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BANKRUPTCY AND STATE COLLECTIONS: THE CASE OF THE MISSING GARNISHMENTS

Richard M. Hynes†

Recent bankruptcy reforms were spurred in part by a bankruptcy filing rate that has more than doubled in the last ten years and that has risen by approximately six hundred percent over the last generation. Some attribute this surge in filings to Americans' greater willingness to avoid debts by declaring bankruptcy. Most academics, however, argue that more Americans are forced into bankruptcy by crushing debt burdens and aggressive collections techniques. Surprisingly, the literature has largely ignored data on the use of these collections techniques. This Article examines the use of one of the most important collections tools, garnishment, in two jurisdictions: the Commonwealth of Virginia and Cook County, Illinois. While the bankruptcy filing rate has risen dramatically in each of these jurisdictions, the rate of garnishment has declined. Because prior studies specifically cite garnishment as one of the leading triggers of bankruptcy, the "missing garnishments" in each of these jurisdictions challenge the claim that an increase in financial distress has caused the rise in bankruptcy filings.

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INTRODUCTION

After years of intense lobbying by the consumer credit industry, Congress enacted reforms that reduce the generosity of consumer bankruptcy and restrict the availability of bankruptcy.[1] Consumer advocates and most bankruptcy scholars vigorously opposed these reforms,[2] and will almost certainly strive to limit the impact of these reforms by influencing judicial interpretation.[3] Consumer advocates have not merely played defense, however, and they have extended the fight far beyond bankruptcy. Congress[4] and the states[5] have passed legislation designed to stop "predatory lending,"[6] and many scholars

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.). For a summary of the changes made by the Act, see Eugene R. Wedoff, Major Consumer Bankruptcy Effects of the 2005 Reform Legislation (Apr. 21, 2005), http://www.abiworld.org/pdfs/s256/mainpoints8.pdf.

[2] *See* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 48 (2001) ("The vast majority of America's bankruptcy law professors have repeatedly expressed their vehement opposition to the bankruptcy reform bills. About 100 professors have written Congress on four separate occasions imploring Congress not to pass such a bill. Exactly *two* law professors have urged passage." (emphasis added) (footnote omitted)).

[3] Scholars argued for narrow interpretations of Congress's previous major bankruptcy reform that was designed to curb "abusive" filings. *See, e.g.*, Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 148 (1986). Recent scholarship suggests that today's scholars have similar plans to influence how the new reform is implemented. *See, e.g.*, Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 223 (2004) ("In other words, myriad factors contribute to the bankruptcy system. The Code is but one. As a consequence, Congress has the power to exclude bankruptcy experts from Code deliberations but not from system reform." (footnote omitted)).

[4] *See* Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended at 15 U.S.C. § 1602 (2000)).

[5] For a summary of state legislation governing consumer credit, see Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 526–28 (2004).

[6] This term lacks a generally accepted definition and stands for a host of lending practices that commentators find objectionable. Though often applied to subprime mort-

advocate much stronger reform, such as a return to strict usury laws[7] and other limits designed to stop lenders who "seduce"[8] consumers with easy credit.

Much of the interest in consumer finance stems from the continued rise in consumer bankruptcy filings. Americans filed over 1.5 million nonbusiness bankruptcies in 2004,[9] a sharp increase from the roughly 189,000 total (business and nonbusiness) bankruptcies Americans filed in 1974[10] and the roughly 53,000 total bankruptcies Americans filed in 1954.[11] These stark filing statistics dominate much of the modern consumer finance literature, though scholars interpret the numbers differently. Some espouse an "Incentive Theory"[12] of bankruptcy that claims more Americans *choose* bankruptcy to avoid paying

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gage loans, commentators also apply this term to a number of loans that they find objectionable, including payday loans and credit card loans. *See, e.g., id.* at 581.

7 *See, e.g.*, Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 38 (2004).

8 *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004). Professor Bar-Gill claims to only challenge arguments against regulation and not make any positive normative claim. *Id.* at 1378. His title is, however, seductive.

9 *See* U.S. COURTS, BANKRUPTCY STATISTICS, 2004 CALENDAR YEAR BY CHAPTER tbl.F-2 [hereinafter 2004 BANKRUPTCY STATISTICS], http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2004.pdf (last visited Jan. 29, 2006) (reporting 1,563,145 nonbusiness bankruptcy filings and 1,597,462 total filings). This number represents a slight decline from the 1,625,208 nonbusiness bankruptcies filed in 2003. U.S. COURTS, BANKRUPTCY STATISTICS, tbl.F-2 (2003), 2003 CALENDAR YEAR BY CHAPTER, http://www.uscourts.gov/Press_Releases /1203f2.xls (last visited Jan. 26, 2006).

10 *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, at 577 tbl.976 (1980) [hereinafter STATISTICAL ABSTRACT: 1980], *available at* http://www2.census.gov/prod2/statcomp/documents/1980-01.pdf (reporting 189,513 total bankruptcy filings in 1974). When measured as a percentage of the population, the 1974 filing rate was approximately one-sixth of the filing rate in 2004. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 8–9 (2003), *available at* http://www.census.gov/prod/2004pubs/03statab/pop.pdf (listing the population of the United States in 1974 as approximately 213,854,000 and estimating the population of the United States in 2004 as approximately 292,801,000). This comparison understates the increase in filings. First, the number of bankruptcies in 1974 includes business bankruptcies. *See* STATISTICAL ABSTRACT: 1980, *supra*. Second, the 1974 figures may indicate multiple filings from a single household because married couples were not able to jointly file a bankruptcy petition until the Bankruptcy Reform Act of 1978. For an article that tries to adjust on account of this change, see Ian Domowitz & Thomas L. Eovaldi, *The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy*, 36 J.L. & ECON. 803, 821 (1993) (discussing the empirical difficulties posed by this change).

11 *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1961, at 500 tbl.668 (1961), *available at* http://www2.census.gov/prod2/statcomp/documents/1961-08.pdf (reporting 53,136 total bankruptcy filings in 1954). This represented a sharp increase from 1950 when there were only 33,392 total filings. *Id.*

12 Bankruptcy literature often refers to the Incentive Theory by other names. *See, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 235 (1989) (calling the Incentive Theory the "simple economic model of bankruptcy"); Scott Fay, Erik Hurst & Michelle J. White, *The Household Bankruptcy Decision*, 92 AMER. ECON. REV. 706, 706 (2002) ("We find support for the *strategic model* of bankruptcy, which predicts that households are more likely to file when their financial benefit from filing is higher." (emphasis added)).

their debts, either because various changes have made bankruptcy more attractive or because more consumers are aware of bankruptcy's benefits.[13] According to the competing theory, the "Distress Theory,"[14] bankruptcy's role in financial distress has not changed significantly, and more Americans are *forced* into bankruptcy by an increase in social instability and indebtedness.[15] Though they generally disagree on policy, proponents of the two theories share the belief that the bankruptcy statistics indicate a deepening crisis.[16]

The consumer finance literature's focus on federal bankruptcy law has come at a cost, as scholars have largely ignored collections efforts that occur outside of bankruptcy. If the bankruptcy statistics indicate a serious problem, the problem is not really bankruptcy itself, but rather financial distress and default more generally. In fact, many, and probably most, Americans who do not repay their debts do not bother filing for bankruptcy.[17] A consumer suffers financial distress regardless of whether she admits failure by filing for bankruptcy. A creditor must write off a bad debt regardless of whether the debt is discharged in bankruptcy or if the creditor simply cannot collect using state collections proceedings[18] and nonjudicial collections techniques.[19] If we are to understand the extent of consumer financial distress, we must look beyond bankruptcy.[20]

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13 *See infra* Part I.A.

14 The Distress Theory is also known by other names in bankruptcy literature. *See, e.g.*, Fay, Hurst & White, *supra* note 12, at 709 (referring to the Distress Theory as the "Adverse Events" theory or the "nonstrategic view" of bankruptcy).

15 *See infra* Part I.B.

16 *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 12, at 3 ("Concern is mounting about what [the rising number of Americans filing for bankruptcy] mean[s] for the American economy and what [it] say[s] about our national character.").

17 *See, e.g.*, VISA U.S.A. INC., 1999 BANKRUPTCY DEBTOR SURVEY (1999), *available at* http://www.watchtheweb.com/99BkDebtorSurvey.pdf (reporting that two-thirds of credit card loans charged off as uncollectible were not attributable to bankruptcy). Some of these loans may, however, be discharged in a bankruptcy proceeding after they are charged off as uncollectible. These percentages are based on outstanding loans and not individuals. It is likely that the percentage of debtors who use bankruptcy is even lower because those who are most likely to be judgment-proof outside of bankruptcy—those with low incomes—are less likely to have large loans.

18 In theory, a creditor could file an involuntary petition against a debtor and use bankruptcy to collect. *See* 11 U.S.C. § 303 (2000). However, this is rarely done. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 476 (4th ed. 2001) ("Involuntary petitions have been rare—so rare, in fact, that the Administrative Office of the Courts ceased any report of the relative proportions of voluntary and involuntary petitions in the mid-1980s.").

19 For a discussion of nonbankruptcy laws that limit debt collection by creditors, see Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121 (2004).

20 A few other articles have begun this task. *See, e.g.*, Amanda E. Dawsey & Lawrence M. Ausubel, Informal Bankruptcy (Twelfth Annual Utah Winter Finance Conference, Working Paper, Feb. 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=332161 (discussing the debtor's ability to use nonbankruptcy laws to avoid repayment).

This Article adds to our understanding of financial distress by examining one of the most important collections tools afforded by state law: garnishment. Garnishment is a judicial remedy used to seize property of a debtor held by a third party, such as unpaid wages in the hands of an employer or money deposited in a bank account. This Article presents the number of garnishment orders issued annually in the Commonwealth of Virginia from 1992 to 2004 and supplements these data with a sample of garnishment orders issued in Cook County, Illinois between 1987 and 2003.[21] Surprisingly, this is the first article in thirty years to carefully examine garnishment statistics.[22]

These new data present a surprising puzzle for consumer finance scholars that challenges some of their most basic assumptions. While the nonbusiness bankruptcy filing rate has increased dramatically over the last ten to fifteen years, the rate of garnishment has declined slightly in Virginia and appears to have fallen dramatically in Cook County, Illinois.[23] Though the data uncovered by this Article do not predate the late 1980s, they do provide insight into the state collections proceedings of Cook County, including the city of Chicago, one of the jurisdictions that Professor David Caplovitz studied a generation ago.[24] Comparing Professor Caplovitz's estimate of the number of garnishment orders in the late 1960s with the number of garnishment orders in recent years suggests that state collections proceedings may have been *more* common in the past than they are today.[25] Given the sharp rise in bankruptcy filings during this period,[26] the relative decline in garnishments is striking. Thus, this Article uncovers a new puzzle in consumer finance: the case of the missing garnishments.

Assuming the missing garnishments are part of a national trend, they have important implications for the ongoing debate over the cause for the rise in bankruptcies and the need for reform. Fundamentally, the Incentive Theory claims that Americans in financial distress today are more likely to file for bankruptcy, and the Distress Theory claims that today there are more Americans in financial dis-

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21 *See infra* Part II.B.

22 Perhaps the excessive focus on consumer bankruptcy can be explained by the availability of data. The Administrative Office of the U.S. Courts publishes the number of bankruptcy filings each quarter. *See* U.S. COURTS, BANKRUPTCY STATISTICS, http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited Jan. 29, 2006). There is no corresponding office to report the number of garnishment orders issued nationally, and in fact, the overwhelming majority of states do not publicly report data on the use of their collections proceedings.

23 *See infra* Part II.B.

24 Professor Caplovitz studied collections proceedings in Chicago, Detroit, New York, and Philadelphia. *See, e.g.*, DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 8 (1974).

25 *See id.* at 225–55; *see infra* notes 154–59 and accompanying text.

26 *See supra* notes 9–11 and accompanying text.

tress. Both claims could be true, and the debate is really over their relative importance. Unfortunately, one cannot weigh the relative importance of these two theories by counting the number of Americans in financial distress, as it is difficult to measure or even define financial distress. Until now, scholars have largely focused on the bankruptcy filing rate as "a thermometer, recording the economic temperature of American families."[27] This Article argues that the rate of garnishment serves as an additional indicator that tells a markedly different story.

The missing garnishments appear to be much more consistent with the Incentive Theory than with the Distress Theory. An increased willingness of debtors to file for bankruptcy could cause the rate of garnishment to fall because the bankruptcy discharge will protect the debtor from garnishment. By contrast, the missing garnishments appear sharply inconsistent with the claim that the rising tide of bankruptcy filings consists of debtors forced into bankruptcy by crushing debt levels, or at least sharply inconsistent with the claim that an increasing number of debtors are forced into bankruptcy by their creditors' efforts to collect these debts. While this apparent inconsistency can perhaps be explained, many of the most obvious explanations are inconsistent with the data, and others are either incomplete or lack empirical support at this time.[28]

The most important implication of this Article may be the need for more research. If the opponents of the recent reforms are correct, bankruptcy may no longer shield distressed debtors from debt collectors. Consequently, policymakers concerned with the plight of these debtors must seek a better understanding of nonbankruptcy collections. Moreover, even after the proper interpretation of the new legislation is settled, broader questions concerning the regulation of consumer finance will remain open, and policymakers will need data to inform their decisions. Viewed with a wider lens, the world of consumer finance may not have changed as much as previously thought—or at least not in the ways previously thought. Policymakers should facilitate more research to better inform their decisions and should make more information about nonbankruptcy debt collection publicly available.

Part I provides a brief overview of the ongoing bankruptcy debate. Part II presents data showing that the use of garnishment bears an inverse relationship to the use of bankruptcy in the two jurisdictions studied. Part III explains why the rise in bankruptcies may have caused the decline in garnishments. Part IV examines other explanations for the missing garnishments that are more consistent with the

27 Warren, *supra* note 7, at 37.

28 *See infra* Part IV.

Distress Theory of bankruptcy and finds that these explanations are either incomplete or lack empirical support at this time.

I
THE BANKRUPTCY DEBATE

Scholars[29] and the popular press[30] have been writing about the latest "mushrooming" of bankruptcy filings for decades. Although several good reviews of the literature already exist,[31] a brief overview helps place this Article's contribution in context. Though there are significant variations, most articles employ some version of the Incentive Theory or the Distress Theory to explain the rise in bankruptcy filings.[32]

The conflict between the Incentive Theory and the Distress Theory drives much of the current policy debate.[33] Advocates of the recent consumer bankruptcy reforms generally support the Incentive Theory, claiming that more debtors are responding to the strong fi-

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29 *See, e.g.*, James Angell MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 90 (1963) ("[Bankruptcy law] demands renewed consideration in the light of mushrooming wage-earner bankruptcies and the dawning recognition that it is a worthy objective for law to sustain the character of citizens rather than complacently collaborate in their demoralization.").

30 *See, e.g.*, *Making Bankruptcy Pay*, TIME, Feb. 22, 1963, at 44 ("But in these days of looking-glass economics, bankruptcy is growing more and more fashionable as a way to settle one's debts and land some more credit.").

31 *See, e.g.*, Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463 (2005) (arguing that household financial distress does not explain the upward trend in bankruptcy filing rates over the past twenty-five years, and proposing an alternative model focusing on the economic and social costs of filing for bankruptcy); Kim Kowalewski, *Personal Bankruptcy: A Literature Review* (Cong. Budget Office Paper No. 2421, 2000), *available at* http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf (reviewing the data on bankruptcy filings between 1994 and 1998, and assessing the empirical research on personal bankruptcy).

32 *See, e.g.*, DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 29–32 (1971) (showing that the rates of filing for bankruptcy tend to be higher in states with stricter laws for wage garnishment); Diane Ellis, *The Influence of Legal Factors on Personal Bankruptcy Filings*, BANK TRENDS, Feb. 1998, at 1, *available at* http://www.fdic.gov/bank/analytical/bank/bt_9803.pdf (finding evidence suggesting that people file for bankruptcy as a response to incentives in bankruptcy laws); Charles A. Luckett, *Personal Bankruptcies*, 74 FED. RES. BULL. 591 (1988) (reviewing personal bankruptcies filed as a result of financial distress); Scott Fay, Erik Hurst & Michelle J. White, *The Bankruptcy Decision: Does Stigma Matter?* (Univ. of Mich., Working Paper No. 98-01, 1998), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=70915 (same).

33 To be sure, other questions factor into the normative debate. For example, a number of articles examine actual bankruptcy filings to determine whether society should expect more bankrupt debtors to repay a larger proportion of their debts. *See* Kowalewski, *supra* note 31, at 23–31 (reviewing tbe literature on whether bankrupt debtors can pay more of their debts while maintaining an acceptable standard of living). Moreover, neither the Incentive Theory nor the Distress Theory necessarily leads to a specific normative conclusion. If debtors are more likely to file for bankruptcy today, they may have been too reluctant to file in the past. If consumers have larger debt burdens today, they may have borrowed too little in the past.

nancial incentives to file.[34] In their view, many Americans are too ready to turn to bankruptcy to avoid repaying their debts, forcing other consumers to pay higher interest rates in compensation for creditors' losses.[35] The solution, according to these scholars, is to reform the Bankruptcy Code to make it more difficult for a debtor to discharge her debts.[36] Proponents of the Distress Theory staunchly opposed the recent bankruptcy reforms,[37] though they often advocate increased regulation of consumer finance to control the "consumer-credit monster"[38] and call for reform of other institutions to make families more financially stable.[39] This debate remains unresolved, although the overwhelming majority of bankruptcy law professors opposed the recent bankruptcy reforms.[40]

A. The Incentive Theory

The Incentive Theory of bankruptcy argues that debtors who file for bankruptcy are responding to incentives created by the law. At first glance, bankruptcy appears extremely attractive. Chapter 7, the most common form of consumer bankruptcy,[41] grants the debtor an immediate discharge of most debts[42] and requires little financial sacri-

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34 *See id.* at vi ("Advocates on one side of the debate about the effects of current bankruptcy law believe that its incentives explain a large part of the filing rate's upswing and its continued high level.").

35 *See, e.g.*, Zywicki, *supra* note 31, at 1540. There is some empirical support for the claim that generous bankruptcy laws lead to higher interest rates and reduced access to credit generally. *See, e.g.*, Reint Gropp, John Karl Scholz & Michelle J. White, *Personal Bankruptcy and Credit Supply and Demand*, 112 Q. J. ECON. 217 (1997) (finding that debtors from low-asset households who live in states with general state-level bankruptcy exemptions pay higher interest rates on auto loans and have reduced access to credit than otherwise equivalent debtors in states with low exemptions).

36 *See* Kowalewski, *supra* note 31, at vii–viii.

37 *See id.* at viii ("Advocates on the other side of the debate about current bankruptcy law see the higher personal filing rate as largely reflecting an increase in financial distress within the household, or consumer, sector of the economy. They contend that such distress stems from adverse circumstances that batter people's finances or from honest mistakes that people make in managing their money.").

38 Warren, *supra* note 7, at 38.

39 *Id.* at 37–40; *see infra* notes 94–95 and accompanying text.

40 *See supra* note 2 and accompanying text. The letters written in opposition to the bankruptcy reforms often cite a number of objections, and thus one cannot assume that all signatories have adopted the Distress Theory of bankruptcy. Some of the signatories have not actually published in the area of consumer finance, and many others have not explicitly adopted the Distress Theory.

41 In 2004, over seventy percent of all nonbusiness bankrupt debtors chose Chapter 7. *See* AM. BANKR. INST., QUARTERLY NON-BUSINESS BANKRUPTCY FILINGS BY CHAPTER, 1994–2005, http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=17624 (last visited Feb. 5, 2006).

42 However, Chapter 7 will not discharge some debts, such as child support, taxes, or debts obtained by fraud. *See* 11 U.S.C. § 523 (a)(1) (2000) (taxes); *id.* § 523(a)(2)(A) (fraud); *id.* § 523(a)(5) (support).

fice beyond filing costs and attorney's fees.[43] In theory, the consumer must forfeit any assets that he cannot exempt pursuant to federal or state law.[44] These assets are then liquidated, with the proceeds distributed first to certain priority creditors,[45] and then to general creditors on a pro rata basis.[46] The bankruptcy exemptions are typically quite generous relative to the actual assets of most Americans,[47] and they are particularly generous given the typical assets of most Americans in financial distress.[48] Moreover, bankruptcy courts allow consumers to sell many of their nonexempt assets and to purchase exempt assets prior to filing.[49] As a result, only a very small minority of consumers in Chapter 7 have nonexempt assets when they file, and general creditors receive nothing in over ninety-five percent of Chapter 7 cases.[50]

For the Incentive Theory to explain the increase in filings,[51] it should identify an increase in the incentive to file. Shortly after the

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43 *See* Richard M. Hynes, *Overoptimism and Overborrowing*, 2004 BYU L. REV. 127, 154–55.

44 *See* 11 U.S.C. § 522 (allowing the debtor to choose between the exemptions made available by her state and certain federal, bankruptcy-only exemptions). The Code does not give the debtor this choice if his state has opted out of the system. *See id.*

45 *Id.* § 507 (delineating creditor priority).

46 *Id.* § 726.

47 For example, in 1995 the median homeowner had roughly $50,000 of home equity. *See* MICHAEL E. DAVERN & PATRICIA J. FISHER, HOUSEHOLD NET WORTH AND ASSET OWNERSHIP v–vii (2001), *available at* http://www.census.gov/prod/2001pubs/p70-71.pdf. Twenty-five states have exemptions that would allow married couples to exempt at least $50,000. *See, e.g.*, Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 361 tbl.1.

48 One study of bankrupt debtors in 1991 revealed that the median homeowner in bankruptcy had just $5,500 in home equity. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 221 (2000).

49 *See generally* Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start*, 70 N.Y.U. L. REV. 235 (1995) (discussing the limits of prebankruptcy planning).

50 *See, e.g.*, EXECUTIVE OFFICE FOR U.S. TRS., U.S. TR. 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."). This figure may overstate distributions in consumer bankruptcy cases because it includes business bankruptcies as well. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-94-173, BANKRUPTCY ADMINISTRATION: CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS 10 tbl.1 (1994), *available at* http://archive.gao.gov/t2pbat2/152238.pdf (noting that business cases represented about a third of all asset Chapter 7 cases and generated about eighty percent of all revenue).

51 Professors Fay, Hurst, and White purport to offer evidence supporting the Incentive Theory. *See* Fay, Hurst & White, *supra* note 12, at 706 ("We find support for the strategic model of bankruptcy, which predicts that households are more likely to file when their financial benefit from filing is higher."). Unfortunately, their evidence is inconclusive because they fail to effectively distinguish the Incentive Theory from the Distress Theory or any other plausible theory of bankruptcy. Their primary result is that debtors who would receive a larger "benefit" from filing are more likely to file. *See id.* at 706, 708–09. They define the benefit of filing as the debt that bankruptcy would discharge less any assets that a debtor would lose because they are not protected by an exemption. *See id.* at 708–09. Because so few debtors lose nonexempt assets in bankruptcy, this primary result may sim-

passage of the Bankruptcy Reform Act of 1978,[52] many claimed that the new law made bankruptcy much more attractive and led to the sharp increase in filings.[53] The Act did, for example, increase the value of exemptions available to many Americans for at least a short period of time,[54] and effectively reduced the out-of-pocket cost of filing by allowing married couples to file jointly.[55] The importance of these changes is subject to dispute,[56] and the empirical literature has

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ply mean that individuals who are more heavily in debt are more likely to file—a prediction that accords with any plausible theory of bankruptcy, including the Distress Theory. Fay, Hurst, and White try two approaches to distinguish their theory. First, they focus on the effect of the debtor's nonexempt assets. *See id.* Under the Incentive Theory, debtors with substantial nonexempt assets are less likely to choose to file because they would lose these assets; under the Distress Theory, the debtor has no choice but to file, and the presence of nonexempt assets makes no difference. *See id.* at 708–10. When Professors Fay, Hurst, and White test the impact of nonexempt assets on the filing decision, they are unable to reject the hypothesis that exemptions have no effect on the filing rate. In fact, their estimates suggest that more generous exemptions lead to a *lower* filing rate. *Id.* at 713–14. Though some studies of state-level filing rates find a positive relationship between generous exemptions and the filing rate, many others find either no statistically significant relationship or even a negative relationship. *See generally* Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168 (2002) (reviewing the relevant literature). As a second approach, Fay, Hurst, and White test whether consumers who have suffered certain adverse events are more likely to file for bankruptcy and find that only divorce has a statistically significant effect on the probability that a debtor will file for bankruptcy. *See* Fay, Hurst & White, *supra* note 12, at 714–15. Note, however, that a failure to prove that these adverse events increase the likelihood of filing with a ninety-five percent certainty is not the same as proving that these events have no effect on the probability of filing. Professors Fay, Hurst, and White's estimates of the effects of each adverse event are consistent with the Distress Theory, but they are unable to prove that their estimates are not the result of random chance. It is not clear if this failure arises from a flaw in the Distress Theory or a weakness in their test; their data set contained only 254 bankruptcy filings. *Id.* at 711. Thus, the debate between the Incentive Theory and the Distress Theory remains unresolved. In any case, the relevant question for this Article is whether the Incentive Theory can explain the rapid *increase* in filings.

52 Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 and 28 U.S.C.).

53 *See, e.g.*, Harriet Thomas Ivy, Note, *Means Testing Under the Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 BANKR. DEV. J. 221, 235 (2000) ("By the end of the 1970s, creditors and others were blaming both the new law and bankruptcy attorneys for the sharp increases in the number of consumer filings.").

54 Because the new exemptions included in the Bankruptcy Reform Act of 1978 allowed the debtor to apply any unused homestead exemption to any property of his choosing, they were generally much more generous than the exemptions previously available to nonhomeowners in most states. *See* Richard M. Hynes, Anup Malani & Eric A. Posner, *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19, 28 (2004). The Bankruptcy Reform Act of 1978 also gave states the right to deny these exemptions to their citizens, *see* 11 U.S.C. § 522(b)(2) (2000), and most states quickly did so, *see* Hynes, Malani & Posner, *supra*, at 26 tbl.1.

55 For a discussion of the changes made by the Bankruptcy Reform Act of 1978, see Domowitz & Eovaldi, *supra* note 10, at 807–09.

56 *See, e.g.*, William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1131 (1983) ("[S]light changes [of the 1978 Act] hardly account for the large increase in bankruptcy filings or for all of the 'abuses' alleged to occur under the [1978 Act].").

failed to firmly establish that the 1978 Act had *any* impact on the number of bankruptcy filings,[57] much less explain why there were almost eight times the number of bankruptcy filings in 2004 as there were in 1978.[58]

Some would argue that the rise in bankruptcy filings does not reflect an increase in the legal benefits of filing, but rather a growing awareness among consumers of the already strong incentives to file. This awareness may have risen either because lawyers can now advertise their services[59] or because information about bankruptcy has spread by word of mouth. One study suggests that between fifteen and twenty-three percent of United States households would benefit financially from filing for bankruptcy,[60] at least ten times the amount that actually filed in 2004.[61] In the past, debtors may have failed to realize how much bankruptcy could benefit them or may have incorrectly assumed that the costs of filing were much larger than they really were. As more debtors file for bankruptcy, each consumer has a greater chance of meeting someone who has actually filed for bankruptcy and therefore learning of its benefits.[62]

The rise in bankruptcy filings may have also made bankruptcy more attractive to modern debtors. The claim that at least fifteen percent of all households would benefit from filing for bankruptcy assumes a rather narrow definition of benefit that considers only the value of the household's nonexempt assets and its current debt.[63] The analysis does not, for example, consider the effect that a bankruptcy filing will have on the household's credit score and its access to

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[57] More accurately, the literature has consistently failed to find statistically significant results. *See, e.g.*, Domowitz & Eovaldi, *supra* note 10, at 822 (estimating that the Bankruptcy Reform Act of 1978 increased filings by about twenty-two percent, but finding this estimate to be too uncertain to reject the hypothesis that there was no effect at all). An extensive survey of this literature is found in Kowalewski, *supra* note 31, at 41 app. A. In brief, this literature asks whether there was a sharp increase in the filing rate after 1978 that cannot be attributed to other factors, such as rising unemployment or a change in the divorce rate.

[58] *See* 2004 BANKRUPTCY STATISTICS, *supra* note 9 (reporting 1,563,145 nonbusiness bankruptcy filings in calendar year 2004); STATISTICAL ABSTRACT: 1980, *supra* note 10, at 577 (reporting 202,951 total bankruptcy filings in fiscal year ending June 30, 1978).

[59] In the late 1970s, the Supreme Court ruled that attorney advertising is protected by the First Amendment. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

[60] *See* Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 214 & tbl.2 (1998).

[61] The 1,563,145 nonbusiness bankruptcy filings in 2004 represent less than 1.5 filings per hundred households. *See* 2004 BANKRUPTCY STATISTICS, *supra* note 9.

[62] *See, e.g.*, Fay, Hurst & White, *supra* note 12, at 710; Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 212–13 (summarizing studies showing that bankrupt debtors often learned of bankruptcy from someone who previously filed).

[63] *See* White, *supra* note 60, at 213 ("Households are assumed to benefit financially from filing for bankruptcy if doing so increases their net worth, where net worth equals the total value of assets minus debt.").

future credit. The analysis also does not consider the effect on the debtor's reputation more broadly or any shame that the debtor may feel. Economists refer to these costs of filing as the "stigma" of filing, and they attribute much of the increase in bankruptcy filings to the decline of this stigma.[64] The stigma of filing for bankruptcy may have fallen because lenders may have become more willing to lend to debtors who have filed for bankruptcy.[65] As the number of people who use bankruptcy rises, the stigma of filing may fall because filing will be seen as less aberrant. Some criticize this theory for its lack of novelty (generations of scholars have made similar claims),[66] but such criticisms largely miss the mark. If novelty were required for a theory's validity, we would have to dismiss the Distress Theory as well. Stories of overly aggressive creditors driving debtors to financial ruin have been around for centuries.[67] As long as the increase in bankruptcy filings implies that defaults have indeed increased, either the Incentive Theory or the Distress Theory (or both) may hold true.

Unfortunately, it is difficult to test the claim that declining stigma has caused the increase in filings because measuring this stigma is challenging. Prior scholars have suggested proxies for this stigma, but the proxies are controversial because they often have economic effects that could impact the bankruptcy filing rate directly. For example, Professors Buckley and Brinig argue that the divorce rate reflects the willingness of a consumer to break a contract and thus is a good proxy for a lack of stigma, though they also acknowledge that a divorce can substantially increase a couple's living expenses and thus may affect the bankruptcy filing rate for reasons other than a decline in stigma.[68] Professors Gross and Souleles try to prove the decline of stigma indirectly by noting the significant increase in the bankruptcy filing rate even after one controls for all of the measurable factors that we think should affect this rate.[69] Critics note that an unexplained increase in filings might not be due to stigma, but rather other factors excluded from the regression.[70] The value of Gross and Souleles's evidence

64 *Id.* at 211.

65 *Id.*

66 *See* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 321 (1999) ("[C]ritics have been blaming growth in consumer bankruptcies on the supposed breakdown of social stigma and the increasing ease of bankruptcy filing for well over eighty years.").

67 *See, e.g.*, ARCHIBALD ROSSER, CREDIT PERNICIOUS (1823).

68 *See* F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201–02, 205 (1998) (explaining some of the outcomes in their analysis of statistical data related to bankruptcy and divorce).

69 *See, e.g.*, David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319, 320 (2002).

70 *See, e.g.*, WARREN & WESTBROOK, *supra* note 18, at 450 ("[W]e tend to be skeptical of studies in which the 'left over' variable 'must be' the one the authors have identified.");

thus depends on their ability to control for other explanations, and criticisms of their work would be more convincing if the critics would point to specific factors that should have been included.

B. The Distress Theory

The dominant normative explanation for bankruptcy is that it serves as a form of insurance that relieves debtors of the need to repay after they have suffered some misfortune such as unemployment, illness, or divorce.[71] Perhaps the rise in filings reflects a greater incidence of misfortunes that effectively force debtors into bankruptcy. Rather than support the bankruptcy reforms proposed in Congress,[72] scholars who ascribe to the Distress Theory believe that the increased number of bankruptcy filings demonstrates a need for a more fundamental reform of our nation's institutions, such as our system of social insurance,[73] so that consumers do not need the relief offered by bankruptcy.

Despite the intuitive appeal of the Distress Theory, empirical studies fail to establish a solid link between the bankruptcy filing rate and the misfortunes that supposedly force debtors into bankruptcy. Studies have failed to establish that individuals who suffer these events

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Gordon Bermant, *What's Stigma Got To Do with It?*, AM. BANKR. INST. J., July–Aug. 2003, at 22, 41.

71 *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 48, at 252–61 (discussing the relationship between bankruptcy and other forms of social insurance); Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000) ("As it happens, consumer bankruptcy is best justified as partial wage insurance . . . ."); Hung-Jen Wang & Michelle J. White, *An Optimal Personal Bankruptcy Procedure and Proposed Reforms*, 29 J. LEGAL STUD. 255, 255 (2000) ("An important function of personal bankruptcy is to provide partial wealth insurance for risk-averse debtors by discharging some debt when debtors' ability to repay turns out to be low."). Note, however, that a growing number of economists question whether the insurance that bankruptcy provides improves consumer welfare. *See, e.g.*, Kartik B. Athreya, *Welfare Implications of the Bankruptcy Reform Act of 1999*, 49 J. MONETARY ECON. 1567 (2002) (finding large welfare gains when bankruptcy is completely eliminated); Kartik Athreya & Nicole B. Simpson, *Personal Bankruptcy or Public Insurance?* (Fed. Reserve Bank of Richmond, Working Paper No. 03-14, 2003), *available at* http://www.richmondfed.org/publications/economic_research/working_papers/pdfs/wp03-14.pdf (suggesting that consumer welfare would be improved if bankruptcy laws were made significantly less generous); Satyajit Chatterjee et al., *A Quantitative Theory of Unsecured Consumer Credit with Risk of Default* (Fed. Reserve Bank of Phila., Working Paper No. 02-6, 2002), *available at* http://www.phil.frb.org/files/wps/2002/wp02-6.pdf (finding a large increase in welfare from a ban on Chapter 7 filings by debtors with above median income). *But see* Igor Livshits et al., *Consumer Bankruptcy: A Fresh Start* (Fed. Reserve Bank of Minneapolis, Research Department, Working Paper No. 617, 2002), *available at* http://research.mpls.frb.fed.us/research/wp/wp617.pdf (finding that depending on the assumptions made the bankruptcy discharge may increase or decrease consumer welfare).

72 However, these scholars do advocate for some reforms of the Bankruptcy Code. *See, e.g.*, Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483 (1997) (analyzing the proposals discussed and put forth by the congressionally appointed National Bankruptcy Review Commission).

73 *See, e.g.*, SULLIVAN, WARREN & WESTBROOK, *supra* note 48, at 102–05, 241–42.

are significantly more likely to file for bankruptcy,[74] and generally have found weak, if any, support for the proposition that the bankruptcy filing rate increases as the rates of these misfortunes increase.[75] For example, the nonbusiness bankruptcy filing rate rose about fifty percent between 1990 and 2000[76] even though this period is generally acknowledged as a time of economic prosperity, and both unemployment and divorce rates, two misfortunes that allegedly are leading triggers of bankruptcy,[77] fell.[78] Moreover, sharp increases in the filing rate have occurred during prior periods of economic expansion, such as the over 700% increase that occurred between 1948 and 1967.[79]

One of the most common explanations for the increase in bankruptcy filings in times of economic expansion is that consumer debt levels rise and make consumers more vulnerable to misfortune.[80] Indeed, this rise in consumer indebtedness serves as the primary explanation[81] for the increase in bankruptcies over

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74 *See* Fay, Hurst & White, *supra* note 12, at 714–15 (finding that only the correlation between divorce and bankruptcy filings is close to statistically significant among several variables often thought to commonly lead to bankruptcy).

75 *See, e.g.*, Kowalewski, *supra* note 31, at 11 ("Because of possible methodological problems, however, empirical studies do not consistently find that macroeconomic factors significantly affected the filing rate.").

76 Americans filed approximately 28.9 nonbusiness bankruptcies per ten thousand in 1990 and 43.3 nonbusiness bankruptcies per ten thousand in 2000. AM. BANKR. INST., ANNUAL BUSINESS AND NON-BUSINESS FILINGS BY YEAR (1980–2004), http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=8149 (last visited Jan. 29, 2006) (reporting 718,107 nonbusiness bankruptcy filings in 1990 and 1,217,972 nonbusiness bankruptcy filings in 2000); U.S. CENSUS BUREAU, PHC-1-1, 2000 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 tbl.1 (2000), *available at* http://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf (reporting the United States' population in 2000 as 281,421,906); U.S. CENSUS BUREAU, 1990 CP-1-1, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS 1 tbl.1 (1990), *available at* http://www.census.gov/prod/cen1990/cp1/cp-1-1.pdf (reporting the United States' population in 1990 as 248,709,873). To determine the number of nonbusiness bankruptcy filings per ten thousand, divide the number of nonbusiness bankruptcies for a given year by the total U.S. population for that same year and multiply the result by ten thousand.

77 *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 48, at 15–21.

78 *See, e.g.*, Zywicki, *supra* note 31, at 1505, 1512.

79 *See, e.g.*, Kowalewski, *supra* note 31, at 6 fig.1 (graphing the number of bankruptcy filings versus the population and showing that in 1948 Americans filed 1.26 bankruptcies per ten thousand, and in 1967 they filed 10.5 bankruptcies per ten thousand).

80 *See, e.g.*, SULLIVAN, WARREN & WESTBROOK, *supra* note 48, at 18.

81 Of course, an increase in consumer indebtedness cannot really explain the increase in bankruptcy filings because one must explain why consumer debt levels have increased. Proponents of the Distress Theory often cite credit market deregulation, especially a Supreme Court decision in 1978 that effectively prevented states from setting usury limits for national banks. *See, e.g.*, Moss & Johnson, *supra* note 66, at 333 & n.94 (referencing Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978)). However, this can be at most a partial explanation. Consumer bankruptcy appears to have been rising long before this change. *See supra* note 79 and accompanying text. Proponents of the Incentive Theory point out that bankruptcy policy may have actually caused the increase in debt by lessening the consequences of default, though they acknowledge that there is an offsetting effect in that creditors will be less willing to lend. *See* Zywicki, *supra*

time.[82] How well the consumer debt burden explains the increase in filings depends largely on which method one uses to measure this burden. Some scholars look for a link between consumer debt and the bankruptcy filing rate,[83] while others look for a link between total consumer indebtedness (consumer debt plus residential mortgages) and the bankruptcy filing rate.[84] Still others question both measures, suggesting that official measures of indebtedness may overlook important sources of credit and overstate the increase in borrowing over time.[85] While the Federal Reserve has good information on the amount of loans extended by financial institutions (these institutions must report to the Federal Reserve), it can only estimate the amount of credit extended by other sources such as retail stores, pawn shops, and individuals.[86]

Though there is some argument about how one should measure the amount of consumer debt, the primary dispute centers on consumers' ability to repay their debt. Figure 1 presents two measures of the ability of consumers to repay their debt with each measure presented as a percentage of its level in 1980. Figure 1 shows that the ratio of consumer indebtedness to income has indeed grown substantially, lending support to the claim that consumers are now less able to withstand misfortune.[87] Proponents of the Incentive Theory argue

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note 31, at 1527–30. It is unclear how far proponents of the Incentive Theory want to push this claim. Some economists argue that debt relief that leads to further borrowing is in fact efficient because the benefits to the debtor must exceed the costs to the creditor. *See* Daniel J. Villegas, *Regulation of Creditor Practices: An Evaluation of the FTC's Credit Practice Rule*, 42 J. ECON. & BUS. 51 (1990).

[82] *See, e.g.*, Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 36 (1998) (stating that the number of bankruptcies closely follows the debt loads of American families); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1081–84 (1998) (explaining that consumer bankruptcy filings rise and fall with the amount of consumer debt). Professors Moss and Johnson make a related claim—that the rise in bankruptcy filings is due to an increase in lending to lower income consumers. *See, e.g.*, Moss & Johnson, *supra* note 66, at 332–42 (discussing changes in consumer finance). Earlier generations of scholars blamed prior increases in the bankruptcy filing rate on lax credit. *See, e.g.*, STANLEY & GIRTH, *supra* note 32, at 197–98; Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 6–8 (1975) (explaining that creditors are willing to extend credit by "overloading" and collecting even more ruthlessly on those oversold loans).

[83] *See, e.g.*, Moss & Johnson, *supra* note 66, at 337–42.

[84] *See* Kowalewski, *supra* note 31, at 14.

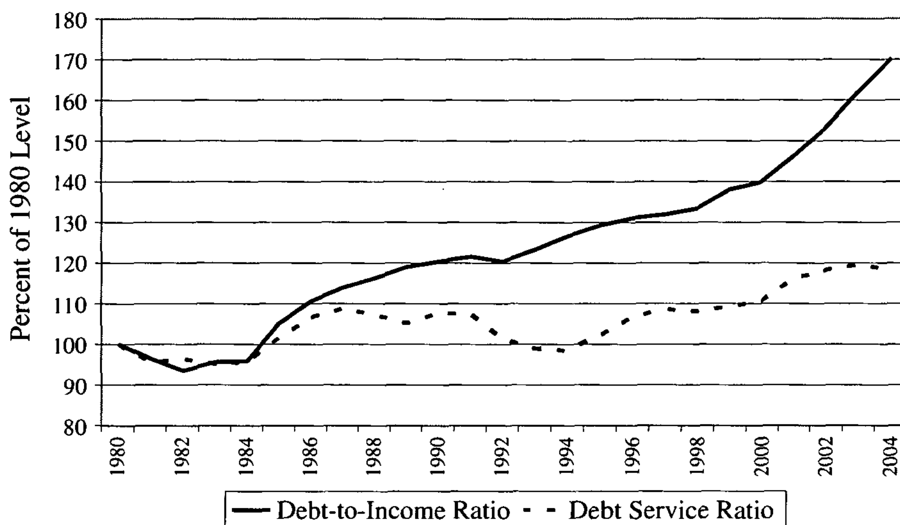
[85] *See* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 37–38 (1999).

[86] Prior researchers have sometimes found fairly unique data sets that include some of these sources of lending and have found that at least some of the increase in bank lending displaced lending from these other sources. *See, e.g.*, Richard L. Peterson, *Usury Laws and Consumer Credit: A Note*, 38 J. FIN. 1299 (1983).

[87] The debt-to-income ratio presented in Figure 1 is calculated as total household debt divided by disposable income. The amount of household debt can be found at BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE: FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES 8 tbl.D.3 (2005), *available at* http://

that the ratio of debt to income does not accurately measure consumers' financial condition. Though the value of household debt has indeed risen, so has the value of household assets, and as a result household net wealth has risen as well.[88] Of course, a rising net worth provides cold comfort to the family that lacks the income needed to pay the bills as they become due.

FIGURE 1: CONSUMER DEBT



The amount of income that consumers must use to repay their loans will depend on the interest rate and how long they have to repay; the debt-to-income ratio does not account for these factors.[89] The Federal Reserve publishes an estimate of how much income consumers must devote to repaying their debts or meeting their financial obligations more broadly, the Debt Service Ratio (DSR).[90] Bankruptcy filings do tend to increase faster in the years after a sharp rise in these debt ratios, so that changes in these debt ratios are correlated with changes in the bankruptcy rate.[91] Yet this correlation shows only that the level of consumer debt has an effect on the bankruptcy filing rate, not that changes in the DSR explain the long-term increase in

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www.federalreserve.gov/releases/Z1/Current/z1.pdf. The 2004 figure represents household debt as of the end of the third quarter. The amount of disposable income can be found at BUREAU OF ECON. ANALYSIS, PERSONAL INCOME AND OUTLAYS, http://www.bea.doc.gov/bea/dn/home/personalincome.htm (last visited Jan. 29, 2006).

88 *See* Zywicki, *supra* note 31, at 1484–85.

89 *See* Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 169 n.374 (2000).

90 *See* THE FED. RESERVE BD., HOUSEHOLD DEBT SERVICE AND FINANCIAL OBLIGATIONS RATIOS, http://www.federalreserve.gov/releases/housedebt/default.htm (last visited Jan. 29, 2006) ("The household debt service ratio (DSR) is an estimate of the ratio of debt payments to disposable personal income.").

91 *See* Kowalewski, *supra* note 31, at 7.

the filing rate. Significantly, the DSR was approximately the same in 1997 as it was in 1987,[92] yet during this period the bankruptcy filing rate more than tripled.[93]

Recently, Professor Elizabeth Warren and her daughter, Amelia Warren Tiyagi, expanded on the increasing indebtedness explanation to include other social changes that have allegedly made consumers more vulnerable to life's misfortunes.[94] For example, they argue that the greater participation of women in the workforce has made families more vulnerable, both by leading them to buy more expensive homes and to take on more mortgage debt, as well as by removing the safety valve of an untapped source of income if times get desperate.[95] The debate over their theories has just begun,[96] and this Article will not examine the relative merits of the arguments. The data collected in this Article do, however, pose a challenge to their claim that American families are more vulnerable financially than they were in the past.

II
BEYOND BANKRUPTCY

The debate over the relative importance of the Distress Theory and the Incentive Theory largely turns on whether the number of consumers who face serious financial distress has dramatically increased. Obviously the rise in the bankruptcy filing rate cannot demonstrate this increase because the cause of this rise is the subject of the debate. The growth in consumer indebtedness relative to disposable income provides important evidence in support of the Distress Theory. This evidence is inconclusive, however, because changes in interest rates and the duration of loans appear to have largely offset the rising debt levels, and financial obligations have claimed a fairly stable proportion of consumers' income over the last twenty years.[97]

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92 The Debt Service Ratio was 12.11 in the first quarter of 1987 and 12.06 in the first quarter of 1997. *See* FED. RESERVE BD., *supra* note 90.

93 In fiscal year 1987, there were roughly 1.77 nonbusiness bankruptcies per thousand population (483,750 total) and in 1997 there were roughly 5.41 nonbusiness bankruptcies per thousand population (1,313,112 total). *See* U.S. COURTS, BANKRUPTCY STATISTICS, 1987–2003 FISCAL YEAR BANKRUPTCY FILINGS BY CHAPTER AND DISTRICT, www.uscourts.gov/bnkrpctystats/FY1987-2003.pdf (last visited Feb. 5, 2006). The population of the United States was approximately 242,804,000 in 1987 and 272,912,000 in 1997. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 8 tbl.2, *available at* http://www.census.gov/prod/2004pubs/04statab/pop.pdf (last visited Feb. 5, 2006).

94 *See, e.g.*, ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003); Warren, *supra* note 7.

95 *See* WARREN & TYAGI, *supra* note 94, at 28–32.

96 For reviews of their work, see David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43 (2004); James Sullivan, Book Review, 27 HARV. WOMEN'S L.J. 273 (2004) (reviewing WARREN & TYAGI, *supra* note 94).

97 *See supra* Figure 1.

At its most basic level, the Distress Theory posits that the number of consumers who have severe difficulty repaying their debts has risen over time. The percentage of loans (or at least unsecured loans) that banks must write off as uncollectible has, in fact, grown along with the bankruptcy filing rate,[98] suggesting that the rise in bankruptcies includes many debtors who would have otherwise repaid their debts. Again, however, this evidence is inconclusive. These data reflect the lending experience of banks and may not reflect the experience of all creditors. More significantly, the increased charge-offs may merely reflect a greater willingness of consumers to use bankruptcy, or the threat of bankruptcy, to avoid repayment. Evaluation of the Distress Theory would therefore benefit from data regarding whether consumers are using the bankruptcy courts before they make a significant effort to repay their debts or whether they are being forced into bankruptcy by aggressive collection measures.

This Article provides some insight as to whether more debtors are forced into bankruptcy by presenting statistics on the use of an important state collections proceeding, garnishment. Surprisingly, garnishment proceedings have received very little attention in the literature. Numerous scholars have suggested that wage garnishment is one of the most common precipitating events of bankruptcy,[99] and the link

98 *See* FED. RESERVE BD., FEDERAL RESERVE STATISTICAL RELEASE: CHARGE-OFF AND DELINQUENCY RATES, http://www.federalreserve.gov/releases/chargeoff/chgallnsa.htm (last visited Jan. 29, 2006) (reporting the charge-off rate on loans made by commercial banks).

99 *See, e.g.*, STANLEY & GIRTH, *supra* note 32, at 28–31; Philip Shuchman & Gerald R. Jantscher, *Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates*, 77 COM. L.J. 360, 362–63 (1972) (finding that states that already had more generous wage exemptions than the newly created federal exemptions had a smaller increase in their bankruptcy filing rates, but noting that these states had a smaller increase in filing rates in the years before the change as well); Ellis, *supra* note 32, at 4–6; Dawsey & Ausubel, *supra* note 20, at 8. Some prior studies fail to find a link between a state's garnishment laws and its filing rate, though they often attribute this failure to a lack of state variation in garnishment laws that makes testing difficult. *See, e.g.*, Lawrence A. Weiss et al., *An Analysis of State-Wide Variation in Bankruptcy Rates in the United States*, 17 BANKR. DEV. J. 407, 418 (2001) ("The lack of significance could result from only a small proportion of the bankruptcy filing population being subject to garnishment of wages or from low variation in the variable across states."). In addition, nearly every prior study of garnishment orders alleges a link between garnishment and bankruptcy. *See infra* note 102. The one study that does not make this allegation found no correlation between bankruptcy and garnishment in the three cities studied. *See* CAPLOVITZ, *supra* note 24, at 275. As Professor Caplovitz himself acknowledges, however, his sample is "too narrow to provide an adequate test." *Id.* Otbers have expressed greater doubt about the link between garnishment and bankruptcy. One survey of consumers in bankruptcy questions this link because few bankrupt debtors were found to have suffered garnishment or other asset seizures. *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 12, at 305 ("Less than 10% [of the bankrupt wage-earners studied] bad suffered a property seizure or garnishment."). However, another survey of bankrupt consumers suggests that at least the threat of garnishment is still quite pervasive. *See* VISA U.S.A. INC., *supra* note 17, at 22 (stating that almost fifteen percent of surveyed bankrupt debtors cited garnishment as the "last straw" that drove them into bankruptcy and fifty-nine percent cited other creditor remedies).

between garnishment and bankruptcy has been cited in congressional testimony.[100] To the extent that scholars have tested this claim, they have not examined the frequency with which creditors begin garnishment proceedings. Rather, they have tested the theory by looking for a correlation between states that restrict the ability of a creditor to garnish a debtor's wages and states with low bankruptcy filing rates.[101] The last major study to examine the number of garnishment proceedings was published over thirty years ago.[102] Because prior studies are decades old, they examine proceedings in an era that predates much of modern debtor-creditor law[103] and the purportedly radical changes in consumer finance that occurred over the last generation.[104]

Despite the alleged link between garnishment and bankruptcy, this Article finds evidence that garnishment has been inversely related to bankruptcy, at least over the last decade or so. As the bankruptcy rate has risen, the garnishment rate has, depending on the jurisdiction, either remained fairly stable or fallen sharply. Subpart A provides a brief primer on debtor-creditor law with an emphasis on changes in the law over the last generation. Subpart B provides statistics on garnishment.

A. A Brief Primer on Debtor-Creditor Law

If a borrower falls behind on his loan, his creditor will probably begin the collections process with a series of phone calls and letters reminding the debtor of his contractual obligation to repay. Historically, the law placed few limits on the ability of the creditor to use such

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100 *See, e.g.*, *Proposed Legislation Authorizing Funds for Bankruptcy Judgeships, and to Review the Implementation of the Bankruptcy Code: Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary*, 102d Cong. 190 (1991) (statement of the National Bankruptcy Conference); *Bankruptcy Act Revision: Hearing on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 1256 (1976) (statement of Robert Ward); *Consumer Credit Protection Act: Hearing on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 90th Cong. 432, 721 (1967) (statements of James. E. Moriarty, Ref. in Bankruptcy and Vern Countryman, Harvard Law School); H.R. DOC. No. 93-137, pt. 1, at 6, 22 (1973).

101 *See, e.g.*, STANLEY & GIRTH, *supra* note 32, at 28–32; Ellis, *supra* note 32, at 4–6; Shuchman & Jantscher, *supra* note 99; Dawsey & Ausubel, *supra* note 20.

102 *See* CAPLOVITZ, *supra* note 24, at 325–26 (published in 1974 and studying collections proceedings from 1967). A series of studies written in the 1960s and early 1970s discuss wage garnishment. *See, e.g.*, W. CTR. ON LAW & POVERTY, WAGE GARNISHMENT: IMPACT AND EXTENT IN LOS ANGELES COUNTY (1968); George Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CAL. L. REV. 1214 (1965); Michael Adrian Harring, Note, *Wage Garnishment: Remedy or Revenge?*, 5 LOY. U. CHI. L.J. 140 (1974). While a law student, future Supreme Court Justice Abe Fortas wrote a notable article on the related topic of wage assignment. *See* A. Fortas, *Wage Assignments in Chicago*—State Street Furniture Co. v. Armour & Co., 42 YALE L.J. 526 (1933).

103 *See infra* Part II.A.

104 *See, e.g.*, Moss & Johnson, *supra* note 66; Sommer, *supra* note 82.

contacts to harass the debtor.[105] Traditional common law torts such as defamation are ill-suited for the typical collections case because most of the collector's communication is with the debtor directly rather than published to a third party. As a result, the debtor has no defamation remedy.[106] However, with the rise of more applicable doctrines in the middle of the twentieth century, such as invasion of privacy, misuse of legal process, intentional infliction of emotional distress, and interference with contractual relations, tort law has begun to provide debtors with greater leverage.[107]

By the late twentieth century, Congress and the state legislatures began to provide consumers with statutory protections as well. Many states have enacted comprehensive debt collection laws that explicitly prohibit harassing or deceptive collection practices and provide a private right of action.[108] The general consumer protection statutes of other states are flexible enough to apply to most forms of debt collection abuse.[109] In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to regulate collector behavior.[110] The FDCPA does not apply to the creditors' own employees,[111] though Federal Trade Commission regulations prohibit some of the same activities addressed by the Act and many state statutes explicitly apply to creditors.[112] Originally, the FDCPA exempted attorneys from its coverage,[113] but in 1986 Congress amended the Act to remove this exemption.[114] Even after this change, some courts believed that certain actions by attorneys remained exempt from the statute, but in 1995 the Supreme Court ruled that they did not.[115]

If letters and phone calls fail to convince the debtor to repay, the creditor may try to seize the debtor's assets or income. Some creditors bargain in advance for the right to seize property by obtaining a mort-

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105 *See* 2 HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW § 676 (1986).

106 *See id.* § 680.

107 *See, e.g., id.* §§ 676–681; Robert M. Berger, *The Bill Collector and the Law—A Special Tort, At Least for a While*, 17 DEPAUL L. REV. 327 (1968); Charles E. Hurt, *Debt Collection Torts*, 67 W. VA. L. REV. 201 (1965); William Richard Carroll, Comment, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 DUQ. L. REV. 97 (1976).

108 *See, e.g.*, CAL. CIV. CODE § 1788 (West Supp. 2006); 2 ALPERIN & CHASE, *supra* note 105, § 632 (discussing collection statutes); ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION app. E (5th ed. 2004 & Supp. 2005) (summarizing state collection statutes).

109 2 ALPERIN & CHASE *supra* note 105, § 633.

110 Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o (2000)).

111 15 U.S.C. § 1692a(6)(A) (2000).

112 *See* 2 ALPERIN & CHASE, *supra* note 105, § 628.

113 *See* Fair Debt Collection Practices Act § 803(6)(F).

114 *See* Neil Simon, Comment, *The Fair Debt Collection Practices Act After* Heintz v. Jenkins*: A Practical Examination of the End of the Exemption*, 46 EMORY L.J. 389 (1997) (discussing the original exemption for attorneys under 15 U.S.C. § 1692a(6)(F)).

115 Heintz v. Jenkins, 514 U.S. 291, 299 (1995).

gage on the debtor's bome or a security interest in the debtor's personal property, such as a lien on the debtor's automobile. Though state foreclosure proceedings can take several months[116] and bankruptcy may further delay foreclosure,[117] the secured creditor generally earns interest during this delay if the value of her collateral exceeds the value of her claims.[118] As a result, charge-offs on secured loans are typically small unless the amount owed greatly exceeds the value of the collateral.[119] If foreclosure does not yield enough to satisfy the loan, the secured creditor will typically have a right to seek the deficiency as a general creditor.[120]

If the creditor has not bargained in advance for a security interest, he must sue the debtor before attaching the debtor's property. When the prior garnishment studies were written, some courts would attach a debtor's property before the creditor obtained a judgment or the debtor had an opportunity to be heard.[121] But beginning in 1969,[122] courts issued a series of opinions that held such prejudgment attachments to be unconstitutional absent extraordinary circumstances.[123] Under current law, unsecured creditors generally must obtain a judgment before a court will attach the debtor's property.

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116 A summary of the foreclosure process in each state can be found at Foreclosure Laws, http://www.stopforeclosure.com/Foreclosure_Laws.htm (last visited Jan. 29, 2006).

117 *See* Kimberly L. Nelson, *Abusive Filings: Can Courts Stop the Abuse Within the Confines of the Bankruptcy Code?*, 17 BANKR. DEV. J. 331, 331 (2000) ("For lenders, use of the bankruptcy process is becoming increasingly troublesome because foreclosure actions are being delayed by as much as five years or more due to the repetitive filing of bankruptcy petitions by mortgagees.").

118 11 U.S.C. § 506(b) (2000).

119 For example, the charge-off rate for residential mortgages extended by commercial banks is 0.08%. By contrast, the charge-off rate for credit cards is approximately 4.22%. Rates are available at Federal Reserve Statistical Release: Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, http://www.federalreserve.gov/releases/chargeoff/ (last visited Jan. 29, 2006).

120 Some states do not allow the creditor to seek recovery as a general creditor if it seizes its collateral and the proceeds do not repay the loan in full. *See, e.g.*, IOWA CODE § 654.18 (1995) (providing for an "[a]lternative nonjudicial voluntary foreclosure procedure" that allows for mortgage foreclosure, provided that, among other things, "[t]he mortgagee shall accept the mortgagor's conveyance and waive any rights to a deficiency or other claim against the mortgagor arising from the mortgage"). In addition, a few states do not allow deficiency judgments after a power of sale foreclosure. *See, e.g.*, CAL. CIV. PROC. CODE § 580d (West Supp. 2006) ("No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.").

121 *See* 2 ALPERIN & CHASE, *supra* note 105, § 660.

122 *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

123 *See* Connecticut v. Doehr, 501 U.S. 1, 9 (1991) (setting forth a three-part test to determine whether a prejudgment remedy violates the Due Process Clause); 2 ALPERIN & CHASE, *supra* note 105, § 663 (collecting cases).

Even if the creditor successfully obtains a judgment, if the creditor has not bargained for a mortgage or security interest, she must find some asset belonging to the debtor to attach. For example, the unsecured creditor can sometimes file her judgment as a lien against the debtor's home.[124] Many debtors do not, however, own homes. Other debtors will have already pledged the entire value of their home to their home mortgage lender. Still others will be able to exempt any remaining equity in their homes from judicial attachment pursuant to a state homestead exemption.[125] Even if the creditor is able to attach a lien, foreclosing on such a lien can be quite costly, and thus many creditors are reluctant to force a sale.[126] A creditor can ask a sheriff to seize the debtor's personal property, but practitioners report that this remedy is used relatively infrequently.[127] Many of the debtor's assets will either be pledged as collateral[128] or protected by state or federal exemptions, and those that are not may yield very little cash once the costs of selling the item are deducted.[129] If the debtor does have cash, it is likely in the hands of a third party in the form of checking account deposits at the bank or unpaid wages in the hands of an employer.

To reach assets of the debtor held by a third party, such as a bank or an employer, the creditor will typically use a garnishment proceeding. Effectively, the creditor will obtain an order forcing the third party to pay a portion of these assets to the creditor instead of the debtor. Wage garnishment has proved to be particularly effective because creditors often find it easier to locate the debtor's employer than to locate the debtor's bank account. Wage garnishment has,

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124 *See, e.g.*, DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA § 5.1, at 249 (2d ed. 1994).

125 *See, e.g.*, FLA. CONST. art. X, § 4(a)(1); TEX. PROP. CODE ANN. § 41.001 (Vernon 2000).

126 *See, e.g.*, ROBERT A. PUSTILNIK ET AL., DEBT COLLECTION FOR VIRGINIA LAWYERS: A SYSTEMATIC APPROACH ¶ 8.501, at 310.2 (Supp. 2005) ("Many attorneys do not like to file judgment creditors' suits. The action often involves a great deal of work. It may be time-consuming and expensive. If the property in question does not bring sufficient money to pay off senior liens, a judgment creditor's suit can cost the client $2,500 or more. Therefore, this remedy must be used with caution.").

127 *Id.* ¶ 8.101 ("One of the least-used means of enforcing judgments is a levy, or [personal] property execution.").

128 *See, e.g.*, Robert F.T. Dugan, *Creditors' Post-Judgment Remedies: Part I*, 25 ALA. L. REV. 175, 198 (1972) ("First, the concomitant expansion of credit and the easy acquisition of consensual liens in personality leave the average debtor with little or no unencumbered personal property. Second, both the sheriff and the plaintiff's attorney lack the time and resources to locate such unencumbered property as may exist." (footnotes omitted)).

129 *See, e.g.*, RENDLEMAN, *supra* note 124, § 2.1, at 49 ("Although the execution process generally involves little expense to the judgment creditor because it can be implemented without interference from the court, it is unattractive because it depends on liquidating the property with a forced sale which recovers only a small percentage of the value of the goods.").

however, also proved to be quite controversial. Federal law enacted in 1968 limits wage garnishment by general creditors[130] to the lesser of twenty-five percent of the debtor's take-home pay or the amount by which the debtor's take-home pay exceeds thirty times the federal minimum wage.[131] Many states restrict wage garnishment further, and at least four states prohibit wage garnishment altogether.[132] Despite these limitations, attorneys specializing in debt collection often refer to garnishment as one of the most effective judicial remedies.[133]

B. The Missing Garnishments

Most jurisdictions do not report the number of garnishments issued. This Article presents statistics from two that do: the Commonwealth of Virginia and Cook County, Illinois. The Commonwealth of Virginia has published the number of garnishment orders issued each year from 1992 to 2004.[134] Cook County does not report garnishment statistics. The Law Bulletin Publishing Company does, however, collect these orders and provide them to Lexis.[135] A fairly diligent search revealed no other publicly available data on garnishments.

Hopefully, further efforts can locate data from more jurisdictions, but Cook County and the Commonwealth of Virginia are good jurisdictions with which to start. Neither jurisdiction experienced a radical change in its debtor-creditor law during the last ten years.[136] In addition, the two jurisdictions provide a sample of both urban and rural populations. Cook County is home to Chicago, one of the nation's largest cities. Virginia is one of the nation's larger states, but, as

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130 15 U.S.C. §§ 1671–1677 (2000). The government and those seeking payment on certain family law claims may garnish a greater amount of wages. *Id.* § 1673(b)(1).

131 *Id.* § 1673(a). Note that a state may apply for an exemption from this law if it enacts legislation that is substantially similar to the federal law. *Id.* § 1675. To date, however, only one state, Virginia, has done so. *See* RENDLEMAN, *supra* note 124, § 3.7(E). Moreover, in doing so Virginia enacted an exemption that is virtually identical to the federal exemption. *See* VA. CODE ANN. § 8.01-512.3 (2000).

132 David F. Snow, *The Dischargeability of Credit Card Debt: New Developments and the Need for a New Direction,* 72 AM. BANKR. L.J. 63, 66 n.22 (1998) (listing four states that prohibit wage garnishment—Texas, Pennsylvania, South Carolina, and North Carolina—and pointing out that these states have low rates of bankruptcy filings). Other states have laws that seem to prohibit wage garnishment, at least if the debtor can convince the judge that the income is needed to support a family. *See, e.g.,* FLA. STAT. ANN. § 222.11 (West 1998).

133 *See, e.g.,* PUSTILNIK ET AL., *supra* note 126, ¶ 8.301 ("[T]he most common and the most effective execution on a judgment is the garnishment, particularly the wage garnishment.").

134 Virginia's Judicial System, Caseload Statistical Information, http://www.courts.state.va.us/csi/home.html (last visited Jan. 29, 2006).

135 When asked in a telephone conversation on January 25, 2003, the Law Bulletin Publishing Company could not provide a reason why its collections methods should result in a marked decline in garnishments. I have been trying to secure the help of the Cook County courts since June 2003, but to date they have been unable to provide the number of garnishments issued.

136 *See infra* Part III.

of 1990, approximately thirty percent of its population lived in rural areas.[137]

The experiences of Cook County and the Commonwealth of Virginia differ in important ways, but one fact remains constant: The use of bankruptcy and garnishment are inversely correlated in that bankruptcy proceedings tend to rise as garnishment proceedings fall.

1. *Commonwealth of Virginia*

Figure 2A presents the relative change in the number of garnishments[138] and bankruptcy filings[139] per thousand population[140] in Virginia from 1992 to 2004. The garnishment statistics include both wage garnishments and garnishments of other property such as bank accounts, but do not include garnishments used to collect family law claims.[141] In 2004 there were 188,235 new garnishments in Virginia, a rate of over twenty-five per thousand population.[142] By contrast, there were just 39,726 nonbusiness bankruptcy filings in Virginia in 2004, a

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[137] U.S. CENSUS BUREAU, URBAN AND RURAL POPULATION: 1900 TO 1990 (1995), http://www.census.gov/population/censusdata/urpop0090.txt.

[138] Virginia has two sets of trial courts, general district courts and circuit courts. General district courts have exclusive jurisdiction for claims less than $4,500 and can also hear claims of up to $15,000. VA. CODE ANN. § 16.1-77 (2003). Circuit courts have exclusive jurisdiction for claims of more than $15,000 and can also hear claims over $4,500. *Id.* According to practitioners, the vast majority of debt collection occurs in district courts because of the lower filing fees. *See* PUSTILNIK ET AL., *supra* note 126, ¶ 7.302. This is borne out by the garnishment data. For example, in 2004 there were 183,565 new garnishment orders in district courts and just 4,670 new garnishment orders in circuit courts. For district court data, see COMMONWEALTH OF VA., CASELOAD STATISTICS OF THE DISTRICT COURTS 01-04—12-04, at 327, http://www.courts.state.va.us/csi/dbrl_2004.pdf (last visited Jan. 29, 2006); for circuit court data, see VA. CIRCUIT COURT CASELOAD REPORTING SYS., CASELOAD REPORT, VIRGINIA, JANUARY 2004 TO DECEMBER 2004, at 307, http://www.courts.state.va.us/csi/cr01_2004_2003.pdf (last visited Jan. 29, 2006).

[139] *See* AM. BANKR. INST., BANKRUPTCY FILING STATISTICS—NON-BUSINESS FILINGS, http://www.abiworld.org/Template.cfm?SectionNºn_business_Bankruptcy_Filings&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=60&ContentID=3259 (last visited Jan. 29, 2006).

[140] For annual Virginia population from 1992–2000, see U.S. CENSUS BUREAU, TIME SERIES OF VIRGINIA INTERCENSAL POPULATION ESTIMATES BY COUNTY: APRIL 1, 1990 TO APRIL 1, 2000 (2000), http://www.census.gov/popest/archives/2000s/vintage_2001/CO-EST2001-12/CO-EST2001-12-51.html (populations for years 1992 through 1999 are estimates developed by the Census Bureau using methodology described at http://www.census.gov/popest/archives/methodology/2001_st_co_meth.html, while the population for 2000 is taken directly from 2000 census data); for annual Virginia population from 2001–2003, see U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2004 (2004), http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf (populations are estimated based on 2000 census data).

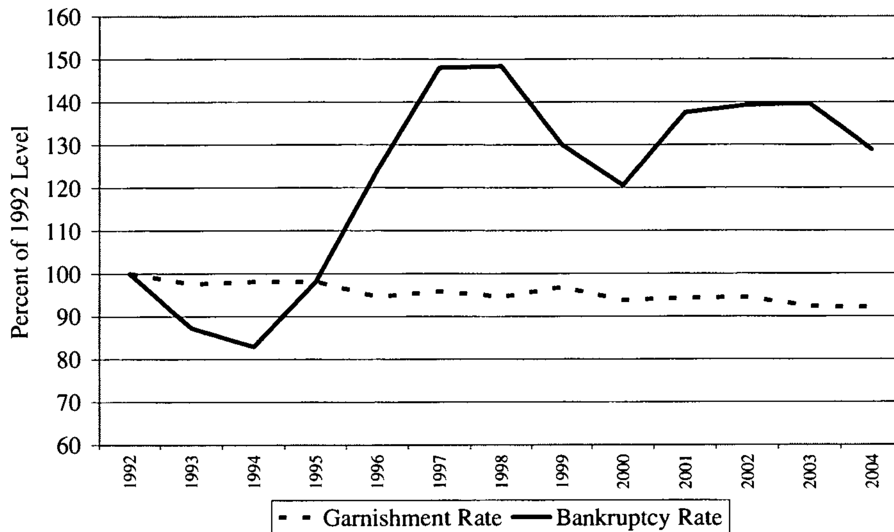
[141] In Virginia these claims are brought in the Juvenile and Domestic Relations District Court. *See* The Juvenile and Domestic Relations Court, http://www.courts.state.va.us/jdrdc/jdrdc.htm (last visited Feb. 6, 2006) (describing the jurisdiction of the Juvenile and Domestic Relations District Court).

[142] *See supra* notes 138, 140 and accompanying text.

rate of a little over five per thousand population.[143] Even accounting for the fact that courts may enter multiple garnishment orders against the same debtor, garnishment is a fairly common remedy in Virginia.

The trends in garnishments and bankruptcy filings suggest that if there is a growing consumer financial crisis, it is not manifesting itself in state collections proceedings. Virginia's bankruptcy filing rate rose almost thirty percent between 1992 and 2004 and almost fifty percent between 1992 and 1998.[144] By contrast, Virginia's garnishment rate remained remarkably constant throughout the period, falling a total of about eight percent between 1992 and 2004.[145]

FIGURE 2A: VIRGINIA BANKRUPTCY AND GARNISHMENT



One might expect the garnishment rate to be somewhat more constant than the bankruptcy rate because plaintiffs may have to resort to garnishment to collect from solvent but stubborn defendants. Even so, the garnishment rate has been remarkably consistent at a time when the bankruptcy filing rate suggests a dramatic decline in the financial health of American consumers.[146] Because the garnishment rate has been so stable, Figure 2B presents the garnishment and bankruptcy rates on different axes to accentuate the movement in the garnishment rate. Figure 2B reveals that bankruptcy and garnishment are actually *inversely* related; as garnishments rise, bankruptcy tends to fall. The two series have a correlation coefficient of -0.71. If, as many

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[143] *See supra* notes 139–40 and accompanying text.

[144] *See supra* note 140 and accompanying text.

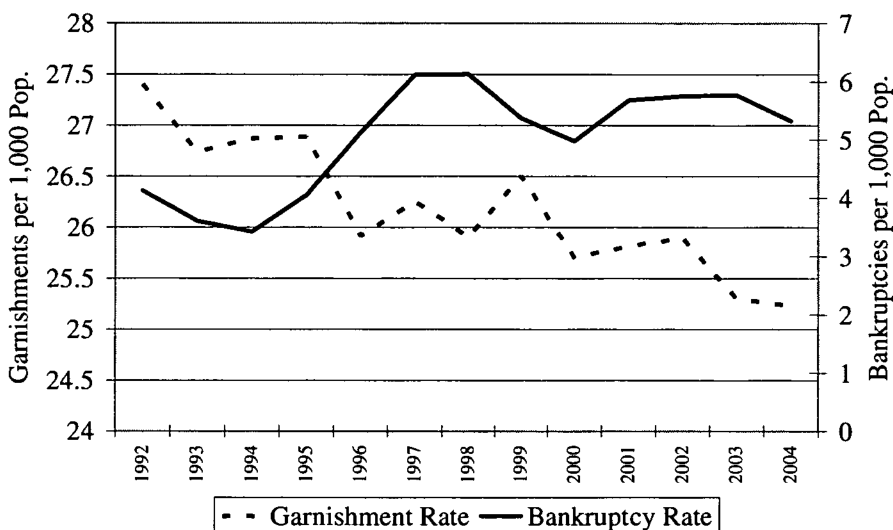
[145] *See supra* note 138 and accompanying text.

[146] *See* Kowalewski, *supra* note 31, at ii (noting the "sharp rise in personal bankruptcy filings between 1994 and 1998").

have suggested, garnishment orders lead to bankruptcies,[147] one would expect a strongly *positive* correlation; perfectly correlated variables have a correlation coefficient of one. Garnishment and bankruptcy appear to be strongly *negatively* correlated, suggesting that decreases in the garnishment rate best explain increases in the bankruptcy filing rate. The Distress Theory suggests no obvious theoretical reason why decreases in garnishment should lead to a decline in bankruptcy, and the missing garnishments present a curious puzzle.

Figure 2B also reveals, however, that much of the negative correlation results from the movement between 1995 and 1996. If one restricts the sample to the years 1996 to 2004, bankruptcy and garnishment exhibit a weakly positive correlation; their correlation coefficient is 0.17. Nevertheless, this fails to solve the case of the missing garnishments as prior theory predicted a *strongly* positive relationship between the two variables.[148]

FIGURE 2B: VIRGINIA BANKRUPTCY AND GARNISHMENT



2. *Cook County, Illinois*

Cook County, Illinois does not publicly report the use of garnishment. Lexis does, however, provide data on wage garnishment orders issued in Cook County. Figure 3 presents the number of Cook County wage garnishments reported per thousand population of Cook County from 1987 to 2003.[149] Figure 3 also provides the number of

[147] *See supra* notes 99–100 and accompanying text.

[148] *See supra* notes 99–100 and accompanying text.

[149] The 1987 rate in Figure 3 represents the rate over the final three quarters of 1987. The U.S. Census reports the population of Cook County in 1980, 1990, and 2000. For 1980 and 1990 population data, see RICHARD L. FORSTALL, U.S. CENSUS BUREAU, ILLINOIS: POPU-

bankruptcy filings per thousand population for the Northern District of Illinois,[150] the bankruptcy district which serves Cook County.[151] The results are even more striking than the Virginia statistics. The bankruptcy filing rate in the Northern District of Illinois in 2003 was over two-and-one-third times the rate of 1988.[152] The Lexis data suggest that the garnishment rate in 2003 was, however, less than one-third of what it was in 1988. In 1988, the bankruptcy rate in the Northern District of Illinois was roughly half the garnishment rate in Cook County. By 2003, the bankruptcy rate was 371% of the garnishment rate. From 1988 to 2002, garnishment and bankruptcy filings exhibited a strongly negative relationship with a correlation coefficient of -0.84.

Though these records cover only a seventeen-year period, the statistics appear comparable to those which scholars presented a generation ago. According to a student note, there were approximately 18.5 garnishment orders per thousand population in Cook County in 1972.[153] Moreover, Professor Caplovitz's data suggest that there was a similar number of garnishment orders in 1966,[154] although his failure to clearly define what constitutes "Chicago" makes it difficult to determine a precise number. According to Professor Caplovitz, "In [1966] more than 87,000 Chicago residents were garnisheed."[155] If Professor Caplovitz is referring to the City of Chicago—an area wholly con-

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LATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990 (1995), http://www.census.gov/population/cencounts/il190090.txt [hereinafter ILLINOIS POPULATION] (reporting the population of Cook county in 1980 as 5,253,655 and the population in 1990 as 5,105,067). For 2000 population data, see U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS, COOK COUNTY, ILLINOIS [hereinafter STATE AND COUNTY QUICK FACTS, COOK COUNTY, ILLINOIS], http://quickfacts.census.gov/qfd/states/17/17031.html (last visited Jan. 29, 2006) (reporting the population of Cook County in 2000 as 5,376,741). To estimate the population in intervening years I assume that the population of Cook County declined at a constant rate between 1980 and 1990 and grew at a constant rate between 1990 and 2000.

150 *See* AM. BANKR. INST., BANKRUPTCY FILING STATISTICS—FILINGS BY DISTRICT, http://www.abiworld.org/Template.cfm?Section=Filings_by_District&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=56&ContentID=3254 (last visited Jan. 29, 2006).

151 The Northern District of Illinois includes eighteen counties. *See* Northern District of Illinois, Divisional Composition by County, http://www.ilnd.uscourts.gov/CLERKS_OFFICE/GeneralInfo/Districtmap.htm (last visited Jan. 29, 2006). However, Cook County comprises roughly 5.4 million of the 8.8 million residents of the Northern District of Illinois. *See* STATE AND COUNTY QUICK FACTS, COOK COUNTY, ILLINOIS, *supra* note 149.

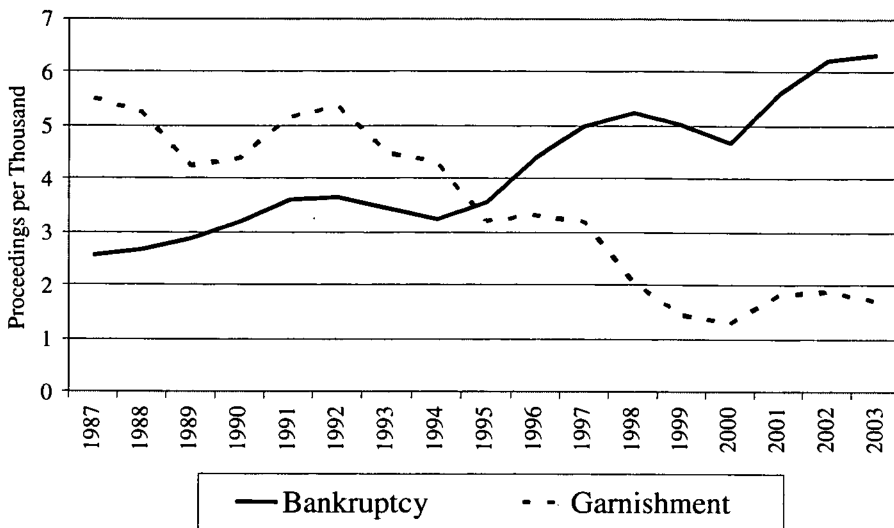
152 Comparisons are made between 1988 and 2003 because the garnishment records contain only a handful of records from the first quarter of 1987 and appear to be incomplete. *See* AM. BANKR. INST., *supra* note 150.

153 Harring reports, "In 1972 there was one garnishment for every 54 persons living in Chicago." *See* Harring, *supra* note 102, at 151. Although referring to "Chicago," Harring notes that his data are derived from the Circuit Court of Cook County. *Id.* at 151 n.70.

154 *See* CAPLOVITZ, *supra* note 24, at 2 n.5.

155 *Id.* Despite his language, it is unclear if Professor Caplovitz's statistics refer to the number of individuals whose wages were garnisbed or the number of garnishment orders. Surrounding text refers to the number of garnishment orders in a later year. *Id.* at 2 ("In

FIGURE 3: COOK COUNTY, ILLINOIS



tained within Cook County[156]—this amounts to approximately 25.8 garnishments per thousand population. If he is referring to the Chicago metropolitan area—an area larger than Cook County[157]—this is roughly 14.3 garnishments per thousand. The Lexis data suggest that there were only 1.7 garnishments per thousand in Cook County in 2003. By contrast, the bankruptcy filing rate in the Northern District of Illinois has increased from roughly 1.5 per thousand in 1966[158] to 6.3 per thousand in 2003.[159] If the Lexis database of garnishment orders is even remotely complete, it demonstrates that there has been a

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Chicago, for example, wage garnishments increased from 64,000 in 1960 to 78,000 in 1969.").

156 In 1970, the City of Chicago had a population of 3,369,357. U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING: POPULATION AND HOUSING UNIT COUNTS 613 tbl.48, *available at* http://www.census.gov/prod/cen1990/cph2/cph-2-1-1.pdf (last visited Jan. 29, 2006).

157 In 1970, the Chicago metropolitan area had a population of 6,093,287. *Id.* By contrast, Cook County had a population of 5,493,766 that year. *Id.*

158 The number of voluntary nonbusiness bankruptcies in the Northern District of Illinois for 1965–1970 were 10,590; 10,678; 9,851; 9,789; 8,473; and 8,473, respectively. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 241 tbl.F.3 (1965) [hereinafter ANNUAL REPORT 1965]; *id.* at 243 tbl.F.3 (1966) [hereinafter ANNUAL REPORT 1966]; *id.* at 287 tbl.F.3 (1967) [hereinafter ANNUAL REPORT 1967]; *id.* at 290 tbl.F.3 (1968) [hereinafter ANNUAL REPORT 1968]; *id.* at 302 tbl.F.3 (1969) [hereinafter ANNUAL REPORT 1969]; *id.* at 304 tbl.F.3 (1970) [hereinafter ANNUAL REPORT 1970]. The number of involuntary bankruptcies (both business and nonbusiness) for 1965 to 1970 was rather negligible, ranging from thirty-nine to seventy-three per year. ANNUAL REPORT 1965, *supra*, at 238 tbl.F.2; ANNUAL REPORT 1966, *supra*, at 240 tbl.F.2; ANNUAL REPORT 1967, *supra*, at 284 tbl.F.2; ANNUAL REPORT 1968, *supra*, at 287 tbl.F.2; ANNUAL REPORT 1969, *supra*, at 299 tbl.F.2; ANNUAL REPORT 1970, *supra*, at 300 tbl.F.2.

159 *See* AM. BANKR. INST., *supra* note 150.

drastic reduction in the use of garnishment over time, a finding that stands in sharp contrast to the rise in bankruptcy filings.

Even if one rejects the Lexis data as potentially unreliable, the Virginia garnishment statistics suggest that we may drastically overstate the increase in financial distress if we focus on the change in the bankruptcy filing rate during the last generation without considering the concomitant decline in the garnishment rate. The Virginia garnishment rate of 25.3 per thousand in 2004 is similar to rates in Chicago and other areas in the late 1960s and early 1970s. A study of garnishment in Los Angeles in the fiscal year ending June 30, 1968 reported a garnishment rate of approximately 23.8 per thousand population.[160] A study of garnishment in San Francisco in 1965 reported a rate of approximately 22.9 per thousand.[161]

By contrast, the bankruptcy filing rate in the corresponding bankruptcy courts was much lower than Virginia's rate of 5.3 bankruptcies per thousand in 2004.[162] In 1966, the bankruptcy rate in the Northern District of Illinois (including Cook County) was approximately 1.45 per thousand,[163] and the corresponding rates in the Northern District of California (including San Francisco) in fiscal year 1965 and the Central District of California (including Los Angeles) in 1968 were 1.23[164] and 1.91[165] respectively. This comparison, coupled with the data presented in Figures 2 and 3 above, suggests that the bank-

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160 *See* W. CTR. ON LAW & POVERTY, *supra* note 102, at 34 ("For the year ending June 30, 1968 the Marshal's and Sheriff's office served a total of 156,603 garnishments to Los Angeles County. . . ."). The population of Los Angeles County was 6,038,771 in 1960 and 7,032,075 in 1970. *See* RICHARD L. FORSTALL, CALIFORNIA: POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990 (1995), http://www.census.gov/population/cencounts/ca190090.txt [hereinafter CALIFORNIA POPULATION].

161 *See* Brnnn, *supra* note 102, at 1214 (reporting that the San Francisco Sheriff's Office served more than 3,700 levies under writs of attachment and execution during January and February 1965, and estimating that seventy-five to eighty percent were wage garnishments). The 22.9 per thousand garnishment rate in the accompanying text factors in Brunn's seventy-five percent estimate and the average of the population of San Francisco in 1960 and 1970. *See* CALIFORNIA POPULATION, *supra* note 160 (reporting a population of 740,316 in 1960 and 715,674 in 1970).

162 *See supra* notes 138, 140 and accompanying text.

163 There were 10,678 bankruptcy filings in the Northern District of Illinois in 1966. *See supra* note 158. The population served by the Northern District of Illinois was 6,877,585 in 1960 and 7,720,576 in 1970. *See* ILLINOIS POPULATION, *supra* note 149.

164 There were 9,918 voluntary nonbusiness bankruptcy filings in the Northern District of California in 1965. *See* ANNUAL REPORT 1965, *supra* note 158, at 242 tbl.F.3. The Northern District of California was split in 1966. The population of the counties that in 1965 comprised the Northern District of California was 5,586,518 in 1960 and 7,015,856 in 1970. *See* CALIFORNIA POPULATION, *supra* note 160.

165 There were 18,843 voluntary nonbusiness bankruptcy filings in the Central District of California in 1968. *See* ANNUAL REPORT 1968, *supra* note 158, at 291 tbl.F.3. The Central District of California was not formed until 1966. The population served by the counties that comprised this district was 8,001,622 in 1960 and 10,342,051 in 1970. *See* CALIFORNIA POPULATION, *supra* note 160.

ruptcy filing rate has risen much more sharply than the garnishment rate.

Obviously, a comparison of different jurisdictions is not ideal because the laws of the jurisdictions can vary in many ways. For example, in 1966 Illinois provided a more generous exemption from garnishment to its residents than Virginia provided to its residents in 2003.[166] In contrast, in 1963 California exempted only fifty percent of a debtor's earnings, but if the debtor needed the income to support his family, the state allowed the debtor to claim a complete exemption from garnishment proceedings brought to collect most debts.[167] However, only a very small percentage of debtors claimed the complete exemption.[168] Unfortunately, if one rejects the results from the Lexis database, no better comparison is currently available.

III
Has Bankruptcy's Rise Caused Garnishment's Decline?

The missing garnishments provide a puzzle for proponents of the Distress Theory of bankruptcy.[169] The Distress Theory claims that a greater proportion of Americans are in financial trouble than ever before.[170] The bankruptcy filing rate serves as one measure of the extent of financial distress, but the bankruptcy filing rate cannot be used to prove that a rise in financial distress has caused the rise in the bankruptcy filing rate. This Article focuses on another measure of financial distress: the rate at which consumers are subject to state collections proceedings. More specifically, this Article focuses on one form of proceeding, garnishment. Assuming garnishment serves as a good proxy for financial distress, the Distress Theory predicts a strongly positive correlation between garnishment and bankruptcy. This prediction of a close relationship between garnishment and bankruptcy is reinforced by the fact that prior scholarship[171] and congressional testimony[172] have cited garnishment as one of the leading

166 *See infra* Part IV.C.

167 *See* Cal. Civ. Proc. Code § 690.11 (1963), *superceded by* Cal. Civ. Proc. Code § 704.130 (1983).

168 *See, e.g.*, W. Ctr. on Law & Poverty, *supra* note 102, at 4 (reporting that only five percent of debtors claimed an exemption); Brunn, *supra* note 102, at 1217 (reporting only fifty-two exemption claims out of 1781 attachments and executions in San Francisco in February 1965). It is possible that some creditors did not seek an attachment of property that was clearly exempt, but it is more likely that many debtors did not claim an exemption that they had to affirmatively file with their claim.

169 *See supra* notes 14–15 and accompanying text.

170 *See, e.g.*, Warren, *supra* note 7, at 1 ("Over the past generation, families have become more—not less—vulnerable to economic collapse, more likely to falter in the wake of a job loss, medical problems and family break ups.").

171 *See supra* note 99 and accompanying text.

172 *See supra* note 100 and accompanying text.

triggers of bankruptcy. However, data analysis has revealed that the two series exhibit a strongly negative relationship. As the bankruptcy filing rate has increased the garnishment rate has declined.

Viewed through the lens of the Incentive Theory, however, the missing garnishments do not present a puzzle at all. The Incentive Theory claims that debtors are now more likely to use bankruptcy to avoid repaying their debts, which is essentially the same as the claim that debtors are more likely to use bankruptcy to avoid collections proceedings such as garnishment.[173] According to the Incentive Theory, the rise in bankruptcy filings may have *caused* the decline in garnishment. If a bankruptcy court discharges a creditor's claim,[174] the creditor can no longer garnish the debtor's wages, because the creditor no longer has a claim to enforce. Just the threat of a debtor's bankruptcy may be enough to deter a creditor from seeking a garnishment order against the debtor, because a creditor must pay various court costs and attorney's fees to obtain a garnishment order.[175] A creditor can generally add these fees to the debtor's bill,[176] but this will mean little if the creditor cannot even collect the amount already owed. Additionally, a creditor may be unwilling to seek a garnishment order if the creditor believes that the debtor will respond by filing for bankruptcy and discharging the creditor's claim. Thus, a sharp increase in the likelihood that consumers will seek bankruptcy protection could lead to a relative decline in the use of garnishment.

The data collected for this Article offer additional evidence for the claim that debtors in financial distress are increasingly more likely to use bankruptcy. As mentioned previously, Professors Gross and Souleles demonstrate that the probability that a debtor will file for bankruptcy has risen even after one controls for many of the factors that are likely to lead to financial distress.[177] However, recall that some scholars have criticized Gross and Souleles's study on the grounds that they may have omitted unspecified factors that lead to financial distress.[178] The Lexis data used in this Article provide a relatively direct measure of financial distress because all debtors in the sample are subject to wage garnishment and are therefore in some financial distress.

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173 *See supra* notes 12–13 and accompanying text.

174 *See* 11 U.S.C. § 727(b) (2000).

175 *See infra* Part IV.C (discussing these fees).

176 *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/12-716 (West Supp. 2005). In Illinois, the debtor is *required* to pay the costs of obtaining a garnishment order "unless . . . costs incurred by the . . . creditor were improperly incurred, in which case those costs shall be paid by the . . . creditor." *Id.*

177 *See supra* note 69 and accompanying text.

178 *See supra* note 70 and accompanying text.

This Article examines whether debtors who are subject to wage garnishment are more likely to file for bankruptcy in the ensuing year. Specifically, the Article examines one thousand Illinois debtors who were garnished in 1995 and compares them to a similar set of debtors from 2001.[179] Each debtor's name and Social Security number were searched in a database supplied by Lexis that reports bankruptcy filings in Illinois to determine if the debtor filed a bankruptcy petition within one year of the garnishment order. Because creditors may not always receive effective notice of a bankruptcy filing immediately, state courts occasionally enter a garnishment order that bankruptcy's automatic stay prohibits. Therefore, this Article also includes bankruptcy filings made within one month prior to the entry of the garnishment order.

The results suggest that debtors are more likely to file today, and thus these results complement earlier studies supporting the Incentive Theory. Of the one thousand debtors examined in 1995, approximately sixty-eight filed a bankruptcy petition within one month prior to or one year after the garnishment order.[180] Of the one thousand debtors searched in 2001, approximately 115 filed a bankruptcy petition within one month prior to or one year after the garnishment order.[181] These figures suggest that approximately 6.8% of the debtors garnished in 1995 filed for bankruptcy and that approximately 11.5% of the debtors garnished in 2001 filed. Consistent with the prediction that creditors will not seek a garnishment order if the debtor is likely to file for bankruptcy, the vast majority of garnished debtors did not file for bankruptcy.

The Incentive and Distress Theories are not, of course, mutually exclusive. The likelihood that a financially distressed debtor will choose bankruptcy may have increased, *and* the number of financially distressed debtors may have increased. To reconcile the missing garnishments with the claim that the rate of financial distress has increased dramatically, one must assume that the change in the

179 *See infra* notes 180–81. Unfortunately this Article was unable to make effective comparisons to years prior to 1995 because there were too many debtors for whom it was impossible to determine if they subsequently filed for bankruptcy.

180 These numbers include only those debtors for whom the Lexis data set provided a bankruptcy filing with a debtor who had (1) the same name and (2) either the same address or same Social Security number. Lexis provided a bankruptcy filing with the same name but did not provide a Social Security number and had a different address for eight other debtors. This problem was more acute in years prior to 1995 and prevented further comparisons.

181 These numbers include only those debtors for whom the Lexis data set provided a bankruptcy filing with a debtor who had (1) the same name and (2) either the same address or same Social Security number. Lexis provided a bankruptcy filing with the same name but did not provide a Social Security number and had a different address for thirteen other debtors.

likelihood that a creditor will pursue garnishment has declined dramatically as well. In fact, one must assume that the decline in the probability that a debtor in financial distress will suffer garnishment must more than offset the increase in the number of debtors in financial distress. In short, the change in the rate of garnishment serves as a rough test of the relative importance of the Incentive and Distress Theories. The limited evidence presented in this Article suggests that the Incentive Theory has played a greater role. This analysis assumes, however, that the rise in the bankruptcy filing rate has caused the decline in the garnishment rate. The next Part considers other possibilities.

IV
CAN WE RECONCILE THE MISSING GARNISHMENTS WITH THE DISTRESS THEORY?

This Article claims that the garnishment rate has declined in at least two jurisdictions. The Distress Theory claims that the number of Americans in financial distress has increased dramatically. If both claims are true, the rate at which creditors garnish financially distressed debtors must have fallen dramatically. The previous Part argues that this decline could have been caused by an increased willingness of consumers to use bankruptcy to avoid repaying their debts. There are, however, other reasons why creditors are less inclined to use garnishment to collect.

One can readily imagine a number of alternative explanations consistent with the Distress Theory for creditors' growing reluctance to seek garnishment. However, these intuitive explanations either lack empirical support or fail to explain the magnitude of the bankruptcy/garnishment disparity. Subpart A explains why changes in job turnover are unlikely to account for a significant number of the missing garnishments. Subpart B suggests that changes in family law also fail to explain the missing garnishments. Subpart C examines the possibility that changes in the law have made garnishment more expensive or less effective, thereby diminishing its appeal as a collection technique. Though some evidence suggests that the cost of garnishment has risen in Virginia, the increased expense does not appear to fully explain the divergence between the garnishment and bankruptcy rates. Finally, Subpart D notes that changes in lending and collections practices may partially explain the decline in garnishment. However, witbout further study, the motivations for, and magnitude of, these changes remains elusive.

A. Changes in Job Turnover

A sharp decline in job stability could, in theory, explain the missing garnishments. Before a creditor can garnish a debtor's wages, he must locate the debtor's employer. If debtors change jobs frequently enough, this search becomes cost-prohibitive. Moreover, a debtor's ability, once garnished, to quickly move to another employer drastically limits the effect of a garnishment order. Thus, a decline in job stability—even without an accompanying decline in the employment rate—could lead to a relative decline in garnishment.[182]

Has this decline in job stability actually occurred? A casual glance at the popular press of the 1990s leaves the reader with the perception that American workers have experienced a marked decline in job stability. Headline-grabbing "downsizing" spawned reports mourning the demise of long-term employment. Perhaps these reports merely sought to explain the persistence of permanent layoffs during a time of economic prosperity. They may have identified, or even fueled, a widespread perception of job instability. However, such anecdotal evidence cannot prove an increased turnover rate substantial enough to explain a significant number of the missing garnishments. The academic research fails to suggest any sea change in the degree of job stability among American workers in the 1990s. Despite inherent problems with the available data sets[183] and disputes over the proper measurement of job stability,[184] most economists agree that job stability in the American labor market has not declined drastically.[185] Even studies positing a decline in job stability in the 1990s describe a rather modest decline.[186] Generally, rising instability in some demographics

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182 Increased unemployment—as distinguished from increased turnover—could also reduce the relative number of garnishment orders by increasing the number of people in financial distress with no wages to garnish. As noted above, however, the unemployment rate has not risen markedly. *See supra* note 78 and accompanying text.

183 For example, surveys do not always ask consistent questions about job security. *See, e.g.*, David Neumark, *Changes in Job Stability and Job Security: A Collective Effort To Untangle, Reconcile, and Interpret the Evidence*, *in* ON THE JOB: IS LONG-TERM EMPLOYMENT A THING OF THE PAST? 1, 10 (David Neumark ed., 2000) [hereinafter ON THE JOB] (noting a change in the Current Population Survey in 1983).

184 *See id.* at 3–11 (describing the relevant studies).

185 *See* Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1206 (2000) ("[R]ecent studies have consistently found only a slight drop in the overall prevalence of long-term jobs."); Neumark, *supra* note 183, at 23 ("Overall, my reading of the evidence is that the 1990s have witnessed some changes in the employment relationship consistent with weakened bonds between workers and firms. Although the magnitude of these changes sometimes suggest sharp breaks with the recent past, they nonetheless indicate that these bonds have been only weakened, not broken.").

186 *See, e.g.*, David Neumark, Daniel Polsky & Daniel Hansen, *Has Job Stability Declined Yet? New Evidence for the 1990s*, *in* ON THE JOB, *supra* note 183, at 70, 101 ("In the aggregate, there is some evidence of modest declines in job stability in the first half of the 1990s . . . .").

has been offset by increased stability elsewhere. For example, the percentage of men over twenty-four years old who have worked for their current employer for at least ten years fell from thirty-eight percent in 1983 to thirty-three percent in 1998, but the corresponding figure for women increased from twenty-five to twenty-eight percent.[187] Thus, decreased job stability cannot satisfactorily explain a meaningful number of the missing garnishments.

B. Changes in Family Law

The law has long treated family law creditors differently from general contract or tort creditors. For example, although the Consumer Credit Protection Act generally allows creditors to garnish only twenty-five percent of a debtor's wages,[188] family law creditors may garnish up to sixty-five percent to satisfy support obligations.[189] Too often, however, the available collections techniques are insufficient and family law creditors go unpaid.[190] As the states' unwillingness or inability to enforce their child support awards led to "skyrocketing" federal assistance expenditures, Congress entered the field of child support enforcement.[191] In the 1980s, Congress passed two significant laws designed to help family law creditors use wage garnishment to collect on their claims. The first act, the Child Support Enforcement Amendments of 1984,[192] required that states enact certain child support enforcement procedures by the end of 1985.[193] Some of these requirements were designed to streamline garnishment by family law creditors. For example, states were required to establish procedures for accepting child support orders from other states to capture noncustodial parents who moved across state lines.[194] In addition, the Amendments required that states give family law creditors priority

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187 U.S. Bureau of Labor Statistics, Employee Tenure in 1998, Report No. 98-387, at 41 tbl.2 (1998), *available at* ftp://ftp.bls.gov/pub/news.release/History/tenure.092498.news. For further discussion of these figures, see Jacoby, *supra* note 185, at 1207.

188 15 U.S.C. § 1673(a) (2000).

189 *Id.* § 1673(b)(2).

190 The U.S. Census Bureau reports that thirty-seven percent of child support due in 2001, approximately thirteen billion dollars, remains unpaid. U.S. Census Bureau, Child Support: 2001, at tbl.1, http://www.census.gov/hhes/www/childsupport/chldsu01.pdf (last visited Jan. 29, 2006).

191 *See* Maureen Gallen, Note, *Congress Demands Stricter Child-Support Enforcement: Florida Requires Major Reforms To Comply*, 10 Nova L. Rev. 1371, 1378–79 (1986) (explaining the genesis of Title IV-D of the Social Security Act, which created a Federal Office for Child Support Enforcement).

192 Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.).

193 42 U.S.C. § 666 (2000). If a state could prove that legislation was needed to bring the state into compliance with the federal requirements, the state was given four months following the end of the first legislative session held after October 1, 1985 to pass the necessary legislation. *See* Gallen, *supra* note 191, at 1381.

194 *See id.* at 1394.

over general creditors in garnishment proceedings.[195] The second act, the Family Support Act of 1988 (FSA),[196] further facilitated garnishment by allowing custodial parents to request wage garnishment regardless of whether payments were in arrears.[197] In addition, the FSA required that any child support order issued or modified after January 1, 1994 authorize wage garnishment unless both parents and/or the court agreed to a different plan.[198]

Theoretically, these legal changes, if they dramatically increased the availability of family law garnishments, could explain some of the missing garnishments in two ways. First, even though bankruptcy will not discharge child support obligations,[199] the more effective collection of family law debts could drive more noncustodial debtors into bankruptcy by making it more difficult for them to pay their other debts. Second, the priority status granted to family law garnishments could discourage general creditors from seeking garnishment orders. Because of the gender-disparate effects of child support law, however, these changes fail to explain much of the divergence between bankruptcy and garnishment.

Statistically, the vast majority of child support orders are entered against men.[200] Thus any effect caused by the changes in family law should affect one sex more than the other. Since far more men than women will face family law garnishments, general creditors would increasingly target female debtors. Similarly, since the debtors ordered to make payments are overwhelmingly male, one should observe a major increase in the percentage of bankruptcies filed by male debtors. However, empirical evidence only weakly supports the first trend, and flatly contradicts the second.

Figure 4 suggests that the percentage of garnished debtors who are women may have risen over time. The Cook County records do not record the sex of the debtor, but they do record the debtors' names. Figure 4 presents the percentage of names that were classified as female out of the first five hundred records in each year for which a classification could reasonably be made.

Though Figure 4 suggests that the percentage of garnished debtors who are women has increased, the evidence does not necessarily suggest that changes in family law caused this change or explain a

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195 *See* VICKI LAMBERT, GARNISHMENT: A PRACTICAL GUIDE 16 (2d ed. 1999).

196 Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

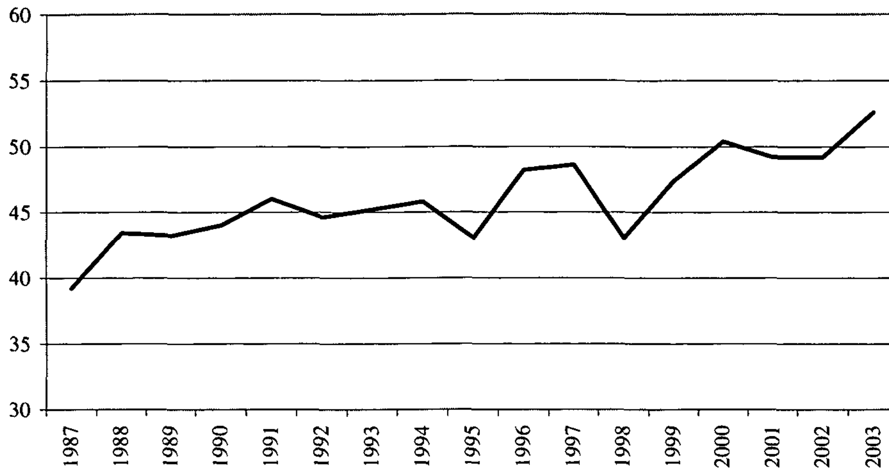
197 42 U.S.C. § 666(b)(3)(A).

198 *Id.* § 666(a)(8)(B).

199 *See* 11 U.S.C. § 523(a)(5)(2000).

200 The U.S. Census Bureau reports that in 2001 over 6.2 million women received child support awards, as compared with only 712,000 men. U.S. CENSUS BUREAU, *supra* note 190, at tbl.1.

FIGURE 4: ESTIMATED PERCENTAGE OF WOMEN AMONG GARNISHED DEBTORS



substantial number of the missing garnishments. First, while relatively more garnishees were female, the dramatic decline in garnishment orders[201] strongly suggests that the total number of women garnished fell. In 1988, there were over 26,000 Cook County garnishment orders in the Lexis database; in 2003, there were less than 10,000. Second, the relative increase of women in state collections proceedings may reflect broader societal changes. Significantly, prior research suggests that the percentage of debtors in bankruptcy who are women has risen sharply as well, a fact that is inconsistent with the theory that the missing garnishments are explained by changes in family law. According to Professor Elizabeth Warren, in 1981 women filing alone accounted for 22.1% of bankruptcies and married couples filing jointly accounted for 44.7%.[202] By 2001, women filing alone accounted for 39.0% of all filings and married couples accounted for another 32.0%.[203] Given this parallel increase in the percentage of bankrupt debtors who are women, it seems unlikely that changes in family law explain the divergence of the garnishment rate from the bankruptcy filing rate.

C. Has Garnishment Become Less Effective or More Expensive?

Garnishment is not, of course, the only collection technique that creditors have available to them. As noted above, creditors can employ extrajudicial techniques such as dunning letters, asking for other

[201] Of course, potential gaps in the Cook County data set may account for this sharp decline. Unfortunately, we do not have individual level information for Virginia.

[202] Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 27 n.38 (2002).

[203] *Id.* at 28 n.40.

remedies to enforce judgments such as the seizure of personal property, or bargaining in advance to seize assets by taking a security interest.[204] To the extent that garnishments have become much less effective or more expensive, creditors may have decided to employ other techniques. If creditors have switched to other collection techniques, a focus on garnishment orders could falsely imply that collections activity has failed to rise along with the bankruptcy filing rate. Changes in the cost and effectiveness of garnishment do not, however, suggest a shift dramatic enough to explain the marked difference between the rise in the bankruptcy filing rate and the stability or decline of the garnishment rate, since the shift away from garnishment would have to be quite significant to explain the discrepancy.

Consider first the series of cases that made prejudgment attachment more difficult to obtain.[205] While both Illinois and Virginia permit prejudgment attachments, this technique is largely limited to situations in which there is significant risk that the defendant will place her assets beyond reach,[206] and both jurisdictions require that the plaintiff post a substantial bond.[207] These limitations may be sufficient to make some forms of prejudgment attachment constitutional in these states.[208] Even if these safeguards are not sufficient to overcome the policy concerns expressed in *Sniadach v. Family Finance Corp.* so that the prejudgment garnishment of wages would be unconstitutional, *Sniadach* was decided long before the period studied in this Article.[209] Moreover, it appears that even in the 1960s the vast majority of wage garnishments were entered after the creditor obtained a judgment. A study of garnishment in Los Angeles County found that of 156,603 garnishments served (148,773 of which were wage garnishments), only 42,103 were prejudgment attachments.[210]

Next consider the amount of the debtor's wages that creditors can garnish. The federal laws regulating garnishment by general creditors have not changed significantly since 1968,[211] and therefore cannot explain the relative decline in garnishment over the last fifteen

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204 *See supra* Part II.A.

205 *See supra* notes 121–23 and accompanying text.

206 *See* 735 ILL. COMP. STAT. ANN. 5/4-101 (West Supp. 2005); VA. CODE ANN. § 8.01-534 (2000).

207 735 ILL. COMP. STAT. ANN. 5/4-107 (West 1993) (requiring a bond double the value of the "sum sworn to be due"); VA. CODE ANN. § 8.01-537.1 (2000) (requiring a bond double the value of the property sought to be seized).

208 *See, e.g.*, Keystone Builders, Inc. v. Floor Fashions of Va., Inc., 829 F. Supp. 181, 183–85 (W.D. Va. 1993) (holding Virginia attachment procedures facially constitutional).

209 *See* 395 U.S. 337 (1969).

210 *See* W. CTR. ON LAW & POVERTY, *supra* note 102, at 34.

211 In 1968, Congress passed the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1693r (2000)). Sections 1671–1677 of title 15 of the *United States Code* discuss in detail restrictions on garnishment. *See* James H. Suddeth III, Comment, *"I Can't Have My Wages Garnisheeed!"*, 50 S.C. L. REV.

years. Even though the federal limitations on garnishment were passed after the year studied by Professor Caplovitz (1967), the federal law probably does not explain much of the decline in garnishment from his day. Federal law limits garnishment to no more than the greater of twenty-five percent of a debtor's wages or the amount protected by state law.[212] When the federal law was introduced in 1968, Illinois already exempted eighty-five percent or more of a debtor's wages if the debtor earned less than $200 a week[213] (about $10,000 per year). In 1967, per capita income in Illinois was just $3,738 per year[214] and the median family income in Chicago in 1969 was $11,928.[215] Thus, many Chicago debtors were unaffected by the change.[216]

Changes in state laws that limit the amount of wages that a creditor may garnish do not seem to explain the decline in garnishment either. Virginia did not change the amount of wages it protects from garnishment during our sample period.[217] Illinois made only one minor change in this exemption during the period presented in Figure 3; in 1992, Illinois increased the exemption from the greater of eighty-five percent of the debtor's wages or thirty times the federal minimum wage[218] to the greater of eighty-five percent of the debtor's wages or forty-five times the federal minimum wage.[219] As expected, the number of reported garnishments did fall the next year, but the number also continued to fall in seven of the next eight years as well. There is little reason to think that collectors were still adjusting to the change in law almost a decade later.

Consider next the duration of a garnishment order. At one time the garnishment orders of many jurisdictions lasted only a short time. For example, in the 1960s a garnishment order in Chicago lasted only

525, 528–30 (1999) (outlining generally the state of federal law pertaining to wage garnishment).

212 15 U.S.C. §§ 1673, 1677 (2000).

213 *See* CAPLOVITZ, *supra* note 24, at 228.

214 Bureau of Econ. Analysis, Regional Economic Accounts, http://www.bea.doc.gov/bea/regional/spi (last visited Jan. 29, 2006).

215 STATISTICAL ABSTRACT: 1980, *supra* note 10, at 456 tbl.755. The median income of a four-person family was $11,912 for Illinois in 1969. *Id.* at 455 tbl.754.

216 This point has been noted by prior scholars. *See, e.g.*, Shuchman & Jantscher, *supra* note 99, at 362 (providing a statistical examination of the "effect [of the federal minimum wage exemption] on bankruptcy rates in states whose wage exemptions were raised").

217 Virginia amended its garnishment laws just once in this time period, in 1998, raising the fee for garnishment to $15 for cases involving less than $500 and $25 for all other cases. *See* 1998 Va. Legis. Serv. ch. 783, sec. 1, § 14.1-112(8) (West) (codified as amended at VA. CODE ANN. § 17.1-275(7) (2003)).

218 John T. Hundley, *Assignments of Wages in Illinois: Pitfalls for Employer Businesses*, 14 DEPAUL BUS. L.J. 21, 51 (2001) (explaining the amendment to the statute, which "increas[es] the maximum withholding period to eighty-four days").

219 735 ILL. COMP. STAT. ANN. 5/12-808 (West 1993).

thirty days;[220] if the debt was still unpaid the creditor would need to obtain a second garnishment order. By 1987, garnishment orders in Illinois could remain in place for up to eighty-four days,[221] and in 1990 Illinois changed its laws so that a garnishment order would remain outstanding until the debt was fully repaid.[222] Thus, it is possible that the decline in garnishments is more apparent than real because creditors in earlier years may have sought multiple orders to collect the same debt.

While it is impossible to divine precisely the impact of lengthening garnishment orders on the decline in garnishments since 1967,[223] changes in the duration of garnishment orders do not explain the relative decline in garnishments over the last fifteen years. First, Virginia did not change the duration of a garnishment order (from 90 days to 180 days) until March 16, 2003,[224] which is too late to explain the relative decline in the number of garnishments. Second, even at the beginning of our sample only a small number of Cook County records involve the same debtor. To determine if the large number of garnishment orders prior to 1990 merely reflects multiple entries against the same debtor, the names of two hundred debtors who had their wages garnished in January of 1988 were searched to see if additional orders were entered against them in 1988. This search uncovered an additional seventeen garnishment orders with a name and address substantially the same as one of the two hundred names searched. A similar search of two hundred debtors garnished in January of 2003 uncovered an additional nine orders from 2003. Thus, it appears that the decline in garnishments cannot be attributed to a change in the duration of garnishment orders, and it is likely that the lower number of additional garnishments in 2003 reflects the general decline in the rate of garnishment.

Even if changes in garnishment law do not explain the missing garnishments, changes in related laws, such as the rules of civil proce-

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220 *See* CAPLOVITZ, *supra* note 24, at 228.

221 *See* Hundley, *supra* note 218, at 51 ("[T]he statute does not provide that the demand lasts until eighty-four days after service, but rather *to the end of the payroll period ending immediately prior to* eighty-four days after service.").

222 1990 Ill. Legis. Serv. 86-1268 (West).

223 Professor Caplovitz seems to use the number of wage garnishments and the number of Chicago residents garnished interchangeably. For example, Professor Caplovitz states, "In Chicago, for example, wage garnishments increased from 64,000 in 1960 to 78,000 in 1969." CAPLOVITZ, *supra* note 24, at 2. He then drops a footnote, however, that reads, "The 1969 figure actually represents a decrease from the decade's peak, which occurred in 1966. In that year more than 87,000 Chicago residents were garnisbeed." *Id.* at 2 n.5.

224 *See* 2003 Va. Legis. Serv. ch. 234, sec. 1, § 8.01-514 (West) (codified as amended at VA. CODE ANN. § 8.01-514 (Supp. 2005)); Memorandum from Steven L. Dalle Mura, Dir. of Legal Research, to Gen. Dist. Court Judges (Mar. 31, 2003), http://www.courts.state.va.us/ed/updates/gdcivillegupdate2003.pdf.

dure, may have made garnishment orders significantly more expensive to obtain. For example, Professor Caplovitz suggests that a sharp increase in the fee for a confession of judgment suit in 1967 could have caused creditors with small claims to forego legal action and thus lead to a sharp decline in garnishment orders.[225] In fact, Virginia appears to have made a similarly important change in its courts in 1995.

Much of the extreme negative correlation between the garnishment and bankruptcy rates in Virginia could have been caused by the imposition of fees for service of process in 1995. Prior to 1995, a sheriff would serve process for no charge.[226] After July 1, 1995, Virginia imposed a $12 fee per defendant,[227] which, because there are two defendants in a garnishment order (the debtor and the third party), actually amounts to an increased cost of $24. In Virginia, creditors can generally add this sum to the debtor's bill,[228] and any such addition will mean little if the creditor is ultimately unable to force the debtor to pay. While $24 may not sound particularly large, it must be weighed against other initial filing costs which are generally $26 or less.[229] Though the garnishment rate remained fairly stable between calendar years 1994 and 1995,[230] the rate did fall by over three-and-a-half percent in calendar year 1996, the sharpest decline in our sample period. In fact, if one restricts the sample to the years 1996 to 2004, garnishment and bankruptcy exhibit a very weak positive correlation.[231]

One should not overstate the ability of this additional cost for service of process to explain the missing garnishments. First, the decline in garnishments appears to begin several months after the new charge came into effect. Second, the fixed cost increase from an additional charge would lead one to expect a more dramatic effect on

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225 *See* CAPLOVITZ, *supra* note 24, at 2 n.5 ("[T]he sharp increase in the filing fee for confession-of-judgment suits, which went into effect in 1967 . . . presumably discouraged creditors from trying to collect on small debts . . . .").

226 *See* PUSTILNIK ET AL., *supra* note 126, ¶ 2.105 ("Before 1995, there was no charge for service of process.").

227 *See id.* ¶ 8.302 (observing that in order to garnish a judgment debtor's wages successfully, "[t]he creditor must pay the statutory fee, which in general district court is $25 plus service of process. Since there are two defendants, each must be served at a cost of $12 per service. Thus, a garnishment costs a total of approximately $49."); *see also* Va. Sen. Bill No. 560, http://leg1.state.va.us/cgi-bin/legp504.exe?951ûl+SB560¶df (last visited Jan. 29, 2006) (stating that a fee of $12 will be assessed to any individual seeking to "summon[ ] a witness or garnishee on an attachment").

228 The standard garnishment summons used in Virginia includes garnishment costs in the total balance due. *See* VA. CODE ANN. § 8.01-512.3 (2000).

229 *See* PUSTILNIK ET AL., *supra* note 126, ¶ 7.403 ("Therefore, the base cost of a warrant in debt or motion for judgment in matters exceeding $200 is about $26, plus the cost of service of process, and $21 for smaller matters.").

230 The garnishment rate rose by 0.06%. *See supra* notes 138, 140 and accompanying text.

231 *See supra* Part II.B.1.

small claims, rather than on larger ones that potentially force debtors into bankruptcy. Third, even by restricting the sample to the years after 1996, garnishment and bankruptcy are only weakly correlated. Increases in the rate of garnishment appear to have little effect on the bankruptcy filing rate.[232]

TABLE 1: AVERAGE AND MEDIAN GARNISHMENT AMOUNTS (2003 DOLLARS)

Year	1987	1991	1995	1999	2003
Average Amount	$2,687	$2,716	$3,027	$3,718	$3,845
Median Amount	$1,780	$1,622	$1,863	$2,035	$2,441

Treatises on Illinois's collections practices fail to uncover any changes that would make garnishment more expensive or less effective.[233] Perhaps a detailed search of Illinois law would uncover important procedural changes in the 1990s that could explain some of the decline in garnishments. However, we do have data on individual claims, which presents an alternative method to determine the significance of such changes. If a legal change made it generally more costly to pursue garnishment, one would expect the most dramatic impact to fall on claims of lesser value. And, in fact, one does observe a relative decline in low-value claims. Table 1 reports the average and median dollar amounts for garnishment orders entered between June 1st and June 15th of each year. After adjusting for inflation, the average (and median) value of garnishment orders did increase significantly between 1987 and 2003. However, this increase may simply represent a rise in consumer indebtedness, or a new trend by consumers to borrow higher amounts from a single lender. Moreover, to sufficiently explain the missing garnishments, one must necessarily uncover a fairly radical decline in small claims. To test this, one needs to examine the distribution of claims in greater detail. Figure 5 shows the percentage of garnishment orders by their respective amounts.

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232 There are also other changes to Virginia civil procedure that could have reduced the garnishment rate. For example, Virginia made a series of amendments to its rules for service of process on corporations, and practitioners report that these rules made it difficult to serve corporations in 1997 and 1998. *See* RENDLEMAN, *supra* note 124, at 3–4 (2003 Supp.) ("Va. Code § 8.01-513 for garnishment service on a corporation was muddled in 1997, and amended again in 1998."). Yet even if one could somehow show that but for these changes the garnishment rate would have risen slightly, the underlying puzzle would almost certainly remain: while the bankruptcy rate rose by almost forty percent, the garnishment rate remained remarkably stable. *See supra* Figure 2A.

233 *See, e.g.*, Harold Stotland & Cindy M. Johnson, *Enforcement of Judgments*, *in* CREDITORS' RIGHTS IN ILLINOIS 3-6 to -14 (1995).

FIGURE 5: VALUE OF CLAIM (2003 DOLLARS)

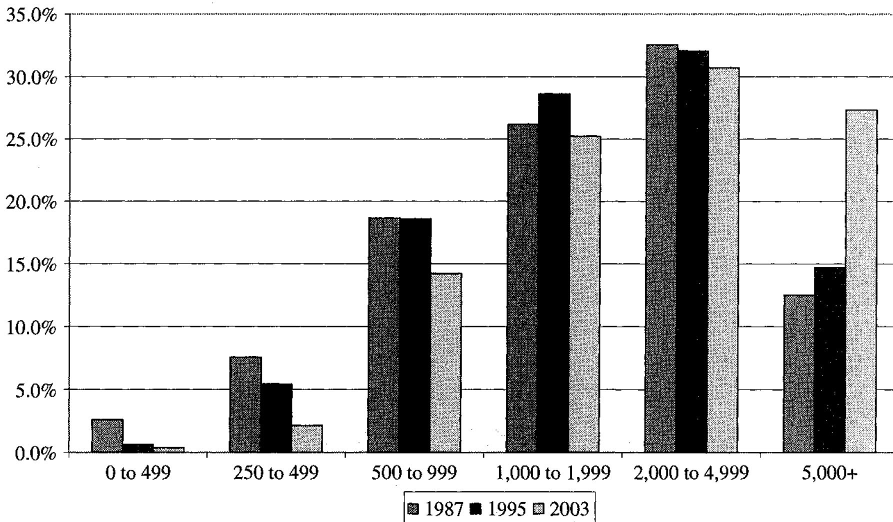

Figure 5 does not reveal a sufficiently dramatic drop in low-value garnishments to explain the fall in the garnishment rate over time. The lowest valuation claims do decline as a percentage of total garnishments, and this drop is indeed substantial when measured against the total number of garnishments filed. For example, claims of less than $250 fell from 2.6% (thirty-five orders) of the total in the first fifteen days of June of 1987 to 0.4% (two orders) of the total in 2003. In addition, the largest claims do rise as a percentage of the total; claims for over $5,000 rise from 12.5% of the total in 1987 to 27.4% in 2003. However, the total number of garnishments in Cook County declined dramatically during this period and even the number of large claims fell. Adjusted for inflation, there were 169 claims for over $5,000 in the first fifteen days of June of 1987 and 154 in the same period in 2003. While changes in the cost of obtaining a garnishment order may explain some of the decline in garnishments, one clearly needs to search for other explanations as well.

D. Have Creditors Shifted Techniques for Other Reasons?

Though changes in the cost and effectiveness of garnishment do not appear to solve the case of the missing garnishments, additional factors may have caused creditors to place more emphasis on alternative collections techniques. Unsecured creditors may make greater use of collections calls, dunning letters, and other judicial remedies such as judicial liens on the defendant's property. Alternatively, creditors may be more likely to seek these liens in advance in the form of security interests. However, these explanations are at best incomplete as one must explain why creditors have changed their collections tech-

niques. Significantly, consumers' increased willingness to choose bankruptcy may affect creditors' choice of remedy.

1. *Changes in the Collection of Unsecured Debts*

This Article focuses on one particular tool available to the unsecured creditor—garnishment. It is possible that creditors have reduced their use of garnishments in favor of other legal remedies. For example, much of the dramatic decline of Illinois garnishments may be due to a shift to another remedy, the citation to discover assets. In Illinois, a citation to discover assets goes beyond a mere discovery of the debtor's assets as the court can order the debtor or a third party to deliver any assets discovered to be applied in satisfaction of the judgment.[234] In fact, a citation to discover assets can be used to reach unpaid wages,[235] though practioner guides suggest that the wage garnishment (or wage deduction) procedure is now the preferred method for reaching unpaid wages.[236] Given the data publicly available, at this time it is impossible to verify empirically whether garnishment has been displaced by other remedies. While this Article presents the first new information in thirty years on the use of garnishment, unfortunately there is no corresponding data on the use of other judicial remedies such as citations to discover assets against the debtor's property against which to compare the reduction in garnishments.

The available evidence does, however, suggest an increase in the use of nonjudicial collections methods, such as dunning letters or telephone calls. The Bureau of Labor Statistics estimates that the number of people employed as bill or account collectors has grown markedly from 288,190 individuals in 1998[237] to 417,430 in 2003.[238]

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234 735 ILL. COMP. STAT. ANN. 5/2-1402 (West 1993).

235 *See* Kauk v. Matthews, 426 N.E.2d 552 (Ill. App. Ct. 1981).

236 *See, e.g.*, ILL. INST. FOR CONTINUING LEGAL EDUC., CREDITORS' RIGHTS IN ILLINOIS §§ 2.13–2.31 (Robert G. Markoff ed., 2004 ed.).

237 *See* Press Release, Bureau of Labor Statistics, Occupational Employment and Wages, 1998 (Dec. 22, 1999), ftp://ftp.bls.gov/pub/news.release/history/ocwage.1222 1999.news. In earlier years, the Bureau of Labor Statistics collected data only for certain industries in each given year, and thus one cannot estimate the total number of bill collectors.

238 *See* BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, NOVEMBER 2003, http://www.bls.gov/oes/2003/november/oes433011.htm (last visited Feb. 6, 2006). Industry surveys also suggest that there has been dramatic growth in the collections industry. *See* Lynn A.S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDPCA*, 17 U. HAW. L. REV. 69, 71 & n.14 (1995). These data are not conclusive, however, because some estimate that collections agencies employ as little as one percent of all individuals engaged in debt collection, with the remaining collections being conducted by attorneys or by the creditors themselves. *Id.* at 80. Others report a similar growth in consumer credit counseling. *See* WINTON E. WILLIAMS, GAMES CREDITORS PLAY: COLLECTING FROM OVEREXTENDED CONSUMERS 16 (1998) ("By early 1996, Consumer Credit Counseling offices of agencies affiliated with the National Foundation for Consumer Credit were lo-

Even accounting for the possibility that some of these additional bill collectors may have displaced others engaged in debt collection, such as attorneys, these figures suggest a substantial growth in nonjudicial debt collection. This rise in nonjudicial debt collection does not necessarily imply an increase in financial distress among debtors. Proponents of the Incentive Theory, for example, could attribute the increase to a greater willingness among consumers to default. In fact, on first examination the rise in nonjudicial debt collection makes the missing garnishments even more puzzling: Why are these additional telephone calls and dunning letters not translating into additional legal action as well?

One explanation is that the additional calls and letters serve as sufficient collection tools in and of themselves. Debtors may choose to repay to avoid further unpleasant contact, and creditors may successfully convince many debtors to repay by warning of dire consequences to their credit scores. This raises the further question of why creditors now make greater use of these nonjudicial collections techniques. One possible answer is suggested by the Incentive Theory. If consumers are more likely to file for bankruptcy when they face a garnishment order, creditors will logically shift to a greater reliance on telephone calls and letters in order to prevent such an occurrence. But to reconcile the missing garnishments with the Distress Theory of bankruptcy, one must find some other explanation for the rise in the use of debt collectors.

A focus on debtor-creditor law, at least at the national level, should lead one to predict that the use of outside debt collectors should have *declined*. The Fair Debt Collections Practices Act (FDCPA), enacted in 1977,[239] prohibits various forms of harassment.[240] In 1987 Congress amended the FDCPA to remove the exemption initially granted to attorneys,[241] and in 1995 the Supreme Court made it clear that no residual exemption remained.[242] To the extent that these changes made nonjudicial collections techniques

cated in over 1200 cities and towns in the United States and Canada, having increased sixfold from only some 200 locations in 12 years."); *see also* Caroline E. Mayer, *Debt Collectors' Tactics Drawing More Complaints*, WASH. POST, July 28, 2005, at A1 (reporting that the number of firms buying consumer debt has risen from "about a dozen firms in 1996 to more than 500 [in 2005]").

239 Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o (2000)).

240 *See, e.g.*, 15 U.S.C. § 1692c(a)(1) (2000) (communicating at a time known to be inconvenient to the consumer); *id.* § 1692d(1) (using the threat of violence); *id.* § 1692d(2) (using obscene or profane language).

241 Attorneys were originally excluded from being "debt collectors" under the Fair Debt Collection Practices Act § 803(6)(F). However, in 1986, Congress abolished the exemption for attorneys. *See* Pub. L. No. 99-361, 100 Stat. 768 (1986).

242 *See* Heintz v. Jenkins, 514 U.S. 291, 299 (1995) ("[T]he Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity. . . .").

more expensive or less effective, one might presume that they would make judicial collections techniques, like garnishment, more attractive.

The subsequent changes in the FDCPA may, however, have partially caused the decline in garnishments, by driving attorneys out of the collections business. By no longer exempting attorneys, the change in the law could have made collections agencies relatively more attractive in comparison, or simply more available given a reduced selection. This shift could result in a relative decline in garnishments if collections agencies are less likely to seek garnishment orders than are lawyers.

Technological changes could have exacerbated this shift. The past ten to fifteen years have witnessed radical changes in the technology of debt collection. Innovations such as predictive dialing have allowed extrajudicial collections efforts to become more automated and thus more cost-effective. If these technological advances have made extrajudicial collection relatively less expensive or more effective, they could have caused a shift away from judicial collection tools such as garnishment. While further research is needed, at this time the missing garnishments continue to pose a challenge to the Distress Theory of bankruptcy.

2. *Changes in Credit Markets*

Consumer credit markets have changed significantly over the last generation, and these changes could help explain the relative decline in garnishment.

a. *Increase in Availability of Credit*

Commentators often cite rising levels of consumer debt as the cause of the increase in bankruptcy filings.[243] However, the increased availability of credit may actually help explain the relative decline in garnishment. Economic theory suggests that credit allows consumers to better withstand temporary setbacks by borrowing to meet their short-term needs.[244] In the past, if consumers had very limited access to credit, they may have been more likely to default on unexpected

243 *See, e.g.*, CALDER, *supra* note 85, at 291–94 (examining the proliferation of consumer credit, which has "turned America into a nation of bankrupts"); Sommer, *supra* note 82, at 36 ("[B]ankruptcies went up dramatically because consumer debt went up dramatically."); Kowalewski, *supra* note 31, at 13–14 (discussing various studies that reveal the strong correlation between the increased incidence of consumer bankruptcy filings and rising debt levels).

244 Some have argued that almost any form of debt relief reduces welfare because it restricts the availability of credit. *See, e.g.*, Athreya, *supra* note 71, at 1569 (concluding that the complete elimination of bankruptcy as a means for debt relief would result in a substantial increase in welfare).

obligations, thereby leading to more garnishments. Of course, one must weigh the ability to use credit to withstand temporary shocks against the possibility that the additional debt would only deepen the consumer's financial crisis.

b. *A Rise in Secured Lending*

Creditors who have bargained in advance for a security interest in the debtor's property may not need to garnish wages to collect their debt. Subject to important limitations,[245] secured creditors can seize and sell their collateral and apply the proceeds to satisfy their debts. Sometimes, however, the sale of the collateral will yield too little, and the creditor will seek to recover the deficiency by using the standard techniques for collecting unsecured debt, including garnishment. In fact, judging by the names of the creditors in the Lexis database, a significant number of secured creditors do seek garnishment orders.[246] Even so, a rise in secured lending may obviate some of the need for garnishment.

There is substantial evidence suggesting that the use of secured lending (and foreclosure) has risen. One trade group association estimated that "between 1998 and 2002 the number of cars repossessed nationally doubled from 1.2 million to around 2.5 million."[247] According to another, the home mortgage foreclosure rate has tripled in the last twenty-five years,[248] though much of this increase occurred outside of the period studied by this Article. The home mortgage foreclosure rate was 0.9% in 1990 and 1.3% in 2003.[249]

The decreased incidence of garnishment may be explained by seeing the rise in secured lending as coming at the expense of unsecured credit, rather than at the expense of other forms of financing, like leasing. A rise in home foreclosures would not, for example, explain the missing garnishments if these foreclosures would have represented evictions in an earlier era. Similarly, a rise in the foreclosure on automobile loans would not explain the missing garnishments if the automobiles would have been leased in prior years; however, auto-

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245 *See, e.g.*, Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1991) (examining the impact of various laws that limit the ability of a mortgage creditor to foreclose on a property).

246 A significant number of creditors listed on the garnishment orders appeared to be automobile dealers or at least automobile lenders. Others were clearly furniture stores. These creditors frequently take a security interest in the automobile or furniture.

247 Adam Fifield, *For the Repo Man, These Are Good Times: The Sluggish Economy Makes for Busy Nights in a Ticklish Job*, PHILA. INQUIRER, Dec. 29, 2002, at A1.

248 *See* Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 404 & n.9 (2004).

249 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 2004–2005, at 745 tbl.1179, *available at* http://www.census.gov/prod/www/statistical-abstract-2001_2005.html (last visited Feb. 6, 2006).

mobile leasing became relatively more common during the period studied.[250]

Even though secured lending may have become relatively more important, this does not necessarily explain the missing garnishments because one must also ask why secured lending has become more common. If, for example, lenders have demanded security interests as a response to a rising bankruptcy filing rate, the rise in secured lending is largely consistent with the Incentive Theory of bankruptcy.[251]

c. *Changes in the "Type" of Creditor*

As discussed in Part II, unsecured creditors must make a number of decisions when deciding how to collect, and there are good reasons to believe that different creditors will adopt very different strategies. Larger creditors, such as banks issuing credit cards, may, for example, make greater use of extrajudicial collections efforts like telephone calls because their size allows them to employ technologies that yield economies of scale.[252] These and other creditors may prefer less aggressive techniques so that they may maintain a reputation for leniency. For example, nonprofit hospitals may feel compelled to appear lenient lest regulators challenge their nonprofit status.[253] Creditors with easy access to a credit-reporting agency may prefer to simply report any default and allow the threat of a damaged personal credit score to induce debtors to repay. Still other creditors may prefer to invoke extremely aggressive remedies so that they may lend to higher risk debtors. To the extent that the market share of creditors who are likely to use garnishment has decreased, this could help explain the relative decline in garnishment.

The prior literature does suggest that certain types of creditors are disproportionately represented in state court, though this evidence is quite dated and somewhat problematic. For example, these studies may only distinguish between collection agency claims and

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250 Approximately 5.7% of new cars were leased in 1990, and this number rose to 26.7% in 1998 before falling to 22.1% in 2003. *See* BUREAU OF TRANSP. STATISTICS, NATIONAL TRANSPORTATION STATISTICS 2004 tbl.1-17, http://www.bts.gov/publications/national_transportation_statistics/2004/html/table_01_17.html (last visited Feb. 6, 2006).

251 Note that if the rise in secured lending has caused a decline in garnishments, tbis fact would have interesting implications for the predatory lending literature because commentators have long argued that garnishments have strongly negative consequences.

252 Note that other creditors may be able to capture these economies of scale by assigning their claims to collections agencies.

253 *See, e.g.*, Lucette Lagnado, *A Nonprofit Hospital Fights To Win Back Charitable Halo*, WALL ST. J., June 29, 2004, at B1 (claiming that the hospital "swor[e] off most, if not all, lawsuits and other aggressive debt-collection tactics against debtor patients" in order to "regain its reputation and persuade authorities that it still genuinely deserves its tax-exempt status").

claims by the original creditor rather than specifying the type of the original claim.[254] The one study that attempts to identify the source of the original claim was based on a small sample of cases drawn from unidentified collections attorneys,[255] and it is impossible to determine if the results reflect the general marketplace or the particular clientele that these attorneys serve. Further research should update and improve these studies.

When interpreting the results of this future research, one must remember that the relative decline in garnishment may both affect and be affected by changes in the market share of various creditors. For example, one prior study found that restrictions on wage assignment led to a significant increase in borrowing from credit unions because credit unions are able to use payroll deductions as a substitute for wage assignment.[256] Similarly, if the changes in bankruptcy law or use make it much more difficult for creditors to collect by wage garnishment, creditors who favor other remedies may gain a competitive advantage. Thus, future research in this area will need to address difficult issues of endogeneity.

CONCLUSION

The rapid and continuing rise of the bankruptcy filing rate has long dominated the consumer finance literature and the accompanying policy debates. Proponents of the recent bankruptcy reforms argued that the current generation is too willing to use bankruptcy to walk away from its obligations.[257] Most bankruptcy scholars opposed these reforms, in part because they believe that the filings are caused by efforts to collect a rising consumer indebtedness, which in turn is caused by overly aggressive and under-regulated creditors.[258] These scholars would instead invoke a host of reforms designed to control the "consumer-credit monster."[259]

Despite bankruptcy's dominance of the consumer finance literature, most consumers who do not pay their loans do not file for bankruptcy.[260] Unfortunately, it is difficult to find reliable information on those debtors who do not file. Although the number of individuals who are subject to state court collections proceedings would provide

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254 *See* W. CTR. ON LAW & POVERTY, *supra* note 102, at app. C.

255 *See* Harring, *supra* note 102, at 152 n.74.

256 *See* Villegas, *supra* note 81, at 64–66.

257 *See generally supra* Part I.A (discussing the Incentive Theory's approach to explaining the eightfold increase in the number of bankruptcy filings since the passage of the Bankruptcy Act of 1978 and 1994).

258 *See generally supra* Part I.B (discussing the Distress Theory, whose proponents do not support the bankruptcy reforms proposed in Congress).

259 *See* Warren, *supra* note 7, at 38.

260 *See supra* note 17 and accompanying text.

insight into this group, no federal office collects these data. As a result, the use of collections proceedings has not been systematically studied by scholars in a generation.

This Article takes a first step in studying modern state collections, and the results of widening our lens beyond bankruptcy are striking. While the bankruptcy filing rate has risen sharply over the last ten to fifteen years, the rate at which creditors use a common judicial collections device, garnishment, appears to be falling.[261] Perhaps the missing garnishments will not surprise those who claim that the increase in bankruptcy filings reflects an increased willingness of consumers to file. If a consumer uses bankruptcy to discharge his obligations, he is no longer subject to a state court judgment or garnishment order. But the missing garnishments do present a more serious challenge to the claim that the increase in bankruptcy filings reflects an increase in financial distress.

If the rise in bankruptcy filings largely represents an increase in financial distress, then the garnishment rate should have risen, not fallen. Indeed, scholars have long cited garnishment as one of the key triggering events of bankruptcy.[262] Perhaps the missing garnishments can be reconciled with the Distress Theory of bankruptcy, and indeed, this Article examines a number of alternative theories that try to do so. Unfortunately, these theories are either incomplete or lack empirical support at the present time.

This Article does not claim to have definitively proved that the Distress Theory plays little role in explaining the increase in bankruptcy filings. Future research may explain why the bankruptcy rate has risen sharply at a time when the garnishment rate has fallen or may secure sources of new data that reveal that the jurisdictions studied in this Article are somehow not representative of the nation as a whole. What future research will show, however, is a matter of speculation. In the interim, we are left with the data we do have. These data suggest that the rise in the bankruptcy filing rate may sharply overstate any increase in financial distress.

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261 *See supra* Part II.B.

262 *See supra* note 99 and accompanying text.