

THE LAST BANKRUPT HANGED: BALANCING INCENTIVES IN THE DEVELOPMENT OF BANKRUPTCY LAW

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ABSTRACT

This Article frames the history of the Anglo-American bankruptcy tradition as a search for solutions to the basic problem that has from the first underlain the bankruptcy process: how to obtain the assistance of a debtor in his financial dismantling. The pivotal moment in this story came in the years 1705 and 1706, when the English Parliament drafted a bill making the bankrupt's refusal to cooperate with the commissioners running his bankruptcy a capital crime. Almost as an afterthought, they also introduced discharge of debt. Incentivizing cooperation with discharge would have a fruitful future. Coercing the debtor to be honest, however, proved a failure. Fraud flourished, and few perpetrators were executed, in part because creditors and jurors found putting bankrupts to death a bit excessive. And yet, despite the failure of the English experiment with harsh penalties, the desire to punish debtors has remained a part of the culture of bankruptcy to this day.

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INTRODUCTION

Around eight o'clock in the morning on Wednesday, November 11, 1761, the condemned prisoner, John Perrott, was taken from his cell in London's Newgate Prison.¹ He spent some time praying with the prison chaplain and receiving the Sacrament; then his leg shackles were knocked off and his hands bound. At a quarter after ten, he appeared "pale and trembling" in the prison yard.² According to a newspaper account, standing in the yard awaiting his fate, "his behaviour there was so decent and so Christian, that it greatly affected every person present."³ A few minutes later the under sheriff came to transport Perrott to his execution. He was loaded onto a cart and carried the short distance to the scaffold erected at the ancient hanging place in West Smithfield. Once there, Perrott looked about anxiously, concerned to see his hearse.⁴ Reassured of its presence, he

1. LLOYD'S EVENING POST (London), Nov. 9, 1761, at 463; LLOYD'S EVENING POST, Nov. 13, 1761, at 478; PUB. LEDGER (London), Nov. 12, 1761, at 1082.

2. 2 ANDREW KNAPP & WILLIAM BALDWIN, THE NEWGATE CALENDAR 325 (London, J. Robins & Co. 1825).

3. LLOYD'S EVENING POST, Nov. 9, 1761, at 463.

4. 4 WILLIAM JACKSON, THE NEW AND COMPLETE NEWGATE CALENDAR 211–12 (London, Alex Hogg 1795).

prayed fervently and at around eleven o'clock was "launched into eternity."⁵

Hanging was a spectator sport in eighteenth-century England, and the accounts of Perrott's execution suggest that the usual crowd turned out to watch him swing.⁶ They came to see off not a murderer, rapist, or highwayman, but rather a bankrupt, albeit a quite spectacular and long remembered one.⁷ Perrott was one of likely only four Englishmen hanged for the crime of fraudulent bankruptcy between 1706 and 1820,⁸ and he was later occasionally—though mistakenly—believed to have been the last bankrupt hanged.⁹

Made a capital offense in 1706 by the Act of 4 & 5 Anne, the crime of fraudulent bankruptcy was statutorily defined as a debtor's failure to cooperate fully with his creditors by appearing before the bankruptcy commissioners and disclosing all of his assets after becoming a bankrupt.¹⁰ The death penalty was abolished for such post bankruptcy crime in 1820, and the offense and the men who were executed under it have become something of a curiosity, relegated to offhand dismissal in current historical scholarship.¹¹ By contrast,

5. 4 THE BLOODY REGISTER: A SELECT AND JUDICIOUS COLLECTION OF THE MOST REMARKABLE TRIALS 275 (London 1764); PUB. LEDGER, Nov. 12, 1761, at 1082.

6. See PUB. LEDGER, Nov. 12, 1761, at 1082 (detailing the reaction of observers to Perrott's behavior in the prison yard and his "exhort[ing]" the crowd before his execution); see also V.A.C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE, 1770–1868, at 56 (1994) (describing the practice of crowds watching executions).

7. See SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, AND OF THE OPERATION THEREOF, MINUTES OF EVIDENCE, 1818, H.C. 127, at 21 (testimony of Basil Montagu) (calling Perrott's case "well known"); ALFRED MARKS, TYBURN TREE: ITS HISTORY AND ANNALS 227 (1908) (referring to "[t]he most remarkable case . . . of John Perrott"); LEEDS MERCURY, Apr. 10, 1813, at 3 ("Only one instance has occurred, we believe, within the memory of man of any bankrupt, before John Senior, suffering capital punishment for the concealment of his effects, and that individual was John Perrott . . . who suffered in the year 1761. Perrott's case, it is said, made a considerable sensation at the time . . .").

8. See *infra* note 222 and accompanying text.

9. For example, an editor's note to a nineteenth-century edition of Blackstone's *Commentaries* called Perrott the last bankrupt hanged. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS: ADAPTED TO THE PRESENT STATE OF THE LAW BY ROBERT MALCOLM KERR *482 n.a (London, John Murray 3d ed. 1862). In fact, the last bankrupt was hanged in York in 1813. See *infra* text accompanying notes 228–32.

10. 4 & 5 Ann., c. 17, §§ 1, 18 (1705 [1706 n.s.]); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *156 (defining fraudulent bankruptcy).

11. See 1 Geo. IV, c. 115 (1820) (abolishing the death penalty for fraudulent bankruptcy); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 156–57 (1982) (discussing 4 & 5 Anne but not mentioning the capital felony provision); John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 167 (1996) (giving little attention

discharge of debt, which was also introduced in the 1706 Act of Anne, is recognized as a crucial pivot point in the history of bankruptcy.¹² For the first time, the law took the interests of the bankrupt into account, however feebly and perhaps even unintentionally.¹³ Since then, Anglo-American bankruptcy law has paid increasing attention to the needs of debtors, and discharge remains one of its defining elements.¹⁴

This Article argues that the role of discharge as an innovation that changed the nature of bankruptcy cannot be fully appreciated without taking the capital punishment provision into account. The two options in the 1706 law—assist the debtor or punish the debtor—represented parallel solutions to the fundamental contradiction on which bankruptcy has from the beginning been built, namely that the debtor must assist in his own financial dissolution.¹⁵ In modern bankruptcy, since the introduction of discharge in the eighteenth century and of voluntary bankruptcy in the nineteenth, this assistance has come to be viewed as a tradeoff that the debtor makes to be freed of the burden of unpayable debts.¹⁶ But this balancing of the interests and duties of debtors and creditors did not exist in early bankruptcy. Whereas today the debtor who turns over his assets may walk away with a discharge, prior to 1706, the debtor had to participate in his

to the capital punishment clause in a study of the 1706 Act); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 11 (1995) (“While obviously quite dramatic, the importance of the death penalty for fraudulent bankrupts should not be overstated . . .”).

12. McCoid, *supra* note 11, at 164.

13. Some scholarly disagreement exists about the extent to which Parliament viewed discharge as a concession to debtors versus merely a way to help creditors get repaid. *See, e.g., id.* at 163 & n.4 (collecting sources that characterize discharge as a creditor’s remedy); Ian P.H. Duffy, *English Bankrupts, 1571–1861*, 24 AM. J. LEGAL HIST. 283, 286 (1980) (discussing discharge’s underpinnings as a concession to non-fraudulent debtors).

14. The heart of modern American bankruptcy law is the discharge by which the debtor, in exchange for providing the bankruptcy trustee with information about his or her finances, turning over his or her assets, and in some instances paying some portion of what he or she owes, is discharged of most debts. *See* 11 U.S.C. §§ 521, 523(a), 541, 727(a) (2006); *see also* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (listing discharge and debtor rehabilitation as “primary purposes” of American bankruptcy law); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393, 1394–96 (1985) (describing the modern discharge process as a “fresh-start policy”).

15. *See, e.g.,* SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 47 (testimony of Germain Lavie, solicitor) (testifying before the House of Commons committee on bankruptcy reform in 1818 that “[i]t is the co-operation of the bankrupt, and the assistance that he affords in the settlement of his affairs, that I consider essential”).

16. *See supra* note 14.

complete financial and personal degradation without having the right to expect anything, except almost certain incarceration in debtors' prison, in return.

This need for debtor cooperation in the face of solely negative incentives created a compliance problem that helped make early bankruptcy unpopular and ineffective.¹⁷ Societies have since discovered that, in bankruptcy, balance matters. In many areas of law, no balancing of interests is necessary. The law of sales, for example, functions equally well whether the acceptance of a contract is valid on dispatch or on receipt, whether a thief in the chain of title does or does not vitiate ownership by a good faith purchaser, or whether a valid contract does or does not require consideration. But in bankruptcy the particular rules are not neutral because societal and economic factors larger than the mere preferences of private parties are at stake.¹⁸ A credit economy relies on the promise that current debts will be paid in the future. If such promises are not kept, the economy falters. But if all promises to pay are fully enforced, entrepreneurial activities will decline and too many productive citizens will lose their incentive to earn in the face of perpetually paying past debts with future earnings.¹⁹ The idea behind creating a

17. See, e.g., 1 THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1693–1695, at 360 (1900) (quoting the 1694 draft of a bill commencing, “[w]hereas the laws heretofore made against bankrupts are defective in many cases, and it is found by experience that few of their creditors, even after a tedious and oppressive prosecution of Commissions of Bankruptcy recover their debts or any considerable part thereof”); SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 50 (testimony of Sir Samuel Romilly, Member, Select Comm. Appointed to Consider of the Bankrupt Laws, and of the Operation Thereof) (“The bankrupt laws appear to me to be in many respects extremely defective, and to require much alteration.”); DANIEL DEFOE, AN ESSAY UPON PROJECTS 192 (London, Thomas Ballard 2d ed. 1702) (1697) [hereinafter DEFOE, ESSAY] (“This Law . . . tends wholly to the Destruction of the Debtor, and yet very little to the Advantage of the Creditor.”); 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 245 (2d ed. 1937) (“That neither the Legislature, nor the common law, nor equity, had succeeded in constructing a satisfactory body of law, is clear from the fact that the defects pointed out at the beginning of the nineteenth century, are, to a large extent, the same as those pointed out by Brinklow in the sixteenth century.”).

18. For an early expression of the understanding of the larger societal impact of bankruptcy, see AN HUMBLE PROPOSAL TO CAUSE BANCRIPTS MAKE BETTER AND MORE SPEEDIER PAYMENTS OF THEIR DEBTS TO THEIR CREDITORS, THAN, BY LONG EXPERIENCE HATH BEEN FOUND, THE STATUTES AGAINST BANCRIPTS DO EFFECT (London 1679) [hereinafter HUMBLE PROPOSAL]. “[I]f Circumstances be so set, as renders *private Property* a *Public Grievance*, in such cases it seems reasonable, that the *Public* do exercise their Authority to convert this *private Grievance* into *their Common-weal*.” *Id.* at 7.

19. This phenomenon was not lost on eighteenth- and nineteenth-century advocates for bankruptcy reform. See, e.g., SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 53 (testimony of Sir Samuel Romilly) (arguing that

greater equilibrium between debtors and creditors has long been that if debtors see an advantage in disclosing their assets to their creditors, they will be less inclined to try to cheat, and if debtors cheat less, creditors will be repaid more.²⁰

It took the English law over a century to begin to understand this truism.²¹ The parliaments that passed the earliest statutes believed that bankruptcy existed to serve creditors alone and thought that all they had to do to obtain debtor cooperation was threaten punishment. Only as it became apparent that the success of bankruptcy as a debt-collection mechanism hinged on maintaining a greater balance between the needs and duties of both creditors and debtors did the law begin to seek out ways to provide positive incentives for debtor participation. The process of trying to solve the problem of obtaining debtor cooperation—a process that involved moving from a purely punitive to a modern, increasingly remedial bankruptcy system—is the focus of this Article.

This development is analyzed through the rise and fall of England's century-long but ultimately failed experiment with

permitting recuperation of future earnings “takes from [the bankrupt] . . . all motives for industry, by subjecting the future fruits of his labours to the demands of his former creditors”); DEFOE, ESSAY, *supra* note 17, at 192 (arguing that English bankruptcy law “encourages no new industry, for it makes [the debtor] perfectly incapable [*sic*] of any thing but *starving*”).

20. See, e.g., SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, FURTHER REPORT OF MINUTES OF EVIDENCE, 1818, H.C. 277, at 5 (testimony of Thomas Nowlan) (“[T]he most effectual mode of preventing fraud is to lessen the temptation or necessity for committing it.” (emphasis omitted)). This is not to say that debtors will not cheat. That is why there is still a Bankruptcy Criminal Code, 18 U.S.C. § 152 (2006), that deals with the exact same crimes that the English penalized in the seventeenth and eighteenth centuries. See generally STEPHANIE WICKOUSKI, BANKRUPTCY CRIMES (3d ed. 2007) (discussing contemporary American criminal bankruptcy law).

21. For early evidence of an understanding see, for example, a broadside written at the time discharge was introduced, CONSIDERATIONS UPON THE BILL, TO PREVENT FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS, HUMBLY SUBMITTED TO THE HIGH COURT OF PARLIAMENT; TOGETHER WITH REASONS FOR SOME CLAUSE OR PROVISION THEREIN TO BE MADE, FOR THE INCOURAGEMENT OF DEBTORS TO DISCOVER AND DELIVER UP THEIR ESTATES, FOR THE EQUAL BENEFIT OF THEIR CREDITORS (circa 1706) (British Library, Cup. 645.b.11/37*) (“It is consistent with the Policy and Reason of Human Laws, almost in all Parts of Christendom, that some Power be constituted to make an Equilibrium of Justice between Debtor and Creditor, suffering neither the one to Cheat, nor the other to Oppress, Bury, Famish, or Ruin another Subject.”); see also REASONS HUMBLY OFFERED FOR PASSING THE BILL FOR PREVENTING OF FRAUDS COMMITTED BY BANKRUPTS (circa 1719 or 1732) (Lincoln's Inn Library, MP 100 no. 5) (stating that creditors “are . . . willing to give such Encouragement as by Experience they have found to be necessary, to encourage Bankrupts justly and fairly to conform thereto, in order to render such a Law more effectual for the Purposes intended”).

employing the threat—and occasionally the reality—of capital punishment for fraudulent bankruptcy. Part I outlines the struggles of early English bankruptcy law in obtaining debtor cooperation during the sixteenth and seventeenth centuries, when the statutes paid no attention to the interests of debtors. Part II treats the pivotal events of 1705 to 1707, during which an infamous financial scandal catalyzed Parliament to reform the bankruptcy law and to try yet again to improve debtor cooperation, first by looking backward to the old solution of penalties, and second, by looking forward to the recent idea of discharge. Part III discusses why the threat of death not only failed to control what was likely to have been widespread bankruptcy fraud but potentially also permitted fraud to flourish in the discharge procedure.

Despite the current and historical importance of bankruptcy, its pre-modern past has barely been investigated. No scholarship has investigated the history of the punitive side of bankruptcy, even though the impulse to punish bankrupts is still very much alive and well, as witnessed by the debates over the extent to which the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 punished debtors for their indebtedness by making bankruptcy more difficult to obtain.²² And while several articles have discussed the origin of discharge, they have used only readily available printed sources.²³ This Article goes beyond the usual sources to research the capital punishment and discharge elements of eighteenth-century bankruptcy through archival manuscripts, parliamentary committee testimony, and contemporary broadsides, newspapers, and pamphlets. This material tells a story that is at once foreign in the severity of the punishment of debtors and yet surprisingly familiar in the underlying attitudes toward them.

22. See, e.g., 151 CONG. REC. S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (proposing amendments to 11 U.S.C. §707(b)) (“This bill would make it harder for individuals who can repay their debt to file for bankruptcy under chapter 7.”); *id.* at S1813–14, S1856–57 (statements of Sens. Frist & Grassley) (explaining that the purpose of the bill is to prevent abuse yet still help the honest but unfortunate debtor); Edith H. Jones & Todd J. Zywicki, *It’s Time for Means-Testing*, 1999 BYU L. REV. 177, 209 (“If discharge of debts is easy in bankruptcy, debtors will incur more debt. Conversely, if obtaining bankruptcy relief is difficult, debtors will be more reluctant to incur debts.”); James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 874 (2006) (arguing that the bankruptcy reform act was merely a cover for trying to make bankruptcy less desirable).

23. See, e.g., sources cited *supra* note 11 and *infra* note 26.

I. THE SEARCH FOR BALANCE IN EARLY BANKRUPTCY (1543–1705)

Bankruptcy began in England as a collection device in which all power rested with the creditors. For a century or more, the law's sole concern was that creditors should be repaid, while the interests of the debtor were ignored.²⁴ Unfortunately for creditors, collection has always required at least some debtor participation. Especially in an age in which the coercive reach of public authorities was limited, as was the case in early modern England, the creditors could not get their money if the debtor did not cooperate in turning over or disclosing his assets.²⁵ Early bankruptcy, however, destroyed the debtor both financially and personally, giving him little incentive to assist in the process. The development of English bankruptcy, from its creation in 1543 to the important juncture of 1706 and beyond, therefore became a search for ways to force or to encourage debtors to contribute to their own ruin. Initially, the best solutions to the problem were found outside the confines of the bankruptcy statutes, which, officially, remained staunchly pro-creditor. This Part investigates the factors behind the harshness of the early law and the forces that attempted to mitigate it by giving some leverage to bankrupts.

Preliminarily, a word must be said about the dating of bankruptcy statutes because the dating system has been a common source of confusion in the literature.²⁶ During the period under

24. Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3–5 (1940); see also, e.g., *Worseley v. Slader*, (1758) 1 Burr. 467, 476–77, 97 Eng. Rep. 407, 412 (K.B.) (stating that the two purposes of bankruptcy are “the management of the bankrupt’s estate” and “equal distribution among his creditors” (emphasis omitted)); *The Case of Bankrupts* (Smith v. Mills), (1584) 2 Co. Rep. 25a, 25b, 76 Eng. Rep. 441, 465–68 (K.B.) (holding that the purpose of the bankruptcy statute was to “relieve the Creditors of the Bankrupt equally, and that there should be an equal and rateable Proportion observed in the Distribution of the Bankrupt’s Goods amongst the Creditors, having Regard to the Quantity of their several Debts; so that one should not prevent the other, but all should be in *aequali jure*”); CONSIDERATIONS UPON COMMISSIONS OF BANKRUPTS 4 (London, R. Gosling 1727) (“The common End of all the Laws relating to Bankrupts, is to discover and collect the Estate of the Debtor, in the best and speediest Manner, in order to make an equal Distribution of it among all the Creditors . . .”).

25. See W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, 69 TRANS. AM. PHIL. SOC. 1, 6–7 (1979) (explaining the lack of state administrative and enforcement mechanisms in early modern England).

26. E.g., Duffy, *supra* note 13, at 286–87, 293 (dating the Pitkin affair to 1704 and 5 Anne to 1706); Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 COM. L.J. 191, 198 (1995) (stating that Parliament “passed” 4 & 5 Anne in 1705); Michael Quilter, *Daniel Defoe: Bankrupt and Bankruptcy Reformer*, 25 J. LEGAL HIST. 53, 56, 64 (2004) (dating the passage of 4 & 5 Anne to 1705 and the passage of 5 Anne to 1706); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65

consideration here, an English statute was officially dated according to the year of the first day of the parliamentary session in which the act was passed.²⁷ Thus, as happened with the statute introducing capital punishment for fraudulent bankrupts, 4 & 5 Anne, c. 17, the parliamentary session began in October 1705, but the act only passed the two houses of Parliament and received royal assent in March 1706. In the statute books, the statute would be dated 1705, but for the purposes of the historical chronology of events it is necessary to realize that it was passed in 1706. For this reason, one sometimes sees the various early bankruptcy acts dated in different years.

A further wrinkle makes dating even more complicated. Until 1752, the English used a modified form of medieval dating in which the first day of the new year was March 25.²⁸ Because the Act of 4 & 5 Anne was passed on March 19, its year of enactment was 1705 under the old style dating system.²⁹ To clarify matters, this Article adopts several conventions. First, all dates are given in modern style. Second, to keep the chronological developments clear, the Article generally refers to the date of passage of an act rather than the official date in the statute books. Third, when the official dates of the acts are listed, they include the statute book date followed by the date of passage, if different, in square brackets with the indication “n.s.” for “new style” for pre-1752 acts which received royal assent before March 25.

A. *The Original Purpose of Bankruptcy*

Insolvency was particularly fraught with negative meaning in the early modern economy. The merchant or trader who relied on credit lived constantly on the edge. The still relatively primitive state of

AM. BANKR. L.J. 325, 333, 337, 339 (dating the passage of 4 & 5 Anne to 1705, the Pitkin affair to 1704, and the passage of 5 Anne to 1706).

27. CHRISTOPHER ROBERT CHENEY, A HANDBOOK OF DATES: FOR STUDENTS OF BRITISH HISTORY 108 (Michael Jones ed., new ed. 2000) (1945).

28. Thus, for example, the year 1705 ran from March 25 (1705) to March 24 (1706 in current, or new style, dating).

29. The March-based dating system has led to occasional misunderstandings in recent scholarship. For instance, one author has interpreted the provision that the Act of 4 & 5 Anne would come into force on June 24, 1706, to mean that fifteen months passed between the conclusion of the retroactive application period (March 10, 1705 old style) and the Act's coming into force, when, in fact, only three months passed, because the retroactive period in modern dating ended on March 10, 1706. McCoid, *supra* note 11, at 166 n.12. To be precise, in modern dating it would have passed on March 22, 1706, because the switch in 1752 from the March 25 to the January 1 new year was accompanied by the change from the Julian to the Gregorian calendar, in which the calendar jumped forward by eleven days (so by statute, when the change took effect, September 2, 1752, was followed by September 14, 1752).

communication, travel, and production meant that he could not be sure when he would receive the next shipment or the next payment on which his ability to pay his own creditors depended. His goal was to “synchronize the payments being made to him as a creditor with those he had to make as a debtor,” and this he could never do with complete assurance.³⁰ As all merchants and traders who depended on credit existed in this state of financial instability, the insolvency of one person who owed significant debts could lead to the failure of many others.³¹

The fragile glue holding together the web of credit on which the economy depended was confidence, and in the tightly knit pre-modern world of buyers and sellers sharing book debt or circulating notes of hand or bills of exchange this confidence was highly personal, resting on reputation and trust and often little else.³² The bankrupt disrupted this system. He was seen not only as stealing money which his creditors might need to keep themselves out of insolvency but more importantly as stealing their confidence. Early comments to Parliament illustrate these twin concerns. In 1559, certain “[c]onsiderations delivered to the Parliament” included the complaint that, whereas “a poor thief doth steal a sheep or pick a purse, they [that is, bankrupts] come away with hundreds and thousands at least, and undo a great many honest men.”³³ And in a speech to Parliament in about 1590, Richard Dane said, “These bankrupts are worse than thieves [who] rob by the highway for necessity; but these are double thieves because they were put in trust with many men’s goods, which

30. Julian Hoppit, *The Use and Abuse of Credit in Eighteenth-Century England*, in *BUSINESS LIFE AND PUBLIC POLICY: ESSAYS IN HONOUR OF D.C. COLEMAN* 64, 65–67 (Neil McKendrick & R.B. Outhwaite eds., 1986); see also V. MARKHAM LESTER, *VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND* 2 (1995) (“The legal procedures governing indebtedness were important because they were the key to sustaining confidence in the credit system that underlay the British economy.”).

31. Hoppit, *supra* note 30, at 67.

32. *Id.* at 65 (“Central to the relationship between the debtor and the creditor was mutual confidence[] [b]ecause the loan was backed by nothing but personal security . . .”); Joanna Innes, *The King’s Bench Prison in the Later Eighteenth Century: Law, Authority and Order in a London Debtors’ Prison*, in *AN UNGOVERNABLE PEOPLE? THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 250, 251 (John Brewer & John Styles eds., 1980) (explaining that the economy “rested upon an extensively ramified network of credit and debt”). For an excellent description of book debt, see AMALIA KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* 58–61 (2007).

33. 1 *CALENDAR OF THE MANUSCRIPTS OF THE MOST HON. THE MARQUIS OF SALISBURY*, K.G. 164 (S.R. Scargill-Bird ed., London, Eyre & Spottiswoode 1883).

by breaking they undo many.”³⁴ In a credit economy clinging, often quite precariously, to solvency, the bankrupt was a threatening character.³⁵

This fear of bankruptcy provides the backdrop against which the earliest English legislation played out. Early modern commentators and modern scholars generally agree that the first English bankruptcy act, 34 & 35 Henry VIII, c. 4 (1542 [1543]), was intended to help creditors recover their money from those debtors who were attempting to defraud them, either through the fraudulent or reckless expenditure of the borrowed money or by the willful refusal to repay their debts.³⁶ The act’s preamble spoke of:

divers and sundry persons, craftily obtaining into their hands great substance of other men’s goods, [who] do suddenly flee to parts

34. Richard Dane, Address to Parliament on the Mischiefs Arising from Bankrupts Concealing Their Effects; with the Means of Addressing the Grievance (circa 1590) (British Library, Lansdowne MS 99 f. 185r.) (“These Bankcrows are worse than theves [that] robbe by the highe way for necessitie: but these are duple theves because they were put in trust with many mens goods: which by breking they undoe many.”); cf. HONORÉ DE BALZAC, EUGÉNIE GRANDET 77 (Sylvia Raphael trans., Oxford World’s Classics 2003) (1833) (“A highway robber is preferable to a bankrupt. A highwayman attacks you, but you can defend yourself and he risks his life. But the other . . .”). I thank Professor Jay Westbrook for this reference.

35. See, e.g., A Recital of the Several Circumstances that May Cause a Debtor to Become a Bankrupt (dated in the catalogue as circa 1571, but likely closer to 1604 based on content) (British Library, Lansdowne MS 13 f. 55r) (“The abuses and deceipts of bankrupts is growne intollerable, the remedies p[ro]vided against them be weake, that unlesse the inconveniency thereof be remedied by this p[ar]liament, all trades of buyinge and sellenge . . . importinge the benefits of this Common wealthe will in short tyme utterlie decaye . . .”); THOMAS DEKKER, THE SEVEN DEADLY SINNES OF LONDON 20 (H.F.B. Brett-Smith ed., Houghton Mifflin Co. 1922) (1606) (“The theefe that dyes at Tyburne for a robbery, is not halfe so dangerous a weede in a Common-wealth, as the Politick Bankrupt. I would there were a Derick to hang up him too.”).

36. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAW, FURTHER REPORT OF MINUTES OF EVIDENCE, *supra* note 20, at 2 (testimony of Thomas Nowlan) (“[T]he bankrupt law was first introduced into England at a period, when, comparatively speaking, trade was in its infancy, and credit very limited; and that the law was solely enacted to *protect* creditors against the *frauds* of debtors; and the bankrupt was then, with justice, perhaps, considered in the light of a *criminal* or offender; and *infamy* was attached to his name.”); 8 HOLDSWORTH, *supra* note 17, at 233, 236, 243 (noting that statutes of bankrupts initially targeted a small class of debtors); A TREATISE OF FRAUDS, COVINS, AND COLLUSIONS 26 (London, John Nutt 1710) (stating that statutes of bankrupts aimed to prevent the deception of creditors); Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 190 (1938) (calling the 1543 act “a law that began with a brief statute directed at the pursuit and punishment of a narrow class of fraudulent debtors”); see also Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 13–16, 22–23 (1986) (arguing that the treatment of debtors under the early bankruptcy laws was in part an extension of the vision in early modern England of the merchant as villain).

unknown, or keep their houses, not minding to pay or restore to any their creditors, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience³⁷

These men were called bankrupts, a term the English had borrowed from the French law, in which the term referred solely to fraudulent, and therefore criminal, insolvents.³⁸ Only the insolvent's pre-bankruptcy behavior mattered in this statute. The debtor who spent his creditors' money for reasons other than honest trade and who refused to pay when required would be treated as a bankrupt. Honest insolvents, whose losses were brought on by forces outside their control and who, without deception, presented their disability to their creditors, did not come within the intendment of the act.³⁹ The language of the Henrician law made clear the equation of bankrupt and criminal, for the statute used the word "bankrupt" only once, in the title, "An Act Against Such Persons As Do Make Bankrupt."⁴⁰ The remainder of the statute referred to the bankrupt only as the "offender."⁴¹

The four defining elements of early English bankruptcy that this statute introduced sought to maximize recovery against the crafty fraudsters who posed such a serious threat to economic stability. First, the debtor had no choice about becoming bankrupt. His creditors put him into bankruptcy, and their petition, originally to members of the

37. 34 & 35 Hen. VIII, c. 4, § 1 (1542 [1543]).

38. 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *277 ("We have fetched as well the name as the wickednesse of bankrupts from foreign nations"); I. Treiman, *Escaping the Creditor in the Middle Ages*, 43 L.Q. REV. 230, 231–32 (1927) ("[T]he fraud of the debtor lay in the mere fact that he was insolvent, rather than in his efforts to cheat his creditors."). The common spelling variants seen in sixteenth-century English legal and legislative texts, such as *banckeroote*, *banckerowte*, and *banckrote*, betray the influence of the French *banqueroute*. Pierre Claude Reynard, *The Language of Failure: Bankruptcy in Eighteenth-Century France*, 30 J. EUR. ECON. HIST. 355, 356–57 (2001).

39. NOMIUS ANTINOMOS, OBSERVATIONS ON THE STATE OF BANKRUPTS, UNDER THE PRESENT LAWS IN A LETTER TO A MEMBER OF PARLIAMENT 2–3 (London, M. Cooper 1760) ("It is true, the law certainly looks on the Bankrupt as a culprit under its chastisement. The preamble of the very first statute made against them, of Henry the Eighth, supposes them to be persons who have run away beyond seas, or elsewhere, from the payment of their just debts . . . but the necessity of the statute was not at first thought applicable to a man, who stood in his counting-house at the head of his books; and on any deficiency, was ready to shew his true estate to his creditors, to give up all to them, or compound for a reasonable part.").

40. This circumlocution is seemingly borrowed from the French usage *faire banqueroute*.

41. See 34 & 35 Hen. VIII, c. 4, §§ 1–2.

Privy Council and, from 1571 onward, to the chancellor, came to be granted as a matter of course upon their *ex parte* evidence alone.⁴² Second, the creditors could only petition after the debtor committed a so-called “act of bankruptcy.” These statutorily defined acts ostensibly demonstrated the debtor’s intent to hinder, delay, or defraud his creditors.⁴³ They thus provided the *actus reus* and the *mens rea* of the crime of bankruptcy.⁴⁴ Third, and arguably the defining characteristic of most bankruptcy systems, the creditors would join together in a single bankruptcy proceeding, which would gather all the assets and then divide them ratably according to the amount of the creditors’ respective debts.⁴⁵ Finally, all of the debtor’s assets came into the bankruptcy estate. With the exception, made in some later statutes, of necessary clothing, the bankrupt would be stripped of everything.⁴⁶ This contrasted with the normal common law rule that placed strict limits on the attachment of real property and liquid assets such as bills, bonds, or choses in action for the payment of debt.⁴⁷ Thus, a man’s home, so strongly protected under the

42. *Id.* § 1; 13 Eliz. I, c. 7, § 2 (1571 [1572]); see also RICHARD BOOTE, SOLICITOR’S GUIDE AND TRADESMAN’S INSTRUCTOR 9 (London, B. Tovey 4th ed. 1774); Alderman Backwell’s Case, (1683) 1 Vern. 152, 153, 23 Eng. Rep. 381, 381 (Ch.) (noting that a bankruptcy commission must be granted as matter of course upon the filing of a petition). Bankruptcy did not become voluntary in America until 1841. See Tabb, *supra* note 11, at 16–18; see also DAVID A. SKEEL, JR., DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 28–33 (2001) (discussing the debates over voluntariness). In England, bankruptcy remained involuntary for merchants until 1841, see 7 & 8 Vict., c. 96, and for non-merchants until 1861, see 24 & 25 Vict., c. 134. Voluntariness was abolished in 1869, 32 & 33 Vict., c. 71, but was restored in 1883, 46 & 47 Vict., c. 52.

43. 34 & 35 Hen. VIII, c. 4, § 1; Treiman, *supra* note 38, at 233–34 (discussing the English bankruptcy act of keeping house). By the last major pre-modern revision of the law in 1732, the number of acts of bankruptcy had increased to about sixteen, and they all described ways of intentionally avoiding creditors or evading their demands. For a list of acts, see EDWARD GREEN, THE SPIRIT OF THE BANKRUPT LAWS 37–38 (London, J. Williams 1767); 2 BLACKSTONE, *supra* note 9, at *478–79; WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA OR, THE MERCHANT’S DIRECTORY 489–90 (London, John Moore 1752). American law retained the bankruptcy act requirement until 1978. Tabb, *supra* note 11, at 8.

44. ROBERT GEORGE CECIL FANE, BANKRUPTCY REFORM IN A SERIES OF LETTERS ADDRESSED TO SIR ROBERT PEEL, BART: LETTERS IV, V, VI, VII 37–39 (London, S. Sweet 1838) (quoting well-known barristers about the treatment of the bankruptcy act as a crime under the law).

45. See Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1917) (“A special process of collective execution is devised, a process directed against all of the property of the debtor, restored to for the common benefit and at the common expense of all the creditors.”).

46. See 5 Geo. II, c. 30, § 1 (1732) (noting an exception for wearing apparel).

47. See Innes, *supra* note 32, at 254; Jones, *supra* note 25, at 13 (“The ability of creditors to seize the assets of a debtor was seriously limited.”).

common law, was no longer his inviolate castle.⁴⁸ Bankruptcy gave creditors a powerful new collection tool, one which they could use on their own volition, without the agreement of the debtor.

To make matters worse, because none of the early bankruptcy statutes contemplated discharging the bankrupt of the unpaid portions of his debts, the process functioned during the sixteenth and seventeenth centuries merely as a sort of enforced pause during which the bankrupt's assets could be gathered in and distributed in an orderly fashion.⁴⁹ In addition, the creditors retained their legal rights to recoup any unpaid debts.⁵⁰ As long as the bankruptcy commission remained in force, future earnings went into the collective and new dividends would be distributed. Thereafter, the creditors could pursue all other legal avenues, including keeping the bankrupt in debtors' prison, until the debts were completely paid.

The next bankruptcy statute, the Act of 13 Elizabeth I, c. 7 (1571),⁵¹ added two important features to the system.⁵² First, it explicitly limited the compass of the statute to merchants.⁵³ Only those who bought and sold for a living were subject to bankruptcy. This would be significant later because it meant that merchants and traders could be convicted as felons for doing things that non-merchants could do with impunity.⁵⁴ Second, the Act created the position of commissioners of bankrupt, who were to be appointed by the chancellor to oversee each bankruptcy.⁵⁵ The commissioners were

48. See JAMES BLAND BURGESS, *CONSIDERATIONS ON THE LAW OF INSOLVENCY, WITH A PROPOSAL FOR A REFORM* 204, 213–15 (1783) (pointing out the extent to which the early bankruptcy procedure removed the protections of the common law); Treiman, *supra* note 38, at 233 (discussing the “special regard to a man’s house” under English law).

49. See Jones, *supra* note 25, at 16.

50. 34 & 35 Hen. VIII, c. 4, § 6 (1542 [1543]); 13 Eliz. I, c. 7, § 10 (1571 [1572]).

51. The Act is sometimes dated 1570, which is inexplicable because no parliaments were held during the year 1570 under either style of dating. The parliamentary session in which the Act passed began in April 1571.

52. The Act added many new elements to bankruptcy procedure, but the ones discussed focus on the foundational elements that characterize bankruptcy. See 1 EDWARD CHRISTIAN, *THE ORIGIN, PROGRESS, AND PRESENT PRACTICE OF THE BANKRUPT LAW, BOTH IN ENGLAND AND IN IRELAND* 11 n.2 (London, W. Clarke & Sons 1812) (discussing innovations in the Act).

53. 13 Eliz. I, c. 7, § 1. It is not clear whether the Henrician Act was intended to apply generally or only to merchants. See Jones, *supra* note 25, at 17. The merchant question was a source of a great deal of litigation and fine distinctions. For an overview, see BEAWES, *supra* note 43, at 488–89.

54. See *infra* notes 375–76.

55. 13 Eliz. I, c. 7, § 2.

not government officials but rather prominent local citizens, often lawyers or merchants, who served in their private capacity and were paid out of the proceeds of the bankrupt's estate.⁵⁶ By the eighteenth century, an official list of commissions existed for London, with each commission composed of five members.⁵⁷ The commissions were assigned from the list in order by a clerk when a petition of bankruptcy was submitted.⁵⁸ Given that the assignees, who collected and distributed the bankrupts' estate, were also creditors, bankruptcy was essentially a private matter largely controlled by those who would benefit from it with little oversight from the courts and susceptible to both corruption and incompetence.⁵⁹

The Henrician statute of 1543 had one serious liability: it probably did not work.⁶⁰ First, it provided little procedure. It empowered creditors to work together to gather and distribute the bankrupt's assets but gave little explanation of how this should happen.⁶¹ Second, it relied on the honesty of the bankrupt—who was presumed to be a criminal—to give up his estate when all of the incentives under the law pushed him to do the opposite. Bankruptcy permitted the creditors to strip the bankrupt of all his assets, imprison him, and continue to attach future earnings until he had repaid his debts in full. Furthermore, because the imprisoned bankrupt was not the state's responsibility, his imprisonment for debt being a private matter between him and his creditors,⁶² he was not fed, clothed, or housed at public expense while in prison, but rather had to find a way to purchase these amenities at the jailers' extortionate rates.⁶³ Therefore, a bankrupt who hoped to be able to survive his imprisonment either had to rely on friends and family for funds or

56. 1 GERARD MALYNES, *CONSUEUDO, VEL, LEX MERCATORIA OR, THE ANCIENT LAW MERCHANT* 158 (London, T. Bassett 3d ed. 1686) (stating that commissioners "must be Counsellors at the Law joynd with some citizens or Merchants").

57. *E.g.*, THOMAS DAVIES, *LAWS RELATING TO BANKRUPTS, BROUGHT HOME TO THE PRESENT TIME* 143–46 (London, H. Lintot 1744) (providing ten lists consisting of commissioners); *A SUCCINCT DIGEST OF THE LAWS RELATING TO BANKRUPTS* 3 (Dublin, Brett Smith 1791) (providing thirteen lists consisting of sixty-six total commissioners).

58. BOOTE, *supra* note 42, at 9.

59. *See infra* notes 378–85.

60. Jones, *supra* note 25, at 17–18.

61. *Id.* at 16.

62. Innes, *supra* note 32, at 253 (“[T]he courts played no more than a passive and procedural role . . .”).

63. *Manby v. Scott* (1663) 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (Ex.) (“If a man be taken in execution and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes . . .”).

conceal some of his assets from his creditors.⁶⁴ And if the bankrupt found a way to pay off his debts, his former bankruptcy could prevent him from obtaining credit in the future.⁶⁵ Yet, even though the bankrupt faced the prospect of ruin, the law expected him to cooperate with his creditors.

The Elizabethan statute of 1571 tinkered with the procedure of debt collection to make it functional, provided that the debtor played his role obediently.⁶⁶ When the debtor did not do so, the law offered no effective means to make him turn over his assets. The Henrician and Elizabethan statutes said nothing about post-bankruptcy crime except that the failure to surrender to the commissioners after a commission of bankrupt was taken out resulted in the punishment of outlawry.⁶⁷ Only in the seventeenth century did laws begin to address the problem of debtor noncooperation by including penalties intended to frighten or coerce the debtor into participating in the bankruptcy process.

B. Coercing Cooperation

The Henrician statute died a quiet death. It was apparently never repealed, but after the passage of 13 Elizabeth I in 1571, it faded away and was rarely adduced.⁶⁸ Yet for all the procedural and administrative flaws in the Henrician statute, creditors of those honest but unfortunate insolvents who had suffered loss from fire, for instance, or a shipwreck, or the failure of their own debtors seem to have quickly seen the value of the bankruptcy mechanism.⁶⁹ Under the common law, the creditors of these honest insolvents could pursue costly and cumbersome suits for debt, or they could compose with the debtor. The first option involved long procedural delays and the prospect of ever-diminishing returns as each successive creditor sued for payment.⁷⁰ The second option required creditors to accept

64. DEFOE, *ESSAY*, *supra* note 17, at 193, 197–98, 201–02.

65. *Id.* at 194.

66. 13 Eliz. I, c. 7 (1571 [1572]); *see also* 1 Jac. I, c. 15 (1604); 21 Jac. I, c. 19 (1624).

67. 34 & 35 Hen. VIII, c. 4, § 5 (1542 [1543]); 13 Eliz. I, c. 7, § 9.

68. 1 CHRISTIAN, *supra* note 52, at 7–8 n.4; Jones, *supra* note 25, at 17–18.

69. These were the paradigmatic examples of misfortunes that could render a man insolvent without culpability. *See* HUMBLE PROPOSAL, *supra* note 18, at 4; REASONS HUMBLY OFFERED FOR PASSING THE BILL FOR THE BETTER RECOVERY OF BANKRUPTS ESTATES, AND FOR THE MORE EQUAL DISTRIBUTION THEREOF (circa 1693).

70. HENRY BRINKELOW, THE COMPLAYNT OF RODERYCK MORS ch. XVII (Sauoy [i.e., Strasbourg], Per Francicum de Turona [i.e., Wolfgang Köpfel] [1542]) (“[W]han any

only a portion of their debts or a longer period for repayment.⁷¹ Unless all creditors agreed to the composition, its benefits were lost because the outlying creditor could imprison the debtor or demand payment in full at the expense of everyone else.⁷² In addition, compositions made the debtor the arbiter of what he could afford to pay and left him in control of his property during the pendency of the negotiations. By contrast, bankruptcy gave the creditors access to all of the debtor's assets, it was a useful joinder device, and it provided a powerful stick with which to beat the recalcitrant insolvent—or the hold-out creditor—into agreeing to a composition.⁷³

Evidence indicates that creditors early on began to make use of the bankruptcy law against honest but unfortunate debtors, even though, by its terms, the Henrician law, at least, was not intended to apply to them. For instance, in April 1571, just as Parliament was considering a major new bankruptcy statute, a bill was proposed entitled, “An Act to repress the oppression of common promoters.” It included a provision prohibiting bankrupts from bringing penal suits “on penalty of being put in the stocks, and the suit voided.”⁷⁴ A marginal note criticizing the text pointed out that “[m]any honest men by hard construction may be accounted a bankrupt, and it is not reason his suit should be void”⁷⁵ Similarly, a document discussing possible changes to the bankruptcy laws dating to around 1580 spoke of “the bankrupt who often is driven to break by accidents with honest men,”⁷⁶ and a draft of an ultimately aborted act from 1601

marchant . . . come to an after deale, and not able to pay his credyte at his due tyme . . . than ye have a parcyal lawe in making of tachmentys [attachments], first come, first servyd: so one or ij shall be all payd, and the rest shal have nothing.”; Innes, *supra* note 32, at 252–53.

71. I. Treiman, *Majority Control in Compositions: Its Historical Origins and Development*, 24 VA. L. REV. 507, 511, 519 (1938).

72. *Id.* at 511–12, 521.

73. See, e.g., 8 HOLDSWORTH, *supra* note 17, at 234 (discussing the use of bankruptcy as a threat); Opinion on the Right of Strangers to Partake of Bankrupts Good Rateably with English Creditors (circa 1580) (National Archives (Kew, London), SP 12/146 f. 232) (“The force of this [bankruptcy] Lawe doth undoubtedlie restraine many p[er]sons of evill consience from Bankrootinge to the greate benefite of subiectes & of strangers, And also compelleth many Bankrootes to yelde much better satisfaction to theire Creditors then otherwise they wolde.”).

74. 20 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF ELIZABETH, ADDENDA 1566–1579, at 346 (M.A.E. Green ed., 1871).

75. An Act to Repress the Opression of Common Promoters (1571) (National Archives, SP 15/20 f. 48) (“Many honest men by harde construction may be accompted a Banckerowte and it is not reason his suite shuld be void . . .”).

76. Opinion on the Right of Strangers to Partake of Bankrupts Good Rateably with English Creditors, *supra* note 73 (“the Bankeroote who often is dryven to breake by accidentes with honeste men”).

“against Co[z]ening Bankrupts and lewd apprentices and factors” excused from certain penalties any bankrupt who could show that his insolvency was due to “loss by [bad] debtors, fire, the adventure of the seas, or other casualty [that] hath happened unto him.”⁷⁷

The distinction between honest and fraudulent insolvents was not new. It had been known in antiquity,⁷⁸ and many continental insolvency systems created separate procedures during the medieval and early modern eras that dealt with honest insolvents civilly and fraudulent bankrupts criminally.⁷⁹ A two-track insolvency law had merit in a society that looked upon bankrupts as criminals because, as the quotes above suggest, unfortunate insolvents raised somewhat different issues from fraudulent ones. It was, for instance, more difficult to justify a bankruptcy law whose primary intent was to punish the debtor for his willful failure to repay his loans because the debtor had arguably done nothing worthy of punishment.⁸⁰ This made the problem of coercing the bankrupt’s cooperation even thornier. The honest insolvent, put into bankruptcy against his will and asked

77. Bill Against Cozening Bankrupts and Lewd Apprentices and Factors (1601) (National Archives, SP 12/283 f. 45) (“losse by Ill debtors, fyer, the adventure of the seas, or other casualty [that] hath happened unto him”); *see also* THOMAS GOODINGE, *THE LAW AGAINST BANKRUPTS: OR, A TREATISE WHEREIN THE STATUTES AGAINST BANKRUPTS ARE EXPLAINED* 35 (London, S. Heyrick 1695) (“[T]he main intent of the Statutes is to relieve Creditors against Frauds and Deceits . . . Fraud and Cheat lies, or should lie at the bottom of all; and I understand not the distinction of a Bankrupt by Fraud, and a Bankrupt by Accident, which I find in some of our Books, as the Laws have been expounded.”).

78. Levinthal, *supra* note 45, at 237.

79. For a contemporary overview of the French and Dutch systems, *see* BEAWES, *supra* note 43, at 554–70, and for a discussion of the French and Spanish systems, *see* the Addenda in THOMAS COOPER, *THE BANKRUPT LAW OF AMERICA, COMPARED WITH THE BANKRUPT LAW OF ENGLAND*, at iii–xxvi (Philadelphia, John Thompson 1801).

80. GOODINGE, *supra* note 77, at penultimate page of preface (“A Bankrupt, by Fraud, I always hated . . . But I regret the proceedings against Bankrupts by Accident . . . and am sorry they are involved in the same Penalties.”); HUMBLE PROPOSAL, *supra* note 18, at 5 (opining that honest bankrupts “merit compassion”). There are later perspectives on the same issue. *See* SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 104 (testimony of John Ingram Lockhart) (“[N]o better can be the result of a commission issued against the most upright merchant, whose extensive dealings, and vast, yet prudent ventures, might all have failed, through uncontrollable events; and who would thus be bowed down before the same species of tribunal, condemned to surrender in public the last piece of coin, or the last token of affection; placed on the same footing, and perhaps at the same table, with some guilty wretch, whose frauds, falsely denominated contracts, are about to receive complete amnesty, from the hands of the same judges, at the instance of some creditors as criminal as himself.”); 151 CONG. REC. S2466 (daily ed. Mar. 10, 2005) (statement of Sen. Mikulski) (“This bill punishes people, assumes that all those filing for bankruptcy have purposefully created their debt problems, imposes a strict standard that does not take into account the circumstances surrounding the bankruptcy . . . That’s not fair . . .”).

to hand over his all, might have been rather indignant about the shabby treatment he was receiving from creditors who, not long before, had probably been friends or business associates. When confronted with the prospect of a bankruptcy that they (in theory) had no say in commencing,⁸¹ even honest insolvents may have sought to conceal assets or abscond.⁸²

The reaction to the dilemma of creating a law that achieved the cooperation of both fraudulent and honest bankrupts was threefold. First, seventeenth-century bankruptcy statutes focused less on the threshold question of what sort of pre-bankruptcy behavior brought an insolvent under the bankruptcy acts and more on forcing all bankrupts, through the threat of corporal punishment and imprisonment, to turn over their assets to the benefit of their creditors. Second, in reaction to a law that continued to ignore their interests, debtors colluded with friendly creditors to control when they entered bankruptcy. Third, eventually accepting some of the defects in the bankruptcy laws, Parliament considered multiple bills during the last quarter of the seventeenth century aimed at helping honest debtors compound their debts with reluctant creditors and avoid bankruptcy entirely.

The sixteenth-century acts of Henry and Elizabeth provided no tools for the commissioners to coerce bankrupts to turn over their assets.⁸³ As this lack of coercive power proved problematic, early in the seventeenth century Parliament passed two new bankruptcy acts that punished the bankrupt's failure to work with the commissioners, because "the best remedy" for an increase in bankruptcy "will be fear of corporal punishment."⁸⁴ The 1604 Act of 1 James I, c. 15 threatened with imprisonment bankrupts who refused to answer the

81. On collusive bankruptcies, see *infra* notes 90–94.

82. Barksdale Reading of 21 Jac. I, ch. 19 (1628) (Lincoln's Inn Library, MS 57 ff. 2v-3r) (reading on the statute of 21 James I, arguing that the bankruptcy statutes responded to frauds that bankrupts had committed); SOME OBSERVATIONS WITH RELATION TO THE LAWS RESPECTING BANKRUPTS: HUMBLI OFFERED TO THE CONSIDERATION OF THIS PRESENT PARLIAMENT (circa 1700) ("[A]t present being exposed to the extreme Severity of the most rigid part of their Creditors . . . , the Bankrupts endeavour to Conceal their whole Estates, and thereby generally defraud their Creditors of the greatest part of their Debts.").

83. See A Recital of the Several Circumstances that May Cause a Debtor to Become a Bankrupt, *supra* note 35 ("The abuses and deceits of bankrupts is growne intollerable, the remedies p[ro]vided against them be weake.").

84. A Briefe of the Bill Exhibited Against Bankrupts (March 13, 1624) (National Archives, SP 14/160 no. 74) ("[T]he best remedy will be feare of corporall punishment.").

commissioners' questions.⁸⁵ Answering falsely with intent to deceive resulting in damage to one's creditors in the amount of ten pounds or more opened the door to a criminal indictment. If found guilty, the bankrupt was sentenced to stand in the pillory for two hours and have one of his ears nailed to the pillory and then cut off.⁸⁶ Twenty years later, 21 James I, c. 19 (1624),⁸⁷ extended pillorying and ear-cutting to punish not just perjury but also the concealment of assets, refusal to disclose information about the estate to the commissioners, and the making of an intentionally fraudulent conveyance of twenty pounds or more.⁸⁸ In addition, the bankrupt who could not "make it appear unto the said commissioners, that he or she hath sustained some casual loss, whereby he or she is disabled to pay what he or she then owed"⁸⁹ would also be pilloried and lose an ear. "Casual loss" meant loss beyond the debtor's control, thus demonstrating that by this time lawmakers expected honest insolvents to be brought under the bankruptcy acts.

Acting against the increasing coerciveness of the law, debtors took it upon themselves to protect their interests. In principle, bankruptcy was involuntary. In practice, however, abundant evidence shows that collusion between the debtor and a favored creditor had become common by at least the late seventeenth century.⁹⁰

85. 1 Jac. I, c. 15, § 8 (1604).

86. *Id.* § 9. Pillorying and cutting off the ear was a common seventeenth-century punishment for crimes ranging from "sedition, writing seditious and libellous works, forgery and coin-clipping to fortune-telling, drunkenness, gambling, adultery, and giving short weight." DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640–1660*, at 7 (1970).

87. This statute is sometimes dated to 1623, presumably because the parliamentary session began in February 1624 n.s., which would have been 1623 o.s. *E.g.*, 1 CHRISTIAN, *supra* note 52, at 37. In fact, no Parliament was held at all in 1623 (dating in modern style).

88. 21 Jac. I, c. 19, § 7 (1624). This was not the first time a statute forbade fraudulent conveyances by debtors. The fraudulent conveyances act of 13 Elizabeth I, c. 5, passed in the same 1571 session as the Elizabethan bankruptcy act, although the fraudulent conveyance law applied more broadly than did the bankruptcy statute—which applied only to merchants. CHARLES ROSS, *ELIZABETHAN LITERATURE AND THE LAW OF FRAUDULENT CONVEYANCE* 31, 38 (2003). The Elizabethan statute was not the first fraudulent conveyance act, but it was broader than earlier acts and consequently displaced them. *Id.* at 31–32; *see also* GARRARD GLENN, *THE LAW OF FRAUDULENT CONVEYANCES 7–8* (1931) (noting that a pre-Elizabethan fraudulent conveyances law existed but was superseded as the controlling statute by 13 Elizabeth I, c. 5). In 1566, Parliament took up a bill against fraudulent gifts and bankrupts. The bill died in the House of Commons. 1 H.C. JOUR. 80 (Dec. 19, 1566). In 1571, the two issues were divided between two bills. *See* G.R. ELTON, *THE PARLIAMENT OF ENGLAND 1559–1581*, at 74 (1986) (noting that the two issues were separated at some point before 1576).

89. 21 Jac. I, c. 19, § 7.

90. *See, e.g.*, DEFOE, *ESSAY, supra* note 17, at 196 ("[W]e see frequently now, that Bankrupts desire Statutes, and procure them to be taken out against themselves."); Jones, *supra*

Technically, this collusion was illegal. Influenced by its origins in the statute of 1543, the act of bankruptcy was theoretically a crime,⁹¹ and, as Lord Mansfield said, “where is the Crime of denying oneself to another, by previous consent and agreement?”⁹² In reality it became so commonplace for a bankrupt to find a sympathetic creditor, commit a deliberate act of bankruptcy in his presence, and ask the creditor to file the petition that such collusion generally went unremarked.⁹³ A document from around 1718 described the situation to the chancellor: “It is the usual practice when Traders through Misfortune are forced, or through Knavery design to Break to cheat their Creditors, to procure some friend of their own to take out a Com[m]ission of Bankrupt against them, for fear a just Creditor should do it.”⁹⁴

note 25, at 30 n.111 (“There was always concern that the bankrupt might get his friends to petition for a commission.”); LORD NOTTINGHAM’S ‘MANUAL OF CHANCERY PRACTICE’ 163 (D.E.C. Yale ed., 1965) (“Sometimes the bankrupt sets up a friend or two as creditors to petition against him, and they understanding one another huddle up the execution of a commission between them, and defeat the rest of the creditors.”); 15 H.C. JOUR. (1706) 292 (statement of Mr. Walker) (“[I]t’s reasonably believed, four in five Commissions are taken out by the procurement of the Bankrupts themselves.”).

91. *E.g.*, *Ex parte Bennet*, (1743) 2 Atk. 427, 428, 26 Eng. Rep. 716, 717 (Ch.) (Hardwicke, L.C.) (stating that a bankrupt “is guilty of a crime and a tort in becoming a bankrupt; and though the genius and turn of bankrupt acts is altered of late, yet it is by the old acts of parliament considered as a wrong”); FANE, *supra* 44, at 37–39 (noting that bankruptcy is criminalized but concluding that this is an error).

92. *Hooper v. Smith*, (1763) 1 W. Bl. 441, 442, 96 Eng. Rep. 252, 253 (K.B.). To “deny oneself” to a creditor meant to have a servant or apprentice falsely tell a creditor who had come seeking payment of a debt that the debtor was not available to avoid payment. *See* SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 23 (testimony of Basil Montagu) (“I wish to add, with respect to the law [against] concerted commissions of bankruptcy, that it appears to me to have originated in the supposition, that the bankrupt laws require the act of bankruptcy to be done with intent to defeat a creditor, and therefore that an act done to benefit the creditor, cannot be considered an act of bankruptcy; the bankrupt statute requires, that an act of bankruptcy shall be done with intent to defraud or delay a creditor; therefore we say, that an act which is done by a trader intending to benefit the creditor, cannot be done to defeat or delay him.”).

93. This is, for instance, what happened in the *Perrott* case in 1760. *See, e.g.*, sources cited *infra* notes 235–36; *see also* Opinion of Counsel (British Library, Lansdowne MS 558 f. 63r) (giving the opinion of counsel from 1723 when the lawyer consulted did not even bother to comment on the fact that the bankrupt had “[d]esired and pressed one Rawson to whom he was largely indebted to sue out a Com[m]ission of Bankrupt against him” (abbreviations expanded without indication)).

94. Papers Relating to the Commissions of Bankrupts (probably circa 1718) (British Library, Stowe MS 416 f. 36v.) (abbreviations expanded without indication); *see also* 2 KNAPP & BALDWIN, *supra* note 2, at 316 (calling arrangements to have a creditor come and demand money “the common and most ready foundation of commissions of bankruptcy”).

But if bankruptcy were so unfair to the debtor, why would he choose to put himself through it, especially before the advent of discharge? One reason complained of in the evidence was the use of false creditors to prove fake debts.⁹⁵ For example, assume a debtor owed a total of £200 to five creditors, and he had £100 in assets. If he convinced five more of his friends to pose as creditors to whom he owed another £200 in total, then each genuine creditor would be repaid a quarter of his original loan. The bankrupt would recoup £50 from the friendly fake creditors and, perhaps, buy some time to pay back any real creditors who came seeking the remainder of their money.

Finally, although Parliament passed no major new bankruptcy legislation between 1624 and 1706,⁹⁶ it did not cease to concern itself with the problem of uncooperative bankrupts. Between 1678 and 1698, it took up at least thirteen separate bills, many of which were designed to provide the unfortunate insolvent with an attractive alternative to the bankruptcy laws.⁹⁷ This legislation employed a

95. 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 413–14 (1992) (providing examples of fraudulent debtor cases heard by Lord Mansfield); BRIT. J., Feb. 4, 1727 (describing this scheme); REASONS HUMBLY OFFER'D FOR ALTERING AND AMENDING THE LAWS CONCERNING BANKRUPTS, AND FOR PREVENTING THE GREAT LOSSES THAT ARE DAILY SUSTAINED BY THEIR CREDITORS, SINCE THE EXPIRATION OF THE LATE ACTS, OF THE FOURTH AND FIFTH YEARS OF THE REIGN OF HER LATE MAJESTY QUEEN ANNE (circa 1718) (Lincoln's Inn Library, MP 100/7).

96. The Act of 13 & 14 Charles II, c. 24 (1661 [1662]), was a minor act concerned with removing noblemen and investors in certain speculative companies from the purview of the bankruptcy statutes.

97. 9 H.C. JOUR. 483, 488 (May 27 and June 4, 1678) (considering a bill to improve the discovery of the estates of bankrupts); 9 H.C. JOUR. 609 (May 2, 1679) (ordering that leave be granted to consider a bill to prevent a minority of creditors from defeating compositions acceptable to the majority); 9 H.C. JOUR. 661 (Nov. 24, 1680) (“*Ordered*, That Leave be given to bring in a Bill to supply the Laws against Bankruptcy.”); 9 H.C. JOUR. 730 (June 6, 1685) (“*Ordered*, That Leave be given to bring a Bill to supply the Defects of the Laws made against Bankrupts.”); 10 H.C. JOUR. 142 (May 22, 1689) (“Pray[ing for a] Bill for the Composition touching Bankrupts Estates.”); 10 H.C. JOUR. 275 (Oct. 26, 1689) (“*Ordered*, That Leave be given to bring in a Bill touching a Disposition of Bankrupts Estates.”); 10 H.C. JOUR. 364 (Apr. 2, 1690) (ordering another “Bill touching the Disposition of Bankrupts Estates”); 10 H.C. JOUR. 572 (Dec. 4, 1691) (“*Ordered*, That Leave be given to bring a Bill for the better Discovery and more equal Distribution of Bankrupts Estates.”); 10 H.C. JOUR. 702 (Nov. 17, 1692) (“*Ordered*, That Leave be given to bring a Bill for the better Ordering and Distributing of Bankrupts Estates, and Relief of their Creditors.”); 11 H.C. JOUR. 3 (Nov. 14, 1693) (“*Ordered*, That Leave be given to bring in a Bill for the better Discovery of Bankrupts Estates.”); 11 H.C. JOUR. 191 (Dec. 21, 1694) (“A motion being made, That Leave be given to bring in a Bill for better Discovery of Bankrupts Estates.”); 16 H.L. JOUR. 142 (Apr. 1, 1697) (passing the Creditors’ Relief (Compositions) Act), *codified as* 8 & 9 Wm. III, c. 18 (1697); 16 H.C. JOUR. 288, 343

different tactic from the bankruptcy statutes by reversing the rhetoric on insolvency. Rather than assuming that all bankrupts were frauds and cheats, these bills began from the premise that most insolvents were honest and anxious to pay what they could to their creditors. The bankrupt became a pitiable unfortunate trying to do his best by his creditors, and the vengeful creditor, whose unwillingness to accept a composition prevented everyone from being paid, became the villain.⁹⁸ The prologue to the proposed 1694 Bankrupts' Estates Bill is similar to others:

whereas bankrupts who are not able to pay their full debts, are oftentimes desirous to compound for the same, or to satisfy their creditors to the utmost of their power, but by the perverseness of some few creditors, . . . such good intentions have been obstructed, to the manifest prejudice of other creditors who have had the greatest share and interest in such bankrupts' estates, and the said bankrupts thereupon, despairing of any good accommodation with their creditors, have withdrawn themselves out of their reach, or consumed in prison the greatest part of their estates, which otherwise by a reasonable composition, would have been disposed of amongst their creditors.⁹⁹

In these bills, concealing assets or oneself was no longer treated as a crime but rather as an understandable response to overbearing and obstinate creditors. The bills proposed that once a certain percentage of the creditors, usually two-thirds, agreed to a composition, the remainder would be forced to join, even if a bankruptcy proceeding had already commenced against the debtor.¹⁰⁰ Although the bills came with an important caveat voiding any agreements in which it was proved that the debtor had not made a full

(May 17, 1698; July 5, 1698) (Creditors' Relief (Composition) Repeal Act), *codified as* 9 & 10 Wm. III, c. 29 (1698).

98. This rhetoric began early. See, for example, a document dated circa 1580 complaining about the "Eville dealinge" of some creditors who

wolde overthrowe suche agrements, and utterlie spoile a nombre of poore men even to their owne and other the creditors greate losses, for as the execution of the statute taketh from the banckerootee all that he hath to the utter overthrowe of him and his familie and the creditors comonlie not half paid, So good compositions bringeth in time full payement to the Creditors, and preservation of the poore men.

Opinion on the Right of Strangers to Partake of Bankrupts Goods Rateably with English Creditors, *supra* note 73 (interlinear additions not marked). For similar rhetoric, see REASONS HUMBLY OFFERED FOR PASSING THE BILL FOR THE BETTER RECOVERY OF BANKRUPTS ESTATES, AND FOR THE MORE EQUAL DISTRIBUTION THEREOF, *supra* note 69, at 149.

99. 1 MANUSCRIPTS OF THE HOUSE OF LORDS, 1693–1695, *supra* note 17, at 360–61.

100. *E.g., id.* at 361.

and honest disclosure of his books and estate,¹⁰¹ they also demonstrated some understanding that the debtor was far more likely to hand over his assets if he knew that he would get something in return.

Only one of these bills passed—in 1697. It was retroactive, applying to failures before November 1696, and its repeal a year later over the objection of many merchants suggests that it had been intended as a sort of one-time amnesty in response to poor economic conditions brought about by the war with France.¹⁰² Less than a decade later, Parliament would take up reform again, this time within the bankruptcy law itself. Yet despite having begun to realize the necessity of a debtor-friendly carrot like discharge, the lawmakers did not give up their old club of threatening punishment. Indeed, they paired discharge with the harshest possible penalty. Discharge would succeed, eventually; capital punishment would be a failure, perhaps right from the first.

II. THE PIVOT POINT (1705–1707)

The one-sidedness of early English bankruptcy, exacerbated by the threat of punishment for refusing to cooperate, created the need for a mechanism like discharge that would offer the debtor a carrot to balance against the existing sticks.¹⁰³ Nonetheless, although some reformers had already advocated some kind of discharge, when a

101. *E.g., id.* at 364.

102. 2 MANUSCRIPTS OF THE HOUSE OF LORDS, 1695–1697, at 504–06 (1903); 3 MANUSCRIPTS OF THE HOUSE OF LORDS, 1697–1699, at 240–41 (1905). The preamble to the repeal act blames fraud, accusing debtors of packing the vote with fake creditors. The broadside plea not to repeal the Act confirms that this was a consideration. It pointed out that “several Abuses and Perjuries have been committed; but that can be no reason, why (for the faults of some few) others, for whom chiefly this Act was made, should have no Benefit by it.” REASONS HUMBL Y OFFERED TO THE RIGHT HONOURABLE THE HOUSE OF LORDS, WHY THE ACT, INTITULED, AN ACT FOR THE RELIEF OF CREDITORS, BY MAKING COMPOSITION WITH THEIR DEBTORS, IN CASE TWO THIRDS IN NUMBER AND VALUE DO AGREE, SHOULD NOT BE REPEALED (1698).

103. *See* REMARKS ON THE LATE ACT OF PARLIAMENT TO PREVENT FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS, WITH PROPOSALS FOR THE AMENDMENT THEREOF 8 (London, J. Morphew 1707) (“That before the passing the late Act, some further Provision was necessary both with respect to Bankrupts and Insolvent Persons for the procuring their Liberty; and also with respect to Creditors for the securing a larger, more equal, and more speedy Distribution of their Debtors Estates.”); REV. ST. ENG. NATION, Feb. 26, 1706, at 98 (Daniel Defoe arguing that, at the time the 1706 Act was under consideration in the House of Commons, a bill with just penalty and no positive incentives for the bankrupt to cooperate would be “*Preposterous* in its Nature, *Unjust in Practice*, and not Practicable in Common Reasoning”).

major financial scandal persuaded Parliament to think seriously about bankruptcy reform in 1705 and 1706, the legislators' immediate reaction was to turn to capital punishment. The moderating mechanism of discharge was an afterthought proposed almost a year later and passed despite a quite mixed reaction from the merchant community.

A. *Early Proposals for a Capital Punishment Provision*

For over a century prior to 1706, legislators had toyed with the idea of making the bankrupt's failure to cooperate in his economic evisceration a capital crime. As early as 1559, the list of "Considerations delivered to the Parliament" recommended that bankruptcy be made a felony with the possibility of pardon the first time if all the creditors petitioned for it.¹⁰⁴ A document that may have been a proposal for the 1604 bankruptcy act recommended that "[i]f the bankrupt forswear the damage of his creditors to a certain¹⁰⁵ value, he is to be indicted and suffer as in [fel]ony¹⁰⁶ without admittance of his book,¹⁰⁷ and his goods saved for his creditors."¹⁰⁸ The clause "without admittance of his book" referred to the refusal of benefit of clergy, also called "pleading the book," and a defendant only pled benefit of clergy, a type of first offender reprieve, if he or she faced capital punishment.¹⁰⁹

No evidence has thus far answered the question whether a provision making bankruptcy a capital offense found its way into any drafts of the 1604 Act, but such a clause did make it into the draft of the next statute. The act that became 21 James I, c. 19 of 1624 was originally taken up in the House of Commons in 1621.¹¹⁰ The 1621 and 1624 bills must, in their preliminary drafts, have been nearly identical,

104. 1 CALENDAR OF THE MANUSCRIPTS, *supra* note 33, at 162, 164.

105. The text is partially effaced, but the remaining letters and the context suggest that the word was "certaine."

106. The original document has deteriorated, and the key word after "suffer as in" has been partly obliterated by a hole. Based on context, it is very likely "felony."

107. From "without" to "book" interlinear.

108. A Recital of the Several Circumstances that May Cause a Debtor to Become a Bankrupt, *supra* note 35 ("If the Bankrupt forswear ye damage of his Creditors to a certaine value, he is to be indicted and suffer as in [fel]ony without admittance of his book and his goodes saved for his Creditors.").

109. See 4 BLACKSTONE, *supra* note 10, at *366–67 (detailing the benefit of clergy); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 458–63 (London, Macmillan & Co. 1883) (same).

110. 1 H.C. JOUR. 537 (Mar. 5, 1621).

for verbatim printed summaries of the two exist.¹¹¹ Both summaries indicate that the laws would punish with pillorying fraudulent conveyance, refusal to disclose assets, and failure to demonstrate to the commission that the loss suffered was caused by misfortune. The bills then went on to punish as a felon without benefit of clergy any bankrupt who absconded and did not surrender himself to the commissioners. In other words, the offender would be hanged. The briefs offered the justification that “[t]his wilfull deceit is worse than burglary, or robbing by the high-way, which may be prevented, this cannot.”¹¹²

In debates in the House of Commons on May 24, 1621, Sir Edward Coke, at that time the famous former judge, appears to have reacted to this provision with the following observation: “Adrian would have bankrupts whipped to death. They deserved it. But I like not laws written in blood. It is sufficient that it is so penal in some cases.”¹¹³ Other members shared Coke’s opposition. The heavily edited manuscript draft of the House of Lords’ version of the 1624 bill shows that the Lords struggled with the capital punishment clause more than with any other provision of the bill.¹¹⁴ They attempted to salvage the clause by adjusting the wording, crossing out lines, and making short substantive additions.¹¹⁵ In the end, however, the Lords abandoned the idea and dropped the entire clause, which consequently did not appear in the final law.

The argument that fraudulent bankrupts should be treated as felons did not die out. In a petition to the House of Lords around 1696, the merchants of London suggested that it “may be very useful in a Law to be made for time to come, whereby it may be made Felony for Debtors to [e]mbezel their Effects, or to abscond

111. The 1621 brief is reprinted at 7 WALLACE NOTESTEIN, FRANCES HELEN RELF & HARTLEY SIMPSON, COMMONS DEBATES, 1621, at 104–08 (1935); the 1624 brief is at A Brief of the Bill Exhibited Against Bankrupts (National Archives, SP 14/160 no. 74).

112. 7 NOTESTEIN ET AL., *supra* note 111, at 107–08; A Brief of the Bill Exhibited Against Bankrupts, *supra* note 111.

113. 5 NOTESTEIN ET AL., *supra* note 111, at 176 (“But I like not Lawes written in bloode. Tis sufficient that it is so penall in some cases.”).

114. An Act for the Further Description of a Bankrupt, and Relief of Creditors Against Such as Shall Become Bankrupts, and for Inflicting Corporal Punishment upon the Bankrupts in Some Special Cases (May 4, 1624) (Parliamentary Archives, HL/PO/JO/10/1/25).

115. *Id.* at f. 5.

themselves”¹¹⁶ In the chapter of his 1697 book, *Essays Upon Several Projects*, proposing bankruptcy reforms otherwise highly favorable to debtors, author and political commentator Daniel Defoe recommended that any merchant or trader demonstrating fraudulent intent either by absconding upon becoming insolvent or by failing to cooperate with the bankruptcy process should “be guilty of Felony, and upon Conviction of the same, shall suffer as a Felon, without Benefit of Clergy.”¹¹⁷

That the death penalty after so much time finally became part of the bankruptcy law in 1706—at exactly the moment when Parliament made an abrupt policy about-face and decided to offer the bankrupt the carrot of discharge—can be explained as a response to a very public scandal involving the massive financial scam that two London merchants, Thomas Pitkin and Thomas Brerewood, nearly pulled off in 1705. The anger and frustration of lawmakers and creditors over their inability to scare Pitkin and Brerewood into making a full and honest disclosure and restitution of the money they had stolen boiled over into a series of parliamentary statutes, one of which was the 1706 Act of 4 & 5 Anne.

B. *The Pitkin Affair (1705)*

On Saturday, February 10, 1705, Thomas Pitkin met with his business partner, Thomas Brerewood, in the Swan Tavern in Cornhill, in the heart of the mercantile district of London.¹¹⁸ The men met to pull the trigger on a fraud that had been at least nine months in the making.¹¹⁹ After the meeting, Pitkin would leave London, absconding first to Scotland and later to Holland, and setting in motion an economic panic, an international manhunt, and a reform of English bankruptcy law.¹²⁰

116. REASONS HUMBLY OFFER'D TO THE RIGHT HONOURABLE THE LORDS SPIRITUAL AND TEMPORAL IN PARLIAMENT ASSEMBLED, AGAINST SOME CLAUSES DESIR'D TO BE INSERTED IN THE BILL, INTITULED, AN ACT FOR RELIEF OF CREDITORS (circa 1696).

117. DEFOE, *ESSAY*, *supra* note 17, at 222–23.

118. OBSERVATIONS ON THE BANKRUPTS BILL: OCCASION'D BY THE MANY FALSE MISREPRESENTATIONS AND UNJUST REFLECTIONS OF MR. DANIEL DE FOE IN HIS SEVERAL DISCOURSES ON THAT HEAD HUMBLY OFFERED TO THE CONSIDERATION OF ALL FAIR TRADERS 26 (London, B. Bragg 1706) [hereinafter OBSERVATIONS ON THE BANKRUPTS BILL].

119. 14 H.C. JOUR. 542 (Feb. 20, 1705) (containing a petition of Pitkin's creditors claiming that the scam had been going on for nine months).

120. OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 5, 26–27.

Pitkin, a linen draper, or wholesale cloth merchant, had his shop at the sign of the Black Spread Eagle in Kings Street, Cheapside, London.¹²¹ He was successful enough to have contracted a marriage with the daughter of a wealthy merchant.¹²² Brerewood served as the procurement agent for army regiments controlled by several of the most powerful noblemen of the day.¹²³ A man of means, he came from a leading family of Chester, and his grandfather, Robert Brerewood, had been a justice of the King's Bench.¹²⁴ Although Pitkin was the face of the scandal, contemporaries believed that Brerewood had masterminded the scheme in which he involved Pitkin as an effective, but perhaps not particularly enthusiastic, dupe.¹²⁵

The fraud itself, to the extent it can be deduced, appears to have been relatively simple.¹²⁶ Pitkin, using at least in part money provided for the purpose by Brerewood, paid off some of his existing creditors early, giving the impression that he was flush with cash in the wake of his profitable marriage.¹²⁷ Having acquired the reputation for wealth,

121. Letter obligatory from Thomas Pitkin to John Winter (Oct. 27, 1704) (Rylands Library (Manchester, England), RYCH/3791/3); *see also* Letter Obligatory from Thomas Pitkin to Elias Barnes (Jan. 20, 1705) (Rylands Library, RYCH/3791/8 and RYCH/3791/9) (letters obligatory both dated Jan. 20, 1705 n.s. and indicating that Pitkin was still at Kings Street).

122. Petition of Thomas Brerewood to the House of Lords (Mar. 28, 1707) (Parliamentary Archives, HL/PO/JO/10/6/117/2372); *see also* 15 H.C. JOUR. 309 (Feb. 25, 1707) (noting that Pitkin's wife possessed a great fortune).

123. *See* 5 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, at 526 (Oxford, Oxford University Press 1857) (noting that Brerewood was an agent of "the four regents").

124. *See* Petition of Frances Brerewood, Wife of Thomas Brerewood, Praying to Be Heard by Counsel Against Brerewood's and Pitkin's Bill (Mar. 31, 1707) (Parliamentary Archives, HL/PO/JO/10/6/117/2372) (referring to the marriage portion given to Brerewood's wife by Brerewood's father, Henry Brerewood, of ten houses in Chester "which were late ye Estate of Sir Robert Brerewood Knight" (abbreviations expanded without indication)); Anita McConnell, *Brerewood, Sir Robert (1588-1654)*, in 7 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 476 (H.C.G. Matthew & Brian Harrison eds., 2004).

125. 15 H.C. JOUR. 310 (Feb. 25, 1707); *see also* THE CASE OF THE CREDITORS OF THOMAS PITKIN; DISCOVERING THE FRAUDULENT CONTRIVANCE AND PRACTICES OF THOMAS BREREWOOD, THE SAID PITKIN'S PRINCIPAL ACCOMPLICE (circa March 1707) (Guildhall Library (London, England), Bside 13.22) ("*Pitkin*, by the repeated Sollicitations of *Brerewood*, was at last prevailed upon to Engage in this Affair."). *But see* REV. ST. ENG. NATION Feb. 23, 1706, at 94 ("differ[ing] from the General Opinion in this Case" and arguing that "the whole Plot, Contrivance, Management, and Method of that Capital Fraud, was Mr. *P[itkin]*'s, wholly his own . . . and the other Gentleman, meerly hook'd in, to bear some of the Scandal").

126. It is also a direct ancestor of one of the most common bankruptcy scams, called a "bustout," committed in the United States today. *See* WICKOUSKI, *supra* note 20, at 10.

127. 15 H.C. JOUR. 309 (Feb. 25, 1707); Petition of Thomas Brerewood Praying to Be Heard by Counsel at the Bar Against a Bill to Subject the Estate of Thomas Brerewood to the Creditors of Thomas Pitkin, Notwithstanding Any Agreement or Composition Made with the

Pitkin proceeded, on Brerewood's instructions, to amass a huge quantity of merchandise on credit. Estimates of his debts ranged from £50,000 to as high as £100,000.¹²⁸ To give some sense of how large a sum that was, consider that a wealthy merchant of the time would have had an annual income of between about £400 and £600 on a capitalization of between £8,000 and £12,000.¹²⁹

As he acquired the goods, Pitkin secretly passed them on to Brerewood.¹³⁰ In addition, prior to absconding, he transferred his entire estate to Brerewood so that when his creditors realized that he had fled and tried to use bankruptcy to recuperate their money, they would find nothing left to go after.¹³¹ The plan apparently envisioned that Brerewood, who actually held all the goods, would step forward and graciously offer to buy the debts of Pitkin's creditors for about forty cents on the dollar (or eight shillings, six pence in the pound).¹³² The conspirators assumed that the creditors would be anxious to get something and would agree to the deal. Presumably, after quietly selling off the merchandise Pitkin had accumulated and repaying himself, Brerewood would split the remainder with Pitkin, who would be able to return to England free of liability or risk of bankruptcy.

The plan did not work out quite as intended. Pitkin's creditors learned of his absence immediately and became suspicious.¹³³ When Pitkin did not return promptly, the creditors took out a commission of bankrupt,¹³⁴ and, given the extent of the fraud and the number of creditors (later estimated to be over 140),¹³⁵ on February 20, 1705,

Creditors of the Said Thomas Pitkin (Mar. 28, 1707) (Parliamentary Archives, HL/PO/JO/10/6/117/2372).

128. 14 H.C. JOUR. 542 (Feb. 20, 1705) (petition of Pitkin's creditors, claiming debts of above £70,000); 15 H.C. JOUR. 309 (Feb. 25, 1707) (testimony before the House of Commons claiming just under £60,000 in debts); 5 LUTTRELL, *supra* note 123, at 545 (estimating that on May 1, 1705, Pitkin owed debts of £100,000); THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125 (claiming that the total debts amounted to £51,000).

129. STANLEY CHAPMAN, MERCHANT ENTERPRISE IN BRITAIN: FROM THE INDUSTRIAL REVOLUTION TO WORLD WAR I 22–24 & tbl.1.1 (1992) (citing estimates from 1688 and 1759).

130. 15 H.C. JOUR. 309 (Feb. 25, 1707); THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125.

131. 15 H.C. JOUR. 308–09 (Feb. 25, 1707).

132. *Id.*; THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125. There were twenty shillings in a pound and twelve pence in a shilling.

133. 15 H.C. JOUR. 310 (Feb. 25, 1707); OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 27.

134. LONDON GAZETTE, Feb. 12, 1705.

135. THE CASE OF MR. GEORGE WILCOCKS, ATTORNEY AT LAW (circa Mar. 1707) (Guildhall Library, Bside 12.118).

they also petitioned the House of Commons for a public act condemning Pitkin.¹³⁶ In their petition they explained that they had been unable to locate any of Pitkin's assets and that if none were located, many creditors would be ruined. They wanted Parliament to address the problem that "the Laws, now in force, have not provided sufficient Remedies for the Discovery of Frauds of this Kind."¹³⁷ The law needed to be able to force the bankrupt to disclose and deliver his assets to his creditors. The Commons responded by creating a committee "to consider some Means to prevent the Prejudice, that happens to Trade by the fraudulent breaking of Traders, and for punishing the same."¹³⁸

The resulting statute, entitled "An Act for the Relief of the Creditors of *Thomas Pitkin*, a Bankrupt, and for the Apprehending of him, and the Discovery of the Effects of the said *Thomas Pitkin* and his Accomplices," became law on March 14, 1705.¹³⁹ Among other provisions, it threatened Pitkin with life imprisonment and standing in the pillory three times a year if he did not return to London and cooperate with his creditors.¹⁴⁰ In the end, Pitkin had to be captured in Holland and extradited back to London, where he told his creditors all, laying the blame squarely on Brerewood.¹⁴¹ Other than spending some time in prison while assisting his creditors in fingering his partner, Pitkin never seems to have made any restitution, and at some point he was able to move to a small village in East Anglia.¹⁴²

Brerewood did not give up so easily. Although the creditors identified him as an accomplice and the House of Lords ordered him taken into custody in early March 1705,¹⁴³ he still managed to salvage part of the original scam by hiring an attorney, George Wilcocks, to

136. 14 H.C. JOUR. 542 (Feb. 20, 1705); THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125.

137. 14 H.C. JOUR. 542 (Feb. 20, 1705).

138. *Id.*

139. 3 & 4 Anne, c. 12 (1704 [1705 n.s.]).

140. ANNO REGNI ANNAE REGINAE ANGLIAE, SCOTIAE, FRANCAE, & HIBERNIAE, TERTIO & QUARTO 212 (London, Charles Bill [1705 n.s.]).

141. 15 H.C. JOUR. 334 (Mar. 11, 1707) (petition of Thomas Brerewood); 15 H.C. JOUR. 310–11 (Feb. 25, 1707) (containing various accounts of Pitkin's capture in Holland).

142. See REV. ST. ENG. NATION, Mar. 14, 1706, at 128 (complaining that Pitkin "walks the Streets, and shows his Face"); THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125 (mentioning that Pitkin had been in custody); Will of Hassel Pitkin (Dec. 15, 1724) (National Archives, PROB 11/626) (the 1724 will of Pitkin's son Hassel Pitkin, mentioning that his father lived in the village of Belchamp Otten).

143. 5 LUTTRELL, *supra* note 123, at 525–26.

negotiate a composition with Pitkin's creditors.¹⁴⁴ Wilcocks assured the creditors "that 8 [shilling] 6 [pence] in the Pound was the utmost that *Brerewood's* Estate would reach to pay," and thereby convinced them all to sign a composition in September 1705.¹⁴⁵ But the creditors eventually got wind of the fact that Brerewood held much more of the stolen assets than he had let on, and they obtained a parliamentary act against him in April 1707, making, despite the previous composition, his entire estate liable to Pitkin's debts on pain of life imprisonment and pillorying three times a year.¹⁴⁶

That was not the end of the story. Brerewood fled to Livorno, Italy, where his creditors found him in December 1707 and at great expense hauled him back to London to stand trial.¹⁴⁷ He was convicted in the London criminal court in March 1709 of "Defrauding Mr. Pitkins Creditors, and Abscond[ing] contrary to an Act of Parli[a]ment made on his Account" and sentenced as the statute against him required.¹⁴⁸ Yet by November he had been freed on a royal pardon after having compounded with Pitkin's creditors to pay an extra one shilling six pence in the pound over the original agreement.¹⁴⁹

144. THE CASE OF MR. GEORGE WILCOCKS, ATTORNEY AT LAW, *supra* note 135.

145. THE CASE OF THE CREDITORS OF THOMAS PITKIN, *supra* note 125; LONDON GAZETTE, Sept. 17, 1705, at 2 (providing notice of the accord between Brerewood and his creditors).

146. An Act to Subject the Estate of Thomas Brerewood to the Creditors of Thomas Pitkin, Notwithstanding Any Agreement or Composition Made with the Creditors of the Said Thomas Pitkin, 5 Anne, c. 23 (1706 [1707]).

147. 6 LUTTRELL, *supra* note 123, at 241; British Library, Add. MS 38464 f. 21r (accounting for some of the expenses for the manhunt and return of Brerewood to England); The Case of the Creditors of John Coggs Deceased, and John Dann Against the Creditors of Thomas Pitkin (n.d.) (British Library, Add. MS 38465 f. 84v) ("[A]t the executing the s^d. Agreem^t. by the s^d Coggs & Dann with the Assignees of Pitkins Cred^t. there were produced severall Acco^t. of the charges of obeyning and prosecuting the s^d. Act of Parliam^t. against Brerewood, and bringing ^{him} over from beyond Sea, amounting to above 1800^l.").

148. THE PROCEEDINGS ON THE QUEEN'S COMMISSION OF THE PEACE, AND OYER AND TERMINER, AND GOAL-DELIVERY OF NEWGATE, HELD FOR THE CITY OF LONDON AND COUNTY OF MIDDLESEX, AT JUSTICE-HALL IN THE OLD-BAYLY, Mar. 2, 1709, at 4 [hereinafter PROCEEDINGS OF THE OLD BAILEY].

149. LONDON GAZETTE, Nov. 3, 1709, at 2 (announcing a composition with Pitkin creditors); Petitions for the Pardon of Thomas Brerewood (1709) (British Library, Add. MS 61617 ff. 158a–59a) (requesting pardon by Queen in exchange for additional payment by Brerewood); Case of the Creditors of Thomas Pitkin (circa 1710) (Hampshire Record Office, 44M69/G2/177 ff. 1–2) (indicating that Pitkin creditors obtained pardon for Brerewood). This was still not the end of the story, for Brerewood contracted with his bankers, Coggs and Dann, to pay the debt. Pitkin's creditors then went against the bankers, who ended up ruined. The

The Pitkin affair was ostensibly the exact sort of fraud that the bankruptcy acts were intended to punish, but when Pitkin absconded in February 1705, the governing law was the 1624 bankruptcy statute, which would have stripped him of his assets and sentenced him to two hours in the pillory and the loss of an ear.¹⁵⁰ Pitkin had secreted his assets, so he had no fear of them being taken from him provided he kept his mouth shut, and a few hours in the stocks seemed to his creditors a rather puny punishment for such a grand crime. Instead, Pitkin's scam had people calling for blood. Even such staunch advocates of a kinder, gentler bankruptcy law as Daniel Defoe and his sometime ally and newspaper-writing counterpart, John Tutchin, editor of the *Observer* newspaper, advocated for forceful punishment.¹⁵¹ Something, they said, needed to be done to deter debtors from committing these sorts of frauds and to punish them severely if they did.¹⁵² These sentiments did not go unnoticed in the Houses of Parliament.¹⁵³

Case of the Creditors of John Coggs Deceased, and John Dann Against the Creditors of Thomas Pitkin, *supra* note 147.

150. For a discussion of the common law of fraud and larceny, see *infra* notes 169–76.

151. DANIEL DEFOE, REMARKS ON THE BILL TO PREVENT FRAUDS COMMITTED BY BANKRUPTS 13 (London 1706) [hereinafter DEFOE, REMARKS] (writing that if the debtor who absconds is “ever, *Pitkin* like, . . . recovered and brought back by Force, he goes directly to the Gallows, as he deserves”); see also OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 17 (saying of Defoe, “[i]t was observed, that your Self and the rest of those Gentlemen who appeared on the same side with you, cry’d up Felony, the Penalty of the Bill, as a mighty Security to the Creditors”).

152. See, e.g., OBSERVATOR (London), Feb. 24, 1705, at 1 (“But what shall we do with such Cheats as this *Pitkin*? I think Hanging is his Due. *Obs[ervator]* ’Tis not his Due, because the Law does not Punish a Crime of that Nature with Death. . . . But I think it highly necessary to Crop these Vices in the Bud. If this *Pitkin* be not Punish’d, such Bankrupts will soon come in Fashion.”).

153. See, e.g., 15 H.C. JOUR. 291 (Feb. 12, 1706) (describing the testimony of Walker, a linen draper, that “this Act was made upon the account of that notorious Fraud of one *Pitkyn*”); OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 5–6 (claiming that the Pitkin affair was the impetus behind the bankruptcy bill); DEFOE, REMARKS, *supra* note 151, at 3 (noting the appeal to Parliament made by Pitkin’s creditors); ALEXANDER JUSTICE, A GENERAL TREATISE OF MONIES AND EXCHANGES 80 (London 1707) (characterizing the Pitkin Act as “being a good Precedent for a more general Law for regulating those Affairs, and preventing frauds, which began to be very common; the Excellent Parliament now in Being, pass’d the following Act, the good Effects of which will be daily felt in *England* more and more”).

C. *The Act of 4 & 5 Anne (1706)*

On March 19, 1706, the Act of 4 & 5 Anne, c. 17, received royal approval.¹⁵⁴ For the first time it granted bankrupts who cooperated with the commission of bankruptcy the possibility of receiving a discharge of their debts and a small stipend from their estate with which to begin again. For this monumental shift of focus, 4 & 5 Anne holds a place of importance in the history of Anglo-American bankruptcy. But the discharge provision came into the bill only in its last stages. Initially, the purpose of the bill was to punish fraudsters like Pitkin as the felons they were thought to be: with death by hanging.

The House of Commons passed the bill condemning Pitkin on March 1, 1705 and sent it to the House of Lords the same day. The next day, following the second reading of the bill in the Lords, it was submitted to committee.¹⁵⁵ The March 3, 1705, entry in the published *Journals of the House of Lords* states only that the committee recommended that the Pitkin bill pass without amendments.¹⁵⁶ The manuscript journal, kept by the clerks of the House, gives a fuller account. According to the manuscript, the committee had reported out the bill with a clause related to frauds committed by bankrupts in general. The Lords objected to the clause, which was removed.¹⁵⁷ The idea of a new, general bankruptcy act, however, was not discarded, and the Lords ordered the common law judges to draft a bankruptcy bill directed at “prevent[ing] [f]rauds frequently committed by [b]ankrupts.”¹⁵⁸ The judges returned a bill in time for it to be read two days later, on March 5.¹⁵⁹ This bill passed the House of Lords with minor amendments, and was before the House of Commons when the Queen prorogued Parliament, thereby expunging all pending bills.¹⁶⁰

The rejected clause and the subsequent judges’ draft formed the original nucleus of the Act of 4 & 5 Anne, c. 17 that eventually became law a year later, in March 1706. The initial March 1705 draft

154. 18 H.L. JOUR. 162 (Mar. 19, 1706).

155. 17 H.L. JOUR. 685 (Mar. 2, 1705 n.s.).

156. 17 H.L. JOUR. 687 (Mar. 3, 1705 n.s.).

157. 6 THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1704–1706, at 298 (1966).

158. 17 H.L. JOUR. 687 (Mar. 3, 1705 n.s.).

159. *Id.* at 689.

160. The bill passed the House of Lords on March 7, 1705. 17 H.L. JOUR. 691. It was read in the House of Commons on March 7 and 8, but it never had the required third reading before Parliament was prorogued on March 14, ending the session. 14 H.C. JOUR. 564–65 (Mar. 7, 1705).

was short—only two-and-a-half manuscript pages—and it did not contain provisions concerning either discharge or the death penalty.¹⁶¹ Instead the judges had written a simple bill narrowly tailored to punishing the likes of Pitkin.¹⁶² The preamble, which the final version would retain, sought to prevent the crimes committed by persons who “have and do daily become bankrupt, not so much by reason of losses and unavoidable misfortunes as to the intent to defraud and hinder their creditors of their just debts and duties to them due and owing.”¹⁶³ To accomplish this, the bill required the bankrupt to provide the same cooperation and disclosure as in the seventeenth-century statutes, but instead of two hours in the pillory and the loss of an ear, the penalty would be life imprisonment and standing in the pillory.¹⁶⁴

The Lords made two changes to the draft before sending it on to the House of Commons.¹⁶⁵ First, they amended the penalty clause so that the uncooperative bankrupt, rather than spending his life in prison, would suffer as a felon without benefit of clergy. Second, the Lords added a sunset provision, setting the act to expire after three years. Both of these new provisions would appear in the final bill.¹⁶⁶ Modern scholars and even Chancellor Hardwicke in an opinion delivered in 1744 have assumed that the eventual 1706 bill was time-limited because the new discharge concept that was found in the final version was meant to be a temporary experiment—or in Hardwicke’s thinking, a temporary expedient.¹⁶⁷ The manuscript record suggests

161. Initial Draft of 4 & 5 Anne (Mar. 5, 1705) (Parliamentary Archives, HL/PO/JO/10/6/85/2131).

162. OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 6 (asserting that the bankruptcy bill was brought in at the same time as the Pitkin bill “to prevent and curb such like Practices for the future”).

163. Initial Draft of 4 & 5 Anne, *supra* note 161, at f. 1 (“[H]ave & doe dayly become Bankrupt, not soo much by reason of Losses and unavoidable misfortunes as to the intent to defraud & hinder their creditors of their just debts & dutys to them due & owing . . .”).

164. *Id.* at f. 3.

165. *Id.*; Manuscript Journal of the House of Lords, 24 Oct. 1704–14 Mar. 1705 (Mar. 6, 1705) (Parliamentary Archives, HL/PO/JO/5/1/40).

166. See 4 & 5 Anne, c. 17, §§ 1, 16 (1705 [1706 n.s.]).

167. See, e.g., *Ex parte* Burton, (1744) 1 Atk. 255, 255–56, 16 Eng. Rep. 163, 164–65 (Ch.) (stating that the discharge provision in the statute of Anne “was temporary at first, and never intended to be a perpetual law, but was made in consideration of two long wars which had been very detrimental to traders, and rend[e]d them incapable of paying their creditors”); Cohen, *supra* note 11, at 156 (describing one historian’s belief that discharge “was devised in response to mercantile difficulties existing immediately prior to the passage of the 1705 act”); Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 19 n.67 (1919) (suggesting that the “dangers” of the 1706 Act’s “leniency” led to stricter provisions in the 1732

otherwise, for the sunset provision came into the statute nearly a year before discharge. Instead, the legislative history indicates that in the original bill, it was the death penalty provision that was meant to be temporary.

After almost 150 years of thinking about making fraudulent bankruptcy a felony and with the Pitkin affair simmering in the background, why would the Lords have been hesitant about permanently recategorizing bankruptcy crime as a felony without benefit of clergy? In the view of one bankruptcy historian, the introduction of the penalty of death for fraudulent bankruptcy was an insignificant change that, “[w]hile obviously quite dramatic, . . . should not be overstated . . . [because] bankruptcy was no different from most property crimes of that era, which also provided for the possible imposition of the death penalty.”¹⁶⁸ In fact, bankruptcy *was* quite different from other similar crimes of the era. As a property crime, bankruptcy resembled larceny, except that larceny required that the stolen property be obtained illegally.¹⁶⁹ Thus, larceny could not cover the situation in which a person received goods through a contractual agreement and then made off with them. Such an act would have to have been addressed civilly.¹⁷⁰ More importantly, although the early eighteenth century witnessed a sustained increase in the number of felonies removed from benefit of clergy, many larcenies remained clergyable, meaning that those convicted were not hanged.¹⁷¹ Indeed, during the sixteenth and early seventeenth centuries, when some members of Parliament were

bankruptcy act); McCoid, *supra* note 11, at 166 n.12, 182 (“The introduction of the discharge is described as initially an experiment because the limitation from the outset on the duration and coverage of the 1706 act strongly suggests that it was meant to be tentative in character.”).

168. Tabb, *supra* note 11, at 11.

169. 6 SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 564 (2003) (defining larceny as “a taking and carrying away of a chattel of value from the possession of someone with better title, without that person’s consent, intending permanently to deprive him of the possession”). Indeed the question of servants or bailees making off with property received in the course of their duties had exercised sixteenth-century judges, requiring an act of Parliament in 1529 to declare that it was a “felony for a servant to abscond with or ‘imbezil’ goods worth 40s. delivered to him by his master to keep to his master’s use.” *Id.* at 567–68.

170. See 2 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 816 (London, A. Strahan 1803) (“Where indeed the possession is honestly obtained upon a contract or trust in the first instance, the subsequent dishonest conversion of it . . . is no other than a breach of trust, for which the party injured has a civil remedy.”).

171. See J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 144 (1986) (describing property crimes newly excluded from clergy during the late sixteenth and early seventeenth centuries).

already advocating hanging bankrupts, nearly all larcenies were clergyable.¹⁷²

To extend the comparison beyond property crimes, fraudulent bankruptcy was analogous to common law fraud, also called cheat, and forgery. Neither of these were capital crimes in 1706, though some types of forgery became capital during the course of the eighteenth century.¹⁷³ Fraud, for instance, which the common law limited to a narrow list of acts including using false weights and measures, selling goods with counterfeit marks, and playing with false dice,¹⁷⁴ had been extended a year before the passage of the first bankruptcy act to include the use of false tokens or counterfeit letters to obtain personal property. But the punishment prescribed was to be by pillorying, “or otherwise, by any corporal pain, (except pain of death).”¹⁷⁵ None of the other crimes against public trade, including smuggling, were capital offenses in 1706, and most were categorized as misdemeanors.¹⁷⁶

Thus, in imposing capital punishment in the 1705 draft and the eventual 1706 law, Parliament treated bankruptcy as a special case, and the fraudulent bankrupt as a particularly incorrigible character. In so doing, the legislators continued to employ an old approach to fight an old battle, using coercion and threats to try to solve the perennial problem of forcing the debtor to give up his assets when the rewards of doing so were not readily apparent. But at the same time, the sunset provision suggests that they were far from convinced that death was the right penalty.¹⁷⁷ This is further evidenced by an alteration in the draft proffered when the Lords took up the bill again during the following session in November 1705. The proposed text was nearly identical to the March draft except for a blank after the words “being thereof lawfully Convicted by Indictment or

172. *Id.* at 143.

173. 3 STEPHEN, *supra* note 109, at 181–82; 2 EAST, *supra* note 170, at 853, 1003; BEATTIE, *supra* note 171, at 146 (explaining that forgery was removed from benefit of clergy in 1729). Blackstone equated forgery with fraudulent bankruptcy, calling both *crimen falsi*—a crime of falsehood. 4 BLACKSTONE, *supra* note 10, at *157.

174. 3 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 995 (London, A.J. Valpy 1816).

175. *Id.* at 996 (discussing 33 Hen. VIII, c. 1).

176. 4 BLACKSTONE, *supra* note 10, at *154–60.

177. *Cf.* BURGESS, *supra* note 48, at 289 (claiming that “[w]henver the framers of a law found themselves at a loss to prevent what they wished effectually to prohibit, they enacted the penalty of death”). James Oldham kindly pointed this text out to me.

Information Shall Suffer.”¹⁷⁸ It seems that the Lords intended to leave open to further discussion the imposition of capital punishment. They did not have that debate, however, because they chose to abandon their own bill in favor of one proposed by the Commons.¹⁷⁹

By the time the Act of 4 & 5 Anne passed the two Houses of Parliament and received royal assent in March 1706, it had morphed into a major reform of bankruptcy law.¹⁸⁰ In addition to introducing capital punishment and discharge, it made important procedural changes, such as requiring the commissioners to hold three creditors’ meetings to help organize the process of proving debts and examining witnesses.¹⁸¹ The bill that finally became “An Act to Prevent Frauds Frequently Committed by Bankrupts” was first read in the House of Commons in late October 1705.¹⁸² Although different from the Lords bill of March, it retained most of that draft’s language, including the felony provision. The Commons bill was read a second time on November 8 and then sent to committee,¹⁸³ where it languished into the new year. At that point, according to Daniel Defoe,¹⁸⁴ “several Persons on both sides began to consider how to make it a compleat Act, and both to relieve the miserable but honest Debtor already fallen into Disaster, and secure Trade against the numerous Mischiefs of Bankrupts for the Future.”¹⁸⁵ As a result, on February 4 the committee was instructed to “receive a Clause, for the better discovery and preventing Frauds committed by Prisoners and Bankrupts, and for the Relief of such Prisoners for Debt as Shall resign their Effects to their Creditors.”¹⁸⁶ If Defoe is to be believed,¹⁸⁷

178. Bankrupts Prevention of Frauds Bill (1705) (Parliamentary Archives, HL/PO/JO/10/6/85/2150 f. 3).

179. 18 H.L. JOUR. 13 (Nov. 7, 1705) (first reading of bill). No further readings of the bill are recorded.

180. CHRISTIAN, *supra* note 52, at 59 n.1 (discussing how this statute ushered in “a new æra in the system of the bankrupt law”).

181. 4 & 5 Anne, c. 17, §§ 1, 18 (1705 [1706 n.s.]) (capital punishment); *id.* § 7 (discharge); *id.* § 13 (three meetings).

182. 15 H.C. JOUR. 5 (Oct. 31, 1705).

183. 15 H.C. JOUR. 15 (Nov. 8, 1705).

184. Defoe had been actively involved in the debates about the bankruptcy bill. He was himself a bankrupt, and it was a topic that had long concerned him greatly. *See* Quilter, *supra* note 26, at 54–55, 62–63, 68.

185. DEFOE, REMARKS, *supra* note 151, at 3–4.

186. 15 H.C. JOUR. 125–26 (Feb. 4, 1706).

187. It is not clear that Defoe always told the truth in the service of his political projects. *See, e.g.*, OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 25–33 (accusing Defoe of “varnishing over” the truth in his advocacy of the bankruptcy bill).

the committee's initial response to their mandate had two parts: discharge and requiring all creditors to come into the collective.

The idea of discharge did not originate in 1706. In 1662, Parliament had considered a bill relieving debtors worth less than £10 of their debts upon their relinquishing two-thirds of their assets.¹⁸⁸ The string of composition acts repeatedly proposed in the last quarter of the same century had also assumed a proceeding analogous to discharge, though within the context of contract rather than bankruptcy.¹⁸⁹ Defoe had called for discharge in his 1697 book, *Essays Upon Projects*,¹⁹⁰ and he and his newspaper, *A Review of the State of the English Nation*, in which he wrote passionately in favor of bankruptcy reform during February and March 1706, were at the peak of their influence at the time of the 1706 debate.¹⁹¹

Writing shortly after the passage of the 1706 Act, Defoe claimed that the discharge provision had been an attempt to resolve an absurdity in an early version of the bill. In early English bankruptcy, creditors retained the right to remain outside the collective and pursue their regular common law remedies. If, however, the debtor were forced to surrender everything, then the creditors participating in the bankruptcy would receive an unfair advantage because nothing would be left for the outlying creditor. Conversely, the debtor remained exposed to prosecution for debts by creditors who did not come in. "From this Circumstance it seem'd so rational, either to force all the Creditors to come in, or to discharge the Debtor from them that stood out, that when such an Offer was made to the House, it was too reasonable to be opposed . . ."¹⁹² Based on Defoe's constant commentary in his *Review*, it appears that the idea of forcing

188. Draft of an Act for Relief of Creditors and Release of Poor Prisoners (Jan 27, 1662 n.s.) (Parliamentary Archives, HL/PO/JO/10/1/310A)

189. McCoid, *supra* note 11, at 182–85; REASONS HUMBLY OFFER'D TO THE RIGHT HONOURABLE THE LORDS SPIRITUAL AND TEMPORAL IN PARLIAMENT ASSEMBLED, AGAINST SOME CLAUSES DESIRED TO BE INSERTED IN THE BILL, INTITULED, AN ACT FOR RELIEF OF CREDITORS, *supra* note 116 (presenting the opposition of the merchants of London to a clause in a composition bill allowing for discharge and an allowance).

190. DEFOE, ESSAY, *supra* note 17, at 214; *see also* OBSERVATOR, Feb. 24, 1706 n.s., at 1 (calling for discharge).

191. Quilter, *supra* note 26, at 58, 62–63. Defoe offered statements of his own role in the process. *See* REV. ST. ENG. NATION, Mar. 19, 1706, at 133; REV. ST. ENG. NATION, Mar. 23, 1706, at 142; DEFOE, REMARKS, *supra* note 151, at 18 (declaring, "I confess, I press'd hard in Parliament for an Amendment" concerning the certificate requirement).

192. DEFOE, REMARKS, *supra* note 151, at 4.

creditors into the bankruptcy initially attracted more attention and generated more antagonism than did the idea of discharge.¹⁹³

Perhaps as a consequence, the creditor requirement did not make it into the final bill and may not even have survived the House of Commons. By contrast, when the Commons committee reported out a bill on February 27, 1706, it included a discharge provision that probably also granted the bankrupt a small allowance of up to 5 percent of his net estate to enable him to begin again.¹⁹⁴ It seems that all the clause required the bankrupt to do to obtain his discharge was to swear an affidavit that he had turned over all his assets fully and honestly.¹⁹⁵ The bill narrowly made it out of Commons on March 6 and was immediately given to the Lords.¹⁹⁶

On March 7, the Lords sent the bill to the committee of the whole house,¹⁹⁷ and the opposition to discharge intensified. The bill's supporters believed that it would pass in early March.¹⁹⁸ To help ensure passage, they recruited merchants to appear before the Lords to voice their support.¹⁹⁹ That plan backfired when the merchants heard the details of the bill.²⁰⁰ They had been in favor of a bill to "prevent frauds [] frequently committed by bankrupts," which was the title inherited from the Lord's initial 1705 draft, but they did not like the idea, as one said, that "I may be paid my debts rather by affidavit than [by] money."²⁰¹ In response, the Lords added an amendment requiring that no certificate of discharge be granted unless the commissioners of the bankruptcy certified to the chancellor

193. REV. ST. ENG. NATION, Feb. 26, 1706, at 98 (stating that the main objection being argued in the House of Commons was the creditor rule). Perhaps this had been Defoe's intention all along. By focusing attention on the creditor rule, he and his allies may have hoped that discharge would fly under the radar.

194. This ended up as 4 & 5 Anne, c. 17, § 7 (1705 [1706 n.s.]).

195. 6 MANUSCRIPTS OF THE HOUSE OF LORDS, 1704–1706, *supra* note 157, at 427–28.

196. 15 H.C. JOUR. 188 (Mar. 6, 1706) (reporting a vote of 54 to 53 on a rider making the bill retroactive, which was the last part of the bill voted on).

197. 18 H.L. JOUR. 140–41 (Mar. 7, 1706).

198. OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 8; *see also* A LETTER FROM A NORTH-BRITAIN, TO HIS FRIEND IN LONDON 1 (1708).

199. *See supra* note 198.

200. REV. ST. ENG. NATION, Mar. 21, 1706, at 138; OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 8–9; *see also* DEFOE, REMARKS, *supra* note 151, at 8 (“[T]he [merchants’] Arguments were so weak, and the People appear’d so hot, and so visibly partial . . .”).

201. 6 MANUSCRIPTS OF THE HOUSE OF LORDS, 1704–1706, *supra* note 157, at 427–28 (“I fear this Bill may have ill consequences. I like the Bill as to the title of it, but it will encourage sloth and those that venture on others’ estates.” (quoting testimony of another merchant)).

or Lord Keeper in writing that the bankrupt had made a full and honest disclosure of his assets.²⁰² The bill was sent back to the Commons with this amendment and was passed into law on March 19, 1706.²⁰³

Within a month of the passage of the Act, the number of docketed commissions of bankruptcy skyrocketed. In 1705, an estimated 159 commissions were opened; in 1706, that number grew to 567. Bankruptcy commissions did not reach 1706 numbers again until the 1770s.²⁰⁴ Breaking 1706 down by quarter shows the impact of the Act even more dramatically: quarter one, prior to the passage of the Act saw thirty-one commissions issued; quarter two, during the period when the Act was available retroactively, saw ninety-one; quarter three saw 166; and quarter four, 279.²⁰⁵

Unfortunately, easy discharge would not last. In January 1707, less than a year after the passage of the Act, the House of Commons received a petition from the merchants and traders of London complaining that, notwithstanding the Act, “there are still carried on divers notorious Frauds (and it may be feared) wilful Perjuries, and secret Evasions of the said Law, to the manifest Prejudice of Trade, and the endangering of the Nation’s Credit both at home and abroad.”²⁰⁶ A committee was immediately created to investigate abuses of the new bankruptcy law.²⁰⁷ In early February, the Commons received a petition from the company of mercers, grocers, apothecaries, and haberdashers of the city of Worcester complaining that the bankruptcy bill “hath been made use of by fraudulent Persons, to the Damage of their Creditors,” and asking that the bill be

202. Manuscript Journal of the House of Lords, 14 June 1705–21 Nov. 1706 (Mar. 11, 1706) (Parliamentary Archives, HL/PO/JO/5/1/41) (amendments made to the act); 18 H.L. JOUR. 153 (Mar. 13, 1706) (additional amendments made and agreed to); 15 H.C. JOUR. 198–99 (Mar. 19, 1706) (reading amendments from the Lords, including amendment concerning discharge certificate); REV. ST. ENG. NATION, Mar. 16, 1706, at 130 (Defoe discussing this “Amendment”); REASONS HUMBLY OFFERED FOR PASSING THE BILL, NOW DEPENDING IN PARLIAMENT RELATING TO BANKRUPTS (1706) (Guildhall Library, Bside 17.87) (referring to the Lords’ amendment).

203. 18 H.L. JOUR. 162 (Mar. 19, 1706).

204. JULIAN HOPPIT, RISK AND FAILURE IN ENGLISH BUSINESS 1700–1800, at 182–83 (1987); *see also* Papers Related to the Commissions of Bankruptcy (n.d.) (British Library, Stowe 416 f. 30r). (listing the number of bankruptcy commissions sealed between June 24, 1706, and April 14, 1719, including 715 commissions for the year June 24, 1706 to June 24, 1707, and only 200 commissions for the following year).

205. HOPPIT, *supra* note 204, at 187–88.

206. 15 H.C. JOUR. 240 (Jan. 17, 1707).

207. *Id.*

amended.²⁰⁸ The following week, the Commons heard testimony of London merchants concerning the “Abuses, and ill Practices, arising from the said Act.”²⁰⁹ Perhaps significantly, during the same period, the bankruptcy committee was also taking testimony about the Pitkin affair, finally learning how Pitkin had obtained his money and about Brerewood’s attempts to cheat the creditors with his disingenuous offer of a composition.²¹⁰

On February 27, 1707, exactly one year after the first bankruptcy act with discharge was introduced, the Commons received a bill to amend the 1706 Act.²¹¹ A key change was the requirement that four-fifths of the creditors in number and value consent to the bankrupt receiving his certificate of discharge.²¹² The Commons passed the bill in late March, sending it to the Lords, who considered but refused several proposed amendments in favor of debtors,²¹³ and returned the bill unaltered with their assent on April 4.²¹⁴ Again the impact on the opening of bankruptcy commissions was immediate. In the first quarter of 1707, before the new law was in place, 149 commissions were opened, but in the second quarter only sixty-four, in the third quarter, thirty-six, and in the fourth quarter, forty-nine. The numbers remained well below their 1706 peak in the following years.²¹⁵ The new rule helped create the phenomenon of the undischarged bankrupt: the bankrupt who had handed over his assets but who did not receive a discharge in return, and who therefore remained liable for all unpaid debts.²¹⁶

The stiffened requirements for discharge affected the place of capital punishment in the statutory scheme in two contradictory ways. The original thought in 1706—at least according to Daniel Defoe—was that a carrot would work better than a stick.²¹⁷ If the bankrupt knew he had some hope—not only of getting out of prison or out

208. 15 H.C. JOUR. 280 (Feb. 8, 1707).

209. 15 H.C. JOUR. 291 (Feb. 12, 1707).

210. 15 H.C. JOUR. 308–11 (Feb. 25, 1707).

211. 15 H.C. JOUR. 314 (Feb. 27, 1707).

212. 5 Anne, c. 22, § 2 (1707).

213. 7 THE MANUSCRIPTS OF THE HOUSE OF LORDS 1706–1708, at 78–82 (1966) (quoting a description in the manuscript minutes concerning the vote on the amendments and describing the amendments).

214. 18 H.L. JOUR. 313–14 (Apr. 4, 1707).

215. HOPPIT, *supra* note 204, at 188.

216. For a discussion of the undischarged bankrupt, see *infra* notes 332–38 and accompanying text.

217. DEFOE, REMARKS, *supra* note 151, at 3–5.

from under the shadow of the threat of imprisonment, but also of having that portion of the debts that he could not pay forgiven—then he would be more likely to deal honestly with his creditors under the bankruptcy commission. He would not need to conceal assets as the only way to survive the bankruptcy ordeal.²¹⁸ But when Parliament reacted to alleged frauds by making discharge more difficult to obtain, many bankrupts continued to have an incentive to conceal assets to protect themselves against the possibility that they would not be released from prison and freed of their debts. Consequently, acts of fraudulent bankruptcy continued alive and well, sometimes committed by otherwise honest men afraid of not getting a discharge. Yet only a handful of bankrupts were ever prosecuted, let alone hanged. Part III attempts to explain why.

III. PUNISHMENT FOR FRAUDULENT BANKRUPTCY (1706–1820)

The two acts of Anne were both set to expire in 1709 but were extended until 1716, when they were permitted to lapse.²¹⁹ A new bankruptcy act, passed in 1719, reintroduced capital punishment and discharge, but, after being continued twice, that act, too, was allowed to expire in 1729.²²⁰ Finally, in 1732, Parliament passed a major bankruptcy reform bill incorporating prior laws and adding some new elements. This bill also included discharge and the felony provision, and thereafter capital punishment for fraudulent bankruptcy remained a part of English law until 1820.²²¹ Thus, for 108 years between 1706 and 1820, England supposedly executed fraudulent bankrupts, but only four men were in fact hanged: Richard Towne, a tallow-chandler, in 1712; Alexander Thompson, an embroider, in 1756; John Perrott, a cloth merchant, in 1761; and John Senior, a

218. See REASONS HUMBLY OFFERED FOR PASSING THE BILL, NOW DEPENDING IN PARLIAMENT RELATING TO BANKRUPTS, *supra* note 202 (“This Bill will prevent Bankrupts concealing their Effects, both by the Severe Penalties it Enacts, and the Encouragements given thereby . . .”).

219. 7 Anne, c. 25 § 4 (1708 [1709]).

220. 5 Geo. I, c. 24, §§ 1, 3 (1718 [1719]), *continued* by 11 Geo. I, c. 29 (1724 [1725]), *further continued* by 13 Geo. I, c. 27 (1727).

221. 5 Geo. II, c. 30, § 1 (1732). This statute also had a sunset provision but was continued multiple times until it was made permanent by 37 Geo. III, c. 120 (1797). See SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 51 (testimony of Sir Samuel Romilly).

clothier, in 1813.²²² A handful of other men were convicted but were pardoned or had their sentences reduced or overturned.²²³

This could be interpreted as a remarkable record of deterrence, but the evidence of continued bankruptcy crime suggests otherwise. The reality seems to have been that imposing capital punishment for fraudulent bankruptcy was a spectacular failure—not simply because it did not prevent the frauds at which it was aimed but also because it was so rarely enforced, permitting other frauds to flourish.²²⁴ This failure will be studied from both a micro and a macro perspective, examining, on the one hand, the motivations of individuals and, on the other, the systemic problems that arose in the century after the introduction of discharge and capital punishment. Section A takes the first approach, presenting a microhistory of the bankruptcy of John Perrott, the paradigmatic fraudulent bankrupt. Perrott borrowed money dishonestly and categorically refused to pay it back once the bankruptcy proceedings began. For his obstinacy, he was hanged. Yet when he dropped dead at the end of a rope, his creditors still could not locate their missing money. The penalty, therefore, did not further either of the traditional goals of bankruptcy: repaying creditors or deterring debtor fraud.²²⁵

Section B discusses the broader reasons why capital punishment failed. Even in the face of such a harsh penalty, and even with the

222. Because no official records were kept, it is not certain that this list is complete. There are, however, two reasons to believe that no one else was hanged for fraudulent bankruptcy. First, no newspaper stories or Old Bailey accounts have surfaced. Second, the appendix to an 1819 parliamentary committee report on the criminal laws records only the four known executions. SELECT COMMITTEE ON CRIMINAL LAWS, &C., REPORT, 1819, H.C. 585, at 132, 147, 152–53.

223. See the Appendix for the complete list.

224. James Bland Burges, the author of a treatise on bankruptcy reform in the late eighteenth century, asserted that the death penalty provision was not used because it was legally inoperative. In the printed version of the statute, the fraudulent bankrupt was to be “convicted by Judgement or Information.” As Burges pointed out, however, the common law mandates that criminal defendants be proceeded against by indictment. BURGES, *supra* note 48, at 289–90; see also GREEN, *supra* note 43, at 225–28 (this appears to be the earliest edition in which this point is made). Although Burges was right on the law, he was wrong on the statute. As Edward Christian related in a later treatise, the words “judgment or information” were a printer’s error. The parliamentary roll containing the official text of the statute had “indictment or information.” CHRISTIAN, *supra* note 52, at 123 n.1 (citing King v. Bullock, (1807) 1 Taunt. 71, 168 Eng. Rep. 595 (E.C.)).

225. See, e.g., SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 80 (testimony of Archibald Cullen) (“The bankrupt law was introduced with a view to prevent and punish the frauds of debtors, and to distribute their property equally amongst all their creditors . . .”).

possibility of discharge, bankruptcy crimes continued to be committed. Contemporaries believed fraud flourished because these crimes went mostly unpunished. As a result of the lack of prosecutions, the rest of the bankruptcy system ended up in disequilibrium, though one that differed from what existed prior to 1706. Instead of bankruptcy being a creditors' remedy, it became—too often for the likes of contemporaries—a fraudulent debtors' playground.

A. *The Bankruptcy of John Perrott (1760–1761)*

John Perrott's bankruptcy and execution in 1761 captured the attention of the times and continued to be remembered decades later as the quintessential bankruptcy fraud.²²⁶ The case was so famous that a nineteenth-century editor of Blackstone's *Commentaries* called Perrott the last bankrupt hanged.²²⁷ In fact, he was not. That honor went to John Senior, a clothier from the village of Alverthope, outside Wakefield in Yorkshire, who in 1813 became the fourth and last man hanged for fraudulent bankruptcy in England. Senior did what many bankrupts probably did: he concealed some of his goods, in this instance a relatively small amount of cloth worth half his total debt.²²⁸ He was likely hanged because he compounded his concealment with fraud. Although it does not appear that his creditors had learned of the hidden assets during the initial period of investigation, before receiving his certificate, Senior began trading in his brother's name. "This excited suspicion, and led to enquiries, which terminated in the assignees' instituting the present prosecution."²²⁹ He was found guilty on the evidence of the many people who had helped him hide the cloth and move it from place to place in the dead of night.²³⁰ The judge "intimated" that Senior should expect no mercy, and he was accordingly hanged a few weeks later.²³¹ The case stirred some passing interest in local newspapers, but by the

226. See *supra* note 7 and accompanying text.

227. 2 BLACKSTONE, *supra* note 9, at *482 n.a.

228. See *Fraudulent Bankrupt*, HULL PACKET, Apr. 6, 1813, at 4 (reporting on Senior's case and also discussing his creditors and his total debts of £1,181); 2 CHITTY, *supra* note 174, at 516–17 (using Senior's indictment as a model and listing concealed property worth £560 out of total debts of £1,181).

229. *Fraudulent Bankrupt*, *supra* note 228, at 4.

230. HULL PACKET, Mar. 30, 1813, at 4.

231. *Fraudulent Bankrupt*, *supra* note 228, at 4; *Execution*, LEEDS MERCURY, Apr. 10, 1813, at 3.

time the bankruptcy lawyer and activist, Basil Montagu, testified before a parliamentary committee studying bankruptcy reform five years later, Senior's story was nearly forgotten. In enumerating to the committee the men executed for bankruptcy crime, Montagu could only note, "I rather think, but am not certain, that a person has been executed within the last eight or nine years, at York."²³²

By contrast, John Perrott's bankruptcy had all the necessary titillating elements to excite public curiosity: money, sex, and intrigue. Capitalizing on the interest, several pamphlets were published laying out the story in great detail, and a number of archival documents and judicial opinions flesh out the numerous legal proceedings in which Perrott engaged. These permit a close-up view of the bankruptcy process and show how the capital felony provision was ultimately unable to prevent or to provide redress for fraud.

On January 17, 1760, John Perrott, a cloth merchant, called his creditors together at the Half Moon Tavern in Cheapside, London to inform them that he could not pay his debts.²³³ Through 1758, Perrott had done business on a cash basis. In 1759, he suddenly began to buy on credit and in significantly larger quantities than before. But he had built a good reputation for honesty during the nearly thirteen years he had been trading for his own account, and his creditors let his debt mount.²³⁴ Even at the January 17 meeting, the creditors were favorably impressed with his forthrightness; nevertheless, they decided to sue out a commission of bankruptcy and arranged for one of their number to call at Perrott's warehouse so that he could "be denied."²³⁵ Denying yourself to a creditor meant instructing an agent to deny a creditor who came seeking money access to you in order to avoid payment. Accordingly, the following morning William Hewitt, a warehouseman and one of Perrott's principle creditors, went to Perrott's warehouse and was duly denied by the apprentice.²³⁶

232. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 21.

233. 1 AN AUTHENTIC NARRATIVE OF THE PROCEEDINGS UNDER A COMMISSION OF BANKRUPTCY AGAINST JOHN PERROTT 1 (London, R. Griffiths 1761) [hereinafter AUTHENTIC NARRATIVE].

234. 2 KNAPP & BALDWIN, *supra* note 2, at 316.

235. PROCEEDINGS OF THE OLD BAILEY, Oct. 21, 1761, at 403 (concerning the act of bankruptcy); *see also* 1 AUTHENTIC NARRATIVE, *supra* note 233, at 1, 3.

236. PROCEEDINGS OF THE OLD BAILEY, *supra* note 235, at 394 (testimony about the act of bankruptcy); Bankruptcy Commission Docket Book (Jan. 19, 1760) (National Archives, B4/16 f. 22) (describing Hewitt as a warehouseman).

Perrott may have hoped he could avoid a commission of bankruptcy, for he had a major fraud in the works, and the scrutiny of a bankruptcy proceeding was going to reveal it.²³⁷ Instead, he may have believed that by calling the creditors together and appearing honest, they would be willing to compound the debt, or he may have been trying to pull off the sort of scheme, often lamented in the bankruptcy literature, in which a debtor put out word that he was insolvent and about to commit an act of bankruptcy, and the creditors rushed in to cut deals. The debtor, who was in fact solvent, then walked away with the money he had been absolved from repaying.²³⁸

Hewitt promptly petitioned for a commission, which issued the day after Perrott committed the act of bankruptcy.²³⁹ The commissioners met immediately, and at that meeting they found Perrott a bankrupt, and he “surrendered himself as such.”²⁴⁰ Between Perrott’s reluctant testimony and the evidence of his accounts and associates, the commissioners soon realized that a large sum of money was unaccounted for. Several pieces of evidence made them suspicious early on. First, though Perrott’s early account books were organized and thorough, during 1758 they began to become confused, and by 1759 they were in “total disorder.”²⁴¹ Second, his annual debt suddenly and unaccountably increased from less than £300 in the years before 1758 to upwards of £27,000 in 1759.²⁴² Third, at the same time that he was buying more on credit, he had also begun to sell anonymously through a broker, Henry Thompson. Perrott sent goods to Thompson, who then invited merchants to make offers without telling them whom he represented.²⁴³ These prospective buyers, among them the leading merchants in town,²⁴⁴ offered to buy at 15 to 20 percent below prime cost, and Perrott always ordered Thompson

237. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 4 (“An examination, exhibiting such strong proofs of the deponent’s misconduct, was not likely to extenuate the justly preconceived suspicions of his creditors.”).

238. *See, e.g.*, 5 Geo. I, c. 24, § 1 (1718 [1719]) (describing a similar practice); THE BANKRUPT. A MODERN CHARACTER (circa 1785) (laying out the same scheme).

239. Bankruptcy Commission Docket Book, *supra* note 236 (recording the issuance of the commission by Sir Robert Henley, the Lord Keeper, naming five commissioners, of whom three were esquires and two gentlemen).

240. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 1.

241. *Id.* at 4 n.(*).

242. 4 BLOODY REGISTER, *supra* note 5, at 270.

243. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 6.

244. *Id.* at 33 (naming several merchants, including Sir Samuel Fludyer, alderman and future Lord Mayor of London).

to accept the buyers' price. Neither Perrott nor Thompson could produce records of these transactions.²⁴⁵

In addition, by deposing several witnesses about Perrott's business activities, the commissioners learned of two potential acts of concealment. In his testimony, Thompson revealed that the day after the commission was sued out, Perrott had his apprentice deliver a package to Thompson for safe keeping. The package was sealed with three seals, and Perrott told Thompson that it contained personal papers unrelated to the bankruptcy. Two days before Thompson testified, Perrott retrieved the package.²⁴⁶ Perrott later informed the commissioners that the package contained "'nothing but letters from the fair sex;' which he had since destroyed."²⁴⁷ The fullest account of the case gave the following alert: "[I]t is necessary to advertise the reader, to keep in his memory the paper parcel sealed with three seals . . . as it was principally owing to the same paper parcel, that this complicated scene of iniquity was at last unravelled."²⁴⁸

The commissioners also received a tip leading them to a certain Patrick Donelly, a wigmaker who told them on March 13 that about two weeks after the commission issued, Perrott sent him two large boxes, claiming that the boxes contained his clothing and asking Donelly to hold onto them while he looked for lodging. Several days later, Perrott instructed Donelly to deliver the boxes to rooms in a house in the fashionable Queen Square.²⁴⁹ The house was occupied by a Mrs. Mary Anne Ferne. Ferne claimed during an interview that she had known Perrott for about a year but had received no money, banknotes, or other effects from him, and the matter was dropped.²⁵⁰

On April 19, the commissioners presented Perrott with a written interrogatory regarding the whereabouts of £13,500 that could not be accounted for.²⁵¹ Relativizing money historically is difficult, but the course of this case indicates that the missing £13,500 represented a

245. *Id.* at 5–6.

246. *Id.* at 6–7.

247. *Id.* at 12.

248. *Id.* at 7.

249. *Id.* at 10–11.

250. *Id.* at 11.

251. *Id.* at 17 (“As you do admit that you have spent the last week . . . with Mr. Maynard, one of your assignees[,] to settle and adjust your accounts and to draw up a true state thereof, to enable you to close such your examination; and do likewise admit . . . there is a deficiency of the sum of 13,513l . . . Give a *true* and *particular* account; What is become of the same, and how, and in what manner you have applied and disposed thereof?”).

very large sum. Indeed, it was nearly twice the annual income of the highest paid barristers of the time.²⁵²

Perrott responded to the interrogatory by saying that he had lost about £2,000 on goods sold in the previous year and otherwise, “for nine or ten years, I have, and am sorry to say it, been *extremely extravagant*, and spent large sums of money.”²⁵³ The commissioners scoffed at this claim. Perrott had only been running up his credit for a year, and an amount like £13,500 was, they felt, too large to spend in so short a time, especially because Perrott claimed that he had never gambled and because his books showed him to be a man of frugal habits.²⁵⁴ Exercising their statutory power, the commissioners had Perrott committed to Newgate Prison until he saw fit to provide a complete and reasonable account of the missing money.²⁵⁵

After six weeks in Newgate, he sent notice to the commissioners that he would answer their question.²⁵⁶ At a meeting on June 5, 1760, Perrott presented the commissioners with an account. Each entry was in round numbers, totaling £15,030. The entries included such items as rent, food, clothing, travel expenses, wages, commissions paid to his agent, and sales losses. The largest entries were: £2,700 for “House-keeping . . . with rent, taxes, and servants wages”; £920 for “Tavern expenses, coffee-house expenses, and places of diversion”; £3,000 for sales losses; and £5,500 for “Expenses attending the connection I had with the fair sex.”²⁵⁷ Perrott submitted no evidence to support this accounting, and the commissioners, unsatisfied with his response, sent him back to Newgate. Perrott petitioned the Lord Keeper to be released, but “his Lordship, on hearing the said deposition read, thought it so infamous in all its circumstances, that he did not think it necessary to order any attendance upon it.”²⁵⁸

The commissioners had well before this time concluded that Perrott was engaged in some sort of fraud, but they lacked hard evidence. Even testimony of a former maidservant of Mary Ann

252. DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE* 106–08 (1982). Attorney General Charles Yorke, one of the best paid barristers of this time, earned £7,322 in 1763. In 1770, the two most successful barristers earned just over £8,000. *Id.* at 107–08.

253. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 17.

254. *Id.* at 5, 17; 4 BLOODY REGISTER, *supra* note 5, at 269–70.

255. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 17.

256. *Id.* at 17–18.

257. *Id.* at 18–19.

258. *Id.* at 19–20.

Ferne, who came forward seeking the advertised reward of 20 percent of the bankrupt's estate to anyone uncovering the missing assets,²⁵⁹ only provided the information that, before meeting Perrott, Ferne had been poor but that now she was flush with money.²⁶⁰ The servant also mentioned that Ferne had hidden a paper package sealed with three seals, which the servant believed contained banknotes, and she claimed that Perrott had instructed her that if anyone came to search the house, she should show them his rooms and not Ferne's.²⁶¹ Nevertheless, the servant's testimony was considered insufficient to obtain warrants or bring suit, so no further discovery was made, and on July 26, 1760, the assignees paid a dividend to the creditors of five shillings in the pound.²⁶²

Making another attempt to obtain his liberty, Perrott turned to the courts. He brought writs of habeas corpus in King's Bench three times arguing that he should be released because he had answered the commissioners' questions. The first petition resulted in no published report, and Lord Mansfield remanded Perrott to Newgate.²⁶³ The next petition, however, produced an important opinion that established the right of commissioners to keep bankrupts imprisoned even after they had answered the commission's questions.²⁶⁴

In *Rex v. Perrott*, heard on February 10, 1761,²⁶⁵ Perrott argued that (1) he had already given a full answer to the commissioners' questions, and (2) the commissioners' jurisdiction to question him,

259. *Id.* at 20; *see also, e.g.*, LONDON GAZETTE, Apr. 19, 1760, at 3 (offering a reward because "there is great Reason to believe that the greatest Part of [Perrott's] Effects are now concealed"). Offering a reward of a percentage of the bankrupt's estate was one of the statutory powers of the assignees. 5 Geo. II, c. 30, § 20 (1732).

260. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 21 (deposition of Sarah Reed on June 20, 1760).

261. *Id.* at 22.

262. *Id.* at 27; *Bankrupts*, PUB. ADVERTISER, June 16, 1760, at 3 (announcing the dividend); *see also* PUB. LEDGER, Feb. 19, 1760, at 131 (listing in detail Perrott's commercial merchandise sold at auction).

263. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 27 (case heard in September 1760).

264. *Id.* at 28–29. In December 1760, Perrott petitioned the Lord Keeper for his liberty. "This matter was debated before the chancellor, when it was determined that the prisoner could obtain redress only in the court of King's Bench; as the matter in question was strictly of legal determination." 4 JACKSON, *supra* note 4, at 208. Consequently, Perrott ended up back before Mansfield. *See* Response of Lord Keeper to Perrott's petition (Dec. 20, 1760) (National Archives, B1/38 f. 235); *see also* Response of Lord Chancellor to Petition (Jan. 22, 1761) (National Archives, B1/39 f. 3).

265. For this date, *see* the marginal note at *Rex v. Perrott*, (1761) 2 Burr. 1215, 1215, 97 Eng. Rep. 796, 796 (K.B.).

and therefore to commit him to prison, lasted only for the statutory forty-two days that the bankrupt had to surrender himself and be examined. Mansfield summarily dismissed point one, saying that Perrott's answer to the commissioners was "very *insufficient and unsatisfactory*."²⁶⁶ On the second issue, he pointed out not only that the bankruptcy statutes gave the commissioners the general power to examine and imprison the bankrupt beyond the statutory period until he made a full answer but also that this was the clear intent of the legislature.²⁶⁷ "The Objection has been strongly argued," Mansfield said, "[b]ut there is no Case to support it. It is a new invention, and would entirely defeat the end and intention of the bankrupt-acts."²⁶⁸

Finding himself once again in Newgate, Perrott agreed to submit to yet another examination by the commissioners.²⁶⁹ This time he explained that about six years previously he had become acquainted with a certain Sarah Powel. Although for the first five years of their relationship he spent £400 or £500 on her,²⁷⁰ during 1759 he had lavished money upon her to the amount of £5,000.²⁷¹ He provided an accounting of this money, each entry listing the month in which he sent Powel the money and the place to which he sent it: £100 at Christmas in 1758, £500 in January 1759, £400 in February 1759, etc.²⁷²

The commissioners were still not convinced. First, Perrott could not provide any details about the money he spent on Powel during the first four years of their acquaintance, nor could he remember where she had lived during those years, even though he claimed to have visited her often and to have written to her. Second, Perrott said that all of the money he sent to Powel came from his agent, Henry Thompson, rather than from (traceable) bank notes. Unfortunately, Thompson had since died.²⁷³ Conveniently, so had Powel, who had

266. *Re x v. Perrott*, (1761) 2 Burr. 1122, 1123, 97 Eng. Rep. 745, 746 (K.B.).

267. *Id.* at 1124, 97 Eng. Rep. at 746 (opinions of Mansfield, C.J., Foster, J., and Wilmot, J.).

268. *Id.*, 97 Eng. Rep. at 746. It was, in fact, not a new invention, according to testimony before a House of Commons committee on bankruptcy reform in 1818. Prior to *Perrott's Case*, it had been an open question whether the commissioners' ability to imprison the bankrupt exceeded the forty-two-day grace period. It had also been an open question whether they had the power to determine the truthfulness of the bankrupt's answers to their questions, or whether any plausible answer was sufficient. *See SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS*, *supra* note 7, at 52 (testimony of Sir Samuel Romilly).

269. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 29.

270. *Id.* at 34.

271. *Id.* at 29–31.

272. *Id.* at 30–31.

273. *Id.* at 31–33.

died penniless of consumption about ten months earlier, meaning that Perrott had known of her death when he gave his previous accounting on June 5, 1760, falsifying his claim that he had covered up the truth to avoid disgracing her.²⁷⁴ In fact, Perrott could provide no proof at all of sending enough money to Powel to keep her in luxury. On the contrary, the commissioners dug up evidence that Powel had complained to others of Perrott's parsimony. To make matters worse, the commissioners discovered that Powel, also known as Rachel Sims, was a prostitute, or, as a contemporary account put it, she was "*in keeping*, as the fashionable term is, by different persons, but was deserted at the time of *Perrott's* meeting her [and] had contracted an habit of drinking, an habit not uncommon to ladies of her profession and disposition"²⁷⁵

Back Perrott went to Newgate, and once again he brought a habeas corpus petition before King's Bench, which heard the case on June 8, 1761.²⁷⁶ Perrott again argued for his release on the ground that he had fully answered the commissioners' inquiry. This time, four barristers spoke on his behalf:

Mr. Gould, Mr. Serj. Davy, Mr. Coxe, and Mr. Stowe argued that he ought now to be discharged, as having given a *full and complete* Answer to the Questions propounded to him: And it is not material, in the present Respect, whether it be true or false; or whether his Conduct was prudent or imprudent.²⁷⁷

Two other barristers disagreed, insisting that Perrott's story was incredible and therefore, by definition, an unsatisfactory response. The court concurred and remanded Perrott to Newgate without opinion.²⁷⁸

Perrott next filed suit in Common Pleas for false imprisonment against the commissioners, but that proceeding was halted when the commissioners made a "fatal discovery."²⁷⁹ Sometime in June 1761, William Hewitt, the assignee, was walking in the garden of Lincoln's Inn when he saw a dejected-looking woman leaning against the wall. He approached this stranger and asked her what was the matter (or at

274. *Id.* at 33.

275. *Id.* at 35.

276. For this date, see the note at *Rex v. Perrott*, (1761) 2 Burr. 1125, 1125, 97 Eng. Rep. 745, 746 (K.B.).

277. *Rex v. Perrott*, (1761) 2 Burr. 1215, 1216, 97 Eng. Rep. 796, 796 (K.B.).

278. *Id.*, 97 Eng. Rep. at 796.

279. 1 AUTHENTIC NARRATIVE, *supra* note 233, at 36.

least so the “remarkably providential” [*sic*] story goes).²⁸⁰ She told him that she had been fired by a certain Mrs. Ferne. Hewitt, recognizing the name and thinking that it might turn up some information in the Perrott case, directed the woman, whose name was Mary Harris, to Thomas Cobb, the assignees’ attorney.²⁸¹ Harris was taken before Justice John Fielding, the famous London police magistrate, where she deposed as follows.²⁸²

According to Harris, four years earlier Ferne had been a servant. She and Harris had lodged together and had even been bedfellows, and at that time Ferne had very little money. On February 14, 1761, Ferne had called upon Harris for the first time in two years and the next day, she asked Harris to become her maid. Harris lived with Ferne and worked for her from March 5 to June 4, 1761. While there, she saw banknotes worth £4,000 in Ferne’s possession. Ferne explained the money by saying that “she had it from Fellows, whom she always made to pay for favours received.”²⁸³ Ferne also told Harris that when she had met Perrott she had no money at all and that “all her fortune was owing” to Perrott,²⁸⁴ and that “if she had known that . . . Perrott was going to fail, she would have got all she could from him . . . that his creditors should not have had any thing.”²⁸⁵

Harris recounted accompanying Ferne on her visits to Perrott in Newgate. She saw Ferne cut banknotes in half and give one of the halves to Perrott. Once she heard Perrott and Ferne talking about buying the fancy house of Sir John Smith in Queen’s Square. Perrott gave her half of a banknote for £1,000 and Ferne unsuccessfully bid £999 for the house. Ferne and Perrott spoke frequently about the opulence in which they would live when he got out of prison. Most importantly, Harris revealed that Ferne expected her lodgings to be searched, so she kept the half banknotes in a copy of Rochester’s

280. 4 BLOODY REGISTER, *supra* note 5, at 271. The assignees had, in September 1760, increased the reward for information to 40 percent of the recuperated assets. Whether or not that affected the servant’s willingness to talk is not discussed in the *Authentic Narrative*, nor is the discovery of Mary Harris. See 2 AUTHENTIC NARRATIVE, *supra* note 233, at 7.

281. 4 BLOODY REGISTER, *supra* note 5, at 271.

282. 2 AUTHENTIC NARRATIVE, *supra* note 233, at 7–10.

283. *Id.* at 7–8.

284. *Id.* at 8–9.

285. *Id.* at 10 (emphasis omitted).

Poems, and when the searchers came, she intended to take up the book and pretend to read.²⁸⁶

Based on this testimony, the commissioners issued a warrant for Ferne's house and Perrott's rooms at Newgate.²⁸⁷ At Ferne's, the searchers found halves of five banknotes, dated February or March 1761, amounting to £185. The other half of four of the notes turned up tied in a rag at the bottom of Perrott's trunk in Newgate, along with half of a note for £1,000.²⁸⁸ Because banknotes were like modern checks with serial numbers, bearing the names of the payees, endorsers, and the bank cashier, they could be traced. The tracks of these five notes led the assignees to Martin Mathias, a solicitor.²⁸⁹

Mathias deposed that Ferne had hired him the previous year, in May 1760, to work on Perrott's case. A month later she brought him thirteen banknotes, in denominations between £100 and £500, totaling £2,200. All of the notes had been cut in half and glued back together with wax. When asked about this, Ferne explained that they had been sent to her from out of the country and cut in half and mailed separately for safety. She asked Mathias to exchange the notes for a single note of £2,200.²⁹⁰ Mathias sent the notes to the Bank of England, receiving in return three notes: two for £1,000 and one for £200. He gave these to Ferne. Mathias testified that he believed the money belonged to Ferne, whom he understood to be a lady of high birth and means.²⁹¹

Ferne's explanation to the commissioners for having the banknotes gave a somewhat different impression. According to her, she acquired the money for granting favors to gentlemen. In particular, she had two elderly gentlemen friends, one who wore "a

286. *Id.* at 9–10.

287. According to 2 AUTHENTIC NARRATIVE, *supra* note 233 at 11, Justice Fielding of the London metropolitan court issued a search warrant on June 25, 1761, but according to the affidavit of William Hewitt, sworn on June 20, recounting the discovery of the notes, the search was made "by Virtue of a Warrant under the hands and seals of the Major part of the Commiss[ioners]." The Information of William Hewitt One of the Assignees of John Perrott a Bankrupt (June 20, 1761) (London Metropolitan Archives, CLA/047/LJ/13/1761/005); *see also* LONDON GAZETTE, June 23, 1761, at 4 (reporting that a warrant had issued on June 18, and indicating that the bank notes had already been found). Thus the date in the *Authentic Narrative* must be a mistake.

288. 2 AUTHENTIC NARRATIVE, *supra* note 233, at 11.

289. *Id.*

290. *Id.* at 13–14.

291. *Id.* at 16. Pye Donkin, another attorney involved in Perrott's case, also deposed that he believed Ferne to be a woman of fortune, from an aristocratic family. *Id.* at 32.

blue coat, and a star upon his breast, and a cockade in his hat” and the other, a man of seventy, who wore “a white coat, with a star on it, and a light blue garter.”²⁹² She did not know the men’s names, but when she needed money, she would contact them at the coffee houses they frequented, and they would give her cash or notes. The half banknotes ended up in Perrott’s trunk for safe keeping because, “her Maid-servant being apt to drink, she, [Ferne], apprehended if she and her servant should both happen to be in liquor together, there would be some danger of setting the house on fire.”²⁹³

The commissioners then set out to discredit every aspect of Ferne’s testimony. She claimed that she had loaned Perrott money before his bankruptcy, but the commissioners learned that she was a common prostitute from a poor family who, a few years earlier, had been reduced to allowing “the gentlemen soldiers then quartered [at Northampton] to participate indiscriminately of her favours.”²⁹⁴ They discounted the story of the elderly gentlemen, in part because there was no light blue garter in any order of British chivalry, “and it is well known that foreigners are not accustomed to be so extravagantly munificent.”²⁹⁵ Most importantly, the assignees succeeded in tracing back most of the thirteen original banknotes to merchants who had paid Perrott’s agent for cloth.²⁹⁶

The game was up. In September 1761, the assignees preferred a bill of indictment against Perrott at the London criminal court, the Old Bailey, for concealing his effects.²⁹⁷ After a month-long delay requested by the creditors, Perrott was tried on October 21, 1761.²⁹⁸ The trial lasted six hours as the prosecution painstakingly explored

292. *Id.* at 19.

293. *Id.* at 21–22 (emphasis omitted).

294. *Id.* at 25, 34.

295. *Id.* at 26–27.

296. *Id.* at 35–38, 40–41.

297. Index to Indictment Books (London Metropolitan Archives, CLA/047/LJ/10/002 f. 106v) (listing Perrott’s indictment on September 14, 1761). The assignees had been planning for this since March, when they sought permission from the creditors to prefer an indictment. PUB. LEDGER, Mar. 18, 1761, at 263.

298. The trial was delayed from its original docketing on September 18 because the assignees’ solicitor, Thomas Cobb, was unable to get the evidence ready in part because of the difficulty in tracking down Perrott’s former apprentice, who had moved to Dublin. Affidavits of Thomas Cobb in King Against John Perrott (Sept. 18, 1761) (London Metropolitan Archives, London Session Papers CLA/047/LJ/13/1761/006).

the money trail.²⁹⁹ Perrott, in his defense, could only say that he had sent all the money he received from Thompson to his mistress, Sarah Powel, and that the half banknotes in his trunk were Ferne's. She had asked him to keep them, and because she was supporting him while he was in Newgate:

I thought I should be very ungrateful, if I did not; and the reason she gave me was, her house had been attempted to have been broke open twice; and for the favours she was pleased to compliment me with, she said she thought she had some little right so to do.³⁰⁰

Perrott's counsel apparently focused on alleged procedural errors.³⁰¹ The Old Bailey proceedings do not record this part of the trial, but some of the claims can be pieced together from discussions in later treatises. One was that Hewitt, the petitioning creditor, improperly testified at Perrott's trial about the discovery of the hidden notes, even though "the Creditor of a Bankrupt cannot be a Witness, for he swears to increase his own Dividend."³⁰² Another complaint was that the warrant committing Perrott to Newgate had certain flaws, including incorrectly reciting the title of the controlling statute, which should have vitiated it.³⁰³ The objections were ignored.

The day before his execution, the two assignees came to visit Perrott in prison. They found him remorseful and willing to answer questions. Assuring him that they forgave him, they asked where the money was. "[A]fter a deep pause, Perrott said, I have this day received the Holy Sacrament, and will answer no more questions."³⁰⁴ The assignees went away empty-handed. One account attributes Perrott's unwillingness to confess even after his conviction to a supposed plot to have a rescue party made up of seamen show up at

299. GEN. EVENING POST (London), Oct. 22, 1761, at 1; PROCEEDINGS OF THE OLD BAILEY, *supra* note 235, at 399–402.

300. PROCEEDINGS OF THE OLD BAILEY, *supra* note 235, at 404.

301. 2 AUTHENTIC NARRATIVE, *supra* note 233, at 42.

302. GREEN, *supra* note 43, at 219; ST. JAMES'S CHRON., Oct. 22, 1761, at 3 (recounting that the assignee was permitted to testify after he agreed to take no dividend from the bill in question). Green also pointed out the collusion between Perrott and Hewitt in the commission of the act of bankruptcy. GREEN, *supra* note 43, at 219.

303. GREEN, *supra* note 43, at 217–18 ("We make the Observation, because we think it extremely remarkable, that a Warrant which had been settled and approved by some of the ablest of the Profession, should be liable to so palpable an Objection; and besides, we could not but admire, that as the Commitment had been so much canvassed and litigated in *Westminster Hall*, the Objection should have escaped . . . Notice . . .").

304. 4 BLOODY REGISTER, *supra* note 5, at 274.

the prison, “secur[e] the turnkey at the gate, forc[e] the keys from him, and then carry[] off the prisoner.”³⁰⁵

Several days after Perrott’s execution on November 11, 1761, Ferne was taken into custody and turned over “the half of two Bank notes; the other moiety of which were sometime since found in the possession of Perrott in Newgate. These notes were artfully concealed behind the backboard of Perrott’s picture, which was in this Lady’s apartment.”³⁰⁶ In April 1762, Perrott’s creditors “unanimously agreed to prosecute the Celebrated Lady who was party in concealing the Bank-notes, with the utmost rigour.”³⁰⁷

John Perrott was the type of bankrupt that Parliament had in mind in 1706 when it passed the first Act of Anne. He was the latter-day Thomas Pitkin, who obtained his creditors’ money through fraud, and through fraud prevented them from recuperating it. What the legislators had not anticipated, however, was that anyone would prefer to go to the gallows rather than disclose where he had hidden the money. In Perrott’s case, the statute had failed miserably. The threat of death did not scare him into revealing his assets, and once he was dead, his creditors were no closer to being repaid.³⁰⁸ Despite the two sometimes being equated, bankruptcy was not like murder.³⁰⁹ The goal of bankruptcy had always been to get the creditors their money back. Vengeance and retribution were not part of the law, at least not explicitly, and they did not further its stated goals. A dead debtor did not pay his debts. Perhaps a frightened debtor did, and Perrott’s

305. *Id.* at 275–76. Several other rumors circulated in the newspapers after Perrott’s death. One story said that, a day before his death, Perrott had given a friend a “Tortoiseshell Snuff-Box, with a Lady’s Picture in it set in Gold” as well as “some other Things of Value, which were contained in the said Box.” WHITEHALL EVENING POST (London), Nov. 26, 1761, at 3. Another story claimed that Perrott was buried under a fictitious name in his hometown of Newport-Pagnel. WHITEHALL EVENING POST, Nov. 28, 1761, at 3.

306. LLOYD’S EVENING POST, Nov. 13, 1761, at 478.

307. LONDON CHRON., Apr. 24, 1762, at 394.

308. ST. JAMES’S CHRON., Dec. 1, 1761, at 4 (“The Punishment Mr. Perrot has lately undergone, will appear to be scarce adequate to his Crime when considered in all its Consequences. It may be alledged, that when a Man forfeits his Life for his Misdemeanors, nothing further ought to be expected or required of him. But this Forfeiture of Life makes no Amends to the Persons injured . . .”).

309. See SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 50–51 (testimony of Sir Samuel Romilly) (explaining that, in the treaty of Amiens between England and France in 1801, the two governments agreed to give up offenders who fled justice, but the only offenders listed were “murderers, persons guilty of forgery, and fraudulent bankrupts”); DANIEL SAUTERIUS, THE PRACTISE OF THE BANCKRVPTS OF THESE TIMES 31–32 (London, John Norton 1640) (equating bankrupts with murderers).

assignees had authorized the publication of an account of the case ostensibly “as a terror to future offenders.”³¹⁰ The problem, as Section B describes, was that prosecutions were so infrequent and convictions so difficult to obtain that much of the threat had gone out of the statutory penalty.

B. The Failure of Capital Punishment

Despite initial optimism that the availability of discharge and the threat of capital punishment would improve debtor cooperation and end fraud, bankrupts discovered that they still needed to conceal assets. Yet, while fraud continued to flourish, indictments and convictions for fraudulent bankruptcy were few. The failure to prosecute encouraged bankrupts to do whatever necessary, honest or not, both to protect their property and to obtain their discharge. As a result, the bankruptcy system became a morass of fraud. In fact, in Ireland, which had adopted English bankruptcy law in 1772,³¹¹ the situation grew so serious that British parliamentarians discussed eliminating bankruptcy entirely in that part of the kingdom.³¹² Nonetheless, despite urgent calls for reform, by 1820, the only significant change was the abolition of the death penalty, a provision whose lack of enforcement was arguably the source of many of the other problems.

1. *The Problem of Fraud.* In the aftermath of the Acts of Anne, commentators had greeted the discharge and death penalty provisions with enthusiasm. Daniel Defoe predicted that the 1706 Act would result in less fraud:

Instead of flying from the Law for fear of Punishment, he now will fly to the Law for Protection; instead of absconding and hiding himself from his Creditors, now he will run to seek them out, offer them all he has as their Due, and demand his Liberty as his Right³¹³

310. 1 AUTHENTIC NARRATIVE, *supra* note 233, at i.

311. 1 CHRISTIAN, *supra* note 52, at vi; 2 *id.* at 1 (discussing the introduction of English bankruptcy law into Ireland).

312. 38 PARLIAMENTARY DEBATES 987 (T.C. Hansard ed., London 1818).

313. DEFOE, REMARKS, *supra* note 151, at 16.

With discharge available, “[n]one then in their Wits” would commit fraud when the penalty for doing so was so steep.³¹⁴ Perhaps the initial reaction to the new law was indeed as Defoe predicted, for around 1718, during a period when the most recent bankruptcy statute containing discharge and the death penalty had lapsed, commentators bemoaned the increase in fraud and portrayed the expired law as a great success. According to one broadside, most of the usual frauds “were Remedied, and in a great Measure prevented, whilst the late Acts were in force . . . the Consequences [being] so fatal, that during all that Time, there are but Two Instances of Persons Convicted as Fraudulent Bankrupts.”³¹⁵

One of those convicted was John Ristow, a weaver from London, who in December 1710 tried to ship £500 worth of household goods and shop merchandise out of the country rather than pay his debts.³¹⁶ His creditors caught him in the process of transferring his effects from

314. REASONS HUMBLY OFFERED FOR ALTERING SEVERAL CLAUSES IN THE BILL DEPENDING IN PARLIAMENT, RELATING TO BANKRUPTS (1707) (British Library, Cup.645.b.11.(7*)) (“It is *Felony* by the late Act for the *Bankrupt* to abscond with his Effects, and not appear and deliver the same: None then in their Wits (unless they design to run away) will fraudulently remove their Goods, when they are certain to be debarr’d their Liberty, and also lyable to be hang’d, if they do not afterwards discover and deliver them back to their Creditors.”); REMARKS ON THE LATE ACT OF PARLIAMENT TO PREVENT FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS, WITH PROPOSALS FOR THE AMENDMENT THEREOF, *supra* note 103, at 5 (“The Prospect of Liberty afforded by the Act will prevent Persons from Transporting themselves and Estates.”); REV. ST. ENG. NATION, Feb. 28, 1706, at 102 (Defoe noting that all that will be required is to hang two or three bankrupts and no one else will dare to cheat).

315. REASONS HUMBLY OFFER’D FOR ALTERING AND AMENDING THE LAWS CONCERNING BANKRUPTS, AND FOR PREVENTING THE GREAT LOSSES THAT ARE DAILY SUSTAINED BY THEIR CREDITORS, SINCE THE EXPIRATION OF THE LATE ACTS, OF THE FOURTH AND FIFTH YEARS OF THE REIGN OF HER LATE MAJESTY QUEEN ANNE, *supra* note 95 (naming eight bankrupts who had absconded since the expiration of the acts); *see also* REASONS HUMBLY OFFER’D FOR MAKING MORE CERTAIN THE LIBERTY OF SUCH BANKRUPTS WHO SHALL FAIRLY AND JUSTLY SURRENDER THEMSELVES, AND EFFECTS, PURSUANT TO THE ACT NOW DEPENDING, OR ANY OTHER ACTS NOW IN BEING, TO PREVENT FRAUDS COMMITTED BY BANKRUPTS 1 (circa 1718) (“Since the Expiration of the late Law of Bankruptcy, on the 26th *June*, 1716, great Numbers have withdrawn Themselves and Effects, some out of the Kingdom, and others into obscure Places, and have Secreted very considerable Sums of Money, and large Quantities of Goods, which would undoubtedly be voluntarily Surrendered, if the Liberty of the Bankrupt be made secure.”).

316. PROCEEDINGS OF THE OLD BAILEY, May 16, 1711, at 3, lists him as Restow. The newspapers and the record of his bankruptcy commission, however, spell the name Ristow. *Advertisements*, LONDON GAZETTE, Dec. 14, 1710, at 2; DAILY COURANT (London), Sept. 12, 1711, at 2; Bankruptcy Commission Docket Book (Dec. 13, 1710) (National Archives, B4/1 f. 17).

a river barge to a sea-going vessel.³¹⁷ Ristow was found guilty and sentenced to death but then pardoned.³¹⁸ Less than two years later, the second bankrupt convicted of fraudulent bankruptcy was not so lucky. Richard Towne was a London tallow chandler, whose reaction to hearing about the bankruptcy commission taken out on him was to sneak out of town at three o'clock in the morning with a large quantity of tallow and his account books.³¹⁹ He was caught when the boat on which he was attempting to flee to Holland was turned back by bad weather.³²⁰ At trial he looked every bit the fraudster. He tried to prove that his petitioning creditor owed him money by producing forged notes,³²¹ and one of his character witnesses called him “as great a Rogue as any in England.”³²² Towne was found guilty and hanged less than two weeks after his trial.³²³

Although no further executions took place until the 1756 conviction of Alexander Thompson, the fact that only three people

317. PROCEEDINGS OF THE OLD BAILEY, *supra* note 316, at 3.

318. *Id.* at 4; REASONS HUMBLY OFFER'D FOR ALTERING AND AMENDING THE LAWS CONCERNING BANKRUPTS, AND FOR PREVENTING THE GREAT LOSSES THAT ARE DAILY SUSTAINED BY THEIR CREDITORS, SINCE THE EXPIRATION OF THE LATE ACTS, OF THE FOURTH AND FIFTH YEARS OF THE REIGN OF HER LATE MAJESTY QUEEN ANNE, *supra* note 95 (naming the two convicted bankrupts: “Town the Tallow-Chandler, that was Hang'd, and J. Ristean, who was Pardon'd”). The absence of other evidence corroborates Ristow's pardon. Of his trial or execution the newspapers say nothing, which would be rather unusual for that time. The deaths of the other bankrupts hanged were always noted in the newspapers. The only notices about Ristow discovered in the newspapers are a notice of the commission against him in the LONDON GAZETTE, Dec. 14, 1710, at 2, and a notice of the auction of his goods in the DAILY COURANT, Sept. 12, 1711, at 2.

319. *A Particular Account of the Tryal of Richard Towne, Tallow-Chandler*, POST BOY (London), Dec. 16, 1712, at 1; LONDON GAZETTE, Apr. 10, 1712, at 2 (offering a reward for Towne's capture).

320. *A Particular Account of the Tryal of Richard Towne, Tallow-Chandler*, *supra* note 319.

321. *Id.* (stating that Towne produced three notes, “which being afterwards view'd by the Judges and Jury, it appear'd plainly to them, that Mr. Thomas's Hand was counterfeited; and, That the Body of the Notes was writ by the Prisoner”); *see also* Bankruptcy Commission Docket Book (Apr. 8, 1712) (National Archives, B4/1 f. 40) (docketing Towne's commission and listing Wm. Thomas, Citizen and Joiner of London, petitioning creditor); *A Particular Account of the Tryal of Richard Towne, Tallow-Chandler*, *supra* note 319 (identifying William Thomas as the prosecutor).

322. *A Particular Account of the Tryal of Richard Towne, Tallow-Chandler*, *supra* note 319. He was apparently also an accomplished liar. Upon his capture, Towne was found to be carrying very little money. He claimed that the two bags containing a total of 800 guineas—a gold coin worth one pound and one shilling—that he had secreted under his coat when he fled had fallen overboard as he leaned over the ship's railing to be seasick in the bad weather. *Id.* He later claimed that the 800 guineas were a fabrication. 3 A COMPLETE COLLECTION OF REMARKABLE TRYALS OF THE MOST NOTORIOUS MALEFACTORS 75 (London, J. Brotherton 1721).

323. EVENING POST (London), Dec. 20, 1712, at 3.

were found guilty of fraudulent bankruptcy in the first fifty years after the passage of the 1706 Act does not alone constitute evidence that fraud actually declined. Newspaper advertisements describing concealment of effects and failure to surrender to commissioners appeared as early as 1707.³²⁴ A notice might read, “there is Reason to believe that Robert Willan . . . did, in the Night-time, between 20th and 21st Instant, remove and convey away all his Shop Goods and Books of Account; in order, as tis supposed, to prevent a Seizure thereof, under the Commission of Bankrupt then issued against him,”³²⁵ or speak of “there being great reason to think he has endeavoured to conceal his effects, and as there is now lying in different peoples [*sic*] hands in London and parts adjacent, and on board some ships in the river, bound for Spain, bales of woollen goods, household furniture, plate, &c.”³²⁶ These advertisements were not common, but they were published in a steady trickle throughout the eighteenth and early nineteenth centuries.³²⁷

Yet most of the men mentioned in the advertisements apparently were never brought to trial, let alone convicted and hanged. The *Proceedings of the Old Bailey* describe only twenty-four bankruptcy trials between 1706 and 1820.³²⁸ The index to the Old Bailey indictment books from 1715 to 1792 records six additional cases.³²⁹ These account for some of the London and Westminster cases, and newspaper stories, court documents, and comments in other sources add another several dozen names from London and around the country, but only seven of these men are known to have been

324. See Appendix. These advertisements were not published prior to the 1706 Act, even though concealing and failure to surrender were crimes under the earlier statutes.

325. DAILY POST (London), July 23, 1730, at 2.

326. GAZETTEER & NEW DAILY ADVERTISER (London), Aug. 2, 1765, at 3 (noting the bankruptcy of Frederick Shepherd).

327. See Appendix.

328. See Appendix.

329. Twelve of the fourteen cases recorded in the *Proceedings of the Old Bailey* between 1715 and 1792 are also mentioned in the indices. The additional names not in the *Proceedings* are in the Index to the Old Bailey Indictment Books (London Metropolitan Archives, CLA/047/LJ/10/001): Benjamin Bailey (concealment, indicted July 18, 1753); George William Pope (concealment, indicted Dec. 4, 1752); and Robert Wright (concealment, indicted July 11, 1750). The 001 volume of the indices is unpaginated. The names are in order of date of indictment listed by last name in alphabetical sections. The second volume of the Index to Indictment Books (London Metropolitan Archives, CLA/047/LJ/10/002), mentions: Edmund Francis Calze, at f. 24r (concealment, indicted July 5, 1779); Derrick Martin, at f. 94v (concealment, indicted Apr. 13, 1774); Thomas Rawbone, at f. 122v (perjury in his examination before the commissioners, indicted Apr. 19, 1784).

indicted.³³⁰ As no official records were kept, this list of bankruptcy criminals cannot be considered exhaustive, and the continuity of complaints about bankruptcy fraud suggests that it was not an isolated problem.³³¹

Fraud continued to occur, in part because the benefits promised by discharge were too often unobtainable.³³² The requirement that four-fifths of the creditors in number and value sign the certificate of discharge meant that one or two significant and angry creditors could prevent the discharge and keep the bankrupt in debtors' prison indefinitely.³³³ Anecdotal evidence suggests that they occasionally did

330. See Appendix for the full list.

331. See, e.g., *INCONVENIENCES ARISING FROM THE PRESENT METHODS IN TAKING OUT AND EXECUTING COMMISSIONS OF BANKRUPT* (circa 1707–1710) (Chetham's Library (Manchester, England), H.P. 2950) (including several examples of fraud by debtors in concealing); Letter to the Editor, *LONDON CHRON.*, May 3, 1759, at 426 (same); Letter to the Editor, *PUB. ADVERTISER*, Nov. 1, 1773, at 1–2 (complaining about the “very great and flagrant Abuses of the Bankrupt Laws”); 35 *PARLIAMENTARY DEBATES*, *supra* note 312, at 244 (“The evil of which he complained, was the multiplication of fraudulent bankruptcies to an extent which threatened the most frightful consequences to the commerce and morals of the country.”). *But see* *CONSIDERATIONS UPON COMMISSIONS OF BANKRUPTS*, *supra* note 24, at 5–6 (claiming that concealment was less common than creditors imagined).

332. *But see* *REMARKS ON THE LATE ACT OF PARLIAMENT TO PREVENT FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS, WITH PROPOSALS FOR THE AMENDMENT THEREOF*, *supra* note 103, at 5 (claiming that many certificates had been signed since the passage of the Act a year before and only a few challenged). Bankruptcy crime is probably a given, so not all crime can be explained by external factors. Current figures estimate that “approximately ten percent of all bankruptcy cases involve abuse or fraud.” *WICKOUSKI*, *supra* note 20, at 1.

333. *SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS*, *supra* note 7, at 32–33 (testimony of Basil Montagu) (listing reasons creditors withhold their signatures); *id.* at 34 (“I am certain also, that deserving bankrupts have very great difficulty sometimes in obtaining the signature of the last one or two creditors, from the consciousness of the power which such creditors possess, so that the good intentions of the great body of the creditors are for a time delayed.”); *id.* at 52–54 (testimony of Sir Samuel Romilly) (“I have known several instances of the most harsh and inhuman refusals of certificates by creditors.”); *THE DEPLORABLE CASE OF SUCH UNFORTUNATE DEBTORS AS HAVE BEEN DECLARED BANKRUPTS* (post 1707) (Guildhall Library, Bside 11.39) (“Some of their Creditors, sharpen'd with their Losses; others provoked at not being preferr'd to the Prejudice of the rest, will always refuse to sign such Certificate.”); *PHILANTHROPOS [ERASMUS PHILIPS], PROPOSALS FOR PROMOTING INDUSTRY AND ADVANCING PROPER CREDIT; ADVANTAGEOUS TO CREDITORS IN PARTICULAR AND THE NATION IN GENERAL: IN A LETTER TO A MEMBER OF PARLIAMENT* 29–30 (1732) (complaining about creditors who spitefully refuse to sign certificates). The unwillingness of creditors to sign the certificate was predicted in 1707 in a broadside. See *REASONS HUMBLY OFFERED FOR ALTERING SEVERAL CLAUSES IN THE BILL DEPENDING IN PARLIAMENT, RELATING TO BANKRUPTS*, *supra* note 314 (pointing out that under compositions the debtor retained control of his property and the creditors had to sign the agreement to get their money, but under bankruptcy “the whole of his Effects will be in his Creditors['] hands, and no Loss accrues by their refusing to sign a Certificate for his

just that. In 1731, a group of bankrupts petitioned the House of Commons for relief. They had been imprisoned for “from One to Fourteen Years” after having, so they claimed, conformed to the bankruptcy laws and turned over all their assets.³³⁴ Nevertheless, some of their creditors, rather than sign the certificate, had left them to “linger out the Remainder of their Days in Misery and Want.”³³⁵ In 1759, a House of Commons committee reported on the difficulty of obtaining the necessary number of signatures and described the plight of bankrupts who were either left in prison for years or unable to rebuild their lives out of constant fear of being arrested for their old debts.³³⁶ Calculations for the years 1757 to 1759 showed that 52 percent of bankrupts did not receive their certificates of discharge.³³⁷ By the period from 1786 to 1805, however, that number had fallen to between 40 and 45 percent.³³⁸

Nonetheless, even though discharge became somewhat easier to obtain toward the end of the century, many bankrupts still had nearly the same incentives after 1706 to conceal assets to ensure their survival during bankruptcy.³³⁹ In particular when the bankruptcy was

Discharge”). The rules about obtaining signatures for the certificate were slightly modified over time, without solving the underlying problem. For an overview of that development, see SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 99 (testimony of Basil Montagu).

334. And if they, in fact, had not conformed, they were in a double bind. If they kept silent and did not turn over their concealed assets, they could support themselves in prison but not please their creditors. But if they reported their crime, they were liable to be executed as felons. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 86 (testimony of Archibald Cullen).

335. RICHARD GRAY, TO THE HONOURABLE THE COMMONS OF GREAT-BRITAIN IN PARLIAMENT ASSEMBLED. THE HUMBLE PETITION OF THE BANKRUPTS NOW CONFINED FOR DEBT IN HIS MAJESTY’S PRISONS OF THE KING’S BENCH AND THE FLEET (circa 1731) (Lincoln’s Inn Library, MP 100/4).

336. 28 H.C. JOUR. 603–04 (June 2, 1759).

337. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 98 (testimony of Basil Montagu).

338. *Id.* at 97.

339. PHILANTHROPOS, *supra* note 333, at 32–33 (“[T]is greatly to be feared some of that Denomination, being sensible of the Disposition of those they had to deal with, have made *Concealments*, to maintain themselves in Prison . . . or procur’d fictitious ones to make the *Number* and *Value* requir’d; chusing rather to run the Risque of being hang’d than that more terrible Death of starving in Prison . . .”); SELECT COMMITTEE ON THE BANKRUPT LAWS, MINUTES OF EVIDENCE, 1817, H.C. 486, at 16 (testimony of Thomas Nowlan) (stating that the law gives bankrupts the choice to conceal or to starve); SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAW, FURTHER REPORT, *supra* note 20, at 1 (testimony of Thomas Nowlan) (“[B]y requiring the bankrupt to surrender his last shilling, it reduces him to the dreadful alternative of choosing between starvation and felony.”).

not collusive and the debtor therefore had perhaps little sense of the hostility he would encounter from his creditors, he stood a good chance of not receiving his certificate. Already in 1707, an anonymous commentator had pointed out the difficult situation this created for the bankrupt when deciding whether to deal honestly with his creditors: “with humble Submission, it seems very hard, if not too much Hardship, for to be obliged, on the Penalty of Death, to surrender Person and Effects, and yet have hardly room for Hope left, that ever they shall be discharg’d from that Confinement till Death give them Enlargement.”³⁴⁰ After 1706, bankrupts had an additional reason to conceal assets besides providing for their own immediate needs: according to later evidence, creditors came to expect bribes before they would sign the certificate.³⁴¹

Bankrupts did not conceal assets unaware of the possible legal consequences. Although in one Old Bailey case the defendant excused his flight and refusal to appear before the commissioners—a capital felony—on the basis that someone had informed him that he was liable to be hanged for some other bankruptcy fraud that he had unknowingly committed,³⁴² it appears likely that most merchants and traders had a reasonable understanding of the elements of the crime of fraudulent bankruptcy. The Lord Mayor of London had ordered at least one of the proposed bankruptcy bills and the account of Richard Towne’s trial to be published, presumably to inform the city’s merchants.³⁴³ Newspapers printed summaries of other bills,³⁴⁴ and the popular *Proceedings of the Old Bailey* recounted many of the London trials.³⁴⁵

Finally, an affidavit from 1768 demonstrates that the participants in a rather routine concealment understood the consequences of their actions. Barbara Wilson related the following conversation between

340. REASONS HUMBLY OFFER’D TO THE HONOURABLE HOUSE OF COMMONS, TO PASS AN EXPLANATORY ACT, TO FURTHER CONFIRM ALL SUCH CERTIFICATES OF BANKRUPTS, AS HAS BEEN ALLOWED AND CONFIRMED BY THE LORD CHANCELLOR OR TWO OF THE JUDGES (circa 1707) (Chetham’s Library, H.P. 2462).

341. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 32, 100 (testimony of Basil Montagu).

342. PROCEEDINGS OF THE OLD BAILEY, Oct. 13, 1708, at 3 (John Slaorgan).

343. ABSTRACT OF THE BANKRUPTS ACT OF 5 GEO. I (1719) (London Metropolitan Archives, CLA/040/07/004); A PARTICULAR ACCOUNT OF THE TRYAL OF RICHARD TOWNE, TALLOW-CHANDLER, FOR FELONY (London, J. Morphew 1712) (title page).

344. See, e.g., *Abstract of a Bill for Preventing Frauds Committed by Bankrupts*, DAILY J. (London), June 9, 1731, at 1.

345. See Appendix.

her brother-in-law, Samuel Wilson, the bankrupt, and his brother and sister:

And the said Samuel Wilson at that time say'd that he thought that his Brother William Wilson and this Examinant would have been called and Examined before the Commissioners upon Oath. Upon which the said William Wilson reply'd that he would not willingly appear at Guildhall to be Examined, for that if he did he should Hang him, meaning the said Samuel Wilson. After which Samuel Wilson and his Sister Mary Wilson, who was then also present, say'd that he would not do to go there, for if he did he must swallow a few Pills.³⁴⁶

Samuel Wilson was a haberdasher, and the goods for which he risked his life were worth about £70.³⁴⁷ No trial ever occurred, however, because Wilson apparently solved his problem by ensuring that Barbara disappeared,³⁴⁸ thereby dashing the assignees' hopes of bringing him to justice.³⁴⁹

The bankrupts who committed the crimes of absenting themselves or of concealing their assets were not necessarily those who lost their creditors' money through reckless or fraudulent pre-bankruptcy behavior. The Act of 1706 and those that followed it defined fraudulent bankruptcy solely as the post-bankruptcy concealment of assets or failure to surrender. The reasons why the debtors became insolvent were not taken into account anywhere in the eighteenth-century statutes, which paid no attention to the old honest insolvent–fraudulent bankrupt distinction.³⁵⁰ Ostensibly, the

346. The Information of Mrs. Barbara Wilson (Apr. 1, 1768) (London Metropolitan Archives, OB/SP/1768/04/026) (abbreviations expanded, punctuation and capitalization somewhat modernized).

347. *Id.*

348. GAZETTEER & NEW DAILY ADVERTISER, May 7, 1768 (giving notice of Barbara's disappearance with "greatest reason to believe that the said Barbara Wilson, hath been spirited away by the agents of the said Samuel Wilson"); *see also* Manuscript Draft of Newspaper Notice (May 1768) (London Metropolitan Archives, OB/SB/1768/05/15); Thomas King at the Provocation of Thomas Dibbs Against Samuel Wilson (May 4, 1768) (London Metropolitan Archives, OB/SB/1768/05/14) (affidavit of assignees); Petition of Samuel Wilson (May 1706) (London Metropolitan Archives, OB/SB/1768/05/16) (denying Samuel Wilson's involvement with the disappearance of Barbara); Affidavit of Mary Wilson (May 20, 1768) (London Metropolitan Archives, OB/SB/1768/05/17) (denying Mary Wilson's involvement with the disappearance of Barbara).

349. Thomas King at the Provocation of Thomas Dibbs Against Samuel Wilson, *supra* note 348 (concerning the need to delay trial).

350. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 104 (testimony of John Ingram Lockhart); *id.* at 66 (testimony of Robert Waithman)

clause in the 1624 Act of James I, which penalized with pillorying and cutting off an ear the inability to demonstrate that one had become insolvent through misfortune rather than recklessness or fraud, remained in force throughout the period under consideration here, but as one witness pointed out to the parliamentary committee in 1818, it was “obsolete.”³⁵¹

One result of this omission, however, was that creditors often turned their decision whether or not to sign the certificate into a comment on the debtor’s pre-bankruptcy behavior.³⁵² Implicitly, then, the law gave the creditor two forms of compensation: his money and “a private vindictive satisfaction, by permitting the creditor to refuse his consent to the certificate.”³⁵³ Yet the imprisonment that commonly resulted when discharge was denied came with no attendant indictment, trial, or finding of guilt by an impartial tribunal.³⁵⁴ The justification for this was that imprisonment for debt was coercive rather than penal,³⁵⁵ but that distinction would have been lost on bankrupts, even the honest but unfortunate ones, who had handed over their entire estate only to find themselves imprisoned for years.³⁵⁶

(complaining about the lack of differentiation between *ex ante* honest and fraudulent behavior); *id.* at 52–53 (testimony of Sir Samuel Romilly) (stating that the statute did not require consideration of *ex ante* behavior); DEFOE, REMARKS, *supra* note 151, at 23 (“Nor do any former Concealments from Creditors entitle a Bankrupt to the Penalties of this Act, provided they are fairly acknowledg’d . . .”).

351. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 105 (testimony of John Ingram Lockhart); 4 BLACKSTONE, *supra* note 10, at *156 (discussing 21 James 1, c. 19 as still in force and describing punishment under the statute). In March 1817, a bill titled “To Make Better Provision for the Repression of Bankruptcy,” H.C. Bill [157] (Eng.), was proposed in Parliament but never passed.

352. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 52–53 (testimony of Sir Samuel Romilly).

353. *Id.* at 96 (testimony of Basil Montagu).

354. *Id.* at 53 (testimony of Sir Samuel Romilly); REASONS HUMBLY OFFER’D FOR MAKING MORE CERTAIN THE LIBERTY OF SUCH BANKRUPTS WHO SHALL FAIRLY AND JUSTLY SURRENDER THEMSELVES, AND EFFECTS, PURSUANT TO THE ACT NOW DEPENDING, OR ANY OTHER ACTS NOW IN BEING, TO PREVENT FRAUDS COMMITTED BY BANKRUPTS, *supra* note 315, at 1 (arguing that imprisonment was worse than a felony conviction because, in the former case, there was no trial); *see also* Prisoner Petition (Nov. 27, 1732) (National Archives, SP 36/28 f. 304) (complaining that “I have Labour^d under as being confined for almost nine Years and being committed by the Commissioners of Bankrupts upon suspicion of concealment and having from time to time beged and pleaded if they had anything against me to try me if not that they would discharge me but cannot git grants for Either: I am halfe starved at times and have no Substance but what I can git by beging at the common Grate”).

355. Cohen, *supra* note 11, at 155.

356. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 85–86 (testimony of Archibald Cullen) (“It is quite clear, and on all hands admitted, that

2. *Why Capital Punishment Failed to Deter Fraud.* The failure to make use of the death penalty provision—as opposed to long-term imprisonment at the creditors’ whim—to punish fraudsters was not entirely unexpected. A gloss on the capital felony clause in the summaries of the proposed 1621 and 1624 bankruptcy bills explained in happy justification, “This is more in terror to them [that is, bankrupts], then likely to be prosecuted by the Creditors.”³⁵⁷ Those skeptical of the 1706 statute repeated the same refrain, only now critically. “[I]f this Bill Pass,” they warned, “it will never be executed.”³⁵⁸ The latter prognostication turned out to be virtually correct. Creditors prosecuted infrequently because of the severity of the punishment and the cost and difficulty involved. Even when creditors did bring lawsuits, juries may have been reluctant to convict not only because of the penalty but also because they understood the potential for fraud in the bankruptcy system itself.

Testimony before several parliamentary committees studying bankruptcy reform in 1817 and 1818 suggested three main reasons why creditors prosecuted so few fraudulent bankrupts. First, and most prominently, many witnesses believed that capital punishment was simply too severe a penalty for the failure to repay debts.³⁵⁹ In 1819,

the power in question has been given, not for the purpose of punishment, but for the single purpose of enforcing a discovery. In point of fact, however, its operation is always penal, and in most cases, penal only.”; *see also id.* at 87 (“Mr. Justice Blackstone, when he said that after the abolition of the *peine forte et dure*, there was no such thing as torture in the English law, had forgotten the power of commitment by commissioners of bankrupt. What is it but a species of torture . . . to wring a confession of supposed guilt, by the *sufferings* or the *terrors* of imprisonment?”); ERASMUS PHILIPS, *THE CREDITOR’S ADVOCATE AND DEBTOR’S FRIEND* 10–12 (London, T. Corbett 2d ed. 1731) (describing the bankruptcy of Nathaniel Dickenson in 1729 in which he had assets sufficient to pay his creditors, but the assignees failed to proceed with the distribution and instead left him in prison).

357. 7 NOTESTEIN ET AL., *supra* note 111, at 107–08; A Brief of the Bill Exhibited Against Bankrupts, *supra* note 111.

358. REASONS HUMBLY OFFERED FOR PASSING THE BILL, NOW DEPENDING IN PARLIAMENT RELATING TO BANKRUPTS, *supra* note 202 (“Objection 5. *It is further Objected by some, That if this Bill Pass, it will never be executed; as it was in the Case of Transporting of Wooll which was Felony by a former Law. Answer.* The Case is greatly different: The Exporter of Wooll, had a Right therein, and only the Interest of the Government concern’d, but here a Man’s property is Fraudulently wrested from him, which irritates Passion; so that such as are for letting Men Rot in Prison, and making Dice of their Bones, are likely enough to put an Act of this kind in Execution.”); *see also* DEFOE, REMARKS, *supra* note 151, at 17 (“I know ’tis objected, that the Felony part will never be put in Execution.”); OBSERVATIONS ON THE BANKRUPTS BILL, *supra* note 118, at 17–18 (explaining that the penalty would not deter those dishonest enough to have committed the fraud in the first place).

359. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 17–19 (testimony of Basil Montagu); *id.* at 50–51 (testimony of Sir Samuel Romilly); *id.* at

Stephen Curtis, a leather factor in London, described to a parliamentary committee investigating the death penalty a case in which the bankrupt's fraud was clearly proved.³⁶⁰ Curtis was the assignee, and the commissioners urged him to prosecute on the grounds that "it was a difficult thing to prove offences and crimes of this sort against a bankrupt so completely as to bring him to justice; and that the assignees ought not to let an occasion pass where they had an opportunity of making an example."³⁶¹ Curtis refused "for no other reason than that the man would certainly have suffered death."³⁶² The result of this unwillingness to prosecute was that some bankrupts committed their crimes with impunity, their creditors having no alternative but to permit them to keep their concealed assets.³⁶³

Second, assignees were also reluctant to prosecute because bringing a bankrupt to trial was expensive.³⁶⁴ In a vestige of medieval law, bankruptcy crime was tried in a criminal court by private prosecution, and therefore the assignees of the bankrupt's estate, themselves creditors of the bankrupt, had to bring the indictment, try the case, and foot the bill. Going to trial might have made some financial sense had the creditors believed a conviction would lead to the recovery of significantly more of the bankrupt's assets, though even then they were ultimately taking money from their own pockets. But if the creditors lost, which they usually did, they got nothing;³⁶⁵ and if the bankrupt went to his grave without breaking down and

67 (testimony of Robert Waithman); SELECT COMMITTEE ON CRIMINAL LAWS, *supra* note 222, at 64 (testimony of Smith); SELECT COMMITTEE ON THE BANKRUPT LAWS, *supra* note 339, at 16 (testimony of Thomas Nowlan); *id.* at 25 (testimony of Joseph Miller).

360. SELECT COMMITTEE ON CRIMINAL LAWS, *supra* note 222, at 96–97 (testimony of Stephen Curtis).

361. *Id.* at 97.

362. *Id.*

363. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 51 (testimony of Sir Samuel Romilly); *id.* at 46–47 (testimony of Germain Lavie, solicitor) (discussing the case of James Nowlan "who lay in Newgate from the year 1793 to 1808, and was then liberated in consideration of the punishment that he had sustained by his long imprisonment, and without any satisfaction whatever being derived to his creditors").

364. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 47 (testimony of Germain Lavie, solicitor) ("I think the expense and the trouble are the sole causes of non-prosecution, with the difficulty of conviction." "And not motives of humanity?" "Certainly not."); SELECT COMMITTEE ON THE BANKRUPT LAWS, *supra* note 339, at 84 (testimony of J. Mayhew) ("[T]he expense of such proceedings is so enormous, that creditors are altogether prevented from adopting them.").

365. See Appendix for conviction rates.

divulging his concealed money, as Perrott did, they also got nothing. Prosecuting a bankrupt was, therefore, largely a matter of private vengeance and perhaps a strategy to scare the fraudster into turning over his assets in return for the assignees withdrawing or conceding the case. This might account for the several instances at the Old Bailey in which the prosecution appeared and announced it had no evidence to put forth, resulting in the bankrupt's acquittal.³⁶⁶

The third reason assignees avoided bringing suit was the difficulty of obtaining a conviction. The prosecution had to prove not only the fraud but also the act of bankruptcy, the petitioning creditor's debt, proper notice to the bankrupt, that the bankrupt was a merchant or trader, that the commissioners were properly appointed and sworn, and several other procedural matters.³⁶⁷ To accomplish this, they could not use the testimony of creditors—who were assumed to be biased because self-interested—or of the bankrupt, who was the defendant in a criminal trial and therefore not expected to incriminate himself.³⁶⁸

Even if the prosecutors could prove all the necessary elements and demonstrate that all procedures had been correctly followed, seemingly certain victories might be dashed on the rocks of mistakes in the wording of notices or indictments. One such instance was the trial of William Tucker in 1807.³⁶⁹ Tucker was a serge manufacturer “much given to swearing,”³⁷⁰ and he was indebted for the “enormous

366. See Appendix for the relevant cases of Thomas Dawson (1729), Thomas Carter (1774), Thomas Evans (1790), and John Ibbetson (1806).

367. SELECT COMMITTEE ON THE BANKRUPT LAWS, *supra* note 339, at 26 (testimony of Joseph Miller) (“[T]here being so many technical requisites to support a prosecution, renders conviction nearly impossible.”); *id.* at 84 (testimony of J. Mayhew) (“[S]uch is the difficulty of giving evidence of such proof to a jury, that solicitors, I believe, in general are altogether deterred from doing it.”); SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 77 (testimony of William Cooke) (“[T]he necessity of proving the petitioning creditor's debt and the bankruptcy increase the chance of the person prosecuted escaping.”).

368. GREEN, *supra* note 43, at 219 (stating that creditors could not serve as witnesses); FANE, *supra* note 44, at 39.

369. For another example, see the case of Edward Frith, tried at the Old Bailey in 1738, who was acquitted because of mistakes in the indictment. PROCEEDINGS OF THE OLD BAILEY, Oct. 11, 1738, at 151; see also THOMAS LEACH, CASES IN CROWN LAW DETERMINED BY THE TWELVE JUDGES, BY THE COURT OF KING'S BENCH, AND BY COMMISSIONERS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY, FROM THE FOURTH YEAR OF GEORGE THE SECOND TO THE TWENTY-NINTH YEAR OF GEORGE THE THIRD 11–13 (London, T. Wheldon 1789).

370. TREWMAN'S EXETER FLYING POST, July 2, 1807, at 1.

sum” of £23,000.³⁷¹ The prosecution was well on its way to proving that Tucker had failed to appear before the commissioners of bankruptcy, as required by the statute, when Tucker’s counsel pointed out that the summons to appear was dated “eight hundred and seven, the word thousand is left out.”³⁷² On this basis, the court directed a verdict for the defendant.³⁷³

The parliamentary commission testimony focused on these three reasons—dislike of the penalty, cost, and procedural hurdles—but contemporaries hinted at others. Juries, for instance, seem to have disfavored sending bankrupts to the gallows.³⁷⁴ If some juries did nullify, they might have done so in response to certain well-known structural problems in the bankruptcy law. One was the inconsistency of making a bankrupt subject to capital punishment for concealing his effects whereas a non-merchant, who could not be made a bankrupt, could secrete his assets with impunity, leaving the creditors merely to fume.³⁷⁵ James Bullock, on trial for fraudulent bankruptcy in 1807, made this exact point in his statement to the jury:

I will say that law is severe, it is partial. You, gentlemen, are like myself, men that get your living by buying and selling. There is every man, even the greatest bulk of society, may buy as many goods of you and me, and other tradesmen, they may pledge them, keep them, embezzle them in any way they may think fit; there is no criminal attachment to them, they may go to prison, and live upon our property. It seems to me very hard, when we, who are subject to so many misfortunes, should be liable to loose [*sic*] our lives, when they may go at large.³⁷⁶

371. *Tucker, the Bankrupt*, TREWMAN’S EXETER FLYING POST, Dec. 10, 1807, at 3.

372. PROCEEDINGS OF THE OLD BAILEY, Dec. 2, 1807, at 49.

373. *Id.*; *Singular Bankruptcy Case*, HAMPSHIRE TELEGRAPH & SUSSEX CHRON., Dec. 14, 1807, at 4.

374. SELECT COMMITTEE ON THE BANKRUPT LAWS, *supra* note 339, at 16 (testimony of Thomas Nowlan); *id.* at 66 (testimony of Thomas Tilson). The Nowlan evidence related to Ireland. Jury nullification would, however, explain the case of Albertus Burnaby, who was acquitted for failure to prove the act of bankruptcy, although the trial proceedings seem to clearly prove the act. PROCEEDINGS OF THE OLD BAILEY, July 11, 1726, at 2–3.

375. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 51 (testimony of Sir Samuel Romilly).

376. PROCEEDINGS OF THE OLD BAILEY, Sept. 16, 1807, at 399.

Bullock, however, was insufficiently sympathetic or convincing. The jury found him guilty, though his sentence was later commuted on review without opinion.³⁷⁷

Another structural problem in the bankruptcy law that might have encouraged jury nullification was its susceptibility to fraud by creditors.³⁷⁸ A man was made a bankrupt by the ex parte declaration of a person claiming to be a creditor for a certain, statutorily required amount.³⁷⁹ The alleged bankrupt had no right to object to the granting of the commission. He could only petition the Lord Chancellor to have it superseded, and the dispute could take months or years to work its way through Chancery.³⁸⁰ In the meantime, his alleged creditors had taken possession of his assets, leaving him nothing with which he could fight his case, unless he committed a felony by concealing assets or had friends or family to support him.³⁸¹

The man who believed himself to have been wrongly made a bankrupt refused to submit to the examination of the commissioners at the risk of a prosecution for capital felony, as George Page discovered in 1819.³⁸² His conviction was overturned on the ground that properly surrendering but then refusing to answer particular questions did not constitute a capital offense.³⁸³ The defendant who felt that his creditors had put him into bankruptcy with fraudulent

377. King v. Bullock, (1807) 1 Taunt. 71, 168 Eng. Rep. 595 (E.C.); 1 EDWARD CHRISTIAN, THE ORIGIN, PROGRESS, AND PRESENT PRACTICE OF THE BANKRUPT LAW BOTH IN ENGLAND AND IRELAND 295-96 (London, W. Clarke & Sons 2d ed. 1818); SELECT CASES FROM THE TWELVE JUDGES' NOTEBOOKS 107-08 (D.R. Bentley ed. 1997) (the trial judge's notebook commenting on the procedural argument).

378. See INCONVENIENCES ARISING FROM THE PRESENT METHODS IN TAKING OUT AND EXECUTING COMMISSIONS OF BANKRUPT, *supra* note 331, at 1-2 (providing examples of creditors' fraud); 1 OLDHAM, *supra* note 95, at 414-15 (providing an example of a creditor-fraud case before Lord Mansfield).

379. GREEN, *supra* note 43, at 71-72.

380. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 56-57 (testimony of Sir Samuel Romilly) ("I have known several instances of this kind: commissions taken out without any colour of justification, either in respect of the insolvent circumstances of the supposed debtor, or of there having been any act of bankruptcy committed; and I have known that such commissions have in the end been superseded, and the persons who took them out have been ordered to pay all the costs of the proceeding: but I never knew an instance of this kind in which the person against whom the commission had been taken out, was not, notwithstanding his ultimate success, completely and irretrievably ruined.").

381. *Id.*

382. PROCEEDINGS OF THE OLD BAILEY, Feb. 17, 1819, at 145-50.

383. Rex v. Page, (1819) Russ. & Ry. 392, 397, 168 Eng. Rep. 861, 865 (C.C.R.).

designs, on his money perhaps or on his customers and trade,³⁸⁴ had to hope that the jurors agreed, as they did when they acquitted John Essington in 1729 to “general Satisfaction, it appearing a scandalous and malicious Prosecution, carried on by the Debtors to his Estate.”³⁸⁵

A final reason for the failure of capital punishment—a reason which contemporaries did not explicitly mention—might have been the inconsistency with which it was enforced, on the occasions that indictments were even brought. As mentioned above, Richard Towne was hanged in 1712 for trying to ship his goods out of the country, whereas in 1710, John Ristow had been pardoned for the same act.³⁸⁶ In 1708, John Sleorin, a London weaver, was acquitted after convincing the jury that his setting out for Holland after being made a bankrupt and his running away from his creditors after they caught him was all an unfortunate mix-up. He claimed he did not know of the commission against him and that he was headed to Holland on an innocent cloth-buying trip.³⁸⁷ In 1756, Alexander Thompson absconded from London as soon as he had received the insurance money for a fire that destroyed his shop. He was arrested upon his return to the city and convicted for failure to appear before the bankruptcy commissioners, even though he claimed he had no notice of the bankruptcy.³⁸⁸ Reviewing the Thompson case sixty years later, the bankruptcy reformer, Basil Montagu, opined that “I very much doubt whether any man now existing could be induced to proceed to execution against such a person for such an offense; it does not appear upon the trial, that he had any actual notice.”³⁸⁹

It so happened, however, that Thompson was a particularly unsympathetic character. A reputed playboy, he mistreated his

384. See SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 33 (testimony of Basil Montagu) (using bankruptcy to eliminate competition); *id.* at 57 (testimony of Sir Samuel Romilly) (causing competitor expenses and malice).

385. PROCEEDINGS OF THE OLD BAILEY, Feb. 26, 1729, at 7. But see the advertisement taken out by Essington’s assignees after the publication of the Old Bailey proceedings, DAILY POST, Apr. 14, 1729, at 1 (accusing the stenographer, who “was employ’d . . . to take the said Tryal . . . fairly and impartially, and not to make (as he has done) the said unjust, or any Reflection, on the Gentlemen concerned in the said Prosecution”).

386. See *supra* notes 319–23.

387. See PROCEEDINGS OF THE OLD BAILEY, *supra* note 342, at 3 (where the name is spelled Slaorgan); LONDON GAZETTE, Oct. 20, 1707, at 2; THE BANKRUPT’S DIRECTORY 32 (London, J. Morphew 1708) (listing John Sleorin, Weaver, London).

388. PROCEEDINGS OF THE OLD BAILEY, Jan. 15, 1756, at 85, 87.

389. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 21 (testimony of Basil Montagu).

London wife and disrespected her father, the purveyor of mineral waters to the King.³⁹⁰ He never overcame the suspicion that he was responsible for the fire that burned down his shop and killed two servants.³⁹¹ And when he absconded, he returned to his native Scotland and bigamously took a second wife. Her father, hearing rumors about Thompson's London wife, made him return most of the marriage settlement. To get the money back, Thompson returned to London and hired a woman to go before a justice of the peace and swear that she had been living with him but that they were not married. But she ended up confessing the trick to a lawyer, who had Thompson hauled before a magistrate and arrested.³⁹² It may well have been these foibles and frauds, and not his relatively paltry debts, that led the jury to decide to hang him.³⁹³ This possibility highlights the real unfairness of the private prosecution of fraudulent bankrupts. Whether or not a bankrupt was going to face death depended a great deal upon how angry and insulted his creditors were, and how much they preferred revenge to money. As Richard Towne's prosecuting

390. 3 SELECT TRIALS FOR MURDER, ROBBERY, BURGLARY, RAPES, SODOMY, COINING, FORGERY, PYRACY AND OTHER OFFENCES AND MISDEMEANOURS, AT THE SESSIONS-HOUSE IN THE OLD-BAYLEY 270-71, 274 (London, J. Wilkie 1764) [hereinafter SELECT TRIALS] (describing Thompson's treatment of his wife and father-in-law and the threatening letter to his father-in-law); PROCEEDINGS OF THE OLD BAILEY, Jan. 15, 1756, at 85 (identifying the father-in-law as "Mr. Davis"); LONDON GAZETTE, Jan. 31, 1756, at 2 (describing the threatening letter sent regarding Thompson to Thomas Davis of St. Albans near Pall Mall); GEN. ADVERTISER, July 25, 1751, at 1 (announcing that Thomas Davis, who had a water warehouse on St. Albans near Pall Mall, had been appointed purveyor of mineral water to the king); GEN. ADVERTISER, Dec. 5, 1751, at 3 (identifying Davis's water warehouse as in St. Albans Street, Pall Mall); PUB. ADVERTISER, May 17, 1756, at 2 (advertisement of Thomas Davis, purveyor to the king).

391. See 3 SELECT TRIALS, *supra* note 390, at 271-73; WHITEHALL EVENING POST, Feb. 21, 1756, at 3 ("Thompson, one of the Malefactors, who was executed Yesterday, on his being ask'd if he set his House on Fire in Bury-Street, St. James's, declar'd he was innocent.").

392. 3 SELECT TRIALS, *supra* note 390, at 273-74. The jury may have known what they were doing in finding Thompson guilty. While he sat in prison awaiting his execution, an anonymous letter believed to have come from Thompson, was sent to his father-in-law, Thomas Davis, threatening that: "[If Davis] don't clear Mr. Thompson (a Person now under Sentence of Death in Newgate [Prison,]) he, the said Davis, shall have a Present sent him of his Son's Heart, who is a Boy of Twelve Years of Age. That, if the said Thompson suffers, so sure shall one of his, the said Davis's Family, suffer likewise a crueller Death." LONDON GAZETTE, Jan. 31, 1756, at 2 (some punctuation adjusted); 3 SELECT TRIALS, *supra* note 390, at 274.

393. His debts amounted to just slightly over the £200 minimum required by statute to be proved by the eight creditors who petitioned for a commission. 5 Geo. II, c. 30, § 23 (1732) (requiring three or more creditors to prove debts of at least £200). PROCEEDINGS OF THE OLD BAILEY, Jan. 15, 1756, at 86 (listing the debts of petitioning creditors); Bankruptcy Commission Docket Book (Apr. 22, 1755) (National Archives, B4/13 f. 192) (docketing of the commission listing the same petitioning creditors); *Fresh Advices from Our Correspondents*, WHITEHALL EVENING POST, Feb. 21, 1756, at 3 (mentioning Thompson's execution).

creditor said when asked if he would visit the defendant in prison, “he would not go to see the Prisoner till he saw him go be hang’d.”³⁹⁴ Another assignee, less angry or less bloodthirsty, might simply have refrained from bringing the indictment in the first place.

The failure to enforce the capital punishment provision of the bankruptcy statutes appears to have had an adverse effect on the entire bankruptcy system and not just on the limited set of frauds at which the provision was aimed. English bankruptcy was originally weighted heavily in favor of the creditors. The creditors chose whether to take out a commission, they controlled the bankrupt’s estate during the pendency of the proceeding, and they retained their rights to pursue the debtor for debts left unpaid after the bankruptcy liquidation. When debtors obtained any favors at all they had to steal them through illegal collusion. In this system, the penalties prescribed in the seventeenth-century statutes were thumbs on the scale, helping the creditor by nudging the debtor toward cooperation. But such nudging was relatively gentle compared with the fist that, in principle, could be brought down on debtors after 1706 and the invention of the capital crime of fraudulent bankruptcy. With the introduction of discharge, however, the debtor suddenly had some weight on his own side of the balance. If the offsetting penalty provision had worked effectively, the bankruptcy law might have evolved more quickly toward a functioning equilibrium between creditors and debtors. But the threat of death proved to be so useless that the fist the legislators thought would keep debtors in line ended up being an empty glove.³⁹⁵ The capital felony provision became “for want of prosecutors, a dead letter.”³⁹⁶

Consequently, with nothing offsetting discharge, the scale tipped—or at least contemporaries perceived it to tip—in favor of the bankrupts. One member of the 1818 parliamentary committee considering bankruptcy reform claimed that in most commissions on which he had served as a commissioner, “the bankrupt had acted with great injustice towards his creditors, generally with dishonesty and fraud . . . and this conduct I can only trace to one cause, and that is,

394. *A Particular Account of the Tryal of Richard Towne, Tallow-Chandler*, *supra* note 319.

395. See SELECT COMMITTEE ON THE BANKRUPT LAWS, *supra* note 339, at 16 (testimony of Thomas Nowlan) (“I also consider that enactment, which declares concealment . . . to be a capital felony, and which was intended to prevent fraud, operates as its principle protection . . .”).

396. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 50 (testimony of Sir Samuel Romilly).

the facility with which almost every bankrupt goes through the operation of his commission.”³⁹⁷ The bankrupt breezed through the bankruptcy because most commissions were taken out collusively.³⁹⁸ The friendly creditor arranged to be elected assignee, and he saw to it that the bankrupt, and his concealed goods, were protected. Then, using bribes, threats, and persuasion, he influenced the other creditors to sign the certificate.³⁹⁹ This was made simpler after 1809 when Parliament amended the law to require that only three-fifths of the creditors in number and value sign the certificate.⁴⁰⁰ As a result, “it was rather more easy for a fraudulent than an honest bankrupt to obtain” his discharge, and this greatly irritated both members of Parliament and the men involved in the bankruptcy system.⁴⁰¹ The fraudster felt confident that he could get away with his bribes, false debts, and cooked books because no effective checks existed on such behavior.⁴⁰² No one was going to enforce the penalty provisions in the bankruptcy statutes such that “nine times out of ten, the commission is worked for the benefit of the bankrupt, and not of the creditors.”⁴⁰³ A bankruptcy procedure with discharge and without the threat of

397. *Id.* at 103 (testimony of John Ingram Lockhart).

398. *Id.* at 40 (testimony of Joseph Fitzwilliam Vandercom).

399. *See id.* at 70 (testimony of William Cooke) (“I think the certificate is the great ground of fraudulent commissions; it is the great inducement to bankrupts to concert commissions to be issued against them . . .”).

400. 49 Geo III, c. 121, § 18 (1809).

401. 38 PARLIAMENTARY DEBATES, *supra* note 312, at 985; *see also* SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 34 (testimony of Basil Montagu); *id.* at 41 (testimony of Joseph Fitzwilliam Vandercom) (complaining that the fraudulent bankrupt was as likely to obtain his discharge as the honest bankrupt).

402. This was not a new development in 1818. *See* CONSIDERATIONS ON THE PRESENT ADMINISTRATION OF THE BANKRUPT LAWS, WITH SUGGESTIONS FOR THEIR IMPROVEMENT, SO AS TO RENDER THEM MORE BENEFICIAL BOTH TO CREDITOR AND DEBTOR 5 (London, W. Richardson 1795) (“Lord Hardwicke in his time declared, that ‘the laws had turned the edge of commissions of bankruptcy, from being, as they were originally, remedial to the creditors, and in the nature of punishment to the bankrupts, whom they considered as offenders, to be the accidental occasion of great frauds.’”).

403. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 68 (testimony of Robert Waithman); *see also* SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 20, at 2 (testimony of Thomas Nowlan concerning Irish law) (“The law, instead of preventing, encourages fraud; for it makes no adequate distinction between the frugal and honest, though unfortunate, trader, and the extravagant, crafty and fraudulent bankrupt; it does not encourage and protect the *former*, nor deter or punish the *latter*; for in its sanguinary and indiscriminating severity, he calculates upon and finds certain impunity.”).

punishment for crimes had become, in the eyes of creditors and their lawyers, a debtor's remedy.⁴⁰⁴

In 1818, the bankruptcy commissioner, Archibald Cullen, sounded the death knell of the bankruptcy system that England invented in the sixteenth century and had attempted to triage with band-aids ever since:

The bankrupt law was introduced with a view to prevent and punish the frauds of debtors, and to distribute their property equally amongst all their creditors; but it has not succeeded; and however wise the original plan may have been thought, yet it does not now, even with all its subsequent alterations and accessions, appear to effect either of the objects which it professed; the property is not forthcoming, or it is wasted: the same frauds still exist, neither diminished nor punished; and a new class has sprung up, engendered by the very proceedings, which have been instituted to prevent them; so that the prominent and growing evil of the present day, with respect to debtor and creditor, appears to be the bankrupt law itself.⁴⁰⁵

Faced with such damning testimony, the House of Commons immediately took up the mantle of bankruptcy reform. A major bill was offered in 1818, then returned to committee, shortened, offered again in 1819, and again returned to committee and cut down.⁴⁰⁶ Through all the revisions, one set of clauses remained constant. Capital punishment for fraudulent bankruptcy was to be abolished because the existing law did not deter frauds due to the lack of convictions and the excessive severity of the penalty.⁴⁰⁷ Instead,

404. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 44 (testimony of Germain Lavie, solicitor) (“As the bankrupt laws are at present administered, I conceive they afford advantage to no one, except the bankrupt.”); 1 OLDHAM, *supra* note 95, at 413 (quoting Lord Mansfield’s complaints before the House of Lords in 1781 that bankruptcy “made a bankrupt’s fortune” and that “every day proved the increase of frauds under the bankrupt laws” (internal quotation marks omitted)).

405. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 80 (testimony of Archibald Cullen).

406. A Bill [as Amended by the Committee] to Amend the Laws Relating to Bankrupts, 1819, Bill [284]; A Bill [as Amended on Re-commitment] to Amend the Laws Relating to Bankrupts, 1819, Bill [339]; LESTER, *supra* note 30, at 33–34.

407. A Bill [as Amended by the Committee] to Alter and Amend the Laws Relating to Bankrupts, 1818, Bill [403], at 35 (“[W]hereas the punishment of death awarded by the said statute against such persons as should be lawfully convicted of any of the offences mentioned therein, hath been found inefficient to deter fraudulent Bankrupts from the frequent commission of such flagitious conduct as was intended to be remedied by the said statute, by reason of the great difficulty of procuring a conviction of such offenders, and of the reluctance

fraudulent bankrupts, defined, as before, as those failing to appear before the commissioners or concealing assets in the amount of £20 or more, would, upon indictment and conviction, be “adjudged to be guilty of felony, and . . . transported for life, or for any period not less than fourteen years, according to the magnitude of the offence or offences of which such Bankrupt or Bankrupts shall be convicted as aforesaid.”⁴⁰⁸ In addition, a new crime was created for destroying, fabricating, or changing books or documents with intent to defraud creditors or to obtain a certificate. This *misdemeanor* was to be punished by “transportation for any term not exceeding fourteen years, or to solitary confinement and hard labour in any of His Majesty’s gaols or houses of correction, in proportion to the enormity of the offence or offences.”⁴⁰⁹ The 1818/1819 bill never passed, and fraudulent bankruptcy remained a capital felony for one more year.⁴¹⁰ In 1820, bankruptcy crime was finally removed from the list of capital offenses in an omnibus death penalty reform bill.⁴¹¹ The new penalty was transportation for seven years to life or imprisonment at hard labor for up to seven years.

Paired with the limited availability of discharge, capital punishment failed as the counterbalancing mechanism tasked with encouraging reluctant debtors to cooperate in their bankruptcy. The assignees’ reluctance to pursue such an expensive and severe penalty freed debtors to try to protect their assets, both by concealing and by defrauding the discharge process through bribes and collusive bankruptcies, knowing that they would likely face no ramifications. As a result, according to the witnesses testifying before the House of Commons committee in 1817 and 1818, non- or merely partial cooperation by bankrupts was endemic and uncontrollable.

CONCLUSION

Vengeance and retribution may not have been explicit goals of the bankruptcy law, but they have contributed to the manner in which creditors and society at large viewed bankrupts. Bankruptcy was

of assignees and others to prosecute such Bankrupts, on account of the too great severity of such punishment, to the great discouragement of fair and honest industry, and the increase of fraud and immorality . . .”).

408. *Id.* at 36.

409. *Id.* at 37.

410. LESTER, *supra* note 30, at 33–34.

411. 1 Geo. IV, c. 115, § 2 (1820).

devised in 1543 to combat the perceived crime of debtors who lived large on their creditors' money or who borrowed money never intending repayment. By 1706, the law's focus shifted toward creating a civil bankruptcy system in which insolvents—honest or not—would willingly repay their debts in the hope of receiving a discharge, and in which only post-bankruptcy fraud would be punished as a felony.

But the system did not work particularly well. Although discharge came to be considered an essential part of bankruptcy,⁴¹² the failure to enforce the capital felony provision permitted fraud to flourish and eventually to undermine the goal of rewarding only the cooperative bankrupt. This occurred during an era in which people involved in the bankruptcy system understood the need for an effective balance between debtors and creditors to ensure voluntary cooperation by the bankrupt.⁴¹³ This understanding raises the question: Why, if the nonenforcement of the penalty for fraud led to systemic disequilibrium and failed to encourage honest cooperation, was capital punishment for bankruptcy not abolished earlier?⁴¹⁴

One part of the answer lay in the work of late eighteenth- and early nineteenth-century English reformers advocating generally against the death penalty.⁴¹⁵ Early eighteenth-century proponents of bankruptcy reform had not generally shared the reformers' squeamishness about hanging people. Although many pamphlets and broadsides written during the first half of the eighteenth century had called for a variety of changes, both minor, such as changes in the means of obtaining discharge,⁴¹⁶ and major, such as switching to a

412. 2 BLACKSTONE, *supra* note 10, at *472 (expressing the view that the English law of bankruptcy was based on a give and take between creditor and debtor, where the creditor obtained the bankrupt's cooperation and the debtor obtained a discharge); SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 55 (testimony of Sir Samuel Romilly) (stating that discharge was necessary to bankruptcy because it was the only justification for taking the debtor's property and making him answerable to his creditors).

413. *See, e.g.*, 38 PARLIAMENTARY DEBATES, *supra* note 312, at 986 (explaining that the bankrupt's assistance in recovering the debts was so valuable that it was worth giving him something significant in return).

414. *Cf.* Douglas Hay, *Property, Authority, and the Criminal Law, in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 56–59 (1975) (asking the same question with regard to capital punishment of theft).

415. GATRELL, *supra* note 6, at 326–30; Hay, *supra* note 414, at 57–58.

416. REASONS HUMBLY OFFERED FOR ALTERING SEVERAL CLAUSES IN THE BILL DEPENDING IN PARLIAMENT, RELATING TO BANKRUPTS, *supra* note 314 (arguing that only the chancellor and the Lord Keeper should decide on discharge).

voluntary bankruptcy system,⁴¹⁷ one provision that most of these texts accepted without objection was that fraudulent bankrupts should hang.⁴¹⁸

Yet, despite some refinement of tastes in criminal penalties later in the century, bankruptcy continued to make people angry, and they wanted to see it “properly” punished.⁴¹⁹ Even Cesare Beccaria, whose book on punishment was relied on by English criminal law reformers, felt that fraudulent bankrupts should be punished severely.⁴²⁰ Since 1543, responses to bankruptcy had been colored by the same human impulses that controlled victims’ reactions to other sorts of crimes.⁴²¹ Creditors wanted revenge, or they wanted the bankrupt to suffer, or they wanted him to serve as an example.⁴²² Creditors wanted the

417. OBSERVATIONS AND PROPOSALS MOST HUMBLY OFFERED TO THE PARLIAMENT BY SEVERAL CREDITORS, MERCHANTS AND TRADERS OF LONDON, RELATING TO THE BILL NOW DEPENDING CONCERNING BANKRUPTS (circa 1718) [hereinafter OBSERVATIONS AND PROPOSALS] (Lincoln’s Inn Library, MP 100/6); PROPOSALS MOST HUMBLY OFFER’D TO THE PARLIAMENT, BY THE MERCHANTS AND TRADERS OF LONDON, FOR AN ACT TO PROMOTE TRADE AND CREDIT, AND ENCOURAGE HONEST INSOLVENT, AND FOR SUPPLYING THE DEFECTS OF THE LATE ACT FOR PREVENTING FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS (circa 1707) [hereinafter PROPOSALS MOST HUMBLY OFFER’D] (Chetham’s Library, H.P. 2354); INCONVENIENCES ARISING FROM THE PRESENT METHODS IN TAKING OUT AND EXECUTING COMMISSIONS OF BANKRUPT, *supra* note 331, at 2; Letter to the Author, BRIT. J., Feb. 4, 1727, at 1.

418. OBSERVATIONS AND PROPOSALS, *supra* note 417; PROPOSALS MOST HUMBLY OFFER’D, *supra* note 417; PHILLIPS, *supra* note 356, at 17. *But see* OBSERVATOR, Feb. 24, 1705, at 1 (referring to the idea of making fraudulent bankruptcy a capital felony, “[w]e have too much Hanging in *England*, we might make the Lives of Malefactors more Beneficial to the Commonwealth than their Deaths can be”).

419. *See* Letter to the Printer, ST. JAMES CHRON., Dec. 1, 1761, at 4 (writing in response to the Perrott case, “[a] *fraudulent Bankrupt* is one of the worst of Robbers, because he takes Advantage of the Trust and Confidence reposed in him by his Creditors”); *York Assize Intelligence*, HULL PACKET, Mar. 30, 1813, at 4 (including the judge’s peroration upon sentencing John Senior in 1813: “after having taken advantage of the beneficent provisions of the law respecting persons in trade, which in cases of insolvency where all the effects have been given up [to] annihilate their debt, and sends them into the world as new men with fresh credit; but (addressing John Senior) ‘you, instead of complying with the conditions of the law, fraudulently concealed from your creditors a considerable part of your effects, as a fund to supply your future want, or perhaps for the purpose of extravagance’” (internal quotation marks omitted)).

420. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 130 (Philadelphia, Philip H. Nicklin 1819); 4 BLACKSTONE, *supra* note 10, at *156 (citing Beccaria regarding fraudulent bankrupts); GATRELL, *supra* note 6, at 331–32 (explaining Beccaria’s importance for English reformers).

421. *See, e.g., supra* notes 33–35.

422. DEFOE, ESSAY, *supra* note 17, at 205–06 (relating the story of a creditor who imprisoned a bankrupt even though he had no money to pay the debts because “[r]evenge is

debtor to pay his “victims” figuratively as well as literally,⁴²³ and they wanted to make sure that bankruptcy was viewed with such horror that community pressure alone would deter others.⁴²⁴ At a certain rather visceral level, it seems, punishment was more important than ensuring cooperation.

The challenge was finding a penalty to replace death. Ordinary imprisonment was no different from what creditors were entitled to do on their mere *ex parte* claim of a debt owed. Some commentators thought that fraudulent bankrupts should simply be denied the benefits of discharge, even if they later ended up disclosing their assets or appearing before the commissioners.⁴²⁵ One Irish solicitor testifying before Parliament in 1818 suggested more colorfully that:

[O]ne fraudulent bankrupt, dressed in yellow trowsers and jacket, with the nature of his offence placarded thereon, and sweeping the street between the Commercial Buildings and Royal Exchange in Dublin, between the hours of two and four o'clock in the afternoon,

sweet”); see also 1 AUTHENTIC NARRATIVE, *supra* note 233, at i (claiming that the prosecution of Perrott was not pursued for vengeance but rather as an example).

423. It is, perhaps, significant that it fell to one of the staunchest opponents of the capital punishment provision to point out that a bankrupt should not “be put to death for the non-delivery of his property, particularly when it is remembered that the offender is not the only person to blame; there must be a feeling in the community, that the imprudent confidence reposed by creditors, is not wholly exempt from censure.” SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 7, at 21 (testimony of Basil Montagu).

424. The concern with stigma is of long standing, as is the belief that the stigma of bankruptcy is declining. See, e.g., DANIEL DEFOE, THE COMPLETE ENGLISH TRADESMAN, IN FAMILIAR LETTERS; DIRECTING HIM IN ALL THE SEVERAL PARTS AND PROGRESSIONS OF TRADE 84 (London, Charles Rivington 1726) (celebrating the fact that bankruptcy was no longer something to fear because “a Commission of Bankrupt is so familiar a thing, that the debtor oftentimes causes it to be taken out in his favour, that he may the sooner be effectually deliver’d from all his creditors at once Some have said, this law is too favourable to the bankrupt; that it makes tradesmen careless; that they value not breaking at all, but run on at all hazards, venturing without forecast and without consideration, knowing they may come off again so cheap and so easie, if they miscarry”); Letter to the Editor, PUB. ADVERTISER, Nov. 1, 1773, at 2 (“At present Bankruptcy is but a Name; it is become so fashionable and countenanced, and the travelling through it is so very easy and expeditious, that few have any dreadful Apprehensions from it.”).

425. REMARKS ON THE LATE ACT OF PARLIAMENT TO PREVENT FRAUDS FREQUENTLY COMMITTED BY BANKRUPTS, WITH PROPOSALS FOR THE AMENDMENT THEREOF, *supra* note 103, at 6 (depriving fraudsters of the benefit of the Act is preferable because it is not penal but rather “Privative of the Favour of the Act”); REASONS HUMBLY OFFERED FOR ALTERING SEVERAL CLAUSES IN THE BILL DEPENDING IN PARLIAMENT, RELATING TO BANKRUPTS, *supra* note 314 (“Exclusion from the Benefits of the late Act, will more effectually answer the end designed.”).

would make a more salutary impression upon the public feeling, than could be produced by a score of executions at Newgate.⁴²⁶

Long after the punishment for fraudulent bankruptcy was reduced to seven years' imprisonment at hard labor, James Fitzjames Stephen, the author of an authoritative early history of English criminal law, lamented that this penalty was insufficient. Although he acknowledged that the old law was too severe, he believed that many instances of fraudulent bankruptcy deserved more than imprisonment for even ten years.⁴²⁷ Fraudulent bankruptcy, he wrote, was just like "wholesale robbery or theft, and the very fact that it looks a less outrageous offence and is one which an apparently respectable person may be tempted to commit, is a reason, I think, for punishing it with special severity."⁴²⁸ Parliament had probably felt the same way in 1706 when it made fraudulent bankruptcy a felony without benefit of clergy, though at that point they could still hope that the penalty would effectively deter fraud.

The impulse to punish bankrupts is not a relic of an unenlightened age. Modern American bankruptcy has largely solved the cooperation problem by making bankruptcy voluntary, increasing the availability of discharge, and limiting the use of criminal sanctions to true cases of fraud or crime. Nonetheless, the desire to punish bankrupts remains, even when evidence points to the conclusion that such punishment does not result in optimal social or economic results.⁴²⁹ As Senator Wellstone said during debates over the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, "[t]his debate is about punishing failure."⁴³⁰

426. SELECT COMMITTEE APPOINTED TO CONSIDER OF THE BANKRUPT LAWS, *supra* note 20, at 7 (testimony of Thomas Nowlan).

427. 3 STEPHEN, *supra* note 109, at 232.

428. *Id.*

429. Megan McArdle, *Sink and Swim. Bankruptcy Helps the Undeserving—and That's the Way It Should Be*, ATLANTIC MONTHLY, June 2009, at 30–32; Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 *passim* (2006).

430. 147 CONG. REC. S7724 (daily ed. July 17, 2001) (statement of Sen. Wellstone).

APPENDIX

EVIDENCE OF FRAUDULENT BANKRUPTCY, 1706–1820

This chart lists information about persons committing fraudulent bankruptcy that can be gleaned from various sources, including the *Proceedings of the Old Bailey* (OBP), manuscript material, such as the indices to the Old Bailey indictment books found at the London Metropolitan Archives (LMA), and newspaper advertisements giving notice that bankrupts had concealed assets or failed to surrender to the bankruptcy commissioners. Advertisements calling only on third parties to turn over concealed assets and not specifically mentioning that the bankrupt was concealing have been excluded.

Year	Name	Profession/ Location	Crime	Outcome (as far as known)	Source(s)
1707	Richard Read	Haberdasher/ London	Not surrendering	Unknown	LONDON GAZETTE, Dec. 8, 1707, at 2
1708	John Sleorgin (a.k.a. Slaorgan)	Weaver/ London	Concealment	Acquitted: no notice	LONDON GAZETTE, Oct. 20, 1707, at 2 OBP, Oct. 13, 1708, at 3
1710	Augustyn Cloribus	Merchant/ London	Not surrendering	Unknown	DAILY COURANT, Aug. 7, 1710, at 2
1711	John Ristow (a.k.a. Restow)	Linen draper/ London	Concealment	Guilty: pardoned	OBP, May 16, 1711, at 3 LONDON GAZETTE, Dec. 14, 1710, at 2 DAILY COURANT, Sept. 12, 1711, at 2

1712	Richard Towne (a.k.a. Town)	Tallow chandler/ London	Concealment	Guilty: hanged	OBP, Dec. 10, 1712, at 2 POST BOY, Dec. 16, 1712, at 1 A PARTICULAR ACCOUNT OF THE TRYAL OF RICHARD TOWNE, TALLOW-CHANDLER, FOR FELONY (1712)
1713	Unknown	Tallow chandler/ London ⁴³¹	Concealment	Committed to Newgate Prison	BRITISH-MERCURY, Jan. 21, 1713, at 7
1713	William Ellins		Unknown: described as “guilty of Felony, as a fraudulent Bankrupt”	Unknown: petitioned Parliament	19 H.L. JOUR. 568 (June 9, 1713)
1715	Balthazer Cornet		Not surrendering	Committed to Newgate Prison	WEEKLY JOURNAL WITH FRESH ADVICES FOREIGN & DOMESTICK, August 20, 1715, at 195
1715	Robert Dawson	Vintner/ London	Concealment	Acquitted: no act	LONDON GAZETTE, May 7, 1715, at 4 OBP, June 2, 1715, at 5
1726	Albertus Burnaby	Brewer/ London	Concealment	Acquitted: no act	LONDON GAZETTE, Feb. 1, 1726 n.s., at 3 DAILY COURANT, Feb. 28, 1726, at 2 LMA CLA/047/LJ/10/001 OBP, July 11, 1726, at 2–3 EVENING POST, July 12, 1726, at 1

431. This could be Richard Towne, but, if not, it implies that a second tallow chandler besides him was committed for concealing effects.

1726	John Elliott	Warehousman/ London	Concealment	Unknown	DAILY COURANT, Mar. 5, 1726, at 2
1726	John Turner	Victualler/ London	Concealment	Unknown	WEEKLY J.; OR, BRITISH GAZETTEER, Nov. 5, 1726, at 4
1727	Daniel Peers	Bay-maker/ Great Coggeshall, Essex	Concealment	Unknown	LONDON GAZETTE, Jan. 3, 1726 [o.s.], at 2
1727	Robert Steel	Chapman/ London	Not surrendering	Acquitted: no notice	LONDON GAZETTE, July 12, 1726, at 2 EVENING POST, Dec. 1, 1726, at 1 LMA CLA/047/LJ/10/001 OBP, Jan. 13, 1727, at 8
1729	James Holden	Victualler/ London	Concealment	Indicted	DAILY J., Mar. 3, 1729, at 1
1729	John Essington	Merchant/ London	Concealment	Acquitted: malicious prosecution	LONDON GAZETTE, May 11, 1728, at 4 DAILY POST, July 20, 1728, at 2 LMA CLA/047/LJ/10/001 OBP, Feb. 26, 1729
1729	Thomas Dawson	Chapman/ London	Concealment	Acquitted: no evidence offered	OBP, Oct. 15, 1729, at 8
1730	Robert Willan	Hosier/ London	Concealment	Unknown	LONDON EVENING- POST, July 21, 1730, at 3
1733	John Ward	London	Concealment	Unknown	DAILY J., Feb. 17, 1733, at 1
1735	William Mason	Currier/ London	Not surrendering	Affidavit sworn against him	LMA CLA/040/07/026
1736	Edward Halliday	Frome, Somerset	Not surrendering	Indicted	LONDON EVENING- POST, Dec. 14, 1736, at 3
1736	Joseph Bezeley	Merchant/ London	Concealment	Unknown	LONDON GAZETTE, July 17, 1736, at 2

1738	Edward Frith	Merchant/ London	Not surrendering	Acquitted: procedural defect	OBP, Oct. 11, 1738, at 150-51 THOMAS LEACH, CASES IN CROWN LAW 11-13 (1789)
1738	John Baker	Hawker of Drapers/ Swansea	Concealment	Unknown	COUNTRY J., July 1, 1738, at 3
1739	George Petty	Fellmonger/ Stratford, Essex	Concealment	Unknown	LONDON EVENING- POST, June 9, 1739, at 3
1739	Henry Ahelves	Tailor/ London	Concealment	Unknown	LONDON EVENING- POST, June 12, 1739, at 2
1742	John Wright	Chapman/ Lewes, Sussex	Concealment	Unknown	LONDON EVENING- POST, Sept. 9, 1742, at 2
1742	Prior Green	Brasier/ London	Concealment Perjury	Acquitted: procedural defect	OBP, Jan. 15, 1742, at 35-37 OBP, Apr. 28, 1742, at 95-98
1742	Thomas Hatton	Laceman/ London	Concealment	Unknown	DAILY POST, Jan. 25, 1742, at 2
1742	William Abram	Linen draper & mercier/ Exeter	Concealment	Unknown	DAILY ADVERTISER, Dec. 23, 1742, at 1
1743	___ Brown	Newcastle	Concealment	Indicted	LONDON DAILY POST, & GEN. ADVERTISER, Apr. 22, 1743, at 1
1743	Isaac Panchand	Merchant/ London	Concealment	Unknown	LONDON EVENING- POST, Apr. 7, 1743, at 3
1743	John Wilson	Shopkeeper/ Kingston-upon- Hull	Concealment	Unknown	LONDON GAZETTE, June 25, 1743, at 2
1745	John Upsdale	Packer/ London	Concealment	Unknown	DAILY POST, June 7, 1745, at 1
1749	Aaron Hart	Jeweler/ London	Not surrendering	Unknown	GEN. ADVERTISER, Jan. 31, 1749, at 2

1749	Peter Comerlan	Merchant/ London	Concealment	Confessed	LONDON EVENING- POST, Oct. 3, 1749, at 2 LONDON GAZETTE, July 16, 1751, at 4
1750	Robert Wright	Scrivener/ London	Concealment	Indicted	LMA CLA/047/LJ/13/175 0/005 LMA CLA/047/LJ/10/001
1752	George Pope	London	Concealment	Indicted	LMA CLA/047/LJ/10/001
1753	Benjamin Bailey	London	Concealment	Indicted	LMA CLA/047/LJ/10/001
1754	Thomas Cardow (a.k.a. Tardow)	London	Not surrendering	Acquitted: not a bankrupt	LMA CLA/047/LJ/10/001 OBP, Apr. 24, 1754, at 173
1755	John Cropley	Innholder/ Newark-upon- Trent	Concealment	Unknown	LONDON EVENING- POST, Mar. 8, 1755, at 2 LONDON GAZETTE, Nov. 15, 1755, at 3
1756	Alexander Thompson	Embroiderer/ London	Concealment	Guilty: hanged	LMA CLA/047/LJ/10/002 OBP, Jan. 15, 1756, at 85-87
1757	John Davis	Linen draper/ London	Concealment	Unknown	PUB. ADVERTISER, June 11, 1757, at 2
1757	Martin Mocho	Tailor/ London	Concealment	Unknown	PUB. ADVERTISER, June 6, 1757, at 3
1759	John Britton	Norwich	Concealment	Confessed	LLOYD'S EVENING POST, Dec. 11, 1761, at 575
1759	Thomas Townshend	Chemist/ Haymarket, Middlesex	Concealment	Unknown	WHITEHALL EVENING POST; OR, LONDON INTELLIGENCER, Feb. 3, 1759, at 3

1761	John Perrott	Linen draper/ London	Concealment	Guilty: hanged	OBP, Oct. 21, 1761, at 393–404 AN AUTHENTIC NARRATIVE OF THE PROCEEDINGS UNDER A COMMISSION OF BANKRUPTCY AGAINST JOHN PERROTT (London, R. Griffiths 1761)
1761	Philip Woodham	Baker/ London	Concealment	Indicted	LMA MJ/SP/1761/09/011
1762	John Leopold Gosler	Rope-maker/ Limehouse, Middlesex	Concealment	Unknown	PUB. ADVERTISER, Jan. 29, 1762, at 4
1765	Frederick Shepherd	Pressman/ Exon, Devon	Concealment	Unknown	GAZETTEER & NEW DAILY ADVERTISER, Aug. 2, 1765, at 3
1765	Richard Holmes	London	Concealment	Acquitted: failure to prove debt	LMA CLA/047/LJ/10/002 OBP, Jan. 16, 1765, at 66
1765	William Steers & Thomas Russel	Haberdashers/ London	Not surrendering Concealment	Unknown	GAZETTEER & NEW DAILY ADVERTISER, Oct. 23, 1765, at 3
1766	Kinsey Tyrer (a.k.a. Kensey, Rinsey)	Mercer/ London	Not surrendering	Acquitted	LMA CLA/047/LJ/10/002 OBP, Jan. 16, 1766, at 80
1766	Philip Brown	Victualler/ Portsmouth	Concealment	Unknown	GAZETTEER & NEW DAILY ADVERTISER, July 2, 1766, at 2
1768	John Mantell	Merchant/ Plaistow, Essex	Concealment	Unknown	GAZETTEER & NEW DAILY ADVERTISER, May 3, 1768, at 2

1768	Samuel Wilson	Haberdasher/ London	Concealment	Unknown	LMA OB/SP/1768/04/026 LMA OB/SB/1768/05/14- 17
1769	William Lane	Dealer in sugar/ London	Concealment	Bankruptcy “enlarged”	PUB. ADVERTISER, Nov. 6, 1769, at 3 LLOYD’S EVENING POST, Dec. 22, 1769, at 608
1774	Derrick Martin	London	Concealment	Indicted	LMA CLA/047/LJ/10/002
1774	Thomas Carter	London	Not surrendering	Acquitted: no evidence offered	LMA CLA/047/LJ/10/002 OBP, Feb. 16, 1774, at 126
1777	Benjamin Pierce (a.k.a. King)	London	Not surrendering	Brought before London magistrate	GAZETTEER & NEW DAILY ADVERTISER, June 19, 1777, at 2
1778	— Solomon	Merchant/ London	Absconding	Tried before Common Pleas: found not entitled to discharge	ST. JAMES CHRON.; OR, BRITISH EVENING POST, May 16, 1778, at 3
1778	Robert Jaques	Haberdasher/ London	Concealment	Prosecutors put off suit at Old Bailey and judge ordered Jaques discharged	GEN. ADVERTISER, & MORNING INTELLIGENCER, May 30, 1778, at 4 LONDON EVENING- POST, July 25, 1778, at 3
1779	Edmund Francis Calze	London	Concealment	Indicted	LMA CLA/047/LJ/10/002

1779	Thomas Tyler	Watchmaker/ London	Concealment	Acquitted	LMA CLA/047/LJ/10/002 OBP, Oct. 20, 1779, at 563–69 GAZETTEER & NEW DAILY ADVERTISER, Oct. 22, 1779, at 3 MORNING POST & DAILY ADVERTISER, Oct. 23, 1779, at 3
1779	Thomas Plumer Byde	Banker/ London	Concealment	Unknown	LONDON GAZETTE, Dec. 18, 1779, at 5
1781	Joseph George Pedley	Distiller/ Bristol	Concealment	Indicted	THE CASE OF THE CREDITORS OF JOSEPH GEORGE PEDLEY, A BANKRUPT OF BRISTOL (Bristol, J. Lloyd 1783)
1784	Thomas Rawbone	London	Not disclosing	Indicted	LMA CLA/047/LJ/10/002
1786	James Macartney	Innholder/ Epsom, Surrey	Not surrendering	Unknown	MORNING POST & DAILY ADVERTISER, Aug. 11, 1786, at 3
1790	Thomas Evans	London	Concealment	Acquitted: no evidence offered	LMA CLA/047/LJ/10/002 OBP, Feb. 24, 1790, at 323
1791	___ Daniel		Not surrendering	Captured in Nova Scotia	ST. JAMES'S CHRON.; OR, BRITISH EVENING POST, Dec. 6, 1791, at 1

1793	George Pitt	Haberdasher/ London	Concealment	Acquitted: procedural defects	LONDON PACKET: OR, NEW LLOYD'S EVENING POST, Dec. 27, 1793, at 1 LONDON CHRON., Sept. 14, 1793, at 265 (notice of commission) OBP, Jan. 15, 1794, at 320–26 SUN, Jan. 21, 1794, at 4
1793	James Nowlan	Soap-Boiler/ London	Concealment	Imprisoned: released without revealing assets	MORNING CHRON., Aug. 1, 1793, at 1 WHITEHALL EVENING POST, Nov. 27, 1794, at 2
1793	Patrick Brenan	Soap-Boiler/ London	Concealment	Unknown	MORNING CHRON., Aug. 14, 1793, at 1
1794	David Valentine	Merchant/ London	Concealment	Unknown	ORACLE & PUB. ADVERTISER, Aug. 22, 1794, at 1
1796	John Frayne	Merchant/ Dublin	Concealment	Guilty: overturned on motion to arrest judgment	ST. JAMES'S CHRON.; OR, BRITISH EVENING POST, Dec. 24, 1795, at 3 STAR, Jan. 6, 1796, at 3 MORNING POST & FASHIONABLE WORLD, Jan. 8, 1796, at 4
1802	John Hatfield	Carlisle	Not surrendering	No charges brought	CALEDONIAN MERCURY, Dec. 6, 1802, at 3
1802	Thomas Shiver	London	Concealment	Indicted	LMA CLA/04/LJ/21/023
1806	John Ibbetson	London	Not surrendering	Acquitted: no evidence offered	OBP, Apr. 16, 1806, at 221

1807	James Bullock	Wine merchant/ London	Concealment	Guilty: sentence commuted	DERBY MERCURY, Aug. 20, 1807, at 1 OBP, Sept. 16, 1807, at 392–402 King v. Bullock, (1807) 1 Taunt. 71, 168 Eng. Rep. 595 (E.C.) SELECT CASES FROM THE TWELVE JUDGES' NOTEBOOKS 107– 08 (D.R. Bentley ed. 1997)
1807	William Tucker	Serge manufacturer/ Exeter & London	Not surrendering	Acquitted: procedural defect	TREWMAN'S EXETER FLYING POST; OR, PLYMOUTH & CORNISH ADVERTISER, July 2, 1807, at 1 OBP, Dec. 2, 1807, at 46–49
1811	Charles Peter Whittaker	Merchant/ London	Not surrendering	Acquitted: procedural defect	OBP, Sept. 18, 1811, at 389–90
1812	Edward Procter	Stagecoach master/ London	Concealment	Acquitted	OBP, Feb. 19, 1812, at 158
1813	John Senior	Clothier/ Alverthorpe, Yorkshire	Concealment	Guilty: hanged	HULL PACKET, Mar. 30, 1813, at 4 HULL PACKET, Apr. 6, 1813, at 4 LEEDS MERCURY, Apr. 10, 1813, at 3
1814	Thomas Forsyth	Draper/ Burslem, Stafford	Concealment	Guilty: judgment arrested on procedural grounds	King v. Forsyth, (1814) Russ. & Ry. 274

1815	William Roberts	Fairsley, Yorkshire	Not surrendering	Guilty: sentence commuted by Prince regent to two years' imprisonment	LIVERPOOL MERCURY; OR, COM. LITERARY & POL. HERALD, Mar. 31, 1815, at 319 LEEDS MERCURY, July 8, 1815, at 3
1818	Thomas Hughes	Linen draper/ London	Concealment	Imprisoned ten months, allegations could not be proved, released	MORNING CHRON., Feb. 5, 1818, at 3
1819	George Page	Silk mercer/ London	Not surrendering	Guilty: judgment arrested	OBP, Feb. 17, 1819, at 145-50 King v Page, (1819) Russ. & Ry. 392