

## Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach<sup>2</sup>

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### INTRODUCTION\*

We are well in the midst of what some have called an empirical legal research revolution.<sup>1</sup> The number of empirical workshops specifically for legal scholars continues to grow, and with it the interest in doing this type of research.<sup>2</sup>

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1. Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1720-21 (2011) (“And, like revolutions, [empirical legal studies] has generated aspects of counterrevolution. It is claimed that ‘there is now too much empirical work being done simply because it looks ‘empirical.’”).

2. See generally Shari Seidman Diamond & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. L. & SOC. SCI. 581 (2010) (analyzing law review articles from 1998 to 2008 and finding that almost half contained some empirical content). The number of conferences available to would-be empiricists continues to grow. See, e.g., 12th Annual Conducting Empirical Legal Scholarship Workshop, Univ. of S. Cal. Sch. of Law (May 22-24, 2013), <http://lawweb.usc.edu/who/faculty/workshops/legalWorkshop.cfm>; 2013 Quantitative Empirical Training Workshop, Ass’n of Am. Law Schs. (Jan. 4-7, 2013), <http://aals.org/am2013/FinalProgram2013.pdf>; 2013 Workshop on Empirical Methods for Law

Hesitation to dive into a project abounds, however, from scholars who do not have direct experience with empirical methods and who perhaps have been deterred by critics.<sup>3</sup> This Article describes an ambitious Randomized Control Trial (RCT) in the area of consumer debt collection. Randomized trials are the same kind of evaluation that the law requires (or at least strongly encourages) before new drugs and medical devices may be sold to the public.<sup>4</sup> Although they have not yet gained widespread popularity in the evaluation of legal systems,<sup>5</sup> randomized trials are uniquely effective ways of assessing whether any benefits observed after implementation of legal or educational assistance programs are really due to those programs as compared to other factors, such as unusual levels of competence or motivation of program participants or changes in the overall economy. In other words, they are the best way that we know of to ensure that at the end of a well-designed study one can say with some certainty that the evaluated treatment *caused* the observed outcome.

In this Article, we describe a proposed RCT to evaluate two interventions that are part of contemporary attempts to assist consumers in financial distress, one from legislators and the other from legal services providers. The first intervention stems from a Congressional requirement. In 2005, Congress mandated that consumers who file for bankruptcy undergo two forms of financial counseling before they can get a discharge, with the hope that this kind of counseling would help them avoid bankruptcy or financial distress in the future.<sup>6</sup> As we will explain, we propose to test the effectiveness of counseling on consumer financial health. The second intervention stems from the observation that a great many consumers in financial distress eventually face debt collection lawsuits, in which they proceed—unrepresented—against attorneys specializing in collection mat-

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Professors, George Mason Univ. Sch. of Law, Law & Econ. Ctr. (May 20-24, 2013), <http://www.masonlec.org/events/2013-workshop-for-law-professors-on-empirical-methods/>; Empirical Training Workshop, Conference on Empirical Legal Studies, Stanford Univ. (Nov. 8-9, 2012), <http://blogs.law.stanford.edu/cels2012/empirical-training-workshop/>; Workshop on Research Design for Causal Inference, Northwestern Univ. Sch. of Law (June 24-28, 2013 and Aug. 12-14, 2013), <http://www.law.northwestern.edu/faculty/conferences/causalinference/>.

3. This type of research is hardly new, even if the term “empirical legal research” (ELS) was only coined in the 2000s. See generally Herbert M. Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925 (2009). The criticisms have been thoroughly rebutted. See, e.g., Russell Korobkin, *Symposium: Empirical and Experimental Methods in Law, Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033 (2002); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002).

4. See 21 C.F.R. § 314.126(b) (2012) (listing characteristics included in an “adequate and well-controlled study”).

5. But see D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013), available at [http://www.harvardlawreview.org/issues/126/february13/Article\\_9432.php](http://www.harvardlawreview.org/issues/126/february13/Article_9432.php); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2011); Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743 (2013) (reporting results of a randomized field experiment).

6. See generally Part I.A, *infra*.

ters. Consumer advocates, legal services providers, and others have called for reforms to protect consumers facing such lawsuits. These critics assert a litany of alleged violations and abuses by debt collectors using the court system that affect consumers who lack legal advice and representation. Though a number of salient examples of abuses have been reported, we have little hard information about how common these abuses are, what specific violations of law and process are entailed in them, or, perhaps most importantly, whether legal advice and representation for consumers would affect the outcome of debt collection lawsuits and the impact of debt problems on subsequent financial health.

Thus, there are at least two large holes in our knowledge of this area. First, we do not know what does and does not work to improve the financial health of individuals in distress. Second, we do not at present understand whether there are systemic problems or abuses in a critical arena—namely, debt collection proceedings—in which persons in financial distress encounter both the financial industry and the court system. To address both concerns, our RCT will evaluate two interventions for consumers who have been sued in a credit card debt collection case: (1) incentives to undergo financial education counseling, and (2) offers of legal representation to persons facing debt collection proceedings.

As we explain in Part III, through the RCT, we will be able to learn about current collections practices—and catalog any abuses—more generally. We describe our proposed study, its importance, and the challenges we face in this Article. Part of our aim here is to convince others that RCT experiments are a unique and powerful source of information, both in debt collection and more widely in evaluating interventions. Our hope is that, in describing our project in detail, we will clarify the process and encourage others to dip their toes in, seek out an empirically-minded partner if needed, and start testing hypotheses.<sup>7</sup> In particular, we hope to encourage clinical and legal services programs to begin evaluating their current processes using an RCT design.<sup>8</sup>

This Article proceeds as follows. Part I examines the first aim of this study—the quantitative aspect—to evaluate two interventions that are hoped to help consumers in financial distress. It also explains why we believe an RCT is valuable in this context. Part II discusses the qualitative aims of the study: (1) an investigation into the alleged abuses in debt collection lawsuits, (2) an examination of the institutions involved in this system—in particular, the court,

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7. The authors welcome the opportunity to help others find empirically-minded partners.

8. Undoubtedly, there are many moving pieces in this long-term project—we do not expect to have gathered all the data until 2019. Nevertheless, there are many “mini-goals” that we have set to accomplish along the way. The first of those goals is one that we have already accomplished: for two semesters, students at Connecticut, Harvard, and Maine law schools have been preparing legal memos and *pro se* materials useful to our legal services partner, Pine Tree, as well as to the public at large. Some of those students were enrolled in consumer law courses that combined doctrinal instruction with the clinical work, and all worked in teams that were composed of students from all three law schools. Even if the project were to end today, the database of memos that the students have developed will be useful for some time.

the attorneys, and the legal services providers, (3) the use of the study as a bridge between clinical and doctrinal instruction, and (4) the creation and usability testing of *pro se* materials. Part III describes our methodology in a way that we hope will encourage others to think about repeating this experiment and includes a description of the innovative *pro bono*/clinical pedagogical component. The Article then concludes with some thoughts on the challenges ahead for this project and for future researchers.

## I. EVALUATING WHAT WORKS AND WHAT DOES NOT FOR CONSUMERS IN FINANCIAL DISTRESS

As of 2010, nearly half of the U.S. population (43.9%) did not have a financial cushion, lacking “sufficient liquid assets to subsist at the poverty level for three months in the absence of income.”<sup>9</sup> More than half of the population (56.4%) was paying subprime rates for their credit products.<sup>10</sup> “At least thirty million Americans have, on average, \$1500 of debt that is subject to collection.”<sup>11</sup> While the economy is improving, for many, the 2008 Great Recession stubbornly persists. Given these facts, we need to answer the following question: What works and what does not work in terms of improving the financial health of the unemployed, the under-employed, the working poor, and persons who struggle to meet their financial obligations? Social welfare and insurance programs may be of limited value to such populations unless these individuals become better able to manage their financial affairs, to plan for unexpected expenses, and to extricate themselves from financial distress. Two interventions are commonly proposed with the aim of providing help to these individuals: (1) financial counseling to help them learn better money management skills and (2) a lawyer who can assist them in getting out of the financial distress hole. We describe two specific versions of those proposals that we test in this study.

### A. *Financial Counseling Required for Debtors in Bankruptcy*

In the 2005 amendments to the Bankruptcy Code, Congress mandated that individuals seeking bankruptcy protection must undergo a credit counseling

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9. *Liquid Asset Poverty Rate*, CORP. ENTERPRISE DEV., <http://scorecard.assetsandopportunity.org/2013/measure/liquid-asset-poverty-rate> (last visited Feb. 10, 2013). That number is 2.5% higher since 2006. *Change in Liquid Asset Poverty*, CORP. ENTERPRISE DEV., <http://scorecard.assetsandopportunity.org/2013/measure/change-in-liquid-asset-poverty> (last visited Feb. 10, 2013).

10. *Consumers With Subprime Credit*, CORP. ENTERPRISE DEV., <http://scorecard.assetsandopportunity.org/2013/measure/consumers-with-subprime-credit> (last visited Feb. 10, 2013).

11. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau to Oversee Debt Collectors (Oct. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-oversee-debt-collectors/>. The number of such debtors is likely much higher because it only includes individuals who have a credit report with Equifax and whose debt collectors have reported the delinquent debt to Equifax.

course prior to filing for bankruptcy, as well as a financial education course before receiving a discharge of their debts.<sup>12</sup> As described below, the general reasoning expressed in the Congressional Record was that the pre-filing requirement would warn debtors of the consequences of filing for bankruptcy (and prevent some debtors from filing) and that the pre-discharge course would help them avoid bankruptcy in the future.

The pre-filing requirement was “intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating—before they decide to file for bankruptcy relief,”<sup>13</sup> and was also intended to reduce the number of people who file for bankruptcy.<sup>14</sup> Senator Jeff Sessions (R-AL)—the sponsor of the amendment incorporating this provision—described on the Senate floor his experience visiting credit counseling agencies and his belief that “[t]hey have proven to be effective for a large number of creditors . . . [and m]any families are finding they can work their way out of debt without filing for bankruptcy, without walking out on their solemn obligations and actually feeling better about themselves as well as learning a lesson for the whole family.”<sup>15</sup>

Senator Sessions expected that 5% to 10% of bankruptcies could be avoided by a pre-filing requirement of financial counseling.<sup>16</sup> Some credit counselors did not seem to agree with this hopeful view, stating in the press that “they expect[ed] only a small share of those who will receive the required counseling to avoid filing bankruptcy [because b]y the time people have contacted a bankruptcy attorney or realized they will seek relief in bankruptcy court, they are usually too debt-burdened to work out a repayment plan outside of court.”<sup>17</sup> However, at least one credit counseling industry insider agreed and believed that 8% of people who filed for bankruptcy before the counseling changes could have worked out a payment plan outside of bankruptcy.<sup>18</sup> Senator Sessions’ prediction does not seem to have come to pass. In the only study with available data on this issue, the

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12. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (West, Westlaw) (11 U.S.C. § 521(b)(1)-(2) (2006) (pre-filing requirement); 11 U.S.C. §§ 727(a)(11), 1328(g)(1) (2006) (pre-discharge requirement)).

13. H.R. REP. NO. 109-31, pt. 1, at 18 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 104; see also Dave Flessner, *Consumers Will Have to See Credit Counselor Before Going to Bankruptcy Court*, CHATTANOOGA TIMES, Apr. 21, 2005, at 23 (quoting the chief counsel for the National Federation of Consumer Counselors as saying that the pre-filing requirement “is like the informed consent a doctor requires before surgery” and that “[f]or such an important financial step, people should be informed about alternatives and consequences of bankruptcy filing.”); JENNIFER ANDREA STAMAN, CONG. RESEARCH SERV., RL 33737, CREDIT COUNSELING REQUIREMENTS UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 AND THE PENSION PROTECTION ACT OF 2006 (2006).

14. STAMAN, *supra* note 13, at 1.

15. 151 CONG. REC. 3496 (2005) (statement of Sen. Jeff Sessions in support of S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) [hereinafter Sessions Statement].

16. *Id.*

17. Dave Flessner, *Consumers Will Have to See Credit Counselor Before Going to Bankruptcy Court*, CHATTANOOGA TIMES, Apr. 21, 2005, at 23.

18. *Id.*

National Association of Consumer Bankruptcy Attorneys surveyed leading credit counseling firms four months after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) went into effect and found that “one in 30 consumers (3.3 percent) was a candidate for paying off what he or she owed under a debt management plan (DMP).”<sup>19</sup>

If the pre-filing discharge was meant to inform and redirect debtors to other options, the pre-discharge financial management training (to be completed just before receiving a discharge) was meant to help debtors “avoid the cycle of indebtedness”<sup>20</sup> and “provide guidance about how to manage their finances, so that they can avoid future financial difficulties.”<sup>21</sup> In particular, Senator Sessions believed that the pre-discharge credit counseling would help bankrupt debtors “manage money wisely[,] . . . avoid high interest debts when they can[,] . . . keep their interest rates low, their borrowing low, to manage their money wisely.”<sup>22</sup>

These educational provisions have been the subject of much debate and discussion. The administration, time, and financial burdens these requirements place on consumers when they are in financial and emotional distress are considerable.<sup>23</sup> Some have argued that the mandate requires an additional cash outlay at a time when resources are most scarce, and these courses are offered to debtors at a time when they are in the throes of a financial and emotional crisis and thus are less likely to absorb any substantive content.<sup>24</sup> In contrast, proponents of these required educational courses argue that consumers in financial distress need the information to develop skills to better manage their personal finances.<sup>25</sup> To date, there is little hard evidence to support either argument. Some researchers have tested individuals’ knowledge of, or intent to use, money-saving and income-maximizing practices before and after a financial

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19. See Michelle Singletary, *What Deadbeats?*, WASHINGTON POST, Feb. 26, 2006, at F1; NAT’L ASSOC. OF CONSUMER BANKR. ATTORNEYS, BANKRUPTCY REFORM’S IMPACT: WHERE ARE ALL THE “DEADBEATS”? 6 (2006) (on file with authors).

20. 151 CONG. REC. 2962 (2005) (statement of Sen. Orrin Hatch in support of S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

21. H.R. REP. NO. 109-31, pt. 1, at 18 (2006); see also STAMAN, *supra* note 13.

22. Sessions Statement, *supra* note 15.

23. See, e.g., Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 55 (2012) (noting that consumers are paying as much as \$100 for both courses); see also 151 CONG. REC. 3825 (2005) (statement of Sen. Russ Feingold in support of several amendments to S. 256) (“The bill also fails to address the potentially prohibitive cost of credit education to some debtors . . . . Let’s not make these counseling and education requirements . . . into some kind of a trap for some . . . good faith debtors whom the bankruptcy decision is actually designed to help.”).

24. See, e.g., Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549 (2005); Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 133 (1999).

25. See ANGELA C. LYONS, TOMMYE WHITE, & SHAWN HOWARD, THE EFFECT OF BANKRUPTCY COUNSELING AND EDUCATION ON DEBTORS’ WELL-BEING: EVIDENCE FROM THE FRONT LINES 4 (2008), available at [http://agec69.agecon.uiuc.edu/research/reports/The%20Effect%20of%20Bankruptcy%20Counseling%20and%20Education\\_122008.pdf](http://agec69.agecon.uiuc.edu/research/reports/The%20Effect%20of%20Bankruptcy%20Counseling%20and%20Education_122008.pdf).

counseling session.<sup>26</sup> Some have surveyed individuals in bankruptcy and asked their view of the educational value or efficacy of financial counseling in bankruptcy.<sup>27</sup> Such studies, while useful, measure what these individuals think or feel after counseling, not what they actually do.

Because Congress mandated that all individuals seeking bankruptcy after BAPCPA must complete the same counseling, it is impossible to evaluate directly whether the counseling requirements have intended or unintended effects because there is no way to create a true comparison group. In other words, the best way to assess the effectiveness of counseling would be to compare the financial outcomes of two groups of consumers contemplating or in the midst of bankruptcy, one of which was randomly assigned to a group required to undergo counseling, the other of which was randomly assigned to a group prohibited from undergoing counseling. This research is not possible, however, given the statutes, which require that all who seek a discharge of debts in bankruptcy undergo counseling.<sup>28</sup>

We propose to do the next best thing. We will create the two groups of consumers identified from a different but closely related cohort of consumers—namely, individuals who are in financial distress and who may at some point end up in bankruptcy, but who are not actually in or immediately contemplating bankruptcy proceedings. That is, the consumers in the study will all have one thing in common: at the time of the study, they will be defending litigation in which a plaintiff seeks to collect on at least one credit card debt. Further, because we lack Congress' power to impose mandatory conditions, we will use incentives (such as a gift card). Thus, by randomizing this group of debt collection defendants into either a control group (no incentive to undergo counseling) or a treatment group (an incentive to undergo counseling of the kind required by Congress to obtain a discharge in bankruptcy<sup>29</sup>), we will be able to evaluate

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26. See, e.g., Gregory Eliehausen, E. Christopher Lundquist, & Michael E. Staten, *The Impact of Credit Counseling on Subsequent Borrower Behavior*, 41 J. CONSUMER AFF. 1 (2007); Jinhee Kim, E. Thomas Garman & Benoit Sorhaindo, *Relationships Among Credit Counseling Clients' Financial Well-being, Financial Behaviors, Financial Stressor Events, and Health*, 14 FIN. COUNSELING & PLAN. 75 (2003); Michael Staten, Daniel T. Brown, & Charles Link, *The Success and Failure of Counseling Agency Debt Repayment Plans*, 38 E. ECON. J. 99 (2012).

27. See, e.g., Deborah Thorne & Katherine M. Porter, *Chapter 13: Debtors' Assessments of Bankruptcy Financial Education*, in CONSUMER KNOWLEDGE AND FINANCIAL DECISIONS: LIFESPAN PERSPECTIVES (Douglas J. Lamdin ed., 2011); ANGELA C. LYONS, SHAWN HOWARD & ERIK SCHERPF, IN SEARCH OF A FRESH START: CAN CREDIT COUNSELING HELP DEBTORS RECOVER FROM BANKRUPTCY? (2010), available at [http://www.cefe.illinois.edu/research/reports/MMI\\_BK%20Counseling\\_Paper\\_051210.pdf](http://www.cefe.illinois.edu/research/reports/MMI_BK%20Counseling_Paper_051210.pdf).

28. 11 U.S.C. § 521(b)(1)-(2) (2006) (pre-filing requirement); 11 U.S.C. §§ 727(a)(11), 1328(g)(1) (2006) (pre-discharge requirement).

29. As of the time of this Article's publication, we continue to assess the feasibility of requiring all of the consumers in our study to undergo both the pre-filing and the pre-discharge forms of counseling. As noted above, the counseling requirements can be time-consuming and can test the organizational capacity of persons in financial distress (although our study subjects will never have to pay to undergo the

whether counseling has beneficial effects on consumers' financial well-being. In addition, as described below, we will also test the effectiveness of the combination of counseling and an offer of representation by an attorney.

*B. Offering Legal Representation to Financially Distressed Individuals*

Given the complexity of the consumer credit system, we speculate that professional legal services may be necessary to help persons in financial difficulty negotiate repayment plans with creditors, avoid paying debts not properly owed (as can happen after identity theft, for example), understand their legal options, and become more engaged in the collection process. We further speculate that lawyer assistance may increase the chances that an individual will pay off more of what is properly owed in the long term and help the individual recover better and faster than he or she would without assistance.

As with the counseling intervention, at present there is little evidence to assess these claims. Researchers have used the result of a collection lawsuit as an outcome and retrospectively compared how frequently persons with lawyers (versus persons without lawyers) had collection judgments entered against them.<sup>30</sup> Even assuming that regression or other statistical techniques are used, however, such studies cannot account for the well-known possibility of selection effects. In other words, perhaps individuals who sought out and obtained lawyers were more motivated, were more articulate, or had greater access to beneficial socioeconomic networks than those without. If this were true, then any differences a retrospective study found in outcomes experienced by a represented versus an unrepresented group could just as plausibly be attributed to these differences in motivation, articulateness, or socioeconomic acumen as to the presence or absence of lawyers. Speaking more generally, retrospective studies are not able to deal with differences in such difficult-to-observe individual characteristics, such that one never knows whether their findings are due to the treatment (in this example, having a lawyer) or due to selection effects.<sup>31</sup> A randomized control trial is the only experimental design we are aware of that can deal with differences in difficult-to-observe characteristics, in law as elsewhere.<sup>32</sup>

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counseling). It is possible that we may be able to test only one or the other of the two types of counseling Congress has mandated. A planned pilot operation should shed some light on the best avenue to pursue.

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

31. Greiner & Pattanayak, *supra* note 5, at 2188-97.

32. See generally David P. Byar et al., *Randomized Clinical Trials—Perspectives on Some Recent Ideas*, 295 N. ENG. J. MED. 74 (1976); Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2009-2010); Greiner & Pattanayak, *supra* note 5, at 2197.

## II. QUALITATIVE RESEARCH, BRIDGING CLINICAL AND DOCTRINAL INSTRUCTION, AND INCREASING ACCESS TO JUSTICE—OR FOUR OTHER REASONS YOU MIGHT WANT TO CONDUCT SUCH A STUDY

### A. *An Investigation Into the Debt Collection Industry*

The second aim of this study is to learn whether abuses alleged to exist in the debt collection industry are in fact a reality.<sup>33</sup> As we will explain, a now-standard narrative has emerged regarding a debt collection business plan that depends on default judgments, compulsory processes (including incarceration), and a high potential for error. How much of this narrative is true? Are violations of law a standard practice or are we simply only hearing about a few sensational cases? Our investigation will provide a window into how the debt collection industry works in practice, at least in one state (Maine). This Part describes the industry dynamics, details some of the issues that have been identified by other researchers and journalists, and explains how the study design will provide much more information than has been previously available about the prevalence of these abuses.

Debt collection is a multi-billion dollar industry composed of first-party collectors, third-party collection agencies, debt buyers, and collection law firms.<sup>34</sup> First-party collectors (otherwise known as creditors) at some point extend credit in the form of credit cards, loans, or utility or other services and seek to collect “in-house” (on their own behalf).<sup>35</sup> In other instances, creditors outsource collection to third-party collection agencies.<sup>36</sup> Collection agencies typically work on a contingency basis, taking roughly 25% to 30% of the amount they are able to collect on the outstanding debt.<sup>37</sup> Debt buyers purchase

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33. In 2012, there were over 11,495 lawsuits filed in federal court alleging an FDCPA violation. *FDCPA and Other Consumer Lawsuit Statistics, Dec. 16-31 & Year-End Review, 2012*, WEBRECON, <https://www.webrecon.com/b/news-and-stats/> (last visited Mar. 9, 2013). The Federal Trade Commission “receives more complaints about the debt collection industry than any other specific industry.” CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT: FAIR DEBT COLLECTION PRACTICES ACT 6 (2012), available at [http://files.consumerfinance.gov/f/201203\\_cfpb\\_FDCPA\\_annual\\_report.pdf](http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf).

34. 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, 265 (2011); ENCORE CAPITAL GRP., INC., ANNUAL REPORT (FORM 10-K) (2013), available at <http://www.sec.gov/Archives/edgar/data/1084961/000119312513055397/d443977d10k.htm> (stating that during 2012, Encore invested \$562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of \$18.5 billion, at an average cost of three cents per dollar of face value. This represented a 45.3% increase over the previous year’s investment).

35. Robert M. Hunt, *Collecting Consumer Debts in America*, FED. RES. BANK OF PHILA. BUS. REV., Q2 2007, at 11, 12, available at [http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt\\_collecting-consumer-debt.pdf](http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf).

36. *Id.* at 12-13.

37. See, e.g., FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 3 (2009) [hereinafter FTC COLLECTING CONSUMER DEBTS], available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (noting that the average rate reported in 2005 was 28%); Defining Larger Participants of the Consumer Debt Collection Market: Final Rule, 77 Fed. Reg. 65775, 65777 n.21

delinquent accounts for a few pennies on the dollar and attempt to collect on those accounts.<sup>38</sup> The Federal Trade Commission (FTC) reports that the nine largest buyers purchase 75% of the total debt purchased in the United States.<sup>39</sup> The debt collection industry “has transformed during the past three decades.”<sup>40</sup> As of the last economic census, there were 4500 firms engaged in debt collection.<sup>41</sup> Both creditors and debt buyers hire collection law firms, which employ similar techniques as non-legal collections—sending letters and making phone calls—as well as legal methods,<sup>42</sup> like filing a lawsuit or seeking a garnishment order. One estimate is that as many as one in twenty delinquent accounts are at some point referred to a collection law firm.<sup>43</sup>

Effective collection activities mitigate lender risk and encourage the normatively desirable principle that those who can afford to fulfill their financial obligations should do so. A well-functioning debt collection system enables lenders to take risks on borrowers with shorter or less-than-perfect credit histories.<sup>44</sup> The industry has argued that the sale of delinquent accounts is an essential part of this system, as creditors can then concentrate their lines of business on their core competencies and can receive immediately bookable revenue when selling delinquent or defaulted accounts.<sup>45</sup>

(Oct. 31, 2012) (Bureau of Consumer Fin. Prot.) [hereinafter CFPB Final Rule Defining Larger Participants] (citing a debt collection trade group for the proposition that collection agencies received an average of 28.4% in commission 2011, with a median commission of 25.5%).

38. See, e.g., FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 12 (2013) [hereinafter FTC DEBT BUYER REPORT], available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>; Encore Capital Grp., Inc., *Encore Capital Group Inc.’s 2011 Investor Presentation*, FAQs.ORG (June 9, 2011), [http://www.faqs.org/sec-filings/110609/ENCORE-CAPITAL-GROUP-INC\\_8-K/dex991.htm](http://www.faqs.org/sec-filings/110609/ENCORE-CAPITAL-GROUP-INC_8-K/dex991.htm) (showing a purchase price of five cents on the dollar for a prototypical portfolio).

39. *FTC Orders Buyers of Consumer Debt to Submit Information for Study of Debt Buying Industry*, FED. TRADE COMM’N, <http://www.ftc.gov/opa/2010/01/sci.shtm> (last modified June 24, 2011).

40. FTC COLLECTING CONSUMER DEBTS, *supra* note 37, at iv.

41. Defining Larger Participants in Certain Consumer Financial Product and Service Markets: Proposed Rule, 77 Fed. Reg. 9592, 9599 (Bureau of Consumer Fin. Prot. Feb. 17, 2012) (citing 2007 Economic Census).

42. *Id.* at 9597.

43. *Id.*

44. See generally FTC DEBT BUYER REPORT, *supra* note 38, at 11:

Debt collection reduces the amounts that creditors lose from debts, both directly (by collecting on the debts) and indirectly (by making it more likely that consumers will incur debt only if they can and will repay it). By reducing the losses that creditors incur in providing credit, debt collection also allows creditors to provide more credit at lower prices—that is, at lower interest rates.

CFPB Final Rule Defining Larger Participants, *supra* note 37, at 65777 (“By collecting consumer debt, collectors reduce creditors’ losses from non-repayment and thereby help to keep credit accessible and more affordable to consumers.”); DBA INT’L, THE DEBT BUYING INDUSTRY: A WHITE PAPER 5 (Jan. 22, 2012), available at <http://media.idahostatesman.com/smedia/2012/01/22/08/29/128SRK.So.36.pdf> (arguing that, by selling delinquent debts, “[c]reditors are able to keep the cost of credit for all consumers lower and make credit more accessible to lower income consumers.”).

45. See, e.g., FTC COLLECTING CONSUMER DEBTS, *supra* note 37, at 3 n.11 (citing Kaulkin Ginsberg, a company that advises the debt collection industry); DBA INT’L, *supra* note 44, at 5; Tania Panczyk,

Most of the public debt buyers still hold such valuations on their balance sheets and report estimated remaining collections. For example, Portfolio Recovery Associates estimates over \$5,000,000 in remaining collections on its 2002 cohort of debt purchases—approximately 12% of the purchase price.<sup>46</sup> One journalist states that, in 2009, Portfolio Recovery Associates was still collecting from debts purchased in 1996.<sup>47</sup>

Some debt buyers generate a significant amount of their revenue through legal means—the type of collection our study focuses on. The public filings of the largest debt buyer—Encore Capital Group—indicate that it receives half of its revenue from legal channels, such as obtaining and collecting on judgments.<sup>48</sup> In 2012, Encore’s “gross legal collections amounted to \$448.4 million,” a 16% increase over the previous year.<sup>49</sup> In 2012, Encore also saw the cost of legal collections decrease four percentage points for the second year in a row, a development they believe was “due to [their] improved ability to more accurately and consistently identify those consumers with the financial means to repay their obligations.”<sup>50</sup> SquareTwo Financial (another large public debt buyer) collected \$129.5 million in 2011 as a result of collection lawsuits—27.5% of their total cash proceeds.<sup>51</sup>

Debt buyers are also likely not as sensitive to reputation risk as a creditor since consumers cannot choose who buys their debt. Because the costs of buying a debt are pennies on the dollar, debt buyers’ up-front costs are small relative to the amount the consumer owes, giving a debt buyer the unique ability to “wait out” a consumer—that is, wait to use more aggressive measures until the consumer has assets or income to pay. The filings of publicly traded debt buyers reveal that it is not unusual to see debt pools purchased five to seven years earlier continue to generate cash flow for a debt buyer.<sup>52</sup> Encore Capital Group—the largest publicly traded debt buyer—explains this to its investors by noting that its “business

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*Moving Upstream; As Outsourcing Grows, What Are Successful Accounts Receivable Management Firms Doing to Ensure a Win-Win Relationship With Clients?*, 6 COLLECTIONS & CREDIT RISK 50 (2001) (“The influx of distressed debt is prompting creditors to focus on their core competencies in both the consumer and commercial arena . . . . So outsourcing some accounts receivable functions is appealing.”); Deborah Everly, *Utility Companies Discovering Benefits of Debt Sales*, ENERGY PULSE (Jan. 3, 2008), [http://www.energypulse.net/centers/article/article\\_print.cfm?a\\_id=1636](http://www.energypulse.net/centers/article/article_print.cfm?a_id=1636).

46. See Press Release, Portfolio Recovery Associates, Inc., Portfolio Recovery Associate Reports Second Quarter 2011 Results (July 28, 2011), <http://www.sec.gov/Archives/edgar/data/1185348/000110262411000447/portfoliorecoveryas.htm> (last visited Apr. 12, 2013) (filed with SEC as Form 8-K).

47. Sweta Singh, *Buyers of Bad Debt Bide Time as U.S. Consumers Fret*, REUTERS (July 22, 2009), <http://www.reuters.com/article/2009/07/22/us-consumerdebtcollection-analysis-idUSTRE56L58R20090722>.

48. ENCORE CAPITAL GRP., INC., *supra* note 34, at 36.

49. See *id.* at 41.

50. *Id.* at 27.

51. SQUARETWO FIN. CORP., ANNUAL REPORT (FORM 10-K) 4 (2012).

52. See, e.g., Encore Capital Grp., Inc., *Well-Positioned, Deep Strengths, Driving Growth: 2012 Investor Day*, PHX.CORPORATE-IR.NET 6 (July 6, 2012), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDY5Njc4fENoWxkSUQ9NTAwMjE2fFR5cGU9MQ==&t=1>.

model depends upon a very small percentage of payers . . . [a]s a result, we only need 19% of all consumers [whose debts they own] to pay us two-thirds of what they owe, over a seven-year period, to achieve significant returns.”<sup>53</sup>

A debt buyer may choose to bring a lawsuit after a determination that a consumer has assets and simply does not want to pay an obligation.<sup>54</sup> It also may be driven by the incentive to ensure that a debt will not become “out of statute”—that is, exceed the period after which a lawsuit cannot be initiated.<sup>55</sup> In some states, a judgment against a consumer will be valid for ten years, or even as long as twenty years.<sup>56</sup> During this time, the debt buyer may again keep the debt on its books or sell it to debt buyers who specialize in collecting judgments.<sup>57</sup> Either debt buyer party can then use legal strategies available in the state where the debtor lives—e.g., garnishment if available—to collect or wait until the consumer has sufficient income or assets to pay.<sup>58</sup>

Until recently, much of what was known about the inner workings of the debt buying industry was anecdotal, cobbled together from small studies, news sources, and stories of litigated cases.<sup>59</sup> Earlier this year, the FTC released its

53. ENCORE CAPITAL GROUP, 2011 INVESTOR DAY 14 (2011), available at <http://investors.encorecapital.com/Cache/1001165988.PDF?D=&O=PDF&IID=4049160&Y=&T=&FID=1001165988>; see PAUL A. LARKINS & L. HEATH SAMPSON, SQUARETWO FIN., ACCELERATING ASSETS BACK TO BLACK 4 (2011), available at <http://www.squaretwofinancial.com/wp-content/uploads/2011/05/Jun-8-2011-8-K-SquareTwo-KBW-Presentation.pdf> (noting that, since 1994, SquareTwo has purchased debt at a face value of \$27.2 billion for \$1.7 billion (\$0.06 per dollar of face value), generating historical cash-on-cash returns of 2.1 times gross and 1.4 times net return on investment).

54. See SQUARETWO FIN. CORP., *supra* note 51 (“If we or a franchise believes that a debtor has the ability but not the willingness to pay the debt owed on an account, our Partners, or local law firm, may initiate legal action on that account.”).

55. While in most other contexts the statute of limitations is an affirmative defense that must be pled by the defendant, a series of cases has held that debt collectors may not sue consumers on an out-of-state debt without running afoul of the FDCPA. See *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 WL 2512679, at \*4 (N.D. Ill. Jun. 23, 2008); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1488 (M.D. Ala. 1987). To the Authors’ knowledge, there are no cases holding the contrary.

56. See, e.g., ALA. CODE § 6-2-32 (2010) (20 years); N.J. STAT. ANN. § 2A:14-5 (West 2000) (20 years); N.Y. C.P.L.R. LAW § 211(b) (McKinney 2003) (20 years); R. I. GEN. LAWS § 9-1-17 (1997) (20 years); ALASKA STAT. § 09.10.040 (10 years); CAL. CIV. PROC. CODE § 337.5 (10 years); LA. CIV. CODE ANN. art. 3501(10 years); MINN. STAT. § 541.04 (10 years).

57. See, e.g., JUDGMENT MARKETPLACE, <http://www.judgmentmarketplace.com/> (last visited Apr. 8, 2013); *FAQs*, MARLEY, HUNTER & WINSTON, LLC, <http://www.mhwrecovery.com/faq.aspx> (last visited Apr. 8, 2013) (“Marley, Hunter & Winston, LLC purchases Federal and State Court Civil Judgments from individuals, businesses, and financial institutions. We specialize in Florida and Michigan Judgments; however, we also purchase Judgments entered in other states on a case by case basis.”); *We Pay Cash for Uncollected Court Judgments*, PRIME JUD. SYS., <http://www.pjsna.com> (last visited Apr. 8, 2013).

58. See generally FTC COLLECTING CONSUMER DEBTS, *supra* note 37, at 61.

59. See, e.g., Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012) (describing preliminary results of a small study of debt collection cases in Indiana); Holland, *supra* note 34; Spector, *supra* note 30 (reporting on a random sample of 507 debt collection cases filed in Dallas County); LEGAL AID SOC’Y, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER INCOME NEW YORKERS 3 (2010),

much-awaited study about the debt buying industry.<sup>60</sup> The FTC drew from data it received from the nine largest debt buyers (entities that collectively purchased 76% of the debt sold in 2008) and analyzed more than 5000 portfolios, containing almost ninety million consumer accounts purchased by these debt buyers over a three-year period.<sup>61</sup>

The FTC's study was extensive in what it addressed, but the Commission did not request information about legal collection strategies for its study.<sup>62</sup> Some aspects of the study are informative. The FTC found that debt buyers rarely obtain information from sellers about whether a consumer had disputed a debt, rarely receive underlying documentation about debts, and are limited in their ability to seek out more documentation.<sup>63</sup> These practices are notable given that, if called upon to prove entitlement to a judgment on a debt in court, the plaintiff creditor/debt buyer would typically need to produce documentation about the account it is seeking to enforce. The FTC also found that contracts among creditors and debt buyers, or amongst debt buyers, regularly contained clauses that disclaimed any warranty as to the accuracy of information provided, sometimes explicitly disclaiming the "accuracy, completeness, enforceability or validity of any of the Accounts and supporting documentation provided by the Bank to the Buyer."<sup>64</sup> This could be problematic because debt collectors are prohibited under federal law from making misleading representations when attempting to collect on debts.<sup>65</sup> One of the authors of this Article argues that, when a debt collector attempts to collect on an account sold through one of these contracts without revealing the underlying quitclaim contract language, they are

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available at [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf); NAT'L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTIONS INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 8 (2010), available at [http://www.nclc.org/images/pdf/debt\\_collection/debt-machine.pdf](http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf) (describing a study of 365 debt collection cases brought in New York City by the 26 debt buyers who filed the greatest number of lawsuits and a 451-case sample of callers to a hotline who were sued by a creditor); see also Beth Healy et al., *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE, July 31, 2006, at A1.

60. The study data collection began in 2009. See FTC DEBT BUYER REPORT, *supra* note 38, at 1-2.

61. *Id.* at 7-8.

62. Critically, when the FTC did the data collection for the study, allegations of mistakes and abuses by the debt collection industry in the courts had not yet surfaced with sufficient vigor. See, e.g., FTC DEBT BUYER REPORT, *supra* note 38; see also Jamie Smith Hopkins, *Md. Court Freezes 900 Debt-Collection Lawsuits*, BALT. SUN, July 20, 2011, [http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720\\_1\\_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits](http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits) ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed. In March, debt buyer Midland Funding[, a subsidiary of Encore Capital,] agreed to drop just over 10,000 cases against Maryland consumers to settle a class-action lawsuit, though it admitted no wrongdoing.").

63. FTC DEBT BUYER REPORT, *supra* note 38, at iii, 39-40.

64. *Id.* at C-14, C-8-10.

65. 15 U.S.C. § 1692e (2012) (prohibiting false or misleading representations including, *inter alia*, "[t]he false representation of—(A) the character, amount, or legal status of any debt").

*per se* violating the FDCPA.<sup>66</sup> The FTC study concluded by noting that “further analysis of certain issues is clearly needed.”<sup>67</sup> In particular, the study highlighted the need to “assess the litigation practices of debt buyers, a frequent course of consumer protection problems” and to “examine the accuracy of the information debt buyers receive and use to collect debts.”<sup>68</sup>

Since the FTC study did not inquire into litigation activities of debt buyers, the stories cited have up to now been mostly anecdotal, but the most critical concerns focus on issues surrounding the collection of debts purchased by debt buying firms and, in particular, the use of the legal process in collection.<sup>69</sup> The narrative of how mistakes or abuses in the legal system occur is widely told, although we have limited knowledge about how much, if any, of this narrative is true.<sup>70</sup> The allegations are that, in many cases, after attempting but failing to collect directly from the consumer, debt collection agencies and debt buyers hire specialized law firms. These firms file lawsuits in bulk—using form complaints and affidavits—and frequently in courts primarily designed for self-represented litigants, such as small claims courts.<sup>71</sup> According to one news report, one law firm in New York filed roughly 80,000 lawsuits per year, or roughly 5700 cases per lawyer on staff.<sup>72</sup> There are no nationwide statistics on the number of debt collection lawsuits in the courts’ dockets, but the FTC has reported that “the majority of cases on many state court dockets on a given day often are debt collection matters.”<sup>73</sup>

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66. For a more in-depth argument, see Dalié Jiménez, *Illegality in the Sale and Collection of Consumer Debts* (June 3, 2013) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250784). Debt collectors, whether acting as third party collectors, law firms, or as debt buyers, must abide by the federal Fair Debt Collection Practices Act (FDCPA) and state consumer protection statutes when collecting on debt. See generally 15 U.S.C. § 1691 *et seq.* (2012). The Consumer Financial Protection Bureau has also issued a rule including nonbank entities with more than \$10 million in annual receipts resulting from consumer debt collection within its supervisory authority. Consumer Fin. Prot. Bureau, *Defining Larger Participants in the Consumer Debt Collection Market*, 12 C.F.R. § 1090 (2013). The rule marks the first time that collectors of any size have been subject to nationwide supervision by a regulatory body. Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rule to Supervise Larger Participants in Consumer Debt Collection and Consumer Reporting Markets: Proposed Rule Would Subject Industries to Federal Supervision for the First Time* (Feb. 16, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rule-to-supervise-larger-participants-in-consumer-debt-collection-and-consumer-reporting-markets>.

67. FTC DEBT BUYER REPORT, *supra* note 38, at 49.

68. *Id.*

69. Holland, *supra* note 34.

70. Our focus here is on the intersection between debt collection and the legal system.

71. The National Association of Retail Collection Association, the trade association for collection attorneys, estimates that owners of debt refer 5% of delinquent accounts to collection law firms. FTC COLLECTING CONSUMER DEBTS, *supra* note 37, at 14.

72. Andrew Martin, *Automated Debt Collection Lawsuits Engulf Courts*, N.Y. TIMES (July 12, 2010), <http://www.nytimes.com/2010/07/13/business/13collection.html>.

73. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2009), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport>.

The narrative also includes objections to the proportion of default judgments in collection litigation.<sup>74</sup> Estimates vary, but, according to some sources, as many as 90% or more of the consumers sued fail to appear in court and consequently have default judgments entered against them.<sup>75</sup> There are reliable reports of fraudulent service of process in some cases,<sup>76</sup> but for the most part no one knows the reasons for the high default rates or, more importantly, what might be done about them. Anecdotes suggest that some consumers who do appear find that the attorneys for the debt buyer or collection agency request continuances because they are not prepared to litigate the case, causing the consumer to have to come to court a second time.<sup>77</sup>

Our study seeks to answer many of these questions. As explained briefly above and in greater detail below, approximately 600 participants will be offered legal representation in their debt collection lawsuits in our study. Documents gained during the process of litigation may shed light on how transfers of rights from credit issuers to debt buyers occur, whether such transfers are accompanied by underlying evidence, whether debt buyers can obtain such evidence to satisfy evidentiary requirements, and how accurate the evidence they present to the court is judged to be. We may also be able to learn something about the accuracy of the narrative we described above: for example, how many cases result in default judgments against consumers, how often debt buyers lack documentary evidence about the underlying debt, whether they have the documents and witnesses required to prove a debt in court, how many contracts that debt buyers attempt to collect on contain explicit disclaimer language, and how frequently consumers are unaware of available legal defenses and remedies, among others. Examination of credit report data and court records may also enable us to understand how often exempt assets and income streams are seized in these cases.<sup>78</sup>

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pdf [hereinafter FTC REPAIRING A BROKEN SYSTEM]. One study of Dallas courts found that suits by debt buyers represented 25% of all cases filed in 2007. Spector, *supra* note 30, at 278.

74. *See, e.g.*, FTC COLLECTING CONSUMER DEBTS, *supra* note 37, at 57 (“Debt collectors, for example, obtained 60,699 default judgments out of an estimated 130,000 debt collection lawsuits filed in Cook County, Illinois, in 2007.”); FTC REPAIRING A BROKEN SYSTEM, *supra* note 73, at 19-21.

75. LEGAL AID SOC’Y, *supra* note 59, at 1 (finding that debt buyers prevailed in nine out of ten lawsuits, usually by obtaining default judgments); URBAN JUSTICE, DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 1 (2007), available at [http://www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf).

76. *See, e.g.*, Press Release, N.Y. Att’y Gen. Eric T. Schneiderman, Cuomo Shuts Down Wny Process Server Co. for Lying on Affidavits of Service (Apr. 7, 2010), available at <http://www.ag.ny.gov/press-release/cuomo-shuts-down-wny-process-server-company-lying-affidavits-service>; Press Release, N.Y. Att’y Gen. Eric T. Schneiderman, Erie County Process Server Accused Of Defrauding Court System Through False Affidavit (Apr. 29, 2008), available at <http://www.ag.ny.gov/press-release/erie-county-process-server-accused-defrauding-court-system-through-false-affidavits>.

77. FTC REPAIRING A BROKEN SYSTEM, *supra* note 73, at 21-22; Spector, *supra* note 30, at 295 (finding that voluntary dismissals by plaintiff—without prejudice to re-file—occurred in 62% of cases in which a defendant appeared and 75% of cases in which the defendant appeared with an attorney).

78. Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, CLEARINGHOUSE REV. J. POVERTY L. & POL’Y., May-June 2012, at 12 [hereinafter *Defending Junk-Debt-Buyer Lawsuits*], available at <http://ssrn.com/abstract=2079155>.

One conceivable problem with the design of this study is the potential to change the very system we are studying. That is, if the abuses described above are occurring in any significant way in Maine, it may be that, by studying the debt collection system in Maine, we change the way debt is collected in Maine. Being cognizant of that, we will look for signs that this could be happening as the study progresses.

*B. A Study of the Institutional Context of Debt Collection:  
Repeat Players Versus One-Shotters*

Another topic explored by this project is how courts figure in to the debt collection business plan we described above. As Marc Galanter famously observed over thirty years ago, common law litigation can be understood as a “game” in which the “have’s tend to come out ahead.”<sup>79</sup> Debt buyers and collection agencies are classic “repeat players” confronting consumer “one-shotters.”

Debt buyers and collection agencies engage in many similar cases in which their individual stakes are small. For them, most individual cases are routine work and require little investment of either time or money to pursue. Similarly, the low cost of debt buying means that the amount of money these organizations have laid out and stand to lose in any given case is typically small. These low stakes, and the presence of only small investments of effort, may allow them to wait out consumers in the hopes of eventually collecting.

By comparison, these cases are not usually routine work for consumers. Individual consumers typically have little experience with debt litigation or any type of civil litigation, and their investments in their cases relative to their own resources of time and money may mean that the stakes for them are often quite high. From a precarious position of insecurity and lack of understanding, consumers thus confront experienced, well-resourced opponents who can bide their time. A central question of this project is whether the planned interventions augment consumers’ resources of expertise and information sufficiently to change the outcome of these cases.

This project explores an institutional context that may depart in important ways from the general paradigm Galanter argued was endemic to American civil litigation. His analysis tells a story of lawfully-behaving parties using the existing rules of procedure to leverage their own resources of expertise, money, and time in rational ways that create fundamentally unequal outcomes.<sup>80</sup> The debt collection context may include some distinctive elements that reveal new knowledge about civil justice in the United States. For example, many contemporary debt collection cases are pursued in small claims courts, which

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79. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 124-25 (1974).

80. *Id.*

were explicitly designed with simplified rules and procedures meant to make it easier for lay people to engage in civil litigation without lawyer representation, to reduce the advantages of the “haves.”<sup>81</sup> These fora were also designed to manage the relatively small volumes of cases pursued by individuals and small businesses, rather than large volumes of cases pursued by large corporations represented by attorneys against many individuals.<sup>82</sup>

In addition to evaluating the effectiveness of specific interventions, our study will provide new information about how the institutional context of debt collection may play a role in shaping the outcomes of these cases.

### C. Bridging Clinical and Doctrinal Instruction

A research effort of this complexity requires help. We have enlisted law students from the University of Connecticut School of Law, the University of Maine School of Law, and Harvard Law School to work with us on a variety of research and access to justice projects related to the study. At the University of Connecticut and the University of Maine, most students are enrolled in a two or three-credit class entitled Consumer Protection/Debt Collection and the Consumer Credit Seminar, respectively.<sup>83</sup> These seminars provide students with the background and a context for the examination of the effects of debt on the American family. For the students not enrolled in a seminar, we offered the following bargain: you will receive no academic credit, no monetary payment, and no other form of compensation (except perhaps credit against a pro bono requirement that you have probably already met). When the eventual publications revealing the findings of this research become available, which may not be for several years, your name will be listed underneath those of the principal authors, along with those of dozens of others who have worked to make the project a reality. To date, over a dozen students have responded favorably to our offered bargain and have collectively dedicated hundreds of hours to the study. The work of all students involved has been, to say the least, inspiring.<sup>84</sup>

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81. See Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293, 339-42 (1981); see also William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC’Y REV. 661, 661 (1985).

82. See Steele, *supra* note 81, at 331-32.

83. Professor Lupica has taught this seminar at Maine Law School during the fall 2012 and spring 2013 semesters. Professor Jiménez is teaching the seminar for the first time in spring 2013 and will teach it again in fall 2013. Students at Harvard Law School volunteered their time to work as research assistants on the study and were supervised by Professors Greiner and Bertling. They did not participate in substantive classes and received no academic credit.

84. We would be amiss if we did not mention the students by name. The Access to Justice team has been ably led by Harin Song (HLS) for the past two semesters, with great help from Lydia Ansari (UConn), Bryce Daigle (HLS), Zack Hill (HLS), Sarah Hodges (Maine), Peter Lacy (Maine), Andrea Matthews (HLS), Lynn Perry (UConn), and Bo Shi (HLS). Yevgeny Shrago (HLS) has led the civil procedure team for both semesters as well, and that team included Donald Bell (UConn), Adam Berry (HLS), John Dey (HLS), Duncan Edgar (Maine), Annie Gregori (Maine), Ashkon Roozbehani (UConn),

For the students enrolled in the seminars, students participate in discussions of readings and documentary films, as well as engage in both “academic” and “live client” research and writing projects. We have drawn on our respective academic interests in the study of consumer credit and its intersection with the issue of access to justice to design our curricula.<sup>85</sup> For example, the Syllabus Introduction for the Maine Law seminar describing the context of the doctrinal and clinical components of the class reads:

The transformation in the economy over the past 20 years has dramatically impacted consumers’ financial health. In addition to a higher personal and societal tolerance toward debt, we have seen dramatic differences in behaviors and business practices of front-line lenders. These altered business practices have resulted in the liberalization of credit solicitations, confusing and exploitive lending rates and terms, and inadequate underwriting standards. We will be reading, discussing, and writing about these issues over the course of the semester. The readings will come from law and non-law sources, including documentary films and the work of a variety of social scientists. The class will discuss issues relevant to the legal system and the study of law generally, including the use of data to measure legal problems, the role of lawyer and non-lawyer actors, and the nature of modern policymaking.<sup>86</sup>

Illustrative topics addressed in the seminars include the intersection of class and the use of consumer credit, the efficacy of financial education, the relationship between debt markets and the American household, regulatory and enforcement mechanisms that currently exist, and state collection laws.<sup>87</sup> The

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and Laura Shortill (Maine). The substantive consumer law team was led in the fall by Katie Hermann (HLS) and in the spring by Houston Shaner (HLS) and was composed of Sarah Abel (HLS), Rachel Deschuytner (Maine), Chris Gagne (Maine), Molly Jennings (HLS), Samantha Koster (UConn), and Brenda Thibault (UConn). Last, but definitely not least, James Wade (Maine) and Diana de Jesus (Maine) have led the evidence team consisting of Elizabeth Carnes (Maine), Christina Colon (UConn), Annie Gregori (Maine), Sarah Hodges (Maine), Dave Joch (HLS), and Andrew Stecker (HLS).

85. See, e.g., Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Structures*, 40 LOY. U. CHI. L. J. 557 (2009); Lois R. Lupica & Jay L. Zagorsky, *A Study of Consumers’ Post-Discharge Finances: Struggle, Stasis or Fresh Start?*, 16 AM. BANKR. INST. L. REV. 283 (2008); Dalié Jiménez, *The Distribution of Assets in Chapter 7 Consumer Bankruptcy Cases*, 83 AM. BANKR. L.J. 79 (2009). Professor Jiménez is also drawing on her time spent as a policy fellow working on debt collection and credit scoring issues at the Consumer Financial Protection Bureau. See, e.g., CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS: THE IMPACT OF DIFFERENCES BETWEEN CONSUMER- AND CREDITOR-PURCHASED CREDIT SCORES (2011), available at [http://files.consumerfinance.gov/f/2011/07/Report\\_20110719\\_CreditScores.pdf](http://files.consumerfinance.gov/f/2011/07/Report_20110719_CreditScores.pdf).

86. Syllabus, Lois R. Lupica, Consumer Credit Seminar at the University of Maine Law School (Spring 2013) (on file with author).

87. See generally Lupica, *supra* note 85; Benedict Carey, *Life in the Red*, N.Y. TIMES (Jan. 14, 2013), <http://www.nytimes.com/2013/01/15/science/in-debt-and-digging-deeper-to-find-relief.html?pagewanted=all&r=0>; Lauren E. Willis, *Against Financial Literacy-Education*, 94 IOWA L. REV. 197 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1105384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105384); ANNAMARIA LUSARDI, PAOLO BAFFI CENTRE, RESEARCH PAPER NO. 2009-35, FINANCIAL LITERACY: AN ESSENTIAL TOOL FOR INFORMED CONSUMER CHOICE? (2008), available at <http://ssrn.com/abstract=1336389>; Mehra Bara-

principal purpose of the seminars is to create and sustain a dialogue about the topic of consumer credit and debt and to offer the students a context for their live client research.

In their role as study research assistants, students are assigned to one of four teams: (i) evidence, (ii) consumer credit and financial services substantive law, (iii) civil procedure, or (iv) self-representation and access to justice/consumer empowerment. In the seminars' first semester, students researched and wrote over twenty memos geared towards Maine on topics such as the intricacies of the statute of limitations defense, available post-judgment defenses and exemptions, the business record and best evidence rules, requirements for affidavits, analysis of defenses to consumer debt actions, requirements of registration and licensing for debt collectors, and causes of action available to debt collectors, among others.

At the end of the first semester, students presented a "memo bank" of research to Pine Tree Legal Assistance attorneys, as well as draft forms to be used by *pro se* consumer defendants.<sup>88</sup> That meeting was held via video conference at more than four locations.

The seminars have provided and will continue to provide students with the opportunity to both research and write memos on questions that are at issue in current client cases. The seminar students have had the chance to read, reflect, and discuss the larger context in which these issues arise. In addition, the team structure of the project offers the students multiple opportunities to have their written work product edited and re-edited, strengthening their writing and self-editing skills. In the Maine Law seminar, there is a final paper (no more than five pages), in which a relevant law review article is assigned, and the students are asked to reflect on the article's thesis in light of what they have learned over the course of the semester.

#### *D. Creating and Disseminating Usable Pro Se Materials*

Students involved in the project are creating a set of materials for self-represented litigants that will be distributed throughout Maine. To begin this task, the students surveyed the literature on *pro se* forms and materials to discover "best practices" and any rigorous testing of the effectiveness of these materials. The academic literature is sparse on this topic; the best analog they have been able to find is the Consumer Financial Protection Bureau's "Know Before You

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darán, *How the Poor Got Cut Out of Banking*, 63 EMORY L.J. (forthcoming 2013), available at <http://ssrn.com/abstract=2056593>; Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361 (2011); Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter ed., 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101397](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101397).

88. See, e.g., Mass. Law Reform Inst., *Forms and Sample Letters*, MASSLEGALHELP, <http://www.masslegalhelp.org/consumer/forms-and-sample-letters>.

Owe” project, which, over the course of a year and a half, aimed to produce forms that would replace the current mortgage disclosures required by two different federal laws.<sup>89</sup> There are a wide variety of self-represented forms available in every state.<sup>90</sup> Materials are also available describing general principles to keep in mind when creating these forms, although it is not certain how these principles were developed.<sup>91</sup> Using these materials, the study team plans to draft *pro se* forms and scripts that can be used by consumers appearing before a judge or in mediation.<sup>92</sup> In the spring of 2013, the team will pilot test the materials by going to small claims courts and requesting feedback on the forms and materials from defendants present in the courtroom. Primarily, the team will be looking for ease of use and readability. Students from the Access to Justice (A2J) team will run the pilot by going to three different court houses in Maine on different days. After collecting feedback, the team will modify the forms and scripts as needed.

In late spring or early summer, students and the study team will return to small claims courts to invite defendants who are present to a focus group at Pine Tree’s offices. We expect to hold at least three hour-long focus groups, where the study team will attempt to ascertain which features of the forms and scripts could be improved. After incorporating the feedback from the focus groups, we will print the forms and scripts in a self-represented litigant packet and make them available online, at Pine Tree offices throughout the state, and at public libraries. Although most of the materials will be Maine-specific, we anticipate making them available to the public in order to both promote similar studies and help consumers, consumer attorneys, and others defend these kinds of cases in the future.<sup>93</sup>

In sum, more than half of the thirty-three students who have worked on the project committed to the study without receiving any credit or financial remuneration. The other students were enrolled in the seminars described above. The study teams made a conscious effort to include at least one student from each of the three law schools. We have thus operated like a pseudo law firm: the

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89. For a chronology of the CFPB methodology, see Consumer Fin. Prot. Bureau, *Know Before You Owe: Mortgages, How We Did It*, <http://www.consumerfinance.gov/knowbeforeyouowe> (last visited Mar. 30, 2013).

90. For listings for each state, see Nat’l Conference for State Courts, *Self-Representation State Links*, NCSC.ORG, <http://www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx?cat=Court%20Forms> (last visited Mar. 30, 2013); Am. Judicature Soc’y, *Pro Se Links*, AJS.ORG, [http://www.ajs.org/prose/pro\\_links.asp](http://www.ajs.org/prose/pro_links.asp) (last visited Mar. 30, 2013); TEX. ACCESS TO JUSTICE COMM., STATEWIDE UNIFORM FORMS—ALL 50 STATES + D.C., available at <http://www.texasatj.org/files/file/2StatesFormResearch.pdf>.

91. See, e.g., *Providing Forms Online: Better Practice Checklist*, AUSTL. GOV’T INFO. MGMT. OFFICE, <http://www.finance.gov.au/agimo-archive/better-practice-checklists/docs/BPC1.pdf>; Richard Zorza, *Court Leadership and Self Represented Litigation, Module 6: Developing and Deploying Plain Language Forms and Instructions 2425* (2008).

92. For example, we are developing sample answers, motions to dismiss, summary judgment motions, motions to strike an interrogatory, etc.

93. Some materials on defending consumer debt collection actions are currently available. See, e.g., *Defending Junk-Debt-Buyer Lawsuits*, *supra* note 78.

faculty member supervisor operating as a proxy for a law firm partner and a third-year student captain as a proxy for a senior associate. Like a law firm, we have oftentimes met late at night or on weekends, and since each team includes at least one student from each of the three law schools, we have typically communicated via conference calls or video chat. We believe that the pedagogical benefits to our research effort are thus both obvious and substantial.

### III. METHODOLOGY AND LESSONS LEARNED

In this Part, we describe the steps we have taken or are underway with the hope that they will serve to inspire readers to initiate or participate in similar projects. Our hope is that by describing our process in detail and our learning along the way, it will be easier for others to undertake projects to evaluate aspects of the debt collection system or other legal interventions.

In this study, an individual in Maine who has been sued in debt collection proceedings, who calls a study-created Hotline, and who otherwise meets eligibility criteria (primarily that income and assets not exceed certain ceilings)<sup>94</sup> will receive limited advice and assistance over the telephone and will be asked if he or she would like to participate in the study. If so, and after that individual executes appropriate waiver and consent forms, she will be randomized to one of four treatment conditions:<sup>95</sup>

- (1) Group 1 (the control group): the individual will be offered copies of the *pro se* materials created by the study and described below and will be informed that he or she can call the Hotline at any time with follow-up questions and for advice, including assistance in using the form pleadings and other content identified above.<sup>96</sup>
- (2) Group 2 (counseling only): the individual will be similarly informed of the availability of telephone assistance and will be offered an appropriate

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94. The study will only enroll individuals who have been sued on one or more credit card collection matters in a court in Maine. In this way, we are studying a population that is already in severe financial distress.

95. The consent forms will include consent to allow us to access the individual's credit report information, as described later in this Article.

96. There are currently limited self-help materials available for individuals sued in a debt collection case in Maine. Pine Tree has the best Maine-specific materials on their website, which consist of two ways a consumer can defend himself or herself in a collection action as well as some general guidance about collections. See *Common Defenses in Small Claims Cases (Third Party Collections)*, PINE TREE LEGAL ASSISTANCE, <http://www.ptla.org/common-defenses-small-claims-cases-third-party-collections> (last visited Apr. 18, 2013); see also *Debt Collection and Repossession*, PINE TREE LEGAL ASSISTANCE, <http://www.ptla.org/library/361> (last visited Apr. 14, 2013). Our materials will go further than that and we intend to publicize them widely, by both putting them on Pine Tree's website, offering copies at local libraries, and, if we are able to, giving them to the court clerks to hand out. Because we are actively offering the control group—and indeed anyone who contacts the Hotline, whether or not they want to enter the study—more information and self-help materials than currently exist, our control group will not be a random sample from the population of debt collection defendants.

incentive<sup>97</sup> to complete the pre-filing and pre-discharge financial counseling required to emerge from bankruptcy. Payment of the incentive will be provided when the consumer has completed both of the types of financial counseling required by Congress to obtain a discharge from bankruptcy (the pre-filing and the pre-discharge counseling) from a United States Trustee-approved provider.

- (3) Group 3 (legal services only): the individual will be offered full representation by a Pine Tree staff attorney. This full representation will extend to all debt collection litigation as well as to other nonmortgage debt matters. Yet to be determined is whether this assistance will extend to representing the client through bankruptcy if the Pine Tree staff determines that such representation might be helpful to the consumer.
- (4) Group 4 (counseling and legal services): the individual will be offered both an appropriate incentive to undergo the same financial counseling as Group 2 and will receive an offer of full representation by a Pine Tree staff attorney of the same type as received by Group 3.

A comparison of the circumstances—financial and otherwise—of each group of study participants at intake into the study as well as one, two, and three years after enrollment in the study will allow us to infer the effectiveness of an incentive to undergo financial counseling, an offer of attorney representation, and the two treatments in combination. Through the use of appropriate statistical techniques, and with appropriate assumptions (the plausibility of which remains to be determined), we will also attempt to infer the effect of financial counseling and attorney representation. We will assess the financial circumstances of the individuals in the study with the same metrics that credit, rental, and other markets use to assess the financial circumstances of potential customers or business partners, i.e., through credit history information compiled by consumer reporting agencies as well as through credit scores. These metrics are objective and important to an individual's ability to access the financial system. They will allow us to look beyond the result of a particular lawsuit to the effect that counseling and/or lawyering have on the financial well-being of the individuals in the study.

A research effort of the complexity and importance of the one we will conduct requires many partners. The team of Principal Investigators has made preliminary arrangements with Money Management International (MMI), the largest non-

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97. The incentive will probably consist of a gift card to a local gas station, grocery store, or all-purpose store (such as Walmart). Preliminary discussions suggest that, due to the three hours needed to complete the two counseling requirements, the amount on these cards will probably need to be approximately \$50. However, it is not yet clear that we will be able to incentivize consumers to undergo both forms of counseling. This will be part of what we hope to figure out through our pilot study. We will need to research all possible assistance programs in which consumers may be participating so as to be aware of all applicable reporting or offset requirement.

profit “full service” provider of financial counseling;<sup>98</sup> Pine Tree, Maine’s largest and oldest statewide legal aid provider;<sup>99</sup> representatives of a number of consumer credit bureaus and of companies that generate credit scores; and the Maine Judiciary.

We have divided our research program into several major categories of tasks, each of which is described below.

### A. *Legal Research and Pro Se Assistance*

As described above, all consumers who participate in the study will receive more assistance than was available before this study began. This means that any effect the study measures could be lower than the effect as between a consumer who is not part of our study and is sued on a debt collection case versus a consumer who is offered legal representation, financial counseling, or both.<sup>100</sup> This is because, by providing telephone assistance and *pro se* materials to Group 1 (our “control group”), we are improving their situation relative to the true control (what the world looks like before we embarked in the study and what the world is like for people who never hear about the study and do not receive the assistance that Group 1 receives).

Going forward, we expect to continue doing further legal research as described in Part II.D, *infra*. But before that, the next major step will be to turn at least some of the memos already written into persuasive pieces. We will use these to draft self-help answers and motions (e.g., motion to dismiss, motion to strike an

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98. See *About MMI*, MONEY MGMT. INT’L, <http://www.moneymanagement.org/About-Us.aspx> (last visited Apr. 18, 2013). MMI (pursuant to an appropriate release form) will inform the study team which study subjects completed counseling. We expect to arrange computer terminals at some Pine Tree offices to allow consumers to complete counseling there, if desired.

99. PINE TREE LEGAL ASSISTANCE, 2011 ANNUAL REPORT 2 (2012), available at <http://www.ptla.org/sites/ptla.org/files/2011%20Annual%20Report.pdf>.

100. Our belief on this score stems from our speculation that a comparison between full representation (or financial counseling, or both) and *some* assistance might provide a contrast less stark than a comparison between full representation (or financial counseling, or both) and *no* assistance. Other studies have also involved the offer of some kind of assistance to the “control” group, generally because of concerns on the part of legal services providers about the ethics and optics. The preference on the part of legal services providers has been to provide something that can be labeled as “help,” even if there is no rigorous evidence to suggest that this “help” has any effect on any measurable (or immeasurable) outcome. See, e.g., Greiner et al., *supra* note 5 (comparing a group offered full representation to a group that received only unbundled legal assistance and finding that the former group experienced vastly more favorable outcomes in terms of possession of the housing units at issue and monetary consequences of the litigation); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, HARV. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078) (comparing a group offered full representation to a group referred to a lawyer-for-the-day program and finding no discernible difference in the outcomes experienced by the two groups); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001) (comparing a group offered full representation to a group offered paralegal assistance and finding that the former group experienced more favorable outcomes in terms of court orders regarding possession and other outcomes).

affidavit) that will be given to *pro se* litigants and also as template language that can be used by Pine Tree attorneys to easily incorporate into their briefs or motions. After that, we will create a collection of materials in the form of an informal manual for attorneys defending clients in debt collection actions.

### *B. Finding Consumers Eligible for Study*

Informal reports to us from virtually all quarters suggest that most consumers facing civil justice problems do not reach out for legal assistance. We theorize that a large number of Maine consumer and credit card debt collection defendants do not call Pine Tree or otherwise seek legal assistance because they do not know that such services are available or because word in the community has circulated to the effect that resource constraints have not typically allowed Pine Tree to offer full representation in such cases.<sup>101</sup> The study team's experience has been that media advertising and posting flyers provide helpful but untested prospects in terms of persuading self-represented litigants to pursue their own self-interests by requesting assistance. The best way to bring a defendant into the study early is to contact her directly at a time when she is most focused on her lawsuit, which will typically be when she is served with a summons and complaint.

If the study creates additional resources for the self-represented or creates a permanent Consumer Debt Hotline (with its own dedicated, statewide, toll-free number), a large number of consumer and credit card debt collection defendants may benefit from becoming part of the study, including those who end up in the trial's control group (Group 1, as described below). Our study team plans to create the Hotline, which will be staffed by a Pine Tree employee funded by the study. Consumers will be able to call this Hotline with questions about debt collection issues. The manual materials created in conjunction with students will be used to train the Pine Tree employee—likely a paralegal—who staffs this Hotline. The Hotline will also serve as an important intake point for the study as described below.

Because service in small claims suits in Maine can be done either by hand or mail, the study team is negotiating with the Maine judiciary to persuade it to modify the Small Claims Rules to insert a page to the Notice of Claim form (which starts the lawsuit) with language notifying litigants (both plaintiffs and defendants) that, if they cannot afford a lawyer in the lawsuit, they may call the Hotline number. For litigants who can afford a lawyer, the page includes the number to the Maine Lawyer Referral Service.

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101. Judy Harrison, *Pine Tree Legal Assistance Marks 45 Years of Helping Poor*, BANGOR DAILY NEWS, July 20, 2012, <http://bangordailynews.com/2012/07/20/news/state/pine-tree-legal-assistance-marks-45-years-of-helping-poor> (noting that Pine Tree “is able to help just 15 percent of the people who qualify financially for services due to underfunding” and that they are only “able to give full representation to just one-third of those who qualify for services”).

This language would permit both plaintiffs and defendants from non-debt collection cases to call the Hotline. If they do, the study-funded paralegal staffing the Hotline will provide every income-eligible caller (plaintiff or defendant) with some immediate (over the telephone) services in the form of advice and assistance in accessing forms. For defendants who are sued in credit card debt collection proceedings, the Research Project Hotline will also serve as the primary intake point through which eligible unrepresented litigants may enter the study. If the individual is calling about something other than a credit card debt collection matter, the paralegal will ascertain whether the matter is something with which Pine Tree can help him or her. If it is not, he or she will be referred to other legal services providers. If the individual is calling about a credit card debt collection matter, he or she will be immediately provided with information and general advice regarding credit card debt collection disputes as well as access to *pro se* assistance materials. The paralegal will also assess the caller's eligibility for the Research Project's services (by, for example, finding out if the consumer meets Pine Tree's income and asset eligibility rules). If so, the Pine Tree paralegal will explain the study to the potential client, complete a study information intake form, request preliminary consent to participate in the study, and explain that the study will involve allowing the research team to access the consumer's credit reports and scores, as well as a potential opportunity for financial counseling. If the potential client accedes, the Pine Tree employee will mail her a study consent form, a form allowing study personnel to access the potential client's credit reports and scores, and other useful forms.<sup>102</sup> The mailing will include a self-addressed stamped envelope to reduce the financial burden on the study participants. Seasoned Pine Tree staff members indicate that, in their experience, clients typically return these types of mailings within two weeks 80% to 90% of the time.

As an alternative to the mail-out, mail-back system, consent forms will be available online and via email. Alternatively, if the consumer visits a Pine Tree office in person, staff at that office will accomplish the same set of tasks identified above in person, with the mailing no longer being necessary. Each Pine Tree office will have at least one staff member trained and able to accomplish all of these tasks. The combination of the statewide Hotline, together with the availability of assistance/intake at each Pine Tree field office, will ensure that the study will be run statewide.

Once the consumer's signatures have been obtained, Pine Tree staff will use a secure, online system to transmit the potential client's consent to participate in the study, his or her consent to access credit reports/scores, and the consumer's study information intake form to the statistical team. The team will randomize the consumer to one of the four Groups described above.

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102. For example, if the individual is randomized into Groups 2 or 4, the package will include a retainer agreement between the individual and Pine Tree.

### C. *Measuring Outcomes*

This study is innovative in its utilization of a combination of subjective and objective metrics to measure the financial well-being of consumers. One of the main results measured will be the outcome of the credit card debt collection case that precipitated the consumer's call to the Hotline. To this end, we will obtain copies of the court records associated with each study participant's case. We are in negotiations with various credit reporting agencies, resellers, and credit score providers to obtain information on consumers as of the time of randomization (immediately after receiving the consumer's signed consent form), as well as at various intervals later (at least one, two, and three years after randomization). We will also use questionnaires at intake and at intervals similar to the credit reports to obtain qualitative information about the study participants.<sup>103</sup>

The study team will periodically access each potential client's credit reports and credit scores (either a FICO score or perhaps a VantageScore) in order to evaluate the consumer's credit status as of the date of randomization, as of one year later, as of two years later, etc. The credit score will be a rough measure of the consumer's financial well-being. We will be able to chart changes in the score throughout the observation period and see how the consumer fares at various points. In addition, the study team will use the contents of the credit reports for analysis. The credit report will be able to tell us a great deal of information about the consumer's financial well-being. For example, the credit report will indicate whether the consumer has been late or delinquent on any accounts in the past year, has any new items that have been charged-off or sent to a collections agency, has filed for bankruptcy,<sup>104</sup> has had a lien placed against his or her home, or has had a judgment entered against him or her in court.<sup>105</sup> We will also have a great deal of information about the various accounts that a consumer has (e.g., credit cards, auto loans, student loans, mortgage account, etc.) and whether any of them has been opened (or closed) since the date of randomization. All of this information will help us paint a picture of the individual's financial well-being, as measured by the financial services companies that provide credit products to consumers.

In addition to the intake questionnaires—which will be designed to help us gauge consumer behavioral preferences—if funding permits, the study team will

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103. Our ability to do this will depend very strongly on funding.

104. If the consumer files for bankruptcy at some point during the observational period, we will be able to view his or her bankruptcy schedules and other information through Public Access to Court Electronic Records (PACER), which will provide us a great deal of more information. *What Information is Available on PACER?*, PACER.GOV, <http://www.pacer.gov/> (last visited Mar. 17, 2013) (stating that PACER is available to anyone who registers for an account and that it includes “case and docket information for all . . . bankruptcy . . . courts” available immediately after they have been electronically filed).

105. The credit reports may also contain updated contact information for the consumer provided by their creditors, which will help us contact the consumers to administer future surveys.

attempt to follow study participants for up to three years after randomization in an effort to obtain survey responses. The surveys will assess elements of overall well-being that might conceivably be affected by counseling and representational interventions, such as self-reported stress levels, perceptions of the court system, and likelihood of compliance with any court-imposed remedies.

The statistical team will code outcome variables for each potential client from Maine court records and the credit reports and scores and will analyze statistically the outcomes experienced by each of the four Groups.

#### *D. Funding*

A study of this magnitude is undoubtedly expensive.<sup>106</sup> However, as is the case for many RCTs, we believe that the cost need not be prohibitive. This study is expensive in part because we are undertaking interventions that have never before been tried by the service providers. Pine Tree has not had the resources to offer representation in credit card debt collection cases, and MMI only offers bankruptcy counseling for consumers who are filing for bankruptcy. A legal services provider or clinical program wishing to evaluate the effectiveness of one of their current services (or treatments) would require a concededly smaller budget. Data gathering imposes additional costs because it requires time to randomize would-be clients into one of the treatment groups.

Should the reader wish to undertake an RCT to evaluate a legal or educational intervention,<sup>107</sup> one potential funding source we intend to investigate is the National Science Foundation's (NSF) program on Law and Social Sciences (LSS), which is a part of the Directorate for Social, Behavioral and Economic Sciences.<sup>108</sup> The program funds projects that align with the NSF's "strategic plan of transforming research frontiers and providing innovation for society"<sup>109</sup> and "considers proposals that address social scientific studies of law and law-like systems of rules."<sup>110</sup> In particular, LSS "especially seeks to enhance its support of scholarship within the Law School academy by encouraging proposals from

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106. Our current budget projections are that this study will cost \$1.5 million over the course of five years, including the two years where the study provides funding to add an attorney and a paralegal to Pine Tree's staff. We have applied to Harvard University for seed funding and are preparing a grant application for the NSF. In addition, we intend to apply to the National Conference of Bankruptcy Judges Endowment for Education and are also in conversations with various Maine-based foundations and philanthropies in an effort to secure funding from local sources.

107. Please feel free contact the Authors if you do.

108. NAT'L SCI. FOUND., DIRECTORATE FOR SOC., BEHAVIORAL & ECON. SCIENCES (SBE), <http://www.nsf.gov/dir/index.jsp?org=SBE> (last visited Apr. 18, 2013).

109. Dr. Myron Gutmann, *Dear Colleague Letter: Law and Social Sciences*, NAT'L SCI. FOUND. (Dec. 11, 2011), [http://www.nsf.gov/publications/pub\\_summ.jsp?ods\\_key=nsf12022](http://www.nsf.gov/publications/pub_summ.jsp?ods_key=nsf12022).

110. *Law and Social Sciences: Special Announcements*, NAT'L SCI. FOUND., DIV. SOC. & ECON. SCI., [http://www.nsf.gov/funding/pgm\\_summ.jsp?pims\\_id=504727&org=NSF&sel\\_org=NSF&from=fund](http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=504727&org=NSF&sel_org=NSF&from=fund) (last visited Feb. 28, 2013).

social scientists within law schools.”<sup>111</sup> Obtaining NSF funding is notoriously difficult<sup>112</sup>—many applications do not get approved in their initial submission—but those that do get approval receive more funding than would be available from many of the other potential sources.<sup>113</sup> Other funding sources may be available, depending on the specific area of intervention.<sup>114</sup>

#### CONCLUSION AND CHALLENGES AHEAD

This is undoubtedly an ambitious undertaking. We began planning this study in early 2011. We will conduct a small pilot project that will enroll twenty to thirty study participants in the spring of 2014 and hope to begin enrolling participants in the full study in late 2014. We will need to recruit 200 to 300 or more potential clients into each Group in the study, for a total of 800 to 1200 total study subjects. We anticipate the enrollment period will last two years. Following enrollment, we will follow participants for up to three years, meaning that we may still be gathering the last pieces of outcome data in late 2019. Nevertheless, we very strongly believe that the findings of this study can significantly impact policy-making and the delivery of legal services. Even if this work proves difficult, it is work worth doing.

At this point, we have secured a number of critical partners—one of the most important of which is Pine Tree, who will be delivering the legal services—but we are in conversations with other vital partners. We have also given presentations about the project to the Federal Trade Commission and the Consumer Financial Protection Bureau, to get both their advice on study design as well as any help they can provide. Our largest hurdle at this point is funding. In the first year of planning, we focused on obtaining the partnerships needed in order to get

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111. Gutmann, *supra* note 109 (“Proposals should focus on a project of significant scientific merit, and must demonstrate how the proposed activities will contribute to advancing interdisciplinary, social scientific understandings of problems within the study of law. These awards will support interdisciplinary research projects or the development of social science research skills that require release from teaching.”).

112. In 2012, the Law and Social Sciences division funded 25% of submitted applications. Overall, the Directorate for Social, Behavioral, and Economic Sciences funded 21% of the 4775 proposals submitted in 2012. The highest rate of funding in the past nine years for Law & Social Sciences was 34% of submitted applications in 2009. *Funding Rate by State and Organization from 2003 to 2012*, NAT’L SCI. FOUND., <http://dellweb.bfa.nsf.gov/awdfr3/default.asp> (last visited Mar. 17, 2013); *see also* NAT’L SCI. FOUND., MERIT REVIEW CRITERIA: REVIEW AND REVISIONS (2011), available at <http://www.nsf.gov/nsb/publications/2011/meritreviewcriteria.pdf>.

113. The majority of awards since 2007 have been between \$100,001 and \$500,000. *What Has Been Funded Through LSS*, NAT’L SCI. FOUND., <http://www.nsf.gov/awardsearch/advancedSearchResult?ProgEleCode=1372&BooleanElement=ANA&BooleanRef=ANY&ActiveAwards=true&#results> (last visited Feb. 28, 2013).

114. For example, the National Institute of Justice has forthcoming solicitations in the areas of social sciences and international studies. *Forthcoming Funding Opportunities*, NAT’L INST. JUSTICE, <http://www.nij.gov/nij/funding/forthcoming.htm#ore> (last visited Mar. 17, 2013). The website allows you to sign up to receive e-mail alerts whenever a new solicitation is released.

the project off the ground and did not focus our attention on securing funding. We believe it most important to have all of the relationships and partners in place so that we can be confident that we can hit the ground running once we obtain funding. At the same time, we have been working on the legal research and securing the necessary materials to insure that we are ready to go as soon as funding becomes available. We are almost there now, and so we have begun to turn our attention to budgeting and securing adequate funding.

We hope that this Article provides our readers with ideas for future research projects and demonstrates how it is possible to design one study that serves many goals.