

The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy: Consumer Bankruptcy in Global Perspective, by Johanna Niemi-Kiesilainen, Lain Ramsay & William C. Whitford (eds.); Comparative Consumer Insolvency Regimes: A Canadian Perspective, by Jacob S. Ziegel

Kent Anderson

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Bankruptcy Law Commons](#)

Review Essay

**Citation Information**

Anderson, Kent. "The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy: Consumer Bankruptcy in Global Perspective, by Johanna Niemi-Kiesilainen, Lain Ramsay & William C. Whitford (eds.); Comparative Consumer Insolvency Regimes: A Canadian Perspective, by Jacob S. Ziegel." *Osgoode Hall Law Journal* 42.4 (2004) : 661-680.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol42/iss4/6>

This Review Essay is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

# REVIEW ESSAY

THE EXPLOSIVE GLOBAL GROWTH OF PERSONAL  
INSOLVENCY AND THE CONCOMITANT BIRTH OF THE  
STUDY OF COMPARATIVE CONSUMER BANKRUPTCY®

*CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE*  
EDITED BY JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY &  
WILLIAM C. WHITFORD (OXFORD: HART, 2003)<sup>1</sup>

&

*COMPARATIVE CONSUMER INSOLVENCY REGIMES:  
A CANADIAN PERSPECTIVE*

BY JACOB S. ZIEGEL (OXFORD: HART, 2003).<sup>2</sup>

BY KENT ANDERSON<sup>3</sup>

I.	INTRODUCTION .....	662
II.	THE BOOKS .....	663
III.	A NARRATIVE ABOUT THE CONTEXT OF THE EXPLOSIVE GLOBAL GROWTH OF CONSUMER BANKRUPTCIES .....	667
IV.	THE METHODOLOGY OF COMPARATIVE CONSUMER BANKRUPTCY .....	671
	A. <i>Comparative Methodology</i> .....	671
	B. <i>Socio-legal and Empirical Methodology</i> .....	674
V.	SUBSTANTIVE OUTCOMES OF THE STUDY .....	676
VI.	CONCLUSION .....	680

---

© 2004, K. Anderson.

<sup>1</sup> [*Global Perspective*].

<sup>2</sup> [*Comparative Regimes*].

<sup>3</sup> The Australian National University, Faculty of Law. The author originally read these books while he was a visiting Associate Professor at Nagoya University School of Law, Japan. He would like to thank Frank Bennett, Terry Halliday, Lynn LoPucki, and Stacey Steele for their comments on an early draft. It goes without saying that all errors and opinions are the author's.

## I. INTRODUCTION

Pick up a newspaper almost anywhere in the world on almost any day and you will see a similar headline: “Bankruptcies Surge to Record Highs.”<sup>4</sup> Australia, Austria, Japan, Korea, the United Kingdom, and, of course, the United States, to name a few,<sup>5</sup> have all seen record consumer bankruptcy filings and it seems likely that these increases will continue. What is going on here? Can anything be done about it? Should anything be done about it?

These are the primary questions that two new books seek to answer. Jacob S. Ziegel’s *Comparative Consumer Insolvency Regimes*<sup>6</sup> takes a uniform look at the issue from a Canadian perspective, while *Consumer Bankruptcy in Global Perspective*,<sup>7</sup> edited by Johanna Niemi-Kiesiläinen, Iain Ramsay, and William C. Whitford, approaches the issue from a divergent, multilateral angle. Before delving into the specifics of the books, however, it is important to be clear about what is being discussed. These books are about consumer bankruptcy, not corporate insolvency. Also, these books are about domestic bankruptcies, albeit viewed from comparative perspectives, not cross-border insolvencies concerning troubled entities with interests in more than one country.

As such, not only do these books document and begin to explain the phenomenal global explosion of personal debtor failure and various legislatures’ responses, but they also mark the birth of a new academic discipline: comparative consumer bankruptcy.<sup>8</sup> This important new field was first conceived in the Osgoode Hall Law Journal in its 1999 special

---

<sup>4</sup> See e.g. Sean Aylmer, “Debt Defaulters Trigger Concern” *Australian Financial Review* (3 October 2003) (WL); “Bankruptcies Likely to Go Up” *Austria Today* (8 June 2004) (WL); Ken Belson “Japan: Record in Personal Bankruptcies” *New York Times* (5 February 2003) (WL) (regarding Japan); “Individual Bankruptcies Soar to Record High: Supreme Court” *Yonhap News [South Korea]* (8 August 2004) (WL); Ashley Seager “Explosion in Number of Bankrupts” *The Guardian [UK]* (7 August 2004) (Lexis); and “Bankruptcy Filings Increase to a Record” *New York Times* (19 August 2003) (WL).

<sup>5</sup> Relying merely on the cases introduced in *Global Perspective* might allow Germany, Hong Kong, Israel, the Netherlands, and New Zealand to be added to the list. See *Global Perspective*, *supra* note 1 at 153, 171-73, 187, 250, 305. Canada has seen a recent plateau in its records that perhaps prevents its inclusion. “Bankruptcy Statistics,” online: Office of the Superintendent of Bankruptcy <[http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/h\\_br01011e.html](http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/h_br01011e.html)>.

<sup>6</sup> *Comparative Regimes*, *supra* note 2.

<sup>7</sup> *Supra* note 5.

<sup>8</sup> In the editors’ own words: “This book is the first major effort in history to look at consumer bankruptcy in all parts of the world from a comparative perspective.” Johanna Niemi-Kiesiläinen, Iain Ramsay & William C. Whitford, “Introduction” in *Global Perspective*, *supra* note 1 at 1 [Niemi-Kiesiläinen *et al.*, “Introduction”].

issue, “Consumer Bankruptcies in a Comparative Context,” guest edited by Ziegel.<sup>9</sup> This new genre of research might be viewed as esoterically narrow or better treated as a sub-discipline within the traditional fields of comparative law, debtor-creditor relations, or consumer protection. However, the sheer number of people caught up as bankrupts worldwide—millions annually<sup>10</sup>—and the distinctive theoretical and practical issues posed by economically failed consumers rather than commercial entities alone seem to justify what might otherwise be construed as an indulgent specialization.

This article critiques these books and more generally examines the new discipline of comparative consumer bankruptcy. After introducing the books in Part II, I provide as context in Part III my narrative background to the explosive growth of personal economic failures globally and the legislative responses and counter-responses. In Part IV, I return to the books and their various essays to consider briefly the methodology of this new field of comparative consumer bankruptcy. Part V suggests a few outcomes of the new discipline by tying together some of the themes developed in the books and essays. Thus, this organization might roughly be thought of as covering the subject, context, process, and content of the new field of comparative consumer bankruptcy. I conclude by enthusiastically recommending the books, heralding the creation of this valuable new field of study, and refraining from adding the typical last paragraph of caveats.

## II. THE BOOKS

*Comparative Regimes* and *Global Perspective* have much in common. As the titles suggest, the books are both about consumer insolvency in global comparison. Though informed by civil law and non-North American experience, they both have a slightly North American common law focal

---

<sup>9</sup> See Jacob S. Ziegel, “Introduction to the Symposium on Consumer Bankruptcies” (1999) 37 Osgoode Hall L.J. 1 at 11-13 (noting, however, that this volume was focused on Canadian, or more generally, North American consumer bankruptcy and a truly comparative perspective was only introduced in a brief final chapter). As with any declaration of a new beginning, a number of others might claim an earlier milestone, but given the limited success of those efforts to result in the weight necessary for sustained development, I would—to continue the analogy—characterize them as flirting with a beginning. See e.g. Johanna Niemi-Kiesiläinen, “Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA” (1997) 20 J. Cons. Pol’y 133.

<sup>10</sup> In the United States alone, there were over 1.625 million consumer bankruptcies in 2003. See Administrative Office for U.S. Courts, News Release, “Business and Non-Business Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, during the 12 Month Period Ending 30 September 2003” (14 November 2003), online: <[http://www.uscourts.gov/Press\\_Releases/0903f2.xls](http://www.uscourts.gov/Press_Releases/0903f2.xls)>.

point. Having been published within weeks of each other in late 2003, the books both have the same temporal reference, *viz.*, the late 1990s to early 2000s. Finally, stylistically the books are similar, both having been competently edited and published by Hart Publishing.<sup>11</sup>

The books are also, however, distinct enterprises. They arose from different circumstances and consequently have slightly different voices and agendas. Ziegel's book was originally a public policy report and government submission that he wrote in light of recent and proposed Canadian legislation.<sup>12</sup> This is evident throughout the book, particularly in the final section where the author's recommendations for change speak directly to Canadian policy-makers about the Canadian context and Canadian law. Though this may date the book and distance the non-Canadian reader, it is nonetheless voyeuristically interesting and serves as a powerful example of the utility of a comparative study.

*Global Perspective*, on the other hand, came out of an international academic conference.<sup>13</sup> Thus, the book's disparate voices and conclusions are structured in a much more traditional scholastic style of a law and social sciences nature. Indeed, all contributors are academics though they represent a variety of disciplines and faculties including commerce, economics, law, political science, public policy, and sociology.<sup>14</sup> No practitioners, however, whether they be judges, lawyers, financial advisors, institutional creditors, social workers, or public service employees, are represented. The academic style carries over into the substance of most chapters in the book as well, but I will address this point below in Parts IV and V.

Not unrelated to the above, the argumentation or themes of the books differ noticeably. *Comparative Regimes* benefits from the consistency in argument of its single author. Ziegel, of course, is one of the most important comparative consumer-commercial law researchers in Canada and internationally.<sup>15</sup> In this enterprise, his approach to the subject provides

---

<sup>11</sup> I normally would not belabour publishing quality in a review essay, but given the declining assiduousness of some academic presses, the standard produced by Hart Publishing in these books deserves mention.

<sup>12</sup> *Comparative Regimes*, *supra* note 2 at vii.

<sup>13</sup> Niemi-Kiesiläinen *et al.*, "Introduction," *supra* note 8 at 2.

<sup>14</sup> See "List of Contributors" in *Global Perspective*, *supra* note 1 at ix-x.

<sup>15</sup> See *e.g.* Jacob S. Ziegel, ed., *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994); Jacob S. Ziegel, Benjamin Geva & Ronald C.C. Cuming, *Commercial and Consumer Transactions: Cases, Text and Materials*, 3d ed. (Toronto: Emond Montgomery, 1995); and Jacob S. Ziegel, ed., *Law and Social Change* (Toronto: York University, Osgoode Hall Law School, 1973).

a simple and effective method for constructing his argument. In a nutshell, he lines up his subject countries similarly so that comparative lessons are easily made and lead rationally to his concluding recommendations. This approach typically runs the risk of insufficiently appreciating the unique contexts of different systems (even of close neighbours such as Canada and the United States, or Australia and New Zealand), the problem of so-called parallel exposition.<sup>16</sup> Similarly, it may result in overstating the acceptance of a target country to a foreign innovation.<sup>17</sup> Moreover, if the writer is too ambitious, it can lead to facile treatment of countries with which the writer has only a passing understanding. Ziegel, however, is largely able to avoid these pitfalls due to his years of international experience, his decision to restrict the book's scope to countries legally and economically similar to Canada, and his reliance on a network of foreign experts.<sup>18</sup> This produces persuasive and digestible policy conclusions, though they are perhaps limited to Canada.

In contrast, *Global Perspective* has twenty-three authors presenting subtly diverging points of view and even occasional contradictions. Thus, any hope of drawing a consistent argument or dominant theme from the book is probably unrealistic. This is not a failing of the individual authors who represent nearly all of the most accomplished researchers in the field.<sup>19</sup> Instead, it is the nature of an edited book that seeks to include such a wide variety of people with different experiences, agendas, and environments. Nonetheless, one can identify a few general themes after all the chapters are read and one considers the scattered data from a broader perspective. Unlike the single-authored work, however, these are not obvious and require readers to paint their own picture. This malleability is both an attraction and danger, which I explore below in Section IV.

Beyond voice and themes, the books also diverge in structure and comparative content. *Global Perspective's* eighteen chapters are organized around five themes and include representatives from all continents and countries at all economic stages of development. The themes are: (1) theoretical perspectives, (2) countries without bankruptcy systems, (3) new bankruptcy systems, (4) mature bankruptcy systems, and (5) debtor

---

<sup>16</sup> See Daniel H. Foote, "The Roles of Comparative Law" (1998) 73 Wash. L. Rev. 25 at 29.

<sup>17</sup> Compare O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod. L. Rev. 1 at 27 with Alan Watson, "Legal Transplants and Law Reform" (1976) 92 Law Q. Rev. 79 at 80.

<sup>18</sup> *Comparative Regimes*, *supra* note 2 at vii-viii.

<sup>19</sup> Contributors in addition to the editors include: Charles Booth, Jean Braucher, John Duns, Rafael Efrat, Catarina Frade, Karen Gross, Nick Huls, Melissa Jacoby, Nadja Jungmann, Maria Manuel Leitao Marques, Jose Reinaldo de Lima Lopes, Rosalind Mason, Bert Niemeijer, Udo Reifner, Saul Schwartz, Teresa Sullivan, Thomas Telfer, Elizabeth Warren, Jay Westbrook, and Xian-Chu Zhang.

education. Regimes specifically examined include those of Australia, Brazil, China, England and Wales, Germany, Hong Kong, Israel, the Netherlands, New Zealand, Portugal, and the United States. A number of other regimes, such as Canada's and Scandinavia's also receive reference.<sup>20</sup> As a result of the variety of participants and countries, the book's structure tends to be pragmatic rather than theoretical or argumentative, adding to the difficulty in isolating a central theme.

In contrast, Ziegel's three-part structure over eight chapters with limited points of comparison strengthens his policy recommendations. The first section is a brief theoretical overview, the bulk of the book contains country surveys, and the final section, as noted already, provides recommendations for Canadian insolvency policy. The country surveys centre on Canada, the United States, Australia, and England and Wales, and very briefly consider Scotland, Scandinavia, and the continental countries of Western Europe. While Ziegel provides specific rationales for why he selected each one of these countries,<sup>21</sup> the commonality of their history, language, economics, politics, and general context is an obvious attraction. Scotland and Continental Europe, for their part, provide classical and accessible counter models with much shared context despite their differences. This choice of comparative markers largely allows Ziegel to sidestep the problematic issues that might be raised by more troublesome examples from Africa, South America, Asia, and Eastern Europe, not to mention command economies and developing economies. As a consequence, Ziegel is able to make strong practical conclusions for Canada and perhaps the developed common law world, but he cannot extrapolate more ambitiously to a grander universal or theoretical level.

Read together, these books provide a primer in all the basic issues of comparative consumer bankruptcy. As such, they have obvious appeal to policy-makers and academics interested in how domestic personal insolvency systems work and how they might be improved. Regarding the specifics of their own domestic laws, the various authors freely express their own pointed criticisms of the current systems and recommendations for reform. Practicing lawyers, accountants, debtors, and creditors, however, will have less use for the policy orientation of these works. There is very little here that explains or assists with the actual mechanics of consumer

---

<sup>20</sup> See e.g. Iain Ramsay, "Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy" in *Global Perspective*, *supra* note 1, 17 at 19 [Ramsay, "Consumer Credit Society"]; Johanna Niemi-Kiesiläinen, "Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy" in *Global Perspective*, *supra* note 1, 41 at 41 [Niemi-Kiesiläinen, "Collective or Individual?"].

<sup>21</sup> *Comparative Regimes*, *supra* note 2 at 3.

bankruptcy practice in any country. Thus, while these books should be in every academic and bureaucratic institution's library, they will unlikely fill much space in law or accounting offices.

### III. A NARRATIVE ABOUT THE CONTEXT OF THE EXPLOSIVE GLOBAL GROWTH OF CONSUMER BANKRUPTCIES

To return to the original questions: What is going on here? Why are so many countries experiencing record numbers of personal insolvencies and thus spurring bankruptcy law reform upon reform, which itself is providing the impetus for this new field of study? Let me provide my own narrative of what I see happening.<sup>22</sup> My story is multi-staged and temporally progressive. Different countries are at different points in this development, and subtle, as well as significant divergences exist among the countries. Nevertheless, it is surprising how much of the story is true for so many countries as economically and geographically diverse as Israel, Brazil, Japan, Germany, and Canada.

The first stage of the global consumer explosion began with a combination of what many have called "the democratization of credit" along with the destabilizing of personal economic foundations. The democratization of credit refers to the increased availability of general credit for non-commercial actors over the past twenty or so years. Niemi-Kiesiläinen, Ramsay, and Whitford explain in their introduction that the democratization of credit has both a supply-side and demand-side component.<sup>23</sup> The supply side is driven by: (1) deregulation that has allowed creditors to offer more credit under less controlled conditions and (2) increased sophistication by private financial actors brought about by computerization and modeling such as credit scoring. The demand side is about consumers' need for more credit today than in the past. This is due to, among other things, a shrinking welfare state that formerly covered a greater percentage of health and education costs, the increased relative cost of housing and transportation, as well as increased acceptance of immediate gratification financed by future income. The end result is that because of the democratization of credit, average Joes and Janes hold more debt than

---

<sup>22</sup> Narrative as a tool in legal analysis has been used largely to give voice to the Other in critical studies, but I use it here to provide order where the comparative data necessary to paint a technical picture is unavailable or incomparable. See generally Daniel A. Farber & Suzanna Sherry, "Telling Stories out of School: An Essay on Legal Narratives" (1993) 45 *Stan. L. Rev.* 807 (discussing narrative methodology, particularly in regards to critical studies).

<sup>23</sup> Niemi-Kiesiläinen *et al.*, "Introduction," *supra* note 8 at 2-3.



in the past.

The second piece of this first stage of the story is the destabilizing of the foundations of consumers' economic base. Most people worldwide would agree that a happy life is grounded in good health, good family, and a good job. These are also the elements necessary for avoiding bankruptcy as unemployment, medical troubles, and family strife are almost universally the most common causes of personal insolvency. Thus, the increased divorce rate in many countries produces instability that results, for some, in economic failure.<sup>24</sup> Health management has undoubtedly improved in the last half century, however, the cost of health care has increased as has the duration of treatment.<sup>25</sup> Unemployment rates country-by-country have fluctuated, but world employment markets have become more fluid. Thus, the likelihood that someone will be unexpectedly out of a job, even if it is for a shorter time than in the past, has increased. Take all of this instability at the most basic level of consumers' economic life, add to it the increased debt volumes promoted by the democratization of credit, splash in a dash of overly optimistic self-belief that most debtors have about their own stability and ability to serve larger debt loads,<sup>26</sup> and the not surprising outcome is an increased number of people who cannot weather the inevitable but unpredictable economic crisis and therefore fail.

The second stage of the narrative is what happens to all of these people who "fail." For those countries that have formal bankruptcy proceedings, whether those are aimed at liquidation or rehabilitation, there has been a surge in filings. For those countries without formal proceedings, there has been increased pressure on the alternative private, semi-private, and public systems that have dealt with economic failure. Needless to say, this unprecedented number of cases has challenged the efficacy of the systems in place.

Faced with the flood of new cases, the existing systems, whether courts or otherwise, began to fine tune and systematize their proceedings to capture efficiency gains in how consumer insolvency cases were handled. In addition, political pressure grew for technical and sometimes substantial

---

<sup>24</sup> See e.g. "Divorce and crude divorce rates: 1997-2001" in *Demographical Yearbook 2001* (New York: 2003) at 639-41, online: United Nations Statistics Division <<http://unstats.un.org/unsd/demographic/products/dyb/dyb2.htm#2001>>.

<sup>25</sup> See e.g. Gerard F. Anderson *et al.*, "Health Spending and Outcomes: Trends in OECD Countries, 1960-1998" (2000) 19:3 *Health Affairs* 150 at 151, 153.

<sup>26</sup> See Saul Schwartz, "Personal Bankruptcy Law: A Behavioural Perspective" in *Global Perspective*, *supra* note 1, 61 at 64-67 (explaining behavioural law and economics evidence of heuristics that "often lead decision-makers to overestimate the probability of success and underestimate the probability of failure"). See also Christine Jolls, Cass R. Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 *Stan. L. Rev.* 1471 at 1477-79.

legislative reforms that codified these efficient practices and introduced other streamlining mechanisms such as automatic rather than discretionary procedures.

One natural side-effect of these efficiency improvements, however, has been an amelioration of the burdens of these proceedings for debtors. That is, as bankruptcy procedures—both judicial and private—have become more routinized, they have caused less inconvenience to debtors in terms of time, cost, and scrutiny. This professionalization or depersonalization of the process itself has made bankruptcy more acceptable and palatable for many and, in turn, increased at-risk debtors' willingness to resort to formal proceedings. In other words, the peaks we are seeing in countries both with and without "mature consumer bankruptcy regimes" may be attributed to the double punch of the changed economic environment *and* the resulting reorganization of the system to respond to that demand.

The third stage of the story has been the response to these new records. The primary response has been by institutional creditors and conservative politicians who have sought innovative reforms to the formal insolvency systems to limit access, increase scrutiny, and raise the cost of bankruptcy relief. Either disingenuously or erroneously, this movement has been labeled under the rubric of curbing bankruptcy abuse. The institutional creditors are interested in such reforms to limit their losses for bad lending decisions while the conservative politicians are cynically seen as "in the pockets" of the powerful lenders' lobby.<sup>27</sup> Nevertheless, this political stance resonates with a number of other voters including what we refer to as "battlers" in Australia (perhaps better known as "the silent majority" in the American context) and owners of small- and medium-sized enterprises (SMEs) ("small business lobby" in American English). The battlers take issue with better-off debtors seemingly "getting away with it" while they struggle to "do right by their creditors." SMEs are concerned because their unsecured trade credit collectively represents one of the largest categories of debt compromised in bankruptcy. However, they lack the specialization, sophistication, and financial wherewithal of institutional creditors to optimize their position in the pre- and post-failure maneuvering, not to mention the necessary margin or volume to distribute the impact of the loss.

For those countries that have progressed the furthest down this path, a sometimes organized response to the conservative law reforms has

---

<sup>27</sup> See Elizabeth Warren, "The Changing Politics of American Bankruptcy Reform" (1999) 37 *Osgoode Hall L.J.* 189; Jean Braucher, "Options in Consumer Bankruptcy: An American Perspective" (1999) 37 *Osgoode Hall L.J.* 155 at 158-60 (covering "The Politics of Consumer Bankruptcy in the United States").

developed. The response has been led by academics, consumer and social welfare advocates, and derivatively liberal politicians.<sup>28</sup> The academics' response has largely been one based on good empirical research and logic. In fact, these two books and the birth of the study of comparative consumer bankruptcy is part of this wave. Taking the bait of the sound-bite friendly "bankruptcy abuse" language, the academics have shown that the increasing bankruptcy rates are not based on abuse, but rather predominately linked to unemployment, divorce, and health problems. Therefore, they argue, it does not make sense to treat the problem by increasing the scrutiny of debtors and restricting access to bankruptcy. In short, the system should remain basically the same, though fine tuning of the personal insolvency system, especially to improve efficiency, is always welcome. The consumer and social welfare advocates generally accept the academics' logic, though some suggest that the response should not be fine tuning of the medicine of the bankruptcy system, but rather getting serious about its economic and social causes by improving consumer protection or welfare benefits.<sup>29</sup>

My own suspicion about the next stage, a fourth stage, is something like the following. The abuse rhetoric has side-tracked too many academics, institutional creditors, and politicians from both sides, leaving the battlers, SMEs, consumers, and social welfare advocates not fully engaged in the debate. At some point, these entities might join to push the formal systems for personal economic failure in completely different directions. For example, in Australia, we have seen the birth of a new federal regime known as the General Employee Entitlements and Redundancy Scheme (GEERS) that addresses the battlers' and social welfare advocates' interests.<sup>30</sup> This program sits on top of the insolvency system in the event of a corporate insolvency and ensures that employees, except insiders, receive full payment of all wages and leave and eight weeks of redundancy entitlements.<sup>31</sup> The program is funded by general tax revenues (in other

---

<sup>28</sup> See e.g. John F. Kerry, "Sen. Kerry on Bankruptcy Reform" (2004) 23 Am. Bankr. Inst. J. 6.

<sup>29</sup> The most obvious example of this school from this collection is Udo Reifner, "Thou Shalt Pay Thy Debts: Personal Bankruptcy Law and Inclusive Contract Law" in *Global Perspective, supra* note 1, 143 [Reifner, "Thou Shalt Pay"]. See also William C. Whitford, "The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy" (1994) 68 Am. Bank. L.J. 397.

<sup>30</sup> See Minister Tony Abbott, Media Release No. 8401, "Even Better Arrangements to Protect Employee Entitlements" (20 September 2001), online: Australian Government, Department of Employment, Workplace Relations and Small Business <<http://www.dewr.gov.au/ministersandmediacentre/mediacentre/detail.asp?show=2050>>.

<sup>31</sup> GEERS is not a creation of legislation. Instead, the federal government issued operational arrangements. See Australia, Department of Employment, Workplace Relations and Small Business, *General Employee Entitlement and Redundancy Scheme Operational Arrangements* (11 July 2002), online:

words, the risks and costs of unemployment due to employer insolvency are distributed and borne, in part, across society) and is conceived of as a prophylactic to the domino effect where one large insolvency leads to the bankruptcy of many dependant bodies.<sup>32</sup> Similarly, in the Australian construction industry, the SMEs and consumer advocates in New South Wales and Victoria have allied to create state construction industry security of payment acts.<sup>33</sup> These acts ensure that suppliers and subcontractors are paid progressively, have recourse to expedited dispute remedies, and take security over funds that contractor-debtors are required to set aside.<sup>34</sup> All of this means that if a contractor-debtor becomes insolvent, the size of a supplier's or subcontractor's claim is less than otherwise would be the case. I am not advocating either of these systems or even bringing them forward for comparative consideration. Instead, I note them merely to suggest the strange political bedfellows that might take consumer bankruptcy in completely new and original directions, away from the contemporary paradigmatic debates such as discharge versus rehabilitation, automatic versus discretionary, and debtor-friendly versus creditor-friendly.

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

With this context in mind, it is worth discussing the method of the new field of comparative consumer bankruptcy. This is important because of the truism that how one goes about answering a question often has a significant impact on the conclusions drawn.

##### A. *Comparative Methodology*

The pull of a comparative approach to the study of domestic personal insolvency is natural and logical. As outlined above, a vast number

---

<<http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D3679%2526a0%253D0%2526a1%253D517%2526a2%253D623,00.html>>.

<sup>32</sup> See Samantha Kinsey, "A Triumph for Labour over Capital: Employee Entitlements in Insolvency in the Wake of the Ansett Collapse" (2002) 10 *Insolv. L.J.* 132 at 132-33, 136-37, 146.

<sup>33</sup> *Contractors Debts Act 1997* (N.S.W.); *Building and Construction Industry Security of Payment Act 1999* (N.S.W.); *Building and Construction Industry Security of Payment Act 2002* (Vic.). See also *Construction Contracts Act 2004* (W.A.); *Building and Construction Industry Payments Act 2004* (Qld.); *Subcontractors' Charges Act 1974* (Qld.).

<sup>34</sup> See Australia, Royal Commission into the Building and Construction Industry, "Security of Payments in the Building and Construction Industry" (19 October 2002) at 12-17, online: <<http://www.royalcombcgi.gov.au/docs/complete%20discussion%20paper%2012.pdf>>.

of countries are facing similar increases in consumer economic failure, yet domestic policy-makers have largely been unable to curb the trend. Thus, in the search for new solutions to this problem, Zweigert and Kötz's promise is encouraging:

[T]he method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.<sup>35</sup>

Furthermore, the pull of the comparative method is strong in many places that have an inherent trust and belief in this method. More specifically, in countries based on a federal system such as Australia, Canada, and the United States, where this comparative method is the historical—if unstated—approach in many closely related private law areas such as contracts and torts, the singular nature of federal bankruptcy law begs for comparison.<sup>36</sup> In short, comparative consumer bankruptcy, as a methodology, is very attractive because it promises to answer unanswered questions more creatively than a purely domestic approach and because it is the natural methodology for many scholars.

I am a strong supporter of the comparative method.<sup>37</sup> It is, however, not without its difficulties in this field. Teresa Sullivan, Elizabeth Warren, and Jay Westbrook identify the chief obstacle with respect to the comparative approach for bankruptcy study in their brief consideration of other countries' systems at the conclusion of *The Fragile Middle Class*.<sup>38</sup> They suggest that contrasting systems (or finding the balance of one system) is a bit like making a three-legged stool: You cannot focus only on the bankruptcy law leg but must ensure that the length of the social safety net leg and consumer credit leg are all proportionate.<sup>39</sup> In undertaking a comparative study, this means that the researcher must not only be intimately familiar with the bankruptcy law of the target countries, but in

---

<sup>35</sup> Konrad Zweigert & Hein Kötz., *Introduction to Comparative Law*, 3d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1998) at 15.

<sup>36</sup> See Kent Anderson, "Small Business Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests" (2001) 75 Am. Bank. L.J. 355 at 358.

<sup>37</sup> Almost all of my own writing in insolvency has been comparative work. See e.g. Kent Anderson, "The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience" (2000) 21 U. Pa. J. Int'l Econ. L. 679.

<sup>38</sup> Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (New Haven: Yale University Press, 2000).

<sup>39</sup> *Ibid.* at 259.

order to make effective and valid contrasts, must also be acquainted with the social security and consumer credit environments. In other words, simply looking at American bankruptcy rates in contrast to, for example, English rates is a false comparison because the more generous social welfare programs and tighter credit market in England will affect those numbers.<sup>40</sup> The degree of study necessary to become fully fluent in all three aspects of one's own system is difficult, but the challenge to master all aspects of another country's systems, not to mention that country's language, legal tradition, and culture—broadly defined—is, at best, daunting. However, that is not to say that it cannot be done.<sup>41</sup> Moreover, when it is done, the rewards can be considerable.<sup>42</sup>

All of those reasons that make comparing consumer bankruptcy systems difficult also render acting on comparative lessons challenging. Stated differently, because bankruptcy law necessarily affects areas like social security and consumer credit, simply receiving a foreign jurisdiction's bankruptcy innovation might not be possible due to its impact on other protected areas of law. These broader differences among countries' approaches to economic failure are what have prevented any substantive international convention on cross-border insolvency despite seven hundred years of attempts.<sup>43</sup> Insolvency law directly and indirectly impacts issues of immense public policy concern and political importance such as the redistribution of property rights, employee entitlements and labour policy, and the commercial viability of businesses. Thus, not only is the likelihood of harmonization of insolvency law improbable, importation of even a discrete foreign bankruptcy procedure can be prohibitively difficult. Again,

---

<sup>40</sup> This is to assume that the bankruptcy law comparison itself is accurate which is often difficult given that finding legal equivalents might be impossible. For example, Ramsay makes the important point that England's formal insolvency rates do not include administration orders issued under the County Courts' general jurisdictional powers. See Iain Ramsay, "Bankruptcy in Transition: The Case of England and Wales: The Neo-Liberal Cuckoo in the European Nest?" in *Global Perspective, supra* note 1 at 212-13 [Ramsay, "Bankruptcy in Transition"].

<sup>41</sup> It is telling of the difficulty level that out of the two books and twenty-four authors, only four selections go much beyond what Mattei has called the comparative law method of "mere discussion of a foreign law." Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) at 97.

<sup>42</sup> Perhaps the most successful example from these works is Ramsay, "Consumer Credit Society," *supra* note 20 (comparing credit card usage and its impact on bankruptcy in Canada, England, and United States).

<sup>43</sup> See Kent Anderson, "Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency" (2004) 23 *Austl. Y.B. Int'l L.* 1 at 2-3. Furthermore, those insolvency conventions that have succeeded such as the UNCITRAL Model Law and the EU Regulation only cover procedural issues due to inability to find common ground on the substantive public policy items.

this is not to argue against the importance of comparative critiques of insolvency. Rather, it is merely to note that careful consideration of the entire domestic environment is needed for successful borrowing and to caution that exact replication of results is unlikely.

All of this distills into what I call the “bowerbird approach” to comparative insolvency law. The Australian bowerbird (*Ptilonorhynchus violaceus*) is famous for creating a nest that assimilates a variety of foreign elements.<sup>44</sup> The bowerbird does not borrow haphazardly, however. In fact, it is quite particular: it only incorporates items that are blue, whether human-made or naturally occurring. Once woven into the bowerbird’s nest (actually it is a bower, hence the name), the blue foreign objects no longer retain their original purpose or characteristics but become an integral part of the bird’s shelter. Comparative consumer bankruptcy’s lessons are like the bowerbird’s blue bits. Each country will have its own unique requirements but once it finds something that satisfies these, the foreign element will neither operate in the same manner nor retain its original physical characteristics. The beauty of this approach is that by looking abroad, borrowing, and adapting, a country may create a legal fabric that is unique and more diverse than if left to its own provincial tendencies.

#### B. *Socio-legal and Empirical Methodology*

One of the subtle things I noticed after reading about three-quarters of these books was a consistency in style among the various writers. Perhaps that is not strange or surprising. Most of this research was presented jointly at a conference, most of the twenty-plus writers have known each other for years, and looking over the predecessor sources in this field, most of these people have met, socialized, criticized, and debated these issues among themselves before. Thus, like spouses or owners and pets, there is no great amazement that much of the style, argumentation, and methodology among this circle has grown to look alike.

The typical method seems to have three parts: (1) a statutory focus on the systems of bankruptcy<sup>45</sup>; (2) at least passing consideration of non-

---

<sup>44</sup> See Gianfranco Bologna, *Simon and Schuster’s Guide to Birds*, (New York: Simon & Schuster, 1981) at 4; Australian Museum Online, “Satin Bowerbird,” online: e<[http://www.amonline.net.au/factsheets/satin\\_bowerbird.htm](http://www.amonline.net.au/factsheets/satin_bowerbird.htm)>.

<sup>45</sup> For example, flipping through *Global Perspective*, *supra* note 1, it is difficult to find a single case citation, but statistical reports and academic studies are found on practically every page. Similarly, while Ziegel has barely one page in his “Table of Cases,” his “Table of Legislation” runs on for ten. See *Comparative Regimes*, *supra* note 2 at xvii-xxviii.

bankruptcy systems provided privately or by other legislative frameworks<sup>46</sup>; and (3) empirical proof. I wholeheartedly endorse this approach.<sup>47</sup> In particular, the willingness to look at the law in action by considering alternative means for resolution and the solid grounding in measurable data is inspirational. Undoubtedly, this enriched approach is attributable to the full embrace of a law and society method of legal scholarship and the truly seminal work done by many of these very authors over the past fifteen years.

Mostly absent from this approach, however, are two elements of classical legal scholarship, namely, a theoretical or normative framework and a detailed exposition of the existing law as interpreted by the courts. I do not seek to make a full defence of these unfashionable techniques here, but I would like to explore briefly what some limitations of failing to include and respect these traditional approaches might be.

The issue is the direction of one's gaze. Empirical work necessarily focuses on current regimes and past experience. It looks *backwards* to determine whether legislative rationales are substantiated in historical data. Socio-legal work largely focuses on the impact of systems particularly the impact beyond the perspective of the narrow legal effect. It looks *sideways* to see what unintended consequences arise from a system and what other systems exist to address the same situation. In contrast, doctrinal work focuses squarely on the system at hand while theoretical work encourages one to look forward. Doctrinal work can be historical and tediously unimaginative, yet it does have the merit of facing squarely the system at issue and, in the better efforts, using the past signposts to provide enlightened navigation for future cases. Theoretical work is criticized as being disconnected from reality, but this is its appeal as well. Such disconnection allows forward thinking. Put into colloquial cliché, delving into the fuzzy world of theory allows and encourages one to "think outside the box."

Like driving a car, being aware of what is behind you, alongside you, within the car itself, and in front of you are all critical in reaching your

---

<sup>46</sup> To provide but one example, Nick Huls, Nadja Jungmann & Bert Niemeijer, "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law" in *Global Perspective*, *supra* note 1 at 303, considers in depth the impact of the voluntary, semi-private debt settlement system on formal insolvency proceedings.

<sup>47</sup> Because I argue for the benefits of including a variety of approaches (see note 49 and accompanying text below), I do not enter the debate regarding whether empirical research in bankruptcy, specifically, and law, generally, is normatively or persuasively better or worse than alternative approaches. See *e.g.* Jay Lawrence Westbrook, "Empirical Research in Consumer Bankruptcy" (2002) 80 *Tex. L. Rev.* 2123; Margaret Howard, "Bankruptcy Empiricism: Lighthouse Still No Good" (2001) 17 *Bankr. Dev. J.* 425.



destination. Thus, while I wholly defend the socio-legal and empirical approach,<sup>48</sup> I nonetheless seek only to note that given the unprecedented global situation (and a feminist's respect for a variety of methodologies),<sup>49</sup> a place should remain for freely considering ideas growing out of the existing law or completely detached from current experience. Hopefully this is a direction that future researchers will pursue and that the pioneering authors in these books will welcome.

## V. SUBSTANTIVE OUTCOMES OF THE STUDY

After having examined the books themselves, the context of the new study, and the methodology of the field, this section draws a few substantive lessons from the comparative consideration of consumer bankruptcy regimes. As discussed already, Ziegel has done this himself to support his Canadian-specific policy recommendations.<sup>50</sup> The following, while consistent with many of Ziegel's observations, seeks slightly broader conclusions with more universal reverberation.

The first lesson from this nascent study is support for my global narrative. Chapters focusing on places as diverse as Australia,<sup>51</sup> Brazil,<sup>52</sup> Germany,<sup>53</sup> Hong Kong,<sup>54</sup> Israel,<sup>55</sup> Scandinavia,<sup>56</sup> not to mention Canada

---

<sup>48</sup> Given my druthers, I would place myself in this camp, however, I must confess to having occasionally used a comparative doctrinal approach. See *e.g.* Kent Anderson, "Statutory Co-operation Mechanisms for Cross-Border Insolvencies in England and America" (2000) 1 *Comp. Fin. & Ins. Rev.* 44 (comparing judicial treatment under *Insolvency Act 1986* (U.K.), s. 426 and *Bankruptcy Code*, 11 U.S.C. § 304); Kent Anderson, "Cross-Border Insolvency: A Proposal Considering the Experiences of Various Common Law Nations" (2001) 51 *Hokkaido L. Rev.* 1633 at 1870 (in Japanese with English summary) (building a statutory mechanism for cross-border insolvency recognition based on a doctrinal examination of Australian, New Zealand, English, and American case law and legislation).

<sup>49</sup> See *e.g.* Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85 *A.J.I.L.* 613 at 613-14.

<sup>50</sup> *Comparative Regimes*, *supra* note 2 at 145-68.

<sup>51</sup> Rosalind Mason & John Duns, "Developments in Consumer Bankruptcy in Australia" in *Global Perspective*, *supra* note 1, 227 at 227-30.

<sup>52</sup> Jose Reinaldo de Lima Lopes, "Consumer Bankruptcy and Over-indebtedness in Brazil" in *Global Perspective*, *supra* note 1, 85 at 97-101.

<sup>53</sup> Reifner, "Thou Shalt Pay," *supra* note 29 at 153.

<sup>54</sup> Charles D. Booth, "Current Trends in Consumer Insolvency in Hong Kong" in *Global Perspective*, *supra* note 1, 167 at 187-91.

<sup>55</sup> Rafael Efrat, "The Political Economy of Personal Bankruptcy in Israel" in *Global Perspective*, *supra* note 1, 167 at 171-73.

<sup>56</sup> Niemi-Kiesiläinen, "Collective or Individual?" *supra* note 20 at 42.

and the United States,<sup>57</sup> all seem to confirm the tale of increased economic vicissitude, resulting in over-extended consumers putting pressure on domestic systems, and culminating in reform efforts to both formal and informal mechanisms. This lesson itself is crucial because the first step in overcoming the comparative approach's methodological difficulties discussed above is to be cognizant of the larger context behind each system.

The second lesson is variously identified as an internal conundrum,<sup>58</sup> a point of harmonization,<sup>59</sup> or a distinguishing factor of the various systems.<sup>60</sup> All formal bankruptcy systems seem to struggle with the location of the balancing point between demanding satisfaction of a commitment and forgiveness of that commitment. This debate—the quintessential issue of bankruptcy law—is played out through a plethora of legislative mechanisms such as restricted access, payment plans, contribution requirements, non-dischargeable debts, and duration of impairment. Almost no generalizations or commonalities exist among the countries.

What can be said is that no system completely forgives past obligations and no system completely insists upon strict compliance with past obligations. Take the extremes, for example. The United States discharges most unsecured debts in a matter of months after application for relief, but it does not forgive certain non-dischargeable debts and it provides only limited protection from secured creditors.<sup>61</sup> On the other hand, countries without any formal bankruptcy system, such as China, effectively force the issue to the private market where creditors have no option but to write-down or write-off debts that debtors cannot pay.<sup>62</sup> Once we acknowledge that all countries are on the grey scale, the question is how a country aligns the multitude of factors to find a balancing point with

---

<sup>57</sup> *Comparative Regimes*, *supra* note 2 at 4-7.

<sup>58</sup> See e.g. Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, "Who Uses Chapter 13?" in *Global Perspective*, *supra* note 1, 269 at 282 (querying whether the emphasis in domestic legislation should be on straight liquidation or repayment plans).

<sup>59</sup> Niemi-Kiesiläinen, "Collective or Individual?" *supra* note 20 at 41 (stating "these opposite views [between common law jurisdictions and civil law jurisdictions] have moved toward more similar positions").

<sup>60</sup> *Comparative Regimes*, *supra* note 2 at 135: "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."

<sup>61</sup> See 11 U.S.C. §§ 506, 523, 727 (2004).

<sup>62</sup> See e.g. Xian-Chu Zhang, "Development of Consumer Credit in China" in *Global Perspective*, *supra* note 1, 105 at 112 (noting up to 50 per cent default on car loans and consequently losses of several million renminbi for auto lenders which necessarily means that the creditor has "discharged" or written-off the debt as a practical matter despite having a legal right to unlimited debtor liability).

which it is comfortable. Viewed in this way, much of the discussion about and distinctions between broad generalities such as legal families, regional groupings, and functional models,<sup>63</sup> as well as ambiguous platitudes such as “fresh start” and “pro-debtor/creditor regimes,”<sup>64</sup> lose a great deal of their explanatory power. That does not mean that comparison is not useful, only that the focus is more profitable at the sub-systems level and with acknowledgment of the vastly complicated and integrated way each system is uniquely composed of these sub-systems.

The third and fourth themes I see emerging from this new field are much narrower. The first is the prevalence of “local insolvency culture.” Local insolvency culture refers to differences within a country’s regions as to how the otherwise uniform bankruptcy law is used.<sup>65</sup> The tendency for regional divergences was identified about a decade ago in the United States,<sup>66</sup> but subsequently it has been documented in a variety of countries including Australia,<sup>67</sup> Canada,<sup>68</sup> England and Wales,<sup>69</sup> Israel,<sup>70</sup> Japan,<sup>71</sup> the Netherlands,<sup>72</sup> and New Zealand.<sup>73</sup> In fact, it seems in every country where people have looked for it, they have found a local insolvency culture. This finding is not surprising. The Realist movement over the past hundred years has shown that individuals and their predilections can have a marked impact on outcomes in the application of “objective” legal science.<sup>74</sup> Also,

<sup>63</sup> See Niemi-Kiesiläinen, “Collective or Individual?” *supra* note 20 at 43; Iain Ramsay, “Models of Consumer Bankruptcy: Implications for Research and Policy” (1997) 20 J. Cons. Pol’y 269.

<sup>64</sup> See Philip R. Wood, *Principles of International Insolvency* (London: Sweet & Maxwell, 1995) at 4.

<sup>65</sup> See Teresa Sullivan, Elizabeth Warren & Jay Westbrook “The Persistence of Local Legal Cultures: Twenty Years of Evidence from the Federal Bankruptcy Courts” (1994) 17 Harv. J. L. & Pub. Pol’y 801 at 804, n. 15.

<sup>66</sup> *Ibid.* See also Jean Braucher, “Lawyers and Consumer Bankruptcy: One Code, Many Cultures” (1993) 67 Am. Bank. L.J. 501.

<sup>67</sup> Mason & Duns, *supra* note 51 at 244.

<sup>68</sup> Iain Ramsay, “Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy” (2000) 74 Am. Bank. L.J. 399.

<sup>69</sup> Ramsay, “Bankruptcy in Transition,” *supra* note 40 at 210.

<sup>70</sup> Efrat, *supra* note 55 at 176-81.

<sup>71</sup> See Kent Anderson & Stacey Steele, “Insolvency” in Veronica Taylor, ed., *Japan Business Law Guide* (2003) at 15-132, 15-294

<sup>72</sup> Huls *et al.*, *supra* note 46 at 304.

<sup>73</sup> Thomas G.W. Telfer, “New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime” in *Global Perspective*, *supra* note 1, 247 at 256.

<sup>74</sup> See *e.g.* Karl Llewellyn, “Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes Are to Be Construed” (1950) 3 Vand. L. Rev. 395 at 396-97.

we have known for years that supposedly unified international law is never applied similarly in different municipal courts.<sup>75</sup> Considering these factors, our expectation that the multitude of options under insolvency law would be applied in a similar manner across regional communities seems naïve. In any event, acknowledging the inevitability of local insolvency cultures developing is an important and practically useful discovery that perhaps only could be appreciated when proven across so many different jurisdictions.

The final, narrower outcome emerging from the new field concerns the role of debtor education in the personal insolvency process. *Global Perspective* helpfully draws this point out by grouping three chapters on the subject,<sup>76</sup> but the issue also makes cameo appearances in many of the book's other selections as well as being one of the specific points of comparison and recommendation for Ziegel.<sup>77</sup> The topic of education in this context predominately relates to the social welfare leg of the broader view of the consumer over-indebtedness issue. In certain jurisdictions such as Canada, the American South, and many European systems, it has been incorporated into part of the bankruptcy law leg of the three-legged stool.<sup>78</sup> That is, debtor education has become a condition of bankruptcy relief in these jurisdictions. These chapters build on the articles in the earlier collection found in the *Osgoode Hall Law Journal*<sup>79</sup> (in particular Carol Ann Curnock's sharp critique of the Canadian system)<sup>80</sup> and are deeply thought provoking. With data both in favour and critical of the education approach, I must confess to my own indecision regarding the issue. But, for pure entertainment value, I think all instructors of insolvency should be afforded a complementary copy of the Zig Ziglar's motivational materials produced by VISA that Jean Braucher describes with sublime

---

<sup>75</sup> See e.g. Michael J. Bonnell, "International Uniform Law in Practice: Or Where the Real Trouble Begins" (1990) 38 Am. J. Comp. L. 865.

<sup>76</sup> "Part V: Debtor Education and Debtor Counseling," in *Global Perspective*, *supra* note 1, 301 at 301-60.

<sup>77</sup> *Comparative Regimes*, *supra* note 2 at 166-68.

<sup>78</sup> See e.g. Iain Ramsay, "Mandatory Bankruptcy Counselling: The Canadian Experience" (2002) 7 Fordham J. Corp. & Fin. L. 525; Jean Braucher, "An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown" (2001) 9 Am. Bankr. Inst. L. Rev. 557; and Johanna Niemi-Kiesilainen, "The Role of Consumer Counselling as Part of the Bankruptcy Process in Europe" (1999) 37 Osgoode Hall L.J. 409.

<sup>79</sup> "Part IV: Evolution of Statutory Consumer Counselling in Canada and Europe" (1999) 37 Osgoode Hall L.J. 369 at 369-413.

<sup>80</sup> "Insolvency Counselling—Innovation Based on the Fourteenth Century" (1999) 37 Osgoode Hall L.J. 387.

understatement as “educational programmes [with] a secular self-improvement ethos that mimics religious evangelism.”<sup>81</sup>

## VI. CONCLUSION

Over the past decade or more, a host of countries have faced an unprecedented number of consumers in economic crisis. This trend seems to defy the general economic health of the country, whether it is developing or developed, and whether it has a long history with bankruptcy law or not. Countries have had varying success with controlling these numbers at the margins, but, for the most part, domestic policy-makers have fundamentally failed to moderate the increases. In fact, many legislatures’ attempts at fine tuning their processes to improve their ability to handle the increases have contributed indirectly to the trend while not addressing a number of marginal groups’ concerns. Given the lack of solutions at home, the gaze has fallen abroad.

*Comparative Consumer Insolvency Regimes* and *Consumer Bankruptcy in Global Perspective* are the forerunners in this new field of comparative consumer bankruptcy. These books do not spell out a simple recipe for controlling domestic bankruptcy figures, but anyone—policy-makers, academics, judicial officers, social workers, et cetera—interested in seriously challenging the problem would do well to begin with these two books. No foreign system will be a perfect fit, and a bit of bowerbird scrutiny is necessary, but the inspiration drawn by thinking about new systems, or old systems in new ways, may well be the seed that spawns the eventual solution.

---

<sup>81</sup> Jean Braucher, “Debtor Education in Bankruptcy: The Perspective of Interest Analysis” in *Global Perspective*, *supra* note 1, 319 at 324.