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Making Sense of Nation-Level Bankruptcy Filing Rates

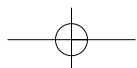
RONALD J MANN

I. INTRODUCTION

MUCH OF THE developed world has experienced a similar pattern of spending, debt, and insolvency over the last 20 years. First, as national income and consumer spending rise, the level of consumer debt inevitably increases. When consumer debt becomes commonplace, the incidence of household financial distress rises, with burgeoning rates of insolvency not far behind. What once was a problem only for merchants and businesses quickly becomes a risk that confronts all classes of the populace, rich or poor. As this pattern has played out, financial distress and insolvency have become front-page news around the globe.¹ European countries that did not even have bankruptcy systems 20 years ago now confront a rising tide of distress that overwhelms judicial and administrative processes as quickly as legislatures can create them.²

¹ See A Bennett, 'Bankruptcies on the Rise, Figures Show', <www.news.com.au>, 10 July 2007 (Australian story noting that '[t]he high cost of living and easy access to credit have led to the highest number of bankruptcies in [New South Wales] for more than 20 years'); 'Sounding the Retreat' (13 July 2006) *The Economist* (discussing rampant 'overindebtedness' associated with willingness of British to 'borro[w] with abandon'); 'The FSA Flinches' (7 September 2006) *The Economist* ('Reformers worry that too many Japanese are borrowing more than they can hope to repay'). Although the topic is newsworthy in Canada, Canadians find themselves in the unusual situation of congratulating themselves on a recent decline in filing rates. *Fewer Canadians Going Bankrupt Despite Rising Debt Levels*, 5 February 2007 (government press release suggesting that 'low unemployment allowed consumers to cope with higher debt levels').

² See J Niemi-Kiesiläinen, 'Consumer Bankruptcy in Comparison: Do We Cure a Market Failure of a Social Problem?' (1999) 37 *Osgoode Hall Law Journal* 473 (discussing new systems in Scandinavia); U Reifner, 'Thou Shalt Pay Thy Debts: Personal Bankruptcy Law and Inclusive Contract Law' in J Niemi-Kiesiläinen *et al* (eds), *Consumer Bankruptcy in Global Perspectives* (Oxford, Hart Publishing, 2004) 143 (discussing European developments). Jason Kilborn has produced an excellent series of case studies on new European systems: see J Kilborn, 'Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice' in J Niemi *et al* (eds), *Consumer Credit, Overindebtedness and Bankruptcy: National and International Dimensions* (Oxford, Hart Publishing, 2009), and the many other articles by Kilborn cited therein.



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Yet despite a general upward trend in filing rates, stark differences in nation-level filing rates persist. For the most telling example, consider the United States and the United Kingdom, the two largest English-speaking economies. In 2004, 930 out of every million UK residents sought formal insolvency relief, but US residents sought such relief at a rate more than five times as high (5,500 out of every million).³ Consider Canada and Australia, the two largest Commonwealth economies. Commentators note the similarity of their systems for providing bankruptcy relief,⁴ but the rate at which Australians and Canadians seek insolvency relief differs sharply. As of 2004, there were 1,300 filings per million in Australia, but more than twice as many (3,100) filings per million in Canada.

Governments concerned about rising rates of financial distress can respond in various ways. They might try to alter individual behaviour, hoping to limit financial distress by discouraging spending.⁵ Alternatively, they might intervene in credit markets, hoping to limit overindebtedness at the source.⁶ Countries that ignore the problem face the possibility of ending up like South Korea, which recently spent billions of dollars to bail out leading financial institutions that faced crippling levels of default and insolvency,⁷ or the United States, which faces a growing crisis centred on rapid increases in foreclosure rates.⁸

³ I note Iain Ramsay's point that comparisons of filing rates across national boundaries are complicated not only by differences in the formal liquidation systems, but also by differences in the possibilities for seeking relief through the multifarious rehabilitation systems, which may be more or less formal or voluntary. I Ramsay, 'Comparative Consumer Bankruptcy' (2007) *Illinois Law Review* 241, 260–2. In this Chapter, however, I cannot undertake to examine all such systems. Instead, I focus on the major formal national-level systems. Thus, for example, I do not include county court administration orders in the statistics for the UK. A complete understanding of the UK pattern would require assessment of the interaction of those orders with the bankruptcy and IVA systems that I do consider. It is enough for this Chapter to suggest (based on the apparent magnitude of county court administration orders) that the UK filing rate would remain relatively low even if I included those filings in calculating the UK filing rate.

⁴ See A Duggan, 'Consumer Bankruptcy in Canada and Australia: A Comparative Overview' in JP Sarra (ed), *Annual Review of Insolvency Law 2006* (Toronto, Thompson Carswell, 2007) at 857; JS Ziegel, *Comparative Consumer Insolvency Regimes: A Canadian Perspective* (Oxford and Oregon, Hart Publishing, 2003) at 96–7.

⁵ That approach would not be congenial in many countries. The US, for example, has depended for decades on consumer spending to drive economic growth. L Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York, Knopf, 2003). Similarly, Japanese reformers focused on consumer behaviour have worried that consumer spending has been too low, not that it has been too high. S Kozuka and L Nottage, 'Re-regulating Consumer Credit in Japan: Culture, Economics and Politics in Contemporary Law Reform' in J Niemi *et al* (eds), *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions* (Oxford, Hart Publishing, 2009).

⁶ For example, the UK's Office of Fair Trading and Department of Trade and Industry (recently superseded by the Department for Business, Enterprise and Regulatory Reform) have both been aggressive in this way in responding to the perceived problem of overindebtedness in the UK. See, eg, OFT, *Consumer Credit (Advertisements) Regulations 2007* (SI 2007/827); DTI, *Fair Clear and Competitive—The Consumer Credit Market in the 21st Century* (White Paper) (Cm 6040, 8 December 2003).

⁷ See RJ Mann, *Charging Ahead* (Cambridge, Cambridge University Press, 2006) 116–17.

⁸ See Office of the Comptroller of the Currency *et al*, *Statement on Subprime Mortgage Lending* (29 June 2007), available at <<http://www.fdic.gov/news/news/press/2007/pr07055a.html>>.

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1 Perhaps the most common response has been to amend the legal system for
2 dealing with financial distress. Even if financial distress is an inevitable by-
3 product of a modern capitalist economy,⁹ differences in the formal legal system
4 affect individual responses to financial problems. Most obviously, the rise of
5 consumer debt in recent decades has led to the creation of new bankruptcy sys-
6 tems in several continental European jurisdictions.¹⁰

7 Even in countries that have had bankruptcy systems for many years, the
8 rising levels of insolvency in recent decades have driven major reforms.¹¹
9 Policymakers have struggled with whether—and how—to alter their systems.
10 Hence, the US has adopted reforms designed to limit access at the same time as
11 the UK and Japan have implemented reforms to encourage more filings. Which
12 approach is correct? Should legislators permit access by a greater number of
13 debtors, to encourage entrepreneurial risk-taking? Or, should they limit access
14 to a smaller number of debtors to lower the moral hazard of an easy release from
15 obligations?¹² What is the best way to filter out the abusive filings from the ‘hon-
16 est but unfortunate’ debtors for whom policymakers design the systems?¹³

17 The disparate responses reflect the likelihood that variations in filing rates
18 rest on different factors in different countries. Some of the variation is attribut-
19 able to different levels of indebtedness. Some of the variation is attributable to
20 different cultural attitudes about financial failure. Some of the variation is
21 attributable to the accessibility of the legal system as a remedy for irremediable
22 financial distress. Some of the variation is attributable to the availability of
23 informal systems of relief. Yet it is not easy to disentangle how those different
24 attributes affect the aggregate nation-level filing rates. This Chapter explores
25 the possibility that aggregate empirical data can shed light on that question, and
26 analyses the policy implications of the differences in nation-level filing rates.

27 First, Part II explains why it is important as a matter of policy to understand
28 whether high or low filing rates stem from economic, cultural, or legal causes.
29 Without understanding why rates are high or low, it is impossible either to
30 assess whether the rate of filing is too high or too low, or to design policies likely
31 to move rates in the appropriate direction.

32 Drawing on prior work about credit card markets,¹⁴ Part III uses aggregate
33 data to distinguish between the economic explanations for filing rates and
34 the cultural and legal explanations. Two findings are salient. First, the bulk of
35 the uniquely high filing rate in the United States appears to be attributable to
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37 ⁹ See MJ Roe, *Political Determinants of Corporate Governance: Political Context, Corporate*
38 *Impact* (Oxford, Oxford University Press, 2002).

39 ¹⁰ See sources cited above n 2.

40 ¹¹ For a collection of papers on that subject, see Part IV of *Consumer Bankruptcy in Global*
41 *Perspectives*, above n 2.

42 ¹² See, eg, SA Rea, Jr, ‘Arm-Breaking, Consumer Credit and Personal Bankruptcy’ (1984) 22
43 *Economic Inquiry* 188; Barry Adler *et al*, ‘Regulating Consumer Bankruptcy: A Theoretical Inquiry’
44 (2000) 29 *Journal of Legal Studies* 585.

¹³ The phrase is from *Local Loan Co v Hunt*, 292 US 234, 244 (1934).

¹⁴ Mann, above n 7.

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economic conditions, not cultural attitudes or the legal system. Second, after controlling for economic conditions, Canada's filing rate is by far the highest of any of the countries for which adequate data is available, the other countries being the United States, United Kingdom, Japan, and Australia.¹⁵

Part IV offers tentative hypotheses to explain the more robust findings in Part III. Thus, it considers both why Canada's propensity to file is so much higher than that of the US, and why Australia's is so much lower. The discussion of Japan and the United Kingdom is more tentative, primarily because of limitations in the data¹⁶ that make the statistical findings considerably more ambiguous than they are for Canada, the US, and Australia. Generally, I hypothesise that 'back-end' issues related to the timing of a discharge and the payments required to obtain it are relatively unimportant. 'Back-end' issues matter primarily to the relatively small sector of bankruptcy filers with significant income or assets. For the great mass of potential filers who have little or no income or assets, the most important issues are 'front-end' barriers to filing, whether they come from procedural obstacles or from cultural attitudes about financial distress.

Part V concludes with a normative assessment of those 'front-end' barriers. Because those barriers tend to bar filings by the desperately insolvent (the 'low-income, low-asset' or LILA debtors), they reflect poor policy choices. The net social benefits of returning the LILA debtors promptly to productivity support a simple and effective system of relief for those debtors.

II. WHY THE REASONS MATTER

The first step in analysing nation-level filing rates is to confront the matrix of factors that affect those rates. Although a rigid categorisation is arbitrary, it is useful to distinguish among three different types of factors, each of which relates to financial distress and bankruptcy in a different way and each of which has different policy implications.

A. Legal Explanations

Although I am predisposed to doubt the importance of purely legal explanations,¹⁷ I start there, primarily because of the conventional wisdom that legal

¹⁵ I study these countries because they are the only ones for which I have been able to obtain a sufficiently long time series of data to permit meaningful quantitative analysis.

¹⁶ In the case of the UK, the apparent problem is that England and Wales have one bankruptcy system, Scotland another, and Northern Ireland no system at all. The data for my control variables extends to the entire UK and I have been unable to locate a time series of data for my control variables that is limited to England and Wales. In the case of Japan, the apparent problem is an unusually long recession that has lasted throughout the study period, so that the data does not include filings from the same mix of economic good and bad periods as the other countries.

¹⁷ See Mann, above n 7, at 96–8 (explaining that differences in legal protections have little relation to the pattern of debit and credit card use).

1 explanations are central to the problem. The intuition relies on a rational actor
2 conception of the debtor: fewer debtors file for bankruptcy in countries with
3 bankruptcy systems that offer relief that is less generous, and more debtors file
4 for bankruptcy in countries that offer relief that is more generous. The analyti-
5 cal premise is that the bankruptcy discharge provides an economic benefit to
6 those that file, and systems in which the benefit is greater should produce more
7 filings. The literature written from this perspective suggests that the key vari-
8 ables in explaining filing rates are the ready availability of a discharge, the types
9 of debts excepted from the discharge, and the scope of required post-bankruptcy
10 payments.¹⁸

11 That explanation is consistent with the US filing rate. The world's highest fil-
12 ing rate is associated with a system in which a discharge is almost automatically
13 and immediately available and with no general requirement of post-bankruptcy
14 payments to creditors. Similarly, Michelle White's work shows that the propen-
15 sity to file is higher in US jurisdictions with higher exemption levels and thus
16 more generous bankruptcy relief.¹⁹

17 The conclusion that the level of filing rates depends for the most part on the
18 legal system makes it easy to adopt responsive policies. For example, countries
19 like the UK and Japan seek higher rates of bankruptcy filings to speed the reso-
20 lution of financial distress. Those countries need only provide a discharge more
21 promptly, lower requirements for post-bankruptcy payments, or increase the
22 level of exempt assets. Conversely, legislators concerned that spiralling filing
23 rates reflect abuse should interpose obstacles to the discharge or increase the
24 likelihood that filers will be obligated to make post-bankruptcy payments to
25 their creditors.

26 27 28 **B. Cultural Explanations** 29

30 A second possibility recognises the interaction between the formal legal system
31 and the society in which it is embedded. Cultural predispositions might affect
32 the decision to file for bankruptcy, and those predispositions may differ from
33 country to country. That perspective recognises that the decision to file for
34 bankruptcy is a permanent one that will have lifelong consequences for the indi-
35 vidual that makes it. Hence, if this explanation were important, filing decisions
36 should diverge from those predicted by a rational-actor conception of the bank-
37 ruptcy decision: individuals might refrain from filing for irrational 'emotional'
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¹⁸ Michelle White's work provides the most careful support for this line of reasoning, showing that more debtors file in United States jurisdictions in which exemptions are higher. MJ White, 'Why It Pays to File for Bankruptcy: A Critical Look at Incentives Under US Bankruptcy Laws and a Proposal for Change' (1998) 65 *University of Chicago Law Review* 685 (hereinafter White, 'Why It Pays to File'); MJ White, 'Why Don't More Households File for Bankruptcy?' (1998) 14 *Journal of Law Economics and Organization* 205 (hereinafter White, 'Why Don't More Households File?').

¹⁹ See White, 'Why It Pays to File', above n 18.

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reasons even if the benefits available to them from a bankruptcy filing exceeded the out-of-pocket costs connected with the filing.

Cultural attitudes about bankruptcy also should affect the legal system itself. Iain Ramsay reminds us that legislators adopt laws that reflect the cultural dispositions that prevail among their constituents and the interest groups that are influential in their jurisdiction.²⁰ For example, UK leaders could embrace bankruptcy reform because of a 'strong admiration' for a 'vibrant enterprise culture' that involved 'responsible risk taking.'²¹ At the same time, concerns that relief for non-business debtors was an entirely different matter made it important for the Government to emphasise its opposition to 'a safety net for overindebted consumers.'²² In this vein, Rafael Efrat argues that cultural attitudes about entrepreneurs explain a great deal of the variation in the formal legal systems for consumer bankruptcy.²³

Although those types of effects are difficult to measure directly, proxies might shed light on the differing levels of cultural resistance to bankruptcy in different nations. In the existing literature, for example, cultural explanations gain powerful empirical support from data about United States filings. Specifically, Michelle White's work indicates that about 15 per cent of all households would benefit in economic terms from filing for bankruptcy, but only about 1 per cent file for bankruptcy in any given year.²⁴ The size of the gap suggests that the rational-actor conception captures little of the motivations for filing; it is reasonable to infer that a portion of the gap is attributable to cultural resistance to bankruptcy filing.

Although there is a long tradition of designing social programs in a way that stigmatises their use,²⁵ it is not clear how often legislators succeed. The mere existence of a national bankruptcy system legitimates bankruptcy filing to a considerable degree.²⁶ Similarly, high levels of overindebtedness are likely to create a culture in which bankruptcy filing necessarily becomes more culturally acceptable.²⁷ As more individuals use a bankruptcy system to resolve their financial problems and move forward with their lives, a larger and larger share

²⁰ See I Ramsay, 'Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales' (2006) 7 *Journal of Theoretical Inquiries Law* 625 (hereinafter Ramsay, 'Functionalism and Political Economy').

²¹ *Ibid* at 17–18.

²² *Ibid* at 18.

²³ See R Efrat, 'Global Trends in Personal Bankruptcy' (2002) 76 *American Bankruptcy Law Journal* 81.

²⁴ See White, 'Why Don't More Households File?', above n 18.

²⁵ See Christopher Howard, *The Hidden Welfare State* (Princeton University Press, 1999).

²⁶ The distinction from welfare is instructive, where stigmatised public assistance programs can be relegated to local authorities. The commitment to a bankruptcy system, by contrast, occurs at the national level. Interestingly, to the extent the United States system has delegated authority to the local standing Chapter 13 trustees, a case can be made that the result has been 'local legal culture' that in some locales stigmatises Chapter 7 bankruptcy filings. See T Sullivan *et al*, 'The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts' (1994) 17 *Harvard Journal Law Public Policy* 801.

²⁷ See Jean Braucher, 'Theories of Over-Indebtedness: Interaction of Structure and Culture' (2006) 7 *Journal Theoretical Inquiries Law* 323.

1 of the populace will be acquainted with people for whom that choice turned out
2 to be a good one. This in turn will weaken norms that regard bankrupts as an
3 'other' class of people held in general disdain. Moreover, as suggested above,
4 cultural predispositions motivate legislatures as well. Thus, in a society in which
5 compassion for bankrupts becomes widespread, it may become increasingly dif-
6 ficult for legislators to treat bankrupts harshly.

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9 **C. Economic Explanations**

10 The final possibility resonates with the opening paragraphs of this paper, con-
11 necting the increase in financial distress and bankruptcy filings to the rapid
12 increase in consumer debt (and especially credit card debt) in most developed
13 countries. The premise of this explanation is that bankruptcy filings for the most
14 part are the result of exogenous shocks, which result in financial distress that
15 would lead to filings in most cases without regard to legal or cultural factors.

16 If this explanation were important, the most significant predictors of nation-
17 level filing rates would be consumer debt, credit card debt, and general eco-
18 nomic conditions. Again, United States data support this theory. It is striking
19 that the United States for years has experienced both the highest level of credit
20 card debt in the world and the highest bankruptcy filing rate. Econometric mod-
21 els that scholars have used to illustrate connections between rising debt levels
22 and increased filing rates buttress that intuition.²⁸

23 Economic explanations would support intervention in the consumer credit
24 markets. For example, a jurisdiction concerned about excessive insolvency
25 might adopt regulations that limited the profitability of lending to those in
26 severe financial distress, hoping to truncate that lending without undue distor-
27 tion of the payment system or the broader lending market.²⁹

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31 **III. ECONOMIC AND NON-ECONOMIC EFFECTS ON FILING RATES**

32 The starting point in empirical analysis of consumer bankruptcy systems is the
33 wide disparity in filing rates across national borders. Figure 11.1 illustrates the
34 magnitude of the disparity, setting out the number of filings per million of pop-
35 ulation in each of five countries as of 2004 (the last year for which complete data
36 is available). Figure 11.1 provides two data points for each country. The first
37 number is the total number of all insolvency filings, which includes both the
38 number of liquidation or 'straight' bankruptcy filings and also the applicable
39 systems for 'rehabilitations' or 'proposals' or 'plans.'³⁰ Each of the five countries
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42 ²⁸ See Mann, above n 7, at 45–72 (summarising and extending that literature).

43 ²⁹ *Ibid* at 119–206 (detailed proposals for intervention in consumer credit markets in the US).

44 ³⁰ The Appendix includes a more complete set of charts showing a time series of those filings for each country from 1990 to the present.

has both types of system. The second number reports only the number of liquidation or straight ‘bankruptcy’ filings.³¹

In isolation, Figure 11.1 suggests that the US has by far the highest rate of filing, with steadily decreasing filing rates in Canada, Japan, Australia, and the UK. Although the disparity is striking, it should be clear from the discussion above that the raw numbers say little about the cause of the disparity. Without further information, it is impossible to tell whether the disparity relates to differences in the systems themselves or rather to cultural differences or differences in economic conditions.

As it happens, it is possible to identify the economic factors that affect the level of insolvency filings in a particular jurisdiction. In prior work focused on the relation between credit card debt and financial distress, I developed a model that documents a strong and significant relation between changes in the level of credit card debt and changes in bankruptcy filings. The model used credit card debt, credit card spending, total consumer debt, and unemployment (as independent variables) to explain the number of bankruptcy filings (as the dependent variable). Generally, the data suggest, an increase of \$100 in credit card debt per capita will be followed one year later by an increase in bankruptcy filings of about 200 per million of population.³² As the magnitude of the filing rates in Figure 11.1 illustrates, that effect is large enough to have substantial practical significance.

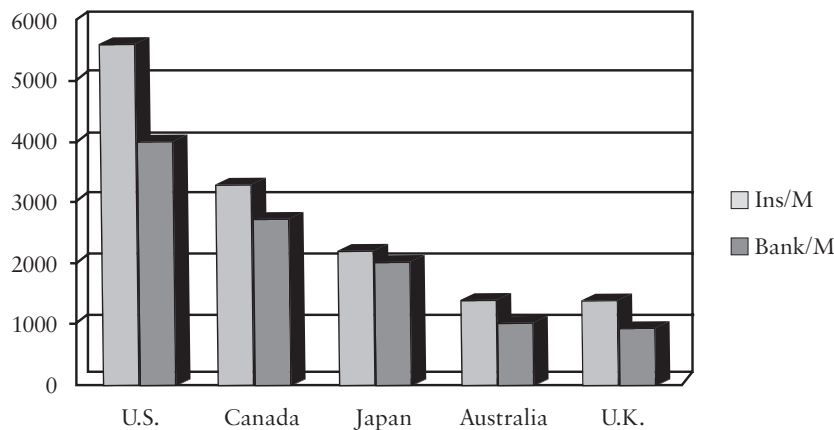


Figure 11.1 2004 Insolvencies per million of population

³¹ As Figure 11.1 illustrates, including or omitting rehabilitation filings does not alter the relative number of filings for any country. However, in the United States there is a much higher percentage of rehabilitation filings than in other countries. The more common use of the rehabilitation system in the US may be attributed in part to the maturity of the Chapter 13 system and in part to the value of that system for retaining home and automobile ownership. In none of the other countries in my study would the rehabilitation filing interfere with the ability of a lender to pursue collateral such as a home or automobile.

³² See Mann, above n 7, ch 5.

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1 As I worked with the data I began to explore how the effect differed from country
2 to country. Even when I added variables (country dummies) to isolate country-
3 specific effects, however, the relation between credit card debt and
4 bankruptcy filings remained significant. What led me to this project was the sur-
5 prising finding that the US was *not* at the top of the scale. Specifically, controlling
6 for economic conditions, the coefficient on the United States variable did *not* sug-
7 gest that there is a higher propensity to file in the United States than in the other
8 countries. Intrigued by that finding, for this project I updated the data used in that
9 work (to reflect additional years of filings) and also segregated the data to permit
10 separate analysis of liquidation filings, rehabilitation filings, and total filings. My
11 intuition was that data about liquidation filings might be more useful than data
12 about total filings, at least in part because rehabilitation filings in many countries
13 are more closely related to informal or voluntary resolution schemes. Moreover,
14 stark differences in the relation between rehabilitation filings and secured credit
15 suggest that those filings might be used for such different purposes in different
16 countries as to make cross-border comparisons meaningless.³³ Ultimately, the
17 central inquiry should relate to total filings in countries (like the United States) in
18 which the big step is to seek any type of formal insolvency relief. By contrast, in
19 countries in which a rehabilitation filing is culturally and legally less significant
20 (Japan, for example), it would be better to examine the smaller number of people
21 that take the more complete step of filing a 'straight' or liquidation bankruptcy.
22 The tables and regression analysis in this Chapter consider both metrics.

23 As summarised in Table 11.1,³⁴ Canada moves to the top of the list once the
24 credit-related variables are accounted for, at least for total filings and liquida-
25 tion filings. Table 11.1 reports whether the filing rates per million are higher or
26 lower than Canada, when economic conditions are controlled. Table 11.A1 in
27 the Appendix includes more detailed data.

28 As the more detailed information in the Appendix shows more fully, large
29 standard errors suggest that the estimates of the coefficients on the country
30 dummies are relatively imprecise.³⁵ The relations are statistically significant
31 only for the United States and for Australia, and in Australia only for liquida-
32 tion filings. Still, the pattern of negative coefficients is striking: the coefficients
33 are negative for each country's total filing propensity and its liquidation filing
34 propensity, when they are compared to Canada. This suggests that, faced with

35 A Chapter 13 filing in the US is commonly used to prevent a foreclosure on a home or repos-
36 session of an automobile. In none of the other countries in this study would a rehabilitation filing
37 bring with it an automatic stay that would grant that protection. This differential benefit from a
38 Chapter 13 filing is a good explanation for why the rate of rehabilitation filings in the US is signifi-
39 cantly higher than the rate in Canada, although the rates of liquidation and total filings are higher
40 in Canada than in the US.

41 ³⁴ Although Table 11.1 does not report it, the results confirm and extend the analysis reported in
42 R Mann, *Charging Ahead*, above n 7, because credit card debt remains highly significant with a sub-
43 stantial positive coefficient in all of the different runs, generally significant at a .001 level.

44 ³⁵ Minus signs indicate a negative coefficient; plus signs indicate a positive coefficient. ** indi-
cates significance at the 1 per cent level, * at the 5 per cent level, and # at the 10 per cent level. Table
11.A1 in the Appendix includes more detailed information about the regressions.

Table 11.1: Country Effects On Individual Bankruptcy Filings³⁶

COUNTRY	TOTAL	LIQU.	REHAB.
USA	—**	—**	+*
Japan	—	—	+
Australia	—	—#	—
UK	—	—	+
N	51	69	51
R2	.93	.93	.97

similar patterns of debt and unemployment, the bankruptcy filing rate would be higher in Canada than in any of the other countries. To put it another way, the data suggest that the high filing rate of the US is largely attributable to the economic conditions captured in the model. Once we control for those conditions, the US gives way to Canada as the nation with the highest propensity to file.

This presents a new puzzle for analysis: why, holding economic conditions equal, Canada should have such a higher ‘propensity’ to file than the USA and Australia. For convenience of exposition, the remainder of the Chapter uses the term ‘propensity’ to reflect this analysis—the extent to which the per capita filing rate in a country is affected by variables other than economic conditions. The next Part of the Chapter explores that puzzle.

IV. THE PATTERN OF INDIVIDUAL BANKRUPTCY FILINGS

The object of this Part is to resolve the two puzzles most clearly suggested by Table 11.1: why Canada’s propensity to file is so much higher than that of the United States and Australia.³⁷ Because the cultural factors are harder to quantify, this Part begins by identifying features of the legal systems that are likely to explain the disparities set out in Table 11.1. The discussion generally rests on three hypotheses. First, the ease or speed of ‘back-end’ legal factors like the discharge is not useful in explaining filing rates. Second, the legal factors with the largest effect on filing rates are ‘front-end’ factors such as the procedural barriers or obstacles to filing; this factor is central to explaining the difference between Canada and the US.³⁸ Third, where no pattern of legal differences

³⁶ It would be surprising if the model did capture all of the variation because there have been substantial bankruptcy reforms in several of the countries during the period of the study. As discussed above, n 16, problems with the UK and Japanese data make it easy to see why the model does not produce significant results for those variables.

³⁷ Given the ambiguity of the findings related to the UK and Japan, I leave that subject to another day.

³⁸ For a similar argument about German filing rates, see W Backert *et al*, ‘Consumer Bankruptcy in Germany’, in *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions*, above n 5.

1 appears, it is reasonable to consider whether the residual cause is a strong cultural predisposition.
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5 **A. Why Is the Canadian Propensity to File Higher than the US Propensity?**
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7 The most intriguing problem is to explain the disparity in filing propensity
8 between Canada and the US. Examining the two countries' systems at a very
9 high level of generality, they provide a good empirical test of the hypotheses
10 about front-end and back-end factors. First, the US discharge is considerably
11 more generous than the Canadian discharge, which would support a lower
12 Canadian filing propensity if the terms of discharge were the most important
13 factor. Conversely, the Canadian bankruptcy process is relatively more accessible
14 than the American process, which would support a higher Canadian filing
15 propensity if accessibility were the most important factor. My conclusion is that
16 the data support the hypothesis that accessibility is a more important predictor
17 of propensity than the generosity of the discharge. Canada has a greater propensity
18 to file, once we account for the markedly higher level of credit card debt in
19 the United States, because Canada's relatively accessible bankruptcy system discourages fewer filers than the relatively inaccessible US system.
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21 On the first point, the United States system offers a faster and almost unconditional discharge, with a stay automatically effective upon filing³⁹ and a discharge available in theory immediately and in practice after a few months.⁴⁰ By contrast, Canada, like most countries, does not permit an immediate discharge. Rather, the discharge cannot be considered for nine months and often involves an unstructured judicial assessment of a report filed by the bankruptcy trustee.⁴¹ To be sure, challenges to discharge are infrequent, apparently affecting far less than one-fifth of the cases.⁴² Yet, the fact remains that the delay of the discharge
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30 ³⁹ BAPCPA did introduce revisions that limit the automatic effectiveness of the stay, but those apply only to repeat filers. See 11 USC § 362(c) (3) (automatic stay against certain creditors lasts only 30 days for certain repeat filers) and (4) (no automatic stay for certain multiple repeat filers).
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32 ⁴⁰ To be sure, the United States has more exceptions to discharge than the other countries I study. See WC Whitford, 'Changing Definitions of Fresh Start in American Bankruptcy Law' (1997) 20 *Journal of Consumer Policy* 179. But those exceptions seem to me back-end issues less likely to affect the decision to file.
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35 ⁴¹ Bankruptcy and Insolvency Act § 170, RSC 1985, c.B-3; S Ben-Ishai, 'Discharge' in S Ben-Ishai and A Duggan (eds), *Canadian Bankruptcy and Insolvency Law* 357, 358–60 (Markham, Lexis Nexis Canada, 2007); Duggan, above n 4, at 873–6. Similarly, the Canadian process includes rules under which debtors with substantial 'surplus' income must make periodic payments to their creditors. Apparently about one-fourth of Canadian debtors make such payments. *Ibid* at 864; S Ben-Ishai, 'Means-Testing' in *Canadian Bankruptcy and Insolvency Law* at 343, 353. Ben-Ishai emphasises that this leaves the system more accessible than the US system 'because debtors with surplus income are still able to move through the bankruptcy process, they are not directly prevented from accessing the fresh start offered by a liquidation bankruptcy or forced into an enforced payment plan.' *Ibid* at 355.
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43 ⁴² Ramsay reports 1994 data in which about 15 per cent of applications were opposed. I Ramsay, 'Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis' (1999) 37 *Osgoode Hall Law Journal* 15, 24. Ziegel reports 1998 data indicating that out of 83,000 discharge applications,
44

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and the risk that it will not be granted unconditionally are quite different from the US experience, where objections to discharge are rare.

On the other hand, the procedures for instituting a bankruptcy in Canada are much simpler than the United States procedures. The prospective bankrupt initiates the proceeding by filing a simple standard-form assignment. The fee is CAN\$75 for summary administration (cases with less than \$10,000 in assets, more than 90 per cent of all cases⁴³) and CAN\$150 for regular administration.⁴⁴ The typical consumer bankrupt does not retain an attorney, though it must pay the fees of the trustee.⁴⁵ There is no mandatory examination by creditors, and no 'abuse' provision that might force the debtor to use the alternative 'proposal' system.⁴⁶ There is a mandatory counselling requirement (introduced in 1992), but it occurs after the filing, not before.⁴⁷ In the United States, the process is much more cumbersome. The forms are considerably more complex, and BAPCPA has only made them more so. Indeed, it is clear that the timing of bankruptcy filings is affected to a considerable extent by the need to collect the information necessary to complete the requisite forms.⁴⁸ Thus, although there is no legal requirement that filers retain an attorney or trustee, the overwhelming majority choose to do so.⁴⁹

The juxtaposition of those distinctions with the substantial difference in propensity to file provides powerful support for the hypotheses about legal precursors. If the economic features of the discharge and future income payments—the 'back-end' effects of bankruptcy—were an important precursor of a high propensity to file, then it is surprising that there is a relatively high propensity to file in Canada. Conversely, the difference between Canada's streamlined procedures and the burdensome procedural obstacles in the United States cuts in the same direction as the propensity data presented in Part III.

B. Why Is the Canadian Propensity to File Higher than the Australian?

The second puzzle is how to distinguish Australia from Canada. As Part III illustrates, Australia has a lower propensity to file after accounting for economic

93 per cent of debtors received an unconditional discharge, 7 per cent a suspended discharge, and less than 1 per cent received conditional discharges or were denied discharges. Ziegel, above n 4, at 39.

⁴³ Ziegel, above n 4, at 19.

⁴⁴ Bankruptcy and Insolvency Act § 132, RSC 1985, c.B-3; Duggan, above n 4, at 870.

⁴⁵ Ziegel, above n 4, at 18. It is difficult to generalise about the levels of Canadian trustee fees, which in some cases might approximate the fees of US attorneys. See below, n 49.

⁴⁶ Ziegel, above n 4, at 20–1.

⁴⁷ Bankruptcy and Insolvency Act §§ 66.13, 157.1, RSC 1985, c.B-3; Duggan, above n 4, at 887–90.

⁴⁸ This also has become more significant after BAPCPA. R Mann and K Porter 'Saving up for Bankruptcy' (forthcoming 2010) 98 *Georgetown Law Journal* (Section V (c)).

⁴⁹ Interestingly, it is not clear that the out-of-pocket costs of filing differ substantially in the two countries. Although the US filing fees are much lower, the costs of trustees in Canada well might exceed the costs of attorneys in the US. At the same time, it appears that US attorneys are much more likely to require up-front payment than Canadian trustees. J Ziegel, 'Indigent Debtors and Financial Accessibility of Consumer Insolvency Regimes', in JP Sarra (ed), *Annual Review of Insolvency Law* (Toronto, Thomson Canada Limited, 2005) 500–4.

1 conditions. The next question is whether legal or cultural factors can explain the
2 difference.

3
4 *i. The Failure of Legal Explanations*
5

6 As other scholars have noted, it is difficult to discern credible explanations
7 based on the bankruptcy systems themselves.⁵⁰ First, the ‘back-end’ portions of
8 those systems are quite similar. For example, the Australian discharge (histori-
9 cally available after 12 months of surplus income payments)⁵¹ closely resembles
10 the Canadian discharge available after nine months.⁵² Because Australia’s
11 propensity to file is so much lower than Canada’s, it is hard to put much weight
12 on the discharge as an explanation.⁵³ Nor do procedural obstacles offer any-
13 thing to explain the distinction.⁵⁴ Australia’s system for initiating bankruptcies
14 is for the most part quite similar to that of Canada; if anything it appears to be
15 *more* accessible than Canada’s, not less.⁵⁵ Professor Ziegel explains, ‘the
16 important point worth stressing here is that it is even easier—and certainly
17 much cheaper—for Australian debtors to initiate bankruptcy proceedings than
18

19 ⁵⁰ See authorities cited above, n 4.

20 ⁵¹ Surplus income payments are even less common in Australia than in Canada. See J Braucher,
21 ‘A Comparative Study of Repayment Forms of Individual Bankruptcy’ in J Niemi-Kiesiläinen *et al*,
22 *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions*,
23 above n 5 (reporting a substantial increase in payments, up to 12 per cent of all filings, as compared
24 to more than 20 per cent of filings in Canada).

25 ⁵² Australia’s discharge period was lengthened to three years in 2002. See Duggan, above n 4, at
26 877. But Australian rates were much lower than Canada’s even before that change. Moreover, as
27 Figure 11.A1 illustrates, the slight (and apparently temporary) decline in filings after 2002 is a small
28 fraction of the aggregate difference between Canadian and Australian filing rates.

29 ⁵³ Recent Japanese reforms (intended to *encourage* bankruptcy filings) suggest that the nature of
30 the discharge is similarly unimportant in explaining the low Japanese filing rate. See J Matsushita,
31 ‘Comprehensive Reform of Japanese Personal Insolvency Law’ (2006) 7 *Journal of Theoretical*
32 *Inquiries Law* 555, 560–4 (summarising those reforms). Although it is too early to be sure (because
33 of the slow process Japan follows for issuing bankruptcy statistics), the early evidence—a substan-
34 tial *decline* in 2005 bankruptcy filings—at least suggests that these reforms will solve little of Japan’s
35 problem. To be sure, the improvement in Japan’s economy beginning in 2004 might have caused
36 some of that decline. However, an obvious alternative hypothesis supported by the experience in
37 other countries is that the 2004 reforms—which emphasise increasing exempt assets and broaden-
38 ing the discharge—do little to address the heart of what keeps Japan’s filings low: the expensive and
39 cumbersome process for gaining access to bankruptcy.

40 ⁵⁴ Procedural obstacles do offer a potential explanation for the low filing rates in the UK and
41 Japan. See Ziegel, above n 4, at 112–13 (discussing onerous procedures in Great Britain);
42 K Anderson and M Ito, ‘Insolvency Law for a New Century: Japan’s New Framework for Economic
43 Failures’ in D Foote (ed), *Law in Japan: A Turning Point* ([Seattle, University of Washington Press],
44 2007) (discussing onerous process for instituting consumer bankruptcy in Japan, which includes
45 judicial scrutiny for eligibility and traditionally has not included an automatic stay); Matsushita,
46 above n 53, at 561. Pre-screening of consumer bankruptcy petitions is not unique to Japan. It also is
47 a common feature of Nordic bankruptcy systems. See J Kilborn, ‘Out With the New, In With the
48 Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have US Reformers
49 Fallen Off the Learning Curve,’ (2007) 80 *American Bankruptcy Law Journal* 435, 443–4 (here-
50 inafter, Kilborn, ‘Sweden’).

51 ⁵⁵ Ziegel repeatedly notes the difference in filing rates, but does not undertake to explain it.
Ziegel, above n 4, at 94, 106.

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it is for a Canadian debtor.⁵⁶ For example, a bankrupt commences a case by completing a short standard form of assignment. The only substantive filing requirement is that the debtor be insolvent. Australia offers a summary administration process with no creditors' meeting for cases with less than \$10,000 in assets (which applies to about 90 per cent of Australian cases). Moreover, debtors typically do not use attorneys or private trustees; rather the Official Trustee administers the case, collecting its fee from the estate and relying on a public subsidy to administer no-asset cases.⁵⁷

ii. Cultural Explanations

If neither economic explanations nor legal explanations are fruitful, an obvious possibility is that cultural explanations provide an explanation for the observed pattern. Because cross-border cultural explanations are inherently nebulous (like dark matter), any such explanation necessarily is speculative. That is particularly true here, where the cultural factors would have to be remarkably powerful to explain the disparities identified in Figure 11.1 and Table 11.1. Still, the juxtaposition of nearly identical legal systems and similar economic conditions with starkly different filing rates justifies exploration of the possibility.

One objective place to look for indicators of a strong cultural disposition against bankruptcy is statutes that impose substantial legal disabilities on those who file for bankruptcy. Such statutes could persist only in a society with a strong cultural disposition against bankruptcy.⁵⁸ Here, there is some evidence to suggest that Australian society takes a harsher perspective than Canada. In contrast to Canadian law, which imposes no substantial disabilities, Australian bankrupts forfeit their passports when they file.⁵⁹

One intriguing suggestion comes from Iain Ramsay, who argues that we observe high filing rates in countries (like Canada and the US) in which private professionals assist bankrupts in initiating proceedings because those professionals have an economic incentive to raise awareness of the bankruptcy process. By contrast, Ramsay argues, we observe low filing rates in countries (like Australia and the UK) that rely entirely on public officers to assist filers, because those officers have a significantly lower incentive to publicise the

⁵⁶ Ziegel, above n 4, at 96–7. Tony Duggan and Jean Braucher share Ziegel's perspective. Duggan, above n 4, at 869–72; Braucher, above n 51.

⁵⁷ See *Ibid*; Duggan, above n 4 at 868–9; R Mason and J Duns, 'Developments in Consumer Bankruptcy in Australia', in *Consumer Bankruptcy in Global Perspectives*, above n 2, at 227, 232–4.

⁵⁸ The UK provides a startling example. Until the Enterprise Act reforms in 2004, the UK bankrupt was subject to numerous serious civil disabilities, akin to those typically imposed on felons. Among other things, British bankrupts (at least before the 2002 Enterprise Act became effective in 2004) could not be a Member of Parliament, Justice of the Peace, company director, chairman of a land tribunal, school governor, estate agent, charity trustee, or even a practicing solicitor or insolvency practitioner. See A Walters, 'Personal Insolvency Law After the Enterprise Act: An Appraisal' (2005) 5 *Journal of Corporate Law Studies* 65, 82–3.

⁵⁹ Bankruptcy Act 1966 § 272. See Duggan, above n 4, at 892. It is unclear how important this ban is in practice. Apparently Australians usually can travel abroad after seeking permission from the trustee. Still, the formal requirement is quite stigmatising.

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1 process.⁶⁰ It is difficult to evaluate that perspective as an overarching explanation.
2 For example, given the low esteem for lawyers and the legal process in the
3 US, many would regard the practical need for lawyers in the US bankruptcy
4 process as an obstacle. A purely administrative process might in practice be
5 much more accessible.

6 On the other hand, I take Ramsay's central point to be that the private pro-
7 fessionals are central in increasing public awareness and receptivity to the bank-
8 ruptcy process. Even in the US advertising by lawyers appears to play a role in
9 developing a cultural perception of bankruptcy as a routine solution to financial
10 distress.⁶¹ If that is the significance of private professionals, then it is hard to be
11 sure that their appearance is not an effect of a relatively receptive culture rather
12 than a cause. In either case, Ramsay's thesis is consistent with the pattern I identify
13 here.⁶²

14 C. Summary

15
16 In a way, the central puzzle the data presents is why Canada's propensity to file is
17 so high, given relatively low levels of debt. One possibility could be that Canadian
18 debt is riskier or more perilous in some way that aggregate data cannot reveal, so
19 that the same level of credit card and other borrowings in Canada would result in
20 higher bankruptcy filings than in other countries. However, the best evidence
21 about global credit card markets makes that hypothesis implausible. If anything,
22 Canada's use of payment cards appears to be considerably more benign than the
23 use in the United States and Australia.⁶³ That suggests that we must look to legal
24 or cultural explanations. With respect to the United States, the most salient distinction
25 that would explain a relatively higher propensity to file is Canada's decision
26 to make its bankruptcy system so accessible, particularly for those in more
27 desperate condition. With respect to Australia, distinctions are even more elusive
28 because it is difficult to identify any feature of the legal system that makes
29 Canada's bankruptcy system more accessible than Australia's. Recognising that
30 the inquiry is speculative, it does suggest that cultural predispositions against
31 bankruptcy are remarkably stronger in Australia than in Canada, reinforced by
32 the greater presence of marketing and advertising in Canada.
33

34 ⁶⁰ Ramsay, above n 3. See Duggan, above n 4, at 893 (tentative endorsement of Ramsay's hypothesis).
35

36 ⁶¹ That certainly is something for which consumer bankruptcy lawyers routinely are criticised.
37 See RJ Mann, 'Bankruptcy Reform and the "Sweat Box" of Credit Card Debt' (2007) *Illinois Law Review* 375, 375.

38 ⁶² As Tony Duggan has pointed out to me, Ramsay's thesis leaves unexplained why a culture that
39 is by hypothesis so opposed to bankruptcy would embrace a legal system that on its face is so receptive
40 to bankruptcy. One obvious possibility is that Australia tolerated such a system *because* filing
41 rates remained low. When filing rates rose in the late 1990s to levels that were remarkably high by
42 Australian standards (though still far below typical rates for the US and Canada), Australia
43 responded by restricting the relief available to those that file. As suggested above n 52, it is not yet
44 clear that those reforms will have a permanent or substantial effect on filing rates.

⁶³ Compared to the US market, Canada's use of debit cards is much more common and its level
of borrowing in payments transactions is much lower. See Mann, above n 7, chs 9–10.

V. POLICY IMPLICATIONS

The analysis in Parts III and IV is descriptive, an attempt to understand the causal relationships between institutional precursors of individual bankruptcy filings and the different filing rates we observe around the world. That discussion, however, does have normative significance. By exposing the reasons for the different rates, it explicates the social impact of existing legal systems as well as the potential gains (and losses) from reforms. Because the focus of this project is the legal systems for consumer bankruptcy, this Part of the Chapter emphasises the legal explanations rather than the cultural explanations.⁶⁴

If we set cultural explanations to the side, the most important conclusion in Part IV is that nation-level filing rates depend much more on front-end procedural obstacles to filing than they do on back-end issues about the timing and conditions of a final discharge. This was surprising at first, because it is in considerable tension with the conventional understanding that high filings plague the US system because of its undue laxity. Yet on reflection, two points make this finding easier to accept.

The first is a behavioural point, that the typical potential bankrupt will pay more attention to those parts of the legal system that are more immediate and less to those that will not have direct effects until weeks or months after a bankruptcy filing. The typical client will be more concerned about the detailed financial records to be produced and the \$700–\$1,000 to be paid up front, than about the lawyer's estimation of the amount of debt that will still be owed months or years later when the proceeding is finally concluded. This distinction is implicit in my characterisation throughout this Chapter of procedural obstacles as front-end attributes and discharge and payment issues as back-end attributes. The individual's reaction to the immediate and remote attributes of the bankruptcy process differs little from the individual's reaction to the immediate and remote attributes of complex products like cell phones, health clubs, and credit cards.⁶⁵

The second relates to the attributes of the universe of potential bankrupts. Rules about income payments and conditions of discharge have relatively little significance for those who have no income or assets, because whatever the law says they are unlikely in fact to make substantial payments to creditors or to suffer in a material way from post-bankruptcy collection activity. Those issues matter, rather, to the relatively well-off subset of filers for whom future payment obligations are realistic. Conversely, procedural obstacles will matter the most

⁶⁴ I have argued in prior work that it is a poor policy choice to influence bankruptcy filing rates by enhancing cultural predispositions against filing. Mann, above note 7, ch 15; RJ Mann, 'Optimizing Consumer Credit Markets and Bankruptcy Policy' (2006) 7 *Journal of Theoretical Inquiries Law* 353.

⁶⁵ See S Dellavigna and U Malmendier, 'Contract Design and Self-Control: Theory and Evidence' (2004) 119 *Quarterly Journal of Economics* 353; X Gabaix and D Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 121 *Quarterly Journal of Economics* 505; Mann, above n 7, ch 12.

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1 to those without income or assets. A \$1,000 bill for costs and fees of filing a bank-
2 ruptcy petition is much more likely to slow a filing by a desperate bankrupt with
3 no income or assets than it is a filing by middle-class debtors with steady income
4 but no realistic possibility of meeting their financial obligations. Moreover, the
5 desperately insolvent have relatively little to gain from a bankruptcy filing (at
6 least in an economic sense). They will pay little or nothing on their debts in any
7 event. For them, the immediate gain from a bankruptcy filing comes from the
8 possibility that creditors might harass them less after they file. The relatively
9 well-off middle-class filers have the most to gain in economic terms, because the
10 bankruptcy process allows them to protect assets or income from creditors who
11 might be able to force payment absent a discharge in bankruptcy.

12 With respect to the US, the Consumer Bankruptcy Project shows that a great
13 many of those who actually file have very little income and few assets. For exam-
14 ple, as of 2001, the median household income of debtors in the Consumer
15 Bankruptcy Project was only \$20,172; 41 per cent were below the poverty line.⁶⁶
16 Asset values are harder to judge, because about half of US bankrupts have
17 homes. Considering non-real-estate assets (the only likely sources for distribu-
18 tions to creditors), the median value of assets was less than \$10,000, far below
19 the median value for all families (more than \$40,000).⁶⁷

20 The Consumer Bankruptcy Project, however, does not say anything about how
21 many more people, similarly desperate, are excluded from the system by the pro-
22 cedural obstacles discussed above. The best evidence of the size of that popula-
23 tion will be evident whenever post-BAPCPA filing rates become sufficiently stable
24 to allow us to discern the size of the decline attributable to that statute. Figure
25 11.A5 shows the total filings in the United States over time, with a data point for
26 2007 extrapolated from the data for the first half of 2007. As the figure suggests,
27 the filing rate almost two years after the effective date of BAPCPA remains sub-
28 stantially below the filing rate before BAPCPA. Thus, although it is still too early
29 to speculate on the ultimate size of the gap, it is increasingly clear that there will
30 be some gap, that the post-BAPCPA filing rate will remain below the pre-
31 BAPCPA filing rate for the foreseeable future.⁶⁸ Because the most important pro-
32 visions of BAPCPA that are likely to affect the filing rate are provisions designed
33 to increase the procedural obstacles to bankruptcy,⁶⁹ the size of that drop suggests
34 the significance of this group to the total filing rate.

35 If marginal filers with no substantial assets or income are a large portion of
36 the potential bankrupts, marginal filers also are those for whom there is the
37 greatest divergence between the private and social value of the bankruptcy
38 filing. As discussed above, the economic value of a bankruptcy filing for a debtor

39
40 ⁶⁶ See T Sullivan, E Warren and JL Westbrook, 'Less Stigma or More Financial Distress: An
41 Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings' (2006) *59 Stanford Law
42 Review* 213, 222-3.

42 ⁶⁷ See *ibid* at 226-7.

43 ⁶⁸ For a detailed discussion of the various factors that affect the size and duration of that gap, see
44 Mann, above n 61.

⁶⁹ *Ibid*.

with little income and few assets is relatively small, because the debtor gains relatively little from the discharge. However, the net social value of the discharge is considerable. On the one hand, the discharge harms third parties relatively little, because even without a discharge creditors would collect little of their debts from this class of bankrupts. On the other hand, society gains considerably from the discharge, because it is central to redeployment of the debtor's human capital. The premise of the bankruptcy discharge is that it increases the likelihood that the discharged can move forward with their lives, engaging in productive economic activity—jobs, tax payments, and attention to their family—and decreases the likelihood that they will drift into positively harmful activities—drug use, crime, and the like.⁷⁰ The more a legal system can facilitate that redeployment, the greater the net social benefits from the system.⁷¹

Given the decades of experience that the US has had with its bankruptcy system, it is surprising that the US has not yet come to grips with the reality of the lower-middle-class bankrupt who has no substantial income or assets. Many other countries have rapidly developing and widely used systems for 'no-income, no-asset' or NINA filings. Thus, following the lead of New Zealand,⁷² the UK's Insolvency Service has proposed a NINA Debt Relief Order designed to be a low cost alternative for 'the very poorest' individuals.⁷³ Available to individuals with no more than £50 in surplus income and no more than £300 in realisable assets, the process would be entirely administrative and have a significantly lower filing fee than the standard bankruptcy process.⁷⁴ The Insolvency Service estimates that filings under the NINA system would be at a rate of more than 500 per million per year, a substantial number in a nation that currently has only about 1,000 bankruptcy filings per year.⁷⁵

Similarly, although Canada already has a 'summary administration' process with reduced fees and process, used by about 90 per cent of its debtors, Canada's Personal Insolvency Task Force recently spent considerable effort debating an even more streamlined 'fast track' process for the poorest debtors.⁷⁶ Sweden is

⁷⁰ See Edmund Phelps, *Rewarding Work* (Cambridge, Harvard University Press, 1997).

⁷¹ The concerns about the potential for positive spillover effects from the bankruptcy process that have been so absent from the US deliberations have dominated European debates in recent years. Eg, Kilborn, 'Sweden', above n 54, at 439; J Kilborn, 'The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law From Unexpected Parallels in the Netherlands' (2006) 39 *Vanderbilt Journal of Transnational Law* 77, 93 (hereinafter Kilborn, 'Netherlands').

⁷² Insolvency Act 2006 (NZ) §§ 361–77, 2006/55. See T Telfer, 'New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime', in *Consumer Bankruptcy in Global Perspective*, above n 2, at 247.

⁷³ Insolvency Service, *Relief for the Indebted—An Alternative to Bankruptcy* (March 2005); Insolvency Service, *Relief for the Indebted—An Alternative to Bankruptcy: Summary of Responses and Government Reply* (November 2005).

⁷⁴ See Ramsay, 'Functionalism and Political Economy', above n 20, at 648–50.

⁷⁵ See *ibid* at 648–9.

⁷⁶ Ziegel, above n 4, at 19. See also S Ben-Ishai and S Schwartz, 'Bankruptcy for the Poor' (2007) 45 *Osgoode Hall Law Journal* (estimating that 70–80 per cent of Canadian failures would qualify as NINA filers). Despite the protracted consideration, the task force ultimately made no recommendation on the question, which remains unaddressed in Canadian law. See Duggan, above n 4, at 872–3.

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1 implementing this year major reforms designed to truncate the process to speed
2 the return of the insolvent to economic productivity.⁷⁷ Recent Netherlands
3 reforms include a ‘fast-track’ procedure for ‘extreme’ cases in which neither
4 assets nor income are expected to produce a return to creditors. Although
5 administrators are applying the procedure cautiously “to create societal sup-
6 port” for the new law in its early years,’ it appears that creditors receive distri-
7 butions in no more than a fifth of all cases in the Netherlands.⁷⁸ Despite the
8 vehement German objections to an American-style discharge, German legisla-
9 tors finally recognised the need for a reduced-cost procedure for no-asset cases,
10 a procedure that has received a major share of filings since its introduction in
11 2001.⁷⁹ Similarly, recognising that French courts were ‘literally submerged by
12 the flood of overindebtedness cases,’ French legislators in the 1990s largely
13 removed any judicial role in most cases.⁸⁰ More recently, French legislators
14 adopted a new procedure for ‘personal recovery’ to deal with the large share of
15 cases (about one-quarter of all filings) in which it is immediately obvious that
16 there is no prospect for payments to creditors.⁸¹

17 These systems recognise that the appropriate bankruptcy procedure for this
18 slice of the debtor population, what we might call the low-income, low-asset
19 (LILA) debtors,⁸² is a purely administrative process. For individuals that cannot
20 reasonably be expected to make any substantial payments, processing at the
21 lowest possible transaction costs should be the goal. The US, by contrast,
22 continues to use a ‘one size fits all’ system, with procedural obstacles that are
23 wastefully obstructive for much of the bankrupt population.

24 The evidence points toward bankruptcy simplification.⁸³ The time has come to
25 abandon the complicated structures laden with bureaucratic hurdles and special-
26 interest provisions worthy of the Internal Revenue Code. At least for the desper-
27 ately insolvent, with no substantial income or assets, the best process is one that
28 is stripped down to its most central elements. First, the system should function as

30 ⁷⁷ See Kilborn, ‘Sweden’, above n 54, at 457–61.

31 ⁷⁸ Kilborn, ‘Netherlands’, above n 71, at 107–8.

32 ⁷⁹ See J Kilborn, ‘The Innovative German Approach to Consumer Debt Relief: Revolutionary
33 Changes in German Law, and Surprising Lessons for the United States’ (2004) 24 *Northwestern
Journal of International Law and Business* 257, 286–8.

34 ⁸⁰ See J Kilborn, ‘La Responsabilisation de l’Economie; What the United States Can Learn From
35 the New French Law on Consumer Overindebtedness’ (2005) 26 *Michigan Journal of International
Law* 619, at 645–47.

36 ⁸¹ See *ibid* at 655–61.

37 ⁸² I am reluctant to proliferate acronyms but the NINA terminology is highly misleading, because
38 the filings are not limited to those with no income or assets at all, but rather to those who have no
39 substantial income or assets. It is also unfortunately confusing that the same term has come into
40 common use to describe no-document real-estate mortgages in the sub-prime sector in recent years.

41 ⁸³ For parallel arguments, see J Braucher, ‘A Fresh Start for Personal Bankruptcy Reform: The
42 Need for Simplification and a Single Portal’ (2006) 55 *American University Law Review* 1295;
43 Kilborn, above n 2. I note that this discussion does not consider the likelihood that debtors often
44 have broader social problems (patterns of drug abuse, dysfunctional family lives, etc), and that the
45 bankruptcy process might be an ideal opportunity to respond to them. As noted by commenters at
46 the Berlin conference for which this Chapter was prepared, European insolvency reform has taken
47 that problem much more seriously than American reform has.

an administrative process designed to provide a service at the lowest possible transaction cost rather than as an adversarial judicial process.⁸⁴ In cases with low levels of assets and income there should be few important factual disputes; disputes about the amount of claims and priorities among creditors are important only when there is valuable collateral or non-exempt assets. Judicial staff and attorneys in the US already work hard to process these cases economically, but the excessive requirements of the post-BAPCPA process waste social resources.

Second, the system should provide complete and unconditional relief as quickly as is practicable. This should occur within days or weeks after the filing, not months or years. Again, when the debtor has low levels of income and assets, delaying or conditioning the discharge only delays the return of the debtor to productive economic activity unburdened by the overhang from the debts of the past.

Finally, the system should impose stern criminal sanctions for fraud, with adequate resources to ensure prosecutorial vigilance. A simple and expedient process will collapse if it is tainted by fraud. Among other things, the cultural perception of those who have gone through the process will turn negative, making it harder to persuade the ‘honest but unfortunate’ debtor to take advantage of the process. The simplest way to avoid that problem is with an oversight system that imposes sufficiently severe penalties on abusive filers. If we want to make a cultural point, the point to be made is that abuse of the system cannot be condoned. An effort to extend that condemnation to the hopelessly insolvent, by contrast, helps none of us.

APPENDIX

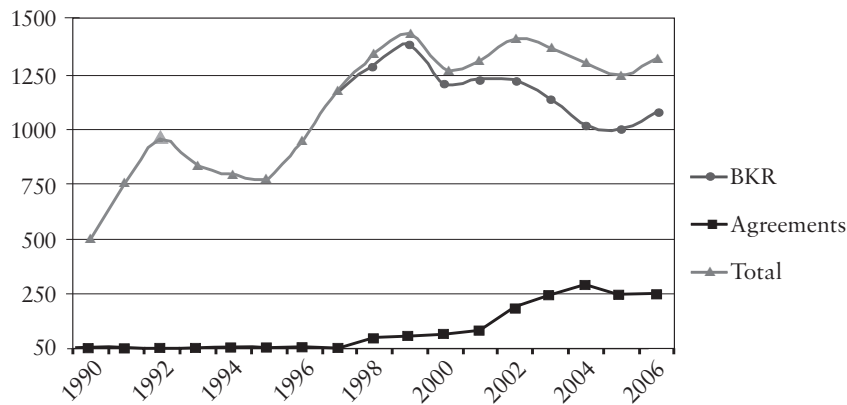
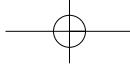


Figure 11.A1 Australian insolvencies over time

⁸⁴ Drafters of the Bankruptcy Code of 1978 rejected proposals for an administrative process. See D Stanley and M Girth, *Bankruptcy: Problem, Process, Reform* 204–15 (Washington, DC, Brookings, 1971). Thirty years of domestic experience coupled with the evidence from abroad justifies rethinking that decision.



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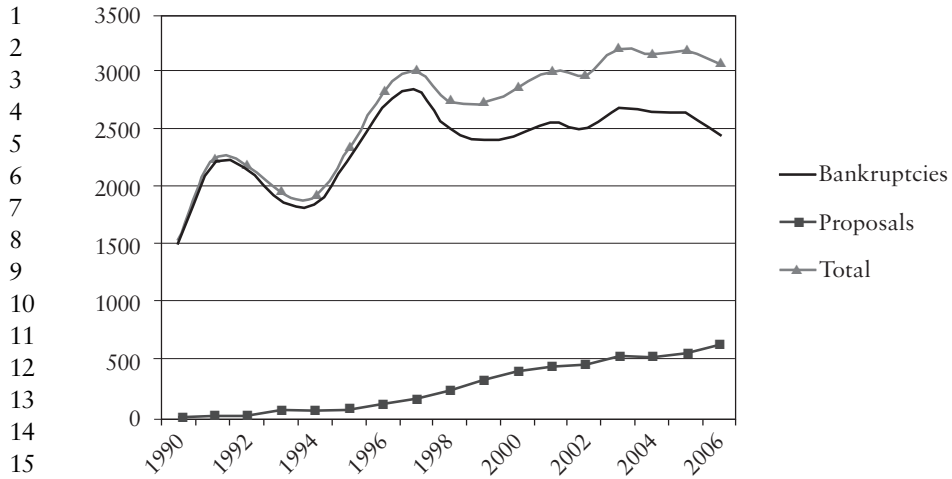


Figure 11.A2 Canadian insolvencies over time

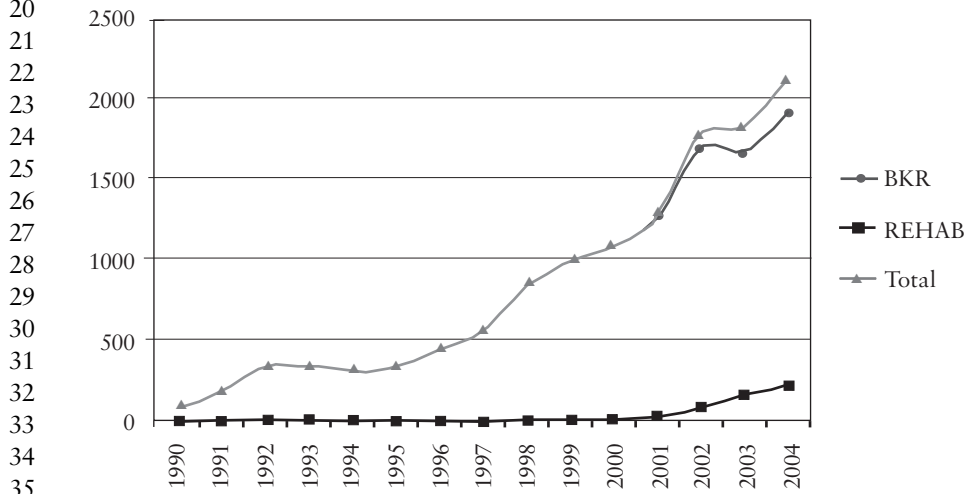
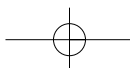


Figure 11.A3 Japanese insolvencies over time

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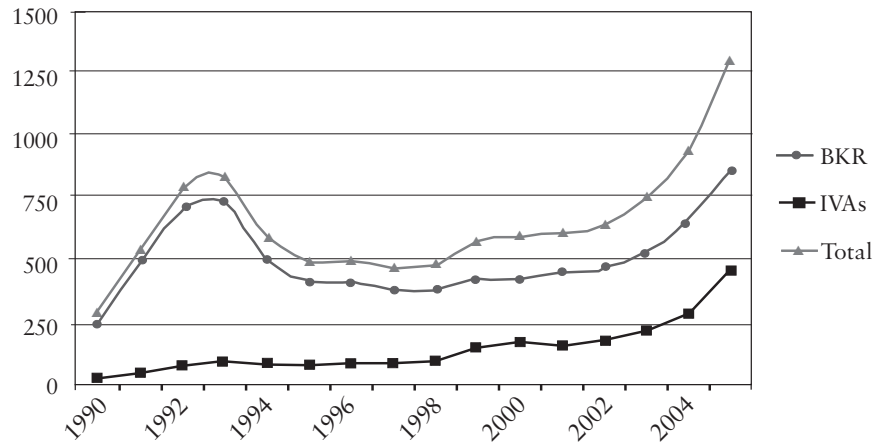


Figure 11.A4 UK insolvencies over time

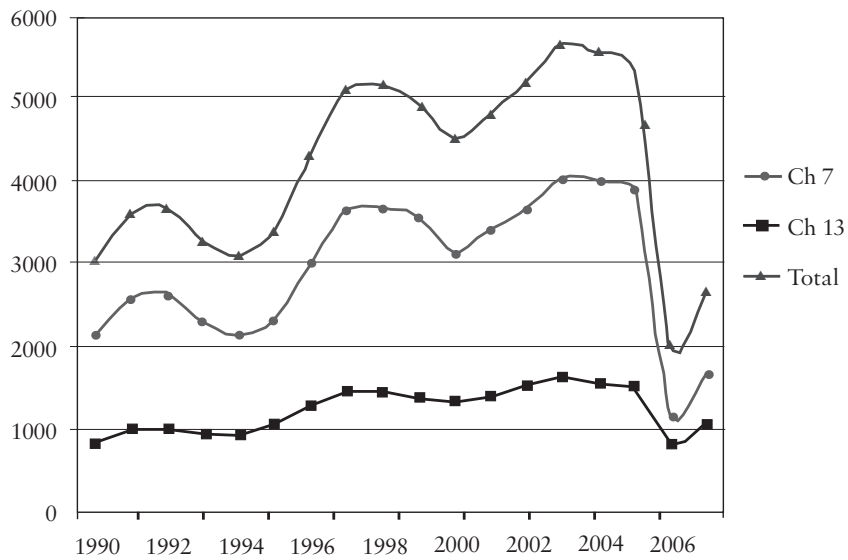


Figure 11.A5 United States insolvencies over time

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Table 11.A1 Summary of regression model

	Total bankruptcies	Liquidations	Rehabilitations
Economic variables			
Credit card debt	1.454 (.181) 8.03***	1.036 (.164) 6.32**	.417 (.068) 6.09**
Consumer debt	.073 (.303) 0.24	-.082 (.198) .018 (.082)	-0.41 0.22
Credit card spending	.090 (.149) 0.60	.144 (.131) 1.10	.053 (.017) 3.17*
Unemployment	56.89 (81.85) 0.70	83.68 (53.27) 1.57	-5.733 (25.33) -0.23
Country dummies			
USA	-704.75 (150.35) -4.69**	-795.78 (183.92) -4.33**	199.25 (59.81) 3.33*
Australia	-1012.01 (679.95) -1.49	-1116.98 (430.93) -2.59#	-115.87 (193.82) -0.60
Japan	-277.60 (692.31) -0.40	-700.09 (469.12) -1.49	32.09 (186.86) 0.17
UK	-627.28 (1106.19) -0.57	-1119.35 (683.77) -1.64	263.29 (284.49) .93
R ²	.93	.93	.97
N	51	69	51

#—significant at .1 level

*—significant at .05 level

**—significant at .01 level

***—significant at .001 level

The table reports the coefficient, the robust standard error in parentheses, and the t-statistic below. The coefficients are in filings/million. Canada is the omitted case, so the coefficients indicate the extent to which filing rates under the same conditions would fall short of (or in the case of rehabilitation filings, exceed) Canadian rates. The regressions use robust clusters to control for autocorrelation in the time series.

