

# Consumer Debt Collection in Massachusetts: Is Civil *Gideon* a Solution?

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Joel Tay\*

## I. INTRODUCTION

In 1963, Justice Black wrote, on behalf of the United States Supreme Court, that “reason and reflection require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>1</sup> That case, *Gideon v. Wainwright*, stood for the idea that criminal defendants have a constitutional right to counsel as part of their due process rights. Recognizing the systemic advantage offered to those with representation, even in civil cases, then-Attorney General Robert Kennedy lamented that the legal profession has “secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.”<sup>2</sup> This paper seeks to continue this conversation about protecting civil defendants’ rights and proposes that Massachusetts provide defendants in consumer debt collection proceedings with a right to counsel to mitigate the negative effects of predatory collection practices.

To do so, the paper will (1) explain the severity of the problem, specifically illustrating the impact on debtors; (2) discuss the enactment of a right to counsel for defendants; (3) outline how the proposal might be implemented; and (4) explore shortcomings and analyze alternative solutions.

## II. THE PROBLEM

The current system of consumer debt collection proceedings results in debtors being unfairly punished and requires a strong response. Consumer debt collection<sup>3</sup> is a pervasive problem in the United States today; it is estimated that one in three, or seventy-seven million adults, in this country have

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\* J.D. Candidate, 2017, Harvard Law School. This paper was initially written for Judge John Cratsley (retired) as part of my participation in his *Judicial Process in Trial Courts* clinic at Harvard Law School.

<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>2</sup> Robert F. Kennedy, Att’y Gen., Address at University of Chicago Law School (May 1, 1964), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-01-1964.pdf> [<https://perma.cc/FUW2-Z49E>].

<sup>3</sup> The five main types of delinquent debt are credit card, telecommunications, electric utility, healthcare, and government debt. See FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 10 (2009), <https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dewr.pdf> [<https://perma.cc/6N5Q-7SVS>].

debts that are “in collection.”<sup>4</sup> According to a *Boston Globe* report, nearly 122,000 small claims cases were filed in Massachusetts in 2005, at least sixty percent of which were brought by professional debt collectors.<sup>5</sup> Consumer advocates likewise report that courts across the country are flooded by debt collection actions.<sup>6</sup> This debt collection industry employs more than 140,000 people nationwide and collected approximately \$55 billion from consumers in 2010.<sup>7</sup>

While there is nothing inherently wrong with pursuing debts, there are several factors that illustrate why consumers face an unfair battle and why a right to counsel for defendants would be an effective solution. First, there is a high rate of defendant default. Second, debt collection attorneys employ predatory tactics. Finally, the consequences on defendants who either default on or lose their cases are under-supervised.

### A. High Rate of Defendant Default

There is currently a high rate of defendant default that can be avoided if defendants are provided counsel to help them navigate the legal system. Panelists in a series of public Federal Trade Commission roundtable discussions estimated that throughout the country, between sixty percent and ninety-five percent of lawsuits resulted in defaults, with most discussions indicating that the default rate in their jurisdiction was close to ninety percent.<sup>8</sup>

The reasons for the high rate of defendant default could be issues related to service of process, ignorance as to the severity of the lawsuit, or an inability to properly mount a defense. Having counsel can help with these causes.<sup>9</sup> In particular, in addition to a variety of possible counterclaims, there are many valid substantive defenses a defendant can pursue that are

<sup>4</sup> See Jeanne Sahadi, *1 in 3 U.S. Adults Have “Debt in Collections,”* CNN (Aug. 7, 2014, 11:49 AM), <http://money.cnn.com/2014/07/29/pf/debt-collections/> [https://perma.cc/C5SS-WY5F].

<sup>5</sup> See Scott LaPierre, *Debtors’ Hell, Part 2: A Court System Compromised*, BOS. GLOBE (July 31, 2006), [http://archive.boston.com/news/special/spotlight\\_debt/part2/page3.html](http://archive.boston.com/news/special/spotlight_debt/part2/page3.html) [https://perma.cc/6M8F-XS5G].

<sup>6</sup> The *Chicago Tribune* reported in June 2008 that there were more than 119,000 such claims outstanding in the Cook County Circuit Court. One judge had 12,000 debtors on his docket—up about double from two years prior. See Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHI. TRIB. (June 8, 2008), [http://articles.chicagotribune.com/2008-06-08/news/0806080066\\_1\\_debt-collectors-court-papers-pushing](http://articles.chicagotribune.com/2008-06-08/news/0806080066_1_debt-collectors-court-papers-pushing) [https://perma.cc/43F5-L4Z3]. In 2011, Capital One filed more than 100,000 debt collection suits in Missouri alone. See Chris Arnold, *Millions of Americans’ Wages Seized Over Credit Card and Medical Debt*, NPR (Sept. 15, 2014), <http://www.npr.org/2014/09/15/347957729/when-consumer-debts-go-unpaid-paychecks-can-take-a-big-hit> [https://perma.cc/EPT4-YLF5]; see also FED. TRADE COMM’N, *supra* note 3, at 56 n.340.

<sup>7</sup> See Viktor Fedaseyev & Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts* 1 (Fed. Research Bank of Phila., Working Paper No. 14-7, 2014), <https://www.philadelphiafed.org/research-and-data/publications/working-papers/2014/wp14-7.pdf> [https://perma.cc/UJ4B-56AZ].

<sup>8</sup> See FED. TRADE COMM’N, *supra* note 3, at 18.

<sup>9</sup> See LISA STIFLER & LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, *THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS* 13 (2014),

otherwise not sought.<sup>10</sup> Debt collectors often have weak documentation<sup>11</sup> and tend to abandon their cases when defendants have counsel and contest these cases.<sup>12</sup> This dynamic suggests that having counsel would send a message to plaintiff attorneys that they will no longer be able to run over unsophisticated defendants.

Defendants who appear in court without representation usually fare no better than those who simply default on their lawsuits. That is because, like those who do not appear, defendants without counsel are unlikely to use the available legal defenses and are thus less likely to prevail than those with counsel.<sup>13</sup>

### B. *Predatory Tactics*

Collection agencies leverage the imbalance of power and utilize predatory tactics to pressure defendants into unfavorable settlements.<sup>14</sup> As the Chief of the Consumer Protection Division of the Massachusetts Attorney General's Office, Max Weinstein, recently testified, the industry is "rife with error and abuse."<sup>15</sup> He noted that debt collectors pursue debtors for debts they do not owe, for higher amounts than owed, or for debts that are beyond statutes of limitations. He added that debt collectors frequently target the vulnerable—the elderly, disabled, or desperately poor.<sup>16</sup> Defendants who have representation will be less vulnerable to this power imbalance.

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[siblelending.org/state-of-lending/reports/11-Debt-Collection.pdf](http://siblelending.org/state-of-lending/reports/11-Debt-Collection.pdf) [https://perma.cc/NPV2-7TEH].

<sup>10</sup> Some of the defenses include mistaken identity, accord and satisfaction, prior full payment, discharge in bankruptcy, minority and capacity to contract, fraud, statute of limitations, and unconscionability. *See generally* NAT'L CONSUMER LAW CTR., SUBSTANTIVE DEFENSES TO CONSUMER DEBT COLLECTION SUITS (Feb. 24, 2010), [http://www.masslegalservices.org/system/files/library/Substantive\\_Defenses\\_to\\_Consumer\\_Debt\\_Collection\\_Suits\\_t.pdf](http://www.masslegalservices.org/system/files/library/Substantive_Defenses_to_Consumer_Debt_Collection_Suits_t.pdf) [https://perma.cc/W4ZS-4U9A].

<sup>11</sup> *See An Act Relative to Family Financial Protection: Hearing on S.146/HB 804 Before the Joint Comm. on Fin. Servs.*, 2015 Leg., 189th Sess. (2015) [hereinafter *Hearing*] (statement of Max Weinstein, Chief, Consumer Prot. Div., Mass. Att'y Gen.'s Office).

<sup>12</sup> *See* Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 745 (2006); THE LEGAL AID SOC'Y ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 7 (2010), <http://www.mfy.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [https://perma.cc/Q2BN-X89Y].

<sup>13</sup> *See* Goldberg, *supra* note 12; *see also* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 56 n.81 (2010) (explaining that a 1976 study of New York small claims cases found that represented plaintiffs recovered two-thirds or more of their awards 71.4% of the time when facing unrepresented defendants, but only 13.5% of the time when facing a represented defendant).

<sup>14</sup> *See* NEW YORK APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 18 (2010), <http://www.appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf> [https://perma.cc/CZ5W-SGRW]; STIFLER & PARRISH, *supra* note 9, at 20.

<sup>15</sup> *Hearing*, *supra* note 11 (statement of Max Weinstein).

<sup>16</sup> *See id.*

*C. Consequences on Debtors*

Defaults often have a devastating impact on debtors, highlighting the need for a right to counsel. The possible effects include (1) a negative mark on a credit report, which can make it difficult to obtain credit in the future; (2) a lien on property, which means that at the point of sale, the creditor is entitled to a portion of the proceeds; (3) property foreclosure or seizure, where the creditor is assigned ownership of certain property to cover the debt; or (4) wage garnishment, where a certain portion of the debtor's income is paid to the creditor each pay cycle.<sup>17</sup> Each of those effects could lead a debtor down a path that makes recovery extremely difficult. This can produce a vicious cycle, pushing the debtor further into debt. For example, collectors begin by seizing property, including vehicles. This in turn makes it difficult for debtors to commute to work, leading to job loss. The lack of income and garnishment of wages then prevent the debtor from being able to acquire basic necessities.

Counsel is required to ensure that debtors enter into settlements that conform to the limits of property and wage garnishment protection laws. These laws are frequently ignored during settlement negotiations by plaintiffs' attorneys.<sup>18</sup> The news is replete with stories where debtors who are employed<sup>19</sup> struggle to make a living because of these garnishment actions.<sup>20</sup> Banks, at the request of collectors, frequently freeze accounts that may contain exempt funds until a resolution of the garnishment order.<sup>21</sup> Additionally,

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<sup>17</sup> See NAT'L CONSUMER LAW CTR., NO FRESH START: HOW STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY 7–8 (2013) <http://www.nclc.org/images/pdf/pr-reports/report-no-fresh-start.pdf> [<https://perma.cc/YGA2-2L4C>].

<sup>18</sup> A National Consumer Law Center study looked into wage garnishment laws and found them deficient. It explained that federal law protects seventy-five percent of an employee's paycheck or \$217.50 a week, whichever is greater. At \$217.50 a week, a single individual is considered below the poverty line, and a family of four with that income is taking in less than half of the poverty guideline. While states are free to set higher standards, the study found that twenty-one jurisdictions protect no more than the federal minimum, and that only twelve states have sufficient protections such that wage garnishment will not cause a paycheck to drop lower than the poverty line for a family of four; the remaining states fall somewhere in between.

That same study found that only nine jurisdictions protect a car (of average, used value) from seizure. Only eight jurisdictions protect a family home from seizure regardless of value, and twenty-two jurisdictions protect a home up to merely a \$50,000 limit. See *id.* at 12–18.

<sup>19</sup> One study found that seven percent of all employees had their wages garnished for consumer debt in 2013, and that five percent of wage earners in the \$25,000–\$39,000 income group were subject to wage garnishment. See AUTOMATIC DATA PROCESSING RESEARCH INST., GARNISHMENT: THE UNTOLD TRUE STORY 3, 12 (2014), <https://assets.documentcloud.org/documents/1301187/adp-garnishment-report.pdf> [<https://perma.cc/HRL5-ANFT>].

<sup>20</sup> See, e.g., Paul Aufiero, *Interview: Abusing the U.S. Court System to Collect Credit Card Debts*, HUMAN RIGHTS WATCH (Jan. 21, 2016, 12:00 AM), <https://www.hrw.org/news/2016/01/21/interview-abusing-us-court-system-collect-credit-card-debts> [<https://perma.cc/8VQG-CGRX>].

<sup>21</sup> See FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 31 (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/7RUN-8CCF>].

because of interest rates and fees, debtors may find themselves in this cycle for many years. Having counsel can ensure that any settlement is fair and realistic for the debtors.

The broad scope and disturbing impact of the current state of aggressive debt collection litigation require reform to protect defendants' rights. This article proposes that Massachusetts provide defendants in debt collection proceedings with a right to counsel in order to ameliorate the unfair negative impact of these proceedings on unrepresented defendants.

### III. ENACTING A CIVIL RIGHT TO COUNSEL

In order to enact this civil right to counsel, legislative or executive action may prove most effective. For reasons briefly described in the following section, a civil right to counsel in consumer debt proceedings is unlikely to be achieved by judicial mandate.

In *Lassiter v. Department of Social Services*, the United States Supreme Court held that in the federal system, there is a presumption against a right to counsel in civil cases unless the defendant faces a potential deprivation of physical liberty.<sup>22</sup> Federal courts have not reconsidered the holding in *Lassiter*, and many believe that the Supreme Court will not disturb the holding.<sup>23</sup>

In Massachusetts, the Supreme Judicial Court in *Genninger v. Genninger* held that when the rights at stake are "mere" property rights, there is no constitutionally protected right to counsel in such proceedings.<sup>24</sup> Thus, attempting to get the right to counsel through the Massachusetts state court system may likewise prove unfruitful.<sup>25</sup>

A more likely route to achieving a civil right to counsel for debtors is through the legislature. After the Supreme Court's decision in *Lassiter*, supporters of a civil *Gideon* effort decided to make use of legislative means to move the cause forward. In 2006, the ABA House of Delegates adopted a

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<sup>22</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

<sup>23</sup> See Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons From the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 U. PA. J.L. & POL'Y 683, 695 (2011).

<sup>24</sup> See *Genninger v. Genninger*, 640 N.E. 2d. 472, 474 (Mass. 1994).

<sup>25</sup> What this seems to indicate is that the way to get courts, federal or state, to announce a constitutionally protected right to counsel in debt collection litigation is to show how the impact of the litigation extends beyond mere property rights. An argument must be made that when debtors are unrepresented, they are unable to properly defend themselves such that their more fundamental rights are violated.

A discussion on the seeming lack of wage garnishment and property protection laws, as well as the various tactics employed by plaintiffs' attorneys, can illustrate how the debt collection cases might cause a defendant to lose the means to work, shelter, and food.

The problem with this approach, however, is that debt collection litigation is varied and diverse. It seems unlikely that a court would hold, as a matter of law, that all debt collection suits require appointed counsel for indigent defendants.

resolution calling on states to provide counsel in certain civil proceedings.<sup>26</sup> Many states have done so and adopted right to counsel statutes targeted at varying civil actions.<sup>27</sup> Massachusetts, likewise, has enacted laws that provide for counsel in certain civil cases, such as child guardianship cases, mental health commitments, and others.<sup>28</sup>

Such a right to counsel has not yet been enacted in consumer debt collection proceedings. However, some legislative efforts have already taken place to secure greater protection for debtors. Currently, Massachusetts's laws protect debtors by requiring collection agencies to be registered with the state.<sup>29</sup> There are laws that prohibit debt collection in unfair, deceptive, or unreasonable ways,<sup>30</sup> and regulations regarding the conduct of debt collectors in the state.<sup>31</sup> In addition, there is legislation pending in Massachusetts that seeks to curb the effects of these lawsuits on debtors. The Family Financial Protection Act, *inter alia*, seeks to decrease the statute of limitations, increase the protection on wage garnishment, decrease interest rates to reflect current rates, and prohibit debt collectors from seeking civil arrest warrants.<sup>32</sup> This article proposes that the legislature enhance those protections by prescribing a right to counsel. Doing so would add teeth to the legislation already in place by providing a pseudo-enforcement mechanism because defendant counsel can advocate more fervently for their clients.

The executive branch may also be capable of creating a right to counsel in debt collection proceedings. In fact, in Massachusetts, the executive branch has already taken action to prohibit debt collection methods. In 2012, the Massachusetts Office of the Attorney General issued revisions to the debt collection regulations that provided stricter guidelines for the industry.<sup>33</sup>

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<sup>26</sup> See HOWARD H. DANA, TASK FORCE ON CIVIL JUSTICE, AM. BAR ASS'N. HOUSE OF DELEGATES, REPORT TO THE HOUSE OF DELEGATES (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_resolution\\_06a112a.auth.checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.auth.checkdam.pdf) [https://perma.cc/PV8Q-RRG3].

<sup>27</sup> For a discussion of state statutes guaranteeing a right to counsel in civil matters, see Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 4 CLEARINGHOUSE REV. 245 (2006); Rulli, *supra* note 23, at 702. For additional information, see generally Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997).

<sup>28</sup> BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS app. at 3–4 (2008), <https://www.bostonbar.org/prs/reports/GideonsNewTrumpet.pdf> [https://perma.cc/JC3F-MJA3].

<sup>29</sup> See MASS. GEN. LAWS ch. 93, § 24 (2009).

<sup>30</sup> See MASS. GEN. LAWS ch. 93, § 49 (1981).

<sup>31</sup> See 209 MASS. CODE REGS. 18 (2004).

<sup>32</sup> See Press Release, Mass. Att'y Gen.'s Office, AG Healey's Office Urges Greater Protection for Consumers Against Abusive Debt Collection Practices (Oct. 27, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-10-27-ffpa-testimony.html> [https://perma.cc/9HHQ-MZR7]; H.R. 804, 189th Gen. Court of the Commonwealth of Mass. (Mass. 2016).

<sup>33</sup> See MASS. ATT'Y GEN.'S OFFICE, GUIDANCE WITH RESPECT TO DEBT COLLECTION REGULATIONS (2013), <http://www.mass.gov/ago/docs/government/debt-collection-guidance-2013.pdf> [https://perma.cc/AF53-QPJS].

The regulations expect creditors to act in good faith and exercise due diligence to produce documentation that confirms that the amount demanded is actually owed by the debtor, and to provide notice and information regarding the debt to the debtors within five days of initial communication.<sup>34</sup> Creditors are also prohibited from attempting to collect on debt that the creditor knows, or has reason to know based on a good faith determination, is past the statute of limitations.<sup>35</sup> The Attorney General has recently increased its enforcement of these regulations.<sup>36</sup>

At a broad level, a recent federal legislative effort may provide insight that could be useful in designing and implementing legislation in Massachusetts that provides for a civil right to counsel in debt collection cases. Some of the insights include use of narrative stories that depict how lives are shattered in civil proceedings without a lawyer, along with strong cautionary statements about inadequate legal protections from the courts, academia, and the population, to provide a firm foundation and catalyst for championing such legislation.<sup>37</sup>

#### IV. IMPLEMENTING A RIGHT TO COUNSEL

This part will discuss several issues related to implementation: (1) design, (2) threshold levels to qualify, and (3) resource management.

##### A. Design

Because of the high rate of default, the defendants must first appear before the court in order for a civil right to counsel solution to be successful. Hence, this proposal has two objectives. It must first address the low defendant appearance rate and then provide effective representation for defendants who do respond to the summons.

There are two responses to the first objective. First, the service of a complaint on a defendant can be made to include a notification of their right to counsel, such that defendants are informed of this right from the beginning. The next response is to enact an outreach program. In Massachusetts Small Claims Court, an answer by the defendant is optional.<sup>38</sup> This means

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<sup>34</sup> *See id.*

<sup>35</sup> *See* Press Release, McGlinchey Stafford LLP, Alert: Massachusetts AG Amends Debt Collection Regulations—Effective Immediately (Mar. 2, 2012), <http://www.mcglinchey.com/Alert-Massachusetts-AG-Amends-Debt-Collection-Regulations—Effective-Immediately-03-02-2012/> [<https://perma.cc/Q6KD-9STX>].

<sup>36</sup> For example, in December 2015, a complaint was filed against one of the largest debt collection law firms in the state alleging violations of the debt collection laws and regulations. *See* Press Release, Mass. Att’y Gen.’s Office, AG Healey Sues Major Debt Collection Law Firm Over Widespread Consumer Abuses (Dec. 23, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-12-23-debt-collection-lawsuit.html> [<https://perma.cc/67UU-2LLH>].

<sup>37</sup> *See* Rulli, *supra* note 23, at 714.

<sup>38</sup> *See* Mass. Unif. Small Claims Rules 3(b).

that a default judgment will not be entered until the date of trial, after proper assessment by the court. This allows some time for these defendants to be reached in order to explain the necessity of responding to the complaint. Because this time is crucial in order to make the legal assistance effective, a change should be sought to make answers optional in cases of debt collection across all court systems in the state.

During this period of time, the person conducting defendant outreach need not be an attorney. This outreach could be conducted through a system of volunteers or paid staff who would use public records to contact defendants with unanswered complaints and upcoming trial dates of no less than thirty days. The defendant would be advised of the pending complaint and informed that he must appear before the court to avoid a default judgment. The defendant would then be advised that representation will be made available, subject to an income threshold. This outreach program would inform debtors who would otherwise feel intimidated or confused by the process that they would be represented if they would but come in and work with someone on the pending action.

If defendants are adequately informed and do appear before a court, the second challenge is to ensure that they are properly represented. Because many of these cases are fairly quick and straightforward, the traditional model of legal aid services will likely be inefficient. That is, assigning a specific attorney to follow through each case from the point of complaint up until judgment will create administrative difficulty. It seems more feasible to have a limited appearance representation system—along the lines of “lawyer for the day” programs<sup>39</sup>—where a group of attorneys is available each day for those litigants who come in unrepresented.

The system would proceed in the following manner: (1) a complaint is filed, and the normal service of process is issued; (2) within a month of the trial date, a complaint that is still unanswered is sent for follow up; and, (3) when an unrepresented indigent defendant shows up on the date of the trial, the defendant is assigned an attorney from a pool who reviews the case and represents the defendant at trial.

### B. *Threshold Levels*

As mentioned, Massachusetts requires professional debt collectors to be registered with the state. This would be the first preliminary threshold: only defendants who are pursued by professional debt collectors would qualify for the right to counsel. This threshold would limit the scope of this right to counsel only to those who would otherwise face experienced debt collectors who might resort to questionable tactics. It would also separate the cases that

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<sup>39</sup> See, e.g., *Lawyer for the Day Programs in Probate and Family Court*, MASS.GOV, <http://www.mass.gov/courts/programs/legal-assistance/ldf-pfc.html> [https://perma.cc/64TG-66Y4]; *BBA Lawyer for the Day in the Boston Housing Court*, BOSTON BAR ASS'N, <http://www.bostonbar.org/in-the-community/public-service/housing-court-lawyer-for-the-day-program> [https://perma.cc/359H-24VT].



pose the greatest threat to defendants' livelihoods from other small claims cases where the case may simply be between two neighbors.

Next, the availability of appointed representation for those who come into the court should be limited by income level. The 2010 ABA Model Access Act provides for a cap set at 125% of the federal poverty level.<sup>40</sup> There does not seem to be any reason, at this point, to deviate from this threshold. It would be prudent to reevaluate this cap after some time, taking into account the number of litigants still turned away and the resource capability of the program.

This second threshold of income level will not be applied to the outreach portion of the program. Because it is close to impossible to know from a complaint alone if a debtor who is being sued is indigent, all defendants with unanswered complaints by professional debt collectors should be tracked down and made aware of their right to counsel, should they qualify.

### C. Resource Management

In implementing this right to counsel, it is not necessary to create a revolutionary system with high costs. Instead, an expansion of the current lawyer for the day and other legal aid programs to all small claims courts could be a cost-effective way to provide representation to the qualifying defendants.

As a starting point, students and members from the local communities could be recruited to help with the outreach portion of this proposal. Next, to staff the appointed counsel pools at the courthouses, local attorneys could be recruited as part of their pro bono programs. Additionally, there is a pre-existing network of legal aid organizations that could be united. The Attorney General's Office has a partnership with eighteen nonprofit programs designed to aid residents with consumer debt issues, and maintains a website where residents can find an organization that is closest to them.<sup>41</sup> These and other similar organizations maintain websites where debtors who have been sued can access information to help them through the process.<sup>42</sup> Bringing these organizations together could achieve economies of scale that would allow this reform to be implemented at a less-than-anticipated cost.

Another way to deal with any potential lack of resources might be to restrict or limit the number of sessions and the number of cases per session. This would allow the cases to be given their proper attention by the court and would allow the representation to be effective. One concern may be that

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<sup>40</sup> See ABA MODEL ACCESS ACT § 3D (A.B.A. HOUSE OF DELEGATES), at 18, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lis\\_sclaid\\_104\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_104_revised_final_aug_2010.authcheckdam.pdf) [<https://perma.cc/9YEF-S9X7>].

<sup>41</sup> See *Local Consumer Programs*, MASS. ATT'Y GEN.'S OFFICE, <http://www.mass.gov/ago/consumer-resources/consumer-assistance/mediation-services/local-consumer-programs.html> [<https://perma.cc/BR8K-ATRK>].

<sup>42</sup> See, e.g., *I Have Debt—Help!*, MASSLEGALHELP, <http://www.masslegalhelp.org/consumer/debt> [<https://perma.cc/6EFE-KFK7>]; MASSLEGALSERVICES, <http://www.masslegalservices.org/> [<https://perma.cc/P4EK-CGPC>].

such a rule could cause delays in scheduling hearing dates and produce a backlog of cases. As a result, the debt collection agencies might have to wait for a longer period of time to collect on their debts. This article does not dispute that the firms also deserve a fair judicial system in which they can collect their debts. However, without actual implementation and data, such concerns are mere conjecture. During implementation, adjustments could and should be made in order to find the correct balance between resources and speed.

## V. SHORTCOMINGS AND OTHER POSSIBILITIES

By way of review, this article has detailed how the debt collection problem is made up of several factors, including a high default rate, questionable tactics used by plaintiffs, and devastating impact on debtors. The two-pronged plan outlined to provide defendants this right to counsel is meant to increase the rate of appearances by defendants and provide a simple system through which qualified defendants can receive proper representation to mount a defense.

One of the main concerns with implementing a right to counsel system is the cost and practicality of establishing a statewide system. However, there is evidence to suggest that providing counsel in civil cases could actually prove more cost effective and financially responsible because of indirect and longer-term societal benefits that arise.<sup>43</sup> For example, in 2014, efforts by the Massachusetts Legal Aid Corporation that prevented or delayed eviction for 1,624 households resulted in an estimated savings to the state of \$6.08 million in shelter costs and \$2.39 million in health care costs.<sup>44</sup> Since predatory debt collection can also lead to homelessness, there is an economic argument that preventing such homelessness will result in overall savings.

Another potential concern is the long-term effectiveness of such a program. While not representative of the entire country or of every lawyer, studies have shown that public defenders or court-appointed lawyers are generally less effective than privately retained counsel, calling into question the effectiveness of any right to counsel.<sup>45</sup> However, as debt collection cases

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<sup>43</sup> See generally Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (2010).

<sup>44</sup> See Donna Southwell, MASS. LEGAL ASSISTANCE CORP., *Civil Legal Aid Yields Economic Benefits to Clients and to the Commonwealth: Some of the Economic Effects in FY14 Advocacy* (2015), [http://mlac.org/wp-content/uploads/2015/08/FY14\\_Economic\\_Benefits.pdf](http://mlac.org/wp-content/uploads/2015/08/FY14_Economic_Benefits.pdf) [<https://perma.cc/T88K-VTRW>].

<sup>45</sup> See, e.g., Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223, 224 n.4 (2005); Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST., Spring 2012, at 46, [http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1036&context=faculty\\_publications](http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1036&context=faculty_publications) [<https://perma.cc/5TG4-EGP3>].

are generally less complex, the usual deficiencies associated with appointed lawyers—such as low attorney experience, reduced motivation, and limited access to resources—may have less of a negative effect here.

Apart from a civil right to counsel, there may be alternative responses that address other aspects of the consumer debt collection problem. For instance, in an attempt to prevent default judgments against defendants who were not notified of court proceedings, the Supreme Judicial Court in 2009 approved amendments to the Trial Court's Uniform Rules on Small Claims.<sup>46</sup> Some of the amendments' key provisions require creditors to verify a debtor's current address prior to filing a claim; set forth details of the debt owed such as account number, date of last payment, and name of original creditor; and notify the court when a judgment has been paid in full.<sup>47</sup> The Court may consider making further adjustments to procedural rules.

For example, in assessing default judgments, the rules currently require courts to examine a set of factors including the certainty of claim, liability, and damages.<sup>48</sup> Setting aside disagreement as to whether or not small claims adjudicators are sufficiently thorough in their review of the merits of the cases,<sup>49</sup> something that could be done is to clarify the burden of proof that a small claims adjudicator must find the evidence to meet before ruling against the defendant in default.

The idea here is not to make the small claims adjudicator a de facto attorney for the defendant, but to level the playing field such that the most obvious defendant rights are protected. From a procedural standpoint, where a lot of the notices might otherwise be improperly or erroneously sent, a requirement that the plaintiff produce at least a certified mail receipt would ensure, at minimum, that the address, and presumably addressee, are both valid and accurate. A substantive requirement that does not seem particularly burdensome would be to require debt collectors to produce documentation about the defendant such as credit applications or account statements.

One benefit of this stricter threshold is a likely reduction in the number of cases filed, which would aid both defendants who do not appear and defendants who do not have attorneys. On the other hand, however, in the interest of justice, these rule changes should not set the standard so high that they eliminate the need for a defendant to participate. A stricter threshold that strikes the right balance could be an effective way to revive defendant rights that would otherwise be lost if litigants were unrepresented.

Other reform possibilities could entail more extensive efforts aimed at educating the public and making information concerning its rights in debt

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<sup>46</sup> See *Consumer Advisory—New Rules Reduce Predatory Debt-Collection Practices, Improve Consumer Protections*, OFFICE OF CONSUMER AFF. & BUS. REG., MASS.GOV, <http://www.mass.gov/ocabt/consumer-advisory-new-rules-reduce-predatory.html> [https://perma.cc/ZT6W-ZYWE].

<sup>47</sup> See *id.*

<sup>48</sup> See Mass. Unif. Small Claims Rules 7(d).

<sup>49</sup> See Goldberg, *supra* note 12, at 744 n.204.

collection disputes more widely available. For example, the Consumer Financial Distress Project creates and circulates cartoon-style self-help guides to aid debtors faced with debt collection troubles.<sup>50</sup> Providing organizations that provide similar services with greater resources, financial or otherwise, could also be beneficial in educating debtors and potential defendants. Finally, a number of other measures discussed above—including enhanced protection of debtors' exempt income and property and stricter enforcement of laws governing debt collection abuses—would likewise advance efforts to protect debtors from livelihood-threatening collection practices.

## VI. CONCLUSION

As currently structured, consumer debt proceedings allow creditors to take advantage of consumers. Recognizing this problem, Massachusetts has already taken some steps to protect consumers. As described in this article, a right to counsel will rebalance the system by responding to the problems of high default rates and plaintiffs' predatory tactics, thereby protecting defendants from the frequently unfair consequences of debt collection.

The plan proposed in this article will expand existing legal aid programs. Defendants will be contacted and informed about their summons and the importance of responding, and they will be provided representation from a pool of attorneys. Such a plan will achieve the goals of increasing defendant appearance rates and providing adequate representation, while not being excessively costly. By providing a right to counsel to debtors in consumer debt collection proceedings, Massachusetts will better shield defendants from the current climate of predatory practices.

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<sup>50</sup> See Elanie McARDLE, *Greiner, HLS Students Spearhead New Consumer Debt Relief Project*, HARV. L. TODAY (Jan. 29, 2014), <http://today.law.harvard.edu/greiner-hls-students-spearhead-new-consumer-debt-relief-project/> [<https://perma.cc/4FUY-V3XS>].