

Theories of Overindebtedness: Interaction of Structure and Culture

*Jean Braucher**

Consumer bankruptcy scholars typically stress either a structural or a cultural account of individuals' problems with debt. Drawing on the history of poverty research, this article argues that research on consumer overindebtedness and bankruptcy should avoid the pitfall of seeing structural and cultural factors as opposing explanations. Deregulation of the credit industry and an incomplete social safety net are key structural conditions that lead to a culture hospitable to overindebtedness. Furthermore, the interaction of structure and culture has practical policy implications. Structural changes such as interest-rate deregulation inevitably transform both business and consumer culture. Policies designed to create a different consumer culture will have a hard time when pitted against strong structural causes of overindebtedness. At a minimum, efforts to create a culture of personal financial responsibility need a strong structural base, such as public education starting at a young age, and could easily require a generation or more to take hold.

* Roger Henderson Professor of Law, University of Arizona, James E. Rogers College of Law. Braucher@law.arizona.edu. Thanks to Rafi Efrat, Ron Harris and Harry Rajak for organizing the June 2005 conference on Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges, sponsored by the Cegla Center for Interdisciplinary Research of the Law, The Buchmann Faculty of Law, Tel Aviv University. Thanks also to the other conference participants for their insights and to Carmen Oszi for thoughtful planning and a very warm welcome.

INTRODUCTION

Scholars and policymakers tend to stress either a structural or a cultural understanding of individuals' problems with debt. Structural accounts of overindebtedness focus on the system of easy credit and on insecurities in personal finances not fully covered by the social safety net.¹ Cultural accounts range from the highly judgmental, blaming consumer irresponsibility and even dishonesty,² to the more sympathetic and psychologically nuanced, stressing consumer vulnerability due to lack of knowledge and differences in mood, attitudes and behavior.³ The argument of this Article is that it is a false

-
- 1 See National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years*, Final Report 82-95 (1997) [hereinafter NBRC Report] (giving a primarily structural account of the increase in consumer debt and bankruptcy in the US). The leading structuralist scholars are the research team of Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, who have studied the demographics of bankruptcy filers and found that their finances have been getting worse, with growing debt to income ratios, and that job loss, illness and divorce are the three common triggers for bankruptcy. See Teresa A. Sullivan et al., *The Fragile Middle Class: Americans in Debt* 70-72, 81 (2000).
 - 2 NBRC Report, *supra* note 1, at 12-13 (Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law, Submitted by Honorable Edith H. Jones and Commissioner James I. Shepherd) (discussing moral dimension of bankruptcy growth and resulting threat to sanctity of contract and social functioning); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, [1999] 1 BYU L. Rev. 177; Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463 (2005).
 - 3 See Richard L. Wiener et al., *High and Low SES Debtors: The Use of Psychological Measures to Determine Differences* 26-27 (Feb. 2004) (Joint Center for Housing Studies, Harvard University, Graduate School of Design & John F. Kennedy School of Government, BABC Working Paper Series No. 04-2), available at http://www.jchs.harvard.edu/publications/finance/babc/babc_04-2.pdf (discussing limits of disclosure to affect borrower behavior and discussing newer models and research investigating the role of emotion and mood in shopping and credit use); Karen Gross, *Failure and Forgiveness — Rebalancing the Bankruptcy System* 94-103 (1997) (discussing the economic and humanitarian benefits of rehabilitation). See also Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 *Theoretical Inquiries L.* 431 (2006); Jason Kilborn, *Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions* (Mar. 2005) (Cegla Center conference paper), available at <http://ssrn.com/abstract=690826>. Both articles use insights about human cognitive biases to discuss approaches to reducing overindebtedness. Psychological explanations for overindebtedness are hard to classify as structural or cultural; human nature could be seen as a structure element

dichotomy to see structural and cultural explanations of overindebtedness as in conflict. Furthermore, this is a point with potentially global reach. As the supply of consumer credit offered by sophisticated credit-granting enterprises expands globally, many countries are seeing the impact of this structural change on their cultures.⁴

Popular media⁵ and politicians⁶ often reinforce the idea that either easy credit or changing culture, but not both in synergy, must be the cause of increasing personal debt, default, and bankruptcy. Because structure sets the conditions for culture, however, one need not choose between structural and cultural accounts of overindebtedness. In both North American and European debates over bankruptcy reform, concerns about the culture of overindebtedness have been used as reasons to do one or both of the following: cut back on access to bankruptcy or set onerous repayment obligations as a condition of debt relief.⁷ It seems unlikely, however, that the consumer

in demand, but to the extent humans can learn to compensate for their cognitive biases, failures to do so individually or collectively are also a product of culture.

- 4 See Iain Ramsay, *Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy*, in *Consumer Bankruptcy in Global Perspective* 17, 18-22, 39 (Johanna Niemi-Kiesilainen et al. eds., 2003) (discussing cultural images of credit cards and growth in their use but cautioning against distortions of the historical record and moralism as substitutes for a more rigorous understanding of the political economy of credit cards in contemporary capitalism).
- 5 See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 *Theoretical Inquiries L.* 365 (2006) (a study of media portrayals of debtors, finding a shift in US public attitudes toward individuals filing for personal bankruptcy, from explanations based on internal to external factors).
- 6 See Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Mothers & Fathers Are Going Broke* 71-72 (2003) (quoting two US politicians as suggesting that debtors lightly resort to bankruptcy); Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 *Am. Bankr. Inst. L. Rev.* 1, 4-5 (1998) (discussing statements of another US politician that there has been a loss of stigma associated with bankruptcy and growing use of the "bankruptcy of convenience").
- 7 After a seven and a half year campaign by the credit industry in the US, Congress adopted legislation in 2005 that restricts access to bankruptcy in numerous ways, including new paperwork and credit counseling requirements that burden all filers and a complex means test that is not likely to catch many debtors but which will probably increase the cost of bankruptcy so as to price some of the worst off out of access. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. No. 109-8, 119 Stat. 23 (2005) (to be codified in 11 U.S.C. §§ 101-1532) (signed into law April 20, 2005, with most of its provisions effective October 17, 2005). See Johanna Niemi-Kiesilainen, *Consumer Bankruptcy in Comparison: Do We Cure*

bankruptcy regimes in either place have more than a marginal impact on the extent of overindebtedness, given the much greater impact of other societal structures, such as interest rate deregulation and insecurities in family finances.⁸

The interaction of structure and culture has practical policy implications. Structural changes inevitably alter both business and consumer culture. Furthermore, programs and policies designed to change consumer culture to reduce risk of debt problems will have a hard time succeeding when pitted against aggressive marketing of goods, services and high cost credit. Initiatives intended to stimulate individual savings and to decrease risky, high cost borrowing must contend with the countervailing influence of marketing designed to stimulate credit use, insecurity in household finances not covered by the social safety net (leading to borrowing to try to ride out a crisis), and the desire to participate in consumer culture. Efforts to create or recreate a culture of personal financial responsibility thus face an uphill battle against entrenched structural and cultural features of society.

Although regulation of interest rates constrains credit supply and thus may be the most effective and quickest way to decrease risky borrowing, this strategy is politically challenging to implement and maintain against pressure from the credit industry, which uses its power to lobby for deregulation and which finds loopholes in any regulatory scheme.⁹ Financial literacy

a Market Failure or a Social Problem?, 37 Osgoode Hall L.J. 473, 481-97 (1999) (discussing development of personal bankruptcy laws in Europe in response to the threat to the social welfare system posed by debt levels that could not be handled by unemployment benefits and describing onerous repayment expectations under the initial versions of these laws).

8 See Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate* (1998) (FDIC Bank Trends series), available at http://www.fdic.gov/bank/analytical/bank/bt_9805.html (making the case that interest rate deregulation in the US has led to huge expansion of consumer credit beginning in the early 1980s). See also Niemi-Kiesilainen, *supra* note 7, at 480-81 (describing credit market deregulation in Europe in the 1980s as a cause of expanded consumer credit volume and noting that enactment of laws providing for bankruptcy relief followed rather than preceded growing problem of overindebtedness); Warren & Tyagi, *supra* note 6, at 71-95 (discussing insecurities in family finances as a cause of debt problems).

9 See, e.g., Christopher Peterson, *Truth, Understanding and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 807 (2003) (discussing difficulty of enforcing interest rate caps and even disclosure regulation, given constantly changing credit charges that creditors claim are not part of the finance charge, so that annual percentage rates are often understated and cannot be meaningfully compared with each other).

programs are easier to sell politically and less threatening to free market ideology,¹⁰ but in order to resist other structural forces, this type of approach probably needs a strong structural base in a society, such as in the public school system starting at an early age. Furthermore, alternative financial institutions may be needed to deal with demand for emergency credit.¹¹ Overall, given the strong structural and cultural underpinnings of current problems with overindebtedness, significant cultural change could take a generation or more, even if structurally supported.¹²

I. LESSONS FROM THE FIELD OF POVERTY RESEARCH

The understanding of overindebtedness as involving both structural and cultural dimensions derives from poverty scholarship.¹³ In the US, the tradition of empirical research on poverty is much older than that of empirical research on overindebtedness and bankruptcy.¹⁴ US poverty scholars began by seeing poverty as caused by structural forces, including labor market failure,

10 See *The State of Financial Literacy and Education in America: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 18 (2002) (Testimony of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve), available at http://banking.senate.gov/02_02hrg/020502/grnspan.htm (discussing financial literacy as a means to improve family finances and prevent consumers from "becoming entangled in financially devastating credit arrangements").

11 See *infra* notes 101-05 and accompanying text.

12 A possible analogy is the transformation of tobacco culture in the US over the last two generations, but the risks of illness and early death caused by tobacco probably made changing that culture easier. The risks of credit are not as dire, and "quitting" entirely is nearly impossible, as well as not necessarily a wise strategy, because some credit (such as home mortgages and student loans) can be part of a good long-term financial strategy. See Christopher Peterson, *Taming the Sharks* 266-79, 307-09 (2004) (suggesting that warnings rather than mere disclosure should be required concerning certain high-cost consumer credit and comparing the warnings required on cigarette packages; also using history of anti-smoking campaigns to suggest that a moralistic campaign against overindebtedness will not work).

13 See Alice O'Connor, *Poverty Knowledge: Social Science, Social Policy, and the Poor in Twentieth-Century U.S. History* (2001). See also Jean Braucher, *Middle-Class Knowledge*, 21 *Emory Bankr. Dev. J.* 193, 216-24 (2004) (reviewing Warren & Tyagi, *supra* note 6) (discussing the analogies between poverty law reform and bankruptcy reform and lessons from the field of poverty research for bankruptcy research).

14 Bankruptcy empiricism is a relatively recent phenomenon. See David R. Stanley & Marjorie Girth, *Bankruptcy: Problem, Process, Reform* (1971) (concerning an early US study, based on a sample of cases closed in 1964). Poverty empiricism in the US

with workers not located near or trained for available jobs, and inequality of opportunity resulting from race segregation and race discrimination.¹⁵ Poverty scholars then developed a reinforcing cultural account of poverty, finding that structural problems produced a culture of resignation, impulsivity, and present-time orientation leading to lack of interest in delaying gratification.¹⁶ This account, stressing that poverty leads to a self-defeating culture, prone to dependency on welfare, was initially seen as a way to increase interest in addressing the structural causes of poverty.¹⁷ Unfortunately, popular media and politicians transformed the cultural account and focused on the culture of poverty while de-emphasizing its structural foundation.¹⁸ The "problem" became welfare rather than poverty, with the poor increasingly viewed as deviant, threatening and unworthy of assistance, ultimately leading to repeal of welfare (which has been replaced by temporary aid to needy families).¹⁹ As a result, a perverse silver lining is that the continuing problems of the poor in the US cannot be blamed on welfare.

There may be a similar silver lining in the aftermath of the recent American bankruptcy legislation.²⁰ In the debate over the 2005 legislation, proponents cast the problem as bankruptcy rather than overindebtedness. The legislation is likely to make bankruptcy more complex and expensive for all who seek relief. Thus, at least in the short term there will likely be reduced access to bankruptcy, especially for the worst off who will have a harder time paying higher fees for services and complying with new paperwork, record production, credit counseling, and financial education requirements.²¹ It remains to be seen

goes back to the 1920s. See O'Connor, *supra* note 13, at 25-54 (giving history of research concerning poverty).

15 See O'Connor, *supra* note 13, at 148-49.

16 See *id.* at 117-18, 265-67.

17 See *id.*

18 See *id.* at 267.

19 See *id.* at 247-50. See also Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (1984) (arguing that welfare itself was the problem).

20 See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (to be codified in 11 U.S.C. §§ 101-1532).

21 See § 521(a)(1)(B)(iii)-(vi) (setting forth some of the new paperwork requirements), § 109(h) (requiring individual debtors, subject to some exceptions, to get a briefing on available credit counseling services and a related budget analysis), § 707(b) (imposing a complex new "means testing" regime), § 727(a)(11) and § 1328(g) (requiring individual debtors to take a personal financial management course to get a discharge). See also Hon. Keith N. Lundin, *Ten Principles of BAPCA: Not What Was Advertised*, 24 Am. Bankr. Inst. L.J. 1, 70 (2005) (stating 2005 Act "reduces access to bankruptcy relief by making bankruptcy more costly, more complicated and less efficient. Add up all of the new documents, new certificates, the new deadlines, the new hearings, the new obstacles to chapter 7 entry and to chapter 13

whether the bankruptcy system, including judges, trustees, the bankruptcy bar and the petition-preparer industry, will be able to make changes to ensure access to those most in need of debt discharge. At any rate, having pushed through a reform package billed as necessary to combat abuse, the credit industry will find it harder to blame continuing overindebtedness on easy availability of bankruptcy. It may then be possible to focus anew on the easy credit system itself, including its structural foundations and the culture it creates.

II. THE STRUCTURAL DIMENSIONS OF CONSUMER CREDIT

Many societal structures influence consumer credit expansion, by increasing both supply and demand. Most prominently, increased supply depends on development of a sophisticated credit industry²² and on government deregulation, particularly of interest rates.²³ Increased demand for credit is driven in significant part by holes in public and private safety net programs and also by employment and family instability.²⁴

A. Structures that Drive Supply

Growth in credit supply depends on market developments such as greater sophistication in business models to allow profitable expansion of consumer credit and to facilitate flow of capital to consumer credit products.²⁵ The

confirmation — [the act] requires a lot more work for debtors' attorneys . . . Debtors will pay for that work, and some debtors will simply be priced out of bankruptcy"). For a simpler way to require repayment by those with means, see Jean Braucher & Charles R. Mooney Jr., *Means Measurement Rather than Means Testing: Using the Tax System to Collect from Can-pay Consumer Debtors after Bankruptcy*, 22-1 Am. Bank. Inst. J. 6 (2003).

22 See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004) (describing how pricing policies of the credit card industry take advantage of human biases, particularly the optimism bias that leads to underestimation of future borrowing, so that consumers pay more attention to annual fees than to interest rates).

23 See Ellis, *supra* note 8.

24 These holes can, for example, include lack of social programs to cover unemployment, illness and disability and lack of savings and pensions. See Ramsay, *supra* note 4, at 23-25; Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 Santa Clara L. Rev. 1065 (2004).

25 See Bar-Gill, *supra* note 22; Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do With It?*, 15 Housing Policy Debate

regulatory environment, including limits on interest rates, creditors' remedies and data sharing, also affects supply. Bankruptcy law, to the extent it limits creditors' ability to collect, presumably has some depressive effect on supply, but this effect is much smaller than the effect of other forms of regulation, particularly interest rate regulation²⁶ and general limits on debt collection behavior²⁷ and on recovery from income of debtors²⁸ and, to a lesser extent, recovery from assets.²⁹

In many parts of the world, consumer credit supply has grown dramatically in recent decades.³⁰ In the United States, this growth has been driven by deregulation of interest rates starting in the early 1980s.³¹ Deregulation in turn led to development of an array of sophisticated techniques of subprime lending, a business development process that is still in progress.³² Creditors

715 (2004) (explaining how Wall Street manages risk of subprime lending through securitization, also known as structured finance).

26 See Ellis, *supra* note 8 (concerning the dramatic impact of interest rate deregulation in the US on expanding the flow of consumer credit). See 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, 260-65 (2004) (noting that growth in German overindebtedness occurred in the period before any law to provide personal bankruptcy relief was enacted); Niemi-Kiesilainen, *supra* note 7, at 480-81 (noting credit market deregulation in Europe in the 1980s as a cause of expanded consumer credit volume).

27 In the US, the federal Fair Debt Collection Practices Act prohibits abusive collection practices by third party debt collectors and requires them to send validation notices to give debtors a chance to dispute the debt that has been referred for collection. 15 U.S.C. §§ 1692-1692o (2000).

28 In the US, federal law restricts garnishment and thus income execution. See 15 U.S.C. §§ 1671-1677 (2000). Many states in the US also have restrictions on garnishment.

29 Exemptions from execution mean creditors cannot look to all assets of debtors. US bankruptcy law incorporates state exemption law, which varies greatly. See 11 U.S.C. § 522(b)(3)(A) (2005). See also Richard M. Hynes, *Credit Markets, Exemptions, and Households with Nothing to Exempt*, 7 *Theoretical Inquiries L.* 493 (2006). Variations in exemptions appear to have minimal impact on US patterns of bankruptcy usage, perhaps because most debtors do not have enough assets to fully make use of available exemptions.

30 See NBRC Report, *supra* note 1, at 84 (noting nearly 700 percent growth in US consumer debt from 1977 to 1997); The Griffiths Commission on Personal Debt, *What Price Credit?* (2005) (concerning growth of consumer credit in the United Kingdom); European Card Review, *European Payment Cards Yearbook 2005*, § 3.2 (concerning growth of consumer credit in Europe).

31 See Ellis, *supra* note 8.

32 See NBRC Report, *supra* note 1, at 92-93 (discussing growth in subprime lending); see also Bar-Gill, *supra* note 22 (concerning sophisticated marketing and pricing of

have become more sophisticated in developing profitable business models that allow them to dip lower in the credit risk pool and still reap profits.

Much debated is whether consumer credit markets have suffered from a lack of rate competition.³³ Alternatively, high rates of interest may result from exploitation of consumers' cognitive biases, so that annual fees and teaser rates have more salience than high long-term rates and late fees.³⁴ Either way, there is market weakness, allowing creditors to charge high rates and drawing capital to this sector. It is often noted that credit card rates do not seem to float with the cost of funds, and that credit card lending, despite its risks, is more profitable than other banking activities.³⁵ The high profits in this sector have led to global expansion in credit card lending, although more so in some countries than in others.³⁶ By reducing debtor access to bankruptcy and thus also reducing creditors' losses due to discharge of debt, the recent US bankruptcy legislation may lead to even more consumer credit expansion to high-risk categories of borrowers in the US, to the extent these customers are not sensitive to certain price features such as long-term rates and late fees. Pricing that takes advantage of borrowers' optimism bias may make it possible for creditors not to pass on savings from reduced bankruptcy losses and therefore to make even riskier loans than they do now. Thus, the result of US bankruptcy reform could be increased supply of credit and more overindebtedness.³⁷

Changes in marketing have assured a ready supply of easy credit to consumers. Even in the prime market, aggressive marketing has increased to the point of saturation. Growth has been even greater in marketing to categories of borrowers who would not have had access to most legal consumer credit a generation or two ago. US college students now get credit cards during their first week at school, if they did not already

credit cards); Engel & McCoy, *supra* note 25 (concerning sophisticated techniques that allow investors to profit from subprime home loans).

33 See, e.g., Lawrence Ausubel, *The Failure of Competition in the Credit Card Market*, 81 Am. Eco. Rev. 50 (1991).

34 See Bar-Gill, *supra* note 22, at 1376-77, 1388-94.

35 See *id.*; NBRC Report, *supra* note 1, at 92 (citing testimony that credit cards are about twice as profitable as other banking activities).

36 See Ronald J. Mann, *Global Credit Card Use and Debt: Policy Issues and Regulatory Responses* (Apr. 2005) (University of Texas School of Law, Law & Economics Working Paper No. 049), available at <http://ssrn.com/abstract=705141>.

37 See Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale L.J. 573, 575 n.7 (1998); Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 Fordham J. Corp. & Fin'l L. 424, 424-27 (2002) (both discussing potential of the US bankruptcy reforms to expand the volume of consumer credit).

have them in high school.³⁸ Persons on government assistance get "payday" loans.³⁹ Borrowers can get "home equity" loans at 125 percent of home value, turning their unsecured debts into ones secured by their homes, often at high rates in sub-prime transactions.⁴⁰ Title "pawn" loans allow consumers to get non-purchase-money secured auto loans, without the cautionary event of a transfer of possession but with the risk of losing a car used to get to work.⁴¹ With this sort of expansion at the bottom of the risk pool, increased default has been the inevitable result, but high risk lending remains profitable because high interest rates are charged.

B. Structures that Drive Demand

When it comes to demand for consumer credit, various forms of economic and social instability are potentially strong influences. Families are driven to borrow more after job loss, divorce or illness,⁴² thereby self-financing their safety net. These events, in addition to their social and emotional effects, are financial crises that create demand for emergency credit to make ends meet. Assuming a ready supply of credit, families borrow more when they suffer sudden drops in income or sudden increases in expenses, or both at once.⁴³ Declining unionization and a more competitive labor market reduce the security of employment, making families more vulnerable to sudden losses of income. Tying health care to employment, as occurs in the US, compounds the risky footing of household finances. For example, a worker who becomes seriously ill can face both a drop in income (if he can no longer work) and an

38 See NBRC Report, *supra* note 1, at 93 (concerning teenagers as high growth customer group).

39 See Amanda Sapir & Karen Uhlich, Southwest Center for Economic Integrity, Pay Day Lending in Pima County, Arizona 3 (2003), available at http://www.economicintegrity.org/pdfdocs/SCEI_ReportOnPayDayLendingRELEASED1.pdf (noting that government assistance check stubs are accepted in lieu of paycheck stubs by payday lenders).

40 See NBRC Report, *supra* note 1, at 94 (concerning routine loan-to-value ratios of 125 percent); Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 Fla. L. Rev. 295, 308-11 (2005) (discussing fact that most sub-prime mortgage borrowers do not use their loans to purchase a house but instead to refinance unsecured debt).

41 See Lynn Drysdale & Kathleen E. Keester, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking about the role of Usury in Today's Society*, 51 S.C. L. Rev. 589, 597-600 (2000) (discussing risks of "title pawn" loans).

42 See Sullivan et al., *supra* note 1, at 81.

43 See generally Braucher, *supra* note 24.

increase in expenses because some medical costs are not covered by insurance or because loss of the job also means loss of employer-paid health insurance benefits. Another example is that when a two-income couple divorces, the income that supported one household now must support two, raising expenses. Furthermore, holes in social and private safety nets also result in increased use of consumer credit. Thus, demand for credit is affected by the extent to which private insurance and government programs fail to provide benefits for unemployment, disability and illness.

Features of the labor market, such as wage stagnation,⁴⁴ and changes in household expenses, such as increased costs for housing,⁴⁵ also affect demand for credit. When wages do not rise with increased household expenses, even though a worker does not lose her job, she may be more tempted to bridge the gap with credit. In the US, for example, household expenditures for housing, medical expenses, health insurance, higher education and child care have all outstripped increases in income.⁴⁶ Higher expenditures leave less for saving, and American saving rates have declined.⁴⁷ When families lack savings, they are less able to weather financial crises without borrowing.

44 See Warren & Tyagi, *supra* note 6, at 31, 201 n.61 (noting that median earnings for men rose only 1 percent from the early 1970s to 2000, while women's earnings increased more than one third).

45 See *id.* at 32-33.

46 See *id.* at 21-33, 40-44, 51-52.

47 See Fed. Res. Bank of St. Louis, Personal Savings Rate, available at <http://research.stlouisfed.org/fred2/series/PSAVERT/112> (last updated May 26, 2006) (chart showing decline in US personal saving rate from 2 percent in 2001 to less than zero in mid-2005 and into 2006, meaning people are spending more than they earn); Richard Peach & Charles Steindel, *A Nation of Spendthrifts? An Analysis of Trends in Personal and Gross Saving*, 6 Current Issues Econ. & Fin. 10 (2000) (noting that personal saving rates declined ten percent in the US from 1983 to 2000, while borrowing increased); see also Milt Marquis, Fed. Res. Bank of San Francisco, What's Behind the Low U.S. Personal Saving Rate? (March 29, 2002) (FRBSF Econ. Letter No. 2002-09), available at <http://www.frbsf.org/publications/economics/letter/2002/el2002-09.html> (noting that US personal saving rates averaged 8 percent from 1980 to 1994 but then fell off sharply to 1 percent in 2001 and also that the US has a much lower personal saving rate than Japan, Germany and France, which had higher saving rates before 1994, and which did not experience the declines that the US did in the 1990s).

III. CULTURAL DIMENSIONS OF CONSUMER CREDIT

A. The New Hard Edge in Creditor Culture

When we speak of cultural change affecting consumer credit, the first impulse is usually to think of changes in consumer culture. But it is important to see that structural change also affects the culture of creditors.

Elizabeth Warren and Amelia Tyagi, in their book *The Two-Income Trap*, used the example of Sears,⁴⁸ a company that many people thought of as an all-American purveyor of goods for middle-class households. The Sears credit operation grew so much that the company was making more on consumer credit than on selling goods. The resulting difficulty of valuing its mixed business led Sears to sell its credit card operation,⁴⁹ but not before it tarnished its reputation with a ruthless culture of skirting and even breaking the law in its collection activities.⁵⁰

With the expansion of the supply of consumer credit, financial institutions are now marketing credit to and collecting debts from persons of a lower socio-economic status.⁵¹ Subprime lending focuses on those who are already overindebted and even in default.⁵² "Reverse red-lining" involves targeting vulnerable populations such as racial minorities, women and the elderly (with the elderly black woman fitting all three categories and thus a frequent target) in high-pressure marketing of very high cost credit that has a high likelihood

48 See Warren & Tyagi, *supra* note 6, at 142.

49 See Andrew Ross Sorkin, *Sears to Sell Card Portfolio to Citigroup For \$3 Billion*, N.Y. Times, July 16, 2003, at C1 (discussing growth of the Sears credit card operation, difficulty of valuing hybrid business and also the possibility that Citigroup could better manage the risk of the portfolio).

50 See Warren & Tyagi, *supra* note 6, at 142 (quoting an FBI investigator to the effect that Sears has failed "to treat the consuming public with fairness and honesty" and discussing practices of getting pro se debtors to reaffirm debts without court approval and without filing the reaffirmation agreements in court as required by bankruptcy law, leading to a class action settlement. See, e.g., *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (D. Mass. 1998)).

51 See Azmy, *supra* note 40, 322-24 (describing subprime mortgage borrowers as a mix of people who would not qualify for conventional mortgages and others who would, but who are unsophisticated, and members of disadvantaged groups, including racial minorities and the elderly).

52 See NBRC Report, *supra* note 1, at 92-93 (discussing growth of high-cost subprime lending to persons with tarnished credit histories).

of only being repaid by foreclosure on a home.⁵³ Predatory forms of lending have been expanding in recent years.⁵⁴

Creditors have developed methods designed to appeal to minority populations that have been excluded from traditional banking and consumer culture. Thus, payday lending appeals to persons who like to deal on a cash basis,⁵⁵ and rent-to-own retailing sells respect at a very high price.⁵⁶ While creditors sometimes portray these sorts of products as promoting the democratization of credit, they can also be seen as a form of cultural exploitation, resulting in redistribution from the poor and from minorities to creditors' investors.⁵⁷ Racial minorities sometimes continue to use the subprime market even when they could get credit from conventional lenders because financial habits and practices can "outlive the material conditions that spawned them," as Professor Regina Austin put it.⁵⁸

Subprime creditors must be prepared to use high-pressure collection techniques to stay profitable. Repossession and foreclosure are more common with subprime lending than in lower risk credit sectors.⁵⁹ Debt collection is a growth industry, both in size and sophistication.⁶⁰

These changes in creditor culture are sometimes portrayed in moral terms, but this is not necessarily a productive way to think about them. They are

53 See Regina Austin, *Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 Am. U. L. Rev. 1217, 1218-19 (2004) (discussing high-pressure marketing of subprime loans to women, minorities, low-income earners and senior citizens).

54 See Azmy, *supra* note 40, at 304-07 (describing "explosion" in growth of subprime lending).

55 See Austin, *supra* note 53, at 1242-43.

56 See *id.* at 1249.

57 See *id.* at 1246-48.

58 See *id.* at 1257; Azmy, *supra* note 40, at 328-30 (noting use of subprime loans by upper-income African Americans).

59 See Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 Wash. U. L.Q. 549, 552 & n.17 (1997) (concerning increased use of repossession by subprime lenders); Azmy, *supra* note 40, at 343-44 (concerning "explosion" in subprime foreclosures, outstripping even the growth in subprime originations).

60 See Pamela Yip, *Debt-Collection Industry Sees Fast Growth, Furious Debate*, Dallas Morning News, Aug. 24, 2005 (reporting debt-collection industry revenue in the US up from \$4.5 million in 1994 to \$15 billion in 2004 and also reporting 58,687 complaints to the Federal Trade Commission in 2004 about debt collectors, 17 percent of all FTC complaints); William J. Holstein, *Consumer Tools for Holding Bill Collectors at Bay*, N.Y. Times, Jan. 20, 2002, Sec. 3 (describing apparent growth in number, sophistication and aggressiveness of debt collection efforts).

also inevitable byproducts of a competitive market in which investors seek the most profitable investments. Creditors who do not become sophisticated in the techniques of subprime marketing, underwriting and collection will lose out to those who do.⁶¹ They are forced by competition to go to the limits of what the law permits (and to the extent that enforcement is lax, they are under pressure to go over the line into illegal activities). Creditor culture is driven by market forces and the regulatory environment, and complaints about the morals of financial institutions' executives and managers will not change that reality. As will be discussed below, it may be more helpful to search for targeted regulatory responses that put pressure on creditors to reduce their risk-taking.⁶²

B. Changes in Consumer Culture

Individuals' struggles with debt go back to the beginning of history. In every ancient culture, suffering associated with loans for consumption resulted in restrictions on money-lending.⁶³ Until the enlightenment, Christian Europe viewed money-lending at interest as a sin and Christian charity as the appropriate moral response to those in financial need.⁶⁴ In addition, across many cultures and through many centuries, there has been a persistent gap between actual practices and the law on the books concerning lending at interest.⁶⁵

The US is currently the global leader in consumer culture, including the use of consumer credit, particularly credit cards.⁶⁶ This makes understanding

61 See John Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. Pa. L. Rev. 129 (2003) (concerning the power of framing of situations on human behavior and also the pressure on businesses to compete to frame situations to maximize profits).

62 See *infra* notes 99-100 and accompanying text.

63 See James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 27 Ariz. St. U. L. Rev. 61, 63-64 (1981) (noting that lending for urgent needs such as food, clothing, and shelter led to repayment problems in ancient societies, with the result that it became an almost universal view that loans to the needy should be charitable and interest-free).

64 See *id.* at 61, 72-77.

65 See *id.* at 70 (concerning evasion of Roman usury law by using foreign agents); *id.* at 73 (concerning lending by Jews when Christians were barred from the practice, resulting in conflation of prejudice against Jews with hatred of money-lending); *id.* at 75-77 (concerning a number of medieval avoidance techniques).

66 See Mann, *supra* note 36, at 7-9 (showing US leads other countries in credit card

the history of this culture's development worthwhile for all. From the colonial period through the first century of US history, the virtue of thrift was deeply rooted in American culture.⁶⁷ Benjamin Franklin referred to debt as the number one vice.⁶⁸ Those who defaulted on debts were viewed as dishonest and evil and treated as criminals.⁶⁹ Usury limits generally were set at six per cent for much of this period, and middle class people were likely to either avoid debt problems or cover them up.⁷⁰ The stigma of being in debt was strong. Nonetheless, lending to working people at high rates of interest, structured to evade usury restrictions, grew throughout the 19th Century.⁷¹ By the early 20th Century, the prevalence of working class debt problems led to the legalization of small loans and licensing of small loan companies, openly allowing higher rates of interest conditioned on regulation.⁷² This development can be seen as the birth of modern consumer credit.

By the 1920s, consumer culture established a beachhead in the American middle class, as the culture of frugality gradually gave way to a willingness to satisfy one's desires using credit rather than savings. The middle class began to use installment loans to purchase automobiles and major household goods.⁷³ Savings began a long decline.⁷⁴ The pace of expansion of consumer culture quickened in the 1960s, particularly as use of credit cards took hold, and expanded through the rest of the 20th Century.⁷⁵ Interest rate deregulation in the 1980s led to a burst of

transactions per capita, credit card spending in relation to GDP, and credit card debt in relation to credit card volume and card volume).

⁶⁷ See Peterson, *supra* note 12, at 78-79.

⁶⁸ See 7 Benjamin Franklin, *The Papers of Benjamin Franklin* 342-49 (Leonard W. Labaree ed., 1963).

⁶⁹ See Efrat, *supra* note 5 (discussing early American views that debtors were criminals, thieves, slaves and dependents).

⁷⁰ See Peterson, *supra* note 12, at 77-79.

⁷¹ See *id.* at 83-88.

⁷² See *id.* at 94-96.

⁷³ See *id.* at 96-98.

⁷⁴ See *supra* note 47.

⁷⁵ See Mann, *supra* note 36, at 11-17 (concerning the history of use of payment and credit cards in the US from the 1950s through the 1990s, including the introduction of an all purpose card in the 1960s). See also NBRC Report, *supra* note 1, at 84 (concerning nearly 700 percent growth of consumer credit in the US from 1977 to 1997).

growth.⁷⁶ Today, the health of the US economy is conventionally understood as depending on robust consumer confidence, expressed by borrowing and spending.⁷⁷

Those who supported the credit industry's campaign for bankruptcy reform in the US — finally successful in 2005⁷⁸ — put their case in moral terms, contending that the growth in bankruptcy filings was caused by a moral decline resulting in a willingness to use bankruptcy when it was not needed.⁷⁹ What is interesting about this rhetoric is that it harks back to earlier views of bankrupts, to use the pre-1978 term, as dishonest manipulators. Since at least the 1970s, the US consumer credit industry had warned of a lack of "credit morality."⁸⁰ This complaint, renewed in the recent reform battle, and this time picked up by politicians,⁸¹ is ironic, given the industry's role in aggressively promoting consumerism in general and high cost, and thus risky, borrowing in particular. The retailing, advertising and credit industries have all contributed to a transformative change in cultural attitudes over the last 80 years, one that was essential to the unleashing of consumer demand.

The success of the American bankruptcy reform campaign is widely understood in terms of interest group politics, with the credit industry buying the favor of politicians using campaign contributions.⁸² Certainly there was no popular outcry demanding new restrictions on bankruptcy. Rather, the complexity of the debate over bankruptcy reform and the way that advocates couched their arguments in terms of stopping abuse while still allowing the unfortunate to get relief made a "yes" vote politically safe. The legislation in

⁷⁶ See Ellis, *supra* note 8.

⁷⁷ See The Conference Board, Consumer Confidence Index (2006), at <http://www.conference-board.org/economics/consumerConfidence.cfm> (index compiled from survey of US households, widely reported in the US media as an indicator of economic health).

⁷⁸ See *supra* note 7.

⁷⁹ See *supra* notes 2, 6-7 and accompanying text.

⁸⁰ See David A. Skeel Jr., Debt's Dominion — A History of Bankruptcy Law in America 191 (2001) (discussing use of this rhetoric in the hearings on the 1978 Bankruptcy Code).

⁸¹ See *id.* at 208; see *supra* note 6.

⁸² See Skeel, *supra* note 80, at 189-91 (describing how the credit industry took their campaign to Congress); Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 Osgoode Hall L.J. 189, 192-93 (1999) (describing how the credit industry poured money into lobbying and campaign contributions to members of Congress).

reality is not only focused on abusers who could afford to repay their debts; its many new twists will burden all filers.⁸³

In addition to its hypocrisy, the credit industry's moral campaign for bankruptcy reform seemed oddly out of step with the reality of American consumer culture. Rafael Efrat's fascinating recent study of popular media representations of debtors from the late 19th Century to the early 21st Century shows that the 1960s marked a huge shift in attitudes toward debt problems.⁸⁴ Efrat shows that popular culture changed dramatically at this time, with Americans coming to see debt problems not as resulting from moral depravity but as understandable and largely externally caused by such factors as market shifts, unemployment, illness, divorce, high medical bills and the like.⁸⁵ In short, the structural change of an increased supply of consumer credit contributed to greater acceptance not only of undertaking debt to participate in consumer culture but also to greater tolerance of those who run into debt trouble.⁸⁶ Still, the credit industry's moral rhetoric resonated with culturally conservative sectors of the American electorate, and debt problems still carry enough residual baggage in American culture that politicians were reluctant to be seen as advocates for debtors, particularly those supposedly using bankruptcy without needing it and costing every American family \$400 a year (two canards used repetitively by the industry and the politicians who backed the legislation most strongly).⁸⁷

83 See *supra* notes 7, 21 and accompanying text.

84 See Efrat, *supra* note 5.

85 See *id.*

86 See *id.* Concerning possible effect of socialization on use of credit, see Stephen E.G. Lea et al., *Psychological Factors in Consumer Debt: Money Management, Economic Socialization, and Credit Use*, 16 J. Econ. Psychol. 681, 682 (1995) (a UK study, finding that those reporting problems with debt described themselves as being in a community where debt was more common, as opposed to those not reporting debt problems). See also Alon Harel and Alon Klement, *The Economics of Shame: Why Less Shame is Better than More* (April 2005) (American Law & Economics Association 15th Annual Meeting, Working Paper 20), available at <http://law.bepress.com/alea/15th/art20> (discussing economic theory that the more people are in a stigmatized category, the lesser the stigma).

87 See NBRC Report, *supra* note 1, at 83-85 (summarizing the empirical evidence that growth in credit volume rather than in bankruptcy abuse explains the increase in numbers of US bankruptcy filings from the early 1980s to 1997). See also Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 Wis. L. Rev. 1, 13-20 (concerning the false claim, made repeatedly during the debate over the US 2005 legislation, that bankruptcy costs every American family \$400 a year, when the real figure is probably less than a tenth of that).

In Europe, as the problem of consumer overindebtedness grew in the 1980s, reform to provide legal relief for consumer debtors, previously lacking, gradually swept across the continent.⁸⁸ Acceptance of the need for laws to address consumer overindebtedness was accompanied by strong concern among policymakers that providing debt relief would erode credit morality.⁸⁹ At the same time, there has been a growing recognition that the most debt afflicted are not going to be able to repay, whether or not the law provides them with relief.⁹⁰ Still, the emphasis in European law reform has been on onerous debt repayment requirements to obtain debt relief, with the aim of not encouraging irresponsible use of credit.⁹¹ Although motivated more by a desire to preserve a communal culture than by an American-style focus on self-reliance, the result in Europe was also a big focus on morality in consumer culture.⁹²

Perhaps insufficiently explored to date is the extent to which European consumer attitudes and behavior may have changed along the same lines as those of Americans, preventing the law from preserving old-fashioned norms of thrift that are no longer common. Debt levels in parts of Europe rose before consumer insolvency laws were enacted, and they have continued to rise, particularly in Germany and to a lesser extent in France; in both countries the legal remedies provided have been modest and difficult to access, so that one would not expect them to have encouraged risky borrowing.⁹³

88 See Niemi-Kiesilainen, *supra* note 7; Jason Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 Am. Bankr. Inst. L. Rev. (forthcoming 2006) [hereinafter Kilborn, *Belgium and Luxembourg*]; 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 (2005) [hereinafter Kilborn, *France*]; Kilborn, *supra* note 26.

89 See Niemi-Kiesilainen, *supra* note 7, at 475, 500-01 (noting moral thinking behind European laws, which sought to promote payment of debts and punish reckless behavior); see also Kilborn, *Belgium and Luxembourg*, *supra* note 88, at 2-5 (noting the evolution in French law, which has become gradually more receptive to debt relief with a rise of consumer debt problems).

90 See Kilborn, *Belgium and Luxembourg*, *supra* note 88, at 9; see also Niemi-Kiesilainen, *supra* note 7, at 501 (noting that many debtors in Scandinavia were unable to repay at all).

91 See Niemi-Kiesilainen, *supra* note 7, at 500-01.

92 See Johanna Niemi-Kiesilainen, *Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy*, in *Consumer Bankruptcy in Global Perspective*, *supra* note 4, at 41-60 (discussing the European moral approach as more rooted in collective thinking and American fresh start policy as a product of liberal individualism).

93 See Kilborn, *supra* note 26, at 270-88 (concerning German implementation of fresh

In Europe, as in the United States, if prevention of debt problems is the goal, design of bankruptcy and insolvency laws is probably a minor influence. Other strategies are needed.

A further question is whether it is useful to put the cultural issue in moral terms. Just as creditors can be seen as responding to market pressures, consumers can be seen as responding to the flood of new credit. With high-cost easy credit available on every other street corner in some places, it is hard to continue to think of those who get in trouble with such credit as immoral. In his book *Taming the Sharks: Toward a Cure for the High-Cost Credit Market*, Christopher Peterson raises the issue whether it is an effective strategy to try to deter risky borrowing by portraying it as immoral.⁹⁴ He compares this approach to repeated unsuccessful efforts to discourage smoking using moral arguments.⁹⁵ Focusing on health risks ultimately proved much more successful in changing the tobacco culture,⁹⁶ and it is possible that public education focused on the risks of high-cost credit would appeal more to the values of today's consumer culture than attempts to cast overindebtedness as immoral. Furthermore, alternatives to high cost credit are needed for the many people who will continue to face financial crises not covered by safety net programs.

IV. CONCLUSION: BUILDING COMPETING STRUCTURES

The influence of structure and culture on the growth of consumer credit can be graphically summarized as follows:

start in 1999, but with a four-step obstacle course before a debtor can access it); Kilborn, *France*, *supra* note 88, at 650-58 (concerning French recognition of

fresh start in legislation effective in 2004, but only for the extremely overburdened debtor); Kilborn, *Belgium and Luxembourg*, *supra* note 88, at 3-5 (summarizing gradual liberalization in French law and also describing indebtedness of American consumers on average as greatest, followed by consumers in Germany and then France, compared to lower levels in Belgium and Luxembourg).

⁹⁴ See Peterson, *supra* note 12, at 276-79.

⁹⁵ See *id.* at 266-76.

⁹⁶ See *id.* at 274-76.

Structures

1. Driving Supply of Credit

Regulatory environment (deregulation)
 Creditors' sophisticated techniques
 (e.g., marketing, risk-spreading,
 collection)
 Weak competition in some sectors

2. Driving Demand for Credit

Income insecurity/wage stagnation
 Lack of health insurance
 Other safety net holes
 (disability, unemployment
 insurance)
 Family break-up
 Cognitive biases (e.g., optimism)

Culture

3. Affecting Supply

Ideology of free market
 Hard-edged creditor culture
 Marketing to already overindebted
 Targeting disadvantaged
 Exploiting minority culture
 High-pressure collection

4. Affecting Demand

Culture of satisfying desires
 Raised expectations (TV images)
 Borrowing more accepted
 Saving less common
 Lack of financial sophistication

This chart shows that the problem of overindebtedness is exceedingly complex, with structural causes reinforced by culture. Furthermore, if one examines the four quadrants looking for a promising place to address the problem, none looks like an easy entry point. The least promising place to begin reform is in quadrant 3, culture that affects supply. Creditors operate under market expectations that they will maximize profits for their investors, and thus they will not change their culture without a regulatory push or a shift in consumer demand. Rather, creditors are likely to become ever more aggressive and sophisticated in their techniques.

Societies could combat overindebtedness by taking aim at its structural underpinnings. Quadrants 1 and 2 thus are somewhat more promising places than quadrant 3 to start to address overindebtedness, but both are still very challenging. In quadrant 2, to attempt to reduce demand for credit by increasing family financial security would require collective political action. Economic development, spurred by educational development and employment training, increases incomes, reduces the need to borrow for consumption and permits greater personal savings to deal with a financial

crisis.⁹⁷ But as experience in the developed world illustrates, consumer culture tends to expand with economic growth, so that problems with debt do not necessarily go away as incomes rise. Strengthening all forms of social insurance, including insurance for health care, unemployment and disability, would also reduce the need to borrow. However, global economic competition has been cutting against income growth, job security and social safety net programs in many parts of the developed world.

In quadrant 1, attempting to change the supply of consumer credit by changing the regulatory environment also would require political action, and affected industries use their resources to combat new regulation. In many countries, interest rate re-regulation is currently politically unrealistic. Furthermore, this strategy does not curb demand, but rather leaves it unsatisfied. Creditors often are able to adapt their business model to evade restrictions.⁹⁸ The gray market also fills in gaps in legal credit.

Still, targeted regulation can focus on reducing the social costs to families and communities of high-risk credit. In Europe, there have been attempts to force internalization of the costs of high-risk credit, without burdening all consumer credit. In Belgium, for example, the costs of administration of some debt repayment plans are borne in part by a tax on loans in default.⁹⁹ Under French law, administrative authorities can take into account, when considering how much relief to recommend that a debtor receive, what a creditor could have learned from checking credit reports.¹⁰⁰ These are examples of strategies designed to push creditors to take steps to minimize risky lending.

Another targeted form of regulation is to promote alternative forms of lending that give borrowers access to loans for emergency needs at more reasonable rates. In the US, the credit union sector is under market and political pressure to serve low-income populations.¹⁰¹ This has led some credit unions to experiment with relatively low-cost payday loans, offered at

97 See A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 *Loy. L.A. L. Rev.* 945, 958 (1999) (noting lack of marketable job skills as one cause of debt problems).

98 See Peterson, *supra* note 9 (concerning complexity of charges as a way to evade even disclosure regulation). See also Ackerman, *supra* note 63, at 70-77 (concerning history of evasion of usury laws).

99 See Kilborn, *Belgium and Luxembourg*, *supra* note 88, at 31.

100 See Kilborn, *France*, *supra* note 88, at 669-70.

101 See Marva Williams & Valjean McLenigham, Woodstock Inst., *Building Community Assets: A Guide to Credit Union Partnerships 6* (Oct. 2004), available at http://woodstockinst.org/document/building_community_assets.pdf (discussing political and market pressures on credit unions to improve service to low-income

under 20 percent annual percentage rate interest (APR).¹⁰² If these programs prove sustainable, they will certainly call into question the legitimacy of the commercial payday lending industry, which often charges interest rates of 300 APR or even more.¹⁰³ Credit union emergency loan programs are typically designed to draw low-income customers into using other financial services, including savings.¹⁰⁴ They thus address the broader problem of the "unbanked" paying high fees for financial services and not making use of secure approaches to saving. Credit union emergency loan programs have made financial counseling and practical education in financial management part of their design.¹⁰⁵ Creating lower-cost alternatives is an approach that was tried in the US 100 years ago (in the form of charitable lending societies) but failed.¹⁰⁶ Still, alternative institutions have a way of illustrating what is wrong with current options. For this reason, even if they do not displace predatory market actors, demonstration projects are helpful in laying the groundwork for targeted regulation that goes after the worst practices.

Compared to the other possibilities, quadrant 4, consumer culture, may be the most promising place to look for change, although one cannot be overly optimistic that this will occur. To have any hope of success in changing consumer culture, a society would probably need to provide structural support, including regulation to warn about the risks of high-cost borrowing and failure to save as well as a strong program of financial education starting in kindergarten and continuing through secondary school. Such efforts, however, would be up against

communities, due to federal regulation of credit unions and saturation in middle—and upper-income financial services markets).

102 See Fannie Mae Foundation, *Innovations in Personal Finance for the Unbanked: Emerging Practices from the Field, Alternative Payday Lending and Basic Banking, Case Studies, Stretch Loans, ASI Federal Credit Union*, available at http://www.fanniemaefoundation.org/programs/pdf/fscs_ASITOC (2003). pdf [hereinafter Fannie Mae Foundation, *Stretch Loans*]; Fannie Mae Foundation, *Innovations in Personal Finance for the Unbanked: Emerging Practices from the Field, Alternative Payday Lending and Basic Banking, Case Studies, NorthSide Community Federal Credit Union: Hot Funds/Cold Cash*, available at http://www.fanniemaefoundation.org/programs/pdf/fscs_NorthsideCFCU.pdf (2003) (describing two alternative payday lending programs with interests rates of 12 percent plus \$3 per week and 16.5 percent).

103 See Sapir & Uhlich, *supra* note 39; Drysdale & Keester, *supra* note 41, at 601-03.

104 See Fannie Mae Foundation, *Stretch Loans*, *supra* note 102.

105 See *id.*

106 See Peterson, *supra* note 12, at 92-94.

the sophisticated marketing that has made current consumer culture so appealing around the world.

In Europe and North America (including Canada), there has been an emphasis on credit counseling and financial literacy education for those who have resorted to bankruptcy.¹⁰⁷ An obvious point is that this education comes a little late, only after a crisis. Trying to provide education at a time of stress reduces its effectiveness. In addition, education of those in bankruptcy carries the risk of blaming these debtors, while failing to warn those equally at risk who have merely been lucky in not falling into overindebtedness.¹⁰⁸ Education ought to be available before credit extension, at least in the highest risk consumer credit sectors. Furthermore, rather than ineffective disclosure regulation, practical education concerning the risks of credit, with information about alternatives and testing of the prospective borrower's understanding, could be required before extensions of high-cost credit.¹⁰⁹ Models of educational programs required before a loan is given are those mandated in the US for recipients of government-guaranteed educational and home loans.¹¹⁰

Given the strength of the easy credit system, cultural change to reduce demand is unlikely without a major investment in competing structures. Comprehensive financial literacy education could begin in pre-school and be incorporated into math and social studies through secondary school. Hands-on education could make the lessons more compelling. Opening real savings accounts and engaging in simulated loan and investment transactions could be part of the curriculum, illustrating how to use both savings and credit to achieve personal goals. Education for the young does not have negative paternalistic overtones. However, trying to combat strong structural pressures and current consumer culture with education designed to change consumer culture is an ambitious goal. In the US, for example, over half the population has low literacy levels and quantitative literacy is even worse.¹¹¹ Furthermore, it is one thing

107 See Jean Braucher, *Debtor Education in Bankruptcy: The Perspective of Interest Analysis*, in *Consumer Bankruptcy in Global Perspective*, *supra* note 4, at 319, 321-22.

108 See *id.* at 333-39 (discussing lack of evidence that those in bankruptcy have worse financial management skills than non-filers, existence of larger population at risk of bankruptcy, social control purpose of debtor education, and credit industry's interest in emphasizing personal responsibility for overindebtedness).

109 See Peterson, *supra* note 12, at 250-88.

110 See Fannie Mae Foundation, Homeownership Education Programs, at <http://www.fanniemae.foundation.org/programs/homeownership.shtml> (2006).

111 See Irwin S. Kirsch et al., National Center for Education Statistics, Adult Literacy

to socialize children into current societal norms, but it is another to try to combat undesirable cultural influences and characteristics using education. Educational programs concerning smoking, safe sex, racial tolerance and co-existence may be useful models to examine when designing education in personal financial management.¹¹² To say the least, we should not expect cultural change to come quickly or easily.

in America: A First Look at the Findings of the National Adult Literacy Survey, available at <http://nces.ed.gov/pubs93/93275.pdf> (2002) (showing that the two lowest categories of adult literacy add up to 51 percent of the population, and that only 4 percent of US population can compute the interest cost of a loan).

¹¹² See, e.g., Peterson, *supra* note 12, at 266-79 (concerning anti-tobacco education); Martha Minow, *Education for Co-Existence*, 44 *Ariz. L. Rev.* 1 (2002); Southern Poverty Law Center, *Teaching Tolerance*, at <http://www.splcenter.org/center/tt/teach.jsp> (2005).