720-21 (exploring how the adversarial system harms unrepresented consumers). See also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (tracing the origins of the adversarial procedure in American law).

<sup>98</sup> See, e.g., Glover, *supra* note 46, at 1125 (“In Hennepin County, 76% of the total filings were by original creditors or debt buyers who filed twenty-five or more lawsuits as of August 2008”). On repeat players, see Galanter, *supra* note 87, at 97-104 (repeat players enjoy advantages in litigation and have systematic advantage over one-shotters); Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 942-43 (1976) (explaining that, even in small claims courts, unsophisticated debtors face a disadvantage). But see Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685 (2005) (proposing consolidation of defendants to increase the incentive to defend them).

<sup>99</sup> See Holland, *Billion Dollar Problem*, *supra* note 61, at 263. In most states, plaintiffs may be

small claims courts' dockets makes it difficult for judges to spend sufficient time scrutinizing cases.<sup>100</sup> All of these structural biases make it very difficult for the consumer to participate on an equal footing with the plaintiff and contribute to a low level of judicial scrutiny.

On the outskirts of the judicial process are private settlements in the courthouse. Troublingly, these often produce *worse* results for consumers than they could expect under the law.<sup>101</sup> Even more alarming is the fact that attorneys often play an active role in such settlements, misinforming debtors of their rights and applying pressure.<sup>102</sup> Judges rarely scrutinize the resulting agreements and often rubberstamp them.<sup>103</sup>

Overall, the system of handling consumer debt is an incubator of abuse. Consumers are largely apathetic to the process and do not respond to lawsuits or show up to hearings. Creditors routinely bring abusive lawsuits that are neither verified nor supported by evidence, and judges do not try cases or provide judicial oversight of cases. The few cases that do receive treatment are haphazardly chosen with no rationale or logic. This provides companies and debt collectors with incentive to inflate their claims and bring bogus charges, and the evidence we have suggests that this happens on a large scale, even though we cannot adequately quantify it. The system affects millions of consumers and yet is deeply and inexcusably flawed. As the FTC recognized: "neither litigation nor arbitration currently provides adequate protection for consumers."<sup>104</sup>

## II. ADMINIZATION

As we have just seen, the courts have turned into default judgment mills, exerting no oversight over filings, which invites abuse and fraud. Adminization is a gatekeeping model of civil litigation that addresses these issues. Section A lays out the main principles of this system, Section B

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represented by a lawyer even in a small claim court, and while defendants may also be represented, this is infrequent. *See* DEPARTMENT OF JUSTICE, SMALL CLAIMS COURT REFORM, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, 6 (1983) (noting the power asymmetry between plaintiffs and pro-se defendants in small claims courts).

<sup>100</sup> *See* Suein Hwang, *Once-Ignored Consumer Debts Are Focus of Booming Industry*, WALL ST. J. (Oct. 25, 2004), at A1.

<sup>101</sup> *See supra* note 84.

<sup>102</sup> *See* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997) (reviewing attorney's role in improper negotiations with poor debtors).

<sup>103</sup> Russell Engler, *And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2019-20 (1999).

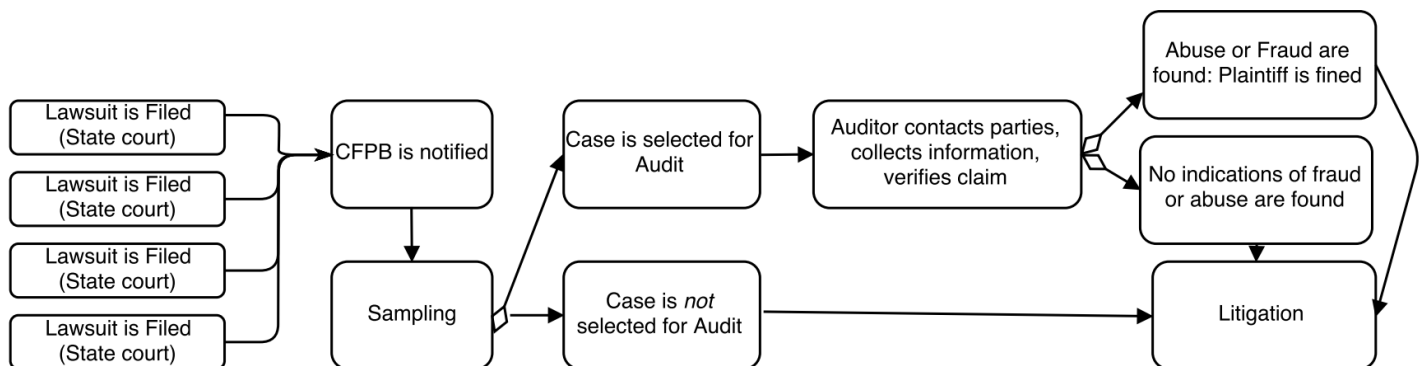
<sup>104</sup> Holland, *Junk Justice*, *supra* note 46.

explores its main features, and Section C applies it to consumer credit litigation.

### A. *Principles of Adminization*

Parallel to civil litigation, we have an administrative system that does not depend on participation for the provision of oversight. When the police, the IRS, the SEC, or the USDA—to give but a few examples—engage in their regulatory activities, they do so on their own initiative.<sup>105</sup> They do not wait for the regulated entities to “participate”; rather, they independently seek and gather relevant information. These agencies do not even need a complaint to start their process; it is the agency that chooses when to intervene. Because administrative agencies do not depend on participation for oversight, they offer great promise for a system that suffers from an oversight vacuum. The core idea underlying Adminization is the addition of a preliminary stage to civil litigation, a gatekeeping agency that screens out some of the cases. This agency uses its administrative powers, most notably—sampling, audit, and fines—to investigate cases and remove those without merit, while using sanctions against those who file abusive lawsuits. This system offers a baseline level of consumer protection that is *independent* of consumer participation.

#### The Adminization Workflow



The idea of Adminization challenges the traditional view that there is

<sup>105</sup> See, e.g., *How Criminal Investigations Are Initiated*, INTERNAL REVENUE SERVICES, <https://www.irs.gov/uac/how-criminal-investigations-are-initiated> (explaining the process for initiating criminal investigations).

tension between agency administration and civil litigation. In its strictest form, this view sees antagonism between the “individualized justice” of litigation and the more expedient but less equitable “bureaucratic management” of administration.<sup>106</sup> More generally, this view posits litigation and administration as multi-dimensional polar opposites, each on the other side of *ex-ante* vs. *ex-post* regulation, proactive vs. reactive, use of rules vs. standards, employment of specialized vs. generalist judgment, public vs. private enforcement, and government vs. individual disputes.<sup>107</sup> However, as Engstrom’s recent administrative litigation gatekeeper theory highlights, agencies and courts can co-exist productively even in private litigation.<sup>108</sup> Indeed, not all of the idea of Adminization is new; we currently have certain hybrid institutions that combine agency and court functions, such as administrative adjudication—workers’ compensation, social security, and asbestos claim tribunals<sup>109</sup>—and specialized courts—the drug,

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<sup>106</sup> See JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 222 (1983). See also JERRY MASHAW ET AL., ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 310 (6th ed. 2009).

<sup>107</sup> Richard A. Posner, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, in REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11, 13 (Daniel P. Kessler ed., 2010). See also Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 275-76 (2013) (“Under regulation, compliance with standards tends to be assessed before, or independently of, the occurrence of harm . . . Under the negligence rule, in contrast, compliance with standards is examined only on the condition that harm transpires”).

Administrative law scholars do not generally focus on adjudicative processes. Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 5 (2015) (“[A]djudication is not the glamor area of contemporary administrative law . . . Adjudication is administrative law at the retail rather than the wholesale level.”). When they do, they mostly focus on individuals protecting themselves from the wrongdoings of government agencies, legitimacy, judicial independence from agency heads, separation of powers, and Congressional ability to implement policies. While Adminization touches on these issues, its focus is on the optimal design of institutions that promote due process, efficiency, and justice.

<sup>108</sup> David Engstrom, *supra* note 28, at 622 (“A systematic accounting of agency gatekeeping helps us to see [the choice between private enforcement and regulation] not as either/or options, but rather the outer poles of a rich continuum of institutional designs that tap agencies’ unique position and capacity to engage with and rationalize private litigation efforts.”). Notably, Engstrom is largely critical of “retail” (i.e., case-by-case) administrative processes. Additionally, he generally abstracts from participation problems and grounds most of the critique on the assumption that the adversarial process itself is functional. *Id.* at 667, 685.

<sup>109</sup> Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891 (1992) (arguing that the processing of asbestos claims should be rendered by an administrative agency rather than the tort system). JOSEPH W. LITTLE ET AL., WORKERS’ COMPENSATION: CASES AND MATERIALS 544-45 (6th ed. 2010) (describing some of the benefits of adminization of workers’ claims). There are also calls now to create administrative health courts. See Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631 (2015). In the context of tort law, some proposed a move to a no-fault system. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985).

mental health, and domestic violence courts. But on closer inspection, even these institutions mostly treat litigation and administration as substitutes, trading off certain due process rights for greater efficiency and subject matter expertise. They do not act synergistically in the way proposed by Adminization and therefore are incomplete examples of the potential of agency-court litigation. Nevertheless, despite the differences, these examples are important, as they assuage potential constitutional concerns with Adminization.<sup>110</sup>

### B. *Main Features of Adminization*

Adminization involves three central features—Audits & fines, sampling, and 3<sup>rd</sup>-party communications, which are currently explored.

#### 1. *Audits and Fines*

To overcome the participation gap in civil litigation, the core feature of Adminization is based on agency-run audits and fines. The agency takes claims and, by its own initiative, investigates the case, collects evidence, interview witnesses, and gathers documents and relevant industry information. To this end, the agency may depend on its own databases, but will often also require information from all involved parties—the debt buyer, the original creditor, the consumer, etc. The agency then reviews and evaluates the information. It seeks to verify the existence of sufficient factual basis to support the claim, to ascertain that there is sufficient evidence, and to investigate potential fraud and abuse.

While the parties will naturally have more immediate access to information pertaining to their own affairs, the agency nonetheless wields considerable power in this regard. As a government-run agency, the agency is able to access information that may not be available to other parties, such as agency records—a treasure trove of information on past behavior and industry practices. Moreover, through its investigatory powers, the agency can access information that is in the hands of the parties. Especially for the weaker party, it is a whole different experience to produce evidence for trial and to respond to a question asked by the agent if, for example, they recall making the alleged purchase and if they have a receipt. Overall, putting the

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Finally, consumer arbitration may suggest yet another solution, an issue addressed separately *infra* section III.D.

<sup>110</sup> See, e.g., Arthur L. Shipe, *Private Litigation before the Commodity Futures Trading Commission*, 33 ADMIN. L. REV. 153 (1981) (considering the constitutionality and desirability of administrative adjudication of private rights in ‘complex cases’ such as futures trading). On the constitutional challenges, see *infra* section IV..

agency at the front of the process, in charge of initiating actions and using its expertise to gather and analyze information, relieves critical pressure from the consumer.

One close analogy is the Equal Employment Opportunity Commission (EEOC). When employees file charges of discrimination in the workplace, the agency is empowered to conduct investigations on behalf of the employee.<sup>111</sup> These cases too involve private information but the agency, through its broad powers of investigation which include subpoenas, is able to acquire considerable information. The Agency handles every year close to 100,000 charges.<sup>112</sup> And while the EEOC audits cases on behalf of plaintiffs and not defendants, it shares the objective of increasing participation.<sup>113</sup> Similarly, the IRS conducts about 1.2 million audits annually,<sup>114</sup> the Department of Justice often takes over private *qui tam* lawsuits under the False Claims Act using its own investigatory powers,<sup>115</sup> and the CFPB has extensive experience in investigation consumer complaints.<sup>116</sup>

A complementary feature of audits is fines. Under Adminization, fines will be used in cases that fail the audit process. The goal is not to conduct a “mini-trial”, but rather inspect the case for plausibility and signs of abuse or fraud – the use of false evidence, the processing of unverified debts, or the claiming of non-existent charges, to give but a few examples.<sup>117</sup>

Where a case is found to involve abuse or fraud, the agency will issue

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<sup>111</sup> 42 U.S.C. § 2000e-8(a) (2012). *See also* EEOC v. Shell Oil Co., 466 U.S. 5441 (1984) (discussing the limits of the EEOC’s investigative powers).

<sup>112</sup> *See* Press Release, EEOC, EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data, (Nov. 2, 2016) (reporting 92,000 claims in 2015).

<sup>113</sup> *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996) (analyzing critically whether the EEOC mitigates participation problems).

<sup>114</sup> Internal Revenue Services, Data Book 2015, 9 (2015) (reporting about 147 million individual income tax returns and audit of 0.8 percent of those)

<sup>115</sup> *See generally* Marc S. Raspant & David M. Laigaie, *Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 38-40 (1998) (describing the government’s role in *qui tam* actions under the False Claims Act).

<sup>116</sup> The CFPB recently proposed a program under which it would examine the practices of covered entities, comprising of approximately 60 percent of the market. *See* CONSUMER FINANCIAL PROTECTION BUREAU, EXAMINATION PROCEDURES: DEBT COLLECTION 28 (2012).

<sup>117</sup> On the plausibility standard, *See* FED. R. CI. P. 12(b)(6), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (setting a plausibility test for the filings of civil actions), *Ashcroft v. Iqbal*, 556 U.S. 662, 678-89 (2009) (“only a complaint that states a plausible claim for relief survives a motion to dismiss.”). *See generally* Raymond H. Brescia & Edward J. Ohanianm, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329, 334-51 (2014) (reviewing the evolution of the standard and its critique). On Rule 11, *see* FED. R. CIV. P. 11.

of a fine. The size of the fine may be influenced by various considerations, and economic theory provides a guidepost: The magnitude of fines should reflect, among other considerations, the probability of evading detection.<sup>118</sup> The agency should calibrate the level of fines according to the perceived accuracy and frequency of its audits. The use of fines is commonplace among agencies, which use them as means of sanctioning noncompliant behavior. Fines give “teeth” to the audit process and guarantee that fraudulent claims will be met with a sanction even in cases of under-participation by the defendant. The fines are then paid to the public coffer and can be used for various social purposes (including financing the agency, although this may raise a conflict of interests).

Overall, the use of audits and fines that are initiated by the agency would provide a bulwark against abuse for those cases where under-participation is a problem. Admittedly, audits are costly to perform (which is one reason why we would not want to turn our entire system of civil litigation to Adminization), and it will be prohibitively costly to audit all incoming cases. We now move to consider another feature of Adminization that accounts for this highly relevant concern.

## 2. *Sampling, Artificial Intelligence, and Resource Management*

Both the judicial process and audits are resource-intensive processes. Marginalist economic theory teaches that given budgetary constraints, it is desirable to allocate resources to where they would have the greatest marginal productivity, that is, to devote attention differentially among cases.<sup>119</sup> However, civil litigation handles attention allocation relatively poorly. Judges are not free to dismiss cases simply because they want to devote more time to hear other cases which are more deserving of judicial attention.<sup>120</sup> In contrast, agencies frequently allocate and prioritize attention

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<sup>118</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (developing the foundations for the theory of optimal fines in law enforcement). There is rich literature that examines the constraints on the use of fines to supplement imperfect enforcement. The key reasons developed there—risk aversion and wealth constraints—apply only weakly in the context of consumer credit litigation. See generally A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in HANDBOOK OF LAW AND ECONOMICS 405 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>119</sup> There are many advantages to the focusing of attention and there are even potential economic gains from focusing enforcement efforts on arbitrary subgroups, like auditing more closely the tax returns of the people whose last name begin with A than those whose last name begins with B. See Henrik Lando & Steven Shavell, *The Advantage of Focusing Law Enforcement Effort*, 24 INT’L REV. L. ECON. 209 (2004).

<sup>120</sup> Adam M Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009)



and resources, with a clear example being the IRS, choosing only select cases for in-depth review. This suggests the power of sampling—the choice of cases to which special attention is devoted. There are a few sampling approaches, and this is not the place to elaborate on the theory of sampling. Generally speaking, however, a basic approach is to choose cases in random. This is the approach used, partially, by the IRS and the TSA. This provides each case an equal chance of being chosen for audit, thus imposing a risk on all participants that they will be checked. This approach has a very clear drawback, in that legitimate cases have an equal chance of being chosen for audit, thus wasting resources. Another approach is to choose cases on the basis of some criteria that indicate that they pose a greater risk. For example, police may monitor more closely known sex offenders. This has the drawback that if the criteria used to sample cases are known in advance, then the system may be gamed.<sup>121</sup> Moreover, pre-screening the cases that would be sampled is itself resource-intensive, thus reducing the benefit of using samples.

Under Adminization, the agency will use ‘smart-sampling’ to select cases for audit. The use of sampling presents the question of how to effectively sample cases. The simplest approach, just noted, is to choose a random sample of cases, the same method used (non-exclusively) by the IRS and the TSA.<sup>122</sup> A better approach, however, is the use of “smart-sampling” techniques. Smart sampling consists of using machine-learning algorithms to identify cases that are statistically most likely to involved fraud. This has the advantage of accuracy nearing—and sometimes exceeding—that of a qualified human, with great speed, and with almost zero marginal cost. The complexity of AI algorithms—which, ironically, is one frequent source of critique levied against them—is a very appealing feature in this context, as it presents a black box to those who would seek to game the system.<sup>123</sup> It is not surprising that the private market is replete

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(exploring the role of randomization in adjudication and defending the use of case randomization). The literature considers, to some extent, the role of managerial judges in managing resources, *see, e.g.,* Resnik, *supra* note 34.

<sup>121</sup> *See* Lando & Shavell, *supra* note 119, at 215 (arguing that a known enforcement focus may increase crime if offenders can freely move to offend in unenforced areas).

<sup>122</sup> The samples are not purely random and profiling (racial and other) is common. *See* Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers’ Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49 (2006) (finding strong evidence of racial profiling in traffic police stops).

<sup>123</sup> *See* VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 178 (2014) (“The basis of an algorithm’s predictions may often be far too intricate for most people to understand”). *See also* David Sussillo & Omri Barak, *Opening the Black Box: Low-Dimensional Dynamics in High-Dimensional Recurrent*

with AI-assisted fraud detection algorithms.<sup>124</sup> In the same spirit, agencies are starting to realize the potential for machine learning for complaint handling. Today, the Securities and Exchange Commission (SEC) is developing an automated system that flags cases for review. The system is based on an automated anomaly detection model that would flag submissions for human review on the basis of statistical deviations from the common filings.<sup>125</sup>

It may seem ambitious to develop a fraud-detecting software, given the great diversity of cases and the complexity involved. And while there is nothing simple about this task, it should be evaluated in context of proven capabilities, especially bearing in mind the recent victory of AI over grandmaster Lee Sedol at the game of Go—a game so rich of possibilities that it was considered to be impossibly stacked against machines and in favor of human intuition.<sup>126</sup> The closest example of a working AI technology in fraud detection comes from the credit card industry.<sup>127</sup> Despite a daily volume of millions of transactions,<sup>128</sup> credit card companies effectively flag fraudulent transactions, alerting human investigators of potential fraud.<sup>129</sup> These algorithms run in real-time and evaluate each transaction against a model of the specific consumer, placing alerts in the case of any significant deviation from model-predicted behavior. Sifting through the large dataset of past purchases, the consumer model is able to detect when purchases are made in unexpected locations, times, or amounts. Importantly, these algorithms run on an almost incomprehensible volume of data and with little to no human intervention manage to detect suspicious transactions, with a

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*Neural Networks*, 25 NEURAL COMPUTATION 626 (2013) (noting how a Recurrent Neural Network is viewed as a black box in terms of its implementation of its target functions).

<sup>124</sup> See generally CLIFTON PHUA ET AL., A COMPREHENSIVE SURVEY OF DATA MINING-BASED FRAUD DETECTION RESEARCH COMPUTING RESEARCH REPOSITORY (2010).

<sup>125</sup> The model is called the “Automatic Quality Model” and is based, at least in part, on a Jones Model: measuring the difference between a company’s discretionary accruals and those of peer companies in the industry. See Douglas M. Boyle, James F. Boyle, and Brian W. Carpenter, *Insights into the SEC’s Accounting Quality Model*, 85 CPA J. 16 (2015).

<sup>126</sup> See Cade Metz, *Google’s AI Takes Historic Match Against Go Champ with Third Straight Win*, WIRED (Mar. 12, 2016); Adrian Cho, *‘Huge leap forward’: Computer that mimics human brain beats professional at game of Go*, SCIENCE (Jan. 27, 2016) (“for many years people have tried to sell the notion of Go as a game in which computers can never beat humans”).

<sup>127</sup> See generally Richard J. Bolton & David J. Hand, *Statistical Fraud Detection*, 17 STAT. SCI. 235 (2002).

<sup>128</sup> See Visa, Annual Report 2013 (2013) (reporting a daily volume of 223 million transactions).

<sup>129</sup> Some of the methods include genetic algorithms, Bayesian classifiers, a Hidden Markov Model, and, more recently, neural networks. See generally Krishna K. Tripathi & Mahesh A. Pavaskar, *Survey on Credit Card Fraud Detection Methods*, 2 INT. J. EMERG. TECHNOL. ADV. ENG. 721 (2012).

relatively low level of either false negatives or false positives. Another telling example is that of spam filters. Until very recently, it seemed nearly impossible for a computer to overcome the problem of spam identification as the range of richness of human communication is so vast. In 2002, for example, Slate ran an article that pessimistically stated that “It’s time to give up . . . spam has won. Spam is killing e-mail.”<sup>130</sup> Pew predicted in 2002—based on a large consensus—a rate of spam growth that would imply today hundreds if not thousands of spam messages every day.<sup>131</sup> Yet, e-mail survived. Google reports that its email service, Gmail, filters 99% of all spam while only having a 1% rate of false positives.<sup>132</sup> Stated differently, Google reports that less than 0.1 percent of email in the average inbox is spam while less than 0.05% of wanted messages are in the spam folder.<sup>133</sup>

Another example could illustrate the power of statistical fraud-detection algorithms. Benford’s law is a decision rule that meets a seemingly impossible challenge: How can one detect fraud in accounting books without actually analyzing them? The astronomer Newcomb postulated in 1881—and later the physicist Frank Benford proved—that one could identify potential fraud by simply looking at the numbers reported in these ledgers, and more specifically, at the digits themselves. If we count the frequency with which each digit appears in financial accounts, a pattern emerges with surprising regularity. In 30% of the cases, the first digit of any number is 1, but there is only 4.5% chance of it being a 9. For a variety of reasons, naturally occurring numbers have greater likelihood of starting with certain digits than others. Knowing this rule, we can count all the digits that appear in a given account book. If much more than 4.5% of the numbers start with 9, or much less than 30% of the numbers start with 1, then we have a good reason to suspect that the book was tampered.<sup>134</sup> Cooking the books will often leave a footprint in the form of unnatural distribution of digits, and simply counting the frequency of digits—without any real understanding of the business—will indicate cases with suspected wrongdoing.

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<sup>130</sup> See Kevin Werbach, *Death by Spam*, SLATE (Nov. 18, 2002), [http://www.slate.com/articles/technology/webhead/2002/11/death\\_by\\_spam.html](http://www.slate.com/articles/technology/webhead/2002/11/death_by_spam.html).

<sup>131</sup> Deborah Fallows, *Email at Work*, PEW INTERNET & AMERICAN LIFE 5 (2002) (citing sources predicting a doubling of spam load every 6 months and a rate of growth from 2001 to 2006 of approximately 600%).

<sup>132</sup> See Cade Metz, Google Says Its AI Catches 99.9 Percent of Gmail Spam, WIRED, (Sep. 7, 2015) <http://www.wired.com/2015/07/google-says-ai-catches-99-9-percent-gmail-spam/>.

<sup>133</sup> See Emil Protalinski, *Google Now Uses An Artificial Neural Network to Fight Spam, Debuts Gmail Postmaster Tools to Cut False Positives*, VENTUREBEAT (July 9, 2015).

<sup>134</sup> Cindy Durtschi et al., *The Effective Use of Benford’s Law to Assist in Detecting Fraud in Accounting Data*, 99 J. FORENSIC ACCT. 17 (2004).

Rules like Benford's law were developed by humans. A software would probably use much more nuanced and sophisticated rules, taking account of every facet of the case—from the identity of the parties through the amounts indicated and perhaps even seemingly irrelevant features like the font used or the time of filing. Gaming these (unknown) rules will prove extremely difficult and, for smaller claims, not worthwhile.

To develop such sophisticated rules, we would need a large body of training data.<sup>135</sup> Ideally, the data will be “labeled”, *i.e.*, each case will be identified as either being with merit or without merit. Without such data, machine learning cannot produce accurate predictions. Luckily, this type of “big data” is readily available.<sup>136</sup> As Andrew Crespo recently noted, a by-product of the judicial process is a large body of unutilized “systemic facts”, which are records of cases, claims, and resolutions.<sup>137</sup> These present an almost perfect type of training data—the software can scan the filings and all relevant facts of the case and then see how it was decided. Of course, some of the data will have to be filtered, as many cases are decided not on the merits. Yet, there is such a wealth of data on all the millions of claims that are filed every year that even after filtering, there will be a very large body of data. Moreover, Adminization constantly produces new data. As part of the process, cases are chosen for audit and are then subject to review—an information producing process. Importantly, not only flagged cases will be chosen, but also a few non-flagged cases. The results of the audit will then be fed into the machine learning algorithm. If a flagged case would prove to involve fraud, this will reinforce the rules used by the software. If there was no fraud in a flagged case, this will prompt the software to modify its decision rules—and the converse applies to non-flagged cases. Over time, the system will self-modify based on the results of the audit process, thus promising continuous improvement and adaptation to changing circumstances.

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<sup>135</sup> A general view among computer scientists is that having a large dataset is at least as important as good machine learning models to the development of effective algorithms. Google's Research Director, Peter Norvig, famously stated on Google's success in this area: “We don't have better algorithms. We just have more data.” *Quoted in Xavier Amatriain, Mining Large Streams of User Data for Personalized Recommendations*, 14 SIGKDD EXPLORATIONS 37, 43 (2013). *See also* Pedro Domingos, *A Few Useful Things to Know about Machine Learning*, 55 COMM. ACM 78 (2012).

<sup>136</sup> On big data and the law, *see* Daniel Martin Katz, *Quantitative Legal Prediction—Or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 Emory L.J. 909 (2013).

<sup>137</sup> Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2065-66 (2016). Crespo's argument is couched in the context of the criminal law system, however, the spirit of his argument applies to civil litigation.

### 3. *Third-Party Communications*

Under the court system, plaintiffs are expected to serve defendants with process.<sup>138</sup> This design feature engenders a moral hazard, as the incentives are misaligned. The plaintiff is expected to serve the defendant, but if the defendant fails to appear in court, the plaintiff is entitled to a default judgment. The goal of service is in contrast to the private incentive that service will not be served. And indeed, there is ample evidence that shows that these misaligned incentives result in faulty service, with many cases where there is simply no service.<sup>139</sup>

Under Adminization, the agency serves process as well as all other communications, such as informing defendants of their rights, thus solving the structural problem. Indeed, pilot programs with third-party service by the court were successful, which suggest a greater potential effectiveness if done at a scale by an agency.<sup>140</sup> And while it may be possible to adapt court to provide services, agencies are naturally better designed to provide such “outgoing” services which involve reaching out to individuals, locating them, and handling the necessary administrative aspects. It will also allow the courts to develop a more independent approach to the evaluation of the quality of service if they are not implicated in the process. In terms of finance, the service may still be funded as is today by the plaintiff through fees. Moreover, taking advantage of its disinterested role, the agency can also provide defendants with educational materials, informing and educating them of their rights, a function that is missing today.<sup>141</sup> With its communications, the agency could provide informative, plain-language explanations of defendants’ rights and duties, using simple illustrations, flowcharts, frequently asked questions (FAQ) and visual guides. In contrast, entrusting plaintiffs with this task would again engender a moral hazard problem.

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<sup>138</sup> See Fed. R. Civ. P. 4(c).

<sup>139</sup> See *supra* section I.A.

<sup>140</sup> N.Y. CITY CIV. CT. UNIFORM R. § 208.6(h) (2008); NEW YORK CITY BAR ASSOCIATION, OUT OF SERVICE: A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY 11-12 (2010), (showing that sending court summons in addition to plaintiff summons resulted in an increase in consumer participation, who often reported to have only received the court’s summons).

<sup>141</sup> See *Thomas v. Law Firm of Simpson & Cybak*, 354 F.3d 696, 699 (7th Cir. 2004) (“nothing in the FDCPA suggests that Congress intended creditors’ unilateral actions to obligate debt collectors to inform debtors of their rights”). Consumer education is at least partially a problem with lack of incentive to learn. Since Adminization makes it easier to contest claims, learning information becomes more attractive.

### C. *Adminization of Consumer Credit Litigation*

The implementation of Adminization to consumer credit litigation starts with the Agency. The administrative overlay in the context of consumer credit will be the CFPB, with its broad regulatory powers under the Dodd-Frank Act.<sup>142</sup> These powers include the power to investigate claims related to debt collection, the power to summon witnesses, and the ability to issue fines.<sup>143</sup> While alternative arrangements are possible, this will have great benefits of scale and will solve important coordination problems. The existence of the CFPB platform, its broad legislative powers, and its subject-matter expertise, promise a smooth implementation at a relatively low marginal cost.

The process starts with a filing of a claim with the agency. A claim could be initiated by the original creditor, or if the state permits, a debt buyer. The claimant would be required to furnish rudimentary information regarding the claim: the identity of the debtor and last known address, an estimate of the breakdown of the debt to its principal and other fees, the origin of the claim, and the name of the original creditor. The standard by which the quality of information is judged is whether it provides sufficient basis for a reasonable but unsophisticated consumer to decide if the debt is real and accurate.<sup>144</sup> The claimant would acknowledge, on pain of financial sanctions, that it holds supporting evidence, although the current rules requiring an affidavit may be relaxed.<sup>145</sup>

The agency will check the claim via an automatic, machine-learning system that would screen and flag cases. The algorithms will check, for example, whether the debt is time barred, whether the interest rate exceeds statutorily allowed levels, and whether another identical claim against the same debtor was filed by a different creditor. If violations of bright line

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<sup>142</sup> See *infra* section IV.A.

<sup>143</sup> *Id.*

<sup>144</sup> A similar requirement exists under German law. See Grozdana Šijanski & Jimmy Barber, The German order for payment procedure (Mahnverfahren), German Law Archive, 2006 available at <http://germanlawarchive.iuscomp.org/?p=343>; EUROPEAN CONSUMER CENTRE GERMANY, THE GERMAN JUDICIAL SYSTEM (2010); Sigmund A Cohn, *A Streamlined Debt Collection Procedure in the Federal Republic of Germany*, 2 BOSTON COLLEGE INT. COMP. L. REV. (1978).

<sup>145</sup> The insistence on signed affidavits in the legal system resulted in a large industry of robo-signing. See generally Holland, *Billion Dollar Problem*, *supra* note 61. Courts treat Robo-signing with disdain, see, e.g., *Intervale Ave Association v Donald*, 38 Misc. 3d 1221(A), 1221A (N.Y. Civ. Ct. 2013) (“[T]he courts have consistently demonstrated an intolerance for ‘robo-signing.’”). But the problem of Robo-signing is artificial because what should matter is the existence of evidence, not the form of signature, and requiring personal knowledge for hundreds of thousands of debt claims is grossly inefficient. If creditors can reliably present claims (at the pain of large financial sanctions), this could achieve the same goals but at a lower cost.

rules are identified, the claim will be automatically rejected without prejudice and a notice will be sent to the creditor, explaining the flaw. This will be beneficial to consumers in that it will filter out empty claims that are currently filed against them; specifically, this will solve the problem of “zombie debts,” which are time barred actions that attempt to exploit consumer ignorance and judicial passiveness.<sup>146</sup>

Besides the automatic screening of cases, the system will also employ “smart-sampling”, to identify the cases which are most likely to involve fraud. The exact algorithms will depend on implementation, but, as a general matter, will synthesize statistical information regarding the identity of the original creditor, the identity and demographics of the debtor, the sums involved, the type of debt involved, time of filings, and other case characteristics. If certain creditors are known to engage in wrongdoing, this will increase the likelihood that the case will be chosen for audit. If certain demographics are targeted more frequently for abusive lawsuits – the elderly, minorities –their cases will be more frequently flagged for audit.

Flagged cases will be transferred to the agency’s auditors which will use their investigative powers to demand proof of the evidence claimed by the creditor. The investigators will check if the evidence is consistent, whether the case presents a cause, and, most importantly, if there are any indications of fraud or abuse. In some cases, there will be a need to acquire information from consumers. In these cases, the investigators will approach consumers and ask for information. The consumer will not be under any obligation to cooperate, but it should be explained that an investigation can only advance the consumer’s case. A friendly conversation could greatly advance the consumer’s interests, as the auditor could lead with simple questions that would avoid the need to present a legal case – “do you have a receipt?”, “Do you have a document showing that you were elsewhere on the date the alleged purchase was made?”, “did you file a complaint against identity theft?”, etc.

If the audit reveals wrongdoing, the plaintiff will be issued a fine. The findings of the investigation will be evaluated by the professional staff at the agency and where they find indications of fraud, abuse, or other illegal practices, they can use their legal powers under the Dodd-Frank act and levy fines.<sup>147</sup> The magnitude of the fine should reflect both the severity of the offense and the likelihood of evasion. In general, large fines would be

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<sup>146</sup> See Young Walgenkim, *Killing “Zombie Debt” Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOYOLA CONSUM. L. REV. 65, 65 (2011) (discussing the problem of debt collectors attempting to “revive stale, paid-off, otherwise uncollectable debt”).

<sup>147</sup> 12 U.S.C. § 5565 (2012).

required to deter companies from bringing abusive lawsuits, seeing that only a sample of cases are audited. This fine will be paid to either the agency or the government by the creditor, and these funds may be used to finance the agency, although it will be prudent to avoid potential conflicts of interest by not creating a direct link between fines and agency's funds.

The use of audits and fines will provide consumers with a basic level of consumer protection. It will do so not by increasing participation but rather by eroding the harsh consequences of under-participation. By using audits and fines, there will be an effective sanction against the filing of fraudulent or unsupported claims, thus making participation less critical and saving considerable resources. The use of audits and fines also conforms to the prevalent but misguided expectation among consumers today that by filing an answer the court will handle the issue *sua sponte*.<sup>148</sup>

All the cases will then proceed to a "Communication" stage. Unlike the current system, it is not the plaintiff but the agency that would be responsible for contacting the consumer. The agency will use its own databases, as well as information provided by the creditor, to locate the consumer and communicate with them, by email, mail, or phone. This will address the root cause of the "sewer service" problem.<sup>149</sup>

Here and throughout, the quality of communications should be emphasized. Freed from the chains of legal language and procedure, the communications should be made simple, friendly, easy to follow, and graphic.<sup>150</sup> The communication should clearly inform the debtor of the fact of a claim made against them and its potential implications. The form should ask if the consumer recalls making the purchase from the original creditor and whether the principal and charges seem correct.<sup>151</sup> On this basis, the form will provide three options: admitting, contesting, or ignoring the message.<sup>152</sup>

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<sup>148</sup>APPLESEED, *supra* note 45, at 18. ("Many defendants believe that once they answer, the court will review their allegations and defenses *sua sponte*.").

<sup>149</sup> See *supra* section I.A.

<sup>150</sup> See D. James Greiner & Andrea J. Matthews, *The Problem of Default, Part I* (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622140](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622140) (studying interventions that improve consumer participation).

<sup>151</sup> This addresses a common problem today of the so-called "alphabet soup" of creditors, where debtors receive debt claims from organizations with a name like ABC, which bear little resemblance to the consumer's experience of the origination of the debt (*e.g.*, BestBuy). See FED. TRADE COMM'N, *LIFE OF A DEBT: DATA INTEGRITY IN DEBT COLLECTION* (2013). For a similar (although more onerous) recommendation, see FTC, *BROKEN SYSTEM*, *supra* note 13, at 7.

<sup>152</sup> How to most clearly encourage consumer response is a question best left to communications experts, who are frequently and regrettably missing from the design of most governmental communications.



Admitting is the first option. The agency could provide an incentive for timely payment, by reducing process fees or interest and making a trusted third party, easy payment system. If the consumer pays off the debt, the agency will provide a confirmation letter that immunizes the consumer from any future action based on this debt. The agency will then process the payment and transfer it to the creditor. Alternatively, the consumer could offer a settlement by proposing an affordable installment plan.<sup>153</sup> The creditor may refuse the plan, thus leading to a request of judgment. However, many creditors should be willing to accept reasonable payment plans, which offer greater recovery than forceful enforcement.

Contesting the claim will involve a simple check-box. Five options should be provided: “I do not recognize the person to whom the debt is owed,” “I already paid off this debt,” “the amount is wrong,” “another person owes this debt,” and “other.” An open comment field should be available where the putative debtor could write why the debt is wrong. Listing supporting evidence should also be made easy, but not mandatory. It is only for contested cases that the creditor will be required to provide a full body of evidence. The chief benefit of only asking for evidence for contested cases is that it saves creditors the immense costs of providing full evidence for all cases. This feature will greatly increase the political appeal of this system to creditors.

If the consumer fails to respond, this would trigger a reassessment of consumer’s address: the agency should invest moderate effort into searching for the debtor using both its own resources and information procured from the creditor. If the agency concludes that reasonable effort has been taken, the communication should be deemed ignored and moved to the verification stage.

Following Communications, all contested claims will be brought to a hearing in front of a court. The case file will include all findings made by the agency in its audit, information which can be useful to both the parties and the court. The judge will then hear the case, using the same procedures that are used today.

The outcomes of the process will be “fed” to the machine learning algorithms, for future improvements. These outcomes include the agency’s findings, consumer’s response, and the court ruling. On this basis, the agency will also be able to manage an internal score of creditor reputation, with every finding of fraud lowering the creditor’s score. Low score creditors will be chosen for audit more often—as the algorithm will take

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<sup>153</sup> Admitting the debt has important legal ramifications, and they should be clearly explained.

account of their identity—whereas high score creditors will be subject to less investigations.<sup>154</sup> Creditor reputation could also be made publicly available, thus informing future consumers before they engage with a specific provider of credit. This reputation system will provide greater compliance incentives, especially since most of the debt collection lawsuits are brought by a limited number of creditors.<sup>155</sup>

This, in broad strokes, is an example of Adminization in the context of consumer credit litigation. While it offers many mutable arrangements, it should provide a general direction forward, one that will greatly improve over the failings of the current system. Adminization will provide a basic safety net of consumer protection, thus mitigating many of the harmful effects of under-participation in the current system. Beyond this advantage, it is worth emphasizing three other, broader benefits. First, and perhaps most importantly, Adminization will put an end—or at least, significantly curtail—the filing of unmeritorious claims. Once plaintiffs internalize the risk associated with the filing of empty claims—due to the real potential for fines—using this strategy should become too costly to be in the financial interest of the plaintiff. Curbing abuse is valuable in itself, but it also has important ex-ante implications. From the consumer side, this will make the use of credit a safer option, thus increasing the utilization of safe credit. This has important implications especially for people in poverty, for which access to credit is a persistent obstacle.<sup>156</sup>

Second, Adminization provides important cost-savings for the judicial system. Overall, we expect the change to lead to fewer cases on the docket because filing wrongful claims will become a risky proposition for plaintiffs and because of automated processing. This will save considerable resources for the courts, freeing them up to devote more attention to rest of the cases on the docket, allowing judges to monitor those cases more closely. Thirdly, Adminization is also highly beneficial for creditors. By automating the process of producing default judgments for uncontested cases, there will be a significant saving in the cost of providing credit—savings that would be expected to be partially passed on to consumers as well. Indeed, Adminization will not be beneficial to *all* creditors, as those who currently

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<sup>154</sup> For obvious reasons, the odds of being selected for audit, even for a creditor with the highest level of reputation, must never be zero.

<sup>155</sup> See DEBT WEIGHT, *supra* note 45, at 14 (finding that 58% of the cases in the sample were brought by three debt buyers).

<sup>156</sup> See, e.g., Dean Karlan & Jonathan Morduch, *Access to Finance*, in *Handbook of Development Economics 1* (Rodrik & Rosenzweig eds., 2009) (“Expanding access to financial services holds the promise to help reduce poverty and spur economic development.”).

engage in fraud will face penalties, but this is—as they say—a feature, not a bug. Of course, besides the benefits there are some costs—a topic I deal with later—but these are expected to be much lower than the costs of any alternative currently considered, and potentially also than the status quo.<sup>157</sup> I turn to consider these alternatives now.

### III. THE FAILURE OF PARTICIPATION-BASED SOLUTIONS

In evaluating the desirability and effectiveness of Adminization, it is important to be cognizant of the benchmark. Clearly, one candidate for a benchmark is the current system, and in relation to the status-quo, there is no doubt that Adminization marks a departure. But the status-quo is not an appealing candidate, because there is large consensus that the current system is unacceptably ineffective and unjust, failing on most metrics. Given the commitment to changing the status-quo, the Adminization should be compared to any of its feasible alternatives, which are all variants of the participation approach.<sup>158</sup> When considered in this light, I will argue that whatever disadvantages and risks Adminization carries, they pale in comparison to the costs and risks of participation-based approaches.<sup>159</sup>

#### A. *Lawyering Up*

The most prominent call to solve the problem of abuse in civil litigation has been to expand legal access through public subsidies of legal services. Under this view, if consumers received subsidized access to legal representation, they would assert their rights in court, stand up against wrongs, and fend off against fraudulent claims; this will allow judges to screen out bad cases and prevent plaintiffs from taking advantage of consumers.<sup>160</sup> This type of proposal is often called a “civil *Gideon*” right,

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<sup>157</sup> See *infra* section IV.D.

<sup>158</sup> On the dominant role of participation-based approaches in state legislatures, see e.g., PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2015) (Requesting \$30 million in public funding for legal assistance to “close the justice gap”); Texas Access to Justice Commission website, <http://www.texasatj.org/mission-goals> (Reporting their central goal of “remov[ing] barriers to our judicial system”); STATE BAR OF CALIFORNIA, CIVIL JUSTICE STRATEGIES TASK FORCE REPORT & RECOMMENDATIONS (2015) (contains a recommendation “that the State Bar support efforts to secure universal representation.”)

<sup>159</sup> Proposals that primarily affect the debt collection industry, such as licensing requirements, are excluded. Perhaps this type of *ex ante* regulation of debt collection is helpful, but the NY experience—where licensing is employed—casts doubt. See NYC ADMIN. CODE § 20-490.

<sup>160</sup> See, e.g., DEBT WEIGHT, *supra* note 45, at 21 (calling on the state of New York to “[f]und legal services for low-income and working poor individuals sued on alleged debts . . . Fund the provision of assistance, information and resources for *pro se* defendants.”). Fox, *supra* note 46, at 75 (“Consumers need to be provided the legal assistance necessary to defend themselves in civil debt litigation.”).

to mirror the right of indigent defendants in criminal proceedings to an attorney.<sup>161</sup> While this is proposed as a primary solution to the problem, it is unworkable, prohibitively costly, and of marginal effectiveness.

First, the sheer number of people who would be eligible for this subsidy is staggering. The former president of the ABA argued, “one in five Americans now qualifies for legal assistance”,<sup>162</sup> although in his view this is probably an understatement as “it’s not just the poor . . . too many low- and moderate-income people cannot access legal representation.”<sup>163</sup> But even the 1 in 5 estimate implies that nationally 64 million people will be eligible to this subsidy. And while not all of these people have legal issues, a significant majority have, and some of them have more than one, suggesting a deeper need for subsidies. A recent study found that about a half of all low-income New-Yorkers have experienced legal issues during that year, with about third of them facing three or more legal issues.<sup>164</sup> Therefore, we would expect there to be about 32 million people who are both eligible and have a legal issue, with about 10 million with three or more such issues.

The cost of providing subsidies on such a scale is immense. The American Bar Association, who has clear interest in downplaying the costs of legal aid, estimate costs at about \$1.7 billion dollar every year.<sup>165</sup> Sarah Steinberg estimates that the cost would be around \$5.4 billion every year.<sup>166</sup> My analysis suggests that even her account underestimates the true costs by an order of magnitude. The best estimate comes to us by looking at the institutions that are currently in place. In New York, the IOLA fund reports that in 2013, a large group of supported organization closed 296,621 cases

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<sup>161</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963)

<sup>162</sup> PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK—APPENDICES, 90 (2015)

<sup>163</sup> *Id.*

<sup>164</sup> PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, 9 (2015).

<sup>165</sup> The ABA finds an even lower amount—\$1.7 billion, but this is based on the very strong assumption that \$100 worth of legal services will suffice to the common consumer. This rate is the equivalent of less than an hour of work per case, which seems highly ambitious. The ABA also notes that the United Kingdom spends \$1.36 billion dollars on legal services to the poor, which would imply a U.S. cost of \$8.16 billion (population-weighted). ABA, REPORT TO THE HOUSE OF DELEGATES, 112A 1 (2006).

<sup>166</sup> See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV 741, 771-72 n.167 (2015) (\$3.4 bn.). Steinberg extrapolates from an analysis made in Maryland, finding that the national costs would be \$5.4 billion. MARYLAND ACCESS TO JUSTICE COMMISSION, MARYLAND ACCESS TO JUSTICE COMMISSION: ANNUAL REPORT 2010 (2010). However, this estimate is also conservative. It assumes low payments to lawyers (\$80 per hour), only 4 hours of work per case, no overhead and administrative costs, and that *pro bono* services will not contract (a phenomenon known as “crowding out”), that the rate of litigation will not increase, and that all those currently represented will continue to hire a lawyer despite free legal services. Accounting for these considerations would dramatically increase the costs involved.

with an overall budget totaling \$266.6 million.<sup>167</sup> This implies a per-case cost of \$897, which is the equivalent of 6 hours of work per case at a rate of \$145.<sup>168</sup> Now, if indeed up to 32 million Americans would be eligible to assistance,<sup>169</sup> then the annual cost would amount to \$28.7 billion – far more than the already costly \$1.7 billion dollar estimate.

Admittedly, it is perhaps possible to cut some of these costs through means-testing or merit-testing applicants,<sup>170</sup> or providing limited legal services such as a hotline for *pro se* debtors. The problem is that means testing is costly to administer and is associated with stigma and secondary costs to potential beneficiaries,<sup>171</sup> thus deterring the neediest from seeking it.<sup>172</sup> Such tests also introduce the possibility of errors<sup>173</sup> and it is questionable whether the limited form of legal assistance would be dramatic enough to produce the necessary change to the current system.

The benefits are quite limited. Most cases are not genuinely disputed<sup>174</sup> and getting more consumers to court could drown the signal (valid consumer defenses) in the flood of noise. Put formally, free representation reduces Type I errors but increases Type II errors. Whether one effect will be greater than the other is an open empirical question, but even if the net effect is positive, it will still be limited. (Under Adminization these undisputed cases are handled automatically). Moreover, the benefits will

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<sup>167</sup> THE INTEREST ON LAWYER ACCOUNT FUND OF THE STATE OF NEW YORK, ANNUAL REPORT 2014, 2 (2014)

<sup>168</sup> See *supra* note 90.

<sup>169</sup> To confirm this from another perspective, in Maryland, an average state in terms of economy and inequality, 1/6 of the population qualifies for legal representation. See MARYLAND ACCESS TO JUSTICE COMMISSION, *supra* (reporting that approximately 1,000,000 Marylanders qualify for legal assistance from organizations funded by the Maryland Legal Services Corporation). This would imply a potential pool of 50 million eligible Americans nationally.

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

<sup>171</sup> See Amartya Sen, *The Political Economy of Targeting*, in PUBLIC SPENDING AND THE POOR 11, 13 (Dominique van de Walle & Kimberly Nead eds., 1995) (“Any system of subsidy that requires people to be identified as poor and that is seen as a special benefaction for those who cannot fend for themselves would tend to have some effects on their self-respect as well as on the respect accorded them by others.”); Jennifer Stuber & Mark Schlesinger, *Sources of Stigma for Means-Tested Government Programs*, 63 SOC. SCI. MED. 933 (2006) (empirical examination of the sources of stigma). See also Bo Rothstein, *The Universal Welfare State as a Social Dilemma*, 13 RATIONALITY SOC. 213, 223 (2001).

<sup>172</sup> Wim van Oorschot, *Targeting Welfare: On the Functions and Dysfunctions of Means Testing in Social Policy*, in WORLD POVERTY: NEW POLICIES TO DEFEAT AN OLD ENEMY 171, 176 (2002); DIMITRI GUGUSHVILI & DONALD HIRSCH, *Means-tested and Universal Approaches to Poverty: International Evidence and How the UK Compares* 2-3 (CRSP, Working Paper No. 40, Aug. 2014) (empirical evidence); Sen, *supra* note 171; Thandika Mkadawire, *Targeting and Universalism in Poverty Reduction* 15-16 (Social Policy and Development Working Paper no. 23, 2005).

<sup>173</sup> See Sen, *supra* note 171, at 12-13; Oorschot, *supra* note 172, at 176.

<sup>174</sup> See *infra* notes 184-187.

likely be diluted if, as is expected, creditors will invest more in legal services, to retain some of their advantage.<sup>175</sup> This is even without taking into account creditors' market power and ability to influence the consumer contract in ways that would mitigate the effects of legal access. At best, then, the benefits will be modest but the costs will be immense. Equally worrying, the costs are likely to expand over time, with little ability to control them, as more and more people may claim eligibility.

### B. *Throwing Judges into the Fray*

Some suggest having judges play a more active role in litigation to level the playing field between the parties.<sup>176</sup> Under this view, judges should be more forgiving of consumers' procedural mistakes, allow more flexible deadlines, and furnish opportunities to amend or correct what may be either mistakes or suboptimal litigation tactics. According to more expansive versions, the judge would even conduct examinations and seek settlements where possible.

This proposal is equally problematic. There are first preliminary concerns about the efficacy of this proposal—we do not know whether inquisitorial systems produce systematically better results, with a lingering concern that judges who produce their own evidence are more prone to confirmation bias.<sup>177</sup> From an institutional perspective, training judges to

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<sup>175</sup> Economic theory predicts that increasing one party's investment in litigation (which is similar to the effect of representation) can lead to an arms race that will greatly increase spending but will not necessarily increase overall judicial accuracy. See Avery Katz, *Judicial and Litigation Expenditure*, 8 INT'L. REV. L. ECO. 127 (1988). The overall effect will be a reduction in the volume of litigation (as it is costlier to litigate) but an increase in the intensity of litigation (because both parties "fight" harder). The net result requires a more robust empirical analysis.

<sup>176</sup> See Steinberg, *supra* note 166, at 801 ("judges should be active, frame legal issues, and question parties and witnesses in order to develop legal claims."). See also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

<sup>177</sup> See Kathryn E. Spier, *Litigation*, in THE HANDBOOK OF LAW AND ECONOMICS 313-316 (A. Mitchell Polinsky & Steven Shavell, eds., 2007) (presenting mixed theoretical accounts of the implications of an inquisitorial system), John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 389-90 (1972) (noting that interested parties may vet evidence more thoroughly than a judge); Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 1961) ("An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not fully known.").

But see E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1143 (1973) (arguing that bias in evidence production will bias outcomes). On the empirical side, see Michael K Block et al., *An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes*, 2 AM. L. ECON. REV. 170 (2000) (in a set of experiments inquisitorial investigations fared better than adversarial ones, but only if parties have no access or knowledge of the other party's information and evidence).

conduct inquisitorial functions requires special adaptation, from change in legal education and training to providing judges with the capabilities required to acquire and authenticate information. But perhaps more troubling are the costs of these proposals. Active judging will make litigation longer, not shorter—when judges show leniency to litigants who fail to meet procedural rules and deadlines, they are doing this at the expense of other litigants, who have met these rules.<sup>178</sup> More fundamentally, the more we ask judges to perform the activities of a lawyer, the closer we are to the first type of proposals, with public subsidies for private lawyers. Discounting overhead and judicial staff, the median annual salary of a judge is \$132,000,<sup>179</sup> compared with a median salary of a public interest attorney of \$45,000-\$75,000.<sup>180</sup> The natural question is whether it would not be cheaper to simply subsidize lawyers outright?

### C. *Modifying the Legal Process*

The third types of reforms involve changes to legal procedure. For example, to mitigate evidentiary problems, many propose that plaintiffs should assert detailed knowledge of the claim, its origin, and of all other evidence.<sup>181</sup> Consequently, some states have imposed heavier evidentiary burdens on creditors.<sup>182</sup> Setting high evidentiary burdens for the sake of controlling litigation is extremely wasteful. Evidentiary bars are a “blunt calibration device . . . that risks screening out meritorious and

<sup>178</sup> See Resnik, *supra* note 34, at 380 (doubting that managerial judging reduces litigation costs).

<sup>179</sup> NATIONAL CENTRE FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (2012). The median salary for district Federal judge is even higher \$174,000 (both values are current to 2012). *Judicial Compensation*, UNITED STATES COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-compensation>.

<sup>180</sup> Press Release, National Assoc’n for Law Placement, *New Public Interest and Public Sector Salary Figures from NALP Show Little Growth Since 2004*, (Oct. 18, 2012). For comparison, a lawyer’s median salary in 2012 was \$113,350, which is 86% of the salary of a state judge and 65% of a federal district judge. *May 2014 National Occupational Employment and Wage Estimates United States*, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/oes/current/oes\\_nat.htm](http://www.bls.gov/oes/current/oes_nat.htm). See also *supra* note 179.

<sup>181</sup> See Eric Y. Wu, *Vigilante Justice: Ensuring that Consumer Credit Plaintiffs are not Above the Law in Collins Financial Services v. Vigilante*, 60 AM. U. L. REV. 1561 (2011) (advocating increased documentation requirements for default judgment). See also Goldberg, *supra* note 46, at 748; DEBT DECEPTION, *supra* note 94, at 2 (arguing in favor of “[p]rohibit[ing] debt buyers from filing lawsuits without evidence.”). Glover, *supra* note 46, at 1133 (“[A]t a bare minimum, courts should require the plaintiff to produce a valid contract between the original creditor and the debtor.”). Fox, *supra* note 46, at 40 (documenting regulatory action aimed at increasing evidentiary standards).

<sup>182</sup> N.C. GEN. STAT. ANN. § 58-70-150 (West 2013) (requiring evidence of the original contract); see similarly MASS. UNIFORM SMALL CLAIMS R. 7(d) (Massachusetts); MD. RULE 3-306(d) (Maryland); MINN. STAT. § 548.101 (2013); Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2012-2 (Aug. 22, 2012) (Delaware).

unmeritorious claims alike”.<sup>183</sup> Additionally, evidence production involves some complex operations, as even the breakdown of the charges to principal, charges and interest, is not straightforward.<sup>184</sup> Admittedly, the costs per case are not high, but given the large volume of cases, these costs quickly become a significant burden. The bigger problem is that these costs are largely wasted because most cases are not disputed. Evidence shows that in only 3.2% of debt collection cases by debt buyers did debtors *informally* bother to dispute the debt.<sup>185</sup> A qualitative in-depth (but small sample) study found that only 20% of the cases were contested, although perhaps half of them had some good faith defense of which they were unaware.<sup>186</sup> Some debtors, presumably those with the best cases, do decide to go to court, but even those debtors fail about 50% of the time.<sup>187</sup> Even if we suppose that the rate of disputes stands at the inflated rate of 30%, these reforms would require the redundant production of evidence in all remaining 70% of the cases.<sup>188</sup> Clearly having robust evidence is also beneficial. Allowing court judgments in the absence of evidence is a recipe for disaster. However, the benefit of evidence only accrues if a sufficient number of cases is scrutinized, which is hardly the case today.<sup>189</sup> Additionally, there is also an evidence requirement today, so one should consider whether the *marginal* increase would solve the deep problems identified here.

Other types of proposals offered conflicting recommendations on the choice of venue. While in the past small claims courts have been offered as a solution, today some call for the transfer of cases to the general civil

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<sup>183</sup> David Engstrom, *supra* note 28, at 643.

<sup>184</sup> Duffy, *supra* note 45, at 1195 (“The amount due, however, is typically the result of complicated, and often dynamic, contract terms.”).

<sup>185</sup> FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 38 (2013). Admittedly, there are certain recording issues involved, especially regarding verbal disputes. However, of the cases recorded, only 50% could be later verified, making the scope of genuine disputes much smaller, *id.* at 40-41. The FTC acknowledges that verbal disputes may not be properly recorded, *id.* at 38. See also Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, GMU L. ECON. RESEARCH PAPER SERIES 15-33 (2015).

<sup>186</sup> See Sterling & Schrag, *supra* note 72, at 366 (studying claims against 15 debtors). Note, however, that the authors believe, based on interviews, that eight of the fifteen interviewees had good faith defenses of which they were personally unaware due to legal ignorance. *Id.* at 384.

<sup>187</sup> See Holland, *Junk Justice*, *supra* note 46 (finding that *pro se* debtors had at least some success in 53% of the cases, although they only won trials in about 1% of the cases. The represented debtors had favorable outcomes in about 85% of cases, but this only applied to 8 cases out of a sample of 4,400 cases). Of course, trial outcomes are only suggestive.

<sup>188</sup> Means and merit testing would increase the benefit of evidence requirements, but would introduce other types of errors and problems (*e.g.*, debtors would “attorney-shop” for lenient attorneys) and involve administrative costs. Most importantly, however, letting private attorneys screen cases amounts to a *de facto* privatization of the process and, as such, should be evaluated independently of the current system.

<sup>189</sup> See *Debtors’ Hell*, *supra* note 1.



courts, where a higher standard of proof might deter creditors from filing.<sup>190</sup> But this is similar to requiring more evidence, and, as just argued, more evidence is unlikely to be the solution to the problem. Others suggest that federal courts will provide a better solution, due to more generous fee-shifting rules.<sup>191</sup> Yet others suggested simply narrowing creditors' access to *any* court. Because litigation tends to be lopsided, they reason, it will be best to allow litigation only after creditors exhaust informal collection efforts.<sup>192</sup> However, since informal collection is tainted with widespread abuse, it is hard to see how such a proposal could improve the consumer's situation, besides, perhaps, buying them some time at a considerable cost to creditors.<sup>193</sup>

The last type of the procedural reforms proposes the imposition of stricter requirements on plaintiffs, requiring them to sign affidavits that they have taken due effort to locate the debtor,<sup>194</sup> prove the timeliness of the claim,<sup>195</sup> or document service by means of GPS technology.<sup>196</sup> Another is educational: the creditor will have to provide consumers with all the necessary information regarding consumer's rights when it serves a summons. The problem with these proposals, even setting aside their costs, is that they critically depend on creditors with misaligned incentives. However, 'incentives find a way,' to paraphrase the famous movie saying, and as long as creditors stand to gain from debtor's failure to appear, they are bound to find loopholes and shortcuts.<sup>197</sup>

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<sup>190</sup> See Goldberg, *supra* note 46, at 747-48.

<sup>191</sup> See Note, *Improving Relief*, *supra* note 51, at 1464 (proposing a doctrine of "equitable remand," allowing federal courts to issue a vacatur of a state court judgment). This involves reforming the *Rooker-Feldman* doctrine that limits federal courts power to intervene in state courts' judgments. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

<sup>192</sup> See Goldberg, *supra* note 46, at 748 ("[T]o ensure that small-claims courts are truly a last resort . . . lawyers should be required to inform the court of all prior communications with the debtor and any extrajudicial collection efforts."). In September of 2013, Minnesota passed a law requiring creditors to provide an advance notice to debtors of intention to file for a judgment and allow 14 additional days. MINN. STAT. § 548.101 (2013). See also Glover, *supra* note 46, at 1132 (advocating filing fees).

<sup>193</sup> The authors of such proposals also seem aware of this inherent difficulty: "one possible weakness . . . is that it may result in more aggressive extrajudicial collection pursuits and consequently more violations of FDCPA", Goldberg, *supra* note 46, at 749.

<sup>194</sup> In Massachusetts, creditors in small claims courts are required to file a: "Verification of Defendant's Address form, certifying that he or she has verified the defendant's mailing address in the manner set forth." MASS. ANN. LAWS UNIFORM SMALL CLAIMS R. 2(b).

<sup>195</sup> See Haneman, *supra* note 87, at 735-37.

<sup>196</sup> See NEW YORK CITY BAR ASSOCIATION, OUT OF SERVICE, *supra* note 140, at 3. FTC, BROKEN SYSTEM, *supra* note 13, at 10 ("jurisdictions should also consider amending service of process rules to require greater verification.").

<sup>197</sup> "[L]ife finds a way." MICHAEL CRICHTON, JURASSIC PARK 178-179 (1990).

#### D. Arbitration and Class-Defense

Two very different types of solutions include arbitration and class litigation. Consumer arbitration is a growing trend.<sup>198</sup> In theory, it has various appealing characteristics that are relevant to some of the problems Administration addresses, most notably, its ability to overcome byzantine procedures and cut costs.<sup>199</sup> Despite these benefits (which many find contestable)<sup>200</sup> arbitration does not solve the structural issues that Administration does. This is especially clear in the case of consumer credit litigation where the FTC itself concluded that arbitration fails to adequately protect consumers.<sup>201</sup> The primary reason for this failure is that arbitration is ultimately a contractual instrument. If the market itself is flawed and rampant with fraud, moral hazard, and asymmetric information, contractual arrangements are more likely to reflect these flaws than to remedy them. More concretely, recall that in the context of consumer credit litigation one pervasive concern is abuse by creditors.<sup>202</sup> However since creditors draft the agreements and affect the choice of arbitrators, those cherry picked arbitrators are structurally impeded from deterring fraud.<sup>203</sup> Moreover, even

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<sup>198</sup> See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (expanding the scope of arbitration clauses in contracts related to class-actions); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 70-76 (2015) (detailing the rise of consumer arbitration).

<sup>199</sup> Arbitration allows consumers to avoid litigation costs, as emphasized by the industry. See Letter from Alan S. Kaplinsky, Attorney, to Chariman Richard Cordray, Bureau of Consumer Financial Protection (July 13, 2015), <http://www.aba.com/Advocacy/commentletters/Documents/cl-jointArbitration2015.pdf>. Reducing costs for creditors could also reduce the costs of consumer goods. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001) (the passing of cost savings is an overlooked advantage for consumers of arbitration).

<sup>200</sup> See PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 43 (2007) [hereinafter PUBLIC CITIZEN] (highlighting the costs of arbitration to consumers as a barrier), but see PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, *ARBITRATION—A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN* 10–12 (2008) (critiquing Public Citizen’s analysis), SEARLE CIVIL JUSTICE INST., *CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION* (2009) (reviewing the empirical literature and finding mostly positive effects of arbitration for consumers). Additionally, there is an empirical doubt to what extent consumers understand and consent to arbitration clauses. See Jeff Sovern et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements* (St. John’s Legal Stud. Research Paper Series, Working Paper No. 14-0009, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516432](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516432) (finding broad consumer misunderstanding of arbitration clauses in contracts).

<sup>201</sup> See FTC, *BROKEN SYSTEM*, *supra* note 13, at i

<sup>202</sup> See Holland, *Junk Justice*, *supra* note 46.

<sup>203</sup> See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*,

well-intentioned arbitrators cannot meaningfully investigate and audit cases where consumers do not appear, and access to arbitration is still considered “prohibitively expensive for consumers with relatively small claims.”<sup>204</sup> A broad range study of 34,000 arbitration cases revealed statistics that are similar to those of litigation, with 94% of arbitrations resolved in favor of the creditor.<sup>205</sup> The study also details evidence of arbitrator shopping where pro-plaintiff arbitrators are sought more often than the less pro-plaintiff arbitrators.<sup>206</sup> As a result, many, including consumer advocates, are disillusioned with arbitration.<sup>207</sup>

Another alternative is the idea of class defense.<sup>208</sup> Developed by Assaf Hamdani and Alon Klement, the class defense mechanism is a mirror image of class action, only that it consolidates dispersed defendants (rather than plaintiffs). When multiple defendants are sued by a single plaintiff, the class defense mechanism would allow them to be sued as a class, binding them all to the outcomes of litigation. The aggregation of claims makes it more worthwhile to defend them, as the joint stakes are large enough to pay a lawyer.<sup>209</sup> Class defense has much greater potential than the other proposals we surveyed, primarily because of its cost-effectiveness. Nonetheless, class defense is unlikely to fully resolve the problems identified here. The main problem is that class actions apply only to cases meeting narrow criteria that are often violated, most notably is the requirement of commonality among the class members. The Supreme Court’s recent decision in *Wal-Mart v. Dukes* means that class members must share a very high degree of commonality, and this is unlikely in many cases of civil litigation and especially in consumer credit contracts.<sup>210</sup> Having said that, if implemented, a class defense mechanism could complement well the institution of

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1997 WIS. L. REV. 33, 60-61; Nancy A. Welsh, *Mandatory Pre-dispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187, 197 (2013) (pre-dispute arbitration is a “system that is beset by structural bias.”).

<sup>204</sup> Sarah Rudolph Cole, *On Babies and Bathwater: The Supreme Court’s Recent Arbitration*, 48 HOUST. L. REV. 457, 466 (2011).

<sup>205</sup> See PUBLIC CITIZEN, *supra* note 200, at 43.

<sup>206</sup> *Id.*, On the other hand, the Searle Civil Justice Institute found only weak evidence of repeat player effects in its review of the literature. See SEARLE CIVIL JUSTICE INST., *supra* note 200, at xiii.

<sup>207</sup> See PUBLIC CITIZEN, *supra* note 200, at 458-59 (2011) (detailing consumer concerns and attempted policy responses to the growth in consumer arbitration agreements), SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 1-2 (2009), (reviewing the empirical evidence, discussing costs, due process, speed, outcomes, and fairness considerations and finding mostly positive effects).

<sup>208</sup> See generally Hamdani & Klement, *supra* note 98 (proposing the mechanism of class defense).

<sup>209</sup> Class defense depends on fee shifting, so that if the class prevails, the representing attorney can recover her fees from the plaintiff. *Id.*, at 715-17.

<sup>210</sup> See *Wal-Mart v. Dukes*, 564 U.S. 131 S. Ct. 2541 (2011) (declining to certify a class action due to lack of commonality among plaintiffs).

Adminization.

*E. A Pyrrhic Victory*

Suppose, contrary to all of the foregoing, that these reforms could work, and that they would bring a large portion of all consumers to court. These consumers would plead and argue their cases and fight against unfair charges, lack of evidence, fraud and abuse, or even more technical issues, such as the proper jurisdictional venue or setoffs and fees. Emboldened and empowered, consumers would also appeal wrong decisions and all would have their day(s) in court. Consequently, reformers hope, the accuracy of legal determination will rise and the scope of fraud and consumer abuse will fall.

This optimistic view requires that the legal system will be able to support all this increase in litigation. The volume of civil litigation is about 15 million cases annually, and it is estimated that about 8 million are consumer credit-related.<sup>211</sup> Today, in the vast majority of cases, consumers either do not appear or do not respond. For example, the civil courts of the City of New York saw 9,295 defendants out of 122,166 cases filed by seven large creditors in 2008—this is about 7%.<sup>212</sup> Getting even one-third of all NY consumers to appear, means that the number of cases that would be heard will rise from 9,295 to 31,000 cases and an additional 4,340 appeals would be filed.<sup>213</sup> Hence, any moderately successful reform would then encumber the courts with a few million new cases each year. This is hoped to be done by the same courts that are currently criticized for being clogged and “overwhelmed” by consumer credit cases.<sup>214</sup> To accommodate these cases, the system would have to quadruple its capacity.<sup>215</sup> Can we sustainably double, triple, quadruple, or more the national expense of the civil legal system?<sup>216</sup>

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<sup>211</sup> See *supra* note 45.

<sup>212</sup> See MFY, JUSTICE DISSERVED *supra* note 72 (the study accounts for the volume of debt claims filed by 7 large creditors).

<sup>213</sup> COURT STATISTICS PROJECT, CASELOAD HIGHLIGHTS (2007) (finding 14% rate of appeal in all civil matters).

<sup>214</sup> See NEW YORK CITY BAR ASSOCIATION, OUT OF SERVICE, *supra* note 140, at 11.

<sup>215</sup> Not all of civil litigation is debt claims, so doubling the number of cases would lead to less than double the resources. Nonetheless, debt claims are the majority of civil litigation, so the necessary increase in resources in response to doubling the debt claims will be large, see *supra* note 45. Also, some of the costs of litigation are fixed, so that more cases would not entail necessarily more courtrooms. However, as we consider here a very large increase in the volume of cases, there would be a need for new infrastructure.

<sup>216</sup> We do not know what the full cost of the legal system is, mainly because funding is fragmented between local, state and the national government, and user fees, fines, charges, etc.

This cost is “that which is seen,” but what about the cost “which is not seen”?<sup>217</sup> The less salient and more removed costs would be those created by the response of creditors and debtors to such a change. Debtors would be much more inclined to defend cases which have less merit, hoping to win them by luck or through the attrition of the creditor. Creditors will wastefully have to spend more on litigation to win cases. Therefore, some creditors will not find it worthwhile to pursue small claims, either because the case lacks merit or because the costs exceed the value of the expected judgment. This will lead many to invest more in informal debt collection<sup>218</sup>—an area that is hard to police and is rife with abuse<sup>219</sup>—and others will altogether abandon small consumer loans, an outcome undesirable for both creditors and debtors.

Indeed, there may be some important benefits to all of these reform proposals: more legal accuracy, less fraud, and greater due process and consumer participation. Adminization does not mean that these routes should be abandoned; rather, we should diversify our approach by using multiple institutions to address a multi-causal problem, thus improving outcomes and reducing costs.

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Phone conversation with William Raftery, Knowledge and Information Service Analyst of the National Center for State Courts, Sep. 14, 2015. On the structure of funding, see US DEPARTMENT OF JUSTICE, SPECIAL REPORT: STATE COURTS ORGANIZATION, 2011, 8 (2013). For comparison, the cost of the New York court system is \$2 billion a year, and \$0.5 billion for the one in Pennsylvania. JOHN LIPPMAN ET AL., NEW YORK STATE UNIFIED COURT SYSTEM BUDGET, FISCAL YEAR 2015-16 (2014); SUPREME COURT OF PENNSYLVANIA, PROPOSED BUDGET OF THE UNIFIED JUDICIAL SYSTEM 2015-2016 (2015) (overall state contributions amount to \$11 billion a year); *Preparation and Submission of the Judicial Branch Budget*, NATIONAL CENTRE FOR STATE COURTS, <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM09>; NATIONAL GOVERNORS ASSOCIATION AND NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES: SPRING 2012 (2012).

<sup>217</sup> See FREDERIC BASTIAT, *THAT WHICH IS SEEN, AND THAT WHICH IS NOT SEEN* (1850). (“In the department of economy, an act, a habit, an institution, a law, gives birth not only to an effect, but to a series of effects. Of these effects, the first only is immediate; it manifests itself simultaneously with its cause - it is seen. The others unfold in succession - they are not seen.”).

<sup>218</sup> See Sergio Lazzarini et al., *Order with Some Law: Complementarity versus Substitution of Formal and Informal Arrangements*, 20 J. L. ECON. & ORG. 261, 262 (2004) (exploring substitution and complementarity between formal and informal norms); Oren Gazal-Ayal & Limor Riza, *Economic Analysis of Plea Bargaining and Prosecution*, in CRIMINAL LAW AND ECONOMICS 145 (Nuno Garoupa ed., 2009) (explaining that trial complexities lead to greater frequency of plea bargains).

<sup>219</sup> See *supra* section I.A. See also *supra* note 193.

## IV. CHALLENGES

A. *Legal Authority*

The use of the CFPB for the purposes of the gatekeeping civil litigation requires legal authority, current laws provide such an authority, although it is with certain limits. The primary source of authority is the Consumer Financial Protection Act (CFPA),<sup>220</sup> enacted as Title X of the Dodd-Frank Act, which established the CFPB and tasked it with implementing and enforcing federal consumer protection law to ensure that “markets for consumer financial products and services are fair, transparent, and competitive.”<sup>221</sup> A central objective is to protect consumers “from unfair, deceptive, or abusive acts and practices.”<sup>222</sup> To achieve these goals, the law provides the CFPB with broad powers: conduct investigations, request information from covered entities, issue subpoenas and civil investigative demands, hold hearings, bring lawsuits, and, importantly, levy fines.<sup>223</sup> The second relevant legislative authority is the Fair Debt Collection Practices Act (FDCPA), which provides enforcement powers to the regulator (originally, the Federal Trade Commission).<sup>224</sup> These powers are intended to curb abusive debt collection practices and encourage fair debt collection practices.<sup>225</sup>

The CFPB’s jurisdiction is very broad. Its enforcement powers encompass any provider of consumer financial services or its affiliates for “unfair, deceptive, or abusive acts or practices”.<sup>226</sup> Moreover, the CFPB has supervisory powers over large banks and certain “non-banks”, *i.e.*, providers of credit such as payday loans, auto lenders, mortgage originators, and more recently, debt collectors with annual earnings over \$10 million, which is not a very high bar.<sup>227</sup> In addition, the FDCPA also empowers the regulator to investigate and pursue action against debt collectors.<sup>228</sup> Using these broad powers, the CFPB regularly engages in enforcement activity that covers a broad array of regulated entities, including banks, law firms filing debt collection lawsuits with insufficient

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<sup>220</sup> Dodd-Frank Act, Title X.

<sup>221</sup> 12 U.S.C. § 5511 (a) (2012).

<sup>222</sup> 12 U.S.C. § 5511 (b) (2) (2012).

<sup>223</sup> 12 U.S.C. §§ 5562–65 (2012)

<sup>224</sup> 15 U.S.C. § 1692l(b) (2012).

<sup>225</sup> 15 U.S.C. § 1692(e) (2012).

<sup>226</sup> 12 U.S.C. § 5531, for the definition of “covered persons” see 12 U.S.C. 1002(6) (2012).

<sup>227</sup> 12 U.S.C. § 5514, large debt collectors are considered “large participants” under 12 U.S.C. § 5514(a)(1)(B), § 5561 (6) (2012) according to 12 CFR 1090.105.

<sup>228</sup> 15 U.S.C. § 1692a (6) (2012).

evidence, debt collectors, and even individuals.<sup>229</sup> As a consequence, the CFPB has the necessary authority to support Adminization of consumer debt litigation, allowing it to investigate and take enforcement actions against those engaged in unfair, deceptive, or abusive acts.

A second related issue concerns the power to regulate activity at the state level by a federal body. This concern is directly addressed by the FDCPA, which explicitly states that “[e]ven where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.”<sup>230</sup> The Supreme Court shared Congress’ view, holding that “commercial lending . . . [has broad impact] on the national economy.”<sup>231</sup> As a side note, the CFPB very recently survived a constitutional challenge that sought to dismantle it.<sup>232</sup> In sum, the law provides the CFPB with the power to conduct audits, sample cases, and use fines. The range of covered entities is broad, although not unlimited. Importantly, these powers extend to activity that is done purely at the state level, thus paving the way to Adminization.

#### *B. Feasibility of Adminization & Political Economy*

The success of regulatory reform does not depend solely on its merits, but also on its political appeal; would Adminization receive sufficient political support? While predicating any sort of political trajectory is difficult, I will note a few reasons why Adminization may appeal to strong, mobilized forces. First, on the consumer side, this system provides a strong, meaningful form of protection. Implementing it on a broad scale can literally improve the life of millions of consumers, over a relatively short period. Consumer advocates and politicians seeking to enhance the welfare of the middle and lower class, may thus find this proposal beneficial. It is more important, however, that Adminization would also be appealing to creditors. Most directly, the automation of uncontested claims will save considerable costs of litigating cases, where a lawsuit has to be prepared and an attorney

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<sup>229</sup> See, e.g., In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, And Gerard J. Felt 2016-CFPB- 0009 (2016) (lawfirm), In the Matter of David Eghbali, Consent Order, 2016-CFPB-0011 (2016) (bank employee).

<sup>230</sup> 15 U.S.C. § 1692 (2012).

<sup>231</sup> See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003). See also *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38-39 (1980) (“Banking and related financial activities are of profound local concern . . . . Nonetheless, it does not follow that these same activities lack important interstate attributes”), *Perez v. United States*, 402 U.S. 146, 154-55 (1971) (“Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce”).

<sup>232</sup> See *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, 2016 U.S. App. LEXIS 18332, at 33 (D.C. Cir. Oct. 11, 2016) (holding that the CFPB will continue operations but under direct supervision and direction of the President).

sent to the court. Second, reducing the load on the courts, also means that judgments will be processed more quickly. Third, and less directly, improving the system of consumer credit litigation, will increase the consumer confidence in the credit market, thus encouraging borrowing. Fourth, improving the quality of decisions will improve the legitimacy of the legal system, and there is reason to believe that greater legitimacy will translate in greater consumer propensity to repay judgments.<sup>233</sup>

These mutual advantages to debtors and creditors promise a real political possibility of implementation. As a case study, in Israel, where a somewhat similar reform was proposed, an unlikely coalition emerged. Both creditors and consumers joined hands in support of the reform.<sup>234</sup> The only opponents were the Israel Bar Association, which expressed concerns that the reform would make parties less likely to retain the services of lawyer.<sup>235</sup> Ultimately, the bar lost.<sup>236</sup> It would seem that overall, Adminization offers a great promise to both plaintiffs and defendants, and should be highly feasible from a political-economy perspective.

### C. *Regulatory Capture*

In administrative law, there is a general concern with regulatory capture.<sup>237</sup> Here, one might worry that creditors will be able to lobby an effect the relevant agency. Without denying the potential dangers of regulatory capture in some cases,<sup>238</sup> the concern in the abstract is

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<sup>233</sup> See, e.g., Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANNUAL REV. PSYC. 375 (2006) (explaining legitimacy as the belief that the law should be obeyed); Jonathan Jackson et al., *Why do People comply with the Law?*, 52 BRIT. J. CRIMINOL. 1051 (2012) (finding higher compliance from those who believe in the legitimacy of the law).

<sup>234</sup> See *Protocol no. 661*, LAW AND JUSTICE COMMITTEE (July 24, 2012), <http://www.knesset.gov.il/protocols/data/rtf/huka/2012-07-24-02.rtf>; see also, *Protocol no. 7*, LAW AND JUSTICE COMMITTEE (June 16, 2015), [http://www.nevo.co.il/law\\_html/law103/20\\_ptv\\_309355.htm](http://www.nevo.co.il/law_html/law103/20_ptv_309355.htm) (endorsement of the process by a consumer NGO).

<sup>235</sup> These concerns were expressed (and criticized by the court) in HCJ 6804/12 Israel Bar v. Minister of Justice, unpublished (12.6.2013) (Hebrew).

<sup>236</sup> In the interest of disclosure, the author was a paid advisor for one of the commercial companies supporting the reform.

<sup>237</sup> See, e.g., STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 26-52 (2008); Posner, *supra* note 107, at 19 (“Agencies are subject to far more intense interest-group pressures than courts.”).

<sup>238</sup> See Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 3 (Daniel Carpenter & David A. Moss eds., 2013) (“[O]bservers are quick to see capture as the explanation for almost any regulatory problem . . . . At the same time, there appears to be a great deal of fatalism . . . about the impossibility of ameliorating or preventing capture.”).



unconvincing.<sup>239</sup> Many government agencies already operate in the world, and they are not all hopelessly captured, despite a great variety of lobby groups.<sup>240</sup> This seems especially true of the CFPB, which has taken a hard line against creditors during its years of operation. Additionally, consumers also mobilize politically, as evidenced by the support garnered by politicians such as Senators Elizabeth Warren and Bernie Sanders and political movements such as Occupy Wall Street.<sup>241</sup> Also, consumers are already at a disadvantage in the courts today, as creditors are repeat players, with more resources, and greater ability to forum-shop. Hence, neither forum is immune to special interests.<sup>242</sup> Ultimately, this challenge does not appear especially worrying. The agency does not replace court proceedings, only adds an additional layer. Hence, the benefit to a plaintiff of “capturing” the regulator is much diminished. Given the great benefits that Adminization could provide and the low concrete threat of regulatory capture, it will be mistaken to let abstract regulatory concerns inhibit meaningful reform.

#### D. *Costs and Incidence*

A final challenge relates to the cost of running the agency. This concern may relate to the costs themselves or their “incidence”, *i.e.*, the idea that the public should bear them. On reflection, however, this challenge does not prove critical. Using the existing platform of the CFPB means that set-up costs are going to be low. The most significant cost is that of the audits, but the agency (and Congress) has control over the frequency of audits, thus guaranteeing budgetary control. For comparison, the IRS handles about 1.2 million audits every year, which amounts to a rate of audit of 0.8 percent of all its cases.<sup>243</sup> This implies that only 64,000 cases need to be audited to achieve the same deterrent effect, and potentially same level of compliance, as personal taxation.<sup>244</sup>

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<sup>239</sup> For general critique, *see* David Engstrom, *supra* note 28, at 674-78. Engstrom argues, however, that there is greater concern with capture when agencies conduct case-by-case adjudication. *Id.*, 678. His reasoning in this context seems to rely on a different model, where the agency substitutes legal supervision rather than complements it – as Adminization does.

<sup>240</sup> For a list of the most concentrated lobby groups, *see Top Interest Groups Giving to Members of Congress, 2016 Cycle*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/mems.php>.

<sup>241</sup> 2016 Democratic Popular Vote, REALCLEARPOLITICS, (noting 12 million votes in favor of Bernie Sanders); Stephen Collinson, *Does Elizabeth Warren Regret Not Running for President?*, CNN (Aug. 26, 2015), <http://www.cnn.com/2015/08/25/politics/elizabeth-warren-joe-biden-elections-2016/> (predicting high potential for both Elizabeth Warren and Bernie Sanders).

<sup>242</sup> *Cf.* Posner, *supra* note 107, at 20 (“Courts are relatively immune to interest- group pressures.”).

<sup>243</sup> *See supra* note 114.

<sup>244</sup> This is done under the assumption of 8 million filings every year, of which 0.5 percent would

Estimating the cost of audit is difficult; luckily, in situations like these, Fermi Estimate often provides useful approximations (within an order-of-magnitude).<sup>245</sup> Collecting evidence in a case, analyzing it, and contacting all the relevant parties, should probably not take more than 10 hours on average for a skilled auditor. The median annual salary of an IRS auditor is about \$70,000,<sup>246</sup> which using the standard divisor of 2,087, implies a per-hour-cost of \$33.5. To this we should add overhead, inefficiencies, and some buffer, so it is probably within reasonable range to assume that for every hour of work, an hour of similar worth is spent. This means that the per-hour cost of audit is (again, using a very rough estimate) about \$70, giving us \$700 per audited case, or a cost of \$44.8 million.<sup>247</sup> Even doubling this estimate, we are still two orders of magnitude less than the cost of the leading alternative. In fact, this cost is so low that there is reason to believe that if it will reduce filings, Adminization will be even cheaper than the status quo, where courts have to handle many cases that should not be filed.

Another source of cost comes from the development of algorithms. However, this cost would be largely a one-off expenditure on development. Perhaps even more importantly from a policy perspective, Adminization can begin *without these algorithms* and simply choose cases at random, similar to the IRS process. Besides these costs, of course, Adminization has considerable financial benefits, including the automatic processing of many cases that today require the attention of judges and plaintiff's attorney, the increase of consumer confidence in the credit market, and, perhaps most importantly, the reduction in fraud and abuse in the credit market.

The incidence objection holds that it should not be the public purse that pays the costs of setting up an agency which delivers service that relates to

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be audited. *See supra* note 45.

<sup>245</sup> *See Fermi Problem*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fermi\\_problem](https://en.wikipedia.org/wiki/Fermi_problem) (“Fermi estimates generally work because the estimations of the individual terms are often close to correct, and overestimates and underestimates help cancel each other out”)

<sup>246</sup> *See Average Salary for Tax Examiner, Collector, or Revenue Agent at U.S. Internal Revenue Service* (IRS) *Employer*, Payscale, [http://www.payscale.com/research/US/Employer=U.S.\\_Internal\\_Revenue\\_Service\\_\(IRS\)/Salary/Job/Tax-Examiner%2c-Collector%2c-or-Revenue-Agent](http://www.payscale.com/research/US/Employer=U.S._Internal_Revenue_Service_(IRS)/Salary/Job/Tax-Examiner%2c-Collector%2c-or-Revenue-Agent)

<sup>247</sup> To verify, the IRS estimates that a \$55 million budget increase will allow it to deal with 500,000 additional cases (including individual audits, employment tax exams and collection matters). This implies a per-case cost of \$574, which—despite the differences between audited cases and the costs of handling the other types of cases, is still suggestive that the analysis here is in the right order of magnitude. *See IRS OVERSIGHT BOARD, FY2015 IRS BUDGET RECOMMENDATION SPECIAL REPORT (May, 2014)*, <https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20FY2015%20Budget%20Report-FINAL.pdf>

purely private, financial matters. While such objections may have some merit in certain contexts, it is also of little relevance to the case made here. This is because there are already large government subsidies at place, and many more are being offered, and the question at hand is how to best allocate those. The operation of the courts, judges' salaries, public attorneys, and provision of information, are all costly activities mostly borne by the public purse. For concreteness, consider the cost of legal aid. All states in the US provide salaried legal aid officers, have organized *pro bono* services, about 70% have court staffed self-help centers for *pro se* parties, about 50% provide legal advice or information hotlines, and about 30% employ a courthouse lawyer for day programs.<sup>248</sup> The overall spending on legal aid is conservatively estimated at \$1.34 billion annually, although only part of this amount is directed at debt cases.<sup>249</sup> Court fees account for an estimated 20-30% of the overall cost of running the court itself.<sup>250</sup>

Overall, whatever costs Adminization entails and whatever their incidence is, it is important to measure them in relation to both the (impossibly) high costs of the alternatives and the benefits of improving the system.

## V. CONCLUDING REMARKS ON ADMINIZATION

An old joke tells of a customer who dines in a restaurant and after finishing his meal, asks for the check, to which the waiter promptly obliges. The customer then decides to review the check in detail, and discovers that among the various items on the list, there is an unrecognized item called "success". Having no recollection of ordering such a dish, the customer asks the waiter as to the meaning of this charge. "It is actually quite simple," responds the waiter, "if the customer pays, then it is a success."

The success method is the calculated, strategic filing of unmeritorious claims in the presence of lax screening mechanisms. The Article demonstrated how civil litigation is systematically lacking in its ability to screen unmeritorious claims. The review of the evidence shows problems of predatory debt collection practices, sewer service, consumer under-participation, lack of legal representation, faulty and sometimes fraudulent

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<sup>248</sup> See REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, 13 (2011).

<sup>249</sup> ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013 (2013). According to the report, the LSC is the largest provider of such services and it provides legal aid in 11% of the cases it handles.

<sup>250</sup> See GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 17-18 (2014) (Reporting findings from Massachusetts and Utah. Note, however, that in Florida the court system seems to be profitable on net).

evidence, and the lack of supervision by judges. This results in a large system that invites the use of the “success method”.

The proposed solution to this problem is the use of a new mode of regulation, in between courts and agencies, called Adminization: The use of a gatekeeper agency to provide oversight when participation is systematically lacking. It also offers a robust protection of due process rights as a matter of both procedure and substance. This results in a lean, cost-effective institution that could garner broad political support, much more so than most of the other reform proposals that are currently advocated. Consumers would enjoy greater access to justice at lower costs and much broader protection of their rights. Creditors would benefit from having greater consumer confidence in the credit market.

Future work will explore other applications of Adminization; some prominent examples include housing, insurance and social benefits fraud, employment law (suits against employees), civil rights, and civil forfeitures. Each unique context brings its own nuance and sensibilities, and the framework presented here can be usefully adapted to meet these considerations. With the advance of algorithmic decision-making, the growing budgetary pressures on courts, and the pressure to improve outcomes for consumers of the legal system, Adminization offers a glimpse into the future of our systems of regulation.