2019

Small Debts, Big Burdens

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Article

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> "Small debts are like small shot; they are rattling on every side, and can scarcely be escaped without a wound . . . ."
>
> – Samuel Johnson[1]

INTRODUCTION

For the impoverished, even relatively small amounts of debt can be crippling.[2] Individuals and families may be unable to meet their basic needs as a result of servicing this debt. Without savings, families must turn to credit to meet emergency expenses or to cover gaps in income, and such debt can quickly spiral. For example, a Consumer Financial Protection Bureau study of vehicle title loans found that the median loan size was a little under $700—but, with the average annual percentage rate (APR) around 300%, many of the debtors were forced to take additional loans to repay the balance, with most taking out four or more loans.[3] For someone living on $1000 a month or less, a $700 debt can quickly spiral out of control. In addition to the financial

† Professor of Law, Rutgers Law School. I thank Abbye Atkinson, Drew Dawson, Pamela Foohey, Melissa Jacoby, Ted Janger, Dalié Jiménez, Robert Lawless, Nathalie Martin, Gina Tron, Jay Westbrook, the National Conference of Bankruptcy Judges, and the Shuchman Fund of Rutgers Law School for financial support for data analysis, and my tremendous research assistants, Reema Chandnani and Deepta Janardhan.

1. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 208 (Roger Ingpen ed., 1909) (1791).

2. *See, e.g.*, Stephen J. Ware, *Debt, Poverty, and Personal "Financial Distress,"* 89 AM. BANKR. L.J. 493, 501 (2015).

3. CFPB, SINGLE-PAYMENT VEHICLE TITLE LENDING 12 (2016), http://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

burden of these debts, indebted individuals face the psychological toll of creditors' persistent collection efforts.[4]

In some cases, individuals are even jailed or threatened with jail time after bouncing a check or failing to appear at a court proceeding related to a debt—even when the debt is disputed or they did not know about the lawsuit.[5] For example, a disabled woman in Texas—whose only income was disability benefits—was arrested for failure to appear in a case involving a $1500 loan for truck driving school that had ballooned to $13,000 over the years with income and fees.[6] Three U.S. marshals came to her home while she was asleep, and after she dressed and put on her prosthetic leg they shackled her feet and waist.[7] In another case, an elderly man in Pennsylvania was threatened with arrest after a $10 check that his granddaughter had written bounced due to insufficient funds resulting from an unexpected nursing home charge.[8] In a California case, an elderly woman with medical problems was threatened with jail if she did not pay charges stemming from a $11.13 bounced check to a grocery store.[9] She was told she owed $262.95, including $125 for a "financial accountability class."[10]

While even small debts can be particularly burdensome for poor individuals and families, these debtors are the least likely to have access to debt relief.[11] If regulators will permit loans that require all of a person's disposable income to be diverted to service the debt, there must be a way to escape this debt. For some, severe hardship may be ameliorated if debt can be swiftly targeted and eliminated early on, enabling them to return to productivity and hopefully build at least a small safety net for the next emergency.

It is unjust and nonsensical to require impoverished debtors to undergo an expensive and burdensome process to obtain relief. This proposal is not about expanding entitlements to bank-

4. *See, e.g.*, Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 315–16 (2010).

5. ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 4 (2018), https://www.aclu.org/sites/default/files/field_document/022318-debtreport_0.pdf.

6. *Id.* at 47.

7. *Id.*

8. *Id.* at 57.

9. *Id.* at 58.

10. *Id.*

11. *See* discussion *infra* Part I.C.

ruptcy relief. Instead, this proposal is designed to make bankruptcy relief that is currently *legally* available, *actually* available to a subset of a group that currently faces great barriers to access. Although improving access to debt relief for all poor debtors is urgent, particularly those with the largest debt loads, I propose a fast-track debt relief process for debtors living at or below the poverty line and owing less than $5000 in debt. Such amounts are unlikely to harm creditors. Not only is the loss relatively small, but many of these debts may also have been ultimately uncollectable. While these debts can be crippling to the impoverished, relieving such debts is unlikely to cripple creditors.

This proposal is only a partial solution, however. First, credit will never be capable of solving chronic income shortfalls, and debt relief cannot solve them either.[12] However, at present many impoverished individuals and families have no choice but to turn to credit, particularly when faced with unexpected expenses or unexpected drops in income. Individuals are often forced to choose between servicing their debt and meeting their basic needs.[13] It is crucial that speedy debt relief be available in order to prevent a debt spiral. My proposal is also only a partial solution because it only applies to debtors with relatively small amounts of debt—even though it is clearly essential that bankruptcy relief also be accessible to impoverished individuals with great debt loads. However, I do not believe it is currently politically feasible to fast-track all bankruptcies based on income alone. This does not mean that things cannot be done to expand access for this population; indeed, if the proposed system functions well perhaps a modified version of this system can be used for poor debtors with larger debt loads.

This Article proceeds as follows. Part I first discusses the burdens of debt on the poor—even when debt loads are relatively small. Then this Part explores whether and in what circumstances poor debtors can benefit from bankruptcy, and finally reviews the barriers to bankruptcy filing for poor debtors. Part II proposes a fast-track debt relief process for debtors whose income is at or below the poverty line and who owe less than $5000

12. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. (forthcoming 2019) (manuscript at 65) (on file with author).

13. *Cf.* Melissa B. Jacoby & Mirya Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL'Y L. & ETHICS 239, 272 (2010) ("[F]inancially distressed families constantly make difficult choices about how to juggle expenses.").

in debt. I argue that such a program would provide tremendous relief for debtors without over-burdening creditors. I then discuss precisely how such a system could be implemented using our existing bankruptcy system. Finally, Part III considers two types of objections. First, the objection that such a system should be administrative rather than part of the bankruptcy system. And second, the objection that the proposal will distort both lender and borrower behavior.

I. DEBT WITHOUT RELIEF

A. THE HEAVY BURDEN OF SMALL DEBTS ON THE POOR

Lower-income debtors have less debt than higher-income debtors, but that debt represents a much larger share of their income. The average credit card debt owed by someone who makes $21,432 per year is $3611 in credit card debt, or 17% of annual income.[14] In addition, the average debt for individuals whose debt has gone to collection is relatively low. On average, individuals that have a debt in collections only owe around $1300.[15] For non-medical debt, the median is $366, and for medical debt, the median is $207.[16] Only 2.8% of non-elderly individuals experienced family medical expenses over $10,000, and only 14% experienced medical expenses over $5000.[17] However, 43% experienced medical debt in excess of $2000.[18] An estimated 77 million Americans—or 35% of adults—have at least one debt that has gone to collection.[19] One in five individuals have medical bills in collection.[20]

14. Erin El Issa, *2016 American Household Credit Card Debt Study*, NERDWALLET n.14, https://www.nerdwallet.com/blog/credit-card-debt/household-credit-card-debt-study-2016 (last visited Feb. 9, 2019) ("We used consumer-reported data from the Survey of Consumer Finances and revolving credit card balance data from Experian to estimate revolving debt based on household income. We used the estimated average credit card APR of 18.76% from our internal data to calculate the amount of interest each household would pay. Households that made less than $21,432 owed $3,611 in credit card debt and paid annual interest of $677 on credit cards. Households that made more than $157,479 owed $13,406 in credit card debt and paid annual interest of $2,515."). Meanwhile, the average debt for earners around $150,000 is just over $10,000, but that represents just 7% of that household's income. *Id.*

15. ACLU, *supra* note 5, at 9.

16. *Id.*

17. Melissa Jacoby, *The Debtor-Patient Revisited*, 51 ST. LOUIS U. L.J. 307, 309–10 (2007).

18. *Id.* at 310.

19. ACLU, *supra* note 5, at 9.

20. *Id.*

Although these amounts are relatively small, for individuals living below the poverty line, small amounts of debt can cause severe hardship. When income is not sufficient or hardly sufficient to meet basic needs, emergencies such as job loss, medical expenses, car repairs, or other sudden costs or sudden drops in income can cause individuals to become trapped in debt.[21] One-third of families have $0 in savings, and 41% of families report that they would be unable to come up with $2000 to cover an emergency expense.[22] Seventeen percent of poor families spend more than 40% of their family income on health care, while only 0.2% of families with incomes at or above 200% of the poverty line spend over 40% of their income on health care.[23] When individuals have no savings and nowhere to cut, they have no choice but to turn to credit.[24] However, when the loan comes due the individual still does not have excess disposable income, so they must cut on food, rent, or utilities in order to pay the bill. Meanwhile, interest accrues and it becomes less and less likely that the individual will ever be able to get out from under the debt.

As Sara Greene explains in discussing her study of how low-income debtors manage emergencies with debt, even when the "initial shock was relatively small, the resulting cycle of debt, interest, and fees became almost inescapable."[25] In some cases, as discussed above, individuals may go without food, electricity, or necessary medication in order to service debt.

These burdens fall hardest on Black and Latinx individuals, who, as a result of persistent and systemic racist policies and practices, are more than twice as likely to be poor than white individuals.[26] White households have thirteen times the median wealth of Black households and ten times the median wealth of Latinx households.[27] Black and Latinx debtors are more likely to

21. *Id.* ("Many Americans spiral into indebtedness because they are living in a state of financial peril and are pushed over the edge by a traumatic event like the loss of a job, serious illness, or divorce, exacerbated by snowballing interest rates and fees."); *see also* Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 271–72 (2017) (including a sample of seventy-one low-income individuals in North Carolina).

22. ACLU, *supra* note 5, at 9–10.

23. Jacoby, *supra* note 17, at 310.

24. *See* ACLU, *supra* note 5, at 10 ("56[%] of Americans say their incomes are falling behind the cost of living.").

25. Greene, *supra* note 21, at 291.

26. ACLU, *supra* note 5, at 10.

27. *Id.* (citing *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), http://www.pewsocialtrends/org/2016/06/27/1-demographic-trends-and-economic-well-being/#fn-21776-11).

be "targeted for risky financial products, such as payday loans,"[28] and are less likely to have savings available to cover emergency expenses.[29] Controlling for income, there are twice as many debt collection lawsuits in Black communities than in white communities.[30]

My empirical work with undocumented debtors provides additional evidence of the tremendous hardship that even small loan amounts impose on the poor. I spoke with fifty-three undocumented individuals,[31] and many of these individuals reported feeling that their debts were too much to handle even though the amounts borrowed were relatively small.[32] Eighty-five percent of the individuals I interviewed carried debt, and the majority had borrowed from multiple lenders.[33] Several borrowed from more than two sources.[34] However, despite these hardships and multiple borrowing sources, only four individuals owed more than $5000.[35] Four individuals owed between $2500 and $5000, five

28. *Id.* (citing FDIC, FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 83–84 (2014), https://www.fdic.gov/householdsurvey/2013appendix.pdf).

29. *See id.* (explaining if "the bottom 25 percent of white households" liquidated all financial assets, they would have $3000 on average, whereas a full quarter of "African-American families would have less than $5" after liquidating assets (citing *What Resources Do Families Have for Financial Emergencies?*, PEW CHARITABLE TR. (Nov. 18, 2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/emergency-savings-what-resources-do-families-have-for-financial-emergencies)).

30. *Id.* at 11 (citing Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods).

31. I describe the study in detail in my earlier paper, *Debt Without Relief*. The design of the study was based on snowball sampling, a technique used to reach sensitive populations. Chrystin Ondersma, *Debt Without Relief: An Empirical Study of Undocumented Immigrants*, 68 RUTGERS U. L. REV. 1801, 1808 (2017). In a snowball sample, initial interviews are conducted with individuals based on a personal connection—in this case, a group of street vendors in New York City—and are then invited to have their family and friends participate in the study. *Id.* at 1809. The interview was conducted in two parts, and participants were paid fifty dollars for each part. *Id.* Interviews were conducted in Spanish, recorded, transcribed, and translated. *Id.* The interview questions included demographic questions, questions about individuals' financial situations, questions about individuals' borrowing experiences, and questions about individuals' potential consideration of bankruptcy relief. *Id.*

32. *Id.* at 1830.

33. *Id.* at 1815.

34. *Id.* at 1816.

35. *Id.* at 1818.

owed between $2000 and $2500, ten owed between $1000 and $2000, and the rest owed less than $1000.[36]

Although the amounts of these debts are relatively low, nearly a third of debtors always or often felt that their debts were too much to handle.[37] An additional 37% occasionally felt that their debts were too much to handle.[38] Fourteen debtors expressly discussed feeling overwhelmed by creditor calls.[39] As I report in my previous paper, study participants reported that creditors would call repeatedly: "[E]veryday 2–3 times a day,"[40] "when I am busy and at work,"[41] just "calling and calling and calling,"[42] or "just to bother you for no reason and they keep calling you only to annoy you."[43] Others described creditors calling to collect even after they had agreed to a negotiated payment schedule: "The thing is they know the times that I'm supposed to pay, since we had an agreement. They still keep calling you, they harass but you already had an agreement."[44] Several study participants described the anxiety caused by the repeated calls: "[W]hen they call repeatedly I get nervous, I feel like someone's going to choke me,"[45] and the repeated calling "stresses me out and put[s] me in a bad mood."[46]

Although some of the debt incurred may have been incurred due to chronic income shortfall, for many of these individuals, debt was incurred in the wake of severe hardship.[47] Thirty-nine individuals (75%) had experienced an unexpected hardship such as job loss, divorce, death of spouse, eviction or foreclosure, hospitalization, deportation proceedings, or arrest.[48] Twenty-nine participants (over half of participants) experienced more than one of these hardships.[49] This suggests that a substantial portion of the debt was incurred as a result of a sudden expense or sudden drop in income.

36. *Id.*
37. *Id.* at 1830.
38. *Id.*
39. *Id.*
40. *See id.* (referencing Interview with Respondent 0001).
41. *See id.* (referencing Interview with Respondent 0004).
42. *See id.* (referencing Interview with Respondent 0009).
43. *See id.* (referencing Interview with Respondent 0003).
44. *See id.* (referencing Interview with Respondent 0012).
45. *See id.* (referencing Interview with Respondent 0030).
46. *See id.* (referencing Interview with Respondent 0048).
47. *Id.* at 1811.
48. *Id.*
49. *Id.*

These debt burdens can have extremely dire consequences. In addition to harassing creditor calls, threats of garnishment, repossession, and foreclosure, in many instances debtors are even threatened with arrest, and in fact jailed, in cases stemming from small amounts of private debt.[50] If a debtor does not appear in court to contest a debt, the court can issue a default judgment.[51] Individuals may miss court dates because they were not served, were confused by the notice, were unable to leave work, unable to find childcare, or were unable to attend for medical reasons.[52] After the judgment is issued, the debtor may be summoned to appear in court to address the payment of the judgment, and/or to fill out paperwork providing information about their financial assets.[53] In forty-four states, courts are able to "issue warrants for the arrest of debtors who" do not comply.[54] Every year tens of thousands of arrest warrants are issued that stem from a failure to pay a private debt.[55] The ACLU was able to obtain data on arrest warrants issued in debt collection proceedings from three states and four counties, and found that in these counties more than 8500 arrest warrants were issued in 2016 pursuant to debt collection proceedings.[56] In many of these cases the debts are small: the ACLU documented hundreds of cases where individuals were arrested for medical debts of less than $1000.[57] Arrest warrants can result even when the amounts of debt at issue are miniscule—even amounts under $10.[58] In twenty-four of the twenty-seven case studies the ACLU reported, the original debt at issue resulting in jail or threat of

50. *See* ACLU, *supra* note 5, at 27 (noting cases where threatening letters were sent for checks that bounced for as low as two dollars).

51. *Id.* at 22 (citing FTC, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf).

52. *Id.* at 22.

53. *Id.* at 13.

54. *Id.* at 12.

55. *Id.* at 4.

56. *See id.* at 12 (stating this information was obtained by the ACLU through the Freedom of Information Act and open records requests).

57. *See id.* at 45 (noting the hundreds of cases in Maryland).

58. *See id.* at 7 (stating that the ACLU documented thousands of cases where consumers were threatened with jail for bounced checks under ten dollars).

jail was less than $5000, and in at least ten of these cases the amount of the original debt was less than $1000.[59]

Many of these cases are manifestly unjust. The cases mentioned in the introduction are just a few of numerous horrifying examples. Other examples include a single mother in Nebraska who was arrested in front of her children and jailed for failure to appear on a case stemming from a $176.50 medical bill,[60] a man in Utah who committed suicide after being jailed for failing to appear on a case stemming from a $2000 ambulance ride charge,[61] and a man in Indiana who was placed under arrest in front of his four young kids, then brought to jail where he spent two nights after being strip-searched—the case stemmed from a $4024.88 auto loan deficiency, where the car had already been repossessed and the man was not aware that he had been sued.[62]

Some debtors who are unable to pay debts stemming from bad checks are also threatened with jail by virtue of agreements between prosecutor's offices and collection agencies, whereby debt collection agencies are permitted to use the prosecutor's seal on the demand letter.[63] The individual is informed that failure to pay the debt—not just the initial debt, but a variety of fees imposed by the collection agency, which sometimes more than quadruple the initial charge—is a crime and that non-payment can result in jail.[64] The fees include, for example, a $150–200 charge to attend a mandatory financial responsibility class—provided, of course, by the debt collector itself.[65] Again, the initial debt can be miniscule: one lawyer in Washington state documented over 10,000 cases where a check written for under $10 resulted in letters threatening arrest and prosecution.[66] In Washington, a mother of three received such a letter bearing the seal of the Kitsap County prosecutor's office and informing her that she faced criminal charges if she did not pay $41.19 plus over $200 in fees, all stemming from a $41.19 check to Goodwill for the purchase of clothes for her children.[67] An individual in

59. *See generally id.* at 45–46 (outlining the ACLU's case studies).

60. *Id.* at 45.

61. *Id.* at 46.

62. *Id.* at 55.

63. *Id.* at 4.

64. *Id.* at 7; *see also id.* at 4–5 (discussing an initial $2500 student loan that mushroomed into $12,000 with interest and fees).

65. *Id.* at 7.

66. *See id.* (citing Interview by ACLU with Paul Arons, Lawyer, Law Office of Paul Arons (Apr. 12, 2017)).

67. *Id.* at 27 (referencing *Cavnar v. BounceBack, Inc.*, No. 2:14-cv-235

Los Angeles was threatened with criminal prosecution after bouncing a $3.87 check to Ralphs grocery store—she ultimately paid $444.87 to the debt collector, including $150 in diversion class fees and $225 in missed class fees.[68] The elderly man in Pennsylvania who bounced a $10 check for medicine, and the elderly woman in California who bounced an $11.13 for groceries, were also sent letters threatening arrest and listing hundreds of dollars of charges because of this kickback arrangement.[69]

Even where no arrest happens, threats of imprisonment may scare individuals to going without crucial basic needs, including food and medication, in order to pay the debt—even when the debt is not actually owed.[70] For example, one seventy-five-year-old woman living on social security was frightened into paying the charges for fear of jail—but in order to pay the debt, she went without her medications.[71] A woman in Georgia was frightened into paying a $800 debt her daughter allegedly owed; she borrowed money to make part of the payments, and stopped paying her utilities, resulting in her power being shut off.[72] The ACLU reported that, in many of the cases they reviewed, "debtors took out high-interest payday loans, borrowed from friends or relatives, surrendered public benefits, or went without food or medication to avoid the threat of jail."[73] In addition, although income from social security or disability is exempt from collection, threats from debt collectors can cause individuals to give up this income in order to satisfy debts.[74]

The experience of being jailed and arrested can cause severe psychological trauma.[75] Individuals arrested under contempt orders stemming from debt reported a number of medical problems, including "anxiety, [insomnia,] stomach problems, panic attacks . . . inability to travel" or to remain home alone, and worsening of conditions such as Crohn's disease.[76] In a Maryland

-RMP, 2015 WL 4429095 (E.D. Wash. July 17, 2015)).

68. *Id.* at 28.

69. *Id.* at 58 (referencing *Smith v. Levine Leichtman Capital Partners, Inc.*, 723 F. Supp. 2d 1205 (N.D. Cal. 2015)).

70. *Id.* at 7.

71. *Id.*

72. *Id.* at 35 (referencing *Gibson v. Rosenthal, Stein, & Assocs.*, No. 1:12 -cv-2900-WSD, 2013 WL 8367255 (N.D. Ga. July 3, 2013)).

73. *Id.*

74. *Id.* at 35–36.

75. *See id.* at 19 (noting instances of parents being arrested in front of their children and the corresponding emotional distress).

76. *Id.* at 20.

case, an elderly married couple (ages seventy-eight and eighty-three) were each jailed for failing to appear in a case involving $2342.76 that they owed to their homeowner's association.[77] The couple was never even served.[78]

While in jail, the husband "began vomiting blood and became non-responsive," and had to be transferred for emergency treatment.[79]

If the debtor has young children, the trauma is magnified. In one Pennsylvania case, a mother was arrested while her minor son slept, and the police refused to allow her to wake him and explain what was happening.[80] In another incident in Ohio, a woman was placed under arrest while home with her three-week-old infant.[81] In Georgia, a woman was arrested in front of her five-year-old after police were called during a family argument and found an outstanding warrant on a default judgment from unpaid rent—the woman had no idea that her landlord had sued because she had never been served.[82] In Washington, an individual was arrested while at home with his six-year-old disabled son—he was kept in the police car for over an hour, "watching in horror as his son sobbed and ran, scared and confused, in and out of their home."[83] All this because the father missed a hearing about the deficiency amount he owed on his pickup truck after it had been repossessed.[84]

In some cases, individuals have been fired for missing work as a result of being jailed; for example, an Illinois truck driver was fired for missing six days of work while jailed, and an Indiana woman was fired after being arrested while at work.[85] Even if the debtor does not end up spending time in jail, the issuance of an arrest warrant alone may appear on a background check, putting in peril job, housing, and educational opportunities.[86]

77. *Id.* at 8.
78. *Id.*
79. *Id.*
80. *Id.* at 19.
81. *Id.*
82. *Id.* at 24.
83. *Id.* at 19.
84. *Id.*
85. *Id.* at 20.
86. *Id.* at 6.

B. THE BENEFITS OF BANKRUPTCY FOR POOR INDIVIDUALS WITH RELATIVELY SMALL DEBT BURDENS

There are clearly risks associated with even small amounts of debt. In an ideal world, it would not be necessary for poor individuals to turn to credit to meet their basic needs. As Abbye Atkinson points out in her forthcoming article, *Rethinking Credit as Social Provision*, credit is not an appropriate solution to poverty.[87] She points out that credit can only be helpful if the future version of the debtor is likely to have a higher income—if not, credit cannot provide assistance, because the future self will never have additional income with which to repay the debt, and will be required to forego essentials if the debt is to be repaid.[88]

Unfortunately, at present it does not seem likely that a more robust welfare system is imminently forthcoming. As I discuss in my article, *A Human Rights Framework for Debt Relief*, I argue that if a government is unwilling to ensure access to basic needs (including housing, water, health care, and food), and debtors will thus be required to incur debt in order to cover their basic needs—particularly if an emergency arises—a robust and accessible debt relief system is crucial.[89]

Of course, bankruptcy is not the only road to debt relief: federal and state legislatures could severely curtail debt collection if they so choose. Some have suggested radical solutions such as prohibiting courts' involvement in any debt collection below a certain amount.[90] Dalié Jiménez has suggested a complete ban on any collection activity after the statute of limitations has expired.[91] A far more robust Fair Debt Collections Act and other state debt collection reforms could also ameliorate the burden of debt collection activity on impoverished debtors. Finally, at a minimum, arrest or threats of arrest could be severely curtailed or prohibited altogether; indeed, some states already wholly ban arrest related to the non-payment of debt.[92] The ACLU Report

87. Atkinson, *supra* note 12, at 6–7.

88. *Id.*

89. Chrystin Ondersma, *A Human Rights Framework for Debt Relief*, 36 U. PA. J. INT'L L. 269, 338–39 (2014).

90. *See, e.g.*, DAVID CAPLOVITZ, CONSUMERS IN TROUBLE 296 (1974).

91. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 78 (2015).

92. ACLU, *supra* note 5, at 6 (explaining that in forty-four states judges can issue arrest warrants for failure to appear at post-judgment proceedings); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1037–38 nn.116–20 (2016).

also includes a number of excellent proposals to prevent individuals from being jailed or threatened with jail as a result of inability to pay private debts.[93] Although each of these proposals would relieve the burden for low-income debtors, none offers a completely clean slate for over-indebted individuals. Many debtors have debt from multiple sources, and could benefit from a solution that would resolve all of their debts at once and offer them a fresh start completely free of their debts.

Can bankruptcy be part of this solution, even if the debt burden is relatively small? There are not many existing filers with small amounts of debt: In 2007, the 25th percentile with respect to the amount of unsecured debt was $18,351, and the 25th percentile with respect to the amount of total debt was $38,425.[94] The median debt load was $87,261, and the median unsecured debt load was $33,882.[95] In their 2010 study of chapter 7 bankruptcies, Katherine Porter and Deborah Thorne explain that debtors in the sample had a median income of $21,870 and a median unsecured debt load of $27,573.[96] In an additional study by Katherine Porter and Deborah Thorne in 2017, the median unsecured debt in chapter 13 bankruptcies was $ 23,440.[97] Data suggest that fewer than 2% of debtors currently in the bankruptcy system owe $5000 or less.[98] But you would not expect filers with debt burdens of $5000 or less to seek bankruptcy relief under the current system; the complexity and expense are disproportionate to the relief. Naturally, debtors that do not file for bankruptcy have much lower debt loads—the median unsecured debt was $7000 in 2011.[99] That does not mean, however, that all those with lower debt burdens are unburdened by their debt obligations.

93. *See* ACLU, *supra* note 5, at 7, 40–43.

94. John A. E. Pottow et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 404 (2008).

95. *Id.*

96. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 82 (2006).

97. Sara S. Greene et al., *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1049 (2017).

98. E-mail from Robert M. Lawless, Professor, Univ. of Ill. Coll. of Law, to author (Oct. 23, 2018) (on file with author) (reporting Stata calculations based on data from the Consumer Bankruptcy Project). In 2007, only 11 of 2384 debtors in the 2007 sample owed less than $5000; in the current Consumer Bankruptcy Project, only 10 of 513 debtors owe less than $5000. *Id.*

99. MARINA VORNOVYTSKYY ET AL., CENSUS, HOUSEHOLD DEBT IN THE U.S.: 2000 TO 2011, at tbl.A1, https://www.census.gov/content/dam/Census/library/working-papers/2011/demo/debt-highlights-2011.pdf.

Bankruptcy can indeed be extremely valuable even for debtors with relatively low debt burdens. First, bankruptcy ceases creditor collection activities, including harassing creditor phone calls,[100] repossession, foreclosure or eviction actions,[101] and collection law suits—including arrest warrants stemming from such cases.[102] Second, bankruptcy allows debtors to keep the fruits of their labor going forward rather than requiring ever-increasing portions of debtors' funds to be diverted to creditors perpetually.[103]

1. Ceasing Collection Actions

Filing for bankruptcy would put an immediate end to all collection proceedings, including civil contempt proceedings. Bankruptcy filing also puts an end to creditor collection calls. One of the most commonly listed reasons for seeking bankruptcy relief is the desire to halt threatening creditor phone calls.[104] One in four individuals contacted by debt collection agencies described feeling threatened.[105] Additionally, when I interviewed low-income undocumented debtors for a previous project, many reported feeling burdened or harassed by creditor calls.[106] It is often not feasible for debtors to simply ignore the calls. The calls take a tremendous psychological toll.[107] Even if lenders would not actually take the action they threaten, "[f]ew [debtors] know the law well enough to understand that the threats are empty . . . ."[108] A bankruptcy filing puts an immediate stop to creditor calls, relieving debtors from burdensome and harassing phone calls.[109]

Bankruptcy also puts a stop to garnishment, repossession, eviction, and foreclosure actions. Although low-income debtors may not have many assets, this does not mean that creditors

100. 11 U.S.C. § 362 (2012).

101. *Id.* (providing for a stay of all collection actions and a stay of continuation of any judicial process).

102. *Id.*; *In re* Daniels, 316 B.R. 342, 347–48 (Bankr. D. Idaho 2004).

103. 11 U.S.C. § 524(a) (enjoining collection of any discharged debts).

104. *See, e.g.*, Mann & Porter, *supra* note 4, at 314–15.

105. ACLU, *supra* note 5, at 32 (citing CFPB, CONSUMER EXPERIENCES WITH DEBT COLLECTION: FINDINGS FROM THE CFPB'S SURVEY OF CONSUMER VIEWS ON DEBT (2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf).

106. Ondersma, *supra* note 31, at 1830.

107. *Id.*

108. Stephanie Ben-Ishai & Saul Schwartz, *Bankruptcy for the Poor?*, 45 OSGOODE HALL L.J. 471, 477 (2007).

109. 11 U.S.C. § 362 (2012).

cannot interfere with their property. Creditors may go after debtors' wages via garnishment orders or seek to repossess debtors' goods.[110] For example, if they own a car—even if they have no equity in the car and it is thus not an "asset"—and they fall behind on payments, a creditor may repossess it. Low-income individuals often do not have enough savings on hand to purchase large household items, such as mattresses, sofas, refrigerators, and stoves. As a result, low-income debtors may purchase these items on credit, or under a rent-to-own model, and these items may be repossessed if the debtor misses payments.[111] When a debtor files for bankruptcy, creditors cannot repossess property without the court's permission.[112] While this does not guarantee that the debtor will be able to keep the property, it provides some breathing room for the debtor to negotiate with creditors or identify an alternative means of keeping that property or acquiring an equivalent. For example, debtors in chapter 7 can "redeem" property by paying only what the property is worth rather than the total owed. If friends or family give or lend the needed funds the debtor can keep the property.[113]

Bankruptcy filing can also prevent evictions or foreclosures. Again, bankruptcy does not guarantee that debtors will be able to retain their home or apartment, but it temporarily halts such proceedings and gives debtors a chance to catch up on arrears.[114] In addition, many bankruptcy courts have loss mitigation programs that provide for mortgage renegotiation during the bankruptcy process.[115] These remedies will not work in all cases—for example, landlords with prepetition judgments are now permitted to evict the debtor unless the debtor is able to cure the default

110. Ware, *supra* note 2, at 504.

111. Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221, 1250, 1254 (2000) (explaining that rent-to-own contracts are often used for furniture (38.9%), appliances (23.4%), or televisions (11.9%), and that "20% of rent-to-own customers are on public assistance"); Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 436–37 (2009).

112. 11 U.S.C. § 362(d) (providing that a stay can be lifted if a creditor is not adequately protected or there is no equity in the property and it is not necessary for the debtor's effective reorganization).

113. *Id.* § 722.

114. *See supra* note 101 and accompanying text.

115. *See* General Order, *In re* Adoption of Loss Mitigation Program Procedures, No. M-364 (Bankr. S.D.N.Y. 2008), http://www.nysb.uscourts.gov/sites/default/files/m364.pdf.

within thirty days of filing.[116] However, for debtors that experience a temporary loss in income or increase in expenses and are able to resume payments, bankruptcy can spare individuals and family disruptions in housing.

Finally, bankruptcy stops collection lawsuits.[117] In addition, all procedures and processes related to the collection suit are barred. This means that an arrest warrant cannot be issued for failure to respond to requests for financial information or failure to appear in court, and the debtor cannot be arrested.[118] The ACLU reported an instance where a man was able to avoid arrest after missing a hearing on an unpaid mortgage deficiency only after filing for bankruptcy.[119] Although criminal proceedings (including some bad check proceedings) may be exempted from the automatic stay, this is not the case if the purpose of the proceeding is to compel payment of debt.[120]

My empirical work with low-income undocumented debtors also supports the conclusion that bankruptcy could be beneficial for low-income debtors. Twenty-one (39.6%) debtors I spoke with expressed wanting calls from creditors to end, fifteen debtors (28.3%) indicated that they would not like to have to repay

116. Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 441 (2009) (citing 11 U.S.C. § 362(b)(22)).

117. 11 U.S.C. § 362.

118. *Id.*; *In re* Daniels, 316 B.R. 342, 345 (Bankr. D. Idaho 2004) (concluding that creditor and counsel willfully and recklessly violated the automatic stay in pursuing arrest of debtor on contempt of court charge for failure to turn over financial information after debtor filed bankruptcy). The Bankruptcy Court stated, "[w]hen Debtor filed for bankruptcy relief, *any* further proceedings in the state court action were unconditionally stayed by operation of federal law. That would obviously include any efforts to enforce the state court's arrest warrant." *Id.* at 348.

119. ACLU, *supra* note 5, at 49.

120. 11 U.S.C. § 362(a)–(b); *In re* Daniels, 316 B.R. at 350. Unfortunately, the protection of the automatic stay does not guarantee that creditors will not attempt to violate the automatic stay. In one Minnesota case, a man was jailed for six days in solitary confinement on a warrant obtained by a debt collector, even though he had filed for bankruptcy. ACLU, *supra* note 5, at 20. He was denied access to a phone and thus could not contact his attorney. *Id.* Still, the penalties for willful violations of the automatic stay are very steep, so creditors should be deterred from such violations after being notified that the debtor has filed for bankruptcy. *See* 11 U.S.C. § 362(k) (stipulating that individuals injured by violations of the automatic stay are entitled to "recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages"); *In re* Daniels, 316 B.R. at 357 (awarding debtor $135 in lost wages, $2850 in attorneys' fees, and $1350 in punitive damages).

money owed, ten (18.9%) indicated that they wanted to avoid repossession of personal property, and eleven (20.8%) indicated that they would like to stop a foreclosure or eviction.[121]

2. The Fresh Start

A key reason to seek the formal discharge of debts is to ensure that, going forward, one can retain the fruits of one's labor without seeing them diverted to repaying creditors. Even debtors with no valuable personal property may experience wage garnishment that makes it impossible for them to pay all necessary expenses. One of the main benefits of bankruptcy filing is the immediate cessation of any wage garnishment.[122] Debtors can also, in some circumstances, recover garnishments made within ninety days prior to the bankruptcy filing.[123] (As Nathalie Martin has pointed out, the garnishments are only recoverable if they are not "de minimus"—that is, if they exceeded $600,[124] although such amounts are hardly "de minimus" from the perspective of an impoverished debtor.) Low-income debtors may also struggle to build wealth if their wages are subject to garnishment. Debtors with incomes at or near the poverty line may not be subject to garnishment.[125] Some states may provide citizens with higher minimum wage standards than federal standards.[126] However, according to a study conducted by the National Consumer Law Center, "no state provides adequate legal protections

121. Ondersma, *supra* note 31, at 1830.

122. 11 U.S.C. § 362(a).

123. *Id.* § 547(b) (showing how payments within ninety days before filing may be recovered if they will enable the debtor to receive more than they would have received absent the payments in a liquidation). Although this provision is designed to bring the funds back into the estate to distribute amongst all creditors, the debtor may be entitled to them if they have sufficient exemptions available. *Id.* § 522(g).

124. *Id.* § 547(c)(8); *see* Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives from the Money Law Clinic*, 12 CLINICAL L. REV. 203, 231–32 (2005).

125. Ware, *supra* note 2, at 503–04.

126. *See* MASS. GEN. LAWS ch. 246, § 28 (2012); *Minimum Wage*, U.S. DEP'T LAB., https://www.dol.gov/whd/minimumwage.htm (last visited Mar. 28, 2019); *Minimum Wage Laws in the States*, U.S. DEP'T LAB., https://www.dol.gov/whd/minwage/america.htm (last updated Jan. 1, 2019).

to prevent garnishment and property seizures from driving families into poverty."[127] More than half of U.S. states permit garnishment of one-fourth of debtors' paychecks—and have "no limit on garnishment" if the check "is deposited in their bank account."[128] In addition, even in states that provide protections for individuals living below the poverty line, if a debtor's income rises above the poverty line, garnishments will be reinstated.[129] Thus, although garnishment laws provide some protection for those individuals suffering the most financially, they do not help those living just above the poverty line. While these debtors may only have a small proportion of their wages garnished, any amount being garnished is likely detrimental when a debtor is already making so little. In addition, debtors protected from garnishment because they earn too little may be deterred from earning more because they could then be subject to garnishment.

After the debtor achieves a discharge in bankruptcy proceedings, creditors are precluded from collecting on any debt incurred prior to the bankruptcy filing.[130] Absent a formal discharge of debts, the outstanding debts are always "waiting for the person should he or she ever find a way out of poverty and thus lose judgment-proof status."[131]

In states that permit arrest warrants to issue for failure to appear in post-judgment proceedings, a fresh start is particularly crucial. Individuals may have no idea that a default judgment has been entered against them, may have no idea that a warrant is outstanding, or may live in fear of being arrested. In one case in Perry County, Indiana, an individual was told they must pay $25 a month toward a $1865.93 judgment for an eight-year-old unpaid rent debt; when the individual explained he could only afford $5 a month, he was told he would be arrested if he did not pay.[132] In one 2015 case in the Southern District of

127. ACLU, *supra* note 5, at 23 (citing NAT'L CONSUMER LAW CTR., NO FRESH START: HOW STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY (2013), https://www.nclc.org/images/pdf/pr-reports/report-no-fresh-start.pdf).

128. *Id.* at 23 n.112 (citing Paul Kiel, *Unseen Toll: Wages of Millions Seized to Pay Past Debts*, PROPUBLICA (Sept. 15, 2014), https://www.propublica.org/article/unseen-toll-wages-of-millions-seized-to-pay-past-debts).

129. *See Handling a Wage Garnishment or Third Party Citation*, ILAO (Aug. 2017), https://www.illinoislegalaid.org/legal-information/handling-wage-garnishment-or-third-party-citation.

130. *See* 11 U.S.C. § 524(a) (2012) (enjoining collection of any discharged debts).

131. Ben-Ishai & Schwartz, *supra* note 108, at 477.

132. ACLU, *supra* note 5, at 17.

Texas, a man was arrested in his home for failure to appear in a case involving his nonpayment of student loans from 1983.[133] Although originally just $2500, the payments had swelled to $12,000.[134] The individual lived on social security and disability and lacked sufficient disposable income to make payments toward the debt.[135] When he missed a court date—because he had just come out of open-heart surgery—several U.S. Marshals appeared at his home and arrested him.[136] In Nebraska, a woman living on exempt social security and disability income was jailed on a 15-year-old arrest warrant.[137] The warrant stemmed from failure to appear on a case involving $1800 allegedly owed to a construction company for home repairs.[138]

In addition to the financial benefit of discharge, a formal declaration of discharge can offer emotional or psychological benefits as well; some have posited that the bankruptcy discharge "liberates the bankrupt psychologically."[139] Others have posited that debtors benefit from the process of appearing before a tribunal to obtain an official, legal declaration that their debt is discharged because it helps them move forward.[140]

Relief from even small amount of debts can have tremendous impact on poor families. An Urban Institute study found that families with even modest savings—between $250 and $749—are more able to withstand income disruptions or sudden expenses than families with no savings.[141] Their risk of eviction or missing utilities payments is substantially lower than families with no savings.[142] This suggests that where individuals are able to discharge small amounts of debt they can avoid getting

133. *Id.* at 5.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 52.

138. *Id.*

139. Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1061 (1987); *see also* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785–86 (1983).

140. *See* Pamela Foohey, A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy 19–20 (Feb. 4, 2019) (unpublished manuscript) (on file with author).

141. SIGNE-MARY MCKERNAN ET AL., URBAN INST., THRIVING RESIDENTS, THRIVING CITIES: FAMILY FINANCIAL SECURITY MATTERS FOR CITIES 3 (2016), https://www.urban.org/research/publication/thriving-residents-thriving-cities-family-financial-security-matters-cities.

142. *Id.* at 4.

caught in a debt spiral—instead of devoting ever increasing portions of their income to servicing debt, these individuals can pay for cars, homes, food, and other economy-fueling goods and services. In addition, they can meet their own basic needs, making it less likely that these individuals and families will need to rely on government aid to get by.

Bankruptcy cannot offer a perfect "fresh start" in all cases—if the individual constantly experiences income shortfalls, bankruptcy cannot eliminate them. In addition, as Katherine Porter and Deborah Thorne have found, steady income is essential to debtor rehabilitation and many debtors who obtain bankruptcy relief still struggle to pay bills one year after filing.[143] Still, in many cases the debt was incurred during a particular period of crisis: "The most common use of the discharged debt has been to provide income and medical care during times of personal economic crises, such as job loss, illness, or divorce."[144] Particularly since the massive shrinking of the social safety net from 14.2 million welfare recipients in 1994 to 2.7 million in 2016,[145] individuals have been largely forced to turn to credit when income shortfalls hit.[146] For these debtors, eliminating the debt before it spirals to consume ever-increasing portions of their income is critical. In particular, eliminating debts incurred in times of hardship could enable impoverished individuals to better meet their basic needs. Again, bankruptcy will certainly not help every low-income individual, and it is not a solution to poverty. However, particularly for individuals with debts incurred during a temporary crisis, debt relief may be essential.

C. BARRIERS TO BANKRUPTCY FOR POOR DEBTORS

While bankruptcy can indeed be beneficial for poor debtors, it is incredibly difficult for poor debtors to successfully access bankruptcy relief. It is now well documented that the poorest

143. Porter & Thorne, *supra* note 96, at 83–85 (reporting empirical evidence that one-quarter of debtors experienced difficulty paying routine bills one year after discharge).

144. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1943–44 (2011).

145. Greene, *supra* note 21, at 236–37 (citing *Caseload Data 1994 (AFDC Total)*, OFF. FAM. ASSISTANCE (Dec. 19, 2004), https://www.acf.hhs.gov/ofa/resource/caseload-data-afdc-1994-total; *TANF Caseload Data 2016*, OFF. FAM. ASSISTANCE (Jan. 12, 2016), https://acf.hhs.gov/ofa/resource/tanf-caseload-data-2016).

146. Atkinson, *supra* note 12, at 18–19; Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 379 (2015).

debtors are the least likely to successfully access bankruptcy relief.[147] After the 2005 amendments to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), bankruptcy became even more complex and expensive, and thus more inaccessible for the poorest debtors.[148] In addition, even if poor debtors are able to file, they are less likely to be able to afford attorneys, and, as discussed below, studies have shown that pro se cases are less likely to result in discharge of debt.[149]

The total fees required to file for bankruptcy in 2018 were $335 to file under chapter 7 and $310 to file under chapter 13.[150] These were substantial increases from the time when BAPCPA was enacted in 2005, at which point filing fees were $200 for chapter 7 and $150 for chapter 13.[151] The Bankruptcy Code permits low-income individuals to apply for a waiver of the filing fee.[152] To be eligible for a fee waiver, individuals must have incomes less than 150% of the poverty line and must be unable to pay the fee in installments.[153] Many poor debtors file for fee waivers. According to a 2007 study, 71.2% of pro se filers (whose income is significantly lower than non-pro-se filers) filed for a fee

147. *See* Ben-Ishai & Schwartz, *supra* note 108, at 487–89 (demonstrating that merely waiving filing fees is insufficient to increase bankruptcy filings given high legal costs); Littwin, *supra* note 144, at 1937 (citing procedural complexity as one cause of increased legal costs, resulting in poor debtors delaying or foregoing bankruptcy); Mann & Porter, *supra* note 3, at 290 ("[M]ost families in serious financial distress do not file for bankruptcy."); *id.* at 324 ("[D]ebtors may defer their filings for additional time because they must save up to pay higher attorney's fees . . . ."). *See generally* MacArthur, *supra* note 116, at 440–75 (detailing the struggle of poor debtors to access bankruptcy relief as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act).

148. *See* MacArthur, *supra* note 116, at 440–75.

149. *See* Ben-Ishai & Schwartz, *supra* note 108, at 487–89.

150. *Schedule of Bankruptcy Fees*, U.S. BANKR. CT. S. DISTRICT IND. (Sept. 1, 2018), http://www.insb.uscourts.gov/webforms/newlaw/FeeSchedule.pdf.

151. MacArthur, *supra* note 116, at 439.

152. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 418, 119 Stat. 109 (2005) (codified as amended at 28 U.S.C. § 1930(f)(1)–(3) (2012)); *see also* U.S. COURTS, OFFICIAL FORM 103B: APPLICATION TO HAVE THE CHAPTER 7 FILING FEE WAIVED (2015) [hereinafter OFFICIAL FORM 103B], http://www.uscourts.gov/sites/default/files/form_b103b.pdf.

153. § 418, 119 Stat. 109.

waiver.[154] The fee waiver forms, however, are relatively complex.[155] Debtors must calculate and report their monthly disposable income and prove that they are unable to pay the sum in installments.[156] This complexity may deter some debtors from even attempting it, but it is impossible to know how many debtors do not file because they cannot afford the filing fee or because they are intimidated by the fee waiver form.

The 2005 amendments to the Bankruptcy Code added a number of procedural and technical hurdles to bankruptcy relief that made the process both more complex and more expensive. Debtors must obtain credit counseling before filing[157] and file a credit counseling certificate with the petition,[158] they must file documents showing all money obtained within sixty days before the filing,[159] they must file their income tax returns,[160] and they must complete and file a monthly net income statement.[161] Debtors seeking discharge under chapter 7 must complete the confusing "Statement of Current Monthly Income and Means Test Calculation" to prove that they are eligible for chapter 7 filing.[162] Failure to complete and file all of these items within forty-five days of filing the petition results in automatic dismissal of the debtor's bankruptcy case.[163]

When I teach consumer bankruptcy in my class, I ask the students to fill out a Chapter 7 Means Test Calculation Form for a relatively simple bankruptcy.[164] In eight years of teaching, only two students have succeeded in filling out the form successfully. About half of the class makes an error at the beginning of the

154. Littwin, *supra* note 144, at 1965 ("Data from the 2007 [Consumer Bankruptcy Project] show that unrepresented debtors had significantly lower incomes [than represented debtors] at the time of bankruptcy."); Philip Tedesco, *In Forma Pauperis in Bankruptcy*, 84 AM. BANKR. L.J. 79, 92 fig.4 (2010).

155. *See* OFFICIAL FORM 103B, *supra* note 152.

156. *Id.*; MacArthur, *supra* note 116, at 419.

157. MacArthur, *supra* note 116, at 425; *see* 11 U.S.C. § 109(h)(1).

158. 11 U.S.C. § 521(b)(1).

159. *Id.* § 521(a)(1)(B)(iv).

160. *Id.* § 521(e)(2)(A).

161. *Id.* § 521(a)(1)(B)(v).

162. MacArthur, *supra* note 116, at 419; *see* U.S. COURTS, OFFICIAL FORM 122A-1: CHAPTER 7 STATEMENT OF YOUR CURRENT MONTHLY INCOME (2015), http://www.uscourts.gov/sites/default/files/form_b122A-1.pdf; U.S. COURTS, OFFICIAL FORM 122A-2: CHAPTER 7 MEANS TEST CALCULATION (2016) [hereinafter OFFICIAL FORM 122A-2], http://www.uscourts.gov/sites/default/files/form_b_122a-2.pdf; *see also* 11 U.S.C. § 521(a)(1)(B)(v).

163. 11 U.S.C. § 521(i)(2).

164. *See* OFFICIAL FORM 122A-2, *supra* note 162.

form because they select the wrong "number of people used in determining deductions [] from income" under Part 2, question 5.[165] The form states: "Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household."[166] Many students thought that only children are claimed as exemptions and did not include the debtor or debtor's spouse. Next, virtually all students make mistakes when trying to ascertain the proper local or national standard in a given category. They have trouble figuring out what should be included in a mortgage or rent operating expense versus a mortgage expense, and they have trouble understanding question 9, which instructs debtors to enter zero if the debt payment exceeds the local mortgage expense standard.[167] The transportation expense section is even more difficult for them, as they struggle to understand what is included in operating costs and what is included in ownership costs.[168] These problems persist even though the students are aware of and access the tables provided on the Department of Justice's website. Without the link to those tables, the errors and confusion, already severe, would be magnified tremendously.

Although purportedly designed to keep out high-income debtors, the effect of the 2005 amendments has been to reduce access for the poorest debtors who cannot afford the increased fees and who have difficulty navigating the complex technical rules without attorneys.[169] Ironically, the elements of the Code

165. *Id.* at 2.

166. *Id.*

167. *Id.* at 3.

168. *See id.*

169. *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 228 (2007) ("If BAPCPA has an impact, it is by requiring more paperwork of consumer debtors, thereby driving up the cost of going bankrupt."); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668 (2005) ("[The means test] adds complexity and cost to all cases, and may deter or dismiss relatively few would-be chapter 7 debtors."); Littwin, *supra* note 144, at 1936 ("At least one scholar has persuasively argued that a decline in overall accessibility was, in fact, the point [of BAPCPA]."); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 395 (2007) ("As filing costs rise, even the most desperately insolvent must delay bankruptcy, at least until they can save the amount necessary for the filing fee and the attorney's fee."); *cf.* Isabel V. Sawhill, *Poverty in America*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 405, 407–08 (David R. Henderson ed., 2008).

that can benefit the few wealthy or high-income debtors that seek its relief are unaltered. Generous homestead exemptions in some states,[170] exclusions of spendthrift trusts from the bankruptcy estate,[171] and the absence of caps on secured debt payments when calculating disposable income[172] all work to ensure that the strategic high-income, wealthy debtor can indeed access bankruptcy relief.[173] While burdensome for all debtors, poor debtors are less likely to be able to manage time away from work to complete all of the required paperwork and locate all of the documents (such as tax returns and pay stubs) that are required to be submitted.[174] Additionally, the poor are less likely to have single, stable sources of income, which makes tracking down all required documents more complicated as they must locate income records associated with each temporary or part time job.

The counseling requirement is also problematic. First, most counseling services have a fee that averages about $50, which very poor debtors likely cannot afford.[175] Second, poor debtors may not be able to afford time away from work to complete the counseling.[176] Third, debtors attempting to navigate the system without an attorney—as poor debtors are more likely to be stuck doing—may simply be unaware of the counseling requirement.[177] Even where debtors urgently need bankruptcy relief, courts are bound to dismiss cases where the debtors failed to obtain a counseling certificate before filing.[178]

In addition to making bankruptcy filing much more complex, BAPCPA also caused attorney's fees to increase.[179] This

170. *See* Lawrence R. Ahern, III, *Homestead and Other Exemptions Under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observation on "Asset Protection" After 2005*, 13 AM. BANKR. INST. L. REV. 585, 594 (2005).

171. *See* 11 U.S.C. § 541(c)(2) (2012).

172. *See* Culhane & White, *supra* note 169, at 676 (suggesting that unlimited secured debt may contribute to bankruptcy abuse).

173. *See* Carlson, *supra* note 169, at 227 ("[T]he 2005 means test *encourages bankruptcy abuse* [and is] *more generous* to high-income debtors than the old case law.").

174. MacArthur, *supra* note 116, at 420 ("The poor may not have the time away from work to complete the required documents . . . .").

175. *Id.* at 425 (citing Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1311 (2006)).

176. *Id.* at 420.

177. *Id.* at 430.

178. *See In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005); MacArthur, *supra* note 116, at 429–30.

179. Littwin, *supra* note 144, at 1960 (referring to a study which found that chapter 7 attorney's fees "increased by 51[%] between early 2005 and 2007").

could be due partly to the increased complexity and partly to the additional liability imposed on debtors' attorneys, including liability even for technical errors in the debtors' schedules of assets and liabilities.[180] Attorney's fees increased 51% after the 2005 amendments went into effect, from a mean of $712 in early 2005 to a mean of $1078 in 2007.[181] Before BAPCPA went into effect, fees ranged from $1500 to $3000 with a median of $2000.[182] In February 2008, fees ranged from $1800 to $4000 with a median of $3000.[183]

Some debtors living at or below the poverty line are able to obtain the counsel of pro bono or nonprofit bankruptcy attorneys who provide free or low-cost assistance, but the need for these services far outstrips demand. Between 2001 and 2007, the percentage of pro se debtors in chapter 7 rose by 250%, suggesting that debtors could not afford the higher attorney's fees.[184] At the same time, the percentage of pro se debtors that succeeded in obtaining a discharge significantly dropped, suggesting that the added complexity for bankruptcy filings after BAPCPA contributed to fewer successful filings.[185] One study of pro se debtors in five districts found *no* dismissals of chapter 7 pro se cases in 2001.[186] In 2007, by contrast, 17.6% of pro se chapter 7 bankruptcies failed.[187] Almost all of these dismissals were due to technical deficiencies, such as incomplete tax records, errors in forms, or missed deadlines.[188] These debtors were also much less likely than represented debtors to successfully correct these technical

180. 11 U.S.C. § 707(b)(4) (2012); *see also* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 286–88 (2005) (describing BAPCPA's "provisions directed at attorneys who represent consumer debtors in [c]hapter 7 cases").

181. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 22 (2008).

182. *Id.* at 25.

183. *Id.* at 25–26; *see also* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 30 (2012) (showing a fifty-one percent increase in total direct access costs in chapter 7 no-access cases after BAPCPA and a thirty-seven percent increase in total access costs in chapter 7 asset cases).

184. Littwin, *supra* note 144, at 1956, 1960 (analyzing data from five districts and found a 2% pro se rate in the 2001 sample and 5.3% pro se rate in the 2007 sample).

185. *Id.* at 1957.

186. *Id.* at 1971.

187. *Id.* at 1971–72.

188. *Id.* at 1976–77 (citing Consumer Bankruptcy Project data).

deficiencies and continue with their cases.[189] As Angela Littwin explained, "pro se [c]hapter 7 debtors after BAPCPA encountered disentitlement through procedural hurdles twice: first in the form of unaffordable attorneys and, second, more directly through technical requirements they could not meet on their own."[190] Nathalie Martin explained, "Having read many pro se petitions, I am convinced that the vast majority of pro se debtors have no idea how to fill out the paperwork."[191] Martin further explains that many debtors list all of their assets and do not claim any exemptions, thus risking loss of important resources.[192]

Some debtors without the resources to pay for attorneys use petition preparers, who assist with preparation of the petition without providing legal advice.[193] Petitioner preparers are not permitted to give legal advice; their role is limited to typing forms.[194] The results for debtors using petition preparers are somewhat better than the results for debtors filling out the forms without any assistance.[195] The fee for petition preparation should not exceed $200.[196] However, debtors living at or below the poverty line are unlikely to have access to $200 for petition preparation.

Another possible risk for low-income debtors is that they will end up filing a "no money down" bankruptcy, whereby they pay attorneys over time in a chapter 13.[197] In a chapter 13, debtors repay creditors over a period of three to five years, and only receive a discharge at the end of the case.[198] If they miss a payment

189. *Id.* at 1977.

190. *Id.* at 1957.

191. Martin, *supra* note 124, at 233 (emphasis omitted).

192. *Id.* at 233 n.105.

193. Michael D. Sousa, *Legitimizing Bankruptcy Petition Preparers: A Sociolegal Prescription for Change*, 89 AM. BANKR. L.J. 269, 273–74 (2015). Sousa suggests that in simple, "no asset" cases, petition preparers should be allowed to give limited legal advice and accompany and aid debtors in their section 341 meetings with creditors. *Id.* at 275–76, 311.

194. U.S. DEP'T OF JUSTICE, BANKRUPTCY PETITION PREPARER GUIDELINES paras. 1, 10 (2014), https://www.justice.gov/sites/default/files/ust-regions/legacy/2014/03/10/bpp_guidelines.pdf.

195. Littwin, *supra* note 144, at 1965.

196. U.S. DEP'T OF JUSTICE, *supra* note 194, para. 4 ("The charge typically allowed in this district for a bankruptcy petition preparer's services is no more than $200 . . . .").

197. Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1059 (2017).

198. Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter*

and their case is dismissed, the debtor again owes all of this debt with interest and does not receive any relief. Unfortunately, most debtors do not have success in a chapter 13—only around a third of such debtors ultimately receive a discharge in bankruptcy.[199] By contrast, 95% of debtors in chapter 7 receive a discharge.[200]

Filing a chapter 13 may not represent a debtor's choice of filing at all: studies show that certain districts have much higher rates of chapter 13 filings than others,[201] and that Black debtors are more likely to end up in chapter 13.[202] The cause of this disparity has proven to be due to bias—attorneys disproportionately steer Black debtors into chapter 13 cases—even when they express a preference for filing a chapter 7.[203] As discussed above, filing a chapter 7 petition without an attorney can be risky, as 17% of chapter 7 filings are dismissed.[204] A debtor who feels unable to navigate chapter 7 pro se may select a "no money down" chapter 13 instead—not realizing that the risk of failure and non-relief is much greater.[205]

All of the available evidence suggests that bankruptcy relief is out of reach for the vast majority of impoverished debtors. The increased complexity of the bankruptcy process after BAPCPA has only exacerbated this problem. Debtors living at or below the

Choice, 9 J. EMPIRICAL LEGAL STUD. 393, 394 (2012) (outlining the characteristics of chapter 13 filings).

199. *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107 (2011); *accord* Greene et al., *supra* note 97, at 1042 (finding that only 36.5% of a sample of 2007 chapter 13 cases resulted in discharge).

200. *See* Porter, *supra* note 199, at 107.

201. *See, e.g.*, Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 556–61 (1993) (finding the "local legal culture" has an impact on the number of chapter 13 filings); *see also* Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 308–12 (2009) (discussing evidence that demonstrates local legal players influence chapter 13 filing patterns).

202. *See* Braucher et al., *supra* note 198, at 393–95 (finding that African Americans disproportionately file chapter 13 bankruptcy partly because consumer bankruptcy lawyers appear to be guiding them into this option).

203. *Id.* at 411–13.

204. Littwin, *supra* note 144, at 1971–72 (stating that, in 2007, 17.6% of unrepresented debtors had their chapter 7 filings dismissed or converted).

205. Paul Kiel & Hannah Fresques, *How the Bankruptcy System Is Failing Black Americans*, PROPUBLICA (Sept. 27, 2017), https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13 ("And once [black debtors] chose Chapter 13, we found, the odds of their cases ending in dismissal—with no relief from their debts—were about 50 percent higher.").

poverty line can seldom afford counsel, and, without counsel, are not able to navigate the complex filing requirements and fulfill all of the necessary prerequisites for obtaining a discharge in bankruptcy. These burdens are even more severe for Black debtors, who are not only more likely to be living below the poverty line, but are also more likely to be pressured to file a chapter 13, under which they are unlikely to ever see their debt discharged.[206] Data suggest that around 13% of debtors in the bankruptcy system have income at or below the federal census bureau poverty line.[207] Given the barriers to filing discussed here, there are likely many more impoverished debtors who need bankruptcy and who are unable to access bankruptcy.[208]

II. FAST-TRACK DEBT RELIEF OPTION: A PARTIAL SOLUTION

Given that impoverished individuals experience substantial hardship when incurring even small amounts of debt, I propose a fast-track debt relief option for individuals with incomes at or below the poverty line who owe less than $5000 in debt. This Part offers two alternative proposals, which I will call Proposal A and Proposal B. I will first describe the proposals in detail and then will discuss the benefits of the proposals. These proposals are meant to compliment rather than supplant proposals that focus on providing access to financial aid to cover emergencies. Until we have a functioning safety net to help low-income individuals facing sudden expenses or sudden drops in income, we must have a way for them to easily discharge such debt before it consumes all available income and interferes with their ability to pay for necessities such as food and utilities.

206. *See* Foohey et al., *supra* note 197, at 1060 ("African Americans are more likely to file 'no money down' chapter 13 cases than other similarly situated debtors."); *see also supra* notes 202 and 205 and accompanying text.

207. *See* E-mail from Robert M. Lawless, *supra* note 98. Of 2335 debtors in the 2007 Consumer Bankruptcy Project, 14.9% of debtors had incomes below the census bureau poverty line based on their household size; of 2952 debtors in the current Consumer Bankruptcy Project, 12.36% of debtors in the study had incomes below the census bureau poverty line for their household size. *Id.*

208. MacArthur, *supra* note 116, at 410 n.18 ("Ninety percent of bankruptcy debtors have incomes below the national median, and a third of the bankruptcy debtors have incomes below the poverty level." (quoting Ralph Brubaker & Kenneth N. Klee, *Resolved: The 1978 Bankruptcy Code Has Been a Success*, 12 AM. BANKR. INST. L. REV. 273, 286 (2004))).

A. PROPOSAL A

Any individual who has an income less than or equal to the poverty level income for his or her state should be able to easily obtain a discharge of $5000 or less in debt. This proposal is designed to avoid the risk of a debt spiral and to achieve a greater likelihood that these individuals will continue to be able to meet their basic needs. Currently, the system is too complex and expensive, and such complexity and expense is particularly unjustified in situations where small amounts of debt are owed by impoverished individuals. There is no meaningful recovery for creditors in such cases, yet the burden on these debtors is tremendous.

Under my proposal, an individual seeking discharge of $5000 in debt or less may, if their income is at or below the poverty line, obtain a discharge of this debt under chapter 7 by filing a special one-page petition under penalty of perjury. The primary goal of this proposal is to make it at least as easy for impoverished debtors to file and obtain a discharge as it was for such filers prior to the implementation of BAPCPA. This should not be controversial since BAPCPA was purportedly designed to exclude only high income, "can pay" debtors from debt relief.[209] In addition, the amount to be relieved under this fast-track option is only $5000, so it does not represent a grave economic loss or risk for creditors.

Rather than listing all assets, petitioners would sign an affidavit that they have no non-exempt assets. Again, if the judge or trustee wishes to require further information they may do so, but it is a waste of time and resources in most cases, as the vast majority of such debtors have no non-exempt assets. (I will address risks and moral hazard concerns in the next section.)

Procedurally, creditors receive notice of the petition and will have thirty days to object to the granting of the petition. Because these are no-asset cases and the debt amounts are so small, § 341 meetings will not be automatic but instead will take place only upon request by the creditor, judge, or trustee within thirty days of the filing of the bankruptcy petition. If there is no request for a meeting within thirty days, the judge will grant a discharge. There will be no other requirements for these debtors: no counseling requirement, no requirement that the debtor submit pay stubs and tax returns, no requirement that the debtor submit

209. *See* MacArthur, *supra* note 116, at 413–14.

statements of intention with respect to property, and no requirement that the debtor undergo any means testing. When only small amounts of debt are at issue, the barriers created by these requirements are simply disproportionate to any possible benefit. These hurdles are justified, if at all, only for debtors with reasonable incomes who are seeking to discharge large amounts of debt.

Rather than re-drafting each section and subsection to clarify that these certain requirements to do not apply where the debtor's income is at or below the poverty line and seeks discharge of $5000 in debt or less, Congress can amend the Code to add an additional simple, concise subsection:

> *Special Petition*
>
> Individuals may file a special petition if:
>
> (a) The debtor's current monthly income is at or below the poverty line for the state in which the debtor resides,
>
> (b) The debtor seeks to discharge not more than $5,000; and
>
> (c) The debtor has no non-exempt assets.

If, after thirty days, no creditor has objected to the Special Petition, the Court shall grant a discharge of no more than $5,000 in debt. Debtors seeking relief pursuant to the Special Petition do not need to complete creditor counseling and do not need to submit any other documents or filings; §§ 109(h), 521(a)(1)(B), 521(b), 521(e), and 521(i) shall not apply. The court or trustee may request a hearing to determine whether the debtor is eligible for the Special Petition. If the debtor is ineligible for the Special Petition, the debtor may file a traditional chapter 7 petition without any prejudice and without any limitations to the automatic stay.

This special fast-track petition would be free. Because petitioners are already attesting that their income is at or below the poverty line, no separate fee waiver form is necessary. The application for fast-track bankruptcy will have included a statement of current monthly income, an affidavit indicating that the debtor has no or nominal non-exempt assets, and an affidavit indicating that the debtor owes no more than $5000. The debtor can submit a list of creditors as in § 521(a)(1)(A), but the additional documentation required in § 521(a)(1)(B) will not be required. A schedule of assets and liabilities under § 521(a)(1)(B)(ii), a statement of financial affairs under § 521(a)(1)(B)(iii), copies of pay stubs under § 521(a)(1)(B)(iv), a statement of monthly net income under § 521(a)(1)(B)(v), and a

statement disclosing anticipated increase in income under § 521(a)(1)(B)(vi) need not be filed.

The debtor will also not be required to file the materials contemplated in § 521(b). There will be no counseling requirement under § 109, and thus no need to file a certificate under § 521(b). The debtor will also not be required to submit tax returns under § 521(e). Of course, § 521(i), which provides for automatic dismissal if this information is not submitted within forty-five days, also will not apply.

It is important to note that trustees or bankruptcy judges would be able to request additional documents if there is some doubt or uncertainty about the debt or income threshold. In addition, debtors are still subject to a denial of discharge in the event that they provide inaccurate information; for example, if they knowingly misstated their income or debt level in applying. Section 727(a)(4) permits denial of discharge if "the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account; (B) presented or used a false claim . . . (D) withheld from an officer of the estate entitled to possession under this title, any recorded information . . . ."[210] The difference is that these materials would not need to be submitted as a matter of course.

A schedule of assets and liabilities is not necessary in these cases, as only no-asset cases are eligible, and as creditors will be notified and must in any event file claims under § 501. If the debtor misstates the amount of debt on the bankruptcy petition, the debtor will not be entitled to fast-track bankruptcy. In no event would the debtor be able to discharge more than $5000 of debt using the fast-track process. Additionally, if the debtor owes more than $5000 they will not be able to access the fast-track system, even if they only want to discharge $5000 worth of their debt. Debtors with greater debt burdens should seek relief of all of their debt via the regular chapter 7 filing process; making the fast-track accessible to this high-debt debtors runs the risk of debtors being pressured (by creditors, attorneys, or trustees) into accepting less relief than that to which they are entitled.

Assembling these materials is too onerous, complex, and time-consuming than is justified given the poverty of the debtors and the small amount of debt at issue in these fast-track cases. Because debtors receiving relief under the Special Petition are

210. 11 U.S.C. § 727(a)(4)(A)–(B), (D) (2012).

only discharging $5000, the eight-year bar under § 727(a)(8)[211] in place for traditional bankruptcies is arguably too onerous. I propose a four-year refilling bar for Special Petition cases. Low-income debtors cannot be expected to get through eight years without a financial crisis that necessitates turning to credit—indeed, even four years is arguably too long. Ideally this proposal would accompany other policy changes that would make reasonable credit accessible to low-income debtors. For unsecured debt alone the median amount discharged is over $25,000, so even if a debtor files four special petitions over the course of sixteen years, this will represent less than the median debt discharged in a traditional chapter 7. Even if the debtor files for a traditional chapter 7 after four years, this additional $5000 discharged four years prior would not represent substantially greater losses for creditors relative to the amount discharged by the average debtor.[212] Hence, permitting debtors to access the bankruptcy system again after four years as opposed to eight would not be costlier to creditors than a traditional bankruptcy filing.

B. PROPOSAL B

Because legislative change is cumbersome, fraught, and infinitesimally likely to succeed, another option, which may come close to achieving the same goal, is a rule change. 11 U.S.C. § 521(a)(1)(B) does not require the filing of these items in all circumstances—it requires them "unless the court orders otherwise."[213] Thus, there is nothing preventing the bankruptcy courts from ordering that these materials are not required in certain cases. Thus, Federal Rule of Bankruptcy Procedure 4002(b), Individual Debtor's Duty to Provide Documentation,[214] could be amended to provide that debtors with income below the poverty level are not required to file the materials indicated in § 521(a)(1)(B). In such cases, courts would submit a form order waiving these requirements, similar to orders waiving the bankruptcy-filing fee.

For increased simplicity, the fee waiver and documentation waiver could be condensed. If a debtor provides sufficient documentation for a filing fee waiver, this would also suffice for a court order that documentation required by § 521(a)(1)(B) is not

211. *Id.* § 727(a)(8) (providing that debtors granted a discharge within the previous eight years are not eligible for a discharge).

212. Porter & Thorne, *supra* note 96, at 82.

213. 11 U.S.C. § 521(a)(1)(B).

214. FED. R. BANKR. P. 4002(b).

required. Under this approach, if a debtor files a successful fee waiver using Official Form B 3B,[215] the court would file an order that the fee waiver request is granted *and* that the debtor need not file the documentation contemplated in § 521(a)(1)(B). Because the fee waiver form itself is somewhat cumbersome (and only debtors with incomes less than 150% of the poverty level are eligible for fee waiver),[216] line two of the form could include a space where the debtor can enter the poverty level for the state in which the debtor resides.[217] Because debtors may not know how to look up the poverty levels in their state, this line should include a link to the U.S. trustee website with a table providing the poverty levels in each state. If the amount entered in "your family's average monthly net income" is equal to or less than the amount indicated in the following line, providing for the poverty level in the debtor's state, the debtor would not have to complete the remainder of the form.[218] A line would be added to the form indicating, "Debtor qualifies for a fee waiver and for a waiver of the § 521(a)(1)(B) documentation requirements." The corresponding court order would indicate that the fee waiver application has been granted and that the debtor is not required to submit the documentation contemplated by § 521(a)(1)(B). Thus, because § 521(a)(1)(B) already provides that the documentation need not be filed if the court orders otherwise,[219] the debtor can avoid these onerous filing requirements consistent with the Bankruptcy Code.

There are two benefits to Proposal B. First and foremost, it does not require legislative action. Second, it would not require a limit of $5000 in debt—because the Code already provides that debtors need not file these documents if the court so orders,[220] there is no reason that a debt maximum need be imposed. This proposal does not relieve the debtor from all of the onerous requirements, including 11 U.S.C. § 109,[221] but it would make the process substantially more feasible for many debtors.

215. U.S. COURTS, OFFICIAL FORM B 3B: APPLICATION TO HAVE THE CHAPTER 7 FILING FEE WAIVED (2014) [hereinafter OFFICIAL FORM B 3B], https://www.uscourts.gov/sites/default/files/b_3b_0.pdf.

216. 28 U.S.C. § 1930(f)(1) (2012).

217. OFFICIAL FORM B 3B, *supra* note 215, at 1.

218. *Id.*

219. 11 U.S.C. § 521(a)(1)(B) (2012).

220. *Id.*

221. *Id.* § 109.

1. Justifying the Proposal

This proposed fast-track petition can help low-income, no asset debtors to avoid debt traps and succeed in meeting their basic needs. Again, these proposals are not the only measures needed to address the problem of financing small financial shocks, or of facilitating bankruptcy filing. In addition to the proposals for limiting debt collection mentioned above, there are also proposals designed to more directly help low-income debtors meet their needs. For example, Jacob Hacker proposes an insurance-based plan to finance dramatic drops in income.[222] His proposal, however, would only be triggered by 20% declines in income,[223] and would not solve the problem of smaller financial shocks, such as car repairs or less drastic medical emergencies. Abbye Atkinson, among others, has discussed the need for a more robust social safety net.[224] Other proposals are at least partially credit-based. For example, Mehrsa Baradaran has proposed postal banking as an option for small loans to finance emergencies with reasonable terms, which would help individuals to avoid debt spirals.[225] Sara Greene proposes a Financial Services for Family Security organization modeled on the Money Advice and Budgeting Service, a program in Ireland that helps individuals who are struggling with debt.[226] Greene's program would also provide small no-interest loans to cover emergencies, after meeting with a counselor to discuss the need for the loan.[227]

There are also other important bankruptcy specific proposals. Dalié Jiménez, Lois Lupica, and Jim Greiner have suggested access to clear self-help materials that would enable debtors to successfully file for themselves.[228] Deborah Thorne, Robert Lawless, and Pamela Foohey, have suggested allowing debtors to pay attorneys' fees in installments in chapter 7 cases so that debtors do not have to file under chapter 13 in order to pay for

222. JACOB S. HACKER, BROOKINGS INST., UNIVERSAL INSURANCE: ENHANCING ECONOMIC SECURITY TO PROMOTE OPPORTUNITY 2 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/200609hacker.pdf.

223. *Id.*

224. *See* Atkinson, *supra* note 12, at 76–81.

225. MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 211–13 (2015).

226. Greene, *supra* note 21, at 300.

227. *Id.* at 305.

228. *See* D. James Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1123 (2017).

an attorney.[229] Michael Sousa has proposed that petition preparers be allowed to give limited legal advice and accompany debtors to § 341 meetings in simple, no asset cases.[230]

Although Proposal A suffers from the need for legislative action, Proposal B may be relatively easily achievable. Proposal B may be less controversial than other legislative proposals, given the relatively low amounts of debt at issue. Again, these proposals are by no means sufficient to address the needs of the impoverished and over-indebted, but they may ameliorate the burden for some—specifically, they can alleviate situations in which a poor individual's debt burden is contributing substantially to her inability to meet basic needs.

In addition to being potentially achievable, my proposal (whether ultimately achieved via Proposal A or Proposal B) provides an avenue to arrive somewhat closer to meeting the basic needs of impoverished debtors. Again, this proposal alone will not be sufficient to guarantee that the basic needs of debtors are met. It can, however, ameliorate the burden for some over-indebted individuals.

This proposal should also be able to withstand creditors' objections. Impoverished debtors will be getting no more relief than they are presently entitled; however, rather than being merely legally and theoretically available, the relief will actually be available to these debtors. There is no justification for the burdensome procedures currently in place when applied to the poorest debtors; and certainly not when relatively small amounts of debt are at issue. Pro se debtors currently face all but insurmountable obstacles to relief,[231] and the poorest debtors are precisely those for whom these obstacles create the greatest injustice.

Because relatively small amounts of debts are being discharged, creditors should be less concerned that a speedy process will be economically detrimental. These are no asset cases and these creditors would not be paid in a chapter 7 in any event; to the extent that they receive more payments under the existing system than a fast-track system, it is due to delays in filing from the expense and complexity of post-BAPCPA bankruptcy filings.[232] Finally, even if the proposal does affect creditor recovery,

229. *See* Foohey et al., *supra* note 197, at 1103.

230. *See* Sousa, *supra* note 193, at 275–276, 311.

231. *See* Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 30 (2009).

232. *See* Mann, *supra* note 169, at 379.

creditors are far more able to bear this cost than impoverished debtors.

In addition to not causing severe losses to creditors, this proposal also does not require the creation of any new agency or system. Existing judges, lawyers, courtrooms, and clerks will process these petitions in the same way that they currently process chapter 7 petitions. The only difference will be that the petitions can be processed much more quickly and with fewer procedures and hearings. If a judge or trustee has any concerns with a petition, a hearing can be held and the case can proceed pursuant to existing chapter 7 protocols if necessary. This simplified process will reduce the burden on bankruptcy courts[233] and will make it possible for judges and trustees to devote time to more complicated cases. This could help maximize recovery for creditors and help ensure cleaner fresh starts for debtors. In addition, this alleviates the costs and burdens on chapter 7 trustees; in no asset cases trustees still have to perform substantial work, but cannot be paid out of the estate. The fast-track proposal eliminates the 341 meeting and the need for extensive review of debtor documents. Of course, attorneys, petition-preparers, trustees, and judges would need to be trained and familiarized with the fast-track process. It is also necessary to address the risk that attorneys would charge their regular rate to assist with the fast-track process;[234] this could be addressed by capping the amount that attorneys or petition preparers may charge to assist with the fast-track process.

Because this process is so simple, non-profits and lawyers donating pro bono services will be able to help more individuals. Pro se qualifying debtors should be able to navigate this simplified filing successfully and should be able to obtain a discharge. The creators of the Financial Distress Research Project, Dalié Jiménez, Jim Greiner, and Lois Lupica, have spent the past

233. *See* Pardo, *supra* note 231, at 6.

234. *See, e.g.*, Adam D. Herring, *Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice*,*"* 37 AM. BANKR. INST. J. 32, 32 (2018) ("[A]ttorneys, law firms and third parties have recently sought to creatively reimagine the terms and methods of payment for representation of consumer chapter 7 debtors. Some of these alternative arrangements could run afoul of bankruptcy law and ethical obligations.").

seven years studying what materials help individuals in financial distress.[235] As part of this project, they created self-help materials aimed at these individuals.[236] For example, UpSolve, a non-profit start-up launched this summer, plans to use these materials to help make bankruptcy "simple, fast, and free."[237] A special petition option would further facilitate access for eligible debtors. This organization and similar non-profits will serve a vital role by helping poor debtors with large debt loads access bankruptcy.

Not only can this proposal help poor debtors seriously burdening creditors or the court system, the proposal also has the potential to benefit the broader economy. If individuals must devote all of their disposable income to servicing debt, they are not able to contribute to the economy by purchasing goods and services. Current policies that keep debtors trapped in debt are not just costly to the debtor, who sacrifices a minimal standard of living,[238] but are also costly to the economy overall.

Finally, the proposal is a step toward satisfying human rights concerns. Because the United States has chosen not to implement a robust safety net, impoverished individuals are at risk of inadequate housing, insufficient food and water, lack of healthcare, and an inability to secure a minimal standard of living sufficient for human dignity.[239] In addition, indebted individuals' human rights are at risk because they may be incarcerated as a result of being unable to pay a debt, or they may end up essentially laboring exclusively for the benefit of their creditors.[240] Atkinson is right that the access to credit alone is incapable of meeting impoverished debtors' needs; however, the lack of social safety net forces debtors to turn to credit, particularly

235. Dalié Jiménez, *Can a Nonprofit Startup Fix the Pro Se Problem in Bankruptcy?*, CREDIT SLIPS (Aug. 1, 2016), http://www.creditslips.org/creditslips/2016/08/can-a-startup-fix-the-pro-se-problem-in-bankruptcy.html.

236. *Id.*

237. *Id.*

238. *See* Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 242–44 (2018).

239. *See generally*, Ondersma, *supra* note 146, at 377 ("Situations of severe overindebtedness can render debtors unable to meet their basic needs, interfering with a debtor's ability to access an adequate standard of living or healthcare."); Ondersma, *supra* note 89, at 272 ("Individuals carrying heavy debt burdens often experience shame, marginalization, exclusion, and the inability to meet their basic needs.").

240. *See* Ondersma, *supra* note 89, at 295–319 (analyzing the human rights that may be at risk for indebted individuals).

in emergency situations.[241] So long as debtors are forced to rely on credit to meet basic needs, it is essential that they have an accessible path to effective debt relief.[242]

III. RESPONDING TO POTENTIAL OBJECTIONS

This section responds to four potential objections: (1) the risk that some debtors with assets or with incomes above the poverty line will receive discharges, (2) the moral hazard risk; i.e., the risk that debtors will incur debt with the intention of discharging it, (3) the objection that such a proposal should be administrative rather than via the bankruptcy courts, and (4) the risk of adverse consequences to borrowers.

A. THE RISK OF HIGH INCOME, HIGH ASSET DEBTORS ACCESSING THIS SYSTEM IS MINIMAL

Allowing admission to this debt relief by affidavit, under penalty of perjury, and without submission of tax returns and pay stubs may allow some ineligible debtors to receive discharges, but this risk is minimal. First, any judge or trustee can request additional proof of income for any case.[243] Lying to the bankruptcy court is criminalized under 18 U.S.C. § 157, so a debtor who is not forthcoming and is then audited risks criminal charges.[244] Second, high-income debtors have little to gain from accessing this minimal discharge. High-income debtors can cope with $5000 in debt, and the benefit of the discharge of this relatively small amount of debt would not outweigh the stigma associated with filing or the hit to the debtor's credit score. If their debt becomes unmanageable they can access bankruptcy through the regular bankruptcy system, which provides greater relief. For these debtors, the fees and complexities of bankruptcy do not pose an insurmountable barrier, as high-income debtors can hire attorneys who can help them access the full panoply of bankruptcy relief. The ability to obtain relief from serious indebtedness is an extremely valuable safety net, and it would

241. *See* Atkinson, *supra* note 12, at 70–71; Ondersma, *supra* note 89, at 339–41.

242. *See* Ondersma, *supra* note 89, at 339–41.

243. *See* 18 U.S.C. § 152(9) (2012) (noting that trustees and officers of the court are entitled to information relating to the property or financial affairs of debtors).

244. *Id.* § 157; *see also id.* § 152 (providing criminal penalties for debtors who make false oaths or accounts to the trustee or bankruptcy court).

make little sense for debtors with reasonable incomes to seek relief from relatively small amounts of debt and risk relinquishing this privilege. The current bankruptcy system benefits high-income debtors in many ways—permitting unlimited deductions from the means test for secured debt such as home mortgages and cars, permitting unlimited homestead exemptions, and excepting spendthrift trusts from property of the estate.[245] If the concern is high income or high asset debtors obtaining discharges, the focus of reform should be on these matters—not maintaining complexity. Of course, as Ronald Mann has argued, the amendments thus far to the Code were not, in fact, designed to create barriers to wealthy, high-income debtors, but were instead designed to keep low-income consumer debtors trapped in debt repayment as long as possible.[246] But to the extent that an objection based on the risk of high-income, high-asset debtors accessing the system is a sincere one, limiting exemptions and allowing creditors to access spendthrift trusts would have more impact than keeping the existing barriers to filing, which fall primarily on those unable to afford counsel.

B. THERE IS LITTLE MORAL HAZARD RISK

This proposal should not increase moral hazard, as it does not expand available bankruptcy relief. Again, the proposal is designed to make it at least as easy for the poor to access bankruptcy as it was prior to BAPCPA—BAPCPA's purported goal was to prevent high income, "strategic" debtors from filing,[247]

245. *See, e.g.*, Baran Bulkat, *What Expenses Can Help You Pass the Bankruptcy Means Test?*, ALLLAW, https://www.alllaw.com/articles/nolo/bankruptcy/expenses-help-pass-means-test.html (last visited Mar. 28, 2019) (noting that mortgages, car loans, and other secured loans can help individuals pass the means test).

246. Mann, *supra* note 169, at 378–79.

247. 151 CONG. REC. 2993–94 (2005) (statement of Sen. Frist) (asserting that people plan their bankruptcies strategically); 145 CONG. REC. 8515–16 (1999) (statement of Rep. Roukema, Chairwoman, H. Subcomm. on Fin. Insts.) (arguing that bankruptcy was becoming a "first stop financial planning tool rather than a last resort"); 144 CONG. REC. 24936–37 (1998) (statement of Rep. Goodlatte) ("Under the current system, some irresponsible people filing for bankruptcy run up their credit card debt immediately prior to filing knowing that their debts will soon be wiped away."); 144 CONG. REC. 21643–44 (1998) (statement of Sen. Grassley) ("The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay."); 144 CONG. REC. 19876–77 (1998) (written remarks of former Sen. Bentsen) ("With growing frequency, bankruptcy is being treated as a first choice rather than a last resort, a matter of convenience rather than necessity."); *see also* Robert M. Lawless et al., *Interpreting Data: A Reply to Professor Pardo*, 83 AM. BANKR.

and my proposal only applies to debtors with incomes below the poverty line. It should not be controversial to remove these barriers with respect to these impoverished debtors. As with any bankruptcy filing, discharge can be denied if there is truly fraud or abuse.[248] Courts can also deny debtors access to bankruptcy filing "for cause."[249] Finally, once debtors file, they could not file again for eight years.[250] Because this is not relief that is available unlimitedly, debtors in poverty would likely reserve this option for true emergencies.

C. AN ADMINISTRATIVE SOLUTION WOULD LIKELY BE INEFFECTIVE AND INEFFICIENT

Some have proposed an administrative solution to filings for low-income, low-asset cases.[251] However, experience with other administrative systems designed to provide relief to the poor suggests that an administrative solution is unlikely to be efficient or easy to navigate.[252] Systems for obtaining welfare benefits, social security disability benefits, and veterans benefits are notoriously complex, and applicants are frequently denied relief due to technical deficiencies or other procedural barriers.[253]

The United Kingdom offers a special process for debtors with little disposable income who owe less than 20,000 pounds, but the process is highly complicated.[254] First, there are a number of eligibility restrictions in addition to the debt cap. Applicants must have less than fifty pounds of disposable income per month, must not be homeowners, and must not own a car worth more than a thousand pounds.[255] In addition, applicants must disclose any transfers for less than reasonably equivalent value

L.J. 47, 50 (2009).

248. 11 U.S.C. § 727(a)(4) (2012).

249. *Id.* § 707(a).

250. *Id.* § 727(a)(8); *see supra* note 211 and accompanying text.

251. Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 615–16 (2000); Ronald Mann, *Making Sense of Nation-Level Bankruptcy Filing Rates*, *in* CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 225, 243 (Johanna Niemi et al. eds., 2009); Mann & Porter, *supra* note 4, at 338.

252. Littwin, *supra* note 144, at 1989–2002 (discussing procedural barriers, inefficiencies, and ineffectiveness in the administrative context of welfare, social security disability programs, and veteran's benefits).

253. *Id.*

254. *Options for Paying Off Your Debts*, GOV.UK, https://www.gov.uk/options-for-paying-off-your-debts/debt-relief-orders (last visited Mar. 28, 2019).

255. *Id.*

in the two years prior to filing.[256] Debt relief under a Debt Relief Order is not immediate and not without costs and repercussions. Debts are not discharged until the Debt Relief Order has been in place for one year.[257] Individuals seeking this debt relief must apply through a Debt Relief Officer and must pay 90 pounds to apply.[258] Finally, individuals with Debt Relief Orders may not create, manage, or promote a company without the court's permission, may not manage a business without disclosing the debt relief order, and may not act as the director of a company.[259] These measures are likely to interfere with impoverished individuals' full productivity.

D. THE PROPOSAL SHOULD NOT ADVERSELY AFFECT BORROWERS

There are two related debtor-friendly objections to address. First, some may worry that the proposal will increase the cost of credit, or that creditors will limit credit for those below the poverty line. Again, as this proposal is not expanding bankruptcy relief, there is no reason to think that the cost of credit will increase. If anything, creditors may prefer that debtors access this system rather than risk discharge of greater debt amounts. BAPCPA did not cause a reduction in the cost of credit,[260] so there is no reason to think that returning to something approaching the status quo for a subset of debtors would cause an increase in the cost of credit. Even if there is an increase to cost of credit, this may be a price worth paying for greater protection for the individuals and families facing the biggest burdens. Finally, any increase would likely be miniscule—for example, four states recently enacted restrictions on the conduct of debt collectors, and a Consumer Financial Protection Bureau study indicated that while the cost of credit did increase, the increase was very small.[261]

256. INSOLVENCY SERV., INTERMEDIARY GUIDANCE NOTES: DRO2, at 5 (2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776730/Intermediary_Guidance__Notes_v16.pdf.

257. *Options for Paying Off Your Debts*, *supra* note 254.

258. *Id.*

259. *Id.*

260. *See* Michael Simkovic, *The Effect of BAPCPA on Credit Card Industry Profits and Prices*, 83 AM. BANKR. L.J. 1, 17 (2009) (noting that BAPCPA actually resulted in an increase in the cost of credit to some consumers).

261. Charles Romeo & Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit* (CFPB Office of Research, Working Paper No. 2018-01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124954.

Another potential objection is that debtors may receive a greater benefit from filing under a traditional chapter 7 that enables discharge of greater amounts of debts. However, this proposal does nothing at all to change or limit that relief; it would still be available. Debtors needing relief from debt in amounts that exceed $5000 would file pursuant to existing rules. Of course, as we have seen, the current system is too onerous for low-income debtors to successfully obtain relief, and we should not stop with this proposal. One potential risk is that this achievement would hinder broader relief. However, BAPCPA has been around for over a decade now, and although its negative consequences have been thoroughly documented there does not seem to be a chance at repeal. If this special petition is successful, perhaps it can be expanded to also apply to impoverished debtors with greater debt loads who have no assets. In the meantime, the improved self-help materials discussed above may succeed in helping more low-income debtors achieve bankruptcy relief.

CONCLUSION

It is important not to overstate bankruptcy's capacity to alleviate problems caused by chronic income shortfalls. Improvements to the bankruptcy system can alleviate over-indebtedness, which can in turn alleviate some of the burdens on the impoverished, but direct efforts to reduce poverty are more critical.[262] We must increase access to affordable housing, healthcare, food, education, and opportunities to improve income. We must also develop a system for providing low-income individuals with access to genuinely affordable credit. If the only form of credit available to low-income debtors facing sudden expenses or income shortfalls is extremely expensive, it becomes impossible for them to dig out. In the meantime, however, there must be a simple and speedy way for low-income debtors to alleviate unmanageable debt burdens and avoid debt spirals. This proposal offers a simple and achievable tool that can aid in achieving that end. Although it will not be a complete solution for every impoverished and over-indebted individual or family, it can make a huge difference for a family that, for example, is making ends meet—even if barely—and is faced with a sudden expense: a medical

262. *See* Ware, *supra* note 2, at 508–09; *see also* Porter & Thorne, *supra* note 96, at 117 (explaining how bankruptcy gives low-income debtors a temporary fix but a debtor's "stagnant or declining income" prevents any financial improvement).

bill, home repair, funeral expense, or car repair. Absent access to decent and manageable credit terms, they will need to be able to get out from that debt load before it becomes destabilizing.