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Are Undocumented Workers Entitled to a Fresh Start? An Analysis of the Ellis Standard and Potential Criminal Consequences under 18 U.S.C. § 152

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ARE UNDOCUMENTED WORKERS ENTITLED TO A FRESH START? AN ANALYSIS OF THE *ELLIS* STANDARD AND POTENTIAL CRIMINAL CONSEQUENCES UNDER 18 U.S.C. § 152

ABSTRACT

Research and case law on U.S. bankruptcy law and how it applies to undocumented immigrants is extremely sparse. There are currently over eight million undocumented immigrants in the U.S., many of whom work "on-the-books" jobs using false Social Security numbers (SSNs). These undocumented workers contribute billions of dollars to the U.S. economy in the form of income, property, and sales taxes—much of which is allocated to fund the U.S.'s social safety net.

Although undocumented immigrants are eligible to file for bankruptcy because they satisfy the definition of a "person" under 11 U.S.C. § 101(41), they file at a much lower rate than their U.S. citizen counterparts. Many choose not to file for bankruptcy because of a fear of deportation. Is this fear a warranted one? Would petitioning for bankruptcy expose someone to unwanted immigration consequences? Are there criminal consequences that undocumented immigrants—and the attorneys whom advise them—should be aware of before submitting a bankruptcy petition to the U.S. Trustee's office?

This Comment primarily focuses on the latter question, analyzing whether the use of a false SSN in obtaining employment is a violation of 18 U.S.C. § 152, the criminal enforcement mechanism for bankruptcy violations. Multiple circuits use the six-factor test outlined in U.S v. Ellis, a 1995 Seventh Circuit case, to determine whether an action rises to the level of a convictable offense. In analyzing this question, this Comment creates the character "Christina"—an undocumented debtor in the U.S. who used her U.S. citizen cousin's SSN on her employment application—to determine whether her actions fall within the purview of 18 U.S.C. § 152.

The inspiration for this analysis comes from the work of Chrystin Ondersma—one of the few academics who has published works on the intersection between bankruptcy and the lives of undocumented immigrants. In her article, titled Undocumented Debtors, *Ondersma stated that "[i]t is not clear . . . that policing debtors' use of false SSNs for employment purposes is properly within the purview of bankruptcy officials and administrators," arguing that "[t]urning in a W-2 with a false SSN does not meet the elements of*

bankruptcy fraud [under 18 U.S.C. § 152] unless the debtor is seeking to discharge debt relating to that SSN." This Comment analyzes this argument after being unable to find any case law or scholarship on the issue.

Additionally, this Comment looks at the issue of undocumented immigrants filing for bankruptcy in a practical manner by (1) highlighting issues that may arise in advising undocumented immigrants to file for bankruptcy and (2) considering public policy in determining whether it would be in the best interest of both undocumented immigrants and the U.S. to provide a pathway for all "persons" to pursue bankruptcy without being deterred by fear of detention or deportation. In sum, this Comment hopes to contribute to the nascent discussion of the intersectionality of bankruptcy and immigration law and determine whether the ubiquitous "fresh start" principle is a possibility for all persons.

INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)[1]—enacted on April 20, 2005—reformed the U.S. Bankruptcy Code (the Code) in an attempt "to emphasize 'personal responsibility' and to reduce the number of people filing for bankruptcy[.]"[2] One of the provisions of the Code that BAPCPA amended was 11 U.S.C. § 521, which now requires a debtor to disclose proof of income from all her sources, as well as "[E]vidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor[.]"[3] Today, debtors disclose this information and begin their bankruptcy petitions for the purpose of obtaining a "fresh start," a concept first articulated in *Local Loan Co. v. Hunt*.[4] There, the U.S. Supreme Court noted that bankruptcy gives "the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[5]

Although *Local Loan* was decided during the U.S. Great Depression, hundreds of thousands of debtors each year still seek a fresh start when falling

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[2] Stephen J. Spurr & Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy*, 87 AM. BANKR. L.J. 27, 27 (2013).

[3] 11 U.S.C. § 521(a)(1)(B)(4) (2019).

[4] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *see also* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047 (1987); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

[5] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

upon hard times. In 2010, during the "Great Recession," 1.5 million bankruptcy petitions were filed in the U.S.—a number which decreased to about 776,000 in 2017.[6] Although they do not file in significant numbers—for reasons discussed *infra*—undocumented immigrants are among those who file bankruptcy.

In order to work in the "formal sector," as opposed to working "off-the-books" jobs where employees are paid in cash and there is virtually no paper trail, many undocumented debtors use invented, purchased, or borrowed Social Security Numbers (SSNs).[7] Moreover, many undocumented immigrants are able to secure credit and bank accounts either through the use of SSNs or Individual Taxpayer Identification Numbers (ITINs).[8] Thus, an undocumented debtor working in the formal sector and seeking to petition for bankruptcy post-BAPCPA will have to show "evidence of payment received within 60 days before the date of the filing of the petition,"[9] which will likely come in the form of pay stubs containing the invented, purchased, or borrowed SSN.

The Code does not discriminate on the basis of immigration status.[10] Nevertheless, the use of an invented, purchased, or borrowed SSN may present issues when an undocumented debtor seeks to file for bankruptcy. Although the Code, which includes BAPCPA, is in Title 11 of the United States Code,[11] the criminal enforcement mechanism for bankruptcy is in chapter 9 of Title 18 of the United States Code. Pertinent for the purposes of this Comment is 18 U.S.C. § 152(3), which imposes a punishment for any person "knowingly and fraudulently mak[ing] a false declaration, certificate, verification, or statement under penalty of perjury . . . in relation to any case under title 11[.]"[12]

In 1995, the Seventh Circuit held that there are six elements the government must prove to show a violation of 18 U.S.C. § 152(3): "(1) a bankruptcy proceeding existed under Title 11; (2) the defendant made a statement relating to the proceeding; (3) the proceeding was under penalty of perjury; (4) the statement related to a material matter; (5) the statement was false; and (6) the statement was made knowingly and fraudulently."[13] In addition to being adopted

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6 *Statistics from Epiq Systems*, AM. BANKR. INST., https://www.abi.org/newsroom/bankruptcy-statistics (last visited Oct. 27, 2018).

7 Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J. L. REFORM 517, 542 (2012).

8 *Id*. at 524–25.

9 11 U.S.C. § 521(a)(1)(B)(4) (2019).

10 *See generally* 11 U.S.C. (2019).

11 *Id.*

12 18 U.S.C. § 152(3) (2019).

13 U.S v. Ellis, 50 F.3d 419, 422 (7th Cir. 1995).

by the lower federal courts in the Seventh Circuit,[14] what will be referred to hereafter as the "*Ellis* standard" has also been adopted by District Courts in the Sixth[15] and Tenth Circuits,[16] the latter of which applied *Ellis* in 2017.

This Comment will explore whether the use of an invented, purchased, or borrowed SSN is a violation of 18 U.S.C. § 152. For clarity, this Comment has created the character "Christina." Christina is an undocumented debtor in the U.S. who used her U.S. citizen cousin's SSN on her employment application when she began working for her employer in the formal sector ten years ago. Although she has gained her *income* by using her cousin's SSN to obtain employment, Christina obtained *credit* through the use of either (1) her ITIN or (2) the methods available for undocumented immigrants to obtain credit discussed *infra*. However, post-BAPCPA, Christina has fallen on tough times and filed for bankruptcy in order to obtain a fresh start.

The SSN used by Christina will hereafter be referred to as "false," but will not be referred to as "borrowed" or "invented." One of the definitions provided by the Oxford Living Dictionary for "false" is "[n]ot according with truth or fact; incorrect."[17] Here, Christina listed her cousin's SSN on her employer's application which asked for her SSN—a written statement that is incorrect. The verb "borrow" is defined as "[t]ak[ing] and us[ing] (something belonging to someone else) with the intention of returning it[,]"[18] while the verb "invent" is defined as "[c]reat[ing] or design[ing] (something that has not existed before)[.]"[19] With regard to the former, it would be impossible for Christina to "return" the SSN back to her cousin, as she already used it on her employment application. In the latter case, Christina did not "create" something that did not exist before. Instead, Christina appropriated her cousin's SSN—which was already in existence at the time—and used it as her own.

In determining whether Christina can, and should, be convicted under 18 U.S.C. § 152, this Comment will look at statutory interpretation of 18 U.S.C. § 152, the *Ellis* standard, case law, and policy considerations. Since the *Ellis* standard has been adopted in other circuits, analysis of case law will not be limited to the Seventh Circuit. Instead, this Comment will look at holdings

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[14] Tucker v. Commander Packaging Ret. Plan for Hourly Emps., No. 12-C-5311, 2012 U.S. Dist. LEXIS 146101, at *6 (N.D. Ill. 2012).

[15] U.S. v. Kurlemann, No. 1:10-cr-14-3, 2010 U.S. Dist. LEXIS 94570, at *7 (S.D. Ohio 2010).

[16] U.S. v. Yurek, No. 15-cr-394-WJM-1, 2017 U.S. Dist. LEXIS 60346, at *5–6 (D. Colo. 2017).

[17] *False*, LEXICO.COM, https://www.lexico.com/en/definition/false (last visited Jan. 25, 2019).

[18] *Borrow*, LEXICO.COM, https://www.lexico.com/en/definition/borrow (last visited Jan. 25, 2019).

[19] *Invent*, LEXICO.COM, https://www.lexico.com/en/definition/invent (last visited Jan. 25, 2019).

across all U.S. federal courts, including bankruptcy courts, in arguing that Christina should not be convicted under 18 U.S.C. § 152.

The application of 18 U.S.C. § 152 to false SSNs has not yet been decided—or even discussed—in case law. Thus, this Comment will cover an issue of first impression and argue that Christina's use of a false SSN does not satisfy the *Ellis* standard because the second, fourth, and sixth elements are not satisfied. In support of this argument, this Comment will first provide background information about how undocumented immigrants acquire credit (and debt), whether undocumented immigrants *can* petition for bankruptcy, and whether they *should* submit a petition. The latter of these three will focus on the potential immigration consequences that arise when advising undocumented clients to file for bankruptcy. Next, this Comment will discuss the statutory and legal framework to determine whether Christina has committed an offense that is convictable under 18 U.S.C. § 152. This section will introduce us to Christina as she files for bankruptcy and discuss the procedural hurdles she will face. Then, the *Ellis* standard will be presented, and this Comment will make the case that the government would face difficulty proving three of the six required elements. After that, this Comment will present policy considerations showing that undocumented immigrants should be entitled to the fresh start principle given their contributions to the U.S. social safety net. Finally, this Comment will conclude by summarizing the legal and practical implications of providing undocumented immigrants unperturbed access to bankruptcy.

I. BACKGROUND

A. How do Undocumented Immigrants Acquire Credit (and Debt)?

In lieu of using a SSN, undocumented immigrants in the U.S. have been able to secure mortgages and credit through some banks by using their ITINs.[20] With the exception of U.S. visa and employment authorization card holders, a SSN can only be issued to U.S. citizens (either after being born in the U.S. or naturalized) or Permanent Residents.[21] However, ITINs are issued by the Internal Revenue Service (IRS) to persons who are required to pay taxes but do not have a SSN.[22] This provides undocumented immigrants with a way to pay

[20] Ondersma, *supra* note 7, at 524–25.

[21] *See* SOCIAL SECURITY ADMINISTRATION, APPLICATION FOR A SOCIAL SECURITY CARD, https://www.ssa.gov/forms/ss-5.pdf (last visited Oct. 27, 2018) (a Permanent Resident has "lawful, work-authorized immigration status" in the U.S.).

[22] Jana Kasperkevic, *The American Dream: How Undocumented Immigrants Buy Homes in the U.S.*, MARKETPLACE (Sept. 11, 2017, 7:03 AM), https://www.marketplace.org/2017/09/08/economy/american-

the taxes they are required to pay, and receive taxes they are owed, without fear of deportation, since "Tax information on ITIN holders is legally protected under privacy laws and cannot be shared with the Department of Homeland Security or Immigration and Customs Enforcement[.]"[23] Although ITINs were initially issued "[T]o enable tax payment by foreign nationals who are not eligible for a [SSN] but own businesses or assets in the U.S.[,]" undocumented immigrants have been able to use ITINs to obtain bank accounts, credit cards, and home mortgages.[24]

It follows that undocumented immigrants who choose to obtain credit by providing creditors with their ITINs can use this credit to make purchases and acquire debt. According to a study in 2014, it was estimated that approximately thirty-four percent of undocumented immigrants in the U.S. owned homes.[25] Moreover, undocumented immigrants have also been able to use their ITINs, or, in some instances, Matricula Consular cards (issued by the Mexican Consulate), to obtain car loans.[26]

Undocumented immigrants may also be privy to less traditional ways of securing credit, circumventing banks and credit card companies entirely. One way this is done is by obtaining payday loans, which do not require a SSN but charge annual interest rates of up to 1,000 percent.[27] Creditors providing payday loans "target immigrants both with and without lawful status[,]" and trap them in a permanent cycle where all of the immigrant's disposable income is used to pay these creditors.[28] Another common method of borrowing money, in Latinx communities specifically, is a "tanda," where a group of people contribute to a pool of funds that are then used by members of that pool to secure loans.[29]

Through these avenues of obtaining credit, undocumented immigrants are arguably more likely than their documented counterparts to fall behind on payments to creditors and need a fresh start. This is especially true of

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dream-how-undocumented-immigrants-buy-homes-us.

[23] Hunter Hallman, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer*, BIPARTISAN POL'Y CTR., (Mar. 28, 2018).

[24] *See* Kasperkevic, *supra* note 22.

[25] MIGRATION POL'Y INST., PROFILE OF THE UNAUTHORIZED POPULATION: UNITED STATES, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Oct. 27, 2018).

[26] Ondersma, *supra* note 7, at 527.

[27] Nathalie Martin, *Giving Credit Where Credit is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 Mich. St. L. Rev. 989, 1008–009 (2015).

[28] Ondersma, *supra* note 7, at 527.

[29] *Id.* at 527–28; *see also* Shereen Marisol Meraji, *Lending Circles Help Latinas Pay Bills and Invest*, NAT'L PUB. RADIO (Apr. 1, 2014), https://www.npr.org/sections/codeswitch/2014/04/01/292580644/lending-circles-help-latinas-pay-bills-and-invest.

undocumented immigrants, who secure credit through organizations that specifically target their communities knowing that these debtors will not be able to pay back the exorbitant interest rates if they fall behind on payments. Moreover, undocumented immigrants are also less likely to have health insurance, which makes them more prone to accumulating medical debt. A study released in 2017 found that forty-five percent of nonelderly undocumented immigrants were uninsured, compared to just eight percent of nonelderly U.S. born or naturalized citizens.[30] This is unfortunate for undocumented immigrants, as a medical debt is a "claim" as defined under the Code that can likely get discharged in a bankruptcy proceeding.[31]

B. Filing for Bankruptcy as an Undocumented Immigrant

There is no requirement of lawful immigration status to file for bankruptcy in the U.S.[32] So long as an undocumented immigrant satisfies the definition of a "person"[33] in the Code, she may qualify as a "debtor."[34] Federal Rule of Bankruptcy Procedure ("FRBP") 1007 requires an individual debtor, in petitioning for bankruptcy, to submit a verified statement that sets out the debtor's social security number or states that the debtor does not have a SSN.[35] This is done by completing and filing a Form B-121, which provides the individual debtor with an option of checking a box confirming that she has neither a SSN or an ITIN.[36] Hence, neither a SSN or ITIN is required to file for bankruptcy.

The main case supporting this proposition is *In re Merlo*,[37] a matter involving a Argentinian debtor who was neither a U.S. citizen or Permanent

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[30] HENRY J. KAISER FAM. FOUND., HEALTH COVERAGE OF IMMIGRANTS (Dec. 31, 2017), https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/ (last visited Nov. 2, 2018).

[31] *See generally* 11 U.S.C. §§ 101(5), § 727(b) (2019).

[32] Ondersma, *supra* note 7, at 518.

[33] *See* § 101(41) (defining "person" to include an individual).

[34] *See* § 101(13) ("The term 'debtor' means person or municipality concerning which a case under this title has been commenced.").

[35] FED. R. BANKR. P. 1007(f).

[36] OFFICIAL FORM, U.S. BANKR. COURT, FORM B-121: STATEMENT ABOUT YOUR SOCIAL SECURITY NUMBERS (2015), http://www.uscourts.gov/sites/default/files/form_b121.pdf.

[37] It is important to note that the debtor *In re* Merlo, 265 B.R. 502, 503 (Bankr. S.D. Fla. 2001) filed a chapter 13 bankruptcy, not chapter 7. However, I have not found any case law which limits *In re* Merlo's applicability strictly to chapter 13. To the contrary, multiple treatises suggest that the holding is not limited to chapter 13. *See* 1 Collier Consumer Bankruptcy Practice Guide ¶ 16.06 (2018) (citing *In re* Merlo to support the proposition that "the Code does not even require that the debtor have a social security number."), 1 Collier Pamphlet Edition 11 U.S.C. § 109 (16th ed. 2018) (citing *In re* Merlo to support the proposition that "[t]here is no requirement that a debtor have a social security number to be eligible to file a bankruptcy case."), 2 Collier Pamphlet Edition F.R.B.P. 1005 (16th ed. 2018) (citing *In re* Merlo to support the proposition that "[a] debtor

Resident and therefore did not have a SSN.[38] The court reconciled 11 U.S.C. § 109—which "does not require a social security number as a condition of being a debtor"[39]—with FBRP 1005, which "requires a debtor to list a social security number in the[ir] bankruptcy petition."[40] The court first noted that "[t]he Rule does not address the situation where a debtor without a social security number files a bankruptcy petition."[41] Then, it noted that compliance with FBRP for someone in Merlo's position would be impossible.[42] Finally, the court held that FBRP 1005 did not prevent Merlo from becoming a debtor.[43] The court disagreed with the argument advanced by the Trustee—citing 11 U.S.C. § 342(c)[44] and FRBP 2002(n)[45]—stating that the "failure of the Debtor to provide a social security number results in the creditors having insufficient information to identify the Debtor."[46] It reasoned that "the language of 11 U.S.C. § 342(c) specifically provides that the legal effect of the notice shall not be invalidated."[47] Thus, "if a debtor does not have a social security number to list, it does not prevent the petitioner from being a debtor under the Code."[48]

Nevertheless, Form B-121 asks the debtor to list all SSNs and ITINs she has used,[49] and the U.S. Trustee has the discretion to—among other things—dismiss the petition.[50] Some states have local rules which require a petition to be

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is not required by the Bankruptcy Code to have a social security number to be eligible for relief. Rule 1005 requires that if the debtor has a social security number, that number must be disclosed. When a debtor does not have a social security number, the case may nonetheless proceed."), 2 Collier on Bankruptcy ¶ 109.01 (16th ed. 2018), 9 Collier on Bankruptcy ¶ 1005.01 (16th ed. 2018) (citing *In re* Merlo to support the proposition that "[t]here is no requirement that an individual have a Social Security number in order to file a bankruptcy case."), 9 Collier on Bankruptcy ¶ 1007.06 (16th ed. 2018) (citing *In re* Merlo to support the proposition that "[i]t is important to note that the rule does not require that the debtor have a Social Security number or that the debtor obtain a Social Security number. While the vast majority of individual debtors have Social Security numbers, some do not. Indeed, some debtors who are eligible for relief are not able to obtain Social Security numbers.").

38 *In re Merlo*, 265 B.R. at 503.

39 *Id.* at 503 (interpreting 11 U.S.C. § 109 (2019)).

40 *Id.* at 504; *see also* FED. R. BANKR. P. 1007(f).

41 *In re Merlo*, 265 B.R. at 504.

42 *Id.*

43 *Id.*

44 11 U.S.C. § 342(c) (2019) ("If notice is required to be given by the debtor to a creditor under this title . . . such notice shall contain the name, address, and last 4 digits of the taxpayer identification number of the debtor.").

45 FED. R. BANKR. P. 2002(n) ("The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.").

46 *In re Merlo*, 265 B.R. at 504.

47 *Id.*

48 *Id.*

49 OFFICIAL FORM, U.S. BANKR. COURT, FORM B-121: STATEMENT ABOUT YOUR SOCIAL SECURITY NUMBERS (2015), http://www.uscourts.gov/sites/default/files/form_b121.pdf.

50 Ondersma, *supra* note 7, at 557.

dismissed if a SSN is not provided.[51] Nevertheless, notwithstanding state law and an assigned Trustee's discretion, federal law permits undocumented immigrants to file for bankruptcy.

C. Do Undocumented Immigrants File for Bankruptcy?

Although eligible under the Code, empirical data shows that undocumented immigrants file for bankruptcy at a much lower rate than documented persons. A study released in 2012 suggests that undocumented immigrants filed "for bankruptcy at less than one percent of the rate of the general population."[52] Moreover, in an email survey sent to bankruptcy clerks earlier this decade, fifty-five percent of the clerks noted that they were not aware of any case in their district where a debtor filed without providing a SSN, while an additional fifteen percent of the clerks responded that they only knew of one individual who had filed for bankruptcy in their district without a SSN.[53] Further, in a recent study where fifty undocumented immigrants in New Mexico were interviewed, forty-nine of the interviewees stated that they had never considered filing for bankruptcy, while only one of the interviewees stated that he or she had considered it.[54]

Fear of deportation is likely the main reason why undocumented immigrants do not petition for bankruptcy. During the interviews with undocumented immigrants in New Mexico mentioned above, sixty-eight percent of the interviewees stated they felt they had been taken advantage of because they lacked a SSN.[55] However, when asked if they would feel comfortable using the court system to pursue a remedy, over two-thirds of the interviewees either said that they would not or that they were not sure.[56] It follows that a person who is unlikely to use the court system to pursue a remedy against another is also unlikely to use the court system to discharge his or her personal liability to creditors with claims against her.

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[51] *See, e.g.*, D. MD. BANKR R. 1002-1 ("The petition will be dismissed without a hearing if . . . a voluntary petition is filed without the debtor's social security number being provided . . . ."); W.D. LA. LBR 1002-1 (Unless excused by order of the court, all petitions filed by an individual debtor shall include copies of . . . the debtor's social security card.").

[52] Ondersma, *supra* note 7, at 537.

[53] *Id.*

[54] Martin, *supra* note 27, at 1040 n.252.

[55] *Id.* at 1040.

[56] *Id.*

D. Should Undocumented Immigrants File for Bankruptcy?

Although undocumented immigrants *can* file for bankruptcy, *should* they? The hesitation of undocumented immigrants to use the courts to pursue a legal remedy (such as bankruptcy) is warranted, as legal issues that are not immigration-related in nature can present risk of detention or even deportation. For example, an undocumented immigrant who is arrested for what the Immigration and Naturalization Act (INA)—located in 8 U.S.C.—refers to as a "crime involving moral turpitude" (CIMT), is then placed in removal proceedings and is subject to deportation.[57] In Georgia, the crime of shoplifting[58] is considered a CIMT under the INA and could also be considered an aggravated felony—another ground for removal—if the defendant's plea states that she had "intent to deprive," and a sentence of at least one year of imprisonment may be imposed.[59] In contrast, having a defendant plead that she had "intent to appropriate" does not make the crime an aggravated felony, and a CIMT categorization can be avoided if the attorney asks the judge to impose a sentence of less than a year (even if it is a suspended sentence) or "ask[s] [the] judge to strike out [any] reference to jail term or confinement on [the] sentencing form when [the] client is sentenced to probation."[60] Thus, there are serious immigration concerns that attorneys should take into account when representing undocumented immigrants in non-immigration matters.

It is not clear whether there is such a concern over bankruptcy matters presenting immigration consequences, as I have been unable to find any sources discussing the issue. There had previously been talk "of making the filing of a bankruptcy a 'sign of moral turpitude[,]'" but these discussions never amounted to policy.[61] Nevertheless, bankruptcy attorneys still face certain considerations when advising undocumented clients. The U.S. Trustee Program—which supervises the administration of cases filed under chapters 7, 11, 12, and 13[62]—is an office within the Department of Justice (DOJ). Moreover, U.S. immigration courts, which are part of the Executive Office for Immigration Review, are also

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[57] *See* 8 U.S.C. § 1229(d) (2018); *see also* 8 U.S.C. §§ 1182(a), 1227(a) (2018).

[58] GA. CODE ANN. § 16-8-14 (West 2017).

[59] Sejal Zota & Dan Kesselbrenner, *Selected Immigration Consequences of Certain Georgia Offenses*, PROJECT CITIZENSHIP (2013), http://projectcitizenship.org/wp-content/uploads/2017/04/Georgia-Crimes-Chart.pdf; *see also* Ga. Code Ann. § 16-8-14 (West 2017); 8 U.S.C. § 1227(a).

[60] Zota & Kesselbrenner, *supra* note 59.

[61] Richard Parker, *Not Born in the USA? The Perils of Bankruptcy Filings by Undocumented Persons*, PARKER, BUTTE & LANE, ATTORNEYS PC, http://pbl.net/resources/ (follow hyperlink; then, follow the "Not Born in the USA?" hyperlink under "Parker, Butte & Lane Attorneys Expert Commentary").

[62] *About the Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/about-program (last updated Mar. 6, 2019).

part of the DOJ. However, the main law enforcement agency responsible for enforcing immigration law within the country's borders, U.S. Immigration and Customs Enforcement (ICE), is a part of the Department of Homeland Security (DHS), which is separate from the DOJ.[63]

Although the U.S. Trustee and ICE are under separate organizations, their separation does not ensure that they will not communicate with one another. DHS and the Federal Bureau of Investigation (FBI)—which is, like the U.S. Trustee's Office, part of the DOJ—share information with one another through the Secure Communities program.[64] According to ICE: "For decades, local jurisdictions have shared the fingerprints of individuals arrested and/or booked into custody with the FBI to see if those individuals have a criminal record and outstanding warrants."[65] However, under the Secure Communities Program, which was re-enacted by an Executive Order issued by President Donald Trump in 2017, those fingerprints are then immediately sent to ICE.[66] If it is determined that the fingerprinted individual is undocumented, ICE then issues a detainer request, asking the local law enforcement agency to hold the undocumented immigrant for forty-eight hours so that ICE may pick them up and place them in deportation proceedings.[67]

Currently, there are seventy-nine local law enforcement agencies in twenty-one states that have an agreement with ICE to receive delegated authority for immigration enforcement within their jurisdictions.[68] Through these agreements, known as 287(g) agreements (named after the corresponding section of the INA), ICE delegates many of their powers to local law enforcement.[69] Even if these local law enforcement agencies do not have 287(g) agreements with ICE, they may still choose to cooperate with detainer requests. In fact, as noted in **Image 1** below, a large majority of local law enforcement agencies cooperate with ICE in some form or fashion.

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[63] U.S. IMMIGR. & CUSTOMS ENF'T, WHO WE ARE, https://www.ice.gov/about (last updated Aug. 15, 2019).

[64] U.S. IMMIGR. & CUSTOMS ENF'T, SECURE COMMUNITIES, https://www.ice.gov/secure-communities (last updated Mar. 20, 2018).

[65] *Id.*

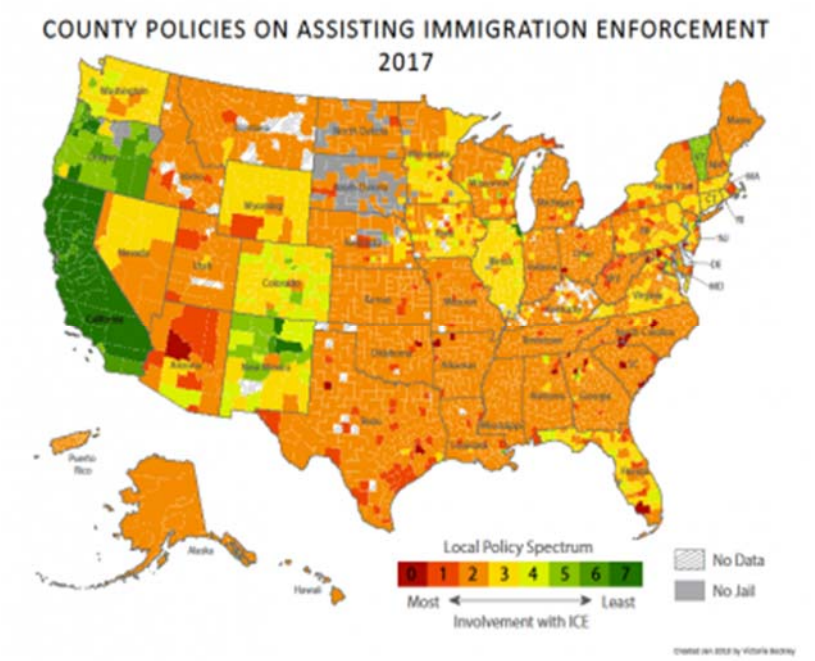
[66] *Id.*

[67] *See* U.S. IMMIGR. & CUSTOMS ENF'T, IMMIGRATION DETAINER (2018), https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

[68] U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/287g (last updated Oct. 14, 2019).

[69] *National Map of 287(g) Agreements*, IMMIGRANT LEGAL RES. CTR., https://www.ilrc.org/national-map-287g-agreements (last updated May 22, 2019).

Image 1: Range of County Policies on Assisting ICE



[70]

Although similar mechanisms are not in place through which bankruptcy courts or the U.S. Trustee's office may cooperate with ICE, there is still a possibility that this information could be shared upon request by ICE or the DOJ. Consequently, attorneys should take into consideration the risk of sharing their clients' information with government entities. It should also be noted that having an undocumented immigrant enter a federal building, such as a U.S. bankruptcy court, may put said undocumented immigrant at risk. Federal courts are not "safe spaces" for undocumented immigrants, as there have been numerous instances of ICE agents arresting and detaining persons whom they suspect are undocumented either inside or directly outside of courthouses,[71] even in more

[70] *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RESOURCE CENTER, https://www.ilrc.org/local-enforcement-map (last updated May 22, 2019).

[71] *See generally* Kymelya Sari, *Migrant LGBTQ Leader Faces Deportation After ICE Arrest at Courthouse*, SEVEN DAYS (Jan. 24, 2019, 11:14 AM), https://www.sevendaysvt.com/OffMessage/archives/2019/01/24/migrant-lgbtq-leader-faces-deportation-after-ice-arrest-at-courthouse.

immigrant-friendly jurisdictions like Boston,[72] Oregon,[73] and Seattle.[74] As was done with Secure Communities, all that is needed for the U.S. Trustee and ICE to cooperate with one another is an Executive Order or similar legislation passed by Congress. This is not an impossibility, especially given the recent rise of xenophobic attitudes in the U.S. (and throughout most of the Western world).[75]

This hostility toward immigrants in general—and undocumented immigrants in particular—is reflected in a Proposed Rule published by DHS on October 10, 2018.[76] The Rule proposes to define the term "public charge," a term used in the INA as a ground of inadmissibility to the U.S.[77] As it reads now, the INA states that "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible[,]"[78] and can therefore be placed into removal proceedings.[79] However, the INA does not define what a "public charge" is, and "in practice and under controlling case law the deportation provision is rarely applied."[80]

In the rare instances where public charge has been applied, only those non-citizens that had previously "[taken] cash welfare[,] known as Temporary Assistance for Needy Families, or Supplemental Security Income . . ." would have been at risk of being defined as a "public charge."[81] However, under the new Proposed Rule, "government officials would ultimately be required to deny

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[72] *See* Maria Cramer, *ICE Arrest at Suffolk Court Rankles New DA*, BOS. GLOBE (Jan. 22, 2019, 8:33 PM). https://www.bostonglobe.com/metro/2019/01/21/ice-arrest-suffolk-courthouse-raises-hackles-new/XCZWXr
JOreGAuxGidDtiPN/story.html.

[73] Parker, *supra* note 61.

[74] *See* Neal McNamara, *ICE Arrests Man at Seattle Court, A Troubling Tactic for Judges*, PATCH (Jan. 23, 2019, 4:23 PM), https://patch.com/washington/seattle/ice-waited-outside-seattle-municipal-court-arrest-man.

[75] *See* Simon Tisdall, *Rise of Xenophobia Is Fanning Immigration Flames in EU and US*, THE GUARDIAN (June 22, 2018, 7:56 PM), https://www.theguardian.com/world/2018/jun/22/as-immigration-crisis-explodes-xenophobes-gain-ground-in-eu.

[76] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018).

[77] *Id.*

[78] 8 U.S.C. § 1182(a)(4) (2019).

[79] *See* 8 U.S.C. § 1227(a) (2019).

[80] Ben Harrington & Audrey Singer, Cong. Research Serv., R45313, *Immigration: Frequently Asked Questions about "Public Charge"* 1 (updated Sept. 19, 2018) (citing Dep't of Just., Immigr. & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999) ("Deportations based on public charge grounds have been rare.")).

[81] *See* Shefali Luthra, *5 Things To Know About Trump's New 'Public Charge' Immigration Proposal*, KAISER HEALTH NEWS (Sept. 25, 2018), https://khn.org/news/5-things-to-know-about-trumps-new-public-charge-immigration-proposal/.

a green card and most other visas to anyone who they predict may, at any point in the future, receive supplementary forms of public assistance . . . ."[82] Thus, if DHS becomes privy to information indicating that someone is in the U.S. without legal status, a previous bankruptcy filing may create a presumption that said individual may be—or may become—a public charge. Moreover, the proposed expansion of the public charge ground may also affect an undocumented immigrant should she find a ground to obtain permanent residence, as the new rule could penalize permanent residence applicants who had previously used Medicaid, "food stamps, Section 8 rental assistance and federal housing vouchers . . . ."[83]

There is also a possibility that U.S. citizens or Permanent Residents who petition on behalf of an alien relative may be liable if that alien becomes a public charge.[84] In applying for a visa or to become a Permanent Resident, aliens are required to submit an Affidavit of Support (Form I-864) (the Affidavit).[85] This Affidavit is filled out by a qualifying relative—referred to as the alien's "sponsor" or "petitioner"—who agrees to "accept legal responsibility for financially supporting" the alien.[86] The Affidavit "is a legally enforceable contract, and the sponsor's responsibility usually lasts until the family member or other individual either becomes a U.S. citizen, or is credited with 40 quarters of work (usually 10 years)."[87] The form is submitted "to show that [the alien] ha[s] the financial means to live in the United States without needing welfare or financial benefits from the U.S. government."[88] Although the public charge inadmissibility ground has been seldom enforced,[89] the Proposed Rule's bolstering of this ground gives reason to believe that that these Affidavits may be reviewed going forward to determine whether a sponsored alien has become a public charge.[90]

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[82] Shawn Fremstad, *Trump's 'Public Charge' Rule Would Radically Change Legal Immigration*, CTR. FOR AM. PROGRESS (Nov. 27, 2018, 10:00 AM), https://www.americanprogress.org/issues/poverty/reports/2018/11/27/461461/trumps-public-charge-rule-radically-change-legal-immigration/.

[83] Luthra, *supra* note 81.

[84] Parker, *supra* note 61.

[85] U.S. CITIZENSHIP & IMMIGR. SERVS., PUBLIC CHARGE, https://www.uscis.gov/greencard/public-charge (last updated Aug. 12, 2019).

[86] U.S. CITIZENSHIP & IMMIGR. SERVS., *AFFIDAVIT OF SUPPORT*, https://www.uscis.gov/greencard/affidavit-support (last updated June 14, 2019).

[87] *Id.*

[88] PUBLIC CHARGE, *supra* note 85.

[89] Em Puhl, et. al., *An Overview on Public Charge*, IMMIGRANT LEGAL RESOURCE CENTER (2018), https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge-20181214.pdf.

[90] *See generally* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018).

A Final Rule that prescribes "how DHS will determine whether an alien applying for admission or adjustment of status is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA or the Act), because he or she is likely at any time to become a public charge" was published on August 14, 2019 and took effect on October 15, 2019.[91]

E. Potential Issues in Advising Undocumented Debtors

Currently, there is no requirement that an attorney provide a client with accurate information regarding the immigration consequences (if any) of filing for bankruptcy. However, a relatively recent holding by the U.S. Supreme Court in the criminal context may one day be applicable to other types of law practices, including bankruptcy. In 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*, a case involving a permanent resident who faced deportation as a result of pleading guilty to a drug trafficking charge.[92] Padilla stated "that his counsel not only failed to advise him of this consequence prior to his entering the plea . . .", but also provided him with incorrect information about the immigration consequences of pleading guilty to a drug trafficking charge.[93] Moreover, Padilla argued "that he would have insisted on going to trial if he had not received incorrect advice from his attorney."[94] The Court held that "counsel's representation 'fell below an objective standard of reasonableness.'"[95] Hence, Padilla's representation by counsel was constitutionally deficient and therefore violated his Sixth Amendment right to counsel as interpreted in the Court's decision in *Strickland v. Washington*.[96] The Court also held "that counsel must inform her client whether his plea carries a risk of deportation."[97] The Court based this holding on "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country . . . ."[98]

The Sixth Amendment only applies to criminal cases.[99] Therefore, the holdings in *Padilla* and *Strickland* do not apply to bankruptcy proceedings.

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91 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Oct. 15, 2019).

92 Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

93 *Id.*

94 *Id.*

95 *Id.* at 366.

96 *Id.* at 369.

97 *Id.* at 374.

98 *Id.*

99 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defen[s]e.").

However, an attorney may be found liable as a matter of civil law if her conduct rises to the level of legal malpractice.[100] The elements of legal malpractice are: "[A] duty of care owed by the defendant to the plaintiff, a breach of that duty, and injury to the plaintiff as a proximate result of the breach."[101] The minimum standard of care is determined "by the degree of departure from customary professional conduct[,]" defined as "the minimum quality of professional conduct 'customarily' provided by the members of that profession."[102] Although the Court in *Padilla* left the issue of relief to the lower court on remand,[103] applying the principles of *Padilla* as they related to legal malpractice in the bankruptcy context is justifiable for two reasons. First, it is not far-fetched to say that it should be "customary" for bankruptcy attorneys to advise their clients on potential immigration consequences. However, there is no information on whether this is actually the customary practice in bankruptcy given the sparse number of undocumented immigrants who file for bankruptcy. Second, *Padilla* is analogous to the bankruptcy context—and many other legal practice areas—as it relates to undocumented immigrants because the rationale for providing accurate immigration advice is identical. The principles enumerated in the Court's opinion in *Padilla*—longstanding precedent, the seriousness of deportation, and the impact of deportation of families[104]—would also apply in the bankruptcy context should an undocumented immigrant find herself deportable on public charge grounds or if she is detained by ICE at her local bankruptcy court.

II. STATUTORY AND LEGAL FRAMEWORK

In determining whether our case study, Christina, can be convicted under 18 U.S.C. § 152, statutory law, case law, and policy implications should be considered. Each of these is analyzed below, as this Comment navigates through Christina's journey filing for bankruptcy as an undocumented immigrant who previously worked in the formal sector with a false SSN. This analysis also presumes the following: (1) Christina has not worked for another employer since she arrived in the U.S.; (2) Christina has an ITIN that she uses to obtain credit; (3) Christina has not used her false SSN to obtain credit; (4) there is no

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100 *See* Martin T. Fletcher, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 772 (1968).

101 *Id.* at 773 (citing Ishmael v. Millington, 243 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Eckert v. Schaal, 58 Cal. Rptr. 817 (Cal. App. 1967)).

102 Martin T. Fletcher, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 773 (1968) (citing Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964); Leverman v. Cartall, 393 S.W.2d 931 (Tex. Civ. App. 1965); W. MORRIS, MORRIS ON TORTS § 4 at 59 (1953); W. Prosser, Law of Torts § 32 at 164–68 (3d ed. 1964)).

103 *Padilla*, 559 U.S. at 374.

104 *Id.* at 373–74.

dischargeable debt associated with this SSN; (5) Christina resides in a state that allows a debtor who does not have a SSN to file for bankruptcy; and (6) notwithstanding her use of a false SSN, Christina has not made any misrepresentations as to the other requirements in BAPCPA.

A. Navigating Statutory Law and Filing for Bankruptcy as an Undocumented Immigrant

42 U.S.C. § 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . ."[105] Thus, undocumented immigrants have the right to enter into contracts with creditors.

Presume that Christina has entered into contractual agreements with a few creditors. Each of these contractual agreements states that she is liable for all debt incurred within the scope of the agreement. Christina has fallen behind on payments to her creditors and would like to seek a fresh start. She conducts research online and discovers that the debts to her creditors can likely be discharged in a chapter 7 bankruptcy.

Consequently, Christina decides to file for chapter 7 *pro se* in the state in which she resides. Prior to submitting her petition, Christina discovers that, in addition to submitting a Form B-121 with her petition,[106] she must also disclose "evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor[.]"[107] Failure to provide these records within forty-five days of the date the petition is filed will result in an automatic dismissal of the petition.[108] Christina lists her ITIN number on Form B-121 and also correctly lists her false SSN on the form. She also obtains and completes all of the requisite documents listed in 11 U.S.C. § 521 and visits her local federal bankruptcy court to file her petition. Upon review of Christina's Form B-121, the U.S. Trustee decides not to dismiss her petition.

The U.S. Trustee convenes a meeting of creditors (a "341 meeting") under her statutory authority.[109] According to the U.S. Department of Justice's *Handbook for Chapter 7 Trustees*, "[w]hen debtors state that they are not eligible for a social security number, the trustee must inquire further in order to verify

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105 42 U.S.C. § 1981(a) (2019).
106 FED. R. BANKR. P. 1007(f).
107 11 U.S.C. § 521(a)(1)(B)(iv) (2019).
108 *See* 11 U.S.C. § 521(i)(1).
109 *See* 11 U.S.C. § 341(a) (2019).

identity."[110] However, an ITIN is considered "acceptable documentation."[111] Consequently, the U.S. Trustee decides to not dismiss Christina's petition.

Christina has been able to satisfy the requirements to petition under the Code. However, an issue may present itself if criminal charges are levied against her under 18 U.S.C. § 152 for providing pay stubs that contain her false SSN, as this statute imposes a punishment for any person "knowingly and fraudulently mak[ing] a false declaration, certificate, verification, or statement under penalty of perjury . . . in relation to any case under title 11[.]"[112]

It is important to note that Christina, as someone who works in the formal sector, receives documentation of payment from her employer in the form of pay stubs. However, those who work in the "informal sector" do not likely have access to documentation from their employer that will satisfy 11 U.S.C. § 521, and therefore should not file for bankruptcy.[113] Consequently, the analysis of liability under 18 U.S.C. § 152 will be limited to how the statute applies to undocumented debtors working in the formal sector who have filed for bankruptcy.

B. Case Law

Case law pertaining to undocumented immigrants in bankruptcy is extremely sparse. This is likely a result of the barriers to filing bankruptcy for undocumented immigrants discussed *supra*, along with the fear of deportation that comes with providing identifying information in a government proceeding. Given the lack of precedent—since Christina's situation is one of first impression—it is necessary to provide a framework to analyze whether she should be convicted under 18 U.S.C. § 152. The *Ellis* standard provides this framework, by listing six elements the government has to prove to show a violation of the statute: "(1) a bankruptcy proceeding existed under Title 11; (2) the defendant made a statement relating to the proceeding; (3) the proceeding was under penalty of perjury; (4) the statement related to a *material* matter; (5) the statement was false; and (6) the statement was made knowingly and fraudulently."[114] It is clear through the conjunctive "and" that each element has to be met in order to convict someone under this statute.

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[110] U.S. DEP'T OF JUST., HANDBOOK FOR CHAPTER 7 TRUSTEES, at 3-5 to 3-6 (2012), https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf/download.

[111] *Id.* (*citing* 28 U.S.C. § 586 (2012)).

[112] 18 U.S.C. § 152(3) (2019). The *Ellis* Court cited 18 U.S.C. § 152(3) (1996); this recently updated version contains identical language.

[113] *See* Ondersma, *supra* note 7, at 542.

[114] U.S v. Ellis, 50 F.3d 419, 422 (7th Cir. 1995) (emphasis added).

Given how precisely the Court in *Ellis* detailed what a conviction under 18 U.S.C. § 152 would require, as well as its recent adoption in multiple circuits, this Comment will apply the *Ellis* standard in its discussion. More specifically, the discussion will analyze whether an undocumented immigrant working in the formal sector who submits pay stubs containing a false SSN within the required forty-five-day period to submit proof of employment documents under 11 U.S.C. § 521(i) satisfies all six elements of 18 U.S.C. § 152.[115]

III. ANALYSIS

A. Statutory Interpretation of 18 U.S.C. § 152

The *In re May* court interpreted 18 U.S.C. § 152 to be "a congressional attempt to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors."[116] Moreover, the Seventh Circuit in *U.S. v. Key*, seven years before *Ellis* was decided, noted that "the essence of the offense under § 152 is the making of a materially false statement or oath with the intent to defraud the bankruptcy court . . . ."[117] Both of these interpretations lend themselves to interpreting 18 U.S.C. § 152 to be applicable to a broad array of acts by the debtor. The *May* case uses the language "all of the possible methods" by a debtor to "defeat the intent and effect of [bankruptcy]" to describe what it believed was Congress's intent in enacting the statute.[118] The interpretation in *Key* is also broad, as it was written as a response rejecting the defendant's argument that the government failed to prove certain elements to satisfy the statute. Additionally, the court in *Ellis*, citing *Key*, noted that the statute's scope "reaches beyond the wrongful sequestration of a debtor's property and also encompasses the knowing and fraudulent making of false oaths or declarations in the context of a bankruptcy proceeding."[119]

Neither of these interpretations of 18 U.S.C. § 152 would be applicable to Christina. Regarding the interpretation in *May*, the court's broad language of "all of the possible methods" is limited—in that same sentence—to those which a debtor acts on to "keep assets from being equitably distributed among

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115 11 U.S.C. § 521(i)(1) (2019).

116 *In re* May, 12 B.R. 618, 625 (Bankr. N.D. Fla. 1980).

117 United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988).

118 *In re May*, 12 B.R. at 625.

119 *Ellis*, 50 F.3d at 423 (*citing Key*, 859 F.2d 1257 at 1259–60).

creditors."[120] In providing a pay stub containing a false SSN, Christina is not keeping her assets from being distributed per chapter 7's distribution mechanism.[121] The only issue arising for Christina under this interpretation would be if she made a misrepresentation as to the other requirements in 11 U.S.C. § 521.[122] This statute states that Christina must provide certain schedules and statements related to her assets, liabilities, income, expenditures, and financial affairs.[123]

The interpretation of the "essence" of the statute, provided in *Key*, may apply depending on what is considered "a materially false statement or oath."[124] In *Ellis*, the court held that the defendant's "[F]ailure to list his prior bankruptcies" constituted a false statement.[125] The application of *Ellis* to undocumented debtors will be discussed *infra*, but it is worth mentioning that the "statements" made by the defendant in *Ellis* and Christina are distinguishable, as Christina's statement—submitting pay stubs containing a false SSN—was a submission of documents necessary for her petition. Moreover, unlike the defendant in *Ellis*, Christina admitted to using a false SSN, leaving it to the U.S. Trustee's discretion whether to dismiss her case.

Even if Christina's submission of her pay stubs constitutes a "false" statement, the language of both the case law and the statute require that the statement be "material." The Oxford Living Dictionary defines material as "significant or relevant, especially to the extent of determining a cause or affecting a judgement."[126] Although the court in *Ellis* does not discuss materiality, the defendant's use of false SSNs was certainly both significant and relevant.[127] In *Ellis*, the submission of a false SSN defrauded the bankruptcy court by allowing the defendant to avoid 11 U.S.C. § 727's prohibition of filing a bankruptcy petition up to eight years after receiving a discharge.[128] In contrast, because Christina did not acquire her debt through the use of her SSN, none of her submission of pay stubs containing false SSNs is neither significant nor relevant.

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120 *Cf. In re May*, 12 B.R. at 625.
121 *See* 11 U.S.C. § 726 (2019).
122 *See* 11 U.S.C. § 521 (2019).
123 *Id.* It has been presumed that Christina has not misrepresented this information.
124 United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988).
125 United States v. Ellis, 50 F.3d 419, 427 (7th Cir. 1995).
126 *Material*, LEXICO.COM, https://www.lexico.com/en/definition/material (last visited Sept. 20, 2018).
127 *See Ellis*, 50 F.3d 419.
128 *See* 11 U.S.C. § 727(a)(8) (2019).

Further, although *Ellis* did not overrule *Key*, the *Ellis* standard appears to alter how to assess whether someone has violated 18 U.S.C. § 152. In *Key*, the Court rejected a categorical approach to determining whether the government met their burden in proving a violation of 18 U.S.C. § 152 in favor of a broader approach in which the government solely had to prove the "[M]aking of a materially false statement or oath . . . ."[129] However, *Ellis*, which cites *Key*, created a specific and extensive categorical standard to assess whether the government has met its burden of proof.[130] Although both cases are still good law, courts should prefer a standard that protects the due process rights of criminal defendants: forcing the government to satisfy all elements of a charge to secure a conviction.

B. Applying Ellis to Undocumented Immigrants

The defendant in *Ellis* was charged and convicted under 18 U.S.C. § 152 for not listing his prior bankruptcies.[131] The court's analysis in determining whether the government had met its burden of proof focused on (1) whether an omission constituted a false statement and (2) whether the defendant had a knowing or fraudulent intent.[132] The first element is irrelevant, as Christina has not made an omission. Thus, we will only discuss *Ellis*'s holding as it pertains to the second element.

In determining the defendant's intent, the Court in *Ellis* noted that "[i]ntent to defraud the bankruptcy court is required to sustain a conviction under § 152."[133] Moreover, in deciding whether the jury's decision to convict the defendant, the court reiterated that "[a] totality of the circumstances" should be considered in determining the defendant's intent.[134] These circumstances should be "[E]valuated in the light most favorable to the government . . . ."[135] Further, solely the use of "circumstantial evidence is sufficient to prove the fraudulent intent required to secure a conviction under § 152."[136] In analyzing the defendant's intent under this standard, and applying the *Ellis* standard, the court held that the jury did not err in convicting him.[137]

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129 *Key*, 859 F.2d at 1259–60.
130 *See Ellis*, 50 F.3d at 422.
131 See *id.*
132 *Id.*
133 *Id.* at 425.
134 *Id.*
135 *Id.*
136 *Id.* at 426.
137 *Id.*

A court applying the *Ellis* standard would not convict Christina under this statute. In addition to the elements of the *Ellis* standard not being met (for reasons discussed below), Christina had no intent of defrauding the bankruptcy court. Rather, she—like many debtors, regardless of legal status—sought to be relieved of her pre-petition debts and be awarded a fresh start. In doing so, she submitted documents containing a false SSN. Nevertheless, in addition to submitting her pay stubs, Christina also listed her false SSN on her Form B-121. This suggests she had the intention of being transparent, not to defraud the court. Further, Christina's filing for bankruptcy does not constitute fraud because she is a "person" under the Code.[138] Consequently, under the Code, she can qualify as a "debtor."[139] Therefore, a court considering a totality of the circumstances should dismiss an 18 U.S.C. § 152 claim against Christina.

In considering the totality of the circumstances, courts should concurrently consider whether all elements of the *Ellis* standard have been met. Under this standard, the government has to satisfy the following elements to meet its burden of proof: "(1) a bankruptcy proceeding existed under Title 11; (2) the defendant made a statement relating to the proceeding; (3) the proceeding was under penalty of perjury; (4) the statement related to a material matter; (5) the statement was false; and (6) the statement was made knowingly and fraudulently."[140] In our hypothetical, the government satisfies the first element since Christina filed a chapter 7 petition. Moreover, the government satisfies the third element since Christina filed a bankruptcy proceeding under penalty of perjury.[141] Further, Christina made a false statement, and therefore concedes the fifth element of the *Ellis* standard. However, the government does not meet its burden of proof in Christina's case since it will not be able to satisfy the second, fourth, and sixth elements of the *Ellis* standard. These elements are discussed below.

1. A Statement Related to a Proceeding

18 U.S.C. § 152 covers "[F]alse declaration[s], certificate[s], verification[s], or statement[s]" in a Title 11 matter.[142] Thus, one must consider whether Christina's submission of pay stubs containing a false SSN falls into any of § 152's categories. § 152 does not explicitly mention pay stubs.[143] However, pay

138 *See* 11 U.S.C. § 101(41) (2019).
139 *See* § 101(13).
140 *Ellis*, 50 F.3d at 422.
141 *See* FED. R. EVID. 603 (2011).
142 *See* 18 U.S.C. § 152(3) (2019).
143 *See* 18 U.S.C. § 152.

stubs fall under 11 U.S.C. § 521, which requires a debtor to submit "[E]vidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor[.]"[144] 11 U.S.C. § 521 does not refer to these types of documents using any of the terms ("statement," "declaration," "certificate," or "verification") in 18 U.S.C. § 152. Thus, because pay stubs are not explicitly listed in 18 U.S.C. § 152 and it is unclear whether they can be labeled "statements," "declarations," "certificates," or "verifications," it is reasonable to conclude that pay stubs are not within the purview of 18 U.S.C. § 152.

However, if determined that the submission of pay stubs containing a false SSN falls under 18 U.S.C. § 152, whether Christina's submission of pay stubs containing a false SSN relates to her chapter 7 proceeding has three interpretations. The first interpretation is that pay stubs are submitted under 11 U.S.C. § 521(a)(1)(B)(iv) since they are "evidence of payment . . . from any employer of the debtor."[145] Without evidence of payment, a bankruptcy petition cannot proceed.[146] Thus, pay stubs relate to the bankruptcy proceeding. The second interpretation is that pay stubs are out of the reach of 18 U.S.C. § 152 because they are not identified under 11 U.S.C. § 521 as either a statement, declaration, certificate, or verification. The third interpretation is that pay stubs fall under the "verification" category, since the submission of them in a petition verifies the debtor's payment from his employer during the sixty-day range. Since all of these are reasonable interpretations, we cannot confidently determine whether this factor weighs for or against Christina. Nevertheless, this factor is not dispositive, and both the fourth and sixth elements listed in the *Ellis* standard weigh in favor of Christina.

2. The Statement is Related to a Material Matter

In its discussion of materiality, the Ninth Circuit held in *U.S. v. O'Donnell* that "[m]ateriality does not require a showing that creditors are harmed by the false statements."[147] The Court further noted that the scope of materiality includes: (1) matters relating to the extent and nature of the bankrupt's assets; (2) inquiries relating to the bankrupt's business transactions or his estate; (3) matters relating to the discovery of assets; (4) the history of a bankrupt's financial transactions; and (5) statements designed to secure adjudication by a

144 11 U.S.C. § 521(a)(1)(B)(iv) (2019).

145 *Id.*

146 *See* 11 U.S.C. § 521(i)(1).

147 United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976), cert. denied, 429 U.S. 960 (1976).

particular bankruptcy court.[148] Moreover, in *U.S. v. Phillips*, the Ninth Circuit found that the debtor providing four false statements—one of which involved listing a false SSN—in her bankruptcy petition, constituted a material matter.[149] In addition to not requiring the government to show creditors' harm as a result of a false statement, a matter is material if it is "pertinent to the extent and nature of bankrupt's assets, including the history of a bankrupt's financial transactions."[150]

In 2002, a Ninth Circuit district court considered a bankruptcy court's interpretation of *Phillips* as it pertained to the materiality of a debtor's omission of her SSN and the use of fabricated SSNs in filing for chapter 7 in *In re Guadarrama*. There, the bankruptcy court held that the Trustee failed to prove that the debtor's failure to disclose her true SSN was a material misrepresentation.[151] It reasoned that the debtor's "listing of false Social Security numbers and failure to disclose her actual [SSN] was not material because an investigation of her valid [SSN] would not have revealed information that would have resulted in denying her a discharge."[152] The debtor also argued that the omission of her valid SSN was not material because it was not used to "incur any pre-petition debt."[153] However, the district court reversed, reasoning that the debtor's use of false SSNs in her petition "[M]ay have been validly issued to other individuals, whose credit was impaired by her use of them to obtain a bankruptcy discharge."[154] The court further reasoned that the debtor's omission of her valid SSN was material because the debtor's "[F]ailure to disclose valid Social Security information impeded the Trustee's ability to determine her eligibility for discharge."[155]

The Ninth Circuit provides a broad interpretation of materiality, encompassing both submissions and omissions that *may* affect a bankruptcy proceeding. As the court in *In re Guadarrama* reasoned, "Materiality is judged not by the *actual* effect of the fraudulent misrepresentation or concealment, however, but by the effect it was *capable* of producing."[156]

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148 *Id.* at 1237–38.
149 United States v. Phillips, 606 F.2d 884, 886–87 (9th Cir. 1979).
150 *Id.* at 887.
151 *In re* Guadarrama, 284 B.R. 463, 468 (C.D. Cal. 2002).
152 *Id.* at 474.
153 *Id.* at 475.
154 *Id.*
155 *Id.*
156 *In re Guadarrama*, 284 B.R. at 475 (Emphasis in original).

Notwithstanding this broad interpretation, which is the most favorable to the government across all the U.S. circuits, Christina's submission of pay stubs containing a false SSN would not satisfy this element. Christina's submission fits within the scope of materiality, as it is defined in *O'Donnell*, since her paystubs relate "to the extent and nature" of her assets and this submission was made to "secure adjudication by a particular bankruptcy court."[157] Moreover, although Christina's use of a false SSN does not harm any of her creditors—since the debt she is seeking relief from was not acquired by using her SSN—harm to creditors is not required to prove materiality.[158]

Nevertheless, the submission of Christina's pay stubs in applying for chapter 7 can be distinguished from the debtors in *Phillips* and *Guadarrama*. In the former case, the court—citing *O'Donnell*—determined that the debtor's submission of a false SSN in applying for bankruptcy was material, reasoning that "[T]he false social security number might have impeded an investigation into the appellant's financial history, and might have misled creditors as to the identity of the petitioner."[159] Hence, *Phillips* proposes that the actual danger, and therefore the materiality of a statement or omission, rest on its *ability* to harm creditors or hinder a proper investigation of a debtor's assets. Neither of these dangers are present in Christina's case, since she listed her false SSN on her Form B-121. By doing this, Christina gave the U.S. Trustee the discretion to either investigate the assets and debts related to that SSN or dismiss the petition.[160]

Similarly, in *Guadarrama*, Christina's submission of her paystubs did not impede "[T]he Trustee's ability to determine her eligibility for discharge," since the false SSN was made available to the trustee through her Form B-121.[161] Therefore, the only way Christina's use of a false SSN would have been "capable" of affecting a bankruptcy proceeding materially is if the Trustee, through her discretion, decided not to look into the SSN provided by Christina. Further, the *Guadarrama* court in reversing the bankruptcy court's holding was, in part, concerned with the impact on the credit of the true holder of the SSN.[162] This danger does not exist in Christina's situation for two reasons. First, Christina did not use her false SSN in petitioning for bankruptcy—since she listed her ITIN number on her Form B-121 and only listed her false SSN when

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157 United States v. O'Donnell, 539 F.2d 1233, 1237–38 (9th Cir. 1976), cert. denied, 429 U.S. 960 (1976).

158 *See O'Donnell*, 539 F.2d at 1237–38; *see In re Guadarrama*, 284 B.R. at 475.

159 United States v. Phillips, 606 F.2d 884, 887 (9th Cir. 1979).

160 *See* Ondersma, *supra* note 7, at 556–57.

161 *In re Guadarrama*, 284 B.R. at 475.

162 *See id.*

asked on the Form to provide all SSNs and ITINs she has used.[163] As a result, Christina sought to be discharged from the debt associated her ITIN, not her false SSN. Second, an inquiry into the false SSN would show that there is no dischargeable debt associated with it—as we presumed earlier in the introduction of Part C. Therefore, there would be no chapter 7 discharge associated with this SSN that would affect the valid holder of the SSN's credit. It follows that Christina's submission of pay stubs containing a false SSN, along with her listing this SSN on her Form B-121, does not constitute a material misrepresentation or omission.

However, should Christina's submission of pay stubs containing a false SSN constitute a material representation under the *Ellis* standard, the court should take an approach similar to that of the court in *In re Riccardo*.[164] There, Mr. Riccardo listed a different SSN on his bankruptcy petition than on his Social Security card and on his tax returns after being "apprised by prior counsel of the importance of using correct social security numbers . . . ."[165] Although the court recognized that Mr. Riccardo's use of a different SSN than what was on his Social Security card was material, the court dismissed his petition without prejudice, provided that the court's decision "be served upon all creditors on the debtors' matrix and the three credit reporting agencies" and Riccardo "be required to disclose in any new filing all prior identities or social security numbers used, as well as this decision."[166] The court reasoned, that in the event Mr. Riccardo filed a subsequent bankruptcy petition, the creditors could successfully get the petition dismissed.[167] Elaborating on this point, the court stated:

> [S]ome creditors may object to discharge, either successfully or not, and many creditors will do nothing. That is their choice. But in any event, both the debtors and their creditors will have *the opportunity* to have their day in court on the issue of dischargeability, with the benefit of such disclosure as is provided in this decision.[168]

In its decision, the court exposed the failure of the Trustee assigned to this case, because the U.S. Trustee had discretion to dismiss the case when it became known that Riccardo used a false SSN. Nevertheless, the court dismissed

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[163] *See* OFFICIAL FORM, U.S. BANKR. COURT, FORM B-121: STATEMENT ABOUT YOUR SOCIAL SECURITY NUMBERS (2015), http://www.uscourts.gov/sites/default/files/form_b121.pdf.

[164] *See In re* Riccardo, 248 B.R. 717 (Bankr. S.D.N.Y. 2000).

[165] *Id.* at 719.

[166] *Id.* at 725.

[167] *See id.*

[168] *Id.*

without prejudice and balanced the equities between debtors and creditors, stating that:

> [I]n this case creditors generally may be harmed by a 'rush to judgment' (which the Bankruptcy Code precludes in order to preserve equality among creditors) and even swift creditors may not benefit if the Riccardos are barred from refiling, whereas the Riccardos desperately need a fresh start, if they can get it.[169]

3. The Statement Was Made Knowingly and Fraudulently

In *Ellis*, the debtor argued that the prosecution failed to prove that his omissions were not the result of mistakes by either the debtor or his attorneys.[170] The court rejected this argument, reasoning that there was sufficient circumstantial evidence "to prove the fraudulent intent required to secure a conviction under § 152."[171] Since *Ellis*, courts in multiple districts have held that circumstantial evidence is sufficient to prove fraudulent intent.[172]

Before analyzing whether there is enough circumstantial evidence for the government to satisfy this element with regard to Christina, it is important to look at other cases where circumstantial evidence satisfied this element. In *Ellis*, the debtor's knowing and fraudulent intent was proven with evidence showing that he previously filed for bankruptcy eight times and used four different SSNs in those filings.[173] Since the disclosure of these bankruptcies would have made the debtor ineligible for the relief he was seeking, the court concluded that the debtor "possessed a strong motive to conceal fraudulently his prior bankruptcies from the court."[174] In *Matter of Extradition of Lehming*, which involved the extradition of a German national for committing an offense in violation of 18 U.S.C. § 152, a district court in the Third Circuit defined "knowingly" as a volitional act that does not require the person doing the act to know that she is breaking the law.[175] Notwithstanding this broad definition, the court found that this element was not satisfied because the government did not provide any direct or circumstantial evidence proving that the defendant made the statements in

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169 *Id.*

170 United States v. Ellis, 50 F.3d 419, 426 (7th Cir. 1995).

171 *Id.* (*citing* United States v. Goodstein, 883 F.2d 1362, 1370 (7th Cir. 1989)).

172 *See* United States v. Mitchell, No. 05-CR-50-LRR, 2007 U.S. Dist. LEXIS 58356, at *20–24 (N.D. Iowa Aug. 9, 2007); Matter of Extradition of Lehming, 951 F.Supp. 505, 515 (D. Del. 1996); *Pavlick v. Mifflin*, 90 F.3d 205, 209 (7th Cir. 1996).

173 *Ellis*, 50 F.3d at 426.

174 *Id.*

175 *See* Matter of Extradition of Lehming, 951 F.Supp. 505, 515 (D. Del. 1996) (citing United States v. Zehrbach, 47 F.3d 1252, 1261 (3rd Cir. 1995).

question.[176] Lastly, in *U.S. v. Mitchell*, an Eighth Circuit district court held that the government satisfied the knowing and fraudulent intent element of 18 U.S.C. § 152.[177] In that case, the defendant's fraudulent reporting of his income and preparation of "sham transaction documents, as well as fraudulent tax returns . . ." was sufficient to secure a conviction.[178]

The U.S. Supreme court took a more nuanced view of the word "knowingly"—albeit through analyzing a different statute unrelated to bankruptcy—when it analyzed 18 U.S.C. § 1028A(a)(1). Section 1028A(a)(1) states that a person shall be found guilty of aggravated identity theft if she "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . ."[179] In *Flores-Figueroa v. U.S.*, the Court held that this statute "requires the Government to show that the defendant *knew* that the 'means of identification'" at issue "belonged to 'another person.'"[180] The court reasoned that "where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object . . . ."[181] If the courts adopted this approach when interpreting this requirement of the *Ellis* standard, the government would be required to prove that the debtor *knew* the statement she made was false. This conflicts with *Lehming*, where the court did not require a person to know she was breaking the law.[182]

Another analogous case supporting Christina's position is *Montes-Rodriguez v. People*, where the petitioner was previously "convicted of criminal impersonation based on his use of a false [SSN] on an application for an automobile loan" under a Colorado statute that "applies when one assumes a false identity or a false capacity with the intent to unlawfully gain a benefit for himself."[183] The petitioner conceded that he used a false SSN, but "argued that he did not assume a false identity or capacity under the statute because he applied for the loan using his proper name[.]"[184] The Colorado Supreme Court reversed the petitioner's conviction, holding that the petitioner "neither assumed a false

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176 Matter of Extradition of Lehming, 951 F.Supp. 505, 516 (D. Del. 1996).

177 United States v. Mitchell, 2007 U.S. Dist. LEXIS 58356, at *24–35 (N.D. Iowa Aug. 9, 2007).

178 *Id.* at *24.

179 18 U.S.C. § 1028A(a)(1) (2019).

180 Flores-Figueroa v. United States, 556 U.S. 646, 647 (2009).

181 *Id.* at 650.

182 *See* Matter of Extradition of Lehming, 951 F.Supp. 505, 515 (D. Del. 1996) (citing United States v. Zehrbach, 47 F.3d 1252, 1261 (3rd Cir. 1995).

183 Montes-Rodriguez v. People, 241 P.3d 924, 925 (Colo. 2010).

184 *Id.*

capacity nor a false identity in violation of the statute."[185] The court noted that "one assumes a false or fictitious capacity in violation of the statute when he or she assumes a false legal qualification, power, fitness, or role."[186] Furthermore, the court reaffirmed an earlier holding, stating that "one assumes a false identity by holding one's self out to a third party as being another person."[187] Just as the petitioner in *Montes-Rodriguez* used his real name and a false SSN to obtain an automobile loan, Christina used her real name with a false SSN to obtain employment. Therefore, as it relates to her identity or capacity, Christina did not falsely represent herself.

Christina's submission of her pay stubs is a volitional act that satisfies the "knowingly" requirement in *Lehming*.[188] However, sufficient evidence does not exist to support that Christina's submission is "fraudulent."[189] Unlike the defendant in *Ellis*, Christina did not submit these pay stubs in an attempt to deceive the bankruptcy court and the U.S. Trustee into allowing her to file for bankruptcy when she otherwise was not eligible to do so. To the contrary, Christina—as an undocumented debtor—is entitled to file bankruptcy so long as she satisfies the definition of a "person" in the Code[190] and is not prevented from filing due to a previous discharge. Further, Christina already admitted that she submitted pay stubs that listed a false SSN when she completed the Form B-121.

Christina is also distinguishable from the defendant in *Mitchell*, who submitted false information pertaining to his income, transactions, and tax returns.[191] Although a court may determine that Christina's submission was false given that the SSN listed on her pay stubs belongs to someone else, this alone does not prove that Christina's *intent* in submitting these pay stubs was fraudulent. Rather, her intent in submitting these pay stubs was likely to satisfy the requirements of 11 U.S.C. § 521.[192]

Furthermore, case law supports the discharge of a petitioner's debt despite their use of a false SSN. In *McVay v. Perez*, the respondent accumulated $400,000 in debt using a false SSN.[193] The Trustee alleged that "[b]y listing a false [SSN] on his Petition and Statement of Social Security Numbers, the

185 *Id.*
186 *Id.*
187 *Id.*
188 *See* Matter of Extradition of Lehming, 951 F.Supp. 505, 515 (D. Del. 1996).
189 *See id.* (citing United States v. Zehrbach, 47 F.3d 1252, 1261 (3rd Cir. 1995).
190 *See* 11 U.S.C. § 101(41) (2019) (defining "person" to include an individual.)
191 *See* United States v. Mitchell, 2007 U.S. Dist. LEXIS 58356, at *24–35 (N.D. Iowa Aug. 9, 2007).
192 *See* 11 U.S.C. § 521(a)(1)(B)(4) (2019).
193 McVay v. Perez (*In re* Perez), 415 B.R. 445, 449 (Bankr. D. Colo. 2009).

Debtor/Defendant knowingly and fraudulently made a false oath or account which is material to his bankruptcy case."[194] The court held that the person whose SSN was used to accumulate this debt had a "right to intervene" in this bankruptcy proceeding and had to be given notice of such right under FBRP 7024.[195] However, absent an objection from that party, the court held that it would grant a discharge.[196] The court granted this debtor a discharge in 2009.[197]

Thus, it is likely that a court will hold that the government will fail to meet its burden in satisfying the second, fourth, and sixth elements of the *Ellis* standard as they apply to Christina. However, in the case that these elements are all satisfied, there are still very strong considerations that support allowing debtors like Christina to file for bankruptcy without being prosecuted under 18 U.S.C. § 152. These considerations are discussed below.

IV. POLICY CONSIDERATIONS

In lieu of using a false SSN, undocumented immigrants are able to file federal tax returns by using their ITINs.[198] ITINs are issued by the IRS "[T]o individuals who must file taxes, but don't possess or aren't eligible for a [SSN]."[199] Any individual who resides and earns income in the United States—whether they work in the formal or informal sector—is required to pay taxes on that income.[200] The most recent statistics on undocumented immigrants in the U.S. labor force are reflected in the chart below. The chart shows that "8 million unauthorized immigrants in the U.S. working or looking for work in 2014, making up 5% of the civilian labor force . . . ."[201]

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194 *Id.*

195 *Id.* at 452–53.

196 *Id.* at 454.

197 *Parker*, *supra* note 61.

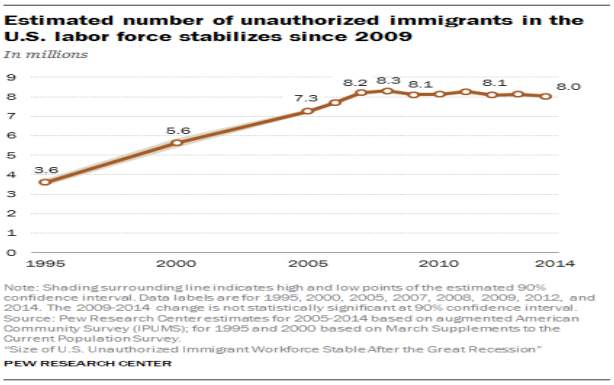
198 *See* Octavio Blanco, *Why Undocumented Immigrants Pay Taxes*, CNN BUSINESS (Apr. 19, 2017, 6:06 AM), https://money.cnn.com/2017/04/19/news/economy/undocumented-immigrant-taxes/index.html.

199 *Id.*

200 Hunter Hallman, *How Do Undocumented Immigrants Pay Federal Taxes? An Explainer*, BIPARTISAN POLICY CENTER (Mar. 28, 2018), https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/.

201 Jeffrey S. Passell & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RESEARCH CENTER (Nov. 3, 2016), http://www.pewhispanic.org/2016/11/03/size-of-u-s-unauthorized-immigrant-workforce-stable-after-the-great-recession/.

Chart 1: Number of Unauthorized Immigrants in the Labor Force



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The most up-to-date empirical studies show "that about half of undocumented workers in the United States file income tax returns[,]" as 4.4 million income tax returns were filed in 2017 by persons who did not have SSNs.[203] These filers paid a total of $23.6 billion in income taxes.[204] This means that the filers who did not have SSNs—many of whom are presumably undocumented immigrants—paid an average of approximately $5,364 to the IRS.[205]

Although millions of undocumented immigrants likely pay thousands in federal income taxes, they are not entitled to the federal benefits that their money is helping fund. The table below shows that undocumented immigrants are not completely entitled to *any* federal benefits. When filing their income taxes, undocumented immigrants are only entitled to certain tax credits, one of which is the Child Tax Credit (CTC), which is "a partially refundable credit designed to support low-income families based on their dependent children."[206] However, recent legislation has limited the refunding of the CTC "to filers whose dependents have valid Social Security numbers . . . ." meaning that filers with undocumented children can no longer receive this credit.[207]

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202 *Id.*

203 Alexia Fernández Campbell, *Trump Says Undocumented Immigrants are an Economic Burden. They Pay Billions in Taxes*, VOX (Oct. 25, 2018, 2:15 PM), https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes.

204 *Id.*

205 *Id.*

206 Hallman, *supra* note 201.

207 *Id.*

Table 1: What Federal Benefits are Undocumented Immigrants Eligible For?[208]

Tax Credits (Refundable)	Ineligible for most tax credits; ITIN holders with U.S. children can receive the Child Tax Credit
Pell Grants & Student Loans	Ineligible
Unemployment Insurance	Ineligible
Supplemental Security Income (SSI)	Ineligible
Supplemental Nutrition Assistance Program (SNAP)	Ineligible
Social Security	Ineligible
Medicaid	Emergency service only
Health Care Premium and Cost-Sharing Assistance	Ineligible
Children's Health Insurance Program (CHIP)	No federal care; some states cover for labor and delivery, prenatal, and postpartum care

These barriers to public benefits are even present *after* undocumented immigrants obtain legal status. Even if a previously undocumented immigrant is able to become a Permanent Resident (i.e., a green card holder) applying for and/or receiving certain benefits may present consequences. The public charge ground discussed *supra* will prohibit Permanent Residents from applying for the benefits in **Table 1** above until five years have passed from the date they became a permanent resident.[209] Therefore, even when immigrants are emigrating to the U.S. in the "legal" or "right" way, they are still not entitled to the same social safety net as U.S. citizens. Instead, these "Permanent" Residents are placed on a five-year probation period, whereby their status may be stripped from them should they need government aid.

This is problematic for several reasons. First, as mentioned above, undocumented immigrants provide billions of dollars of federal revenue in the form of income taxes every year. These taxes are used to fund, among other things, the programs in **Table 1**, which U.S. citizens use when they are in need or fall upon hard times. Second, this barrier bars noncitizens whom have paid exorbitant filing fees directly to the government. The filing fee for submitting an adjustment of status application to become a Permanent Resident ranges from

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[208] *Id.*

[209] *See* 8 U.S.C. § 1227(a)(5) (2019) ("Any alien who, within five years after the date of entry, has become a public charge . . . is deportable."); *see also* Luthra, *supra* note 81.

$750 to $1,225.[210] This does not include filing fees for applications sent directly to DHS before the submission of an I-485 application. For example, an undocumented immigrant may have a petition filed on her behalf by a family member in order to obtain a visa (by filing an I-130 petition) before applying for permanent residency. The filing fee for such an application is $535.[211] These fees, which total as much as $1,760, pose a great financial strain on someone seeking to obtain status in the U.S. This strain is exacerbated for those who already have payment obligations elsewhere, such as obligations arising from credit obtained to make purchases or receipt of medical services without health insurance.

In addition to paying federal income taxes, undocumented immigrants also pay property and sales taxes.[212] A recent study found that this population pays over $11.7 billion in state and local taxes.[213] Moreover, undocumented immigrants working in the formal sector, like Christina, "still have payroll taxes for Medicare and Social Security withheld from their paycheck, even if they put a fake [SSN] on their W-2 form."[214] It is estimated that these undocumented immigrants "pay about $9 billion in payroll taxes annually."[215] A review by the Social Security Administration (SSA) found that undocumented immigrants contributed $13 billion in payroll taxes to the Social Security Program.[216] The Chief Actuary of the SSA estimated that "1.8 million immigrants were working with fake or stolen Social Security cards in 2010"—a number that is expected to increase to 3.4 million by 2040.[217]

Given these contributions to the economy, undocumented immigrants should be entitled to not only the same social welfare benefits as their U.S. citizen counterparts, but also to the fresh start principle. Christina, and many like

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[210] *See* APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I-485, https://www.uscis.gov/i-485.

[211] PETITION FOR ALIEN RELATIVE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I-130, https://www.uscis.gov/i-130.

[212] *See* Alexia Fernández Campbell, *Trump says undocumented immigrants are an economic burden. They pay billions in taxes.*, VOX (Oct. 25, 2018, 2:15 PM), https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes.

[213] *See* Lisa Christensen Gee et. al., *Undocumented Immigrants' State & Local Tax Contributions*, INSTITUTE ON TAXATION & ECONOMIC POLICY (2017) https://itep.org/wp-content/uploads/immigration2017.pdf.

[214] Alexia Fernández Campbell, *Trump Says Undocumented Immigrants Are an Economic Burden. They Pay Billions in Taxes*, VOX (Oct. 25, 2018, 2:15 PM), https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes.

[215] *Id.*

[216] *Id.*

[217] *Id.*

her, are "honest but unfortunate"[218] debtors who have fallen upon difficult times. Like many U.S. citizens, she has worked hard and contributed to the U.S. economy through her labor and income. It follows that she, too, should be entitled to what the Supreme Court referred to as "a new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt."[219]

CONCLUSION

This Comment was written in an attempt to present both a legal and moral argument in favor of allowing undocumented immigrants working in the formal sector with false SSNs to file for bankruptcy without facing criminal or immigration-related consequences. With regard to the "legal" aspect, I expanded on an issue first presented by Chrystin Ondersma in *Undocumented Debtors*—the application of what I have referred to as the "*Ellis* standard" in determining whether undocumented immigrants who use false SSNs in obtaining employment in the formal sector have committed a convictable offense under 18 U.S.C. § 152. Ondersma stated that this was "not clear," arguing that "[t]urning in a W-2 with a false SSN does not meet the elements of bankruptcy fraud [under 18 U.S.C. § 152] because unless the debtor is seeking to discharge debt relating to that SSN, use of the false SSN is neither a material statement nor a material omission."[220] Ondersma also noted that "[t]urning in a W-2 with a false SSN does not meet the elements of bankruptcy fraud because unless the debtor is seeking to discharge debt relating to that SSN" does not satisfy the fourth element of the *Ellis* standard, requiring that the statement be related to a *material* matter.[221]

Despite there being no case law on this issue as it pertains to undocumented immigrants—either before or after the publishing of *Undocumented Debtors* in 2012—I found myself agreeing with Ondersma after reviewing the case law related to *Ellis*. However, after reviewing this pertinent case law, I realized that a federal prosecutor attempting to convict someone like Christina under 18 U.S.C. § 152 and the *Ellis* standard faces difficulty meeting her burden under both the second element (proving that the use of a false SSN is a statement that is *related* to a bankruptcy proceeding) as well as the sixth (proving that the statement was made both knowingly *and* fraudulently). I hope that further clarification of the arguments in favor of someone like Christina will lead to

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218 Local Loan, 292 U.S. at 244.

219 *Id.*

220 Ondersma, *supra* note 7, at 558.

221 *Id.*

more undocumented debtors attempting to use the Code without fear of criminal consequences.

Paving a pathway for undocumented immigrants to file for bankruptcy is the right thing to do. It is not enough to simply give undocumented debtors the ability to petition for bankruptcy—which they do possess, since they satisfy the definition of a "person" under the Code[222]—but a mechanism should be in place to quell the justified fear within the undocumented population that availing themselves to the bankruptcy courts and the U.S. Trustee's office will not lead to them being detained or sent back to their country of origin. These are people that work difficult (and sometimes menial) jobs and contribute to the U.S. economy and social safety net but are not afforded the same protections as U.S. citizens. Notwithstanding their contributions, this population is at a severe handicap, as they do not benefit from federal and state welfare programs that the rest of the population is privy to when they need financial assistance (as illustrated in **Table 1**).

Given negative sentiments toward undocumented immigrants, which contribute to xenophobic attitudes spewing throughout the U.S. and the rest of the Western world, it is unlikely that comprehensive immigration reform that will provide further financial protection for undocumented immigrants will happen in the near future. Until then, the *right* thing to do is to provide a pathway through which those among the undocumented population who fall upon tough times can achieve a true fresh start.

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222 *See* 11 U.S.C. § 101(41) (2019).

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