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Broke but not Bankrupt: Consumer Debt Collection in State Courts

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BROKE BUT NOT BANKRUPT: CONSUMER DEBT COLLECTION IN STATE COURTS

*Richard M. Hynes**

Virginia, with a population of about seven million, has averaged more than a million civil filings a year since the late 1980s. The overwhelming majority of these filings seek to collect debts from consumers, and most judgments go unpaid. Despite this apparent insolvency, civil litigation appears to be only tenuously related to consumer bankruptcy whether one looks at Virginia or at the nation as a whole. Nationally, the non-business bankruptcy filing rate rose by more than 350% between 1980 and 2002, while the civil filing rate rose by about 12%. Prior research suggests that relatively few bankrupt debtors have been sued by their creditors in state court, that most bankrupt debtors are drawn from the middle class, and that bankrupt debtors own homes at nearly the same rate as the general population. This Article finds that few civil defendants file for bankruptcy, that civil litigation is concentrated in cities and counties with lower socio-economic characteristics, and that civil defendants in Virginia have a significantly lower rate of homeownership than the general population. In other words, the bankruptcy statistics exclude many defaulting and insolvent consumers, and these consumers may be disproportionately drawn from the more disadvantaged segments of society.

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Bankruptcy filing statistics provide a useful¹ but incomplete measure of consumer financial distress. Although bankruptcy was relatively rare in prior generations, default and insolvency were not. Debtor's prison might have been as common in early America as bankruptcy is today.² The United States lacked a bankruptcy law for much of its history,³ and even today many, and probably most, consumers who fail to repay their debts do not file for bankruptcy. Instead, they refuse to pay, and they seek relief in a system of "informal bankruptcy."⁴ About two-thirds of all consumer-credit loans that banks charge off as uncollectible are not owed by consumers in bankruptcy,⁵ and a similar percentage of credit card bad

1. See, e.g., Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 37 (2004) (arguing that the bankruptcy filing rate is "a thermometer, recording the economic temperature of American families").

2. See 6 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 99 (library ed. 1915), cited in CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 174 n.8 (Da Capo Press 1972) (1935) ("As late as 1833, however, it was estimated that 75,000 persons were annually sent to jail for debt . . ."). In 1833, there were roughly fourteen million Americans, see 1 U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 8 ser.A 6–8 (Bicentennial Ed. 1975) (reporting a population of approximately 14,162,000), suggesting a debtor's prison rate of approximately 5.3 per thousand. In 2005, there were 2,039,214 non-business bankruptcy filings, see Am. Bankr. Inst., U.S. Bankruptcy Filings 1980–2006, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=46621&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Nov. 16, 2007), a total that was almost certainly inflated by the rush to file before the change in the law. See Andrew Blackman, *Bankruptcy Filings Soar as Tougher Law Nears*, WALL ST. J., Oct. 4, 2005, at D2. In 2006, non-business bankruptcy filings declined sharply to just 597,965. Am. Bankr. Inst., *supra*. Even so, the 2005 total represents "just" a rate of 6.9 per thousand—there were approximately 296,410,000 Americans in 2005. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 7 tbl.2 (126th ed. 2007), available at <http://www.census.gov/prod/2006pubs/07statab/pop.pdf>.

3. The United States has had a permanent bankruptcy law in effect since 1898. See Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995). Congress passed three other bankruptcy acts in the nineteenth century, but it quickly repealed each act. See Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99; Tabb, *supra*, at 13.

4. Professors Dawsey and Ausubel coined the term "informal bankruptcy," which applies to "non-repayment without the benefit of the formal bankruptcy process." See Amanda E. Dawsey & Lawrence M. Ausubel, *Informal Bankruptcy 1* (Apr. 12, 2004) (unpublished working paper), available at <http://www.ausubel.com/creditcard-papers/informal-bankruptcy.pdf>. For another work examining the consumer's choice between bankruptcy and simply refusing to pay, see generally Sumit Agarwal et al., *Exemption Laws and Consumer Delinquency and Bankruptcy Behavior: An Empirical Analysis of Credit Card Data*, 43 Q. REV. ECON. & FIN. 273 (2003).

5. See, e.g., AM. BANKERS ASS'N, 1997 INSTALLMENT CREDIT SURVEY REPORT 109 tbl. 90 (9th ed. 1997) (reporting that approximately 70% of banks' consumer-credit losses occur outside of bankruptcy).

debt losses are charged off before the debtor files for bankruptcy.⁶

It is hard to study defaulting consumers who do not choose bankruptcy. Credit reports are not publicly available,⁷ and defaulting consumers often do not want to be found. Many collection methods, such as telephone calls and dunning letters, leave no trace in the public record. This Article focuses on one collection device that does leave a paper trail—state lawsuits.

Specifically, this Article examines the civil courts of the Commonwealth of Virginia and finds a staggering amount of consumer debt collection litigation. Since the late 1980s, Virginia's courts have averaged more than one civil filing each year for every five individuals,⁸ and the majority of these filings seek to collect debt from consumers.⁹ Most complaints result in a judgment for the plaintiff,¹⁰ and most judgments are apparently never paid.¹¹ Virginia is somewhat unique; its rate of civil litigation is higher than that of nearly every other state.¹² However, there are signs that consumer debt collection accounts for a substantial portion of the civil filings in many states.¹³

Although one would expect most consumers sued in state court to be in financial trouble, surprisingly little overlap exists between the populations of bankrupt debtors and state court civil defendants. Prior research suggests that less than one-third of bankrupt debtors were sued by their creditors in state court.¹⁴ This Article finds that less than 20% of

6. VISA U.S.A. INC., 1999 ANNUAL BANKRUPTCY SURVEY (2000) (reporting that two-thirds of credit card loans charged off as uncollectible were not attributable to bankruptcy).

7. The Philadelphia office of the Federal Reserve obtained access to a sample of credit reports, but its scholars have not directly addressed the questions addressed in this Article. *See generally* Robert B. Avery et al., *Credit Report Accuracy and Access to Credit*, 90 FED. RES. BULL. 297 (2004) [hereinafter *Credit Report Accuracy*] (using credit reports to attempt to quantify the effects of credit-record-data limitations on consumers' access to credit); Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, 89 FED. RES. BULL. 47 (2003) [hereinafter *Consumer Data*] (using credit reports to examine the scope and content of credit-report data); David K. Musto, *What Happens When Information Leaves a Market? Evidence from Postbankruptcy Consumers*, 77 J. BUS. 725 (2004) (using credit reports to analyze the ten-year limit on reporting personal bankruptcy for its effects on credit access and creditworthiness); David K. Musto & Nicholas S. Souleles, *A Portfolio View of Consumer Credit* 1 (Fed. Reserve Bank of Philadelphia, Working Paper No. 05-25, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829784 (using credit reports to "measure the 'covariance risk' of individual consumers" to provide a portfolio view of consumer credit). For a history of the credit-reporting industry, see Robert M. Hunt, *A Century of Consumer Credit Reporting in America*, (Fed. Reserve Bank of Philadelphia, Working Paper No. 05-13, 2005), available at <http://www.phil.frb.org/files/wps/2005/wp05-13.pdf>.

8. *See infra* Figure II.4.

9. *See infra* Tables IV.2, IV.3 & IV.4 and accompanying text.

10. *See infra* Table IV.7.

11. *See infra* Table IV.9.

12. *See infra* Table II.2.

13. *See infra* notes 179–82 and accompanying text.

14. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE

Virginia consumers sued in 2001 filed for bankruptcy by 2006, and this remains true even if the sample is limited to those consumers who have failed to pay a judgment.¹⁵ This lack of overlap between the populations of bankrupt debtors and civil defendants is not new. A 1971 study found that just 18% of bankrupt debtors cited actual litigation as an immediate cause of their bankruptcy filing,¹⁶ and a 1974 study found that just 7% of defendants sued for defaulting on consumer debt filed for bankruptcy.¹⁷

This lack of overlap reminds us that defaulting debtors need not choose bankruptcy and that they have another option—they can choose informal bankruptcy and simply refuse to pay. Because defaulting debtors need not choose bankruptcy, we should expect to find significant differences between bankrupt debtors and those who choose informal bankruptcy. This Article finds some evidence consistent with this expected finding. Prior research suggests that bankrupt debtors are overwhelmingly drawn from the middle class.¹⁸ Significantly, this prior research suggests that bankrupt debtors own homes at almost the same rate as the general population, though their homes are typically worth less.¹⁹ By contrast, this Article finds that civil defendants in Virginia have lower rates of homeownership than bankrupt debtors and the general population.²⁰ In addition, this Article finds that civil litigation is disproportionately

FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 305 (Oxford Univ. Press 1989) [hereinafter AS WE FORGIVE].

15. See *infra* Table IV.10.

16. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 48 (1971). This does not mean, however, that the threat of state court debt collection is an unimportant determinant of consumer bankruptcy. Stanley and Girth found that 43% of debtors cited the threat of legal action as an immediate cause of bankruptcy. *Id.*

17. DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 274 (1974).

18. See, e.g., TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 3 (2000) [hereinafter *FRAGILE MIDDLE CLASS*] (“Bankrupts . . . represent a fair cross-section of the American middle class.”); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 *STAN. L. REV.* 213, 220 (2006) [hereinafter *More Financial Distress*]; Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 *WASH. & LEE L. REV.* 1777, 1781–82 (2004) (“More than 90% of those who filed for bankruptcy either attended college, had a job in the upper 80% of all occupations in the United States, or had bought a home. Two-thirds of the families met two or more criteria, and almost 30% met all three. . . . That is, about 91% to 93% of bankrupt white families, Hispanic families, and black families were solidly middle class.” (footnotes omitted)).

19. AS WE FORGIVE, *supra* note 14, at 129 (finding that roughly 52% of bankrupt debtors owned homes and 64% of the general population owned homes but that the declared median value of homes in bankruptcy (\$35,000) was substantially lower than that of the general population (\$56,100)); *More Financial Distress*, *supra* note 18, at 225 n.39, 226 (noting that the homeownership rates among 2001 bankrupt debtors was about 52.5% but that the declared median home value of debtors in bankruptcy was just 60.9% of the declared median home value of the general population).

20. See *infra* Part IV.C.4.

concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents.²¹ In short, the bankruptcy statistics represent just a portion of those in financial distress, and the preliminary data suggest that many of the insolvent debtors who do not file may be too broke for bankruptcy.

The apparent disconnect between bankruptcy and civil litigation extends beyond the lack of overlap between bankrupt debtors and civil defendants. In a prior article, I showed that the rate of garnishment (an important post-judgment remedy) in Virginia and Cook County, Illinois declined while the bankruptcy filing rate rose sharply.²² Part II of this Article looks at civil litigation more broadly and discovers the same basic pattern. In the states for which I have data, the average civil filing rate grew just 12% between 1980 and 2002, while the non-business bankruptcy filing rate grew by more than 275%.²³ Thus, there is little evidence of an increase in consumer debt collection litigation that would match the rise in the non-business bankruptcy filing rate.

The stability of the rate of consumer debt collection litigation creates a puzzle for those who claim that increased financial distress caused the rise in bankruptcy filings.²⁴ One can, however, advance a number of potential explanations for this puzzle. In my prior article, I addressed (and largely dismissed) a number of these explanations.²⁵ This Article presents new data that allow us to consider the plausibility of other theories, and these other theories are not so easily dismissed. For example, to the extent that consumer debt collection litigation typically targets the poor, it may reveal little about the financial condition of the middle class. On the other hand, the stable rate of consumer debt collection litigation might cause us to question claims of rising financial distress among the more disadvantaged segments of our society. The villains of today—the payday lender and the check-cashing stores²⁶—may simply have displaced the villains of yesterday—the small loan company, the direct seller, and the low-income retailer.²⁷

21. See *infra* Part III.

22. See Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 607 (2006).

23. See *infra* Table II.3.

24. See, e.g., *More Financial Distress*, *supra* note 18, at 239–42, 247–51 (arguing that the rise in bankruptcy filings is due to either a decrease in stigma or an increase in financial distress and that there is no evidence of a decline in stigma).

25. See Hynes, *supra* note 22, at 635–45 (arguing that changes in job turnover, family law, and the costs of litigation do not explain an appreciable number of the missing garnishments).

26. Numerous authors have alleged that payday lenders exploit the poor. See, e.g., Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 3 (2002); Lisa Blaylock Moss, Commentary, *Modern Day Loan Sharking: Deferred Presentment Transactions and the Need for Regulation*, 51 ALA. L. REV. 1725, 1727 (2000).

27. See CAPLOVITZ, *supra* note 17, at 30–34.

Part I briefly describes the collection system and predicts outcomes that are largely consistent with what I observe in the data and in the previous literature. Part II uses data from the National Center for State Courts to demonstrate that (i) the civil filing rate varies dramatically by state and (ii) the civil filing rate has grown much more slowly than the non-business bankruptcy filing rate. Part III uses data on the dispersion of civil suits across Virginia and three other states to demonstrate that civil litigation is concentrated in areas with more disadvantaged residents. Part IV uses individual court filings to demonstrate that (i) the overwhelming majority of civil litigation in Virginia attempts to collect debt from individuals, (ii) surprisingly few complaints name the same defendant—civil litigation reaches a very large number of Virginians, (iii) contract claims dominate the civil docket, (iv) most filings result in a judgment, (v) though most judgments are for less than \$1,000, most are never satisfied, (vi) few judgment debtors seek protection in bankruptcy, but creditors appear to abandon legal procedures to collect their judgments after one or two years, and (vii) the homeownership rate of civil defendants in Virginia is probably much lower than the homeownership rates of bankrupt Americans and the general population. Part V concludes.

I. THE ROLE OF STATE COURTS IN THE COLLECTION PROCESS

Many debtors lack an accurate understanding of the laws governing debt collection, and debtors and their creditors may behave irrationally. Defaulting consumers may fail to address their insolvency, hoping that their problems will resolve themselves. Their creditors may fail to listen to reason, stubbornly pursuing debts that the consumer just cannot pay. However, if we assume that everyone behaves rationally and understands the law, we can generate implications that are reasonably consistent with what we observe in the world.

A. *A Brief Description of the Collection Process*

Assume a consumer experiences financial difficulty and must decide whether to pay an unsecured obligation such as a credit card or dentist bill.²⁸ The consumer could try to convince his creditors to accept a lower payment, but this negotiation may prove difficult if he owes debt to multiple creditors. Each creditor will want the other creditors to provide the forgiveness. In addition, the negotiation will largely be driven by the legal environment that will govern if the parties cannot reach an agreement.

28. For simplicity, this Article ignores issues specific to secured debt.

The consumer may decide to file for bankruptcy.²⁹ A bankruptcy filing would invoke the automatic stay and prevent his creditors from attempting to collect.³⁰ If all of the requirements of bankruptcy are met, the debtor would be given a discharge that would free his future income from the claims of nearly all of his creditors.³¹ In theory, the debtor's property would be distributed to his creditors,³² but federal and state laws provide substantial exemptions.³³ In practice, distributions to general creditors from non-exempt assets are extremely rare.³⁴ Bankruptcy has costs, however. Fees for the most common form of bankruptcy, Chapter 7, are now \$299,³⁵ and a lawyer may charge an additional \$1,000 to \$2,000 to complete the necessary paperwork.³⁶ The bankruptcy filing will remain in the consumer's credit file for ten years,³⁷ and the law prohibits the consumer from obtaining another bankruptcy discharge for the next eight years.³⁸

A defaulting debtor has another option—he can simply refuse to pay and wait for his creditors to pursue him. The decision to wait is not irreversible; the consumer can file for bankruptcy at any time if the pressure from his creditors becomes too great. This pressure may begin with a reminder of the obligations, and the ensuing telephone calls and letters may not be so gentle in tone. Many large creditors will routinely

29. The consumer would choose among several bankruptcy chapters, but this Article ignores this level of detail.

30. 11 U.S.C.A. § 362 (West 2007).

31. *See id.* § 524. Some claims, such as family-law claims, are exempt from the discharge. *Id.* § 523(a).

32. *See id.* § 541.

33. The bankruptcy code provides specific property exemptions, but the code also allows each state to “opt-out” and deny its citizens the right to use these exemptions. *See id.* § 522. About two-thirds of the states have done so. *See* Richard M. Hynes et al., *The Political Economy of State Property Exemption Laws*, 47 J.L. & ECON. 19, 24 (2004). Section 522 of the code also permits each debtor to use the exemptions that would be available in a state collection proceeding. *See* 11 U.S.C.A. § 522(b)(3)(A). For examples of specific state exemptions, see *infra* notes 61–64, 71 and accompanying text.

34. *See, e.g.*, EXECUTIVE OFFICE FOR U.S. TRS., U.S. DEP'T OF JUSTICE, UNITED STATES TRUSTEE PROGRAM: PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000, at 7 (2001), available at http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/assetcases/Publicat.pdf (“Historically, the vast majority (about 95 to 97 percent) of chapter 7 cases yield no assets.”).

35. 28 U.S.C.A. § 1930 (West 2007) (providing that the fee to be paid to the clerk of the court for filing Chapter 7 bankruptcy is \$245); *see also* U.S. Courts, Bankruptcy Filing Fees, <http://www.uscourts.gov/bankruptcycourts/fees.html> (last visited Nov. 16, 2007) (providing that the filing fees for Chapter 7 bankruptcy total \$299, which includes the trustee fee and administrative fee).

36. BankruptcyAction.com, Bankruptcy Information, FAQ's, Chapter 7 and 13 Information, <http://www.bankruptcyaction.com/questions.htm> (last visited Nov. 16, 2007).

37. *See* Fair Credit Reporting Act § 605, 15 U.S.C. § 1681c(a)(1) (Supp. IV 2004).

38. 11 U.S.C.A. § 727(a)(8) (West 2007).

report the consumer's account activity to the credit bureaus,³⁹ and a record of the default will remain in the consumer's creditor report for seven years.⁴⁰ The creditor might hire a collection agency or sell the debt to a distressed-debt buyer. The collection agency or distressed-debt buyer will apply additional pressure and will likely report the debt to the credit bureaus. The Fair Debt Collections Practices Act (FDCPA) limits the collection efforts of these third parties (the collection agency and the distressed-debt buyer).⁴¹ If the original creditor is collecting, however, the consumer will need to look to state law for protection.⁴²

Some consumers never pay regardless of who applies the pressure. The lender (or its assignee) must decide whether to seek a judgment in state court⁴³ or to abandon collection efforts and save the expense of litigation. The cost of filing a claim varies significantly from state to state. The filing

39. See *Consumer Data*, *supra* note 7, at 50.

40. See Fair Credit Reporting Act § 605, 15 U.S.C. § 1681c(a)(2) (Supp. IV 2004).

41. See Fair Debt Collections Practices Act, 15 U.S.C. §§ 1692–1692p (2000) (providing rules to which “debt collectors” must adhere in collecting debts). Section 1692a defines “debt collector” as “any person who uses . . . interstate commerce . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another.” *Id.* § 1692a(6). Note that an attorney may be deemed to be a debt collector. See *Heintz v. Jenkins*, 514 U.S. 292, 294 (1995) (finding that an attorney who regularly attempts to collect debts for a client, even if the collection is indirect through litigation, is a debt collector according to the FDCPA).

42. For a brief summary of these state laws, see ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION 741–49 (5th ed. 2004).

43. The lender may be unable to file an involuntary bankruptcy petition by itself and may be unable to file in conjunction with other creditors. Unless a consumer has fewer than twelve qualifying creditors, at least three creditors must file the petition and the sum of their claims must exceed \$13,475. See 11 U.S.C.A. § 303(b)(1) (West 2007). Even if the consumer has fewer than twelve creditors, the lender must be owed at least \$13,475. See *id.* § 303(b)(2). Involuntary cases are very rare. H.R. REP. NO. 108-110, at 2 (2003) (“[F]ewer than 1 percent of all bankruptcy case filings are commenced involuntarily.”). If the lender resides in a state different than that of the consumer, the lender could sue in federal court pursuant to diversity jurisdiction. 28 U.S.C.A. § 1332 (West 2007). However, federal courts will not hear diversity suits if the amount in controversy is less than \$75,000. *Id.* Thus, the lender will almost certainly file in state court.

fee for a \$1,000 claim is as low as \$34 in Virginia⁴⁴ and \$30 in Maryland,⁴⁵ and as high as \$100 in California⁴⁶ and \$130 in Illinois.⁴⁷ Victorious creditors may add these costs to the amount owed,⁴⁸ but this means little if the creditor fails to collect the judgment.

Lawsuits may also entail substantial administrative costs. State law may require the creditor to hire a lawyer,⁴⁹ and the creditor will need to sue in the appropriate court. If the FDCPA applies, the creditor must sue the consumer in a judicial district in which the consumer “resides at the commencement of the action” or “signed the contract sued upon.”⁵⁰ The FDCPA does not, however, apply to suits brought by the creditor who originated the loan or a creditor who purchased the loan before it was in default.⁵¹ Some states, including Virginia, have more liberal venue rules and allow the creditor to sue the consumer where the creditor is located.⁵²

44. ROBERT A. PUSTILNIK ET AL., DEBT COLLECTION FOR VIRGINIA LAWYERS: A SYSTEMATIC APPROACH ¶ 7.302 (2d ed. Supp. 2006) (“The cost of initiating an action in general district court is about one-third of the cost of a circuit court action.”). The filing fee for a civil complaint for a claim greater than \$200 in James City County/Williamsburg General District Court is \$34 (plus an additional \$12 for service on each person). Telephone Call to James City County/Williamsburg Courthouse, Automated Information System, 757-564-2400 (Sept. 23, 2007). The filing fee in James City County/Williamsburg Circuit Court for a legal complaint up to \$50,000, a contract complaint up to \$50,000, a detinue action up to \$50,000, and an unlawful detainer action up to \$50,000 is \$77. James City County/Williamsburg Circuit Court, Civil Fee Schedule, http://www.courts.state.va.us/circuit_fees/civilfees/james_city_county~williamsburg.pdf (last visited Nov. 16, 2007).

45. Dist. Court of Md., Civil Cost Schedule and Other Charges, <http://www.courts.state.md.us/district/forms/civil/dccv12.pdf> (last visited Nov. 16, 2007).

46. Superior Court of Ca. County of San Benito, Statewide Civil Fee Schedule, http://www.sanbenito.courts.ca.gov/filing_fees.htm (last visited Nov. 16, 2007) (providing a \$100 filing fee for a claim filed by a person who has filed more than twelve small claims within the previous year).

47. The Office of the Clerk of the Court in DuPage County, Ill., Law Division Filing Fees, http://www.dupageco.org/courtclerk/generic.cfm?doc_id=389 (last visited Nov. 16, 2007).

48. See, e.g., VA. CODE ANN. § 16.1-94.01 (2007).

49. See, e.g., *id.* § 16.1-88.03. In Virginia, a corporation may designate an agent to file suit in general district court; the corporation is not required to hire an attorney. *Id.*

50. Fair Debt Collections Practices Act § 811, 15 U.S.C. § 1692i (2000). If the debt collector sues for an interest in real property, the collector may also bring the action where the property is located. *Id.* The FDCPA applies to outside counsel when counsel is a debt collector. *Heintz v. Jenkins*, 514 U.S. 292, 294 (1995).

51. See 15 U.S.C. § 1692a(6)(F) (2000).

52. Virginia allows the creditor to sue the consumer in the city or county in which the consumer resides, maintains his principal place of employment, or regularly conducts substantial business activity. VA. CODE ANN. § 8.01-262 (2007). More significantly, Virginia allows the creditor to file where the contract was breached, *id.* § 8.01-262(4) (allowing suit where “the cause of action . . . arose”), and courts have interpreted this to mean the location of the creditor’s home office because that was where payment was due. See, e.g., *Vill. Auto Ctr. v. Apple Auto Glass & Mirror, Inc.*, 51 Va. Cir. 471, 472 (Vir. Cir. Ct. 2000). Additionally, Virginia courts generally respect agreements as to venue. See, e.g., *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990). Some states restrict the plaintiff’s choice of venue significantly. See, e.g.,

Large creditors can (and do) sue Virginia residents from across the state in a single court, greatly reducing the creditors' costs of litigation.⁵³

Credit bureaus typically do not note civil suits in their files, but they do record judgments.⁵⁴ These judgments remain in the consumer's credit report for seven years or until enforcement of the judgment is barred by the statute of limitations.⁵⁵ A judgment does not guarantee payment, however, and the plaintiff must take further action to enforce its judgment. One typically thinks of bankruptcy as the refuge for those who cannot pay, but non-bankruptcy law also protects the insolvent by limiting the enforcement of judgments.

Consider first the ability of a plaintiff to levy on real property owned by a consumer. Virginia law allows the plaintiff to obtain a lien on real property by recording the judgment in the circuit court of the county or city in which the property is located and paying a small fee (currently about \$8).⁵⁶ Most other states have similar laws or allow the judgment to serve as a lien against the defendant's property.⁵⁷ Often the lien will be sufficient to induce the defendant to repay because the lien limits the defendant's ability to sell or refinance his home. The plaintiff may also force a sale of the home to satisfy the lien. In Virginia this requires another suit,⁵⁸ and the process is difficult, expensive, and risky.⁵⁹ Creditors with senior liens must be paid before the plaintiff receives any of the proceeds,⁶⁰ and Virginia law allows a consumer to exempt \$5,000 (\$11,000 for a family of four) of any property from attachment and

ALA. CODE § 6-3-2 (2007) ("All actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence."); GA. CONST. art. VI, § II, para. VI ("All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides . . .").

53. See *infra* note 270 and accompanying text (noting that Richmond is the forum of choice for a major credit card issuer).

54. See *Consumer Data*, *supra* note 7, at 67.

55. Fair Credit Reporting Act § 605, 15 U.S.C. § 1681c (2000 & Supp. IV 2004).

56. See PUSTILNIK ET AL., *supra* note 44, ¶ 7.1803.

57. See, e.g., CAL. CIV. PROC. CODE § 697.310 (West 2007) ("Except as otherwise provided by statute, a judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder."); CONN. GEN. STAT. § 52-380a (2007) ("A judgment lien, securing the unpaid amount of any money judgment, including interest and costs, may be placed on any real property by recording, in the town clerk's office in the town where the real property lies, a judgment lien certificate, signed by the judgment creditor or his attorney or personal representative . . ."); OHIO REV. CODE ANN. § 2329.02 (West 2007) ("Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment . . .").

58. See VA. CODE ANN. § 8.01-462 (2007); PUSTILNIK ET AL., *supra* note 44, ¶ 8.501.

59. See PUSTILNIK ET AL., *supra* note 44, ¶ 8.501.

60. See VA. CODE ANN. § 8.01-459 (2007).

execution.⁶¹ Many states allow the defendant to exempt much more home equity,⁶² and in a few states the plaintiff simply may not attach a lien to the defendant's home.⁶³ Virginia and a number of other states also effectively exempt the home from attachment by a plaintiff that has a claim against only one spouse if the property is held in the form of tenancy by the entireties.⁶⁴ Finally, many defendants do not own any real estate at all, and the plaintiff must look to the defendant's personal property for satisfaction.

The satisfaction of a judgment from the defendant's personal property typically requires two steps. First, the plaintiff must ask the court to issue a writ ordering the sheriff to levy on the defendant's personal property.⁶⁵ If the defendant still fails to pay the judgment, the plaintiff may force a sale of the property and apply the proceeds to satisfy the debt.⁶⁶ This remedy is seldom used in Virginia.⁶⁷ Like all other states, Virginia exempts some of the defendant's personal property from seizure, and these exemptions will protect the meager assets of many defaulting debtors.⁶⁸ In addition, the seized property may fail to generate much profit after deducting the costs of sale. Finally, creditors may use this remedy infrequently because a better remedy is available: garnishment.

61. *See id.* § 34-4 (exempting \$5,000 for each householder plus \$500 for each dependent child). "Householder" is defined as "any resident of Virginia." *Id.* § 34-1.

62. *See, e.g.*, ALASKA STAT. § 09.38.010 (2007) (allowing a homestead exemption up to \$54,000); CAL. CIV. PROC. CODE § 704.730 (West 2007) (allowing a homestead exemption between \$50,000 and \$150,000, depending on the circumstances of the debtor); IDAHO CODE ANN. § 55-1003 (2007) (allowing a homestead exemption up to \$100,000).

63. *See, e.g.*, TEX. PROP. CODE ANN. § 41.001 (Vernon 2007); FLA. CONST. art. X, § 4, cl. a1.

64. *See, e.g.*, PUSTILNIK ET AL., *supra* note 44, ¶ 8.604 (stating that under Virginia law, "property held as tenants by the entireties is exempt from the claims of individual creditors of the owners of the property"). An excellent, though somewhat dated, description of this doctrine can be found in *Sawada v. Endo*, 561 P.2d 1291, 1294-95 (Haw. 1977).

65. In Virginia, this is the writ of fieri facias, which costs the plaintiff an additional \$37. *See* PUSTILNIK ET AL., *supra* note 44, ¶ 8.102 ("The clerk of the general district court will collect a total of \$37: \$12 for issuing the writ and \$25 for the sheriff's service.").

66. *See id.* ¶ 8.113.

67. *Id.*

68. *See* VA. CODE ANN. § 34-26 (2007) (enumerating items that are exempt under the poor-debtor's exemption); PUSTILNIK ET AL., *supra* note 44, ¶ 8.103 (listing exemptions applying to the third-party debts of an individual, including "(i) almost all household furnishings and appliances up to a value of \$5,000; (ii) wearing apparel up to a value of \$1,000; (iii) tools and equipment used in the householder's business up to a value of \$10,000; and (iv) \$2,000 in equity in a vehicle not used in business"). These exemptions, like the real property exemptions mentioned above, are typically the same exemptions available in bankruptcy. *See* 11 U.S.C.A. § 522(d) (West 2007). The Fourth Amendment may also limit the ability of a sheriff to search for non-exempt property. For a discussion of this issue, see Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 634 (2006).

The consumer's most liquid assets are likely to be claims against third parties—a checking or savings account at a bank or unpaid wages in the hands of an employer. A plaintiff with a judgment can force a bank or an employer to pay the plaintiff instead of the consumer by bringing a garnishment action.⁶⁹ There are, however, limits on the amount of bank deposits or wages that a plaintiff may seize. Federal law prohibits a general creditor from seizing more than the lesser of 25% of the debtor's take-home pay or the amount by which the debtor's weekly take-home pay exceeds thirty times the federal minimum wage.⁷⁰ Some states further limit wage garnishment or even prohibit it altogether,⁷¹ but Virginia's law is only marginally more restrictive than the federal law.⁷² Bank deposits are also protected if the debtor can show that such deposits were exempt wages or exempt income support payments.⁷³

A creditor is unable to use garnishment if the debtor has no bank account and works for cash compensation. In addition, the creditor might not know the identity of the defendant's employer or the location of the defendant's bank account. Even if the plaintiff collected this information when it extended the loan, this information may be inaccurate at the time of default. Assuming the plaintiff can find the defendant, the plaintiff may use an interrogatory to compel the defendant to come to court and disclose the location of his assets.⁷⁴ If the defendant fails to attend the interrogatory, the plaintiff may ask the court to issue an order compelling the defendant to show cause for why he failed to appear at the interrogatory.⁷⁵ If the defendant fails to appear to show cause, the plaintiff may ask the court to issue a *capias* (essentially an action for contempt of court) to have the defendant arrested.⁷⁶

Courts usually rely on the plaintiff to tell the court when the defendant has paid.⁷⁷ However, the penalty for failing to report payment is often small. The penalty for failing to notify the Virginia courts is just \$50, and this penalty is imposed only if the debtor makes a written request and the

69. *See, e.g.*, VA. CODE ANN. § 8.01-511 (2007).

70. 15 U.S.C. § 1673 (2000). Funds deposited in the debtor's bank account may also be exempt if they are from social security or disability payments or even the debtor's wages. *See, e.g.*, VA. CODE ANN. § 34-34 (2007); PUSTILNIK ET AL., *supra* note 44, ¶ 8.601.

71. *See, e.g.*, FLA. STAT. § 222.11 (2007); N.C. GEN. STAT. § 120-4.29 (2007); *id.* § 135-9; 42 PA. CONS. STAT. ANN. § 8127 (West 2007); S.C. CODE ANN. § 37-5-104 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 2007).

72. Virginia protects the greater of 75% of the debtor's take-home pay or forty times the federal minimum wage. *See* VA. CODE ANN. § 34-29 (2007).

73. *See* PUSTILNIK ET AL., *supra* note 44, ¶ 8.308.

74. *See* VA. CODE ANN. § 8.01-506 (2007).

75. *See id.* § 8.01-508.

76. *See id.*

77. In Virginia, the plaintiff must notify the court to release the judgment within thirty days of payment. *Id.* § 8.01-454.

creditor fails to act within ten days.⁷⁸ As a result, court records almost certainly undercount the number of paid judgments.

Every state imposes a statute of limitations on judgments;⁷⁹ Virginia general district court judgments remain effective for ten years.⁸⁰ Plaintiffs may, however, extend the life of their judgments.⁸¹ As a result, plaintiffs in nearly every state may, in theory, pursue an unpaid judgment indefinitely.⁸² The need to free the debtor from this cloud of liability is the primary justification for bankruptcy's "fresh start."⁸³

B. *Implications: Choosing Bankruptcy and Choosing Suit*

Studies of bankrupt debtors and civil defendants examine just a fraction of the consumers who default on their obligations. In addition, bankruptcy and civil filings are the products of conscious choice, and therefore the debtors and creditors who use these legal processes will probably be quite different than those who do not. To understand the nature of these biases, consider the consumer's decision to file for bankruptcy and the creditor's decision to sue.

1. The Debtor's Choice to File for Bankruptcy

If a consumer decides not to pay his debts, at least four factors are likely to affect the choice between bankruptcy and informal bankruptcy (simply refusing to pay): the consumer's wealth and income, his access to credit, his financial stability, and his amount and types of debt. Each of these factors suggests that I should find greater concentrations of middle-class debtors in bankruptcy and greater concentrations of poor debtors in informal bankruptcy. The empirical evidence in the literature and in Parts III and IV of this Article supports this proposition.

First consider a middle-class consumer who faces an unexpected medical bill of a few hundred dollars. If the consumer has a limited

78. *Id.*

79. See 1 WILLIAM HOUSTON BROWN, THE LAW OF DEBTORS AND CREDITORS § 6:79 (rev. ed. Supp. 2007).

80. VA. CODE ANN. § 16.1-69.55(B)(2) (2007).

81. To extend the limitations period for general district court judgments, Virginia plaintiffs may docket an abstract of the judgment in circuit court and thereby extend the life of the judgment to twenty years. See *id.* § 8.01-251(G).

82. See BROWN, *supra* note 79, § 6:79. A few states prohibit plaintiffs from pursuing judgments indefinitely. See, e.g., N.D. CENT. CODE § 28-20-35 (2007) (requiring the cancellation of all judgments or renewals after twenty years); OR. REV. STAT. § 18.194 (2005) (limiting a judgment lien to ten years with one renewal permitted); WASH. REV. CODE § 4.56.210 (2006) (limiting a judgment lien to ten years with one renewal permitted).

83. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("[Bankruptcy] gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

amount of other debt, bankruptcy is obviously a poor choice. A bankruptcy filing may require more than \$2,000 in attorney's and filing fees,⁸⁴ and the filing will not allow the consumer to evade payment if he has significant non-exempt assets that may be seized in bankruptcy. Even if the amount of debt that would be discharged exceeds the monetary cost of filing, the consumer may wish to preserve the option to file for bankruptcy in the future if his condition worsens.⁸⁵ Perhaps more importantly, the consumer may fear the damage that a bankruptcy filing would cause to his credit rating.

Informal bankruptcy is also likely to be a poor strategy. The label "middle class" evokes images of stability,⁸⁶ and this stability makes the debtor vulnerable to a creditor's collection techniques. A stable debtor is easy to locate, and thus a creditor can easily apply non-judicial pressure (dunning letters and telephone calls) or serve process for a suit. If the consumer owns a home, the creditor can attach a lien and wait until the debtor wants to sell the home or refinance.⁸⁷ If the consumer has a steady job or a bank account, the creditor can use garnishment to enforce its judgment.⁸⁸ To the extent that these remedies are available and effective, simply refusing to pay will only delay payment and force the consumer to incur additional stress and court fees. Paying the debt is likely to be the consumer's best option, especially if he has easy access to credit and can manage short-term cash needs.

Access to credit may, of course, lead to larger debt burdens, and the consumer may eventually decide that he cannot repay his obligations. The larger debts are likely to render informal bankruptcy a less attractive option because the larger debts will increase creditors' incentive to collect. As a result, bankruptcy becomes relatively more attractive. The consumer may decide that spending \$2,000 on filing and attorney's fees is a bargain if it allows him to avoid repaying large unsecured debt and stops the phone calls and other efforts of determined creditors. Moreover, once the consumer determines that a creditor's threats are credible, waiting to file for bankruptcy makes little sense. This may help explain why Sullivan, Warren, and Westbrook find few civil lawsuits and garnishments in the files of bankrupt debtors⁸⁹ and why other scholars find that state-law remedies such as garnishment are quite significant in determining whether

84. See *supra* notes 35–36 and accompanying text.

85. See, e.g., Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206, 223–28 (1998) (arguing that many consumers do not file for bankruptcy because they wish to preserve the option to do so in the future).

86. See FRAGILE MIDDLE CLASS, *supra* note 18, at 238 ("Stability is the essence of the middle class.").

87. See *supra* notes 56–57 and accompanying text.

88. See *supra* note 69 and accompanying text.

89. See AS WE FORGIVE, *supra* note 14, at 305.

a consumer will file for bankruptcy.⁹⁰ The threat of garnishment may be sufficient to drive consumers into bankruptcy.⁹¹

Now consider the choice of a more impoverished debtor. Unless this debtor can find assistance from legal aid, he may be unable to gather the cash necessary to file for bankruptcy. On the other hand, the debtor's poverty may make a simple refusal to pay a more viable alternative. If the debtor lacks a home, a steady job, and a bank account, there may be little that the creditor can do to enforce its judgment. The judgment will appear on the debtor's credit report, but the debtor may hope that a judgment for an unpaid medical bill will have less effect than a default on a debt to a financial institution.⁹² In fact, the debtor may hope that his default will not affect his credit rating at all. Many small vendors and service providers do not regularly report payment histories directly to the credit bureaus;⁹³ the credit bureaus will learn of the default only if the creditor assigns the account to a collection agency or obtains a judgment.⁹⁴ Moreover, these creditors might not know the consumer's social security number, and the credit bureaus may have difficulty identifying the debtor if he moves. Some scholars estimate that credit bureaus cannot adequately track address changes for close to half of lower-income Americans because these individuals do not use traditional forms of credit.⁹⁵ In any case, the debtor may not have enough cash or credit available to repay the debt, and informal bankruptcy may be his only option.

There is some evidence that bankrupt debtors and debtors who default without filing for bankruptcy were significantly different as far back as the late 1960s. Professor David Caplovitz studied a group of consumers who were sued in state court in 1967 (a subset of those who defaulted and did not file for bankruptcy), and, based on a consideration of income, education, age, and race, he described the individuals he studied as "marginal poor."⁹⁶ Stanley and Girth studied a group of consumers who filed for bankruptcy in 1964, and, based on variables similar to those used

90. See, e.g., Agarwal et al., *supra* note 4, at 278; Dawsey & Ausubel, *supra* note 4, at 9, 24–25.

91. There is some support for this theory in the literature. In 1971, Stanley and Girth found that just 18% of bankrupt debtors cited actual legal action as an immediate cause of bankruptcy but that 43% cited threatened legal action, such as garnishment. See STANLEY & GIRTH, *supra* note 16, at 47–48.

92. See, e.g., *Credit Report Accuracy*, *supra* note 7, at 306 (suggesting that defaults on medical debt are less important to credit evaluators because these defaults may be of little use in predicting payments on other debt). As a result, future creditors may pay less attention to defaults on medical debt.

93. See *Consumer Data*, *supra* note 7, at 50.

94. See *id.* at 67–68.

95. See Todd B. Hilsee et al., *Hurricanes, Mobility, and Due Process: "The Desire to Inform" Requirement for Effective Class Action Notice Is Highlighted by Katrina*, 80 TUL. L. REV. 1771, 1791–92 (2006).

96. See CAPLOVITZ, *supra* note 17, at 14–21, 325–26.

by Professor Caplovitz, they described their consumers as “a picture of neither poverty nor instability.”⁹⁷ Unfortunately, however, the data collected by Stanley and Girth are not directly comparable to the data collected by Professor Caplovitz, and thus one cannot say for certain whether the two groups were very different at the time.⁹⁸

Sullivan, Warren, and Westbrook, continuing and expanding on the work of Stanley and Girth, stress that the overwhelming majority of bankrupt families can be fairly described as “middle class.”⁹⁹ Though bankrupt debtors earned smaller incomes than the general population, they had roughly comparable levels of occupational prestige,¹⁰⁰ years of education,¹⁰¹ and homeownership rates.¹⁰² Whites were slightly overrepresented in their sample of bankrupt debtors; though blacks were overrepresented as well, all other minority groups were underrepresented.¹⁰³ They also found that credit card debts and other obligations to financial institutions comprise a very large portion of the amount bankrupt debtors owed.¹⁰⁴ Unfortunately, the existing literature does not offer a modern analog to the work of Professor Caplovitz that would allow us to compare bankrupt debtors with those debtors who chose informal bankruptcy.

The literature does, however, offer two recent studies of consumers who default on credit card debt whether or not they file for bankruptcy.¹⁰⁵ Both studies find that consumers are more likely to choose informal bankruptcy if state law limits the remedies available to their creditors outside of bankruptcy.¹⁰⁶ One of the studies, by Professors Dawsey and Ausubel, goes a step further and shows that individuals who live in areas with larger African-American populations are less likely to file for

97. See STANLEY & GIRTH, *supra* note 16, at 42–45.

98. For example, Professor Caplovitz tells us the percentage of defaulting debtors who graduated from high school, CAPLOVITZ, *supra* note 17, at 19, but Stanley and Girth present data on education in a manner that does not allow the computation of this statistic, see STANLEY & GIRTH, *supra* note 16, at 42–43. In addition, the two studies focused on different locations with only some overlap, and any difference may be due to geography rather than the legal process. See CAPLOVITZ, *supra* note 17, at 323–24 (studying cases from Philadelphia, New York, Detroit, and Chicago); STANLEY & GIRTH, *supra* note 16, at 6 (studying cases from the federal districts of Northern Ohio, Northern Alabama, Maine, Northern Illinois, Oregon, Western Texas, Southern New York, and Southern California).

99. See *supra* note 18 and accompanying text.

100. See AS WE FORGIVE, *supra* note 14, at 91 (“The debtors in bankruptcy work alongside other Americans, in roughly the same industries and jobs, and with nearly the same general occupational prestige . . .”).

101. See FRAGILE MIDDLE CLASS, *supra* note 18, at 53.

102. See *supra* note 19 and accompanying text.

103. See FRAGILE MIDDLE CLASS, *supra* note 18, at 46.

104. *Id.* at 131 (finding that credit card debt typically comprised one half of all unsecured debt).

105. See Agarwal et al., *supra* note 4; Dawsey & Ausubel, *supra* note 4.

106. See Agarwal et al., *supra* note 4, at 278; Dawsey & Ausubel, *supra* note 4, at 23–25.

bankruptcy after defaulting.¹⁰⁷ Professors Dawsey and Ausubel do not explain why individuals who live in predominantly African-American neighborhoods are more likely to choose informal bankruptcy, though they hint that this may be due to a greater use of informal economic practices, such as the cash wage payment, and the use of check-cashing institutions instead of bank accounts.¹⁰⁸ Professors Dawsey and Ausubel do not exclude the possibility that race serves as a proxy for other variables such as income or job security.

This Article complements these prior studies. The prior studies are limited to credit card accounts, and the Dawsey and Ausubel study is further limited to holders of “gold” credit cards.¹⁰⁹ Significantly, Professors Dawsey and Ausubel estimate that the holders of these gold cards have above-average credit scores.¹¹⁰ To test whether the bankruptcy statistics miss a substantial amount of insolvency among disadvantaged groups, however, I need data that include these disadvantaged groups. In addition, Dawsey and Ausubel focus solely on a failure to repay credit card debt,¹¹¹ but borrowers may choose to default on other obligations for strategic reasons. For example, the literature on credit reports suggests that defaults on medical obligations carry less of a penalty than defaults on financial obligations.¹¹²

Unlike the studies of credit card defaults, however, this Article focuses only on those consumers who are sued in state court. This Article’s count of state civil actions therefore undercounts those who choose informal bankruptcy because some consumers who choose informal bankruptcy are not sued. In addition, the consumers who are sued may differ significantly from those who are not. The next section considers the creditor’s choice to sue so that I can predict the nature of this bias.

2. The Creditor’s Choice to Sue

The above analysis suggests that many defaulting debtors who choose informal bankruptcy are effectively judgment proof. Why then do so many creditors bother to sue? In many cases they do not. For example, Virginia’s Bureau of Financial Institutions reports that in 2005 payday lenders charged off 76,546 returned checks as uncollectible but sued only 9,039 borrowers.¹¹³ The civil litigation statistics may represent just the tip of the informal-bankruptcy iceberg.

107. See Dawsey & Ausubel, *supra* note 4, at 3–4.

108. *Id.* at 4.

109. *Id.* at 13.

110. *Id.* at 19.

111. *Id.* at 13–14.

112. See *supra* note 92 and accompanying text.

113. See STATE CORP. COMM’N, SUPPLEMENT TO THE 2005 ANNUAL REPORT OF THE BUREAU OF FINANCIAL INSTITUTIONS: PAYDAY LENDER LICENSEES CHECK CASHERS 8 (2005), available at <http://scc.virginia.gov/division/banking/forms/ar04-05.pdf>.

The decision to sue is easier to understand if civil litigation is placed within the larger context of consumer debt collection. Before suing, creditors are likely to expend considerable effort trying to collect the debt themselves, and many creditors will have sent the debt to a collections agency or sold the debt to a third party.¹¹⁴ The median account assigned to a debt-collection agency is \$440, the median amount recovered is \$68, and the median commission charged by a collection agency is 28%.¹¹⁵ Consumer debt collection is a low-margin business; the above numbers suggest that net recovery rates are usually around eleven cents on the dollar.¹¹⁶

Viewed in this light, the decision to sue appears less puzzling. Creditors will sue as long as the expected net return is greater than zero and greater than the next best alternative. Not all consumers are completely judgment proof, and the creditor may hope to recover some money through garnishment or other means. Even if the creditor would not collect immediately, it might reason that a judgment would serve as an option that would pay off should the consumer's condition improve before the statute of limitations runs. This option may yield a significant return if the creditor is owed a large amount. This option would, of course, come at the expense of the debtor. However, the value of this option might not exceed the costs of filing for bankruptcy, and the debtor might lack the liquidity needed to settle with the creditor at the time of suit.

This theory yields testable implications. First, although Virginia law offers fairly strong creditor remedies, one should expect a low rate of satisfaction of judgments because the cost of filing suit is relatively low and creditors will be willing to sue when there is just a small chance of collecting.¹¹⁷ Second, the sample of civil defendants should be less likely to be judgment proof than the larger population of debtors who default without filing for bankruptcy; the civil defendants should not necessarily represent the poorest segment of society. Moreover, the difference between the population of civil defendants and the larger group who chose informal bankruptcy is likely to increase as the various costs of filing suit increase. As a result, my sample of civil defendants in Virginia is unlikely to be representative of civil defendants in states where it is more costly for the creditor to sue or harder for creditors to enforce their judgments. On

114. For a description of the collection process, see Robert M. Hunt, *Collecting Consumer Debt in America*, FED. RES. BANK PHILA. BUS. REV., Q2 2007, at 11, 12–16, available at http://philadelphiafed.org/files/br/2007/q2/hunt_collecting-consumer-debt.pdf.

115. *Id.* at 13–14.

116. Significantly, this rate of eleven cents on the dollar equals the average purchase price of credit card debt reported by Mann and Hawkins. Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 863 n.24 (2007).

117. In Virginia, the filing fee is just \$34 for a claim greater than \$200 and \$29 for a claim less than \$200; the sheriff will serve process for an additional \$12. *See supra* note 44 and accompanying text.

the other hand, our sample of civil defendants in Virginia should be more representative of the population that chooses informal bankruptcy than the civil defendants in these other states because unpaid Virginia creditors should be more likely to sue.

A creditor may decide to sue even if it knows that its debtor is judgment proof and will always be judgment proof. Some creditors may believe, perhaps erroneously, that they need a judgment for tax or regulatory purposes. The Internal Revenue Service does not require that the creditor sue to demonstrate that a debt is worthless,¹¹⁸ but some creditors may believe that they need to sue. Some have alleged that federal Medicare-related laws encourage hospitals to use aggressive debt-collection techniques, but the federal government denies this.¹¹⁹ The data allow one to test whether medical creditors behave differently than other creditors. The data do not provide strong evidence that they do.¹²⁰

Even absent perceived regulatory requirements, a creditor may still decide to sue a judgment-proof consumer because the judgment will impose costs on the consumer by damaging the consumer's credit rating. Note that a damaged credit rating does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job, or even purchase automobile insurance.¹²¹ Thus, creditors may routinely sue their debtors to maintain a reputation as a "tough" debt collector and discourage other debtors from defaulting. The filing of the suit may also help convince the current defendant to pay. As noted above, credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

The threat-based theories of suit yield empirical predictions, and this Article tests some of these predictions below. Again, these theories suggest that many judgments will remain unpaid. A creditor that wants a reputation for tough behavior must sue even when recovery is very unlikely. If the civil filing serves as a threat, actual judgments would represent cases when the threat failed to induce payment.

The theories also suggest that different creditors should exhibit different behavior. Many large financial creditors regularly report their debtor's payment history to the credit bureaus, so these creditors do not need to file suit to credibly threaten to damage the debtor's reputation. I

118. Internal Revenue Service, U.S. Department of the Treasury, Topic 453—Bad Debt Deduction, <http://www.irs.gov/taxtopics/tc453.html> (last visited Nov. 16, 2007).

119. See Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 569 (2006).

120. See *infra* Part IV.C.3.

121. See, e.g., Anthony Ramirez, *SPENDING IT; Name, Resume, References. And How's Your Credit?*, N.Y. TIMES, Aug. 31, 1997, § 3, at 8.

should therefore observe fewer suits by these creditors because they would sue primarily when they plan to enforce their judgments. I cannot test this theory using my data, but I can test a related theory: If non-financial creditors sue to induce a settlement prior to judgment, financial institutions should be more likely to try to enforce any judgments that they obtain.

In evaluating the threat value of a judgment, one must remember that even a small creditor does not need to sue the consumer to record the default in the consumer's credit report. The assignment of the debt to a collection agency serves the same purpose because these collection agents report the default to the credit bureaus.¹²² This suggests that the use of civil suits should be highly dependent on both the cost of suing and state regulations that restrict the use of collection agents.

3. Should Bankruptcy and Civil Filings Follow the Same Trend?

Consumers who struggle to pay their bills have four basic options: repay in full, convince the creditor to accept partial payment, file for bankruptcy, or work through informal bankruptcy. Creditors will choose to sue some, but not all, consumers who do not pay and do not file for bankruptcy. If the number of consumers who struggle to pay their bills rises, and neither the fraction that choose bankruptcy nor the fraction that is sued changes, both the number of consumers who file for bankruptcy and the number of consumers who are sued should increase. Therefore, the absence of an increase in the amount of civil litigation provides at least some evidence supporting the claim that Americans are more likely to file for bankruptcy than they were in the past.

This evidence is not, however, conclusive. There are at least two basic reasons why the civil filing rate may have grown much more slowly than the financial-distress rate. First, many civil filings have nothing to do with a consumer's inability or unwillingness to pay his debts, and thus the effects of an increase in financial distress on the civil filing rate will be muted. Second, the fraction of consumers in financial distress who default and are sued by their creditors may have changed over time.

Broad measures of civil litigation obviously include many cases that have nothing to do with consumer financial distress. For example, businesses will sue businesses. I do not know if this explanation plays an important role in explaining the relative stability of the national civil litigation rate analyzed in Part II because I do not know the composition of this litigation. However, I do know that this explanation is unimportant when analyzing filings in Virginia general district courts. Nearly all civil filings in general district courts seek to collect debt from individuals.¹²³

122. See *Consumer Data*, *supra* note 7, at 68–70.

123. See *infra* Table IV.2.

A consumer who finds himself sued in state court is not necessarily unable or even unwilling to pay his debts; he may simply dispute the validity of the claim asserted against him. Some evidence supports the claim that many suits are unrelated to an inability or unwillingness to pay debts generally. The civil filing rate is perhaps too stable; it does not tend to rise substantially as unemployment or consumer debt levels increase.¹²⁴ Most consumers are sued just once or twice in a given year,¹²⁵ most judgments are for less than \$1,000,¹²⁶ and a large number of suits are brought by trade creditors—medical-service providers, furniture stores, utility providers.¹²⁷ On the other hand, a \$1,000 or even \$500 bill may be sufficient to push many Americans into financial distress,¹²⁸ and the vast majority of judgments are apparently never paid.¹²⁹ In other words, the civil filing statistics raise precisely the same question that is raised by the bankruptcy filing statistics—do these filings represent consumers who *can't pay* or simply *won't pay*?

A civil lawsuit is just one of the tools that creditors use to collect debts, and it is possible that legal or technological changes have caused creditors to move away from the state courts. In a prior article, I considered changes in federal law and Virginia state law that would explain a shift away from the use of civil litigation to collect debts, and I concluded that these changes were unlikely to explain much of the missing litigation.¹³⁰ I also

124. See *infra* note 144 and accompanying text.

125. See *infra* Table IV.6 and accompanying text.

126. See *infra* Table IV.8.

127. See *infra* Table IV.4.

128. For example, a well-publicized study of the role of medical expenses in consumer bankruptcy classified individuals as “Major Medical Bankruptcies” if they had \$1,000 in uncovered medical expenses over two years. See David U. Himmelstein et al., *MarketWatch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF., Feb. 2, 2005, at W5-63, -65, <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1>.

129. See *infra* Table IV.9.

130. See Hynes, *supra* note 22, at 639–45. My prior article may have understated the importance of increases in the cost of litigation. Consumer debt collection is, however, an extremely low-margin business; therefore, even a small change in costs could have very significant effects. Based on conversations with the clerk of the Richmond general district court, the real cost of filing a complaint and serving process actually fell between 1995 and 2005. In July 1995, the cost of filing suit and serving a complaint was \$30 (\$39.69 in 2006 dollars). In 2005, the cost of filing suit and serving a complaint was \$38 (\$39.23 in 2006 dollars). However, the cost of seeking a garnishment action rose substantially due to a change in the sheriff’s charge for serving process that took effect in 2004. In 1995, a garnishment action cost an additional \$30 (\$39.69 in 2006 dollars), and in 2005 it cost \$74 (\$76.39 in 2006 dollars). Moreover, the cost of filing suit and seeking garnishment was dramatically lower in 1991. In 1991, a creditor could file suit and seek a garnishment order for just \$20 total (\$29.60 in 2006 dollars). In 2005, this amount was \$112 (\$115.61 in 2006 dollars). Telephone Interview with Ms. Sandra Cox Blount, Clerk of Court, Richmond Civil Gen. Dist. Court (Oct. 30, 2007); U.S. Dep’t of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Nov. 16, 2007). It is therefore possible that an increase in fees could have dampened the increase in

noted, however, that the debt-collection industry has undergone major technological advances that could have made non-judicial collection techniques less expensive relative to a lawsuit.¹³¹ Unfortunately, I still lack the data necessary to test the importance of this explanation for the divergence in the civil-litigation and non-business bankruptcy statistics.

The data collected in this Article do, however, allow for an assessment of the importance of two other explanations that I raised in my earlier article. First, an increase in the availability of credit may help explain a simultaneous rise in bankruptcies and fall in civil litigation.¹³² Greater access to credit may allow a consumer to avoid defaulting on unexpected obligations such as medical bills and thereby avoid lawsuits. If the consumer uses this credit to meet a large number of unexpected obligations, however, he may find that his debt burden has grown too large to repay and that it has grown sufficiently large to make bankruptcy more attractive than simply refusing to pay. The data presented below offer mixed support for this explanation. Trade creditors comprise a large portion of the plaintiffs in state court.¹³³ The share of the civil filings brought by these trade creditors has not fallen appreciably in the last ten years;¹³⁴ however, much of the increase in Virginia's bankruptcy filing rate occurred prior to the years for which the district courts still retain records. Virginia's bankruptcy filing rate was actually higher in 1997 than it was in 2005.¹³⁵

In my prior article, I also suggested that changes in credit markets might explain the divergence between the civil filing rate and the bankruptcy filing rate.¹³⁶ In particular, credit card companies may be less likely to sue than other creditors either because their size allows them to

litigation. Perhaps other jurisdictions have substantially raised the cost of filing as well.

131. Hynes, *supra* note 22, at 646–47; *see also* Hunt, *supra* note 114, at 15–16 (describing the advent of WATS lines, predictive dialing, and computer models that predict which collection methods are most likely to achieve results with a particular debtor).

132. *See* Hynes, *supra* note 22, at 648.

133. *See infra* Table IV.4.

134. *See infra* Table IV.4.

135. The number of non-business bankruptcies in Virginia grew from 41,763 in 1997 to 44,621 in 2005. Am. Bankr. Inst., Annual U.S. Bankruptcy Filings by State 1995–1999, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35718> (last visited Nov. 16, 2007) [hereinafter Bankruptcy Filings by State 1995–1999]; Am. Bankr. Inst., Annual U.S. Bankruptcy Filings by State 2000–2006, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=46951> (last visited Nov. 16, 2007) [hereinafter Bankruptcy Filings by State 2000–2006]. However, Virginia's population grew from 6,829,000 in 1997 to 7,567,000 in 2005. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT: ESTIMATES & PROJECTIONS—STATES, METROPOLITAN AREAS, CITIES, http://www.census.gov/compendia/statab/population/estimates_and_projectionsstates_metropolitan_areas_cities/ (then follow “17-Resident Population—States: 1980 to 2005” hyperlink) (last visited Nov. 16, 2007).

136. *See* Hynes, *supra* note 22, at 648.

use technology that makes other collection techniques more valuable or because they fear that a large number of suits could damage their reputation.¹³⁷ This Article finds that credit card companies comprise a surprisingly small share of the plaintiffs.¹³⁸ On the other hand, I cannot conclude that these creditors are less likely to sue because I do not know the total number of defaults on credit card accounts or the total number of defaults on other obligations.

Sections 1 and 2 above suggest that bankrupt debtors and civil defendants may be drawn from very different populations, and the divergence between civil filings and bankruptcy filings may indicate a sharp divergence in the economic well-being of these two groups. The rise in bankruptcy filings may indicate a rise in financial distress among the middle class, while the stable (but high) rate of consumer debt collection in state court may indicate that the amount of financial distress suffered by the poor has not grown appreciably over time. The data are consistent with this claim—civil litigation seems to be disproportionately concentrated in disadvantaged areas. However, the data do not suggest that civil litigation is exclusively confined to these areas, and further research is needed to determine the financial characteristics of the consumers who are sued.

II. THE EXTENT OF CIVIL LITIGATION IN THE UNITED STATES

This Article suggests that statistics capturing the amount of consumer debt collection litigation can serve as an additional proxy for consumer default and insolvency. Unfortunately, states do not publish statistics on consumer debt collection litigation. In a prior article, I used garnishment as a proxy for consumer debt collection litigation, but I could find only one state, Virginia, that reported how often this remedy is used.¹³⁹ However, the National Center for State Courts (NCSC) publishes statistics on the use of civil litigation generally,¹⁴⁰ and these statistics can be used to test whether the stability of the Virginia garnishment rate is likely to be an anomaly.

Part IV shows that the overwhelming majority of civil suits filed in Virginia are consumer debt collection filings,¹⁴¹ and the evidence suggests that consumer debt collection accounts for a very high percentage of the

137. *See id.*

138. *See infra* notes 272–73 and accompanying text.

139. I was also able to construct a measure of the use of garnishment in Cook County, Illinois, by using a database on Lexis. *See Hynes, supra* note 22, at 607.

140. These statistics are published in annual reports. *See, e.g.,* COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2005 (2006), available at http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf [hereinafter STATE COURT CASELOAD STATISTICS 2005].

141. *See infra* text following note 240.

civil filings of other states.¹⁴² Consumer debt collection will not dominate the docket in every state, and the civil litigation statistics will not record those consumers who default but are not sued. However, the civil filing statistics provide geographic and temporal variation that is unavailable in any other publicly available data set besides the bankruptcy statistics.

The NCSC's statistics establish two clear facts. First, the civil filing rate varies widely from state to state, and Virginia has one of the highest rates in the country.¹⁴³ Second, the civil filing rate has remained dramatically more stable than the bankruptcy filing rate.¹⁴⁴ It is very unlikely that the rate of consumer debt collection litigation has risen as quickly as the bankruptcy filing rate.

A. *Prior Literature on the Use of Civil Litigation to Collect Consumer Debts*

There has been surprisingly little recent research on the use of civil litigation to collect consumer debts. Perhaps the best existing data are found in two Federal Reserve studies that examine consumer credit reports. The first Federal Reserve article uses a 1999 sample of credit reports and finds that 12.3% of the individuals had a "public record" in their credit file.¹⁴⁵ The second article uses a 2003 sample and finds that 12.2% of the individuals had a public record in their credit file.¹⁴⁶ These public records include bankruptcy filings (22.7% of the 1999 public records), liens (34.1%), judgments (39.7%), and lawsuits (2.6%).¹⁴⁷ These are not yearly figures; bankruptcy may remain in the credit reports for ten years, while judgments may remain for seven years or until their statute of limitations expires.¹⁴⁸ About 37% of the consumers with public records in their file have more than one.¹⁴⁹ While the credit reports reveal a large number of judgments, very few (15.8%) of these judgments appear to have been satisfied.¹⁵⁰ Of those judgments that have not been satisfied, the median amount outstanding is between \$500 and \$1,000.¹⁵¹ Just 3.1% of the unpaid judgments are for more than \$10,000.¹⁵² The first article classifies the creditors who obtained the judgments: 17.7% medical, 4.5%

142. See *infra* notes 179–82 and accompanying text.

143. See *infra* Table II.2; see also STATE COURT CASELOAD STATISTICS 2005, *supra* note 140, at 116 tbl.3.

144. See *infra* Table II.3.

145. See *Consumer Data*, *supra* note 7, at 51 tbl.1.

146. See *Credit Report Accuracy*, *supra* note 7, at 303 tbl.1.

147. See *Consumer Data*, *supra* note 7, at 67 tbl.10. There are very few lawsuits in the sample because credit-reporting agencies typically wait for a judgment.

148. 15 U.S.C. § 1681c (2000 & Supp. IV 2004).

149. See *Consumer Data*, *supra* note 7, at 67.

150. *Id.* at 67 tbl.10.

151. *Id.*

152. *Id.*

utility, 3.9% government, 5.7% collection agency, 25.4% creditor, and 42.9% other.¹⁵³

The Federal Reserve results are largely consistent with the analysis in Part I: a large number of civil judgments, a low rate of satisfaction, low judgment values relative to the likely costs of filing for bankruptcy, and a significant share of the judgments in favor of non-financial creditors. However, the Federal Reserve's studies leave important questions unanswered. For example, we do not know how often multiple judgments are entered against the same individual,¹⁵⁴ so we do not know how many individuals are sued. We also do not know how many judgment debtors later file for bankruptcy. The studies find a large number of unpaid judgments, but we don't know whether the creditors are actively pursuing these judgments. The studies find that most judgments have rather small balances remaining, but we do not know the original amount. Perhaps more importantly, these statistics do not tell us whether the defaulting debtors who file for bankruptcy differ markedly from those who do not. Finally, the statistics do not reveal how the judgments are distributed across states or across time.

Though there are no readily accessible statistics on consumer debt collection litigation, the NCSC publishes data on the total amount of civil litigation in each state.¹⁵⁵ These statistics are not discussed in most of the prior empirical literature on civil litigation. Most of the books and empirical articles examining civil litigation in state courts have little relevance to consumer insolvency because they focus on courts of "general jurisdiction."¹⁵⁶ Despite the label, many of these courts lack

153. *Id.* "Creditor" includes "large retailers, banking institutions, and finance companies." *Id.* "Other" includes "small retailers, law firms, individuals, [and] educational institutions." *See id.*

154. The results do report how frequently individuals have more than one "public record" in their file, but they do not identify judgments separately from other public records. *See id.* at 67.

155. *See supra* note 140 and accompanying text.

156. *See generally* CAROL J. DEFRANCES & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CONTRACT CASES IN LARGE COUNTIES (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccilc.pdf> (noting the number of contract disputes disposed of by the state courts of general jurisdiction); CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjavilc.pdf> (studying juries in state general jurisdiction courts); FRANCIS W. LAURENT, THE BUSINESS OF A TRIAL COURT (1959) (studying the proceedings of a trial court of general jurisdiction during a hundred-year period from 1855 to 1954); WAYNE V. MCINTOSH, THE APPEAL OF CIVIL LAW (1990) (using data from civil trial cases filed in St. Louis, Missouri, circuit court to test theoretical predictions of socioeconomic change and litigation); MOLLY SELVIN & PATRICIA A. EBENER, RAND INST. FOR CIVIL JUSTICE, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN LOS ANGELES SUPERIOR COURT (1984), available at <http://rand.org/pubs/reports/2007/R3165.pdf> (exploring delay in a court of general jurisdiction); Theodore Eisenberg et al., *Federal Product Liability Litigation Reform: Recent Developments and Statistics: Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433 (1996) (using state courts of general jurisdiction as part of their sample); Lawrence M. Friedman & Robert V.

jurisdiction to hear most consumer debt collection cases because they cannot hear claims that seek less than a few thousand dollars.¹⁵⁷ In addition, most states provide their trial courts with overlapping jurisdiction, and their courts of limited jurisdiction are authorized to hear claims of up to \$10,000 or more.¹⁵⁸ As a result, most unsecured consumer debts fit comfortably within the jurisdiction of the limited-jurisdiction

Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1976) (studying the civil load of two California trial courts between 1890 and 1970); Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 592 (compiling and summarizing data on contract litigation); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 756 (2004) (“[W]e introduce the results from a major new data collection initiative . . . designed to ascertain trial trends in state general jurisdiction courts.”).

157. See STATE COURT CASELOAD STATISTICS 2005, *supra* note 140, at 76 fig.C (listing the minimum dollar amounts needed to have jurisdiction in state trial courts). A number of articles focus on courts at the other end of the spectrum—small claims courts. For a good, but dated, overview of this literature, see Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975). For useful works published more recently, see JOHN A. GOERDT, NAT'L CTR. FOR STATE COURTS, SMALL CLAIMS AND TRAFFIC COURTS (1992); JOHN C. RUHNKA & STEVEN WELLER, NAT'L CTR. FOR STATE COURTS, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (1978); Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); Thomas L. Eovaldi & Peter R. Meyers, *The Pro Se Small Claims Court in Chicago: Justice for the “Little Guy”?*, 72 NW. U. L. REV. 947 (1978). Unfortunately, most of these works focus on just one state and do not track changes in the use of these courts over time. One recent exception is a series of articles published in the *Boston Globe*. See Michael Rezendes & Francie Latour, *No Mercy for Consumers; Firms' Tactics Are One Mark of a System That Penalizes Those Who Owe*, BOSTON GLOBE, July 30, 2006, at A1; Beth Healy, *Dignity Faces a Steamroller; Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOSTON GLOBE, Jul. 31, 2006, at A1; Walter V. Robinson & Michael Rezendes, *Enforcers' Might Goes Unchecked*, BOSTON GLOBE, Aug. 1, 2006, at A1; Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOSTON GLOBE, Aug. 2, 2006, at A1. As is obvious from the titles of the articles, this series reiterates an old theme in the small-claims literature—small-claims courts are used by the powerful to collect from the poor. See *Small Claims Courts as Collections Agencies*, 4 STAN. L. REV. 237 (1952) (criticizing how creditors use small-claims courts to collect from the poor). The *Boston Globe* series provides important insight into consumer debt collection in Massachusetts courts, but at times the series overstates its claims. For example, the series reports a “tidal wave of lawsuits,” Robinson & Healy, *supra*, but the data presented in the prior day's article tell a very different story. They report an 11% increase in the number of small claims in Massachusetts “over the past decade.” Healy, *supra*. Assuming that they are measuring the change in civil litigation from 1995 to 2005, this represents an increase in the rate of civil litigation (small claims per thousand population) of about 6.5%, or just 0.6% a year. By contrast, the number of non-business bankruptcies filed in Massachusetts per thousand population increased by 83% during this same period. The population of Massachusetts was approximately 6,141,000 in 1995 and 6,399,000 in 2005. See U.S. CENSUS BUREAU, *supra* note 2, at 20 tbl.17. The total number of non-business bankruptcies grew from 13,796 in 1995 to 26,308 in 2005. Bankruptcy Filings by State 1995–1999, *supra* note 135; Bankruptcy Filings by State 2000–2006, *supra* note 135.

158. See STATE COURT CASELOAD STATISTICS 2005, *supra* note 140, at 76 fig.C.

courts,¹⁵⁹ and the overwhelming majority of suits are filed in these courts when they are available. For example, more than 90% of civil filings in Idaho, Maryland, Massachusetts, Michigan, Nebraska, and Virginia are made in courts of limited jurisdiction, and more than 70% of civil suits are filed in courts of limited jurisdiction in at least thirteen other states.¹⁶⁰ Thus, the exclusion of the courts of limited jurisdiction renders most prior studies inapplicable to the questions of how much consumer debt collection litigation exists and how it has changed over time.

A few prior articles examine changes in the amount of civil litigation more generally. In 1984, Robert Kagan claimed to find a decline in debt collection litigation from the end of World War II until the early 1980s.¹⁶¹ However, most of the data he used to show a decline in debt collection litigation were drawn from courts of general jurisdiction¹⁶²—the courts that lacked jurisdiction to hear most consumer debt collection cases. His article does present some data from municipal and small claims courts in California, but these data show an increase of approximately 28% in the civil filing rate over the fifteen-year period from 1965 to 1980.¹⁶³ Further, the non-business bankruptcy filing rate rose more than 300% between 1984 and 2004,¹⁶⁴ suggesting that there have been radical changes in debt collection since the publication of his paper. One of the major explanations he offered for the decline in litigation contrasts sharply with much of the current bankruptcy scholarship. He argued that a major cause of the decline in civil litigation is the increase in “systematic stabilization” that has made consumers less vulnerable to financial shocks.¹⁶⁵ Many modern

159. As noted above, the credit reports suggest that just 3.1% of outstanding judgments are greater than \$10,000, though more of the initial judgments may have exceeded this threshold. See *supra* note 152 and accompanying text.

160. COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005, at 23 (Richard Y. Schauffler et al. eds., 2006), available at http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWhole%20Document_final_1.pdf [hereinafter EXAMINING THE WORK OF STATE COURTS 2005]. The thirteen states are Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Texas. *Id.* Some of these limited-jurisdiction courts may hear family-law claims or other matters.

161. Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC’Y REV. 323, 331 (1984).

162. *Id.* at 332 tbl.2, 334 tbl.3.

163. *Id.* at 336 tbl.4 (showing an increase in the combined debt collection litigation rate from 18.7 per thousand population in 1965 to 24 per thousand in 1980).

164. I use 2004 as a basis for comparison because the 2005 and 2006 bankruptcy statistics were likely affected by the large number of individuals who filed in anticipation of the recent bankruptcy reforms. There were 284,517 non-business bankruptcies in 1984 and 1,563,145 in 2004. Am. Bankr. Inst., *supra* note 2. The population of the United States increased from 235,825,000 in 1984 to 293,657,000 in 2004. U.S. CENSUS BUREAU, *supra* note 2, at 7 tbl.2.

165. See Kagan, *supra* note 161, at 355–57. He also argues that there has been a “legal rationalization” of credit transactions as institutional lenders are more willing to absorb bad-debt losses rather than litigate and consumers are more willing to file for bankruptcy to avoid collection

bankruptcy scholars have argued that the recent rise in the bankruptcy filing rate proves that consumers are *more* vulnerable to financial shocks.¹⁶⁶

In 1986, Marc Galanter used data from the NCSC to note a lack of a “litigation explosion” between 1978 to 1984,¹⁶⁷ and in 1994, Ostrom and Marvell used this same source to show a decline in civil filings from 1992 to 1994.¹⁶⁸ These papers support the finding of a stable rate of civil litigation, but Galanter’s paper is now more than two decades old. The number of bankruptcy filings has doubled since Ostrom and Marvell published their article,¹⁶⁹ and their conclusion is based on just three years of data. Ultimately, Ostrom and Marvell attribute the decline in filings to the recession of the early 1990s.¹⁷⁰ However, if they had identified the actual cause of the stagnant civil filing rate, the amount of litigation should have expanded during the economic prosperity of the late 1990s. As shown below, it did not.

In a recent article, I found a similar stability or an actual decline in the rate of garnishment in two jurisdictions—the Commonwealth of Virginia and Cook County, Illinois.¹⁷¹ Since the publication of that article, the Virginia courts and the Administrative Office of the U.S. Courts have released data that reflect the change in civil litigation and bankruptcy since the implementation of the latest bankruptcy reforms. The Bankruptcy Reform Act of 2005 went into effect in October 2005 and had an immediate and dramatic effect on the number of bankruptcy filings. The number of non-business bankruptcy filings in Virginia dropped by more than 70%, from 44,621 in 2005¹⁷² to just 12,901 in 2006.¹⁷³

One might expect these reforms to increase the amount of civil litigation. To the extent that financially distressed consumers cannot file for bankruptcy, they remain vulnerable to suit. Figure II.1 presents the garnishment rate (per 5,000 residents) and the civil filing rate (per 1,000 residents) for Virginia general district courts between 1996 and 2006.¹⁷⁴

efforts. *Id.* at 362–63. Finally, he argues that legal changes have raised the cost of litigation for creditors. *Id.* at 364–65.

166. See, e.g., Warren, *supra* note 1, at 26–28.

167. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6, 7 tbl.1 (1986).

168. Brian J. Ostrom & Thomas B. Marvell, *The Collapse in Contract Case Filings Since 1991*, 17 JUST. SYS. J. 221, 222, 223 tbl.1 (1994).

169. See Am. Bankr. Inst., *supra* note 2.

170. See Ostrom & Marvell, *supra* note 168, at 225.

171. See Hynes, *supra* note 22, at 607.

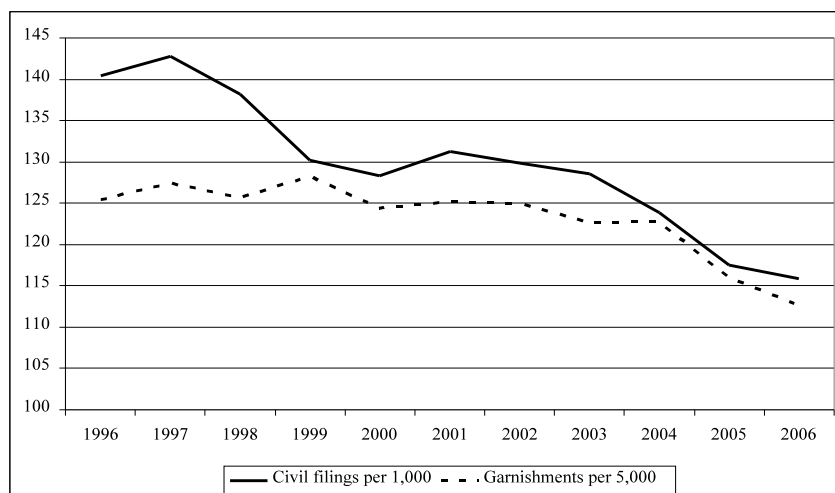
172. Bankruptcy Filings by State 2000–2006, *supra* note 135.

173. *Id.*

174. For the number of civil filings in 1996 through 2005, see Virginia’s Judicial Sys., District Court Caseload Statistics, <http://www.courts.state.va.us/csi/#decs> (last visited Nov. 16, 2007). For the number of civil filings in 2006, see SUPREME COURT OF VA., VIRGINIA 2006 STATE OF THE JUDICIARY REPORT, A106 (Christopher M. Wade et al. eds., 2006), available at

Figure II.1 is scaled to accentuate any change in the filing rates over time. The amount of civil litigation actually declined in 2006.¹⁷⁵ We can account for this decline in a number of ways. First, this is just one year, and the decline appears to be a continuation of a general (and gentle) downward trend in civil litigation in Virginia. Second, the demand for bankruptcy in 2006 may have been artificially low because so many debtors rushed to beat the filing deadline in 2005. Finally, the Virginia courts increased filing fees from \$26 in 2005 to \$36 in 2006,¹⁷⁶ and these increased costs could have offset any effect from the change in the bankruptcy law. We will have to wait to determine if the bankruptcy reforms had any meaningful effect on civil litigation.

Figure II.1: Total Civil Filing Rate and Garnishment Rate in Virginia¹⁷⁷



My prior article focused on garnishment on the theory that this remedy was most closely related to consumer debt collection.¹⁷⁸ Part IV of this

http://www.courts.state.va.us/reports/2006/state_of_the_judiciary_report.pdf. For the population statistics used in the Figure, see U.S. CENSUS BUREAU, *supra* note 135. The U.S. Census Bureau does not report the population in 2006. I assumed that the rate of population growth between 2005 and 2006 was the same as the rate of growth between 2004 and 2005.

175. Compare VIRGINIA'S JUDICIAL SYS., DISTRICT COURT CASELOAD STATISTICS REPORT 01/05–12/05, at 323, http://www.courts.state.va.us/csi/dbr1_2005.pdf (last visited Nov. 16, 2007) (listing the total new civil cases in general court as 828,392 for 2005), with VIRGINIA'S JUDICIAL SYS., DISTRICT COURT CASELOAD STATISTICS REPORT 01/06–12/06, at 323, http://www.courts.state.va.us/csi/dbr1_2006.pdf (last visited Nov. 16, 2007) (listing the total new civil cases in general court as 827,718 for 2006).

176. See *supra* note 130.

177. For data used in this Figure, see *supra* note 174.

178. See Hynes, *supra* note 22, at 607.

Article suggests that, at least in Virginia, the overwhelming majority of all civil filings seek to collect debt from consumers. This may not be true elsewhere, but there are a number of indications that consumer debt collection plays an important role in the civil docket of many states. First, the credit-report data discussed above suggest that Americans have millions of unpaid judgments entered against them.¹⁷⁹ Second, others have noted that debt collection plays an important or even dominant role in the civil dockets of specific states.¹⁸⁰ Third, the vast majority of civil suits are filed in courts of limited jurisdiction when these courts are available,¹⁸¹ and these courts cannot hear claims of more than a few thousand dollars. Finally, in a few of the states that lack courts of limited jurisdiction, small claims account for as much as 42% of their civil filings and contract claims account for another 27%.¹⁸²

B. *The National Center for State Courts' Data*

The NCSC published data on the amount of civil litigation in both general- and limited-jurisdiction courts from 1976 to 1981 and from 1984 to 2004.¹⁸³ The data are not complete—many states are missing data for some or all of their courts in some years. In addition, data problems limit the comparability of civil litigation rates across states. For example, a few states count subsequent actions, such as garnishment, in their totals while most states do not, and a few states exclude small claims from their totals while most do not.¹⁸⁴ Even if the states applied the same methods of counting civil filings, peculiar state laws would still make a cross-state comparison of civil filings a poor measure of differences in consumer insolvency and default. For example, Maryland landlord–tenant law requires that the first notice of an overdue rent payment come from the court instead of the landlord,¹⁸⁵ and more than half of Maryland civil

179. See *supra* notes 145–47 and accompanying text.

180. See, e.g., Robinson & Healy, *supra* note 157.

181. See *supra* note 160 and accompanying text.

182. E-mail from Shauna M. Strickland, Court Research Analyst, Nat'l Ctr. for State Courts, to Richard Y. Schauffler, Dir., Research Servs., Nat'l Ctr. for State Courts (Mar. 7, 2007) (on file with author) (“Reviewing the 2004 CSP civil data that we published in *Examining the Work of State Courts, 2005*, I found the following: in 6 unified courts, small claims cases top the civil composition at 42% and contract cases come in second at 27%. . . . So, since contract is a prevalent case type and debt collection is likely to be more common than other contract case types, it seems that it is likely that a good portion of civil cases are debt collection cases.”).

183. See *supra* note 140 and accompanying text.

184. For a summary of these counting differences, see STATE COURT CASELOAD STATISTICS 2005, *supra* note 140, at 71 fig.B (listing the methods of counting civil cases in state appellate courts); *id.* at 99 fig.H (listing the methods of counting civil cases in state trial courts).

185. See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 473 (2003), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1404_hartman.pdf.

filings are landlord–tenant disputes.¹⁸⁶ To the extent that states do not change their laws or counting methods, comparisons of civil litigation across time present fewer problems.

Even allowing for these difficulties, the NCSC data seem to demonstrate two facts about civil litigation in the United States. First, the rate of civil litigation varies dramatically across states, and Virginia has one of the highest rates of litigation.¹⁸⁷ Second, the civil filing rate of most states has remained fairly stable since the mid-1970s.¹⁸⁸ There is little evidence of growth in the rate of consumer debt collection litigation that would match the growth in the non-business bankruptcy filing rate.

C. Differences in Civil Filing Rates Across States

Table II.2 presents the civil filing rate (exclusive of domestic relations) per 100,000 people for each state in 2004. Even allowing for substantial differences in the method used to count filings, the extremely large variance revealed by Table II.2 suggests that some states have dramatically higher filing rates than others. Significantly, Virginia's rate is more than two and a half times that of the median state, and only part of this difference is likely due to Virginia's method of counting filings. Part IV suggests that after adjusting the Virginia filing rate to remove subsequent filings such as garnishment from the total, Virginia's filing rate would still be more than one filing each year for every ten Virginians.¹⁸⁹ One must remember the fact that Virginia is an outlier when interpreting the findings of Part IV.¹⁹⁰

186. In 2005, Maryland district courts received 525,814 landlord–tenant filings and just 352,800 other civil filings. MGMT. ANALYSIS & RESEARCH, MD. JUDICIAL CTR., THE DISTRICT COURT MARYLAND JUDICIARY ANNUAL STATISTICAL ABSTRACT 2005, at 64 chart DC-4.2.13, http://www.courts.state.md.us/publications/annualreport/reports/2005/district_court_1.pdf (last visited Nov. 16, 2007).

187. *See supra* note 143.

188. *See supra* note 144.

189. *See infra* Part IV.B.1; Table IV.1 and accompanying text.

190. These statistics also suggest that we may want to revisit Sullivan, Warren, and Westbrook's finding that few bankrupt debtors have been subject to civil litigation. *See AS WE FORGIVE*, *supra* note 14, at 305 (finding that only one-third of debtors had a lawsuit filed against them prior to bankruptcy and only one in ten had been subject to garnishment or another effort to enforce a judgment). They based this observation on a study of bankrupt debtors in California, Illinois, Pennsylvania, Tennessee, and Texas, *id.* at 18, and Table II.2 reveals that four of these jurisdictions have below-average litigation rates. The NCSC does not publish complete statistics for Tennessee. *See EXAMINING THE WORK OF STATE COURTS 2005*, *supra* note 160, at 23.

Table II.2: Civil and Non-Business Bankruptcy Filings per 100,000 People in 2004¹⁹¹

	Civil	Bankruptcy		Civil	Bankruptcy
Maryland	17,647	519	Kentucky	5,236	666
District of Columbia	14,602	344	Nebraska	5,134	499
Virginia	13,376	525	Iowa	5,097	429
New Jersey	9,676	466	Arizona	4,949	520
Georgia	8,605	836	Rhode Island	4,888	378
New York	8,353	394	Arkansas	4,808	860
Indiana	7,607	860	Missouri	4,627	642
Kansas	7,433	584	Wisconsin	4,514	482
Delaware	7,350	402	Illinois	4,418	621
Michigan	7,207	628	Alabama	4,391	914
Ohio	7,148	771	West Virginia	4,354	621
South Carolina	7,036	359	North Dakota	4,226	346
Louisiana	7,021	646	New Hampshire	4,164	343
South Dakota	6,892	350	Alaska	3,954	218
Colorado	6,841	587	New Mexico	3,858	456
Connecticut	6,589	322	Washington	3,848	600
Nevada	6,319	690	Pennsylvania	3,411	468
North Carolina	6,247	416	Texas	3,250	397
Idaho	5,954	653	Vermont	3,177	259
Florida	5,863	476	California	2,888	329
Montana	5,828	451	Minnesota	2,627	240
Utah	5,576	825	Hawaii	2,127	323
Massachusetts	5,504	283			

Table II.2 also reveals that the civil filing rate and the non-business bankruptcy filing rate are only weakly correlated (0.12). The NCSC casts some doubt on the litigation statistics for Maryland, Virginia, and the District of Columbia.¹⁹² If one excludes these jurisdictions, the correlation

191. The civil filing statistics are taken from the NCSC. EXAMINING THE WORK OF STATE COURTS 2005, *supra* note 160, at 23. Mississippi, Oklahoma, and Wyoming did not report civil data to the NCSC in 2004. Table II.2 also excludes Oregon, Maine, and Tennessee because the NCSC did not receive data for courts of limited jurisdiction from these states. *Id.* The bankruptcy statistics are taken from the American Bankruptcy Institute. Bankruptcy Filings by State 2000–2006, *supra* note 135. Population statistics are taken from the Statistical Abstract of the United States. U.S. CENSUS BUREAU, *supra* note 2, at 20 tbl.17.

192. See EXAMINING THE WORK OF STATE COURTS 2005, *supra* note 160, at 22 (“Maryland reports an unusually high number of landlord/tenant cases that largely originate from the city of Baltimore. Virginia . . . counts every civil petition and subsequent action as a separate filing The District of Columbia’s small resident population . . . fails to account for all of the out-of-District residents from Virginia and Maryland who are often embroiled in civil litigation there.”). One might argue, however, that these reasons are insufficient to exclude these states. The

between civil litigation and bankruptcy improves to 0.32. Perhaps we should not expect a higher correlation between civil litigation and bankruptcy. First, even if civil litigation serves as a proxy for the rate of default, a large number of bankruptcy filings means that a large number of defaulting consumers cannot be sued. Second, states employ different methodologies when counting the number of civil filings.¹⁹³ Third, at least some civil litigation has nothing to do with consumer financial distress.¹⁹⁴ Finally, creditors can rely more heavily on other collection methods if a state makes its litigation process too expensive or ineffective.

D. *The Relative Stability in Civil Filing Rates over Time*

Table II.3 presents the rate of change in the civil and bankruptcy filing rates for every state for which the NCSC provides complete data in 1980, 1990, and 2002. In contrast to Table II.2, Table II.3 includes domestic-relations cases. The primary lesson of Table II.3 is that the civil filing rate has been markedly more stable than the non-business bankruptcy filing rate. The median civil filing rate rose by 24% between 1980 and 2002, and the average civil filing rate (weighted by population) rose by just 12%. In contrast, the median bankruptcy filing rate in these states rose by 362%, and the weighted average rose by 276%. Consumer debt collection litigation comprises just a portion of all civil litigation, and any increase in consumer debt collection may be muted by stability or declining rates of other forms of litigation. However, it would be difficult to reconcile the very different growth rates in civil litigation and bankruptcy without assuming that consumer debt collection comprises an implausibly small fraction of civil litigation.

landlord–tenant disputes of Baltimore may be unusually common, but they are actual civil filings. This Article demonstrates that Virginia’s civil litigation docket is extremely active even after one removes the subsequent filings. *See infra* Part IV.B.1. If it is true that the District of Columbia’s civil litigation rate is overestimated due to the presence of residents of Virginia and Maryland, this suggests that the litigation rates of these two states (the two most litigious) are *underestimated*.

193. *See supra* note 184 and accompanying text.

194. *See supra* notes 124–27 and accompanying text.

Table II.3: Percent Change in Civil and Non-Business Bankruptcy Filing Rates¹⁹⁵

	1980 to 2002		1990 to 2002			1980 to 2002		1990 to 2002	
	Civil	Bankruptcy	Civil	Bankruptcy		Civil	Bankruptcy	Civil	Bankruptcy
AK	-3%	302%	-1%	19%	MA	-7%	476%	-14%	92%
AZ	12%	349%	-11%	23%	MN	-8%	269%	-10%	16%
CA	-33%	148%	-26%	23%	MO	21%	356%	5%	126%
CO	29%	174%	26%	-2%	NH	-30%	386%	-45%	61%
CT	9%	468%	5%	113%	NC	17%	272%	-15%	152%
DE	46%	426%	10%	174%	ND	83%	456%	31%	126%
DC	-19%	398%	-21%	174%	OH	41%	206%	15%	94%
FL	69%	963%	25%	109%	PA	46%	699%	14%	221%
HI	-8%	508%	-23%	395%	SD	73%	481%	48%	111%
ID	24%	259%	14%	75%	VT	46%	723%	-2%	205%
IL	-11%	201%	-7%	106%	VA	46%	287%	-6%	92%
IA	4%	300%	5%	128%	WA	-9%	326%	-4%	121%
KS	74%	246%	34%	63%	WV	38%	657%	31%	205%
KY	38%	235%	18%	81%	WI	21%	388%	-19%	134%
Median						24%	362%	8%	129%
Average, Weighted by Population						12%	276%	-3%	80%

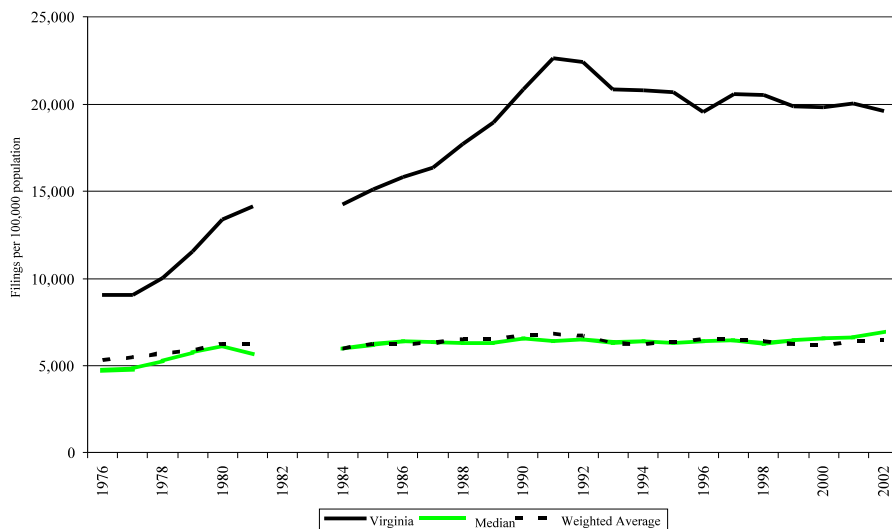
Table II.3 suggests that much of the increase in the civil filing rate occurred prior to 1990. The average civil filing rate was approximately the same in 2002 as it was in 1990. Virginia's experience was particularly dramatic. Figure II.4 presents the civil filing rate in Virginia from 1976 to 1981 and 1984 to 2002 as well as the median and weighted average of all states for which I have data in each of those years. Nine states from Table II.3 are excluded from Figure II.4 because the NCSC lacks data for these states in some of the years.¹⁹⁶ Virginia's civil filing rate roughly doubled

195. The civil filing statistics are taken from the NCSC. COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2003, at 20 (Brian J. Ostrom et al. eds., 2004), available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Full_Report.pdf; COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 1990, at 11 tbl.L4 (1992); COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 1980, at 58-66 (1984). The bankruptcy statistics are taken from the American Bankruptcy Institute Bankruptcy Filings by State 2000-2006, *supra* note 135; Am. Bankr. Inst., Annual U.S. Bankruptcy Filings by State 1990-1994, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=35717&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Nov. 16, 2007); Am. Bankr. Inst., Annual U.S. Bankruptcy Filings by State 1980-1984, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35680> (last visited Nov. 16, 2007). Population statistics are taken from the Statistical Abstract of the United States. U.S. CENSUS BUREAU, *supra* note 2, at 20 tbl.17.

196. Colorado, Massachusetts, Minnesota, North Dakota, Pennsylvania, South Dakota, Vermont, West Virginia, and Wisconsin are excluded because the NCSC lacks data from these

between 1976 and 1990 but then declined slightly (about 8%) between 1990 and 2002.¹⁹⁷

Figure II.4: Civil Filing Rates Reported by NCSC¹⁹⁸



In a recent publication, the NCSC presents a graph showing the increase in civil litigation in the United States from 1995 to 2004.¹⁹⁹ This graph excludes domestic-relations cases.²⁰⁰ The NCSC's graph shows a 15% increase in total civil filings between 1995 and 2004 and a 19% increase in civil filings in courts of limited jurisdiction.²⁰¹ As a practical matter, there is not much difference between the NCSC's results and those of Table II.3 or Figure II.4. The U.S. population increased by 10.3% during this period, so the NCSC's analysis shows a 4.3% increase in the total civil litigation rate and a 7.9% increase in the civil litigation rate in courts of limited jurisdiction.²⁰² In contrast, the national bankruptcy filing

states for some years.

197. Unfortunately, I do not know the cause of the increase in the civil filing rate during the 1980s, and general district courts do not retain court records that are more than ten years old. It is quite possible that consumer debt collection litigation increased significantly during this period.

198. For data used in this Figure, see *supra* note 183 and accompanying text.

199. EXAMINING THE WORK OF STATE COURTS 2005, *supra* note 160, at 22.

200. *See id.* at 16 (explaining that the civil and domestic-relations cases are treated as separate categories).

201. *Id.* at 22.

202. The U.S. population was approximately 266,278,000 in 1995 and 293,657,000 in 2004. U.S. CENSUS BUREAU, *supra* note 2, at 7 tbl.2.

rate increased by more than 62% during this same period.²⁰³

Table II.3 suggests that there is substantial variance in the change in civil litigation across states. North Dakota's rate increased by 83% between 1980 and 2002, and a few states, such as California and New Hampshire, experienced a decrease in civil litigation. Interestingly, the rate of change in civil litigation is moderately correlated with the rate of change in the bankruptcy filing rate (0.37) if one measures the change from 1980 to 2002. This suggests that some of the factors that have caused an increase in the non-business bankruptcy filing rate may have had an effect on civil filing rates. However, if one measures the change from 1990 to 2002, the two measures are uncorrelated (-0.04).

III. EXAMINING DIFFERENCES IN CIVIL LITIGATION WITHIN VIRGINIA

The next two Parts focus on civil litigation within Virginia.²⁰⁴ Table III.1 lists the civil filing rate in the general district court of each judicial district in Virginia in 2000 and the percentage of all Virginia filings that each judicial district received. Nearly every judicial district has a civil filing rate that is well above that of most states.²⁰⁵ However, some districts have civil filing rates that are dramatically higher than others. Table III.1 demonstrates that Virginia's high filing rate is probably unrelated to its proximity to the District of Columbia; the litigation rates in the suburbs of northern Virginia (districts 17, 18, 19, and 31) are substantially lower than the state average.²⁰⁶ More importantly, by comparing the filing rates with demographic variables for each judicial district or county, we can gain some insight on the likely characteristics of the defendants. Specifically, civil litigation is disproportionately concentrated in areas with more disadvantaged individuals.²⁰⁷ Though this Article focuses on Virginia, this

203. The U.S. population was approximately 226,546,000 in 1980 and 287,985,000 in 2002. *Id.* Americans filed 287,570 non-business bankruptcy filings in 1980, 874,642 in 1995, 1,539,111 in 2002, and 1,563,145 in 2004. *See* Am. Bankr. Inst., *supra* note 2.

204. This Article starts with a single state to make the project manageable. Virginia makes its court dockets available on the Internet in searchable form, greatly enhancing the ability to gather data. *See* Virginia's Judicial Sys., Virginia Courts, <http://www.courts.state.va.us/courts/courts.html> (last visited Nov. 16, 2007). Court data from 2000 are used to facilitate comparisons to other variables.

205. *Compare infra* Table III.1 (listing civil filing rates for Virginia's judicial districts for 2000), with COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORKS OF STATE COURTS, 2001, at 18 (Brian J. Ostrom et. al. eds. 2001), *available at* http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Full_Report.pdf (listing civil filings rates for all states for 2000).

206. *See* COURT STATISTICS PROJECT, *supra* note 205, at 18 (listing Virginia's rate of civil filing as 14,315 per 1,000). One might also suspect that Virginia's high civil filing rate is due to an aggressive use of forum selection clauses whereby creditors sue out-of-state consumers in other states. However, my search of the Richmond docket found that just 3% of the defendants resided outside of Virginia. *See supra* note 204.

207. *See* FedStats State Court Districts: Virginia, <http://www.fedstats.gov/mapstats/statecourts/>

Part verifies that this concentration of civil litigation in disadvantaged areas occurs in other states as well.

Table III.1: Virginia Civil Litigation by District in 2000²⁰⁸

Judicial District	Civil Filings per 100,000	Percent of Total	Judicial District	Civil Filings per 100,000	Percent of Total
1	16,446	3.6%	16	10,221	3.1%
2	18,532	8.7%	17	5,308	1.2%
2A	9,092	0.5%	18	9,867	1.4%
3	17,832	2.0%	19	4,590	5.0%
4	36,089	9.3%	20	4,415	1.1%
5	14,712	2.6%	21	14,754	1.6%
6	11,276	1.4%	22	13,236	1.7%
7	23,990	4.8%	23	16,923	3.8%
8	20,934	3.4%	24	12,259	3.1%
9	8,614	2.1%	25	8,759	2.0%
10	11,651	2.0%	26	12,716	4.1%
11	15,061	1.8%	27	7,876	2.2%
12	10,847	3.3%	28	7,978	0.9%
13	48,861	10.6%	29	7,838	1.0%
14	12,812	3.7%	30	4,723	0.5%
15	10,863	4.6%	31	8,432	3.0%

All Virginia judicial districts have active civil litigation dockets, but some dockets are much more active than others. For example, Hampton (district 8), Newport News (district 7), and Norfolk (district 4) all had litigation rates in excess of 20,000 per 100,000 people, while the neighboring 9th district received less than 9,000 civil filings in its general district courts per 100,000 people. Other jurisdictions exhibit similar disparities in their filing rates. For example, the general district court in the city of Baltimore receives 24,377 landlord-tenant filings and 6,337 contract and tort (claims of less than \$25,000) filings per 100,000 people while the corresponding rates for the general district court in Montgomery County are just 4,212 and 2,835 filing per 100,000 people.²⁰⁹

sc51.html (last visited Nov. 16, 2007) (providing demographic and economic data by judicial district in Virginia).

208. For the district court civil filing statistics used in the Table, see VIRGINIA’S JUDICIAL SYS., DISTRICT COURT CASELOAD STATISTICS REPORT 01/00–12/00, http://www.courts.state.va.us/csi/dbr1_2000.pdf. For the Virginia County population statistics used to calculate the filing rates in the Table, see Univ. of Va., Geospatial and Statistical Data Center, 2000 County Files, <http://fisher.lib.virginia.edu/collections/stats/ccdb/county2000.html> (last visited Nov. 16, 2007). For a list of the district that corresponds to each county, see SUPREME COURT OF VA., *supra* note 174, at B4.

209. See MD. JUDICIARY, ANNUAL REPORT OF THE MARYLAND JUDICIARY: STATISTICAL

By comparing the filing rates in the cities and counties²¹⁰ within a state to demographic variables for those locations, we can gain some insight into the likely characteristics of the defendants. Table III.2 sets forth the variables, their meanings, and the summary statistics. This Part considers four states: Virginia, Maryland, California, and Florida. I chose these states because they have very different civil filing rates; their court statistics make it easy to identify a class of filings that are likely to be consumer debt collection; and the data identify where in the state these suits were filed.²¹¹ Both Maryland and Virginia have unusually high civil filing rates, though most of Maryland's high civil filing rate appears to be due to an unusual aspect of its landlord-tenant law.²¹² California and Florida have much lower civil filing rates. California appears to have consciously decided to discourage the use of state courts to enforce contracts against consumers. Each year a plaintiff may file just two claims of more than \$2,500 in small-claims court, and the filing fee for a claim of less than \$1,500 increases from \$30 to \$100 if the plaintiff has filed more than twelve claims that year.²¹³ Debt-collection agencies and other assignees are barred from California small-claims courts altogether.²¹⁴ Florida sharply limits the availability of creditor remedies. Florida allows the consumer to exempt all of his home equity regardless of the value of the home,²¹⁵ and Florida exempts all of a head of household's wages from garnishment if certain conditions are met.²¹⁶

In addition to the demographic variables that Caplovitz; Stanley and Girth;²¹⁷ and Sullivan, Warren, and Westbrook suggest,²¹⁸ I include variables capturing population density, crime rate, and a measure of the importance of the retail and banking sector.²¹⁹ For Virginia I also include the number of physicians per 1,000 population. Scholars have argued that

ABSTRACT 1999–2000, at 22 tbl.DC-4, *available at* <http://www.courts.state.md.us/publications/annualreport/reports/2000/annualstats.pdf> (listing total filings for each district and county); Univ. of Va., *supra* note 208 (listing population statistics for each Maryland county).

210. In Virginia, cities are not subdivisions of counties but legally separate entities.

211. One could almost certainly test other states as well, but I have not done so.

212. *See supra* notes 185–86 and accompanying text.

213. Ca. Courts, Self-Help Center: Small Claims Basics, <http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm> (last visited Nov. 16, 2007).

214. Ca. Dep't of Consumer Affairs, The Small Claims Court, A Guide to Its Practical Use: Glossary of Terms, http://www.dca.ca.gov/publications/small_claims/glossary.shtml (last visited Nov. 16, 2007).

215. FLA. CONST. art. X, § 4, cl. a1.

216. FLA. STAT. § 222.11 (2007) (exempting from garnishment “[a]ll of the disposable earnings of a head of family whose disposable earnings are less than or equal to \$500 a week”).

217. *See* CAPLOVITZ, *supra* note 17, at 14–21, 325–26; STANLEY & GIRTH, *supra* note 16, at 42–45.

218. *See* AS WE FORGIVE, *supra* note 14, at 91; FRAGILE MIDDLE CLASS, *supra* note 18, at 53.

219. *See infra* Table III.2.

consumer bankruptcy increases as the degree of urbanization increases,²²⁰ and I include population density to test whether this effect extends to civil litigation. The concentration of doctors and retail sales per capita are included because Virginia places few limits on the plaintiff's choice of venue.²²¹

One of the most heated debates in the consumer bankruptcy literature is whether a decline in stigma has caused the increase in the bankruptcy filing rate.²²² If this stigma applies to defaults generally instead of just bankruptcy, it could affect the rate of civil litigation as well. Unfortunately, however, no one has developed a universally accepted proxy for stigma.²²³ One approach is to use a variable such as divorce rate that arguably increases as social stigma declines.²²⁴ These variables do not, however, isolate the effects of stigma because they either directly affect financial distress (divorce strains the family finances and increases the cost of living)²²⁵ or are affected by other variables that potentially increase financial distress. On the other hand, omitting any control for stigma could arguably bias the results. I therefore include the crime rate in the analysis presented below. The crime rate turns out to be a very strong predictor of the civil filing rate, but there are a number of potential explanations for its significance. First, it may indicate a greater default rate due to lessened stigma. Second, it may reflect some measure of poverty not captured by other control variables. Third, it may reflect some measure of economies of scale at the courthouse if states add extra court capacity where the crime rate is highest.

220. See, e.g., CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW 12 (2000), available at <http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf>.

221. See *supra* note 52 and accompanying text.

222. See CONG. BUDGET OFFICE, *supra* note 220, at 21–23. Compare *More Financial Distress*, *supra* note 18, at 247 (“[O]ur data are more consistent with a rise in stigma than the oft-asserted decline.”), with Jeffrey Davis, *Fixing Florida’s Execution Lien Law Part Two: Florida’s New Judgment Lien on Personal Property*, 54 FLA. L. REV. 119, 122 (2002) (“However, in today’s world the stigma of filing bankruptcy is largely gone.”).

223. CONG. BUDGET OFFICE, *supra* note 220, at 21–22.

224. See F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201–02, 205 (1998) (suggesting that bankruptcy filing rates may depend on the strength of certain social norms).

225. *Id.* at 201–02.

Table III.2: Variables²²⁶ and Definitions

Variable	Definition	VA Mean (Std Dev.)	CA Mean (Std Dev.)	FL Mean (Std Dev.)	MD Mean (Std Dev.)
VAC	Total civil filing in general district court (less than \$15,000) per 100,000 people in 2000 ²²⁷	12,840 (11,118)			
VAG	Garnishments per 100,000 people in 2000 ²²⁸	2,493 (2,798)			
CAC	Civil filings seeking less than \$25,000 (limited civil filings and small claims) per 100,000 people in 2000 ²²⁹		2,370 (536)		
FLC	“Small Claims” (less than \$5,000) plus “Civil” (\$5,001 to \$15,000) plus evictions per 100,000 people in 2000 ²³⁰				3,754 (1,450)
MDCT	Contract and Tort filings (less than \$25,000) per 100,000 people in 2000 ²³¹				3,754 (1,450)
MDLT	Landlord–tenant filings per 100,000 people in 2000 ²³²				9,927 (7,712)
HS	Percent of population with high school degree or higher in 1990	75.9 (12.3)	76.0 (6.7)	74.5 (6.3)	79.1 (9.3)
College	Percent of population with bachelor’s degree or higher in 1990	24.8 (13.9)	23.0 (6.3)	18.4 (5.0)	25.8 (12.7)
Income	Median family income in 1997	45,090 (14,811)	40,993 (7,973)	34,037 (4,184)	48,409 (11,933)

226. For the sources of the civil litigation data, see *infra* notes 227–32. The number of doctors is taken from the Virginia Board of Medicine, Practitioner Information Website, <http://www.Vahealthprovider.com> (last visited Nov. 16, 2007). For all other data, see Univ. of Va., Geospatial and Statistical Data Center, <http://fisher.lib.virginia.edu/collections/stats/ccdb/> (last visited Nov. 16, 2007). In calculating the summary statistics, I weighted each county in accordance with its population in 2000.

227. VIRGINIA’S JUDICIAL SYS., *supra* note 208, at 323.

228. *Id.*

229. JUDICIAL COUNCIL OF CA., 2001 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1990–1991 THROUGH 1999–2000 (2001), *available at* <http://www.courtinfo.ca.gov/reference/documents/csr2001.pdf>.

230. FLA. OFFICE OF THE STATE COURTS ADM’R, 2000–01 STATISTICAL REFERENCE GUIDE, *available at* http://www.flcourts.org/gen_public/stats/bin/reference_guide/2000_01cntycivil.pdf.

231. MD. JUDICIARY, *supra* note 209.

232. *Id.*

Young	Percent of population between the ages of 18 and 44 in 2000	41.2 (5.3)	41.6 (2.9)	36.9 (5.5)	39.9 (2.2)
Poverty	Percent of population in poverty in 1997	11.7 (6.3)	16.0 (5.1)	14.4 (3.9)	9.50 (6.0)
Home	Percent of homes or apartments that were owner-occupied in 2000	68.5 (12.1)	57.0 (8.1)	69.6 (8.2)	67.9 (8.8)
Popdens	Population per square mile in 2000	1,532 (1,832)	1,727 (2,548)	848 (742)	1,940 (2,402)
White	Percent of population listed as white in 2000	72.3 (15.2)	59.5 (10.7)	78 (8.8)	64.0 (23.6)
Crime	Crime rate (FBI) in 1999	3,135 (1,711)	6,555 (1,347)	6,205 (1,805)	5,612 (2,500)
Unemp	Unemployment rate in 2000	2.3 (1.5)	5.1 (1.6)	3.7 (1.3)	3.99 (2.11)
Retail	Retail sales per capita in 1997	9,308 (4,897)	8,167 (1,256)	10,322 (2,055)	9,151 (2,164)
Med	Physicians per 100,000 people	307.9 (349.3)			

Table III.3 presents the correlations (weighted by county population) between the log of the civil filing measures in Virginia and the various explanatory variables. The two measures of litigation in Virginia are highly correlated. Both are positively correlated with poverty, unemployment, and the percentage of the population between the ages of eighteen and forty-four. Both measures are negatively correlated with median income, education, homeownership, and the percentage of the population that is white. Note that income represents the median income in the city or county of the district and not the defendant's income. Therefore, I cannot attribute this result to the idea that defendants are more likely to be sued when they suffer a temporary shock to their income. These results suggest that civil litigation is disproportionately concentrated in areas with more disadvantaged individuals. The litigation measures are also very strongly correlated with the log of the crime rate. As noted before, it is unclear whether this represents the importance of stigma or various other social problems. The measures are correlated with retail sales and the concentration of physicians, suggesting that these creditors may play a significant role in civil litigation. I confirm this suggestion in Part IV below. Finally, Table III.3 confirms that these results are not unique to Virginia.

Table III.3: Pairwise Correlations²³³

	Ln(VAC)	Ln(VAG)	Ln(CAC)	Ln(FLC)	Ln(MDCT)	Ln(MDLT)
Ln(VAG)	0.95***					
Ln(MDLT)					0.84***	
HS	-0.11	-0.13	-0.47***	-0.15	-0.62**	-0.36*
College	-0.26***	-0.27***	-0.34**	0.20*	-0.36*	-0.16
Ln(Income)	-0.48***	-0.47***	-0.43***	0.02	-0.75***	-0.47**
Young	0.24***	0.18*	0.09	0.62***	0.19	0.46**
Poverty	0.57***	0.53***	0.55***	0.34***	0.72***	0.51**
Home	-0.60***	-0.52***	-0.38***	-0.67***	-0.82***	-0.80***
Ln(Popdens)	0.37***	0.31***	0.33**	0.42***	0.52***	0.74***
White	-0.55***	-0.54***	-0.46***	-0.72***	-0.68***	-0.73***
Ln(Crime)	0.76***	0.73***	0.67***	0.61***	0.81***	0.87***
Unemp	0.26***	0.21**	0.09	0.32**	0.71***	0.47**
Ln(Retail)	0.47***	0.56***	-0.27**	0.31**	-0.31	-0.27
Ln(Med)	0.48***	0.44**				

* Significant at 10%; ** Significant at 5%; *** Significant at 1%

Table III.4 presents a few regressions that try to determine which variables are most significant and the magnitude of any effects these variables have on civil litigation.²³⁴ Because I have so few observations, only some of the variables are included. The various measures of education, poverty, and unemployment are excluded because they are all highly correlated with median income. Of the variables that are included, the most robustly significant variables are median income, the percentage of the population that is white, and the crime rate. Models with just these three variables explain almost 70% of the variance in Virginia's filing rate.

Table III.5 confirms that the results are not unique to Virginia. In particular, the crime rate is strongly significant in predicting the civil filing rate in the counties of each state. Seven of the eight coefficients on median income and the percentage of the population that is white have the "correct" sign, but only three are statistically significant. Even so, this simple model explains at least half of the variation in civil filing in each regression. On balance, these results suggest that civil defendants are likely to be disproportionately (but not exclusively) drawn from disadvantaged sectors of our society and may therefore be relevantly different from the middle-class bankrupt debtors. Part IV provides further evidence for this possibility in the form of relatively low homeownership rates among civil defendants.²³⁵

233. I calculated these correlations using the data in Table III.2.

234. The regressions weight each county by its population in 2000. The results do not change markedly if Richmond is excluded from the sample.

235. See *infra* Part IV.

Table III.4: Regressions—Civil Filing Rate, Virginia²³⁶

	Ln(VAC)	Ln(VAC)	Ln(VAC)
White	-0.009 (.013)**	-0.014 (.000)***	-0.010 (.001)***
Young	0.005 (0.703)	0.013 (.324)	
Ln(Income)	-1.05 (.000)***	-1.52 (.000)***	-0.708 (.000)***
Home	0.010 (.279)	0.012 (.222)	
Ln(Popdens)	0.072 (.221)	0.140 (.222)	
Ln(Retail)	0.041 (.739)	0.267 (.036)**	
Ln(Med)	0.140 (.034)**	0.180 (.001)***	
Ln(Crime)	0.606 (.000)***		0.795 (.000)***
Constant	13.83 (.000)***	18.66 (.000)***	11.12 (.000)***
Obs	125	125	126
R-sq	0.72	0.64	0.69
p values in parentheses			

Table III.5: Regressions—Civil Filing Rate, Other States²³⁷

	Ln(CAC)	Ln(MDCT)	Ln(MDLT)	Ln(FLC)
White	-0.002 (.539)	-0.003 (.278)	-0.005 (.502)	-0.026 (.000)***
Ln(Income)	-0.329 (.045)**	-0.641 (.001)***	-0.041 (.926)	0.022 (.938)
Ln(Crime)	0.640 (.000)***	0.378 (.027)**	1.62 (.001)***	0.315 (.037)**
Constant	5.726 (.039)**	12.0 (.027)**	-4.26 (.567)	6.82 (.037)**
Obs	54	24	24	67
R-sq	0.50	0.80	0.76	0.56
p values in parentheses				

236. I calculated these regressions using the data on Virginia in Tables III.2 & III.3.

237. I calculated these regressions using the data on other states in Tables III.2 & III.3.

IV. LESSONS FROM THE INDIVIDUAL COURT FILINGS

Part I suggests that a preoccupation with bankruptcy will cause us to overlook a substantial number of defaulting and insolvent consumers and that some of these defaulting consumers can be found in state court. Parts II and III present civil litigation statistics, but these Parts do not demonstrate that the civil filings have anything to do with consumer debt collection. That is the task of this Part. This Part's first goal is to estimate how many Virginians default on legally binding obligations without filing for bankruptcy. The aggregate civil filing statistics certainly overstate the number of Virginians who are sued. First, Virginia includes subsequent filings such as garnishment, in its total,²³⁸ and thus the number of complaints is less than the number of filings. Second, some of the filings will name institutions as defendants.²³⁹ Third, a few defendants will be named in multiple suits.²⁴⁰ Unfortunately, however, these explanations account for fewer of Virginia's civil filings than one would like. Consumer debt collection litigation appears to be extremely pervasive.

My examination of individual filings also allows me to confirm some of the predictions of Part I. Most of the judgments are for relatively small amounts, and yet very few judgments are paid in full.²⁴¹ Very few consumers file for bankruptcy once they are sued, and the percentage does not change markedly if I focus on those consumers who still have not paid a judgment after five years.²⁴² These debtors do not obtain a "fresh start," and their creditors could pursue the judgments for a potentially unlimited period.²⁴³ However, the vast majority of court records show no collection activity beyond the first two years after the judgment.²⁴⁴ This suggests that many debtors obtain an informal discharge without filing for bankruptcy; their creditors appear to abandon collection efforts. Some creditors appear more aggressive than others. Consistent with the analysis in Part I, financial creditors are twice as likely to attempt to enforce their judgment as are other creditors.²⁴⁵ Finally, I find further evidence that civil defendants are likely to be substantially different than bankrupt debtors. While prior research suggests that bankrupt debtors resemble the middle class and have similar rates of homeownership, a search of the paper records from Richmond, Virginia suggests that civil defendants have a lower rate of homeownership than bankrupt debtors and the general population.²⁴⁶

238. *See supra* note 184 and accompanying text.

239. *See infra* Part IV.B.2.

240. *See infra* Part IV.B.3.

241. *See infra* Part IV.C.1.

242. *See infra* Part IV.C.2.

243. *See supra* notes 81–82 and accompanying text.

244. *See infra* Part IV.C.3.

245. *See infra* note 309 and accompanying text.

246. *See infra* Part IV.C.4.

A. Sources of Data

This Part supplements the aggregate data with individual filings from general district courts in Virginia. The Virginia courts post electronic records of civil filings on the Internet,²⁴⁷ and I collected random samples²⁴⁸ from 1997, 2001, and 2005. I did not gather records prior to 1997 because courts can (and do) destroy records that are more than ten years old.²⁴⁹ Although the electronic records allow me to construct a random sample of civil filings in Virginia, they are incomplete. The electronic records omit any documentation attached to the initial complaint, and the courts remove personal identification information, such as the defendant's address, from the electronic records.²⁵⁰ Therefore, this Article also draws a sample of paper records from the Richmond general district court.²⁵¹

B. Each Year Hundreds of Thousands of Virginia Consumers Are Sued

There are obviously more civil filings in Virginia than there are Virginians who are sued. Some filings are efforts to collect previously entered judgments, some filings seek to collect money from businesses, and a few Virginians are sued many times. Even accounting for these factors, however, it is clear that each year hundreds of thousands of Virginians are sued for defaulting on consumer debts.

1. Accounting for Subsequent Actions

Consider first the fact that Virginia includes subsequent actions, such as garnishments and interrogatories, in its total number of civil filings

247. See Virginia's Judicial Sys., Case Information, <http://www.courts.state.va.us/caseinfo/home.html> (last visited Nov. 16, 2007) (providing links to the searchable automated information system for the Virginia courts).

248. The samples were created in three steps. First, I estimated the total number of complaints in each county. In 2001 and 2005 this was done by determining the largest case number in each county. For a description of the case-numbering system employed, see *infra* notes 257–58 and accompanying text. Second, I randomly allocated the cases to each county based on the number of complaints received. A few courts did not follow the case-numbering system in 1997, so I weighted each county by the total number of civil filings in that year. Third, I randomly selected case numbers within each county. Fourth, I collected the initial complaint and all subsequent filings corresponding to that complaint.

249. See VA. CODE ANN. § 16.1-69.55 (2007).

250. See Virginia's Judicial Sys., Internet Privacy Policy and an Internet Privacy Statement, <http://www.courts.state.va.us/sitemap/privacypolicy.html> (last visited Nov. 16, 2007).

251. The Norfolk general district court also kindly provided copies of court records. Unfortunately, I did not fully understand the court's case-numbering system at the time, and therefore I did not pull a fully random sample.

while most other states count only initial complaints.²⁵² In Virginia, a plaintiff may file a civil suit in either circuit court (claims greater than \$4,500) or general district court (claims less than \$15,000).²⁵³ The first column of Table IV.1 reports the number of complaints received by Virginia circuit courts, exclusive of appeals, from general district and family-law courts and exclusive of other family-law claims.²⁵⁴ General district courts do not report the number of complaints that they receive, and general district courts receive the overwhelming majority of filings. General district courts do, however, report the number of garnishments separately from all other filings.²⁵⁵ Table IV.11 suggests that garnishments account for about 80% of all filings made after the initial complaint.²⁵⁶ Therefore, one can roughly estimate the number of civil complaints in general district court by subtracting 1.25 times the number of garnishments from the total number of filings. The fourth column of Table IV.1 provides this estimate.

I provide an alternative estimate of the number of complaints that is based on Virginia's case-numbering system. Virginia courts assign each new complaint a case number that identifies the year in which the complaint was filed and the order in which the complaint was received.²⁵⁷

252. See STATE COURT CASELOAD STATISTICS 2005, *supra* note 140, at 71 fig.B.

253. See VA. CODE ANN. § 16.1-77 (2007) (providing general district courts with exclusive jurisdiction over claims of less than \$4,500 and concurrent jurisdiction over claims between \$4,500 and \$15,000). For an overview of the Virginia Court System, see Virginia's Judicial Sys., Virginia Courts in Brief, <http://www.courts.state.va.us/cib/cib.htm> (last visited Nov. 16, 2007).

254. See Virginia's Judicial Sys., Circuit Court Caseload Statistics, <http://www.courts.state.va.us/csi/home.html#circuit> (last visited Nov. 16, 2007). This figure does not include appeals from general district courts and J&DR courts, reinstatements, garnishments, divorce suits, or other equity suits.

255. The number of garnishments may actually stand for the total number of subsequent proceedings. According to the data published on the court's webpage, the total number of civil filings equals the number of warrants in debt and unlawful-detainer actions plus the number of motions for judgment and the number of garnishments. See, e.g., VIRGINIA'S JUDICIAL SYS., DISTRICT COURT CASELOAD STATISTICS REPORT 01/06-12/06, at 323, http://www.courts.state.va.us/csi/dbr1_2006.pdf (last visited Nov. 16, 2007). This cannot be right because it implies that there were no other complaints (e.g., detinue) and no other subsequent actions (e.g., interrogatories). An analyst at the Virginia courts confirmed that detinue is included with warrant in debt and unlawful detainer. This analyst was unsure if interrogatories and other subsequent filings were included with garnishments. E-mail from Chris Wade, Virginia courts, to author (Oct. 31, 2007) (on file with author). To the extent that they are included, Table IV.1 understates the number of complaints in Virginia.

256. See *infra* Table IV.11.

257. For example, the first filing that a general district court in a particular county receives in 2007 would be numbered "GV07000001-00." Any subsequent actions (such as garnishments) related to that complaint would be given the same initial number but would have a different suffix. The first garnishment would be numbered "GV07000001-01"; the second would be numbered "GV07000001-02." The second complaint received by that county court would be numbered "GV07000002-00."

To the extent that courts do not skip case numbers,²⁵⁸ the highest case number should equal the number of complaints in that court. The sum of the highest case number in each city or county is given in the last column of Table IV.1. Though not identical, the third and fourth columns exhibit similar scale and a similar downward trend.

Table IV.1: Number of Complaints in Virginia²⁵⁹

	CIRCUIT COURTS	GENERAL DISTRICT COURTS			
		Virginia Court's Reports			This Study
	Civil Filings in Circuit Court	Total Civil Filings	Garnishments	Total Filings Less Estimated Subsequent Filings	Estimated Complaints
1997	41,825	974,615	174,048	757,055	747,631
2001	41,860	944,283	179,932	712,188	719,601
2005	40,894	888,940	175,583	669,461	672,001

Regardless of the estimation method, two facts emerge from Table IV.1. First, the overwhelming majority of complaints are filed in general district court, and so the rest of this Part will focus solely on general district courts. Second, Virginia courts receive a staggering number of complaints. In 2001, Virginia courts received around 750,000 civil complaints, or approximately 10,400 complaints per hundred thousand people.²⁶⁰ This filing rate is much higher than that of nearly every other state.²⁶¹ More importantly, Virginia's civil filing rate represents more than one complaint for every ten Virginians every year.

2. Consumer Debt Collection Dominates the Civil Docket

Table IV.2 demonstrates that nearly all general district court filings seek a remedy from an individual. Some of these cases could be business disputes; not all businesses operate in corporate form, and many entrepreneurs guarantee the debts of their corporations.²⁶² However, there

258. My searches suggest that courts rarely skip case numbers. For example, in 2001 only one of three hundred case numbers that I searched yielded no records. An additional four case numbers yielded no complaint. However, there was a subsequent garnishment that corresponded to each of these case numbers, and the plaintiff in each case was the state of Virginia. There were, however, exceptions. In 1997, two counties, Mathews and Middlesex, skipped a large amount of case numbers. Because these counties typically receive very few filings, I simply excluded them from the totals listed in Table IV.1.

259. For data used in this Table, see *supra* notes 254–58 and accompanying text.

260. In 2001, Virginia had a population of approximately 7,191,941. U.S. CENSUS BUREAU, *supra* note 2, at 20 tbl.17.

261. See *supra* Table II.2.

262. This problem is not unique to civil litigation. Bankruptcy scholars argue that a significant number of bankruptcies that are categorized as “non-business” in the official statistics are in fact business bankruptcies. See Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing*

is little reason to believe that these business debts comprise a large portion of the courts' dockets. Less than 1% of the claims listed both an individual and the name of a business, and less than 3% of the claims listed an individual doing business under a trade name. In addition, the nature of the complaints does not indicate a large portion of business debts.

Table IV.2: Defendant Type²⁶³

	1997	2001	2005
Claims listing business only	2.2% (9 filings)	2.2% (13 filings)	3.7% (22 filings)
Claims listing individual with d/b/a name	0.5% (2 filings)	2.0% (12 filings)	0.5% (3 filings)
Claims listing business and individual	1.0% (4 filings)	0.8% (5 filings)	0.5% (3 filings)
Claims listing single individual	86.1% (346 filings)	82.5% (495 filings)	82.5% (495 filings)
Claims listing two or more individuals	10.2% (41 filings)	12.5% (29 filings)	12.3% (77 filings)
Total filings	402	600	600

Because the electronic records do not contain any factual allegations, I cannot determine the actual nature of each claim. I can, however, gain some insight into the nature of the claim by looking at the form of complaint the plaintiff chose. Table IV.3 presents the rate at which each form appears in my sample.

Table IV.3: Percent of Claims by Type (Number of Filings)²⁶⁴

	1997	2001	2005
Debt	59.7% (240)	63.3% (380)	61.8% (371)
Unlawful Detainer	21.4% (86)	20.7% (124)	24.3% (146)
Motion for Judgment	5.2% (21)	3.2% (19)	3.8% (23)
Detinue	3.7% (15)	3.8% (23)	3.7% (22)
Other	10.0% (40)	9.0% (54)	6.3% (38)

A warrant in debt seeks the payment of money, and these actions account for roughly 60% of the civil filings in Virginia. Warrants in

Business Bankruptcy, 93 CAL. L. REV. 743, 747–48, 793 (2005).

263. For data used in this Table, see *supra* notes 247–48.

264. For data used in this Table, see *supra* notes 247–48.

unlawful detainer, which typically relate to landlord–tenant disputes, account for another 20% of the filings. A motion for judgment is an extremely general form, and the plaintiff may use this form to ask for almost any type of relief. A warrant in detinue seeks the return of specific property, such as a couch, that has been rented or sold subject to a security interest. There are relatively few motions for judgment and warrants in detinue. Finally, there are a significant number of “other” claims—almost 10% of the total. These “others” include subsequent actions, such as a garnishment, for which I could find no corresponding complaint. The government brought nearly all of these “other” claims, and most were probably not consumer debt collection claims.²⁶⁵

A warrant in debt could be used by tort plaintiffs and so might not be considered consumer debt collection. However, tort suits probably do not account for a large share of the civil filings. Although the electronic records do not contain the factual allegations, the records do list the name of the plaintiff. Table IV.4 classifies the plaintiffs in the electronic records into broad categories.

Table IV.4 Type of Plaintiff—Percentage (Number of Claims)²⁶⁶

	Electronic Records—Statewide			Richmond
	1997	2001	2005	2001
Housing (includes individuals filing unlawful detainer)	23.4% (94)	21.7% (130)	26.5% (159)	25.7% (3)
Medical	18.7% (75)	22.2% (133)	22.5% (135)	16.0% (49)
Finance credit card other	16.2% (65)	16.3% (98)	18.2% (109)	35.2% (108) (87) (21)
Business-Other	16.4% (66)	14.2% (85)	12.2% (73)	9.1% (28)
Government	19.9% (80)	17.3% (104)	12.5% (75)	10.4% (32)
Individual (not unlawful detainer) Tort	5.2% (21)	6.5% (39)	7.0% (42)	3.3% (10) (7)
Lawyer	0.7% (3)	1.0% (6)	1.2% (7)	0
Unknown	0	0.8% (5)	0	0.3% (1)

265. When speaking of consumer debt collection, most people probably envision the definition used in the Fair Debt Collections Practices Act. See 15 U.S.C. § 1692a(5) (2000) (defining “debt” as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment”). Some of the paper records of filings brought by the government did not seek any money at all but rather suspended licenses or imposed other punishment.

266. For data used in this Table, see *supra* notes 247–48.

Although Table IV.4's categories are broad, even this level of generality provides important lessons. The nature of the plaintiffs suggests that the overwhelming majority of claims are contract claims. Together, Housing, Medical, Finance, and Business-Other account for roughly 70%–80% of all claims, and individuals (other than landlords) account for less than 10% of all claims.

Medical-service providers filed between 18%–23% of all filings in my sample. This percentage is consistent with the Federal Reserve's findings that roughly 18% of all judgments are in favor of medical plaintiffs.²⁶⁷ Medical-service providers have received a great deal of criticism in recent years for aggressive collection techniques, including lawsuits.²⁶⁸ Because I have only court filing records, I cannot determine if medical-service providers are more likely to sue than other creditors. I can, however, ask whether they are more likely to aggressively pursue their judgments, which I do in Part IV.C.3.²⁶⁹

Some of the conclusions below are based on a sample of paper records collected from the Richmond general district court. Table IV.4 suggests that these results should be interpreted with caution because Richmond is not necessarily representative of the state as a whole. Recall from Table III.1 that Richmond (district 13) has a dramatically higher filing rate than every other general district court in Virginia. One reason for its unusual filing rate is that it is the forum of choice of a major credit card issuer. This credit card issuer accounted for 75 of the 87 credit card claims in Richmond and for about 25% of all complaints in the Richmond sample.²⁷⁰ This does not completely account for Richmond's unusually high filing rate, however. Richmond's civil filing rate is more than four times that of the median district.²⁷¹

Although a single credit card issuer plays a major role in Richmond's docket, credit card issuers do not appear to account for a substantial portion of the civil filings in Virginia. By 2004, the credit card market was relatively concentrated, with the top ten issuers accounting for almost 90% of the market.²⁷² I therefore compared the list of issuers and their affiliates

267. See *Consumer Data*, *supra* note 7, at 67 tbl.10.

268. See Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 Nw. U. L. REV. 535, 536–37 (2006) (arguing that these criticisms are largely misplaced).

269. See *infra* Part IV.C.3.

270. I drew 306 records from Richmond. Other creditors seemed to dominate the docket in other counties. For example, the University of Virginia's medical center accounted for more than one-third of the civil filings in a sample taken at the Albemarle County courthouse.

271. See *supra* Table III.1.

272. Frontline, *Secret History of the Credit Card, Market Share of Top Ten Credit Card Issuers*, <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/marketshare.html> (last visited Nov. 16, 2007). For a list of the top ten credit card issuers in 2005, see Ins. Info. Inst., *Top Ten Credit Card Issuers by Outstandings, 2005–2006*, <http://www.iii.org/financial2/>

against the plaintiffs in my sample of filings from across Virginia. In 2005, these ten credit card issuers brought only seven of the three hundred claims in my sample (2.3%); six of these claims were brought by a single issuer.²⁷³ It is difficult to compare this result to the Federal Reserve studies, which combined credit card issuers with other lenders and large retailers under the heading “creditor.” Because the “creditor” heading accounted for 25.4% of all judgments,²⁷⁴ it is at least plausible that the paucity of credit card judgments generalizes to other states. The relative absence of credit card issuers contrasts sharply with the focus on these lenders in the recent consumer bankruptcy literature. A number of scholars have pointed to the growth in credit card debt as a major cause of the increase in the bankruptcy filing rate.²⁷⁵ Using 2001 data, Sullivan, Warren, and Westbrook found that about half of all non-mortgage debt (by value) in their sample was credit card debt.²⁷⁶

One possible explanation for the lack of credit card debt in the sample is that credit card issuers may sell their distressed debt, and these debt buyers sue. Despite the expansion in the market for distressed consumer debt²⁷⁷ and the reputation of these debt buyers for aggressive collection techniques,²⁷⁸ I find that relatively few suits are brought by distressed-debt buyers. I focus solely on warrants in debt and motions for judgment because these are the claims that would plausibly be filed by a buyer of distressed credit card debt.

I test for the presence of distressed-debt buyers in two ways. The electronic records contain a field in which the plaintiff must list the original assignor of the debt, if any. The first row of Table IV.5 presents the results using this measure. To the extent that the plaintiff neglects to list the assignor on the complaint or the court neglects to enter the assignor in the proper field in the electronic records, this first measure will understate the degree of assignment. On the other hand, this measure may overstate the presence of distressed-debt buyers in my sample because some assignments are made to a related party or are made long before the

chartindex/chart/ppartid.742195/ (last visited Nov. 16, 2007).

273. In 1997, 1.25% (3 of 240) of the warrant in debt actions were brought by a single credit card issuer; none of the other top ten credit card issuers appeared in my sample. In 2001, 4.21% (8 of 190) of warrants in debt were brought by the top ten credit card issuers; six of these were brought by a single issuer. Because there are so few credit card issuers in the samples, the standard errors of these estimates are high. For example, the 95% confidence interval for the 2001 sample is 1.35% to 7.07%.

274. See *Consumer Data*, *supra* note 7, at 67 tbl.10.

275. See, e.g., FRAGILE MIDDLE CLASS, *supra* note 18, at 108, 119–21.

276. See *More Financial Distress*, *supra* note 18, at 232.

277. See Caroline E. Mayer, *As Debt Collectors Multiply, So Do Consumer Complaints*, WASH. POST, July 28, 2005, at A01.

278. For example, see the series of articles in the *Boston Globe*, *supra* note 157.

debt becomes distressed.²⁷⁹ To correct for these problems, I offer a different measure. The second row includes all plaintiffs that (i) are listed as a debt buyer in one of a number of industry surveys²⁸⁰ or (ii) contain the words “recovery” or “receivables” in their name. The second row excludes assignments that were obviously not credit card debt or were obviously between related parties.

Table IV.5: Percent of Warrant in Debt Claims by Assignees—Electronic Records²⁸¹

	1997	2001	2005
Assignment reported in electronic records	2.9% (7 of 240)	3.9% (15 of 380)	5.9% (22 of 371)
“Distressed-debt-buyer”	0	5.8% (22 of 380)	8.6% (32 of 371)

Regardless of the measure, the proportion of warrants in debt that are brought by distressed-debt buyers remains relatively low (under 10%), though this percentage is increasing. My estimates are somewhat consistent with the Federal Reserve’s finding that only 9.2% of judgments in the credit records were in favor of collection agents.²⁸² The apparent lack of credit card filings is consistent with several theories discussed in Part I. However, I do not have a sample of defaults that did not lead to a suit, so I cannot test whether credit card issuers are less likely to sue. In addition, the relatively small percentage of suits brought by credit card issuers and collections agents still translates into a fairly large number of suits. If I assume that 11.5% (9.2% + 2.3%)²⁸³ of the 2005 warrants in debt

279. In 1997, there were just seven assignments disclosed. Three of these assignments were from one bank to another bank that acquired the first bank’s credit card business. Another assignment was from Sprint Cellular to Sprint Corporation. The fifth assignment was from an individual to a bank, and a sixth was from an individual to a hospital. Only one assignment even remotely resembled the typical model of a distressed-debt buyer: a satellite television company assigned its claim to a bank. In 2001, two of the eight assignments were probably not related to the purchase of distressed debt. One assignment was from Discover Financial Services to Discover Bank, and another assignment was from a hospital to a nursing school. All nine of the assignments in 2005 were to plausible distressed-debt buyers.

280. See Michelle Molnar & Diane Alaimo, *Top of the Heap*, COLLECTIONS & CREDIT RISK, Nov. 1999, at 46, 48–50 (listing the top fifty collection agencies, collectors of consumer debt, and collectors of commercial debt for 1998); Debt Connection, Listing for Debt Buyers, <http://www.debtconnection.com/debtbuyers.asp> (last visited Nov. 16, 2007); Credit-Repair Central, “Junk Debt Buyers”: Beware of These Questionable Collection Agencies, <http://www.credit-repaircentral.com/junkdebtbuyers.html> (last visited Nov. 16, 2007); Credit Assistance Network, About Junk Debt Buyers, http://www.expert-credit-advice.com/junk_debt.htm (last visited Nov. 16, 2007); DBA International, 2006 Conference Attendee List, http://www.dbainternational.org/confInfo/2006_conf_attendees.aspx (last visited Nov. 16, 2007).

281. For data used in this Table, see *supra* notes 247–48, 279–80 and accompanying text.

282. See *Consumer Data*, *supra* note 7, at 67 tbl.10.

283. See *supra* note 282 and accompanying text (noting that 9.2% of judgments are in favor of collection agents); *supra* note 273 and accompanying text (noting that 2.3% of the claims in the

were brought by these creditors and that 62%²⁸⁴ of complaints²⁸⁵ were warrants in debt, then 47,914 warrants in debt were filed by credit card issuers and collection agencies. This is roughly equivalent to the 44,621 non-business bankruptcies filed by Virginians in that year.²⁸⁶ Some of the “missing” suits may simply reflect the extremely large number of filings from other creditors.

3. Few Filings Name the Same Defendant

Consumers who default on one obligation may have difficulty paying their other bills, and so one might expect that most civil defendants will be sued many times. Table IV.6 presents an attempt to estimate whether a small number of defendants are responsible for a large number of Virginia’s filings. I searched the electronic court records for other complaints filed in 2001 against the individuals in my 2001 sample. The Virginia courts database presents filings by county, so I searched Richmond and the county where the defendant was originally sued. This search contains false positives to the extent that two different individuals with the same name (“John Smith”)²⁸⁷ were sued. It also contains false negatives to the extent that an individual is sued in two different counties (other than Richmond). Therefore, Table IV.6 is intended to provide a rough estimate of the frequency of multiple suits against the same defendant.

Table IV.6: Other Filings Against Same Name in 2001 in Same County or Richmond

# of Other Filings	Debt, Motion for Judgment, and Detinue	Unlawful Detainer	All Other
0	83	15	13
1	22	11	2
2	9	6	2
3	5	2	1
4	3	4	0
5	0	2	0
6+	2 (6, 6)	4 (7, 8, 11, 12)	2 (10, 15)

study were brought by credit card issuers).

284. See *supra* Table IV.3 (listing warrants in debt as 61.8% of the complaints in the study).

285. See *supra* Table IV.1 (listing Virginia’s total general district court filings as 672,001).

286. Bankruptcy Filings by State 2000–2006, *supra* note 135.

287. I am deliberately overinclusive. I include as a match any name that is not inconsistent. For example, if my original was “John Smith,” I include both “John Smith” and “John A. Smith.” If there are listings for both “John A. Smith” and “John B. Smith,” I include the name with the higher number of filings.

Table IV.6 suggests that relatively few debtors have more than one or two suits filed against them in a single year, and many of the records of multiple suits in Table IV.6 arise out of an ongoing dispute between the same parties. Consider, for example, the two names that had more than ten matches. Each was a warrant in unlawful detainer (landlord–tenant), and in each case all but one of the other filings were warrants in unlawful detainer filed by the same plaintiff.

4. Most Judgments Are Relatively Small

Part I suggests that most judgments should be small relative to amounts owed by bankrupt debtors. Sullivan, Warren, and Westbrook report that the median unsecured debt of bankruptcy consumers in 2001 was \$20,276,²⁸⁸ which is \$22,360 in 2005 dollars.²⁸⁹ The court records do not allow a direct comparison because they do not reveal the total amount that the debtor owes, only the amount of one particular judgment. Moreover, the court records do not list the amount of the original claim, only the amount of actual judgments. Table IV.7 suggests that about 60% of warrant in debt complaints result in a judgment.

Table IV.7: Percent of Claims Resulting in Judgment²⁹⁰

	1997	2001	2005
Debt	60.7% (145 of 239)	60.3% (226 of 375)	60.4% (223 of 369)
Unlawful Detainer	49.4% (42 of 85)	54.0% (67 of 124)	48.6% (71 of 146)
Detinue	80.0% (12 of 15)	31.8% (7 of 22)	40.9% (9 of 22)
Motion for Judgment	47.6% (10 of 21)	57.9% (11 of 19)	68.2% (15 of 22)

Although plaintiffs could have sued for up to \$15,000 in general district court,²⁹¹ half of the 2005 warrant in debt judgments were less than \$895. Even claims by financial institutions had a median value of just \$1,849. A significant number of judgments were for much smaller amounts. About one-fourth of the warrant in debt judgments in 2005 were for less than \$300. These findings are consistent with those of the Federal Reserve studies discussed above. The Federal Reserve found that the median value for all judgments and the median value of five of its six categories of judgments (Medical, Utility, Government, Collection Agency, and Other) was between \$500 and \$1,000.²⁹² “Creditor”

288. See *More Financial Distress*, *supra* note 18, at 229 fig.5.

289. See CPI Inflation Calculator, *supra* note 130.

290. The statistics in Table IV.7 exclude filings transferred to another venue or appealed. For data used in this Table, see *supra* notes 247–48.

291. See VA. CODE ANN. § 16.1-77 (2007).

292. See *Consumer Data*, *supra* note 7, at 67 tbl.10.

judgments were somewhat larger, with a median between \$1,001 and \$5,000.²⁹³

Table IV.8: Average (Median) Judgment—2005 Dollars²⁹⁴

	1997	2001	2005
Detinue	\$1,364 (\$538)	\$1,143 (\$884)	\$1,332 (\$1,134)
Motion for Judgment	\$601 (\$489)	\$364 (\$183)	\$404 (\$200)
Warrant in Debt	\$1,631 (\$550)	\$1,711 (\$701)	\$2,029 (\$685)
Medical	\$554 (\$428)	\$1,092 (\$525)	\$1,464 (\$501)
Finance	\$3,545 (\$1,967)	\$2,879 (\$1,109)	\$2,543 (\$1,189)
Business-Other	\$1,204 (\$798)	\$1,194 (\$609)	\$2,286 (\$1,134)
Government	\$558 (\$164)	\$251 (\$171)	\$403 (\$281)

C. Most Judgments Are Not Satisfied, but Most Debtors Do Not File for Bankruptcy

Tables IV.6 and IV.8 suggest that most civil defendants have just one judgment entered against them in a given year and that most of these judgments are for less than \$1,000. According to court records, however, the vast majority of these judgments are never paid. Despite the existence of these unpaid judgments, very few of the debtors in my sample sought bankruptcy protection. Virginia general district court judgments do not expire for ten years, and the creditor can renew the judgment as long as it likes.²⁹⁵ However, after two years have passed since the unpaid judgment has been entered, very little collection activity occurs. It appears that either the rate of repayment is drastically understated or many debtors have achieved an informal discharge of their debt.

1. Most Judgments Are Not Satisfied

It is perhaps too soon to expect the 2005 judgments to have been satisfied, so consider the judgments entered in 2001. Although the plaintiffs have had five years to collect their judgments, less than one-fourth of their judgments were reported as paid in full as of the end of 2006. In addition, very few judgments are repaid after the first two years, suggesting that it is unlikely that the repayment rate for these judgments will rise substantially.

293. *Id.*

294. For data used in this Table, see *supra* notes 247–48.

295. See *supra* notes 80–83 and accompanying text.

Table IV.9: Satisfaction of Judgments²⁹⁶

	1997	2001	2005
Percent of all judgments satisfied	20.3%	23.3%	15.7%
Excluding unlawful detainer and “other”	22.8%	27.3%	16.2%
Of those satisfied, percent satisfied within 2 years	n /a ²⁹⁷	77.5%	n/a

The Federal Reserve study discussed above finds an even lower rate of judgment satisfaction (15.8%).²⁹⁸ Of course, both data sets rely on the accuracy of court records, and the court records generally rely on the plaintiff to report when a judgment has been paid. The true rate of payment is undoubtedly higher than the rate reported in the case files, but it is very difficult to estimate the extent of the difference. However, Professor Caplovitz’s study from the early 1970s provides some support for the proposition that a substantial portion of judgments will go unpaid. In a survey of debtors who were sued in 1967 for defaulting on a consumer loan, Professor Caplovitz finds that only 22% reported paying their debt in full and 38% reported making some payments.²⁹⁹ Forty percent reported making no payments at all.³⁰⁰

2. Few Judgment Debtors File for Bankruptcy

Although the court records suggest that most judgments remain unpaid, the overwhelming majority of defendants in my sample did not file for bankruptcy. Table IV.10 presents the results of a comparison of my records with the Virginia bankruptcy filing database maintained by Lexis.³⁰¹ Searching the electronic records creates a significant risk of false positives; I do not know if a “John Smith” in the Lexis bankruptcy database is the same “John Smith” sued in state court. This risk is mitigated by searching only for names containing a middle name or middle initial. However, I count as a match any bankruptcy record that lacks an inconsistent middle name or initial. For example, if the civil filing record lists “John A. Smith,” a bankruptcy filing by “John Smith” would be a match, but a bankruptcy filing by “John B. Smith” would not be a match. Some of the Richmond paper records allow me to avoid this problem because they list the debtor’s social security number on the complaint, and I can compare the first five digits of these social security

296. For data used in this Table, see *supra* notes 247–48.

297. About half of the records from 1997 that were marked satisfied had no satisfaction date.

298. See *Consumer Data*, *supra* note 7, at 67 tbl.10.

299. See CAPLOVITZ, *supra* note 17, at 246.

300. *Id.*

301. The Lexis databases used were VA Bankruptcy Filings (VABKT) and VA Bankruptcy Filings (Archive) (VAABKT).

numbers to the numbers listed in the Lexis databases. This sample is unlikely to be representative of the state's filings as a whole, however. Filings that included the defendant's social security number were almost exclusively made by financial institutions or the government.

Table IV.10: Number of Debtors Who Filed for Bankruptcy After Judgment³⁰²

	All Judgments		Unpaid Judgments	
	Electronic	Richmond	Electronic	Richmond
Never filed	47	78	37	44
Filed prior to 2001	10	13	7	7
Filed from 2001 to 2003	6	9	3	5
Filed from 2004 to 2006	4	2	3	1
Total searched ³⁰³	61	108	49	57

Less than 10% of the names in my electronic sample from 2001 appear in the Lexis bankruptcy database between January 1, 2001, and December 31, 2003. Even if I expand my bankruptcy filing period to the end of 2006, this percentage increases to only 16.4%. Limiting the sample to those debtors with unpaid judgments actually causes the percentage to fall slightly to just 12.2%. Though surprising, these results corroborate Professor Caplovitz's survey of consumers sued in 1967; he found that just 7% filed for bankruptcy.³⁰⁴

3. Post-Judgment Actions Are Surprisingly Limited

The data suggest that many debtors fail to repay their judgments but do not seek bankruptcy protection. Therefore, these debtors are vulnerable to garnishment or other collection efforts for a potentially unlimited amount of time. I cannot observe all of the techniques that creditors may employ to enforce their judgments; I can observe only the rate at which creditors bring subsequent proceedings, such as garnishments and interrogatories. Table IV.11 suggests that the overwhelming majority of subsequent proceedings are garnishment proceedings.

302. For data used in this Table, see *supra* notes 247–48, 301.

303. The total is less than the sum of the prior rows because some records returned multiple bankruptcies.

304. See CAPLOVITZ, *supra* note 17, at 274.

Table IV.11: Distribution of Subsequent Filings³⁰⁵

	1997	2001	2005
Garnishment	87	132	88
Interrogatory	17	29	11
Show Cause	2	8	1
Capias	0	0	0
Other	1	6	3
Total	107	175	103

Perhaps the most significant facts about the subsequent proceedings are that there are relatively few of them and creditors seem to cease bringing these actions fairly soon after the judgment is entered. Table IV.12 presents the total number of subsequent actions per unpaid judgment, and Table IV.13 presents the time from the initial judgment to the last collection proceeding in the file.

Table IV.12: Subsequent Actions per Unpaid Judgment (Excluding Unlawful Detainer and Other)³⁰⁶

	1997	2001	2005
0	95	129	158
1	22	29	41
2	7	12	6
3	1	3	4
4	1	3	0
5-7	3	2	0
8-10	0	0	0
10+	0	0	0

Table IV.13: Time from Last Hearing to Last Recorded Collection Action to Collect Unpaid Judgment (Excluding Unlawful Detainer and Other)³⁰⁷

	1997	2001
No subsequent actions	95	129
Less than 1 year	21	25
1 to 2 years	8	15
2 to 3 years	4	4
3 to 4 years	0	3
More than 4 years	1	2

305. For data used in this Table, see *supra* notes 247-48.

306. For data used in this Table, see *supra* notes 247-48.

307. For data used in this Table, see *supra* notes 247-48.

The analysis in Part I suggests that financial creditors should behave differently than other plaintiffs. In particular, these financial creditors should be more likely to actually collect their judgments or to at least attempt to enforce the judgments that they obtain. I test this theory by examining the collection of the judgments entered in each of the three years of my study. Because medical creditors have received harsh criticism for aggressive collection techniques, I also test whether they are more likely to use subsequent proceedings to enforce their judgments. I control for fixed-year effects³⁰⁸ and the size of the judgment. Financial creditors are almost twice as likely either to collect or to begin subsequent proceedings to try to collect their judgments than other creditors (individuals, lawyers, other business, and government), and this effect is statistically significant.³⁰⁹ The odds ratio for medical plaintiffs is a little less than one, but this effect is not statistically significant. The fixed-year effects are not statistically significant.

Table IV.14: Likelihood of Subsequent Proceeding or Actual Satisfaction of Judgment³¹⁰

Variable	Odds Ratio	Pr> z
1997 Judgment	0.76	0.32
2001 Judgment	1.39	0.22
Finance	1.86	0.05
Medical	0.84	0.78
Judgment Amount	1.00	0.38
Judgment Amount Squared	1.00	0.29
Observations	106	
Pseudo R-sq	0.04	

4. Are Many Civil Defendants Judgment Proof?

One explanation for the relatively low rate of judgment satisfaction and the unwillingness of many creditors to actively enforce their judgments is that a very large proportion of the civil defendants are effectively judgment proof. Part III supports this theory—Virginia’s civil litigation is concentrated in areas with a greater proportion of disadvantaged individuals. This Part provides further support for this theory by showing a relatively low homeownership rate among civil defendants.

308. The omitted dummy variable represents judgments entered in 2005. The results are more dramatic if I focus solely on 1997 or on 2001. In each case the finance creditors are more than twice as likely to either attempt to collect or actually collect their judgments.

309. If I restrict my sample to unpaid judgments, finance creditors are 1.75 times more likely to institute subsequent proceedings.

310. For statistics used in this Table, see *supra* notes 247–48 & 308–09.

Civil filings do not disclose whether the defendant owns a home, and the electronic records do not disclose even the defendant's address. However, the paper records list the defendant's address, and Richmond places property tax records on the Internet.³¹¹ I compared the paper records of filings made in the Richmond general district court against these property tax records to determine if the defendant owned the property listed as his or her address in 2001, the year of the suit. Less than 14% of the defendants owned their homes,³¹² well below the state average of 75.1%³¹³ and the Richmond average of 76.2%.³¹⁴ This does not mean that very few homeowners are sued in state court. Even if the 14% homeownership rate applies statewide, this would still translate into more than 100,000 civil suits in 2001.³¹⁵

VI. CONCLUSION

In 1980, Americans filed 287,570 non-business bankruptcies; by 2005, this number had grown to 2,039,214.³¹⁶ These stark statistics fueled a decade-long fight over bankruptcy reform that ultimately culminated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.³¹⁷ These statistics also led to a boom in bankruptcy scholarship that has taught us a great deal about bankrupt debtors. One of the prominent lessons of this scholarship is that bankrupt debtors are drawn almost exclusively from the middle class, and prior scholars concluded that financial distress is a "middle-class pathology."³¹⁸

If financial distress is a middle-class pathology, it is not exclusively so. A focus on bankruptcy has obscured the fact that defaulting consumers can simply refuse to pay. We do not know precisely how many Americans choose this "informal bankruptcy" system,³¹⁹ but the data suggest that they may easily outnumber the bankrupt debtors.³²⁰ This Article analyzes state court civil filings to get a sense of how many Americans default without

311. Richmond, Va., City Assessor's Office, Property Search, <http://eservices.ci.richmond.va.us/applications/propertysearch/frmMainSearch.aspx> (last visited Nov. 16, 2007).

312. If I exclude warrants in unlawful detainer, this percentage rises to 23.2%.

313. U.S. Census Bureau, Annual Statistics: 2004, Homeownership Rates by State: 1984 to 2004, <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04t13.html> (last visited Nov. 16, 2007).

314. U.S. Census Bureau, Annual Statistics: 2001, Homeownership Rates for the 75 Largest Metropolitan Areas: 1986 to 2001, <http://www.census.gov/hhes/www/housing/hvs/annual01/ann01t14.html> (last visited Nov. 16, 2007).

315. See *supra* Table IV.1.

316. See Am. Bankr. Inst., *supra* note 2.

317. Pub. L. No. 109-8, 119 Stat. 23 (codified throughout 11 U.S.C.A. §§ 101–1532 (West 2007)).

318. See FRAGILE MIDDLE CLASS, *supra* note 18, at 238.

319. This term is taken from Dawsey & Ausubel, *supra* note 4, at 2.

320. See *supra* notes 5–6 and accompanying text.

choosing bankruptcy, and the numbers are staggering. Virginia alone has averaged more than one million civil filings a year for more than the last twenty years,³²¹ and the overwhelming majority of these filings seek to collect debts from consumers.

This Article also finds that civil defendants and bankrupt defendants differ in predictable ways. Stated simply, the bankrupt debtors are those debtors who have something to protect. Thus, limiting our focus to bankruptcy not only causes us to underestimate financial distress generally, but the defaulting and insolvent Americans whom we overlook are the most disadvantaged members of our society. The implications of this Article are not entirely grim, however. While the bankruptcy filing rate has risen dramatically over the past few decades, the rate of civil litigation appears to have changed very little.

The debate over consumer bankruptcy reform will certainly continue. This debate must consider what, if anything, should be done to encourage the consumers who have chosen informal bankruptcy to choose instead to repay their debts or to file a bankruptcy petition. An informed answer to this question requires information about the financial condition of these debtors that we do not yet have. However, if we wish to understand default and insolvency, we cannot restrict ourselves to the bankruptcy courts merely because the light is brighter.

321. See *supra* notes 8, 140 and accompanying text; *supra* Figure II.4.