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Recalling The Public Interest in Personal Insolvency Law: A Note on Professor Fletcher's Foresight

Joseph SPOONER*

Introduction

> *"The major part of the cost of providing a basic framework for the administration of the panoply of legal remedies and procedures which are essential to any developed society should properly be borne by the community as a whole, even though it may be appropriate to make adjustments periodically in the balance of contribution to be extracted from those individuals who avail themselves of the system thus established."*[1]

1 It is a privilege to add to this collection in honour of the illustrious contribution to insolvency scholarship made by Professor Fletcher. His academic achievements on behalf of all insolvency research speak for themselves, and I have had the fortune of also gaining from his gifts as a teacher and mentor, luckily becoming Professor Fletcher's last doctoral student during my PhD studies at University College London. I benefitted greatly from his supervision which combined freedom to roam with attentive and dedicated direction, his guiding hand invisible when appropriate but always present. Professor Fletcher introduced me to a wide world of insolvency law which he encouraged me to explore, while also reminding me of the benefits, indeed duty, of exploring the often understudied depths of the system in our own jurisdiction. It is in this spirit, and inspired by Professor Fletcher's public-minded scholarship, that I now present this brief review of the current state of the personal insolvency system in England and Wales.[2] This paper takes the form of a snapshot

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* Joseph Spooner is Assistant Professor at the Department of Law, London School of Economics and Political Science. Some ideas discussed in this paper were developed when co-authoring a policy submission with Professor Iain Ramsay, whom I thank for his thoughts: see I. Ramsay and J. Spooner, *Submission to Insolvency Service Call for Evidence: Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit* (2014), available at SSRN: <http://ssrn.com/abstract=2601349>. I also thank Professor Paul Omar for his initiative and organisational endeavour in preparing this collection. All errors and omissions remain my own.

[1] I. Fletcher, "Bankruptcy Law Reform: The Interim Report of the Cork Committee, and the Department of Trade Green Paper" (1981) 44 *The Modern Law Review* 77.

[2] For reasons of brevity, this article must assume the reader's working knowledge of personal insolvency law in England and Wales. Further information can be found in Professor Fletcher's

of the contemporary condition of the law and its surrounding context of household over-indebtedness, drawn primarily from relevant data published in the past two years (2014-2015).

2 I frame this piece around a short article of Professor Fletcher's published at a crucial juncture for the development of the personal insolvency law system. In the 1981 *Modern Law Review*, Professor Fletcher critiqued a newly published Government Green Paper which showed a:

> "remarkable, and ominous, divergence… between views and priorities of… the [then] Administration and those of the [Cork] Committee set up under the previous one."[3]

3 Many of the weaknesses of the current system may be traced to this ominous divergence between the consumer insolvency proposals of the final Cork Report[4] and subsequent legislation which largely ignored these recommendations. The Cork Committee had proposed a holistic redevelopment of a public personal insolvency system to meet "the demands of the consumer society."[5] In contrast, the Government of the time largely ignored the specificity of consumer insolvency and proposed a scaled down system which reduced the public role in insolvency administration, as insolvency officers were to be replaced by private practitioners paid by bankruptcy petitioners. In critiquing these latter proposals, Professor Fletcher's article presented a compelling case for the recognition of the public interest in personal insolvency policy. He advanced an argument for the design and funding of a personal insolvency system based on a foundational principle that the law benefits society at large, beyond providing gains to debtor and creditors alone. The piece criticised law reform founded upon ideology rather than principle or evidence, and the replacement of the core objectives of personal insolvency law with a single objective of lowering Government expenditure, under policies:

> "dominated by the determination to reduce civil service manpower above all other considerations."[6]

4 These criticisms of the shape personal insolvency policymaking was taking at this time help to cast light on the law's development in the intervening period, and on its current state.

5 Now seems a particularly apt moment to survey English personal insolvency law and to revisit Professor Fletcher's comments. The Global Financial Crisis and Great Recession have led to extensive financial strain for already heavily leveraged

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comprehensive textbook: I. Fletcher, *The Law of Insolvency* (4th revised ed) (2009, Sweet & Maxwell, London).

[3] Fletcher, above note 1, at 77.

[4] Sir K. Cork, *Insolvency Law and Practice : Report of the Review Committee* (HMSO, 1982).

[5] Ibid., at 11.

[6] Fletcher, above note 1, at 81.

UK households, with high levels of household over-indebtedness and repayment difficulty.[7] One might expect a particularly significant role for personal insolvency law in responding to these developments. Making this an equally opportune time for taking stock of the law is the surprising fact that in the face of such widespread financial difficulties, personal insolvency numbers in England and Wales are decreasing, while bankruptcies in particular fell to a two-decade low by the end of 2014.[8] Therefore the role of personal insolvency law, and particularly bankruptcy, seems to be reducing when one might expect it to be growing. Similarly, policymakers seem not to recognise the significant role which conditions suggest personal insolvency law should now be playing. A recent Insolvency Service review of the conditions for accessing the Debt Relief Order procedure and commencing creditor-petitioned bankruptcy procedures did not consider this remarkable decline in the use of personal insolvency procedures and the question of whether the law was extending its reach wide enough to serve its public interest objectives.[9] Thus we arrive at the strange situation in which personal insolvency law on many accounts has a particularly vital role to play in promoting aggregate welfare, but yet this appears not to be recognised by policymakers. Instead the practical role performed by the law decreases significantly.

6 This article begins by discussing the public interest in personal insolvency law, and particularly in its function of providing debt relief to over-indebted households under the "fresh start" policy. I then consider briefly the current state of personal insolvency law, discussing recent falls in statutory insolvencies, explanations of this trend and potential negative public policy consequences. I then briefly discuss the political ideas and trends which have led to this position. I trace the law's development back to the policy proposals critiqued by Professor Fletcher and follow it alongside the advancement of neo-liberal ideas of privatisation and commercialisation through to the current dominance of austerity ideology. I conclude by considering possible reforms, indicating how the abovementioned trends limit possibilities for reform and so for the rediscovery of the public interest in personal insolvency law's provision of household debt relief.

Personal Insolvency Law and the Public Interest in Private Law

7 Despite the inherently private law orientation of early bankruptcy laws, personal insolvency law and policy have also held a longstanding belief that the law serves certain public interest objectives beyond private concerns. These objectives have been traditionally understood as:

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[7] See paragraphs 21-22 below.
[8] Insolvency Service, I*nsolvency Statistics - October to December 2014 (Q4 2014)* (2015) Statistics Release Ins15/Coms/011, at 4.
[9] Insolvency Service, *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit: Call for Evidence* (2014).

> "a balancing of the respective interests of creditors (and of the public at large) on the one hand, and of failed debtors on the other, and the maintenance of the highest attainable standards of commercial morality and business integrity."[10]

8 Early versions of the law leaned heavily towards a singular objective of allowing creditors to enforce private contracts, ensuring satisfactory methods for debt collection were available[11] and solving the collective action problem of creditor competition for access to a limited pool of debtor assets.[12] This ultimately contractarian view,[13] typical of private law orthodoxy, was based on a belief that maximising returns to creditors would produce optimal resource allocations, meaning this was the aim to which insolvency law should aspire. The changing conditions of personal insolvency law's operation, and its transformation from a commercial law to a tool for addressing the modern phenomenon of mass household over-indebtedness, mean that the balance of the law has shifted over time. As the law now primarily provides debt relief to debtors holding few assets and low incomes, its primary objective is embodied in the "fresh start" policy. This idea provides that relieving financially troubled households from over-indebtedness will produce outcomes enhancing aggregate welfare by restoring these households to positions of economic productivity and social inclusion.[14] Justifications for the fresh start policy have been multifarious, ranging from utilitarian economic perspectives of maximising debtor productivity, to humanitarian and moral justifications.[15]

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[10] Fletcher, above note 1, at 77–78.

[11] C. Tabb, "The Historical Evolution of the Bankruptcy Discharge" (1991) 65 *American Bankruptcy Law Journal* 325, at 327.

[12] T. Jackson, *The Logic and Limits of Bankruptcy Law* (1986, Harvard University Press, Harvard MA), at 328.

[13] A. Levitin, "Bankrupt Politics and the Politics of Bankruptcy" (2011) 97 *Cornell Law Review* 1399, at 1405.

[14] For accounts of the fresh start policy, *see e.g.* M. Howard, "A Theory of Discharge in Consumer Bankruptcy" (1987) 48 *Ohio State Law Journal* 1047; C. Hallinan, "The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory" (1986) 21 *University of Richmond Law Review* 49; W. Whitford, "Changing Definitions of Fresh Start in US Bankruptcy Law" (1997) 20 *Journal of Consumer Policy* 179. The role of the law in maintaining "commercial morality and business integrity" has reduced as the law has moved from a commercial law to a mechanism primarily used by consumer debtors in respect of their household finances. Even with the corresponding recognition of the primacy of the law's debt relief, function, however, the law continues to regulate debtor misconduct, albeit by focusing on culpable debtors rather than taking the historical approach of punishing all debtors: see e.g. Insolvency Service, *Productivity and Enterprise: Insolvency - A Second Chance* (Cm 5234) (2001), at 4–8. Changes in the dynamics of consumer borrowing and in the operation of personal insolvency law now mean that the aim of preserving standards of commercial morality and business integrity may involve regulating *creditor* conduct, rather than sanctioning debtors. For example, this would involve personal insolvency law attempting to promote responsible lending practices: World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013), at paragraphs 88–93.

[15] R. Flint, "Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor" (1991) 48 *Washington and Lee Law Review* 515, at 519; Howard, above note 14, at 1048.

9 It is economic justifications which have tended to hold most influence for policymakers, however. As early as the Parliamentary debates which led to the opening of bankruptcy access to non-trading debtors (a reform which began the process resulting in personal insolvency now being primarily used by consumer debtors), the economic benefits of relieving honest debtors from their obligations were recognised. Such measure would prevent the debtor's economic productivity from being ended by her insolvency, allowing the debtor to:

> "begin the world again and have the benefit of his future industry and exertions."[16]

10 A century and a half later, the bankruptcy reforms introduced in England and Wales under the Enterprise Act 2002 were based upon similar reasoning that providing a fresh start to failed business debtors would encourage entrepreneurship and advance economic growth.[17]

11 Within the legal system, courts have also recognised the important public interest objectives served by personal insolvency law, which are deemed sufficiently significant to override otherwise applicable private law rights. The European Court of Human Rights has pointed to public interest justifications for the interference with creditors' property rights represented by consumer debt relief.[18] The Court noted that while an interference with property rights which merely conferred a "private benefit on a private party" could not be justified as being in the public interest, this was not the case in respect of debt relief under a personal insolvency regime.[19] Legitimate social and economic policies justify the modification of existing contracts and provide:

> "an urgent and compelling public interest in affording debtors the possibility of seeking debt adjustment in certain circumscribed situations."[20]

12 The Court of Justice of the European Union also recently struck down a national consumer insolvency law provision which limited access to residents of that country, on the grounds that this restriction on debt relief could dissuade debtors from exercising their freedom of movement rights.[21] The court's decision makes clear a vision of debt relief policies' role in facilitating free movement of workers, maximising employment prospects and so unlocking the productivity of the

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[16] HC Deb 15 March 1860 vol 157 col 654, per Sir Richard Bethell, Attorney General.
[17] Insolvency Service, above note 14.
[18] *Back v Finland* [2004] European Court of Human Rights Application No. 37598/97, 2005 BPIR 1.
[19] Ibid., at 60.
[20] Ibid., at 59.
[21] *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* [2012] EUECJ C-461/11 ("*Radziejewski*"). See also J. Niemi, "Never Too Small to Fail: Insolvency of Consumers as an International Concern", in W. Backert *et al.* (eds), *Contemporary Issues in Consumer Bankruptcy* (2013, Peter Lang, Munich).

European workforce.[22] These decisions mirror the seminal judicial statement of the fresh start policy by the US Supreme Court that the debt relief function of bankruptcy law:

> "has been again and again emphasized by the courts as being of public, as well as private, interest, in that it gives to the honest but unfortunate debtor… a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[23]

13 The Global Financial Crisis and Great Recession have led to renewed recognition of the public interest in providing debt relief to over-indebted individuals. International organisations have taken novel interest in issues of household debt relief and personal insolvency law. In 2013 the World Bank published a *Report on the Treatment of the Insolvency of Natural Persons,* which advances a list of "foundations of insolvency for natural persons" predominantly focusing on the "benefits for society, national and international" achieved by providing debt relief in insolvency.[24] The public policy benefits of such laws identified in the Report almost all relate to debt discharge, illustrating the centrality of debt relief to the modern law.[25] During the Great Recession, the IMF also argued in favour of debt relief as a means of addressing "debt overhang", the tendency of mass household over-indebtedness to reduce consumer spending and so cause economic growth to lag.[26]

14 An important reiteration of the potential overall welfare gains linked to household debt relief policies has been provided by Professors Mian and Sufi's 2014 book, *House of Debt*.[27] The book links economic downturns to credit expansions and illustrates empirically how the true cause of the Great Recession in the USA appears to have been located not in a financial sector crisis and retraction in bank lending, but rather in falling consumption among highly indebted households whose net wealth was decimated when house prices fell dramatically. The authors argue that the mechanism of mortgage lending inflicts all of the losses of a drop in property values on the borrower, while leaving the creditor untouched with a claim to full repayment of a loan. As society's borrowers are those with the highest marginal propensity to consume, the distribution of losses onto borrowers leads to dramatic falls in consumption, causing economic downturn. The appropriate policy response therefore is not to prop up banks but to redistribute

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[22] *Radziejewski,* at paragraphs 28–31.
[23] *Local Loan Co v Hunt* (1934) 292 US 234 (US Supreme Court), at 244.
[24] World Bank, above note 14, at paragraphs 27–40.
[25] Ibid., at 76–111.
[26] International Monetary Fund, *Dealing with Household Debt*, *World Economic Outlook 2012* (IMF 2012); Y. Liu and C. Rosenberg, *Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox* (International Monetary Fund 2013) IMF Working Paper WP/13/44 5.
[27] A. Mian and A. Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (2014, University of Chicago Press, Chicago IL).

losses more evenly, primarily through the provision of aggressive debt relief to heavily leveraged houses whose net wealth has been reduced.[28] Imposing losses onto creditors should reduce the consumption lag and overall economic harm, since creditors' spending will be less impacted by losses than will that of borrowers. Also, such loss shifting should have additional benefits of discouraging irresponsible lending driven by an artificial belief that debt contracts – especially mortgage debts – are infallible investments.[29]

15 This "debt overhang" framework advocates powerfully for renewed support of the public interest in the fresh start policy of household debt relief. While the limitations of Professors Mian and Sufi's study to the context of US housing debt must be acknowledged, economic analysts of the UK economy reach similar conclusions[30] (even if the Bank of England concerns itself more with regulatory measures to prevent harmful build-up of household debt, rather than debt relief measures to address the problem *ex post*).[31] This argument poses a significant challenge to English personal insolvency law. Firstly, it reminds us of the need for broad access to personal insolvency law as a means of providing debt relief for highly leveraged households. Indeed, ensuring broad access to debt relief currently provided seems to be the very least that this analysis demands of the law, since the "debt overhang" rationale's recommendations for debt relief extend beyond traditional and current understandings of insolvency law.

16 Secondly, they argue for a role for bankruptcy in restructuring mortgage debt, including principal reduction, an area to which personal insolvency law has not traditionally extended.[32] They advocate debt relief for households whose net wealth has plummeted, which may involve relief for households regarded as cash-flow solvent and so excluded from insolvency law.[33] This framework also highlights the need to protect household *wealth* and ensure that undue damage is not wreaked on household balance sheets, as this will cause households to reduce spending. This contrasts with the usual focus of the fresh start policy in insolvency law on maintaining an *income* necessary for "for the reasonable support of the debtor and those dependent on the debtor";[34] as well as protecting merely essential assets and liquidating any remaining property.[35] The "debt overhang" rationale therefore suggests that positive economic outcomes could result from a significant expansion

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[28] Ibid., at 135–151.
[29] Ibid., at 170, 179–180.
[30] M. Whittaker and K. Blacklock, *Hangover Cure: Dealing with the Household Debt Overhang as Interest Rates Rise* (Resolution Foundation 2014); P. Bunn and M. Rostom, *Household Debt and Spending* (Bank of England 2014) Bank of England Quarterly Bulletin 2014 Q3.
[31] Bunn and Rostom, above note 30.
[32] World Bank, above note 14, at paragraphs 319–325. But see e.g. A. Levitin, "Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy" (2009) *Wisconsin Law Review* 565.
[33] Section 272(1), Insolvency Act 1986; Fletcher, above note 2, at paragraph 6-088, citing *Re Coney* [1998] BPIR 333.
[34] World Bank, above note 14, at paragraph 274.
[35] Ibid., at paragraphs 223–261.

of the scope and extent of debt relief provided by personal insolvency law. If it is too much to expect personal insolvency law alone to address all of these issues, at a minimum this analysis suggests that there should be broad access to the most extensive levels of relief currently offered by the law.

17 Yet the challenge posed to personal insolvency law and policy by the Great Recession and the debt overhang problem has not been as widely recognised in England and Wales as it has in other jurisdictions. Even those advocating reforms to address the debt overhang problem have declined to recommend developing personal insolvency law and instead recommend "softer" policies to address household debt, stating that:

> "the UK's insolvency regime is held up as being at the forefront of international practice."[36]

18 Similarly, the Insolvency Service's recent review of creditor bankruptcy petitions and the Debt Relief Order procedure was concerned with tweaking slightly the access conditions for both procedures, neglecting to explore wider questions of whether personal insolvency law was performing sufficiently in terms of the scope and extent of debt relief provided. This suggests a complacency towards the state of personal insolvency law which is justified neither by the preceding discussion of the public interest need to provide household debt relief, nor by the evidence of the operation of the system, which I now discuss.

Causes for Concern in the Contemporary Personal Insolvency System

19 Professor Fletcher's warnings regarding the direction personal insolvency policy was taking in the early 1980s have turned out to be prescient predictions of problems likely to arise from the Government's proposals to reduce the role of public officials in insolvency. These included the inability of the system to police against the possibility of (debtor) fraudulent misconduct,[37] the lack of Government vision as to how insolvency procedures would interact,[38] and the dramatic reduction in access to bankruptcy for insolvent individuals.[39] The first of these problems merits a discussion in its own right, but for reasons of brevity this paper focuses on the latter two problems. I illustrate the foresight of Professor Fletcher's warnings by describing how barriers to accessing "public" debt relief via bankruptcy and the Debt Relief Order procedure have developed which risk inhibiting the fresh start policy. I then describe the lack of due consideration to the relationship between these procedures and the statutory Individual Voluntary Arrangement (IVA) procedure and non-statutory Debt Management Plans (DMPs), the proliferation of

[36] Whittaker and Blacklock, above note 30, at 12.
[37] Fletcher, above note 1, at 83.
[38] Idem.
[39] Ibid., at 81–84.

which at the expense of bankruptcy and DROs may further obstruct the achievement of the public policy benefits of debt relief.

Falling Personal Insolvencies, Plummeting Bankruptcies

20 It is striking that personal insolvencies, and particularly bankruptcies, have been decreasing in number significantly in recent years (Figure 29.1). In 2014, bankruptcies plummeted to lows not seen since 1998 (notably before the Enterprise Act 2002's bankruptcy reforms, which were with justification predicted to "increase the attractiveness and incidence of bankruptcy"[40]). The 2009 introduction of the Debt Relief Order procedure could be expected to have reduced bankruptcy numbers somewhat as some "no income, no assets" cases which would have entered bankruptcy were otherwise diverted into the new procedure. The DRO procedure indeed grew in use in its first years, but subsequently its use declined. DRO numbers have been significantly lower than estimates predicted by the Insolvency Service when proposing the new procedure (40% lower in the fourth full year of operation).[41] The drop in bankruptcies has therefore been more extensive than can be explained by the DRO procedure's introduction alone. Indeed even when numbers of bankruptcies and DROs are combined, their 2014 total represents a low not seen since 2005 bankruptcy levels (Figure 29.2).

21 While insolvency practitioners attribute this position to rising incomes and increased ability of households to repay their debts,[42] debt advice charities are less optimistic and caution that household indebtedness levels remain problematic and are forecast to increase further.[43] Indeed, levels of financial difficulty have not fluctuated with personal insolvency rates, and it appears difficult to attribute falling rates to reductions in household over-indebtedness. Aggregate household debt levels have declined during the years of the Great Recession, but debt levels nonetheless remain higher than they were at the century's beginning, and are rising to such an extent as soon to exceed pre-crisis peaks.[44] The distribution of this

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[40] A. Walters, "Personal Insolvency Law after the Enterprise Act: An Appraisal" (2005) 5 *Journal of Corporate Law Studies* 65, at 81.

[41] Insolvency Service, *Relief for the Indebted - An Alternative to Bankruptcy: Summary of Responses and Government Reply* (The Insolvency Service 2005), at 20.

[42] R3, *R3 Comments on Q2 2015 Insolvency Statistics* (29 July 2015), at 3, available at: <https://www.r3.org.uk/index.cfm?page=1114&element=22480&refpage=1008> [last viewed 28 September 2015].

[43] Money Advice Trust, *Insolvencies Reach Lowest Level in Nearly a Decade*, available at: <http://www.moneyadvicetrust.org/media/news/Pages/Insolvencies-reach-lowest-level-in-nearly-a-decade.aspx>; Money Advice Trust, *Personal Insolvencies Continue to Decline* (29 April 2015), available at: <http://www.moneyadvicetrust.org/media/news/Pages/Personal%20insolvencies%20continue%20to%20decline.aspx>; Money Advice Trust, *Downward Trend in Insolvencies Welcome but Borrowing Set to Rise* (29 July 2015) <http://www.moneyadvicetrust.org/media/news/Pages/Downward-trend-in-insolvencies-welcome-but-borrowing-set-to-rise.aspx> [all last viewed 28 September 2015].

[44] See e.g. A. Pardoe *et al.*, *Unsecured and Insecure? Exploring the UK's Mountain of Unsecured Personal Debt - and How It Affects People's Lives* (Citizens Advice Bureaux 2015).

aggregate debt must also be taken into account, with one study for example showing that the poorest 10% of the population were spending almost half of their income on debt repayments during the Great Recession, while the wealthiest 10% spent just under one tenth of their income.[45]

22 One 2014 study shows that three million people demonstrate at least three objective signs of financial difficulty, including borrowing to keep up with existing bills and debts, falling behind on essential bills and regularly incurring late payment charges.[46] Another 2015 report estimates that approximately 9% of UK households are "financially vulnerable" (demonstrating debt-to-income ratios exceeding 60%), while almost 12% are "over-indebted" (with debt servicing costs-to-income ratios exceeding 25%).[47] These data represent an increase on equivalent numbers from 2012, suggesting rising debt difficulties. Recently published Office for National Statistics data further show that the share of borrowing households reporting their financial debt to be a heavy burden has increased since 2008 to almost 20%, while the combined proportion of the indebted population feeling burdened to some extent by debt rose in 2008-2010 and again in 2010-2012 (now standing at 56% of borrowing households).[48] These figures are even higher for lower income households, with approximately 33% of borrowing households in the two lowest income deciles feeling heavily burdened by debt.[49] Despite differences in methodologies and indicators used in these studies, together they present a picture of significant over-indebtedness across the UK population, suggesting extensive demand for debt relief through personal insolvency.

23 The fall in bankruptcies and DROs also seems to defy research on the link between overall household debt levels and bankruptcy. Professor Lawless' work on US bankruptcy rates shows that contractions in consumer credit lead to short term increases in bankruptcy filings, as consumers can no longer use emergency credit to avoid falling into bankruptcy.[50] While large numbers of UK households are indeed borrowing to keep up with repayments,[51] the Great Recession has nonetheless seen a tightening of access to credit, particularly for households at the lower end of the income distribution.[52] This might suggest the arrival of a "day of reckoning" for consumer debtors,[53] as reduced ability to access emergency credit might push them

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[45] M. Whittaker, *On Borrowed Time? Dealing with Household Debt in an Era of Stagnant Incomes* (Resolution Foundation 2012), at 3.

[46] R. de Santos, StepChange Debt Charity and YouGov, *Life on the Edge: Towards More Resilient Family Finances* (StepChange Debt Charity 2014), at 7.

[47] D. Gibbons and L. Vaid, *Britain in the Red: Provisional Report* (Centre for Responsible Credit (commissioned by TUC and Unison) 2015), at 24, 28–9.

[48] Office for National Statistics, *The Burden of Financial and Property Debt, Great Britain, 2010 to 2012* (2015), at 3.

[49] Ibid., at 8.

[50] R. Lawless, "The Paradox of Consumer Credit" (2007) *University of Illinois Law Review* 347.

[51] de Santos *et al.*, above note 46, at 3, 7.

[52] Whittaker, above note 45, at 4.

[53] Lawless, above note 50, at 349.

into insolvency, increasing personal insolvency rates. English bankruptcy and DRO rates run counter to this trend. Professor Lawless argues that lower levels of household debt should in the long run lead to reduced bankruptcy filings, but the falls in household debt during the Great Recession are unlikely to represent such a long-term trend,[54] and do not seem so drastic as to reduce bankruptcy rates to 1990s levels. Thus we may need to look elsewhere to explain the falling bankruptcy and DRO numbers.

24 Two factors seem particularly significant in explaining the under-use of bankruptcy and Debt Relief Orders. The first involves financial conditions which the debtor must satisfy to access the debt relief these procedures offer, while the second is based on the diversion of debtors into alternative debt solutions (IVAs and DMPs). Firstly, access to the DRO procedure is tightly restricted based on the debtor's income, asset and debt levels. The DRO procedure is a "no income, no asset" procedure,[55] which was designed for debtors who:

> "do not generally owe a great deal… are often living on very low incomes… have no surplus income after meeting ordinary living expenses and cannot afford to make even token payments to their creditors [and] have no assets that could be sold to defray the debt."[56]

25 Importantly, in proposing this mechanism the Insolvency Service noted that it was targeted at debtors who could not afford to access bankruptcy, and so were excluded from alternative debt relief solutions (see below).[57] Given the "no income, no asset" debtor demographic for whom the procedure was designed, access was conditioned on the debtor's income and assets falling below certain ceilings. An additional condition was also imposed, however, limiting access to debtors owing less than GBP 15,000 (this ceiling has in 2015 been raised to GBP 20,000). This condition does not necessarily follow from the design of the procedure for debtors of low income and few assets. It may make sense (given bankruptcy's traditional and residual debt collection function) to divert into bankruptcy debtors possessing excess assets and income capable of being liquidated and distributed to creditors. In contrast, the level of debt owed seems to have no bearing on whether the debtor should obtain relief via bankruptcy or DRO, however, and this condition is more difficult to explain.[58] The bare justification offered by the Insolvency Service was unconvincing, merely stating that:

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[54] The Office for Budget Responsibility forecasts household gross debt to income levels to rise in the coming years, surpassing pre-financial crisis levels by 2020: Office for Budget Responsibility, *Office for Budget Responsibility Economic and Fiscal Outlook March 2015* (2015) (Cm 9024), at 73.
[55] World Bank, above note 14, at paragraphs 99–100.
[56] Insolvency Service, *Relief for the Indebted - An Alternative to Bankruptcy* (2005), at 12.
[57] Idem.
[58] Ramsay and Spooner, above preliminary note.

> "We think that given there are other remedies available to people who get into debt and that the aim of these proposals is to meet the needs of those with relatively low levels of debt, the total liabilities for people who enter the scheme should be restricted."[59]

26 The result of this additional entry requirement for accessing the DRO procedure is that debtors possessing little to no disposable income and few if any saleable assets are excluded from the DRO procedure if their debts exceed GBP 20,000. The limited data available show that, in 2013-14, 77% of debtors in bankruptcy held assets placing them below the new DRO asset ceiling of GBP 1,000, but yet 85% of bankruptcy debtors are excluded from the DRO due to the GBP 20,000 debt ceiling.[60] This exclusion of debtors from the DRO procedure is particularly problematic when combined with the severe obstacles faced by debtors seeking to enter bankruptcy.

27 A chief factor limiting use of bankruptcy is that access is restricted by the costs which must be paid by petitioning debtors. Debtors presenting a petition must pay a court fee of GBP 180[61] and a deposit of GBP 525[62] to cover (partly) the cost of administering the bankruptcy procedure. In response to the growing number of asset-less consumer bankruptcies (which provide insufficient proceeds to pay administrative costs) in recent decades, secondary legislation has increased the size of the deposit at almost yearly intervals, with particularly large increases in 2010 and 2011.[63] These costs represent a significant practical obstacle for debtors seeking to access bankruptcy. The court fee of GBP 180 may be reduced to GBP 5 via remission,[64] but the deposit of GBP 525 cannot be reduced. A debtor's challenge on human rights grounds to her inability to obtain remission of the deposit was rejected in the case of *Regina v Lord Chancellor, ex parte Lightfoot*.[65]

28 The combination of strict DRO access conditions and the costs of accessing bankruptcy mean that many debtors may be excluded from both procedures. This risk is illustrated by data submitted by debt advice agencies to the Insolvency Service as part of the 2014 Call for Evidence on the DRO procedure. Citizens Advice Bureaux indicated that many of their clients are unable to afford bankruptcy but hold debt levels above the DRO ceiling.[66] In a survey of the agency's clients

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[59] Insolvency Service, above note 56, at 25.

[60] Insolvency Service, above note 9.

[61] Schedule 1, Civil Proceedings Fees Order 2008/1053, as amended by Civil Proceedings Fees (Amendment) Order 2014/874.

[62] Article 6, Insolvency Proceedings (Fees) Order 2004/593, as amended by Article 2(b), Insolvency Proceedings (Fees) (Amendment) Order 2011/1167.

[63] See e.g. comments of Richard Judge, Chief Executive of the Insolvency Service, in: The Insolvency Service, *Oral Evidence Taken Before the Business, Innovation and Skills Committee* (House of Commons, Hansard 2012).

[64] Schedule 2, Civil Proceedings Fees Order 2008/1053.

[65] *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597 [CA] ("*Lightfoot*").

[66] Citizens Advice Bureau, *Debt Relief Orders and the Bankruptcy Petition Limit: Citizens Advice Response to the Insolvency Service*, *Evidence: a Citizens Advice Social Policy Publication* (2014), at 3.

advised about bankruptcy in 2013-2014, 53% earned incomes of less than GBP 1,000 per month, while 90% earned less than GBP 2,000 per month. The prospect of these debtors raising the access price to bankruptcy seems remote. Of debtors advised about bankruptcy, 54% had debts of over GBP 20,000, disqualifying them from accessing the DRO procedure. These debtors therefore appear unlikely to be in a position to access debt relief via either procedure, at least without external assistance. These figures are supported by data published by debt advice charity Christians Against Poverty, which indicated that 35% of its clients accessing bankruptcy required a bursary from the charity to do so. Of this group, 78% were ineligible for access to the DRO procedure on the sole ground that their debts exceeded the then debt ceiling of GBP 15,000.[67]

29 Therefore evidence suggests that the combination of bankruptcy access costs and the unduly restrictive and unsatisfactorily justified conditions for accessing the Debt Relief Order procedure has significant exclusionary effects in denying access to debt relief. Debtors in this position of exclusion from both procedures may either remain trapped in "informal insolvency", with all the negative consequences that brings for debtors and society,[68] or may, if they have some income available for distribution to creditors, find an alternative solution to their debt difficulties. Such alternative solutions also raise significant policy concerns, however, as I now discuss.

Interaction of Personal Insolvency Mechanisms and the Growth of Private Intermediation

30 Professor Fletcher's second note of caution was that the Government proposals of the early 1980s lacked a clear vision of how alternative personal insolvency mechanisms should interrelate. Again this concern appears to be manifested in problems of the current system. In contrast to the decline in bankruptcies and DROs, recent years have seen rising rates of Individual Voluntary Arrangements (IVAs). These are statutory repayment plans based on debtor-creditor consensual renegotiation of obligations through the intermediation of an insolvency practitioner. The use of IVAs by consumers grew rapidly in the early 2000s, and numbers continued at a high level once lender refusal to cooperate in the procedure[69] was eased through the introduction of the consumer IVA protocol –

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[67] Christians Against Poverty, *Too Poor to Go Bankrupt* (Christians Against Poverty 2014).

[68] World Bank, above note 14, at paragraph 67. See also S. Albanesi and J. Nosal, *Insolvency After The 2005 Bankruptcy Reform* (Federal Reserve Bank of New York Staff Reports, Federal Reserve Bank of New York April 2015).

[69] A. Walters, "Individual Voluntary Arrangements: A "fresh Start" for Salaried Consumer Debtors in England and Wales" (2009) 18 *International Insolvency Review* 5; M. Green, "New Labour: More Debt - The Political Response", in J. Niemi *et al*. (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (2009, Hart Publishing, Oxford).

negotiated between lenders and IVA providers - in 2008.[70] Since then, IVAs have risen reasonably steadily throughout the Great Recession, reaching an unprecedented high in 2014 (Figure 29.1).

31 Similarly, Debt Management Plans (DMPs) – non-statutory long-term repayment plans involving delayed full repayment of principal which are negotiated by debtors with creditors through charitable or fee-charging debt management agencies - have grown rapidly in recent years and appear to be even outpacing IVAs. Data about the prevalence of DMPs is limited and inconsistent, but one large scale study commissioned by a representative body of DMP and IVA providers, the Debt Resolution Forum, estimated that 165,000 DMPs started in 2011. This figure would outnumber all annual personal insolvency procedures combined.[71]

32 The decline in bankruptcies, coupled with an increase in IVAs and DMPs, suggests a diversion of financially troubled debtors away from bankruptcy and towards these consensual renegotiation procedures. One factor contributing to this trend is that the cost structures of IVAs and DMPs facilitate debtor access more readily than the prohibitive up-front costs of bankruptcy. Insolvency Service surveys suggest that in most IVA cases, debtors do not pay up-front fees to practitioners, but instead spread the costs of the practitioners' fees over the course of their IVA repayment plan.[72] Debt Management Plans are either provided by non-fee-charging advice services, or fees are paid through deductions from the debtor's monthly repayments to creditors. An up-front fee can play a crucial role in deterring liquidity constrained debtors from accessing bankruptcy and diverting them to a procedure which allows payment to be staggered, such as an IVA or DMP.[73] This effect was recognised by the Insolvency Service in evidence presented to Parliament in 2013.[74]

33 Evidence of a second factor contributing to this diversion of debtors into IVAs and DMPs comes from the Financial Conduct Authority's (FCA) 2015 report on the *Quality of Debt Management Advice*,[75] the latest in a line of studies exposing

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[70] Insolvency Service, *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement*; Insolvency Service, *Review of the Impact of the IVA Protocol* (2009).

[71] Zero-Credit and Debt Resolution Forum, *Debt Resolution in the UK* (2012), at 20. This figure approximates a 2009 Ministry of Justice estimate of the annual number of DMPs: Ministry of Justice *et al.*, *Debt Management Schemes - Delivering Effective and Balanced Solutions for Debtors and Creditors* (2009), at 14; S. Collard, *An Independent Review of the Fee-Charging Debt Management Industry* (2009), at 3.

[72] Insolvency Service, *Survey of Debtors and Supervisors of Individual Voluntary Arrangements* (2008), at 9-10; Insolvency Service, above note 51, at 13–14.

[73] Albanesi and Nosal, above note 68, at 2.

[74] House of Commons, Business, Innovation and Skills Committee, *The Insolvency Service* (House of Commons 2013) Report of Session 2012-3, at 6 (paragraph 42).

[75] Financial Conduct Authority, *Quality of Debt Management Advice* (2015) Thematic Review TR15/8.

the widespread consumer protection problems in the debt management market.[76] Consistent with principal-agent theory[77] and empirical evidence from other jurisdictions,[78] the FCA found that intermediaries who have a financial incentive to direct debtors into income-producing solutions tend to steer debtors into such procedures and direct them away from bankruptcy and DROs, which produce no income. The FCA found evidence of firms failing to provide advice in respect of options which did not produce income for firms (e.g. bankruptcy) and selling solutions to debtors without adequate consideration of their suitability or appropriateness for the debtor.[79] Fee charging firms in particular:

> "often failed to give fair and balanced information and advice about some insolvency solutions such as bankruptcy and debt relief orders."[80]

34 Debtors tend to have little knowledge of the various solutions available to them in the complex personal insolvency environment, are unlikely to "shop around" and may not actually have been seeking debt management services when first coming into contact with an advice agency.[81] On occasion debtors can be introduced to a firm through unsolicited marketing, as a firm may buy a debtor's contact details in order to sell her a product such as a debt management plan.[82] The FCA found that these factors mean that debtors may:

> "be susceptible to influence or may make choices that are not in their best interests."

35 Such decisions might for example include committing to an unsustainable repayment plan,[83] when in:

> "many instances… debt relief solutions [i.e. bankruptcy and DROs] are likely to have been more appropriate."[84]

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[76] B. Rowe *et al.*, *Financial Conduct Authority Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (ESRO, FCA 2014); Office of Fair Trading, *Debt Management Guidance Compliance Review* (2010) OFT1274.
[77] F. McIntyre *et al.*, "Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcies" (2015) 17 *American Law and Economics Review* 245, at 245–6.
[78] *See e.g.* J. Braucher, "Lawyers and Consumer Bankruptcy: One Code, Many Cultures" (1993) 67 *American Bankruptcy Law Journal* 501; J. Braucher *et al*., "Race, Attorney Influence, and Bankruptcy Chapter Choice" (2012) 9 *Journal of Empirical Legal Studies* 393; McIntyre *et al.*, above note 77; I. Ramsay, "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy" (2000) 74 *American Bankruptcy Law Journal* 399; S. Ben-Ishai and S. Schwartz, "Credit Counselling in Canada: An Empirical Examination" (2014) 29 *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 1.
[79] Financial Conduct Authority, above note 75, at 7–8.
[80] Ibid., at 25.
[81] Ibid., at 10.
[82] Ibid., at 4.82.
[83] Ibid., at 10.
[84] Ibid., at 25.

36 This diversion of debtors into the renegotiated repayment plans of IVAs and DMPs rather than the more rapid discharge of bankruptcy or DROs clearly risks negative consequences for debtors' welfare. Further, it also risks defeating the fresh start policy and the public interest in providing household debt relief. While IVAs are standardised so that the average duration of repayment plans is now approximately five and a half years, this remains considerably longer than the one year period for which a bankruptcy or DRO debtor must wait for her fresh start. The few existing empirical studies of the IVA procedure have raised considerable concerns regarding the imbalance of negotiating power between debtors and creditors under this procedure, which requires an IVA proposal to be approved by 75% in value of creditors.[85] This can lead to creditors "holding out" and agreeing to IVAs only on very onerous or unsustainable repayment terms, again compromising the debtor's fresh start.

37 These risks led the Insolvency Service to propose reforms in the mid-2000s which would have reduced creditor power in consumer cases,[86] only for proposed legislation to be abandoned in favour of the negotiation of the IVA Protocol between creditors and insolvency practitioners. More empirical research of the IVA procedure is desperately needed, but latest data from the Insolvency Service heighten these concerns, showing increasing IVA failure rates (often caused by unsustainable repayment terms) and a rise in IVAs of very long durations.[87]

38 The diversion of debtors into DMPs poses an even greater threat to the fresh start policy. The FCA found many examples of fee charging debt management companies:

> "recommending very long debt management plans (often many decades long, some 100+ years) when debt relief solutions are likely to have been more appropriate."[88]

39 The FCA also identified problems of unsustainably high repayments under DMPs, with firms for example deliberately misrepresenting debtors' income and expenditure levels in order to fit the debtor's case into a plan of sufficiently high payments to cover the firms' fees.[89] This is despite such firms being under a regulatory obligation to refer clients to non-fee-charging agencies when debtors have insufficient disposable income to pay fees. Other dubious practices involved firms using debtor payments to cover fees first before passing payment to creditors,

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[85] M. Green, *Individual Voluntary Arrangements Over-Indebtedness and the Insolvency Regime: Short Form Report* (University of Wales 2002); S. Morgan, *Causes of Early Failures in Individual Voluntary Arrangements* (2008).

[86] Insolvency Service, *Improving Individual Voluntary Arrangements* (2005).

[87] Insolvency Service, *Individual Voluntary Arrangements: Outcome Status of New Cases Registered Between 1990 and 2013, England & Wales* (2014), available at: <https://www.gov.uk/government/.../IVA_Outcomes_2014_-_web.doc>.

[88] Financial Conduct Authority, above note 75, at paragraph 4.55.

[89] Ibid., at paragraphs 4.22, 4.34.

directing debtors into unsustainable DMPs before subsequently rolling over debtors into IVAs, and actively discouraging debtors from availing of free debt advice.[90] Undoubtedly these practices compromise the debtor's fresh start and increase the likelihood of her economic unproductivity and social exclusion.

Concluding Remarks on the Current State of the Personal Insolvency System

40 When reviewing insolvency law, the Cork Committee considered that:

> "the most urgent need of all is for the introduction of a simple, accessible and inexpensive procedure for dealing with the ordinary consumer debtor".[91]

and recommended the introduction of bespoke consumer insolvency procedures, structured through a mechanism similar to the "single portal" idea advanced in US literature.[92] This would have involved all debtors being directed by a court and Official Receiver into the most appropriate of a range of procedures specifically designed for consumer debtors. Therefore the Committee proposed a carefully calibrated system, under which the relationship between procedures was designed and regulated by policymakers, courts and insolvency officials, all acting in furtherance of the goals of the insolvency system. The failure to adopt these recommendations has instead produced a system under which a debtor is directed into one procedure or another based on artificial access restrictions, the debtor's liquidity constraints and the advice of private actors whose incentives conflict with debtors' welfare and the public interest.

41 Professor Fletcher's warning that the policies he critiqued lacked a vision as to how respective personal insolvency procedures should interact appears to ring true. Legislative developments have placed the question of which procedure a debtor enters largely outside the scope of policy design. The issue of "rational sorting"[93] as between straight debt discharge, repayment plan and voluntary renegotiation personal insolvency procedures,

> "vital considerations that should precede a discussion of formal regime design",[94]

have been left to the personal insolvency "market". As this is a market suffering from multiple failures, this position leads to the negative welfare outcomes

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[90] Rowe *et al*., above note 76, at 38–43.
[91] Cork, above note 4, at paragraph 272.
[92] See e.g. J. Braucher, "A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal" (2005) 55 *American University Law Review* 1295; K. Porter, "The Pretend Solution: An Empirical Study of Bankruptcy Outcomes" (2011) 90 *Texas Law Review* 103; W. Whitford, "Has the Time Come to Repeal Chapter 13?" (1989) 65 *Indiana Law Journal* 85.
[93] J. Braucher, "A Law-In-Action Approach To Comparative Study Of Repayment Forms Of Consumer Bankruptcy", in Niemi *et al.* (eds), above note 69.
[94] World Bank, above note 14, at paragraph 127.

described above, and the frustration of personal insolvency law's public policy objectives.

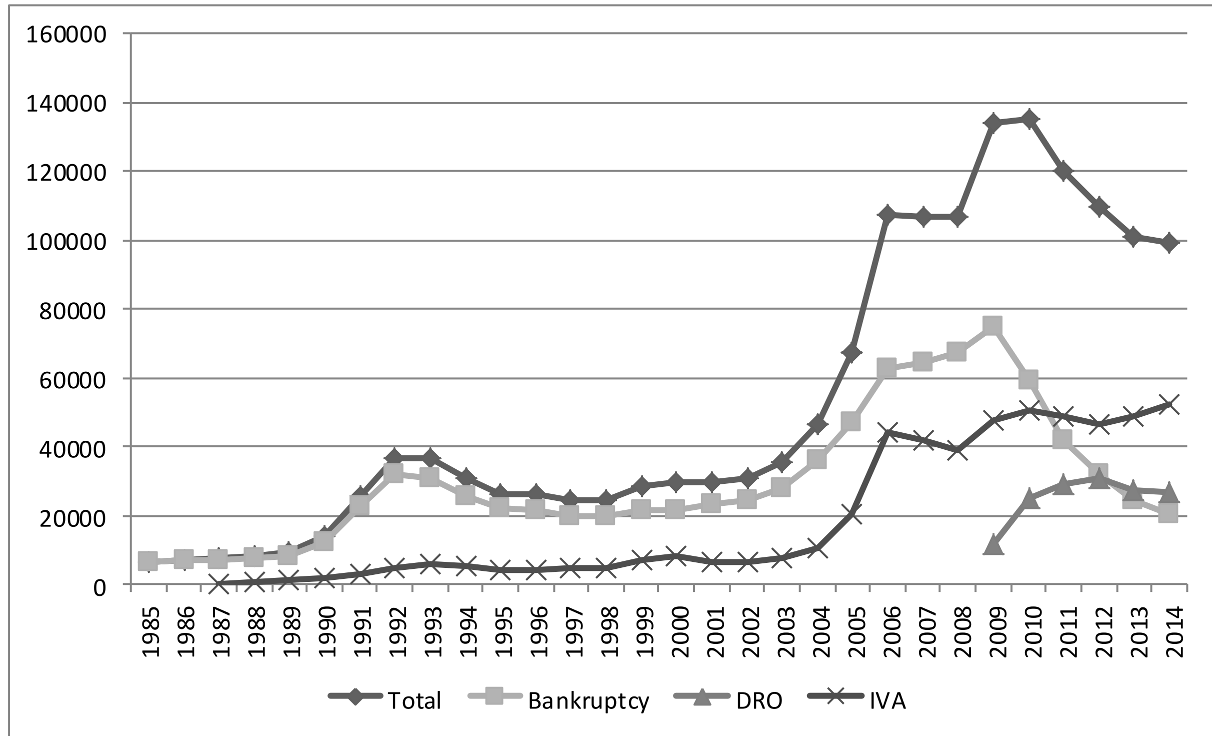

Figure 30.1: Total Personal Insolvencies, England and Wales, 1985-2014.
Source: The Insolvency Service

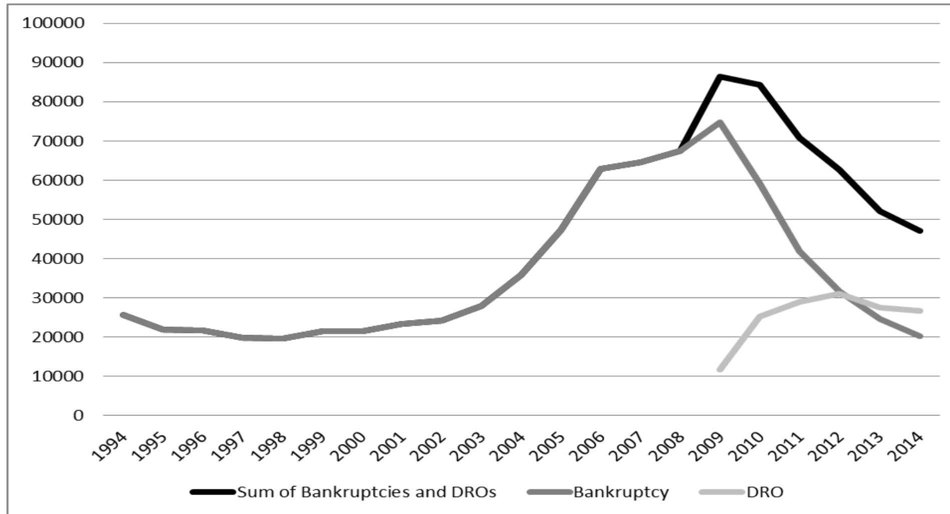

Figure 30.2: Total Sum of Bankruptcies and DROs, 1994-2014.
Source: The Insolvency Service

The Disappearing Public Interest: Commercialisation and the Post-Democratic Era of Personal Insolvency Law

42 Professor Fletcher contrasted the "carefully-constructed, systematic" approach to personal insolvency regime design of the Cork Committee with a *laissez faire* Government policy response favouring as little action as possible.[95] Indeed much of personal insolvency law's development in recent decades is marked by the absence of policy review of the system. The legislative response to the final Cork report declined to fill the gaps in the system created by "the emergence of the consumer debtor".[96] It did not introduce bespoke consumer insolvency procedures, and added to the personal insolvency system merely by introducing the IVA mechanism, which the Cork Report had recommended only for business debtors.[97] These gaps in the system - which have increased as access to bankruptcy has tightened and onerous entry hurdles have prevented the DRO procedure from counterbalancing this trend – have led to development "from below" by private actors rather than public policy development.[98]

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[95] Fletcher, above note 1, at 83.
[96] Cork, above note 4, at paragraph 16.
[97] Ibid., at paragraph 355.
[98] I. Ramsay, "A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and England – a Story from the Trente Piteuses" (2012) 75 *Modern Law Review* 212, at 247.

43 Consumer insolvency has been "hardly conceptualised at all"[99] and has been left to develop independently of any holistic overview, through a policy approach which can only be described as a "policy of muddling through."[100] The head of a leading money advice charity describes the position as one of a system which has "evolved organically over several decades", with no one taking care:

> "to ensure that a viable debt solution is made available to every single person struggling to repay what they owe, and that no-one is allowed to fall through the cracks."[101]

44 This has facilitated the negative outcomes described above. In fact, Professor Fletcher argued that the problem with the Government proposals of the early 1980s were that they were less concerned with advancing the objectives of personal insolvency law than with promoting "wholesale privatisation" and a:

> "general policy of instituting an administrative *cuisine minceur*."[102]

45 This appears now to have been an astute observation, since the subsequent development of personal insolvency law, and the negative outcomes it has produced, may be understood as flowing from wider neoliberal processes of Government cost reduction, privatisation and commercialisation.[103] While the Insolvency Acts of 1985-6 did not institute reforms quite as radical as those proposed in the initial Green Paper, the ultimate rejection of the Cork Committee's "single portal" holistic approach to consumer insolvency can clearly be attributed to a desire to reduce public expenditure on the insolvency system.[104]

46 Professor Fletcher's prediction that the policies in question would involve the "wholesale 'privatisation' of this entire sector"[105] has almost come to pass, as commercially provided solutions overtake bankruptcies and DROs. Similarly, when considering today's plummeting bankruptcy rates and the role played by the policy

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[99] Ibid., at 244.

[100] Ibid., at 245.

[101] J. Elson and Money Advice Trust, *Money Advice Trust Welcomes Debt Solution Improvements* (15 January 2015), available at: <http://www.moneyadvicetrust.org/media/news/Pages/Money-Advice-Trust-welcomes-debt-solution-improvements.aspx> [last viewed 28 September 2015].

[102] Fletcher, above note 1, at 77, 81.

[103] See also Ramsay, above note 98, at 245–48; I. Ramsay, "Bankruptcy In Transition: The Case Of England And Wales - The Neo-Liberal Cuckoo In The European Bankruptcy Nest?", in J. Niemi *et al.* (eds), *Consumer Bankruptcy in Global Perspective* (2003, Hart Publishing, Oxford); I. Ramsay, "Between Neo-Liberalism And The Social Market: Approaches To Debt Adjustment And Consumer Insolvency In The EU" (2012) 35 *Journal of Consumer Policy* 421.

[104] A 1984 Government White Paper rejected the Cork approach because it would not reduce the involvement of the Official Receiver, who would be required to carry out inquiries in each case in which an insolvency application came before the courts in order to determine which insolvency procedure would be appropriate for each case: see Department of Trade and Industry, *A Revised Framework for Insolvency Law* (1984), at paragraph 17.

[105] Fletcher, above note 1, at 77–78.

of increasingly shifting administrative costs onto users, one should recall that the Green Paper:

> "candidly admitted that the net consequence of this transfer of the burden of financing the administration of civil bankruptcy would be a reduction in the annual number of petitions."[106]

47 Now is a particularly significant time to recognise that much of the current personal insolvency system, including its problematic aspects, can be initially traced to a prioritisation of reducing public expenditure over the achievement of the law's objectives. This provides a timely warning as trends of recent decades are intensified, and a new threat is posed to personal insolvency law's fresh start policy, by the ideology of austerity.[107]

48 In linking the personal insolvency system to these wider trends of Government cost reduction, privatisation and commercialisation, Professor Colin Crouch's *Post-Democracy* framework appears particularly instructive.[108] This model views modern democratic participation and electoral debate as:

> "a tightly controlled spectacle, managed by rival teams of professionals expert in the techniques of persuasion, and considering a small range of issues selected by those teams."[109]

49 It views the real exercise of political power as being:

> "shaped in private by interaction between elected governments and elites that overwhelmingly represent business interests."[110]

50 This model is a vision of a democracy emptied by a rupture between the mass of the population and the political elite, and the:

> "growing dominance of business lobbies over most other interests [which] has distorted the real policy delivery side of government activity, with real consequences for citizens."[111]

51 Crouch presents one example of such a symptom of post-democratic politics in the organisational reform of public services. This has seen governments renouncing the distinctive role of public service, contracting out and privatising service provision, and requiring its departments to act as firms, to the point where Government tries:

> "gradually to divest itself of all direct responsibilities for the conduct of public services."[112]

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[106] Ibid., at 81.
[107] See generally M. Blyth, *Austerity: The History of a Dangerous Idea* (2013, OUP, New York NY).
[108] C. Crouch, *Post-Democracy* (2004, Polity Press, Cambridge).
[109] Ibid., at 4.
[110] Idem.
[111] Ibid., at 30.

52 This ultimately leads to a "commercialisation of citizenship", as goods and services which were once available as of right to individuals by virtue of their status as citizens became subject to market principles and available only on a commercial basis.[113] Negative consequences of this application of commercial principles to public services includes the *distortion* of a service or good, where by it is so changed, or the barriers to accessing it without payment are so artificial, that the quality of the service or good changes to the point where any efficiency gains are outweighed by the losses incurred.[114] Similarly, public services can become subject to *residualisation*, whereby commercial operators choose the most desirable market segments among public services "customers", so that only those on low incomes and lacking in political influence rely on public provision. This ultimately leads to reductions in the quality of the service provided publicly.[115]

53 These ideas help us to understand the development of personal insolvency law as described above. Professor Fletcher and the Cork Committee conceptualised a functioning personal insolvency system as a public institution to be designed and operated in the public interest, providing benefits to society beyond those contemplated by:

> "doctrinaire… policies which measure the worth of everything exclusively in terms of their apparent or notional cash costs."[116]

54 Contemporary perspectives among policymakers and courts appear to view personal insolvency mechanisms differently, as a "product" or "service" in a debt management or personal insolvency market.[117] Policymakers seem consistently unperturbed by the expansion of market alternatives to bankruptcy and have indeed encouraged this process, while not investigating very closely whether it was producing appropriate outcomes.[118] The aim of limiting government expenditure on the bankruptcy and Debt Relief Order procedures has clearly been a persistent concern for policymakers.[119] It is expected that debtors will pay for the benefit of debt relief, and that the bankruptcy system will apply business logic in recovering

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[112] Ibid., at 40–1.
[113] Ibid., at 80–85.
[114] Ibid., at 86.
[115] Ibid., at 89.
[116] Fletcher, above note 1, at 85.
[117] See e.g. Insolvency Service, above note 87, at paragraph 21; Insolvency Service, above note 9, at paragraph 2.34.
[118] Ramsay, above note 98, at 246.
[119] On introducing the DRO procedure, the Insolvency Service considered the alternative possibility of waiving the deposit payment required to enter bankruptcy, but rejected this prospect as it did not "believe that it is appropriate that [the cost of administering bankruptcies] should be met out of general taxation": Insolvency Service, above note 57, at 7. See also Insolvency Service, *Impact Assessment of a Reform to the Debtor Petition Bankruptcy Process* (2007), at 1; Insolvency Service, *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (2009), at 10.

its own costs.[120] This commercialisation has led to the *distortion* of bankruptcy through the imposition of an unjustified and artificial financial barrier which is unrelated to any substantive norms of insolvency law,[121] as:

> "[p]rinciples of justice become distorted when subordinated to those of business."[122]

55 This is most evident in the *Lightfoot* decision, where even the judiciary rejected the idea that cost barriers to entering bankruptcy raised any issue of access to justice.[123] Instead of a human right and matter of justice, the court conceptualised bankruptcy as a "service" benefitting debtors, for which they should be expected to pay. This view of bankruptcy mirrors wider trends which have increasingly conceptualised private law:

> "as an exclusively private affair best resolved by the parties rather than being considered in the public arena of the trial."[124]

56 This logic has been linked to free market ideology, the belief that courts should only intervene in parties' affairs when asked to do so, and:

> "the classical liberal impulse to minimise the influence and power of the state."[125]

57 The gaps in the personal insolvency system left by access barriers and an absence of holistic regime design inevitably led to commercial operators' entry into a newly identified personal insolvency market.[126] This is again emblematic of wider trends, as what were previously considered to be public services become available for profit-making opportunities and:

> "capitalism expands its scope not just by developing new goods and production methods, but also by energetically pulling more and more areas of life within its reach."[127]

58 Commercial actors' targeting of the most profitable market segments, i.e. debtors with sufficient resources to contribute to a commercially attractive IVA or DMP, risks residualizing the "public" insolvency mechanisms of bankruptcy and DROs.[128] The residual role of the DRO procedure was already explicit in its design.

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[120] House of Commons, Business, Innovation and Skills Committee, above note 74, at 14–15.
[121] See e.g. Ramsay and Spooner, above preliminary note, at 1.
[122] Crouch, above note 108, at 86.
[123] *Lightfoot*, above note 65.
[124] L. Mulcahy, "The Collective Interest in Private Dispute Resolution" (2013) 33 *Oxford Journal of Legal Studies* 59, at 60. For similar sentiments in the specific context of personal insolvency, see J. Kilborn, *Creeping Privatization of Justice - Credit Slips,* available at: <http://www.creditslips.org/creditslips/2013/03/privatized-justice.html#more> [last viewed 28 September 2015].
[125] Mulcahy, above note 124, at 65.
[126] Ramsay, above note 98, at 246; Ben-Ishai and Schwartz, above note 78, at 3–4, 19.
[127] Crouch, above note 108, at 79, 81.
[128] Ben-Ishai and Schwartz, above note 78, at 12–17; Ramsay, above note 98, at 246.

The Insolvency Service indicated that the procedure was only for those with no alternatives; suggesting debtors should in the first instance seek a market solution and use “other remedies available to people who get into debt”.[129]

59 Similarly bankruptcy may be left to be increasingly used by less “profitable” debtors with few if any assets (often obtaining assistance to pay the entry costs – see above).[130] This creates considerable financial strain for the bankruptcy system under conditions in which it is expected to be self-funded, as the public system is deprived of resources which are diverted to commercial providers.[131] This may lead to an under-resourced bankruptcy being viewed as ineffective and/or unsustainable, further undermining its operation and leading to a scaling back of ambition for its delivery of the public policy objective of debt relief for over-indebted households.

60 Professor Crouch further suggests that the dominance of commercial logic in public service provision, combined with increased private provision, ultimately undermines government self-confidence, as public services begin to consider that actors from the commercial sphere hold superior expertise.[132] This factor may have contributed to the limited ambition of the 2014 Insolvency Service review of the DRO procedure.[133] This confined itself to adjusting the DRO debt ceiling level for inflation, rather than asking any more fundamental questions concerning the overall personal insolvency system and in particular regarding the interaction between the public bankruptcy and DRO procedures and the commercial operations of the IVA and DMP markets. Crouch argues that:

> “as knowledge relevant to governance and regulation is seen as residing almost uniquely in profit-seeking private corporations, these are encouraged to deploy that knowledge in a way that enhances their own profits.”[134]

61 There is a risk that this has happened to the personal insolvency system, where policymaking on IVAs has been effectively privatised.[135] IVA terms are negotiated by private bargaining of creditors and debtors, through the intermediation of profit-driven IVA providers, under a rulebook written by creditors and IVA providers in the form of the IVA Protocol. Rules drafted by these commercial parties substitute for abandoned legislative proposals which would have addressed debtor-creditor negotiating imbalances and reduced the harmful effects of intermediaries’ perverse incentives.[136] In this context it is difficult to safeguard the public interest in advancing the fresh start policy if it conflicts with commercial incentives.

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[129] Insolvency Service, above note 56, at paragraph 20.
[130] Insolvency Service, above note 9, at 14.
[131] House of Commons, Business, Innovation and Skills Committee, above note 74, at 13–5.
[132] Crouch, above note 108, 41–42.
[133] Insolvency Service, above note 9.
[134] Crouch, above note 108, at 42.
[135] Ramsay and Spooner, above preliminary note, at 2, 11–14.
[136] Insolvency Service, above note 86; Insolvency Service, *Improving Individual Voluntary Arrangements: Summary Of Responses And Government Reply* (2006).

62 Austerity policies implemented throughout the Great Recession have intensified the trends described above and placed the fresh start policy under further strain. The bankruptcy debtor petition deposit rose from GBP 360 to GBP 525 over the years 2010 and 2011, while a desire to reduce court expenditure on bankruptcy is clear at this time.[137] This means there is little appetite for increased funding of the personal insolvency system to respond to the pressing need for household debt relief policies. Indeed, the Insolvency Service has suffered severe drops in income in recent years, for example losing almost one third of staff and reducing its costs by a third in the two years from 2010 to 2012.[138] Cuts to legal aid have affected the provision of debt advice severely, with estimates that the budget for debt related legal aid has been cut by 75%.[139]

63 To exacerbate these developments, not only have prevailing conditions increased financial difficulties for many households,[140] but austerity policies have included increasingly aggressive debt collection activities by government creditors,[141] thus raising pressure on households just as the means of relieving such pressure are becoming less accessible. Cuts to the Insolvency Service policy budget have also reduced the ability to collect and publish data for monitoring the operation of the personal insolvency system, limiting the prospects of addressing problems. This was evident in the inability of the Insolvency Service to conduct research to review the operation of DROs, despite prior promises to conduct a "full evaluation" by 2012.[142] Professor Fletcher's message that policymaking from an ideological perspective should neglect neither evidence nor principle thus remains particularly pertinent in the contemporary age of austerity.

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137 J. Swinson, MP (Minister for Employment Relations, Consumer and Postal Affairs), *Consultation: Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up - Government Response* (Insolvency Service 2012); Insolvency Service, *Consultation: Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up* (2011).

138 House of Commons, Business, Innovation and Skills Committee, above note 74, Evaluation 60.

139 Great Britain: Parliament: House of Commons: Business Innovation and Skills Committee, *Debt Management: Fourteenth Report of Session 2010-12, Report, Together with Formal Minutes, Oral and Written Evidence* (2012), at paragraphs 135–7.

140 *See e.g.* E. Herden *et al.*, *Is Welfare Reform Working? Impacts on Working Age Tenants* (LSE Housing and Communities, South West Hailo, LSE Centre for Analysis of Social Exclusion 2015).

141 House of Commons Committee of Public Accounts, *Managing Debts Owed to Central Government* (House of Commons 2014) Seventh Report of session 2014-15 HC 555, incorporating HC 1061, Session 2013-14; Fraud, Error, Debt Taskforce, *Tackling Debt Owed to Central Government: An Interim Report* (2012); StepChange Debt Charity, *Council Tax Debts: How to Deal with the Growing Arrears Crisis Tipping Families into Problem Debt* (Stepchange Debt Charity 2015); Citizens Advice Bureau, *Council Tax Arrears, Councils and Bailiffs* (CAB 2013).

142 Insolvency Service, *Debt Relief Orders: Interim Evaluation Report* (2010), at 4.

Conclusions

64 An over-indebted individual in England and Wales searching for debt relief must navigate a complex system of statutory and non-statutory remedies, provided judicially, administratively, charitably and commercially. Each procedure presents different conditions which must be overcome, based on formal legal rules, creditor consent, the payment of upfront fees, or the fitting of a debtor's case into a commercial provider's business model. This complicated mixture of public and private remedies, lacking general policy oversight, has led to two primary negative outcomes. Some "iceberg insolvent" debtors fall through the cracks and are excluded from debt relief entirely, while others are excluded from the most appropriate solutions and directed into alternatives which may not provide them with the quality of debt relief intended by public policy.

65 The origins of these trends can be seen in Government policies of the early 1980s which shunned a holistic approach to personal insolvency regime design offering bespoke consumer procedures, in favour of an approach which would minimise the role of publicly funded institutions. Subsequent political trends of privatisation, commercialisation and now austerity have continued this process, reducing the role of statutorily mandated debt relief through courts and the insolvency administration, while increasing that of consensual debt renegotiation through commercial intermediation.

66 The system calls for simplification and the introduction of reform along the lines of a "single portal" model, as had been proposed by the Cork Committee[143] and rejected by the Government position critiqued by Professor Fletcher.[144] The expansion of the DRO procedure much more broadly than its current very narrow scope would be one effective means of achieving this. Probing questions should also be asked about the benefits of debtor-creditor renegotiated payment plans as compared to the more rapid fresh start offered by bankruptcy and DROs' debt discharge. Strong consideration must also be given to whether the significant role of the commercial debt management industry is justified and whether we can really reconcile the Financial Conduct Authority's verdict that standards in the industry are "very disappointing" but yet that the industry nonetheless:

> "can provide a valuable service to customers struggling with debt."[145]

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[143] Cork, above note 4, at paragraphs 550, 272 et seq., more widely at paragraphs 545–565.

[144] See Ramsay and Spooner, above preliminary note, at 9–10, 13.

[145] Financial Conduct Authority, above note 75, at 36. See also I. Ramsay, *Damning Report on Debt Management Advice by Financial Conduct Authority--Need for Comprehensive Review of Insolvency Alternatives,* available at: <https://creditdebtandinsolvency.wordpress.com/2015/06/27/damning-report-on-debt-management-advice-by-financial-conduct-authority-need-for-comprehensive-review-of-insolvency-alternatives/> [last viewed 28 September 2015].

67 One difficulty is that the trends described above have also made any change of policy direction difficult. Budget cuts have reduced the ability of the Insolvency Service to conduct research and develop evidence-based reform proposals. The privatisation of policymaking to commercial actors through the IVA Protocol and IVA Forum further limits the advancement of the public interest where it conflicts with the interests of empowered industry insiders.[146] Furthermore, the shift of debtors from the judicial process of bankruptcy to non-judicial debt remedies threatens our collective interest in private litigation by reducing the prospects of representative and significant cases generating court precedents which might advance the law's policy objectives judicially.[147] Indeed, the routinisation of uncontested low value bankruptcies means that the few bankruptcy cases which generate court judgments are increasingly likely to be high value business cases unrepresentative of the circumstances of the standard consumer debtor.[148]

68 Counterweighing against these considerations is the current increased recognition of the economic benefits of household debt relief described above. Privatisation changes the nature of the State's role from service provision to regulation,[149] and inadequate regulation may have led to the public policy problems outlined above. In this regard reform may flow from the Financial Conduct Authority's continued scrutiny of the debt management industry through its authorisation process,[150] particularly given the recent success the regulator has had in expelling abusive practices from the payday loan industry. The previous Government has provided for the funding of free debt advice through the Money Advice Service by the imposition of industry levies,[151] and also announced plans to review the "legal framework for debt administration". This review was to consider the impacts of additional statutory consumer protections and ensure:

> "that any changes fit well with the formal and informal debt solutions currently available to consumers."[152]

69 One hopes that this commitment will be taken on by the new Government elected in 2015 so that the review can provide a long overdue policy reconsideration of the personal insolvency system as a whole, and an opportunity to reassert the public interest in household debt relief.

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[146] Ramsay, above note 98, at 245–47.
[147] Mulcahy, above note 124.
[148] E. Warren, "Vanishing Trials: The Bankruptcy Experience" (2004) 1 *Journal of Empirical Legal Studies* 913.
[149] Ramsay, above note 98, at 247; Ben-Ishai and Schwartz, above note 78, at 4.
[150] Financial Conduct Authority, above note 75, at 36–37.
[151] HM Treasury, *The Government's Response to the Independent Review of the Money Advice Service* (2015), at paragraphs 2.11–2.13.
[152] Ibid., at paragraphs 2.8–2.10.

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