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# TOWARDS AN INTERNATIONAL PARADIGM OF PERSONAL INSOLVENCY LAW? A CRITICAL VIEW

IAIN RAMSAY\*

This article analyses three issues related to the global spread of personal insolvency laws. First, it outlines the emergence of an international paradigm on personal insolvency law and its central feature of a policy preference for partial repayment alternatives as the norm with residual immediate relief reserved for the deserving poor debtor. Second, it examines critically this paradigm in the light of existing empirical studies of the extent to which personal insolvency law achieves economic and social objectives associated with the fresh start such as financial inclusion. The mixed empirical findings on the success of personal insolvency law in achieving these objectives, particularly for individuals subject to instability of employment or poverty raises further questions about the role of personal insolvency law as a modestly progressive safety net for overindebtedness. The final section of the article considers therefore recent radical theories of consumer credit in contemporary capitalism which conceptualise credit as exploitative and personal insolvency law as a disciplinary and legitimating institution which individualises default and may neutralise collective responses to debt and its wider causes such as limited public support or provision. The article concludes by outlining how these radical insights might contribute to future socio-legal research on personal insolvency law.

## I INTRODUCTION

Personal insolvency law became more significant after the Great Recession of 2008 when international institutions identified household debt as a potential systemic risk for the international financial system.<sup>1</sup> The subsequent Eurozone crisis accelerated insolvency law reforms within the European Union ('EU'), which proposed a directive on insolvency and restructuring law in 2016.<sup>2</sup> Emerging economies have also introduced or reformed personal

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\* LLB (Hons) (Edinburgh University), LLM (McGill University). Professor of Law, University of Kent, Canterbury, UK. This article is a revised version of a keynote address at the QUT Faculty of Law, Personal Insolvency Conference, 8 September 2016. I am grateful to those who commented on the paper at the conference and to Toni Williams and the anonymous reviewers for the QUT Law Review for very useful comments.

<sup>1</sup> Susan Block-Lieb, 'Best Practices in the Insolvency of Natural Persons: Rapporteur's Synopsis' (World Bank Insolvency and Creditor/Debtor Regimes Task Force Meetings, Washington DC, 11 January 2011) [17], citing closing remarks of Vijay Tata (Chief Counsel, World Bank LEGPS) '... one of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual over-indebtedness....'.

<sup>2</sup> See European Commission, Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures, Directive 2012/30/EU, COM (2016) 723 final, 2016/0359 (COD). For Latin America see Consumers International, A Model Law on Family Insolvency for Latin America and the Caribbean (2011). Colombia was the first Latin American country to introduce a personal insolvency law with discharge as an important aspect. See General Code of Procedure (Columbia), Law No 1564 of 2012, Title IV (ss 531ff). Article 40 of the revised UN Guidelines on Consumer Protection states that 'Member states should



insolvency laws.<sup>3</sup> It is not an exaggeration to identify a ‘global proliferation’ of personal insolvency laws.<sup>4</sup> This article explores three questions related to this phenomenon. First, it outlines the contours of an emerging international paradigm on personal insolvency law, identifying issues which seem to have a transnational salience, such as the promotion of entrepreneurialism through a liberal insolvency law discharge. The article finds partial repayment alternatives to be the preferred policy instrument in this paradigm, combined with residual immediate relief for the deserving poor, sometimes described as No Income No Asset Debtors (‘NINAs’). The article highlights both the points of consensus and continuing uncertainties in the paradigm, including the scope of its application to both consumers and traders. Paradigms are a mixture of scholarly ideas and political interests. The Washington consensus is an example.<sup>5</sup> This is also true of personal insolvency law. I do not attempt to document comprehensively the conjunction of interests and ideas shaping the emerging international paradigm; that is the topic of a separate article.

Second, the article examines this paradigm in the light of existing empirical studies of the extent to which personal insolvency law achieves objectives associated with the fresh start, such as increased entrepreneurialism, and financial and social inclusion.<sup>6</sup> These studies represent the second wave of personal insolvency law research. The first wave addressed the demographics of insolvents, the reasons for individuals choosing insolvency and, particularly in the United States (‘US’), the question of whether individuals were abusing the system.<sup>7</sup> I suggested in 1997 that research might focus on the longitudinal effects of bankruptcy and the fresh start,<sup>8</sup> and an increasing number of such studies now exist, primarily in the US, but also in Europe, and Australia. Some studies draw attention to the gap between the promise and the reality of insolvency relief for at least a significant portion of the bankrupt population.<sup>9</sup> These studies also question the dominance given to repayment alternatives in the emerging paradigm and raise questions about the role of personal insolvency law in addressing issues faced by NINA debtors. Responses to these findings might include measures to make the fresh start more effective through the reduction of existing disabilities and barriers facing bankrupts,<sup>10</sup>

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ensure that collective resolution procedures are expeditious, transparent, fair, inexpensive and accessible to both consumers and businesses, including those pertaining to over-indebtedness and bankruptcy cases’.

<sup>3</sup> For example, India (2016), Russia (2015). China may introduce a personal insolvency law within this decade.

<sup>4</sup> See Frank Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty First* (Allen Lane, 2016) 432: ‘The global proliferation of bankruptcy laws, finally, is a recognition that overindebtedness is a problem in all affluent societies, including social market and welfare states’.

<sup>5</sup> Sarah Babb, ‘The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor’ (2013) 20 *Review of International Political Economy* 268.

<sup>6</sup> Jose M Garrido, ‘The Role of Personal Insolvency Law in Economic Development: An Introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons’ (2014) 5 *The World Bank Legal Review* 111 (referring to the suicide of farmers in India and social conflict in Hungary over problematic mortgage loans).

<sup>7</sup> The classic US studies from this period are: Teresa A Sullivan, Elizabeth Warren, Jay Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Oxford University Press, 1989); Teresa Sullivan, Elizabeth Warren and Jay Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000).

<sup>8</sup> Iain Ramsay, ‘Models of Consumer Bankruptcy: Implications for Research and Policy’ (1997) 20 *Journal of Consumer Policy* 269, 286. See also Jay Westbrook, ‘Empirical Research in Consumer Bankruptcy’ (2001–02) 80 *Texas Law Review* 2123, 2147: ‘We know very little about consumer bankrupts after they leave the bankruptcy court, except that they rarely file again. ... We know little about the financial situation of debtors after bankruptcy...the gaping holes in our knowledge make it hard to evaluate how successful bankruptcy is in providing a fresh start.’; Jean Braucher, ‘Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?’ (2004) *Santa Clara Law Review* 1065, 1090.

<sup>9</sup> See below, Part III.

<sup>10</sup> US writers argue for simplification of the process to reduce costs and increase access. See eg Ronald J Mann, ‘Making Sense of Nation-level Bankruptcy Filing Rates’ in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart, 2009) 243;

more careful screening of those wishing to file for insolvency, or better social and economic policies to address directly the problems associated with insolvency such as job insecurity or limited health coverage.<sup>11</sup> Bankruptcy research functions in this last case as the ‘canary in the mine’, identifying wider problems in society.<sup>12</sup>

The gap identified between the promise and reality of the ‘fresh start’ leads to my final topic, reflection on the role of personal insolvency in contemporary capitalism. A conventional view is that the fresh start in bankruptcy is a modestly progressive safety net for addressing over-indebtedness. Certainly, this assumption underlies the emerging paradigm and much contemporary research on personal insolvency law. Since the Great Recession, theoretical writing on the role of credit and debt in capitalism has mushroomed.<sup>13</sup> A few writers<sup>14</sup> have reconceptualised bankruptcy as a disciplinary and legitimating device in a contemporary capitalism defined by debt. Bankruptcy law mediates the contradictions between the imperatives of a contemporary capitalism defined by credit-led accumulation and the inevitable problems of non-repayment for certain groups in society.<sup>15</sup> This perspective challenges the progressive assumptions about insolvency law, and I examine briefly the significance of this perspective for future research on personal insolvency.

## II AN EMERGING INTERNATIONAL PARADIGM?<sup>16</sup>

A policy paradigm represents a framework of ideas on the goals of a policy, the instruments that can be used to attain the goals and the nature of the problem at issue.<sup>17</sup> In the area of corporate insolvency law,<sup>18</sup> an international paradigm<sup>19</sup> has emerged since the Asian financial crisis of the late 1990s, when a modified Anglo-American ‘rescue culture’ was

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Ronald Mann and Katherine Porter ‘Saving Up for Bankruptcy’ (2010) 98 *Georgetown Law Journal* 289, 336: ‘the filing patterns suggest a group of debtors for whom the decision to file bankruptcy is deferred by a lack of funds’. See also the suggestions in Nicola Howell and Rosalind Mason, ‘Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce’ (2015) 38 *University of New South Wales Law Journal* 1529.

<sup>11</sup> See eg Jacob S Hacker, ‘The Middle Class at Risk’ in Katherine Porter (ed) *Broke: How Debt Bankrupts the Middle Class* (Stanford University Press, 2012).

<sup>12</sup> Westbrook, above n 8, 2125.

<sup>13</sup> Literature here includes: Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2014); Adair Turner, *Between Debt and the Devil: Money, Credit and Fixing Global Finance* (Princeton University Press, 2016); David Graeber, *Debt: The First 5,000 Years* (Melville House, 2011); Greta R Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Harvard University Press, 2011); Susanne Soederberg, *Debtfare States and the Poverty Industry: Money Discipline and the Surplus Population* (Routledge, 2014).

<sup>14</sup> See below, Part IV.

<sup>15</sup> See Soederberg, above n 13, and discussion below in Part IV.

<sup>16</sup> Some of the material in this section draws on chapter 6 of Iain Ramsay, *Personal Insolvency In the 21<sup>st</sup> Century: A Comparison of the US and Europe* (Bloomsbury, 2017).

<sup>17</sup> See the classic article by Peter A Hall, ‘Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain’ (1993) 25 *Comparative Politics* 275, 279. A more ambitious concept is that of a transnational legal order: ‘the transnational production of legal norms and institutional forms in particular fields and their migration across borders regardless of whether they address transnational activities or purely national ones’: Gregory Shaffer (ed) *Transnational Legal Ordering and State Change* (Cambridge University Press, 2014) 6.

<sup>18</sup> See Terence Halliday and Bruce G Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, 2010); Susan Block-Lieb, ‘Settling and Concordance: Two Cases in Global Commercial Law’ in Shaffer, above n 17.

<sup>19</sup> Terence Halliday and Gregory Shaffer (eds) *Transnational Legal Orders* (Cambridge University Press, 2015) 11: ‘transnational legal order’ defined as ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions’.

internationalised as part of the international financial architecture of economic development. This order is embedded in the United Nations Commission on International Trade Law ('UNCITRAL') legislative guide on insolvency, providing best practices for assessing a state's insolvency law, and functioning as part of structural adjustment programmes under loan conditionality. In contrast, personal insolvency was viewed historically as not significant internationally in terms of the international financial architecture. Along with the topic of over-indebtedness it raised social, cultural and political issues which were best left to individual states.<sup>20</sup> Until the 1990s, many industrialised nations had no — or limited — personal insolvency systems which provided a discharge of debts. Where discharge was available it was usually limited to traders.<sup>21</sup> However, developments in Europe and elsewhere since the recession of the early 1990s and the subsequent Great Recession of 2008 suggest the contours of an emerging paradigm of personal insolvency.

A policy paradigm assumes agreement on the nature of the problem at issue. The immediate problem addressed by personal insolvency is that of over-indebtedness, but disagreement has existed as to whether factors such as unemployment or individual behaviour through overspending are the primary causes of over-indebtedness.<sup>22</sup> The EU Commission identifies over-indebtedness mostly with unemployment, divorce and illness,<sup>23</sup> while a recent Bank of France study indicates a 'conjuncture of events' as the primary reason (see Table 1). The Insolvency Service in England and Wales identifies both exogenous and individual causes for insolvency (Table 2). These official statistics on reasons for bankruptcy are important politically because they suggest the nature of a policy response, contribute to ongoing political debates, and shape dominant narratives about the nature of failure. However, the limits of the categorisations in these data and their partial construction of the social reality of over-indebtedness mean that they should be treated with caution.<sup>24</sup>

**Table 1: France: Principal Causes of Over-Indebtedness 2014**

Unemployment or degradation of employment	23
Budget Constrained	17
Routine use of credit	14
Conjuncture of events	41
Intergenerational assistance	5

Source: Bank of France, Study of Paths Leading to Overindebtedness (2016).

<sup>20</sup> See eg Donna McKenzie Skene and Adrian Walters, 'Consuming Passions: Benchmarking Consumer Bankruptcy Law Systems' in Paul Omar (ed) *International Insolvency Law* (Ashgate, 2008) 137: 'hardly any attention has been paid at the international level to the potential global socio-economic impact of consumer over-indebtedness. This contrasts with the global interest in business insolvency and rescue.'

<sup>21</sup> Writing in 2003 we noted that, 'Twenty years ago an academic book about consumer bankruptcy systems around the world would not have been possible. Most countries did not have a consumer bankruptcy system.' 'Introduction' in Johanna Niemi, Iain Ramsay and William C Whitford (eds) *Consumer Bankruptcy in Global Perspective* (Hart, 2003) 1.

<sup>22</sup> Resulting in significant differences between systems for example in relation to access criteria, institutional frameworks, time to discharge and discharge exceptions.

<sup>23</sup> European Commission, above n 2, 4.

<sup>24</sup> I discuss the limits of statistics on reasons for bankruptcy and the various research studies on causes of personal insolvency further in Ramsay, above n 16, 16–24.

**Table 2: England and Wales: Bankruptcies by Cause of Insolvency as Recorded by the Official Receiver 2015.**

	Non-Trading Cases (n=11095) (%)	All Cases (n=14905*) (%)
Business related failure	--	25
Living Beyond Means	19	14
Relationship breakdown	16	12
Loss of employment	12	9
Illness/accident	11	8
Reduction in household income or significant reduction in bankrupt's income	24	18
Speculation	1	1
Other	17	13

Source: Insolvency Service, Bankruptcies by age gender and cause of insolvency 2015. <https://www.gov.uk/government/statistics/individual-insolvencies-by-location-age-and-gender-england-and-wales-2015>>. In 955 cases, the cause was recorded as 'unknown/non-surrender'. These cases are not included in the Table.

After the Great Recession, writers linked individual debt problems to macroeconomic issues.<sup>25</sup> The policy problem now was that significant numbers of over-indebted individuals created a debt overhang and acted as a drag on economic growth. One response was therefore the provision of access to a swift deleveraging of debt. This swift deleveraging narrative was, as I will argue in the next section, initially adopted by the International Monetary Fund ('IMF'), but ran into headwinds in its application within the EU. This debate over the nature of the problem of individual failure to repay suggests that laws will continue attempting to balance debt relief with provisions intended to address moral hazard and individual behaviour.

The goals of individual insolvency policy are encapsulated in the idea of the fresh start but the concept of the fresh start is ambiguous, even in a country sometimes regarded as its source, the US. A fresh start may simply mean being free from the burden of existing debt, but might also include ideas of financial and social reintegration.<sup>26</sup> Promoting entrepreneurialism through a swift fresh start has become an influential idea. Several European states, such as Germany and the Netherlands, promoted social reintegration through the use of independent debt counselling agencies as the primary intermediaries. Individual counselling provided a substitute for rollbacks in welfare provision.<sup>27</sup> Although counselling could be justified in terms of an enabling welfare state which would help individuals to participate again in the labour market rather than receive cash transfers, the limited funding for counselling and patchy national

<sup>25</sup> See Atif Mian and Amir Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent it from Happening Again* (University of Chicago Press, 2015).

<sup>26</sup> See eg discussion in Margaret Howard, 'A Theory of Discharge in Consumer Bankruptcy' (1987) 48 *Ohio State Law Journal* 1047, 1069, where Howard concluded that 'discharge in the context of non-tort claims should have only one goal — to restore the debtor to economic productivity and viable participation in the open credit economy. This standard calls for making discharge broadly available, since viable economic participation is restored by lifting the burden of impossible debt. No one advocates discharge on demand, however. Thus, some limitation is necessary...?'

<sup>27</sup> See Johanna Niemi, 'The Role of Consumer Counselling as Part of the Bankruptcy Process in Europe' (1999) 37 *Osgoode Hall Law Journal* 409, 411.

coverage, as in Sweden, undercut its potential effectiveness.<sup>28</sup> In contrast, the US and Canada now mandate financial counselling for bankrupts, based partly on a perception that individual financial mismanagement leads to insolvency, as well as the political influence of financial institutions. The EU Directive highlights the economic benefits for investment, lending and promoting consumer demand through a swift discharge.<sup>29</sup> It focuses on the economic rather than social benefits of the fresh start.

Repayment plans with residual immediate relief for the deserving poor represent the preferred instruments for achieving the fresh start while addressing concerns about moral hazard. This represents the most solid aspect of the paradigm. We noted this trend in 2009.<sup>30</sup> It is certainly the continental European model. The development of debt adjustment systems in Europe, often introduced by conservative governments in the 1990s represented an adjustment to a more neoliberal model of the role of the market and social provision.<sup>31</sup> European studies and soft law initiatives during this period outlined an optimal policy for personal insolvency, partly inspired by Chapter 13 of the US Bankruptcy Code.<sup>32</sup> It included the idea of a moratorium or stay, a realistic payment plan, usually no more than four years subject to majority approval by creditors, adequate exemptions determined by member states, professional debt counsellors acting as advisers and administrators, financing partly by creditor levies, with immediate discharge for the hopelessly indebted. By 2009, Jason Kilborn argued that European policymakers were converging on a ‘unitary paradigm of consumer insolvency treatment’ involving less demanding repayment plans and greater possibilities for the residual discharge of debts.<sup>33</sup> These developments reflect partly a social learning process concerning the fact that many individuals had little payment capacity, and partly state concerns about the public costs of processing debtors. For example, the introduction of the English NINA procedure was driven by a desire to minimise court and government processing costs.

A significant ambiguity in the scope of the paradigm concerns its application to both individual consumers and traders, and whether traders should have a swifter period of discharge than consumers. The promotion of entrepreneurialism through a liberal discharge procedure is an

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<sup>28</sup> This was the conclusion of the Hedborg Report in 2013 in Sweden SOU 2013 Out of the Debt Trap. I discuss this at greater length in Ramsay above n 16, ch 5.

<sup>29</sup> ‘Shorter discharge periods have a positive impact on both consumers and investors, as they are quicker to re-enter the cycles of consumption and investment. This boosts entrepreneurship’: European Commission, above n 2, 4. The social aspects of insolvency have less salience in the Directive. The EU Economic and Social Committee had recommended for consumers in 2014 ‘a free procedure, a moratorium on claims, ability to keep main residence and the possibility of cancelling debts in most extreme situation. The goal is to find a solution that will enable households to avoid social exclusion and where possible to pay off their debts as far as their means allow’: see ‘Opinion of the European Economic and Social Committee on Consumer Protection and Appropriate Treatment of Over-indebtedness to Prevent Social Exclusion’ (Exploratory Opinion) INT/726 Rapporteur-general Reine Claude Mader (2014).

<sup>30</sup> See Niemi, Ramsay and Whitford, above n 10, 7: ‘Today most countries sponsor repayment plans, with or without a discharge option upon conclusion, and even common law countries that traditionally have emphasized nearly unconditional access to a discharge procedure increasingly emphasize repayment plans as an alternative.’

<sup>31</sup> See Johanna Niemi, ‘Consumer Bankruptcy: Market Failure or Social Problem? (1999) 37 Osgoode Hall Law Journal 473, 502.

<sup>32</sup> See Nick Huls, ‘Towards a European Approach to Overindebtedness for Consumers in the EC Member States: Facts and Search for a Solution’ (1993) 16 Journal of Consumer Policy 216; Udo Reifner et al, Consumer Overindebtedness and Consumer Law in the European Union: Final Report (Commission of the European Communities, 2003). Huls noted (at 224) that ‘our model is constructed as a combination of those elements of European solutions that are promising and some elements from the American bankruptcy code’. He noted in 1993 that over-indebtedness was primarily viewed as an issue in Northern European states but not in Italy, Greece, or Spain. In application of the model ‘member states could learn from each other without any interference from Brussels’.

<sup>33</sup> See Jason Kilborn, ‘Two Decades, Three Key Questions’ in Niemi, Ramsay and Whitford, above n 10, 329.

integral aspect of the emerging international paradigm. The EU Directive of 2016 proposes a maximum three-year discharge period for the honest entrepreneur as part of wider policies to enhance entrepreneurialism in the EU, with the possibility of applying this period to consumers.<sup>34</sup> In Britain, the new Labour government at the beginning of the century embraced entrepreneurialism in the 2002 liberalisation of the English discharge procedure.<sup>35</sup> The shortening of the discharge period in Germany from six to three years in 2014 for individuals able to pay a portion of their debts is also intended to promote entrepreneurialism.<sup>36</sup> Some European countries have recently introduced special provisions to make it easier for entrepreneurs to fail (Sweden, France, Spain). Australia recommends liberalisation of the discharge process to promote entrepreneurialism.<sup>37</sup>

Consumers, the self-employed and small businesses represent overlapping categories of debtors. Many self-employed individuals use personal credit cards to finance their business and mortgage the family home to support a business. In the ‘gig economy’, with workers no longer employed in traditional 9–5 jobs,<sup>38</sup> the self-employed are little different from employees. Moreover, consumers are, like businesses, encouraged to be responsible risk takers, investing in education or training, and managing their financial future in an increasingly financialised culture.<sup>39</sup> The concept of the individual as an ‘entrepreneur of the self’ managing one’s human capital erodes distinctions between the entrepreneur and the consumer.<sup>40</sup>

## A International Institutions and the Emerging Paradigm

International institutions have contributed to the development of the contemporary paradigm since the Great Recession. The IMF promoted in some documents the importance of a swift deleveraging of household debt in the wake of the crisis, arguing that such measures would benefit primarily those with a higher propensity to consume (average to lower income consumers) and thus drive a recovery.<sup>41</sup> However this ‘swift deleveraging’ approach received more muted support in the actual work of the IMF in Europe after the Eurozone crisis, suggesting political resistance by states and other actors such as the European Central Bank. An IMF working paper in 2013 argued from cross-country experience that reforms should

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<sup>34</sup> European Commission, above n 2, art 20; and see Recital 15 where the Commission notes that consumer over-indebtedness is a matter of ‘great economic and social concern’.

<sup>35</sup> The Insolvency Service Annual Report 2014–2015 states at the outset that ‘Entrepreneurialism and a drive for business growth will be accompanied by financial failures as well as successes’.

<sup>36</sup> Frank Fossen quotes the German Minister of Justice stating that the ‘reform of insolvency law is one of the most important projects in business law’ and that ‘those who exhibit the entrepreneurial spirit deserve legal protection that encourages them in their decision to depart into self-employment’: Frank M Fossen, ‘Personal Bankruptcy Law, Wealth, and Entrepreneurship — Evidence from the Introduction of a “Fresh Start” Policy’ (2014) 16 *American Law and Economics Review* 269, 274.

<sup>37</sup> See Productivity Commission, ‘12.3 Issues in Personal Insolvency’, *Business Set-up, Transfer and Closure: Inquiry Report (No 75, 2015)*: recommendation 12.1, for a one-year discharge period. Individuals with excess income would be required to make payments for three years (see at 343).

<sup>38</sup> Matthew Taylor, *Good Work*, the Taylor Review of Modern Working Practices (Department of Business, Energy and Industrial Strategy (UK), 2017) <<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>>.

<sup>39</sup> See Neil Fligstein and Adam Goldstein, ‘The Emergence of a Finance Culture in American Households, 1989–2007’ (2015) *Socio-Economic Review* 1.

<sup>40</sup> But media discourse may still reflect the distinction between entrepreneurs and consumers describing how the former ‘bounce back from bankruptcy’. See Sue Tabbitt, ‘Bouncing Back from Bankruptcy’, *The Guardian*, 29 October 2012, <<https://www.theguardian.com/small-business-network/2012/oct/29/bouncing-back-from-bankruptcy>>.

<sup>41</sup> See International Monetary Fund, *World Economic Outlook* (2012), and other documents discussed in Ramsay, above n 16, 159.



provide a fresh start for ‘financially responsible’ individuals, typically after three to five years. It also proposed a swift ‘no income no asset procedure’ for those with no repayment capacity.<sup>42</sup> This latter procedure recognises the limits of existing European repayment systems where significant numbers of individuals have no repayment capacity and may be unable to pay for accessing the insolvency system in those countries which impose a fee.<sup>43</sup> The idea of a special NINA procedure originated in New Zealand and was implemented in England and Wales in 2009. Writers appeal to this idea as a model for US bankruptcy simplification.<sup>44</sup> The English model is a means-tested administrative procedure involving an online application to the Insolvency Service through a limited number of primarily publicly subsidised<sup>45</sup> ‘approved intermediaries’,<sup>46</sup> who act as screening agencies checking the eligibility of the debtor.<sup>47</sup> The order can be used every six years. A debtor must inform the Insolvency Service of any change in her or his financial status (for example, increase in income) during the one-year period.<sup>48</sup> The use of the term ‘Debt Relief’ rather than bankruptcy is intended to avoid the stigma of bankruptcy, which might deter some applicants.<sup>49</sup> The objectives of the procedure are to

<sup>42</sup> See Yan Liu and Christoph B Rosenberg, ‘Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economic and Legal Toolbox’ (IMF Working Paper, No 13/44, 2013). See also International Monetary Fund, Spain: 2013 Article IV Consultation: Selected Issues (IMF Country Report, No 13/245, 2013) 25. The IMF persuaded Cyprus to adopt a law which includes: a three-year discharge for bankruptcy; the possibility of a restructuring plan in relation to secured and unsecured debts subject to approval of 75 per cent in value of creditors; a no income no asset programme with discharge after one year for individuals with debts under €20 000. See also Greece, Memorandum of Understanding between EU and Greece (2015) 18–19,

[http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/01\\_mou\\_20150811\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf).

India has adopted a no-asset procedure in its recent reform. See the Insolvency and Bankruptcy Code 2016 Part III Chapter 11 introducing a ‘fresh start process’ for debtors with limited income, assets and debts. The debtor is discharged after six months (s 92).

<sup>43</sup> See in Canada: Stephanie Ben-Ishai and Saul Schwartz ‘Bankruptcy for the Poor?’ (2007) 45 *Osgoode Hall Law Journal* 471.

<sup>44</sup> See eg Ronald J Mann, ‘Making Sense of Nation-Level Bankruptcy Filing Rates’ in Niemi, Ramsay and Whitford above n 10 243–4; Elizabeth Warren et al, *The Law of Debtors and Creditors: Text, Cases and Problems* (Wolters, Kluwer, 7<sup>th</sup> ed, 2014) 320. But see Angela K Littwin, ‘The Affordability Paradox: How Consumer Bankruptcy’s Greatest Weakness May Account for Its Surprising Success’ (2011) 53 *William and Mary Law Review* 1933. See also Hermie Coetzee and Melanie Rostoff, ‘Consumer Debt Relief in South Africa — Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand’ (2013) 22 *International Insolvency Review* 188.

<sup>45</sup> Citizens Advice, a registered charity, is the major intermediary. Citizens Advice aims ‘to provide the advice people need for the problems they face’ and improve the policies and principles that affect people’s lives’, a research and campaigns agenda known as ‘social policy’, <https://www.citizensadvice.org.uk/about-us/>. It receives the majority of its funding from central government and each local bureau may also receive funds from institutions such as the National Lottery. A central office provides expertise, but it relies heavily on volunteers in local bureaux. Its website indicates that there are ‘338 individual charities... Of the 28 500 people who work for the service, over 22,000 of them are volunteers and nearly 6,500 are paid staff’.

<sup>46</sup> See Debt Relief Orders (Designation of Competent Authorities) Regulations 2009, reg 3(2)(b)(i).

<sup>47</sup> Access is limited to individuals with non-exempt assets below £1000, a vehicle valued at less than £1000, unsecured debts less than £20 000, and no more than £50 in surplus income, based on a formula tracking reasonable expenditures of individuals in the bottom income quintile. Data indicate that about 1 per cent of applications are rejected by the Insolvency Service with further information requested in about 5 per cent of cases. Individuals must pay for the service (£90) with £10 going to the approved intermediary. Access is barred to individuals who have entered into a transaction at an undervalue or given a preference within the previous two years, and debtor behaviour can be sanctioned through a DRO restriction order. A restriction order may be made either through the court, or an undertaking by the debtor to the Insolvency Service. A broad discretion exists to make such an order where it is appropriately structured by a list of factors such as ‘incurring, before the date of the determination of the application for the [DRO], a debt which the debtor had no reasonable expectation of being able to pay’: see Insolvency Act 1986, sch 4ZB(2)(h).

<sup>48</sup> Insolvency Act 1986, s 251J(5).

<sup>49</sup> This description was proposed in a 2004 research paper on administration orders where the authors noted that ‘some of the people we interviewed were very resistant to the idea of bankruptcy, and were deterred by the stigma

provide debt relief for those who are unable to pay the costs of accessing bankruptcy (approximately £700) and to prevent financial exclusion.<sup>50</sup>

In 2013, the World Bank, after recognising the international significance of consumer insolvency in 2011,<sup>51</sup> published a Report on the Treatment of the Insolvency of Natural Persons.<sup>52</sup> This document did not outline best practices,<sup>53</sup> but recognised the dominance internationally of payment plans as a condition of relief.<sup>54</sup> It was implicitly critical of long repayment plans imposed on individuals with no repayment capacity as in Germany (six years) and Sweden (five years). Although individuals may be given a ‘zero repayment plan’ in these jurisdictions, they are not discharged until the end of the plan. The World Bank report, like the IMF, also highlighted the problem of the NINA debtor, the individual with no assets or repayment capacity or resources to pay for insolvency. German studies suggest that 80 per cent of debtors on plans are nullinsolvenz, that is, they have no capacity to make repayments over the six-year waiting period.<sup>55</sup> In Sweden, approximately 40 per cent of debtors on the five-year restructuring plans have no repayment capacity.<sup>56</sup> Figure 1 shows the rise in France of *rétablissement personnel*, providing an immediate discharge to individuals with no likelihood of repaying their debts. The World Bank Report also recognised the issue of moral hazard in a bankruptcy system, but concluded that there was a danger that focus on this issue could

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they would face given the relatively small sums of money they owed ... A simplified debt procedure would therefore seem more appropriate for people on very low incomes that are unlikely to increase. This could be called something other than bankruptcy, to overcome the stigma that people feel, and differentiate it from the full bankruptcy procedure.’ Elaine Kempson and Sharon Collard ‘Managing Multiple Debts: Experiences of County Court Administration Orders among Debtors, Creditors and Advisors’ (DCA Research Series 1/04, Department for Constitutional Affairs (UK), July 2004).

<sup>50</sup> ‘Part 5 [of the Tribunals Courts and Enforcement Act 2007] introduces a package of targeted measures that improve and extend the range of solutions available to assist debtors with relatively low income and debts. Those solutions seek to promote financial inclusion and are targeted, in particular, at those who are disproportionately affected by debt and are generally least able to deal with a range of creditor demands.’ United Kingdom, Parliamentary Debates, House of Lords, 29 November 2006, HL Vol.687, col.766. ‘DROs were introduced in April 2009 following research that identified that there were people in long-term debt difficulties who had nothing to offer their creditors and who could not afford to make themselves bankrupt. Delivered in partnership with the professional debt advice sector, DROs provide low-cost easy access to debt relief for those overwhelmed by relatively low levels of unmanageable debt. They are designed to provide a fresh start for the most vulnerable people trapped in debt.’: United Kingdom, Parliamentary Debates, House of Commons, 9 November 2010, c7-8WS (Edward Davey). Lady Justice Hale has described the procedure as ‘a new and simplified way of wiping the slate clean for debtors who are too poor to go bankrupt’: *Secretary of State v Payne* [2011] UKSC 60, 63.

<sup>51</sup> See, Block-Lieb, above n 1, [17] ‘[R]ecent events suggest that the expansion of access to finance, the extension of modern modes of financial intermediation, and the mobility and globalization of financial flows may have changed the character and scale of the risk of consumer insolvency in similar ways in many different economies’.

<sup>52</sup> See, World Bank, Report on the Treatment of the Insolvency of Natural Persons (2013). This was the work of a small group of academics, (the author was a member of the drafting committee, chaired by Jason Kilborn), within the context of a World Bank Task Force comprised of lawyers, government representatives, academics, judges (primarily US bankruptcy judges), and representatives of UNCITRAL.

<sup>53</sup> The reasons were the potential diversity of cultural, and social issues associated with personal insolvency. World Bank above n 52, [12]. While these reasons have some weight, the approach taken by the Report was also driven by political factors. The Bank wished to publish a report quickly, and any attempt to state best practices might result in the project being taken over by UNCITRAL. See discussion in Ramsay, above n 16, ch 6.

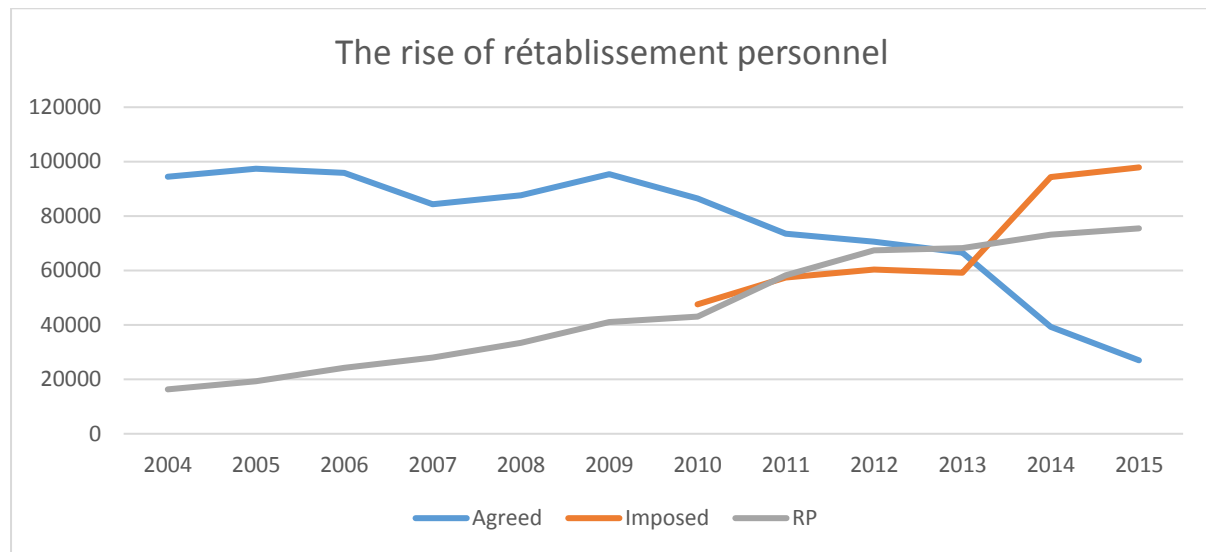
<sup>54</sup> World Bank, above n 52, 134.

<sup>55</sup> Information provided by Jan Heuer citing 2015 statistics on over-indebtedness where 46 per cent of debtors are unemployed, 37 per cent without formal job qualifications, 38 per cent with debts below 10 000, 29 per cent with debts between 10 000 and 25 000, 48 per cent with incomes below 900 euro a month: Jan Heuer, ‘The New Poor Person’s Bankruptcy: International and Comparative Dimensions’ (Workshop presentation, University of Kent, 28 April 2016) on file with author.

<sup>56</sup> See Ramsay, above n 16, ch 5.

overshadow the many benefits of debt relief, and existing evidence did not suggest moral hazard was a significant problem.<sup>57</sup>

**Figure 1: France: The rise of rétablissement personnel 2004–2015**



Source: Bank of France: Annual Overindebtedness Statistics

## B Are Anglo-Saxon Systems Different?

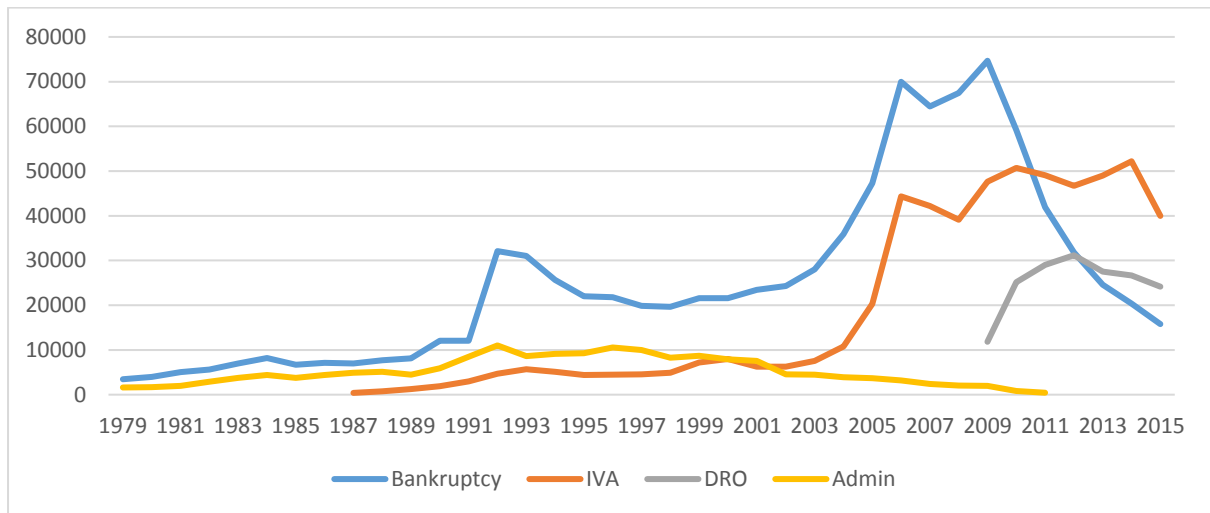
It might be argued that Anglo-Saxon systems do not fit the paradigm of a preference for repayment plans, given the historic role of straight bankruptcy providing a bankruptcy discharge without the necessity of an income repayment order. Moreover, individuals in Anglo systems may choose their insolvency solution, whereas states such as Germany impose a standard solution on debtors. These differences might suggest the persistence of legal origins in creating difference.<sup>58</sup> However, common law systems have witnessed the rise of formal repayment alternatives, for example the Individual Voluntary Arrangement (‘IVA’) in England and Wales (Figure 2) promoted by entrepreneurial debt intermediaries, the consumer proposal in Canada (see Figure 3),<sup>59</sup> or the debt settlement arrangement in Australia (Figure 4).

<sup>57</sup> World Bank, above n 52, [113]–[119].

<sup>58</sup> Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46 *Journal of Economic Literature* 285.

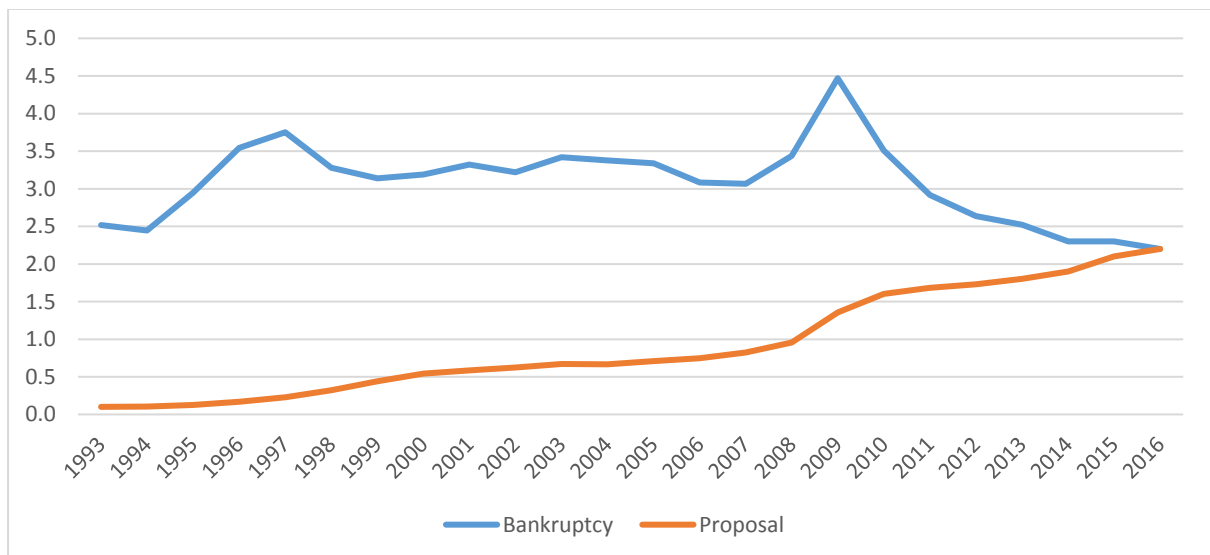
<sup>59</sup> The increase in Canada is partly a function of the increase in 2009 of total unsecured debt permitted in a proposal from CAN\$75 000 to \$250 000. Evidence also exists of increased steering by intermediaries towards debt repayment rather than straight bankruptcy. See Office of Superintendent of Bankruptcy Canada, *Review of Licensed Insolvency Trustee Business Practices in Relation to Administration of Consumer Insolvencies* (2017) <<https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03754.html>>. See the comparative discussion of repayment alternatives in Jean Braucher, ‘A Law in Action Approach to Comparative Study of Repayment Forms of Consumer Bankruptcy’, in Niemi, Ramsay and Whitford, above n 10, ch 16.

**Figure 2: England and Wales Bankruptcy, IVAs, Debt Relief Orders, 1979–2015 (Administration Orders 1979–2011)**

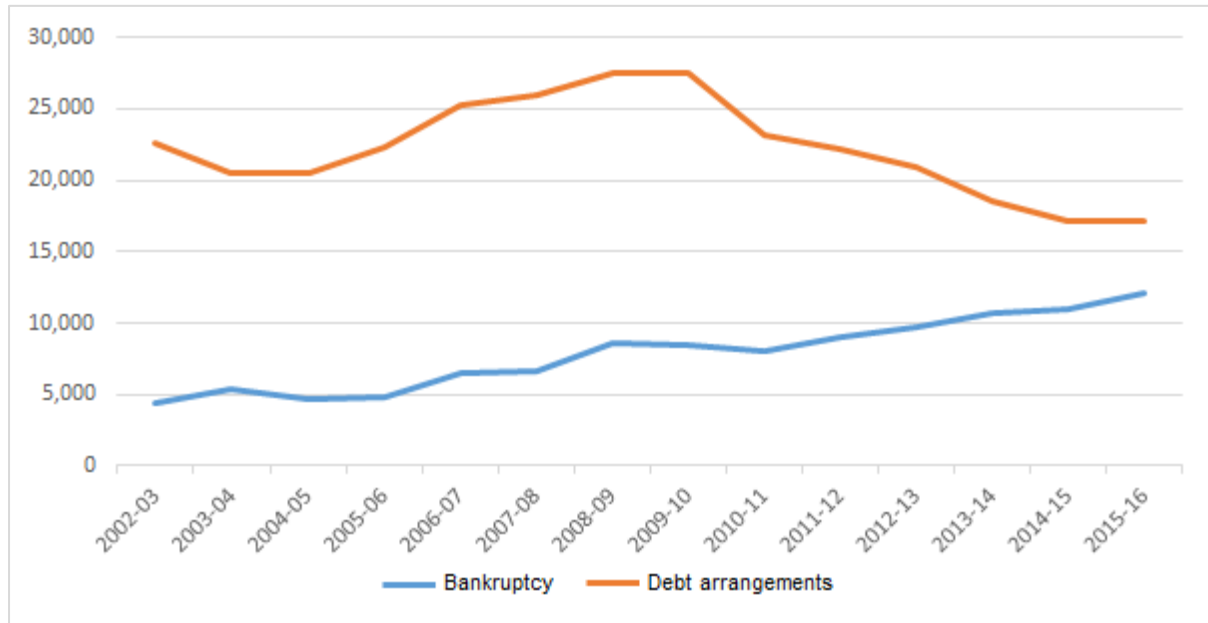


Source: Insolvency Service England and Wales, Annual Insolvency Statistics

**Figure 3: Canada Bankruptcies and Proposals per 1000 Capita 1992–2016**



Source: Office of Superintendent of Bankruptcy, Canada. Note that the ceiling for debt in consumer proposals increased from CAN\$75 000 to CAN\$250 000 in 2009.

**Figure 4: Australia, Debt Arrangements and Bankruptcy 2002–2016**

Source: Australian Financial Security Authority, Annual Personal Insolvency Statistics

The UK, Canada and Australia have also introduced ‘surplus income’ requirements so that individuals may be making payments for up to three years after they are discharged. Even in the US, the non-dischargeability of significant debts such as student loans and the use of re-affirmation agreements mean that individuals may continue to repay debts notwithstanding the discharge.<sup>60</sup> US legislators have historically demonstrated a preference for Chapter 13, the partial repayment alternative, as the primary remedy for consumer debtors at least since the Bankruptcy Reform Act 1978, even if in practice this preference was frustrated by debtor choice and the reality of debtors’ circumstances.<sup>61</sup> In the UK, government as well as insolvency professionals share a master narrative of ‘can pay should pay’. The major professional body, R3, is lobbying for an extension of the standard bankruptcy discharge period to three years, with a swift discharge reserved for the deserving poor under the Debt Relief Order (‘DRO’).<sup>62</sup> Straight bankruptcy is a suppressed political alternative<sup>63</sup> for debtors in the UK.

<sup>60</sup> The US Supreme Court noted that the 2005 amendments were based on an ideology of ‘can pay, should pay’. See, Kagan J in *Ransom v FIA Card Services*, N. A 562 U.S. 61, 64 (US Supreme Court, 11 January 2011): ‘In particular, Congress adopted the means test — [t]he heart of [Bankruptcy Abuse Prevention and Consumer Protection Act 2005’s] consumer bankruptcy reforms... and the home of the statutory language at issue here — to help ensure that debtors who can pay creditors do pay them.’

<sup>61</sup> See, Ramsay, above n 16, ch 2.

<sup>62</sup> R3, *The Personal Insolvency Landscape; A Way Forward for Formal Debt Relief* (2014) <[https://www.r3.org.uk/media/documents/policy/policy\\_papers/personal\\_insolvency/R3\\_Personal\\_Insolvency\\_Landscape\\_Jan\\_2014.pdf](https://www.r3.org.uk/media/documents/policy/policy_papers/personal_insolvency/R3_Personal_Insolvency_Landscape_Jan_2014.pdf)>.

<sup>63</sup> In 2015, the UK Financial Conduct Authority found in research on debt management companies, that few individuals had knowledge of the different options, and conceptualised bankruptcy as an extreme and stigmatising option. Advisers often downplayed bankruptcy as an alternative remedy. They often reinforced customers’ initial reluctance to consider bankruptcy and played on misconceptions about it to deter them from this alternative. The FCA reported ‘many instances where customers were recommended very long-term debt management plans (often many decades...) when debt relief solutions are likely to have been more appropriate but adequate information and advice [were] not provided’: Financial Conduct Authority, ‘Quality of Debt Management Advice’ (Thematic Review TR15/8, June 2015) [4.55] <<https://www.fca.org.uk/publication/thematic-reviews/tr15-08.pdf>>. In one

This emerging paradigm of the primacy of repayment plans assumes that such an approach is economically and socially beneficial and in Part III, below, I examine existing empirical studies on the effectiveness of existing personal insolvency systems in achieving a fresh start. As a preliminary, one characteristic is the increasing length of plans in common law jurisdictions. Thirty years ago, conventional wisdom was that a plan in excess of three years would often fail,<sup>64</sup> but plans are now written for five years or more as in the case of the IVA.<sup>65</sup> It is not clear whether this is economically or socially beneficial.<sup>66</sup> Completion rates of repayment plans raise concerns,<sup>67</sup> and the absence of any repayments by many debtors on plans in countries such as Sweden and Germany suggest the need for a swift discharge for many debtors. Constructing the NINA process as a residual programme does not seem to fit the reality of these systems where substantial numbers of debtors seem to have no repayment capacity. Braucher, surveying studies of repayment alternatives in North America, Australia and Europe in 2009 concluded that existing data, while ‘spotty’ suggested that these alternatives had high costs in relation to debt repayment and ‘significant rates of failure to achieve a discharge’.<sup>68</sup> Almost no knowledge existed on whether repayment plans were effective treatments for over-indebtedness or simply left ‘many debtors struggling financially and perhaps in other ways too’.<sup>69</sup> In many countries this question remains unanswered.

### III CONTEMPORARY EMPIRICAL RESEARCH ON THE ‘FRESH START’

The ‘fresh start’ is a central objective of personal insolvency law in many countries. The absence of significant assets in most individual bankruptcies undercuts the significance of the traditional bankruptcy objective of equitable distribution of assets among creditors. The World Bank outlines several objectives associated with the fresh start: encouraging entrepreneurialism; increased productivity; promoting financial and social inclusion; reducing health and welfare costs; encouraging responsible lending; and maximising economic activity.<sup>70</sup> The EU Commission identifies ‘reduced consumption, labour activity and foregone growth opportunities’ with over-indebtedness, arguing that shorter discharge periods will

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case, a debt adviser failed to correct a debtor’s misconception about the effects of bankruptcy and recommended a debt management plan lasting 125 years! Firms often had incentive structures for selling debt solutions.

<sup>64</sup> The Cork Committee concluded in 1982 that the maximum duration of the proposed Debts Arrangement Order should be three years since ‘it is clear from the Judicial statistics relating to administration orders that debtors are unlikely to maintain the discipline of instalment payments over periods in excess of three years and we therefore recommend this period as the norm’: Insolvency Law Review Committee (UK), (Cork Committee), *Insolvency Law and Practice: Report*, Cmnd 8558 (1982) [313].

<sup>65</sup> See Insolvency Service, *Individual Voluntary Arrangements Outcomes 1990–2015* (27 January 2017) 1 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/586485/IVA\\_Outcomes\\_2015\\_-\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586485/IVA_Outcomes_2015_-_web.pdf)>, noting that over ‘10% of IVAs registered in 2009 and 5% in 2008 were still ongoing, having started around 7 or 8 years earlier’. In Canada, a recent study of consumer proposals indicated an average length of 4.4 years. This represents an increase from the norm of three years in the 1990s and early 2000s. See Vyacheslav Mikhed and Barry Scholnick, ‘Consumer Proposals in Canada after the 2009 Legislative Amendments to the BIA’ (Research Paper, Office of Superintendent of Bankruptcy, Canada, 2015) 43 <<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/request.html?Open&id=90541C27F538E96485257F7F0060F37C&p=1>>.

<sup>66</sup> See Jean Braucher, ‘A Law-in-Action Approach to Comparative Study of Repayment Forms of Consumer Bankruptcy’ in Niemi, Ramsay and Whitford, above n 10, 333. Braucher suggested three criteria for evaluating repayment systems: creditor repayment, debt relief, and treatment of debt problems.

<sup>67</sup> Insolvency Service data in England and Wales indicate a failure rate of 30–40 per cent for IVAs: Insolvency Service, above n 65. Studies in the US have pointed to high failure rates for Chapter 13 plans. The study by Mikhed and Scholnick, above n 65, indicates a failure rate of 23 per cent in Canada.

<sup>68</sup> Braucher, above n 66, 353.

<sup>69</sup> *Ibid.*

<sup>70</sup> Other benefits include proper account valuation, reducing wasteful collection costs, concentrating losses on more efficient and effective loss distributors. See World Bank, above n 52, [400] for summary.

permit consumers to re-enter the ‘cycle of consumption’.<sup>71</sup> Given these objectives, the task of research must be to determine whether existing systems achieve them. At the outset, it must be stated that this is a challenging research question. Bankrupts are a difficult group to study, and longitudinal data requires following individuals over a reasonable period of time. Moreover, in order to draw firm conclusions about the effect of personal insolvency law, one should ideally have a control group of similarly situated individuals who have not experienced insolvency.

The US tradition of the liberal ‘fresh start’ is an obvious site for testing the effectiveness of the fresh start. Several US studies question the efficacy of the existing fresh start under both Chapter 7 and Chapter 13. Porter and Thorne found that one year after bankruptcy filing, 25 per cent of Chapter 7 bankrupts were struggling to pay routine bills and 33 per cent had a similar financial situation to that when they filed bankruptcy.<sup>72</sup> They noted that the Brookings Institution had reached a similar conclusion in their study of bankrupts in the mid-1960s. A key factor differentiating those in continuing financial difficulties from other bankrupts was the absence of an adequate and steady income.<sup>73</sup> A bankruptcy discharge did not solve this problem, because employers might not hire an individual who had filed for bankruptcy notwithstanding the prohibition in bankruptcy law on discrimination against bankrupts. Thus, although bankruptcy seemed to provide a fresh start for the majority of bankrupts, Porter and Thorne concluded that for others it was a ‘temporary refuge’ from continuing income problems.<sup>74</sup>

Other studies suggest that bankrupts may continue to suffer financially for a substantial period after bankruptcy. Zagorsky and Lupicka concluded on the basis of a comparative study of filers and non-filers that for filers it ‘took many years to restore financial well-being’.<sup>75</sup> Han and Li concluded that bankrupts have less access to unsecured credit such as credit cards after bankruptcy and were more likely than other consumers to use expensive credit sources. Although this high cost did reduce over time, filers were still more prone to face financial hardship ten years after filing.<sup>76</sup> They concluded that ‘for many bankrupt households, debt discharge alone failed to provide a long-run improvement in their financial health’.<sup>77</sup> More recent research suggests that the seven and 10-year bankruptcy ‘flags’ on a credit file had a

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<sup>71</sup> European Commission, above n 2, 4.

<sup>72</sup> Katherine Porter and Deborah Thorne, ‘The Failure of Bankruptcy’s Fresh Start’ (2006) 92 *Cornell Law Review* 67, ‘We found that just one year post bankruptcy, one in four debtors was struggling to pay routine bills, and one in three debtors reported an overall financial situation similar to, or worse than, when that debtor filed bankruptcy. Our analysis of these data demonstrates that steady and sufficient income is the key to improved post-bankruptcy financial health. Factors that cause household income to decline, such as unemployment and underemployment, illness or injury, and old age, undermine the chances of financial recovery. These data reveal the limitations of bankruptcy as a social safety net and highlight the fragile economic situations of American families. We conclude that bankruptcy is an incomplete tool to rehabilitate those in financial distress.’

<sup>73</sup> United States Bankruptcy Code, Protection Against Discriminatory Treatment, 11 USC § 525.

<sup>74</sup> *Ibid* 70.

<sup>75</sup> See Lois R Lupica and Jay L Zagorsky, ‘A Study of Consumers’ Post-discharge Finances: Struggle, Stasis or Fresh Start?’ (2008) 16 *American Bankruptcy Institute Law Review* 283.

<sup>76</sup> See Song Han and Geng Li, ‘Household Borrowing after Personal Bankruptcy’ (2011) 43 *Journal of Money, Credit and Banking* 491; Song Han and Wenli Li, ‘Fresh Start or Head Start? The Effects of Filing for Personal Bankruptcy on Work Effort’ (2007) 31 *Journal of Financial Services Research* 123; Ethan Cohen-Cole, Burcu Duygan-Bump and Judit Montoriol-Garriga, ‘Who Gets Credit after Bankruptcy and Why? An Information Channel’ (2013) 37 *Journal of Banking and Finance* 5101 (limited debt availability immediately after bankruptcy, but increased availability after 18 months).

<sup>77</sup> Han and Li (2011), above n 76, 514.

substantial impact on credit availability, with increases in credit scores and credit balances after the flags were lifted.<sup>78</sup>

It is often assumed that debtors do not obtain credit after bankruptcy because of the limits of available credit supply. Porter questions this conventional wisdom, citing studies which demonstrate that a significant credit market exists, targeting recently discharged bankrupts. She concludes that many debtors who have experienced bankruptcy do not borrow on credit cards because of the painful experience of bankruptcy.<sup>79</sup> This undermines the fresh start objective of facilitating re-entry to the credit market.

Empirical studies of Chapter 13, which permits an individual to cure arrears on a home mortgage and repay a portion of debts over three to five years have questioned its benefits. Studies document low completion rates (on average about one third of filers obtain a discharge) and a failure by many individuals to save their homes, which is often a reason for filing for Chapter 13.<sup>80</sup> One recent study, using a logistic regression analysis of national data from the 2007 Consumer Bankruptcy project, concludes that the majority of individuals do not complete plans under Chapter 13, that Chapter 13 does not act as a home-saving device, and generally delays rather than prevents foreclosure. Chapter 13, the authors conclude is ‘profoundly inefficient’.<sup>81</sup>

These socio-legal studies contrast with an econometric study by Dobbie and Song,<sup>82</sup> which followed the trajectory of individuals in Chapter 13 from 1992 to 2005 in terms of subsequent earnings, mortality rates, and home foreclosure. Using a randomised methodology,<sup>83</sup> which allowed for the existence of a control group, the authors found that over the first five post-filing years those at the margin who were granted Chapter 13 bankruptcy protection were significantly better off financially in terms of income,<sup>84</sup> and had a significantly lower mortality rate and home foreclosure rate than those denied bankruptcy protection. The difference between the groups is represented by the significant deterioration in those who did not obtain bankruptcy protection rather than gains by those granted protection. Those who filed successfully for Chapter 13 have similar pre- and post-filing earnings. Therefore, bankruptcy

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<sup>78</sup> See, Will Dobbie et al, ‘Bad Credit, No Problem? Credit and Labour Market Consequences of Bad Credit Reports’ (Staff Report, Federal Reserve Bank of New York, 2016) <[https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr795.pdf?la=en](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr795.pdf?la=en)>.

<sup>79</sup> See Katherine Porter, ‘Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors’ (2010) 18 *American Bankruptcy Institute Law Review* 1.

<sup>80</sup> See eg, Sullivan, Warren and Westbrook, above n 7, 217; Scott F Norberg and Andrew Velkey, ‘Debtor Discharge and Creditor Repayment in Chapter 13’, (2006) 39 *Creighton Law Review* 473, 476; William C Whitford, ‘The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy’, (1994) 68 *American Bankruptcy Law Journal* 397, 411; studies cited in Braucher, above n 66, 335–6; and Katherine Porter, ‘The Pretend Solution: An Empirical Study of Debtor Outcomes’ (2011) 90 *Texas Law Review* 103. But see Henry E Hildebrand III ‘A Response to a Pretend Solution’ (2011) 90 *Texas Law Review* 1, criticising the methodology which limited interviews to individuals who had failed in Chapter 13. Porter indicates that, for 70 per cent of filers saving the home is the principal reason for choosing Chapter 13.

<sup>81</sup> See Sara S Greene, Parina Patel and Katherine Porter, ‘Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes’ (Legal Research Paper no 2016-46, University of California Irvine, 2016) 1.

<sup>82</sup> Will Dobbie and Jae Song, ‘Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection’ (2015) 105 *American Economic Review* 1272.

<sup>83</sup> Bankruptcy filers are randomly assigned to judges who vary in their rates of granting bankruptcy protection. They were therefore able to investigate individuals at the margin who might randomly be confirmed or rejected. After discarding data relating to bankruptcy offices with a single judge and certain other factors which prevented random assignment, the authors’ data represented 26 per cent of Ch 13 filings during this period.

<sup>84</sup> Marginal recipient of Ch 13 earning \$5 562 more than marginal dismissed filer.



appeared to mitigate the effects of a financial downturn for an individual preceding bankruptcy.<sup>85</sup> The study also suggests that bankruptcy protection might increase incentives to continue to work, through its protection against wage garnishment.<sup>86</sup> Economic stability might be promoted,<sup>87</sup> because individuals do not have incentives to go underground, or move state to avoid wage garnishment, and are protected against immediate home foreclosure. The authors conclude that Chapter 13 bankruptcy protection provides significant benefits for debtors.<sup>88</sup>

The contrast between the findings of this study and previous socio-legal studies is striking. Thus, although many individuals do not receive a discharge in Chapter 13, according to Dobbie and Song they have a better post-bankruptcy experience than those not granted protection. These US findings on Chapter 13 and Chapter 7 suggest that some debtors do benefit from these chapters, but for at least a minority of debtors the costs of bankruptcy may be high and it may not be addressing continuing problems of inadequate or insecure income.<sup>89</sup> Sullivan, Warren and Westbrook also suggest that the stigma of bankruptcy may have increased over time as greater media publicity is given to filings and the importance of maintaining a good credit score. A potential bankrupt may now fear the cost to her or his credit reputation, in a similar manner to the historical fear of disapproval by one's neighbours and community.<sup>90</sup>

European studies of the longitudinal effects of personal insolvency relief are limited. No recent systematic studies exist in England and Wales, a jurisdiction which liberalised the bankruptcy discharge in 2002 by reducing the period from three years to one year. The English Insolvency Service evaluated the impact of this reform, concluding in 2007 that although a swift discharge did have immediate emotional benefits, bankrupts still faced difficulties in re-entering the financial market because there were no changes in lending and credit reference policies.<sup>91</sup> The concept of stigma was associated by bankrupts with problems obtaining a bank account, being unable to repay creditors, and the effects on their credit rating.<sup>92</sup>

The few empirical studies of continental European repayment plans are troubling. A qualitative longitudinal analysis of individuals on debt restructuring plans in Finland indicates that individuals continued to live at a low subsistence level one year after the payment plan had ended.<sup>93</sup> A pilot study of individuals who had used the Swedish debt restructuring system

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<sup>85</sup> '[B]ankruptcy protection mitigates the long-term consequences of financial shocks that might otherwise harm debtors but does not confer any benefits in the absence of a financial shock': Dobbie and Song, above n 81, 1292.

<sup>86</sup> The authors tested this by analysing the effects in states with different wage garnishment laws.

<sup>87</sup> Tested through analysis of probability of individual working in the same industry, and on probability of worker in baseline county.

<sup>88</sup> Dobbie and Song, above n 82, 1274.

<sup>89</sup> Hacker, above n 11.

<sup>90</sup> See Teresa A Sullivan, Elizabeth Warren and Jay Westbrook, 'Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings (2006) 59 *Stanford Law Review* 213, 242; Elizabeth Warren and Amelia Warren Tyagi develop the theme that stigma may have increased. See 'The Myth of the Immoral Debtor' in Elizabeth Warren and Amelia Tyagi, *The Two Income Trap: Why Middle-Class Parents are Going Broke* (Basic Books, 2003).

<sup>91</sup> See Insolvency Service, *Enterprise Act 2002—the Personal Insolvency Provisions: Final Evaluation Report (2007)* [30]: 'Rehabilitation of bankrupts is being stifled by a lack of change in lender and credit reference agency policies, which, despite earlier discharge, will continue to deny bankrupts access to various types of financial products.'

<sup>92</sup> Insolvency Service, *Attitudes to Bankruptcy Revisited (2006)*.

<sup>93</sup> 'In Finland, of those debtors who have implemented a payment plan, over 40% described their subsistence as poor when asked 1 year after the payment plan had ended.' See Tuula Linna, 'Consumer Insolvency: The Linkage between the Fresh Start, Collective Proceedings and the Access to Debt Adjustment' (2015) 38 *Journal of Consumer Policy* 357, 372.

during the period 2003 to 2008<sup>94</sup> found that 34 per cent did not think it had given them a fresh start,<sup>95</sup> although a majority responded that debt relief had provided a solution to their financial problems. Finally, recent Australian research questions whether bankruptcy provides significant benefits for disadvantaged and low income, individuals since it fails to address the structural causes of financial hardship. Ali, O'Brien and Ramsay conclude that, while bankruptcy provides many benefits, they are unevenly distributed with 'access to adequate income' playing a critical role in rehabilitation.<sup>96</sup>

The promotion of entrepreneurialism is part of the personal insolvency paradigm but studying the effects of bankruptcy law on entrepreneurialism throws up the difficulty of identifying 'entrepreneurs'. Entrepreneurialism is associated with innovation but studies often use self-employment as a proxy. Self-employment is a category which may be over-inclusive as a proxy for innovation, ranging from individuals who are 'very self-sufficient to extremely vulnerable'.<sup>97</sup> It may include individuals who were formerly employed and are in precarious positions with low incomes and few social protections. A widely cited econometric study does indicate a correlation over time between the liberality of the bankruptcy discharge, and levels of self-employment.<sup>98</sup> However, the study does not comment on the quality or innovative nature of the self-employment which is encouraged. Another study suggests no connection between insolvency and innovative entrepreneurship.<sup>99</sup> The English Insolvency Service found no connection between the liberalised discharge procedures in 2002 and business start-ups (used as a proxy for entrepreneurialism).<sup>100</sup> Moreover, while a more forgiving bankruptcy law may permit more marginal high-risk business activity it may also result in higher credit costs for all entrepreneurs,<sup>101</sup> in terms of interest rates and collateral requirements. In the US, more homeowners in states with high homestead exemptions are likely to own a business, but may pay higher interest rates for credit.

US bankruptcy law is the inspiration for European policy makers wishing to promote entrepreneurialism through bankruptcy. 'Fail fast, fail cheap and move on' is a mantra

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<sup>94</sup> The Swedish restructuring system requires a five-year period of rehabilitation irrespective of ability to make any payment.

<sup>95</sup> See generally Richard Ahlstrom, S Edstrom and M Savemarkt, *Is Debt Relief Rehabilitative? An Evaluation of Debt Relieved Persons' Health, Life Quality and Personal Finances Three Years After Conducted Debt Relief* (The Swedish Consumer Agency, 2014).

<sup>96</sup> See Paul Ali, Lucinda O'Brien and Ian Ramsay, 'Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study' (2017) 40 *Melbourne University Law Review* 688, 725; Paul Ali, Lucinda O'Brien and Ian Ramsay, 'Bankruptcy, Social Security and Long Term Poverty: Results from a Survey of Financial Counsellors and Consumer Solicitors' (2016) 44 *Australian Business Law Review* 144.

<sup>97</sup> Mies Westerveld, 'The "New" Self-Employed: An Issue for Social Policy' (2012) 14(3) *European Journal of Social Security* 15, 19, referring to the analysis by Martine D'Amours and Stephane Crespo, 'The Dimensions of Heterogeneity Among Own Account Self-Employed: Elements for a Typology' (2009) 59 *Industrial Relations* 459. See Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, 2011).

<sup>98</sup> See John Armour and Douglas J Cumming, 'Bankruptcy and Entrepreneurship' (2008) 10 *American Law and Economics Review* 303.

<sup>99</sup> David M Primo and Wm Scott Green, 'Bankruptcy Law and Entrepreneurship' (2011) *Entrepreneurship Research Journal* 1(2) <<https://search-proquest-com.ezp01.library.qut.edu.au/docview/1435441928?accountid=13380>>. This study used two measures: self-employment and different levels of venture capital within a state. The latter was intended to capture the 'innovative' nature of entrepreneurialism.

<sup>100</sup> See Insolvency Service, above n 91, 41–2 citing statistical analysis conducted by Department of Business, Innovation and Skills.

<sup>101</sup> See Aparna Mathur, 'Beyond Bankruptcy: Does the US Bankruptcy Code Provide a Fresh Start for Entrepreneurs?' (2013) 37 *Journal of Banking and Finance* 4198. Business owners who have declared bankruptcy are charged higher rates and are more likely to be denied a loan. Owners of previously bankrupt firms are less likely to own credit cards.

associated with Silicon Valley but socio-legal study of bankrupt entrepreneurs in the US does not always provide an optimistic picture of individuals ‘bouncing back’ in business.<sup>102</sup> Lawless notes the mythology in the US of the founders of Google who financed their business initially through ‘all of our credit cards and our friends’ credit cards and our parents credit cards’.<sup>103</sup> Bankruptcy law may aspire to facilitate this type of high-risk, high-reward business but Lawless cites Shane’s text *The Illusions of Entrepreneurship*<sup>104</sup> which notes that most small businesses fail; only a few are established in high tech industries; and they contribute only a modest number of jobs. A more forgiving bankruptcy law for self-employed individuals is certainly justifiable for similar reasons to those applicable to consumers, but the evidence is not overwhelming on its promotion of entrepreneurialism.

#### A Research on NINA Programmes

Little systematic research exists on the success of schemes designed specifically to provide a swift fresh start for those with few assets or income. In England and Wales, women represent the majority of users of the Debt Relief Order (‘DRO’). Many are sole parents and unemployed. They owe debts to central and local state creditors and public utilities, as well as private creditors.<sup>105</sup> Reductions in income and increases in expense dominate the reasons for filing a DRO (Table 3).

**Table 3: England and Wales: Causes of Debt Relief Order 2015 (Multiple Causes)**

Business failure	0.74
Illness accident	22.9
Increase in household expense	11.9
Living beyond means	15.5
Loss of employment	11.5
Relationship breakdown	14.8
Significant Reduction in household income	33.3
Other	6.5
Unknown	0.9

Source: Insolvency Service.

<sup>102</sup> See Robert Lawless, ‘Striking Out on Their Own: The Self-Employed in Bankruptcy’ in Porter, above n 11, ch 6.

<sup>103</sup> Ibid.

<sup>104</sup> Scott A Shane, *The Illusions of Entrepreneurship* (Yale University Press, 2008).

<sup>105</sup> An early survey by the Insolvency Service noted that the profile of debtors accessing the DRO system was primarily ‘low income, predominantly unemployed individuals with an average of six creditors; over 53 per cent of debt was owed to banks, building societies and credit card companies’: Insolvency Service, *DROs Initial Evaluation Report 2010* (2010). More informal data since the recession suggest that public creditors may now be more significant: see eg Anne Pardo et al, *Unsecured and Insecure* (Citizens Advice, 2015).

A government review in 2014–15 did gather information from approved intermediaries and others on its operation. The consensus was that the ‘current system is working well’.<sup>106</sup> Clients of intermediaries indicated that the DRO had improved their mental and physical health. The Order also had a positive impact on 50 per cent of debtors’ relationships with their families.<sup>107</sup> However, little evidence exists as to the economic and financial impact of the order. Sixty-one percent of debtors in a non-random online survey indicated that they had not wished to access credit after the DRO, with one commenting that the experience of the DRO has ‘taught them a lesson about borrowing in the future’.<sup>108</sup> An earlier pilot study of bankruptcy had also found that a significant portion of bankrupts communicated a reluctance to borrow in the future,<sup>109</sup> and Porter identified the same theme in her 2010 US study.<sup>110</sup> The DRO could not only be performing a ‘responsibilising’ or disciplining function, but also undermining the objective of consumers re-entering the credit market. Further preliminary non-random research on social media suggests that individuals are often concerned about the effect of a DRO on their credit rating, with some regretting the effects it may have on their ability to obtain credit.<sup>111</sup> Evaluation of the similar ‘No Asset’ procedure in New Zealand concluded that the benefits of the procedure, while significant, might be short term, addressing immediate debt problems but not more general budgeting skills among the debtors interviewed<sup>112</sup>.

These special means-tested procedures may increase access through reduced costs but their relatively stringent access controls suggest a continuing fear among policy makers about moral hazard and opportunism in insolvency. The Insolvency Service also has an interest in minimising its costs in administering NINA insolvencies. It devotes modest resources to the DRO and covers its costs through the user fee, with advice agencies (the approved intermediaries) bearing the majority of the costs of screening individuals.<sup>113</sup>

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<sup>106</sup> See Department of Business, Innovation and Skills, *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit—Call for Evidence; Analysis of Responses* (2015). ‘The responses to both the call for evidence and the survey of users showed that debt relief orders are thought to be working well and have provided an important additional route for debt relief for vulnerable people, with benefits for mental health and family relationships as well as allowing a fresh financial start’: United Kingdom, Parliamentary Debates, House of Commons, 15 January 2015, c30-31WS (Jo Swinson).

<sup>107</sup> Insolvency Service, above n 105, 14. The Insolvency Service conducted a non-random survey, and 72 per cent of respondents had been through the DRO process.

<sup>108</sup> *Ibid* 18.

<sup>109</sup> John Tribe et al, ‘Bankruptcy Courts Survey’ (on file with author) 57: ‘a sizeable proportion of individuals who are no longer willing to borrow.... If rehabilitation is a key objective of our personal insolvency law...then this response is troubling’.

<sup>110</sup> Porter, above n 79.

<sup>111</sup> These comments are based on analysis of Netmums (UK) threads ([www.netmums.com](http://www.netmums.com)): ‘Anyone done a debt relief order?’ (142 posts); ‘Debt Relief Order please help’ (12 posts); ‘Debt Relief Order’ (15 posts). DROs remain on a debtor’s credit file for six years.

<sup>112</sup> See Ministry of Economic Development, *Evaluation of the No-Asset Procedure: Final Report* (2011) 3–4. One article suggests reforming the NAP in New Zealand to require mandatory participation by debtors in counselling. See Trish Keeper, ‘New Zealand’s No Asset Procedure: A Fresh Start at No Cost?’ (2014) (3) *QUT Law Review* 79.

<sup>113</sup> See Insolvency Service Annual Report and Accounts 2015–16, House of Commons Paper No HC 482, (13 July 2016) 85, which indicates a surplus of £415 000 in 2015–16. The major advice agency, Step Change, argued in its submission to the review of the DRO in 2014 that ‘the current £10 payment to competent authorities for each DRO is nowhere close to the actual cost of advising on and processing a DRO application. This funding situation is not sustainable in the long term...’. It indicates that the ‘cost of completing a DRO application is £190’: Step Change Debt Charity, Submission to the Insolvency Service Consultation Paper: *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit*, 2014, 12. The English model contrasts with New Zealand where the absence of screening agencies results in a high percentage of rejected applications by the state Insolvency Trustee Service (over 25 per cent). See Ministry of Economic Development, above n 112, 47 which indicates that

Although not a study of bankrupts, a longitudinal qualitative study of low income individuals in England who had obtained debt advice in 2007 and 2011 provides intriguing results.<sup>114</sup> This group would often meet the requirements for a DRO. At the end of the project in 2015 just over a third described themselves as ‘debt free’,<sup>115</sup> half described themselves as ‘managing’ their debt, and a small number saw little possibility of moving out of debt. Those who were debt free did so either through bankruptcy, inheritance or increased income with a very small proportion doing so through saving and cutting back. Seven participants became debt free through bankruptcy; four remained debt free at the end. The authors concluded that bankruptcy represented ‘a breathing space’ for some but for others was simply a ‘temporary respite in a longer story of indebtedness’.<sup>116</sup> Bankruptcy was a temporary change in a long term experience of problems where income does not meet outgoings.<sup>117</sup> The authors conclude that debt advice and financial literacy were of some value, but greater priority should be given to addressing structural problems of low wages, limited social security, and health issues. According to the authors, ‘wilful non-payment and financial mismanagement are, in fact, minor concerns’ for those on low incomes.<sup>118</sup> They also suggested that insufficient attention was currently given to understanding the trajectory of debt careers rather than merely providing a static picture of over-indebtedness and its causes.

These preliminary findings suggest several reasons for further study of the NINA debtor. First, the DRO and similar procedures focus on a generally low-income group which may provide a challenge for the fresh start objective, since debtors may be suffering from continuing income problems. Studies in the UK indicate three different types of poverty: individuals who have a one-off transient experience of poverty; those experiencing recurring poverty and those in persistent poverty.<sup>119</sup> The poor are ‘not a homogenous and essentially static population’.<sup>120</sup> A DRO may therefore be effective for some groups, but is possibly unnecessary for those with a transient experience of poverty. Second, the majority of users of the English process are female and often sole parents. Social reproduction<sup>121</sup> in contemporary capitalism, remains women’s work. If wages stagnate and social supports are reduced, social reproduction may depend on high cost credit. Study of the DRO provides a window onto this phenomenon, which could be linked to study of similarly situated households who have not used a DRO. Third, it provides

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the primary reasons for the high levels of rejection are incomplete applications, debts higher than the statutory ceiling and objections by creditors.

<sup>114</sup> Gaby Atfield, Robert Lindley and Michael Orton, ‘Living with Debt After Advice: A Longitudinal Study of People on Low Incomes’ (Friends Provident, 2016) 22: Fifty-nine participants were recruited in 2007 from not-for-profit advisers Citizens Advice, National Debtline and three community-based advice providers. Fifty-three were recruited in 2011 from individuals with mortgage arrears, some of whom had sought advice.

<sup>115</sup> Ibid 9: the authors indicate that their definition of ‘debt free’ must be qualified: ‘Some participants described themselves as debt-free when they clearly were not entirely without debt, having overdrafts, credit cards and mortgages. Some also owed money to family members, but they had no debts for which they were being pursued by creditors’.

<sup>116</sup> Ibid 31.

<sup>117</sup> Ibid 9.

<sup>118</sup> Ibid 66.

<sup>119</sup> Noel Smith and Sue Middleton, *A Review of Poverty Dynamics Research in the UK* (Joseph Rowntree, 2007) 3.

<sup>120</sup> Ibid.

<sup>121</sup> Defined broadly as ‘a key set of social capacities: those available for birthing and raising children, caring for friends and family members, maintaining households and broader communities’: Nancy Fraser, ‘Contradictions of Capital and Care (2016) 100 *New Left Review* 99.

an opportunity to study the intersection of private law regulation of debt, and housing and welfare policy and administration.<sup>122</sup>

## B Summary

The following points arise from analysis of the empirical studies in this section. First, bankruptcy does seem to provide benefits for some individuals but not others. This might seem a trite observation but further research to identify relevant groups who may benefit would be useful. Further longitudinal studies are necessary of the trajectory of individuals into over-indebtedness, the role of bankruptcy as an intervention in the process, and the subsequent experience of the debtor. Typologies of the debtor career may emerge from such studies. The Money Advice Service in the UK for example has attempted to outline different categories of the over-indebted, including ‘struggling students, benefits dependent families, worried working families, stretched families, low wage families and optimistic young workers’.<sup>123</sup> Debt relief might have different consequences for these groups. Debt advice agencies may already explicitly or implicitly tailor advice based on these typologies, but further research on the debt career of these distinct groups and the effects of bankruptcy on the career should be undertaken. Second, the extent of the benefit of the fresh start may depend on the practices of market actors such as banks<sup>124</sup> and credit reference agencies. It is the rules of credit reporting systems, used by creditors, insurance companies, employers and landlords, rather than the law, which may determine the availability of services for individuals who have filed for bankruptcy.<sup>125</sup> The English attempt to use the Bankruptcy Restriction Order signal as a warning for the market by separating culpable from innocent bankrupts seems to have had little effect on credit reporting systems.<sup>126</sup> Third, bankruptcy as presently structured, may be a limited remedy for certain groups who suffer from continuing instability of employment, long term poverty or unemployment. It may represent a temporary relief but may need to be integrated with better social protections.<sup>127</sup> It is not a substitute for such protections. Existing measures to alter bankrupts’ behaviour through counselling are unlikely to be effective in addressing the problems faced by this group.<sup>128</sup> The studies pose the research question of how personal insolvency law, a private law form of consumption insurance, fits with social insurance and welfare provision, which may differ between countries. Fourth, Howard, in an analysis of ideas associated with the fresh start, poses the question whether bankruptcy is expected to serve too

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<sup>122</sup> For example, individuals using a DRO may still be evicted from social housing. See *Places for People Homes Ltd v Sharples*; *A2 Dominion Homes Ltd v Goddfrey* [2011] EWCA Civ 813 (holding that a DRO order did not act as a stay on a social landlord evicting a tenant).

<sup>123</sup> See Money Advice Service, *Indebted Lives: The Complexities of Life in Debt* (2014).

<sup>124</sup> Which may close a bank account of a bankrupt in England and Wales.

<sup>125</sup> See the interesting discussion of the role of these systems in influencing the effectiveness of a fresh start in Howell and Mason, above n 10. The World Bank Report on the Treatment of the Insolvency of Natural Persons, above n 52, noted the potential for these systems to discriminate and the relative absence of research on this topic.

<sup>126</sup> Institutional creditors have their own systems for assessing credit so that legal provisions requiring bankrupts to disclose their status if borrowing over £500 are something of a dead letter.

<sup>127</sup> Atfield, Lindley and Orton, above n 114, 66, argue on the basis of their research that ‘we need to think very differently about debt. Policy debates are stuck in ruts and do not fit with the lived reality of debt as revealed in this research. Wilful non-payment and financial mismanagement are minor concerns. Policy makers should pay much more attention to “upstream” measures that prevent chronic debt problems arising in the first place, such as low wages, social security, health.’

<sup>128</sup> A meta-analysis of studies of financial education concluded that financial education may have a role in improving behaviours where individuals have ‘the ability or slack to exert greater control’. It could improve savings behaviour but ‘did less well in preventing loan defaults’: Margaret Miller et al, ‘Can You Help Someone Become Financially Capable? A Meta-analysis of the Literature’ (Background Paper, World Bank, 2014, on file with author).

many masters.<sup>129</sup> We might want to be more modest in our expectations of the fresh start. We should also recognise the challenges in measuring the relationships between the fresh start and achieving a variety of social and economic objectives. Finally, the gap between the promise and the reality of the fresh start as a safety net suggests the value of considering alternative, more radical analyses of personal insolvency law in contemporary capitalism. These might open up new approaches and research questions for personal insolvency law research.

#### IV THE RADICAL CRITIQUE AND THE STUDY OF PERSONAL INSOLVENCY

The rise in the significance of personal insolvency law is linked with the transformations in capitalism since the 1970s. These have resulted in a rise in inequality,<sup>130</sup> stagnation of wages in several countries, and the growth in household debt. The decline of the ‘male breadwinner’ model of the household and the rise of the two-income household creates a hostage to fortune should one partner lost a job. Neoliberal policies reduced the power of labour and welfare entitlements and embraced consumerism and entrepreneurialism. This period of high globalisation since the 1980s has been one where the lower middle classes of the rich countries have been the largest losers,<sup>131</sup> and studies suggest that this group is most likely to face issues of over-indebtedness and insolvency.

Theorising about credit and debt increased exponentially after the Great Recession, often as part of analyses of contemporary capitalism and neoliberalism.<sup>132</sup> Several writers have highlighted the role of household debt in maintaining consumer demand in the face of stagnating wages, but also in contributing to unsustainable housing bubbles.<sup>133</sup> Crouch describes this phenomenon as ‘privatized Keynesianism’,<sup>134</sup> which reconciles labour flexibility with the maintenance of consumer demand. Streeck, adopting crisis theories of capitalism developed by the Frankfurt School in the late 1960s, argues that capitalism faced a legitimisation crisis, as capitalist states were increasingly unable to steer the economy effectively and make good on increased social expectations. One strategy to address this problem was the promotion of private consumption, financed by ‘lavish credit to private households’, thereby ‘buying time for the existing social and economic order’.<sup>135</sup> Discourse theorists influenced by Foucault have highlighted how individuals are increasingly encouraged to behave like responsible credit users who ‘learn to exploit credit markets appropriately’. Lazzarato argues in *The Making of the Indebted Man*<sup>136</sup> that in contemporary society with fewer traditional ‘sites of discipline’, such

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<sup>129</sup> Howard above n 26, 1069.

<sup>130</sup> See Engelbert Stockhammer, ‘Rising Inequality as a Cause of the Present Crisis’ (2015) 39 *Cambridge Journal of Economics* 935; Ramsay, above n 16, ch 1.

<sup>131</sup> See Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, 2016) 20. Milanovic notes also the large rise in inequality where ‘within-nation inequalities in the rich world have increased during the past twenty-five to thirty years’.

<sup>132</sup> For a review of studies see Basak Kus, ‘Sociology of Debt States, Credit Markets and Indebted Citizens’ (2015) 9(3) *Sociology Compass* 212.

<sup>133</sup> ‘Cynical as it may seem, easy credit has been used as a palliative through history by governments that are unable to address the deeper anxieties of the middle class directly’: Raghuram Rajan, *Fault Lines: How Hidden Fractures Still Threaten the World Economy* (Princeton University Press, 2010) 8–9.

<sup>134</sup> See Colin Crouch’s discussion of ‘Privatised Keynesianism’ in Colin Crouch, ‘Privatised Keynesianism: An Unacknowledged Policy Regime’ (2009) 11 *British Journal of Political and International Relations* 382.

<sup>135</sup> Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2013) 4. See also discussion in David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

<sup>136</sup> Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neo-Liberal Condition* (MIT Press, 2012).

as the factory, a society of control now exists,<sup>137</sup> where the creditor-debtor relationship has become more central to contemporary capitalism than the capital–labor relationship. The power to control and constrain debtors ‘does not come from outside, as in disciplinary societies, but from debtors themselves’.<sup>138</sup> This shaping of individual subjectivity may be through government promotion of financial literacy, or technologies of credit scoring, with credit bureaux performing a sorting and disciplining role.<sup>139</sup> Individuals are encouraged to check their credit score and improve their credit rating. They must learn to live with debt.<sup>140</sup> Consumers are enlisted as regulatory subjects to make credit markets competitive (for example, through switching behaviour) and by policing ‘internalities’ such as impulsiveness or myopia, which might result in over-indebtedness. This is the world of the responsible borrower.<sup>141</sup>

The idea of debt as a disciplining force is not new. Calder argued that the rise of instalment debt in the US, which required individuals to adjust to the discipline of monthly payments, extended the discipline of the Fordist factory system to private consumption.<sup>142</sup> He also documents the efforts of elite opinion makers to normalise and legitimise consumer debt, for example changing its description from ‘consumptive’ to consumer debt in the 1930s. This conscious creation of a debt culture was supported both by labour and business interests in the US.<sup>143</sup>

Marxist analyses link both material conditions and ideological factors to paint a picture of exploitative credit, where financial institutions have increasingly turned to value-extraction from consumers as a source of profit,<sup>144</sup> legitimated by liberal credit narratives. Soederberg argues that capital exploits low income workers through the credit system, a form of secondary exploitation which fails to address the continuing problem of falling profits, low productivity and stagnant wages. The law structures and legitimates this exploitation through what she terms the Debtfare State as one component of the neoliberal state. A neo-liberal discourse of the ‘democratisation of credit’, ‘financial inclusion’, and ‘consumer protection’ legitimates this exploitation. The democratisation of credit to poorer individuals substitutes for secure jobs; ‘financial inclusion’ masks the often poor credit terms which many workers obtain; and consumer protection relies on ‘individualized market based protection rather than the welfare

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<sup>137</sup> See Gilles Deleuze, ‘Postscript on the Societies of Control’ (1992) 59 *October* 3. This idea of ‘governmentality’ where individuals experience discipline and shaping at many sites — the workplace, school — is a characteristic of neo-liberal ‘governing at a distance’.

<sup>138</sup> Lazzarato, above n 136, 69.

<sup>139</sup> See Marion Fourcade and Kieran Healy, ‘Classification Situations: Life Chances in the Neoliberal Era (2013) 38 *Accounting, Organizations and Society* 559.

<sup>140</sup> Lazzarato, above n 136, 112: ‘Learning how to “live with debt” has now been made part of certain American school curricula’. See also Iain Ramsay, ‘Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in an Informational Economy’ in Niemi, Ramsay and Whitford, above n 21, 38.

<sup>141</sup> Lazzarato, above n 136, 104. Individuals ‘develop a way of life, discipline, attitudes and conduct appropriate to the “indebted man” [sic] who should learn to exploit credit markets appropriately’.

<sup>142</sup> See eg Lendol Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (Princeton University Press, 2009). Calder drew on Jean Baudrillard: J Baudrillard, ‘The Consumer Society’, *Selected Writings* (Stanford University Press, 2001) 81. This point was also made by David Caplovitz in the 1970s: D Caplovitz, ‘The Social Benefits and Costs of Consumer Credit’ in RM Goode (ed), *Consumer Credit* (Leyden, 1978).

<sup>143</sup> This shift in the ideology of debt was part of a more general shift to consumerism in the US which was promoted by Ordoliberal writers such as Walter Lippman to reduce class conflict between capital and labour: James Q Whitman, ‘Consumerism versus Producerism: A Study in Comparative Law’ (2007) 117 *Yale Law Journal* 340, 361.

<sup>144</sup> Paulo L Dos Santos, ‘On the Content of Banking in Contemporary Capitalism’ (2009) 17 *Historical Materialism* 180.



state'.<sup>145</sup> Bankruptcy processes address the problems of higher level of default in this system through increased disciplining measures such as mandatory counselling, means testing, more repayment alternatives, and processes which delay the opportunity to declare bankruptcy. According to Soederberg, the US's Bankruptcy Abuse Prevention and Consumer Protection Act 2005 ('BAPCPA') represents the raw power of capital to reduce the scope of bankruptcy's fresh start.<sup>146</sup> Bankruptcy also legitimates the system by individualising failure and responsibility, neutralising collective responses to debt. The increased focus on repayment alternatives to straight bankruptcy reduces losses, forces responsibility onto consumers and suggests that straight debt forgiveness is a suppressed political alternative in contemporary society. Soederberg does not provide any reform proposals beyond those of guaranteeing a living wage and public provision for basic social needs.<sup>147</sup> This radical critique is not fundamentally different from contemporary critiques of the US system by progressive scholars such as Katherine Porter, Jacob Hacker<sup>148</sup> or Jay Westbrook. Progressives recognise the need to change income support and healthcare systems, but they probably assume, unlike Soederberg, that bankruptcy is a potentially useful institution which can be reformed to address the limits of the current system.

Soederberg's critique overgeneralises and lacks attention to empirical and historical facts. For example, it is difficult to adopt her characterisation of the US Bankruptcy Reform Act 1978 as 'burdensome' to debtors.<sup>149</sup> However, the radical approach may be useful for framing future research. It underlines the importance of discourse and narratives in shaping both social and individual understanding of debt, default and insolvency, and provides a potential grid for analysing existing findings. I outlined earlier the important role of insolvency statistics in shaping official narratives of failure. Further studies might explore the relationship of professional discourses of failure to individual debtors' narratives and what debtors learn from the process, relating these findings to studies of individuals' relationship to law and experience of the legal system.<sup>150</sup> Such a study could provide an opportunity to understand the extent to which debtors 'buy in' to neoliberal norms, identifying their problems in personal mismanagement rather than broader structural causes.<sup>151</sup> Addressing this question may be best

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<sup>145</sup> Susanne Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (Routledge, 2014). Paul Mason in his popular book *PostCapitalism: A Guide to Our Future* (Allen Lane, 2015) 20, remarks pithily that 'we are no longer slaves only to the machine, to the 9–5 routine, we've become slaves to interest payments. We no longer just generate profits for our bosses through our work, but also profits for financial middlemen through our borrowing. A single mum on benefits, forced into the world of payday loans and buying household goods on credit, can be generating a much higher profit rate for capital than an auto industry worker with a steady job'.

<sup>146</sup> Soederberg, above n 145, 86–90; and see Linda Coco, 'Debtor's Prison in the NeoLiberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005' (2012) 49 *California Western Law Review* 1. See also the special issue of *Critical Sociology* (2014) for a series of articles on the increasingly coercive nature of debtor–creditor relations. About 100 individuals are imprisoned in England and Wales annually for non-payment of council tax. Bankruptcy is used by councils as a means of enforcing council tax.

<sup>147</sup> Soederberg, above n 145, 244.

<sup>148</sup> 'Bankruptcy can be a backstop for the worst financial collapses but was never intended as a replacement for a well-designed and robust safety net... Bankruptcy relief for approximately 1.5 million middle class families each year is ultimately an enormously wasteful, inefficient and incapable means of providing economic security to those who need it': Hacker, above n 11.

<sup>149</sup> Soederberg, above n 145, 87.

<sup>150</sup> See eg Patricia Ewick and Susan S Silbey, *The Commonplace of Law: Stories of Everyday Life* (University of Chicago Press, 1998).

<sup>151</sup> Although this may be problematic since the norm that everyone should pay their debts is not simply found in neoliberalism. See Liam Stanley, "'We're Reaping What We Sowed": Everyday Crisis Narratives and Acquiescence to the Age of Austerity', (2014) 19 *New Political Economy* 895.

achieved through rich qualitative research. Although much has been written at a high theoretical level about the shaping of individual subjectivity in neoliberalism, empirical investigation of the success of such shaping is limited.<sup>152</sup> Law and society scholarship suggests that individuals are not passive recipients of law but may resist or reinterpret laws. Understanding how different individuals approach the insolvency process and its aftermath might increase our knowledge of how individuals think about the legal process and the role of factors such as class and gender in these constructions.

## V CONCLUSION

This article sketched an emerging paradigm of personal insolvency with partial repayment alternatives as a preferred policy instrument, combined with residual immediate relief for the deserving poor. The paper documented concerns about the economic and social benefits of repayment alternatives, and the possible limits of insolvency law in addressing the problems of NINA debtors, while pointing to the need for further research. The growth of longitudinal research on the extent to which individuals receive a fresh start suggests that, while bankruptcy may benefit some groups, for others it is merely a way-station in a continuing battle with problems of debt and unstable income. Moreover, the connection between a liberal discharge procedure and the promotion of entrepreneurialism, a dominant international driver of reforms, deserves further examination.

The mixed findings of existing research on the effectiveness of the fresh start suggest the need for more evidence-based policy and greater focus on the role of credit reference systems in determining the success of the fresh start. The current wave of empirical research raises questions whether bankruptcy is a progressive institution and what its role should be within social welfare systems, whether it dampens pressures for social welfare reform, or acts as a useful signal of the need for reform. The radical critique of bankruptcy as a legitimating and disciplinary institution in contemporary capitalism merits a scholarly response. It also has the methodological message that qualitative analysis of the discourse of bankruptcy and the experience of bankrupts may increase knowledge of the extent to which bankruptcy is a progressive or disciplinary institution. The introduction of special procedures in several countries to provide debt relief for low income individuals provides the opportunity to test the possibilities and limits of the fresh start precisely for those who may fall into the category of a 'surplus population' — marginalised and low-income workers.

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<sup>152</sup> See John Clarke et al, *Creating Consumers: Creating Citizen Consumers* (Sage, 2007) 21.