Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies

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Traditionally, civil law jurisdictions in Scandinavia and the continent of Europe have not been willing to acknowledge the appropriateness of extending bankruptcy relief to consumer debtors and discharging any part of their debts. The opposition was based on the importance of upholding the sanctity of contractual obligations: pacta sunt servanda. This attitude stood in contrast to the fresh start philosophy of US bankruptcy law, which embraced a more forgiving attitude, focusing on the reintegration of the insolvent debtor into society, substantially free of debt, after he has filed for bankruptcy and surrendered his non-exempt property for distribution among his creditors.

The relaxation of credit controls and the rapid increase in the number of insolvent debtors in the late 1980s and early 1990s has forced many continental jurisdictions to reconsider their traditional opposition. They have since adopted debt adjustment plans providing various forms of debt relief to overcommitted debtors but only a substantial number of years after the initial proceedings. The American reaction has gone in the opposite direction. With the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the United States has reversed its century old liberal fresh start tradition. The 2005 Act imposes a formidable means test as well as other preconditions to determine whether a debtor has sufficient discretionary income to pay off twenty percent of his or her unsecured debts under a Chapter

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13 plan. If the answer is yes, the debtor is denied the right to file a bankruptcy petition under Chapter 7 of the Bankruptcy Code.

This paper asks whether these developments on opposite sides of the Atlantic suggest that facts on the ground are more important than dogma and deeply entrenched beliefs. The author's answer is that while there is certainly a trend towards convergence between continental European and US approaches to consumer insolvency, it is much too soon to speak of a common culture and a common approach. He notes, however, that Commonwealth jurisdictions (notably Australia, England and Canada) have long adopted a means test to determine a debtor's eligibility for discharge from debt and suggests that continental scholars would have done better to study the Commonwealth experience as embodying a suitable compromise than to flirt with the US fresh start philosophy, only to reject it as too alien to the continental moral sense.

INTRODUCTION

Comparative consumer insolvency law is the newest branch of insolvency law, and is only 25 years old.[1] Its newness is due to the fact that until the mid-1980s there was little to compare with outside the common law jurisdictions. This was because the civil law countries in continental Europe and the Scandinavian countries either did not recognize the availability of consumer bankruptcies or, if they did, did not recognize the possibility of a discharge of the consumer's debts at the end of the proceedings[2] — a critical component of meaningful relief for seriously overcommitted debtors.

The leading common law jurisdictions — the US, England, Canada, Australia — were significantly more accommodating than their civil law cousins. Even here, however, there were hurdles to overcome on the way to reconciling major differences. Only the US had a firmly entrenched and near century-old fresh start policy and gave debtors easy access to the bankruptcy system as well as an optional Chapter 13 compositional

1 *See* Jacob Ziegel, *The Challenges of Comparative Consumer Insolvencies*, 23 Pa. St. Int'l L. Rev. 839 (2005); Sefa M. Franken, Book Review, 68 Mod. L. Rev. 169 (2005); Kent Anderson, Book Review, 42 Osgoode Hall L.J. 661 (2004).

2 Jacob Ziegel, Comparative Consumer Insolvency Regimes: A Canadian Perspective, ch. 7(1) (2003) (especially page 135); *Cf.* Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. Consumer Pol'y 125 (1992).

alternative. In the other enumerated common law countries, access to the system was expensive, a powerful stigma still attached to bankruptcy, and discharge of debts was at the court's discretion and was generally only available a substantial number of years after the initial filing.

The legal scene has changed dramatically since the mid-1980s. The Scandinavian countries and most of the leading civil law jurisdictions on the continent — Germany, France, Austria, the Netherlands, Belgium and Luxembourg — have adopted consumer insolvency or debt adjustment legislation.[3] The legislation recognizes at least the possibility of a partial or complete discharge of the debtor's outstanding debts, albeit only at the end of a very substantial, and in some cases, onerously long, period of mandatory repayments and close supervision of the debtor's conduct. Civil law jurisdictions in Latin America and Southeast Asia have followed suit with comparable legislation or are showing interest in doing so. In Southeast Asia, Japan is a particularly arresting example of a powerful industrial state with a combined indigenous and civilian insolvency tradition whose consumer insolvency law moved perceptibly closer to the common law models in the 1990s and early 2000s.[4]

The common law jurisdictions have not stood still either. Over the past 20 years, Canada, England and Australia have all made their consumer insolvency legislation and procedures much more user-friendly.[5] The

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3 For the details see Ziegel, *supra* note 2, at 137-43 (ch. 7(2) and ch. 7(3)).

4 *See* Mark D. West, *Dying to Get Out of Debt: Consumer Insolvency Law and Suicide in Japan*, *in* Law in Everyday Japan: Sumo, Sex, Suicides and Statutes 215 (2005); Kent Anderson & Stacey Steele, *Insolvency*, *in* Japan Business Law Guide 15-001 to -312 (Veronica Taylor ed., 2003); Kent Anderson & Makoto Ito, *Insolvency Law for a New Century: Japan's New Framework for Economic Failures*, *in* Law in Japan: Into the 21st Century (Dan Foote ed., 2006). *See also* Kent Anderson, *Japanese Insolvency Law After a Decade of Reform*, 43 Can. Bus. L.J. (forthcoming 2006) (especially pt. III, graph 2 (Growth of Japanese Consumer Insolvencies as Ratio of Population) and graph 6 (Comparative Individual Bankruptcy/Liquidation Ratios 1980-2004)).

5 For the details see Ziegel, *supra* note 2, ch. 2(2) (Canada), ch. 4 (Australia), and ch. 5 (England and Wales). With respect to England, see also the important recent report, The Insolvency Service, Relief for the Indebted — An Alternative to Bankruptcy?, *available at* http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/reliefortheindebtedanalternativetobankruptcyresponse.pdf (Mar. 2005) (advancing a proposal for a fast track non-judicial debt relief procedure for low-income no-asset debtors to augment the existing administration order debt relief regime under the County Courts Act and to provide a realistic alternative to the high cost personal insolvency procedures

bankruptcy stigma has been substantially diluted and discharge of unpaid debts is near automatic or completely automatic in a broad run of cases, although not along the US fresh start lines, as I will explain later. The critical distinction between the US fresh start policy, as it existed until very recently, and the Commonwealth jurisdictions' approach lay in the treatment of the debtor's post-bankruptcy income and the timing and conditions of the debtor's discharge. Contrary to a widely held belief among civilians, until April 20, 2005 a wide gulf separated the Commonwealth countries from the US Bankruptcy Code with regard to these basic features.

The ideological gap has narrowed perceptibly with President Bush's signature on April 20, 2005 of the five hundred-page Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BAPCPA), which was approved by large majorities in both branches of Congress earlier in the year. Easily the most important conceptual change wrought by BAPCPA is the introduction of a mandatory means test for all new personal bankruptcy filers.[6] In turn, this will trigger denial of access to Chapter 7 of the Code to those filers with median state incomes or better, whose net disposable income after deduction of recognized expenses is deemed sufficient to enable them to enter into a Chapter 13 debt adjustment plan with their creditors. Prior to BAPCPA, the US was rightly regarded as the jurisdiction with the most generous fresh start policy in the Western hemisphere for first-time consumer bankrupts. BAPCPA has fundamentally changed the direction and mood of US consumer bankruptcy philosophy and has brought it much closer in concept, though surely not in execution and detail, to the qualified fresh start policy and means test model practiced in the other common law jurisdictions.

These dramatic changes did not occur in an economic and social vacuum. They were inspired by the dismantling of usury barriers and other credit restrictions in North America and Western Europe, by the rapid growth of consumer credit of all types but especially (in North America) the use of credit cards, and by an equally rapid and disturbing increase in the number of overindebted consumers.[7]

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under the Insolvency Act, 1986, c. 45, as amended). On the role of administration orders, see Ziegel, *supra* note 2, at 122-24 (ch. 5(4)(c)).

6 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, §102, Pub. L. No. 109-8, 119 Stat. 23 (2005). For a summary of the principal consumer provisions, see Am. Bankr. Inst., 25 Changes to Personal Bankruptcy Law, *at* http://abiworld.net/bankbill/changes.html (last visited Mar. 1, 2006).

7 Here are some figures. Between 1985 and 1997 the number of Canadian personal insolvencies increased from 19,752 to 90,034, and increased further to 102,539 in 2001. ("Personal insolvencies" include business-related insolvencies.) In the US, the number of consumer insolvencies reached 1.596 million in 2004. The number

Given that the basic social and economic phenomena appear to be similar in advanced economies, it is relevant to ask whether we are witnessing a meaningful convergence in the remedial laws adopted to address the problems of overcommitted consumers — whether, in short, pragmatism and facts on the ground have inspired the crop of *fin de siécle* 20th century legislation — or whether basic ideological differences still distinguish the civil law from the common law approach. If we conclude that there is still such a distinction (as many would argue there is), then we must ask which of the two approaches we find more compelling. It is important to stress, however, that the ideological divide is not peculiar to the civil and common law approaches. Prior to the enactment of BAPCPA, non-US common law observers often perceived the US fresh start doctrine, as enshrined in the 1978 US Bankruptcy Code, to be as ideologically driven in its own way as was the civil law commitment to the sanctity of contractual obligations.[8] They believed that this fundamentally distinguished the US approach from the heavily qualified discharge doctrine applied in the other common law insolvency systems. This paper, therefore, attempts to address the ideological component at both ends of the insolvency spectrum.

I. Civil Law Reforms 1984-2005

A. The Ethos of Traditional Civil Law

Jason Kilborn has given us three meticulously detailed and documented accounts of the evolution and current status of the German, French, Belgian and Luxembourgian consumer insolvency and debt adjustment laws

of insolvencies in England and Wales grew from 6,776 in 1985 to 24,441 in 1997 and reached 46,650 in 2004. The number of Australian personal insolvencies grew from 8,761 in 1986-87 to 24,109 in 2001-02. In Germany, where bankruptcy relief for consumers only became available in 1999, 20,000 personal bankruptcy and small business petitions were filed in the first full year of operation of the 1994 law; 44,000 petitions were filed in 2002 after the 2001 amendments to the Insolvenz Ordnung (Insolvency Law). In 2004, the figure reached 48,000. Ziegel, *supra* note 1, text accompanying note 16. In Japan, the number of individual bankruptcies increased from 160,457 in 2001 to 214,633 in 2002. *Cf.* Japan Information Centre, *at* http://www.jicc.co.jp/f/index.html (2005). According to a New York Times report, as many as 2 million Japanese were effectively bankrupt in 2002. Ken Belson, *Struggling in Debt, Sacrificing Pride*, N.Y. Times, Dec. 28, 2002, at C1. West, *supra* note 4, at 3, compares a similar estimate by a Japanese bankruptcy attorney.

8 This author was among those who reached this conclusion.

enacted between 1989 and 2004.[9] Johanna Niemi-Kiesilainen, a distinguished Finnish scholar, previously told us in two powerful critiques[10] that what the continental laws and the Scandinavian insolvency regimes share is a common socializing philosophy based on the sanctity of contractual obligations that sharply distinguishes the European approach from the market-oriented Anglo-Saxon fresh start policy. According to Niemi-Kiesilainen, the object of the Anglo-Saxon fresh start philosophy is to relieve the consumer of the burden of accumulated debts at the earliest possible opportunity and to restore the consumer as an active participant in the marketplace. The civil law programs, on the other hand, have different goals. They are designed to impress upon the consumer the importance of observing her debt obligations, and to impose on her a period of rehabilitation and repayment of debts that may run for as long as ten years, and which (in France's case) only grudgingly holds out any prospect of a partial or complete discharge at the end of the period.

B. A Critique of the European Civil Law Approach

Consumer insolvency comparativists have both the opportunity and the obligation to evaluate the theoretical underpinnings and assumptions of the different approaches to consumer insolvencies and to test them against the available data. I claim no first hand knowledge of the western European and Scandinavian laws and their practical operation. Instead, I have used secondary sources I believe to be reliable to educate me on these points. This study has led me to believe that the civilian approach is vulnerable to challenge on the following grounds.

9 Jason Kilborn, *La Responsabilisation de l'Economie: What the U.S. Can Learn from the New French Law on Consumer Indebtedness*, 26 Mich. J. Int'l L. 619 (2005) [hereinafter Kilborn, *La Responsabilisation*]; Jason Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 Am. Bankr. Inst. L. Rev. (forthcoming 2006) [hereinafter Kilborn, *Belgium and Luxembourg*]; Jason Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 New J. Int. L. & Bus. 257 (2004) [hereinafter Kilborn, *Innovative German Approach*].

10 Johanna Niemi-Kiesilainen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 Osgoode Hall L.J. 473 (1999); Johanna Niemi-Kiesilainen, *Collective or Individual? Construction of Debtors and Creditors in Consumer Bankruptcy*, *in* Consumer Bankruptcy in Global Perspective 41 (Johanna Niemi-Kiesilainen et al. eds., 2003) [hereinafter Niemi-Kiesilainen, *Collective or Individual?*].

1. There is No Obvious Justification for the Stigma Attached to the Overcommitted Debtor in Civilian Insolvency Systems, and No Convincing Correlation Between the Debtor's Conduct and the Rehabilitative Requirements

The civilian philosophy appears to be that an overindebted debtor who has not met her contractual obligations has breached a basic moral and legal code, a breach that may, if a sufficient number of debtors follow suit, jeopardize the whole basis of the modern credit system. This view is redolent of the philosophy that permeated the common law treatment of insolvent debtors for much of the 19th century and before.[11] The 19th century common law reaction was largely unsuccessful in correctly diagnosing and addressing the root problems of personal bankruptcies and, it seems, their 20th century civilian successors may have succumbed to the same mistaken dogma.

We are told that the European debt adjustment laws are only accessible to those debtors who have acted honestly and have not abused the credit system.[12] This being the case, it is difficult to see how one can reproach a debtor who, through no fault of his own, has lost his job because of a plant closing or general recession, who has fallen ill, or whose marriage has fallen apart. The same observation applies to a working family that relied on two incomes to meet heavy financial commitments and now finds itself unable to keep up the payments because one of the partners has lost her job or is no longer able to work.[13] Such misfortunes deserve our sympathy, not moral condemnation, and it is difficult to see what a long rehabilitation period and exacting payment requirements can accomplish to remedy the debtor's plight.

There is also another aspect that appears to be overlooked in the civilian calculus. Even if one assumes the debtor(s) acted unwisely in assuming so much debt to begin with, behavioral economists and psychologists have shown that impulsive behavior in making credit purchases is common among consumers, and is not evidence of a character defect.[14] Indeed, impulsive

11 *Cf.* V. Markham Lester, Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England (1995) (especially ch. 3).

12 *Cf.* Niemi-Kiesilainen, *Collective or Individual?*, *supra* note 10, at 41, 43.

13 *Cf.* Elizabeth Warren & Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Mothers and Fathers are Going Broke (2003).

14 Professor Jackson was the first insolvency scholar to apply the behaviorists' findings to rationalize the US fresh start doctrine (although he also invoked other grounds). *See* Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 232-41 (1986) (ch. 10). His example has since been followed by others. *See, e.g.*, Saul Schwartz, *Personal Bankruptcy Law: A Behavioural Perspective*, *in* Consumer Bankruptcy in Global Perspective, *supra* note 10, at 61; Jason Kilborn, Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes

behavior is relied on heavily by the credit industry to promote the use of its products.[15]

2. The Moralistic Approach Ignores the Singular Nature of Consumer Credit and Ignores the Credit Industry's Superior Capacity for Policing Debtor Behavior

A distinctive feature of much consumer credit is that it encourages present consumption and defers the obligation to pay into the future. Here too behaviorist researchers have done much to illuminate this phenomenon and have shown that when assuming credit obligations consumers often discount the risk of not being able to meet future installment payments (cognitive dissonance). Another important ingredient is the high cost of consumer credit and its ballooning effect, especially with respect to credit cards, where the debtor fails to make a timely payment, exceeds her credit limits, or is guilty of some other infraction of the credit card agreement.[16] All of this suggests that governments should place a much heavier burden on the credit

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and Evaluating Solutions (June 2005) (Cegla Center conference paper), *available at* http://ssrn.com/abstract=690826; *See also* Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 Theoretical Inquiries L. 431 (2006).

15 Two simple examples must suffice. The first is the familiar "come on" used by North American credit card companies to attract new card subscribers by offering low interest rates during the first three or six months' life of the credit card, only to be followed at the end of the introductory period by much higher rates. The second example is the common form of credit advertising used by merchants informing the consumer that the first payment will only become due twelve months or some other long period after the purchase (and incidentally without alerting the consumer to the fact that interest liability will still accrue during this period or is incorporated into the price; it is only the obligation to start paying that is postponed). Another common form of impulsive behavior (to which this author has also frequently fallen victim) is to visit a store to make one credit card purchase and to end up making more purchases because the merchandise looked attractive and the purchases seemed so "convenient." I do not mean to suggest the card companies are responsible for this infectious type of behavior though they must surely know of and rely on it in making their calculations of prospective credit card use.

16 Credit card rates in Canada currently run from 18-20% per annum in advertised rates. The cost of department store revolving credit may be as high as 30%. The cost of "pay day" loans may be over 500% depending on how one calculates the various items and on whether the debtor has missed one or more payments. Credit card advertising often also underplays the impact of high interest charges and delinquency penalties and the danger of putting the consumer on a treadmill from which he cannot extricate himself. *See also* National Consumer Credit Centre, *Hearings on Improved Credit Card Disclosure Before the U.S. Senate Subcommittee*, Am. Bankr. Inst. Update, May 19, 2005. *Cf.* Ronald J. Mann, *Optimizing Consumer*

industry to prevent consumers from overextending themselves and that they should sanction those creditors who exploit consumer weaknesses for their own gains. Some modest efforts have been initiated along this line in Western European countries (almost none have been made in North America),[17] but these measures seem to fall short of what is needed if creditor policing of debtor behavior is to be taken seriously. An economist might contend that the threat of the debtor declaring bankruptcy and the creditor not being able to recover the balance of its debt is the most effective sanction.[18] However, this reasoning overlooks the fact that the sanction can be heavy-handed and that it penalizes the careful as well as the risk-prone creditor. It can also hurt involuntary creditors, and this is a widely adopted reason in common law jurisdictions for excluding a variety of debts from the catalogue of dischargeable debts in bankruptcy.

3. The Rocky Road of Credit Counseling and Financial Education

Many regulators in the Western hemisphere have warmly embraced the virtues of credit counseling and financial education for overcommitted debtors. Such programs also occupy a high profile in BAPCPA.[19] Credit counseling was made mandatory under the 1992 amendments to the Canadian Bankruptcy and Insolvency Act (BIA).[20] Together with financial education,

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Credit Markets and Bankruptcy Policy, 7 Theoretical Inquiries L. 395 (2006) (especially pt. I).

17 The German and French laws and the recently adopted Swiss Federal Law on Consumer Credit of March 2001 require creditors to exercise prudence in extending credit and to report defaults to a central credit bureau. However, there is no available data on the impact these requirements have had on actual credit practices. The British government also introduced extensive amendments in a December 2004 bill to the Consumer Credit Act 1974. *See* the Consumer Credit Bill, H.L. Bill 34 54/1 (2004), *available at* http://www.publications.parliament.uk/pa/ld200506/ldbills/042/2006042.pdf. These too were mainly designed to improve disclosure of the cost of consumer credit and amounts owed by consumers under existing agreements, and to improve policing of usurious interest rates. Additional steps for improving responsible credit extension practices are considered in The Griffiths Commission on Personal Debt, What Price Credit?, *available at* http://www.niace.org.uk/news/Docs/Griffiths-report-on-personal-debt.pdf 91, 107 (chs. 10, 12, and especially Recommendation 28). In the US, BAPCPA contains no restrictions on credit agreements and imposes no sanctions for credit grantors' abusive practices; nor does the Canadian insolvency legislation. *See also* Ziegel, *supra* note 2, at 150-51 (ch. 8(2)(c)).

18 Professor Jackson gives this as a reason in support of the US style fresh start rule. *See* Jackson, *supra* note 14.

19 *See* Am. Bankr. Inst., *supra* note 6, items 2 and 4.

20 Ziegel, *supra* note 2, at 50-52. *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3,

it likewise appears to play a foundational role in much of the continental European, including Scandinavian, debt relief legislation.[21]

However, there are substantial grounds for caution, if not outright skepticism. Canadian and American investigations have shown that there may be no difference in the payment performance and post-bankruptcy conduct of debtors who have been exposed to credit counseling and financial education programs and those who have not.[22] The financial education may also be tendentious and interest-driven (as where it is financially supported by the credit industry).[23] Just as important, its value may be quickly dissipated by seductive credit advertising (i.e., "no down payment" or "no payments for the first 12 months") of the kind all too familiar in North America.

4. The Questionable Effectiveness of Long Probationary Periods and Harsh Repayment Requirements

As previously noted, a distinctive feature of the continental European debt relief programs is the long probationary period the debtor must serve and the harsh repayment requirements to which he is often subjected before becoming eligible for partial or complete discharge, if discharge is available at all.[24] Professor Kilborn notes that reliable completion figures are

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§ 157.1 (1985) (Can.); Office of the Superintendent of Bankr., Directive No. 1R2 (December 21, 1994).

21 *See* Johanna Niemi-Kiesilainen, *The Role of Consumer Counselling as Part of the Bankruptcy Process in Europe*, 37 Osgoode Hall L.J. 409 (1999).

22 *See* Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 Am. Bankr. Inst. L. Rev. 557 (2001); *Cf.* Saul Schwartz, *Effect of Bankruptcy Counseling on Future Creditworthiness: Evidence from a Natural Experiment*, 77 Am. Bankr. L.J. 257 (2003) (comparison of Canadian consumer bankrupts pre-1993 who had not received counseling with post-1993 bankrupts who had received counseling showed no statistically significant differences in their credit ratings).

23 *See* Jean Braucher, *Debtor Education in Bankruptcy: The Perspectives of Interest Analysis*, *in* Consumer Bankruptcy in Global Perspective, *supra* note 10, at 319 (ch. 16).

24 Professor Kilborn commends the German 2001 amendments allowing the debtor to retain a progressively higher percentage of his income in the later years of the repayment period. One may question, however, whether this is enough of an incentive and whether a shorter repayment period — say, of three years — would not be a better trade off. Presumably, economists and social workers have much to contribute to the design of efficient and reality-oriented repayment plans, though there is not much evidence of their expertise being used for this purpose. (Debt adjustment arrangements in France under the *loi Neiertz*, Law No. 89-1010 of Dec. 31, 1989, J.O., Jan. 2, 1990, may be an exception to this observation.)

scarce.[25] However, there appears to be much evidence of high failure rates and recidivism among debtors under the *loi Neiertz*[26] in France. We know that the *loi Neiertz* was amended four times over a fifteen-year period because the expectations that the regulators had of the debtors enrolled in the program were much too high.

There is a rich body of US and Commonwealth experience in the area of surplus income payment programs from which our civilian colleagues could also benefit. Under the current Canadian insolvency regime, if a debtor opts for a straight bankruptcy, one-half of the debtor's surplus income must be paid to the trustee to cover the trustee's fees and disbursements and for distribution among the debtor's creditors.[27] Ascertainment of the amount of surplus income is based on data collected annually by Statistics Canada[28] of expenditures for food, shelter, transportation and other basic items incurred by median and low-income families and individuals across Canada. Low-income Canadians (LICO) are those whose expenditures on shelter, food and other basic items, as a ratio of income, are twenty percent more than those in the average income group.[29] The model leaves debtors with exempt income substantially above the support levels for welfare recipients under the provincial welfare programs. Between August 1998 and December 2001, 19.06% of consumer bankrupts were found liable for surplus income payments under section 68 of the BIA and all but 9.29% of the debtors with surplus income met in full the payments they were required to make.[30] The Canadian debtors had a strong incentive to meet their statutory obligations because their entitlement to a discharge at the end of the nine-month period was contingent upon compliance with the surplus payment requirements.

These successful completion rates have led Canadian regulators to believe that the right balance has been struck. The great majority of Canadian

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25 Kilborn, *La Responsabilisation*, *supra* note 9, text accompanying notes 151-52.

26 Law No. 89-1010 of Dec. 31, 1989, J.O., Jan. 2, 1990 (relating to consumer overindebtedness).

27 Ziegel, *supra* note 2, at 27-37 (ch. 2.7).

28 Statistics Canada is the official Canadian government agency, located in Ottawa, for the collection and analysis of data relating to the national economy and other facets of the nation's life.

29 *See* Ziegel, *supra* note 2, at 29 n.91.

30 *Id.* at 31. For Australian experience under the Australian income contribution requirements, see *id.* at 100-03. For the British income payment requirements and income payment agreements under the Insolvency Act, 1986, c. 45 (as amended by the Enterprise Act, 2002, c. 40), see *id.* at 117-18. For details of the Australian provisions, see Rosalind Mason, *Consumer Bankruptcies, An Australian Perspective*, 37 Osgoode Hall L.J. 449 (1999).

bankrupts are exempt from making payments because their incomes fall below the LICO level; those who are required to make payments are not left destitute but are left with a generous margin for discretionary expenditures, though I do not want to suggest it is always adequate. Just as important, the belt tightening is for a relatively short period of nine months. At the end of this period, paying debtors have the psychological satisfaction of knowing that they have met the statutory requirements. They also have the presumptive entitlement to a new financial start, free of all remaining non-exempt debts except for the small number of cases where the trustee or a creditor raises objections.[31]

Canada's experience with surplus income payment requirements in straight bankruptcies should be compared with its performance experience

31 For the small minority of cases, see Ziegel, *supra* note 2, at 38-39. The position has changed significantly now that Bill C-55, 53-54 Eliz. II, 2004-2005, a major bankruptcy and insolvency amending bill, was adopted by the Canadian Parliament on November 25th, 2005. The amendments are not effective until proclaimed into force, and the federal government has given the Canadian Senate a written undertaking that proclamation will not occur before June 30, 2006, and that before this date the government will refer the Act to the Senate for detailed study and, if appropriate, recommendations for changes. Section 100 of the Act replaces section 168.1(1) of the Bankruptcy and Insolvency Act, R.S.C., ch. B-3 (1985) (Can.), and will postpone the automatic discharge of first time bankrupts from 9 months to 21 months where the debtor has been required to make surplus income payments under section 68. The change was requested by Canadian trustees for several reasons. Sections 170-170.1 of the Bankruptcy and Insolvency Act require the trustee of a bankrupt to file a report with the court and the Superintendent of Bankruptcy indicating, among other things, whether in the trustee's opinion the bankrupt could have made a viable proposal to creditors under Part III, Division 2 of the Act but chose instead to file for bankruptcy. Trustees complained that debtors would often want to know in advance, before engaging the services of a trustee, what the trustee's practice was with respect to the section 170 report, and that this triggered unfair competition among trustees. *See* Personal Insolvency Task Force, Office of the Superintendent of Bankruptcy, Final Report 44-45 (Aug. 2002). This author, who was a member of the Task Force, opposed the amendment, and continues to do so. Trustees were strongly represented on the Task Force; consumers very poorly so. The Task Force gave no consideration to the impact of an automatic extension of the nine month automatic discharge period. The majority of its members assumed that debtors with surplus income would have no difficulty maintaining their surplus income payments for an extra twelve months even though experience with consumer proposals showed that as many as 38.2% of debtors failed to maintain their payments, resulting in cancellation of the proposal. *See also infra* text accompanying note 32; Jacob Ziegel, *A Rough Deal for Bankrupt Consumers*, Toronto Globe & Mail, Aug. 29, 2005, at A21; Jacob Ziegel, *The Travails of Bill C-55*, 42 Can. Bus. L.J. 440 (2005).

under the BIA's consumer proposal (CP) regime,[32] Canada's counterpart to the US Bankruptcy Code's Chapter 13. The CP regime, like Chapter 13, is optional, but unlike Chapter 13 is conditioned on creditors' as well as the court's approval of the debtor's proposal. The proposal usually involves payments over a three to five year period. On successful completion of the payments the balance of the debts is discharged as under a straight bankruptcy.

The non-completion rate for consumer proposals in Canada is much higher than non-payment in the case of surplus income payment requirements in straight bankruptcies, and in 2004 amounted to 38.21% of the number of proposals approved by the debtor's creditors in 2000.[33] Admittedly, the Canadian failure rate is much less than the 70 per cent failure rate under Chapter 13 in the US, but this is small consolation. It raises the question why there is such a marked difference between performance ratios under the surplus income payment requirements and under consumer proposals. There is no empirically verified answer, but Canadian observers believe a number of factors are important. First, the statutory period for surplus income payments is much shorter in straight bankruptcies — nine months versus three to five years for consumer proposals — and therefore involves much less belt tightening for debtors. Second, local culture may be at work in debtors being persuaded by trustees to opt for a consumer proposal when realistically their current earnings and future prospects do not justify the heavier commitments under a CP. Third, the debtor's financial condition may have deteriorated subsequent to the creditors' approval of the proposal and the debtor may have lacked the resources or initiative to seek creditor approval of a modified CP. In any event, the Canadian experience strongly suggests that a short repayment period leaving the debtor with a relatively generous margin for above welfare-level expenditures stands a much higher chance of success than multi-year plans involving significant economic sacrifices.

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32 Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 1 (1985) (Can.).

33 Tabular information provided by the Office of the Superintendent of Bankruptcy, Ottawa (April 2005) (on file with the author). Precise figures for non-completion rates under the Australian Bankruptcy Act, 1966, pt. IX, were not available to the author but appear to be similar to the Canadian rate for consumer proposals. *See* Ziegel, *supra* note 2, at 106 tbl.4.2.

II. Revisiting the US Pre-BAPCPA Fresh Start Policy

Revisiting the pre-2005 US fresh start policy may seem an academic exercise given the fact that it has now received a lethal blow[34] at the hands of a Republican Congress and Republican president. Yet there are good reasons for conducting a postmortem for the purposes of this paper. One is that there is no guarantee that the burdensome, complex, and widely criticized means test in BAPCPA and the many other creditor-oriented features in the Act will survive long without extensive amendments.[35] A second reason is that even a cursory review of the history and rationales of the fresh start doctrine will illuminate the ideology that sustained the doctrine for more than one hundred years in contrast to the sanctity of contract doctrine that provided the ideological basis for continental European opposition to the adoption of any kind of fresh start principle. Finally, acceptance of the argument that there were significant flaws in the justification for an all or nothing fresh start doctrine may persuade us that a qualified fresh start rule as currently mandated in the British, Canadian and Australian insolvency legislation has much to commend it.

A. Historical Overview

A fresh start rule entitling a debtor to be discharged from his remaining debts already appeared in the insolvency legislation of some of the colonial American states before 1789.[36] It was therefore a familiar issue to 19th century federal politicians as they grappled with the recurring question of what type of bankruptcy legislation should be adopted by Congress, usually in response to

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34 *Cf.* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 Bankr. Dev. J. 1 (2001) (commenting on Bill S256's substantially identical predecessors).

35 In fact, an amending bill, H.R. 1860, 107th Cong. (2005) was introduced in Congress on April 26, 2005 by congresspersons Dana Rohrabacher and Walter Jones. A number of members of Congress also gave notice, on September 2, 2005, of their intention to present an amending bill in light of the impact on their personal and economic lives of tropical storm Katrina. In the US Congressional system, where the members are not bound by party discipline, it is much easier for a Senator or congressperson to introduce legislation and to garner support for it from other members of Congress than it is for members of Parliament in the British-style Parliamentary system. Much US legislation is initiated this way and is often enacted into law.

36 Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900 (1974) (especially pages 270-74).

one of the many economic recessions that plagued the United States during the century. A fresh start rule was included in the 1841 Bankruptcy Act, and was much invoked by debtors. However, the Act was repealed three years later and the fresh start rule did not make its reappearance until the Bankruptcy Act of 1898. That Act itself was a compromise between Northern mercantile interests, who badly wanted a national bankruptcy act, and Southern and Midwestern agricultural interests who saw little need for it.[37] Inclusion of the fresh start rule was the price the latter group exacted for its support. Other options, such as the qualified discharge rule adopted in the 1883 British Bankruptcy Act, do not appear to have been seriously considered by the members of Congress, and no doubt for good reason — British 19th century bankruptcy legislation was widely perceived as overwhelmingly pro-creditor.

The fresh start rule appears to have caused no serious reverberations among creditors in the interwar period 1914-1939. Presumably, this was because consumer credit was still in its early stages and because the number of personal bankruptcies was modest judged by current standards.[38] Another explanation may be that few insolvent debtors would have been in a position to make surplus income payments after the start of Great Depression even if the US Bankruptcy Act had contained such a requirement.[39] The fresh start rule received official imprimatur at the highest judicial level in the US Supreme Court's judgment in *Local Loan Co v. Hunt*,[40] and therefore would have been seen as an intrinsic part of American values and not to be tampered with lightly.

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37 For a more nuanced explanation of the various factors influencing the final outcome, see David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 Bankr. Dev. J. 321 (1998/99).

38 The total number of bankruptcy cases filed in the US was 45,641 in 1925, 62,845 in 1930, and 50, 997 in 1939. In 1952, the number was 34,873, and it grew to 62,086 in 1956. The numbers continued to grow rapidly during the balance of the 1950s. *See* United States Statistical Abstracts, Tables of Bankruptcy Statistics tbls.642-643 (2005), *available at* http://www.census.gov (last visited Mar. 1, 2006); Compare Report of the Commission of the Bankruptcy Laws of the United States, pt. I, ch. 2 (July 1973) [hereinafter NBC Report], with respect to the postwar consumer bankruptcy figures. I am very grateful to Professor Robert Lawless of the University of Utah Law School for assisting me in tracking down this source.

39 Leo Calder offers a different explanation. He points out that householders were very conscientious during the Great Depression to maintain installment payments on durable goods and this may explain why the bankruptcy figures remained remarkably stable throughout the 1930s. *See* Leo Calder, Financing the American Dream: A Cultural History of Consumer Credit 262-90 (1999). Compare the number of US bankruptcies cited in *supra* note 38.

40 292 U.S. 234, 244 (1934).

This positive perception of the rule continued into the post-World War II period until at least the 1970s. The National Bankruptcy Commission (NBC) had no hesitation in reaffirming the soundness of the fresh start principle in its 1973 report to Congress[41] and the revised Bankruptcy Act adopted by Congress in 1978 reflected the same sentiment. Surprisingly, the US credit industry does not appear to have mounted a serious effort while Congress was debating the Act to modify the fresh start rule,[42] although the number of consumer bankruptcies was beginning to grow substantially. Nevertheless, the credit industry was successful in persuading Congress to adopt section 707(b) of the Code as part of a package of amendments in 1984. Section 707(b) empowers the bankruptcy judge or the United States Trustee to initiate proceedings to deny the petitioner bankruptcy relief if one or the other was satisfied that granting the relief would lead to a substantial abuse of the system. Until recently, the abuse provision does not appear to have been invoked often. Moreover, the bankruptcy judges were not agreed on how the abuse standard should be applied in practice.[43]

The number of US consumer bankruptcies quadrupled between 1985 and 1997.[44] Not surprisingly, the credit industry became alarmed and started to mount a well-financed campaign to curb what its representatives described as consumer abuses in the use of Chapter 7. The industry also pushed hard to persuade the newly appointed National Bankruptcy Review Commission (NBRC) that the time had come to impose meaningful restrictions on the use of Chapter 7 and to endorse the industry's strong partiality for a means test. The efforts were not successful. On the contrary, a majority of the Commission strongly reaffirmed its support for the fresh start rule and rejected the industry's contention that there were large-scale abuses.

Nevertheless, the credit industry persisted in its lobbying efforts and is said to have spent many millions of dollars winning the support of Congressional members. After several unsuccessful efforts during the Clinton administration, the credit industry finally achieved its goal with the enactment of Bill S-256. As previously explained, the BAPCPA 2005

41 Calder, *supra* note 39, at 232-41 (pt. I, ch. 6).

42 Note, however, Professor Tabb's statement that the US consumer credit industry began its reform efforts to qualify the fresh start rule in the mid-1960s and that they have continued since then. Tabb, *supra* note 34, at 9. The earlier industry efforts do not appear to have left much of an impact, since they are not referred to in the NBC Report, *supra* note 38.

43 *See* Tabb, *supra* note 34, §2.14 (especially pages 121-22).

44 It escalated from 341,233 in 1985 to 1,350,118 in 1997. OSB, International Statistics 7 (June 1999).

imposes a means test on all new bankruptcy filers and forces those deemed capable of paying off a substantial part of their debts either into a Chapter 13 arrangement or into forgoing bankruptcy relief altogether. The means test constitutes only a small — but, from the industry's point of view, critically important — part of the heavily creditor-oriented provisions in Bill S-256.

Although not necessarily opposed to some restrictions on the availability of easy discharges from bankruptcy, most US insolvency academics and many bankruptcy judges and trustees have opposed the means test provisions as being unwieldy, bureaucratic, and expensive to implement and likely to do more harm than good. Regrettably, in the long debate on the BAPCPA and its predecessors, there was little discussion, even in the academic community, of the qualified discharge provisions appearing in the English and Canadian legislation and what the US could learn from the Commonwealth experience.[45]

B. Rationales of the Fresh Start Principle

A century's familiarity with the fresh start principle has led many US scholars to endorse its virtues as energetically as their European civilian colleagues embrace the sanctity of contract principle. The question for discussion is whether the rationalizations in favor of the US rule are convincing, and whether a persuasive case can be made, even in the US context, in support of a qualified discharge policy along the lines adopted in the Commonwealth legislation.

I have summarized elsewhere and given my reactions to[46] eight principal reasons advanced over the years by US authors who oppose the introduction of any type of means test, whether in order to deny debtors access to Chapter 7 bankruptcy (as mandated in Bill S-256) or to require debtors to pay over surplus income for a prescribed period as a condition of the discharge of the remaining debts. I was not then wholly persuaded by the reasoning in favor of the retention of the status quo and still remain unconvinced. Four of the

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45 An early exception of a US scholar taking a close look at the British bankruptcy and discharge law and practice is Professor Douglass George Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. Pa. L. Rev. 69 (1982). The article is frequently referred to by subsequent US commentators on the fresh start policy as a cautionary tale of the British hostility to individual bankruptcies. Professor Boshkoff's article was written long before the major changes adopted in the English legislation of 1986 and 2002 and no longer reflects current English law and practice.

46 Ziegel, *supra* note 2, at 65 (ch. 3.5).

reasons that have surfaced regularly in discussions of the US discharge policy, and in debates on the defects of the credit industry-driven Congressional bills introducing a means test, deserve some attention here.

The first is that it is much better to secure the debtor's consent to a voluntary payment system by giving the debtor incentives that are not available in a straight bankruptcy than to coerce him to make involuntary payments. Unhappily, the weakness with this reasoning is that US experience with Chapter 13 plans (and, one might add, Canadian and Australian experiences with its Commonwealth counterparts) challenges the assumption that voluntary repayment programs work best. Economists have also argued that the option of a Chapter 7 discharge without a payment requirement encourages debtors to behave opportunistically and to choose the Chapter of the Code (Chapter 7 or Chapter 13, or occasionally Chapter 11) that will best shelter their assets and income from creditors' grasps. Given a choice, it is argued, why would a debtor with surplus income opt for a Chapter 13 plan (other than for moral or professional reasons) when he could shelter all of his post-bankruptcy income and obtain a prompt discharge under Chapter 7? In the light of this encouragement for debtors to engage in strategic planning, it may be thought that the British and Canadian approaches strike a better balance between straight bankruptcy and a compositional scheme. This is particularly so given the need for creditor approval of a compositional scheme under the Canadian and British legislation and the court's power to deny a discharge in straight bankruptcy if the debtor has substantial income and the court is of the view (in Canada) that the debtor ought to make payments for a longer period than the minimum nine months prescribed by Parliament.

A second reason given in support of the US fresh start position is that a British-style income payment and discretionary discharge system is intrusive, paternalistic, and subjective since no two debtors and their families have the same needs or face the same circumstances.[47] The short answer to this objection, it is suggested, is that there is much less paternalism and subjectivity in the Canadian and Australian surplus payment models than there is in the British provisions and that even in England the Insolvency Service has adopted a standard payment scale in bankruptcies administered by the Service that eliminates the earlier defects. As previously mentioned, the

47 *Id.* at 120-23; Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 583 (1993) (eloquently expressing similar sentiments without allusion to the British style provisions), *cited in* Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 505 (1997).

Canadian model, introduced in 1997, appears to be working well and, so far as one can tell, has provoked little resistance and few complaints from debtors. In England, too, most income payments are negotiated with the Insolvency Service and there is only intermittent judicial involvement.[48] It seems, in any event, inconsistent for US critics to accuse the British system of paternalism and to argue in the same breath, in opposing a means test, that no two debtors and their families have the same needs or face the same circumstances.

There is a third oft-repeated reason in support of the US style fresh start rule (one that I have invoked myself in criticizing the civilian "must pay" mentality). It is argued that since the bulk of consumer bankruptcy debts today consist of consumer credit liabilities, it is more efficient to oblige the credit industry to internalize its losses or to tighten its credit-granting standards if creditors believe their losses are too high, than it is to expect consumers to resist the impulse for instant gratification encouraged by the ready availability of consumer credit.[49] In my view, this reasoning commends itself when the debtor has no surplus income, but provides no answer with respect to the debtor who *is* in a position to make payments but opportunistically seeks bankruptcy shelter to avoid having to do so. The insurance analogy implicit in the US critics' reasoning breaks down in this scenario, just as it does where the debtor has incurred involuntary liabilities or seeks a discharge from non-commercial liabilities such as repayment of a student loan or taxes owing to various levels of government.

A fourth, and most commonly given, reason given by critics of BAPCPA and its predecessors will strike many as the most compelling. This is that there is no evidence of large scale abuses in the existing bankruptcy system and that the overwhelming percentage of those seeking Chapter 7 bankruptcy protection are hopelessly insolvent and would not be able to pay off their indebtedness in any reasonable time frame even if means testing and a mandatory Chapter 13 regime were to be introduced.[50] There are really three parts to this criticism of the means testing ideology. The first is that it is inefficient and oppressive to apply a means test to ferret out the small percentage of debtors in a position to make some payments. The criticism may well be justified for the complex means testing provisions in BAPCPA and its ilk, but it does not destroy the case for a simpler and much less intrusive means

48 *See* Ziegel, *supra* note 2, at 117-18.

49 Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 234-36 (1986).

50 Teresa A. Sullivan et al., *Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Cultures*, 20 J. Consumer Pol'y 223 (1997).

testing such as is applied under the Canadian regime. As previously indicated, the section 68 surplus income provisions in the Canadian Act appear to be working well and have generated few complaints.[51]

The second proposition implied in the means testing criticism is that means testing may also jeopardize the debtor's entitlement to a prompt discharge where there is no surplus income. Obviously this is a danger that must be guarded against. However, I am not aware of any evidence that the Commonwealth surplus payment requirements have had this spillover effect. On the contrary, the March 2005 proposals of the English Insolvency Service[52] signal considerable enthusiasm for creating a fast track discharge procedure for no-asset and bottom income indigent debtors.

The third and more questionable proposition implicit in the opposition to means testing is that means testing should not be used to extract nominal payments from debtors. It is true that the Canadian experience, and even more so the continental European experience, is that the payments are in many cases too small to make a dent in the outstanding debts and are in any event mostly swallowed up in trustees' fees and administrative expenses.[53] However, I believe that these are questions of detail[54] and do not address the question of principle. This question is whether requiring debtors with surplus income to make *some* payments as a condition of their discharge is morally justifiable and protects the integrity of the bankruptcy system.

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51 I do not mean to suggest the system has no flaws; it clearly has. For an early critique see Jacob Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 Osgoode Hall L.J. 205, 227-28 (1999).

52 The Insolvency Service, *supra* note 5.

53 *See* Ziegel, *supra* note 2, ch. 7(b), p. 135 ; *cf.* Kilborn, *Innovative German Approach*, *supra* note 9, at 258, 290.

54 The problem could be addressed by providing that payments below a threshold amount be paid into a public fund for consumer education or other worthy purpose. Compare the Belgian provision requiring lenders to pay a percentage of their defaulted loans into a public fund to help defray the fees of the debt mediators. *See* Kilborn, *Belgium and Luxemburg*, *supra* note 9, at 30. In Canada, the Superintendent of Bankruptcy has proposed a legislative amendment to allow uncashed dividend remittances to estate creditors to be credited to a bankruptcy research fund. However, the proposal did not find its way into Bill C-55, 53-54 Eliz. II, 2004-2005. *See supra* note 31.

III. WHAT LIES AHEAD? PARALLEL PATHS, CONVERGENCE, OR RECONCILIATION OF PHILOSOPHIES?

It is appropriate now to answer, albeit briefly, the question implicit in the title of this paper. What are the important factors that determine the structure and contents of a country's insolvency system? Are they ideology, past history and experience, or the pressures exerted by the mounting number of overindebted debtors and the need to find practical solutions? Do ideologies remain constant or do they bend under the pressure of events?

So far as legislative and operational developments in continental Europe and the common law jurisdictions are concerned, this paper has attempted to show that all these factors have played a role over the past twenty years. If one had to single out one factor as playing a dominant role it would be facts on the ground — the hard reality of the insolvency systems having to adjust to the new social and economic environments. This is surely true of the legislative and operational changes adopted in England and Canada, particularly in England, where, until very recently, the English Insolvency Service did not even deem it important enough to publish separate statistics on the number of consumer bankruptcies. Similarly, the truncated periods[55] under the recent amendments to the English and Canadian Acts for the discharge of first time no-asset and low-income debtors are a realistic response to the mounting number of consumer insolvencies.

Acceptance, albeit reluctant acceptance, of social and economic realities surely also explains German willingness to grant debtors a discharge from their remaining debts, although admittedly only after a six year probationary period, and only after the ritual offerings and lamentations at the shrine of the sanctity of contracts. That willingness represents a major sea change from the outright rejection of the "Anglo-Saxon" solution in a German expert's report as recently as 1986.[56] Admittedly, too, the French willingness to wipe the slate clean and to allow debtors to make a fresh start has been much slower and more hesitant. The fact remains however that the *loi Neiertz* would not have been changed so often between 1989 and

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55 Nine months under the 1992 amendments to the Bankruptcy and Insolvency Act, R.S.C., ch. B-3 (1985) (Can.), and one year under the 2002 amendments to the English Insolvency Act, 1986, c. 45, with the possibility of a reduction of the period in the English Act to six months.

56 Kilborn, *Innovative German Approach*, *supra* note 9, at 269.

2004 if the French authorities had resolutely preferred ideology over hard realities.

So far as continuing continental European adherence to the sanctity of promises in the consumer insolvency context is concerned, I have argued that it is based on doubtful premises and fails to take into account the realities of the modern marketplace and the special character of consumer credit. Whether this means that the ideology will quickly disappear (or ought to disappear) is more debatable.[57] The common law history of the acceptance of easy discharge facilities shows that it may take half a century or more,[58] depending on the pressure of events, but that it is bound to occur sooner or later.

With respect to American developments, the historical evidence shows that adoption of the fresh start principles in the 1898 Bankruptcy Act was colored by early exposure to the iniquities of indentured labor, distrust of judicial discretion involving the discharge of debts, and a strong preference for a simple and clean discharge rule. No doubt, the fresh start principle was also influenced by ideology — the need to allow insolvent debtors to make a new economic start free of the burden of debt — but the ideology had a strong pragmatic bent and was grounded in experience. The attitude changed in the late 1970s when creditors claimed to have discovered the true cost of easy discharges and began to agitate for stricter rules. It remains to be seen how well or badly BAPCPA translates into practice and whether it will create the bureaucratic nightmares predicted by its critics. Whatever the future holds, it cannot be denied that adoption of a means test for Chapter 7 filers represents a seismic shift in American insolvency philosophy and brings it much closer to the Commonwealth models, though there are large differences between the techniques adopted in BAPCPA and the Commonwealth provisions. I have suggested that those who oppose *any* type of means test to determine whether debtors should

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57 I hope this paper has made it clear that I am not opposed to enforcing promises if the debtor has a realistic capacity to pay. My concern over the continental philosophy is that it insists on continuing to squeeze the lemon even after it is clear that there is no juice left and that it too often ignores the reasons why the lemon was so small to begin with.

58 In England, the interval was 72 years between the Bankruptcy Act, 1914, 4 & 5 Geo. 5, c. 59, and the Insolvency Act, 1986, c. 45, although there were some ameliorating amendments in between. In Canada, the interval between the Bankruptcy Act of 1919 and the major 1992 amendments, Bankruptcy and Insolvency Act, R.S.C., ch. 27 (1992) (Can.), was 73 years, but again, there were intervening amendments.

be required to make payments in the post-bankruptcy period may have overshot their mark, and that Commonwealth experience shows that it can be made to work without extravagant costs and without discouraging overburdened debtors from seeking relief.[59]

My overall conclusion, then, is that, yes, there is increasing convergence in solutions adopted to address consumer indebtedness. Facts on the ground are very important, but that they will not lead on their own to a change in official attitudes or national cultures without very persuasive research to show the flawed premises on which the early attitudes were based. It is still an open question whether the adoption of BAPCPA in the US represents an authentic change in US public opinion regarding the need for a means test of some description to curb alleged widespread consumer bankruptcy abuses, or whether the Act reflects the successful lobbying efforts of a very powerful industry and a responsive US president and Republican-dominated Congress. A means test has been an integral part of Commonwealth insolvency legislation for many years, so its retention in the most recent reforms has caused little controversy. What does require much closer examination for comparative purposes is the structure of the Commonwealth means tests, the duration of the means test, and the relationship between surplus income payment requirements in straight bankruptcies and optional consumer proposals to creditors in Chapter 13 type arrangements.

59 A cynic may suggest that US opponents of BAPCA played their cards poorly. Instead of opposing the legislation, they should have supported it enthusiastically in the hope that in practice the Act would collapse under the sheer weight of its oppressiveness and bureaucratic demands, and that public opinion would force Congress to dismantle most of the 2005 changes.