Volume 36
Issue 2 *The Seventeenth Annual Emory Bankruptcy Developments Journal Symposium*

2020

Consumer Bankruptcy Should Be Increasingly Irrelevant—Why Isn't It?

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CONSUMER BANKRUPTCY SHOULD BE INCREASINGLY IRRELEVANT—WHY ISN'T IT?

Pamela Foohey[*]

INTRODUCTION

In *Bringing Relevance Back to Consumer Bankruptcy*, Professor Nathalie Martin makes an important observation about America's current economic and social stratification.[1] Widening wealth and income inequality has created a society in which the gap between the rich and the poor is larger than before the Great Depression.[2] As Professor Martin also notes, wealth and income gaps are even greater for people of color.[3] The widening gap between the rich and the poor increasingly threatens the United States' economic and social stability.[4] The breadth of the gap also means that the American middle class is on the brink of becoming a historical artifact.[5] Over the past four decades, the middle class's share of income has fallen thirty percent.[6]

Professor Martin makes another the key observation: middle class households constitute the majority of consumers who file bankruptcy.[7] As established in work I have done with my co-investigators on the Consumer Bankruptcy Project (CBP), Professors Robert Lawless, Katherine Porter, and

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* Associate Professor, Indiana University Maurer School of Law. My thanks to the editors of the *Emory Bankruptcy Developments Journal* for inviting me to participate in their Seventeenth Annual Symposium, and to Professors Nathalie Martin, Daniel Keating, and David Lander for an interesting and lively discussion about the consumer bankruptcy system.

1 Nathalie Martin, *Bringing Relevance Back to Consumer Bankruptcy*, 36 EMORY BANKR. DEV. J. 581 (2020).

2 *See* Bill Chappell, *U.S. Income Inequality Worsens, Widening to a New Gap*, NPR (Sept. 26, 2019), https://www.npr.org/2019/09/26/764654623/u-s-income-inequality-worsens-widening-to-a-new-gap; Kari Paul, *America's 1% Hasn't Controlled This Much Wealth since before the Great Depression*, MARKETWATCH (Aug. 5, 2018), https://www.marketwatch.com/story/wealth-inequality-in-the-us-is-almost-as-bad-as-it-was-right-before-the-great-depression-2018-07-19.

3 *See* Nick Noel, et al., *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY (Aug. 2019), https://www.mckinsey.com/industries/public-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap.

4 *See generally* MICHAEL YATES, THE GREAT INEQUALITY (2016) (overviewing how income inequality negatively affects nearly every aspect of American's lives); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 117 (2012) (overviewing how inequality threatens America's growth).

5 *See* Keith Miller & David Madland, *As Income Inequality Rises, America's Middle Class Shrinks*, CTR. FOR AM. PROGRESS (Dec. 18, 2014), https://www.americanprogress.org/issues/economy/news/2014/12/18/101790/as-income-inequality-rises-americas-middle-class-shrinks (noting the shrinking middle class).

6 PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY 3 (2017).

7 Martin, *supra* note 1, at 582.

Deborah Thorne, the majority of people who file bankruptcy come from a cross-section of the middle class.[8] This makes sense. Filing bankruptcy is expensive. CBP data show that attorneys charge between $1,500 and $3,500 to help with a case.[9] The less income a family has, the less likely they can save, and the less likely they can afford to file bankruptcy. Also, the system is designed to help people preserve some of their assets so they can get a "fresh start."[10] The less income a family has, the less property they will own that bankruptcy can help them save. Everything they own likely is exempt under state law.[11]

In addition, as Professor Martin details, the 2005 passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) made it more difficult and expensive for people to file bankruptcy, as well as reduced the financial and legal benefits of filing.[12] The people who turn to bankruptcy courts for help also consistently report feeling shame upon filing.[13] This shame links with people putting off filing for years: two-thirds of debtors state that they seriously struggled to pay their debts for two or more years before filing bankruptcy.[14]

As Professor Martin writes, this all should mean that "[c]onsumer bankruptcy has become . . . irrelevant."[15] Consumers and bankruptcy, as Professor Martin continues, should have "moved apart."[16] Yet, cumulatively,

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[8] Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 223 n.19 (2018). The CBP is an on-going, long-term research project studying persons who file bankruptcy. For details, *see* CONSUMER BANKR. PROJECT, http://www.consumerbankruptcyproject.org/ (last visited Jan. 31, 2020). In 2018, Professor Porter left the project to represent California's 45th district in the United States House of Representatives.

[9] Foohey, et al., *Sweatbox*, *supra* note 8, at 229 (detailing attorneys' fees to file and represent debtors).

[10] *See* Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2298, 2302–04 (2019) (discussing reasons for granting people a discharge of most of their debts).

[11] *See* Pamela Foohey, Robert M. Lawless, & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV., at 10–12 (forthcoming 2020), https://ssrn.com/abstract=3451565 (discussing exemptions).

[12] Martin, *supra* note 1, at 612; Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered titles of the U.S. Code). The law's effective date was October 17, 2005. *Id.* § 1406(a), 119 Stat. at 215; *see also* Foohey, et al., *Sweatbox*, *supra* note 8, at 229–32 (discussing BAPCPA); Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 183–87 (2016) (overviewing BAPCPA's changes to the Bankruptcy Code that "appeared likely to impair the consumer bankruptcy system's ability to function").

[13] Foohey, et al., *Sweatbox*, *supra* note 8, at 249 (reporting that seven out of ten debtors state that they felt shame upon filing bankruptcy).

[14] *Id.* at 220 (noting that thirty percent of debtors report seriously struggling with their debts for five or more years and that people report struggling longer than in prior decades); *see also* Pamela Foohey, *Debt's Emotional Encumbrances*, in EDWARD EDGAR RESEARCH HANDBOOK ON LAW AND EMOTION (Susan A. Bandes, Jody Lynee Madeira, Kathryn Temple, & Emily Kidd White eds. 2020), https://ssrn.com/abstract=3471406 (discussing how filing bankruptcy has been framed as a moral wrong for consumers).

[15] Martin, *supra* note 1, at 581.

[16] *Id.*

people have not sought a divorce from the bankruptcy system. Consumer bankruptcy filing rates have fluctuated, but not dropped over the past fifteen years. Filings rose between 2006 and 2010, declined from 2011 through 2018, and now are at the same level as around 2007.[17] Perhaps more telling, filings remained about the same between 2016 and 2019.[18] Thus, the rate of decrease of filings year-over-year is decreasing, which foreshadows a potential increase in consumer bankruptcy filings in coming years.[19] In short, even if it possibly should not be, consumer bankruptcy is still very much a part of people's lives.

There are important reasons why consumer bankruptcy remains relevant, even if consumers' and bankruptcy's interests have diverged. Some of these reasons suggest that it is more relevant than ever. The remainder of this response overviews the place consumer bankruptcy presently occupies in the United States. In doing so, I detail why consumer bankruptcy remains relevant in the face of a socio-economic structure and of laws that suggest that bankruptcy may not be a particularly useful place for struggling Americans to turn to for help. The response ends by calling for a bolder vision for consumer bankruptcy in light of the shifting place of the bankruptcy system in America's increasingly thread-bare social safety net.

A. The Rise of Consumer Credit

For multiple decades, Americans have used credit to fill the gap created by widening income and wealth inequality. As Professor Martin notes, consumer debt outstanding now is higher than before the Great Recession.[20] People have taken out home loans and education loans to try to achieve and retain middle class status.[21] They have taken out auto loans and turned to credit cards to pay

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[17] *See Just the Facts: Consumer Bankruptcy Filings, 2006-2017*, ADMIN. OFFICE OF U.S. COURTS, charts 1 and 2 (Mar. 7, 2018), https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited Jan. 31, 2020).

[18] *See* Bob Lawless, *Bankruptcy Filing Rate Remains Flat*, CREDIT SLIPS (Nov. 14, 2019), https://www.creditslips.org/creditslips/2019/11/bankruptcy-filing-rate-remains-flat.html.

[19] *See* Bob Lawless, *Bankruptcy Rate Rises in December . . . A Blip and Not a Blip*, CREDIT SLIPS (Jan. 10, 2017), https://www.creditslips.org/creditslips/2017/01/bankruptcy-rate-rises-in-december-a-blip-and-not-a-blip.html.

[20] Martin, *supra* note 1, at 590; *see also* Kevin Wack, *Consumer Debt Is at an All-time High. Should Banks Be Worried?*, AM. BANKER (July 30, 2018), https://www.americanbanker.com/news/consumer-debt-is-at-an-all-time-high-should-banks-be-worried (discussing Americans' debt loads over time).

[21] *See* Michael Corkery & Stacy Cowley, *Household Debt Makes a Comeback in the U.S.*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/business/dealbook/household-debt-united-states.html (noting that debt "allows Americans to make large investments in education and housing . . . ."); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003).

for necessities, which includes cars.[22] If "traditional" sources of credit are not available to them, because of their income level or because of their demographics, they have turned to subprime loans and other high-cost credit, such as payday loans.[23]

This credit is costly. Beyond stymying people's ability to save, taking out credit in the face of not having enough income means that people will default.[24] Some of those defaulted loans will end up in bankruptcy court. Indeed, in recent years, Professor Lawless consistently has accurately predicted consumer bankruptcy filings based on a regression model that accounts for outstanding consumer credit levels and national personal income.[25]

That these loans will end up in bankruptcy court is the launching point for Professor Martin's suggestions for allowing strip down of secured debt (home and auto loans) and for the discharge of student loans.[26] These suggestions should make bankruptcy more attractive to struggling Americans because they will increase the financial benefits of filing. Families will have a better chance of keeping their homes and cars through bankruptcy and will find a much-needed escape valve for burdensome student loan debt. Professor Martin's contends that these suggestions will move consumers and bankruptcy closer together.[27] Nonetheless, I am skeptical that much will change in people's relationship with consumer bankruptcy if these suggestions are implemented.[28]

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[22] *See* Foohey, et al., *Driven*, *supra* note 11, at 2–5 (discussing car loans and the need for cars); KATHERINE PORTER, MODERN CONSUMER LAW (2016) (noting that most people with a credit card balance pay twenty-five percent interest and "earn incomes well above the poverty line"); Andrew Haughwout, et al., *Trends in Household Debt and Credit*, Staff Report No. 882, FED. RES. BANK OF N.Y. (Mar. 2019), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr882.pdf.

[23] *See* Pamela Foohey & Nathalie Martin, *Reducing the Wealth Gap Through Fintech "Advances" in Consumer Banking and Lending*, 2021 U. ILL. L. REV. (forthcoming), at Part III.C, https://ssrn.com/abstract=3551469 (detailing who uses payday loans and other alternative, high-cost credit).

[24] Consumer credit delinquencies now also are at an all-time high. *See* Foohey, et al., *Driven*, *supra* note 13, at 2–5 (discussing auto loan delinquencies).

[25] Bob Lawless, *Bankruptcy Filings for 2017—Let's Say 767,000*, CREDIT SLIPS (Jan. 11, 2017), https://www.creditslips.org/creditslips/2017/01/bankruptcyfilingsfor2017letssay767000.html.

[26] Martin, *supra* note 1, at 595, 605.

[27] Martin, *supra* note 1, at 622.

[28] This is not to say that the use of the bankruptcy system will not change at all. Allowing the discharge of student loans should bring people into the system, which I think will be productive for the American economy and society. Rather, I anticipate that the system's use will not change as greatly as anticipated or as much as needed for bankruptcy to become "relevant" as Professor Martin is using the term.

B. The Decline of Everything Else

Besides the rise of consumer credit, Professor Martin notes the (hopefully temporary) decline of the Consumer Financial Protection Bureau's (CFPB) check on consumer financial product and service providers.[29] That the CFPB returned $12 billion to American consumers in a mere six years speaks to a broader, systemic problem with credit in the United States.[30] Stated simply, people *need* credit.

Contrary to what Professor Martin mentions in passing, rising debt loads do not mean that Americans are less financially literate than they were in past decades.[31] Given the decline in wages in the face of rising costs of necessities, Americans may be more financially literate now than they were forty years ago. That people report seriously struggling with their debts for years before filing bankruptcy suggests that Americans have become adept at juggling their financial lives.[32] In Professor Mehrsa Baradaran's words, the difference is that "the middle class seems to be juggling with beanbags, and the poor are juggling with knives. Dipped in poison."[33]

In addition, nearly eighty percent of debtors report that debt collection calls pushed them to file bankruptcy after these years of struggling.[34] The "persistent drum beat" of debt collectors likely plays an important role in people's decisions to file bankruptcy, even if bankruptcy court is not the best place for them to take their problems.[35] Pervasive debt collection is a symptom of why people need so much credit that defaults and delinquencies are commonplace, and not of poor financial management skills.[36] Life's risks, such as illness and fluctuations in the economy that impact retirement savings, have shifted from the government and employers onto individuals. Changes in the job market likewise have left people

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29 Martin, *supra* note 1, at 591.

30 *See* Zixta Q Martinez, *Six Years Serving You*, CFPB (July 21, 2017), https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.

31 Martin, *supra* note 1, at 583.

32 *See supra* note 14 and accompanying text; MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 117 (2015).

33 BARADARAN, *supra* note 32, at 117; *see also* Lauren Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011) (arguing against the imperative of financial education).

34 Foohey, et al., *Sweatbox*, *supra* note 8, at 246.

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

36 People of color face greater and more persistent debt collection. *See* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods; *Debt in America*, URBAN INST. (Dec. 17, 2019), https://apps.urban.org/features/debt-interactive-map (last visited Jan. 31, 2020) (breaking down debt in collection nationwide by white communities and communities of color).

more vulnerable to fluctuations in their income and to repeated job loss.[37] This risk shift and the fraying of America's social safety net is occurring along with increasing income inequality and the widening wealth gap, which amplifies people's need for credit.

People also are taking out credit in an environment in which there are few restraints on how companies interact with consumers, from what they charge people to how they collect debt.[38] This environment thrives, in part, because people need credit and will accept it often regardless of the terms.[39] Ultimately, people and their precarious, yet often necessary loans end up in bankruptcy court increasingly for reasons having little to do with what bankruptcy law can offer them.[40]

C. *What People Want From Bankruptcy*

Although the total number of consumer bankruptcy filings per year has not shifted that much in the past fifteen years, the households in the system have changed in important ways during that period.[41] Who exactly turns to bankruptcy now for help, and why they do, shows how the system is serving as a place of last resort in the face of a frayed social safety net. It also shows the limitations of tweaking bankruptcy laws with the goal of making the system relevant to American households.

One of the most dramatic changes in the bankruptcy system over the past thirty years is the age of filers. Based on CBP data, as Professors Thorne, Lawless, Porter and I have detailed, Americans aged sixty-five and over now constitute twelve percent of filing households.[42] In comparison, in 1991, older Americans accounted for two percent of filing households.[43] This represents a

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[37] *See generally* Deborah Thorne, Pamela Foohey, Katherine Porter, & Deborah Thorne, *Graying of U.S. Bankruptcy: Fallout From Life in a Risk Society*, SOCIOLOGICAL INQUIRY (forthcoming 2020), online version at https://onlinelibrary.wiley.com/doi/10.1111/soin.12323 (overviewing the risks that have been shifted onto Americans over the past decades); JACOB HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (2008).

[38] The CFPB's history of enforcement actions evidences the lack of regulation and restraint. *See supra* note 30 and accompanying text.

[39] Studies of the people who take out payday loans demonstrate this point. *See generally* Nathalie Martin, *1,000% Interest – Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (2010) (surveying people in New Mexico who took out payday loans).

[40] This observation is the embedded in the final part of Professor Martin's Paper, in which she focuses on the potential of the consumer bankruptcy system. Martin, *supra* note 1, at 588. *See infra* Part D.

[41] *See supra* notes 16–18 and accompanying text.

[42] Thorne, et al., *Graying of U.S. Bankruptcy*, *supra* note 37, table 3.

[43] *Id.*

393 percent increase.[44] Again in comparison, older Americans as a percentage of the United States' population increased fourteen percent during the same thirty year period.[45] Americans between ages fifty-five and sixty-four as portion of the population filing bankruptcy also increased 252 percent during the same period.[46] Combined, Americans aged fifty-five or over now make up a third of the households in bankruptcy.[47]

The increase in older Americans filing bankruptcy comes with a decrease in younger Americans filing bankruptcy. Over the past twenty years, people aged forty-four and under make up an increasingly smaller portion of Americans in bankruptcy.[48] Percentage-wise, this decrease is smaller than the increase in Americans aged fifty-five or older.[49] In short, the consumer bankruptcy system is aging and the needs of the people who use the system have shifted.

Making student loans dischargeable, as Professor Martin recommends, should bring some younger Americans into the bankruptcy system to deal with their loans and be able to start building their financial lives.[50] But older Americans still will constitute a large portion of the households using bankruptcy. That they will continue to seek help in bankruptcy in potentially increasing numbers links with what they indicate contributed to their filings.

Older Americans cite persistent debt collection (seventy-two percent), decline in income (sixty-nine percent), medical expenses (sixty-two percent), and job loss because of medical issues (forty percent) as the top reasons that contributed to their filings.[51] Among contributors to their filings that older Americans choose less often are unaffordability of mortgage payments, home foreclosure, and student loans.[52] Older Americans' financials further suggest that although they may be concerned about keeping their homes, strip down may not be particularly helpful to them in that regard. They are much more likely to own homes than other bankruptcy filers: sixty-six percent of older Americans own their homes versus forty-one percent of other debtors.[53] They also tend to hold a bit of equity in their houses: on average and at the median, their secured

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44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *See infra* note 58 and accompanying text.
51 Thorne, et al., *Graying of U.S. Bankruptcy*, *supra* note 37, at 14–17. Debtors may select more than one option from a list of what contributed to their bankruptcy filings.
52 This is based on data from the Consumer Bankruptcy Project, *supra* note 8.
53 Thorne, et al., *Graying of U.S. Bankruptcy*, *supra* note 37, at 18, table 4.

debts are less than their total assets.[54] This makes sense. Older individuals have spent years paying their mortgage, during which time their houses appreciated in value. Allowing strip down of home loans, as Professor Martin recommends, while helpful, may not make bankruptcy much more "relevant" to older Americans, and may not address why they are turning to bankruptcy for help.[55]

Other debtors also overwhelmingly cite debt collection as a contributor to their bankruptcy filings, as well as decline in income and medical expenses.[56] Two-thirds of debtors, across all ages, cite medical expenses or illness-related work loss as contributors to their filings.[57] Across all debtors, saving homes in default or foreclosure and dealing with student loans, though contributors to filings, are not among the most prevalent reasons they indicate as why they come to bankruptcy for help: forty-five percent of all debtors cite unaffordable mortgages or foreclosure and twenty-five percent of all debtors cite student loans.[58]

That people cite debt collection most often as a contributor to their bankruptcy filings further suggests incremental changes to bankruptcy laws, while making improvements, may not move the needle all that much on consumer bankruptcy's relevance to Americans. Professors Lawless, Porter, Thorne, and I have linked persistent debt collection with Americans' lengthy struggles to try to pay their debts before filing bankruptcy. Debt collection pushes people to file.[59] By the time most people enter the bankruptcy system, they own few assets and face a mountain of unsecured debts, much of which likely comes from medical expenses and everyday expenses put on credit cards in the wake of job loss.[60] The longer people struggle, the less they have. People also are struggling increasingly longer, as CBP data show, suggesting that by the

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[54] *Id.* As we detail in other work based on CBP data, debtors' other secured assets are their cars. These cars tend to be over-secured or only slightly under-water, meaning that older Americans generally hold a bit of equity in their homes. Foohey, et al., *Driven*, *supra* note 11, at 18, table 1; *infra* notes 61–66 and accompanying text.

[55] *See* Martin, *supra* note 1.

[56] Thorne, et al., *Graying of U.S. Bankruptcy*, *supra* note 37, at 14.

[57] David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey, & Steffie Woolhandler, *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. OF PUB. HEALTH 431, 432 (2019).

[58] *Id.* at 432, table 1. Middle-aged Americans in particular also cite divorce as a main contributor to their filings. Thorne, et al., *Graying of U.S. Bankruptcy*, *supra* note 37, at 14.

[59] *See generally* Foohey, et al., *Sweatbox*, *supra* note 8.

[60] *Id.* at 239, table 1; *supra* note 57 and accompanying text. At present, CBP does not disaggregate unsecured debts by type of debt, such as medical debt and credit card debt, because of time constraints.

time most Americans get to bankruptcy court, their main concern is dealing with unsecured debts, only a portion of which are student loans.[61]

Finally, Professor Martin proposes allowing strip down on auto loans.[62] People often come to bankruptcy with cars and loans on those cars. This is a topic that Professor Lawless, Thorne, and I explored in depth in *Driven to Bankruptcy*.[63] Based on CBP data, we find that eighty-five percent of debtors enter bankruptcy with at least one automobile.[64] Debtors who file chapter 7, at the median, hold equity in their cars. In contrast, debtors who file chapter 13, at the median, are slightly underwater on their cars.[65] For these debtors, strip down of auto loans would reduce their secured debts slightly. But given that debtors pay secured debts over time via the repayment plan, how motivating a slight reduction in plan payments will be to them is questionable.[66]

Additionally, to provide more nuance about cars and car loans in bankruptcy, we use a statistical technique called cluster analysis to categorize debtors with cars.[67] The analysis yields four distinct groups of debtors. Of these groups, only one comes to bankruptcy with cars, at the median, underwater. This group contains eighteen percent of filing households. Of these households, thirty-eight percent file chapter 13.[68] Although there are a few debtors in the other groups with underwater cars, our analysis suggests that the people who file bankruptcy with automobiles are seeking something other than strip down of their auto loans. Based on data from debtors' statement of intention, that might be the return of a repossessed or seized vehicle or a revised loan agreement.[69]

For people with cars, bankruptcy seems like a place of refuge from debt collectors, repo-men[70] and the inability to keep up with loan payments. The crux

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61 Foohey, et al., *Sweatbox*, *supra* note 8, at 235–37. Although debtors are required to list their amount of student loan debt separately on the summary of schedules, the figures listed on the summary are not a reliable indicator of debtors' actual student loan debt outstanding, and thus, though we collect them, we do not rely on or report those data. For a discussion of why bankruptcy filings have missing data or data inaccuracies, *see* Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 764–68 (2005) (explaining how popular software leads bankruptcy attorneys to wrongly categorize cases as business or individual bankruptcies).

62 Martin, *supra* note 1, at 603.

63 *See generally* Foohey, et. al, *Driven*, *supra* note 11, at 10.

64 *See generally id.* at 18–19.

65 *See generally id.* at 18, table 1.

66 *See generally id.* at 12–14 (discussing treatment of secured loans in chapter 13).

67 *See generally id.* at 26.

68 *See generally id.* at 28, table 3.

69 *See generally id.* at 23, figure 1.

70 *Repo Man*, IMDB, https://www.imdb.com/title/tt0087995/ (last visited Jan. 31, 2020). People also file bankruptcy to keep their cars after they are repossessed because of parking tickets and other government fines,

of their struggles, yet again, is a lack of income and other resources to meet daily expenses. Indeed, the median value of debtors' most valuable car is $5,400 for chapter 7 filers and $8,928 for chapter 13 filers.[71] People are not turning to bankruptcy to keep luxury or new vehicles.

Overall, CBP data show that bankruptcy is serving as a place for people to turn to when they have nowhere else to go for a few crucial reasons: because they do not have enough savings to pay mounting medical expenses during their retirement years; because they cannot recover from income loss due to job loss; because they do not make enough to pay for life's necessities; because they need to be sure to keep their car so they can get to work; and because they can no longer deal with collection calls to pay debts that they have no way of paying even though they really wish they could do so. Stated succinctly, the consumer bankruptcy system has assumed a place in America's social safety net that it was not meant to occupy. This means that consumer bankruptcy should be more relevant to Americans than ever.

D. The Benefit of Suggesting Big Changes Now

In the final part of her article, Professor Martin turns her attention to bankruptcy's place in addressing income, wealth, and debt inequality. She asks: "Are we motivated to use the bankruptcy system to attempt solve some of these problems, and if so how?"[72] As the above analysis suggests, people already are coming to bankruptcy with these problems, even if the system is not designed to address these momentous economic and social issues. Although the bankruptcy system perhaps should not be designed or positioned to deal with these issues in an ideal scenario, the reality is that bankruptcy is one of a handful of places Americans can turn to for help. Now is the time to think broader and larger about how to make consumer bankruptcy relevant to the core of Americans' financial struggles.

In discussing bankruptcy's place in America's unequal society, Professor Martin kindly cites my article, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, in which I call upon research about procedural justice across the criminal and civil legal systems to detail the deficiencies in

an issue that the Supreme Court of the United States soon will be hearing in *City of Chicago v. Fulton*, No 19-357, 2019 U.S. App. LEXIS 18393 1, 12 (7th Cir. May 14, 2019). *See* Foohey et al., *Driven*, *supra* note 11, at 14 (discussing exemptions).

[71] Foohey et al., *Driven*, *supra* note 11, at 19 (discussing exemptions).

[72] Martin, *supra* note 1, at 618.

consumer bankruptcy's procedures.[73] Based on that analysis, I conclude that the current structure of debtors attending 341 meetings, which typically constitutes their only contact with the bankruptcy system, likely does not provide them the voice and closure they seek upon filing bankruptcy.[74] Given this, I propose two revised "deals" for debtors. One proposal specifically leaves the consumer bankruptcy system intact, as it currently is designed. With that constraint, I propose eliminating the 341 meeting and instead having debtors appear in court, in person, telephonically, or online, to be questioned by the bankruptcy judge.[75]

My other proposal contemplates "more radically reconfiguring the consumer bankruptcy system" as a more effective way to improve bankruptcy's procedural justice and, at the same time, make it more effective for the people who use it.[76] The second goal in that regard speaks to Professor Martin's call to think more deeply about consumer bankruptcy's place in people's financial struggles. Given that now is the time to think about bigger changes to bankruptcy to align consumers' and the system's interests, parts of my proposal, and the reasoning underlying my proposal, apply to thinking through what larger changes to the system will be beneficial.

Key features of my larger proposal are collapsing chapter 7 and chapter 13 into one proceeding and crafting the law to provide debtors with options that address their particular needs.[77] For example, bankruptcy can offer "fast-track" procedures for dealing with certain types of loans. Options also should allow strip down of home and car loans, as well as student loan discharge. Also included should be expedited processes to discharge certain key debts, such as medical bills and credit card debt (on which people often charge medical expenses). To the extent that these processes include repayment through a plan,

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73 *Id.* at 621; *see generally* Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2298 (2019).

74 *See* Pamela Foohey, *A New Deal, supra* note 73, at 2334–35.

75 *Id.* at 2337.

76 *Id.* at 2342.

77 *Id.* at 2344. Collapsing chapter 7 and chapter 13 is not a new idea. That it continues to be raised suggests how far bankruptcy law and people's situations have diverged over the decades. *See* David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 56 (2004) (discussing Elizabeth Warren's *The New Economics of the American Family* and noting that "[c]hapter 13 has never worked as expected" and that "the most sensible solution would be to combine chapter 7 and chapter 13 into a single chapter"); William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 104 (1989). Senator Elizabeth Warren, as part of her Presidential campaign, released a plan to reform consumer bankruptcy that includes collapsing chapter 7 and chapter 13 into one proceeding which provides debtors with options to deal with their financial struggles in a variety of ways. *See generally* Elizabeth Warren, *Fixing Our Bankruptcy System To Give People a Second Chance*, MEDIUM (Jan. 7, 2020), https://medium.com/@teamwarren/fixing-our-bankruptcy-system-to-give-people-a-second-chance-f1dd0812a65a.

the processes must augment households' budgets to allow people to take care of themselves and their families. Chapter 13's high dismissal rates evidence that chapter 13 does not presently provide households with an adequate budget.[78] Regardless of the exact procedures and processes created, unnecessary paperwork, unproductive credit counseling, and financial education must be eliminated.[79]

Overall, the focus of these suggestions is streamlining the consumer bankruptcy system to provide people with a place to turn to deal with their financial struggles that more fully accounts for why they have come to bankruptcy for help. Because of the frayed social safety net and continued risk shifting onto individuals, the consumer bankruptcy system is increasingly important to American households. As this response has shown, "important" does not necessarily mean "relevant." Absent policy changes outside bankruptcy, now is the time for bigger changes to the system that have a greater chance of making consumer bankruptcy relevant to Americans' needs.

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[78] *See* Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1062–63, 1092–94 (2017) (detailing chapter 13 discharge, conversion, and dismissal rates).

[79] *See, e.g.*, Michael Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQUETTE L. REV. 391 (2013); Deborah Thorne & Katherine Porter, *Debtors' Assessments of Bankruptcy Financial Education*, *in* CONSUMER KNOWLEDGE AND FINANCIAL DECISIONS: LIFESPAN PERSPECTIVES (Douglas Lamdin, ed. 2012); Deborah Thorne & Katherine Porter, *Financial Education for Bankrupt Families: Attitudes and Needs,* 24 J. OF CONSUMER EDUC. 15, 16 (2007).