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A MODERN POOR DEBTOR'S OATH

Richard M. Hynes & Nathaniel Pattison***

Bankruptcy offers a fresh start that frees individuals from crushing debt burdens. Many insolvent Americans are, however, simply too poor to afford bankruptcy. Filing for even the simplest type of bankruptcy costs around $1,800, with most of this money paid to attorneys who help complete more than twenty required forms and schedules. These forms verify that the debtor qualifies for relief and help divide the debtor's estate among creditors, but for the large majority of debtors, this paperwork is unnecessary because the debtor easily qualifies for relief and has no assets to distribute.

History offers a better model. Two centuries ago, the law granted release from debtor's prison through the simple execution of a "poor debtor's oath"—a short declaration that the debtor lacked substantial assets. For most debtors, modern bankruptcy law should require no more than an updated version of a poor debtor's oath that provides relief unless creditors or their trustees are willing to pay some cost to challenge the oath's validity. To discourage the wealthy from taking false oaths, Congress could sharply limit the exemptions available in the simplified procedure. Even dramatically smaller exemptions would protect all of the assets of the overwhelming majority of bankrupt debtors. By avoiding costly processes for debtors who obviously qualify for bankruptcy relief, a modern poor debtor's oath could save hundreds of millions of dollars in transaction costs each year and greatly expand access to bankruptcy.

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INTRODUCTION

"The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor."[1] The fresh start offers insurance against adverse events, such as unemployment or illness, that debtors either cannot purchase in the marketplace or will not purchase due to

[1] See Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (internal quotation marks and citations omitted).

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volitional or cognitive failures.[2] The fresh start also protects a debtor's friends, family, and acquaintances from the consequences of the debtor's financial distress. It may even protect the broader economy.[3] Insolvent debtors may have little reason to work hard if creditors can seize their earnings.[4]

Bankruptcy cannot provide these benefits to debtors who cannot afford to file. Even the simplest form of bankruptcy, Chapter 7, requires more than twenty complex forms and schedules,[5] so nearly all debtors hire a lawyer.[6] On average, debtors spend more than $1,800 on filing and attorney's fees.[7] These debtors must also pay their attorneys up front because, if the payment were financed, that debt too would be cancelled in bankruptcy. Debtors thus need to "sav[e] up for bankruptcy,"[8] and yet the debtors most in need of bankruptcy are often those who live paycheck-to-paycheck and cannot afford to save up for anything.

Some of the cost of the modern bankruptcy petition is due to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[9] legislation supported by then-Senator Joe Biden.[10] Arguing that some debtors were filing for bankruptcy when they could afford to pay some or all of their debts, creditors successfully lobbied

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[2] Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393, 1405–18 (1985).

[3] Id. at 1418–24.

[4] Id. at 1420–24. For qualifications to this argument, see Richard M. Hynes, Non-Procrustean Bankruptcy, 2004 Univ. Ill. L. Rev. 301, 321–26.

[5] For example, in the Central District of California Bankruptcy Courts, at least twenty-seven forms are required to be submitted to the court by Chapter 7 debtors. U.S. Bankr. Ct. for the Cent. Dist. of Cal., Chapter 7 Petition Package (Individual Debtors), 3–6 (Dec. 2020), https://www.cacb.uscourts.gov/sites/cacb/files/documents/forms/Ch7%20IndividualPetitionPackage.pdf [https://perma.cc/JHR2-HMMG].

[6] Just 6.5% of Chapter 7 debtors file pro se. See infra note 158 and accompanying text.

[7] See Lois R. Lupica, The Consumer Bankruptcy Fee Study: Final Report, Am. Bankr. Inst. 130, tbl.A-6 (Dec. 2011) (listing total direct access costs (attorney's fees plus filing fees) for no-asset Chapter 7 cases of $1,304 in 2005 dollars). The Bureau of Labor Statistics Inflation calculator converts $1,304 in May of 2005 into $1,806 in May of 2021. CPI Inflation Calculator, U.S. Bureau of Lab. Stat., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/33FK-GRDN] (last visited Apr. 3, 2022).

[8] See, e.g., Ronald J. Mann & Katherine Porter, Saving Up for Bankruptcy, 98 Geo. L.J. 289, 292 (2010). Then-Professor Porter has since been elected to the U.S. House of Representatives.

[9] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

[10] 151 Cong. Rec. 3, 4351 (2005) (statement of then-Senator Joe Biden) (arguing in favor of the bill's adoption during debate, concluding that "[a] vote for this bill is a vote to protect family support payments in bankruptcy. That is why I support this bill").

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Congress to increase the evidence that debtors must produce when filing.[11] Many consumer advocates, including then-Professor Elizabeth Warren, strongly opposed BAPCPA, arguing that the reforms would unduly raise the cost of filing for the vast majority of debtors who truly deserved relief.[12]

Now-President Joe Biden has endorsed bankruptcy legislation sponsored by now-Senator Elizabeth Warren.[13] With respect to making bankruptcy more accessible,[14] these reforms do not go far enough. By repealing some of BAPCPA's requirements, Senator Warren's reforms may reduce the current cost of filing,[15] but even before 2005, filing under Chapter 7 still cost consumers around $1,200 (in 2020 dollars).[16] Warren's reforms would also allow more debtors to finance their attorney's fees.[17] Yet that reform still leaves debtors spending significant sums just to prove an inability to pay their creditors and impedes bankruptcy's fresh start by immediately saddling individuals emerging from bankruptcy with debt.

The complex forms and schedules required of *debtors* filing for bankruptcy stand in sharp contrast to the simple notice-filing standards available to *creditors*, who can file debt collection suits with just "a short and plain statement of the claim."[18] Of the "eight million debt claims . . . filed [every year,] . . . six million . . . turn into default

[11] See Robert H. Scott, III, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the Credit Card Industry's Perseverance Paid Off, 41 J. Econ. Issues 943, 945 (2007).

[12] See, e.g., Robert M. Lawless et al., Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors, 82 Am. Bankr. L.J. 349, 362 n.53 (2008).

[13] Katie Glueck & Thomas Kaplan, Biden, Looking to Attract Progressives, Endorses Warren Bankruptcy Plan, N.Y. Times (May 22, 2020), https://www.nytimes.com/2020/03/14/us/politics/biden-warren-bankruptcy.html [https://perma.cc/Y3V9-YN9Y].

[14] We express no judgment on other aspects of the reforms, such as making it easier to discharge student debt. Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. § 101(b)(8) (2020).

[15] Elizabeth Warren, Fixing Our Bankruptcy System to Give People a Second Chance, Warren Democrats (Jan. 7, 2020), https://elizabethwarren.com/plans/bankruptcy-reform [https://perma.cc/Q529-HMSB].

[16] See Lupica, supra note 7, at 130 tbl.A-6 (reporting total direct costs of $866 in 2005 dollars). Adjusting for inflation, this is roughly $1,199 in 2020 dollars. CPI Inflation Calculator, supra note 7.

[17] Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. § 101(b)(4) (2020); Warren, supra note 15.

[18] See, e.g., Fed. R. Civ. P. 8. Even a plausibility standard requires only that the complaint allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

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judgments,"[19] meaning that the plaintiff will never have to produce any evidence.

By going all the way back to the Founding era, one can find an insolvent debtor's action that matched the simplicity of modern notice filing—the poor debtor's oath. "Debt was an inescapable fact of life in early America . . . [that] cut across regional, class, and occupational lines. Whether one was an Atlantic merchant or a rural shopkeeper, a tidewater planter or a backwoods farmer, debt was an integral part of daily life."[20] The United States lacked a lasting federal bankruptcy law until the end of the nineteenth century,[21] and many Founding-era Americans found themselves in debtor's prison.[22] The poor debtor's oath was an early reform that freed many debtors from this prison. In contrast to the numerous documents that a modern bankrupt debtor must submit, a federal version of this oath fit into just a few lines: "You solemnly swear (or affirm) that you have not estate, real or personal, nor is any to your knowledge holden in trust for you to the amount or value of twenty dollars, nor sufficient to pay the debt for which you are imprisoned."[23]

Legal historian Bruce Mann suggests that the fact that the poor debtor's oath was not part of a bankruptcy system explains the oath's simplicity.

> Insolvency and bankruptcy process create procedures for determining creditors' claims against a debtor and for distributing the debtor's property among his or her creditors in proportion to their claims. Poor debtor's oaths offered neither, nor could they when they applied only to debtors with too little property to be worth distributing.[24]

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[19] See, e.g., Yonathan A. Arbel, Adminization: Gatekeeping Consumer Contracts, 71 Vand. L. Rev. 121, 123 (2018).

[20] Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence 3 (2002).

[21] Prior to 1898, Congress enacted three bankruptcy acts that together lasted less than twenty years. Congress repealed the Bankruptcy Act of 1800 in 1803, Act of Dec. 19, 1803, ch. 6, 2 Stat. 248, the Bankruptcy Act of 1841 in 1843, Act of Mar. 3, 1843, ch. 82, 5 Stat. 614, and the Bankruptcy Act of 1867 in 1878, Act of June 7, 1878, ch. 160, 20 Stat. 99. For a history of bankruptcy in the United States, see generally David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America (2001) and Charles Jordan Tabb, The History of Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5 (1995).

[22] See infra notes 52–55 and accompanying text.

[23] Act of May 5, 1792, ch. 29, § 2, 1 Stat. 265, 266. For other versions of the poor debtor's oath, see *infra* note 64 and accompanying text.

[24] Mann, supra note 20, at 51.

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Although modern bankruptcy law has procedures for determining creditors' claims and distributing the debtor's property, these procedures are not used in around 95% of consumer Chapter 7 cases because there are no assets to distribute.[25] Well less than 2% of these cases distribute more than $5,000 to unsecured creditors.[26] The Supreme Court of the United States understated matters when it said that the fresh start is bankruptcy's "principal purpose."[27] In the overwhelming majority of consumer bankruptcies, the fresh start is bankruptcy's sole purpose.[28]

Bankruptcy's numerous schedules and other required documents could still play a useful role if they are needed to determine whether a debtor deserves a fresh start. However, because nearly all consumers who file under Chapter 7 receive the same relief—a discharge of debt without forfeiting any assets—a court does not need full disclosure of the specifics of a debtor's financial condition. The court only needs to know that the debtor's financial condition is bad enough to qualify for a Chapter 7 discharge without any distribution to unsecured creditors. For many debtors, this purpose can be achieved with a modern version of the poor debtor's oath. One possible version of this oath based on the current law's substantive rules would read, "After any exempt property is excluded and administrative expenses are paid, no funds will be available to distribute to unsecured creditors, and my household income is below [median income]."[29] Little more is actually needed from most debtors beyond their identifying information; creditors could learn of the debtor's filing from the credit bureaus such as Equifax, Experian, and TransUnion.[30]

Although we call for a modern version of the poor debtor's oath, we do not envision restricting the oath to the truly destitute. During her tenure as a law professor, Senator Warren and her colleagues persuasively

[25] See infra Table 1.
[26] See infra notes 129–33 and accompanying text.
[27] See Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).
[28] Tom Jackson recognized this point when he noted that "[t]he fresh-start policy is thus substantively unrelated to the creditor-oriented distributional rules that give bankruptcy law its general shape and complexity." Jackson, supra note 2, at 1396.
[29] For a longer discussion of the possible text of this oath, see *infra* Section III.D.
[30] See infra Section IV.A. Our proposal is similar to Tom Jackson's suggestion that the fresh start could be tied to a public declaration of insolvency. See Jackson, supra note 2, at 1396 n.8. ("For example, the law might grant discharge through a system of public notice whereby certain assets (such as future wages) would be freed from the claims of existing creditors. The mechanism of public notice would inform creditors of the debtor's election.").

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argued that most bankrupt debtors are drawn from the "middle class,"[31] and in this paper, we demonstrate that the overwhelming majority of bankrupt debtors could rightfully take the above oath. As a result, we will primarily use the less common label for a poor debtor's oath—an insolvent debtor's oath.[32]

That so many debtors can rightfully take the oath is partly due to bankruptcy's current substantive rules. By definition, half of all households earn less than the median income, which makes them automatically pass bankruptcy's income-based means test,[33] and many states provide exemptions that allow debtors to protect substantial wealth in bankruptcy. For example, twenty states allow debtors to exempt at least $100,000 in home equity,[34] and seven states (and the District of Columbia) have homestead exemptions with no dollar limit.[35] We do not try to justify or reform these substantive rules. Rather, we argue that, given these substantive rules, bankruptcy should use very different procedures.

During the Founding era, an insolvent debtor's oath shifted the burden of proof to the creditor to show that the debtor actually had assets.[36] However, a modern version could instead serve the same role that notice pleading serves in consumer debt collection—delaying the time when moving parties must present evidence and excusing presentation when their opponents concede or do nothing. Although the plaintiff retains the burden of proof in consumer debt collection, notice pleading shifts some burden to the defendant, who must challenge the complaint and force the plaintiff to provide evidence. If the defendant does nothing, the plaintiff will win a judgment by default. Similarly, creditors or their trustees could challenge an insolvent debtor's oath and thereby force the debtor to complete the extensive schedules required by existing law. If such challenges are sufficiently costly, creditors will not challenge an oath

[31] See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 2–3 (2000).

[32] For others using this phrase, see, for example, Robert A. Feer, Imprisonment for Debt in Massachusetts before 1800, 48 Miss. Valley Hist. Rev. 252, 259 (1961) and Walter H. Moses, Enforcement of Judgments Against Hidden Assets, 1951 U. Ill. L.F. 73, 79.

[33] See infra note 125 and accompanying text.

[34] See infra note 104 and accompanying text.

[35] See infra notes 101–03 and accompanying text.

[36] See Feer, supra note 32, at 255 ("The creditors were to be notified of the oath, and if they did not prove within fifty days that it was false, the prisoner was to be freed unless his creditors agreed to pay his weekly board charges.").

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unless there is a reasonably high probability that the oath was falsely taken. If an oath goes unchallenged, the debtor will receive a discharge by default.[37]

Lawsuits and other efforts to pursue a defaulting debtor cost money. Therefore, creditors and debt collectors have developed tools to predict whether debtors are likely to have sufficient assets or income to satisfy their judgments.[38] We show that these same tools could be used to identify false oaths with a high degree of accuracy.[39]

By discouraging high-asset debtors from falsely taking an insolvent debtor's oath, the law could reduce the incentive for creditors and trustees to challenge oaths and thereby lessen the administrative burden on those debtors who truly qualify for relief. In the Founding era, this was done by threatening severe punishment for perjury. This threat remains today in the form of bankruptcy fraud. Over time, however, consumers may learn that such a threat is largely empty. In our current system, debtors who make a material misstatement on their bankruptcy petition face more risk of being struck by lightning than being convicted of bankruptcy fraud.[40]

Sharply limiting asset exemptions would more effectively deter wealthy debtors from falsely taking an insolvent debtor's oath. Such a punishment is unlikely to harm debtors who rightfully take an oath because most debtors have assets that are far below currently available exemptions.[41] Homestead exemptions can be quite generous. However, over the last decade, roughly 80% of Chapter 7 debtors reported no home equity at all,[42] making the size of the homestead exemption available to them irrelevant.

Part I explores the debtor-creditor law of the Founding era. Although this law was much less generous than modern law, it did provide a very simple way for debtors to declare their inability to pay—the insolvent debtor's oath. Part II describes a modern bankruptcy law that offers consumers very generous relief but requires complex paperwork and is unaffordable for many in financial distress. Part III proposes a new and

[37] As is true under current law, courts could revoke a discharge if it is found to have been obtained by fraud or if a subsequent audit by the U.S. Trustee suggests revocation is appropriate. See 11 U.S.C. § 727(d); infra notes 165–69 and accompanying text.

[38] See infra Section III.B.

[39] See infra Section III.B

[40] See infra notes 202–06 and accompanying text.

[41] See infra Table 2 and accompanying text.

[42] See Nathaniel Pattison & Richard M. Hynes, Asset Exemptions and Consumer Bankruptcies: Evidence from Individual Filings, 63 J.L. & Econ. 557, 569 tbl.2 (2020).

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greatly simplified bankruptcy procedure that would allow some debtors to take an updated version of the insolvent debtor's oath in lieu of completing the complicated forms and schedules required by current law. The potential benefits are enormous. Because so many consumers file, the population of bankrupt consumers spends more than one billion each year on Chapter 7 filing costs alone,[43] and the indirect costs of the paperwork may be even larger. Some insolvent debtors are too broke to file; they either forego bankruptcy protection altogether or file under a different chapter that allows them to pay their attorneys over time but rarely discharges their debts.[44] Our proposal offers something for supporters of means testing as well. Procedures that require the production of costly information are easier to justify if they are restricted to the small number of debtors who are likely to have significant assets or income. Part IV addresses likely criticisms of our proposal, and Part V concludes.

I. DEBTOR'S PRISON AND THE POOR DEBTOR'S OATH

Early American law treated insolvent debtors harshly. In addition to debtor's prison, some states allowed creditors to force their debtors into involuntary servitude. "Yankee merchants . . . kept many workers on the Newfoundland fishing grounds by plying them with rum and brandy, then binding them to service as defaulting debtors when they failed to pay their liquor bills."[45] Thus, searching for a pro-debtor reform from this era may seem like a fool's errand.

Although the substantive rules of the Founding era's debtor-creditor law were harsh, this law had a procedural rule that was much more debtor-friendly than its modern counterpart. During the Founding era, debtors could take a simple oath that declared their insolvency and thereby shifted the burden of proof to creditors to demonstrate that debtors could pay their debts.

A. Debt and Debtor's Prison in the Founding Era

"Fishermen and whalemen obtained vessels, provisions, and gear; homesteading farmers acquired land and livestock; artisans founded

[43] See infra notes 128–30 and accompanying text.
[44] See infra Section II.B.
[45] Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900, at 40 (1974).

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shops, mills, and yards—all on credit dispensed liberally enough to make Americans a heavily indebted people."[46]

Default inevitably accompanies debt. Rather than seize a debtor's assets, creditors often used the law to seize the debtor's person. Debtor's prison was a fearsome collection tool. While today creditors begin the judicial collection process by serving notice of their complaint, Founding-era creditors could have their debtor arrested; they did not have to wait until they actually had a judgment to throw their debtors into debtor's prison.[47]

Debtor's prison imposed enormous social costs, but, at least at the outset of the case, these costs were often not borne by the creditor using the remedy. The costs of operating the prison and feeding the debtor were borne by the state or debtors themselves. "Unlike criminals and paupers, debtors had to provide their own food, fuel, and clothing—supplied from their own resources, the generosity of family or friends, begging, or the beneficence of a local relief society—or they did without."[48]

Nearly all states ended the use of debtor's prison for general contract claims before the Civil War,[49] though some merchants who sold on credit continued to use debtor's prison into the twentieth century by disguising their claims as tort claims. For example, Richard Ford reports that, in the 1920s, Michigan "[d]ealers selling furniture, automobiles, clothing and jewelry on 'easy credit' . . . [were] flooding the courts with [contract claims] disguised as actions in trespass on the case, in order to obtain *capias* or body execution."[50] "The principal victims of the system [were] the workingmen . . . ."[51]

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[46] Daniel Vickers, Competency and Competition: Economic Culture in Early America, 47 Wm. & Mary Q. 3, 20 (1990).

[47] Coleman, supra note 45, at 4–5.

[48] Mann, supra note 20, at 87. Some reforms shifted these costs to creditors. See Coleman, supra note 45, at 195 (describing Virginia law: "At first the defaulter had to pay his own prison fees, but when the General Assembly authorized the construction of the General Court Prison for Debtors at Williamsburg in 1711 it assumed the expense of caring for all inmates. In 1726 creditors became liable for these costs after the first twenty days and in 1772 the obligation commenced on the first day of imprisonment.").

[49] See Matthew J. Baker, Metin Cosgel & Thomas J. Miceli, Debtors' Prisons in America: An Economic Analysis, 84 J. Econ. Behav. & Org. 216, 219 tbl.4 (2012).

[50] Richard Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 46 (1926); see also Eugene J. Morris & Hilton M. Wiener, Civil Arrest: A Medieval Anachronism, 43 Brook. L. Rev. 383, 385–87 (1977) (describing laws that allowed civil arrest for torts such as fraud as late as the 1970s).

[51] Ford, supra note 50, at 45.

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Prior to its abolition, debtor's prison was very common. "The Prison Discipline Society's estimate is that five out of every six prisoners were in fact in prison for debt in the sampled states, and that this put the total number of people imprisoned for debt, at least across the northeastern United States, well into the tens of thousands."[52] Charles Warren estimates that around seventy-five thousand Americans were sent to debtor's prison in each of the years surrounding 1833.[53] Adjusting for population, that is more than twice the rate of consumer bankruptcy today.[54] Some regional estimates are dramatically higher. Peter Coleman reports that "three Philadelphians in every eight spent some time in a debtors' prison in the late 1820's."[55]

B. The Poor Debtor's Oath as a Path to Freedom

Those imprisoned for debt rarely paid. Of 2,057 debtors imprisoned in the United States in 1830, just 294 (14%) paid the creditor who imprisoned them.[56] "[The] primary function [of debtors' prison] was to deter default in the first place by giving borrowers an incentive to disclose hidden assets."[57] It made little sense to retain the debtor in prison if it was obvious that neither the debtor nor the debtor's friends and relatives could pay. Sometimes, creditors would release debtors voluntarily. Of more

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[52] See Baker et al., supra note 49, at 217; Prison Discipline Soc'y, Fifth Annual Report of the Board of Managers of the Prison Discipline Society 38 (Bos., Perkins & Marvin 1830).

[53] Charles Warren, Bankruptcy in United States History 174 n.8 (1935).

[54] The United States population in 1833 was approximately fourteen million. U.S. Census Bureau, 1 Historical Statistics of the United States: Colonial Times to 1970, at 8 ser.A6–8 (1975) (reporting a population of 14,162,000 for 1833). Therefore, approximately one out of every 187 Americans went to debtor's prison each year. There were 612,561 bankruptcy filings in the year ended September 30, 2020. Admin. Off. of the U.S. Cts., Table F: U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending September 30, 2019 and 2020, at 1 (September 30, 2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_f_0930.2020.pdf [https://perma.cc/Z5ZW-BL4Y]. The U.S. population was approximately 330,000,000. Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2020, U.S. Census Bureau, https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html [https://perma.cc/4GVE-M46K] (last visited Jan. 22, 2022). This is one bankruptcy filing for every 539 Americans.

[55] Coleman, supra note 45, at 287.

[56] See Ford, supra note 50, at 47; Prison Discipline Soc'y, supra note 52, at 39.

[57] See Baker et al., supra note 49, at 216.

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interest for this paper is a reform that led to freedom without creditor consent—the insolvent, or poor debtor's, oath.[58]

As Bruce Mann explains, "[i]ndigent debtors whose debts were small and their assets even less and who had been in jail for thirty days could swear to these facts and be thrown back onto the streets whence they had come."[59] The oath did not free debtors of their obligation to repay—there was no discharge.[60] It merely offered the possibility of freedom from imprisonment for that debt.

Versions of an insolvent debtor's oath appeared in America as early as the late seventeenth century,[61] though it was not a constant feature of the law in any state. For example, Massachusetts enacted a poor debtor's oath in 1698, repealed the oath in 1725, then "reenacted a comparable though temporary measure in 1727 and revived the same law from time to time from 1733 to 1787, when it made it a permanent part of the Massachusetts relief system."[62]

The most striking feature of the insolvent debtor's oath was its simplicity. While modern consumer bankruptcy can require more than twenty separate forms and schedules, the federal version of the poor debtor's oath fit on just a few lines: "You solemnly swear (or affirm) that you have not estate, real or personal, nor is any to your knowledge holden in trust for you to the amount or value of twenty dollars, nor sufficient to pay the debt for which you are imprisoned."[63]

Other versions were slightly longer because they also had the debtor swear to the absence of avoidable transfers or allowed for the possibility that some assets could not be attached. For example, one of the first versions, enacted by Massachusetts in 1698, read:

> I, A. B., do upon my oath solemnly profess and declare before Almighty God, that I have not any estate real or personal in possession, reversion or remainder of the value of ten pounds in the whole, or sufficient to

[58] Both types of release were common. For example, Ford reports that, of the 2,057 debtors who were imprisoned in 1830, 744 (36.2%) were released under a poor debtor's oath, and 1,019 (49.5%) were released by their creditors. Ford, supra note 50, at 47.

[59] Mann, supra note 20, at 50.

[60] In addition to federal bankruptcy law, some states did offer discharges of debt. See, e.g., Coleman, supra note 45, at 31–37.

[61] Id. at 40 ("In 1672 [Massachusetts] creditors became liable for the jail fees of their imprisoned debtors. If they failed to pay, the prisoner who could swear that he was worth less than five pounds was to be released.").

[62] Id. at 41.

[63] Debtor's Prison Relief Act of 1792, Pub. L. No. 2-29, § 2, 1 Stat. 265, 266.

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> pay the debt or damages for which I am imprisoned; and that I have not . . . sold . . . or otherwise conveyed, disposed of or entrusted all or any part of my estate thereby to secure the same, to receive or expect any profit or advantage thereof, to defraud or deceive any creditor or creditors whatsoever to whom I stand indebted.[64]

By taking the insolvent debtor's oath, a debtor did not automatically win freedom. Rather, the oath shifted the burden of proof. Creditors could challenge the accuracy of the debtor's oath,[65] but, like modern creditors trying to enforce a judgment in state court, the creditors had to show that the debtor actually had assets.[66]

Some versions of the oath allowed creditors to keep debtors in prison if the creditors were willing to pay the jailing fees,[67] and, in the case of one Delaware version of the oath, creditors had to pay to support the debtor's family as well if incarceration would make the debtor's "family . . . become a public charge."[68] This too can be seen as a form of burden shifting. Creditors had to bear a cost to prove that they had reason to believe that the debtor was hiding assets. This cost shifting was enough

[64] Act of June 21, 1698, ch. 11, § 1, 1698 Mass. Acts 330, 330. A later Vermont version was quite similar:

> You solemnly, sincerely and truly swear (or affirm) by the name of the everliving God, without evasion, equivocation or mental reservation, that you have not any estate, real or personal, except necessary apparel and bedding for yourself and family, in possession, remainder, or reversion, to the value of twenty dollars in the whole, nor sufficient to pay the debt, damages or cost for which you are committed, nor have you since your commitment disposed of the same, except for the necessary subsistence of yourself and family, and that you have not directly or indirectly, disposed of all or any part of your estate to defraud or deceive any of your just creditors. So help you God.

Act of Mar. 9, 1797, ch. 23, § 12, 1797 Vt. Acts & Resolves 317, 325.

[65] See Feer, supra note 32, at 254–55 ("The creditors were to be notified of the oath, and if they did not prove within fifty days that it was false, the prisoner was to be freed unless his creditors agreed to pay his weekly board charges.").

[66] See, e.g., Act of June 21, 1698, ch. 11, § 1, 1698 Mass. Acts 330, 331 ("[T]hat the said oath taken by such prisoner be not disproved by good testimony of any credible person . . . .").

[67] Coleman, supra note 45, at 40 ("However, if the creditors believed that the defaulter had concealed property, they could keep him in jail for a further three months by paying the usual jail fees."); id. at 61 ("In 1791 it allowed judgment prisoners to take the poor debtor's oath after thirty days in custody. It also deprived creditors of the right to hold defaulters in jail by paying the prison fees, but it repealed this restriction five years later."). Some jurisdictions required creditors to pay these fees even before the oath was taken. See Feer, supra note 32, at 255 ("In 1706, the General Court cleared up the first of these problems by providing that creditors must assume responsibility for all jail fees as long as the debtor was in prison, if the debtor could not pay them himself.").

[68] Prison Discipline Soc'y, supra note 52, at 45.

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to free many debtors because "[t]his forced the judgment creditor to balance the cost of support against the doubtful possibility of discovering concealed assets or someone ransoming the prisoner. In most cases it was cheaper to release him."[69]

The insolvent debtor's oath was not available to all. Debtors usually had to wait before they could take an oath and secure their freedom. One early nineteenth-century commentator complained of a law that allowed "debtors imprisoned for debts not exceeding twenty-five dollars . . . [to] be exonerated immediately, by a five minutes process, and simply swearing before a magistrate that they are not worth twelve dollars and fifty cents."[70] However, states usually made debtors wait thirty days in prison before they could take the oath.[71] Because debtors then had to provide notice to their creditors and the court had to hold a hearing, debtors sometimes had to wait several months for their freedom.[72]

The language of the oath excluded debtors with substantial assets. The text of some oaths, like the Vermont oath quoted above, allowed the debtor to protect at least some property. In 1672, Massachusetts made debtors swear they were worth less than £5;[73] in 1798, Rhode Island imposed a limit of $10;[74] and in 1854, Connecticut imposed a limit of $17.[75] Over time, these exemptions grew,[76] though truly generous exemptions such as homestead exemptions did not emerge until the middle of the nineteenth century.[77]

Other versions of the oath excluded debtors who owed too much. One of the earliest versions of this oath, enacted by Massachusetts in 1698, excluded debtors who owed more than £500 to any one creditor.[78] This

[69] Coleman, supra note 45, at 56.

[70] Joseph D. Fay [Howard, pseud.], A Disquisition on Imprisonment for Debt, as the Practice Exists in the State of New-York 39 (N.Y., Charles Wiley & Co. 1818).

[71] See Mann, supra note 20, at 101.

[72] Feer, supra note 32, at 254 ("The prisoner had to spend at least one month in jail before taking the oath, and creditors had to receive notice at least fifteen days before the court sat. Since courts sat infrequently in some counties, the prisoner might have to wait several months.").

[73] Mann, supra note 20, at 50.

[74] Act of February 28, 1803, 1798 R.I. Pub. Laws 90, 91.

[75] Conn. Gen. Stat. § 12-160 (repealed 1971).

[76] See Coleman, supra note 45, at 68, 225, 236; Mann, supra note 20, at 19–20, 62–63 (describing growth in exemptions in various states).

[77] See Paul Goodman, The Emergence of Homestead Exemptions in the United States: Accommodation and Resistance to the Market Revolution: 1840–1880, 80 J. Amer. Hist. 470, 470–72 (1993).

[78] Feer, supra note 32, at 254.

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limit probably served to exclude a few large merchants or landowners.[79] The annual per capita income in New England in 1675 was about £7.2 (£10.1 for Boston), and the predicted wealth for a forty-five-year-old hinterland laborer and forty-five-year-old Boston professional was £35.7 and £475.8, respectively.[80] Adjusted for inflation, £500 in 1698 is roughly £88,000 in 2020,[81] or $120,000.[82] Most imprisoned debtors did not owe very much. A report that sampled prisons around 1830 suggests that more than two-thirds owed less than $20 ($486 in 2020 dollars) and just 10% owed more than $100 ($2,430 in 2020 dollars).[83]

II. MODERN BANKRUPTCY'S GENEROUS BUT UNAFFORDABLE RELIEF

During the Founding era, creditors could imprison defaulting debtors or force them into involuntary servitude.[84] By contrast, the overwhelming majority of modern debtors who choose Chapter 7 receive a discharge of substantially all of their debts without having to forfeit any assets to general creditors.[85]

While American bankruptcy law offers generous relief, filing for bankruptcy is expensive, and many consumers cannot pay the necessary attorney's and filing fees.[86] One of the reasons that bankruptcy is expensive is that it requires a detailed accounting and documentation of debtors' assets, debts, creditors, income, and expenses.

BAPCPA increased the amount and complexity of the paperwork, which lengthened the time needed to prepare a bankruptcy case and raised

[79] Debt limits varied tremendously. For example, in 1774, Maryland offered delivery for debtors who owed less than £200, Coleman, supra note 45, at 164–65, but in 1705, Virginia offered freedom for debtors who assigned their assets to their creditors, as long as they owed less than £10. Id. at 195.

[80] See Peter H. Lindert & Jeffrey G. Williamson, American Colonial Incomes, 1650–1774, at 40–41 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19861, 2014).

[81] Bank of Eng. Inflation Calculator, https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator [https://perma.cc/KU7J-VRLK] (last visited Jan. 16, 2022).

[82] Currency.ME.UK, Convert Pounds to Dollars | GBP to USD, https://www.currency.me.uk/convert/gbp/usd [https://perma.cc/A7SH-9K8A] (last visited Jan. 16, 2022).

[83] See Baker et al., supra note 49, at 218. For inflation adjustments, see Federal Reserve Bank of Minneapolis, Consumer Price Index, 1800-, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800- [https://perma.cc/64YS-TC9C] (last visited Jan. 16, 2022).

[84] See supra notes 45–47 and accompanying text.

[85] See infra Table 1 and accompanying text.

[86] See, e.g., Mann & Porter, supra note 8, at 318.

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attorney's fees. Examining the impact of BAPCPA, the U.S. Government Accountability Office writes,

> According to bankruptcy attorneys and other parties involved in the process, significantly more legal work is required to meet the requirements of the new law. For example, satisfying the new means test for a bankruptcy filing requires completing a lengthy form that includes various calculations of the debtor's income and expenses.[87]

After interviews with fifty-three bankruptcy attorneys, Angela Littwin summarizes, "My data also support the proposition that the real harm BAPCPA caused was through the procedural barriers it created, especially the additional work it imposed on consumer bankruptcy attorneys and clients alike."[88] Andrew MacArthur describes the impact of the paperwork as,

> The net effect of this transformation is that by tripping up unknowing debtors with additional paperwork, the bankruptcy system is now less trusting of the debtor and more protective of access to the system. This is especially true for the poor, who may lack the requisite knowledge required to complete this paperwork.[89]

The purposes of the cumbersome paperwork are to verify that a debtor qualifies for Chapter 7 and to distribute their assets to general creditors, but the paperwork is often unnecessary. In the large majority of Chapter 7 cases, the debtor easily qualifies for Chapter 7 and has no assets to distribute.[90] In these cases, the detailed documentation is wasteful and raises the cost of filing. The high costs also distort debtor choices in undesirable ways. Some debtors file under a bankruptcy chapter ill-suited for their needs while others stay out of bankruptcy altogether and seek refuge in a system of informal bankruptcy that provides limited relief.[91] We argue that these tests can be implemented with procedures that impose much lower social costs.

[87] See U.S. Gov't Accountability Off., GA0-08-697, Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, at 21 (2008).

[88] See Angela Littwin, Adapting to BAPCPA, 90 Am. Bankr. L.J. 183, 195 (2016).

[89] See Andrew P. MacArthur, Pay to Play: The Poor's Problems in the BAPCPA, 25 Emory Bankr. Dev. J. 407, 419–20 (2009).

[90] See infra Tables 1 and 2 and accompanying text.

[91] See infra Section II.B.

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A. Bankruptcy Law's Generous Relief

This Article proposes a reform to Chapter 7, the Chapter chosen by about two-thirds of bankrupt consumers.[92] The basics of Chapter 7 can be stated simply.[93] Debtors receive a discharge of their debts but must forfeit any non-exempt assets that they have. Using records of all bankruptcies filed between fiscal years 2008 and 2017,[94] we find that more than 95% of debtors who file Chapter 7 receive a discharge, though this percentage falls to 75% if the debtor does not use a lawyer. Chapter 7 cases usually conclude quickly, with 75% of debtors receiving their discharge within three to four months.[95]

Befitting its label "liquidation," Chapter 7 is designed to distribute the debtor's assets or their proceeds to unsecured creditors.[96] In furtherance of this goal, debtors provide numerous separate schedules and other documents when they file their petitions. The number of these documents varies from time to time as some schedules are combined, but currently, debtors in some jurisdictions must provide at least twenty.[97] Included among these forms are three schedules of the debtor's assets (real property, personal property, and exempt property) and three schedules of the debtor's obligations (secured debt, unsecured debt, and priority debt).

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[92] Admin. Off. of the U.S. Cts., Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2021, at 1 (March 31, 2021) https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0331.2021.pdf [https://perma.cc/4UXQ-25DS] (reporting that 62% of non-business bankruptcies were filed under Chapter 7). For a description of other bankruptcy Chapters available to consumers, see *infra* notes 140–57 and accompanying text.

[93] In Section IV.B, we discuss additional aspects of Chapter 7.

[94] Integrated Databased (IDB) (2021), Fed. Jud. Ctr., https://www.fjc.gov/research/idb [https://perma.cc/L5V2-2NWB].

[95] Id.

[96] 11 U.S.C. § 726 (2018).

[97] See supra note 5.

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Table 1: Case-Level Disbursements from Chapter 7 Cases (2000-2013)[1]

	Percent of cases with positive disbursement	95th percentile of disbursements	Average disbursements per case
General unsecured claims	5.4%	$702	$395
Priority claims	0.6%	$0	$55
Unsecured or priority	5.7%	$894	$450
Secured claims	0.3%	$0	$406
Trustee payments	5.2%	$312	$362
Funds paid to debtor: exemptions	0.7%	$0	$48

[1] Data: Disbursements for all non-corporate Chapter 7 asset cases filed between 2000 and 2013 are from the Uniform Final Reports of the United States Trustee Program (USTP). https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports [https://perma.cc/8N6P-WLHU].

As a practical matter, consumer Chapter 7 cases almost never distribute anything to creditors who lack security interests (e.g., a mortgage or a security interest in an automobile). Table 1 presents data from all non-corporate Chapter 7 cases filed between 2000 and 2013. Just 5.4% of cases distribute anything to general creditors. Including distributions to priority claims does not change this result materially; just 5.7% of cases distribute anything to either general unsecured or priority claims. Table 1 suggests that distributions to secured creditors are also rare, but this result may be deceiving. Although bankruptcy's discharge will eliminate the debtor's personal obligation to repay the debt, the creditor's lien will survive the bankruptcy,[98] and the creditor may therefore collect after the bankruptcy concludes.

Chapter 7 distributes so little to creditors because most bankrupt debtors have few assets, and debtors can protect what little they have with exemptions provided by either federal or state law.[99] Although some "wildcard" exemptions allow a debtor to protect any property subject to

[98] See Dewsnup v. Timm, 502 U.S. 410, 417 (1992).
[99] 11 U.S.C. § 522 (2018).

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some dollar limit,[100] most exemptions protect specific forms of property, like home equity, retirement accounts, or automobiles.[101] Some states offer very generous exemptions; this is particularly true of home equity. For example, Texas allows married debtors to exempt up to $100,000 of personal property and all of their home equity regardless of its value.[102] Six other states and D.C. offer some debtors "unlimited" homestead exemptions,[103] and a total of twenty allow debtors to exempt at least $100,000 in home equity.[104]

Most debtors do not come anywhere close to fully utilizing the exemptions available to them. For example, the majority of Chapter 7 debtors do not use the homestead exemption at all because they have no home equity to exempt.[105] The Federal Judicial Center data does not include home equity, but it does include the total value of the debtor's real property and the value of the debtor's secured debt.[106] Simply subtracting the value of the debtor's secured debt from the value of the debtor's real property is not a perfect measure of the value of the debtor's home equity because some debtors will own second homes or other real estate, and

[100] Id. § 522(d)(5) ($1,325 plus up to $12,575 of any unused amount of the homestead exemption); N.H. Rev. Stat. Ann. § 511:2 (2020) ("The debtor's interest in any property, not to exceed $1,000 in value . . . ."); 9 R.I. Gen. Laws § 9-26-4(16) (2020) ("[A] debtor in bankruptcy may exempt an additional six thousand five hundred dollars ($6,500) in any assets.").

[101] 11 U.S.C. § 522(d)(2)–(12) (2018); Ark. Code Ann. § 16-66-218(a)(2) (2021); Cal. Civ. Proc. Code § 703.140(2) (Deering 2021); Fla. Stat. Ann. § 222.25(1) (LexisNexis 2021); Ga. Code Ann. § 44-13-100(2)(F) (2021); Tex. Prop. Code Ann. § 42.0021 (West 2019).

[102] Tex. Prop. Code Ann. §§ 41.001, 42.001 (West 2019).

[103] Fla. Const. art. X, § 4; Ark. Code Ann. § 16-66-210 (2021); D.C. Code § 15-501 (2021); Iowa Code Ann. § 561.16 (West 2022); Kan. Stat. Ann. § 60-2301 (West 2021); Okla. Stat. tit. 31, § 1 (2021); S.D. Codified Laws § 43-45-3 (2021).

[104] Fla. Const. art. X, § 4; Ariz. Rev. Stat. Ann. § 33-1101 (LexisNexis 2021); Ark. Code Ann. § 16-66-210 (2021); Del. Code. Ann. tit. 10, § 4914 (2021); Idaho Code § 55-1003 (2021); Iowa Code § 561.16 (West 2021); Kan. Stat. Ann. § 60-2301 (West 2021); Mass. Gen. Laws ch. 188, § 1 (LexisNexis 2021); Minn. Stat. § 510.02 (West 2021); Mont. Code Ann. § 70-32-104 (2021); Nev. Rev. Stat. Ann. § 21.090 (LexisNexis 2021); N.H. Rev. Stat. Ann. § 480:1 (2021); N.D. Cent. Code § 47-18-01 (2021); Ohio Rev. Code Ann. § 2329.66 (LexisNexis 2021); Okla. Stat. tit. 31, § 1 (2021); 9 R.I. Gen. Laws § 9-26-4.1 (2021); S.D. Codified Laws § 43-45-3 (2021); Tex. Prop. Code Ann. § 41.001 (West 2021); Vt. Stat. Ann. tit. 27, § 101 (2021); Wash. Rev. Code Ann. § 6.13.030 (LexisNexis 2021). For a summary of homestead exemptions in 2017, see Pattison & Hynes, *supra* note 42, at 565.

[105] Debtors can sometimes use portions of an unused homestead exemption to protect other property. See, e.g., 11 U.S.C. § 522(d)(5) (2018).

[106] Bankruptcy Petition NewSTATS Snapshots Database BPNS Database Codebook, Fed. Jud. Ctr. (Nov. 2021), https://www.fjc.gov/sites/default/files/idb/codebooks/Bankruptcy%20IDB%20Online%20Codebook%20rev%2011102021.pdf [https://perma.cc/Q5K3-YK8B].

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some will have car loans or other secured debt. However, in another paper, we show that the difference between the total value of the debtor's real property and the total value of the debtor's secured debt provides a reasonable proxy of the debtor's home equity. Using this proxy, we found that, between fiscal years 2008 and 2017, approximately 80% of Chapter 7 filers reported no home equity either because they do not own a home (52%) or they own a home but their mortgages exceed the value of their homes (29%).[107]

Table 2 provides further details about the assets and income of debtors who file Chapter 7 bankruptcies. In Chapter 7, just 2.6% report more home equity than the applicable homestead exemption,[108] and even this may overstate the number of homes vulnerable to bankruptcy trustees. First, this figure does not account for other means of protecting home equity, such as the use of tenancy by the entireties.[109] Second, a trustee may decline to pursue a debtor who appears to have some home equity because of a fear that liquidation costs will consume any surplus.[110] Before distributing money to general creditors, the trustee must give the debtor the value of the exemption.[111] As seen in Table 1, just 0.7% of Chapter 7 cases distribute any money to debtors on account of exemptions, and this is for all exemptions, not just homestead exemptions.[112]

[107] See Pattison & Hynes, supra note 42, at 569.

[108] This figure uses our proxy for home equity: total real property less total secured debt.

[109] 11 U.S.C. § 522(b)(3)(B) (2018); 4 Collier on Bankruptcy ¶ 522.10[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2021).

[110] 11 U.S.C. § 554(a) (2018).

[111] Id. § 522(c), (d); see Schwab v. Reilly, 560 U.S. 770, 794–795 (2010) (holding that a Chapter 7 trustee may sell the asset and pay the debtor the dollar amount of the exemption claimed).

[112] To calculate this figure, we divide the number of cases with distributions to a debtor from the Uniform Final Reports of the United States Trustee Program (USTP) by the total number of cases reported by the Administrative Office of the U.S. Courts. Chapter 7 Trustee Final Reports, U.S. Dep't of Just. (Oct. 29, 2020), https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports [https://perma.cc/R4F9-HAFQ].

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Table 2: Finances of Bankrupt and Financially Distressed Debtors[1]

	Percentile ($)				
	50th	75th	90th	95th	% above threshold
Chapter 7 filers					
Home equity	0	0	$11,537	$34,900	
Non-exempt home equity	0	0	0	0	2.6%
Annual income minus median	-$14,795	$1,139	$18,772	$31,027	26.3%
Chapter 13 filers					
Home equity	0	0	$32,000	$71,466	
Non-exempt home equity	0	0	0	$23,692	8.7%
Annual income minus median	-$3,161	$19,811	$45,934	$65,598	45.7%
SIPP financially distressed					
Home equity	0	$45,000	$140,000	$223,999	
Vehicle equity	$1,725	$5,340	$11,106	$15,200	
Financial assets	$109	$1,658	$9,600	$30,300	
Non-exempt home equity	0	0	$69,600	$150,000	19.4%
Non-exempt vehicle equity	0	$2,700	$7,800	$12,199	39.7%
Non-exempt financial assets	$50	$1,401	$9,100	$30,200	58.3%
Non-exempt (all, applying wildcard)	0	$7,645	$89,410	$178,400	37.8%
Annual income minus median	-$27,345	-$8,797	$16,808	$37,660	17.7%

[1] Data on Chapter 7 and Chapter 13 filers are from the 2008–2017 Federal Judicial Center Integrated Database. The table shows the equity and income of bankruptcy filers as reported during the year of the initial filing. Single filers are assigned the means-testing threshold for single-person households, and joint filers are assigned the threshold for two-person households. SIPP financially distressed households are households in the 2008 SIPP that report an instance of financial distress in the wave 6 Adult Well-being Module. The means-testing threshold is assigned based on the size of the household. Financial assets consist of money in bank accounts, interest-earning assets and accounts, and stocks or mutual funds. Survey of Income and Program Participation Datasets 2008, U.S. Census Bureau,

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https://www.census.gov/programs-surveys/sipp/data/datasets.2008.html [https://perma.cc/M63R-NWQV].

We hope that our proposal will draw some debtors into Chapter 7 bankruptcy who would not otherwise file, so Table 2 also reports information about the assets and incomes of Chapter 13 filers and a broader sample of financially distressed households. Chapter 13 filers tend to have greater assets and incomes than those in Chapter 7, but many would still easily qualify for Chapter 7. Only 8.7% have home equity above the applicable state exemption, and more than half report income below their state's median (adjusted for household size). We also examine a sample of financially distressed debtors in the 2008 Survey of Income and Program Participation ("SIPP").[113] We define financially distressed debtors as ones who report an instance of financial distress such as missing a housing or utility payment or foregoing medical treatment for financial reasons. In other work, we and another co-author verify that this proxy is correlated with other measures of financial stress.[114] In Table 2, we see that most of these debtors have no home equity at all (such as renters), and only 19.4% have non-exempt home equity. More have non-exempt vehicle equity (39.7%) or non-exempt financial assets (58.3%), but most of this wealth is quite low. For example, the seventy-fifth percentile for financial assets among these households in financial distress is $1,658, less than the average cost of filing for Chapter 7.

With even a little bit of planning, these debtors could likely protect their wealth by converting it into assets that are protected. There are some limits to this permitted planning,[115] but these limits are unlikely to affect debtors of modest means. BAPCPA imposed a cap (now $170,350) on the homestead exemption if the debtor acquired the residence within 1,215 days before filing,[116] and there is some case law that suggests that debtors who engage in too much planning risk a denial of their discharge. In *Norwest Bank Nebraska, N.A. v. Tveten*, the U.S. Court of Appeals for the Eighth Circuit affirmed a denial of a discharge after the debtor converted

[113] Survey of Income and Program Participation Datasets 2008, U.S. Census Bureau, https://www.census.gov/programs-surveys/sipp/data/datasets.2008.html [https://perma.cc/M63R-NWQV].

[114] See Leora Friedberg, Richard M. Hynes & Nathaniel Pattison, Who Benefits from Bans on Employer Credit Checks?, 64 J.L. & Econ. 675, 682–83 (2021).

[115] 4 Collier on Bankruptcy, supra note 109, ¶ 522.08[4].

[116] 11 U.S.C. § 522(p) (2018); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code, 84 Fed. Reg. 3,488, 3,489 (Feb. 12, 2019).

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$700,000 of wealth from non-exempt to exempt property.[117] The dissent colorfully summarized (and criticized) the holding as "when a pig becomes a hog it is slaughtered."[118] Debtors of modest means do not have hundreds of thousands of dollars of wealth to protect and so run no risk of running afoul of this principle.

The most valuable asset for many debtors is their human capital (their ability to earn future income), and the bankruptcy code explicitly exempts this asset from the estate.[119] Prior to 2005, Chapter 7 did not explicitly consider a debtor's earnings when determining eligibility for bankruptcy, though a few courts dismissed filings by debtors with a substantial ability to repay their debts under an "abuse" standard.[120] BAPCPA added a presumption of abuse that applies if a Chapter 7 debtor's projected disposable income (projected income minus expenses) over the next five years is sufficient to repay at least $6,000 (and for some debtors much more).[121]

To allow a court to make this determination, the debtors must provide schedules of income and expenses, copies of all paystubs received within the sixty days before filing, the most recent tax return, and a statement disclosing any reasonably anticipated increase in their income or expenses.[122] The code imposes other obligations on the debtors as well. The debtors must provide a list of all creditors with their addresses and proof that they completed credit counseling. If a debtor has secured debt such as a mortgage on a home or a car loan, the debtor will also need to file a statement that they intend to retain or surrender the property to the secured creditor, and if the debtor wants to reaffirm debt so that the debtor's liability survives the discharge, the debtor must file a

[117] See Norwest Bank Neb., N.A. v. Tveten, 848 F.2d 871, 872 (8th Cir. 1988); see also Dolese v. United States, 605 F.2d 1146, 1149, 1154 (10th Cir. 1979) (finding over $150,000 in loans from a corporation to its sole shareholder were constructive dividends).

[118] See *Norwest Bank*, 848 F.2d at 879 (Arnold, C.J., dissenting) (quoting In re Zouhar, 10 B.R. 154, 157 (Bankr. D.N.M. 1981)).

[119] 11 U.S.C. § 541(a)(6) (2018).

[120] Id. § 707(b)(1); see Behlke v. Eisen (In re Behlke), 358 F.3d 429, 432, 434, 438 (6th Cir. 2004); 1st USA v. Lamanna (In re Lamanna), 153 F.3d 1, 5 (1st Cir. 1998); Fonder v. United States, 974 F.2d 996, 999–1000 (8th Cir. 1992); In re Walton, 866 F.2d 981, 985 (8th Cir. 1989); Zolg v. Kelly (In re Kelly), 841 F.2d 908, 915 (9th Cir. 1988).

[121] The current projected disposable income for the "abuse" standard is $8,175. 11 U.S.C § 707(b)(2)(A) (2018); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code, 84 Fed. Reg. 3,488, 3,489 (Feb. 12, 2019).

[122] 11 U.S.C. § 521 (2018).

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reaffirmation agreement.[123] If the court holds a discharge hearing, the debtor must appear, but "[f]ew courts hold discharge hearings except in cases in which there are reaffirmation agreements," and even then the court does not need to hold a hearing if the debtor was represented by a lawyer when negotiating the agreement.[124]

BAPCPA's presumption of abuse does not apply to debtors who earn less than the median income for similar households in their state.[125] The vast majority of bankrupt consumers fall below this level. The Federal Judicial Center's bankruptcy data does not record household size, so we ignore any non-filing household members (such as children) and compare the individual filers to the one-person threshold and joint filers to the two-person threshold. The income thresholds are higher for larger households, so our comparison will understate the share of filers below the threshold.[126] Even with this bias, nearly three quarters of Chapter 7 filers are below the relevant median and thus are automatically exempt from the means test. The SIPP does contain household size, which allows us to better estimate whether a household's income exceeds the relevant median. Using this data, fewer than 18% of financially distressed households have income above the relevant median.[127]

B. The High Costs of Bankruptcy and Their Consequences

In a comprehensive study of bankruptcy attorney's fees, Lois Lupica found that, after BAPCPA, the average out-of-pocket costs (direct costs) of filing under Chapter 7 were $1,972 (all dollar amounts are adjusted for inflation to 2021 dollars) for cases in which the debtor had assets to distribute and only slightly less, at $1,806, for "no-asset" cases.[128] Prior to BAPCPA, these costs were significantly lower but still expensive for

[123] Id. § 523(c).

[124] 4 Collier on Bankruptcy, supra note 109, ¶ 521.17.

[125] 11 U.S.C. § 707(b)(6) (2018). The court can still dismiss the case under a totality of the circumstances analysis, but this is rarely done. See infra notes 254–58 and accompanying text.

[126] Id. § 707(b)(6). In addition to the omission of children, our measure also ignores the spouses of married individuals who do not file jointly.

[127] See supra Table 2.

[128] Lupica, supra note 7, at 130 tbl.A-6; CPI Inflation Calculator, supra note 7; see also Pamela Foohey, Robert M. Lawless & Deborah Thorne, Portraits of Bankruptcy Filers, 56 Ga. L. Rev. (forthcoming 2022) (manuscript at 13 & n.53), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3807592 [https://perma.cc/5PBJ-8P2D] (last visited Apr. 6, 2022) (reporting average nominal attorney's fees of $1,313 between 2013 and 2019 and discussing costs of bankruptcy's extensive paperwork).

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financially distressed Americans, at $1,505 for asset cases and $1,199 for no-asset cases.[129] Lupica's post-BAPCPA estimates suggest that the amount that consumers spend on filing and attorney's fees in Chapter 7 is about four times larger than the average amount distributed to general and priority creditors ($450) in these cases.[130] This comparison of averages understates the problem because all of the distributions come from 5% of cases, and more than half of the distributions come from just 0.3% of cases.[131] American consumers filed 6,949,438 Chapter 7 bankruptcies over the last decade.[132] If roughly 95% of these cases were no-asset cases, American consumers spent more than eleven billion dollars on filing and attorney's fees in cases that distributed nothing to general creditors.

In addition to wasting more than a billion dollars a year, the high cost of filing a no-asset Chapter 7 case may push debtors into options that provide less-effective debt relief. Some debtors may avoid filing for bankruptcy altogether and try to evade their creditors' collection efforts.[133] Non-bankruptcy law does afford debtors significant protections.[134] Most of the asset exemptions that are available in bankruptcy are available in state court collection proceedings as well,[135] and both federal and state laws limit the ability of creditors to garnish a debtor's wages.[136] Federal and state laws also limit the ability of creditors and debt collectors to harass a debtor through phone calls or other non-judicial collection techniques,[137] and statutes of limitation and statutes of repose may afford a form of fresh start by eventually making debts

[129] Lupica, supra note 7, at 130 tbl.A-6; CPI Inflation Calculator, supra note 7.

[130] See supra Table 1.

[131] See infra notes 183–84 and accompanying text.

[132] Am. Bankr. Inst., Quarterly Non-business Filings by Chapter (1994–Present) 4–6, http://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Quarterlynonbusinessfilingsbychapter1994-Present.pdf [https://perma.cc/ZN6Q-WEY4] (last visited Jan. 20, 2022).

[133] Scholars sometimes refer to this strategy as informal bankruptcy. See Amanda E. Dawsey, Richard M. Hynes & Lawrence M. Ausubel, Non-Judicial Debt Collection and the Consumer's Choice Among Repayment, Bankruptcy, and Informal Bankruptcy, 87 Am. Bankr. L.J. 1, 2 (2013).

[134] For a longer comparison of the relief offered by bankruptcy and non-bankruptcy law, see Richard M. Hynes, Why (Consumer) Bankruptcy?, 56 Ala. L. Rev. 121, 127–44 (2004).

[135] See, e.g., Tex. Prop. Code Ann. §§ 41.001, 42.001 (West 2021).

[136] See 15 U.S.C. § 1673(a) (2018) (limiting garnishment by general creditors to the lesser of 25% of the debtor's disposable earnings or the amount by which the debtor's disposable earnings exceed thirty times the federal minimum wage); Tex. Const. art. XVI, § 28 (prohibiting garnishment by general creditors).

[137] See Dawsey et al., supra note 133, at 11–12, 16, 18 (describing these laws and testing their effect on bankruptcy filings).

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unenforceable.[138] However, the terms of this informal bankruptcy are not nearly as generous as Chapter 7.

Other debtors will choose another bankruptcy chapter. Individuals can file under Chapter 11, but just 0.3% of bankrupt individuals choose this Chapter.[139] Similarly, Chapter 12, available to family farmers and fishermen, accounts for a negligible number of filings.[140] However, Chapter 13, which is available to individuals with regular income, accounts for 30% of all individual bankruptcies.[141]

Chapter 13 offers debtors a very different deal. Chapter 13 debtors propose a plan whereby they will use their disposable income over five years (three if they have below-median income) to repay their creditors.[142] Debtors don't receive a discharge until they complete their plans, convert their cases to Chapter 7, or petition the court for hardship discharges.[143] About two-thirds (65.6%) of Chapter 13 debtors in the Federal Judicial Center data fail to complete their plan.[144] While 11% of Chapter 13 debtors convert to Chapter 7, the remainder are dismissed, primarily for failure to make plan payments.

If so few debtors actually receive a discharge of their debts, why do so many choose that Chapter? There are several possible reasons. First, some

[138] See Hynes, supra note 134, at 141–42 (describing the effect of statutes of limitations).

[139] See Richard M. Hynes, Anne Lawton & Margaret Howard, National Study of Individual Chapter 11 Bankruptcies, 25 Am. Bankr. Inst. L. Rev. 1, 71 (2017).

[140] Admin. Off. of the U.S. Cts., Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2020, at 1, https://www.uscourts.gov/sites/default/files/bf_f2_1231.2020.pdf [https://perma.cc/Z5ZW-BL4Y] (last visited Jan. 17, 2022) (stating that only 800 of the 544,463 cases commenced were filed under Chapters other than 7, 11, and 13).

[141] See id.

[142] See 11 U.S.C. § 1325 (2018).

[143] Id. § 1328. Chapter 13 does provide for the possibility of a hardship discharge, id., but the Federal Judicial Center data reveals that just 0.58% of Chapter 13 filings resulted in a hardship discharge, Bankruptcy Petition NewSTATS Snapshots Database BPNS Database Codebook, Fed. Jud. Ctr. (Nov. 2021), https://www.fjc.gov/sites/default/files/idb/codebooks/Bankruptcy%20IDB%20Online%20Codebook%20rev%2011102021.pdf [https://perma.cc/Q5K3-YK8B]; Bankruptcy Cases Filed, Terminated, and Pending from FY 2008 to Present, Fed. Jud. Ctr., https://www.fjc.gov/research/idb/bankruptcy-cases-filed-terminated-and-pending-fy-2008-present [https://perma.cc/9XZM-PHAL] (last visited Jan. 18, 2022).

[144] Others have found similar failure rates. See Sara S. Greene, Parina Patel & Katherine Porter, Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes, 101 Minn. L. Rev. 1031, 1032 (2017) ("Two out of three consumers dropout before the end of the repayment plan . . . ."); Scott F. Norberg & Andrew J. Velkey, Debtor Discharge and Creditor Repayment in Chapter 13, 39 Creighton L. Rev. 473, 476 (2006) (finding a discharge rate of 53%).

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may be ineligible for Chapter 7 due to the means test, but Chapter 13 still accounted for around 30% of consumer filings even before BAPCPA.[145] Table 2 above reveals that most Chapter 13 debtors earn less than the median income, and others may have sufficiently large expenses to pass the means test.[146] Second, some debtors may file under Chapter 13 because they are ineligible for a discharge in Chapter 7. A debtor cannot receive a discharge in Chapter 7 if she received a discharge under Chapters 7 or 11 in the last eight years or a discharge under Chapters 12 or 13 in the past six years.[147] By contrast, a debtor can receive a discharge under Chapter 13 as long as she has not received a discharge under Chapters 7, 11, or 12 in the past four years or a discharge under Chapter 13 in the past two years.[148] Third, receiving a discharge is not the primary goal of most Chapter 13 debtors.[149] More commonly, they mention goals such as saving their home from secured creditors,[150] and Chapter 13 may facilitate this goal.[151] Fourth, some debtors may be pushed into Chapter 13 to increase their attorney's profit.[152]

Most important for this proposal, debtors may file under Chapter 13 because they cannot afford to file under Chapter 7. The total expenses of Chapter 13 are actually larger than Chapter 7. Lupica estimated that

[145] Admin. Off. Of the U.S. Cts., Table F-2: U.S. Bankruptcy Court: Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code During the Twelve Month Period Ended Dec. 31, 2004, at 1, https://www.uscourts.gov/sites/default/files/statistics_import_dir/1204_f2.pdf [https://perma.cc/E5Q9-WDPQ] (last visited Jan. 17, 2022) (showing that, in 2004, 449,129 of 1,597,462 total filings (about one-third) were under Chapter 13).

[146] Some scholars argue that high-income debtors can easily generate expenses so that they pass the means-test. See, e.g., David Gray Carlson, Means Testing: The Failed Bankruptcy Revolution of 2005, 15 Am. Bankr. Inst. L. Rev. 223, 260–63, 266–67 (2007) (describing debtors "double-dipping" to claim a spouse's expenses against income without counting the spouse's income as contributing to the debtor's expenses, and describing the benefits of "rack[ing] up" more bad debt to "game the system"); Eugene R. Wedoff, Means Testing in the New 707(b), 79 Am. Bankr. L.J. 231, 242 (2005) ("[C]uriously, the trigger points also give the debtor an incentive to increase non-priority unsecured debt prior to bankruptcy . . . .").

[147] 11 U.S.C. § 727(a)(8)–(9) (2018).

[148] Id. § 1328. Because Chapter 13's discharge comes at the end of a plan that typically lasts between three and five years, this limitation is rarely binding.

[149] Katherine Porter, The Pretend Solution: An Empirical Study of Bankruptcy Outcomes, 90 Tex. L. Rev. 103, 111–12 (2011).

[150] Id.

[151] Most notably, the debtor may use Chapter 13 to cure missed mortgage payments. 11 U.S.C. § 1322(b)(5) (2018).

[152] See Lars Lefgren, Frank L. McIntyre & Michelle Miller, Chapter 7 or Chapter 13: Are Client or Lawyer Interests Paramount?, 10 B.E.J. Econ. Analysis & Pol'y. 1, 2 (2010) (arguing that attorneys steer debtors into the Chapter that maximizes the attorneys' profits).

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average Chapter 13 direct costs were $3,962 for cases that resulted in a discharge and $2,505 for cases that did not (amounts adjusted for inflation to 2021 dollars).[153] By far the largest component of the direct cost of filing is the attorney's fee.[154] In Chapter 13, however, debtors can pay these fees in installments over the course of their plan.[155] If debtors file under Chapter 7 without paying their attorneys in full, their obligations to pay would be discharged along with their other pre-petition debt.[156] The lower up-front costs of attorney's fees cause some to choose Chapter 13 who would otherwise prefer Chapter 7.[157]

Debtors can avoid attorney's fees by filing pro se, but the Federal Judicial Center data suggests that only about 6.5% of Chapter 7 consumer filers do,[158] and debtors who file pro se have a much lower success rate. Filing for bankruptcy is difficult. The instruction book that accompanies the bankruptcy petition has forty-four pages,[159] and many pro se filers fail. Around 95% of Chapter 7 debtors receive a discharge, but this number falls to just 79% for debtors who file pro se.[160]

[153] Lupica, supra note 7, at 128 tbl.A-1; CPI Inflation Calculator, supra note 7.

[154] In Chapter 7, attorney's fees averaged $1,498 in asset cases and $1,332 in no-asset cases. Lupica, supra note 7, at 132 tbl.A-10. In Chapter 13, they averaged $3,550 in cases that resulted in a discharge and $2,065 in cases that did not. Id. at 129 tbl.A-5.

[155] 11 U.S.C. § 330 (2018).

[156] 1 Collier on Bankruptcy, supra note 109, ¶ 1.07[1][a][i].

[157] See Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, "No Money Down" Bankruptcy, 90 S. Cal. L. Rev. 1055, 1088–90 (2017) (documenting the prevalence of "no money down" Chapter 13 filings among consumers otherwise suitable for Chapter 7). As evidence of liquidity constraints among bankruptcy filers, research finds sharp increases in Chapter 7 filings when debtors receive April tax rebates. At the same time, there are slight declines in Chapter 13 filings, consistent with some filers substituting Chapter 7 for Chapter 13 after receiving the rebates. See Tal Gross, Matthew J. Notowidigdo & Jialan Wang, Liquidity Constraints and Consumer Bankruptcy: Evidence from Tax Rebates, 96 Rev. Econ. & Stats. 431, 431 (2014); see also Mann & Porter, supra note 8, at 319 (finding an increase in Chapter 7 filings between January and March and suggesting that "debtors wait to file until their tax refunds become available to defray the costs of filing").

[158] Others have found similar results. Lupica, supra note 7, at 130–31 tbls.A-7 & A-8 (finding that 5.8% of debtors filed pro se and that nearly all (97%) pro se filers pay someone to prepare the forms for them).

[159] U.S. Bankr. Crt., Instructions | Bankruptcy Forms for Individuals (Dec. 2020), https://www.uscourts.gov/sites/default/files/instructions_individuals.pdf [https://perma.cc/6WM7-YHEM].

[160] Authors' calculations are from FJC Integrated Database cited *supra* note 94.

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III. ADAPTING THE INSOLVENT DEBTOR'S OATH TO PROVIDE NOTICE FILING IN MODERN BANKRUPTCY

Americans have long been wary of generous debt relief. In 1725, Massachusetts repealed its poor debtor's oath because it had "been a shelter to vicious and improvident persons, a great encouragem[en]t to idleness and ill-husbandry, and too much a temptation to perjury, as well as injurious and oppressive to many honest creditors."[161] We would restate the argument differently; generous debt relief creates at least two forms of moral hazard. First, it reduces the incentive for the debtor to avoid the need for relief in the first place—encouraging "improvidence" and "idleness." Second, generous debt relief that is not accompanied by careful means testing encourages debtors to claim relief when they do not actually need it.

To minimize the risk that debtors will claim relief that they do not need and deserve (type II error), modern bankruptcy law demands that all debtors submit extensive evidence. But the required evidence raises the cost of filing and thus excludes debtors who truly need and deserve relief (type I error). Bankruptcy requires too much information from too many people, and notice filing provides a way to better balance type I and type II errors. Most debtors should be allowed to begin bankruptcy with a modern insolvent debtor's oath, and debtors should present extensive evidence only if a creditor or trustee challenges the oath. By relying on the knowledge and expertise of creditors, notice filing would reserve bankruptcy's costly processes for those cases in which there is a real risk that the debtor does not deserve relief (type II error).

The advantages of notice filing depend on the ability of creditors to sort debtors by the risk that they would either have assets available for distribution or fail bankruptcy's means test. We demonstrate that even with a small subset of the information available to creditors, one can identify a large number of bankrupt debtors for whom this risk is negligible. The law could further reduce this risk by discouraging debtors from wrongfully taking an insolvent debtor's oath. The fear of prosecution for bankruptcy fraud may deter debtors from wrongfully taking an oath, but debtors may learn that this threat is empty. Debtors who include a material misstatement in their bankruptcy filing face more risk of being struck by lightning than being convicted of bankruptcy

[161] Coleman, supra note 45, at 41.

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fraud.[162] To supplement this threat, bankruptcy should sharply limit the exemptions available to those who wrongfully take an insolvent debtor's oath.

Perhaps an insolvent debtor's oath should not be available to all debtors. First, by requiring a challenge before collecting information, notice filing marginally increases transactions costs for those cases in which creditors or trustees challenge and demand more evidence. If creditors are almost certain to challenge, it may be better to require a debtor to provide the evidence at the outset. Second, debtors with complicated finances require complicated oaths, and complexity may deter needy debtors.

Finally, creditors and trustees must have the right incentives to challenge. Creditors may be too eager to challenge debtors who will almost certainly pass bankruptcy's tests in order to raise the cost of filing for bankruptcy. This problem can be mitigated by raising the fee for challenging an oath and, perhaps, using some of this fee to offset the costs of challenges for a debtor who rightfully took the oath. Creditors and even trustees may also have too little incentive to challenge debtors who have wrongfully taken an oath because they cannot capture all of the benefit. Thus, it may be necessary to expand the current auditing role of the U.S. Trustee.

A. An Insolvent Debtor's Oath for Consumer Bankruptcy

An insolvent or poor debtor's oath serves as a surprisingly good model for modern bankruptcy practice. This oath was designed for the very simple purpose of verifying that the debtor had no assets available for distribution to creditors and was otherwise entitled to relief.[163] Although modern bankruptcy law has procedures for determining creditors' claims against a debtor and for distributing the debtor's property, these procedures are not used in around 95% of cases because no assets are actually distributed.[164] Thus, the law could jettison these procedures, or at least reserve them for cases in which there are assets, and adapt the insolvent debtor's oath to accommodate the basics of both the asset and income means tests of modern bankruptcy.

[162] See infra Subsection III.C.1.
[163] See Mann, supra note 20, at 50–51.
[164] See supra Table 1.

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There are many reasonable possibilities for the language of this oath, but we offer a preliminary version to make our argument concrete: "After any exempt property is excluded and administrative expenses are paid, no funds will be available to distribute to unsecured creditors, and my household income is below [median income]."

Given a list of applicable exemptions for their state, many debtors could easily determine that they satisfy the requirements of the oath. If a creditor or a trustee challenges the validity of the oath, the debtor would need to provide the forms and schedules required by current law. However, if there is no challenge, the debtor would receive a discharge by default. Of course, just as a state court may set aside a plaintiff's default judgment in case of fraud,[165] so too could a bankruptcy court revoke a discharge for fraud. Indeed, current law already gives bankruptcy courts the ability to do so.[166] Current law also allows bankruptcy courts to revoke a discharge if a subsequent audit by the U.S. Trustee office identifies a material misstatement that the debtor cannot explain.[167] We discuss the role of audits in our proposed system below.[168]

An analogy to tax law may be helpful. Millions of Americans are not required to file tax returns because their income falls below a threshold that varies by the household's characteristics.[169] For example, a married couple who are both over sixty-five did not have to file if they earned less than $27,000 in 2019.[170] Many will choose to file tax returns even though they do not have to do so, but that is usually because they are entitled to a refund as a result of either over-withholding payroll taxes or being eligible for the Earned Income Tax credit.[171] Since the amount of the refund varies with the debtor's income, the government needs them to file a tax return so that it knows exactly how much to pay.

Unlike these programs, Chapter 7 provides the same basic relief to nearly all debtors.[172] Chapter 7 grants these debtors a discharge of their

[165] See, e.g., Va. Code Ann. § 8.01-428 (2005) (allowing a court to set aside a default judgment due to fraud on the court).
[166] 11 U.S.C. § 727(d) (2018).
[167] Id.
[168] See infra note 239 and accompanying text.
[169] Internal Revenue Serv., Publ'n. 501, Dependents, Standard Deduction, and Filing Information 2 tbl.1 (2020), https://www.irs.gov/pub/irs-pdf/p501.pdf [https://perma.cc/Z6K5-HNHX].
[170] Id.
[171] Id. at 5.
[172] In Section IV.A below, we discuss aspects of Chapter 7 relief that do not fit neatly into the standard discharge.

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debts without requiring them to forfeit any assets to their unsecured creditors. The effect of bankruptcy's relief varies because bankruptcy allows most debtors to keep what they have while discharging most unsecured debt. As a result, bankruptcy protects more income for those who earn more and wipes away more debt for those who owe more. A small number of debtors use exemptions to protect hundreds of thousands of dollars, while most debtors have few assets to exempt. Courts do not need to know the amount of income or assets they are protecting or even the amount of debt they are discharging. In the overwhelming majority of cases, courts only need to know that the debtor's income is sufficiently low to qualify for Chapter 7 and that the debtor has no non-exempt assets available for distribution.

To be sure, the information bankrupt debtors provide about their finances serves other purposes. Information about a debtor's creditors allows courts to provide notice to all affected parties, but in Section IV.A below, we argue that actual notice is not and should not be required for most creditors. Social scientists, including ourselves, have used data from debtors' schedules to assess the performance of bankruptcy law.[173] However, forcing destitute individuals to pay nearly $2,000 each to generate this dataset is patently absurd. Academic purposes could be served nearly as well with information from a random sample of these debtors that could be generated at a fraction of the cost. Moreover, the cost of this data could more fairly be borne by academia or society in general rather than be placed on the backs of the bankrupt.

B. The Ability of Creditors to Sort Debtors

A central premise of our argument is that, for a large number of debtors, creditors can be confident that an insolvent debtor's oath was rightfully taken. Creditors already know a lot about debtors—information collected during loan applications, credit reports, and public records—that they can use to predict which debtors likely qualify for the oath. Moreover, for many debtors, the prediction problem is not hard. As we noted earlier, many Chapter 7 filers easily meet the criteria of the insolvent debtor's oath. Among Chapter 7 filers in 2008–2017, around 95% had no assets to distribute, almost 75% had below-median income, and 72% had both no

[173] See Pattison & Hynes, supra note 42, at 569.

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assets to distribute and below-median income.[174] Thus, even if creditors have no information about a debtor, it is very likely that the debtor satisfies the criteria of the insolvent debtor's oath.[175]

With information they have available, creditors can generate good predictions of which borrowers have rightfully taken the oath and which cases they may wish to challenge. To illustrate, we consider what creditors are able to infer about debtors from just a few pieces of easily available information. Using data from the Federal Judicial Center Integrated Database on Chapter 7 filers between 2008 and 2017, we examine how well creditors could predict whether a filer had funds available for distribution or had above-median income.[176] That is, if the law allowed Chapter 7 debtors to take an insolvent debtor's oath in lieu of the numerous forms and schedules that they must now complete, could creditors have predicted which cases would not qualify for the oath because they have non-exempt funds or above-median income? Because cases with significant assets may take some time to close and our data set only updates case status through 2017, we examine cases filed between 2008 and 2015 and closed by 2017.

[174] See supra Tables 1 and 2. These statistics are based on the reported income and equity at the time of filing, but they are unchanged if calculated using the reported income and equity at the time that the case is closed.

[175] This assumes that the types of debtors who file using the insolvent debtor's oath would remain similar to the types of debtors currently filing for Chapter 7 bankruptcy. We discuss this assumption below.

[176] See supra note 94. The indicator for funds available for unsecured creditors is whether the Chapter 7 filer answered "yes" to the question seventeen under Part six: "Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?" See U.S. Cts., Official Form 101 Voluntary Petition For Individuals Filing for Bankruptcy 7 (2020), https://www.uscourts.gov/sites/default/files/b_101.pdf [https://perma.cc/WU28-JVZ3]. The percent with below-median income is based on the filer's reported monthly income compared to the median for a single-person household (or a two-person household for cases filing jointly). For these prediction exercises, we use the final value for these variables at the time the case was closed.

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Table 3: Percent of 2008–2015 Chapter 7 Filers with Funds Available for Unsecured Creditors[1]

State	Percent	State	Percent	State	Percent
Montana	32.9%	Oklahoma	5.6%	Massachusetts	2.4%
South Dakota	26.4%	Iowa	5.3%	Pennsylvania	2.3%
Utah	21.0%	South Carolina	5.2%	Arkansas	2.2%
Louisiana	20.9%	Minnesota	4.8%	Missouri	2.2%
Colorado	20.0%	Vermont	4.8%	Kentucky	2.0%
Indiana	18.2%	Washington	4.7%	Maryland	2.0%
Wyoming	16.1%	North Dakota	4.5%	California	1.9%
Kansas	14.6%	New York	4.4%	Tennessee	1.7%
Nevada	14.1%	Nebraska	4.3%	Wisconsin	1.7%
Arizona	12.1%	Michigan	3.4%	West Virginia	1.3%
Florida	11.5%	Virginia	2.9%	New Jersey	1.3%
Idaho	11.3%	Texas	2.8%	New Mexico	1.1%
Ohio	9.5%	Hawaii	2.8%	Georgia	1.0%
New Hampshire	7.9%	Connecticut	2.8%	Mississippi	1.0%
Maine	7.6%	North Carolina	2.7%	Delaware	0.9%
Oregon	7.5%	Alabama	2.5%	Rhode Island	0.8%
Alaska	5.6%	Illinois	2.5%		

[1] Data: 2008–2015 FJC Integrated Database.[177] Funds available for unsecured creditors is measured when the Chapter 7 case closes.

To begin, suppose creditors know only a filer's location. Nationally, 5.6% of Chapter 7 debtors who filed between 2008 and 2015 had funds available for distribution to unsecured creditors at the close, but there are large differences between states.[178] In a dozen states, fewer than 2% of filers had funds available. At the other extreme, there are a dozen states

[177] See supra note 94.

[178] See supra note 94. The 5.6% of debtors reporting that they expect funds available for distribution in the FJC data nearly matches the 5.7% of filers who had funds available for distribution based on the Chapter 7 Trustee Final Reports. The difference is partly due to the two datasets covering different periods. The FJC sample covers cases filed between 2008–2015 and closed by 2017, while the Trustee statistics are the average among cases filed between 2000 and 2013. Moreover, the FJC's state-level share of cases that expect funds to be available is highly correlated with the Trustee Final Reports' share of a state's cases that actually disburse funds (a correlation coefficient of 0.86).

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where more than 10% of filers did, and in Montana, more than 30% did. Creditors can incorporate this information, challenging more cases in states where debtors are more likely to have funds available.

Knowing the debtor's judicial district provides better information. Across judicial districts, the share of Chapter 7 cases with funds for unsecured creditors ranges from 0.8% in the Northern District of Mississippi to 40.2% in the Middle District of Louisiana. Knowing the debtor's zip code is better still. Figure 1 reports differences across zip codes in the share of filers having funds available (top panel) or the share with above-median income (bottom panel).[179] Based on the zip code, creditors can identify groups of filers that almost certainly satisfy asset and income criteria. In nearly 7,000 zip codes (containing 18% of Chapter 7 filings), fewer than 1% of Chapter 7 filers had funds available for distribution to unsecured creditors. At the other extreme, there are thirty-one zip codes where the share exceeds 50%. For income, the differences across zip codes are even larger. Nationally, 26.5% of all Chapter 7 filers earn above-median income, but the shares across different zip codes range from 0% to 80%. Recall that our data includes the entire population of bankruptcy filings. This means that there are some zip codes for which there were no debtors with above-median income who filed under Chapter 7 during this ten-year period.

[179] In Figure 1 and the statistics reported below, we restrict the sample to zip codes with at least ten Chapter 7 filings during the sample period of 2008–2015. Funds for unsecured creditors and income levels are as reported at the time that the bankruptcy filing was closed.

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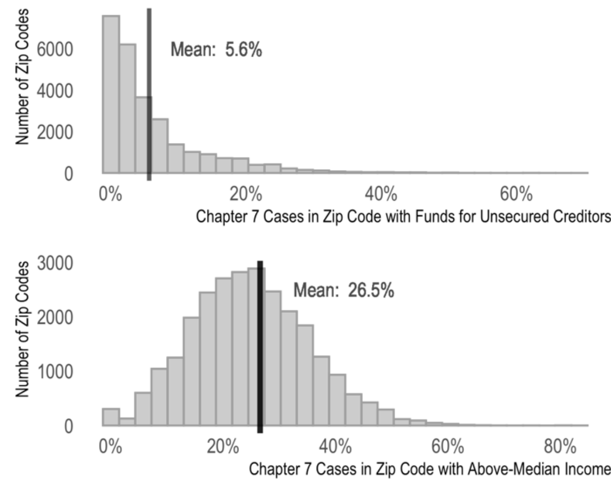
Figure 1: Geographic Differences in Can-Pay Chapter 7 Filers[1]



[1] Data: 2008–2015 FJC Integrated Database, restricted to zip codes with at least ten Chapter 7 bankruptcy filings during this period. In each panel, the vertical lines show the national mean for Chapter 7 filers. Histograms show the distribution of unweighted means at the zip code level.

Creditors also have access to credit reports, and this too is informative about whether debtors qualify for the oath. For example, creditors will know the debtor's total unsecured debt. Figure 2 plots the relationship between a debtor's total unsecured debt and the likelihood that the debtor has funds available for unsecured creditors (top panel) or above-median income (bottom panel). Both curves are generally upward sloping, indicating that filers with more unsecured debt tend to have higher assets and incomes as well.

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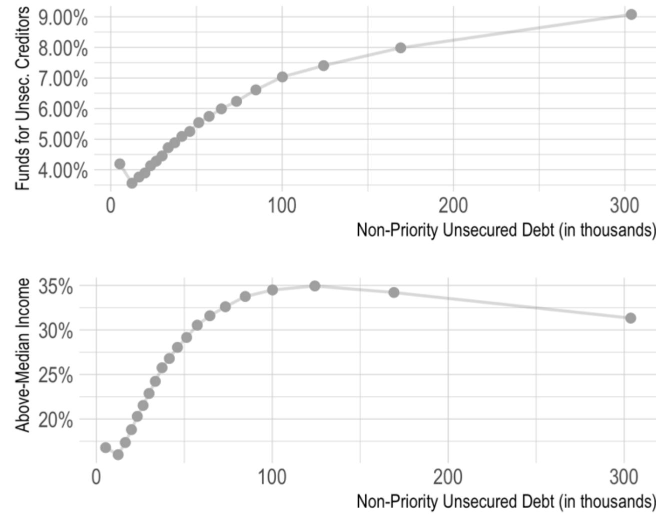
Figure 2: Relationship Between Outstanding Debt and Can-Pay Debtors[1]



[1] Data: 2008–2015 FJC Integrated Database Chapter 7 cases. To limit the range of the plot, we restrict the data to cases with less than $500,000 in non-priority unsecured debt. The top panel plots the share of cases with funds for unsecured creditors and the bottom panel plots the share of cases with above-median income for each bin.

These examples show that the debtor's location and the debtor's outstanding debt are independently informative about whether the debtor qualifies for the oath. Such information, however, will be most useful taken together, along with other information, within a model that provides a quantitative prediction about whether debtors qualify for the oath. In the following exercise, we estimate simple models predicting whether a Chapter 7 case would fail either requirement of the insolvent debtor's oath. We intentionally use simple models relying on a small number of variables in order to demonstrate a lower bound on the predictive ability of creditors. With sophisticated models, more resources, and more information about debtors, creditors would be able to improve upon the accuracy of these baseline predictions.

We form a model-training sample consisting of 50,000 randomly selected Chapter 7 cases, then estimate several logit models that rely on different subsets of variables. Table 4 reports the estimates and measures of performance. Models I–III predict whether a case has funds available

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for distribution to unsecured creditors. Model I includes only a single control variable: the zip code average share of cases with funds available.[180] Model II adds the (log of) a debtor's total liabilities and unsecured debt as control variables. Model III, our richest specification, adds more variables that would likely be available to the creditor, namely, the zip code's share of cases with above-median income and its share with non-exempt home equity, along with controls for whether the debt is primarily business debt and for homeownership status. Because creditors may already have or be able to purchase information about a debtor's monthly income,[181] we include that as well. Additionally, Model III interacts the zip code's share of funds available with many of these variables. Model IV changes the dependent variable, instead predicting whether a case has above-median income. For obvious reasons, we do not include the debtor's monthly income as a predictor in this model.

To evaluate the performance, we use these models to make predictions in a separate test sample consisting of roughly 580,000 Chapter 7 cases that were not used to estimate the models. For each case in the test sample, each model generates a predicted probability of having funds available (Models I–III) or having above-median income (Model IV). For example, based on the zip code's share of cases with funds available and the debtor's debt, Model II may predict that a given case has a 30% chance of having funds available. Creditors, in deciding which cases to challenge, can then choose a threshold probability and challenge cases where the predicted probability exceeds this threshold. In choosing this threshold, there is a trade-off between mistakenly challenging a debtor who qualifies for the oath (false positives) and not challenging a debtor who fails it (false negatives). The optimal choice of this threshold will depend on the relative costs of these false positives and false negatives. To provide a concrete example of model performance, we assume creditors assign equal weight to these errors in calibrating their test.[182]

The bottom panel of Table 4, test sample performance, summarizes the ability of the models to classify debtors correctly within the test sample.

[180] In all models, zip code averages are formed from a separate sample of 5.3 million bankruptcy filings that are not included in either the training sample or testing sample. Whether funds are available and whether the filer passes the means test is based on the information reported at the close of the bankruptcy case. The results are largely unchanged if, instead, we use the values reported during the year of the initial filing.

[181] See infra note 191 and accompanying text.

[182] Specifically, we set the prediction cut-point to maximize the product of the true positive rate and true negative rate.

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Based on the dependent variable, "positive" indicates having available funds for unsecured creditors (Models I–III) or above-median income (Model IV), and "negative" indicates the opposite. The first row, negative predictive value, reports the share of cases that the model classified as negative which genuinely were negative. In Models I–III, 98% of cases that were classified as not having assets available genuinely did not have assets available. Thus, creditors can reliably identify a group of borrowers unlikely to have funds available. The next row shows the true positive rate, which measures the share of cases that genuinely do have funds (positive cases) that are correctly classified. For Model I, the true positive rate indicates that 73.5% of the cases that genuinely have assets are correctly classified. Thus, the model is able to both identify a group of borrowers that are extremely unlikely to have funds and is also able to identify most of the cases that do have funds available. The next row, the true negative rate, is the share of cases that genuinely have no funds (negative cases) which are correctly classified. Our choice to balance false positives and false negatives is evident in that both the true positive rates and true negative rates are around 73%.

In Model IV, we also predict whether the debtor has above-median income.[183] If creditors have a measure of the debtor's income, perhaps through information collected during loan applications or from services that collect payroll information,[184] then they can almost perfectly identify which debtors have above-median income. In Model IV, we instead conservatively assume creditors have no information about a specific debtor's income. Using other variables, creditors can still identify groups of debtors that are very likely to pass the means test. The negative predictive value indicates that, of cases that the model classifies as having below-median income, 84.2% do in fact have below-median income. The true positive and true negative rates are slightly lower than those in Models I–III, correctly classifying around 65% of positive and negative cases.

[183] To keep the Table concise, we report only one specification predicting above-median income.

[184] See infra note 191 and accompanying text.

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Table 4: Predicting the Availability of Funds for Unsecured Creditors[1]

	Dependent variable:			
	Indicator for funds available for distribution to unsecured creditors			Indicator for above-median income
Logit Model	I	II	III	IV
Control variables				
Zip code-level controls				
Share with funds available	11.39***	11.57***	24.09***	1.17**
	(0.22)	(0.22)	(1.49)	(0.53)
Share with above-median income			-0.86**	7.00***
			(0.38)	(0.83)
Share with non-exempt equity			-1.38	-1.41
			(1.30)	(1.26)
Individual-level controls				
Log(total liabilities)		0.39***	0.21***	0.65***
		(0.02)	(0.05)	(0.04)
Log(unsecured debt)		0.06**	0.20***	-0.06***
		(0.03)	(0.03)	(0.02)
Log(monthly income)			0.21***	
			(0.06)	
Indicator for business debt			1.05***	-1.59***
			(0.14)	(0.13)
Indicator for home owner			0.58***	0.08**
			(0.06)	(0.03)
Interactions	No	No	Yes	Yes
N (training sample)	50,000	50,000	50,000	50,000
Test sample performance				
Negative predictive value	98.0%	97.9%	98.1%	84.2%
True positive rate	73.5%	72.1%	75.2%	66.4%
True negative rate	73.0%	75.4%	74.4%	64.3%
AUC	0.79	0.8	0.814	0.707

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[1] This Table reports coefficient estimates for logit models estimated on a sample of 50,000 randomly selected Chapter 7 cases filed between 2008 and 2015. The test sample is a randomly selected 10% sample of Chapter 7 cases, excluding those used in model training. Standard errors are reported in parentheses. Funds available, above-median income, and zip code-level averages are based on records reported at the close of the case. Zip code averages are formed from observations that are not in the test or training sample. Individual-level controls are as reported during the year the case was filed. Model III includes the interaction of the zip code share with funds available with itself, the share with above-median income, the share non-exempt, the log of total liabilities, and the log of monthly income. Model IV includes the same interactions but substitutes the zip code's share of cases with above-median income for the share with funds available.

The performance statistics reported above depend on our choice of a threshold used to classify cases, and there is a trade-off between the true negative rate and true positive rate. With a different threshold, creditors can generate fewer false positives at the cost of more false negatives. That is, by setting a higher challenge threshold, creditors can challenge fewer cases but increase the likelihood that challenged cases truly have assets to distribute. This may be optimal because, while about 5% of Chapter 7 cases have some funds to distribute, most of these cases distribute very small amounts. Only 22% of Chapter 7 asset cases (1.3% of all Chapter 7 cases) between 2000 and 2013 distributed more than $5,000 to unsecured creditors. Significant distributions are concentrated in an even smaller segment. 58% of the total amount distributed to unsecured creditors during this period came from just the top 5% of asset cases (the top 0.3% of all Chapter 7 cases). By using a higher threshold for challenging cases, creditors could focus on identifying this small share of cases with non-trivial distributions to unsecured creditors.

Table 4 also reports the area under the receiver operating characteristic curve ("AUC"), a standard measure of model performance for binary classifiers that does not depend on our choice of threshold.[185] The AUC can be interpreted as the probability that, given a randomly chosen true positive and true negative case, the model will correctly rank the positive case above the negative one. For example, an AUC of 0.5 implies that it is a coin flip whether the model will correctly rank a random positive case above a negative case. Such a model would have no predictive value. As seen in Table 1, our measures are well above 0.5. The AUC increases from 0.79 to 0.814 as we move from Model I to Model III, reflecting the

[185] David W. Hosmer Jr., Stanley Lemeshow & Rodney X. Sturdivant, Applied Logistic Regression 173–77 (David J. Balding et al. eds., 3rd ed. 2013).

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advantage of including more information. When assessing the goodness of fit, an AUC of 0.7–0.8 is considered acceptable discrimination between positive and negative cases, and an AUC of 0.8–0.9 would be excellent.[186] In summary, even with this simple model and a few variables, these models do a fairly good job of discriminating between cases that are likely and unlikely to qualify for the insolvent debtor's oath.

There are a few caveats to this exercise. We are assuming creditors will want to challenge cases that report having funds available for unsecured creditors (or that have non-exempt equity or fail the means test). In practice, creditors may have different objectives when deciding who to challenge, and so they would be solving a somewhat different prediction problem than we do. For example, creditors may wish to challenge only cases in which the funds available are likely to exceed the creditor's cost of bringing a challenge. Most importantly, our exercise evaluates the potential to predict the assets and income using data on past Chapter 7 filers. Applying this model to future filers taking the insolvent debtor's oath is more complicated. First, the composition of filers will change, as the aim of simplifying filing is to make bankruptcy more affordable and increase access to bankruptcy. The new filers are likely to come from the lower end of the income and asset distributions, however, so they may be easy to identify as qualifying for the insolvent debtor's oath. Second, our model incorporates some information about bankruptcy filers that will not be collected from those taking an insolvent debtor's oath. For the individual-level data, creditors have access to close substitutes from credit bureaus, public records, and administrative records. For the zip code-level averages, creditors can update these historical averages with information about changes in economic characteristics across zip codes. In general, these zip code characteristics are persistent over time, so the past values will remain informative even if new information is not being collected.

Despite these caveats, our analysis almost certainly underestimates a creditor's ability to classify debtors. We intentionally use a simple model based on only a few characteristics of debtors. Creditors, in contrast, have significantly more resources, experience, and information to use when classifying borrowers. Indeed, predicting whether a debtor is likely to have assets or income is a familiar problem for creditors and debt collectors. Collecting debt, through litigation or collection agents, costs

[186] Id. at 177.

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money, so creditors want to target these efforts at those most likely to repay. As one English debt collection manual colorfully explains,

> Legal action is pointless if the customer does not have the means to pay the amount of the judgment awarded. In fact it is worse than pointless because you stand to lose the court fees and possibly other costs too. There is a time-honoured saying that in matters of the law the only person who can defeat a very rich person is a very poor person. If the customer does not have the money, it is unlikely that a rich philanthropist will be found to provide it and you had better not start legal proceedings.[187]

Creditors and debt collectors will try to reserve the most expensive collection efforts for those debtors who can be persuaded or forced to pay, and they make significant technology investments to do so efficiently. Since the early 1990s, creditors have adopted collection-scoring models and machine learning to segment delinquent accounts and better target their collection resources.[188]

Creditors also have access to much more information about debtors than what we use in our exercise. The creditor may have collected information about the debtor's income and assets when it extended the loan, and some creditors, such as credit card companies, will have extensive spending data that can serve as a proxy for income. Creditors can also purchase needed information from third parties. For example, creditors can use public records to find assets such as real estate or motor vehicles.[189] If creditors do not want to gather the public records themselves, they can use services such as Experian or Lexis-Nexis.[190] Experian offers a model that predicts a debtor's income based on credit bureau attributes. Equifax offers even more direct information; a subsidiary called The Work Number has "a massive database that contains all (or almost all) of your work history and salary

[187] Roger Mason, The Complete Guide to Debt Recovery 1 (2003).

[188] Lukasz A. Drozd & Ricardo Serrano-Padial, Modeling the Revolving Revolution: The Debt Collection Channel, 107 Amer. Econ. Rev. 897 app. at 4–7 (2016), https://www.aeaweb.org/content/file?id=3753 [https://perma.cc/5EZF-AU95].

[189] See Kathleen Michon, How Do Judgment Creditors Find Your Property?, Nolo, https://www.nolo.com/legal-encyclopedia/how-do-judgment-creditors-find-your-property.html [https://perma.cc/S2V6-8CZV] (last visited Feb. 7, 2021).

[190] Collections Products, Experian, https://www.experian.com/consumer-information/collections-products [https://perma.cc/6YTT-8HXE] (last visited Feb. 7, 2018).

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information."[191] The creditors can even outsource the analytics; Lexis-Nexis provides ratings that are explicitly designed to predict whether collection efforts will prove fruitful.[192]

In addition to this information available from credit bureaus, public records, and administrative records, debtors who rightfully take an insolvent debtor's oath may want to voluntarily provide some information to reduce the risk that they will be challenged. For example, an insolvent debtor's oath could permit, but not require, a debtor to attach a prior year's tax return or a recent pay stub. Of course, even voluntary disclosure can have significant costs, and the current law's requirement that debtors produce tax returns and pay stubs are among the most criticized aspects of current bankruptcy law.[193] Allowing the inclusion of this evidence is not the same as requiring it.[194] Debtors who have other strong indicators (e.g., residence location and debt load) of having no assets and below-median income may have little need to volunteer more.

With these additional sources of information, more sophisticated models, and experience in predicting collection outcomes, creditors could do much better than our simple models in predicting whether a debtor has wrongfully taken an insolvent debtor's oath.[195] We do not argue that this prediction will be perfect. After all, the low rate at which judgments are

[191] Bethany Lape, How Does That Debt Collector Know About My New Job?, MyHorizonToday (June 11, 2015), https://www.myhorizontoday.com/bankruptcy101/how-does-that-debt-collector-know-about-my-new-job/ [https://perma.cc/YT52-PSWY].

[192] Collections and Recovery, Lexis Nexis, https://risk.lexisnexis.com/financial-services/collections-and-recovery [https://perma.cc/849C-UKGX] (last visited Feb. 7, 2021); Debt Recovery Assessment, Lexis Nexis, https://risk.lexisnexis.com/financial-services/collections-and-recovery/debt-recovery-assessment [https://perma.cc/EQ38-3TME] (last visited Feb. 7, 2021).

[193] James J. White, Abuse Prevention 2005, 71 Mo. L. Rev. 863, 874 (2006); Keith M. Lundin, Ten Principles of BAPCPA Not What Was Advertised, 24 Am. Bankr. Inst. J. 1, 3 (2005) ("Don't think for a minute that bankruptcy professionals are happy about this purposeless complication and inefficiency. Getting paid to gather paycheck stubs . . . has no utility for anyone in bankruptcy cases.").

[194] Under some assumptions, voluntary disclosure may become a de facto requirement because the market will assume that a refusal to disclose reveals bad information. See Sanford J. Grossman & Oliver D. Hart, Disclosure Laws and Takeover Bids, 35 J. Fin. 323, 324 (1980).

[195] One concern is these prediction algorithms could exacerbate racial inequalities, particularly for Black bankruptcy filers, within the bankruptcy system. For example, the prediction algorithms may lead creditors to challenge more cases filed by members of minority groups. In our data, however, the share of a zip code's residents that are Black has a negative correlation with the share of cases with funds for unsecured creditors (a coefficient of correlation of -0.07) and little correlation with the share of cases that fail the means test (a coefficient of correlation of 0.02).

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satisfied suggests that creditors sometimes wrongly believe that debtors have assets or income. Some debtors who rightfully take the oath will inevitably have their oaths challenged and have to provide more information. For our proposal to improve upon the current system, it is enough that creditors be able to predict with a reasonable degree of accuracy.

C. Discouraging Can-Pay Debtors

Creditor and bankruptcy trustee challenges can identify debtors who wrongfully take the insolvent debtor's oath, but these challenges require the same costly verification that the oath is designed to avoid. By penalizing debtors who wrongfully take the oath, we may be able to reduce the number of challenges and the resulting costs. Two available options are criminal sanctions for bankruptcy fraud and limiting asset exemptions for debtors who wrongfully take an oath.

1. The Empty Threat of Bankruptcy Fraud Prosecution

Debtors convicted of a false swearing of the early Massachusetts poor debtor's oath were returned to prison and "suffer[ed] the pains and forfeitures as by law are to be inflicted upon any person convicted of wilful perjury."[196] The modern version of this sanction would be a conviction for bankruptcy fraud. One might hope that sufficiently severe sanctions would deter debtors from wrongfully taking an insolvent debtor's oath. After all, Nobel laureate Gary Becker famously argued for maximal sanctions for all crimes to maintain deterrence while minimizing enforcement costs.[197] Society has, however, not followed his advice; we do not execute jaywalkers. And, as a practical matter, we do not punish bankruptcy fraud.

BAPCPA instructed the U.S. Trustee to audit cases with unusual income or expenditures and also gave the program the power to randomly audit one out of every 250 consumer bankruptcy cases.[198] However, the actual audit rate is much lower. For example, in fiscal year 2019 the

[196] Act of June 21, 1698, ch. 11, § 4, 1698 Mass. Acts 330, 331–32.

[197] See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 204 (1968).

[198] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 603(a), 119 Stat. 122 (codified at 28 U.S.C. § 586 note (2018) (Audit Procedures)).

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program conducted random audits in just "one out of every 930 consumer cases."[199]

Assuming these audits are truly random, they provide a good indication of the number of errors in individual bankruptcy filings. Of those cases in which an audit was completed between fiscal year 2007 and fiscal year 2019, the U.S. Trustee Program found "material misstatements" in 19% of cases.[200] Claiming a need "to preserve the integrity of the audit process," the program does not provide a precise definition of "material misstatement" but instead discloses that "material misstatements in general relate to the understatement or omission of the debtor's assets, income, or a pre-petition transfer of property."[201] The true rate of error may be higher as this percentage does not account for cases in which the debtor refuses to provide the information necessary to conduct an audit or in which the case is dismissed (possibly after the audit was begun). One would expect these excluded cases to have a much higher rate of misstatements. Under the extreme assumption that all of these excluded cases involved some misstatement, the misstatement rate rises to 28% of all cases.

The U.S. Trustee Program can refer cases of bankruptcy fraud for criminal prosecution, but these prosecutions are extremely rare. According to U.S. District Court data, over the fourteen years between January 1, 2006, and December 31, 2019, 951 defendants were prosecuted for bankruptcy fraud and 824 were convicted.[202] While this 87% conviction rate is impressive, the more striking figure is the small number of prosecutions. During this same period, Americans filed 13,796,627

[199] U.S. Dep't of Just. Exec. Off. for U.S. Trs., Public Report: Debtor Audits by the United States Trustee Program Fiscal Year 2019, at 2 (2020), https://www.justice.gov/ust/file/debtor_audits_fy_2019_public_report.pdf/download [https://perma.cc/7MK6-ENHK] [hereinafter 2019 Report].

[200] This rate varied from 13% in 2016 to 27% in 2007 with a median rate of 17%. Because the rate of audit varied by year, we calculate the average of the average rate for each year. Authors' calculations are from DOJ Reports and Studies, U.S. Dep't of Just. (Sept. 9, 2021) https://www.justice.gov/ust/bankruptcy-data-statistics/reports-studies [https://perma.cc/R4F9-HAFQ].

[201] See, e.g., 2019 Report, supra note 199, at 3.

[202] U.S. Courts, Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense (2006); id. (2007); id. (2008); id. (2009); id. (2010); id. (2011); id. (2012); id. (2013); id. (2014); id. (2015); id. (2016); id. (2017); id. (2018); id. (2019), https://www.uscourts.gov/data-table-numbers/d-4 [https://perma.cc/P92U-JK3A].

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non-business bankruptcy filings.[203] Even if one assumes that *all* of the bankruptcy fraud prosecutions were for non-business bankruptcies and that 18% of non-business filings contain a material misstatement, roughly 0.03% of non-business debtors who actually made a material misstatement were convicted of bankruptcy fraud. This is roughly the same risk that someone will be struck by lightning during their lifetime.[204]

Debtors who make a material misstatement but have committed no other crimes may have virtually no risk of a bankruptcy fraud conviction. A recent study found that about 75% of prosecutions for bankruptcy fraud were brought in conjunction with some other non-bankruptcy crime such as tax evasion.[205] Moreover, when bankruptcy fraud was the only crime alleged, two-thirds of the few prosecutions that actually occurred were dismissed.[206]

There may be good reasons for the lack of criminal prosecution of bankruptcy fraud. It can be difficult to determine whether a material misrepresentation was due to fraud instead of an innocent or negligent error,[207] and society may not want to punish debtors who are in the midst of a financial crisis even if this crisis is not sufficiently severe to qualify for unfettered access to Chapter 7. Still, the statistics do suggest that potential criminal prosecution is unlikely to be much of a deterrent.[208]

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[203] Annual Business and Non-business Filings by Year (1980–2020), Am. Bankr. Inst., https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf [https://perma.cc/8WFR-N6Y6].

[204] See Flash Facts About Lightning, Nat'l Geographic (June 24, 2005), https://www.nationalgeographic.com/news/2005/6/flash-facts-about-lightning [https://perma.cc/QX6X-B2K6]; see also Yonathan A. Arbel, Shielding of Assets and Lending Contracts, 48 Int'l Rev. L. & Econ. 26, 28 (2016) (noting that bankruptcy fraud is rarely prosecuted).

[205] See Leia A. Clement, A Study on Bankruptcy Crime Prosecution Under Title 18: Is the Process Undermining the Goals of the Bankruptcy System?, 31 Emory Bankr. Devs. J. 409, 425 (2015).

[206] Id. at 426.

[207] 18 U.S.C. § 152 (2018).

[208] The US Trustee Program can also pursue civil sanctions such as dismissal or denial of discharge. Unfortunately, it is hard to assess how often these sanctions are pursued against debtors with material misstatements in their filings. In fiscal year 2018, the U.S. Trustee program took 4,017 civil enforcement actions against consumer debtors in bankruptcy. U.S. Dep't of Just Exec. Off. for U.S. Trs., United States Trustee Program Annual Report of Significant Accomplishments Fiscal Years 2017–2018, at 5 (2015), https://www.justice.gov/ust/file/ar_2017.pdf/download [https://perma.cc/P9NU-9EUL]. However, most of these actions are clearly unrelated to material misstatements. This number includes all civil actions, not just those tied to material misstatements. For example, 35% of these actions seek to dismiss a case for delay, non-payment of fees, or the failure to file schedules, and another 34% are motions to dismiss for failing to satisfy Chapter 7's means test. Id. Actions to deny a discharge

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2. Limiting Exemptions

Even negligent mistakes encourage creditors to raise costly challenges and thus would impose substantial costs on the legal system based on an insolvent debtor's oath. To deter debtor mistakes, the law could sharply limit the exemptions available to debtors who wrongfully take an oath.

The law could implement exemption limits in different ways. The simplest approach would be to limit the exemptions available to all debtors who take an insolvent debtor's oath. Many states provide exemptions that are far larger than the assets of most bankrupt debtors. As noted above, twenty states allow debtors to exempt more than $100,000 in home equity,[209] but about 80% of debtors who file under Chapter 7 claim no home equity at all.[210] A homestead exemption of just $5,000 would still protect 96.2% of Chapter 7 filers.[211]

One of us has previously offered a partial defense of large homestead exemptions,[212] and we are not arguing for their repeal. We are merely suggesting that the very small number of debtors who can exempt tens or hundreds of thousands of dollars of home equity do not need an insolvent debtor's oath; they can hire lawyers and complete a more thorough filing process.

Sharply limiting exemptions could, however, lead to harsh results for honest mistakes. Assume that a debtor who submits to the complete filing process can exempt $100,000 of home equity but that an insolvent debtor's oath limits the exemption to $5,000. If a debtor with a $300,000 home and a $290,000 mortgage ($10,000 in home equity) takes an insolvent debtor's oath because she undervalued her home at just under $295,000, she would lose $5,000 in equity and could possibly lose her home in a forced sale.

An alternative approach would limit the sanction to those who have non-exempt assets under the standard exemptions. To deter these debtors from taking the insolvent debtor's oath, the law must make them worse

in Chapter 7 account for 23% of actions, or 943 cases. It is unclear what fraction of these dismissals are due to material misstatements discovered by the U.S. Trustee Program.

[209] See supra note 104 and accompanying text.

[210] See Pattison & Hynes, supra note 42, at 569.

[211] This percentage reflects equity reported at filing. If one instead uses equity reported at closing, this percentage rises to 97.9%, but the increase is largely due to changes in the sample (dropping cases that fail to close) rather than changes in reported equity within a case.

[212] See generally Hynes, supra note 4 (arguing that the unequal relief provided by bankruptcy accords with its social insurance role if creditors can sort debtors by the expected generosity of the insurance and charge debtors for this insurance by raising interest rates).

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off than if they had provided full disclosure at the outset.[213] The penalty should increase with the size of the error. For example, the law could force debtors to waive some amount of exemptions for every dollar of non-exempt property that full disclosure reveals. Assume that a debtor lives in a state with a $100,000 homestead exemption, has a home worth $400,000 and a mortgage worth $280,000 ($120,000 in home equity). Such debtors rarely file under Chapter 7, perhaps because they fear the loss of their homes in forced sales,[214] but if such a debtor did file, current law would protect $100,000 in home equity. Assume that this debtor instead wrongly takes an insolvent debtor's oath, claiming to have less than $100,000 in home equity. We think it extremely unlikely that such a debtor would be criminally prosecuted; it is too likely that a $20,000 undervaluation was an honest mistake.[215] However, the debtor would take greater care to avoid such a mistake if the debtor lost, say, one dollar of exemption for every dollar of non-exempt equity. This would mean that the debtor who wrongfully took an insolvent debtor's oath could protect just $80,000 in home equity—$20,000 less than if the debtor completed the full disclosures at the outset. Note that this penalty would become stronger as the size of the required error grew and the likelihood of an honest mistake decreased. Consider another debtor who wrongfully took an insolvent debtor's oath by filing with a $500,000 home and just a $300,000 mortgage ($200,000 in home equity). Because the debtor's equity is double the homestead exemption of $100,000, the debtor would not be entitled to any homestead exemption at all.

Forcing debtors to forego exemptions may occasionally punish innocent and trivial mistakes. For example, some debtors of modest means may fail to engage in pre-bankruptcy planning and file with non-exempt balances in their checking accounts, or they may have firearms that a trustee could seize and sell. We have three responses. First, society could mitigate this problem by enacting larger wildcard exemptions. Second, even in the absence of greater wildcard exemptions, trustees and creditors may not wish to spend the money necessary to pursue low-asset

[213] To prevent a debtor from evading this sanction, the simplified system should allow a court to refuse a debtor's request to dismiss the case.

[214] See Pattison & Hynes, supra note 42, at 587–88 (finding that bankruptcy filings increase when states increase their homestead exemptions and that the additional filings are primarily debtors whose home equity was made completely exempt by the increase).

[215] In other work, we find that debtors with equity near the exemption apply lower valuations than other bankrupt debtors, suggesting that they may strategically undervalue their homes to deter trustees. See Pattison & Hynes, supra note 42, at 588–91.

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debtors because the payoff from finding these assets would be quite small. Finally, one must balance these potential debtor losses against the amounts that debtors are now losing in the form of attorney's fees. Recall that among financially distressed debtors, the seventy-fifth percentile of non-exempt financial assets is still less than the amount that debtors are now paying for filing and attorney's fees.[216]

D. Limiting Access to an Insolvent Debtor's Oath

Our goal is to minimize bankruptcy's transaction costs, but in some cases, notice filing will raise them. For those cases in which a trustee or a creditor challenges an oath, notice filing simply adds a step to the bankruptcy process—the challenge. If there are categories of cases in which a challenge is virtually guaranteed, the law could save transaction costs by demanding that the debtor produce evidence at the outset. Unfortunately, it is difficult to specify such categories in advance, and by mandating evidence, the law would be using the judgment of judges or politicians instead of that of creditors to determine when evidence is required.

As noted in Section III.B, the amount of debt a filer owes predicts higher income and an ability to pay something to creditors. Therefore, one can make a plausible case for a debt limit on an insolvent debtor's oath. Some early insolvent debtor's oaths did have debt limits. For example, an early Massachusetts oath was limited to debtors who owed less than £500 to any one creditor, an enormous sum of money (over $120,000 in 2020 dollars) that likely excluded a few large merchants or other traders.[217] A more thorough examination of their affairs was appropriate both because of the sums involved and because it would be easier for them to hide wealth.

In a recent article, Chrystin Ondersma proposes a simplified bankruptcy filing that has some similarities to our proposal, but she would limit the simplified procedure to debtors who owe less than $5,000.[218] As she notes, this targeted, "partial solution" would not apply to most current bankruptcy filers, as "fewer than 2% of debtors currently in the bankruptcy system owe $5,000 or less."[219] Although she does not

[216] See supra Table 2 and accompanying text.
[217] See supra notes 78–83 and accompanying text.
[218] Chrystin Ondersma, Small Debts, Big Burdens, 103 Minn. L. Rev. 2211, 2213 (2019).
[219] Id. at 2223.

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reference the poor debtor's oath, her proposal is more faithful to the literal meaning of its name. However, her very low debt limit would prevent many destitute individuals from receiving relief. Even if creditors do not lend large sums to the poor, the poor can incur large expenses such as hospital bills, and compound interest and penalties can turn small debts into very large debts.[220]

If there is a debt limit, it should be dramatically higher than $5,000. As noted above, roughly 95% of Chapter 7 filers have no assets available for distribution to general creditors, and at least 73% report income that is below the median income for their state.[221] We say at least because the data reported by the Federal Judicial Center does not include household size, so we compare reported income to the median income for a single-person household or a two-person household for those filing jointly. Of those Chapter 7 debtors who have both below-median income and no assets to distribute, the median amount owed to general unsecured creditors is $40,000, and the median amount of total liabilities is $84,000. Even the fifth percentile of these debtors owe a substantial amount—$9,000 to general unsecured creditors and $15,000 in total liabilities.

Perhaps there are other indicators that predict whether a challenge will be raised, and therefore, debtors should provide the evidence at the outset. Creditors may wish to challenge debtors likely to have assets or income that they cannot readily observe without disclosure. For example, creditors may be able to easily check a debtor's wage income by paying a service that collects data from employers,[222] but they may have less ability to assess a debtor's self-employment income. One might, therefore, restrict access of debtors with more than trivial non-wage income. The current bankruptcy petition asks whether the debtor is a sole proprietor.[223] Perhaps a similar question could be used to limit an insolvent debtor's oath to wage earners. We say "perhaps" because we believe that the better approach would be to place limits on the oath based on past challenges actually raised by creditors.

There is another reason to limit the availability of an insolvent debtor's oath—to keep the oath simple. For example, our model oath is limited to

[220] Indeed, her proposed debt limit would require filing soon after incurring modest debts, before late payments and fees cause the debt to exceed the threshold. For example, one debtor motivating her proposal had an original debt of $2,500 that swelled to $12,000. Id. at 2229.

[221] See supra Tables 1 and 2 and accompanying text.

[222] See Lape, supra note 191.

[223] U.S. Cts., supra note 176, at 4.

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debtors who earn less than median income, but debtors with above-median income can pass the current income-based means test if they have sufficiently large expenses.[224] One could accommodate these debtors by adding additional clauses to the oath. For example, it could read: "After any exempt property is excluded and administrative expenses are paid, no funds will be available to distribute to unsecured creditors, and *either* my household income is below [median income] *or my expenses are sufficiently large that I would still pass Section 707(b)'s means test*."

Unfortunately, the additional language adds complexity that may confuse some debtors. Whether the greater coverage is worth this complexity cost is a hard question. In evaluating this question, one must remember that around three out of four past Chapter 7 filers had below-median income,[225] making the additional language unnecessary, and that the case for controlling filing costs is less compelling for high-income debtors.

E. Setting Enforcement Incentives

Even if creditors can reasonably predict whether debtors have rightly taken an insolvent debtor's oath, the law must ensure that they do not have too much incentive to challenge oaths that are rightly taken and have sufficient incentive to challenge oaths that are wrongly taken.

A system in which creditors audit too often would forfeit the potential cost savings of the simplified procedure. Large commercial creditors are repeat players and may be willing to take a short-term loss to develop a reputation for hardball tactics. After all, it costs the state tens of thousands of dollars to house a prisoner for a year,[226] but the state is willing to bear this cost for the deterrence benefit it brings.

A creditor who plays hardball by repeatedly challenging debtors whose oaths were almost certainly truthful could hope to accomplish two things. First, a creditor may hope to deter debtors from filing for bankruptcy at

[224] 11 U.S.C. § 707(b) (2018). This raises the question of what to do with high-income debtors who falsely take an oath. If further investigation reveals that these debtors would have failed the means test, their cases should be dismissed. However, a lesser sanction may be appropriate for above-median debtors who have sufficiently large expenses to pass the means test.

[225] See supra Table 2.

[226] See Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891, 63,891–92 (Nov. 19, 2019) (reporting that the 2018 average cost per inmate per year in federal prisons was $37,449.00).

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all and thereby collect more outside of bankruptcy. Note, however, that the creditor does not capture all of the benefit of keeping the debtor out of bankruptcy as this would enhance the collection efforts of other creditors as well. Second, debtors may repay creditors with a reputation for playing hardball in full before filing for bankruptcy and hope that the remaining creditors will refrain from raising a challenge.

The easiest way to discourage creditors from undesirable auditing is to force them to pay a substantial fee to challenge the debtor's filing. To further limit their ability to impose substantial costs on truly needy debtors, this fee could be used to subsidize the debtor's attorney's fees if a more thorough examination reveals that the debtor owes nothing. Currently, such fee shifting is used to deter creditors from too often claiming that their debt is non-dischargeable because the debtor incurred the obligation under false pretenses.[227] As is now done with involuntary filings, bankruptcy could apply further sanctions if the creditor's filing was made in bad faith.[228]

We do not argue that these steps would eliminate the costs imposed on debtors who truly need relief, only that they reduce these costs below the current level. After all, our proposal would still allow debtors to file for bankruptcy using the current format. And some debtors may find it in their interest to do so. Debtors who have substantial assets and who have had substantial income in the past may find it worthwhile to simply file the full information at the outset.

Relying on the self-interest of creditors and bankruptcy trustees may result in insufficient enforcement. Debtor's prison was a collection tool used by an individual creditor against a debtor. Thus, the creditor had a strong incentive to challenge if it thought that a debtor wrongly took the oath. A creditor in a modern bankruptcy proceeding has much less incentive to challenge a wrongful insolvent debtor's oath as it would need to share the proceeds of a successful challenge with other creditors.[229] Bankruptcy trustees provide at least a partial solution to this common pool problem as they act on behalf of the creditors as a group, recouping

[227] 11 U.S.C. § 523 (2018).

[228] Id. § 303(i)(2).

[229] Bankruptcy could mitigate this problem by awarding creditors who successfully challenge a wrongfully taken oath a greater share of the estate. For a similar proposal to pay bounties to creditors who file involuntary petitions, see Richard M. Hynes & Steven Walt, Revitalizing Involuntary Bankruptcy, 105 Iowa L. Rev. 1127, 1133 (2020).

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expenses before distributing assets.[230] On the other hand, trustees themselves only receive a tiny share of amounts recovered.[231] Moreover, the expenses required to uncover fraud can quickly eat through any assets that were fraudulently hidden.

The Supreme Court case of *Law v. Siegel* provides a compelling example.[232] The bankruptcy trustee uncovered clear fraud; the debtor falsely claimed that a mortgage reduced his equity in his home.[233] Uncovering the fraud cost the trustee $500,000, and the trustee moved for a "surcharge" on the debtor's homestead exemption to recover a portion of these expenses.[234] However, the Supreme Court denied the surcharge.[235]

The Supreme Court may have been right as a matter of statutory interpretation, but the outcome was almost certainly wrong as a matter of policy. One might be able to justify generous exemptions in the context of consensual creditors, but it is hard to think of a justification for exemptions when the claim asserted is an intentional tort like fraud. The Supreme Court rightly noted that the debtor faced a possible denial of discharge and criminal prosecution,[236] but neither sanction was applied to the debtor. Because the debtor had settled with his major creditor,[237] there was no debt to discharge, and we could find no record of a criminal prosecution.

Above, we discuss the possibility of limiting the exemptions available in a simplified system. This may substantially increase the incentive of creditors to challenge debtors who are likely to have substantial assets, but it still provides only a partial solution. The trustee in *Law v. Siegel* had to spend far more to uncover the fraud than the value of the wealth that the defendant attempted to hide.[238] Moreover, challenges to the debtor's stated lack of income will not yield any direct recovery at all as the remedy for excessive income is dismissal of the case. Thus, the bankruptcy trustee may have little incentive to investigate income. Creditors may have some incentive as a dismissal may lead to greater non-

[230] 11 U.S.C. § 726 (2018).
[231] Id. § 326(a).
[232] 571 U.S. 415 (2014).
[233] Id. at 418–19.
[234] Id. at 420.
[235] Id. at 427–28.
[236] Id. at 427.
[237] Id.
[238] See supra note 234 and accompanying text.

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bankruptcy collections. However, they would likely have to share these enhanced collections with other creditors.

This insufficient incentive to prosecute is a general problem in the law. Robbery victims could sue their robbers for assault and conversion, but it would be very expensive to find and serve process on their assailants, and even if victims received judgments, many assailants lack the assets necessary for the victims to actually collect. Moreover, much of the benefit of pursuing perpetrators comes from deterring others from committing similar crimes, and this benefit accrues to society more generally. As a result, the government spends significant public resources to enforce criminal law. The U.S. Trustee already plays a significant role in ensuring that debtors comply with bankruptcy's rules. This office already facilitates the application of the income-based means test and conducts both random and targeted audits.[239] If creditor and bankruptcy trustee enforcement is insufficient, the role of the U.S. Trustee could be expanded.

Unfortunately, any challenge to an insolvent debtor's oath, whether it be by a U.S. Trustee audit or by a creditor or bankruptcy trustee challenge, would impose additional costs on debtors. We see two potential solutions. First, debtors could insure against this risk themselves by contracting with an attorney to provide the services in the event they are challenged. Second, the insurance could be built into the system. That is, bankruptcy filing fees could be increased to allow some subsidy for debtors who are challenged (at least those challenged randomly). Debtors currently spend around $1,800 to file for bankruptcy—roughly $400 on fees and $1,400 for an attorney.[240] If the fee were increased to $500, $100 of this amount could be used to subsidize attorney's fees when the debtor is challenged. If just one out of every twenty debtors were challenged, this would allow for $2,000 to spend verifying the debtor's assets and income, and debtors would still save an average of $1,300 per filing. Note that this probably overstates the need to raise fees as a shift towards default judgments should dramatically lower bankruptcy court costs, facilitating a reduction in filing fees.

[239] See supra note 202 and accompanying text.
[240] See supra notes 128–29 and accompanying text.

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IV. ADDRESSING COUNTERARGUMENTS

In this Part, we anticipate five criticisms of our proposal. First, Founding-era debtors took an insolvent debtor's oath in a proceeding begun by a creditor, but consumer bankruptcies almost always begin with a voluntary filing,[241] and the version of an insolvent debtor's oath that we propose would not provide the court with the information needed to provide actual notice to creditors. Second, we focus on a simplified version of Chapter 7, and some issues that arise in Chapter 7 require more information than our insolvent debtor's oath would provide. Third, the benefits of our proposal are greatest if many debtors are able to avoid hiring an attorney, but some debtors will need an attorney to know whether they are eligible for an insolvent debtor's oath. Fourth, increasing bankruptcy's availability may actually reduce welfare by restricting access to credit. Fifth, our proposal takes bankruptcy's substantive rules as given, but the new President has endorsed reforms that would change these rules dramatically.

A. An Insolvent Debtor's Oath Fails to Provide Creditors with Notice

The current code allows the judge to excuse the debtor from completing many bankruptcy schedules, but it does not allow the judge to excuse the debtor from providing a list of creditors so that the court can send creditors notice of the proceeding,[242] and a failure to list a debt may mean that the debt is not discharged.[243] While an insolvent debtor's oath could require a full list of creditors, debtors should not have to list commercial debts.

Even current law will sometimes excuse a failure to list a debt. The failure to list affects dischargeability only if the failure prevents the creditor from timely filing a proof of claim and if the creditor did not otherwise have notice or actual knowledge of the case.[244] As the leading bankruptcy treatise explains,

> [i]n a no-asset chapter 7 case, no deadline is set for the filing of claims. Therefore, the lack of notice to the creditor does not deprive the creditor

[241] Creditors can file an involuntary petition against an individual debtor, but such petitions account for just 0.02% of all individual bankruptcy petitions. See Hynes & Walt, supra note 229, at 1152.

[242] 11 U.S.C. § 521(a)(1)(B)(i) (2018) ("unless the court orders otherwise").

[243] Id. § 523(a)(3).

[244] Id.

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> of the opportunity to timely file a proof of claim. In such circumstances, unless the debt [is non-dischargeable for another reason], it is discharged.[245]

The no-asset exception to non-dischargeability would apply in nearly all cases.[246] Under current law, however, debtors should not leave their schedule of creditors blank as doing so can lead to other consequences such as a dismissal of the case.[247] We use the fact that current law can discharge an unlisted debt to support our claim that actual notice is not paramount in a no-asset case because there is nothing to distribute. This does not mean that notice serves no role. Creditors may want notice so that they can challenge whether the case is, in fact, a no-asset case.

We argue that the law should not demand actual notice for commercial creditors; for large institutional lenders like banks, constructive notice should suffice. Constructive notice is an established element of the law. For example, publishing notice in a newspaper or posting notice in a courthouse may provide adequate notice of a legal proceeding.[248] Such "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[249]

Publication notice should prove sufficient for commercial creditors because credit reporting agencies already gather records from bankruptcy courts and distribute this information to these creditors.[250] If the notice provided by credit reporting agencies is slower than the notice currently provided by courts, the law could increase the delay between filing and the grant of a discharge. Debtors could also voluntarily list and notify some creditors so that a court can punish willful violations of the automatic stay.[251] And constructive notice may be inappropriate for some creditors such as those holding tort or family law claims. Still, the law could greatly ease the debtor's burden by requiring only constructive

[245] 4 Collier on Bankruptcy, supra note 109, ¶ 523.09[5].

[246] See supra Table 1.

[247] 11 U.S.C. § 707(a)(3) (2018) (allowing for dismissal of a case if the debtor does not file the appropriate documents).

[248] See Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317–18 (1950).

[249] Id. at 314.

[250] See Consumer Financial Protection Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data 17 (Dec. 2012), https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf [https://perma.cc/P7RR-QEL9].

[251] 11 U.S.C. § 362(k) (2018).

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notice for large, commercial creditors as they already extensively utilize the credit reporting system.

B. There is More to Chapter 7 Than Our Simple Description

We characterize Chapter 7 as involving two issues: (i) whether the debtor has non-exempt assets that can be distributed to creditors, and (ii) whether the debtor's filing should be dismissed because the debtor has sufficient disposable income to create a presumption of abuse under Section 707(b)(2). Reality is, of course, more complex.

Debtors can have their cases dismissed or discharges denied for many other reasons. For example, debtors can have their cases dismissed because they failed to pay their filing fees or they committed violent crimes and their victims oppose the filing,[252] and they can have their discharges denied because they concealed or transferred assets before filing or recently received another discharge.[253] Moreover, Section 707(b)(2)'s means test merely creates a presumption of abuse. Some commentators argue that, if there is no presumption of abuse, courts should never dismiss a Chapter 7 filing due to an ability to pay.[254] However, some courts have rejected this view and have dismissed filings by debtors with below-median income because they thought that the debtors could make significant payments.[255]

It may be reasonable to ask the plaintiff to provide more information than is contained in our sample oath. For example, debtors could be asked to disclose if they have enjoyed a material increase in their income or if they have received a recent discharge. However, just as plaintiffs need not plead the absence of any conceivable defenses to their claims, debtors should not have to plead the absence of any conceivable reason why a

[252] Id. §§ 707(a)(2), (c)(2).

[253] Id. §§ 727(a)(2), (8), (9).

[254] See 6 Collier on Bankruptcy, supra note 109, ¶ 707.04[3][b] ("It seems clear that the 'bright line test' of section 707(b)(7) means that no Chapter 7 case should be dismissed based on the debtor's ability to pay if the debtor has an income below the safe harbor threshold."); Marianne B. Culhane & Michaela M. White, Catching Can-Pay Debtors: Is the Means Test the Only Way?, 13 Am. Bankr. Inst. L. Rev. 665, 666 (2005) ("Congress intended the means test to be the only test of ability to pay under the revised Code.").

[255] See, e.g., In re Pak, 343 B.R. 239, 246 (Bankr. N.D. Cal. 2006); In re Pennington, 348 B.R. 647, 648, 651–52 (Bankr. D. Del. 2006); Robert J. Landry, II., The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough, 29 N. Ill. L. Rev. 245, 250 (2009) ("[T]he safe harbor, passage of the means test, or rebutting the presumption of abuse may not be enough for the debtor to get the relief they seek.").

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court should deny relief. In federal courts, plaintiffs need not plead the absence of affirmative defenses such as duress, fraud or the running of the statute of limitations,[256] and they need not plead special matters such as their capacity to sue.[257] Similarly, bankruptcy law could leave many issues to be raised by trustees or creditors. Notably, trustees and creditors could be asked to raise objections based on a totality-of-the-circumstances test when the debtor alleges that there is no presumption of abuse. Two justifications for shifting this burden are that consumers would have a very difficult time discerning the contours of a totality-of-the-circumstances test and successful objections are exceedingly rare.[258] Just 0.2% of Chapter 7 debtors who allege that their income is below the relevant median have their cases dismissed for abuse under Section 707(b).[259]

A second potential problem is that, to tailor relief, courts will sometimes need more information than would be provided in an insolvent debtor's oath.

Some debts are excepted from the discharge. These include certain taxes, credit obtained under false pretenses, liability for fraud, domestic support obligations, liability for willful and malicious injury or drunk driving, and government fines.[260] Student loans are also non-dischargeable unless the debtor can demonstrate "undue hardship."[261] Debtors can waive the discharge with respect to certain loans by reaffirming them.[262] To do so, debtors must file reaffirmation agreements and either have their attorneys certify that the agreements are in the debtor's interest or have the judges verify that this is true.[263]

Secured debts can also complicate the discharge. Although Chapter 7 eliminates a debtor's personal liability to a secured creditor, the creditor's lien survives.[264] Debtors can use Sections 506 and 722 to redeem some

[256] See Fed. R. Civ. P. 8(c).
[257] See Fed. R. Civ. P. 9(a)(1).
[258] See Littwin, supra note 88, at 201 ("The third [attorney interviewed] simply stated that, if a client passes the means test, the U.S. Trustee will generally not challenge on the 'totality of the circumstances,' an alternative to the means test for seeking dismissal of a Chapter 7 case for abuse under § 707(b) of the Bankruptcy Code.").
[259] This number rises only slightly for debtors with income above the relevant median—0.27%.
[260] 11 U.S.C. §§ 523(a)(1), (2)(A), (4), (5), (6), (7), (9) (2018).
[261] Id. § 523(a)(8).
[262] Id. § 524(c)(2).
[263] Id. § 524(c)(2), (3), (6).
[264] See Dewsnup v. Timm, 502 U.S. 410, 417 (1992).

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property for less than the creditor's original lien. If a secured creditor is owed more than the value of its collateral, Section 506 will split its secured claim into a secured claim equal to the value of the collateral and an unsecured claim for the remainder. The debtor can then use Section 722 to redeem (effectively purchase) the collateral by repaying the secured claim in full.

These complications do not justify the current forms and schedules. To apply Sections 506 and 722, courts do not need to know the value of all of a debtor's assets—just the value of the asset that serves as collateral. As for non-dischargeable debts, they are uncommon and often small. More than half of Chapter 7 filers report zero non-dischargeable debts, and 75% report less than $2,000 in non-dischargeable debts.[265] Moreover, the dischargeability of most debts is determined by the nature of that debt, and thus courts don't need a complete picture of the debtor's financial affairs. Indeed, under current law, the dischargeability of some debts can be determined by non-bankruptcy courts long after the debtor receives her discharge.[266]

Determining the dischargeability of student loans under current law requires extensive financial information as debtors must demonstrate "undue hardship."[267] However, "only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans."[268] Indeed, this demonstrates a more general point. The desirability of an insolvent debtor's oath does not require that it be sufficient for all or even most debtors. It is enough that a substantial number of debtors would receive sufficient relief in a simplified system. Debtors may be able to receive greater relief in a more complicated system, but complication creates costs and thereby reduces the number of debtors who will receive any relief at all.

[265] Authors' calculations are from FJC Integrated Database, cited *supra* note 94.

[266] 4 Collier on Bankruptcy, supra note 109, ¶ 523.03 ("[T]he bankruptcy court has exclusive jurisdiction of most dischargeability determinations under sections 523(a)(2), (4), and (6) [false pretenses, fraud, and willful and malicious injury]. For all the other exceptions to discharge enumerated in section 523(a), jurisdiction may be exercised by either the bankruptcy court or the state or other nonbankruptcy court.").

[267] 11 U.S.C. § 523(a)(8) (2018).

[268] Jason Iuliano, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard, 86 Am. Bankr. L.J. 495, 495 (2012).

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C. Lawyers Are Indispensable

Our goal of reducing the cost of filing for bankruptcy would be furthered by making bankruptcy lawyers unnecessary for most debtors. Of course, even if Congress adopts our proposal, some debtors will need the help of a lawyer.

For some debtors, the simplicity of our short oath masks complex interpretive issues. For example, when does someone close to the debtor count as part of the household so that this person's income must be included in their household income?[269] Other debtors may need help understanding the exemptions available to them so that they can determine whether they have non-exempt assets. Understanding these exemptions may also help some debtors plan for bankruptcy by, for example, converting non-exempt assets into exempt assets.[270]

We do not need to argue that all, or even most, debtors will be able to file an insolvent debtor's oath without the aid of a lawyer; it is enough that a substantial number will be able to do so. Many bankrupt debtors should find it easy to determine whether they have household income below the median because their income is far below the threshold. Even with the conservative calculations used in Table 2, half of Chapter 7 filers are at least $15,000 below the means-testing threshold. Good instructions could help debtors of modest means discover if they have any assets that are not protected by exemptions and suggest alternative investments that would be protected. Many debtors do not need to engage in substantial pre-bankruptcy planning because they simply have no wealth to protect.

An analogy to Medicaid is helpful. Some older Americans with significant assets pay attorneys to help them distribute these assets to their families while still maintaining Medicaid eligibility.[271] However, a great many recipients do not engage in this planning and are able to complete the necessary forms by themselves.[272] Our goal is to make the same true

[269] See, e.g., In re Epperson, 409 B.R. 503, 507 (Bankr. D. Ariz. 2009) (holding that the portion of income of an unrelated roommate that was used for household expenses counted as part of debtor's current monthly income).

[270] For a discussion of the limits of such planning, see *supra* notes 115–18 and accompanying text.

[271] See, e.g., Milan Markovic, Lawyers and the Secret Welfare State, 84 Fordham L. Rev. 1845, 1852 (2016) ("In particular, attorneys' participation in 'Medicaid planning' allows middle-class and even upper-class Americans to transfer the costs of long-term care to the government.").

[272] Id. at 1855 ("Studies estimate that anywhere from 5 percent to 54 percent of current Medicaid beneficiaries have engaged in Medicaid planning.").

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of bankruptcy. Perhaps debtors with substantial assets and income should consult attorneys to help them file, but for a great many debtors, eligibility should be quite clear.

The U.S. Courts "strongly recommend[]" the use of an attorney to file for bankruptcy.[273] In addition to listing the help an attorney can provide in completing the forms, the web page notes that attorneys can help the debtor understand the consequences of bankruptcy.[274] If consumers do not understand bankruptcy's benefits, they may be too reluctant to file. One might hope to overcome this problem through enhanced public education, but lawyers who hope to earn fees may engage in more effective outreach.

Here, an analogy to refund anticipation loans is helpful. Many consumer advocates vilify the high costs of such loans,[275] and governments have taken steps to prohibit these loans or at least sharply curtail their use.[276] However, their elimination may come at a cost. Many Americans fail to claim earned income tax credits because they fail to file tax returns. By allowing tax return preparation services to claim a larger profit from each consumer transaction, refund anticipation loans may increase the incentive for these services to find customers and increase the rate at which the needy claim their benefits.[277]

Whether or not one believes that this argument justifies the availability of refund anticipation loans, it is less persuasive as a justification for the complexity of the current bankruptcy filing requirements. First, the cost of filing under Chapter 7 is about six times as large as the amount charged by tax preparers.[278] Second, our proposal can reduce the filing costs even

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[273] Filing Without an Attorney, U.S. Cts., https://www.uscourts.gov/services-forms/bankruptcy/filing-without-attorney [https://perma.cc/NWE5-ZKRB] (last visited Feb. 9, 2021).

[274] Id. (stating that lawyers (i) "Advise you on whether to file a bankruptcy petition"; (ii) "Advise you under which chapter to file"; (iii) "Advise you on whether your debts can be discharged"; (iv) "Advise you on whether or not you will be able to keep your home, car, or other property after you file"; (v) "Advise you of the tax consequences of filing"; (vi) "Advise you on whether you should continue to pay creditors"; (vii) "Explain bankruptcy law and procedures to you"; (viii) "Help you complete and file forms"; and (ix) "Assist you with most aspects of your bankruptcy case").

[275] See Andrew Hayashi, Myopic Consumer Law, 106 Va. L. Rev. 689, 716–17 (2020) (discussing arguments made by critics of refund anticipation loans).

[276] Id. at 726.

[277] Id. at 737–38 ("I estimate that [after the elimination of refund-anticipation loans,] roughly 67% of RAL applicants switched to RACs, 18% of RAL users switched to self-preparation, and 6.2% stopped claiming the EITC.").

[278] Id. at 721 (noting that total tax preparation fees "cost at least $292 per EITC taxpayer"). Chapter 7 filing fees average more than $1,800. See Lupica, supra note 7, at 130 tbl.A-6.

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if it does not eliminate the need for bankruptcy lawyers. An insolvent debtor's oath should reduce the attorneys' costs, and, in a competitive market for bankruptcy preparation, attorneys should pass these cost savings onto debtors through lower fees. Indeed, even if one believes that debtors should be required to consult with an attorney before filing, this still does not justify the completion of complex forms.

Perhaps there is a final reason to preserve a role for lawyers. Angela Littwin has argued that bankruptcy lawyers provide a powerful lobbying force that ensures that bankruptcy law continues to offer generous relief.[279] Perhaps this is true, but they are extremely expensive lobbyists, earning more than a billion dollars a year for cases in which there are no assets to distribute. And it is not clear that lawyers have an incentive to lobby for what is best for debtors. Lawyers may lobby against reforms that make filing simple so that their services remain necessary. Just as commercial tax preparation services have successfully lobbied to prevent paperless tax filing,[280] bankruptcy lawyers have a strong incentive to oppose a proposal like ours that would make bankruptcy more affordable and more accessible to the poor.

D. An Insolvent Debtor's Oath Would Restrict Access to Credit

If an insolvent debtor's oath increases creditors' losses, it should make them less willing to lend. This is a common critique of generous terms of debt relief. For example, some have argued that generous bankruptcy reduces consumer welfare because the welfare costs of losing access to credit outweigh the welfare gains of the insurance that bankruptcy provides.[281]

One source of greater creditor losses would be increased transaction costs. Most notably, creditors would need to spend resources to decide which debtors to challenge and then raise the challenges. Our hope is that such challenges can be made exceedingly rare by strongly discouraging "can-pay" debtors from taking an insolvent debtor's oath and thus

[279] Angela Littwin, The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success, 52 Wm. & Mary L. Rev. 1933, 2015 (2011).

[280] Jay A. Soled & Kathleen DeLaney Thomas, Regulating Tax Return Preparation, 58 B.C. L. Rev. 152, 182–83 (2017).

[281] Kartik B. Athreya, Welfare Implications of the Bankruptcy Reform Act of 1999, 49 J. Monetary Econ. 1567, 1568 (2002).

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substantially reducing the payoff of raising a challenge. The greater source of creditor loss is likely to be an increase in bankruptcy filings.

Consider two groups of new filers: (i) debtors who do not now file because they would lose non-exempt assets or would fail bankruptcy's means test, but who would use an insolvent debtor's oath and hope that they are not caught, and (ii) debtors with no non-exempt assets and below-median income who do not now file because they cannot afford to pay filing and attorney's fees. The prospect of additional filings by the first group is indeed a problem. Our hope is that creditors catch debtors in the first group with a sufficiently high probability and that these debtors can be further deterred through the potential loss of exemptions when they are caught.

We do not believe that additional filings by those who cannot afford to file under current law are a problem. Indeed, we tout these additional filings as a primary benefit of our proposal. Still, these additional filings will result in losses to creditors. Creditors can pass these losses on to borrowers by raising interest rates, or they can avoid losses by restricting access to credit. And we acknowledge that some debtors with no non-exempt assets and below-median income should repay their debts in full. At the time that many low-income debtors apply for a loan, the debtors and their creditors can be fairly certain that the debtor's household income will not rise above the relevant state median, thus exempting these debtors from the means test,[282] and creditors can be fairly certain that many of these debtors will not have significant non-exempt assets. If a great many of these debtors filed for bankruptcy or otherwise defaulted, creditors would sharply restrict the supply of credit to them. There are, however, several factors that would limit the magnitude of creditor losses and limit the severity of the credit-market response.

First, although the oath reduces the monetary costs of filing, the non-monetary costs of bankruptcy would still discourage many debtors from filing. For example, a bankruptcy filing can severely damage a debtor's credit score, and debtors lose protection against future shocks because they must wait several years before they can receive another discharge.[283] These and other deterrents may be sufficient to prevent debtors from filing when they do not truly need relief and, in turn, limit additional losses to creditors.

[282] See supra notes 119–25 and accompanying text.

[283] 11 U.S.C. §§ 727(a), 1328(f).

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Second, for many debtors who would file because bankruptcy is cheaper under the oath, the alternative would not have been full repayment of their debt. Instead, if bankruptcy remained unaffordable, they would still default, but they would do so informally, outside of bankruptcy.[284] Debt relief outside of bankruptcy is less generous, so switching from informal default to bankruptcy would lead to additional losses to creditors. For example, Chapter 7 bankruptcy protects all of a debtor's income, while federal law outside of bankruptcy allows wage garnishment if the debtor's weekly earnings are more than thirty times the federal minimum wage.[285] Still, the additional loss to the creditor is not the full amount that is discharged but only what the creditor could have recovered (after expenses) through debt collection in informal default. Since these new debtors who would file under the oath are those who currently find bankruptcy unaffordable, it is unlikely that creditors would recover significant amounts from them outside of bankruptcy.

Third, existing empirical evidence suggests that changes in the cost of filing generate moderate changes in credit markets. BAPCPA increased, rather than reduced, the costs of filing, but it provides an example of how responsive credit markets are to changes in the cost of filing. BAPCPA increased the average attorney's fee for a no-asset Chapter 7 bankruptcy by 48%.[286] Credit card lenders responded by reducing interest rates by around 1.4–1.9 percentage points for the riskiest filers (credit scores less than 550), 0.5–1 percentage points for those with fair credit (credit scores of 600–700), and there were negligible changes for those with higher credit scores.[287] These estimates capture the net effect of BAPCPA's increase in filing costs as well as several other BAPCPA provisions limiting bankruptcy access and restricting its benefits, so they will

[284] For example, when BAPCPA raised the cost of filing, many debtors who would have filed for bankruptcy substituted to defaulting informally. See Stefania Albanesi & Jaromir Nosal, Insolvency After the 2005 Bankruptcy Reform 1 (Nat'l Bureau Econ. Rsch., Working Paper No. 24934, 2018), https://www.nber.org/papers/w24934 [https://perma.cc/2L8H-HAYA].

[285] 15 U.S.C. § 1673(a) (2018) (limiting garnishment to the lesser of 25% of disposable income or the amount by which weekly earnings exceed thirty times the federal minimum wage). Whether one should enhance the debt relief available to debtors with few assets and low income is a question that we leave for future research.

[286] See Lupica, supra note 7, at 7.

[287] Tal Gross, Raymond Kluender, Feng Liu, Matthew J. Notowidigdo & Jialan Wang, The Economic Consequences of Bankruptcy Reform 62 (Nat'l Bureau Econ. Rsch., Working Paper No. 26254, 2019) https://www.nber.org/papers/w26254 [https://perma.cc/4HGS-25N7].

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overstate the impact of changes in the cost of filing alone. Although speculative, these magnitudes suggest that, even if the oath sharply reduces the cost of filing, credit card interest rates would rise by a moderate amount.

Finally, if desired, the law could avoid additional filings and changes in the composition of filers by simply raising the filing fee enough to offset the reduction in attorney's fees. The oath would still avoid wasteful expenditure on unnecessary paperwork, while the higher filing fee would retain the same monetary barrier to filing.

E. The Oath Must Adapt to a New Bankruptcy System

Our proposal presumes that bankruptcy's substantive law remains unchanged. However, President Biden has endorsed a reform proposal by Senator Warren that would radically change the law by replacing both Chapters 7 and 13 of the bankruptcy code with a new Chapter 10.[288] This Chapter 10 would consider both a consumer's income and non-exempt assets to determine a repayment plan.[289] Unlike Chapter 13, however, debtors would receive a discharge immediately upon confirmation of their plans. [290]

The new proposal requires no payments from debtors who lack non-exempt assets and earn less than 135% of median income.[291] The data we present in Tables 1 and 2 suggests that the overwhelming majority of current filers would pay nothing to general creditors under the proposed law. Thus, an insolvent debtor's oath could be easily adapted to the new system as courts would not need to know the debtor's precise financial condition. As with current law, courts need only know that the debtor's financial condition is bad enough.

CONCLUSION

Bankruptcy's discharge "frees the debtor's future income from the chains of previous debts,"[292] but many insolvent Americans cannot afford to file. To help win debtors' freedom from a figurative debtor's prison,

[288] See supra note 13 and accompanying text.
[289] Consumer Bankruptcy Reform Act of 2020, S. 4991, § 104(a)(1)(O), 116th Cong. (2020) (defining "minimum payment obligation").
[290] Id. § 102.
[291] Id. § 104.
[292] See Jackson, supra note 2, at 1393.

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we propose repurposing a tool that once freed Americans from a literal debtor's prison: the insolvent or poor debtor's oath.

Just as notice filing allows creditors to begin debt collection suits with short and plain statements of their claims, many debtors should be allowed to begin a bankruptcy proceeding with a simple oath that declares an inability to pay. These debtors should only have to incur the cost of providing evidence if their creditors or bankruptcy trustees object. By reducing the cost of filing for bankruptcy, a modern poor debtor's oath could save hundreds of millions of dollars a year and open bankruptcy's doors to those most in need of relief.