

# THE EDGES OF FORGIVENESS: THE MORAL POLITICS OF BANKRUPTCY REFORM IN THE UNITED STATES AND ENGLAND

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## ABSTRACT

Law and morality are, as they have always been, deeply intertwined. Much academic work has been dedicated to the moral assumptions underlying criminal justice reform, tort reform, and a number of other specific legal areas. Bankruptcy, heavily code-based as it is, is no exception. From the earliest days of gemstones as a form of currency, debtors and creditors have been at odds about what to do about those who cannot repay their loans. Since the establishment of formal bankruptcy systems, there has been contentious discourse over who gets to use those systems.

This Comment traces the moral judgments made about debtors surrounding recent bankruptcy reforms in England and the United States: the introduction of the Debt Relief Order and the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, respectively. Beginning with the shared history of these two schemes, through their divergence and recent reforms, tracing the development of the two systems reveals key beliefs by decision-makers in each. Ultimately, the two pieces of reform were driven by differing prevailing views about what kind of relief consumer debtors deserve and what the limits of that relief should be.

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Abstract.....	1
Introduction.....	2
I. Background.....	4
A. Shared Origins at Common Law.....	4
B. Major Moments in English Consumer Bankruptcy.....	7
C. Major Moments in American Consumer Bankruptcy .....	10
II. Analysis.....	13
A. English Bankruptcy Reform: The Debt Relief Order.....	14
1. Removal of the Administrative Fee .....	15
2. Expanded Eligibility .....	16
3. Debt Advice .....	19
B. American Bankruptcy Reform: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 .....	20
1. The Chapter 7 Means Test and Chapter 13 Disposable Income Analyses .....	23
2. Nondischargeability of Luxury Goods and Services .....	27
3. Mandatory Credit Counseling and Debtor Education.....	28
III. Conclusion .....	31

## INTRODUCTION

Insolvency law has long included moral judgments about persons who become insolvent. From Ancient Rome comes the notion of *fallitus ergo fraudator*: “insolvent, thus a swindler.”<sup>1</sup> Authorities could legally dismember such “swindlers,” distributing their bodies among their creditors in proportion to the debt owed to each.<sup>2</sup> While hardly a sustainable scheme for creditor recoveries, the available punishment for the insolvent clearly demonstrates the severity of negative moral judgment passed upon them in ancient societies.

Indeed, the oldest recorded debt predated the appearance of coins by three thousand years. As long as there has been debt, legal systems all over the world over have struggled with how to deal with those who could not pay their debts—the insolvent. Throughout history, creditors have

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<sup>1</sup> KARL GRATZER, INTRODUCTION TO HISTORY OF INSOLVENCY AND BANKRUPTCY FROM AN INTERNATIONAL PERSPECTIVE 6 (Karl Gratzler & Dieter Stiefel eds., 2008).

<sup>2</sup> *A (Very) Brief History of Bankruptcy and Debt in the West*, AM. BANKR. INST., <https://www.abi.org/feed-item/a-very-brief-history-of-bankruptcy-and-debt-in-the-west> [https://perma.cc/EUB6-MELS] (last visited Oct. 29, 2025).

enslaved insolvent debtors to pay off their debts.<sup>3</sup> For example, Sumerian reformer King Urukagina cancelled debt slavery upon his rise to power, around 2375 BC.<sup>4</sup> The ancient Lydians would not mint the first coins for another 1700 years.<sup>5</sup> Reformers eventually introduced a number of mechanisms to suspend debtors' payments, but critics continued to view reforms as "a perversion of the traditional and customary method of dealing."<sup>6</sup>

Moral judgment about debtors continues to guide bankruptcy reforms to the present day. The perennial question in bankruptcy reform is who deserves the clean slate that the bankruptcy discharge represents, who falls within the "edges of forgiveness"<sup>7</sup> that the scheme recognizes. Through comparison of recent consumer bankruptcy reforms in the United States and England, this Comment argues that the two systems have diverged because of differing prevailing moral views about debtors. The United States has become comparatively less debtor friendly in the last two decades due to a preoccupation with the idea that debtors have been abusing the system. England, on the other hand, has become significantly more debtor friendly through recent reforms that simply provide debtors an avenue for relief rather than scrutinizing their motivations or circumstances.

Part II of this Comment provides a brief history of the shared common law background of the American and English consumer bankruptcy systems.<sup>8</sup> Part III focuses on the recent moral discourse surrounding debtors in both jurisdictions through the lens of the Debt

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<sup>3</sup> It is worth noting that debt bondage still very much exists in the modern day. For a brief discussion, see *Debt Bondage Remains the Most Prevalent Form of Forced Labour Worldwide – New UN Report*, United Nations: United Nations Hum. Rts. Off. of the High Comm'r (Sep. 15, 2016), <https://www.ohchr.org/en/press-releases/2016/09/debt-bondage-remains-most-prevalent-form-forced-labour-worldwide-new-un> [<https://perma.cc/CU8C-KERQ>].

<sup>4</sup> *Urukagina, the Reformist King*, SUMERIAN SHAKESPEARE, <https://sumerianshakespeare.com/70701/77001.html> [<https://perma.cc/9MBM-WNVW>] (last visited Oct. 29, 2025).

<sup>5</sup> E.J. Neiburger & Don Spohn, *Prehistoric Money*, 54 CENT. STATES ARCHAEOLOGICAL J. 188, 188 (2007).

<sup>6</sup> Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 229 (1918).

<sup>7</sup> ELIZABETH WARREN, JAY WESTBROOK, JOHN A.E. POTTOW & KATHERINE M. PORTER, *THE LAW OF DEBTORS AND CREDITORS* 148 (8th ed. 2021) ("The grounds for total denial of a discharge now number 12... Reading them all is worthwhile. They are stern reminders of the edges of forgiveness in the bankruptcy system.").

<sup>8</sup> A brief note on terminology throughout this Comment: when referring to the modern English case alone, this Comment will generally use the word "insolvency," while for the American case, the common law history, and when referring to the two schemes together, this Comment will use the word "bankruptcy."

Relief Order (DRO) in England and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 in the United States. Finally, this Comment concludes by arguing that differing moral discourse surrounding bankruptcy reform has a significant impact both on what those reforms accomplish and how they impact real debtors.

## I. BACKGROUND

The history of bankruptcy is long, complicated, and sometimes unexpectedly violent. This Part provides an admittedly narrow cross section of that history. Subpart A discusses key developments in the consumer bankruptcy system at common law from the earliest bankruptcy statutes until 1711, the shared background for the modern American and English systems. Subpart B details significant developments in English consumer bankruptcy since 1711, concluding with the events leading up to the introduction of the DRO.<sup>9</sup> Finally, Subpart C describes the evolution of the American consumer bankruptcy system from the founding of the United States to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

### A. SHARED ORIGINS AT COMMON LAW

The American and English<sup>10</sup> consumer bankruptcy systems are particularly ripe for comparison due to their shared origins at early modern common law. This common history provides a control—any changes to the law in either country since American independence have occurred against the same backdrop. It is important to note that the phrase “consumer bankruptcy” would have been somewhat of a misnomer at the time the two bodies of law diverged. Between 1570 and 1861, bankruptcy was only available to traders, merchants, and those “engaged in commercial and financial ... pursuits.”<sup>11</sup>

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<sup>9</sup> The Insolvency Act of 1986, while significant, largely reformed the corporate insolvency system and is thus outside the scope of this comment. *See Insolvency Act 1986*, 1986 c. 45. For a description of the English insolvency system as it operated under the Insolvency Act of 1986, *see* Alexandra Rihm, *Reorganization Schemes Under U.K. Insolvency Act of 1986: Chapter 11 as a Springboard for Discussion*, 73 *LOY. L.A. INT'L & COMP. L.J.* 985, 998–1019.

<sup>10</sup> It is worth noting that Wales also follows the English consumer bankruptcy system. LORRAINE CONWAY, *HOUSE OF COMMONS LIBR., BANKRUPTCY 4* (2022). For brevity, when this comment uses “English,” it refers to bankruptcy scheme employed in England and Wales.

<sup>11</sup> Ian P.H. Duffy, *English Bankrupts, 1571-1861*, 24 *AM. J. LEGAL HIST.* 283, 283 (1980).

Bankruptcy historians typically consider the first English insolvency legislation to be the 1542 Act of Parliament 34 & 35, ominously titled “An Act Against Such Persons as Do Make Bankrupt.”<sup>12</sup> In part, the act read:

Where divers and sundry persons, craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown ... and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience ... cause their said lands, tenements, fees, annuities, offices, goods, chattels, wares, merchandizes, and debts, to be searched, viewed, rented, and appraised, and to make sale of the said lands, tenements, fees, annuities, and offices ... for true satisfaction and payment of the said creditors that is to say; to every of the said creditors a portion, rate and rate like, according to the quantity of their debt.<sup>13</sup>

While the Act did contain something resembling a modern consumer bankruptcy, it lacked key mainstays of modern consumer insolvency proceedings. There was no discharge, no protection of future income or property, and no stay of collection activities.<sup>14</sup>

Clearly unsatisfied with the behavior of those crafty “sundry persons,” Parliament passed a further bankruptcy statute in 1571, noting in the preamble that “those kind of persons have and still do increase [debt] into such great and excessive numbers, and are like more to do, if some better provision not be made for the repression of them.”<sup>15</sup> The 1571 statute also codified the exclusion of ordinary people from bankruptcy, applying the statute only to tradesmen.<sup>16</sup> These provisions follow naturally from prevailing concerns at the time. The statute arose from contemporary anxieties about misconduct among merchants which harmed both trade itself and businesses that employed much of England’s workforce.<sup>17</sup>

For tradesmen, bankruptcy under the 1571 statute was a tough row to hoe. Upon petition from a creditor, the Lord Chancellor appointed

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<sup>12</sup> Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. & AM. L. REG. 1, 1 (1919); Statute of Bankrupts 1542, 34 & 35 Hen. 8 c.4 (Eng.).

<sup>13</sup> Statute of Bankrupts 1542, 34 & 35 Hen. 8 c.4 (Eng.). This statute is old enough that the original printing used Early Modern English spelling and capitalization conventions. Spellings have been modernized here for ease of reading.

<sup>14</sup> See *id.*; Robert DeMarco, *History of Bankruptcy – Part 6*, AM. BANKR. INST. (July 6, 2013), <https://www.abi.org/feed-item/history-of-bankruptcy-%E2%80%93-part6> [<https://perma.cc/GW2K-Y9T5>].

<sup>15</sup> An Act Touching Orders for Bankrupts 1571, 13 Eliz. c. 7, § 1 (Eng.). Spelling and capitalizations modernized.

<sup>16</sup> *Id.*

<sup>17</sup> Duffy, *supra* note 11, at 284.

commissioners to determine whether the debtor was a trader eligible for bankruptcy and whether the debtor had committed an “act of bankruptcy” with the intent to defraud creditors.<sup>18</sup> If both of these tests were satisfied, commissioners had wide latitude to bring about recovery for creditors: “[Commissioners] were authorized to seize the bankrupt, examine him and his wife under oath, break down the door of his house and sell his goods and land.”<sup>19</sup> Fraud could result in fines or jail, and refusal to answer a commissioner’s questions (or concealment of more than twenty pounds worth of property) could result in pillory and the loss of an ear.<sup>20</sup>

The next major bankruptcy statute, the 1624 Act for the Description of a Bankrupt and Relief of Creditors, did not provide relief for the intrepid tradesmen.<sup>21</sup> Indeed, the act began by chastising debtors because “daily experience shows that the number and multitude of bankrupt do increase more and more, and also the frauds and deceit invented and practiced for the avoiding and deluding the penalties of the good laws in that behalf already made and the remedy by them provided.”<sup>22</sup> In response to the (allegedly) continued misbehavior on the part of debtors, Parliament took even more drastic steps to curb what it saw as unacceptable levels of abuse in the bankruptcy system. The 1624 statute specified that all existing bankruptcy law “shall be in things largely and beneficially construed and expounded for the aid, help, and relief of the creditors.”<sup>23</sup> This severe prescribed interpretation reflected Parliament’s view that the most effective way to deal with increasing fraud was to give commissioners broad latitude to crack down on misbehaving debtors.<sup>24</sup>

By the dawn of the eighteenth century, debtors began to see some relief from the stringent measures of centuries past. The 1705 Act to Prevent Frauds Frequently Committed by Bankrupts and the 1711 Act for Repealing a Clause Made in the Twenty First Year of the Reign of King

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<sup>18</sup> *Id.* Most “acts of bankruptcy” were some variation on physically fleeing to avoid one’s creditors. For a list, see VIII W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 237–238 (London, Methuen & Co. LTD.).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> While “a bankrupt” was the parlance of the time, this Comment will use the modern, and somewhat friendlier, term “debtor” throughout.

<sup>22</sup> An Act for the Description of a Bankrupt and Relief of Creditors 1624, 21 Jac. c. 19, § 1 (Eng.). Spelling and capitalizations modernized.

<sup>23</sup> *Id.* (alteration in original).

<sup>24</sup> Duffy, *supra* note 11, at 285.

James the First included a number of debtor-friendly improvements.<sup>25</sup> These statutes introduced two principal features of modern consumer bankruptcy to English Law: maintenance payments for cooperative debtors and the discharge of any remaining debts following the completion of the bankruptcy.<sup>26</sup> Not only was there a discharge for the first time, but the administrative requirements of the discharge demonstrated a shift of power from creditors to quasi-judicial commissioners.<sup>27</sup> The debtor was entitled to their discharge, as a matter of law, if the majority of commissioners certified that the debtor had complied with the law.<sup>28</sup> The changes made by the 1705 and 1711 statutes reflected both the practical and moral pitfalls of the existing system. On the practical side, an incarcerated debtor typically had trouble earning money to repay their creditors.<sup>29</sup> On the moral side, the change was motivated by increasing compassion for debtors.<sup>30</sup> The new discharge faced a series of changes during the early eighteenth century, becoming variously more and less difficult to achieve, but the possibility of the coveted fresh start for debtors remained on the books.<sup>31</sup>

After the 1705 and 1711 statutes were enacted in England, the United States declared its independence from England, and the laws and moral judgments diverged. However, as each consumer bankruptcy system treaded its distinct path, it is worthwhile to remember the arc of their shared history. Harsh crackdowns on debtor misbehavior may have made sense from a particular moral perspective, but ultimately did not create the greatest value for all parties. As demonstrated by the 1705 and 1711 statutes, a pro-debtor moral tilt need not be mutually exclusive with a system that disproportionately benefits creditors.

## B. MAJOR MOMENTS IN ENGLISH CONSUMER BANKRUPTCY

Parliament kicked off the eighteenth century with a 20-year back-and-forth on the question of just how broadly discharges should be

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<sup>25</sup> Act to Prevent Frauds Frequently Committed by Bankrupts 1705, 4 Ann. c. 17 (Eng.); Act for Repealing a Clause Made in the Twenty First Year of the Reign of King James the First 1711, 10 Ann. c. 15 (Eng.). The title of the 1711 statute has been truncated here for the purposes of space—the full title is over seventy words long, and no official shortened title exists.

<sup>26</sup> Levinthal, *supra* note 12, at 18

<sup>27</sup> *Id.* at 19–20.

<sup>28</sup> *Id.* at 19–20.

<sup>29</sup> *Id.* at 18–19.

<sup>30</sup> *Id.* at 18.

<sup>31</sup> Duffy, *supra* note 11, at 288–89.

available to debtors. In 1716, Parliament purposely allowed the discharge provisions in effect to expire.<sup>32</sup> In 1718, they were reinstated for all debtors.<sup>33</sup> In 1729, the discharge privilege expired again, but was revived in 1730 only for already existing bankruptcy commissions.<sup>34</sup> The discharge provision was permanently restored for all debtors in 1732.<sup>35</sup> The next English bankruptcy reforms came with the Insolvent Debtors Act of 1813, which provided for debtors to be released from prison under specified circumstances.<sup>36</sup> With the Insolvent Debtors Act, English law was participating in a wider trend away from debtors' prisons.

English bankruptcy law continued to adopt a noticeably more pro-debtor stance as the nineteenth century wore on. By 1825, the English law recognized voluntary bankruptcy for the first time.<sup>37</sup> English debtors had a new opportunity to control their own bankruptcy process, rather than waiting for creditors to drop the metaphorical other shoe.<sup>38</sup> In 1830, Parliament directed either the courts or an assignee or receiver to manage bankruptcies, depending on the proceeding.<sup>39</sup> In 1861 tradesmen and ordinary people alike gained access to the general bankruptcy system.<sup>40</sup> The Bankruptcy Act of 1883 (and its 1890 amendments) was a more mixed development. For the first time, the law recognized a distinction between fraudulent bankruptcy and simply misfortunate bankruptcy.<sup>41</sup> On the other hand, the 1883 Act imposed drastic penalties on debtors and strict limitations on granting discharge.<sup>42</sup> Debtors could be arrested for failing to attend an examination or if a court found that they were likely to flee.<sup>43</sup> Discharge could be denied to a debtor who "brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living."<sup>44</sup> So, while bankruptcy was newly available to everyday people, debtors were now subjected to scrutiny and moral judgment about whether their debts had been incurred in a rash or unjustifiable manner.

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<sup>32</sup> *Id.* at 288.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Insolvent Debtors Act 1813, 53 Geo. 3 c. 102 (Eng.).

<sup>37</sup> William H. Hotchkiss, *Bankruptcy Laws, Past and Present*, 167 N. AM. REV. 580, 581 (1898).

<sup>38</sup> Bankrupts Act 1825, 6 Geo. 4. c. 16 (Eng.).

<sup>39</sup> See Hotchkiss, *supra* note 37 at 581.

<sup>40</sup> *Id.* at 581–82.

<sup>41</sup> *Id.* at 582

<sup>42</sup> *Id.*

<sup>43</sup> Bankruptcy Act 1883, 46 & 47 Vict. c. 52, § 25 (Eng.).

<sup>44</sup> *Id.* § 28.

Perhaps none articulated the changing attitudes towards debtors in England over the course of the nineteenth century more eloquently than William H. Hotchkiss, who wrote in 1898 that “[o]ld things are passing away. Sympathy sits where sternness sat. The nimble debtor is no longer part of a tragedy. He belongs to the serio-comic drama instead. Bankruptcy is not a crime, but a condition; not always a disgrace, but rather a disease; and present laws, while providing relief for him who owes, seem but negatively valuable to him who owns.”<sup>45</sup>

English bankruptcy law, particularly throughout the nineteenth century demonstrates a clear, real-time struggle to balance the interest of debtors (him who owes) and creditors (him who owns). For Hotchkiss, the balance was easy to strike. He noted that “the [bankrupt] needs protection against the [creditor]; the creditor can take care of himself.”<sup>46</sup> For Parliament, the balance was not so clear. As Professor Louis E. Levinthal put it, the discharge brought English law into the modern age of bankruptcy law, leaving “the question uppermost in the minds of the legislators being whether the State or the creditors should have the dominant authority over the proceedings.”<sup>47</sup> The ever-shifting fate of the discharge and the extent to which debtors were considered punishable rather than pitiable demonstrate how decision-makers grappled with the consequences of their bankruptcy system.

A century later, by the early 2000s, UK households had taken on mounting levels of consumer debt.<sup>48</sup> Lending in Britain increased by almost billion pounds per month in 2002, leaving the average adult Briton in eighteen thousand pounds of consumer debt.<sup>49</sup> That amount of debt was sustainable for most households—only a quarter of British households reported financial distress between 2001 and 2002—but likely would not stay that way forever.<sup>50</sup> As one report from the University of Bristol’s Personal Finance Research Centre put it: “The historically high levels of borrowing are, therefore, problematic for [only a] small number of people. But a far greater number would, potentially, be at risk of serious

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<sup>45</sup> Hotchkiss, *supra* note 37, at 591.

<sup>46</sup> *Id.*

<sup>47</sup> Levinthal, *supra* note 6, at 20.

<sup>48</sup> ELAINE KEMPSON, PERS. FIN. RSCH. CTR., OVER-INDEBTEDNESS IN BRITAIN: A REPORT TO THE DEPARTMENT OF TRADE AND INDUSTRY 1 (2002).

<sup>49</sup> DEP’T FOR CONST. AFFS., A CHOICE OF PATHS: BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT 8 (2004).

<sup>50</sup> KEMPSON, *supra* note 48, at 23.

difficulties in an economic downturn or a period of sustained increase of interest rates.”<sup>51</sup>

In the face of a possible consumer debt crisis, the Department for Constitutional Affairs (DCA) began to examine the pitfalls of the consumer bankruptcy system in England for its increasingly over-indebted population.<sup>52</sup> As part of that investigation, the DCA identified a group of especially vulnerable debtors: those who could not even afford to enter bankruptcy.<sup>53</sup> The poorest Britons had no real access to formal debt relief remedies. Individual voluntary agreements and debt management plans require funds to make a repayment plan, and bankruptcy, as a later parliamentary report would describe it, “is an expensive and disproportionate response for a debtor with no real assets.”<sup>54</sup> Following a series of consultation papers, the DCA formed a working group of representatives from the debt advice sector and the Insolvency Service to develop a non-court-based debt relief scheme, intended to be inexpensive and straightforward for the poorest debtors.<sup>55</sup> The result of those working groups was, in large part, rolled into the Tribunals, Courts, and Enforcement Act of 2007, which first introduced the DRO to the English insolvency system.<sup>56</sup>

### C. MAJOR MOMENTS IN AMERICAN CONSUMER BANKRUPTCY

The US Constitution explicitly recognizes the importance of a national bankruptcy system. Article I provides that “Congress shall have power to ... establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”<sup>57</sup> Indeed, in Federalist No. 42, James Madison remarked that the federal bankruptcy power “is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely

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<sup>51</sup> *Id.* at vi.

<sup>52</sup> *See, e.g.*, DEP’T FOR CONST. AFFS., *supra* note 49, at 2.

<sup>53</sup> LORRAINE CONWAY, HOUSE OF COMMONS LIBR., DEBT RELIEF ORDERS (DROs) 5 (2024).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* at 4.

<sup>57</sup> U.S. CONST. art. I, § 8, cl. 4.

to be drawn into question.”<sup>58</sup> The actual execution of the bankruptcy clause was not the subject of extensive debate among the founders.<sup>59</sup>

Once Congress finally took up their task of establishing uniform bankruptcy law in the United States, more than a decade after the Constitution was ratified, the law it produced was substantially similar to that of England.<sup>60</sup> America’s first bankruptcy law, the Bankruptcy Act of 1800, largely followed the English model of personal bankruptcy.<sup>61</sup> Most of its key provisions sound familiar: Bankruptcy was limited to merchants and it was exclusively an involuntary proceeding, invoked upon a creditor’s petition.<sup>62</sup> The Act did seem to follow England’s lead. It extended more leniency to the honest debtor, providing for a discretionary allowance to be paid to the debtor from the estate, depending on what portions of their overall claims creditors received.<sup>63</sup>

The England-inspired Bankruptcy Act of 1800 was not intended to provide a permanent scheme for American bankruptcy—the act was written to expire after five years.<sup>64</sup> It only survived three before being repealed.<sup>65</sup> The cited reasons for repeal were myriad, and included equity concerns, like the limited availability of bankruptcy and the difficulty of appearance in federal court as well as practical concerns, like the difficulties presented to creditors seeking to recover from an already imprisoned debtor.<sup>66</sup>

The United States would be in and out of federal bankruptcy acts for the better part of the next century, and would not have another federal bankruptcy act until the Bankruptcy Act of 1841.<sup>67</sup> The Bankruptcy Act of 1841 was the first to provide for voluntary bankruptcy proceedings, initiated by the debtor, and an early exemption system, protecting up to

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<sup>58</sup> THE FEDERALIST NO. 42 (James Madison).

<sup>59</sup> *Artl.S8.C4.2.2 Historical Background on Bankruptcy Clause*, Const. Annotated, [https://constitution.congress.gov/browse/essay/artl-S8-C4-2-2/ALDE\\_00013181/\[https://perma.cc/X9HB-UE57\]](https://constitution.congress.gov/browse/essay/artl-S8-C4-2-2/ALDE_00013181/[https://perma.cc/X9HB-UE57]) (last visited Oct. 20, 2024).

<sup>60</sup> Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 19, 2 Stat. 19 (1800) (repealed 1803); Hotchkiss, *supra* note 37, at 582.

<sup>61</sup> Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L. J. 226, 228 (1976).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Bankruptcy Act of 1800, § 64, ch. 19, 2 Stat. 19, (repealed 1803).

<sup>65</sup> Act of Dec. 19, 1803, § 1, ch. 6, 2 Stat. 248 (repealing the Act of Apr. 4, 1800).

<sup>66</sup> Countryman, *supra* note 61.

<sup>67</sup> Act of Aug. 19, 1841, § 1, ch. 9, 5 Stat. 440 (repealed 1843).

\$300<sup>68</sup> worth of apparel, furniture, and other necessities.<sup>69</sup> However revolutionary, the Bankruptcy Act of 1841 was even shorter-lived than its predecessor: it took effect in 1842 and was repealed in 1843, on the basis of creditor discontent with the ease of discharge.<sup>70</sup> In the aggregate, creditors under the Bankruptcy Act of 1841 only recovered 10 percent of the value of their claims, *before* administrative expenses.<sup>71</sup> The Bankruptcy Act of 1867 arose out of the financial strife following the Civil War, and notably introduced the *composition agreement*, a scheme allowing debtors and creditors to negotiate the terms of repayment, usually for less than the full amount of the loan.<sup>72</sup> The Bankruptcy Act of 1867 was repealed in 1878, once again on the basis of small creditor recoveries and too-frequent discharges.<sup>73</sup>

It is worth noting that, at this point, the United States had a federal bankruptcy process for only sixteen of its eighty-nine years under the Constitution.<sup>74</sup> At long last, enter the Bankruptcy Act of 1898.<sup>75</sup> From 1898 to the present, the United States has enjoyed a continuous federal bankruptcy system.<sup>76</sup> The Bankruptcy Act of 1898 and its later amendments created a few notable features of bankruptcy that persist to the present day: the creation of the US Trustee, the establishment of relatively well-defined exceptions to discharge, and voluntary bankruptcy of corporations.<sup>77</sup> Over the next eighty years, a series of amendments to the Bankruptcy Act of 1898 created the municipal bankruptcy scheme

<sup>68</sup> For context, in 1841, an average laborer in New York who worked would earn \$59.40 per week. In 2024, the U.S. average weekly wage was \$1,192 and the federal exemption for household goods was \$8,000. See Estelle M. Stewart & Jesse Chester Bowen, *History of Wages in the United States from Colonial Times to 1928*, BULL. OF U.S. BUREAU OF LAB. STATS. NO. 604 (Dep't of Lab.), 1929 (average weekly wage in 1841); ECONOMIC NEWS RELEASE, USUAL WEEKLY EARNING OF WAGE AND SALARY WORKERS: FOURTH QUARTER 2024 (2025), [https://www.bls.gov/news.release/archives/wkyeng\\_01222025.htm](https://www.bls.gov/news.release/archives/wkyeng_01222025.htm) [<https://perma.cc/8BN8-6FWP>] (average weekly wage in 2024); 11 U.S.C. § 522(d)(3) (2024 federal exemption for household goods); Countryman, *supra* note 61, at 229 (describing the Bankruptcy Act of 1841).

<sup>69</sup> Countryman, *supra* note 61, at 229.

<sup>70</sup> *Id.*; see generally Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

<sup>71</sup> Countryman, *supra* note 61, at 229.

<sup>72</sup> *Id.*; *The Evolution of U.S. Bankruptcy Law: a time line*, FED. JUD. CTR., (Sept. 25, 2019), <https://www.fjc.gov/content/323917/evolution-us-bankruptcy-law-time-line> [<https://perma.cc/5RK6-YKDR>] [hereinafter *The Evolution of U.S. Bankruptcy Law*].

<sup>73</sup> Countryman, *supra* note 61, at 230.

<sup>74</sup> Cong. Rsch. Serv., *Restrictions on State Bankruptcy Power*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artI-S8-C4-2-6/ALDE\\_00013185/#ALDF2000062\\_00020220/](https://constitution.congress.gov/browse/essay/artI-S8-C4-2-6/ALDE_00013185/#ALDF2000062_00020220/) [<https://perma.cc/6VQG-5RHL>] (last visited Oct. 20, 2024).

<sup>75</sup> See generally Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

<sup>76</sup> *The Evolution of U.S. Bankruptcy Law*, *supra* note 72.

<sup>77</sup> *Id.*

(later known as Chapter 9) along with the corporate reorganization, adjustment, and wage-earner plans.<sup>78</sup>

The last major pre-2005 bankruptcy overhaul came with the Bankruptcy Reform Act of 1978.<sup>79</sup> The 1978 Act introduced the modern Bankruptcy Code and overhauled the 1898 framework, establishing separate bankruptcy courts and judgeships, consolidating Chapters X, XI, and XII into Chapter 11, and creating Chapter 13 for individual consumers.<sup>80</sup>

## II. ANALYSIS

This Part compares specific facets of the consumer bankruptcy schemes in the United States and England, and the moral discourse surrounding each. Through comparison of the consumer bankruptcy systems in the United States and England, it will become clear that the divergent evolution of the two systems in the modern day is the direct result of differing moral questions: Who uses the system? Who deserves the clean slate that bankruptcy provides?

This Part first considers the introduction and subsequent reforms of the DRO in England, specifically focusing on the removal of the ninety-pound administrative fee to enter the debt relief order, expansions to debtor eligibility, and increased availability of debt advice for potential DRO debtors. I argue that these reforms to the English consumer insolvency system demonstrate a clear interest in prioritizing access to the insolvency system over interrogating whether a debtor is morally deserving of relief.

This Part then reviews the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, focusing on the Chapter 7 means test and the Chapter 13 disposable income analysis, the treatment of luxury goods, and mandatory credit counseling. I argue that these reforms, in contrast to those in England over the last twenty years, make the American consumer bankruptcy system less debtor friendly and were in large part motivated by moral judgments of which debtors deserve relief.

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<sup>78</sup> *Id.*

<sup>79</sup> See generally Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

<sup>80</sup> *The Evolution of U.S. Bankruptcy Law, supra* note 72.

## A. ENGLISH BANKRUPTCY REFORM: THE DEBT RELIEF ORDER

The DRO was introduced to the English insolvency repertoire as part of a series of reforms made in 2007 to the 1986 Insolvency Act.<sup>81</sup> A DRO freezes an eligible debtor's responsibility to repay their debts, subjects them to a series of restrictions for the next twelve months, and writes off qualifying debt, so long as the debtor's circumstances do not change and the debtor does not breach any restrictions.<sup>82</sup> The restrictions are not particularly onerous, and may even seem common sense: debtors seeking DROs may not make false representations to official receivers, falsify or conceal documents, fraudulently dispose of property, engage in business or obtain credit without disclosing the prospective DRO, or otherwise fail to comply with the DRO's requirements.<sup>83</sup> The debtor eligibility requirements are also relatively straightforward. In order to receive a DRO, a debtor must be domiciled or have done business in England or Wales in the previous three years, must not be involved in other insolvency proceedings, must not have made undervalued or preference transfers in the last two years, and must fall under the designated limits on surplus income and possession value.<sup>84</sup> Finally, which debts are eligible for discharge (referred to as "qualifying debts")<sup>85</sup> within the DRO scheme may be familiar to American bankruptcy practitioners. Debtors may not use a DRO to avoid family court obligations, student loans, confiscated money for drug trafficking or other criminal offenses, or certain tort damages.<sup>86</sup>

The DRO is a particularly useful vehicle to evaluate changing moral attitudes towards debtors in England over roughly the same period as the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) and its fallout. The statutory structure of the DRO is specific and self-contained. It is detailed in terms of who can be a debtor, what a discharge takes, and what that discharge includes once a debtor gets it. By focusing on the eligibility criteria, qualified debt, and restrictions placed on debtors seeking a DRO, an increasingly pro-debtor, pro-access moral tilt in England becomes clear.

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<sup>81</sup> CONWAY, *supra* note 53, at 6.

<sup>82</sup> *Id.* at 4.

<sup>83</sup> Tribunals, Courts and Enforcement Act 2007, c. 15, sch. 17 (Eng.).

<sup>84</sup> *Id.* sch. 18.

<sup>85</sup> The Insolvency Serv., *How To Get a Debt Relief Order (DRO)*, GOV.UK (June 28, 2024), <https://www.gov.uk/guidance/how-to-get-a-debt-relief-order-dro> [<https://perma.cc/8ZB7-KFRH>].

<sup>86</sup> Insolvency (England and Wales) Rules 2016, SI 2016/1024, r. 9.2.

### 1. Removal of the Administrative Fee

Whether debtors could practically access the DRO was a key consideration at the time of its introduction. To hear one member of Parliament explain it, the goals were to “improve and extend the range of solutions available to help debtors with low incomes and debts ... to promote financial inclusion ... [of] those who are disproportionately affected by debt and are generally least able to deal with competing creditor demands.”<sup>87</sup> A debtor who is nominally able to access a DRO, but cannot afford the fees or is unable to navigate the DRO bureaucracy will not become a debtor (in the legal insolvency sense) at all.<sup>88</sup> In the legislation that introduced the DRO and in subsequent amendments to the scheme, the main legislative focus has become clear: To ensure access to the scheme, both as a statutory matter and a practical one, rather than interrogating the choices debtors have made to find themselves in need of the DRO.

Prime Minister Rishi Sunak’s 2024 budget updated the DRO scheme in a few key ways to improve accessibility.<sup>89</sup> The budget removed a ninety-pound administrative fee, which was previously a requirement to enter a DRO.<sup>90</sup> The motivation for the change as explained by then-Chancellor of the Exchequer Jeremy Hunt was clear: “For some people the best way to resolve debts is through a debt relief order. But getting one costs £90 which can deter the very people who need them the most. So having listened carefully to representations from Citizens Advice, I today relieve pressure on around 40,000 families every year by abolishing that £90 charge completely.”<sup>91</sup> The removal of the ninety-pound fee was not limited to only those under a certain income threshold, or those with acceptable debt.<sup>92</sup> The removal of the fee applied uniformly to thousands of British families for whom ninety pounds represented a substantial

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<sup>87</sup> HC Deb (5 Mar. 2007) (457) col. 1318.

<sup>88</sup> Colletta Smith, *Debt Relief Orders: Fee of £90 Axed for Poorest*, BBC (Mar. 29, 2024), <https://www.bbc.com/news/business-68669762> [<https://perma.cc/STR7-7D28>] (discussing how being unable to afford the DRO fee priced individuals out of insolvency).

<sup>89</sup> Prime Minister Sunak’s 2024 budget was presented to parliament and received Royal Assent on May 24, 2024. *Finance Act (No. 2) 2024 Stages*, UK Parliament: Parliamentary Bills, <https://bills.parliament.uk/bills/3690/stages> [<https://perma.cc/9VF3-ZQM4>] (last visited Sep. 27, 2025).

<sup>90</sup> *Budget Summary: Key Points from Jeremy Hunt’s Speech*, BBC (Mar. 7, 2024), <https://www.bbc.com/news/business-68359756> [<https://perma.cc/34FX-2ZBM>].

<sup>91</sup> HM Treasury & The Rt Hon Jeremy Hunt MP, *Spring Budget 2024 Speech* (Mar. 6, 2024).

<sup>92</sup> See Smith, *supra* note 88.

barrier to debt relief.<sup>93</sup> Andrew Shore, Assistant Director of Policy at the Insolvency Service, saw things much the same way: “We know that the fee was, for some, a barrier to dealing with their debts. Removing it is a big step forward in helping those most in need to find a sustainable solution that works for them.”<sup>94</sup>

The removal of the ninety-pound fee was more than a gesture of good faith towards Britain’s most distressed debtors—it has had tangible results on DRO filings. A BBC report on Insolvency Service statistics found that DRO filings dramatically increased after the removal of the fee.<sup>95</sup> One month after the fee was suspended, 3,436 DROs were taken out—more than any single month since the introduction of the DRO in 2009 and 63 percent higher than the monthly average between 2014 and 2024.<sup>96</sup> That increase has meant real help for the poorest debtors, who now have access to debt relief that was not previously accessible. Filing for a DRO requires that one have a surplus of less than seventy-five pounds *monthly*.<sup>97</sup> For debtors, having enough income to afford a DRO, and not so much income that they no longer qualify for one, was a challenging needle to thread. The alleviation of that challenge is difficult to overstate. As one debt coach put it to the BBC, “I’ve known lots of people who [were] too poor to go bust . . . I can think of three people specifically at this moment in time who it will be manna from heaven to get their debts cleared without having to find the ninety-pound fee.”<sup>98</sup>

## 2. Expanded Eligibility

In the run-up to the introduction of the DRO in England, many a newspaper column inch was dedicated to the debt habits of Britons. As Dee O’Connell, writing for *The Observer*, opened a piece on Britons’ debt, “Britain is in the grip of a debt crisis. A profound shift in our behaviour has turned a country that has long taken pride in itself as a nation of stable

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<sup>93</sup> See *id.*

<sup>94</sup> The Insolvency Serv., *Changes to Debt Relief Orders Will Support People in Financial Distress*, GOV.UK (Apr. 5, 2024), <https://www.gov.uk/government/news/changes-to-debt-relief-orders-will-support-people-in-financial-distress> [https://perma.cc/DC2V-WK4V].

<sup>95</sup> Kevin Peachey, *More People Seek Help for Debts as Fee Scrapped*, BBC (May 17, 2024), <https://www.bbc.com/news/articles/ce5183105470> [https://perma.cc/X8QC-VSL8].

<sup>96</sup> *Id.*

<sup>97</sup> Surplus income is income calculated after payment of tax, national insurance, and “normal household expenses,” not dissimilar to the Chapter 13 disposable income analysis in the American context. CONWAY, *supra* note 53, at 9.

<sup>98</sup> Smith, *supra* note 88.

savers into a land of credit-happy consumers, intoxicated by their new purchasing power and opportunities to borrow and spend... ‘Once I started to borrow, I decided, “In for a penny, in for £10,000,”’ [said one debtor].<sup>99</sup> Despite some examples of those spending far beyond their means, popular discourse in the first decade of the twenty-first century did not tend to assign blame for increasing debt to debtors themselves.<sup>100</sup> One *Economist* article took a noticeably compassionate tone with the indebted (and, in many cases, overindebted) Britons: “Putting personal finances in order is never a painless process. ‘All debt is bad debt,’ says Mr. [Brian] Dennehy—if only because it eventually has to be repaid. With interest rates on the rise, it may be best to bite the bullet sooner rather than later.”<sup>101</sup>

Some contemporary scholars maintained that the English debt load did not constitute a debt crisis.<sup>102</sup> For example, Professor Iain D.C. Ramsay of Osgoode University reported that “record-breaking debt-to-income levels noted in the English press of 140% comprise primarily home mortgages, and both the Bank of England and an expert report concluded that the proportion of households facing financial problems has remained fairly stable over the past decade.”<sup>103</sup> However, debt crisis or no, debt was disproportionately impacting certain groups: those in the lowest income brackets, single parents, and women.<sup>104</sup>

The tone of relative compassion towards would-be debtors under DROs continued beyond the media and into the halls of Parliament. At an early 2007 reading of the Tribunals, Courts and Enforcement Bill in the House of Lords, Lord Bellingham (a Conservative, it should be noted) said, “on debt relief, a range of new solutions will be targeted at those who are least able to cope. Given the record amount of money owed in society, we support measures that will make it easier for such people to sort their lives out.”<sup>105</sup>

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<sup>99</sup> Dee O’Connell, *Money to Burn*, THE GUARDIAN (Nov. 30, 2003), <https://www.theguardian.com/lifeandstyle/2003/nov/30/shopping.features> [<https://perma.cc/GLG4-LKMU>].

<sup>100</sup> For some further discussion of the British media’s relationship with consumer debt and spending around this period, see Iain D.C. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales*, 7 THEORETICAL INQ. L. 625, 652 n. 95 (2006).

<sup>101</sup> *Get Tough with Yourself*, THE ECONOMIST: 1843 MAGAZINE (Jul. 9, 2004), <https://www.economist.com/news/2004/07/09/get-tough-with-yourself> [<https://perma.cc/AL96-3SWN>].

<sup>102</sup> Ramsay, *supra* note 100, at 654.

<sup>103</sup> *Id.* at 654.

<sup>104</sup> *Id.*

<sup>105</sup> See HL Deb (5 Mar. 2007) (457) col. 1351-1352.

Since the introduction of the DRO, the key eligibility requirements have been expanded several times. Most recently, Prime Minister Sunak's 2024 budget made significant changes to certain debtor eligibility requirements. First, the budget increased the permissible vehicle value in a DRO from 2,000 pounds to 4,000 pounds.<sup>106</sup> Unlike Chapter 7 bankruptcy in the United States, vehicle value is part of a threshold eligibility requirement for DROs—those with more than the prescribed value limit in their vehicles simply cannot enter a DRO.<sup>107</sup>

The vehicle value increase demonstrates that the DRO remains narrowly tailored to those it sought to serve—the lowest-income debtors—but is also responsive to the actual circumstances those debtors face. At its inception in 2009, the DRO allowed a debtor to have a vehicle of up to 1,000 pounds in value.<sup>108</sup> A 2006 survey showed that the vast majority of the Citizens Advice Bureau, one debt advisor's clients fell under this limit.<sup>109</sup> In a study of 567 Bureau clients, only 30 percent reported owning a motor vehicle with any value at all.<sup>110</sup> Of those who owned vehicles, 48 percent valued their vehicle at 1,000 pounds or less.<sup>111</sup> Thus, the 1,000 pounds would only have excluded approximately 16 percent of Citizens Advice clients—those likely to already have lower income and in more debt than average. Even though the scheme was widely inclusive of lower-income debtors, the relatively low vehicle valuation limit attracted some criticism.<sup>112</sup>

The eligible vehicle value was first increased in 2021, in conjunction with the Breathing Space economic relief plans.<sup>113</sup> As part of

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<sup>106</sup> CONWAY, *supra* note 53, at 8.

<sup>107</sup> *Debt Relief Order: Which Assets Are Included?*, STEPCHANGE DEBT CHARITY, <https://www.stepchange.org/debt-info/how-assets-affect-a-debt-relief-order.aspx> [https://perma.cc/JJ8A-WFRX] (last visited Mar. 23, 2023).

<sup>108</sup> GUIDE TO DEBT RELIEF ORDERS, THE INSOLVENCY SERVICE 11 (2013).

<sup>109</sup> The Citizens Advice Bureau, now referred to simply as Citizens Advice, is a network of charities offering confidential advice on a variety of legal issues. *See We are Citizens Advice, We are the People's Champion*, Citizens Advice, <https://www.citizensadvice.org.uk/about-us/information/what-we-do/> [https://perma.cc/ZL7Q-N5J7] (last visited Mar. 23, 2025); JANE PHIPPS & FRANCESCA HOPWOOD ROAD, *DEEPER IN DEBT* 7 (2006).

<sup>110</sup> Phipps & Road, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> *See* Chrystin Ondersma, *Small Debts, Big Burdens*, 103 MINN. L. REV. 2211, 2250 (2019).

<sup>113</sup> *Ad-hoc Statistics on the Breakdown of Newly Eligible Debt Relief Orders by Eligibility Criteria Change, England and Wales, 1 July 2021 to 30 June 2022*, GOV.UK: THE INSOLVENCY SERV. (Oct. 11, 2022), <https://www.gov.uk/government/statistics/ad-hoc-statistics-on-the-breakdown-of-newly-eligible-debt-relief-orders-by-eligibility-criteria-change-england-and-wales-1-july-2021-to-30-june-2022/ad-hoc-statistics-on-the-breakdown-of-newly-eligible-debt-relief-orders->

a series of government responses to increasing debt and economic distress during the COVID-19 pandemic, the value limit for vehicles was doubled from 1,000 pounds to 2,000 pounds.<sup>114</sup> Craig Simmons, Head of Debt Policy and Strategy at the Money and Pensions Service, described Breathing Space and its related financial policy changes as “one of many landscape shifting initiatives we expect to see as part of the UK Strategy for Financial Wellbeing, and we continue to trial, deliver and promote other interventions which can make a real difference to people’s lives.”<sup>115</sup> Subsequent data shows that the increase in vehicle value did have a positive impact on debtor access. In the year after the changes to DRO eligibility for vehicles, 11 percent of newly eligible filers became eligible because of the increased value threshold.<sup>116</sup>

In 2024, the limit was doubled again from 2,000 pounds to 4,000 pounds.<sup>117</sup> On the importance of this change, Andrew Shore of the Insolvency Service explained that “some people need a car for work, mobility or family reasons, but the value of vehicles has risen a lot in recent years. Raising the value of the car you can own will enable more people to access a DRO when they need one.”<sup>118</sup> The availability of government-supported debt advising services, and their central role in COVID-era reforms to debt and insolvency in England demonstrate a commitment to expanding access and aid for debtors in need.

### 3. Debt Advice

Finally, this Subpart concludes with a brief discussion of the debt advice available to English debtors. England has a strong culture of citizen advice charities, both publicly and privately funded, which dates back to the period just before World War II.<sup>119</sup> England has had a long history of

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by-eligibility-criteria-change-england-and-wales-1-july-2021-to-30-june-2022  
[<https://perma.cc/2PLV-8JU4>] [hereinafter *Ad-hoc Statistics*].

<sup>114</sup> *New Measures to Help Vulnerable People in Problem Debt*, GOV.UK: THE INSOLVENCY SERV. (May 10, 2021), <https://web.archive.org/web/20230615100425/https://www.gov.uk/government/news/new-measures-to-help-vulnerable-people-in-problem-debt>.

<sup>115</sup> John Glen, *Breathing Space to Help Millions in Debt*, GOV.UK (Feb. 6, 2020), <https://www.gov.uk/government/news/breathing-space-to-help-millions-in-debt> [<https://perma.cc/T2SN-LTWY>].

<sup>116</sup> *Ad-hoc Statistics*, *supra* note 113.

<sup>117</sup> Insolvency Serv., *supra* note 94.

<sup>118</sup> CONWAY, *supra* note 53, at 6–7.

<sup>119</sup> *History of the Citizens Advice Service*, CITIZENS ADVICE  
<https://web.archive.org/web/20151118040555/https://www.citizensadvice.org.uk/about-us/how->

privately funded services: the Money Advice Trust, founded in 1991, is one such service and is funded by banks, building societies, private trusts, and the Government.<sup>120</sup> Citizens Advice is funded much the same way, by a mix of private and government contributions.<sup>121</sup> These debt advice organizations are effective in their missions. The two organizations reported in 2021 that they had collectively served over 420,000 people in the previous year.<sup>122</sup> Almost half of Citizens Advice clients reported an improvement in their mental health, and 90 percent of Money Advice Trust clients reported a reduction or stabilization of their debts.<sup>123</sup>

The availability of debt advice has gone hand in hand with insolvency reform. When discussing the Breathing Space reforms, which included expanding access to the DRO, several key players discussed the availability of advice as a key underpinning of those reforms. The chief executive of the Money Advice Trust explained that “Breathing Space will provide a powerful new incentive for people in problem debt to seek the free advice they need and give them the time and protections necessary to get back on the road to financial health.”<sup>124</sup>

## B. AMERICAN BANKRUPTCY REFORM: THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

Finally, we arrive at the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).<sup>125</sup> As its name suggests, BAPCPA reflected a belief in Congress that the bankruptcy scheme created by the Bankruptcy Reform Act of 1978 was too debtor friendly and ripe for abuse.<sup>126</sup> This subpart proceeds by providing an overview of the economic

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citizens-advice-works/who-we-are-and-what-we-do/history-of-the-citizens-advice-service/ (Nov. 18, 2015).

<sup>120</sup> *Our Funding*, MONEY ADVICE TRUST, <https://moneyadvicetrust.org/partnerships/our-funding/#:~:text=We%20are%20funded%20by%20a,the%20money%20and%20credit%20environment> (last visited Mar. 23, 2025) [https://perma.cc/6YBG-TMBW].

<sup>121</sup> See CITIZENS ADVICE ANNUAL REPORT AND ACCOUNTS 2023–2024, CITIZENS ADVICE 20–22 (2024).

<sup>122</sup> Stuart Stamp, *Toward Good Practice: A Review of Money Advice Services and Debt Management Systems in Ireland, the United Kingdom, France and Germany* 8 (U.N. Rsch. Inst. Soc. Dev., Working Paper No. 2023-05, 2023).

<sup>123</sup> *Id.*

<sup>124</sup> Glen, *supra* note 115.

<sup>125</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 [hereinafter BAPCPA].

<sup>126</sup> ELIZABETH WARREN, JAY WESTBROOK, JOHN A.E. POTTOW & KATHERINE M. PORTER, *THE LAW OF DEBTORS AND CREDITORS*, 11-12 (8th ed. 2021) (noting that “most bankruptcy specialists believe that the basic premise of BAPCPA is wrong (and its name Orwellian)”).

conditions surrounding BAPCPA, and the moral judgments that proponents of the bill made in response to those conditions.<sup>127</sup> Then, this subpart discusses the underlying moral discourse surrounding three of BAPCPA's most infamous provisions: the Chapter 7 means test and Chapter 13 disposable income analyses, the nondischargeability of luxury goods purchases, and the mandatory credit counseling and debtor education requirements.

Supporters of BAPCPA relied on economic data and theories when discussing BAPCPA's impact on creditors. As Senator Chuck Grassley explained in a press release days before the Senate Committee on the Judiciary held hearings on BAPCPA, "Someone has to pick up the tab when people get out of repaying their own debts. When losses are frequent and the economy is weak, businesses are more likely to raise prices for other consumers to offset those losses."<sup>128</sup> This economy-focused approach to BAPCPA's impact on creditors continued as BAPCPA made its way through the Senate.

BAPCPA's supporters were concerned by the prospect of increasing creditor losses due to consumer bankruptcy. In the early 1980s, only 0.3 percent of American households filed for bankruptcy annually.<sup>129</sup> By the early 2000s, that number rose to 1.5 percent.<sup>130</sup> As the House Report on BAPCPA (which ultimately recommended passage) noted: "the recent escalation of consumer bankruptcy filings does not appear to be just a temporary event, but part of a generally consistent upward trend."<sup>131</sup> Supporters of BAPCPA emphasized the impact of increasing consumer bankruptcy filings on the economy. Particularly of concern were losses to creditors from consumer bankruptcy discharges. The House Report specifically noted that credit card issuers lost out on \$18.9 billion in 2003.<sup>132</sup> Unsurprisingly, banks and credit card issuers were extensive lobbyists for BAPCPA.<sup>133</sup> Testimony before the Senate Committee on the

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<sup>127</sup> BAPCPA, *supra* note 125.

<sup>128</sup> Press Release, Chuck Grassley, Iowa State Senator, Grassley Renews Effort to Reform Bankruptcy Code (Feb. 2, 2005) (on file on Sen. Grassley's official website).

<sup>129</sup> Steve Maas, *Bankruptcy Reform of 2005 Sharply Reduced Filings*, NBER DIGEST, Dec. 2019, at 5.

<sup>130</sup> *Id.*

<sup>131</sup> H.R. REP. NO. 109-31, pt. 1, at 3 (2005).

<sup>132</sup> H.R. REP. NO. 109-31, pt. 1, at 5 (2005). Despite these losses, it is worth noting that the credit card industry still cleared \$45 billion in profit in 2003. See LUKASZ DROZD, WHY CREDIT CARDS PLAYED A SURPRISINGLY BIG ROLE IN THE GREAT RECESSION 9 (2021).

<sup>133</sup> Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 ILL. L. REV. 375, 376 (2007).

Judiciary also centered on the economic losses for creditors. Kenneth Beine, then-president of Shoreline Credit Union, described the situation at his institution, “At Shoreline Credit Union, bankruptcy filing and losses have shown a steady increase since 1996. In 1996, losses due to bankruptcy as a percentage of total charged-off loans was 4.6 percent. That grew to... 71.9 percent in 2003, and 50.3 percent in 2004... our losses have increased significantly: in 1998, losses were \$15,309... in 2003, losses were \$115,191.”<sup>134</sup>

A broad economic theory when it came to creditors was a common thread throughout BAPCPA’s journey. Law Professor Todd J. Zywicki contended that the increase in filings caused creditors to increase interest rates, prices, and fees to recoup their losses in the form of a “bankruptcy tax.”<sup>135</sup> Zywicki argued to the committee that creditors of all stripes (utilities, mortgage providers, retailers, credit card providers, and hospital systems, to name a few) were passing along their bankruptcy losses to consumers—“we all pay for bankruptcy abuse in higher down payments, higher interest rates, and higher costs for goods and services.”<sup>136</sup> Oft-cited among BAPCPA supporters was the idea that this increase in costs for goods and services would cost each American family \$400 yearly.<sup>137</sup> A credit industry lobbyist later admitted to inventing this figure.<sup>138</sup>

When discussing the potential impact on debtors, BAPCPA’s supporters took a different tack, focusing on alleged abuses and moral improprieties of debtors. Professor Zywicki pitched BAPCPA’s approach to debtors like this, “[t]he Bill will also reinforce the lesson that bankruptcy is a moral as well as an economic decision. Filing bankruptcy reflects a decision to break a promise made to reciprocate a benefit bestowed upon you... Regrettably, the personal shame and social stigma that once restrained opportunistic bankruptcy filings has declined substantially in recent years.”<sup>139</sup> Professor Zywicki was not alone in

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<sup>134</sup> *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Comm. On the Judiciary*, 109th Cong. (2005) (prepared statement of Kenneth Beine).

<sup>135</sup> *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Comm. On the Judiciary*, 109th Cong. (2005) (prepared statement of Prof. Todd J. Zywicki).

<sup>136</sup> *Id.*

<sup>137</sup> See Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 13.

<sup>138</sup> *Id.* at 14.

<sup>139</sup> *Bankruptcy Reform: Joint Hearing Before the Subcomm. On Commercial and Administrative Law of the House Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 98 (1999) (statement of Prof. Todd J. Zywicki) (In a hearing on an earlier version of the bill that would ultimately become BAPCPA, Professor Zywicki explained a little differently: “People ask me, why do you care about

viewing BAPCPA as a necessary step to protect the bankruptcy system against morally wayward filers. Senator John Cornyn asserted that “we need to restore a greater sense of personal responsibility to our financial system and to prevent the abuses of the bankruptcy law that we have witnessed in recent years.”<sup>140</sup> Even President George W. Bush appeared to be influenced by remarks like those of Professor Zywicki and Senator Cornyn. At BAPCPA’s signing, President Bush remarked that “America is a nation of personal responsibility, where people are expected to meet their obligations.”<sup>141</sup>

While moral judgments about debtors are evident throughout BAPCPA’s legislative journey, the knock-on effects of those moral judgments are most clear in three changes made by BAPCPA: the Chapter 7 means test and Chapter 13 disposable income analyses, new exceptions to discharge introduced by BAPCPA, and the mandatory credit counseling requirement.

### *1. The Chapter 7 Means Test and Chapter 13 Disposable Income Analyses*

Much of BAPCPA’s moral discourse centered on the availability of the Chapter 7 discharge. For BAPCPA’s supporters, debtors who could afford to pay their creditors, even partially, should not be allowed an unconditional discharge. As Kenneth Beine noted in his testimony, “what concerns [credit unions], however, are the cases of abuse by those who file Chapter 7 and totally walk away from their debt, even though they can afford to pay.”<sup>142</sup> Senator John Cornyn was more explicit in his moral judgment of debtors, arguing that discharge “should be available to those who are unable to pay – not to those who are simply unwilling to pay.”<sup>143</sup>

More specifically, BAPCPA sought to deny debtors with the ability to pay back their debts the near-immediate discharge of Chapter 7. Instead, those debtors would now be redirected into Chapter 13 plans and be made to repay their creditors over a longer period of time. The mechanism to sort out debtors who truly deserved the relief of Chapter 7

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bankruptcy? I think the answer is that an analogy is to shoplifting... shoplifting is wrong; bankruptcy is also a moral act.”)

<sup>140</sup> *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Comm. on the Judiciary*, 109th Cong. 27 (2005) (statement of Sen. John Cornyn).

<sup>141</sup> Presidential Statement on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 1 Pub. Papers 640 (Apr. 20, 2005).

<sup>142</sup> Beine, *supra* note 134.

<sup>143</sup> Cornyn, *supra* note 140.

from the rest was the means test provisions of BAPCPA, which ultimately superseded 11 U.S.C. § 707(b)(2) as it sat prior to BAPCPA's passage.<sup>144</sup> The new § 707(b)(2) establishes a method to evaluate debtor eligibility for Chapter 7 by evaluating the debtor's income and expenses in relation to their debt.<sup>145</sup> Too much income, or not enough debt, gives debtors an uphill battle to continue a Chapter 7 case.

The manner in which BAPCPA's means test provisions changed the existing code is a clear reflection of the moral discourse to which the new means test responded. First, the language. Prior to BAPCPA, § 707(b)(2) allowed dismissal of a Chapter 7 case for "substantial abuse."<sup>146</sup> BAPCPA struck the word "substantial," allowing dismissal of a case for simply "an abuse."<sup>147</sup> This change in language significantly broadened the scope of debtor conduct that would constitute a dismissible abuse.<sup>148</sup> However, it appears that Congress had one particular form of dismissible abuse in mind: filing for Chapter 7 with too much disposable income, or not enough debt.

The mechanics of the means test betray the moral judgments made about debtors with too many assets trying to avail themselves of Chapter 7's speedy discharge. The means test is not an eligibility requirement—those are in Chapter 1 of the Bankruptcy Code.<sup>149</sup> The means test creates a presumption of abuse for debtors who have too many assets, and thus fail the means test.<sup>150</sup> Debtors are presented with relatively narrow (and onerous) grounds for rebutting the presumption.<sup>151</sup> And these debtors who, in the words of one senator, "are simply unwilling to pay," can fail the means test with relatively few assets.<sup>152</sup> Indeed, a debtor earning only \$167 in monthly income may fail the means test and be required to convert their

<sup>144</sup> See BAPCPA, *supra* note 125, § 102(a)(1), 119 Stat. 23, 27 (2005).

<sup>145</sup> 11 U.S.C. § 707(b)(2)(A)(i). For a more in-depth discussion of the mechanics of the means test, see also Ned W. Waxman and Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, but "Totality" is Determinative*, 45 HOUS. L. REV. 901 (2008).

<sup>146</sup> BAPCPA, *supra* note 125, § 102(a)(2)(B)(i)(III), 119 Stat. 23, 27 (2005).

<sup>147</sup> *Id.*

<sup>148</sup> Waxman & Rucki, *supra* note 140, at 904.

<sup>149</sup> See 11 U.S.C. § 109.

<sup>150</sup> To "fail" the means test means to have sufficient assets in relation to debts that the rebuttable presumption of abuse arises. To "pass" means to fit within the test's requirements, and that the debtor is safe from dismissal under § 707(b).

<sup>151</sup> The presumption is rebuttable by "demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces," and debtors must itemize each expense that should be considered when adjusting their income calculation. 11 U.S.C. § 707(b)(2)(B).

<sup>152</sup> Comyn, *supra* note 140.

cases to Chapters 11 or 13 proceedings, or leave bankruptcy court empty-handed.<sup>153</sup>

For the debtor who is bounced out of Chapter 7 and turns to Chapter 13, the statutorily endorsed judgment of spending habits and ability to pay continues. In Chapter 13, a debtor proposes a repayment plan. The debtor makes installment payments to the trustee, who then distributes those payments *pro rata* according to creditor priority.<sup>154</sup> Typically, a debtor must pay all of their disposable income over the length of a plan, between three and five years.<sup>155</sup> A debtor's disposable income is their current monthly income minus amounts "reasonably necessary to be expended" to support the debtor or dependents, satisfy domestic support obligations, operate a business, or make certain limited charitable or religious contributions.<sup>156</sup> However, what is in fact reasonably necessary for debtors to expend is an oft-litigated and highly subjective portion of the Bankruptcy Code, putting judges in the tricky position of passing judgment on the spending habits of individual debtors.

Take the education of debtors' children, for example. Is private school reasonably necessary to support a debtor's dependents? Generally speaking, private school is not considered a reasonably necessary expense.<sup>157</sup> However, debtors may be able to continue paying for private school throughout a Chapter 13 case if there is a compelling need.<sup>158</sup> A compelling need may arise from mental health concerns or medical conditions, essentially requiring bankruptcy judges to assess whether a debtor's child is physically or psychologically able to be successful in public school.<sup>159</sup>

The situation gets even stickier when debtors send their children to religious private schools. Is religious devotion enough to make private school tuition reasonably necessary, absent some other compelling reason? In some circuits, no. As the First Circuit put it in *In re Watson*:

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<sup>153</sup> Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 665 (2005).

<sup>154</sup> *Chapter 13 – Bankruptcy Basics*, U.S. CTS. (last visited November 17, 2024), <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> [https://perma.cc/RV2C-6A5J].

<sup>155</sup> *Id.*

<sup>156</sup> 11 U.S.C. § 1325(b)(2).

<sup>157</sup> *In re Webb*, 262 B.R. 685, 689 (Bankr. E.D. Tex. 2001).

<sup>158</sup> *In re Golematis*, 2012 WL 3583154, at \*3 (Bankr. E.D. Mich. 2012).

<sup>159</sup> *See In re Webb*, 262 B.R. 685 (Bankr. E.D. Tex. 2001) (holding that a child's generalized anxiety disorder, ADHD, and potential obsessive-compulsive mood disorder reasonably necessitated private school); *See also In re Crim*, 445 B.R. 868 (Bankr. M.D. Tenn. 2011) (holding that debtors could continue paying for private school for their chronically ill daughter).

To allow the Watsons to pay parochial school tuition over the life of the proposed plan would require already severely reduced creditors to fund the private education of the Watsons' children. We can appreciate the importance attached by the Watsons to the religious values of a parochial school education. Still, it is not impossible to inculcate those values outside of a school, and the court could reasonably conclude... that it would be improper to impose the added expense on the Watsons' unpaid creditors where the children's educational needs could otherwise be met in the public schools.<sup>160</sup>

In *Watson*, the First Circuit upheld the bankruptcy court's determination that the strong religious ties in the debtor's family are not enough to allow payment of religious private school tuition through the length of a Chapter 13 case.<sup>161</sup> On the other hand, in *In re Cleary*, the Bankruptcy Court for the District of South Carolina held that religious private school tuition *was* a reasonably necessary expense in Chapter 13.<sup>162</sup> In that case, the court noted that the debtor had strong religious convictions, and that his wife worked in the parochial school that his children attended.<sup>163</sup> Each of these holdings place a different weight on their debtors' religious convictions, demonstrating the types of difficult and deeply personal decisions that bankruptcy judges are called upon to second-guess. To determine what is a reasonable expense, judges may find themselves with the unenviable duty of evaluating the sincerity of debtors' religious beliefs.<sup>164</sup>

For consumer debtors, particularly post-BAPCPA, the bankruptcy process in the United States is marked by close scrutiny and judgment. Putative Chapter 7 debtors are subjected to an onerous means test in order to determine whether they are deserving of the Chapter 7 discharge, or whether they are "totally walk[ing] away from their debt, even though they have the ability to pay."<sup>165</sup> For those forced into Chapter 13, the outlook is not necessarily better. Every expense is criticized to determine whether that money is better spent on creditors instead. In either case, the principle

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<sup>160</sup> *In re Watson*, 403 F.3d 1, 8 (1st Cir. 2005).

<sup>161</sup> *Id.*

<sup>162</sup> *In re Cleary*, 357 B.R. 369, 374 (Bankr. D. S.C. 2006).

<sup>163</sup> *Cleary*, 357 B.R. at 373–74.

<sup>164</sup> Note that religious debtors have other statutory protections in bankruptcy, including those granted by the Religious Liberty and Charitable Donation Protection Act of 1998, which protects tithes of up to 15% of a debtor's income. See *Giving God the Unavoidable Preference: Tithing and the Religious Liberty and Charitable Donation Protection*, AMERICAN BANKRUPTCY INSTITUTE, <https://www.abi.org/abi-journal/giving-god-the-unavoidable-preference-tithing-and-the-religious-liberty-and-charitable> [https://perma.cc/787A-GZEW].

<sup>165</sup> Beine, *supra* note 134.

behind BAPCPA to ensure that every available cent is paid to creditors has resulted in debtors being put under a moral microscope.

## 2. *Nondischargeability of Luxury Goods and Services*

Additionally, BAPCPA made changes to the sorts of pre-bankruptcy purchases for which debtors can receive relief, largely seeking to prevent debtors from making extravagant purchases, then filing for bankruptcy to get out of paying for them. Among the debt most scrutinized by BAPCPA is “luxury goods” under 11 U.S.C. § 523(a)(2)(C). The luxury goods clause of section 523(a)(2)(C) reads, in pertinent part, that “consumer debts owed to a single creditor and aggregating more than \$500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable.”<sup>166</sup> Prior to BAPCPA, the Bankruptcy Code allowed for discharge of up to \$1,215 in luxury goods and services purchases within sixty days of filing.<sup>167</sup> Notably, BAPCPA both increased the lookback period (from sixty days to ninety) and decreased the amount of dischargeable debt, both of which make it more difficult for debtors to discharge consumer debt related to luxury goods purchases.<sup>168</sup> For debtors with the purchasing history proscribed by § 523(a)(2)(C), the burden falls upon to debtor to rebut a presumption of abuse.<sup>169</sup>

To be clear, when the Bankruptcy Code says, “luxury goods,” it does not necessarily refer to diamond jewelry and angora sweaters. The Bankruptcy Code explains that “the term ‘luxury goods or services’ does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.”<sup>170</sup> The practical line-drawing of what is and is not a luxury is very much left to the courts. When determining whether a purchase is a luxury good, “courts look to the circumstances of each particular case to see if the services were ‘extravagant,’ ‘indulgent,’ or ‘nonessential.’”<sup>171</sup> As another court put it, “[I]luxury in itself implies extravagance, superfluousness, self-indulgence; going beyond or overflowing an implicit, indeterminate level of

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<sup>166</sup> 11 U.S.C. § 523(a)(2)(C).

<sup>167</sup> A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, n. 161 (2006).

<sup>168</sup> *Id.*

<sup>169</sup> *In re Crowson*, 395 B.R. 224, 228 (Bankr. N.D.N.Y. 2008).

<sup>170</sup> 11 U.S.C. § 523(a)(2)(C)(ii)(II).

<sup>171</sup> *In re Chase*, 372 B.R. 133, 140 (Bankr. S.D.N.Y. 2007).

comfort.”<sup>172</sup> The analysis is highly fact-specific, and each individual judge is called upon to draw a moral line between necessity and “an implicit, indeterminate level of comfort.” Particularly post-BAPCPA, the judgment is baked into the discharge process.<sup>173</sup>

The luxury goods and services provision was largely geared toward those whom Congress felt were irresponsibly using credit cards—those with options, who made a conscious choice to spend above their means.<sup>174</sup> The credit card industry heavily lobbied Congress on this point.<sup>175</sup> However, the well-off debtor that the luxury goods provision targets is not the one most impacted by it. As one bankruptcy attorney put it, “this provision would affect only lawyers who were ‘dumb enough to file right after’ their client incurred a large credit card bill.”<sup>176</sup> Spare a thought for the debtor who has no choice but to file after incurring a large (in all likelihood nondischargeable) credit card bill. A debtor who is facing foreclosure, or mounting collections calls on medical debt, may have no choice but to file within the ninety-day window. In policing perceived abuses, BAPCPA ensnares debtors who lack the resources to wait for a more opportune time to file—the wide net cast in the name of catching abusers most harms those who most need relief.<sup>177</sup>

### 3. *Mandatory Credit Counseling and Debtor Education*

Finally, BAPCPA added to the Bankruptcy Code a requirement that debtors receive credit counseling and financial management education as a condition of discharge.<sup>178</sup> As one speaker at BAPCPA’s senate hearing described it, “I am confident that early financial education would have helped some young adult members of Shoreline Credit Union to make different decisions than they did.”<sup>179</sup> The credit counseling requirement is

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<sup>172</sup> *In re Blackburn*, 68 B.R. 870, 874 (Bankr. N.D. Ind. 1987).

<sup>173</sup> *Id.*

<sup>174</sup> Dickerson, *supra* note 167, at 947.

<sup>175</sup> Brock N. Meeks, *Lobbyists Battle Over Bankruptcy Bill*, NBC NEWS (Oct. 24, 2003, 3:30 AM) <https://www.nbcnews.com/id/wbna3340655> [<https://perma.cc/V8PA-D9ZB>].

<sup>176</sup> Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 228, n.400 (2016).

<sup>177</sup> *See, e.g.*, Donald L. Swanson, *BAPCPA: A Radical Departure From Historical Bankruptcy Laws (A Report From May of 1900)*, AM. BANKR. INST., <https://www.abi.org/feed-item/bapcpa-a-radical-departure-from-historical-bankruptcy-laws-a-report-from-may-of-1900> [<https://perma.cc/7SVF-29HK>] (describing BAPCPA’s abuse provisions as “an unfortunate over-reaction” and “an economic disaster for many of those consumers who genuinely and honestly needed a Chapter 7 fresh start!”).

<sup>178</sup> BAPCPA, *supra* note 125.

<sup>179</sup> Beine, *supra* note 134.

a condition of filing, and requires that debtors gain an understanding of their financial situation enough to understand whether bankruptcy is their best option.<sup>180</sup> A credit counseling agency may provide mortgage counseling, student loan counseling, small business financial coaching, and credit report reviews in addition to bankruptcy counseling services.<sup>181</sup> It is the debtor's responsibility to pay for the necessary educational courses, unless they are able to obtain a fee waiver.<sup>182</sup> While credit counseling agencies have faced increased scrutiny in recent years, the credit counseling requirement is typically not the more controversial of the two—that would be the debtor education requirement.<sup>183</sup>

To satisfy the debtor education requirement and receive a discharge, debtors must take a course after filing their petition.<sup>184</sup> The goal of this requirement is that debtors “exit bankruptcy knowing the basic principles of personal finance that are necessary to manage their financial affairs.”<sup>185</sup> The curriculum for debtor education is not prescribed by statute, but the course must include “materials related to budget development, money management, financial record-keeping, wise use of credit, and consumer resources.”<sup>186</sup>

The assumption inherent in the debtor education requirement is that debtors have filed for bankruptcy due to, at best, a lack of financial education leading to poor decision-making. But this assumption simply does not reflect the reality on the ground, a reality perhaps best illustrated by the case of one debtor who gave her testimony before the Senate Judiciary Committee Subcommittee on Courts: Kerry Burns. Kerry Burns

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<sup>180</sup> Henry G. Hobbs, Jr. & Patricia J. Stanley, *Credit Counseling and Debtor Education Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, in 54 U.S. ATT'YS BULL. 15, 15–16 (2006).

<sup>181</sup> Rebecca Lake & Daphne Foreman, *Your Guide to Credit Counseling Services*, FORBES ADVISOR (Sept. 30, 2025, 2:06 PM), <https://www.forbes.com/advisor/debt-relief/credit-counseling-services-guide/> [<https://perma.cc/BE4E-JTWD>].

<sup>182</sup> Bill Fay, *Pre-Bankruptcy Credit Counseling*, DEBT.ORG, <https://www.debt.org/bankruptcy/pre-bankruptcy-credit-counseling/> [<https://perma.cc/U73F-DH8W>]; *Frequently Asked Questions (FAQs) – Credit Counseling*, U.S. DEPT OF JUSTICE: U.S. TRUSTEE PROGRAM, <https://www.justice.gov/ust/frequently-asked-questions-faqs-credit-counseling> [<https://perma.cc/3YM3-M2JA>] (Sept. 30, 2021).

<sup>183</sup> For a brief discussion of the kinds of chicanery engaged in by some credit counseling agencies, see Max Fay, *Recognizing a Credit Repair or Credit Counseling Scam*, DEBT.ORG, <https://www.debt.org/credit/counseling/scams/#:~:text=The%20Consumer%20Financial%20Protection%20Bureau,marketing%20practices%20to%20lure%20clients> [<https://perma.cc/D2J3-64SD>] (Sept. 19, 2025).

<sup>184</sup> Fay, *supra* note 182.

<sup>185</sup> Hobbs & Stanley, *supra* note 180, at 16.

<sup>186</sup> *Id.*

is a mother from Rhode Island whose son, Finnegan, was diagnosed with cystic fibrosis the day after he was born, “something that shocked me and my husband Patrick.”<sup>187</sup> The Burnses took leave from their jobs to be by their son’s side, cashing in retirement accounts and selling cars to keep their heads above water as best they could.<sup>188</sup> Finnegan died at four-and-half years old after being hospitalized for months.<sup>189</sup> Following their son’s death, struggling with Finnegan’s medical bills and other obligations, the Burns family declared bankruptcy, and took the mandatory credit counseling and debtor education courses.<sup>190</sup> Kerry Burns testified that the Burns’ were asked during their course “why we were going bankrupt, and how we could have avoided the situation in which we currently find ourselves... it was sort of a slap in the face, honestly.”<sup>191</sup> As Kerry Burns noted, “to be unable to help myself and my husband financially after not being able to save my son, is embarrassing and shaming, and truly adds insult to injury.”<sup>192</sup> As of her testimony, Kerry Burns and her husband Patrick had not finished the credit counseling course.<sup>193</sup>

Crucially, the debtor education requirement has only very limited exceptions, for lack of services in a debtor’s district, incapacity, disability, or military active duty.<sup>194</sup> The Bankruptcy Code does not provide exceptions for debtors who have filed for bankruptcy due to circumstances beyond the debtor’s control—all debtors are treated as if they have made financial mistakes and require further education.<sup>195</sup> The moral judgments and assumptions that motivate the credit counseling and debtor education requirements are clear, and in many cases, they are wrong. Senator Elizabeth Warren, then a professor at Harvard Law School, said it best when she testified before the Senate Judiciary Committee, “I think you will find that most debtors are filing for bankruptcy not because they had

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<sup>187</sup> *Medical Debt: Can Bankruptcy Reform Facilitate a Fresh Start?: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 111th Cong. 4 (2009) (statement of Kerry Burns).

<sup>188</sup> *Id.* at 5.

<sup>189</sup> *Id.* at 4.

<sup>190</sup> *Id.* at 5–6.

<sup>191</sup> *Id.* at 6, 27.

<sup>192</sup> *Id.* at 6.

<sup>193</sup> *Id.* at 27.

<sup>194</sup> 11 U.S.C. § 109(h).

<sup>195</sup> 11 U.S.C. §§ 727(a)(11), 1328(g)(1).

too many Rolex watches and Gameboys, but because they had no choice.”<sup>196</sup>

### III. CONCLUSION

Personal bankruptcy is never a bloodless process.<sup>197</sup> The judgments about hypothetical debtors that underpin bankruptcy reforms in recent years have had significant impacts on real debtors, and nowhere do those impacts become clearer than in the diverging paths of the United States and England. Over the span of two years (2005 in the United States and 2007 in England), both countries enacted massive reforms of their consumer bankruptcy systems, but each reform was animated by very different attitudes towards debtors. Presented with the question of who deserves the fresh start that bankruptcy can provide, decisionmakers in both places had vastly different focuses, motivated by vastly different underlying beliefs.

In times of economic downturn, the language surrounding the Debt Relief Order focused on ensuring that those most in need of a fresh start were able to get one, while the discourse around BAPCPA was focused on ensuring that the fresh start was not available to those judged to be undeserving. Discussion of the Debt Relief Order has centered on the inclusion of debtors who were otherwise being shut out. The removal of the ninety-pound administration fee to enter a DRO and the two increases in allowable vehicle value were both responses to more difficult economic times shutting debtors out of the system. In contrast, BAPCPA limited the discharge available, in many cases for those struggling the most. Increased scrutiny of debtor expenses and narrower discharge for particular kinds of purchases shrunk the available relief, and the rhetoric surrounding those legislative choices demonstrates that they were motivated by negative moral judgments of debtors.

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<sup>196</sup> *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (prepared statement of Prof. Elizabeth Warren).

<sup>197</sup> The author’s personal favorite description of bankruptcy law from a non-practitioner comes from Texas attorney Mark Bankston, who represents several family members of Sandy Hook school shooting victims in their ongoing litigation against Alex Jones: “I’m a trial lawyer. I go get a verdict, I go to the insurance company, they write me a check. We’re done, we move on. But now I realize I have entered a world that is so labyrinthine and arcane, and full of weird ceremonies of lawyers spinning in circles three times and shaking hands...” Dan Friesen & Jordan Holmes, *Mark Bankston, Tapestry King*, KNOWLEDGE FIGHT, at 29:32 (May 3, 2023), <https://open.spotify.com/episode/4EpGHTUe4YmMgKuhcYECp4?si=27735c04f7ba4b58>.

Finally, the two systems vary in their attitudes towards counseling debtors. In England, debtors are encouraged to seek free debt counseling, available through a variety of organizations. This is a proactive measure, one that debtors are encouraged to avail themselves of prior to any formal insolvency proceedings. Contrast that with the credit counseling and debtor education requirements in the United States. The courses are typically retrospective, focusing on where debtors went wrong and what they must do to avoid a similar situation. Inherent in the US model is the idea that debtors are in bankruptcy because they have made mistakes, and that their bankruptcy largely could have been avoided.

Ultimately, these two consumer bankruptcy systems are a tale of two judgments. In one system, the most vulnerable debtors are offered assistance and increasingly accessible paths to discharge to move past their debts. In the other, debtors are subjected to increased scrutiny of their every choice in the time before their filing. The underlying assumptions and judgments that influence the direction of bankruptcy reform have real impacts on thousands of real debtors who could well fall just outside the edges of forgiveness.