BANKRUPTCY REFORM'S IMPACT ON ACCESS TO BANKRUPTCY'S "FRESH START" POLICY: REFORMS NEEDED TO RESTORE ACCESS TO JUSTICE

By

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INTRODUCTION

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[1] marked Congress' most significant overall of United States bankruptcy law since 1978.[2] BAPCPA added statutory hurdles to prevent perceived wealthy debtors from filing Chapter 7 bankruptcy. Congress failed to recognize that most Americans who go bankrupt are middle class[3] who suffer a major unforeseen financial blows in the form of illness, divorce, or some other calamity.[4] What has occurred in light of BAPCPA for many middle class and lower income Americans is limited access to bankruptcy relief.

Access to bankruptcy is denied because of a host of practical reasons, including the fact that one-third of bankruptcy filers are below the poverty level.[5] This means paying an attorney is difficult for many Chapter 7 debtors. Getting paid as an attorney for a Chapter 7 debtor is equally as challenging. Additionally, several statutory provisions in the Bankruptcy Code[6] and caselaw exacerbate the problem. The challenge to paying for Chapter 7 relief, coupled with other factors,[7] has led to an increasing access problem to Chapter 7 relief.[8] The access issue can be so acute that some "debtors are simply too broke to file."[9]

Bankruptcy relief[10] is a privilege,[11] not a constitutional right.[12] Even so, access to bankruptcy relief, particularly Chapter 7, needs to be addressed by policymakers. What appear to be artificial barriers should be removed so debtors. The need to address this issue stems from the vital role that consumer bankruptcy plays in the United States.[13] Consumer bankruptcy serves as the ultimate social safety net to catch individuals when other aspects of the social safety net are inadequate.[14] It provides individual business owners and entrepreneurs the opportunity to put resources to work to help the overall economy grow.[15] Bankruptcy provides redress when no other avenue for redress is available.[16] If access is limited without good cause, the vital role of consumer bankruptcy in the United States is undermined. To date the access issue raised by this paper has not been adequately addressed by policymakers. In fact, BAPCPA has negatively impacted access to bankruptcy relief.[17]

This paper addresses some important factors that contribute to access problems to obtaining Chapter 7 relief and offers specific statutory and policy reforms that can enhance access to Chapter 7. This increased access will promote the fundamental social and economic goals of Chapter 7 bankruptcy for individual consumers and individual business owners.

Following this Introduction an overview of Chapter 7 bankruptcy and the social and economic role of bankruptcy is set forth. In Part II identifies the major barriers in place to obtaining Chapter 7 relief. With this backdrop, Part III reframes the issue as an access to justice issue rather than merely a micro-economic problem for potential debtors and attorneys. Part IV offers several specific statutory reforms regarding attorney fees and other aspects of the Code, that will, in part, enhance the access to Chapter 7 relief. The Conclusion provides other areas of research and possible reforms necessary to address the access to justice issue.

I. OVERVIEW OF CONSUMER BANKRUPTCY LAW AND POLICY IN THE U.S.

A. Bankruptcy Options and Policy Goals

Individuals seeking consumer bankruptcy protection have two primary options under the Bankruptcy Code:[18] Chapter 7[19] or Chapter 13.[20] Chapter 7 is a liquidation procedure that typically lasts about four months[21] and has no impact on post-filing income of the debtor.[22] The

debtor surrenders nonexempt assets,[23] if there are any, and a trustee will liquidate those assets and use those funds to repay creditors.[24] In most cases there are no nonexempt assets, so most cases provide no return to unsecured creditors.[25] Unless a creditor objects to discharge[26] or seeks an exception to discharge,[27] the debtor will receive a discharge of most pre-petition unsecured debts[28] a number of months after filing for bankruptcy relief.

Although the focus of this paper is on Chapter 7, it is important to have a basic understanding of Chapter 13 as well. Chapter 13 is a much longer and complex process[29] than Chapter 7. As such, most individuals opt to file under Chapter 7.[30] Chapter 13 is employed if a debtor has nonexempt assets, such as a car or home, that a debtor wishes to retain.[31] Under Chapter 13 a debtor can retain their assets, however, the debtor must continue to make payments to secured creditors[32] and formulate a repayment plan[33] and devote projected disposable income[34] to repay unsecured creditors over a three to five year period.[35] At the end of the repayment plan the debtor will receive a discharge[36] of the most of the remaining unsecured obligations.[37] The scope of the discharge in Chapter 13 is broader than that in Chapter 7,[38] another reason why an individual may opt for filing under Chapter 13 rather than Chapter 7.

There are two policy goals of consumer bankruptcy.[39] The principal purpose of bankruptcy relief is to provide a debtor a fresh start.[40] A second policy goal, but somewhat competing with the fresh start, is to provide an equitable distribution of assets among creditors.[41] Whether an individual files under Chapter 7 or Chapter 13, both options operate to move toward achieving the policy goals.

Upon filing Chapter 7 the debtor is afforded an automatic stay[42] which stops all collection efforts.[43] The automatic stay lasts until the debtor obtains a discharge at the end of the case.[44] The discharge serves as a permanent injunction against collection prepetition debts.[45] The automatic stay during the bankruptcy case and the discharge injunction after the case provide the debtor a fresh start.[46] The liquidation of nonexempt assets provides the opportunity for a return to creditors.[47] This promotes the policy goal of an equitable distribution of assets.

Just as in Chapter 7, upon filing Chapter 13 the debtor is afforded the protection of the automatic stay,[48] which bars all post-filing collection efforts.[49] The protection of the automatic stay typically remains until a case is closed, dismissed or a discharge is granted.[50] The confirmation of the repayment plan by the court binds all creditors to the terms of the plan.[51] That restructuring of the debtor's obligations in the plan provides the debtor a fresh start. At the same time, the repayment to creditors furthers the equitable distribution of assets policy goal. If a debtor completes the plan, the discharge provides the long-term fresh start to a debtor.

B. BAPCPA

Although BAPCPA was the most substantial overall of consumer bankruptcy since the Bankruptcy Code was enacted in 1978,[52] it did not change the chapter options outlined above that are available to individuals.[53] However, BAPCPA did add statutory hurdles[54] designed to reduce the number of consumer filings generally, but specifically the number of Chapter 7 consumer filings.[55]

The primary tool to achieve these goals is a statutory means test[56] that adds a presumption of abuse in Chapter 7 cases if it is determined that the debtor could repay a portion of general unsecured debts.[57] The determination of the ability to repay a portion of unsecured debts is a complex process employing both historical income and expense information, coupled with expense deductions based on IRS National Standards and Local Standards.[58] If the

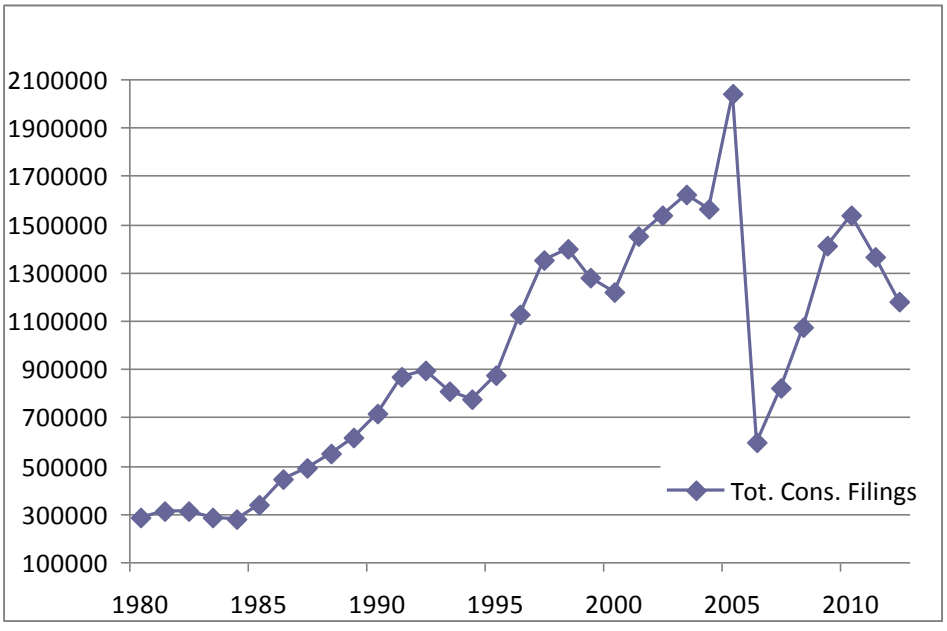
presumption arises, the debtor cannot obtain relief under Chapter 7 without rebutting the presumption by showing special circumstances.[59]

Even if presumption of abuse does not arise, a case can still be subject to dismissal if one of two grounds are shown that warrant a finding of abuse.[60] First, a finding of abuse can be based on "whether the debtor filed the petition in bad faith."[61] Alternatively, a finding of abuse can be based on whether "the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."[62] A detailed analysis of the enumerated grounds for abuse has been a matter of great scholarly debate and is well beyond the scope of this article.[63]

C. Consumer Bankruptcy Filing Rates and Trends

A cursory review of the total consumer bankruptcy filings, as reflected in Table 1, reveals that in most years from 1980 through 2005 the filings have increased.[64] In 2005 the filings peaked to over 2 million as the implementation of BAPCPA loomed in late 2005.[65] Post-Reform Act filings dropped dramatically, [66] but began to increase through 2010.[67] In 2011 the filings dropped from 1.5 million to 1.3 and dropped to 1.1 million in 2012.[68] The filing rates in 2013 continue to be on a downward trend.[69]

FIGURE 1 – TOTAL CONSUMER BANKRUPTCY FILINGS (1980-2012)



Source: Administrative Office of U.S. Courts

As reflected in Table 1, the composition of filings, i.e. Chapter 7 versus Chapter 13, has remained relatively consistent most years since 1980 with 70.34% of filing having been under Chapter 7. The composition of Chapter 7 filings dramatically increased in 2005 from 71.55% to 80.02%.[70] However, in 2006 the composition of Chapter 7 filing decreased after the Reform Act

down to 58.42, but that decline was just temporary as the composition of Chapter 7 filings is averaging about 70% since 2009.[71]

TABLE 1 – CHAPTER 7 CONSUMER-BANKRUPTCY FILINGS AS A PERCENTAGE OF TOTAL CONSUMER-BANKRUPTCY FILINGS

Year	**%**	**Year**	**%**	**Year**	**%**	**Year**	**%**
1980	74.53	*1989*	71.49	*1998*	72.13	*2007*	60.90
1981	72.00	*1990*	70.84	*1999*	70.62	*2008*	66.56
1982	68.88	*1991*	71.02	*2000*	68.91	*2009*	71.48
1983	69.23	*1992*	71.69	*2001*	71.08	*2010*	71.68
1984	69.39	*1993*	70.19	*2002*	70.71	*2011*	70.43
1985	70.26	*1994*	69.08	*2003*	71.19	*2012*	69.20
1986	72.69	*1995*	68.37	*2004*	71.55		
1987	73.59	*1996*	69.38	*2005*	80.02	***Avg***	**70.34**
1988	72.90	*1997*	70.95	*2006*	58.42		

Source: Administrative Office of U.S. Courts

It is interesting to note that despite the statutory options available and what appears to be extraordinarily high consumer filing numbers, only a fraction of individuals that could benefit from bankruptcy relief actually do file.[72] It is a central thesis of this paper that there is an access to justice issue, particularly of Chapter 7, that does in fact limit the number of individuals that need to avail themselves of bankruptcy relief.

D. Social and Economic Justification for Chapter 7 Bankruptcy

Bankruptcy provides some minimal level of a social safety net.[73] It is effectively the ultimate social safety net providing relief when other parts of the social safety net are not available or do not provide adequate relief. When there are gaps in other components of the safety net, such as unemployment or healthcare insurance, consumer credit is used as a "self-financed safety net."[74] When individuals cannot handle the burden of the "self-financed safety net" they seek protection under consumer bankruptcy.[75] This safety net function is vital in the U.S., in fact, bankruptcy is "deeply woven in the American social safety net."[76]

Bankruptcy also serves as consumption insurance.[77] By having a framework to resolve all debts in one proceeding through a discharge of some or all of an individual's debts, a large drop in consumption when an individual experiences a drop in wealth or income can be minimized.[78] The discharge will permit funds which would have to be used to repay debts to be used for consumption.[79]

When we consider bankruptcy from a macro-economic vantage point it can also contribute to economic growth in the economy. Without bankruptcy and other consumption insurance individuals financial problems may lead to long-term economic problems that impact their ability to work and maximize income potential over many years.[80] Without income individuals will not be able to spend and consume. Both of these activities are vital to continued growth in the economy.

One of our economy's basic macroeconomic goals is economic growth, which is typically measured by Gross Domestic Product ("GDP").[81] The largest component of GDP is

total expenditures.[82] Household consumption is the largest (70%) of the four components that comprise total expenditures: consumption, investment, government purchases and net exports.[83] If households divert resources from current consumption to paying unsecured credit obligations they cannot effectively afford, those resources are not used for new consumption. This will reduce, or at least not increase consumption, which will in turn cause the same effect, on total expenditures, i.e. leading to a reduction or not increase GDP. This will have an effect on other aspects of the macro-economy including increased unemployment and this will further exacerbate the over problems and slowdown growth in the economy. An accessible consumer bankruptcy system plays an important role in the overall economy and enhances economic growth.

The two overriding objectives of American bankruptcy law, as noted above, are to provide debtors with the relief of a fresh start and to provide an equitable distribution of assets among creditors.[84] The latter objective appears to be overshadowing, even robbing, the former objective of granting relief. Senator Chuck Grassley's Opening Statement at the Bankruptcy Reform Hearing on February 10, 2005 highlights the Congressional desire to limit access to bankruptcy. Senator Grassley stated, "Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; . . ."[85] In enacting BAPCPA Congress failed to balance the policy objectives of American bankruptcy law, as well as the impact such legislation would have on the social safety net or the macro-economy. It opted for adding a host of barriers for relief to curtail the number of Chapter 7 filings.

II. BARRIERS TO OBTAINING CHAPTER 7 RELIEF

Congress drafted BAPCPA with the delineated goal of creating more barriers for debtors to discharge their debts in bankruptcy proceedings.[86] BAPCPA expanded the grounds for dismissal of a chapter 7 bankruptcy. It also burdened the debtor with additional administrative demands with increased financial disclosures. Scholars have addressed increased administrative burden and its correlation to increased direct costs of filing for bankruptcy in the form of filing fees and attorney fees.[87] All of these burdens curtail a debtor's access to bankruptcy, thus thwarting access to justice. In this section we address the barriers facing debtors who seek Chapter 7 relief.

A. Increasing Costs of Filing of Chapter 7

"[B]ankruptcy relief is not free."[88] The monetary costs associated with filing for relief is a significant barrier to obtaining relief.[89] The monetary costs – attorney fees and other costs - are simply too high for many individuals, particularly lower income individuals.[90]

B. Attorney Fees

Attorney fees associated of filing Chapter 7 have increased in light of the BAPCPA requirements.[91] The exact magnitude of the increase is not known as the statistical work on this issue to date has varying results; however, most scholars view the increase as dramatic in light of BAPCPA.[92] A post-BAPCPA pilot study in a single district found that Chapter 7 attorney fees increased after BAPCPA by 21.54%.[93] A larger pilot study found Chapter 7 attorney fees

increased after BAPCPA by 53%.[94] The General Accounting Office (GAO) conducted a study and found that the average attorney fee for Chapter 7 after BAPCPA increased by 51%.[95]

Attorney fees for routine Chapter 7 cases are about $1,000[96] and in some jurisdictions average more than $1000.[97] Attorney fees in most Chapter 7 cases typically are required to be paid up front.[98] Some individuals may not be able to raise funds to pay for legal services,[99] which limits a debtor's ability to access relief through bankruptcy proceedings.

C. Other Direct Costs

Beyond attorney fees, other direct costs have risen in recent years, particularly since BAPCA.[100] Required filing fees,[101] credit counseling fees,[102] debtor education fees[103] and credit report fees[104] all contribute to the overall cost of filing Chapter 7. Just as with attorney fees, these additional direct costs have increased. For example, in the a single district study in the Northern District of Alabama researchers found that the total direct access cost of filing Chapter 7 increased by 32.73% after BAPCPA.[105] A larger six district study found a 55% increase in the total direct access costs to Chapter 7 after BAPCPA.[106]

Although the cost associated with each is relatively small,[107] in the aggregate, coupled with the attorney fee, the total direct access costs associated with filing is substantial to an individual in financial relief. The direct access costs can be a significant burden on individuals seeking bankruptcy relief.[108] The cost increases may actually remove filing Chapter 7 as an option for some individuals.[109]

D. Statutory Hurdles to Paying for Chapter 7

1. Discharge of Pre-Petition Legal Fees

One approach used to try to provide for payment of attorney fees that cannot be paid upfront prior to filing has been attorneys agreeing to accept payment of some or all of the attorney fee post-petition. However, most courts have found that unpaid attorney fees for work associated with filing a Chapter 7 petition are discharged under the Bankruptcy Code.[110] Both the Seventh[111] and Ninth[112] Circuits have expressly addressed this issue and both found that the pre-petition debt for attorney fees were discharged under the Bankruptcy Code.[113] Furthermore, if the attorney attempts to collect the discharged debt such efforts will violate the automatic stay.[114] Beyond the statutory problems under the Bankruptcy Code, attorneys may also find themselves with serious ethical issues because of their status as a creditor of their client.[115]

A small minority of courts have found that unpaid attorneys fees associated with the filing of a Chapter petition are not discharged under the Bankruptcy Code.[116] *In re Perry* reasoned that a pre-petition attorney fee was nondischargeable because the fees were properly disclosed[117] under Bankruptcy Rule 1016(b)[118] and Bankruptcy Code 329(a).[119]

Some attorneys have addressed the issue by collecting checks pre-petition and then negotiating those checks post-petition for prepetition services. Such arrangements are not a workable solution.[120] Cashing the checks pre-discharge violates the automatic stay and cashing the checks post-discharge violates the discharge injunction.[121]

A few courts have permitted the payment of the balance of legal fees post-petition pursuant to a reaffirmation agreement.[122] Under the Bankruptcy Code a Chapter 7 debtor can reaffirm a pre-petition debt.[123] However, reaffirming an unsecured debt that will be discharged

seems to run counter to the very purpose of obtaining Chapter 7 relief.[124] From the debtor perspective Chapter 7 is designed to provide a fresh start.[125] Burdening debtors with unsecured debts post-filing, even an attorney fee related to bankruptcy services, greatly impacts the actual fresh start a debtor obtains.[126] Furthermore, reaffirmations are only to be approved if they meet the "best interest" requirement of the Code.[127] It seems that unsecured obligations would rarely, if ever, be in a debtor's best interest to reaffirm.[128] Finally, debtors are to be counseled regarding the reaffirmation by their attorney.[129] It is impossible to see how a conflict of interest does not occur if the attorney is advising the debtor to reaffirm a debt owed to the attorney.[130]

2. Prohibition on Paying fees from the Estate

Another source of possible payment would be estate funds, however, attorneys are not able to use estate funds to pay fees. Following the amendments to the Bankruptcy Code by the Bankruptcy Reform Act of 1994 ("Reform Act"),[131] an increasing number of courts have found that Chapter 7 debtors' counsel are no longer allowed to be compensated for post-petition services from a debtor's estate regardless of the nature of the services themselves.[132] Subsequent to the Reform Act the Supreme Court held that attorney's fees cannot be paid from a Chapter 7 estate except in limited circumstances.[133] This was a considerable change in the law as most courts prior to the Reform Act allowed compensation out of the estate to Chapter 7 debtors' counsel as long as the services rendered were of a benefit to the estate.[134] The change in law has caused some problems for Chapter 7 debtors' attorneys getting paid.[135] This impacts access for at least some debtors.

E. Increasing Complexity and Pro Se Representation

Since the enactment of BAPCPA, bankruptcy has become more complex. Individuals that engage in self-representation are likely to complete the bankruptcy process unsuccessfully.[136] Post-BAPCA empirical research confirms this. A post-BAPCPA pro-se debtor has 16.62 greater odds of dismissal than a represented debtor.[137] The greatest reason for dismissal is the failure to file required information.[138] Although pro-se and represented debtors have cases dismissed for failure to file required information, the impact is much greater on the pro-se filer. Post-BAPCPA 67.4% of dismissed pro-se Chapter 7 cases were dismissed for not filing information required by the Code.[139] Pre-BAPCPA the dismissal rate for pro-se Chapter 7 cases based on not filing required information was 31.9%.[140] Debtors represented by counsel had a dismissal rate for not filing information of 33.3% post-BAPCPA and 15.1% pre-BAPCPA.[141]

It has also been argued that with "minimal effort" individuals can file pro se.[142] "Theoretically, every debtor has access to the bankruptcy system because anyone can file *pro se*."[143] Consumer bankruptcy is a complicated area of the law[144] and the mere ability to file does not mean an individual has been afforded the opportunity to avail themselves of all the "strategic advantages available under the bankruptcy rules."[145] In fact, many lawyers have difficulty with the many filing requirements in the Code and Rules. To suggest a non-lawyer can navigate their way through consumer bankruptcy with ease and success runs counter to common sense. Judge Lipez recognized this fact when he recently wrote: "I doubt that bankruptcy individuals will ordinarily be able to navigate the complexities of the bankruptcy process on their own."[146]

F. Limited Pro Bono Services

As outlined above, pro se filing is not a viable option for most individuals. Likewise, pro bono legal representation is not a viable option for many debtors.[147] Although bankruptcy clinics are a large component of consumer law clinics in the U.S.,[148] the availability of free legal services are quite scarce.[149] If they are available the criteria to have such services be available to a particular individual are very limited.[150] Furthermore, the current economic crisis has led to an increase in demand for bankruptcy services and most bankruptcy clinics are able to represent a very small fraction of individuals that can benefit from relief.[151] For example, at a typical bankruptcy clinic at the University of the Pacific McGeorge School of Law received over 1000 inquires for bankruptcy assistance in year, but were only able to represent about 100 clients in the year.[152]

Beyond the already stretched pro bono services generally in the legal field, BAPCPA may have actually made the availability of pro bono services more limited in the bankruptcy context.[153] BAPCPA provided enhanced liability provisions for attorneys by requiring that the lawyer certify the accuracy of the schedules, certify a debtor has the ability make payments in reaffirmation agreements, and disclose themselves as "debt relief agencies."[154] These enhancements may have a chilling effect on some lawyers' willingness to take on bankruptcy pro bono cases.[155] Ironically, the economic downturn of 2008 has led to fewer attorneys handling bankruptcy pro bono cases because those that continue to practice consumer bankruptcy after BAPCPA have a booming business and do not take on pro bono cases.[156]

Even if an individual can find pro bono legal assistance, the failure to pay the other direct access costs will likely lead to legal barriers to relief with dismissal of a case or closure without a discharge. A filing fee can be waived for in forma paupis filers.[157] However, such a waiver is quite limited.[158] If the fee is not waived and unable to be paid, the case will be dismissed.[159] The credit counseling required to obtain a certificate for filing is to be provided without "regard to ability to pay the fee,"[160] but it seems unlikely many individuals will receive the counseling for free.[161] If a case is filed without a proper credit counseling certificate, the case will likely be dismissed.[162] And if a debtor education course is not completed, the debtor will not receive a discharge.[163]

G. Chapter 13 and Fee Only Plans

Some individuals who cannot afford to pay Chapter 7 attorney fees upfront may file Chapter 13 solely to pay the attorney fees.[164] A Chapter 13 plan can provide for the payment of attorney fees over the life of the plan as opposed to upfront payment for Chapter 7 attorney fees.[165] These Chapter 13 cases are really a Chapter 7 case disguised as a Chapter 13.[166]

The fee-only Chapter 13 plan is not a workable solution to the access issue for a host of reasons. First, some courts may not permit this practice under the theory that plans which do not propose to pay creditors overtime are not proposed in good faith.[167] A second concern is that there may be overreaching, possible attorney abuse and self-dealing in such cases[168] due at least in part to a potential principal-agent problem.[169] Third, the attorney fee for Chapter 13 cases are substantially higher than Chapter 7 fees, at least two to three times higher than the typical Chapter 7 attorney fee.[170] To use a method to achieve bankruptcy protection that is so much more expensive than other options wastes valuable resources of an already cash-strapped debtor. It imposes a very high opportunity cost on debtors making such a decision.

The most significant reason why Chapter 13 as an alternative to filing Chapter 7 is not a viable option is simple – Chapter 13 does not work in most cases. There is a very high default rate in Chapter 13.[171] Most research has found that two in three Chapter 13 cases fail to complete their Chapter 13 plan.[172] Other estimates have been slightly lower.[173]

Regardless of the exact number, Chapter 13 simply is not a workable solution for many, many individuals. The primary reason why Chapter 13 plans fail is pretty self evident-inability to make plan payments. In 2009 the Administrative Office of U.S. Courts estimated that, of the 145,940 Chapter 13 cases that were dismissed, 71,114 were dismissed for inability to make plan payments.[174] There is a near 50% dismissal rate based on a failure to make plan payments in Chapter 13 cases.[175] The reasons for failure to complete a Chapter 13 plan payments stems from underlying reasons one would typically expect- unemployment, illness or other reductions in income.[176] Others have suggested that the inability to make plan payments may also be based on "unrealistic plans that are doomed from the inception."[177] The evidence is strong, Chapter 13 is not quite as successful as policymakers would seem to think it is.[178]

Logic supports the premise that the fee-only Chapter 13 debtor would have a much higher default rate and fail would likely occur quicker than non fee-only Chapter 13s. If a debtor cannot afford to save enough to pay Chapter 7 attorney's fees it seems the likelihood of making plan payments is quite low.[179] The high default rate leads to wasted resources for the debtor, creditors and the court system, all for the benefit of the attorney.[180] And, most importantly, the debtor is left in the same financial quagmire, if not in a worse position, then prior to their filing.[181]

Although, some debtors may not be dismissed, but rather convert to Chapter 7[182] and receive a discharge,[183] other debtors are not as fortunate. In the case of outright dismissal the debtor has no discharge of debts and likely will be in a worse financial position with a heavier debt burden as interest will have continued to accrue during the pendency of the Chapter 13 case, not to mention expending funds on Chapter 13 filing fees and attorneys' fees.[184] The failed Chapter 13 will have consequences on the ability to obtain relief in future filings in light of limitations on the availability of the automatic stay in successive filings.[185]

The barriers to obtaining Chapter 7 relief are real. They limit a person's ability to access bankruptcy relief; in particular, these barriers limit a person's access to the "fresh start" bankruptcy law seeks to bestow upon a debtor. The limited access to bankruptcy relief undermines the vital role of consumer bankruptcy. Why did Congress limit access to bankruptcy? How has Congress understood bankruptcy relief, or what we call bankruptcy justice?[186] We now turn to the question of access to justice in the context of consumer bankruptcy.

III. REFRAMING THE ISSUE: ACCESS TO BANKRUPTCY JUSTICE

A. Overview of Access to Justice

Access to justice is a critically important concern in the evaluation of a legal system and its capacity to afford justice to its citizens. Possibly the most central components of a just society are the legal procedures ensuring equal rights to its citizens of effective representation, access to reparation, and an impartial judge. The U.N. has held that access to justice is a human right and "is essential for tackling the root causes of poverty."[187] The Universal Declaration of Human Rights sets forth principles of access to justice[188] such as impartial tribunals (Art. 8),[189]

equality before the law (Art. 7),[190] a right to due process (Art. 10),[191] and the right to be presumed innocent in a criminal action (Art. 11),[192] among others. Although "access to justice" is often viewed in procedural terms, it is more than procedural issue and appeals to a sense of social justice. The matter of whether a society should forgive debtors or not, or creates barriers for debtors to obtain relief, is more than an economic or legal issue. It is a matter of what society values; it is a matter of social justice.[193]

What does it mean to have "access to justice" for consumer debtors?[194] Does access to justice imply equal access to bankruptcy relief? Deborah L. Rhode, in her scholarship on access to justice issues, argues that "Equal justice under the law is a principle widely embraced and routinely violated."[195] She has observed that an estimated 80 percent of the poor and the majority of middle-income Americans have need of legal aid, but have no access to it because they cannot afford it.[196] Rhodes points out how the inadequacy of basic medical services has generated much debate whereas the lack of legal service in the United States has garnered very little attention.[197] This holds true for access to justice when it comes to Chapter 7 bankruptcy filings.[198] An estimated 30 percent of debtors who would meet the means test, and thus qualify for Chapter 7 discharge, cannot overcome the barriers and obstacles addressed above.[199] They, therefore, forfeit the opportunity to access justice.

The issue of accessing bankruptcy justice begs the following question: is justice achieved when a debtor no longer has to make good on his/her financial obligations? This question invokes an important analysis of the twin policy goals of BACPA—granting a "fresh start" and achieving equitable distribution of assets among creditors. In the context of bankruptcy, a debtor faces the problem of not being able to pay her obligations. What recourse does she have? What recourse does the creditor have? Either the problem is resolved with judicial intervention or in the state of nature, i.e., without judicial intervention.[200]

In this section, we first explore the U.S. legislative history of major bankruptcy reform in the United States with the purpose of highlighting patterns of Congressional control of the gate to access to bankruptcy. Congressional history shows a pattern of the U.S. government granting access to a "fresh start" for debtors, but then swiftly repealing it. We then explore the foundational sources of bankruptcy justice and the various conceptions of bankruptcy justice. The principal question being: what is bankruptcy justice? We then examine the question of who should have access to bankruptcy justice as understood under the rubric of the "fresh start" policy. We conclude our discussion about access to justice by addressing the denial of access to bankruptcy justice through legislative barriers and statutorily constructed delays to access to bankruptcy justice.

B. Legislative History of Bankruptcy Reform and Access to Bankruptcy Justice

The bankruptcy policy goal of affording a debtor a fresh start has largely remained constant in the U.S. So too have the philosophical underpinnings of bankruptcy law remained the same over time. However, two divergent issues have governed the minds of legislators since the enactment of the first bankruptcy laws. The competing issues are eligibility for relief and scope of relief. Congress has served the role of a seesaw, or pendulum, moving back and forth on scope and eligibility.[201] By necessity, Congress has repeatedly responded to an ever-changing economic landscape; however, their response has been ambivalent on the question of providing permanent access to bankruptcy justice. As a consequence, access to relief through bankruptcy has increased or decreased over time depending on the philosophical views of Congress as to

whether access to bankruptcy justice should be afforded to American citizens. These views can be seen by examining the legislative history of bankruptcy.

Initially, bankruptcy was viewed as a semi-criminal act; today, even with the increased barriers of BACPA, US law and policy is more focused on relieving or restructuring repayment of the debts of an individual, family, or business from heavy financial loss. Before ratification of the United States Constitution, and for some time after, bankruptcy proceedings favored the creditor. Seen in historical context, today's bankruptcy laws favor the debtor even with the barriers and obstacles they impose. However, as will be addressed below, social and economic justice demand increased access to bankruptcy justice.

Bankruptcy Act of 1800

Congress was empowered under Article 1, Section 8, Clause 4 to enact "uniform laws on the subject of Bankruptcies." Federal district courts have jurisdiction over bankruptcy matters.[202] Congress first addressed the issue of bankruptcy with the enactment of the Bankruptcy Act of 1800.[203] The Panic of 1796 and 1797 ("Panic") spurred this legislation into enactment. The Panic was a number of economic downturns. The primary culprit of the Panic was a land speculation bubble that burst in 1796.[204] Prominent Americans were placed in debtor's prison for their inability to repay debts.[205] Robert Morris and James Wilson, both signors of the Declaration of Independence, were among the prominent.[206] Robert Morris, known as a primary financier of the American Revolution, spent three years in debtor's prison whereas Supreme Court Justice, James Wilson, dodged the law and escaped what would have become a similar fate as Morris.[207] However, access to the discharge of debts was not allowed to the likes of Morris. The Act of 1800 was a creditor's remedy.[208] Debtors would benefit only at the mercy of the creditor.[209] A discharge of the debts[210] and the person were allowed, so long as the creditors, bankruptcy commissioners, and the federal district judge approved.[211] Nonetheless, unlike the 2005 bankruptcy reforms, the reform of 1800 was arguably compelled by the lack of access to bankruptcy justice. A sense of social and economic justice arguably pushed earlier congressmen to relieve persons of crushing debt and prison time. The Bankruptcy Act of 1800 did not provide much relief to debtors; it was largely a dispute resolution framework for debtors and creditors and was repealed in 1803 due to a lack of appetite for debtor's relief. Relief was limited to traders and provided only for involuntary proceedings. An example of what little relief the Act of 1800 offered is illustrated the incarceration rate of the time—some 2,000 delinquent debtors by 1816 were incarcerated in the State of New York alone.[212] Many died in debtor's prison.[213] However, access to bankruptcy relief would begin to seep into the conscience American bankruptcy law.

The Bankruptcy Act of 1841

The Bankruptcy Act of 1841[214] served as a significant step to allow more access to bankruptcy. The major innovation of the Act of 1841 was its allowance for voluntary bankruptcy.[215] Scholars have called it a "watershed event in bankruptcy history."[216] For the first time, debtors on their own initiative without the creditor's consent, could file for bankruptcy and obtain relief. The door to access was now open. Eligibility was offered to "all persons whatsoever . . . owing debts . . ."[217] The Act still reserved for creditors much power by allowing a creditor to block a discharge.[218] However, future bankruptcy proceedings would always

provide for voluntary bankruptcies. Once the goal of providing debtors with relief, the Act of 1841 was quickly repealed in 1843. Nonetheless, a more liberal conception of the "fresh start" policy was now cemented in the American imagination of bankruptcy social policy.

The Bankruptcy Act of 1867

With the repeal of 1843, and no political appetite for a federal bankruptcy law, access to bankruptcy relief was closed. Eligibility and scope was not only diminished, but was eliminated. However, the devastation of the Civil War would change the American mindset leading Congress to enact the Bankruptcy Act of 1867.[219] The Act of 1867 broadened access to bankruptcy in the United State than had been seen before—states could now discharge pre-existing debts,[220] states could also discharge the debts of non-residents.[221] The Act included both voluntary[222] and involuntary[223] bankruptcy. Congress did not include the Act of 1841's prohibition of involuntary bankruptcy to merchants, thus promulgating a broader notion of social justice in bankruptcy law. Now any creditor was subject to the threat of involuntary bankruptcy. The Act of 1867 also allowed provision for corporations.[224] Possibly most important for advocates of access to broader relief in bankruptcy, the list of acts of bankruptcy, supporting an involuntary petition for bankruptcy, was extended significantly compared to the prior bankruptcy legislation.[225] Sadly, like with the 2005 reform, the Act of 1867 provided an approximate one-third of eligible debtors discharge.[226] Discharge was not easily accessible. Regardless of the limited access to relief, creditor's again won the day by garnering the public's attention with their overwhelming criticism of the federal bankruptcy law.[227]

Congress repealed the Act of 1867 in 1878.[228] The 1874 amendments to the Act of 1867 were also discharged in the 1878 repeal. However, before the repeal of the Act of 1874, Congress made a significant step by enacting the "composition agreement" in the 1874 amendments.[229] The composition agreement did not allow for full discharge, but broadened access to bankruptcy relief by allowing debtors to pay a percentage of her debts over time while retaining her property. The composition agreement would form the legal framework for the future "reorganization" bankruptcy provisions. However, by 1878, access to federal bankruptcy relief was again afforded to no debtors.

Congress had a history of debating the extent of eligibility and scope of bankruptcy relief, but as the history of bankruptcy law through the 19th century, Congress sought to abdicate authority over bankruptcy laws to the states. Federal bankruptcy law did not provide stability or predictability, but served only as a temporary relief. Access to justice issues in bankruptcy law was either non-existent, or extremely limited to debtors. From the date of ratification of the U.S. Constitution to the Bankruptcy Act of 1898,[230] also known as the Nelson Act, there was no permanent federal bankruptcy law. Until the year 1898, Congress had only afforded some type of eligibility and scope of relief to debtors for a mere16 years of the country's history.[231]

Bankruptcy became more stable with the enactment of the Bankruptcy Act of 1898. Congress would not repeal the Act of 1898 until 1978, when it replaced the Act of 1898 with the Bankruptcy Reform Act of 1978.[232] However, in 1938 in particular, Congress made substantive amendments to the Act of 1898, whereupon access to bankruptcy relief was expanded.

The Bankruptcy Act of 1898

The Bankruptcy Act of 1898 provided for greater access to bankruptcy relief, although the barriers to access relief were still tremendous. Whereas previous acts of Congress made it difficult, if not impossible, for debtors to obtain a discharge of their debts. The Act of 1898 removed many barriers, abolishing the conditions of consent or approval of the creditor, and limited the barriers to access discharge. Congress expanded eligibility and thus granted a discharge of debt except in the event the debtor committed a crime or fraud.[233] Congress expanded the scope of access to discharge by designating fewer debts as non-dischargeable.[234] Expansive access to bankruptcy relief was offered to "any person who owes debts, except a corporation."[235] The 1898 Act also capped amount of fees an attorney or other professionals could be paid.[236]

From 1898 to the Reform Act of 1978, Congress enacted several pieces of legislation seeking to temper the "pro-debtor" legislation of 1898. Congress limited access to bankruptcy relief for debtors by creating more grounds of denial of discharge or by adding debts to be excepted for discharge.[237] Congress strengthened the penal provisions and ultimately failed to see repeal of federal bankruptcy law.[238]

The Bankruptcy Act of 1938 and the 1970 Amendments

Congress passed the Chandler Act of 1938. This Act gave unprecedented authority to the Securities and Exchange Commission in the administration of bankruptcy filings. This act expanded voluntary access to the bankruptcy system, but enhanced the complexity of bankruptcy proceedings, necessitating legal counsel to help the debtor navigate bankruptcy proceedings.
While Congress amended bankruptcy laws various times over the years, the 1970 amendments should be noted. [239] They provided the debtor with teeth to enforce and protect her right to a discharge of her debts. U.S. Bankruptcy law had come a long way from its first law in 1800—a creditor's act—to 1970 where statute afforded a debtor recourse to preserve her right to access bankruptcy relief.

The Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978[240] brought about the most significant reform to its date. It replaced the Act of 1898. A notable feature of the Act of 1978 was its attorney fee arrangement. Instead of capping fees, the Act removed such a cap.[241] The underlying premise was that debtors should be able to seek the best legal counsel, thus allowing a competitive fee structure. The Act of 1978 also encouraged Chapter 13 readjustment of debts, and discouraged a Chapter 7 discharge. Congress sought in this Act continued to strike a balance between debtors' and creditors' interests, but primarily seeking the equitable distribution of assets among creditors. Congress hoped that creditors would be paid more through Chapter 13, hence its encouragement. However, in the ensuing years with its increased bankruptcy filings, the credit industry would jockey its influence in Congress, seeking harsher penalties for debtors.

The next set of bankruptcy reforms were the passing of BAPCA in 2005. They are also the most recent. As already noted and discussed, BAPCA limits access to bankruptcy justice. This limitation has halted progress in offering access to bankruptcy relief. The credit lobby won the day. American bankruptcy history shows a crescendo of access to justice only to be reversed in 2005. What are the foundational, philosophical sources driving Congress's conception of access to justice? Understanding possible answers to this question can help clarify why policy

makers choose the direction they take in the bankruptcy debate on access to justice. We now attempt to address this question.

C. What Access to Justice in Bankruptcy Court?

Access to justice scholarship is extensive. Much of the research concerning access to justice raises questions about the following: is effective access to justice necessary?[242] Of what does effective access consists.[243] Are lawyers necessary for effective assistance?[244] Should there be a guaranteed right to counsel in civil matters?[245] Is access to justice a procedural concept? Is the issue of access to justice a narrowly tailored discussion about individuals, or is it about a broader notion of inequality.[246] Should technological innovation provide greater access to justice? [247] Should there be more access, or a reduction of barriers to access, with new advancements in technology?[248] Another important set of questions is whether or not access to justice is afforded to persons with disabilities[249] or immigrants.[250] We are addressing access to justice in the context of bankruptcy proceedings in the United States.

Relatively fewer scholars have addressed the narrower issue of access to justice in the context of bankruptcy in the United States.[251] The most substantive discussions address barriers to bankruptcy justice and empirical analyses of consumer bankruptcy. Very little discussion addresses the foundational or philosophical sources to access to bankruptcy justice. For example, Richard I. Aaron argues that BAPCPA denies access to consumer bankruptcy relief and therefore denies many American citizens justice.[252] He argues that bankruptcy should be available to those who cannot legitimately pay their debts, but that bankruptcy should not be available for those who are simply unwilling to pay their debts.[253] However, while Aaron does address some barriers to access to bankruptcy justice, he does not address the philosophical justifications, or foundational sources, for his argument. Matthew J. Fischer explores access to bankruptcy justice in the context of the Equal Access to Justice Act, but does not address foundational sources to the access to justice problem, or the barriers that BAPCPA pose for prospective consumer debtors.[254] The Honorable Marcia S. Krieger makes the argument that the United States bankruptcy courts are courts of equity, and thus by their equitable nature, are rooted in various conceptions of social justice.[255] A. Mechele Dickerson explores the racial biases in U.S. bankruptcy laws in her discerning scholarship. She argues that "the Ideal Debtor is white, and for that reason, race matter[s] in bankruptcy"[256] and that "bankruptcy laws likely will continue to disproportionately benefit white debtors" in the United States.[257]

D. Fresh Start as Social Justice

The most exploratory scholarship in the context of bankruptcy justice addresses the bankruptcy "fresh start" policy. U. S. bankruptcy law provides forgiveness of one's debts and bestows on a debtor a financial "fresh start," meaning her pre-petition debts are discharged and she retains her post-petition earnings.[258] The Supreme Court has explained the purpose of the bankruptcy "fresh start" policy in various cases,[259] notably in *Local Loan Co. v. Hunt*: [I]t gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[260] In an earlier case, *Williams v. United States Fidelity & guaranty Co.,* the Supreme Court acknowledged one of the chief policies of bankruptcy law is to "relieve the honest debtor from the weight of

oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes."[261]

Many scholars have addressed the meaning and limitations of the fresh start policy.[262] While the fresh start policy is not guaranteed or absolute, such as the case with alimony and student loans,[263] it provides powerful economic relief to qualifying overburdened debtors and can serve as the ultimate safety net.[264] When an individual debtor can no longer meet financial obligations, due to health problems or economic downturns, among other reasons, bankruptcy's fresh start policy provides broad protection to debtors who may not otherwise find relief—thus essentially remaining imprisoned to creditors—and may unnecessarily rely on welfare programs.[265] Limiting the qualifications for debtors to access relief, or delaying a fresh start, may render meaningless the fresh start policy and can increase costs of other welfare programs.[266]

BAPCA discharge policy purposefully provides a less charitable fresh start to individual debtors than it did prior to the reform, which, arguably, is a reflection of Congress' conception of social justice. The fresh-start policy is designed for the poor, but with increased financial and dilatory barriers, as discussed above, the poor often cannot access a fresh-start. What understanding of justice has driven Congress to limit, if not quash in many instances, the fresh start policy?

E. Foundational Sources of Access to Bankruptcy Justice

Scholars and legislators are at an impasse on how to understand and legislate bankruptcy law; in particular, what qualifications a debtor must meet before being granted a discharge of her debt. As can be seen in early American history, bankruptcy was available on a limited basis for very short periods of time. It served as a tool to aid the economy. As Douglas Baird and Thomas Jackson argue,[267] in what has been deemed a normative theory,[268] the purpose to have bankruptcy laws is to collect debt. This purely economic view prevailed for most of early American history.[269] Over time, bankruptcy relief was less an economic stimulus than it was an expression of social justice—it was now a matter of doing the right or moral thing, i.e., to provide relief to overburdened, and overwhelmed debtors. Nevertheless, the economic view, as bolstered by the credit industry, may have had, and may currently have, more supporters. That support notwithstanding, scholars have developed competing philosophical justifications for bankruptcy relief.[270] Donald Korobkin argues that bankruptcy law is more than a simple response to the economic problem of debt collection, but can also be seen as communal response driven by social justice to achieve.[271] When seen in this light, for Korobkin, bankruptcy law and policy becomes "a process for rendering richer, more informed decisions to govern the relationships of all persons affected by financial distress."[272] Elizabeth Warren argues against the economic justification of bankruptcy.[273] She concludes that no one theory can describe the need and purpose of bankruptcy law.[274] For those legislators unpersuaded by non-economic or social justice arguments, the economic tool bait has persuaded. Congress's explicit goal with BAPCPA of 2005 was to reduce the number of consumer bankruptcy filings, in particular, chapter 7 filings (i.e. discharges).[275] Congressional history also shows a deep reticence to provide bankruptcy relief in the 18th and 19th centuries. The 20th and now 21st centuries show a philosophical acceptance of permanent access to debtor's relief.

There is another understanding as to why many early Americans believed access to bankruptcy was a good policy. Some early Americans believed they were under a spiritual or

religious injunction to forgive others, and more particularly, other's debts.[276] The idea of granting another a "fresh start" or "redeeming" another or making intercession on behalf of another, was believed to be inherently Christian, if not Jewish. It can be argued that, as a result of religious influence, bankruptcy law and policy has been influenced by a religious belief associated with forgiveness. Christianity is the predominant faith in the United States.[277] With this argument in mind, American bankruptcy law did not originally adopt a Judeo-Christian view of debtor-creditor law.[278] Discharge policy did not exist. As American Bankruptcy law and policy evolved, its "fresh start" policy evolved. Today the current "fresh start" policy under BAPCPA exceeds the benefits offered debtors as set forth in the Old Testament, or Pentateuch.[279] Steven Resnicoff identifies argues that some correlation exists between the influence of the Pentateuch (or the first five books in the Old Testament) at least four major pro-debtor policies to which American law and Christian and Jewish scriptures now agree.[280] They are as follows: "(1) a debtor's immunity from involuntary labor, imprisonment or corporal punishment;[281] (2) a debtor's right to certain exempt property;[282] (3) a debtor's protection from creditor harassment; and (4) basic support of a debtor's financial rehabilitation."[283]

The notion of Jubilee is set forth in Leviticus 25: 8-13.[284] Jubilee was a year designated for universal pardon, which was to include not only sins, but also debts. While this tradition no longer appears to be observed as it was historically observed, influence of the tradition can still be seen in various religious traditions today.[285]

While various economic and non-economic sources have informed some type of American conception of bankruptcy justice, today's America seems to be driven by competing claims about bankruptcy justice. Certainly the economic versus non-economic claims as discussed above remain forceful in today's discussion about bankruptcy law, in particular, what to do with the fresh start policy. However, a newer and possibly stronger notion of justice in the form of liberal egalitarianism may be the primary driver. That is to say, the current fashion of contemporary conceptions of justice since the publication of John Rawls' *A Theory of Justice* in 1971.[286] John Rawls writes in the opening section of *A Theory of Justice* that

> Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by the many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.[287]

In short, bankruptcy's fresh start policy may not be so much about liberty as it is about equality. This point has also been made by Ronald Dworkin.[288] It is the moral significance, not the economic significance, of the human person that is at the heart liberal egalitarianism.

While some view contemporary conceptions of justice as a limited, liberal view of justice, such as what Rawls propounds, it can be argued that within the liberal family of justice can be found the likes of Friedrich Hayek,[289] Karl Popper,[290] and more recently, Robert

Nozick[291] and Michael Sandel.[292] Arguably these two are much closer to older tradition of classical liberalism of the 19th century, a la J.S. Mill. While Hayek and Popper could be center stage, as their epistemological liberalism may have informed a conservative Congress' desire to increase barriers to Chapter 7 filings; Rawls, and his progeny who have developed and extended his legacy, provide a far more persuasive conception of justice, which is more aligned with the non-economic justifications of bankruptcy relief. Bankruptcy may very well be, at its roots, the domain of political theorists addressing the problem of equality. No matter how the argument is sliced, the question is, why allow some relief from their debt, and others no relief?

While we do not address the underlying reasons that have led scholars and policymakers to move away from the "economic view" to a more egalitarian or social justice view, we do address possible philosophical drivers that may have informed the reasoning and decision making of scholars and policymakers. We suggest that more modern, liberal conceptions of justice have shaped bankruptcy law and policy, along with, to some extent, pro-debtor features in American religious belief. As an increased sense of social justice and equality has breached the American conscience, an increase to access to bankruptcy justice has been realized. The exception being the reforms of 2005 (BAPCA).

F. Access to Justice Denied

The relatively high financial cost of filing bankruptcy, the inability to get paid from the estate and discharge of attorneys' fees results challenges to attorneys to getting paid, and, for individuals being able to afford to pay for legal services in many cases. The true problem is not the challenge to payment of the attorney in and of itself, but rather, the underlying result that occurs. This leads to a problem with access the Chapter 7 relief for some individuals.[293] If inability to fund the cost of filing Chapter 7 leads to access to justice issue[294] reforms need to be considered to address the inability to fund the cost of Chapter 7.

It has been suggested that there are no access to Chapter 7 issues because there is a lack of empirical data to support the proposition.[295] The lack of empirical evidence does not mean there is no access problem. It would be quite a challenge to collect data on individuals that did not file Chapter 7 due to lack of access.[296] As outlined above there are several factors, beyond the increased attorney fees and other costs,[297] that indicate access issues have become for acute in the bankruptcy field in recent years.

G. Access to Justice Delayed

The increased attorney fees and other costs, even if not a barrier to relief, may defer the filing of bankruptcy for some debtors.[298] Delayed access to justice presents a host of problems. The delay in obtaining relief can lead to social losses such as unproductive use of human capital during the delay.[299] For example, if a small business person, an entrepreneur, defers filing to raise funds for the costs associated with filing, during that period the entrepreneur is not able to move on to new endeavors or new employment opportunities. In such instances the delay in filing leads the loss of the external benefit provided by the entrepreneur if he or she was able to use his or her human capital in the most productive way.[300]

Even if an individual is not an entrepreneur or delayed in employment opportunities, other stresses on the household due to the continued financial distress likely occur during the delay.[301]

IV. PROPOSED STATUTORY REFORMS

A. Excepting Attorney Fees from Discharge

To address the underlying issue of paying attorneys and helping debtors pay attorneys, and to hopefully increase access is for Congress to modify the dischargeability of attorney fees.[302] Prior have proposed such reforms, but the bills have not been enacted into law. For example, the Medical Bankruptcy Fairness Act of 2009 ("MBFA")[303] included a provision excepting from discharge a debt "incurred by a debtor relating to attorneys fees generated as result of the debtor's filing of a petition under chapter 7."[304]

Excepting attorney fees from discharge is not a silver bullet to the access issue, but it should help improve access by encouraging lawyers to take cases in which payment will made overtime.[305] Otherwise a lawyer that is not paid upfront and knows the debt is dischargeable, like any other lender in such a position, will either raise the fee associated with filing to take into account the risk of non-payment or simply not take a case due to the risk of non-payment.[306]

The statutory exception to discharge may very well reduce the attorney fee in particular legal markets and increase the quantity of bankruptcy demanded and supplied. The economic reasoning is straightforward. Consider the hypothetical market for Chapter 7 legal services. The market supply of Chapter 7 bankruptcy is the availability of legal services for filing, which is based primarily on the availability of bankruptcy suppliers (attorneys willing to file cases).[307] The fees in a particular legal market are subject to court review, there are no apparent barriers to entry and exit of bankruptcy suppliers, which results in same approximate fee is charged for routine cases.[308] Individual attorneys cannot typically impact the price in a particular market.[309] The market price is the market supply curve in a particular market.[310] In the typical legal market the supply for routine Chapter 7 services is highly price elastic, if not perfectly elastic as depicted by a horizontal supply curve.[311]

The demand for Chapter 7 bankruptcy has been characterized as highly inelastic, if not perfectly inelastic.[312] This may hold true for some segments of the population but the conclusion is likely too simplistic. The elastic of demand for Chapter 7 protection depends on whether Chapter 7 protection is a necessity and the ability to raise funds to file for relief.

If Chapter 7 relief is truly a necessity and there is no other close substitutes to address their financial problems then it would be expected to be highly inelastic. However, this would only apply if the individual can raise sufficient fund to file for Chapter 7 relief. Some of the middle class would likely fit into this category.

Consumer bankruptcy would also be highly inelastic for upper income individuals. These individuals can raise funds for filing. Chapter 7 relief may not be a pure necessity for individuals in this group as they may be able to have other options to deal with their financial problems. Nevertheless, the price increases and costs associate with filing would likely not be enough so that individuals in this group are responsive to the price change. For this group demand may be perfectly inelastic.

The rest of the population—many in the middle class and working poor that cannot raise sufficient funds to file for relief --- the demand for Chapter 7 bankruptcy is likely elastic. Individuals in this group have some income and may be able to address financial problems, albeit perhaps ineffectively, over time. They can often tread financial water, although they may well benefit from Chapter 7 relief. These individuals are likely price responsive. The exact slope of the demand curve will vary from legal market to legal market.

Combining the market supply curve and the market demand curve for those that are price elastic shows how making attorney fees nondischargeable likely will lead to an increase in the supply of legal services. This shift downward in the supply curve will lead to a lower attorney fees and increase the number of Chapter 7 filings in particular legal market.

B. Permitting Payment from Estate

Changing the statutory framework regarding paying from the estate will not have as a dramatic impact as modifying the dischargeability of attorney fees. Most cases are "no asset" cases meaning that there are no estate assets available to distribute to creditors.[313] Therefore, in most individual Chapter 7 cases there is no source of estate funds to pay attorneys.[314] Nevertheless, in some cases it will open this as an avenue to pay for an attorney and it will add consistency in the treatment of debtor's attorney fees under the various chapters of the code.

The statutory solution is straightforward. Payment of professionals out of the estate are governed by several Code sections, particularly Sections 503(b) and Section 330(a). Section 503(b) provides in relevant part:

> (b) After notice and hearing, there shall be allowed administrative expenses ..., including--
>
> * * * * * *
>
> (2) compensation and reimbursement awarded under section 330(a) of this title.[315]

Section 330(a) provides in relevant part:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[316]

Section 330 should be amended to include chapter 7. In cases where funds are available and the services are beneficial and necessary such services would be compensable along with other Section 503(b) administrative expenses.

This modification of the Code would address several concerns raised in not permitting Chapter 7 attorney's s from the estate. First it has been argued that "[i]t is incongruous that Congress would remove the right for a Chapter 7 debtor's attorney to be compensated and add the right for a Chapter 12 and Chapter 13 debtor's attorney to be compensated."[317] A second major criticism is that "[i]t is inequitable since a Chapter 7 debtor still has duties to perform which require the services of an attorney."[318]

The third primary criticism is that the "result is inconsistent with other provisions of the Bankruptcy Code. Section 329 of the Bankruptcy Code allows a debtor's attorney to receive a retainer in connection with services to be rendered. It would be inconsistent to allow a Chapter 7 debtor to be allowed to be compensated from a pre-petition retainer, but, not from the assets of the debtor's estate."[319] The difficulty with this argument is that any portion of a flat fee collected or "retainer" paid pre-petition which has not been earned as of the date of the petition is property of the estate.[320] Prior to the Reform Act courts which allowed payment from any excess non-earned pre-petition retainer for post-petition services under Section 330 and Section 503(b) just

as payment for such services were allowed out of any other estate assets. The Code bars payment for post-petition services from property of the estate and thus any payment from the excess "pre-petition" retainer for post-petition services is barred as well.[321] There is no legal distinction from being paid out of the excess unearned pre-petition retainer and being paid from other assets or monies of the Chapter 7 debtor on the date of the petition as both are property of the estate. Modifying the Code by permitting Chapter 7 attorneys to share with other administrative expenses would eliminate this problem.

C. Reducing Other Direct Costs

The statutory reforms advocated will not in and of themselves fully address the increasing access to justice issues associated with Chapter 7 relief. Nevertheless, they should eliminate several statutory barriers to obtaining legal representation. Policymakers need to consider other areas of reforms that can help increase access to obtaining relief. Other statutory changes to the Bankruptcy Code should be considered. There are certain provisions added by BAPCPA that do nothing more than create artificial hurdles to obtaining relief and increase the costs of filing

1. Filing Fees and In Forma Pauperis

Parties commencing a Chapter 7 case must pay a filing fee.[322] The current Chapter 7 filing fee is $306.[323] This cost may seem small, but in the context of an individual in dire straight, paying the filing fee can be challenging.[324] Some debtors avail themselves of the ability to pay the fee in installments once the case in filed.[325] However, for others, the cost may be too high and seek a waiver of the filing fee,[326] in forma pauperis status.[327]

Although there is statutory authority to waive a filing fee, the parameters of the waiver are very strict. Only individuals that have income "less than 150 percent of the income official poverty line. . . applicable to a family of the size involved and is unable to pay that fee installments"[328] are able to qualify for a waiver.

There are several problems with the waiver provision.[329] First, the mechanics of showing that a debtor meets this standard is quite complex and involves correctly completing the schedules in an accurate and complete manner.[330] This is quite challenging for a pro se debtor. Second, only the poorest of the poor would qualify because even if they meet the 150% threshold, showing that they are unable to pay the fee in installments seems unlikely in many cases.[331] Third, courts are not required to waive the fee if a debtor satisfies the criteria.[332]

The waiver requirements should be modified in several ways. First, a simple on page form should be developed that a pro se debtor can complete it to show how they are eligible under the waiver provisions. Second, the waiver of the fee should not be linked to ability pay the fee in installments. The debtor's financial situation should be examined on the day of filing without projecting into the future. Third, upon a showing that the statutory threshold is satisfied, courts should be required to waive the fee. The changes will make waiver more accessible.

2. Credit Counseling

The credit counseling requirement is another good example of an area of needed reform as it does nothing but add an additional cost with no meaningful benefit.[333] Debtors must

complete a credit counseling briefing prior to filing.[334] The typical cost of such a briefing is about $50.[335] The reality is that the actual briefing is often done on the phone or via the internet with no meaningful counseling of a debtor.[336] The result is that credit counseling is just a formality, often taken on the eve of bankruptcy, that provides no benefit to debtors.[337] The credit counseling requirement should be repealed, thus eliminating this burden and the financial cost associated with it.[338]

The Code's debtor education requirement should not be eliminated.[339] The time and cost expended for the credit counseling could be channeled to the post-filing debtor education requirement. A requirement such as this makes sense and may help prevent future bankruptcies.[340]

D. Reducing the Red Tape associated with Means Testing Provisions

The statutory means test increases the costs of filing and does appear to have meaningfully enhanced the bankruptcy system.[341] The means test should be reformed so that it is simpler which would improve access by reducing the cost associate with legal representation and make pro se filing more feasible. These modifications would also work toward actually enhancing the bankruptcy system. Several aspects of the means test should be modified.[342]

For example, the means test calculation creates costs and red tape for debtors.[343] Disposable income is calculated by completing Form B22A.[344] Form B22A is complex as it incorporates the statutory determinations of income and expenses which are not based on actual income and expenses.[345] Income is based on the debtor's income in the six months prior to filing.[346] Documentation of income must be provided within 60 days,[347] as well as other documentation which drives up the cost and complexity.[348] Expenses are based, in part, by referring to IRS expense tables.[349] What results is a disposable income figure that may or may not be accurate. If it is inaccurate and the presumption arises, then a debtor will have to rebut the presumption, which is very limited.[350] This process drives actual costs associated with an attorney representing a debtor and the complexity makes the likelihood of a *pro se* filer successfully navigating the bankruptcy process much less likely.[351]

Reforming the means to permit calculation of actual income and expenses at the time of filing would provide a more accurate analysis of actual disposable income.[352] This would reduce the likelihood of an erroneous presumption of abuse under the current framework. The more accurate financial picture the means test provides will reduce the litigation surrounding the means test calculations. This will reduce costs associated with filing and make navigating a *pro se* filing easier.

CONCLUSION

Regardless of the specific reforms considered, the goal of policymakers of any reforms to the Bankruptcy Code should be to improvement of the system overall, including access to relief for those that desperately need it. Unfortunately many of the recent consumer bankruptcy reforms have not had this focus, and the result is an increasingly expensive system that has not been improved. Bankruptcy policy embodied in BAPCPA penalizes and creates unnecessary hurdles for relief for individuals in dire strait.[353] The reforms outlined herein, albeit incremental steps, can help improve the system by eliminating unnecessary statutory hurdles to help provide a social safety net[354] to catch individuals when there is no other avenue for relief.

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter BAPCPA).
[2] Megan R. O'Flynn, Comment, *The Scorecard So Far: Emerging Issues in Cross-Border Insolvencies under Chapter 15 of the U.S. Bankruptcy Code*, 32 NW. J. INT'L L. & BUS. 391, 392 (2012).
[3] Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2126 (2003).
[4] *See, e.g.*, Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 411 (2004) (Professor Warren found in her empirical work that "more than eight out of ten families with children cite just three reasons for their bankruptcies: job loss, family breakup, and medical problems.").
[5] Andrew P. MacArthur, *Pay to Play: The Poor's Problems in BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 407 (2009).
[6] 11 U.S.C. §§ 101–1527 (2006). Unless otherwise noted, all references to the Bankruptcy Code, Code, or section are to title 11 of the United States Code.
[7] *See infra* notes 86-186 and accompanying text.
[8] For a thoughtful analysis of the panoply of factors, including economic costs of filing, causing an access to justice issue in consumer bankruptcy, see generally Richard I. Aaron, *Access to Justice: Consumer Bankruptcy*, 2006 UTAH L. REV. 925 (2006). *See also* Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 6 (2009) (Recognizing that the inability to file due to inability to pay attorney fees leads to "serious access-to-justice concerns."). Other scholars have criticized the argument that there is an access to Chapter 7 problem. *See* Joshua D. Morse, Comment, *Public Policy Is Never a Substitute for Statutory Clarity: Rejecting the Notion that Pre-petition Attorney-Fee Debts Are Nondischargeable in Chapter 7 Bankruptcies*, 40 SANTA CLARA L. REV. 575, 604-05 (2000).
[9] Richard Hynes, *Payday Lending, Bankruptcy, and Insolvency*, 69 WASH. & LEE L. REV. 607, 629 (2012). See also, Allyn O'Connor, *Bankruptcy Assistance: Creative Strategies*, 2010-DEC BUS. L. TODAY 1, 1 (2010) (noting that lack of affordable legal assistance negatively impacts an individual's ability to file for bankruptcy relief).
[10] The primary relief to an individual debtor in the typical Chapter 7 case is the discharge of most pre-petition unsecured debts. *See* 11 U.S.C. § 727(a) (2006).
[11] Aaron, *supra* note 8, at 925.
[12] *Id*. at 949. *See also* U.S. v. Kras, 409 U.S. 434, 447, 93 S.Ct. 631, 638 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").
[13] *See infra* Part I.A and C.
[14] Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J. LAW REV. 517, 521 (2012) ("Bankruptcy is an important safety net for individuals or families who incur debt because of job loss, medical emergency, or family breakup.").
[15] *See infra* text accompanying notes 81-83.
[16] Aaron, *supra* note 8, at 950.
[17] *See generally*, Aaron, *supra* note 8, at 935-949 (analyzing how BAPCPA actually has led to a decrease in access to bankruptcy relief).
[18] Elijah M. Alper, Note, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealth Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1913 (2007). Beyond Chapter 7 and Chapter 13, an individual can afford themselves of bankruptcy protection under two other chapters of the Code: Chapter 11 and Chapter 12. *See, e.g.*, Janicelynn J. Asamoto, Note, *Reconciling Ripley and Joye: A Fact-Sensitive Analysis of Petition-Year and Pre-Petition-Year Income Tax Claims in Chapter 13 Bankruptcies*, 79 FORDHAM L. REV. 521, 525 (2010) (noting that consumer debtors have four options under the Bankruptcy Code). Although, individuals can opt to file for relief under Chapter 11, individuals rarely seek relief under this chapter of the Code. Alper, *supra* note 17, at n.35. Chapter 11 is typically used by businesses or high income earning individuals with business interests. *See, e.g.*, Sephen P. Ferris & Robert M. Lawless, *The Expenses of Financial Distress: The Direct Costs of Chapter 11*, 61 U. PITT. L. REV. 629, 634 (2000) (Recognizing that they typical chapter debtor is an individual with business assets or business firms.). Individuals can also file for relief under Chapter 12, however, the individual must be a farmer and is not the typical individual consumer debtor. For an overview of Chapter 12 bankruptcy, see generally Robin Cochran, Comment, *The New Chapter 12 of the Bankruptcy Code: A More Efficient Approach for Family Farmer Reorganization*, 57 MISS. L.J. 185, 186-201 (1987)
[19] 11 U.S.C. §§ 701-727 (2006).
[20] 11 U.S.C. §§ 1301-1330 (2006).
[21] *See, e.g.*, *In re* McClearn, 37 B.R. 471, 473 (Bankr. W.D. Wis. 2007) (The court recognized that most Chapter 7 cases conclude within ninety days of the meeting of creditors.) The meeting of creditors is required to be scheduled

between twenty-one and forty days after the bankruptcy filing. *See* FED. R. BANKR. P. 2003(a). Therefore, most Chapter 7 cases conclude in about four months.

[22] Alper, *supra* note 18, at 1914.

[23] Michael D. Sousa, *A Delicate Balancing Act: Satisfying the Fourth Amendment while Protecting the Bankruptcy System from Debtor Fraud*, 28 YALE J. ON REG. 367, 414 (2011).

[24] Patrick J. Bonner, *Limitation of Liability: Should it be Jettisoned after the Deepwater Horizon*, 85 TUL. L. REV. 1183, 1193 (2011) ("[A] debtor surrenders all nonexempt assets . . . and the trustee collects the assets, sells them off, and distributes the proceeds pro rata to creditors.").

[25] Emily Gildar, Comment, *Arizona's Anti-Deficiency Statutes: Ensuring Consumer Protection in a Foreclosure Crisis*, 42 ARIZ. ST. L.J. 1019, 1028 (2010). *See also* Alper, *supra* note 18, at n.47 (recognizing that some estimate that ninety-six percent of Chapter 7 debtors pay nothing to unsecured creditors).

[26] *See* 11 U.S.C. §§ 727(a)-(c) (2006) (Outlines the limitations on a court granting a discharge and provides parties authority to object to discharge.).

[27] 11 U.S.C. §§ 523(a) (2006) (listing nineteen categories of debts that are potentially not dischargeable in Chapter 7).

[28] Kathleen Murphy & Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(b),* 16 AM. BANKR. INST. L. REV. 413, 415 (2008).

[29] The Chapter 13 process has been characterizes as a "long and arduous process." Asamoto, *supra* note 17, at 529.

[30] *See* Asamoto, *supra* note 18, at 529 (Most individuals opt for Chapter 7 liquidations, rather than Chapter 13.); Keri Mahoney, Comment, *The Unlucky Penny: How $0.01 in Collateral Value can Limit the Debtor's Ability to Strip off a Junior Mortgage in a Chapter 7 Proceeding*, 29 TOURO L. REV. 757, 763 (2013) ("[I]n 2012, Chapter 7 bankruptcy filings were filed at more than double the rate of Chapter 13 filings . . . Chapter 7 remains the most common mechanism for an individual to file for bankruptcy.").

[31] *See* Asamoto, *supra* note 18, at 529 (Noting that one reason a debtor may choose Chapter 13 is to retain nonexempt assets.). For a thorough treatment of a host of reasons an individual may choose Chapter 13 over Chapter 7, see generally Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, §§ 4.1-4.17 (Rev. 2009), available at www.Ch13online.com.

[32] *See, e.g.*, Lundin & Brown, *supra* note 31, at § 101.1 (noting the required treatment for secured creditors, including making periodic payments). *See* 11 U.S.C. §§ 1325(a)(5) (2006) (setting forth treatment of secured creditors, including required payments).

[33] 11 U.S.C. § 1321 (2006) (requires filing of a plan by a debtor).

[34] 11 U.S.C. § 1325(b)(1)(B) (2006) (provides a debtor must devote projected disposable income through the plan).

[35] 11 U.S.C. § 1325(b)(4) (2006) (sets for the "applicable commitment period," i.e., the plan periods can be between 3 and 5 years). *See also* Asamoto, *supra* note 18, at 526-527.

[36] 11 U.S.C. § 1325(a) (2006) (provides for discharge at the completion of plan payments). An individual can obtain a discharge prior to completion of plan payments in very limited circumstances. 11 U.S.C. § 1325(b) (2006).

[37] Asamoto, *supra* note 18, at 528. Unless a debt is provided for in the plan, is a debt for restitution or a criminal fine in connection with a debtor's conviction or is a debt specific in 11 U.S.C. § 523(a)(5), (8) or (9), it is subject to discharge in Chapter 13. 11 U.S.C. § 1325(a) (2006).

[38] Lundin & Brown, *supra* note 31, at § 344.1, at ¶ 6 ("The discharge of an individual debtor after completion of all payments under a Chapter 13 plan is the broadest discharge available under the Code.").

[39] Stephen C. Behymer, Note, *Not Interested? A Trustee Lacks "Party in Interest" Standing to Move for an Extension of the Nondischargeability Bar Date on Behalf of Creditors*, 82 FORDHAM L. REV. 937, 941 (2013) (Modern bankruptcy law in the U.S. "focuses on providing the debtor with a "fresh start" while simultaneously facilitating the fair and orderly collection of debts owed to creditors."); Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 31 (2013) (recognizing that fresh start and equitable distribution of assets policy goals of consumer bankruptcy); Asamoto, *supra* note 18, at 529 ("In its modern incarnation, the Bankruptcy Code is widely acknowledged to further two goals: (1) compensate creditors equitably, and (2) provide filers with a clean financial slate--the debtor's fresh start.").

[40] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007) ("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor."). *See also* Behymer, *supra* note 38, at 944 (noting that the fresh start policy is "one of the most important rationales underlying the bankruptcy system"). For a detailed treatment of the historical development of the fresh start policy in

bankruptcy, see generally Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

[41] *See also* Bruce, *supra* note 39, at 33 (The author characterizes this goal a providing "for the fair treatment of credtiors . . . [through] the ratable distribution of assets. . .").

[42] 11 U.S.C. § 362(a) (2006) (Provides that the filing of a bankruptcy petition operates as a stay of various collection efforts).

[43] Alper, *supra* note 18, at 1914.

[44] 11 U.S.C. § 362(c) (2006) (Outlines how the automatic stays terminates including the closing of the case, dismissal of the case or the grant or denial of a discharge.).

[45] *See* 11 U.S.C. § 524(a)(2)-(3) (2006) (Sets for the effect of a discharge, including its effect as a discharge on various commencement or continuation efforts to collect discharged debts).

[46] *See* Alper, *supra* note 18, at 1915 (noting that the "discharge serves as the debtor's fresh start"); Bruce, *supra* note 38, at 31 (the discharge furthers the fresh start policy).

[47] The Code provides for a distribution scheme of property of the bankruptcy estate to creditors. 11 U.S.C. § 726(a)-(b) (2006).

[48] 11 U.S.C. § 362(a) (2006).

[49] *See, e.g*., Tracy L. Leyba, Note, *Hamilton v. Lanning: The Economic Implications of Forecasting a Debtor's Disposable Income*, 7 J. BUS. & TECH. L. 181, 184 (2012) ("Once an individual files for Chapter 13, the automatic stay provision under § 362 prohibits creditors from seeking further collection of the debtor's property. . .").

[50] 11 U.S.C. § 362(c) (2006).

[51] Kristen Scott Nardone, *Modification for Above-Median-Income Debtors*, 30-FEB AM. BANKR. INST. J. 16, 68 (2011) ("A confirmed plan becomes binding on all parties and represents a final judgment on the merits.").

[52] Stephen J. Spurr & Kevin M. Ball, *The Effects of a Stattue (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy*, 87 AM. BANKR. L.J. 27, 28 (2013) ("BAPCPA is the most significant revision of the Bankruptcy Code since its enactment in 1978.").

[53] *See supra* notes 18-20 and accompanying text.

[54] *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 33-35 (2012) (outlining the various new hurdles to consumer bankruptcy by BAPCPA).

[55] *Id*. at 27 ("The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act had as one of its stated goals the reduction of consumer bankruptcy filings and, failing that, a decline in consumer cases filed under chapter 7 of the Bankruptcy Code.").

[56] 11 U.S.C. § 707(b)(2)(A)(i)-(iv) (2006).

[57] *See* Laura B. Bartell, *Pension Plan Loans and Means Testing – The Pernicious Endurance of Villarie*, 87 AM. BANKR. L.J. 89, 114 (2013) ("Congress created a new presumption of abuse--familiarly known as the "means test"--which . . . [is] . . . intended to determine by a mechanical formula whether the debtor would have the ability to pay creditors in a chapter 13 plan.").

[58] The actual calculation is done by a debtor completing Official Form 22A. Bartel, *supra* note 57, 114, n. 189 ("Official Form 22A is the statement that must be complete by every individual debtor filing a chapter 7 case to establish eligibility for that chapter under 11 U.S.C. § 707(b)(2)."). For a concise summary of the calculation, see generally *id.* at 113-114.

[59] 11 U.S.C. § 707(b)(2)(B)(i) (2006).

[60] 11 U.S.C. § 707(b)(3)(A) and (B) (2006). *See also* James D. Walker, et al., *Bankruptcy*, 64 MERCER L. REV. 849, 867 (2013) ("Even when the presumption of abuse does not arise, § 707(b) (3)(B) provides an alternative test for determining whether a Chapter 7 filing is abusive.").

[61] 11 U.S.C. § 707(b)(3)(A) (2006).

[62] 11 U.S.C. § 707(b)(3)(B) (2006).

[63] For example, see generally Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395 (2009) (thoughtful critique of the means test in practice); David Gray Carlson, *Means Testing: The Failed Bankrutpcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007) (extensive analysis of the problems and ambiguities in the means test); Marianne B. Culhane & Michaela M. White, *Catching Can Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005) (detailed treatment of the means test and its limitations); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L. J. 231 (2005) (comprehensive anaylsis of the means test advocating a viewpoint favoring broad discretionary authority of courts under the means).

[64] *See* Figure 1.

[65] The effective date of BAPCPA was October 17, 2005. Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 352, n. 86 (2013). The filings soared up to that date. Spurr & Ball, *supra* note 52, at 33.
[66] The drop is expected in light of the great increase in 2005. Individuals effected raced to the courthouse and the lull in filings is logical. *See, e.g.*, Spurr & Ball, *supra* note 52, at 33 ("Because BAPCPA made bankruptcy relief more costly, individuals on the brink of insolvency made sure to file for bankruptcy before its effective date. Thereafter debtors became more cautious about borrowing, which reduced the probability that they would later file for bankruptcy.").
[67] *See* Figure 1.
[68] *See* Figure 1.
[69] For fiscal year 2013 ending September 30, 2013 total consumer filings (1,072,807) were down 12% from fiscal year total consumer filings (1,219,132). U.S. Courts, *Bankruptcy Filings Drop 12 Percent in Fiscal Year 2013*,THE THIRD BRANCH NEWS (October 24, 2013), http://news.uscourts.gov/bankruptcy-filings-drop-12-percent-fiscal-year-2013.
[70] *See* Table 1.
[71] Spurr & Ball, *supra* note 52, at 49 ("[T]he data indicate that the enactment of BAPCPA was followed by a substantial increase in the overall share of consumer cases filed under chapter 13. However, that increase proved to be temporary; it peaked in the fiscal year 2006 and then eroded continuously until it essentially returned to its pre-BAPCPA levels in the fiscal year 2009.").
[72] O'Connor, *supra* note 9, at 1. ("A recent USA Today headline reads "Only a Fraction of Those in Need File for Bankruptcy." The author cites a lack of affordable legal assistance as a primary reason why most debtors don't file for bankruptcy.").
[73] Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 276 (2007) *;* Bruce, *supra* note 38, at 32 (noting that bankruptcy provides a "social safety net"). For a comprehensive treatment of the social insurance and safety net function of consumer bankruptcy, see generally Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005).
[74] Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill*, 44 SANTA CLARA L. REV. 1065, 1066 (2004).
[75] *See, e.g.*, *id* (Noting that the use of consumer credit as a "self-financed safety net" contributes to consumer bankruptcy filings.).
[76] Robert M. Lawless & Elizabeth Warren, *Shrinking the Safety Net: The 2005 Changes in U.S. Bankruptcy Law*, U. ILLINOIS LAW & ECONOMICS RESEARCH PAPER NO. LE06-031, 15 (2006), *available at* http://ssrn.com/abstract=949629.
[77] White, *supr*a note 73, at 276. *See also* Kartik Athreya, *Unemployment Insurance and Personal Bankruptcy*, 89(2) FEDERAL RESERVE BANK OF RICHMOND ECONOMIC QUARTERLY 33, 33 (2003) ("[B|]ankruptcy allows households some flexibility in timing repayments in a way that allows for sudden unforeseen contingencies. As an implicit form of insurance, bankruptcy may augment, substitute for, or even limit other forms of insurance.").
[78] White, *supra* note 73, at 276.
[79] *Id.* at n 2.
[80] *Id.* at 276 ("This type of insurance is valuable because sharp falls in consumption can have permanent negative effects on debtors and their families--for example, debtors' illnesses may turn into disabilities for lack of medical care, debtors may become homeless, or debtors' children may drop out of school in order to work, leading to lower earnings as adults.").
[81] JEFF HOLT, PRINCIPLES OF ECONOMICS 5-1 (5th ed. 2000).
[82] *Id.*
[83] *Id.*
[84] *See supra* notes 39-41 and accompanying text.
[85] SENATOR CHURCK GRASSLEY, OPENING STATEMENT OF SEN. CHUCK GRASSLEY AT BANKRUPTCY REFORM HEARING, SENATE COMMITTEE ON THE JUDICIARY, February 10, 2005, http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9716) (last visited on January 1, 2014).
[86] *Id.*

[87] Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 6 (2009) (Recognizing that the inability to file due to inability to pay attorney fees leads to "serious access-to-justice concerns.").
[88] Robert J. Landry, III & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 331 (2008) (quoting Katherine A. Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 122 (2006)).
[89] Aaron, *supra* note 8, at 937.
[90] Peggy Maisel & Natalie Roman, *The Consumer Indebtedness Crisis: Law School Clinics as Laboratories for Generating Effective Legal Responses*, 18 CLINICAL L. REV. 133, n.158 (2011).
[91] *Medical Debt: Can Bankruptcy Reform Facilitate a Fresh Start*? *Hearing Before the Subcomm. on Administrative Oversight and the Courts*, 111th Cong. 58 (2009) (statement of John A.E. Pottow, Prof. of Law, Univ. of Mich. Law Sch.) (hereafter Pottow), available at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da151bfa1 www.judiciary.senate.gov/pdf/10-20-09%20Pottow%20Testimony.pdf. *See also* MacAuthur, *supra* note 5, at 420 (Recognizing that a host of additional filing requirements were added to the Bankruptcy Code by BAPCPA and this has increased the cost of obtaining legal assistance.); White *supra* note 73, at 287 (Noting that attorney fees are predicted to increase from less than $1000 up to $1500 to $2500 in light of BAPCPA. The increase is due to the "extra time that bankruptcy lawyers must spend to investigate and certify assets, liabilities, income, and consumption figures.").

Some have theorized that the changes to BAPCPA, particularly the enhanced attorney liability provisions, may not only increase the attorneys' fees, but they have a chilling effect on some lawyers' willingness to represent individuals in bankruptcy cases. *See, e.g.,* The ABA Governmental Affairs Office, *Summary of ABA Efforts to Oppose Excessive Federal Agency Regulation of Lawyers*, 66 CONSUMER FIN. L.Q. REP. 36, 38 (2012) ("The ABA is concerned that if these attorney liability provisions in BAPCPA are not reversed, they will continue to have a chilling effect on lawyers' willingness to represent debtors in bankruptcy. . .").
[92] *See, e.g.*, Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 511 (2007) ("Certainly debtor's attorneys' fees in consumer chapter 7 cases have increased dramatically since BAPCPA became law . . .").
[93] Landry & Yarbrough, *supra* note 88, at 342-43.
[94] Lupica, *supra* note 54, at 69.
[95] *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO 08-697, REPORT TO CONGRESSIONAL REQUESTERS, BANKRUPTCY REFORM, DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 22-23 (2008).
[96] Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, __ J. EMPIRICAL LEG. STUD. __, ___ (2012 forthcoming), *available at* SSRN: http://ssrn.com/abstract=1989039 or http://dx.doi.org/10.2139/ssrn.1989039, at 3. A
[97] Hynes, *supra* note 9, at 629.
[98] Anne E. Wells, *Navigating Ethical Minefields on the Bankruptcy Bandwagon*, 31 CAL. BANKR. J. 767, 789 (2011). *See also* A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 925 (2006) ("Chapter 7 debtors are almost always forced to pay their attorneys before the case is filed.").
[99] Wells, *supra* note 98, at 789 ("Thus, debtor's counsel in a Chapter 7 case generally must be paid in full before the bankruptcy case is filed. This presents a unique problem as potential bankruptcy clients, who by definition are experiencing financial difficulty, often do not have the necessary funds on hand to pay for the services they need.").
[100] *See* Maisel & Roman, *supra* note 90, at 170 ("Indeed, many of the difficulties encountered in filing for bankruptcy today were created by Congressional reform of the bankruptcy laws in 2005, which not only increased the costs of filing for bankruptcy but also made it more difficult for individuals to qualify for bankruptcy protection.").
[101] Debtors are required to pay a filing fee for commencing a Chapter 7 case. 28 U.S.C. § 1930(1)(A) (2006). Prior to BAPCPA the Chapter 7 filing fee was $155. Landry & Yarbrough, *supra* note 88, at 335. The current Chapter 7 filing fee is $306. *Bankruptcy Filing Fees*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/BankruptcyFilingFees.aspx (last visited July 10, 2012). Chapter 7 filing fees have substantially increased since the enactment of BAPCPA when the fee was increased from $155 to $200. For a discussion of the ever increasing filing fees, see generally A. Mechele Dicerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L L.J. 135, n.71 (2008).

[102] The Bankruptcy Code requires individual debtors to complete certain pre-petition credit counseling requirements. 11 U.S.C. §§ 109(h), 521(b) (2006). The cost associated with complying with the credit counseling requirements is typically $50. Landry & Yarbrough, *supra* note 88, at 337; MacAuthor, *supra* note 5, at 426. Likewise the U.S. Trustee estimates the median fee for credit counseling in 2012 at $50. U.S. DEPARTMENT OF JUSTICE, UNITED STATES TRUSTEE PROGRAM ANNUAL REPORT 46 (2012), *available at* http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2012.pdf.

[103] The Bankruptcy Code requires individual debtors to complete certain post-petition debtor education requirements. 11 U.S.C. § 727(a)(11) (2006). The cost associated with complying with the debtor education requirements is approximately $50. Landry & Yarbrough, *supra* note 88, at 338. The U.S. Trustee estimates the median debtor education fee for individuals at $49 and for couples at $55. U.S. DEPARTMENT OF JUSTICE, UNITED STATES TRUSTEE PROGRAM ANNUAL REPORT *supra* note 102, at 46.

[104] Attorneys will typically run a credit report as part of the case preparation. This fee may be included in the attorney fee charge or as an additional charge.

[105] Landry & Yarbrough, *supra* note 88, at 343.

[106] Lupica, *supra* note 54, at 60-1.

[107] *See* Aaron, *supra* note 8, at 937 (recognizing that the filing fee is "trivial in comparison to the stakes in bankruptcy").

[108] Porter & Thorne, *supra* note 88, at 122 ("With a median annual income of less than $22,000, the direct expenses of filing a Chapter 7 case are quite burdensome."). *See also* Melissa B. Jacoby, *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*, 71 MO. L. REV. 903, 913 (2006) ("BAPCPA has raised the cost of bankruptcy access substantially for filers. . .").

[109] Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 369 (2009).

[110] James L. Neher, Comment, *Rethinking the Discharge of Pre-petition Attorney Fees in Chapter 7 Bankruptcy: A Debtor Oriented Perspective*, 6 D.C. L. REV. 91, 91 (2001). *See also Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127 (7th Cir. 2003) (The court recognized that almost every judge that has considered the issue of dischargeability of pre-petition Chapter 7 attorney fees has found that they pre-petition debtor for attorney fees are discharged).

[111] Bethea, 352 F.3d at 1127.

[112] *In re* Biggar, 110 F.3d 685, 688 (9th Cir. 1997). *See also In re Sanchez*, 241 F.3d 1148, 1150 (9th Cir. 2001).

[113] William L. Norton, Jr., *Installment Retainers, in* 9 NORTON BANKR. L. & PRAC. 3D § 172:19 (July 2012), *available at* Westlaw NRTN-BLP.

[114] *Id.*

[115] *Id.*

[116] Neher, *supra* note 110, at 91. *See In re* Perry, 225 B.R. 497, 500-01 (Bankr. D. Colo. 1998); *In re* Mills, 170 B.R. 404 (Bankr. D. Ariz. 1994).

[117] *In re* Perry, 225 B.R. at 500. *See generally* Morse, *supra* note 8, at 606-07 (summarizing, and critiquing the *Perry* court's analysis).

[118] FED. R. BANKR. PROC. 1016(b).

[119] 11 U.S.C. § 329(a) (2006).

[120] For a discussion of the problems associated with this practice, see Anne E. Wells, *Navigating Ethical Minefields on the Bankruptcy Bandwagon*, 31 CAL. BANKR. J. 767, 788-89 (2011).

[121] *In re* Newkirk, 297 B.R. 457 (Bankr. W.D. N.C. 2002) (finding that negotiation of postpetition checks was a violation of the stay and the discharge injunction, and a conflict of interest requiring disgorgement; *In re* Shell, 312 B.R. 431, 435 (Bankr. M.D. Ala. 2004) (post-dated checked for payment of attorney fees was a violation of the automatic stay and a violation of the discharge injunction post-discharge).

[122] Matter of Nidiver, 217 B.R. 581, 584-85 (Bankr. D. Neb. 1998).

[123] 11 U.S.C. § 524 (2006).

[124] Porter & Thorne, *supra* note 88, at 99 (recognizing that reaffirmations may "blight" the fresh start). *See also* Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1087 (2004) ("Reaffirming unsecured debts is almost always a bad idea. . ."); Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 764 (1999) (raising concerns about the adequacy of the protection to the fresh start by permitting reaffirmations).

[125] Terrance Gallogy, Comment, *Enforcing the Clawback Provision: Preventing the Envasion of Liablity under Section 954 of the Dodd-Frank Act*, 42 SETON HALL L. REV. 1229, 1252 (2012) ("The most important policy goal of

Chapter 7 bankruptcy is allowing a "fresh start" to a debtor so that he or she has the opportunity to start anew unhindered by the burden of preexisting debt.").

[126] The burden that reaffirmations can pose was recognized even prior to the enactment of the Bankruptcy Code. *See* H.R. Doc. No. 93-137, pt. 1, at 177 (1973) ("Substantial evidence of the use of reaffirmations to nullify discharges has come to the Commission's attention. To the extent reaffirmations are enforceable, the 'fresh start' goal of the discharge provisions is frustrated.").

[127] 11 U.S.C. § 524(c)(A)(6)(ii) (2006).

[128] Danielle Friedberg, Note, *The Ethical Ramifications of Section 330(A)(1) of the Bankruptcy Code*, 11 AM. BANKR. INST. L. REV. 289, 304 (2003) ("Rarely is reaffirming an unsecured liability in the debtor's best interest.").

[129] 11 U.S.C. § 524(c) (2006).

[130] Wells, *supra* note 88, at 789 ("Asking debtors to reaffirm obligations to counsel post-petition will also likely be unavailing, as reaffirmation agreements require the approval of counsel, putting attorneys in a position adverse to their debtor clients.").

[131] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4107 (1994).

[132] *In re* Friedland, 182 B.R. 576 (Bankr. D. Colo. 1995); *In re* Kinnemore, 181 B.R. 520 (Bankr. D. Id. 1995); *In re* Fassinger, 191 B.R. 864, 865 (Bankr. D. Oregon); *In re* Century Cleaning Services, Inc., 202 B.R. 149, 151 (Bankr. D. Oregon 1996). *See, e.g., In re* Thomas, 195 B.R. 18 (Bankr. W.D. N.Y. 1996). *Contra In re* Grossman et al., 1996 WL 389324, *fn1. (Bankr. E.D. Pa.) (not reported in B.R.) (Court declined to follow holdings of *Fassinger* and *Friedland*, however, the court did not provide any in depth analysis of the issue.).

[133] Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023, 157 L. 2d 1024 (2004).

[134] *See In re* Woodward East Project, 195 B.R. 372, 375 (Bankr. E.D. Mi. 1996). However, prior to the Reform Act at least one court denied compensation for Chapter 7 debtors' attorneys from the estate for post-petition services without regard to the nature of the services. That court took the position that

> practicing attorneys representing [Chapter 7] debtors ... must devise ways to obtain payment prior to the filing of the petition ... or make suitable alternative arrangements for financing post-petition services. While Chapters 11, 12, and 13 allow for estate payment of certain qualified professional fees, it is incumbent for Chapter 7 debtor's counsel to not rely on estate assets to pay ... post-petition attorney's fees.

In re Kahler, 84 B.R. 721, 724 (Bankr. D. Colo. 1988).

[135] *See, e.g.*, Lawrence P. King, Understanding the 1994 Amendments to the Bankruptcy Code: Commercial Bankruptcy Issues, 710 PLI/Comm 247 (Jan. 1995); Bankruptcy Court Denies Compensation to a Chapter 7 Debtor's Attorney, 9 No. 8 Inside Litig. 30 (August 1995).

[136] Pottow, *supra* note 91, at 4. *See also*, Angela Littwin, *The Affordability Paradox*, 52 WM. & MARY L.REV. 1933, 1938 (May 2011) ("[T]he high *pro se* failure rate since 2005 suggests that it is reasonable to equate the inability to afford a lawyer with having less than full access to the bankruptcy system.").

[137] Pardo, *supra* note 8, at 25

[138] *Id.* at 27.

[139] *Id*. at 28.

[140] *Id.* at 29.

[141] *Id.*

[142] *See* Morse, *supra* note 8, at 605.

[143] Kerry Haydel Ducey, *Bankrutpcy Just for the Rish? An Analysis of Popular Fee Arrangements for Pre-Petition Legal Fees and a Call to Amend*, 54 VAND. L. REV. 1665, 1701 (2001).

[144] *Id.* at 1667-68 ("Legal counsel is indispensable if a debtor is to effectively file for bankruptcy. The bankruptcy laws are complex, and legal counsel is often crucial in helping the debtor make an informed decision based on his unique circumstances and the available alternatives." (citing WILLIAM C. HILLMAN, PERSONAL BANKRUPTCY: WHAT EVERY DEBTOR AND CREDITOR NEEDS TO KNOW 20 (1993) ("Many mistakes people make by trying to do it on their own often cannot be corrected later. Even the simplest choices involve uncertainties and risks if you are not thoroughly familiar with the law.")).

[145] Ducey, *supra* note 143, at 1701.

[146] *In re* Puffer, 674 F.3d 78, 86 (1st Cir. 2012). *See also* O'Connor, *supra* note 9, at 1 ("Bankruptcy courts, legal services organizations, and pro bono programs have all noticed the dramatic increase in the need for bankruptcy legal assistance as well as most pro se filers' lack of success.").

[147] For a brief overview of pro bono options and challenges in the bankruptcy field, see generally O'Connor, *supra* note 9.

[148] Maisel & Roman, *supr*a note 90, at 168.
[149] Dickerson, *supra* note 98, at 925.
[150] *Id.* at 924-25 ("Though most localities have always had pro bono bankruptcy programs or other free legal services, those services generally were made available only for debtors whose wages were being or likely would be garnished or those who had nonexempt property that could be seized.")
[151] Maisel & Roman, *supra* note 90, at 169.
[152] *Id.* at n.179.
[153] The ABA Governmental Affairs Office *supra* note 91, at 38. *See also* O'Connor, *supra* note 9, at 1 ("Many bankruptcy pro bono programs, however, have faced a shortage of volunteers for the last few years. In part, this is due to the myriad of changes to the bankruptcy process imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.").
[154] The ABA Governmental Affairs Office, *supra* note 91, at 38.
[155] *Id*. at 38.
[156] O'Connor, *supra* note 9, at 1.
[157] *See* 28 U.S.C. § 1930(f) (2006).
[158] For a discussion of the statutory formula, see Philip Tedesco, *In Forma Pauperis in Bankruptcy*, 84 AM. BANKR. L.J. 79, 82-84 (2010).
[159] The Code provides for dismissal of cases if the filing fee is not paid. 11 U.S.C. § 707(a)(2) (2006).
[160] 11 U.S.C. §111(c)(2)(B), (d)(1)(E) (2006).
[161] MacAuthor, *supra* note 5, at 426. Waiver of the credit counseling requirement is possible under 11 U.S.C. § 109(h)2)(A, 3(A), (4) (2006). See Aaron, *supra* note 8, at 945. However, the waiver requirements are quite limited.
[162] MacAuthor, *supra* note 5, at 430.
[163] The Code provides as a condition precedent to granting a Chapter 7 discharge a debtor completing a debtor education requirement. 11 U.S.C. § 727(a)(11) (2006).
[164] Pottow, *supra* note 91, at 4-5. *See also* Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2143 (2002).
[165] Braucher et al., *supra* note 96, at 3.
[166] James Massey et al., *Consumer Bankruptcy Panel: Attorneys Fees in the Northern District of Georgia*, 25 EMORY BANKR. DEV. J. 377, 381 (2009) (discussing the problems of the fee only Chapter 13 cases and characterizing them as really as a disguised Chapter 7 case).
[167] *In re* Puffer, 674 F.3d at 81. *See also In re* San Miguel, 40 B.R. 481 (Bankr. D. Colo. 1984) (Chapter 13 case was dismissed for lack of good faith when plan only paid lawyer).
[168] Even if there is no overreaching or self-dealing, lawyers may in good faith guide clients to Chapter 13 so they can attempt to achieve the relief they need, and the attorney getting paid may be a positive effect of that guidance. Studies show that lawyers play a significant role in determining whether a debtor files Chapter 7 or Chapter 13. *See* Braucher et al., *supra* note 22, at 36 (recognizing the body of research "suggesting that attorneys play a large role in guiding chapter choice.").
[169] The concern is that the Chapter 13 case, as opposed to a Chapter 7 case, is filed purely for the payment of attorney fees. As recognized in the context of appeals the pursuit of an appeal may lead to "a potential principal-agent problem arises pursuant to which the attorney will work counter to his client's interest in order to further his financial gain." Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 945 (2012). The same can be said in the fee only Chapter 13 cases.
[170] Braucher et al., *supra* note 96, at 3 ("It is not uncommon for attorneys to charge $2,500 to $3,000 for a chapter 13 but only $1,000 for the less-complicated chapter 7"); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 119 (2011).
[171] Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L L. & BUS. 257, 294 (2004). *See also In re* Attanasio, 218 B.R. 180, 195 (Bankr. N.D. Ala. 1998) (recognizing the "high failure rate of Chapter 13 cases").
[172] Braucher et al., *supra* note 96, at 3 ("[I]t is only estimated that only about one-third of all chapter 13 filers manage to complete the repayment plan."); Porter, *supra* note 96, at 162. *See also* Scott F. Norberg & Andrew J. Velky, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 509 n. 74 (2006) (reporting that the failure rate in Chapter 13 is about two-thirds)(citing Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L .J. 461, 474-75 (1997)); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An*

Empirical Study of Discharge and Debt Collection in Chapter 13, 7 AM. BANKR. INST. L. REV. 415, 427 (1999)(finding a post-confirmation failure rate of 60% in a single district study over a 6 year period); NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 233 (1997), available at http:// govinfo. library. unt. edu/ nbrc/ report/ 08 consum. pdf ("For more than a decade, two-thirds of all Chapter 13 plans have failed before the debtor completes payments, and sometimes before unsecured creditors have received anything at all.").

Courts have recognized the high failure rate. For example, see *In re* Solis, 356 B.R. 398, 413 (Bankr. S.D. Tex. 2006)(the court cited to a 65% failure rate nationwide)(citations omitted). Even the Supreme Court, in dicta, after reviewing some of the literature on the issue, chimed in on the post-confirmation failure rate of near 60%. *See, e.g.*, Till v. SCS Credit Corp., 541 U.S. 465, 493 & fn1, 124 S.Ct. 1951, 1969 (2004)(citations omitted).

[173] In a single division study, that is now somewhat dated, the researcher reported a 63.1% success rate, or stated conversely a 37% failure rate. *See* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L.J. 17, 40-42 (1989). More recently a bankruptcy judge found that the success rate in its division within a district was 55%, or stated conversely a 45% failure rate. *See In re* Moore, 367 B.R. 721, 725 (Bankr. D. Kan. 2007)(finding that 55% of the Chapter 13 cases closed upon completion of the plan).

[174] *See* Admin. Office of the U.S. Courts, 2009 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, at 64 tbl.6 (2009), available at http:// www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2009/Table1D.pdf

[175] *See, e.g.*, Rafael I. Pardo, *Reconceptualizing Present-Value Analysis in Consumer Bankruptcy*, 68 WASH. & LEE L. REV. 113, n137 (2011) (analyzing the data and calculating a 49% dismissal rate).

[176] *See* Joseph P. Corish and Michael J. Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47, n80 (1986).

[177] 1 NAT'L BANKR. REV. COMM'N, *supra* note 172, at 234.

[178] It is important to recognize that it is quite hard to quantify success or failure. Much of the outcome of whether Chapter 13 is a success or failure depends on how success or failure is measured. The dominant way success is measured is whether a repayment plan was completed and discharge granted. *See* Gordon Bermant, *Bankruptcy by the Numbers: What Is "Success" in Chapter 13? Why Should We Care?*, 23 AM. BANKR. INST. J. 20, 67 (2004). Some debtors may dismiss cases before completion of plan payments and discharge if they have cured a deficiency. Ed Flynn, *Stability Amid a Changing Landscape*, 33 AM. BANKR. INST. J. 40, n.12 (2014).

[179] Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy, in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 123 (Katherine Porter ed., 2012).

[180] *Se,e e.g.*, *In re* Jackson 2012 WL 909782, *9 (Bankr. N.D. Ala. 2012) (recognizing the wasted resources of time and money of debtors in the fee only cases that get dismissed).

[181] Professor Porter aptly characterizes the position of many debtors in the wake of a Chapter 13 failure as follows:

> Nearly all of the two in three families that file Chapter 13 and later drop out of their repayment plans do so in precarious financial straits. The majority of homeowners seem poised to lose their homes, and families are already experiencing an uptick in collection pressure. These families still owe their unsecured debts, and they are out of ideas and options. Some families may file another bankruptcy, some may simply avoid collectors for years, and some will simply tumble down the socioeconomic ladder, losing homes, cars, and their aspirations for middle-class prosperity.

Porter, *supra* note 170, at 162.

[182] The Code provides for conversion by a debtor Chapter 7 at anytime. 11 U.S.C. § 1307(a) (2006).

[183] *See* 11 U.S.C. § 727 (2006)(providing for discharge of certain debts under Chapter 7).

[184] 1 NAT'L BANKR. REV. COMM'N, *supra* note 172, at 234.

[185] The Code limits the availability of the automatic stay if the debtor has had one or more cases pending during the previous year. 11 U.S.C. § 362(c)(3) and (4) (2006).

[186] We use the terms "bankruptcy relief" and "bankruptcy justice" in this paper interchangeably.

[187] *International Day for the Eradication of Poverty*, OHCHR.ORG, October 17, 2012, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12670&LangID=E (last visited Jan. 11, 2014).

[188] Universal Declaration of Human Rights, G.A. res 217A (III), U.N. Doc A/810 at 71 (1948) (articles six through 11 address the issue of access to justice). UN.ORG, *available at* http://www.un.org/en/documents/udhr/index.shtml#a6 (last visited Jan. 11, 2013).

[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *See* Bruch H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1 (2003).
[194] *See* Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3 (2010). (Lawrence explores what is meant by "access to justice" and who should be afforded access and to what and for what purpose.)
[195] Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 870 (2009).
[196] *Id* at 880.
[197] Rhode, *supra* note 194, at 869.
[198] O'Connor, *supra* note 9, at 1. ("A recent USA Today headline reads "Only a Fraction of Those in Need File for Bankruptcy." The author cites a lack of affordable legal assistance as a primary reason why most debtors don't file for bankruptcy.").
[199] *Id.*
[200] Deborah L. Rhode addresses access to justice issues that relate to our paper. *See* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369 (2004); Defining the Challenges of Professionalism: Access to Law and accountability of Lawyers, 54 S.C. L. REV. 889 (2003); Deborah Rhode, *In the interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 CURRENT LEGAL PROBLEMS 93 (2003): Deborah Rhode, *Pro Bono in Principle and in Practice*, 53 JOURNAL OF LEGAL EDUCATION 413 (2003).
[201] Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 473 (2007).
[202] See 28 U.S.C. § 1334(a). District courts were granted original jurisdiction in bankruptcy proceedings in the Bankruptcy Act of 1867. *See* Ch. 19, §1, 2 STAT. at 517.
[203] Bankruptcy Act of 1800, ch.19, 2 Stat. 19, *repealed by* Act of Dec 19, 1803, ch. 6, 2 STAT. 248. *See also*, DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001); EDWARD BALLEISEN *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA*, (2001).
[204] Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 344-345 (1991)
[205] Skeel, *supra* note 203.
[206] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14-15 (1995).
[207] *Id.* at 15.
[208] Ch. 19, §1, 2 STAT. at 18-21.
[209] *Id* § 36, 2 STAT. at 30 to 31.
[210] *Id.*
[211] *Id* § 36, 2 STAT. at 31.
[212] *See* Steve Rhode, *The History of Credit & Debt – Debtors' Prison*, Get Out of Debt http://getoutofdebt.org/14244/the-history-of-credit-debt-debtors-prison (providing a brief history of debtor's prisons in America) (last visited on Jan. 6, 2014).
[213] *Id.*
[214] Bankruptcy Act of 1841, ch. 9, 5 STAT. 440, *repealed by* Act of Mar. 3, 1843, ch. 82 5 STAT. 614.
[215] *See* John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANK. DEV. J. 361 (1988).
[216] Tabb, *Supra* note 206 at 14-15, 17.
[217] Ch. 9, § 1, 5 STAT. at 441 (as found in Tabb, *Supra* note 206 at 14-15, 17).
[218] *Id.* § 4, 5 STAT. at 443
[219] Ch. 176, § 14 STAT. 517. *Repealed by* Act of June 7, 1878, ch. 160, 20 STAT. 99 (1878).
[220] *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (The Supreme Court held that states could not discharge preexisting debts).
[221] *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (The Supreme Court held that states could not discharge the debts of a person from another state.).
[222] *See* Ch. 176, § 11 and 14 STAT. 521-522.
[223] *Id* § 39, 14 STAT at 536-537.
[224] *Id* § 39, 14 STAT at 536-537.

[225] *Id* §§ 36-37. 14 STAT at 534-535.
[226] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14-15, 20 (1995) (citing ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 34 (1879).
[227] CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 127 (1935).
[228] Act of June 7, 1878 ch. 160, 20 STAT. 99.
[229] Act of June 22, 1874, ch. 390, § 17, 18 STAT. 178, 182-184 (repealed 1878).
[230] Ch. 541, 30 STAT. 544 (repealed 1978).
[231] Tabb, *Supra* note 206 at 14-15, 17 (Tabb explores the issue of scope and eligibility).
[232] PUB. L. NO. 95-598, 92 STAT. 2549.
[233] Ch. 541, § 14, 30 STAT. at 550.
[234] *Id.* § 6, 30 Stat. at 550-51.
[235] *Id.* § 4a, 30 Stat. at 547.
[236] Tabb, *Supra* note 206 at 35.
[237] Tabb, *Supra* note 206 at 27.
[238] *Id.*
[239] Act of Oct. 19, 1970, PUB. L. NO. 91-467, 84 STAT. 990.
[240] PUB. L. NO. 95-598, 92 STAT. 2549 (1978).
[241] 11 U.S.C.A. § 330(a)(1)(e) (reasonable attorney fees are allowed).
[242] *See* John T. Nockleby, *Introduction: Access to Justice: It's Not For Everyone,* 42 LOY. L.A. L. REV. 859 (2009).
[243] *Id.*
[244] Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979 (2009).
[245] Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065 (2009).
[246] Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913 (2009).
[247] Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV 1117 (12009).
[248] *Id.*
[249] Esme Grand and Rhonda Neuhaus, *Liberty and Justice for All: The Convention on the Rights of Persons with Disabilities*, 19 ILSA J INT'L & COMP L 347 (2013).
[250] Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 *GEO. J. LEGAL ETHICS* 3 (2008).
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[252] Richard I. Aaron, *Access to Justice: Consumer Bankruptcy*, UTAH L. REV. 925 (2006).
[253] *Id.* at 925-926.
[254] Matthew J. Fischer, *The Equal Access to Justice Act: Are the Bankruptcy Courts Less Equal Than Others?*, 92 MICH. L. REV. 2248 (1994).
[255] Marcia S. Krieger, *"The Bankruptcy Court is a Court of Equity": What Does That Mean?*, 50 S.C.L. REV 275 (1999).
[256] A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2005).
[257] A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919 (2006).
[258] 292 U.S. 234 (1934) (acknowledging the concept of "fresh start" for debtor following bankruptcy). The Court in *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) stated "one of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Id.* at 244 (quoting *Williams v. U.S. Fidelity & G. Co*., 236 U.S. 59, 554-55 (1915)).
[259] *See, e.g., Traer v. Clews*, 115 U.S. 528, 541 (1885) ("The policy of the bankruptcy act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start."). *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start.").
[260] *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).
[261] *Williams v. United States Fidelity & guaranty Co.*, 236 U.S. 549, 554-55 (1915)

[262] *See*, e.g., Michael G. Hillinger, *How Fresh a Start?: What Are "Household Goods" for Purposes of Section 522(f)(1)(B)(i) Lien Avoidance?*, 15 BANK. DEV. J. 1 (1999); Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549 (1995); F. H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDISCIPLINARY L.J. 67 (1995); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, *21 U. RICH. L. REV. 49 (1986); Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).
[263] F.H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDIS. L.J. 67 (1994) (exploring barriers to the fresh start policy of bankruptcy law).
[264] Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1401 (1985).
[265] *Id.* at 1402 ("If there were no right of discharge, an individual who lost his assets to creditors might rely instead on social welfare programs.").
[266] *Id*. at 1403.
[267] *See generally* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 97 (1984).
[268] Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333, 334 (1992).
[269] *See* Otis B. Grant, *Are the Indigent Too Poor for Bankruptcy? A Critical Legal Interpretation of the Theory of Fresh Start Within a Law and Economics Paradigm*, 33 U. TOL. L. REV 773 (2002).
[270] *See generally* Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 15 (1991).
[271] Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 762-66 (1991).
[272] *See* Korobkin, *supra* note 271, at 335.
[273] Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 811 (1987).
[274] *Id* at 811. (Warren views her own understanding of bankruptcy policy as "dirty, complex, elastic, [and] interconnected").
[275] SENATOR CHUCK GRASSLEY, OPENING STATEMENT OF SEN. CHUCK GRASSLEY AT BANKRUPTCY REFORM HEARING, SENATE COMMITTEE ON THE JUDICIARY, February 10, 2005 http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9716 (last visited on January 1, 2014).
[276] *See* JOHN STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1101, 3 (1833) (contending that it is against Christianity and morally indefensible to imprison insolvent debtors).
[277] Religion & Public Life Project, PEW RESEARCH FORUM, http://religions.pewforum.org/reports (last visited on April 28, 2014). The report estimates, among all adults, 78.4 percent of Americans are Christian.
[278] Steven H. Resnicoff, *Religion and Bankruptcy: Perspectives Thereon and Treatment Therein: Jewish and American Bankruptcy Law: Their Similarities, Differences, and Interactions*, 19 AM. BANKR. INST. L. REV. 551 (2011).
[279] *Id* at 552.
[280] *Id* at 551.
[281] *Deuteronomy* 24:6-13 (requiring various forms of creditor leniency if debtors cannot pay).
[282] *Exodus* 22:24-26 (stating that creditors should return destitute debtor's cloak at sunset).
[283] *See* Resnifoff, *supra* note 277, at 551.
[284] The King James Version translates the verses as follows: "And thou shalt number seven sabbaths of years unto thee, seven times seven years; and the space of the seven sabbaths of years shall be unto thee forty and nine years. Then shalt thou cause the trumpet of the jubilee to sound on the tenth *day* of the seventh month, in the day of atonement shall ye make the trumpet sound throughout all your land. And ye shall hallow the fiftieth year, and proclaim liberty throughout *all* the land unto all the inhabitants thereof: it shall be a jubilee unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family. A jubilee shall that fiftieth year be unto you: ye shall not sow, neither reap that which groweth of itself in it, nor gather *the grapes* in it of thy vine undressed. For it *is* the jubilee; it shall be holy unto you: ye shall eat the increase thereof out of the field. In the year of this jubilee ye shall return every man unto his possession."

[285] *Jubilee*, CATHOLIC ENCYCLOPEDIA, http://www.catholic.org/encyclopedia/view.php?id=6508 (last visited on January 4, 2014).
[286] JOHN RAWLS, A THEORY OF JUSTICE, (1971).
[287] JOHN RAWLS, A THEORY OF JUSTICE (Revised ed.), (1999).
[288] RONALD DWORKIN, A MATTER OF PRINCIPLE, 181-204 (1985).
[289] *See* F.A. HAYEK, THE ROAD TO SERFDOM, (1944). F.A. Hayek, The Mirage of Social Justice (1976).
[290] KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES, (1945).
[291] Robert Nozick, Anarchy, State, Utopia (1974).
[292] MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (Sandel puts forward what is known as communitarian critique of liberalism).
[293] *See* Kerry Haydel Ducey, *Bankrutpcy Just for the Rish? An Analysis of Popular Fee Arrangements for Pre-Petition Legal Fees and a Call to Amend*, 54 VAND. L. REV. 1665, (May 2001) (recognizing that inability to pay for legal fees may result in indigent debtors accessing the relief provided by the Bankruptcy Code). *See also* MacArthur, *supra* note 5, at 407 (recognizing that BAPCPA's reforms have made access to bankruptcy more difficult, particularly for the poor)
[294] *See* Pardo, *supra* note 4, at 7 (Professor Pardo characterized the access issue in this way.).
[295] See Morse, supra note 8, at 604.
[296] Ducey, *supra* note 143, at 1701.
[297] *See supra* notes starting at 86 and accompanying text.
[298] Ronald J. Mann & Katherine Porter, *Saving up for Bankruptcy*, 98 GEO. L.J. 289, 336 (2010) (The impact of not filing can be viewed as a negative externality rather than forgone a positive externality. This article provides a brief overview of the application of externalities and the role of bankruptcy relief.).
[299] *Id.* at 337.
[300] Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 988-990 (2012)
[301] Mann & Porter, *supra* note 102, at 337 (such stresses include harm to debtor's children, delaying preventative medical care or depleting retirement funds)
[302] Other scholars have called for legislative reform. For example, see Morse, *supra* note 8, at 606-07; Ducey, *supra* note 143, at 1703.
[303] Medical Bankruptcy Fairness Act of 2009, S. 1624, 111th Cong. (2009) [hereinafter MBFA] (proposing title 11 amendment for protection of those whose debt arose from medical expenses).
[304] MBFA, § 6(a). Section 6 provides as follows:

> SEC. 6. NONDISCHARGEABILITY OF CERTAIN ATTORNEYS FEES.
> Section 523(a) of title 11, United States Code, is amended--
> (1) in paragraph (18), by striking 'or' at the end;
> (2) in paragraph (19), by striking the period at the end and inserting '; or'; and
> (3) by inserting after paragraph (19) the following:
> '(20) incurred by a debtor relating to attorneys fees generated as result of the debtor's filing of a petition under chapter 7.'.

[305] *See, e.g.*, Pottow, *supra* note 91, at 5 ("[B]y making the attorney's bill non-dischargeable, a putative lawyer will feel more comfortable taking on a client's case without demanding upfront payment.").
[306] *Id.* at 5.
[307] Robert J. Landry, III, Bill Scroggins & Bill Fielding, *Consumer Bankruptcy Reform and Increasing Consumer Filing Rates: A Microeconomic Explanation*, 37 J. BUS & ECON. PERSPECTIVES 61, 64 (2010).
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] Braucher et al., *Supra* note 63 at 2 ("[M]ore than 90% of chapter 7 debtors have no assets to liquidate either because of legal protection that leave the debtor with minimal amount of assets (known as exemptions) or because the debtor has pledged all of his assets as collateral. . .").
[314] Ducey, *supra* note 143, at 1667 (recognizing that in the typical no-asset case there will be no funds to pay for an attorney up front).
[315] 11 U.S.C. § 503(b) (2006).
[316] 11 U.S.C. § 330(a)(4)(B) (2006).

[317] *Bankruptcy Court Denies Compensation to a Chapter 7 Debtor's Attorney*, 9 NO. 8 INSIDE LITIG. 30 (August 1995).
[318] *Id.*
[319] *Id.*
[320] *In re* Lilliston, 127 B.R. 119, 120-121 (Bankr. D. Maryland 1991).
[321] *Contra In re* Century Cleaning Services, Inc., 202 B.R. 149 (Bankr. D. Oregon 1996) (Court held that if there is a valid unavoided attorney's retaining lien under state law based on the attorney's possession of a pre-petition retainer, the attorney upon proper disclosure under Section 329 is authorized to look to the collateral securing the services, the pre-petition retainer, to satisfy fees incurred post-petition.)).
[322] 28 U.S.C. § 1930(a)(1) (2006).
[323] The statutory fee is $245. 28 U.S.C. § 1930(a)(1) (2006). In addition to the statutory fee, filers must pay an administrative fee ($46) and a case trustee fee ($15), bringing the total filing up to $306. *See* U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule (28 U.S.C. § 1930), May 1, 2013, available at http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx. (last visited May 29, 2014).
[324] MacArthur, *supra* note 5, at 440 ("Although the fees required may not seem significant to most people, most poor debtors enter bankruptcy with insufficient income to afford these fees.").
[325] FED. R. BANKR. PROC. 1006 (b) (provides for payment of filing fee in installments).
[326] 28 U.S.C. § 1930(a)(f) (2006); FED. R. BANKR. PROC. 1006 (c).
[327] For a discussion of the history of in forma pauperis status in bankruptcy proceedings, see generally Henry J. Sommer, *In Forma Pauperis in Bankruptcy: The Time has Long Since Come*, 2 AM. BANKR. INST. L. REV. 93, 94-110 (1994).
[328] 28 U.S.C. § 1930(a)(f)(1) (2006).
[329] MacAuthur, *supra* note 5, at 438-39 (discussing four problems associated with the waiver provisions)
[330] Mac Authur, *supra* note 5, at 439 (noting the complexity of the schedules to show that a waiver is warranted).
[331] MacAuthur, *supra* note 5, at 438.
[332] MacAuthur, *supra* note 5, at 439-39.
[333] For a discussion of the credit counseling requirement and recognition that the requirement is of little benefit for most debtors, see Katherine A. Jeter-Boldt, Note, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement*, 71 MO. L. REV. 1101, 1114-1116 (2006).
[334] 11 U.S.C. § 109(h), 521(b) (2006).
[335] Landry, *Supra* note 88 at 337.
[336] *See* Joseph Satorius, Note, *Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement*, 75 FORDAM L. REV. 2231, 2238 (2007) (Noting that the "fact that the counseling requirement can be satisfied with a phone call or Internet session in the final days of a petitioner's financial distress has caused many scholars to question the usefulness of the counseling.")
[337] Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy's Social Insurance Function after BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 255-56 (2009) (recognizing that the credit counseling requirement is just an administrative burden that increases the cost associated with filing for bankruptcy relief). For a discussion of the value associated with credit counseling, see generally U.S. GOV'T ACCOUTABILITY OFFICE, GAO-07-203, VALUE OF CREDIT COUNSELING REQUIREMENT IS NOT CLEAR 19 (2007).
[338] Currie, *supra* note 337, at 256. *See also* Gloria J. Liddell, Pearson Liddell, Jr. & Michael J. Highfield, *Does and Economic Crisis Merit a Prima Facie Finding of "Exigent Circumstances" or other Emergency Relief? The Impact of the Credit Counseling Provision of BAPCPA upon Distressed Homeowners in a Severe National Economic Downturn*, 44 J. MARSHALL L. REV. 129, 174 (2010) (recommending elimination of the credit counseling requirement).
[339] 11 U.S.C. § 727(a)(11) (2006).
[340] Currie, *supra* note 336, at 257.
[341] The means test was designed to curb abuse and limit the number of Chapter 7 filings, however, data indicate that filings are moving toward the pre-BAPCPA levels. *See* Brian Rothschild, *The Illogic of No Limits Bankruptcy*, 23 EMORY BANKR. DEV. J. 473, 506 (2007). Furthermore, most debtors that file under Chapter 7 are not found to be abusive. Currie, *supra* note 337, at 262. The means test does little to ferret out abusive filers in practice. Currie, *supra* note 337, at 262.
[342] For an overview of possible areas of reform and problems with the means test, see generally Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 805-818 (2007).

[343] Tribble, *supra* note 342, at 814.
[344] Tribble, *supra* note 342, at 815.
[345] *See, e.g.,* Currie, *supra* note 337, at 261 (recognizing the "impenetrably complex" calculation under the means test).
[346] Tribble, *supra* note 342, at 816.
[347] Tribble, *supra* note 342, at 815.
[348] Currie, *supra* note 337, at 261.
[349] Tribble, *supra* note 342, at 817.
[350] *Id.*
[351] *See* Currie, *supra* note 337, at n133 (The complexity of the test itself may increase the burdens to filing as a pro se debtor may find difficulty in navigating through the formula.) .
[352] Tribble, *supra* note 342, at 816-817.
[353] Currie, supra note 337, at 274.
[354] *See* Currie, *supra* note 337, at 274 (noting the important social function that bankruptcy plays).