

# FROM REPRESENTATION TO RESEARCH AND BACK AGAIN: REFLECTIONS ON DEVELOPING AN EMPIRICAL PROJECT

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## INTRODUCTION

*Doreen<sup>1</sup> was in her late sixties when she first visited the law school clinic. She lived alone in half of a two-family house and suffered from numerous health problems. Her only source of income was her Social Security retirement benefits. Eight years before coming to the clinic, she had been working in a hospital, a wage earner with, as she put it, money in the bank, when her only daughter became gravely ill. For the next five years, Doreen did all she could to help before her daughter died during surgery. By that time, Doreen had not only exhausted her savings, but she had also exceeded the spending limits of at least two credit cards just to get by. When Doreen called her bank to say that she would be unable to make payments on her cards, she spoke with a bank officer who had heard about her troubles and was sympathetic regarding her financial situation. He informed her that a collection agency would take over the debt and that, if she could not pay, the bank would write the amount off as a bad debt or as a loss. She was relieved. As expected, a collection agency subsequently contacted her a few times but stopped when she did not respond. Although the debt appeared on her credit report, she understood it would remain there until paid or for seven years, whichever came first.*

*A few months later, Doreen was surprised when she began receiving phone calls regarding the debt. She was confused when the callers identified themselves because the company was not the same one that had contacted her previously. She believed that the matter had been resolved. Nevertheless, she received a number of calls. Some came early in the morning, others late at night, and still others on holidays like Christmas and Thanksgiving. On more than one occasion, Doreen felt*

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1 "Doreen" is a pseudonym. Unless otherwise noted, all quotations in this section are Doreen's words as spoken to student attorneys in the initial intake interview or in one of their numerous subsequent conversations and are recorded in memoranda or other documents memorializing those interviews and conversations. Records relating to the clinic's representation of Doreen are on file in the SMU Civil Clinic.

*threatened, as she did after one caller told her, “sell your house, old lady, and pay your bills.”*

*When Doreen came to the clinic for her intake interview, she brought a state court petition that she said had been left on her front porch. She said the name of the plaintiff appeared to be the same as the company that had been calling her at all hours. She also brought several discovery requests that she said had been sent to her a few weeks earlier. They included requests for admissions that asked her, among other things, to admit that the debt was valid and that she owed the amount identified in the suit. Unfortunately, by the time Doreen arrived at the clinic, the time for responding had passed, which meant that the seventy-five requests for admissions were deemed admitted under state law.*

The story of Doreen illustrates some of the obstacles facing consumers who find themselves at the center of litigation to collect consumer debts. When Doreen arrived in the SMU Civil Clinic in the fall of 2007, the lawsuit against her was essentially over. Unless the deemed admissions could be set aside, she would be left without any defenses to the underlying lawsuit. Students and supervisors set out to do what they always do at the beginning of an attorney-client relationship: They interviewed, researched and explored possible ways in which they might be able to provide assistance. They developed facts and law sufficient to support a request that the court set aside the deemed admissions. They identified defenses that would be waived if not raised in pleadings, as well as potential counterclaims to offset any liability Doreen might have. They drafted discovery requests of their own and served them upon the plaintiff and when the plaintiff failed to respond, they filed a motion to compel. Eventually, they negotiated a dismissal of the case and all claims with prejudice. Doreen prevailed and the student attorneys had the satisfaction of winning their first case.

Doreen’s story was also the seed for a long-term project exploring the litigation of consumer debt collection and documenting the widespread nature of lawsuits like hers. The results of that project are the subject of a recent article.<sup>2</sup> This essay supplements the article by describing how the project grew out of Doreen’s story. As part of a symposium issue marking the 4th Annual Bellow Scholar Workshop at UDC David A. Clarke School of Law in November 2010, this essay also reflects on the contributions of the Bellow Scholar program to the development of the project.<sup>3</sup>

Since the symposium, much has happened in the world of debt collection litigation.<sup>4</sup> Legislative action in my own state of Texas has meant change for the rules of procedure governing consumer collection litigation in some courts.<sup>5</sup> As a

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2 Mary Spector, *Debts, Details and Defaults: Exploring the Impact of Debt Collection Litigation on Consumers and the Courts*, 6 VA. L. & BUS. REV. 257 (2011).

3 See *infra* Part IV.

4 See *infra* notes 47-55 and accompanying text.

5 H. Bill 79, 82d Sess. § 5.02 (Tex. 2011) (enacted).

result, the project that started after Doreen walked into the clinic in 2007 returned to the clinic in the fall of 2011, becoming the basis for a second project to draft proposed statewide rules of procedure for collections in small claims cases.

My goal in sharing Doreen's story here is two-fold. First, it is to provide an example of how our work with students and our clients can shift from representation to research to advocacy and back again. My second goal is to encourage others—students, clinic supervisors, fellows and faculty—to consider the work they do and its potential “to improve the quality of justice in communities, to enhance the delivery of legal services,” and “to promote economic and social justice,” goals that are at the heart of the Bellow Scholar program.<sup>6</sup>

Part I considers Doreen's story as a story of representation in a law school clinic. Part II considers her story as a basis for developing a research project exploring issues raised by the representation. It also reflects on the process of conducting the project and contains a brief summary of the results. Part III shows how, even before the project was complete, its results could be used to highlight some of the problems facing consumers like Doreen and begin to provide a basis for education and reform. It also describes how research can be used as part of a curriculum with clinic students. Finally, Part IV reflects on the Bellow Scholar program's contribution to the work of clinical teachers, their students and clients, and the communities in which they live.

## I. REPRESENTING CONSUMERS IN THE CLINIC

Each year the SMU Civil Clinic processes approximately 1100 applications for legal representation. From those, clinic faculty maintain a docket of approximately 50 open files on subjects ranging from landlord-tenant disputes to disputes between neighboring landowners, from deceptive trade practices and other consumer-related matters to employment disputes, from insurance-related problems to disputes with government entities and benefits-related problems.

This case- or client-centered practice is a common feature of many law school clinics.<sup>7</sup> From time to time, however, clinic faculty at the SMU Dedman School of Law have ventured into new areas of practice as community and client needs arose.<sup>8</sup> For example, although clinic students routinely represent tenants in dis-

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<sup>6</sup> See Announcement, *Committee on Lawyering in the Public Interest, Bellow Scholar Proposal Solicitation* (Aug. 23, 2008) (on file with the author); see also Announcement, *The Bellow Scholar Program: A Project of the Section on Clinical Legal Education of the Association of American Law Schools, 2001-2003* (on file with the author) (describing legacy of Gary Bellow and program created in his memory); see also Jeanne Charn, *Service and Learning: Reflection on Three Decades of the Lawyering Process at the Harvard Law School*, 10 *CLINICAL L. REV.* 75 (2003).

<sup>7</sup> See David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 *CLINICAL L. REV.* 191-97 (2003).

<sup>8</sup> This type of flexibility in clinic representation has been described as an element of community lawyering. See Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333, 344-46 (2009).

putes with landlords and consumers in disputes with businesses, they have also represented property owners under pressure from neighborhood groups as well as owners of small businesses finding themselves the victims of fraud or deception.<sup>9</sup>

When Doreen first visited the clinic seeking representation, her application presented several consumer law issues that fit easily into the clinic's overall docket. Within just a few months, nearly a dozen consumers approached the clinic seeking representation in similar cases. All of the applications shared at least some characteristics with Doreen's case. They described the recent filing of a lawsuit against them to collect a debt arising out of a consumer credit card or cell phone account. All cases were filed by plaintiffs who were not the original creditors but claimed to be assignees and who were often unrecognizable to the consumers. All of the plaintiffs were represented by counsel who served petitions on consumers containing few facts. The petitions were often accompanied by poorly drafted affidavits, which on their face often did not satisfy evidentiary or procedural rules for admissibility, and bore characteristics of what by the autumn of 2010 had come to be known as robo-signing.<sup>10</sup>

In some cases, applicants claimed the debt was not theirs, others claimed creditors told them their accounts had been written off years before, and still others could not understand how the amount sought in the lawsuit could so far exceed a spending limit imposed on an original account. Some of the applicants readily admitted they owed some amount of money but were embarrassed to admit that family emergencies, medical problems and/or loss of jobs had caused them to borrow money which they had little means to repay. Eventually, bills mounted and debt collectors became involved, using a variety of methods to secure payment. Some of the methods were legitimate; some were not.

From the supervisors' point of view, the debt cases were good teaching cases that fit into the general model of small-case, individual representation that is common in many clinics.<sup>11</sup> In addition to discrete issues of basic contract law, the cases presented the potential for a thorough investigation of facts to determine the availability of potential counterclaims under federal and state law. They also gave students the opportunity to draft pleadings, motions and discovery requests. Although full trials rarely occurred, many of the cases provided opportunities for

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9 Movement outside the typical clinic docket can have a positive collateral effect on the institutions involved in the dispute in ways not always possible in the typical case or client-centered docket. See also Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355 (2008) (advocating movement away from "canonical" approaches to clinical education).

10 See Gretchen Morgenson & Andrew Martin, *Big Legal Clash on Foreclosure is Taking Shape*, *N.Y. TIMES*, Oct. 21, 2010, at A1 (defining robo-signing); 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, 263 (2011).

11 See Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 *CLINICAL L. REV.* 573, 575 (2006). See also Brodie, *supra* note 8.

contested motion hearings and formal mediation conferences. All provided opportunities for careful client counseling in a context in which the student attorneys could claim ownership of the matter and reflect on it in a way that enhanced their learning experience.<sup>12</sup>

There were drawbacks to representing consumer collection cases in the clinic. After successfully representing two or three consumers in collection cases, some clinic faculty found that the similarity of the cases provided the students with few opportunities for creativity. Simply entering an appearance or serving discovery requests was often enough to result in a voluntary dismissal. If no counterclaims had been raised, the case was over. Although a dismissal appeared to be a victory for the client, there was always the chance that the debt might reappear as the subject of another collector's calls or worse, another lawsuit.<sup>13</sup> Moreover, many of the student attorneys were not sure there was much they could do (or much they wanted to do) to help the applicants. After all, many applicants admitted they owed some amount, but it just was not clear how much. "I pay my debts," one student told me. "Why should I help someone avoid hers?"

The drawbacks also presented unique teaching opportunities. With guidance, students began investigating the facts more deeply. As they explored the law governing the creation and collection of consumer debts, student attorneys learned that federal and state laws provided debtors with rights that needed protection.<sup>14</sup> They learned to read documents with a critical eye, explore evidentiary issues and challenge their own assumptions. Through their representation of consumer debtors, students appreciated the difficulty most debtors would have in mastering rules regarding evidence, procedure and burdens of proof, as well as the substantive law governing collection practices. Student attorneys also learned that their presence in the lawsuit on behalf of their clients was a game changer that could alter the outcome significantly.<sup>15</sup> Like most clinic students, they learned by en-

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12 See Weinstein, *supra* note 11.

13 See Richard J. Dalton, Jr., 'Zombie Debt': *When collectors haunt you*, NEWSDAY, Feb. 8, 2008, available at [http://www.kaulkin.com/files/2008-02-08\\_Newsday.com.pdf](http://www.kaulkin.com/files/2008-02-08_Newsday.com.pdf). See also Robert Berner & Brian Grow, *Prisoners of Debt*, BUS. WK., Nov. 12, 2007, available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00062.pdf>. The Government Accountability Office reported that some estimate as much as half of all consumer credit card debt is sold multiple times. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES COULD BETTER REFLECT EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 29 (2009) [hereinafter GAO REPORT]. See also Asset Acceptance Capital Corp., *What We Purchase*, <http://www.assetacceptance.com/sell/Purchase.aspx> (advertising that it purchases charged-off receivables at all stages of delinquency, including fresh, primary, secondary, tertiary and warehouse).

14 See Fair Debt Collection Practices Act, 15 U.S.C. § 1692. See also TEX. FIN. CODE §§ 392.001-92.404 (West 2011).

15 See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 114 n.45 (1974) (exploring how and why parties with attorneys fare better in all types of representation).

gaging in some of the practice skills associated with being a lawyer: interviewing clients and drafting answers, counterclaims, discovery requests, and motions. Equally important, they also began to think critically about the role of lawyers on both sides of this type of litigation.<sup>16</sup>

Over a short period of time, the number of cases appearing in the clinic increased and the “real education” began.<sup>17</sup> Students and supervisors believed that their cases were not isolated, but instead were part of a larger pattern in which repeat players appeared to flout rules of evidence, procedure and professional responsibility to transform their delinquent credit card accounts into legally enforceable judgments.<sup>18</sup> The clinic program was designed to encourage reflection on the broader ethical and social dimensions of lawyers’ work, and as a result students engaged in this clinic began to see the cases in a new light. They started to see their work as essential to the system of justice. They were not helping people avoid debts; they were consumer advocates, making sure those invoking the power of the courts did so with respect for their clients, the system, and its rules.

## II. MOVING FROM REPRESENTATION TO RESEARCH

### A. Context

In February 2007, just a few months before Doreen walked into the Clinic, the Federal Home Loan Bank Corporation announced it would stop buying what it considered to be the riskiest of the subprime home mortgages.<sup>19</sup> A few months later, Moody’s and Standard & Poor’s, the nation’s leading rating agencies, downgraded their ratings of billions of dollars worth of securities, many of which were backed by those risky mortgages.<sup>20</sup> A Senate report published in 2011 credits these actions as critical events in bringing about the economic crisis of 2008 and the resulting downturn of the nation’s economy.<sup>21</sup>

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16 See Kimberly O’Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L. REV. 335, 339 (2005) (describing social justice mission at core of clinical legal education); Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93 (1994).

17 See Roy Stuckey, *Teaching With Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 812-13 (2007).

18 See Galanter, *supra* note 15.

19 Federal Reserve Bank of St. Louis, *The Financial Crisis: A Timeline of Events and Policy Actions*, <http://timeline.stlouisfed.org/index.cfm?p=timeline> (last visited May 20, 2012).

20 *Id.*

21 STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 47 (2011), available at <http://www.hsgac.senate.gov/download/report-psi-staff-report-wall-street-and-the-financial-crisis-anatomy-of-a-financial-collapse>.

At the time, however, consumer debt continued to climb throughout 2007 at an annual rate of 5.8%.<sup>22</sup> As consumer debt grew, so did the industry concerned with collecting those debts, which was employing new technologies to increase productivity.<sup>23</sup> The growing industry also generated a growing number of consumer complaints to the Federal Trade Commission. In 2007, consumer complaints regarding collection practices by third-party creditors increased by approximately 20% and accounted for more than 25% of all complaints received by the agency.<sup>24</sup>

To respond to the increase in the number of complaints from consumers, and to explore the effects of the technological advances that contributed to the phenomenal growth of the collection industry, the Federal Trade Commission convened a public workshop to explore the modern practice of collecting consumer debts. Held in the fall of 2007, the workshop brought together representatives of the finance and debt collection industries, consumer advocates, attorneys, and others.<sup>25</sup> During discussions about the tremendous change in the collections industry brought about by technology and sheer volume, consumer advocates from around the country voiced concerns regarding a range of issues similar to the ones present in Doreen's case. Among the problems identified were the inadequacy of information available to consumers regarding the debt, problems with credit reporting by debt collectors, and the use of mobile phones and other communications technologies to communicate with consumers.<sup>26</sup> Other concerns related to problems consumers faced in defending themselves in collection litigation, particularly in litigation initiated by debt buyers.<sup>27</sup> The problems described sounded like the ones student attorneys faced when representing clinic clients: lack of adequate service, insufficient notice resulting from thinly pleaded complaints, and lack of representation.<sup>28</sup> Although industry representatives re-

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22 FEDERAL RESERVE G.19 STATISTICAL RELEASE (2012), available at <http://www.federalreserve.gov/Releases/g19/>.

23 See Spector, *supra* note 2, at 264-65.

24 FEDERAL TRADE COMMISSION, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT 4-5 (2008), available at <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>.

25 FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 2 (2009) [hereinafter WORKSHOP REPORT].

26 *Id.* at 28, 34.

27 See Spector, *supra*, note 2 at 265-66. See also, Holland, *supra* note 10.

28 WORKSHOP REPORT, *supra* note 25, at 55-58. Recognizing the absence of empirical evidence relating to litigation, the FTC then convened a series of roundtable events to more fully explore the litigation of consumer debts. *Id.* at 66. In its report of those roundtables, the Commission concluded that the system was broken and needed fixing, though it also noted a continued absence of empirical data. JON LEIBOWITZ ET AL., FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 6, 15-16 (2010) [hereinafter BROKEN SYSTEM].

luctantly acknowledged some of the advocates' concerns, they also marginalized their significance as anecdotal and unsupported by hard data.<sup>29</sup>

### B. *The Project*

By the end of 2007 the clinic's experience representing Doreen and others like her became more than anecdotal. It became the prototype for a project to begin to provide the data necessary to demonstrate the existence of the concerns raised by consumer advocacy groups. The goal was to look at litigation files in cases initiated by debt buyers to determine whether Doreen's case was representative of others or whether it was an aberration. Could one identify the original creditor or the date of default? Were facts alleged showing the plaintiff's relationship to the debt? Did defendants appear in the litigation? Were default judgments common? Did consumers retain counsel? Did the presence of counsel change the results, and if so, how?

I hypothesized that the data regarding suits by debt buyers would establish that the cases share at least five characteristics: (1) plaintiffs' pleadings contained few factual allegations; (2) most cases resulted in a default judgment; (3) consumers waived important rights; (4) few attorneys appeared on behalf of consumers; and (5) when attorneys did appear on behalf of a consumer, they made a difference in the outcome of the litigation.

I knew that an examination of the contents of court files was necessary to gather this information; a review of docket sheets would not suffice. Doing so efficiently, however, was a challenge. Because the contents of case files were not available electronically in my jurisdiction, much less remotely, examining their contents would require researchers to visit the courthouse and pull files from shelves for review one at a time. Accordingly, I considered working in another jurisdiction that maintained searchable electronic files or permitted some form of remote access. Throughout the spring of 2008, I explored available options in formal and informal discussions about the project with faculty, researchers and practitioners at a series of conferences and workshops.<sup>30</sup>

Although a great deal of attention at the time was devoted to the growing subprime mortgage meltdown, there were a number of parallels between collection of unsecured consumer debt and the growing foreclosure crisis. For example,

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29 See WORKSHOP REPORT, *supra* note 25.

30 One of the first steps was attending a conference in May 2008, titled *Emerging Issues in Subprime Lending*, hosted by Professor Linda Fisher, one of the 2011-12 Bellow Scholars at Seton Hall University Law School's Center for Law and Social Justice and attended by law faculty, clinical teachers, housing professionals and practitioners in legal aid programs. See *Call for Papers, Emerging Issues in Subprime & Predatory Lending Research: Analysis & Advocacy, A Conference for Leading Scholars and Activists*, Seton Hall Law School, Newark, N.J. May 8-9, 2008 (on file with the author). I also attended the AALS 2008 Conference on Clinical Education, [http://www.aals.org/events\\_2008\\_clinical.php](http://www.aals.org/events_2008_clinical.php).



courts began to question the standing of entities seeking judicial foreclosure of residential mortgages in much the same way that consumer advocates questioned the standing of debt collectors as assignees of original creditors.<sup>31</sup> These parallels sparked interest in the project and generated encouragement and ideas about the types of information that might be gathered and how to collect it.<sup>32</sup>

After attending an intensive workshop on conducting empirical legal research,<sup>33</sup> I decided to concentrate my efforts in my own jurisdiction. I began to refine the categories of data to be collected and met with court personnel to discuss how to access court records for review. With the assistance of an expert in statistical sampling, Dr. Lynne Stokes of Southern Methodist University, I decided that cluster sampling could be used to randomly select cases within a margin of error of three to five percent.<sup>34</sup> By mid-July 2008, shortly after the FDIC seized control of California-based IndyMac, signaling one of the nation's largest financial failures,<sup>35</sup> we began to collect the litigation data that would form the basis of my study. The process of collecting a sample cluster and gathering the data continued throughout the remainder of the summer of 2008 and into fall. By early November 2008, preliminary data appeared to confirm many of the anecdotal reports industry representatives had largely dismissed the previous year.<sup>36</sup>

### C. *Collecting and Thinking About the Data*

Throughout the fall of 2008 and the first half of 2009, I worked with a graduate student in statistics to organize the data for presentation. The information collected fell into one of thirty categories that we arranged into four major subject areas. The first included identifying information about people and entities involved in the litigation—the parties and their attorneys, if any—as well as entities not involved in the litigation, such as the original creditors. The second category contained defensive information, including information about service on the defendant, appearance, and whether any defenses or counterclaims were asserted.

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31 *E.g.*, *Wells Fargo v. Farmer*, 18 Misc. 3d 1124 (N.Y. Sup. 2008) (holding that plaintiff lacked standing to sue for foreclosure where the plaintiff did not establish valid assignment prior to time suit was filed); *Davenport v. HSBC Bank*, 739 N.W.2d 383 (Mich. App. 2007).

32 Important early encouragement came from The American Bar Association's Section of Litigation Research Fund, which provided early support for travel and research assistance. *See* Letter from American Bar Association, Section of Litigation to Professor Mary Spector (Apr. 28, 2008) (on file with author).

33 The 7th Annual Conducting Empirical Legal Scholarship Workshop, cosponsored by Northwestern University Law School and Washington University in St. Louis School of Law. The conference was held in Chicago on June 23-25, 2008 and was conducted by Professors Lee Epstein and Andrew D. Martin as conference faculty.

34 *See* Spector, *supra* note 2 at 277-79.

35 *See* Kathy M. Kristof & Andrea Chang, *Federal Regulators Seize Crippled IndyMac Bank*, L.A. TIMES, Jul. 12, 2008, <http://articles.latimes.com/2008/jul/12/business/ft-indymac12>.

36 *See supra* note 25 and accompanying text.

The third category included information about claims alleged in the petition regarding the amount sought and method of calculating it, as well as details, if any, of charges for late payments, spending beyond a credit limit, or other fees. This category also included data regarding the amount of attorneys' fees sought and the method used to calculate them. In addition, if a file contained affidavits, researchers recorded the identity and business affiliation of the affiant and noted whether supporting documents such as credit agreements appeared in the file. The last category contained information about outcomes, whether the cases resulted in a default judgment, dismissal without prejudice, agreed judgment, dismissal with prejudice, or affirmative recovery for the defendant.<sup>37</sup>

Initial collection moved along fairly smoothly, but each time I looked at the data to answer one question, additional questions arose. Resolving these questions often required returning to the original files for re-examination, and that meant time: time to travel to the courthouse, review the files, code the information, and re-examine it. An example of these unanticipated issues related to the identity of the original creditors. Although not parties to the suits, the identification of the original creditor is nevertheless important in the litigation, not only because it provides the consumer with notice of the nature of the claim, but also because improper articulation of a corporate entity's name can prove fatal to potential counterclaims or third-party claims for affirmative relief.<sup>38</sup>

Initial review of the data revealed 112 cases in which "Citibank" had been identified as the original creditor; however, another twenty-eight cases identified an original creditor by names that contained some form of the word "Citi." Because of the possibility that differences in names were attributable to the use of abbreviations when coding, I was unwilling to draw any conclusions from this initial review. As a result, re-examination of the files was necessary to verify the precise names used in the court files. Indeed, re-examination of the files revealed that the name "Citibank" was used to identify the original creditor in just seventy-seven cases, while the name "Citibank (South Dakota)" was used in thirty-nine cases with seven other variations used in the remaining cases.<sup>39</sup> One conclusion regarding this variety was that each variation in corporate name signified a different corporate entity. To test that conclusion, each of the variations was checked against records maintained by Texas' Office of Secretary of State. Not a single one of the nine different variations of the "Citibank" name was registered as a legal entity. Had a consumer wished to assert a counterclaim or obtain discovery from any of these entities, she would have likely faced great difficulty.

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37 See Spector, *supra* note 2, at 277-78.

38 See Spector, *supra* note 2, at 284-85 (discussing variations in corporate names found among entities).

39 *Id.* at 283.

This was just one of a number of similar issues that continued to arise in almost every category of information. The process was still ongoing at the time of the 2009 AALS Conference on Clinical Legal Education, where preliminary results were first reported in connection with the Bellow Scholars program.<sup>40</sup> Eventually, the results of the project began to take final form and were ready for publication by early 2011, just over three years after Doreen first walked in the clinic door. Some of the results were stunning. For example, nearly 95% of the cases lacked any information regarding date of default or calculation of the amount allegedly owed, information that can be essential to insuring due process.<sup>41</sup> Likewise, an overwhelming majority of the case files contained affidavits supporting collectors' claims that had characteristics of robo-signing.<sup>42</sup> While only 40% of all cases in the sample resulted in a default judgment—far fewer than reported in some jurisdictions—the rate was nevertheless double that reported for all civil cases in the jurisdiction.<sup>43</sup> Fewer than 10% of the defendants retained counsel.<sup>44</sup>

In addition, the data revealed unexpected findings. For example, more than a quarter of the plaintiff/debt-buyers in the sample were in violation of Texas law when they filed suit without first obtaining state-mandated bonds to engage in debt collection.<sup>45</sup> In such cases, as in others, consumers waived not only potential defenses to collection, but also affirmative claims for relief.<sup>46</sup> In short, the study provided evidence to support the anecdotal claims of collection abuse in litigation.

Doreen was not alone.

### III. BEGINNING TO USE THE DATA IN A CHANGING ENVIRONMENT

As the first round of data collection came to a close in the fall of 2008, it was clear that the nation's economic health was seriously at risk and that individual consumers were faring no better.<sup>47</sup> Accordingly, even before the final report was published, we started to share preliminary data with others through clinic projects, conferences, and in working groups. In one early clinic project in the fall

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40 See Conference Materials, *AALS Conference on Clinical Legal Education: Emerging Lawyers: Clients, Complexity and Collaboration in a Cross-Disciplinary Lens* (May 5, 2009), available at <http://www.aals.org/documents/2009clinical/clinicalbrochureforweb.pdf>.

41 Spector, *supra* note 2, at 298.

42 *Id.*

43 *Id.*

44 *Id.*

45 See TEX. FIN. CODE § 392.101 (2006) (requiring \$10,000 bond to be filed with Secretary of State).

46 See Spector, *supra* note 2, at 281-82.

47 See David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 3, 2008, available at <http://www.nytimes.com/2008/10/04/business/economy/04bailout.html?pagewanted=all>.

of 2008, as clinic students continued to represent consumers in debt collection litigation, a student attorney and supervisor shared their experiences and the data collected so far to educate volunteer mediators appointed by the courts in contested collection cases.<sup>48</sup>

At times, the presentation of preliminary data generated ideas for refinement of the analysis, as well as suggestions for immediate action to improve consumers' access to justice. For example, at a presentation in summer 2009, at roughly the time of the creation of the Consumer Financial Protection Bureau,<sup>49</sup> I had just explained that dismissals occurred in more than 60% of cases in which a consumer appeared, a South African clinician, known for his work in street-law programs, noted how helpful that information could be in counseling consumers where legal services were scarce. With great enthusiasm, he suggested that simply counseling consumers about their rights and the value of appearing in court had the potential to spread clinic resources to large numbers of consumers without engaging in full and complete representation.<sup>50</sup>

Settings such as the 2009 and 2010 AALS Conferences on Clinical Education, in Cleveland and Baltimore, respectively, provided additional opportunities to share information and experiences on a range of topics common to our clinics and our clients. At the 2010 conference, an additional working group formed to discuss strategies for approaching foreclosure and debt collection litigation as well as efforts to protect consumers in post-judgment proceedings for collection. Among the many subjects discussed was the existence of robo-signed affidavits in foreclosure and collection cases, which weren't widely reported until several months later when they became front-page news.<sup>51</sup> By the following fall, after a large national lender suspended its foreclosure activity because of admitted defects with the affidavits it used to support many of its foreclosures<sup>52</sup> clinic students in Maryland, supervised by one of the participants in the Baltimore working group, joined in a motion seeking to certify a class of homeowners claim-

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48 Mary Spector, Presentation to SMU Center for Dispute Resolution, *Collecting and Litigating Consumer Debts: The Consumer's Perspective* (Sept. 5, 2008) (on file with the author).

49 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1011, 124 Stat. 1376 (2010); see also *Creating the Consumer Bureau*, <http://www.consumerfinance.gov/the-bureau/creatingthebureau> (last visited May 18, 2012).

50 The comments to which I refer were made by Professor David J. McQuoid-Mason at the end of a presentation at the 7th International Journal of Clinical Legal Education Conference held at Murdoch University in Perth, Australia, July 9-11, 2009. See *Detailed Conference Programme* (2009) (on file with the author).

51 See e.g., Morgenson & Martin, *supra* note 10.

52 David Streitfield, *GMAC Halts Foreclosures in 23 States for Review*, N.Y. TIMES, Sept. 20, 2010, available at <http://www.nytimes.com/2010/09/21/business/21mortgage.html>.

ing their foreclosures were tainted by fraudulent affidavits<sup>53</sup> supporting the foreclosures.

By the summer of 2011, some state and local jurisdictions had taken action to address some of the issues debt buyer litigation raised, particularly in small claims court.<sup>54</sup> Work of clinic supervisors and students in the University of Maryland clinic provided some of the background that led the State of Maryland to promulgate a number of new procedural rules for use in debt cases, some of which targeted cases initiated by debt buyers.<sup>55</sup> North Carolina appeared to take an approach that would have broader application by applying debt collection procedural rules without regard to the court in which the case was filed.<sup>56</sup> Similar efforts are currently underway in California as well, where Senate Bill 890 aims to require that “the debt buyer has valid evidence in the form of business records that the debt buyer is the sole owner of the specific debt at issue, the amount of debt, and the name of the creditor at the time the debt was charged off, among other things.”<sup>57</sup>

Closer to home, in a special legislative session, the Texas legislature promulgated a new law that appeared to touch on these same issues. House Bill 79 would make it possible for collection cases involving less than \$10,000 to be brought in a newly created small claims jurisdiction of the justice courts.<sup>58</sup> The new legislation also directed the courts to promulgate rules of procedure for the jurisdiction to be used in debt collection cases filed by assignees, lenders, and debt collectors.<sup>59</sup>

While the SMU Civil Clinic had previously used the results of the Dallas project to inform its direct representation of consumers in collection cases, House Bill 79 provided clinic students with an opportunity to engage in advocacy of a different kind. As the fall 2011 semester began, a new group of students became acquainted with the story of Doreen and the research that resulted from previous clinic representation as they embarked on a new rules-drafting project. This project gave the clinic and the students the opportunity to consider systemic change as a way to address client problems. It enabled them to think outside the confines of existing rules to consider how alternatives might provide greater protection to

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53 Brendan Kearney & Danny Jacobs, *Clinic Joins Foreclosure Motions*, MD. DAILY REC., Nov. 2, 2010, available at <http://mddailyrecord.com/2010/11/02/clinic-joins-foreclosure-motions/>.

54 E.g., MASS. ANN. LAWS UNIF. SMALL CLAIMS RULES, Rule 2(b); see also MD. CODE ANN., CTS. & JUD. PROC. §§ 3-306, 308, 509 (West 2012).

55 Letter from Advisory Committee to the Court of Appeals (July 1, 2011) (describing proposed rule changes) (on file with author).

56 Consumer Economic Protection Act of 2009, N.C. GEN. STAT. §§ 58-70-145–55 (2011) (prohibiting the filing of a lawsuit to collect a debt after expiration of the statute of limitations).

57 S.B. 890, 2011-2012 Sess., at 1-2 (Cal. 2012).

58 See *supra* note 5.

59 *Id.*

consumers.<sup>60</sup> Some students explored developments in other jurisdictions, some observed local court proceedings, and others explored opportunities for community education. With weekly group meetings to share information and monitor progress, student attorneys produced a draft set of rules. The Texas Supreme Court's Rules Advisory Committee is currently working on the issue. In the meantime, clinic faculty are considering other ways in which research that grew out of direct representation of clients can be used to supplement the clinic curriculum. Possible projects include additional drafting projects and community outreach.

#### IV. REFLECTIONS ON THE PROCESS

It is still too early to tell what, if any, lasting impact this project will have on the "quality of justice in communities . . . [or] in the delivery of legal services."<sup>61</sup> I am hopeful it may play some role in helping to promote economic and social justice. Although those goals are lofty ones that often seem beyond the reach of an individual clinic teacher working within a single law school, they are exactly the goals the Bellow Scholar Program seeks to promote.

The program is named for Gary Bellow, a pioneer in clinical legal education whose impact in the field reaches far beyond his students and clinics at the Harvard Law School.<sup>62</sup> After his death, the American Association of Law Schools Section on Clinical Legal Education established the Bellow Scholar Program to honor him and his work.<sup>63</sup> Administered by the section's Committee on Lawyering in the Public Interest, the program selects clinicians who are embarking on "innovative proposals designed to improve the quality of justice in communities, to enhance the delivery of legal services, and to promote economic and social justice."<sup>64</sup>

Projects represent a variety of subject areas such as disability rights,<sup>65</sup> child welfare,<sup>66</sup> consumer law,<sup>67</sup> criminal law<sup>68</sup> and clinical legal education<sup>69</sup> that re-

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60 The type of work may be more consistent with the type of work performed in public advocacy organizations and elsewhere. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008).

61 See Announcement, *The Bellow Scholar Program*, *supra* note 6 (describing legacy of Gary Bellow and program created in his memory).

62 See *Symposium: The 25th Anniversary of Gary Bellow's and Bea Moulton's The Lawyering Process*, 10 CLINICAL L. REV. 1 (2003); see also GARY BELLOW: CLINICAL PIONEER AND TIRELESS WORKER FOR SOCIAL JUSTICE, <http://www.udclawreview.com/bellow-scholars/> (last visited May 15, 2012).

63 See Announcement, *The Bellow Scholar Program*, *supra* note 6.

64 *Id.*

65 E.g., Joseph Tulman, *Using Disability Rights to Diminish Incarceration*.

66 E.g., Alan Lerner, *Identifying the Red Flags of Child Neglect to Facilitate Evidence-Based Focused Responses*.

67 E.g., Linda Fisher, *The Links Between the Foreclosure Process and Vacant & Abandoned Urban Properties* (a study of the "ripple effects" of the foreclosure crisis in Newark, New Jersey);

flect the diversity of clinical education.<sup>70</sup> This diversity enables broad and far-ranging discussions, not only about the topics of the projects, but also about the work's relationship to the scholar's teaching and clinic, as well as strategies for achieving the social justice or pedagogical goal of the project. This can occur because of the nature of the project itself, as in discussions related to the Robinson-Dorn/Schumacher project, designed to collect information about the role of legal fellows in clinic work. It can also occur when a participant realizes how he or she might adapt methods used by others and integrate features of research or advocacy into the framework of an existing clinical program. The common threads are the project's connection to the scholar's clinic work and teaching and its potential for improving economic or social justice. Connections may arise from work on a particular subject matter or located within a discrete geographic area.<sup>71</sup> They may

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Professor Judith Fox, *Debt Collection: A Survey of Indiana Courts* (an empirical study in response to the FTC's 2009 report concluding that the nation's system of resolving disputes about consumer debt "is broken").

68 E.g., M. Chris Fabricant & Adele Bernhard, *The Impact of CompStat-Based 'Zero Tolerance' Policing on Low-Income Communities of Color* (an empirical study of the impact of so-called "zero tolerance policing" on a small subsection of the South Bronx).

69 David Santacroce, *The Consequences of Institutionalization for the Teaching-Service Mission of Clinics*; Michael Robinson-Dorn, Scott Schumacher, & Caroll Seron, *Fellow Travelers* (a study of clinical teaching fellowships).

70 This diversity is reflected in the range of projects Bellow Scholars have undertaken. The first Bellow Scholars were named in 2003 for a two-year term. They were: Jeff Selbin and Mary Louise Frampton for their project, *Evaluating Models of Legal Services Delivery*; Doug Smith for his *Workers' Rights Project*; and Sophie Bryan for *Ethical Issues in Group Representation Cases*. The next group of Bellow Scholars, for the 2005-06 term, were: Muneer Ahmad and Susan Bennet on behalf of their colleagues at American University's Washington College of Law for their project, *Services to Clients Having Limited English Proficiency* and Anthony Alfieri, on behalf of his colleagues at the University of Miami School of Law for work in an interdisciplinary project, *Community Health Education Rights Clinic*. The 2007-08 group of Bellow Scholars included Brenda Bratton Blom for her *The Community Justice Initiative, Community Prosecution Project*; the late Alan Lerner for *Identifying the Red Flags of Child Neglect to Facilitate Evidence-Based Focused Responses*; and Joseph Tulman for *Using Disability Rights to Diminish Incarceration*. In addition to the author, the 2009-10 scholars were Faith Mullen for her work, *Access to Justice and Community Involvement in the DC Office of Administrative Hearings*; David Santacroce for his work with the Center for the Study of Applied Legal Education (CSALE); and Michael Gregory and Susan Cole for their project, *Evaluating Advocacy in Trauma-Sensitive Schools*. See List of Scholars, attached to e-mail from Juliet Brodie, Co-Chair, AALS Section on Clinical Legal Education, Committee on Lawyering in the Public Interest (Sept. 7, 2010) (on file with author). There are six Bellow Scholars in the 2011-12 cycle. They are: M. Chris Fabricant & Adele Bernhard for their work in the Bronx, *The Impact of CompStat-Based 'Zero Tolerance' Policing on Low-Income Communities of Color*; Judith Fox, *Debt Collection: A Survey of Indiana Courts*; Linda Fisher, *The Links Between the Foreclosure Process and Vacant and Abandoned Urban Properties*; and Michael Robinson-Dorn, Scott Schumacher, & Caroll Seron, *Fellow Travelers*. E-mail from Michael Gregory and Juliet Brodie to lawclinic@lists.washlaw.edu (Jan. 13, 2011) (on file with author).

71 Linda Fisher's project, as well as the joint project of Chris Fabricant and Adele Bernhard, provide excellent examples.

also arise from a particular form of clinic design, needs of a community or even from the scholar's reflection regarding supervision and teaching.

An important component of the Bellow Scholar program is the support it offers the scholars for the projects. Though non-economic in nature, the program's support can be more valuable than any monetary award.<sup>72</sup> This support often takes place at the semi-annual gatherings that have become a regular feature of the program where scholars can receive guidance and encouragement in the use of collaborative and empirical techniques. Collaboration with and education by social scientists adds an important dimension to the work of Bellow Scholars. The clinical teacher adept at traditional legal research may be unfamiliar with the best practices and protocols used by researchers outside the legal profession. The social scientists offer not only guidance on research methods, but also a critical perspective on the substance of the projects. Their perspective can be useful for clinical teachers at whatever stage of their research, especially because some have become regular participants at Bellow gatherings. As a result, their familiarity with the work of the Bellow Scholars also enables them to offer an important perspective on the projects' development from year to year.<sup>73</sup>

Through the semi-annual gatherings discussed above, the program also encourages scholars to accomplish the social justice goals that are its heart. Formal meetings and workshops include brainstorming sessions to generate strategies for targeting and implementing reform efforts, provide suggestions for collaboration, research and advocacy partners, as well as ideas to enhance the research and maximize its impact. These formal opportunities also create an environment where personal and professional relationships develop over common interests.<sup>74</sup>

## CONCLUSION

It is through the creation and maintenance of these relationships between and among lawyers, social scientists, clinic faculty, and students that the Bellow Scholars program encourages clinic faculty to look beyond the immediate legal problems of individual clients to systemic approaches for improving the quality of justice in their communities. This deepens our "appreciation of practice as a

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<sup>72</sup> Professor Faith Mullen, a 2009-10 Bellow Scholar, should be credited for making this point.

<sup>73</sup> Dr. Rebecca L. Sandefur, Senior Research Social Scientist with the American Bar Foundation, and Dr. Corey Shdaimah, Assistant Professor and Academic Coordinator for the MSW/JD Dual Degree Program at the University of Maryland, have been regular participants in the fall workshops since the inception of the Bellow Scholar program.

<sup>74</sup> See *Committee on Lawyering in the Public Interest, Bellow Scholar Proposal Solicitation* (Aug. 23, 2008) (on file with author); see also *The Bellow Scholar Program*, *supra* note 6 (describing legacy of Gary Bellow and program created in his memory) (on file with author).



human enterprise, as a way of solving problems, as a way of thinking about the world,"<sup>75</sup> and, hopefully, as a way of improving it.

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<sup>75</sup> See Jeanne Charn, *Service and Learning: Reflection on Three Decades of the Lawyering Process at the Harvard Law School*, 10 CLINICAL L. REV. 75, 79 n.11 (2003) (describing early days of Gary Bellow's teaching).

