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# THE RETREAT OF AMERICAN BANKRUPTCY LAW

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*In 2005 the United States adopted provisions constraining the bankruptcy 'fresh start' for the first time in its history. This paper describes the experience under the 2005 amendments over the decade since their enactment, including the data reported by empirical studies of their effects. It suggests a reappraisal of the goals of consumer bankruptcy law in the 21st century, including the simplification and reduction of costs that would arise from abandoning the idea that bankruptcy law should be used as a collection device for professional creditors in consumer cases. It discusses various possible approaches for a new reform while emphasising the importance of the continuing role of lawyers and courts in the consumer bankruptcy process.*

> *The payment of debts is necessary for social order. The non-payment is quite equally necessary for social order. For centuries humanity has oscillated, serenely unaware, between these two contradictory necessities.*[1]

From 1898 until 2005, the fresh start was available to any American who needed it and was willing to pay the considerable reputational and psychological cost of filing for bankruptcy, as well as a filing fee and a lawyer's fee. The year 2005 saw the retreat of American law from its exceptional commitment to the fresh start, even as a number of other countries were moving cautiously in the US direction. Now that we have a decade of experience and data about the effect of the 2005 amendments, it is time for us to use that experience to cast a new light on the goals and costs of consumer bankruptcy in the 21st century. My central conclusions are these:

1. Given that the great majority of bankrupt consumer debtors cannot pay their debts in whole or material part, the central role of bankruptcy is ensuring the fresh start. In the modern world, the fresh start includes an opportunity for debtors to keep property subject to a security interest or mortgage, including their homes and a means of transportation, while respecting the rights of secured creditors.
2. It is past time for us to recognise that in the 21st century, bankruptcy should focus on the fresh start and should not be used as a collection device for professional unsecured creditors (eg issuers of credit cards) in consumer cases. Those creditors calculate the risk of non-payment on an actuarial basis that contemplates and welcomes substantial defaults as part of a profit-maximising business model. By lending to a mass of consumers on that basis, they have only a limited claim to protection from the discharge: primarily the right to be protected from obvious manipulation.

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[1] Simone Weil, 'On Bankruptcy', in *Selected Essays: 1934-1943*, 145, 149 (Richard Rees trans, Oxford University Press, 1962).

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3. Most restrictions on the use of bankruptcy arise from a fear of abuse. Although that fear is often illusory or exaggerated, bankruptcy law should include an effective check on obvious debtor abuse at the lowest possible additional cost in non-abusive cases, which are the great majority.
4. Despite the routine nature of many aspects of consumer bankruptcy, it should continue to be administered through a judicial system.

These conclusions are restricted to consumer bankruptcies and to the treatment of claims by companies in the business of extending credit, that is, professional creditors.[2] The problems of small-business bankruptcies overlap with consumer cases, but small-business bankruptcies involve issues materially different from those presented in the great mass of bankruptcies filed by persons who owe primarily consumer debt. They are not discussed here. Similarly, the issues that arise with non-professional creditors (eg neighbours or co-signers) are so distinct I only touch upon them in this paper. In the discussion that follows, I will begin with a review of the American experience in the last 10 years, the decade in which access to the fresh start has been significantly constrained. The key points are:

1. Although the 2005 changes were adopted on the premise they would increase unsecured creditor returns in bankruptcy, the data strongly suggest that they failed to produce any significant increase in bankruptcy distributions. Instead, the benefit to unsecured professional creditors arose from a mass of paperwork justified as preventing supposed abuse. This 'busywork' has substantially increased lawyer's fees and costs with the effect of keeping a substantial number of debtors out of bankruptcy or delaying their entry. That effect has undoubtedly provided a bonanza for professional creditors.
2. It is highly likely that the debtors discouraged from filing were in as much need of bankruptcy relief as those who filed.
3. A central objective of the sorting process was to increase the share of cases filed in Chapter 13, our debt payout proceeding. It failed in that way too, with the fraction of bankruptcy filings made in Chapter 13 settling into the same range as before — about one-third.[3]

Based on that experience, I will argue we should change in some fundamental respects the way we think about consumer bankruptcy relief in modern society. The most basic change is that we should stop thinking of bankruptcy as a method of wringing payment from financially distressed debtors. Most countries have extensive non-bankruptcy provisions designed to enforce payment of debts. Some even have laws that permit harassment of debtors by debt collectors in ways that might not be permitted for other purposes. The central point of

[2] Professional creditors might be defined in terms of national or at least multi-state issuance of consumer credit by members of a creditor group such as Visa, or a national payday lender. However, the best approach might be to identify the category by inclusion in the creditor coverage of the *Credit Card Accountability Responsibility and Disclosure Act of 2009*, PL No 111-24 ('Card Act') or other consumer debt protection statutes.

[3] See Administration Office of the US Courts, *2014 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (2014), 33, table 3 ('BAPCPA Report') (indicating that Chapter 13 cases made up 34 per cent of the total number of bankruptcy cases terminated in a 12-month window). See generally Scott F Norberg and Andrew J Velkey, 'Debtor Discharge and Creditor Repayment in Chapter 13', (2006) 39 *Creighton Law Review* 473, 476, 479 (finding a discharge rate of only 33 per cent among Chapter 13 debtors who filed in seven districts in 1994); Jean Braucher, 'A Law-in-Action Approach to Comparative Study of Repayment Forms of Consumer Bankruptcy' (Arizona Legal Studies Discussion Paper No 08-09, August 2009), finding, based on different methods of comparative evaluation of repayment forms of consumer debt proceedings, repayment options in North America, Europe, and Australia have high costs in relation to unsecured debt repayment and high rates of failure to achieve a discharge).

bankruptcy law is to suspend or terminate those provisions as to a debtor who invokes its protection. The ancient idea that bankruptcy (insolvency) was at bottom a collection device for creditors has considerable vitality in a business setting, but not in a modern consumer credit and bankruptcy system.

From a debtor's perspective, the discharge is the heart of the matter, albeit with a few narrowly focused exceptions. Yet it is also in the interest of debtors to retain some encumbered assets, especially homes and automobiles, necessary to a fresh start. Security interests and mortgages serve a function in the marketplace and are generally recognised in bankruptcy law everywhere. Procedures to permit payment of secured debts and retention of collateral are essential to the fresh start.[4] It is often said that debtors have another interest that should be protected by bankruptcy law: the opportunity to pay their debts voluntarily under a debt arrangement (in the United States, Chapter 13). The failure rate for such payment plans under the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* ('BAPCPA') (at least half) remains deplorable. For the average debtor, the primary use of Chapter 13 is not to permit voluntary payments (which can be truly voluntary without any binding plan), but to permit the debtor to retain property subject to a security interest. If a new bankruptcy reform could include procedures that make retention practical in a liquidation, the primary remaining purposes of Chapter 13 would be to pay attorneys' fees in instalments and to use bankruptcy as a collection mechanism.[5]

I will suggest some possible approaches to a modified consumer bankruptcy system based on a decade of experience under BAPCPA and a few normative premises. The central theme of my suggestions will be a de-emphasis on collection of unsecured consumer debt owed to professional creditors.

## I THE *BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT* (BAPCPA)

BAPCPA has been the subject of many articles.[6] I will offer only a brief summary and analysis. Proposed pro-creditor changes in the Bankruptcy Code ('the Code')[7] were introduced in the late 1990s in reaction to the report of the National Bankruptcy Review Commission,[8] which

[4] The two largest questions would be whether the price the debtor must pay for retention of collateral should be regulated by bankruptcy law and, if so, what should be the components of that price and what procedures should govern the process?

[5] Debtors occasionally have other goals that can be addressed on a case-by-case basis. See below, text accompanying n 84.

[6] See eg, Nicola Howell and Rosalind F Mason, 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce' (2015) 38 *University of New South Wales Law Journal* 1529; Angela K Littwin, 'Adapting to BAPCPA' (2016) 90 *American Bankruptcy Law Journal* 183; Sara Greene, Parina Patel and Katherine Porter, 'Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes (2017) 101 *Minnesota Law Review* 1031; Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, 'Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings' (2006) 59 *Stanford Law Review* 213, 253–54; Lois R Lupica, *The Consumer Bankruptcy Fee Study: Final Report* (American Bankruptcy Institute, 2012) 11–13 < http://digitalcommons.mainelaw.maine.edu/ faculty-publications/32>; Stefania Albanesi and Jaromir Nosal, 'Insolvency after the 2005 Bankruptcy Reform' (Staff Report No 725, Federal Reserve Bank of New York, April, 2015); Michelle J White, 'Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA' (2007) *University of Illinois Law Review* 275; Ronald J Mann and Katherine Porter, 'Saving Up for Bankruptcy' (2010) 98 *Georgia Law Journal* 289, 292; Robert M Lawless et al, 'Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors' (2008) 82 *American Bankruptcy Law Journal* 349. Given the rich literature in Australia and elsewhere describing the structure and operation of the United States Bankruptcy Code, I assume some familiarity with the US system.

[7] The United States Bankruptcy Code comprises the whole of Title 11 of the United States Code, 11 USC § 101 ff.

[8] National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* (1997).

had proposed mostly pro-debtor changes.[9] The credit industry pointed to the fact that consumer bankruptcy filings had steadily increased year to year and argued that bankruptcy was too easy, despite empirical work showing that most debtors were just as overwhelmed by unpayable debts as they had been in prior decades.[10] They claimed that many debtors were filing for bankruptcy when they could have paid their debts.[11] After years of struggle — during which a strong version of the industry's proposals was actually passed by Congress, only to be vetoed by President Clinton — the industry succeeded in making BAPCPA into law in 2005. It contained many of the provisions the creditors had proposed.

The most debated substantive change was the institution of the means test which, for the first time, blocked access to Chapter 7 liquidation bankruptcy and a prompt discharge. The idea was to identify the debtors who could pay part or all of their debts and to block them from Chapter 7. If debtors' income and debts fell within the means test formula, they would be forced to choose a Chapter 13 payment plan or not to file bankruptcy at all. The test also created a novel distinction among Chapter 13 debtors, requiring more affluent debtors, as measured by its formula, to undertake longer payouts.[12] (Five years is the standard period.) The elaborate formula reflected the industry's conviction that bankruptcy experts, especially specialised bankruptcy judges, were too generous to debtors, a conviction that led to very detailed provisions to measure what percentage of 'disposable' income debtors had to pay.[13] Unfortunately, a further consequence of the industry's suspicion of the bankruptcy bench and bar[14] was that the new provisions were drafted by non-experts who drafted non-expertly,[15] leading to years of litigation.[16]

Other substantive provisions on the consumer side included, inter alia, increasing the period the debtor would be excluded from another Chapter 7 discharge, expanding the exceptions to

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[9] See Lawrence Ponoroff, 'Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality' (2016) 90 *American Bankruptcy Law Journal* 329, summarising the history of these pro-debtor changes.

[10] Sullivan, Warren and Westbrook, above n 6, 253–4. That study relied primarily on the ratio of debt-to-income as a measure of ability to pay. See below n 48 and related text, discussing the debt-to-income issue further.

[11] See Judge Edith H Jones and Todd J Zywicki, 'It's Time for Means-Testing' (1999) *Brigham Young University Law Review* 177, 186–7, claiming that the implementation of means testing would have caused many debtors, who had the ability, to repay their unsecured creditors. A study financed by the credit industry in the 1980s had claimed that too many consumers were considering 'enriching themselves [through bankruptcy] as often as the law allows': Credit Research Center, Krannert Graduate School of Management, *Consumer Bankruptcy Study: Volume II* (Purdue University, 1982) 103.

[12] See eg, Eugene R Wedoff, 'Major Consumer Bankruptcy Effects of the 2005 Reform Legislation' (2005) 38 *Uniform Commercial Code Law Journal* 87–118; Henry J Sommer, 'Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005' (2005) 79 *American Bankruptcy Law Journal* 191; Christian E Weller, Bernard J Morzuch and Amanda Logan, 'Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate' (2010) 84 *American Bankruptcy Law Journal* 327 (2010). In bare summary, the formula largely excluded from application of the new rules those debtors with an income below the median income for the state of their residence. Above median debtors were subject to a complicated set of rules for determining their 'disposable income', from which they were to pay something to their unsecured creditors. Secured creditors' entitlements were also strengthened and their priority access to future income enhanced.

[13] Wedoff, above n 12; Sommer, above n 12; Littwin, above n 6.

[14] Most technical laws, like bankruptcy and tax, are the subject of a technical amendments Bill a year or two after adoption. That sort of Bill is designed to make no substantive change, but to correct errors. The credit industry was so suspicious of those with bankruptcy expertise that it blocked the usual technical amendments legislation for years, fearing that some weakening of the 2005 changes might occur. The technical statute for the 2005 amendments was finally adopted in 2010: *Bankruptcy Technical Corrections Act of 2010*, Pub L No 111-327, 22 December 2010, 124 Stat 3557.

[15] The most infamous example of bad drafting is the 'hanging paragraph': Sommer, above n 12, 191–2.

[16] Lupica, above n 6, 114–15; Lawless et al, above n 6, 351–2.

discharge for luxury purchases prior to bankruptcy, and reducing the property a debtor would be allowed to exempt and retain.

However, the bulk of the legislation was made up of procedural changes. Most of them involved adding substantially to the pile of paperwork that debtors and their lawyers were required to complete and file with the court. The means test formula itself required an elaborate form filled with complicated calculations. But the most novel and troubling provisions of the procedural amendments imposed many new duties on the consumer's lawyer, including specified disclosures, mandated record keeping, and the making of a 'reasonable inspection' to assure the debtor's filings were correct. To that extent, the lawyer was made personally responsible for the accuracy of a debtor's filings.[17] Two other changes directly increased the time and money necessary to obtain a discharge: requiring credit counselling before the petition could be filed and completion of a 'financial management' course prior to discharge.[18]

In an insightful article, my colleague Angela Littwin has shown that many of the dire predictions concerning the operation of the new provisions have failed to materialise.[19] In part this result arose from the un-sophisticated drafting of the non-experts, but the main reason was the adaptability of the lawyers and judges, which made the provisions in practice far less onerous than they had appeared (and perhaps were meant to be). Two specific factors that mitigated the burden were the rapid appearance of software that largely automated the paperwork and the common sense of the Executive Office of the United States Trustee in interpreting and applying the new provisions.[20]

In particular, the means test has not made a major substantive difference in bankruptcy proceedings, although it is important in a small percentage of cases involving debtors with higher incomes.[21] This result is unsurprising, given that a number of empirical studies prior to the adoption of BAPCPA showed that relatively few of the debtors who had filed under the prior law would have been barred from Chapter 7 had the means test been in place.[22] On the other hand, the calculations still had to be made and the forms filed. That meant the data for the forms had to be gathered from distressed and unsophisticated debtors[23] to be entered into the algorithms for the means test calculation, along with the completion of much other paperwork.

## II THE EFFECTS OF BAPCPA

In the end, the substantive changes had little effect while the procedural ones led to the best possible result for the credit industry: fewer distressed debtors filing for bankruptcy.[24] Mann

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[17] Littwin, above n 6, 185; Wedoff, above n 12, 13; Sommer, above n 12, 206; 11 USCA § 707(b)(4) (West).
[18] 11 USCA §§ 109(h)(1), 727(a)(11) (West).
[19] Littwin, above n 6.
[20] For example, the Office made it possible to satisfy the credit counselling requirement by completing a brief on-line course. The Executive Office of the United States Trustee is a branch of the executive in the Justice Department. There is a United States Trustee responsible for each federal judicial district, although some cover more than one district. It performs many of the administrative duties required by the system as well as providing advice to the bankruptcy judges, including scrutiny of attorneys' fees and proposed plans.
[21] Albanesi and Nosal, above n 6, 2.
[22] See eg, Sullivan, Warren and Westbrook, above n 6, 239; Marianne Culhane and Michaela White, 'Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors' (1999) 7 *American Bankruptcy Institute Law Review* 27, 31.
[23] Lupica, above n 6, 31–2.
[24] Albanesi and Nosal, above n 6, 36; Ed Flynn, 'BAPCPA: The Mystery of the 5 Million Missing Cases' (2014) 33 *American Bankruptcy Institute Law Journal* 32, 32.

and Porter argue persuasively that the increased costs of all the busywork mandated by the amendments had the effect of raising the cost of bankruptcy substantially and that this cost increase has delayed or discouraged filings.[25] In particular, the accommodations lawyers and judges had to make to permit the system to function properly were themselves a major, and unavoidable, cause of the increase in costs.

The American Bankruptcy Institute[26] funded a study by Lupica to investigate the effects of BAPCPA on the fees consumer bankrupts had to pay to lawyers.[27] The study took a national sample of consumer cases and analysed them in great detail.[28] For example, it found that fees in no-asset Chapter 7 cases under BAPCPA (90 per cent of consumer Chapter 7 cases[29]) had increased an average (mean) of 48 per cent from their pre-amendments level.[30] So in cases in which the debtor had no assets available for unsecured creditors, the debtor would have to pay the lawyer almost 50 per cent more than before, to file the most routine of bankruptcy cases. Chapter 7 cases with some assets for distribution and Chapter 13 cases also showed dramatic increases in attorneys' fees and other costs.[31] The General Accounting Office did a study with a differently configured sample and reported increases of approximately 50 per cent in attorneys' fees in both Chapter 7 and Chapter 13 cases.[32] It also reported estimates of more than US$100 million in taxpayers' money for start-up costs for the new provisions, plus some additional amounts of increased costs going forward.[33]

Consumer bankruptcy filings have been materially lower since 2005 even after controlling for various economic factors that may have had that effect.[34] It would hardly be surprising if fee increases of the magnitude just described were an important cause of that decline. In fact, many of those who study the bankruptcy statistics believe that the cost of the busywork and the related dramatic increase in overall costs has suppressed consumer filings.[35] One knowledgeable government official who often publishes statistical studies of bankruptcy estimated that BAPCPA fended off 5 million petitions that would have been filed in the years 2005–2013.[36]

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[25] Mann and Porter, above n 6, 292.

[26] The ABI is a membership organisation that includes judges, lawyers, academics, and others interested in the bankruptcy process: American Bankruptcy Institute, *About Us* <http://www.abi.org/about-us>.

[27] Lupica, above n 6.

[28] Indeed, the report is a valuable source of empirical data on many aspects of the subject beyond fees, although that is its central focus: Lupica, above n 6, 6–8.

[29] Lupica, above n 6, 49.

[30] Ibid 51.

[31] Ibid 36–48, 51. The amounts of increase (and a few regional decreases) varied considerably from one district to another, but the overall effect was a substantial increase.

[32] Professor Braucher anticipated a key problem, administrative costs: 'administrative costs may well exceed disbursements to unsecured creditors': Braucher, above n 3, 335. The US Trustee's Office and the Federal Judiciary estimated the total start-up cost of BACPA would be US$120 782 000: United States Government Accountability Office, *Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse and Consumer Protection Act of 2005* (2008) 14, 16.

[33] US Government Accountability Office, above n 32, 3–4.

[34] See eg, Lawless et al, above n 6. This study was the latest from the Consumer Bankruptcy Project which conducted large consumer bankruptcy studies of cases filed in 1981, 1991, 2001, and 2007. I was a co-principal investigator for the first two of these studies.

[35] Flynn, above n 24, 32. Other economic factors, including a substantial pay-down of debt by consumers overall, have likely contributed to the substantial fall in consumer filings. For a study of that factor, see generally Robert Lawless, 'The Relationship Between Nonbusiness Bankruptcy Filings and Various Measures of Consumer Debt' (University of Illinois Law and Economics Research Paper Series, 2001).

[36] Flynn, above n 24, 32. Another estimate by leading empiricists was a 'missing' 800 000 filings in 2007 alone. That is, they estimated that 2007 filings were perhaps 800 000 fewer than experience under pre-BAPCPA would have suggested: Lawless et al, above n 6, 350.

Among the things that the amendments' sponsors wanted to achieve was a long-term increase in Chapter 13 filings. Increasing the percentage of debtors committed to a payment plan in Chapter 13 was a major stated purpose of BAPCPA, but that goal rested on the demonstrably false premise that many debtors in the past had chosen Chapter 7 despite being able to pay. The percentage of Chapter 13 cases did indeed rise in the first years after the statute was adopted, but by 2014 it returned to its historic niche as the filing place for about one-third of the debtors, mostly homeowners.[37]

Not only have Chapter 13 filings failed to rise as a proportion of total filings, but there is no evidence the Chapter 13 debtors are achieving more repayment. Over the twenty-five years under the Code prior to BAPCPA about one-third of cases filed in that chapter resulted in completed plans.[38] I am disappointed to say that the Land of Bankruptcy Empiricism has not yet completed a study that provides very current data post-BAPCPA, although some top-notch researchers are compiling data that should give us answers by 2018 or so. For now, the government data are not helpful, because they report completions and dismissals each year without tying the completions to the year of filing.[39] The few data we have suggest that completions may have risen to 36 per cent, but that information was gathered early in the life of BAPCPA and such a small difference is probably not reliable as a trend.[40] In my view, a reasonable assumption would be that the proportion of Chapter 13 filings is likely close to the range that prevailed prior to BAPCPA, about one-third. Even in those cases the information so far suggests that the credit industry changes did not appear to have produced more payment in Chapter 13 bankruptcy than under the prior legal regime.[41]

The effect of a failed case varies.[42] Some debtors may have benefited to some extent from the respite from collection efforts before the filing was dismissed, giving them the breathing space that they needed. But too many of the Chapter 13 filers continued to suffer reverses, often the same troubles that led them to bankruptcy in the first place, and their cases were dismissed for non-payment. The failure of their cases left them with the same debt as before, minus whatever payments they were able to make before their cases failed, minus substantial bankruptcy costs, and often minus their homes.[43] Since about one-third of debtors filed for Chapter 13[44] and around 66 per cent of those Chapter 13 filers failed to complete a plan and get a discharge,[45] the debtors who actually completed a plan and received a discharge represent just 10–13 per

[37] Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Oxford University Press, 1989), 266; Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000); Lupica, above n 6, 33; Greene, Patel and Porter, above n 6, 1043. The percentage of asset and no asset cases in Chapter 7 remained substantially the same before and after the 2005 amendments: Lupica, above n 6, 49.

[38] See Sullivan, Warren and Westbrook, *As We Forgive*, above n 37, 216; Norberg and Velkey, above n 3.

[39] So, in Year 4 there might be 50 completions and 50 dismissals while Year 5 might see 50 completions and 100 dismissals. But we don't know when the cases in either category were filed, since dismissals happen throughout the Chapter 13 process. It could be that the Year 4 dismissals were from Years 2 and 3, while the Year 5 dismissals were from Year 1. It would be incorrect to claim a 50 per cent completion rate in Year 4, falling to a 33 per cent rate in Year 5. We would have to look at the dismissals and assign them to the years they were filed to make a true comparison about failure rates.

[40] The best data we have are from a study of 2007 cases, so it is hard to know if they represent the long-term under BAPCPA. See Greene, Patel and Porter, above n 6, table 1. The ABI data showed around 40 per cent completion, but those data were very early: Lupica, above n 6, 32–3.

[41] The percentage of claims paid in the ABI Study cases actually dropped just a bit: Lupica, above n 6, 67.

[42] Katherine M Porter, 'The Pretend Solution: An Empirical Study of Bankruptcy Outcomes' (2011) 90 *Texas Law Review* 103, 151–3.

[43] Ibid 111, stating that some of these cases would be 'converted' to Chapter 7, but most would be dismissed.

[44] BAPCPA Report, above n 3, 33, table 3.

[45] Ibid 45.

cent of the total number of consumer cases filed in bankruptcy courts.[46] Overall, unsecured creditors received no increase in percentage distributions under the amendments than they received prior to BAPCPA.[47] The actual repayment rate declined a bit after BAPCPA was adopted, although the difference was slight. Thus, virtually any benefit for creditors generated by BAPCPA has been derived from the increase in the cost of bankruptcy that barred or discouraged debtors from seeking bankruptcy protection.

## III THE CREDITOR PAYOFF FROM DEBTOR EXCLUSION

If those debtors who did not file for either form of bankruptcy were the 'can pay' debtors who were more affluent or less indebted than others, the resulting increase in creditor recoveries would be exactly what Congress intended: more recovery from people who could pay. If, however, these are people in the same distress as those who did file, then it seems apparent from the rates of payment of those who filed Chapter 13 that many non-filers were equally unable to pay their debts outside of bankruptcy.

As explained above, even before BAPCPA was introduced extensive empirical studies, starting with 1981 filers and extending to the early years of this century, showed that there were vanishingly few 'can pay' debtors in bankruptcy. Thus, the burden of showing that the excluded debtors were 'can pay' candidates must fall on the proponents of the changes. In fact, there is no evidence that the excluded debtors were more able to pay than those who have filed under BAPCPA. Given the fact that those same empirical studies showed that the debt-to-income ratios of bankruptcy debtors had got steadily worse from 1981 through 2007 (the first year of BAPCPA),[48] it would be illogical to assume without evidence that those excluded could have paid any material part of their debts. The constancy of the increase in the debt–income ratio from 1981 through two years of experience under BAPCPA strongly implies that those excluded from bankruptcy are likely to be at least as distressed as those who filed, because the primary reason for their exclusion — the cost of filing bankruptcy — is only marginally connected to their debt-to-income position. If anything, those excluded by costs would seem likely to be more indebted regarding their incomes than those who found the money to file.[49]
It is important to understand why the exclusion of highly indebted consumers from bankruptcy would be so valuable to professional creditors, given that these debtors cannot pay off any substantial part of their debts. By a careful analysis of the credit card business model, Mann has shown that the profits of credit card companies in particular arise in large part from debtors who linger long in default, paying something but not enough, as interest and multiple fees increase their debts and debt collectors are free to pressure and harass.[50] He dubbed that state

[46] The sample of pre-BAPCPA cases included in the American Bankruptcy Institute Study had a 50 per cent completion rate, a rate that dropped in subsequent years. Lupica, above n 6, 32–3.

[47] Ibid 7, 67–8; Braucher, above n 3, 336. Apparently, payment results in Germany have been similarly disappointing: Braucher, 347; and this is true in other European countries as well: see note 151, Jason J Kilborn, 'The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for The US Law from Unexpected Parallels in the Netherlands' (2006) 39 *Vanderbilt Journal of Transnational Law* 77, 102.

[48] Sullivan, Warren and Westbrook, *As We Forgive*, above n 37, 74; Sullivan, Warren and Westbrook, *Fragile Middle Class*, above n 37, 70–2, 130; Sullivan, Warren and Westbrook, above n 6, 239; Lawless et al, above n 6, 353. The ratio in 2001 was debt 2.5 times annual income: Lawless et al, 377. Because the great majority of consumer debtors have few assets subject to creditors' claims — most are exempt or encumbered — net worth is not very important on the consumer side. Nonetheless, it is striking that debtors' inflation-adjusted negative net worth doubled from 1981 to 2007: Lawless et al, 369–70.

[49] Albanesi and Nosal, above n 6, 21.

[50] The same business model is central to the business models of many issuers of small, short-term loans ('payday lenders'). Ronald J Mann, 'Bankruptcy Reform and the "Sweat Box" of Credit Card Debt' (2007) *University of Illinois Law Review* 375, 385–6. The article opens a fascinating window on the financial world of credit card

of debtor existence the 'sweat box'. He asserts, based on the financial evidence, that 'lenders are not just indifferent to default, they actually rely upon it in part to turn on the sweatbox's heat switch for their most lucrative constituency'.[51] As Freeman has commented, 'the ideal credit card user maintains only enough financial institution stability to avoid bankruptcy proceedings'.[52] Her article is more recent than Mann's and pulls together very helpfully a number of sources. She argues: 'Although most economists and legal scholars view the 'credit card problem' of excessive consumer debt as one of market failure, it is in fact a story of overwhelming market success', citing Owen Bar Gill, among others.[53] Perhaps the most powerful support for these conclusions comes from the General Accounting Office, one of the most dispassionate of our government entities, which estimates that 80 per cent of the industry's profits now come from interest payments and consumer fees rather than merchant-paid fees.[54] John Pottow has provided a helpful analysis of the causes and resulting externalities of these credit practices.[55]

By keeping more debtors in the box and outside of bankruptcy, BAPCPA has undoubtedly earned for the credit card companies more than the cost of their expensive lobbying campaigns for BAPCPA, even if not a dollar more was paid to them within bankruptcy proceedings.[56] To illustrate this point, if one million excluded debtors (a highly conservative number)[57] managed to pay an additional US$200 each, there would be a US$200 million return to the credit industry.[58] Therefore a lack of greater payment in bankruptcy (those 'can pay' debtors being elusive) pales in comparison with the windfall the industry has received by making bankruptcy much more expensive and therefore less available.[59]

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companies. See also Dalié Jiménez, 'Dirty Debt Sold Dirt Cheap' (2015) 52 *Harvard Journal on Legislation* 41, discussing issues related to the collection of consumer debt, especially credit-card debt, barred by the statute of limitations—yet another window into that industry.

[51] Mann, above n 50, 379.

[52] Andrea Freeman, 'Payback: A Structural Analysis of the Credit Card Problem' (2013) 55 *Arizona Law Review* 151, 162.

[53] Oren Bar-Gill, 'Seduction by Plastic' (2004) 98 *Northwestern University Law Review* 1373, 1373–4.

[54] See Freeman, above n 52, 154, citing US Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers: Report to the Ranking Minority Member*, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, US Senate, GAO-06-929, September 2006, 67 <http://gao.gov/new.items/d06929.pdf>. James White, an eminent commercial scholar not famous for pro-consumer stances, has suggested that exclusion of debtors of all sorts from bankruptcy was likely to be a reason for BAPCPA: James J White, 'Abuse Prevention 2005' (2006) 71 *Montana Law Review* 863. Yet another confirmation is found in a recent comparison of earnings and profits of credit card companies before and after the Card Act: Sumit Agarwal et al, 'Regulating Consumer Financial Products: Evidence from Credit Cards' (NBER Working Paper No w19484) 37-44, <https://ssrn.com/abstract=2332556> (stunning graphs show earnings and profits strongly skewed to debtors with lower credit ratings). Note that I use 'exclusion' to include those who delay filing and thus are excluded for a period of time during which they make additional payments.

[55] John Pottow, 'Private Liability for Reckless Consumer Lending' (2007) *University of Illinois Law Review* 405, 418.

[56] For one interesting calculation, based on the available evidence, see Mann, above n 50, 375–6. One early estimate by an economist was US$4 billion a year: Robert H Scott III, 'Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the Credit Card Industry's Perseverance Paid Off' (2007) 41 *Journal of Economic Issues* 943, 945: the author estimated that the industry contributed almost $25 million to politicians from 1999–2005.

[57] Recall the estimates of 5 million excluded petitions from 2005–2013 and 800 000 in 2007 alone: Flynn, above n 24, 81; Lawless et al, above n 6, 376.

[58] We do not have a metric for the coincident human misery.

[59] See Lawless et al, above n 6, 379–80.

The professional creditors have developed algorithms that are highly predictive as to certain cohorts of debtors, many of whom have weak credit ratings. A roughly predictable number of them will be unable to pay their debts. While the write-off of those debts is part of the business model, if the debtors can be pushed for a few more payments before they fail or give up, the resulting profit is over and above the amount the models would otherwise predict. Thus, there is no paradox between these debtors being 'unable to pay' and a substantial increase of profit from excluding them from bankruptcy.[60]

BAPCPA's procedural changes were justified primarily to identify debtors who could pay some substantial part of their debts. The evidence to date strongly suggests the changes have not achieved that result. The primary benefit to creditors came from exclusion of persons unlikely to be able to pay off their debts, paying sporadically in the sweat box. There has been a large aggregate gain for the industry at the same time that the additional payments from each debtor were relatively small.

## IV THE PROPER FUNCTIONS OF CONSUMER BANKRUPTCY LAW WITH REGARD TO PROFESSIONAL CREDITORS

To summarise:

1. The benefits to professional creditors from BAPCPA do not lie in greater payments in bankruptcy, but rather in excluding many debtors from bankruptcy protection.
2. The debtors who are kept out of bankruptcy by the costs of complying with BAPCPA are as financially distressed as those who filed.
3. Those excluded debtors are unlikely to pay off their debts outside of bankruptcy because they are in much the same financial distress as those who are unable to pay in bankruptcy.
4. It follows that the primary benefit to professional creditors lies in the sweat box.

These propositions tee up a normative question: does society accept that obtaining some payments to creditors through the sweat box justifies denying bankruptcy relief to those who will never be able to pay any substantial portion of their debts? Congress was not asked that question. The question that was presented was whether debtors who could pay their debts should be barred from bankruptcy or discouraged from using it. Once experience has confirmed what empirical research predicted—that the excluded debtors would at best make some further payments in a context of ever-increasing debt—I believe the answer to the question should change. To introduce devices that exclude millions of debtors from the fresh start they need, merely to extract a few additional payments from heavily burdened debtors, seems to me to be morally repugnant, economically unproductive, and socially damaging.

For many years prior to 2005, the unsecured credit industry accepted losses from marginal debtors because the majority of marginal (often called 'sub-prime') debtors generated profits greater than those losses. The losses were built into a successful business model. The 2005 moral and economic trade-off to exclude needy debtors from bankruptcy to marginally reduce those losses and increase those profits seems a bad social and economic exchange. It follows for me that consumer bankruptcy should not be used to collect debts for professional creditors. Its function should be to provide the fresh start. Some would argue that debtors would be

[60] See Lauren E Willis, 'Against Financial-Literacy Education' (2008) 94 *Iowa Law Review* 197, 265–6, discussing the 'fee-harvesting credit card' which, by targeting consumers who were likely to incur fees, enabled creditors to reap profits and write-off debts that were largely the credit-card 'issuer's own fees'.

deprived of additional credit that might help them avoid bankruptcy. I would respond that avoiding bankruptcy when a debtor needs it is precisely the problem for many debtors and for a society that wants debtors restored to full economic function.[61]

However, there remains the problem of possible abuse of the bankruptcy process. Many of us could agree that blatant and widespread manipulation of bankruptcy by debtors who could comfortably repay their debts would be a bad result. Not only would it be morally troubling, it might lead to a contraction of unsecured credit and an increase in its price. Thus there would be a social value in preventing that abuse of a system designed to rescue people from serious over-indebtedness. If there is evidence of such abuse, the question becomes what is the best approach to fend off such a result.

Some years ago, as the notion of consumer bankruptcy was beginning to take hold in Western Europe,[62] I had occasion to write an article about the effects on bankruptcy law of the ever-present fear of abuse of such a system.[63] I argued that the American experience of almost a century under liberal-consumer bankruptcy laws seemed to show that the fear was greatly exaggerated, but nonetheless lawmakers overcorrected for it, leaving debtors with inadequate and often unworkable procedures. Reflecting on the experiences in the United States and elsewhere since that time,[64] I have come to see that part of the exaggeration of the risk of abuse came from confusing the risk of abuse with the use of bankruptcy as a collection device. Even though there is no evidence that widespread abuse is likely, citizens are often concerned by the simple logic of discharge: people would naturally run up debts and then gaily discharge them if there were no price to pay for doing that.[65] Insistence that debtors pay what they reasonably can pay could serve as a bar to abuse even though that approach has little value in producing meaningful payments of unsecured debt. The two uses of bankruptcy—collecting payment and deterring abuse—are rarely separated in discourse, but they are conceptually and perhaps practically distinct. As we have seen, the first goal is unachievable. The claim underlying the second goal is that the threat of collection in bankruptcy is the best defence against serious abuse.

For 107 years US bankruptcy law, largely[66] relied on social controls to avoid bankruptcy abuse, in particular, the stigma of bankruptcy. Even in the United States, a nation populated by many

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[61] See Michelle J White, 'Why Don't More Households File for Bankruptcy?' (1998) 14 *Journal of Law, Economics and Organization* 205, 205, suggesting that more 'households would benefit financially from bankruptcy than actually file'; Sullivan, Warren and Westbrook, above n 6, 214–15, suggesting that increases in bankruptcy filings were driven by economic need, not due to declining social stigma surrounding bankruptcy; Mann and Porter, above n 6, 338, stating that access to bankruptcy is important in part because 'society loses when people are trapped in financial distress, discouraged from productive economic enterprises and so burdened by debts that they cannot participate in the consumer economy'.

[62] See generally Iain Ramsay, 'Comparative Consumer Bankruptcy' (2007) *University of Illinois Law Review* 241; Iain Ramsay 'US Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law' (2015) 87 *Temple Law Review* 947; Kilborn, above n 47, 83, n17.

[63] Jay Lawrence Westbrook, 'Local Legal Culture and the Fear of Abuse' (1998) 6 *American Bankruptcy Institute Law Review* 25, 28.

[64] The concern over abuse and the procedures structured in light of those fears are captured in the excellent comparative work of Jason Kilborn: Kilborn, above n 47, 77.

[65] White, above n 61, 205.

[66] Dismissal of cases for 'substantial abuse' was included in the Code in 1984, but the creditors proposing BAPCPA complained that it was underused: Kathleen Murphy and Justin H Dion, '"Means Test" or "Just a Mean Test": An Examination of the Requirement the Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B)' (2008) 16 *American Bankruptcy Law Review* 413, 432–3.

immigrant debtors from the start, bankruptcy carried a substantial stigma.[67] The claim that was made in the BAPCPA debates was that the stigma had greatly declined, so that filing bankruptcy was socially perceived as just a clever legal manoeuvre. Whatever might be said about that factor in the business context,[68] Mason and others have demonstrated its implausibility in consumer cases.[69] Mason pointed to the continuing effect of bankruptcy on reputation:

> A seminal British law reform report on insolvency in the 1980s, the Cork Report, referred to one result of bankruptcy as 'a sense of failure and humiliation ... with [his] family or [his] colleagues at work' which must be aggravated if there is a public examination and press publicity. More recently a World Bank report in 2014 on insolvency and natural persons cited surveys of debtors in many well-established insolvency systems that revealed 'pervasive and profound feelings of guilt, shame, and stigma'. Bankruptcy stigma also has an economic aspect – affecting a bankrupt as an economic player, whether in seeking employment, credit ([eg] to operate a business as a sole trader) or positions of responsibility.[70]

In the United States, my co-authors and I have shown in previous work that the data concerning the financial situation of bankrupt debtors 'hint that, despite loud claims to the contrary, the stigma of bankruptcy may actually be increasing.'[71] In fact, in over more than a century, the generous US system produced no widespread abuse.

Closely related to the unsupported argument that stigma has declined is the concern about moral hazard: might debtors run up unpayable debts knowing that bankruptcy is readily available? There is no evidence for this claim either, but more importantly it has a certain inherent difficulty rarely discussed. Just the same concern is presented by every social measure designed to protect us from bad or risky choices. Rescue teams in the national parks might encourage climbers to try more dangerous routes up the mountain. Fire insurance might encourage carelessness in the kitchen. These sorts of claims usually have three characteristics: they make no distinction between misfortune and assumption of the risk; they assume that society is better off when its members are discouraged from taking risks, and they may represent excuses for failing to aid others although each of us sometimes makes poor choices. My conclusion is that there is no sustainable argument for erecting barriers to consumer bankruptcy because of a fear of abuse. Nonetheless, in the concluding section of this paper, I will include that concern among the factors that should be considered in any future reform.[72]

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[67] Ramsay, 'Comparative Consumer,'above n 62, 256; Paul Ali, Lucinda O'Brien and Ian Ramsay, 'Short a Few Quid': Bankruptcy Stigma in Contemporary Australia' (2015) 38 *University of New South Wales Law Journal* 1575, 1575.

[68] *See* Robert O'Harrow Jr, 'Trump's Bad Bet: How Too Much Debt Drove His Biggest Casino Aground', *Washington Post*, 18 January 2016 <https://www.washingtonpost.com/investigations/trumps-bad-bet-how-too-much-debt-drove-his-biggest-casino-aground/2016/01/18/f67cedc2-9ac8-11e5-8917-653b65c809eb_story.html>, discussing how Trump believed 'that he was shrewd for using "the laws of the country to my benefit"'; Bryan Hood, '4 Times Donald Trump's Companies Declared Bankruptcy', *Vanity Fair*, 29 June 2015 <http://www.vanityfair.com/news/2015/06/donald-trump-companies-bankruptcy-atlantic-city>.

[69] See eg, Howell and Mason, above n 6, 1529–30; Sullivan, Warren and Westbrook, above n 6, 214–15.

[70] Howell and Mason, above n 6, 1530–31 (footnotes omitted).

[71] Sullivan, Warren and Westbrook, above n 6, 214–15.

[72] Braucher, above n 3, 342, citing Jacob Ziegel, 'What Can the United States Learn from the Canadian Means Testing System?' (2007) *University of Illinois Law Review* 195, 206.

## V THE FRESH START

Once we have put to one side using consumer bankruptcy as a collection device, we can focus more specifically on what bankruptcy law must do to ensure a fresh start. After reviewing the literature and the bankruptcy files of many debtors, it seems to me that debtors have three basic goals:

1. Both discharge of unsecured debt and retention of possessions generally seen as indispensable to starting over;
2. A mechanism for paying attorneys' fees and costs;
3. Miscellaneous fresh start relief (eg, protection of co-signers and truly voluntary repayment).

The most important component of the fresh start is the discharge. However, further relief is necessary in light of the existence of security interests in nearly all jurisdictions: procedures that permit debtors to retain certain property necessary to the debtor's basic needs and the ability to find work. Part of the retention of necessary property is met by exemption policy, which is beyond the scope of this paper. However, in Chapter 7 the retention of property necessary to a fresh start, including exempt property, is often precluded by outstanding liens.[73] In Chapter 7, encumbered property can be retained by agreement with the secured creditor, but such 'reaffirmations' are often onerous.[74] Debtors routinely file in Chapter 13 for the primary reason of keeping liened property,[75] but at the price of paying a formula amount of mostly unrelated unsecured debt over three to five years—a 'stale start' which is almost always onerous and often leads to repeated defaults.[76] The retention of necessary property should not be hostage to payment of debts to unsecured professional creditors. The property that falls into the essential category will vary around the world. For us, most often a car is necessary to keep a job or to pursue employment, and in many cases, there is not a better alternative for shelter than paying to keep an existing home.[77] In the United States, both cars and homes will routinely be subject to a security interest and a mortgage respectively; in effect, the grant of the lien is a waiver of any exemption of that property vis-à-vis the secured creditor. Chapter 13 is regularly understood as the solution to these problems.

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[73] See generally Lawless et al, above n 6, 366–7, noting that families in bankruptcy often have assets, such as homes and vehicles, encumbered by secured loans.

[74] The lender is not required to agree to reaffirmation and often uses the debtor's need for the collateral to require addition of interest, late fees, and attorneys' fees, among other terms. Elizabeth Warren, Jay Lawrence Westbrook, Katherine Porter and John Pottow, *The Law of Debtors and Creditors: Text, Cases and Problems* (Aspen Press, 7th ed, 2014) 187–91.

[75] Ibid 215; repayments in Chapter 13 have several advantages, especially the opportunity to repay the debt in instalments. In some cases, it is possible for the debtor to 'strip' the security interest on personal property to reflect its current value.

[76] See Porter, above n 42.

[77] There are exceptions. A car may be a luxury for those who live in New York City and a home may be the 'cause' of the bankruptcy. Sullivan, Warren and Westbrook *The Fragile Middle Class*, above n 37, 143, 227. Blanket liens on household goods are not so much of a concern for us, because obtaining non-purchase-money liens on household goods is for the most part unlawful in the United States by a rule of the Federal Trade Commission: 16 CFR § 444.1. In addition, such liens are ordinarily subject to avoidance in a consumer bankruptcy: 11 USCA § 522 (West). On the other hand, vendors' liens are not avoidable and may encumber essential property like refrigerators.

Another important reason that debtors choose Chapter 13 is to pay attorneys' fees.[78] The Supreme Court has barred the use of estate property[79] in Chapter 7 to pay a debtor's lawyer.[80] The ordinary result is that debtors must pay the lawyer's fee in advance. Thus, we have the title of an important article, *Saving Up for Bankruptcy*.[81] For debtors who cannot arrange to pay in advance,[82] the instalment payment advantage in Chapter 13 is an important attraction.[83]

Finally, there is a miscellany of reasons for extended payment in bankruptcy. For example, a debtor may want to protect a mother who co-signed the note and may well be liable for the whole of it if the debtor discharges it. Chapter 13 provides an answer for this also in the form of the co-debtor stay.[84]

There has always been a concern to have a procedure enabling debtors to pay their debts voluntarily. The obvious response is that a debtor can always do that post-discharge on a truly voluntary basis. Yet there may be a few cases where debtors want to pay in full or large part, but are under great pressure from debt collectors and feel they need a mechanism to forestall creditors pending payment. It is not clear how often this problem arises, but it seems an important question to some observers. Again, Chapter 13 is presented as the solution.

## VI THE POSSIBLE SHAPE OF REFORM

### A *Reform Within the Existing System*

Katherine Porter has done a careful and persuasive study that was virtually unique in actually examining the outcomes of Chapter 13 cases in detail and is therefore enormously helpful.[85] In another ground-breaking investigation of Chapter 13 procedures, Porter, Patel, and Greene[86] have given us an important insight into who uses Chapter 13, as well as the chances for success for various types of users.[87] Their focus has been on the debtors, not the creditors, and their suggestions for possible reforms, subject to further research, are aimed at improving the existing system. The reforms they consider are important but less sweeping than those suggested in this article. They could be forgiven for thinking that I am politically naïve in proposing that collection should be reduced or eliminated as a goal in consumer bankruptcy. They might be correct in that, but it is my view that identification of the best answer is important in any movement for reform, even if our society ultimately settles for something less. Thus, with respect and admiration, I want to go further.

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[78] See Porter, above n 42, 118–19.
[79] Estate property in the United States is all the debtor's property that is not claimed as exempt: 11 USCA § 541 (West).
[80] *Lamie v US Treasury*, 540 US 526, 538 (2004).
[81] See Mann and Porter, above n 6.
[82] See Warren et al, above n 74, 297.
[83] Keith M Lundin and William H Brown, *Chapter 13 Bankruptcy* (4th ed) Ch13online.com, § 38.3, <http://www.ch13online.com>, discussing the option to pay the filing fees in instalments, generally, early in the case.
[84] 11 USCA § 1301 (West).
[85] See Porter, above n 42.
[86] Greene, Patel and Porter, above n 6. They also provide a host of useful references to other empirical studies.
[87] Ibid 17, for example, they find a larger failure rate among black users.

### B *The Simple Version of Reform*

To the extent policy makers are prepared to consider relief for debtors beyond reform of the existing system, I offer some suggestions framed for this discussion to fit the US system, but perhaps suggestive as applied to other bankruptcy regimes as well. In the US context, it seems to me that a simple extension of the Chapter 7 discharge injunction along the lines suggested below could accommodate the debtors' key goals. On that basis, Chapter 13 would be largely unnecessary given a de-emphasis on collection on behalf of unsecured professional creditors.

Except for the discharge, the most important item of fresh start relief in Chapter 7 is the retention of encumbered property. An extended discharge stay against lien enforcement would bar seizure and sale of that property during the case and would continue as long as the debtor was making whatever payments were required. The stay would give debtors a chance to cure arrears and pay off these debts. The discharge of all other debts would often make it possible. There are some things to be debated in adopting such a procedure in Chapter 7. In particular, would payments go directly to secured creditors or would trustees be involved in administration (probably yes); would the amount to be paid be the remainder of the original debt or the value of collateral at the time of bankruptcy; what procedures would be used to lift the stay and permit seizure; and how would this relief relate to exemption policy?[88] Each of those would involve important details and occasion spirited discussion, but all of these points could be resolved, it seems to me, without great technical difficulty. Chapter 13 could be 'seen off' in favour of the necessary additional provisions in Chapter 7, with the caveats noted below.

Similarly, fees and costs could be paid in instalments over some period of time set by statute, with the same sort of questions about procedures as with secured debt. If the debtor opted to pay over time, the discharge could be delayed until payment was complete, with the stay barring enforcement of pre-petition debts as with secured debt. This arrangement would solve the problem of saving up for bankruptcy as discussed above.

For those cases where the central motif is the payment of debts voluntarily or to protect co-signers, there would be tricky questions about the proper metric to determine when use of the stay is appropriate for those purposes and over what period of time. Given that these cases may be relatively rare, I am not sure that creation of some elaborate procedure is appropriate. It might be enough to issue a stay where the court finds the results fair all round and to nullify it on the same basis, creating a common law of the treatment of rare cases.

Finally, a reformer should address the problem of manifest abuse, if only to address the theoretical (or sound-bite) concerns of opponents of reform. A standard of manifest abuse would likely be acceptable, but if a more specific approach is wanted it might be adoption of an additional exception to discharge in liquidation: a) if clear and convincing evidence showed that the debtor had incurred debts with a present intention of non-payment; or b) if the debtor is solvent to pay creditors substantially in full, without regard to the value of exempt property,[89] under either the bankruptcy standard (balance sheet, at fair value) or the equity standard (ability to pay debts when due). Both standards have been applied with a fair measure of certainty for many decades. Some interesting questions would arise in the drafting, but nothing insurmountable.

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[88] For example, in our bankruptcy system the opportunity to redeem encumbered property by paying the full outstanding debt in one payment is limited to exempt property: 11 USCA § 722 (West).

[89] Exempt here includes property otherwise not available to creditors, such as future bequests.

Most of the paperwork imposed by BAPCPA was unnecessary in the first place, and the adoption of a simple system would render it almost completely superfluous. The same is true of most of the extra obligations imposed on consumer attorneys. Coupled with payment of fees in instalments, a rollback of both the paperwork and the extra duties would likely reduce the cost of bankruptcy.

### C *Narrower Reform*

#### 1 *Smaller Creditors*

Some would object to the proposal I offer above because of concern for small, local creditors, especially individual lenders and suppliers of goods and services. The case against using bankruptcy as a mechanism for collecting consumer debt is not nearly so applicable to them. Creditors holding these sorts of debts may be found in too many consumer bankruptcies to be called rare. If careful study finds that to be true, provision could be made for paying them under existing Chapter 13 rules, including a modified version of the means test. Applying that test to debts that would generally be much smaller, and occur less often, would perpetuate the existing complexity and associated expense in those rules; and those rules might have somewhat more bite in some cases because debtors might be more able to pay the non-professional debts. However, a rule that eliminated the means test in any case not including such debts would likely dispense with the means test paperwork in most consumer cases. The removal of the means test would also make it likely consumers with such debts could and would settle them outside of bankruptcy altogether.

#### 2 *Limiting Collection on Behalf of Professional Creditors*

Given the immense profits of the consumer credit industry, it seems unlikely to me that de-emphasising recovery for professional lenders would reduce any extensions of credit that a sensible policy maker would regret discouraging. But complete discharge of most professionally issued consumer debt may draw too much resistance. In that case, a more limited approach would nonetheless greatly improve the current system.[90] There are many possibilities. One would be to limit recovery by professional creditors to a certain dollar amount or a certain percentage of 'current monthly income' as defined by the Bankruptcy Code.[91] Or certain consumer debt issued by professional creditors could be disallowed for distribution. For example, the Code could disallow claims for credit extended after a serious default in payment to that creditor, pending a subsequent full reinstatement of the account. Another approach would be to disallow claims from creditors who set hopelessly unrealistic minimum payment levels that nearly guarantee their debtors would never be able to repay their balances fully.[92] At the least, those sorts of rules would reduce the amount of debt seeking repayment in Chapter 13. In addition, they might modestly deter irresponsible issuance of credit, narrowing the dimensions of the sweat box. However, it is also possible that bankruptcy losses are so relatively small compared to the benefits of marginal lending that professional lenders would make no adjustments in their models.

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[90] Pottow, above n 55, 435–6, offered an intriguing proposal that creditors be liable for reckless lending as defined.

[91] 11 USCA § 101(10A) (West).

[92] See Mann, above n 50, 387, discussing credit card minimum payment levels that will result in a debtor taking decades to pay off the debt.

### D *The Role of Lawyers*

A number of people over many years have observed that the great majority of consumer bankruptcies seem relatively simple. Given the absence of weighty legal issues in those cases, the natural thought is to relegate them to administrative resolution to save taxpayers, debtors, and creditors time and money.[93] Yet, Angela Littwin has argued persuasively that the presence of lawyers and judges who devote a significant part of their time to consumer bankruptcy has saved it from the ills associated with administrative procedures.[94] To summarise her case, she likens consumer bankruptcy to various social 'safety net' programs.[95] She discusses 'bureaucratic disentitlement,' a process that enables opponents of a social program to claim abuse by some users as an excuse for adopting procedural reforms that make the process substantially less available and less helpful to its intended beneficiaries.[96] She believes that the entrenchment of judges and lawyers in the consumer bankruptcy system,[97] together with the overlap in the United States between that system and business bankruptcy, which engages many affluent and influential lawyers, has helped to prevent bureaucratic disentitlement from being nearly as successful in bankruptcy as it has been in other social programs. This point obviously relates to the other article she has published about the success (and cost) of the bankruptcy bench and bar in adapting to the antidebtor provisions of BAPCPA. Thus she suggests that the natural reaction to the barrier of costs created by BAPCPA —assignment of most cases to an administrative agency—might be disadvantageous, because of the vulnerability of such a system to bureaucratic disentitlement.[98]

In addition to that very cogent point, the role of lawyers in consumer bankruptcy should continue because bankruptcy law is one of the most technically difficult and complex areas of the law. Although it would be a great improvement to simplify it,[99] its economic importance and its moral ambiguity combine to cause lawmakers to fill it with exceptions and qualifications,[100] a tendency exploited by various pressure groups. The suggestions I've made above would significantly simplify US law, but much complexity would remain. As long as consumer bankruptcy looks more like a Victorian desk and less like a Herman Miller table, it will be a task for lawyers and judges.

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[93] See eg, David T Stanley and Marjorie Girth, *Bankruptcy: Problem, Process, Reform* (Brookings Institution, 1971) 44–5.

[94] See Angela K Littwin, 'The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success' (2011) 52 *William and Mary Law Review* 1933, 2009–22. I do her article an injustice in the brief summary that follows, so I commend it to everyone who recognises the importance of the institutional side of consumer bankruptcy.

[95] Ibid 1938, 1944–6. Littwin seems at times to consider that this view is the correct one, one of our few points of disagreement on this subject.

[96] Ibid.

[97] Ramsay, 'Comparative Consumer', above n 62, 266, citing David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press, 2001).

[98] Littwin, above n 94, 1940–41. Seeing the system institutionally, Littwin argues that 'when struggling, bankrupt consumers hand over much-needed funds to their lawyers, they are paying for more than representation in their individual cases. They are paying for the fact that much of the administrative work necessary to process their bankruptcies will be completed by people they have hired, rather than by government officials operating under the [political] pressures of bureaucratic disentitlement' (footnote omitted).

[99] See Jean Braucher, 'A Fresh Start for Personal Bankruptcy Reform: The Need for a Fresh Start and a Single Portal' (2006) 55 *American University Law Review* 1295.

[100] The drafting sessions must be filled with comments like this: 'But what if the debtor won the lottery soon after discharge? Well, let's say within 18 months of the discharge and ...'.