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# JUST CONSUMER FINANCIAL PROTECTION: PREVENTION OR CURE

Andrea J. Boyack*

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.
~ John Rawls, *A Theory of Justice*[1]

## INTRODUCTION

Twenty-first century US economic trends prove the adage about the rich getting richer.[2] Economic inequality grows when those with more wealth have far greater access to cheaper credit and greater ability to avoid their problematic debts.[3] Persistent and deepening economic inequality is driven by many factors, including our legal system's relatively poor treatment of poor debtors.[4] A just approach to consumer

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[1] JOHN RAWLS, A THEORY OF JUSTICE 3 (rev'd ed. 1999).

[2] In 2020, Professor Nathalie Martin warned that "the wealth and income gaps between rich and poor [in the United States] are the largest today in history." Nathalie Martin, *Bringing Relevance Back to Consumer Bankruptcy,* 36 Emory Bankr. Dev. J. 581, 582 (2020). "Economic inequality, whether measured through the gaps in income or wealth between richer and poorer households, continues to widen." Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality,* Pew Research Center (Jan. 9, 2020). In 2022, ten percent of the US population held three-quarters of the nation's wealth. Ana Hernández Kent & Lowell R. Ricketts, *U.S. Wealth Inequality: Gaps Remain Despite Widespread Wealth Gains*, Federal Reserve Bank of St. Louis (Feb. 7, 2024). Economic inequality is higher in the United States than the United Kingdom, Japan, Canada, Germany, and France. *Id.* The adage is attributed to Percy Bysshe Shelley who wrote: "The rich have become richer, and the poor have become poorer; and the vessel of the State is driven between the Scylla and Charybdis of anarchy and despotism." PERCY BYSSHE SHELLEY, A DEFENSE OF POETRY (written 1920, published posthumously 1940).

[3] MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY (2015). The competitive market can exacerbate rather than mitigate this disparity, because "competition can drive firms to offer products that subsidize wealthier consumers at the expense of poorer consumers." Lauren E. Willis, *Performance-Based Consumer Law,* 82 U. Chi. Law Rev. 1309, 1319 (2015). S*ee also* SENDHIL MULLAINATHAN AND ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 65 (2013); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U Chi L Rev 1155, 1184-85 (2013) (Overdraft fees increase costs of lower-income debtors and subsidize wealthier ones.).

[4] Alina Bartscher, et al., *Modigliani Meets Minsky: Inequality, Debt, and Financial Fragility in America, 1950-2016*, Federal Reserve Bank of NY Staff Reports (May 2020) (explaining how the household debt-to-income ratio is a key factor in economic inequality).

financial protection would demand positive outcomes for society's most vulnerable people.

There is no consensus on how the law can better protect low-income consumers from overindebtedness while simultaneously ensuring their access to necessary capital.[5] Scholars debate priorities. Is it most important to protect people from incurring improvident debt obligations? Or is it more important to provide an effective method to avoid debt burdens already incurred? Is it more justified to gate-keep the entrance to financial obligations or to guard the exit? This article offers observations about the relationship between *ex ante* debt protection and *ex post* debt relief laws using some comparative case studies to illustrate various approaches. Understanding the connection between prevention and cure of financial distress can inform and improve legal reforms and help the debtor-creditor system evolve to mitigate – rather than escalate – economic inequality.

European legal systems have traditionally focused on *ex ante* consumer financial protection by controlling access to debt obligations.[6] Limits on consumer lending reduce the likelihood that people will incur legal obligations they cannot afford to meet. In the name of fairness, regulations rather than contracting parties themselves can determine interest rates, fees, and the scope of consumer financial obligations. Protective regulatory oversight prevented people from contracting against their own self-interest, even though this limited access to credit.[7] The American legal system, conversely, has traditionally eschewed government interference with the content of private contracts. Freedom of contract enables unrealistic and burdensome financial commitments, but the US legal system has generally preferred to treat the symptoms of financial distress through insolvency proceedings rather than inoculate against overindebtedness through regulatory oversight. The experiences of

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[5] "Consumer debt" in this article refers broadly to any "debt incurred by an individual primarily for a personal, family, or household purpose." *See* 11 U.S.C. § 101(8).
[6] *See generally* JASON J. KILBORN, COMPARATIVE CONSUMER BANKRUPTCY (2007) [hereafter, KILBORN, COMPARATIVE CONSUMER BANKRUPTCY]; Christopher Lewis Peterson, *The Political Economy of Consumer Credit Securitization: Comparing Predatory Lending in Home Finance in the U.S., U.K., Germany and Japan*, in CONSUMER CREDIT, DEBT, AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (William Whitford, Iain D. C. Ramsay, and Johanna Niemi-Kieseläinen, eds., Hart Publishing, 2009).
[7] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 6-9 (Excessive consumer debt was rare in European countries until the 1980s because consumer credit was "all but unavailable.").

both systems illustrate the link between consumer lending and consumer bankruptcy. Data show that "consumer bankruptcy filings rise and fall with the levels of consumer debt."[8] In 1898, the United States prioritized cure over prevention and innovated a relatively quick and effective path for consumers to avoid debt through Chapter 7 of the US Bankruptcy Code ("Chapter 7").[9] Liberal debt relief provided a societal safety value for financial distress that arose from unregulated lending and easy access to credit. Together, this system encouraged productivity, entrepreneurship, and resilience.

These opposite approaches to consumer financial protection – the European focus on prevention and the American prioritization of cure – began to somewhat converge in the early 21st Century.[10] With the advent of global financial markets, consumer credit in Europe had become more "democratized" and "liberalized," meaning that courts and regulators exerted less oversight and more lightly policed terms of financing agreements. Reduced contractual oversight led to increasing consumer debt that, in several European legal systems, spurred the development of a form of consumer bankruptcy. US debtor-creditor law has recently evolved in the opposite direction.[11] In 2005, amendments to the Bankruptcy Code constrained consumer access to bankruptcy's "fresh start."[12] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") established a new regulator, the Bureau of Consumer Financial Protection (the "CFPB"), tasked with more attentively and effectively protecting consumers from incurring improvident debt obligations.[13]

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[8] Elizabeth Warren, *The Bankruptcy Crisis*, 73 Indiana L. J. 1079, 1081 (1998) (citing data from the Congressional Budget Office that showed "[t]he incidence of bankruptcy in the adult population closely follows the indebtedness of the household sector."). T*he Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 39 (1997) (statement of Kim J. Kowalewski, Chief, Financial and General Macroeconomic Analysis Unit, Macroeconomic Analysis Division, CBO).
[9] The Bankruptcy Act of 1898 "recognized formally for the first time the overriding public interest in granting a discharge to 'honest but unfortunate' debtors." Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. Kan. L. Rev. 553, 565–66 (2010).
[10] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 51 (discussing how differences between US and European bankruptcy laws have been shrinking, even though European governments assert that the US model is one "usually to be avoided rather than emulated").
[11] *Id.,* at 51-62 (European consumer bankruptcy law has developed in the "opposite direction.").
[12] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 19-8. 119 Stat. 23 (codified in scattered sections of 11 U.S.C.) (effective Oct. 2005).
[13] H.R. 4173. Title X of the Act outlines the scope and authority of the CFPB. Since its formation, the CFPB has issued dozens of rules and other compliance mandates with respect to various sorts of consumer lending. The June 2024 Supreme Court opinion in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___

This article examines the relationship between two complementary and related consumer financial protection approaches: regulatory oversight of financing terms (*ex ante* protection) and bankruptcy discharge of consumer debts (*ex post* protection). Although often conceptualized as distinct areas of law, consumer financial regulation and consumer bankruptcy are two sides of the same coin and function together to treat the harms of financial distress. This article seeks to explore the relationship and tensions between these various approaches by juxtaposing consumer debtor-creditor law attitudes and legal developments in continental Europe (primarily France and Germany) with those in the United States.[14] After a brief overview of consumer indebtedness in the United States, Part I examines consumer financial regulation trends in the United States, France, and Germany. Part II compares and contrasts US, German, and French approaches to consumer bankruptcy and outlines some recent developments in insolvency law in these systems. Part III explains why optimal consumer protection laws should recognize the importance of both *ex ante* regulation and *ex post* bankruptcy discharge and should embrace the complexity inherent in debtor-creditor law. The article concludes with a brief consideration of how and why legal reforms should act holistically to improve the financial wellbeing of the most economically vulnerable consumers in society.

## I. PREVENTION: CONTRACTUAL OVERSIGHT

### A. Consumer Debt in the United States

Consumer financial distress is marked by burdensome debts.[15] How best to address overindebtedness is a contentious issue. Behind the seemingly innocuous

(2024) which overturned the touchstone administrative law opinion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) calls into question the CFPB's scope of authority and role for the future. *See* Henry Engler, *US financial regulators, banks, industry groups remain cautious on Supreme Court's "Chevron" deference ruling*, Thompson Reuters (July 15, 2024).

[14] This article uses "Europe" as shorthand for continental western Europe, and in particular France and Germany. Europe is, of course, not a legally and economically cohesive unit, but several continental western European countries have followed a similar trajectory in terms of increasing consumer access to both credit and to bankruptcy over the past few decades.

[15] Warren *supra* note 8, at 1081; Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale L. Rev. 573, 575 (1998). Although traditionally debt is seen as a precursor to bankruptcy, neoliberal critics of traditional Chapter 7 bankruptcy have theorized that the causal link may work in reverse: namely, that the availability of bankruptcy encourages debt. Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Northwestern L. Rev. 1463, 1477 (2005).

phrase "consumer credit" lurks some of the most combustible fuels inflaming political and social divides, historically and today.[16] One the one hand, economically vulnerable debtors may need protection from predatory lending and high interest rates and fees. On the other hand, prohibiting high-cost loans will cut off financially desperate consumers from credit, which may exacerbate their financial distress.

Cost of credit depends on a lender's assessment of the borrower's credit risk, measured both by the borrower's ability to repay and the borrower's willingness to repay.[17] Higher incomes and fatter asset portfolios reduce credit risk, providing cheaper and easier access to capital. Conversely, lower-income individuals with poor credit histories are generally excluded from mainstream financing resources that are available to their higher-income/credit score counterparts.[18] Being a higher credit risk raises one's cost of capital, sometimes significantly.[19]

It is overly simplistic, however, to conclude that consumers who pay excessive amounts for capital are better off forgoing debt altogether. Access to credit allows consumers to invest in lifestyle and earning capacity improvements.[20] Economic theory posits that if borrowers correctly understand loan terms and make rational economic decisions, they will only incur debts that facilitate those improvements that exceed borrowing costs.[21] Although higher capital costs should theoretically chill borrowing,

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[16] Thomas Durkin, Gregory Elliehausen, and Todd Zywicki opined that consumer credit has historically evoked "much angst and commentary" from "[e]conomists, behavioral scientists, historians, sociologists, teachers, lawyers, judges, journalists," theologians, politicians, "and others through history." Thomas A. Durkin, Gregory Elliehausen, Todd J. Zywicki, *Consumer Credit and the American Economy: An Overview*, 11 J.L. ECON. & POL'Y 279 (2015).

[17] Jim Akin, *What is Creditworthiness*, experian.com (Dec. 9, 2023).

[18] *See generally* BARADARAN, HOW THE OTHER HALF BANKS *supra* note 3.

[19] For example, payday loans have come under fire for the exorbitant interest rates they charge and the terms of the loan that typically prohibit partial repayment and hidden fees. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 2002 Minnesota Law Rev. 744. A recent study measured the impact of payday loans on consumer bankruptcy, finding that payday loans increased likelihood of personal bankruptcy by a factor of 2. Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* 62 J. of Law and Econ. 485 (2020).

[20] Durkin et al., *supra* note 16, at 4-8, discussing research demonstrating that access to credit boosts present and future productivity, as long as costs do exceed such gains.

[21] "Borrowers will borrow, and lenders will lend when, for both parties, the risk-adjusted expected return from the change of spending timing exceeds its expected cost." *Id.* at 8. Although law and economics theory is premised on the presumption of human rationality, it is widely recognized that people do not consistently (or even frequently) behave rationally in real life. *See, e.g.,* RICHARD L. THAYLER & CASS R. SUNSTEIN, NUDGE (2008) (explaining that human beings have bounded rationality and can be manipulated through design, unlike the fictional "homo economicus").

overly costly and burdensome debts persist. In part, this is because not all consumer debt is voluntarily incurred. Some debts result from dire circumstances and bad luck rather than debtor choice.[22] Borrowers may also incur burdensome debts when they fail to understand the risks and costs involved.[23]

In the United States, medical debt is ubiquitous, particularly among low-income households.[24] People do not choose illness or injury. Before providing medical care, most healthcare providers require patients to affirm their acceptance of financial responsibility. Contracts for services often contain incomplete (or no) information about the amount that ultimately will be charged, though.[25] Lingering and burdensome medical debt is a quintessentially American problem and triggers a large percentage of consumer bankruptcy filings.[26] In the United States, healthcare is both relatively expensive and is funded privately, not socialized. According to data from the Organization for Economic Cooperation and Development, the United States spends more on health care than any other modern, industrialized nation, and such increased

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[22] A 2012 study showed that 43.9% of Americans lacked the savings to pay for an unforeseen medical crisis or weather unemployment beyond three months without borrowing. CFED, Assets & Opportunities Scorecard, *Living on the Edge: Financial Insecurity and Policies to Rebuild Prosperity in America* 3 (2013), available at http://assetsandopportunity.org/assets/pdf/2013_Scorecard_Report.pdf. *See also* Consumer Financial Protection Bureau, *Empowering low income and economically vulnerable consumers* (Nov. 2013), https://files.consumerfinance.gov/f/201311_cfpb_report_empowering-economically-vulnerable-consumers.pdf; Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039 (2007) (discussing lender targeting vulnerable populations for high-cost lending products).

[23] In a 2006 study, for example, the Center for American Progress and the Center for Responsible Lending found that 38% of consumers believe that "[m]ost financial products such as mortgage loans and credit cards are too complicated and lengthy for [them] to fully understand." CTR. FOR AM. PROGRESS ET AL., FREQUENCY QUESTIONNAIRE 8 question 47 (2006). *See also* Oren Bar-Gil & Elizabeth Warren, *Making Credit Safer*, 157 U. Penn. L. Rev. 1, 27-32 (2008).

[24] Christopher Robertson, Mark Rukavina & Erin C. Fuse Brown, *New State Consumer Protections Against Medical Debt* , *in* 327 JAMA 121 (2022), https://doi.org/doi:10.1001/jama.2021.23061; Consumer Financial Protection Bureau, *CFPB Finds 15 Million Americans Have Medical Bills on Their Credit Reports* (Apr. 29, 2024) (Some 88 billions dollars of medical debt is in collections in the United States, and low-income households are most likely to have medical debt).

[25] CHRISTOPHER ROBERTSON, EXPOSED: WHY OUR HEALTH INSURANCE IS INCOMPLETE AND WHAT CAN BE DONE ABOUT IT (2019). Some recent laws have increased price transparency in healthcare. Christopher Robertson, Wendy Netter Epstein & Hansoo Ko, *The effects of price transparency and debt collection policies on intentions to consume recommended health care: A randomized vignette experiment* 20 Journal of Empirical Legal Studies (2023).

[26] ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 81 (2003); David U. Himmelstein et al., *MarketWatch: Illness and Injury as Contributors to Bankruptcy*, 24 Health Afrairs (Web Exclusive) W5-63 (2005).

costs are caused by higher prices rather than more frequent use of medical services.[27] Unless an American consumer's need is funded by an applicable government program, the consumer must pay her own medical bills. Many consumers purchase private health insurance that will cover some, but typically not all, of the charged amount.[28] Insured or not, American consumers are likely to incur burdensome and sometimes involuntary medical debts.[29]

Credit card debt and short-term loans (including title loans and payday loans) may appear to be voluntary financial commitments, but although borrowers choose to incur these debts, many low-income households do so out of the desperate need to fund unforeseen costs (say, an unexpected car repair) or cover basic essentials (rent, utilities, food, and the like). In the United States, consumers rely on credit for nearly every aspect of their lives: food, clothing, shelter, transportation, education, and medical care.[30] Credit cards are perhaps the most common vehicle to pay for day-to-day expenses. Interest on unpaid credit card balances accrues at a relatively high rate, and many consumers are unable to pay off their credit card balances and continue to incur compounding interest upon the debt.[31] Lower-income households carry relatively

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[27] *U.S. Healthcare from a Global Perspective*, Commonwealth Fund, http://www.commonwealthfund.org/publications/issue-briefs/2015/oct/us-health-care-from-a-global-perspective

[28] ROBERTSON, EXPOSED *supra* note 25.

[29] Daniel A. Austin, *Medical Debts as a Cause of Consumer Bankruptcy*, 67 Maine L.Rev. 1 (2014).

[30] Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 603 (2009) (asserting that "credit has become an essential part of the consumer economy and is relied upon by many as both a convenience and a necessity"). "When the social security system does not protect people in case of unemployment or illness, consumer credit may be the only way to finance a crisis situation." JOHANNA NIEME-KIESILÄINEN & ANN-SOFIE HENRIKSON, LEGAL SOLUTIONS TO DEBT PROBLEMS IN CREDIT SOCIETIES: REPORT TO THE COUNCIL OF EUROPE (English ed. 2006), at 10, fn. 13 [hereafter NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE]. *See also* Melissa B. Jacoby, *Generosity Versus Accessibility: Bankruptcy, Consumer Credit and Health Care Finance in the US*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 283-301 (Johanna Niemi-Kiesiläinen, Iain Ramsay, and William Whitford, eds., 2003). [hereafter, GLOBAL PERSPECTIVE ].

[31] José A. García, *Borrowing to Make Ends Meet; The Rapid Growth of Credit Card Debt in America* 1 (2007), available at http://demos.org/pubs/stillborrowing102407.pdf; Christian E. Weller, *Drowning in Debt: America's Middle Class Falls Deeper in Debt as Income Growth Slows and Costs Climb* 6-7 (Ctr. For Am. Progress, May 2006), www.americanprogress.org/kf/boomburden-web.pdf. *See also* A. Mechele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L L.J. 135, 137 (2008) (asserting that "consumers are waaaaaaaaay in debt. They are drowning in debt and are not likely to receive relief under the present consumer insolvency statutes.").

higher amounts of credit card debt.[32] Such overindebtedness creates a "debt trap" from which consumers struggle to escape.[33] When salaries are inadequate to cover increasingly costly living expenses, consumers turn to debt to bridge the gap – if debt is available.[34] Adjusted for inflation, US median incomes have remained relatively stagnant throughout the 21st Century while cost of living expenses, particularly housing costs, have increased.[35]

High cost of housing is a significant component of consumer indebtedness. Seventy percent of household debt is mortgage debt.[36] Residential mortgage debt in the United States totals more than 20.2 trillion dollars, the majority of it held by government or government-sponsored entities.[37] Government involvement in the residential mortgage market enables extensive federal oversight and control over the structure and costs of prime mortgage loans.[38] But low-income households frequently lack sufficient

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[32] [cite recent stats].
[33] Sousa, *supra* note 9, citing to Nicolas P. Retsinas & Eric S. Belsky, *Introduction: Borrowing to Live, in Borrowing to Live: Consumer and Mortgage Credit Revisited* 3 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008).
[34] Robert M. Lawless, et al. *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L. J. 349 (2008); Lawrence Mishel, et al., *Wage Stagnation in Nine Charts,* ECON. POL'Y INST. (Jan. 6, 2015), http://www.epi.org/publication/charting-wage-stagnation.
[35] A chart showing median income in nominal and adjusted terms can be found at https://seekingalpha.com/article/4675233-median-household-income-january-2024. *See also* Eric Van Nostrand, et al., The Purchasing Power of American Households, US Dep't of Treasury (Dec. 14, 2023), https://home.treasury.gov/news/featured-stories/the-purchasing-power-of-american-households (giving data to show that "real wages are rising and unemployment remains historically low"). Mark Huffman, *Inflation is low but the cost of living isn't*, Consumer Affairs (Apr. 25, 2014), https://www.consumeraffairs.com/news/inflation-is-low-but-the-cost-of-living-isnt-042514.html. "By 2008, over half of all Americans reported that their incomes were falling behind their costs of living." Lawless, et al. *supra* note 34 at 350. *See also Growing Rich-Poor Divide in Affording Necessities: Economic Discontent Deepens as Inflation Concerns Rise,* THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, Feb. 14, 2008, at 3, http://www.people-press.org/2008/02/14/economic-discontent-deepens-as-inflation-concerns-rise/; Weller *supra* note 31. Sousa *supra* note 9, citing Bill McKibben, Deep Economy: The Wealth of Communities and the Durable Future 11 (2007) (finding that the bottom 90% of American taxpayers earned $27,060 in real dollars in 1979, $25,646 in 2005).
[36] Motley Fool, https://www.fool.com/the-ascent/research/average-household-debt/.
[37] https://www.statista.com/statistics/274636/combined-sum-of-all-holders-of-mortgage-debt-outstanding-in-the-us/; https://fred.stlouisfed.org/release/tables?eid=1192326&rid=52. Homeownership in the United States is encouraged and subsidized, in part by the federal government's promotion of residential mortgage lending. Robert Van Order, *The U.S. Mortgage Market: A Model of Dueling Charters*, 11 J. Hous. Research 23 (2000); Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 Am. U. L. Rev. 1489 (2011).
[38] For example, the federal government's role in prime mortgage lending allowed it to mandate forbearance for payment defaults on such loans during the COVID-19 Pandemic. The CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

means and credit history to obtain these federally subsidized mortgage loans. Excluded from subsidized home loans, those with insufficient income and credit qualifications are more likely to obtain higher cost, subprime mortgage loans and loans offered through innovative, frequently online, systems (including the recently popular model of "FinTech").[39] High-cost mortgage loans are more likely to end in default, foreclosure, and home loss. Those who are financially unable to buy or whose living situation is not conducive to buying a home must pay increasingly unaffordable rental costs, and some renters end up funding housing costs through short-term loans.[40]

American consumer debt also pays for transportation costs. Most communities in the United States lack adequate public transportation, making automobile access a prerequisite to holding a job, shopping for food, and taking advantage of public goods and services.[41] In most of the country, access to a car is essential, and most vehicle purchases are facilitated by debt.[42] In 2019, over 80% of cars purchased in the United States were bought on credit.[43] As of 2024, the aggregate consumer debt secured by private automobiles exceeded than 1.25 trillion dollars.[44] The volume of automobile debt in the United States has grown faster than any other type of consumer debt over the past decade.[45]

Consumer debt also funds higher education in the United States.[46] As of the first quarter of 2024, 43 million borrowers in the United States collectively owed 1.6 trillion

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[39] *See generally* Engel & McCoy *supra* note 22; Christopher K. Odinet, *Predatory Fintech and the Politics of Banking,* 106 Iowa L. Rev. 1739 (2021). Some scholars question whether higher-cost consumer debt is justifiably frames as predatory. *E.g.,* Zywicki *supra* note 15.
[40] NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2024 (2024) https://nlihc.org/oor. Twenty-seven percent of households, and 74% of extremely low-income renters (and 26% of all renters), spend more than 50% of their income on housing costs. *Id.* at 8. Someone working 40 hours a week would have to earn an average of $32.11 per hour to afford a modest two-bedroom rental home. *Id.* at 1.
[41] Driving Into Debt, PIRG (Feb. 2019), https://pirg.org/resources/driving-into-debt-2/. "Access to a vehicle is necessary to reach jobs and economic opportunity in much of the nation. Even in the nation's most transit-oriented metropolitan area, New York City, only 15 percent of jobs are accessible within an hour by transit, as opposed to 75 percent within an hour's drive." *Id.*
[42] Ninety-five percent of American households own a car. Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Georgetown Law J. 1257 (2020).
[43] Driving Into Debt *supra* note 41.
[44] *Id.*
[45] Levitin *supra* note 42 at 1260-1261.
[46] Christopher Avery & Sarah Turner, *Student Loans: Do College Students Borrow Too Much—Or Not Enough?* 26 J. of Econ. Perspectives 165 (2012) (discussing the exponential growth of educational loans

dollars in educational debt.[47] The average American household carrying such debt owes nearly $30,000.[48] Unlike in Europe, higher education costs in the United States are largely privatized, although the federal government subsidizes many educational loans.[49] The majority of student debt represents modest-sized loans taken out to attend for-profit and community colleges.[50] Four million student loans go into default each year.[51] The CFPB has warned of the magnitude of student debt in America and the associated threat of mass default.[52] Although disclosures and regulatory oversight provide some constraint on origination of educational loans, these protections may not effectively prevent overindebtedness. Most borrowers incurring educational debts are unsophisticated, recent high-school graduates, who are barely old enough to enter into any legally binding contract.[53] Furthermore, over the past two decades, the principal amount of educational loans has increased to reflect skyrocketing costs of higher

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in the United States and its likely impact on career choice, ability to purchase a home, and even the decision when and whether to marry).

[47] *Student Debt*, FEDERAL RESERVE BANK OF NEW YORK, Center for Microeconomic Data, https://www.newyorkfed.org/microeconomics/topics/student-debt.

[48] Alicia Hahn, *2024 Student Loan Debt Statistics*, Forbes (Apr. 18, 2024), https://www.forbes.com/advisor/student-loans/average-student-loan-debt-statistics/.

[49] Jonathan Zinman, *Consumer Credit: Too Much or Too Little (or Just Right)?* 43 J. of Legal Stud. 209, 212, fn4 (2014); https://studentaid.gov/understand-aid/types/loans.

[50] Susan Dynarski, *New Data Gives Clearer Picture of Student Debt*, N.Y. TIMES (Sept. 10, 2015).

[51] Jason Jabbari, et al., *Student Debt Forgiveness and Economic Stability, Social Mobility, and Quality-of-Life Decisions: Results from a Survey Experiment*, 9 SOCIUS (Sociological Research for a Dynamic World) (2023), https://doi.org/10.1177/23780231231196778.

[52] Danielle Douglas-Gabriel, *The Surprisingly High Number of People Who are Behind on their Student Loans*, THE WASH. POST (Sept. 29, 2015). Some 40% of student loan borrowing comes from loans to attend graduate school. Josh Mitchell, *Grad-School Loan Binge Fans Debt Worries,* THE WALL ST. J. (Aug. 18, 2015). The consumer financial distress debate rages in the context of student debt. *See, e.g.,* Jacob Alderdice, *The Informed Student-Consumer: Regulating For-Profit Colleges by Disclosure*, 50 Harv. C.R. – C.L. L. Rev. 215 (2015)(arguing for enhanced disclosure at the time of contracting); Dustin Carl Carter, *Save the Students, Save the World: How Bankruptcy Could Help Correct the Inequitable Intrusion of For-Profit Colleges Into Higher Education*, 33 Miss. C.L. Rev. 401 (2014-2015)(advocating that some student loans become dischargeable in bankruptcy); Duke Chen, *Student Loans in Bankruptcy*, CRS Report for Congress (July 26, 2007)(analyzing a later-defeated bill to make both public and private student loans dischargeable after seven years). President Biden has proposed several possible avenues of debt forgiveness for student loans, but only a limited number of such plans have been implemented. https://www.ed.gov/news/press-releases/biden-harris-administration-takes-next-step-toward-additional-debt-relief-tens-millions-student-loan-borrowers-fall, *See also* Jabbari, et al. *supra* note XX.

[53] Nilton Porto, Soo Hyun Cho, & Michael Gutter, *Student Loan Decision Making: Experience as an Anchor*, 42 J. Fam. Econ. Issues 773 (2021); Wayne Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 Md. L. Rev. 405 (2017).

education in the United States, so that the borrowed sums may be so large as to lose any real meaning for young, inexperienced borrowers.[54]

US consumer debt – including mortgage, credit card, car, short-term loans, educational, and medical debt – skyrocketed in the early 21st Century.[55] Although many new consumer finance regulations have been enacted since the 2008 Financial Crisis spawned the formation of the CFPB, consumer debt levels remain high and trend higher.[56] During the first quarter of 2024, total household indebtedness in the United States reached the highest level ever: $17.69 trillion.[57] Although mortgage loans make up the lion's share of consumer debt, credit card debt has significantly increased during the post-pandemic inflationary years and in 2024 aggregates at $1.2 trillion.[58] As of 2023, the average US household owed $104,215 in debt, including approximately $22,713 in non-mortgage debt.[59] Although household debt burdens have increased in real numbers in recent years, disposable incomes have also increased. The ratio of consumer debt to household disposable income in the United States, which from 2006-2014 had ballooned to over 100%, by 2023 dropped to 86.5%.[60]

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[54] Elizabeth Akers & Matthew Chingos, *Are College Students Borrowing Blindly?* Brookings: Brown Ctr on Education Policy (Dec. 2014) (finding that "about half of all first-year students in the U.S. seriously underestimate how much student debt they have, and less than one-third provide an accurate estimate within a reasonable margin of error"). Akers & Chingos also found, "that about 13 percent of respondents to their survey reported that they did not have a loan, when in fact they did." *Id.* at 3.
[55] WILLIAM BONNER & ADDISON WIGGIN, EMPIRE OF DEBT: THE RISE OF AN EPIC FINANCIAL CRISIS 212 (2006); Sousa *supra* note 9, at 554.
[56] *Household Debt and Credit* FEDERAL RESERVE BANK OF NEW YORK, Center for Microeconomic Data, https://www.newyorkfed.org/microeconomics/hhdc/background.
[57] QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, FEDERAL RESERVE BANK OF NEW YORK: Q1 2024 (May 2024), www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2024Q1.
[58] Michelle Black, *Average Credit Card Debt Study 2024*, Forbes Advisor (June 14, 2024).
[59] Motley Fool, citing Experian data. www.fool.com/the-ascent/research/average-household-debt/; Mary Ellen Cagnassola, *Here's How Much Debt the Average American Has*, Money.com (May 3, 2024).
[60] Bartscher, et al. *supra* note 4; Wolf Richter, *Household Debt as % of Disposable Income Fell to Good-Times Lows, on Much Higher Incomes Despite the OMG Headlines*, WolfStreet.com (May 16, 2023), https://wolfstreet.com/2023/05/16/household-debt-as-of-disposable-income-fell-to-good-times-lows-on-much-higher-incomes-despite-breathless-omg-headlines/. *See also* Dickerson *supra* note 31 at 27 (U.S. consumer debt was 125% of household disposable income in 2008.); Daniel Harari, *Household Debt: statistics and impact on economy*, House of Commons briefing paper 7584 (Jan 31, 2017), at 13 (U.S. consumer debt was 104% of household disposable income in 2016.). In 1995, household debt in the U.S. was 97% of disposable income. KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra,* note 6.

B. *Ex Ante* Consumer Financial Protection in the United States

Historically, laws and courts in the United States provided scant oversight with respect to consumer lending apart from state usury laws that capped interest rates.[61] The high point of reluctance to regulate private contracting came in the early 1900s when the Supreme Court held that state law prohibiting certain unfair terms in employment agreements was an unconstitutional interference with the right to contract.[62] This now-infamous decision came to represent three decades of limited or no regulation of private contracts in the name of personal freedom, but the Supreme Court eventually relented and allowed states to pass laws protecting workers and other consumers from certain burdensome contract terms.[63] State governments have enacted consumer protection statutes over the past several decades to protect the public interest. During the last half of the 20th Century, numerous state and federal regulations mandated disclosures, implied warranties, and established product safety requirements.[64] Even though numerous such laws impact consumer contracts today, the concept that individuals should be able to freely frame the content of their own agreements without government interference remains the baseline of US contract law.[65]

During the 1960s and 1970s, progressive courts and legislatures took a more protectionist stance with respect to consumer financing contracts. Citing the gross disparity of bargaining power in many consumer contracts, courts expanded common law doctrines of contract avoidance. Judges innovated equitable grounds to invalidate

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[61] *See* Anne Fleming, *The Borrower's Tale: A History of Poor Debtors in Lochner Era New York City*, 30 Law & Hist. Rev. 1053, 1054 (2012) ("6 percent per year allowed in New York State").

[62] Lochner v. New York, 198 U.S. 45 (1905). In *Lochner v. New York*, the Supreme Court held that state legislators lacked the power to regulate the working hours of bakers (limiting such hours to 10 hours per day and 60 hours per week), because such a limitation impermissibly interfered with private individual's right to contract. Although the *Lochner* decision is the most (in)famous of the conservative "freedom of contract" court decisions of the era, the Supreme Court had previously adopted the same reasoning in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). *See* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 3 Cornell Law Rev. 527 (2015).

[63] Colby & Smith *supra* note 62. The Court did not explicitly state that *Lochner* was overruled until 1963, decades after it had abandoned the *Lochner* treatment of contractual regulation. *Id.* at 535. *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in Lochner . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

[64] *See generally* MICHAEL GREENFIELD, CONSUMER TRANSACTIONS (6th ed. 2014).

[65] Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 Denv. Law Rev. 1 (2023).

or re-write contracts based on fairness, refusing to enforce terms that were seen as "unconscionable" in the context of bargaining inequality.[66] The neoliberal economic trends of the 1980s and beyond pushed back on such *ad hoc* contractual constraints, however. Research by the Federal Deposit Insurance Corporation demonstrates a tight correlation between deregulation in the 1980s and ballooning consumer debt,[67] and in United States, contract regulation and reformation in the name of fairness is still very much the exception rather than the rule.[68] Contractual regulations (minimum wage requirements, non-waivable disclosure, warranty mandates, and the like) must bear a rational relationship to a legitimate public purpose such as promoting community health, safety, and welfare.[69] As one court explained, protective governmental interference in private contracts could only be justified when the parties do not "stand upon equality," because regulatory interference in contracts among equally sophisticated parties would be indefensible.[70] Consumer credit contracts exemplify contracts between vastly differently situated negotiators, however. When consumers incur debts, the lender will "lay down the rules," and the borrower is "practically constrained to obey them."[71] The inequality of bargaining power in consumer financing justifies some measure of governmental oversight.

One way state governments have attempted to protect unsophisticated borrowers was through capping the legal rate of interest that could be charged on

[66] Judge Skelly Wright is perhaps the best example of judicial consumer protection and originated the doctrines of unconscionable contract terms, the implied warranty of habitability for leases, and products liability. *See* Williams v. Walker-Thomas Furniture, 350 F.2d 445 (D.C. Cir. 1965).

[67] The Federal Deposit Insurance Corporation observed that deregulation of consumer lending in the 1980s meant that a "tightly regulated world, marked by a low level of personal bankruptcies and restricted access to credit, was exchanged for a deregulated world marked by expanded access to consumer credit and a higher level of personal bankruptcies." Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, BANK TRENDs (Federal Deposit Ins. Corp., Washington, D.C.), Feb. 1998, at 1, cited by Warren, *The Bankruptcy Crisis supra* note 8 at 1083.

[68] A study of North Carolina cases published in 2014, for example, found that an unconscionability claim was successful only 3.37% of the time. Brett M. Becker & John R. Sechrist II, *Claims of Unconscionability: An Empirical Study of the Prevailing Analysis in North Carolina*, 49 Wake Forest L. Rev. 633, 639 (2014).

[69] *E.g.,* West Coast Hotel Co. v. Parrish, 55 P.2d 1083 (Wash. 1936) (explaining that limitations on liberty of contract require due process of law and a rational relation between the subject regulated and community health, safety, morals, and welfare).

[70] *Id*.

[71] *Id*.

consumer loans.[72] Ironically, federal regulation of national banks undercut the effectiveness of state usury protections. The 1978 Supreme Court decision of *Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.* cited the Supremacy Clause to establish a significant loophole for nationally chartered banks.[73] Because state law would not apply to national financial institutions, reasoned the Court, such lenders need not comply with state usury regulations outside the state of their formation.[74] The *Marquette* decision "effected a near total pre-emption of state usury law" and opened the floodgates of consumer credit card and other higher-cost consumer debt.[75] The federal government could theoretically pass a national cap on interest rates for consumer loans (as have other countries, like Canada), but to date has not done so.[76] State usury laws still apply to certain categories of loans, although short-term loan carveouts permit high-interest, short-term, and title loans to flourish in many jurisdictions.[77]

Disclosure remains the touchstone for *ex ante* consumer financial protection in the United States. Theoretically, disclosure requirements protect consumers by providing information which enables borrowers to protect themselves in the marketplace.[78] Disclosure-based consumer protection thus leaves undisturbed the

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[72] Anne Fleming, *The Long History of "Truth in Lending"*, 30 J. Pol.y Hist. 236, 239, 251, 255 (2018).
[73] 439 U.S. 299 (1978). The court held that state regulations limiting interest rates that banks could charge were subordinate to federal regulatory authority for national banks. Justice Brennan held that usury protection was best left to Congress to determine. *Id.* at 319.
[74] *Id.* at 310, 313 (holding that a national bank could charge borrowers the rate of interest authorized in the state where it was located notwithstanding a lower usury cap in states where lending occurred). Congress ratified the decision with legislation two years later. 12 U.S.C. § 1831d(a) (2006) ("In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates… such State bank or such insured branch of a foreign bank may [charge interest on a loan] …at the rate allowed by the laws of the State, territory, or district where the bank is located...").
[75] Brian M. McCall, *Unprofitable Lending: Modern Credit Regulation and the Lost Theory of Usury,* 30 Cardozo L. Rev. 549, 605 (2008). Subsequently, Congress passed the Gramm-Leach-Bliley Act that extended the *Marquette* usury pre-emption principle to Arkansas, the one state that had continued to assert the authority to define and prohibit usurious lending by FDIC-insured banks. citing state constitutional provisions. Gramm-Leach-Bliley Act § 731, 12 U.S.C. § 1831u(f) (2006).
[76] Section 347 of the Canadian Criminal Code makes it a criminal offence to enter into an agreement to receive payments for advancing credit in excess of 60% of the total principal value.
[77] Currently, "only non-bank local credit providers such as pawn shops, rent-to-own dealers, and some payday lenders subject to state usury law and even these may be able to escape state usury law by partnering with an out-of-state bank." McCall *supra* note 75, at 605.
[78] Willis, *Performance-Based Consumer Law supra* note 3, at 1321-1326 (2015); Fleming *supra* note 72.

parties' "freedom of contract."[79] Economic theorists generally approve of disclosure-based regulations, reasoning that disclosure cures parties' asymmetrical information that would lead to mispriced transactions.[80]

In 1968, Congress passed the Truth in Lending Act (TILA).[81] TILA and its enabling Regulation Z mandated that lenders make specific disclosures prior to consumer financial transactions and created the first private right of action for a lender's failure to comply with a federal disclosure mandate.[82] TILA was the first in a series of Congressional acts passed to protect consumer borrowers through mandated disclosures.[83] TILA was enacted only after a long and arduous policy battle, and although consumer advocates initially heralded the act as ushering a new era of consumer protection, TILA has not proved adequate to keep consumer borrowers out of financial distress.[84] In part, this is because the theory of disclosure-based consumer protection broke down in practice.[85] Consumers did not attend to or understand voluminous

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[79] U.S. policy has long supported free market empowerment over government interference with markets, and disclosure mandates fit neatly into that conception of consumer creditor markets. Willis, *Performance-Based Consumer Law supra* note 3, at 1321 The only thing that consumers need protection from, according to this theory, was lack of information. Once well-informed, consumers should be vested with the freedom to engage in whatever transactions they deemed most advantageous to them. *See* Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 881–85 (2003).

[80] Mehrsa Baradaran, *Banking and the Social Contract*, 89 Notre Dame L. Rev. 1283, 1333–34 (2014). Some scholars see even disclosure mandates as paternalistic interference with an efficient market and parties' freedom of contract. *See, e.g.,* Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with A Contractualist Reply to Carrington & Haagen)*, 29 McGeorge L. Rev. 195, 221 (1998) (

> Contract law leaves that up to the consumer who can decide how much time and money to invest in the acquisition of information. Mandatory disclosure laws take that discretion away from the consumer. Far from fostering autonomy, mandatory disclosure laws are "parentalist" restrictions on autonomy. Mandatory disclosure laws may appear to provide "free" information to the consumer by imposing the costs of disclosure on the other party to the transaction. Some of those costs will, however, be passed on to the consumer; how much depends on the elasticities of demand for, and supply of, the goods covered by the mandatory disclosure requirement.

[81] Truth in Lending Act, 15 U.S.C. §§1601-1667 (2002). The 1968 version of TILA was watered down by amendments in 1980.

[82] *Id.*; Adam Goldstein, *Why "It Pays" to "Leave Home Without It": Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827, 833 (2006); Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1149 (2010).

[83] Budnitz *supra* note 82; Fleming *supra* note 72.

[84] Fleming *supra* note 72.

[85] OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014) (discussing the failures of the mandated disclosure).

information provided in connection with their credit transactions, and because most consumer borrowers lack sophistication, legal representation, and competent financial advice, simply making information available does not empower or even effectively inform the consumer.[86] Over time it ironically became clear that creditor disclosure was at least equally beneficial for lenders who could use it as an effective risk management tool.[87] The theory of competitive free markets producing optimal consumer credit options is such a foundational assumption in American financial policy, however, that *ex ante* consumer protection continues to rely primarily on disclosure to level the consumer – corporate contract law playing field.[88]

In spite of mandatory disclosures, consumer debt and financial distress in the United States increased dramatically in the 1990s and beyond. More than 1.3 million families filed for personal bankruptcy in 1997.[89] Congressional responses to growing consumer indebtedness focused primarily on the bankruptcy-side of the equation, attempting to reduce consumer bankruptcy by limiting access to debt discharge. Consumer advocates of the era pointed out that the rising number of consumer bankruptcies was a symptom rather than a problem itself. These scholars and advocates called for increased attention to preventing crippling debt rather than only addressing (or choosing to ignore) consumers' existing financial distress.[90]

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[86] Carl E. Schneider & Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. Penn. Law Rev. 647 (2011). *See also* Sherrill Shaffer, *Rethinking Disclosure Requirements*, May/June 1995 Business Review 15 (Federal Reserve Bank of Philadelphia); BEN-SHAHAR & SCHNEIDER, MORE THAN YOU WANTED *supra* note 82, at 64-66; Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture,* 7 Theoretical Inquiries in Law 323, 326-328 (2006).

[87] Adam Goldstein, *Why "It Pays" to "Leave Home Without It": Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827, 833 (2006); Peterson, *Truth, Understanding supra* note 79, at 881–85.

[88] David N. Anthony et al., *CFPB Continues Focus on Consumer Reporting and the FCRA with New "Guidance" on Background Checks and Consumer Disclosures*, Consumer Financial Services Law Monitor (Troutman Sanders, Jan. 12, 2024). Even before 2007, however, there have been some substantive limitations on certain sorts of consumer loans, for example prohibitions on confessions of judgment, cross-collateralization, non-possessory purchase money security interests in household goods, and so forth. The touchstone of ex ante consumer financial protection in the United States, however, is and has always been prevention of financial distress via disclosure.

[89] Warren, *The Bankruptcy Crisis, supra* note 8, at 1101.

[90] Elizabeth Warren warned:

> We should be haunted by questions about why so many Americans are losers in the great financial game of life. Dealing with the problems of more than a million families is not as easy as closing the doors to the bankruptcy courts. To understand these failures, inquiries must reach well beyond the bankruptcy system…. [L]owering the bankruptcy

The series of financial crises that began in 2007 (Subprime, Foreclosure, and Financial Market Crises) challenged the notion that existing disclosure mandates provided adequate consumer financial protection.[91] The Dodd-Frank Act's establishment of a new Treasury Department bureau, the CFPB, inspired efforts to craft more effective consumer financial protection methods.[92] The CFPB took a broad approach to prevention of financial distress and passed regulations that went beyond mere disclosure requirements.[93] First, the CFPB tweaked disclosure mandates to prescribe the precise format and timing of disclosures, hoping to increase their practical effectiveness.[94] Second, the CFPB launched consumer financial literacy initiatives aimed at educating people regarding financial terms and risks.[95] The CFPB envisioned that more financially savvy consumers provided with more easily comprehensible information would better protect themselves from financial distress.[96] In addition to these types of disclosure enhancements, the CFPB also placed certain substantive limits on the type of structures and terms that consumer credit contracts may contain.

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filing rate should not be an end in itself, a decline in rates is good only if it is a sign that fewer families are failing. *Id.*

[91] Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Protection & Stronger Laws*, 13 Wyoming Law Rev. 405 (2013); James M. Lacko & Janis K. Pappalardo, *The Failure and Promise of Mandatory Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment With Mortgage Borrowers*, 100 American Econ. Review 516 (2010).

[92] Dodd-Frank Act sections 1098 & 1100A, codified at 12 U.S.C. 2603(a) & 15 U.S.C. 1604(b). Elizabeth Warren proposed the creation of a consumer financial protection agency in a short article published in 2007. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. 8, 16 (Summer 2007), available at http://www.democracyjournal.org/article.php?ID=6528.

[93] Jeanne M. Hogarth & Ellen A. Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking : Lessons Learned from Consumer Testing*, Federal Reserve Bulletin, https://www.federalreserve.gov/pubs/bulletin/2011/articles/designingdisclosures/default.htm.

[94] The CFPB combined two mandated disclosures under TILA and RESPA into a more readable disclosure format referred to as "Know Before You Owe." Press release, U.S. Bureau of Consumer Fin. Prot., Consumer Financial Protection Bureau proposes "Know Before You Owe" mortgage forms (July 9, 2012); https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-finalizes-amendment-know-you-owe-mortgage-disclosure-rule/.

[95] Financial literacy includes "being knowledgeable, educated, and informed on the issues of managing money and assets, banking, investments, credit, insurance, and taxes" and "understanding the basic concepts underlying the management of money and assets (e.g., the time value of money in investments and the pooling of risks in insurance)." Jeanne M. Hogarth, *Financial Literacy and Family and Consumer Sciences*, 94 J. Fam. & Consumer Sci. 14, 15-16 (2002).

[96] Some eminent contract law scholars cheered this approach, stressing that the failure of disclosure mandates arose from the complexity and incomprehensibility of information disclosed. *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law,* 66 Stan L Rev 545, 579-80 (2014).

CFPB substantive regulations are tailored to different sorts of consumer lending. For example, the CFPB passed the "ability-to-repay" rule for mortgage lending that requires lenders to "find out, consider, and document a borrower's income, assets, employment, credit history, and monthly expenses" in order to "figure out if a borrower can repay a loan."[97] Lenders can meet this requirement by making a "Qualified Mortgage" loan.[98] A "Qualified Mortgage" must not include "certain risky loan features" such as an interest-only period, negative amortization, and a balloon payment. Furthermore, the cost of the loan (measured in terms of the loan's Annual Percentage Rate) must not exceed an established threshold, and the amount of the loan's cost payable upfront (as fees and "points") is also capped.[99] Specific underwriting procedures are prerequisite to originating a Qualified Mortgage loan.

The CFPB has issued similar rules applicable to providers of automobile financing and another set of regulations for short-term/payday lenders.[100] In each case, the CFPB has detailed practices and loan structures that would be deemed unfair, deceptive, and abusive to consumers.[101] The final rule for "Payday, Vehicle Title, and Certain High-Cost Installment Loans" requires an "ability to pay" assessment, limits roll-overs, and mandates cooling-off periods.[102] The CFPB rule also requires certain notices and limits lender remedies and collection options.[103] In crafting its regulations, the CFPB has acknowledged the need to balance preventative consumer protection and access to credit. "We cannot afford to tolerate practices, intentional or not, that unlawfully price

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[97] https://www.consumerfinance.gov/ask-cfpb/what-is-the-ability-to-repay-rule-en-1787/.
[98] *Id.*
[99] 86 FR 22844, 12 CFR 1026 (Apr. 30, 2021); https://www.consumerfinance.gov/ask-cfpb/what-is-a-qualified-mortgage-en-1789/#:~:text=A%20Qualified%20Mortgage%20is%20a,before%20you%20take%20it%20out.
[100] Automobile financing rulemaking established substantive oversight of financing agreements offered by car dealerships. 12 CFR 1090.108, on June 30, 2015, Pub. L. No. 111-203 (2010). Regulation of payday and other short-term lending attempted to address loans made in anticipation of default to protect consumers from being caught in a long cycle of short-term debt. 82 FR 54472.
[101] *See* Levitin *supra* note 42.
[102] 12 CFR Part 1041; 12 CFR 1001 et seq.; https://files.consumerfinance.gov/f/201506_cfpb_automobile-finance-examination-procedures.pdf. The "ability to repay" requirement, sometimes termed a "mandatory underwriting rule," is perhaps the most common new consumer financial regulation type and has been enacted with respect to several sorts of loans. https://www.consumerfinance.gov/rules-policy/final-rules/payday-vehicle-title-and-certain-high-cost-installment-loans/.
[103] *Id.*

out or cut off segments of the population from the credit markets."[104] Nevertheless, the CFPB continues to propose and consider regulation that would protect economically vulnerable consumers from falling into inescapable cycles of debt.[105]

Policy justifications for consumer lending regulation cite both consumer financial distress and potential broader market effects.[106] Certain loan structures involve significant default risk which imposes costs not only on the parties but also on the public. One takeaway lesson from the Financial Crisis was that excessive borrower defaults could cause creditor insolvency, and a significant number or size of creditor insolvencies could threaten the national and global economy.[107] Prohibiting certain risky loans, therefore, promotes financial sector safety and soundness.[108]

Nevertheless, some CFPB efforts to regulate consumer contracts have met with political resistance. In June 2017, the CFPB issued its final Arbitration Agreements Rule which prohibited mandatory arbitration provisions that also waived class action proceedings in the context of consumer contracts.[109] A few months later, however, President Trump signed a joint resolution disapproving the agency rulemaking under the Congressional Review Act, which led to the CFPB removing the Rule.[110] CFPB rules

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[104] CFPB to Pursue Discriminatory Lenders (April 18, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-pursue-discriminatory-lenders/#:~:text=%E2%80%9CWe%20cannot%20afford%20to%20tolerate,lenders%20whose%20practices%20are%20discriminatory.%E2%80%9D. *See also* Baradaran *supra* note 80, at 1302-1303.

[105] Scott Sowers, *The U.S. wants to crack down on payday loans. Here's what you need to know,* The Washington Post (June 13, 2024).

[106] Erik F. Gerding, *The Subprime Crisis and the Link Between Consumer Financial Protection and Systemic Risk*, 4 FIU L. REV. 435, 436 (2009) ("consumer financial protection can, and must, serve a role not only in protecting individuals from excessive risk, but also in protecting markets from systemic risk").

[107] "Consumer financial protection can, and must, serve a role not only in protecting individuals from excessive risk, but also in protecting markets from systemic risk." *Id.* at 436.

[108] In spite of the theory that limitations on risky lending benefit consumers as well as creditors, some scholars and politicians, including most prominently Senator Elizabeth Warren, note that safety and soundness is concerned with creditor profitability, and that this goal is often in conflict with the goals of debtor financial protection. *See* Baradaran, *supra* note 80, at 1333–34.

[109] James H. Carter & John V.H. Pierce, *Have Class Arbitration Found New Life?* NY Law J. (Nov. 16, 2015).

[110] Advocates and legal scholars have since been pressing the CFPB to draft a new rule prohibiting mandatory arbitration provisions in consumer contracts. *See* Alison Frankel, *Law profs, business groups spar over consumer arbitration ban*, Reuters (Nov. 16, 2023); Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001 (Nov. 14, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvorxbxypd/frankel-cfpbrule--lawprofletter.pdf; PETITION FOR RULEMAKING: To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services,

that mandate underwriting (like ability-to-repay), limit certain risky terms in consumer finance contracts (like roll-overs in payday loans), and inform consumers of their legal rights (for example, notifying borrowers that they need not pay time-barred debt) have also been criticized as increasing the cost of and decreasing access to credit.[111] Other critics blame recent bank consolidations that have reduced market competition on the increased regulatory complexity of consumer lending.[112] An attempt to invalidate the CFP's funding and authority was rejected by the Supreme Court in May 2024.[113]

In the United States, *ex ante* interference with the substantive terms of consumer financing arrangements has always run into objections framed as freedom of contract and access to credit concerns.[114] The specter of diminished credit access is an effective bugaboo and complicates state and federal efforts to moderate terms in the most onerous and one-sided of consumer financial contracts.[115] Payday loan agreements illustrate the policy and practical difficulties that preventative regulatory efforts face. Payday loans are infamous for charging exorbitant interest, sometimes over 1,000% per annum, tacking on burdensome fees, and trapping consumers in a cycle of debt.[116]

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https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2023/09/Petition_CFPB_1028Rulemaking092023.pdf.

[111] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and its Regulation*, 28 Loy. Consumer L. Rev. 167, 237 (2016).

[112] *See generally* Durkin, et al. *supra* note 16; Diana Olick, *How Dodd-Frank Changed Housing for God and Bad*, CNBC.com (Jul. 16, 2015). The Consumer Bankers Association asserted that small banks were being "suffocated with regulation" and thereby being forced to merge. Jackie Stewart, *One in Six Banks Must Merge: CBA Chief Hunt,* American Banker (Feb. 12, 2016).

[113] CFPB v. Community Financial Services Association of America, 601 U.S. ___ (2024) (May 16, 2024). *But see supra* note 13 discussing later rulings regarding administrative authority and renewed questions regarding the CFPB's continuing power to promulgate regulations.

[114] *E.g.,* Karen Godeon Mills & Brayden McCarthy, *The State of small Business Lending: Credit Access During theRecovery and How technology May Change the Game,* Harvard Business School Working Paper 15-004 (July 22, 2014); Robert L. Clark & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 Review of Banking and Financial Law 235 (2013-2014). *See generally* DURKIN, ELLIEHAUSEN & ZYWICKI *supra* note 16.

[115] *Compare* Brenden Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?* 40 Fla. St. U. L. Rev. 691, 707 (2013) (Regulation of consumer finance "can reduce the effects of a financial crisis, but it could just as easily worsen the effects, or even trigger a financial crisis itself by overly restricting access to credit.") with Bar-Gil & Warren *supra* note 23 (Credit has provided substantial value for millions of households,… [but] for families that get tangled up with truly dangerous financial products, the results can be wiped-out savings, lost homes, higher costs for car insurance, denial of jobs, troubled marriages, bleak retirements, and broken lives.").

[116] *CFPB Finds Four Out of Five Payday Loans Are Rolled Over or Renewed* (Mar. 25, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-four-out-of-five-payday-loans-are-rolled-over-or-renewed/.

Nevertheless, even the consumers who themselves are trapped in the payday loan death spiral sometimes claim that they would suffer even more if that debt spigot were turned off.[117] Furthermore, lenders have shown a remarkable ability to change their business models and processes to comply with or work around changing regulations on consumer lending, and this facility undercuts regulatory effectiveness for consumer protection.[118]

Today, *ex ante* protections for consumer debtors in the United States fall under the rubrics of (a) disclosure mandates, (b) the prohibition of "unfair, deceptive, abusive acts and practices," (c) mandatory underwriting in connection with consumer loans, and (d) flexible but rarely and unevenly applied judicial doctrines such as unconscionability.[119] Lenders in the United States still have the power to impose fairly one-sided contract terms on their consumer debtors and charge them high fees and interest rates as long as the lender complies with applicable statutory and regulatory hurdles, for example by disclosing mandated information at the time of contract.[120]

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[117] Paige Marta Skiba, *Regulation of Payday Loans: Misguided*, 69 Wash & Lee L. Rev. 1023 (2012). The Consumer Financial Services of America claimed that rules prohibiting payday lending terms and mandating ability-to-pay underwriting "significantly limit a consumer's ability to roll over payday loans, and this may dampen demand to originate payday loans and/or increase default rates." Arthur Banes, et al., *Economic Impact on Small Lenders of the Payday Lending Rules Under Consideration by the CFPB* Charles River Assoc. for the Consumer Financial Serviecs of America (May 12, 2015), https://media.crai.com/sites/default/files/publications/Economic-Impact-on-Small-Lenders-of-the-Payday-Lending-Rules-under-Consideration-by-the-CFPB.pdf.

[118] Willis, *Performance-Based Consumer Law supra* note 3, at 1327-1329. "When product-design regulation intended to eliminate payday lending has been implemented, firms have continued to lend at the same prices through a parade of sleights." *Id.* at 1327. *See also* Ronald J. Mann & Jim Hawkins*, Just Until Payday,* 54 UCLA L Rev 855, 901-02 (2007); Michael A. Stegman, *Payday Lending,* 21 J Econ Persp. 169, 180 (2007). It is difficult to enforce substantive limits on any types of consumer lending, given constantly changing charges and novel financial structures innovated by the industry. *See* Peterson, *Truth, Understanding supra* note 79.

[119] Mandatory underwriting aimed to address one significant pre-Financial Crisis problem: that of lenders requiring no borrower documentation regarding income prior to funding the loan (such loans are variously called "Alt-A" loans and "No-Doc" loans or even "Liar Loans"). Ending Mortgage Abuse: Safeguarding Homebuyers: Hearing Before the S. Subcomm. on Housing, Transportation, and Community Development of the S. Comm. on Banking, Housing, and Urban Affairs, 110th Cong. 4 (2007) (statement of Michael D. Calhoun, Center for Responsible Lending) (noting that more than a third of loans in a sample of 2007 mortgage-backed-securities offerings lacked documentation of borrower income). Regulatory agencies such as the Federal Trade Commission and the CFPB refer to "unfair, deceptive, abusive acts and practices" as UDAAP, and these tactics are prohibited by Section 5 of the Dodd-Frank Act.

[120] In financing arrangements, consumers have "little or no control over the terms of the agreement." Courts and legislatures are thus justified to "correct the imbalance of bargaining power that contracts of this sort appear to involve." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 770–71 (1983).

C. (Some) European Approaches to Consumer Finance Regulation

Traditionally, European legal systems adopted a more protectionist, even paternalistic, approach to preventing consumers' financial distress.[121] Over time, the international market for consumer debt has elicited more deference to written terms of the parties' financing arrangement.[122] Consumer debt in several European countries, which for years was lower in both real and income-relative terms than in the United States, dramatically increased over the last few decades.[123] In the 1960s, German per capita debt was only about €2,500 per indebted household, but just three decades later, per capita consumer debt had increased to €10,000 per household.[124] In the twenty years from 1995 to 2016, during which US household debt increased from 97% of disposable income to 104%.[125] Average household debt load in Austria increased from 62% of disposable income to 86.2%, and in Belgium, average household debt rose from 56% of disposable income to 105.3%[126] Household debt in France during the same two decades increased from 54% to 102% of disposable household income.[127] In the Netherlands, household debt more than doubled relative to disposable income, reaching 254%, up from 113% in 1997.[128] A 2001 study concluded that 18% of the European Union's adult population was "over-indebted," meaning they were facing difficulties or serious difficulties in repaying loans and meeting financial obligations.[129]

European consumer credit only became a significant feature of Europe's economies in the waning decades of the 20th Century. Prior to the advent of global

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[121] "In general, any legal rule that prohibits an action on the ground that it would be contrary to the actor's own welfare is paternalistic." *Id.*.
[122] Johanna Niemi-Kiesläinen, Iain Ramsay, William C. Whitford, *Introduction,* in GLOBAL PERSPECTIVE *supra* note 30, at 2. The worldwide development and spread of consumer credit has been called the "democratization of credit." *Id.* For an explanation of why a lending institution's non-negotiable standard terms and conditions for lending is not justifiable considered under the rubric of "contract," see generally MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).
[123] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 4-11.
[124] Udo Reifner, *'Thou shalt pay thy debts' Personal bankruptcy Law and the Inclusive Contract Law*, in GLOBAL PERSPECTIVE, *supra* note 30.
[125] Harari *supra* note 60, at 13; KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 5.
[126] Harari *supra* note 60, at 13; KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 5.
[127] Harari *supra* note 60, at 13; KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 5.
[128] Harari *supra* note 60, at 13; KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 5.
[129] Niemi-Kiesläinen et al., *supra* note 122 at 1. Consumers self-identified as "over-indebted" in the OCR Macro *Study of the Problem of Consumer Indebtedness: Statistical Aspects Final Report* (2001) at 2.

financial markets in the 1980s, European consumers did not have, and perhaps did not need, the sort of easy access to credit that their American counterparts demanded. Most European governments provided extensive social supports for their population, and although some such supports have decreased over the last few decades, the existence of such public benefits partly explains European consumers' relatively lower capital needs.[130] Each European government has its own particular approach to providing public benefits, but relative to Americans, Europeans live in societies where "each individual was and is still guaranteed minimum income to cover the basic costs of living."[131] In addition, governments in most European nations provided their populace with "health care, schooling, university education," and other public services, lessening the need of private debt to afford necessities.[132] In cases of individual financial distress, "welfare agencies could also pay rent" to ensure that people could stay in their homes.[133] Statutory exemptions and welfare laws prevented creditors from seizing state-provided benefits to apply to debts in default.[134] Because collection options were limited, most creditors eventually just "quietly closed accounts" of their defaulting consumer debtors, "writing off the debts in order to reduce wasted administration costs."[135]

Political and economic changes in the 1980s and 1990s contributed to an increased appetite for consumer debt in Europe, and deregulation of consumer lending fed that appetite. The reunification of East and West Germany in 1990 spurred consumer spending as East German households obtained access to western consumer goods for the first time.[136] France, Sweden and other European countries pushed consumers to buy their own homes, just as real property values ballooned.[137] Financial market

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[130] JENS ALBER & NEIL GILBERT, UNITED IN DIVERSITY? COMPARING SOCIAL MODELS IN EUROPE AND AMERICA (2010); Iain Ramsay, *Comparative Consumer Bankruptcy*, 2007 U. ILL. L. REV. 241, 245 -248 (2007); Niemi-Kiesläinen et al., 122, at 3 (referencing the "contraction of the welfare state" during the early years of the 21st Century). American consumers almost always must privately pay the costs of shelter, transportation, education, and health care, but much of these same costs were (and to some extent still are) funded by the state for European consumers. *Supra* notes XX – XX and accompanying text.
[131] Reifner *supra* note 124, at 146.
[132] *Id.*
[133] *Id.*
[134] *Id.* Reifner calls this a "de facto discharge" of debt in cases where debtors could not repay.
[135] *Id.* at 146-147.
[136] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 7-8.
[137] *Id.* at 8.

changes also reflected technological developments. Credit scoring and digital underwriting made it cheaper and easier for lenders to assess the risk of making a particular consumer loan.[138] Digital tracking improved creditors' ability to collect debts from unwilling consumers, decreasing the likelihood that borrowers could freely walk away from their debts.[139] Innovative financial products also made consumer lending less expensive and more accessible. European consumers began using credit cards, accelerating the flow of consumer capital and growing household indebtedness.[140]

Changes in social services, finance regulation, political structures, and technology changed the nature of consumer finance in Europe. Previously, most consumer loans were secured by collateral; the advent of credit cards led to the increase of consumer unsecured debt.[141] Unsecured creditors lack collateral and associated leverage to obtain voluntary repayment, so unsecured debt costs more (carries higher interest rates and fees) to compensate the lender for increased risk.[142] As social changes in several European countries led to reduced government benefits, consumers found themselves seeking capital to cover more of their day-to-day expenses.[143] To fund newly privatized costs, European consumers turned to consumer credit.[144] Innovations in lending and increased of consumer demand for loans put political pressure on governments to tweak their consumer protection approach in ways that would increase access to credit.

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[138] Frank Gargano, *How lenders are adapting to new tech to strengthen underwriting activity*, American Banker (Dec. 11, 2023).

[139] "New information technology and debt collection services as a branch of personal investigation services put an end to the writing-off of consumer debts." Reifner *supra* note 124, at 147.

[140] Gunnar Trumbull, *Consumer Protection in French and British Credit Markets*, Joint Center for Housing Studies, Harvard University (Feb. 2008), https://www.jchs.harvard.edu/sites/default/files/ucc08-17_trumbull.pdf, ("Both France and Germany have experienced dramatic growth in consumer borrowing in the past 15 years.").

[141] Niemi-Kiesläinen et al., *supra* note 122 at 3. In addition to the differences between unsecured credit card debt and secured consumer lending, credit card debt is "open ended, meaning there is not a proscribed repayment schedule and no fixed date when, barring default, the debt will be extinguished." *Id.*

[142] STEPHEN P. PARSONS, CONSUMER BANKRUPTCY LAW IN FOCUS 20 (2017); Akin *supra* note 17.

[143] Niemi-Kiesläinen et al., *supra* note 122, at 8.

[144] Reifner *supra* note 124, at 147. According to Reifner, "[c]onsumers must now increasingly become investors in order to maintain general living standards. Credit is now used to buy consumer durables, to finance holidays and household equipment, to pay for further education, and to bridge liquidity crises…Regular income is no longer sufficient guarantee of access and participation."

Contract regulation stands in tension with access to consumer credit. In the United States, although courts can avoid contracts based on a grossly unfair contracting process (coercion or deceit) or lack of contractual capacity, they are rather limited in their ability to examine and modify the substance of a private agreement.[145] Creditors in the United States expect to control the terms of their financing relationships as long as they comply with specific regulations.[146] US courts lack the power to modify the cost of credit or default terms that were already accepted by a borrower.[147]

Recent changes in consumer finance notwithstanding, European legal systems approach consumer contracts from a different perspective.[148] "Protection of employees, consumers, and tenants, environmental and health protection, education and other non-profit activities" are essential parts of civil law.[149] If they deem it necessary to do so, judges in European courts can examine a contract's substance to determine whether its terms are fair and can modify the terms in order to promote the mutual interest of the parties and court's conception of what is just.[150] Because "[c]onsumer contracts are contracts between unequal partners," with businesses having the power to frame terms to their liking, European courts and regulators are more attentive to the content of the fine print and feel justified to act affirmatively to protect consumers from becoming obligated to a one-sided deal.[151] Although there has been a degree of deregulation since the 1990s, courts in Europe remain relatively protective of consumers in the context of their financial relationships.[152]

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[145] There are legislative substantive limitations to contracting in certain prescribed situations (typically where the parties are very unequal in terms of bargaining power), but even these sorts of proactive constraints on contracting must be adopted according to due process and reflect a rational relationship between the limitation and community needs.
[146] Unconscionability requires some procedural unfairness as well as substantive unfairness. The only substantive-only basis for avoiding a contract is "public policy."
[147] Boyack *supra* note 65. The rare instances when state usury laws apply are exceptions to this rule.
[148] Ramsay *Comparative Consumer Bankruptcy supra* note 130, at 250 -258.
[149] Reifner *supra* note 124, at 156.
[150] *Id.*, at 143.
[151] European systems considered it the government's job to protect consumers from bad contract terms; and the American system considered it the consumer's job to protect himself.
[152] *See generally* Reifner *supra* note 124 Even though some European courts have moderated this approach in recent decades, scholars (both in Europe and the United States) cite the clear power imbalance among parties in consumer lending as justification for a more active approach to *ex ante* consumer financial protection. There are many proposals to broaden judicial and regulatory oversight of consumer contracts. *See, e.g.,* RADIN supra note 122.

Against this backdrop, it is unsurprising that European courts first responded to problems of increasingly unsustainable levels of consumer debt in the 1990s in the same way that they had previously dealt with unfairness arising in the context of any contract: they examined the contract's substance and, if it seemed appropriate to do so, recalibrated the parties' obligations. Consumer overindebtedness was perceived as a problem created in large part by irresponsible financial institutions who failed to ensure that their customers would reasonably be able to repay their loans.[153] Because consumer financial distress was framed as a public rather than private problem, European countries at first responded to increasing consumer indebtedness in a public rather than private way.

In France, François Mitterand's "*responsabilisation de l'économie*" specifically empowered courts to modify private contract terms in order to appropriately spread the costs of consumer debt.[154] Individual judges, special tribunals, and consumer ombudsmen variously played the role of mediator, determining whether a consumer debtor's financial obligations should be revised.[155] Providing some relief from contract obligations was necessary in the 1990s because although France adopted a version of consumer insolvency laws in 1989, it was not until 2004 that it became possible for French consumers to obtain an immediate debt discharge.[156] Consumer financial protection in France therefore relied primarily on regulation of permissible contract content supplemented by a mediation process conducted by special commissions of the central bank.[157] If this semi-voluntary mediation did not adequately resolve the consumer's financial distress, the issue would be sent to a judge who could adjust the contract terms in significant substantive ways, including ordering payments stopped,

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[153] Reifner *supra* note 124, at 147. According to this view, creditors were seen "as responsible for the circumstances of poor families." *Id.*

[154] Reifner *supra* note 124, at 147.

[155] The authority to rewrite consumer financial obligations was vested with the judge in certain states (for example, France, Norway, and Finland), and in other states, this authority was exercised by special courts (for example, the Netherlands and Sweden). Consumer ombudsmen were involved in Finland and Sweden. *Id.*

[156] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 67-70. In 2010, France introduced an even more streamlined process to provide an immediate discharge to those with no capacity to repay and no assets. Iain Ramsay, *U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law*, 87 Temple L. Rev. 947, 973 (2015).

[157] Reifner *supra* note 124, at 148.

writing off interest, and doing "many things which purist contract lawyers in other countries would not imagine in their worst nightmares."[158]

In Germany, judicial authority to modify contract terms was framed as species of contract interpretation. Citing the general obligation that contracting parties have to act in good faith, German courts re-interpreted terms in order to reduce stated interest rates, avoid spousal co-liability, restrict fees, and invalidate default interest provisions.[159] German courts also were willing to award damages to consumers who had felt pressured into taking on debt obligations that they could not reasonably repay.[160] German consumer financial protection laws and policy arose from and was exercised according to the general theory that *der Schutz des Schwächeren im Recht* (the protection of the weaker party is the law).[161] The German Constitutional Court upheld this approach and gave it a constitutional foundation.[162] The court explained, "the civil courts must investigate whether the wording of the contract results from a structural imbalance in bargaining power and, if this is the case, rectify the position under civil law through the application of general clauses."[163]

European systems' traditional, prevention-oriented approach to protecting consumers from financial distress arguably resulted in substantively fairer contract obligations, but it also injected financial relationships with greater unpredictability and chilled consumer lending. American financial institutions prefer to unilaterally dictate the rules applicable to their relationships with customers and are generally less willing to make loans if those terms are subject to modification by regulators and judges.[164] Capital providers manage their risks by drafting contract terms to address issues that may arise in the future, and the costs of a transaction reflect *ex ante* risk allocations.

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[158] *Id*.
[159] *Id.* at 147-148.
[160] *Id.*
[161] *See* EVON HIPPEL, DER SCHUTZ DES SCHWÄCHEREN IM RECHT *(1986)*, *cited in* Reifner *supra* note 124, at 148.
[162] *See* Bundesverfassungsgericht 1 BVR 696/96 (May 2, 1995) *Neue Juristische Wochenschrift* 1996 at 2021, *cited in* Reifner *supra* note 124, at 148.
[163] *Id.*
[164] American financial institutions were early adopters of a consumer lending model, decades before their counterparts in Europe. US financial institutions came to expect the light-touch regulatory approach typical of contract law in the US. Even today, lenders balk at perceived intrusive regulation into the content of their contracts. *See* Boyack *supra* note 65.

Judicial power to rewrite contracts based on hindsight upsets these allocations and, arguably, interferes with contractual autonomy.[165] It also violates the "golden rule of finance," namely: He who has the gold, makes the rules.[166]

By the end of the 20th Century, European consumers joined with financial institutions to demand relief from European contractual paternalism.[167] The "democratization of credit" was heralded as a critical development that would help fuel individual equality and economic growth in Europe.[168] For example, Rosa-Marie Gelpi of the European Credit Research Institute and François Julien-Labruyère of the European financial services company Cetelem wrote an influential book in which they called consumer credit "the cornerstone" of economic growth and "one of the greatest promoters of social mobility."[169] Calls for liberalized consumer credit were couched in terms of empowering the populace and justified by underlying principles of social justice.[170] Consumer credit was touted as the "single greatest factor of social integration" and was praised as a way to modernize European economies.[171] To increase access to

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[165] Morris Bernhard, *Personal Loan Departments in Banks*, 134 Bankers' Magazine 320 (April 1937) (discussing the relationship between risk allocation and profit).

[166] This satirical "golden rule" appeared in 1964 the comic strip "Wizard of Id" by Johnny Hart on May 3, 1965. 1965 May 3, Dallas Morning News, Comic Strip Name: Wizard of Id, Comic Strip Authors: Parker and Hart (Brant Parker and Johnny Hart). The comic strip quip has since been repeated and referenced in many discussions regarding economics and finance. *See* Oleg Komlik, *Remember the Golden Rule! Whoever has the gold makes the rules!* Economics Sociology & Political Economy (Aug. 28, 2015), https://economicsociology.org/2015/08/28/remember-the-golden-rule-whoever-has-the-gold-makes-the-rules/.

[167] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6.

[168] "The democratization of credit refers to the increased availability of general credit for non-commercial actors over the past twenty or so years." Kent Anderson, *The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy*, 42 OSGOODE HALL L.J. 661, 667 (2004).

[169] ROSA MARIE GELPI AND FRANÇOIS JULIEN-LABRUYÈRE, THE HISTORY OF CONSUMER CREDIT: DOCTRINES AND PRACTICES at 84, 171 (transl. Mn Liam Gavin, 2000).

[170] Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 Am. J. Comp. L. 479, 480–81 (2013).

[171] *Id.* at 95. Note that the book by Gelpi and Julien-Labruyère seems to have been written at least in part as an advocacy tool, to influence EU policymakers in Belgium. Lendol Calder, *Review: The History of Consumer Credit: Doctrines and Practices*, Economic History Ass'n (EH.net August 2000), http://eh.net/book_reviews/the-history-of-consumer-credit-doctrines-and-practices/, citing to GELPI & JULIEN-LABRUYÈRE *supra* note 169. The authors of the book "would like to see [Brussels] taking a hand-off approach to credit markets so that governments can treat the causes of economic woes (e.g., high taxes, low investment) rather than mere symptoms (e.g., overindebtedness). Calder notes that the authors seem to let their ends justify their means at times, and occasionally resort to "facile" and "shaky historical claims." *Id.*

credit and corresponding economic and societal benefits, several countries moderated their *ex ante* approach to consumer financial protection in favor of a more American "free market."[172]

Once regulatory control of consumer lending loosened, the European market for credit cards, debit cards, and overdraft protection grew.[173] Less government contractual oversight resulted in greater access to credit, and "great masses of people who were eager to leverage their future earning capacity for immediate consumption and gratification" took advantage of new financial opportunities that easy credit provided.[174] Even though European governments still mandated disclosures, the deregulation of the content of consumer financial contracts opened the door to increased consumer lending in Europe and facilitated cost-saving harmonization among debt instruments.[175] So not to chill lending, European countries exercised less oversight of financing terms, increasingly relying on disclosure to create informed consumers who, theoretically, could protect themselves.[176] Disclosure requirements align with free market theory and are based on the assumption that an informed counterparty can better exercise contractual autonomy.[177] Nevertheless, disclosure-based consumer protection in Europe ran into the same practical difficulties as in the United States. Lenders embraced disclosure primarily as a useful tool to reduce their own risks, and problems of overindebtedness persisted.[178]

Consumer credit has now spread across the Atlantic, as has the problem of consumer overindebtedness. Overindebtedness causes, exacerbates, and perpetuates

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[172] Deregulation of consumer credit across countries has been accompanied by the rise of neoliberalism, marked by "an ideology of consumer choice" and individual responsibility. Ramsay *Comparative Consumer Bankruptcy supra* note 130, at 244.
[173] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 7. *See also* NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30 at 12 ("European consumer credit market was to a large extent deregulated in the 1980s.").
[174] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 7.
[175] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 12.
[176] This approach mirrored that of consumer financial protection in the United States. *Supra* notes 68-78 and accompanying text.
[177] Disclosure, theoretically, empowers consumers so they can act as capable, rational, market actors and protect their own interests without interfering in free choice. In practice, consumers do not read and cannot understand disclosures, and even if they do understand the words, they lack the financial literacy to apply their understanding and make good judgments. Baradaran *supra* note 80, at 1333–34.
[178] *Supra* notes 81-83 and accompanying text.

financial distress, even though the impact of such distress on low-income households may be less dire in countries with robust social safety nets.[179] Once financial distress becomes intractable, *ex post* debt relief may be the only remaining solution. But European countries began to struggle with increasing consumer debt before they had developed a consumer bankruptcy system.[180]

In the 1990s, German courts adopted "free consumer choice" as the new guiding principle for financial contract interpretation and enforcement.[181] Courts no longer routinely found stated rates of interest usurious, parties to a contract could effectively establish spousal co-liability through the fine print, and courts were more willing to enforce draconian creditor remedies and penalties.[182] Courts that a decade earlier had taken an active role in protecting consumers from lender overreach began deferring to lender-drafted contract provisions, noting that obligations freely entered into should be enforceable. The law of financial obligations was increasingly governed by the free market rather than legislators and courts. Problems caused by consumer financial distress that would not be averted would have to be handled after they arose.[183]

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[179] Braucher, *Theories of Overindebtedness supra* note 83. Note that it is debatable whether the spread of consumer credit in a particular country does not necessarily predict the level of consumer financial distress in the country. The *Council of Europe Report* explained that in some European countries where the use of consumer credit is relatively low, the percentage of consumers who were over-indebted was as high or even higher than in other countries where the use of consumer credit is relatively high. In Spain, for example, only one in five households had consumer debt in 1996, but 80% of the consumer with debt were over-indebted. In Denmark, on the other hand, almost half of the households had consumer debt, but only 50% of these households were over-indebted. NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 7. On the other hand, research supports other scholars' assertion that there is a high degree of correlation between the rate of bankruptcy filings and the amount of outstanding consumer credit. *See, e.g.,* Charles J. Tabb, *Lessons from the Globalization of Consumer Bankruptcy*, 30 LAW & SOC. INQUIRY 763, 773 (2005).

[180] Although more and more "European countries … have enacted a law on consumer debt adjustment," they "have in no way harmonised their laws." *Id.* at 30.

[181] Reifner *supra* note 124, at 151.

[182] *Id.*

[183] *Id.* at 152. Sometimes consumers are burdened with what should properly be viewed as business debt rather than true consumer debt, typically arising from personal guarantees of small business loans. This type of debt is perhaps the most difficult to regulate, and it is the type of debt that seems to be best suited for a quick "fresh start" discharge, as it indicates debt obtained to finance entrepreneurial risk-taking rather than standard of living consumption. *See* NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 9-10 (discussing the credit-limitation costs of regulating such debt and the ways in which such debt differs from other debts incurred by consumers).

As long as European courts remained willing and able to re-write or broadly interpret consumer financial contracts, consumers' onerous financial obligations could be prevented, and if overindebtedness is preventable, then there is limited need for an escape route from debt. But lighter regulation and oversight of consumer finance led to increasing problems of consumer financial distress which could only be resolved *ex post.* Responding to the persistence of problematic debt obligations, European systems began to innovate consumer bankruptcy-type avenues of relief.[184] The trend was self-perpetuating: The less *ex ante* oversight prevented financial distress from arising, the more need there was for an *ex post* debt discharge option.

## II. CURE: BANKRUPTCY FRESH START

### A. US Bankruptcy Goals, Access, and Impacts

American culture champions entrepreneurship and risk-taking. The ethos of the United States is centered on the ideal of equality of opportunity – the dream that anyone can become rich and successful with enough hard work and moxie.[185] Prioritizing opportunity and risk-taking historically has dovetailed with two unique features of the US consumer credit system: freedom of contract with respect to credit access, and the availability of a fresh start with respect to debt discharge in bankruptcy.[186]

In spite of numerous regulatory requirements and some limited equitable safety valves providing relief from unfair consumer contracts, American law continues to start

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[184] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6.

[185] As early as 1835, Alexis de Toqueville observed that Americans believe "that their whole destiny is in their hands." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 206 (1835) This ethos is commonly known as the "American Dream." SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997); HERBERT MCCLOSKEY & JOHN ZALLER, THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD DEMOCRACY AND CAPITALISM (1984). *See also,* Andrea J. Boyack, *A New American Dream for Detroit,* 93 U. Detroit Mercy L. Rev. 573 (2016).

[186] D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1565 (2013) (discussing how, in America, "bankruptcy is widely regarded as an important legal tool to facilitate entrepreneurship"). Consumer bankruptcy has not always been part of US law, however. There was no legal way to discharge debt until The Bankruptcy Act of 1841, although people unable to pay their debts occasionally fled to western states, out of the reach of their creditors. Federal Judiciary Center, *Jurisdiction: Bankruptcy*, https://www.fjc.gov/history/work-courts/jurisdiction-bankruptcy#:~:text=The%20Bankruptcy%20Act%20of%201841,to%20voluntarily%20commence%20bankruptcy%20proceedings; Joseph McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. Hist. L.Q. 3369, 375, 393 (1983).

from a hands-off baseline when it comes to the content of consumer loan agreements. This is distinct from the European approach. On the other hand, although US law does little to actively prevent consumers from incurring burdensome debts, the "fresh start" offered by Chapter 7 of the US Bankruptcy Code was, and even after the 2005 amendments to the Bankruptcy Code remains, perhaps the most generous consumer debt relief system in the world.[187]

A Chapter 7 bankruptcy discharge frees a consumer debtor from nearly all unsecured consumer debts upon relinquishing non-exempt property.[188] State law determines what property is exempt from liquidation to pay debts, so the practical benefit of bankruptcy's fresh start varies from jurisdiction to jurisdiction.[189] Low-income bankruptcy debtors, however, frequently have no non-exempt property and thus relinquish nothing in exchange for a Chapter 7 discharge.[190] Debtors who file a bankruptcy petition under Chapter 7 are immediately protected from all collection efforts by an automatic stay.[191] Filing for Chapter 7 bankruptcy also immediately grants the debtor the right to retain all income earned after filing, none of which is required to be allocated toward repaying pre-petition dischargeable debts.[192] There is no minimum

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[187] Ramsay, *U.S. Exceptionalism supra* note 156 at 947, *citing* MONICA PRASAD, THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY 183 (2012), and DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 1 (2001).

[188] The "modern era of liberal debtor treatment" began with the Bankruptcy Act of 1898 and has been guided by the policy goal to offer relief to "the honest debtor from the weight of oppressive indebtedness and permit him to start afresh." *Local Loan Co. v. Hunt* 292 U.S. 234, 244 (1934). All amendments and changes to the US Bankruptcy System since 1898 have asserted the intention to stay true to the fresh start goal. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67, 72 (2006).

[189] The Bankruptcy Code establishes a set of federal exemptions but permits states to opt out of such exemptions and mandate use of their own exemptions. 11 U.S.C.A. § 522(b)(2)(A). A majority of states have opted out. Debtors in states that have not opted out have the choice of their applicable state exemptions of federal exemptions in § 522(d). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 19-8. 119 Stat. 23 (codified in scattered sections of 11 U.S.C.) (effective Oct. 2005), created rigid limits on a debtor's ability to relocate or transfer value into a new home prior to bankruptcy in order to take advantage of more generous state exemptions. 11 U.S.C. §§ 522(b)(1), (3)(A).

[190] United States Courts, *Chapter 7 Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics ("Most chapter 7 cases involving individual debtors are no asset cases.") *See also* STEPHEN P. PARSONS, CONSUMER BANKRUPTCY LAW IN FOCUS 14-15 (2017) (providing a profile of a typical consumer debtor).

[191] 11 U.S.C.A. § 362.

[192] 11 U.S.C.A. § 541(a)(6).

required repayment amount for consumer debtors in Chapter 7, and the majority of Chapter 7 consumer bankruptcies result in zero or very nominal pay out to creditors whose debts are discharged.[193] Debtors can lose their entire bankruptcy discharge if they engage in fraudulent behavior before or during bankruptcy.[194] A consumer debtor who files for Chapter 7 bankruptcy and acts in good faith can immediately protect their exempt assets and future income and, within a very few months, and without any formal court hearing, can escape much of their unsecured debt and start fresh.[195] Secured debts are not discharged, and, unless the collateral is relinquished to the lender or the loan is reaffirmed, are repaid up to the value of the collateral.[196]

Some debts, however, are designated as non-dischargeable in a Chapter 7 bankruptcy.[197] For over a hundred years, US Bankruptcy law has exempted certain categories of financial obligations from bankruptcy discharge, including particular tax liabilities, debts incurred through fraud, and amounts owed to creditors left off of the debtors' schedules. In 1938, the Chandler Act added spousal support payments and certain employee wages to the list of non-dischargeable debts.[198] Then, in 1978, the Bankruptcy Code added three new categories of non-dischargeable debts, including government debt and federally insured students loans.[199] Finally, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added ten additional

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[193] United States Courts, *Chapter 7 Bankruptcy Basics, supra* note 190.
[194] 11 U.S.C. § 727 details the sorts of fraudulent behavior that merits a global discharge for debtors, including lying to the court or and fraudulently transferring or hiding assets.
[195] 11 U.S.C. § 727(b) (automatic discharge in Chapter 7 bankruptcy). Debtors need not appear at a court hearing but are required to appear and be questioned by the bankruptcy trustee at a public "meeting of creditors." 11 U.S.C. § 341.
[196] 11 U.S.C. § 506. Generally, a debtor would not owe more than the value of the collateral on the filing date, even if the stated amount of the loan is higher. This concept, called a "cramdown," is subject to some important exceptions that were expanded by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 19-8. 119 Stat. 23 (BAPCPA). For example, BAPCPA prohibited a cramdown for the stated principal owed on a car loan acquired within 910 days prior to bankruptcy. Rajashri Chakrabarti & Nathaniel Pattison, *Auto Credit and the 2005 Bankruptcy Reform: The Impact of Eliminating Cramdowns*, Federal Reserve Bank of New York, Staff Report No. 797 (Oct. 2016).
[197] *See* 11 U.S.C. §§ 506, 523, 727.
[198] Chandler Act, ch. 575, § 17, 52 Stat. 851 (1938) (repealed and replaced with the Bankruptcy Code in 1978).
[199] 11 U.S.C. § 523(a); Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998,* 15 Bank. Dev. J. 343 (1999).

categories of non-dischargeable debt.[200] Although the bankruptcy bench and bar has articulated no objection to many of these categories, the inability to discharge certain types of debts remains contentious.[201] Each of the categories of non-dischargeable debts eats away at the concept of the debtor's fresh start, and although it is difficult to justify protecting the ability of a dishonest debtor to begin afresh, several of the new categories of non-dischargeable debts substantially undermine the purposes of bankruptcy for even honest but unfortunate debtors.[202] For example, there is nothing blameworthy about incurring educational debt; indeed, taking out loans to obtain a higher education is expected and encouraged in the United States.[203]

Until 2005, any consumer debtor in the United States could seek a fresh start under Chapter 7 if done in good faith, but BAPCPA introduced a new gatekeeping hurdle for Chapter 7 consumer bankruptcy, the so-called "Means Test."[204] The Means Test reflected Congress's attempt to screen bankruptcy debtors to ensure that those who are capable of making more than nominal payments toward their debts are required to do

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[200] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 19-8. 119 Stat. 23 (codified in scattered sections of 11 U.S.C.) (effective Oct. 2005).

[201] For example, some claim that limitations on discharging prisoner fees, certain cash advances and purchases of "luxury goods" (a term not defined), and private student loans should be reconsidered or refined. *See* 11 U.S.C. §§ 523(a)(2), (17), and (8), respectively. Thomas Bak et al., *A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates*, 25 Emory Bankr. Dev. J. 11 (2008); Karen M. Gebbia, *The Keepers of the Code: Evolution of the Bankruptcy Community,* 91 Am. Bankr. L.J. 183 (2017).

[202] The articulated policy of US consumer bankruptcy law since 1898 has been to provide relief to the "honest but unfortunate debtor." Sousa *supra* note 9, at 565–66.

[203] Richard Fossey, *"The Certainty of Hopelessness:" Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?* 26 J. L. & EDUC. 29, 33 (1997) (The Bankruptcy Code groups education debtors together with those who commit fraud, embezzlement, breach of fiduciary duty, and other crimes involving `moral turpitude.). *See also* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt,* 53 Santa Clara L. Rev. 329 (2013) (explaining the connection between rising educational costs and the difficulty in discharging educational debt); John P. Hunt, *Consent to Student Loan Discharge,* 95 Indiana L. J. 1137 (2020) (arguing the policy reasons for a more liberal discharge for educational debt); Jason Iuliano, *The Student Loan Bankruptcy Gap,* 70 Duke L. J. 497 (2020) (presenting data regarding the extent to which student loans persist after bankruptcy notwithstanding undue hardship in repaying the debt.) From 2017 to 2024, there were numerous bills proposed in both the US Senate and House of Representatives seeking to remove private student loans from the list of non-dischargeable debt in bankruptcy, but none of these proposals have been passed by Congress. *See, e.g.,* Fairness for Struggling Students Act, S. 729, 115th Cong. (2017); Private Student Loan Fairness Act, H.R. 138, 118th Cong. (2023).

[204] 11 U.S.C. § 707(b). Critics of easy access to Chapter 7 consumer bankruptcy had for years been calling for means testing as a way to curb debtor abuse. Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. Rev. 177 (1999).

so.[205] Under the Means Test, Chapter 7 was limited to those consumers who could prove either (a) that they had earned less than the local median income for the debtor's household size over the six months prior to filing, or (b) that their unsecured debt was significantly large enough relative to their "disposable income" (as calculated by BAPCPA's cumbersome formula) to justify an immediate discharge rather than a multi-year repayment plan.[206] A debtor who earned to much or owed too little relative to their pre-bankruptcy earnings would be precluded from filing for liquidation bankruptcy under Chapter 7 and could only file for debt reorganization under Chapter 13 – a bankruptcy proceeding that grants a discharge after the debtor successfully pays all disposable income toward outstanding debt for three to five years.[207]

In addition to enacting income and debt-based limits on filing for bankruptcy under Chapter 7, BAPCPA dramatically increased the complexity and cost of filing for bankruptcy. Prior to 2005, a debtor needed only to file three documents to commence bankruptcy, but BAPCPA requires that in order to file, a consumer debtor must prepare and submit numerous additional documents (tax records; schedules of all assets, liabilities, income, expenditures; a narrative of how financial distress arose; disclosures regarding anticipated future income; and more), provide statements of intention regarding secured property, obtain an attorney certification, and complete pre-filing credit counseling.[208] These additional requirements added significantly to the upfront

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[205] David K. Stein, *Wrong Problem, Wrong Solution: How Congress Failed the American Consumer*, 23 Emory Bankr. Dev. J. 619, 634 (2007) (explaining the methodology of the Means Test and the Congressional goals it reflects).
[206] 11 U.S.C. § 707(b).
[207] *See* Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 Am. U. L. Rev. 1295, 1306 (2006) (criticizing the complexity of the Means Test); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?* 13 Am. Bankr. Inst. L. Rev. 665, 673-77 (2005) (criticizing, among other things, the calculation of the debtor's "current monthly income," the computation of "disposable income" under the Means Test, and the limited bases for rebutting the "presumption of abuse" under the Test).
[208] 11 U.S.C. § 521(a)(1) and (2) and § 521(b). Debtors sometimes report that required credit counseling does little but create a larger stigma and increase shame for filing bankruptcy. *See, e.g.,* Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 Am. Bankr. L.J. 435, 437–38 (2013). Although European nations have also embraced the idea that consumer insolvency and debt readjustment should include a requirement for debtor financial education, the requirement for "credit counseling" in the United States seems less focused on substance and individual financial advising (which is rare) and more on adding a bureaucratic hoop through which a would-be bankruptcy debtor must jump. *See infra* notes X and accompanying text.

cost of filing for Chapter 7 bankruptcy, in terms of fees, cost of credit counseling, and – most significantly – the cost of hiring an attorney.[209] Under the revised US Bankruptcy Code, it became even more vital for consumer debtors to hire an attorney due to the increased complexity of the process and the many hidden pitfalls that could doom a bankruptcy proceeding filed without expert assistance.[210] Unlike in other countries, debtor credit counseling and attorney assistance is funded by the debtor, not by the public, and these costs must be paid upfront, prior to filing.[211]

BAPCPA thus represents a recent reduction of *ex post* consumer financial protection in the United States. The 2005 amendments have been criticized as undermining the fresh start policy that was the foundation of American consumer bankruptcy law.[212] The debates surrounding the passage of BAPCPA prove, however, that making it more difficult for consumers to obtain a Chapter 7 discharge was an intended feature, not a bug.[213] Before it was passed, BAPCPA endured a long political battle in which creditors pushed to make consumer bankruptcy debt discharge less accessible and more limited.[214] The 2005 amendments were the product of these

[209] Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 Notre Dame L. Rev. 219 (2018); Braucher, *Theories of Overindebtedness supra* note 83, at 325-326.
[210] *Can I file my own bankruptcy case?* American Bankruptcy Institute, https://www.abi.org/feed-item/can-i-file-my-own-bankruptcy-case#:~:text=The%20most%20recent%20report%20showed,13%20Bankruptcy%20Without%20an%20Attorney.
[211] A US debtor seeking an immediate bankruptcy discharge must pay her attorney upfront because unpaid attorney's fee obligations do not receive any payment priority in a chapter 7 bankruptcy. Lamie v. U.S. Trustee, 540 U.S. 526 (2004). Inability to come up with more than $1,000 in cash bars the most severely indigent from the bankruptcy courts and denies them the protection of bankruptcy's automatic stay and its discharge. "It is unjust and nonsensical to require impoverished debtors to undergo an expensive and burdensome process to obtain [debt] relief." Chrystin Ondersma, *Small Debts, Big Burdens,* 103 Minnesota L. Rev. 2211, 2212 (2019)
[212] *See, e.g.,* Ronald J. Mann, *Bankruptcy Reform and the "Sweat box" of Credit Card Debt*, 2007 U. Ill. L. Rev., 375, 376-377 (2007) (noting the ways that BAPCPA was notoriously unfriendly to consumer debtors).
[213] *See, e.g.,* Lawless et al. *supra* note 34, at 358 (BAPCPA legislative debates characterized bankrupt consumer debtors "as deadbeats who abused the system."); Sousa, *Bankruptcy Stigma supra* note 208, at 437–38 (The goal of BAPCPA was to "ferret out the abusers" of the consumer bankruptcy system.).
[214] For more on the political battles and pressures leading up to BAPCPA, *see* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 243. The interest groups seeking to limit consumer access to and effectiveness of bankruptcy's fresh start have, somewhat confusingly, coopted the term "bankruptcy abuse and consumer protection" to represent their policy aims. According to William Whitford, "[t]he institutional creditors are interested in such reforms to limit their losses for bad lending decisions while the conservative politicians are cynically seen as "in the pockets" of the powerful lenders' lobby." *Id. See also* Elizabeth Warren, *The Changing Politics of American*

creditor advocacy efforts and were founded upon a narrative of rampant consumer bankruptcy abuse.[215] As professor-turned-senator Elizabeth Warren has repeatedly demonstrated, BAPCPA was passed in the absence of any data showing consumer bankruptcy abuse.[216] Instead, data showed that "the system is generally used by American families in desperate financial circumstances," who, without recourse to bankruptcy "would be hopelessly trapped with debts on which they could never even pay the annual interest; they would face a future of increasing debt loads until they died."[217] A majority of bankruptcy lawyers, judges, and scholars criticize BAPCPA as unfairly denying distressed consumer debtors an avenue of relief that is especially necessary in a system without active upfront regulation of consumer finance.[218] Although BAPCPA remains part of US bankruptcy law, it is to date the only significant amendment to the Bankruptcy Code that was "enacted without the general consensus of the bankruptcy community."[219]

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*Bankruptcy Reform,* 37 OSGOODE HALL L.J. 189 (1999); Jean Braucher, *Options in Consumer Bankruptcy: An American Perspective,* 37 OSGOODE HALL L.J. 155 at 158-60 (1999) (covering "The Politics of Consumer Bankruptcy in the United States"); Anderson *supra* note 168 at 667-670.

[215] Robert Slimak, *Checking Up with BARF: Evaluating the Effectiveness, Challenges and Shortcomings of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 11 Rich. J. L. & Pub. Int. 85, 86 (2008). *See also* Bak, *supra* note 201 at 23; Gebbia *supra* note 201 at 282.

[216] Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 493 (1997).

[217] *Id.*

[218] Mann *supra* note 213, at 376; Stein *supra* note 205, at 633-634. *See also* TERESA SULLIVAN, ELIZABETH WARREN, AND JAY WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 259 (2000) (recounting empirical studies regarding the cause of consumer bankruptcy which indicate lack of income and unexpected circumstances, such as job loss, divorce, or health problems, cause a majority of consumer bankruptcies).

[219] Gebbia *supra* note 201, at 282. There have been near constant efforts to amend the most objectionable bankruptcy provisions created by BAPCPA, but these reforms have not (yet) passed Congress. Perhaps the most notable reform proposal is the Consumer Bankruptcy Reform Act, introduced in 2020 and then again in 2022 and championed by bankruptcy-scholar-turned-senator Elizabeth Warren. Consumer Bankruptcy Reform Act, S. 4980, 117th Cong. 2022); Elizabeth Warren, *Fixing Our Bankruptcy System to Give People a Second Chance*, Medium.com (Jan. 7, 2020); Warren Senate Press Release, *Consumer Bankruptcy Reform Act Summary* (Sep. 28, 2022). In addition to the proposals specifically addressing educational debt discussed *supra* note X, an amendment creating a specialized, streamline bankruptcy proceeding to deal with medical debt has been proposed in Congress five times. Medical Bankruptcy Fairness Act, S. 146, 117th Cong. (2021). *See also* Amy Y. Landry & Robert J. Landry, III, *Medical Bankruptcy Reform: A Fallacy of Composition*, 19 Am. Bankr. Inst. Rev. 151 (2011).

B. (Some) Consumer Bankruptcy Developments in Europe

European nations have long been more conservative than the United States when it comes to consumer debt relief.[220] Consumer bankruptcy did not exist in Europe before the 1990s, although in practical terms, limits on collectability of consumer debts (discussed *supra*) provided a sort of "de facto discharge" of those consumer debts in some cases where debtors could not repay.[221] Early European insolvency procedures evolved from *ad hoc* court-imposed contract modifications which typically required creditors to stretch out a term, lower an interest rate, or even write down principal owed to reflect declining collateral values – all in the name of fairness. This *ad hoc* approach was gradually supplanted by more formalized procedures allowing European courts to restructure consumer debt.

Responding to the liberalization of consumer credit and increasing consumer indebtedness, European countries began to formalize *ex post* consumer debt relief starting in the 1990s.[222] Debt relief offered a solution to consumer financial distress which, perhaps due to lighter upfront financial regulation, had not been prevented.[223] Establishing formal procedures for consumer debt relief flowed logically from the significant increase in consumer debt in several European nations. By the early 2000s, the number of consumer insolvencies in France and Germany had grown dramatically, although consumer bankruptcy was still not as widespread in Europe as it was at that time in the United States. Once laws better facilitated consumer bankruptcy, it became more popular. During 1999-2000, the first two years of Germany's new insolvency system, the *Insolvenzordnung*, there were fewer than 1,000 bankruptcies. But more than 25,000 German consumers filed for bankruptcy under that system in just the first half of 2002.[224]

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[220] Reifner *supra* note 124, at 146-151.
[221] *Id.* at 147. *See supra* notes XX – XX and accompanying text.
[222] By 2005, 14 European countries (nearly 1/3 of the Council of Europe) had created a consumer debt adjustment act. The first countries to adopt such laws were the Western European countries with the most developed credit markets, such as Germany and France. NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 27. Note that European consumer bankruptcy developed over a century after consumer bankruptcy in the United States.
[223] Niemi-Kiesläinen et al., *supra* note 122, at 4.
[224] *Id.*, at 153, citing Federal Ministry of Justice Press Release No 62/2002 (Nov. 22, 2002).

When European legislators introduced the possibility of consumer insolvency proceedings, they initially refused to include a process for immediate debt discharge akin to Chapter 7 of the U.S. Bankruptcy Code.[225] European *ex post* consumer debt relief differed from consumer bankruptcy in the United States.[226] European insolvency proceedings typically require both some short-term asset liquidation and a long-term repayment of debt through future earnings, somewhat similar to US Chapter 13 bankruptcy.[227] The applicable repayment period varies widely from European country to country, and the proper scope of "debt adjustment laws" is something that has been the "object to lively legal policy discussion in many countries."[228]

Consumer insolvency procedures are specific to the applicable European jurisdiction, but these systems can be grouped within three general categories. First, the Nordic countries emphasize debtor good faith, and their debt adjustment procedures are only accessible to a debtor who did not act irresponsibly in incurring large debts immediately prior to seeking relief and who has already made a good faith attempt to repay their debts.[229] Second, Germany, along with Austria and Estonia, emphasizes the completion of a repayment plan and offers discharge to debtors only when they successfully do so.[230] Third, France, Belgium, the Netherlands, and Luxemburg emphasize prevention and voluntary workouts, which are given institutional support, but may provide a limited debt discharge option in extreme cases.[231] Compared to Chapter 7 in the United States, it is usually a longer and more difficult process for debtors to obtain a discharge of debts under each of these systems.[232] The cases of Germany and France are discussed in a bit more detail below.

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[225] "Every country considers the U.S. model--even if only as a cautionary "be sure not to go that far" heuristic." Tabb, *Lessons supra* note 179, at 775; Niemi-Kiesläinen et al., *supra* note 122, at 14, 29.
[226] Reifner *supra* note 124, at 149.
[227] Chapter 13 of the US Bankruptcy Code provides a pathway for debt reorganization and repayment of debts over three to five years, with a discharge being granted to the consumer debtor upon successful completion of the repayment plan.
[228] *Id.*
[229] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 30.
[230] *Id.;* Jason L. Kilborn, *The Innovative German Approach to Consumer Debt Relief Revolutionary Changes in Germany Law, and Surprising Lessons for the United States*, 24 Northwestern L. Int'l & Bus. 257, 261 (2003-2004).
[231] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 30
[232] *Id.*

In Germany, consumer overindebtedness is governed by legislation entitled "*Insolvenzordnung*" (Insolvency Law) which became effective on January 1, 1999.[233] Under this law, consumers may commence court-assisted insolvency only after proving at least one failed attempt to reach a voluntary restructuring agreement with creditors,[234] although such failure is presumed if a creditor is engaged in collection efforts.[235] In theory, restructuring starts with the debtor proposing a repayment plan to the court, and the creditors thereafter have the opportunity to object to it.[236] If a majority of the creditors affirmatively object, then the case is submitted to a legal procedure called "simplified consumer insolvency proceedings" (*vereinfactes Verbraucherinsolvenzverfahren)* under which, first, the debtor's unprotected assets are distributed to creditors to pay down the debt, and then the debtor is given a six-year probationary repayment period prior to discharge.[237] During this six-year "good behavior period" (*Wohlverhaltensperiode*), the debtor must turn over all nonexempt income to a trustee who distributes it among the creditors.[238] At the end of this six-year period, and as long as it appears that the debtor acted in good faith to maximize earnings (doing whatever work is available, even if menial), the judge will grant a discharge of unpaid debts.[239] Legal fees in connection with the debtor's bankruptcy proceedings are payable in installments over the six-year repayment period.[240] In practice, plans proposed by consumer debtors typically mirror the statutory default plan, and almost no creditors raise objections to such plans.[241] German insolvency law today does offer the possibility of a discharge, but it is awarded only to those consumer debtors who are

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[233] *Id. citing* Insolvenzordnung (InsO) 5.10.1994, Bundesgesetzblatt Teil I, 2866.
[234] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 77. Originally, the court-driven insolvency began with another mandatory attempt to negotiate a resolution between creditors and the debtor, but these efforts were seldom successful and, beginning in 2001, became optional.
[235] Reifner *supra* note 124, at 150.
[236] *Id.*
[237] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 77-78.
[238] *Id.* at 78-79*;* Reifner *supra* note 124, at 150.
[239] Reifner *supra* note 124, at 150.
[240] *Id.* at 151.
[241] *Id.*

deemed morally worthy and deserving after completing their repayment plan. This is sometimes framed as an "earned fresh start."[242]

The French law dealing with consumer bankruptcy, entitled "Law concerning the prevention and regulation of problems linked to the overindebtedness of individuals and families," became effective in March 1990 and was incorporated into the Consumer Protection Code in 1993.[243] The first iteration of French debt restructuring law required a prolonged repayment period for consumer debts and limited discharge to merchants or consumers engaged in a small business.[244] In the 1990s, insolvent French consumers would avail themselves of a mediated "consensual workout" orchestrated by the *commissions de surrendettement*.[245] By 1999, France had created a method for consumers "in cases of extreme distress" to engage in a two-part debt relief process, first a deferral of obligations for up to two years, and second a re-examination of the debtor's financial status and partial discharge.[246] Then, in 2004, French law was amended to offer a simplified, immediate full discharge through a "procedure of personal recovery" (*procedure de rétablissment personnel)*, although this is available only in cases where the consumer's financial distress is determined by the *commission* to be "irremediable."[247] Finally, in 2010, France introduced an even more streamlined process to provide an immediate discharge to those found to have no capacity to repay and no valuable assets.[248] Like German law, French bankruptcy has a very strong focus on debtor education and counseling, and the counseling provided is far more substantive than the perfunctory counseling consumer debtors undergo in the United States.[249]

Even though France and Germany (and several other European countries) have recently adopted procedures allowing consumers to (eventually/occasionally)

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[242] Kilborn, *The Innovative German Approach supra* note 230; Robert Anderson, *Consumer Bankruptcy in Europe: Different Paths for Debtors and Creditors,* EUI Working Papers LAW No. 2011/09, at 21.
[243] *Loi relative à la prevention et au règlement des difficultés liées au surendettement des particuliers et des familles.* Incorporated into articles L331-1 to L333-8 of the Consumer Protection Code. *See* Reifner *supra* note 124, at 149.
[244] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 27.
[245] *Id.*, at 27-29. KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 63-64.
[246] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 64-66.
[247] *Id.* at 67-70.
[248] Ramsay, *U.S. Exceptionalism supra* note 156 at 973.
[249] Tabb, *Lessons supra* note 179, at 777; NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30.

discharge their debts, in practice, European insolvency laws uniformly prioritize steering debtors and creditors into a facilitated or imposed modification of the financing relationship.[250] Many instances of consumer financial distress in both countries are resolved under such a "court-imposed quasi-contract in which debts are reduced, adjusted to income and limited in time."[251] European civil law systems also typically require consumer debtors to attempt to negotiate with their creditors and give creditors the power to object to the proposed repayment plan, a feature somewhat reminiscent of commercial bankruptcy reorganization in the United States (Chapter 11).[252]

An examination of various countries' approaches to consumer bankruptcy illustrates the many structural options available for *ex post* consumer financial protection. Bankruptcy can offer an immediate discharge, require repayment for some period of time, or can include a combination of both. Some European countries have been experimenting with a hybrid system, offering two avenues of debt relief: a sell-out and immediate discharge and a pay-out debt restructuring approach (either through two different sorts of bankruptcy, like in the United States, or through two different paths to discharge through the same system).[253] Even though at first glance there has been some limited convergence among different countries' bankruptcy systems, scholars caution that when the systems are examined in practice rather than mere theory, significant differences remain.[254] Systems also diverge with respect to the role of professionals in the bankruptcy proceeding and whether these professionals are private attorneys (as in the United States) or public administrators (as is the case in most other countries).[255]

European systems require debtors to adequately justify their need for bankruptcy relief, and although consumers in the United States must provide an explanation of how they arrived in financial distress, they need not offer grounds to

[250] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6, at 62-70 and 77-81; Kilborn, *The Innovative German Approach supra* note 230 at 262.
[251] Reifner *supra* note 124, at 152.
[252] Tabb, *Lessons supra* note 179, at 777.
[253] *See supra* notes XXX – XXX and accompanying text.
[254] Niemi-Kiesläinen et al., *supra* note 122, at 9-10 (asserting that there is likely "much greater divergence in consumer bankruptcy systems than first appears").
[255] *Id.* at 10.

excuse their pre-bankruptcy behavior.[256] Another key difference between European and US consumer bankruptcy is the extent to which the debtor's property may be retained rather than liquidated.[257] European countries offer uncapped, categorical protection for several types of debtor property, including basic household goods, basic social allowances, monies for essential medical needs, and necessary working tools.[258] But consumer debtors in Europe cannot typically retain a personal automobile or land they own.[259] Only two European countries (Bulgaria and Moldova) provide protection for a debtor's real property.[260]

Although several European countries now provide a legal method whereby consumer financial distress can be cured through debt discharge, many such countries remain convinced that it is preferable to actively prevent consumer overindebtedness from occurring to begin with. In 2001, the European Union drafted a directive calling, to some extent, for a renewed focus on preventing consumer financial distress rather than expanding access to debt discharge.[261] The directive asserted that consumer overindebtedness was preventable, and that creditors should be held liable for "improvident lending."[262] By focusing on creditor prudential lending and justifications for limiting creditor collection rights, the EU directive adopted a "responsible lending" approach to consumer credit, an approach that focuses on prevention more than cure.[263] The European Ministers of Justice later adopted a resolution entitled "Seeking Legal Solutions to Debt Problems in a Credit Society" that focused on prevention of consumer

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[256] *Id.* Of course, if the pre-bankrutpcy behavior includes fraud, that would be the grounds for the debtor to be denied a discharge.
[257] In the United States, such laws are called "exemptions" and the categories and valuation caps on such exemptions vary widely from state to state. In Europe, exempt property is sometimes term *beneficium* based on the Latin term for protected assets .NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 22-23.
[258] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 22-23.
[259] Tabb, *Lessons supra* note 179, at 778. ("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.").
[260] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 23.
[261] EC Proposal on Council Directive on the harmonization of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM (202) 443 final of Sept. 9, 2002 at 8, *cited in* Reifner *supra* note 124 at 153, fn. 23.
[262] *Id.*
[263] Reifner *supra* note 124, at 153, fn. 23.

financial distress.[264] Although the council acknowledged that Europe had embraced the concept of consumer credit, it suggested that *ex ante* consumer education and protection laws and procedures were the most effective and fair ways to combat the individual and social costs of overindebtedness. The Ministers of Justice cautioned against moving toward the US model of a less upfront consumer lending oversight and a more expansive consumer debtor fresh start.[265]

Although several European countries have increasingly liberalized their consumer bankruptcy systems, debt discharge is still seen as a last resort.[266] Even with the additional burdens imposed on debtors by BAPCPA, the US bankruptcy system continues to make an immediate debt discharge available to an extent that most Europeans would find "simply incomprehensible."[267] According to Johanna Niemi-Kielsiläinen, the underlying vision of consumer debt relief in civil law countries remains different than in common law systems.[268] In common law systems, the emphasis is on the role of the citizen as a market actor and the primacy of the concept of "fresh start." In civil law countries, the vision behind debt relief is that of a citizen's quality of life and a citizen's obligation not to cause harm to others, meaning that debt restructuring will be a comprehensive effort to improve the debtor's future quality of life while avoiding creditor harms.[269]

## III. MITIGATING FINANCIAL DISTRESS: THE BEST OF BOTH WORLDS

### A. Treatment Through Prevention and Cure

Consumer bankruptcy and consumer credit systems are inextricably linked.[270] Lender control of the costs and terms of a lending relationship, free from regulatory

[264] MJU-26 (2005) Resol. 1. This resolution was adopted at the Conference on Social Aspects of Justice in Helsinki in April 2005. *See* NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30.
[265] NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 4.
[266] Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem,* 37 Osgood Hall L.J. 473, 481-497 (1999).
[267] Tabb, *Lessons supra* note 179, at 776.
[268] Niemi-Kiesiläinen *supra* note 267; Tabb, *Lessons supra* note 179.
[269] Tabb, *Lessons supra* note 179; *see also* Iaian Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy,* 20 J. OF CONSUMER POL'Y 133, 269 (1997).
[270] "The legal response to over-indebtedness can be divided into three categories; prevention, alleviation and rehabilitation." NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30, at 11.

oversight or judicial substantive modifications, would likely to make consumer credit more accessible, but consumer debtors taking advantage of such accessible credit would ultimately bear more risks and incur higher costs[271]. Creditors' moral hazard arising from lack of upfront oversight theoretically could be mitigated by consumers' ability to discharge burdensome debts. Just as inoculation is less critical if a cure is readily available, upfront regulation of their financial commitments is arguably less essential when consumers can freely escape the consequences of burdensome debt obligations. Generous back-end dischargeability may thus indirectly incentivize better lender underwriting. The US consumer debtor-creditor system is based on this perspective.

On the other hand, European perspectives recognize that upfront regulation and the judicial power to modify lending terms may prevent onerous financial obligations from being incurred to begin with. Although highly regulated consumer financing may also chill credit availability, as long as there is little or no ability for consumers to avoid their debts, lenders may still find it profitable to offer loans. Prevention of overindebtedness through contractual control should result in fewer instances of financial distress, and limited debt relief could address such rare cases.

Loosening consumer protections, whether through "democratization of credit" in Europe or through tightening access to discharge in the United States, increases the likelihood of consumer financial distress.[272] The dramatic increase in consumer debt in Europe in the 1990s illustrates how fewer upfront controls can significantly expand consumer reliance on credit.[273] In the United States, reduced ability to discharge debt subtly incentivized more willingness to lend. For example, once BAPCPA made private educational debt non-dischargeable, credit providers' willingness to make private

[271] European consumer finance scholars assert that there "seems to be a European consensus about the priority of the prevention of over-indebtedness through legal means." *Id.* Avoiding debt problems is paramount, and engaging in the *ex post* management of debt is "a last result." *Id.*
[272] Anderson *supra* note 168, at 667. The democratization of credit resulted both from an increased supply of consumer credit resulting from deregulation and an increased demand for consumer credit resulting from a shrinking welfare state, increased costs of living, and increased expectation of "immediate gratification financed by future income." *Id.*
[273] Considering the European experience with overindebtedness suggests that credit and debt levels are multi-faceted and reflect their structural and cultural context. Braucher, *Theories of Overindebtedness supra* note 83, at 325.

student loans dramatically increased.[274] A lack of bankruptcy discharge creates a moral hazard for lenders to be sloppy in their credit assessments because defaulting borrowers cannot use bankruptcy to escape their obligations. Creditors are better able to engage in predatory consumer lending when there is little *ex ante* financial oversight. On the other hand, creditors have long asserted that too generous a bankruptcy discharge creates a moral hazard for borrowers to irresponsibly incur and then walk away from large amounts of debt.[275] And lenders and economic theorists claim that consumer finance oversight harms everyone by artificially constraining the market for credit. The relationship among these different elements of the debtor-creditor system makes it challenging to simultaneously constrain various parties' incentives to misbehave, protect vulnerable individuals from financial distress, and support valuable economic activity.

Because both *ex ante* or *ex post* consumer financial protection measures can mitigate debtor financial distress and impact the availability of credit, problems arise when legal changes focus myopically on only one of these interrelated policy goals.[276] A focus exclusively on protection from onerous debt burdens can cut people off from credit that could be used to increase productivity or quality of life. This arguably slowed economic activity in Europe prior to the lifting of credit constraints. And a focus exclusively on the free flow of credit can lead to overindebtedness and financial distress, as experienced by consumers on both sides of the Atlantic in the late 1990s. Erecting barriers to bankruptcy without addressing income deficits or abusive lending practices resulted in burdensome indebtedness and left lower-income households unable to escape the "sweatbox" of ever-increasing debt.[277] The United States arguably made this

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[274] One downside of credit expansion is that it permits prices to increase without equivalent demand decreases. The availability of private loans for higher education made it possible for dramatic tuition increases for US colleges and universities without a corresponding decrease in enrollment. A similar effect occurred in the early part of the 21st Century when easier access to residential mortgage credit allowed market prices for homes in the United States to balloon into the bubble that burst in 2008. *See* Andrea J. Boyack, *Lessons in Price Stability from the U.S. Real Estate Market Collapse*, 2010 Mich. St. L. Rev. 925 (2010).
[275] *See generally* Zywicki *supra* note 15.
[276] William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 Am. Bank. L.J. 397 (1994).
[277] Foohey et al., *supra* note 209.

misstep when BAPCPA made bankruptcy both more expensive and less helpful to low-asset debtors at a time when regulation did not effectively protect consumers from incurring crippling debt.[278] The hesitancy of some European countries to provide a thorough fresh start to hopelessly indebted consumers might likewise be criticized as trapping people in unfair financial obligations that regulatory oversight has apparently failed to prevent.[279]

The European and American experiences illustrate that the relationship between financial distress preventative measures and cures is a critical consideration in designing an effective system of consumer financial protection. Decreasing upfront regulation of consumer finance in Europe led to increased financial distress, necessitating a consumer bankruptcy safety valve. Limiting consumer access to bankruptcy in the United States left consumers unprotected from problematic financial obligations that they could not later escape. Increasing financial distress from onerous debts spurred innovations in upfront consumer protection regulations and oversight in the United States and consumer bankruptcy innovations in Europe. There may be no definable optimal balance between *ex ante* and *ex post* consumer financial protection, but recognizing the connection between these two areas of law is prerequisite to correctly calibrating consumer financial protection. Offsetting changes can mitigate adverse impacts caused by reducing one type of consumer protection. In other words, limits on bankruptcy access likely should coincide with efforts to keep consumers from incurring problematic debts. And a hands-off approach to consumer finance agreements likely should coincide with a more robust avenue for debt discharge.

Impacts of different approaches to consumer financial distress cannot be adequately assessed out of context. Consumer financial protection is inextricably linked

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[278] Limiting debt discharge to disincentive incurring debt turned out to be ineffective at limiting consumer financial distress. This is unsurprising, since there is abundant evidence that the majority of financially fragile low-income households do not seek bankruptcy based on overconsumption and an attempt to abuse the system, but rather because of unexpected economic upheavals, such as unemployment, divorce, and health problems. Anderson, *supra* note 168 at 670. *See generally* SULLIVAN, WARREN, AND WESTBROOK *supra* note 218, at 259.
[279] Jason J. Kilborn, *Behavioral Economics, Overindebtedness, & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions,* 22 Emory Bank. Dev. J. 13 (2005).

with other rules and institutions in a given society.[280] The reasons consumers seek out debt and the impact of overindebtedness means something very different in a society with a more tightly woven social safety net, such as France and Germany. And freedom of contract and generous fresh start fit more comfortably in the context of an aggressively free market capitalist system that celebrates entrepreneurship and risk-taking. Contexts are not static, however. In the United States, the Foreclosure Crisis led the government to adopt a more active regulatory stance with respect to financial products. And increasing economic inequality calls into doubt some foundational presumptions regarding the free market's supposed equality of opportunity. On the other side of the Atlantic, pressures to back away from comprehensive social safety nets have wrought different contextual changes. If consumers in France and Germany would become privately responsible for the costs of necessary medical procedures, for example, that would likely increase the demand both for credit and for discharge of debt, as it has in the United States. Increasing social safety nets might reduce some consumers' need to obtain high-cost debt, but "[a]s the welfare state shrinks, the number of bankruptcies primarily caused by such hardships can be expected to increase."[281]

One difference between protecting consumers from entering into onerous financial arrangements and providing consumers an exit from such obligations is that the former relies on controls and the latter relies on incentives. Take, for example, the risk-assessments that the CFPB requires under its new "ability to pay" rules. Such rules mandate that lenders carefully confirm borrower creditworthiness prior to funding a loan. Creating a legal requirement to conduct adequate underwriting contrasts with the free-market approach that simply creates incentives for lenders to adequately assess borrower credit. If a lender suffers losses from borrower default, then the creditor should be driven by self-interest to ensure that its borrower can and will likely repay the loan. In the realm of economic rationality, there is no need to have the government establish laws and exercise oversight with respect to adequate underwriting because

[280] Niemi-Kiesläinen et al., *supra* note 122 at 10-12. "No part of a justice system operates in isolation." *Id.* at 12.
[281] *Id.,* at 8.

lender self-interestedness will naturally lead to prudential lending.[282] This sounds good, but does the incentive-based approach work in practice? The Financial Crisis experience suggests that if lenders can avoid or offload the risk of borrower default, say by charging upfront fees large enough to offset default losses, or by transferring credit risk to investors buying debt-based securities, or by obtaining a government bailout for the losses it suffers, the incentive to do adequate credit assessment disappears. Without a natural, economic constraint on publicly harmful behavior, regulatory prevention is necessary.[283]

Another possible systemic abuse that could be addressed directly through enforcing regulation or indirectly through internalized costs is abuse of the bankruptcy system by debtors. Proponents of BAPCPA and forces resisting the development of liberal bankruptcy regimes in France and Germany have expressed concern that consumers will be irresponsible borrowers if debt discharge is too easy.[284] Theoretically, would-be borrowers should be more hesitant to take on debt if there is no avenue to escape financial obligations.[285] In practice, though, incentives are poor tools for limiting debtor bankruptcy abuse.[286] Human irrationality typically minimizes future risks, and borrowers may not be able to adequately assess their likelihood of ultimate default at the time they obtain a loan.[287] Furthermore, some loans are incurred in the context of financial desperation. If a debtor sees no alternative to a risky loan, making the loan riskier still will do nothing to dissuade incurrence of the debt.[288] Bankruptcy

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[282] Scholars and advocates who called for the establishment of the CFPB, including now-senator Elizabeth Warren, presented evidence showing that lenders, in practice, tended to focus on profitability (even just short-term profitability) rather than safety and soundness, and because consumer distress did not risk lenders' profits, there was, in practice, inadequate economic incentive for lenders to avoid unsafe financial products. Baradaran *supra* note 80, at 1333–34.
[283] Baradaran *supra* note 80, at 1334.
[284] *See supra* notes XXX – XXX and accompanying text.
[285] *But see* Kilborn, *Behavioral Economics supra* note 280 at 23-24 (discussing cognitive biases and concluding that "we are asking too much of bankruptcy law if we expect it to change overly risky consumer borrowing behaviors.").
[286] Furthermore, as consumer bankruptcy data is accumulated, it seems less and less justified to fear abuse. It is rarely an issue, in the United States as in Europe. Jason J. Kilborn, *The Rise and Fall of Fear of Abuse in Consumer Bankruptcy: Most Recent Comparative Evidence from Europe and Beyond*, 96 Texas L. Rev. 1327 (2018).
[287] Kilborn, *Behavioral Economics supra* note 280 at 23-24.
[288] Warren, *A Principled Approach supra* note 216.

abuse, therefore, is likely a better candidate for regulatory oversight than reliance on economic incentives.

In the past two decades, consumer bankruptcy has become relatively less accessible in the United States while becoming relatively more accessible in Europe.[289] But it is unlikely that these consumer bankruptcy systems will fully converge because fundamental differences in their national ethos, economic structures, and perspectives persist. The United States remains oriented toward individual autonomy and the free market, and its consumer financial protection system will likely continue to emphasize economic incentives over regulation.[290] Debt discharge is a more comfortable fit with the American economic system than is regulatory debt prevention.[291] The unabated resistance to the CFPB's "watchdog" role by neoliberal economists suggests that more extensive *ex ante* protections may be politically unfeasible.[292] European civil law countries, on the other hand, have long emphasized social justice over the free market values which makes *ex ante* consumer financial protection a more natural policy fit.[293] Consumer bankruptcy systems in France and Germany (and most other European countries) also embrace a more hands-on approach, with ample oversight of the process to weed out consumer abuse.[294]

B. <u>Holistic Medicine for Consumer Financial Distress</u>

According to WebMD.com, holistic medicine "takes the whole person – mind, spirit, and body – into consideration," and draws from "a variety of practices, ranging from traditional medical treatments like drugs to alternative remedies like herbs and

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[289] KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6.
[290] *See supra* notes XXX – XXX and accompanying text.
[291] Tabb, *Lessons supra* note 179, at 777.
[292] *E.g.,* Zywicki *supra* note 15; Caruso *supra* note 170, at 480–81 (explaining that the realm of contract law in the United States is dominated by neoclassical economic thought rather than social justice). *See generally* RICHARD CORDRAY, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY (2020) (detailing the goals and efforts of the CFPB during its first dozen years and the political resistance it has faced).
[293] Tabb, *Lessons supra* note 179, at 777-778. *See also* Caruso *supra* note 170, at 480–81(comparing US and European "political dynamics of legal integration" and finding that social justice "has gained discursive ground in EU contract law").
[294] *See supra* notes XXX – XXX and accompanying text.

massage."[295] When treating consumer financial distress, both US and European legal systems can achieve better, more sustainable results by considering the entirety of individual and systemic economic needs and incentives, including sources of necessary capital to pay cost of living, limits on creditor overreach, and relief for vulnerable debtors unable to escape a cycle of debt.[296] Access to bankruptcy cannot be considered in a vacuum, and nor can access to credit.[297] A more holistic analysis of debtor-creditor law should draw from and consider the interplay among a variety of possible approaches, ranging from active regulatory involvement to market competition, and from predictable bankruptcy proceedings to *ad hoc* restructuring of debt.[298]

The connection between prevention and cure in addressing consumer financial distress enables a more sophisticated and tailored approach for society to deal with the double-edged sword of credit. Consumer credit is both possibly good and possibly bad, so a well-calibrated policy must both provide sufficient front-end contract oversight and adequate back-end debt relief to siphon off harms while preserving benefits. Consumer finance regulations should prevent vulnerable consumers from being tricked into onerous commitments, but there also must be adequate alternative ways that struggling households can obtain basic essentials. Overly restrictive regulation could chill both financial innovation and credit access, but if the market will not constrain creditors from profiting off poverty, the government must. Regardless of the level of contractual oversight, it is important to keep bankruptcy accessible and beneficial for the most financially distressed consumers. A financial fresh start option must serve the most needy, good faith debtors.

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[295] Heddy Marks, *What is Holistic Medicine and How Does It Work?* WebMD.com (Nov. 16, 2023), https://www.webmd.com/balance/what-is-holistic-medicine.
[296] After all, because "the problem of over-indebtedness is exceedingly complex," it defies a simple solution. Braucher, *Theories of Overindebtedness supra* note 83 at 342.
[297] Ondersma *supra* note 211 at 2212 (discussing how the "chronic income shortfalls" of the poor make it necessary to consider credit access together with debt relief).
[298] Crafting an effective debtor-creditor systems has been likened to making a three-legged stool: One cannot focus only on the bankruptcy law leg but must balance the length of that leg to the consumer credit leg and the leg representing the social safety net leg. and consumer credit leg are all proportionate. SULLIVAN, WARREN, AND WESTBROOK *supra* note 218 at 259.

Consumer financial distress can also be conceived of as the outcome of two problematic inputs: income inadequacy and lender predation. Consumer financial protection should attempt to combat both. Creating incentives for prudential lending is helpful, but experience shows that incentives alone may prove insufficient to prevent vulnerable borrowers from being targeted with high-cost, risky loans. Substantive limits on certain loan features, perhaps interest rates above a set cap or certain harsh acceleration triggers and penalties, might help prevent burdensome financial obligations. Regulation is only as good as its enforcement, however, and it would be both costly and difficult to adequately supervise all extensions of consumer credit – especially in an economy that is in large part built on consumer spending. But holistic consideration of consumer financial protection may inspire alternative ways to spur compliance. For example, borrower authority to unilaterally modify loans that failed to conform with regulatory parameters would likely incentivize more widespread compliance.[299] Regulations could mandate assessment of borrower ability to repay the debt and provide that borrowers can automatically discharge debts that were funded without adequate underwriting.[300] Regulation requiring clear explanation of costs to consumer borrowers could also prohibit collection of interest on loans made without effective and timely cost disclosures. Essentially, prevention of consumer financial distress occurs on a spectrum from policing the process and requiring disclosures to limiting loan variables and features, and debt-relief could be employed to reinforce lending regulations.

Creditor and debtor misbehavior can also be addressed on the back end through bankruptcy laws. Depending on the degree of lender culpability and borrower good faith, such *ex post* consumer protection can take the form of a voluntary (or semi-voluntary) workout/modification of loan terms, an imposed repayment plan over some reasonable period of time, or even a fairly immediate discharge. Although US bankruptcy

[299] Providing consumer debtors with the ability to routinely rewrite contracts that transgress regulatory boundaries would create incentives for creditors to self-police.

[300] For example, in response to the Financial Crisis that began in 2008, the CFPB promulgated an "Ability to Repay" rule that required lenders accurately assess borrower likelihood of default prior to funding a loan. Dodd-Frank and the CFPB also barred certain types of lending, including those with a risky structure, high interest rate, or excessively one-sided terms. Niemi-Kiesläinen et al., *supra* note 122 at 7.

law currently envisions a fairly automatic sorting process that channels debtors into appropriate avenues for debt relief, a fair and effective cure for consumer financial distress likely requires a more individualized, tailored approach. Perhaps a process that draws from European models to facilitate workouts and engage in more probing assessments of borrower and creditor culpability before crafting a bankruptcy plan could improve results, individually and for society. American and European critics of consumer debt discharge frequently assert that debtors who need not pay their debts have no incentive to limit the amount of debt they incur – and that accessible bankruptcy is therefore ripe for abuse.[301] In reality, most consumer bankruptcies result from unforeseen problems and unavoidable hardships (including entrepreneurial ventures that fail) or overindebtedness that reflects income insufficiency.[302] But checks on possible systemic abuse could be designed carefully so as not to cut off access for non-abusers. More bluntly crafted barriers to bankruptcy access punish "honest but unfortunate" debtors and foreclose possible private and public fresh start benefits.[303]

A holistic approach to consumer financial distress must also address the other problematic input: insufficient income. In the United States, the problem of lack of income is frequently replaced by the problem of overindebtedness as people borrow to cover living expenditures that exceed their earnings. There are significant economic benefits from access to capital, and the United States, which led the world in the development and spread of consumer capital, has enjoyed the associated economic growth and increased standards of living.[304] But not all borrowing relates to facilitating commerce or investing in professional or lifestyle improvements. The most impoverished consumer debtors must borrow simply to survive. In the context of the lowest-income households, a better alternative to cover basic essentials is necessary.

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[301] *See supra* notes XXX – XXX and accompanying text.
[302] Niemi-Kiesläinen et al., *supra* note 122 at 8.
[303] SULLIVAN, WARREN, & WESTBROOK, THE FRAGILE MIDDLE CLASS *supra* note 218.
[304] Or, perhaps not. Overindebtedness might cause increased standard of living in the short term, but studies are inconclusive with respect to the long-term impacts of taking on debt that cannot be repaid. For one thing, credit availability may reduce the pressure for wage increase and lead to systematic focus on poverty's symptom (too much debt) rather than its true cause (not enough income). For a discussion of some of the problems of increasing consumer credit, *see* Ramsay *Comparative Consumer Bankruptcy supra* note 130.

For example, enhanced government supports (housing, medical costs, transportation, and education) or perhaps subsidized, low-cost loans for households unable to pay for necessities could fill the gap that high-cost (and possibly predatory) loans now fill.[305] Prudential lending regulation coupled with government income assistance would also increase systemic stability, both for financial institutions and consumers.[306] Insulating individuals and institutions from undue risk provides a public benefit. "Historically many countries have regulated credit extension in the name of protecting the financial solidity of financial institutions."[307]

Consumer financial protection reform also must address barriers to bankruptcy access and assistance.[308] Simply regulating the entry into and content of credit relationships will not adequately protect consumers from financial distress. Unexpected problems – job loss, death, divorce, or casualty destruction – correlate with insolvency.[309] Inability to predict the future, including ballooning costs and insufficient income, can thwart even savvy, prudential borrowers' intentions of repayment.[310] Consumer bankruptcy is still a necessary back-up plan, and access to it should be preserved, particularly for those who lack any other way to get out of debt. A well-designed consumer bankruptcy system can relieve consumer financial distress, both in the short term, for example through an automatic stay,[311] and through longer-term benefits like the fresh start.[312] Debt discharge facilitates debtor rehabilitation and encourages productivity and resilience. Bankruptcy benefits creditors as well by establishing fair and predictable procedures for sharing available funds, creating a more equitable treatment among creditors than the "fastest dog gets fed" approach of

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[305] *See, e.g.,* BARADARAN, HOW THE OTHER HALF BANKS *supra* note 3.
[306] Ironically, the economic fortunes of many lower-income households improved during the COVID-19 pandemic because the government provided cash subsidies to supplement incomes. *See generally* SCOTT FULFORD, THE PANDEMIC PARADOX: HOW THE COVID CRISIS MADE AMERICANS MORE FINANCIALLY SECURE, (2023).
[307] Niemi-Kiesläinen et al., *supra* note 122 at 6.
[308] Ondersma *supra* note 211.
[309] SULLIVAN, WARREN, & WESTBROOK, THE FRAGILE MIDDLE CLASS *supra* note 218.
[310] Kilborn, *Behavioral Economics supra* note 280 at 23-24.
[311] 11 U.S.C. § 362 provides for an automatic stay that provides debtors with breathing room and protects income from garnishment, property from repossession, and homes from being lost through eviction or foreclosure. *See* Foohey, Lawless, Porter & Thorne *supra* note 209.
[312] Local Loan Co. v. Hunt, 292 U.S. 234 (1934); ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER, AND JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS 6 (8th ed. 2021).

collections law.[313] Debts that persist after the bankruptcy discharge undermine the positive impacts of the fresh start, and inadequate state exemptions might leave the debtor exiting bankruptcy unable to truly start again. Non-dischargeable debt should be limited to those that reflect borrower culpability or a compelling public interest.[314]

Examining various European and American approaches to consumer bankruptcy suggests that a broad and varied menu of possible outcomes is warranted.[315] Some debtors likely need only a facilitated workout or some extended time to pay at least a portion of their debts. Others merit a full discharge and new start. A plan that persists over time likely should include some flexibility, in terms of duration and content.[316] Barriers to entry that exclude the most desperate consumer debtors are hard to justify, as are prerequisites to filing that amount to mere administrative hurdles rather than methods to be more responsive to debtor and creditor needs.[317]

C. Why Consumer Financial Protection Matters

In order to engage in a normative discussion comparing various approaches to consumer financial distress (prevention or cure, American or European), we must first settle upon a standard by which a given system may be assessed. Scholarly justifications for particular consumer finance protections are typically couched in terms of consumer welfare and social justice may also reference economic efficiency of the *pareto optimal* variety. Each of these sorts of justifications is centered on the same concern: that a particular system treat both creditors and debtors fairly but also result in relative

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[313] WARREN, WESTBROOK, PORTER, & POTTOW, *supra* note 311, at 323.
[314] Zywicki, *The Law and Economics supra* note 111.
[315] Ramsay, *Comparative Consumer Bankruptcy supra* note 130 at 257-259 (discussing the complexity and value of comparative debtor-creditor law analyses). "[T]he method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system." KONRAD ZWEIGERT & HEIN KÓTZ., INTRODUCTION TO COMPARATIVE LAW, 3d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1998) at 15
[316] Niemi-Kiesläinen et al., *supra* note 122 at 9. Time to obtain discharge varies widely among countries. In Canada, 9 months, in Australia, 6 months, in England, 12 months, in Hong Kong, 4-8years *Id.* at fn 18. These are more commonwealth-based discharge focused systems. Germany requires 6 years (see supra), and even US 3-5 for consumer debt repayment plan under Chapter 13. 11 U.S.C. § 1328.
[317] For example, pre-bankruptcy credit counseling in the United States is a perfunctory pre-bankruptcy cost providing no real benefit to debtors or creditors. More effective counseling would likely have to be individually tailored and provided sooner in the debt cycle. Niemi-Kiesläinen et al., *supra* note 122 at 7.

improvements for the most vulnerable parties. Legal structures that increase overall wealth but impose costs on society's have-nots are both unjust and inefficient.[318] In A Theory of Justice, John Rawls theorized that justice in society is achieved through "fairness," meaning systems that allocate equality with respect to basic liberties and establish social and economic structures that result in wide benefits, "in particular for the least advantaged members of society."[319] Rawls' deontological theory holds that justice turns on what rational men would choose in a hypothetical situation of equal liberty, where "no one knows his place in society, his class position or social status" and is unaware of the "distribution of natural assets and abilities."[320] Behind this "veil of ignorance," people would choose the rules and systems that would be amenable to all or, at the very least, would never impose costs on the most vulnerable to benefit the more fortunate[321] By definition, such a system would be just.[322]

Similarly, a just debtor-creditor system appropriately balances concerns of both debtors and creditors, attempting to benefit both equally or, at the very least, to avoid harming the more vulnerable party.[323] Social justice starts with equal liberty, which includes the freedom to enter into binding agreements.[324] Rawlsian justice runs parallel to efficiency when people make legally enforceable commitments that are both fair and

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[318] It would be unjust for society's rules to systematically channel wealth away from those with the least to those with the most, although, as Billie Holiday sang, in many cases, "them that's got shall get." Billie Holliday, "God Bless the Child," (1946). Holliday's lyrics subtly reference the Biblical parable of the talents from Matthew 25: 29.
[319] RAWLS *supra* note 1, at 3, 266.
[320] *Id.* at 1 at 11-12.
[321] *Id.* at 266.
[322] Because each person in Rawls's original position lacks knowledge of his individual nature and circumstances, "no one is in a position to tailor principles to his advantage." If everyone were blind to their future circumstances, they would unanimously agree to create a system that distributes any uneven benefits to the most vulnerable. This would be justice free from pressures to advantage those whose circumstances already bestow upon them an unequal benefit. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 Tex. L. Rev. 541, 559–60 (1993). *See also* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) (discussing the "veil of ignorance" to ensure fairly defined outcomes); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 907 (1982) (positing that if debtors and creditors could objectively frame a system to allocate risks and benefits, it would achieve the same outcome as would a Rawlsian consensus).
[323] RAWLS *supra* note 1 at 266.
[324] *Id.* at 301-307. Rawls explains that behind the veil of ignorance, men would agree that they should be bound by their own voluntary commitments so that each person could justifiably rely on the commitments of others. *Id.* 303-306.

mutually beneficial. But when commitments are the product of coercion or even adhesion, in a context where only one party has the power to shape the transaction, the terms of the agreement cannot be presumed to be mutually beneficial or fair. In such cases, it may be neither just nor efficient to rigidly enforce terms chosen by and for the benefit of the stronger party.[325] Intrusion into private contract to protect less savvy or empowered consumers from predatory or even overly burdensome loans can therefore promote justice, as long as borrower protections do not leave the lender inadequately protected from credit risks. And although borrower voluntary assent to terms might evidence that both parties calculated the arrangement as beneficial, this presumption only arises if the borrower's acceptance of the loan was truly voluntary – meaning that there was both adequate information and a choice of alternatives.[326] The "do no harm" mandate of just laws might mean that the only just solution to consumer credit's double-edges sword is to create public insurance for uncompensated lender risks or to provide a public consumer credit option.[327]

Although principles of justice provide ample normative force for improving the law's unequal treatment of economically vulnerable individuals, there are important pragmatic justifications for reforming debtor-creditor law to mitigate economic inequality as well. It is widely recognized that consumer financial distress is not only a personal financial problem but also creates a net loss of productivity and value in society.[328] In addition to economic impacts, "blatant inequality" is also "a threat to our democracy."[329] Society and rule of law become destabilized when an increasing number of people lack confidence that the government and its legal system "work for them."[330]

A useful way to measure how well a given debtor-creditor system calibrates these various factors is to measure results.[331] Does a given system accelerate or slow the "rich

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[325] *Id.* at 301-307. *See also* Boyack *supra* note 65.
[326] Skiba *supra* note 114.
[327] BARADARAN, HOW THE OTHER HALF BANKS *supra* note 3, at 5 (Professor Baradaran proposes that US Post Offices might be a source of publicly subsidized lending.).
[328] Bar-Gil &Warren *supra* note 23; ." Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. Ill. L. Rev. 1, 3-4 (1994).
[329] BARADARAN, HOW THE OTHER HALF BANKS *supra* note 3, at 5.
[330] CORDRAY *supra* note 293 at 225-228.
[331] Willis, *Performance-Based Consumer Law supra* note 3.

get richer" trajectory?[332] If it accelerates or even if it simply fails to abate the transfer of wealth from the poor to the rich, systemic improvements are necessary. A close examination can help inform reforms. Should efforts focus on preventing poor consumers from incurring high-cost debts? Or should efforts focus on providing additional income supports and credit options?[333] Perhaps existing financial obligations should be discharged or modified.

The debt burden of middle- and lower-income households is an important component and driver of wealth inequality. When living expenses have increased faster than salaries, "the middle and lower classes have borrowed more to stay in place; they've borrowed from the very rich who have gotten richer."[334] Inequality tends to grow along with increasing consumer debt because "[t]he rich need a place to earn interest on their surplus funds, and the rest of the population makes a juicy lending target."[335] This truism leads to the conclusion that a key part of addressing inequality is to ensure the proper balance between credit access and financial protection for those segments of the population who are not getting rich off the current system.[336] Consumer protection laws – in the form of financial regulation and consumer bankruptcy – can help people successfully navigate around or through potential financial peril.

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[332] The moral foundations of debtor-creditor law, both in Europe and in the United States, reflect justice as conceived of by John Rawls. Rawls recognized that society is "pervaded by inequalities in social position and life prospects," and defined a just system as one that, at a minimum "improves the expectations of the least advantaged members of society." Rawlsian justice provides justification for consumer financial protection as well as a method to assess its effectiveness. If debtor-creditor laws perpetuate or worsen economic equality, it is by this definition, unjust. Korobkin *supra* note 321, citing JOHN RAWLS, A THEORY OF JUSTICE (1971).

[333] An appropriate analysis of the functioning of a debtor-creditor system would examine not only debtors in financial distress, but also the effects of the system on those who are not insolvent and may be made better off with additional access to credit or freedom to craft innovative financing arrangements. According to Rawlsian justice, "the welfare of these parties [should] be considered as well." Rasmussen *supra* note 335 at 3.

[334] DOUG HENWOOD, WALL STREET: HOW IT WORKS AND FOR WHOM 64-65 (1998).

[335] *Id.* at 65.

[336] In *A Theory of Justice*, John Rawls theorized that justice in society is achieved through "fairness," meaning systems that allocate equality with respect to basic liberties and establish social and economic structures that result in wide benefits, "in particular for the least advantaged members of society." RAWLS *supra* note 1 at 3, 266; *see also* Korobkin *supra* note 321.

## CONCLUSION

Money makes the world go round, not just for companies, but also for individuals. Legal systems across the globe have long grappled with the tensions of access to capital versus financial regulation, borrower empowerment versus consumer protection, and debt enforceability and collection versus the necessity of a fresh start for the over-indebted.[337] There is likely no one perfect balance between these competing concerns. In spite of the differences between Europe and US consumer finance histories and legal systems, over the past few decades, the disparity between these various approaches has somewhat narrowed.[338] Consumer bankruptcy in the United States has become less accessible and less forgiving, particularly since 2005.[339] At the same time, support for increased regulation of consumer finance gained traction in America after the 2008 Financial Crisis, leading to tighter capital availability in consumer sectors – for better or for worse.[340] Recent European legal developments have moved in the opposite direction, widening access both to consumer credit and to the overindebtedness escape route of bankruptcy.[341] A survey of different approaches to consumer financial protection shows

[337] Jason Kilborn, one of the most prolific comparative bankruptcy scholars, describes consumer financial distress thus: "Some problems are universal." KILBORN, COMPARATIVE CONSUMER BANKRUPTCY *supra* note 6 at 3. In researching adequacy of consumer credit supply, Jonathan Zinman remarked that "research and policy on consumer credit often has a Goldilocks feel," with some claiming that markets produce too much credit (leading to unjustifiable overindebtedness), and some claiming that borrower protections end up unjustifiably chilling capital supply. *See* Zinman *supra* note 49. *See also* GELPI & JULIEN-LABRUYÈRE *supra* note 169 (recounting the long history of consumer credit from the Code of Hammurabi in 1792 BC as well as the much more recent developments of consumer bankruptcy).

[338] Ramsay, *Comparative Consumer Bankruptcy supra* note 130, at 245 -248 (discussing some limited amount of convergence in the credit market structure). Charles Tabb attempts to quantify this convergance by placing bankruptcy systems on a scale from 0 to10, with 0 being "the most extreme form of antidebtor, procreditor legislative system, and 10 being the opposite." According to Tabb, the United States was a 10 until the Congress passed the Bankruptcy Abuse BAPCPA on April 20, 2005. Tabb opines that European countries have moved from a 0 to 3 or 4 and the United States has moved from a 10 to a 7 or perhaps a 6. Tabb, *Lessons supra* note 179, at 775.

[339] *See* Lawless, et al. *supra* note 32.

[340] The desirability and impact of *ex ante* regulation of consumer credit relationships is hotly debated among consumer finance scholars. *See, e.g.,* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856 (2013)(detailing the establishment of the Consumer Financial Protection Bureau, explaining its mission, and critiquing its impact as "likely to raise the price of and access to credit"); *c.f.* Jean Braucher & Angela K. Littwin, *Examination as a Method of Consumer Protection*, 87 Temple L. Rev. 807 (2015)(explaining the unrealized promise of consumer protection legislation in the 1960s and 70s and heralding the development and potential of the Consumer Financial Protection Bureau).

[341] Ramsay *Comparative Consumer Bankruptcy supra* note 130.

a spectrum regarding both *ex ante* protection in consumer financial contracting and *ex post* consumer debt relief.

Tracing the recent developments in the United States and Europe with respect to consumer credit contracts, on the one hand, and consumer bankruptcy on the other suggests that these two areas of the law are inextricably linked. There is less need for consumer *ex post* protection from onerous credit contracts when onerous financing terms are unlikely to be enforceable to begin with. On the other hand, when freedom of contract principles stymie *ex ante* consumer protection efforts, a more liberal "fresh start" through consumer bankruptcy may be necessary. The tensions of consumer credit can be precariously balanced as long as changes to *ex ante* and *ex post* consumer financial protections move in tandem. But foreclosing consumer financial relief on one end of this equation without correspondingly liberalizing the relief offered on the other end upsets the balance and creates social and political harms. Adequate consumer debt protection or forgiveness encourages inclusion and productivity for vulnerable consumers, but failure to address consumer financial distress frays the "fabric of society."[342] As courts and lawmakers consider whether and how to change the debtor-creditor system, they must attend both to the pros and cons of unregulated consumer credit and the connection between bankruptcy and consumer financial obligations.

European and American consumers are increasingly alike in the consumer credit markets they occupy and the capital providers with which they do business. In addition, consumers on both sides of the Atlantic are increasingly becoming over-burdened by debt and are more likely to suffer from financial distress.[343] Comparing the consumer

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[342] Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate,* 59 Geo. Wash. L. Rev. 56, 94 (1990). *See also* CORDRAY *supra* note 293 at 227 ("When public officials ignore these concerns [about economic inequality,] or merely grandstand about them, it corrodes our social fabric even further.").

[343] Scholars agree conceptually about the problem of having "too much" consumer credit and generally use the term "overindebtedness" to mean the same thing: debt that is unsustainable or will be impossible or overly difficult to repay. There are a variety of approaches to establishing a more precise definition and measuring overindebtedness. The administrative model measures debt problems based on some quantifiable and officially registered data, such as the number of bankruptcy filings. The objective model measures household insolvency using a debt-to-income ratio approach, regardless of whether a household has sought debt relief. The subjective model measures how many households self-identify as being over-burdened by debt, through surveying households to determine consumer

outcomes and societal impacts of the American approach to the French and German systems permits an assessment of which elements better serve particular societal goals (considering always, of course, the different contexts in which each approach is administered).[344] The answer to this question may not be the same for all legal systems, and it may very well be that the best approach for the United States would not be workable in France or Germany because of different social, political, and economic structures. What does seem to be true, however, is that limiting *ex ante* consumer financial protection will lead to a greater demand for consumer bankruptcy relief, and providing greater consumer bankruptcy relief can siphon of systemic strain caused by failing to provide adequate protection of consumers in the realm of financial contract terms.[345] Even though it is a challenge to balance attention to prevention and cure, cutting off a cure without ramping up the prevention is a recipe for social and political volatility and systemic destabilization.[346]

The United States has been an outlier in its approach to consumer bankruptcy, but it has long been an outlier in terms of having cheap and easy consumer credit too. Now that consumer credit is available globally, we can take a step back and ask: Is the traditional US approach to consumer protection system the best model? Or can an examination of other countries' treatment of consumer financial distress disclose innovations that could be adapted to and help improve the US debtor-creditor system? Legal improvements begin with defining a goal, and achievement of the goal is the way to measure success.[347] If the goal of consumer financial protection is to reverse

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perception that debt load is higher than is manageable or repayable. *See* NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30.

[344] Niemi-Kiesläinen et al., *supra* note 122 at 5 (explaining that a comparative legal analysis provides "an opportunity to explore the practical effects of the different legal responses to common problems – perhaps making possible conclusions about which responses better serve particular goals."

[345] *See* supra notes XX – XXX and accompanying text.

[346] Overindebtedness is causes economic harm to individuals, households (including children), and society as a whole. Overindebtedness causes psychological harms and social harms as well. It is linked with hopelessness and lack of incentive for productivity. Consumers with heavy debt burdens they can never hope to escape will either withdraw from society or become dependent on others or the public. NIEME-KIESILÄINEN & HENRIKSON, COUNCIL OF EUROPE *supra* note 30 at 10-11.

[347] For example, if the paramount goal is efficiency, it may be possible to take an economic approach to bankruptcy law that protects the interests of the most vulnerable – among both debtors and creditors. It is possible to promote efficiency as well as social justice. Rasmussen, *supra* note 335.

increasing economic inequality, then consumer finance laws should improve the finances of lower income households and not be complicit in their economic decline.[348] A system where the poor get richer through adequate capital access and protection from burdensome financial obligations will lead to a more economically and politically just and stable society for all.[349]

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[348] RAWLS *supra* note 1 at 266. *See also* Robert J. Landry, III & David W. Read, *Erosion of Access to Consumer Bankruptcy's "Fresh Start" Policy in the United States: Statutory Reforms Needed to Enhance Access to Justice and Promote Social Justice*, 7 Wm. & Mary Pol'y Rev. 51, 62–63 (2015) (theorizing that "bankruptcy's fresh start policy may not be so much about liberty as it is about equality," and that "[i]t is the moral significance, not the economic significance, of the human person that is at the heart of liberal egalitarianism").

[349] "Bankruptcy may very well be, at its roots, the domain of political theorists addressing the problem of equality…. As an increased sense of social justice and equality has breached the American conscience, an increase to access to bankruptcy justice has been realized. However, the increasing costs of filing and other statutory hurdles, particularly the bankruptcy reforms in 2005, have nevertheless diminished access to bankruptcy justice." Landry & Read *supra* note 347, at 63.