# COMMON-LAW BANKRUPTCY SYSTEMS: SIMILARITIES AND DIFFERENCES

NATHALIE MARTIN*

History cannot be the only factor that determines which bankruptcy system and debtor-creditor philosophy a country develops. If it were, England, the United States, Canada, and Australia, would all have adopted very similar bankruptcy philosophies and laws, because they all grew from the same English legal history. Yet all these systems are unique, presumably for cultural and economic reasons.[1] Marked differences in both philosophy and practice distinguish American personal and business bankruptcy from that of other common law countries.[2]

Despite large-scale transplantation of English law into the United States, long after the Revolutionary War, the United States diverged from England in the area of bankruptcy, for economic and philosophical reasons. The United States never adopted the English's unforgiving and highly administrative bankruptcy process,[3] although both Australia and Canada did adopt the English system. The focus in the United States instead was on balancing the desires of creditor groups and debtor

* Associate Professor of Law, University of New Mexico School of Law. The author thanks Karen Gross, Frederick Hart, and Christian Fritz for their comments on earlier drafts of this article, and Richard Moran, Stephanie Schaeffer, and Jennifer Breakell for their research assistance. I also thank my editor, Jac Calabro, for his fine editorial assistance.

[1] All the countries discussed in this article have relatively lenient personal bankruptcy systems by world standards. *See* Rafeal Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L.J. 81, 88–90 (2002). Other countries that have more lenient personal bankruptcy systems, besides the U.S., England, Canada and Australia, include Hong Kong, New Zealand, Taiwan, Russia, Scotland and the Netherlands. Virtually all of these countries impose a chapter 13-like payment plan on at least some bankruptcy debtors before granting them a discharge. *Id*.; *see, e.g.*, Leslie Burton, *An Overview of Insolvency Proceedings in Asia*, 6 ANN. SURV. INT'L & COMP. L. 113, 117 (2000) (attributing lack of stigma attached to bankruptcy proceedings in Hong Kong to cultural implications of long standing market economy); Paul B. Lewis, *Trouble Down Under: Some Thoughts on the Australian-American Corporate Bankruptcy Divide*, 2001 UTAH L. REV. 189, 212–17 (2001) (contrasting differences between American social benefit approach to bankruptcy and Australia's adoption of creditor's bargain approach).

[2] These differences are particularly surprising as between the U.S. and England. *See* DAVIS SKEEL, DEBT'S DOMINION 90 (Princeton U. Press 2001) (highlighting divergence between American and English bankruptcy law in nineteenth century, despite former initially mimicking latter); *see also* Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 889 (2003) (suggesting U.S. should follow bankruptcy practice of Canada and parts of Europe and limit individuals to debt relief through mandatory payment plans); Michael J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 685 (1998) (stating U.S. is "extremely unusual" in its debtor-friendly stance).

[3] *See* SKEEL, *supra* note 2, at 2 (stating American and English bankruptcy law are markedly different and outlining administrative process in England); s*ee also* Lewis, *supra* note 1, at 203 (illustrating even at Constitutional Convention, American government sought to avoid harsher punishments provided for in England's bankruptcy law, namely death); G. Stanley Joslin, *The Philosophy of Bankruptcy–A Re-Examination*, 17 U. FLA. L. REV. 189, 194 (1964) (distinguishing American bankruptcy practice from England's in granting of exemptions).

groups, and promoting commerce.[4] To this day, an American bankruptcy debtor's freedom of choice about whether to liquidate or reorganize remains a key component of United States bankruptcy law,[5] one that is only recently being replicated around the world.[6] While in most parts of the world business failure causes less stigma than personal financial failure, both forms are viewed far more negatively in England, Australia, and Canada than in the United States.

English bankruptcy law, like that of most of the world, requires that a government official review each bankruptcy case in great detail, and also review each debtor's behavior with great scrutiny, to decide whether to grant or deny a discharge.[7] In a sense, the debtor is presumed *not* to be entitled to such a discharge unless the government official can be convinced otherwise. A similar penal flavor colors the bankruptcy laws of Australia, and even to some extent, Canada, despite that these are the most lenient bankruptcy systems in the world, outside the United States.[8]

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[4] *See* SKEEL, *supra* note 2, at 1–2 (explaining several benefits granted to debtors under U.S. law not available elsewhere); *see also In re* The V Companies, 292 B.R. 290, 296 (B.A.P. 6th Cir. 2003) (stating that allowing creditor standing furthers Congress' interest in balancing interests of debtors and creditors) (citing Canadian Pacific Forest Products, Ltd. v. J.D. Irving, Ltd. (In re The Gibson Group), 66 F.3d 1436, 1440–41 (6th Cir. 1995)). *But see* Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 296 (1994) (explaining pro-agrarian Republicans opposed bankruptcy because it encouraged merchant and finance capitalism).

[5] *See* SKEEL, *supra* note 2, at 1–2 (explaining U.S. bankruptcy law benefits debtors by providing them choice of turning assets over to court for discharge or keeping them and making payments under rehabilitation plan); *see also* C.R. Bowles & John Egan, *The Sale of the Century or a Fraud on Creditors?: The Fiduciary Duty of Trustees and Debtors in Possession Relating to the "Sale" of a Debtor's Assets in Bankruptcy*, 28 U. MEM. L. REV. 781, 797 (1998) (stating courts will normally defer to debtors preference to reorganize their business as opposed to liquidating); Nicholas L. Georgakopoulous, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 74 (2002) (illustrating difficulties faced in choosing between reorganization or liquidation when false prices are involved).

[6] *See* Julia M. Metzger & Samuel L. Bufford, *Exporting United States Bankruptcy Law: The Hungarian Experience*, 21 CAL. BANKR. J. 153 (1993) (noting how other countries are looking to U.S. for example of working bankruptcy system); *see also Up from the Ashes: Bankruptcy–America v. Europe*, THE ECONOMIST (London), Mar. 23, 2002, at 74 (noting that England and rest of Europe are moving toward American-style bankruptcy systems). Other countries are also examining Article 9 of the Uniform Commercial Code. *See* Daniel E. Allen, *Personal Property Security Interests in Australia–A Long, Long Trail A-Winding*, 106 DICK. L. REV. 145, 147 (2001) (discussing how New Zealand, Canada, Australia and even England, are looking to Article 9 of American Uniform Commercial Code to solve few nagging problems with personal property security systems in their own countries' laws). European and other societies are becoming more American in other ways as well. *See* James A. Morone & Janice M. Goggin, *Health Policies in Europe: Welfare States in a Market Era*, 20 J. HEALTH POL. POL'Y & L. 557, 563 (1995) (noting England immigration has led to many of same political questions faced in America for years and England and other European nations may soon be "Americanized").

[7] *See* SKEEL, *supra* note 2, at 2 (stating same); *see also* Douglas G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 79–82 (1982) (explaining role of both official receiver and public examination in English bankruptcy law with respect to discharge); Gabriel Moss, *Comparative Bankruptcy Cultures: Rescue or Liquidation? Comparisons of Trends in National Law—England*, 23 BROOK. J. INT'L. L. 115, 118 (1997). (illustrating role of English receiver generally involved running entire business after "floating"charge was recognized).

[8] *See* Efrat, *supra* note 1, at 100–01 (listing Canada and Australia among nations author deemed to have "liberalized" fresh start policies); Lewis, *supra* note 1, at 195–96 (explaining role of administrator in Australian bankruptcy proceedings and personal liability that can be assigned to any officer violating this

This essay briefly compares the structures of the bankruptcy systems of England, Australia, and Canada to those of the United States, and then attempts to explain how and why these divergent systems developed, despite their similar history. Part I describes the historical roots of the English bankruptcy system, as well as attitudinal remnants of this history in English society today.[9] Part II briefly describes the structure of the personal bankruptcy systems of each of the countries discussed here: England, Australia, and Canada;[10] and Part III briefly describes the reorganization systems of each of these countries.[11] Part IV attempts to explain how these differences developed.[12] This section asks whether these systemic differences reflect merely historical, cultural and economic differences, whether they reflect divergent societal goals, or whether they have developed largely by chance. This essay ultimately concludes that all of these factors play a part in explaining these differences.[13]

While this essay briefly compares the bankruptcy laws on the books in each of the countries mentioned above, it recognizes that doctrinal comparisons of the law rarely shed light on the way law actually operates.[14] Functional comparisons require empirical data regarding how these systems operate, not merely what law is reflected on the books.[15] This essay does not gather or report on this type of data,[16] but instead simply asks why countries with similar economies and to some extent, histories, would not enact similar bankruptcy systems on their books.[17]

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relationship); Sean Dargan, Note, *The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law*, 17 CONN. J. INT'L L. 107, 108–09 (2001) (noting similarities between Canadian and U.S. bankruptcy laws but explaining Canadian bankruptcy proceedings are more closely aligned with English bankruptcy law.

[9] *See infra* notes 18–46 and accompanying text.

[10] *See infra* notes 47–136 and accompanying text.

[11] *See infra* notes 137–219 and accompanying text. This Article does not describe the U.S. bankruptcy systems, as it is written primarily for U.S. audiences. For an excellent summary of the American consumer bankruptcy system, written primarily for Canadian readers, see Jean Braucher, *Options in Consumer Bankruptcy: An American Perspective*, 37 OSGOODE HALL L. REV. 155 (1999).

[12] *See infra* notes 220–69 and accompanying text.

[13] *See id*.

[14] Lynn M. Lopucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267, 270 (1994) (stating same). While these scholars suggest that readers of comparative law works prefer functional comparisons to merely legal comparisons both can be useful, the latter to compare how systems of law actually function, and the former to ask why countries and regions *enact* the laws that they do.

[15] *Id*. (stating same).

[16] This essay will, however, report on the findings of Professors and Triantis, who did such a functional study of U.S. and Canadian reorganization systems. *See infra* notes 138–42 and accompanying text.

[17] Naturally, this means that the laws of some of the countries described here may operate quite differently than what one would assume by simply reading the books.

## I. THE ROOTS OF COMMON LAW INSOLVENCY: ENGLAND'S HARSH BANKRUPTCY LAWS AND THEIR MODERN-DAY ATTITUDINAL REMNANTS

Unlike the United States, England never had to sprint to create a commercial economy.[18] Thus, from its inception, English bankruptcy had a very different emphasis and flavor than did early American bankruptcy law.[19] England's first bankruptcy law was enacted in 1543.[20] The preamble to this statute described the bankruptcy debtor as an anti-social, immoral, character who regularly took advantage of others.[21] The law itself was designed solely for the benefit of creditors and was virtually criminal in nature.[22] Bankruptcy was something creditors "did" to the debtor, an involuntary social condition to which a naughty user of credit was subjected against his will.[23] Not surprisingly, then, early English bankruptcy laws

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[18] Like many other European nations, it developed its commercial economy over a long period of time, with typical ebbs and flows but continued growth from 1805, at the early beginnings of the industrial revolution, to the present. *See* Bruce G. Carruthers & Terence C. Halliday, 74 AM. BANKR. L.J. 35, 57 (2000) (discussing later obstacles affecting English bankruptcy); *see also* Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AMER. BANKR. INST. L. REV. 5, 5–8 (1995) (describing early English influence on American bankruptcy).

[19] *See* Tabb, *supra* note 18, at 7 (noting harshness of early English bankruptcy); *see also* Paul B. Lewis, *Can't Pay Your Debts Mate? A Comparison of the Australian and American Bankruptcy Systems*, 18 BANKR. DEV. J. 297, 298 (recognizing early English bankruptcy law did not assist honest but unfortunate debtor). English law was hardly unique at the time in its tough treatment of bankruptcy debtors. Common punishments around the world "included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment and death." Tabb, *supra* note 18, at 7. Early stories claim that in Rome, creditors were permitted to carve up the body of a debtor. *Id*; *see also* St. George Tucker, 2 WILLIAM BLACKSTONE'S COMMENTARIES 471 (Augustus M. Kelley 1969) (describing Roman bankruptcy law where "the creditors might cut the debtor's body into pieces, and each of them take his proportionate share").

[20] *See* E. BALDWIN, A TREATISE UPON THE LAW OF BANKRUPTCY AND BILLS OF SALE 1 (Stevens & Hayes 1890) ("The earliest English statute relating to bankruptcy, as we now understand the term, was passed in the year A.D. 1542 . . . ."); Robert Weisberg, *Commercial Mortality, The Merchant Character, and the History of the Voidable Preference,* 39 STAN. L. REV. 3, 21 (1986) (discussing statute); *see also* Lewis, *supra* note 19, at 298–99 (describing provisions of 1542 bankruptcy statute, passed under Henry VIII).

[21] *See* Weisberg, *supra* note 20, at 21. The Preamble stated:

> Where divers and soondry persones craftelye obteyning into theyre hands greate substaunce of other mennes goods doo sodenlie flee to partes unknowne or kepe theyre houses, not mynding to paie or restore to any of theyre creditours theyre debtes and dueties, but at theyre owne willes and pleasures consume the substaunce obteyned by credyte of other men, for theyre owne pleasure and delicate lyving, againste all reasone equity and good conscience . . .

*Id.* (quoting 34 & 35 Hen. 8, c. 4 (1542-43) (Eng.)); *see also* BLACKSTONE'S, *supra* note 19, at 477 (noting that "the law is extremely watchful to detect a man whose circumstances are declining . . . as early as possible: that the creditors may receive as large a portion of their debts as may be . . . a man may not go on wantonly wasting his substance.").

[22] *See* Weisberg, *supra* note 20, at 21 (observing that English bankrupts historically committed "acts of bankruptcy"); *see also* BALDWIN, *supra* note 20, at 1–2 ("It is evident that, under all bankruptcy law, a debtor. . . was deemed an offender against the criminal laws of the country; and the law seems at that time to have been administered with considerable severity and harshness. . . ."); Thomas E. Plank, *Bankruptcy And Federalism,* 71 FORDHAM L. REV. 1063, 1078 n.60 (2002) (noting imprisonment of debtor important creditor collection device).

[23] *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AMER. BANKR. L.J. 325, 336 (1991). Tabb writes:

were filled with penalties and punishments for non-payment, the most well known of which was to "suffer as a felon, without the benefit of clergy," a polite phrase for the death penalty.[24] While few were actually subject to death for failing to pay one's bills, debtors' prison was common,[25] as was being shunned by society in Dickensian fashion.[26]

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> [I]n 1542 Parliament enacted the first English bankruptcy law, 34 & 35 Henry 8, chapter 4, entitled 'An act against such persons as do make bankrupts.' As the title indicates, the act was not passed with any heed for the interests of the debtor. Instead, it was intended to give creditors a further collection remedy. The new remedy lay against all fraudulent and absconding debtors (but not merely unfortunate debtors), referred to throughout the act as 'offenders.' This act, along with all of the early bankruptcy laws, was quasi-criminal in nature, and provided for the imprisonment of the offender if necessary. A British commentator notes that 'the law seems at that time to have been administered with considerable severity.' Under this act (and for almost three centuries hence) bankruptcy was purely involuntary as to the debtor. The right to commence a bankruptcy proceeding rested solely in the hands of the creditors of the debtor. This limitation was perfectly consistent with the rationale of the act, which was to protect creditors and thus facilitate commerce. Upon notice the various assets of the debtor were seized, appraised, and sold, and the proceeds were distributed pro rata to all creditors proving just claims.

*Id*.; *see* GEORGE CRABB, A HISTORY OF ENGLISH LAW 467 (Fred B. Rothman & Co. 1971) (1831) (discussing preamble and statute further); *see also* BLACKSTONE'S, *supra* note 19, at 472, n.e (describing semantic origin of title, "An act against such persons as do make bankrupts").

The first voluntary bankruptcy in England was passed in 1844 and applied to traders only. *See* Tabb, *supra* note 18, at 16–17 (stating Bankruptcy Act of 1841 allowed involuntary and voluntary bankruptcy). This was extended to non-merchants in 1861. *See* BALDWIN, *supra* note 20, at 1 ("[W]hilst those of the Act Elizabeth applied solely to traders, a distinction indeed which existed down to the year 1861.").

[24] *See* Tabb, *supra* note 18, at 336 (stating same). *But see* Weisberg, *supra* note 20, at 5–7 (discussing 1697 treatise and Defoe's impact on society). In his *Essay on Projects*, D. DEFOE, AN ESSAY UPON PROJECTS, FROM THE EARLIER LIFE AND THE CHIEF EARLIER WORKS OF DANIEL DEFOE (H. Morley ed. 1889), Defoe sets out public sentiment concerning the laws of England.

> [The laws are] generally good, and above all things are temper'd with Mercy, Lenity, and Freedom. But bankruptcy law has something in it of Barbarity; it gives loose to the Malice and Revenge of the Creditor, as well as a Power to right himself, while it leaves the Debtor no way to show himself honest: it contrives all the ways possible to drive the debtor to despair, encourages no new Industry, for it makes him perfectly incapable of anything but starving.

*Id.* Sentiments such as Defoe's clearly show that society, as a whole, was conscious of the ill effect the law had on the average bankrupt. *See generally* John C. McCoid II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 362–66 (1988) (discussing DeFoe, his essays and proposals for bankruptcy).

[25] *See* Tabb, *supra* note 18, at 7 (noting prevalence of imprisonment for over 600 years). As an example of how harsh the "bankrupt" was treated by the early British code, consider that a nonconforming bankrupt was subject to the death penalty and that to obtain a discharge the bankrupt had "to (i) secure a certificate of conformity from a majority of 'bankruptcy commissioners,' (ii) obtain such a certificate from four-fifths of creditors, in value and number, and (iii) swear that the creditor certificates 'were obtained fairly and without fraud.'" Peter V. Pantaleo, *Basic Business Bankruptcy 1992, in* PRACTISING L. INST., COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 11 (1992); *see also* Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 262 B.R. 412, 416 (B.A.P. 6th Cir. 2001) (addressing use of imprisonment as punishment for debtors in early America).

[26] For an example of Britain's historical perception of bankruptcy in the nineteenth century, one should read Dickens' "Little Dorrit." The story is about a father and his family living and growing up in a debtor's prison (Swansea). Dickens' tale is not unlike Defoe's sentiment in *supra* note 24. Essentially, the bankrupt was treated like a leper, and the prison was like a leper colony. Mr. Dorrit, finally gets out of prison, after

There initially was no debtor discharge, though there was plenty of credit, even as early as the 1600's.[27] The first debtor discharge was introduced in the Statute of Anne in 1705, but this provision was only in place for three years.[28] The debtor discharge later became part of the permanent law, but was granted only upon application rather than automatically, and only after the debtor proved that he had been honest and had cooperated with creditors.[29] Until 1705, a bankruptcy discharge was only available to merchants, as credit was seen as unnecessary and even fraudulent if obtained outside the commercial context.[30] Unlike the early American economic climate, in which every man was seen as a potential merchant who could

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receiving a windfall in inheritance, spends it all, and then dies before being forced to return to debtor's prison. The story's main focus is on how bankruptcy impacts the family unit, and how it is truly punitive in nature. *See* CHARLES DICKENS, LITTLE DORRIT (Penguin Books 1995) (1857); *see also* Nordberg v. Arab Banking Corp. (*In re* Chase & Sanborn Corp.), 904 F.2d 588, 593 n.10 (comparing debtor's current situation to harsh conditions in debtor's prison). *See generally* Larry M. Wertheim, *Dickens' Lesser Lawyers*, 46 S.D.L. REV. 695, 699–701 (2000) (summarizing Dickens novel and social themes reflected in it).

[27] *See* Tabb, *supra* note 23, at 330 (stating right to commence bankruptcy proceeding rested with creditors); *see also* Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 226–28 (1976) (outlining history of English bankruptcy law and lack of debtor discharge). *See generally* Louis E. Levinthal, *The Early History of English Bankruptcy* Law, 67 U. PA. L. REV. 1, 4–5 (1919) (discussing evolution of early English bankruptcy law).

[28] *See* Tabb, *supra* note 23, at 333. Tabb also notes that discharge was not automatic. The bankrupt needed to receive a "certificate of conformity." To receive this, the bankrupt needed to voluntarily surrender to an examination by the court, full disclosure, and delivery of all the bankrupt's assets to the court. The court maintained the power to deny the certificate, but this discretion was seldom used. What's interesting is that creditors at the time had no power to block the bankrupt's receipt of the certificate. One could argue that this was one of the first pro-debtor bankruptcy law, but as will be seen the act lasted all but three years. *Id*.; *see also In re* Ball, 257 B.R. 309, 314 (Bankr. D. Ariz. 2001) ("England's Statute of Anne, adopted in 1705, is generally regarded as the first discharge provision in a bankruptcy law. . ."); *In re* Bliemeister, 251 B.R. 383, 390 (Bankr. D. Ariz. 2000) (discussing limits on effectiveness of Statute of Anne discharge provision due to subsequent amendments to it).

[29] *See* Tabb, *supra* note 23, at 333. This provision is still popular in the personal bankruptcy laws of many countries today; *see also* Michael Adler, *The Overseas Dimensions: What Can Canada and the United States Learn from Other Countries?*, 37 OSGOODE L.J 415, 416 (1999) (noting English Insolvency Act usually granted automatic discharge except when debtor not cooperative); Richard Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 472 (1991) ("[t] he debtor's cooperation and consent of two-thirds of the creditors were essential to the discharge.").

[30] *See* Tabb, *supra* note 23, at 335 (noting non-merchants were deemed at fault for having used credit in first place); *see also* Ian P. H. Duffy, *English Bankrupts, 1571–1861*, 24 AM. J. LEGAL HIST. 283, 286–87 (1982) (discussing change in early eighteenth century bankruptcy law as first time in which debtors were granted limited privileges); John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 163 (1996) (stating limitation of debtor discharge to merchants possibly technique to induce insolvent traders to cooperate with creditors).

help grow the economy,[31] early English society accepted credit only as a necessary evil.[32]

In 1869, England enacted new bankruptcy legislation that was far more creditor-oriented than the similar law enacted around the same time in the United States.[33] It called for creditor control of virtually all key issues in a bankruptcy case, including who would be appointed to oversee the bankruptcy process.[34] Thereafter, in 1883, England enacted an administratively-run system in which the Board of Trade appointed a receiver to conduct most administrative functions in a case, leaving the process free of most judicial interaction.[35] This format is still the defining feature of English bankruptcy today, both personal and business.[36] This administrative format also minimizes the role of private attorneys in the general bankruptcy process, which distinguishes English bankruptcy processes from the lawyer-oriented American system.[37]

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[31] *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 28 (N. Carolina Press 2001) (describing credit-driven nature of antebellum economy); *see also* John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 426 (2000) ("[C]reditors at the time were quite concerned that state statutes relieving creditors of debts were impairing the obligation of contracts, and thus destroying confidence of parties to ordinary business transactions.").

[32] *See* David S. Kennedy & R. Spencer Clift III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 169 (2000) (stating that debt and credit were considered immoral in England); Weisberg, *supra* note 20, at 66 (noting credit as a source of "persistent moral anxiety"). As Professor Weisberg notes, in the U.S., bankruptcy law was seen as a "robust, economical, and scientific instrument of commercial efficiency." In England credit was morally-tinged and represented false wealth to many people in traditional land-based society. *See id*. at 66 (illustrating this moralistic view of credit).

[33] *See* Tabb, *Evolution of the Bankruptcy Discharge, supra* note 23, at 361 (noting 1869 Act served as model for American law allowing composition agreements, whereby creditors voted to accept a debtor payment plan); Tabb, *History of Bankruptcy Laws, supra* note 18, at 21 (stating same); *see also* Andy Warhol Found. for Visual Arts v. Hayes (*In re* Hayes), 183 F.3d 162, 168 n.2 (2d Cir. 1999) (discussing change in American law and imposition of discharge of debt).

[34] S*ee* SKEEL, *supra* note 2, at 37–38 (stating 1869 Act gave creditors control of key issues); *see also* David Skeel, *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 327 (asserting that "officialism" gave way to creditor control under 1869 English legislation).

[35] S*ee* SKEEL, *supra* note 2, at 38 (describing this move towards "officialism" in England). These administrative oversight procedures remain the defining feature of English bankruptcy law today, as well as that of Australia and Canada. *Id*.; *see also* Boshkoff, *supra* note 7, at 79 (discussing 1833 legislation).

[36] *See* Moss, *supra* note 7, at 115 (explaining how liquidators in England are feared); *see also* Roberts, *supra* note 44, at 18 (stating new law was designed to encourage risk); *Personal Finance*, *supra* note 44, at 28 (stating through new bankruptcy laws, government's attempting to reduce stigma attached to bankruptcy).

[37] *See* Moss, *supra* note 7, at 121 (distinguishing U.S. and English bankruptcy law). U.S. early debtor-oriented approach to bankruptcy as well as the primacy of attorneys (as opposed to court-appointed administrators) distinguished U.S. bankruptcy law from that of every other insolvency law in the world. *Id*. at 137; *see also* Evan D. Flaschen & Leo Plank, *The Foreign Representative: A New Approach to Coordinating the Bankruptcy of a Multinational Enterprise*, 10 AM. BANKR. INST. L. REV. 111, 114 (2002) (distinguishing chapter 11 from other less flexible insolvency systems); *Interview With New NCBJ President James D. Gregg*, AM. BANKR. INST. J., Oct. 2002, *available at* 2002 ABI JNL. LEXIS 141, at *3 (stating Code fairly balances creditor's and debtor's rights). *But see* Ronald Lechner, *Walking From the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 977 (2002) (emphasizing differences in European bankruptcy law between European countries).

While English laws themselves became more lenient over time, this unforgiving attitude toward unpaid debt and credit never really changed. Thus, even today, English society is unforgiving about financial failure.[38] The English generally consider financial failure a weakness of character, whether it is caused by business or personal financial missteps.[39] Strictly personal bankruptcies, resulting from too much credit card debt or the loss of a job or good health, have been rare in the past because there was little consumer credit, and government programs helped people if they lost employment or needed health care.[40] Now there is more credit and more personal financial failure.[41]

While the United Kingdom certainly has more bankruptcies than the rest of the European Union,[42] these are still considered major embarrassments, even if they result from the failure of a business. Executives in a company that fails can have a difficult time finding another job and often are shunned socially.[43] Thus, despite all the new credit available, the "British marketplace comes down hard on those who have gotten into financial difficulty."[44] The attitude is "once a bankrupt, always a bankrupt".[45] The English government currently is attempting to change these attitudes in order to encourage people who have failed to go back into business and help fuel Britain's flagging economy.[46] Yet it is unclear that one can change

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[38] *See* Efrat, *supra* note 1, at 106 (noting stigma of bankruptcy may be factor in lower bankruptcy filing rates in England); Lucinda Kemeny & Garth Alexander, *Blair Chases American Dream*, TIMES (London), February 18, 2001, at A1 (noting mantra of "once a bankrupt, always a bankrupt"). The U.S. did away with the word "bankrupt" in the 1978 Code, replacing it with the more genteel "debtor," exactly because "bankrupt" carried such negative stigma. *See* 11 U.S.C. § 101 (1997). This was done to attempt to stop citizens from being prejudiced toward bankruptcy debtors. *See* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: A Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 110 (1986) (noting change in vocabulary an effort to decrease stigma).

[39] *See* Boshkoff, *supra* note 7, at 84–85 (examining causes for discharge; Leonard Hoffman, *Cross-Border Insolvency: A British* Perspective, 64 FORDHAM L. REV. 2507, 2507 (1996) (referring to bankruptcy as disgrace); Kemeny & Alexander, *supra* note 38, at A1 (noting stigma).

[40] *See* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 295 (2000) (discussing broad range of government "safety nets" in England and other nations); Morone & Goggin, *supra* note 6, at 558 (noting England currently has a state-run health care system but that it and other similar European systems may soon be "Americanized."); Wendy E. Smith, *That Which Does Not Kill Us, Does It Make Us Stronger? Legal Aspects of Pain Management in Great Britain*, 10 PACE INT'L L. REV. 649, 663 (1998) (stating that health care in England is available through National Health Service).

[41] *See* Efrat, *supra* note 1, at 93 (observing that deregulation of U.K. credit card market resulted in massive increase in personal debt); Ian Fletcher, *Card Fraud Soars to Pounds 228M*, EVENING STANDARD, Oct. 16, 2002, at 15 (noting mounting credit card debt throughout U.K. and other nations).

[42] *See* Efrat, *supra* note 1, at 101 (comparing bankruptcy filing statistics); *cf.* Lydia Adetunji, *Household Debt Blamed for Leap in Insolvencies*, FINANCIAL TIMES (London), Nov. 8, 2003, at 1 (noting increase in personal bankruptcies in England); Elizabeth Judge, *Businesses Going Bust in UK Surge to Record Level*, TIMES (London), Nov. 4, 2003, at 25 (warning that business bankruptcies approach decade-long highs).

[43] *See* Royal Bank of Scotland, Plc v. Fielding, *available at* 2003 EWHC 986, 987 (Eng.) (describing effect of bankruptcy on debtor's child); Boshkoff, *supra* note 7, at 80–82 (discussing public examination process); Kemeny & Alexander, *supra* note 38, at A1 (recognizing stigma).

[44] Kemeny & Alexander, *supra* note 38, at A1.

[45] *Id.*

[46] *See* Dan Roberts, *Inside Track Enterprise: A Fairer Deal for Insolvency*: *ENTERPRISE BILL: The New Bill Aims to Encourage Responsible Risk-Taking*, FINANCIAL TIMES, March 28, 2002, at 18 (stating recent

attitudes by changing laws. The government is likely to be unable to tell people how to think or whom to invite to parties, even through drastic legal change.

## II. PERSONAL BANKRUPTCY SYSTEMS THROUGHOUT THE COMMON LAW

All of the common law countries discussed below feature relatively forgiving personal bankruptcy systems, at least compared to the rest of the world.[47] These are the most lenient systems outside the United States, with Canada's being the most forgiving, followed by England and then Australia.[48] All of these countries also have high levels of both consumer debt and bankruptcy filings,[49] yet the systems differ in significant ways.

### *A. Down and Out in the U.K. Today* [50]

Personal bankruptcy in the United Kingdom has changed since the early days but it is still less focused on providing a fresh start to the debtor, and more focused

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Enterprise Bill designed to encourage risk); *Personal Finance-Bankrupts Get Chance to Start Again*, BIRMINGHAM POST, November 9, 2002 at 28 (noting government's attempt to reduce stigma attached to bankruptcy through new Enterprise Bill). *See generally* Moss, *supra* note 7.

[47] *See* Efrat, *supra* note 1, at 100–01 (reviewing bankruptcy filings in several countries). *See generally* Jeffrey Davis, *Bankruptcy, Banking, Free Trade, and Canada's Refusal to Modernize Its Business Rescue Law*, 26 TEX. INT'L L. J. 253, 253–62 (1991) (outlining developments in bankruptcy laws of different countries); Barbara K. Morgan, *Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy*, 74 AM. BANKR. L.J. 461, 474–88 (2000) (outlining insolvency laws in different countries).

[48] I base this conclusion on two primary legal constructs: the homestead exemption and the need to do a repayment plan in order to get a discharge. Neither England nor Australia has a homestead exemption, while Canada has homestead exemptions more similar to those offered in the U.S. England does not require a payment plan, Australia has one, and Canada has one on the books that is little used. *See infra* notes 43–132 and accompanying text.

[49] *See* Efrat, *supra* note 1, at 100-01 (containing bankruptcy filing statistics for the four countries). Comparative consumer credit usage statistics are hard to find, but global increases in consumer credit are widely reported. *See* Jason Booth, *KIS Investors Bet on South Korea's Rising Debt*, WALL ST. J., May 30, 2002, *available at* 2002 WL 3396232 (discussing U.S. and South Korean levels of credit card debt and predicting consumer-credit blowout in South Korea that could slow entire economy); Ian Fletcher, *Card Fraud Soars to Pounds 228M*, EVENING STANDARD, Oct. 16, 2002, *available at* 2002 WL 101323704 (noting mounting credit card debt throughout the United Kingdom, Mexico and Malaysia, as well as China, South Korea and Thailand); M2 PRESSWIRE, *Growth of Credit Cards in Emerging Markets Leading to Concern Over Mounting Consumer Debt and Card Fraud*, Oct, 15, 2002, *available at* 2002 WL 26804947 (describing skyrocketing credit card debts in China, South Korea, Brazil, and Thailand); EUROPEAN CREDIT RES. INST., *ECRI Research Report Number 1, Consumer Credit in the European Union*, at 16–18, hppt://www.ecri.be/pubs/ecrien, visited on Mar. 2, 2003 (noting tremendous increases in credit card debt in Europe). Australian consumer debt levels have doubled, as a percentage of household income, since 1990. *Forever in Our Debt*, SYDNEY MORNING HERALD, Sept. 24, 2003. Over a third of all households had credit cards in 1998-99, with 34-36% paying interest on these cards. *Australian Social Trends*, http://www.abs.gov.au/Austats/abs@nsf, visited on November 7, 2003. The U.K. has seen similar increases in consumer credit usage. *See U.K. Consumer Heads for Debt Hangover*, RETAIL BANKER INT'L, Aug. 21, 2003, at 10, *available at* 2003 WL 64024956 (describing consumer credit usage); Anna Griffiths, *No Expense Spared*, CAMPAIGN, Oct. 31, 2003, at 30, *available at* 2003 WL 57331299 (describing same).

[50] The governing law is the Insolvency Act of 1986. Insolvency Act, 1986, c. 45 (Eng.).

on creating a remedy and a recovery for creditors.[51] The debtor in a personal bankruptcy has two options: either file an individual voluntary arrangement ("IVA") or file for bankruptcy.[52] An IVA is an agreement between the debtor and creditor regarding how debts will be repaid, which is supervised by an insolvency practitioner.[53] The debtor must apply to the courts to pursue an IVA, and an insolvency practitioner is appointed. These insolvency practitioners must be licensed and usually are accountants or solicitors. Their primary job is to dispose of assets and make payments to creditors.[54]

Like its American counterpart, English bankruptcy law allows both voluntary and involuntary bankruptcies.[55] The official receiver investigates the debtor's financial affairs before and during the bankruptcy and then reports the findings to the court and creditors. Interestingly, this investigation generally is done without the debtor's counsel present, as attorneys generally play a much smaller role in bankruptcy cases in England than they do in the United States.[56] Once the order has been placed, the debtor must inform the official receiver of all assets within twenty-one days of filing the petition and is barred from obtaining credit.[57] For the most part, failure to comply with these duties will result in a dismissal of the case.[58] In

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[51] *See* Tabb, *supra* note 18, at 7 (noting historically pro-creditor attitude in England); *cf.* SKEEL, *supra* note 2, at 38 (explaining officials' authority to investigate each debtor, even without an attorney present); Harry Rajak, *Rescue Versus Liquidation in Central and Eastern Europe*, 33 TEX. INT'L. L.J. 157, 162–64 (1998) (noting rescue efforts in England limited to situations where certain specified purposes are achieved).

[52] *See Summary of Insolvency Bankruptcy Procedures*, *at* http://www.insolvency.co.uk/legal/options.htm (last visited Nov. 7, 2003) (explaining two choices provided to individual debtors). *See generally* MARTINDALE-HUBBELL INT'L L. 2003 DIGEST, § Eng, 8–9 (outlining English insolvency law).

[53] *See* Insolvency Act, 1986, c. 45, §§ 252–263 (Eng.); *see also Summary of Insolvency Bankruptcy Procedures*, *supra* note 52 (highlighting need for insolvency practitioner during IVA process). In some respects, this is similar conceptually to a chapter 13 case. *See* 11 U.S.C. §§ 1301–1330 (providing law governing chapter 13 case).

[54] *Bankruptcy – FAQ*, *at* http://www.insolvency.co.uk/legal/bankrfaq.htm (last visited Nov. 20, 2003); *see also* Roger Enock & Geoff Nicholas, *London: The Company Market and Insolvency: Schemes of Arrangement; Section 304; The Policyholders Protection Board, in* PRACTISING L. INST., COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 78 (1996) (describing insolvency practitioners as licensed individuals who are also often experienced accountants); *cf.* Moss, *supra* note 7, at 121-22 (noting English judges tend to favor insolvency practitioners over debtors).

[55] *See* Insolvency Act, 1986, c. 45, § 246 (Eng.) (providing that creditors of debtor or debtor himself may file petition). A petition could be filed by the "bankrupt" or by creditors owed £750 or more. *Bankruptcy – FAQ*, *at* http://www.insolvency.co.uk/legal/bankrfaq.htm; *see also* Richard H.W. Maloy, *Comparative Bankruptcy,* 24 SUFFOLK TRANSNAT'L L. REV. 1, 37 (2000) (outlining alternative parties that may file petition). The petition is filed either in High Court in London or in a County Court near where the debtor resides. Once filed, the petitioner must pay £450 (£150 Court costs and £300 for the Official Receiver's deposit. *See Bankruptcy – FAQ*, *at* http://www.insolvency.co.uk/legal/bankrfaq.htm.

[56] *See* Insolvency Act, 1986, c. 45, § 399(2) (Eng.) (providing that official receiver is appointed, paid and supervised by Secretary of State and Treasury); *see also* SKEEL, *supra* note 2, at 38 (describing English bankruptcy system as "pervasively governmental and administrative in character").

[57] *See* Insolvency Act, 1986, c. 45, § 288 (Eng.) (requiring debtor to submit statement of assets and liabilities to official receiver within 21 days after order has been made); *see also* Rafael Efrat, *The Fresh Start Policy In Bankruptcy In Modern Day Israel*, 7 AM. BANKR. INST. L. REV. 555, 578 n.126 (noting similar procedure in Israel).

[58] *See, e.g.,* Insolvency Act, 1986, c. 45, § 288(4)(b) (Eng.) (providing that debtor who, without reasonable excuse, fails to submit a statement of affairs to official receiver is guilty of contempt of court).

some instances, however, such failure is a criminal offense.[59] For instance, a debtor cannot obtain credit of £250 or more either alone or with another person, without disclosing the bankruptcy, [60] nor can he or she be involved in promoting, forming or managing a company without the court's permission.[61] The system is unquestionably tough on debtors, particularly compared to the American personal bankruptcy system.[62] There are some exemptions that permit an English bankrupt to keep some minimal belongings but these are far from generous and include only tools, other items of equipment, books, household furnishings, and in certain circumstances, vehicles necessary for employment, business or vocation.[63] There is no homestead exemption for the English debtor, and as a result, the official receiver usually liquidates the home to pay off creditors. This sale process can be very slow. One person who went through bankruptcy as a result of a failed business in 1993 reported that "they appointed someone to go through my entire life with me."[64] His house in the country was sold[65] and his car was picked up by trailer one morning and taken away eight years later.[66] It takes three years to get a personal bankruptcy

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[59] *See, e.g.,* Insolvency Act, 1986, c. 45, § 288(4)(b) (Eng.) (providing that debtor who is guilty of contempt of court may be punished).

[60] *See Bankruptcy – FAQ*, *at* http://www.insolvency.co.uk/legal/bankrfaq.htm (stating debtor prohibited from obtaining credit of £250 or more without disclosing bankruptcy). This inability to obtain credit following bankruptcy contrasts starkly with credit practices in the U.S., where the free market determines whether recent bankruptcy debtors receive more credit. Surprisingly, bankruptcy debtors are often offered much more credit following bankruptcy than they had before because their old debts are gone, they cannot file for bankruptcy again for at least six more years. *See* 11 U.S.C. § 727(a)(8) (2003) (providing discharge cannot be granted to debtor who had been discharged within past 6 years). They are now considered far better credit risks. *See* Mary Kane, *More Lenders Offering Credit After Bankruptcy*, THE PLAIN DEALER, Aug. 4, 1997, at 4C (discussing ease with which debtors may obtain new credit after filing for bankruptcy).

[61] *See* Nigel Howcroft, *Insolvency Procedures of the United Kingdom and Canada: A Comparative Review*, 5 J. INT'L BANKING LAW 67, 69 (1990) (recounting administrative procedure requiring court to appoint insolvency practitioner to manage debtor's business); B*ankruptcy FAQ, at* http://www.insolvency.co.uk/legal/bankrfaq.htm (stating debtor restricted from promoting, forming or managing a company without court's permission).

[62] *See supra* notes 36–44 and accompanying text; *see also* SKEEL, *supra* note 2, at 38 (concluding English bankruptcy system harsh to debtors because debtors cannot obtain discharge for several years during which they are subject to searching scrutiny).

[63] *See* Insolvency Act, 1986, c. 45, § 283 (Eng.) (defining bankrupt's estate and noting which assets are not included); David Caplovitz, *Personal Bankruptcy in America*, *in* BANKING FOR PEOPLE: SOCIAL BANKING AND NEW POVERTY CONSUMER DEBTS AND UNEMPLOYMENT IN EUROPE, NATIONAL REPORTS 277 (Udo Reifner & Janet Ford, eds., 1992) ("In England, the bankruptcy law is harsh because the consumer has to give up practically everything he owns in order to apply for bankruptcy."); Efrat, *supra* note 1, at 89 (noting English debtors unable to keep many assets).

[64] Kemeny & Alexander, *supra* note 38, at A1; *see also* Boshkoff, *supra* note 7, at 79–80 (explaining public examination process); U.K. INSOLVENCY SERVICE, *Guide to Bankruptcy*, at 4–5 (2001), *available at* http://www.insolvency.gov.uk/pdfs/gtbweb.pdf (discussing pervasiveness of appointed officer's duties).

[65] Kemeny & Alexander, *supra* note 38, at A1; *see also Guide to Bankruptcy*, *supra* note 64, at 9 (noting debtor may lose home).

[66] He is now living on public support and in shame. *See* Kemeny & Alexander, *supra* note 38, at A1. If the debtor is married, the non-bankrupt spouse may be able to put the sale of the home off for up to a year. *Id*.; *Guide to Bankruptcy*, *supra* note 64, at 9 (discussing flexibility if debtor has wife or children living in home).

discharge,[67] unless the debtor has filed a previous bankruptcy within the last 15 years, in which case the discharge takes five years.[68]

### *B. Going Broke Down Under*

Like in America, Australian bankruptcy law grew out of English law on the subject.[69] While American law quickly diverged from the English form by granting a much more lenient discharge and focusing on the debtor's "fresh start,[70] Australian law remained very close to its English roots.

Debtors in the Unites States essentially get to choose whether to initiate a chapter 7 liquidation and get an immediate discharge, or to commence a chapter 13 repayment plan over a period of years and perhaps keep more assets.[71] Under chapter 7, the debtor must relinquish all non-exempt assets to the trustee, for sale and distribution to creditors.[72] In the chapter 13 plan, the debtor often gets to keep or "buy back" the non-exempt assets through the repayment plan.[73] By contrast, Australian debtors are required to complete a payment plan, similar to a chapter 13,

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[67] Insolvency Act, 1986, c. 45, § 279(2)(b) (Eng.) (providing that, generally, first time debtor is discharged in three years). *See* IAN FLETCHER, THE LAW OF INSOLVENCY 37 (Sweet & Maxwell 1990) (stating "first time" debtors may be entitled to automatic discharge within three years); Efrat, *supra* note 1, at 88–89 (noting voluntary petitions for bankruptcy are automatically discharged after three years). You will also become free from bankruptcy immediately where the court annuls the bankruptcy order. Insolvency Act, 1986, c. 45, § 282(1) (Eng.) (providing court with power to annul).

[68] This discharge is discretionary and thus not automatic. *See* Insolvency Act, 1986, c. 45, § 280(1) (Eng.) (providing five-year waiting period for discretionary discharge); *see also* IAN F. FLETCHER, THE LAW OF INSOLVENCY 37–38 (1st ed. 1990) (stating that debt forgiveness for recurring debtors may be obtained only through application to court); Kemeny & Alexander, *supra* note 38, at A1 ("[B]ankrupts who have been identified as irresponsible or negligent will be subject to restrictions for up to 15 years.").

[69] *See* AUSTRALIAN BANKRUPTCY LAW 17 (Dennis Rose ed., 1990) (stating Australian bankruptcy legislation was based on 1883 English Act and amendments); Brian R. Cheffins, *Corporate Governance Convergence: Lessons from Australia*, 16 TRANSNAT'L LAW. 13, 37 (2002) (commenting Australian bankruptcy law similar to U.K. bankruptcy law); Lewis, *supra* note 19, at 297 (noting American and Australian bankruptcy law have same roots).

[70] *See* Lewis, *supra* note 19, at 297 (tracking how U.S. bankruptcy law diverged from Australian bankruptcy law, despite very common roots); *see also* James Hubler, *The End Justifies the Means: The Legal, Social and Economic Justifications for Means Testing under the Bankruptcy Reform Act of 2001*, 52 AM. U. L. REV. 309, 315 (discussing bankruptcy provisions adopted by Congress which emphasize debtor's fresh start after bankruptcy proceedings); Terrance Michael & Michael Pacewicz, *Settling Objections to Discharge in Bankruptcy Cases: An Unsettling Look at Very Unsettled Law*, 37 TU L. L.J. 637, 639 (discussing discharge tool available in United States and referring to commentator's classification of tool as "most liberal discharge provisions in the world").

[71] *See* 11 U.S.C. §§ 701–784 (2002) (providing law for chapter 7 proceedings); 11 U.S.C. §§ 1301–1330 (2002) (providing law for chapter 7 proceedings); *see also* Adam Feibelman, *Federal Bankruptcy Law and State Sovereign*, 81 TEX. L. REV. 1381, 1386 n.194 (2003) (discussing consumer choice between chapter 7 and 13); Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 581 (2000) (noting same).

[72] *See* 11 U.S.C. § 704 (2002) (providing duties of trustee); Foster & Poe, *supra* note 71, at 581 ("Under chapter 7, the debtor surrenders all non-exempt assets in which he still has equity to a trustee . . . .").

[73] *See* 11 U.S.C. § 1327(b) (2002) (providing debtor's continuing interest in assets of estate); Foster *supra* note 67, at 582 ("Chapter 13 permits [debtors] to keep both his exempt and non-exempt assets.").

in order to get a discharge at the end of the case.[74] Not all debtors make enough money actually to have to make payments. When a debtor *is* obligated to pay a contribution under these formulae, however, he or she is forbidden from leaving Australia without court permission during the repayment period.[75] Moreover, like in an American chapter 7, the Australian debtor must relinquish all non-exempt property, rather than buying it back through the repayment plan.[76] Thus, personal bankruptcy in Australia is a hybrid between a chapter 7 and a chapter 13, imposing the hardships of each on all debtors in every case.[77]

The exemptions are smaller in Australia for the most part, with household furnishings, tools of trade, a motor vehicle exempt up to a certain amount, but no homestead exemption.[78] Unsecured creditors are stayed from collecting on their

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[74] If income exceeds the threshold amount, the debtor must contribute a specified amount of every dollar earned over and above that amount. The threshold amount varies based on certain conditions. Generally, if the debtor's income is below the threshold amount, then the debtor need not contribute income toward the repayment of debt. *See* Bankruptcy Act, 1966, § 139K (Austl.) (stating threshold amount takes into account debtor's dependents as well as certain other expenses). Specifically, most recent language from the act sets out these provisions:

> Actual income threshold amount, at the time an assessment is made in relation to a contribution assessment period, means:
> (a) if the bankrupt does not have any dependants at that time—the base income threshold amount; or
> (b) if the bankrupt has one dependant at that time—the base income threshold amount increased by 18%; or
> (c) if the bankrupt has 2 dependants at that time—the base income threshold amount increased by 27%; or
> (d) if the bankrupt has 3 dependants at that time—the base income threshold amount increased by 32%; or
> (e) if the bankrupt has 4 dependants at that time—the base income threshold amount increased by 34%; or
> (f) if the bankrupt has more than 4 dependants at that time—the base income threshold amount increased by 36%.

*Id*.

[75] *See* Bankruptcy Act, 1966, § 139ZU (Austl.) (indicating one is forbidden from leaving Australia during repayment period without court permission); Lewis, *supra* note 19, at 332 (stating individuals declaring bankruptcy in Australia must surrender their passport). This provision suggests that Americans do not consider a failure to pay debts as serious a matter as the Australians do. To think that such a monetary infraction could result in such a fundamental limitation of freedom is nothing short of shocking to the American mind. *See generally* 11 U.S.C. § 522 (2002) (providing exemptions and illustrating debtor-friendly nature of U.S. laws).

[76] *See* Bankruptcy Act, 1966, § 116(1) (Austl.) (providing creditors with broad reach into debtor's assets); Lewis, *supra* note 19, at 323 (stating debtor must relinquish all nonexempt assets owned at time of bankruptcy).

[77] *See supra* notes 69–76 and accompanying text; *infra* notes 78–94 and accompanying text; *see also* Lewis, *supra* note 19, at 323–26 (stating Australian bankruptcy law is hybrid of American chapter 7 and chapter 13 and imposes financial obligations of each on Australian debtor).

[78] In the U.S. most debtors are guaranteed some form of homestead exemption, and in Florida and Texas, a bankruptcy debtor can exempt a home of any size and value. *See* FLA. CONST. art. X, § 4(a)(1) (1984) (specifying when homestead exception applies); TEX. PROP. CODE § 41.001(a) (Vernon ed. 2000) (exempting homestead and lots used for burial); Lewis, *supra* note 19, at 333 (stating homes are one of most common assets exempted); Oliver Pollack and David G. Hicks, *Please Sir, I Want Some More,"—Loopholes, Austerity and the Cost of Living—Nebraska Exemption Policy Revisited*, 73 NEB. L. REV. 298, 312 (1994) (stating home is most valuable asset to most individuals).

debts during a bankruptcy case and generally receive a pro rata share of the proceeds of the debtor's plan payments and nonexempt assets.[79]

Secured creditors, however, have much stronger rights under Australian law and are not necessarily stayed from pursuing their claims or their collateral.[80] Creditors with security can either remove their property from the estate and foreclose on it, while paying any overage to the trustee in bankruptcy if it sells for more than the debt, or allow the trustee to sell the collateral and then get paid from the proceeds if the claim is proved.[81] This essentially eliminates the need for secured creditors to move for relief from the automatic stay and gives creditors the right to take away any property with a security interest on it, even during a bankruptcy.[82] Under American law, by contrast, a debtor with equity in property is considered an owner of the property as well, and thus has certain rights flowing from that ownership right.[83]

Like in a chapter 13 proceeding in the Unites States, a discharge takes three years in Australia, unless the court decides upon application to grant an early discharge.[84] Objections to discharge also can be lodged, similar to the process used in the United States for this purpose.[85] Certain debts are not discharged, and secured creditors are not bound by the discharge, which means essentially that deficiency claims are not discharged.[86] Though Australian bankruptcy policy describes the

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[79] *See* Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd (2000) 171 A.L.R. 568 (Austl.) ("[C]reditors of companies which become insolvent must, unless they are secured creditors that are afforded priority, participate pari passu in the available assets of the company."); s*ee also* Lewis, *supra* note 19, at 326 (stating unsecured creditors are treated similarly in many aspects in Australia and U.S.).

[80] *See* Lewis, *supra* note 1, at 235 (describing advantages Australian secured creditors enjoy over unsecured creditors); *see also* Lewis, *Can't Pay Your Debts Mate?, supra* note 19, at 326–27 (noting courses of action available for Australian secured creditors).

[81] *See* Lewis, *supra* note 19, at 327 (noting secured creditor's option to withdraw from bankruptcy proceeding).

[82] *See id*. (stating same).

[83] The second bankruptcy purpose that Professor Lewis mentions to help a secured creditor realize on its collateral is simply not a bankruptcy goal in the United States at all. Whether we realize it or not, along with its debtor-oriented bankruptcy laws, the United States has the most lenient creditor collection laws in the world. American law allows total self-help repossession by secured creditors, and thus bankruptcy in no way facilitates realization on collateral; to the contrary it interferes with such realization. Australia on the other hand does not allow for self-help repossession and thus bankruptcy actually quickens a secured creditors' process of realizing on collateral. *See* Lewis, *supra* note 19, at 333–35 (stating same).

[84] *See* AUSTRALIAN BANKRUPTCY LAW, *supra* note 69, at 229 (discussing three year time period for discharge of debt in Australia and eligibility for early discharge); s*ee also In re* Easley, 240 B.R. 563, 564 (Bankr. W.D. Mo. 1999) ("The Bankruptcy Code (the Code) allows the court to grant Chapter 13 debtors a discharge before they complete all of their plan payments…."); Lewis, *supra* note 19, at 327 (noting exception to default discharge provision).

[85] *See* Bankruptcy Act, 1966, §§ 149B–D (Austl.) (providing process for lodging objections to discharge). The objections lodged by the trustee or Official Receiver usually are based on an allegation of bad faith. In this regard, Australia's provisions are akin to § 727 of the U.S. Code. *See* 11 U.S.C. § 727 (2002) (providing for discharge of debts). Yet, as Professor Lewis notes, such objections can delay a discharge by anywhere between 5–8 years. *See* Lewis, *supra* note 19, at 327 n.160. (noting typical discharge from bankruptcy three years after filing)

[86] *See* Lewis, *supra* note 19, at 327–28 (noting secured creditors can look to security to obtain repayment). In some respects however, Australian bankruptcy law is more debtor-friendly than American law. For

fresh start as one goal,[87] the discharge granted is far narrower by comparison.[88] American law currently does not require that future income be used to pay for creditor claims,[89] and Australian law does, [90] reflecting the largest difference. This difference, along with narrower Australian exemptions which do not include the home, makes bankruptcy far less attractive in Australia.[91] Moreover, Australian bankruptcy, like that of many countries mentioned above, is accompanied by a host of lost privileges, including travel outside the country (the trustee in bankruptcy actually holds the person's passport) and the loss of the right to obtain credit without disclosing one's bankruptcy status.[92] Finally, discrimination against bankruptcy

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example, far fewer debts are non-dischargeable in Australia and there is no prohibition against repeat filings. *See generally* 11 U.S.C. § 523 (2002) (listing the exceptions to dischargeable debts); *In re* Scotten, 281 B.R. 147, 149 (Bankr. D. Mass. 2002) ("The debt at issue in this case would be non-dischargeable in a Chapter 7 pursuant to section 523(a)(6), which exempts from discharge any debt 'for willful and malicious injury by the debtor to another entity or to the property of another entity.'"). Moreover, an involuntary is arguably harder to file, or the grounds narrower, as there must be fraud or another "act" of bankruptcy rather than a debtor who is generally not paying his debts as they come due. Finally, if the debtor files a voluntary petition, he may choose his trustee rather than having a random person appointed, and the creditors' meeting is not mandatory in every case. This is helpful in the rare case where the client is an agoraphobic or is a missing person or is otherwise unable to go to the meeting. Since no legal rights are adjudicated at the meeting, this seems sensible.

[87] *See* AUSTRALIAN BANKRUPTCY LAW, *supra* note 69, at 1 (asserting general principal of Australian bankruptcy law is to help debtor make fresh start); Lewis, *supra* note 19, at 329–34 (discussing three component parts of fresh start policy); Peta Spender, *Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability*, 25 SYDNEY L. REV. 223, 247 (explaining Australia's shift in emphasis from punishing defaults to providing fresh start).

[88] *See* Lewis, *supra* note 19, at 328–29 (discussing non-dischargeability of certain debts). Professor Lewis offers an explanation for these differences, by identifying two distinct purposes for the Australian bankruptcy system, providing a fresh start and helping a secured creditor realize its collateral. *Id*. at 329–35 (discussing dual policy). Given that secured creditors in the U.S. pursue their collateral under state law, not bankruptcy, and that in fact U.S. bankruptcy specifically thwarts such efforts to realize on collateral, the American system focuses exclusively on the first. The American system is predicated on the idea that "the honest but unfortunate debtor…[be given] a new opportunity in life and a clear field for future effort"). *Id.* at 331 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). Thus, the American system provides an outlet for a debtor who might otherwise become dependant on public welfare, at the same time ensuring that the debtor can still participate in the economy. *See id*. at 330.

[89] *See In re* Mulherin, 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003) (imposing a "totality-of-the-circumstances approach to the 'undue hardship' inquiry" with regards to using future income) (quoting *In re* Long, 322 F.3d 554 (8th Cir. 2003)); *see also* Hemar Ins. Corp. of Am. v. Cox, 338 F.3d 1238, 1242–43 (11th Cir. 2003) (stating under section 493(A) of the Education Amendments of 1976, future income will only be used to offset student loan debt if it does not cause "undue hardship"). Yet, with the current bankruptcy reform bill, this would change. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 5745, 107th Cong. § 201(a) (2002), *available at* http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.5745:.

[90] Bankruptcy Act, 1966, § 139P (Austl.) (providing liability of debtor to bay contribution); *see also* Lewis, *supra* note 19, at 323 (stating Australian bankrupts must repay debts from future income).

[91] *See* Lewis, *supra* note 19, at 324–25 (stating homes not exempt under Australian law). C*ompare* 11 U.S.C. § 522(d) (2000) (providing exemption for real estate), *with* Bankruptcy, 1966, § 116(2)(b)-(d) (Austl.) (providing no household exemption among list of exempted assets.

[92] *See* Lewis, *supra* note 19, at 332 (noting Australian debtor required to reveal status when applying for certain credit). In the U.S., we leave this up to the creditors to discover, though few seem to care. American newspapers are replete with auto dealership ads claiming "Bankruptcy Debtors Wanted."

debtors is disallowed in the United States but is permitted in Australia.[93] Despite these differences, both the United States and Australia have relatively high rates of personal bankruptcy, with the United States at 5 filings per 1000 persons, and, and Australia at 1.7 for every 1000.[94]

### *C. Down and Out in Canada*

Like the laws of many countries, Canada's first bankruptcy laws applied to merchants only.[95] By the early 1900's, however, Canada enacted general insolvency laws that could be used by both individuals and merchants.[96] Canadian bankruptcy law changed little between 1919 and the 1970's, but there have been significant reforms since 1970.[97]

Like American bankruptcy law, Canadian personal bankruptcy law is based loosely upon two premises: first, that creditors can do better in a collective collection proceeding than by dismembering the debtor piece-meal; and second, that a debtor should have a way of discharging debts in certain instances.[98] The personal

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[93] *See* Lewis, *supra* note 19, at 332 (noting Australian law less protective of bankrupts than US Bankruptcy Code). Though section 525 of the U.S. Code provides broad protection to the debtor, it has been narrowed such that if a person was led to bankruptcy because of financial irresponsibility or substance abuse, the person may legally be discriminated against because of the financial irresponsibility or substance abuse. Also, the limitation on nongovernmental discrimination is narrow and forbids adverse treatment of bankrupt debtors only in regards to employment. *See* 11 U.S.C § 525 (2000) (providing protection against discriminatory treatment).

[94] *See* Efrat, *supra* note 1, at 100–01. Though the U.S. has a significantly larger population than the four other nations surveyed, its number of filings per person is much greater. While these numbers themselves appear disparate, New Zealand and Japan report filing rates of .7 per 1000 residents and it goes further down form there, to .47 in England and Wales, to .16 in Israel. *Id.* at 101. In other words, in 1997, Israel had 16 bankruptcies for 1000 residents while England and Wales had 47, Japan had 70, Australia had 170, Canada had 300, and The U.S. had 510. Japan has one filing for every 6,645 persons; the U.K. per every 1,335; Australia per every 750; Canada per every 401; and the U.S. per every 108 Americans. *Id.* at 101.

[95] *See* Jacob S. Ziegel, *Canada's Phased-In Bankruptcy Reform*, 70 AM. BANKR. L.J. 383, 385 (1996) (finding early Canadian legislation applied only to involuntary bankruptcies of traders). *See generally* Barbara K. Morgan, *supra* note 47, at 484 (noting early Canadian bankruptcy law biased toward liquidation).

[96] *See* Maloy, *supra* note 55, at 4–5 (stating Canadian law applies to "all persons, including individuals, partnerships [and] unincorporated associations"); Morgan *supra* note 47, at 484 (noting BIA applies to both companies and individuals); Ziegel, *supra* note 95, at 386 (explaining Canadian Bankruptcy and Insolvency Act applies the same rules to both insolvent natural persons and incorporated debtors).

[97] *See* Iain D.C. Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy,* 74 AM. BANKR. L.J. 399, 412 (2000) (noting Canadian transformation in insolvency practice over past twenty years); Jacob S. Ziegel, *The Modernization of Canada's Bankruptcy Law in a Comparative Context*, 33 TEX. INT'L. L.J. 1, 1–3 (1998) (describing enactment of Bankruptcy and Insolvency Act, both enacted in past decade, as well as extensive review procedures by Bankruptcy and Insolvency Act Advisory Committee). *See generally* Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada – United States Comparison,* 37 OSGOODE HALL L.J. 205, 212 (1999) (discussing history of Canadian bankruptcy legislation).

[98] *See* Ziegel, *supra* note 95, at 387 (describing Canada's bankruptcy philosophy); *see also* Morgan, *supra* note 47, at 484–85 (discussing Canadian debtor's ability to discharge debt); Daniel J. Tyukody Jr., *Good Faith Inquiries Under the Bankruptcy Code: Treating the Symptom, Not the Cause,* 52 U. CHI. L. REV. 795,

bankruptcy discharge envisioned by Canadian lawmakers, not surprisingly, has historically been much more limited than the American-style discharge.[99] Historically, a Canadian discharge was available only to those who were in financial trouble due to no fault of their own, and who did not engage in profligate spending.[100] Moreover, until recently, the discharge was not automatic.[101] Instead, Canadian lawmakers followed the English system, in which the debtor had to apply for a discharge that could be granted in the court's discretion, either in full or in part, or denied completely.[102]

Prior to granting a discharge, the law required that the trustee in bankruptcy file a report with the court describing the debtor's conduct both prior to and during his or her bankruptcy.[103] The report also detailed the causes of the bankruptcy.[104] These reports played a very significant role in determining if a discharge was granted.[105] Certain allegations, if proven, resulted in automatic denial of a discharge.[106] One of

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799–800 (1985) (explaining benefits of collective collection procedure over dismembering debtor piecemeal).

[99] *See* F.H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDISC. L. J. 67, 83 (1995) (calling Canadian discharge policy "conservative" and American style discharge "liberal," but claiming Canadian style appears superior); Ramsay, *supra* note 97, at 405 (noting Canadian conditional discharge is unknown in U.S. and discussing limitations on Canadian discharge); Ziegel, *supra* note 95, at 387 (stating unlike U.S., Canada does not confer a right of discharge on consumer debtor after debtor's nonexempt assets have been liquidated and proceeds distributed).

[100] *See* Ziegel, *supra* note 95, at 400–01 (describing Canadian discharge prior to 1992 Amendments); *cf.* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 173 (1985) (Can.) (requiring trustee to file a pre-discharge hearing report describing debtor's conduct); *In re* Pilgrim, [1999] 181 Nfld. & P.E.I.R. 181 (Can.) (allowing discharge of blameless insolvent).

[101] *See* Efrat, *supra* note 1, at 98 (stating automatic discharge introduced in Canada's 1992 Amendments); Ramsay, *supra* note 97, at 404 (finding summary procedure results in automatic discharge after nine months for first time Canadian bankrupts); Ziegel, *supra* note 95, at 401 (noting Bankruptcy Advisory Committee's recommendation individual bankrupt should be discharged automatically nine months after date of bankruptcy adopted in 1992 Amendments).

[102] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 169(1) (1985) (describing application of discharge); Ziegel, *Philosophy and Design*, *supra* note 97, at 231 (describing distinction between situations where court had complete discretion to discharge application and those where it dismissed application or made conditional order). Professor Ziegel believes that the discretionary discharge system is preferable to the U.S.-style automatic discharge. *Id.* He also notes that other common law countries, such as Canada, Australia and England, all compensated for the discretionary discharge by having less categories of non-dischargeable debts, thus providing a "fresher start" in some ways than the U.S. bankruptcy system. *Id*. at 242 (noting substantially more U.S. exceptions than non-dischargeable debts in Britain and Australia).

[103] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 170 (1985) (Can.); *see also* Ziegel, *supra* note 95, at 400 (stating same). *See generally* Ziegel, *Philosophy and Design*, *supra* note 97, at 230 (noting amendments simplified discharge procedures).

[104] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 170 (1985) (Can.); Ziegel, *supra* note 95, at 400 (stating same); *cf.*, Ziegel, *Philosophy and Design*, *supra* note 97, at 210 (inquiring whether Canadian system has struck better balance than American system in determination of legitimate uses of bankruptcy for discharge of consumer debts).

[105] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 173 (1985) (Can.) (describing when discharge may be refused, suspended, or granted conditionally); *see also In re* Clarke, [1998] 5 C.B.R. (4th) 170 (granting conditional discharge based on trustee's report) (Can.); Ziegel, *supra* note 95, at 400 (noting pivotal role of trustee's report).

[106] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 173 (1985) (Can.) (enumerating thirteen bases of refusal); *see also In re* Lypchuk, [2000] 22 C.B.R. (4th) 231 (Can.) (reviewing circumstances where

these was that the debtor's assets were not equal to or greater than 50% of the debtor's unsecured debts.[107] This particular barrier to the discharge was commonly used at one time, though the court could overrule the automatic denial if it found that the excessive indebtedness was not the debtor's fault.[108] Of course, as with the American system, some debts were not discharged at all, because of their important societal status.[109]

These barriers to discharge were implemented in order to maintain high standards of "commercial and personal morality."[110] As such, they interjected moral and causation queries into the bankruptcy process that are completely absent in American law. For American debtors, the cause of the financial difficulties generally makes no difference in the discharge, and there is certainly no limit on the amount of debts that can be discharged.[111]

Canadian personal bankruptcy cases grew in number throughout the 1980's, discharges became routinely granted, and the trustee's reports diminished in importance.[112] Trustees and creditors began lodging fewer objections based upon the 50% rule, apparently giving up in cases where collection of the non-discharged

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automatic discharge should be denied); Ziegel, *supra* note 95, at 400 ("The court was obliged to refuse the application, or to suspend the discharge or grant a conditional order of discharge, if one of thirteen conditions was shown to exist.").

[107] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 173(1)(a) (1985) (Can.) (describing this ground for objection); *see also* Iain D. C. Ramsay, *Individual Bankruptcy: Preliminary Findings of a Socio-legal Analysis,* 37 OSGOODE HALL L.J. 15, 69–71 (1999) (describing opposition to discharge). This barrier to discharge is hard to imagine under an American bankruptcy system. Such low debts would make an American bankruptcy seem almost unnecessary, immature, or not worthwhile. The most successful or worthy bankruptcy cases, at least in many people's minds, are the ones that discharge the most debts. As they provide more bang for the buck. It is also unclear how the assets are valued under the Canadian "50% of assets" tests. Under an American bankruptcy view of "value" in a liquidation bankruptcy, most assets depreciate extensively immediately after purchase. Perhaps Canadian courts used a retail purchase value; if not, hardly anyone would be eligible for a discharge under this rule.

[108] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 173(1)(a) (1985) (Can.) (noting courts discretion to overrule objection); *see also* Ziegel, *supra* note 95, at 401 (stating same). This objection to discharge is still available to Canadian trustees and creditors, although it is used less today than in the past. *See* Ramsay, *supra* note 107, at 69 (noting availability of discharge). In Professor Ramsay's study of debtor's in Ontario, he found that although this particular objection could be lodged against virtually every bankrupt, such objections were filed in just 14% of the cases, and most were resolved before a hearing. *Id.*

[109] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 178 (1985) (Can.) (refusing to discharge six categories of debt); *see also* Ziegel, *supra* note 95, at 401 n.111 (noting non-dischargeable categories). These non-dischargeable debts include alimony and other family support, debts obtained by fraud, false pretenses, or misrepresentation, among other things. *Id*.; *see also* Ramsay, *supra* note 107, at 69–71 (stating reasons trustee may oppose discharge).

[110] Ziegel, *supra* note 95, at 401.

[111] In a typical chapter 7 liquidation, neither the court nor the bankruptcy trustee will look into the cause of the bankruptcy at all, or the amount of spending vis-à-vis the asset values of the debtor. In fact an American attorney could even be criticized for filing a bankruptcy for someone whose debts were so low that the bankruptcy would not be "worth it."

[112] *See* Ziegel, *supra* note 95, at 401 (recognizing growth of Canadian consumer bankruptcies along with routinely granted discharge in 1980s); *cf*. F.H. Buckley, *The Debtor As Victim*, 87 CORNELL L. REV. 1078 (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000) ("From 1986 to 1997, credit card debt doubled in . . . Canada.").

debts seemed unlikely.[113] Based on these changes in the system, Parliament changed the laws to provide for an automatic discharge as long as there were no objections to the discharge, the debtor had not filed a previous bankruptcy, and the debtor's income was not over $40,000.[114]

Because bankruptcies were traditionally for businesses in Canada, people became concerned in 1996, when personal cases outnumbered business cases five to one.[115] This caused many to conclude that personal bankruptcy in Canada has become too easy.[116] In fact, Canada now has the second largest number of personal bankruptcy cases in the world.[117] In reaction to this increase in filings, since 1997 Canada has used a form of "means testing" similar to that currently being considered by the United States Congress.[118] This Canadian law requires individuals

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[113] *See* Ziegel, *supra* note 95, at 401 (noting effect of fifty-percent rule on number of discharges). Repayment of debts often appeared unlikely due to the fact that consumer bankrupts were often drawn from low-income segments of society. *Id*.; *see also* J.A. BRIGHTON & J.A. CONNIDIES, CONSUMER BANKRUPTS IN CANADA, SUMMARY OF FINDINGS (1982) (stating bankruptcy largely associated with unskilled and semiskilled workers).

[114] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 168.1 (1985) (reflecting legislative changes); *see also* Ziegel, *supra* note 95, at 401 (stating recommendations by Bankruptcy Advisory Committee).

[115] *See* Ziegel, *supra* note 95, at 389–90 (citing statistics provided by Office of the Superintendent of Bankruptcy of Canada); OFFICE OF THE SUPERINTENDENT OF BANKR. OF CAN., A N OVERVIEW OF CANADIAN INSOLVENCY STATISTICS 4–6 (2002), *available at* http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwGeneratedInterE/br01375e.html (graphing number of consumer and business insolvencies each year from 1966 to 2002). These numbers are far from shocking by American standards. In 2002, personal bankruptcies accounted for 97.6% of the total in the United States. During the three-month period ending December 31, 2002, business filings totaled 9,500 nation-wide whereas personal filing totaled 385,629. *See* AM. BANKR. INST., *U.S. Bankruptcy Filing Statistics, at* http://www.abiworld.org/stats/newstatsfront.html (citing data provided by Administrative Office of the Courts).

[116] *See* Ziegel, *supra* note 95, at 400–06 (discussing debate surrounding this issue); Dana Flavelle, *Bankruptcies Head for Record: Consumers in Trouble, as are Firms They Use*, TORONTO STAR, Oct. 12, 1995, at D1 (reporting experts believed 1992 changes to federal Bankruptcy Act encouraged individuals to walk away from their debts). *But see* Ramsay, *supra* note 107, at 71 (stating although bankruptcy was a routine procedure, debtors still traumatized).

[117] *See* Efrat, *supra* note 1, at 100-01 (comparing bankruptcy rates of seven nations); Ziegel, *Philosophy and Design*, *supra* note 97, at 207 n.1 (noting bankruptcy rate was higher in Canada than Australia and England and Wales but less than United States); Ramsay, *supra* note 97, at 399 n.1 ("Canadian consumer insolvencies increased from 19,752 in 1985 to 90,034 in 1997. This latter figure represented a rate of 3 per 1000 persons.").

[118] *See* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means,* 7 FORDHAM J. CORP. & FIN. L., 407, 412 (2002) (offering Canada and Australia as examples of countries using means testing approaches); Ramsey, *Market Imperatives, supra* note 97, at 525 n.2 (describing means testing rule in Canada). *See generally* Ramsay, *Individual Bankruptcy, supra* note 107, at 50 (examining means testing in effect). Professor Ramsay notes that in an Ontario-based bankruptcy study performed during the mid-90's, the vast majority of bankrupts made income contributions to the estate under Canada's means testing test, discrediting the public view that most debtors simply walk away form their debts. *Id*.

For a discussion of the proposed U.S. means testing formulae, see 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, 246 (2000). Congress has recently approved a form of means testing in future U.S. cases. Under the new section 707(b) of the Code, a presumption of abuse will arise if the debtor's net monthly income is $100 or more. Though there are allowable deductions to the monthly income, if the debtor's budget falls outside of this presumption amount, any party in interest may move to have the case dismissed or converted to a chapter 13. *But see* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 1–5 (2001) (noting although both houses of Congress passed bankruptcy reform

with "surplus income" to repay debts over three years before getting a discharge.[119] The amount that must be paid is set by the trustee and is based upon the debtor's "personal and family situation."[120] Under current formulas, however, only about 15% of Canadian debtors are required to pay back any of their debts under this system.[121] Even where no ongoing payments to creditors are necessary, a Canadian discharge takes approximately nine months,[122] during which time a debtor may not serve on the municipal counsel in most provinces, and may not sue to enforce any property rights.[123] Additionally, a Canadian debtor may not serve as the director of a

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legislation in 2000 and 2001, it has yet to be enacted as it was pocket-vetoed by President Clinton in 2000 and failed to reach conference in 2001, put on the backburner by terrorist strikes on September 11).

[119] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 68(1) (1985) (directing trustee to determine portion of bankrupt's income exceeding amount necessary to maintain reasonable standard of living); OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY CANADA, *Directive No. 11R on Surplus Income* (Oct. 3, 2000), *available at* http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwGeneratedInterE/br01055e.html (defining "surplus income"). Given that Canadians essentially *must* do the equivalent of a chapter 13 if they can afford to, Canadian rates of bankruptcy are higher than I would expect. In reality, however, few Canadian debtors are required to repay their debts under current formulas. In 1999, 85% or more have incomes at or below the prescribed low-income cost of living at which they are required to make payments (merely a surplus of $100). *See* OFFICE OF THE SUPERINTENDENT OF BANKR. CANADA, *Personal Insolvency Task Force: Final Report 2002* (Aug 2002), *available at* http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwGeneratedInterE/br01285e.html (last visited Dec. 2, 2003) (providing statistics).

Based on its cultural similarity and its geographic proximity to the U.S., and its relatively high rate of bankruptcy, one might expect Canada's personal bankruptcy laws to be very similar to that in the U.S. In reality, Canada's laws are more similar to those of Australia, at least in terms of forcing debtor's to engage in a payment plan over time. *See* Braucher, *supra* note 118, at 412 (mentioning Canada and Australia together). The U.S. may soon join the ranks of those requiring debtors to repay some of their debts if they can afford to do so. *See* Tabb, *supra* note 118, at 1–2 (discussing recent reform efforts).

[120] Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 68(3) (1985) (Can.) (requiring trustee to consider this as well as amount necessary to maintain reasonable standard of living); *see also* DIRECTIVE NO. 11R ON SURPLUS INCOME, *supra* note 119 (providing guidance for trustees); Ramsay, *supra* note 97, at 527–28 (discussing statute and directive).

[121] *See* Ramsay, *supra* note 97, at 404 n.20 ("[F]rom August 1 to December 3, 1999, there were 16.5% of bankrupts with surplus income.") (reporting findings of Office of Superintendent of Bankruptcy).

[122] The Canadian discharge takes three times as long as an American discharge, which is typically accomplished in three months. *See* Efrat, *Fresh Start Policy, supra* note 57, at 574 (discussing insolvency laws of several countries and stating how there is an automatic discharge after nine months for a Canadian debtor who files a bankruptcy petition for the first time); Efrat, *Global Trends, supra* note 1, at 89 (explaining how, under Canadian insolvency law, there is an automatic discharge within nine months for a debtor who files a first time bankruptcy petition); Ziegel, *supra* note 95, at 401 (stating 1992 amendments provide an automatic discharge nine months after date of bankruptcy).

[123] *See* Efrat, *Global Trends, supra* note 1, at 90 (discussing how Canadian debtor "precluded from initiating an action to enforce her property rights" until discharged); Efrat, *Fresh Start Policy*, *supra* note 57, at 574 n.103 (stating "undischarged debtor precluded from initiating action to enforce property rights" in many Canadian provinces). This aspect of Canadian bankruptcy law contrasts starkly with U.S. bankruptcy laws, where suits are considered an important part of creditor recoveries. Property of the debtor is considered property of the estate and the trustee has a duty to enforce any property rights the debtor may have. *See* 11 U.S.C. § 541(a) (2000). Additionally the trustee has avoiding powers that remove restrictions or conditions for transfer of the debtor's property. *See* 11 U.S.C. §§ 541(c), 544(a) (2000). The trustee is able to get control over property of the debtor by using power of 11 U.S.C. § 542(a) (2000), which states that an entity "in possession, custody or control, during the case, of property that the trustee may use, sell or lease… shall deliver to the trustee, and account for, such property . . . ."

corporation, nor may she obtain loans of over $500 or engage in any trade whatsoever without disclosing her "bankrupt" status.[124]

What is most interesting about Canada's bankruptcy laws, however, is not how it differs from United States law but who uses the system. According to one Canadian scholar, bankruptcy tends to be used most frequently by the lower classes in Canada,[125] whereas in the United States, it is a largely middle-class phenomenon.[126] Several empirical studies of Canadian debtors confirm these conclusions. In a 1988 study, the researchers found that the vast majority of Canadian bankruptcy debtors were drawn heavily from the lowest skill levels and the lower working class, in essence the lowest classes.[127] Bankrupts in Canada also have a *lower* rate of home and car ownership than the general population, whereas bankruptcy debtors in the United States have a *higher* rate of home ownership than

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[124] *See* Efrat, *Global Trends, supra* note 1, at 90 (explaining "[u]ntil the debtor receives his discharge, various penalties are imposed on him"); Efrat, *Fresh Start Policy, supra* note 57, at 574 n.103 (describing various penalties undischarged bankrupt faces in Canada). Some aspects of Canadian bankruptcy law appear more favorable to debtors than the Canadian counterpart, however. For example, there is no limit to the frequency with which a Canadian bankrupt can file for bankruptcy, and people in the same household with essentially the same debts can file together. *See* Ramsay, *supra* note 107, at 64 (stating that "[s]ince 1992, it has been possible for related persons to file a joint bankruptcy where their debts are substantially the same."). Additionally, the list of non-dischargeable debts is larger in the U.S than in Canada. *See* Ziegel, *Philosophy and Design*, *supra* note 97, at 242 (comparing list of non-dischargeable debts in United States to nine Canadian exclusions).

[125] *See* Saul Schwartz, *The Empirical Dimensions of Consumer Bankruptcy: Results From a Survey of Canadian Bankrupts*, 37 OSGOODE HALL L.J. 83, 97 (1999) (stating Canadians who file for bankruptcy are "much poorer than the general population"); Jacob S. Ziegel, *The Fragile Middle Class: Americans in Debt*, 79 TEX. L. REV. 1241, 1244 (2001) (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (Yale University Press 2000) (describing a study finding Canadian bankruptcy was "associated with the working class 'and in particular the lower working class'"); *see also* Ramsay, *supra* note 107, at 39 (comparing percentage of different labor categories in general population to their percentage in population declaring bankruptcy).

[126] *See* Ziegel, *supra* note 125, at 1244 (noting consumer bankrupts are not outliners of American society). Ziegel was surprised by the book's title. He found it surprising that the authors focused on class in the book, given America's reputation as a classless society. He ultimately saw the point of the title, namely that bankruptcy debtors are not outliers in society; bankruptcy debtors are people we know, students, neighbors and associates; bankruptcy debtors are victims of America's "market-driven, highly competitive, compulsively consuming, and anti-welfarist environment." Ziegel does not take issue with the authors' conclusions that bankruptcy is a middle-class phenomenon in the U.S., and that most personal bankruptcy can be traced to events outside a person's control, such as unemployment and downsizing, medical bills and other significant effects of illness, broken homes, the burden of home ownership, and the transforming affects of credit cards on consumer credit. Actually, he does believe that lifestyles and consumption habits play a larger role than the authors would. *See also* Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1005 (2002) (describing findings that "debtors who file for bankruptcy are a fairly representative cross-section of middle America"); Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 427 (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (Yale University Press 2000)) (stating that authors "found that debtors in bankruptcy closely resemble other middle-class Americans").

[127] *See* Ramsay, *supra* note 107, at 39 (finding Canadian bankrupts do not correspond to a "cross-sample of the labour force"); *see also* Schwartz, *supra* note 125, at 97 (stating "the sample of those seeking bankruptcy protection was much poorer that than the general population"); Ziegel, *supra* note 125, at 1244 (listing studies that found consumer bankruptcy in Canada associated with working class).

the general population.[128] American exemption schemes also tend to be richer than Canadian exemption schemes,[129] making it possible for many more middle class Americans to file for bankruptcy and discharge their debts, without losing any of their property.[130] Moreover, making the discharge dependent on making $40,000 or

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[128] *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 231–36 (Yale University Press 2000) (correlating debtors, with home-ownership and race); *see also* Robert B. Chapman, *The Bankruptcy of Haig-Simons? The Inequality of Equity and the Definitions of Income in Consumer Bankruptcy Cases*, 10 AM. BANKR. INST. L. REV. 765, 796 n.183 (2002) (contesting estimate of debtors who are home-owners is likely underestimated). *But see* Ed Flynn & Gordon Bermant, *Be It Ever So Humble, There's No Place Like Home*, 22 AM. BANKR. INST. J. 22, 23 (2003) (concluding "[c]hapter 7 debtors are far less likely to be homeowners than the population at large"). Professor Jacob S. Ziegel seems to believe that these facial differences could be the result of methodological differences, and that in reality we could be talking about debtors from the same classes on each side of the border if we used the same measures. *See* Ziegel, *supra* note 125, at 1244. I actually doubt this. I do think that bankruptcy in the United States is largely a middle class phenomenon.

[129] Canadian exemptions vary greatly from province to province, much the same way they vary in the U.S. from state to state. Interestingly, most Canadian provinces have a tool of trade allowance of $10,000 per person, a much more meaningful exemption for this important category than the meager amounts allowed by most U.S. laws. *See* Ziegel, *Philosophy and Design, supra* note 97, at 258–62 (detailing, by province and territory, type and value of exempt property); *Bankruptcy Exemptions for Each Province & Territory*, at http://www.bankrutpcycancada.com/bankrutpcy exemptions.htm (explaining which property is exempt from seizure, as determined by Canadian provinces and territories); *cf.* 11 U.S.C. § 522(d)(6) (stating "[d]ebtor's aggregate interest, not to exceed $1,500 in value, in any . . . tools, of the trade of the debtor or the trade of a dependent of the debtor" may be exempt).

[130] In a chapter 7 bankruptcy an estate is created to collect and sell property to satisfy the debt of the debtor. However, a debtor can claim certain assets exempt from the bankruptcy estate not to be sold for the benefit of the creditors. "The historical purpose of exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge." H.R. REP. NO. 95-595, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6087.

In the United States a debtor filing bankruptcy may choose between the federal or state exemptions, if the state the debtor is filing in has not "opted-out" of the federal bankruptcy exemption scheme. *See* 11 U.S.C. § 522(b) (2002). Some examples in the federal exemption system are: [1] up to $17,425 of equity in real or personal property used as a homestead, [2] up to $2,775 in one motor vehicle, [3] up to $9,300 in household furnishings, [4] up to $1,150 of jewelry, [5] $925 in any property (usually checking accounts) and if the debtor did not use the homestead exemption up to an additional $8,725, [6] up to $1,750 in professional books or tools of the trade. 11 U.S.C. §§ 522(d)(1)–(6). Additionally, the debtor has a right to receive payment for certain things such as social security, veteran benefits, and alimony. 11 U.S.C. § 522(d)(10). All the dollar figures are updated by the United States Congress periodically to reflect economic conditions.

State exemption schemes were developed not because of bankruptcy but because of collection laws. Because each state has their own exemption legislation there is a quite a bit of difference between states. A person filing in Delaware, which has opted-out of the federal scheme, can only choose the Delaware exemptions, which are not generous. For example a debtor can only exempt books, clothing, a seat or a pew in church, sewing machines, tools of the trade, (limited to a certain amount is some counties) and pianos. *See* DEL. CODE ANN. TIT. 10, § 4902 (2003). Delaware does not even have any type of homestead exemption. Texas allows not only unlimited homestead exemptions, but also up to $30,000 in personal property which includes household furniture, tool and equipment, clothing, jewelry, firearms, and motor vehicles. *See* TEX. PROP. CODE ANN. §§ 41.001, 42.002 (Vernon 2003). But Texas does not allow a checking account to be exempt like the federal exemptions. Unlike Texas, Florida has opted out of most of the federal exemptions. *See* Fla. Stat. § 222.20 (2002). Florida allows all federal section 522(d)(10) exemptions. Florida also has an unlimited homestead exemption. *See* FLA. CONST., art. X, § 4(a)(1) (2002). However, Florida has modest personal property exemption, only up to $1,000 in personal property, money contributed to retirement funds and college trust funds. *See id*., § 4(a)(2); *see also* FLA. STAT. ANN. §§ 222.21, 222.22, 222.25 (West 2003).

less makes the Canadian personal bankruptcy system available by design to only the lower classes.[131]

The causes of bankruptcy also differ in the two countries. In Canada, the leading causes of bankruptcy are loss of employment and broken families.[132] Loss of employment, health problems, and broken families are leading causes of financial failure in the United States.[133] Obviously, loss of employment plays a large part on both sides of the border. Canadian bankrupts are two to three times more likely to be unemployed than the general population, making loss of employment is a very significant factor in Canadian cases.[134] Health care debts, however, do not play a large part in Canadian bankruptcies. Perhaps the reasons are obvious: Canada has nationalized healthcare, making health care costs an insignificant factor in Canadian bankruptcy cases.[135] Canada also has larger safely

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[131] I also suspect that the true lower classes in the United States are unlikely to have access to information about bankruptcy, lawyers to file cases for them, or, at least until recently, the credit that would allow them to get into kind of bind that would necessitate a bankruptcy. *See* Rafael Efrat, *The Disadvantaged in Bankruptcy*, 19 BANK. DEV. J. 71, 74 n.4 (2002) (explaining "underrepresentation hypothesis" which asserts members of disadvantaged groups may be underrepresented in bankruptcy because of limited access to credit and information as well as high costs of legal services) ; *see also* THE FRAGILE MIDDLE CLASS, *supra* note 128, at 42 (articulating underrepresentation hypothesis).

[132] *See* Ramsay, *supra* note 107, at 69 (stating Canadian studies "suggest that individual bankruptcy files provide a signal of economic problems, which are often attributable to broader economic and social forces"). Professor Saul Schwartz suggests that another huge factor is that many people who did not use credit in the past, such as younger people and the self-employed, now have access to, and are using, large amounts of credit. *See* Schwartz, *supra* note 125, at 118 (asserting rising number of personal bankruptcies is attributable to "the increase in borrowing by particular subgroups who are either new to borrowing (such as young people or unmarried women), or by subgroups who have traditionally borrowed but who are more numerous now than before (such as the self employed)."); Jay L. Westbrook, *Comparative Empiricism*, 37 OSGOODE HALL L.J. 143, 146 (1999) (citing loss of employment as a top cause of bankruptcy in Canadian studies).

[133] *See* THERESA SULLIVAN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS, 331 (Oxford University Press 1989) (explaining economic disasters such as "failed business, job layoff, or serious medical debt" typically cause bankruptcies); *see also* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices–A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 193 (1997) ("[E]mployment loss, marital break-up or both commonly precede bankruptcy."); Efrat, *supra* note 131, at 116 (asserting several U.S. studies have shown "a close association between divorce and bankruptcy"). *But see* Ford Elsaesser, *Filings Are Driven by Increases in Consumer Debt*, 1996 ABI JNL. LEXIS 538, at *5 (stating recent survey showed number one reason for filing bankruptcy was overextension").

[134] *See* Ziegel, *supra* note 125, at 1248–49 (stating Canadian bankrupts two to three times more likely to be unemployed than general population); *see also* Ramsay, *supra* note 107, at 36 (reporting employment status of bankrupts in Canadian study); Westbrook, *supra* note 132, at 146 (citing loss of employment as a top cause of bankruptcy in Canadian studies).

[135] Sullivan, Warren and Westbrook report in 1987, more than nine million families spent over 20% of their income on health-related costs, and that in 1998, one-fifth of the persons sampled about bankruptcy causes listed health-related problems as a cause of their bankruptcy. *See* THE FRAGILE MIDDLE CLASS, *supra* note 128, at 166–77 (explaining correlation between medical debt and bankruptcy). *See generally* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1101 (2000) (asserting increase in U.S. bankruptcy filings may be partly attributable to lack of medical insurance). Conversely, in Canada, less than one-percent of debtors claimed that health-related causes contributed to their bankruptcy. *See* Rafael Efrat, *The Rise and Fall of Entrepreneurs: An Empirical Study of Individual Bankruptcy Petitioners in Israel*, 7 STAN. J.L. BUS. & FIN. 163, 215–16 n. 262 (2002) (stating Canada has "a comprehensive medical care

nets for people in general, including divorced mothers who are not receiving support payments.[136]

## III. REORGANIZING BUSINESSES ACROSS THE COMMON LAW

Despite very similar economies, reorganizing a business is not the same process in the United Kingdom, Australia, or Canada, as it is in the United States. Other common law countries are far more skeptical of the United States' "debtor-in-possession" model and generally embrace rescue culture to a lesser degree than Americans do. This is surprising in light of the origins of American reorganization law, but is perhaps understandable given the very different economic histories of the various countries.

Under the American debtor-in-possession model, current management presumably controls the business reorganization process.[137] However, the power that managers have is not unlimited.[138] Management often is replaced during chapter 11 cases of large, publicly traded companies.[139] These changes often are instigated by creditors,[140] who–along with shareholders–form the managers' constituents upon insolvency.[141] Thus, creditors clearly retain a great deal of power

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system[] that make[s] it unlikely that medical costs or debts per se will cause many bankruptcies.") (quoting THE FRAGILE MIDDLE CLASS, *supra* note 128, at 158).

[136] *See* Efrat, *supra* note 131, at 168 ("Canada offers a stronger social safety net than is offered in the United States"); *see also* Andrew J. Roman, *Electricity Deregulation in Canada: An Idea Which has Yet to be Tried?*, 40 ALBERTA L. REV. 97, 119 (2002) (stating Canada offers "complex social safety nets"). *See generally* Buckley, *supra* note 112, at 1079–80 (asserting bankruptcy filings are lower in countries with stronger safety net"); Efrat, *supra* note 1, 102 (claiming number disparities of bankruptcy filings in different countries may be attributable to "the varying degrees of safety net provided by the various countries").

[137] *See* SKEEL, *supra* note 2, at 2 (stating that failing business' management decides whether to liquidate it or attempt to reorganize it); *see also* Evan D. Flaschen & Leo Plank, *The Foreign Representative: A New Approach to Coordinating the Bankruptcy of a Multinational Enterprise*, 10 AM. BANKR. INST. L. REV. 111, 114 (2002) (recognizing management's option to become debtor-in-possession); *cf.* 11 U.S.C. § 1101(1) (2002) (defining "debtor-in-possession").

[138] *See* Lynn M. Lopucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 675 (1993) (noting that management of these large companies is highly vulnerable to the powers of others, including creditors and shareholders).

[139] *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 281 (2002) (acknowledging transition to new ownership in many chapter 11 cases); Lopucki & Whitford, *supra* note 138, at 723–38 (providing charts and statistics) In fact, in the Lopucki and Whitford study, the CEO of the company was replaced at least once in 70% of the cases. *Id*. at 726.

[140] Lopucki & Whitford, *supra* note 138, at 736. Lopucki and Witford note that out of forty cases studied, managers were replaced at the insistence of creditors in 18 cases. These data also demonstrate that management is replaced for a number of other reasons as well. *Id.* (recognizing several factors for managerial turnover).

[141] Lopucki and Witford note that this concept of management representing both shareholders and creditors upon insolvency is widely held, but not really understood. *Id.*at 672-73. Not surprisingly then, they conclude that managers do not fully understand or comply with this maxim. *Id*. at 797 (asserting that management aligns with neither shareholders nor creditors ). In reality, if a company is insolvent, equity is frequently eliminated in the case under the absolute priority rule. *Id*. at 746-47 (noting companies' general adherence to absolute priority rule).

in large reorganization cases in the United States, despite the debtor-in-possession model.[142]

In smaller chapter 11 cases, which unquestionably make up the vast majority of the overall number of cases,[143] management normally stays in place.[144] In fact, the management actually *is* the business and carries whatever value there is in the company over and above the value of the assets themselves.[145] Moreover, there tends to be no difference between management and equity in the small firm.[146] In these small cases, management is still subject to the control of creditors, particularly given that equity cannot maintain its ownership of the small firm unless creditors either consent or are paid in full.[147]

Whether a case is large or small, however, the United States takes a very different approach to business reorganizations, as compared to other nations. The choice about whether to liquidate or reorganize is still made by the debtor's management in the United States.[148] In large reorganizing companies, management often changes, though in the vast majority of cases that reorganize in the United States, management does not change. Some chapter 11 companies ultimately will be sold as going concerns, which again means that management, as well as ownership, will change.[149] Nevertheless, all chapter 11 cases start from a wholly different premise, namely that in a chapter 11 reorganization, the debtor's management will run the case.

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[142] *See* Lopucki & Whitford, *supra* note 138, at 746–47 (concluding that creditors dominate management of chapter 11 cases).

[143] *See, e.g.*, Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. SMALL & EMERGING BUS. L. 181, 185 (2000) (stating that small businesses "constitute the overwhelming majority of business bankruptcies."); Bruce A. Markell, *LaSalle and the Little Guy: Some Initial Musings on the Ultimate Impact of Bank of America, NT & SA v. 203 North LaSalle Street Partnership*, 16 BANKR. DEV. J. 345, 346 (2000) (noting that many bankruptcy cases are filed by small businesses or individuals); Elizabeth Warren & Jay Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 500 (1999) (noting that more than 90% of the current chapter 11 cases are smaller cases).

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

[145] *See* 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.29, at 4 (3d ed. 1996) ("Ownership and management frequently coalesce in closely held corporations, where not uncommonly all the principal shareholders devote full time to corporate affairs."); Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 944 (2001) (noting that in small businesses firm value comes from the owner/manager along with firm-specific human capital).

[146] *See* O'NEAL & THOMPSON, *supra* note 145, at 4 (stating same).

[147] This is the result of the Absolute Priority Rule. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (2002) (providing statutory basis for absolute priority rule). Some scholars, however, doubt whether the rule operates to stop owners of small businesses from retaining their equity interests in the debtor. *See, e.g.*, Baird & Resmussen, *supra* note 145, at 943 (providing example of this phenomenon). Finally, even in the U.S., despite the debtor-in possession model, many companies are ultimately sold as going concerns, which obviously displaces existing ownership and perhaps management as well.

[148] SKEEL, *supra* note 2, at 1–2 (describing debtor's choice); Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U.L. REV. 499, 513 (1994) ("In bankruptcy, management can choose to reorganize as a leaner, meaner entity with fewer employees or can decide to liquidate entirely . . . .").

[149] The businesses that remain in business through this process will remain there for the benefit of employees, customers, suppliers and the community as a whole.

### *A. English Rehabilitation laws*

When business rehabilitation laws were first enacted in England, these laws at first only applied to specialized businesses that the public could not do without, such as canal companies, railroads and municipalities.[150] Later, business reorganization was available to businesses of all kinds, but in no event were these procedures permitted to interfere with any of the rights of secured creditors.[151] If a high enough percentage of unsecured creditors voted to allow a company to reorganize, then it could theoretically be reorganized rather than liquidated, but a secured creditor was always allowed to take its collateral if it so chose.[152] Under this system, a liquidation culture prevailed in England until 1986, when deep recessions caused the Parliament to reassess this position.[153] English law made its first move toward a "rescue culture"[154] in 1986, in a statute acknowledging that a rehabilitation system that favored reorganization over liquidation could save jobs.[155] In enacting

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[150] *See* Davis, *supra* note 47, at 258–59 (discussing development of rescue procedures in response to public's need for certain essential businesses to keep operating). This was true in the United States as well. *See id.* at 254. *See generally* PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 176 (Sweet & Maxwell 1995) (discussing development of rehabilitation statutes and judicial rescue proceedings in Britain and United States).

[151] *See* Davis, *supra* note 47, at 253 (discussing expansion of reorganization option). *But see* Niall L. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 AM. BANKR. L.J 251, 274–75 (1982) (claiming some disturbance of secured creditors' rights is essential for rehabilitation effort to succeed).

[152] *See* Davis, *supra* note 47, at 253–54 (noting reorganization could be attempted if favored by high percentage of unsecured creditors).

[153] *See* Moss, *supra* note 7, at 115 (discussing English law's emphasis on liquidation in insolvency proceedings); *see also* WOOD, *supra* note 150, at 175 (describing history of rehabilitation laws stemming from economic recessions that led to political pressure to rescue economic enterprises).

[154] By rescue culture, I mean an insolvency culture that favors rehabilitating companies rather than liquidating them, for the sake of saving jobs, good will, and the like. *See generally* Ron W. Harmer, *Comparison of Trends in National Law: The Pacific Rim*, 23 BROOK. J. INT'L. L. 139, 146–48 (1997) (describing rescue culture across several jurisdictions including England); Muir Hunter, *The Nature and Functions of a Rescue Culture,* 104 COM. L.J. 426, 437–38 (1999) (providing detailed definition of rescue culture from British scholarly perspective); Harry Rajak, *Rescue Versus Liquidation in Central and Eastern Europe*, 33 TEX. INT'L L.J. 157, 163–64 (1998) (discussing rescue procedure administered under Insolvency Act and addressing survival of company as one of its purposes).

[155] *See* Davis, *supra* note 47, at 258 (citing D. MILMAN & C. DURAT, CORPORATE INSOLVENCY LAW AND PRACTICE 1 (1987)). The Cork Committee, which was formed to revamp England's business insolvency laws, wrote in 1985 that:

> The business or commercial insolvent presents an entirely different picture [from the private or consumer insolvent]. The failure of such an insolvent has wide repercussions, not only upon those intimately connected with the conduct of the business, such as directors, shareholders and employees, but on other interests, such as suppliers, etc. The effect of the failure upon the *realizable* value of stock, plant and goodwill can be disastrous, and not infrequently there is a general feeling of desperation, which needs to be resolved. A modern manifestation of this is the sit-in by workers, seeking by their physical presence to ensure that their jobs will not be lost, by having some new organization carry on the business.

DEP'T OF TRADE, INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE, 1982, Cmnd. 8558, § 203. The Committee went on to say that "[w]e believe that a concern for the livelihood and well-being of those dependent upon an enterprise, which may well be the lifeblood of a whole town or even a

the 1986 law, the House of Lords stated that "[t]he Rescue Culture, which seeks to preserve viable business, was and is fundamental to much of the (Insolvency) Act of 1986."[156] Despite the strongest imaginable support for rescue culture in the legislative history of the 1986 law,[157] English society still has tremendous resistance to rescue culture.[158] All the insolvency laws of England are still quasi-penal in nature, including business insolvency laws.[159] Although major strides have been made toward allowing a business to rehabilitate, the new laws attempt to achieve these goals through proceedings that are entirely creditor driven. Secured creditors' rights remain completely intact and courts play a very minimal, non-interventionist role in the proceedings.[160]

The most commonly used reorganization process in the United Kingdom today is called "Administration."[161] In an Administration, an administrator is appointed to

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region, is a legitimate factor to which a modem (sic) law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community, that it must not be overlooked. *Id.* § 204. *See generally* Barbara K. Morgan, *supra* note 47, at 475 (discussing English insolvency laws focus on saving businesses and jobs rather than liquidation).

[156] Powdrill v. Watson, 2 A.C. 394, 442A (H.L. 1995) (Eng.).

[157] *See* Hunter, *supra* note 154, at 426 (illustrating acceptance of "rescue culture" in U.K.); Ian G. Williams, *Time for a Change: Will the U.K. Embrace the "Rescue Culture?"*, AM. BANKR. INST. J., (stating 1986 reforms moved U.K. closer to "rescue culture"). Interestingly, centuries earlier, Joseph Chamberlain, President of the Board of Trade, stated that "the purpose of every good bankruptcy law…as far as possible [is] to protect the salvage and also to diminish the number of wrecks." *Id*. at 435 (citation omitted).

[158] *See* Moss, *supra* note 7, at 121–22 (recognizing English judges' tendency to favor financiers over debtors). Some of this anti-rescue culture view may flow simply from a fear of the American chapter 11 reorganization scheme and the way in which it favors the debtor and often leaves management in place. *See id.* The English believe that U.S. courts are far too debtor oriented and generally believe that a third party, not existing management, should manage a reorganization. *Cf*. Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1044–46 (1992) (criticizing U.S. bankruptcy law's allowing management to act in self interest to avoid liquidation).

[159] *See* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAN. L. REV. 713, 715–16 (1985) (describing earliest English bankruptcy laws' treatment of debtors as criminals); *cf.* Boshkoff, *supra* note 7, at 77 (stating threat of insolvency proceeding important factor in debt recovery) (citation omitted) Hunter, *supra* note 154, at 427 (observing that English bankruptcy has traditionally had "quasi-penal" in nature).

[160] *See* Richard F. Broude, et al., *The Judge's Role in Insolve*ncy *Proceedings: Views from the Bench: Views from the Bar*, 10 AM. BANKR. INST. L. REV. 511, 516–17 (2002) (describing relatively non-interventionist role of English courts in administration procedure). The court hopes to play no role in the proceeding and tries its best to stay out of it completely. *See id.* at 516. As for secured creditors, when the floating charge was still recognized, then secured creditors literally controlled the entire reorganization proceeding. *See* Moss, *supra* note 7, at 122 (recognizing the favored treatment of financiers holding floating security interests).

[161] *See* Broude, *supra* note 160, at 516 (stating administration is U.K.'s "most effective and popular rehabilitation process"); *see also* Ken Baird and Richard Tett, *The International Scene: Arms of U.K. Administration Embrace U.S. Companies,* AM. BANKR. INST. J., May 2003, *available at* 2003 ABI JNL. LEXIS 84, at *1–2 (stating administration is powerful tool in U.K. and is increasing in popularity because legislative amendments have made process quicker and cheaper); E. Bruce Leonard, *The International Scene: The International Year in Review,* AM. BANKR. INST. J., DEC. 2001, *available at* 2001 ABI JNL. LEXIS 231, at *12–13 (stating administration preferable for many reasons, including fact administrator is required to submit proposals to creditors within three months for reorganization or restructuring).

There is also the Administrative receivership, in which a receiver takes over for a company that had pledged its accounts receivable and inventory to a secured party on or before liquidation, in which case the

propose a plan and attempt to get it approved by creditors.[162] There is no debtor-in-possession in an Administration and little court involvement.[163] If creditors want to accept the plan proposed by the administrator, they can vote in favor of it.[164] If they don't, a traditional liquidation occurs.[165] Unlike American chapter 11 law, in which "cramming down" the secured creditor is a major benefit to the proceeding,[166] the

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secured party can just take over the assets. The floating charge holder appoints the administrative receiver. In this sense, a "floating charge" is a security that remains unattached to any particular piece of collateral during the operation of the company as an ongoing concern. *See* Broude, *supra* note 160, at 516–17. For the most part, the receivership's actions occur outside the court, yet the receivership can ask for the court's support in certain circumstances. The most frequent time the receivership goes to the court is during administration. There, the judge appoints an administrator, often at the recommendation of the company. The judge has several options: he can create the administration order and appoint the administrator, or he can dismiss the petition or he can make an interim order. The judges can also make any order to a similar effect so long as two things are satisfied. First, the company must be insolvent; and second, the order is feasible. *See generally id.* (describing this process).

[162] *See* Insolvency Act, 1986, c. 45, sched. B1(1), para. 3 (Eng.) (describing purposes of administrator). The administrator is charged with filing a plan of reorganization within three months, and running the business in the meantime. *See* Hoffmann, note 39, at 2508–09 (describing duties of administrator).

[163] *See* Broude, *supra* note 160, at 516–17. Neither is there a specialized bankruptcy court. *See id.* at 524. Interestingly, the U.S. bankruptcy system is virtually 100% non-interventionist in 97% of the cases because the court does not get involved in most liquidation cases, and 97% of American bankruptcy cases are liquidations, when personal bankruptcies are also included. *See* Broude, *supra* note 160, at 529–30. The other three percent, however, the reorganization cases, are not non-interventionist. *See id.* England seems to have just the opposite structure. Liquidation, the traditional way to deal with all financial failure always was a court-driven process. *See* Hunter, *supra* note 154, at 427–28 (describing the long court proceedings involved in traditional bankruptcy cases). Interestingly, one question asked when England was considering adopting a rescue culture was whether there was a less formal procedure that could be used as an alternative bankruptcy and company winding-up proceedings. *See id.* at 433. The creation of such an "informal" alternative was seen as the lynchpin of creating a "rescue culture." *See id.* (describing this desire for alternative but informal proceeding as first official signpost to English rescue culture). What is unclear, however, is why this non-interventionist culture was seen as necessary to producing a rescue culture, and also why it is seen as so superior to interventionist systems. *See* Broude, *supra* note 160, at 556. As both American and French reorganization law suggests, rescue culture is also embodied in many interventionist systems. *See id.*

[164] *See* Insolvency Act, 1986, c. 45, § 5(2) (Eng.) (providing voting procedure for approval of plan). There is no concept of classification, as one would find in American chapter 11 law, because the secured creditors cannot be affected and other creditors are essentially treated the same. *See* DOING BUSINESS IN THE UNITED KINGDOM § 15.04(3)(d) (Barbara Ford ed., 2003) (recognizing majority vote needed in favor of administration in order for resolution to pass creditors' meeting).

[165] Insolvency Act, 1986, c. 45 § 43(1); *see also* DOING BUSINESS, *supra* note 164, § 15.04(3)(d) (noting court's ability to discharge administration order where creditors reject proposal by majority vote). *But see* Moss, *supra* note 7, at 130 (describing feature of administration orders to keep liquidation "at bay.").

[166] The phrase "cram down" has two meanings in American chapter 11 law. First, one can cram down the value of a secured creditor's claim under 11 U.S.C. § 506(a). Second, one can cram (the plan) down a secured creditor's throat by forcing such creditor to accept a plan that the creditor did not vote for as long as certain requirements, under 11 U.S.C. § 1129(b), are met. *See* 11 U.S.C. § 506(a) (2002) (valuing secured claim at collateral's actual value or loan amount, whichever is *less*) (emphasis added); 11 U.S.C. § 1129(b) (2002) (setting forth equitable requirements which, if satisfied by debtor company, will enable reorganization plan to go forward, *absent* approval from secured creditors); *cf*. Davis, *supra* note 133, at 254–56 (describing dilution of creditor control as necessary by-product of reorganization).

English plan cannot in any way affect, change or undermine the claims or treatment of secured creditors.[167]

English Administrations can be initiated either by the debtor company or by creditors. Relief is granted if the company is insolvent in the balance sheet or cash flow sense,[168] *and* if an Administration is likely to successfully prevent failure of the company.[169] The petition for Administration creates an automatic stay of all collection proceedings against the company, which applies to both secured and unsecured creditors, but as discussed above, the plan itself cannot affect the ultimate rights of secured creditors.[170] Although the Administration proceeding can be initiated by either the debtor or by creditors, there is little incentive for a debtor to initiate such a proceeding. Management immediately is replaced in most cases[171]

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[167] Insolvency Act, 1986, c. 45, §§ 22, 35(2) (Eng.); s*ee* Davis, *supra* note 47, at 259 (describing prohibition on proposal's affecting security interests without secured creditors' consent); *see also In re* Berkeley Applegate Ltd., 1 All E.R. 32, 37–38 (Ch. 1989) (providing that secured creditors' claims are paramount to winding up costs).

[168] *See* DOING BUSINESS, *supra* note 164, § 15.04(2)(d) (requiring inability of company to pay its debts before administration order can be granted); Broude*, supra* note 160, at 516 (framing insolvency in 'balance sheet' or 'inability to pay debt' terms). *See generally* Michael G. Draper & Turner Kenneth Brown, *Taking a Leaf Out of Chapter 11?*, L. SOC'Y'S GAZETTE, May 8, 1991, at 28 May 8, 1991 (distinguishing chapter 11 cases, where debtor need not be insolvent, from British administration proceedings, where insolvency required).

[169] Insolvency Act, 1986, c. 45, §§ 8(1), 8(3)(a) (Eng.); *see also* DOING BUSINESS, *supra* note 164, § 15.04(2)(d) (enumerating reasons for administration orders where they would prevent company failure); Christopher Roberts, *A Solution for ITV Digital*, NEW L.J., Apr. 19, 2002, *available at* NLJ 152.7028(597) (applying "company rescue" principles to those administration orders indicating probable company survival).

[170] *See supra* notes 164–67 and accompanying text (describing creditor-driven nature of English rehabilitation laws). Even though the secured creditor cannot have its interests affected by the plan, which must be filed by the administrator within three months, staying a secured creditor action is quite radical by world standards. *See* Porta et al., *Creditor Rights Around the World* (1998), *at* http://www.insolvency.co.uk/legal/corescue.htm#annexb (last visited Nov. 11, 2003) (listing those countries which impose automatic stays on creditors). *See generally* John Armour, et al., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VAND. L. REV. 1699, 1737–39 (2002) (noting evolution of English law more favorable to secured creditor, or cohesive group of creditors, creating "floating charges" which trump automatic stay of debtor's assets). A floating charge is a clause, first drafted in England in the mid-nineteenth century, granting clients a security interest in both present and after-acquired (future) property. *Id.* Deemed valid by British courts, these charges further enabled secured creditors to recover, irrespective of an automatic stay. *Id.*

[171] *See* Hoffmann, *supra* note 39, at 2514 (stating that English Administrator is to take control of all company's assets and business); Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 79 n.178 (2001) ("The English administrator . . . does not need to negotiate with . . . debtor's management, but instead takes complete control of the debtor company in a matter of hours after his appointment."); Wisit Wisitsora-At, *New Thai Statute Blends Chapter 11 With Singapore Practices*, AM. BANKR. INST. J., Mar. 1999, at 19 (noting English Administration system provides for independent licensed practitioner to be appointed to take over control of company). The administrator can ask the court for permission to keep management on, but it appears that this is rare. *See* Broude, *supra* note 160, at 517–18. In this article, British attorney John White describes a case in which he represented the administrator in a huge railroad case, and wanted the court to approve the reappointment of the existing directors to run the company. *See id*. at 517. Just in case they did not do a good job, the administrator wanted this to avoid personal liability for the directors' potential mistakes. Being non-interventionist by nature, the court refused to enter an order approving the continuing employment of these people. *See id*. at 517–18. While White tells the story to exemplify the non-interventionist nature of the English bankruptcy courts, it also exemplifies how deeply existing management is distrusted after financial failure in this culture, as well as how hard it

which, from an American point of view, would make it very hard for the company to continue operating.[172]

While this system may result in some "reorganizations,"[173] the reorganization that is contemplated is quite different conceptually from the traditional reorganization case under chapter 11.[174] In describing the procedure for getting a plan approved under this new reorganization law, attorney John White explains, "[i]f the proposal is approved by the creditors, then the administrator moves forward, realizes assets, and sells."[175] Very few American reorganization specialists would equate a proto-typical chapter 11 reorganization with realizing assets and "selling,"[176] Thus, it appears that the typical use of Administration is to sell companies as going concerns rather than in piece-meal form. This is hardly

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must be to actually reorganize a business without ongoing management of the business during the process. *See id*. at 518. In some ways, it is surprising that any companies reorganize at all under these conditions.

[172] *See* Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back–Something May Be Gaining On You*", 68 AM. BANKR. L.J. 155, 216 (1994) (explaining existing management has business acumen and knowledge to operate debtor's business most effectively); David Rawden, *Turnaround Topics: How Growth Can Kill a Company*, AM. BANKR. INST. J., Oct. 1996, *available at* 1996 ABI JNL. LEXIS 548, at *3 (discussing management development as essential to company's capability to grow). There seems to be deep hostility and distrust of the existing management, which has at least some of the knowledge needed to keep things running initially.

[173] *See* Evan D. Flaschen, *Sorting Out Mr. Maxwell's Tangled Webs*, NAT'L L.J., October 5, 1992, at 19 ("[English administration] proceedings are the English version of reorganization under chapter 11 of the Bankruptcy Code."); *see also* Judy Beckner Sloan, *Current Problems in International Insolvency*, 2 SW. J. L. & TRADE AM. 175, 176 (1995) (book review) ("[R]eorganization and English administration both serve the same purpose . . . ."); Hoffmann, s*upra* note 39, at 2508 ("[English Administration] is the nearest thing in British law to chapter 11 of the U.S. Bankruptcy Code."). To accomplish this at all in any case, the Administrator needs to be able to hire the expertise to run the company long enough to get the plan considered. *See generally Insolvency Practitioners Association General Information Page*, *at* http://ipaukcom.site.securepod.com/InfoGeneral.asp (last visited November 11, 2003). These Insolvency Practitioners act as trustees in bankruptcy, nominees and supervisors of voluntary arrangements, liquidators, administrators and administrative receivers of companies. *See id.* They belong to an organization that is essentially self-regulating. *See id.* Initially, the Association was formed in 1961 as a discussion group of accountants specializing in insolvency. Over the early years it grew in stature and numbers until it became incorporated under its current name in 1973. The Association then became empowered to grant and renew insolvency licenses under the 1986 Act. *See id*.

[174] *See, e.g.,* Broude, *supra* note 160, at 517 (providing example of administration proceeding in Railtrack case); *see also* Beckner Sloan, *supra* note 173, at 176–77 (summarizing differences between reorganization and English administration); Tung, *supra* note 171, at 79 n.178 ("English administration is a very different creature from Chapter 11 in the United States.").

[175] Broude, *supra* note 160, at 517 (citing Insolvency Act, 1986, c. 45, § 43(1) (Eng.)).

[176] *See* Beckner Sloan, *supra* note 173, at 177 ("[M]ost administrations in the United Kingdom result in the sale of the business, while in the United States, the business tends to remain in the hands of the debtor."). While one can liquidate a company in a chapter 11, pursuant to a going concern sale, American bankruptcy attorneys still see this as liquidation, not reorganization. This certainly is not the traditional use of chapter 11. Chapter 11 contemplates that the company will restructure its debts, but will not sell its assets to another owner or company. *See* 11 U.S.C. §§ 1126, 1129 (2002). Existing management may stay in place or maybe creditors will receive the company's stock as a distribution on account of their claims in a plan. Just selling the company to someone else, while permitted, has been considered a non-contemplated use of chapter 11. *Cf. In re* Microwave Prods. of America, Inc., 102 B.R. 666, 670 (Bankr. W.D. Tenn. 1989) (stating that "other management" may come in form of trustee).

"reorganization" in the American sense, and does not seem to be–at least from an American point of view–a radical divergence from prior English law.

In summary, English rehabilitation law recently has been overhauled to promote reorganization and fuel a failing economy.[177] Even in its new form, however, this law is very different from American rehabilitation law. Existing management cannot stay in place, there is an insolvency requirement, and the process is entirely creditor controlled. This form of rescue culture may achieve its goals of saving some businesses from piece-meal liquidation by allowing them to be purchased while still operational. It also may save jobs and avoid harm to suppliers and others who deal with the troubled company. It is not, however, a reorganization in the traditional American sense of the word.

### *B. Australian Reorganization Laws*

Australian business reorganization law, known as "Voluntary Administration," does not differ significantly from English reorganization law.[178] A third-party "Administrator," runs the company and proposes a "deed of arrangement" on which creditors may vote.[179] The proceeding is non-interventionist and the creditors, who are thought to have the most at stake in the proceeding, decide whether the company should continue in business or liquidate.[180] As with English cases, the proceedings are creditor-driven. The Administrator is expected to assess the company's future and devise a plan for paying creditors within a very short period of time, sometimes as quickly as one month.[181] Aussies share the English distrust of the American debtor-in possession system, finding it mired by the potential misdeeds of existing management.[182]

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[177] *See supra* note 44 and accompanying text.

[178] *See* Harmer, *supra* note 154, at 150 ("Drawing on the benefit of the earlier insolvency rescue regime developments in the United States and in England, a new form of corporate insolvency procedure termed 'Voluntary Administration' became available in Australia in 1993."). While one scholar has claimed that Australian law recently diverged from English law in important ways, in the grand scheme the Australian Voluntary Administration is very similar to the English Administration. *See* Lewis, *supra* note 1, at 191–200 (describing Australian system that closely resembles English system). Both have a non-interventionist court, an administrator that is typically an accountant, and a very creditor-oriented proceeding. *See id*.

[179] *See* MYT Eng'g v. Mulcon (1999) 195 C.L.R. 636, 657–58 (discussing role of administrator, act of executing deed, approval of deed); Lewis, *supra* note 1, at 198 (illustrating creditors' role as voters). The voting is by simple majority of creditors both in number and amount. *See id*. at 220.

[180] *See* Corporations Act, 2001, c. 5, § 439C (Austl.) (listing creditors' choices); Lewis *supra* note 1, at 198 ("The vote as to whether a company should be liquidated or reorganized is determined by a simple majority of creditors . . . .").

[181] *See* Lewis, *supra* note 1, at 225–26 (discussing rapid pace of Australian administration process); Stewart Oldfield, *Big Banks Say No to Chapter 11*, AUSTL. FIN. REV., May 20, 2003, at 1, *available at* 2003 WL 20257406 ("[T]he current Australian system . . . most often gives administrators just a month to effect a turnaround . . . ."); *see also* Corporations Act, 2001, c. 5, § 438A (Austl.) (enumerating duties of administrator).

[182] *See* Lewis, *supra* note 1, at 224 (identifying absence of debtor-in-possession law in Australian reorganization system); Brian R. Cheffins, *Corporate Goverance Convergance: Lessons from Australia*, 16 TRANSNAT'L LAW. 13, 37 (2002) (recognizing Australia has "no scope" for debtor-in-possession corporate rescues); Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as*

While the Australian business reorganization system is considered fast and efficient, it is unclear how many companies can succeed under these incredibly short time frames.[183] Last year, three of Australia's largest companies filed for Voluntary Administration: HIH Insurance Co., Harris-Scarfe, and OneTel.[184] After brief attempts at reorganization, all three companies were liquidated, though companies of this size would almost certainly survive in the United States.[185]

### *C. Canadian Reorganization Laws*

Because Canadian insolvency laws originally grew out of the English law on the subject, its first laws did not differ dramatically from those of England.[186] In recent years, however, Canada's reorganization laws have grown increasingly similar to those of the United States, both on its books and in actual practice.[187] Given that Canada and the United States are each other's largest trading partners,

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*Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 444 (1995) (distinguishing Australia's voluntary administration system from United States' debtor-in-possession concept in reorganization). Paul B. Lewis particularly believes that the debtor-in-possession leaves management in the driver's seat even though it has nothing to lose by trying, and could harm the interests of creditors in the process. Lewis, *supra* note 1, at 224. Lewis provides an excellent outline of the differences between Australia's Voluntary Administration and chapter 11. *Id*. at 212–19.

[183] *See* Lewis, *supra* note 1, at 225–27 (identifying problems of the Australian reorganization process due to its speed); *see also* Sarah McBride, *Australia's Tough-Minded Bankruptcies May Serve as Role Model*, WALL ST. J., Dec. 16, 2002, at A2 (believing the "tight timetables" of Australia's bankruptcy laws results in less room for companies to operate without having to make debt payments).

[184] *See* Christopher Jay, *Keeping Track of Sticky Corporate Situations Via The Web*, AUSTL. FIN. REV., Jan. 4, 2003, at 31, *available at* 2003 WL 2650252 (noting the collapses of HIH, One.Tel and Harris Schafe); McBride, *supra* note 183, at A2 (using the collapse of HIH, Harris Schafe, and One.Tel to illustrate tough Australian bankruptcy laws); *Pasminco Forced Into Voluntary Liquidation*, AAP NEWS, Sept. 20, 2001, *available at* 2001 WL 27610597 (including liquidation of HIH and One.Tel in list of high-profile Australian corporate collapses). HIH was Australia's second largest insurance company, Harris Scharfe was its third-largest retailer, and OneTel was the fourth largest telecommunications company. This would be the equivalent of Allstate Corp., Dillard's, Inc. and Bell South all going under in the same year. *See* McBride, *supra* note 183, at A2.

[185] *See* Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 600–01 (1993) (finding that plan confirmation is commonplace among large firms in chapter 11, and that larger companies have a far better chance of reorganizing); *see* McBride, *supra* note 183, at A2 ("After brief attempts at restructuring, the Australian companies [including HIH] all liquidated."); Colleen Ryan, *Did This Domino Have to Fall?*, AUSTL. FIN. REV., Aug. 10, 2002, at 31, *available at* 2002 WL 21086219 (discussing HIH liquidation). The Australian system rests on the "simple theory of marketplace efficiency: letting poorly run companies fail leaves the field to those that can compete. And that, ultimately, is good for the economy. 'It's like having brush fires in the forest to get rid of the undergrowth…If you've failed in business, you need a process to get you out of the way.' " McBride, *supra* note 183, at A2.

[186] *See* Ziegel, *supra* note 95, at 386 **(**noting first Bankruptcy Code was modeled after English Bankruptcy Act of 1883); Dargan, *supra* note 8, at 108 (explaining Canada's insolvency laws were modeled after English law because of colonial rule).

[187] *See* Ziegel, *supra* note 95, at 387 (describing similarities in policy between American and Canadian bankruptcy laws); *see also* Dargen, *supra* note 8, at 111 (recounting Canada's deliberations over needing more flexible approaches to insolvency similar to United States' Bankruptcy Code); *infra* notes 177–88 and accompanying text.

this is a logical development.[188] In its move toward an American reorganization system, Canada has become the first nation to embrace the debtor-in-possession model.[189] Despite this change, Canada–like the rest of the world–is still wary of the debtor-in-possession model.[190]

Like England, and to some extent, Australia, secured creditors traditionally have held a protected position in Canadian Insolvency law.[191] Secured creditors are not stayed in an insolvency or liquidation proceeding and until recently, were not stayed by a reorganization case either.[192] Canadian scholars, aware of this divergence from United States law, have tried to explain it. Because secured creditors' lending ratios are purportedly higher in Canada, and as a result lenience toward debtor rehabilitation was likely to create losses to secured rather than unsecured creditors, Canadian lawmakers consistently have believed that the secured creditor in a case should have the right to decide whether a business should be reorganized or liquidated.[193] In the past, it went without saying that secured

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[188] *See* Jacob S. Ziegel, *Corporate Groups and Crossborder Insolvencies: A Canada - United States Perspective*, 7 FORDHAM J. CORP. & FIN. L. 367, 368 (2002) (suggesting that economic interactions between Canada and United States increased need for bankruptcy uniformity); *see also infra* notes 177–88 and accompanying text; *cf.* Davis, *supra* note 47, at 262–64 (emphasizing NAFTA and increased interdependence on trade require more uniform bankruptcy laws between Canada and United States).

[189] *See e.g.,* Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience,* 21 U. PA. J. INT'L ECON. L. 679, 750–51 n.317 (2000) (discussing Canada's ancillary recognition of debtor-in-possession while in American bankruptcy proceedings); Evan D. Flaschen et al., Symposium, *Foreign Representatives in U.S. Chapter11 Cases: Filling the Void in the Law of Multinational Insolvencies*, 17 CONN. J. INT'L L. 3, 17 (2001) (noting instance when Canadian court appointed monitor similar to United States' practice of appointing foreign representatives to sit beside a debtor-in-possession); *see also infra* notes 184–85 and accompanying text.

[190] *See* E. Bruce Leonard, *The International Year in Review* AM. BANKR. INST. J., Dec. 2000–Jan. 2001, at 24 (recounting legislative skepticism of debtor-in-possession model during Canada's 1997 amendments to bankruptcy statutes); E. Bruce Leonard & Melvin C. Zwaig, *Developments and Trends in United States/Canada Cross-Border Reorganizations*, 9 J. BANKR. L. & PRACT. 343, 358. (2000) (demonstrating Canada's hesitancy to adopt debtor-in-possession); *infra* notes 197–198 and accompanying text.

[191] *See* David C. Cook, *Prospects for a North American Bankruptcy Agreement; Les Prospects Pour Une Convention de la Faillite en Amerique Du Nord; Los Prospectos para un Convenio de Quiebra de Norte America*, 2 SW. J. L. & TRADE AM. 81, 106 (1995) (noting preferred position of secured creditors in Canada); Ramsay, *supra* note 97, at 446 (noting underlying theme of creditor control in Canadian bankruptcy regime); Jacob S. Ziegel, *Secured Transactions in Personal Property and the Federal-Provincial Conflict in Canadian Bankruptcy Law*, 46 S.C. L. REV. 877, 881–82 (1995) (illustrating immunization of secured creditors to stays in Canadian bankruptcy proceedings).

[192] *See* Timothy C.G. Fisher & Jocelyn Martel, *The Creditors' Financial Reorganization Decision: New Evidence from Canadian Data*, 11 J.L. ECON. & ORG. 112, 114 (1995) (identifying the options of secured creditors in faced with reorganization); *see also* Ziegel*, supra* note 191, 881–82 (1995) (noting inapplicability of stay to secured creditors in Canada). While this is obviously true in England and Australia too, Canada's geographic proximity to the United States and the openness of the borders created a unique opportunity for cross-border business and even insolvency forum shopping. *See* Davis, *supra* note 47, at 267.

[193] *See* Davis, *supra* note 47, at 270 ("[I]n Canada a reorganization should not be imposed on a secured creditor against its will.") (quoting ADVISORY COMMITTEE ON BANKRUPTCY AND INSOLVENCY, *Proposed Bankruptcy Act Amendments*, at 53–54 (1986) (Can.)); *see also* Fisher & Martel, *supra* note 192, at 114 (noting that secured creditors are not bound by Canadian Bankruptcy Act); LoPucki & Triantis, *supra* note 14, 277 (describing secured creditors right to block reorganization under Canadian Bankruptcy Act).

creditors had not been and should not have been affected by a Canadian reorganization case.[194]

Despite these long-standing beliefs, the Canadian Parliament recently enacted the Bankruptcy and Insolvency Act of 1997 (the "BIA"),[195] which contains a number of innovative provisions, including a broad stay that applies to both secured and unsecured creditors.[196] This law can be used by any reorganizing company of any size, and allows a debtor to file a reorganization case with a mere notice of intention to file a plan of reorganization.[197] Prior law required that the plan be field at the time of the petition.[198] The BIA allows the debtor up to six months to complete its reorganization plan and present it to creditors, whereas in the past Canadian reorganizations were expected to move far more briskly than their American counterparts.[199] The BIA provides for the immediate appointment of a trustee, but for the mere purpose of monitoring and watch-dogging the debtor's activities.[200] Thus, under Canadian law–unlike English and Australian law–it is the debtor, not a third party, that runs the company and proposes the plan.[201]

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[194] *See* James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 477 n.32 (1995) (recognizing Canadian bankruptcy law historically nonbinding on unsecured creditor); *supra* note 193 and accompanying text.

[195] An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, and the Income Tax Act, ch. 12, 1997 C. Gaz., Part III, 1 (Can.) (amending R.S.C., ch. B-3 (1985) (Can.)) (codified as amended at R.S.C., ch. B-3 (1997) (Can.)).

[196] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 69(1) (1985) (Can.) (stating "no creditor . . . shall commence or continue any action" once debtor has filed notice of intention, subject to specific limitations); *see also* Barbara K. Morgan, *supra* note 47, at 484 (noting that generally "[t]he BIA provides for an automatic stay of any action, execution, or other collection proceeding by creditors without leave of court); Ziegel, *supra* note 95, at 392 (observing "[t]he filing of a notice of intention imposes an automatic stay on all creditor activities against the debtor . . . .") (citation omitted). *See generally* Ziegel, *Philosophy and Design, supra* note 97, at 213–14 (reviewing modifications made by 1997 amendments to Canada's Bankruptcy and Insolvency Act); Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 3, 8 (highlighting changes wrought by 1997 amendments and noting various innovative features introduced by 1997 amendments).

[197] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 50.4 (1) (1985) (Can.) ("Before lodging a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality . . . ."); *see also* Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 8 (observing "provisions in the BIA contain many debtor friendly features–notably the ability to initiate the reorganization process with a simple notice of intention . . . ."); Ziegel, *Canada's Phased-In Bankruptcy Reform, supra* note 95, at 392–95 (detailing principal features of pre-1992 BIA).

[198] *Cf.* L.W. HOULDEN & GEOFFREY B. MORAWETZ, HOULDEN AND MORAWETZ BANKRUPTCY AND INSOLVENCY ANALYSIS, Part III, E § 1.2 (West Group 2003) (recognizing that 1992 amendments to bankruptcy laws permitted insolvent person to file notice of intention to make proposal with Official Receiver); Fisher Oil & Gas Corp. v. Guar. Bank & Trust Co., [1982] 142 D.L.R. (3d) 43 (Can.) (revealing complex analysis facing pre-1992 courts in analyzing holding proposals).

[199] Bankruptcy and Insolvency Act, R.S.C., ch. B-3, §§ 50.4 (8), 50.4 (9) (1985) (Can.) (allowing debtor cumulative extensions to complete reorganization plan but only if court is satisfied with debtor's good faith and due diligence); *see also* Morgan, *supra* note 47, at 485 n.149 (observing initial stay remains effective for thirty days but may continue until six months has elapsed); Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 8 (including six months' time to file reorganization proposal as one of "strong creditor-oriented safeguards" contained in BIA).

[200] Bankruptcy and Insolvency Act, R.S.C., ch. B-3, §§ 50.4 (6), 50.4 (7) (1985) (Can.) (outlining trustee's duties and notification responsibilities). Oddly, the debtor chooses the trustee in a voluntary case and the

Under this new reorganization law, a reorganization plan is approved if it is accepted by a majority in number and two-thirds in amount of each creditor class.[202] The court cannot cram down the plan on classes that reject it.[203] Thus, while a secured creditor must be classified separately and thus can kill the plan by voting no, the scheme embodied in the BIA looks more like chapter 11 than any other system on the globe.[204]

Oddly, the prior reorganization law in Canada, the Companies Creditors Arrangement Act (the "CCAA"),[205] was in no way revoked by the BIA and thus is still in place as well.[206] Prior to 1997, this meant that most companies, whether large or small could choose to reorganize under the CCAA or the BIA.[207] The CCAA, however, later was amended to limit its applicability to companies with debts of $5 million (Canadian) or more.[208] The CCAA contains no stay of secured creditor actions, despite that the large companies that would be reorganizing under it would surely need such a stay. [209]

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creditors pick the trustee in an involuntary case. *See* Ziegel, *supra* note 95, at 388 (confirming this practice). I wonder about the incentives created by such a system, as well as the effectiveness of the so-called monitoring in a voluntary case.

[201] Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 55 (1985) (Can.) (noting "consent of the debtor" required when determining proposal terms)*; see also* Lewis, *supra* note 1, at 193–98 (explaining how administrator, appointed by debtor company's directors, assumes the corporate officers' powers).

[202] Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 62 (2) (1985) (Can.) (expressly providing such voting procedures); *see also* 561861 Ontario Ltd. v. 1085043 Ontario Inc., [1999] 15 C.B.R. (4th) 146 (Can.) (explaining the effect of section 62 (2)); HOULDEN & MORAWETZ, *supra* note 198, at E § 18 (confirming "[i]f a majority in number and two-thirds in value of a class of secured creditors do not vote in favour of the plan, the plan is rejected by them and it is not binding on them.").

[203] *See* Ziegel, *supra* note 95, at 393 (stating "a Canadian court has no cramdown powers, even if it feels the rejecting creditors are acting unreasonably.").

[204] Canada has one of the only other working debtor-in-possession systems in the world. *See generally* Ziegel, *supra* note 95, at 387 (commenting "Canadian bankruptcy philosophy broadly mirrors the American philosophy."). Other countries have such schemes on the books, but as will be discussed later, few of them are actually used. *See infra* notes 220–34, 254–57 and accompanying text.

[205] Companies' Creditors Arrangement Act, R.S.C., ch. C-36 (1985) (Can.).

[206] *See* Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 6 (noting Canada's two "regimes" governing reorganization for insolvent businesses). Ziegel goes on to write: "It was believed . . . that the amendments mentioned above foreclosed the CCCA to . . . [but] the skeletal nature of the Act and its near total silence on many of the questions likely to arise in the course of a major reorganization made it an unsuitable vehicle for this purpose." *Id.*, at 6–7.

[207] *See* Ziegel, *supra* note 95, at 387 ("[C]orporate debtors can choose to proceed either under the Winding Up Act (WUA), the Companies' Creditors Arrangement Act (CCAA), or Part III of the BIA."). *But cf. id.*(observing restrictions on consumers to solely parts of the BIA). *See generally* Janis Sarra, *Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant Super-Priority Financing in CCAA Applications*, 23 DALHOUSIE L.J. 337 (2000) (discussing complimentary roles of CCAA and BIA).

[208] *See* Ziegel, *supra* note 95, at 390 (establishing, despite its weaknesses, CCAA is "vehicle of choice" for debtor companies). Said amendments avoided "the excessive liberality of Chapter 11, on the one hand, while refusing, on the other, to continue the secured creditors' immunity from the scope of the old Part III provisions." *Id.* at 391.

[209] Despite the lack of a formal stay, Lopucki and Triantis explain that secured creditors are placed under sufficient pressure of other kinds; even under the CCAA the debtor's estate is normally not dismembered during a reorganization. Lopucki & Triantis, *supra* note 14, at 285.

Yet the CCAA creates other incentives for reorganizing companies. For example, its plan deadlines are much more forgiving, thus giving large companies more time to reorganize.[210] The CCAA also creates incentives for management to stay with the failing company that even chapter 11 does not provide, by allowing explicitly the debtor's reorganization plan also to settle claims creditors may have against directors.[211] This provision was included so that these key managers and employees of the debtor will not quit working for the troubled company at the time when their advice and guidance is needed most.[212] Thus, without question, Canadian lawmakers see a benefit to keeping existing management in place.

While parts of the United States and Canadian reorganization systems appear quite different–particularly with respect to the speed of the reorganization process, oversight of the debtor's management, and the treatment of secured creditors–in reality these two systems function similarly.[213] A trustee is appointed in every Canadian case, at least under the BIA, but such trustee shares the debtor's managerial duties rather than taking them over completely.[214] While a debtor in Canada has far less ability to force a plan on dissenting creditors,[215] and while a failed plan technically requires in immediate liquidation of the Canadian company,[216] in practice Canadian trustees, debtors, and attorneys try to compromise in cases where these strict rules would result in the liquidation of a viable company.[217]

This is not to say that these systems operate identically. To the contrary, other parts of the Canadian reorganization system look similar to that of the United States, but actually are different in both law and practice. Canada has sought to promote reorganization without creating the abuses and delays that it feels are present in the American chapter 11 system.[218] It has sought to achieve these dual

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[210] *See* Ziegel, *supra* note 95, at 391 (discussing example of time extensions as within court's discretion and advantage from CCAA). Ziegel points out that when a secured creditor has a general security interest in most of the debtor's inventory, the creditor must provide the debtor with 10 day's notice before executing on the security agreement. *Id.*at 399.

[211] Companies' Creditors Arrangement Act, R.S.C., ch. C-36, § 5.1(1) (1985) (Can.); s*ee also* Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 9 (illustrating large benefit afforded management by being shielded from liability).

[212] *See* Ziegel, *Modernization of Canada's Bankruptcy Law, supra* note 97, at 10 ("The effect of the new provision in Bill C-5 is to offer the directors a strong incentive to negotiate a successful proposal so as to gain immunity from these personal liabilities."). Most of these claims are for taxes and past wages. *See id*. at 9–10.

[213] *See* Lopucki & Triantis, *supra* note 14, at 340 (demonstrating similarities between U.S. and Canadian systems).

[214] *Id*. at 341.

[215] *Id*. at 330 (noting that Canadian plans cannot bind those who did not vote for it).

[216] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 61(2)(a) (1985) (parantherical); *see also* Lopucki & Triantis, *supra* note 14, at 332 (sating same). In the U.S., the debtor can keep trying new plans. *Id*.

[217] *See id*. Lopucki and Triantis report that in one case, creditors took a "straw poll" to see if the plan was going to fail. If it were to fail, they would go back and try to renegotiate the plan, rather than risk liquidation. 11 U.S.C. § 349 (providing that dismissal of case does not prejudice debtor's effort to re-file petition); *see also* Lopucki and Triantis, *supra* note 14, at 315 (noting U.S. debtor's ability to re-file).

[218] *See* Ziegel, *supra* note 95, at 389.

goals in its own unique ways, by creating a debtor-in-possession system that will promote reorganization while at the same time forcing companies to meet short deadlines in order to avoid costly delays.[219]

## IV. CONCLUSIONS ABOUT BANKRUPTCY SYSTEMS IN THE COMMON LAW TRADITION

The United States, Australian, and Canadian bankruptcy systems all grew out of the unforgiving English system. However, the United States economy diverged from the others, becoming more competitive and much more capitalistic. This was done both out of necessity and design. The idea was to create a competitive economy quickly and also to survive harsh conditions in the new world.[220] Debt forgiveness, both personal and business debt, ultimately was seen as critical to a vibrant American economy.[221] Neither England, nor Australia nor Canada fully embraced this theory, and thus these countries still do not embrace the relatively forgiving American bankruptcy schemes.[222] These historical and economic differences explain–in large part–why both the American personal bankruptcy system and the business bankruptcy system are more forgiving toward the debtor than those of the other common law countries. In the end, differing economic goals help explain these differences.

### *A. Comparing Business Bankruptcy Reorganizations.*

In the business bankruptcy world, the other common law countries remain less forgiving and less trusting of the debtor than the United States.[223] The American system favors "rescue" culture over liquidation culture. The English government now believes that a rescue culture would benefit the economy, but old attitudes die

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[219] *See id.*

[220] *See* BALLEISEN, *supra* note 31, at 28 (describing highly competitive antebellum economy); G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 521–22 (2000) (describing transformation of harsh bankruptcy laws into more charitable practices); *cf.* Nancy Isenberg, *Laissez-Unfaire: Gender and the Political Manipulation of the Common Law in Antebellum American*, 37 TUL. L. REV. 929, 939–40 (2002) (explaining changes in bankruptcy laws in post-Civil War era).

[221] *See* Brunstad, *supra* note 220, at 522 (indicating debt forgiveness is essential function of bankruptcy law); *cf*. BALLEISEN, *supra* note 31, at 28 (describing antebellum economy featuring vast extensions of credit); Jonathan E. Sanford, *Foreign Debts to the U.S. Government: Recent Rescheduling and Forgiveness*, 28 GEO. WASH. J. INT'L L. & ECON. 345, 363–64 (discussing U.S. policy of forgiving foreign nations' debt).

[222] *See* Brunstad, *supra* note 220, at 521–22 (stating that practices in other countries are less generous than current U.S. proceedings); Barry L. Zaretsky, *Symposium: Bankruptcy in the Global Village*, 23 BROOK J. INT'L L. 1, 4 (observing that English approach is less debtor friendly than U.S. approach).

[223] *See, e.g., supra* notes 150–219 and accompanying text; *see also* Brunstad, *supra* note 220, at 521–22 (noting other countries are far less generous with treatment of debtor than U.S.); Zaretsky, *supra* note 222, at 4 (observing that "rescue culture" has not taken hold in other nations).

slowly.[224] New rescue statutes have been enacted, but they still look like liquidation statutes to American eyes.[225] They still provide for the "sale" of businesses albeit more slowly.[226] Debtors-in-possession are distrusted and creditors, particularly secured creditors, control most of the reorganization proceedings.[227] Australian reorganization laws are even more stringent than English ones.[228] The attitude down under seems to be that if a business fails, it should be pushed aside so others can fill the gap.[229]

Canada's reorganization laws are more similar to those of England and Australia than to those of the United States, but in practice its system operates more like the American system.[230] Canadian laws still require more control over the debtor-in-possession's operation of its business, require stricter time constraints, and provide far increased control to secured creditors in such cases.[231] These differences are real, but other differences on the books are superceded by practices that make the Canadian law more similar to chapter 11 than mere book knowledge would suggest.[232] Thus, Canadian lawmakers have enacted reorganization schemes that appear quite different from chapter 11, but often operate in a way that is quite similar to chapter 11.[233] Canada clearly wishes to maintain its own identity with respect to policies of reorganization.[234] At the same time necessity requires that

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[224] *See supra* note 141 and accompanying text; *see also* Moss, *supra* note 7, at 115 (mentioning traditional English emphasis on liquidation); *cf.* John Willcock, *Big Four Face US Might in Restructuring Deals*, TIMES (London), Mar. 27, 2003, at 34 (noting British accountants also must move towards rescue culture).

[225] *See supra* notes 173–76 and accompanying text; *see also* John Armour et al., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VAND. L. REV. 1699, 1744 (2002) (explaining Insolvency Act of 1985 was designed to provide for survival of business rather than liquidation if possible).

[226] English law considers a "going concern sale" a high level of reorganization, whereas in Australia, even that may be impossible if there is no immediate buyer. *See* Lewis, *supra* note 1, at 225. Professor Lewis notes that an Australian company's ultimate disposition is typically determined within one month of the company's bankruptcy filing. *Id*. (citing Corporate Reform Act, 1992, § 4369(E)(2) (Austl.)). The Corporate Reform Act's strict deadlines can be extended in rare circumstances. Corporate Reform Act, 1992, § 439A (6). However, in a typical case there is little time to find a buyer for a going-concern sale.

[227] *See* Mark A. Frankel, *Federal Taxation of Corporate Reorganizations*, 66 AM. BANKR. L.J. 55, 73 (indicating creditors in effect control reorganization proceeding); Linda J. Rusch, *Single Asset Cases and Chapter 11: The Classification Quandary*, 1 AM. BANKR. INST. L. REV. 43, 60–61 (acknowledging creditors should control reorganization process in order to foster greater monetary collection).

[228] *See supra* notes 178–85 and accompanying text.

[229] *See id*. In other words, life is tough and you live with it.

[230] *See supra* notes 186–219 and accompanying text. Whether Canada is more similar culturally to the United States, on the one hand, or to England or Australia, on the other hand, is far less clear. Many Canadians outside Quebec would probably say they are more culturally similar to Continental Europeans or even English or Australian people, whereas, most Americans probably see Canadians from outside Quebec as extensions of themselves and their culture.

[231] *See* Lopucki & Triantis, *supra* note 14, at 337–39.

[232] *Id*. at 340.

[233] *Id*. at 341. While these authors suggest that this has happened because any market economy is likely to come up with a system that functions in roughly the same way chapter 11 does, this has not been the case in either England or Australia, nor in most of the other market economies of the world. *See supra* notes 150–85 and accompanying text (describing business bankruptcy systems in England and Australia).

[234] Lopucki & Triantis, *supra* note 14, at 341.

these two bordering trading partners, with similar economies and cultures, have reorganization systems that operate similarly if not identically.

*B. Comparing Consumer Bankruptcy Systems.*

In addition to differing the history and economics described above, culture also plays a large part in explaining why the countries described in this Article have designed different bankruptcy systems. This is particularly true of consumer bankruptcy systems. The United States is more consumeristic than these other countries.[235] In fact, consumerism is engrained in Americans practically from birth, and drives much of the nation's economic policy.[236] This may explain why the American personal bankruptcy systems cater to the middle rather than the lower classes.[237] These are the people who can best continue to be meaningful economic players, the ones we need in order to keep the dollars flowing. By comparison, Canada's system, and perhaps the systems of Australia and England as well, serve mostly the lower classes, the classes that need help the most, but who probably won't ever do much to fuel the economy.[238]

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[235] *See* ROBERT E. LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES 176 (YALE U. PRESS 2000) ("[T]he United States [is] the apotheosis of . . . consuming . . . ."); *see also* Christopher L. Peterson, *Truth, Understanding, and High Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 864 (2003) (acknowledging America's consumeristic culture); Ziegel, *supra note* 125, at 1244 (stating that America has compulsively consuming environment.

[236] LANE, *supra* note 235, at 176 (noting that consumerism defines Americans). Spending is also critical to the U.S. economy, as President Bush reminded us after 9/11. President George W. Bush, Speech to Congress, (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html. The Federal Reserve then encouraged consumer spending by repeatedly cutting interest rates over the next few months. *See U.S. Economy Shrinks*, October 31, 2001, *at* http://edition.cnn.com/2001/BUSINESS/10/31/economy/index.html, (last visited on January 7, 2003) (indicating that Federal Reserve followed this policy in the wake of 9/11). Again on January 7, 2003, President Bush delivered a speech in which he encouraged Americans to be good consumers in spite of the economic stand-still. President George W. Bush, Speech to Economic Club of Chicago, (Jan. 7, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030107-5.html.

[237] Ziegel, *supra* note 125, at 1244 (stating that debtors are not outliers of American society). Ziegel, who recently reviewed the empirical study of Sullivan, Warren, Westbrook, entitled *The Fragile Middle Class,* was surprised by the book's title. He found it surprising that the authors focused on class in the book, given America's reputation as a classless society. He ultimately saw the point of the title, namely that bankruptcy debtors are not outliers in society, but people we know, students, neighbors and associates, who are victims of America's "market-driven, highly competitive, compulsively consuming, and anti-welfarist environment." Ziegel does not take issue with the authors' conclusions that bankruptcy is a middle-class phenomenon in the U.S., and that most personal bankruptcy can be traced to events outside a person's control, such as unemployment and downsizing, medical bills and other significant effects of illness, broken homes, the burden of home ownership, and the transforming affects of credit cards on consumer credit. Actually, he does believe that lifestyles and consumption habits play a larger role than the authors would. *See generally id*.

[238] *See id*. at 1244 (observing that "consumer bankruptcy was very much a phenomenon associated with the working class").

Additionally, the United States' free market economy, which creates volatility in the job market, makes failure a certainty, at least for some.[239] As one scholar has commented when describing capitalism in its purer forms, "these crises entail…the devaluation, depreciation, and destruction of capital. And that is never a comfortable process to live with–particularly since it also entails the devaluation, depreciation, and destruction of the labouror."[240]

Unlike most other societies, the American free-market system also allows consumers to take on unlimited amounts of consumer credit.[241] The United States has dealt with the extensive availability of credit in society by putting the burden on lenders to determine credit-worthiness.[242] If the borrower cannot pay back the loan, he or she is permitted to discharge the debt, thus placing the risk of loss on the creditor who made the improvident loan. Under this free-market approach to the availability of credit, it is considered most efficient to make the credit industry internalize these losses.[243]

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[239] *See, e.g.*, Kent M. Forney, *Insurer Insolvencies and Guaranty Associations*, 43 DRAKE L. REV. 813, 814 (1995) (stating insolvency and failure are inevitable in insurance industry despite heavy regulation); *see also* Michael Adler, *The Overseas Dimension: What Can Canada and the United States Learn from the United Kingdom?*, 37 OSGOODE HALL L.J. 415, 420 (1999) (discussing inevitability of casualties in capitalist societies); Kent Anderson, *The Cross-Border Insovency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 680 (2000) (discussing global implications of insolvencies in free market economies).

[240] DAVID HARVEY, THE LIMITS TO CAPITOL 97 (Oxford Press 1984).

[241] As a result of relentless and unyielding admonitions to spend, as well as other cultural factors, Americans have more debt of all kinds than persons of other parts of the world. *See generally* Thomas A Fogarty, *A Record Number of U.S. Homeowners are Facing Foreclosure, and Many More Are Falling Behind*, USA TODAY, September 10, 2002, at 1A. Fogarty reports that during April, May and June of 2002, 1.23% of all mortgages–or 640,000–were in foreclosure. *Id*. This is the highest rate recorded in the 30 years in which this data has been kept, and is up from 1% just one year ago. *Id*. Consumer debt is at an all-time high, second mortgages are at an all-time high, foreclosures are at an all-time high, and personal bankruptcies are at an all-time high. *See, e.g., Bankruptcy Filings Hit Historic Highs* (Nov. 25, 2002), *at* http://www.abiworld.org/release/3Q02.html (last visited Nov. 7, 2003). Yet at least one scholar has wondered why more U.S. households do not file for bankruptcy, concluding that as of 1998, only about 1% of households file but 15% could benefit from such a filing. *See* Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998) (indicating that bankruptcy filings could triple without exhausting the number of households that could benefit from such filings); *cf*. Riva D. Atlas, *Risking House and Credit: Home Equity Borrowing Rises to Worrisome Levels*, N.Y. TIMES, Mar. 26, 2003, at C1 (stating home equity loan levels have reached such levels that consumer groups think many will be unable to service their loans and end up homeless). Some lenders, including Wells Fargo Bank, are even ending up to 100% of the home's value, despite that people often have insufficient income to service such loans. *See id*. Between 1979 and 1997, personal bankruptcies increased by more than 400%. *See* FRAGILE MIDDLE CLASS, *supra* note 128, at 3 (citation omitted). Since World War II, the annual personal bankruptcy rate has steadily increased most years. These increases accelerated during the 1980's and 1990's, frequently breaking records from quarter to quarter and year to year. *See id*.

[242] *See* Manufacturer's Hanover Trust Co. v. Ward (*In re* Ward), 857 F.2d 1082, 1084 (6th Cir. 1988) (stating lender has duty to investigate creditworthiness and lenders who fail to do so should not be rewarded); *In re* Waste Conversion Techs., Inc., 205 B.R. 1004, 1009 (D. Conn. 1997) (observing that reasonable creditor would investigate debtor's creditworthiness).

[243] *See* Ziegel, *Philosophy and Design, supra* note 97 ("[I]t is more efficient to oblige the credit industry to internalize its losses . . . ."). *See generally* JAMES R. BARTH ET AL., THE FUTURE OF AMERICAN BANKING 25-37, 55, 65-77 (1992) (discussing high risk lending by banks).

From an American perspective, bankruptcy acts as a social safety net in an economic downturn.[244] A robust capitalist economy ensures that such downturns, along with vibrant upturns, will occur. The safety nets provided by broad bankruptcy rights are particularly necessary in the United States, where consumer credit availability outstrips any reasonable ability to repay the amounts owed.[245] Large consumer debts increase a person's exposure to downturn and crisis.[246] Thus, a free-market approach to consumer credit is balanced by a forgiving consumer bankruptcy system. One without the other could create imbalances and thwart economic growth from consumer spending, by leaving past spenders dormant.[247]

Additionally, the legal and economic systems in the United States contain few other social safety nets, at least by global standards.[248] Thus, American society often

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[244] *See* Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Group, Ltd. (*In re* Wedgewood Realty Group), 878 F.2d 693, (700–02) (3d Cir. 1989) (characterizing 11 U.S.C. 105(a) as safety net by which actions against bankrupt estate may be enjoined); *cf.* Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L.J. 1277, 1287–88 (citing safety nets offered by insurance industry). *But see* Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 15 (postulating bankruptcy as safety net seems to be perverse solution and offers "temporary relief" at best (quoting Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 460 (1997))).

[245] It is not that consumer credit is abused but rather that these large debts cannot be carried once a person loses a job, becomes ill, or gets divorced. *See* FRAGILE MIDDLE CLASS, *supra* note 128, at 19–26 (discussing increased vulnerability in wake of unforeseen circumstances); *cf*. Braucher, *supra* note 11, at 160 (1999) (cautioning failure to provide expanded safety net tends to create deleterious effects in economy); Carlos J. Cuevas, *The Consumer Credit Industry, the Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and Justice: A Critical Analysis of the Consumer Bankruptcy System*, 103 COM. L.J. 359, 378–79 (1998) (noting significant adverse consequences arising from credit card companies solicitation of consumer creditors unworthy of further credit).

[246] *See* FRAGILE MIDDLE CLASS, *supra* note 128, at 140 (detailing credit card debt's effect on middle-class families); *see also* Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 253–54 (1997) (charting credit card delinquencies and personal bankruptcies filings from 1990 to 1996); Hon. David F. Snow, *The Dischargeability of Credit Card Debt: New Developments and the Need for a New Direction*, 72 AM. BANKR. L.J. 63, 65 (1998) (reporting perception among bankruptcy judges that credit card debt causes upsurge in personal bankruptcy filings).

[247] Deregulated consumer credit is on the rise in the countries described here, as well as many others around the world. *See* Jason Booth, *KIS Investors Bet on South Korea's Rising Debt*, WALL ST. J., May 30, 2002, at C14 (predicting consumer-credit blowout in S. Korea that could slow entire economy); Ian Fletcher, *Card Fraud Soars to Pounds 228M*, EVENING STANDARD (London), Oct. 16, 2002, at 15, *available at* 2002 WL 101323704 (noting mounting credit card debt throughout U.K., Mexico, Malaysia, China, South Korea and Thailand); *Growth of Credit Cards in Emerging Markets Leading to Concern Over Mounting Consumer Debt and Card* Fraud, M2 PRESSWIRE, Oct. 15, 2002, *at* 2002 WL 26804947 (describing skyrocketing credit card debts in China, South Korea, Brazil, and Thailand). *See generally* Paul Mizen, *Consumer Credit and Outstanding Debt in Europe*, EXPERIAN CENTRE FOR ECONOMIC MODELING, *available at* http://www.nottingham.ac.uk/economics/ExCEM/issues/issues4.pdf (discussing implications of varying credit systems in Europe); EUROPEAN CREDIT RESEARCH INSTITUTE, *Consumer Credit in the European Union* (2000), at 16–18, *available at* http://www.ecri.be/pubs/ECR1en.pdf (noting tremendous increases in credit card debt in Europe).

Time will tell whether forgiving bankruptcy systems will follow. It appears that some countries do appear to be passing U.S. style bankruptcy systems in order to help fuel a market economy. *See* Metzger & Bufford, *supra* note 6, at 153 (noting other countries looking to U.S. for example of working bankruptcy system).

[248] *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 460 (4th ed. 2001) (noting prevalence of non-bankruptcy social protections in Europe); Ann Morales Olazabábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U.

uses bankruptcy as a catch-all solution to many social problems.[249] Indeed, given that the bankruptcy system supplants and substitutes for broader based social welfare systems in place in other countries, it is hardly surprising that it provides greater or broader rights than the bankruptcy systems of other countries. When considering the availability of consumer credit, as well as the volatility of American job market and economy as a whole, a forgiving system of debt relief provides one of the only forms of relief available.[250]

In the United States, forgiving personal bankruptcy systems, coupled with an open-door policy with respect to consumer credit, create desirable economic results.[251] These policies encourage consumer spending by allowing consumers to continue using their income to purchase more goods and services, thus promoting further economic growth.[252] Policy makers in the United States have chosen to fuel the economy not just through commercial activity but also through consumer spending,[253] thus insuring that personal financial failure does not curtail future spending.

This fixation with consumer spending, as an economic indicator, is not shared in other parts of the world. The personal bankruptcy systems of England, Australia, and Canada, are probably more similar to that of the United States than any others around the world. Yet all three have discretionary rather than automatic bankruptcy discharge provisions,[254] and all three also require that individuals pay back a portion of their old debts under a repayment plan.[255] While the U.S. House of Representatives recently has approved a similar repayment plan in the United

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PUB. INT. L.J. 317, 354–55 (2003) (pointing out safety nets provided by other countries); Ziegel *Philosophy and Design, supra* note 97, at 210 (highlighting Canada's broad safety net).

[249] *See* Broude, *supra* note 160, at 522 (commenting on plenary use of bankruptcy for financial problem solving); *cf*. Kilborn, s*upra* note 2, at 889–90 (noting need for more generous U.S. bankruptcy policy as substitute for other forms of social safety nets).

[250] *See* Broude, *supra* note 160, at 522 (describing bankruptcy system as "only place" Americans have to deal with loss due to numerous forms of economic risk).

[251] Consumer spending is widely believed to be a measure of overall consumer confidence. When a household is deciding what it can afford, it will look at probable future income as well as current income. If consumers are optimistic about the future economy, they will be inclined to spend their disposable income. If, however, they do not believe that good times lie ahead, they are more likely to save their money. THOMAS MAYER ET AL., MONEY, BANKING, AND THE ECONOMY 273 (6th ed. 1997).

[252] In other words, under the current U.S. system, human capital is used to fuel future spending and economic growth, not to pay back past obligations. *Compare* Iain D.C. Ramsay, *supra* note 107, at 50 (describing Canadian systems, in terms of use of human capital), *with* Karen Gross, *Demonizing Debtors: A Response to the Hornsberger-Ziegel Debate*, 37 OSGOODE HALL L.J. 263, 266 (1999) (discussing debate in U.S. society, as well as in Congress, about whether debtor's future income should be dedicated, at least in part, to paying off past-due creditors).

[253] *See supra* notes 235–37 and accompanying text (discussing consumeristic underpinnings of U.S. economy).

[254] *See* Ziegel, *Philosophy and Design, supra* note 97, at 228–31.

[255] *See generally* Lewis, *supra* note 1; Ziegel, *Philosophy and Design, supra* note 97, at 228–31 (characterizing discretionary discharge under Canadian bankruptcy law as "most important difference" between Canadian and U.S. bankruptcy systems); *Guide To Bankruptcy*, U.K. Insolvency Service, at 10 (2001), *available at* http://www.insolvency.gov.uk/pdfs/gtbweb.pdf (providing that discharge is optional under English law).

States,[256] the idea of using future human capital to pay off past debts does not encourage additional spending or additional economic growth. Indeed such a plan works against the theory that economic growth, even if based on consumer spending charged to an unpaid credit card, is a good thing. In any event, the United States' economic growth goal may explain why the U.S. has not had a repayment plan requirement in the past and why these other countries have had such plans.[257]

Other explanations have been proposed as well. In his book *Debt's Dominion,*[258] Professor David Skeel claims that American bankruptcy law is very different from that around the world, because of the unique role of partisan politics in the United States bankruptcy enactment process, as well as the unique role of attorneys in such process.[259] As Professor Skeel explains, since the beginning of such process, Republicans generally have represented the creditor interests and Democrats generally have represented debtor interests.[260] As a result of these differing perspectives on the part of lawmakers, the law developed into a complex system that balanced these interests rather than merely acting as a creditor collection device.[261] Additionally, attorneys played a large and prominent role in both forming and perpetuating the American bankruptcy systems.[262] As a result, attorneys continue to play a far larger role in U.S bankruptcy cases than they do in any other system in the world.[263] This unquestionably perpetuates the existing system.[264]

A more contemporary cultural factor also plays a role in explaining why the personal bankruptcy system in the United States is forgiving, compared to other systems. Americans may have a different relationship with money than most other people.[265] The American emphasis on economic conditions, consumerism, and material things makes money one of the strongest forces in society.[266] Money *is* power in American society. It defines Americans' worth and status in a way unmatched elsewhere. If Americans lose money, they fear that they will lose themselves.[267]

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[256] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 5745, 107th Cong. § 201(a) (2002), *available at* http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.5745:.

[257] *But see id*. (containing Congress' recommendation for adopting repayment plan).

[258] *See* SKEEL, *supra* note 2.

[259] *See id*. at 16.

[260] *Id*.

[261] *See id*.

[262] *Id*. at 46.

[263] *Id*.

[264] While these observations do help explain how the U.S. system developed as it did, they do not thoroughly explain why similar influences did not have similar effects on some of the other countries described here.

[265] *See* LANE, *supra* note 235, at 176 (noting that consumerism shapes "the totality of American life in a very profound manner."); 626–27 (describing unique American brand of capitalism).

[266] *See id*.

[267] *See* Karen Gross, *Demonizing Debtors: A Response to the Honsberger-Ziegel Debate*, 37 OSGOODE HALL L.J. 263, 271 (1999) (asserting that money is as fundamental as language). Moreover, the societal emphasis on money has moved people further apart and placed things over people, thus decreasing overall happiness in American society. LANE, *supra* note 235, at 10 (noting Americans are wealthier than they are

Material things appear to play a smaller role in most other societies.[268] Perhaps this also explains the comparatively forgiving nature of the personal bankruptcy system in the United States. Americans are encouraged by society to buy things, and also need material things in order to be valued in society. They also need a safety net if they are ultimately unable to pay for all these necessities. Given these differences in societal views and economic goals, as well as these quirks of history and culture, the differences among the common law bankruptcy systems should not be surprising. In fact, perhaps the many similarities among these systems should surprise us instead.[269]

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happy). Perhaps this is yet another reason to provide respite from this source of anxiety and pain in a money driven society**.**

[268] *See, e.g.,* Thomas R. Burton, III, *Enraged Over Punishment: One Judge's Call for Sentencing Reform*, 16 B.C. THIRD WORLD L.J. 167, 175 (1996) (book review) ("Scandinavian society stresses greater social and economic equality that de-emphasizes materialistic goals."); Mark Hannig, *An Examination of the Possibility to Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of the Nafta States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties*, 13 ARIZ. J. INT'L & COMP. LAW 175, 178 (1996) (describing indigenous peoples as "non-materialist").

[269] The differences between the U.S. system and these other systems actually look significant, as long as one does not compare them to any of the other systems around the world. All three of these other countries appear to rely less on consumer spending to fuel their economies, and also provide more safety nets in the event of failure. *See* Efrat, *supra* note 135, at 168. As societies, they focus less on money and rely less on bankruptcy law to solve all societal ills. *See* AUSTRALIAN BANKRUPTCY LAW, *supra* note 69, at 212–15 (explaining the social theory of bankruptcy reorganization in detail); Broude, *supra* note 160, at 516 (explaining how American bankruptcy proceedings become the solving ground for extensive societal problems).