

# Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales

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*This Article is made up of two parts. The first part reflects on the dominant functionalist approach to comparative consumer bankruptcy and suggests that this might be supplemented by a political economy analysis that addresses the role of national and international interest groups, including professionals, and ideology in understanding different national responses to overindebtedness in North America and Europe. The second part examines current reforms to consumer bankruptcy and responses to overindebtedness in the UK through this political economy lens and concludes that competition among professional groups, the role and interests of the Insolvency Service, and the ideology of the Third Way in consumer policy will influence the ultimate structure adopted for addressing consumer insolvency. A study of the English experience suggests that there is also an element of national path dependency to consumer insolvency reform that may resist pressures towards convergence of approaches between countries in addressing issues of consumer insolvency.*

## INTRODUCTION

A dominant approach in comparative scholarship on consumer bankruptcy views change and development in consumer bankruptcy law as a response to social and economic needs — in particular, as a safety valve for

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increased consumer indebtedness and decreases in social welfare. This functionalist approach is well-known in comparative law.<sup>1</sup> In this article I conclude that although over the long haul law may reflect social and economic needs, it is also valuable to pursue more finely grained comparative investigations of the political economy of consumer bankruptcy reform and development.<sup>2</sup> My interest in probing functionalism was prompted by the casual observation that England and Wales<sup>3</sup> has a much lower per capita rate of personal bankruptcy than Canada; and this did not seem to be explained by the functional criteria of different levels of consumer credit or welfare provision. Moreover, overindebtedness was a significant public policy issue in the UK but of relatively minor importance in Canada, notwithstanding the much higher level of consumer bankruptcy in the latter country.<sup>4</sup>

Many explanations may exist for these differences, including, on closer inspection, functional explanations. My initial observations stimulated me, however, to pursue a different tack in studying recent English developments, one that focuses on the role of interest groups and ideas in shaping

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- 1 See *infra* pp. 628-42. The functionalist approach in comparative law is outlined in Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3d ed. 1997). For a discussion and critique see *Comparative Legal Studies: Traditions and Transitions* (Roderick Munday & Pierre Legrand eds., 2004); Michele Gradazzi, *The Functionalist Heritage*, in *id.* at 100; Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 *Harv. Int'l L.J.* 221 (1999); see also Mathias W. Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *Am. J. Comp. L.* 671 (2002). For a discussion of comparative methodology and consumer bankruptcy, see Kent Anderson, *The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy*, 42 *Osgoode Hall L.J.* 661 (2004); see generally *Consumer Bankruptcy in Global Perspective* (Johanna Niemi-Kiesiläinen et al. eds., 2003). For a general reflection on the methods and projects of comparative law, see Annelise Riles, *Introduction: The Projects of Comparison*, in *Rethinking the Masters of Comparative Law* (Annelise Riles ed., 2001).
  - 2 For existing studies of individual countries, see, for example, 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); David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* (2001).
  - 3 I refer to England and Wales because Scotland has a separate bankruptcy system. However, when discussing overindebtedness I refer to the United Kingdom, since overindebtedness is a significant issue throughout the UK.
  - 4 Canada has a per capita individual bankruptcy rate about three times that of England and Wales. But in relation to overindebtedness, according to Duhaime, "Je crois pouvoir confirmer maintenant que ce problème n'existe pas dans la conscience sociale." Gerard Duhaime, *La Vie à Credit: Consommation et Crise* 325 (2003).

the construction of a distinct national response to overindebtedness and bankruptcy reform. During the past twenty years there has been a cycle of reform of both consumer and corporate bankruptcy norms in many countries. Studies of corporate bankruptcy regimes document both the political dynamics of the national evolution of different bankruptcy regimes<sup>5</sup> and the international interests and institutions that interact and clash with national interests in the process of national reforms.<sup>6</sup> There is little study, however, of the relationship of these national, regional and international interests in shaping distinct national responses to consumer overindebtedness.

I proceed by outlining what a thoroughgoing commitment to functionalism might mean in the study of comparative consumer bankruptcy. I then suggest that given the limits of functionalism, a focus on interests and ideas might be valuable in explaining continuing similarities and differences between countries. I examine the unfinished story of contemporary developments in England and Wales in consumer bankruptcy from this perspective, situating these developments within the broader discussion of responses to overindebtedness. I highlight the role of professional insolvency practitioners and debt advisors in contesting and shaping reform, as well as the role of the public Insolvency Service. This competition and conflict between interest groups in framing policy in England and Wales takes place against the background of the influential Third Way approach to policymaking in relation to consumer markets and I sketch its role in contemporary debates on consumer bankruptcy. I conclude tentatively that convergence and divergence in national responses to consumer overindebtedness are likely to be influenced by the institutions and professions that currently exist for addressing overindebtedness. Given the significant differences among these institutions and professions in various countries, there may be less convergence of approach than might be assumed to flow from the increasingly global reach of a "consumer credit society."<sup>7</sup> There does

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5 See, e.g., Bruce G. Carruthers & Terence C. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (1998); Skeel, *supra* note 2.

6 See, e.g., Bruce G. Carruthers & Terence C. Halliday, *The Global Production of Law: The Diffusion of Corporate Bankruptcy Law 1973-1998* (2003) (American Bar Foundation Working Paper No. 2213).

7 The convergence/divergence debate in comparative law is discussed in Anthony Ogus, *Competition Between National Legal Systems: A Contribution Of Economic Analysis To Comparative Law*, 48 *Int'l & Comp. L.Q.* 405, 405-06 (1999). See also Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *Mod. L. Rev.* 11 (1998) (skepticism concerning convergence); Pierre Legrand, *European Legal Systems Are Not Converging*,

also seem to be an element of path dependency in the English reforms that are implemented within existing structures of advice and regulation. While it would be dangerous to generalize these findings, students of US consumer bankruptcy have also identified a path dependency in bankruptcy law that may not be substantially changed by the recent creditor-inspired reforms to the US Bankruptcy code.<sup>8</sup>

### I. FUNCTIONALISM AND COMPARATIVE CONSUMER BANKRUPTCY

A functional approach in comparative law makes three assumptions: (1) comparison should focus on the common social/economic problem that is often addressed by differing bodies of law in differing legal systems; (2) societies face similar problems and, although they may use different techniques, come to the same practical result; and (3) law responds to the needs of a society and this explains differences and similarities between legal systems.<sup>9</sup> Zweigert and Kötz, the best-known proponents of functionalism,

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45 Int'l & Comp. L.Q. 52 (1996) (impossibility of legal transplants from one legal tradition to another); Ugo Mattei & Alberto Monti, *Comparative Law & Economics: Borrowing and Resistance*, 1:2 Global Jurist Frontiers, Article 5 (2001) (describing the possibility of developing an economic model to explain phenomena of convergence and divergence among legal systems).

8 This is a theme in Skeel, *supra* note 2. "[T]hree factors . . . have continued to define the politics of US bankruptcy law: creditors, pro-debtor ideology, and bankruptcy professionals." *Id.* at 17. "The basic contours of our consumer . . . bankruptcy laws date back to the days of the horse and buggy . . . but the overall approach should be good for another century." *Id.* at 243. A consumer advocate, commenting on the recent US bankruptcy bill, concludes:

[D]ebtors and creditors alike may be surprised to find that some of the supposedly pro-creditor changes in the Code could benefit 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.

Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 75 Am. Bankr. L.J. 191, 230 (2005).

9 See Zweigert and Kötz, *supra* note 1, at 34-40; *id.* at 45:

Law is "social engineering" and legal science is a social science. Comparative lawyers recognize this: it is, indeed, the intellectual and methodological starting-point for their discipline. Comparative law is thus closely in tune with current trends in legal science when it asks what the function of legal institutions in different countries may be, rather than what their doctrinal structure is, and when it orders the solutions of the various systems upon a realistic basis by testing them for their responsiveness to the social needs they seek to fill.

Zweigert and Kötz also argue, *id.* at 10, that comparative law and the sociology

argue that this method will be most fruitful in "non-political" areas of law and those where there are not strong moral and political feelings.<sup>10</sup>

The first assumption is necessary to address the well-known fact that different legal systems often use differing legal concepts and categories to address a common problem. Comparative understanding should avoid being hobbled by parochial legal characterizations. In the insolvency context, it may be necessary to look elsewhere than the category of bankruptcy for institutions that perform similar functions to consumer bankruptcy in the US. This method seems particularly relevant to the study of bankruptcy since civil law countries did not historically recognize the concept of the discharge of debts for individual consumers.<sup>11</sup>

Following the functionalist method of studying the problem rather than the legal category, a search for "consumer bankruptcy law" or its equivalent in a foreign jurisdiction might be replaced by a focus on the common economic and social problem of overindebtedness. A focus on overindebtedness would also have the benefit of demonstrating the limitations of existing national socio-legal research in the US, which has been dominated by legal categories. Most US empirical research on overindebtedness over the past two decades has studied the legal institution of bankruptcy. This research was driven by immediate policy concerns over whether individuals were abusing the bankruptcy system in the wake of the 1978 Bankruptcy Act reforms. This research replaced an earlier generation of research on the individual legal system of creditors' remedies, which was driven by policy concerns over the pathology of consumer credit and its impact on the poor.<sup>12</sup> Development of

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of law use similar methods and that legal sociology is important to defining the problem to be addressed: "Comparative lawyers have long known that only rules which perform the same function . . . can profitably be compared."

10 In *id.* at 40, the authors state that

if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively "unpolitical" we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way.

11 See generally Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure A Market Failure or a Social Problem?*, 37 Osgoode Hall L.J. 473 (1999); Nick Huls et al., *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions* (1994).

12 The major review by Bill Whitford in 1979 of the individual system of creditors' remedies marked the end of this era. See William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 Wisc. L. Rev. 1047.

a broader national research agenda would be a useful consequence of a focus on overindebtedness.

If overindebtedness is the common problem, a comparativist might posit a hypothetical debtor (or debtors) with a particular level of multiple debt who has lost her job (and one could further vary the facts in terms of home ownership and levels of outstanding debt) and ask how each legal/social system would address the issue.<sup>13</sup> This approach might probe differences in the legal and practical approaches to overindebtedness in different systems, and the institutional and cultural understandings of different systems that are not revealed by overall data. It might be a first step to understanding both the internal point of view adopted by those working within a particular system to issues of overindebtedness and differing social norms regarding overindebtedness. It might also stimulate critical analysis of both the concept of overindebtedness and the function of bankruptcy law. Bankruptcy may not always function solely to address overwhelming overindebtedness but rather represent a strategy of asserting consumer rights. The use of a bankruptcy filing in the US to forestall foreclosure or eviction by triggering the stay on further action by the creditor provides an example of this strategy.<sup>14</sup>

Assuming that there exists a consensus on the concept of overindebtedness,<sup>15</sup> functionalism requires analysis of all methods adopted to both treat and prevent overindebtedness. For example, treatment of overindebtedness in England and Wales would include not only bankruptcy but also county court administration orders, individual voluntary arrangements (IVAs), informal moratoria, and repayment plans negotiated by Citizens Advice Bureaux or credit counseling agencies. Prevention of overindebtedness in some countries would include controls on credit granting, interest rate ceilings or adequate housing benefits. The role of different forms of credit (e.g., credit cards) and credit institutions (e.g., credit bureaus<sup>16</sup>)

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13 Zimmermann and Whittaker analyze good faith in European contract law using this approach. See Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law* (2000).

14 For further analysis of the role of consumer bankruptcy as consumer protection, see William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 1994 *Am. Bankr. L.J.* 397.

15 For a review of the various approaches to measuring overindebtedness, see Oxera, *Are UK Households Over-Indebted?*, available at <http://www.oxera.com/main.aspx?id=1425> (2004).

16 Thus there is a divide between countries such as France and Australia, where only negative information is held by credit bureaus, and countries such as the US and Canada, where both positive and negative information is held. Economists argue that these differences have a significant effect on the depth of a credit market. See

in increasing or preventing overindebtedness would have to be understood. Analysis of issues such as legal controls on credit granting highlights the fact that overindebtedness may be a consequence of existing legal rules and institutions and functionalism must attempt to identify whether bankruptcy law may be itself a cause of overindebtedness. A harsh bankruptcy law may create incentives for creditors to be less careful in granting credit and a very lenient bankruptcy law could provide incentives for individuals to become overindebted. Capturing the significance of these many variables makes comparative analysis complex, though certainly not impossible. Mauro Cappelletti and Bryant Garth's large research project on access to justice could be described as within this genre. They took the common problematic of access to justice and surveyed the "full panoply of institutions, devices, personnel and procedures used to process, and even prevent, disputes in modern societies" as part of a policy-oriented and reformist approach to civil procedure.<sup>17</sup>

Analysis is further complicated by Zweigert and Kötz's second assumption, which requires that the comparativist also study the practical effects of each system, investigating the law in action as well as the law on the books. The need for factual detail on issues such as how trustees, lawyers or debt advice workers actually operate clearly makes this project extremely complex, with the danger that the researcher becomes lost in these details.

Comparative quantitative analysis that uses multiple regressions is one sophisticated response to these problems, which has produced some impressive work. Ronald Mann proposes an account of cross-cultural determinants of high credit card use and a tentative account of the relationship between high levels of credit card use and the liberalization of bankruptcy regimes.<sup>18</sup> And recent work suggests a significant relationship between the liberality of bankruptcy regimes and entrepreneurial activity.<sup>19</sup> These studies are part of a trend towards quantitative analysis in comparative law and in studies of the role of law in economic development.<sup>20</sup> Comparative

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John M. Barron & Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the US Experience*, in *Credit Reporting Systems and the International Economy* (Margaret Miller ed., 2003).

<sup>17</sup> See *Access to Justice: A World Survey* (Mauro Cappelletti & Bryant Garth eds., 1978). For a critique see Austin Sarat, *Access to Justice*, 94 *Harv. L. Rev.* 1911 (1980-81) (book review).

<sup>18</sup> See Ronald Mann, *Credit Card Policy in a Globalized World* (2004).

<sup>19</sup> See John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship* (Mar. 2004) (ESRC Center for Business Research, University of Cambridge Working Paper No. 300), available at <http://www.cbr.cam.ac.uk/pdf/wp300.pdf>.

<sup>20</sup> See, e.g., Daniel D. Berkowitz et al., *The Transplant Effect*, 51 *Am. J. Comp. L.* 163 (2003).

quantitative analysis has produced results that challenge conventional distinctions between civil and common law regimes, as well as identifying significant factors in the success or failure of legal transplants. It may be that regressions will be the way forward; I do not pursue the benefits and costs of this approach<sup>21</sup> further in this paper, but simply note that regression analysis across different countries is a complex undertaking.

The idea that the law responds to the needs of a society — Zweigert and Kötz's third assumption — is central to the work of comparative consumer bankruptcy scholars. Authors argue that as high levels of consumer credit permeate all levels of society, and credit increasingly substitutes for state provisions for unemployment or subsidies for education, there will be a greater need for a "safety valve" such as bankruptcy to address the casualties of this credit system.<sup>22</sup> The growth of national consumer bankruptcy or debt adjustment systems can therefore be explained or predicted by changes in the social safety net such as provision for unemployment in different societies. In this mapping exercise the US represents one end of a continuum — a "consumers' republic"<sup>23</sup> — with the deepest consumer credit market, a modest safety net without universal health care, and consequently the highest level of personal bankruptcy in the world.

Lizabeth Cohen argues that the US was a "consumers' republic" between

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21 For a useful introduction to issues in regression analysis, see Alan O. Sykes, *An Introduction to Regression Analysis* (1993) (Chicago Working Papers in Law and Economics).

22 Teresa Sullivan, Elizabeth Warren and Jay Westbrook hypothesize that the development of bankruptcy law in different countries will be responsive to increases in consumer credit and the availability of public support systems. See Teresa Sullivan et al., *The Fragile Middle Class* 259 (2000). Rafi Efrat has developed a functional approach in a global context, linking the relative liberality of a bankruptcy discharge to various underlying economic factors such as entrepreneurialism and levels of consumer credit:

[T]he various formulations of the fresh start policy in personal bankruptcy around the globe are a function of the financial vulnerability facing people situated in a given country. That is, to the extent that individuals in a given country have access to significant credit, and to the extent those individuals are protected by a limited government welfare safety net, one is more likely to find a fresh start policy that is broad in scope.

Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 *Am. Bankr. L.J.* 81 (2002).

23 See Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (2003). Cohen argues, however, that many of the policies undergirding the consumers' republic — subsidies for home mortgages and consumer credit and the GI Bill — not only did not result in a classless society but often increased class, gender and racial divisions.



1949 and 1973: a private consumer marketplace supported by government policies, such as low cost mortgages and tax-subsidized consumer credit, intended to spur increased private consumption that would ensure high employment and productivity. This model also promised democracy and equal status — the breakdown of traditional class distinctions — through increased consumption. It was an American version of T.H. Marshall's concept of "social citizenship," in which the welfare state promised a citizenship of equal status and a "universal right to real income" that modified class inequality.<sup>24</sup> Within the consumers' republic, in 1973, the US Bankruptcy Commission conceived of individual bankruptcy — overwhelmingly dominated by consumer filers since the 1950s — as providing a fresh start for male consumers to re-enter this "open credit economy."<sup>25</sup> Ironically, the Bankruptcy Reform Act of 1978, that implemented many of the reforms recommended by the Bankruptcy Commission, was enacted as the consumers' republic faltered in the stagflation of the 1970s. Cohen argues that in the contemporary US there is a consumerization of the republic where, in her view, individuals are focused on self-interest with little interest in the common good, in an economy of increased inequality and segmentation of markets. This phenomenon undercuts support for the broad risk and loss spreading programs, such as consumer bankruptcy, which seem to be giving others "something for nothing."<sup>26</sup>

At the other end of the continuum are continental European countries that until the 1990s did not recognize the concept of a discharge of debt for consumers and that adopted open credit markets only after the financial liberalization of the 1980s. As the US-like conditions of an open credit society and reduced social safety net protection spreads to other countries, some writers foresee the inevitability of greater convergence between individual bankruptcy systems. David Skeel, for example, asks,

[a]s we look into the future, the obvious question is this: . . . what will happen to the . . . French consumer who is overwhelmed by medical bills that are not fully covered by his health insurance . . . . Because the existing consumer bankruptcy laws of most nations offer little relief to troubled debtors, one does not have to be a visionary to see that

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24 *Id.* at 409 (citing T.H. Marshall & Tom Bottomore, *Citizenship and Social Class* 28 (1992)).

25 *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 71 (1973).

26 Cohen, *supra* note 23, at 397.

any decline in social protections will create new pressure to liberalize bankruptcy regulation.<sup>27</sup>

Within this convergence model, the recent reforms to US bankruptcy law that introduce a means testing procedure, shift some debtors into five year repayment programs, and introduce mandatory pre-bankruptcy counseling, represent a growing rapprochement between the US and some European systems of debt adjustment.<sup>28</sup> These trends identified in countries of the North will, it is assumed, be replicated in countries of the South and transitional economies as consumer credit markets develop in these countries.

Most writers, while stressing this functionalist theme, recognize that specific responses to growing overindebtedness will be developed within a country's existing institutional structures for addressing overindebtedness,<sup>29</sup> and that cultural or ideological conceptions about the nature of debtors and creditors and about the role of the state may be relevant.

Johanna Niemi-Kiesiläinen addresses these issues in her discussion of "debt-adjustment" procedures in Europe.<sup>30</sup> She argues that we must understand the meaning of these procedures within the overall legal and social system. This necessitates an understanding of the internal point of view of the legal and social system — its assumptions and ideologies. Adopting Habermas's conception of legal paradigms as representing images of society,<sup>31</sup> Niemi-Kiesiläinen contrasts the liberal market model of US consumer bankruptcy with the "social market model" or "welfare state model" of Scandinavian and German debt-adjustment systems.

Niemi-Kiesiläinen concludes that these models reflect a different conceptualization of the rights and responsibilities of debtors, creditors and the state. In Scandinavia, debt relief is a substitute for the limits of the welfare state's ability to address unemployment and other circumstances

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27 Skeel, *supra* note 2, at 242.

28 See Jason J. 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 L. & Bus. 257 (2004); Jason J. Kilborn, *La Responsabilisation de l'Economie: What the US Can Learn From the New French Law on Overindebtedness*, 26 Mich. J. Int'l L. 619 (2005); Jason Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 Am. Bankr. Inst. L. Rev. (forthcoming 2006).

29 See, e.g., Skeel, *supra* note 2, at 243.

30 See Johanna Niemi-Kiesiläinen, *Constructions of Debtors and Creditors in Consumer Bankruptcy*, in *Consumer Bankruptcy in Global Perspective*, *supra* note 1, at 41.

31 See Jürgen Habermas, *Paradigms of Law*, 17 Cardozo L. Rev. 771 (1996).

beyond an individual's control. It is therefore tailored to protect only against "unforeseen" difficulties such as long term unemployment or illness. Individuals who do not fit this profile but have simply overconsumed or been imprudent may experience difficulties in obtaining relief. The different functions attributed to debt adjustment result in practical differences in relation to such issues as counseling, the ability to reaffirm individual debts and controls on access to the system. This analysis is in many respects illuminating. There is, however, a danger of over-determinism in the liberal/welfarist dichotomy that may underestimate both the varieties of capitalism<sup>32</sup> and the varieties of welfare states,<sup>33</sup> as well as the role of power relations, in the development of particular programs.

The previous paragraph might suggest that approaches to overindebtedness represent a particular cultural understanding within a society. However, the claim that law is expressive of a national culture may overestimate the solidity of cultural understandings, underestimating the political conflicts and interests that underlie them, the extent to which there are counter tendencies in individual countries' legal development and culture,<sup>34</sup> and the possibilities of radical change. For example, an identification of the understanding of bankruptcy developed during the period of the consumers' republic in the US as *the* US understanding of individual bankruptcy may understate the role of competing contemporary and historical understandings of individual bankruptcy.<sup>35</sup> Such identification is a normative justification posing as an empirical description.

Studies of Japan, a country where cultural norms are assumed to

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32 See Varieties of Capitalism (Peter A. Hall & David Soskice eds., 2000).

33 See Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).

34 [T]he idea of law as the expression of a unique form of life drastically exaggerates the unity and continuity, and understates the made-up character, of the cultures manifest in law . . . Institutions become a second-order fate, but only after having been shaped and stabilized by a surprising history of fighting and compromise, of halting insight and armed illusion. People forget the sufferings and sorrows of the war, and reimagine them as culture.

Roberto Unger, *What Should Legal Analysis Become?* 127 (1996).

35 Thus Bruce Mann, in his history of bankruptcy law, concludes that the Bankruptcy Act of 1800 offered only a provisional solution to "the question of whether and how a society should forgive its debtors," and that "every subsequent generation, including ours, confronted the question for itself." Bruce Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 254-55 (2002). See also Skeel, *supra* note 2, at 14-16, 154-57. Rafi Efrat argues that bankruptcy was not regarded as a safety net until the 1960s. Before that the bankrupt was regarded as a fraudster or deviant. See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 *Theoretical Inquiries L.* 365 (2006).

significantly influence individuals' economic behavior, may be relevant to this discussion of law and culture. These studies indicate that institutional and legal factors lie behind supposed cultural attitudes and consequently a change in these factors may affect individual choices.<sup>36</sup> Ronald Mann has demonstrated 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>37</sup> Similarly, lower levels of consumer credit in France may reflect the impact of interest rate ceilings and negative credit reporting rather than a French aversion to borrowing.

The dominant message in functionalist accounts remains one of an inexorable structural logic: as particular economic conditions or practices develop, there will be changes in the law. The infrastructure/superstructure logic is very visible, but there is often little further description of why and how particular institutional changes happen, or what the role of "model mongers"<sup>38</sup> and interest groups is in pursuing reform. It is as if society is a pressure cooker of debt that bubbles over and demands a legal response in terms of changes to bankruptcy law. This assumption is expressed by Johanna Niemi-Kiesiläinen in her review of the development of personal insolvency law in Europe in the 1990s: "because of the recession, the need for such laws was so obvious that the laws met hardly any opposition at all."<sup>39</sup>

At first glance this idea seems quite convincing.<sup>40</sup> However, one might pursue a more finely grained analysis. It is true that in many European countries financial liberalization during the period 1980-1995 stimulated a consumption boom and, in some countries, such as Finland, Norway and Sweden, a subsequent banking crisis.<sup>41</sup> The changes in debt adjustment

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36 See Takao Tanase, *The Management of Disputes: Automobile Accidents in Japan*, 24 *L. & Soc'y Rev.* 651 (1990) (concluding that the non-litigiousness of the Japanese is not explained by Japanese attitudes to litigation but by the institutional structures for the management of disputes); 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) (changes in bankruptcy law may be one factor in reducing stigma and shame and possibly suicide).

37 Ronald Mann, *Credit Cards and Debit Cards in the United States and Japan*, 55 *Vand. L. Rev.* 1055 (2002).

38 Braithwaite and Drahos define model mongers as "agents who pursue their political agenda by experimental floats of large numbers of (mostly foreign) models." John Braithwaite & Peter Drahos, *Global Business Regulation* 585 (2000).

39 See Niemi-Kiesiläinen, *supra* note 11, at 502.

40 See the comments of David Nelken, *Comparatists and Transferability*, in *Comparative Legal Studies: Traditions and Transitions*, *supra* note 1, at 448.

41 Kindleberger and Aliber note that in Finland, Norway and Sweden during this period there was "a mania in real estate and stocks . . . and then a crash." Charles P.

rules could therefore be viewed as one part of the necessary re-regulation and legitimization for this new consumer credit driven capitalism.<sup>42</sup> But financial liberalization differed within Europe: some countries, such as France, maintained interest rate ceilings and negative credit reporting which in combination dampened the democratization of credit. Indeed, France has a relatively modest level of access to credit compared to other European countries.<sup>43</sup> But France, under a socialist government, introduced a modest form of debt relief in 1989 as part of consumer protection. The law was conceptualized as a response to the problems of "active" as opposed to "passive" consumer overindebtedness and was part of a package proposal aimed at preventing consumer overindebtedness. Germany's reforms of the 1990s piggy-backed on business bankruptcy reforms,<sup>44</sup> and unlike the original French proposals held out the promise of a discharge to a debtor who entered a repayment plan. England and Wales survived a "debt crisis" in the late 1980s and early 1990s without any substantial change to its fairly restrictive bankruptcy laws and debt repayment systems. The introduction of the automatic discharge in 1986 was not a response to concerns over consumer overindebtedness, nor was the subsequent liberalization in 2002 of the bankruptcy discharge period from three years to one year.<sup>45</sup> It is possible to

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Kindleberger & Robert Aliber, *Manias, Panics and Crashes: A History of Financial Crises* 8 (2005). I benefited greatly in the following account from Jason Kilborn's articles on European debt adjustment systems. See sources cited *supra* note 28.

42 See generally, on new regulatory capitalism, David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, in *Annals of the American Academy of Political and Social Science* 598 (2005); Christopher R. Way, *Political Insecurity and the Diffusion of Financial Market Regulation*, in *Annals of the American Academy of Political and Social Science*, *supra*, at 125. This argument is implicit in Niemi-Kiesiläinen, *supra* note 11, at 502 (reforms to debt adjustment laws described as part of a movement "towards a more rigorous market economy in Western Europe"). Changes to European debt adjustment laws were made in England and Wales (1986, 2002), Denmark (1984), Germany (1994, 2003), Austria (1995), Sweden (1994), France (1989, 1998, 2004), Netherlands (1997), and Belgium (1998).

43 A recent report in France suggests that the combination of negative credit reporting and interest rate ceilings means that there are substantially lower levels of access to credit in France than in other EU countries. See N° 2034 Assemblée Nationale, Douzième Législature, Rapport fait au nom de la Commission des Affaires Économiques, de l'Environnement et du Territoire sur la Proposition de Loi (n° 2029) de Mm. Jean-Christophe Lagarde et Hervé Morin, tendant à prévenir le surendettement, R. M. Jean-Christophe Lagarde, *available at* <http://www.assemblee-nationale.fr/12/rapports/r2034.asp> (last visited Mar. 1, 2006).

44 See Niemi-Kiesiläinen, *supra* note 11, at 486.

45 Rafi Efrat argues that the deregulation of the UK credit market in the early 1980s prompted the "liberalization of the British fresh start policy in 1986," Efrat, *supra*

conclude from even this cursory description of these European developments that more detailed analysis of the process of reforms in these countries might yield valuable comparative insights on the role of interest groups in fashioning reforms and the extent to which such reforms fitted within existing institutional structures for addressing economic and social problems.

The functionalist hypothesis in comparative consumer bankruptcy stresses the significance of reductions in the social safety net as a factor in the rise of overindebtedness. Many bankruptcies in the United States are related to medical problems and bankruptcy provides a crude form of insurance for unpaid medical bills. However, the precise relationship between changes in the welfare state in Europe and overindebtedness remains to be documented. It is not clear that the welfare state substantially declined in European countries during this period or that it would have been adequate to address the substantial rise in overindebtedness.<sup>46</sup> It is possible that in Europe the welfare state was unable to address major shocks such as bank crises (as occurred in Finland and Norway). The English evidence indicates that overindebtedness is concentrated among a small percentage of households and for some of these individuals welfare state provisions have never been adequate and credit has always been used to manage the problems of inadequate income. The level of outstanding debt among members of this group has increased significantly.<sup>47</sup> What is not clear is whether this is because of changes in credit markets, rather than changes in welfare entitlements.

Changes in debt adjustment laws in Europe seem to be responses to different constituencies. In Scandinavian countries such as Norway and Finland, reform of debt adjustment law was a response to middle class misery as the homes of the middle class were threatened in the depression of the late 1980s and the subsequent debt adjustment law in Norway protected homes from seizure. In other countries, the main constituency for protection are primarily lower income debtors.<sup>48</sup> The most recent French reforms are partly conceptualized as responding to the problems of *quartiers de difficulté*

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note 22, at 93, but I think that the historical record suggests otherwise. See Carruthers & Halliday, *supra* note 5, at 373-420. See *infra* Part III for an account of English changes.

46 See, e.g., Francis G. Castles, *The Future of the Welfare State: Crisis Myths and Crisis Realities* (2004). A review of scholarship on the welfare state in Europe concludes that "the expectation of no sweeping retrenchment has largely been confirmed . . . and the resilience of the welfare state has become the starting point for most of the work on retrenchment." See Christoffer Green-Pedersen & Markus Haverland, *The New Politics of the Welfare State*, 12(1) J. Eur. Soc. Pol'y 43, 44 (2002).

47 See Elaine Kempson, *Overindebtedness in Britain* (2002).

48 See, for example, discussion of England and Wales, *infra* Part III.

— protecting those on the margins of society and combating issues of social exclusion.<sup>49</sup> This understanding of the beneficiaries of debt relief law differs from the influential US understanding that consumer bankruptcy provides relief to the middle class.

There are therefore differences in societies' conceptualizations of the function of debt relief and the constituencies receiving this relief. Niemi-Kiesiläinen argues that the new debtors of the 1990s in Scandinavia were not always in lower social or income groups and that the new middle-class debtors generated political pressure for change.<sup>50</sup> Niemi-Kiesiläinen's comment raises the question of the political influence of different groups on the introduction and subsequent history of European debt adjustment laws. In several countries, such as England and France, the beneficiaries of debt relief are not a powerful political constituency. At a time when lower income individuals seem to have little influence in many countries, why would governments enact debt adjustment protections? Were they a response to the fear of a populist political backlash, stoked by the media? A method of preserving the system of consumer credit against more extensive controls,<sup>51</sup> enacted for reasons similar to those underlying the original Bismarckian welfare state? Or were they, as Niemi-Kiesiläinen argues, part of an adjustment to a new form of consumer credit driven capitalism and a method of reducing demand for welfare by allowing individuals to write down their debts?

Functionalism may point to broad social and economic changes or crises that precede the introduction of a debt adjustment or bankruptcy regime. However, the expansion or retrenchment of the regime may be more dependent on influential actors who have an interest in the regime. The

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49 The most recent study by the Bank of France indicates that in 2004, individuals using the *commissions du surendettement* were between ages 35-54, often workers, employees or unemployed (over 30%), renters rather than owners, with a monthly salary of less than 1500 euro. 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 *Enquête typologique 2004 sur le surendettement*, [http://www.banque-france.fr/fr/publications/telechar/autres\\_telechar/enquete\\_typo2004\\_surendettement.pdf](http://www.banque-france.fr/fr/publications/telechar/autres_telechar/enquete_typo2004_surendettement.pdf) (2005). 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 ménages, 17ème Rapport Annuel (2004)*, available at [http://www.fbf.fr/Web/internet/content\\_particuliers.nsf/\(WebPageList\)/observatoire+de+l+endettement+des+menages?Open](http://www.fbf.fr/Web/internet/content_particuliers.nsf/(WebPageList)/observatoire+de+l+endettement+des+menages?Open) (May 11, 2005).

50 See Niemi-Kiesiläinen, *supra* note 11, at 481.

51 See Mark J. Roe, *Backlash*, 98 Colum. L. Rev. 217 (1998).

particular institutional structure chosen for a regime may create a path-dependence. David Skeel argues that the institutional structure established in 1898 for US bankruptcy, that gave a primary role in its administration to the private bar, rather than a public agency, has been of decisive importance in shaping the subsequent history of bankruptcy in the US.<sup>52</sup> A political science perspective will therefore be valuable, focusing on interest groups, policy entrepreneurs, networks of influence, the role of "crises" in framing responses, and the relationship of changes in debt law to wider ideological currents. This perspective would also be sensitive to the politics of individual countries, for example the extent to which there is a corporatist or pluralist model of interest groups and the relative role of the state and different institutions within the policy making process.<sup>53</sup>

Bankruptcy rules in many countries are often highly technical and in some countries are part of civil procedure, a classic lawyer's law. This does not mean, however, that bankruptcy law and administration are non-political. Apart from obvious interest groups, such as creditor and debtor groups, there are the professionals who tend the rules (judges, lawyers, accountants, debt counselors) and who will often have an interest in furthering their role and interests. The politics of bankruptcy change may often be played out in changes in low-visibility implementation and administration of the law where professionals can often bring about substantial change through technical amendments. Skeel discusses the political influence of lawyers and judges in shaping the structure of US bankruptcy law and representing a powerful constituency in reform debates.<sup>54</sup> It is child's play to pick out "special interest" provisions in bankruptcy legislation, and historical accounts of overindebtedness in the United States and Canada emphasize the close connection of issues of debt to class conflict.<sup>55</sup>

Zweigert and Kötz caution that topics that "are heavily impressed by moral views or values" will be an exception to their second premise, namely that different legal systems will arrive at the same or similar practical result. Again, issues of debt and bankruptcy often engender moral

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52 See Skeel, *supra* note 2, at 43.

53 In France, for example, the central role of the state in the economy is reflected in the influence of the Bank of France on the surendettement commissions.

54 See Skeel, *supra* note 2, at 16 ("bankruptcy professionals have spearheaded a relentless expansion of both the scope of the bankruptcy laws and their own prominence"); *id.* at 47 ("Since 1898, bankruptcy professionals have been the single most important influence on the development of bankruptcy law."). The role of judges in reform debates is explored in *id.*, ch. 5.

55 See, e.g., Mann, *supra* note 35.



debates about promise-keeping and the moral economy of the market. Since promise-keeping is an important norm of capitalist societies, we would expect variations on a theme rather than deep divisions among countries of the North. We would also expect that as capitalist societies develop consumer capitalism, they would not leave debt-paying norms to chance or to the vagaries and limits of legal enforcement. Indeed, there are many institutions in contemporary societies that communicate the proper norms of credit use.

Vivienne Curran claims that there is a higher concern with the morality of contract performance in civil law systems than in the more pragmatic common law,<sup>56</sup> and that this could influence approaches to overindebtedness. Certainly there is significant concern in countries such as France with the potential effects on individual responsibility for repayment of debts of a US-style debt discharge. But similar concerns have also been expressed in England and Wales, the home of the supposedly more pragmatic common law. The maintenance of "commercial morality" continues to be viewed as an important objective of consumer bankruptcy law in England and Canada. Common law countries tend to have more effective enforcement of creditor rights than civil law countries — a result that seems at first blush incompatible with the argument that common law systems are less concerned with the sanctity of promises than are their civil law counterparts.

In summary, functionalism is valuable in drawing researchers away from parochial classifications within their own legal system and in forcing them to focus on the complexities of cause and effect in the relationship between law and overindebtedness. A careful functionalist approach should always be sensitive to whether the supposed common function — in this case addressing overindebtedness — is in fact what a particular bankruptcy law always does in practice. The instrumental nature of the functionalist approach may also downplay an understanding of the cultural role of law, although again careful comparison should attempt to account for the internal point of view of a legal system. There is also a "social engineering" assumption in functionalism that different legal systems "solve" the problem of overindebtedness in differing ways. But the law may not in fact solve the problem. It may simply legitimize or otherwise justify a particular economic or social structure. While legitimization could be called a solution, I am not sure that is what the traditional instrumental functionalist has in mind. Finally, Zweigert and Kötz argue that functionalism is likely to be most

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<sup>56</sup> See Vivienne Curran, *Cultural Immersion, Differences and Categories in U.S. Comparative Law*, 46 Am. J. Comp. L. 43 (1998).

useful in non-political areas of private law. But such an approach does not seem to fit well in relation to bankruptcy and overindebtedness. Debt has throughout history been imbued with politics. I therefore turn to this aspect of bankruptcy and overindebtedness.

## II. THE POLITICAL ECONOMY OF COMPARATIVE CONSUMER BANKRUPTCY

National responses to overindebtedness engage political interests, broadly defined, as well as ideologies, and comparative analysis should be sensitive to the relationship between international, regional and national interests, and to the role of ideology in affecting legal change. International organizations such as the IMF, World Bank and UNCITRAL<sup>57</sup> have shown an interest in corporate bankruptcy as part of the process of economic development. The introduction of "modern" corporate bankruptcy regimes together with sophisticated credit bureaus and clear creditor rights in security are part of the Washington consensus for expanding and improving the allocation of credit (and permitting the penetration of foreign financial services markets by US companies). The US Chapter 11 model is influential either because of the prestige associated with it or simply as part of the "new imperialism"<sup>58</sup> associated with the US model of corporate capitalism. UNCITRAL has published a Legislative Guide on Insolvency Law<sup>59</sup> in relation to corporate bankruptcy and the EU has developed a Regulation on Insolvency as part of the attempt to improve the entrepreneurialism and competitiveness of EU businesses. There are, therefore, in the field of corporate bankruptcy, powerful actors promoting particular visions of bankruptcy that could potentially conflict with existing national interests and traditions.<sup>60</sup>

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57 See, for example, the following statement from UNCITRAL, Legislative Guide to Insolvency Law 10 (2004), *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html): "Insolvency laws and institutions are critical to enabling states to achieve the benefits and avoid the pitfalls of integration of national financial systems with the international financial system."

58 See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Legal Stud. 383 (2003).

59 UNCITRAL, *supra* note 57.

60 Consider, for example, the recent introduction of corporate bankruptcy in Brazil, based on the US Chapter 11 model, that will substantially reduce workers' entitlements in relation to failed enterprises. This legislation was introduced by the left-of-center Workers Party. Law No. 11.101, of Sept. 2, 2005, D.O.U. of 02.09.2005.

There has been little study of the interaction of international and national actors and interests in shaping consumer debt relief approaches. At the international level, few powerful actors show an interest in consumer bankruptcy.<sup>61</sup> The World Bank studies the "front end" of consumer credit — i.e. the facilitation of consumer credit markets through credit bureaus<sup>62</sup> and positive credit reporting systems that will serve to deepen credit markets in developing countries. The IMF may demand that countries introduce effective enforcement regimes as a condition of its loans. It has, however, demonstrated less interest in the "back end"; debt-relief programs for consumers and the social consequences of opening credit markets are therefore neglected.<sup>63</sup> Although there are provisions on responsible lending in the proposed new directive on consumer credit aimed at reducing overindebtedness, there is no European project to harmonize consumer debt adjustment or bankruptcy regimes.<sup>64</sup>

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61 INSOL International has developed guidelines on personal insolvency.

62 See, e.g., *Credit Reporting Systems and the International Economy* 34 (Margaret Miller ed., 2003) (noting that "[t]he credit reporting industry is growing worldwide, spurred by technological innovation and the liberalization of financial markets"). Almost half of the private reporting agencies worldwide were established after 1989.

63 For an example of a developing country's response, see the following letter from the Brazilian Central Bank to the IMF, available at <http://www.imf.org/External/NP/LOI/2003/bra/04/index.htm> (last visited Mar. 1, 2006):

[T]he process of privatizing the federalized banks has resumed, with a new round of evaluations to determine the minimum price for sale for one of the banks. Second, by June 2004 the government will fully implement the central bank's credit reporting system (Cadastro Positivo) to allow for better credit-rating decisions by lenders and enhance competition among financial intermediaries by making it easier for borrowers to move from one lender to another. Third, to improve the working of consumer credit markets, workers will now be allowed to pledge a fraction of their future wages to the repayment of consumer loans; by March 2004, this arrangement will also be expanded to include retirees in the public pension system. By reducing collection risks on personal loans, this measure should significantly increase flows and reduce spreads on these types of loans.

See also World Bank, *Access to Financial Services in Brazil*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/BRAZIL/EXTN/0,,contentMDK:20283780~pagePK:141137~piPK:141127~theSitePK:322341,00.html> (2005). For a critical discussion of this use of conditionalities by international institutions, see B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *Eur. J. Int'l L.* 1, 8-9 (2004).

64 The Enterprise Directorate of the EU Commission has published a report that advocates a more liberal bankruptcy regime to promote entrepreneurialism. See *Best Project on Restructuring, Bankruptcy and a Fresh Start*, available at [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_m](http://europa.eu.int/comm/enterprise/entrepreneurship/support_m) (Sept. 2003).

There may, however, be a diffusion of ideas between countries. The US concept of the "fresh start" is often referred to in European debates<sup>65</sup> although its influence on the particular solutions adopted is more difficult to assess. Comparative scholars argue that the "prestige" of a particular model will affect the extent to which it is a successful transplant,<sup>66</sup> and the US experience of consumer bankruptcy does not always garner high prestige in reform debates. An analogy might be drawn here to class actions as a mechanism for achieving access to justice for consumers. While the US concept of the class action is attractive in principle, there is much concern about the "Yankee baggage" that is associated with it,<sup>67</sup> and any importation of the idea of class actions is likely to operate quite differently from the US model. During the late 1980s some European academics acted as "model mongers," promoting the idea of a modified fresh start for European debtors that would graft European ideas to the general concept of the fresh start. In some cases these scholars had direct influence over policymaking.<sup>68</sup>

Within individual countries theories of interest group analysis in political science may be useful in explaining the development of bankruptcy regimes. Public choice analysis argues that diffuse and fragmented groups such as consumers are unlikely to press their demands in the political arena as effectively as more concentrated producer groups. This is one reason for public subsidization of consumer groups in several countries. Consumers may also have conflicting interests as potential borrowers and as individuals who may be overindebted. Other groups, such as debt-counselors, may act as agents of consumers in debt reform debates and mobilize the media to give higher profile to issues of consumer debt. Coverage in the media is often regarded as a surrogate form of political demand and politicians feel

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Policy institutes funded by the credit industry have been established (the European Credit Research Institute) and coalitions of consumer groups have developed at the European level. The most recent European Directive on Consumer Credit is available at [http://europa.eu.int/comm/consumers/cons\\_int/fina\\_serv/cons\\_directive/ccd\\_devlp\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/ccd_devlp_en.htm) (last visited Mar. 1, 2006).

<sup>65</sup> Kilborn notes many references to the US model in his articles. *See generally* sources cited *supra* note 28.

<sup>66</sup> *See* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *Am. J. Comp. L.* 93 (1995).

<sup>67</sup> *See* Antonio Gidi, *Class Actions in Brazil — A Model for Civil Law Countries*, 51 *Am. J. Comp. L.* 311, 322 (2003).

<sup>68</sup> *See, e.g.*, N.J.H. Huls, *American Influences on European Consumer Bankruptcy Law*, 15 *J. Consumer Pol'y* 125 (1992); N.J.H. Huls, *Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution*, 20 *J. Consumer Pol'y* 143 (1996).

obliged to frame a response to it. Technical topics such as bankruptcy tend to be dominated by insider professional groups who act both as self-interested actors and as agents of consumer debtors in the political process. Skeel and others argue that in US bankruptcy reform, consumer bankruptcy lawyers and legal academics have filled this role of speaking on behalf of consumer interests.<sup>69</sup>

There is also the role of ideas. Changes in bankruptcy law and regulation of overindebtedness take place against the background of dominant understandings of the role of credit, consumers and consumption within the economy. Groups who wish to bring about change may attempt to frame their position as being congruent with these ideas rather than as a challenge to dominant norms: the manner in which groups frame dominant ideas in order to pursue their agenda may affect a political outcome.<sup>70</sup> The success of international consumer groups outside North America in relation to the labeling of GMO food was related to their successful use of the rhetoric of consumer choice, a central tenet of free market economics and neo-liberalism.<sup>71</sup>

These remarks on the politics of comparative consumer bankruptcy are preliminary. At this stage of my work I am not committed to marching through the facts with a single theory. These multiple theories provide a context for a description of the current politics of interest groups in relation to reform in England and Wales.

### III. THE REFORM OF CONSUMER INSOLVENCY IN ENGLAND AND WALES

#### A. The Enterprise Act and Entrepreneurialism

Significant changes were introduced to the bankruptcy regime in England and Wales by Part Ten of the Enterprise Act.<sup>72</sup> These provisions liberalize

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<sup>69</sup> See Skeel, *supra* note 2, at 88, 191-97. In relation to the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), ninety-two law professors signed a letter opposing the consumer bankruptcy reforms in the legislation (letter on file with author).

<sup>70</sup> See, e.g., Christoph Strünck, *Mix-Up: Models of Governance and Framing Opportunities in U.S. and E.U. Consumer Policy*, 28 J. Consumer Pol'y 203 (2005).

<sup>71</sup> See David Harvey, *A Brief History of Neoliberalism*, ch. 2 (2005).

<sup>72</sup> The Enterprise Act, 2002, c. 40 (Eng.). I discuss the changes to personal insolvency in Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales*, in

the discharge process so that an individual is discharged from her debts after twelve months and, in practice, may be discharged within a period of a few months. These changes were not introduced as a response to concerns about consumer overindebtedness or the limits of the welfare state, and current discussions over consumer indebtedness initially developed as a phenomenon distinct from issues of bankruptcy policy.

The changes in bankruptcy law resulted from a belief among the New Labour elite that a reduction in the stigma of bankruptcy and consequent fear of failure would promote "responsible risk taking" and entrepreneurialism, making England and Wales a European leader in facilitating entrepreneurship.<sup>73</sup> This linking of bankruptcy to entrepreneurialism was based on a strong admiration among influential government leaders of the US approach to bankruptcy, which is claimed to have contributed to a vibrant enterprise culture in that country through the availability of a liberal fresh start. Peter Mandelson stated, in 1998, "I am told that some investors actually prefer to back businessmen and women with one or more failures under their belt because they appreciate the spirit of enterprise shown and recognize the experience that has been gained from it."<sup>74</sup> This sentiment was echoed by Melanie Johnson, the Parliamentary Under Secretary of State, during Parliamentary debate on the Act, who asserted that in the US "if people do not have one or two failures under their belt . . . they are hardly regarded as serious entrepreneurs."<sup>75</sup>

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Consumer Bankruptcy in Global Perspective, *supra* note 1, at 212, 218-22. See also Adrian Walters, *Personal Insolvency Law After the Enterprise Act: An Appraisal*, 5 J. Corp. L. Stud. 65 (2005).

73 See The Insolvency Service, *Bankruptcy: A Fresh Start* 1, 5 (2000) [hereinafter *Bankruptcy: A Fresh Start*]; The Insolvency Service, *Insolvency — A Second Chance*, 2001, Cm. 5234, para. 1.8, available at <http://www.archive.official-documents.co.uk/document/cm52/5234/5234.htm> (July 2001) [hereinafter *Insolvency — A Second Chance*]: "The proposed reforms to our bankruptcy law will keep us in the lead in these European developments." See also the comments attributed to Peter Mandelson in 1998, while Secretary of State in the Department of Trade and Industry: "In the US some of the most successful entrepreneurs are those who have failed once or twice. Banks and society as a whole don't write people off as failures. They see them as people who have learned." *Guardian*, June 14, 2000, at 29. See also Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* 191 (2002), for further references to the Blair government's enthusiasm for a less stigmatizing approach to business failure.

74 See Peter Mandelson, *Speech Before the British American Chamber of Commerce* (Oct. 13, 1998), available at <http://www.dti.gov.uk/ministers/archived/mandelson131098.html>.

75 Melanie Johnson, MP, Parliamentary Under Secretary of State for Competition, Consumers and Markets, *quoted in Independent*, June 11, 2000. MP Johnson

The Insolvency Service, the executive agency of the UK Department of Trade and Industry that administers the system of official receivers, was also interested in reforming individual bankruptcy. This agency processes the great majority of consumer cases in England and Wales, since consumer cases do not generate sufficient assets to make them profitable for private insolvency practitioners. The service was interested in reducing its costs in processing no-asset bankruptcies that raised no issues for investigation. It had published a consultation paper that included the possibility of a broad review of the various public and private mechanisms used by consumers to address problems of overindebtedness.<sup>76</sup> However, the link to entrepreneurialism, and New Labour values of "modernization" — the White Paper on Insolvency promised "a thoroughly modern bankruptcy" — resulted in several reforms being fast-tracked into a flagship Enterprise Bill. Without the connection to this agenda, bankruptcy reform might have taken much longer to be enacted.

The Parliamentary Under Secretary indicated during parliamentary debates on the Enterprise Bill that the insolvency reforms were not intended as a safety net for overindebted consumers and that other alternatives, such as repayment plans, were more appropriate:

[A] person's entry into bankruptcy is not a right and should be considered very much a last resort . . . bankruptcy is not the only method of dealing with debts . . . There are several other routes available to individuals with financial problems . . . Many individuals can, and do, apply to county court for administration orders and discharge their liabilities through monthly payments . . . growing numbers of individuals with debt problems seek advice and assistance from organizations in the voluntary sector such as Consumer Credit Counselling Service and Paylink . . . Several of them offer repayment plans of as little as £1 per week.<sup>77</sup>

The government also indicated that it would not alter the requirement that individuals must pay a lump sum deposit to access bankruptcy, a fee which makes bankruptcy out of reach for some debtors.<sup>78</sup> However,

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noted that, according to a study, 31.5% of English people say that fear of failure would prevent them from starting a business. In the United States the rate is only 21%. Global Entrepreneurship Monitor 2001 Executive Report, *quoted in* Melanie Johnson, Speech to Insolvency Lawyers' Association (Nov. 13, 2002), *available at* <http://www.dti.gov.uk/ministers/speeches/MJohnson131102.html>.

<sup>76</sup> See Insolvency — A Second Chance, *supra* note 73.

<sup>77</sup> See 387 Parl. Deb., H.C. (6th ser.) (2002) 61 (words of Parliamentary Under Secretary of State for Trade and Industry, Ms. Melanie Johnson).

<sup>78</sup> An individual must pay an initial fee of £310 to cover the costs of administration and

many consumers would benefit from the changes since the reforms apply to individuals generally, whether or not the bankruptcy results from consumer or business debts. There had already been a growth in the number of consumer bankrupts during the 1990s. Between 1996 and 2003 the percentage of non-trader bankrupts rose from forty to seventy percent of individual bankrupts.<sup>79</sup> The implications of liberalization for consumers were a significant topic during parliamentary debates. Several MPs, briefed by credit granters, claimed that the reduction in stigma and the short discharge period would result in an "explosion" of bankruptcies resulting in the erosion of personal responsibility that, they claimed, had occurred in the US.<sup>80</sup> In contrast, other MPs, briefed by the main debt advice agency in the UK, argued that the bill did not adequately meet overindebted individuals' needs because of the problems of access. Neither of these positions resulted in changes to the bill.

Since the government had a large majority in parliament, it was able to implement its strategy for individual bankruptcy without modification at the legislative stage. However, the Enterprise Act has turned out to be only the first act in the continuing reform of consumer bankruptcy and other methods of addressing consumer overindebtedness. The Insolvency Service has recently proposed a "No Income No Asset" (NINA) Debt Relief Order (not described as bankruptcy) that will be a low cost alternative for "the very poorest"<sup>81</sup> individuals unable to pay their debts. Based on a New Zealand model, this "poor person's bankruptcy" (echoing the 19th century description of the English administration order) is aimed at individuals with no more than £15,000 in total unsecured and secured debt who cannot pay even a portion of their debt within a reasonable period of time and who have no more than £50 in surplus income or £300 in realizable assets. The Service estimates that up to 36,000 individuals a year would use this service. This alternative would be

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also pay court fees. See Insolvency Proceedings (Fees) Order (2004) SI 2004/593. The court fee may be waived. The deposit fee was challenged unsuccessfully under the European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 221, as restricting a fundamental right of access to the courts. *R. v. Lord Chancellor ex parte Lightfoot*, 2000 Q.B. 597 (Eng. C.A.).

79 See The Insolvency Service, *Relief for the Indebted — An Alternative to Bankruptcy* 16 (2005).

80 See Ramsay, *supra* note 72, at 220-21. In fact, consumers in the US do not seem to file for bankruptcy based on a rational cost-benefit analysis. A well-known study by Michelle White indicates that only a small portion of individuals who could benefit from filing for bankruptcy chooses to do so. See Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. Econ. & Org. 205 (1998).

81 The Insolvency Service, *supra* note 79, at 21.



attractive to many of the current users of the county court administration order, the great majority of whom are unemployed and in receipt of State benefits.<sup>82</sup>

Unlike the general bankruptcy procedure introduced under the Enterprise Act, there will be no court involvement in a NINA and the fee would be significantly less than the current deposit of £310 (possibly £100). In practice, the differences are modest since even before the Enterprise Act reforms the court proceedings were generally a formality and the initial interview by the Insolvency Service with a debtor may be conducted by telephone. After this the debtor simply waited out the discharge period.<sup>83</sup> Under the NINA a debtor will also have to demonstrate that she has made an unsuccessful attempt to deal with her creditors. An individual would be channeled into the scheme through an "approved intermediary" such as a Citizen's Advice Bureau or not-for-profit debt advice agency. The use of approved intermediaries reduces the costs to the Official Receiver but an approved intermediary such as Citizens Advice would require additional government funding to process these cases.<sup>84</sup>

In addition, a working group has developed proposals for a more consumer-friendly IVA procedure.<sup>85</sup> The IVA was introduced in 1986 for

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82 See also the earlier consultation paper by the Department of Constitutional Affairs, *A Choice of Paths: Better Options to Manage Overindebtedness and Multiple Debt* (July 20, 2004) (Consultation paper 23/04), available at <http://www.dca.gov.uk/consult/debt/debt.pdf>. Research on county court administration orders shows that seventy-five percent of users receive unemployment benefits and sixty-five percent are young females. See Civil Justice Division and Information Management Division Department of Constitutional Affairs, *Who is Using County Court Administration Orders and Debtor Petitions?* (2003); Elaine Kempson & Sharon Collard, *Managing Multiple Debts: Experiences of County Court Administration Orders Among Debtors, Creditors and Advisors* (2004).

83 See Ramsay, *supra* note 72, at 210.

84 The Insolvency Service proposal argues that these will be short term costs since in the long run the availability of the debt relief order will reduce the current negotiating costs between the intermediary and the creditors. Citizens Advice responded to this consultation by indicating that

[a]dequate funding is essential if the not-for-profit sector is to provide the approved intermediaries . . . the Insolvency Service could give Citizens Advice funding in proportion to the number of DROs generated by Citizens Advice Bureaux for us to fund additional money advice capacity within bureaux according to need.

Citizens Advice also suggested that some of the funding might come from the credit industry. See Citizens Advice, *Relief for the indebted*, [http://www.citizensadvice.org.uk/index/campaigns/social\\_policy/consultation\\_responses/cr\\_consumerandebt/relief\\_for\\_the\\_indebted](http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_consumerandebt/relief_for_the_indebted) (last visited Mar. 1, 2006).

85 For the group's most recent document, see Report of the Individual Voluntary Arrangement Working Group (on file with author).

small businesses and professionals to make a composition of their debts and was not designed for consumer debtors. In recent years the IVA has been modified in practice by entrepreneurial insolvency practitioners to address consumer needs, and the current proposals would simplify the process with the aim of making it an attractive alternative for consumers.<sup>86</sup> These proposals make no reference to comparative experience such as repayment plans under the Canadian consumer proposal regime or Chapter 13 of the US Bankruptcy Code.

The Department of Constitutional Affairs (formerly the Lord Chancellor's Department) is also proposing reforms to the much-criticized administration order procedure in the county courts. These would increase the amount of debt that could be included in a repayment plan from £5000 to £15,000, permit repayment over five years, and allow composition of debts if the debtor complies with the repayment plan.<sup>87</sup> The Department also proposes the introduction of an enforcement restriction order for debtors who have suffered a change of circumstance since they incurred their debts. This will provide temporary relief (initially six months) for individuals who are unable to meet their commitments in the short or medium term.

The number of debt management plans offered by private agencies has mushroomed in England during the past decade. The industry is dominated by three large providers that focus on providing standardized debt management plans for a fee, primarily in relation to unsecured debts.<sup>88</sup> Although they have been subject to much criticism, a review of their services indicated that they have been part of an increasingly mixed economy of public and private advice provision.<sup>89</sup> The companies have sought further respectability by developing a code of practice in association with the Office of Fair Trading. There is also a non-profit Consumer Credit Counselling Service, based on the US model of creditor financing, which offers repayment plans which reschedule a debtor's repayments.

In terms of the use of the various alternatives for overindebted persons in 2004 in England and Wales, there were 35,898 bankruptcies, 10,751 IVAs, 3,948 administration orders and an estimated 72,500 debt management

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<sup>86</sup> See The Insolvency Service, *Improving Individual Voluntary Arrangements*, available at [http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/improvingIVAs.pdf](http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/improvingIVAs.pdf) (July 2005).

<sup>87</sup> See Department of Constitutional Affairs, *Response Paper to Consultation 17/03/05*, at 19 (2005).

<sup>88</sup> See Ramsay, *supra* note 72, at 217.

<sup>89</sup> See Claire Whyte & Sharon Collard, *Fee or Free? The Role of Fee-Charging Debt Advice Companies in Money Advice Provision* (1999).

plans.<sup>90</sup> Seventy percent of bankruptcies were consumer bankruptcies. The situation in England and Wales might be compared with that in Canada, where in 2004 there were 84,426 consumer bankruptcies, 8,844 business bankruptcies, 16,658 consumer proposals, and at a rough estimate, 8,000 debt management plans (outside Quebec) operated by credit counseling services. Given the much larger population of England and Wales (fifty-one million) compared with Canada (thirty-two million) these raw statistics suggest that a significantly higher portion of the Canadian population is seeking to repay through a formal process.

These data may also provide some support for functionalist arguments. The dominance of debt management plans in England may indicate the current limits and costs (economic and psychological) of other alternatives for consumers. The debt management plan substitutes, albeit imperfectly, for bankruptcy or a composition of debts. However, Canadians on debt management plans generally have a much lower average level of debt (approximately \$22,000) than the average debts of individuals on English debt management plans (£20,000-25,000). Individuals using consumer proposals in Canada also show a significantly lower total household income than individuals Using IVAs (\$31,600 compared with approximately £25,000-30,000).<sup>91</sup>

Since the introduction in England and Wales of the more liberal bankruptcy discharge in 2004, the number of individual bankruptcies has increased substantially. There has been speculation as to whether the liberal discharge period has caused this increase, and also as to whether there is a new "type" of bankrupt debtor emerging, based on raw statistics that indicate significant increases in young, often female bankrupts. The absence of systematic empirical study of consumer bankruptcy in England makes these questions difficult, if not impossible, to answer.<sup>92</sup> The Bank of England, in its 2005 Financial Stability Review, attributes the increase to higher levels of unsecured borrowing among individuals with existing debts, making them more vulnerable to income shocks. It also speculates that recent increases

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90 See The Insolvency Service, *supra* note 86, at 1.

91 The Canadian data for 2004 were provided to the author by the Office of the Superintendent of Bankruptcy (on file with author). The English data are based on Michael Green, Individual Voluntary Arrangements, Over-Indebtedness and The Insolvency Regime, at III:3 (2002); Report of the Individual Voluntary Arrangement Working Group, *supra* note 85, at 11; and information from an interview with a leading IVA provider, *see infra* note 110. The distinction in average debts for consumer proposals and IVAs may be accounted for by the fact that Canada has separate regimes for consumer and commercial proposals. In England and Wales the IVA covers both consumer and commercial debtors.

92 A very recent pilot study of bankruptcy suggests that males represent the majority

might reflect greater awareness of options available to the overindebted.<sup>93</sup> England and Wales still has a bankruptcy rate that is less than one fifth of the US rate.<sup>94</sup>

### **B. Overindebtedness, the "Debt Crisis," and Bankruptcy Reform**

Bankruptcy reform and concerns about overindebtedness initially ran along distinct tracks, partly because there is little tradition in the UK of viewing bankruptcy as an integral aspect of the regulation of the consumer credit market. However, the reforms to bankruptcy and insolvency legislation must now be viewed within the overall overindebtedness strategy of the current government.

Overindebtedness became a major public issue in the UK in the late 1990s. Although the actual nature and extent of overindebtedness remain contested, the media regularly reports on "debt explosions," "credit binges," "debt traps," and "the ticking time bomb of debt." There is a "debt crisis."<sup>95</sup> In 2000, the Government convened a "debt summit," then a task force on overindebtedness, and finally, in 2004,

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of bankrupts, with fifty-three percent males and forty-seven percent females. *See* Centre for Insolvency Law and Policy, *Bankruptcy Courts Survey 2005 — A Pilot Study Final Report* (2006). A modest study of bankruptcy by the Department of Constitutional Affairs, conducted before the introduction of the Enterprise Act changes, found that two-thirds of bankrupts were men, and thirty-eight percent were unemployed, although only three percent were recorded as both unemployed and receiving benefits. Only twenty-two percent were homeowners (in a country with a homeownership level approaching seventy percent). 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 US studies. It is possible that they may have lost their jobs and sold their homes before petitioning for bankruptcy.

93 *See* Bank of England, *Financial Stability Review 19* (2005). A review by the Financial Services Authority notes that the upward trend in insolvencies commenced before the bankruptcy law changes. *See* Financial Services Authority, *Financial Stability Review 17* (2005).

94 Bank of England, *supra* note 93, at 17.

95 *See, e.g.,* Dee O'Connell, *Money to Burn: We are More in Debt than Any Other Country in Europe, Living Constantly Beyond Our Means. So How Did A Nation of Shopkeepers Become a Nation of Shopaholics? And Are We Living on Borrowed Time?*, *Observer Magazine*, Nov. 30, 2003, at 28 (the article begins with the statement "Britain is in the grip of a debt crisis."); Sarah Crown, *Consumer Body Warns on Britain's "Credit Binge,"* *Guardian*, Apr. 22, 2004, at 12; Jane Croft,

developed an ambitious "Overindebtedness Action Plan."<sup>96</sup> During this period Parliamentary committees denounced the practices of credit card companies, cross-examined the Chairman of Barclay's Bank who admitted that "I do not borrow on credit cards: it is too expensive," and reported the story of a dog that had been sent an application for a gold credit card.<sup>97</sup>

This upsurge of interest in overindebtedness coincided with plans to modernize the Consumer Credit Act of 1974<sup>98</sup> in a new Consumer Credit Bill,<sup>99</sup> and its parliamentary passage became the focus for a debate on overindebtedness, credit marketing practices, sub-prime lending and loan sharking. The media highlighted a court decision which struck down a couple's loan of £5,750 from a sub-prime lender that had spiraled to a debt of £140,000.<sup>100</sup>

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*Ocean of Debt: Aggressive Tactics Blamed For Borrowing Explosion*, Financial Times, June 2, 2004, at 4; John McConnico, *Money: How to Get Down from the Credit Mountain: Six Million Families are in A Debt Trap*, *Indep.* on Sunday, Apr. 25, 2004 at 22; *Mirror*, Feb. 21, 2001, at 5; *Borrowers Dig a Deeper Debt Trap*, Sunday Express, Aug. 31, 2003, at 9; Jane Padgham, *Britain's Household Debt Mountain Is Set to Top UK pound 1 Trillion*, Evening Standard, June 2, 2004, at 37; Liam Halligan, *The Debt Pandemic*, New Statesman, Oct. 24, 2005, at 12.

96 There is a large literature on overindebtedness in England and Wales. See, for example, the Department of Trade and Industry's overindebtedness page, <http://www.dti.gov.uk/ccp/topics1/overindebtedness.htm> (last visited Mar. 1, 2006). Given space constraints, the reader will find the report commissioned by the opposition conservative party in the UK a useful source of materials. See The Griffiths Commission on Personal Debt, *What Price Credit?* (2005).

97 See UK Parliament, Select Committee on Treasury, Minutes of Evidence, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmtreasy/125/3101608.htm> (Dec. 23, 2003). Concerns about credit explosions are not new. In 1989, the Office of Fair Trading published a report on overindebtedness that began with the comment that "few consumer issues have so consistently . . . attracted as much attention and controversy as the so called 'credit explosion' of recent years." Office of Fair Trading, *Overindebtedness* (1989). See also, on atrocity stories in relation to credit, Lendol Caldor, *Financing the American Dream: A Cultural History of Consumer Credit* (1999).

98 Consumer Credit Act, 1974, c. 39 (Eng.).

99 This is now the Consumer Credit Act, 2006, c. 14 (Eng.), available at <http://www.dti.gov.uk/ccp/creditbill/> (last updated Apr. 7, 2006).

100 See the recent Appeal Court decision, *London North Securities Ltd. v. Meadows*, 2005 All E.R. 381 (Eng. C.A.), that upheld the lower court's decision on technical grounds and expressed no opinion on whether the bargain was extortionate under the Consumer Credit Act. For media treatment, see, for example, *Couple Beat New Bid by Loan Firm to Make Them Repay £384,000*, Daily Mail, July 28, 2005, at 31. Commentary on the lower court (county court judgment, unreported) included: *Judge Wipes Out Loan Row Couple's £384,000 Debt*, Independent, Oct. 29, 2004, at 2; *"Shylock" Firm in New Bid*, Daily Star, Nov. 7, 2004, at 20 (describing the

There is no clear evidence of a debt crisis. The record-breaking debt-to-income levels noted in the English press of 140% comprise primarily home mortgages, and both the Bank of England and an expert report concluded that the proportion of households facing financial problems has remained fairly stable over the past decade.<sup>101</sup> Official and expert documents continue to identify problem debt with particular groups: younger families with mortgages in lower income groups, individuals on low incomes, and lone parents. The most recent survey notes an over-representation of women and those in the lowest income bracket.<sup>102</sup> The most common payment in arrears was council tax and other utilities. There is thus a conflict between these documents and media reports that refer to widespread overindebtedness. Overindebtedness seems to track class and gender divisions in English society.

Whether or not there is in fact a "debt crisis," the government has produced an ambitious overindebtedness strategy, which includes the following policies: development of a national strategy for financial capability; increases in affordable credit through development of credit unions and alternative models of affordable credit; introduction of a "stakeholder suite" of financial products to promote asset savings; investigation of the role of interest rate ceilings; strengthening of credit licensing and attacks on unfair lending

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fact that the lender in this case, Northwestern Securities, was applying to the Office of Fair Trading for a new credit license); Nina Montagu-Smith, *Judge Cancels £384,000 Debt over £5,750 loan. Couple Faced Losing Home After Falling Behind with "Extortionate Repayments,"* Daily Telegraph, Oct. 29, 2004, at 10; David Ward, *Court Frees Merseyside Couple From Loan Debt That Soared From £5750 to £384,000. Judge Says Home Improvement Agreement With Credit Company Was Extortionate,* Guardian, Oct. 29, 2004, at 3; Patrick Mulchrone, *House of Pain; Debt Threat Couple Who Owe £384,000,* Mirror, Oct. 26, 2004, at 4; John Crowley, *Lender 'Told Us We Should Borrow More,'* Daily Telegraph, Oct. 27, 2004, at 8.

<sup>101</sup> Bank of England, *supra* note 93, at 60:

The share of households reporting debt to be a burden seems little changed in recent years. In the BHPS surveys from 1995 to 2001, around 10% reported their debts to be a heavy burden and 29% somewhat of a burden, similar to the NMG survey. The rapid growth of unsecured debt in recent years has not, therefore, as yet led to any overall increase in the degree of financial distress reported by a small group of households. But the survey does point to a small group of heavily indebted individuals who continue to face substantial problems in servicing their debt.

*See also* Merxe Tudela & Garry Young, *The Distribution of Unsecured Debt in the UK: Survey Evidence*, Winter 2003 Q. Bull. Bank Eng. 417, 423. In its 2004 Financial Stability Review the Bank notes that write-offs on credit cards are 3%.

<sup>102</sup> *See* Department of Trade and Industry, *Overindebtedness in Britain: A DTI report on the MORI Financial Services Survey 2004* (2005).

practices; attack on illegal money lending; improved data sharing to underpin responsible lending decisions; increases in the funding of free and available debt advice; alternative dispute resolution for debt disputes; the improvement of insolvency with the introduction of a "no income no asset" procedure; and finally, improvement in housing benefits and the administration of council tax benefits.<sup>103</sup> Several of these reforms were enacted in the recent Consumer Credit Act of 2006.<sup>104</sup>

The overindebtedness strategy reflects New Labour's "Third Way," "joined-up" approach to policy-making that attempts to address all facets of a problem, bringing together different departments and perspectives on an issue. The Third Way provided the intellectual scaffolding for New Labour's policies — "a framework of ideas for an era of globalization"<sup>105</sup> — by developing a policy framework that would avoid the extremes of neo-liberalism and statism. It focused on policy modernization, recognizing the centrality of the market, the limits of traditional forms of redistributive policies (such as income transfers) and the need for empowering individuals to make responsible choices.

The Third Way in consumer policy envisages a consumer credit market of responsible lenders and borrowers that may be achieved through a variety of regulatory instruments. These range from better credit scoring and new consumer credit rights, to self-regulation — inclusion by the British Bankers Association, under its Banking Code, of "health warnings" about the dangers of regularly paying only the minimum balance on a credit card. This approach resonates with contemporary thinking about regulation that describes it as decentered,<sup>106</sup> recognizing that regulatory strategies should combine governmental and non-governmental actors and be involved in structuring and influencing market interactions rather than merely policing infractions of rules. Thus, the Overindebtedness Action Plan states:

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103 See Department of Trade and Industry & Department of Work and Pension, *Tackling Overindebtedness: Action Plan 5-6* (2004).

104 These include replacement of the extortionate bargain test by an "unfair relationship" test; enhancement of the Office of Fair Trading's powers of investigation under the licensing regime and the creation of new intermediate sanctions; and access for consumers to the Financial Ombudsman Service for consumer credit disputes. See Consumer Credit Act, 2006, c. 14 (Eng.), available at <http://www.dti.gov.uk/ccp/creditbill/> (last updated Apr. 7, 2006).

105 See Wyn Grant, *Economic Policy in Britain* 4 (2002) (quoting Anthony Giddens).

106 See Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in A "Post-Regulatory" World*, 54 *Current Legal Probs.* 103 (2001).

Working with our partners in the credit industry, the voluntary sector and consumer groups, the Government seeks to minimize the number of people who become over-indebted and to improve the support and processes for those who have fallen into unsustainable debt . . . Our aim is to get to a position where consumers have the capability and information they need to make informed decisions about borrowing and where lenders make responsible decisions about whether and how much credit to grant.<sup>107</sup>

In relation to overindebtedness, there are the investments by the UK government in debt and financial capability advice initiatives to address existing debt problems and prevent future debt problems. Access to bankruptcy is not the responsible alternative but is available only for those overindebted consumers who have no possibility of repaying their debts (likely to be defined as the ability to pay over five years). These requirements for access to bankruptcy are similar to those in the recent French law, that an individual be "irredeemably compromised,"<sup>108</sup> before being permitted to access the new special procedure that will discharge debts after twelve months. Although consumers are now expected to be responsible risk takers, there is little political support for them to have access to bankruptcy in the same manner as failed entrepreneurs.

The Action Plan represents a major public commitment. Such a unified approach to overindebtedness is difficult to achieve in a country with a federal system, such as the United States, where jurisdiction over issues of credit and debt regulation is divided. The English approach is also based on the assumption that there are gradations of debt problems — some that are

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<sup>107</sup> Department of Trade and Industry & Department of Work and Pension, *supra* note 103, at 1.

<sup>108</sup> 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.

For an overview and evaluation of the procedure, see Nathalie Côte, *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).



temporary and others that are more permanent. The Enforcement Restriction Order is aimed at the former, bankruptcy at the latter. A comparative issue is the extent to which individual court procedures — such as the proposed Enforcement Restriction Order — will address cases that would be dealt with by bankruptcy procedures in the US or Canada.

#### IV. INTEREST GROUPS AND IDEOLOGIES IN INSOLVENCY REFORM IN ENGLAND AND WALES

A traditional way of thinking about the shape of bankruptcy legislation is to view it as representing a balance between creditors and debtors — a balance that reflects history and the changing class positions of creditors and debtors. The Cork Committee concluded that "society has always striven hard to maintain a just balance between the creditor on the one hand and the debtor on the other."<sup>109</sup> In the UK, the financial industry is represented by groups such as the Consumer Credit Trade Association, the Consumer Credit Association, the British Bankers Association, and the Finance and Leasing Association. The two major consumer groups in the UK, *Which?* (formerly the Consumers' Association) and the National Consumer Council, have shown much interest in consumer credit reform and overindebtedness but less interest in insolvency reform. Undoubtedly these groups will influence reform.<sup>110</sup> However, other groups, such as professionals and public agencies, also influence reform — particularly the relative balance of public and private provision of services to the overindebted, and here I focus on their roles.

##### A. Insolvency Practitioners

There are approximately 1,200 insolvency practitioners in England and Wales, who have a monopoly on the conduct of statutory insolvency processes, such as bankruptcy or IVAs. The insolvency profession in England and Wales has shown little interest in the consumer debtor. It was not possible to service this market profitably and the great majority of individual

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<sup>109</sup> See *Insolvency Law and Practice: Report of the Review Committee* (1982); see also Andrew Keay, *Balancing Interests in Bankruptcy Law*, 30 *Common L. World Rev.* 206 (2001).

<sup>110</sup> There are also some specific groups in England and Wales that advocate on behalf of bankrupts. See the description of the Bankruptcy Association and the Bankruptcy Advisory Service in David Milman, *Personal Insolvency Law, Regulation and Policy* 21 (2005).

bankrupts are processed by the Insolvency Service. The costs and complexity of an IVA were also presumed to make them unavailable to consumers. However, since the mid 1990s there has been increased specialization by a small number of insolvency practitioners in providing "streamlined" IVAs to consumers. Michael Green, in research on IVAs, concludes that the great majority of arrangements represent consumer debts. In addition, 36% of all IVAs were handled by five firms, so that, in his words, there was a handful of "bulk processors," handling "factory IVAs."<sup>111</sup>

This entrepreneurial activity by a small number of insolvency practitioners makes IVAs available on a routine basis to consumers. One major provider of this option has a caseload that doubled from early 2005 to 2006.<sup>112</sup> The plans offered by these companies generally last five years. One provider interviewed by the author claimed that the average IVA client is a married couple with children, with a total household income of £27,000 (similar to the average national household income), unsecured debts of £25,000, and repaying an average of £330 a month. In the view of this provider, creditors are unlikely to accept a plan where debts are less than £12,000 or if the dividend is less than twenty pence on the pound. Firms charge fees of about £6,000 for a five year plan.<sup>113</sup> These practitioners advertise their services widely and the growth of this specialized group of insolvency professionals accounts for the exponential rise in the use of IVAs over the past year.<sup>114</sup> This group clearly has a strong professional interest in the development of this option.

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111 See Michael Green, *Individual Voluntary Arrangements, Overindebtedness and the Insolvency Regime*, Short Form Report, ch. III:7 (2002).

112 See *Debt Free Direct Shares Soar as the Workload Doubles*, Evening Standard, Feb. 6, 2006, at 26:

Shares in personal insolvency experts Debt Free Direct hit new highs today after the company revealed it is more than twice as busy as it was last year. Latest figures reveal it is handling 1038 individual voluntary arrangement cases a month against 453 this time last year. It said it had had a very strong response to post-Christmas advertising for its services, which enable debt-laden individuals to consolidate their borrowings and come to an agreement with their creditors. Debt Free Direct shares rose 10p to 313p, their highest since flotation three years ago.

113 Interview with a major provider of IVAs (Sept. 17, 2004) (notes on file with author).

114 The most recent DTI statistics indicate an increase of 117% in IVAs from the fourth quarter of 2004 to the fourth quarter of 2005. Individual bankruptcies increased by 57%. The insolvency Service, *Statistics Release: Insolvencies in the Fourth Quarter 2005*, <http://217.154.27.195/sd/insolv200602/index.htm> (Feb. 3, 2006). See also David Prosser, *Record Level of Bankruptcies Prompts Debt Warning*, Independent, Aug. 6, 2005, at 44 (the rise in IVAs is attributed by an industry expert to the fact that several companies have come into the market in the past twelve months advertising the merits of IVAs).

There have been criticisms of the fees taken and quality of advice provided by some insolvency practitioners in relation to IVAs,<sup>115</sup> and other debt advice agencies have questioned the insolvency practitioners' monopoly on providing IVAs.<sup>116</sup>

### **B. The Insolvency Service**

The Insolvency Service is an executive agency. The concept of an executive agency is part of the new public management initiatives that were introduced in many OECD countries in the 1990s, according to which government should be run more like a business, with a focus on outputs and quantification and a more competitive basis for providing public services. The Service administers the system of official receivers throughout England and Wales, who perform an investigative role, and acts as a trustee in consumer bankruptcies that are not profitable for private insolvency practitioners. Such cases represent the great majority of consumer bankruptcies and the service does not recover its costs of administration in these cases. Individuals may often find it difficult to pay the required upfront deposit of £310 for bankruptcy even if they are granted remission from court fees. The Service rejects the concept of cross-subsidization of no-asset cases by bankruptcies with assets, or the funding of consumer cases from general taxation.<sup>117</sup> Even within the NINA "Debt Relief Programme" the Service proposes an upfront entry fee to cover administrative costs (perhaps £100). This decision does not seem to reflect a cost/benefit analysis that might take into account the social costs of being unable to access bankruptcy.

Public subsidy of these cases would, however, occur through funding of Citizens Advice in its role as an approved intermediary. Given the status of the Insolvency Service as an executive agency — and that as such it is expected to be run more along the lines of a business — it has an interest in reducing the costs of administration of no-asset consumer cases.

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115 See, e.g., Insolvency Practices Council, 2003 Annual Report 3, 4 (2003); See also Green, *supra* note 111, para. 69.

116 See the response of Citizens Advice to the report on improving individual voluntary arrangements, *supra* note 86, Citizens Advice, Improving Individual Voluntary Arrangements, [http://www.citizensadvice.org.uk/index/campaigns/social\\_policy/consultation\\_responses/cr\\_consumerandebt/improving\\_individual\\_voluntary\\_arrangements](http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_consumerandebt/improving_individual_voluntary_arrangements) (Oct. 11, 2005). Citizens Advice criticized the monopoly of insolvency practitioners in providing IVAs and raised concerns about the quality of service provided by some insolvency practitioners.

117 The Insolvency Service, *supra* note 79, at 13.

The user pay model adopted by the Insolvency Service fits a model of the consumerization of government services, where individuals view their relations with government as a market relationship. Such an approach is not an inevitable result of the privatization and deregulation initiatives of the past twenty years. In Australia, a country with a similar history of deregulation, the great majority of consumer bankrupts are processed by the government at no cost to the bankrupt.<sup>118</sup>

### C. Debt Advice Agencies

Public and private debt advice agencies play an important role in England and Wales in addressing problems of overindebted consumers. Free financial advice centers developed in England and Wales in the early 1970s, pioneered by the Birmingham Money Advice Centre. Their model of holistic debt advice was subsequently adopted by Citizens Advice. Citizens Advice is the oldest (established 1939), largest and possibly most influential of advice agencies in the UK,<sup>119</sup> and is the largest independent network of free advice centers in Europe. Four hundred ninety-six individual Advice Bureaux operate from 3,200 locations and are all members of Citizens Advice, the national association that establishes standards and provides support and policy direction. The Department of Trade and Industry provides two thirds of the funding of Citizens Advice. Local Bureaux are funded primarily through local authorities and charitable organizations. In addition, the Legal Services Commission has, since 1999, provided significant funding to the agency

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118 The Australian government rejected proposals to introduce a fee after research indicated that the cost to government of processing bankrupts was (Australian) \$250. *See* Insolvency and Trustee Service Australia (ITSA), Cost Recovery Impact Statement 17-18 (2005), which states that

[f]ollowing the application of cost recovery principles, ITSA had flagged a possible processing fee of \$250 to be charged on debtors for processing debtor's petitions . . . . All stakeholder groups (including creditors) have criticized the proposal on the basis that charging people seeking protection of the insolvency system would be inconsistent with personal insolvency policy . . . the 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.

In England, the Department of Constitutional Affairs (formerly the Lord Chancellor's Department) also has an interest in reducing the costs of administering the administration order procedure, where fees are currently capped, and in reducing the use of court time for summary bankruptcies. It will therefore support the NINA as a substitute for an administration order.

119 *See generally* Ramsay, *supra* note 72, at 215-17.

under changes to the legal aid system that made legal aid funds available for services provided by non-lawyers. Eighty percent of Advice Bureaux workers are volunteers.

Citizens Advice Bureaux are now the primary source of legal advice on consumer and debt problems for many lower income consumers. The majority of debtors who seek advice rent their homes and receive state benefits.<sup>120</sup> Adequate funding is a continuing issue in relation to Citizens Advice Bureaux, and studies have indicated that individuals often have difficulty obtaining advice because of limited opening hours, unanswered telephone calls, full offices and queues.

Citizens Advice is an important actor in overindebtedness policy making. It has been one of the most vocal advocates of the argument that there is a serious crisis of overindebtedness. In its publication *In Too Deep* it states:

Since 2000, there has been a debate between the credit industry, consumer organisations and the Government as to whether the UK is facing a problem of personal indebtedness. Over the last five years, Citizens Advice Bureaux UK wide have reported a substantial increase in the number of new debt enquiries. They are now dealing with well over a million new debt enquiries per year. There has been a marked growth in the number of new enquiries about consumer credit where enquiries have risen by 47 percent over the five years to 2002. Consumer credit debt enquiries now form nearly two-thirds of all new enquiries about debt made to Citizens Advice Bureaux. Other advice providers have also reported a rise in the number of people contacting them for help with debt problems.<sup>121</sup>

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<sup>120</sup> See Citizens Advice, Consultation on Review of Insolvency Rules, [http://www.citizensadvice.org.uk/index/campaigns/social\\_policy/consultation\\_responses/cr\\_consumeranddebt/review\\_of\\_insolvency\\_rules\\_1986](http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_consumeranddebt/review_of_insolvency_rules_1986) (Jan. 13, 2006), which comments as follows on Citizens Advice's 2001 study, Citizens Advice, *In Too Deep: CAB Clients' Experience of Debt* (2003) [hereinafter Citizens Advice, *In Too Deep*]:

A survey in 2001 showed the current net monthly household income of CAB debt clients to be less than half of the average monthly income for UK households as a whole. Although nearly 60 per cent of these clients were receiving wages or income from self-employment, nearly a third were in receipt of the safety net benefits of income support and jobseekers allowance. A further 13 per cent had wages topped up by tax credits. These are far higher proportions than in the population as a whole. A 2004 survey showed that 29 per cent of CAB debt clients had no disposable income for their creditors and a further 22 per cent had less than £20 per month disposable income.

<sup>121</sup> Citizens Advice, *In Too Deep*, *supra* note 120, at 1.

The government has recently announced a large infusion of £45 million from the Financial Inclusion Fund for debt advice. The objective is to increase the availability of face-to-face debt advice within financially excluded areas and to disadvantaged social groups. The advice will include the development of financial capability so that individuals will not face debt problems in the future. There will be a competition for projects but the government is already working closely with leading organizations such as Citizens Advice, and Advice UK, in developing this initiative.

#### D. Lawyers

Unlike in the United States, lawyers do not play a significant role in relation to consumer insolvency in England and Wales.<sup>122</sup> Lawyers may provide individuals with advice on debt, and in this area they compete with the Debt Advice Agencies who also receive funding from Community Legal Services.<sup>123</sup> Reviews comparing the performance of lawyers and non-lawyer debt advice agencies found that "it was non-lawyers who were operating at the higher levels of quality in social welfare law (debt, welfare benefits, and employment in particular)."<sup>124</sup> There is also a difference in style between lawyers and debt-advice agencies. In debt matters, "non-lawyers adopt a more holistic, less court-centered approach, and . . . may be avoiding litigation based strategies."<sup>125</sup> Debt-advice agencies are more likely than lawyers to address the possibility of rescheduling all debts rather than limiting advice to debts that might be challenged. Lawyers were far more likely than advice agencies to challenge the validity of debts.<sup>126</sup>

Elite insolvency practitioners in the US and Canada have often shown

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122 The recent pilot study found that only 22% of bankrupts (this included individuals, businesses and consumers) consulted a solicitor before commencing the bankruptcy process. Centre for Insolvency Law and Policy, *supra* note 90, at 159.

123 Community Legal Services funds the delivery of civil legal aid and advice services. This is overseen by the Legal Services Commission, which was created under the Access to Justice Act, 1999, c. 22 (Eng.) and is the successor body to the Legal Aid Board. Since 1999, non-lawyer advice agencies have received funding from Community Legal Services for the provision of advice. See Legal Services Commission, Corporate Information, <http://www.legalservices.gov.uk/aboutus/how/index.asp> (last visited Mar. 1, 2006).

124 Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & Soc'y Rev. 765, 796 (2003).

125 *Id.* at 793.

126 Lawyers challenged the validity of debts in thirty-one percent of cases, compared to four percent for advice agencies.

a patrician empathy for the small consumer debtor and supported the institution of a relatively open consumer bankruptcy. My hypothesis is that in England this is not generally the case. For example, in 1994 an influential group claimed that the use of bankruptcy by small consumer debtors was "a most disturbing phenomenon" representing an "abuse of the system."<sup>127</sup>

### E. Academics

I include academics within this section because they often exercise influence through "model mongering" and providing research that informs assumptions about debtors and creditors. For example, in the US, academics such as Elizabeth Warren, both through direct policy work and through research on the bankruptcy process, have undoubtedly influenced the debate.<sup>128</sup> Moreover, a coalition of academics lobbied against the new bankruptcy reforms in the US. In Europe, Nick Huls influenced the development of Dutch law through his research in North America that he then fused with European ideas to promote a hybrid European model of debt adjustment.<sup>129</sup> In England and Wales, however, academic lawyers, with a few exceptions, have shown little interest in consumer bankruptcy or consumer overindebtedness.<sup>130</sup> Few social scientists study credit and overindebtedness and even fewer study personal insolvency. There are no systematic studies of consumer insolvency and little systematic information that would problematize professional understandings and approaches. As a consequence, consumer bankruptcy

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<sup>127</sup> See Justice, *Insolvency Law: An Agenda for Reform* 15 (1994).

<sup>128</sup> Elizabeth Warren was the Reporter for the National Bankruptcy Review Commission which reported in 1997. For information on the Commission, see National Bankruptcy Review Commission, <http://govinfo.library.unt.edu/nbrc/index.html> (Nov. 26, 1997). The empirical work of Warren and her co-authors Teresa Sullivan and Jay Westbrook, which concluded that bankruptcy was primarily used by middle class Americans to address employment interruptions, has been influential. See Sullivan et al., *supra* note 22; see also Elizabeth Warren & Amelia Warren Tyagi, *The Two Income Trap* (2003). During the recent passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), ninety-two law professors signed a letter to Congress opposing the passage of the bill. See *supra* note 69.

<sup>129</sup> See sources cited *supra* note 68.

<sup>130</sup> There may be an increasing interest. See, e.g., Milman, *supra* note 110. Walters comments that "there is no great tradition of consumer bankruptcy scholarship" in the United Kingdom. See Adrian Walters, *Review*, 28 *J. Consumer Pol'y* 243 (2005).

policymaking remains an anomaly within the current UK government culture of evidence-based policy.

### F. Summary

Traditional professions such as lawyers and accountants play a small role, outside of IVAs, in the market for servicing the overindebted. Publicly and privately funded debt advice agencies play a major role. Government has a reluctant role as processor of last resort. Unlike the US or Canada, no commercial providers have a strong interest in promoting bankruptcy as a solution to an individual's problems. Their livelihood does not depend on ensuring that individuals have ready access to bankruptcy. In contrast, creditors, some insolvency professionals and the Insolvency Service share a common interest in an easily accessible and widely publicized repayment alternative to bankruptcy.<sup>131</sup> They will favor reforms that channel individuals towards repayment systems such as IVAs; they will not oppose the maintenance of the upfront fees for access to bankruptcy. Private debt management companies have no interest in promoting bankruptcy since this would cause them to lose clients.

## CONCLUSION

The reform of consumer bankruptcy in England and Wales was a sidewind of reforms intended to promote entrepreneurialism. This objective was influenced by the prestige of a foreign model, that of the United States. Foreign models and learning play little role, however, in the continuing process of adjusting the English regime to the needs of consumers,<sup>132</sup> except for the use of the New Zealand NINA model. Neither the EU — through directives or regulations — nor other international agencies have influenced the response to consumer overindebtedness in England and Wales. Academics, who could be important "model mongers," have contributed little to consumer bankruptcy policy making.

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<sup>131</sup> These are, in fact, the recommendations of the working party that was primarily composed of insolvency practitioners and creditors with some credit counseling representation. See Report of the Individual Voluntary Arrangement Working Group, *supra* note 85.

<sup>132</sup> Although an early document published by the Insolvency Service did refer to developments in other countries. See Bankruptcy: A Fresh Start, *supra* note 73, at 12-15.



The English experience illustrates that bankruptcy reform is rarely a single event. Initial changes generate consequences that result in further change until the cycle of reform becomes institutionalized into a routine practice. These changes may often result in jurisdictional battles between different service providers as each attempts to promote, defend or consolidate its position. In England and Wales this will occur in relation to the provision of consumer IVAs and in the development of the appropriate regulatory structure. The outcomes for consumers are a consequence of these professional battles rather than a response to direct consumer influence.

English developments are framed partly by the perception that there is a debt crisis and a lending system that is out of control. The idea of a debt crisis was promoted by an influential institution (Citizens Advice). The debt crisis, like other crises, provides opportunities for groups to frame issues and promote political agendas that might not be possible in other situations. In the case of England it supported increased pressure for the responsabilization of the supply and demand side of the credit market. Consumer bankruptcy reform was tacked on to responses to the debt crisis. However, subsequent developments that involve the detailed implementation of schemes such as the IVA or NINA are likely to be structured by the priorities of professionals and government agencies. The absence of systematic empirical knowledge on the operation of the consumer bankruptcy system and the experience of consumer bankrupts makes it difficult for outsiders to challenge professional knowledge or to stimulate a debate on the role of consumer bankruptcy in contemporary society.

The scholarly agenda in comparative consumer bankruptcy has developed in a relatively unselfconscious way. Yet it has already produced important findings and hypotheses about the relationship between law, society and culture, as well as subversive insights on national developments. In this essay I have argued that we might expand analysis to include more systematic comparative analyses of the political economy of responses to overindebtedness. I have said little about cultural understandings partly because I am somewhat skeptical, in this area of credit and consumer culture, of statements that suggest bankruptcy or existing levels of credit reflect a country's culture.

Any comparative study of debt adjustment must also be framed within the international spread of consumer credit, the international institutions that influence the structure of the ground rules for credit in developing countries (IMF, World Bank), as well as the role of regional institutions (EU). The past thirty years have been a period of great volatility and change in the international financial economy. The cycle of change initiated in consumer debt adjustment during this period is a function of these changes.

Comparative studies of consumer bankruptcy and debt adjustment suggest the falsifiable hypothesis that as consumer credit develops in a country, some form of safety valve for individuals who fail will also develop. The timing of this development cannot be predicted with certainty. Reforms to consumer bankruptcy may be an initial by-product of corporate reforms. The structure and nature of the response will often depend on the existing role of the state and professional groups in addressing corporate bankruptcy or consumer debt problems. A central distinction should be drawn between countries in which a public agency has a significant role and those in which much work is delegated to professionals. The nature of the dominant professional group (lawyers, accountants, debt-advice workers) will affect the particular style of the debt adjustment regime. A comparative focus on how these differences in style affect the experience of ordinary debtors — in terms of issues such as rehabilitation or the exercise of rights — as well as the development of the debt adjustment regime would be valuable. Such a study could contribute to an understanding of the optimal delivery of services to vulnerable groups.



