

# COMPARATIVE CONSUMER BANKRUPTCY

Iain Ramsay\*

*This article discusses comparative consumer bankruptcy in the context of the international spread of consumer credit capitalism and its accompanying social cost, overindebtedness. The article outlines the contours of regulation of credit markets and overindebtedness within Europe, the influence of the U.S. idea of the “fresh start” on recent changes in European debt-adjustment laws and continuing contrasts with the U.S. approach to bankruptcy. As consumer debt increases in Europe and elsewhere, these differences between continental European and North American approaches to bankruptcy might be explained by the path-dependence of legal institutions, cultural differences, or the political influence of interest groups. The article is skeptical about cultural explanations of difference and suggests the value of an analysis that is sensitive to political economy and history. It also argues that future comparative research should focus on overindebtedness rather than bankruptcy.*

## I. INTRODUCTION

In many European countries, the last two decades of the twentieth century and the beginning of the twenty-first century have witnessed a continuing cycle of reforms to procedures addressing consumer overindebtedness.<sup>1</sup> In the United States, the recent enactment of the Bank-

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\* Professor of Law, Osgoode Hall Law School, York University, Toronto, Canada. An earlier draft of this article was presented at the Conference “Consumer Bankruptcy and Credit in the Wake of the 2005 Act” in April 2006. Thanks to participants for comments, in particular Bill Whitford and Jacob Ziegel. Thanks also to Stephanie Ben-Ishai and Toni Williams for comments on an earlier draft.

1. See JOHANNA NIEMI-KIESILÄINEN & ANN-SOFIE HENRIKSON, LEGAL SOLUTIONS TO DEBT PROBLEMS IN CREDIT SOCIETIES—A REPORT TO THE COUNCIL OF EUROPE (2005), available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Steering\\_Committees/CDCJ/Documents/2005/CDCJ-BU%20\\_2005\\_%2011EREV.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/CDCJ/Documents/2005/CDCJ-BU%20_2005_%2011EREV.pdf); see also CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE (Johanna Niemi-Kiesiläinen et al. eds., 2003); JACOB ZIEGEL, COMPARATIVE CONSUMER INSOLVENCY REGIMES—A CANADIAN PERSPECTIVE (2003); Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 OSGOODE HALL L.J. 473 (1999); Charles Tabb, *Lessons from the Globalization of Consumer Bankruptcy*, 30 LAW & SOC. INQUIRY 763 (2005). For studies of specific countries, see Jason Kilborn, *Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, AM. BANKR. INST. L. REV. 69 (2006) [hereinafter Kilborn, *Belgium and Luxembourg*]; Jason

ruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 is the outcome of a long political battle over the terms on which consumers should be able to discharge debts.<sup>2</sup> Developing countries such as Brazil are considering the introduction of measures to address overindebtedness as well.<sup>3</sup> In doing so, they consider the comparative advantages of adopting the U.S. or European approaches to consumer insolvency. Many reforms of corporate bankruptcy law have been introduced during this period in developed and developing countries. Just as the growth of industrial capitalism in nineteenth-century England led to a high incidence of bankruptcy and a preoccupation with bankruptcy law and its reform,<sup>4</sup> the contemporary focus on bankruptcy and increasing use of insolvency procedures by consumers coincides with the emergence of new forms of capitalism at the beginning of the twenty-first century.

These developments have stimulated the study of comparative consumer bankruptcy and other policies that address the increasingly common problem of individual overindebtedness.<sup>5</sup> In this article, I discuss comparative consumer bankruptcy,<sup>6</sup> sketched within the larger canvas of the international spread of consumer credit capitalism and the accompanying social costs of overindebtedness. After outlining contemporary European approaches to overindebtedness, I discuss central issues in comparative research on consumer bankruptcy and suggest that the causes, prevention, and treatment of overindebtedness—rather than

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Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the U.S.*, 24 NW. J. INT'L L. & BUS. 257 (2004) [hereinafter Kilborn, *Innovative German Approach*]; Jason Kilborn, *La Responsabilisation de L'Économie: What the United States Can Learn from the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619 (2005) [hereinafter Kilborn, *New French Law*]; Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales—the Neo-liberal Cuckoo in the European Bankruptcy Nest?*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra*, at 205.

2. See William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143.

3. See Kilborn, *Belgium and Luxembourg*, *supra* note 1, at n.6.

4. Barbara Weiss comments that “the extremely high rate of bankruptcy was not only a troubling economic question but a deeply painful dilemma of public morality . . . [T]he question of what to do about appalling statistics of bankruptcy provoked the most bitter debate concerning the proper moral attitude toward bankruptcy, and the proper legal measures to be adopted.” BARBARA WEISS, *THE HELL OF THE ENGLISH: BANKRUPTCY AND THE VICTORIAN NOVEL* 23 (1986); see also MARGOT C. FINN, *THE CHARACTER OF CREDIT: PERSONAL DEBT IN ENGLISH CULTURE, 1740–1914* (2003); V. MARKHAM LESTER, *VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND* (1995).

5. There are different methods of measuring overindebtedness. See, e.g., UK Department of Trade and Industry, *Over-indebtedness*, <http://www.dti.gov.uk/consumers/consumer-finance/over-indebtedness/index.html> (last visited Nov. 6, 2006). For a review of different approaches, see OXERA, *ARE UK HOUSEHOLDS OVERINDEBTED?* (2004), and sources cited *supra* note 1. The recent report commissioned by the opposition conservative party in the United Kingdom is a useful source of materials. See THE GRIFFITHS COMMISSION ON PERSONAL DEBT, *WHAT PRICE CREDIT?* (2005) [hereinafter GRIFFITHS COMMISSION], available at <http://www.centreforsocialjustice.org.uk/client/downloads/pubGriffithsComm.pdf>; see also UDO REIFNER ET AL., *CONSUMER OVERINDEBTEDNESS AND CONSUMER LAW IN THE EUROPEAN UNION* (2003).

6. See also Kent Anderson, *The Explosive Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy*, 42 OSGOODE HALL L.J. 661 (2004).

bankruptcy law—should be the starting point for comparative research on the pathologies of consumer credit. I then turn to the theme of convergence and divergence in national approaches to overindebtedness and probe cultural and political explanations for these differences. I suggest the importance of political economy and historical dimensions in comparative analysis, as well as modest skepticism for cultural explanations. As the field of comparative consumer bankruptcy develops, it should attempt to generate more general propositions about the role of law in constituting and regulating credit markets and the relationship of legal norms to social norms about credit and debt. Such an approach will of course ultimately aid policymaking because it may suggest limits on the possibility of bringing about economic or social change through law.

## II. BANKRUPTCY AND DEBT ADJUSTMENT IN CONSUMER CREDIT CAPITALISM

The restructuring of capitalism since the 1970s and the transition from the managed capitalism of the postwar Fordist era has resulted in a central, international role for finance capital and for a consumer-credit-driven capitalism in many countries beyond the United States.<sup>7</sup> The liberation of finance capital from regulatory and national constraints, along with the development of computer technology, permitted the capital markets to work in real time and become the nerve centre of leaner and more flexible forms of capitalist accumulation.<sup>8</sup> The U.S. “consumer lending revolution,”<sup>9</sup> evinced by “deregulation, the rise of the general-purpose credit card, credit scoring, risk based pricing and securitization,”<sup>10</sup> is one manifestation of these characteristics. In addition, finance capital increasingly searches out new markets in South America or Asia through mergers or expansion as intense competition results in the saturation of traditional markets.<sup>11</sup>

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7. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEO-LIBERALISM* (2005); SUSAN SOEDERBERG, *THE POLITICS OF THE NEW INTERNATIONAL FINANCIAL ARCHITECTURE* (2004); Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 *THEORETICAL INQUIRIES* L. 323 (2006).

8. See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996); see also GIOVANNI ARRIGHI, *THE LONG TWENTIETH CENTURY: MONEY, POWER, AND THE ORIGINS OF OUR TIMES* (1994). In *A Brief History of Neo-Liberalism*, David Harvey comments that financial activity could flourish as never before, eventually everywhere. A wave of innovations occurred in financial services to produce not only far more sophisticated global interconnections but also new kinds of financial markets based on securitization, derivatives, and all manner of futures trading. Neo-liberalization has meant, in short, the financialization of everything. HARVEY, *supra* note 7, at 33. See generally RANDY MARTIN, *THE FINANCIALIZATION OF DAILY LIFE* (2002).

9. See Richard A. Brown & Susan E. Burhouse, *Implications of the Supply-Side Revolution in Consumer Lending*, 24 *ST. LOUIS U. PUB. L. REV.* 363, 365 (2005).

10. See Susan Burhouse, Fed. Deposit Ins. Corp., *Evaluating the Consumer Lending Revolution* (Sept. 17, 2003), <http://www.fdic.gov/bank/analytical/fyi/2003/091703fyi.html>.

11. See, e.g., Peter Larsen, *StanChart and Barclays Plan LG Card Bid*, *FIN. TIMES*, Apr. 21, 2006, at 20 (reporting that Standard Chartered and Barclays are among bidders for controlling stake in LG

The period since 1970 has also seen significant economic volatility. Charles Kindleberger and Robert Aliber indicate that the “years since the early 1970s are unprecedented in terms of the volatility of the prices of commodities, currencies, real estate and stocks and the frequency and severity of financial crises.”<sup>12</sup> The deregulation of consumer credit that occurred in many countries in Europe in the late 1970s and early 1980s stimulated a consumption boom, and in several countries, a subsequent banking crisis.<sup>13</sup> These material changes in the economy have been accompanied by the rise of neoliberalism, which emphasizes both an ideology of consumer choice and the individual’s responsibility to plan her financial needs, such as pension provision.<sup>14</sup> In the United States and the United Kingdom, the values of security and equality have been traded for freedom of choice and increased consumption alternatives that may involve greater financial risk for an individual.<sup>15</sup> In addition, Avner Offer points out that the shift to the two-earner family as a necessary means of maintaining middle-class status occurred at the same time as financial liberalization.<sup>16</sup> At the household level, one commonality in North America and Western Europe over the past decade is that individuals hold increasing levels of debt, although the United States remains the leader in levels of consumer debt per capita.<sup>17</sup> Higher levels of debt are

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Card to permit expansion in South Korea’s consumer finance industry, and that Barclays recently purchased controlling stake in South Africa and has credit card operations in Japan, Thailand, Malaysia, and Hong Kong); Corrick Mollenkamp, *HSBC Targets Emerging Markets in Consumer Push*, WALL ST. J., Oct. 24, 2005, at 1 (“HSBC plans to make a big push, including in consumer finance, into Brazil, Mexico and Turkey as well as continuing to ramp up its Asian business.”); Clint Riley, *Best on the Street*, WALL ST. J., May 22, 2006, at R3 (“A yearlong ‘buy’ rating on Unibanco-Uniao de Bancos Brasileiros . . . propelled Morgan Stanley’s Jorge Kuri into the No. 1 spot in the banking sector, with a 105% return on the stock. ‘The story in 2005 was about growth in credit in Brazil,’ says Mr. Kuri . . .”); Asif Shameen & Diane Brady, *GE Money Heads East*, BUS. WEEK, Nov. 7, 2005, at 56 (reporting that “expansion in emerging Asia is [GE’s] top priority” and that part of this strategy is to “tap[] into growing demand from middle-class Asians for credit”); Jan Smith-Ramos, *Latin America’s Need for Credit Scores*, BUS. CREDIT, Mar. 2006, at 62 (“The Latin American credit card market has once again seen double-digit growth in 2005 proving that it is one of the most dynamic credit card markets in the world.”). For the global spread of the credit card, see RONALD MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS ch. 10 (2006).

12. CHARLES P. KINDLEBERGER & ROBERT ALIBER, *MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES 1* (5th ed. 2005).

13. *See id.* at 45.

14. *See generally* HARVEY, *supra* note 7.

15. *See* AVNER OFFER, *THE CHALLENGE OF AFFLUENCE: SELF-CONTROL AND WELL-BEING IN THE UNITED STATES AND BRITAIN SINCE 1950*, at 271–74 (2006); *see also id.* at 301 (“[W]hen consumption is weighted highly at the expense of investment, both the UK and the USA rank highly, compensating with high consumption for low security and high inequality.”).

16. *Id.* at 288. Offer notes that “[f]or male workers in the United States, real wages hardly increased from c.1970 until the mid-1990s. . . . Taken overall, incomes only rose in two-earner families. But to earn that income, hours at work had to rise as well.” *Id.* at 272; *see also* ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 31 (2003).

17. The European Credit Research Institute report *Consumer Credit and Lending to Households in Europe* indicates that, in terms of the ratio of consumer credit to gross disposable income, British, German, and Austrian households were the most indebted in the European Union. Consumer credit accounted for 23.8%, 16.2%, and 15.6% of gross disposable income in the United Kingdom, Germany, and Austria, respectively. Consumer credit accounted for 25% of gross household disposable income

not necessarily bad if there are corresponding increases in assets. However, during much of the 1990s consumer credit was used by many middle- and lower-income consumers in the United States and Canada as a method to compensate for stagnant incomes and to finance present consumption.<sup>18</sup> Credit may blunt pressure for higher wages while sustaining consumption and reducing, if only temporarily, the continuing problem of overproduction.<sup>19</sup> Many individuals are not only integrated into the volatility of the international circuits of capital through their employment, but also through a dependence on credit both for necessities and as part of a “credit culture.”<sup>20</sup> Doug Henwood argues that, in the United States during the 1990s, there was a relationship between the concentration of wealth in investments and consumer credit: “[T]he middle and lower classes have borrowed more to stay in place; they’ve borrowed from the very rich who have gotten richer. The rich need a place to earn interest on their surplus funds and the rest of the population makes a juicy lending target.”<sup>21</sup>

The transition from the managed capitalism of the postwar era to the new era of consumer-credit-driven capitalism does not mean that the world is converging in one dominant form of capitalism or one common structure of consumer credit. Writers have identified several varieties of contemporary capitalism and welfare states,<sup>22</sup> and they continue to search

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in the United States. Outstanding consumer credit per capita in Europe indicates that the United States continues to have higher levels of consumer credit. See CAMILLE SELOSSE & LORNA SCHREFLER, EUROPEAN CREDIT RESEARCH INST., CONSUMER CREDIT AND LENDING TO HOUSEHOLDS IN EUROPE 8 fig.6 (2005). Examples of average per capita debt are: Belgium, €1400; France, €2400; Germany, €2900; United Kingdom, €4500; United States, €5300. *Id.* 10 fig.8.

18. See HARVEY, *supra* note 7, at 25 fig.1.6; Douglas G. Baird, *Technology, Information, and Bankruptcy*, 2007 U. ILL. L. REV. 305.

19. Fred Magdoff, *The New Face of Capitalism: Slow Growth, Excess Capital, and a Mountain of Debt*, MONTHLY REV.: AN INDEP. SOCIALIST MAG., Apr. 2002, at 1, 9.

The growing debt in the consumer sector, even well into the recession, has been one of the main reasons that the recession so far has been a relatively mild one. Workers have sought to maintain their spending despite little in the way of real wage gains for decades and despite rising unemployment. It is unlikely though that this will continue much longer without a sudden interruption. In the 1990s, household debt rose for the first time above 100% of personal disposable income in the United States and is even higher in some other advanced capitalist countries, including Japan, Germany, and Britain. *Dicing with Debt*, ECONOMIST, Jan. 26, 2002, at 22, 22–23; see also DOUG HENWOOD, WALL STREET 65–66 (1997). Henwood argues that consumer credit “helps to nourish both the appearance and reality of a middle-class standard of living in a time of polarization.” *Id.* at 66. Henwood refers to a study by Robert Pollin that concludes that “the bottom 40% of the income distribution borrowed to compensate for stagnant or falling incomes . . . , while the upper 20% borrowed mainly to invest . . . .” *Id.* at 65; see also HARVEY, *supra* note 7, at 25; WARREN & TYAGI, *supra* note 16, at 31 (describing the wage stagnation of the period).

20. This integration is reflected in calls to make those investing in capital markets through securitization to be more responsible for problems faced by debtors in relation to the credit instruments securitized. See Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending* (June 19, 2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=910378](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910378).

21. HENWOOD, *supra* note 19, at 64–65.

22. See generally GOSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1990); VARIETIES OF CAPITALISM (Peter A. Hall & David Soskice eds., 2000); Robert Boyer, *How and Why Capitalisms Differ*, 34 ECON. & SOC’Y 509 (2005).

for explanations for these divergences.<sup>23</sup> Tony Judt, in his magisterial review of postwar Europe,<sup>24</sup> draws a broad contrast between the United States and what he describes as the “European Social Model”:

Europeans received free or nearly free medical services, early retirement and a prodigious range of social and public services. Through secondary school they were better educated than Americans. They lived safer and—partly for that reason—longer lives, enjoyed better health (despite spending far less) and had many fewer people in poverty. This then was the “European Social Model.”<sup>25</sup>

Judt also argues that, notwithstanding the rise of neoliberalism, there is broad cross-class support in Europe for the state’s duty to protect individuals against misfortune and that “an overwhelming majority of Europeans took the view that poverty was caused by social circumstances and not individual inadequacy.”<sup>26</sup> Judt paints with a broad brush and clearly there are variations within this picture: the United Kingdom, for example, has a model of capitalism in some respects closer to the U.S. paradigm than other European nations.

Despite the existence of these social protections, there has been a significant rise in the use of insolvency procedures<sup>27</sup> by individuals in a number of European countries. Although it is dangerous to generalize, there have been changes in cultural approaches to credit. Writing in the 1980s, the comparative scholar Bernhard Grossfeld wrote on the difficulties of understanding and comparing U.S. law and culture with Germany because their “stage of development in state and society is so different from ours.”<sup>28</sup> Discussing the use of credit cards, he comments that

credit over there is quite different from credit here. The private sector is much more “credit orientated” in the United States. To be deep in debt hardly enhances our standing over here, but over there it is different: a person with no debts there cannot be creditworthy, or he would have some . . . and debtors are exposed to fewer risks.<sup>29</sup>

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23. See, e.g., David Brady et al., *Economic Globalization and the Welfare State in Affluent Democracies, 1975–2001*, 70 AM. SOC. REV. 921 (2005).

24. See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005).

25. *Id.* at 793.

26. *Id.*

27. In Germany, for example, consumer insolvency proceedings increased from 33,269 in 2003 to 71,345 in 2005. Dörte Busch, *Current Reform Efforts of German Consumer Insolvency Law and the Discharge of Residual Debts*, 7 GERMAN L.J. 591 (2006). In France, the number of dossiers opened by the *Commissions de surendettement* increased from 68,000 in 1994 to 188,000 in 2004. See Banque de France, *Bilan National de L’Activite des Commissions de Surendettement* (June 1, 2006), [http://www.banque-france.fr/fr/publications/telechar/catalogue/stat\\_surend.pdf](http://www.banque-france.fr/fr/publications/telechar/catalogue/stat_surend.pdf). For information on the United Kingdom, see Insolvency Service, *Individual Insolvencies in England and Wales 1999 to 2004*, <http://www.insolvency.gov.uk/otherinformation/statistics/general/individual-e-w.htm> (last visited Nov. 7, 2006).

28. See BERNHARD GROSSFELD, *THE STRENGTHS AND WEAKNESSES OF COMPARATIVE LAW* (Tony Weir trans., 1990).

29. *Id.* at 60–61.

Germany now has a relatively high level of consumer credit as measured by debt-to-income ratios and significant increases in insolvency.<sup>30</sup>

There are some similarities in the reasons for overindebtedness in European countries and North America. Tables 1 and 2 indicate that “passive” indebtedness (to use the French term) caused by a change of life circumstance is a major cause of overindebtedness in the United Kingdom and France. The main difference between these European countries and the United States is the absence of healthcare costs as a significant cause of financial difficulty. Elizabeth Warren and Amelia Tyagi indicate that, in the United States, “nearly nine out of ten families with children cite just three reasons for their bankruptcies: job loss, family breakup, and medical problems.”<sup>31</sup>

TABLE 1  
REASONS FOR FINANCIAL DIFFICULTIES IN THE UNITED KINGDOM  
(PERCENT OF HOUSEHOLDS, PRIMARY REASON)

	1989	2002
Loss of income	26	45
–redundancy	–	19
–relationship breakdown	–	5
–sickness or disability	–	7
–other loss of income	–	14
Other changes in circumstances	7	–
Insufficient (1989) Low (2002) Income	25	14
Overcommitment	24	10
Increased/unexpected expenses	10	12
Overlooked or withheld payment	12	8
Third-party error	–	5
Debts left by former partner	–	4
Other reasons	12	3

Source: 1989 Figures quoted in Berthoud & Kempson, *Credit and Debt—The PSI Report* (1992); Kempson, (2002).

TABLE 2  
ORIGIN OF OVERINDEBTEDNESS IN FRANCE  
(IN PERCENTAGE)

Origin of Overindebtedness		Percentage of All Dossiers			
		2001	2001	2004	2004
Active	Excessive Credit	19.4	36.4	14.6	27.1
	Bad Management	7.7		6.4	
	Too Expensive Housing	3.1		1.2	
	Excessive Expenditures	2.2		1.4	
	Other	4.0		3.5	

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30. Oliver J. Haas, *Overindebtedness in Germany* 13 (Employment Sector Soc. Fin. Program, Working Paper No. 44, 2006), available at <http://www.ilo.org/public/english/employment/finance/download/wp44.pdf>.

31. See WARREN & TYAGI, *supra* note 16, at 81; see also David U. Himmelstein et al., *Market-Watch: Illness and Injury as Contributors to Bankruptcy*, 24 HEALTH AFF. (WEB EXCLUSIVE) W5-63 (2005), <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1>.

TABLE 2—Continued

	Origin of Overindebtedness	Percentage of All Dossiers			
Passive	Redundancy/Unemployment	26.5	63.6	30.8	72.9
	Separation/Divorce	15.5		14.7	
	Illness/Accident	9.1		10.8	
	Decline in Resources	6.9		6.2	
	Death	2.5		2.4	
	Other	3.1		8.0	
	Total	100.0		100.0	

Given the spread of what might loosely be termed “consumer credit capitalism,” one might predict increasing convergence of rules and institutions that structure the credit market. These rules and institutions include not only bankruptcy law but also regulation of credit bureaus, forms of credit, and controls on credit terms. Certainly there is much reform and consolidation of consumer credit law taking place throughout the world.<sup>32</sup> Models of consumer lending are increasingly internationalized through mergers and expansion of finance capital.<sup>33</sup> Convergence might also occur through the influence of international and regional institutions. International institutions, such as the World Bank and the International Monetary Fund (IMF), increasingly take an interest in the institutional structure of consumer credit. The IMF demands as conditionalities of loans that countries adopt rules that, in its view, will facilitate consumer credit and the entry of foreign financial institutions.<sup>34</sup> The World Bank has also shown significant interest in the development of credit bureaus throughout the world and their role, along with effective creditor rights, in facilitating consumer credit and a “credit culture.”<sup>35</sup> While data privacy laws, such as the European Union Directive

32. See, e.g., CONSUMER AFFAIRS VICTORIA, THE REPORT OF THE CONSUMER CREDIT REVIEW (2006), available at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Credit\\_Review\\_Documents/\\$file/credit\\_review\\_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) (showing the Australian example); UK Dep’t of Trade and Indus., Consumer Credit Act 2006, <http://www.dti.gov.uk/consumers/consumer-finance/credit-act-2006/index.html> (last visited Nov. 7, 2006) (explaining background of the Act); see also Republic of South Africa, National Credit Act 34 of 2005; Credit Contracts and Consumer Finance Act 2003, 2003 S.N.Z. No. 52; Canadian Office of Consumer Affairs, Cost of Credit Disclosure Harmonization, <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01086e.html> (last visited Nov. 7, 2006) (Canada recently harmonized aspects of federal and provincial law).

33. Consider, for example, HSBC’s takeover of Household International as a means of introducing Household’s model of subprime lending to the eighty countries in which it does business. See Karina Robinson, *HSBC’s Killer Move*, BANKER, Oct. 6, 2003, at 20–22. This article notes that one of the reasons for the purchase was as a spearhead into new countries. *Id.* at 22. The Chairman of HSBC noted that “over the next 30 years, 50% of the increase in world demand is forecast to come from emerging markets. . . . Consumer finance will be the first step for many of the aspiring middle classes as they buy a car, then a house and then choose a credit card.” *Id.*

34. For an example of a developing country’s response to the IMF, see Letter from Antonio Palocci Filho, Minister of Fin., & Henrique de Campos Mierelles, Governor, Cent. Bank of Brazil, to Horst Kohle, Int’l Monetary Fund (Nov. 21, 2003), available at <http://www.imf.org/External/NP/LOI/2003/bra/04/index.htm>. See also WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 115 (2005), available at [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf).

35. See CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY 81–82, 103–04 (Margaret Miller ed., 2003).

on data privacy, may moderate the competitive effects of information sharing through credit bureaus, there will be continuing pressures from international financial institutions to expand credit. This “re-regulation” of economies to facilitate consumer credit capitalism may deepen the credit market by democratizing credit, but it may also increase levels of overindebtedness and its associated social costs. However, there has been less interest at the international and regional level in these social costs of consumer credit. The introduction of corporate bankruptcy is viewed as an important aspect of economic development, but consumer bankruptcy receives less attention. Concern for the costs associated with the credit culture generally seem to be an afterthought in policymaking.

This brief international overview suggests that there are strong pressures on the supply side of the consumer credit market to increase consumer use of credit. There is also potential volatility of credit markets with the continuing danger of “irrational exuberance” on the supply side, whether in mature markets or in developing markets such as Eastern Europe<sup>36</sup> or South Korea. On the demand side of the market, consumers may be subject to behavioral biases in making decisions about credit. Overoptimism, underestimation of risk, and hyperbolic discounting are now documented in studies of credit markets.<sup>37</sup> Suppliers are aware of these biases and may exploit them.<sup>38</sup> Avner Offer makes the general argument that affluence, defined as the enormous increase in the flow of consumer goods and services since the Second World War, undermines prudence, which he defines as “a sustainable balance between the present and the future.”<sup>39</sup> Individuals in an affluent society have greater difficulties in achieving this balance because affluence undermines commitment strategies in a society of increasing novelty and abundance.<sup>40</sup> These reflections on individual biases and social influences suggest challenges for contemporary societies attempting to address pathologies such as overindebtedness or obesity.

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36. See Christopher Duenwald et al., *Too Much of a Good Thing? Credit Booms in Transition Economies: The Cases of Bulgaria, Romania, and Ukraine* (IMF Working Paper No. 05/128, 2005), available at <http://ssrn.com/abstract=887997> (discussing the rapid credit growth of the three “transition economies” in Eastern Europe).

37. See Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behaviorism, and the Misguided “Reform” of Bankruptcy Law*, 84 TEX. L. REV. 1481 (2006); Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQUIRIES L. 431, 434–38 (2006) (discussing optimism bias and the illusion of control); Iain Ramsay, *Consumer Credit Regulation as the Third Way* (Oct. 24, 2005) (unpublished manuscript on file with author), available at <http://osgoode.yorku.ca/iainramsay> (follow “Recent drafts and publications” hyperlink).

38. See Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76 (2004) (summarizing a behavioral theory that assesses “behavioral biases that result[] in the underestimation of future borrowing”).

39. OFFER, *supra* note 15, at 3.

40. *Id.* at 11.

### III. EUROPE: THE FOCUS ON OVERINDEBTEDNESS AND EUROPE NOT A MONOLITH

The financial liberalization and deregulation of the 1980s stimulated large rises in consumer credit use in many European countries and in some, such as Finland, Norway, and Sweden, a subsequent banking crisis.<sup>41</sup> Since the late 1980s, there has been a continuing cycle of reform to debt adjustment regimes throughout Europe. I use the term “debt adjustment,”<sup>42</sup> coined by my colleague Johanna Niemi-Kiesiläinen, rather than bankruptcy to describe continental European systems because the European reforms generally require a mandatory payment plan as a condition of a possible discharge and often control access based on “good faith” or permanent insolvency.<sup>43</sup> To an external observer, there seems to have been a gradual liberalization of these requirements over the past decade. For example, France now permits a discharge after one year, but only if an individual can prove that she is “irredeemably compromised,” and there is no likelihood of payment of her debts in the foreseeable future.<sup>44</sup>

The U.S. conception of the “fresh start” has undoubtedly influenced European developments. For example, the most recent French reform (loi Borloo) is described as “*le loi de la seconde chance*” and “*rétablissement personnel*.”<sup>45</sup> But this U.S. influence should not be overstated. The fresh start concept is a symbolic principle that takes on different hues within differing national contexts. The concept was used initially by reformers to critique the absence of consumer bankruptcy procedures and

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41. See, e.g., Steven R.G. Ongena et al., *Distressed Relationships: Lessons from the Norwegian Banking Crisis (1988–1991)*, at 8–10 (Dec. 1, 1999) (unpublished manuscript), available at <http://ssrn.com/abstract=198748>.

42. Niemi-Kiesiläinen, *supra* note 1, at 476.

43. See Kilborn, *Belgium and Luxembourg*, *supra* note 1, at 84–85 (noting that, in Belgium and Luxembourg, when a debtor and creditor cannot agree to a consensual payment plan, the case will progress to court where a judicially imposed plan will be considered); Kilborn, *Innovative German Approach*, *supra* note 1, at 272 (describing Germany’s new Insolvency Act, which requires debtors to attempt to create Germany’s payment plan with creditors); Kilborn, *New French Law*, *supra* note 1, at 636 (stating that the majority of modern French cases “conclude with a long-term payment plan”).

44. The new article 330-1 of the French Code de la Consommation reads:

Art. L. 330-1.—La situation de surendettement des personnes physiques est caractérisée par l'impossibilité manifeste pour le débiteur de bonne foi de faire face à l'ensemble de ses dettes non professionnelles exigibles et à échoir ainsi qu'à l'engagement qu'il a donné de cautionner ou d'acquitter solidairement la dette d'un entrepreneur individuel ou d'une société dès lors qu'il n'a pas été, en droit ou en fait, dirigeant de celle-ci . . .

« Lorsque le débiteur se trouve dans une situation irrémédiablement compromise caractérisée par l'impossibilité manifeste de mettre en oeuvre des mesures de traitement visées au deuxième alinéa, il peut solliciter l'ouverture d'une procédure de rétablissement personnel dans les conditions prévues au présent titre.

C. CONSUMM. art. L.330-1. For an overview and evaluation of the procedure, see Nathalie Coté, *Le Nouveau Dispositif de Traitement du Surendettement des Particuliers. Titre III de la loi no 2003-710 du 1er août 2003*, 46 JCP G Semaine Juridique 1973 (2003); Kilborn, *New French Law*, *supra* note 1, at 635.

45. See C. CONSUMM. arts. L.332-5, L.332-12 (2004). For discussion of the 2003 amendments, see JEAN CALAIS-AULOY & FRANK STEINMETZ, *DROIT DE LA CONSOMMATION* 624 (7th ed. 2006).

the lifelong liability for debts that existed in some European countries, but it was often a combination of chapter 13 and chapter 7 that was regarded as providing a model. Nick Huls, who played a role in transplanting U.S. ideas of the “fresh start” to European debates on overindebtedness, argued for a combination of chapters 7 and 13 and for an increased role for debt counselors in mediation that would avoid U.S. overlegalization.<sup>46</sup> Western European countries have not accepted the straight discharge of chapter 7 as a model of reform. One commentator suggests that on the continent of Europe the appropriate concept is an “earned start” rather than a “fresh start,”<sup>47</sup> adding that consumer bankruptcy, “understood as referring to a proceeding which offers a quick and formal discharge of debt,” has not been accepted in Europe.<sup>48</sup> In England and Wales, the fresh start influenced the liberalization of the bankruptcy discharge in the Enterprise Act 2002.<sup>49</sup> However, this liberalization was designed to stimulate entrepreneurialism rather than to provide a safety net for consumers.<sup>50</sup> Subsequent policy proposals do not favor a relatively unrestricted access to the bankruptcy discharge for consumers, but rather an expansion of access to repayment plans as the main consumer alternative with a low-cost bankruptcy procedure for the poor debtor with no assets and no likelihood of repaying her debts.<sup>51</sup>

If the European legal transplants differ from the U.S. models in their new transplanted soil, they have also irritated the receiving legal system.<sup>52</sup> Some European progressives view the introduction of the discharge of debts in consumer bankruptcy as having had a detrimental effect on the development of social consumer rights in contract law.<sup>53</sup> They argue that judges are less willing to develop consumer protective contract law where an individual has the ability to ultimately discharge her debts.<sup>54</sup> They also view consumer bankruptcy as a limited solution to the

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46. See Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL’Y 125, 138 (1992); Nick Huls, *Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution*, 20 J. CONSUMER POL’Y 143, 153–56, 158 (1997).

47. REIFNER ET AL., *supra* note 5, at 166.

48. *Id.* at 170.

49. For a fuller description, see Iain Ramsay, *Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis*, 37 OSGOODE HALL L.J. 15, 17–18 (1999).

50. *See id.*

51. *See id.* at 20–21; *see also* DEP’T FOR CONSTITUTIONAL AFFAIRS, DRAFT TRIBUNALS, COURTS, AND ENFORCEMENT BILL (2006), available at <http://www.official-documents.co.uk/document/cm68/6885/6885.pdf>; DEP’T FOR CONSTITUTIONAL AFFAIRS, TRIBUNALS, COURTS, AND ENFORCEMENT BILL: EXPLANATION NOTES 78–82 (2006), available at [http://www.dca.gov.uk/legist/tribenforce\\_explanatorynotes.pdf](http://www.dca.gov.uk/legist/tribenforce_explanatorynotes.pdf).

52. See Gunther Teubner, *Legal Irritants: How Unifying Law Ends Up in New Differences*, in VARIETIES OF CAPITALISM, *supra* note 22, at 417–41.

53. See Udo Reifner, “*Thou Shalt Pay Thy Debts*”: *Personal Bankruptcy Law and Inclusive Contract Law*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 1, at 143.

54. *See id.* at 151.

problems of loss of income and unemployment associated with overindebtedness.<sup>55</sup>

The institutional framework of consumer debt adjustment in Europe contrasts with the U.S. paradigm. Unlike in the United States, in Europe lawyers play a minor role in debt adjustment procedures. In several countries, professional debt counselors, paid by the state or charitable organizations, advise and channel debtors through the debt adjustment procedures. Public institutions process the majority of consumer bankrupts in several countries. In France, the Bank of France plays a central role in the *Commissions de surendettement*. In England and Wales, the public Official Receiver's office processes the majority of consumer bankruptcies.

Consumer credit markets and their regulation differ within Europe in terms of credit availability, forms of credit use (e.g., credit cards), and levels of consumer debt among the population.<sup>56</sup> There is not a European consumer credit market.<sup>57</sup> The accession of new states in Central and Eastern Europe increases these differences. There are also variations in regulation of credit markets. France has a negative credit reporting regime whereas several other countries in Europe have both positive and negative reporting regimes.<sup>58</sup> A recent French report suggests that the absence of extensive credit reporting accounts for the lower level of credit availability in France.<sup>59</sup> Several countries (e.g., France, Germany, Belgium, and Poland) have interest rate ceilings.<sup>60</sup> French usury law has different rates for different market segments and the rate is established at one-third above the market rate.<sup>61</sup> The German Supreme Court has

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55. See *id.* at 146.

56. See SELOSSE & SCHREFLER, *supra* note 17.

57. A consultancy report recently identified five types of European credit markets: (1) dynamic (United Kingdom, Italy, Portugal, Spain, Hungary, Czech Republic, Poland), which feature a high level of innovation, competition and liberal regulation; (2) unrestrained (Greece, Turkey, Finland, Netherlands, Sweden, Ireland, Norway); (3) liberal regulation and good development potential constrained (France, tough and well entrenched regulation); (4) saturated (Germany, Austria, Belgium), which are characterized by little scope for development given cultural resistance to debt, weak macro-economic growth, low levels of competition and regulatory restrictions; and (5) dormant (Switzerland, Denmark, Luxembourg), where low levels of competition hold back market development. See MERCER OLIVER WYMAN, EUROPEAN CREDIT RESEARCH INST., CONSUMER CREDIT IN EUROPE: RIDING THE WAVE (2005).

58. See John Barron & Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience*, in CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY, *supra* note 35, at 273–310.

59. See JEAN-CHRISTOPHE LAGARDE, ASSEMBLÉE NATIONALE RAPPORT NO. 2034, at 21 (2005), available at <http://www.assemblee-nationale.fr/12/pdf/rapports/r2034.pdf>.

60. For a summary of the various usury rates in Europe, see REIFNER ET AL., *supra* note 5, at 102–03 (indicating the existence of usury ceilings in Belgium, France, Germany, Italy, and Netherlands). For discussion of proposed interest rate caps in Poland, see *Stockwatch: Provident Financial Lower as Poland Approves Rate Cap*, FINANZ NACHRICHTEN, Aug. 9, 2005, <http://www.finanznachrichten.de/nachrichten-2005-08/artikel-1943808.asp>.

61. See C. CONSOMM. art. L.313-3, available at [http://195.83.177.9/upl/pdf/code\\_29.pdf](http://195.83.177.9/upl/pdf/code_29.pdf) (“Any contractual loan granted at an annual percentage rate which at the time of granting, is more than one third higher than the average percentage rate applied by the credit institutions during the previous quarter for loans of the same type presenting a similar risk factor, as defined by the administrative authority

established rates at about double the market rate.<sup>62</sup> There is a lively debate in Europe concerning the role of interest rate ceilings in protecting individuals from overindebtedness.<sup>63</sup>

Several current EU policy initiatives in consumer credit are driven primarily by a desire to facilitate a competitive European credit market. This gives effect to the Lisbon agenda to make Europe the most globally competitive region in the world.<sup>64</sup> The proposed European Directive on Consumer Credit is intended to stimulate a competitive EU credit market through the introduction of a standardized calculation of APR throughout Europe.<sup>65</sup> Consumer critics view it as embracing a neoliberal model of market facilitation with a modest nod to the problems of overindebtedness through the concept of “responsible lending.”<sup>66</sup> Although there is widespread media coverage of the problem of overindebtedness in many European countries,<sup>67</sup> the EU has not proposed to harmonize regulation of the treatment of overindebtedness through bankruptcy or debt adjustment procedures.<sup>68</sup> Although there is an EU Regulation on Insolvency,<sup>69</sup> it was drafted primarily for business bankruptcies and sev-

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after consulting the Conseil national du crédit, constitutes a usurious loan.”). The rates as of January 1, 2006, are 19.67% for loans less than or equal to €1524; 17.37% for overdrafts, revolving credit, and installment sales above €1524; and 7.89% for personal loans and other loans above €1524. See CALAIS-AULOY & STEINMETZ, *supra* note 45, at 426–27.

62. See Reifner, *supra* note 53, at 103.

63. In the United Kingdom, debate has focused on a controversial report arguing that interest rate ceilings in Germany and France resulted in exclusionary effects on consumer credit. See generally DEPT OF TRADE & INDUS., THE EFFECT OF INTEREST RATE CONTROLS IN OTHER COUNTRIES (2004).

64. See Commission of the European Communities, *White Paper: Financial Services Policy: 2005–2010*, at 5, COM (2005) 629 final (Dec. 1, 2005), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0629en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0629en01.pdf); Commission of the European Communities, *Green Paper: Mortgage Credit in the EU*, COM (2005) 327 final (July 19, 2005), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0327en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0327en01.pdf); Press Release, European Comm’n, Internal Market: New Commission Expert Group to Identify Obstacles in EU Mortgage Funding Market (June 27, 2006), <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/855&format=HTML&aged=0&language=EN&guiLanguage=en>.

65. For current information on the progress of the Directive and its main provisions, see European Commission, Consumer Credit Directive: Community Legislation in Progress, [http://ec.europa.eu/consumers/cons\\_int/fina\\_serv/cons\\_directive/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/fina_serv/cons_directive/index_en.htm) (last visited Nov. 9, 2006).

66. See, e.g., Debt on our Doorstep, House of Lords Condemns EU Credit Directive, July 6, 2006, <http://debt-on-our-doorstep.com/newsitems/newsitem060706.html>.

67. See, e.g., Liam Halligan, *The Debt Pandemic*, NEW STATESMAN, Oct. 24, 2005, <http://www.newstatesman.com/200510240005>; see also Philippe Le Coeur, *Bank of France Considers that Households Are Taking on Too Much Debt*, LE MONDE, Dec. 28, 2005, at 1; Virginia Malingre & Cécile Prudhomme, *Bank of France Alarmed by Growth of Credit*, LE MONDE, Dec. 28, 2005, at 11.

68. The Commission commissioned a study in the early 1990s and in 2003 as well as a statistical analysis of the extent of overindebtedness. See NICK HULS ET AL., OVERINDEBTEDNESS OF CONSUMERS IN THE EC MEMBER STATES: FACTS AND SEARCH FOR SOLUTIONS (1994); REIFNER ET AL., *supra* note 5; GIANNI BETTI ET AL., STUDY OF THE PROBLEM OF CONSUMER INDEBTEDNESS: STATISTICAL ASPECTS (2001), available at [http://ec.europa.eu/consumers/cons\\_int/fina\\_serv/cons\\_directive/fina\\_serv06\\_en.pdf](http://ec.europa.eu/consumers/cons_int/fina_serv/cons_directive/fina_serv06_en.pdf). The Council of Europe has also conducted a study of overindebtedness. See NIEMI-KIESILÄINEN & HENRIKSON, *supra* note 1.

69. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_160/l\\_16020000630en00010018.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00010018.pdf).

eral countries do not apply it to their consumer debt adjustment procedures.<sup>70</sup>

The policy focus in Europe often tends to be on overindebtedness and its prevention rather than on treatment of overindebtedness through bankruptcy. This is the objective of the concept of responsible lending, which was given a high profile when the European Commission included it in the original draft of the proposed new European Directive on Consumer Credit.<sup>71</sup> The responsible lending provision has the aim of preventing overindebtedness and consequent economic exclusion as well as reducing the cost to member states' social services.<sup>72</sup> Based on a Belgian model, the original proposal had two aspects: (1) a requirement for creditors to consult credit databases before granting credit; and (2) a suitability of credit requirement that would require the creditor to make sure that the type and amount of credit was appropriate to the needs of the debtor.<sup>73</sup> This proposal proved to be controversial. Although this proposal has been watered down in more recent drafts,<sup>74</sup> the concept of responsible lending remains influential as a principle, as it connects with contemporary discussions of corporate social responsibility and attempts

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70. NIEMI-KIESILÄINEN & HENRIKSON, *supra* note 1, at 39–40.

71. *Proposal for a Directive of the European Parliament and of the Council on the Harmonization of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers*, at 15–16, COM (2002) 443 final (Sept. 11, 2002) [hereinafter *Commission Proposal*], available at [http://www.ecri.be/media/documents/commission\\_proposal.pdf](http://www.ecri.be/media/documents/commission_proposal.pdf).

72. The provision will “lessen the risk of consumers falling victim to disproportionate commitments that they are unable to meet, resulting in their economic exclusion and costly action on the part of Member States’ social services.” *Id.* at 8.

73. *See id.* art. 6, at 37–38; *see also id.* art. 8, at 39 (providing requirement to consult databases before granting credit); *id.* art. 9, at 40 (“Where the creditor concludes a credit agreement or surety agreement or increases the total amount of credit or the amount guaranteed, he is assumed to have previously assessed, by any means at his disposal, whether the consumer and, where appropriate, the guarantor can reasonably be expected to discharge their obligations under the agreement.”). Swiss law concretizes this requirement. *See Loi fédérale sur le crédit à la consommation [LCC]* [Federal Consumer Credit Act], March 23, 2001, Recueil systématique du droit fédérale [RS] 221.214.1, arts. 23–32, available at [http://www.admin.ch/ch/f/rs/221\\_214\\_1/index.html](http://www.admin.ch/ch/f/rs/221_214_1/index.html). Under Swiss law, lenders must consult a database that will include positive and negative information before granting credit and must ensure that the borrower in taking on the credit will not be reduced below a minimum level of subsistence that is defined by reference to the exemption of income from seizure under debt enforcement law. *Id.* art. 28. This is a modest amount that is less than the recommendations of Swiss social agencies on minimum living requirements.

The scope of the law is somewhat undercut because of special provisions in relation to credit cards and lines of credit. Credit card debt has to be reported to the central database only if it is over 3000 Swiss Francs. The credit limit on a card must be determined at the time of granting the credit taking into account credit bureau information, and a “summary” examination of the income and assets of the borrower. *See id.* art. 30. A commentator on the law suggests that the legislation will not significantly affect credit card companies and banks offering lines of credit. The law does not apply to real estate mortgages. *See generally* Bernd Stauder, *Le prêt responsable: L'exemple de la nouvelle loi Suisse sur le crédit à la consommation*, in MELANGES EN L'HONNEUR DE JEAN CALAIS-AULOY: ÉTUDES DE DROIT DE LA CONSOMMATION, at 1029 (2004).

74. *See Modified Proposal for a Directive of the European Parliament and of the Council on Credit Agreements for Consumers Amending Council Directive 93/13/EC*, at 6, COM (2005) 438 final (Oct. 7, 2005) (only necessary to consult databases “where appropriate”), available at [http://ec.europa.eu/consumers/cons\\_int/fina\\_serv/cons\\_directive/2ndproposal\\_en.pdf](http://ec.europa.eu/consumers/cons_int/fina_serv/cons_directive/2ndproposal_en.pdf).

to “responsibilize” the supply side of credit markets.<sup>75</sup> “Responsible lending” may become an international principle for consumer credit markets.<sup>76</sup> It may also become a site for political conflict as consumer groups, such as the Global Fair Finance Initiative, monitor multinational companies’ performance in credit markets in developing and developed countries.<sup>77</sup> Given the prestige of EU models of consumer law outside the EU, one might expect responsible lending to be considered by other countries that are in the process of reforming credit law.<sup>78</sup> The concept of responsible lending is of course not unknown in the United States. The law of lender liability, the concept of improvident credit extension, regulation of predatory lending through the Home Ownership and Equity Prevention Act, and the Community Reinvestment Act all might be included under the umbrella of responsible lending.<sup>79</sup>

#### IV. THE AGENDA OF COMPARATIVE CONSUMER BANKRUPTCY

The developments outlined in previous Parts have stimulated the study of comparative consumer bankruptcy and other policies that address the increasingly common problem of individual overindebtedness. Scholarship on comparative consumer bankruptcy is often driven by an interest in convergence and divergence of legal systems, a central question in contemporary comparative analysis.<sup>80</sup> The scholarship is also driven by an attempt to understand the relationship between law and social economic change, specifically changes in credit markets and legal change. The law may be either a dependent variable responding to social and economic problems thrown up by changes in credit markets or an in-

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75. I discuss this further in Ramsay, *supra* note 37.

76. See, e.g., Current Issues on Consumer Law, Responsible Lending: What Could it Be? (May 19, 2006), [http://uutiskirje.kuluttajavirasto.fi/consumer\\_law/consumer\\_law\\_4\\_2006/en\\_GB/responsible\\_lending](http://uutiskirje.kuluttajavirasto.fi/consumer_law/consumer_law_4_2006/en_GB/responsible_lending).

77. The Global Fair Banking Initiative is a development of the National Community Reinvestment Coalition (NCRC). See Nat’l Community Reinvestment Coalition, NCRC Announces Launch of European Coalition for Responsible Credit (ECRC) and the Global Community Reinvestment Coalition (GCRC), <http://www.ncrc.org/global/> (last visited Nov. 7, 2006). The NCRC’s web site indicates that “NCRC and its international partners have raised worldwide awareness of fair lending and responsible credit issues and, in so doing, preserved NCRC’s ability to maintain a persuasive dialogue with multi-national banks as they continue to expand beyond U.S. borders.” *Id.* Within Europe there is also a European Coalition for Responsible Credit. *Id.*

78. See, for example, the discussion of responsible lending in the recent Australian Consumer Credit Review. CONSUMER AFFAIRS VICTORIA, *supra* note 32, 132–56. South Africa has adopted a concept of “reckless credit.” National Credit Act 34 of 2005 s. 18, available at <http://www.thedti.gov.za/ccrdlawreview/creditact2006.htm>. The European Union now represents an influential model of consumer market regulation in areas such as product safety, standard setting, and product liability. See, e.g., Mathias Reimann, *Product Liability in a Global Context: The Hollow Victory of the European Model*, 11 EUR. REV. PRIVATE L. 128 (2003).

79. See John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405.

80. Anthony Ogus views the convergence issue as one of “three main tasks of comparative law,” noting that the convergence issue “has been the subject of intense debate among comparative lawyers.” A.I. Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT’L & COMP. L.Q. 405, 405 (1999).

strument of change. Governments may wish to transplant legal institutions to achieve economic and cultural change. The liberal discharge provisions of the English bankruptcy reforms in 2002 are intended to stimulate entrepreneurialism and express influential government leaders' admiration for the U.S. "fresh start" model of bankruptcy.<sup>81</sup>

Law is also an expression of values, and bankruptcy law is at the crossroads of important values—the legal and social norm that debts should be repaid and the value of a safety net for individuals who have miscalculated risks or suffered from an unfortunate change of circumstances. Bankruptcy law in common-law countries outside the United States historically used shaming sanctions as a method of upholding commercial morality.<sup>82</sup> U.S. law deliberately jettisoned many shaming sanctions in the 1978 Bankruptcy Reform Act, rejecting the moralization of failure for the consumer debtor.<sup>83</sup> European countries have moved gingerly towards this model, but fears are expressed there of the effects of liberal discharge procedures on the norm of *pacta sunt servanda* and social solidarity.<sup>84</sup> Recent U.S. reforms that make bankruptcy less attractive to debtors seem partly based on a belief that bankruptcy law should be more supportive of the sanctity of contracts.<sup>85</sup>

The study of comparative consumer bankruptcy is part of the general renaissance of comparative law scholarship.<sup>86</sup> Comparative law has

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81. For further discussion of the background to the English reforms, see generally Ramsay, *supra* note 1.

82. For an analysis of the changing historical nature of bankruptcy and shaming sanctions, see James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 *YALE L.J.* 1841, 1874–78 (1996).

83. For example, the term "debtor" was substituted for "bankrupt" in the 1978 U.S. Bankruptcy Reform Act. In their discussion of the background to the 1978 Act, Carruthers and Halliday state that "[i]n the United States, by contrast, there is virtually no concern with investigative or sanctioning aspects of the fraud or recklessness by debtors, nor of the use of law as a sanctioning device." BRUCE CARRUTHERS & TERENCE HALLIDAY, *RESCUING BUSINESS* 418 (1998).

84. *Id.* at 416–18; see also Braucher, *supra* note 7, at 340; Jacob Ziegel, *Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies*, 7 *THEORETICAL INQUIRIES L.* 299, 304 (2006).

85. See, e.g., NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 1123–49 (1997) (containing Judge Edith H. Jones and Commissioner James I. Shepherd's additional dissent to recommendations for reform of consumer bankruptcy law); Edith Jones & Todd Zywicki, *It's Time for Means-Testing*, 1999 *BYU L. REV.* 177.

Zywicki argues that increased bankruptcy filing rates can "be explained by changes in social and personal norms regarding bankruptcy," but admits that "empirically measuring changes in broad and diffuse social factors such as shame and stigma is difficult . . ." Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 *Nw. U. L. REV.* 1463, 1532–33 (2005).

86. Annelise Riles comments that there is:

[A]n expanding interest in comparative law among scholars and practitioners outside the traditional community of comparativists on the one hand and, paradoxically a waning of interest in mid-century methods of comparative law among comparativists on the other. In many parts of the world, comparative law is now taken as newly relevant to projects of constitution and code drafting or the harmonization of laws. Even the American courts, last bastions of parochialism, have begun to consider the value of comparative materials in decision making.

Annelise Riles, *Introduction: The Projects of Comparison*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 1, 2 (Annelise Riles ed., 2001).

been hitched to the star of a variety of projects.<sup>87</sup> These include modernization and rationalization (such as law reform at national or regional levels) and the new law and development movement. Although these projects have stimulated a renaissance in comparative law studies, there remains skepticism among comparativists as to whether comparative law is a coherent discipline.<sup>88</sup> For instance, Mathias Reimann argues that the subject “consists of a multitude of bits and pieces that do not add up to a coherent whole.”<sup>89</sup> The dominant theory of functionalism<sup>90</sup> has been criticized on many grounds,<sup>91</sup> and there is no commonly accepted methodology for comparative analysis. Reimann believes that “comparative studies can generate insights into the basic structures, nature, and development of law, as well as into its relationship with economy and society.”<sup>92</sup> He suggests that the discipline might develop through testing limited falsifiable hypotheses, pursuing explanations of the data found and the differences between systems.<sup>93</sup> This is inevitably an interdisciplinary project that involves an understanding of the historical, social, and economic environment of different legal systems.

Reimann’s diagnosis on comparative law as a discipline may be too severe,<sup>94</sup> but his criticisms are useful for establishing the objectives and

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87. *Id.* at 11.

88. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 685 (2002).

89. *Id.* at 686. Reimann refers to some of the discipline’s failures: the obsession with the civil law–common law distinction; the main focus on the nation state systems of Western capitalist societies; the failure to become interdisciplinary; the absence of statistical data; and the absence of intellectual goals. *Id.* at 685–86, 697.

90. The best statement of this approach is KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d. ed. 1998). For an excellent critique and reconstruction of functionalism in comparative law, see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Reimann et al. eds., forthcoming). For a fuller discussion of functionalism in relation to comparative consumer bankruptcy, see Iain D.C. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales*, 7 THEORETICAL INQUIRIES L. 625 (2006).

91. For example, some have said that it has a bias towards finding similarities, or that it represents a relatively shallow set of guidelines for research. See WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 79–82 (2000); Gunter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT’L L.J. 411, 434–40 (1985); Reimann, *supra* note 88, at 681–83.

92. Reimann, *supra* note 88, at 697.

93. *Id.* at 698.

94. There are several important quantitative studies on comparative aspects of law and economy. Ronald Mann has conducted path-breaking analysis that suggests a correlation between the growth of credit card debt and bankruptcy. See MANN, *supra* note 11, at 66 (“[T]he most important aspect of the results is the finding on credit card debt. Even if credit card spending and consumer debt are held constant, an increase in credit card debt—a shift of consumer borrowing from non-card borrowing to card borrowing—is associated with an increase in bankruptcy filings.”). The law and finance literature uses comparative regression analyses to capture the relationship of legal institutions (such as levels of creditor enforcement or the existence of credit sharing information) to credit availability and the likelihood of default. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rainer Haselmann et al., *How Law Affects Lending* (Columbia L. & Econ., Working Paper No. 285, 2005), available at <http://ssrn.com/abstract=846665>. There are comparative studies of corporate governance that relate forms of corporate governance law to historical and political differences, and comparative sociological studies of corporate bankruptcy that provide explanations of the relative influence of interest groups,

methods of comparative consumer bankruptcy. It should aspire to be more than “bits and pieces.”<sup>95</sup> Comparison should not simply be a description of different countries with an occasional reference to “trends in consumer bankruptcy.” It should propose generalizations about the nature of legal development, its relationship to economy, society, and culture. For example, what triggers the development of relief mechanisms such as consumer bankruptcy? The obvious answer—increased consumer debt—is only a partial explanation because countries with comparatively low levels of debt introduced debt adjustment systems during the 1990s.<sup>96</sup> What explains persisting differences between countries in their legal institutions and approach to this area? Are there cultural, political, or historical reasons at work here? Or is there a path dependence to the approach in different legal systems? What role does “chance and prestige”<sup>97</sup> play in the introduction of policies on overindebtedness? Comparative analysis should probe these questions using legal, economic, social, historical, and political data.

This brief description of comparative approaches to consumer bankruptcy underlines the ambitious nature of the undertaking and the need to think carefully in designing a research program. Scholars should have a good reason for choosing particular countries to compare. Comparative consumer bankruptcy is not completely dominated by the “Country and Western” tradition in comparative law—a tradition that focuses almost exclusively on the Western capitalist societies.<sup>98</sup> Its concern for the relationship between economic and legal development links it to scholarship in law and development, although this literature has yet to be fully integrated into studies of consumer bankruptcy. At the same time, comparing countries with similar economies and legal traditions that nonetheless appear to adopt different approaches to overindebtedness may be illuminating. This was the approach Carruthers and Halliday took to understand the distinct corporate bankruptcy regimes in England and Wales and the United States.<sup>99</sup> If the United Kingdom seems to follow many U.S. developments one generation later, then the current mild panic in the United Kingdom about overindebtedness and

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including professionals, on legal development in different countries. See, e.g., CARRUTHERS & HALLIDAY, *supra* note 83; MARK ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE* (2003).

95. Reimann, *supra* note 88, at 698.

96. See Kilborn, *Belgium & Luxembourg*, *supra* note 1, at 69.

97. See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995); see also ALAN WATSON, *LEGAL TRANSPLANTS* (1970) (arguing that legal transplants and law reform are primarily the work of legal elites borrowing legal rules and institutions).

98. See, e.g., CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 1 (discussing China, Brazil, and Hong Kong). Twining describes this tradition as having the following characteristics: the subject matter is legal doctrine, usually private law; its unit of analysis is the nation state with a focus on Western capitalist societies; it is concerned with the similarities and differences between the common law and civil law. See TWINING, *supra* note 91, at 185.

99. See CARRUTHERS & HALLIDAY, *supra* note 83.

policy responses would be a valuable case study to compare with those of a previous U.S. generation to the pathologies of consumer credit. The nation state is assumed to be the unit of comparison, but studies within the United States or comparing different regions in North America deserve to be included within the description of comparative bankruptcy law.

Traditional comparative law also suggests some elementary precepts that every comparativist should follow: (1) study the problem addressed by legal systems as well as the legal rules and institutions; (2) place the rules in the context of the legal, social, and cultural system; and (3) study the law in action as well as the law in the books.<sup>100</sup> Studying the problem that is often addressed by different bodies of law avoids being hobbled by insular legal categories. “Bankruptcy” as a legal term carries much parochial baggage. The common issue of overindebtedness and the different social and legal responses might be the initial focus of inquiry, mapping the approaches taken in different countries to prevent and treat overindebtedness, as well as the social construction of overindebtedness in different societies. Not all individuals who are overindebted choose to declare bankruptcy. Mapping comparatively the different choices that are available to individuals and why particular choices are made would be a valuable, if challenging, research project.

There are issues of research methodology and the role of quantitative and qualitative methods. Quantitative studies are difficult when conducted in a single country.<sup>101</sup> They are even more difficult to conduct across jurisdictions. Comparing consumer “bankruptcy” statistics across countries is difficult. They may include both individual business and consumer bankruptcies, yet not include all methods that consumers have of writing down debt or extending payments. For example, in England and Wales in 2004, there were 35,898 bankruptcies (of which 70% were consumer bankruptcies) and 10,751 Individual Voluntary Arrangements (IVAs)<sup>102</sup> included in the official insolvency statistics.<sup>103</sup> But there were also 3948 county court administration orders<sup>104</sup> and an estimated 72,500

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100. See generally ZWEIGERT & KÖTZ, *supra* note 90, at 32–47.

101. See, e.g., Jay Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123 (2002).

102. IVAs permit individuals to repay a portion of their debts. For a full description of Individual Voluntary Arrangements, see D. MILMAN, *PERSONAL INSOLVENCY LAW, REGULATION AND POLICY* 130–37 (2005).

103. See The Insolvency Service, *Bankruptcies and Company Liquidation: Analysis by Industry 2004*, <http://www.insolvency.gov.uk/otherinformation/statistics/general/b-lbyindustry.htm> (last visited Nov. 9, 2006).

104. For a description of county court administration orders, see Ramsay, *supra* note 1, at 212–13; Donna McKenzie Skene & Adrian Walters, *Consumer Bankruptcy Law Reform in Scotland, England and Wales 15–16* (July 6, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=914522>.

debt management plans in the private sector.<sup>105</sup> Neither of these latter mechanisms is included in official bankruptcy statistics.

There is a danger of misleading comparisons when all methods of addressing overindebtedness are not included. One therefore might compare the English data with insolvency in Canada in 2004, where there were 84,426 consumer bankruptcies, 8844 business bankruptcies, 16,658 consumer proposals,<sup>106</sup> and an estimated 9500 debt management plans outside Quebec operated by credit counseling services.<sup>107</sup> Given the much larger population of England and Wales (fifty-three million)<sup>108</sup> compared with Canada (thirty-two million),<sup>109</sup> it would appear that a significantly larger percentage of English consumers are using informal debt management plans, rather than bankruptcy, as a solution to their debt problems. Simply looking at the formal bankruptcy statistics would therefore be misleading. However, further analysis of the debt profiles of individuals using these English debt management plans would be necessary to determine whether they are comparable to Canadians using bankruptcy procedures. One might find that more middle-income individuals used these plans (thus providing greater support for the “middle class” hypothesis outside the United States). This outline of the different mechanisms used to treat overindebtedness indicates the complexities of cross-jurisdictional analyses that are obscured by a focus solely on bankruptcy statistics. Functionalism has at least the merit of expanding the researcher’s horizon to include all methods of addressing overindebtedness.

A further example is France, where, in 2004, 188,176 individuals made applications to the *Commissions de surendettement*.<sup>110</sup> This represents a filing rate of 3.1 per thousand population,<sup>111</sup> a rate that is similar to the individual bankruptcy rate in Canada and substantially higher than

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105. See THE INSOLVENCY SERVICE, IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS 11, available at [http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/improvingIVAs.pdf](http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/improvingIVAs.pdf).

106. For a description of consumer proposals, see Jacob Ziegel, *What Can the United States Learn from the Canadian Means Testing System?*, 2007 U. ILL. L. REV. 195.

107. Office of the Superintendent of Bankr. Canada, *Insolvencies in Canada in 2004*, <http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01476e.html> (last visited Nov. 9, 2006); Iain Ramsay & Jenny Sui, *Credit Counseling Services Across Canada* (unpublished material on file with author) (Manitoba not included in the English province data because data not obtainable).

108. National Statistics, *Population Estimates: UK Population Grows to More than 60 Million*, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=6&Pos=1&ColRank=1&Rank=374> (last visited Nov. 9, 2006).

109. Statistics Canada, *Population by Year, by Province and Territory*, <http://www40.statcan.ca/101/cst01/demo02a.htm?sdi=population> (last visited Nov. 9, 2006).

110. For a description of the *Commissions de surendettement*, see Kilborn, *New French Law*, *supra* note 1, at 635.

111. See National Institute for Statistics and Economic Studies, *2005 Demographic Report: In France, the Female Fertility Rate Continues to Rise*, [http://www.insee.fr/En/ffc/pop\\_age4.htm](http://www.insee.fr/En/ffc/pop_age4.htm) (last visited Nov. 9, 2006) (reporting that on “January 1st 2006, the population of metropolitan France and the overseas departments is estimated to be 62.9 million inhabitants”).

the bankruptcy rate in England and Wales.<sup>112</sup> But this phenomenon seems paradoxical because France has a much lower rate of consumer credit per capita and credit to disposable income than these countries.<sup>113</sup> However, it is possible that there are fewer private debt management plans in France so that the *Commissions* are the only alternative for overindebted individuals. We would also need to know which repayment institutions in other countries should be compared to the work of the *Commissions de surendettement*.

Comparative data may not be collected using the same method, and consumer credit data may not be comparable across countries.<sup>114</sup> Cross-country comparisons of data on the users of bankruptcy and debt require careful interpretation. For example, consider the use of bankruptcy by differing classes. U.S. consumer bankruptcy serves the middle classes or a representative cross-section of the population.<sup>115</sup> Although this also seems to describe debtors in Japan,<sup>116</sup> it does not adequately describe Canadian bankrupts,<sup>117</sup> nor does it seem to fit bankrupts in Australia,<sup>118</sup> or England and Wales,<sup>119</sup> although the data from England are rather lim-

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112. England and Wales' personal bankruptcy rate is currently just over one-fifth that of the United States, but it has increased significantly during recent years from 0.88 per 1000 people in 2004 to 1.27 in 2005. Scotland, which has a separate insolvency system, has a higher rate at 1.89 per 1000 people. See Skene & Walters, *supra* note 104, at 55.

113. See NURIA DIEZ GUARDIA, EUROPEAN CREDIT RESEARCH INSTITUTE, CONSUMER CREDIT IN THE EUROPEAN UNION: ECRI RESEARCH REPORT No. 1, at 49 tbl.A 14, 50 tbl.A 15 (2000), available at [http://www.ecri.be/media/research\\_report/ECR1en.pdf](http://www.ecri.be/media/research_report/ECR1en.pdf).

114. See Jonathan Crook, *The Measurement of Household Liabilities: Conceptual Issues and Practice* (Credit Research Ctr., Univ. of Edinburgh, Working Paper No. 05/1, 2005), available at [http://www.crc.man.ed.ac.uk/workingpapers/workingpaper05\\_1.pdf](http://www.crc.man.ed.ac.uk/workingpapers/workingpaper05_1.pdf).

115. See TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000).

116. See Mark D. West, *Dying to Get Out of Debt: Consumer Insolvency Law and Suicide in Japan* 26–27 (Univ. of Mich. Law Sch., Pub. L. Working Paper No. 37, 2003), available at <http://ssrn.com/abstract=479844>.

117. See Saul Schwartz, *The Empirical Dimensions of Consumer Bankruptcy: Results from a Survey of Canadian Bankrupts*, 37 OSGOODE HALL L.J. 83, 101 (1999). But see Ramsay, *supra* note 49, 39–41 (expressing a more ambivalent view of the class status of bankrupts).

118. See Rosalind Mason & John Duns, *Developments in Consumer Bankruptcy in Australia*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 1, at 228–29 (noting that bankrupts are at the lower end of the socioeconomic scale and that 61% of bankrupts were not employed).

119. There is very limited English data on this issue. A very recent pilot study of bankruptcy suggests that males represent the majority of bankrupts, with 53% males and 47% females. Twenty-seven percent of debtors were unemployed and the vast majority of users were not homeowners. Under fifteen percent of debtors owned their home either at the time of bankruptcy or prior to bankruptcy. See CENTRE FOR INSOLVENCY LAW AND POLICY, BANKRUPTCY COURTS SURVEY 2005—A PILOT STUDY FINAL REPORT (2006), available at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldoes/BankruptcyCourtsSurvey.pdf>.

A modest study of bankruptcy by the Department of Constitutional Affairs, conducted before the introduction of the Enterprise Act revisions, found that two-thirds of bankrupts were men, and 38% were unemployed, although only 3% were recorded as both unemployed and receiving benefits. Only 22% were homeowners (in a country with a homeownership level approaching 70%). Sixty-three percent had total debts under £40,000. These data do not tell us whether these are middle-class individuals who have fallen on hard times, as reflected in U.S. studies. It is possible that they may have lost their jobs and sold their homes before petitioning for bankruptcy. See CIVIL JUSTICE DIV. & INFO. MGMT. DIV., DEP'T OF CONSTITUTIONAL AFFAIRS, ADMINISTRATION ORDER REFORM PROJECT,

ited. In France, there may be more middle-class debtors in recent years, but again data are limited.<sup>120</sup> However, traditions of class analysis differ between countries.<sup>121</sup> The Canadian studies used a different basis than the U.S. studies for measuring issues of class.<sup>122</sup> Comparing factors such as educational attainment of debtors across countries may be difficult because a high school or college diploma in the United States is not readily comparable to ostensibly similar qualifications in other countries. These comments indicate a challenge for comparative studies to develop harmonized international statistics based on “transferable concepts.”<sup>123</sup>

Much of traditional comparative law is qualitative and interpretive. One of the attractions of comparative bankruptcy scholarship is the potential to obtain quantitative data because most states maintain judicial statistics on bankruptcy or debt adjustment regimes. The disadvantage of this is that there are few rich ethnographies of consumer debt and bankruptcy outside the United States that would allow for greater comparative analysis of arguments concerning distinct credit cultures, attitudes to repayment, and willingness to use bankruptcy or debt adjustment mechanisms.

Bankruptcy procedures may also be used for different purposes across countries, confounding the assumption that they are addressing the common problem of overindebtedness. Indeed, the recognition that legal institutions have multiple functions complicates the assumption that the common problem is overindebtedness. In the United States, bankruptcy may function as a form of consumer protection for individuals

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WHO IS USING COUNTY COURT ADMINISTRATION ORDERS AND DEBTORS' PETITIONS? 13–15 (2003) (on file with author).

Research on county court administration orders shows that 75% of users receive unemployment benefits and 65% are young females. See *id.* at 5; ELAINE KEMPSON & SHARON COLLARD, MANAGING MULTIPLE DEBTS: EXPERIENCES OF COUNTY COURT ADMINISTRATION ORDERS AMONG DEBTORS, CREDITORS AND ADVISORS (2004), available at [http://www.dca.gov.uk/research/2004/1\\_2004.pdf](http://www.dca.gov.uk/research/2004/1_2004.pdf). Recent research on Individual Voluntary Arrangements indicates that the majority of users earn less than £20,000 and are in unskilled, semiskilled, or clerical occupations. See PRICEWATERHOUSE COOPERS, LIVING ON TICK: THE 21ST CENTURY DEBTOR 17 (2006), available at <http://www.pwc.com/uk/eng/about/svcs/brs/PwC-IVARreport.pdf>.

120. A recent study by the Bank of France indicates that in 2004, individuals using the *Commissions de surendettement* were between 35–54, often workers, employees or unemployed (over 30%), renters rather than owners, with a monthly salary of less than €1500. It was the modesty of their resources, combined with a change of circumstance, rather than the quantitative level of debt, that caused their problems. See BANQUE DE FRANCE, ENQUÊTE TYPOLOGIQUE 2004 SUR LE SURENDETTEMENT (2005), available at [http://www.banque-france.fr/fr/instit/telechar/services/enquete\\_typo2004\\_surendettement.pdf](http://www.banque-france.fr/fr/instit/telechar/services/enquete_typo2004_surendettement.pdf). The Annual Report of the Household Debt Observatory is more nuanced in suggesting that although overindebtedness is primarily concentrated in lower occupational classes, there are also overindebted individuals from the management and professional classes. See L'OBSERVATOIRE DE L'ENDETTEMENT DES MENAGES, 17ÈME RAPPORT ANNUEL 2004 (2005).

121. See FIONA DEVINE, SOCIAL CLASS IN AMERICA AND BRITAIN 11 (1997).

122. The Canadian studies used the Porter-Pineo-McRoberts scale. See P.C. Pineo et al., *The 1971 Census and the Socioeconomic Classification of Occupations*, 14 CAN. REV. SOC. & ANTH. 91, 91 (1977).

123. See TWINING, *supra* note 91, at 191.

whose home is threatened with foreclosure.<sup>124</sup> Filing for bankruptcy in a liberal bankruptcy regime such as the United States may provide a general substitute for asserting a legal defense to a creditor claim. Lawyers may channel a client to bankruptcy, rather than attempt to defend the individual claim or refer an individual to a debt-counseling agency. The introduction of debt discharge to a country where it was not previously available may result in a repetition of this U.S. phenomenon. Udo Reifner claims that the growth of debt adjustment protection in Germany has substituted for consumer protection law.<sup>125</sup> Bankruptcy must also be set against the background of other safety nets in society. The absence of universal healthcare in the United States means that a significant portion of bankruptcies are health related—a phenomenon that is much less significant in European countries.<sup>126</sup>

Bankruptcy and debt are also cultural phenomena and comparative analysis should attempt to understand what bankruptcy or debt adjustment means for the participants and the wider society.<sup>127</sup> Even a detailed ethnography of one country may suggest generalizations about the nature of law.<sup>128</sup> Laws may provide what Jürgen Habermas describes as “images of society.”<sup>129</sup> Thus, Johanna Niemi-Kiesiläinen argues that different images of society (ideologies) are inscribed in Scandinavian and U.S. bankruptcy law.<sup>130</sup> The latter includes those of the market and the idea of permitting individuals a swift return to the market.<sup>131</sup> In contrast, debt adjustment in Scandinavia is viewed as a substitute for welfare state protections against unemployment and illness.<sup>132</sup> This view affects the terms on which debt adjustment may be available. In Scandinavia, it is tailored to protect only against “unforeseen” difficulties, such as long-term unemployment or illness, for which the welfare state provided protection. Thus, individuals who do not fit this profile, but have simply overconsumed or been imprudent may experience difficulties in obtaining relief. The functions attributed to debt adjustment within this ideology result in practical differences from the United States in relation to

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124. See Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323.

125. See Reifner, *supra* note 53, at 143.

126. See Melissa Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 549 (2006); see also Ian Domowitz & Robert L. Sartain, *The Determinants of the Consumer Bankruptcy Decision* (Jan. 1997) (unpublished manuscript), available at <http://ssrn.com/abstract=70>.

127. See generally Clifford Geertz, *Thick Description: Towards an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3 (1973).

128. See David Nelken, *Comparative Sociology of Law*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* 329, 332 (Reza Banakar & Mex Travers eds., 2002).

129. See Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 771 (1996).

130. See generally CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 1, ch. 3, at 45.

131. See *id.* at 47.

132. See *id.* at 49.

such issues as counseling, the ability to reaffirm individual debts, and controls on access to the system.<sup>133</sup>

Niemi-Kiesiläinen's work illustrates the difficulties of comparing differing systems without understanding the internal point of view of a legal system. A U.S. researcher may see a repayment institution that "looks like chapter 13," but the researcher should go beyond this initial frame of reference to understand how this institution fits within the legal system and culture. Niemi-Kiesiläinen's research highlights the "differences in the way aspects of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society."<sup>134</sup>

Bankruptcy and debt adjustment regulation also raise issues that may be subsumed within more general themes in law and society, such as the study of professional power and influence. Professionals play an important role in the administration of bankruptcy and debt-adjustment schemes—lawyers in the United States, accountants in Canada, and professional debt counselors in many European countries. Bankruptcy and debt adjustment is a complex and sometimes arcane body of law. Individuals facing debt problems may need advice on credit law, repayment options, and the availability of state welfare and housing benefits. Studies of lawyer-client relationships suggest that consumer-lawyer relationships are often those of professional dominance.<sup>135</sup> In addition, given the technical nature of bankruptcy law, professionals may have a disproportionate influence on the structure and substance of the law. Bruce Carruthers and Terence Halliday, writing on the background to bankruptcy reform in the United States and England in the 1970s and 1980s, comment that "[b]ecause bankruptcy legislation is both infrequent, seemingly non-ideological, not of great electoral interest, and highly technical, it appears to be a site particularly amenable to professional dominance."<sup>136</sup> However, the recent enactment of BAPCPA over the opposition of many bankruptcy professionals and academics indicates the limits of professional influence over the passage of legislation (if not over its implementation). There are therefore two research questions here: (1) the effects of different professional groups on the nature and quality of the professional-client relationship in debt-adjustment proceedings; and (2) the relative power of professional groups in different political eras to influence the development of policy and the law.

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133. See *id.* at 52, 53, 56.

134. Nelken, *supra* note 128, at 333.

135. See, e.g., Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115 (1979). In relation to bankruptcy lawyers, see Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993). For a comparative analysis of professionals in consumer bankruptcy, see Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399, 455–60 (2000).

136. CARRUTHERS & HALLIDAY, *supra* note 83, at 74.

Finally, bankruptcy may be used as a method of highlighting pathologies in society such as inadequate unemployment relief or health-care. Bankruptcy may be the proverbial canary in the coal mine providing an early warning of social issues.<sup>137</sup> Comparative scholarship might illustrate common pathologies of contemporary international capitalism and the different methods adopted to temper these pathologies.

## V. CULTURE AND POLITICS IN COMPARATIVE CONSUMER BANKRUPTCY

Returning to the question of explanations for continuing differences between Western European and U.S. bankruptcy and debt adjustment laws, the differences might reflect cultural differences, the path dependency of legal institutions, or the political influence of interest groups. “Culture” is sometimes used to explain national differences in both the use of credit and attitudes to bankruptcy:<sup>138</sup> the Japanese are supposedly averse to consumer credit and regard bankruptcy as highly stigmatizing, whereas the French and Belgians are averse to borrowing.<sup>139</sup> These traits may change though. In England, the media suggest that a “debt culture” has emerged over the past couple of decades.<sup>140</sup> I think that we should be careful in appealing to culture as an explanation for the differences between developed countries’ approaches to debt and credit or to the patterns of rules and institutions that regulate the credit market. Two examples illustrate my hesitation about the adoption of cultural arguments.

The concept of U.S. exceptionalism<sup>141</sup> in consumer bankruptcy seems to be based on cultural arguments about shared U.S. attitudes to risk-taking, tolerance of failure, and cultural approaches to the role of the market.<sup>142</sup> Thus, U.S. legal culture, despite having more expansive

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137. See generally GROSSFELD, *supra* note 28, at 51.

138. See Tabb, *supra* note 1, at 774 (noting that Kilborn shows that the culture of consumer indebtedness has never really taken off in Belgium and Luxembourg); *id.* at 769 (contending that strong cultural attitudes against bankruptcy in Japan undermine legal transplantation of U.S. bankruptcy law); see also Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT’L & COMP. L. REV. 1 (2005).

139. See Martin, *supra* note 138, at 35–63.

140. See, e.g., GRIFFITHS COMMISSION, *supra* note 5, at 19–23. In relation to the issue of cultural change, see Ronald Inglehart & Wayne Baker, *Modernization, Cultural Change and the Persistence of Traditional Values*, 65 AM. SOC. REV. 65 (2000). For a discussion of the relationship of structure to culture, see Braucher, *supra* note 7.

141. See SEYMOUR LIPSET, *AMERICAN EXCEPTIONALISM* 17 (1996).

142. See, e.g., Tony Freyer, *Debt Failure and the Development of American Capitalism: Bruce Mann’s Pro-Debtor Republic*, 30 L. & SOC. INQUIRY 739 (2005) (noting that “commentators agree that compared to those in other commercial countries, Americans possess a strange indulgence towards bankrupts”). Regarding bankruptcy in America, Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook write:

Our bankruptcy law is distinctively American. . . . American bankruptcy laws are unique in concept, not merely in detail. They rest on notions of a fresh start and protecting the little guy, ideas some might describe as liberal. But they also differ from the rest of the world in being highly individualistic and in minimizing the role of governmental regulation and subsidy, values generally considered conservative. In one sense, bankruptcy is un-American, because we do not much like

civil liability than European countries, provides limited liability in the law of debtor-creditor relations and bankruptcy. U.S. protection is not limited solely to the liberal discharge. Wages are not assignable in the United States,<sup>143</sup> a debtor's home may be protected from execution and seizure in bankruptcy, and an individual may avoid the effects of a substantial individual judgment by declaring bankruptcy.<sup>144</sup>

In these accounts, culture seems to represent a broadly shared set of practices—almost a natural and apolitical phenomenon. Here law is the “the mirror of society.”<sup>145</sup> But this description obscures the contingent nature of cultural values, the historical conflicts in the development of a culture, and the winners and losers in cultural change. A historical perspective is essential here. It may show that culture is a contingent accommodation of conflicting ideas and interests. The idea of a “pro-debtor” culture in the United States does seem to be an important feature of U.S. history,<sup>146</sup> but may understate the continuing historical conflicts over the development of laws and institutions. David Skeel argues that the history of U.S. bankruptcy law reflects a persistent political conflict between the interests of creditors and a pro-debtor ideology with lawyers playing an important role in expanding the role of bankruptcy and often acting as spokespersons for debtor interests.<sup>147</sup> The development of chapter 13 of the U.S. Bankruptcy Code suggests competing “cultures” in bankruptcy. Since the Chandler Act, the U.S. Congress has been convinced that chapter 13 is “a more responsible way” for consumers to handle their debts.<sup>148</sup> The enactment of BAPCPA recognizes the ascendancy of that culture, although the actual impact of this legislation is difficult to predict at this time. An advocate for consumer debtors comments that “debtors and creditors alike may be surprised to find that some of the supposedly pro-creditor changes in the Code could benefit

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to think about failure. But it is peculiarly our own because of its solicitude for the risk-taker. In that sense, bankruptcy is as American as apple pie . . . .

TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 341 (1989); *see also* SCOTT SANDAGE, *BORN LOSERS: A HISTORY OF FAILURE IN AMERICA* 48–59 (2005).

143. Unlike, for example, in Germany.

144. Unlike, for example, in Canada, where this may result in a conditional discharge with a requirement to repay a portion of the debt.

145. For extended discussion of the mirror thesis, see BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001). Grossfeld argues that “every culture has its particular law, and every law its particular cultural life.” *See* GROSSFELD, *supra* note 28, at 14.

146. GROSSFELD, *supra* note 28, at 14.

147. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 80–89 (2001).

148. *See* Teresa A. Sullivan et al., *Who Uses Chapter 13?*, in *CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE*, *supra* note 1, at 269, 269–72 (providing a history of the development of chapter 13 in southern states, where it was often used by African Americans; describing a continuing geographic skew in the use of chapter 13, with its use “being concentrated in the southern states”; and noting the existence of substantial variations within states). Charles Tabb, referring to the legislative history of the Bankruptcy Reform Act of 1978, notes that “Congress intended for Chapter 13 to function as the primary rehabilitation chapter for individual consumer debtors.” *See* CHARLES TABB, *THE LAW OF BANKRUPTCY* 895 (1997).

some consumer debtors, that the credit industry has not accomplished all that it may have thought it did, and that practices may not change nearly as much as many people anticipate.”<sup>149</sup>

It might be better to substitute the term “ideology” for “culture.” This would draw attention to the contested nature of cultural formations. One does not need to be a historical materialist, for whom culture is a mere superstructure of economic relations, to take seriously the argument that the development of a “credit culture” in the United States involved processes of socialization that were nurtured by both private economic interests, which benefit from credit expansion, and state initiatives. Lendol Caldor’s history of consumer credit in the United States shows how installment credit became normalized in the 1920s partly through shifts in the views of what he describes as “opinion leaders,” such as the American Bankers Association, middle-class magazines, and academic studies such as Edwin Seligman’s *The Economics of Installment Selling*, which was commissioned by General Motors.<sup>150</sup> Caldor’s adoption of Jean Baudrillard’s argument that “credit is a disciplinary process”<sup>151</sup> that teaches individuals the habits of regular repayment and budgeting—the counterpart in the field of consumption to Taylorism in the workplace—underlines the political nature of the development of a consumer credit culture.<sup>152</sup> Lizabeth Cohen describes the “explosion” of consumer credit in the United States after the Second World War that was accompanied also by the growth of consumer bankruptcy.<sup>153</sup> This growth of credit represented a conscious political creation of a “consumers’ republic”—a consumer marketplace supported and encouraged by government policies such as low-cost mortgages and tax-subsidized consumer credit—that promised not merely high employment but also democracy and equal status without the necessity of a significant welfare state.<sup>154</sup> This may be taken as postwar U.S. consumer “culture.” But Cohen also draws attention to the continuing political conflicts at many

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149. See Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AMER. BANKR. L.J. 191, 230 (2005).

150. LENDOL CALDOR, FINANCING THE AMERICAN DREAM 211–61 (1999).

151. Baudrillard writes:

Credit here plays a determining role . . . . The idea is exemplary. Presented under the guise of gratification, of a facilitated access to affluence . . . and of “freedom from the old taboos of thrift, etc.,” credit is in fact the systematic socioeconomic indoctrination of forced economizing and an economic calculus for generations of consumers . . . . Credit is a disciplinary process which extorts savings and regulates demand—just as wage labour was a rational process in the extortion of labour power and in the increase of productivity.

JEAN BAUDRILLARD, *Consumer Society*, in JEAN BAUDRILLARD: SELECTED WRITINGS 49 (1988).

152. See generally CALDOR, *supra* note 150.

153. LIZABETH COHEN, A CONSUMERS REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 124 (2004) (noting that in 1935, 35% of the 70,000 personal bankruptcies were by wage earners, whereas in the mid-1950s, 85% of the 80,000 personal bankruptcies were by wage earners). Cohen also notes that the 1955 Economic Report of the President acknowledged that “people are no longer timid about borrowing.” *Id.* at 22.

154. See generally COHEN, *supra* note 153.

levels over the development of this republic that implicated issues of class, gender, and race.<sup>155</sup> Although the consumers' republic was intended to promise equality and class mobility without a substantial welfare state, consumer credit did not reduce class distinctiveness, and other aspects of state policy such as how the Taft-Hartley Act reduced the power of organized labor.<sup>156</sup>

During this period, the understanding of consumer bankruptcy as a safety net had its fullest expression in the 1973 Report of the Bankruptcy Commission, which emphasized the importance of the "fresh start" in allowing a debtor to become productive and reenter the credit economy.<sup>157</sup> Rafael Efrat documents the changing social norms about bankrupts and the bankruptcy system in the United States during this period, arguing that it was not until the 1960s that bankrupts were regarded in a sympathetic manner—as casualties rather than fraudsters or deviants.<sup>158</sup> This social insurance function of bankruptcy law, protecting those who through no fault of their own get into financial difficulty, performed a legitimating role for the credit system during this period by holding out the promise of a fresh start for those who fail. During a period when capital was dependent on a large industrial workforce, the rhetoric of the fresh start to ensure productive labor was appealing.<sup>159</sup> This rhetoric may no longer resonate in an economy with a large group of generic labor that is easily replaceable<sup>160</sup> and a neoliberal ideology of individualization of risk where safety-net benefits are viewed as providing "something for nothing" to the recipients.<sup>161</sup>

Conceiving of bankruptcy law as ideology also invites empirical research that, in vulgar Marxist analysis, shows the ideology to be a "false conception of reality." Thus, Katherine Porter and Deborah Thorne indicate that bankruptcy fails to provide a fresh start for the one-third of consumer bankrupts who face continuing problems of inadequate income.<sup>162</sup> While presumably two-thirds of debtors did receive some relief, this finding provides some support for Udo Reifner's argument that the introduction of the U.S. "straight discharge" in Europe would not address underlying problems of unstable income and unemployment, and could reduce pressure to ensure adequate public support programs.<sup>163</sup>

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155. *Id.*

156. *Id.* at 164.

157. Bankruptcy should "rehabilitate debtors for continued and more value-productive participation" in the economy. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 71 (1973).

158. See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365, 389-90 (2006).

159. See William Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. CONSUMER POL'Y 179, 194-95 (1997).

160. See CASTELLS, *supra* note 8, at 385.

161. See COHEN, *supra* note 153, at 397.

162. See Katherine A. Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=894453>.

163. Reifner, *supra* note 53, at 146.

This research could be linked to broader research on the relationship of credit to social divisions and the winners and losers in the credit society.<sup>164</sup>

A second example of culture is the case of Japan. Japan is often used to illustrate the importance of cultural attitudes. The argument is that overindebtedness and bankruptcy represent a substantial cultural stigma in Japan, causing some individuals to commit suicide rather than declare bankruptcy.<sup>165</sup> However, changes in Japanese insolvency law and bankruptcy practice have made insolvency more accessible, and Japan now has a bankruptcy rate higher than England and Wales.<sup>166</sup> This may have reduced the suicide rate.<sup>167</sup> This observation suggests that institutions matter. Other studies of legal institutions in Japan indicate that institutional and legal factors lie behind supposed cultural attitudes, and consequently a change in these factors may affect social norms.<sup>168</sup> Ronald Mann demonstrates that the institutional structure of Japanese banking and telecommunications prevented the growth of credit card borrowing in that country, rather than a cultural aversion to such cards.<sup>169</sup> Similarly, if we turn to experience in other countries, lower levels of consumer credit in France and Belgium may reflect the impact of interest rate ceilings, negative credit reporting, and limits on taking security on a home rather than a French or Belgian aversion to borrowing.<sup>170</sup> Of course, an argument could be made that these institutional constraints on credit reflect a general cultural consensus. But this should stimulate further investigation of the consensus claim about the particular culture.

Culture is a complex phenomenon, and I do not pretend in the above comments to have provided a systematic account of its role in relation to credit, debt, and bankruptcy.<sup>171</sup> My purpose was to indicate the need to probe carefully claims that law, in this sense, reflects culture—

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164. See ROBERT MANNING, *CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT* 297 (2000).

165. See Martin, *supra* note 138, at 13–64.

166. See Kent Anderson, *Japanese Insolvency Law After a Decade of Reform*, 43 *CAN. BUS. L.J.* 2, 20 (2006).

167. West, *supra* note 116 (Changes in bankruptcy law may be one factor in reducing stigma and shame and possibly suicide.); see Anderson, *supra* note 166, at 14 (“Japan has experienced an exponential growth in formal insolvencies over the past decade.”).

168. See Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 *L. & SOC'Y REV.* 651, 654–55 (1990) (concluding that the nonlitigiousness of the Japanese is not explained by Japanese attitudes to litigation but by the institutional structures for the management of disputes).

169. Ronald Mann, *Credit Cards and Debit Cards in the United States and Japan*, 55 *VAND. L. REV.* 1055 (2002).

170. See Tullio Jappelli & Marco Pagano, *Information Sharing in Credit Markets: A Survey* (Ctr. for Studies in Econ. and Fin., Working Paper No. 36, 2000), available at <http://www.iue.it/FinConsEU/ResearchActivities/EconomicsOfConsumerCreditMay2003/Papers/Jappelli.pdf>; Tullio Jappelli & Marco Pagano, *Information Sharing, Lending and Defaults: Cross Country Evidence* (Ctr. for Studies in Econ. and Fin., Working Paper No. 22, 1999), available at <http://ssrn.com/abstract=183975>.

171. One important omission in my discussion is the role of credit in countries with a dominant Islamic population.

understood as a national consensus on values. Johanna Niemi-Kiesiläinen may be correct in arguing that debt adjustment laws in Scandinavia represent a shared culture,<sup>172</sup> but one might ask how far such a model may be generalized beyond Scandinavia.

We may wish to investigate the distinction between the “legal culture” of bankruptcy, defined as the framework of meaning and practice adopted by courts and lawyers, and the “external legal culture”—the understanding of social groups and the public.<sup>173</sup> We should not necessarily assume that legal change (e.g., the introduction of a discharge for debts) brings about cultural change simply because more individuals now choose to use this procedure. It is possible that the demand was always there, but that the supply was simply too costly or unavailable.

Functionalism may explain the need for the introduction of a safety valve in a society with high levels of consumer credit. The particular approach adopted by a country may, however, be explained by reference to the interests and ideologies at play in the development of consumer bankruptcy law and the regulation of overindebtedness.<sup>174</sup> A conventional view of bankruptcy law is that it reflects a balance between creditor and debtor interests, and it is certainly possible to line up countries on a “creditor friendly/debtor friendly” axis. However, a focus solely on creditors and debtors obscures the role of other interests in shaping bankruptcy policy. David Skeel argues that the U.S. bankruptcy bar and judiciary played a key role in the United States, both in promoting the expansion of consumer bankruptcy and in acting as a spokesperson for debtors.<sup>175</sup> If the U.S. consumer bankruptcy system is unique, it is partly because of the central role of lawyers in consumer bankruptcy administration and policy. The role of lawyers is so deeply embedded in the U.S. system and their impact so pervasive that it is likely that institutional reforms attempting to “delegalize” bankruptcy with a greater role for debt advice agencies on a European model would not be successful. Notwithstanding the spread of a global “consumer credit society,” the shape of the institutional structure for addressing debt may depend on the role of those interest groups closely associated with a particular structure.

The dominant role of lawyers in the U.S. consumer bankruptcy system contrasts with England and Wales, where lawyers play little role in advising overindebted consumers. This role is played by debt advice

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172. See Johanna Niemi-Kiesiläinen, *Constructions of Debtors and Creditors in Consumer Bankruptcy*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 1, at 41.

173. See Nelken, *supra* note 128, at 335 (referring to Lawrence Friedman’s concept of legal culture).

174. For existing studies of individual countries, see SKEEL, *supra* note 147; Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997); Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379 (2003).

175. See SKEEL, *supra* note 147, at 17, 43.

agencies, such as Citizens Advice Bureaux, a nationwide network of publicly subsidized advice centers.<sup>176</sup> In other European countries, debt counselors are the professionals who shepherd individuals through the process. We might expect therefore that any response to debt problems would be shaped partly by these groups and that they would promote and protect their role within the debt repayment system. In Canada, the trustee in bankruptcy, generally an accountant, plays a central role in the bankruptcy process, acting as advisor to the debtor, administrator of the estate, and representative of creditor interests.<sup>177</sup> The recent history of Canadian bankruptcy reforms provides examples of trustees in bankruptcy promoting their interests in consumer bankruptcy.<sup>178</sup> These professional groups may be able to influence agenda setting in reform, both in ensuring that certain items are on the agenda and that others are not. Pro-debtor laws in a country may often therefore be a side wind of the agenda of other groups.

The role of state agencies in bankruptcy may be significant both as a reflection of interest group influence and as promoting distinct interests in bankruptcy administration and policymaking. The United States remains a relatively privatized bankruptcy system, and it is well known that the U.S. bar and judiciary opposed the creation in the 1970s of an executive agency similar to the Canadian model that would process no-asset cases and exercise close control over the bankruptcy process.<sup>179</sup> Paradoxically, the Canadian system became increasingly privatized in the late 1970s as private trustees found that processing low-income bankrupts could be profitable and the government came under increasing cost-cutting pressures.<sup>180</sup> In England and Wales, the great majority of consumer bankrupts are processed by the state through the Official Receiver's office. However, individuals must pay a significant upfront fee for this service.<sup>181</sup> In Australia, by contrast, the public Official Receiver continues to process the great majority of consumer cases at no cost to the debtor.<sup>182</sup> Notwithstanding the similar influences in England and

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176. MICHEL DEBEAUVAIS, NATIONAL EDUCATIONAL RESEARCH POLICIES: A WORLD SURVEY 103 (1990), available at <http://unesdoc.unesco.org/images/0008/000854/085487eo.pdf>.

177. Ramsay, *supra* note 135, at 399.

178. Ramsay, *supra* note 174.

179. Ramsay, *supra* note 135, at 406 n.32.

180. Ramsay, *supra* note 174, at 385; Ramsay, *supra* note 135, at 407-08.

181. An individual must pay a lump sum deposit of £325 as well as court fees of £150. See Insolvency Proceedings (Fees) Order, 2004, S.I. 2004/593, art. 6, ¶ 1 (U.K.), as amended by Insolvency Proceedings (Fees) (Amendment) Order, 2006, S.I. 2006/561, art. 2, ¶ 2 (U.K.); see also Insolvency Rules, 1986, S.I. 1986/1925, r. 6.42(1) (U.K.) ("The petition and the statement of affairs shall be filed in court, together with three copies of the petition, and one copy of the statement. No petition shall be filed unless there is produced with it the receipt for the deposit payable on presentation.").

182. The Australian government rejected proposals to introduce a fee after research indicated that the cost to government of processing bankrupts was \$AU250. INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA, COST RECOVERY IMPACT STATEMENT 6 (2005), available at [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3ECost%20Recovery-%3ECost%20Recovery%20Documents/\\$FILE/CRIS\\_230205.pdf](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3ECost%20Recovery-%3ECost%20Recovery%20Documents/$FILE/CRIS_230205.pdf). This report notes that

Australia of neoliberalism and a user-pay model of government services, these countries differ in an important aspect of bankruptcy administration. The recognition of bankruptcy as a regulatory system invites further comparative research on the dynamics of the relationship of state agencies to the various actors in the bankruptcy system. This is an untapped area of research. For example, I know of no comparative analysis of the role of the Office of Superintendent of Bankruptcy in Canada and the U.S. Trustee Service.

Political conflict over debtor-creditor relations takes place within the broader context of national ideologies and also increasingly the influence of international interests and ideologies, such as neoliberalism. However, ideology is not always a pervasive part of bankruptcy reform. Reforms are often worked out through “expert groups” and working committees composed of those with a strong interest in what remains a relatively technical area of law. Bankruptcy law is a relatively esoteric subject and seems to go through cycles. During certain economic periods, bankruptcy policymaking is very much the domain of policy experts and those who operate the system. Governments are happy to delegate policymaking to “policymaking communities.” This may permit rent-seeking by insiders as well as professional dominance in reform. During certain periods, bankruptcy changes may interact with broader concerns, such as the competitiveness of business, or become a focus for moral panics or concerns about social disintegration.<sup>183</sup> During the nineteenth-century transformation of the English economy, bankruptcy preoccupied Victorian society, sparking intensive debate and legislative reforms.<sup>184</sup> It was of concern to the business community, legal profession, and government because an effective bankruptcy law was viewed as crucial to sustaining confidence in the credit system that underlay the British economy.<sup>185</sup> It was also seen as a national issue because of the “tax” that bankruptcy passed on to the consumer.<sup>186</sup> The landmark 1883 legislation enacted towards the end of this period survived unchanged, except for minor revisions, until the 1970s.<sup>187</sup> A writer on debt in the early 1970s could state confidently that the study of debt and debt collection was a topic of “low visibility.”<sup>188</sup> The unusually active contemporary period in

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[a]ll stakeholder groups (including creditors) have criticised the proposal on the basis that charging people seeking protection of the insolvency system would be inconsistent with personal insolvency policy. . . . [T]he personal insolvency system provides an overriding general community benefit, not just relief for the debtor, so the cost of processing the petitions . . . should be met by taxpayers, not individual debtors.

*Id.* at 18.

183. See WEISS, *supra* note 4, at 20 (“Increasingly the novelists saw bankruptcy as a symptom of social disintegration, of a world that was losing its sustaining ties of community, stability, and order.”).

184. See LESTER, *supra* note 4.

185. *Id.*

186. *Id.*

187. *Id.*

188. PAUL ROCK, MAKING PEOPLE PAY 4 (1973).

consumer bankruptcy reforms in many countries may be the prelude to a new era of stability.

## VI. CONCLUSION

While historians disagree as to what constitutes a consumer society,<sup>189</sup> John Benson suggests that they are “societies . . . in which choice and credit are readily available, in which social value is defined in terms of purchasing power and material possessions, and in which there is a desire, above all, for that which is new, modern, exciting and fashionable.”<sup>190</sup> Study of the pathology of consumer credit in contemporary societies—overindebtedness—ought to provoke reflection on the material and ideological forces at work in these societies. Credit has historically had a close connection to power, both literally as a means of financing governments but also in defining and symbolizing social divisions.<sup>191</sup> In the United States, consumer credit was held out as promising democracy and equality. But, paradoxically, high levels of consumer credit coexist in the United States with high levels of inequality compared with other developed countries.

Comparative studies of overindebtedness have focused primarily on the important task of describing the nature and assumptions of different legal systems’ handling of indebtedness, the role of different policies in combating overindebtedness, and the possibility of legal transplants. As this area develops, we may expect more interdisciplinary studies that link detailed ethnographies or quantitative analyses to broader theorizing about the role of credit, debt, and legal enforcement in different societies. We would not expect that consumer capitalist societies would leave such an important issue as ensuring the repayment of debts to chance or the vagaries of legal enforcement. Although this may result in some convergence between these countries, variations on a theme are often illuminating. Within all this, a historical perspective will be important.

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189. See Craig Clunas, *Modernity Global and Local: Consumption and the Rise of the West*, 104 *AM. HIST. REV.* 1497 (1999) (reviewing several books on consumer culture).

190. JOHN BENSON, *THE RISE OF CONSUMER SOCIETY IN BRITAIN, 1880–1980*, at 4 (1994) (footnote omitted) (summarizing the view of several scholars).

191. See, e.g., FINN, *supra* note 4, at 9–10.

