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BANKRUPTCY POLICY IN A DEMATERIALISED INSOLVENCY LAW: GLIMPSES OF A HIDDEN SYSTEM

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1. INTRODUCTION

It is a source of great pride that I have been asked to contribute to this special issue in memory of my mentor Professor Fletcher, and of sadness that he will not read this. In this essay I look at one of Professor Fletcher's parting gifts, which appeared in the 2017 volume of this journal, in which he identified and challenged the 'dematerialisation' of insolvency law. In that work he drew attention to trends that have removed various key aspects of insolvency procedures 'from open view' and called into question the consequences of these developments.[2] Professor Fletcher cautioned against the loss of transparency and public scrutiny due to increasingly invisible directors' disqualification and bankruptcy restriction order proceedings, disappearing bankruptcy court hearings, and the discontinuation of physical creditors' meetings. In this article I seek to add to Professor Fletcher's case in arguing that two particularly important observations are obscured in a 'dematerialised' personal insolvency law.

The first is that lawmakers appear to appreciate insufficiently the role that personal insolvency law can play in offering widespread debt relief in an economy and society suffering from the effects of excessive levels of household debt. While politicians apparently remain in denial regarding worryingly high household debt burdens, policy institutions from the Bank of England to the IMF warn of the risks involved in the persistent debt dependency of the contemporary economic order. A case for debt relief has emerged. This creates a central role for personal insolvency as a unique societal institution in its routine discharge of debt as of right. The second observation is the extent to which English personal insolvency law not only fails to fulfil this role but has lately retreated into an increasingly regressive system dominated by ideas of marketisation and the maximisation of returns to creditors and intermediaries. The history of personal insolvency policy is one of tension between the goals of debt collection and debtor rehabilitation.[3] In particular, just as the policy case for prioritising debt relief seems strongest, the pendulum of English personal insolvency law practice has swung in the opposite direction towards maximising returns to creditors.

Despite the centrality of household debt among causes of the Global Financial Crisis and Great Recession, personal insolvency law reform has not featured among policy responses. The prevailing opinion seems to be that English law operates effectively, as even those arguing for debt relief policies claim that 'the UK

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[2] Ian Fletcher, '"Out of Sight, out of Mind"? The Progressive Dematerialisation of Our Insolvency Procedures' (2017) 30 Insolvency Intelligence 81.

[3] Margaret Howard, 'A Theory of Discharge in Consumer Bankruptcy' (1987) 48 Ohio State Law Journal 1047, 1082; David A Skeel, *Debt's Dominion : A History of Bankruptcy Law in America* (Princeton University Press, 2001) 210.

bankruptcy process is widely considered to offer an example of international best practice in terms of speedy discharge, flexibility and debtor recovery.'[4] The reality of the law over the past decade, such as it remains open to public view, makes that perspective appear complacent. The 'speedy' debt discharge and debtor recovery under the bankruptcy and Debt Relief Order (DRO) procedures is increasingly denied to debtors. Further, the 'flexibility' of the law has become a euphemism for how its malleability allows creditors and intermediaries to advance their interests while producing outcomes that are less favourable for debtors and of dubious public interest. Government proposals for the introduction of a Statutory Debt Repayment Plan procedure would reintroduce a prior policy that has existed on the statute books - unused and without commencement - since the Tribunals, Courts and Enforcement Act 2007. Current policy betrays a lack of learning from the past decade regarding the urgency of household debt problems and the consequent public policy imperative of prioritising the debt relief function of personal insolvency law.

2. The Case for Debt Relief and The Potential of Personal Insolvency Law

While the political chaos gripping the UK suggests that much has changed since the Global Financial Crisis, it may also indicate the reality that for most people the contemporary economic order has changed too little.[5] After the crisis, the 'Great Conversation that many were expecting never took place'.[6] Our politics has not cast aside the trends of financialisation and dependence on debt that led our economy into turmoil. Austerity policies have intensified reliance on household debt to maintain both economic growth and household living standards, increasing the substitution of private debt for public debt.[7] Pro-cyclical austerity has coincided with the worst decade for real wage growth in two centuries,[8] leaving the economy heavily dependent on the 'privatised Keynesian' growth model of debt-based consumption.[9] Evidencing a 'credit/welfare trade-off',[10] reduced social welfare provision is now linked to increased debt, with several reports blaming cuts for pushing households to borrow in order to fill new budget gaps.[11]

This position leaves household indebtedness in the UK at historically high levels. Debt-to-income ratios of 140% dwarf the equivalent level of less than 80% in 1987.[12] Some estimates suggest that debt servicing ratios, representing the share of disposable household income spent on interest payments, now exceed pre-

[4] Matthew Whittaker and Katie Blacklock, 'Hangover Cure: Dealing with the Household Debt Overhang as Interest Rates Rise' (Resolution Foundation 2014) 61.
[5] Mark Blyth and Matthias Matthijs, 'Black Swans, Lame Ducks, and the Mystery of IPE's Missing Macroeconomy' (2017) 24 Review of International Political Economy 203.
[6] David Graeber, *Debt: The First 5,000 Years* (Melville House 2012) xx.
[7] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso Books 2014) 38–40; Aldo Barba and Massimo Pivetti, 'Rising Household Debt: Its Causes and Macroeconomic Implications—a Long-Period Analysis' (2009) 33 Cambridge Journal of Economics 113; Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP USA 2013) 152–177.
[8] Resolution Foundation, 'Public and Family Finances Squeezes Extended Well into the 2020s by Grim Budget Forecasts' (*Resolution Foundation*) <http://www.resolutionfoundation.org/media/press-releases/public-and-family-finances-squeezes-extended-well-into-the-2020s-by-grim-budget-forecasts/> accessed 3 October 2017.
[9] Colin Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' (2009) 11 The British Journal of Politics & International Relations 382; Bank of England, 'Financial Stability Report: June 2017' (Bank of England 2017) 41 14–15.
[10] Monica Prasad, *Land of Too Much* (Harvard University Press 2012) ch 9.
[11] Eileen Herden, Anne Power and Bert Provan, 'Is Welfare Reform Working? Impacts on Working Age Tenants' (LSE Housing and Communities, South West Hailo, LSE Centre for Analysis of Social Exclusion 2015) 5–6, 12; Suzanne Fitzpatrick and others, 'The Homelessness Monitor: England 2015' (Crisis UK 2015) viii.
[12] Bank of England (n 9) 3.

crisis figures.[13] The Financial Conduct Authority has uncovered widespread default and persistent debt among credit card users (with over two million accounts falling into this latter category),[14] while also finding concerns in bank overdraft and high-cost credit markets.[15] In addition, there has been a notable rise of problem debt in relation to essential obligations such as rent arrears and debts owed to central and local government.[16] The Money Advice Service now estimates that over eight million people in the UK can be categorised as over-indebted.[17]

The weight of this household debt burden generates a powerful case for expansive debt relief policies. It also creates an important role for personal insolvency law as a unique institution for discharging debt. In 2018, the National Audit Office (NAO) estimated the cost of problem debt at approximately £900 million per year. This cost captures individuals' likelihood to be living in subsidised housing or to be experiencing anxiety or depression.[18] Yet the figure represents only a small portion of the social costs of excessive household debt. For example, the NAO was unable to calculate costs relating to employment and social welfare benefits due to lack of data. A government estimate from 2003 cautiously proposed that reduced productivity resulting from over-indebtedness could amount to 30% of salary, approximately 1% of GDP.[19] Current levels surely represent a cost we may not afford to bear in an economy plagued by low productivity. These figures also omit what the last decade has revealed as one of the crucial economic costs of high debt levels: lost consumer spending caused by household 'debt overhang'.[20] Mian and Sufi offer the most developed explanation of this effect. They illustrate how the Great Recession in the USA appears less related to a financial crisis of bank lending, and is more accurately attributable to falling consumption among highly indebted households.[21] Similar effects of excessive leverage have been found in other countries, including the UK.[22] Various technical accounts now recognise that debt-burdened households demonstrate a higher marginal propensity to consume than society's creditors such that over-indebtedness, or even heavy leverage among solvent households, may deny an economy its main spenders.[23] In order to restore aggregate demand, policy responses in economic crises might require redistributing losses more evenly than the pro-creditor distributions produced by debt contracts,[24]

[13] Damon Gibbons, 'Britain in the Red: Why We Need Action to Help over-Indebted Households' (Centre for Responsible Credit (commissioned by TUC and Unison) 2016) 4.
[14] Financial Conduct Authority, 'Credit Card Market Study: Interim Report' (FCA 2015) MS14/6.2; Financial Conduct Authority, 'Credit Card Market Study: Final Findings Report' (FCA 2016) MS14/6.3; Financial Conduct Authority, 'Credit Card Market Study: Consultation on Persistent Debt and Earlier Intervention Remedies' (FCA 2017) CP17/10.
[15] Financial Conduct Authority, 'High-Cost Credit: Including Review of the High-Cost Short-Term Credit Price Cap' (FCA 2017) Feedback Statement FS17/2.
[16] *See e.g.* National Audit Office, 'Tackling Problem Debt' (National Audit Office 2018) <https://www.nao.org.uk/report/tackling-problem-debt/> accessed 3 December 2018; London Assembly, Economy Committee, 'Final Demand: Personal Problem Debt in London' (Greater London Authority 2015); Joseph Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction, and Bankruptcy's Social Safety Net' (2017) 44 Journal of Law and Society 374.
[17] Money Advice Service, 'A Picture of Over-Indebtedness' (Money Advice Service 2016) <https://www.moneyadviceservice.org.uk/en/corporate/one-in-six-adults-struggling-with-debt-worries> accessed 31 July 2017.
[18] National Audit Office (n 16) 7.
[19] Department of Trade and Industry, *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century (White Paper)* (HMSO 2003) 138.
[20] Atif Mian and Amir Sufi, *House of Debt* (University of Chicago Press 2014); Philip Bunn and May Rostom, 'Household Debt and Spending in the UK' (Bank of England 2015) 554; Bank for International Settlements, 'The Global Economy: Maturing Recoveries, Turning Financial Cycles?' (BIS 2017) 48–50; International Monetary Fund, 'Household Debt and Financial Stability', *Global Financial Stability Report October 2017* (IMF 2017) 65.
[21] Mian and Sufi (n 20).
[22] Bunn and Rostom (n 20).
[23] International Monetary Fund, 'Dealing with Household Debt', *World Economic Outlook 2012* (IMF 2012) 9–10 <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/c3.pdf>; Mian and Sufi (n 20) 50–1, 131–3, 140–8.
[24] Mian and Sufi (n 20) 18–20, 50–52.

necessitating extensive household debt relief. As an example of the economic benefits of such redistribution, the FCA's redress scheme in relation to PPI mis-selling has contributed to growth by refunding billions of pounds in compensation to borrowers.[25]

One consequence of the current situation is that policymakers' pre-crisis faith in the economic benefits of financial market expansion has been replaced by an emerging acceptance that 'less finance can be better'.[26] While once the link between financial development and growth was unquestioned, evidence mounts that elevated levels of leverage reduce the likelihood of economic growth.[27] Regulatory responses that restrict excessive lending are appropriate and can prevent future debt problems from building up.[28] However, they cannot address existing high debt levels. Recent years have shown the limits of monetary policy both in addressing outstanding leverage levels and boosting household consumption activity.[29] Fiscal measures are a more promising means of addressing debt overhang, with social transfers (such as unemployment benefits) acting as 'automatic stabilisers' to rebalance the economy.[30] Nonetheless, that possibility has been so far thwarted by ideological commitments to austerity policies where governments see little available 'fiscal space' for such approaches.[31] In this context, debt relief policy measures may be particularly appropriate as an alternative to fiscal measures in 'economies with limited scope for expansionary macroeconomic policies'.[32] I argue that a strong case exists for expansive debt relief policies and that personal insolvency law can offer this, particularly through debt discharge available under the bankruptcy and debt relief order (DRO) procedures. Yet bankruptcy laws are only rarely invoked in discussions regarding policy responses to problem of excessive household debt. Professor Fletcher argued that the 'dematerialisation' of insolvency has rendered the law less visible, with one consequence being the displacement of the law from the forefront of policymakers' minds and public discussion. This dematerialisation also obscures the potentially central role that insolvency law could play in addressing this pressing policy challenge. In the next sections, I illustrate how a dematerialisation of personal insolvency, through declining use of public procedures and maximum privatisation, has increasingly driven the law out of the scope of democratic deliberation, while also inhibiting its ability to achieve positive public policy outcomes.

3. Austerity, Recession and the Changing Shape of Personal Insolvency Law

The response of personal insolvency in the past decade has moved the law in the opposite direction to that suggested by the policy literature described above. In his 2017 article, Professor Fletcher wrote that '[s]ince the last quarter of the twentieth century successive reforms of the law of personal bankruptcy have been directed at providing a less harsh experience for those debtors deemed to belong to the category of "honest but unfortunate

[25] One agency estimated in 2012 that payments at a level of £15bn could boost UK GDP by 0.7%. Thus far, payments have exceeded significantly £30bn. See the discussion by Professor Kempson, citing the National Institute for Economic and Social Research: Elaine Kempson, 'What Explains the Low Impact of the Financial Crisis on Levels of Arrears among UK Households?' in Federico Ferretti (ed), *Comparative Perspectives of Consumer Over-Indebtedness* (Eleven International Publishing 2016) 79.
[26] Adair Turner, *Between Debt and the Devil: Money, Credit, and Fixing Global Finance* (Princeton University Press 2015) 17; Mian and Sufi (n 20) 127.
[27] International Monetary Fund (n 20) 53.
[28] Bunn and Rostom (n 20); International Monetary Fund (n 20).
[29] Anna Zabai, 'Household Debt: Recent Developments and Challenges' (2017) 2017 Bank for International Settlements Quarterly Review 39, 45.
[30] International Monetary Fund (n 23) 13, 26.
[31] Jason Furman, 'How Lawyers Can Help Macroeconomists in the Wake of Three Major Challenges Keynote Address' (2017) 34 Yale Journal on Regulation 709, 719–720.
[32] International Monetary Fund (n 23) 27.

casualties of circumstance", rather than "irresponsible or amoral abusers of the credit system".'[33] This is undoubtedly true of law-on-the-books over this period, but law-in-action has done much to undo this legislative progress and to swing the pendulum away from debt relief and towards increased repayment to creditors. High costs and limited access criteria exclude debtors from the comparatively generous debt relief offered via the bankruptcy and DRO procedures. This has led to an alarming decline in use of these two procedures best placed to offer the debt relief contemporary economic conditions demand (Figure 1). Instead, these exclusions coupled with the marketing practices of insolvency intermediaries mean that most debtors are now subject to the harsher experiences of long-term repayment plans via Individual Voluntary Arrangements (IVAs) and Debt Management Plans (DMPs). This changes the shape of personal insolvency from a publicly-administered law under which debtors obtain relief as of right under democratically determined conditions, towards a privatised process under which the terms of debt forgiveness are set opaquely by creditors and intermediaries.

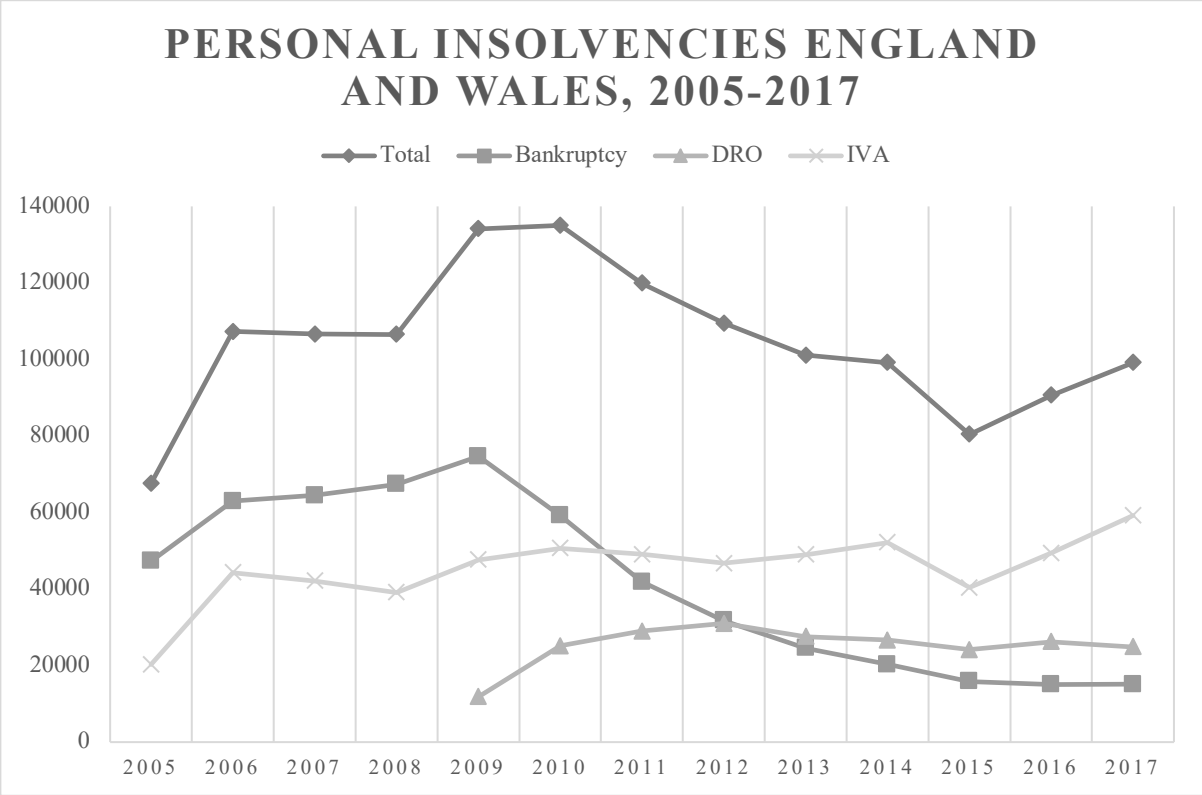

FIGURE 3.1: PERSONAL INSOLVENCY RATES, 2005-2017. SOURCE: THE INSOLVENCY SERVICE

A. Challenging Austerity and the Marketisation of Bankruptcy

One dimension of this trend, well-documented elsewhere,[34] is the limited access to bankruptcy and DRO procedures caused by high fees (in relation to both procedures) and a ceiling on debt levels for DRO applicants

[33] Fletcher (n 2) 83.

[34] Joseph Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge University Press 2019) ch 4; Sharon Collard, Colin Kinloch and Sarah Little, 'Debt Solutions in the UK Recommendations for Change' (Money Advice Service 2018); Joseph Spooner and Iain DC Ramsay, 'Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit - Submission by Professor Iain Ramsay and Dr Joseph Spooner to the Insolvency Service Call for Evidence' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2601349 <http://ssrn.com/abstract=2601349> accessed 31 July 2015.

(currently set at £20,000).[35] While access fees have long featured in bankruptcy law[36] they were increased substantially (by 40%) between 2009 and 2011.[37] This coincided with increasing court costs (alongside cuts to legal aid services[38]) under austerity policies.[39] The effect of these fees in reducing access to employment tribunals generated considerable political controversy and criticism from observers,[40] and ultimately led to a tipping point at which the judiciary invalidated these particular excesses of austerity. In *UNISON*, the UK Supreme Court condemned employment tribunal fees as contrary to the common law right of access to justice.[41] The legality of the bankruptcy fee regime relies on the turn-of-the-century decision by the Court of Appeal in *Lightfoot*.[42] Here the court said that bankruptcy costs do not threaten access to justice and merely represent payment 'towards the costs of services being provided by others for the petitioner's benefit.'[43] *UNISON* however challenges the 'assumption that the administration of justice is merely a public service like any other [and] that courts and tribunals are providers of services to the "users" who appear before them' as failing to understand 'the importance of the rule of law'.[44] The Supreme Court emphasised the public importance of access to the courts in developing the law through determining questions of public interest, and in giving effect to legislative rights where democratic politics has decided the public interest requires their enforcement, cannot be underestimated.[45] According to the judges, in the employment law context it must be possible for employees to enforce rights, 'if employment relationships are to be based on respect for those rights.' The alternative is that 'the party in the stronger bargaining position will always prevail.' Without access to justice, 'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[46]

These words give considerable pause for thought as the number of bankruptcy cases plummets. Has austerity's exclusion of debtors from bankruptcy undermined the democratic decision that insolvent debtors have the right to a 'fresh start' and full debt discharge on completing a one-year waiting period?[47] The *Lightfoot* logic that bankruptcy does not involve issues of access to justice ignores how personal insolvency law develops in the courts as well as through statute and administrative practice,[48] a fact that must be clear to the government agencies who litigate in superior courts in search of favourable interpretations of bankruptcy law.[49] Access to justice arguments apply equally to the creditor-debtor relationship as to that of employers and employees. Personal insolvency laws form part of the 'ground rules' of credit markets, and the (un)availability of

[35] Insolvency Act 1986, Sched. 4ZA para. 6.; Insolvency Proceedings (Monetary Limits) Order 1986/1996, Sched. 1
[36] John Tribe, 'The Lightfoot Paradox: Financing the Cost of Personal Insolvency Relief through Bankruptcy Revenue Stamps and Sliding Scales - Part A' (2016) 29 Insolvency Intelligence 97.
[37] See e.g. comments of Richard Judge, Chief Executive of the Insolvency Service, in: The Insolvency Service: Oral Evidence Taken Before the Business, Innovation and Skills Committee (House of Commons, Hansard 2012).
[38] It is estimated that legal aid funding for debt problems has been cut by 75%: Great Britain: Parliament: House of Commons: Business Committee Innovation and Skills, *Debt Management: Fourteenth Report of Session 2010-12, Report, Together with Formal Minutes, Oral and Written Evidence* (The Stationery Office 2012) paras 135–7.
[39] *See* Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 The Modern Law Review 412, 414–419.
[40] Adams and Prassl (n 39).
[41] *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51.
[42] *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597 (Court of Appeal (England and Wales)); Spooner, *Bankruptcy* (n 34) ch 4.
[43] *Lightfoot* (n 42) 623, per Simon Brown LJ.
[44] *UNISON* (n 41) para 66.
[45] ibid 72.
[46] ibid 68.
[47] As established under the Enterprise Act 2002.
[48] David Milman, 'Bankruptcy in the Courts: Continuity in an Era of Change?' (2017) 30 Insolvency Intelligence 91; David Milman, 'The Challenge of Modern Bankruptcy Policy: The Judicial Response.' in Sarah Worthington (ed), *Commercial Law & Commercial Practice* (Hart Publishing 2003).
[49] *Regina (Cooper and Payne) v Secretary of State for Work and Pensions* United Kingdom Supreme Court [2011] UKSC 60, [2012] 2 WLR 1.

bankruptcy to borrowers changes market dynamics considerably.[50] Moreover, *UNISON* challenges the status quo of contemporary austerity and its underpinning neoliberal assumption that bankruptcy is merely a 'service' provided to paying 'users'.[51] It reminds us of the classic judicial observation that bankruptcy's debt relief function must be recognised 'as being of public, as well as private, interest, in that it gives to the honest but unfortunate debtor… a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'[52] The dematerialisation of insolvency law has been based on an overriding aim of 'the elimination of resource-hungry procedures',[53] but bankruptcy may offer policy benefits for which it is worth paying.

B. Failures in the Personal Insolvency Marketplace

The decline of the bankruptcy and DRO procedures has been accompanied by the rise of IVAs and DMPs, in what has effectively involved a privatisation of personal insolvency. This represents a lucrative development for intermediaries, particularly for large 'volume' providers,[54] and evidence from the last decade raises substantial concerns regarding marketing practices underpinning these trends. The structure of English personal insolvency law has created a complicated array of potential solutions from which debtors must evaluate the most appropriate option, creating a privileged role for intermediaries as gatekeepers. This represents a classic agency problem, where the interests of intermediaries may diverge from those of the debtors they represent.[55] Evidence from a range of North American empirical studies demonstrates that insolvency intermediaries frequently 'steer' debtors into procedures based more on the advancement of intermediary interests than those of their clients.[56] Unsurprisingly, regulatory investigations from the FCA and OFT have uncovered similar problems in the English system over the past decade.[57]

In 2018, the Insolvency Service added to this picture in an investigation of the monitoring and regulation of Insolvency Practitioners (IPs), that raised 'significant concerns about how IPs at "volume IVA" firms operate and are regulated.'[58] It found 'poor quality advice being given to debtors, potentially leading them to enter an IVA when other debt solutions may be more appropriate', unjustified charging of expenses, and 'financial products being potentially mis-sold to individuals who do enter an IVA'.[59] It also uncovered intermediaries manipulating figures regarding debtors' expenditure so as to produce a monthly surplus income of £50 on debtor balance sheets, artificially pushing low-income debtors out of DRO eligibility and into IVAs.[60] The Insolvency Service raised further concerns regarding the effectiveness of the self-regulatory regime applicable to IPs, finding that the Recognised Professional Bodies overseeing

[50] Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 Oxford Journal of Legal Studies 177, 178–189.
[51] *UNISON* (n 41) para 66.
[52] *Local Loan Co v Hunt* (1934) 292 US 234 (US Supreme Court) 244.
[53] Fletcher (n 2) 81.
[54] Insolvency Service, 'Review of the Monitoring and Regulation of Insolvency Practitioners' (Insolvency Service 2018) 10.
[55] Frank McIntyre, Daniel M Sullivan and Laura Summers, 'Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcies' (2015) 17 American Law and Economics Review 245.
[56] Pamela Foohey and others, 'No Money down Bankruptcy' (2016) 90 Southern California Law Review [i]; Stephanie Ben-Ishai and Saul Schwartz, 'Credit Counselling in Canada: An Empirical Examination' (2014) 29 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 1; Jean Braucher, Dov Cohen and Robert M Lawless, 'Race, Attorney Influence, and Bankruptcy Chapter Choice' (2012) 9 Journal of Empirical Legal Studies 393; Jean Braucher, 'Lawyers and Consumer Bankruptcy: One Code, Many Cultures' (1993) 67 American Bankruptcy Law Journal 501.
[57] Financial Conduct Authority, 'Quality of Debt Management Advice' (2015) Thematic Review TR15/8; Office of Fair Trading, 'Debt Management Guidance Compliance Review' (2010) OFT1274.
[58] Insolvency Service, 'IP Review' (n 54) 4.
[59] ibid 10–11.
[60] ibid 12.

practitioners tended neither to bring disciplinary action nor to order compensation where evidence was available of debtors being diverted into inappropriate solutions.[61] These findings should make clear the role of intermediary incentives in contributing to the trend towards increased IVAs and DMPs over bankruptcies and DROs.

Supporting empirical evidence from the more carefully studied US bankruptcy system,[62] the limited available evidence under a dematerialised English personal insolvency law suggests poor outcomes for many debtors who enter long-term repayment plans. Regulators have found creditors making onerous demands when negotiating IVAs,[63] and have uncovered intermediary practices that involve squeezing debtors into unaffordable plans.[64] In this context it is unsurprising that IVAs now exhibit failure rates of approximately 30-40%.[65] The few published empirical studies of IVAs exhibit 'general agreement that IVA terms are currently overly dictated by creditor groups'[66] as 'the debtor is effectively powerless'.[67] Over time creditors have leveraged this power to extend the average repayment period duration long beyond the three years envisaged by the Cork Committee on designing the IVA.[68] Despite prevailing claims among stakeholders that IVAs typically endure for 5-6 years, Insolvency Service data show significant minorities of longer-term plans. By the end of 2017, ongoing IVAs included over five per cent of arrangements commenced in 2009 and almost one quarter of those commenced in 2011.[69] Outcomes for debtors are even worse under DMPs, with the FCA finding many examples of debt management companies 'recommending very long debt management plans (often many decades long, some 100+ years) when debt relief solutions are likely to have been more appropriate'.[70] The FCA also uncovered problems of unsustainably high repayments under DMPs,[71] alongside practices of intermediaries taking front-loaded fees before passing on any debtor payments to creditors, 'rolling over' debtors from unsustainable DMPs into IVAs, and discouraging debtors from availing of free debt advice.[72] It is difficult to see how positive outcomes arise for debtors and the wider economy from financially struggled households remaining trapped in long-term repayment plans, often on the edge of affordability and failure. If regulators are concerned to address effects of 'persistent debt' among credit card borrowers,[73] why should they be content to watch debtors increasingly becoming locked into persistent debt under IVAs and DMPs, when legislation makes rapid debt relief available under bankruptcy and DROs?

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[61] ibid 11.

[62] Katherine Porter, 'The Pretend Solution: An Empirical Study of Bankruptcy Outcomes' (2011) 90 Texas Law Review 103; Braucher, Cohen and Lawless (n 56); Sara S Greene, Parina Patel and Katherine Porter, 'Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes' (2016) 101 Minnesota Law Review 1031; Foohey and others (n 56).

[63] Insolvency Service, *Survey of Debtors and Supervisors of Individual Voluntary Arrangements* (2008) 30–4; Insolvency Service, *Review of the Impact of the IVA Protocol* (Insolvency Service 2009) 18, 27.

[64] On the link between unaffordability of repayments and IVA failure, see e.g. Sue Morgan, 'Causes of Early Failures in Individual Voluntary Arrangements' (2008) 42; Insolvency Service, *Survey of Debtors and Supervisors of Individual Voluntary Arrangements* (n 63) 12; Insolvency Service, *Review of the Impact of the IVA Protocol* (n 63) 18.

[65] Insolvency Service, 'Individual Voluntary Arrangement Outcomes and Providers 2017' (*GOV.UK*) <https://www.gov.uk/government/statistics/individual-voluntary-arrangement-outcomes-and-providers-2017> accessed 4 January 2019.

[66] Morgan (n 64) 41.

[67] Michael Green, 'Individual Voluntary Arrangements Over-Indebtedness and the Insolvency Regime: Short Form Report' (University of Wales 2002) 8.

[68] Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (HMSO, 1982) para 387.

[69] Insolvency Service, 'IVA Outcomes 2017' (n 65).

[70] Financial Conduct Authority, 'Quality of Debt Management Advice' (n 57) para 4.55.

[71] ibid 4.22, 4.34.

[72] Becky Rowe and others, 'Financial Conduct Authority Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services' (ESRO, FCA 2014) 38–43.

[73] Financial Conduct Authority, 'Credit Card Consultation' (n 14).

This evidence from the past decade should expose dubious claims that IVAs and/or DMPs can produce better outcomes for debtors than bankruptcy or DROs, outside of exceptional cases of debtors fortunate enough to benefit from significant property holdings or low debt levels (or, exceptionally, certain elevated professional status jeopardised by bankruptcy). Often such claims are founded on exaggerated accounts of the benefits of IVAs/DMPs and costs of bankruptcy/DROs. The 2018 Insolvency Service investigation found IPs leveraging public fears and lack of knowledge regarding bankruptcy in order to divert clients into more lucrative options.[74] The lack of transparency associated with the dematerialisation of personal insolvency law has placed certain stakeholders into powerful positions as custodians of key information. In this context one might ask for self-reflection from professional organisations who list advantages of IVAs as including their ability to 'allow an individual to avoid the perceived stigma of bankruptcy'. [75] It is difficult to see how these gatekeepers' emphasis of negative associations does not itself contribute to bankruptcy stigma.

The FCA's response to its findings regarding DMPs was to conduct an extensive review of the debt management sector, refusing authorization to many providers.[76] This action was effective in prompting many other providers to leave the marketplace voluntarily or switch to IVA provision, availing of the regulatory arbitrage opportunities made available by a system under which IVAs fall outside the FCA's jurisdiction, and are subject to the lighter-touch regime exposed by the recent Insolvency Service investigation.[77] The FCA's judgment was that many DMP providers did not meet the minimum standards necessary to operate in the marketplace, and effectively that their DMPs were unsafe products.[78] These DMP providers thus experienced a similar fate to high-cost lender Wonga, as firms whose business models were found to be unsustainable when subjected to regulatory scrutiny. This suggests that similar questions must be asked about the IVA firms found to have engaged in practices analogous to those of extinct DMP providers, and about the utility of the IVA product that in many cases guarantees worse outcomes for consumer debtors than bankruptcy or DROs.

4. Current Government Proposals: Personal Insolvency Law remains Out of Mind

A lack of transparency in the personal insolvency system may be convenient not only to the stakeholders operating profitably within this environment, but also to policymakers unwilling to confront its problems.[79] Changes to personal insolvency law since the crisis have been minimal. At time of writing, the government is consulting on the introduction of 'Breathing Space' and 'Statutory Repayment Plan' mechanisms.[80] It is

[74] Insolvency Service, 'IP Review' (n 54) 13.
[75] R3: Association of Business Recovery Professionals, 'Volume IVA Providers: Recommendations for Strengthening the Regulatory Framework' (2018) 11.
[76] Financial Conduct Authority, 'Review of Debt Management Sector Gets Underway' (*FCA*, 18 October 2017) <https://www.fca.org.uk/news/news-stories/review-debt-management-sector-gets-underway> accessed 3 December 2018; Money Advice Service, 'A List of Companies and Individuals That Deal with Debt Management That Are No Longer Able to Offer Debt Management Plans' <https://www.moneyadviceservice.org.uk/en/articles/debt-management-companies> accessed 3 December 2018.
[77] Financial Conduct Authority, 'Sector Views 2017' (2017) 23.
[78] Oren Bar-Gill and Elizabeth Warren, 'Making Credit Safer' (2008) 157 University of Pennsylvania Law Review 1.
[79] *See e.g.* Iain Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart Publishing 2017) 104.
[80] HM Treasury, 'Breathing Space Scheme: Consultation on a Policy Proposal' (*GOV.UK*, 29 October 2018) <https://www.gov.uk/government/consultations/breathing-space-scheme-consultation-on-a-policy-proposal> accessed 10 December 2018.

puzzling to see these proposals prioritised, given the problems identified above and alternative reform ideas currently in circulation. In a recent report on household debt commissioned by the Money Advice Service, the first four of eight policy recommendations were directed at removing the obstacles to accessing bankruptcy outlined above.[81] Meanwhile, Australian policymakers appear to have accepted evidence that their debt agreement procedure is susceptible to similar problems as the IVA market.[82] They have introduced reforms to cap the length of repayment plans at three years, to empower the Australian Official Receiver to reject plans which risk causing financial hardship to debtors, and to tighten the regulation of practitioners.[83] Irish personal insolvency law has determined reasonable levels of debtor repayments openly and democratically, in a manner that contrasts with the secrecy of the UK Standard Financial Statement model.[84] In addition, debtor access fees have been waived and advice funding has been provided to debtors unable to hire intermediaries, while the underlying emphasis of the Insolvency Service of Ireland is to promote more, rather than fewer, personal insolvencies.[85]

The UK government proposals are comparatively limited in their ambition. The 'Breathing Space' mechanism would allow debtors to apply, through a debt advice agency, for a moratorium on creditor collection activity while they receive advice regarding appropriate debt solutions. The proposed 'Statutory Repayment Plan' procedure effectively aims to put voluntary DMPs (involving full repayment of sums owed) on a statutory basis, making such arrangements legally binding when approved by a qualified majority of creditors (75% in value) and/or the Insolvency Service. The government consultation offers further evidence in support of Professor Ramsay's observation that 'historical amnesia is a common disease in bankruptcy policymaking',[86] as the Tribunals, Courts and Enforcement Act 2007 has already enacted similar repayment plan provisions onto the statute book, though these have never been commenced. As minimalistic interventions, the proposals seem to emanate from a pre-crisis era of faith in the efficiency of financial markets and the welfare-enhancing nature of consumer credit. They conflict with the more drastic solutions warranted in the post-crisis era and the pressing contemporary case for expansive debt relief policies. They also appear to ignore the past decade of evidence regarding widespread problems associated with IVA and DMP repayment plans and the patently worse outcomes for debtors produced by these procedures compared to bankruptcy and DROs. It is difficult to explain why, at a time when the FCA is taking steps towards withdrawing DMPs from the marketplace, government wishes to give legislative imprimatur to this frequently defective product. Further, the addition of any new procedures (even those having potential to assist debtors, such as the 'Breathing Space') increases complexity and creates opportunities for intermediaries to avail of consumer confusion to divert those seeking assistance into most profitable options.[87] The proliferation of procedures contradicts recommendations advanced by the Cork Committee and several academic authors for the introduction of a

[81] Collard, Kinloch and Little (n 34).
[82] Vivien Chen, Lucinda O'Brien and Ian Ramsay, 'An Evaluation of Debt Agreements in Australia' (2018) 44 Monash University Law Review 151.
[83] 'Comprehensive Reform of the Debt Agreement System' <https://www.attorneygeneral.gov.au/Media/Pages/Comprehensive-reform-of-the-debt-agreement-system-12-February-2018.aspx> accessed 21 November 2018.
[84] Insolvency Service of Ireland, 'Reasonable Living Expenses Guidelines' (June 2013) <http://www.isi.gov.ie/en/ISI/Pages/Reasonable_living_expenses> accessed 9 July 2013.
[85] *See e.g.* The Insolvency Service of Ireland, 'ISI Welcomes "Abhaile" the New Mortgage Arrears Resolution Service and Launches a New Information Campaign' (*The Insolvency Service of Ireland*, 3 October 2016) <https://www.isi.gov.ie/en/ISI/Pages/Abhaile_new_Mortgage_Arrears_Resolution_Service_and_ISI_Information_Campaign_launch> accessed 25 October 2016; Joseph Spooner, 'The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: The Case of Ireland and the Troika' (2018) 81 The Modern Law Review 790.
[86] Ramsay (n 79) 43.
[87] William C Whitford, 'The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy' (1994) 68 American Bankruptcy Law Journal 397; Porter (n 62) 113.

simple 'single portal' under which courts or administrators direct debtor applications to the most appropriate solutions from a public policy perspective.[88]

5. CONCLUSION

The UN Special Rapporteur on Extreme Poverty and Human Rights recently concluded that the UK government 'has remained determinedly in a state of denial' regarding the problem of poverty in this country.[89] This state of denial seems to extend to problems of household debt. In responding to a recent Parliamentary committee enquiry on household finances, the government reported proudly that household incomes are slightly higher and debt levels slightly lower than before the crisis.[90] One wonders how such limited improvement in household finances over the past decade could be celebrated, rather than recognised as an existential threat to our contemporary order of financialized capitalism. Household debt, and more narrowly personal insolvency, both fall between various government departments and bodies with none seemingly determined to take responsibility.[91] Government attitudes towards personal insolvency policy in recent decades have favoured maximum privatization and minimal public intervention, and observers might get the impression that policymakers are content for this area to remain out of sight and out of mind. This paper has aimed to show that such blindness comes at a high cost given personal insolvency law's potential to address pressing policy challenges associated with excessive household debt and the current obstacles to the law fulfilling this potential. Professor Fletcher concluded his article by arguing that the time is right for a comprehensive empirical inquiry into the operation of insolvency law to produce a coherent restatement **'**fit for use in the twenty-first century'.[92] The very least we could do to honour Professor Fletcher would be to echo his call.

[88] Cork (n 68) paras 550, 272 et seq., more widely 545-565; Whitford (n 87); Jean Braucher, 'A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal' (2005) 55 American University Law Review 1295; Porter (n 62); Spooner and Ramsay (n 34).

[89] Philip Alston, 'Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights' (UN Office of the High Commissioner on Human Rights 2018) 1.

[90] House of Commons Treasury Committee, 'Household Finances: Income, Saving and Debt: Government Response to the Committee's Nineteenth Report' (2018) HC 1627.

[91] National Audit Office (n 16); Comptroller and Auditor General, *Helping Over-Indebted Consumers* (The Stationary Office 2010); Ian F Fletcher, *The Law of Insolvency* (4th Revised edition, Sweet & Maxwell 2009) 17.

[92] Fletcher (n 2) 85.