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LIFE IN THE SWEATBOX

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The time before a person files bankruptcy is sometimes called the financial "sweatbox." Using original data from the Consumer Bankruptcy Project, we find that people are living longer in the sweatbox before filing bankruptcy than they have in the past. We also describe the depletion of wealth and well-being that defines people's time in the sweatbox. For those people who struggle for more than two years before filing bankruptcy—the "long strugglers"—their time in the sweatbox is particularly damaging. During their years in the sweatbox, long strugglers deal with persistent collection calls, go without healthcare, food, and utilities, lose homes and other property, and yet remain ashamed of needing to file. For these people in particular, though time in the sweatbox undermines their ability to realize bankruptcy's "fresh start," they do not file until long after the costs outweigh the benefits. This Article's findings challenge longstanding narratives about who files bankruptcy and why. These narratives underlie our laws, influence how judges rule in individual cases, and affect how attorneys interact with their clients.

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Introduction

The time before a person files bankruptcy is sometimes called the financial "sweatbox."[1] People in the financial sweatbox are on the brink of defaulting on their debts, which is when their lenders can charge high interest rates and fees and otherwise profit from their customers' financial misery.[2] Although the term "sweatbox" often is connected with bankruptcy, how long people spend in the sweatbox before filing and what it means to live in the sweatbox has yet to be carefully examined. Understanding what people endure while in the sweatbox is crucial to evaluating the longstanding belief that people decide to file bankruptcy based on a strategic, financial calculation. This unverified narrative about people's filing decisions underlies our bankruptcy laws and influences how the legal system operates in practice, including whether people actually can obtain the beneficial "fresh start" bankruptcy promises.

Using original data from the Consumer Bankruptcy Project (CBP),[3] we find that people are living longer in the sweatbox before filing bankruptcy than they have in the past, and describe the depletion of wealth and well-being that defines people's time in the sweatbox. Today, two-thirds of people who file bankruptcy report that they seriously struggled with their debts for more than two years prior to bankruptcy.[4] Almost one-third report that they

1 Jay Westbrook is credited with coining the term "sweatbox" to describe "the business model of squeezing a few years of fees out of debtors before financial default." John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. Ill. L. Rev. 405, 416. Ronald Mann linked the term specifically with credit card lending. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. Ill. L. Rev. 375, 391; *see also* Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 Iowa L. Rev. 1369, 1399 (2008) [hereinafter Porter, *Bankrupt Profits*] (describing families that are "slow to pay" as "ideal customers for lenders' 'sweatboxes'").

2 *See* Mann, *supra* note 1, at 385–87, 391 (defining the sweatbox). The sweatbox also includes people who have defaulted on their debts, which typically occurs after they have spent time trying to keep up with monthly payments plus added fees and additional interest. *Id.* at 386–87 ("The question for the lender is how long the borrower will remain in the unstable position [of amount outstanding continuing to grow] before failure occurs.").

3 The Consumer Bankruptcy Project (CBP) is a multiresearcher effort that investigates the people who file bankruptcy. The CBP's current iteration includes people who filed bankruptcy between 2013 and 2016. For details about the CBP, *see infra* Part II.

4 *See infra* Section III.A.

seriously struggled for more than five years, double the frequency from the CBP's survey of people who filed bankruptcy in 2007.[5]

For those people who struggle for more than two years before filing bankruptcy—the "long strugglers"—their time in the sweatbox is particularly damaging, distinguishing them from other debtors. They lose their homes to foreclosure, sell other property, report going without food and other necessities, all while employing multiple tactics to try to make ends meet and dealing with persistent debt collection calls and lawsuits. When long strugglers finally file, they enter bankruptcy with fewer assets than other debtors and overwhelming unsecured debts.[6]

Long strugglers would have benefitted financially from filing months or years before they did. Yet seven out of ten long strugglers say they felt shame upon filing bankruptcy.[7] These debtors' reports about their prebankruptcy lives suggest a model of deciding to file based on something beyond just dollars and cents. This reality contrasts starkly with an enduring narrative about people's use of bankruptcy as a calculated, knowledgeable decision, as evidenced most clearly by debates surrounding the most recent overhaul of bankruptcy laws.

The term "financial sweatbox" came out of the debates leading to the 2005 passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),[8] a major amendment to the Bankruptcy Code designed to decrease consumer bankruptcy filings by making filing more difficult, expensive, and time-consuming.[9] The consumer credit industry insisted that changes to bankruptcy were needed because bankruptcy courts were full of deadbeat, "can-pay" debtors who filed "bankruptcies of convenience" to try to escape their rightful obligations and who felt no shame in "abusing" the system.[10] This story contradicted the overwhelming expert consensus that the bankruptcy system functioned well, abuse was rare, and there was no need for drastic overhaul.[11] Academic articles posited that the consumer credit indus-

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5 *See infra* Section III.A.

6 *See infra* Sections III.C–E.

7 *See infra* Section III.G.

8 Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered titles of the U.S. Code). The law's effective date was October 17, 2005. *Id.* § 1406(a), 119 Stat. at 215.

9 *See* Angela Littwin, *Adapting to BAPCPA*, 90 Am. Bankr. L.J. 183, 183–87 (2016) (overviewing BAPCPA's changes to the Bankruptcy Code that "appeared likely to impair the consumer bankruptcy system's ability to function"); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 27 (2012) (noting BAPCPA's goals); Mann, *supra* note 1, at 377 (listing BAPCPA's changes to the Code); *infra* Part I.

10 Mann, *supra* note 1, at 376–77 (discussing debates about the 2005 amendments to bankruptcy laws); *see also* Porter, *Bankrupt Profits*, *supra* note 1, at 1371–72 (overviewing the "strategic behavior" model of bankruptcy).

11 *See* Porter, *Bankrupt Profits*, *supra* note 1, at 1371–72 (discussing empirical evidence that contradicted the "strategic behavior" model of bankruptcy); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 493 (1997) [hereinafter Warren, *Principled Approach*] ("[T]here are no data showing that the consumer bankruptcy system is shot through with abuse. Indeed, most data, including the consumer credit industry's own studies, show that the system is generally used by American families in des-

try lobbied for BAPCPA to prolong the time consumers spend on the brink of financial default when lenders make the most money—that is, the time people spend in the sweatbox.[12]

Although the financial sweatbox existed long before it was termed as such, BAPCPA brought it to the forefront of discussions about consumer credit policies and bankruptcy. The sweatbox metaphor quickly became popular in commentary both about BAPCPA's effect[13] and about the consequences of the consumer lending business model generally.[14] For instance,

perate financial circumstances."); Letter from ninety-two law professors, to Arlen Specter, U.S. Senator & Patrick Leahy, U.S. Senator (Feb. 16. 2005) (critiquing BAPCPA), *reprinted in* Charles J. Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S. 256*, 43 CANADIAN BUS. L.J. 28, 70–75 (2006).

12 *See, e.g.*, Mann, *supra* note 1, at 389–92 (linking this lending model to BAPCPA); Porter, *Bankrupt Profits*, *supra* note 1, at 1372 (noting that during debates about BAPCPA, "the credit industry's lending decisions were not subjected to the same scrutiny as debtors' borrowing decisions"); Pottow, *supra* note 1, at 407–08 (arguing that bankruptcy reforms should have been targeted, in part, to those creditors who are responsible for debtors' defaults).

13 *See* Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 353 (2008) (stating that BAPCPA's result "is that more of the over-indebted remain in the 'sweat box of consumer credit' for longer"); Linda Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1, 3–5 (2012) (overviewing BAPCPA's effects on bankruptcy filings); Giacomo Rojas Elgueta, *The Paradoxical Bankruptcy Discharge: Rereading the Common Law–Civil Law Relationship*, 19 FORDHAM J. CORP. & FIN. L. 293, 331 (2014) (stating that it "appears" that BAPCPA was designed to prolong debtors' time in the sweatbox); Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 153 (2013) (discussing the subprime credit card market and bankruptcy); Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 353 (2008) (noting that data from the 2007 Consumer Bankruptcy Project support the "sweat box" theory); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1936 (2011) (linking the sweatbox to BAPCPA's goals); Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 409–11 (2009) (discussing BAPCPA's effect on the poor's access to bankruptcy); Michael Simkovic, *The Effect of BAPCPA on Credit Card Industry Profits and Prices*, 83 AM. BANKR. L.J. 1, 1–2 (2009) (investigating credit card profits post-BAPCPA); Derek S. Witte, *The Bear Hug That Is Crushing Debt-Burdened Americans: Why Overzealous Regulation of the Debt-Settlement Industry Ultimately Harms the Consumers It Means to Protect*, 14 TEX. REV. L. & POL. 277, 278 (2010) (linking bankruptcy, debt settlement, and the sweatbox).

14 *See* Oren Bar-Gill, Exchange, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 784–86 (2008) (relying on the sweatbox metaphor to discuss one theory of credit card issuers' business model); Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 120–21 (2012) (discussing the sweatbox in the context of consumer lending); Cassandra Jones Havard, *"Goin' Round in Circles" . . . and Letting the Bad Loans Win: When Subprime Lending Fails Borrowers: The Need for Uniform Broker Regulation*, 86 NEB. L. REV. 737, 760–62 (2008) (linking the sweatbox to subprime home loans); Iain Ramsay, *'To Heap Distress Upon Distress?' Comparative Reflections on Interest-Rate Ceilings*, 60 U. TORONTO L.J. 707, 716–17 (2010) (discussing the "'sweatbox' model of lending" as it applies to consumer lending in the United Kingdom); Amy J.

the passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"),[15] which limits how credit card companies can charge consumers, highlighted credit card lending's sweatbox.[16] The CARD Act ameliorated some of the effects of this part of the financial sweatbox,[17] saving American consumers $11.9 billion a year without reducing access to credit or increasing interest rates charged by lenders.[18]

Credit cards are but one corner of the sweatbox, and even after the CARD Act's enactment, financial distress undoubtedly remains a devastating experience. What our data show about the hardships that long struggling debtors in particular endure before filing paints a grim picture of life in the sweatbox. The sweatbox's severe financial and emotional drain makes our finding about the increase in how long people struggle to pay their debts prior to filing bankruptcy particularly noteworthy, especially in light of few other measurable changes in the financial and demographic profile of people who file.[19] That people sacrifice increasingly more as they spend a longer time in the sweatbox, depleting assets key to building their postbankruptcy lives, also may make their ability to achieve bankruptcy's "fresh start" and get back on their feet even more tenuous.[20]

Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 241 (2016) (extending the sweatbox metaphor to consumer dispute resolution, such as the arbitration clauses that are included in many consumer contracts).

15 Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 12, 15, 16, and 31 U.S.C.).

16 Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence From Credit Cards*, 130 Q.J. ECON. 111, 112–15 (2015) (overviewing the CARD Act); Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 974–75 (2012) (overviewing the CARD Act and explaining that it "restricts issuers' ability to raise interest rates and impose penalty fees").

17 *See* Bar-Gill & Bubb, *supra* note 16, at 973 (noting what common credit card lending terms the CARD Act has not substantially affected); Eboni S. Nelson, *From the Schoolhouse to the Poorhouse: The Credit CARD Act's Failure to Adequately Protect Young Consumers*, 56 VILL. L. REV. 1, 4–7 (2011) (summarizing the CARD Act and arguing that it does not sufficiently protect younger consumers).

18 Agarwal et al., *supra* note 16, at 114; *see also* CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 10 (2015), http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (finding that the CARD Act helped consumers avoid more than $16 billion in "gotcha" credit card fees over four years).

19 The data confirm that families continue to arrive in bankruptcy reeling from job loss, medical expenses, and divorce; drowning in debt; and representing a cross section of the American middle class. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 243 (2000) (identifying job loss, medical expenses, and divorce as the leading triggering causes of bankruptcy filings); Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 25, 25 (Katherine Porter ed., 2012) (noting that consumer bankruptcy largely is a middle-class phenomenon); *infra* Part III.

20 *See generally* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006) (exploring whether bankruptcy offers families a better financial future); *infra* Part V. "Fresh start" comes from *Local Loan Co. v. Hunt*, 292 U.S.

The narratives told about when and why people file bankruptcy influence the legislative details of the Bankruptcy Code, how bankruptcy judges rule in individual cases, how attorneys interact with their clients, and consumer financial laws generally.[21] Without data, the polity will construct these narratives around anecdotes that not only might be false, but also may rest on cultural stereotypes.[22] To make evidence-based decisions about bankruptcy and consumer credit laws, we need to understand how people experience these systems. In describing the lengths that people who file bankruptcy go to pay their debts, this Article's results challenge enduring beliefs about people's bankruptcy filing decision-making process, will provide judges with data to make decisions that reflect reality, and should influence debates about changes to consumer credit policies and bankruptcy for years to come.[23]

Part I of this Article overviews consumer bankruptcy, including the debates surrounding BAPCPA's passage that highlight the prevailing narrative about how people decide to file bankruptcy. In Part II, we summarize our methodology. Part III presents our findings about life in the sweatbox, focusing on those people who report struggling with their debts for more than two years before filing.

Why do people report spending longer in the sweatbox before filing bankruptcy? As detailed in Part IV, our data cannot answer that question directly, but the data suggest one primary explanation. As compared with other debtors, long strugglers were much more likely to cite pressure from debt collectors as ultimately leading them to bankruptcy. Half of long strug-

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234, 244 (1934) ("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.'" (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915))).

21 *See* Braucher, *supra* note 14, at 120–21 (discussing consumer lending); Adam Levitin, Rosemary Gambardella & Mark S. Scarberry, *Abusive Credit Card Practices and Bankruptcy: Three ABI Members Testify Before Senate Judiciary Subcommittee*, AM. BANKR. INST. J., May 2009, at 10 (reviewing testimony about a Senate bill designed to "encourage safer and sounder consumer lending by discouraging lenders from making loans that they cannot reasonably expect consumers to repay, including 'sweatbox' lending models").

22 Studies about the racial demographics of bankruptcy are one example of how narratives based on stereotypes can influence the bankruptcy system. *See* Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL L. STUD. 393, 393 (2012) (finding that African American households are more likely than other similar households to file chapter 13 rather than chapter 7, and linking the disparity to attorneys); A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 623 (2012) (discussing *Race, Attorney Influence, and Bankruptcy Chapter Choice* and responding to alternatives offered to explain the results as themselves being based on cultural stereotypes).

23 The American Bankruptcy Institute recently formed a Commission on Consumer Bankruptcy. *The ABI Commission on Consumer Bankruptcy*, AM. BANKR. INST., https://consumercommission.abi.org/ (last visited Aug. 21, 2018). One of this Article's authors is the Commission's Reporter. The Commission's formation and charge to broadly reconsider consumer bankruptcy laws make the data in this Article especially timely.

glers also had a collection lawsuit filed against them prior to bankruptcy.[24] Long strugglers' reports of collection pressures coincide with changes in debt collection and debt buying.[25] In prior decades, falling behind on debts meant being unable to pay businesses and people who were part of a debtor's daily life. Now, collection calls increasingly come from a handful of market-dominant lenders or unknown entities that purchased the delinquent debt from the original creditor or another debt buyer.[26] In addition, changes in information technology should have made it economical to pursue legal remedies for small-dollar debts that a generation ago might have gone uncollected.[27]

In a world of escalating collection tactics, some people who previously may have sweated it out and never filed bankruptcy may now decide to file. For others, changes in debt collection may lead them to conceptualize their money troubles as legal problems addressable by bankruptcy, also bringing them into the bankruptcy system.[28] Combined, which households file bankruptcy may have fundamentally shifted, and with it, debtors' reports of how long they struggle prior to filing.

Regardless of the reasons, people report waiting longer to file bankruptcy. Contrary to assertions that people file "bankruptc[ies] of convenience,"[29] our data establish that most debtors resort to bankruptcy as a last-

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24 *See infra* Section III.C.

25 *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 49–55, 92 (2015) (overviewing debt buying and collection, and noting how they changed postrecession when delinquent debts flooded the market); Neil L. Sobol, *Protecting Consumers From Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 334–36 (2014) (chronicling the development of these industries); *infra* Part IV.

26 *See* John S. Kiernan, *Paying Debt in Collections: When to Do It, How to Pay & Expert Tips*, WALLETHUB (June 3, 2014), https://wallethub.com/edu/debt-collections-guide/25818/ (noting that debt usually is turned over to collectors after months of nonpayment despite collection attempts).

27 *See* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods (discussing "a little-known but pervasive shift in the way debt is collected in America: Companies now routinely use the courts to pursue millions of people over even small consumer debts"); *infra* note 130.

28 As explained *infra* Part IV, although the characteristics of people who file bankruptcy have remained unchanged, *see supra* note 19, changes in debt collection may have pushed certain households with these same characteristics to file bankruptcy that would not have done so in prior years. Our results thus engage with broader inquiries into how people conceptualize "justiciable events" in their lives as addressable by law. *See* Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L.J. 1319, 1324–36 (2015) (overviewing research regarding "how people understand the relevance of law to problems in their life"). For other explanations for why people are spending longer in the sweatbox, see Section III.B and Part IV.

29 *Supra* note 10. Popular conceptions of people's use of the bankruptcy system also remain misleading, as evident in the abundance of bankruptcy attorney websites that include pages devoted to dispelling myths about why people file bankruptcy. *See, e.g.*, Robert Brandt, *Why People Declare Bankruptcy?*, LAW FIRM ROBERT S. BRANDT (Dec. 28, 2010), http://www. brandtlawfirm.com/bankruptcy/why-people-declare-bankruptcy/; Randall R.

ditch measure and are ashamed of filing. In Part V, we develop the implications of people's lengthy struggles and financial misery for their lives before, during, and after bankruptcy. Understanding the reality of the people who appear in bankruptcy courts is essential to the functioning of the bankruptcy system and to its reform—as well as to the enactment of effective consumer credit laws and policies. We conclude by emphasizing the importance of evidence-based decisions and policies going forward to transform bankruptcy once again into a system that helps people get back on their feet.

I. Consumer Bankruptcy in the United States

A. *Filing Bankruptcy*

The debtor initiates almost every consumer bankruptcy case in the United States. The debtor's filing of the petition with the bankruptcy court creates the estate and activates the automatic stay.[30] The automatic stay halts most actions that would adversely affect the debtor's financial interests, such as ongoing wage garnishments and foreclosure sales. It also prevents collection attempts, such as calling people at their homes or repossessing their property.[31]

People who file bankruptcy essentially have two options: chapter 7 or chapter 13.[32] The two chapters are distinct in terms of length, cost, and to some extent, the ability to keep property,[33] but for most debtors, the end goal of each is the discharge of debts. Chapter 7 is often referred to as a liquidation bankruptcy.[34] In exchange for turning over all nonexempt assets, which are sold by a bankruptcy trustee for the benefit of creditors, the debtor receives a discharge.[35] More than 95% of debtors who file chapter 7

Saxton, *Why Do People File for Bankruptcy Relief?*, Saxton L., PLLC (July 1, 2017), https://saxton.law/why-do-people-file-for-bankruptcy-relief/; *Why Do People File For Bankruptcy?*, Walker & Walker L. Offs., PLLC (Mar. 30, 2016), http://www.bankruptcytruth.com/why-file-bankruptcy.html.

30 11 U.S.C. §§ 362(a), 541 (2012).

31 *Id.* § 362(a).

32 People also may file under chapter 11, which provides for reorganization of debts and is typically used by artificial entities. Chapter 11 cases accounted for 0.15% of all nonbusiness cases filed in 2016. *Table F-2, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2016*, Admin. Office U.S. Courts, http://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2016.pdf [hereinafter *Table F-2*]; *see also Caseload Statistics Data Tables*, Admin. Office U.S. Courts, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. The discussion thus focuses on chapters 7 and 13.

33 *See infra* note 35.

34 *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 116 (2011) [hereinafter Porter, *Pretend Solution*] (describing chapter 7).

35 In practice more than 90% of chapter 7 cases are "no-asset," meaning that the debtor owns no property subject to liquidation by the trustee. *See* Ed Flynn, Gordon Bermant & Suzanne Hazard, *Chapter 7 Asset Cases*, Am. Bankr. Inst. J., Dec. 2002–Jan. 2003, at 22, 22 (reporting that 96% of nonbusiness chapter 7 cases filed in 2002 were closed

receive a discharge of most debts, typically within four to six months of filing.[36]

In chapter 13, debtors keep all of their property,[37] but must pay their "disposable income" to their creditors over a three- to five-year repayment plan approved by the bankruptcy judge.[38] Only after the debtor successfully completes plan payments will the bankruptcy court grant the discharge. Because a household that files chapter 13 must journey from filing a petition through plan confirmation and finally through plan completion, the chapter 13 process may take over six years.

Extensive data show that, historically, only about one-third of chapter 13 cases make it to a discharge.[39] The remaining approximately two-thirds of cases are dismissed or converted to chapter 7.[40] If a chapter 13 case ends in dismissal, the debtor is left without any forgiveness of debts.[41] The Code also limits how often a household may file bankruptcy depending on what chapter was previously filed and whether the case ended with a discharge.[42]

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without any money distributed to creditors); Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (reporting that 93% of nonbusiness chapter 7 debtors who filed in 2007 entered bankruptcy with no distributable assets). Debtors also generally can keep property encumbered by consensual liens in chapter 7. *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1061–62 (2017) (discussing retaining property in chapter 7).

36 In the 2007 CBP, 97% of debtors who filed chapter 7 received a discharge. Foohey et al., *supra* note 35, at 1093 tbl.5; *see also* 11 U.S.C. §§ 523, 727 (detailing the discharge in chapter 7); Braucher et al., *supra* note 22, at 394 (noting the timing of discharge in chapter 7); Porter, *Pretend Solution*, *supra* note 34, at 116 (noting the chapter 7 discharge rate).

37 The ability to keep all assets is chapter 13's biggest financial advantage, and the conventional wisdom is that chapter 13 is most useful as a tool to help save homes. *See* Porter, *Pretend Solution*, *supra* note 34, at 117–18.

38 *See id.* at 116–18 (describing chapter 13 plans).

39 In the 2007 CBP, 36.5% of chapter 13 cases resulted in a discharge following plan completion. Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1042–43 (2017) (noting that the one-third statistic has endured for decades); *see also* Porter, *Pretend Solution*, *supra* note 34, at 107–09 (overviewing studies confirming the one-third statistic).

40 *See* Greene et al., *supra* note 39, at 1042–44 (reporting chapter 13 dismissal and conversion rates).

41 *See* Porter, *Pretend Solution*, *supra* note 34, at 118 (noting the effect of discharge on a debtor's personal liability for debts). Chapter 13 debtors who complete half of the plan payments can be eligible for a hardship discharge if the reason for failure to complete plan payments is "due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1). Although no hard data are available, it is commonly believed that hardship discharges are rare.

42 If a household received a discharge in chapter 7, it must wait eight years before filing chapter 7 again or four years before filing chapter 13. 11 U.S.C §§ 727(a)(8), 1328(f)(1). If a household received a discharge in chapter 13, it must wait two years before receiving another discharge in chapter 13 or six years before filing chapter 7. 11 U.S.C. §§ 727(a)(9), 1328(f)(2). The bankruptcy court can prohibit a household from filing another bankruptcy case if its case was dismissed with prejudice. *See* 11 U.S.C. § 109(g)(1).

In the latest iteration of the Consumer Bankruptcy Project ("Current CBP"), 63.5% of the cases were filed under chapter 7. The use of chapter 7 versus chapter 13 varies widely by judicial district,[43] but our sample reflects the nationwide divide between chapters 7 and 13.[44]

Regardless of which chapter a debtor files, bankruptcy is expensive, confusing, and time-consuming, particularly post-BAPCPA. All debtors now must submit extensive documentation[45] and complete credit counseling and financial management courses.[46] The documentation requirements connect with the "heart" of BAPCPA—the "means test."[47] The means test is meant to serve as an income screen that restricts eligibility to file chapter 7, preventing can-pay debtors from accessing chapter 7's quick discharge.[48] If a household has too much income in comparison to allowed expenses and debts, then it cannot file chapter 7.[49] Every debtor who files must complete the means test, even though very few people are barred from filing chapter 7 based on it.[50]

Each of these burdens may seem small individually, but cumulatively they create a much larger bar to filing bankruptcy—"death by a thousand cuts," as BAPCPA has been described.[51] These burdens also make bankruptcy attorneys' jobs more difficult and time-consuming, which increases how much they charge their clients.[52] Retaining a bankruptcy attorney

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Dismissal of a prior case also weakens the protections of the automatic stay. *See* 11 U.S.C. § 362(c)(4)(A).

43 *See* Bob Lawless, *(Yet Another) Chapter 13 Map*, CREDIT SLIPS (Dec. 11, 2013, 3:59 PM), http://www.creditslips.org/creditslips/2013/12/yet-another-chapter-13-map.html (mapping the percentage of all 2013 bankruptcy cases that were filed under chapter 13 in the ninety federal judicial districts in the fifty states and the District of Columbia). Our recent article details why the use of chapters 7 and 13 varies widely by district. *See generally* Foohey et al., *supra* note 35.

44 For instance, in 2016, 62% of nonbusiness cases were filed under chapter 7. *See Table F-2*, *supra* note 32.

45 *See* Littwin, *supra* note 9, at 195–96 (discussing documentation).

46 11 U.S.C. §§ 109(h)(1), 727(a)(11), 1328(g); *see also* Littwin, *supra* note 9, at 196–98 (noting that these courses create hurdles to filing and discharge). Attorneys have deemed these courses "burdensome" and "a complete and utter waste of my clients' time." *Id.* (quoting from interviews with bankruptcy attorneys).

47 *See* Littwin, *supra* note 9, at 184 (describing BAPCPA); *see also* 11 U.S.C. § 707(b).

48 *See* H.R. REP. NO. 109-31, pt. 1, at 2 (2005) ("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."); *see also* Lawless et al., *supra* note 13, at 352–53 (discussing the means test).

49 *See* Porter, *Pretend Solution*, *supra* note 34, at 119 (discussing the means test).

50 *See* Littwin, *supra* note 9, at 192–95 (discussing the means test and how most attorneys did not find that the means test posed a problem for their clients).

51 Amy Buttell Crane, *Understanding the New Bankruptcy Law*, MIRSEPASY L. OFFS., (2005), http://www.nwlink.com/~mloweb/bankruptcy2.html (quoting Travis Plunkett, former legislative and regulatory affairs director for the Consumer Federation of America).

52 *See* Littwin, *supra* note 9, at 200 ("Uncertainty leads to difficulty advising clients as well as to frequent litigation, resulting in expense clients can struggle to afford." (footnotes omitted)).

always has been expensive for cash-strapped households, but the Current CBP data confirm findings from other studies: attorneys' fees have risen.[53] Attorneys now charge an average of $1224 to file and represent the debtor in chapter 7, and an average of $3442 to file and represent the debtor in chapter 13.[54] But filing bankruptcy pro se is difficult and jeopardizes a debtor's ability to receive a discharge.[55] The vast majority of debtors thus employ an attorney to file their cases. In the Current CBP, 90.1% of all debtors used an attorney to file their bankruptcy cases.[56]

B. *The Financial Sweatbox, BAPCPA, and Bankruptcy Filings*

The debates surrounding BAPCPA and BAPCPA's effects provide useful recent background on popular conceptions about when and why people file bankruptcy, and how the timing of their filings relates to the financial sweatbox. BAPCPA is associated with a decrease in the number of bankruptcy filings during the initial years following its enactment, which the coinvestigators of the 2007 CBP linked to financially struggling households delaying filing.[57] Although BAPCPA aimed to decrease bankruptcy filings, consistent with rhetoric surrounding its passage about people strategically filing "ban-

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53 *See* Lupica, *supra* note 9, at 36–37, 57, 69 (finding that attorneys' fees increased 24% to 48% post-BAPCPA, depending on chapter, amount of administrable assets, and discharge).

54 Attorneys' fees are from Current CBP data. See *infra* Part II for a discussion of the CBP and its methodology. The difference in cost relates to chapter 13's relative complexity. *See* Lupica, *supra* note 9, at 111–12 (overviewing how long attorneys report spending to prepare a chapter 13 case). Because of how attorneys report their fees, we are unable to disaggregate attorneys' fees from bankruptcy petition filing fees. Most of the attorneys' fee data likely include the filing fee. The filing fee is $335 for a chapter 7 case and $310 for a chapter 13 case. *See* Foohey et al., *supra* note 35, at 1058 n.10. For a discussion of how attorneys' fees affect bankruptcy filings, see generally *id.*

55 In a sample of chapter 13 cases filed pro se in 2007 and 2008, 0.8% of chapter 13 cases ended in a discharge. In a sample of chapter 7 no asset cases filed in 2007 and 2008, 6.1% of the cases were filed pro se, but pro se cases made up 28.2% of the chapter 7 no asset cases that ended in dismissal versus 5.5% of the cases that ended in discharge. Likewise, in a sample of chapter 7 asset cases filed in 2007 and 2008, 3.3% of the cases were filed pro se, but pro se cases made up 14.3% of the chapter 7 asset cases that ended in dismissal versus 2.8% of the cases that ended in discharge. Lupica, *supra* note 9, at 81, 139 tbl. A–7.

56 Debtors are more likely to hire an attorney to file chapter 13 than chapter 7—89.5% versus 91.1% of debtors, respectively. Some of the cases filed without an attorney likely used a petition preparer. *See* Lupica, *supra* note 9, at 31 (finding in sample of cases filed in 2007 and 2008, 5.8% of the chapter 7 cases and 2% of the chapter 13 cases were filed pro se).

57 Lawless et al., *supra* note 13, at 353, 357.

kruptc[ies] of convenience,"[58] it only sought to exclude those people who truly could pay their creditors.[59] This was not what happened.

Data from the 2007 CBP suggest that following BAPCPA, income correlated with which families filed bankruptcy, with the means test functioning "like a barricade, blocking out hundreds of thousands of struggling families indiscriminately . . . ."[60] Another nationwide study of filings post-BAPCPA found that households in poorer zip codes were disproportionately less likely to file: filings in poor neighborhoods decreased 32% more than filings in rich neighborhoods.[61] If income is considered a proxy for ability to pay, as it is by the means test,[62] then rather than stop can-pay debtors from filing, BAPCPA more often prevents honest, but unfortunate cannot-pay debtors from filing, while wealthier households enjoy unchanged access to bankruptcy.[63]

That BAPCPA's effect was to make bankruptcy less accessible reflects the debates that led to its passage and the theory that the consumer credit industry's true goal was to pass a law that would extend the time people spend in the sweatbox.[64] When people are on the brink of default, lenders can charge high interest rates and fees, and make more money. Financially distressed

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58 Mann, *supra* note 1; *see* 144 CONG. REC. S10787 (daily ed. Sept. 23, 1998) (statement of Sen. Grassley) ("The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay."); Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, *in* 1 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 1043, 1044 (1997) ("[B]ankruptcy has become a first resort rather than a last measure for people who cannot keep up with their bills."); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 208 ("Bankruptcy is now too frequently a choice fostered by irresponsible spending habits and an unwillingness to live up to commitments."); *see also supra* text accompanying note 10.

59 *See* Lawless et al., *supra* note 13, at 352–53 (discussing BAPCPA's goals); Lupica, *supra* note 9, at 27.

60 Lawless et al., *supra* note 13, at 353.

61 Timothy Layton, Frank McIntyre & Daniel Sullivan, *Did BAPCPA Deter the Wealthy? The 2005 Bankruptcy Reform's Effect on Filings Across the Income and Asset Distribution* (2010), https://ssrn.com/abstract=1708119; *see also* Stefania Albanesi & Jaromir Nosal, *Insolvency After the 2005 Bankruptcy Reform* (Fed. Reserve Bank of N.Y. Staff Reports, Staff Report No. 725, 2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr725.pdf (finding that BAPCPA caused a permanent drop in chapter 7 filings concentrated at the bottom of the income distribution).

62 *See supra* note 48 and accompanying text.

63 *See* Albanesi & Nosal, *supra* note 61 (noting in the abstract that for low-income individuals, "BAPCPA may have removed an important form of relief from financial distress"); Lawless et al., *supra* note 13, at 353 ("[T]here has been no shift in the income levels of filers that would have occurred if . . . high-income abusers had been pushed from the system.").

64 *See supra* note 18.

customers in the sweatbox are many lenders' best customers,[65] as demonstrated by the $11.9 billion a year that the CARD Act saves consumers.[66]

To make its case for restricting access to bankruptcy and thus extend the time consumers spend in the sweatbox, the consumer credit industry painted a picture of profligate spending and uninhibited use of bankruptcy.[67] This picture was not new. Rather, it was updated and embellished for more than a decade.[68] Proponents of this picture argued that reforms were necessary because the "rising tide of bankruptcy filings" cost every moral, bill-paying family $400 a year, a figure that made for "the best sound-bite in the debate."[69] Proponents further linked people's supposed propensity to file at the first sign of financial trouble to a purported drastic decline in bankruptcy's stigma.[70]

None of the proponents' claims were supported by evidence. Proponents never substantiated the often-cited "fact" that bankruptcy was costing every American family $400 a year.[71] The claim that bankruptcy courts were filled with can-pay debtors was contradicted by decades of robust empirical evidence that people file bankruptcy after experiencing exogenous shocks, such as decline in income, increased expenses, job loss, divorce, and medical problems.[72] Based on this evidence, the related claim that bankruptcy's stigma had disappeared became suspect.[73] If anything, comparing levels of

65 *See* Mann, *supra* note 1, at 379 (theorizing about lenders' true motives with BAPCPA).

66 *See supra* note 18.

67 *See* Mann, *supra* note 1, at 376 (noting that BAPCPA passed "[a]fter extensive lobbying by banks and credit card companies"); Porter, *Bankrupt Profits*, *supra* note 1, at 1372–73 (stating that the financial practices of the creditors were not closely examined during debates); Elizabeth Warren, *The Phantom $400*, 13 J. BANKR. L. & PRAC. 77, 77–78 (2004) (describing the credit industry's "public relations campaign to amend the bankruptcy laws").

68 *See* Warren, *supra* note 67, at 77–78.

69 *Id.* at 77.

70 *See* A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1891–92 (2006) ("Supporters [of BAPCPA] . . . suggested that debtors lacked integrity because they no longer felt any personal obligation to pay debts they could afford to repay."); Porter, *Bankrupt Profits*, *supra* note 1, at 1376–77 (overviewing arguments that debtors were immoral "strategic actors" who used bankruptcy to shirk their obligations).

71 *See* Warren, *supra* note 67, at 78–79.

72 *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP 81 (2003) (citing self-reported data from debtors to show that job loss, family breakup, and medical problems were the reason for 87% of consumer bankruptcy filings); Porter, *Bankrupt Profits*, *supra* note 1, at 1373–75 (arguing based on analysis of the credit industry's solicitation of bankruptcy debtors that its actions are consistent with the exogenous shocks model of consumer bankruptcy filings, not the strategic or immoral actor models); *supra* note 19.

73 Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 233–41 (2006) (refuting the declining stigma hypothesis).

consumer debt and the number of bankruptcy filings, the stigma of filing may have increased over past decades.[74]

Nonetheless, lured by tales of a $400 bankruptcy "tax,"[75] Congress embraced the consumer credit industry's assertion that restricting eligibility to and otherwise making it harder to file bankruptcy was the best policy.[76] Consequently, rather than screening out can-pay debtors, BAPCPA punishes everyone, especially lower-income households, increasing the financial distress of people who file bankruptcy.[77] In reporting on the 2007 CBP data, CBP coinvestigators wrote that the "rising debt loads are consistent with the view that troubled families are delaying bankruptcy—struggling longer with their bills and building up bigger loads of debt before succumbing."[78]

In Part III, we analyze data from the Current CBP to expand on this observation. Between 2007 and now, though bankruptcy laws have remained identical, people report struggling longer before filing. That the pattern of entry to bankruptcy relief has continued to change suggests that the sweatbox of lending has only become hotter, and that bankruptcy has become even less effective at helping with financial problems.

II. Methodology

Data for this Article come from the Consumer Bankruptcy Project (CBP), a multiresearcher, long-term project that investigates the people who file bankruptcy, their reasons for filing, and the consequences of their bankruptcies. The CBP uses a nationally representative sample and combines data from bankruptcy court records and questionnaires. Past iterations of the CBP occurred in 1981, 1991, 2001, and 2007, giving us a historical baseline against which to compare the current data (although only the 2007 data were a national random sample). The latest iteration of the CBP—the Current CBP—began in 2013 and, at present, includes data about people who filed bankruptcy during the four-year period from 2013 to 2016. Three of this Article's authors have been involved with the CBP since 2001.

Because we will reference data from the 2001 and 2007 CBPs, a brief review of those studies is appropriate. These studies relied on cross-sectional

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74 *Id.* at 242–47 (arguing that a growing number of families are in financial trouble, but fewer are filing, which may mean that bankruptcy's stigma has increased).

75 *See* Warren, *supra* note 67, at 84 (noting that the chair of the House Judiciary Committee of the House of Representative's report cited as a fact that bankruptcy losses "translate into a $400 annual 'tax' on every household in our [n]ation" (quoting 150 Cong. Rec. H148–02 (daily ed. Jan. 28, 2004) (statement of Rep. Sensenbrenner)).

76 *See* Porter, *Bankrupt Profits*, *supra* note 1, at 1371 n.4 ("[T]he standard characterization of the legislation is a public-choice story that strongly emphasizes the consumer-credit industry's capture of Congress through lobbying and financial contributions.").

77 *See* Lawless et al., *supra* note 13, at 353 (noting that the CBP data show that the people who file bankruptcy are more laden with debt than in prior decades).

78 *Id.*; *see also* Wenli Li, Michelle J. White & Ning Zhu, *Did Bankruptcy Reform Cause Mortgage Default to Rise?* 2, 23 (Nat'l Bureau of Econ. Research, Working Paper No. 15968, 2010), http://www.nber.org/papers/w15968 (finding that BAPCPA caused mortgage default rates to rise as people tried to pay their debts for a longer time).

data collection, measuring a snapshot in time of bankruptcy cases filed by individuals under chapter 7 and chapter 13 over a six-month time span.[79] Because of technological limits, the 2001 CBP relied on random samples from bankruptcy courts located in five judicial districts across the United States, in rural and urban areas, believed to be nationally representative.[80] With the widespread adoption of electronic court records, the 2007 CBP data were drawn from a nationally random sample of chapter 7 and chapter 13 cases filed in the fifty states and the District of Columbia. As with prior CBP iterations, written questionnaires were mailed to the debtors who had filed these cases.[81] The questionnaires collected otherwise unavailable demographic information and asked debtors about their financial situations and coping mechanisms leading up to their bankruptcy filings. The 2007 CBP data come from 2438 bankruptcy filings and questionnaires, as well as a subset of approximately 1000 interviews.[82] A full methodology of the 2007 CBP is detailed elsewhere.[83]

We relaunched the CBP in 2013 as an ongoing data collection effort. Rather than taking a snapshot of consumer bankruptcy filings from a short period of time, the Current CBP collects data on an ongoing basis, providing a database that builds incrementally and will allow for comparisons over time. Like the 2007 CBP, the Current CBP sample is national and random. Beginning in February 2013 and every three months thereafter, we generate a list of all cases filed by individuals under either chapter 7 or chapter 13 in the fifty states and the District of Columbia for three randomly selected business days. From this group, 200 bankruptcy cases are randomly selected to comprise the sample. The samples are collected in February, May, August, and November, and include cases filed at the beginning, middle, and end of a month.[84]

As with the 2007 CBP, a mailing list is generated from the debtors' addresses as listed on the bankruptcy petition. We mail an introductory letter to each debtor explaining the project. A written questionnaire is mailed three to four days later. Debtors may complete the questionnaire via mail or

79 We exclude cases filed by debtors that are legal entities, such as corporations. Cases filed by individuals are included regardless of whether the petition indicates the case involves primarily business or consumer debts. *See* Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CALIF. L. REV. 743, 764–68 (2005) (explaining how software for nonsubstantive reasons may miscategorize cases as business or consumer).

80 For a discussion of the methodologies for the 1981, 1991, and 2001 CBPs, see Katherine Porter, *Appendix: Methodology of the 2007 Consumer Bankruptcy Project*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra* note 19, at 235, 235.

81 *Id.* at 237.

82 *Id.* at 237, 242.

83 *Id.* at 236–44 (detailing the 2007 CBP methodology); Lawless et al., *supra* note 13, at 396–97 (detailing the interviews). This Article does not rely on the telephone interviews.

84 A detailed discussion of the methodology of the Current CBP is included in the first article relying on Current CBP data. Foohey et al., *supra* note 35, at 1072–74.

online, and are offered a fifty-dollar gift card from Walmart or Amazon for participating.[85]

Data collected from the bankruptcy court records and the written questionnaires include demographic and household information, reasons for filing bankruptcy, money management tactics used prior to filing, hardships experienced before filing, emotional responses to bankruptcy, and basic health information.[86] Many of the 100-plus variables in the Current CBP were also included in the 2007 CBP and prior CBP iterations. When we compare findings with the 2007 CBP or earlier CBP iterations, we adjust dollar-denominated data, such as asset values and debt amounts, for inflation to July 2016 dollars based on the Consumer Price Index.[87]

In this Article, we report from people who filed bankruptcy in 2013, 2014, 2015, and 2016. These data include information from a total of 3200 bankruptcy cases sampled during these four years. Of the 3200 households sent questionnaires, a total of 910 questionnaires were returned for a 28.4% response rate.[88]

III. Prolonged Struggles in the Sweatbox

The Current CBP data show that bankruptcy filers still have many characteristics of the American middle class, as they did in the 2007 CBP and prior iterations of the CBP. More than three-fourths of households have at least one employed or self-employed person, the highest-educated adult in the household has completed at least some college, half of households contain a married couple or permanent partners, and half of households include at least one minor child.[89] About half of households that file own homes.[90] Of course, the CBP households are not typical of the middle class in one way—they are deeply indebted and lack the resources to deal with these

85 *Id.* at 1073 (detailing how debtors are solicited to complete the questionnaires).

86 *Id.* at 1071–73 (describing data collection procedures).

87 *See generally Consumer Price Index*, Bureau of Lab. Stat., https://www.bls.gov/cpi (last visited Aug. 24, 2018).

88 The questionnaires sent to households as part of the 2007 CBP had an approximately 50% response rate. Lawless et al., *supra* note 13, at 393. We believe that the existence of research funding that allowed much greater efforts in 2007 to follow up with nonrespondents through telephone calls and other means primarily influenced the difference in response rates.

89 In the 2007 CBP and Current CBP, respectively, 79.5% and 74.8% of households included at least one person who was employed or self-employed. In the 2007 CBP, the highest-educated adult in 59.4% of households had completed at least some college; in the Current CBP, the highest-educated adult in 59.1% of households had completed at least some college. In the 2007 CBP, 51.3% of debtors reported living with a spouse or permanent partner when they filed bankruptcy, as compared to 47.2% in the Current CBP. In the 2007 CBP, 52.7% of the cases were of a household containing a minor, as compared to 47.4% in the Current CBP.

90 In the 2007 CBP and Current CBP, respectively, 50.0% and 44.7% of debtors owned homes.

debts. In the Current CBP, the median household has total debts of just over $100,000 and a low monthly income of around $2650.[91]

Our analysis shows one very notable difference between the people who filed bankruptcy in 2007 and those who filed more recently.[92] People indicated that they waited longer to file. Postponement of filing bankruptcy comes with potentially damaging repercussions of spending additional years drowning in debt that cannot realistically be repaid, and the accompanying stressors of trying to pay it back despite this reality. The following sections detail how long people struggle with their debts before filing bankruptcy, and the consequences of their extended struggles.

A. *Longer Stays in the Sweatbox*

Data from the questionnaires directly describe debtors' prebankruptcy timeline. We asked debtors how long they seriously struggled with their debts before they filed bankruptcy—that is, how long they lived in the sweatbox. Similar to prior CBP iterations, in the Current CBP, debtors were limited to six preset categories: did not seriously struggle, fewer than six months, at least six months but less than one year, at least one year but less than two years, at least two years but less than five years, and five years or more.[93] In the Current CBP, very few people (7.1%) reported resorting to bankruptcy after less than six months of serious financial struggles, and only 15.1% struggled for less than a year. The hardship period before filing bankruptcy must be measured in years, not weeks or months.

Debtors' modal response was a period of struggling for between two and five years. Two-thirds (66.4%) of households struggled to pay their debts for more than two years.[94] And almost a third (30%) of households reported

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91 In the 2007 CBP, the median debtor had total debts of $100,037.30 and monthly income of $2617.69. In the Current CBP, the median debtor had total debts of $100,401.70 and monthly income of $2693.55. Because the means are heavily influenced by outliers, the medians are generally better indicators of central tendency, which is why medians are reported.

92 Age also has changed. The median age of people who file bankruptcy shifted right between the 2007 CBP and the Current CBP, from forty-three to forty-nine. In other recent work, we explored reasons for the shift that do not relate to prolonged struggling. Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout From Life in a Risk Society* (Aug. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226574. Additionally, when we divided the Current CBP sample into those debtors who reported struggling for less than two years and those who reported struggling for more than two years, which seems to be households' tipping point in terms of struggling, we did not find a statistically significant difference in the ages of the two groups. Bankruptcy remains a largely midlife experience.

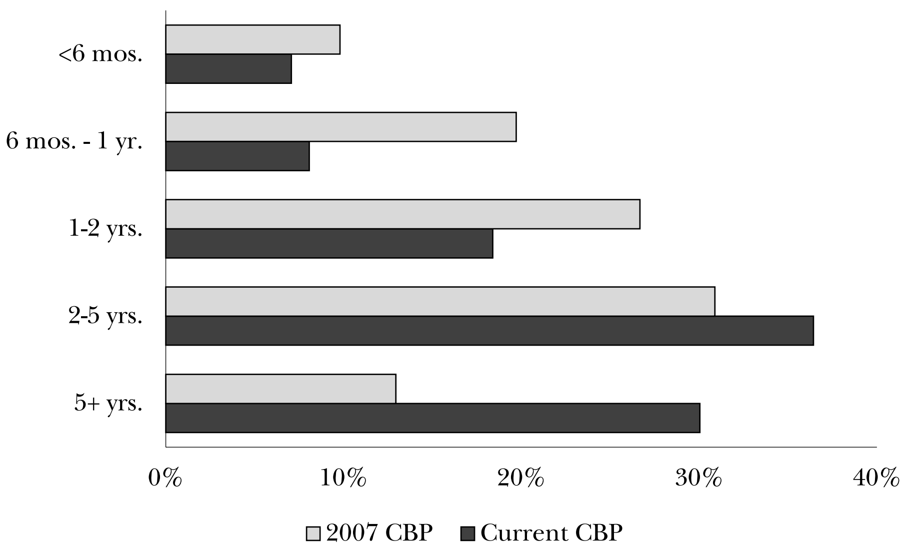
93 In the 2007 CBP, the two categories with the least amount of time struggling were "[l]ess than 3 months" and "[m]ore than 3 months less than 6 months." Lawless et al., *supra* note 13, at 382 fig.12.

94 During the Current CBP's four-year period, debtors reported struggling for similarly long periods of time. For instance, 65.9%, 70.4%, 67.0%, and 62.8% of households indicated they struggled for more than two years in 2013, 2014, 2015, and 2016.

suffering through serious financial problems for five years or longer. Most people did not file bankruptcy as an immediate solution to their financial difficulties.

People who sought bankruptcy relief in the Current CBP also waited even longer than in the past, about ten months longer if we convert our categorical responses into a continuous measure using the midpoint of each category. The mean period of time that a household in the Current CBP seriously struggled with their debts before filing bankruptcy exceeds three years.[95]

FIGURE 1. "BEFORE BANKRUPTCY, HOW LONG DID YOU STRUGGLE?" 2007 CBP VS. CURRENT CBP



Note: Respondents in the 2007 CBP and Current CBP were asked, "Before you filed bankruptcy, how long did you seriously struggle with your debts?" Figure 1 reports the percentage of respondents indicating each time struggling category. It combines the two categories with the least amount of time struggling.

This change reflects a marked shift in behavior in a short period of time, particularly given no changes in bankruptcy law. The currently reported mean time of three years struggling is more than twice the length of the average engagement before a first marriage[96] and equals the time between when a baby is born and when that child typically enters preschool. Every

95 For the ultimate category of "5+ years," we assumed the person struggled for five years. The mean time spent struggling in 2007 was 2.3 years. This is a statistically significant difference ($t = 11.19$, $p < .001$) from the 3.1 years reported in the Current CBP.

96 *See* Jaimie Mackey, *What Is the Average Length of an Engagement?*, BRIDES (Oct. 28, 2017), https://www.brides.com/story/how-long-should-you-be-engaged-before-marriage ("The average engagement length in the U.S. is between 12 and 18 months . . . .").

three years is literally when a blue moon (as in "once in a blue moon") occurs.[97]

The changes between the 2007 and the Current CBP occur across the entire distribution of debtors. Two to five years of struggling still is the modal answer in both studies, but the percentage of households struggling five years or more has increased by more than twofold. Correspondingly, shorter struggles are less common. The likelihood that a household will struggle with debts for less than a year has declined by two-and-a-half times in less than a decade.

Additionally, the increase between 2007 and the Current CBP in how long people report struggling before filing bankruptcy is a continuation of a trend since 2001. In the 2001 CBP, the longest interval category available was more than two years.[98] In 2001, about one-third (32.6%) of debtors indicated "[m]ore than two years."[99] In 2007, that percentage rose to 43.8% in 2007, an increase of more than a third.[100]

Because two years of struggling remains the tipping point for households, in detailing life in the sweatbox, we emphasize those debtors who reported struggling for two years or more—"long strugglers," as we call them. To highlight the consequences of the time long strugglers spend in the sweatbox, we often compare their experiences to those of other debtors. Nonetheless, these other debtors also spent time in the sweatbox, just less. Only 3% of debtors in the Current CBP reported that they "did not seriously struggle" before filing. The sweatbox is a reality for almost everyone who files bankruptcy, even if the time spent in it is less miserable for some people.

B. Limitations

The data show a remarkable increase in how long people report struggling with their debts before filing bankruptcy. Because what it means to "seriously struggle" is open to interpretation, we purposely focus on the rate of change across CBP iterations in presenting our findings. Although we think that people's general conception of what it means to "seriously struggle" with their debts has not changed between CBP iterations, we cannot eliminate with certainty the possibility that how respondents answered the question varied over time. The wording of the question and the number of choices is the same across CBP iterations, but the Current CBP questionnaire includes longer time categories for the least amount of time spent struggling.[101] However, debtors' responses increased at the higher end of the preset categories, which are the same across CBP questionnaires. It seems

97 Blue moons occur about every two to three years. *See* Robert Martin, *Friday Is the Last Blue Moon Until 2018*, WEATHER CHANNEL (July 27, 2015), https://weather.com/science/space/news/blue-moon-july.

98 Lawless et al., *supra* note 13, at 382 fig.12.

99 *Id.*

100 *Id.* For a graphical comparison of the results from the 2001 CBP and the 2007 CBP, see *id.*

101 *See supra* note 93 and accompanying text.

unlikely that the adjustment of the preset categories prompted a change in how debtors answered the question.

Apart from the wording of the CBP questionnaire itself, between 2007 and the Current CBP's timeframe world markets experienced the Great Recession.[102] Living through disruptive economic times may have altered how people thought about what it means to "seriously struggle" with their debts because their attitudes about the economy and finances changed. Hard economic times may amplify how people experience their financial problems, leading debtors to report that they "seriously struggled" to pay their debts for a longer time prior to filing than they would have absent living through the Great Recession. Alternatively, people may see their family, friends, and neighbors dealing with financial problems and discount the severity of their own struggles. Debtors' reports of how long they seriously struggled before filing actually may understate the duration of their struggles, and, concomitantly, our results would underestimate the increase in time people seriously struggle before filing.

Surveys that ask people their attitudes about the economy provide useful proxies to assess whether people's views of what it means to "seriously struggle" may have changed in recent years. These proxies suggest that people's attitudes about the economy now are similar to their attitudes in 2007. For instance, the consumer confidence index, which is based on people's plans for major purchases and their current and projected future economic situation, was essentially the same in 2007, when it averaged 100.1, and between 2013 and 2016, when it averaged 100.0.[103]

Similarly, the General Social Survey asks people to evaluate their economic well-being.[104] In 2008, 70.4% of respondents indicated that they were satisfied or more or less satisfied with their financial situation, as compared to 73.4% of respondents in 2014.[105] Likewise, in 2008, 39.9% of respondents indicated that they thought their financial situation had stayed the same "[d]uring the last few years," a percentage that remained relatively stable

102 The National Bureau of Economic Research dates the Great Recession as between December 2007 and June 2009. THE NAT'L BUREAU OF ECON. RESEARCH, BUSINESS CYCLE DATING COMMITTEE (2010), http://www.nber.org/cycles/sept2010.pdf.

103 *Leading Indicators—Consumer Confidence Index (CCI)*, ORG. FOR ECON. CO-OPERATION & DEV., https://data.oecd.org/leadind/consumer-confidence-index-cci.htm (last visited Dec. 17, 2017). Between 2007 and 2013, the CCI decreased and then increased, along with the economic downturn and recession. *Id.* The CCI averaged 99.1, 99.7, 100.7, and 100.6 in 2013, 2014, 2015, and 2016, respectively.

104 *GSS General Social Survey*, NORC AT THE U. OF CHI., http://gss.norc.org/ (last visited Dec. 18, 2017).

105 TOM W. SMITH, JAESOK SON & BENJAMIN SCHAPIRO, NORC AT THE U. OF CHI., GENERAL SOCIAL SURVEY FINAL REPORT: TRENDS IN PUBLIC EVALUATIONS OF ECONOMIC WELL-BEING, 1972–2014 7 tbl.2 (2015) http://www.norc.org/PDFs/GSS%20Reports/GSS_EconomicWellBeing15_final_formatted.pdf.

through 2014.[106] And Pew Research Center's poll that tracks Americans' views on the economy shows a sharp drop in outlook by the end of 2007 and a steady increase through the Current CBP's timeframe.[107]

In short, although our findings could be an artifact of time or reflect an unidentifiable selection effect among respondents, there is little reason to think that there has been a fundamental change in how people think about "seriously struggling" with debts. Plus, our data show a substantial shift in how long people report struggling before filing bankruptcy. People's views about what it means to "seriously struggle" also would have had to change massively between 2007 and the Current CBP's timeframe for how debtors answer this question to explain our findings. We now turn to a description of what life is like in the sweatbox for the debtors in the Current CBP.

C. *Financial and Legal Life in the Sweatbox*

The time that long strugglers spend in the sweatbox takes a noticeable toll. Long strugglers arrive at the bankruptcy courthouse with more problems to solve, and more wear on their lives than other debtors. On a financial basis, as summarized in Table 1, long strugglers are in awful financial shape.

TABLE 1. COMPARISON OF MEDIAN FINANCIAL CHARACTERISTICS, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS

	Long Strugglers	Other Debtors
Total assets	$28,036	$51,610
Secured debts	$18,042	$37,002
Unsecured debts	$44,227	$34,848
Total debts	$98,430	$94,288
Monthly income	$2524	$2517
Total debt-to-asset ratio	2.19	1.50
Total debt-to-income ratio	2.62	2.42
% homeowners	40.8%	50.9%
% homeowners with involuntary liens	66.4%	50.9%
% collection action filed against debtor	50.3%	35.6%

Note: Table 1 reports financial characteristics for all people who filed bankruptcy (from the Current CBP, divided between those who reported struggling for more than two years ("long strugglers") and those who reported struggling for less than two years ("other debtors"). All data are inflated to July 2016 dollars based on the Consumer Price Index.

106 *Id.* at 6 tbl.1, 99 (reporting that 37.6% and 41.5% of respondents in 2010 and 2012, respectively, indicated that their financial situation had stayed the same "[d]uring the last few years").

107 Bruce Stokes, *As Republicans' Views Improve, Americans Give the Economy Its Highest Marks Since Financial Crisis*, PEW RES. CTR. (Apr. 3, 2017), http://www.pewresearch.org/fact-tank/2017/04/03/americans-give-economy-highest-marks-since-financial-crisis/.

By the time they file, at the median, long strugglers owe more than twice the value of what they own. Their median debt-to-asset ratio is over 40% higher than other debtors—2.19 versus 1.50 ($z = -4.01$, $p < .001$). Most notably, long strugglers are less likely to own a home when they file than other debtors (χ^2 (1, N = 869) = 7.96, $p = .005$). Their lower homeownership rate is apparent in their lower median amounts of total assets and secured debts. If we restrict the sample to homeowners (N = 384), the dire financial conditions of long strugglers become starker. The median long struggler owes more secured debts—$137,480 versus $116,303 ($z = 1.84$, $p = .066$), as well as more unsecured debts—$43,288 versus $38.375 ($z = 1.14$, $p = .253$).

In addition, as reported in Table 1, of those long strugglers who still own their homes, two-thirds arrive at bankruptcy court with an involuntary lien, such as a tax lien, against their home. The median long struggling household with an involuntary lien owes $4065 on the lien. This is more than 150% of one month's income for a long struggling household, assuming no taxes and expenses. The median amount that long strugglers owe on the lien starkly contrasts with the median of $1482—about 60% of one month's income—owed by other debtors that enter bankruptcy with a lien against their home.

As debts secured by property, involuntary liens generally increase the likelihood that debtors will lose their homes, particularly given the relatively high amounts owed by long struggling families. Involuntary liens also serve as an indication of struggling and failing to make ends meet. They attach upon continued nonpayment of overdue debts by operation of law, such as tax liens, or by judicial process initiated by creditors, such as unsecured creditors.

Actual collection actions against debtors are another indication of debtors' inability to make ends meet, and provide another powerful signal to overindebted households that their financial situations are irremediable. Consistent with the higher incidence of attachment of involuntary liens, as reported in Table 1, half of long strugglers also had a collection action filed against them prior to filing bankruptcy. As detailed in Section III.D, long strugglers tried to work with their creditors. But despite these and other efforts, for a majority of long struggling debtors, life in the sweatbox includes appearing as a defendant in a lawsuit.

When long strugglers file bankruptcy, they are financially drained. Based on their financial situations, particularly their low homeownership rates, filing chapter 7 makes the most sense.[108] Long strugglers indeed are statistically significantly more likely to file chapter 7 than other debtors. Seven in ten (70.8%) of long struggling debtors filed chapter 7, as compared to 58.5% of other debtors (χ^2 (1, N = 892) = 13.54, $p < .001$). Recall that, on average nationwide, about two-thirds of consumer bankruptcy cases are filed

108 On a financial basis, chapter 13 is most useful to keep assets. *See supra* note 37.

under chapter 7, meaning that those people who struggle longer are slightly more likely than the average debtor to file chapter 7.[109]

Although our data cannot speak to how debtors' financial situations change while they live in the sweatbox, there is reason to think that long strugglers' time in the sweatbox is marked by asset depletion and increasing debts. Foreclosure and other collection techniques necessarily result in the loss of property, whether by a sale of assets or the garnishment of wages, which decreases a household's ability to pay other debts. And as described in Section III.D, long strugglers' coping techniques include selling property more often than other debtors. Long strugglers may be more likely to be in worse financial shape before entering the sweatbox, which also could explain why they arrive at bankruptcy court with fewer assets and higher debts. But long strugglers' reports about their struggles to pay their debts suggest that during the extra time that they spend in the sweatbox, as compared to other debtors, they deplete their assets, lose their homes, and run up their debts. Regardless of the cause, their lack of assets may drastically affect their ability to achieve long-term benefits from bankruptcy's discharge.

D. *Coping in the Sweatbox*

Delays in filing bankruptcy exact more than financial tolls on individuals and families. Long strugglers report going to great lengths to try to pay back their debts. The CBP questionnaire asks debtors what they did "to try to make ends meet," and provides them a list of twelve common coping mechanisms, such as asking creditors for help and working more hours.[110] Table 2 reports those coping mechanisms that long strugglers reported using much more often than other debtors.

Despite their lower homeownership rates, long strugglers were more likely than other debtors to indicate coping mechanisms related to houses, suggesting that they worked hard to try to save their homes. Although the majority of all debtors asked their creditors for help, a full two-thirds of long strugglers reported asking creditors to "work with them" generally, and a quarter reported asking for a loan modification or to refinance their mortgage specifically. Still, one out of ten long strugglers sold their house to make ends meet, double the percentage of other debtors. And almost half of long strugglers specified that they pawned other property.

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109 *See supra* notes 43–44 and accompanying text. Prior literature addresses chapter 13's success rate, based on discharge, to conclude that filing chapter 13 often may not be the most effective use of bankruptcy. *See* Greene et al., *supra* note 39, at 1085–90 (identifying factors that make completing chapter 13 bankruptcy more likely); Porter, *Pretend Solution*, *supra* note 34, at 113 (stating that chapter 13 is "a pretend solution" and calling for a "redesign [of] bankruptcy relief to be simpler and blunter"); William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 104–05 (1989) (arguing that chapter 13's repeal will best serve the interests of the greatest number of debtors). As such, that long strugglers file chapter 7 more often than other debtors may make their use of bankruptcy more productive.

110 Respondents also may select "something else" and write a response.

TABLE 2. COMPARISON OF "COPING" MECHANISMS, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS

	Long Strugglers	Other Debtors
Ask creditors to "work with you"	67.0%	57.2%
Obtain loan modification, refi, or home equity loan refi	25.6%	17.4%
Sell house	11.5%	5.0%
Sell or pawn car, furniture, or other property	47.9%	37.8%
Worked more hours or got another job	66.6%	53.2%
# coping mechanism (mean)	5.5	4.7

Note: Respondents in the Current CBP were provided a list of twelve common coping mechanisms commonly used to address financial distress and asked to identify the ones they used "to try to make ends meet." "Long strugglers" are respondents who identified in a separate question that they "struggled" for more than two years before filing bankruptcy. All differences are statistically significant at $p < .01$, using a chi-squared test for the differences in percentages and a t-test for the difference in the mean on the number of coping mechanisms.

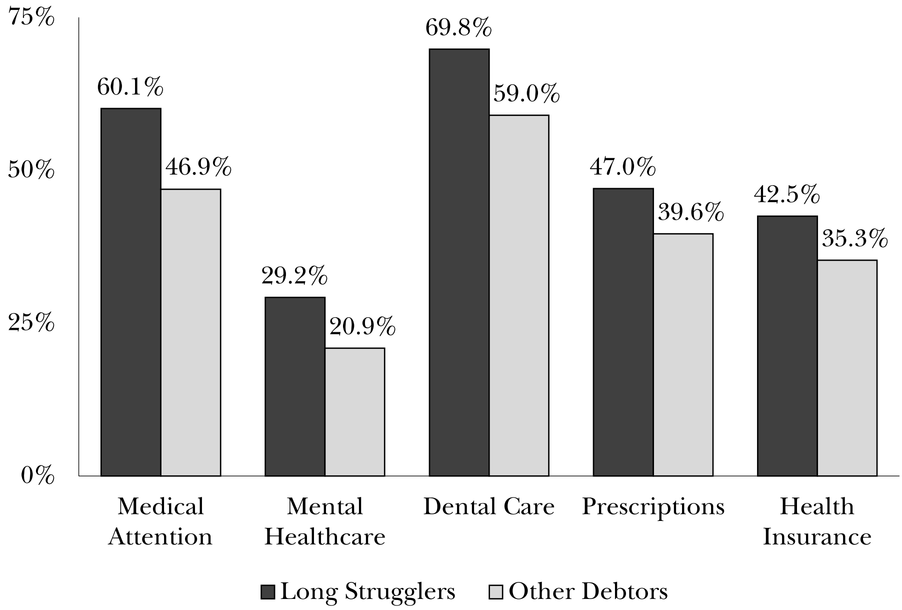
These efforts to make ends meet align with the low value of long strugglers' assets. That long strugglers sold their homes and pawned other property is even more significant given that two-thirds of debtors also reported working more in order to make ends meet. Although long strugglers on average reported using more than five coping mechanisms trying to make ends meet while living in the sweatbox, their efforts seemed to be of little avail.

E. Going Without in the Sweatbox

In addition to reaching out to creditors, selling property, and working more, long strugglers also report going without many necessities during the years they struggle to pay their debts. Similar to the question about coping mechanisms, the CBP questionnaire asked debtors what they had to go without because of their financial situation, and provided respondents with a list of thirteen items, such as medicine, food, utilities, car repairs, and paying the mortgage or rent. Long strugglers' responses paint a bleak picture, particularly as compared to other bankrupt debtors.

Long strugglers' responses about their healthcare stand out most starkly. The CBP questionnaire's list of necessities includes five related to people's health: medical attention, mental healthcare, dental care, medications, and health insurance. Long strugglers report going without each of these items much more often than other debtors, as depicted in Figure 2. Consequently, we combined them into a five-item "health-related" privation index for Table 3 (alpha = .76).

Figure 2. Comparison of Health-Related Privations, Current CBP, Long Strugglers vs. Other Debtors



Note: Respondents in the Current CBP were provided a list of thirteen privations commonly experienced by households in financial distress and were asked to identify which of the items they had to "go without." Figure 2 reports the answers to the five privations related to health. "Long strugglers" are respondents who identified in a separate question that they "struggled" for more than two years before filing bankruptcy. All differences are statistically significant at $p < .05$ using a chi-squared test.

Most prominent among long struggling debtors' health-related privations is medical attention, which likely relates to these debtors also going without health insurance. Considered together, as reported in Table 3, on average, long strugglers indicated that they went without more health-related necessities as compared to other debtors. Almost one-third (31.7%) of long strugglers went without four or five health-related items. Another 20.9% went without three of these items, meaning that more than half of long strugglers go without at least one of the health-related necessities.

In the short term, people may be able to manage health-related issues, but most of these problems are not temporary or self-healing.[111] When untreated, health problems escalate and cost even more—in terms of money, and in terms of time, stress, pain, and worry. Foregoing the range of health-related necessitates illustrates the lengths that long strugglers will go to try to

111 For instance, almost half of Americans live with a chronic condition, such as heart disease, cancer, arthritis, and respiratory diseases. Many of these conditions lead to hospitalization and long-term disability. Megan Comlossy, Nat'l Conference of State Legislators, Chronic Disease Prevention and Management 2–3 (2013), http://www.ncsl.org/documents/health/chronicdtk13.pdf.

repay their debts, and raises concerns about their physical and mental welfare during their journeys to bankruptcy courts.

TABLE 3. COMPARISON OF PRIVATIONS, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS

	Long Strugglers	Other Debtors
Health-privation index (mean)	2.5	2.0
Went without food	31.9%	24.1%
Went without utilities	22.1%	14.6%
Went without other insurance	39.8%	27.0%
total # of privations (mean)	4.1	3.3

Note: Respondents in the Current CBP were provided a list of thirteen privations commonly experienced by households in financial distress and were asked to identify which of the items they had to "go without." "Long strugglers" are respondents who identified in a separate question that they "struggled" for more than two years before filing bankruptcy. Table 3 reports the debtors' choices for a five-item "health-privation" index as well as answers to other privations where the differences were statistically significant ($p < .05$). The differences in the privations index and total number of reported privations are also statistically significant ($p < .01$).

Long strugglers' willingness to sacrifice does not end with healthcare. Table 3 reports other items that long strugglers reported going without much more often than other debtors. Long struggling households were more likely than other debtors to indicate that they went without the basic necessities of food and utilities. In contrast, all debtors reported going without other less necessary items—car repairs, funding retirement accounts, and continuing education—at similar rates (that were not statistically significant differences). Of the privations listed on the CBP questionnaire, food, utilities, and healthcare arguably are the most basic necessities, and needs that should not go unmet because of overindebtedness.

F. Ending Life in the Sweatbox

The CBP questionnaire also lists eleven "things" that might lead people to file bankruptcy, such as medical expenses, divorce or separation, and unaffordable mortgage payments. For each, respondents selected from a four-point Likert scale with the poles of "very much agree" and "very much disagree," or could select "not applicable."[112] Long strugglers' responses to these questions tell a tale of the accumulated effect of their coping techniques and privations. Table 4 lists those reasons that long strugglers reported much more often than other debtors.

112 When reporting answers, we include "not applicable" with "very much disagree."

TABLE 4. COMPARISON OF REASONS FOR FILING BANKRUPTCY, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS

	Long Strugglers	Other Debtors
Unaffordable mortgage payments	45.9%	31.4%
Home foreclosure	26.5%	17.9%
Divorce	27.2%	19.4%
Medical expenses	60.9%	52.3%
Pressure from debt collectors	81.2%	69.7%

Note: Respondents in the Current CBP were asked out of a list of eleven items what "things contributed to" their filing bankruptcy. For the question asking which of "the following things contributed to your bankruptcy," respondents were given a four-point Likert scale: "very much agree," "somewhat agree," "somewhat disagree," and "very much disagree." Respondents also could indicate the item was "not applicable" to them as a reason for bankruptcy. Any respondent who said they "very much agreed" or "somewhat agreed" was counted as citing that particular choice as a reason for their bankruptcy. Table 4 reports the reasons that were statistically different ($p < .05$) between long strugglers and all other bankruptcy filers.

Despite trying to work with creditors, particularly to obtain loan modifications and forbearances, long struggling debtors often cited unaffordable mortgage payments and foreclosure actions as contributors to their filings. Long strugglers also highlighted divorce as influencing their filings more often than other families. This reason likewise may reflect their lower homeownership rates. Divorce splits one household into two, and along with the split, may make it more difficult to keep up with mortgage payments, resulting in involuntary liens and foreclosure.[113]

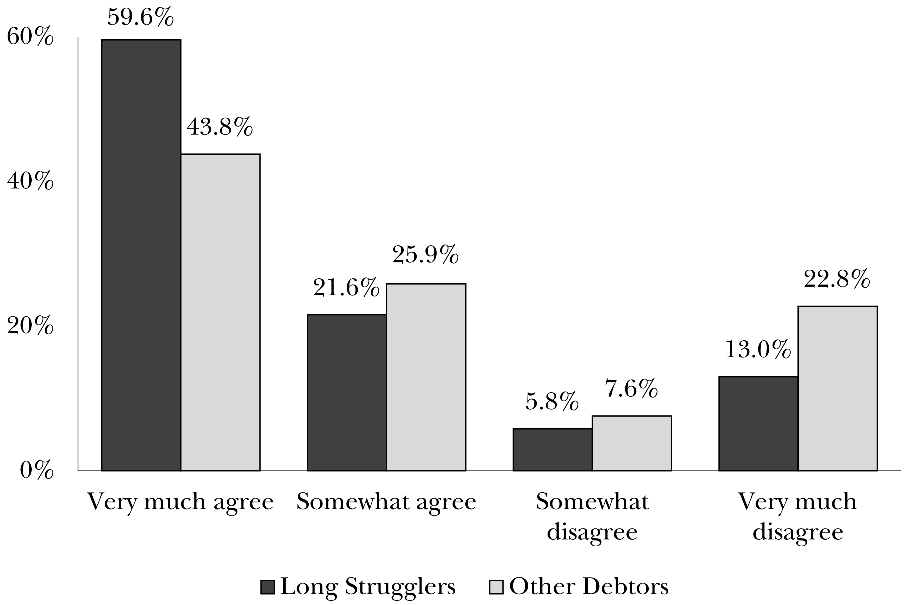
The effects of long strugglers' health-related privations emerge in one of the most often cited contributors to their filings—medical expenses.[114] Long strugglers were 30% more likely to "very much agree" that medical expenses contributed to their filings than other debtors—39.8% versus 30.5%. Although long strugglers are willing to forego healthcare and insurance, they nonetheless seem to incur burdensome medical debts—debts which catch up with them and chase them to the bankruptcy system for protection.

113 *See* WARREN & TYAGI, *supra* note 72, at 107–12 (discussing the financial consequences of divorce); Jerry Anthony, *Home Burdens: The High Costs of Homeownership*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra* note 19, at 65, 75 (noting that marital status is related to housing costs, "with homeownership seeming to be particularly expensive for people who are not married").

114 Besides collection efforts, which are discussed *infra*, the only contributor that long strugglers agreed with "very much" and "somewhat" more often was income. Almost 80% of long strugglers cited income as a contributor to their filing. Likewise, 74% of other debtors cited income as a contributor. Debtors' responses make sense. A lack of sufficient income in relation to debts is why people file bankruptcy.

Of all the contributors to their filings, long strugglers' dealings with debt collection stood out. As shown in Figure 3, long strugglers were much more likely to report "pressure from debt collectors" as a reason for their bankruptcy as compared to other bankrupt debtors. Most notably, less than half of other debtors indicated that they "very much agreed" that debt collection was a reason for their bankruptcy filings, as compared to six in ten of long strugglers.

FIGURE 3. PRESSURE FROM DEBT COLLECTION WAS REASON FOR BANKRUPTCY, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS



Note: Respondents in the Current CBP were asked whether pressure from debt collectors contributed to their filing bankruptcy. Figure 3 reports the percentage of respondents indicating each level category, divided between those who reported struggling for more than two years ("long strugglers") and other debtors. Respondents could indicate "not applicable." Those respondents who selected "not applicable" are included in the "very much disagree" category.

Part of the story of long strugglers' collapse into bankruptcy almost certainly is the reckoning with involuntary liens and actual collections actions discussed above that are clear markers of irreparable financial situations.[115] In addition to creditors' legal actions, the persistent "drum beat" of collectors' calls also may wear on people, eventually leading to bankruptcy as a solution to their problems.[116]

115 *See supra* Section III.C.

116 *See* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 314–15 (2010).

G. *What Makes People Stay in the Sweatbox?*

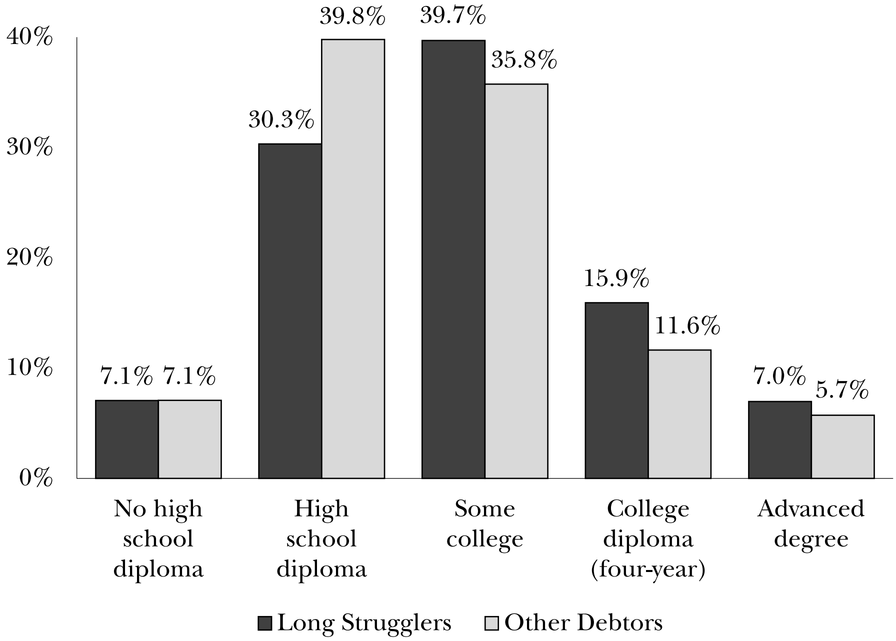
What might explain why the majority of people report struggling for so many years before they file bankruptcy, enduring collection attempts, working more, going without necessities, and losing their property? Our data cannot answer this question directly, but we can use the data to explore whether long strugglers differ in important ways from debtors who report struggling for less time. Before exploring the characteristics of long struggling debtors, we caution that an unmeasured variable may be at work, and that we cannot prove why people are electing to battle with their severe financial distress for a longer period of time before filing bankruptcy. Nonetheless, there are two important ways in which long strugglers differ from other debtors that we think are important parts of the story of why people report waiting longer to file.

First, long struggling debtors differ from other debtors on one notable demographic characteristic—education. The CBP has repeatedly inquired about education levels. In reporting on the 2007 CBP data, one of this Article's authors noted that the population of bankruptcy filers was more highly educated than the general United States population, and that Americans with some college education, but who had not completed a four-year degree, were the group most likely to file bankruptcy.[117]

Across all debtors in the 2007 CBP and Current CBP, the general distribution of educational achievement has changed modestly, with slight differences at the distribution's tails. There are fewer debtors with very low levels of education, particularly those without a high school diploma or GED—10.4% versus 7.3% in the 2007 and Current CBP, respectively. And the percent of debtors who have four-year college degrees and more advanced degrees has increased—16.7% versus 20.8% in the 2007 and Current CBP, respectively. Focusing solely on debtors in the Current CBP, as shown in Figure 4, more notable differences exist between long strugglers' and other debtors' educational attainment.

117 Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra* note 19, at 85, 86–87.

FIGURE 4. EDUCATION LEVELS OF PEOPLE IN BANKRUPTCY, CURRENT CBP, LONG STRUGGLERS VS. OTHER DEBTORS



Note: Respondents in the Current CBP were asked about their educational levels. Figure 4 reports the percentage of respondents indicating each educational level category, divided between those who reported struggling for more than two years ("long strugglers") and other debtors.

This relationship also can be conceptualized as the percentage within each educational cohort that reports a long struggle. Among those debtors with a high school degree or less, 61.9% reported struggling for more than two years. In comparison, 70.9% of debtors with at least a four-year college degree reported struggling more than two years. Debtors with more education are waiting longer to seek bankruptcy help.

Higher education levels could contribute to a longer delay in filing bankruptcy for two key reasons. People with more education may experience more fear about bankruptcy's stigma, whether as a pure matter of belief, or because they are more likely to have careers for which filing bankruptcy could be a substantial problem.[118] College degrees also may equip people with more knowledge of, or a willingness to assert their legal rights in advance of bankruptcy. More educated individuals may call the bluffs of debt collectors, understand whether they can protect their assets from seizure and

118 For example, despite passing the bar exam, law school graduates may not be admitted to particular states' bars if they have filed bankruptcy because they may be deemed not to have the requisite character, fitness, and moral qualifications to practice law as demonstrated by their "financial irresponsibility." Lori Shaw, *What Does it Take to Satisfy Character and Fitness Requirements?*, STUDENT LAW., Oct. 2008, at 12, 14.

judgment, or use nonbankruptcy tools, such as a cease-and-desist letter under the Fair Debt Collection Practices Act (FDCPA), to stave off debt collectors.[119]

Second, long strugglers differ from other debtors on one feeling about their bankruptcy filings—shame. We asked debtors about their feelings upon filing, and provided a list of major emotions—such as anger, relief, and shame—and a four-point Likert scale with poles of "not at all" and "a great deal."[120] Debtors who struggled longer were much more likely to indicate that they felt shame "somewhat" or a "great deal" than those who struggled for less than two years—71.1% versus 61.8% (χ^2 (3, N = 875) = 11.39, p = .010). Anticipating feeling shame upon filing bankruptcy may push people to delay filing and to spend more time in the sweatbox. Although long struggling debtors indicated that they felt shame upon filing more often than other debtors, overall, less than a third (32.0%) of all debtors responded that they felt shame "not at all" or only "a little bit." The majority of people who seek bankruptcy protection experience filing as shameful.[121]

IV. Debt Collection and Increased Time in the Sweatbox

Why do people now report struggling longer to pay their debts before filing bankruptcy? It could be that people simply are struggling longer. But long strugglers' responses about their higher education levels and feeling shame upon filing, coupled with their highlighting of debt collection pressures as a reason for their filings and that half have been sued by their creditors prior to their filing,[122] suggest another hypothesis more consistent with our findings.

Both higher education and shame at the thought of using the bankruptcy system may counsel people dealing with crushing debts to put off filing. Indeed, some people may never file bankruptcy at all, especially if they experience few external pressures, such as wage garnishment, that encourage filing. One significant external pressure comes from creditors' efforts to collect past due debts. In approximately the last ten years, debt origination, collection, and buying have changed dramatically. These changes in turn may have altered how some people think about their debt problems as legal problems addressable by using law, possibly even altering who files bank-

119 15 U.S.C. § 1692c (2012) (providing that a debt collector must cease communicating with a debtor upon receipt of a "ceasing communication" letter).

120 *See* Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 Law & Contemp. Probs. 177, 189–90 (2017) (discussing basic and major emotions).

121 This result supports the theory that filing bankruptcy remains stigmatized. *See supra* notes 73, 74, and accompanying text. Stigma can strongly influence feelings of shame, particularly depending on what culture values are marked as worthy of stigmatizing others for their nonconformity. *See* Paul Gilbert, *Evolution, Social Roles, and the Differences in Shame and Guilt*, 70 Soc. Res. 1205, 1215–19 (2003) (discussing how shame and stigma are linked with cultural values). *See generally* Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (1963) (linking stigma, social identity, and cultural values).

122 *See supra* tbl.1.

ruptcy, bringing long struggling debtors to bankruptcy as a way to deal with creditors.

Americans always have lived in debt and creditors always have dealt with delinquencies.[123] A generation ago, the creditors demanding payment from debtors often were the businesses that provided goods or services, such as family doctors and local grocers, and the local banks that financed large purchases, such as houses and cars. In contrast, debts now overwhelmingly are owed to the faceless corporation that issued the credit card used to purchase goods and services,[124] and to the equally large bank (and increasingly nonbank) that provided financing to purchase a car or home.[125] Relationships that once included local and personal elements have become business dealings divorced from actual transactions. When debtors fall behind on payments, the lack of a personal relationship may temper the urgency of paying, while emboldening creditors and debt collectors to try to collect.

This transformation from personal relationship to mere financial transaction marks an institutional shift in debtor-creditor relations. Although the changes in how debts are originated and collected started several decades ago, the most noticeable shift in out-of-court debt collection seems to have occurred in the last ten years. The shift is traceable in part to the Great Recession's liquidity crisis, which flooded the developing debt-buying market with charged-off debt, putting more Americans at risk of being called by debt collectors.[126] The Bureau of Labor Statistics estimates that the number of bill or account collectors grew 64% between 1998 and 2015, from approximately 288,000 to about 472,000 individuals.[127] Reports published by the

123 *See generally* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK (2011).

124 *See* Robert Harrow, *Largest U.S. Credit Card Issuers: 2017 Market Share Report*, VALUEPENGUIN, https://www.valuepenguin.com/largest-credit-card-issuers (last updated June 27, 2017) ("[T]he largest 10 credit card issuers . . . together hold roughly 89% of total revolving credit card debt in the United States.").

125 *See* Michele Lerner, *The Mortgage Market Is Now Dominated by Non-Bank Lenders*, WASH. POST (Feb. 23, 2017), https://www. .com/realestate/the-mortgage-market-is-now-dominated-by-nonbank-lenders//02/22/9c6bf5fc-d1f5-11e6-a783-cd3fa9_.?utm_=.4c638a15250f (noting that in 2011, 50% of new mortgage dollars were loaned by three big banks, but by 2016, those banks' share dropped to 21% while six of the top ten lenders were nonbanks); Trefis Team, *Which U.S. Banks Hold the Largest Share in the Country's Auto Lending Industry?*, NASDAQ (Nov. 11, 2016), http://www.nasdaq.com/article/which-us-banks-hold-the-largest-share-in-the-countrys-auto-lending-industry-cm708154 (listing the banks with the largest market share in auto loans).

126 *See* Jiménez, *supra* note 25, at 92 (overviewing the liquidity crisis' effect on charge-offs and debt buying).

127 Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 646–47 (2006) (discussing Bureau of Labor Statistics data and noting that "[t]he available evidence does, however, suggest an increase in the use of nonjudicial collections methods, such as dunning letters or telephone calls" in recent years); *Occupational Employment and Wages, May 2015*, BUREAU LAB. STAT., https://www.bls.gov/oes/2015/may/oes433011.htm#ind (last visited Oct. 2, 2018).

Federal Trade Commission and the Consumer Financial Protection Bureau highlight the problems consumers report encountering with debt collectors, indicating that collection methods have shifted.[128]

Our data likewise suggest that debt collections' drum beat has noticeably altered in recent years.[129] The 2007 CBP questionnaire asked debtors about their reasons for filing bankruptcy in a slightly different way from the Current CBP questionnaire. Instead of a list of eleven items that contributed to their bankruptcy filings, in the 2007 CBP, debtors could choose from a list of twenty items. And instead of allowing debtors to answer on a four-point Likert scale, the 2007 CBP questionnaire provided debtors with a binary choice of "yes" or "no" for each item. Among the twenty items in the 2007 CBP questionnaire was "aggressive collection efforts by creditors." Thus, in asking about "pressure from debt collectors," the Current CBP questionnaire includes a broader debt collection category.

In the Current CBP, 77.6% of all debtors either "very much agreed" or "somewhat agreed" that "pressure from debt collectors" contributed to their filings. In comparison, in the 2007 CBP 43.8% of all debtors identified "aggressive collection efforts by debtors" as a reason for their filings. As with debtors in the Current CBP, those debtors in the 2007 CBP who reported struggling with their debts for more than two years were more likely to report that "aggressive collection efforts" was a reason they filed bankruptcy. More than half (55.7%) of the 2007 CBP's long strugglers cited this reason versus 41.4% of the 2007 CBP's other debtors (χ^2 (1, N = 1,020) = 20.71, $p < .001$). Although the comparison between the 2007 CBP and Current CBP is not perfect because of changes in the question, these results generally support the idea that debt collection efforts are greater now than they were in 2007.

Additionally, over the last ten years, in-court debt collection has increased, particularly by debt buyers.[130] For example, an analysis of collec-

128 *See* CONSUMER FIN. PROT. BUREAU, CONSUMER EXPERIENCES WITH DEBT COLLECTION 5 (2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (reporting on consumers' complaints about debt collectors); NAT'L CONSUMER LAW CTR., CONSUMER DEBT COLLECTION FACTS (2018), https://www.nclc.org/images/pdf/debt_collection/Debt-Collection-Facts-2016.pdf (collecting facts about the debt collection industry); FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013), https://www.ftc.gov/sites/default/files/documents//practices-debt-buying-industry/debtbuyingreport.pdf (discussing debt buyers).

129 *See supra* note 116.

130 Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016), https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine (overviewing "the growing use of the courts to collect consumer debts"). Based on studies of debt collection, it is difficult to determine conclusively how much lawsuit activity has increased. *See* Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 3–5 (2008) (discussing debt collection in Virginia and noting that "there are signs that consumer debt collection accounts for a substantial portion of the civil filings in many states"). Nonetheless, long strugglers in particular report debt collection pressures as a trigger of filing bankruptcy, and their court records indicate that more than half were sued by their creditors prior to filing. *See supra* Section III.F, tbl.4.

tion suits filed in Florida, Missouri, New Jersey, and New Mexico counties shows that the number of collection lawsuits filed by debt buyers significantly increased beginning around 2006 and 2007.[131] Some debt buyers file so many lawsuits that their employees have admitted to "[r]obo-signing" affidavits to accompany the pleadings at a rate of 200 to 400 a day.[132]

The institutional shift in relationships between creditors, debt collectors, and American families may have changed how long struggling debtors think about how to deal with their debt problems. Long strugglers necessarily have the wherewithal, including education, but also simple grit to postpone filing bankruptcy for a very long time. They also overwhelmingly feel shame in needing to file.[133] For some long strugglers, bankruptcy always may have been an option that they knew about and considered. But without creditors' out-of-court collection efforts and lawsuits serving as an extra push, long strugglers may have put off filing forever.

Alternatively, for some long strugglers, creditors' collection efforts and lawsuits may prompt them to view what they had thought of as money problems as legal problems with legal solutions, including filing bankruptcy. Every delinquent debt raises legal issues. But not everyone will think of collection attempts as legal actions or of the possibility of stopping those attempts with bankruptcy. People often view legal problems as personal problems to be dealt with outside of the legal system—by doing nothing, through self-help, or by seeking the assistance of a third party.[134] Research shows that people consistently do nothing when faced with money problems that raise civil legal issues.[135] Even if people are aware of applicable law, they do not evoke law in response to civil legal problems, such as persistent calls

131 Kiel, *supra* note 130 (tracking collection suits filed from in the 1990s through 2014).

132 Peter A. Holland, *Notes From the Trenches: Current Trends in Consumer Junk Debt Buyer Litigation*, 49 MD. B.J. 18, 26 (2016) (citing *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, CONSUMER FIN. PROTECTION BUREAU (July 8, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/) (discussing actions against debt buyers); *see* Fred O. Williams, *Robo-Signed Collection Cases Under Fire*, CREDITCARDS.COM (Apr. 17, 2013), https://www.creditcards.com/credit-card-news/debt-buyer-robo-signing-under-fire-1282 (discussing litigation brought against Midland Funding regarding robo-signing).

133 *See supra* Section III.G.

134 *See* Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 951 n.5 (2009) [hereinafter Sandefur, *Fulcrum Point*] (defining a "civil justice problem" as "one that has civil legal aspects and raises civil legal issues, though the person who has the problem may never think of as it a legal problem and may never take legal action to try to resolve it"); Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, *in* TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 114 (Pascoe Pleasence et al. eds., 2007) [hereinafter Sandefur, *Importance of Doing Nothing*] (discussing what people do when they encounter a justiciable problem); *supra* note 28.

135 *See* Sandefur, *Importance of Doing Nothing*, *supra* note 134, at 112, 123 (discussing why people often take no action to address money problems).

from debt collectors.[136] At some point, a problem in someone's life transforms into a legal problem that a person may choose to address with a legal solution.[137]

Every collection attempt is an occasion for a debtor to identify collectors' calls and lawsuits as implicating law. Instead of collection remaining "alegal[ ]" for long struggling debtors,[138] persistent collection attempts from unfamiliar people and businesses may transform the inability to meet one's financial obligations into a legal problem. And in an environment of superficial debtor-creditor relationships, the shameful act of filing bankruptcy to manage a personal debt relationship may become an acceptable legal action to deal with a tenuous business affiliation.

In short, changes in how delinquent debts are bought, sold, and collected may have altered which households file bankruptcy, bringing long struggling debtors into the system who would not have filed in prior decades. With long strugglers actually filing bankruptcy, the length of time people report struggling with their debts prior to filing necessarily would increase. Given the benefits and costs of filing bankruptcy, it makes sense that the people who file still overwhelmingly have markers of middle-class status.[139] But the specific households that make up the middle class in bankruptcy very well may be different as compared to 2007 and prior decades.[140]

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136 *See* Catherine R. Albiston & Rebecca L. Sandefur, Essay, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117 (defining the "demand side" of law as "how people come to think about and act on their potentially justiciable experiences"); Sandefur, *Fulcrum Point*, *supra* note 134, at 950 ("In the United States and other developed nations, most civil justice problems are never taken to law."). To the extent that people did not know about bankruptcy, conceptualizing their money troubles as legal problems might prompt them to search for information about legal solutions, including bankruptcy. But before debtors look for information about bankruptcy, they need to view their problems as legal.

137 This is a complex process described by the "naming, blaming, claiming" framework. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 644–47 (1980); *see also* Leon H. Mayhew, Essay, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401, 403 (1975).

138 Sandefur, *Fulcrum Point*, *supra* note 134, at 953.

139 *See supra* note 89 and accompanying text.

140 Between 2007 and 2016, the total number of households that filed bankruptcy each year rose and then fell. For case filing statistics, see *Caseload Statistics Data Tables*, U.S. CTS., http://www.uscourts.gov/statistics-reports/caseload-statistics (last visited Nov. 4, 2018). There are many reasons for why filings would increase or decrease despite certain people—here, long strugglers—being more likely to file bankruptcy, such as outstanding consumer debt and people's income. *See* Bob Lawless, *Bankruptcies Down 12% in 2014, Forecast Predicts the Same Decline for 2015*, CREDIT SLIPS (Jan. 8, 2015, 3:25 PM), http://www.creditslips.org/creditslips/2015/01/bankruptcies-down-12-in-2014-forecast-predicts-the-same-for-2015.html (detailing "a mathematical model that . . . captur[es] the variation in bankruptcy filing rates"). That our hypothesis suggests that more long strugglers filed bankruptcy in recent years does not require that the total number of households that filed also increase.

Although changes in debt buying and collection emerge as the most plausible explanation consistent with the data for why people report struggling longer with their debts before filing bankruptcy, other plausible hypotheses exist. Chief among these explanations is the continuing effects of BAPCPA's changes to consumer bankruptcy. Bankruptcy practice likely stabilized within a year or so of BAPCPA's passage, which is when the 2007 CBP sample was taken. However, it could have taken debtors longer to fully account for BAPCPA. Research regarding "social spillover"—how the actions of others in people's neighborhoods can influence their decisions—indicates that consumer bankruptcy filing rates increase in a given year if filing rates in the same area increased the prior year.[141] Scholars link these results with people learning about bankruptcy from their networks of friends, family, coworkers, and neighbors.[142] Based on this theory, much of the knowledge transmission within communities about BAPCPA's hurdles to filing presumably occurred in the year or two after its enactment. It is conceivable, however, that it may have taken longer for social spillover's full effects to affect the timing of bankruptcy filings.

A small portion of the increase in time debtors report struggling between 2007 and the Current CBP thus may be attributable to BAPCPA rather than to a force outside the bankruptcy system. Nonetheless, the percentage of long strugglers already increased significantly between the 2001 and 2007 CBPs, coinciding with BAPCPA. Given that the percentage of long strugglers increased significantly yet again between the 2007 CBP and Current CBP, and during a time when bankruptcy law remained unchanged, it is more plausible to look to forces outside of the bankruptcy system.[143]

Ultimately, our research design cannot choose between competing explanations for the increase in how long people report struggling with their debts before filing bankruptcy. Regardless, the Current CBP has uncovered a significant change in how people seem to be filing bankruptcy. As explored in the next Part, longer delays before filing bankruptcy raise concerns about the harms of life in the sweatbox. Future experimental or quasi-experimental research designs with larger datasets that take a long-term view of household finances may help to answer questions about the mechanisms behind why people are struggling longer.

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141 *See* Foohey, *supra* note 28, at 1329–31 (overviewing social spillover in the context of consumer bankruptcy).

142 *See id.* (noting that this "learning" may be about bankruptcy's procedures, costs, and benefits, or about whether a person's community views filing bankruptcy as stigmatizing).

143 The transformation of debtor-creditor relations began decades ago. Prior increases in how long people report struggling with their debts prior to filing thus partly may be attributable to changes in debt collection. Debtors' reports about how long they spend in the sweatbox prior to filing increased between the 2001 CBP and 2007 CBP. *See supra* notes 98–100 and accompanying text. BAPCPA's enactment during the years between those two CBP iterations may have obscured the reality that a portion of the increase was attributable to the changing nature of debt collection.

V. Consequences of Years Living in the Sweatbox

From a financial perspective, people seriously struggling with debt should file bankruptcy sooner rather than later. Although it may be speculated that for some long struggling debtors, their delay may negate the need to file bankruptcy because their financial situation will resolve itself, most people who file owe debts that simply cannot be repaid absent a miracle or a lottery win. The median debt-to-income ratio of people who filed during the Current CBP was 2.46, meaning that it would take debtors almost two and a half years to repay what they owe, assuming they applied *all* of their income to their debts. Far from being a first resort, bankruptcy is the last refuge for struggling families, and their decisions to file do not reflect the utilitarianism bankruptcy law presumes.[144]

Based on their responses to the CBP questionnaire, for the people who ultimately file bankruptcy, their delay in filing only deepens the financial mire. The time they spend struggling negatively impacts their daily lives and likely harms their ability to realize bankruptcy's "fresh start."[145] What debtors tell us about their time in the sweatbox, combined with other research about living with effectively unpayable debts, provides an invaluable description of consumer credit's and bankruptcy's place in America's economy and life.

A. *The Costs of Financial Misery*

To squeeze a few more dollars out of their lives, people work overtime, forego basic necessities, face serious health consequences, deal with persistent debt collection calls, end up in court, lose homes, and sell what little they own. Behind this list of statistics of long strugglers' time in the sweatbox are families whose lives are altered by their prolonged struggles. Combined with other research about the consequences of overindebtedness, our data provide important details about the effects of years living in the sweatbox.

Financial misery hurts families.[146] For couples, financial distress is "complicated by the internal dynamic of the household."[147] Struggling with unmanageable debts can strain marriages and relationships.[148] Fights over

144 *See supra* Section I.B.

145 *See supra* note 20.

146 *See* Katherine Porter, *The Damage of Debt*, 69 Wash. & Lee L. Rev. 979 (2012) (overviewing the possible harms of unmanageable debt); Pottow, *supra* note 1, at 411 ("The debtor's family and others in her circle of intimates suffer too, experiencing the very tangible psychological and monetizable costs when a debtor endures general default.").

147 Mann & Porter, *supra* note 116, at 317–18.

148 *See generally* Marianne Cooper, Cut Adrift: Families in Insecure Times (2014) (discussing how families dealt with money problems during the Great Recession); Deborah Thorne, *Women's Work, Women's Worry?: Debt Management in Financially Distressed Families*, *in* Broke: How Debt Bankrupts the Middle Class, *supra* note 19, at 136 (overviewing the stress of debt on relationships).

how to make ends meet,[149] shifting of responsibilities for dealing with ever-worsening finances,[150] and watching loved ones deal with the emotional distress that comes with money troubles[151] may lead to separation and divorce.[152] Splitting one household into two only worsens the financial problems. In contrast, filing bankruptcy may actually salvage some relationships.[153]

For parents, financial troubles are compounded with worries over how the kids cope with the hardships.[154] If homes are foreclosed, children are displaced along with their parents, and may switch schools, possibly more than once, as their parents find a workable living situation.[155] Home loss is linked with educational regression.[156] Even if children are not displaced, they notice their parents' financial distress. Schedules change, diets change,

149 Thorne, *supra* note 148, at 147 (reporting that 80% of couples stated that they experienced increased tension and more frequent fights prior to filing bankruptcy).

150 Deborah Thorne, *Extreme Financial Strain: Emergent Chores, Gender Inequality and Emotional Distress*, 31 J. FAM. & ECON. ISSUES 185, 185 (2010) (interviewing couples who had filed bankruptcy and finding that the "mundane chore of paying bills" transforms into multiple chores before bankruptcy for which women become disproportionately responsible); Thorne, *supra* note 148, at 139 (finding that when "debts routinely outstrip income," the chore of paying mounting bills disproportionally falls to women).

151 Thorne, *supra* note 148, at 141 (finding that for both men and women, stress, insomnia, and depression accompanied overindebtedness).

152 *See* Jonathan D. Fisher & Angela C. Lyons, *Till Debt Do Us Part: A Model of Divorce and Personal Bankruptcy*, 4 REV. ECON. HOUSEHOLD 35, 48 (2006) (exploring the relationship between divorce and bankruptcy and noting that "future research" on marital disruption needs to more carefully model the role that financial distress plays within a marriage); Thorne, *supra* note 148, at 147, 149–51 (noting that "marital satisfaction [prior to bankruptcy] decreased as the reported levels of stress associated with debts increased" and exploring a possible causal relationship between financial problems and separation and divorce).

153 *See* Thorne, *supra* note 148, at 152 (positing that BAPCPA might "exacerbate the connection between financial distress and marital dissolution").

154 *See generally* ILONA PINTER, DAVID AYRE & EMILY EMMOTT, THE CHILDREN'S SOC'Y, THE DAMAGE OF DEBT: THE IMPACT OF MONEY WORRIES ON CHILDREN'S MENTAL HEALTH AND WELL-BEING (2016), https://www.childrenssociety.org.uk/sites/default/files/the-damage-of-debt-2016.pdf (detailing the results of interviews with parents and children in the United Kingdom about the effect of debt problems on children's well-being); Elizabeth Warren, Essay, *Bankrupt Children*, 86 MINN. L. REV. 1003 (2002) (discussing children and bankruptcy).

155 *See* Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, *supra* note 19, at 119, 130–32 (overviewing the effects of home loss on children, and noting that some children switched schools more than once); Warren, *supra* note 154, at 1004 (noting that children having to change schools is one of the consequences of bankruptcy).

156 Culhane, *supra* note 155, at 130.

and activities are scaled back as parents cut spending.[157] Such changes can confuse children, resulting in behavioral and emotional problems.[158]

The effects of prolonged financial problems extend beyond families to workplaces and communities. Existing in a state of money scarcity damages people's ability to lead productive lives.[159] Merely determining how one will survive day to day depletes people's mental resources.[160] This leaves little energy for attending to anything else,[161] including one's job, threatening people's livelihoods and leading to further economic drain.[162] People withdraw from society, adding to their isolation.[163] And the costs of life in the sweatbox are magnified by people's reported underutilization of health-related services and insurance, which can permanently harm people's health.[164]

The nonfinancial consequences of life in the sweatbox can be stated in terms of well-being and the ability to live productive and healthy lives, or in terms of externalities of unmanageable debt.[165] These consequences exist alongside the financial drain that occurs when people voluntarily sell their assets to pay their debts or when creditors resort to debt collection and legal actions.[166] The full cost of debtors' prebankruptcy privations, particularly health related, remains unknown, but undoubtedly is borne by all Americans.

It may seem counterintuitive, perhaps unbelievable, that people would sacrifice so much when doing so undoubtedly goes against their interests. But debtors' reported behavior in trying to cope with unmanageable debts parallels research regarding how people with "underwater" mortgages acted during the Great Recession's mortgage crisis. Underwater homeowners—people whose houses were worth less than the mortgages owed on them—generally were unwilling to abandon their homes, instead continuing to make mortgage payments despite having no reasonable prospects of recoup-

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157 *See id.* at 132; Porter, *supra* note 146, at 1020–21 (recounting interviewed debtors' answers regarding how unmanageable debt impacted their family relationships and children).

158 *See* Culhane, *supra* note 155, at 132; Sue Shellenbarger, *When Tough Times Weigh on the Kids*, WALL ST. J. (Sept. 24, 2008), https://www.wsj.com/articles/SB122220949327768879 ("[C]hildren are actually silent carriers of family financial stress.").

159 *See* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 1–16 (2013) (discussing how the lack of a valuable resource—time, money, food—"captures the mind" and causes people to focus on that which is scarce to the exclusion of other tasks).

160 *See id.* at 9–52 (overviewing the effect of scarcity on "fluid intelligence" and finding that money concerns reduce a person's IQ by the equivalent of thirteen to fourteen points).

161 *See id.* at 35–38 (describing the "tunneling tax").

162 *See* Porter, *Damage of Debt*, *supra* note 146, at 990 ("[T]he harms of debt may reverberate from the indebted individual to that person's family, workplace, and larger community.").

163 *See id.* at 1011 (discussing social exclusion).

164 *See id.* at 1006–07 (discussing health-related privations).

165 *See id.* at 984.

166 *See id.* at 1005 (noting the financial consequences of unmanageable debts).

ing their losses.[167] Even if they understood their untenable financial situations, homeowners refused to abandon what amounted to sinking ships because, as Brent White argued, they felt fear, shame, and guilt about their situations.[168] These emotional and social constraints that people felt seemed to have been "actively cultivated by the government, the financial industry, and other social control agents in order to induce individual homeowners to act in ways that [were] *against* their own self-interest . . . ."[169]

The mortgage crisis presents another tale of consumer lending's sweatbox. It also underscores the link between shame and financial failure that marks long strugglers' journeys to filing bankruptcy. And it highlights the role of the financial industry and government regulations, or lack thereof, on the industry in preserving consumer credit's sweatbox.

B. Accessing the Fresh Start

Bankruptcy laws provide a textbook example of how law can falter when knowledge about the problems to be regulated are discounted or ignored. Bankruptcy laws, in part, provide a check on consumer lending.[170] When Congress passed BAPCPA, it turned a blind eye to evidence about the problems bankruptcy must handle, and people reported struggling longer with their debts before filing.[171] Severe financial problems—such as those experienced by most people who file bankruptcy—plunge households into a deep, dark hole. Bankruptcy laws, in effect, provide a ladder out of that hole, helping people get back to level financial ground. The ladder's height should have been—and supposedly was—determined by the hole's depth. Indeed, the consumer credit industry and other proponents of BAPCPA effectively argued that the hole that the bankruptcy system must help debtors out of was shallower than presumed. And thus, BAPCPA shortened the ladder by making it harder and more expensive for people to file bankruptcy.

This Article's findings show that financial distress's hole is deeper than previously thought. Our data further show that, contrary to their own interests, people play a role in digging the hole. People also watch assets vanish through creditors' lawsuits and out-of-court collection efforts, while seeing their debts accumulate.

Miscalculation of the depth of bankrupt debtors' financial distress derives partly from faulty conceptions about people's decision-making pro-

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167 *See generally* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971 (2010).

168 *Id.* at 971–72.

169 *Id.* at 972.

170 *See* Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981–83 (1981) (discussing discharge as allocating risk of loss between debtor and creditor); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1426 (1985) (noting that discharge "leaves the determination of whether to extend credit to *creditors*, . . . who are better able, by observing individual debtors or by employing specific contractual covenants, to monitor individuals' consumption of credit").

171 *See supra* Section I.B.

cess about filing bankruptcy. The primary goal of consumer bankruptcy, both chapters 7 and 13, is to provide the debtor with a fresh start through the discharge of debts—that is, to get people back on level financial ground. Utilitarianism and economic productivity inform the most pervasive justifications for granting people a discharge.[172] Debtors' presumed utilitarian calculation that underlies debates about access to bankruptcy supposes more knowledge about law and shrewdness about timing than our data suggest people have. People's willingness to file is diminished further by feelings of shame about using bankruptcy, even when filing is clearly financially beneficial. Combined, the bankruptcy system is severely hampered in delivering the fresh start it is assumed to bestow on struggling families.

Receiving a true fresh start involves more than simply discharging most debts. Bankruptcy's discharge does not magically allow people to avoid future financial problems or to be equipped to meet future financial challenges. As research by two of this Article's authors has shown, receiving a discharge in chapter 7 does not always translate to an improved financial situation.[173] For a significant minority of debtors, their financial situation remains the same or even worsens in the months after they receive a discharge.[174] Likewise, less than half of chapter 13 filings result in either a discharge of debt or a significant other goal, such as saving a home.[175]

Whether people will encounter financial problems postbankruptcy depends on a variety of factors, but most prominently income.[176] Financial problems also emerge because of expenses, such as medical bills, which may increase unexpectedly.[177] In some instances, if a family has some cash and other assets saved, those assets may provide enough cushion to make it through a rough patch of unemployment or to cover unexpected expenses.

The longer people struggle to pay their debts before they file bankruptcy, the more assets they lose or sell and the more debt they incur. Some of this debt may be nondischargeable, leaving them with less of a fresh start

172 *See, e.g.*, Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1085 (1987) ("[M]andating [conditional debt relief] comes down to a diminution of the goal of economic productivity."); Jackson, *supra* note 170, at 1433 (describing the economic benefits of allowing people to discharge their debts in terms of human capital); Warren, *Principled Approach*, *supra* note 11, at 492 ("[Americans] need the chance to remain productive members of society, not driven underground or into joblessness by unpayable debt.").

173 *See generally* Porter & Thorne, *supra* note 20.

174 *See id.* at 69, 84 (reporting that 65% of interviewed debtors indicated that their financial situation improved postbankruptcy, and that 25% of debtors indicated that paying bills remained a struggle postbankruptcy).

175 *See* Porter, *supra* note 146, at 1017.

176 Porter & Thorne, *supra* note 20, at 70 (identifying "one key trait that distinguished those families who continued to struggle after bankruptcy: [l]ack of adequate steady income").

177 *Id.* at 105 ("[M]edical problems significantly correlate with families' postbankruptcy financial well-being. Medical problems were second only to job and income problems as reasons for a family's worse-off financial situation.").

postdischarge.[178] Of more concern, people who enter bankruptcy with few assets necessarily leave bankruptcy with few assets, regardless of applicable exemptions.[179] Fewer assets in turn mean that these households will face greater difficulties with the postdischarge challenges that bear on whether people are able to realize their fresh starts.

Overall, our data show that the promise of bankruptcy's discharge and fresh start has become even more attenuated. As people struggle to pay their debts longer before filing bankruptcy, fewer people should be expected to recover financially once they file. Narratives and knowledge about which people file bankruptcy, why they file, and when they file affect the structure of the Bankruptcy Code and whether the bankruptcy system itself will struggle to help families get back on their feet.

Conclusion

Contrary to claims that people who file bankruptcy are profligate overspenders looking for an easy break as a "first resort,"[180] the Current CBP data show that the individuals and families who seek refuge in the bankruptcy system try to pay their debts for an increasingly longer time prior to filing. The time that they spend in the sweatbox goes against their best interests and reduces their ability to achieve a fresh start. Rather than a calculated cost-benefit analysis, for most debtors, filing bankruptcy seems to be a shameful option of last resort.

Besides waiting longer to file, little about the people who file bankruptcy has changed over the last decade. Bankruptcy laws likewise have remained unchanged since BAPCPA. At their core, the results presented in this Article show consumer credit policies still have a key role to play in mitigating the harms of crushing debts, and that the bankruptcy system is less effective than previously assumed.

Prior to every household's bankruptcy filing are years of participation in the credit economy. Consumer credit laws and policies represent the first line of defense against the escalation and compounding of unmanageable debts' hardships. They provide the best way to balance the harms of lending with its benefits. These regulations are not meant to prevent borrowing, but rather to mitigate or prevent the financial harms and externalities that result from crushing debts.[181] The results of the CARD Act provide a prominent

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178 *See* 11 U.S.C. §§ 523, 727, 1328 (2012) (providing for the discharge in chapter 7 and 13).

179 *See* sources cited *supra* note 35 (discussing exemptions and "no-asset" cases).

180 Warren, *Principled Approach*, *supra* note 11, at 494.

181 *See generally* Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079 (2010) (arguing that unfettered access to credit prevents people from exercising financial freedom and imposes costs on people's well-being). For example, regulations may help convince people who otherwise would remain unbanked or underbanked to use financial products that ultimately will save them money. *See* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 3, 122–26 (2015) (detailing how the unbanked may spend up to 10% of their money to use their money, and

example of how evidence-based regulation can enhance value and help consumers. The $11.9 billion per year that the CARD Act saves Americans once was part of the sweatbox's financial drain on families.[182] What our data show about the harms of prolonged time in the sweatbox is an important step in quantifying the full range and extent of unmanageable debts' harms.

Likewise, without these data, prevailing narratives based on faulty assumptions resting on popular stereotypes about the people who file bankruptcy set the structure of the Bankruptcy Code and affect how attorneys and judges make decisions in individual cases. Our bankruptcy laws currently are designed to search out the rare instances of people who want an easy break and block them from filing. Instead, our bankruptcy laws should be concerned about ensuring that families who have worked hard to try to pay their debts and desperately need a break do not postpone filing because bankruptcy is so expensive and time-consuming. That is, our data show that the bankruptcy system should be worried about the costs and externalities of too many people not filing rather than the danger of too many people filing.

Updating narratives about who files bankruptcy is equally crucial to ensuring that bankruptcy judges can make decisions in individual cases that reflect reality. Similarly, when bankruptcy attorneys have access to evidence about the details behind people's financial decline prior to bankruptcy, they can better advocate for their clients. The bankruptcy system only functions effectively when attorneys, judges, and policymakers understand the reality of the problems to be solved.

Describing people's lives in the sweatbox is fundamental to understanding how our consumer credit and bankruptcy systems interact. This Article's results will move bankruptcy a considerable step forward in helping families realize the promise of its fresh start. And they will provide the foundation for future research into why people spend an increasingly long time in the sweatbox prior to filing, including the potential connection between debt collection and people's use of bankruptcy. Such research is essential to promoting the evidence-based policies that will balance the harms and benefits of consumer credit, and that will transform bankruptcy back into a system that truly helps people regain their financial footing.

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the costs of fringe lending that people who do not have access to mainstream banks often must use).

182 *See supra* note 18.