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Universalism and Choice of Law

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The Challenges of Comparative Consumer Insolvencies

Jacob Ziegel*

I. A New Branch of Comparative Law

This paper is about a new branch of comparative law, comparative consumer insolvency law, and its challenges. Comparative consumer insolvency law is at best only twenty-five years old and for a very good reason. Before the 1980s, most countries did not perceive consumer insolvencies as a significant social, legal and economic problem, and even fewer gave it much legislative attention. That neglect was also shared by most insolvency text writers and academics, with the exception of American authors among whom this topic has attracted attention for a much longer period.

All this has changed dramatically, as may be seen from the following random statistics. Beginning with my own country, Canada, as late as 1972, the number of individual non-business bankruptcies, 3,647, was smaller than the number of business bankruptcies. It grew rapidly thereafter and reached 21,025 in 1980.¹ Between 1985 and 1997, the number of consumer insolvencies increased by over 300 percent, from 19,752 to 90,034.² In 2001, the total number of individual filings

* Professor of Law Emeritus, University of Toronto. Warm appreciation to Ryan Lavallee, Joint MBA-JD University of Toronto student, for valuable research and editorial assistance.

1. Office of the Superintendent of Bankruptcy (OSB), *International Consumer Insolvency Statistics* (Ottawa, June 1999) 2 [hereafter *International Statistics*].

2. There was a drop of nearly 10% in the number of Canadian consumer insolvencies between 1997 and 1998 (from 90,034 to 82,620) and a 3.7% increase in the US figures (from 1,350,118 to 1,398,182) as compared with a 20% increase in the US figures between 1996 and 1997. See *International Statistics, supra* note 1, at 1, 3, 7. The improvement in the Canadian employment position and the general buoyancy of the Canadian economy may explain the drop in the Canadian figures, although this is only speculation. The steep rise in the US insolvency figures throughout the 1990s shows that a robust economy is no harbinger of lower insolvency filings. Prof. Ausubel argues that credit industry standards, especially on the credit card side, are more important factors. See L.M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy* (1997) 71 AM. BANKR. L.J. 249.

amounted to 102,539.³ The U.S. figures tell a similar story. Between 1985 and 1997, the number of consumer insolvencies grew from 341,233 to 1,350,118, also a three-fold increase. The number has continued to climb and reached 1,452,129 in 2001 and 1.6 million in 2003.⁴ Still more significant is the increase in the number of consumer insolvencies as a ratio of population. In Canada, the ratio increased between 1981 and 1997 from 0.93 to 3.00 per 1,000 of population, an increase of 223%. The comparable figures for the U.S. were 1.4 and 5.1, an increase of 264%.⁵

The number of insolvencies in other jurisdictions was much smaller. Nevertheless, they too show a very significant percentage increase between 1985 and 1997. During this period, the number of personal insolvencies in England and Wales grew from 6,776 to 24,441 and from a ratio of 0.14 to 0.47, a 235% increase.⁶ The number of personal insolvencies was 30,587 at the end of 2002. The number has continued to grow and amounted to 10,271 in the third quarter of 2003.⁷ The number of Australian personal insolvencies grew from 8,761 in 1986/7 to 22,333 in 1996/7, a 150% increase.⁸ The ratio per head of population

3. "Total individual filings" comprises individual bankruptcies and Division 1 and 2 proposals by individuals. There were 87,302 individual bankruptcy filings, of which 9.1% were individual business filings and 90.9% (79,317) individual consumer filings. There were 1,721 individual Division 1 filings, of which 72.2% (1,243) were individual consumer filings. Of the 13,453 individual Division 2 filings all but 4% were individual consumer filings. Information supplied in email message to author from Stephanie Cavanagh, OSB analyst (10 January 2003). A different set of numbers, based on different criteria, appears in *International Statistics*, June 2004, and cites the total number of personal insolvencies as 93,419. The difference appears to rest in the fact that the 2004 numbers excludes filings by individually owned businesses.

4. See *International Statistics*, *supra* note 1, at 7, and American Bankruptcy Institute, *Filing Statistics, Annual U.S. Filings*, available at <http://www.abiworld.org/stats/1980annual.html> (last visited December 8, 2004). The US consumer insolvency figures cover both ch. 7 and ch. 13 filings.

5. *International Statistics*, *supra* note 1, at 4, 10.

6. *Id.* at 12, 13, 17-18. Note carefully that in the Insolvency Service statistics individual insolvencies covers individual business and professional insolvencies as well as consumer insolvencies.

7. *The Times*, April 9, 2004, p.2. There were 11,967 individual insolvencies in the third quarter of 2004 on an adjusted basis. This was an increase of 31.1% on the same period in 2003. There were 35,604 individual insolvencies altogether in 2003. Department of Trade and Industry Homepage, *DTI, Statistics Release: Insolvencies in the Third Quarter 2004*, 5 November 2004, and Table 2, *Individual Insolvencies in England and Wales (seasonally adjusted)*, available at <http://www.dti.gov.uk/sd/insolv/> (last visited December 8, 2004).

8. *International Statistics*, *supra* note 1, at 29. The number of personal bankruptcies amounted to 24,109 in administrative year 2001-2002, of which 20,039 were non-business bankruptcies. These figures do not include debt agreements and arrangements under Parts IX and X of the Commonwealth Bankruptcy Act. See additionally Jacob Ziegel, *Comparative Consumer Insolvency Regimes* (Oxford, Hart Publishing, 2003) [hereinafter *Comparative Consumer Insolvency Regimes*], Table 4.1 at

grew from 0.50 to 1.21, an increase of 142%.⁹ The number of personal insolvencies grew to a further 22,637 during the 2002-3 administrative year.¹⁰

Looking at some non-common law jurisdictions, in Scotland the number of individual sequestrations (i.e., individual insolvency proceedings) jumped from 2,618 in the 1985/6 administrative year to 11,970 in 1992/3 before dropping back substantially in later years for reasons unrelated to the need for insolvency relief. In Germany, where bankruptcy relief for consumers and other individuals only became available as of 1999, 20,000 personal bankruptcy and small business petitions were filed in the first full year of operations of the 1994 law despite its very restrictive provisions; 44,000 petitions were filed in 2002 after the 2001 amendments to the law.¹¹ Japan provides a still more dramatic example of the impact of *de facto* insolvencies on the need for legal solutions. According to a *New York Times* report, as many as 2 million Japanese were effectively bankrupt in 2002; another estimate put the number at 1.5 million to 2 million.¹² Despite a less than favourable bankruptcy law, individual bankruptcies in Japan increased from 160,741 in 2001 to 214,996 in 2002, or one person out of 587 in a population of 126 million.¹³ The number of filings under a 2001 law introducing a civil rehabilitation option doubled from 6,210 in the first year of its operation to 13,498 in 2002.¹⁴

II. Reasons for Rapid Growth in Number of Consumer Insolvencies

Insolvency essentially describes an individual's debt position and is usually defined as the status of a person who cannot meet her liabilities as they become due for payment or whose liabilities exceed her assets.¹⁵

94.

9. See *International Statistics*, *supra* note 1, at 32.

10. Insolvency and Trustee Service Australia, *Annual Report by the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act 2002-2003*, available at [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3EPublications-%3EAnnual%20Documents/\\$FILE/1-G_Annual2003.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3EPublications-%3EAnnual%20Documents/$FILE/1-G_Annual2003.pdf?OpenElement) (last visited August 4, 2004), 14.

11. Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States* (2004) 24 NW J. INT LAW & BUS 257, at 286-87.

12. Mark D. West, *Dying to Get Out of Debt: Consumer Insolvency Law and Suicide in Japan*, University of Michigan Law School, Public Law & Legal Theory Res. Paper Series, Res. Paper No. 37, also accessible at <http://ssrn.com/abstract/479844>, at 3, 17.

13. Japan Information Center Corp, *V. Increase in personal bankruptcies and problems of multiple debts* (2003), available at http://www.jicc.co.jp/ff_05.html (last visited August 3, 2004).

14. West, *supra* note 12, at 29.

15. Cf. Bankruptcy and Insolvency Act (BIA), Canada, Rev. Stat. Can. 1985, c 31 (1st Suppl.), as am., s 2(1), definition of "insolvent person."

Often the two tests coincide because an individual with readily realizable assets can usually draw on a line of credit to meet current expenses. However, so far as consumers are concerned, it is a safe assumption that the second insolvency test, an excess of liabilities over assets, describes the condition of most consumer insolvents. Consumer overindebtedness is not, of course, a new phenomenon—it is encountered in all societies, new and old, and at all levels of industrial development—so it is relevant to ask, what are the particular circumstances that account for the rapid growth in consumer insolvencies over the past twenty-five years in so many industrialized societies around the globe? The most important reasons appear to be the following:

1. *Rapid growth in the use and availability of consumer credit.* Various forms of consumer credit—i.e., credit available for personal use or consumption—have been available in most Western societies for over a century. However, the credit was usually closely regulated by law and was usually only available to well established employees with strong credit records and to middle- and upper-income individuals. These barriers were removed at different stages and at different tempos in the post-World War II period as credit restrictions, usury ceilings and other legislative impediments were lifted. Similarly, large financial institutions discovered that consumer credit was a safe and highly profitable form of new business. The introduction of credit cards and the heavy marketing of them, starting in the 1970s, also made a very significant difference in the volume of outstanding credit. Credit cards with a revolving line of credit ensure repeat business and encourage compulsive shopping by consumers and a “consume now, pay later” mentality in consumer expenditures. Not surprisingly, U.S. studies show a close correlation between the volume of outstanding credit card debt and the growth in U.S. consumer bankruptcies.¹⁶

Here again some statistics best describe the larger picture. The volume of consumer credit in the U.S. grew from U.S. \$390.3 billion in 1982 to U.S. \$1,701 billion in 2001;¹⁷ the corresponding figures for Canada were CAN \$139,710 million¹⁸ and CAN \$203,713 million.¹⁹ Those for the United Kingdom rose from £36,290 million in 1987 to £141,719 million in 2002.²⁰ In Germany, the volume of outstanding

16. D. Ellis, *The Influence of Legal Factors on Personal Bankruptcy Filings*, *Bank Trends* (February 1998), Number 98-03. Federal Deposit Insurance Corporation, Division of Insurance (Washington D.C.).

17. *International Statistics*, *supra* note 1, at 4.

18. *Id.* at 5.

19. Statistics Canada, *Consumer Credit, Excluding Mortgages*, available at <http://www.statcan.ca/english/Pgdb/fin20.htm> (last visited August 4, 2004).

20. United Kingdom Office for National Statistics, 23.15 Consumer credit' *National Statistics Online*, available at <http://www.statistics.gov.uk/STATBASE/Expodata/>

credit grew from DM 130,720 million in 1980 to DM 388,800 million in 1996,²¹ a 200 percent increase that substantially exceeded the population growth during the same period. The Japanese figures are even more striking. Here consumer credit grew from ¥166.9 billion in 1979 to ¥ 681.3 billion in 2000, a 308% increase.²²

2. *Reduction in Savings by individuals and families.* Whether or not it is a consequence of the rapid growth of consumer credit, observers in the U.S., Canada and other countries have noted a disturbing and steady increase of consumer indebtedness as a ratio of total disposable after tax incomes. Equally troubling is a growing tendency for financial institutions to encourage older couples to mortgage their home equity, ostensibly to provide them with greater liquidity and a more comfortable life style in their mature years.

3. *Financial mismanagement by consumers and lack of financial literacy.* In commenting on the causes of consumer bankruptcy, trustees in bankruptcy, financial counsellors, and credit grantors often claim that debtor mismanagement of their finances and lack of budgetary skills is a primary cause of consumer insolvencies. This conclusion is suspect since it ignores the role which credit advertising and the general marketing environment play in encouraging credit consumption. Nevertheless, the widely held belief that credit mismanagement is the primary cause of consumer over-indebtedness encouraged the Canadian Parliament to add provisions in the 1992 amendments to Canada's Bankruptcy and Insolvency Act (BIA)²³ making credit counselling mandatory for consumer bankrupts and those debtors seeking approval of a consumer proposal for reduction of their debts in an approved debt repayment plan.

4. *Impact of Unforeseen Circumstances.* This congeries of events covering such incidents as unemployment or reduced earnings by a family breadwinner, demotion to a less remunerative job, family problems, significant illness in the family, and large medical bills has been given great prominence in the U.S. by the empirical research of three leading researchers, Sullivan, Warren and Westbrook. Their findings show that these factors greatly exceed in importance the other asserted causes of consumer bankruptcies.²⁴ Analyses of bankruptcy

Spreadsheets/D4925.xls (last visited August 4, 2004).

21. *Comparative Consumer Insolvency Regimes*, *supra* note 8, 136. See also European Credit Research Institute, *Briefing on Consumer Credit, Indebtedness and Overindebtedness in the EU* (undated), <http://www.ecri.be>.

22. Japan Information Center Corp., *supra* note 13, at 1.

23. See now BIA, s 157.1 and OSB Directive No 1R2 (21 December 1994).

24. See Teresa Sullivan, Elizabeth Warren, and Jay Westbrook, *The Fragile Middle Class: Americans in Debt* (New Haven, Connecticut, Yale University Press, 2000), as summarized in Bankruptcyaction.com, *Bankruptcy Profiles*, available at

causes in Canada, Australia and England suggest that illness and medical bills play a much smaller role there than they do in the U.S., and this is generally agreed to be because these countries have a much stronger social safety net to protect insolvent debtors than is true in the U.S. On the other hand, unemployment and family problems also figure significantly in the Australian and Canadian statistics, though it may be that in a substantial number of cases these factors also mask other problems.

III. Responding to Consumer Insolvencies

Historically, early societies responded very harshly to debtors who were not able to meet their commitments. Under biblical and early Roman law, commitment to slavery and even worse fates awaited debtors and their families. Even as late as the 19th century, creditors in England and other common law jurisdictions were entitled to seek civil imprisonment for delinquent debtors, and frequently did, as readers of Charles Dickens' novels know only too well. This harsh remedy reflected two attitudes. One was the belief that, unlike insolvent traders whose misfortunes were ascribed to the vagaries of the marketplace and other uncontrollable contingencies, non-traders were deemed to be the authors of their own misfortune and therefore little deserving of sympathy. The other attitude grew out of a sense of frustration. In the absence of effective means for discovering and seizing debtors' assets, creditors felt the need to resort to coercive methods like imprisonment in the hope that payment would be offered by the debtor or by the debtor's relatives and friends.

Insolvency law has travelled a long distance since those rather crude and simplistic attitudes. There is a much better appreciation today that personal insolvency and a failure to honour debt obligations do not in themselves denote moral bankruptcy and serious character defects. Nevertheless, the fact remains that a large number of civil law jurisdictions—in Latin America, southern and eastern Europe, and the Far East, for example—continue to deny insolvent debtors access to bankruptcy proceedings or, if they do permit it, do not accompany it by

<http://www.bankruptcyaction.com/USbankstats.htm> (last visited August 3, 2004). Their findings were as follows: average age: 38; 44% of filers are couples; 30% are women filing alone; 26% are men filing alone; slightly better educated than the general population; two out of three have lost a job; half have experienced a serious health problem; and fewer than 9% have not suffered a job loss, medical event or divorce. For a highly readable account of the problems many middle class American couples who have accumulated mortgage and other debts premised on a steady two family income and where one of the partners subsequently falls ill or loses her job, see ELIZABETH WARREN AND AMELIA TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (New York: Basic Books, 2003).

the prospect of offering the bankrupt immediate or eventual discharge of the debtor's remaining debts.

This is in sharp contrast with the American "fresh start" philosophy. This, at least since the National Bankruptcy Act of 1898, has given insolvent U.S. consumers ready access to the bankruptcy system and more or less immediate discharge of the remaining debts on surrender of the debtor's non-exempt assets. The underlying belief here is that the debtor is a victim of unforeseen circumstances—unemployment, an economic depression, sickness and such like—and that restoring the debtor promptly as a productive member of society without the millstone of perpetual indebtedness is as much in the community's interest as it is in the interest of the debtor and his family.

Thus, broadly speaking, it may be said that modern bankruptcy systems fall into three categories so far as their approach to consumer insolvencies are concerned:

1. Jurisdictions that remain very conservative in their response to consumer over-indebtedness;
2. Jurisdictions that adopt an ultra-liberal position of the American "fresh start" variety; and
3. Jurisdictions that adopt a moderately liberal and qualified fresh start policy. The Canadian, English and Australian insolvency regimes belong to this group and, it would appear, so does the Japanese regime as a result of the adoption of the 1999 Specified Conciliation Law.

A. A Preliminary Question

The classification of modern consumer insolvency systems raises a more basic question of the type of assistance that should be made available to consumer debtors and at what point, and the philosophy informing each of these approaches. These approaches too fall under three principal headings, *viz.*:

1. Counselling facilities for overcommitted debtors coupled with voluntary repayment plans;
2. Court supervised partial repayment plans followed by discharge of the remaining debts. Consumer proposals in Canada, administration orders and Individual Voluntary Arrangements (IVAs) in England, chapter 13 plans in the US, and creditor approved repayment plans under the Japanese Conciliation Law fall into this category; and

3. Regular or simplified bankruptcy proceedings coupled with discharge of remaining debts either immediately (the US approach) or after a minimum prescribed period coupled with an obligation by the bankrupt to make surplus income payments up to the time of discharge or for a fixed period (Canadian, English and Australian approaches and, in a more attenuated form, the German approach as a result of the 2001 amendments).

B. Rationales of Different Approaches

The appropriateness of each of these approaches will depend on a debtor's particular circumstances. A debtor experiencing only temporary financial difficulties and enjoying a substantial discretionary income may require little more than financial counselling and an extension of time by creditors for repayment of the consumer's debts. On the other hand, a debtor with more serious financial difficulties and with few prospects of being able to pay off all the debts within a reasonable time frame, but anxious to avoid the stigma of bankruptcy, will benefit from having access to a statutory rehabilitation plan. Then, thirdly, there is the large group of debtors with little or no discretionary income who are hopelessly insolvent. For them, personal bankruptcy followed by discharge of the debts either at the conclusion of the proceedings or within a few months thereafter, seems the obvious and indeed often the only feasible solution assuming the debtors have not been guilty of active misconduct.

C. Rationales of U.S. Fresh Start Philosophy

What is striking about the American fresh start approach is that it appears to offer the debtor the prospect of an immediate release from all his dischargeable debts following the filing of the bankruptcy petition and completion of the accompanying formalities regardless of his particular circumstances and capacity to repay some or all of his debts.²⁵ Many non-American observers are troubled by what they perceive to be an excessively generous or naïve approach and see it as an invitation for abuses by unscrupulous debtors.²⁶ However, this view is not shared by

25. The US position may change radically if, as seems likely as of this writing (March 2005), US credit industry's seven year to persuade Congress to adopt a means testing law for debtors seeking to take advantage of chapter 7 of the US Bankruptcy Code is finally crowned with success. S.256 was easily approved by the Senate on March 11, 2005 and the predictions are that the House of Representatives will follow suit.

26. Note, however, that pursuant to 11 USC 707(b) and Bankruptcy Rules, Rule 1017(e), the U.S. bankruptcy court has power to dismiss an abusive bankruptcy petition. Until recently such motions were rare, one of the reasons being that only the court acting on its own initiative and the US trustee could bring such a motion. However, acting in

most American bankruptcy scholars and many bankruptcy judges, and they offer one or more of the following rationales in support of the fresh start philosophy:²⁷

1. That to impound a consumer bankrupt's future income would violate the 13th amendment to the U.S. Constitution against involuntary servitude.

2. That a coercive payment regime will provoke the consumer's resistance and encourage the consumer to change jobs or otherwise become less productive, and perhaps even to disappear completely.

3. That it is much better to secure the debtor's consent to a voluntary payment system by giving the debtor incentives that are not available in a straight bankruptcy than to coerce him to make involuntary payments.

4. That the British-style income payment and discretionary discharge system is based on the historical role of the British insolvency legislation as a creditors' debt collection instrument. This was not true (it is argued) of the American National Bankruptcy Act of 1898 because pre-bankruptcy debt collection rules generally fall under state jurisdiction.²⁸

5. That a British-style income payment and discretionary discharge system is intrusive, paternalistic, and subjective since no two debtors and their families have the same needs and face the same circumstances.²⁹

6. That to attempt to engraft a means test on what is already a very complex and overburdened US consumer bankruptcy system would be the straw that breaks the camel's back.³⁰

7. That since the bulk of consumer bankruptcy debts today consist of consumer credit liabilities, it is more efficient to oblige the credit

response to creditors' criticisms, US trustees in various districts appear to have become more active in initiating such proceedings.

27. Comparative Consumer Insolvency Regimes, *supra* note 8, 69.

28. See D.G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings* 131 U. PA. L. REV. 69, 121 (1982).

29. *Id.* at 120-123; and J. Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 583 (1993) (eloquently expressing similar sentiments without allusion to the British style provisions), *cited in* E. Warren, *A Principled Approach to Consumer Bankruptcy* 71 AM. BANKR. L.J. 483, 505 (1997).

30. E. Warren, *supra* note 29, at 505-506. The metaphor is the author's, not Prof. Warren's.

industry to internalise its losses or to tighten its credit granting standards if creditors believe their losses are too high than to expect consumers to resist the impulse for instant gratification encouraged by the ready availability of consumer credit.³¹

8. That there is no evidence of large scale abuses in the existing bankruptcy system and that the overwhelming percentage of those seeking chapter 7 bankruptcy protection are hopelessly insolvent and would not be able to pay off their indebtedness in any reasonable time frame even if means testing and a mandatory chapter 13 regime were to be introduced.³²

D. The Ongoing U.S. Debate

Since 1997, efforts have been made by the powerful U.S. credit industry to persuade Congress to adopt legislation that would deny bankruptcy relief to those debtors deemed capable of paying a substantial percentage of their debts (20 percent is a popular figure) over a five year period. Congress actually approved such legislation in 2000 but President Clinton pocket vetoed the bill as one of his last acts in office.³³ A successor bill has won the endorsement of each of the Houses of Congress but as of this writing (July 2004) remains frozen in committee because of fierce opposition by one or two Congresspersons and their determination to amend the bill to promote other non-bankruptcy objectives.³⁴

It is in any event important to recognize that what current U.S. law offers insolvent debtors is only a "qualified" fresh start and not an absolutely clean slate. This is because there are no less than 18 exceptions to the right to an unconditional discharge under the present Bankruptcy Code.³⁵ In addition, many American debtors enter into reaffirmation agreements with creditors agreeing to pay their debts even after statutory discharge of the debts. Then, too, debtors in all states must surrender their non-exempt assets to the trustee at the time of bankruptcy. The exemptions vary widely among the states and this too is

31. T.H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (Harvard University Press, 1986) ch. 10, at 234-236.

32. T.A. Sullivan, E. Warren and J.L. Westbrook, *Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Cultures* 20 J. CONS. POL'Y 223 (1997).

33. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 58-60.

34. However, the prospects may have greatly improved with President Bush's reelection as President in November 2004 and with a substantial increase in the number of elected Republican Senators.

35. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 80-81.

the subject of much controversy among the federal legislators.³⁶

E. The Fresh Start Policy in Other Common Law Jurisdiction

In England, the principle of a debtor's entitlement to a discharge of his debts in bankruptcy was first recognized in the Bankruptcy Act of 1883. However, it was a long way removed from the American fresh start rule. In particular, the English discharge was subject to the following important qualifications. First, the discharge was in the discretion of the court and, in addition to denying the discharge altogether, the court could issue a conditional or suspended discharge. Second, the debtor had to apply for the discharge and creditors were entitled to oppose it. In the third place, the debtor could be required to make voluntary or court mandated payments to the trustees pursuant to agreement or a court order (income payment order (IPO)).³⁷ Significantly, the English legislation contained no formula for determining the amount of the IPO but left it to the court's discretion subject to the debtor being left with sufficient income to meet the debtor's essential expenditures for himself, his family and other dependents.

Important amendments to the discharge provisions were adopted in the English Insolvency Act of 1986.³⁸ First time bankrupts were now entitled to an automatic discharge, after three years in the case of regular bankruptcies and after two years in the case of summary administrations.

Further changes arrived with the enactment of the Enterprise Act 2002.³⁹ The basic discharge period has now been reduced to one year and may be shortened still further if the Official Receiver files a notice that investigation of the bankrupt is unnecessary or that investigation of the bankrupt has been concluded.⁴⁰ Non-British readers may be surprised to learn that these amendments were prompted not by a concern to meet the needs of the growing number of over-indebted British consumers. Rather, they were inspired by the British government's wish to encourage a stronger enterprise culture in the British population.⁴¹

The Canadian discharge system offers still another version of a modified fresh start policy. Prior to 1992, the Canadian bankruptcy

36. *Id.* at 63-65.

37. *Id.* at 117. In practice, an IPO appears to have been made in about 10 percent of the cases, *id.*, Table 5.2 at 118.

38. *Id.* at 118-19; Insolvency Act 1986, s 279(1).

39. *Enterprise Act 2002* (U.K.), 2000, c. 40.

40. *Id.* at s 256(1), amending Insolvency Act 1986, s. 279(1).

41. See Secretary of State for Trade and Industry, *Productivity and Enterprise. Insolvency—A Second Chance* (London, Cm 5234, July 2001).

legislation basically mirrored the pre-1986 British approach to the debtor's entitlement to a discharge. Amendments in 1992 to the Bankruptcy and Insolvency Act (BIA)⁴² entitle first time bankrupts to an automatic discharge nine months from the date of the bankruptcy order unless the discharge is opposed by the Superintendent of Bankruptcy, the trustee in bankruptcy or the debtor's creditors. In the latter event, the court is free to make such order as it deems appropriate. In practice, there are few objections to the debtor's discharge.

Another and still more important change in the Canadian position was introduced in 1997⁴³ dealing with the debtor's obligation to make surplus income payments during the bankruptcy period and prior to the debtor's discharge. The pre-1997 practice was to leave it to the trustee's discretion to reach an appropriate agreement with the debtor although the trustees were expected to follow the surplus income guidelines provided by the Superintendent. The 1997 amendments made it *obligatory* for the bankrupt to make surplus income payments to the trustee in accordance with a "low income cut off" (LICO) table prepared annually by the Superintendent.⁴⁴ The results from the first three years of operation of the new surplus income regime are instructive and also throw important light on the soundness of the U.S. style fresh start policy. In the period 1998-2001, the surplus income of Canadian individual bankrupts varied from 16.94% in 1998 to 19.88% in 2001.⁴⁵ The size of the surplus payments made by the bankrupts varied widely among the provinces. Nationwide, 55.6% of the payments were below CAN \$200; the mean amount was CAN \$240.16 and the median figure CAN \$180 per month.⁴⁶

F. *Scandinavian and Continental European Approaches*

The approach of the continental European countries, including the Nordic countries, to the treatment of consumer over-indebtedness lies at the opposite end of the spectrum to the liberal discharge policies adopted in common law jurisdictions—not just the United States but equally those of Canada, Australia, and England. The reasons for this disparity rest partly in legal history and partly in the restricted role that consumer credit has played, and perhaps still plays, in these countries. For a long time, bankruptcy was not, and in many cases still is not, an option for

42. SC 1992, c. 27, s. 61(1), adding s 168.1(1)(f) to the parent Act.

43. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 28, and BIA s. 68 as revised in 1997.

44. Note importantly that the bankrupt is only obliged to pay 50% of the surplus income as determined in accordance with the Superintendent's directive.

45. *Comparative Consumer Insolvency Regimes*, *supra* note 8, Table 2.1, at 32.

46. *Id.* at 31.

consumers in Western Europe. Where the remedy was available, unpaid debts survived the bankruptcy process for as much as thirty years. Even now, nearly twenty years after legislative relaxation of the old shibboleths, consumer access to a right of discharge remains difficult and heavily circumscribed. Dr. Niemi-Kiesilainen reminds us in her excellent survey of the European legislative developments⁴⁷ that there are three basic differences between the Scandinavian, continental European and common law approaches. Thus, in all the European legislation examined by her (a) access is restricted to debtors deemed deserving of assistance; (b) all of them require a mandatory payment plan of from 5 to 7 years and there are no facilities for an automatic discharge;⁴⁸ and (c) all of them place special emphasis on debt counselling services provided by a variety of state-sponsored or state-funded social agencies. Their dual role is to help the consumer draw up a debt adjustment plan and to mediate its acceptance by creditors, and to wean debtors away from the use of consumer credit and to live in the future on a balanced and, usually, very tight budget.

Even these modest changes in European attitudes might not have come about but for the rapid increase in the number of overcommitted consumer debtors in the 1980 and 1990s.⁴⁹ Before the 1970s and 1980s, most of the continental countries restricted the availability of consumer credit through various controls. Demand exceeded supply and defaults were rare.⁵⁰ Since then, the volume of consumer credit and/or household credit has grown rapidly, though not at an even rate. The UK figures were cited earlier.⁵¹ In Germany, consumer credit increased from 15 billion ECU in 1970 to 200 billion ECU in 1998. As a percentage of

47. J. Niemi-Kiesilainen, *The Role of Consumer Counselling as Part of the Bankruptcy Process in Europe* (1999) 37 OSGOODE HALL L.J. 409 [hereinafter *Counselling*]; J. Niemi-Kiesilainen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?* (1999) 37 OSGOODE HALL L.J. 473 [hereinafter *Developments*]; J. Niemi-Kiesilainen, *Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy* in J. Niemi-Kiesilainen, IDC Ramsay and W.C. Whitford (eds), *CONSUMER BANKRUPTCY IN A GLOBAL PERSPECTIVE*, (Oxford, Hart Publishing, 2003) ch. 2.

48. "All European bills emphasize that the law must not undermine the general moral imperative of paying one's debts." Niemi-Kiesilainen, *ibid. Developments*, at 482.

49. "Debtors" is used here in the sense commonly employed by sociologists, viz. individuals with accumulated debts. A substantial number of the chapters in U. REIFNER AND J. FORD (EDS), *BANKING FOR PEOPLE* (Berlin, de Gruyter, 1992) contain a detailed examination of the state of indebtedness in various European countries, especially among low-income consumers. For a later study, see EU Directorate-General for Health and Consumer Protection, *Study of the Problem of Consumer Indebtedness: Statistical Aspects, Final Report* (Brussels, October 2001) [hereinafter *Consumer Indebtedness*].

50. Niemi-Kiesilainen, *Developments*, *supra* note 47, at 480. For an excellent description of the German position, see also Kilborn, *supra* note 11.

51. United Kingdom Office for National Statistics, *supra* note 20.

PDI, average indebtedness grew from 15% in 1978 to 25% in 1997.⁵²

G. Complexities of Continental Rules: German Insolvenzordnung 1994

The complexities of many of the Nordic and Western European consumer insolvency regimes may be gauged from the following description of the rules appearing in the German insolvency law of 1994. The original report of the Commission established by the German government in the 1980s to present proposals for revising the century old German insolvency laws did not include recommendations for dealing with consumer problems and a discharge facility was only provided for business debtors. Strong pressure by consumer groups and the support of the Social Democratic opposition party led to amendments being adopted for consumer debt relief during debate on the bill in 1991. The law was approved in 1994 but only became operative at the beginning of 1999. The law adopted a two-track procedure for the relief of consumer debtors. The first, governed by Article 304, involved a debt adjustment plan; the second was a bankruptcy proceeding, falling under Article 286, which, if all went well, might conclude after an interlude of 7 or more years with the discharge of any remaining debts. Under the debt adjustment procedure, the debtor was obliged to negotiate with the creditors and present them with a plan. The plan had to be approved by half the creditors in number and value but a secured creditor could not be bound without its consent. The plan also required court approval and, when that had been obtained, an insolvency manager had to be appointed to collect and distribute the payments and supervise the plan.

The bankruptcy procedure was apparently based on different principles and involved the debtor being required to pay his attachable income for up to 7 years to a trustee-manager for distribution to the creditors followed by discharge of any remaining debt if the debtor had observed all the requirements of the Law. Importantly, the Article 286 procedure also had a preliminary phase requiring the debtor and his creditors to engage in serious negotiations about the terms and amounts of the payments to individual creditors.⁵³ It also envisaged the possibility of the payment plan involving all of the debtor's family with the prospect of reducing the seven year period if other members of the household contributed payments.⁵⁴

The new Law encountered substantial teething troubles in its first

52. Udo Reifner, *Consumer Lending and Overindebtedness Among German Consumer Households, Expert Report to the European Commission* (Hamburg, 27 March 1998) [hereinafter *Expert Report*] at 475.

53. *Id.* at 85-86.

54. *Id.* at 83.

year of operation. Apparently, only 13% of the applications for debt release led to approved payment plans. Some of the difficulties were the following:⁵⁵ there was a long waiting list for the obligatory debt counselling mandated by the legislation; attorneys were not entitled to sufficiently high fees to be attracted to offer their services; some judges believed that the debtor had to be in a position to repay a minimum amount of the debt to be entitled to enroll in a plan; and major creditors were being uncooperative in the negotiation of payment plans. The debt release provisions in Article 304ff were also criticised on the following grounds:⁵⁶

1. The costs of the procedure had to be borne by the debtor. Since many debtors could not afford to pay, even with legal aid, they were excluded from access to debt relief altogether.
2. The procedure was too complex and could lead to the proceedings being terminated without the debtor's participation.
3. The duration of the procedure—a minimum of 7 years⁵⁷—was much too long, especially when account is taken of the financial hardship suffered by the debtor during this period as well as the debtor's obligation to comply with numerous duties.
4. The Law was regressive insofar as it required the debtor to accept any offer of work even if totally unsuitable for the debtor.
5. The Law took no account of creditors' responsibility for the debtor's over-indebtedness. Banks were also given unfair priority treatment over other creditors' claims and, in particular, were entitled to continue to attach the debtor's earnings.
6. The Law was demeaning to debtors and deprived them of their dignity as human beings.
7. The law operated unfairly against guarantors of the debtor. They could be sued by the debtor's creditors but had no right of recourse against the debtor. This meant that other members of the debtor's

55. The information is taken from an email to the author from Dr. Reifner (6 December 1999).

56. Reifner, *Expert Report*, *supra* note 52, at 86-88. See also U. Reifner, *The Eleventh Commandment: Inclusive Contract Law and Personal Bankruptcy* in NIEMI-KIESILAINEN, RAMSAY AND WHITFORD, *CONSUMER BANKRUPTCY IN A GLOBAL PERSPECTIVE*, *supra* note 47.

57. In practice, after allowing for an initial waiting period, it could be as long as 10 years.

family, and divorced or separated spouses, could suffer great hardships and might themselves have to seek bankruptcy relief.

The rigidities of the 1994 provisions were substantially relaxed in 2001 amendments to the German law. Nevertheless, the amendments retained the principle of the debtor's obligation to make payment from surplus income for six years, to accept any type of employment offered to the debtor, and emphatic rejection of the painless U.S.-style fresh start philosophy. It seems, however, that the 2001 amendments have led to a very significant increase in the number of consumers seeking debt relief.⁵⁸

H. Relationship of Debt Repayment Plans to Straight Bankruptcy Proceedings

The preceding description of the current German approach to consumer insolvencies (which is reasonably representative of the approach adopted in many other Western European countries) raises a basic question of the appropriate relationship between negotiated and creditor approved repayment plans and bankruptcy proceedings resulting in a discharge of the debtor's unpaid debts. Generally speaking, in common law jurisdictions it is left up to the debtor to make the appropriate choice between these alternatives. It is assumed the debtor will opt for the type of relief best suited to her particular circumstances and that the state should not make the decision for her.⁵⁹ It is felt to be better to build sufficient incentives into the repayment regime for the debtor to opt for it in the expectation that a self-directed decision will produce better results than a coerced decision made for the debtor. This perception is supported by experience in Canada and the U.S. of high rates of failure in voluntary repayment plans: as high as 70 percent in the U.S. for chapter 13 plans and about a third in Canada for consumer proposals.

As noted, the continental European approach proceeds from the premise that the debtor should always be obliged to make payments for long periods of time before "earning" the right to a discharge in bankruptcy, so there is no hesitation about building a mandatory

58. See Kilborn, *supra* note 11.

59. However, there is much evidence in the U.S. and Canada that "local culture" in the form of attorneys and bankruptcy judges (U.S.A.) and trustees in bankruptcy, creditors (sometimes) and bankruptcy judges (Canada) will often influence a debtor's decision. Note too that pursuant to s.170(2)(c) of the BIA, the trustee, in filing the trustee's report at the time of the debtor's eligibility for discharge, must indicate whether, in the trustee's opinion, the debtor could have made a viable proposal instead of opting for the bankruptcy route.

repayment plan into the overall insolvency scheme. It could also be argued that the Commonwealth countries' approach is not that different from the continental structure since the Canadian, English and Australian legislation all require the debtor to turn over surplus income for varying periods before earning the right to a discharge. Given this feature, it seems but a small step for the legislation to provide that the administrator may refuse a bankruptcy remedy altogether if she forms the view that the debtor had the resources to enter into a voluntary repayment plan and was unreasonable in refusing to do so. The argument also derives substantial support from the philosophy informing all the recent Congressional bills. As previously noted, their common theme is that a debtor should be denied access to a chapter 7 discharge if the debtor's financial statement shows that the debtor could have repaid a given percentage of the debts over a five year period after allowing for prescribed cost of living expenses.

I. The Future of the Fresh Start Philosophy

The preceding survey will have shown that so far no other country—common law or civil law in orientation—has evinced serious interest in following the U.S. lead in granting a consumer bankrupt the right to an immediate discharge without regard to his earning capacity and subject only to surrendering his existing non-exempt assets. In the U.S. itself, the fresh start philosophy is under deep assault by the finance industry and presumably the lobbyists' efforts will continue regardless of the fate of the bills currently before Congress.

To non-American observers, many of the rationalizations of the fresh start philosophy seem fragile. Nevertheless, its underlying theme appears to have left its imprint on many of the more recent non-U.S. insolvency regimes in recognizing the need for more generous discharge provisions in the face of the rapidly escalating number of overcommitted debtors and the futility of making impecunious debtors walk the plank for up to six years to satisfy Calvinist notions of a responsible debtor. The reduced discharge periods in Canada and England—nine months in the former and a year or less in the latter—essentially reflect this reality.

It is also important to stress the very modest results of the surplus income payment requirements in the countries that have adopted them as a condition of the debtor's eligibility for discharge. In England, income payment orders in recent years have only been made in about ten percent of the personal bankruptcies; in Canada, the overall percentage of bankrupts with surplus income as determined under the statutory BIA formula varied from 16.94% to 19.06% in the period between 1998 and

2001.⁶⁰ However, the actual benefits to an estate from surplus payments is often negligible. For example, in one sample of 900 summary administration files, pay outs only amounted to an average of CAN \$103.13 and 3.6% of total receipts, or 0.4% as a percentage of receipts from all 900 files.

IV. Other Aspects of Modern Consumer Insolvency Systems

The discharge of debts provisions and the introduction of debt repayment plans as an alternative to the bankruptcy solution constitute only a small, albeit very important, part of the larger insolvency picture. Space only permits me to indicate a few of the many other issues facing modern policy makers.

A. *Accessibility of Bankruptcy Relief*

In many jurisdictions—England, Germany and Japan are good examples—debtors have often been denied access to the bankruptcy system because the legal and related expenses are well beyond the debtor's pocket. In England, a petitioner must deposit the sum of £250 to cover the administrative costs of the Insolvency Service as well as a court filing fee of £120 before the petition will be accepted.⁶¹ This financial hurdle explains in large part why the English personal bankruptcy rate is so low. In both Germany and Japan, it seems, petitioners face the prospect of high attorney fees, which may run to several thousand dollars. The Canadian position is different. In Canada, bankruptcy assignments are overwhelmingly handled by licensed trustees and they have solved the fee problem by their willingness to accept a small down payment and the debtor's promise to pay the balance of the trustee's fee and expenses (approx. CAN \$1,750) by installments.⁶² However, the arrangement has encountered significant legal and other difficulties and the future of such instalment arrangements is uncertain.⁶³

It is not clear how indigent debtors solve the problem of access to the U.S. bankruptcy system since it is now well established that a debtor's pre-bankruptcy promise to pay the attorney's fees is not enforceable once bankruptcy has intervened. Instead, the attorney must file a proof of claim like all other creditors. Because of the detail and

60. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 35, n.99.

61. *Id.* at 115.

62. For the details see *Comparative Consumer Insolvency Regimes*, *supra* note 8, 20; see also Niemi-Kiesilainen, *supra* note 47, and sources cited therein.

63. See J.S. Ziegel, *Financing Consumer Bankruptcies*, Re Berthelette, and *Public Policy* (2000) 33 CAN. BUS. L.J. 294, and J.S. Ziegel, *Indigent Debtors and Financial Accessibility of Consumer Insolvency Regimes*, ANNUAL REVIEW OF INSOLVENCY LAW, 2004, p 499.

complexity of the documents required to accompany the petition, it is difficult for debtors to complete the documents themselves. Nevertheless, there appears to be a small but not insignificant number of *pro se* filers who complete the petition themselves, aided in some cases by pro bono lawyers or legal service clinics.

In terms of simplicity and accessibility to insolvent debtors, the Australian model is surely the best. The bankruptcy petition and supporting statement of affairs are easy to complete and no court hearing or filing fees are involved. Instead, the debtor can mail in the petition or lodge it by hand at one of the ITSA offices across Australia. If the documentation is in order and the debtor is not ineligible to file for bankruptcy, the Official Receiver must accept the petition and bankruptcy follows automatically.⁶⁴ Unless the debtor has retained the services of a registered (i.e., private trustee) (very unlikely in practice), following the bankruptcy order the debtor's estate will be administered by the Official Receiver, again free of charge to the debtor. Most consumer bankruptcy cases handled by ITSA are "no asset" cases and so can be handled very expeditiously and at low cost by the ITSA officials.

B. Exempted Property

Even the most indigent of debtors must be left with sufficient clothing, household equipment and furniture to maintain some semblance of dignity and comfort for himself and his family and, where relevant, with tools and equipment to continue plying his trade or profession. Historically, the exemptions in England were barely at the subsistence level and were severely limited in value. The "one size fits all" standard has been abandoned in the current English Insolvency Act and has been replaced by a "necessary" standard appropriate to the debtor's circumstances.⁶⁵ Accordingly, s. 283(2) of the English Act entitles the debtor to retain:

- (a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
- (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family.

64. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 97, and the excellent article by Thomas G.W. Telfer, *The Proposed Federal Exemption Regime for the Bankruptcy and Insolvency Act* (2005) 41 CAN. BUS. L.J. 279.

65. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 116.

In case of dispute, the decision of what is necessary to meet the debtor's needs is made by the trustee with a right of appeal to the bankruptcy judge. Reported English judgments appear to indicate that in practice the courts err on the side of generosity.

Other insolvency regimes, civil law and common law, appear to have retained the model of an itemized list of exemptions with individual monetary ceilings. This is generally true in Canada and the U.S. In Canada, exemption levels continued to be governed by provincial law although the federal government has been urged to exercise its bankruptcy power to impose a uniform exemptions standard for all personal bankruptcies. The provincial exemption levels vary widely, with the Prairie provinces' debtor oriented provisions being the most generous and those of the Maritime provinces the least generous. Even greater disparity in exemption levels is found among the American states, particularly in the treatment of the debtor's residence, where the exempted amount may range from a few thousand dollars to total exemption of the debtor's home. The 1978 Bankruptcy Code attempted to provide a minimum floor of exemptions for all debtors by entitling the debtor to choose between the state exemptions and the Code provided exemptions.⁶⁶ However, the drafter's good intentions were thwarted when most of the states decided to exclude the optional federal standards, which is what the Code entitles them to do.

An important feature that appears to divide North American jurisdictions from overseas countries is the treatment of the debtor's residence, or "homestead" as it is often referred to in the North American legislation. Overwhelmingly, most of the American states and the Canadian provinces grant some form of exemption in this area but, as already noted, the exemption varies enormously in value. The inequities of these disparities from the debtors' and creditors' points of view have often been noted, but legislators in both countries have so far been unable to resolve it satisfactorily. The English and Australian bankruptcy legislation contains no explicit exemptions for residences though it seems that in England the bankrupt and his family may be afforded protection from being ousted from the family home for a reasonable period of time.⁶⁷ On the face of it, allowing the bankrupt debtor to retain a generous equity in the family home may be unfair to the debtor's creditors. However, those who subscribe to this position overlook the fact that the psychic harm to the debtor and his family of being forced to move into rented accommodation in an entirely different

66. 11 USC § 522(b). See also *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 63-65.

67. See *Insolvency Act* (Eng.), as amended, s 283(2).

area, and the associated costs of the move, may more than offset any pecuniary benefits to the creditors. In most cases, a debtor's equity in the home is quite modest. It is only in those jurisdictions where the homestead exemption is very high (or subject to no ceiling at all) that the debtor will choose not to use his equity as collateral for a loan to help pay off his existing indebtedness.

Another exemption issue that is currently attracting much attention in Canada is the treatment of various types of pension plans. Federal and provincial pension legislation exempts employment related pension plans from seizure in or outside bankruptcy. Its proponents argue that the exemption should also extend to *voluntary* savings plans such as the Registered Retirement Savings Plan recognized under Canada's federal tax legislation on the ground that the state should encourage taxpayers to make provision for their sunset years.⁶⁸ There are two weaknesses about this reasoning. One is that the proposed exemption is unfair to low income debtors whose discretionary income is too small to enable them to set up a private pension plan, yet who are still expected to make payments to the trustee. The other is that it proves too much. If private pensions are exempted then so, it may be argued, should a debtor's equity in his home, and that exemption should be more generous than the limits currently provided for in most provincial legislation. This is because for most debtors the home represents the largest single investment and nest egg for their retirement years.

C. *Reaffirmations and Non-Dischargeable Debts*

These two topics are quite disparate but, in the interest of space, it is convenient to treat them together. A reaffirmation involves the question whether a debtor should be free to reaffirm pre-bankruptcy obligations following the debtor's discharge or whether such post-bankruptcy agreements need to be carefully regulated to avoid abuses. The proponents argue that regulation is necessary and that without this protection debtors may easily lose the benefits of a statutory discharge. American experience shows⁶⁹ that these concerns are well founded. Canadian case law also illustrates that debtors will frequently reaffirm a pre-bankruptcy contract—for example, by retaining a leased vehicle even after the debtor's discharge—without appreciating the legal consequences of their conduct. Most common law jurisdictions have no clear rules governing reaffirmation of pre-discharge obligations and so, at a minimum, the case for statutory clarification of the position is very

68. *Comparative Consumer Insolvency Regimes*, *supra* note 8, at 24.

69. *Id.* at 88-89.

strong.

Pre-bankruptcy debts and obligations that are non-dischargeable in bankruptcy raise a very different set of issues. The non-dischargeable debts and obligations are invariably spelled out in the legislation and, though there may be problems of construction, the basic position is clear enough. What is highly contentious are the types of debts and obligations that should be non-dischargeable and the policy that determines their choice. The answers vary widely even among common law jurisdictions. The Canadian BIA contains eight non-dischargeable types of debts and obligations compared to five each for Australia and England and a whopping eighteen for the United States!⁷⁰ It seems consistent with public policy that criminal penalties should not be dischargeable in bankruptcy but it is not as obvious that the same status should be accorded to unpaid taxes—they are dischargeable under the Canadian, British and Australian acts but not under the U.S. Bankruptcy Code. Should the answer to this question rest on the debtor's motivation in failing to meet his civic obligations or does it rest on the sense of unfairness that other taxpayers should have to shoulder the extra burden of the bankrupt's delinquent taxes? Could the same argument not be made as well about many other types of debt? The treatment of alimony and family support obligations raises another set of difficult questions. They are not dischargeable in the above-mentioned jurisdictions, except in Australia, where the court may grant relief from payments that are in arrear,⁷¹ and in England, where s.281(5) of the Insolvency Act permits the court to grant release from a family support or maintenance debt "to such extent and on such conditions" as the court may direct. The high incidence of unpaid family support obligations suggests that public policy in this area may be easier to enunciate than to enforce.

D. Prophylactics and Creditors' Accountability

A well designed and balanced insolvency system will be concerned not only to provide relief to overcommitted debtors but also to put mechanisms in place to discourage over-indebtedness to begin with. Here the tendency is to put the burden on the debtors to acquire the skills and discipline for proper budget management either through their own exertions or with the help of high school instruction or credit counselling

70. *Id.* at Table 2.4, 42-44. Student loans constitute a separate and even more controversial category and are often dealt with in separate legislation. For the Canadian treatment, *see id.* at 129. (At the time of this writing, a private member's bill is pending in the Canadian House of Commons to reduce the non-dischargeability period for student loans from ten years to two years.)

71. *Cwth. Bankruptcy Act*, s. 153(2), (2A).

facilities. As previously noted, the Canadian Act does in fact oblige bankrupts to receive some elementary counselling as a condition of their discharge from bankruptcy. However, the available evidence appears to show that the statutory imposed counselling makes little difference to the debtors' postdischarge credit rating.⁷² It is also unclear whether this is because the course of instruction is too short to change basic attitudes and expenditure patterns or whether it is because saturation credit advertising and the easy availability of credit cards quickly offsets the benefits of counselling.

It is striking however that North American legislation in general imposes no legal obligations on creditors to exercise prudence and restraint in the granting of credit except so far as the discipline may be imposed *ex post* following the discharge of a debtor from monies owing to a creditor. This is a crude approach and tars a careful credit grantor with the same brush as the lax creditor whose high interest rates and generous profit margins allow it to absorb higher losses. It seems that, under the prodding of the British government, financial institutions and other major credit grantors have agreed to screen credit applicants more carefully and to adopt standards of prudential conduct but it is not clear how these can be effectively enforced in practice without credible sanctions.⁷³ In any event, these initiatives have no counterpart in North America and offers of unsolicited credit cards and beguiling offers of credit for the acquisition of goods and services with no down payment and no repayments for a year or more continue to flourish despite the high insolvency rates in Canada and the U.S. The U.S. credit card industry has even opposed suggestions for modest disclosure requirements in monthly statements that would tell the credit card holder how long it would take him to pay off the current balance on the credit card at the minimum rate prescribed by the credit card agreement.

72. See Saul Schwartz, *Effect of Bankruptcy Counseling on Future Creditworthiness: Evidence from a Natural Experiment* (2003) 77 ABLJ 257 (showing that a comparison of Canadian consumer bankrupts pre-1993 who had not received counseling with post-1993 bankrupts, who had not received it, showed no statistically significant differences in their credit ratings.).

73. Of particular interest in this context is the Swiss *Federal Law on Consumer Credit* of March, 2001, available at <http://www.ofj.admin.ch/f/index.html> (last visited February 6, 2005). The Law requires creditors to exercise prudence in extending credit to new consumers, to report extensions of credit to a central registry as well as significant default in payments by debtors, and imposes strong sanctions for non-compliance by creditors. See esp. Section 5 and Article 32. (I am indebted to Professor Bernd Stauder of the University of Geneva for drawing my attention to this legislation and providing me with a copy of it.)

V. Conclusion

In this paper I have attempted to explain the principal reasons for the rapid growth in many industrialized societies in the number of over-indebted consumers and the diverse approaches adopted in consumer insolvency regimes to address these challenges. The variations in philosophy and techniques range from those conservative systems primarily committed to educating debtors to handling their own and their family's finances more responsibly, and granting discharge from unpaid debts only as a last resort, to ultra liberal and moderately liberal regimes accepting the need for a prompt or reasonably early discharge with a view to returning the debtor as a productive and self-respecting member of society. The American fresh start philosophy represents the most generous approach but it has found few exact imitators anywhere else. However, it has influenced a general tendency in many countries to relax earlier stringent preconditions to the granting of a discharge and the imposition of post-discharge disqualifications and restrictions.

The framing of an appropriate discharge policy and the design of effective non-bankruptcy rehabilitational schemes constitute only a part of the much larger number of issues which must be addressed by modern consumer insolvency regimes. These issues run the gamut from providing consumers ready access to the insolvency system to the questions of the types of debts and obligations that should be non-dischargeable and under what circumstances the law should recognize the debtor's reaffirmation of pre-bankruptcy debts.

This survey has also tried to make it clear that none of the above questions should be approached abstractly. Rather, they should be grounded in sound empirical research of the actual impact of current rules and an appreciation that consumer insolvencies involve multidisciplinary phenomena. *A priori* assumptions and sweeping generalizations need always to be tested against the available data and policy makers and legislators should resist the temptation to moralize about the weaknesses of overindebted consumers.

Finally but not least, the paper draws attention to the important role played by the consumer credit industry in contributing to the over-indebtedness phenomenon and the need, at least in common law jurisdictions, to devise much stronger incentives for the credit industry to police its own credit practices more rigorously than has been true up to now.