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The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands

*Jason J. Kilborn**

Every self-respecting person will surely exert himself
to the utmost to repay debts in full whenever contracted.
At the same time, it seems sensible—indeed pedagogically responsible—
not to pursue people their whole lives for debts.[1]

ABSTRACT

This Article offers a unique perspective on the heavily revised U.S. consumer bankruptcy law, which went effect on October 17, 2005, in light of a surprising discovery: It turns out that the U.S. consumer bankruptcy system as "reformed" resembles in many critical respects the consumer bankruptcy system in place for the past six years in the Netherlands. As a result of this serendipitous U.S.-Dutch convergence, years of experience under the Dutch consumer debt relief system can provide a rare glimpse into the future of the new U.S. system. The Dutch law in practice has diverged in significant ways from legislative expectations, and such divergences might well be repeated—for better or worse—in the United States. In particular, comparisons between the Dutch and U.S. systems reveal latent weaknesses and portend an impending breakdown in the "credit counseling" and "means testing" parts of our new system. A comparative view of recent Dutch developments offers not only cause for concern, however, but also hope for some effective solutions.

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1. Handelingen II 1994/95, nr. 99, p. 6075 (comments of Rep. Van der Vlies, member of the Second Chamber). For a good discussion of the powers of the First and Second Chambers and the legislative structure and process in the Netherlands, see INTRODUCTION TO DUTCH LAW 300, 302–13 (J.M.J. Chorus et al. eds., 3rd rev. ed., 1999).

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In U.S. legal discourse, the notions of "legal transplants" and "globalization" more often than not seem to refer to the one-way dissemination of U.S. norms to other countries.[2] Seldom does one see any discussion of U.S. importation of foreign legal ideas. Indeed, most lawmakers in the United States seem generally hostile to foreign influences on U.S. law.[3] Nonetheless, it turns out that one of the most significant modern U.S. legal reforms has imported—quite inadvertently[4]—a framework strikingly similar to that of one particular foreign legal system.

This Article takes advantage of a rare double opportunity to break new ground in commercial, consumer, and comparative law. First, it offers one of the first detailed analyses of key elements of a

2. One recent article, for example, opens with the following sentence: "Since the end of the Second World War, and particularly following the end of the Cold War, the American legal system arguably has become the most influential legal system in the world." Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 1 (2004). This Article goes on to catalogue nearly two dozen other articles and books praising, criticizing, or just describing the influence of U.S. law on the laws and practices of other countries. *See id.* at 1–3 & nn. 1–17; *see, e.g.*, Brian R. Cheffins & Randall S. Thomas, *The Globalization (Americanization?) of Executive Pay*, 1 BERKELEY BUS. L.J. 233 (2004); Richard C. Breeden, *The Globalization of Law and Business in the 1990's*, 28 WAKE FOREST L. REV. 509 (1993).

3. For example, conservative politicians are apoplectic about Supreme Court Justice Anthony Kennedy's reference to foreign legal norms in his opinion invalidating the juvenile death penalty. *See* Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005); *see, e.g.*, *id.* at 1225–29 (Scalia, J., dissenting); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3, *available at* http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html. For a wonderfully lucid and insightful discussion of this issue, see Sarah H. Cleveland, *Is There Room for the World in Our Courts?*, WASH. POST, Mar. 20, 2005, *available at* http://www.utexas.edu/law/news/2005/032105_cleveland.html.

4. In the legislative record of the new U.S. consumer bankruptcy reform law, the Author found no reference whatsoever to any other developing system in Europe or elsewhere. This is not altogether surprising, as few people in the United States are aware of recent developments in Europe on this front, particularly in smaller countries like the Netherlands, in part due to the dearth of information on these systems in widely-available English-language sources. The Author has tried to improve this situation by producing articles on each of the new European systems. *See infra* note 6.

recent overhaul of U.S. consumer bankruptcy law, effective since October 17, 2005.[5] Undoubtedly, many analyses of the new reform law will follow, but this Article offers a unique perspective in light of a curious and surprising *second* discovery: it turns out that the new U.S. consumer bankruptcy law represents globalization in a more balanced sense. This Article reveals that Congress has in many respects adopted the consumer bankruptcy system that has been in place for the past six years in the Netherlands.[6] Since the late 1800s, the Netherlands and the United States have developed distinct but surprisingly parallel responses to consumer financial distress. This Article explores how the two systems have converged at the beginning of the twenty-first century. To complete the globalization picture, this Article also notes key similarities and differences between the Dutch system and the new consumer debt relief systems in neighboring European states, primarily Germany and France.

As a result of this serendipitous U.S.-Dutch convergence, years of experience under the Dutch consumer debt relief system can act as a sort of crystal ball, providing a rare glimpse into the future of the new U.S. system. The Dutch law "on the ground" has diverged from legislative expectations in significant ways, and such divergences might well be repeated—for better or worse—in the United States in coming years. In particular, comparison with Dutch experience reveals latent weaknesses and portends an impending breakdown in the credit counseling and "means testing" parts of our new system. In particular, the new U.S. system will likely face serious challenges due to mandatory participation by the financially troubled credit counseling industry and due to mandatory payment plans that hold some debtors to quite restrictive household budgets for five long years. Credit counseling will likely delay but not avoid bankruptcy, and many of those forced into payment plans face likely failure in their steep climb out of financial distress. Luckily, a final parallel with Dutch law suggests that enlightened application of judicial discretion might assuage some of these concerns.

Part I situates the discussion by briefly noting the theoretical similarities and fundamental differences between the bankruptcy systems in the United States and the Netherlands from the late 1800s to 1979. Part II traces how the two systems began to converge in 1979 by adopting parallel but essentially opposite systems of consumer credit (debt) counseling. Finally, Part III describes how the two systems have finally arrived on largely common ground. Part III.A explores the development and early implementation of the new Dutch consumer bankruptcy system, focusing on how the law has actually applied in the real world of consumer financial distress. This

5. *See infra* text accompanying note 199.
6. *See infra* Part III.B.

Part continues a larger project to chart recent developments in consumer debt relief law in Europe.[7] Part III.B introduces several key elements of the revised U.S. consumer bankruptcy system and compares them with similar elements in the Netherlands. Drawing on the preceding analysis of Dutch experience, this final Part paints a fuller picture of what is likely to come—both good and bad—under the new U.S. law.

I. BANKRUPTCY IN THE UNITED STATES AND THE NETHERLANDS BEFORE 1979

In both the United States and the Netherlands, a legal system of bankruptcy has been available to consumers—that is, individuals not engaged in entrepreneurial activity—since the late 1800s. The U.S. Bankruptcy Act of 1898 arose, as several predecessor laws had, after a period of speculation in securities that led to the financial collapse of scores of individuals, some rather prominent.[8] Although consumerism and the great democratization of credit would not really get underway until the early 1900s,[9] the stage was set early in the United States for open access to a system of debt relief for all comers. Moreover, the 1898 Act firmly established the principle that bankruptcy in the United States would mean immediate and unconditional elimination of prior indebtedness (discharge) and a "fresh start" for debtors to begin a new economic life.[10]

Bankruptcy in the Netherlands, as in other European countries, has always carried an entirely different meaning. The Dutch Bankruptcy Law (*Faillissementswet*) has been in force since 1896, and like its U.S. analogue, it applies to individuals of all vocations,

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7. Jason 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, 269 (2004) [hereinafter, Kilborn, *German Law*]; Jason Kilborn, *La Responsabilisation de l'Economie: What the United States Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619, 636 n.115 (2005) [hereinafter, Kilborn, *French Law*]; Jason Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 AM. BANKR. INST. L. REV. (forthcoming spring 2006), *available at* http://ssrn.com/abstract=690802 [hereinafter, Kilborn, *Belgium and Luxemburg*].

8. *See* DAVID A SKEEL, JR. DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 24–28 (2001); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002).

9. LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 124–203 (1999).

10. Of course, some debts have always been excluded from the discharge, but this sort of detail lies beyond the scope of this paper. For a brief discussion of the scope of the "fresh start" offered by the 1898 Act and its four predecessors, see Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 859–61 (2003).

eliminating a prior restriction to merchant debtors.[11] To this day, though, bankruptcy in the Netherlands offers not relief for debtors, but a general collection device for creditors.[12] Dutch bankruptcy proceedings conclude with unpaid creditors retaining their right to pursue the debtor for life, seizing any property beyond the small modicum of assets shielded as exempt from creditors' claims.[13] The guiding principle is not the U.S. fresh start, but the old Roman maxim *pacta sunt servanda*—contracts must be fulfilled. Only through a new agreement with creditors to replace the old defaulted obligations could debtors escape lifelong liability.[14]

II. REFORM IN 1979 AND THE CHALLENGES OF THE 1990S: THE ORIGINS OF CONVERGENCE

The rise of consumerism and an expansion of credit to ordinary consumers in the 1950s and 1960s placed great stress on both nations' bankruptcy systems. As a result, the Netherlands and the United States both enacted reforms in 1979. Although these reforms took very different forms, the parallel in timing is striking. How these two systems changed in 1979 would powerfully influence the way they further developed toward the end of the century.

A. *The U.S. Bankruptcy Code and the Rise and Fall of Credit Counseling*

No great economic crisis prompted the eventual overhaul of the 1898 U.S. Bankruptcy Act.[15] The structure of the Act, however, proved ill-suited to the burgeoning bankruptcy practice in the United States after World War II. As spending and borrowing expanded rapidly among the new class of consumers,[16] members of this group began to overwhelm the bankruptcy system. Annual bankruptcy filings grew from about 10,000 in 1946 to over 200,000 in 1967, with

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11. Frits Hamminga, *Netherlands: Insolvency Proceedings*, *in* EUROPEAN INSOLVENCY PRACTITIONERS' HANDBOOK 193–94 (Sir Kenneth Cork & G.A. Weiss eds., 1984).

12. *Id.* at 195–96.

13. *Id.* at 195–96, 201; Kamerstukken II 1994/95, 22 969, nr.19, p. 24; Handelingen II 1994/95, nr. 99, p. 6073.

14. The Dutch law allows the court to impose a composition agreement on some recalcitrant creditors, but only if supermajorities in number and amount of claims vote in favor of a debtor-proposed settlement. *See id.* at p. 214.

15. Indeed, the reform act of 1978 was the first U.S. bankruptcy law not preceded by a major economic crisis or panic. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 942 (1979).

16. CALDER, *supra* note 8, at 291–97; Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 13–21 (2005).

the consumer share of these filings rising from 84% to 92%.[17] This avalanche of filings taxed the inefficient administrative structure of the system, producing high administrative costs and delays.[18]

1. The Bankruptcy Code and Chapters 7 and 13

Effective in October 1979,[19] a largely structural reform of the 1898 Bankruptcy Act produced the current U.S. Bankruptcy Code.[20] The current code creates a bifurcated system of bankruptcy relief for consumers in Chapter 7 and Chapter 13; the debtor chooses the chapter under which relief is sought. Before the most recent reform went into effect, about 70% of debtors filed under Chapter 7, continuing the original U.S. fresh-start approach. This approach immediately shields debtors from liability on most obligations (discharge) in exchange for handing over their non-exempt property to an appointed trustee for liquidation and distribution to creditors.[21] In the overwhelming majority of these cases, the trustee reports that the debtor owns no property that may be lawfully seized;[22] the case thus concludes with a discharge and fresh start after a total duration of about four months.

The other 30% of U.S. debtors have chosen to enter into a three- to five-year repayment plan under Chapter 13, which discharges debtors from their unpaid obligations only upon completion of the payment plan.[23] Debtors propose their own plans subject only to a few general requirements.[24] The most notable requirement is that the plan must dedicate to creditors all of the debtor's "disposable income," which is vaguely defined as that income "not reasonably necessary" for the debtor's household expenses.[25] Additionally, some courts require at least a certain minimum payment to creditors to

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17. H.R. DOC. NO. 93–137, at 2 (1973).

18. *See id.* at 2--4.

19. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, § 402(a) (1978).

20. 11 U.S.C. §§ 101–1330 (1978), *amended by* Pub. L. No. 109-8 (effective Oct. 17, 2005).

21. *See id.* §§ 521–22, 541–42, 701, 725–27 (1978), *amended by* Pub. L. No. 109-8 (effective Oct. 17, 2005).

22. *See, e.g.*, Robert D. Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 456 n.14 (1997); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 38 (1988).

23. *See* 11 U.S.C. § 1328(a) (2005), substantially amended by Pub. L. No. 109-8, effective Oct. 17, 2005. Some debtors may receive relief even if they do not complete their payment plans, but the requirements for such "hardship discharges" are quite strict. *Id.* § 1328(b).

24. *See id.* §§ 1322(a), 1325, *amended by* Pub. L. No. 109-8 (effective Oct. 17, 2005).

25. *See id.*. § 1325(b)(2). This will change for debtors with above-median income for their state when the most recent reform is implemented on October 17, 2005. The budgetary scheme of the law as revised is described below in Part III.B.2.b.

establish the debtor's good faith.[26] The required minimum dividend—or the lack of a required minimum—currently differs significantly from district to district, even within the same state.[27] Only about one-third of Chapter 13 debtors manage successfully to complete their payments and receive a discharge.[28]

2. DMPs and Credit Counseling in Crisis

Before the most recent amendments to the Bankruptcy Code, neither chapter required the debtor to attempt to negotiate an out-of-court payment plan with creditors.[29] Nonetheless, since the mid-1960s, some consumer debtors have delayed or avoided entering the bankruptcy system by attempting to negotiate alternate payment arrangements with creditors with the help of private credit counselors.[30]

Ironically, credit counseling in the United States was initiated not by welfare organizations, but by commercial banks. In response to rising default rates and personal bankruptcy filings among their consumer customers, banks funded the initial setup of a network of credit counseling agencies throughout the United States beginning in the 1950s.[31] Creditors sought to redirect consumers away from a

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26. *See* 11 U.S.C. § 1325(a)(3) (1978).

27. *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, Texas, required plans to offer 100% payment, but in Austin, TX, only 25–33%, in Cincinnati, OH, 70%, but in Dayton, Ohio, only 10%).

28. Teresa A. Sullivan et al., *Who Uses Chapter 13?*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 269, 273, 274–75, tbl. 1 (Johanna Niemi-Kiesiläinen et al. eds., 2003).

29. *See infra* Part III.B.1 for a discussion of the new credit counseling and financial management training requirements. Before the 2005 reform, Congress similarly refused to require a Chapter 13 payment plan as a quid pro quo for relief for debtors with significant future income. As this Author has argued before, the reasons for Congress' action seem wholly unconvincing. *See* Kilborn, *supra* note 9, at 892–94. The 2005 amendments will change this, too, although only for a small percentage of debtors. *See infra* Part III.B.2.

30. *See infra* note 31 and accompanying text for indepth discussion of credit counseling.

31. *See, e.g.*, S. REP. NO. 109-55, at 4, 34 (2005), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=sr055.pdf&directory=/diskb/wais/data/109_cong_reports> [hereinafter ABUSIVE PRACTICES]; DEANNE LOONIN & TRAVIS PLUNKETT, CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS 6 (Consumer Fed'n of Am. & Nat'l Consumer Law Center eds., 2003), *available at* http://www.law.upenn.edu/bll/ulc/UCDC/cfa-nclcreport.pdf [hereinafter CREDIT COUNSELING IN CRISIS]. These non-profit counselors formed an umbrella organization in 1951 called the National Foundation for Consumer Credit (NFCC) to coordinate counseling strategy and practices. National Foundation for Credit Counseling Who We Are, http://www.nfcc.org/AboutUs/aboutus_01.html (last visited Nov. 16, 2005). Between the mid-1980s and mid-1990s, the number of non-profit counseling offices expanded six-fold from 200 to more than 1,300 throughout the United States. *See id.* (reporting currently 1300 offices nationwide);

quick discharge of debt in the bankruptcy system and toward compromise repayment arrangements, called debt management plans (DMPs).[32] These DMPs generally call for 100% payment of outstanding debt (excluding secured debt, like home mortgage and car loans) over three to five years.[33]

To encourage debtors to enter into such DMPs, creditors offer reductions in accruing interest and late fees. To encourage counseling agencies to guide debtors into DMPs, creditors originally offered the agencies so-called "fair share" payments of 12–15% of the amounts paid by debtors to creditors through the DMPs.[34] These fair share payments represent the principal source of continuous funding for credit counseling in the United States. As a result of this DMP-focused funding model, counselors have increasingly focused on enrolling as many debtors as possible in DMPs that maximize payments to creditors (and, consequently, payments to the counseling agencies), rather than counseling debtors on the most suitable options for relief.[35]

Enormous growth in the volume of credit counseling and DMPs in the late-1990s led many creditors to reevaluate the expenses associated with supporting the counseling system. Many concluded that their fair share payments to the credit counseling industry constituted an excessive expense for creditors and an excessive

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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, 52 (1997) (noting the growth from 200 to 1200 by 1996). At the same time, a new group of non-NFCC affiliated agencies flooded the market, eventually outnumbering NFCC agencies by more than five to one. *See* CREDIT COUNSELING IN CRISIS, *supra* note 30, at 7 (reporting more than 1,000 agencies in 2002, only 150 of which were affiliated with the NFCC). After a string of recent mergers and closures, industry experts now estimate a total of around 400 agencies, although the number of offices run by these agencies is unknown. *See* Leslie E. Linfield, *Credit Couseling Update: The "Perfect Storm" Brewing*, AM. BANKR. INST. J., Apr. 2005, at 30, 31. Many of these new entrants are members of the other coordinating organization for credit counselors in the United States, the Association of Independent Consumer Credit Counseling Agencies (AICCCA), located online at http://www.aiccca.org/about.cfm.

32. Williams, *supra* note 31, at 51–52.

33. *Id.* at 52–53, 59–62 (explaining in part why creditors demand 100% payment in DMPs); NFCC, Personal Plans & Solutions, Debt Management Plan, http://www.debtadvice.org/PersPlans/persplans_02.html (explaining that DMPs generally last three to five years, resulting in payoff of debt, and creditors offer not remission, but waiver of fees); AICCCA, FAQS, *at* http://www.aiccca.org/press_room.cfm (explaining that DMPs involve concessions by creditors to reduce or eliminate interest and penalties—not remission of principal—and require up to sixty months of payments); CREDIT COUNSELING IN CRISIS, *supra* note 31, at 21–24 (explaining that secured debts are excluded and that creditors will grant only three kinds of concessions: re-aging accounts, interest reductions, and fee and penalty waivers).

34. ABUSIVE PRACTICES, *supra* note 31, at 2, 34–35; CREDIT COUNSELING IN CRISIS, *supra* note 31, at 6–7.

35. CREDIT COUNSELING IN CRISIS, *supra* note 31, at 7–8, 13, 23–24; Linfield, *supra* note 31, at 30.

benefit for counseling agencies.[36] Thus, many creditors sharply scaled back or even eliminated their fair share payments, pushing the credit counseling industry to the edge.[37] To counter this faltering financial support, some counseling agencies adopted pricing schemes and servicing tactics that placed heavy financial demands on consumer debtors and generated large profits for affiliated companies.[38] Following a Congressional investigation of the industry, several of the key bad actors have either left the market[39] or amended their business models to adopt more suitable pricing structures and to reduce or eliminate conflicts of interest with for-profit affiliates.[40] An inherent and fundamental conflict remains, however, between the counseling agencies' dependency on DMP-based fair share payments from creditors and the counselors' ostensible mission to provide effective assistance to consumer debtors.

No reliable public data exist on the number of consumers who have avoided bankruptcy through private credit counseling and DMPs, but recent reports indicate that counseling requests have risen sharply, while the rate of creditor acceptance of DMPs remains low.[41] While counseling agencies assisted about 250,000 clients in 1988, that number had risen to nearly a million by 1996.[42] By 2003, counseling industry representatives were reporting at least 2.5 million counseling requests per year.[43] In the 1990s, industry officials suggested that approximately 34% of consumer credit counseling clients were able to resolve their debt problems with a DMP, while another 34% could manage with simple budgetary

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36. *See* David A. Lander, *Recent Developments in Consumer Debt Counseling Agencies*, AM. BANKR. INST. J., Feb. 2002, at 14, 15; ABUSIVE PRACTICES, *supra* note 31, at 35 (noting that fair share payments were taking up 25–30% of some creditors' collections budgets by the late 1990s).

37. *See* CREDIT COUNSELING IN CRISIS, *supra* note 31, at 10–13, 20; Lander, *supra* note 36, at 14; ABUSIVE PRACTICES, *supra* note 31, at 35.

38. For a detailed discussion of some of these tactics and the harm they caused consumer debtors, see ABUSIVE PRACTICES, *supra* note 31, at 1–5, 10–31, 35–36; CREDIT COUNSELING IN CRISIS, *supra* note 31, at 13–17, 31–34.

39. Ironically, the most famous "bad actor," the heavily advertised AmeriDebt, filed for Chapter 11 bankruptcy protection in June 2004. *See In re* AmeriDebt Inc., Case No. 04-23649-PM (Bankr. D. Md. 2004). In September 2004, a trustee was appointed, who immediately began the liquidation of AmeriDebt's assets in anticipation of an eventual dissolution of the company. See ABUSIVE PRACTICES, *supra* note 31, at 47.

40. *See* ABUSIVE PRACTICES, *supra* note 31, at 45, 47–53. Many agencies remain financially strapped, forced to seek additional support from sources in the non-profit sector, such as the United Way. *See* CREDIT COUNSELING IN CRISIS, *supra* note 31, at 20.

41. *See infra* text accompanying notes 43, 45.

42. *See* Williams, *supra* note 31, at 53.

43. *See* Leslie E. Linfield, *Consumer Credit Counseling Reform: The Good, the Bad and the Ugly*, AM. BANKR. INST. J., Nov. 2004, at 14 (noting that many more than this—perhaps as many as 9 million—might have sought help with non-affiliated agencies).

instruction.[44] Beginning in the late-1990s, though, creditors increasingly imposed restrictive criteria on accepting consumers into DMPs, sometimes not even making these criteria clear to the counselors.[45] By 2001, creditor rejections of proposed DMPs had become "common though often illogical," and creditors were offering fewer interest-rate reductions and other concessions to facilitate such plans.[46]

B. *Credit Counseling in the Netherlands: Municipal Banks and the NVVK Voluntary Debt Adjustment Model*

As in the United States, the volume of consumer credit in the Netherlands grew exponentially from the 1960s to the 1980s, as did incidences of excessive debt.[47] Rather than amend the Bankruptcy Act to accommodate consumer interests, the Dutch response focused on credit counseling. The Dutch counseling system would face its own crisis by the late-1990s, however, pushing the Netherlands toward fundamental reform.

1. A Different Approach to Organizing Credit Counseling

The credit counseling system in the Netherlands was also initiated and supported by banks, but the banks involved were originally very different. Beginning in the 1930s, Dutch credit regulations restricted commercial lending to consumers, but they encouraged municipalities to create their own banks—funded and controlled by local city councils—to make available low-interest loans to their consumer citizens on a tax-free, break-even basis.[48] These municipal credit banks, or *gemeentelijke kredietbanken* (GKBs), were pushed out of the consumer lending market in the late 1950s as finance companies and commercial banks regained dominance. The meteoric rise of consumer indebtedness, however, created a new mission for the GKBs: credit counseling.[49] The coordinating organization for these GKBs, the Dutch Association for Consumer Credit, or *Nederlandse Vereniging voor Volkskrediet* (NVVK), has

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44. Williams, *supra* note 31, at 52–53.

45. CREDIT COUNSELING IN CRISIS, *supra* note 31, at 12–13.

46. *See Pushed off the financial cliff*, CONSUMER REPORTS, July 2001, *available at* http://www.consumerreports.org/main/detail.jsp?CONTENT<>cnt_id=85425&FOLDER<>folder_id=18151.

47. *See, e.g.*, Nick Huls, *Alternatives to Personal Bankruptcy*, *in* VERBRAUCHERKREDIT UND VERBRAUCHERINSOLVENZ: PERSPEKTIVEN FÜR DIE RECHTSPOLITIK AUS EUROPA UND USA 289, 293 (1986) [hereinafter Huls, *Alternatives*].

48. *See id.* at 291; DIETER KORCZAK & GABRIELA PFEFFERKORN, ÜBERSCHULDUNGSSITUATION UND SCHULDNERBERATUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 158–59 (1992).

49. *See* Huls, *Alternatives*, *supra* note 47, at 293.

been instrumental in facilitating and organizing credit counseling in the Netherlands for decades. In contrast to the U.S. counseling model, Dutch creditors generally pay nothing to the GKBs. Credit counseling in the Netherlands is funded primarily by local city councils and sometimes by small contributions from debtors, but never more than 6% of the total installments paid through to creditors under a plan.[50]

In 1979, the NVVK, in consultation with representatives of the commercial banks, developed its Code of Conduct for Debt Arrangement (*Gedragscode Schuldregeling*), which has become the gold standard for consumer credit restructuring in the Netherlands.[51] Pursuant to the Code, the consumer debtor submits an application for debt arrangement to the local GKB, along with complete financial information, and the GKB decides whether or not a debt adjustment and repayment plan are feasible.[52] Despite the unitary NVVK code of conduct, practices among the various GKBs differ substantially. From the late-1980s to the mid-1990s, however, GKBs rejected about half of these applications, mainly because of the debtor's "insufficient repayment capacity" to manage a payment plan.[53]

For accepted applications, the GKB administers a standard payment plan, provided that all creditors agree to accept the plan.[54] In the 1980s, creditors accepted the terms of such GKB-proposed

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50. *See id.* at 300.

51. *See* Gedragscode, http://www.volkskrediet.nl/gedragscode.html; Huls, *Alternatives*, *supra* note 47, at 294. The Code has been amended periodically and it was amended substantially in 2000 to react to the implementation of the new Dutch consumer bankruptcy law. N. JUNGMAN, ET AL., VAN SCHULD NAAR SCHONE LEI: EVALUATIE WET SCHULDSANERING NATUURLIJKE PERSONEN 47–49 (2001), *available at* http://www.wodc.nl/onderzoeken/onderzoek_w00190.asp?loc=/onderwerp# [hereinafter WODC REPORT].

52. *See* Huls, *Alternatives*, *supra* note 47, at 295.

53. *See id.* at 300; N.J. Huls, *Etat des lieux en matière d'assainissement légal des dettes aux Pays-Bas*, *in* LES CONSOMMATEURS ET L'EUROPE DES SERVICES FINANCIERS 141, 146 (Pierre DeJemeppe ed., 1992) [hereinafter Huls, *Etat des lieux*].

54. The standard plan might be administered in two ways: In a debt rehabilitation (*schuldsanering*), the GKB essentially makes a consolidation loan to the debtor, passing on a lump-sum payment to creditors of their pro-rata share of the debtor's entire projected disposable income, calculated as described below. The debtor repays the GKB over the life of the plan, while in a debt intermediation (*schuldbemiddeling*); the GKB collects monthly disposable income payments from the debtor and passes these payments on to creditors. *See* WODC REPORT, *supra* note 51, at 31. At least in the late 1990s, about three-fourths of Dutch plans were lump-sum debt rehabilitation consolidations. *See id.* at 43, tbl. 5. In contrast, U.S. DMPs overwhelmingly (if not exclusively) follow the debt intermediation model. *See supra* Part II.B.1. In addition, some Dutch localities also have special funds from which the local GKB can draw to offer grants for debt consolidation, which do not have to be repaid, although many localities have reduced or eliminated these funds after passage of the new Dutch consumer bankruptcy law in 1998. *See* WODC REPORT, *supra* note 51, at 33–35.

plans in all but a very few cases.[55] The standard plan includes a freeze on accruing interest and recovery fees; already in the 1980s, about one-quarter of all plans offered a voluntary remission of between 5% and 90% of the principal debt that could not be paid over the life of these plans.[56] The standard amount that these plans require the debtor to dedicate to the plan has changed recently, as discussed below.[57] Before 2001, however, debtors were forced to turn over to the GKB all income in excess of 94% of the legally prescribed social assistance minimum income—essentially the welfare qualification level—for three years.[58] The percentage payment to creditors is thus determined according to the debtor's abilities rather than the creditors' claims. Given these substantial demands, however, by the early 1990s, Dutch credit counselors had observed a recidivism rate of about 30% (this percentage refers to debtors who were unable to fulfill their obligations under these plans and thus returned for another attempt at a different negotiated arrangement).[59]

2. Rising Debt-to-Income Ratios and the Voluntary Process In Decline

The early-1990s witnessed rising numbers of requests for debt counseling and a declining percentage of cases where counselors were able to broker out-of-court arrangements. Only the GKBs publish their data on the rate of agreement to voluntary plans, and estimates suggest that just over half of all counseling is administered by other counseling agencies and organizations.[60] Nonetheless, the public GKB data reveal clear trends that can be extrapolated to the entire debt counseling industry in the Netherlands.[61] The number of debt

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55. Huls, *Alternatives*, *supra* note 47, at 296 (suggesting an overall creditor rejection rate of 2–3%).

56. *See* Huls, *Etat des lieux*, *supra* note 48, at 146.

57. For a discussion of current practice, see *infra* Part III.A.2.

58 Huls, *Alternatives*, *supra* note 47, at 296–98.

59. *See* Kamerstukken II 1995/96, 22 969, nr.32, p. 3; RESEARCH VOOR BELEID, SCHULD EN BOETE: WETSVOORSTEL SCHULDSANERING BLIJFT MENINGEN VERDELEN (1996), *available at* http://www.researchvoorbeleid.nl/basis/artikelen_herfst-1996/schuld.htm.

60. *See* WODC REPORT, *supra* note 51, at 36. A survey of WSNP debtors in 1999 and 2000 revealed that 51% of them had received pre-WSNP counseling from a GKB, as opposed to social service agencies or private counselors. *See id.* at 81.

61. *See* Huls, *Alternatives*, *supra* note 47, at 306, n.6. One survey of GKB and non-GKB debt counseling files in 1997 discovered a similar general rate of plan establishment for the mixed group as for just GKB-brokered arrangements. See WODC REPORT, *supra* note 51, at 43 (reporting 39% success for GKB and non-GKB counselors in 1997, the same rate as reported by the NVVK just for GKB plans). On the other hand, when it analyzed the results of individual agencies, this same survey reported that the four GKBs surveyed had quite low success rates, while non-GKB counselors, especially the three social welfare agencies surveyed, achieved plans

counseling petitions filed annually with GKBs rose from about 13,000 in the early-1980s,[62] to 19,000 by 1992, then jumped to just over 31,500 in 1998.[63] The number of payment plan agreements brokered by the GKBs, however, remained steady at about 10,000 to 11,000 per year.[64] The rate of "success"[65] in forging agreements in the voluntary plan process thus fell sharply from just over 50% in 1992 to about 35% in 1994, where it largely remained through 1998.[66]

Experts attribute this decline to two factors: larger debts and more creditors.[67] Debtors' incomes had risen much more slowly than consumer debt levels, significantly reducing the percentage repayment that debtors could offer creditors. One prominent survey of files in the voluntary arrangement process in 1997, for example, found that 71% of debtors filing petitions for debt counseling had total income of less than about $12,000 per year.[68] After deducting the exempt 94% social assistance minimum income, only 33% of all surveyed debtors were able to pay more than $100 per month to creditors, and only 23% were able to pay more than $150 per month.[69] Thus, over the standard three-year plan, fewer than a one-fourth of debtors could offer $5000 or more to their creditors—less than half of their average debt burden of about $11,000.[70]

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markedly more often—in as many as 65% of cases. *See id.* at 43, tbl. 6. Thus, extrapolating averages for GKBs to all credit counseling may skew the results *downward* somewhat, but this likely nonetheless provides a roughly accurate evaluation of the voluntary process.

62. *See* Huls, *Alternatives*, *supra* note 47, at 301, tbl. 1 (showing 12,995 applications in 1981, 14,379 in 1982, 14, 358 in 1983, and 13, 350 in 1984)

63. *See* WODC REPORT, *supra* note 46, at 189, Annex 5.

64. *Id.*

65. Note that "success" here may well be a transitory condition. Recall that 30% of debtors were unable to fulfill their obligations under these plans in the 1980s, *See supra,* text accompanying note 59. This Author found no publicly available data—and suspects none exists—on the rate of successful *completion* of these post-1990s plans.

66. *See* WODC REPORT, *supra* note 51, at 189, Annex 5. The agreement rates of individual GKBs varied immensely, however. One study identified rates ranging from 26% to 65% among various local GKBs. *See id.* at 43, tbl. 6.

67. *See id.* at 37.

68. *See id.* at 27, 39 (reporting 71% of debtors with income below 2000 Dutch gilders per month). The average exchange rate for gilders to U.S. dollars in 1997 (and in later years) was about 2:1. FXHistory: historical currency exchange rates, http://www.oanda.com/convert/fxhistory (last visited Nov. 17, 2005) [hereinafter FXHistory].

69. WODC REPORT, *supra* note 51, at 44, fig. 5.

70. *See id.* at 41 (reporting an average debt of 21,927 gilders). The spread of debt loads around this average is slightly weighted to lower levels, so the median or "middle" debt level would likely have been somewhere around 10,000 gilders, or $5,000. FXHistory, *supra* note 68, at fig. 4. A 1992 study of the voluntary arrangement process had identified an average debt burden of about $8,000, suggesting a significant rise in debt during the 1990s. WODC REPORT, *supra* note 51, at 41.

After analyzing a number of characteristics of these debtors, such as age, marital status, number of children, income, and total debt load, the 1997 study concluded that one factor clearly distinguished debtors who succeeded from those who failed to establish a voluntary arrangement with creditors: the *percentage* of total debt that could be paid off in the standard three-year plan.[71] The net amount of income available for creditors was not significant in isolation. Rather, the key indicator was the volume of debt against which that income would have to be applied. Accepted plans offered on average a 56% repayment of debt, while rejected plans offered on average only 27%.[72] Creditors are obviously focused on their bottom line, but this study suggests that absolute numbers are not as important as relative amounts. Creditors were increasingly unwilling to entertain repayment plans as the *percentage* of their recovery fell below 40–45%, even if the *amount* of payment offered seemed substantial in absolute terms.

III. CONVERGENCE: DUTCH EXPANSION AND U.S. RESTRICTION OF CONSUMER BANKRUPTCY

In the late-1990s, policymakers became concerned first about the falling number of Dutch voluntary debt arrangements and then about the rising number of U.S. consumer bankruptcy filings. As a result, the Dutch government and parliament began an eight-year-long process of implementing a more forgiving approach to consumer debt relief, while the U.S. Congress began an eight-year-long debate about restricting access to debt relief. The Netherlands joined France and Germany in moving decisively toward the U.S. model[73] by introducing a statutory discharge of unpaid consumer debt and a fresh start for debtors. The United States, in contrast, moved toward a more restrictive, European approach to consumer debt relief. This Part focuses on the process that brought Dutch and U.S. law into surprising parallel and addresses the key elements of the laws resulting from that process. A survey of recent experience under the new Dutch model offers compelling insights as to what is in store under the radically revised U.S. law.

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71. *Id.* at 46.

72. *See id.*

73. *See, e.g.*, Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL'Y 125 (1992).

A. *The Netherlands Amends Its Bankruptcy Law To Add Consumer Relief*

The road to consumer debt relief began in the Netherlands just as had in Germany; the Dutch produced a system very similar to the German model.[74] Like German policymakers,[75] their Dutch counterparts convened a commission to examine the Dutch business bankruptcy law; however, the commission released a report in 1989 that also suggested offering expanded relief to consumers.[76] While the German commission strongly resisted the notion of freeing consumers from overburdening debts, the Dutch *Mijnssen* commission readily accepted this new form of relief from the outset.[77] In multiple places in the legislative record of the new Dutch law, lawmakers noted that around 200,000 Dutch consumers had fallen into trouble with overburdening debts.[78] After the general deregulation of consumer credit in the early 1980s, the Netherlands had experienced a significant increase in the number of consumer bankruptcy cases[79] (in the classic, creditor-collection sense[80]). This rising indicator of consumer economic distress became a cause for concern for policymakers, who sought a direct legislative solution to the problem.

The fundamentals of the new Dutch system of statutory consumer debt relief have changed very little since the introduction of the government reform bill in the lower house of parliament in December 1992.[81] Indeed, the legislative record reveals relatively few points of dispute over the new law. It nonetheless took many years for the bill to wind its way through the legislative process and emerge as a new law in June 1998,[82] effective December 1, 1998.[83] With the

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74. Dutch lawmakers seem to have paid little attention to contemporaneous developments in neighboring Germany, however. *See infra* note 156.

75. *See* Kilborn, *German Law, supra* note 7, at 269 (describing the formation of the German bankruptcy review commission in 1978 and the release of its second report in 1986).

76. *See* Huls, *Etat des lieux, supra* note 53, at 150; Kamerstukken II 1992/93, 22 969, nr.3, pp. 3–4.

77. *See* Huls, *Etat des lieux, supra* note 53, at 150–51, 154. It may well be that the Dutch commission expressed less hostility to the Anglo-American notion of discharge, thanks in large part to the influence of a report by the pre-eminent Dutch scholar Nick Huls, who had examined the U.S. consumer bankruptcy system in depth and positively appraised its potential for the Netherlands. *See id.* at 148, n.7.

78. *See, e.g.*, Kamerstukken II 1992/93, 22 969, nr.3, p. 27; Kamerstukken II 1994/95, 22 969, nr.19, pp. 1, 3; Handelingen II 1994/95, nr. 99, p. 6073; Handelingen II 1994/95, nr. 100, p 6109.

79. *See, e.g.*, Handelingen II 1994/95, nr. 99, p. 6072.

80. *See supra* Part II.

81. *See* Kamerstukken II 1992/93, 22 696, nr.3 (MvT).

82. *See* Law of 25 June 1998, Stb. 1998, 445 (Neth.).

83. *See* Order of 9 Nov. 1998, Stb. 1998, 622 (Neth.); Handelingen I 1997/98, nr. 34, p. 1757. The first WSNP case was opened around 9:45 AM (ET) on December 1,

final Law on Debt Rehabilitation of Natural Persons (*Wet schuldsanering natuurlijke personen*), generally known as the WSNP,[84] the Dutch legislature added a new third and final title to the Dutch Bankruptcy Act of 1896.

Both German and Dutch reformers ultimately defended the radical new fresh start[85] policy primarily in terms of offering debtors a perspective for their respective futures; the policy gave debtors an incentive to remain productive workers rather than cowering in the shadow of insurmountable debt for the remainder of their productive lives.[86] Despite fears of undermining debtor responsibility and payment morality,[87] lawmakers insisted that reinvigorating consumer debtors would avoid a series of equally undesirable social ills, including poverty, social isolation, and lost productivity.[88] In addition, Dutch policymakers hoped that the threat of a potentially less attractive, court-imposed payment plan would act as a "stick behind the door" to goad creditors into compromising with debtors and entering into more voluntary debt arrangements.[89]

1998, in Haarlem, when the court converted the first of many old-style bankruptcy (collection) cases to a new WSNP (relief) case. *See Primeur in Haarlem*, WSNP UPDATE, no. 8 (Feb. 1999), *available at* http://www.wsnp.rvr.org/bibliotheek/data/update/Update8. htm.

84. The acronym is generally rendered "Wsnp," according to European capitalization standards, but for ease of reading by U.S. readers, the Author uses all capitals. The agency currently charged with administering and monitoring the new law has a wonderful website dedicated to all matters relating to the WSNP. *See* Wsnp Home Page, *at* http://www.wsnp.rvr.org.

85. Dutch uses at least two phrases to capture this distinctly U.S. concept: *schone lei* or "clean slate" is the most common, but *nieuwe start* or "new start" is also encountered.

86. *Compare* Kilborn, *German Law*, *supra* note 7, at 270–71, with Huls, *Etat des lieux*, *supra* note 53, at 150; Kamerstukken II 1992/93, 22 969, nr.3, pp. 2, 6; Kamerstukken II 1994/95, 22 969, nr.19, pp. 3, 20; Handelingen II 1994/95, nr. 99, pp. 6071, 6075, 6078.

87. *See, e.g.*, Kamerstukken II 1992/93, 22 969, nr. 3, pp. 4–5. The Justice Minister argued forcefully that the asset liquidation and stringent payment plan requirements of the new law would avoid any undermining of responsibility or payment morality. *See id.* at 5.

88. *See* Handelingen II 1994/95, nr. 99, pp. 6081; Kamerstukken I 1995/96, 22 969, nr.34b, p. 2; Handelingen II 1997/98, nr. 61, p. 4580.

89. This image—the "stick behind the door" (*stok achter de deur*) menacing creditors with unpleasant consequences if they refused to agree to out-of-court workouts—is repeated over and over in the legislative history and commentary as representing one of the primary purposes of the new Dutch law. *See, e.g.*, Kamerstukken II 1992/93, 22 969, nr.3, pp. 6–7; Kamerstukken II 1994/95, 22 969, nr.19, p. 17; Handelingen II 1994/95, nr. 99, p. 6079; Kamerstukken I 1995/96, 22 969, nr.34b, p. 2; Kamerstukken II 1997/98, 25 672, nr.5, p. 2; Handelingen II 1997/98, nr. 61, p. 4576; Handelingen II 1997/98, nr. 61, pp. 4580–81; Kamerstukken I 1997/98, 22 969, nr.297b, p. 7.

1. The Voluntary Plan Process: Trouble at the Gates to the WSNP

Notwithstanding the precipitous decline of the voluntary plan process, the WSNP makes out-of-court payment plan negotiations the mandatory entryway into the new consumer debt relief process. Like the German law,[90] the WSNP requires debtors to include with their petitions a declaration explaining why "there is no real possibility to come to an out-of-court debt rehabilitation arrangement."[91] This declaration must be issued by local authorities in the debtor's municipality or, more often, by the local GKB or other credit counseling agency to whom local authorities have delegated this duty.[92] As described above,[93] the local GKB or other counseling agency most likely will have evaluated the debtor's payment potential and rejected (or unsuccessfully attempted) an out-of-court workout with creditors. The new law thus attempts to both encourage and leverage off of the decades-old system of credit counseling and voluntary arrangements administered largely by local authorities.

As in Germany,[94] the process of structuring and negotiating a voluntary payment plan with creditors in the Netherlands often impedes Dutch consumer debtors' ability to obtain needed relief. Delays vary considerably depending on local conditions and the complexity of debtors' problems, but debtors often face two types of delays: consumer waiting periods and creditor holdout delays. First, estimates suggest that in two-thirds of Dutch municipalities, consumers face waiting periods of two to six months just to get appointments with local debt counselors.[95] Second, creditors understandably do not view responding to debt arrangement proposals as an issue of urgent necessity, and a last few holdout creditors often need more time-consuming prodding from debt counselors. Combined delays of three to nine months often result from the initial waiting period and the process of collecting—and sometimes cajoling—creditors' assent to voluntary plans.[96] Waiting periods have increased substantially due to the greater demand on counselors following the enactment of the WSNP.[97]

Unfortunately, the result of this negotiation process is seldom worth the wait. The rate of success for this time- and labor-intensive process has continued to decline after the WSNP entered force in

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90. *See* Kilborn, *German Law*, *supra* note 7, at 272–73.

91. Faillissementswet [F] [Bankruptcy Law] art. 285 (Neth.). Citations to the WSNP are made by reference to the Bankruptcy Act (*Faillissementswet* or F) of which the WSNP is the third and concluding title.

92. *See Id.* at art. 285(1)(e); WODC REPORT, *supra* note 51, at 12, n.2.

93. *See supra* Part II.B.

94. *See* Kilborn, *German Law*, *supra* note 7, at 274.

95. *See* WODC REPORT, *supra* note 51, at 32.

96. *See id.* at 32–33, 53.

97. *See id.* at 53.

December 1998. After falling from just over 50% in 1992 to about 35% in the years from 1994 to 1998,[98] the rate of successfully brokered out-of-court plans fell again suddenly to 28% in 1999[99] and to 26% by 2001.[100] From 2003 through 2004, requests for debt adjustments filed with GKBs rose from 34,500 to 39,000, but the number of plans accepted by creditors fell from 5,300 to 3,500; this initial success rate continued to plunge from 15% to 9%.[101] Credit counselors have reported that creditors are generally less willing to enter into voluntary arrangements now that the WSNP offers a clear and predictable alternative.[102] The desired "stick behind the door" operation of the new law to encourage more out-of-court arrangements does not seem to be working.[103]

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98. *See supra* note 61 and accompanying text.

99. *See* WODC REPORT, *supra* note 51, at 37. The average success rate for brokering out-of-court plans remained stable from 1999 to 2002 at about 30%. *See* RAAD VOOR RECHTSBIJSTAND DEN BOSCH, SAMENVATTING RESULTATEN ENQUÊTE WISSELWERKING MINNELIJKE REGELING-WSNP (2002), *available at* http://www.wsnp.rvr.org.

100. *See* ROEL SCHOLLEN, ADVIESRAPPORT "SCHULDREGELEN DAT DOE JE SAMEN," Summary, § 3.1 (2003), *available at* http://www.wsnp.rvr.org/bibliotheek/data/ondstu/adv_schuld_samen.htm.

101. *See* NEDERLANDSE VERENIGING VOOR VOLKSKREDIET, JAARVERSLAG 2004, at 22–23 (2005), *available at* http://www.volkskrediet.nl/NVVK_Jaarverslag_2004.pdf.

102. *See* WODC REPORT, *supra* note 51, at 56.

103. For an enlightening and insightful discussion of why adoption of a more closely monitored and predictable alternative in the WSNP has shifted creditors' incentives toward refusing out-of-court arrangements, see Nick Huls, et al., *Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law, in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 269, 273, 274–75, tbl. 1 (Johanna Niemi-Kiesiläinen, et al. eds., 2003); *See also* WODC REPORT, *supra* note 51, at 61–64, 98. Another aspect of the system designed to encourage voluntary arrangements—the so-called "accord"—also seems to be enjoying little success. After an in-court WSNP process has been opened, the debtor may, but need not, present a proposed voluntary payment plan to creditors for their vote. *See* F arts. 329, 331. The debtor's plan can be approved by the judge and imposed on recalcitrant creditors ("crammed down," to use the U.S. buzz phrase) so long as a majority in number and amount of claims of unsecured and preferred creditors appearing at the hearing vote in favor of the plan. *See* F art. 332(3). Alternatively, the court can cram down the plan on one or more creditors with particularly large claims if: (a) three-quarters in number of preferred and unsecured creditors vote in favor of the plan, and (b) the refusal of the larger claimant(s) to approve the plan was "unreasonable" given the circumstances, particularly the percentage that the rejecting creditor(s) stand(s) to recover if the WSNP process continues without a voluntary plan. *See* F art. 333(4). This cram down process was invoked successfully in only 1% of cases in the first two years of the new law. *See* WODC REPORT, *supra* note 51, at 72, tbl. 9, 146–47. By 2003 and 2004, still only about 2% of cases concluded with an accord. *See* Centraal Bureau voor de Statistiek, Meer Schuldsaneringen in 2004 (Mar. 29, 2005), *available at* http://www.cbs.nl/nl/publicaties/artikelen/algemeen/webmagazine/artikelen/2005/1671k.htm [hereinafter CBS Stats 2004]; Centraal Bureau voor de Statistiek, Ruim 10 duizend schuldsaneringen in 2003 (Mar. 29, 2004), *available at* http://www.cbs.nl/nl/publicaties/artikelen/algemeen/webmagazine/artikelen/2004/1430k.htm [hereinafter, CBS Stats 2003]. Experience under the very similar cram down provision of the German consumer bankruptcy system produced similar results, and this provision is

This low rate of agreed out-of-court arrangements is not surprising, given that the reasons for failure of voluntary arrangements—high debt levels and low percentage payoff capacity[104]—have continued to exist since the early 1990s. A study of WSNP cases in 1999 and 2000 suggested that the in-court process was serving the very debtors that one would expect to be poor candidates for an out-of-court workout. The surveyed cases revealed an average annual debtor income of about $12,500 and an average debt load of about $50,000.[105] These debtors had average fixed expenses of about $400 per month,[106] not to mention floating expenses for food and other household expenses. Even if debtors expended only a modest $400 per month for food and other variable household expenses, an average of *at most* $3,000 per year, or about $9,000 over a three-year voluntary plan, would reasonably be available for creditors[107] These amounts are well under the 40% pay-off break-point at which earlier studies had suggested creditors refuse to accept a voluntary plan.[108] In the declarations issued by local counseling authorities in support of these debtors' petitions, nearly 70% explained that the voluntary process had failed because "not all creditors [were] in agreement" or there was "no cooperation from creditors." Over 20% more attributed the failure to the debtors'

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slated for elimination there. *See* Kilborn, *German Law*, *supra* note 7, at 275–77. In both Germany and the Netherlands, policymakers now propose to move this cram down phase into the pre-court voluntary process, allowing the debtor to ask the court in summary proceedings to impose an out-of-court plan on one or more "unreasonably" disagreeable creditors. *See, e.g.*, Kamerstukken II 2004/05, 29 942, nr.3, pp. 5, 16–19; Kilborn, *German Law*, *supra* note 7, at 277. Although Huls suggested in the 1980s that only 2–3% of voluntary arrangements fell through due to lack of cooperation by one creditor, *See* Huls, *Alternatives*, *supra* note 47, at 296, one prominent study of cases from 1999 and 2000 suggested that 21% of voluntary workouts failed due to one creditor's refusal, and more than half failed due to refusal by three or fewer creditors. *See* WODC REPORT, *supra* note 51, at 83, tbl. 17.

104. *See supra* notes 69–70 and accompanying text.

105. *See* WODC Report, *supra* note 51, at 76–78. Even excluding the former businesspeople with somewhat higher income and debt levels, the average non-entrepreneur debtor income was just under $12,000 per year, chasing an average debt load of about $30,000—still far too lopsided of a ratio to cover living expenses and still offer creditors at least a 40%-50% recovery over three years. Later data suggest income gaining ground on debts, but not enough to shift the tide on out-of-court settlements. *See* 2002: meer zaken, meer beëindigingen, WSNP UPDATE, no. 29 (Mar. 2003), *available at* http://www.wsnp.rvr.org/bibliotheek/data/update/Update29.htm (reporting average income of €1,070 per month (about $16,000 per year) and an average debt load of €24,000 (about $30,000) for "non-entrepreneur" debtors filing in 2002).

106. *See* WODC Report, *supra* note 51, at 76–78.

107. The debtors themselves overwhelmingly (71%) reported on their petitions that they had no repayment capacity, while the average repayment capacity for those who reported some ability to pay was only about $125 per month—or $4,500 over a three-year plan. *See id.* at 82.

108. *See supra* note 69 and accompanying text.

"insufficient repayment capacity" or "lack of stable income."[109] The voluntary process apparently remains by-and-large a simple numbers game.

2. The In-Court Process and Payment Plans—How Much?

If the debtor's documents are in order, if the debtor is in good faith, and if the debtor is unable to continue making normal payments on debts,[110] the court will take several actions. The court appoints a trustee to collect and liquidate the debtor's available assets and administer a payment plan drawing on three to five years of the debtor's future income.[111] The court also appoints a "judge-commissioner" to supervise the trustee and handle disputes later in the case.[112] Like its German counterpart,[113] the Dutch in-court process includes two stages to extract value from the debtor: the sale of the debtor's non-exempt assets[114] and the collection of the debtor's non-exempt income.[115]

A creditor's main source of value, if any, is the debtor's future disposable income. Most bankrupt consumers in the Netherlands and elsewhere have no property either legally available[116] or practically

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109. WODC REPORT, *supra* note 51, at 82, tbl. 16.

110. F arts. 284, 288. These good faith and insolvency requirements are similar to those imposed by the French law, and the Dutch rejection rate is quite similar to the rejection rate in France—about 9% in the early years of the new systems. *See e.g.*, WODC REPORT, *supra* note 51, at 72, 88–91; *cf.* Kilborn, *French Law*, *supra* note 7, at 636, n.115 (reporting a rejection rate for French petitions falling from 10% to 7% from 1990 to 2003).

111. F arts. 287(3), 316. In the early years, lawyers were appointed as trustee in about 50% of cases, and the GKB or other counselor who helped the debtor initially was appointed in another quarter. *See* WODC REPORT, *supra* note 51, at 83–84, tbl. 18. One curious aspect of estate administration unique to Dutch law is the so-called *"postblokkade,"* which requires the debtor's mail to be diverted to the trustee during the course of the case. F art. 287(9). This provision was designed to ensure that the trustee would receive complete information about payments being made to and undeclared obligations incurred by the debtor, both of which would affect the administration of the estate. Kamerstukken II 1997/98, 25 672, nr.3, pp. 5–6. The trustee is required to hand deliver to the debtor any mail not pertaining to the debtor's financial situation. F arts. 99(1), 327. Trustees report that having this access to the debtor's mail is very helpful (at least for the first year or so) in uncovering hidden or overlooked assets and liabilities. WODC REPORT, *supra* note 51, at 104–05.

112. F arts. 287(3), 314.

113. Kilborn, *German Law*, *supra* note 7, at 278–80.

114. F arts. 295(4)–(6), 314–327, 347.

115. F arts. 295(1)–(3), 343–46.

116. The range of property exempted from seizure and liquidation is very similar under the Dutch WSNP and European and moderately generous U.S. state exemption laws. *See* F art. 295(4)–(5); Burgerlijk Wetboek [BW] [Civl Code] bk.3 art. 5 (Neth.); *see also* Wetboek van Burgerlijke Rechtsvondering [Rv] [Code of Civil Procedure] art. 447 (Neth.) (exempting identified items in normal execution proceedings).

valuable enough to sell to produce a distribution to creditors.[117] Like the earlier German and French consumer debt relief systems,[118] the WSNP generally requires the court to impose a rehabilitation payment plan on the debtor.[119] Consistent with the developing European approach, the Dutch WSNP requires the debtor to hand over to the trustee for a certain term of years all non-exempt income; that is, income legally subject to seizure by creditors.[120]

Unlike other European systems (and the U.S. system), the WSNP measures "exempt" income not in terms of a percentage of the debtor's total income, but in terms of a percentage of the official welfare assistance level for various types of debtors—regardless of each debtor's individual income.[121] By default,[122] the law requires the debtor to turn over all income in excess of 90% of the social assistance minimum, subject to a series of adjustments based on certain of the debtor's household expenses.[123] The WSNP allows the judge to increase the amount left to the debtor, however, at the judge's apparently unfettered discretion.[124]

How much income to reserve to debtors was a strenuously debated topic in the legislative process. Legislators often questioned the sufficiency of 90% of the social assistance minimum to support the debtor—and possibly a family—for three years.[125] Because the social assistance minimum takes into account children only in single-parent households, legislators worried that debtors in two-parent families (and all families with multiple children) would be particularly hard pressed to manage on this meager income.[126] Legislators repeatedly pressed for a 4% increase to at least match the amount left to debtors under the NVVK out-of-court payment plan model.[127] After much back-and-forth debate with the Justice Minister about the adequacy

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117. If debtors do have any valuable property, like houses, they will most likely have granted security interests or mortgages in this property, and such secured creditors' rights to take their collateral property from the debtor are unaffected by the law. *See* F art. 299b; Huls, *Etat des lieux*, *supra* note 53, at 152.

118. *See e.g.*, Kilborn, *German Law*, *supra* note 7, at 267–68, 279 & n.131; Kilborn, *French Law*, *supra* note 7, at 630–31.

119. *See* F arts. 338(5), 343–46.

120. F art. 295(2).

121. *See* RV art. 475d.

122. The default rule is virtually never applied in practice. *See infra* note 126 and accompanying text.

123. F art. 295(2); RV art. 475d; Wet werk en bijstand [WWB] arts. 20–23 (Neth.).

124. F art. 295(3).

125. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr.19, p. 3; Handelingen II 1994/95, nr. 99, pp. 6073, 6078.

126. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr.19, p. 4.

127. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr.24; Handelingen II 1994/95, nr. 99, pp. 6073, 6078–80, 6083.

of this 90% level,[128] the legislature capitulated and the 90% exemption remained unchanged.

The courts would have the last word on the matter, however. Ultimately, this issue was resolved "on the ground" through informal coordination among courts, counseling agencies, and judicial enforcement officials. In a surprising bit of private lawmaking, a national working group of Dutch bankruptcy judges called *Recofa* convened a commission in 2000 to harmonize in- and out-of-court consumer debt rehabilitation practice by agreeing on a uniform basis for calculating the so-called "amount to be left free" for debtors (*vrij te laten bedrag,* or *vtlb*).[129] The *Recofa* calculation guide was released in July 2001[130] and has since been adopted as the standard by nearly all courts, NVVK member credit counselors, and, increasingly, officials in normal judicial execution proceedings.[131] The *Recofa* group thus managed without legislative intervention to amend a crucial part of the Dutch law and to standardize practice under the WSNP and the NVVK out-of-court workout model.

Evidently, even before the *Recofa* guide was developed, very few debtors were relegated to 90% of the social assistance minimum income—the mandated level that is still, to this day, mandated by law.[132] The *Recofa* guide, however, rejected the 90% level once and for all. Consistent with judicial practice during the first two years of the new law, the *Recofa* guide reserves 95% of the social assistance minimum for debtors wholly dependent on public aid, and 100% for

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128. The Second Chamber early on requested that the Justice Minister review the general exemption level in the execution law to see if it ought to be increased. *See* Handelingen II 1994/95, nr. 99, p. 6083; Handelingen II 1994/95, nr. 100, p. 6128; Kamerstukken II 1994/95, 22 969, nr.27; Kamerstukken II 1995/96, 22 969, nr.30. Based on an evaluation that did not respond to the legislature's concerns, the minister refused to consider an increase in the general exemption level. *See* Kamerstukken II 1995/96, 22 969, nr.31. The legislature ultimately dropped the issue after the minister responded to a series of questions challenging the evaluation and the minister's refusal, *See* Kamerstukken II 1995/96, 22 969, nr.32, although the First Chamber once again brought up this issue before final passage of the legislation, and the minister hinted at the practical solution to be implemented by judges and the NVVK, *See* Handelingen I 1997/98, nr. 34, pp. 1742, 1752, 1755–57. Note that German legislators undertook a similar process, and they ultimately increased the German exemption levels substantially. *See* Kilborn, *German Law, supra* note 7, at 285–86.

129. *See* Rekenmodel Recofa, WSNP UPDATE, no. 23 (Sept. 2001), *available at* http://www.wsnp.rvr.org/bibliotheek/data/update/Update23.htm.

130. *Id.*

131. *See* BEREKENING VAN HET VRIJ TE LATEN BEDRAG BIJ TOEPASSING VAN DE WET SCHULDSANERING NATUURLIJKE PERSONEN, RAPPORT VAN DE WEKRGROEP REKENMETHODE VTLB RECOFA § 1.1 (2005), *available at* http://www.wsnp.rvr.org/bewindinfo/data/beleidsstukken/recofa/rapport%20januari%202005%20_ontkoppeld_.pdf [hereinafter REKENMODEL].

132. *See* WODC REPORT, *supra* note 51, at 84–85, tbl.19, 96, 106–07. Early on, courts calculated the exempt amount in a wide variety of ways, usually leaving more than 90% of income to debtors, especially working debtors. *See* NICK HULS & VIVIAN SCHELLEKENS, JE ZIET DE GATEN IN HUN HANDEN 58–59 (2001).

debtors with income from at least eighteen hours of work per week.[133] *Recofa* adopted these higher percentages to respond to the debtor's need to have some reserve for large or unexpected expenditure and to encourage debtors to find and hold work.[134] Moreover, for working singles (with and without children), to the extent that they earn more than the standard minimum income level, the base minimum is increased by approximately 40%.[135]

Thus, using 2005 figures,[136] the *Recofa* model reserves to working singles without children as much as €804.89 per month (about $12,000 per year); working single parents can retain as much as €1,034.85 per month (about $15,500 per year).[137] These two groups represent about two–thirds of debtors in both the out-of-court and WSNP debt adjustment processes.[138] Joint debtors with or without children can retain as much as €1,207.32 per month (about $18,000 per year) if both individuals work at least eighteen hours per week; they retain €1,149.83 per month (about $17,250 per year) if only one individual works.[139] Two-parent households with children are the third largest group of distressed debtors, constituting about 20% in the in- and out-of-court processes.[140] This baseline of the Dutch law thus leaves less income to debtors, on average, than German and French law. In comparison, single debtors in Germany in the early twenty-first century enjoyed a 100% exemption on the first €939 per month (about $14,000 per year), although they could

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133. *See* REKENMODEL, *supra* note 131, §§ 5.1–5.2. Indeed, in a joint case in which both partners work at least eighteen hours per week, the guide allocates 105% of the social assistance minimum to the joint debtors together. *See id.* § 5.2.

134. *See id.*

135. *See* REKENMODEL, *supra* note 131, § 4.2; Rv art. 475d(1)(b); WWB art. 25.

136. The base amounts of minimum assistance have risen only slightly for inflation over time. Compare, for example, the amounts listed in the current Law on Work and Assistance (WWB) with the amounts listed in its predecessor, the General Assistance Law (*Algemene Bijstandswet*, or ABW) from 1995, *available at* http://wetten.overheid.nl (by entering these law names and dates in a search).

137. *See* REKENMODEL, *supra* note 131, § 4.2; WWB art. 25. Here and throughout this paper, the Author has used an exchange rate of $1.25/€, which represents a rough average of the EUR/USD exchange rate over the past 12 months, reduced for the fact that the Euro has fallen sharply against the dollar in recent weeks. Oanda: The Currency Site, http://www.oanda.com/convert/fxhistory (last visited Nov. 2, 2005). The 2005 base monthly assistance amounts for single childless adults is €574.92 (about $8,600 per year), and €804.88 (about $12,000 per year) for single parents. *See* WWB art. 21. These base amounts are increased by up to €229.97 (about $3,450 per year) for wage earners. *See* WWB art. 25. Technically, this increase applies only to singles with higher than average expenses that hit their incomes harder because they cannot be shared with another earner, but the *Recofa* model evidently assumes this situation exists for all singles.

138. WODC REPORT, *supra* note 51, at 74, tbl. 10 (reporting childless singles as 45% of all debtors, and single parents as about 21%, in both the voluntary and judicial processes).

139. REKENMODEL, *supra* note 131, § 4.1.

140. WODC REPORT, *supra* note 51, at 74, tbl. 10.

keep up to a maximum of €1,507 (about $22,500 per year) if they earned more.[141] The French exemption scheme is more complicated, but childless single debtors in 2005 can retain a maximum of €13,698 per year (about $17,000).[142]

Fortunately for Dutch debtors, the social assistance minima are not the end of the story.[143] In addition to these base amounts designed to cover basic living expenses,[144] the *Recofa* model follows the execution law by increasing the debtor's budget for health insurance premiums and monthly rental[145] housing expenses beyond certain minimal levels.[146] The *Recofa* model also increases the debtor's allowance to meet any childcare expenses not covered by the employer. The model increases the debtor's allowance by €147 (about $180) for monthly auto transportation expenses to the extent necessary for income production, although it recommends using a moped as a cheaper alternative to a car.[147] Adding these additional allowances likely brings the budgets of many Dutch debtors much closer to those allowed in surrounding debt relief systems.

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141. Kilborn, *German Law*, *supra* note 7, at 286 n.192. These levels were likely increased for inflation in 2004, as the German law now requires. *Id.* at 286 n.190.

142. Kilborn, *French Law*, *supra* note 7, at 630 n.79. Note that the Author used the much higher January 2005 exchange rate of $1.36/€ to calculate the dollar figures in this earlier article. *Id.* at 630 n.75.

143. Even before the *Recofa* model was released, judges often allocated extra budget amounts (generally, about $85 per month on average, and sometimes as much as $500 or more per month) to debtors with higher housing and healthcare expenses. WODC REPORT, *supra* note 51, at 85–86, tbl. 20.

144. REKENMODEL, *supra* note 131, § 5.10.

145. The Dutch law is not designed for homebuyers. The *Recofa* model explicitly excludes from housing expenses any payment toward a mortgage loan, and it suggests that in most cases, a debtor-owned home encumbered by a mortgage should be sold (and presumably the debtor should find rental housing). *Id.* § 4.8.4. A similar approach to forced sale of mortgaged homes appears in Belgian consumer debt relief law. Kilborn, *Belgium and Luxembourg*, *supra* note 7, at 25, n.99. This may represent a significant shortcoming of the WSNP, as the great bulk of indebtedness in the Netherlands has arisen from mortgage borrowing. NIBUD, FINANCIEEL GEDRAG IN NEDERLAND, § 3.2 at 9 (2004), *available at* http://www.nibud.nl/docs/Fingedrag.pdf; DIDIER DAVYDOFF ET AL., COMITÉ CONSULTATIF DU CONSEIL NATIONAL DU CRÉDIT ET DU TITRE, L'OBSERVATOIRE DE L'ÉPARGNE EUROPÉENNE, L'ENDETTEMENT DES MÉNAGES EUROPÉENS DE 1995 À 2002 §§ 2.2–2.3, 3.3, annex 2 (2004) (on file with author) (showing housing loans as a greater percent of borrowing in the Netherlands than in any other European state from 1995 to 2002).

146. Rental housing expenses increase the "amount to be left free" to the debtor to the extent they exceed the statutory rent-subsidy level of, on average, €178 per month (about $220), along with an increase of up to €48 ($60) per month for utilities. REKENMODEL, *supra* note 131, §§ 4.8.2.1, 4.8.3; RV art. 475d(5)(b). Although the execution law generally limits the increase to the amount of the original minimum level (another €178 or $220 per month), the *Recofa* model allows for budgeting of full rental expenses to debtors who are searching for or unable to find or move to cheaper housing. REKENMODEL, *supra* note 131, §§ 4.8.2.1, 5.3.

147. *Id.* §§ 5.6–5.7.

3. Payment Plans Part II—How Long?

The WSNP theoretically gives the judge maximum freedom to design a payment plan with whatever provisions seem "reasonable and fair."[148] In reality, most plans simply set out the amount of income left to the debtor over a standard three-year repayment term.[149] In exceptional circumstances, the court *can* impose up to a five-year plan,[150] but only if the debtor is granted a monthly budget allowance beyond the minimum required by law during the entire plan period.[151] Plans longer than three years have been rare in the first several years of operation of the WSNP.[152]

The maximum duration of imposed payment plans was one of the most hotly debated topics in the legislature. The government's initial bill proposed simply that the court should have full discretion to determine the length of the plan, not to exceed five years.[153] The Justice Minster explained that this term had been chosen based on the five-year statute of limitations (the "prescriptive period" in the civil law) for most contractual obligations.[154] As debate on this topic heated up, a broad legislative consensus emerged in favor of a presumptive three-year plan, with the possibility, in exceptional cases, to extend the plan up to five years; the position came to be called the "three-years-unless principle."[155] Although the Justice

148. F art. 343(1); *see also* Kamerstukken II 1992/93, 22 969, nr. 3, p. 59 (remarking on the broad discretion theoretically allowed to the court).

149. F art. 343(2); WODC REPORT, *supra* note 51, at 95, 107, 146. Because most plans take on this standardized, simple form, the government has proposed reforming the law to scrap the discretionary plan altogether and adopt a more predictable and uniform German model: a simple, statutorily established three years on minimum income leading to conclusion of the case. Kamerstukken II 2004/05, 29 942, nr. 3. pp. 6–7.

150. The legislature and government suggested that five-year plans might be imposed, for example, on higher-income debtors (estimated to be 10–20% of all debtors) who could make payments through the plan yet still retain monthly income above the social assistance minimum. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr. 19, p. 5; Handelingen II 1994/95, nr. 99, pp. 6081–82; Handelingen II 1994/95, nr. 100, pp. 6116–17; Kamerstukken II 1994/95, 22 969, nr. 28, p. 2.

151. F art. 343(2); *see also* X/Kemps, Gerechtshof [HOF] [court of ordinary appeal], Bosch, 2 mei, 2002 (Neth.), *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-299 (reversing the district court's order imposing a plan longer than three years without allowing for a greater-than-minimum budget to the debtor); X/Rompen, Gerechtshof [HOF] [court of ordinary appeal], Bosch, 5 maart, 2002 (Neth.), *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-323 (same).

152. Kamerstukken II 2004/05, 29 942, nr. 3, p. 33.

153. Kamerstukken II 1992/93, 22 969, nr. 3, pp. 18, 59.

154. Kamerstukken II 1994/95, 22 969, nr. 19, p. 24.

155. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr. 19, pp. 2, 5; Kamerstukken II 1994/95, 22 969, nr. 23; Handelingen II 1994/95, nr. 99, p. 6073; Kamerstukken II 1994/95, 22 969, nr. 29, p. 1; Handelingen II 1995.96, nr. 4, p. 203; Handelingen I 1997/98, 34, p. 1744.

Minister urged that the original bill allowed the court discretion to choose a three-year plan, lawmakers insisted that minimum social standards should be established by the legislature rather than the courts.[156] The government finally relented on this point and amended its proposed bill.[157]

Legislators preferred the three-year period because the decades of credit counseling experience by the GKBs had proven the effectiveness of the maximum three-year-plan model of the 1979 NVVK code of conduct.[158] Lawmakers emphasized that this model had been established in large part to avoid recidivism; longer plans led to flagging motivation by consumer debtors and markedly increased levels of repeat debt problems.[159] It was suggested that, especially in light of experience under the NVVK voluntary model, expecting someone to live longer than three years on the social assistance minimum would be "from a social point of view not responsible."[160] Moreover, if creditors knew that a court-imposed plan would extract five years of income while a consensual arrangement under the NVVK model would require only three years, the goal of encouraging more out-of-court workouts would be undermined.[161] Thus, more than any other influence, the well-developed practice of voluntary arrangements in the Netherlands compelled the adoption of the three-year standard—a much shorter period than in surrounding debt relief systems.[162]

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156. Kamerstukken II 1994/95, 22 969, nr. 19, pp. 5, 24; Kamerstukken II 1994/95, 22 969, nr. 22; Handelingen II 1994/95, nr. 99, pp. 6077, 6081. This is quite an ironic statement in light of the debate over the amount to be left free for debtors' budgets and the eventual takeover of this area of policy by the courts. *See supra* Part III.A.2.

157. Kamerstukken II 1994/95, 22 969, nr. 28.

158. *See supra* Part II.B.1.

159. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr. 19, pp. 2, 11–12, 14, 18; Kamerstukken II 1994/95, 22 969, nr. 23; Handelingen II 1994/95, nr. 99, pp. 6075, 6077, 6079, 6081; Handelingen II 1994/95, nr. 100, p. 6133; Kamerstukken II 1995/96, 22 969, nr. 30, p. 2 ; Kamerstukken I 1995/96, 22 969, nr. 34b, p. 7; *see also* Huls, *Alternatives*, *supra* note 47, at 297.

160. Kamerstukken II 1994/95, 22 969, nr. 19, p. 5; *see also* Handelingen II 1994/95, nr. 99, p. 6071.

161. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr. 19, p. 5; Handelingen II 1994/95, nr. 99, p. 6081; Handelingen II 1995/96, nr. 4, p. 203.

162. Oddly, comparative law played very little if any role in the development of the Dutch system. Only twice in the entire legislative record does a legislator refer to the considerably longer plan periods of the new systems in neighboring states, as he asks at one point whether a three year period "feels like fraud" in light of the five and seven year periods of "surrounding countries." Kamerstukken II 1994/95, 22 969, nr. 19, p. 15; *see also* Handelingen II 1994/95, nr. 100, p. 6121. This question was essentially ignored. Although the reference isn't explained, the five- and seven-year periods come from existing and planned law governing judicial plans in France and Germany at the time. Kilborn, *German Law*, *supra* note 7, at 282–84; Kilborn, *French Law*, *supra* note 7, at 647 n.208. Indeed, before the Dutch bill became law, proposals

The uniform result of completion of the plan is also established by law. Upon conclusion of the repayment term, most[163] unpaid obligations are "no longer enforceable" unless the judge refuses a discharge[164] after a hearing within one month of the conclusion of the plan term.[165] The court can refuse a discharge if the debtor has failed to fulfill an obligation under the WSNP,[166] such as by failing to inform and cooperate with the trustee or failing to exert maximum effort to produce income.[167] Though it does happen,[168] Dutch courts

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were pending in Belgium and Luxembourg for five- and seven-year maximum plans, respectively. Kilborn, *Belgium and Luxembourg*, *supra* note 7, at 23–26.

163. The only unsecured debts not subject to discharge are student loans. F art. 299a.

164. The effect of the Dutch law can be properly called a "discharge," even though, just like under the U.S. law, "discharge" does not mean the obligations are destroyed. Under U.S. law, the "discharge injunction" simply prevents creditors from enforcing the debtor's unpaid obligations. 11 U.S.C. § 524(a) (2005). Similarly, the Dutch discharge simply makes the unpaid obligations no longer enforceable at law, although a so-called "natural obligation" remains, morally obliging fulfillment of the obligations to the extent that the debtor can do so later. F art. 358; Huls, *Etat des lieux*, *supra* note 53, at 156; Kamerstukken II 1992/93, 22 969, nr. 3, pp. 10, 20–22, 66; Kamerstukken II 2004/05, 29 942, nr. 3, p. 2.

165. F arts. 352–58.

166. F art. 354(1).

167. Although this appears nowhere in the statute, one of the debtor's main obligations under the WSNP is to exert maximal effort to find and keep work that will produce the greatest possible distribution to creditors. The Justice Minister stressed this point in the legislative record, and the Supreme Court recently acknowledged this duty, albeit in dictum. Kamerstukken II 1992/93, 22 969, nr. 3, pp. 6, 59; Kamerstukken II 1997/98, 25 672, nr. 6, p. 9; Hoge Raad (July 12, 2002), § 2.12, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-341. The German law, in contrast, explicitly imposes a requirement to find and keep good work. Kilborn, *German Law*, *supra* note 7, at 280–81.

The courts are divided on the extent of this duty, but some debtors are (rarely) denied a discharge or dismissed early from the WSNP process for failing to exert themselves sufficiently to find and keep work. The Supreme Court recently rejected an appeal from a couple denied discharge for failing to make €877.26 of prescribed plan payments, despite the couple's explanation that the failure was the result of the husband's losing his job when his employer went bankrupt. Verzoeker, Hoge Raad [HR] [Supreme Court of the Netherlands], 25 maart 2005, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2005A004; The main problem in this case, though, seems to have been failure to communicate this problem to the trustee (and failure to appear at court hearings) rather than the simple failure to pay what the plan prescribed. Similarly, the appellate court in Amsterdam affirmed an early dismissal (without discharge) of a case in which the debtor had moved to a much lower-paying job, although the main problem in this case, too, seems to have been failure to discuss this move with the trustee. X/Rijkelijkhuizen, Gerechtshof [HOF] [court of ordinary appeal], Amsterdam, 23 augustus 2002, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-336; *see also* Schuldenaar, Arrondissementsrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Bosch, 10 mei 2004, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2004-451 (denying a discharge in the case of an imprisoned debtor, in part because he could not fulfill his duty to earn income from prison); X/Noppen, Gerechtshof [HOF] [ordinary court of appeal], Arnhem, 7 september 2000, *available at* http://www.wsnp.rvr.org/cgi-very rarely deny a discharge after the full term of the case has run.[169] For example, in 2003, the Dutch Supreme Court, (*Hoge Raad*), affirmed one discharge denial based on the debtor's having concocted a scheme to conceal from the trustee the fact that he had taken over a part of his employer's repair business.[170]

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bin/Jurisprudentie/preview.cfm?Code=2000-191 (rejection a WSNP petition because the debtor faced a 6-month prison term and could not fulfill her duty to maximize income during that time). Failure to look for work—at least after the court orders such a search—might also lead to denial of discharge. B, Gerechtshof [HOF] [ordinary court of appeal] Bosch, 27 november 2003, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2003-423; X/R.E.F., Gerechtshof [HOF] [ordinary court of appeal] Arnhem, 11 november 2002, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-363; *see also* Khadija D./ Dungen, Gerechtshof [HOF] [ordinary court of appeal] Bosch, 24 juni 2004, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2004-450.

In contrast, however, another appellate court reversed an order of the district court denying discharge for a wealthy debtor's failure to make all of the plan-prescribed minimum payments into the estate, even though the debtor had allegedly failed to attempt to reduce excessive living expenses. X/Goede, Gerechtshof [HOF] [ordinary court of appeal] Leeuwarden, 29 aug. 2001, *available at* http://www.wsnp.rvr.org/cgibin/Jurisprudentie/preview.cfm?Code=2001-278; *reversing* X, Arrondissementsrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht] Assen, 25 jan. 2002, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-284; *see also* X/Kemps, Gerechtshof [HOF] [ordinary court of appeal] Bosch, 14 mei 2002, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-324 (reversing a denial of discharge for failure to make a sufficient contribution to the estate).

168. This conclusion is based on the Author's review of the cases collected in the extremely helpful database of jurisprudence in the library section of the main WSNP website, *available at* http://www.wsnp.rvr.org/frames/fr_bibl.htm (last visited Nov. 14, 2005).

169. The court might dismiss the case *early*, however, based on the debtor's early rehabilitation, failure to fulfill duties under the law, assumption of large debts, or attempt to harm creditors. F art. 350(3); *See, e.g.*, R.G./M. B.-R., Hoge Raad [HR] [Supreme Court of the Netherlands], 10 januari 2003, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2003-381; X/van de Voort, Gerechtshof [HOF] [ordinary court of appeal] Bosch, 5 maart 2002, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2002-322. In 2003, 5% of the 7,700 cases that ended that year concluded (probably early) with a negative result, and in 2004, that number rose to 20%. CBS Stats 2003, *supra* note 98; CBS Stats 2004, *supra* note 98.

170. HR 20 June 2003, *available at* http://www.wsnp.rvr.org/cgi-bin/Jurisprudentie/preview.cfm?Code=2003-405 (last visited Nov. 14, 2005). The debtor had his son take over the inventory and goodwill of the business and employ the debtor 20–25 hours per week, although the son was fully employed elsewhere and had no intention of entering the repair business, and the debtor acted as the main contact person for the business. REKENMODEL, *supra* note 131, § 3.2.

4. Self-Financing the Trustee's Fee or Avoiding It In Simplified Proceedings: The Real "Stick Behind the Door"

Trustees need to be reasonably remunerated for the labor-intensive processes of monitoring the debtor, collecting and distributing income, and reporting to the court for three years. The Dutch legislature chose a largely self-financing structure to cover the trustee's fees, which also enhances the "stick behind the door" goal of encouraging creditors to agree to voluntary arrangements and avoid the in-court process. If creditors reject a voluntary arrangement, and the case goes to court, all publication costs and most of the trustee's fee[171] are paid from estate assets and income that would otherwise be distributed to creditors.[172]

Until recently, the trustee received only about $25 per month from the estate—about $900 over a three-year plan—for administering each debtor's case.[173] To strengthen the "stick behind the door" effect[174] and improve trustee quality, in 2004 the trustee's fee was nearly doubled to €37 (about $45) per month—about $1,600 over a three-year plan period.[175] This may well improve trustee recruiting and retention, but the voluntary plan process has remained moribund. Recall that both the absolute number and the rate of voluntary plans *fell* rather sharply in 2004 according to recent NVVK data—from 5300 (15%) in 2003 to 3500 (9%) in 2004.[176] Apparently, if creditors are faced with a 60% loss in the voluntary process, they are more than willing to accept an even greater loss in the in-court process.

As a result of the priority payment from the estate of the trustee's salary and substantial publication costs,[177] most Dutch

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171. Trustees are remunerated in two ways. In addition to the monthly salary distribution from the estate, trustees receive a per-case subsidy and limited expense reimbursement from government funds. This subsidy has risen periodically from its original level of about $625 per case, and it stands today at between €1,000 and €2,400 ($1,250 and $3,000), depending upon whether the case is single or joint and whether or not the debtor is an ex-entrepreneur. *WSNP en euro*, WSNP UPDATE, no. 25 (Dec. 2001), *available at* http://www.wsnp.rvr.org/wsnpindex2.html (follow "Bibliotheek" hyperlink; then follow "Nieuswsbrief Update Wsnp" hyperlink; then follow "nr 25 December 2001" hyperlink) (last visited Nov. 14, 2005); Order of Feb. 6, 2001, Stb. 2001, 80, *available at* http://www.wsnp.rvr.org/bibliotheek/data/besluiten/subs_bew_besl.htm; Order of June 20, 2002, Stcrt. 2002, 119, at 10.

172. F art. 320(7).

173. Kamerstukken II 1997/98, 25 672, nr. 3, p. 3; Order of July 15, 1998, art. 2, Stb. 1998, 477 (setting the salary at fifty gilders per month); Order of Feb. 6, 2001, Stb. 2001, 81 (same).

174. *See, e.g.*, Kamerstukken II 2004/05, 29 942, nr. 6, p. 5.

175. Order of Aug. 3, 2004, Stb. 2004, 391.

176. *See supra* note 103 and accompanying text.

177. Before 2005, publication in local and national newspapers could cost as much as $2,500 per case. WODC REPORT, *supra* note 51, at 151. These costs will fall

plans thus far have been purely symbolic, offering little or nothing to creditors. One prominent study revealed that, of the two-thirds of surveyed cases filed in 1999 and 2000 for which payment capacity was known, 56% could pay only the $25 trustee fee or less per month; another 25% could pay only between $25 and $125 per month, and another 9% could pay only between $125 and $250 per month.[178] Deducting the trustee's fee, even these few higher-income debtors could pay creditors only about $7,500 over a three-year plan. Creditors complained in the early years of the new law that only about 20% of cases held hearings to verify creditors' claims and plan any distribution to creditors.[179]

Legislators anticipated from the very beginning that many debtors would be unable to pay anything substantial beyond the trustee's fee,[180] and they provided for a fast-track simplified procedure for extreme cases. If one year after the opening of the case the debtor still has neither assets nor sufficient available future income potential to produce a distribution to creditors, the trustee can issue a declaration to the effect that "it is not reasonably anticipated that the debtor can fulfill his or her obligations in full or in part."[181] On the basis of this declaration, the court can end the process and grant the debtor an immediate discharge.[182] The law allows the court to withhold judgment for further observation of the debtor,[183] and courts seem to be applying this one-year provision quite cautiously despite the significant numbers of "can't pay" debtors. One prominent study suggested that courts were holding back on these one-year discharges "to create societal support" for the new law in its early years.[184] Nonetheless, courts ended 4% of cases with discharges already between 1999 and 2001,[185] well before these cases would have concluded on the normal three-year track.

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significantly as internet publication replaces print publication by mid-2005. Law of 24 Nov. 2004, Stb. 2004, 615; Order of 30 Dec. 2004, Stb. 2005, 10; *Faillissementswet aangepast*, WSNP UPDATE, no. 36 (Apr. 2005), *available at* http://www.wsnp.rvr.org/wsnpindex2.html (follow "Bibliotheek" hyperlink; then follow "Nieuswsbrief Update Wsnp" hyperlink; then follow "nr 36 April 2005" hyperlink) (last visited Nov. 14, 2005).

178. WODC REPORT, *supra* note 51, at 86, tbl. 20. Another 10% of debtors could pay $250–$1350 per month.

179. *Id.* at 119.

180. Kamerstukken II 1992/93, 22 969, nr. 3, p. 10; Handelingen II 1994/95, nr. 99, pp. 6083–84; Handelingen II 1994/95, nr. 100, p. 6118; Kamerstukken II 1997/98, 25 672, nr. 3, p. 5; Kamerstukken I 1997/98, 22 969, nr. 297, p. 5.

181. F art. 352(2).

182. *Id.*

183. F art. 354(3).

184. WODC REPORT, *supra* note 51, at 147.

185. *Id.* at 72, tbl. 9 (reporting 415 of 15,254 total cases ended with a discharge in 1999 and 2000); *Instroom 2001*, WSNP UPDATE, no. 26 (Mar. 2002), *available at* http://www.wsnp.rvr.org/ wsnpindex2.html (follow "Bibliotheek" hyperlink; then follow "Nieuswsbrief Update Wsnp" hyperlink; then follow "nr 26 Maart 2002" hyperlink)

In a recent reform proposal, the government has proposed expanding this simplified proceeding to cases in which some distribution might be made to creditors, but the amount is so small that continuation on the usual three-year track is "not justified."[186] Following recent similar developments in France,[187] the Dutch system seems to be abandoning the "payment morality" function of economically wasteful payment plans where debtors have no hope of both paying administrative costs and substantially paying down their debts.

5. Getting Comfortable With the WSNP: Rising Filings Year After Year

After an initial period of hesitancy, Dutch debtors continue to flock to the WSNP in increasing numbers year after year. Lawmakers originally anticipated around 12,000 WSNP filings per year,[188] but that barrier was broken only last year. On the heels of a relatively slow start, with only about 6,300 filings in 1999, the number of "definitive"[189] new case openings jumped 36% in 2000 to over 8,600 and remained at that level in 2001.[190] New filings rose about 10% in each of 2002 and 2003 before shooting up nearly 32% in 2004, to just under 14,000—about 8.6 filings for every 10,000 Dutch residents.[191] Thus, the Dutch filing rate is now on par with the rate in neighboring Belgium (nine filings per 10,000), although it still lags far behind the filing rates in France (twenty-seven filings per 10,000) and the United States (fifty–five filings per 10,000).[192] The 3,708

(last visited Nov. 14, 2005) (reporting 477 cases ended with discharge in 2001, which brings the 1999–2001 total to 892 of about 23,750 cases initiated in those three years).

186. Kamerstukken II 2004/05, 29 942, nr. 3, pp. 5–6, 36–37 (suggesting that an expected distribution of less than 2% of creditors' claims would trigger this new provision).

187. The unique simplified process in the Dutch law and its restricted application resemble the recently adopted procedure of personal recovery under the French law. Kilborn, *French Law*, *supra* note 7, at 655–61.

188. Kamerstukken II 1997/98, 25 672, B, p. 3; Kamerstukken II 1997/98, 25 672, nr. 3, p. 3; Handelingen I 1997/98, 34, p. 1741.

189. "Definitive" case openings exclude the few cases opened "provisionally" in anticipation of future information or to deal with exigent circumstances. F art. 287(2), (4)–(8). The provisional case opening procedure has been used in only about one in seventeen cases. Kamerstukken II 2004/05, 29 942, nr. 3, pp. 7–8.

190. For a constantly updated table of bankruptcy and WSNP definitive case opening information, see Uitgesproken faillissementen en schuldsaneringen, Centraal Bureau voor de Statistiek, (2005), *available at* http://statline.cbs.nl/StatWeb/Table.asp?STB=G1&LA=nl&DM=SLNL&PA=37289&D1=a&D2=a&HDR=T&TT=2 (last visited Nov. 14, 2005) [hereinafter Uitgesproken]. The table reports 6360 "definitively" opened cases in 1999, 8669 in 2000, and 8678 in 2001.

191. *Id.* (reporting 9,479 cases opened in 2002, 10,587 in 2003, and 13,969 in 2004); CBS Stats 2004, *supra* note 103 (reporting the 8.6/10,000 rate).

192. Kilborn, *Belgium and Luxembourg*, *supra* note 7, at 35.

filings in the first quarter of 2005,[193] however, exceed the number of first-quarter filings in 2004 by nearly 8%, putting the system on track to reach nearly 15,000 by year's end.[194]

B. *Consumer Bankruptcy Reform (Restriction) in the United States*

Just as the Dutch bankruptcy law was taking on a more liberal or debtor-friendly approach to discharging unpaid consumer debts, the U.S. Congress was preparing to shift U.S. policy toward a more restrictive European model of requiring more debtors to pay. Before 1996, Congress appeared uninterested in amending the U.S. consumer bankruptcy system. That changed when the Administrative Office of U.S. Courts released data revealing that, during a time of remarkable general economic vitality, the total number of bankruptcy filings had for the first time exceeded one million in 1996.[195] A cry immediately arose over a supposed decline in the stigma of bankruptcy and over abuse of the system by irresponsible consumers seeking an easy escape from their obligations. In September 1997, the first of many bills was introduced in Congress that proposed to reform the consumer bankruptcy system by, among other things, requiring a Chapter 13 payment plan as a prerequisite for relief for debtors with "excess" disposable income. An eight year struggle ensued in which bills received supermajority support in both houses of Congress but failed for one reason or another year after year.[196] Finally, on April 20, 2005, President Bush signed a bill into law.[197] Most of the provisions of the new law became effective on October 17, 2005.[198]

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193. Uitgesproken, *supra* note 190.

194. This continuous rise in filings and the attendant administrative workload have prompted the first reform proposal, currently pending in the Second Chamber. Echoing similar complaints in the United States, *see infra* Part II.B., the Justice Minister has warned that numerous filings might undermine public support for the new law, so the government has proposed, among other things, imposing heightened restrictions on access to the system. Kamerstukken II 2004/05, 29 942, nr. 3. The "restricted access" aspect of the reform proposal received a cold reception in the Second Chamber, Kamerstukken II 2004/05, 29 942, nr. 6, although other aspects of the reform, *see, e.g.*, *supra* notes 149 (scrapping the "discretionary" model and adopting a standard three-year plan) and 185 (extending application of fast-track one-year plans), seem likely to pass in coming months.

195. For the sources of all of the factual assertions in this paragraph, and for a thorough analysis of the history of U.S. bankruptcy reform between 1996 and early 2004, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUSTON L. REV. 1091, 1095–1106 (2004); *see also* H.R. Rep. No. 109–31, at 6–10 (Apr. 8, 2005), *available at* http://thomas.loc.gov/cgi-bin/cpquery/z?cp109:hr31.109:.

196. Jacoby, *supra* note 195.

197. Press Release, White House, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html. The Bankruptcy

Unwittingly, Congress and the President have restructured the U.S. consumer bankruptcy system to parallel the Dutch system in many central respects. The 512-page law makes numerous changes to current law and practice,[199] but the most important revisions are particularly noteworthy for the extent to which they echo elements of the Dutch system—sometimes in surprising ways. Dutch experience sheds useful light on the future of the radically reformed U.S. consumer bankruptcy system. This Part focuses on two particularly revealing areas of comparison with Dutch law and practice: pre-court payment plan negotiations and in-court payment plan budget levels.

1. Required Pre-Bankruptcy Credit Counseling—Out-of-Court Negotiations in Sheep's Clothing

One seemingly innocuous provision of the new law may have the most substantial effect. Under the revised U.S. Bankruptcy Code, an individual can seek relief under any chapter of the Code *only* after having received "an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis" within 180 days before the bankruptcy filing.[200] At first glance, this provision seems to require little more than disclosure of "opportunities" for credit counseling and "assistance" in analyzing a budget, explicitly suggesting that a quick telephone call or reference to an internet site might suffice.[201]

In fact, this simple provision might well radically alter how individuals seek and receive debt relief in the United States. The law will, de facto, require many (if not most) debtors to negotiate an out-

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Abuse Prevention and Consumer Protection Act of 2005 was assigned Public Law number 109–8.

198. Pub. L. No. 109-8, § 1501 (2005) (making most provisions effective 180 days after enactment).

199. For a description of the major consumer amendments implemented by the reform law, see EUGENE R. WEDOFF, MAJOR CONSUMER BANKRUPTCY EFFECTS OF THE 2005 REFORM LEGISLATION (2005), *available at* http://www.abiworld.org/pdfs/s256/mainpoints8.pdf.

200. 11 U.S.C. § 109(h)(1) (2005) (as amended by Pub. L. No. 109-8, § 106(a)). The law allows for certain exceptions; e.g., for debtors in districts where public officials have declared that insufficient credit counseling is available, or debtors whose "incapacity, disability, or active military duty in a military combat zone" prevents their obtaining such counseling. *Id.* § 109(h)(2)–(4). These exceptions are narrow and, in my view, are likely to be interpreted and applied very narrowly.

201. One can easily imagine a series of two or three handouts or internet pages that would fulfill these requirements—page one might list the addresses and telephone numbers of local counseling agencies and discuss briefly what they do, and pages two and three might describe an average household budget with estimated average local expenses and prompt debtors to compare their budgets with the model.

of-court repayment plan (DMP) with creditors, just as Dutch law requires it de jure. This result will follow from the mandatory *source* of the required "briefing" and the unique financial structure of consumer credit counseling in the U.S.

Individuals cannot receive the required briefing from any source that offers a simple web page or recorded telephone message, but must go to "an approved nonprofit budget and credit counseling agency described in [new] section 111(a)."[202] To be approved, a counseling provider must do much more than simply make available the briefing required by the new law: it must offer general counseling by trained and experienced counselors on the sources of and appropriate solutions for each individual debtor's financial difficulties, and must also "provide for safekeeping and payment of client funds, including an annual audit of the trust accounts and appropriate employee bonding."[203] As it turns out, it is not enough to provide a briefing on opportunities for credit counseling and budget analysis. The provider itself must be equipped to offer professional counseling and guidance services, possibly including facilities for the intake and distribution of client funds—i.e., servicing DMP payment plans.[204]

Just as German and Dutch debtors must file a certificate, generally issued by credit counselors, attesting to failure of their out-of-court negotiations,[205] the new law requires U.S. individual debtors to file with their petitions a certificate "from the approved nonprofit budget and credit counseling agency" that provided the required briefing.[206] The certificate must describe the credit counseling services provided to the debtor, clearly implying that more than a briefing is intended. The law is silent on what requirements, if any, credit counselors can impose on the issuance of these certificates.[207]

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202. 11 U.S.C. § 109(h)(1) (2005) (as amended by Pub. L. No. 109-8, § 106(a)).

203. *Id.* § 111(c)(2)(C), (E), and (F) (2005) (as amended by Pub. L. No. 109-8, § 106(e)(1)).

204. Although this seems to be at odds with the law, the U.S. Trustee's application for counselor approval suggests that not all counseling agencies need to be equipped to administer payment plans. Executive Office for United States Trustees, *Instructions for Application for Approval as a Nonprofit Budget and Credit Counseling Agency* 4 (2005), *available at* http://www.usdoj.gov/ust/bapcpa/ccde/docs/BCC ApplicationInstructions.pdf (suggesting that the DMP administration section "applies only to Agencies offering debt management plans").

205. *See supra* notes 94–95 and accompanying text; Kilborn, *German Law*, *supra* note 7, at 273 & n.83.

206. 11 U.S.C. § 521(b)(1) (2005) (as amended by Pub. L. No. 109-8, § 106(d)).

207. In contrast to the Dutch law, the U.S. law does not clearly require counselors to cooperate with debtors and issue such certificates. *Cf.* F art. 285(4); Kamerstukken II 1997/98, 25 672, B, p. 2; Kamerstukken II 1997/98, 25 672, nr. 3, p. 4. Counseling agencies in the United States are apparently free to impose whatever requirements they wish for issuance of the required certificates.

Credit counseling agencies can be expected to make every effort to push debtors into out-of-court payment plans—possibly even requiring an attempted payment plan as a condition to issuance of the required certificate. Given the financial structure of credit counseling in the United States, counseling agencies are trapped in a patent conflict between their own survival and their pre-bankruptcy clients' interests.

A combination of statutory fee restrictions, waning creditor financing, and a lack of governmental support will all but force credit counselors to squeeze revenue from their consumer debtor clients. The new law requires approved counseling agencies to charge no more than a "reasonable" fee for their services and to "provide services without regard to ability to pay the fee."[208] As a result, basic per-case intake fees might not defray operating costs for counseling agencies. The traditional alternative source of financial support for counseling is in sharp decline. As discussed above,[209] credit counselors in the United States are largely funded by creditors, who have heavily scaled back their financial support in recent years. If Congress expects the credit counseling industry to act as watchdogs over the entryway to the bankruptcy system, it should adequately compensate counselors. The Dutch parliament, for example, allocated substantial financial support to local credit counseling agencies in connection with their new role under the consumer bankruptcy law.[210] The U.S. Congress, in contrast, imposed an unfunded mandate on these already financially strapped agencies.

Thus, to service a flood of pre-bankruptcy clients, counseling agencies will have to funnel as many debtors as possible into the one reliable source of funding they have: servicing fees and other creditor incentives associated with DMPs.[211] Credit counselors earn very little for clients directed immediately into bankruptcy, so they can be expected to continue their current practice of shunning bankruptcy and steering as many debtors as possible into DMPs, even in cases where payment plans are clearly destined for failure.[212]

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208. 11 U.S.C. § 111(c)(2)(B) (2005) (as amended by Pub. L. No. 109-8, § 106(e)(1)).

209. *See supra* notes 31–32 and accompanying text.

210. In enacting the WSNP, the Dutch federal government allocated 15 million gilders (about \$7.5 million) for financing local counseling activities, in addition to 10 million gilders (about \$5 million) of extra funding for the courts and the initial implementation costs for the new law. *See* Kamerstukken II 1997/98, 25 672, B, p. 3; Kamerstukken II 1997/98, 25 672, nr. 3, pp. 3, 6–7.

211. *See supra* notes 31–37 and accompanying text.

212. CREDIT COUNSELING IN CRISIS, *supra* note 31, at 23–25 (noting recent NFCC reports of a 26% completion rate and arguing that counseling agencies "are loathe to discuss bankruptcy with consumers because they do not make any money on these consumers"); AICCCA Consumer Credit Counseling Code of Practice § 9(B)(3) (2003), *available at* http://www.aiccca.org/mbrdocs/Code of Practice.doc (last visited Nov. 15, 2005) (requiring counselors to "[p]rovid[e] a DMP to clients as an alternative

Congress apparently anticipated and perhaps even intended this result. Although no mention of "debt repayment plans" appears anywhere in the provision that introduces the counseling requirement, an amendment to a different section of law requires the debtor to file "the debt repayment plan, if any, developed . . . through the approved nonprofit budget and counseling agency."[213] Thus, both as a matter of legislative intent and as a matter of likely practical implementation, the required credit counseling in the new law actually represents a *sub silentio*, backdoor adoption of required out-of-court payment plan negotiations, much like the explicit requirement of Dutch law.

a. An Impending Spike in Waiting Periods

The analogous Dutch experience with required counselor-supported, pre-court negotiations is instructive: U.S. debtors will likely have to wait longer to receive needed relief. Even for those U.S. debtors who already would have obtained credit counseling before considering bankruptcy, a flood of new clients will surely produce waiting periods for the mandatory counseling. Experts predict that, with passage of the counseling requirement, "the rising tide of Americans seeking credit counseling will become a flood."[214] Counseling agencies in the United States will likely face at least the two- to six-month waiting periods of most Dutch counseling centers.[215] Even before the impending flood of new pre-bankruptcy clients, the ratio of those seeking counseling to the number of counseling offices in the United States is comparable to if not smaller than the ratio in the Netherlands.[216] Perhaps the significant market for consumer credit counseling will attract more entrants to the

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to bankruptcy"); Lea Krivinskas, *"Don't File!": Rehabilitating Unauthorized Practice Law-Based Policies in the Credit Counseling Industry*, 79 AM. BANKR. L.J. 51, 56, 64–67 (2005).

213. 11 U.S.C. § 521(b)(2) (as amended by Pub. L. No. 109-8, § 106(d)).

214. CREDIT COUNSELING IN CRISIS, *supra* note 28, at 31; *see also* CONSUMER REPORTS, *supra* note 45 (reporting on the prediction by noted consumer credit expert Robert Manning that requests for credit counseling will increase by at least one-third within a year of passage of the new law, and counselors will be "absolutely overwhelmed").

215. *See supra* notes 94–97 and accompanying text.

216. In the United States, estimates suggest that approximately 8,000 counseling offices service between 3 and 9 million clients annually—between 375 and 1,125 clients per office per year. *See supra* note 31 and accompanying text. In the Netherlands in 2004, approximately sixty-seven members of the NVVK handled around 39,000 requests for counseling—582 requests per agency (which may be divided among a number of offices for some of these agencies). *See supra* note 101; OVERZICHT VAN DE INSTELLINGEN DIE LID ZIJN VAN DE NEDERLANDSE VERENIGING VOOR VOLKSKREDIET, *available at* http://www.volkskrediet.nl/ (last visited Nov. 1, 2005) (listing members).

industry, including debtor lawyers, but such a change would take time; waiting periods will likely be a problem for some time. Moreover, as counselors urge more and more debtors to negotiate payment plans, Dutch experience suggests that the plan negotiation process will add months to the wait.[217]

One other provision, unique to the new U.S. law, will exacerbate the burden on counselors and the ensuing waiting periods for consumers. In addition to requiring "credit counseling" before debtors file for relief, the new law requires debtors to complete "an instructional course concerning personal financial management" before they receive a discharge at the end of a case under either Chapter 7 or Chapter 13.[218] This seemingly well-intentioned provision seems to respond to the desire, voiced repeatedly by lawmakers in the Netherlands, for "integrated" counseling as part of the debt relief system.[219] Dutch legislators noted numerous times that part of the problem is that some consumers have trouble handling and budgeting money,[220] so the U.S. move to add a pre-discharge counseling requirement seems to be a relatively positive, albeit small step, in preventing future problems. On the other hand, the law sets few clear criteria for evaluating the content of these required courses[221]; already overwhelmed counselors will fall even farther behind as they undertake financial management training in addition to credit counseling for all debtors.

b. The Gloomy Outlook for DMPs In Light of Comparable Dutch Success Rates: a Cost-Benefit Imbalance?

Dutch experience also strongly suggests that few, if any, debtors will be successfully diverted from bankruptcy by required credit counseling. This Author has suggested before that requiring a European-style voluntary plan negotiation stage would produce little success in the United States,[222] and the Dutch experience confirms this suspicion. Careful study of the out-of-court plan negotiation process in the Netherlands indicates that creditors systematically reject plans offering less than about a 40% payout over three years.[223]

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217. *See supra* notes 96–97 and accompanying text.

218. 11 U.S.C. §§ 727(a)(11), 1328(g) (as amended by Pub. L. No. 109-8, §§ 106(b), (c)).

219. *See, e.g.*, Kamerstukken II 1997/98, 25 672, nr. 3, p. 2; Kamerstukken II 2004/05, 29 942, nr. 6, pp. 2, 9–10 (recommending, among other things, budget counseling during the plan period).

220. *See, e.g.*, Kamerstukken II 1994/95, 22 969, nr. 19, pp. 2, 13–14; Handelingen II 1994/95, nr. 99, p. 6075; Handelingen II 1997/98, nr. 61, p. 4580.

221. 11 U.S.C. § 111(d) (as amended by Pub. L. No. 109-8, § 106(e)(1)).

222. Kilborn, *German Law*, *supra* note 7, at 292–94; Kilborn, *French Law*, *supra* note 7, at 666–69.

223. *See supra* notes 71–72 and accompanying text.

Empirical studies show that few U.S. debtors in the bankruptcy system could hope to offer such a dividend given their income, reasonable expenses, and debts.[224] Moreover, U.S. creditors have historically required a 100% return of principal, and credit counselors in the United States have already begun to report declining cooperation in recent years by creditors in the plan-negotiation process.[225] The dismal and falling success rate of the mandated Dutch voluntary plan process[226] is a harbinger of near certain failure of the similar U.S. process. Thus, Congress has imposed on every U.S. debtor a time- and labor-intensive process that will prove completely superfluous in the vast majority of cases.

c. The Miniature New U.S. "Stick Behind the Door"

Buried in the new U.S. law is one provision apparently designed to compel creditors to cooperate in the all-but-doomed out-of-court plan negotiation process. Dutch law similarly has sought from the beginning to enhance the out-of-court agreement process with a "stick behind the door," threatening creditors with much smaller returns in the in-court plan process.[227] The failure of the Dutch "stick behind the door" effect demonstrates, however, how utterly ineffective this new provision of U.S. law will be.

In a section entitled "Promotion of Alternative Dispute Resolution," the new U.S. law adds a provision allowing the court to reduce a creditor's claim if that creditor "unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency."[228] This provision confirms Congress' intention that debtors receive not only a briefing on credit counseling

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224. *See, e.g.*, Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, Twenty-First Century Bankruptcy: Two Decades of Evidence About Consumer Debt and The Stigma of Bankruptcy (unpublished manuscript on file with Author). This report on the latest installment from the famous Consumer Bankruptcy Study reveals that U.S. debtors in 2001 were in even worse financial shape than their counterparts in previous decades. Annual income levels remained low (mean $26,982, median $24,006), and unsecured debt levels were way up (mean $34,425, median $20,450), not to mention a significant increase in longer-term secured debt. *See id.* at 5–6, 9, tbl. 1a. Consequently, debt-to-income ratios had also risen sharply (mean 4.63, median 2.3), including the crucial ratio of non-mortgage debt to income (mean 2.12, median 1.17). *See id.* at 9–11, tbls. 2–3. Thus, the average debtor would have to dedicate *all* income for over a year to pay off unsecured debts in full. Taking into account taxes, secured debt service, and reasonable living expenses for these debtors, only a very few might have hoped to offer a 40% or greater distribution to unsecured creditors in a voluntary three- to five-year out-of-court payment plan.

225. *See supra* note 45 and accompanying text.

226. *See supra* notes 98–103 and accompanying text.

227. *See supra* note 89 and accompanying text.

228. 11 U.S.C. § 502(k)(1)(A) (as amended by Pub. L. No. 109-8, § 201(a)).

opportunities before filing, but that they are urged into out-of-court payment plans by approved credit counseling agencies. It also confirms, however, Congress' unrealistic understanding of the give-and-take element of the out-of-court negotiation process.

This "stick" is whittled away to virtually nothing by three caveats and limitations. First, the offer of a reasonable alternative repayment schedule must have been made at least sixty days before the debtor's bankruptcy filing.[229] Creditors are free to refuse reasonable offers in compromise if the debtor files for bankruptcy shortly after the refusal. Of course, debtors are not likely to wait sixty days to file for bankruptcy relief after a creditor has rejected their attempt to settle out of court. Second, the debtor must have offered to pay at least 60% of the creditor's claim within a reasonable extension of the original contractual repayment period.[230] Given sky-high U.S. debt levels and stagnant income, few debtors are likely to be able to offer 60% payment without a substantial repayment period, which would likely exceed a reasonable extension.

Finally, the U.S. "stick" turns out to be not particularly menacing. As punishment for having unreasonably refused to negotiate a 40% remission of debt, the creditor faces reduction of its claim by a maximum of only 20%.[231] The Dutch "stick" often reduces payout to creditors to nothing, yet creditors still refuse to be swayed for a variety of economic and non-economic reasons.[232] One can hardly imagine that the threat of losing 20% of the creditor's claim will promote alternative dispute resolution that would not already have been successful.

This provision is a blatantly half-hearted attempt to hold creditors responsible for their own economically irrational and irresponsible refusal to negotiate out of court—refusals that have become quite common in recent years.[233] Dutch legislators repeatedly acknowledged and sought to address the responsibility of creditors for creating excessive demands on the bankruptcy system by refusing reasonable economic compromises.[234] It is a shame that the U.S. Congress has refused to do likewise.

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229. *Id.* § 502(k)(1)(B)(i) (as amended by Pub. L. No. 109-8, § 201(a)).

230. *Id.* § 502(k)(1)(B)(ii) (as amended by Pub. L. No. 109-8, § 201(a)).

231. *Id.* § 502(k)(1) (as amended by Pub. L. No. 109-8, § 201(a)).

232. *See supra* notes 173–76 and accompanying text.

233. CONSUMER REPORTS, *supra* note 46.

234. *See, e.g.*, Kamerstukken II 2004/05, 29 942, nr. 6, pp. 9, 18; Kamerstukken II 2001/02, 28 258, nr. 5, p. 4; Kamerstukken II 2001/02, 28 258, nr. 3, p. 2; Kamerstukken II 1994/95, 22 969, nr. 19, pp. 2, 12–13; Handelingen II 1994/95, nr. 99, p. 6078–79.

2. The Means Test, Restricted Payment-Plan Budgets, and an Intense Monitoring Burden for Trustees

"The heart of the [new law's] consumer bankruptcy reforms"[235] is the "means test," which is designed to force more debtors out of quick Chapter 7 relief and into Chapter 13 payment plans.[236] Reasonable estimates indicate, however, that few debtors will be denied access to Chapter 7, just as relatively few debtors actually pay anything to creditors in the Netherlands. For higher-income debtors forced into payment plans under the new U.S. system, though, the means test imposes a strictly regulated budget in much the same way as Dutch law and practice do. Careful comparison of the new U.S. law with recent Dutch payment plan practice reveals two important observations: the mandated U.S. budget is comparatively meager for most debtors, but judges can alter the system fundamentally to fix perceived imbalances.

a. Means Testing: Many Apply, Few Are Selected

Another striking similarity between the U.S. and Dutch laws remains: despite the seemingly demanding nature of both, few debtors will in fact pay anything to creditors. Although the Dutch law technically requires all debtors to submit at least three years of income to their creditors, most debtors can produce nothing more than the trustee's fees, and some cases conclude with a discharge after only one year.[237] Most Dutch debtors simply bide their time until discharge at the conclusion of their cases. This is also true now in the United States, as most debtors obtain relief in a few months under Chapter 7, and this will remain true despite the new and apparently more rigorous means test.[238]

Analytically, the means test consists of two parts,[239] each of which exempts large groups of debtors from imposed payment plans. In part one, the debtor's (and spouse's) "current monthly income"[240] is multiplied by twelve and compared with the inflation-adjusted

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235. H.R. Rep. No. 109-31, at 2 (2005) (Conf. Rep.).

236. For a discussion of Chapter 13 and payment-plan practice under current law, see *supra* notes 23-28 and accompanying text.

237. *See supra* notes 177–85 and accompanying text.

238. Todd Zywicki, *Bankrupt Criticisms: The Bankruptcy Bill Deserves to Pass*, NATIONAL REVIEW ONLINE, Mar. 15, 2005, *available at* http://www.nationalreview.com/comment/zywicki200503150744.asp (last visited Nov. 1, 2005).

239. The test is not formally divided into two parts in the law, but for ease of comprehension, I have divided it into what I see as its two logical components.

240. The word "current" here is a misnomer, and this entire phrase is a term of art. "Current monthly income" under the new law is defined as the average of the debtor's monthly income over the past six months. 11 U.S.C. § 101(10A) (as amended by Pub. L. No. 109-8, § 102(b)).

median family income of a household of the same size as the debtor's in the debtor's state.[241] Only debtors with above-median income are subject to the rest of the means test and a potential imposed payment plan.[242] For example, the 2005 inflation-adjusted median income for a single debtor in Louisiana—one of the poorest U.S. states—is approximately $30,000, and approximately $50,000 for a family of four.[243] One would expect, and empirical survey data have confirmed,[244] that few U.S. debtors seeking bankruptcy relief have income above these averages; thus, this first stage of the means test will likely eliminate most debtors immediately, freeing them to seek quick Chapter 7 relief.

In part two, debtors subtract a series of expenses from their above-average monthly income to see whether significant disposable income is available for creditors. As discussed in greater detail below,[245] debtors are allowed to deduct a standard allowance for monthly food, clothing, and general household expenses, as well as housing and transportation expenses up to a standard maximum established for each debtor's locale.[246] In addition to these standard expenses, debtors can deduct the amounts that they would otherwise pay in a five-year, in-court payment plan to secured and preferred creditors and the trustee's administrative fee, as well as a few other specific exceptional expenses.[247] The means test denies the debtor access to Chapter 7 only if the remainder of the debtor's income after all of these deductions would allow the debtor to pay creditors at least $6,000 over an imposed five-year plan ($100 per month).[248]

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241. *Id.* § 707(b)(6)–(7) (as amended by Pub. L. No. 109-8, § 102(a)).

242. To be precise, the "means test" is simply an interpretive gloss on a section that provides for dismissal of the debtor's case for "abuse." *Id.* § 707(b). If the debtor "passes" either part of the means test, abuse is not presumed based on ability to pay, the debtor need not attempt a repayment plan under Chapter 13, and the debtor's (Chapter 7) case may be dismissed only for some other kind of abuse. *Id.* § 707(b)(1).

243. The state medians from the 2000 Census (reporting 1999 data) are available from the Census Bureau's website, http://www.census.gov/census2000/states (last visited Nov. 1, 2005); and changes in inflation as measured by the Consumer Price Index for All Urban Consumers (CPI-U) are available on the website of the Bureau of Labor Statistics, http://www.bls.gov/cpi/home.htm (last visited Nov. 1, 2005).

244. *See, e.g.*, Sullivan, Warren & Westbrook, *supra* note 224; TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000).

245. *See infra* Part III.B.2.b.

246. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (as amended by Pub. L. No. 109-8, § 102(a)).

247. *Id.* § 707(b)(2)(A)(ii)(II)–(V), (iii)–(iv) (as amended by Pub. L. No. 109-8, § 102(a)).

248. *Id.* § 707(b)(2)(A)(i) (as amended by Pub. L. No. 109-8, § 102(a)). The test is actually more complex than this, as debtors with more than $24,000 in unsecured debt can be denied access only if they can pay 25% of their unsecured debt, which is more than $6,000 over a five-year plan. *Id.* If the debtor can pay $10,000 over a 5-year plan

Given these exemptions and deductions, even the most hawkish supporters of consumer bankruptcy reform have estimated that only 7–11% of debtors might be excluded from Chapter 7 by the means test.[249] Nonetheless, in *every* Chapter 7 case, debtors will have to file a detailed description of how the means test applies to them,[250] and the trustee must review *every* Chapter 7 case and file a statement explaining whether the debtor passes or fails the means test.[251]

One might wonder why Congress imposed the time- and resource-intensive review of the complex means test on *every* case when only about 10% of cases are expected to fail. Dutch reformers expressed concern immediately about aspects of their system that they feared might overburden actors in the system without a commensurate return to creditors.[252] After trustees and courts complained of a cost-benefit imbalance in certain labor-intensive provisions of the new Dutch law, reformers recently proposed amendments to reduce unnecessary complexity.[253] One can only hope that the Congress will respond similarly to the imminent entreaties of overburdened trustees and courts who will now face a largely pointless and unproductive paperwork review burden.

b. The Comparative Burdens On the Few Who Pay

Debtors who fail the means test in the United States will now be relegated to mandatory five-year Chapter 13 payment plans if they seek debt relief,[254] and the means test provides the restricted budgetary framework for such plans. A comparison of the budget elements allowed to debtors under Dutch and U.S. law shows that the

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(at least $166.67 per month), however, the means test denies access to Chapter 7 regardless of debt levels. *Id.*

249. *See, e.g.*, Zywicki, *supra* note 238 (noting that roughly 80% of filers earn below their state's median income, and estimating that half of the remainder will be unable to pay enough unsecured debt to fail the means test).

250. 11 U.S.C. § 707(b)(2)(C) (as amended by Pub. L. No. 109-8, § 102(a)).

251. *Id.* § 704(b)(1) (as amended by Pub. L. No. 109-8, § 102(c)). If the debtor doesn't pass, the trustee must file a motion to dismiss the debtor's case or explain in a written statement why a dismissal should not be imposed. *Id.* § 704(b)(2) (as amended by Pub. L. No. 109-8, § 102(c)).

252. Already in 1995 the First Chamber had expressed concerns about a potential burden on the judiciary posed by the WSNP. *See, e.g.*, Kamerstukken I 1995/96, 22 969, nr. 34a, p. 1; Kamerstukken I 1995/96, 22 969, nr. 34c, p. 2; Kamerstukken I 1996/97, 22 969, nr. 133. The law passed only after measures were taken to simplify the process. *See* Kamerstukken II 1997/98, 25 672, nr. 3, pp. 1–3; Kamerstukken II 1997/98, 25 672, nr. 5, p. 8; Handelingen II 1997/98, nr. 61, p. 4571; Kamerstukken I 1997/98, 22 969, nr. 297, pp. 4–5; Handelingen I 1997/98, 34, pp. 1740–41. The First Chamber remained concerned, however, about the burden on the judiciary. See, e.g., Kamerstukken I 1997/98, 22 969, nr. 297b.

253. Kamerstukken II 2004/05, 29 942, nr. 3, pp. 2, 6, 9. This proposal is pending in the Second Chamber.

254. 11 U.S.C. § 1322(d) (as amended by Pub. L. No. 109-8, § 318(1)).

U.S. law reduces at least some debtors to quite a minimal level of existence. If U.S. courts follow the example of their Dutch counterparts, however, they can craft a more reasonable budget based on the demands of each individual case.

Both U.S. and Dutch law allow for a baseline standard budget for household expenses. While Dutch law incorporates a uniform national welfare level enacted by the legislature,[255] the U.S. law incorporates a uniform national minimum budget designed and implemented by federal taxing authorities. The Internal Revenue Service (IRS) applies so-called "collection financial standards" in evaluating compromise offers by taxpayers with arrearages,[256] and one of these standards is a sliding scale of basic budgetary allowances for debtors with increasing income levels and family sizes. The new U.S. law adopts these IRS budgetary standards as the basis for gauging payment ability in consumer bankruptcy cases.[257] Above-median income debtors seeking relief through a Chapter 13 payment plan must now cede to creditors all income beyond the standard IRS budget allowances.[258]

For example, the 2005 baseline monthly budget for debtors who earn \$40,000–\$50,000 per year[259] is \$649 per month for singles, \$857 for two-person households (e.g., single parents with one child), and \$1,002 for three-person households (e.g., couples with one child).[260] Similarly situated Dutch debtors (assuming all adult members of the household were employed) would be budgeted about 50% more—\$1,000 per month for singles, \$1,290 for single parents, and \$1,500 for working couples.[261] The IRS guidelines budget more to debtors with higher incomes, but they allow a budget similar to the Dutch levels

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255. *See supra* notes 121–23 and accompanying text.

256. These collection financial standards are amended annually and are available on the IRS website, http://www.irs.gov/individuals/index.html (follow "Collection Financial Standards" hyperlink) (last visited Nov. 1, 2005).

257. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (as amended by Pub. L. No. 109-8, § 102(a)).

258. *See* Pub. L. No. 109-8, § 102(h) (amending the definition of "disposable income" in 11 U.S.C. § 1325(b) for above-median income debtors).

259. This income is just above the 2005 median for 1- to 3-member households in Louisiana, but not for 4-member households in Louisiana, and probably not even for smaller households in more prosperous states. Recall that only above-median income debtors are subject to this budget.

260. *See IRS Allowable Living Expenses*, http://www.irs.gov/businesses/small/article/0,,id=104627,00.html.

261. *See supra* notes 136–40 and accompanying text. The portion of the IRS budget allocated for food and clothing (about 60% of the entire budget) can be increased by 5% if "reasonable and necessary." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (as amended by Pub. L. No. 109-8, § 102(a)). But even then the figures would lie markedly below the Dutch levels for similar debtors.

only for debtors who earn more than $70,000 per year[262]—not likely members of the ranks of bankrupt debtors.

If legislators in the Netherlands felt that asking debtors to live on the Dutch minimum income for more than three years was socially irresponsible,[263] one wonders how they would react to a required five years on the significantly tighter U.S. budget. The contrast between the Dutch and U.S. budget levels is striking and surprising. Most observers (including this Author) would have thought that European consumer bankruptcy laws required much more of "can pay" debtors than the U.S. law, even after the reform, but this turns out to be quite untrue.

On top of this baseline, both U.S. and Dutch law provide additional budget allowances for other living expenses.[264] The IRS guidelines allow for limited deductions for housing and utilities, as well as transportation. The housing allowances vary by the county in which the debtor lives and the number of occupants in the dwelling,[265] and the transportation allowances vary by region and metropolitan area. For example, in 2005, single debtors in New Orleans (Orleans Parish) can spend up to $942 per month for housing and utilities, while families of four or more can spend up to $1,274 per month.[266] Single debtors living just up the highway in rural Bunkie (Avoyelles Parish), on the other hand, can only spend up to $635 per month, and a family of four can spend only up to $860 per month.[267] For transportation expenses, debtors throughout

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262. For 2005, the IRS monthly budgets for one-, two-, and three-member households earning more than $70,000 per year are $953, $1,280, and $1,430, respectively. *See IRS Allowable Living Expenses*, *supra* note 260.

263. *See supra* note 160 and accompanying text.

264. In addition to these housing and transportation allowances, only the U.S. law allows for two other extraordinary expenses, although these are likely covered by Dutch social welfare laws. U.S. debtors can add to their budgets the costs of caring for elderly or disabled household members or members of their immediate family living elsewhere, as well as up to $1,500 per year per child for private primary and secondary education. 11 U.S.C. § 707(b)(2)(A)(ii)(II), (IV) (as amended by Pub. L. No. 109-8, § 102(a)). The Dutch medical system would undoubtedly provide for elder and disabled care independently of the bankruptcy system, and the Dutch education system is sufficiently supported by the state so as not to require resort to private schooling.

265. Although not everyone agrees on this point, the new law appears to allow for unlimited budget allowances for mortgage and secured car payments, as both of these are secured debts that the means test allows to be paid in full. *Id.* § 707(b)(2)(A)(iii) (as amended by Pub. L. No. 109-8, § 102(a)). This is perhaps the most significant distinction between the U.S. and Dutch laws in general—U.S. law heavily favors mortgagees and debtors with mortgages, while Dutch law essentially requires sale of all mortgaged property, even if it produces a significant loss for both mortgage creditors and debtors. *See supra* note 145.

266. IRS, *Louisiana-Housing and Utilities Allowable Living* Expenses, http://www.irs.gov/businesses/small/article/0,,id=104796,00.html (last visited Nov. 1, 2005).

267. *Id.*

Louisiana can spend up to $242 per month on gas and maintenance for one car in 2005.[268]

These IRS housing and transportation allowances are somewhat more generous than the Dutch equivalents, but in most cases, the amounts are not generous enough to make up for the substantially smaller U.S. baseline budget discussed above. Debtors in the Netherlands are expected to cover the first approximately $220 of housing expenses from their baseline budgets, and the law provides extra budget allocations for expenses beyond this low level. Although the Dutch law technically offers only a very limited additional housing allowance (about $280 for rent and utilities beyond the initial $220), courts generally allow for full housing expenses for debtors unable to relocate to low-cost housing, along with up to about $180 per month for necessary car transportation.[269]

For those few above-median-income U.S. debtors whom the new "means test" pushes into payment plans, the new law apparently goes even farther than the Dutch law in extracting as much value as possible from future income and pushing debtors into a subsistence (perhaps even sub-subsistence) lifestyle. Judging by years of Dutch experience with payment plans,[270] very few U.S. debtors will be able to manage through five years of living on the meager IRS budget, and these debtors might therefore ultimately be denied relief. If, as can be predicted, the budget-restricted plans of the new law fail as often as Chapter 13 plans do under current law,[271] one would hope that Congress would at least abandon the mandatory five-year period and replace it with the Dutch standard of three years.

c. Saved by the Judge?

There may be a light at the end of this dark tunnel for the few debtors compelled into apparently unworkable payment plans under the new law. Dutch experience suggests that judges might not stand by and watch as honest debtors are denied relief by overly stringent requirements. The Dutch law allows courts to add extra budget allowances at their discretion, and the exercise of this discretion produced a substantially more flexible and generous budget system for Dutch debtors than the law seemed to prescribe.[272] Likewise in the United States, the new law contains a "pressure valve" provision

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268. IRS, *Allowable Living Expenses for Transportation*, http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (last visited Nov. 1, 2005). Debtors without cars can spend up to $197 per month on public transportation, and debtors with two cars can spend up to $336 per month. *Id.*

269. *See supra* notes 145–46 and accompanying text.

270. *See supra* notes 158–60 and accompanying text.

271. *See supra* note 28 and accompanying text (reporting a 66% failure rate).

272. *See supra* notes 124, 129–47 and accompanying text.

that allows courts to increase the debtor's budget for "special circumstances."[273] One would hope that U.S. courts would follow the example of their Dutch counterparts in exercising their statutory discretion to impose balanced, reasonable, and realistic budgetary demands based on debtors' individual circumstances, regardless of the budgets the IRS suggests ought to suffice for all debtors.

IV. CONCLUSION

Who would have thought that such distant and different countries as the United States and the Netherlands would arrive independently at virtually the same system of consumer debt relief? On the other hand, perhaps this is simply evidence of the logical result of economic and legal globalization. Modern democratic economies can be expected to face similar challenges and to converge on similar solutions. As a flood of liberalized credit was loosed on U.S. and Dutch consumers, debtors in both countries faced similar household financial crises that posed similar social and economic problems for our societies. While the legal responses to these problems started in different places in the United States and the Netherlands, perhaps it is little wonder that they ultimately arrived at largely the same point.

The U.S. backlash against liberal consumer bankruptcy policies seems to have overshot the area of convergence, though. This examination of Dutch practice has suggested a few areas in particular where the U.S. reform seems to have overcorrected. Indeed, the Dutch law is no model of perfection either as the political process is sometimes understandably unable to deal directly and effectively with the complex problems of financially overextended consumers.

Luckily, the Dutch and U.S. laws contain flex points that allow courts to stretch the law to fit the changing demands of varying cases. More now than ever, the future of U.S. consumer bankruptcy policy rests in the hands of the good people in black robes behind the bench. Let us hope that they will be more receptive to foreign influence and seize the opportunity to learn from the mistakes and successes of our friends in Europe. Globalization should be a two-way street.

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273. 11 U.S.C. § 1325(b)(2)–(3) (incorporating 11 U.S.C. § 707(b)(2) into the definition of "disposable income").

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