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## THE DEMOCRATIC (IL)LEGITIMACY OF ASSEMBLY-LINE LITIGATION

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### INTRODUCTION

Millions of debt cases are filed in the civil courts every year.<sup>1</sup> In debt actions, asymmetrical representation is the norm, with the plaintiff almost always represented by counsel and the defendant very rarely so. A number of jurisdictions report that up to ninety-nine percent of defendants in debt cases appear pro se — a figure that calls into question the basic legitimacy of these proceedings.<sup>2</sup>

Professor Daniel Wilf-Townsend’s central contribution to the literature on debt collection, and state civil justice more broadly, is to demonstrate through sophisticated empirics what has long been anecdotally reported: that a cluster of corporate plaintiffs he dubs “top filers” are responsible for a large share of debt collection litigation.<sup>3</sup> Wilf-Townsend surveyed top filer activity across twenty court systems in a single year to provide a snapshot-in-time of their influence, finding that an average of about twenty-three percent of debt suits in each state are brought by just ten corporate plaintiffs — each of which brings tens or hundreds of thousands of claims a year and has instituted routinized, assembly-line methods for railroading pro se defendants.<sup>4</sup> This empirical finding is significant in providing rich detail on the identity of the

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<sup>1</sup> See PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 5–8 (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/N99W-VGAA>]; Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. (forthcoming 2022).

<sup>2</sup> Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1596–97 (2018).

<sup>3</sup> Plaintiffs in consumer cases are often depicted as billion-dollar debt buyers who bundle and purchase debt for pennies on the dollar and then aggressively seek recoupment of that debt through litigation against ordinary consumers. Wilf-Townsend’s data found more variation among corporate plaintiffs, with financial services companies as likely to pursue assembly-line litigation as debt buyers, and a mix of healthcare providers and property managers serving as top filers as well.

<sup>4</sup> Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1729 (2022) (about twenty-three percent average); *id.* at 1742 (files tens or hundreds of thousands of cases). Moreover, many companies were top filers across the country. The three top filers nationally brought nearly 300,000 lawsuits in a single year — roughly equivalent to all federal civil cases combined. *Id.* at 1732.

corporate entities running the debt collection mill in state civil courts. As Wilf-Townsend asserts, it also provides insight into the types of reforms that may be most effective. His prescriptions focus on ways to rein in corporate filings, and to do this he puts forward a number of options for reforming the courts: congestion pricing for top filers to increase the cost of litigation, class actions brought by defendants against top filers in violation of consumer laws, and a reconfiguration of the judicial role in which judges actively inspect the validity of top filer claims.

Wilf-Townsend's research adds an unexamined dimension to our understanding of debt collection proceedings, which, for various reasons related to the way state courts operate, are largely obscured from public view. His novel empirical work provides a window into corporate monopolization of the courts, which further illuminates the power differential between plaintiffs and defendants in debt court.<sup>5</sup> This research is critical and difficult to conduct — and far too little of it is undertaken.

We take Wilf-Townsend's articulation of civil justice failure one step further. In doing so, we question both the democratic legitimacy of debt collection courts and the adequacy of incremental reform that targets the structure of litigation. In this Response, we take a panoramic picture of state civil courts, and debt cases in particular, and name specific features of the courts that must be taken into account in crafting reform prescriptions. We proceed in three parts. Part I contributes two critical components to Wilf-Townsend's rich description of consumer debt cases: pervasive intersectional inequality among pro se defendants and a record of fraud among top filers. Wilf-Townsend offers a version of civil courts as tasked with adjudicating consumer contracts and doing so poorly. As he asserts: "State courts backstop the bread-and-butter transactions that make up the consumer economy, overseeing litigation over contracts and providing the ultimate enforcement mechanism for the trillions of dollars of consumer debt in the United States."<sup>6</sup> We add to this portrayal a sharper focus on the racial, gender, and class dynamics of civil courts, which play an outsized role in state civil justice dysfunction and have normative implications for institutional design solutions.<sup>7</sup>

In addition, we expand on Wilf-Townsend's account of assembly-line plaintiffs. Corporate debt collectors concentrate their power by

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<sup>5</sup> Notably, Wilf-Townsend's findings mirror findings made by Professor Matthew Desmond and Devin Rutan in eviction cases, in which a small number of large landlords were found to be responsible for a significant percentage of all evictions in seventeen cities that were the subject of study. Devin Q. Rutan & Matthew Desmond, *The Concentrated Geography of Eviction*, 693 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 73 (2021).

<sup>6</sup> Wilf-Townsend, *supra* note 4, at 1707.

<sup>7</sup> See Jamila Michener, *Policy Feedback in a Racialized Polity*, 47 POL'Y STUD. J. 423, 441–44 (2019); Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26, 32–34 (2019).

flooding the courts with millions of lawsuits, as Wilf-Townsend highlights. We enhance this depiction by documenting pervasive fraud on the part of assembly-line plaintiffs, which Wilf-Townsend names — but does not fully explore — as germane to the operation of civil courts. The clustering of corporate entities in state civil courts tells part of the story; the fraudulent conduct of plaintiffs in debt cases also plays a significant role in exacerbating poverty and inequity for marginalized groups in civil courts. These fraudulent practices exploit low-income communities of color and fuel troubling structural inequality.

Part II positions Wilf-Townsend’s “more radical”<sup>8</sup> proposal to restructure debt proceedings into agency-style adjudication as a form of problem-solving courts, which have an established history in the U.S. justice system. Wilf-Townsend advances his proposal — in which related claims by a single entity are submitted in batches and then sampled by judges for closer scrutiny — as more radical than others because it steps outside of accepted litigation practices and instead embraces an active judicial role that, under present Judicial Canons, stands on shaky ethical ground.<sup>9</sup> We suggest that Wilf-Townsend’s agency-adjudication proposal can be viewed as akin to the problem-solving model, featuring an investigatory judge and a corporate plaintiff subject to monitoring. This model has already shown promise in rental housing matters, a close cousin of debt collection cases, and Wilf-Townsend’s rendering includes a particular focus on reducing the per-case cost of adjudication. We place his proposal within the larger literature on active judging — a proposal deeply engaged by scholars, including ourselves — and suggest that Wilf-Townsend sets forth a first step toward reimagining state civil courts. We endorse incremental reform as important and pragmatic, and have ourselves advanced various forms of it, but we also submit that tinkering along the adjudicatory edges is unlikely to extricate the courts from perpetuating a system of wealth extraction and racial and class subordination.

Part III borrows from the grassroots movement to defund the police to set forth a broader and more aspirational vision of reform. This vision places Wilf-Townsend’s proposals on a continuum that supports institutional tinkering but also recognizes the need for bold solutions. Civil courts are visible evidence that the American government has failed to uphold the social contract.<sup>10</sup> The legislative and executive branches have consistently refused to expand the social safety net. Almost any unplanned (but typical) life event — a caretaking responsi-

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<sup>8</sup> Wilf-Townsend, *supra* note 4, at 1772.

<sup>9</sup> See generally Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (forthcoming 2022).

<sup>10</sup> See Shanahan et al., *supra* note 1 (manuscript at 3).

bility for an elderly parent, a child's need for health or education services, an increase in rent above an affordable threshold — can kickstart a downward spiral into debt delinquency and poverty. In all of these areas, Black women are likely to be hit the hardest.<sup>11</sup>

State civil courts operate as the institutions of last resort — the democratic emergency room — for people's social needs.<sup>12</sup> The judicial branch, designed to engage in adversarial dispute resolution and protect rights, cannot effectively serve its democratic role when the cases it “adjudicates” are one sided and, too often, brought by corporate plaintiffs who overwhelm courts with bad claims. Judges are emergency room doctors without any training in — or resources for — triage, pattern recognition, problem diagnosis, referral making, or collaboration with specialists. This is an untenable position for the courts to retain as democratic institutions intended to check state and private power, and ultimately brings the legitimacy of these courts into question.<sup>13</sup> The question of legitimacy in assembly-line litigation is heightened by the asymmetrical nature of these cases, in which supercharged repeat players have the capacity to bury both courts and consumers with so many lawsuits that resolution of most claims by default becomes the only way to keep the system afloat. Drawing on an invest/divest framework, we propose that bold reform would focus on reestablishing the democratic legitimacy of state civil courts by increasing social provision to defendants economically ravished by assembly-line litigation and also by keeping courts squarely in the business of resolving two-party adversarial disputes.

#### I. ADDITIONAL FEATURES OF THE DEBT COLLECTION MACHINE: RACE, GENDER, POVERTY & CORPORATE FRAUD

This Part introduces a fuller demographic and organizational picture of debt cases in civil courts that ultimately challenges their democratic legitimacy. Wilf-Townsend gives us a stark account of power concentrated in a small number of assembly-line plaintiffs. An exploration of the racial, gender, and socioeconomic status of pro se defendants is not Wilf-Townsend's project, and yet the intersectional disparities that plague defendants are critical to the discussion of debt courts and civil

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<sup>11</sup> Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022).

<sup>12</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS, Winter 2019, at 128, 129–30; Shanahan et al., *supra* note 1 (manuscript at 3).

<sup>13</sup> Our invocation of legitimacy is meant broadly and captures Professor Richard Fallon's three categories of court legitimacy: sociological legitimacy (Does the public view the legal institution as worthy of respect?); moral legitimacy (Should people treat the legal institution as worthy of respect?); and legal legitimacy (Is the legal institution using methods that are generally accepted within legal culture?). See RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20–46 (2018); see also Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244 (2019).

justice reform. This Part also expands on Wilf-Townsend's detailed description of top filers by presenting evidence, much of it amassed by the Federal Trade Commission, the Consumer Financial Protection Bureau (CFPB), Human Rights Watch, and the Pew Charitable Trusts, that the business model of corporate debt buyers is grounded, in large part, on a specific set of fraudulent practices designed to extract wealth from poor communities. The picture of debt litigation, as we articulate it, highlights courts' role in reproducing racial, gender, and socioeconomic inequities and is critical to the normative analysis of where to go from here.

A. *Who Are the Pro Se Defendants in Debt Cases?*

Race, gender, and poverty are entrenched features of the civil justice landscape and pro se defendants in debt cases are disproportionately likely to be low-income people of color.<sup>14</sup> Poverty, construed broadly, is at the root of most consumer cases (and most civil justice matters more broadly). Roughly forty percent of Americans have less than \$400 in savings, making even minor financial shocks, such as a broken car transmission or an unexpected medical procedure, difficult to absorb.<sup>15</sup> As Professor Abbye Atkinson explains, as a matter of policy, the extension of credit is a central — yet fundamentally flawed — tool of social provision in the face of these needs.<sup>16</sup> The result is that millions of Americans default on debt they have incurred. In a financial emergency, many families prioritize rent. That leaves medical debt, credit card debt, and auto loans — the trifecta of the modern debt collection industry — unpaid, at least temporarily.<sup>17</sup> Debt delinquency puts already-vulnerable families at risk of aggressive collection efforts and lawsuits.

Socioeconomic factors tell a part of the story but not all of it. Racial and gender dynamics also play a definitional role in any account of the civil justice system. Women, particularly Black women, bear the brunt of most punitive civil justice actions, with debt collection likely no exception. In recent work, one of us, together with Professor Kathryn Sabbeth, amassed research demonstrating that carried debt and debt

<sup>14</sup> Sabbeth & Steinberg, *supra* note 11 (manuscript at 23).

<sup>15</sup> BD. OF GOVERNORS OF THE FED. RESV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (May 2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [<https://perma.cc/2QWV-92L7>].

<sup>16</sup> Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1098–99 (2019); Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1414–15 (2020); see also Pamela Foohey, Dalíé Jiménez & Christopher K. Olinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISCOURSE 126, 128–29 (2020).

<sup>17</sup> Andy Newman, *They Need Legal Advice on Debts. Should it Have to Come from Lawyers?*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html> [<https://perma.cc/77NP-HTAG>].

delinquency rates are higher among Black women than any other group across every common category of debt.<sup>18</sup> The reasons for this disparity are both complex and predictable, implicating larger issues of gender and racial equity, including lower wages,<sup>19</sup> increased responsibility for unpaid work such as childcare and eldercare,<sup>20</sup> predatory lending practices that target women,<sup>21</sup> and a far greater likelihood that women will assume primary financial responsibility for dependent children.<sup>22</sup> No court system isolates the race or gender of defendants in debt cases.<sup>23</sup> The fact that courts do not track demographic data systematically is itself a manifestation of structural inequality: debt cases — not unlike other areas of civil law — are simply not considered important enough to study, understand, or solve (Wilf-Townsend and Professor Dalié Jiménez are among the few entrepreneurial researchers attempting to reverse that trend). However, we can assert that disproportionately high rates of debt accrual and default among women, and particularly Black women, make them a prime target for lawsuits.

This depiction of defendants in debt cases, the vast majority of whom lack counsel, is essential to understanding assembly-line litigation specifically and the civil courts generally. Courts are not simply burdened by a deluge of top filer lawsuits that undermine fair and accurate adjudication; they also function as sites of deepening racial, gender, and income inequality.

### B. *What Are the Top Filer Plaintiffs Doing?*

The top filer business model does more than overwhelm courts with millions of debt suits. It exploits the racial and gender hierarchy in civil courts by utilizing three interrelated practices to twist defective debt claims into judgments that evade review. First, top filers engage in “sewer service,” a practice in which the plaintiff purports to have served the defendant with notice of the lawsuit — and submits an affidavit to

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<sup>18</sup> Sabbeth & Steinberg, *supra* note 11 (manuscript at 19).

<sup>19</sup> Intersectionality is particularly significant when it comes to wages, with Black women earning only sixty-two cents on the dollar compared to white men. Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 *GEO. J. GENDER & L.* 1, 11 (2020).

<sup>20</sup> Annalisa Merelli, *There's A Mind-Boggling Amount of Work Women Do that We Literally Can't Quantify*, *QUARTZ* (May 18, 2016), <https://qz.com/686075/we-still-have-literally-no-way-to-quantify-exactly-how-much-work-women-do> [<https://perma.cc/KF4G-X3TH>].

<sup>21</sup> Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 *CHI.-KENT L. REV.* 65, 68 (2014).

<sup>22</sup> A quarter of American households with minor children are headed by a single mother. *See* WENDY WANG, KIM PARKER & PAUL TAYLOR, PEW RSCH. CTR., *BREADWINNER MOMS 17* (2013), [https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/05/breadwinner\\_moms\\_final.pdf](https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/05/breadwinner_moms_final.pdf) [<https://perma.cc/7ESP-BHFU>].

<sup>23</sup> *See* PEW CHARITABLE TRS., *supra* note 1, at 22 (reporting that only eleven states isolate data on debt cases at all, and none along race or gender lines).

this effect to the court — when, in fact, personal service was never accomplished.<sup>24</sup> Second, debt collectors employ “robo-signing,” a tactic in which the complaint includes an affidavit asserting personal knowledge of the underlying debt, when often the debt has been bundled and sold so many times that the assembly-line plaintiff has in its possession only a ledger indicating the amount of debt allegedly owed, without any information about the original creditor, the debt’s chain of custody, or even how the debt was accrued.<sup>25</sup> Finally, corporate plaintiffs either knowingly or negligently pursue debt protected from collection, including time-barred or “zombie” debt, debt discharged in bankruptcy, or debt either never owed or already paid. For at least a decade, agencies and advocacy groups have divulged these deceitful tactics, amounting to a colossal scam transpiring in the courts.

To use our formal civil justice institutions, a plaintiff must serve notice of its claim, have personal knowledge of the validity of the claim, and make efforts to avoid bringing a frivolous or meritless claim. Without these procedural steps, the lawsuit is illegitimate even if the debt, at one point, was delinquent. Wilf-Townsend casts assembly-line plaintiffs as economically efficient engines because of the size and volume of their business. Equally important to appreciate, however, is that corporate plaintiffs consolidate their power by purchasing debt they know little about for pennies on the dollar, as Jiménez has documented.<sup>26</sup> These corporations then ram lawsuits through the courts against a racialized and gendered population of low-income people they presume will not assert their rights.

The unfortunate reality is that courts have done little to curb these practices. Judges are not equipped to adjudicate cases under conditions of asymmetrical representation, often ceding undue power to the assembly-line debt buyer to control the facts and evidence considered. This type of judicial minimalism has an unsurprising result: judges churn through hundreds of cases a day and almost always rule for the plaintiff.<sup>27</sup> Powerful corporate entities have almost entirely captured debt courts, controlling dockets and leveraging judges’ reticence to rectify the David-and-Goliath-like mismatch of skills and knowledge between the parties. As Wilf-Townsend reports, corporate plaintiffs typically secure their requested relief breezily. With a judgment in hand, they have broad powers to pursue enforcement through wage garnishment, property liens, and asset seizure. What Wilf-Townsend uncovers

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<sup>24</sup> Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL’Y REV. 91, 107 (2017).

<sup>25</sup> Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 293–94 (2011).

<sup>26</sup> Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

<sup>27</sup> HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR (2016), <https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor> [<https://perma.cc/V868-263Y>].

is that this problem is even bigger than previously realized, with the size and volume of repeat-player debt litigation rendering judicial examination of these claims almost impossible.

The result is not simply that assembly-line plaintiffs win claims. On a platform of fraud, debt buyers are extracting wealth at the expense of poor people, continuing an American capitalist tradition of plundering and exploiting vulnerable communities of color with the courts' imprimatur. According to the Center for Responsible Lending, "[t]op debt collectors may have seized over \$700 million between 2012 and 2017 through garnishment."<sup>28</sup> To be clear, our portrayal of debt suits as procedurally deficient, and possibly meritless, actions brought against unrepresented and low-income racial minorities does not describe the full universe of debt collection. But it captures a sufficiently large percentage of it that civil justice reform must wrestle with how to respond accordingly.

## II. NEW ADJUDICATORY MODELS AND INCREMENTAL REFORM

Wilf-Townsend's project unearths the dominance of a small number of corporate plaintiffs in debt actions, and his proposed reforms respond to that finding in particular. He suggests raising the price of litigation for assembly-line plaintiffs and either supplementing or coupling congestion pricing with close judicial inspection of randomly selected debt claims. Although Wilf-Townsend does not name it as such, we place his proposal within a growing body of literature on problem-solving courts and active judging and show that it represents a practical vision of incremental reform. However, as we will elaborate upon in Part III, Wilf-Townsend's proposal, along with others that precede it, should be viewed as a first step toward much broader institutional redesign.

### *A. Birds of a Feather: Civil Problem-Solving Theory and the Agency-Adjudication Model*

Wilf-Townsend's agency-adjudication proposal fits into growing consideration of problem-solving courts as a means of reforming the civil justice system. Problem-solving courts have been well-established in family law for decades and, more recently, have been incorporated in other areas of civil justice. One of us conducted empirical work in an experimental housing court and proposed a theory of three core

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<sup>28</sup> JULIA BARNARD, KIRAN SIDHU, PETER SMITH & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, COURT SYSTEM OVERLOAD 3 (2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-california-debt-oct2020.pdf> [https://perma.cc/7PRU-JH33].

problem-solving methods specifically tailored to respond to asymmetrical assembly-line litigation.<sup>29</sup> First, the judge names the purpose of the court as solving a social problem.<sup>30</sup> Second, the judge serves an active and investigatory role, perhaps engaging the assistance of an independent factfinder, to dissect the validity of claims.<sup>31</sup> Third, the judge monitors corporate plaintiffs that bring unlawful claims to bring their operations into legal compliance.<sup>32</sup> A close analogue to drug courts, civil problem-solving courts nonetheless have distinct features and advantages. In particular, the civil problem-solving model flips the script, requiring courts to monitor corporate misconduct rather than placing the onus on vulnerable, overburdened defendants to modify their behavior.<sup>33</sup>

Wilf-Townsend's agency-adjudication model adheres closely to the problem-solving paradigm. Implicit in Wilf-Townsend's model is the abandonment of facially neutral adjudication in favor of inquisitorial-style judging. In his rendering, judges are empowered to monitor corporate plaintiffs, reviewing their debt claims for evidence of bad faith. This alleviates the burden on pro se consumers to raise affirmative defenses or even appear at the hearing at all. In addition, the court is tasked with remedying a social problem — improving the debt collection business — freeing judges to refashion their role to suit this purpose. This model stands in stark contrast to traditional conceptions of civil courts as sites of neutral dispute resolution. Wilf-Townsend supports his proposal for an enhanced judicial role with a keen insight that civil courts primarily function “as a site for private companies to petition the state for permission to redistribute others' assets to themselves,”<sup>34</sup> in which “third parties are permitted to play a role but rarely do so.”<sup>35</sup> A rich literature on active judging precedes Wilf-Townsend's proposal and both informs and supports this approach.<sup>36</sup>

### *B. Judicial Role Reform as Incremental Reform*

The agency-adjudication model is a sensible form of incrementalism, and largely adheres to proposals put forward by other access-to-justice scholars. Wilf-Townsend's contribution in this space is to introduce claims sampling as a means of making judicial scrutiny more efficient.

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<sup>29</sup> Steinberg, *supra* note 2, at 1604–24.

<sup>30</sup> *Id.* at 1605–12.

<sup>31</sup> *Id.* at 1612–20.

<sup>32</sup> *Id.* at 1620–24.

<sup>33</sup> *Id.* at 1624–29.

<sup>34</sup> Wilf-Townsend, *supra* note 4, at 1743.

<sup>35</sup> *Id.* at 1768.

<sup>36</sup> See, e.g., Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1517–20 (2020); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 686–99 (2017).

Even so, certain tweaks to Wilf-Townsend's approach would increase its impact. For one, when claims-sampling judges discover a bad lawsuit, they should have a mechanism to track their singular findings and then aggregate them to dismantle top filer corporate fraud. One option is the formation of peer-to-peer networks within the judiciary to ensure that top filers known to bring bad claims are flagged for consistent monitoring in every court where they conduct business. This collaborative judicial action is just one example of an emerging, broadening view of judicial role reform.<sup>37</sup> In addition, in his claims-sampling proposal, Wilf-Townsend relies on a selection of debt lawsuits at random to trigger judicial investigation. This assumes an information vacuum about top filer activity, when in fact, the CFPB brings regular lawsuits against debt collectors to estop fraudulent practices<sup>38</sup> and also maintains a crowd-sourced database in which consumers can log complaints about unlawful debt collection tactics.<sup>39</sup> An effective incremental reform would involve better information sharing systems, through which courts and regulatory agencies can develop feedback loops. This would permit intelligence on bad actors to be shared bidirectionally, providing judges with specific targets for their scarce investigatory resources and adding heft to CFPB policy reforms and litigation.

In sum, Wilf-Townsend's agency-adjudication model joins a growing incremental reform movement that encourages judges to conceive of their purpose differently, employ independent investigation, engage active or inquisitorial styles, and monitor corporate entities that, until now, have run roughshod over judges too fearful of violating neutrality to rein them in. These are much-needed first steps to stimulate change within our formal civil justice institutions. In the next Part, we explain why, in addition to incremental change, we should also consider transformational reform. Race, gender, and poverty magnify the fundamental institutional mismatch between, on the one hand, a debt collection mill well-poised to manipulate and control courts and, on the other, poorly resourced courts ill-suited to address large social problems.

### III. INVEST/DIVEST AND TRANSFORMATIONAL REFORM

A full vision of civil justice reform first requires courts to be viewed as evidence that our social contract has unraveled. Courts do not serve their democratic purpose when they act as rubber-stamp institutions for

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<sup>37</sup> See Bridget Mary McCormack, Essay, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J.F. 175, 185–88 (2021).

<sup>38</sup> *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/enforcement/actions> [<https://perma.cc/RZX5-KKHX>] (listing recent lawsuits brought against debt collectors and debt buyers, among other entities).

<sup>39</sup> *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, [https://www.consumerfinance.gov/data-research/consumer-complaints/search/?dataNormalization=None&dateRange=3y&date\\_received\\_max=2022-02-07&date\\_received\\_min=2019-02-07&searchField=all&state=PA&tab=Map](https://www.consumerfinance.gov/data-research/consumer-complaints/search/?dataNormalization=None&dateRange=3y&date_received_max=2022-02-07&date_received_min=2019-02-07&searchField=all&state=PA&tab=Map) [<https://perma.cc/S8AZ-VJJA>].

corporate plaintiffs to accumulate wealth at the expense of poor people. Courts also do not serve their democratic purpose if they are left to solve income inequality across the types of problems people bring to the civil justice system. And courts, as currently configured — or even as improved by way of incremental reforms — are not equipped to effectively combat private power organized to subordinate marginalized groups. Borrowing loosely from the invest/divest framework popularized by the movement to defund the police, we suggest that bold reform involves expanding the social safety net, removing poverty-driven cases from the courts, and restoring the civil justice system to its proper function as an institution that engages in lawmaking and genuine two-party dispute resolution. At the same time, proposals such as Wilf-Townsend's, as well as other incrementalist reforms, should be embraced as part of a spectrum of reforms necessary to evolve our formal civil justice institutions over time.

#### A. *Civil Courts as the Emergency Rooms of Democracy*

Civil courts are the institution of last resort or the emergency room of democracy. A family hits a period of financial distress, no safety net staves off rent and debt delinquency, and predatory corporate interests, seizing on financial vulnerability, then deposit this family's emergency in a court that cannot solve income inequality. When poverty is not addressed another way, it ends up in civil court.<sup>40</sup>

Assembly-line litigation is a delegitimizing force in civil courts due to the deep power imbalances it perpetuates. The judicial branch is designed, as an institution of democratic governance, to engage in adversarial dispute resolution, develop legal norms, and protect rights. None of this occurs in lawyerless courts where one party to the dispute predictably presents little to no evidence or argument. With default rates as high as ninety percent on some debt collection dockets,<sup>41</sup> courts engage in hardly any dispute resolution. Since corporate plaintiffs almost always win their claims, and a lawyerless defendant is highly unlikely to press an appeal, courts engage in almost no lawmaking in the area of consumer rights. And courts' refusal to challenge the tactics of debt buyers makes clear that individual rights protection is not a priority either. As an attendant consequence, courts play an active role in the financial instability, homelessness, and psychological harm experienced by regular people ensnared in the civil justice infrastructure. Corporate capture has transformed debt courts, as institutions, into engines of

<sup>40</sup> See Shanahan et al., *supra* note 1 (manuscript at 3).

<sup>41</sup> See JON LEIBOWITZ, WILLIAM E. KOVACIC, J. THOMAS ROSCH, EDITH RAMIREZ & JULIE BRILL, FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/Q47G-SXTP>].

wealth extraction in the face of social inequality. This corporate control of courts, which deepens poverty and reinforces racial and gender inequities, means civil courts have become increasingly unaccountable and undemocratic.

*B. Invest/Divest — A Loose Framework  
for Transformational Civil Justice Reform*

The undemocratic narrative of state civil courts we have set forth reveals incremental proposals alone as ultimately inadequate. This is not to suggest that Wilf-Townsend has missed the mark, but rather to place his work in a larger landscape. Much of our own work has advanced incrementalism, taking the tack that courts are impervious to radical change and therefore best reformed slowly, through modest proposals. Increasingly, however, it is becoming clear that we must simultaneously contemplate transformational change. It is critical to name and clearly delineate aspirational goals; without them, there are no bold reforms to chase.

Policing has been the target of a grassroots abolitionist movement harnessing ground-up activism to demand a fundamental restructuring of criminal legal institutions. But no similar popular movement has advanced an agenda for reform of our civil courts. In plain sight, civil justice institutions increasingly act as violent actors, using the force of the state to remove people and their possessions from their homes, destroy credit or lending opportunities that keep families afloat, and turn low-level debt delinquency into a snowballing spiral of financial insecurity.<sup>42</sup> Despite civil courts' explicit role in structural marginalization, they have, so far, evaded grassroots attention and calls for abolition.<sup>43</sup>

Abolitionist theory rests inherently on community-led demands for a “democratic political economy where people possess the agency and power to self-determine the conditions of their lives.”<sup>44</sup> Abolitionist reforms “aim to build grassroots power as they redress the crises of our times” and “embody a combined concern with democracy and the economy, the ends and processes of grassroots power.”<sup>45</sup> Without organized

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<sup>42</sup> See Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in A GUIDE TO CIVIL PROCEDURE (Brooke Coleman, Suzette Malveaux, Portia Pedro, Elizabeth Porter eds., forthcoming 2022); Shanahan et al., *supra* note 1 (manuscript at 31–34).

<sup>43</sup> See Portia Pedro, Essay, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 154–56 (2021) (arguing that we have not yet arrived at an understanding of structural marginalization in civil procedure: “To prevent civil procedure from reinforcing, or continuing to reinforce, racial subjugation, we need to understand how these seemingly technocratic or neutral rules and doctrine are already deployed in ways that reinforce existing hierarchies including white supremacy.” *Id.* at 154. “While some organizers are calling for police abolition, prison abolition, or both, there is not a widespread call for abolishing courts. Or at least there is not such a call yet.” *Id.* at 156.).

<sup>44</sup> Amna A. Akbar, Response, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020).

<sup>45</sup> *Id.* at 98.

popular power calling on civil legal systems to pursue anticapitalist and antiracist goals, it is difficult to lean on abolitionism as a theory to scaffold bold reform proposals in this space. Reforms proposed without the participation of affected communities are inherently suspect and risk legitimatizing or advancing the existing system. Elites are not best positioned to challenge the prevailing social and economic order; in fact, placing the masses at the center of the democratic process is, in some ways, the larger project of abolitionism.

We recognize the need for communities to self-actualize in the process of agenda-setting for civil justice reform and lay no claim to abolitionism in this respect. Nonetheless, the invest/divest framework popularized by the Movement for Black Lives charts a path toward one vision of transformational change for the civil justice system. Incremental reforms have two common features: they accept the civil justice system as fundamentally premised on solid footing, and they focus on investment in the system itself. Versions of such reforms include increased funding for courts so that judges have the resources to achieve accuracy in individual adjudication. Or they involve investment in the civil courts for the purposes of toppling bad-apple plaintiffs. Or they involve training judges to properly accommodate pro se parties with procedural simplification and explanation. Incrementalism assumes that an increase in resources or oversight will inhibit the destructive power of the civil legal system.

The invest/divest model rests on the opposite premise: that we achieve reform not by investing in broken institutions, but by investing in communities. In addition, the model contemplates defunding, or divesting from, institutions that produce structural marginalization. In policing, the invest/divest model has been interpreted in many ways, but even if it lacks precision in its specific ask, it “creates the space to politically and normatively question the status quo.”<sup>46</sup> This framework provides a loose model, both discursively and pragmatically, for understanding the challenges to the democratic legitimacy of the civil justice system and proposing an alternative vision.

Bold reform in civil justice requires a twofold approach: increasing social provision to vulnerable people (investing) and driving cases that reinforce inequality out of the civil courts (divesting). This approach applies across state civil courts. In assembly-line litigation in particular, the problem to solve is that civil courts serve as a debt collection vehicle for profit-making companies and, in doing so, perpetuate structural marginalization. This cannot be addressed without first taking stock of

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<sup>46</sup> Jessica M. Eaglin, Essay, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 138 (2021); see also *id.* at 134 (acknowledging that “defund” is a plastic and malleable term” but nonetheless critical to public discourse).

the root causes of debt delinquency and reversing the neoliberal trend of the late twentieth century to slash the social safety net and yield government function to the control of market forces. Community investment is a necessary precondition for transformational change. As for divestment, populist movements to cancel student loan debt<sup>47</sup> and prevent medical bankruptcy through universal healthcare<sup>48</sup> can be leveraged to envision a different function for civil courts. There is energy and support among the American public to erase crippling debt as a form of racial economic justice.<sup>49</sup> If movements such as these were to take hold, debt collection would never reach the courts.

Abolitionists argue that police do not achieve public safety, but rather inflict surveillance and violence in its place. They also point to policing as an institution that is irredeemably flawed due to its origins in slavecatching and racial subordination. This, they argue, requires abolition of the police and the emergence of a wholesale alternative. The civil courts are positioned somewhat differently. If right-sized, the civil legal system could regain its democratic purpose, check state and private power, resolve disputes in which both parties are participatory, and develop law on issues of social and economic importance. But to get there, we must call on the legislative branch to meet people's basic needs well before court involvement becomes inevitable. We must also call upon courts to use their moral and political authority to refuse a docket of debt collection that enriches private parties and subordinates marginalized populations. Civil courts continue to hold an important democratic function, but as currently constituted, they largely fail to discharge it.

To those who might argue the civil legal system is not up to this challenge, we point to the courts' frenzied reform activity during the COVID-19 crisis. In the first six months of the global pandemic, courts issued thousands of administrative orders reforming their operations. They moved hearings online, adopted new procedures, jettisoned formalistic traditions such as wet signatures, and generally revealed themselves to be flexible institutions capable of adapting to changed

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<sup>47</sup> Adam S. Minsky, *How "Cancel Student Debt" Went from a Fringe Idea to Mainstream*, FORBES (Sept. 21, 2020, 10:38 AM), <https://www.forbes.com/sites/adamminsky/2020/09/21/how-cancel-student-debt-went-from-a-fringe-idea-to-mainstream/?sh=240770035489> [https://perma.cc/9QFW-4A58].

<sup>48</sup> *Medicare-for-All Prevents Medical Bankruptcies*, PUB. CITIZEN, <https://www.citizen.org/article/medicare-for-all-prevents-medical-bankruptcies> [https://perma.cc/YS2S-CVKZ].

<sup>49</sup> See, e.g., Adewale Maye, *The Student Loan Debt Crisis Impedes Black Women's Economic Security*, CTR. FOR L. & SOC. POL'Y (July 6, 2021), <https://www.clasp.org/blog/student-loan-debt-crisis-impedes-black-womens-economic-security> [https://perma.cc/3GZ8-7KBH].

circumstances far more nimbly than many in the legal profession anticipated.<sup>50</sup> While certain reforms were not well matched to the circumstances, a window into the courts' activity during this period reflects an institution better able to recognize its shortcomings and respond accordingly than has been demonstrated in the past. As a harbinger for more aggressive reform, perhaps this recent adaptation shows promise.

#### CONCLUSION

We can reimagine courts as institutions that support equality. State civil courts, in their current distortion, are failing to meet their democratic purpose. It does not have to remain so. Perhaps a grassroots movement will grow to demand abolition of civil courts, but we are not there yet. Nonetheless, we can still learn from the ideals set in motion by the Movement for Black Lives and the calls to invest in communities and divest from institutions that perpetuate racial subordination. This includes investing in people to meet their social needs so that courts are not co-opted as institutions that reproduce and entrench inequality. It includes right sizing courts to be institutions in which equally matched adversaries bring to the attention of the judiciary issues of social, political, and economic significance. In exposing the dominance of a small number of corporate plaintiffs in debt suits, Wilf-Townsend helps make the case that civil courts have become pawns in a large-scale effort to pillage low-income communities of color on the cheap and easy. His important finding lends credence to the larger project of questioning the democratic legitimacy of these courts and should be leveraged to aspire to bold reforms over incremental ones.

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<sup>50</sup> See Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 386–95 (2021); Colleen F. Shanahan, Alyx Mark, Jessica K. Steinberg & Anna E. Carpenter, Essay, *COVID, Crisis, and Courts*, 99 TEX. L. REV. ONLINE 10, 14–15 (2020).