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Lessons from the Globalization of Consumer
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Charles J. Tabb*

*University of Illinois College of Law, ctabb@law.uiuc.edu

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Abstract

This essay is inspired by two recent books on comparative consumer bankruptcy: (1) *Consumer Bankruptcy in Global Perspective* (Oxford, U.K. and Portland, Ore.: Hart Publishing, 2003, Johanna Niemi-Kiesiläinen, Iain Ramsay, and William Whitford, editors), and (2) *Jacob S. Ziegel, Comparative Consumer Insolvency Regimes – A Canadian Perspective* (Oxford, U.K. and Portland, Ore.: Hart Publishing, 2003). After describing the worldwide legislative frenzy in the enactment of consumer bankruptcy laws since 1984, the essay turns to three basic questions. First, what is driving the global legislative surge? Here the paper points to strong evidence that the “democratisation” of consumer credit, stemming from deregulation and improved technology and information, has driven up the amount of consumer credit exponentially, with a correspondingly large increase in default, thus necessitating some sort of legislative response to consumer over-indebtedness. Second, is there a global trend of convergence, whereby legislative relief for over-indebted consumers is moving towards a common set of norms? The paper suggests that while there is some evidence of convergence, the differences still are substantial, predominate, and are likely to – and should – persist. Finally, the paper asks – should we care about comparative consumer bankruptcy study? That is, is the comparative study of consumer bankruptcy regimes meaningful, useful, or helpful? After expressing a number of important caveats and limitations, several substantial benefits of comparative bankruptcy scholarship are noted.

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Lessons from the Globalization of Consumer Bankruptcy

by Charles J. Tabb, Alice Curtis Campbell Professor of Law and the Associate Dean for Academic Affairs at the University of Illinois College of Law

Forthcoming in LAW & SOCIAL INQUIRY

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Lessons from the Globalization of Consumer Bankruptcy

JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY, AND WILLIAM WHITFORD, editors. *Consumer Bankruptcy in Global Perspective*. Oxford, U.K. and Portland, Ore.: Hart Publishing, 2003. Pp. x + 368. \$ ____ hardback.

JACOB S. ZIEGEL. *Comparative Consumer Insolvency Regimes – A Canadian Perspective*. Oxford, U.K. and Portland, Ore.: Hart Publishing, 2003. Pp. xxviii +183. \$ ____ hardback.

Author of essay:

Charles J. Tabb

University of Illinois College of Law

504 East Pennsylvania Avenue

Champaign, Illinois 61820

217.333.2877 (phone)

217.244.1478 (fax)

ctabb@law.uiuc.edu

Charles J. Tabb is the Alice Curtis Campbell Professor of Law and the Associate Dean for Academic Affairs at the University of Illinois College of Law

Introduction

We live in an era of rapidly increasing internationalization and globalization. This certainly is true in the realm of economics, and to a somewhat lesser – but growing – extent in law.¹ Until quite recently, though, the arcane arena of consumer bankruptcy largely resisted the globalization pull, in both economics and in law. Perhaps to a surprising degree, the manner of dealing with the problem of consumer over-indebtedness was essentially and fundamentally parochial in nature. Countries took radically different approaches to dealing with the problems of individual consumer over-indebtedness.

¹ I have experienced this phenomenon first-hand, including trips to Auckland, New Zealand in 2001 for the International Consumer Law Conference, where I spoke on consumer bankruptcy reform in the United States (Tabb 2003); to Beijing, China in 2002, where I participated in the International Conference on Insolvency Law at the invitation of the Finance and Economic Committee of the National People's Congress of the People's Republic of China; and to Beijing again in 2005 for the Chinese and American Law Deans' Conference.

Historically, the consumer bankruptcy systems of different nations have varied dramatically – if, indeed, a given country had such a system at all. In much of the world, indeed, the phrase “consumer bankruptcy” would have been an oxymoron: by definition and conception, “bankruptcy” is (or was) a legal mechanism to be used for *business* failures only. The quaint and moralistic notion was that only business people would need or be able to justify incurring debt. This limited usage was common also in Anglo-American jurisprudence until the middle of the nineteenth century, but then England and the United States expanded their conceptions of “bankruptcy” to embrace debt relief for non-business individual consumer debtors (Coleman 1974, McCoid 1996, Tabb 1991, -----1995, Warren 1935). But the original usage persists to a greater or lesser degree in the civil law tradition – greater in South America and Central America, and lesser, but not defunct, in continental Europe and the Middle East (Efrat 2002). Thus, Lopes observes that “[a]ccording to Brazilian law – as in most Roman law derived systems – it [bankruptcy] applies exclusively to *comerciantes*, either as individuals or incorporated legal entities.”² Kilborn explains how French law labored under a similar limitation until 1989 (Kilborn 2005a). Italy and Greece remain so constrained to this day.

Even if a civil law country has offered some form of legal debt relief to consumers, the scope of that relief has been modest indeed. Much is required of debtors and little is given. Indeed, Niemi-Kiesiläinen espouses the view that the Anglo-Saxon and the European civil law systems are so fundamentally different in basic conception and operation that it is misleading to even use the same name to describe them, and thus prefers to denominate the European model as “consumer debt adjustment” rather than “consumer bankruptcy” (Niemi-Kiesiläinen 1999, -----2003).

The United States has been the most notable exception (outlier?), with a liberal “fresh start” policy for individual consumer debtors in effect since 1898 (Braucher 1999, Howard 1987, Jackson 1985, Skeel 2001, Tabb 1990, ----- 1991, ----- 1995, ----- 1997, ----- 1999, ----- 2003, Whitford 1997). Until recently, most individual consumer debtors in the United States enjoyed broad access to an immediate and unconditional discharge of debts, unhampered even by a corresponding requirement of future income contribution. The only other countries with a hint of a “liberal” policy for debtors have been England and its Commonwealth countries, most notably Canada. But, even in those jurisdictions, the law historically could hardly be characterized as debtor-friendly: debtors have never been able to get an immediate debt discharge as in the States, facing instead various restrictions imposing limited, conditional, and suspended discharge rules (Boshkoff 1982, Heath 1999, Honsberger 1999, Telfer 2003, Ziegel 1997, ----- 1999b, ----- 1999c, -----2003).

Now, however, the citadels of consumer bankruptcy parochialism and apathy are being breached. Since 1984, major bankruptcy or insolvency laws have been passed in at least the following countries (Efrat 2002, Kilborn 2003, ----- 2005a, ----- 2005b, Niemi-Kiesiläinen

² José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-Indebtedness in Brazil*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, at 91 (Hart Publishing, Niemi-Kiesiläinen, Ramsay and Whitford, eds. 2003).

1997, ----- 1999, -----2003, Reifner 2003, Ziegel 2003):

2005: United States
 2002: England and Wales
 Australia
 2001: Germany
 2000: Luxembourg
 1999: Germany
 1998: Belgium
 1997: Netherlands
 Canada
 1996: Israel
 Hong Kong
 1994: Germany
 Austria
 United States
 Sweden
 1993: Finland
 1992: Norway
 Canada
 1989: France
 1986: England and Wales
 1985: Scotland
 1984: United States
 Denmark

What has been the trend of these changes? The answer depends in large part on the starting point. Countries where it was not a good thing to be a financially embarrassed consumer debtor – that is, those countries that had never had a consumer bankruptcy law at all, or whose law was at best rudimentary, or whose law was creditor-friendly, have been adopting more debtor-friendly consumer bankruptcy legislation. Examples abound. In Europe alone, a veritable flood of new consumer bankruptcy laws has been adopted since the Danes opened the floodgates in 1984 (Niemi-Kiesiläinen 1999). Scotland passed the Bankruptcy (Scotland) Act of 1985, and England and Wales substantially liberalized their consumer bankruptcy laws in 1986 and then again in the Enterprise Act of 2002 (Ramsay 2003a, Walters 2005, Ziegel 2003). On the continent, France passed a sweeping bankruptcy act, the *Loi Neierz*, on the last day of the decade of the 1980s, enabling consumer debtors to pursue bankruptcy debt relief for the first time in a meaningful way (Kilborn 2005a, Niemi-Kiesiläinen 1999). Likewise, Germany moved in 1999 in the *Insolvenzordnung* (Insolvency Act) to offer overburdened debtors their first opportunity for debt relief (Kilborn 2003). In Scandinavia, each of Norway, Finland, and Sweden moved toward more generous debtor relief in 1992, 1993, and 1994, respectively (Niemi-Kiesiläinen 1999, Ziegel 2003). In all of these countries, the basic trend has been towards *more generous relief* for debtors.

Tilting dramatically in the opposite direction is the United States, where the political pressure in the past two decades has been to *curtail* the bankruptcy law's generosity to debtors (Braucher 1999, Tabb 1999, ----- 2003, Warren 1999). After many, many years of intense and well-financed lobbying efforts by the consumer credit industry, and several very near-misses at adopting the desired (by the credit industry) stringent reforms (Tabb 2003), in April 2005 those efforts finally bore fruit. On April 20, 2005, President George W. Bush signed into law Senate Bill 256, the quite inaptly named "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." S. 256 contains virtually the entire wish list of reforms that the consumer credit industry has been trying to implement at least since 1967, and vigorously and continuously since 1982. Our neighbor to the north, Canada, likewise moved (in 1997) to restrict the benefits of and expand the demands in bankruptcy on consumer debtors (Honsberger 1999, Schwartz 1999, Telfer 2003, Ziegel 1999c). So too the legislative push (as yet unconsummated) in Australia has been to make bankruptcy tougher on debtors (Mason 1999, Mason and Duns 2003).

Scholars have not failed to notice this seismic legislative activity, and increasingly are turning their focus to questions of comparative consumer bankruptcy. Thus the books that inspired this essay. Indeed, just since 1997, at least four major sets of studies have been published. Noted bankruptcy scholars Johanna Niemi-Kiesiläinen (the University of Helsinki), Iain Ramsay (Osgoode Hall Law School, York University, Toronto), and William Whitford (the University of Wisconsin), have edited a fascinating collection of seventeen essays on that topic, *Consumer Bankruptcy in Global Perspective* (Niemi-Kiesiläinen, et. al. 2003a) (hereafter "*Global Perspective*").³ They hardly stand alone. In the same year, Jacob Ziegel of the University of Toronto published *Comparative Consumer Insolvency Regimes — A Canadian Perspective* (Ziegel 2003) (hereafter "*Canadian Perspective*").⁴ Professor Ziegel previously edited a 1999 symposium issue of the *Osgoode Hall Law Journal* devoted to the topic "Consumer Bankruptcies in a Comparative Context" (Ziegel 1999a). In 1997 Niemi-Kiesiläinen and Ramsay edited a symposium issue of the *Journal of Consumer Policy* that addressed the topic "Changing Directions in Consumer Bankruptcy Law and Practice in Europe and North America" (Niemi-Kiesiläinen and Ramsay 1997). Among U.S. scholars, Jason Kilborn of LSU (Kilborn 2003, ----- 2005a, ----- 2005b, ----- 2005c), Nathalie Martin of New Mexico (Martin 2003, ----- 2005), and Rafael Efrat of Cal State Northridge (Efrat 2002, ----- 2003, -----2004) have joined the ranks of such luminaries as Whitford, Ramsay, Niemi-Kiesiläinen, Ziegel, and Jean Braucher of Arizona in assessing issues in comparative consumer bankruptcy.

This frenzied legislative surge, and the nature of that legislation, naturally prompt at least three (and perhaps four) questions. First, one might ask whether there is a global trend of

³ This book was reviewed by Richard I. Aaron, *Festschrift for Ruth Ann and James Wilson: A Review of Consumer Bankruptcy in Global Perspective*, *American Bankruptcy Institute Law Review* 12: 521-534.

⁴ This book and *Global Perspective* were reviewed by Sefa M. Franken, *Review of Niemi-Kiesiläinen et al., "Consumer Bankruptcy in Global Perspective," and Ziegel, "Comparative Consumer Insolvency Regimes: A Canadian Perspective*, *Modern Law Review* 68:169-172.

convergence, whereby legislative relief for over-indebted consumers is moving towards a common set of norms. That is, those who previously had been harsh towards debtors are becoming more permissive, while those who have been debtor havens (heavens?) have clamped down. In short – everyone is meeting somewhere in the vast middle. Is this true? I will suggest that while there is some evidence of convergence, the differences still are substantial, predominate, and are likely to persist.

Second, what is driving the global surge, and does the answer to that question bear at all on the answer to the first?

Third, related to the foregoing questions – should we care? That is, is the comparative study of consumer bankruptcy regimes meaningful, useful, or helpful? Or, is it simply an intellectually fun but otherwise vapid enterprise, on the order of memorizing baseball statistics (another hobby of mine)?

Why So Much Consumer Bankruptcy Legislation?

In the interests of arbitrariness (or contrariness), let me tackle the second question first. Why so much consumer bankruptcy legislation in the past 21 years? I identify 1984 as the tipping point. In that year, the United States (starting from the pro-debtor side of the scales) and Denmark (starting from the pro-creditor side) each passed major bankruptcy laws; in the States, in the Bankruptcy Amendments and Federal Judgeship Act, the first inroads were made on a freely available and accessible right to an unconditional chapter 7 discharge, with the introduction of the “substantial abuse” test of 11 U.S.C. § 707(b), and in Denmark, the Debt Arrangement Act introduced the option of debt arrangements for consumers for the first time.

So, why? In a word (or three, actually): *increased consumer debt*. This answer may seem trite or tautological, but that does not make it any less true. Where debt goes, inability to pay debt is sure to follow. Always has, always will. “Stuff” happens: debtors (or their dependents) get sick; debtors get laid off; debtors miscalculate future risks, and so forth. And where the number of debtors who are unable to repay debts increases substantially, there is pressure to do something to provide at least a modicum of relief for debtors. Societies have discovered that, blood sport aside, it is not in the public interest to leave overburdened debtors entirely to the mercy of their creditors. The human capital and productive capacities of such debtors will not be fully realized if the debtors perceive that they will not enjoy the fruits of their labors (Adler et. al. 2000, Jackson 1985, Tabb 1990, -----1991, ----- 2004).

Most (perhaps all) societies have *started* from the position that defaulting debtors are bad people, and deserving of punishment and harsh treatment rather than any sort of leniency, mercy or relief, but eventually they discover that that tack just does not work, for a host of reasons. Indeed, on a macroeconomic level there seems to be a growing recognition (which the U.S. first came to in the wake of the Second World War) that a reasonably substantial level of consumer debt is positively beneficial to the economy. But a society then has to accept the cold reality that all debts will not be repaid, and have the fortitude to do something about it. Further, if credit is freely available but debt relief is not, then debtors will be much more wary of taking on the risk of credit in the first place, thereby undermining the potential benefits of credit availability. A

generous bankruptcy law, by comparison, through its insurance-like function (Adler et. al. 2000) positively encourages “responsible risk-taking,” which is a public good – a point frankly recognized by the British Trade Secretary in 1998, as part of the discussions leading up to the British Enterprise Act 2002 (Walters 2005).

So, the short story is this: credit increased dramatically, increases in default followed, and new bankruptcy legislation then ensued. The linkage was explicit and direct in country after country. Consider one of many examples – Germany (Kilborn 2003). Credit increased in the 1980s; then a commission issued a report in 1989 detailing “the explosion of consumer debt and its dire consequences” and urging “the introduction of new discharge provisions”; a bill was introduced, which stated directly that one goal was to give an opportunity for an “honest debtor to free himself of his remaining debts,” and after a few more years’ wrangling, the new more debtor-protective law was enacted. Much the same story unfolded in France (Kilborn 2005a).

Of course, lurking in the foregoing discussion is the question: *why* has credit expanded so dramatically? What is new on the world’s economic stage in the past score of years is the availability of credit to the masses – the “*democratisation*” of consumer credit (Marques and Frade 2003, Niemi-Kiesiläinen et. al. 2003b). Whether one views more freely accessible consumer credit as an evil curse foisted upon unwitting innocents by rapacious creditors, the key to prosperity and opportunity for all, a demonstration of unbridled greed by unprincipled debtors, or some awkward combination of the foregoing, country after country is recognizing the simple fact that widely accessible consumer credit and the need for some sort of consumer debt-relief system (perhaps bankruptcy) go hand-in-hand. And, if a consumer bankruptcy system is available, debtors will use it. The correlation between the rate of bankruptcy filings and the amount of outstanding consumer credit is quite high (Ausubel 1997, Lawless 2001) – and this phenomenon is not limited to the United States (Booth 2003, regarding Hong Kong).

So, in sum, the story is simple: credit. Lots of it. Available to lots and lots of people, including especially those who have never had access to credit before. This explosion in credit is a worldwide phenomenon. The magnitude of the explosion varies across countries, depending on a number of factors, but the trend line goes in only one direction – up! – virtually everywhere (Sullivan et. al. 2000). For example, Professor Lawless shows a *sevenfold* increase in revolving consumer debt outstanding in the United States in the last score of years of the second millennium (Lawless 2001); Marques and Frade show an even more dramatic *tenfold* increase in banking credit for consumption in Portugal in the 1990s alone (Marques and Frade 2003); Booth points to a *sixfold* increase in credit card debt in Hong Kong in the last decade (Booth 2003). Furthermore, and perhaps more important than the absolute level of consumer debt, the *percentage* of consumer debt compared to debtors’ income has steadily been rising (Schwartz 1999 (Canada), Sullivan et. al. 2000 (United States)). Many of the articles in *Global Perspective* focus on the expansion in the availability of and use of credit (Booth 2003, Lopes 2003, Marques and Frade 2003, Niemi-Kiesiläinen et. al. 2003b, Ramsay 2003b, Reifner 2003).

Why this credit explosion? One major reason is the legal *deregulation* of the credit markets, which allows credit issuers to offer credit on lucrative terms to many consumers. That credit is legal, though, does not mean much unless credit issuers have both the *information* about

consumers and the technological *means* necessary to market their product. The technological revolution of the 1980s and 1990s brought both, in ways unimaginable in prior generations, indeed, even just a scant few years before. It is a simple matter now for credit issuers to target consumers with sophisticated and aggressive offers of credit, and they do so. Credit issuers have become increasingly aggressive and sophisticated in marketing credit. Any middle-class American likely receives several “pre-approved” credit card offers each week. In the United States alone, several billion credit card solicitations are sent every year (Tabb 2003).

That credit is offered does not, of course, compel the solicited debtors to accept the offer. Many reformers in the States decrying debtor “abuse” and urging stricter bankruptcy laws lay much of the blame for the bankruptcy explosion at the debtors’ feet, arguing that debtors should be more restrained in taking on credit, be more troubled by the “stigma” of bankruptcy and thus devoted to the moral imperative of repayment, and should part more readily with their supposedly ample excess future income to that end (Eisenberg 1981, Jones and Shepherd 1997, Jones and Zywicki 1999). These assertions, of course, are hardly uncontested: there is evidence that debtors do not enjoy substantial future repayment capacity (Culhane and White 1999), that a strong anti-bankruptcy stigma does persist (Stencel 2004), and that debtors may take on inappropriate levels of debt due not to unchecked avarice but due to systematic psychological heuristic failings, as revealed by the emerging field of behavioral economics (Jackson 1985, Kilborn 2005c, Schwartz 2003, Tabb 2004). Empirical evidence from other countries, such as Canada, also calls the “abuse” mantra into question (Ramsay 1999, Schwartz 1999).

Regardless of the ultimate merits of those debates, though, this topic reveals one of the most intriguing points revealed by comparative study: in different cultures, debtors *do* act differently in taking advantage of available credit – at least to some degree. In *Global Perspective*, Marques and Frade note that in Portugal there had to be a cultural shift (which *is* occurring) for individuals to consume on credit *before* they save (Marques and Frade 2003). In China and Taiwan, the precepts of Confucianism promote the ideology of purchasing modestly from savings rather than from borrowings, and emphasize the importance of personal integrity and good reputation, which would be sullied by defaulting on obligations (Tsai 2004, Zhang 2003). Kilborn shows that the culture of consumer indebtedness has never really taken off in Belgium and Luxembourg (Kilborn 2005b). Be that as it may, though, the strongly dominating trend line across the globe is for more and more debtors to accept the aggressively marketed credit made available to them.

In the United States, our economic system is predicated on extensive use of credit; indeed, the legislative history to the 1978 Bankruptcy Reform Act specifically recognizes the central importance of widespread participation by consumers in the open credit economy (House of Representatives 1977, National Bankruptcy Review Commission 1997). Indeed, credit issuers in the States make very high profits precisely *because* so many debtors accept credit offers (Tabb 2003). And for most unsecured credit, the “price” of credit is sufficiently high to factor in bad debt risks. In such a setting, it is a bit like “having your cake and eating it too” for the credit industry then to complain about high bankruptcy filing rates.

The plain facts are these: if there is substantial credit available, and in much of the world

there is, then large numbers of debtors will take on credit, and they do, and, then, correspondingly, large numbers of debtors will then default on their credit obligations, and again, they do. At that point in the cycle, *something* needs to – or will – happen to the financially embarrassed debtors. And, if a consumer bankruptcy system is available, debtors will use it. If debtors do use it – which they in fact do – then credit issuers will cry “foul” and push for stricter bankruptcy laws. So back and forth we go.

The Question of Convergence

One of the really interesting questions raised by the study of comparative consumer bankruptcy systems is whether the bankruptcy laws of the nations of the world (i) are and (ii) should be *converging* toward a common approach (Franken 2005). The scholarship to date does not provide a fully persuasive answer to either variant of the question. My armchair assessment is that the answers are “to a modest extent, but no more” on both counts. That is, countries are, and probably should be, moving from polar extremes slightly toward a middle ground, *but* are not and should not converge entirely. In my own thinking I am a numbers lover, so permit me to offer the following numerical description of my position. Assume a scale from 0-10, with 0 being the most extreme form of anti-debtor, pro-creditor legislative system, and 10 being the opposite, *viz.*, the most pro-debtor, anti-creditor system (i.e., until April 20, 2005, the United States!). As this essay is written in the immediate wake of the 2005 U.S. Act, the countries at the “0” end of the scale have moved to 3, or maybe 4; the U.S., up at “10” before, has retreated to 7, or perhaps 6. But the true mid-point of “5” has not, and likely will not, and probably should not, be attained.

What facts do we know about the movement toward convergence? First, we know that countries do look consciously at the laws, and the scholarship, of others when assessing the desirability for legislative change. Every country considers the U.S. model – even if only as a cautionary “be sure not to go that far” heuristic (Kilborn 2003). But generally the countries seeking to grant more debtor protection do consider how a more debtor-protective system might be implemented, as in the U.S. (Huls 1992). Walters shows how England and Wales drew directly on the U.S. for inspiration in the Enterprise Act 2002 (Walters 2005). Once a reform law has been adopted, then similarly situated countries may draw on the new law for guidance. For example, the Scandinavian experience shows that Denmark’s 1984 law was carefully studied by Finland, Norway, and Sweden and had obvious influences on the early 1990s legislation in those countries. And sometimes legislators point to other countries’ regimes when arguing for legislative change in the direction of the other countries’ laws. For example, throughout the U.S. reform movement of the past 15 years, it has been a commonplace for pro-credit industry “get tough on debtors” advocates to point to and urge adoption of something like the much harsher European laws that required debtors to pay out of future income for years to obtain even modest debt relief (but conveniently forgetting to mention the more generous social welfare systems of those countries, but more on that to come).

A second fact we know is that the direction of movement is generally predictable. If a country had weak or non-existent debtor protection, then the legislative push has been to protect debtors more fully. The opposite holds as well, with the U.S. and Canada being the leading

examples. Only England and Wales buck, albeit modestly, this trend.

Third, some features of the consumer bankruptcy laws are common in almost all systems, to greater or lesser degree. Of course, I speak at a high level of generality here; as is often the case in law, the “devil is in the details,” and the details may differ a lot. But even so, one can identify some post-reform commonalities (more so if the U.S. is excluded):

- debtors who meet the demands of the law can obtain – eventually – *some* form of debt relief, or “discharge;”
- debtors generally have to contribute some portion of their future income as a quid pro quo for debt relief;
- debtors typically are granted exemptions in some current assets and future wages;
- negotiation and compromise with creditors is encouraged, often as a prerequisite to obtaining more formal debt relief;
- debtor education and counseling is an integral part of the system; and
- some form of bankruptcy access “gate-keeping” rules are imposed to screen undesirable debtors.

A fourth observable fact, notwithstanding the third point just above, is that some major differences persist – especially if the U.S. system is included. Most of these differences concern the very same points on which commonalities were just identified.

The biggest difference, by far, revolves around the U.S. chapter 7 straight liquidation bankruptcy model, whereby a debtor can obtain an *immediate, unconditional, total discharge of prior debt with no future income payment requirement*. Even after the U.S. 2005 Act, many consumer debtors still will be able to obtain chapter 7 relief. In virtually all of the rest of the world, such a system is simply incomprehensible.

A second difference is that the requisites for a debtor to obtain access to bankruptcy vary dramatically. In many countries, the debtor must justify why they came to the pass of insolvency, and explain away what otherwise would be a moral default that might inhibit their right to gain entry into the bankruptcy system. Under U.S. law, by contrast, debtors need not explain their pre-bankruptcy behavior.

Third, U.S. debtors may be able to enjoy *much* more generous rights to exempt property, through the operation of the odd U.S. federal/state system wherein state exemption laws are incorporated into the federal bankruptcy code. The much-noted availability of an unlimited homestead exemption in states such as Texas and Florida, allowing a “bankrupt” debtor to retain property worth millions of dollars, likewise is unimaginable in the rest of the world.

A fourth distinction is whether a debtor must try to negotiate with her creditors. In European civil law systems, the answer is a resounding “yes;” Anglo-American tradition is to the contrary. Today in the U.S., even after the 2005 Act, a debtor who can proceed only under chapter 13 because of disposable income nevertheless may *impose* a chapter 13 plan on creditors,

without negotiation or creditor voting.

A fifth significant difference concerns the debtor education and counseling provisions, which are integral components of the European civil law systems, but which historically have not been important in Anglo-American systems (Berry & McGregor 1999, Curnock 1999, Niemi-Kiesiläinen 1999, ----- 2003). Of course, the 2005 U.S. Act now imposes debtor counseling as a prerequisite to chapter 7 relief and debt discharge, but it is too early to tell how much traction these rules will have in practice. There are complicated issues and problems to be sorted out (Braucher 2003, Gross 2003).

Finally, though, one might argue that all of the differences emanate from a fundamental difference in the cultural conceptions of the role and status of individuals – including debtors – and society (Niemi-Kiesiläinen 2003). This basic divide may explain, and justify, why total convergence is neither likely nor desirable. In the U.S. especially, and to a lesser degree in other common law systems, the orientation is toward free markets and individual autonomy. *Laissez-faire* in its full flower of course passed from the scene eons ago, but the basic social and economic premise in the U.S. still embraces a liberal, free-market individualism. Bankruptcy laws and their freely available discharge supposedly encourage entrepreneurship, risk-taking, individual productivity and enterprise, and aggressive credit consumption, all of which on a macroeconomic level drives the economic engine – the market – for the good of all. As noted earlier, Walters shows that England and Wales in enacting the Enterprise Act 2002 were directly motivated by a desire to mimic the U.S. in this regard (Walters 2005).

By contrast, in the civil European law conception, the focus is not on the market but on the promotion of social justice in the welfare state. As Niemi-Kiesiläinen observes, “[t]he object of regulation is not the market, but the protection against social risks.”⁵ Given this social welfare orientation, it is understandable why civil law systems generate strong moral overtones in regard to the worthiness of the debtor and the debtor’s obligation to repay what she can (Graver 1997).

Following this tack, the unlikelihood and undesirability of total convergence follows not only from deeply ingrained culturally divergent views on the moral imperative of debt incurrence and repayment, but *also* from the simple fact that a bankruptcy law is but one facet of a country’s overall legal and social framework. Thus, a bankruptcy law cannot and does not operate in isolation. In particular, it is a vital cog in the social safety net, addressing how financially distressed debtors may be assisted. If a country offers substantial social benefits to its citizens – unemployment benefits, job protection, universal health insurance, and so forth – the need for a generous consumer bankruptcy law to alleviate the hardships brought on by over-indebtedness are lessened; the converse, of course, also is true (Efrat 2002, Franken 2005, Jacoby 2003, Niemi-Kiesiläinen et. al. 2003b, Ramsay 1997, Sullivan et. al. 2000). Indeed, the point is even more basic: the generous provision of social services may even *prevent* much consumer over-

⁵ Johanna Niemi-Kiesiläinen, *Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, at 49 (Hart Publishing, Niemi-Kiesiläinen, Ramsay and Whitford, eds. 2003).

indebtedness in the first place. In the Scandinavian countries, for example, the entire welfare state construct supports individuals from birth to death. But, if such benefits are not widely available – as in the United States – distressed debtors who are out of work, ill but uninsured, and so forth, must incur debt to pay for these basic social services. And, where debt goes, bankruptcy may not be far behind. True, the United States has (or perhaps I should say *had*) a very generous bankruptcy law toward debtors. But, the rest of the U.S. social welfare system is very parsimonious. Thus, for example, in the United States, tens of millions of people lack health insurance, and one of the principal reasons for our high bankruptcy filing rate is the need to deal with uninsured medical debts (Jacoby 2003). The bankruptcy system is the only place left for such individuals to turn for relief. In effect, our consumer bankruptcy law acts as a last-gasp after-the-fact social safety net. In effect, as Professor Ramsay observes, “[b]ankruptcy provides the ultimate re-insurance for the use of credit cards as a substitute for social welfare.”⁶ Aptly, he calls this system “credit-card welfare.”

In sum, the United States is fundamentally oriented toward a private market solution – bankruptcy – to the problems of the welfare state. Most of the European countries, by contrast, have an avowed social welfare regime. That being the case, it would neither be likely nor desirable that the consumer bankruptcy systems would entirely converge. Indeed, it is an intriguing question whether the prototypical models of debt settlement (the European tradition) and bankruptcy (the Anglo-American tradition) can even *coexist* (Huls et. al. 2003)

Is Comparative Study of Bankruptcy Systems Meaningful?

All of the foregoing brings us to a final fairly central question, which is whether this entire intellectual enterprise is worth doing. That is, is the comparative study of the consumer bankruptcy systems of different countries useful or meaningful?

In the preceding section, I raised one core concern about the utility of studies directed at comparative consumer bankruptcy, which is that the consumer bankruptcy regime is an inextricably interconnected component of a country’s entire social welfare system. Assessing consumer bankruptcy models requires at a minimum an appreciation of the full breadth of the entire social welfare network. Otherwise any statements would be dangerously incomplete.

Further complicating the matter is that the law on the books and the law in action often bear little resemblance to each other. Scholars are recognizing increasingly the central importance of “local legal culture” in the actual operation and effective implementation of any legal system, and consumer bankruptcy is no exception (Braucher 1993, Efrat 2004, Sullivan et. al. 1997). In the United States, for example, Professor Braucher and Professors Sullivan, Warren, and Westbrook independently have shown that the exact same federal and state laws are administered very differently within a single state. The same holds true, but probably even more so, on the international level. So, even if one were to know the different laws of different

⁶ Iain Ramsay, *Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, at 24 (Hart Publishing, Niemi-Kiesiläinen, Ramsay and Whitford, eds. 2003).

nations, that knowledge would be only modestly helpful unless one also knew how the law really worked on the ground.

Related to this point is the fact that the law as written can only have effect as implemented through legal *institutions* – and those, too, vary enormously across societies. To give but one example, when I met with the Chinese government in 2002 regarding the possible reform of their bankruptcy law, I learned that one of their core concerns was building up an adequately trained, and trusted, judiciary which could implement effectively any new bankruptcy law. In the U.S. we sometimes take for granted our extraordinarily highly trained and talented bankruptcy judiciary, but in fact our bankruptcy law as written could not function without them.

An additional cautionary note regarding the utility of comparative bankruptcy study is that many of the basic differences in societies do not operate only – or even primarily – at a *legal* level. Personal, family, and cultural norms exert enormous influence. Due regard for these sorts of non-legal distinctions suggests that great care be taken when assessing the desirability of another country’s bankruptcy system. Professor Martin calls this problem the “peril of legal transplantation” (Martin 2005). For example, she points to the experience of Japan, which has borrowed heavily from U.S. bankruptcy law, but she explains that “Japan’s attempted transplantations have failed to overcome strong cultural attitudes against bankruptcy.”⁷ Japanese culture is strongly rooted in shame, and bankruptcy is viewed as an intensely shaming event. Not surprisingly, then, credit is much less widely used and the personal bankruptcy filing rate is but a small fraction of that in the U.S. East Asian cultures, which emphasize the importance of harmony, reputation, and cooperation, frown not only on using credit but on resolving insolvency problems through formal legal bankruptcy processes (Tsai 2004, Zhang 2003).

So too in other societies it may be the case that the debtor’s *need* for formal legal relief from overwhelming debt is less pressing, because family ties and personal friendships form a primary protective network of financial support (Lopes 2003). For instance, Lopes notes that “it is still fairly unthinkable that [family members] will not, in times of great financial distress, give a helping hand to family.”⁸ And, this assumption of a supportive role is viewed as obligatory not just by family and friends, but by society at large, which accordingly would be less inclined to push off onto private creditors a burden that is seen as properly falling to the debtor *and* the debtor’s private support network. In the U.S., by contrast, since World War II, social and family ties have weakened greatly.

It should be noted that much “comparative” law scholarship is not, in reality, truly *comparative* but rather is more descriptive of the content of the laws of different countries

⁷ Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, Boston College International and Comparative Law Review 28:1, at 52-53.

⁸ José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-Indebtedness in Brazil*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, at 87 (Hart Publishing, Niemi-Kiesiläinen, Ramsay and Whitford, eds. 2003).

(Riemann 2002). This is certainly true, for the most part, of the two books being reviewed. To be sure, they offer a veritable cornucopia of fascinating information about consumer bankruptcy regimes in the world. The first book, *Consumer Bankruptcy in Global Perspective*, in truth is more of an *anthology* of articles on various aspects consumer bankruptcy around the globe than it is a cohesive and integrated book on comparative consumer bankruptcy law. That is, fundamentally most of the articles are neither *integrated* nor *comparative*. The only cohesion is that all of the articles in some way talk about local problems of consumer over-indebtedness. Only one of the seventeen collected articles, “*Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy*” (Niemi-Kiesiläinen 2003), along with the *Introduction* (Niemi-Kiesiläinen et. al. 2003b), takes a truly comparative approach. For the most part, the reader is left to draw her own comparisons between systems and identify common themes and issues. Much the same can be said about the essentially non-comparative nature of the other book, *Comparative Consumer Insolvency Regimes — A Canadian Perspective* (Ziegel 2003). While not an anthology in nature, like *Global Perspective*, Ziegel’s book does not undertake much in the way of explicit comparisons. Instead, the great bulk and core of that book are the descriptive country surveys (part B).

This tendency to the “global compendium” rather than a “comparative” approach is also a hallmark of two other recent studies: the 1999 *Osgoode Hall Law Journal* symposium (Ziegel 1999a) (again, a notable exception being Niemi-Kiesiläinen’s work, “*Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*” (Niemi-Kiesiläinen 1999)); and the 1997 *Journal of Consumer Policy* symposium (Niemi-Kiesiläinen and Ramsay 1997) (the principal exception here being “*Models of Consumer Bankruptcy: Implications for Research and Policy*” (Ramsay 1997)). In both of those symposia, the dominant approach is to look *separately* at different individual countries, either regarding the system as a whole or at some particular facet of the bankruptcy law.

Those caveats noted, there still is room for the enterprise of comparative consumer bankruptcy study. In one respect, of course, really thoughtful and nuanced *comparative* scholarship that accounts for the nits picked above would be tremendously helpful – but difficult. Thus, scholarship that addressed not only the law on the books, but the law in action, and cultural constraints, and institutional limitations, and so forth, would be compelling.

On another level, comparative scholarship on consumer bankruptcy laws serves a useful function in that, simply put, more knowledge is better than less. The more scholars, judges, attorneys, and lawmakers know about the approaches taken in different countries to solve universal problems, the better. Indeed, Professor Riemann suggests that this function of describing foreign laws may be the most useful contribution of comparative law scholarship to date (Riemann 2002).

Another benefit of comparativism may be described by analogy to one of the oft-mentioned benefits of our country’s federalism – that of allowing for local experimentation with different approaches to common problems. With more experiments run, policymakers have a larger and richer laboratory experience to draw on in identifying superior solutions. In the case of federalism, of course, the “local” experiments are run at the state level; for comparativism, the

“experiments” are done by country. In the U.S. federalism context, this phenomenon is colorfully captured by the phrase “let 50 flowers bloom” (referring to the 50 states). From the comparative perspective, there would be many more flowers in the field!

One might object that the analogy is overstated or even inapt, in that the different states in the United States have much more in common than do the different nations of the world. True enough. But such an objection only suggests that due caution be exercised in weighing the relevance and utility of any given country’s system to another country, not that it be disregarded altogether; in evidentiary trial terms, it would be akin to “taking the evidence for what it’s worth.”

The foregoing objection does indicate, though that the more underlying commonalities that exist between different countries, the more meaningful the comparative study. Thus, for example, common law countries in the Anglo-American tradition should be able to learn much of value from their fellow travelers in that tradition (Martin 2003). A U.S. scholar or lawmaker understandably might care much more about the nature of the bankruptcy law in England than in Sweden.

Comparative study may further yield useful dividends in the revelation of details about how particular legal regimes answer common questions. Many of the concerns about comparative study voiced above are macro sorts of problems; at the micro level, once the broader issues have been resolved or decided, it can be quite helpful to learn more about specifics. Thus, for example, a country may need to make a first-order decision about whether or not to require contributions of future income as a condition of a discharge. Once that Rubicon is crossed, though, there are a myriad of very specific details that must be worked out as a second-level matter: for how many years; what percentage of income; how should disposable or available income be calculated; what exceptions should be made; and so forth. Comparative study can inform those specifics.

Finally, another important task for comparative study is identifying the right *questions* to ask. This role is critical – even if the *answers* might differ, depending on local custom and circumstance.⁹ Many questions might be asked. Indeed, for countries today, the questions

⁹ A good example is Jacob S. Ziegel, *Comparative Consumer Insolvency Regimes: A Canadian Perspective* 9 (Hart Publishing 2003), where in his country surveys, he asks (and tries to answer):

- “(1) How does the debtor enter the bankruptcy process, are there preconditions, and who administers and pays for the debtor’s bankruptcy?
- (2) How much of the debtor’s property must the debtor surrender to the bankruptcy estate? Does it include any part of the debtor’s income prior or subsequent to the discharge? What part of the debtor’s property is exempt from the trustee’s reach, and how are secured claims treated?
- (3) When is the debtor entitled to apply for a discharge or is discharge automatic at some point? May the court refuse a discharge or impose conditions for a discharge? In particular, may the court require payment of some or all of the outstanding debts from

abound. In a world of rapidly escalating consumer debt, such questions are inescapable. Should there even be a consumer bankruptcy system? If so, should the system be oriented towards creditor protection? Debtor relief? Some uneasy combination of the two? In the realm of creditor protection, should the focus be on individual creditor autonomy or on collective action for the benefit of the whole? How sacrosanct should secured claims be? How readily should debtors be able to gain access to the consumer bankruptcy system itself? Once in the system, what sort of relief should the debtor be able to get? How broad should that relief be? What must the debtor do to obtain that relief? How quickly can the debtor obtain the relief?

The litany of issues and questions could go on and on. The important missions for comparative scholars, though, are to ask the questions; to look for answers; to share the answers; and to analyze the meaning and relevance of those answers. Policy makers then can draw on the contributions of these scholars and make more fully informed decisions about how to shape their country's debt relief laws.

Conclusion

Comparative consumer bankruptcy hardly existed as a field a mere decade ago. Energetic and visionary scholars, dating really from the Budapest conference in 1996, have started the enterprise and moved it past its first baby steps. The range of possibilities for a consumer bankruptcy system covers the waterfront. In the nations of the world, almost every possible point on the range has been tried. This range reflects the seemingly eternal tension and ambivalence inherent in the conflicts between the interests of creditors – who want to get paid, or at least some revenge or satisfaction for *not* getting paid – and debtors – whose interests lie in obtaining some measure of relief from a daunting debt burden. Comparative law scholars can help illuminate the answers that have been given. The works in *Global Perspective* and *Canadian Perspective* are an auspicious beginning. Now other scholars must take up the mantle and continue this important work.

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- future income of the debtor? What types of claims are excluded from discharge?
- (4) What alternative statutory schemes are in place to enable or encourage a debtor to avoid straight bankruptcy and to enter into an arrangement or compromise of his debts ('plan or proposal') with the debtor's creditors? What are the preconditions for a successful plan or proposal? What are the consequences of the debtor's failure to live up to the terms of the plan or proposal?
- (5) Does the regime permit reaffirmation of pre-bankruptcy debts?
- (6) What roles do credit or debt counselling and financial education play as part of the debtor's rehabilitation, whether in a straight bankruptcy or as part of a plan or proposal?

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