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La Responsabilisation de L'economie: What the United States Can Learn from the New French Law on Consumer Overindebtedness

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LA RESPONSABILISATION DE L'ECONOMIE:† WHAT THE UNITED STATES CAN LEARN FROM THE NEW FRENCH LAW ON CONSUMER OVERINDEBTEDNESS

*Jason J. Kilborn**

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† This phrase originated in the late 1980s with then-President of France, François Mitterand, to describe the view that the rapidly expanding consumer-credit economy should be held responsible for the welfare problems that it caused to overindebted consumers. See Udo Reifner, "*Thou shalt pay thy debts*" *Personal Bankruptcy Law and Inclusive Contract Law*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 143, 147–48 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003). Mitterand's vision was accomplished largely through empowering French courts to "renegotiate" burdensome consumer contracts post-hoc for the benefit of overburdened consumers. See *id.* France's adoption of consumer bankruptcy relief, focusing on altering contract terms and now allowing the ultimate possibility of eliminating contract liability altogether, represents the culmination of this process of "responsible-izing" the supply side of the consumer credit economy. See *id.*

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The law [introducing a discharge of debt into French law] contributed . . . to the renovation of traditional principles of contract law in the name of the imperatives of social justice.¹

We must resign ourselves to admitting that
 "the right not to pay one's debts" . . .
 is today definitively anchored in our legislation.²

The French word for "bankruptcy"—*faillite*—comes from the Latin *fallere*, "to cheat, deceive, or trick."³ Because French law until recently limited "bankruptcy" relief to merchants,⁴ a consumer's inability to pay

1. Anne Sinay-Cytermann, *La réforme du surendettement: Les innovations de la loi du 29 juillet 1998 de lutte contre les exclusions*, JCP 1999, I, 106, ¶ 36.

2. Nathalie Côte, *Le nouveau dispositif de traitement du surendettement des particuliers: Titre III de la loi no. 2003-710 du 1er août 2003*, JCP 2003, I, 175, ¶ 1.

3. See DANIEL DESURVIRE, HISTOIRE DE LA BANQUEROUTE ET FAILLITE CONTEMPORAINE 11 (1992); Y. Pavec, *France: Insolvency Proceedings*, in EUROPEAN PRACTITIONER'S HANDBOOK 85, 86 (Kenneth Cork & G.A. Weiss eds., 1984).

4. See, e.g., DESURVIRE, *supra* note 3, at 63–64; Didier Salavert & Richard Ortoli, *The Bankruptcy Laws of France*, in EUROPEAN BANKRUPTCY LAWS 55, 61 (David A. Botwinik & Kenneth W. Weinrib eds., 2d ed. 1986); J.H. DALHUISEN, DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY §§ 2.02[4], 2.04, 3.01[1] (1983).

her debts was generally called *déconfiture*⁵—a word with a similarly unflattering etymology. It derives from the Latin *decoquere*, which means literally “to diminish by boiling down,” but also figuratively, “to squander.”⁶ These judgmental words and their origins reflect the long-held antagonism and disdain of most French policymakers and the public toward consumers mired in debt.

But times change, and attitudes change along with them. In the late 1970s and 1980s, France was forced to reevaluate its prejudices, as the “democratization” of credit⁷ introduced scores of consumers to the joys of “buying now, paying later.”⁸ Unfortunately, this new privilege was accompanied by a period of rising unemployment and inflation in a European economy reeling from the Oil Crisis.⁹ As a result, consumer borrowing quickly became consumer over-indebtedness, which grew into a social and political crisis that affected masses of ordinary, respectable people throughout Europe.¹⁰

On December 31, 1989, France became the second continental European nation to enact legislation to deal with the rising problem of financially overburdened consumers.¹¹ Between December 1989 and August 2003, the new law evolved through three significant amendments, each of which offered increasingly substantial relief. The course of these amendments in French law—especially the “law in action” that resulted from and influenced the “law on the books”¹²—offers tremendous opportunities for comparison with and reflection on the embattled U.S. system of consumer bankruptcy relief.

5. See, e.g., PASCAL ANCEL, *DROIT DES SÛRETÉS* 2–3 (2d. ed. 2000).

6. See DALHUISEN, *supra* note 4, § 3.02[1]; DESURVIRE, *supra* note 3, at 63–64; Pavec, *supra* note 3, at 86. One more French word sounds deceptively like “bankruptcy,” but means something quite different: *banqueroute*. This word does not signify ordinary bankruptcy (*faillite* or *déconfiture*), but rather fraudulent evasion of legitimate debt, in some cases even considered criminal. See, e.g., DESURVIRE, *supra* note 3, at 26, 38, 47–48, 51–52.

7. For a succinct description of the “democratization” of credit, see Françoise Domont-Naert, *Legal Responses to Problems of Consumer Indebtedness in Europe*, in *CONSUMER LAW IN THE GLOBAL ECONOMY* 285, 290–91 (Iain Ramsay ed., 1997).

8. See Luc Bihl, *Le surendettement: apparition d'un fléau social*, in *LE SURENDETTEMENT DES PARTICULIERS* 1, 4 (Michel Gardaz ed., 1997).

9. See, e.g., DANIELLE KHAYAT, *LE SURENDETTEMENT DES MÉNAGES* 6–7 (1999).

10. See, e.g., Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 *J. CONSUMER POL'Y* 125, 126 (1992); Raphael Efrat, *Global Trends in Personal Bankruptcy*, 76 *AM. BANKR. L.J.* 81, 92–94 (2002); Johanna Niemi-Kiesiläinen, *Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy*, in *CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE* 41, 49 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

11. Law No. 89-1010 of Dec. 31, 1989, J.O., Jan. 2, 1990, p. 18, JCP 1990, III, 63451. Denmark was the first, as it adopted consumer “bankruptcy” legislation in 1984. See Niemi-Kiesiläinen, *supra* note 10, at 42.

12. See Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

This Article on the French law continues a study of European consumer debt-relief systems, which I began previously in an article on the German system.¹³ With rapid legal and practical developments in consumer debt-relief law, Europe provides an excellent comparative legal laboratory for observing the potential benefits and pitfalls of consumer bankruptcy reforms. In particular, French and German experiences with long-term payment plans shed useful light on the great debate raging in the United States over similar plans.¹⁴

Like its predecessor, this Article seeks to achieve two goals as it describes the evolution of consumer debt-relief law in France: First, this article analyzes a wide variety of legislative material and commentary on the French consumer insolvency law that has been neither translated¹⁵ nor substantially discussed in English.¹⁶ I hope that citations to easily accessible Internet-based foreign sources and my English commentary will deepen and broaden U.S. debate on consumer bankruptcy reform. As French legislators took a keen interest in the operation of U.S. consumer bankruptcy law,¹⁷ it is now our turn to learn from France's gradual and carefully deliberated experiment with consumer debt relief.

More centrally, this Article describes the complex and unique approach taken by the French law. It explores the legislative history and practical result of each stage of the process. Along the way, it briefly compares the French procedure to those in the United States and Germany. The French experience offers further challenges to both the traditional "liberal" and "conservative" positions on consumer bankruptcy reform in the United States. The economic results for debtors and creditors under the French, German, and U.S. systems differ relatively little, but the French and German systems emphasize an element of "responsibility" that the U.S. Congress seems intent on incorporating into

13. See Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 Nw. J. INT'L L. & BUS. 257 (2004).

14. See, e.g., H.R. Rep. No. 107-617, at 7-27 (2002); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 12-34 (2001); Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 436-38 (1997); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 CHICAGO L. REV. 685, 710-16 (1998).

15. Unless otherwise indicated, all translations of French materials are the author's.

16. To be sure, several authors have made brief references to the earlier French laws, see, e.g., JACOB S. ZIEGEL, *COMPARATIVE CONSUMER INSOLVENCY REGIMES—A CANADIAN PERSPECTIVE* 140 (2003); Reifner, *supra* note †, at 148, Domont-Naert, *supra* note 7, at 287-88, but this Article offers a more detailed discussion of the laws and their implementation, including the latest round of reforms from August 2003.

17. The legislative record of the French law is peppered with references to the consumer bankruptcy laws of the United States and other countries. For one particularly comprehensive example, see SERVICE DES AFFAIRES EUROPÉENNES, *LE TRAITEMENT DU SURENDETTEMENT* (1998), available at http://www.senat.fr/lc/lc37/lc37_mono.html.

U.S. law.¹⁸ Europe has viewed consumer bankruptcy from the perspective of “responsibility” from the outset,¹⁹ albeit in an arguably more balanced and sensitive manner. The French and German experiences demonstrate alternative methods of achieving the laudable goals of U.S. reformers—indeed, perhaps more effective and comprehensive alternatives.

Part I traces the rise of consumer borrowing and the advent of consumer “over-indebtedness” in France. It exposes the ill effects of deregulation of the consumer credit market, as well as the shortcomings of the pre-1990 system of legal protections for debtors. Part II analyzes the multistage French system of consumer debt relief as it has developed over nearly fifteen years. Comparing the French system with those in the United States and Germany, Part II shows just how serious European legislators are about demanding responsibility from debtors in attempting a fair compromise with creditors—and how they apparently accomplish this goal. Finally, Part III reflects on several salient themes of the development of the French system and the lessons they offer the United States. Most importantly, while the French law requires sacrifice and responsibility from debtors, it has not lost sight of the pivotal responsibility of lenders in creating a positive and profitable, but sometimes dangerous, new world of consumer lending. This crucial point seems to have been all but lost in discussions of U.S. consumer bankruptcy policy.

I. THE DEMOCRATIZATION OF CREDIT IN A CREDITOR-FRIENDLY LEGAL SYSTEM

A society in which consumers do not borrow to finance consumption has no need for a legal system of consumer debt relief. While there was a time when France used to host such a society, those days are all but forgotten. In a very short period in the early 1980s, consumer lending accelerated from a trickle to a flood, transforming the credit market and placing unforeseen stress on the legal system. Cries for legal relief from an avalanche of debt soon reached the ears of French legislators.

This Part explores the economic and legal developments that formed the impetus for adoption of the French consumer debt relief regime of 1989. Part I.A. describes the genesis of France’s consumer-debt problem

18. See Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2025–27 (2003) (suggesting that “Congress is animated by a new political ideology of ‘personal responsibility’ that serves as a counterweight to the traditional prodebtor ideology. . . . The personal responsibility ideology sees consumer bankruptcy primarily as a moral issue, rather than an economic issue”).

19. See Niemi-Kiesiläinen, *supra* note 10 (contrasting the economic versus social/responsibility constructions of consumer bankruptcy policy in the U.S. and Europe).

in a wave of credit deregulation in the late 1970s and early 1980s. Part I.B. shows how the French legal system was caught unprepared for the consequent surge of collection activity against delinquent consumers, setting the stage for legislative reform.

*A. Deregulation of Consumer Credit and
the Road to Over-indebtedness*

Until recently, consumer over-indebtedness was a rare and largely marginal problem in France, as credit was all but unavailable to consumers. As one former bank employee described it, “[i]n 1965, to be a [bank’s] client was an honor to be earned.”²⁰ Those select few positioned on the higher rungs of the social ladder could—and often did—borrow to finance their well-to-do lifestyle.²¹ For the great mass of the populous, though, banks viewed consumer lending “with the greatest distrust.”²² “Ordinary” borrowers were relegated to the services of cooperatives and finance companies,²³ and their borrowing was a last resort to finance shortfalls of resources to cover current expenses (rent, car repair) or extraordinary outlays (medical and education expenses not covered by state subsidies).²⁴

French consumers began to use credit more widely after World War II for larger purchases (primarily cars and furniture²⁵), but even then, consumer credit laws prevented most consumers from accessing credit.²⁶ Consumer credit regulations limited the amount of consumer credit extended by requiring large down-payments for purchase-money loans (20% to 30% of the purchase price) and limiting the length of time over which payments on consumer loans could be spread (increasing the monthly payments on those loans).²⁷

20. Hervé Jaouen, *Quelques transformations d'attitude et de pratiques chez les banquiers de 1965 à 1995*, in *LE SURENDETTEMENT DES PARTICULIERS* 213, 214 (Michel Gardaz ed., 1997).

21. See Bihl, *supra* note 8, at 2. One commentator suggests that, for example, a doctor wishing to buy a boat might procure a bank loan, but not an “ordinary” consumer. See Jaouen, *supra* note 20, at 216. For a fictional but realistic account of the borrowing habits of the 19th century French “middle class” and the bankruptcy system they faced, see HONORÉ DE BALZAC, *THE RISE AND FALL OF CESAR BIRROTEAU*, available at <http://www.worldwideschool.org/library/books/lit/romance/RiseandFallOfCesarBiroteau/toc.html>.

22. See Jaouen, *supra* note 20, at 215–16.

23. See, e.g., *id.*

24. See Bihl, *supra* note 8, at 2–3.

25. See JEAN-JACQUES HYEST & PAUL LORIDANT, SÉNAT FRANÇAIS, *RAPPORT D'INFORMATION NO. 60, SURENDETTEMENT: PRÉVENIR ET GUÉRIR* § I.B.1(b) (1997), available at http://www.senat.fr/rap/r97-060/r97-060_toc.html.

26. See Bihl, *supra* note 8, at 3.

27. See *id.*; Marie-Thérèse Calais-Auloy, *Le Crédit à la Consommation en France*, in *VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA* 102, 102–03 (Günter Hörmann ed., 1986); Dominique Schaffhauser,

All of that changed when the French government followed the European trend of lifting credit controls between the late 1970s and the mid-1980s,²⁸ ushering in a consumer lending and borrowing free-for-all.²⁹ Banks and other lending institutions began an advertising blitz,³⁰ competing fiercely to sell their various loan “products” to consumers.³¹ To entice consumer borrowers, French banks used various innovative and attractive forms of lending, particularly revolving credit in the form of credit cards and lines of credit (*découverts*).³² The rate of annual growth in lending to consumers rose from 6% in 1980, to 21% in 1985, to 39% in 1986.³³ Between 1984 and 1988, consumer recourse to institutional lending rose 158%.³⁴ In 1985, a consumer law reform commission proposed a re-imposition of 10% down-payments in order to avoid “rash purchases,” and to make buyers more “responsible.”³⁵ But it was too late for

Les Droits des Débiteurs, in VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA 489, 489, 499 (Günter Hörmann ed., 1986).

28. See NURIA DIEZ GUARDIA, EUROPEAN CREDIT RESEARCH INSTITUTE, RESEARCH REPORT NO. 1, CONSUMER CREDIT IN THE EUROPEAN UNION 14–15, 18 (2000), available at <http://www.ecri.be/pubs/ECR1en.pdf>. All credit controls (other than usury limits on interest rates) were lifted between 1985 and 1987 in France. See Anne Morin, *La loi française relative au surendettement: bilans et perspectives*, in LES CONSOMMATEURS ET L'EUROPE DES SERVICES FINANCIERS 123, 126 (1992).

29. See Calais-Auloy, *supra* note 27, at 103; Jaouen, *supra* note 20, at 221–23; Franck Marmoz, *Surendettement et Droit Commun*, 2001 REVUE DE LA RECHERCHE JURIDIQUE 1389, 1389; Morin, *supra* note 28, at 126–27; Gilles Paisant, *La loi du 31 décembre 1989 relative au surendettement des ménages*, JCP 1990, I, 3457, ¶ 2.

30. See, e.g., Bihl, *supra* note 8, at 4; Jaouen, *supra* note 20, at 234–44.

31. See Morin, *supra* note 28, at 127; Jaouen, *supra* note 20, at 223, 225–27, 233–36, 238–44; HYEST & LORIDANT, *supra* note 25, § I.B.2.(b).

32. See Morin, *supra* note 28, at 127; Jaouen, *supra* note 20, at 234–35; HYEST & LORIDANT, *supra* note 25, § I.C.2.(b); GUARDIA, *supra* note 28, at 23, 56 & tbl. A23 (noting a rise in credit card use in France from 14% of total consumer debt in 1991 to 25% in 1993 and thereafter—small compared to 44% in the United States, but still a significant number). The number of people actually using credit cards remains quite small, however, around 7%, although as many as half of all French consumers possess a credit card of some kind (mainly department store cards). See FRANÇOIS GUILLAUMAT-TAILLIET & CHRISTELLE ROINEAU, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ETUDES ÉCONOMIQUES, L'ENDETTEMENT DES MÉNAGES: ENQUÊTE ACTIFS FINANCIERS 1992, at 10, 24, 99–101 (1998). A *découvert* is actually nothing more than an overdraft on a consumer's bank account, but French banks market the equivalent of overdraft protection as a credit device similar to a line of credit, and measures of consumer debt include these overdrafts. See, e.g., Bihl, *supra* note 8, at 4; HYEST & LORIDANT, *supra* note 25, § I.C.2.(b); GUILLAUMAT-TAILLIET & ROINEAU, *supra* note 32, at 8, 10; MOODY'S INVESTORS SERVICE, FRENCH CONSUMER FINANCE: INDUSTRY OUTLOOK 9 (2000), available at <http://www.ecri.be/pubs/issue1/frcf.pdf>.

33. See HYEST & LORIDANT, *supra* note 25, § I.B.2.(b).

34. See KHAYAT, *supra* note 9, at 7.

35. See Marie-Odile Mouriau, *Les Actions Gouvernementales dans le Domaine du Crédit à la Consommation et du Recouvrement de l'Impayé en France*, in VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA 119, 120, 124 (Günter Hörmann ed., 1986).

such proposals; Pandora's box had been thrown wide open, and the consumer credit economy had taken on a life of its own.

Although French consumers remained moderately indebted relative to consumers in Germany, the Netherlands, and the United States,³⁶ the consumer debt burden rose dramatically in France during the 1980s. In 1980, indebted French consumers on average carried a debt equal to three months income, but by 1985, that number had grown to five months, and six months by 1988.³⁷ Non-housing consumer credit, as a percentage of disposable income, grew 178% in France during the 1980s.³⁸ By 1989, an estimated 200,000 French households carried a debt burden with monthly payments exceeding 60% of their monthly income.³⁹ The French governmental program of encouraging new home buying during a period of high interest rates in the early 1980s constituted one important cause of this heavy debt burden.⁴⁰ Thanks in large part to this increase in accession to housing, total outstanding consumer debt rose from 12 billion francs in 1970 to 409 billion francs by 1995.⁴¹ Consumer credit growth leveled off in the 1990s and the 2000s,⁴² but total outstanding consumer debt continues to rise in France (and throughout Europe).⁴³ Analysts expect this trend to continue.⁴⁴

36. See, e.g., GUARDIA, *supra* note 28, at 7, 17–18, 20–21, tbls. A14–A18; DIDIER DAVYDOFF ET AL., L'OBSERVATOIRE DE L'ÉPARGNE EUROPÉENNE, COMITÉ CONSULTATIF DU CONSEIL NATIONAL DU CRÉDIT ET DU TITRE, L'ENDETTEMENT DES MÉNAGES EUROPÉENS DE 1995 À 2002 1, 13, 22–23, 63–64 (2004), available at http://www.banquedefrance.fr/banque_de_france/fr/telechar/infobafi/rap_endette_menage.pdf. In 1995, for example, consumers in France carried approximately one-half as much consumer debt and total debt (including housing mortgage debt) as German consumers, and only one-third as much as U.S. consumers. See HYEST & LORIDANT, *supra* note 25, § I.C.1.

37. See Paisant, *supra* note 29, ¶ 2.

38. See GUARDIA, *supra* note 28, tbl. A18 (rising from 3.0% in 1980 to 8.3% in 1989 and 1990).

39. See Paisant, *supra* note 29, ¶ 2.

40. See HYEST & LORIDANT, *supra* note 25, §§ I.B.2(b), I.C.2(a). For example, from 1981 to 1985, over 750,000 French borrowers financed home purchases with “progressive-rate” mortgage loans. See *id.* The interest rates on these loans during the first 5–9 years ranged between approximately 9% and 13% (a relatively high rate already), but those rates jumped later on in the loan (in the late 1980s) to as high as 14.7%. See *id.* To make matters worse, many of these homes were subject to rapid depreciation, losing between 8% and 33% of their value in five years. See *id.* Fortunately, many of these households (as many as 25%) were able to refinance their mortgage loans at lower interest rates within the first ten years (to avoid the spike in interest later on in the loan). See *id.*

41. See HYEST & LORIDANT, *supra* note 25, § I.C.2 (noting also that the percentage of French consumers who own their home rose from 46.7% in 1975 to 54.4% in 1990).

42. See GUARDIA, *supra* note 28, at 19, tbls. A14, A18; HYEST & LORIDANT, *supra* note 25, § I.C.1; DAVYDOFF ET AL., *supra* note 36, at 1, 13–14, 37, 63–64.

43. See DAVYDOFF ET AL., *supra* note 36, at 63 (showing a rise in total consumer debt in France between 1995 and 2002 from €437 million to €587 million).

44. See MOODY'S INVESTORS SERVICE, *supra* note 32, at 5–11.

Most consumers managed this rise in indebtedness relatively well, but many did not. Many consumers found the new world of interest rates and monthly payment strange and confusing. Many borrowers did not understand the significance of interest rates, repayment terms, or the total cost of the loans that they had undertaken.⁴⁵ “Debt management companies” emerged in the mid-1980s, taking advantage of consumers’ confusion regarding the legal and economic aspects of their debts.⁴⁶ Many of these companies—like their U.S. counterparts⁴⁷—offered ill-founded advice that did more harm than good, and they were officially outlawed in 1985.⁴⁸ By 1989, the dockets of the small claims courts (*tribunaux d’instance*)⁴⁹ consisted primarily—75%—of collections cases for non-payment of consumer debts.⁵⁰

B. A Legal System Ill-Equipped to Deal with Overburdened Consumers

Before 1990, the French legal system offered few sources of respite or relief for the new wave of financially overextended consumers. Although the word for consumer insolvency —*déconfiture*— appeared in several scattered Civil Code articles,⁵¹ the law provided no definition of or collective remedy for consumer over-indebtedness.⁵² Bankruptcy laws

45. See, e.g., Gilles Jacoud, *La publicité diffusée par les établissements de crédit: facteur de surendettement ou facteur de prévention?*, in *LE SURENDETTEMENT DES PARTICULIERS* 265, 265 (Michel Gardaz ed., 1997) (noting that, according to a 1989 survey of consumer borrowers, one French consumer borrower in three did not know the length of the repayment period for her loan(s), and two-thirds had no idea of the interest rate on their loans). This consumer confusion remained despite the “Scriveners” laws of 1978 and 1979 that required lenders to disclose clearly the terms of their loans. See *id.* at 276.

46. See Morin, *supra* note 28, at 128; Mouriau, *supra* note 35, at 125–26.

47. See, e.g., PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE, PROFITEERING IN A NON-PROFIT INDUSTRY: ABUSIVE PRACTICES IN CREDIT COUNSELING 1–23 (2004), available at http://govt-aff.senate.gov/_files/032404psistaffreport_creditcounsel.pdf; CONSUMER FEDERATION OF AMERICA & NATIONAL CONSUMER LAW CENTER, CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS 2, 31–34 (2003), available at <http://www.law.upenn.edu/bll/ulc/UCDC/cfa-nclcreport.pdf>.

48. See Morin, *supra* note 28, at 128; Mouriau, *supra* note 35, at 127; Law No. 85-1097 of Oct. 11, 1985, J.O., Oct. 15, 1985, p. 11982, JCP 1985, III, 57787, codified at C. CONSOMM. art. L.321–1 (2004).

49. The *tribunaux d’instance* have jurisdiction over all personal and property cases, including cases of property seizure and wage garnishment, where the amount in dispute is up to €3800 (about \$4500, see <http://www.oanda.com> for current and historical conversion rates). See C. DE L’ORGANISATION JUDICIAIRE arts. R.321–1, R.321–4 (2004), available at <http://www.legifrance.com/WAspad/ListeCodes>.

50. See Morin, *supra* note 28, at 126. One judge reported that, in her district of Rambouillet, between 1976 and 1980, the amount in controversy in cases of asset seizure rose from 90,000 F to 600,000 F. See Schaffhauser, *supra* note 27, at 489.

51. See C. CIV. arts. 1276, 1613, 1860, 1913, 2003, 2032 (2004).

52. See, e.g., Paisant, *supra* note 29, ¶ 6.

existed in France in one form or another since 1673,⁵³ but those laws did not apply to consumers.⁵⁴ From the 1200s to the 1900s, French individuals could seek global refuge from the pursuits of their creditors only by invoking the old Roman procedure of *cessio bonorum* (cession of all assets),⁵⁵ maintained in the Code Napoléon in article 1268.⁵⁶ But the *cessio* had no effect on the debtor's obligations or on creditor's efforts to seize the debtor's property. In exchange for the debtor's relinquishment of all his property for distribution to creditors, the *cessio* offered only release of the debtor's person from prison.⁵⁷ This procedure lost all practical relevance with the abolition of imprisonment for ordinary debt in France in 1867.⁵⁸

1. Short-Term Payment Deferrals

For the debtor's property, French law provided consumers only three types of limited protection against the pursuits of individual creditors. First, the Civil Code allows a court to grant a short-term delay or extension of time to pay an individual contractual debt.⁵⁹ Introduced into the Code in 1936,⁶⁰ this provision offers "breathing room" to those who need

53. See DESURVIRE, *supra* note 3, at 33, 38–63.

54. See *supra* note 4.

55. For a history and general description of the *cessio bonorum*, see Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 870–72 (2003).

56. See, e.g., DESURVIRE, *supra* note 3, at 17, 32, 44. A particularly curious aspect of French bankruptcy law is associated with the *cessio*: at least during the 16th–18th centuries, debtors who had invoked the *cessio* were required to wear (or at least carry with them) a green cap whenever they appeared in public. See Jean-Louis Thireau, *Techniques et procédures de désendettement dans l'ancien droit français*, in LE SURENDETTEMENT DES PARTICULIERS 127, 149 (Michel Gardaz ed., 1997). The cap served both as a humiliating form of degradation and punishment for the debtor, as well as a warning to those who might otherwise consider doing business with the bankrupt. See *id.* The obligation to wear the *bonnet vert* was enforced less strenuously throughout the 17th and 18th centuries, disappearing entirely in the early 1700s. See *id.* at 150–51.

57. See, e.g., DESURVIRE, *supra* note 3, at 44–45; Thireau, *supra* note 56, at 128, 132–35, 140–41 (Michel Gardaz ed., 1997); Philippe Théry, *Le droit français de l'exécution*, in SEIZURE AND OVERINDEBTEDNESS IN THE EUROPEAN UNION 261, 310 (Georges de Leval ed., 1997).

58. See, e.g., Théry, *supra* note 57, at 310; JEAN VINCENT & JACQUES PRÉVAULT, VOIES D'EXÉCUTION ¶ 23 (17th ed. 1993). Indeed, the Civil Code articles on cession were abrogated as of January 1, 1993. See Law No. 91-650 of July 9, 1991, J.O., July 14, 1991, p. 9228, D.S.L. 1991, 317, art. 94.

59. See C. Civ. art. 1244–1 (2004).

60. See Law of Mar. 25, 1936, J.O., Mar. 26, 1936, D.P. IV 1936, 108; DESURVIRE, *supra* note 3, at 52. Debtors could obtain similar relief since the Middle Ages by requesting letters of respite from the court, delaying payment for 1–5 years. See, e.g., Thireau, *supra* note 56, at 130–32, 137–38, 142.

a bit more time to gather their affairs and manage their obligations.⁶¹ The relief offered by this law, however, is limited, both substantively and procedurally. Substantively, the delay or extension may not exceed two years.⁶² Procedurally, the debtor must hail into court each individual creditor with respect to whose debt the debtor requests a delay or extension.⁶³ These limitations render the law incapable of addressing more serious cases of over-indebtedness.⁶⁴

2. Restrictions on Asset Seizure

Second, to ensure the debtor a “decent life,”⁶⁵ the law shields certain types of consumer property from seizure by creditors.⁶⁶ Thus, no matter how deeply indebted, French debtors can retain “all movable goods necessary to the life and work of the debtor and his family.”⁶⁷ An administrative decree elaborates on this vague description by offering a non-exclusive list of items that are clearly exempt from creditor collection efforts, such as clothing, bedding, household linen, food, cooking utensils and equipment, certain furniture, a washing machine, books used for study, children’s toys, personal or family items of only sentimental value, domestic animals, and tools and instruments of the debtor’s trade or profession.⁶⁸ But, not to seem overly generous with what it giveth, the law immediately taketh away, noting that “items of value,” given their rare, antique, or “luxurious character,” may be seized by creditors.⁶⁹ Thus, not only may creditors seize “non-essentials,” like

61. Although this law always applied to individual consumers, a 1978 law clarified that consumers could seek such a delay or extension under what was then article 1244 of the Civil Code. See Law No. 78-22 of Jan. 10, 1978, art. 8, J.O., Jan. 11, 1978, p. 299, JCP 1978, III, 46697.

62. See *id.* Originally, the law offered only a one-year delay or extension, but the period was extended to two years in 1985, just as consumers began to feel the bite of over-indebtedness. See Law No. 85-1097 of Oct. 11, 1985, art. 7, J.O., Oct. 15, 1985, p. 11982, JCP 1985, III, 57787.

63. See Morin, *supra* note 28, at 129.

64. See *id.*

65. See, e.g., Théry, *supra* note 57, at 271.

66. See Law No. 91-650, *supra* note 58; Decree No. 92-755 of July 31, 1992, J.O., Aug. 5, 1992, p. 10530, D.S.L. 1992, 452, both of which may be accessed online by entering the law numbers and dates available at <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleLegi.jsp>. The law of execution of judgments was amended substantially as of January 1, 1993, see Law No. 91-650, *supra* note 58, art. 97, but the law applicable in the 1980s differed very little with respect to property exempt from seizure. See C. PR. CIV. [ANC.] arts. 592-592-2 (2004).

67. Law No. 91-650, *supra* note 58, art. 14(4).

68. See Decree No. 92-755, *supra* note 66, art. 39. As for items not on this list, courts and commentators have suggested that gas and electric ranges and refrigerators, for example, are also protected. See VINCENT & PRÉVAULT, *supra* note 58, at 75.

69. Law No. 91-650, *supra* note 58, art. 14(4).

television sets, bookshelves, and rugs,⁷⁰ but also any “necessary” items that seem overly valuable, such as new or “luxurious” cars.⁷¹

3. Wage Exemptions

Finally, in “the most important disposition, without contest,”⁷² the law restricts seizure of the debtor’s present and future earnings from work.⁷³ Nonetheless, this protection, too, is somewhat limited. Because the protected amount is revised annually based on fluctuations in the consumer price index,⁷⁴ a review of current law provides a relatively representative gauge of past and present French policy on wage garnishment restrictions.

Creditors can seize an increasing amount of the debtor’s earnings as the debtor’s take-home pay increases. Using rounded current figures and a recent exchange rate,⁷⁵ creditors can seize 5% of annual wages up to \$4325, then 10% of wages between \$4325 and \$8500, then higher percentages of several progressively higher tiers of income until the final tier allows seizure of two-thirds of wages between \$20,750 and \$25,400.⁷⁶ For each child or parent in the debtor’s care, the limits of each of these ranges are increased by about \$1600.⁷⁷ Creditors can deprive the debtor of 100% of wages above these maximum protected amounts.⁷⁸

Thus, childless debtors in one-income households today can keep a maximum of about \$18,625 if their annual income exceeds \$25,400.⁷⁹ Adding a child increases these limits to a \$20,000 exemption for income

70. See VINCENT & PRÉVAULT, *supra* note 58, at 75.

71. See *id.* at 75–76.

72. See Théry, *supra* note 57, at 273.

73. See Law No. 91-650, *supra* note 58, arts. 48–49; C. TRAV. arts. L.145–1–L.145–13, R.145–1 to R.145–39. Note that, like Germany but unlike the United States, France allows employees to assign their future wages contractually to creditors. See C. TRAV. art. R.145–40 to 145–44; GÉRARD COUCHEZ, VOIES D’EXÉCUTION ¶ 314 (3d ed. 1994). Cf. 49 Fed. Reg. 7740, 7755–61 (1984) (outlawing most forms of future wage assignments in the United States as unfair trade practices). Wages can be assigned only insofar as they may be seized; in other words, the limits on coercive seizure of wages (garnishment) also limit voluntary assignment of wages. See C. TRAV. art. L.145–2.

74. See Théry, *supra* note 57, at 273.

75. These figures are based on the conversion rate on January 1, 2005, of \$1.36/€. See <http://www.oanda.com/convert/fxhistory>.

76. See C. TRAV. art. R.145–2 (2005). For 2005, the schedule of seizable earnings proceeds as follows: 5% of the first €3180; then 10% between €3180 and €6260; then 20% between €6260 and €9380; then 25% between €9380 and €12,450; then one-third between €12,450 and €15,540; and finally two-thirds between €15,540 and €18,680.

77. See *id.* (for 2005, allowing an extra €1190 per “person in the debtor’s charge”).

78. See *id.*

79. Applying the rising percentages of seizable income to each “tranche” up to €18,680 produces €4981.83 (about \$6775) of seizable income; therefore, about €13,698 (\$18,625) of exempt income.

of at least \$27,000.⁸⁰ These exemptions are thus relatively generous, at least for debtors with incomes near the top end of the exemption scale. Indeed, if both spouses work, the exemptions apply to *each* person's income, so these limits can be doubled if both spouses have good jobs. But most consumers end up in financial distress precisely because their incomes are *not* near the top of these ranges, or one or both spouses do *not* have good jobs.

In addition to this ceiling of protection, the French legislature installed a floor of protection in 1999 to aid those at the bottom of the income scale.⁸¹ Prior to 1999, a portion of every franc of wages was available to creditors. After 1999, 100% of the earnings of extremely low-income consumers are exempt from seizure up to the so-called *revenu minimum d'insertion*, or "RMI."⁸² This "floor" rests very close to the ground, however. The level of RMI for 2004 is €417.88 per month, just over \$6000 per year, and is increased by 50% if the debtor has a spouse or domestic partner and by another 30% for each child in the debtor's care.⁸³ In contrast, the poverty level for individuals under age sixty-five in the United States in 2003 was just over \$9500, about \$12,500 for two-person households, and almost \$15,000 for three-member households.⁸⁴

Although most consumer debtors in France and elsewhere possess little if any hard property that can be seized, seizure of earnings "is a procedure that produces, in general, good results" from the creditor's perspective.⁸⁵ With no effective means of legal relief from rapacious garnishment of their earnings, some French debtors left their jobs and often their homes, finding work in a neighboring city—until creditors discovered where the debtor had gone, and the process repeated itself.⁸⁶ Some

80. Adding €1190 for a child to all of the exempt income levels up to the increased maximum of €19,870 produces €5041.33 (about \$6850) of seizable income; therefore, about €14,828.67 (about \$20,000) exempt.

81. See Law No. 98-657 of July 29, 1998, J.O., July 31, 1998, p. 11679, D.S.L. 1998, 303, arts. 87, 88. See *infra* note 232 and accompanying text for an explanation of the Feb. 1, 1999, effective date of this law.

82. See C. TRAV. art. L.145-2 (2004).

83. See Decree no. 2003-1282 of Dec. 26, 2003, J.O., Dec. 30, 2003, p. 22404, JCP 2004, III, 20004; Decree No. 88-1111 of Dec. 12, 1988, J.O., Dec. 13, 1988, D.S.L. 1999, p. 2, art. 1, available at <http://www.legifrance.com/WAspad/RechercheSimpleLegi.jsp>. For consumers with more than \$6000 of annual earnings, the normal rules still apply; i.e., 5% of the first \$3800 of their earnings, and 10% from \$3800 to \$7500 is still seizable. The "RMI-minimum" rule applies only to consumers who would otherwise be left with less than \$6000 total earnings after seizure.

84. See U.S. CENSUS BUREAU, POVERTY 2003, available at <http://www.census.gov/hhes/poverty/threshld/thresh03.html>.

85. See VINCENT & PRÉVAULT, *supra* note 58, ¶ 171.

86. See *id.*

debtors had reportedly changed jobs three and four times in this way.⁸⁷ Alternatively, some of the most indebted French consumers chose simply to “play dead,” avoiding their creditors and sometimes even fading out of public economic life entirely.⁸⁸

II. THE BIRTH AND GROWTH OF THE FRENCH LAW ON CONSUMER OVER-INDEBTEDNESS

This combination of skyrocketing indebtedness and inadequate legal relief for overburdened debtors spurred the development of France’s first consumer bankruptcy law. This Part describes the new French system of consumer debt relief and compares it generally with the corresponding systems in the United States and Germany.⁸⁹ Part II.A. provides two points of reference with general descriptions of the U.S. and German systems of consumer debt relief. Parts II.B. through II.D analyze the legal provisions and practical application of the three levels of debt-relief offered by the French law—(1) payment plan, (2) moratorium and partial discharge, and (3) immediate bankruptcy proceedings and full discharge. Finally, Part II.E. attempts to look to the future and predict where the French system will go next.

A. Brief Overview of the U.S. and German Systems of Consumer Debt Relief

The United States Bankruptcy Code⁹⁰ extends to consumers the most generous debt relief of any legal system in the world today.⁹¹ Most overburdened consumers seek relief under Chapter 7 of the Bankruptcy Code. Generally represented by a lawyer, the debtor files with the Bankruptcy Court (a division of the U.S. District Court in each district) a petition for relief and a detailed and complex description of her current financial affairs and history. Within about forty days, the debtor is summoned to a meeting of creditors, which is conducted by a “Chapter 7 trustee.” The trustee is generally a local bankruptcy lawyer or accountant appointed by the United States Trustee, a government agent who administers the bankruptcy system. Creditors rarely appear at this meeting, and

87. *See id.*

88. *See* Morin, *supra* note 28, at 129; HVEST & LORIDANT, *supra* note 25, at 2.

89. I have tried as best I could to address the questions in Professor Ziegel’s insightful model for comparative consumer bankruptcy analysis. *See* ZIEGEL, *supra* note 14, at 9.

90. 11 U.S.C. §§ 101-1330 (2004). This description is based on my personal knowledge and experience with the U.S. consumer bankruptcy system. For a good general academic discussion of this system, see MICHAEL J. HERBERT, *UNDERSTANDING BANKRUPTCY* (1995).

91. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 325 (1991).

the trustee generally asks only a few questions to confirm that the case file accurately describes the debtor's debts, assets, and income. In the overwhelming majority of cases, the trustee concludes that the debtor owns no property that may be seized, and the case is all but closed.⁹² Approximately sixty days later (after the period for creditors to object to the debtor's request for relief has expired), the court enters an order discharging the debtor of liability on all of her pre-bankruptcy debts (other than a few specific debts that are not subject to discharge).⁹³ The debtor gets to keep all of her future income.

Alternatively, the debtor can choose to seek relief under Chapter 13 of the Bankruptcy Code, which requires the elaboration of a three- to five-year plan of payments to creditors. The plan must dedicate to creditors⁹⁴ all of the debtor's "disposable income," which is vaguely defined as that income "not reasonably necessary to be expended for the maintenance or support" of the debtor, the debtor's dependents, or for the debtor's business, if any.⁹⁵ The amounts that courts require such plans to dedicate to creditors—and, consequently, the amounts left to the debtor—vary widely from district to district, even within the same state.⁹⁶ In exchange for making all of the payments under this plan, the debtor receives a discharge of all pre-bankruptcy obligations (again, except those specifically excepted from discharge, which are fewer in a Chapter 13 case than in Chapter 7).⁹⁷ Only about one-third of U.S. debtors choose to seek relief subject to a Chapter 13 plan, and of those who do, only about one-third successfully complete the plan and receive their

92. See, e.g., Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 456 n.14 (citing unpublished 1997 official statistics showing that "no-asset" cases constituted 95% of all Chapter 7 cases); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 38 (1988) (showing a return to unsecured creditors in only 3% of liquidation cases in the late 1970s and early 1980s). If the debtor does own property that can be seized and sold, the trustee does so and distributes the net proceeds to creditors.

93. Such debts include, among others, alimony and support obligations, fines and penalties owed to governmental units, drunk-driving tort claims, and student loans. See 11 U.S.C. § 523(a) (2004).

94. Secured creditors and priority unsecured creditors must be paid the full value of their claims, see 11 U.S.C. §§ 1322(a)(2), 1325(a)(5) (2004), but this level of detail is beyond the scope of this brief overview.

95. See 11 U.S.C. § 1325(b)(2) (2004).

96. See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 532, 546–47, 550–51 (1993) (revealing that the Bankruptcy Court in San Antonio, TX, requires Chapter 13 plans to offer 100% payment to creditors, but in Austin, TX, only 25–33%, in Cincinnati, OH, 70%, but in Dayton, OH, only 10%).

97. See 11 U.S.C. § 1328(a) (2004).

discharge.⁹⁸ Overall, 1.4 million U.S. consumers filed for bankruptcy relief in 2001, rising to 1.5 million in 2002, and 1.6 million in 2003.⁹⁹

The German *Insolvenzordnung* also offers consumers two paths to freedom from debt, but the debtor must attempt both paths, and both require a payment plan of some kind from the debtor.¹⁰⁰ A German consumer bankruptcy case begins long before the court filing of any documents or information on the debtor's financial situation. Instead, German law requires the debtor first to attempt to negotiate with creditors for an amicable resolution of her credit problems. The debtor must be represented in this negotiation by a lawyer or state-sponsored debt counselor, and the "case" begins in court only if the debtor's representative files an affidavit attesting that no amicable arrangement with creditors could be established. About 30% of German consumer debtors reach an out-of-court agreement with their creditors.¹⁰¹

The other 70% of German debtors proceed to file in court the same sorts of documents and information as their U.S. counterparts. Like in the United States, a court-appointed trustee sells any property subject to seizure (which is present in only the most exceptional of cases), and the case proceeds to its final stage. Rather than immediately freeing the debtor from her obligations, though, the German system requires the debtor to submit to a six-year period of deprivation, during which she assigns all of her income subject to seizure to the trustee for distribution to creditors. The debtor must make every effort to obtain and keep suitable employment during this period; if not, creditors can oppose the debtor's request for relief. Since 2002, German law shields dramatically more income from seizure, however,¹⁰² to an extent that most debtors have to cede little if any income during this six-year "good behavior period." Non-business "insolvency" filings in Germany have risen from

98. See, e.g., Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *Who Uses Chapter 13?*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 269, 273, 274–75, tbl. 1 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

99. See ANNUAL U.S. NON-BUSINESS BANKRUPTCY FILINGS BY CHAPTER AND JUDICIAL DISTRICT 2000–2003, at <http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=3210> (reporting 1,452,030 non-business filings in 2001, 1,539,111 in 2002, and 1,625,208 in 2003).

100. Rather than citing individual German sources in support of this description, I refer the reader to my description of the German system, which I believe is still the only detailed analysis in English of the German law. See Kilborn, *supra* note 13, at 272–86; see also ZIEGEL, *supra* note 16, at 140–43; Reifner, *supra* note †, at 150–51.

101. See Kilborn, *supra* note 13, at 275. I have found no statistics on the rate of successful completion of such plans, and I suspect Germany, like France, does not produce such statistics. See *infra* note 151–152 and accompanying text.

102. See *id.* at 285–86 (reporting that the wages of a childless couple are protected from seizure 100% up to €1289 per month—currently about \$21,000 per year—and up to a maximum protected wage of €2066 per month—currently about \$33,700).

17,000 in 2001,¹⁰³ to 47,000 in 2002,¹⁰⁴ to 61,000 in 2003.¹⁰⁵ This growth trend is continuing, as non-business filings rose nearly 28% in the first eleven months of 2004 over the same period in 2003¹⁰⁶

B. *The French Law, Level One: The Commission, Payment Plans, and the Courts*

The French provisions on “Treatment of Situations of Overindebtedness,”¹⁰⁷ located in the Consumer Code,¹⁰⁸ establish a system that draws on both the U.S. and the German approaches. In form and substance, the French system greatly resembles the German system. Both emphasize a preliminary stage of out-of-court negotiation, and both relegate the courts to a supporting role behind non-judicial negotiators. The French system places much more power in the hands of a special out-of-court negotiating “commission,” however, and the rarely utilized final phase offers relief in essentially the same way as U.S. law.

The first level of relief in the French system has remained relatively stable since its introduction in the original *Loi Neiertz*,¹⁰⁹ effective March 1, 1990.¹¹⁰ Like the German model, the French law requires an initial, out-of-court step of negotiation with creditors.¹¹¹ Indeed, consistent with the European trend, the French law highly favors the amicable settlement route.¹¹² Before the late 1990s, a negotiated payment plan was the only

103. See STATISTISCHES BUNDESAMT, RUND 37 600 UNTERNEHMENSINSOLVENZEN IM JAHR (2002), at <http://www.destatis.de/presse/deutsch/sach/pm13.htm> (reporting 17,048 filings by “other” than business debtors, and 46,849 “other” filings in 2002).

104. See *id.*

105. See STATISTISCHES BUNDESAMT, ÜBER 100 000 INSOLVENZEN VON UNTERNEHMEN UND PRIVATEN IM JAHR (2003), at <http://www.destatis.de/presse/deutsch/pm2004/p1280132.htm> (reporting 61,403 “other” than business debtors in 2003).

106. See STATISTISCHES BUNDESAMT, KNAPP 10 800 INSOLVENZEN IM NOVEMBER (2004), at <http://www.destatis.de/presse/deutsch/pm2005/p0490132.htm>.

107. The drafters of this new law clearly sought to avoid the negative connotations of the older terms discussed above in notes 3, 5, 6 and accompanying text (*faillite* and *déconfiture*) through the rhetorical device of using a newly coined, neutral term, “overindebtedness” (*surendettement*). See, e.g., DESURVIRE, *supra* note 3, at 167 n.295.

108. See C. CONSOMM. arts. L.330–1–L.333–8, R.331–1–R.333–5 (2004), available at (as amended in August 2003) http://lexinter.net/Legislation7/traitement_des_situations_de_surendettement.htm. The “L” articles reflect legislation, while the “R” articles set forth regulatory implementation of the law.

109. Law No. 89-1010 of Dec. 31, 1989, J.O., Jan. 2, 1990, p. 18, JCP 1990, III, 63451. The law is called *Loi Neiertz* after the name of the then-Secretary of State for Consumer Affairs, Véronique Neiertz, who spearheaded the introduction and passage of the law. See HYEST & LORIDANT, *supra* note 25, § I.A.; Vatin, *supra* note 127, at 101.

110. See Law No. 89-1010, *supra* note 109, art. 32.

111. See C. CONSOMM. arts. L.331–1–L.331–6 (2004).

112. See, e.g., HYEST & LORIDANT, *supra* note 25, § I.A.1.(b); Morin, *supra* note 28, at 130; ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1001, at 7 (2003), available at <http://>

available option for debt relief, and as this Part describes, the overwhelming majority of cases today still conclude with a long-term payment plan.¹¹³

1. The Commission

At the outset, the French system avoids the long administrative delays of the German system¹¹⁴ by assigning gatekeeping responsibility¹¹⁵ not to understaffed debt counselors, but to 117¹¹⁶ official “commissions on individual over-indebtedness,” established in each “department”¹¹⁷ in France. The debtor may, but need not, be represented in lodging a request for relief and, if the debtor so chooses, appearing before this

www.assemblee-nationale.fr/12/pdf/rapports/r1001.pdf; SÉNAT, AVIS, DOC. NO. 405, at 141 (2003), available at <http://www.senat.fr/rap/a02-405/a02-4051.pdf> (last visited June 18, 2004).

113. See *infra* notes 150 and 215 and accompanying text.

114. On the months-long bottlenecks at the beginning of the process in Germany, see Kilborn, *supra* note 13, at 274.

115. The debtor’s “overindebtedness” and “good faith” are prerequisites for access to the system, and the commission’s first task is to verify that these conditions are present. See C. CONSO MM. arts. L.330-1, L.331-2, L.331-3 (2004). “Overindebtedness” is defined in the very first section of the law as “the manifest impossibility for the good faith debtor to meet the totality of his or her nonprofessional debts that are now or will be exigible in the future.” C. CONSO MM. art. L.330-1 (2004). By and large, the commissions and courts have construed the somewhat vague notions of “overindebtedness” and “good faith” relatively liberally. See, e.g., HYEST & LORIDANT, *supra* note 25, § I.A.2(a); JEAN CALAIS-AULOY, DROIT DE LA CONSOMMATION ¶ 417 (3d ed. 1992); Pascal Ancel, *La pratique française du redressement judiciaire civil*, in LE SURENDETTEMENT DES PARTICULIERS 55, 62-63 (Michel Gardaz ed., 1997); Isabelle Couturier, *La condition de bonne foi pour le règlement des difficultés liées au surendettement des particuliers*, in LE SURENDETTEMENT DES PARTICULIERS 73, 77-82 (Michel Gardaz ed., 1997). Construction of both of these concepts, however, has been far from uniform. See, e.g., Morin, *supra* note 28, at 131-32; KHAYAT, *supra* note 9, at 50-54; Gilles Paisant, *Le redressement judiciaire civil à l’essai*, JCP 1991, I, 3510, ¶¶ 4, 16-32. In the early years of the new law, some regions had a rejection rate as high as 82%. See DESURVIRE, *supra* note 3, at 171 & n.307. The general average rate of rejection of petitions for lack of “overindebtedness” or “good faith” has fallen from about 10% to about 7% between 1990 and 2003. See DIRECTION DU RÉSEAU, BANQUE DE FRANCE, SURENDETTEMENT: ENQUÊTE TYPOLOGIQUE annex 1 bis (2001), available at <http://www.banque-france.fr/fr/telechar/typologi.pdf> [hereinafter, BANQUE DE FRANCE SURVEY]; ASSOCIATION FRANÇAISE DES SOCIÉTÉS FINANCIÈRES, BANQUE DE FRANCE—INDICATEURS STATISTIQUES SUR LE TRAITEMENT DU SURENDETTEMENT—MARS 2004 (May 4, 2004), available at <http://www.asf-france.com/COMM/optcomm/publications/Selcirculaires/selcirqpdf/asf2004146.pdf> [hereinafter, AFSF STATISTICS]. Approximately half of the rejections are due to lack of overindebtedness, and another significant percent of cases are rejected for the presence of professional debts. See ASSEMBLÉE NATIONALE, REP. NO. 856, § II.A (1998), available at <http://www.assemblee-nationale.fr/rapports/r0856-01.asp>. A small portion of cases simply “fall by the wayside,” as debtors die, change address, or simply abandon their cases. See Ancel, *supra*, at 62.

116. This was the number of commission in 1997. See HYEST & LORIDANT, *supra* note 25, § II.A.2.

117. Mainland France is divided into 22 “regions,” which are subdivided into 96 “departments” (*départements*), much like the United States is divided into states and counties. See GENERAL INFORMATION ABOUT FRANCE, at <http://www.france-pub.com/efrance.htm>.

commission.¹¹⁸ These commissions are not part of the judiciary, and no judicial agency monitors the activities of the commissions. Instead, the majority of the commissions' members concurrently hold positions in the executive branch of government or bear responsibility for monetary policy at the local or national level.

Six voting members and two "consultative" members comprise each commission. The representative of the State in each department (the *préfet*) serves as the president of each commission.¹¹⁹ The local treasurer-general serves as vice-president, and the local director of fiscal services rounds out the first, heavily "political" half of the commission's voting membership.¹²⁰ In addition, the president of the commission appoints two more members based on the recommendations of (1) the French association of credit establishments and investment enterprises (presumably the "creditor" representative) and (2) local family and consumer associations (presumably the "debtor" representative).¹²¹ An August 2003 law¹²² added two more, purely consultative¹²³ members to each commission: a social worker and an attorney.¹²⁴ The social worker's task is to advise the commission on the optimum method to treat the debtor's personal and familial situation and to develop a realistic payment plan to avoid future credit disaster.¹²⁵ The social worker is not expected to offer any "credit counseling" or other advice to the debtor. Unlike most debtors in the German system, the debtor in the French system thus receives little or no counseling on budgeting, debt management, or any other matter. The lawyer is expected to help in verifying the legality of creditors' claims and ensuring that files ultimately transmitted to the courts conform to legal norms.¹²⁶

118. See, e.g., CHANTAL MARTIN, L'INSTITUT NATIONAL DE CONSOMMATION, VOS DROITS: ENDETTEMENT ET SURENDETTEMENT, Fiche J212, at 3 (2004), available at http://www.inc60.fr/bases/2_les_guides/j212-endettement_05_04.pdf; C. CONSOMM. art. L.331-3 (2004).

119. See C. CONSOMM. art. L.331-1 (2004).

120. See *id.*

121. See *id.*

122. See Law No. 2003-710 of Aug. 1, 2003, J.O., Aug. 2, 2003, p. 13281, D.S.L. 2003, p. 1985.

123. See Côte, *supra* note 2, ¶ 11.

124. See Law No. 2003-710, *supra* note 122, art. 35(II).

125. See C. CONSOMM. art. L.331-2 (2004) (linking the determination of the debtor's payment-plan budget with advice from the social worker); ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1001, *supra* note 112, at 28; SÉNAT, AVIS, DOC. No. 404, at 57 (2003), available at <http://www.senat.fr/rap/a02-404/a02-4041.pdf>; see also HYEST & LORIDANT, *supra* note 25, § III.B.3 (first suggesting the addition of a social worker to help advise the commission).

126. See, e.g., SÉNAT, AVIS, DOC. No. 404, *supra* note 125, at 54; ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1001, *supra* note 112, at 27.

The final voting member, and the “workhorse”¹²⁷ of each commission, is the representative in each department of the French central bank—the Banque de France¹²⁸—who acts as the “secretary” of each commission.¹²⁹ As usual, the secretary really runs the show. In an intriguingly unique approach,¹³⁰ the French law assigns to the central bank primary responsibility for collecting the “declarations of over-indebtedness” and financial information from debtors,¹³¹ analyzing that information and developing recommended payment plans, negotiating those plans with creditors and debtors, advising debtors on the course of their cases, and advising the commission on how best to proceed with pending cases.¹³² Neither the debtor nor any creditor may propose a plan, as that privilege belongs exclusively to the secretary of the commission. The Banque de France is thus the main public face of the commission, as well as the main driver of policy and practice.¹³³

Odd as it might seem to assign a bank to control a consumer debt-relief commission, this creative solution turned out to be one of the most

127. See Jean-Luc Vatin, *Traitement du surendettement: Nouvelles perspectives*, in BULLETIN DE LA BANQUE DE FRANCE 101, 101 (2d trim. 1996), available at http://www.banquedefrance.fr/banque_de_france/fr/telechar/bulletin/etud30_9.pdf; cf. HYEST & LORIDANT, *supra* note 25, §§ I.A.2.(b), II.A.2 (calling the commission the “workhorse” of the system, but noting the central guiding role of the Banque de France); Morin, *supra* note 28, at 133 (noting that practice had shown that the Banque de France was “the essential element” of the commissions); KHAYAT, *supra* note 9, at 70 (noting that the Banque de France plays a “role of the first order” in the functioning of the commissions).

128. The Banque de France is not a commercial bank and is not a creditor in these cases. Its functions are largely regulatory and oversight, much like the activities of the system of U.S. Federal Reserve banks. See, e.g., La Banque de France et le SEBC, La mission fondamentale de la Banque de France est la mise en oeuvre de la politique monétaire unique dans le cadre du SEBC, at <http://www.banquedefrance.fr/fr/banque/main.htm>.

129. See C. CONSO MM. art. L.331-1 (2004).

130. The French legislature was keenly aware of its unique approach in the scheme of various administrative structures of consumer debt relief. See HYEST & LORIDANT, *supra* note 25, § I.B.2(c).

131. Consistent with the European “inquisitorial” system of justice, the Banque de France on behalf of the commission has great power to collect information on the debtor from a wide variety of sources. See C. CONSO MM. art. L.331-3 (2004).

132. See, e.g., KHAYAT, *supra* note 9, at 70, 75; Morin, *supra* note 28, at 133-34 (noting that the Banque de France “effectuates virtually the totality of tasks” involved in preparing for the commissions’ deliberations); BANQUE DE FRANCE, SERVICES RENDUS À LA COLLECTIVITÉ: LE SECRÉTARIAT DES COMMISSIONS DE SURENDETTEMENT, at http://www.banquedefrance.fr/banque_de_france/fr/info/collect/4.htm (describing the Banque’s role as secretary); Circular of Mar. 24, 1999, J.O., Apr. 13, 1999, p. 5424, JCP 1999, III, 20076, § 3.1.1 (describing the various and multiple responsibilities of the secretary of the commission), available at <http://www.legifrance.com/WAspad/UnTexteDeJorf?numjo=ECOT9914008C>.

133. The economics ministry and other parts of the administration attempt to influence policy in the commissions by issuing regulatory circulars to the presidents of the commissions, see, e.g., *infra* notes 177-180 and accompanying text, but these circulars have no legally binding force. See JEAN-LUC AUBERT, INTRODUCTION AU DROIT ET THÈMES FONDAMENTAUX DU DROIT CIVIL ¶ 174 (8th ed. 2000).

effective elements of the new French system. The participation and support of the central bank was seen as critical to ensuring smooth operation of the new law. The central bank's pivotal role lent crucial legitimacy to the radical new law in the eyes of lending establishments.¹³⁴ The central bank was all too happy to lend its support, as it sought ways to exert greater oversight (and ultimately restraint) over the credit activities of French commercial lenders.¹³⁵ The Banque de France was instrumental in overcoming the initial reticence of many creditors toward the new system. In the face of obstructionist attitudes from many institutional creditors during the first few years of the new system, working groups constituted by the Banque de France successfully lobbied their constituent credit organizations in support of the new law. This lobbying effort produced a strong upsurge in creditor cooperation and a 150% increase in the success rate of out-of-court plan negotiations between 1990 and 1993.¹³⁶

2. Payment Plans in Theory and Reality

The commissions' primary "mission"¹³⁷ is to facilitate negotiated plans between debtors and creditors. Once again, the Banque de France—not the debtor or her lawyer—collects and analyzes all relevant information, negotiates a plan with the debtor and creditors, and proposes a resolution of each case to the commission.¹³⁸ The law offers maximum flexibility at this stage. The plan may include measures such as a deferral or extension of time to pay, a full or partial remission of debt, reduction or elimination of accruing interest, or the creation or substitution of a guarantee.¹³⁹ Any of these relief measures may be made contingent on the debtor's accomplishing or abstaining from any act, such as selling certain property¹⁴⁰ or avoiding any further debt.¹⁴¹ Originally, the commission

134. See KHAYAT, *supra* note 9, at 22–27, 30–31.

135. See Danielle Salomon, *Quand une politique publique en cache une autre . . . : La loi Neiertz comme réponse politique et acte opportuniste des organes de tutelle*, in LE SURENDETTEMENT DES PARTICULIERS 13, 14–15, 21, 29–32 (Michel Gardaz ed., 1997).

136. See HYEYST & LORIDANT, *supra* note 25, § I.A.1(b). Vatin, *supra* note 127, at 105, Nick Huls, *Towards a European Approach to Overindebtedness of Consumers*, 16 J. CONSUMER POL'Y 215, 218 (1993) (linking the large number of agreed plans to the "moral power" of the Banque de France).

137. See C. CONSOMM. art. L.331–6 (2004) ("The commission has as its mission to reconcile the parties with a view toward elaborating a conventional payment plan approved by the debtor and his or her principal creditors.").

138. See *supra* note 132 and accompanying text.

139. See C. CONSOMM. art. L.331–6 (2004).

140. Property sales are a rare component of these out-of-court plans, most often involving real property or cars. See HYEYST & LORIDANT, *supra* note 25, § II.B.1(a) (reporting home sales in 5% of cases, car sales in 4%).

141. See C. CONSOMM. art. L.331–6 (2004).

was supposed to accomplish this process of formulating and proposing a plan within two months of the filing of the debtor's declaration,¹⁴² but that period was extended to six months in 2003 (due in part to the increasing caseload of the commissions).¹⁴³

In theory, only the approval of the debtor's "principal" creditors is required to support the plan.¹⁴⁴ In practice, though, the commissions acknowledge failure if any one creditor refuses to sign on.¹⁴⁵ Nonetheless, after an initially tepid reception by creditors, the out-of-court plan negotiation stage of the process has shown a remarkable rate of success.

In 1990, the first year of the new law, creditors and debtors accepted plans suggested by the Banque de France in only 45% of the cases administered by the commissions.¹⁴⁶ That percentage rose to 58% in 1991 and 62% in 1992,¹⁴⁷ thanks in large part to the concerted lobbying efforts of the Banque de France.¹⁴⁸ Creditors and debtors were reconciled to payment plans in over 60% of cases from 1992 to 1996,¹⁴⁹ and approximately 70% of all administered cases since have concluded with an agreed payment plan.¹⁵⁰

Unfortunately, many of these plans were likely destined for failure. Despite repeated pleas for statistical inquiry,¹⁵¹ no data exist on the rate of ultimate successful completion of these out-of-court agreed plans.¹⁵² In fact, these incredible figures undoubtedly reflect, at least in part, pie-in-the-sky plans signed by intimidated or uninformed debtors. A variety of factors account for this gloomy outlook for many out-of-court plans, but three reasons predominate.

142. See Law No. 89-1010, *supra* note 109, art. 9.

143. See C. CONSO. art. L.331-3 (2004).

144. See C. CONSO. art. L.331-6 (2004); KHAYAT, *supra* note 9, at 101.

145. See KHAYAT, *supra* note 9, at 101.

146. See BANQUE DE FRANCE SURVEY, *supra* note 115, annex 1 bis.

147. See *id.*

148. See *supra* note 136 and accompanying text.

149. See BANQUE DE FRANCE SURVEY, *supra* note 115, at annex 1 bis (reporting 63% agreed plans in 1993 and 1994, 66% in 1995, and 69% in 1996).

150. See *id.* (reporting 74% agreed plans in 1997, 75% in 1998 and 1999, and 70% in 2000); ASSOCIATION FRANÇAISE DES SOCIÉTÉS FINANCIÈRES, BANQUE DE FRANCE—INDICATEURS STATISTIQUES SUR LE TRAITEMENT DU SURENDETTEMENT—DÉCEMBRE 2004 (Jan. 6, 2005), available at <http://www.asf-france.com/COMM/optcomm/publications/Selcirculaires/selcircpdf/asf2005023.pdf> [hereinafter, AFSF STATISTICS 2004] (reporting 69% agreed plans in 2001, 2002, and 2003, and for 2004, reporting that agreed plans constituted 69% of those cases not referred for "personal recovery proceedings," but just 59% of all administered cases).

151. See, e.g., HYEST & LORIDANT, *supra* note 25, §§ I.A.1(b), II.A.1, II.B.2(a), III.B.1; Vatin, *supra* note 127, at 108.

152. See, e.g., Vatin, *supra* note 127, at 108 (explaining that this lack of follow-up is due in part to a desire to avoid placing the beneficiaries of such plans in a situation of "tutelage," with Big Brother looking over their shoulders).

a. Creditor Refusal to Agree to “Real” Relief

First, creditors generally resist the sort of “real” relief that many debtors need. Creditors commonly agree to short deferrals of payment, payment extensions, and interest rate reductions.¹⁵³ But although the out-of-court plan may provide for remission of part or all of the debtor’s obligations, creditors have consistently rejected this solution.¹⁵⁴ For severely overburdened consumers, deferrals simply delay the inevitable plan failure and re-filing for relief.¹⁵⁵

b. Overly Lengthy Plans

Second, these out-of-court plans extend over very long periods of time. Most studies of the subject strongly suggest that payment plans exceeding three to five years are destined to fail.¹⁵⁶ U.S. law limits the maximum duration of a Chapter 13 plan to five years,¹⁵⁷ and the German system concludes with a six-year forced payment period.¹⁵⁸ In France, in contrast, most out-of-court plans extend over eight to ten years.¹⁵⁹ Indeed, some of the earliest plans extended as long as fifteen years.¹⁶⁰ After 2003, all plans are limited to a ten year maximum by law, unless more time is necessary to manage longer-term home mortgage loans in order

153. See, e.g., Morin, *supra* note 28, at 138; HYEST & LORIDANT, *supra* note 25, § II.B.1(a), II.C.2; Vatin, *supra* note 127, at 108; BANQUE DE FRANCE SURVEY, *supra* note 115, at 5–6.

154. See, e.g., HYEST & LORIDANT, *supra* note 25, §§ I.A.1(b), II.B.1(a) (citing a National Consumer Institute figure of 10% of cases involving a modest agreed remission of debt); Vatin, *supra* note 127, at 106; BANQUE DE FRANCE SURVEY, *supra* note 115, at 5 (noting that, in a survey set in 2001, only 8.4% of cases involved an agreed remission of debt). The results obtained in the first stage of the French “bankruptcy” system thus strongly resemble the results of consumer credit counseling in the U.S. Credit counselors—both for-profit and not-for-profit—often obtain payment extensions and reductions of interest rates, but creditors seldom if ever agree to abandon any part of the principal debt or accrued interest. See, e.g., Winton E. Williams, *Consumer Credit Counseling Services: A Growing Private-Sector Response to Counterproductive Collection Practices That May Lead to Bankruptcy*, 7 J. BANKR. L. & PRAC. 47, 51–53, 60–62 (1997); CONSUMER FEDERATION OF AMERICA & NATIONAL CONSUMER LAW CENTER, *supra* note 47, at 6, 21–22.

155. See *infra* notes 230–231 and accompanying text.

156. See, e.g., Huls, *supra* note 136, at 228 (noting that debt counselors had identified three years as the maximum period during which debtors were willing and able to submit to a plan); Kilborn, *supra* note 13, at 283 (reporting the findings of German debt counseling centers); see also Morin, *supra* note 28, at 140 (noting the U.S. experience that plans should be no longer than 5 years).

157. See 11 U.S.C. § 1322(d) (2004).

158. See *supra* Part II.A.

159. See, e.g., HYEST & LORIDANT, *supra* note 25, § II.B.2(a) (noting that the average plan period by 1997 was 10 years); BANQUE DE FRANCE SURVEY, *supra* note 115, at 6, 23, tbl. 30 (reporting that, of plans concluded in early 2001, 29% extended over 5–8 years, and 31% stretched beyond this).

160. See Morin, *supra* note 28, at 134.

to avoid loss of a home.¹⁶¹ But the notion that any commission can predict a debtor's finances a decade into the future, or that any consumer can remain within a tight budget for ten lean years, is obviously questionable, at best.

c. Insufficient *Reste-à-Vivre* Left to Debtors for Living Expenses

The third and most important factor undermining confidence in these out-of-court plans is that these plans systematically impose unrealistic payment demands that typically leave insufficient resources to cover the debtors' reasonable living expenses. The most critical aspect of any payment plan is establishing a delicate balance between how much of the debtor's income to allocate to creditors and how much to retain in order to support the debtor and her family. The commissions' record of weighting this balance in favor of creditors has posed perhaps the most significant problem in the French system.

In the early years of the new system, commission-proposed plans often left debtors only \$2300¹⁶² per year for each individual in the debtors' households.¹⁶³ Commissions generally used one of two methods to calculate the so-called *reste-à-vivre*—the amount of income to be allocated to the debtor's living expenses over the life of the plan: in one method, the debtor's expenses for utilities, insurance, and other various on-going expenses were covered; in the other, these expenses were not covered.¹⁶⁴ According to one small-scale study, in 58.5% of plans signed in 1992 and 1993, the debtors were left to make do with between \$180 and \$360 per month.¹⁶⁵ In a broader survey of plans established in early 2001, the Banque de France discovered that the *reste-à-vivre* for the *generous* commissions averaged only about \$500 per month for single debtors, \$700 per month for childless couples, and \$1000 per month for couples with two children.¹⁶⁶ The *less generous* commissions allocated a tight monthly budget of less than \$300 per month for single debtors, less than \$500 per month for couples, and just over \$800 per month for couples

161. See C. CONSOMM. art. L.331-6, L.331-7 (2004).

162. This figure results from application of an approximate average conversion rate for French Francs to U.S. dollars in the early 1990s—\$0.18/F. See <http://www.oanda.com/convert/fxhistory>.

163. See Morin, *supra* note 28, at 134 (reporting that plans left to debtors only 35 F per person per day).

164. See HYEST & LORIDANT, *supra* note 25, § II.B.1(a).

165. See HYEST & LORIDANT, *supra* note 25, § II.C.1 (showing 2% of plans leaving less than 1000 F per month to debtors, 58.5% leaving between 1000 F and 2000 F per month).

166. See SÉNAT, AVIS, DOC. No. 473 (June 3, 1998), available at http://www.senat.fr/rap/197-473/197-473_mono.html#toc27 (reporting monthly averages of 2927 F, 4074 F, and 5960 F for singles, couples, and couples with two children).

with two children.¹⁶⁷ In contrast, even the *revenu minimum d'insertion* (the amount designed to avoid total exclusion of low-income consumers from society¹⁶⁸) for one person during this period averaged \$400 per month.¹⁶⁹ It is not clear how these commissions expected debtors to manage essential expenses given these hyper-frugal budgets.

Already in the early years of the new system, commentators began observing that few debtors could be expected to complete a plan under the extreme pressure of these "scandalously low" budgets.¹⁷⁰ According to the only study on plan completion, conducted in May 1995 by the Center for Savings Research, 10% of plans had already failed by mid-1995.¹⁷¹ In a survey of debtors conducted by that same organization in 1994, 54% responded that they expected difficulties in abiding by the terms of their plans.¹⁷² Indeed, based on more analyses in the late 1990s, the National Consumer Institute expressed its belief that three-quarters of the plans then existing were not viable.¹⁷³ By March 1997, over 13% of debtors had registered negative credit entries on their credit reports after signing a payment plan,¹⁷⁴ and by 1998, 30% of debtors had suffered negative credit report entries within the first several years of their plans.¹⁷⁵

Regulatory and legislative initiatives have increased the amounts left to debtors under these plans, but they likely have not gone far enough. Already in January 1993, the miserly practices of the commissions with respect to the *reste-à-vivre* left to debtors attracted the concern of the administration. In a regulatory *circulaire*¹⁷⁶ distributed to commissions in January 1993,¹⁷⁷ the economics minister noted the problem of overly stringent plans and urged commissions to avoid leaving debtors with less

167. See *id.* (reporting monthly averages of 1623 F, 2700 F, and 4638 F for the three groups).

168. See *supra* note 82 and accompanying text.

169. See Decree No. 91-1373 of Dec. 30, 1991, J.O., Dec. 31, 1991, p. 17419, D.S.L. 1992, 69 (setting RMI at 2184.79 F from 1/1/92 to 7/1/92, and 2224.11 F from 7/1/92 to 12/31/92); Decree No. 93-143 of Feb. 2, 1993, J.O., Feb. 4, 1993, p. 1891, D.S.L. 1993, 233 (setting RMI at 2253.02 F from 1/1/93 forward).

170. See, e.g., Morin, *supra* note 28, at 134; Sinay-Cytermann, *supra* note 1, ¶ 8.

171. See HYEST & LORIDANT, *supra* note 25, § II.A.1; ASSEMBLÉE NATIONALE, REP. NO. 856, *supra*, note 115, § II.A.

172. See HYEST & LORIDANT, *supra* note 25, § II.C.1.

173. See ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, § II.A.

174. See HYEST & LORIDANT, *supra* note 25, § II.A.1.

175. See ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, § II.A.

176. These regulatory circulars represent the administration's attempt to influence policy in the commissions, but they have no binding legal force. See AUBERT, *supra* note 133, ¶ 174, at 170.

177. Circular of Jan. 22, 1993, B.O.C.C., Feb. 13, 1993, p. 48, D.S.L. 1993, 277.

than the *revenu minimum d'insertion*.¹⁷⁸ The economics ministry repeated this entreaty to moderation in another circular in September 1995,¹⁷⁹ and it increased the suggested minimum *reste-à-vivre* to all earnings not subject to seizure.¹⁸⁰

The legislature took up this issue in 1998,¹⁸¹ and as of February 1, 1999, the commissions are required by law to leave to debtors all earnings not subject to seizure.¹⁸² Indeed, the law describes non-seizable income only as a *starting point* for the amount to be left to debtors, identifying this as presumptively “*one part* of the resources necessary for ongoing expenses.”¹⁸³ Again, one of the explicit primary functions of the social worker on the commission is to recommend an appropriate *reste-à-vivre* beyond this absolute minimum.¹⁸⁴

The French system thus seems to have evolved toward a more demanding variant of the German system.¹⁸⁵ Seventy percent of German debtors reach the final stage of the process,¹⁸⁶ which requires debtors to assign all of their seizable income to a trustee for six years.¹⁸⁷ Now, French debtors whose cases conclude at the out-of-court plan stage (also, coincidentally, 70% of all cases)¹⁸⁸ are pressed into plans that similarly require cession of all (or most) seizable income for eight to ten years.¹⁸⁹

But although the French commissions seem to be leaving much more income to debtors on average, the *reste-à-vivre* left to French debtors still lags behind what German debtors are permitted to retain. The German restrictions on seizure of earnings were vastly liberalized in 2002, allowing married debtors to retain at least \$21,000 per year, and as much as \$33,700 per year.¹⁹⁰ A review of French plans adopted in early 2001, in contrast, showed that 65% of plans left between \$700 and \$1400 per

178. *Id.* § A.III. The administration also urged commissions to avoid depriving debtors of goods “indispensable to the exercise of their profession (automobiles . . .).” *Id.*

179. Circular of Sept. 28, 1995, J.O., Dec. 13, 1995, p. 18111, D.S.L. 1996, 2.

180. *Id.* § 3.2.1.

181. See Law No. 98-657, *supra* note 81, art. 87.

182. See C. CONSOMM. art. L.331-2 (2004). See *supra* Part I.B.3 for a discussion of the current amounts of earnings not subject to seizure. This was not an uncontroversial point. The Senate preferred to avoid the “de-responsible-ization” of low-income potential debtors in shielding all or most of their income. See, e.g., SÉNAT, AVIS, DOC. No. 473, *supra* note 166; SÉNAT, REP. No. 544 (1998), available at <http://www.senat.fr/rap/197-544/197-544.html#toc90>.

183. C. CONSOMM. art. L.331-2 (2004) (emphasis added).

184. See C. CONSOMM. art. L.331-2 (2004).

185. Indeed, the German model was chosen explicitly from among other major legislative approaches. See SÉNAT, REP. No. 450 (1998), available at http://www.senat.fr/rap/197-450/197-45011_mono.html#toc260.

186. See *supra* Part II.A.

187. See *id.*

188. See *supra* note 150 and accompanying text.

189. See *supra* Part II.B.2(b).

190. See *supra* note 102 and accompanying text.

month to debtors (\$8400 to \$16,800 per year), and only 3% left more than this.¹⁹¹ While these numbers exceed the absolute minimum necessary to avoid exclusion from economic society,¹⁹² one suspects that many French consumers will be unable to resign themselves to life on this poverty-level budget for as many as ten years.

3. The Limited Role of the Courts

In this first, most important level of relief, like in Germany, the French courts simply provide backup for the commissions. Originally, consumers could choose to initiate their “over-indebtedness” cases in court rather than before the commission.¹⁹³ But just as they had come to the aid of overburdened consumers, French lawmakers quickly had to address a serious problem of overburdened courts.¹⁹⁴ In the first few years of the new system, the courts were “literally submerged by the flood of over-indebtedness cases.”¹⁹⁵ The average delay for the establishment of a court-developed plan, in as many as a quarter of all cases, quickly rose to 15.4 months.¹⁹⁶

Consequently, in 1995,¹⁹⁷ the legislature relegated the courts to a supporting role, with the commissions acting as obligatory and exclusive points of entry into the system. Today, in the vast majority of cases, the courts fulfill only two limited functions: they resolve a small variety of procedural disputes arising in the course of the commissions’ work,¹⁹⁸

191. See BANQUE DE FRANCE SURVEY, *supra* note 115, at 5, 22 & tbl. 29 (reporting that 65% of plans left debtors with between 5000 F and 10,000 F per month). These dollar figures were arrived at using a conversion rate of \$0.14/F, the average conversion rate during 2001. See <http://www.oanda.com/convert/fxhistory>. To be fair, although 8% of plans left the debtor with only the meager RMI or less, and 24% left debtors with between RMI and about \$700 per month, approximately this percentage of cases involved debtors with *total* income of less than \$700 per month. See *id.* at 13 & tbl. 9.

192. RMI for a two-person household in 2001 was about \$550 per month. See Decree No. 2000-1286 of Dec. 26, 2000, J.O., Dec. 29, 2000, p. 20817, JCP 2001, III, 20417 (setting base RMI at 2608.5 F per month for 2001); C. CONSOMM. art. R.331-10-2 (2004) (increasing the base RMI by 50% for a household). In contrast, the poverty level in the United States in 2001 for single-member households was just over \$9000 per year, and just over \$14,000 for three-member households. See U.S. CENSUS BUREAU, POVERTY 2001, available at <http://www.census.gov/hhes/poverty/threshld/thresh01.html>.

193. See, e.g., Morin, *supra* note 28, at 132, 135.

194. See, e.g., ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1001, *supra* note 112, at 7; HYEST & LORIDANT, *supra* note 25, § I.A.1(b); ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, § I.B.1.

195. KHAYAT, *supra* note 9, at 35-36.

196. See Vatin, *supra* note 127, at 109 (noting also that the courts were able to establish plans in only 58% of cases submitted to them between 1990 and 1992).

197. See Law No. 95-125 of Feb. 8, 1995, J.O., Feb. 9, 1995, p. 2175, JCP 1995, III, 67294.

198. See, e.g., C. CONSOMM. arts L.331-3 (2004) (disputes concerning the initiation of the case based on the debtor’s state of “overindebtedness” or “good faith”), L.331-4 (2004) (disputes

and they confer legal force on recommendations made by the commissions.¹⁹⁹

In the approximately 30%²⁰⁰ of cases in which the commissions cannot themselves reconcile creditors to an out-of-court arrangement, the commissions can make recommendations for a court-imposed plan.²⁰¹ The Banque de France has suggested that the existence of the “stick” of a court-imposed plan has increased the success rate of the out-of-court stage, enhancing the willingness of creditors to accept the “carrot” of a flexible, out-of-court negotiated plan.²⁰² The commissions can recommend a court-imposed plan only at the debtor’s request.²⁰³ The law states that the commissions “can” grant the debtor’s request for a recommended plan,²⁰⁴ but there appears to be little basis for a rejection of the debtor’s request,²⁰⁵ and the commissions apparently grant virtually every request for recommending a plan.²⁰⁶ Once again, the commission (that is,

concerning the debtor’s financial condition, particularly creditors’ claims and their amounts), L.332–2 (2004) (disputes concerning the measures recommended in the plan by the commission).

199. See KHAYAT, *supra* note 9, at 36–37; HYEYEST & LORIDANT, *supra* note 25, § I.A.2(b); Vatin, *supra* note 127, at 109–11; Gilles Paisant, *La réforme de la procédure de traitement des situations de surendettement par la loi no. 95-125 du 8 février 1995*, JCP 1995, I, 3844; NATHALIE SAUPHANOR, L’INFLUENCE DU DROIT DE LA CONSOMMATION SUR LE SYSTÈME JURIDIQUE ¶¶ 469–83 (2000). Although the legislature rejected earlier proposals to place final decision-making authority in the hands of the commissions, even the ultimately less radical reallocation of power between the courts and commissions created a “marginalization” of the role of the judge that has been heavily criticized on separation of powers grounds. See, e.g., SAUPHANOR, *id.*, ¶ 479; Paisant, *id.*, ¶¶ 4–5; Vatin, *supra* note 127, at 109–10; Anne Morin, *Surendettement des particuliers et des familles: commentaire de la loi française du 31 décembre 1989*, 1990 REVUE EUROPÉENNE DE DROIT DE LA CONSOMMATION 108, 116. One commentator has suggested that this division of authority was based solely on the reticence of the French legislature to fund the judiciary adequately enough to manage an increased caseload of overindebtedness cases. See KHAYAT, *supra* note 9, at 121. This debate is intriguingly reminiscent of the debate in the United States in the 1980s concerning the role and powers of the Article I Bankruptcy Courts. For a general discussion of this complex and fascinating issue in U.S. bankruptcy history, see HERBERT, *supra* note 90, §§ 5.02–5.04.

200. See *supra* note 150 (noting the 70% “success” rate of out-of-court plans).

201. See C. CONSOMM. art. L.331–7 (2004).

202. See Vatin, *supra* note 127, at 113.

203. See C. CONSOMM. art. L.331–7 (2004).

204. See *id.*

205. Cf. KHAYAT, *supra* note 9, at 115–16 (discussing the same language in art. L.331–7–1).

206. See BANQUE DE FRANCE SURVEY, *supra* note 115, at annex 1 bis (showing a rate of recommendation upon the debtor’s request of nearly 93% between 1995 and 2000, with a backlog of 5% of cases untreated); AFSF STATISTICS, *supra* note 115 (showing a more than 100% rate of recommendation from 2001 through March 2004, apparently in light of the small backlog of untreated cases).

the Banque de France) develops the proposed recommendation—not the debtor.²⁰⁷

The possible scope of relief in a court-imposed plan is more restricted than in an out-of-court negotiated plan, however.²⁰⁸ A court-imposed plan may not provide for the remission (discharge) of any obligation except in one specific case:²⁰⁹ The court may provide for a partial or full discharge only of a deficiency obligation remaining on a home mortgage loan following the forced sale of the home (that is, if the debtor still owed \$100,000 on her home, and a foreclosure sale of the home produced net proceeds of only \$80,000, the \$20,000 “deficiency” for which the debtor would otherwise remain liable could be discharged in part or in full).²¹⁰ Courts have rarely exercised this power, however.²¹¹ For all other debts, a court-imposed plan is limited to offering an extension of the repayment period²¹² or a reduction of accruing interest.²¹³

Court-imposed plans offering these “ordinary,”²¹⁴ measures of relief consistently constitute around 15% of all cases treated by the commissions from 1995 through 2004.²¹⁵ These recommendations are opposed by either creditors or debtors in fewer than 10% of cases,²¹⁶ and for those

207. In fact, debtors contest approximately 5% of the commissions' recommendations. See AFSF STATISTICS, *supra* note 115 (reporting an average of about 1500 debtor-initiated contests of about 35,000 recommended plans from 2001 through 2003).

208. The total length of a court-imposed plan originally could not exceed 5 years, but this limitation was extended to eight years in 1999, and then to ten years in 2003, when agreed out-of-court plans were subjected to the same limit. See, e.g., Céline Rondey, *La réforme du surendettement par la loi “Borloo” du 1er août 2003*, D. 2003, Doctrine, 2162.

209. See C. CONSOMM. art L.331-7 (2004).

210. See *id.*

211. See Salomon, *supra* note 135, at 36.

212. Before 1999, the commissions could recommend that the court impose a deferral (that is, a period during which no payment is made on a debt), but after the 1998 amendments, for individual debts, courts can only impose an extension of the total time to pay. See Law No. 98-657, *supra* note 81, art. 92; C. CONSOMM. art. L.331-7, 1° (2004). The commissions can still recommend, and the courts can still enter, deferrals of payment, but such deferrals must encompass *all* debts, not individual debts. See C. CONSOMM. art. L.331-7-1 (2004).

213. See *id.* The court plan may also call for the application of payments to the principal of the debt, rather than to accrued interest and penalties, in order to reduce the amount on which interest will continue to accrue. See *id.*

214. See *infra* Part II.C. for a discussion of “extraordinary” court plans and powers, applicable in exceptional cases.

215. See BANQUE DE FRANCE SURVEY, *supra* note 115, at annex 1 bis (reporting about 11,000 confirmed plans out of a total of between about 60,000 and 90,000 administered cases annually from 1996 to 1999, and 17,170 confirmed “ordinary” plans out of 117,240 total administered cases in 2000); AFSF STATISTICS 2004, *supra* note 150 (reporting between 20,544 and 23,103 “ordinary” recommendations per year from 2001 through 2004 of a total of between 117,000 and 159,000 cases administered in those years, including referrals in 2004 to “personal recovery proceedings”).

216. See AFSF STATISTICS, *supra* note 115 (reporting challenges to only 10% of commission recommendations from 2001 through 2003, with “ordinary” recommendations constituting about two-thirds of total recommendations).

that are not opposed within fifteen days,²¹⁷ the court simply enters an order confirming the recommended plan, giving it the force of law.²¹⁸ The court holds no hearing, does not solicit a vote from creditors, and disposes of most cases with a simple order.

Thus, with or without minor court involvement, this first “payment plan” stage of the process disposes of at least 75% of all French consumer over-indebtedness cases. The relief granted at this stage generally amounts to no more than a simple extension of time to pay or a reduction in accruing interest. If it seems surprising to a U.S. observer that these minor measures can offer effective relief to the vast majority of French consumers, let us not forget that the French are far less overwhelmed by debt than their German or U.S. counterparts,²¹⁹ and the Banque de France’s statistics do not report on successfully *completed* plans. Whether this first level of relief in the French process is “effective” or not remains to be seen. The prognosis for most plans is dim, however, and the French legislature has already had to return to the drafting table twice in the last six years to offer comprehensive relief to those truly in need, as the next two Parts will reveal.

C. Level Two, “Extraordinary” Recommendations: Global Payment Moratorium and Partial Discharge of Debt

After only a few years of practice under the new law, the commissions and courts discovered an increasing number of cases for which the law simply did not empower them to offer effective relief. A severe economic depression rocked Europe in the early 1990s, putting many consumers out of work²²⁰ just as their debt levels reached new heights after the credit revolution of the late 1980s.²²¹ For others, divorce or illness left them unable to manage heightened debt levels incurred at an earlier stage in life, when the outlook for the future was brighter.²²² Most

217. See C. CONSOMM. art L.332-2 (2004).

218. See C. CONSOMM. art L.332-1 (2004).

219. See *supra* note 36 and accompanying text.

220. See, e.g., Niemi-Kiesiläinen, *supra* note 10, at 49.

221. See *supra* notes 28-34 and accompanying text.

222. Unemployment, divorce or separation, and illness are constantly cited as the primary “causes” (perhaps more accurately, “triggers”) of overindebtedness. See, e.g., Xavier Lagarde, *Prévenir le surendettement des particuliers*, JCP 2002, I, 163, ¶ 2 (citing unemployment, divorce/separation, and illness as causing 51% of all cases of overindebtedness); HYEST & LORIDANT, *supra* note 25, § I.B.2(a) (citing figures on the “causes” of overindebtedness between 1994 and 1996, with unemployment, illness, and divorce/separation accounting for 60% or more of cases in each year); ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, § II.B (citing studies reporting over 40% of cases attributable to unemployment, and around 15% attributable to each of illness and separation); ASSEMBLÉE NATIONALE, REP. NO. 1062, at 67 (1998), available at <http://www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i1062.pdf>.

creditors adamantly refused to give up any portion of their debts,²²³ and even ten-year payment deferrals and reductions of interest rates to zero could not put many consumers back on track to paying 100% of their debts.

1. "Ordinary" Measures Increasingly Proved Insufficient

More and more consumers demonstrated a marked inability to repay their accumulated debt in full, and many could pay nothing whatsoever. One 1995 national study suggested that 28% of debtors could barely cover reasonable living expense, let alone pay anything on their debts, and only 25% of debtors clearly had the capacity to repay any significant portion of their debts after covering reasonable living expenses.²²⁴ Smaller studies at the *département*²²⁵ level reported similar findings.²²⁶ Even the Banque de France ultimately recognized simple insufficiency of resources as one of the most important causes of failure of the negotiated-plan stage.²²⁷

Because lack of resources was not a proper basis for dismissal of a case,²²⁸ the commissions and courts had to manage as best they could with the tools they were given. A trend soon developed in which the commissions and courts would hammer out a "payment plan" imposing a multi-year²²⁹ deferral of all payments, with full expectation that the debtor would be back with a repeat filing for relief upon the expiration of the deferral period.²³⁰ Estimates of the extent of this "repeat filing"

223. See *supra* note 154 and accompanying text.

224. See HYEST & LORIDANT, *supra* note 25, § I.B.1(a) (reporting the findings of a 1995 study by the Center for Research on Savings). The study reported "gross repayment capacity" of a small subset of debtors, calculated by subtracting fixed expenses from monthly income. See *id.* at n.7. It thus did not subtract any amount to allow debtors to cover ongoing *variable* expenses for food, clothing, maintenance, education, etc.—the so-called "*reste-à-vivre*." See *id.* at n.7. I have subtracted the most common "*reste-à-vivre*" amount left to debtors as reported in the 2001 Banque de France survey: 5000 F–10,000 F per month. See *supra* note 191.

225. *Départements* are the equivalent of U.S. counties. See *supra* note 117.

226. See HYEST & LORIDANT, *supra* note 25, § II.C.1 (describing the findings of a 1995 study in the Loire department, reporting negative payment capacity for 32% of debtors, and ability to pay more than 500 F per month—about \$75—in only 27% of cases).

227. See Vatin, *supra* note 127, at 108.

228. Early on, some courts held otherwise and simply dismissed cases of debtors without sufficient resources to form the basis for a successful payment plan. See Ancel, *supra* note 115, at 64–65. These courts left debtors to the pursuits of their creditors, which the courts assumed would be fruitless, given the lack of seizable assets and income of these debtors. See *id.* The French high court, the *Cour de cassation*, firmly rejected this approach and required the courts to do what they could with these "terminal" cases. See Cass. 1re civ., Jan. 27, 1993, Bull. civ. I, no. 41, D. 1993, Jur. p. 343, note Jean-Pierre Bonthoux.

229. Before 1999, the maximum length of an in-court plan imposing such a deferral was 5 years. See Law No. 89-1010, *supra* note 109, art. 12.

230. See, e.g., HYEST & LORIDANT, *supra* note 25, §§ II.C.2, III.B.5; SÉNAT, AVIS, Doc. No. 478, Ch. 2, § II.A (June 4, 1998), available at <http://www.senat.fr/rap/197-478/>

trend ranged between 15% and 18% of all cases.²³¹ These debtors needed fundamental relief in the form of discharge of at least some of their debts.

2. Legislative Response: A Higher Level of Relief

In 1998, the legislature responded with a hesitant half-step toward discharge of unpaid debt. Since February 1, 1999,²³² if creditors refuse a negotiated plan, the commissions can recommend—and the courts can impose—“extraordinary”²³³ measures, more powerful than the “ordinary” measures of simple payment deferrals and reductions of interest rates.

If the commission establishes that the debtor is “insolvent,” as defined in the law (see below), it may²³⁴ recommend that the court impose a global deferral of *all* of the debtor’s debts for up to two years.²³⁵ This period is designed to allow the debtor’s financial situation to stabilize.²³⁶ At the conclusion of this period, the commission reexamines the debtor’s financial situation.²³⁷ If the debtor’s situation has improved, and she is no longer “insolvent,” then the commission must²³⁸ recommend a payment plan²³⁹ including some or all of the “ordinary” measures discussed above²⁴⁰ (up to ten years of payment extensions and interest rate reductions).²⁴¹ If the debtor remains insolvent at the expiration of this period,

197-47813.html; Sinay-Cytermann, *supra* note 1, ¶ 11; ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1001, *supra* note 112, at 8.

231. See HYEST & LORIDANT, *supra* note 25, § II.C.2.

232. This is the date on which the 1998 amendments became effective. See Law No. 98-657, *supra* note 81, art. 99; Decree No. 99-65 of Feb. 1, 1999, J.O., Feb. 2, 1999, JCP 1999, III, 20038 (the publication of which fixed the entry into force of the amendments).

233. “Extraordinary” and “ordinary” are terms of art used in practice to distinguish recommendations made under article L.331-7 from those made under article L.331-7-1. See, e.g., Nathalie Côte, *Le nouveau dispositif de traitement du surendettement des particuliers: Titre III de la loi no. 2003-710 du 1er août 2003*, JCP 2003, I, 175, ¶¶ 21-22.

234. The word here again is “may” (*peut*)—not shall, although there seems to be no basis for the commission’s refusal to recommend a global suspension if the debtor is, in fact, insolvent. See KHAYAT, *supra* note 9, at 115-16.

235. See C. CONSOMM. art. L.331-7-1 (2004). This period was three years before 2003. See C. CONSOMM. art. L.331-7-1 (1999). Note that, under the law after 1999, the commissions cannot recommend, and the courts cannot impose, deferrals of individual debts. See C. CONSOMM. art. L.331-7, 1° (2004).

236. See, e.g., Sinay-Cytermann, *supra* note 1, ¶ 13.

237. See C. CONSOMM. art. L.331-7-1 (2004).

238. The language of the statute is markedly different here for the first time: “*elle recommande*,” as opposed to “*elle peut recommander*.” See C. CONSOMM. art. L.331-7-1 (2004). Cf. *supra* note 204 and accompanying text.

239. Note that a return to the negotiated-plan stage of art. L.331-6 is not permitted—the commission must proceed to the recommendation stage in art. L.331-7. See Sinay-Cytermann, *supra* note 1, ¶ 20.

240. See *supra* notes 208-213 and accompanying text.

241. See C. CONSOMM. art. L.331-7-1 (2004).

the commission must recommend a partial, pro-rata²⁴² extinguishment (discharge) of most²⁴³ of the debtor's obligations.²⁴⁴ The law leaves to the case-by-case discretion of the commissions just what percentage of the debtor's obligations to discharge. A debtor can benefit from such a discharge only once every eight years.²⁴⁵

Even in this stage, designed for the seriously overburdened and downtrodden,²⁴⁶ the debtor cannot escape paying at least some of her obligations (or at least evading the pursuits of her unpaid creditors). The French model is very serious about reserving a U.S.-style "full discharge" for only the most marginal of marginalized debtors. A full discharge of all liabilities is available only for debtors whose insolvency has been established as "irremediable," and only after the debtor has undergone the simplified procedure of "personal recovery" (*redressement personnel*), discussed in Part II.D., below.

3. The Gateway to Level Two: "Insolvency" On the Books and In Practice

This "ultimate relief" was designed to be reserved for the "most desperate" cases of those who were unable to meet even the ongoing expenses of daily life—the approximately 25% of debtors with absolutely no ability to repay any portion of their debts.²⁴⁷ The legislature restricted this new "extraordinary" relief to cases where the commission establishes "insolvency of the debtor," defined as "the absence of resources or of seizable goods of a nature to permit the discharge of all or

242. The Senate had recommended that the courts be given the ability to discharge certain debts more or less than others, but this proposal was not included in the amendment. See Sinay-Cytermann, *supra* note 1, ¶¶ 23–24. As it stands, the court may only enter a discharge of a certain, equal percentage of *all* of the debtor's affected debts. See Circular of Mar. 24, 1999, *supra* note 132, § 3.4.3 (suggesting, for example, discharge of 50%, 60%, or 75% of all of a debtor's debts).

243. Support obligations (child support and alimony), as well as fines, penalties, and reparations orders entered in the context of a criminal case against the debtor, are not subject to *any* form of relief—extension or discharge. See C. CONSOMM. art. L.333–1 (2004). In addition, the debtor's obligation to reimburse a guarantor (surety) or co-obligor who has paid the guaranteed debt on behalf of the debtor is not subject to discharge. See C. CONSOMM. art. L.331–7–1 (2004).

244. See C. CONSOMM. art. L.331–7–1 (2004).

245. See *id.*

246. See *infra* note 247 and accompanying text.

247. See ASSEMBLÉE NATIONALE, REP. NO. 1062, *supra* note 222, at 67 (describing the intended beneficiaries of the law, those with "passive" indebtedness, characterized by "the impossibility, pure and simple, to meet the needs of daily life" marked by a "total absence of resources"); ASSEMBLÉE NATIONALE, REP. NO. 780 (1998), at 15, 28, available at <http://www.assemblee-nationale.fr/legislatures/11/pdf/projets/pl0780.pdf>; ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, at 7; SÉNAT, AVIS, DOC. NO. 478, available at <http://www.senat.fr/rap/197-478/197-47832.html>; Sinay-Cytermann, *supra* note 1, ¶¶ 2, 11.

part of his or her debts and rendering inapplicable the [“ordinary” payment-plan] measures foreseen in article L.331–7.²⁴⁸ As thus strictly defined, “insolvency” appears to exist only where the debtor possesses absolutely no seizable goods (of whatever value) and has absolutely no non-exempt income—otherwise, at least “a part” of the debtor’s obligations could be met.²⁴⁹

But the commissions and courts have construed “insolvency,” and thus the range of debtors eligible for “extraordinary” relief, rather broadly. Already in March 1999, the economics ministry urged the commissions essentially to abandon the rigid statutory definition of “insolvency.” The economics ministry suggested that debtors should be deemed insolvent if they could not meet *all* liabilities “within reasonable delays.”²⁵⁰ The ministry further suggested ten years as a point of reference for the length of a “reasonable delay.”²⁵¹ Establishing insolvency when the debtor cannot pay all of her debts in ten years seems to fly in the face of the legislative requirement of no ability to pay even “a part” of existing obligations. The ministry boldly suggested reading out the first part of the statutory definition, focusing on the second: While the commissions need not make the unlikely finding that the debtor is totally unable to pay any small part of any obligation whatsoever, they should establish that the debtor cannot meet all obligations through a ten-year “ordinary” payment plan, with payment extensions and interest-rate reductions. According to the economics ministry, if the provisions of “old” law cannot offer effective relief, the “new” law of global deferral and discharge ought to be available.

The courts seem to have also construed “insolvency” rather liberally. In 2002, a certain Ms. Djerrad filed a declaration of over-indebtedness, owing her creditors the equivalent of just over \$37,200.²⁵² After meeting ongoing expenses of \$1160 per month, the debtor had “disposable income” of just under \$150 per month.²⁵³ Over the 120 months of a ten-year “ordinary” plan,²⁵⁴ this debtor theoretically could have paid her

248. C. CONSOMM. art. L.331–7–1 (2004).

249. See, e.g., KHAYAT, *supra* note 9, at 113.

250. See Circular of Mar. 24, 1999, *supra* note 132, ¶ 3.4.

251. See *id.*

252. See Cass. 1e civ., Oct. 2, 2002, RTDCOM. 2003, p. 173, note Gilles Paisant. The note reports that Ms. Djerrad owed 257,000 F. On February 17, 2002, France adopted the Euro as its official currency, and the permanent exchange rate was set at 6.55957 French Francs per Euro. See <http://www.oanda.com/site/euro.shtml>. During 2002, the average exchange rate for one Euro was \$0.95. See <http://www.oanda.com/site/euro.shtml>.

253. See Paisant, *supra* note 252, at 173 (reporting income of 9000 F and expenses of “more than” 8000 F per month).

254. See C. CONSOMM. arts. L.331–6, L.331–7 (2004) (setting ten years as the maximum duration of a payment plan).

creditors nearly \$18,000—about half of her debt. Nevertheless, the trial court found her to be “insolvent.”²⁵⁵ Although the *Cour de cassation* overturned this decision, citing the lower court’s failure to consider the value of the debtor’s apartment, it explained its ruling by suggesting that a sale of the apartment might “carry off a discharge of debt sufficient to permit a *recovery of the debtor’s situation* by application of the measures provided for in article L.331–7.”²⁵⁶ In other words, the French high court also seems to be focused on the second part of the definition of “insolvency;” the question is not whether or not the debtor can pay any portion of any debt, but rather, whether a payment plan with “ordinary” measures (payment extensions and interest rate reductions) can resolve the debtor’s financial problems entirely.

During the same time period, another court confronted this issue squarely and interpreted the notion of “insolvency” extremely freely. There, the debtor owed just under \$40,000, which clearly could not be paid in full with her just under \$200 monthly disposable income.²⁵⁷ But dedicating all of this disposable income over a ten-year ordinary plan, the debtor could have paid \$24,000—over half of her debt. Yet the court once again found the debtor to be “insolvent,” noting that this notion “cannot be reserved to only the situations of those whose payment capacity is inexistent.”²⁵⁸ The reporter of this case noted the inconsistency between the literal statutory definition of “insolvency” and the very liberal definition applied by the court; the court effectively read out the “or part” from “discharge all or part of his or her debts” in the definition of insolvency, “privileging its spirit over its letter.”²⁵⁹

The French high court has not dealt with this case yet, but it seems to have signaled its acceptance of the liberal approach to defining “insolvency.” In a 2001 order, the *Cour de cassation* affirmed the combination of required payments with “extraordinary” measures (which require “insolvency”).²⁶⁰ This order inevitably signals the high court’s view that a debtor who can pay some but not all of her debts is “insolvent,” despite the literal statutory definition.

255. See *id.* For a similar case, see CA Caen, 1er ch., Oct. 18, 2001, RTDCOM. 2002, pp. 172–73, note Gilles Paisant (overturning the lower court and entering a partial discharge for a debtor owing 140,000 F (just over \$20,000) with monthly disposable income of 500 F (\$72) for eight years, and 250 F (\$36) thereafter—a total of \$7775 over ten years, more than one-third of her total debt).

256. See Paisant, *supra* note 252, at 173 (emphasis added).

257. See Trib. inst. Vienne, Nov. 25, 2002, RG No. 11-02-000596, RTDCOM. 2003, p. 174, at 175, note Gilles Paisant.

258. See *id.*

259. *Id.*

260. Arrêt [Order] of Feb. 13, 2001, Bull. civ. 1, no. 34, JCP 2001, IV, 1638, RTDCOM. 2001, p. 783, note Gilles Paisant; see also RTDCOM. 2003, p. 175, note Gilles Paisant.

4. Effective Relief Rarely Applied

Nonetheless, despite their broad construction of *possible* application of global payment deferrals and discharge, commissions and courts have *actually* applied these “extraordinary” measures of relief quite rarely. A 2001 Banque de France survey revealed that “extraordinary” recommendations constituted only 38% of all recommendations submitted to the courts.²⁶¹ This represents only 10% of all cases handled by the commissions.²⁶² The ultimate relief of discharge of debt was recommended in only 17% of the “extraordinary” cases, only about 2% of all of the cases administered by the commissions.²⁶³

Later statistics reflect that the commissions have continued to confine “extraordinary” relief to only a few cases, but the ratio of “extraordinary” to “ordinary” recommendations has grown recently. The commissions recommended global payment deferrals and discharges in between 10% and 13% of all administered cases from 2001 to 2004, but the percentage of total recommendations that included these “extraordinary” measures grew from about 36% in 2001 and 2002 to about 45% in 2003 and 2004.²⁶⁴ The percentage of recommended discharges of debt has increased slightly, as well. Recommendations for some sort of discharge rose from about 18% of all “extraordinary” recommendations in 2001 to about 30% in 2003 and 2004, and from 1.7% of all administered cases in 2001 to about 4% in 2003 and 2004.²⁶⁵ The trend is toward growth of these “extraordinary” solutions, but the trend line is rising extremely slowly. Once again, the French commissions appear to be vigilantly guarding the ultimate relief of discharge of debt, offering it to only a choice few.

261. See BANQUE DE FRANCE SURVEY, *supra* note 115, at 2–3, 25. Although the survey included only cases submitted to the commissions between April 9 and June 8, 2001, its data accurately reflected the general percentage of the various “levels” of relief offered. For example, the study analyzed 8600 cases resulting in either a payment plan or recommendations, of which, 72% (6200) represented agreed payment plans. See *id.* at 2. This is consistent with the approximately 70% of cases concluding with an agreed plan in each year between 1996 and 2003. See *supra* note 150.

262. See BANQUE DE FRANCE SURVEY, *supra* note 115, at 2 (reporting 8600 cases resulting in agreed plans or recommendations, and 2400 cases involving recommendations, of which 38% equals 912 cases of “extraordinary” recommendations).

263. See BANQUE DE FRANCE SURVEY, *supra* note 115, at 2, 26 (reporting 8600 total administered cases, and of 2400 cases involving recommendations, 6.5% (156) involved discharge of debt).

264. See AFSF STATISTICS 2004, *supra* note 150 (reporting about 30–40,000 recommendations per year from 2001 to 2004, of which 11–19,000 were “extraordinary”).

265. See AFSF STATISTICS 2004, *supra* note 150 (reporting 2036 recommended discharges in 2001, 3368 in 2002, 5327 in 2003, and 5845 in 2004).

D. Level Three, "Personal Recovery":
Toward a U.S.-Style System

The 2001 survey by the Banque de France provided the impetus for the latest round of reform. The data reported in that survey suggested to legislators that the commissions were not implementing effective relief for the most over-indebted consumers.²⁶⁶ Legislators noted with concern that, although 27% of debtors exhibited no ability at all to repay any of their debts, only a small fraction of debtors ultimately received effective relief, either through voluntary remission of debt by creditors or through court-imposed discharge.²⁶⁷ The data from this survey revealed the depths of financial despair to which some consumers had sunk. A significant fraction of debtors were not only "insolvent," but their insolvency was clearly not a transitory condition. From the outset their files clearly showed that these debtors would remain unable to pay any significant portion of their debts even after a two-year global payment deferral.²⁶⁸ For these debtors, the "moratorium" represented a pure formality, and their complex cases placed a grossly disproportional administrative burden on the commissions.²⁶⁹ These debtors needed efficient and effective relief immediately.

1. "Final" Legislative Reform

Thus, the legislature took up consumer debt relief yet again in the summer of 2003 and finally introduced a "fresh start"²⁷⁰ procedure for discharging all debts immediately. Designed to offer a "second chance" to the most deeply indebted consumers,²⁷¹ the latest and final level of French consumer debt relief strongly resembles the U.S. consumer bankruptcy

266. See SÉNAT, AVIS, DOC. NO. 404, *supra* note 125, at 12; SÉNAT, AVIS, DOC. NO. 405, *supra* note 112, at 151–52; ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1002, at 10 (2003), available at <http://www.assemblee-nationale.fr/12/pdf/rapports/r1002.pdf>.

267. See SÉNAT, AVIS, DOC. NO. 405, *supra* note 112, at 151–52 (citing the Banque de France's survey data); ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1002, *supra* note 266, at 10 (same).

268. See COMITÉ CONSULTATIF DU CONSEIL NATIONAL DU CRÉDIT ET DU TITRE, RAPPORT 2002–2003 § 2.2.2.2 (2003), available at http://www.banquedefrance.fr/banque_de_france/fr/telnomot/infobafi/rapcc_02_03.pdf.

269. See ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1003, TOM III, at 36 (2003), available at <http://www.assemblee-nationale.fr/12/pdf/rapports/r1003-3.pdf> (noting that the new procedure would greatly alleviate the burden on the Banque de France and the commissions, as the most critical one-third of cases represented on average 80% of the administrative burden of the commissions).

270. The French purposely adopted the U.S. term, translating it literally "nouveau départ." See, e.g., SÉNAT, AVIS, DOC. NO. 404, *supra* note 125, at 15; SÉNAT, AVIS, DOC. NO. 405, *supra* note 112, at 164; Cyrille Charbonneau & Frédéric-Jérôme Pansier, *Présentation des dispositions relatives au surendettement dans la loi d'orientation et de programmation pour la ville et la rénovation urbaine*, GAZ. PAL. 2003, 2765, at 2765.

271. See, e.g. ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1003, *supra* note 269, at 13–14.

model: Eliminating the payment-plan stage altogether, the new measures call for liquidation of the debtor's assets almost immediately after the filing of the case, after which the court swiftly orders a discharge of all indebtedness.

Proposals for a U.S.-style system of immediate liquidation and discharge had circulated from the very first consideration of consumer debt relief in France nearly fifteen years ago. Indeed, these proposals preceded the payment-plan-oriented proposals that ultimately emerged as the *Loi Neiertz*²⁷² in 1989. Since as early as 1877, in the northeastern departments of Upper Rhine, Lower Rhine, and Moselle, local law has offered indebted consumers relief in a procedure called civil bankruptcy (*faillite civile*), essentially a streamlined version of the "commercial bankruptcy" available to merchants throughout France.²⁷³ This civil bankruptcy is virtually identical to Chapter 7 consumer bankruptcy in the United States, although the consumer has to establish her "insolvency" to qualify for relief.²⁷⁴ The Secretary of State for Consumer Affairs originally recommended in January 1989 that this U.S.-style *faillite civile* simply be extended to the whole of France.²⁷⁵ Again in April 1989, similar proposals emerged, along with a slightly modified proposal suggesting a combination of possible payment plans and immediate discharges.²⁷⁶

Legislators rejected these proposals to adopt civil bankruptcy more broadly for a number of reasons. Primary among them were: (1) fear of encouraging irresponsible borrowing by debtors; (2) concerns about the high cost of the procedure (as high as F 20,000, around \$3000²⁷⁷); (3) worry about an increased burden on the courts; and (4) desire to avoid the social and economic "infamy" associated with public announcements of the names of debtors benefiting from the procedure.²⁷⁸ After over a decade of struggling with "ordinary" and "extraordinary" payment plans under the *Loi Neiertz*, however, the government and legislature finally had to acknowledge the utility of the simple and effective *faillite civile* model and the ease with which its pitfalls could be avoided.²⁷⁹

272. See *supra* note 109 for an explanation of this common designation of the French consumer bankruptcy law.

273. See, e.g., Jean-Luc Vallens, *La faillite civile: Une institution du droit local d'Alsace et de Moselle*, JCP 1989, I, 3387, ¶ 1.

274. See *id.* ¶¶ 16, 23; KHAYAT, *supra* note 9, at 26–29.

275. See Salomon, *supra* note 135, at 19.

276. See Paisant, *supra* note 29, ¶ 8.

277. See ASSEMBLÉE NATIONALE, REP. NO. 856, *supra* note 115, at 34.

278. See, e.g., HYEST & LORIDANT, *supra* note 25, §§ I.A.1, I.A.2(a), III.A.2; Sinay-Cytermann, *supra* note 1, ¶ 4; Côte, *supra* note 2, ¶ 39.

279. See SÉNAT, AVIS, DOC. NO. 405, *supra* note 112, at 158.

The legislature explicitly modeled its latest form of debt relief on the *faillite civile* system still available in Alsace and Moselle.²⁸⁰ Mindful of serious politico-rhetorical issues, though, legislators deftly avoided the term “bankruptcy” (*faillite*), calling their new level of relief “personal recovery” (*rétablissement personnel*).²⁸¹

Unlike the U.S. model, both in theory and in practice, the French system reserves this “ultimate” measure of relief for those few debtors who are most financially overburdened and economically marginalized. This final level of relief is available only to debtors whose situation the commission identifies as “irremediably compromised.”²⁸² This term of art is defined as “the manifest impossibility to put in place the treatment measures” in articles L.331–6, L.331–7, and L.331–7–1; that is, a payment plan with “ordinary” or “extraordinary” recommendations.²⁸³ The National Assembly originally proposed adding specifically that it must be manifestly impossible *to discharge the debtor’s entire debt burden* through implementation of “ordinary” or “extraordinary” measures, *given the debtor’s current and future assets and income*.²⁸⁴ The Senate, however, rejected this proposal. The Senate preferred a policy strongly emphasizing *any* possible application of the “traditional” payment-plan procedure, minimizing the use of the new “personal recovery” procedure.²⁸⁵ The Senate strongly opposed allowing debtors to equate liquidation of their property with discharge of all of their debts while continuing to benefit from “substantial and stable revenue” without being required to contribute anything to their creditors.²⁸⁶ This vague definition is designed to allow the greatest margin of flexibility for the commissions and courts.²⁸⁷

Thus, a U.S.-style “get-out-of-jail-free” discharge of liability is available only to French debtors who are so overburdened that no payment plan, even one extending over ten years, could possibly retire any significant portion of their debts.²⁸⁸ If the debtor might pay off even a

280. See, e.g., ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1003, *supra* note 269, at 14, 81; ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1001, *supra* note 112, at 12, 32; SÉNAT, AVIS, DOC. NO. 404, *supra* note 125, at 15, 61. In 1997, Senators Hyst and Loridant had proposed a system somewhat similar to the one ultimately adopted in 2003. See HYEST & LORIDANT, *supra* note 25, § III.B.5.

281. See C. CONSOMM. art. L.330–1 (2004); see also Côte, *supra* note 2, ¶ 39 (noting the rhetorical issue).

282. See C. CONSOMM. art. L.331–3 (2004).

283. See *id.* art. L.330–1 (2004).

284. See ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1001, *supra* note 112, at 21, 51.

285. See SÉNAT, AVIS, DOC. NO. 404, *supra* note 125, at 23, 49–51.

286. See *id.* at 50–51.

287. See, e.g., Côte, *supra* note 2, ¶ 29.

288. See ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1002, *supra* note 266, at 15 (noting that the new procedure was needed by that 27% of debtors with no payment capacity at all);

significant portion of debt, a combination of “ordinary” and “extraordinary” measures in a payment plan remains the preferred solution.²⁸⁹ Indeed, one of the provisions of the new procedure reminds the judge that, if she believes that “judicial liquidation can be avoided, the judge shall” instead establish a payment plan containing “ordinary” measures (payment extensions and interest rate reductions).²⁹⁰ Additionally, if the court subsequently discovers that the debtor’s situation is no longer “irremediably compromised,” the judge must return the case to the commission for the development of an agreed or recommended payment plan.²⁹¹

2. The Process of “Personal Recovery”

Here once again, the commission remains the gatekeeper to relief. After the debtor files a declaration, the commission must determine within six months whether the debtor’s situation is “irremediably compromised.”²⁹² Only if the commission so finds, may it then direct the case to the court for the opening of a procedure of “personal recovery.”²⁹³ Within one month, the court verifies the “irremediably compromised” nature of the debtor’s situation, as well as her good faith, and enters an order opening a “personal recovery” proceeding.²⁹⁴

ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1003, *supra* note 269, at 25, 36, 82 (suggesting that the new procedure was designed for “the most critical one-third of cases,” including those involving “a great number of creditors”).

289. See SÉNAT, AVIS, DOC. NO. 404, *supra* note 125, at 51; Charbonneau & Pansier, *supra* note 270, at 2766. See also *supra* note 260 and accompanying text (describing the French high court’s acceptance of the notion of combining required partial payment of debt with “extraordinary” recommendations for partial discharge). Indeed, carrying forward its insistence on requiring maximal efforts from debtors to pay something to their creditors, the legislature imposed a new requirement on the old U.S.-style “*faillite civile*” still in force in Alsace and in Moselle. Today, for the first time, the court can require a contribution from the debtor, payable to creditors over a period of up to two years, as a prerequisite to *faillite civile* relief. See *id.* at 83.

290. See C. CONSOMM. art. L.332–10 (2004). The legislative history suggests that such a situation might arise because the judge, from a position of authority, might be more persuasive than the Banque de France in cajoling creditors into agreeing to a reasonable plan involving remission of part of their claims. See ASSEMBLÉE NATIONALE, AVIS, DOC. NO. 1003, *supra* note 269, at 86.

291. See C. CONSOMM. art. L.332–12 (2004).

292. See C. CONSOMM. art. L.331–3 (2004).

293. See *id.* If the commission fails to make a determination within nine months, or if the debtor disagrees with the commission’s negative determination, the debtor may lodge a request directly with the court to open a procedure of “personal recovery.” See *id.* art. L.332–5 (2004).

294. See C. CONSOMM. art. L.332–6 (2004). The opening of a “personal recovery” procedure acts as an immediate and automatic stay of all non-support collections actions initiated against the debtor. See *id.*; cf. 11 U.S.C. § 362 (2004) (similarly staying actions against the debtor after the commencement of U.S. bankruptcy proceedings). For all other cases, which

After the case is officially opened, the procedure progresses much like the process in U.S. Bankruptcy Court. Either the judge²⁹⁵ or a court-appointed trustee²⁹⁶ identifies and verifies the claims against the debtor, and catalogues the debtor's income²⁹⁷ and available assets,²⁹⁸ although one suspects that most debtors at this stage will have very few if any available assets.²⁹⁹ If the debtor has available assets, the trustee has four months to catalogue them, and either the trustee or a liquidator will proceed to sell them and partition the proceeds among creditors.³⁰⁰ This procedure does not require the debtor to dedicate any of her future income to payment of creditors—presumably because, if she had any significant seizable future income, she would be ineligible for this procedure, and the court would impose an “ordinary” or “extraordinary” payment plan, perhaps with a partial discharge.

Upon completion of the sale—or after the court has established that the debtor has no available assets—the court announces the closure of the proceedings for “asset insufficiency.”³⁰¹ Such closure signals the immediate “erasure” (discharge) of all of the debtor's non-professional debts,³⁰² other than those few specifically excepted from discharge.³⁰³ The court may, but need not, order the debtor to undertake measures of “social

progress through the commission, the debtor or the commission must request that the court enter a stay of collections actions. *See* C. CONSOMM. art. L.331–5 (2004).

295. Because most cases at this stage will involve few if any available assets, the judge alone, by default, will make the required findings regarding the debtor's economic and social situation, presumably based only on the case file. *See* C. CONSOMM. art. L.332–7 (2004); Côte, *supra* note 2, ¶ 35.

296. The trustee, if any, is paid €200 (\$240) for cataloguing the debtor's “economic and social situation.” *See* Arrêté [Order] of Mar. 29, 2004, art. 1, available at <http://www.legifrance.gouv.fr/imagesJO/2004/063/JO200406364.pdf>. If the debtor has no available assets, this fee is paid either out of the debtor's future income—if the court so orders—or is borne by the state. *See id.* art. 1; C. CONSOMM. art. R.332–13 (2004). If the debtor has seizable assets, the trustee and liquidator receive a portion of the sale proceeds. *See id.* art. 2.

297. The trustee must review the debtor's income in one last-chance effort to revert to a payment plan. *See* C. CONSOMM. art. R. 332–19 (2004).

298. *See* C. CONSOMM. arts. L.332–6, L.332–7 (2004).

299. The law does not explicitly incorporate the list of assets that are exempt from seizure outside “bankruptcy.” Instead, it states that “movable goods necessary to the debtor's ongoing life and non-professional goods indispensable to the exercise of the debtor's professional activity” are excluded from liquidation in the “personal recovery” process. *See* C. CONSOMM. art. L.332–8 (2004). This definition is very similar to the one for exempt property outside of “bankruptcy,” although most cars are clearly exempt under the new definition, and the Senate noted the similarity with approval. *See* SÉNAT, AVIS, DOC. No. 404, *supra* note 125, at 67–68; *see also* Charbonneau & Pansier, *supra* note 270, at 2768.

300. *See* C. CONSOMM. art. L.332–8 (2004). The sale can be amicable (private sale) or forced (public auction), and the liquidator may take as long as twelve months to complete it. *See id.*

301. *See* C. CONSOMM. art. L.332–9 (2004).

302. *See id.*

303. *See supra* note 243.

follow-up.”³⁰⁴ The content of these measures is vested in the unfettered discretion of each judge, but the legislative history suggests that the debtor might be required to seek counseling on how to manage a budget.³⁰⁵ Debtors can undergo a “personal recovery” as often and as many times as necessary.³⁰⁶

3. A Slow Start for the New Procedure

The new “personal recovery” procedure was designed for the 25% to 33% of debtors with no payment capacity,³⁰⁷ and legislative planners estimated that the new procedure would implicate about 35,000 cases annually.³⁰⁸ During the first several months of the new procedure, though, the commissions have sent relatively few cases to the courts for “personal recovery” proceedings, and not all debtors have agreed to go. In the first ten months of availability of the new procedure,³⁰⁹ the commissions considered 124,007 cases for referral to the courts for “personal recovery.”³¹⁰ Of these, the commissions referred only 22,030 cases, retaining the remainder in the “traditional” process.³¹¹ Thus, the new procedure has been invoked in about 18% of cases in which it was considered, which constitutes just under 14% of all cases administered

304. See C. CONSOMM. art. L.332–9 (2004).

305. See ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1003, *supra* note 269, at 85. For an interesting discussion of the practice of several Chapter 13 trustees implementing similar programs in the United States, see Jean Braucher, *Debtor Education in Bankruptcy: The Perspective of Interest Analysis*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 319, 323–32 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

306. Oddly enough, one can receive a *partial* discharge only once every eight years. See C. CONSOMM. art. L.331–7–1 (2004). Early proposals suggested limiting the “personal recovery” total discharge procedure to once in a lifetime. See ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1003, *supra* note 269, at 88; ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1002, *supra* note 266, at 28. The Senate rejected these proposals, noting that some people may need a “fresh start” more than once during their lifetimes. See SÉNAT, AVIS, DOC. No. 404, *supra* note 125, at 23, 74; SÉNAT, AVIS, DOC. No. 405, *supra* note 112, at 174. Nonetheless, the courts might interpret the requirement of “good faith” to exclude “serial filers” from later proceedings. See Rondey, *supra* note 208, at 2166.

307. See *supra* note 288.

308. See ASSEMBLÉE NATIONALE, AVIS, DOC. No. 1001, *supra* note 112, at 5. This figure fairly represents 27% of the 134,000 total administered cases from 2003. See AFSF STATISTICS, *supra* note 115 (showing 134,261 cases in which the agreed plan phase had concluded, either successfully or not, in 2003).

309. The new procedure has been available only since February 25, 2004, the day on which an implementing regulation appeared in the Official Journal. See Decree No. 2004-180 of Feb. 24, 2004, J.O., Feb. 25, 2004, p. 3757, D.S.L. 2004, 611; MINISTÈRE DÉLÉGUÉ À LA VILLE ET À LA RÉNOVATION URBAINE, INFORMATION PRESSE, RÉFORME DU SURENDETTEMENT DES PARTICULIERS: PUBLICATION DU DÉCRET D’APPLICATION (2004), available at <http://www.ville.gouv.fr/pdf/actualite/presse/surendettement-2004.pdf>.

310. See AFSF STATISTICS 2004, *supra* note 150.

311. See *id.*

during this period.³¹² Currently available statistics encompass relatively few cases pending longer than the six-month period for consideration of new cases, so these already significant numbers may rise in the coming months.³¹³ Initial indicators suggest that commissions remain somewhat reticent but are beginning to accept the “ultimate” form of relief.

Surprisingly, many debtors also apparently remain reticent. The debtor must agree to referral of her case for the new proceeding³¹⁴ Of the 22,030 cases referred thus far, only 16,321 debtors have agreed to go forward with a “personal recovery” proceeding.³¹⁵ Not every debtor has indicated her assent or refusal, but 2347 have affirmatively refused.³¹⁶

E. *The Road Ahead*

In its fifteen-year existence, the French law of “consumer overindebtedness” has never gone longer than five years without an amendment. The Banque de France and others have been monitoring the system carefully, and the legislature has been quick to respond to perceived deficiencies. The next round of reforms is likely no more than a few years away, and at least three trends suggest possible areas ripe for legislative reevaluation.

1. Rising Filings: A System Under Increasing Stress

Just like in the United States and Germany, consumer overindebtedness filings are significantly on the rise in France. In the first year of the *Loi Neiertz*, tens of thousands of requests for relief overwhelmed the commissions and courts: Over 90,000 French consumers sought relief from their debts in 1990.³¹⁷ Filings fell off significantly over the subsequent years, but then surged at the end of the 1990s. Total filings returned to their 1990 level in 1997, with over 95,000 filings, then rocketed up to nearly 118,000 in 1998 and 142,000 in 1999.³¹⁸ As the

312. See *id.* (reporting 159,222 cases in 2004 referred for personal recovery or concluding with an agreed plan or commission recommendation).

313. Future monthly reports of the statistics of the over-indebtedness commissions will be indexed at <http://www.asf-france.com/COMM/optcomm/publications/Selcirculaires/selection.htm>.

314. See C. CONSOMM. art. L.331-3 (2004).

315. See AFSF STATISTICS 2004, *supra* note 150.

316. See *id.*

317. See BANQUE DE FRANCE SURVEY, *supra* note 115, annex 1 bis (reporting 90,174 total filings in 1990).

318. See *id.* (reporting 68,075 filings in 1991; 63,830 in 1992; 68,863 in 1993; 68,608 in 1994; 70,112 in 1995; 86,999 in 1996; 95,756 in 1997; 117,854 in 1998; and 142,219 in 1999).

twenty-first century opened, nearly 150,000 French consumers flocked to the commissions.³¹⁹

The last three years have witnessed sustained filing levels, and recent statistics portend no easing of the burden on the system. Nearly 138,000 consumers filed for debt relief in 2001, rising to 145,000 in 2002, 165,000 in 2003, and 188,000 in 2004.³²⁰ These numbers undoubtedly will begin to take a heavy toll on an already overstressed system of commissions and courts in the months and years to come. The commissions seem to be making little headway in dealing with the backlog of approximately 70,000 cases that has awaited commission action for quite some time.³²¹

We may well see a simplification of the system over the next several years as the commissions begin to groan under the weight of tens of thousands of relatively complex cases. The statistics thus far suggest that the commissions are beginning to ease their burden by diverting more cases to the simplified "personal recovery" system,³²² and this trend may well continue or even accelerate.

2. Repeat Filers and an Impending Breakdown of the Plan Stage

Compared to their northern-European neighbors, French consumers carry a much lighter debt burden,³²³ yet consumer debt-relief filings in France outpace those in Germany nearly three to one.³²⁴ Why? The Banque de France suggests that a combination of factors accounts for the rise in filings in France, but prominent among them is a high level of repeat filings.³²⁵ In its 2001 survey, the Banque de France revealed that 30% of the cases surveyed represented repeat filers.³²⁶ The primary reason why these debtors had filed for relief a second time was the expiration of a payment deferral in a plan that initially failed to provide effective relief.³²⁷ Another substantial portion of repeat filings was attrib-

319. See *id.* (reporting 148,435 total filings in 2000).

320. See AFSF STATISTICS 2004, *supra* note 150.

321. Data on the backlog of cases in process or waiting during the past 12 months are available in the individual statistical reports for each month, available at <http://www.asf-france.com/COMM/optcomm/publications/Selcirculaires/selection.htm>.

322. See *supra* Part II.D.3.

323. See *supra* note 36.

324. See *supra* note 105 (reporting only 60,000 consumer insolvency filings in Germany in 2003).

325. See Vatin, *supra* note 127, at 112.

326. See BANQUE DE FRANCE SURVEY, *supra* note 115, at 27.

327. See *id.* at 27 & tbl. 35 (reporting that "expiration of a deferral" accounted for 45.9% of all repeat filings).

utable to a change in circumstance that made compliance with the payment plan impossible.³²⁸

These findings support earlier warnings that the enormously successful payment-plan stage of the system is poised for an impending breakdown. In the late 1990s, the government consumer agency had suggested that 75% of all pending payment plans were destined for failure.³²⁹ In a system where 80%–85% of cases conclude with a payment plan,³³⁰ problems with those plans threaten to seriously undermine the system, particularly if a substantial portion of affected debtors are forced to seek relief a second time. This Article has described fundamental problems with numerous plans negotiated or imposed in the 1990s,³³¹ most critically, a consistently deficient budget left to debtors to cover ongoing expenses.³³² If debtors have not yet felt the pain of these miserly plans, it is likely only a matter of time.

With an average duration of 8 to 10 years, a sharply increased number of French payment plans implemented in the late 1990s will conclude over the next several years. Unfortunately, no statistical system tracks the ultimate fate of these plans, but a spike in filings—including a substantial number of second-time filers—attests to a coming crisis. Even if the commissions now have learned from experience and are recommending more feasible plans, the next several years will likely testify to their mistakes of the past. We can expect to see a growing number of failed plans in France in the coming years.

3. Serious Inequities Across Districts: The Problem of Local Legal Culture

United States scholars have observed and criticized the phenomenon dubbed “Local Legal Culture,”³³³ in which similar cases receive vastly different treatment depending upon the extra-legal culture of the locale in which the case is treated. If nothing else can be said about the future of the French consumer debt-relief system, one can predict with absolute confidence that the Local Legal Culture phenomenon will pose a continuing problem.

328. See *id.* (reporting that change in circumstance accounted for 33.72% of repeat filings).

329. See *supra* note 173.

330. See *supra* notes 150 and 215 and accompanying text.

331. See *supra* Part II.B.2.

332. See *supra* Part II.B.2(c).

333. See, e.g., Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994); Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25 (1998); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

The legislature addressed the serious problem of inequality among commissions in the allocation of payment plan budgets,³³⁴ but significant disparities continue.³³⁵ Likewise, commissions differ widely in the relief they are willing to recommend in payment plans. More fundamentally, the requirements for access to the most effective relief—discharge of debt—are defined in such a vague way (“insolvency” and “irremediably compromised”) as to make wide variances across districts inevitable.

German lawmakers largely avoided these problems by requiring the same level of payment over the same number of years from all debtors, and in granting the ultimate relief of discharge to all debtors who make it through the six year “good behavior period.”³³⁶ French legislators opted for a more discretionary U.S.-model. Perhaps positive experience across the northeastern border will ultimately convince French lawmakers to revisit the law with an eye to avoiding the pernicious effect of Local Legal Cultural variances.

III. WHAT CAN THE U.S. LEARN FROM ALL OF THIS?

The well-documented development of the French consumer debt relief system offers many lessons for United States policymakers. It is all too easy simply to transpose numbers and suggest that what works in France should work in the United States or elsewhere. But at the very least, evaluating consumer debt relief from the perspective of another modern system sheds useful light on United States consumer bankruptcy policy. One can and should ask whether and to what extent some general themes prevalent in France might improve U.S. practice. I will conclude by commenting on three points that strike me as particularly provocative for U.S. policy.

A. *Is There a “Problem” of Overly Elevated Filings in the United States?*

Data on consumer indebtedness and levels of bankruptcy filings in France challenge the notion that the United States has a problem with excessive consumer bankruptcy filings. The French are renowned for their “historically low . . . propensity to borrow,”³³⁷ yet consumer over-indebtedness filings continue to climb higher each year. Between 2001 and 2003, nearly 450,000 French consumers sought legal relief from

334. See *supra* notes 182–183 and accompanying text.

335. See COMITÉ CONSULTATIF DU CONSEIL NATIONAL DU CRÉDIT ET DU TITRE, *supra* note 268, § 2.2.3.2.

336. See *supra* text at note 102.

337. See MOODY'S INVESTORS SERVICE, *supra* note 32, at 7.

their debts.³³⁸ In other words, three-quarters of one percent of the entire French population declared themselves unable to deal with their debts over the last three years.³³⁹ During the same period, over 4.6 million U.S. consumers declared bankruptcy.³⁴⁰ This represents 1.6% of the total U.S. population.³⁴¹ Thus, in percentage terms, about twice as many U.S. consumers sought relief from their debts as did French consumers.

Consistent with these figures, the debt burden of U.S. consumers is about twice as heavy as that weighing on French consumers. The European Credit Research Institute reported that, in 1996, total household debt represented 49.8% of the disposable income of the average French household, but 91.3% of the disposable income of the average U.S. household.³⁴² Consumer (non-housing) debt represented 8.3% of average household disposable income in France, but 21.5% in the U.S.³⁴³ The fact that filing rates and debt loads bear the same ratio between France and the United States certainly cannot be viewed as “proof” of anything. But these numbers represent at least an intriguing coincidence that, in my view, suggests something important about the infatuation in the United States with elevated filing levels.

French statistics tend to belie any suggestion that high U.S. consumer bankruptcy filing rates reflect scheming consumers and an overly permissive relief system. Victorian notions of a lack of “responsibility” among U.S. consumers do not stand up to the similarly high filing rate of French consumers. The French system demands much more responsibility of filers than does the U.S. system, yet filing numbers are climbing in France at a rate comparable with the United States given the respective levels of consumer debt. Whether United States and French consumers rely more than they should on credit is a separate and more difficult question. A comparison of debt burden and frequency of filing, however, suggests that French and U.S. consumers seek relief in numbers that are largely consistent with the average debt burden in their country. A high case load seems to have less to do with how much “responsibility” the system demands of filers. Instead, a high rate of filings seems to track how heavily debt weighs upon the population of consumers.

I submit that the French figures at least call into question any claim that the United States has some “problem” with excessive consumer

338. See *supra* note 320 (reporting total filings of 448,833 from 2001–2003).

339. See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACT BOOK, France, People*, available at <http://www.odci.gov/cia/publications/factbook/geos/fr.html> (estimating total French population at just over 60 million as of July 2004).

340. See *supra* note 99 (reporting total filings of 4,616,349 from 2001–2003).

341. The U.S. Census website reports a total U.S. population of just under 294 million as of June 2004. See <http://www.census.gov>.

342. See *GUARDIA*, *supra* note 28, at 49 & tbl. A14.

343. See *id.* at 53 & tbl. A18.

bankruptcy filings. Both countries have learned that consumer lending and borrowing benefits both the general quality of consumer life and the overall economy, but accidents and misjudgments are a normal part of life, particularly for the average consumer. The problem is not providing relief to “too many” people who find themselves unable to cope due to misjudgments or unexpected “accidents of life.” The problem is deluging consumers with complex offers of credit when they are unprepared to understand their terms, appreciate their possible consequences, or plan for future income disruptions.³⁴⁴ The new open credit economy produces casualties, and U.S. policymakers should learn from their French colleagues to view the need to deal compassionately with those casualties not as a problem, but as a serious side effect of an open consumer credit system.³⁴⁵

B. Changing Attitudes: Could Negotiated Payment Plans Work in the United States?

Unlike the “liberal” U.S. model, the French consumer debt relief system emphasizes an element of “repayment morality.” In addition to offering relief to debtors in need, the emerging European consumer bankruptcy systems aim to inculcate the morality of paying one’s debts.³⁴⁶ This is clearly true in France and Germany. In both France and Germany, virtually every case begins with a negotiation with creditors and a good faith attempt at an agreed solution to the debtor’s problems. The results of these negotiations are striking: an agreed plan emerges from this stage in 70% of cases in France and 30% in Germany. Moreover, almost every debtor spends years either attempting to make some payment to creditors or awaiting a determination that any such attempt would be futile.

Would the U.S. system not benefit from similar efforts to emphasize payment morality? While it might impress upon debtors some sense of responsibility to force them into the process of negotiating with creditors, this process would likely produce far less satisfactory results in the United States for several reasons. First, the primary drivers of policy and practice in the United States and France occupy very different positions of trust and leverage with respect to creditors. Before the Banque de France stepped in to lobby creditors to cooperate in the plan process,

344. For a wonderful discussion of the psychological dimensions of consumers’ inability to plan for potential financial problems and the new theories of “behavioral economics,” see Saul Schwartz, *Personal Bankruptcy Law: A Behavioral Perspective*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 61 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

345. See Lagarde, *supra* note 222, ¶ 3; Morin, *supra* note 28, at 139.

346. See Niemi-Kiesiläinen, *supra* note 10, at 53–54, 59.

only 45% of cases ended with an agreed plan. As principal negotiator and liaison between the public and the debt relief system, the Banque de France deserves most of the credit for the astounding success rate of signing debtors and creditors to payment plans. In contrast, the lawyers and trustees in charge of the U.S. consumer bankruptcy system enjoy no such relationship with creditors. The administrative structure of the U.S. system thus offers little impulse for a significant movement toward feasible negotiated compromise plans.

Second, most French payment plans aim to retire 100% of creditors' claims. This might be possible given the smaller average debt loads of French consumers. But not only do U.S. consumers bear more debt, they also bear greater expenses for such items as health care, child care, and education. The few resources that French consumers are able to give up in their payment plans are eaten away in the United States by expenses not covered by government welfare programs. The *reste-à-vivre* (budget for debtor's living expenses) of U.S. plans would have to be considerably greater than those in France. If 25% of French debtors have absolutely no capacity to repay any of their debts, chances are that *most* U.S. debtors would have no payment capacity, and few could pay anything substantial. Consequently, U.S. creditors would have to give up all or large portions of their claims to support a payment-plan system in the United States. French practice has shown that creditors are loathe to accept this without significant outside pressure, and without a fundamental restructuring, the U.S. system offers no source for such outside pressure.

Finally, focusing on substance rather than form, we must not forget that vast numbers of French plans will ultimately end in failure. On the one hand, forcing all debtors to negotiate and attempt to fulfill their obligations might effectively change attitudes in the United States about greater financial responsibility. On the other hand, thrusting debtors into years of tight budgets and meager payments, only to allow most of them to fail in the end, will only show most debtors that diligence is futile in an age of declining wages, rising unemployment, and scores of low-income consumers not covered by adequate health insurance. Decades of practice in the United States have shown that consumer debtors are seldom able to complete a payment plan, particularly a plan that extends over many years. The benefit to creditors in these plans is largely illusory, and setting up consumers to fail seems more a cruel game than an effort at fostering responsibility.

Even if negotiated payment plans might not work in the United States, courts certainly could *impose* payment plans on debtors and creditors, as in the later stages of the French system. This might make sense from the perspective of "individual responsibility for debtors," but

the economic value to creditors of *realistic, viable* plans is likely to be severely limited, given the economic and social conditions of most over-extended U.S. consumer debtors. After reviewing the French and German systems, I believe that payment plans in an overwhelming majority of cases can serve only a rhetorical or pedagogical purpose—a very positive but limited goal. The German system accomplishes balance by requiring a “payment” period in every case but offering real protection to a livable amount of income. The reality of consumer economics virtually ensures that no German debtor will actually pay anything to creditors, yet the system steadfastly reminds debtors of their obligations and the dangers of the modern credit economy. So far, the French system seems to be taking itself too seriously, as the U.S. system might do if current “reform” proposals are adopted here. It is neither economically nor pedagogically sound to demand that most debtors promise to make payments that they are realistically unable to make. Both debtors and the system suffer from the endless cycle of filing and refiling that overly demanding plans produce. It has to end somewhere, and German lawmakers seem to have identified a much more meaningful end point.

At the end of the day, I remain convinced of the soundness of a system that demands some form of moderate, realistic payment plan of every debtor. But I am much less sanguine about the potential success of such a system in the United States, particularly the system envisioned in current proposals pending in Congress. Payment plans are fine as long as they are realistic. Both the German and French systems have progressed gradually from more to less demanding—and less to more realistic. But while German plans seem to be quite realistic, at least the early French plans did not, due in significant part to the wide discretion granted to the commissions. If a payment-plan system were to be adopted in the United States, I would hope that lawmakers would opt for a realistic, rational, German-type approach, but current proposals seem to be oriented much more along the lines of the stubbornly dogmatic, unrealistic French approach. The income of most U.S. consumers is already stretched to the breaking point. For debtors already past the breaking point, overly demanding plans with insufficient income reserves would serve no constructive purpose. Unfortunately, it appears as though an ill-considered policy of “getting tough on debt” is as much in vogue in the U.S. Congress as is the equally questionable policy of “getting tough on crime.”

Indeed, let us not forget that forcing plans on all debtors creates a significant administrative burden and substantial extra expense. I believe the educational benefits of a German-type plan system are worth the expense, so long as the costs are allocated sensibly and fairly. In Europe,

the burden and expense of such systems fall on the state—under current U.S. reform proposals, the added expense would fall mainly on debtors. In my view, this simply adds insult to injury.

*C. What's Good for the Goose . . .
Responsibility for Lenders, Too*

The rhetoric of financial responsibility tends to be very one-sided in the United States, but the greatest lesson that France has to offer the United States is that responsibility is a two-way street. While required negotiations and the preeminence of payment plans in the French system force debtors to take responsibility for their financial lives, other elements of the law explicitly call on lenders to bear their fair share of responsibility. The *Loi Neiertz* not only instituted a system of consumer debt relief, it also instituted a system of credit reporting.³⁴⁷ One of the explicit goals of the law was to make lenders more responsible in their practices of extending credit to consumers.³⁴⁸ The credit reporting system facilitates the achievement of this objective by making lenders bear their share of responsibility for consumer over-indebtedness.³⁴⁹

Lenders are effectively required to act responsibly by restricting consumer credit in light of negative information in the new credit reporting system.³⁵⁰ The law directs that, in deciding which measures of relief to recommend, “the commission shall take into account the knowledge of the debtor’s debt situation that each creditor might have had at the time of execution of the different contracts.”³⁵¹ Furthermore, the law suggests that the commission “may also verify that the contract was entered into with the seriousness imposed by standards of professional practice.”³⁵² Thus, the law encourages the commissions to sanction lenders who make foolish or unfounded loans, primarily those who extend credit to already overextended debtors.³⁵³ I have found no commentary on the

347. See Law No. 89-1010, *supra* note 109, art. 23; C. CONSOMM. art. L.333–4 (2004). The system reports only negative credit information, “payment incidents,” rather than all information concerning a consumer’s debt portfolio, as in the U.S. credit reporting system. See, e.g., SERVICES RENDUS À LA COLLECTIVITÉ: LE FICHER NATIONAL DES INCIDENTS DE REMBOURSEMENT DES CRÉDITS AUX PARTICULIERS, *available at* http://www.banquedefrance.fr/banque_de_france/fr/info/collect/3.htm; DIRECTION DES MOYENS DE PAIEMENTS SCRIPTURAUX ET DES SYSTÈMES D’ÉCHANGE, BANQUE DE FRANCE, BULLETIN DE LA BANQUE DE FRANCE, Sept. 1994, at 99, *available at* http://www.banquedefrance.fr/fr/telechar/bulletin/etud9_3.pdf.

348. See Morin, *supra* note 28, at 129, 137, 140; HYEST & LORIDANT, *supra* note 25, § III.C.2.

349. See Morin, *supra* note 28, at 129

350. See Marmoz, *supra* note 29, at 1402.

351. C. CONSOMM. art. L.331–7 (2004).

352. *Id.*

353. See, e.g., Marmoz, *supra* note 29, at 1402; cf. ZIEGEL, *supra* note 16, at 150–51 (discussing similar proposals in Canada).

commissions' practice in this area—perhaps the Banque de France has been unwilling to differentiate treatment among responsible and irresponsible lenders. But at least French lawmakers acknowledged that some lenders bear particular responsibility for consumer over-indebtedness and ought equitably to be held accountable.

Not only does U.S. law contain no analogous rule of “creditor responsibility,” the rules effectively shield creditors from any challenge to their lending behavior. When a U.S. debtor’s lawyer develops a Chapter 13 payment plan, U.S. bankruptcy law prohibits the plan from discriminating “unfairly” against any class of creditors.³⁵⁴ As far as I am aware, no one has ever attempted to classify separately all “irresponsible claimants” to be paid less than others. If this were ever attempted, though, I doubt that any court would accept this separate classification as “fair.”

One can easily imagine a great number of U.S. creditors who would fall into such an “irresponsible” class in the United States. The list would certainly begin with the “payday lenders” and other purveyors of “high-cost credit,” who lend to those whose credit histories make them “unacceptable risks” for “main-stream” lenders.³⁵⁵ Payday lenders, pawnshops, rent-to-own outlets, and home-equity “predatory” lenders have reaped enormous and growing profits over the last two decades.³⁵⁶ It would make perfect sense to hold them accountable for the distress that their “distressed lending” causes to consumers. Anyone who watches cable television is all too familiar with buzz-lines like the following: “Bad Credit? No Credit? Bankruptcy? No Problem!” These lenders would also occupy a prominent position on the “irresponsible” list. Would it not be perfectly equitable, as the French law suggests, to offer such creditors vastly inferior treatment in a plan? Even among more “main-stream” lenders, what about banks that issue credit cards to consumers who have borrowed the limit on several other cards, or banks that issue cards without verifying the employment or income reported, or banks that issue multiple credit cards to college students with little or no capacity to repay the charges?³⁵⁷ If card issuing banks maximize profits by relying on credit scores and inflating late and over-limit fees,³⁵⁸ rather than acting “responsibly” in checking a credit report and current em-

354. See 11 U.S.C. § 1322(b)(1) (2004).

355. For excellent discussions of the development of this growing segment of the U.S. credit market, see generally CHRISTOPHER L. PETERSON, *TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET* (2004); ROBERT D. MANNING, *CREDIT CARD NATION: THE CONSEQUENCES OF AMERICAN'S ADDICTION TO CREDIT* 121–23, 195–225 (2000).

356. See PETERSON, *id.*, at 17, 21, 25, 35–36; MANNING, *id.*, at 203–10.

357. For a discussion of these types of extremely common practices, see MANNING, *supra* note 355, at 27, 94, 121, 137–39, 159–93.

358. *Id.* at 94, 121.

ployment, should the system not take that into account when some consumers are inevitably unable to pay?

It ought to give policymakers pause that lenders spend millions of dollars to lobby Congress for reform of the consumer bankruptcy problem instead of simply acting more responsibly in their lending decisions. Consumer bankruptcy losses ought to be viewed as a cost of trading profits for responsibility. If the market demands profitability levels fueled by credit scores and truncated review of credit applications, the market must expect that a small percentage of borrowers will need relief from financial overextension. If responsibility is to become the cornerstone of U.S. consumer bankruptcy policy, perhaps policymakers should follow the European lead in more aggressively taking account of the responsibility of the supply side as well as the demand side of the market. The French system offers a final, simple lesson in taking a balanced approach to responsibility. Sometimes the simplest lessons are the most important.