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CONSUMER BANKRUPTCY AS PART OF THE
SOCIAL SAFETY NET: FRESH START OR
TREADMILL?

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I. INTRODUCTION

The current state of the U.S. personal bankruptcy system can best be understood in its complex context, one that includes a rapid expansion of consumer credit in the last two decades,1 declining savings over that period,2 an incomplete

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1. See FEDERAL RESERVE STATISTICAL RELEASE, tbl. G.19 Historical Data (showing that total consumer credit outstanding rose from $437 billion in December 1983 to over $2 trillion in December 2003, an increase of nearly 500%), available at http://www.federalreserve.gov/releases/G19/hist/cc_hist_nt.html (last visited Mar. 4, 2004); see also REP. OF THE NAT'L. BANKR. REV. COMMISSION 84 (1997) (stating that consumer debt grew by 700% from 1977 to 1997) [hereinafter NBRC REPORT].

2. See Richard Peach & Charles Steindel, A Nation of Spendthrifts? An Analysis of Trends in Personal and Gross Saving, 6 CURRENT ISSUES ECON. & FIN. 10 (2000) (noting that personal savings rate declined ten percent from 1983 to 2000, as borrowing increased); see also Ana M. Aizcorbe et al., Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances, FED. RES. BULL. 4-5, tbl.1 (Jan. 2003) (showing that between 1992 and 2001, the percentage of families who saved increased by 2.1% to 59.2%, but the percentage in the bottom quintile in income who saved declined by 0.2% to 30.0%, and the percentage in the bottom quintile in net worth who saved declined by 3.2% to 34.5%), available at http://www.federalreserve.gov/pubs/bulletin/2003/0103lead.pdf (last visited Apr. 8, 2004). Thus, in lower income and lower net worth families, two-thirds or more did not save at all in 2001, and among all families, more than forty percent did not save that year. Also, the Federal Reserve Board's Survey of Consumer Finances, from which these figures are drawn, uses a different formula from the national income and product accounts (NIPA) measure of savings, which showed a decline in savings from 1998 to 2001, both in levels and as a percentage of disposable income. Id. at 6. Both SCF and NIPA have limitations, see id. at 6, and putting the two together, the overall picture seems to be one of at best fairly flat rates of savings, with many families continuing not to save at all, and at worst of a long decline in savings.

1065
social safety net, and a general cultural affinity for risk-taking, both in credit-fueled consumption and in productive ventures. The developing field of comparative consumer bankruptcy has helped to provide this broad perspective. In particular, gaps in unemployment and health care insurance benefits in the United States, combined with ready availability of consumer credit, have led to use of credit as a self-financed safety net, contributing to dramatic increases in personal bankruptcy filings.

Europeans see the relative permissiveness of U.S. personal bankruptcy law as grounded in our individualism and limited welfare state programs, particularly our limited unemployment and health care insurance. They also fear that they are headed down the same path of over-indebtedness as Americans, albeit with a time lag.


4. See Aizcorbe et al., supra note 2, at 21-23, tbl.11 (showing that the median value of total outstanding debt for the 75.1% of families that had any rose 9.6% from 1998 to 2001); id. at 27 (showing that aggregate debt payment to disposable income ratio rose about one percent, to fourteen percent, from 1998 to 2001); see generally Margaret Howard, A Theory of Discharge in Consumer Bankruptcy, 48 OHIO ST. L.J. 1047 (1987) (discussing discharge as spurring productivity of workers and encouraging risk-taking by entrepreneurs). A comparison with China’s difficulties in implementing policies to combat deflation provides a helpful perspective on our affinity for consumption on credit; these Chinese policies discouraged savings and promoted consumer spending, but they ran up against a cultural tradition that consumption should be based on past savings and that borrowing is a public embarrassment, making it impossible to displace cash as king in the Chinese marketplace. See Xian-chu Zhang, Development of Consumer Credit in China and Concerns About the Underlying Legal Infrastructure, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, supra note 3, at 108-18.

5. See generally CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, supra note 3.


7. See Johanna Niemi-Kiesilainen, Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, supra note 3, at 41-60 (arguing that American bankruptcy law reflects liberal individualism in comparison to the social welfare orientation of European debt adjustment laws).

8. See Michael Adler, The Overseas Dimension: What Can Canada and the United States Learn from the United Kingdom?, 37 OSGOODE HALL L.J. 415,
2004 CONSUMER BANKRUPTCY

Bankruptcy laws are a recent innovation, enacted in the 1980s and 1990s in response to the problem that existing unemployment compensation programs were not generous enough to handle growing consumer debt. These new European laws are much less generous than U.S. bankruptcy law, at least in their aspirations if not necessarily in reality. Europeans typically regard bankruptcy as an occasion for social work to preserve and extend the social welfare system. They tend to believe that debtors in over their heads should learn to live at a subsistence level while repaying debts and avoiding quick reentry into the credit system.

By comparison, personal bankruptcy in America recycles debtors back into the consumer credit system almost immediately. Those who provide financial education to U.S. debtors in bankruptcy view this state of affairs as inevitable.

420 (1999) (noting that the credit economy in the United Kingdom resembles that in North American some years ago and that growing role of consumer credit inevitably leads to casualties).


10. See id. at 500-03 (discussing how a fresh start is not the aim of European laws, although discharge is given at the end of a repayment process in which repayment of less than fifteen percent of debt is the average, with some debtors unable to repay at all).

11. Johanna Niemi-Kiesilainen, The Role of Consumer Counseling as Part of the Bankruptcy Process in Europe, 37 OSGOODE HALL L.J. 409, 413 (1999) [hereinafter Niemi-Kiesilainen, Consumer Counseling]; see also Jean Braucher, Debtor Education in Bankruptcy: The Perspective of Interest Analysis, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, supra note 3, at 319, 341-42 (discussing how the European laws dealing with debt adjustment are designed to shore up the social welfare system) [hereinafter, Braucher Debtor Education and Interest Analysis].

12. See Niemi-Kiesilainen, Consumer Counseling, supra note 11, at 413 (noting that European systems seek to have debtors avoid credit and fulfill plans, often forcing debtors to learn to live at a subsistence level, in contrast to credit counseling in North America that seeks to make debtors into better consumers of credit).

13. NBRC REPORT, supra note 1, at 94 (citing a study by Michael Staten documenting the practice of soliciting debtors for new credit shortly after their bankruptcy discharges, when they cannot get another discharge for six years). A debtor who gets a Chapter 7 discharge is not eligible to file for another for six years. 11 U.S.C. § 727(a)(8) (2004).

14. See Jean Braucher, An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown, 9 AM. BANKR. INST. L. REV. 557, 587 & n.184 (2001) (discussing credit re-establishment as a topic in education programs for debtors in bankruptcy and the instructor's view that it is inevitable that debtors will use credit again, so they should learn to do so
Use of consumer credit as a safety net is particularly risky when the individual is already carrying a large and troublesome balance of such credit, as many Americans do. We do not understand why many consumers carry a high amount of debt before they hit a crisis. In this article, I wish to make an argument for more basic research to understand demand for consumer credit. A related empirical question that bears investigation is the long-term financial picture for debtors after they file in bankruptcy. Are many of them back in a lot of debt soon after bankruptcy?

A reason to focus on better understanding the demand for consumer credit is that the supply side seems unlikely to change. The supply side is easy to understand; the credit industry is driven by the profit motive. In the last twenty-five years, the industry has been largely deregulated, and this has led to explosive growth. There appears to be no political will to reimpose interest rate limits to restrict supply. Industry self-regulation seems equally unlikely, given that subprime lending has become a well-established sector in consumer finance.

It is possible that we will look back on the current period as one of social adjustment to the new world of deregulated consumer credit. If progress toward reduction of overindebtedness is going to occur without reform of the supply side, changes in consumer behavior or changes in the social

wisely) [hereinafter Braucher, Empirical Study of Debtor Education]; Jean Braucher, Debtor Education and Interest Analysis, supra note 11, at 329 (discussing how instructors and materials in courses for bankruptcy debtors treat future use of credit as inevitable, for example with materials that state, “chances are you will probably need some type of loan in the future”); see also Susan Block-Lieb et al., Lessons from the Trenches: Debtors Education in Theory Practice, 7 FORDHAM J. OF CORP. & FIN. L. 503, 509 (2002) (discussing the goal of education of “enabling debtors to function more effectively in our credit-based economy”).

15. See Aizcorbe et al., supra note 2, at 29, tbl.14. In 2001, eleven percent of families had debt payment-to-disposable income ratios of more than forty percent, with rates for the same measure of twenty-seven and sixteen percent, respectively, for the bottom and next to the bottom quintiles in income. Id. The same table shows that as of 2001, seven percent of families had a payment past due sixty days or more, with the same measure at 13.4 and 11.7 percent, respectively, for the bottom and next to bottom quintile in income. Id.

16. See supra note 1 for statistics on growth of outstanding consumer credit. See also infra notes 48-51 and accompanying text (concerning deregulation of interest rates for consumer credit).

17. See NBRC REPORT, supra note 1, at 92-93 (noting movement of general credit issuers into a subprime market).
safety net, or possibly both, must occur. Taxes and transfer payments would be a more open, direct and humane way of providing safety net programs than allowing discharge of debts in bankruptcy after use of consumer credit to survive a financial crisis.\(^{18}\) Consumers pay for the bankruptcy safety net in higher interest and in the stress and stigma of the experience both of bankruptcy and over-indebtedness, and the credit industry also pays to some extent in lower profits.\(^{19}\)

Recognizing that new restrictions on supply of credit and more complete social programs do not seem to be in the offing, bankruptcy officials and scholars have begun to focus more on the possibility of demand-side change. One manifestation of this shift is the movement for debtor education in financial management as part of the bankruptcy process.\(^{20}\) However there are serious questions about whether educational initiatives should focus on a broader population (such as all school-children or all persons applying for their first credit card) and whether attempting to change consumer behavior concerning credit is any more realistic than expecting creditors to hold back on supply without legal restrictions.\(^{21}\)

To evaluate whether debtors in bankruptcy or a broad

\(^{18}\) Jean Braucher, *Response to Eric Posner*, 7 FORDHAM J. OF CORP. & FIN. L. 463, 466, n.21 (2002) (agreeing with Posner that taxes and transfer payments are a better way to deal with redistribution than legal rules such as bankruptcy law, but noting that when we fail to create an adequate safety net, the legal system is forced to cope in other ways).

\(^{19}\) See infra note 59 and accompanying text (concerning credit industry exaggeration of the cost to consumers of bankruptcy losses). Consumer bankruptcy, like other consumer protection, imposes some costs on consumers, although any given protection often imposes a very small cost. See Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 424-25 (1988) (concerning the FTC's analysis of the cost of its Credit Practices Rule). Creditors also probably lose some of their profits due to the costs of consumer bankruptcy; to the extent that competition is not perfect, they can charge more than the sum of their costs plus a competitive rate of return, and a corollary is that they may not be forced to reduce rates when they save costs.


\(^{21}\) See A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 958 (1999) (noting that job skills and income may be more important to long-term financial health than financial management ability).
population should be targeted for personal financial education and to understand the obstacles to financial stability in general and after bankruptcy in particular, we need two kinds of basic research. First, we need to understand why many consumers increasingly carry high debt loads even before they run into a financial crisis. Second, we need to follow bankruptcy filers longitudinally. We do not know to what extent bankruptcy is a turning point in consumer debtors' financial lives, and how many continue to be over-indebted and for what reasons. We do, however, have reason to believe that reaffirmations in Chapter 7, the fresh start form of bankruptcy, and unrealistic budgets in Chapter 13, the repayment plan option, cause problems for debtors. Beyond problems with how bankruptcy is being used, the obstacles to long-term financial security after bankruptcy are a matter of conjecture.

Our bankruptcy system provides temporary relief to many debtors, and this alone might be considered to justify its existence. If we aspire to improve the long-term financial health of debtors after bankruptcy, however, we should be trying to find out whether debtors really get a fresh start and if not, what can be done to see that they do. The idea of a "fresh start" is part of the mythology of consumer bankruptcy but perhaps not the reality for most of those who file. Of course, it may be overly optimistic to harbor the hope that

22. See infra text accompanying notes 71-92 (concerning the high baseline of debt held by many families and its role in causing bankruptcy).

23. See infra text accompanying notes 108-32 (concerning the lack of knowledge of bankruptcy filers' situations some years after bankruptcy).

24. Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-707 (2004) is formally called a "liquidation" bankruptcy, but because most consumer debtors have no assets in excess of exemptions, no liquidation occurs; most Chapter 7 debtors get a discharge without liquidation. See Jean Braucher, Options in Consumer Bankruptcy: An American Perspective, 37 OSGOODE HALL L.J. 155, 160-64 (1999) (giving empirical rather than formal descriptions of Chapter 7 and Chapter 13, and emphasizing how the two chapters are in fact typically used)—Chapter 7 usually involves no liquidation but often involves informal repayment and reaffirmation of some debts, and Chapter 13 plans usually are not completed—so that it is not clear that more repayment occurs in Chapter 13 than in Chapter 7).


26. See infra notes 109-25 and accompanying text (discussing reaffirmation in Chapter 7 and failed plans in Chapter 13).

27. See KAREN GROSS, FAILURE AND FORGIVENESS 115-34 (1997) (concerning the difference between a legal fresh start and a true fresh start).
more knowledge of the demand side of the consumer credit equation, before and after bankruptcy, would affect policy. It remains to be seen whether Congress will be willing to back away from industry-drafted legislation in the light of empirical research showing its premises are unfounded. The credit industry likely will continue its drive for bankruptcy "reform" that would increase costs for all filers, not just those with the means to repay more of their debts. The proposed legislation would likely increase the supply of credit without affecting consumer demand for it. It may be hard in this political climate to focus attention on better understanding demand.

II. WHAT WE DO KNOW ABOUT DEBTORS IN BANKRUPTCY

In 2003, more than 1.6 million non-business bankruptcy cases were filed in the United States. More than one million personal cases have been filed every year since 1996. Filings have grown steadily in recent decades, from about 286,000 non-business cases in 1983 to the 1.6 million figure in 2003, reflecting a growth of 560 percent in twenty years.

In addition to the large growth in the numbers of filings,
what is known about bankruptcy debtors is primarily demo-
graphic. The people filing today are no better off than previ-
ous bankruptcy filers or than the rest of the population. In
fact, their incomes are, at the median, significantly lower
than the national median income, and one-third have in-
comes at or below the poverty line. They are also carrying
more debt in relation to income compared to previous filers. The
total short-term (non-mortgage) debt to income ratio of
bankruptcy filers grew to exceed 1.5 as of 1997.

Although debtors in bankruptcy are typically poor and
low-income, this does not mean that they are chronically so. There
is considerable income volatility in the U.S. economy. By
indicia such as college attendance, job status, and home
homeownership, ninety percent of debtors in bankruptcy are
middle class. Most of the social safety net programs, such as
welfare, Medicaid, and public housing, are not designed for
middle-class persons. When middle-class persons experience
an income disruption, they often live on credit for a time, and
then go back to work, still owning some property such as a

34. See NBRC REPORT, supra note 1, at 83 n.124 (noting that bankruptcy
filers of the 1990s were in as much or more trouble as debtors of the early
1980s); see also SULLIVAN ET AL., supra note 28, at 66, tbl.2.4 (noting that the
median income in 1997 dollars of bankruptcy filers was $26,439 in 1981,
35. SULLIVAN ET AL., supra note 28, at 61 (bankruptcy filers in 1991 had a
median family income of $17,964, compared to $36,404 national median income
that year).
36. See id. at 63. Also, virtually no debtors had incomes above $75,000 in
income for 1991. Id. at 62.
37. See id. at 71, tbl.2.5 (showing that the median debt to income ratio in-
creased from 1.41 in 1981, to 1.68 in 1991, and to 2.44 in 1997).
38. See id. (showing a median total non-mortgage debt-income ratio of 1.54
in 1997, an increase from 0.75 in 1981 and 0.96 in 1991). This means that in
1997 a filer with median income and debt had $18,756 in income and over
$28,000 in short-term debt. See id. at 66, tbl.2.4 (providing median income of
filers for 1997). These ratios are based on total short-term debt, while the Fed-
eral Reserve has constructed an aggregate level measure of debt burden that
uses an estimate of total scheduled loan payments (interest plus minimum re-
payments of principal), divided by disposable income. See Aizcorbe et al., supra
note 2, at 27, 29 & tbl.14. The Federal Reserve measure thus incorporates long
repayment periods commonly used in credit card lending. By showing how
much of disposable income is committed to regular debt payments, the Federal
Reserve measure gives a feel for the hit to the family budget.
39. See Deborah D. Godwin, Dynamics of Households' Income, Debt, and
40. See Elizabeth Warren, Financial Collapse and Class Status: Who Goes
home or car, but unable to meet current expenses and at the same time repay the debts they accumulated while unemployed. These persons do not meet income or asset tests for poverty programs.

The public and private insurance programs used by the middle class, such as unemployment compensation and disability and health insurance, have large gaps, leading families to use consumer credit in times of financial crisis. This phenomenon contributes to the high volume of bankruptcy cases. A self-financed safety net is possible for many because of the ready availability of consumer credit to anyone who continues to make minimum payments. Consumers who run balances on their credit cards are the “good” customers, in the sense of producing profits, and are thus targeted for new credit.

Because bankruptcy filers are mostly middle-class, existing literature on the underclass and chronically poor does not capture their situation. We need new basic research if we are to understand the knowledge, attitudes, and behaviors of bankruptcy filers concerning personal finances, compared to the rest of the middle class. There are reasons to suspect that the filers and many non-filers are more similar than different, as will be discussed.


42. See Jacoby, supra note 3 (concerning gaps in public and private health insurance); Deborah Maranville, Unemployment Insurance Meets Globalization and the Modern Workforce, 44 Santa Clara L. Rev. 1129 (concerning those ineligible for unemployment compensation).

43. See Sullivan et al., supra note 28, at 79, Fig. 3.1 (reporting that two-thirds of bankruptcy filers give job problem as a reason for bankruptcy); id. at 145, Fig. 5.1 (reporting 19.3 percent giving a medical reason for bankruptcy); id. at 181 (reporting that more than fifteen percent identified marital disruption as a reason).

44. See NBRC Report, supra note 1, at 91 (noting that borrowers who do not pay in full each month are “good” customers because they earn credit card issuers about seventy-five percent of their revenues).

45. See id. (noting that not only are those with balances the good customers, but that companies have instituted charges or even cancelled the cards of those who pay in full each month).

III. WHAT WE KNOW ABOUT THE REASONS FOR THE INCREASED VOLUME OF CONSUMER DEBT

A. Supply and Demand

The increase in bankruptcy filings has occurred in tandem with an increase in volume of consumer credit. Interest rates for most consumer credit were deregulated in the early to mid-1980s, after the U.S. Supreme Court held in *Marquette National Bank v. First Omaha* that the National Bank Act permitted a national bank to take the interest rate in the state where it was located and export it to customers in other states, even if those states had lower usury limits. National banks responded by locating subsidiaries in states with high or no interest rate limits as a base to market credit cards nationally. To protect their own state banks' competitiveness, most states responded by lifting usury limits. Also, new credit industry sectors, such as rent-to-own and payday lending, either used creative lawyering to do an end-run around usury laws or got protective legislation enacted to permit them to charge high rates. Thus, understanding the supply side of the increase in volume is not difficult. Consumer credit is a highly profitable business.

47. See NBRC REPORT, supra note 1 (concerning increases in debt over the last twenty-five years); supra notes 31-33 and accompanying text (concerning increases in bankruptcy filings since 1983); Robert M. Lawless, *The Relationship Between Nonbusiness Bankruptcy Filings and Various Basic Measures of Consumer Debt* (noting that as consumer debt increases, so do the number of non-business bankruptcy filings), available at http://www.law.unlv.edu/faculty/rlawless/busbkr/filings.htm (last modified Jan. 10, 2004); see also Ana M. Aizcorbe et al., supra note 2, 24-25 (noting that the overall median debt of families rose 9.6 percent from 1998 to 2001, and that the median credit card balance in 1998 and 2001 remained unchanged at $1,900, but usage rose for families with incomes below the sixtieth percentile while it fell for groups above that point, and that number of families having a credit card rose 3.7 percent, to 76.2 percent of families in 2001).


49. See Ellis, supra note 30 (concerning the move of Maryland Bank, N.A. to Delaware, where it became MBNA and could take advantage of Delaware law).


52. See NBRC REPORT, supra note 1, at 92 (noting that credit cards are
Understanding the demand side is not nearly as simple. Americans have clearly been willing to take advantage of the new credit that has been offered to them. In the last two decades we have seen a “democratization” of consumer credit, with higher-risk debtors who previously lacked easy access getting credit, albeit often at high rates. In retrospect, we can see that usury restrictions on consumer credit—by constricting supply—held back a tide, and some of that new volume is causing problems for consumers.

B. Usury

The history of usury restrictions is religious and cross-cultural. Usury laws were based on the moral insight that borrowing at interest to pay for current consumption carries a high risk of increasing suffering. Charity was thought to be the right response to need. Social welfare programs are a modern analogue of charity. Many cultures first recognized exceptions to usury limits for productive enterprise, such as borrowing to buy seed, a kind of transaction where the loan and interest could be repaid from the increase. After the hardship caused in the ancient world by small personal loans at high interest, the Christian world condemned usury, and it was not until the early twentieth century that high rates of interest for small loans for short-term consumption became legal in the U.S. One cannot use consumer credit to borrow one’s way out of poverty, and a corollary seems to be that even middle-class families often cannot borrow their way out of a financial crisis.

All this being said, effective usury limits are dead and

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53. *Id.* at 92-94 (noting the growing subprime and home equity markets, and the targeting of young people, lower-income people, and those who recently received a discharge in bankruptcy).
55. *See id.* at 65-67 (concerning lending at interest permitted in early commercial societies).
56. *See id.* at 68, 92.
57. *See* Drysdale & Keest, *supra* note 51 (analogizing efforts of fringe borrowers to improve their financial situations while paying high prices for credit to “trying to go up a descending escalator”).
gone and appear unlikely to come back. We probably will continue to be awash in consumer credit. With this huge volume of consumer debt, the United States is likely to continue to see high numbers of bankruptcies.

C. Potential Reforms

As the numbers of bankruptcies grew even during the boom years of the 1990s, the credit industry began to lobby for a credit-industry "reform" package. Rather than focusing on the tandem growth of consumer credit volume and bankruptcy, the industry argued for new restrictions on access to bankruptcy, using an unsupportable claim that each American family was paying $400 a year for the bankruptcies of others, when the true figure is a tiny fraction of that. The industry legislation, which has been introduced in every Congress since 1997, is billed as "means testing" to make those with the means to repay do so in Chapter 13 rather than allowing them to get a quick discharge in Chapter 7. But as noted, debtors who file in bankruptcy are increasingly worse off, so the increases in filings are not a result of better off persons resorting to the bankruptcy courts. In reality, the proposed legislation would reduce access to bankruptcy, primarily by increasing the costs through new, largely pointless paperwork burdens and institutional hurdles such as required credit counseling before filing for bankruptcy and required debtor education after filing, as a condition of discharge. The higher cost of bankruptcy, in terms of both money and time, would likely make it unaffordable for debt-


60. See Jones & Zywicki, supra note 58.

61. See supra notes 33-38 and accompanying text.

62. See Braucher, Means Testing, supra note 29, at 430-41 (discussing existing controls on abuse and the complexity of the means-testing paperwork under the proposed legislation).

63. See id. at 442-43.
ors who are the worst off.\textsuperscript{64}

If we were serious about catching the small percentage of abusers in the system—those who have the income to repay a significant portion of their debts—we would simplify our bankruptcy law and have just one option: requiring anyone with income above some threshold to repay a portion of that income for three-to-five years.\textsuperscript{65} The current system is much too complex to be transparent. Neither consumers nor politicians understand it.

It is unclear whether the industry legislative package will be enacted. By reducing access to bankruptcy, the legislation predictably would increase the volume of consumer credit even more, as creditors responded to lower bankruptcy losses by further opening the spigots of supply.\textsuperscript{66} We would likely see more people struggling with debt and more bankruptcies in absolute terms, although spread across a larger volume of credit.

Already, the number of people struggling with debt is much greater than the number filing in bankruptcy.\textsuperscript{67} There is a much larger pool of consumer debtors who are at risk of filing than those who file.\textsuperscript{68} Also, there is reason to believe

\textsuperscript{64} See id. at 424-30.

\textsuperscript{65} See Jean Braucher & Charles W. Mooney Jr., Means Measurement Rather than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors After Bankruptcy, AM. BANKR. INST. J., Feb. 22, 2003, at 6. (presenting a proposal to require all Chapter 7 debtors above a threshold income level to pay, according to a graduated scale, a percentage of income for three years after discharge, with collections distributed to creditors). This approach would catch abusers at the back end, based on actual income, rather than basing means testing on a look-back period, which might not be an accurate projection of future income. See id. The proposal does not entail elimination of Chapter 13, but that feature could be added, on the grounds that if all debtors with means are being required to repay, there is no need for the complexity of Chapter 13. See id. The elimination of Chapter 13 is also justified on the grounds that most Chapter 13 plans fail. See infra notes 119-28 and accompanying text (concerning high failure rate in Chapter 13).

\textsuperscript{66} See Braucher, Means Testing, supra note 29, at 424-28.

\textsuperscript{67} For example, more people seek credit counseling than file for bankruptcy, indicating a broader problem of trouble handling debts. See Richard L. Stehl, The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998, 7 AM BANKR. INST. L. REV. 133, 148-49 (1999) (noting that the capacity of credit counseling agencies was inadequate to handle two million requests for credit counseling in 1997, even without required counseling).

that this risk pool suffers from anxiety-related psychological and social problems, including family problems, health problems, and work problems. Unmanageable debt and resulting stress are not good for people. Bankruptcy "reform" initiatives tend to deflect attention from the bigger problem of over-indebtedness by focusing on those who file as if they were deviant "others." Thinking of filers as deviant avoids facing up to the even more alarming possibility that they could be a lot like many other Americans, until they get a pink slip, become ill, or experience family breakup. We know that demographically the filers are middle class. What we do not know is whether their knowledge, attitudes, and behavior are different from the rest of the middle class or, to a large extent, similar.

IV. UNDERSTANDING BANKRUPTCY AND DEMAND FOR CREDIT

A. Causes of Bankruptcy

To understand the high volume of consumer bankruptcies, it is helpful to see bankruptcy filers in the context of the larger population of those who are over-indebted and at risk of filing. Filing in bankruptcy usually involves four economic factors:

1. lack of family reserves, either in the form of savings or of an at-home adult who could go to work or become a caregiver for a sick family member;
2. a high debt load in relation to income;
3. a trigger that radically decreases income or increases

percent of U.S. households as of 1992 would have benefited financially from filing in bankruptcy and that even more would have benefited with advance planning).

69. See Nick Huls, Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions 204-10 (1994) (discussing negative social and psychological impact of struggles with debt among Europeans).

70. See supra notes 39-40, 67-70, and accompanying text.

71. See White, supra note 68 (discussing the larger population that could benefit from bankruptcy).

72. See supra note 2 (concerning lack of saving by a large part of the population).

73. See Warren & Tyagi, supra note 41, at 55-70 (discussing how the stay-at-home mother, particularly a generation or two ago, served as a safety net).

74. See supra notes 37-38 and accompanying text.
expenses (such as job loss, divorce, or illness; illness may cause job loss and thus loss of income or uninsured health care expenses or both); and

(4) a lack of a safety net to cover the triggering crisis sufficiently, so that, for example, unemployment insurance is too small or not available at all, or health care costs are not insured publicly or privately.6

The first two factors, lack of savings and high debt, are present for a significant part of the population, and the fourth factor is also increasingly present for many persons, making filers similar to many others on these three factors.7 In this sense, the trigger “causes” the bankruptcy, but in reality all four factors contribute to it. Social legislation and private insurance could reduce the fourth factor, but prospects for that sort of change are doubtful. Also doubtful are prospects for change in the rates of job loss, divorce, or illness. Jobs in particular are becoming less secure, with unemployment benefits not filling the gap.8

This perspective highlights that the first two factors, lack of savings and high debt, are important causes of bankruptcy. It is worth evaluating whether change is possible in these areas to reduce over-indebtedness as well as bankruptcy, and the attendant stress and suffering. Why do so many Americans lack savings, even in the middle class? Why do they run up significant debts prior to the triggering crisis, so that the crisis proves unmanageable and pushes them over the edge into bankruptcy? These are the areas where, at least in theory, families could make changes and reduce problems with debt. We need to understand better the lack of savings and high indebtedness, not just for those who file but for the whole risk pool of Americans who would be unable to handle a triggering crisis given their lack of reserves and mound of debt.

The debt picture is complex. Not everyone who becomes over-indebted stays that way or files for bankruptcy. There

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75. See supra notes 3, 43.
76. See supra notes 3, 42.
77. See supra note 2 (concerning lacking of any savings by 40 percent of Americans); supra notes 1 & 15 (concerning growing consumer indebtedness); supra note 42 (concerning gaps in health insurance and unemployment insurance).
78. See supra note 42.
appears to be even more debt mobility than income mobility;\textsuperscript{79} those with the highest debt loads are often able to pay them down, only to be replaced by new persons carrying high debt loads.\textsuperscript{80} The idea of "the over-indebted American household" does not capture these dynamics and tends to evoke an overly simplistic picture.\textsuperscript{81} Many families pass through periods of over-indebtedness. If a financial crisis occurs at such a time, the family could easily end up in bankruptcy.

B. Existing Research on Attitudes Toward Debt

There is very little research on Americans' attitudes toward debt.\textsuperscript{82} There is some reason to believe that Americans are developing more negative attitudes about borrowing even as we use credit more.\textsuperscript{83} This is not surprising; media attention as well as exposure to the debt problems of friends and relatives or one's self could explain this direction of change in attitude. On the other hand, there may be growing acceptance of borrowing to pay normal living expenditures.\textsuperscript{84} In short, the complexity in our attitudes toward debt bears investigation. Perhaps the simple fact of ready supply has made debt seem normal and inevitable.\textsuperscript{85}

There has been more research in England.\textsuperscript{86} Using the social science method of network analysis,\textsuperscript{87} one study asked ordinary people the question, "Why do people use credit and get into debt?"\textsuperscript{88} Their answers provided this network of explanations: greed, pleasure, lack of self control, personal inadequacy, external problems, crises, social pressures, com-

\begin{itemize}
  \item \textsuperscript{79} See Godwin, supra note 39, at 322.
  \item \textsuperscript{80} See id. at 323.
  \item \textsuperscript{81} See id. at 306.
  \item \textsuperscript{82} See id. at 306-07.
  \item \textsuperscript{83} See id. at 307.
  \item \textsuperscript{84} See Stephen E.G. Lea et al., Psychological Factors in Consumer Debt: Money Management, Economic Socialization, and Credit Use, 16 J. ECON. PSYCHOL. 681, 682 (1995) (finding, in a study of a British population taken from the Oxford University subject panel, that those with problems repaying debt described themselves as being in a community where debt was more common and more tolerated, as compared to those without problems with debt).
  \item \textsuperscript{85} See, e.g., id.
  \item \textsuperscript{86} This method makes use of the explanations of ordinary people about the causes of complex social problems to gain insight into shared beliefs. See Peter K. Lunt & Sonia M. Livingston, Everyday Explanations for Personal Debt: A Network Approach, 30 BRITISH J. SOC. PSYCHOL. 309, 309-11 (1991).
  \item \textsuperscript{87} See id. at 313.
\end{itemize}
mercial pressures, and the credit system. It is interesting that ordinary English people do not speak of using credit to meet their human needs. Of course, English consumers may have different attitudes from Americans. The explanations given in this study are consistent with more general insights of behavioral economics, which include the perspective that we do not act on our pre-existing rational preferences but rather are influenced by aspects of our social situations, specifically how situations are framed, including some situational influences we do not even necessarily perceive. Standard money management programs reflect intuitive understanding of behavioral economics by attempting to educate consumers to be more aware of factors influencing consumer decisions, such as marketing techniques, our own moods, and our families and friends.

V. DEBTOR EDUCATION AS A SOLUTION TO THE INCREASED USE OF CONSUMER BANKRUPTCY

Debtor education in bankruptcy is a programmatic response to the higher numbers of bankruptcy filings in recent years, and one that involves focusing on the demand side of the consumer credit system. Some bankruptcy officials and some scholars are pushing education in financial management as a key way to address the growth in bankruptcy filings.

89. See id. at 318-20.
90. This could be in part, for example, because consumer culture follows along there at a time lag. See Adler, supra note 8.
92. See id. at 154, 157-59.
93. See, e.g., PERSONAL FINANCIAL CHOICES: SETTING A NEW COURSE (a cooperative effort of the National Association of Chapter 13 Trustees, the National Foundation for Consumer Credit and its Member Counseling Service Agencies, and Visa, USA) (copy on file with the author). This source is a workbook used in Chapter 13 debtor education programs, including chapters on "Communicating Your Philosophy of Money," dealing with identifying the values that underlie spending decisions and understanding feelings about money and the role of relationships with family members and friends in spending decisions, and on "Advertising and Sales Techniques—Problems and Solutions," dealing with how advertisers play upon our feelings and insecurities and discussing strategies for resisting impulse buying. See id.
94. See Braucher, Empirical Study of Debtor Education, supra note 14 (concerning programs begun by Chapter 13 and Chapter 7 trustees); Block-Lieb et
The credit industry has joined the debtor education movement by supporting efforts of trustees and scholars and also by putting mandatory credit counseling and mandatory debtor education into its bill. The type of education that would satisfy the proposed requirement would be unlikely to have much long-term effect. A course of a few hours (covering the typical money management topics, including budgeting, setting goals, saving, shopping wisely and resisting overspending), even if well designed and executed, may not be capable of changing behavior for long, if at all. If education becomes a legal requirement to get a discharge, programs would spring into being and predictably many would be poor in quality or, worse, predatory and fraudulent, trying to sell something to a vulnerable population. The creditor push for mandatory debtor education in bankruptcy began without a prior exploration of whether filers are different from non-filers in their knowledge, attitudes, and behavior and of what sorts of education would be most effective.

95. See Braucher, Empirical Study of Debtor Education, supra note 14, at 580 (concerning support of Visa, USA, for programs run by trustees).
96. See Block-Lieb et al., supra note 14, at 511, 523 n.1 (noting participation of bankers on the board of directors for the Coalition for Consumer Bankruptcy Debtor Education, which designed a pilot program providing debtor education in bankruptcy).
97. See Braucher, Means Testing, supra note 29, at 442-43 (concerning mandatory counseling and education features of the proposed legislation).
98. See Braucher, Empirical Study of Debtor Education, supra note 14, at 581-84 (describing how mandatory educational programs run by Chapter 13 trustees in some areas range from two to four hours on one day, in some cases the same day that the debtor reports for examination by the trustee concerning assets and expenses, and describing topics covered in existing programs).
99. Short debtor education programs do seem to make debtors feel better, and the attendees still have positive opinions of the courses up to a year and a half later. See Braucher, Empirical Study of Debtor Education, supra note 14, at 567. There has been no study of longer-term impacts or of impacts measured by actual behavior, as opposed to self-reported attitudes and self-reported behavior, except for a study that could not find evidence of impact on Chapter 13 plan completion. See id. at 577-79 (finding that other Chapter 13 trustee practices appeared to have more influence on plan completion than education programs, and that education programs did not show positive association with completion after regression analysis to take into account other influences).
100. See Block-Lieb et al., supra note 14, at 521-22 (noting a lack of clear guidance on the ends of education in the proposed legislation, as well as lack of funding).
101. See id. at 521 (criticizing the lack of guidance on evaluation of programs.
It is understandable that the credit industry would support mandatory education even if ineffective in changing debtors' future prospects. The education requirement would create a hurdle to accessing the bankruptcy discharge while also serving the rhetorical function of assigning debtors responsibility for their own problems.\footnote{102} If the required education also failed to reduce use of credit, so much the better from the perspective of creditor interests.\footnote{103} For those without this sort of self-interest, however, long-term effectiveness should matter, if the goal is more than temporary good feelings.

For at least three reasons, research is needed comparing bankruptcy filers to the rest of the population with respect to their financial knowledge, attitudes, and behavior. First, if bankruptcy debtors are much like the rest of the middle class, this might suggest that financial management education should be made more generally available or be required for all, and that the education should be given over a long period of time, to maximize chances for success. Financial education could begin in preschool, with simple, concrete examples, and be incorporated into arithmetic and social studies in elementary school and then made part of practical life curricula and economics courses in secondary school. Freshmen in college might learn about the costs and risks of using credit as they are first offered credit cards. Passing a test on use of credit could even be required before issuance of a credit card, much as drivers are required to pass a test on rules of the road before getting a license. Requiring financial education for all young people makes it part of socialization, rather than a program that labels some adults as deviants, a risk with mandatory debtor education in bankruptcy.\footnote{104} Requiring debtors in bankruptcy to take an educational program seems to assume that they are different, rather than unlucky, but in the legislation and noting that a pilot test under the proposed legislation would start only after the effective date of the legislation, including its education requirement).

\footnote{102}{See Braucher, Debtor Education and Interest Analysis, supra note 11, at 339.}
\footnote{103}{See id.}
\footnote{104}{See Carol Ann Curnock, Evolution of Statutory Consumer Counselling in Canada and Europe: Insolvency Counselling—Innovation Based on the Fourteenth Century, 37 OSGOODE HALL L.J. 387 (1999) (criticizing required Canadian counseling in bankruptcy for assuming debtors are irresponsible and deviant in multiple ways).}
we do not know whether or to what extent this is so. If we find that they are not different, this could suggest that either socialization programs for the whole population or safety net programs for all would be better strategies than programs treating bankruptcy debtors as deviants.

Second, even if bankruptcy debtors do turn out to be different in their knowledge, attitudes, or behavior, we need to know how they are different (and, as will be discussed, what obstacles they face) in order to be able to design effective educational programs. It is common in financial management education to go beyond providing information and to teach how framing devices of marketing or influences of family members can lead a person into financial trouble. Preliminary work in studying voluntary debtor education in bankruptcy suggests that information is less what is needed than learning to be sensitive to one's attitudes, moods, and family influences. We do not know if bankruptcy filers are more easily influenced by the consumer credit industry than others are.

Finally, there are difficult normative and feasibility issues involved in designing financial management education in general, issues that are heightened with mandatory debtor education in bankruptcy. Should these programs teach old-fashioned middle-class virtues of prudence, diligence in accumulation of wealth, personal responsibility, and delayed gratification? What if the middle class no longer holds these values? Is it realistic to attempt to change culture

105. See supra note 93.
106. See Richard L. Wiener et al., High and Low SES Debtors: The Use of Psychological Measures to Determine Differences, JOINT CENTER FOR HOUSING STUDIES 27 (2004), available at http://www.jchs.harvard.edu/babc/ (last visited Jan. 11, 2004) (discussing hypothesis that emotion and motivation are more important than information in influencing behavior concerning shopping and incurring debt).
108. Certainly there have been huge changes in American culture in recent decades. See generally e.g., HERBERT J. GANS, MIDDLE AMERICAN INDIVIDUALISM (1988) (describing middle Americans as increasingly fighting an uphill battle for economic security and describing how they have separated themselves from civic and political participation). The middle Americans Gans writes about are not necessarily middle class in traditional senses, such as based on either education, occupation and income, or on values. Rather, he focuses on the middle of the white population of the United States. See id. at 8. People in this group generally distrust big, powerful organizations, whether
through education? It is one thing to educate young people into norms held in the culture, and another to try to educate them to resist and change culture.

When the students of financial management education are adults in a financial crisis, it is particularly important to think through whether the normative assumptions of a required program are in keeping with those of the population generally. Is it appropriate to set expectations for bankruptcy filers at a level that involves trying to teach them to be better personal financial managers than most people are? Furthermore, unless education in bankruptcy produces attitudinal and behavioral change that contributes measurably to more stable financial futures, the primary function of required programs in bankruptcy is to create a hurdle to accessing the benefits of bankruptcy. Debtor education also serves a secondary rhetorical function of putting the focus on debtors as responsible for avoidance of financial problems, rather than seeing responsibility as shared by debtors, creditors, and our society in general, in the way it defines public and private health and unemployment insurance programs. The causes of bankruptcy are in part structural, involving the many insecurities of the middle class in the contemporary economy, as well as cultural and personal. Debtor education addresses only the latter two types of cause. Meanwhile, structural factors likely produce and reinforce cultural and personal attitudes, making it hard to change the latter. For example, heavy marketing of easy credit is likely to reinforce the attitude that using easy credit is unproblematic, and educational programs will have an uphill battle against the market-tested campaigns of the advertising world.

VI. THE LONGITUDINAL PICTURE AFTER BANKRUPTCY

We do not know in any systematic way the financial situations of debtors one, three, five, or ten years after a bankruptcy filing, whether in Chapter 7 or Chapter 13. We do not know who gets out of trouble and builds a sound financial future and why.

One area where there is some limited knowledge con-
cerns repayment by debtors even after discharge, in some cases impairing their fresh starts. Debtors who file and get a discharge in Chapter 7 are not eligible to file for another discharge in Chapter 7 for six years. Many Chapter 7 debtors reaffirm some of their debts that would otherwise be discharged, and others continue to pay some debts informally. Reaffirmation of a home mortgage can be a good choice for a debtor, since alternative housing may be more expensive and the lender may insist on the reaffirmation. A debtor who can simply continue making mortgage payments without reaffirming is better off, however, because the debtor will get a discharge from personal liability and will have the option of walking away from the deal and simply giving up the home, should it prove unaffordable or become worth less than the amount of the mortgage.

The wisdom of reaffirmation of car loans is even more debatable, because sometimes there are less risky alternatives (simply continuing to pay, without becoming personally liable, with the creditor acquiescing or by court-protected ride through of the loan) or cheaper (negotiating to pay less than the full loan on a threat to convert to Chapter 13 and "cram down" the loan, paying only the value of the collateral).

110. See Marianne Culhane & Michaela White, Debt After Discharge: An Empirical Study of Reaffirmation, 73 AM. BANKR. L.J. 709, 720, 730, 741, 745-46 (1999) [hereinafter Culhane & White, Debt After Discharge]. This article notes that one quarter of debtors in the study reaffirmed one or more debts, with forty percent of those debtors reaffirming unsecured debt, and it also discusses many instances where debtors retained collateral without reaffirmation, by continuing to repay, with creditor acquiescence or judicial protection for the debtor, letting the secured debt ride through bankruptcy).
111. See 11 U.S.C. § 521(2)(A) (2004) (referring to reaffirmation of secured debts). When a debtor is current on payments, the debtor may be able to simply repay through creditor acquiescence, or in four circuits, the courts protect the debtor against foreclosure, permitting the secured debt on which the debtor is current to simply ride through the bankruptcy. See Marianne Culhane & Michaela White, But Can She Keep the Car? Some Thoughts on Collateral Retention in Consumer Chapter 7 Cases, 7 FORDHAM. J. CORP. & FIN. L., 471, 477-78, 487-88 (2002) (concerning ride through of secured loans, something the industry reform legislation would eliminate, making reaffirmation and creditor acquiescence the only ways to retain a home, with the additional option of redemption for a car under 11 U.S.C. § 722 (2004)).
112. See supra notes 110-11 (concerning creditor acquiescence and court-protected ride-through for secured loans).
113. Because there is no cramdown in Chapter 13 for mortgages secured only by a principal residence, it is harder to negotiate to pay less than the full loan amount in Chapter 7. See 11 U.S.C. § 1322(b)(2) (2004). But with personal
Debtors' lawyers sometimes go along with reaffirmations on secured loans to avoid the work of negotiating for a better deal for the debtor client.  

Reaffirming unsecured debts is almost always a bad idea, yet many debtors do and get a "stale start," in that they emerge from bankruptcy personally obligated for debts that they could have discharged. The reasons for reaffirmation include lazy lawyers in some cases or, in others, unrepresented clients, who do not understand that reaffirmation is not required.

One implication of the data on reaffirmation is that the timing of proposed mandatory debtor education in bankruptcy may be wrong. If education came before filing, debtors could be forewarned that reaffirming unsecured debts impairs the fresh start as well as prospects for long-term financial security.

Chapter 13 debtors typically commit to a repayment plan of three to five years, and therefore do not get an immediate fresh start. The process of completing a plan is often arduous, and property collateral, lawyers can sometimes negotiate for their clients to pay less than the loan amount in Chapter 7, on the threat to convert to Chapter 13 and cramdown the loan to collateral value under 11 U.S.C. §§ 1322(b)(2), 1325(a)(5).  

See Jean Braucher, Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility, 5 AM. BANKR. INST. L. REV. 165, 179-80 (1997) [hereinafter Braucher, Counseling Consumer Debtors] (describing the use of this strategy by some lawyers and generally discussing the need for more negotiation if lawyers are to best serve their debtor clients' interests).

See William C. Whitford, Changing Definitions of Fresh Start in U.S. Bankruptcy Law, 20 J. CONSUMER POLY 179 (1997); see also Culhane & White, Debt After Discharge, supra note 110, at 730 (finding that reaffirmations occurred in twenty-five percent of cases, and that forty percent of them involved reaffirmation of unsecured debts).

See Culhane & White, Debt After Discharge, supra note 110, at 736 (concerning creditor use of threats to challenge dischargeability and force an adversary proceeding as a possible means to get reaffirmation); see also NATIONAL CONSUMER LAW CENTER, LEARNING FINANCIAL LITERACY IN BANKRUPTCY: CONSUMER BANKRUPTCY EDUCATION PROJECT SURVEY REPORT, at 5-6 (reporting that in a survey of Chapter 7 debtors, six percent thought reaffirmations may be required and 22.6% did not know whether they were voluntary or required), available at http://www.nclc.org/initiavies/bankruptcy/content/bankruptcy_survey_content.htm (last visited Mar. 8, 2004).

See 11 U.S.C. §§ 1322(d), 1325(b)(1)(A), (B) (allowing plans to last up to five years and, if debts are not paid in full, requiring debtors to commit disposable income for three years to avoid confirmation challenge); id. § 1328(a) (typically calling for discharge after completion of the plan).
ous, as debtors try to pay for homes and cars and also repay part of their old unsecured debt, while meeting current expenses.\textsuperscript{118} Most Chapter 13 debtors do not complete their plans and thus do not get a discharge unless they file again, either in Chapter 7 or once more in Chapter 13.\textsuperscript{119} There is a great deal of interest in serial filing of Chapter 13 as an abusive practice (for example, filing and staying in Chapter 13 just long enough to halt a foreclosure).\textsuperscript{120} But the more common serial filing phenomenon probably involves a debtor who cannot manage under an arduous plan and fails, only to try again.\textsuperscript{121} This behavior is not abusive; the more pertinent question is whether the debtor should have either had a more realistic Chapter 13 plan to begin with or filed in Chapter 7 because a repayment plan was not feasible. Many debtors propose too burdensome Chapter 13 plans that obviously will fail.\textsuperscript{122} When plans are unrealistic from the outset, often the fault is with the debtors' lawyers,\textsuperscript{123} document preparers,\textsuperscript{124} or,  

\textsuperscript{118} See NBRC REPORT, supra note 1, at 277 (discussing external encouragement or moral compulsion as reasons for ill-fated attempts to repay debts in Chapter 13).

\textsuperscript{119} See William C. Whitford, The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection and Consumer Protection in Consumer Bankruptcy, 68 AM. BANKR. L.J. 397, 411 (1994) (stating that thirty-one percent of cases were closed as completed); see also Braucher, Empirical Study of Debtor Education, supra note 14, at n.5 (citing various empirical studies of completion); § 1328(a) (providing for discharge generally after plan completion). A debtor can convert to Chapter 7, 11 U.S.C. § 1307(a), and file in Chapter 7 after dismissal or file again in Chapter 13. See NBRC REPORT, supra note 1, at 273-76 (discussing the high Chapter 13 failure rate and proposing that conversion to Chapter 7 be the default rule, rather than dismissal).

\textsuperscript{120} See NBRC REPORT, supra note 1, at 276-81 (generally describing repeat filing in Chapter 13); id. at 278 (discussing filing to delay foreclosure).

\textsuperscript{121} See Susan L. DeJarnatt, Once Is Not Enough: Preserving Consumers’ Rights to Bankruptcy Protection, 74 IND. L.J. 455, 475-76 (1999) (reporting the results of a survey finding that Chapter 13 trustees generally did not favor blocking the right to refile and did not identify repeat filings as a major source of abuse).

\textsuperscript{122} See Braucher, Counseling Consumer Debtors, supra note 114, at 181-82 (discussing failure to budget realistically); id. at 185-86 (arguing that debtors' lawyers should be warning their clients of the high risk of failure in Chapter 13 and explaining the consequences of failure).

\textsuperscript{123} See id.

\textsuperscript{124} In some districts, debtors use document preparers at very high rates. See VISA CONSUMER BANKRUPTCY 1997 BANKRUPTCY PETITION STUDY (1997) (reporting that 22.5 percent of California Chapter 13 debtors in the study filed pro se), available at http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Bankruptcy_Petitio
in the case of unrepresented debtors, Chapter 13 trustees and the courts, which often do not raise the feasibility issue.\textsuperscript{125} Given the high failure rate in Chapter 13, the biggest means testing problem in consumer bankruptcy seems to be a failure to test for means to complete a Chapter 13 plan.\textsuperscript{126}

As with the problems resulting from Chapter 7 reaffirmations, the problem of unrealistic Chapter 13 plans suggests that the timing of proposed mandatory education may be wrong. If education came before debtors filed their Chapter 13 plans (typically the plan is filed with the petition), they could learn the importance of a realistic budget to plan success.\textsuperscript{127}

Among the debtors who avoid reaffirming debts in Chapter 7, various other reasons may mean they will not benefit fully from their discharges. Most consumer debtors have no non-exempt property at risk and should not file in bankruptcy until they are back to work and have income to protect.\textsuperscript{128} If they file when they still have to incur more debt to get by, whether to live on or for medical expenses, they will quickly be back in debt trouble. Also, if the underlying cause of bankruptcy was too little income to cover current expenses, bankruptcy alone will not get the debtor out of financial trouble. Before filing, such a debtor needs to either increase income or decrease expenses; otherwise debts will just begin to mount again. In short, good use of Chapter 7 requires advance


\textsuperscript{126} See supra note 119 (concerning the high failure rate of Chapter 13 plans); Braucher, Means Testing, supra note 29, at 417-18 (discussing the lack of concern in the reform legislation about "can’t pay" debtors who do not have the means to succeed in Chapter 13 but who try and fail).

\textsuperscript{127} See Braucher, Debtor Education and Interest Analysis, supra note 11, at 328 (noting that providing education after filing means that it comes too late to allow instruction about the importance of realistic budgeting to be put into practice in drawing up the Chapter 13 plan or in making a choice of chapter in light of whether Chapter 13 is feasible).

\textsuperscript{128} Most Chapter 7 cases are no asset. See NBRC REPORT, supra note 1, at 137 (stating that about ninety-five percent of Chapter 7 cases are no asset, and most of the five percent with assets are business rather than personal cases). The benefit of a discharge in a no asset case is that post-petition income is protected from pre-petition creditors. 11 U.S.C. § 541(a)(6) (2004) (providing that earnings of an individual after commencement of a case are not property of the estate). A debtor with no nonexempt equity in a home and no income may nonetheless feel a need to file to stop a foreclosure, but unless there is income to pay the mortgage, the bankruptcy filing will not protect the home for long.
analysis in light of the lessons of good financial management. Furthermore, if the debtor's fundamental problem could easily occur again (another layoff, another bout with an uninsured medical problem), new debt troubles may recur despite the best planning.

Those who complete a Chapter 13 plan, only a third of Chapter 13 filers, 129 may be the most likely to succeed financially in the long run. Such debtors learn to live on a budget for a number of years, and when the plan is completed, these debtors may suddenly have extra disposable income each month (the amount of their plan payments that represents repayment of old unsecured debt). On the other hand, if they had filed in Chapter 7 instead and realized the importance of saving, they might have gotten on the road to a sound financial future more quickly; they might have saved the amount of their unsecured debt repayments, building a nest egg rather than completing a Chapter 13 plan. 130

We know little about the financial situations of debtors after bankruptcy. Who does well and who does not? What are the key factors in the success stories? Are increased income and good health insurance most crucial to staying out of debt and beginning to save? Or is it learning to budget? Or could it be that having payroll deductions of savings is what makes the most difference? If more income is the key, job training would be a more effective strategy than financial management education.131 If payroll deduction of savings is a big factor, more promotion of this strategy would be advisable. We also do not know who gets into trouble again after a

129. See supra 119 and accompanying text (discussing non-completion rate).
130. Many debtors who file in Chapter 13 are not counseled about this alternative, which is more likely to meet debtors' goals in circuits that permit ride-through of secured debts in Chapter 7. See supra notes 110-11. Many Chapter 13 plans primarily involve repayment of secured debt, so that the small amount repaid to general unsecured creditors is not enough to make the debtor flunk the "substantial abuse" test in Chapter 7. See 11 U.S.C. § 707(b); see also Scott F. Norberg, Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13, 7 AM. BANKR. INST. L. REV. 415, 434, n.61 (1999) (19.1 percent of Chapter 13 plan payments nationally in 1998 went to general unsecured creditors); Braucher, Counseling Consumer Debtors, supra note 114, at 189 (noting that saving in Chapter 7 the amount that would have been paid to unsecured creditors in Chapter 13 would probably make the debtor better off financially compared to the benefits of lower cost credit that might be available to a debtor who completed a Chapter 13 plan).
131. See Dickerson, supra note 21, at 958.
bankruptcy and why (other than that many debtors reaffirm debts in Chapter 7, impairing their fresh starts, or fail to complete plans in Chapter 13).\textsuperscript{132} The gaping holes in our knowledge make it hard to evaluate how successful bankruptcy is in providing a fresh start. Lack of knowledge also makes it hard to design good education programs. It is of course possible to teach about all the usual pitfalls to a stable financial situation,\textsuperscript{133} but education for debtors in bankruptcy could be better designed for the real problems that filers encounter after their discharge, if only we knew what those problems are.

\textbf{VII. CONCLUSION}

Borrowing to get by in a financial crisis—and thus using consumer credit as a safety net—is part of the context of our soaring personal bankruptcy numbers. But another important factor is the baseline of debt that many families carry before a crisis. Creditors have made a burgeoning supply of consumer credit available in response to deregulation of interest rates, a development that has made very high risk lending profitable.

This article argues that we need more basic research to understand why many families are carrying big burdens of debt in general. We also need basic research to develop a longitudinal picture of debtors after bankruptcy, to learn whether most debtors really get a fresh start and build more secure financial futures, as well as why some fail while others succeed.

Both types of research advocated here involve the demand side of the consumer credit equation. With better understanding of demand in general, we might be able to speed social adjustment to the world of easy credit. Also, with more

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\item \textsuperscript{132} \textit{See supra} notes 109-26 and accompanying text.
\item \textsuperscript{133} These pitfalls include not saving and failing to keep debt burdens low. \textit{See} \textsc{Warren} \& \textsc{Tyagi}, \textit{supra} note 41, at 163-67 (discussing the idea of a family conducting "a financial fire drill," to see whether it has enough savings to live for six months without the income of one of two earners in the family, whether its fixed expenses are as low as possible, and making sure it has insurance to cover serious health problems or disability). For a family that has just filed in bankruptcy, perhaps because of unemployment or illness, the idea of having enough savings anytime soon to be able to live on them for six months may be very discouraging, and getting health or disability insurance once one already has an illness or disability may be problematic or impossible.
\end{itemize}
\end{footnotesize}
knowledge of the new debt problems debtors get into after bankruptcy, we might be able to figure out how to get them off the treadmill.

Although it is worth striving for new approaches to reduce problems with over-indebtedness and bankruptcy, the underlying causes of financial insecurity are complex. They include income disruptions, illness, family break-up, lack of savings, high debt to begin with, and limited private and public insurance programs for unemployment, disability, and health care. Easy credit and structural financial insecurity likely contribute to cultural and individual acceptance of resort to bankruptcy. With so many factors in play, structural, cultural and personal, we should not expect the need for bankruptcy relief as part of the safety net to disappear any time soon, particularly if interest rates for consumer credit remain unregulated.