ARTICLE

ENDING PERPETUAL DEBTS

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ABSTRACT

Consumer debts in the United States can effectively live (and grow) forever: most statutes of limitations do not extinguish them; they can morph into relatives' obligations after the debtor's death; and they sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. This Article explores the practical, philosophical, and economic effects of the current system. It proposes a form of "automatic bankruptcy" for consumer debts: a federal discharge that, by operation of law, would extinguish debts (roughly) seven years after a default, or seven years after a judgment. The Article explores additional features of this proposal including ones designed to ensure it is self-executing, and others that mirror features of the Fair Credit Reporting Act and the discharge provisions of the Bankruptcy Code.

TABLE OF CONTENTS

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I. INTRODUCTION

For human beings, death is certain; but this is not so for debts. This Article argues that law and practice conspire to create a class of virtually perpetual debts that psychologically and actually burden those individuals for much longer than economically and socially justified. It argues for an automatic form of debt discharge to occur after a period of time during which creditors have been unsuccessful in extracting payment from a debtor.

As far back as the Bronze Age, Babylonian kings periodically issued proclamations cancelling all their subjects' debts.[1] In biblical times, these "Clean Slate" proclamations were codified into law and occurred regularly.[2] This was known as the Jubilee year; an "occasion of joyful celebration," since this was a time when many peasants returned home from serving as debt peons.[3] Despite calls for a Jubilee in modern times, it remains something ancient.

Today's debts can grow and persist seemingly forever. Paying the debt in full should suffice, but sometimes even this is not

1. DANIEL C. SNELL, A COMPANION TO THE ANCIENT NEAR EAST 206 (2006).

2. MARC VAN DE MIEROOP, KING HAMMURABI OF BABYLON: A BIOGRAPHY 12 (2005).

3. JUDY BARNES ET AL., COASTING: AN EXPANDED GUIDE TO THE NORTHERN GULF COAST 241 (4th ed. 2003).

enough. The well-documented problem of "zombie debts" stems from the larger practice of selling and reselling unsecured debts with little to no evidence of the sale record and creates a world in which individuals may be contacted about a debt many years after it is paid and required to provide evidence that they indeed paid it. The death of the debtor also fails to extinguish the debt, and it may instead turn into the obligation not just of the estate of the deceased—the legal rule—but of the survivors for failure to know about their lack of obligation under the law.

It is common to think that statutes of limitations can kill debts.[4] But this is not the case in most states. Generally, these statutes only provide a defense to a civil action.[5] If the debtor fails to raise the defense in a timely manner, the creditor may obtain a judgment against her, and enjoy another ten or twenty years in which to collect.[6] In most states outside of Mississippi and Wisconsin, creditors can continue to pursue debtors outside of the courts past the limitations period.[7] Creditors may also attempt to persuade debtors to make a small payment or acknowledge the debt and thus restart the limitations period, even if that period had expired long before. This "reset" would once again allow a creditor to use the court process to collect from the debtor.

Debtors in the United States do have one escape from immortal obligations: they can avail themselves of bankruptcy protection. A bankruptcy discharge renders the debt uncollectible

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4. LaToya Irby, *What to Know About the Statute of Limitations on Debt*, THE BALANCE (May 31, 2017), https://www.thebalance.com/statute-of-limitations-on-debt-960565 [https://perma.cc/Q3DM-9F3S]; *see also* Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L.Q. REP. 372 (2010) (noting that "[m]any lawyers are surprised to learn that a creditor or debt collector is allowed to collect on a time-barred debt. After all, it may seem that this is the point of having a statute of limitations.").

5. *See* Jeanine Skowronski, *50 Things Anyone Dealing with a Debt Collector Should Know*, CREDIT.COM (Apr. 5, 2017), http://blog.credit.com/2017/04/50-things-anyone-dealing-with-a-debt-collector-should-know-168944/ [https://perma.cc/7Z7A-9YEB]. The exception to this rule only applies in two states. In Mississippi and Wisconsin, the passing of the statute of limitations period extinguishes the right as well as the remedy. MISS CODE ANN. § 15–1–29 (1976); Thomas J. Watson, *Bankruptcy Cases: Proceed with Caution*, WIS. LAW., July/Aug. 2016, at 56. In those states, once the statutory period expires, the debtor no longer owes the debt. This is essentially the proposal of this Article. Unfortunately, I have found no economic studies of the impact of these rules on the availability or cost of lending in Mississippi or Wisconsin.

6. The creditor may open itself to liability under the Fair Debt Collection Practices Act (FDCPA) in this situation, and perhaps to the state analog to the FDCPA. However, these would be separate actions that could be pursued by the debtor against the creditor. 15 U.S.C. § 1692k(a), (d) (2012).

7. *See, e.g.*, Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, BANKING & FIN. SERVS. POL'Y REP., Aug. 2014, at 13.

from the individual and protects the debtor from future attempts at collection, making it a violation of a court order to do so.[8] But not all debts are dischargeable, and the process is costly and underused. Bankruptcy can also be overkill, like amputating a limb when a more exacting surgical procedure would do.

If a debt is not repaid in full, it will likely grow significantly over time.[9] The creditor will also be able to attempt to collect by filing a lawsuit against the consumer. Across the country, hundreds of thousands of such lawsuits are filed every year in state courts.[10] The creditor, as a result of the debtor's default, wins the overwhelming majority of these suits.[11] Once a creditor obtains a judgment, they can pursue the debtor for ten or twenty years in most states, sometimes longer.[12] This means that the idea is that even if the debtor is judgment-proof at the time of the judgment, the debt owner may continue to "follow" the debtor and recover if the debtor's situation improves.[13] But how long should this be allowed? What is the cost of this system, economically and socially? Should the system change? In what way? What are the implications of such a change?

This Article explores these questions. It ultimately argues for a debt Jubilee of sorts: a statutory procedure under federal law whereby individual consumer debts are automatically and regularly extinguished and cannot be revived. Akin to an "automatic" bankruptcy discharge, this system would unequivocally "kill" unsecured consumer debts seven years and 180 days after the consumer ceased paying, or seven years after they were reduced to a valid judgment. My proposal creates a

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8. Steven H. Resnicoff, *Interactions Between Bankruptcy Law and State Law: What Illinois Judges Need to Know*, 24 LOY. U. CHI. L.J. 437, 453 (1993).

9. Many contracts creating debts include provisions for adding interest and fees to a delinquent obligation. Even if there was no such provision, many states allow creditors to collect a statutory amount of interest. Rachel Marin, *Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor*, BUS. L. TODAY, April 2014, https://www.americanbar.org/publications/4blt/2014/04/04a_marin.html [https://perma.cc/2SD3-ESZM].

10. Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1 (2008).

11. *Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor*, HUMAN RIGHTS WATCH (Jan. 20, 2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor [https://perma.cc/5AUP-PJ6Z].

12. Gerri Detweiler, *Creditor Gets a Judgment Against You—Now What?*, CREDIT.COM (Apr. 20, 2017), http://blog.credit.com/2017/04/creditor-gets-a-judgment-against-you-now-what-51696/ [https://perma.cc/QMX2-9XT3].

13. In reality, it appears that most judgments go unpaid. Hynes, *supra* note 10, at 19–20, 56–57.

uniform federal law applicable to consumer debts owed to private, nongovernmental entities.[14] This goes beyond the typical "statutes of repose" and extinguishes both the right as well as the remedy and provides the former debtor affirmative statutory rights against someone who attempts to collect an extinguished debt.

Part II gives an overview of the laws governing different types of debts—how long a creditor must use legal process to collection for various debts and in what ways can debts be extinguished. It details how and when debts can become perpetual obligations. Part III discusses the benefits, consequences, and costs of these lasting debts. Part IV proposes and explores a solution: requiring that no matter what else happens, debts be automatically discharged after a (roughly) seven-year period of nonpayment. This Part also explores the likely effects of this proposal, addresses some likely objections, and discusses theoretical justifications. Part V concludes.

II. PERPETUAL OBLIGATIONS: THE LIFE OF DEBTS

My contention that most debts are effectively perpetual rests on a combination of formal law and law-in-action. This Part describes how debts are born, grow, and how they die. It then turns to explain how debts are like a cancer—perpetually growing—often even in cases in which one might think they die, such as when they are paid in full, the debtor dies, or the statute of limitations expires. Finally, I argue that in most cases, consumer debts can only meet their "true death" through a bankruptcy discharge.

A. Birth and Development

Debts can be born in many ways. They might come about as a result of a contractual agreement a consumer failed to honor: failing to pay a credit card bill, writing a check that bounces, or failing to pay a cell phone bill. A government may impose debts for late or nonpayment of taxes, tickets, fines, or other assessments.[15] Debts may be incurred after medical treatment if the insurance company refuses to pay the whole bill. If a debt is not repaid in

14. I specifically carve out debts owed to individuals—such as child support and alimony—and debts owed to governmental entities (e.g., taxes, fines, etc.). These items deserve special consideration and are beyond the scope of this Article.

15. Government debts can include fines, fees, orders of restitution, taxes, and federally guaranteed student loans, among others. U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/W35J-AX49].

full, the amount due will likely increase through interest rates and fees. This growth can be quite substantial. Whether and how much interest accrues depends on the type of debt. If the debt was created by a contract, the contract probably included a provision for interest that compounds on a daily or monthly basis until it is repaid in full. If not, many states statutes allow creditors who did not provide for interest in their contract to charge simple or sometimes compound interest on delinquent debts.[16] Similarly, fees are typically spelled out in a contractual agreement, but may be added by operation of law in the form of, for example, court costs.

When a debt is delinquent, the creditor has a few options. Calling or writing the debtor are usually at the top of the list. If these tactics fail to produce payment, the remaining options depend on the type of debt.

If attempting to collect from the consumer proves unsuccessful, a creditor may hire a third-party collection agency to attempt to collect or may choose to recoup some of the loss by selling the obligation to a debt buyer.[17] Interest can continue to accrue on the debt if allowed by law or contract. After some time, the debt owner may choose to sue the consumer in state court.[18] Winning a debt collection lawsuit allows the debt owner to essentially turn an unsecured debt into a secured one by way of a judgment.[19] Since most cases are won by default, it is often the case that the plaintiff will not need to offer any proof—that the defendant owes the debt, the amount is correct, or the plaintiff is the current owner of the debt—because the allegations in the complaint are sufficient.[20] If the debt owner wins a lawsuit, court costs and judgment interest—plus attorney's fees if permitted by the contract—will be added to the debt.[21]

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16. CONN. GEN. STAT. § 31-1 (2015), 815. ILL. COMP. STAT. 205/2 (2016), MASS. GEN. LAWS ch. 107, § 3 (2016), FLA. STAT. § 687.01 (2016), TEX. FIN. CODE § 302.002 (2016).

17. *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 42 (2015).

18. Debts owed to the government operate a little differently. While the government (state or federal) can obtain a judgment and satisfy it using the same court processes as a private creditor, in practice this is rare. The reason is that in most cases the government enjoys extraordinary powers of collection. Danielle Douglas-Gabriel, *Trump Administration Welcomes Back Student Debt Collectors Fired by Obama*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/03/trump-administration-welcomes-back-student-debt-collectors-fired-by-obama/?utm_term=.639cbcfe21a1.

19. Kristi Welsh, *What's the Difference Between Secured Debt and Unsecured Debt?*, CREDIT.COM (Oct. 31, 2016), http://blog.credit.com/2016/10/whats-the-difference-between-secured-debt-unsecured-debt-161871/.

20. Danning v. Lavine, 572 F.2d 1386, 1388–89 (9th Cir. 1978).

21. Margaret Reiter, *What is a Money Judgement?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-money-judgment.html [https://perma.cc/RTB8-K6TA] (last visited Oct. 4, 2017).

Once a judgment is entered, the plaintiff–creditor—now a "judgment creditor"—can initiate supplementary proceedings to collect on that judgment. These proceedings vary significantly state by state. In some states, a plaintiff–creditor will need to first obtain a "writ"—court order—before executing in any of the defendant–debtor's property.[22]

The defendant–debtor may or may not be given notice of this writ, or a notice to appear to supplementary proceedings where the debtor is supposed to explain whether they have any non-exempt property that could be used to satisfy the judgment. Once issued, the writ orders the sheriff or marshal to look for non-exempt property of the debtor,[23] seize it, sell it, and pay the proceeds to the judgment creditor until the judgment is fully paid.[24]

In most states, a judgment creditor can garnish the debtor.[25] A garnishment is a legal means of collecting a monetary judgment

22. *In re* Wilson, 38 B.R. 940, 941–42 (Bankr. W.D. Ky. 1984); Asher v. United States, 570 F.2d 682, 683–84 (7th Cir. 1978).

23. Each state has exemption laws which list precisely what kind or amount of property cannot be seized by judgment creditors and the process which must be taken before doing so. A debt collector is bound by the requirements of the FDCPA for it post-judgment collection activities. *See* Richard H. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 632, 647–48 (2006) (finding that garnishments are extremely common in Virginia).

24. Writs are routinely issued and delivered to sheriffs for "execution." Once the sheriff receives a writ, he or she will go looking for the debtor's property. In practice, the lawyer for the judgment–creditor may tell the sheriff exactly where to find the property of the debtor (such as a car, a stereo, a home, etc.). In most cases, the sheriff will take physical possession of the property (termed "to levy upon the property"); take it to the courthouse; advertise it; and sell it to the highest bidder. In the case of real property, a notice of seizure and sale will be posted, or potentially a judgment lien will be entered in the property record at the registry of deeds such that the property cannot be sold without taking account of the judgment. Any proceeds obtained from the sale of the property will go to pay the judgment creditor. *Construction Law Survival Manual: Ch 17—Enforcement of Judgment*, FULLERTON & KNOWLES, http://www.fullertonlaw.com/enforcement-of-judgment#f [https://perma.cc/HC9Y-CG3G] (last visited Feb. 4, 2018). An entry is made in the judgment record noting the partial or complete satisfaction of the judgment. If the proceeds are insufficient to pay the judgment in full, the sheriff will be commanded to look for other of the debtor's property to seize and the process will start again. In many of these cases, this process will stop with the sheriff because no non-exempt property is found or known about. While the sheriff has authority to go into a person's home and seize any property that is non-exempt—e.g., jewelry, flat-screen televisions, etc.—in practice this probably rarely happens unless someone knows specifically that the debtor has high value items in his home. If the debtor owns a car outright, or has equity in it, seizure will likely occur, since many states do not exempt cars from seizure. Justin Harelik, *What Can Creditors Take in a Bankruptcy?*, BANKRATE, http://www.bankrate.com/finance/debt/what-can-creditors-take-in-a-bankruptcy.aspx [https://perma.cc/4ZQ2-DAFT] (last visited Oct. 6, 2017).

25. *See, e.g.*, FLA. STAT. § 77.01 (2016); ALA. CODE § 5-19-15 (1975); ALASKA STAT. § 09.40.010 (2015); ARIZ. REV. STAT. § 12-1598 et seq. (2007); ARK. CODE ANN. § 16-110-402 (2015); CAL. CIV. PROC. CODE § 706.050 (West 2016); COLO. REV. STAT. § 13-54-104 (2015); CONN. GEN. STAT. § 52-361a (2015); GA. CODE ANN. § 18-4-20 (2016), KY. REV. STAT. § 425.506 (2016).

against a judgment debtor by ordering a third-party—the garnishee—to pay money, otherwise owed to the defendant-debtor, directly to the judgment creditor.[26] A judgment creditor will typically seek to garnish a debtor's bank account or wages from his employer.[27]

A minority of states do not allow wage garnishment to satisfy unsecured consumer debts—but do for debts related to taxes, child support, federally-guaranteed student loans, and court-ordered fines or restitution.[28] Several other states observe maximum thresholds that are lower than the 25% maximum provided by federal law.[29] Some states prohibit garnishment altogether in certain circumstances.[30]

Once a creditor obtains a judgment, she has much longer than the original statute of limitations period to pursue the debtor: 10 or 20 years in most states, sometimes longer.[31] In New York, for example, a judgment creditor may initiate a collection proceeding up to 20 years after a judgment has been issued.[32] This means that a consumer may be obligated to pay up on a debt up to 26 years after she ceased paying.[33] During those 26 years, post-judgment interest continues to accrue.[34] In most states, post-judgment

26. 32 CFR § 935.97 (2016).

27. *Garnishment: Forcing Debtors to Pay Involuntarily*, HIDAY & RICKE, P.A., https://www.dropbox.com/s/zrzxrzd38rd7nw3/Hiday-Ricke-Garnishment-Forcing-Debtors-to-Pay-Involuntarily.pdf?dl=1 (last visited July 26, 2015) [http://perma.cc/9FXZ-ZT8U] (noting that "garnishments can be an extremely effective recovery tool [and that] they account for a large percentage of the funds that we collect on behalf of our clientele")

28. With the exception of Pennsylvania, North Carolina, South Carolina, and Texas, all states allow some form of garnishment. to satisfy unsecured consumer debts. PA. CONS. STAT. § 8127 (2005); N.C. GEN. STAT. § 110-136 (2015); N.C. GEN. STAT. § 120-4.29 (2015); S.C. CODE ANN. § 37-5-04 (2016); TEX. CONST. ART. 16, § 28 (2017).

29. DEL. CODE ANN. tit. 10, § 4913 (2003); 735 ILL. COMP. STAT. 5/12-803 (2006).

30. The other type of garnishment, also known as attachment (or attachment of earnings), requires the garnishee to deliver all the defendant's money and/or property in the hands of the garnishee at the time of service of process to the court, to be paid over to the judgment creditor. Since this type of garnishment is not continuing in nature, but is not subject to the type of restrictions that apply to wage garnishment, it is most often used to levy bank accounts. William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 608–09 (1968).

31. *See, e.g.*, N.J. REV. STAT. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. GEN. LAWS ANN. § 9-1-17 (West 2014) (20 years); ALA. CODE § 6-2-32 (2014) (20 years); KY. REV. STAT. ANN. § 413.090 (West 2014) (15 years); OHIO REV. CODE ANN. § 2305.06 (West 2014) (15 years); 735 ILL. COMP. STAT. 5/13-206 (2014) (10 years); LA. CIV. CODE ANN. art. 3499 (2014) (10 years); W. VA. CODE § 55-2-6 (2014) (10 years); WYO. STAT. ANN. § 1-3-105(a)(i) (West 2014) (10 years).

32. *In re* Ballenzweig's Estate, 22 N.Y.S.2d 541 (1940).

33. This assumes the consumer was sued on the debt just before the six-year statute of limitations expired. *See* N.Y. CIV. PRAC. LAWS & RULES § 201 et seq.

34. David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the Strange World of Deemed Judgments*, 75 ALB. L. REV. 671, 692–93 (2012).

interest is set by statute or by the court with a statutory maximum. A maximum of 8–12% is not uncommon.[35]

Exacerbating the problem, some states allow post-judgment interest to compound, typically annually. As an example, in Michigan, the post-judgment interest rate for a defaulted credit card debt is 12%, compounded annually.[36] If a creditor obtained a $1,000 judgment in Michigan, she could be entitled to collect as much as $3,105.85 from the debtor through legal proceedings for up to 10 years after the judgment.[37] In contrast, the same debt in a state using simple interest would only rise to $1,900 after 10 years of remaining unpaid. After the expiration of the judgment (10 years in Michigan, longer in many other states), the creditor may still contact the debtor to obtain payment of whatever is left on the debt, although she would not have any legal means to coerce the debtor into paying.[38]

Why might a creditor wait to collect from a debtor? Sometimes it is because the debtor does not have any assets that could be seized to pay his creditors—that is, the debtor is judgment proof. The creditor might also determine that although collection costs are added to the debt, it is too costly to attempt to collect. The creditor might also hope that the debtor repays voluntarily—through phone calls or the like.

B. Cancerous Growth

Cancer cells are immortal.[39] They replicate endlessly; growing and growing perpetually.[40] My contention is that in important ways, in the United States, debts function the same way. At bottom, a debt is an obligation to pay a sum to another party. The sum itself is often changing; growing as interest accumulates,

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35. But note that the Supreme Court of Connecticut recently decided that courts do not have discretion to award post-judgment interest in a situation where the contract involved a loan and the parties agreed to a post-maturity interest rate. Sikorsky Fin. Credit Union, Inc. v. Butts, 108 A.3d 228, 233 (Conn. 2015).

36. MICH. COMP. LAWS ANN. § 600.6013 (West). This 9% compounds annually. The formula is Principal x (1 + interest rate) $^{\text{time (in years)}}$.

37. These numbers would be different if the debtor made any payments towards the debt. Michigan has a ten-year statute of limitation for collecting on a judgment. MICH. COMP. LAWS ANN. §600.5809(3) (West).

38. Depending on the interest rate, there may be incentives for a creditor to wait to get paid. AJ Walker, *Old Debt Can Take a Chunk out of Your Paycheck*, NBC CONN. (May 14, 2015, 7:12 AM), http://www.nbcconnecticut.com/troubleshooters/Old-Debt-Can-Take-a-Chunk-Out-of-Your-Paycheck-303688231.html [https://perma.cc/5T43-GV8G].

39. *Cancer Cells*, CANCER RESEARCH UK (Oct. 28, 2014), http://www.cancerresearchuk.org/about-cancer/what-is-cancer/how-cancer-starts/cancer-cells [https://perma.cc/SHY2-WLAK].

40. *Id*.

decreasing if the debtor makes a payment. In many important ways, however, consumer debts refuse to die.

Even when repaid in full, some debts may return, like zombies rising from the grave. The debtor's death does not kill her debts; they survive and may haunt the debtor's family members for months or years after.[41] At first blush, the expiration of the statute of limitations may seem to spell the end for a debt. However, in most circumstances these statutes are not meant to be debt-killers; they merely lessen the debt owner's remedies. In practice, they may have no effect unless the debtor explicitly asserts her rights. The only way to ensure a debt truly dies is through a bankruptcy discharge. Obtaining a discharge is akin to achieving permanent remission. Like with cancer, however, remission comes at a cost.

1. Full Payment. Full payment of a debt would seem like a very good way to kill it entirely. Paying it in full ostensibly extinguishes it. The debtor fulfills her obligation and the creditor is made whole. This is true for many debts, but today individuals must worry about debt zombies rising from the full payment grave to haunt the former debtor.[42]

Most unsecured consumer debts that remain unpaid are sold to debt buyers after a few months or a year of nonpayment.[43] In these situations, the buyer buys the rights that the creditor had to collect from the debtor. In many cases, that is all they buy.

As I have described elsewhere, the contracts selling these debts do not purport to sell much else—many disclaim all warranties of title or accuracy.[44] Few include any documentation about the debt.[45] All that is transferred between creditor and buyer is information about a debt (the debtor's name, address, amount of the debt, when it was incurred, etc.).[46] This is the same information that is transferred between debt buyers when the debt is sold multiple times, as often happens when it remains unpaid.

41. *In re* Marriage of D'antoni, 125 Cal. App. 3d 747, 749 (1981).

42. *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 330 (2014).

43. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 96 (2017).

44. Jiménez, *supra* note 17, at 59.

45. Brian Burnes, *Jackson County Jury Assesses $82 Million Verdict Against Debt Collection Firm*, KAN. CITY STAR (May 15, 2015, 8:48 AM), http://www.kansascity.com/news/local/article21073359.html [https://perma.cc/M5C9-M2YP].

46. *In re* Pursley, 451 B.R. 213, 217 (Bankr. M.D. Ga. 2011).

Because all that is transferred during a debt sale is information, the theft or disclosure of this information to third parties means that those third parties would have the same information as the debt buyer and could pursue the debtor despite the fact that they do not own the debt.[47] Thus, payment in full may not extinguish the debt: the debtor may have paid the wrong party,[48] or the debt buyer may have sold the same debt to two different parties,[49] or sold it without disclosing that it had already been paid in full.[50] The longer a debt goes unpaid, the more times it is sold and resold, and the more likely it will turn into a zombie.

2. Death of the Obligor. Another natural way that debts should die is if the obligor dies. But this is often an imperfect death. Debts survive the death of the obligor.[51] Creditors can seek payment from the assets of the estate of the deceased.[52] In the ideal world, the estate has a trustee who liquidates assets to repay creditors and then under the supervision of a probate court, doles out any remaining assets to the estate's beneficiaries.

The reality for most Americans is much more muddled. Most individuals are insolvent—or close to it—upon their death.[53] In these situations, there is little reason for survivors to pay expensive trustee or probate fees. Instead, the survivors—typically the spouse or children—do what they can, all the while grieving for their family member.[54] Most estates have such few assets that they do not go through probate, leaving the deceased relatives to figure out what to do about the phone calls they receive from creditors about their relative's debts.[55] Survivors sometimes pay debts out of their own pocket because they do not understand the law. Eventually these

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47. JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD 5–7 (2015).

48. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 270 n. 75 (2011).

49. *Id*. at 271 n.76.

50. *Id*. at 271 n.78.

51. Bill Fay, *Debt of Deceased Relatives*, DEBT.ORG, https://www.debt.org/advice/deceased-relatives/ [https://perma.cc/276R-HQW2] (last visited Oct. 10, 2017).

52. *Id*.

53. *Id*.

54. *See FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts*, 76 FED. REG. 44915 (July 27, 2011).

55. *See* Concurrence of Commissioner Julie Brill, FDCPA Enforcement Policy Statement Matter No. P104806 (Jul. 20, 2011), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/statement-policy-regarding-communications-connection-collection-decedents-debts-policy-statement/110720fdcpa.pdf [https://perma.cc/A8WE-9BNN].

debts die when the estate is administered, but before doing so, they may morph into debts of the spouse or children.[56]

3. Statutes of Limitations (SOLs). Statutes of limitations "are, and have been, considered basic in our legal system, as well as in others."[57] They have existed for almost four hundred years in Anglo-American law.[58] Sometimes called "statutes of repose," the often-repeated justification is that "they are designed to protect against stale claims after evidence has been lost, memories have faded and witnesses have disappeared."[59]

Some have argued that "the word 'repose' can be taken literally in this situation—that relief of individuals from worry over past events is a proper public purpose."[60] In their current form, however, statutes of limitations do not serve that purpose. First, in most states, statutes of limitations are only an affirmative defense to a civil action.[61] Failing to raise the defense early enough in a case typically waives it.[62] Second, not all debts have a corresponding limiting statute.[63] Third, it is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths. Fourth, most statutes of limitations only extinguish the legal remedy, not the right to collect.[64] Expiration of the statute does not prevent a creditor from calling or writing the debtor seeking to

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56. Paul Muschick, *Debt Collector Sued for Pursuing People for Relatives' Debts*, THE MORNING CALL (June 10, 2015), http://www.mcall.com/news/local/watchdog/mc-hamilton-law-group-james-havassy-filial-responsibility-law-watchdog-20150610-column.html [https://perma.cc/M7X8-KS2U].

57. Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 131 (1955).

58. "The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law." *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950).

59. Callahan, *supra* note 57, at 133. Typically, the concern is about the defendant being unable to produce old evidence, not the plaintiff. *Id.*

60. *Id.* at 136.

61. *See* Sobol, *supra* note 42, at 346.

62. *See* Dominczyk, *supra* note 7, at 13.

63. Some debts do not even enjoy the imperfect "repose" provided by a limitations period. All civil actions between private parties have a limitation period, but not all actions that could be brought by a government (state or federal) do. For example, federally-backed student loans have no statute of limitations. *See* 20 U.S.C. § 1091a(a) (2012). Also, willfully failing to file tax returns means that there is no statute of limitation on how far back the IRS or many state equivalents might reach. *See* Robert W. Wood, *Even the IRS Has Time Limits*, FORBES (Oct. 8, 2009, 12:00 PM), http://www.forbes.com/2009/10/08/IRS-tax-audits-statute-limitations-personal-finance-wood.html [https://perma.cc/XC2Y-M99Z].

64. *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 45 (2013), http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf [https://perma.cc/929N-EUCB].

collect.[65] Finally, in most states and circumstances it is very easy for a consumer to restart a statute by something as simple as making a small payment.[66]

a. Affirmative Defense Must Be Asserted or Waived. Most statutes of limitations merely provide a defense to a civil action.[67] The creditor can sue, and in most cases does not even have an obligation to plead that the lawsuit was filed within the limitations period.[68] If the debtor does not affirmatively raise the limitations defense early enough in the case, she will waive the defense and the lawsuit will continue.[69] Raising the defense shifts the burden to the plaintiff to prove they sued within the limitations period, but the consumer first has to know that this is an option. The overwhelming number of debt collection cases today are decided not on the merits but through a default judgment.[70] When consumers do appear in court to contest, they often do so without a lawyer.[71]

The Fair Debt Collection Practices Act (FDCPA or "Act") covers some consumer debt cases; in those situations, debt collectors who file a lawsuit past the statute of limitations do so in violation of the Act.[72] This may be little consolation for the consumer who's been sued, however. In the state court debt lawsuit—these are invariable in state court—she will still need to

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65. *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 22–23 (2010), https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-collection-litigation [https://perma.cc/FK4G-8GEB].

66. *See* Sobol, *supra* note 42, at 347.

67. This is true around the world also. *See* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 4–121 (Mauro Cappelletti ed., 2014).

68. FED. R. CIV. P. 8. This was not always the case. For example, adversary possession cases in England in the 1400s and up to at least 1540 placed the burden on "the plaintiff to show that the action was started within the limitation period. . . ." Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 162–64 (1927).

69. "When the statute runs, a power is created in the debtor to bar any action commenced by the creditor, by pleading the statute." Albert Kocourek, *Comment on Moral Consideration and the Statute of Limitations*, 18 ILL. L. REV. 538, 540 (1923).

70. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 208 (2014); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 362–63 (2012); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 271–72 (2011).

71. *See* Jiménez, *supra* note 17, at 55. The creditors also often dismiss these cases because they are not prepared to proceed despite having filed the case. *See* Spector, *supra* note 70, at 295–97 (stating that in cases in which defendant debtors appeared, plaintiff creditors often opted for dismissal without prejudice).

72. Jiménez, *supra* note 17, at 77 & n.140.

raise the affirmative defense of the statute of limitations. If she does so successfully, the lawsuit should be dismissed. If she does not raise it or does not raise it on time, the lawsuit will proceed and she might be found liable.[73] She will then have an independent cause of action under the FDCPA—and perhaps analogous state laws—against the debt collector.[74] There are limits, however. She will need to bring this claim within one year of the collector's lawsuit—due to the FDCPA's own statute of limitations—and her maximum recovery will be limited to $1,000 for the violation, any proved actual damages, and attorney's fees for the FDCPA case.[75] While there are generally more attorneys who take FDCPA cases than debt collection cases, the consumer who fails to raise her limitations defense still has to know that she has a possible cause of action under federal law.

b. Difficult to Ascertain. In the United States, state legislatures set most periods of limitation. These typically vary by type of action.[76] For example, actions based on written contracts tend to have limitations between 3–10 years; oral contracts between 3–6 years.[77] There is even wider variety. Besides written and oral contracts, many states have different limitations periods for implied account stated,[78] sales of goods, leases, dishonored checks, and promissory notes. It is critical for a consumer to determine which limitation period applies to the debt.[79] Figuring out which

73. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 495–96 (1997) ("While the sanction is certainly severe (the defense of limitation, if successful, completely bars the plaintiff's claim), there are currently so many exceptions to limitation of actions that many prospective plaintiffs will be tempted to file anyway.").

74. *See* Jiménez, *supra* note 17, at 77 & n.140; *see also* FED. TRADE COMM'N, *supra* note 65, at 6.

75. 15 U.S.C. § 1692k(a), (d) (2012).

76. *See generally 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Federal law sets the limitations period for debts that arise out of federal obligations—taxes for example. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 518 (1986) (stating "statute of limitations is thus a matter of federal law" when federal claims are at issue).

77. *See 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016).

78. *Id.*; Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339, 340 (2013) ("Implied account stated is a cause of action, pled when a creditor sues to recover a debt."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 282 (AM. LAW INST. 2017); 1 AM. JUR. 2D ACCOUNTS & ACCOUNTING § 26 (2017).

79. This assumes the consumer first understands that there is such a thing as the statute of limitations. In other research interviewing debt collection defendants in small claims courts in Connecticut, Maine, and Massachusetts, researchers have encountered defendants who had difficulty believing there was such a law. *See* D. James Greiner, Dalié Jiménez & Lois Lupica, *Self-Help, Reimagined,* 92 IND. L.J. 1119, 1168, 1171 & nn. 237–38 (2017).

statute applies to a particular debt can sometimes be a very complex undertaking and one not easily resolvable without a court's involvement.[80]

First, one needs to categorize the type of limitation that applies. Consider the purchase of a washing machine on credit in New York. Is the transaction governed by a "contract" or is it a "sale of goods?" Oral and written contracts have a six-year limitation period in New York.[81] However, the Uniform Commercial Code Article 2—applicable in New York and every other state save Louisiana—places a four-year limitations period on a collection claim where the original contract was one for the sale of goods.[82] This supersedes state laws that are specific to statutes of limitation, but it would not be something that even a savvy consumer is likely to know about. To complicate matters further for consumers, courts have held that the Uniform Commercial Code governs transactions that are not obviously sales of goods, such as a collection action on a store credit card or actions to collect delinquent utility bills for water, electricity, and gas.[83]

What about a "simple" credit card debt? Federal law requires that credit card agreements be in writing and contain certain disclosures.[84] But if the creditor cannot produce the written contract or evidence that the consumer agreed to the contract terms, she will likely sue under an "account stated" theory—if the state allows it.[85] Indeed, many debt collection lawsuits today are filed on that theory, despite most being made up of credit card debts owed originally to large national banks.

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80. Paul D. Rheingold, *Solving Statutes of Limitation Problems*, *in* 4 AM. JUR. TRIALS 441, 449–51 (1966). ("Nothing short of a treatise could cover all the problems attending the application of the statutes of limitations of the fifty states and of the federal jurisdiction, and such treatment would not be of direct interest to the practicing attorney."); Brief of ACA Int'l as Amicus Curiae in Support of Petitioner at 4, LVNV Funding, LLC v. Crawford, No. 14-858 (U.S. Feb. 19, 2015) ("Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act.").

81. N.Y. C.P.L.R. § 213 (McKinney 2017).

82. U.C.C. § 2-725 (Am. Law Inst. & Unif. Law Comm'n 2014).

83. *See generally* NAT'L CONSUMER LAW CENTER, COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS § 3.75 (1st ed. 2008) (stating that UCC Article 2 statute of limitations applies to collection actions on store credit cards and delinquent utility bills).

84. *See* 12 C.F.R. § 226.6 (2017)*; see also Credit Card Agreement Database*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/agreements/ [https://perma.cc/D4XL-VUXE] (last visited Oct. 14, 2017).

85. *See* Turnbull, *supra* note 78, at 343–44, 370–71 (stating that debt buyers often plead under an account stated theory due to difficulties obtaining required documents, such as the original contract, from original creditors).

Another difficulty with limitations periods is that it not always clear which state's limitation period applies. Imagine a consumer who, while a resident of state A, obtained a credit card issued by a bank incorporated in state B. The agreement contained a choice-of-law clause selecting state C as the state whose law governs. The consumer now lives in state D and is sued there.[86] Which state's limitations period applies? Does it matter where the consumer resided when the contract was first breached? The answer depends entirely on state D's statutory and common law. It is not always possible to analyze with certainty.

Debt collectors frequently criticize the complexity of statutes of limitation,[87] and with good reason.[88]

c. Debt Remains Due and Payable Past Expiration of Statute. In most cases, statutes of limitations only extinguish the legal remedy, but they do not extinguish the "right" to collect.[89] In those circumstances, creditors can continue to dun debtors outside of court past the limitations period.[90] Creditors can also nudge a debtor to restart the limitations period by persuading her to make a small payment towards the debt, or in some states, by simply acknowledging the debt.[91] If the debtor made such a payment or

86. If the lawsuit was for a "consumer debt," the creditor or debt buyer should file suit in the jurisdiction in which the consumer lives. 15 U.S.C. § 1692i (2012). If it is a business debt, no such requirement would apply. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 719 (stating that the FDCPA specifically excluded the collection of debts from businesses and does not apply).

87. *See* NARCA, POLICY POSITIONS ADOPTED BY THE NARCA BOARD OF DIRECTORS, (June 27, 2011), http://c.ymcdn.com/sites/www.narca.org/resource/resmgr/About_NARCA/NARCAPolicyPositions.pdf [https://perma.cc/5KWZ-BXYH] ("NARCA concurs with the FTC that, ideally, statutes of limitations for consumer debt should be clear, simple and uniform."); FED. TRADE COMM'N, *supra* note 64 at 49 (noting that "[t]he debt collection industry claims it is difficult to determine whether a debt is time-barred because different statutes of limitations could apply and there could be facts that tolled or restarted the statute of limitations.").

88. *See* Ochoa & Wistrich, *supra* note 73, at 496. ("[I]t has become increasingly difficult to dispose of time-barred claims as a threshold or preliminary matter (that is, by demurrer or summary judgment) rather than at trial . . . . This difficulty also means that the legal system spends considerable time and resources in determining which claims are barred and which are not.").

89. Campbell v. Holt, 115 U.S. 620 (1885). *But see* Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only . . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right.").

90. *See, e.g.*, Buchanan v. Northland Grp., Inc., 776 F.3d 393, 396–97 (6th Cir. 2015) ("Under Michigan law, as under the law of most states, a debt remains a debt even after the statute of limitations has run on enforcing it in court.") (citing De Vries v. Alger, 44 N.W.2d 872, 876 (Mich. 1950)).

91. In many cases, filing this lawsuit might be a violation of the Fair Debt Collection Practices Act (FDCPA), or even state laws. However, the FDCPA and state statutes tend to

acknowledgment, courts treat it as a waiver of the previous limitations period and allow creditors to pursue the debtor as if the limitation had not run.[92] This is so even if the debtor restarted the clock unwittingly.

This is not the case in Mississippi or Wisconsin. In these two states, the expiration of the limitations period on a debt means "the right is extinguished as well as the remedy."[93] In other words, once the expiration period passes, the creditor loses all rights it had to the debt—the debtor is fully released. The Wisconsin Supreme Court explained that in their view, the expiration of the statute creates a new property right in the debtor.[94] This is precisely my proposal in this Article: a way to kill debts definitively and completely.

In Mississippi, the limitations period for written contracts is three years, among the shortest in the country.[95] In Wisconsin, it is six years, a more typical length. The Mississippi statute has been the law of the land since 1880.[96] The Wisconsin statute was

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have a one-year statute of limitations, have limited (typically $1,000) damages, and will not erase the underlying obligation. *See generally* 15 U.S.C. §§ 1692–1692p (2012); *Improving Relief from Abusive Debt Collection Practices*, 127 HARV. L. REV. 1447, 1452–54, 1460–62 (2014); Sobol, *supra* note 42, at 345, 347, 349 & n.128.

92. *See* Sobol, *supra* note 42, at 347, 349.

93. WIS. STAT. ANN. § 893.05 (West 2017); Heritage Mut. Ins. Co. v. Picha, 397 N.W.2d 156 (Wis. Ct. App. 1986) ("Wisconsin may be unique in holding that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself.").

94. *In re* Hoya's Will, 180 N.W. 940, 944 (Wis. 1921) (stating that Wisconsin considers "that the statute of limitations destroys the right of action itself and gives rise to a new property right in the debtor" although many states and the Supreme Court hold otherwise). *See also* Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L.Q. REP. 244, 247-48 (2002) (discussing a Wisconsin case that found a collector liable under the FDCPA and Wisconsin statutes for attempting to collect an out-of-statute debt).

95. MISS. CODE ANN. § 15-1-49 (2013); *see 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Mississippi also has one of the shortest limitations periods for judgments: 7 years. *Id.*; MISS. CODE ANN. § 15-1-43, 45 (2013).

96. The current version of the statute can be found at section 15-1-3 of the Mississippi Code. This section has identical language to section 2685 in the Code of 1880. *See* MISS. CODE ANN. § 15-1-3 (2013); MISS. CODE § 2685 (1880). Interpreting the 1880 enactment, the Mississippi Supreme Court stated that the section on limitations on action "declares that 'the completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.'" Proctor v. Hart, 16 So. 595, 596 (Miss. 1895). The court went on to note that "[t]he change wrought by this new statute is radical. Not only the remedy is denied, the action barred, but the right itself is extinguished upon the completion of the period of limitation. The remedy and the right, whatever it was, are alike destroyed. There remains nothing to revive." *Id.* The Code of 1880 was a revision of the Code of 1871. It modernized the law in some ways, and although it purported to use the statutes in effect at the time as its basis, the section in question did not exist in the 1871 Code, nor was it passed as a session law in the intervening years. *See* Michael Hoffheimer et al.,

first enacted in 1979, but it codified common law that dated as far back as 1860.[97] Astonishingly, I have not been able to find any empirical or other analysis in the legal or economics literature discussing the effects of these laws.[98]

d. Easy to Restart the Limitations Period. The statute of limitations period is shockingly easy to restart. The most common way is through a partial payment of the debt.[99] This heavily incentivizes creditors to contact consumers about stale debts in order to restart the limitations period.[100] The older a debt, the cheaper it is to buy, but there are debt buyers who specialize on buying exactly this kind of debt. Although consumer protections exist in principle, in practice they are difficult to access.

Most states allow a creditor to restart the limitations period by securing a payment or a promise of payment on the debt, or sometimes by obtaining oral acknowledgment from the debtor that the debt exists.[101] The creditor can try to persuade the consumer to do any of these things any time after the expiration of the limitations period, even if many years have passed.[102] In most

Pre-1900 Mississippi Legal Authority, 73 MISS. L.J. 195, 217 (2003); RH Thompson, Mississippi Codes: An Address (1926) (address given at the annual meeting of the Miss. Bar Association), *available at* https://library.courts.ms.gov/thompsononcodes.htm#1840 [https://perma.cc/8KJE-R4C5].

97. Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only. . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right."); Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin—A Conceptual Guide*, 88 MARQ. L. REV. 927, 933–34(2004).

98. The Author, a research assistant, and an extremely able librarian performed an exhaustive search of the economics, social science, interdisciplinary, and legal databases available to us as well as the Proquest dissertation database and only turned up a handful of articles that mentioned the different rules in Mississippi and Wisconsin. None analyzed them in any great detail. *See, e.g.*, Sobol, *supra* note 42, at 345; Dominczyk, *supra* note 7, at 13; Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 735 (2008).

99. "Partial payment of a debt is regarded as equivalent to an admission of the debt and, therefore, a new promise is implied from it." 31 WILLISTON ON CONTRACTS § 79:85 (4th ed. 2004). But note that "[i]f there are any words or circumstances tending to negate the implication of a new promise naturally to be drawn from a partial payment, the debt will not be revived." *Id.*; *Contra* Midland Funding LLC v. Thiel, 144 A.3d 72, 78 (N.J. Super. Ct. App. Div. 2016).

100. As noted in Part III.A, some debt buyers specialize in purchasing "out of statute" debts. *See infra* notes 156–160 and accompanying text.

101. *Developments*, *supra* note 58, at 1254 ("It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run.").

102. *See, e.g.*, Young v. Sorenson, 47 Cal. App. 3d. 911, 914 (Ct. App. 1975) ("[P]art payment of a debt or obligation is sufficient to extend the bar of the statute. The theory on

cases, the creditor does not have an obligation to notify the consumer that making a small payment or acknowledging the debt will enable the creditor to use legal means to collect, and that those means would not be available otherwise.[103]

Consumers do have some limited protections here, but like with much else regarding the statute of limitations, they have to be aware of them and assert them. The FDCPA gives the consumer the right to request that the collector cease all communications with the consumer.[104] The request must be in writing.[105] In situations where the debt is out-of-statute, if the collector does not want to run afoul of the FDPCA, this should mean that after sending a written cease-and-desist letter, the consumer will no longer hear from this collector about the debt. That said, the collector can sell the debt and the consumer will once again be dunned by a new party. She will then have to notify that party in writing that it should cease communicating with her. She will also have to understand that a debt is out-of-statute in the first instance.

More consumer protections may be forthcoming. In recent years, Maine[106] and Connecticut[107] enacted statutes that prevent the limitations period from restarting after it has expired.[108] In

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which this is based is that the payment is an acknowledgment of the existence of the indebtedness which raises an implied promise to continue the obligation and to pay the balance.") (internal citations omitted).

103. *See* Thomas R. Dominczyk, *Collecting Time-Barred Debt: Is it Worth the Risk?*, BUS. L. TODAY, Apr. 2014, at 1, 2–3 (stating that most courts treat filing lawsuits and explicitly threatening to sue as violations of the FDCPA without requiring further disclosure from debt collectors, but noting that some courts have required debt collectors to disclose that they are unable to compel payment or sue to collect the debt).

104. *See* 15 U.S.C. § 1692(c) (2012). If the consumer is being dunned by the original creditor, the law is much less clear. The CFPB has taken the position that this would be an unfair practice and that they could regulate it under their UDAAP authority. However, this authority does not provide for a right of action by consumers. *See* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012) (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

105. *See* 15 U.S.C. § 1692(c) (2012).

106. *See* ME STAT. tit. 32 § 11013(8) ("Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.").

107. CONN. GEN. STAT. § 36a-814.

108. Massachusetts' attorney general promulgated a rule requiring collectors attempting to collect on a time-barred debt to provide a notice to consumers about their rights. 940 MASS CODE REGS. 7.07(24). Unfortunately, the safe harbor notice provided under the regulations is a 159-word all-caps block of text, a presentation which is likely to make it very difficult for self-represented individuals to understand. *See* Greiner et al., *supra* note 79, at 1135 (citing studies about the difficulty of reading all-caps sentences).

litigation, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have taken the position that attempting to collect an out-of-statute debt without disclosing that the debt collector does not have the right to sue the consumer on that debt is a deceptive statement in violation of the FDCPA.[109] This position is not binding on the industry, although the CFPB will soon propose new debt collection rules which might include this.[110] For now, although a few courts have agreed with the consumer agencies, not all who dun consumers are subject to the FDCPA.[111] Unless and until laws or rules prohibit this behavior industry-wide, creditors will have an incentive to continue dunning consumers past the limitations period in an attempt to restart the clock.[112]

109. *See* Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau Supporting Affirmance at 12–19, Delgado v. Capital Mgmt. Servs., LP, No. 13-2030 (7th Cir. Aug. 14, 2013)*;* Brief of Federal Trade Commission and Consumer Financial Protection Bureau Supporting Reversal at 13–20, Buchanan v. Northland Grp., Inc., No. 13-2523 (6th Cir. Mar. 5, 2014); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged [https://perma.cc/6EH4-RRF3] (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts").

110. FED. TRADE COMM'N, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 20 (2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [https://perma.cc/G23W-64B2].

111. The CFPB also has authority to regulate many original creditors not subject to the FDCPA, namely banks. 12 U.S.C. § 5481(6), (15) (2012). Its authority in those circumstances covers what would be considered "unfair, deceptive, or abusive acts or practices" (UDAAP). 12 U.S.C. § 5531(a). The CFPB has not, however, clarified that misleading a consumer about collecting past the statute of limitations is a UDAAP. *See* Kathlyn L. Farrell, *Managing UDAAP Compliance Risks in Financial Institutions*, J. TAX'N & REG. FIN. INSTITUTIONS, Nov.–Dec. 2013, at 21, 28–30 (stating that the CFPB has the authority to regulate bank and non-banks for abusive practices, but that what constitutes an abusive practice has not yet been delineated*). But see* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012), http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf [https://perma.cc/6EY6-39SY] (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

112. *But see* FTC DEBT BUYER REPORT, *supra* note 87, at 48 n.198 (2013) (describing how New York, New Mexico, and Massachusetts have all enacted statutes or regulations that require debt collectors who attempt to collect on out of statute debts to disclose to consumers that the collector cannot initiate a legal proceeding against them).

C. True Death: Bankruptcy Discharge

Outside of Mississippi and Wisconsin, the only true death[113] for a debt is after a bankruptcy discharge.[114] This is so partly because the nature of bankruptcy as a court proceeding that catalogues and adjudicates individual debts. But a bankruptcy discharge is a superior method of killing debts for two principal reasons: (1) the bankruptcy discharge comes with a perpetual injunction against any attempt at collection of a discharge debt, and (2) the Bankruptcy Code does not permit the revival of a discharged debt outside of a bankruptcy proceeding.[115] The discharge injunction is actually a relatively new innovation: its current iteration is barely 40 years old.[116] Even so, bankruptcy also has some drawbacks: it does not discharge all debts, some consumers may be more hurt by filing bankruptcy than by abstaining, the process is costly, and it is underused.[117]

When an individual receives a bankruptcy discharge, the court issues (1) a judgment and (2) an automatic and permanent injunction declaring that the debtor no longer has any responsibility to pay for the debts included in the discharge.[118] After, creditors are barred by the injunction from pursuing the debtor for those debts.[119] Any judgments obtained in violation of

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113. "'True Death' is a term that refers to the ultimate destruction of a vampire . . . ." *True Death*, TRUE BLOOD WIKI, http://trueblood.wikia.com/wiki/True_Death [https://perma.cc/4AWL-2N77] (last visited Oct. 14, 2017).

114. The current version of the bankruptcy discharge is fairly new. *See generally* Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1–56 (1971) (discussing effects of 1970 amendments to bankruptcy code on dischargeability of debts); Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 723–67 (1979) (noting of evolution of discharge from 1970 amendments to 1978 bankruptcy code); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047–88 (1987) (evaluating changes in the bankruptcy code through 1984 amendments); Brief of Amici Curiae Professors Ralph Brubaker et al. in Support of Appellee at 5–12, Anderson v. Credit One Bank, N.A., No. 16-2496 (S.D.N.Y. Feb. 27, 2017) Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 325–71 (1991) (detailing the evolution of discharge in the United States from prior to 1800 to 1898); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 56–113 (1990) (discussing the evolution of the malicious and willful injury exception to discharge).

115. In bankruptcy, this is called a "reaffirmation" and there are strict procedural and disclosure requirements for it to be effective. *See* 11 U.S.C. § 524(c), (d), (k) (2012).

116. *See* 11 U.S.C. § 524.

117. Joseph J. Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A. J. 685, 688 (1959).

118. 11 U.S.C. § 524.

119. This wasn't always the case. The 1976 Bankruptcy Code added the injunction. 11. U.S.C. § 32(f) (1976).

the injunction are void *ab initio.*[120] Since the proceeding is public and provides notice to creditors, it also makes it clear that an unsecured debt that was incurred prior to the bankruptcy is discharged—so long as that debt was eligible for a discharge.[121]

Bankruptcy provides a finality that nothing else can. If a consumer is contacted about a debt discharged in bankruptcy, she has the power of a federal court behind her when she tells the creditor to stop the contact. Unlike the FDCPA cease-and-desist option, the consumer does not have to do this in writing and the bankruptcy discharge injunction will work even against subsequent debt buyers.[122] Bankruptcy even supersedes state laws that say that an obligation discharged in bankruptcy can nonetheless serve as "moral consideration" for a new, enforceable obligation.[123]

However, not all debts can be discharged in bankruptcy. There are nineteen enumerated exceptions to the bankruptcy discharge.[124] Most have to do with debts owed to the federal or state governments.[125] Many others involve various types of fraud or defalcation,[126] certain kinds of injuries caused to persons or property,[127] debts that were not disclosed by the debtor[128] or were not discharged in a previous bankruptcy,[129] or debts owed to a

120. *See generally* 11 U.S.C. § 524(a)(1) ("A discharge in a case under this title--(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . .").

121. Eligibility here will depend on a few things, such as whether the debt was listed in the bankruptcy schedules and whether it was not one of the debts barred from discharge. 11 U.S.C. § 523 (2012).

122. In most cases, it will also work even if the debtor failed to include the debt in her bankruptcy schedules. If the debtor is one of the 93% of Chapter 7 bankruptcy filers who did not have any assets to distribute to her creditors, the creditor would not have received anything under the bankruptcy anyway, so has no cause for complaint. Their debt is also discharged. *See Debt Collection*, FED. TRADE COMM'N (May 2015), https://www.consumer.ftc.gov/articles/0149-debt-collection [https://perma.cc/DK3J-XP6M]; *Can a Debt Collector Try to Collect on a Debt that was Discharged in Bankruptcy?*, CFPB, https://www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-try-to-collect-on-a-debt-that-was-discharged-in-bankruptcy-en-1425/ [https://perma.cc/E9WZ-P3RC] (last updated Oct. 25, 2017).

123. Douglass G. Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36, 56, 59, 60–61 (1971).

124. *See* 11 U.S.C. § 523 (2012).

125. 11 U.S.C. §§ 523(a)(1), (a)(7), (a)(8), (a)(13), (a)(14), (a)(14A), (a)(14B), (a)(15), (a)(17).

126. *See id.* §§ 523(a)(1), (a)(4), (a)(11), (a)(12), (a)(18), (a)(19).

127. *See id.* § 523(a)(6) (willful and malicious injury to another or property of another); *see also id.* at (a)(9) (death or injury caused while under the influence).

128. *See id.* § 523(a)(3).

129. *See id.* § 523(a)(10).

spouse or child in connection with a divorce or separation agreement.[130] Finally, student loan debts are only dischargeable in bankruptcy if the debtor files a separate lawsuit within the bankruptcy case in which she is able to prove that it would be an "undue hardship" to repay her student loans.[131] A miniscule number of bankrupt individuals with student loans—by one estimate 0.1%—attempt to discharge their student loans in this fashion.[132] Although about half of them succeed, these numbers mean that student loans are practically non-dischargeable.[133]

In addition, filing bankruptcy can turn out to be a losing proposition for some consumers. In a Chapter 13 bankruptcy, the debtor makes payments for three or five years to her creditors according to a court-approved plan.[134] Nationwide, about 37% of consumers file for bankruptcy under Chapter 13; only 30% of those succeed in obtaining a discharge.[135] For the 70% who do not obtain a discharge, some successfully convert their case to a Chapter 7 bankruptcy;[136] the rest simply go back to their lives and continue to owe the debts they did not repay in full during their bankruptcy. Some of these individuals may find that filing bankruptcy but failing to obtain a discharge means that they are now responsible for debts that had previously been out-of-statute.[137] Creditors are generally allowed to file proofs of claim for out-of-statute debts.[138] Doing so does not violate the Bankruptcy Code, although upon objection by any party in interest, the claim should be disallowed.[139] Other creditors whose payout is reduced because the

130. *See id*. §§ 523(a)(5), (a)(15).

131. *See id*. at § 523(a)(8).

132. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495, 499, 505, 525 (2012).

133. *Id*. at 505.

134. *See* 11 U.S.C. § 1322 (2012).

135. United States Bankruptcy Courts, *Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2016* at Table F-2; Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

136. In a Chapter 7, the debtor gives up her nonexempt assets in exchange for a discharge of all debts that can be discharged. Her nonexempt assets are sold and the proceeds are distributed to creditors under a priority scheme dictated by the Bankruptcy Code. In the overwhelming majority of consumer Chapter 7 cases (93%), creditors do not receive any payment from the bankruptcy estate. Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795 (2009).

137. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

138. 11 U.S.C. Rule 3001 (2012).

139. 15 U.S.C. § 502(b)(1).

stale debt is being paid, the bankruptcy trustee,[140] and the debtor herself[141] have a theoretical incentive to investigate all proofs of claims for the possibility of stale claims.[142] But anecdotal evidence from judges and attorneys, however, indicates that very few objections are filed.[143] Last term, the Supreme Court ruled in *Midland v. Johnson* that it is not a violation of either the Bankruptcy Code or the FDCPA to file a proof of claim for a facially out-of-statute debt.[144] After this decision, a debtor who does not obtain a discharge in a Chapter 13 bankruptcy may exit bankruptcy owing not just the same debts she did before, but having restarted the limitations period and now being at risk for a lawsuit on debts that were previously legally uncollectable.[145]

Bankruptcy is also costly—so costly that it often takes consumers considerable time to get together the filing costs and attorney's fees.[146] It was previously thought that excessive, abusive, or otherwise oppressive debt collection may have triggered bankruptcy filings by consumers seeking to take advantage of the automatic stay to stop the phone calls.[147]

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140. The trustee is supposed to work for the benefit of all unsecured creditors. Bankruptcy FAQ, NAT'L ASS'N OF BANKR. TRS., http://www.nabt.com/faq.cfm [https://perma.cc/HH66-GPMB].

141. The debtor has a strong incentive to object in some cases. For example, if she has student loans they will not be discharged through the bankruptcy so any extra money that goes towards the student loans will reduce the debtor's future liability. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in STUDENT LOANS AND THE DYNAMICS OF DEBT 175, 180 (Brad Hershbein & Kevin M. Hollenbeck, eds., Upjohn Press 2015), http://papers.ssrn.com/abstract=2332284.

142. The POCs themselves should have enough information on their face to be able to figure this out. BANKR. R. FED. PROC. 3001. As the Debt Buyer's Association points out in a brief on this issue, the statute of limitations is an affirmative defense (everywhere but within the ambit of the FDCPA) and thus it is up to a party to in interest to object to the POC. This objection must be done in writing and unless the claim is withdrawn, the court must hold a hearing on the matter. If no one objects to the claim, the debt buyer can collect a distribution from the estate, at the expense of other creditors whose claims were enforceable outside of bankruptcy.

143. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

144. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1415–16 (2017).

145. About 70% of debtors who file a Chapter 13 bankruptcy do not obtain a Chapter 13 discharge. Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

146. Daniel Bortz, *Are You Too Broke to Go Bankrupt?*, U.S. NEWS (July 26, 2012, 10:00 AM), https://money.usnews.com/money/personal-finance/articles/2012/07/26/are-you-too-broke-to-go-bankrupt.

147. In a nationwide sample of bankrupt debtors, more than four in five consumers had been contacted by a debt collector either at home or at work, and that the typical consumer "received an average of thirteen debt collection calls in each of the weeks just prior to their bankruptcy filing. The median respondent reported receiving six calls each

However, in a recent study from a nationwide sample, Professors Mann and Porter found that what "triggers" the actual bankruptcy filing is when a debtor has enough money to pay his lawyer and the filing fees.[148] These fees increased dramatically in 2005.[149] They conclude, "[c]reditor collection activity does not force people into an immediate bankruptcy. On the contrary, it wears them down slowly but ineluctably, like water dripping on a stone."[150]

Finally, bankruptcy is underused. Only a fraction of consumers in serious financial distress ever file for bankruptcy.[151] According to a 1998 study of a national sample of American households, bankruptcy relief would have provided an economic benefit to "15% of the sample, but only about 0.66–1% sought relief any given year."[152] There is some evidence this has not changed much.[153] Despite the vast number of individuals currently in financial distress in the United States—upwards of 77 million by one count[154]—very few choose to file bankruptcy. In 2014, less than one million bankruptcy cases were filed throughout the country: the highest one-year filing rate ever was in 2006 at just over two million bankruptcies.[155]

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week, more than one per business day." Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 306–07 (2010).

148. *Id.* at 323.

149. *Id.* at 324, n.136.

150. *Id.* at 292.

151. Amanda E. Dawsey et al., *Non-Judicial Debt Collection and the Consumer's Choice Among Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1, 18–19 (2013).

152. Mann & Porter, *supra* note 147, at 290; Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998). *But see* Richard M. Hynes, *Optimal Bankruptcy in a Non-Optimal World*, 44 B.C. L. REV. 1 (2002) (arguing that "The truly destitute have little to fear from their creditors. Their poverty prevents their creditors from seizing anything of value, and the days when default meant imprisonment, enslavement, or even death have long since passed. Bankruptcy protects those with something left to lose. . . .").

153. Mann & Porter, *supra* note 147, at 290 n.3.

154. More than 77 million have at least one account reported as "in collection" on their credit report, owing an average of $5,178. Caroline Ratcliffe et al., DELINQUENT DEBT IN AMERICA 7 (2014), www.urban.org/publications/413191.html. The median debt is $1,349. *Id.* at 11 n.16.

155. The exact number of filings in 2014 was 936,795, which included cases filed by individuals, corporate entities, and even municipalities. United States Courts, *Bankruptcy Filings Drop Nearly 13 Percent in Calendar Year 2014*, U.S. COURTS (Jan. 28, 2015), http://www.uscourts.gov/news/2015/01/28/bankruptcy-filings-drop-nearly-13-percent-calendar-year-2014 [https://perma.cc/BT5S-MDRB]. It is difficult to count how many *individuals* file bankruptcy every year. The United States Courts only keeps track of bankruptcy filings, which could be made by one person or jointly between two married debtors. In addition, the numbers are broken up between "business" and "non-business" filings, which do not correspond to "corporate entities" and "individuals." Even so, one can make some crude estimates. Even assuming each case filed in 2014 included two married

Bankruptcy kills debts. But with some important caveats: not all debts are dischargeable, some consumers may end up owing more if they fail to obtain a discharge in bankruptcy, the bankruptcy process is costly and underused. More importantly, one must file for bankruptcy in order to obtain this discharge.

III. BENEFITS, COSTS, AND CONSEQUENCES OF PERPETUAL DEBTS

The previous Part made the case that debts can act like immortal obligations, surviving past payment, the debtor's death, limitations periods, and sometimes (if not discharged), bankruptcy. This Part turns to the consequences of this system. It begins by outlining the mostly economic benefits of a system in which debts may be recoverable many years after they were incurred. It then describes what I view as the heavy costs and consequences of this system to individuals and the community.

A. Benefits

The current system has potentially substantial economic benefits. Perpetual debts mean that creditors have an opportunity to wait out the debtor until her financial circumstances improve. The ability to do this means that secondary markets for debts can flourish.[156] The complexity of the system itself, not just the perpetual nature of debts, also increases the collectability of debts. This in turn may have the effect of decreasing the overall cost of credit in the economy.

Three related industries exist primarily as a result of the current effectively perpetual nature of debts: debt buyers who only buy debts that have been reduced to judgment, debt buyers who specialize in purchasing debts past the statute of limitations,[157] and analytics companies who specialize in helping debt owners "wait the debtor out."[158] Alerts are sent to creditors when it is more

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debtors, that would mean that less than 1.9 million individuals filed bankruptcy in 2014. The numbers are similar if slightly higher in previous years. *Id.*

156. *See generally* Jiménez, *supra* note 17.

157. Andrew Martin, *Old Debts Never Die; They Are Sold to Collectors*, N.Y. TIMES (Jul. 30, 2010), http://www.nytimes.com/2010/07/31/business/31collect.html?_r=0 [http://perma.cc/LW9H-EXG9] ("Such claims are routinely sold on debt collection Websites, where out-of-statute debt is for sale for a penny or less on the dollar."); *see also Portfolios*, CREDIT CARD RESELLER, LLC, http://www.creditcardreseller.com/portfolio.htm [https://perma.cc/9LHJ-EVXQ] (listing portfolios for sale whose statute of limitations began to run as far back as 2006).

158. *Locate Debtors*, EXPERIAN, http://www.experian.com/business-services/find-debtors.html [https://perma.cc/RU96-7UJ7] (last visited Jan. 16, 2017).

likely debtors can be reached for payment because, for example, they moved to a state that allows garnishment, bought a car or home, opened a new line of credit, etc. Through these companies, debt owners can passively keep track of debtors until something happens that increases the likelihood the debtor can be reached for payment: something such as moving to a state that permits garnishment, subscribing to the Wall Street Journal or New York Times, or opening a new line of credit, etc. These benefits are not insubstantial. The fact that there are businesses that specialize in older debts and that these debts continue to be traded for many years after they have remained unpaid is evidence that there are profits to be made.[159]

There is an additional benefit that results from the complexity of the current system. That is, the uncertainty for the debtor who is not likely to know about statutes of limitations or that making even a small payment past the statutory period revives the debt. For the debt owner, the ambiguity increases the likelihood that she will be able to obtain payment from the debtor or that another debt buyer will think he has the right strategy to obtain payment, and she will be able to at least resell the debt to someone else.[160]

The ability to continue to collect from debtors virtually forever may also have the benefit of lowering the cost of credit for everyone else.[161] An increased ability to collect on a debt decreases the cost of default to the creditor.[162] This may result in lower cost or more widely available credit for everyone. A number of studies have found an association between laws restricting collection remedies and "higher interest rates and increased probabilities of denials of credit."[163]

However, this is not the same as saying that less regulation necessarily equals cheaper or more available credit. In an analogous situation, one of de-regulation, Xiaoling Ang and I found the opposite effect than one might expect.[164] In 2005, Congress

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159. *See* Josh Adams, *The Role of Third-Party Debt Collection in the U.S. Economy* (ACA INT'L WHITE PAPER 2016), http://www.acainternational.org/files.aspx?p=/images/38130/aca-wp-role3rdparty.pdf [https://perma.cc/S6EG-KEPD].

160. *See* Jiménez *supra* note 17, at 42; *see also* FTC DEBT BUYER REPORT, *supra* note 87, at i.

161. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation* 18 (2015), http://works.bepress.com/todd_zywicki/6/ [https://perma.cc/4YMD-LGJF] (last visited Oct 11, 2015) (arguing that "lenders will respond to [an] increased risk of loss by raising prices to compensate or by reducing risk exposure").

162. *See* Adams, *supra* note 159, at 4.

163. Richard M. Hynes & Eric A. Posner, *Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 185 (2002) (collecting studies).

164. Ang & Jimenez, *supra* note 141, at 175.

amended the Bankruptcy Code to, among other things, make it nearly impossible to discharge private student loans.[165] This change meant that suddenly, all outstanding and future private student loans could no longer be killed by a bankruptcy discharge—truly perpetual debts as it were. Theoretically, this change increased the expected returns of outstanding and future private student loans. In a neoclassical economics model, this kind of regime change should lead to a decrease in the cost of loans for students, assuming competition. But that did not happen. The availability of private student loans increased, to be sure, but so did the cost.[166]

It might be possible to test this proposition empirically. As previously noted, Mississippi and Wisconsin have statutes that purport to automatically extinguish debts after the statute of limitations has expired.[167] These laws date back to 1880 and 1879, respectively, making it difficult to design a study to determine the effects of the statutes.[168] Nonetheless, it is surprising that the economics and legal literature appear devoid of any discussion—theoretical or empirical—about the effects of these statutes on the cost or availability of consumer credit.[169]

There is a little we can glean from the available data, however. The Federal Reserve tracks credit card debt balance per capita and reports it by state as of the end of the year.[170] Although Mississippi had the lowest per capita outstanding credit card debt balance every year from 2003–2015, Wisconsin's credit card balances were less than a standard deviation below the national average.[171] As an example: Indiana, Iowa, and Missouri all have lower average per capita credit card balances than Wisconsin.[172] When other types of credit get lumped together, West Virginia takes the crown with the lowest level of per capita credit

165. *Id*. at 180. Federal student loans already received that treatment from previous changes to the Code. *Id*.

166. *Id.* at 179.

167. *See supra* notes 93–95.

168. *See supra* notes 96–97.

169. *See supra* note 98.

170. *Quarterly Report on Household Debt and Credit: Q2 2010 to Date*, FEDERAL RESERVE BANK OF NEW YORK, https://www.newyorkfed.org/microeconomics/databank.html [https://perma.cc/EZW3-WTBP].

171. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, STATE LEVEL HOUSEHOLD DEBT STATISTICS 2003–2015, February, 2016, https://www.newyorkfed.org/microeconomics/data.html [https://perma.cc/JL2Z-52KZ].

172. *Id*. Sadly, Mississippi has long ranked at the bottom of many lists that proxy for quality of life. *See, e.g.*, Emily Le Coz, *Kids Count Report: Miss. on Bottom of List Again*, CLARION LEDGER (Jul. 22, 2014), http://www.clarionledger.com/story/news/local/2014/07/21/kids-count-report-miss-bottom-list/12975235/ [https://perma.cc/5SUU-4YDF].

outstanding for almost all the years from 2003–2015—Mississippi comes in second.[173] Wisconsin is again below average, but above states like Texas, Nebraska, North Dakota, and Oklahoma.[174] This is not conclusive evidence of much more than more research needs to be done: there are many laws that affect the ability to collect from a defaulted obligation and outstanding credit per capita is at best a crude measure of the availability of credit.

It is plausible that the current system—by virtue of the ability of debts to remain collectible almost indefinitely—lowers the overall cost of credit or even increases access to credit. The more relevant question, however, is whether that decrease in cost or increase in access is large enough to justify the additional social costs caused by a system of perpetual debts.[175]

B. Costs

We are a nation of debtors: many of us are delinquent in our obligations and most depend on credit to absorb financial shocks. Nearly a third of Americans have at least one account reported as "in collection" on their credit report, owing an average of $5,178.[176] Almost half lack a financial cushion sufficient to survive for three months without income.[177] What are the costs of the practically perpetual nature of debts to the human beings who owe them? Or on the systems that exist to support such a regime? This Section identifies some of the psychological, regulatory, and other costs individuals and society as a whole experience as a result of the current system of nearly perpetual obligations.

It is important to separate the costs of "simple" over-indebtedness from the costs created by the almost perpetual nature of debts. Over-indebtedness undoubtedly exacts a

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173. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, *supra* note 171.

174. *Id*.

175. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1081 (1979) ("Even where regulation has impact on the profitability of collection and therefore on interest rates or credit availability, there may be circumstances in which the benefits to delinquent debtors are so great that most persons would be reasonably confident that the regulation is efficient in the wealth maximization sense and worth the liberty costs.").

176. 77 million Americans have an account in collections; the median debt is $1,349. Carolyn Ratcliffe et al., DELINQUENT DEBT IN AMERICA (2014), www.urban.org/publications/413191.html. Percent of adults calculated using 2010 Census numbers. UNITED STATES CENSUS BUREAU, STATE & COUNTY QUICK FACTS (2010), https://www.census.gov/quickfacts/fact/table/US/PST040216 [https://perma.cc/Z4GR-DHSB] (estimating that 76% of the population is 18 years or older, and that the US population in 2010 was 308,758,105).

177. PROSPERITY NOW, CFED ASSETS & OPPORTUNITY SCORECARD—LIQUID ASSET POVERTY RATE 2006–10, http://scorecard.prosperitynow.org/data-by-issue#finance/outcome/liquid-asset-poverty-rate [https://perma.cc/WLJ8-MC35] (last visited Feb. 4, 2018).

psychological and sometimes physical cost on individuals and society.[178] Difficulty repaying one's debts is associated with a plethora of negative outcomes.[179] One study links an inability to make minimum payments and default to increased anxiety.[180] Multiple studies find an association between debt and depression.[181] A high debt-to-income ratio, defaulting on a mortgage, and foreclosure are also each associated with more negative health outcomes.[182] Financial stress has also been linked to work absenteeism,[183] lower graduation rates,[184] and obesity in children[185] and adults.[186] Some have gone as far as to argue "that debt may be a factor in social isolation, feelings of insecurity and shame, self-harm and suicidal ideation."[187] Research on scarcity also suggests that financial distress causes lower mental function, leading to bad decisions that in turn lead to other problems,

178. *See, e.g.*, Eva Selenko & Bernad Batinic, *Beyond Debt. A Moderator Analysis of the Relationship Between Perceived Financial Strain and Mental Health*, 73 SOC. SCI. & MED. 1725, 1725 (2011) ("Heavy debt not only has economic consequences, but has also been related to severe psychological and physical distress.").

179. It is difficult for most of these studies to perfectly tease out the causal relationship between financial distress and the negative outcome. *Id*. at 1731 ("[T]he causal direction from perceived financial strain to mental health . . . is uncertain").

180. Patricia Drentea, *Age, Debt, and Anxiety*, 41 J. HEALTH AND SOC. BEHAV. 437, 445 (2000).

181. *See generally* Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 388 (2010); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197 (2005); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441 (2001).

182. *See, e.g.*, Sarah L. Szanton et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women*, 63 J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SCI. 369 (2008); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 S. ECON. J. 873 (2005); Patricia Drentea & Paul J Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 527 (2000); Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure and Health in a Diverse Internet Sample*, 60 NURSING OUTLOOK 134 (2012).

183. Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An Empirically Derived Model*, 14 FIN. COUNSELING & PLANNING 31 (2003).

184. Graduation rates for students from the bottom of the income distribution are reduced significantly when students owe more than $10,000 in debt. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133 (2012).

185. Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RES. 755, 757 (2009).

186. Eva Münster et al., *Over-indebtedness as a Marker of Socioeconomic Status and Its Association with Obesity: a Cross-sectional Study*, 9 BMC PUB. HEALTH (2009), https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/1471-2458-9-286 [https://perma.cc/RSA2-Y2UV] (concluding that "[o]ver-indebtedness was associated with an increased prevalence of overweight and obesity that was not explained by traditional definitions of socioeconomic status.").

187. Chris Fitch et al., *Debt and Mental Health: The Role of Psychiatrists*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 194, 195 (2007).

including eviction, divorce, and a need for government benefits.[188] In these cases, individual costs can quickly become costs borne by society in the form of increased taxes or health care costs.[189]

The ability of debts to continually resurface in an individual's life can only increase these psychological and social burdens, as over-indebted individuals are forced to remain in a debt trap almost eternally. This debt trap disincentivizes work.[190] As the Supreme Court has noted, "[f]rom the viewpoint of the wage earner, there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either."[191] These psychological costs may be difficult to quantify, but that does not make them unimportant.[192]

There are other social costs. The current system with all its complexity incurs significant regulatory costs.[193] The uncertainty over which type of statute of limitation might apply to a particular debt incurs costs for debt owners, regulators, and consumers. Confusing matters further, the Fair Credit Reporting Act (FCRA) provides a different time period during which a debt can be reported to credit bureaus that is unrelated to the limitations period.[194]

Debt buyers face the risk of FDCPA liability and the attendant necessity to have systems in place to attempt to avoid it.[195] This increases legal costs, especially for anyone who operates in multiple jurisdictions. Regulators incur increased monitoring and oversight costs as a result of the complexity. Society may also

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188. *See, e.g.*, SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 13–14 (2013); Virginia Graves, *Does Poverty Really Impede Cognitive Function? Experimental Evidence from Tanzanian Fishers*, (2015) (unpublished Master's Thesis, University of San Francisco), http://repository.usfca.edu/thes/129/ [https://perma.cc/6MRF-75FH]; DAVID CAPLOVITZ, MAKING ENDS MEET: HOW FAMILIES COPE WITH INFLATION AND RECESSION 155 (1979) (finding that "[t]hose whose incomes had fallen behind rising prices were much more likely to show mental stress . . . than those whose incomes kept up with rising prices.").

189. *See* Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1007 (2012) (positing that "[e]xcessive debt may be associated with underutilization of medical treatment[,]"" which might lead to more severe and expensive consequences).

190. *Id*. at 988.

191. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

192. *See* Porter, *supra* note 189, at 1003–22 (proposing a framework for understanding the harms of overindebtedness and urging further empirical research).

193. *See generally* LUIGI ZINGALES, A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY (2012).

194. 15 U.S.C. § 1681c(a)(4) (2012).

195. Creditors collecting on their own debts (or debts acquired before they were delinquent) are not subject to the FDCPA. Nevertheless, they may be legitimately concerned that the CFPB will find that collecting on time-barred debt is an unfair or deceptive practice as prohibited by Dodd–Frank. 12 U.S.C. § 5531 (2010).

bear some costs in the form of increased social safety nets required to cope with consumers who get further mired in debt.[196] To be clear, the argument is not that these costs would not exist in a system where debts were automatically discharged: it is that the complexity of the current system gratuitously increases regulatory costs.

C. Consequences

A system in which debts are practically immortal creates a number of perverse incentives. One is an increase in the creditor's moral hazard at the time it grants credit when it may continue to pursue the debtor for decades after a default. Similarly, creditors have an increased incentive to try to at least delay the consumer's bankruptcy decision in order to ensure that more can be collected from them. Finally, in a system in which only bankruptcy can truly kill debts and creditors are otherwise permitted to continue dunning for many years, consumers have strong incentives to file bankruptcy. Despite this and the willingness of creditors to continue to offer credit even after bankruptcy, fewer consumers file than would economically benefit.[197] Combined, these consequences of perpetual debts disproportionally affect the most vulnerable consumers: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

Imagine a world in which creditors could always be certain that they would be repaid in full. In that world, creditors would have little incentive to withhold lending from even very risky customers.[198] Collection would be risk-free, albeit not necessarily cost-free.[199] That is an extreme example, of course, but my contention is that our system of perpetual debts likewise reduces the creditor's incentive to underwrite more carefully. The ability of debt owners to "wait out" the debtor for decades increases the creditor's moral hazard as it encourages riskier lending. In 2007, Ronald Mann argued that some credit card issuers depended on what he called a "sweat box" model of credit.[200] In Mann's model,

196. *See, e.g.*, Whitford, *supra* note 175, at 1075.

197. *See generally* Hynes, *supra* note 13; White, *supra* note 152.

198. *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 3 (2011) (explaining the role of financial institutions as "directing resources toward profitable investments," and the disastrous result should lenders be guaranteed recovery on even the most foolish loans).

199. *Id.* Increased costs might be tacked on to the debt itself, however, in the form of social costs as debtors lean on illegitimate modes of repayment facing such a guaranteed debt payment. *Id.*

200. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*,

"lenders are not just indifferent to default, they actually rely in part upon it to turn on the sweatbox's heat switch for their most lucrative constituency."[201] As Andrea Freeman has noted, "the ideal credit card user maintains only enough financial stability to avoid bankruptcy proceedings."[202]

In Mann's model, the breakeven period for consumers in the sweat box may be as short as two years.[203] In other words, after two years "an issuer can profit even on loans that wind up being written off entirely; every payment after that point is gravy."[204] My argument is that this gravy is enhanced by our system of perpetual debts. Not only can an issuer break even after only a few years, but after charge-off, the ability to continue to pursue the debtor for the rapidly growing debt turns that debt into an asset that can be sold to debt buyers. Until recently, that sale could be done quite straightforwardly—no underlying documentation evidencing the debt was required—and the issuer often washed its hands of any problems by disclaiming accuracy, title, and other warranties during the sale.[205] Part of the reason this system has worked is lax oversight by bank regulators; the other part is that debt buyers continued—indeed many still continue—to profit from the system by being able to pursue the debtors for many years after default and even collect default judgments in state courts.[206]

Our system of perpetual debts combined with the sweat box model may also explain the initially puzzling finding that bankrupt debtors are a highly sought-after segment for consumer credit.[207] One study found that "individuals with the lowest credit score and a lower propensity to repay as proxied by income, race[,] and education are . . . offered more credit after bankruptcy."[208] Given that bankruptcy is the only method that can truly discharge a debt, and that those who obtain a bankruptcy discharge are

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2007 U. ILL. L. REV. 375, 379 (2007).

201. John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 417 (2007).

202. Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 162 (2013).

203. Pottow, *supra* note 201, at 416.

204. *Id.*

205. Jiménez, *supra* note 17, at 61.

206. *Id.* at 95–96; *see also* Whitford, *supra* note 175, at 1064–66 (discussing the limits of debtors' leverage in debt collection).

207. Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1391–92 (2007) (finding that "just one year after bankruptcy, 96.1% of debtors were recipients of credit solicitations").

208. Ethan Cohen-Cole et al., *Forgive and Forget: Who Gets Credit After Bankruptcy and Why?* (Working Paper, July 23, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341856.

barred from obtaining another one for eight years,[209] creditors can be sure that they can keep a debtor in the sweat box for at least that period of time.

Not all individuals who have trouble repaying their debts will suffer these consequences, however. For some, the financial struggles may be temporary: a new job, completing an educational program, or a myriad of other happy circumstances could turn things around, partially or completely. Others may temporarily be better off: receiving a large tax refund, bonus at work, or a short-term increase in wages during the holiday season. This temporary improvement might be enough to pay down some debts.[210] But this may not happen to all, or even many, over-indebted individuals. For these "poor but unfortunate" debtors,[211] the U.S. legal system provides a way in which to avoid or reduce these costs: personal bankruptcy.[212]

But when debts are effectively immortal, creditors and debt owners have an incentive to attempt to delay the bankruptcy filing decision as long as possible.

In 2005, Congress amended the Bankruptcy Code.[213] The stated purpose of the amendments was to thwart what some argued was "rampant abuse" of the bankruptcy system: too many people filing strategically, despite an ability to repay.[214] Proponents of this hypothesis attributed the previous decades' increase in filings to a relaxation of bankruptcy rules and a decline in the "stigma" associated with filing bankruptcy.[215] The empirical

209. 11 U.S.C. § 727(a)(8) (2012).

210. Indeed, if the debt has been sold, the new debt owner might be eager to settle for a fraction of what is owed. Debt buyers pay less than a dime for most debts purchased. That fact may not be known to the individual, however. More perversely, individuals who are not yet on firm financial footing but could repay some debts might be concerned about getting in touch with debt collectors to offer any kind of payment. They may (reasonably) fear that exposing themselves to a garnishment or lawsuit. The uncertainty over what might happen creates additional emotional costs.

211. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U. S. 279, 286, 287 (1991)).

212. To be clear, not all can be avoided. As discussed in Part III.B, not all debts are dischargeable in bankruptcy.

213. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8 (2005).

214. *See, e.g.*, Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 193, 204 (1999).

215. *See, e.g.*, Michelle J. White, *Chapter 14 Bankruptcy Law*, 2 *in* HANDBOOK OF LAW AND ECONOMICS 1013–1072, 1068 http://www.sciencedirect.com/science/article/pii/S1574073007020142 [https://perma.cc/S3WN-969X] (last visited Aug. 21, 2015) ("The empirical work on bankruptcy suggests that the increase in the number of personal bankruptcy filings that occurred over the past 20 years could have been due to a combination of households gradually learning how favorable Chapter 7 is and bankruptcy

support for the proposition that bankruptcy filers were (or are) largely strategic players was and remains scant at best.[216] At the time, Professor Mann argued that "the important effect [of the changes would] be to slow the time of inevitable filings by the deeply distressed, allowing [credit] issuers to earn more revenues from these individuals before they file."[217] While it is impossible to know precisely why, since 2005, consumer bankruptcy filings have decreased steadily, despite the Great Recession.[218]

A system of perpetual debts also incentivizes debt owners to dun debtors excessively and inefficiently. As Professors Mann and Porter have noted, "[b]ecause each creditor has an incentive to be first in line to collect, and because the creditors can dun their debtors at little or no cost to themselves, creditors as a group engage in dunning activities that individual debtors find intolerable."[219] These dunning activities may compel some debtors to file bankruptcy, even if mostly to be rid of particularly aggressive creditors. In some cases, this may lead to bankruptcies that would not have happened but for the excessive dunning.[220]

And yet, not everyone who could benefit files bankruptcy.[221] Empirical research after The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) suggests that the amendments created both structural and procedural barriers that may prevent some worthy individuals from filing.[222] A major barrier is cost: after BAPCPA was enacted, the costs of filing

becoming less stigmatized as filing became more common."); Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 216 (2006) (quoting a number of elected and other officials denouncing the lack of bankruptcy stigma) (quoting Federal Reserve Bank Chairman Alan Greenspan as saying: "[p]ersonal bankruptcies are soaring because Americans have lost their sense of shame"); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006).

216. *See* Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK RICHMOND ECON. Q. 1, 2 (2004); Marianne B. Culhane & Michaela M. White, *Creighton: Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) (finding that "can pay" debtors as screened out by the 2005 "means test" constituted less than 3.6% of random sample).

217. Mann, *Sweat Box*, *supra* note 200, at 379.

218. *See, e.g.*, Robert M. Lawless, *Bankruptcy Filings Drop 10% in 2015*, CREDIT SLIPS (Jan. 7, 2016, 4:37 PM), http://www.creditslips.org/creditslips/2016/01/bankruptcy-filings-drop-10-in-2015.html [https://perma.cc/NAU2-L9R8].

219. Mann & Porter, *supra* note 147, at 292.

220. *Id.* at 330. *But see* Hynes, *supra* note 13, at 57 (finding that few judgment debtors file for bankruptcy).

221. White, *supra* note 152; Hynes, *supra* note 13.

222. LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY: FINAL REPORT 3–4 (2011).

bankruptcy increased between 24% and 51%, depending on the type of bankruptcy.[223] Given findings that the biggest determinant of when a consumer files for bankruptcy is when they have amassed enough money to pay for the attorney and filing fee, bankruptcy is now more expensive than ever.[224] Since the Great Recession, the trend is decidedly for fewer bankruptcies: filings decreased almost 42% between 2010 and 2014 and decreases again in 2015.[225]

These consequences of a system of perpetual debts combine to hurt the most vulnerable individuals: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

IV. AUTOMATIC DISCHARGE

The rest of this Article explores a proposal to ameliorate the social and economic costs of our current system of perpetual debts. My purpose is to explore the ways in which this proposal could reduce some of the regulatory and psychological costs of the current system without creating (too many) additional problems.

A. A Simplifying Proposal

I propose a form of automatic bankruptcy for individual debts: a federal law providing for the automatic discharge of consumer debts after a seven-year period.[226]

My aim is to articulate the simplest rule that would address most of the concerns from the previous pages.[227] "The simpler a

223. Chapter 7 no asset cases, the simplest bankruptcy cases of all, increased an average of 51%. *Id*. at 6. Chapter 7 asset cases (those in which the debtor thought she would have assets to distribute to her creditors) increased 37%. *Id.* In Chapter 13, cases that completed with a discharge increased an average of 27%. *Id*. Dismissed chapter 13's—where the debtor did not obtain a discharge—increased 24%. *Id.*

224. Mann & Porter, *supra* note 147, at 292.

225. Robert M. Lawless, *Bankruptcies Down 12% in 2014, Forecast Predicts the Same Decline for 2015*, CREDIT SLIPS (Jan. 8, 2015, 3:25 PM), http://www.creditslips.org/creditslips/2015/01/bankruptcies-down-12-in-2014-forecast-predicts-the-same-for-2015.html [https://perma.cc/HY6M-D8GH].

226. For the definition of consumer debt, I borrow the one from the Fair Debt Collection Practices Act: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (2012).

227. As the National Consumer Law Center ("NCLC") has noted in their proposal to adopt a uniform statute of limitations, doing so "would promote clarity for all, avoid loopholes, and empower consumers to more easily identify and defend themselves from lawsuits that

rule is, the fewer provisions there are and the less it costs to enforce them."[228] This principle goes to both the necessity that this be a federal law and one that takes effect automatically. "The simpler [a rule] is, the easier it is for voters to understand and voice their opinions accordingly. Finally, the simpler it is, the more difficult it is for someone with vested interests to get away with distorting some obscure facet."[229]

In brief, the proposed statute would have the following five features:

(1) Owners of unsecured consumer debts would have seven years in which to collect those debts, with the clock beginning to run 180-days after the consumer's behavior that gave rise to the cause of action. Payments made during this period do not restart the collection clock.

(2) Judgments based on consumer debts would have a separate, non-renewable, seven-year clock. In other words, the initial seven-year extinguishment period can be extended if a court renders a judgment in a lawsuit filed before. The automatic discharge federal law I am proposing would not only automatically extinguish the legal remedy of collecting through the courts, but also any right of repayment.[230]

(3) When the applicable seven-year period expires, the debtor's obligation to the creditor and the creditor's concomitant right to collect cease to exist. Similar to the bankruptcy discharge, a judgment obtained on an extinguished debt is void and can be collaterally attacked in a different proceeding.

(4) Attempting to collect on an extinguished debt would be an unfair practice giving rise to a private right of action against the collector, with statutory financial penalty, attorney's fees, and actual costs (including disgorgement

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are filed after the statute of limitations has expired." My proposal differs significantly from the NCLC, who recommends a three-year period for unsecured debts not reduced to judgment and five years after a judgment. *Id.* at 6, 12–15.

228. Luigi Zingales, *Why I Was Won Over by Glass-Steagall*, FIN. TIMES (June 10, 2012) https://www.ft.com/content/cb3e52be-b08d-11e1-8b36-00144feabdc0?mhq5j=e5*; see also* ZINGALES, *supra* note 193, at 207.

229. ZINGALES, *supra* note 193.

230. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

of any payments made by the consumer) obtainable from the collector. Regulators such as the Consumer Financial Protection Bureau and states' attorneys general could also enforce the statute.

(5) The two extinguishment periods would preempt contrary state law and could not be waived by the consumer.

Statutes of limitations for debts have typically been creatures of state law, and it is possible for much of this proposal to be implemented at the state level.[231] Indeed, the National Consumer Law Center has proposed a model state statute of limitations that "creates a single 3 year statute of limitations for all consumer debts being collected in the state," ensures that the enacting state's citizens would not be subject to longer statutes of limitation, extinguishes the debt upon expiration of the three years, and limits collection of judgments to five years.[232]

My proposal requires a federal law, however, because a state-by-state implementation would leave in place the crushing complexity of a system in which few can be certain which statutory period applies. Even if all states adopted statutes that extinguished all rights and remedies upon the expiration of the statute of limitation, debt owners and consumers would still find it difficult to determine which statutory period applied to a particular debt. A state-by-state enactment would retain many of the regulatory costs of the current system. That is, the costs of time spent by debt owners deciding which statute of limitation is likely to apply, time spent by courts deciding that issue, and costs of regulatory supervision over debt owners' procedures for calculating limitations periods would all remain. This means that many of the potential cost savings to creditors in Part IV.B would be non-existent.

In a state-by-state implementation, consumers would also continue to be hurt for two reasons. To the extent that a consumer

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231. The Contracts Clause does not have to be a bar to such legislation, so long as it only applies to debts that were not in default when the statute is enacted. *Developments*, *supra* note 58, at 1190 ("It has long been settled that legislatures may prospectively limit the time within which actions may be brought, and alter existing periods at will as to obligations not yet ripened into causes of action."); *see also* U.S. CONST. art. I, § 10, cl. 1 (restricting the states from coining money, but not limiting state authority to establish statutes of limitations for debts).

232. APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER L. CTR., MODEL STATUTE OF LIMITATIONS REFORM ACT, 2 (Dec. 2015), https://www.nclc.org/images/pdf/debt_collection/statute-of-limitations-reform-act.pdf [https://perma.cc/HZ9F-KC8T]. The model statute also proposes a private right of action for violations and prohibits extending the limitations period in certain circumstances. *Id.*

knows what a statute of limitations is, she would likely still encounter difficulty selecting the relevant statute.[233] Second, a complex state-by-state system would continue to make it difficult for consumer advocates to communicate the concept of statutes of limitations to consumers effectively.[234] Simply put, the simplest and most efficient implementation of this proposal requires a Congressional statute.

The first substantive part of the proposal envisions a single federal collection period of seven years applicable to unsecured consumer debts, running from 180 days after a default. Seven years to collect on an unsecured debt is longer than most states' limitations periods,[235] and almost double what the NCLC has proposed.[236] Choosing this number has the advantage of simplicity.

The seven-year period purposely mirrors the Fair Credit Reporting Act's (FCRA) reporting period. The FCRA currently permits credit reporting agencies to report the existence of delinquent accounts for up to seven years from the date in which they were first sent to collections.[237] The current provision is agnostic as to whether the debt is legally collectible. A bankruptcy discharge has no effect on the reporting period; credit bureaus can continue to report discharged debts for the same FCRA-prescribed period as any other delinquent debt.[238] Because this can be confusing, credit bureaus report the debt as "included in bankruptcy" or "discharged in bankruptcy."[239] Without such a notation, third parties obtaining the consumer's credit report would assume that the debt is legally owed and the consumer has

233. *See* Fred O. Williams, *Expiration Dates Fuzzy On Old Credit Card Debt*, CREDITCARDS.COM (Mar. 22, 2013), https://www.creditcards.com/credit-card-news/collectible-expiration-date-old-debt-statute-1282.php [https://perma.cc/RW94-P7MG].

234. *See id.*

235. Sixteen states "provide a three-year statute of limitations for written contracts, oral contracts, or both." NCLC, *supra* note 242, at 13. Many others limit collection on contractual debts to six years or less. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.040(1) (West 2016) (6 years); WIS. STAT. § 893.43 (2016) (6 years); ARK. CODE ANN. § 16-56-111 (2005) (5 years); CAL. CIV. PROC. CODE § 337 (West 2006) (4 years).

236. In its model legislation, NCLC has proposed a three-year limitations period for consumer debt, and five years for judgments. *Id.*, at 2–3.

237. 15 U.S.C. § 1681c(c)(1) (2012).

238. *See* Stephanie Lane, *Can Debts Discharged in Bankruptcy Appear on My Credit Report?*, NOLO, https://www.nolo.com/legal-encyclopedia/can-debts-discharged-bankruptcy-appear-my-credit-report.html [https://perma.cc/BGM2-DWQG].

239. *See id.* This notation is not enshrined in a statute or regulation; it is the credit bureaus' interpretation of what the FCRA requires them to do to ensure "maximum possible accuracy of the information . . . ." 15 U.S.C. § 1681e(b) (2012).

failed to pay.[240] Mirroring the FCRA provision in this proposal simplifies its implementation. Assuming the underlying information is correct, if a delinquent debt is reported without a bankruptcy notation, the consumer is liable for the debt.[241]

In contrast with the first proposal, a seven-year period for judgments is significantly lower than the 10 or 20-year limit that is the norm in most states.[242] The difference here is partly balanced by the (also) significant time-difference between the proposal and current law for pre-judgment debts. Furthermore, empirical evidence suggests that most judgments go unsatisfied.[243] It is thus likely that an empirically derived time limit on satisfying judgments would be significantly lower than the current statutory period in most states. The most valuable part of a seven-year limit on collecting judgment is in its simplicity. Similar as above, a seven-year period harmonizes with the FCRA's requirement that civil judgments can only remain in a credit report for up to "seven years or until the governing statute of limitations has expired, whichever is the longer period."[244]

The third element of this proposal is critical for its function: once the applicable seven-year period expires, the debt is automatically extinguished and cannot be revived. Because the extinguishment periods cannot restart, once one knows the date of default, calculating whether a debt is still valid becomes simple arithmetic. If more than seven years (and 180 days) have passed after the default, it is as if that debt never existed. The debt owner no longer owns anything.[245] Thus, a judgment purportedly declaring that the defendant was liable for a discharged debt would be invalid and void and could be collaterally attacked in a separate proceeding.[246]

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240. *In re* Haynes v. Chase Bank USA, 2015 WL 862061, at *1 (S.D.N.Y. 2015).

241. The Consumer Financial Protection Bureau has authority to issue regulations interpreting the FCRA. Fair Credit Reporting (Regulation V) 12 C.F.R. 1022 (2011).

242. Nationwide, statutes of limitations on judgments are lengthy: typically between ten and twenty years. Richard M. Hynes, *Why (Consumer) Bankruptcy*, 56 ALA. L. REV. 121, 143 (2004). Most states allow some form of renewal of judgments. *See id.* at 142.

243. Hynes, *supra* note 13.

244. 15 U.S.C. § 1681c(a)(2) (2012). The only applicable period under my proposal would be seven years.

245. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

246. *See also In re* Gurrola, 328 B.R. 158, 164 (B.A.P. 9th Cir. 2005) (explaining that in the context of the Bankruptcy Code, the term "'void' . . . unambiguously connot[es] a

Laws aimed at helping the unsophisticated (and unrepresented) consumer face a familiar stumbling block if they require that the consumer know or exercise their statutory rights in order to work. While perhaps "good on paper," such laws expose consumers to unscrupulous actors who exploit their lack of sophistication. Statutes of limitations are an apt example.[247]

The bankruptcy discharge works well because most consumers who obtain one are represented by counsel and are presumably advised on its power and reach. But it also works well because it has some "teeth" in the form of a federal injunction against collection of discharged debts (and possible money penalties). This is why we need the fourth element of my proposal: a strict liability statutory declaration that attempting to collect on an extinguished debt is an unfair practice giving rise to a private right of action against the collector.[248] The consumer would have not just the ability to collect a statutory financial penalty (similar to the FDCPA) for each attempt to collect but could also recover actual costs, including any payments made to the collector after the debt was discharged. To encourage the consumer bar to bring these cases, the consumer could also recover reasonable attorney's fees for a successful suit. Lastly, regulators such as the Consumer Financial Protection Bureau and states' attorneys general could enforce this statute. The aim here is to increase the costs to bad actors.

The final and important requirement of this proposal is to prohibit the enforcement of any waivers with regards to any of the previous provisions. Thus, similar to a bankruptcy discharge (and unlike the Wisconsin or Mississippi statutes), there could be no "revival" of the debt once the debt was automatically discharged. The previous obligation could not be reinstated even if both parties agreed and even if the debtor made a payment towards the debt.[249] A judgment issued on a debt that had been discharged would be

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judgment rendered without subject-matter jurisdiction that could be ignored as a nullity and collaterally attacked").

247. Sometimes it's not only the consumer who is exploited, but the system itself, as with the practice of using bankruptcy to collect on time-barred debts.

248. I use the word "collector" here simply to mean the entity that attempted to collect, whether that entity is the original creditor, a subsequent debt owner, or a third party hired to collect the debt.

249. The bankruptcy provision, 11 U.S.C. § 524 (2012), was intended to overturn the common law rule that a prior obligation, though discharged in bankruptcy, was enough to support consideration for a new commitment to repay. *See* RESTATEMENT (SECOND) OF CONTRACTS § 83 cmt. b (AM. LAW INST. 2017) (providing that an express promise to pay a debt could remain binding even if it was discharged during a bankruptcy proceeding). If the debtor made the payment erroneously, not knowing the law, she might even be entitled to recover that payment, depending on state law.

void and could be collaterally attacked in a separate proceeding. The most typical one would be a lawsuit under the FDCPA.

A comparison of the major differences between my proposal and the existing bankruptcy discharge might be helpful. Table 1 lays out the major features.

Table 1 - Comparing the bankruptcy discharge to the "automatic discharge" proposal

Similarities	**Differences**
Both would be federal statutes. Debts are extinguished by operation of law. Debts cannot be resurrected after the discharge, even if both parties agree.[250] Record-keeping of discharged debts may be available.[251] Affects most kinds of unsecured consumer debts, including those that have been reduced to judgment. Judgments involving discharged debts are void and can be collaterally attacked.	Debt discharge is automatic once collection period expires; debtor need not do anything. Debtor may not be aware debt has been discharged. No public record of which debts have been discharged. Timing of automatic discharge could be extended if debt owner sues before debt is extinguished and obtains a judgment. Creditor knows when the discharge will occur.[253] Debts are discharged individually. Private student loans are automatically discharged; no proof of undue hardship needed.

250. Bankruptcy has a procedure for reaffirmation of a debt but most reaffirmations must happen under the supervision of the bankruptcy judge. 11 U.S.C. § 524(a)(1)–(2), (k)(3)(J)(i)(7) (2012); Baran Bulkat, *Reaffirmation Agreements in Chapter 7 Bankruptcy*, THE BANKRUPTCY SITE, https://www.thebankruptcysite.org/resources/bankruptcy/state-bankruptcy-law/will-chapter-7-trustee-agree-my-reaffirmation-request [https://perma.cc/5XXZ-YML6].

251. In bankruptcy, the record-keeping happens when the debtor fills out her schedules listing all of her debts. These schedules become part of the public record once the bankruptcy case is filed. The analogous situation in the proposal is the debtor's credit report and its listing of outstanding debts. The analogy is not perfect. The bankruptcy filing remains a public record forever; whereas debts do not need to be listed in a credit report and will only remain there for a certain period of time. 11 U.S.C. § 521(a) (2012); MARGARET C. JASPER, HOME MORTGAGE LAW PRIMER 93 (3d ed. 2009).

253. As opposed to not knowing whether there will be a bankruptcy filing at all, let alone a discharge.

Former debtor can pursue violations through federal statutes.[252]	Private right of action against those attempting to collect, including costs, fee-shifting, and a statutory penalty.

The objective of this proposal is to give creditors a clear and defined amount of time in which to attempt to collect an unsecured debt from a consumer. This time can be extended by obtaining a judgment on a debt, but the time to collect on that judgment would also be limited and non-renewable. In effect, this proposal limits the length of an unsecured consumer obligation to 7–14 years, depending on if and when a creditor obtains a judgment. It is a clock against which the collector is racing to persuade the debtor to repay or to use legal process to force repayment. The dual goals are to encourage creditors to act diligently in attempting to secure payment and to allow debtors to easily know when they are no longer burdened by a debt.

B. Effect on Creditors, Collectors, and the Cost of Credit

One of the posited benefits of the current perpetual system is that the ability to continue collecting for lengthy periods from delinquent debtors may lower the overall cost of credit. It is often stated that increased regulation will tend to increase the cost of credit or decrease its availability.[254] However, as Bill Whitford and Harold Laufer found, the answer is not necessarily black or white: "regulation may sometimes induce creditors to adopt more efficient collection techniques without adversely affecting their net income."[255] Further, because creditors compete amongst each other for a small or non-existent pool of funds from the debtor, regulation may also reduce collection costs on all creditors.[256] Finally, knowing that *ex post* remedies are limited may discipline

252. In the case of a bankruptcy discharge violation, debtors have the option to enforcing the discharge through the Bankruptcy Court (who may impose penalties for the violation of the discharge injunction) or they may sue under the FDCPA for attempting to collect a debt not legally owed. *See* Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004). In the case of my automatic discharge proposal, debtors may sue under the FDCPA for the same principle.

254. *E.g.*, Zywicki, *supra* note 161.

255. Whitford, *supra* note 196, at 1077 (citing William C. Whitford & Harold Laufer, *Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 649 (1975) (noting that collectors had further routinized and streamlined their collection procedures following increased regulation).

256. *Id.* at 1077–78. Bankruptcy also arguably serves this function.

some creditors to make sure they are lending to those who are likely to repay.[257] Thus, it does not necessarily follow that costs would increase or availability of credit would decrease with additional regulation.[258]

On the contrary, a uniform federal law might reduce the overall cost of collection: calculating the appropriate period becomes a simple matter of addition.[259] Such a law would reduce the uncertainty caused by the current patchwork of state statutes and differing interpretations of the appropriate state law to apply. For the law-abiding debt collector, it would also reduce the probability of a FDCPA and FCRA lawsuits, a significant cost-saver.[260]

Another likely consequence of this proposal is the further consolidation of the debt collection and debt buying industry.[261] This consolidation is not new. It is currently occurring largely as a result of increased enforcement the Federal Trade Commission, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau (CFPB), and states attorneys general.[262] Looming new regulations by the CFPB, increasing numbers of FDCPA lawsuits, and intensified scrutiny in the academic and popular press are likely also to blame.

But consolidation in this space should not be feared. Commentators tend to attribute the bulk of debt collection abuses

257. *See, e.g.*, Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 399 (2006) (proposing rules that place more of the risk of financial distress on lenders, "so that they have an incentive to use information technology to limit the costs of distress"); Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* at 20–21, FEDERAL RESERVE BANK OF PHILADELPHIA (June 19, 2015), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-23.pdf [https://perma.cc/5A8S-ZPJH].

258. *Accord* Zywicki, *supra* note 161, at 2 ("In theory, well-designed debt collection rules can aid both borrowers and lenders by increasing access to and reducing prices for consumer credit.").

259. As one commentator has noted, "[n]o one can tell, of course, how much additional judicial effort would be required if there were no statutes of limitations; but it may well be that it would not exceed that expended in deciding legal questions engendered by the statutes themselves." *Developments*, *supra* note 58, at 135.

260. WebRecon reports that, since 2010, there have been over 10,000 FDCPA lawsuits annually with 10,402 in 2016. *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WEBRECON LLC (Jan. 24, 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/ [https://perma.cc/G5E2-YZVE].

261. *See Study: Over-Regulation of Debt Collectors by CFPB Could Harm Consumers and Credit Economy*, ACA INT'L, (Sept. 30, 2015) (quoting Zywicki, *supra* note 161).

262. Michael R. Flock, *Debt Buyers—Shrinking Opportunities Amid Regulatory Reform*, ABF J. (Sept. 2014), http://www.abfjournal.com/articles/debt-buyers-shrinking-opportunities-amid-regulatory-reform/ [https://perma.cc/SV3J-Q3G7].

to smaller debt collectors.[263] Without regulation, there are few barriers to entry to purchase or collect debt.[264] Smaller collection operations have fewer resources and are more likely to violate the law for lack of knowledge or ability to train their employees. They are also more likely to "work" older debt, or debt that has changed ownership multiple times, both circumstances which increase the likelihood of consumer harm. Industry consolidation should also increase efficiency of collections, and allow collectors and debt buyers to use their increased market power to create more complex and accurate analytical models of whether a debtor is likely to repay. This should in turn decrease the cost of collections, which may trickle up to a decrease in the cost of credit, all else being equal.[265]

Nevertheless, this statute would undoubtedly incur some costs. State courts dockets across the United States are already filled with debt collection lawsuits, most of which are resolved upon the debtor's default.[266] This proposal might have the effect of forcing creditors to sue more often, to obtain the additional seven-year period in which to collect. It might also increase the number of lawsuits, although whether it does would depend on whether the expected value of collecting on a judgment, conditional on winning the lawsuit, is large enough to make it worthwhile. Indeed, instead of an increase in the total number of lawsuits, we might observe a substitution effect, as some lawsuits would no longer be brought.

A potential critique of this proposal is that it will reduce the availability of credit as lenders may not be able to legally charge sufficiently high prices to compensate for the lower probability of recovery upon default. Riskier consumers will suffer disproportionately, as lenders would still be willing to offer credit to those with a low probability of default. First, to the extent that

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263. *See* Halpern, *supra* note 47, at 158 (suggesting that small-time debt collection agencies are successful because they induce psychological anxiety in debtors).

264. *Id*.; *see* Fedaseyeu, *supra* note 259, at 20.

265. In addition, better analytics would help collectors identify those consumers who truly cannot pay (and who only own exempt assets) and should decrease the likelihood of those consumers being contacted. *See* Tom Groenfeldt, *Bank Reduces Debt Collection Costs Through Big Data Analytics*, FORBES (July 8, 2015, 7:25 AM), https://www.forbes.com/sites/tomgroenfeldt/2015/07/08/bank-reduces-debt-collection-costs-through-big-data-analytics/#20b6436379b3 [https://perma.cc/3PSM-92WE]; *Debt Management and Collection Analytics (Customer Segmentation)*, SCOREDATA, http://scoredata.com/debt-management-and-collection-analytics-customer-segmentation/ [https://perma.cc/VY4E-AWGV] (last visited Jan. 11, 2018).

266. For decades, commentators have noted that the majority of lawsuits in state court dockets involve the collection of consumer debts. *Cf*. D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 220 (1974).

an automatic discharge would discourage lenders from granting loans to those who will be unable to repay them, this may not be a great loss.[267] As Heidi Hurd has noted, "there is no virtue in allowing creditors to extend credit to those who can be reliably predicted to default on its terms."[268]

But note that independent of this proposal, the more time passes from the moment of default, the lower the probability of collecting.[269] In other words, as time passes, the recovery curve inexorably approaches zero.[270] At some point, the likelihood of recovery is so miniscule that it may be possible to set a long enough period for the automatic discharge that the diminishing returns of collection after that time would not be worthwhile. An automatic discharge rule reduces creditors' ability to collect. How *much* it reduces it, however, depends on *when* the automatic discharge happens. I have proposed setting a seven-year statutory period that could not be revived by a promise or even subsequent payments.

Another likely criticism is that an automatic discharge of debts may incentivize debtors to hide from their creditors for the

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267. This may force some consumers to substitute towards other types of credit products. *See* Zywicki, *supra* note 161, at 22.

268. Heidy M. Hurd, *The Virtue of Consumer Bankruptcy* in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 234 (Ralph Brubaker, Robert M. Lawless, and Charles J. Tabb, eds., 2012). Discussing theological reasons for forgiving debts, Simon Taylor notes:

> The mutual recognition of sinfulness is significant because it implies that both debtors and creditors have a responsibility in the problems that have arisen over debt in the current context. Loans must not only be asked for, they must be granted. Responsible borrowing finds its counterpart in responsible lending. An acknowledgement of the odious nature of some debts is an essential part of this responsible lending. There is an element of risk in the creation of debt and this must be shared between creditor and borrower. It is not responsible to lend when it is clear that the debt will not be able to be repaid and that a situation of deepening indebtedness will result. Nor, however, is it responsible to simply allow debtors who have squandered their loans to be given more money to squander. The issues of moral hazard here must be addressed by any proposed debt forgiveness, but it must be addressed in both directions.

Simon J. Taylor, *Forgiving Debts: A Theological Contribution*, 41 MODERN BELIEVING 3, 11 (2000).

269. *See* Margaret Reiter, *What to Expect When Your Debt Goes to Collection*, NOLO, https://www.nolo.com/legal-encyclopedia/what-expect-when-your-debt-goes-collection.html [https://perma.cc/Y6NR-GHDR] (last visited Oct. 4, 2017). We can see this somewhat on the price of charged-off receivables, which start at cents on the dollar for "fresh" charge-offs and go to fractions of pennies for debts that are past the statute of limitations. *See* FED. TRADE COMM'N, *supra* note 64, at ii, iv–v, 23–24, 42.

270. *See, e.g.*, OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, *Chart 7: Recovery Distributions Depending Date of Default*, *in* ACTUARIAL REPORT ON THE CANADA STUDENT LOANS PROGRAM 2011 (June 1, 2012), http://www.osfi-bsif.gc.ca/eng/oca-bac/ar-ra/cslp-pcpe/Pages/CSLP_2011.aspx#cht-7 [https://perma.cc/YY23-2MVQ].

statutory period in an effort to get away with not repaying their debts. While there may be some debtors who make this choice, it is unlikely many would do so. First, in this age of hyper-connectivity, it is increasingly hard to hide from anyone without incurring significant costs, such as changing one's name or identity.[271] Second, this proposal does not change the current cost of defaulting. The debtor's credit report would still suffer, as would her opportunity to obtain more credit. Third, and most importantly, seven years is a *long* time. If the aim of the strategic consumer is to avoid repaying creditors, bankruptcy is a far more attractive option.[272]

In my view, this proposal is not likely to increase bankruptcy filings. In effect, debtors receive bankruptcy-like protections without having to do anything. To be sure, filing bankruptcy also means receiving the protection of the automatic stay and a court-managed process. However, in most cases, it means hiring and paying for a lawyer and paying substantial fees. More likely, enactment of this proposal would tend to decrease filing rates. In particular, debtors who would have had to save to file "no asset" Chapter 7 cases might prefer waiting out the clock, especially in jurisdictions in which wage garnishment is limited. For some creditors, a system of automatic discharge could prove to be a better deal than if the debtor filed bankruptcy.

C. Effect on Consumers

A federal statute that definitively and automatically discharges of consumer debts would go a long way towards ameliorating the social costs and negative economic consequences discussed in the previous Part. Even if restricting creditors remedies in this way does not increase "consumer welfare" in the strictly economic sense,[273] my argument is that it would be justified to fulfill objectives that go beyond wealth maximization,

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271. *See, e.g.*, Jessica Winch, '*Changing My Name Was the Only Way to Escape Debt Hell*', TELEGRAPH (Apr. 26, 2014, 7:34 AM), http://www.telegraph.co.uk/finance/personalfinance/borrowing/10787200/Changing-my-name-was-only-way-to-escape-debt-hell.html.

272. The exception here might be with regards to private student loans, which are presumptively non-dischargeable in bankruptcy but would be automatically dischargeable under my proposal. *See* Ang & Jiménez, *supra* note 144 at 175–76, 186, 195.

273. Zywicki, *supra* note 161, at 20 (noting that "it is unclear as an *a priori* matter whether tighter restrictions on creditor collection remedies will increase consumer welfare" and cautioning against regulating without a full understanding of the costs and benefits of the potential regulation).

for example, reducing "mental anguish"[274] caused by perpetual debts.[275]

Implementation of this proposal would dramatically decrease the time during which a creditor could dun a consumer. Debt owners who continue to attempt collection from debtors after extinguishment of the debt would do so without legal basis.[276] Legally, it would be as if a debt had never existed in the first place. In the case of a debt collector, they would be violating the FDCPA's prohibition against making false or misleading representations. Specifically, the collector would be falsely representing "the character, amount, or legal status of any debt" by arguing that the consumer owed them anything.[277] An originating creditor—that is, a bank or other entity that extended credit to the consumer—is not subject to the FDCPA, but would arguably violate the CFPA prohibition against deceptive acts or practices.[278] Either party would likely violate state consumer protection statutes.

A single national law that automatically discharges debts after a unified time and which does not allow the clock to restart even when a payment is made after a default greatly reduces the power of zombie debts. Such a system greatly simplifies the message that regulators and consumer advocates would have to communicate to consumers about their rights. All they would need to explain is when to begin counting the limitations period and how long it is. The FTC may not be able to prevent scammers from calling a consumer about a debt she already repaid, but after the appropriate amount of time has passed, the consumer would be much more likely to understand that this zombie could not hurt her.[279]

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274. Whitford, *supra* note 196, at 1081 ("Even if regulation is not efficiently wealth maximizing, it might be seen as justifiable to fulfill other regulatory objectives, such as avoidance of mental anguish.").

275. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 462 (1996) (arguing that "promoting peace of mind benefits all members of society, including the innocent and the risk-averse, not just those who actually have committed a legal wrong"); Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, JURISPRUDENCE, at 6 (forthcoming 2018), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2563233 (noting that "the kind of prosperity that enables human flourishing might differ from simple maximization of gross domestic product").

276. Naturally, just like in a bankruptcy, nothing prohibits a former debtor from giving money to a former creditor, but the creditor would have no basis to seek payment. *See* Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFFALO L. REV. 369, 374 (1997).

277. 15 U.S.C. 1692e(2)(A) (2012).

278. Nevertheless, a few states have enacted their own FDCPA statutes and some do cover original creditors. *See, e.g.*, CAL. CIV. CODE § 1788 et seq.

279. *See* Irby, *supra* note 6. In fact, if she can find the scammer she might even be able

An automatic discharge of debts would also likely reduce the emotional and social toll that perpetual debts can cause a debtor who continues receiving phone calls and letters for many years while she is unable to repay. This will also assist people who are aware that there is a debt out there that is growing interest and could resurface at an untimely moment to garnish her wages or take her assets.

This proposal does have potential downsides for consumers, however. As discussed earlier, the automatic discharge and inability to restart the clock after a default might cause a debt owner to sue a consumer she otherwise might not have. This might lead to more consumers being sued, or to a different composition of the kinds of lawsuits brought.[280] Bringing the lawsuits earlier would benefit consumers at least to the extent that they are more likely to have evidence available to defend themselves against it.[281] In addition, as Mann and Porter have noted, "losses can be minimized by a process that limits the time and expense consumed by the period of distress and returns the household to productive economic activity."[282]

V. CONCLUSION

This Article has argued that consumer debts in the United States can effectively live—and grow—forever: statutes of limitations do not extinguish them; they can morph into relatives' obligations even after the debtor's death; and sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. But bankruptcy is both costly and in some cases, overkill, in that it can extinguish debts that a debtor was able to and perhaps even willing to pay.

As an alternative, this Article has explored a proposal for a type of "automatic bankruptcy" of consumer debts: a debt discharge that would take effect by operation of federal law after roughly seven years from the date of default, or, in the case of a judgment, seven years after its issuance. The proposal combines features from traditional statutes of limitation (a statutory period that generally extinguishes the legal remedy) with the bankruptcy

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to hurt *him* by suing for a violation of the FDCPA. *See* Lisa Lake, *Stop a Debt Collector's Empty Threats*, FED. TRADE COMM'N (July 21, 2014), https://www.consumer.ftc.gov/blog/2014/07/stop-debt-collectors-empty-threats [https://perma.cc/5JY4-MAPY].

280. *See supra* note 33 and accompanying text.

281. Although it is certainly true that "for the ordinary individual, the financial and emotional burden of potential litigation cannot be underestimated." Ochoa & Wistrich, *supra* note 304, at 462.

282. Mann & Porter, *supra* note 151, at 296.

discharge (the complete extinguishment of all collection rights and remedies). The aim is to reduce the psychological and economic weight of debts that can be collected forever while limiting the potential economic downsides.