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## UNDOCUMENTED DEBTORS

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*Undocumented immigrants in financial distress are barred from seeking many forms of assistance. Bankruptcy is one tool that is, in theory, available to undocumented debtors because legal status is not a prerequisite to bankruptcy relief. This Article explores undocumented debtors' interactions with the bankruptcy system. Undocumented debtors face both formal and informal barriers to bankruptcy filing, including fear of deportation, misinformation, and the legal requirement that the debtor produce financial records. It is both possible and desirable to ease many of these barriers. Bankruptcy relief facilitates the rehabilitation of debtors in financial distress, contributes to the economic well-being of the debtor's family and community, and provides an orderly, equitable resolution of the debtor's financial affairs. These values apply with no less force when the debtor is undocumented.*

The recent recession has increased anti-immigrant sentiment and has inspired increasingly harsh measures directed at “illegal immigrants,” who are accused of “taking jobs” from authorized residents.<sup>1</sup> For example, Arizona attracted national attention with its new law that makes it a state crime to be in the United States illegally and requires local law enforcement to arrest individuals suspected of being in the country illegally.<sup>2</sup> Georgia, Alabama, Indiana, and South Carolina recently adopted similar measures.<sup>3</sup> Additionally, some anti-immigrant activists have proposed new

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1. For examples of such measures see Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2091–92 (2008) (discussing proposed legislation to eliminate birthright citizenship); Miriam Jordan, *Tough Law Attracts Legal Challenges*, WALL ST. J., Apr. 30, 2010, at A3; Jonathan Weisman & Stephanie Simon, *The Arizona Immigration Law: Ruling is New Hot-Button Issue in Election Year*, WALL ST. J., July 29, 2010, at A6. For the view that immigrants are “taking jobs from ‘Americans,’” see, e.g., Gary Martin, *Napolitano, GOP House Members Spar*, HOUS. CHRON., Oct. 27, 2011, at A11 (stating that Lamar Smith accused “illegal immigrants” of taking jobs from “unemployed American worker[s]”); Jeremy Redom, *Panel Wraps Up Immigration Bill Hearings*, ATLANTA J. CONST., Feb. 12, 2011, at 6B (stating that proponents of Georgia bill HB 87 targeting illegal immigration argue undocumented immigrants are “taking jobs from state residents”).

2. For a thorough summary of the law and its implications, see Gabriel J. Chin, Carissa BYRNE Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

3. See Jerry Markon, *Justice Targets Laws Like Arizona's*, WASH. POST, Sept. 30, 2011, at A01.

interpretations of the Constitution that would bar the American-born children of undocumented immigrants from citizenship.<sup>4</sup>

Undocumented immigrants are also disproportionately burdened by the economic slowdown, as jobs largely held by undocumented immigrants diminish in number.<sup>5</sup> Undocumented immigrants face high unemployment rates in the wake of declines in construction and manufacturing.<sup>6</sup> At the same time, Congress has considered some legislative proposals to help undocumented immigrants, none have been adopted.<sup>7</sup>

Bankruptcy is an important safety net for those in financial distress. Entering bankruptcy proceedings can stop harassing calls from creditors, wipe away medical debt, cancel credit card debt, forestall a foreclosure, or prevent lenders from suing borrowers personally when a foreclosed property is sold for less than what it is worth.<sup>8</sup>

Bankruptcy is also available, at least in theory, to undocumented immigrants. The Bankruptcy Code contains no requirement that the debtor prove lawful status. Yet, the legal literature has not addressed the availability of bankruptcy for undocumented debtors. Although bankruptcy may be a crucial tool for undocumented debtors in financial distress, these debtors face substantial barriers to bankruptcy filing. As this Article reports, few undocumented debtors seek or obtain bankruptcy relief.

This Article also considers whether the barriers faced by undocumented immigrants should be removed. This question engages two spheres of political and academic debate: first, the bankruptcy context, whether and to what degree accessibility to bankruptcy should be expanded; and second, the immigration context, whether and to what degree rights and privileges should extend to undocumented immigrants.

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4. See Motomura, *supra* note 1, at 2091–92 (discussing proposed legislation to eliminate birthright citizenship); Robert Gehrke, *Utah Lawmakers, Educators: Keep the 14th*, SALT LAKE TRIB., Sept. 3, 2010; Peter Grier, *14th Amendment: Is Birthright Citizenship Really in the Constitution?*, CHRISTIAN SCI. MONITOR, Aug. 11, 2010.

5. See Tara Bahrampour, *Fewer Entering US illegally; Report Cites Sharp Decline Since 2007*, THE BOSTON GLOBE, Sept. 2, 2010, at 2 (attributing the decline in undocumented immigrants to the loss of thousands of construction jobs).

6. See *id.*

7. For example, the Development, Relief, and Education for Alien Minors Act (DREAM Act), a bill to provide undocumented immigrants with educational opportunities, failed in Congress. See Julia Preston, *Immigration Vote Leaves Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35; Scott Wong & Shira Toeplitz, *Immigration Legislation Fails to Pass Senate Vote*, NEWARK STAR-LEDGER, Dec. 19, 2010, at 003.

8. See 11 U.S.C. § 362 (2006) (barring collection activities, foreclosures, and repossessions upon bankruptcy filing); 11 U.S.C. §§ 727, 1328 (2006) (providing for the discharge of debt).

Many of the barriers to bankruptcy relief experienced by undocumented debtors can and should be eased. This Article proceeds in five Parts. Part I discusses the benefits of bankruptcy for our society, for debtors in general, and for undocumented debtors specifically. Part II explains that undocumented debtors are eligible for bankruptcy relief under the Bankruptcy Code. Part III reports empirical evidence suggesting that a proportionally small number of undocumented debtors currently obtain bankruptcy relief. At most, undocumented debtors file for bankruptcy at one percent of the rate of the general population. Part IV discusses a number of potential formal and informal barriers to bankruptcy relief for undocumented debtors. Part V considers whether, as a normative matter, undocumented individuals should be entitled to obtain bankruptcy relief. From both bankruptcy policy and immigration policy standpoints, the necessary participation of undocumented immigrants in a consumer credit-based economy requires that bankruptcy relief be made accessible to this population. Amendments to bankruptcy rules and guidelines, in addition to education for lawyers and others involved in the bankruptcy system, can relieve some of the existing barriers to bankruptcy relief.

## I. THE IMPORTANCE OF BANKRUPTCY

### *A. Benefits of the Bankruptcy System*

To illuminate why it is important that undocumented immigrants not be barred from obtaining bankruptcy relief, this Part presents an overview of the benefits bankruptcy offers. A rich debate exists regarding the justifications for the U.S. bankruptcy system. Although there is no consensus, scholars and policymakers coalesce around two key positions. First, a debtor-oriented rationale, in which bankruptcy provides a “fresh start” for the “honest but unfortunate debtor.”<sup>9</sup> Bankruptcy allows the debtor to discharge her debts and retain the wages she earns thereafter. This fresh start increases the likelihood that the debtor will be able to

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9. The term “fresh start” originated in *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), where the Supreme Court noted that bankruptcy gives “the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” See also Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1402 (1985).

continue to feed, clothe, and house herself and her dependents.<sup>10</sup> Bankruptcy, in this respect, partially shifts the burden of the survival of the destitute debtor from the public to the debtor's creditors.<sup>11</sup> Providing an escape route for heavily indebted individuals is particularly important in the United States where both families<sup>12</sup> and our economy depend heavily on consumer credit.<sup>13</sup> In addition, there are currently no limits (such as usury restrictions) to ensure that debtors can afford the loans they borrow.<sup>14</sup> The bankruptcy escape valve is thus a crucial component of each consumer credit agreement—it gives debtors who are unable to repay the ability to halt collection efforts.

The second justification for bankruptcy is that it allows creditors to access the debtor's assets in an orderly manner.<sup>15</sup> This rationale emphasizes the potential to maximize utility for creditors. Absent bankruptcy, debt collection becomes a race that awards only the most sophisticated or most aggressive creditors. Debtors may repay only certain favored creditors and ignore others.<sup>16</sup> Bankruptcy,

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10. Many individuals in bankruptcy are parents with children. See Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1011–13 (2002) (reporting data that families with children are 300 percent more likely to file for bankruptcy, and that one in fifty-one children experienced bankruptcy in 2001).

11. This Article does not endeavor to persuade the reader that the justifications for bankruptcy articulated here are worthy ones. Other scholars have done so persuasively and this Article thus adopts their theoretical framework as a starting point.

12. See generally ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE* (Basic Books 2003).

13. See, e.g., Michael D. Sousa, *A Delicate Balancing Act: Satisfying the Fourth Amendment While Protecting the Bankruptcy System From Debtor Fraud*, 28 YALE J. ON REG. 367, 402 (2011) (“Our nation’s economic welfare undeniably has come to depend upon ordinary consumers making purchases on credit that are unsecured by collateral.”) (citations omitted); Vincent D. Rougeau, *Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates*, 67 U. COLO. L. REV. 1, 1–2, 19 (1996); SUSAN BURHOUSE, FDIC, *EVALUATING THE CONSUMER LENDING REVOLUTION* (Sep. 17, 2003), <http://www.fdic.gov/bank/analytical/fyi/2003/091703fyi.html>.

14. See *Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (permitting banks to charge the interest rate of the state in which the bank is located regardless of interest rate limits in the state of the customer’s residence). It is also now well documented that the recent financial crisis stemmed from sub-prime mortgage loans issued to borrowers who could not afford to repay the loans. See generally KATHLEEN C. ENGEL & PATRICIA A. MCCOY, *THE SUBPRIME VIRUS* (Oxford Univ. Press 2011).

15. See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 785 (1987) (“Bankruptcy law aims first to conserve and divide an estate that cannot meet all its obligations . . . .”); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857 (1982) (arguing that bankruptcy can help eliminate a race to the assets by providing for *pro rata* distributions to general creditors, thus maximizing collections for creditors).

16. Bankruptcy requires similarly situated creditors to be paid *pro rata*. See 11 U.S.C. § 507 (2006); Warren, *supra* note 15, at 782 (“In enforcing the rights of one creditor, state collection law does not address the possible consequence that the collection will render the debtor unable to pay its remaining creditors.”).

however, has an equalizing function that forces unsecured creditors to share equally in the debtor's assets.<sup>17</sup> As further evidence of bankruptcy's potential benefit to creditors, Section 303 of the Bankruptcy Code allows creditors to *force* debtors to file for bankruptcy.<sup>18</sup> Although this provision is invoked infrequently,<sup>19</sup> its existence reflects Congress' recognition that bankruptcy is designed not only to provide relief to creditors, but also to ensure a fair distribution for creditors.<sup>20</sup>

As discussed in greater detail in Part V, these primary justifications for the bankruptcy system—a fresh start for the debtor and an equitable and orderly distribution for creditors—apply with equal force to documented and undocumented debtors.

### *B. Benefits of Bankruptcy for Debtors*

Bankruptcy is an important safety net for individuals or families who incur debt because of job loss, medical emergency,<sup>21</sup> or family breakup.<sup>22</sup> The Bankruptcy Code provides two mechanisms through which an individual debtor may obtain a fresh start. First, through Chapter 7 Bankruptcy proceedings, a debtor can seek an

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17. Bankruptcy is not a perfect equalizer for all creditors, primarily because it entitles secured creditors to the value of their collateral. This entitlement means that secured creditors often receive a much greater recovery in bankruptcy than unsecured creditors. *See, e.g.*, 11 U.S.C. § 362(d) (2006) (stating secured creditors may be released from the automatic stay to foreclose on property if, for example, their security interest is not adequately protected); 11 U.S.C. § 506 (2006) (stating secured creditors in bankruptcy are entitled to their full claim, including interest and fees, up to the value of their collateral).

18. 11 U.S.C. § 303 (2006).

19. Despite the availability of involuntary bankruptcy, most creditors prefer to negotiate non-bankruptcy solutions rather than pursue involuntary filings. *See generally* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number is Not Too Small*, 57 BROOK. L. REV. 803, 805–06 (1991).

20. A common reason for a creditor to seek an involuntary bankruptcy petition is that certain other creditors are being treated preferentially. *See, e.g.*, *In re* 801 S. Wells St. Ltd., 192 B.R. 718, 725 (Bankr. N.D. Ill. 1996) (citing the prevention of preferential payments to favored creditors as a proper reason to file an involuntary petition); *In re* Broshear, 122 B.R. 705, 708 (Bankr. S.D. Ohio 1991) (referencing “the historic mission of involuntary bankruptcy to provide creditors with a means of assuring equal distribution of a debtor’s assets among his creditors”).

21. Indeed, medical debt is one of the most frequent reasons for bankruptcy filing. Of the forty-five percent of the U.S. population who filed for bankruptcy, at least 62.1 percent file for medical reasons. David U. Himmelstein, Deborah Thorne, Elizabeth Warren & Stefie Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 741 (2009).

22. WARREN & TYAGI, *supra* note 12, at 80–81. *See also* Michelle 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, 693 n.39 (1998) (noting job loss, serious illness, and divorce as major reasons for filing bankruptcy).

immediate discharge of her debts in exchange for relinquishing all of her non-exempt assets to creditors.<sup>23</sup> In a Chapter 7 bankruptcy, unsecured debt such as credit card debt and medical bills are promptly discharged. A second option is Chapter 13 bankruptcy, which allows the debtor to retain her assets by making payments to her creditors for a period of three to five years, after which time her remaining debts are discharged.<sup>24</sup> If a Chapter 13 debtor wishes to retain property that is subject to a security interest—for example furniture or appliances—that debt can be reduced to the value of the property if the debtor owes more than the property is worth.<sup>25</sup>

Filing a bankruptcy petition puts a stop to all collection activity by creditors, including harassing phone calls and actions to repossess the debtor's property.<sup>26</sup> Additionally, once in bankruptcy proceedings, homeowners who are in default on their mortgage may halt foreclosure and catch up on arrears, if they are able.<sup>27</sup> Or, if the homeowner owes more on the mortgage than the home is worth and wishes to relinquish the home to the bank, the resulting deficiency can be discharged in bankruptcy.<sup>28</sup> Bankruptcy also offers relief to individuals who are self-employed because it enables business owners to discharge debt associated with their businesses (for example, personal guarantees), providing them the financial freedom to begin anew.<sup>29</sup>

Absent bankruptcy, creditors are able to call debtors to pressure repayment, and may also sue debtors to obtain an enforceable

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23. 11 U.S.C. § 727 (2006).

24. 11 U.S.C. §§ 1322, 1328 (2006).

25. 11 U.S.C. § 1325(a)(5)(B)(ii) (2006). Automobile loans can also be reduced to the value of the automobile, though only if the automobiles were purchased over two-and-a-half years before filing. *Id.*

26. 11 U.S.C. § 362 (2006). One of the reasons debtors most frequently cite for filing for bankruptcy is to stop harassing calls from creditors. Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 304–07 (2010). See also *People Behind the Bankruptcy Numbers: Preliminary Results of Chapter 13 Study in Progress, Testimony Before the Subcomm. on Admin. Oversight and the Court of the Senate Comm. on the Judiciary*, 105th Cong. 6 (1998) (statement of Professor Tahira K. Hira) (reporting results of survey of bankruptcy filers who state that “no more phone calls from creditors” is one of the principal reasons listed for filing bankruptcy).

27. See 11 U.S.C. §§ 362, 1325(b). For a discussion of the potential benefits of Chapter 13 for homeowners, see John Eggum, Katherine Porter & Tara Twomey, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1126 (2008); see also 11 U.S.C. § 1322(c) (2006) (giving homeowners in Chapter 13 the right to cure and de-accelerate the mortgage any time before foreclosure); Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, in CREDIT MARKETS FOR THE POOR 73, 104 (Patrick Bolton & Howard Rosenthal eds., 2005) (noting that homeowners frequently file under Chapter 13 as opposed to Chapter 7 to gain these advantages).

28. See 11 U.S.C. § 727 (2006).

29. See, e.g., Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2314–15 (2005).

judgment. After obtaining a judgment, creditors are legally able to garnish debtors' wages or seize debtors' assets.<sup>30</sup> Secured creditors need not obtain a judgment in order to repossess debtors' property, instead they are free to repossess upon default.<sup>31</sup> Thus, only after obtaining a bankruptcy discharge can a debtor earn an income and accumulate money and property without fear that she will be required to relinquish it to creditors.

### *C. Benefits of Bankruptcy for Undocumented Immigrants*

The benefits of bankruptcy described above are no less applicable to undocumented debtors. Undocumented individuals carry mortgages, credit card debt, medical debt, business loans, and less traditional debt such as payday loans—even if the rate of such borrowing is lower among undocumented debtors than among the general population.<sup>32</sup> Additionally, evidence suggests that, on average, the undocumented community faces higher poverty rates and lower incomes than the general population; thus, they are more vulnerable to financial crisis.<sup>33</sup> Undocumented individuals and families also lack substantial access to public support such as unemployment benefits, housing assistance, and food assistance, leaving bankruptcy as one of the few tools available for financial recovery.

## 1. Traditional Lending

Historically, banks and credit unions did not offer mortgages to individuals without a social security number (SSN).<sup>34</sup> As a result, many undocumented immigrants were not eligible for loans.<sup>35</sup>

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30. See, e.g., GA. CODE ANN. § 18-4-20 (2004) (permitting wage garnishment); IOWA CODE § 626.1 (2007) (execution following judgment); *id.* §§ 626.26, 642.1–.20 (garnishment of wages); MASS. GEN. LAWS ANN. ch. 235, § 31 (West 2000) (execution by creditors after default); NEV. REV. STAT. § 21.090(1)(g) (2007) (wage garnishment); TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (West 2008) (execution of judgments).

31. See U.C.C. § 9-609 (2000) (permitting self-help repossession after default).

32. See *infra* Part I C1, C2, and C3.

33. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 16–17 (2009).

34. See, e.g., Miriam Jordan & Valerie Bauerlein, *Bank of America Casts Wider Net for Hispanics*, WALL ST. J., Feb. 13, 2007, at A1.

35. See Ivan Light et al., *Korean Rotating Credit Association in Los Angeles*, in IMMIGRANT AND MINORITY ENTREPRENEURSHIP: THE CONTINUOUS REBIRTH OF AM. COMMUNITIES 171 (John S. Butler & George Kozmetsky eds., 2004); ANDREW I. SCHOENHOLTZ & KRISTIN STANTON, FANNIE MAE FOUND. & INST. FOR THE STUDY OF INT'L MIGRATION, REACHING THE

Undocumented individuals wishing to take out home mortgages or apply for credit cards were forced to rely on a friend or family member with a social security number who was willing to apply in their own name. Beginning in the early 2000s and accelerating during the recent housing boom, however, some banks began offering mortgages and credit cards to foreign-born immigrants who provided Individual Taxpayer Identification Numbers (ITINs) in lieu of SSNs.<sup>36</sup> ITINs are identification numbers that the Internal Revenue Service issues to individuals who are not eligible for a SSN, but who are required to pay income taxes.<sup>37</sup> Though initially offered as a mechanism to encourage those without SSNs to file taxes, ITINs have begun to function as an identity card that can be used for other purposes, such as obtaining loans. ITIN mortgages were purportedly designed for foreign-born individuals with lawful status, but are “widely acknowledged to be used primarily by illegal immigrants,”<sup>38</sup> though it does not appear that ITIN holders repre-

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IMMIGRANT MARKET: CREATING HOMEOWNERSHIP OPPORTUNITIES FOR NEW AMERICANS 4 (2001), available at <http://content.knowledgeplex.org/kp2/img/cache/kp/2553.pdf>.

36. See DEYANIRA DEL RIO, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, MORTGAGE LENDING AND FORECLOSURES IN IMMIGRANT COMMUNITIES: EXPANDING FAIR HOUSING AND FAIR LENDING OPPORTUNITY AMONG LOW INCOME AND UNDOCUMENTED IMMIGRANTS 6 (2009); Azam Ahmed & Karoun Demirjian, *Credit Offered to Illegal Residents: Banks Target Workers Without Documents*, CHI. TRIB., Feb. 15, 2007, at 1; Miriam Jordan, *Legal and Illegal, Welcome: Small Banks for Latinos Move into the Void, Serve a Hungry Market*, WALL ST. J., Nov. 10, 2007, at B1 [hereinafter *Legal and Illegal, Welcome*]; E. Scott Reckard et al., *Banking on Illegal Immigrants: A Move to Issue Credit Cards to People Without Social Security Numbers Draws Anger and Praise*, L.A. TIMES, Feb. 14, 2007, at A1; Laura Sonderup, *The Business of Immigrant Markets: Providing Access to Financial Services*, 60 CONSUMER FIN. L. Q. REP. 503, 503 (2006); see also MICHAEL A. FRIAS, FDIC REPORT: LINKING INTERNATIONAL REMITTANCE FLOWS TO FINANCIAL SERVICES: TAPPING THE LATINO IMMIGRANT MARKET, SUPERVISORY INSIGHTS, 17, 20 (2004), available at <http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin04/siwin04.pdf>. Banks offering ITIN mortgages include Banco Popular, Wells Fargo, Citibank, Fifth Third, North Shore Bank, and Second Federal Savings & Loan. See Steve Bergsman, *Banks Are Quietly Wooing Undocumented Immigrants*, AM. BANKER, June 1, 2005, available at [http://www.americanbanker.com/usb\\_issues/115\\_6/-251351-1.html](http://www.americanbanker.com/usb_issues/115_6/-251351-1.html); Jordan, *Legal and Illegal, Welcome*, supra at B1; Robin Sidel, *Banks Court Illegal Immigrants with Loans: Mortgages Are Offered as Growing Trend Sparks Reluctance, Criticism*, WALL ST. J., May 3, 2007, at C1.

37. *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuse: Hearing Before the Subcomm. on Oversight and Subcomm. on Soc. Sec. of the Comm. on Ways & Means*, 108th Cong. 37, 39 (2004) (statement of Michael Brostek, Director, Tax Issues, General Accounting Office) [hereinafter *ITIN Testimony*]. To receive an ITIN, an applicant must provide the tax return for which an ITIN is needed along with verification of identity and foreign status (through a passport, driver's license, or foreign identification card). *Id.* at 8.

38. Anna Gorman, *Illegal Residents, Diligent Owners; Data Show That Fewer Immigrants Than U.S. Citizens Are Delinquent on Their Mortgages*, L.A. TIMES, Oct. 6, 2008, at B1.



sent the majority of the undocumented immigrant population.<sup>39</sup> As of 2008, banks lent between \$1 and \$2 billion in ITIN mortgages.<sup>40</sup>

According to a 2009 survey, thirty-five percent of unauthorized immigrant households own homes.<sup>41</sup> Of course, not all of the mortgages obtained by undocumented immigrants during this period were ITIN mortgages, as only a small portion would have been able to obtain an ITIN loan.<sup>42</sup> Although undocumented debtors who obtained traditional credit using the SSN of a friend or family member would not be able to obtain a discharge of that debt in bankruptcy,<sup>43</sup> those undocumented debtors who obtained unsecured credit with an ITIN may benefit from bankruptcy in the event of financial hardship.

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39. Compared to 38 million tax returns placed in the suspense file between 1996 and 2000, only 342,000 W-2s were filed under ITINs. *ITIN Testimony*, *supra* note 37, at 38, 77. Based on 2001 numbers, between 300,000–530,000 1040s are filed per year under ITINs. *ITIN Testimony*, *supra* note 37, at 49, 98.

40. DEL RIO, *supra* note 36, at 6. Interestingly, the default rates on ITIN mortgages are substantially lower than default rates overall, suggesting that this is a promising lending product that could become more prominent as the market recovers. Light et. al., *supra* note 35, at 172; Gorman, *supra* note 38, at B1. However, after the housing crash and the corresponding increase in anti-immigrant sentiment, the issuance of ITIN mortgages slowed. See Miriam Jordan, *Mortgage Prospects Dim for Illegal Immigrants*, WALL ST. J., Oct. 23, 2008, at A3.

41. RAKESH KOCHHAR, ANA GONZALEZ-BARRERA & DANIEL DOCKTERMAN, PEW HISPANIC CTR., THROUGH BOOM AND BUST: MINORITIES, IMMIGRANTS AND HOMEOWNERSHIP (2009). These numbers are substantially higher than the numbers of ITIN mortgages that have been issued. Many of these homes were likely purchased in the name of a friend or relative with legal status, meaning that, on paper, the debt would be owed by the friend or relative rather than the individual actually making payments on the loan. The success rate of such mortgages is unknown. PASSEL & COHN, *supra* note 33, at 19. Mortgage loans obtained with a false or borrowed SSN could not be addressed in a bankruptcy proceeding because the fraud would be uncovered and the debtor subjected to civil and possibly criminal penalties. In cases where documented friends or family members of undocumented individuals are named as debtors on the mortgage, the friend or family member would be required to be the bankruptcy petitioner in order for any deficiency to be discharged. In these cases, nothing ties the undocumented borrower to the note other than a sense of personal or moral obligation; bankruptcy would not be necessary to sever the undocumented individual from her debt. DEL RIO, *supra* note 36, at 2 (explaining that some undocumented immigrants were initially told that they qualified for a mortgage but then were told they needed to borrow a social security number from a family or friend).

42. PASSEL & COHN, *supra* note 33, at iv–v, 18–19.

43. Naturally, only the debtor listed on the loan is obligated on the loan, meaning that the friend or family member listed on the loan would have to file for bankruptcy in order to discharge the debt. See 11 U.S.C. § 542(a) (only personal liabilities of the debtor are discharged in bankruptcy).

## 2. Barriers to Accessing Credit Through Banks Lead to Nontraditional Borrowing

Although some banks reach out to undocumented immigrants,<sup>44</sup> many barriers to accessing credit remain. Many undocumented immigrants have negative perceptions about financial institutions. For example, one study reported a perception among Latino immigrants that banking services are too costly and not appropriate for individuals of modest means.<sup>45</sup> Limited English proficiency may also discourage some undocumented immigrants from interacting with financial institutions.<sup>46</sup> In addition, undocumented immigrants often lack a credit history<sup>47</sup> and access to information about the requirements obtaining a loan.<sup>48</sup> Many undocumented immigrants are members of minority groups whose members are more likely to reside in areas that are underserved by banks.<sup>49</sup>

Fear of deportation is another reason undocumented immigrants underutilize banks.<sup>50</sup> Some banks routinely file “suspicious activity reports” (SARs) with the Financial Crimes Enforcement Network (FinCEN) if they suspect that a customer is undocumented.<sup>51</sup> One representative of a national bank offering ITIN

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44. See *supra* note 36.

45. Roberto Suro & Sergio Bendixen, *The Remittance Process and the Unbanked*, in *BILIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES AND BANKING* 5, 13 (Pew Hispanic Ctr. 2002), available at [http://www.brookings.edu/metro/pubs/20060504\\_financialaccess.pdf](http://www.brookings.edu/metro/pubs/20060504_financialaccess.pdf) (“[P]articipants . . . expressed what appeared to be exaggerated concerns about the fees charged by banks especially when compared to the fees they must pay to check-cashing services when they pay their bills with cash or money orders. In general, there seemed to be a widespread perception among remittance senders that bank accounts are not meant for people of modest financial resources such as themselves and that banks charge too much for the services they do deliver.”).

46. ANNA PAULSON, AUDREY SINGER, ROBIN NEWBERGER & JEREMY SMITH, *THE BROOKINGS INSTITUTION, FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES* 26, 33 (2006), available at [http://www.chicagofed.org/community\\_development/files/fai-lessons\\_from\\_diverse\\_perspectives.pdf](http://www.chicagofed.org/community_development/files/fai-lessons_from_diverse_perspectives.pdf).

47. Light et al., *supra* note 35, at 171.

48. Light et al., *supra* note 35, at 171; SCHOENHOLTZ & STANTON, *supra* note 35, at 4.

49. See *Bank Branches Boom, But Not For Minorities*, CBS NEWS.COM (Aug. 17, 2009), <http://www.cbsnews.com/stories/2009/08/17/business/main5246561.shtml>.

50. See CELINA KAWAS & HARSHA THADHANI, *WWB GLOBAL NETWORK FOR BANKING INNOVATION AND GLOBAL FIN., INNOVATION BRIEF, REMITTANCES: CITIBANK BUILDS REMITTANCE PRODUCTS DESIGNED FOR MEXICAN MIGRANTS, WITH BANAMEX* 3 (2004).

51. Since the passage of the Patriot Act, the filing of Suspicious Activity Reports (SARs) has more than tripled from 203,538 in 2000 to 732,563 in 2008. FINCEN, *THE SAR ACTIVITY REVIEW – BY THE NUMBERS*, ISSUE 13, at 4 (Jan. 2010). The United States Department of Treasury’s Financial Crimes Enforcement Network attributes the tremendous rise in SARs filings to banks’ beliefs that “the key to avoiding regulatory and criminal scrutiny under the Bank Secrecy Act is to file more reports, regardless of whether the conduct or transaction identified is suspicious.” FINCEN, *THE SAR ACTIVITY REVIEW – TRENDS, TIPS & ISSUES*, ISSUE 8, at 3 (Apr. 2005). Of course, filing a SAR report might not be in the bank’s

mortgages admitted to routinely filing “preemptive” SARs on ITIN mortgage loan borrowers, though no criminal activity was suspected.<sup>52</sup> Additionally, some banks incorrectly inform customers that the Patriot Act requires them to request a social security card before opening an account, which discourages undocumented immigrants from applying.<sup>53</sup>

A lack of trust in financial institutions can lead to use of nontraditional borrowing services such as payday loans. Payday lenders target immigrants both with and without lawful status.<sup>54</sup> Because payday loans can carry interests rates over 1000 percent, debtors who incur payday loans often find themselves in a “debt trap,” where most of their disposable income is allocated to repaying the loans.<sup>55</sup>

In addition, undocumented immigrants may purchase appliances, furniture, or automobiles on credit without being required to submit social security numbers.<sup>56</sup> Car dealerships in cities including Los Angeles and Miami offer car loans to borrowers showing Matrícula Consular cards (identification cards issued by the Mexican consulate) and ITINs.<sup>57</sup> No social security number is required.<sup>58</sup> Undocumented immigrants may also borrow from family members and friends, or participate in “tandas,” a system where individuals

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best interest if it has already lent money to the debtor if the report results in the debtor being deported and defaulting on the loan.

52. DEL RIO, *supra* note 36, at 9–10.

53. DEL RIO, *supra* note 36, at 9.

54. Some payday loan companies do not require a SSN. Only two states expressly require borrowers of payday loans to submit proof of SSN, suggesting that such loans can normally be obtained without proof a SSN. *E.g.*, Steven Horwitz, *Another Credit Market Regulation, With a Twist*, COORDINATION PROBLEM BLOG, (July 15, 2010, 9:53 AM), <http://www.coordinationproblem.org/2010/07/another-credit-market-regulation.html>; CHECK INTO CASH, <http://www.checkintocash.com/faqs.htm> (last visited Oct. 22, 2011); *see also* Katherine Houren, *Achieving the American Dream in Debt? Why the USA Patriot Act Puts Undocumented Immigrants at Risk for Abuse by the Payday Loan Industry*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 561, 570–74 (2009).

55. *See* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 149 (2004); Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 997 (2006); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855 (2007); Nathalie Martin, *1,000% Interest - Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010); Michael A. Stegman & Robert Ferris, *Payday Lending: A Business Model that Encourages Chronic Borrowing*, 17 ECON. DEV. Q. 8 (2003); *see also* Stephanie Ben-Ishai, *Regulating Payday Lenders in Canada: Drawing on American Lessons*, 23 B.F.L.R. 323 (2008).

56. *See, e.g.*, Brian Grow et al., *Embracing Illegals*, BUSINESSWEEK, July 18, 2005, at 1–3 available at [http://www.businessweek.com/magazine/content/05\\_29/b3943001\\_mz001.htm](http://www.businessweek.com/magazine/content/05_29/b3943001_mz001.htm) (reporting that “scores” of financial institutions accept ITINs for car loans).

57. *Id.* at 1–2.

58. *Id.*

join together to make contributions to a fund that is distributed to selected members in turn and repaid over time.<sup>59</sup>

As a result, undocumented immigrants have access to a wide range of credit sources, all of which may need to be addressed through bankruptcy if the individual faces financial distress. Non-bank loans, including payday loans, are eligible for discharge through bankruptcy proceedings.<sup>60</sup> Loans used to purchase goods can also be discharged in Chapter 7 if the debtor does not wish to retain the item, or in Chapter 13, which allows the debtor to reduce the repayment amount. Thus, the availability of bankruptcy is important to undocumented individuals who carry these types of loans and are unable to repay them because of financial crisis.

### 3. Medical Debt

Bankruptcy can provide relief for another troublingly common form of debt—medical debt. Because of difficulties accessing credit, undocumented debtors are likely to have less debt from car loans, mortgages, and credit cards than members of the general population. There is no evidence to suggest, however, that undocumented immigrants incur medical expenses at rates lower than members of the general population. Undocumented immigrants may accumulate medical debt at greater levels than the general population because of their difficulty in accessing health insurance.<sup>61</sup> Only forty percent of undocumented immigrants have any form of health insurance.<sup>62</sup> Fifty-nine percent of undocumented adults,<sup>63</sup> and forty-five percent of undocumented children, have no health insurance.<sup>64</sup> Twenty-five percent of children born in the United States to undocumented parents are uninsured.<sup>65</sup> As a re-

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59. Tandas (also called “cundinas”) are most common in Mexican American immigrant communities. Daniel Gonzalez, *An Old Tradition For Tough Times: Money Sharing*, ARIZ. REPUBLIC, May 29, 2009, at A1. Typically, around ten members contribute money each week, and each week one member is selected to receive the pooled funds. Korean immigrants use a similar system called “*hye*”. Dexter Filkins, *In Some Immigrant Enclaves, Loan Shark is the Local Bank*, N.Y. TIMES, Apr. 23, 2001, at A1; Paul Van Slambrouck, *My Lender, My Friend: Lender Circles With a Latino Twist*, CHRISTIAN SCI. MONITOR, Jan. 13, 2010.

60. 11 U.S.C. §§ 727, 1328 (2006).

61. See Dayna Bowen Matthew, *The Social Psychology of Limiting Healthcare Benefits for Undocumented Immigrants—Moving Beyond Race, Class, and Nativism*, 10 HOUS. J. HEALTH & POL’Y L. 201, 207–19 (2010).

62. Krissah Thompson, *Initially Waved Off, Hispanic Advocates Jump Into Health Debate; Effort Centers on Ensuring Reform Doesn’t Shortchange Immigrants*, WASH. POST, Nov. 12, 2009, at A5.

63. PASSEL & COHN, *supra* note 33, at iv–v, 18–19.

64. *Id.*

65. *Id.*

sult, many undocumented immigrants lack a financial safety net for when they or a family member falls ill.

Following implementation of the Patient Protection and Affordable Care Act (PPACA), it may become more difficult for undocumented individuals to obtain health insurance. Of the 23 million individuals who will remain uninsured after PPACA takes effect, one third are expected to be undocumented immigrants.<sup>66</sup> Under the new law, undocumented immigrants are not only ineligible for Medicare and Medicaid, but they are also barred from purchasing private insurance—even with their own money—through the new health care exchanges.<sup>67</sup> It is unclear what kind of insurance market will exist outside the exchanges or whether undocumented immigrants will have any access to it.<sup>68</sup> Without health insurance, a single medical crisis may lead to sky rocketing costs for an undocumented immigrant.

Even those undocumented individuals who have health insurance may experience unmanageable medical expenses because of insufficient insurance coverage. Indeed, only one-fourth of all individuals filing for bankruptcy in 2007 lacked health insurance.<sup>69</sup> Yet the majority of individuals nevertheless cited medical reasons as a cause for seeking bankruptcy.<sup>70</sup> This suggests that health insurance is often insufficient protection against financial crises. As a result, both insured and uninsured undocumented immigrants may need to rely on bankruptcy to discharge unmanageable medical costs.<sup>71</sup>

Bankruptcy is important to those individuals who are at risk of wage garnishment or asset seizure because of unpaid medical expenses, or to those who are simply overburdened by calls from medical debt collectors. Undocumented individuals may have an easier time escaping calls from medical bill collectors if they do not have a SSN to link them to the debt. For many, a change of

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66. Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering 'the Call of History'*, N.Y. TIMES, Mar. 21, 2010, at A1.

67. David M. Herszenhorn, *Explaining the 'Exchange': A Primer*, in *Prescriptions: The Business of Health Care*, N.Y. TIMES BLOG (Sept. 15, 2009, 1:17 PM), <http://prescriptions.blogs.nytimes.com/2009/09/15/explaining-the-exchange-a-primer/>.

68. *See id.*

69. Lack of health insurance was not predictive of bankruptcy filing, though a gap in health coverage was slightly correlated with an increased risk of bankruptcy filing. Himmelstein, et al., *supra* note 21, at 743–44.

70. *Id.*

71. Some research suggests that undocumented individuals may be walking away from the bills even if they are not filing for bankruptcy. *See* Mindy Sink, *National Briefing Southwest: Arizona: \$20 Million For Immigrant Care*, N.Y. TIMES, Sept. 28, 2001, at A28. However, as discussed in greater detail below, not all undocumented debtors can easily evade medical debt collectors.

residence may be sufficient to avoid detection by a collection agency. However, moving is costly and may not be feasible for many debtors.<sup>72</sup>

Given that undocumented immigrants are presumably no less exposed to medical crises than members of the general population, bankruptcy could provide a crucial safety net for undocumented individuals who face medical emergencies—particularly for those who cannot easily avoid creditors by changing residences.

#### 4. Small Business Debt

Access to bankruptcy is also particularly important to small business owners who borrow to finance a business. This need is particularly great for undocumented immigrants because many self-employed entrepreneurs identify as either documented or undocumented immigrants.<sup>73</sup> Immigrant entrepreneurs, however, are underrepresented in bankruptcy filings.<sup>74</sup> One study found several differences between immigrant entrepreneurs and native-born entrepreneurs in bankruptcy.<sup>75</sup> For example, immigrant entrepreneurs “reported greater difficulties accessing credit” and greater reliance on “high cost credit cards.”<sup>76</sup> At the same time, immigrant entrepreneurs demonstrated less reliance on debt financing than their native-born counterparts.<sup>77</sup> The author of the study concluded that

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72. Changing jobs can be risky and expensive. The forty percent of undocumented debtors who do have health insurance are more likely to have stable employment that they cannot afford to abandon. Although health insurance is not a perfect proxy for employment, most individuals with coverage obtain it through their employer. *See, e.g.*, Michelle Singletary, *An Appealing Solution to Health Insurance Denials*, WASH. POST, Mar. 24, 2011, at A15. Moving is especially difficult for those undocumented families with children. Forty-five percent of undocumented immigrants live in a household that includes a spouse or partner and at least one child. For these individuals, moving may mean uprooting children from their school or childcare setting. JEFFREY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN (2010), available at <http://pewhispanic.org/files/reports125.pdf>.

73. IVAN LIGHT & CAROLYN ROSENSTEIN, RACE, ETHNICITY, AND ENTREPRENEURSHIP IN URBAN AMERICA 181 (1995) (“[I]n every decennial census between 1880 and 1980, the foreign born evidenced persistently higher rates of self-employment than did native born.”) (citations omitted); ROBERT W. FAIRLIE, SELF-EMPLOYED BUSINESS OWNERSHIP RATES IN THE UNITED STATES: 1979–2003 4 (2004) available at <http://www.sba.gov/advo/research/rs243tot.pdf> (reporting that 14 percent of business owners in 2003 were first generation immigrants); Rafael Efrat, *Immigrant Entrepreneurs in Bankruptcy*, 82 AM. BANKR. L.J. 693, 695–96 (2008).

74. *See* Efrat, *supra* note 73, at 707–09.

75. *Id.*

76. *Id.* at 709.

77. *Id.* at 710.

immigrants' "limited use of, or limited access to, debt to finance their business operations may have resulted in fewer [immigrant borrowers] needing to resort to bankruptcy to address their financial fragility."<sup>78</sup>

Although immigrant entrepreneurs were underrepresented in the study, they were nonetheless present. Such entrepreneurs may rely on credit. Entrepreneurs who do not have access to bank loans may also receive loans from microlending organizations.<sup>79</sup> Such lenders do not require loan recipients to show proof of lawful status and thus may be appealing to undocumented borrowers. Loans incurred from microlenders would also be dischargeable in bankruptcy.<sup>80</sup>

Anecdotal evidence also suggests that many immigrant borrowers, particularly in Latino communities, rely on loan sharks (known as "prestamistas") for business loans. For example, it has been estimated that there is a \$10 million market every year for business loans of less than ten thousand dollars, and that primarily loan sharks are meeting that demand.<sup>81</sup> The rate of interest for such loans is an estimated 104 to 260 percent annually.<sup>82</sup> Bankruptcy provides a legal mechanism for discharging or renegotiating these burdensome loans in the event that the business fails or income from the business is insufficient to repay the loans.<sup>83</sup> Of course, the fact that it is illegal to attempt to collect debt that has been discharged in bankruptcy—including debt owed to loan sharks—is not likely a sufficient deterrent for many loan sharks. Bankruptcy could still be helpful to those indebted to loan sharks, however, as a discharge of other debt (such as credit card debt) would free up cash flow to be devoted to repaying loan sharks.

Whatever the source of credit, if a small business is undergoing temporary cash flow problems, a bankruptcy filing can bring crucial relief by enabling the debtor to terminate losing contracts, restructure debt, and move forward. Alternatively, if the business has failed, the debtor can liquidate the business and begin anew without sacrificing future income to the creditors of the failed business.

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78. *Id.* at 711.

79. See WEBSITE OF PROJECT ENTERPRISE, <http://www.projectenterprise.org/Membership/smallloans.html> (last visited Nov. 14, 2011) (indicating that a loan can be obtained without a credit check).

80. See 11 U.S.C. § 523(a)(1) (2006).

81. Filkins, *supra* note 59, at A1.

82. *Id.*

83. 11 U.S.C. §§ 727, 1328 (2006).

## II. UNDOCUMENTED DEBTORS ARE ELIGIBLE TO OBTAIN BANKRUPTCY RELIEF

The Bankruptcy Code provisions and accompanying rules and guidelines contain no requirement of lawful status to file for bankruptcy. The Bankruptcy Code even includes special rules for debtors who lack a SSN. In theory, then, personal bankruptcy is a financial tool that is available to everyone, regardless of immigration status.

Lawful residency in the United States is not required under the Bankruptcy Code. Non-residents, including residents of foreign countries, are eligible for bankruptcy relief if they have some real or personal property in the United States.<sup>84</sup> In addition, the Federal Rules of Bankruptcy Procedure specifically contemplate that a debtor filing for bankruptcy might not have a SSN. Federal Rule of Bankruptcy Procedure 1007(f) requires an individual debtor to “submit a verified statement that sets out the debtor’s social security number, or states that the debtor does not have a social security number.”<sup>85</sup> This requirement was implemented as a result of a study conducted by the Office of the United States Trustee in 2001 that revealed some debtors were filing for bankruptcy relief under false social security numbers.<sup>86</sup> As a result, the Office of the U.S. Trustee implemented a requirement that the debtor submit a statement verifying their SSN or indicating that they have no SSN in order to file for bankruptcy.

This verification statement, Form B-21 “Statement of Social Security Number(s),” provides three options for the filer. First, the debtor may check the box indicating that the “Debtor has a Social Security Number” and then list the number.<sup>87</sup> Because all lawful

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84. 11 U.S.C. § 109(a) (2006). In order to file for bankruptcy under Chapter 7, you must be a “person” (whether individual or corporate) who is not a railroad, a bank or bank-like entity, or a foreign insurance company. 11 U.S.C. § 109(b). Indeed, foreign corporations with subsidiaries in the United States often seek bankruptcy relief in the United States, most frequently under chapter 11 of the Bankruptcy Code. *See, e.g., In re Global Ocean Carriers Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000) (holding that shipping company headquartered in Greece with a few thousand dollars in a Delaware bank account permitted to file Chapter 11 petitions in Delaware).

85. FED. R. BANKR. P. 1007(f).

86. Press Release, Executive Office for the U.S. Trustees, Personal Bankruptcy Filers Will Be Required to Show Proof of I.D. Based on Results of Pilot Study (Jan. 3, 2002) (on file with author), *available at* [http://www.justice.gov/ust/eo/public\\_affairs/press/docs/pr20020103.htm](http://www.justice.gov/ust/eo/public_affairs/press/docs/pr20020103.htm).

87. OFFICIAL FORM, U.S. BANKR. COURT, FORM B-21: STATEMENT OF SOCIAL-SECURITY NUMBER(S) (2007), *available at* [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_1207/B\\_021\\_1207f.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_021_1207f.pdf). The debtor is also instructed to list all SSNs if the debtor has more than one. This requirement presumably exists to identify debtors who have used SSNs fraudulently. *Id.*



residents—including both citizens and those carrying green cards—can obtain a SSN, lack of a SSN is a good proxy for unlawful status.<sup>88</sup>

Undocumented debtors who have not invented, borrowed, or purchased a SSN—but who are employed and are paying taxes—may file for bankruptcy using an ITIN. Thus, the second option is for the filer to check the box stating that the “Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN)” and then list the ITIN.<sup>89</sup> Approximately 12.5 million ITINs were issued between 1996 and 2007.<sup>90</sup> The majority of ITIN applicants—estimated as between fifty-four and seventy-five percent—are Mexican citizens.<sup>91</sup> Because individuals who are eligible for a SSN must use one when filing a tax return, the IRS believes that most individuals using ITINs are not eligible to work in the United States.<sup>92</sup> By providing an option for debtors to list an ITIN in lieu of a SSN on Form B-21, the bankruptcy system implicitly recognizes that undocumented people using an ITIN may file bankruptcy petitions.

The final option for a debtor completing Form B-21 is to check a box certifying that the “Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number

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88. See SOC. SEC. ADMIN., *Social Security Numbers for Noncitizens*, <http://www.ssa.gov/pubs/10096.html#3> (last visited Feb. 27, 2012). Debtors who have filed asylum petitions may also obtain social security numbers while their applications are pending, even though they do not have lawful status. See, e.g., SOC. SEC. ADMIN., *Documents You Need to Work in the U.S.*, <http://www.ssa.gov/immigration/documents.htm> (last visited Feb. 27, 2012). A small number of individuals without a SSN may be foreign individuals with property in the United States, but this number would be tiny, as bankruptcy is not likely to be useful to many foreign consumers (a U.S. bankruptcy proceeding cannot prevent creditors from seizing assets abroad).

89. OFFICIAL FORM, U.S. BANKR. COURT, FORM B-21: STATEMENT OF SOCIAL-SECURITY NUMBER(S) (2007), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_1207/B\\_021\\_1207f.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_021_1207f.pdf).

90. Adriana Gomez, *When Immigration Meets the American Dream*, ROANOKE TIMES, Aug. 16, 2009, at 1.

91. CTR. FOR ECON. PROGRESS, THE IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN): AN OPERATIONAL GUIDE TO THE ITIN PROGRAM, at 7 (2004) (Mexican nationals made up 53 percent of ITIN applicants in 1999, 2000, and 2001). Form B-21 was apparently amended to “ensure that the court and creditors can properly identify a debtor who does not have a Social Security number” and to provide an option for the debtor to list an ITIN instead. OFFICIAL FORM, U.S. BANKR. COURT, FORM B-21: STATEMENT OF SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN) (Comm. Note 2008).

92. *ITIN Testimony*, supra note 37, at 36; Oscar Avila, *Tax ID Numbers Open Door Wider for Illegal Immigrants*, CHI. TRIB., Apr. 15, 2002, at CN; Elizabeth Llorente, *Here Illegally With a Legal ID: More Immigrants Living Up to Get Numbers From the IRS*, THE RECORD (Bergen County, N.J.), Mar. 12, 2009, at L12.

(ITIN).<sup>93</sup> Despite the option to file a bankruptcy petition without a SSN, debtors without one must still prove their identity to the bankruptcy court. However, the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) make clear that a SSN is not necessary to prove a debtor's identity. The Bankruptcy Rules expressly provide that debtors may provide "a written statement that [documentation pertaining to social-security numbers] does not exist" in lieu of a social security card.<sup>94</sup>

The Chapter 7 and Chapter 13 Handbooks for U.S. Trustees provide guidance concerning acceptable proof of identity for undocumented debtors. Pursuant to the Chapter 7 Handbook and Instructions for Trustees:

When debtors state that they are not eligible for a social security number, the trustee will need to inquire further in order to verify identity. In this situation, proof of an Individual Tax Identification Number (ITIN) issued by the Internal Revenue Service for those people not eligible for a social security number would be acceptable documentation.<sup>95</sup>

The individual trustee is given discretion regarding which identification documents to accept at the 341 meeting.<sup>96</sup> Similarly, the Chapter 13 Handbook specifies that if debtors "state that they are not eligible for a social security number . . . the standing trustee will need to inquire further in order to verify identity."<sup>97</sup> The Chapter 13 Handbook specifically states that, in such cases, an ITIN is sufficient documentation for individuals who are ineligible for a SSN.<sup>98</sup> If the debtor has no ITIN, other proof of identification must

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93. OFFICIAL FORM, U.S. BANKR. COURT, FORM B-21: STATEMENT OF SOCIAL-SECURITY NUMBER(S) (2007), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_1207/B\\_021\\_1207f.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_021_1207f.pdf).

94. FED. R. BANKR. P. 4002(b)(1)(B).

95. U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 7 TRUSTEES, at 7-1 (2002), available at [http://www.justice.gov/ust/eo/private\\_trustee/library/chapter07/docs/7handbook1008/Ch7\\_Handbook.pdf](http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf).

96. See U.S. DEP'T OF JUSTICE, OBLIGATIONS OF A CHAPTER 11 DEBTOR (2011), available at [http://www.justice.gov/ust/r06/docs/general/dip\\_new\\_obligations.pdf](http://www.justice.gov/ust/r06/docs/general/dip_new_obligations.pdf) ("Permissible forms of identification include a valid state driver's license, government issued picture identification card, U.S. passport, or legal resident alien card. Proof of social security number may be provided through . . . documents such as a social security card, current W-2 Form, or payroll check stub. Other forms of identification or [proof of social security number] may be accepted [in the discretion of the U.S. Trustee or the private trustee appointed to administer the case].").

97. U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES, at 5-2 (1998), available at [http://www.justice.gov/ust/eo/private\\_trustee/library/chapter13/docs/handbook2010/Handbook\\_Ch13\\_Standing\\_Trustees.pdf](http://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/handbook2010/Handbook_Ch13_Standing_Trustees.pdf).

98. *Id.*

be submitted, but neither the Chapter 7 Handbook nor the Chapter 13 Handbook provide examples of other acceptable identification, though presumably a foreign identification card would suffice. Nevertheless, it is clear that neither a social security card nor proof of lawful status is a prerequisite to filing for bankruptcy.

### III. FEW UNDOCUMENTED DEBTORS OBTAIN BANKRUPTCY RELIEF

Despite the fact that many undocumented debtors could benefit from bankruptcy relief and that under the Bankruptcy Code such relief is legally available to them, few undocumented immigrants file for bankruptcy.<sup>99</sup> This Part reports empirical data suggesting that undocumented debtors file for bankruptcy relief at less than one percent of the rate of the general population.

#### A. Methodology

To determine how many undocumented debtors are taking advantage of the bankruptcy provisions, I searched the electronic filing system for federal courts, the Public Access to Court Electronic Records (PACER), for Chapter 7 and Chapter 13 cases filed in bankruptcy court between 2004 and 2010 where the SSN was entered as 000-00-0000. I omitted cases that were listed as “void” or “filed in error,” as well as petitions filed by corporate debtors. As a result, I was able to determine the number of such cases filed under Chapter 7 and Chapter 13 for each year and in each federal district court.

When a bankruptcy court clerk electronically files a bankruptcy petition in which the debtor does not list a social security number, the clerk enters 000-00-0000 in lieu of a social security number. I searched for these cases because, as discussed in Part II, a debtor without a SSN who is domiciled in the United States is far more likely to be undocumented.<sup>100</sup> However, not all petitions filed under 000-00-0000 will belong to undocumented debtors and the total number of petitions entered under 000-00-0000 likely represent a

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99. Empirical evidence suggests that immigrants are underrepresented in bankruptcy. For example, one recent study of bankruptcy filers in the Central District of California found that first-generation immigrants were underrepresented in bankruptcy. Efrat, *supra* note 73, at 701–02.

100. Avila, *supra* note 92, at CN; Llorente, *supra* note 92, at L12. I am currently in the process of reviewing in detail the bankruptcy petitions filed under 000-00-0000 to better determine what percentage were actually filed by undocumented debtors, and to discern the portion of such petitions that were dismissed, as well as the cause of dismissal.

larger number than the total number of undocumented individuals in the bankruptcy system. For example, some debtors may have inadvertently omitted their SSN. The bankruptcy system relies heavily on SSNs to notify creditors and track claims, however, so any SSN that was inadvertently omitted would be promptly corrected unless the case is dismissed. Some debtors may intentionally omit their SSNs. For example, those debtors seeking to gain only the advantage of the automatic stay to ward off foreclosure or repossession of property may attempt to avoid associating their SSN with their bankruptcy filing.<sup>101</sup> Debtors filing such petitions, referred to as “face filings,” have no intention of relinquishing their assets or obtaining a discharge. However, a debtor who has a SSN will not be able to obtain bankruptcy relief without providing it, so those cases in which a debtor purposefully omits her SSN will be dismissed.

In addition to potential over-inclusion, this study may also be slightly under-inclusive. Undocumented debtors who file for bankruptcy under an ITIN are not included in the results of the PACER search.<sup>102</sup> Moreover, individuals who obtained a valid SSN by submitting false documents were also excluded from the search.<sup>103</sup>

To at least partially offset the risk of under and over inclusivity, I supplemented the PACER data by contacting Clerks of Bankruptcy Court for each federal district to ask whether they were aware of any debtors who had filed a bankruptcy petition without a SSN. If a debtor did not have a SSN and instead filed using an ITIN, this would be brought to the attention of all involved in the bankruptcy proceeding when the debtor filed her Form B-21. To collect this information, I sent each of the clerks an e-mail asking whether, to their knowledge, any individual without a SSN had ever filed a

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101. See CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW 30–31 (2000), available at <http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf> (reporting that some dismissed cases may represent multiple filings by the same debtor or “face filings” that may have been dismissed before their plans were confirmed). Bankruptcy imposes an “automatic stay” forcing creditors to cease collection and foreclosure actions. 11 U.S.C. § 362 (2006).

102. Although the number of debtors filing under ITINs is not known, the responses from clerks, reported below, suggest that the number is negligible.

103. Unfortunately, it is not possible to know the precise number of undocumented individuals who possess a valid SSN; however, this number would be a fraction of the undocumented population because of the difficulty and expense of acquiring a valid SSN using fake documents. That said, the Social Security Administration reported that as many as 100,000 SSNs may have been wrongly issued in 2000. It is not possible to ascertain the number of those wrongly issued SSNs that were given to undocumented immigrants. See Robert Pear, *Foreigners Obtain Social Security ID with Fake Papers*, N.Y. TIMES, May 20, 2002, at A1; Michael Riley, *Social Security Cracks Down: Fake Numbers Tied to Shadow Economy of Illegal Workers*, DENV. POST, May 26, 2002, at K-01.

bankruptcy petition in their district. I received responses from forty-eight out of the ninety clerks I contacted.

### *B. Few Undocumented Debtors File for Bankruptcy*

Between 2004 and 2010, 2,681 petitions were filed under 000-00-0000.<sup>104</sup> These represent a filing rate of less than .05 bankruptcy filings per thousand among the undocumented population, compared to a rate of just under five per thousand in the general population. This suggests that undocumented debtors file for bankruptcy at less than one percent of the rate of the general population. In 2009 there were 11.1 million undocumented immigrants in the United States.<sup>105</sup> That year, out of a population of 307 million, 1.41 million individuals filed for bankruptcy.<sup>106</sup> If undocumented individuals filed for bankruptcy at the same rate as the general population, there would have been over fifty thousand bankruptcy petitions filed by undocumented debtors in 2009.

Of the 2,681 bankruptcy petitions filed using 000-00-0000 instead of a SSN between 2004 and 2010, 1,311 were filed under Chapter 7 and 1,370 were filed under Chapter 13.<sup>107</sup> Thus, just over half of all petitions filed without a SSN were filed under Chapter 13.

As shown in Figure 1, the number of filings without a SSN has varied over the past six years, with a sharp increase in 2010. This increase could be wholly attributable to an increase in “face filings” rather than an actual increase in filings by undocumented debtors. In any event, petitions filed without a SSN remain less than .07 per thousand undocumented immigrants, or just over 1/100th the rate among the general population.

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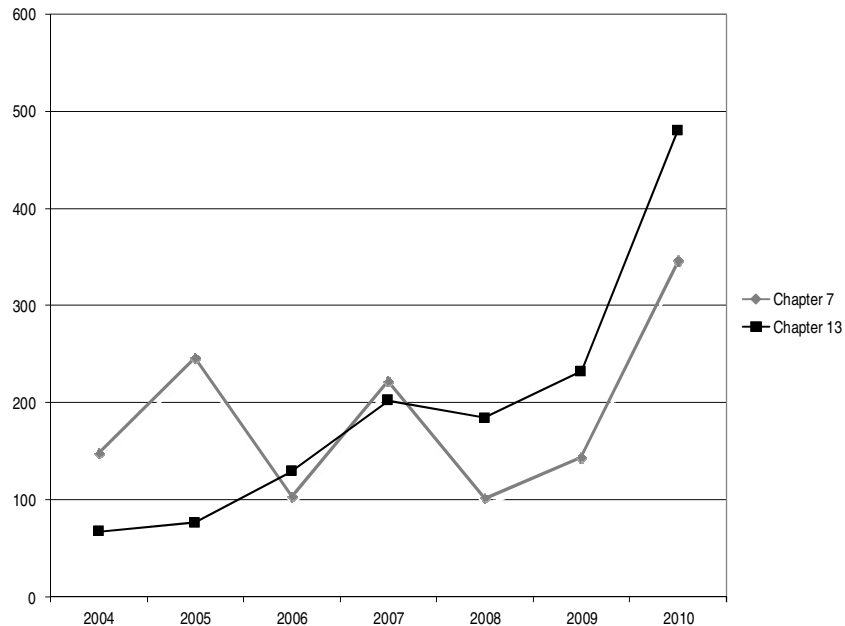
104. Data from [www.pacer.gov](http://www.pacer.gov) is on file with the Author. Again, I removed cases that were “filed in error” or were business filings.

105. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 9 (Feb. 2011), *available at* <http://pewhispanic.org/files/reports/133.pdf>. The undocumented population increased rapidly from 1990 to 2006, reaching a peak of 12 million in 2007, decreased to 11.1 million in 2009, and increased slightly to 11.2 million in 2010.

106. Sara Murray & Conor Dougherty, *Personal Bankruptcy Filings Rising Fast*, WALL ST. J., Jan. 7, 2010, at A3; U.S. CENSUS BUREAU: POPULATION, <http://www.census.gov/compendia/statab/cats/population.html> (last visited Nov. 14, 2011).

107. *See* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), <http://www.pacer.gov/> (last visited Mar. 8, 2012).

FIGURE 1  
NUMBER OF CHAPTER 7 AND CHAPTER  
13 FILINGS WITHOUT SSNs



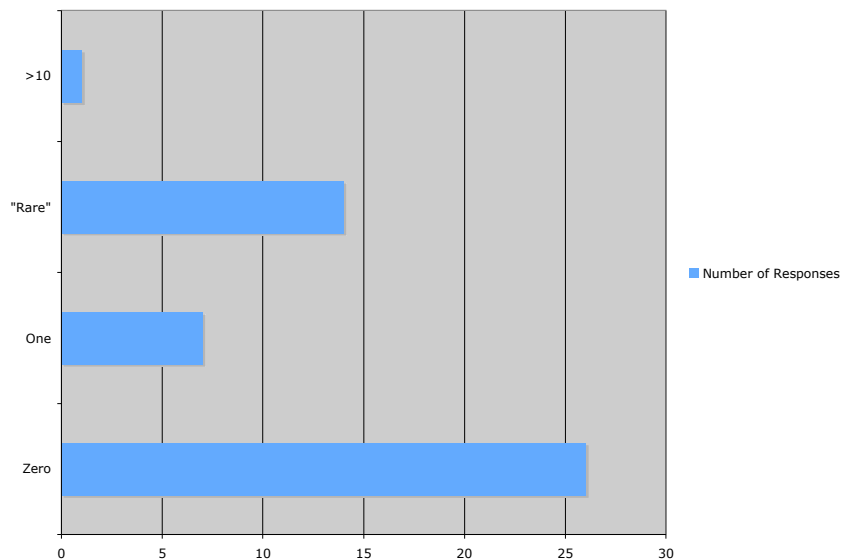
Of the forty-eight clerks who responded to my email survey, fifty-five percent indicated that they were not aware of any case in which an individual without a SSN filed a bankruptcy petition in their district.<sup>108</sup> An additional fifteen percent indicated that only one individual without a SSN had filed a bankruptcy petition in their district. Thus, seventy percent of the clerks who responded were aware of either zero or only one case where the debtor lacked a SSN. Thirty percent of the clerks recalled a small number of such cases, either reporting two or three cases or answering “yes, but it is extremely rare.”<sup>109</sup> However, no district reported that the filing of

108. E-mails from Clerks of Bankruptcy Court (on file with author).

109. The far outlier was the bankruptcy court in the Southern District of Texas, which responded to my inquiry with a list of all thirty-one cases filed under 000-00-0000 through May 2010. For reasons discussed above, this number is probably over-inclusive. Still, with an undocumented population of approximately 400,000 in the greater Houston area alone, this represents less than .008 percent of undocumented individuals. Assuming there were thirty-one additional cases in the second half of the year, this would represent less than .016 percent of the undocumented population. By contrast, out of a general population of 5.5 million in the greater Houston area, 14,110 individuals filed for personal bankruptcy in 2010, representing about 0.2 percent of the general population. Put differently, even in the district with the highest number of reported filings by undocumented individuals, the rate

bankruptcy petitions by debtors without a SSN was a regular occurrence.

FIGURE 2  
CLERKS' RECOLLECTION OF NUMBER OF PETITIONS FILED  
WITHOUT SSNs



The clerks' responses confirm that it is exceedingly rare for undocumented debtors to file for bankruptcy. They also indicate very few of the filings under 000-00-0000 are actually made by debtors without SSNs. The data support the conclusion that many of the cases filed under 000-00-0000 are not filed by individuals who lack a SSN, but are instead mistakes or petitions filed by debtors who wish to avoid revealing their SSN.

Admittedly, this informal survey has limitations because it is possible that some of the non-responding clerks' offices experienced higher numbers of undocumented debtors than those districts that did respond. Even if all of the remaining districts experienced high numbers of debtors without SSNs filing for bankruptcy, it is still significant that over half of all districts have zero, one, or only a handful of debtors filing for bankruptcy without a SSN.

Although this informal survey does not definitively prove that few undocumented debtors file for bankruptcy, it at least demonstrates that there are not large numbers of debtors without a SSN

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of filings among undocumented debtors in Houston is still less than 1/50th the rate of filings in the general population.

filing for bankruptcy. Although neither the PACER study nor the informal survey of clerks could determine the exact number of bankruptcy petitions filed by debtors without a SSN or with a ITIN, the data suggests that this type of filing represents only a tiny fraction of the total number of bankruptcy filings.

#### IV. BARRIERS TO BANKRUPTCY FOR UNDOCUMENTED DEBTORS

As discussed in Part II, undocumented debtors are legally permitted to access bankruptcy relief. Access in principle, however, may not translate to access in practice. The data presented in Part III indicates that very few petitions for bankruptcy relief are filed without a SSN.

Low filing rates may be partially attributable to lower debt burdens among undocumented immigrants. Yet this alone cannot explain the tiny number of individuals filing for bankruptcy without social security numbers. Although it is possible that undocumented individuals hold car loans, home loans, or credit cards at one percent the rate of the general population, as discussed in Part II, it is extremely unlikely that undocumented individuals have one percent of the amount of medical debt of the general population. If, conservatively estimated, the forty percent of undocumented immigrants who lack geographic mobility filed for bankruptcy due to medical debt at rates comparable to the general population there would be at least 11,988 filings by undocumented individuals per year.<sup>110</sup> The data reflects a much smaller number of filings among undocumented debtors—only an average of 376 per year were filed under 000-00-0000.

One interpretation of the data from this survey is that the low rates of bankruptcy filing among undocumented debtors compared to the general population may be attributable to barriers to bankruptcy relief. This Part discusses the formal and informal barriers to bankruptcy relief that undocumented debtors face.

##### *A. Statutory Barriers*

Simply because a debtor has met the requirements for filing a bankruptcy petition does not mean that she will succeed in obtaining a discharge of debts. The Bankruptcy Code sets out a number

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110. *Cf. supra* text accompanying note 21 and text accompanying note 62.



of requirements debtors must complete to obtain relief. These requirements include filing a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of the debtor's financial affairs with the bankruptcy court.<sup>111</sup> Furthermore, in 2005 the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) made it substantially more cumbersome for debtors to put together their statement of financial affairs. Under BAPCPA, a debtor must now disclose proof of income from all sources.<sup>112</sup> Debtors are also required to submit all pay stubs within forty-five days.<sup>113</sup> The penalty for failing to submit pay stubs is automatic dismissal.<sup>114</sup> A debtor may file a motion to extend the time to submit the pay stubs and other required documents, but the court must find "justification" for the delay.<sup>115</sup> In addition, the debtor must provide a copy of her tax returns at least seven days before the 341 meeting is scheduled or the court will dismiss the case.<sup>116</sup> Failure to provide a certificate of credit counseling and tax returns can also result in dismissal.<sup>117</sup> Additionally, because BAPCPA requires the U.S. Trustee's Office to audit one out of every 250 petitions,<sup>118</sup> attorneys often direct debtors to gather all copies of their bank statements that relate to

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111. 11 U.S.C. § 521 (2006).

112. See 11 U.S.C. § 521(a)(1) (2006).

113. See 11 U.S.C. § 521(i) (2006). Alternatively, a debtor may provide other evidence of all income earned within sixty days of the date of filing. 11 U.S.C. § 521(a)(1)(B)(iv). If there is any discrepancy between the pay stubs and the income listed, the debtor is required to provide an explanation.

114. The bankruptcy trustee may also ask the court to decline to dismiss the case if it is in the best interest of creditors and there was a good faith attempt to file the documents. However, if the trustee chooses not to ask the court to decline to dismiss the case, there is no good faith exception. *Id.* § 521(i)(4). Catherine Vance, *Attorney Liability and § 521: Dismissal for Failure to File Required Documents*, GP SOLO LAW TRENDS & NEWS: PRACTICE AREA NEWSLETTER (ABA Gen. Practice, Solo & Small Firm Division) Sept. 2005 ("The biggest (but by no means the only) threat is that § 521 provides for *automatic* dismissal of a bankruptcy case where certain documents are not timely filed."). Section 521(a)(1) lists the documents subject to 521(i)(1)'s automatic dismissal, and includes the list of creditors, schedule of assets and liabilities, statement of financial affairs, copies of payment advices received within sixty days pre-petition, statement of monthly net income, and a statement disclosing any reasonably anticipated increase in income over twelve months from petition date.

115. 11 U.S.C. § 521(i)(3) (2006).

116. *Id.* § 521(e)(2)(A)(i).

117. See 11 U.S.C. § 109(h) (2006) (stating a person may not be a bankruptcy debtor without providing certificate of completion of credit counseling); 11 U.S.C. § 521(e) (providing for dismissal in event of failure to file tax returns).

118. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 603(a), 119 Stat. 23. Debtors may also be required to gather receipts or bank statements relating to all transactions in the six months before filing. See *Debtor Audit Information*, DEPARTMENT OF JUSTICE, [http://www.justice.gov/ust/eo/bapcpa/debtor\\_audit/](http://www.justice.gov/ust/eo/bapcpa/debtor_audit/) (last visited Mar. 8, 2012).

transactions in the last ninety days, as these must be submitted in the event of an audit.

Although these requirements are burdensome for all debtors, they make completing the bankruptcy process impossible for many undocumented debtors. For an undocumented individual who lacks an ITIN, or who used both a SSN and an ITIN for employment purposes, filing for bankruptcy is tremendously complicated and fraught with risk. Undocumented debtors who are employed in the formal sector—and who receive pay stubs and W-2s—face a particular challenge, even if they have an ITIN. In order to work in the formal sector, these individuals must have invented, purchased, or borrowed a SSN.<sup>119</sup> This situation will affect many undocumented debtors, as the Social Security Administration estimates that two-thirds of undocumented workers use false SSNs.<sup>120</sup> When debtors using false SSNs for employment purposes submit their pay stubs as part of bankruptcy proceedings, the false SSN will be exposed and the debtor cannot simultaneously certify that they “have no social security number” on Form B-21. Additionally, some undocumented individuals have both a false SSN, used to gain employment, and an ITIN, used to file a tax return.<sup>121</sup> Such individuals will indicate on Form B-21 that they have an ITIN, but their W-2 will reflect a SSN. This discrepancy could prompt a U.S. trustee to object to the continuation of the bankruptcy case.<sup>122</sup> In addition, there is currently nothing preventing the trustee from alerting police or immigration authorities.

Undocumented individuals who file tax returns using an ITIN will be able to supply tax returns. However, only a minority of undocumented workers are ITIN holders.<sup>123</sup> Debtors who work in the

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119. Cf. AVIVA CHOMSKY, *THEY TAKE OUR JOBS!: AND 20 OTHER MYTHS ABOUT IMMIGRATION* 36–38 (Beacon Press 2007). If an undocumented immigrant works in the formal economy and uses a fake SSN, the federal and state taxes deducted from his paycheck will go into the Social Security Administration’s earnings suspense file. *Id.* at 38. The amount in the suspense file associated with false SSNs was about \$7 billion per year as of 2005. *See id.* *See also* Rachel L. Swarns, *Illegal Immigrants at Center of New ID Theft Crackdown*, N.Y. TIMES, Dec. 14, 2006, at 38 (stating that nearly 1,300 workers, or ten percent of workforce, had allegedly stolen ID of citizens to obtain work).

120. CHOMSKY, *supra* note 119, at 37.

121. *See* Andrew Villegas, *Federal Policies a Hindrance to Enforcing Immigration Law*, GREELEY TRIB., Nov. 15, 2008, at A2.

122. *See* Martha Davis & Jane Limprecht, *Beyond Identifying the Problem: Debtor ID Initiatives Move Ahead*, AM. BANKR. INST. J., Apr. 2003, at 12, 50 (citing case dismissed where SSN listed on W-2 did not belong to debtor). *See also In re Merlo*, 265 B.R. 502 (S.D. Fla. Bankr. 2001) (denying trustee’s motion to dismiss where debtor lacked SSN).

123. One reason offered for the low rate of ITIN use is that immigrants feel that officials are suspicious of them and are not comfortable seeking an ITIN. *ITIN Testimony*, *supra* note 37, at 15. Currently, under a 1976 Internal Revenue law, the IRS cannot share information concerning unlawful immigration status with the Department of Homeland Security.

informal sector—whether self-employed or paid under the table—and do not file taxes using an ITIN are also placed in a difficult position because they will not have tax returns, pay stubs, or other proof of income from their employer. Thus, bankruptcy may not be a viable option for debtors who report income in their bankruptcy petition but have not filed tax returns because their tax evasion will be exposed and back taxes and penalties owed.

Another barrier is the requirement in BAPCPA that attorneys closely monitor the information and documentation that debtors submit. Attorneys must make a “reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and determine[] that the petition, pleading, or written motion is well grounded in fact . . . .”<sup>124</sup> An attorney’s signature on a petition constitutes certification that the attorney has no knowledge after an inquiry that information contained in the debtor’s schedules is incorrect.<sup>125</sup> Compliance with these provisions is difficult and time consuming because attorneys must gather tax returns and pay stubs, and may also be required to verify these documents using other sources, such as employers, spouses, or ex-spouses.<sup>126</sup> Furthermore, schedules to the bankruptcy petition contain information about the debtor’s assets and liabilities, including bank account balances, which change continuously and may be difficult to verify.<sup>127</sup> As a result of these provisions, it may be difficult or impossible for undocumented debtors to produce sufficient documentation to satisfy this standard and, as a result, attorneys may be less inclined to represent undocumented immigrants in bankruptcy filings.

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Villegas, *supra* note 121, at A2. However, the United States General Accounting Office has suggested that the Internal Revenue Service, in issuing ITINs, could provide the Department of Homeland Security with “enhanced information to use in targeting its enforcement efforts.” *ITIN Testimony*, *supra* note 37, at 45. If that occurs, the result is likely to be fewer (if any) immigrants applying for ITINs because of fear of immigration consequences.

124. 11 U.S.C. § 707(b)(4)(C) (2006).

125. *Id.* § 707(b)(4)(D).

126. Alan D. Eisler, *The BAPCPA’s Chilling Effect on Debtor’s Counsel*, 55 AM. U. L. REV. 1333, 1337 (2006).

127. Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 313 (2005). In some cases, this delay could cause serious problems for debtors. Many debtors file for bankruptcy on the eve of a foreclosure sale in a last-ditch effort to save their homes. Prior to the BAPCPA, although attorneys advised debtors of their obligation to provide truthful financial information, “[a]ttorneys did not guarantee the accuracy of this information, nor were they expected to do so.” Eisler, *supra* note 126, at 1335.

*B. Local Rules*

Not only do the Bankruptcy Code and Bankruptcy Rules create difficulties for prospective undocumented petitioners, but some district-specific local rules promulgated by bankruptcy and district courts create further barriers. Local rules are binding on petitioners, like the federal rules, and are equally important to understanding what happens when an undocumented debtor files for bankruptcy.

Most local rules explicitly recognize the ability of debtors without a SSN to file a bankruptcy petition by completing Form B-21.<sup>128</sup> Some local rules, forms, or instructions still state, however, that the debtor is required to provide a SSN. For example, in Kansas the local bankruptcy rules require attorneys to certify that the “full Social Security Number of the debtor(s) was served” upon creditors.<sup>129</sup> Maryland’s local bankruptcy rules state that the petition will be dismissed without a hearing if the debtor fails to provide a SSN.<sup>130</sup> The Western District of Missouri requires the full SSN to be listed,<sup>131</sup> while the local bankruptcy rules of the District of Montana requires the debtor to bring proof of a SSN to the 341 meeting.<sup>132</sup> Further, the Western District of Louisiana’s local bankruptcy rules expressly state that the debtor is required to submit a SSN unless otherwise ordered by the court.<sup>133</sup> Thus, in jurisdictions such as these where the local rules require the debtor to submit a SSN, an undocumented debtor may be asked to obtain a waiver of the local rules before the bankruptcy case can proceed. Such a debtor may be hesitant to pursue such a waiver for fear of drawing attention to her immigration status. Undocumented debtors who

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128. See, e.g., OFFICIAL FORM, U.S. BANKR. COURT, E.D. KY., FORM B-21: STATEMENT OF SOCIAL SECURITY NUMBER(S) (2003), available at <http://www.kyeb.uscourts.gov/kyeb/Rules/Form%2021.pdf>; LBR 7067-1(D) (Bankr. E.D. La.); U.S. Bankr. Court M.D. La. Admin. Procedures, available at <http://www.lamb.uscourts.gov/localrules/adminprocedures.pdf>; Local Bankruptcy Rules, U.S. Bankr. Court, District of Massachusetts (2009), available at [http://www.mab.uscourts.gov/pdfdocuments/LR\\_12-09.pdf](http://www.mab.uscourts.gov/pdfdocuments/LR_12-09.pdf); LBR 9011(e) (Bankr. W.D. Mi.); Neb. R. Bankr. P. 7067-1.

129. D. Kan. LBR 1009-1, available at [http://www.ksb.uscourts.gov/images/local\\_rules/2010\\_Local\\_Rules.pdf](http://www.ksb.uscourts.gov/images/local_rules/2010_Local_Rules.pdf).

130. MD LOCAL BANKRUPTCY RULE 1002-1 (“The petition will be dismissed without a hearing if . . . a voluntary petition is filed without the debtor’s social security number being provided . . .”).

131. Local Rule 1007-1 (Bankr. W. Mo.).

132. Mont. LBR 2003-5.

133. W.D. La. LBR 1002-1, available at <http://www.lawb.uscourts.gov/court/Publications/LocalRules/LocalRules02052010.pdf>. I phoned the help desk of the bankruptcy court of the Western District of Louisiana to inquire whether a debtor without a SSN could file a bankruptcy petition in that district; the office indicated that such a debtor would have to seek a waiver of the local rule.

find out that a SSN is required, particularly those filing bankruptcy *pro se*, may simply assume that they are ineligible. As a result, local rules that require a SSN for a bankruptcy filing may dissuade undocumented debtors from filing—even if such a debtor could, in theory, obtain a waiver of the applicable local rule.

### C. Local Practice

To assess whether bankruptcy relief is feasible for undocumented individuals, it is also important to examine local practice. A number of empirical studies have found wide variations in bankruptcy filing patterns across districts.<sup>134</sup> These studies suggest that the cause of this variation is local legal culture.<sup>135</sup> Individual bankruptcy filing decisions do not occur in a vacuum, but rather in the context of a network of actors, including trustees, attorneys, and judges.<sup>136</sup> Given the documented variation in bankruptcy patterns from district to district, it would not be surprising if court clerks, trustees, and attorneys handled filings by undocumented debtors

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134. See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 503 (1993) (explaining the way in which lawyers' preference can impact debtor choice); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 239 (1986) (the first study noting the impact of lawyers' views on clients' decisions and explaining the difficulty a lawyer encounters in trying to apply certain solutions to client's bankruptcy needs); Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 307–08 (2009) (finding variation in bankruptcy filing patterns across districts over time); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 820 (1994) (describing variation in filing patterns among judicial districts from 1970 to 1990); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Bankruptcy*, 68 AM. BANKR. L.J. 397, 406–12 (1994) (reporting dramatic differences among districts in percentages of payment promised in Chapter 13 plans). For theoretical discussions of local legal culture, see, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1749 (1976); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 396 (1950); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1501 (1996) (arguing that legal communities form shared mental models of the law and process cases accordingly); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

135. Defined as “systematic and persistent variation in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality . . .” Sullivan et al., *supra* note 134, at 804.

136. The importance of local legal culture is codified in Disciplinary Rule 7-106(c)(5) of the Model Code of Professional Responsibility, which states: “In appearing in his professional capacity before a tribunal, a lawyer shall not . . . fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.” DR 7-106(C)(5).

differently in different jurisdictions. Thus, an undocumented debtor filing for bankruptcy in District A may face barriers that an undocumented debtor filing for bankruptcy in District B might not face. Variations in local practices are likely to play an increasingly important role as the undocumented population becomes more dispersed.<sup>137</sup> As a result, a growing number of jurisdictions should expect to handle bankruptcy petitions by undocumented debtors.

In an effort to assess whether and to what degree treatment of undocumented debtors varies from district to district, I conducted an informal study to determine approximately what an undocumented *pro se* debtor might experience when she inquires about the possibility of filing for bankruptcy in a given district. To do so, I called the number listed on each bankruptcy court's website—typically referred to as the “help desk.” I was able to reach seventy-six of the ninety-four help desks.<sup>138</sup> In each phone call I asked what occurred, procedurally, when a debtor who has no SSN filed for bankruptcy. Although this informal study has some shortcomings, the wide variation in responses nevertheless suggests that an undocumented debtor's experience will vary substantially depending at least in part upon the district in which he files.<sup>139</sup>

Of the seventy-six help desks I reached, eight helpers stated that a debtor who lacked a SSN was not eligible to file for bankruptcy.<sup>140</sup> Seven indicated that an ITIN was required for a debtor who did not possess a SSN. Sixteen said that they did not know what happened when someone without a social security number filed for bankruptcy. Twenty-nine stated that a judge, trustee, or party in interest might object to the lack of social security number, which could result in the trustee or party in interest filing an objection or the judge issuing an order to show cause. One help desk indicated that the debtor would need to obtain a waiver of the local rule re-

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137. For example, in 2008 only twenty-two percent of all undocumented immigrants in the United States lived in California, down from forty-two percent in 1990. In addition to Florida, Illinois, New Jersey, New York, and Texas, which have all historically had high numbers of undocumented residents, greater numbers of undocumented immigrants now reside in Georgia, North Carolina, and other states in the Southeast. PASSEL & COHN, *supra* note 33, at 3–4.

138. I did not contact U.S. territories or Puerto Rico. The help desks I could not reach were those for which no one answered the phone and either did not have a mechanism for leaving a message or did not return my message.

139. For example, I only spoke to one help desk member per district. A variation may exist between help desk member to help desk member. Moreover, I was not an actual debtor seeking help and the help desk may be more diligent in seeking to provide access to bankruptcy to an actual debtor.

140. Notes from telephone conversations with the help desks are on file with the author.

quiring submission of a SSN. Only fifteen helpers referenced Form B-21, which permits the debtor to check a box indicating that she has no social security number.<sup>141</sup> Based on these responses, it is likely that many *pro se* undocumented debtors who call a help desk for guidance would be deterred from filing.

Attorneys may also inadvertently act as a barrier to undocumented debtors filing for bankruptcy. Some attorneys may not be aware that debtors may file without a SSN, or they may hesitate to represent a debtor who lacks a SSN. Many attorney websites that list the documentation needed to file a bankruptcy petition incorrectly include “social security card” on that list.<sup>142</sup> One attorney website aimed at immigrant filers states that “illegal immigrants MAY file [for] bankruptcy assuming they can present the appropriate identification to the bankruptcy trustee, including a valid social security card.”<sup>143</sup> Of course, “illegal immigrants” would not have a valid social security card and, as discussed in Part II, social security cards are not a prerequisite to bankruptcy filing. Undocumented immigrants who are told to produce a valid social security card will likely withdraw from the bankruptcy process.

If attorneys and bankruptcy court employees are not aware that undocumented debtors are eligible to file for bankruptcy, or do not believe that undocumented debtors should file for bankruptcy, undocumented debtors are unlikely to learn that bankruptcy is an option.

#### *D. Fear of Deportation*

Even in districts that are amenable to, or supportive of, undocumented individuals accessing the bankruptcy system, undocumented individuals may understandably hesitate to seek relief from a judicial

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141. *See supra* Part II for a discussion of Form B-21. These responses are not mutually exclusive. For example, two helpers referenced Form B-21 but also explained that a judge or trustee might address the lack of SSN in some way.

142. *See, e.g.*, WEBSITE OF THE BANKRUPTCY LAW NETWORK, <http://www.bankruptcylawnetwork.com/documents-needed-to-get-your-bankruptcy-case-started-a-growing-list/> (last visited Sept. 30, 2011); WEBSITE OF THE LAW OFFICES OF WALTER METZEN, <http://www.freshstartbankruptcyattorneys.com/Required-Documents.htm> (last visited Sept. 30, 2011); WEBSITE OF THE LAW OFFICES OF ARTHUR RUMMLER, [http://www.dupagebankruptcylaw.com/What\\_You\\_Need.html](http://www.dupagebankruptcylaw.com/What_You_Need.html) (last visited Sept. 30, 2011).

143. WEBSITE OF THE LAW OFFICES OF SLAVA AARON TENENBAUM, <http://www.bankruptcywecanhelp.com/Immigration-and-Bankruptcy.html> (last visited Sept. 30, 2011) (emphasis in original).

system out of fear of deportation.<sup>144</sup> This fear is salient enough to deter many undocumented individuals from seeking emergency medical treatment,<sup>145</sup> sending their children to school,<sup>146</sup> and contacting law enforcement to report crimes.<sup>147</sup> Even a constitutional or statutory right to a public service is not always sufficient to overcome fear of deportation.<sup>148</sup> If this fear is sufficiently severe to keep many undocumented immigrants out of hospitals and schools, it likely deters them from filing for bankruptcy. In addition, some bankruptcy courthouses are adjacent to, or even in the same building as, offices for the Department of Homeland Security, which further decreases the likelihood that an undocumented debtor will be willing to attend the bankruptcy proceedings.

#### V. SHOULD BANKRUPTCY RELIEF BE ACCESSIBLE TO UNDOCUMENTED IMMIGRANTS?

Given that at least some undocumented individuals would stand to benefit from bankruptcy relief, it is important to ask whether, as a policy matter, access to bankruptcy for undocumented individuals should be expanded. Lawmakers and commentators who have spoken out against illegal immigration have argued that undocumented immigrants should be barred from everything from health care to education,<sup>149</sup> and those same objectors would likely oppose access to bankruptcy as well. This Part argues that the current barriers to bankruptcy are inconsistent with both bankruptcy and immigration policy and proposes methods for removing these barriers to expand access.

##### *A. Barriers to Bankruptcy Should Be Lifted*

Both bankruptcy policy and immigration policy weigh in favor of lifting barriers to bankruptcy for undocumented immigrants. The

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144. I use the term “deportation” in this Article even though “removal” is now the term that the Department of Homeland Security uses to describe the ejection of an immigrant from the United States.

145. Rose Cuison Villazor, *What is a “Sanctuary”?*, 61 SMU L. REV. 133, 153–54 (2008).

146. See Associated Press, *Texas: Immigrants Pull Children From School*, N.Y. TIMES, Oct. 5, 2007, at A19.

147. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1480–81 (2006) (providing examples of immigrants choosing not to report crimes for fear of deportation).

148. All children are entitled to a free education, see *Plyer v. Doe*, 457 U.S. 202 (1982), and to be treated for medical emergencies. 42 U.S.C. § 1395dd(b) (2006).

149. See sources cited *supra* notes 2–4 and accompanying text.



reality of undocumented debtors' participation in the consumer credit-based economy requires the alleviation of barriers to bankruptcy for undocumented debtors.

### 1. Bankruptcy Policy

There is no reason that undocumented debtors should be excluded from the group of "honest but unfortunate debtor[s]" entitled to a fresh start.<sup>150</sup> Breaking immigration rules does not disqualify a person from bankruptcy relief. Many lawbreakers—even thieves or drug dealers—may have their debts discharged in bankruptcy so long as such debts were not fraudulently incurred.<sup>151</sup> There is nothing in the nature of unlawful immigration status that places undocumented immigrants outside of bankruptcy's reach. Indeed, the Bankruptcy Code is an implicit part of every contract, and barriers to bankruptcy relief for undocumented immigrants are inconsistent with the recognition that undocumented immigrants can be parties to contracts.<sup>152</sup> The participation of undocumented debtors in contracts, including consumer credit contracts, contributes to economic growth.<sup>153</sup> For better or for worse, our economy depends heavily on consumer spending—which means, increasingly, spending on credit. The price of every contract reflects the possibility that the debtor may default and file for bankruptcy.<sup>154</sup> Debtors and creditors cannot contract around

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150. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

151. 11 U.S.C. § 727 (2006) (providing that the court "shall" grant the debtor a discharge unless one of twelve specific exceptions apply).

152. The principle that bankruptcy is built into every contract is found in the rule that an individual cannot contract away his/her right to a bankruptcy discharge. *See, e.g.*, *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987); *In re DiPierro*, 69 B.R. 279, 282 (Bankr. W.D. Pa. 1987); *In re Markizer*, 66 B.R. 1014, 1018 (Bankr. S.D. Fla. 1986); *In re Krieger*, 2 B.R. 19, 23 (Bankr. D. Or. 1979); *In re Weitzen*, 3 F. Supp. 698 (S.D.N.Y. 1933); *Fed. Nat'l Bank v. Koppel*, 148 N.E. 379 (Mass. 1925). For a discussion of how contracts are negotiated in the shadow of bankruptcy law, *see generally* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001).

153. *See* Gorman, *supra* note 38 at B1. Undocumented immigrants represent a largely untapped market of potential homeowners. Given that undocumented immigrants have thus far proven to be reliable borrowers, mortgage borrowing by undocumented immigrants could facilitate the recovery of the housing market and benefit the broader economy.

154. *See Chapter 9: Assessing the Legal Infrastructure for Financial Systems*, WORLD BANK & INTERNATIONAL MONETARY FUND, FINANCIAL SECTOR ASSESSMENT: A HANDBOOK 230 (2005), available at <http://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch09.pdf> ("Effective creditor rights and insolvency systems play a vital role in helping to sustain financial soundness, and they promote commercial confidence by enabling market participants and stakeholders to more accurately price, manage, and resolve the risks of default and nonperformance.").

bankruptcy *ex ante*.<sup>155</sup> The “fresh start” that bankruptcy provides is a crucial safety net in the absence of meaningful regulation *ex ante*, such as interest rate limits and a requirement that the borrower understand the terms of the contract before entering into the agreement.

Barriers to bankruptcy for undocumented debtors interfere with bankruptcy’s goal of providing a fresh start to the debtor so that she may support herself and her family and make positive contributions to the economy. The more difficult filing for bankruptcy is made for undocumented debtors, the bigger the windfall for voluntary creditors such as ITIN mortgage lenders because the contract will have included a cost reflecting a risk of bankruptcy that does not exist for that individual.

A group that faces barriers to bankruptcy relief is likely to be particularly attractive to creditors. For example, those who have filed for bankruptcy within the last eight years are much more likely to be targeted by predatory creditors.<sup>156</sup> Empirical evidence demonstrates that the credit industry aggressively markets higher interest credit products such as credit cards and car loans to borrowers who have just emerged from bankruptcy.<sup>157</sup> Given that those without access to bankruptcy are especially at risk for predatory lending, systemically excluding the undocumented from bankruptcy filing is disconcerting. Creditors may be more attracted to undocumented debtors knowing that bankruptcy relief is inaccessible for this population.

While barriers to bankruptcy for undocumented debtors may benefit some creditors, such barriers also work to the disadvantage of less sophisticated or less aggressive creditors. Indeed, a key justification for bankruptcy is the equitable and orderly distribution of the debtor’s financial affairs for the benefit of creditors.<sup>158</sup> State law collection practices award those creditors who are most aggressive or who provide services or property most important to the debtor. Without bankruptcy, taxing authorities and doctors are not as likely to be paid as landlords or utility companies. Furthermore, creditors of undocumented debtors do not have the debtor’s SSN

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155. *In re Tru Block Concrete Products, Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Ca. 1983); see also *Riggs Nat. Bank of Washington, D.C. v. Perry*, 729 F.2d 982, 985 (4th Cir. 1984) (clause providing for default upon bankruptcy filing unenforceable).

156. See Katherine Porter, *Bankrupt Profits: The Credit Card Industry’s Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1392–93 (2008).

157. See *id.* (reporting empirical evidence that debtors emerging from bankruptcy received, on average, ten offers for credit in each month subsequent to bankruptcy filing, and reporting that over eight-five percent of such solicitations specifically referenced the recent bankruptcy).

158. See sources cited *supra* note 16 and accompanying text.

and thus do not have the leverage to threaten harm to the debtors' credit reports.<sup>159</sup> As a result, creditors whose services or property undocumented debtors no longer need are less able to collect outside of bankruptcy.

In providing creditors with the right to force debtors to file for bankruptcy upon certain conditions, the Bankruptcy Code recognizes that, in some cases, bankruptcy will be more beneficial for at least some creditors than for debtors.<sup>160</sup> If the Bankruptcy Code banned undocumented debtors from bankruptcy, creditors would not be able to pursue an involuntary bankruptcy against undocumented debtors. Without bankruptcy access for undocumented immigrants, creditors cannot rely on the organized and equitable resolution of the debtor's financial matters that bankruptcy provides.

## 2. Immigration Policy

In the immigration context, much of the debate and discussion revolves around where lines should be drawn—that is, which rights and privileges should extend to undocumented individuals and which should not. Undocumented immigrants are currently entitled to at least some basic rights and resources, including the ability to enter into contracts, purchase food, seek emergency room care, and seek redress for workplace abuses. Given the importance of bankruptcy in our consumer credit-based economy and the participation of undocumented immigrants in that economy, it should be clear that bankruptcy is wholly consistent with these basic rights, and follows naturally from the recognition that undocumented debtors can enter into contracts.<sup>161</sup>

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159. Creditors of undocumented debtors using an ITIN to obtain credit may be able to impact credit reports and, as a result, have somewhat more leverage.

160. 11 U.S.C. § 303 (2006).

161. Currently there are no legislative proposals to bar undocumented immigrants from entering into contracts. In fact, current law includes an affirmative right for anyone to enter into contracts, including undocumented immigrants. 42 U.S.C. § 1981(a) (2006) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."); *see also* *Buck v. Stankovic*, 485 F. Supp. 2d 576, 583–86 (M.D. Pa. 2008) (granting attorneys' fees to an undocumented immigrant who was refused a marriage license where an injunction ordering granting of the license had previously been ordered); *King v. ZirMed, Inc.*, No. 3:05CV-181-H, 2007 WL 3306100, at \*5 (W.D. Ky. Nov. 6, 2007) (holding that denying undocumented workers the right to contract flies in the face of 42 U.S.C. 1981); *Shen v. A & P Food Stores*, No. 93 CV

In reality, undocumented individuals participate in the labor market and their participation is both necessary and desirable.<sup>162</sup> As a result, much of our legal framework recognizes that undocumented immigrants' participation in the market requires affording them many of the protections that are available to others in a similar position. Undocumented workers are entitled to workplace protections such as minimum wage, freedom from sexual harassment, and safe workplace conditions.<sup>163</sup> Undocumented workers who fall ill or who get pregnant are entitled to protection under the Family Medical Leave Act.<sup>164</sup> Similarly, undocumented consumers are legally entitled to purchase products that are safe. In the event that they experience an injury from an unsafe product, they are entitled to sue the manufacturer.<sup>165</sup> Bankruptcy, just like product safety regulations and contract laws, exists not only for the protection of individual consumers and individual parties to contracts, but also for the overall well-being of our economy.

Of course, there remains vigorous debate regarding the propriety of extending other rights and entitlements to undocumented immigrants. For example, several localities have enacted laws to prevent undocumented immigrants from renting apartments<sup>166</sup> or obtaining jobs.<sup>167</sup> Some activists argue that undocumented immi-

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1184(FB), 1995 WL 728416, at \*\*1-3 (E.D.N.Y. Nov. 21, 1995) (holding that refusing to sell groceries to an immigrant is a denial of the right to contract).

162. See, e.g., Editorial, *Rot in the Fields*, WASH. POST, Dec. 3, 2007, at A16 (describing farmers' inability to find lawful residents willing to work as agricultural workers); see also Jennifer Ludden, *Q&A: Sen. Kennedy on Immigration, Then and Now*, NPR (May 9, 2006), <http://www.npr.org/templates/story/story.php?storyId=5393857> (Sen. Kennedy: "The fact is, this country, with each new wave of immigrants, has been energized and advanced . . . in terms of its economic, social, cultural and political life . . . I don't think we ought to fear it, we ought to welcome it.").

163. See Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1363 (2009).

164. See 42 U.S.C. § 1395dd(b) (2006).

165. See, e.g., *Gomez v. F&T Int'l LLC*, 842 N.Y.S.2d 298, 302 (2007).

166. See, e.g., VALLEY PARK, MO., ORDINANCE 1721 § 2 (2007), available at <http://www.valleyparkmo.org/docs/Ordinances/ordinance%201721.pdf> (creating penalties in the housing context); see also Rose Cuison Villazar, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1038-39 (2010).

167. Arizona's employer sanction law is the most well-known example. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216 (2008 & Supp. 2010). Other towns have enacted ordinances with similar aims. See, e.g., VALLEY PARK, MO., ORDINANCE 1722 § 4.A (2007), available at <http://www.valleyparkmo.org/docs/Ordinances/Ordinance1722.pdf> (creating penalties in the employment context); HAZLETON, PA., ORDINANCE 2006-18 § 4.A (2006), available at <http://www.aclu.org/pdfs/immigrants/hazletonsecondordinance.pdf> (creating penalties in the employment context); *id.* § 5.A (creating penalties in the housing context). Georgia, Alabama, Indiana, and South Carolina also recently enacted far-reaching laws barring undocumented immigrants from housing, employment, and post-secondary education. Markon, *supra* note 3, at A1. The Obama administration is challenging the constitutionality of several of these laws. *Id.* In contrast to the movement in some states towards excluding

grants should not be entitled to any government benefits.<sup>168</sup> Such objectors oppose providing undocumented immigrants not only with government benefits, but also any service that the government has a role in providing.<sup>169</sup> The effect of such proposals is to inhibit undocumented immigrants from moving and transacting in public life.<sup>170</sup>

The problem with regulating undocumented immigrants to the shadows and precluding them from accessing any regulatory apparatus is that public regulation is so pervasive that this approach would bar undocumented immigrants from nearly every activity. If undocumented immigrants could not access the court system, they would not be able to enforce contracts or property rights—meaning that in practice, they could not have a contractual right to damages or a property right to convey land. In addition, following this logic, undocumented immigrants could not access fire departments, police departments, or serve as complaining witnesses. Such severe restrictions would leave victims of serious harms without redress and perpetrators of harm without

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undocumented immigrants from public life, New Haven has adopted an identification card available to all residents regardless of legal status. See Caitlin Carpenter, *New Haven Opts to Validate Its Illegal Residents*, CHRISTIAN SCI. MONITOR, July 17, 2007, at 2. For a detailed discussion of the varied local approaches to immigration, see Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 578–79 (2008).

168. See Matthew Benson, *Wider Range of State Benefits Requiring Citizenship Sought*, ARIZ. REPUBLIC, Mar. 4, 2008, at B1; Chris L. Jenkins, *Warner Signs Limits on Immigration Benefits*, WASH. POST, Mar. 30, 2005, at B05; Teresa Watanabe, *Activists Push Ballot Initiative to End State Benefits for Illegal Immigrants' and Their U.S.-Born Children*, L.A. TIMES, July 13, 2009, at A-1. Perhaps many in the anti-immigration reform camp would respond by suggesting that, rather than seek bankruptcy relief, immigrants in trouble simply return to their country of origin. This is not likely to be a feasible solution in many instances, however, particularly for immigrants with children in the United States.

169. This view is evidenced by the recent health care reform debate. See Thompson, *supra* note 61, at A5. Because the insurance exchanges are not publicly funded, but are merely private exchanges that are made possible by a public apparatus, these objectors appear to equate “public benefits” with any substantive ends made possible by public systems or procedures.

170. See Motomura, *supra* note 1, at 2076–77 (describing states’ power to control access to admission, in-state tuition and financial aid as reflective of the position that undocumented immigrants are “not fully part of the community, even if their labor is vital to the economy”). Indeed, undocumented immigrants are often described as a “shadow population.” See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218 (1982) (“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”); Nancy Zarate Byrd, *The Dirty Side of Domestic Work: An Underground Economy and the Exploitation of Undocumented Workers*, 3 DEPAUL J. FOR SOC. JUST. 245, 266–67 (2010) (stating that criminalization of employers who “knowingly” hire undocumented immigrants resulted in the “cultivation of a shadow economy”).

punishment.<sup>171</sup> Just as we refuse to permit employers and manufacturers an exemption from these health and safety standards when contracting with undocumented immigrants, it is equally inappropriate to place undocumented immigrants and their creditors outside the reach of bankruptcy.

### *B. How to Lift Barriers to Bankruptcy*

This Article has suggested that bankruptcy can be an important tool for some undocumented immigrants, that very few undocumented immigrants are obtaining bankruptcy relief, that formal and informal barriers to bankruptcy contribute to these low rates of bankruptcy relief, and that removing such barriers is good policy. The question that remains is *how* to remove the existing barriers to bankruptcy for undocumented immigrants. This Part explains how steps can be taken to ease these barriers without leading to fraud or identity theft. Modified documentation requirements, education efforts, and amendments to the U.S. Trustee guidelines would ease many of the existing barriers for the undocumented.

First, BAPCPA's documentation requirements, including the means test, should be eased. As discussed in Part IV, these requirements discourage not only undocumented debtors, but all debtors. Empirical evidence has revealed that the BAPCPA requirements have deterred many eligible debtors from filing for bankruptcy.<sup>172</sup> Furthermore, the cost of filing for bankruptcy increased in the wake of BAPCPA because of the increased time needed to assemble the petition and related documents. As a result, BAPCPA's documentation requirements prevent more low-income debtors from filing than high-income debtors, given that low-income debtors may not be able to afford the increased legal costs.<sup>173</sup> Additionally, for those who can afford to file for bankruptcy, the BAPCPA means test, which is purportedly designed to force higher income debtors into Chap-

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171. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 249–250 (2009) (explaining that allowing undocumented immigrants to access courts to redress civil rights violations benefits society as a whole); Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 45 (2008) (explaining that limitations on undocumented immigrants' ability to sue for workplace violations results in deteriorated workplace conditions for all).

172. Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 361–63, 385 (2008).

173. See, e.g., Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1951–52 (2011); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 378–79 (2007); James J. White, *Abuse Prevention 2005*, 72 MO. L. REV. 863, 874 (2006).

ter 13's repayment plan rather than Chapter 7's immediate discharge, has merely increased the time that it takes to prepare a bankruptcy filing, increasing the opportunity for creditors to squeeze what they can from the debtor.<sup>174</sup> For undocumented debtors, some of BAPCPA's documentation requirements—in particular, the requirement that the debtor submit her W-2—force the debtor to reveal her unlawful status and, in some cases, forecloses her ability to obtain bankruptcy relief. Requiring debtors to jump over these documentation hurdles has not served its stated purpose and should be abandoned.

Easing these barriers does not mean that abusive filings will be tolerated. BAPCPA was not necessary to enable creditors to dismiss abusive bankruptcy filings—creditors have always had the right to request that courts dismiss cases in which they suspect abuse.<sup>175</sup> If creditors cannot find a basis to prevent a bankruptcy case from being filed, Congress should not put a thumb on the scale in favor of dismissal. Returning the burden of proving bankruptcy abuse to creditors restores access to bankruptcy for debtors, and gives undocumented debtors a chance at bankruptcy relief.

Even if all of the BAPCPA documentation requirements are not lifted, at minimum the automatic dismissal for failure to file certain documents should be eliminated. The bankruptcy judge should be permitted to consider the circumstances of each case and the debtor should be given time to assemble the daunting list of materials.<sup>176</sup> Such an extension of time would be particularly important for undocumented debtors working in the informal sector who did not file tax returns out of fear of deportation or lack of information. The bankruptcy process should assist these undocumented debtors in meeting their tax obligations. Although taxes are non-dischargeable, keeping the debtor in the bankruptcy proceedings is still beneficial because it increases the likelihood that taxing authorities will be repaid. Outside of bankruptcy, a debtor will likely choose to pay creditors that more directly affect his basic needs—such as utility companies, landlords, or mortgage lenders—making it unlikely back taxes will ever be collected.

Second, educating the clerks, assistants, trustees, judges, help desk staff, and attorneys that a SSN is not a prerequisite to

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174. See Mann, *supra* note 173, at 384–92 (discussing how credit card companies profit from allowing delinquent borrowers to struggle in a “sweat box” of partial payments, late fees, and penalties, but not being cut off completely).

175. 11 U.S.C. § 707 (1998), amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

176. Of course, bankruptcy judges would be free to promptly dismiss a case or lift the automatic stay in “face-filing” cases where the debtor makes no attempt to file schedules.

bankruptcy filing will increase the bankruptcy relief available to undocumented individuals. Continuing Legal Education courses should be conducted for attorneys and court staff to explain how cases filed by debtors that do not have a SSN can be processed. It would also be helpful to develop regional referral systems for lawyers with experience handling petitions of undocumented immigrants. Finally, legal clinics already handling bankruptcy petitions should develop further expertise in undocumented debtor cases so as to provide both direct legal services to these debtors and to serve as a resource for other attorneys that need assistance with undocumented debtor petitions.

Third, the Handbook for United States Trustees should be amended to clarify that bankruptcy officials and administrators do not have the burden—or the option—of addressing the immigration status of any undocumented debtor so long as the debtor is not committing bankruptcy fraud. The IRS receives notice of millions of false or mismatched SSNs every year, yet it is prohibited from notifying immigration authorities. The Internal Revenue Code contains confidentiality provisions that prohibit officials from contacting the Department of Homeland Security based on any information procured in tax documents.<sup>177</sup> Similarly, the bankruptcy system should process cases involving undocumented debtors without involving immigration authorities. Bankruptcy judges, trustees, and clerks must distance themselves from immigration policy by processing bankruptcy cases without regard to immigration status when there are no issues of fraud or identity theft.

Finally, workers should be allowed to obtain bankruptcy relief even if they have obtained employment under a false SSN, so long as they have not used that SSN for any other purpose. Fraud and identity theft are serious concerns, however there are already sufficient mechanisms in place to ensure that individuals cannot obtain bankruptcy relief for debts associated with someone else's SSN. Over the past decade the United States Trustee's Office has uncovered several instances of fraud in the bankruptcy system, and has taken measures to combat it, specifically by requiring the debtor to fill out the Form B-21.<sup>178</sup> The United States Trustee's Office has a

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177. See I.R.C. § 6103 (West 2010).

178. For example, the identification requirements that mandate that a debtor provides proof of identification and proof of SSN are a result of a pilot study conducted by the United States Trustee's Office, which uncovered a number of instances of misidentified bankruptcy filers and incorrect SSNs. See sources cited *supra* note 86 and accompanying text; Davis & Limprecht, *supra* note 122, at 12 (explaining that in the pilot project, of 8,000 errors identified in 2001, more than 6,200 debtors filed amended petitions to correct these problems).



number of tools at its disposal to address invalid SSNs, including motions to dismiss, expunge complaints, correct SSNs, or vacate orders for relief or by objecting to discharge or Chapter 13 plan confirmation.<sup>179</sup> These measures are sufficient to combat identity theft and ensure that a debtor does not file for bankruptcy under another person's SSN.

Given the adequacy of these measures, it is not necessary to investigate whether the debtor has used another identifier for employment purposes, as is apparently occurring in some cases.<sup>180</sup> Although many of the cases of identity theft identified by the United States Trustee's Office are indeed attempts to obtain bankruptcy relief using false identification,<sup>181</sup> undocumented debtors who were not seeking to discharge any debt related to their false SSN may have been improperly categorized as "identity theft" cases.<sup>182</sup> For example, a Minnesota bankruptcy case was dismissed when a debtor presented a W-2 showing a SSN that the IRS determined belonged to an unrelated minor living in another state.<sup>183</sup> The court barred her from re-filing until she disclosed all false SSNs she had used and obtained a legal SSN—even though obtaining a legal SSN is not a prerequisite to bankruptcy filing.<sup>184</sup> The requirement that a debtor obtain a SSN amounts to a requirement that she obtain lawful immigration status before filing for bankruptcy, despite any such requirement in the Bankruptcy Code.

Of course, even if undocumented debtors are not intentionally stealing others' identities, undocumented debtors using invented SSNs on employment forms may inadvertently choose a SSN that belongs to someone else.<sup>185</sup> Thus, a debtor using an invented SSN to seek bankruptcy can inadvertently affect the credit of another individual, even if the debtor is not seeking to discharge any debt related to that SSN. It is entirely appropriate for bankruptcy courts and the United States Trustee's Office to ensure that bankruptcy

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179. Davis & Limprecht, *supra* note 122, at 12; see also Jane Limprecht, *Fresh Start or False Start? Dealing with Identity Theft in Bankruptcy Cases*, AM. BANKR. INST. J., Dec./Jan. 2001, at 12, 40. Limprecht describes one case in which a debtor stole an individual's identity after finding the victim's lost wallet. The debtor filed for bankruptcy, presenting a fraudulent SSN, driver's license, and immigration document to the trustee.

180. See Davis & Limprecht, *supra* note 122, at 50.

181. For example, in a case in California the court discovered that a debtor filed fifteen prior bankruptcy cases using four names and two SSNs. A Georgia case uncovered a debtor who filed six prior bankruptcy cases with eight SSNs and nine names. *Id.* at 12.

182. The Supreme Court has held that inventing a SSN for employment purposes does not constitute identity theft. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).

183. See Davis & Limprecht, *supra* note 122, at 50.

184. *Id.* at 50.

185. See John Leland, *Some ID Theft is Not for Profit, But to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A1.

debtors are prohibited from taking any action that will in any way affect the credit of other individuals. Naturally, undocumented debtors would not and should not be able to discharge any debt associated with a fraudulently obtained SSN. For debtors filing without a SSN, the only debt that would be discharged would be debt incurred under their name. For a debtor filing under an ITIN, the only debt that would be discharged would be debt associated with their name and ITIN.

It is not clear, however, that policing debtors' use of false SSNs for *employment purposes* is properly within the purview of bankruptcy officials and administrators. The bankruptcy fraud statute makes it a crime to "knowingly and fraudulently make[] a false declaration, certificate, verification, or statement" in a bankruptcy case.<sup>186</sup> A debtor commits bankruptcy fraud under this statute if, during a bankruptcy proceeding and under penalty of perjury, she knowingly and fraudulently makes a false statement related to a material matter.<sup>187</sup> A material omission can also constitute bankruptcy fraud.<sup>188</sup> Turning in a W-2 with a false SSN does not meet the elements of bankruptcy fraud because unless the debtor is seeking to discharge debt relating to that SSN, use of the false SSN is neither a material statement nor a material omission.

Additionally, the bankruptcy system already has the expertise to preclude relief in cases of misconduct without barring bankruptcy relief completely. For example, a debtor who incurred part of her debt fraudulently is not be able to discharge that debt, but her other debts can be discharged.<sup>189</sup> In part, this solution recognizes that bankruptcy is not a remedy designed solely to benefit the debtor but also to assist creditors.

In contrast, the case of a debtor working using an ITIN should be straightforward. The IRS does not verify the identity of ITIN applicants and ITINs are not intended to be identity documents.<sup>190</sup> Current bankruptcy procedures, however, already require that a photo ID be submitted along with an ITIN and an ITIN in con-

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186. 18 U.S.C. § 152 (2006).

187. See *United States v. Ellis*, 50 F.3d 419, 422 (7th Cir. 1995). In order to show that a debtor "knowingly and fraudulently ma[de] a false declaration, certificate, verification, or statement" in a bankruptcy case in violation of the criminal bankruptcy fraud statute, 18 U.S.C. § 152, the government must show that "(1) a bankruptcy proceeding existed under Title 11; (2) the defendant made a statement relating to the proceeding; (3) the proceeding was under penalty of perjury; (4) the statement related to a material matter; (5) the statement was false; and (6) the statement was made knowingly and fraudulently." *Id.* at 422.

188. *Id.*

189. 11 U.S.C. § 523(a)(2) (2006).

190. *General ITIN Information*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/individuals/article/0,,id=222209,00.html> (last visited Oct. 1, 2011).

junction with a national identification card should constitute sufficient proof of identity for bankruptcy purposes.<sup>191</sup> Thus, the precautionary procedures already in place ensure that the risk of identity theft in bankruptcy proceedings is minimal and the requirement that the debtor submit photo identification at the 341 meeting should be sufficient to thwart identity theft. Although there is no guarantee that a debtor will not present false identification in the bankruptcy proceeding, this risk exists equally for legal residents.

The measures proposed by this Article will not guarantee bankruptcy access for undocumented debtors. However, these straightforward changes can increase bankruptcy access without compromising the goal of combating fraud and identity theft. Certainly other barriers—particularly fear of deportation—will remain, but these steps will at least make bankruptcy relief a feasible possibility for some undocumented debtors.

#### CONCLUSION

Bankruptcy relief is an important safety net, particularly in times of economic downturn. Although undocumented immigrants typically do not have as much debt as individuals in the general population, undocumented immigrants are still at risk of sudden job loss or medical emergency and experience the same need to urgently discharge mortgage or medical debt.

Currently the Bankruptcy Code and Bankruptcy Rules permit undocumented debtors to file for bankruptcy. As a practical matter, however, undocumented debtors face substantial barriers to obtaining bankruptcy relief; barriers that are inconsistent with both immigration policy and bankruptcy policy. Undocumented debtors must not be denied access to bankruptcy so long as we allow them to enter into contracts to purchase goods and services. Undocumented individuals—whether contributing to the economy as workers, consumers or borrowers—must have access to the same

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191. For example, the Mexican Matricula Consular has recently been modified to increase its security. The Mexican government now conducts background checks on the individuals that apply for the card, and the card includes security elements such as holograms that are only viewable with detection tools that recognize valid cards. See Kathryn Lee Holloman, *The New Identity Crisis: USA Patriot Act Customer Identification Programs and the Matricula Consular as Primary Identity Verification for Mexican Nationals*, 7 N.C. BANKING INST. 125, 128 (2003); ANDORRA BRUNO & K. LARRY STORRS, CONG. RES. SERVICE, CONSULAR IDENTIFICATION CARDS: DOMESTIC AND FOREIGN POLICY IMPLICATIONS, THE MEXICAN CASE, AND RELATED LEGISLATION 2 n.2 (2005), available at <http://fpc.state.gov/documents/organization/45470.pdf>.

bankruptcy protections afforded to those with lawful status. Additionally, barring undocumented debtors from bankruptcy relief impedes an orderly and equitable recovery for creditors and interferes with the debtor's ability to provide for her family and to contribute positively to the economy. For better or for worse, our economy depends heavily on consumer credit for growth, and individuals and families must often rely on consumer credit to meet basic needs. Borrowing by undocumented immigrants creates opportunities for economic growth. As long as that is the case, access to bankruptcy for everyone—including undocumented debtors—is crucial. Barriers to bankruptcy for undocumented debtors create inequities for debtors and creditors alike and must be eliminated.