Personal Insolvency in the 21st Century

A Comparative Analysis of the US and Europe

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The Rise of Personal Insolvency Law

I. Introduction

In 1883, TH Farrer, an eminent English civil servant and one of the architects of the Bankruptcy Act 1883, wrote:

> A further point of great interest is the question of making some proceeding analogous to bankruptcy applicable to the case of workmen who have little or nothing but their weekly wages so that they may in the case of insolvency be able at moderate cost and on reasonable terms, to obtain their discharge and so that the sentence of imprisonment which county court judges now inflict for willful non-payment of small debts may be reduced within the smallest compass.[1]

The answer to Farrer's question was the administration order, introduced in Joseph Chamberlain's 1883 Bankruptcy and Insolvency Act and subsequently described as the 'poor man's bankruptcy'. This permitted an individual to repay a portion of debts over a period of years and then write off any balance remaining. The administration order had a chequered career[2] in the twentieth century, influencing reforms in the United States (US) in the 1930s,[3] European reforms in the 1980s, but limping into twenty-first-century England and Wales as other mechanisms for writing down debt emerged.

In 2013, specialists from the International Monetary Fund (IMF), reflecting on their experience of advising and influencing European governments on the adoption of new personal insolvency laws in the wake of the eurozone crisis, described an emerging European model of personal insolvency as a repayment plan of three to five years with a discharge of remaining debt at the end of this period.[4] This continuity in ideas about personal insolvency relief contrasts with the massive change in the role of household debt in the economy, and its triggering of the Great Recession in 2008. Moreover the poor man's bankruptcy had become

[1] TH Farrer, *The State in Its Relation to Trade* (London, Macmillan and Co, 1883) 35–36. The discussion of bankruptcy was in a chapter entitled 'General Limits of the State on Contractual Obligations'.

[2] See discussion below, ch 4.

[3] See discussion below, ch 3.

[4] See Y Liu and C Rosenberg, *Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox* (Washington DC, International Monetary Fund, 2013).

the poor person's bankruptcy as women now represented the majority of users.[5] The IMF concluded in 2012 that recessions triggered by large increases in household debt could result in slower economic recovery than those triggered by other events.[6] Swift and effective insolvency procedures during a recession to reduce the household debt overhang could therefore have a valuable macro-economic effect by restoring consumer demand in the economy, an argument developed systematically by economists Atif Mian and Amir Sufi in their bestselling analysis of the 2008 recession, *House of Debt*.[7] In 2013, the World Bank published a report on personal insolvency, justifying the introduction of a personal insolvency discharge in terms of reducing lost productivity and costs to families and communities, while creating incentives for responsible lending and accounting practices, and allocating the risk of losses to those in the best position to spread those risks.[8] The European Union (EU) proposes greater harmonisation of personal insolvency law as part of the development of an integrated credit and capital market.[9] In the early part of the twenty-first century, personal insolvency law had become a significant market institution and ground rule of credit markets.

This book analyses the political and institutional development of personal insolvency law since 1979 in the US and Europe, while recognising that states entered this period with distinct regulatory institutions and historical baggage which helps with understanding differences in approach to personal insolvency law. The period since 1979 is remarkable for the introduction and reform of individual insolvency systems throughout Europe and other parts of the world (see Table 1.1) and increased use of these systems by over-indebted individuals.[10] This period follows the enactment of the Bankruptcy Reform Act 1978 in the US, the election of Margaret Thatcher in the United Kingdom (UK) in 1979, the increasing influence of neo-liberalism, and the growth of household debt as a driver of the economy[11]

[5] See ch 3 section VI.

[6] IMF, *World Economic Outlook* (Washington DC, IMF, 2012) 91. See also F Bornhorst and M Arranz, 'Growth and Importance of Sequencing Debt Reductions Across Sectors' in M Schindler and others (eds), *Jobs and Growth: Supporting the European Recovery* (Washington DC, International Monetary Fund, 2014) ch 2. The Bank of England concluded in 2014 that 'there is evidence that high levels of household debt have been associated with deeper downturns and more protracted recoveries in the United Kingdom'. See P Bunn and M Rostom, 'Household Debt and Spending' (2014) 3 *Bank of England Quarterly Bulletin* 304.

[7] A Mian and A Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (Chicago, University of Chicago Press, 2015).

[8] See J Kilborn, J Garrido, C Booth, J Niemi, and I Ramsay, *World Bank Report on the Treatment of the Insolvency of Natural Persons* (Washington DC, World Bank, 2013); see also JM Garrido, 'The Role of Personal Insolvency Law in Economic Development' (2013) 5 *The World Bank Legal Review* 111. Garrido notes that the 'association between insolvency law and economic development is frequently overlooked … An effective personal insolvency law regime provides solutions for indebted persons while attaining broader goals for inclusive economic development.'

[9] See ch 6, 111.

[10] See Figure 3.3 in ch 3 for the rise in per 1,000 capita filings in England and Wales and Canada between 1987 and 2012.

[11] See for example C Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' (2009) 11 *The British Journal of Politics & International Relations* 382, 382; A Barba and M Pivetti, 'Rising

in many countries, in some acting as a substitute for stagnant wages.[12] The household debt-to-income ratio in the UK rose from 90 to 160 per cent between 1987 and 2007.[13] Increased inequality developed in many states[14] and more financial failure occurred during this period than any previous historical period.[15] Capitalism was being transformed.[16]

Table 1.1: Personal Insolvency and Debt Adjustment—Dates of Significant Legislative Change in European Jurisdictions and US since 1978

Austria	1993
Belgium	1997, 2005, 2009
Cyprus	2015
Czech Republic	2006, 2008
Denmark	1984, 2000, 2005, 2010
England and Wales	1986, 1990 (not in force), 2002, 2007, 2015
Estonia	2003, 2010
Finland	1992, 2015
France	1989, 1995, 1998, 2003, 2010, 2014
Germany	1994 (in force 1999), 2001, 2013
Greece	2010, 2013, 2015
Hungary	2015
Ireland	1988, 2012, 2015
Italy	2012
Latvia	2007, 2009, 2010, 2013

(continued)

Household Debt: Its Causes and Macroeconomic Implications—a Long-Period Analysis' (2009) 33 *Cambridge Journal of Economics* 113, 113; RG Rajan, *Fault Lines: How Hidden Fractures Still Threaten the World Economy* (Princeton, Princeton University Press, 2010). 'Cynical as it may seem, easy credit has been used as a palliative throughout history by governments that are unable to address the deeper anxieties of the middle class directly', ibid 8–9; W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London, Verso Books, 2014) 32–46. For an overview of studies see B Kus, 'Sociology of Debt States, Credit Markets, and Indebted Citizens' (2015) 9(3) *Sociology Compass* 212. See further discussion below at section III.

[12] See below, section III.

[13] See P Bunn and M Rostom, 'Household Debt and Spending in the UK', Bank of England Staff Working Paper no 554 (London, Bank of England, 2015) 1.

[14] See discussion in T Piketty, *Capital in the Twenty-First Century* (Cambridge Mass, Harvard, 2014); B Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge Mass, Harvard, 2016).

[15] See C Kindelberger and P Aliber, *Manias, Panics and Crashes: A History of Financial Crises* (Hoboken NJ, Wiley, 2005) 15. See also CM Reinhart and K Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton, Princeton University Press, 2009).

[16] Probably the best and most prescient analysis of these transformations can be found in M Castells, *The Information Age: Economy, Society and Culture* (Oxford, Blackwell, 1998).

Table 1.1: ***(Continued)***

Lithuania	2013
Luxembourg	2000, 2013
Netherlands	1998, 2007, 2008
Norway	1992
Poland	2009, 2014
Portugal	2004, 2012
Romania	2015
Russia	2015
Scotland	1985, 1993, 2002, 2007, 2010, 2014
Slovakia	2004, 2006, 2011
Slovenia	2007, 2015
Spain	2013, 2015
Sweden	1994, 2007, 2011
US	1978, 1984, 1994, 2005

Source: Author

Personal insolvency systems can be divided initially into 'old' and 'new' systems. Old systems, primarily in the common law countries, recognised from the mid-nineteenth century the possibility of an individual non-trader using the bankruptcy system to discharge debts.[17] These systems became dominated by consumers rather than businesses at different periods: in the 1930s in the US;[18] by 1971 in Canada;[19] and only in the late 1990s in England and Wales.[20] Continental Europe is a site of 'new' personal insolvency systems in states that, previous to the 1980s, had not recognised the possibility of individual non-traders discharging their debts.

Two forms of personal insolvency now exist in Europe and the US. 'Straight' liquidation bankruptcy is when an individual gives up non-exempt assets for a discharge of most unsecured debts after a period ranging from a few months in the US to three to five years in several jurisdictions.[21] The second approach envisages repayment by an individual of a proportion of their debts in return for receiving

[17] The trader requirement for bankruptcy was abolished in England and Wales in 1861.

[18] See below, ch 2.

[19] See Office of Superintendent of Bankruptcy, Canada, Annual Report, 1971 noting 3,647 and 3,045 consumer and business bankruptcies respectively and see discussion of consumer bankrupts in *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Tassé Report) (Ottawa, Government of Canada, 1970) at para 2.1.13 indicating that 'the plight of the consumer or wage-earner debtor is one of the most important problems that must be faced in the field of bankruptcy in Canada'.

[20] See below, ch 3, Figure 3.2.

[21] Canada, 9 months; UK 12 months; Australia, New Zealand, 3 years. The EU Commission proposes a period of 3 years for 'honest entrepreneurs'. See discussion below, ch 6.

a discharge of the remainder after, typically, three to five years. The US, Canada, and the UK have both alternatives, while the repayment model is the dominant European model. That consumers should make an income contribution where possible rather than use straight bankruptcy is a dominant contemporary theme. Controversial is how much income or how great an attempt at payment should be made by a debtor as the price of a discharge. Liberal access to straight bankruptcy with a relatively swift discharge is increasingly a 'suppressed political alternative' for consumers, even in those jurisdictions such as England and Wales where it is available to consumers.[22]

The introduction of debt relief mechanisms in Europe followed the period of credit and capital liberalisation of the 1980s. Two 'critical junctures'[23] occurred. The first was in the late 1980s and 1990s, and included a banking crisis in the Nordic countries, a mini sub-prime crisis in France, and Germany's adjustment to reunification, all of which resulted in a first wave of debt adjustment laws, in some cases intended to be temporary (France), in others layered on to an existing business bankruptcy reform (Germany). The US model of Chapter 13—the income repayment chapter of the US Bankruptcy Code—the English administration order, and an earlier Danish reform influenced these reforms.[24] In all continental EU countries the US idea of a straight discharge for debtors was considered and rejected and significant periods of debt repayment were required before the possibility of a discharge. In France the original objective of the law was that individuals would repay all debts over time. These reforms experienced initial negative feedback about the institutional processes adopted and the ability of individuals to access relief. In France the courts were overloaded. In Germany and Sweden many debtors went through a fruitless attempt at a voluntary settlement before being able to access judicial debt relief. In all countries many individuals had no repayment capacity and few assets. Reforms addressing these process issues were often driven by concerns about reducing judicial costs. Other aspects, such as increasing access and reducing the waiting period before discharge, proved more intractable to change, resulting in phenomena such as zero-repayment plans while individuals waited for a discharge. During the 2000s, new EU Member States in central and Eastern Europe adopted insolvency legislation, often following the less than optimal German model.[25]

[22] See discussion below, ch 3.

[23] A 'critical juncture' is a period of 'contingency during which the usual constraints on action are lifted or eased.' J Mahoney and KA Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge, Cambridge University Press, 2010).

[24] Jason Kilborn has provided valuable accounts in English of the development of these systems. See eg J Kilborn, *Comparative Consumer Bankruptcy* (Durham NC, North Carolina Press, 2007); J Kilborn, 'Twenty Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark' (2009) 18 *International Insolvency Review* 155.

[25] For a trenchant critique of the operation of the German law in the 2000s by one of the few systematic empirical studies of the German system see W Backert, D Brock, and K Maischatz, 'Bankruptcy in Germany: Filing Rates and the People Behind the Numbers' in J Niemi, I Ramsay, and WC Whitford (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*

The Great Recession and subsequent eurozone crisis are the second critical juncture. In the US the issue of writing down mortgage balances in bankruptcy, a response to the foreclosure crisis, was raised but defeated in Congress.[26] The troika (EU Commission, IMF, and European Central Bank) and the European Semester (the annual cycle of economic policy guidance and surveillance) required or strongly recommended the introduction and revision of corporate and individual insolvency laws in several countries, including Spain, Portugal and Greece, either as a condition of bailouts or under the new EU monitoring of the stability pacts.[27] In Ireland, reforms were underway but the international institutions influenced modifications to the original proposals.[28] Since international standards did not exist for personal insolvency,[29] and little systematic empirical study existed of consumer insolvency schemes in Europe, the international agencies were forced to make policy 'on the hoof' as they went along.[30] The Great Recession stimulated a rethinking of the role of household debt regulation and individual bankruptcy in the European project of achieving an integrated credit and capital market.

Significant differences continue to exist within the European systems and between these systems and the US system in terms of access criteria, institutional frameworks, discharge conditions and the financing of systems. This book began as a study in comparative public policy in an attempt to explain these differences. Part of the answer for existing differences lies simply in timing rather than deep-seated cultural differences between countries. Although Anglo-Saxon systems were not designed for consumers, and the discharge was a mechanism for obtaining debtor cooperation,[31] these systems could be converted to consumer use, sometimes by enterprising private intermediaries, without the high political costs of legislative reform. This low-visibility method of bringing about change often resulted in subsequent legislative acceptance of the practices that seemed

(Oxford, Hart Publishing, 2009). They note that many debtors have no repayment capacity: 'It has to be questioned whether there is much sense in a six-year-long period of good conduct (*Wohlverhalten*) before discharge from remaining debts is allowed. Why should people be kept under financial "probation" when there is no recognizable output for creditors and there is evidence of poor quality of life for debtors?'

[26] See below, ch 2 section V.A.

[27] See below, ch 6.

[28] For discussion of the Irish reform process see J Spooner, 'Long Overdue: What the Belated Reform of Irish Personal Insolvency Law Tells Us about Comparative Consumer Bankruptcy' (2012) 86 *American Bankruptcy Law Journal* 243: J Spooner, 'Sympathy for the Debtor? The Modernization of Irish Personal Insolvency Law' (2012) 25(7) *Insolvency Intelligence* 97.

[29] In contrast to corporate insolvency, where the United Nations Commission on International Trade Law (UNCITRAL) Guidelines are used by the international agencies to assess countries insolvency laws.

[30] Susan Block-Lieb expresses it nicely as 'shooting from the hip'. S Block-Lieb, 'Austerity, Debt Overhang, and the Design of International Standards on Sovereign, Corporate, and Consumer Debt Restructuring' (2015) 22 *Indiana Journal of Global Legal Studies* 487.

[31] See J McCoid II, 'Discharge. The Most Important Development in Bankruptcy History' (1996) 70(1) *American Bankruptcy Law Journal* 163.

to be meeting a social need. David Moss and Gibbs Johnson note the relatively unplanned rise of individual insolvency law in the US, commenting that 'at least since the beginning of the twentieth century students of consumer bankruptcy have found it to be a bewildering institution. No-one it appears ever intended to create it.'[32] In contrast, introducing a 'right not to pay one's debts'[33] in countries such as France and Sweden in the late 1980s entailed the high political costs of successfully introducing legislative change in the face of a powerful financial lobby. It is not surprising that the initial attempts to do so were hedged in by significant controls on access or the possibilities for discharge of debt.

Chapters two to five examine changing personal insolvency law and policy in the US, England and Wales, France, and Sweden, and outline the relevant political interests, the political and institutional context, and the role of narratives in framing policy choices in each country. These countries were chosen for several reasons. First, the US credit and bankruptcy system often serves as an international model to be either emulated or avoided. It influenced initial European reforms[34] in the 1990s and, more recently, European policymakers and think tanks argue that the US has recovered more swiftly than the EU states from the recession because of its liberal bankruptcy laws that permit a fresh start.[35] I therefore consider US bankruptcy law in a longer historical frame to illustrate the continuing conflicts within the US over the terms on which individuals should be able to discharge debts. England and Wales has, notwithstanding its similar legal origins, followed a different trajectory from the US in personal insolvency. France has developed a unique system to manage over-indebtedness, which is sometimes held up as an international model for developing countries,[36] and Sweden represents a personal insolvency system within a Scandinavian model of capitalism and social welfare.

Existing literature identifies distinct classifications of personal insolvency systems. Nordic countries are associated with a 'welfarist' perspective, while the French over-indebtedness system is conceptualised as consumer protection and

[32] D Moss and G Johnson, 'The Rise of Consumer Bankruptcy: Evolution, Revolution or Both' (1999) 73 *American Bankruptcy Law Journal* 311.

[33] I take the phrase from the title of Ripert's article in the 1930s. See G Ripert, '*Le droit de ne pas payer ses dettes*' (1936) *Dalloz, Recueil Hebdomadaire Chronique* 57.

[34] See N Huls, 'American Influence on European Consumer Bankruptcy Law' (1992) 15 *Journal of Consumer Policy* 125, 135–37.

[35] V Jourova (Director General, Justice), 'Insolvency Law in Europe—Giving People and Businesses a Second Chance' (speech at the Conference on 'Insolvency law in Europe: current trends and future perspectives', Jurmala, Latvia, 23 April 2015) http://ec.europa.eu/commission/2014-2019/jourova/announcements/insolvency-law-europe-giving-people-and-businesses-second-chance_en: '[I]n the U.S. the average debt discharge period is less than one year, while in most EU countries it's between five and seven years. There is evidence which shows that shorter discharge periods allowed U.S. households to recover more quickly from the crisis.' See also G Steinhauser and M Dalton, 'Lingering Bad Debts Stifle European Recovery' *Wall St Journal* (New York, 31 January 2013).

[36] For example, influencing reform proposals in Brazil and see Consumers International, *Model Law on Family Insolvency for Latin America and the Caribbean* (2011), www.consumersinternational.org/media/880320/a%20model%20law%20on%20family%20insolvency%20for%20latin%20america%20and%20the%20caribbean.pdf.

the US system as market regulation.[37] These images are helpful but may not capture the contemporary reality of these systems. Thus chapter five indicates that Sweden does not represent a social welfare approach to debt relief, for example, but is, rather, a tough creditor-oriented system. Jan Heuer has provided an empirically based classification of the underlying normative structure of individual insolvency laws. The 'market model' (US, Canada) provides a swift discharge, allocating market risks to creditors as superior risk-bearers and ensuring the reentry of the debtor to the credit market. The 'restrictions model' (England and Wales, Scotland, Australia, New Zealand) has similarities to the market model but includes significant restrictions on debtors as a mechanism of public protection. The 'liability model' (Germany, Austria) emphasises the individual responsibility of debtors for repayment. Finally, the 'mercy model' (Denmark, Finland, Norway, Sweden, France) represents needs-based systems where the nature and scope of relief offered debtors is significantly dependent on the discretionary decisions of bureaucratic decision makers.[38]

Heuer's classification underlines the normative ideas underlying the different systems carried into effect, for example in Germany, with the requirement of the repayment period before discharge, the integration of debt counsellors into the system to teach consumers the proper norms of credit behaviour, and the obligation to search for work during the repayment period. This approach smacks of the influence of German ordoliberal ideas of the responsible citizen.[39] These normative ideas may also reflect political interests. The initial German legislation represented agreement between the German banks and debt counsellors on the importance of the period of good behaviour before the possibility of discharge.

The differences between insolvency systems reflect historical contingency and the influence of political interest groups and ideas. The German example of the confluence between ideas and political interest groups suggests that we should be cautious of attributing the current German system to cultural causes. The differences between European regimes raises the question of the extent to which these systems may be converging, with both the internationalisation of household credit and as a consequence of the Great Recession of 2008. Chapter six moves the analysis, therefore, to the international level and discusses the emergence of an international 'common sense' about personal insolvency in the wake of the Great Recession, as international and regional actors paid greater attention to the role

[37] See J Niemi, 'Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy' in J Niemi, I Ramsay, and W Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Oxford, Hart Publishing, 2003) 41–60.

[38] See J Heuer, 'Social Inclusion and Exclusion in European Consumer Bankruptcy Systems' (on file with author) and J Heuer, 'Private Überschuldung und Sozialpolitik: Varianten der staatlichen Regulierung von Verbraucherinsolvenz und Rechtschuldbefreiung' (2015) 61(3) *Zeitschrift für Sozialreform* 315.

[39] See the discussion of ordoliberalism in M Foucault, *The Birth of Bio-Politics, Lectures at the College of France* 1978–79 (A Davidson (ed), trans G Burchell) (Basingstoke, Palgrave Macmillan, 2010) 81 where the state, according to Ludwig Erhard, establishes 'both the freedom and responsibility of the citizens'.

of household debt in contributing to financial instability and prolonging debt-fuelled recessions. Writers claim that a transnational legal order[40] of corporate insolvency norms has now spread throughout the world. I do not make such a broad claim but do suggest a common set of ideas emerging through 'good practices' and 'cross-country experience'. The troika and European Semester imposed insolvency reforms on some countries and the EU promotes harmonisation of insolvency norms as an element of the ground rules of an integrated retail credit market. The historical trader/non-trader distinction surfaces again in contemporary EU proposals with a liberal discharge promoted for entrepreneurs but a more cautious approach adopted towards consumers.

Finally, chapter seven poses the question of whether the development of personal insolvency law since the early 1980s represents a progressive step. This might seem an odd question since most writers conceptualise personal insolvency law as providing relief from hardship. It represents part of a social safety net, a socially provided insurance,[41] and perhaps a last-gasp addition to other social protections.[42] The World Bank argues that providing a fresh start for debtors in personal insolvency may increase productivity and promote entrepreneurialism and economic stability. However, finding reliable evidence demonstrating the contribution of insolvency law to these objectives is not easy and is a task compounded by the difficulties of longitudinal study of bankrupts and obtaining a reliable counterfactual control population. Studies have questioned whether individuals do obtain a fresh start[43] and US studies have questioned the benefits of Chapter 13—the

[40] Gregory Shaffer defines transnational legal ordering as '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'. G Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge, Cambridge University Press, 2013) 6–7. See below, ch 6.

[41] Elizabeth Warren and Jay Westbrook argue that 'the genius of the Western democracies has been maintaining the lively edge of capitalism while preserving social stability and productivity through various devices that contain the market's inevitable shocks to individuals and communities. Bankruptcy is an integral part of that machinery.' See E Warren and JL Westbrook, *The Law of Debtors and Creditors: Text, Cases, and Problems* (New York, Aspen Law & Business, 2006) 353–54.

[42] See discussion of the relationship between regulatory private law protections (such as insolvency) and the welfare state in H Haber, 'Regulation as Social Policy: Home Evictions and Repossessions in the UK and Sweden' (2015) 93(3) *Public Administration* 806.

[43] See eg E Cohen-Cole, B Duygan-Bump, and J Montoriol-Garriga, 'Who Gets Credit after Bankruptcy and Why? An Information Channel' (2013) 37 *Journal of Banking & Finance* 5101 (limited debt availability after bankruptcy). See also S Han and G Li, 'Household Borrowing after Personal Bankruptcy' (2011) 43 *Journal of Money, Credit and Banking* 491; S Han and W Li, 'Fresh Start or Head Start? The Effects of Filing for Personal Bankruptcy on Work Effort' (2007) 31 *Journal of Financial Services Research* 123. For a study on the limited effects of Swedish restructuring law see R Ahlström, S Edström, and M Savemark, 'Is Debt Relief Rehabilitative? An Evaluation of Debt Relieved Persons' Health, Life Quality and Personal Finances Three Years after Conducted Debt Relief' 2014:15 (Stockholm, The Swedish Consumer Agency, 2014); R Ahlström, S Edström, and M Savemark, 'Over-Indebtedness as a Risk Factor for Inequality in Health and Life Quality among Swedes—A Survey of Debts, Health and Living Conditions among Over-indebted Households in Sweden' (Stockholm, The Swedish Consumer Agency, 2014); R Ahlström, 'The Costs to Society of Over-indebtedness

repayment model—for many homeowners, but a recent econometric study claims that it is beneficial in mitigating the consequences of financial distress.[44]

A darker vision of insolvency law is that it performs both a disciplining and legitimating function in a debt-driven neo-liberal economy, depoliticising class conflict between debtors and finance capital. Within this vision, consumer debt is a secondary form of exploitation of the surplus population, which staves off rather than solves the problems of falling rates of productivity and stagnant wages. The higher levels of default within this system confers a disciplining role on personal insolvency law which individualises failure, concealing its class dimensions. Within this view, the history of US bankruptcy law since 1978 is one of financial interests promoting measures to discipline debtors through means testing and required counselling.[45] The US Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) of 2005 represents within this narrative the power of the financial lobby to restrict access to bankruptcy and increase corporate profits.

Susanne Soederberg's analysis highlights the contrasting characterisations of insolvency law as social control and individual empowerment. Whichever perspective is adopted, class issues are significant. Unequal access to debt relief is a political powder keg. In 1883, the English[46] administration order was intended to address the criticism that bankruptcy and a discharge of debts was only available to the middle classes while working-class debtors suffered imprisonment for debt. During the recent eurozone crisis, political movements organised around mass write downs of debt in Spain and Greece. The European Central Bank (ECB) in 2015 recognised the issues of political legitimacy raised by the existence of different standards of debt restructuring for corporate and individual debtors. The availability of personal insolvency law was 'important to ensure that the political appetite for resolving less socially sensitive NPE portfolios is not undermined'.[47]

in Sweden—Loss of Production, Health Care Expenditures, Sick-Leave and Disability Pensions' (The Swedish National Audit Office, 2015). I discuss further these issues in ch 6, in particular the relationship between insolvency laws and entrepreneurialism, in the context of EU proposals for a Directive to harmonise insolvency law.

[44] See eg K Porter, 'The Pretend Solution: An Empirical Study of Bankruptcy Outcomes' (2011) 90 *Texas Law Review* 103; S Green, P Patel, K Porter, 'Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes' (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839060) noting at 1 that 'study after study … has found that only about one-third of consumers who enter chapter 13 complete their repayment plans and therefore receive a discharge'; cf W Dobbie and J Song, 'Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection' (2014) 105 *American Economic Review* 1272.

[45] See eg S Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (London, Routledge, 2014) 49, 86–87, 95–97. See discussion below, ch 7.

[46] Reference to England includes England and Wales. Scotland has its own bankruptcy and insolvency laws.

[47] ECB, *Financial Stability Review* (Frankfurt, ECB, May 2015) 148.

II. Explanations for Stability and Change in Personal Insolvency Law

Explanations of the development of personal insolvency laws include functionalism, the idea that legal changes respond to the needs of a society,[48] interest group analyses,[49] national cultural values,[50] or 'legal origins', which argues that the French civil law jurisdiction and the common law jurisdictions exhibit different styles of legal regulation.[51] These approaches provide important insights and I draw on them throughout the book. An interest group perspective highlights the role of financial interests as long-term repeat players who can shape personal insolvency law in arenas of both 'quiet' and 'loud' politics,[52] as well as through the market. Appeals to national culture or legal origins draw attention to the role of history and ideas in shaping the law, and a tendency to turn to existing institutions to solve new problems. Cultural explanations may, however, underplay historical conflicts, the role of political interest groups in promoting particular ideas, and the instrumental use of cultural arguments, images and myths.[53] Culture tends to provide a toolkit[54] of arguments in political debates over bankruptcy rather than a set of binding constraints.

Contemporary personal insolvency laws are not the outcome of a single political conflict, and a comparative study of their stability and change is a study of politics over time.[55] I draw, therefore, on aspects of historical institutionalism[56]

[48] See I Ramsay, 'Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales' (2006) 7 *Theoretical Inquiries in Law* 625, 645–64. For a systematic analysis and critique of functionalism see R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 1st edn (Oxford, Oxford University Press, 2006).

[49] These have often drawn on public choice analysis. For work on the US system see EA Posner, 'The Political Economy of the Bankruptcy Reform Act of 1978' (1997) 96 *Michigan Law Review* 47; DA Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, Princeton University Press 2014) 14, 15. For Canada see I Ramsay, 'Interest Groups and the Reform of Canadian Consumer Bankruptcy Law' (2003) 53 *University of Toronto Law Journal* 379.

[50] See N Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *Boston College International and Comparative Law Review* 1.

[51] R La Porta, F Lopez-de-Silanes, and A Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.

[52] P Culpepper, *Quiet Politics and Business Power Corporate Control in Europe and Japan* (Cambridge, Cambridge University Press, 2011).

[53] See discussion in J Spooner, 'Fresh Start or Stalemate?' European insolvency law reform and the politics of household debt' (2013) 21(3) *European Review of Private Law* 747.

[54] P DiMaggio, 'Culture and Cognition' (1997) 23 *Annual Review of Sociology* 263.

[55] P Pierson, *Politics in Time: History, Institutions, and Social Analysis*, 1st edn (Princeton, Princeton University Press, 2004).

[56] Historical institutionalism covers a broad range of writing. Influential texts include: Pierson, ibid; J Mahoney, D Rueschemeyer, and KA Thelen (eds), 'How Institutions Evolve: Insights from Comparative Historical Analysis' in J Mahoney and D Rueschemeyer (eds), *Comparative Historical*

which conceptualises policy changes as resulting from both exogenous (societal changes) and endogenous forces, steering a middle path between views of law as an autonomous institution or an unrefined functionalism. This approach is useful for understanding personal insolvency law, which is both a highly technical subject with its own internal dynamics and professional corps, and also is an area affected by socio-economic and political change, party politics and public values such as promise keeping, personal responsibility and relief of hardship. The chapters on individual countries highlight the role of different interest groups and narratives operating within different institutional frameworks. These institutional differences include the role of parliaments, government bureaucracies, expert committees and courts in creating and developing the law. The institutional fragmentation of US politics, with its many veto points, makes 'big bang' changes difficult.[57] It is not easy to displace existing legislation. This contrasts with the 'elective dictatorship' of the UK parliamentary model, and the important role of technocracies in France and Sweden.[58] The US legislative structure may permit more opportunities for interest group provisions, and the decentralised implementation of the US Bankruptcy Code allows for experimentation and learning. The persistence of 'local legal culture' is one example.[59]

The timing of change may be significant. I have already mentioned the significance of the early abolition of the trader criterion for insolvency in many common law jurisdictions. Path dependency[60] suggests that relatively contingent historical

Analysis in the Social Sciences (Cambridge, Cambridge University Press, 2000); W Streeck and K Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in W Streeck and K Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford, Oxford University Press, 2005); J Mahoney and K Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge, Cambridge University Press, 2010). A useful outline of the different varieties of institutionalism is provided in VA Schmidt, 'Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"' (2010) 2 *European Political Science Review* 1. Examples of applications by legal scholars include OA Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 *The Iowa Law Review*; J Bell, 'Path Dependence and Legal Development' (2012) 87 *Tulane Law Review* 787.

[57] The Bankruptcy Reform Act 1978 was enacted 10 years after the creation of the Bankruptcy Reform Commission and the BAPCPA 10 years after creation of the National Bankruptcy Review Commission. For chronological histories of these enactments see KN Klee, 'Legislative History of the New Bankruptcy Code' (1980) 54 *American Bankruptcy Law Journal* 275. For BAPCPA, see S Jensen, 'A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005' (2005) 79 *American Bankruptcy Law Journal* 485.

[58] See S Steinmo, *The Evolution of Modern States: Sweden, Japan, and the United States* (Cambridge, Cambridge University Press, 2010); M Prasad, *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, and the United States* (London, University of Chicago Press, 2006) 238–39. And see discussion below, ch 4.

[59] See TA Sullivan, E Warren, and JL Westbrook, 'Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts' (1994) 17 *Harvard Journal of Law & Public Policy* 801. The persistence of state differences in the use of Chapter 13 and Chapter 7 suggests that learning may be modest.

[60] For an excellent discussion of this concept see Pierson, *Politics in Time* (n 55) 44–53.

choices may have long-term and unintended effects[61] resulting in an institutional structure that may be difficult to change.[62]

A critical juncture may provide an opportunity for change agents or policy entrepreneurs to provide new diagnoses of a policy area and promote an agenda for change. The Great Recession of 2008 represented such a juncture and its impact on personal insolvency law is examined in chapter six. Critical junctures may not only be exogenous events such as a severe economic downturn, but also may arise from a puzzle about existing explanations of social phenomena—for example, why do bankruptcies continue to increase during an apparently buoyant economic period? These events provide opportunities for policy actors to provide new diagnoses and agenda for change.

Reference to critical junctures suggests a picture of stability punctuated by dramatic change. However, a study of the law in action often highlights the many low-visibility realms of change and sites of political conflict over personal insolvency norms as different groups promote particular practices and interpretations. Even if we focus initially on the law in books, many important changes in insolvency law are introduced not through primary legislation but through circulars, court rules, protocols and guidelines.[63] Table 1.1, which documents primary legislation, underestimates therefore the continuing adjustments and changes to insolvency law. This is often the arena of quiet politics, a seemingly technical low-visibility

[61] David Skeel drew on path dependency when arguing that US consumer bankruptcy law, with its early rejection of English 'officialism' in 1898, and reliance on courts, set in train the need for lawyers and judges in the administration of bankruptcy. The subsequent opposition of these groups to an administrative system increased the costs of political attempts in the 1930s during the New Deal, and again in the 1960s, to substitute an administrative model based on the English Official Receiver model. If the 1898 US Bankruptcy Act had been first introduced in the 1930s an administrative model might have been adopted. 'The best way to appreciate how U.S. bankruptcy law could have taken a very different look is to consider a simple counterfactual. Suppose the nation had continued without a federal bankruptcy law into the twentieth century. If federal bankruptcy had remained precarious into the New Deal, Congress might have dealt with insolvency issues quite differently … Each of the other strands [of the New Deal safety net] is administrative rather than judicial in nature. It does not take too great a leap of imagination to speculate that New Deal lawmakers, if they had been writing on a clean slate, might well have crafted an administrative bankruptcy system.' Skeel, *Debt's Dominion* (n 49) 100.

[62] The 'dead weight of previous institutional choices' may limit the subsequent room to manoeuver. JS Hacker, *The Divided Welfare State: The Battle Over Public and Private Social Benefits in the United States* (Cambridge, Cambridge University Press, 2002) 54.

[63] The implementation of legislation may itself be dependent on executive decrees, which provide a potential veto point. See discussion below in ch 3 section III about the failure of the executive to implement legislation reforming the administration order in England and Wales. This low visibility of decision-making can sometimes mislead. Thus, two political scientists claimed that England had revised its consumer bankruptcy law in 1990 with the passage of s 13 of the Courts and Legal Services Act which permitted discharge of debts after a three-year administration order. See W Schelkle, 'A Crisis of What? Mortgage Credit Markets and the Social Policy of Promoting Homeownership in the United States and in Europe' (2012) 40 *Politics & Society* 59; G Trumbull, *Strength in Numbers: The Political Power of Weak Interests* (Cambridge, Harvard University Press, 2012). But although the Bill for the Act was enacted by Parliament, s 13 has never been brought into force. This veto had a major impact on the balance of public and private repayment alternatives in England and Wales.

world of little interest to politicians and the public.[64] Implementation by courts and officials may convert a law from its original purpose or frustrate its objectives. The hostility of many US bankruptcy judges to provisions of the 2005 BAPCPA amendments, fuelled by the failure of Congress to consult them on its passage, may have contributed to the failure of some provisions to achieve their objective.[65] Private actors and intermediaries may achieve substantial change in individual personal insolvency law through inventive 'conversions'[66] of laws to serve unintended objectives. Entrepreneurial accountants converted the individual voluntary arrangement (IVA) in England and Wales, intended to provide relief for company directors, into a mass-produced consumer remedy.[67] Groups may also undermine intended legislative objectives, as finance companies did for the 'fresh start' in the US in the 1950s and 1960s.[68] This study of the role of private actors in the conversion of law illustrates the limits of institutional design. Bankruptcy legislation in the US has favoured repeatedly the idea of Chapter 13 repayment plans for consumers, but only with modest success.[69]

Institutionalists have developed a useful vocabulary of 'conversion', 'drifting',[70] and 'layering' to describe political strategies of change and stasis.[71] I have already mentioned the significance of conversion. Drifting is the politics of inaction and in chapter three is illustrated by English developments. Layering 'the addition of new rules which do not displace existing rules but operate on top of or alongside existing rules and policies', may 'alter or compromise' an existing institution.[72] Layering may occur because of the high political costs of direct legislative repeal.[73] It may reflect a political strategy to undermine existing law by adding an exception that over time provides a precedent for a more direct displacement of existing law. The 'substantial abuse' amendment introduced by financial interests in the 1984 US bankruptcy reform legitimated the idea that a significant group of individuals

[64] See my discussion in I Ramsay, 'Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada' (2003) 53 *University of Toronto Law Journal* 379, 412–18 and the discussion of the development of the individual voluntary arrangement protocol in England and Wales in ch 3 section V.A.

[65] See discussion of the failure of the serial filing provisions in ch 3 (at n 151).

[66] 'Conversion' describes a situation where the rules remain the same but are interpreted or implemented differently by actors who 'actively exploit the inherent ambiguities of the institutions'. Mahoney and Thelen, *Explaining Institutional Change* (n 56) 17.

[67] See below, ch 3 section IV.

[68] See below, ch 2 section III.

[69] See generally, ch 2 section III.

[70] Mahoney and Thelen, *Explaining Institutional Change* (n 56) 17: '*Drift* occurs when rules remain formally the same but their impact changes as a result of changes in external conditions (citing JS Hacker, 'Policy Drift: The Hidden Politics of US Welfare State Retrenchment' in W Streeck and K Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies*, 1st edn (Oxford, Oxford University Press, 2005). When actors choose not to respond to such environmental changes, their very inaction can cause change in the impact of the institution.'

[71] Hacker states that these are often 'covert strategies that political actors adopt when trying to transform embedded policy commitments': ibid 16.

[72] See Mahoney and Thelen, *Explaining Institutional Change* (n 56) 15.

[73] See below, ch 2 section IV, concerning the strategy of financial interests in the US after the Bankruptcy Reform Act 1978.

were abusing bankruptcy and assisted in developing the personal responsibility agenda that dominated the 2005 amendments. Layering may also result simply in contradictions within a statute. This may be said to have been the consequence, in 2002, of the English layering of an entrepreneurialism agenda onto a statute encrusted with the historical, quasi-criminal status of bankruptcy.

Terence Halliday and Bruce Carruthers draw on both institutional insights and sociolegal studies to propose a cyclical theory of legal change that they describe as 'recursivity'.[74] This theory claims that much lawmaking goes through cycles. New laws often contain ambiguous and contradictory provisions that result in unintended consequences, conflicting interpretations and creative compliance, generating a further round of reform that ultimately results in a settling of the law on a new equilibrium. These cycles of reform may often be triggered by scandals or crises. Halliday and Carruthers point to US corporate bankruptcy law as an example with recursive episodes during the 1890s, 1930s and late 1970s. Applying their analysis to the development of international corporate bankruptcy norms after the Asian financial crisis, they conclude that this process of change is one of 'trial and error', 'innovation and adaptation', and 'learning from experience'. While convergence may exist at a level of global principles, much variation continues at the level of local implementation and the law in action.[75]

Halliday and Carruther's analysis might seem applicable to personal insolvency law with a cycle of reforms in Europe beginning in the 1980s, with states initially 'muddling through' with partially effective laws being adjusted over time, sometimes by courts, or legislatures, in other cases by private intermediaries. The Great Recession triggered a further cycle of reforms with the movement towards a new European equilibrium of individual insolvency law norms, with substantial variations in implementation and detail.

Significant differences exist, however, between the dynamics of corporate and individual insolvency development. Cross-border issues are of less significance in individual insolvency, notwithstanding the existence of 'bankruptcy tourism'.[76] In corporate insolvency law, a small group of global actors promoted the internationalisation of a modified US (Chapter 11) rescue culture based on a shared narrative of the importance of corporate insolvency to economic development and international financial stability. A similar group with a shared agenda does not exist in individual insolvency law and no country has a strong interest in internationalising its individual insolvency law. English lawyers and policymakers may be keen to make London an attractive forum for corporate restructuring, but not one for EU citizens seeking to take advantage of the liberal bankruptcy discharge in England.

[74] See T Halliday and B Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Palo Alto, Stanford University Press, 2010) 15–32; and see the initial development of this approach in T Halliday and B Carruthers, 'The Recursivity of Law: Global Norm-Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112 *American Journal of Sociology* 1135.

[75] ibid 33–35.

[76] See discussion below, ch 6 section V.

A corporate rescue model can be portrayed as making everyone better off, including creditors and the wider community, whereas individual insolvency law represents primarily a modest redistribution from creditor to debtor. Since it is also often portrayed as a redistribution from one group of consumers (those who pay their debts) to another (those who do not), personal insolvency law reform is often controversial, a hot potato best left to national actors to sort out.

A. The Role of Narratives in Personal Insolvency Policy

Narratives provide a framework of ideas about the goals of a policy, the nature of the problem addressed, and the most appropriate instruments to achieve these goals.[77] Narratives are important in agenda setting, cementing political coalitions (for example, debt counsellors and creditors agree on overspending as the cause of over-indebtedness), and giving meaning to the work of bureaucracies and actors in a bankruptcy system.[78] Actors within a bankruptcy system—judges, accountants, lawyers, advice bureaux—develop 'social constructions' of bankrupts, narratives about debtors and the appropriate use of the bankruptcy process.[79] These actors often contribute to bankruptcy policymaking and so their constructions of debtors may be influential.[80] Since the public may have relatively little knowledge of bankruptcy or bankrupts, interest groups, policy entrepreneurs, and academic 'model mongers' have an incentive to promote particular narratives. Critical junctures (the Great Recession) may provide opportunities for changing diagnoses and policy prescriptions. Large increases in bankruptcy filings provided opportunities for financial interests in the US to promote narratives of bankruptcy abuse and the idea of 'lifestyle insolvencies' as part of a political campaign to reduce access to bankruptcy. The sound bite of the $400 'bankruptcy tax' was created and cited in US and UK legislative debates even though it had little empirical support.[81] Similarly, the UK banks and some professionals promoted an image of debtors 'living beyond their means' in the 2000s.[82] The Great Recession globalised issues

[77] See PA Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25 *Comparative Politics* 275.

[78] See M Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge, Cambridge University Press, 2002); see also Schmidt, 'Taking Ideas and Discourse Seriously' (n 56).

[79] P Rock, *Making People Pay* (London, Routledge, 1973); J Braucher, D Cohen, and RM Lawless, 'Race, Attorney Influence, and Bankruptcy Chapter Choice' (2012) 9 *Journal of Empirical Legal Studies* 393; I Ramsay, *Debtors and Creditors—A Socio-Legal Perspective* (Abingdon, Butterworths Law, 1986).

[80] Their constructions may also have practical consequences in steering individuals to particular solutions. Studies in the US indicate racial stereotyping of debtors by lawyers in decisions whether to channel individuals to Chapter 7 or 13.

[81] See E Warren, 'The Phantom $400' (2004) 13(2) *Journal of Bankruptcy Law and Practice* 77. For the US citations, see below, ch 2 (n 124). For the UK, see the debates on the Enterprise Act 2002 below, ch 3 section IV.

[82] See below, ch 3 section V.A.

of household debt and household insolvency with international agencies and their consultants hurriedly developing international policy scripts around personal insolvency, economic recovery and entrepreneurialism.[83] These early narratives in the construction of an international common sense of personal insolvency may have long-term influence.

Personal insolvency narratives are constructed from contrasting and conflicting ideas. These include the concepts of a fresh start, a second chance, the prevention of social exclusion, and the promotion of entrepreneurialism (responsible risk-taking). Counter-narratives include the influential *pacta sunt servanda*—the 'common sense' idea that 'one pays back one's debts' associated with the maintenance of 'good payment culture'—the control of moral hazard, and the importance of personal responsibility reflected in the slogan 'can pay, should pay'. These ideas represent the toolkit for political argument, and policymakers often claim that they have drawn a balance between the values. This may lead to quite different results in each country since it may be difficult to measure an optimal balance. In addition, central concepts such as the fresh start or financial inclusion are ambiguous. A fresh start might be interpreted as either a simple discharge of debts or the more complex idea of financial rehabilitation No unequivocal answers exist as to the scope of the fresh start, how much of an individual's human capital should be devoted to repaying creditors in an insolvency, what specific assets should be exempt from seizure, and which debts should be excluded from the fresh start. Financial inclusion might include a variety of measures ranging from a simple discharge of debts through credit counselling and employment advice to ensure an individual's full participation in society.[84]

Dominant narratives about bankruptcy reflect partly the 'storytelling power of the stakeholders'[85] who link their story to more general values in society. The success of any particular group may depend on the national context of the production of influential ideas, described by John Campbell and Ove Pedersen as a country's 'knowledge regime'—'the organizational and institutional machinery that generates data, research, policy recommendations and other ideas that influence public debate and policymaking'.[86] This includes the role of political think tanks, academic researchers, governmental advisory units and their relationship to legislatures. Changes in a knowledge regime will affect how influential ideas are produced and disseminated in policy regimes. For example, lawyers, legal academics, and judges played an influential role in consumer bankruptcy development in

[83] See below, ch 6.

[84] See D Beland, 'The Social Exclusion Discourse: Ideas and Policy Change' (2007) 35 *Policy and Politics* 123. He comments that it 'legitimizes modest policy reforms entirely compatible with moderate understandings of economic liberalism'.

[85] JF Witt, 'Narrating Bankruptcy/Narrating Risk' (2003) 98 *Northwestern University Law Review* 303.

[86] JL Campbell and OK Pedersen, *The National Origins of Policy Ideas: Knowledge Regimes in the United States, France, Germany, and Denmark* (Princeton, Princeton University Press, 2014).

the US through institutions such as the National Bankruptcy Conference[87] and the National Association of Bankruptcy Judges.[88] However this influence was disrupted after 1978 by policy entrepreneurs for creditor interests.[89] This disruption coincided with the increasing 'war of ideas' in the US in the late 1970s as the post-war consensus on policymaking broke down. Consumer bankruptcy was transformed by policy entrepreneurs from a technical issue to the political issue of addressing personal responsibility.[90] In contrast, in France the knowledge regime was dominated by state technocrats who attempted to manage a more consensual approach to policy.

A disjuncture may exist between expert knowledge of the reasons for bankruptcy and public knowledge and attitudes to bankruptcy. For example, the Association of Business Recovery Professionals (R3, the English trade association for insolvency practitioners) conducted a study on attitudes to bankruptcy in 2012 which found that 82 per cent of individuals thought that some people take advantage of the system to write off debts incurred through reckless spending, and 65 per cent of respondents thought that most individuals could avoid bankruptcy by reining in their spending behaviour.[91] This focus on individual mismanagement of finances as a cause of bankruptcy contrasts with the majority of existing empirical studies which draw attention to the importance of issues such as unemployment (see Tables 1.2 to 1.6).[92] The general public's view of the causes of bankruptcy, based on the R3 study, cannot be simply explained solely by the rise of neo-liberal ideas of personal responsibility since the 1970s. Paul Rock's small survey of Londoners' views of debtors in the late 1960s found that in response to the question 'What

[87] The National Bankruptcy Conference, established in 1932, drafted many of the provisions of the 1938 Chandler Act, and during the 1950s and 1960s annually presented to Congress proposed amendments to the Bankruptcy Act as well as commented on and opposed proposals from other sources. It was an elite group of about 50 members by the 1960s composed of practitioners, referees in bankruptcy and law professors. Testimony of Frank Kennedy, vice-president National Bankruptcy Conference, *Hearings before the Subcommittee on Bankruptcy of the Committee on the Judiciary, US Senate Second Session on SJ Res 100 A Bill to Create a Commission to Study the Bankruptcy Laws of the US* (1969) 50. See for further discussion ch 2 section III.

[88] Before the Bankruptcy Reform Act 1978, this group was known as the National Conference of Bankruptcy Referees. It also sponsored Congressional Bills. See discussion below, ch 2 section III.

[89] See E Warren, 'The Changing Politics of American Bankruptcy Reform' (1999) 37 *Osgoode Hall Law Journal* 189. John Fabian Witt refers to the importance of 'narrative entrepreneurs' in US bankruptcy history. This describes how particular groups were able to strategically shape ideas about risk and law's approach to risk-taking. See Witt, 'Narrating Bankruptcy' (n 85). John Pottow develops this theme in his analysis of the lobbying landscape surrounding the enactment of BAPCPA. JAE Pottow, 'A U.S. Perspective on the Contextual Terrain of Political Economy in Insolvency Reform' in S Ben-Ishai and A Duggan (eds), *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (Markham, LexisNexis, 2007).

[90] Pottow, ibid 386–87.

[91] See 'Personal Debt Snapshot GB population calls for tighter controls on payday loans and a tougher bankruptcy regime to curb reckless spending', available at https://www.r3.org.uk/media/documents/policy/research_reports/personal_debt_snap/R3PersonalDebtSnapshotW8_FINAL.pdf. The statistics are based on responses to the statements: '[m]ost people could avoid bankruptcy by reining in reckless spending' and '[s]ome people take advantage of bankruptcy to write off their debts that they built up through reckless spending'.

[92] In 2014, an EU study of over-indebtedness concluded that 'macroeconomic factors are among the most important causes of financial difficulties … higher unemployment levels as well as increases in unemployment were associated with an increase in all types of arrears.' Civic Consulting, *Overindebtedness of European Households: Updated Mapping of the Situation, Nature, Cause, Effects and Initiatives for Alleviating its Impact* (Brussels, 2014) 8.

would you say is the main reason for people being in debt?' 61 per cent responded 'not enough self control', 20 per cent 'too easy to get credit', and nine per cent 'poverty'.[93] The 'common sense' knowledge that one should live within one's means and pay one's debts is a powerful historical idea.[94] It provides fertile ground for interest groups that promote the idea in the media that bankrupts are irresponsible or imprudent individuals.[95] Politicians are sensitive to media images since newspaper coverage represents a form of surrogate political demand. Moving insolvency policymaking from an issue dominated by technical experts to a political arena may reduce the influence of expert narratives, suggesting that the institutional context for bankruptcy reform (expert committees, parliament) may affect the outcome.

A central question in any narrative is the reason for individuals filing for bankruptcy. Tables 1.2 to 1.6 outline causes for over-indebtedness and insolvency in England and Wales, France, Germany and the Netherlands. These data indicate the role of unemployment, credit overextension, separation and divorce, and the significance of individual business failures in those countries that permit sole proprietors to use insolvency law.[96] In the US a seminal study of consumer bankruptcy cited employment problems (67.5%), divorce (22.1%), and medical bills (19.3%) as causes of bankruptcy.[97]

[93] See P Rock, *Making People Pay* (London, Routledge, 1973) 17, Table 1.5.

[94] See the interesting discussion of the power of common sense ideas about debt in framing acceptance of the need for austerity in the UK after the financial crisis of 2008. L Stanley, '"We're Reaping what We Sowed": Everyday Crisis Narratives and Acquiescence to the Age of Austerity' (2014) 19(6) *New Political Economy* 895. See also D Graeber, *Debt: The First 5,000 Years* (New York, Melville House Publishing, 2011) 2–3, who commences his book by documenting a conversation where an individual responds to the idea of a debt amnesty for developing countries with the comment 'But', she objected as if this were self-evident, '[t]hey'd borrowed the money! Surely one has to pay one's debts.' His book concludes that the principle is 'a flagrant lie' and that only some people have to repay (391).

[95] See the discussion in ch 2 section IV.A concerning the US and ch 3 section V on the construction of English insolvents as 'binge borrowers' and the bankers' campaign to restrict entry to IVAs in 2005. Rafael Efrat noted how the *New York Times* changed in the 1960s to depicting bankrupts as irresponsible or incompetent rather than the previous typification of the bankrupt as a fraudster, with greater emphasis on the extent to which they were subject to unemployment and other changes of circumstances. R Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 *Theoretical Inquiries in Law* 365.

[96] A recent EU-wide survey of 'stakeholders' prepared for the EU Commission concluded that macro-economic factors such as unemployment and approaches to 'money management' were important causes of over-indebtedness. 'Incapacity to deal with financial products' or 'lack of money management skills' were regarded as the most important causes of over-indebtedness by almost two-thirds of respondents. However, over-indebted households seemed to stress the importance of unemployment and changes in employment as the dominant factor. See Civic Consulting, *The Over-Indebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating Its Impact Final Report* (Brussels, Civic Consulting, 2013) 92–93, 162. A Swedish study of individuals experiencing debt problems identified unforeseen expenditures (54%) and illness, unemployment, death and 'similar circumstances' (32%) as the primary causes. See Swedish Enforcement Authority, *Everyone Wants to Pay Their Fair Share: Causes and Consequences of Overindebtedness* Report 2008:1B (Stockholm, Swedish Enforcement Authority, 2008) 31.

[97] See TA Sullivan, E Warren, and JL Westbrook, *The Fragile Middle Class: Americans in Debt* (New Haven, Yale University Press, 2000) Fig 1.2: 'Job-related income interruption is by far the most important cause of severe financial distress for middle class Americans.' Ibid 75. On medical debts see D Himmelstein, D Thorne, E Warren, and S Woolhandler, 'Medical Bankruptcy in the United States, 2007: Results of a National Study' (2009) 122(8) *The American Journal of Medicine* 741–46. Although this study's claim that 62% of bankruptcies in the US are caused by medical bills has been challenged, medical bills remain a significant cause of bankruptcy in the US.

Table 1.2: 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
Total	100	100

* In 955 cases the cause was recorded as 'unknown/non-surrender'. These cases are not included in the table.
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) (last accessed 19/12/2016).

Table 1.3: France—reasons for over-indebtedness

	Reasons	2001	2004	2007	2007 (RP)
ACTIVE	Too much credit	19.4%	14.6%	13.6%	5.4%
	Poor management	7.7%	6.4%	6%	2.4%
	Housing costs	3.1%	1.2%	1.2%	0.9%
	Excess charges	2.2%	1.4%	1.3%	1%
PASSIVE	Unemployment/ job loss	26.5%	30.8%	31.8%	32%
	Separation/ divorce	15.5%	14.7%	14.7%	14.5%
	Accident/illness	9.1%	10.8%	11.3%	18.8%
	Lowered resources	6.9%	6.2%	6.2%	7.3%
	Death	2.5%	2.4%	2.5%	3.6%
	Other	7.1%	11.5%	11.4%	14.1%
	Total	100%	100%	100%	100%

Source: Bank of France, Surveys of Individuals using Overindebtedness Commissions 2001, 2004, 2007.
Note: RP= retablissement personnel.

Table 1.4: 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 Over-Indebtedness* (2014) 7–8, https://www.banque-france.fr/fileadmin/user_upload/banque_de_france/La_Banque_de_France/study-of-paths-leading-to-over-indebtedness.pdf.

Table 1.5: Germany—primary causes of over-indebtedness in 2014

Causes	**%**
Unemployment, reduced working	26.8
Separation/divorce	9.0
Sickness	7.7
Consumer behaviour	8.6
Business failure	10
Income poverty	10.5
Other	34.4
Total	100

Source: Institut für Finanz dienst leistungen (IFF), Over-indebtedness Report 2015.

Table 1.6: Netherlands: causal factors for debt adjustment in 2012

Causes	**%**
Divorce	22
Reduced income	58
Overspending	32
Compensatory behaviour	33
Total (N)	3830

Source: Wet Schuldsanering Natuurlijke Personen (WSNP) [Debt Restructuring for Individuals], Monitor 2012 Table 3.6.

Statistics on reasons for bankruptcy are important politically because they underpin images of bankrupts and suggest a policy response—'the story about the nature of failure always has influenced the legislative agenda'.[98] Overuse of

[98] RM Lawless and E Warren, 'The Myth of the Disappearing Business Bankruptcy' (2005) 93 *California Law Review* 743, 746. They cite, for example, B Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, Harvard University Press, 2009); E Balliesen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill, The University of North Carolina Press, 2001); Witt, 'Narrating Bankruptcy' (n 85).

credit may suggest greater financial literacy, counselling, disciplining of debtors or restrictions on credit granting. Unemployment indicates an unfortunate situation, which may signal the need for further investigation of existing social safety nets. France provides a stark example of the political role of statistics on over-indebtedness. The statistics in Table 1.3 collected by the Bank of France highlighted the significance of the 'passively indebted consumer' subject to external changes of circumstance. This conceptualisation drove liberalisation of the over-indebtedness law and provided the possibility for a consensus between creditors and debtors since the statistics indicated that neither creditors nor debtors were responsible for over-indebtedness. However the basis for these statistics was discredited by the French National Audit Office resulting in a new official study reflected in Table 1.4. These latter statistics have been used to justify greater financial literacy initiatives, reflecting greater focus on individual failings leading to over-indebtedness. In England and Wales, the image of the 'overborrowing debtor' mentioned above seemed to be substantiated by a 2005 study which documented the reasons for individuals using an IVA, which permits an individual to repay a portion of their debts, generally over a period of five years. The authors of the study concluded that for 83 per cent of individuals, the reason for the IVA was 'expenditure in excess of income' which was interpreted as individuals living beyond their means and 'simply … not budgeting properly'.[99] Expenditure in excess of income begs the question, however, of why the expenditure was in excess of income.

The political consequences of these data suggest caution in handling them. First, the statistics are likely to represent a crude construction of the social reality of over-indebtedness. Second, a combination of factors may often exist. An individual may attempt to maintain a lifestyle after a temporary drop in income through the use of credit cards, hoping that they will be able to get back into the job market but this may result in increasing levels of debt. Will a subsequent bankruptcy in such a case be coded as 'expenditure in excess of income' or unemployment? This may depend on the views of the coder. These data are often collected by different groups (regulators, policymakers, insolvency practitioners, academics) for different purposes. The data to be coded might be based on actual statements by debtors, or the interpretation of files completed by the debtor, or an intermediary. Given the difficulty in interpreting an individual's route into bankruptcy, the data may be affected by the views or practices of those collecting the data. Robert Lawless and Elizabeth Warren demonstrated how coding practices by government officials in the US had the effect of making business bankruptcies disappear, driving a narrative that bankruptcy was primarily an affair of overspending consumers.[100]

[99] PriceWaterhouseCoopers, *Living on Tick: The 21st Century Debtor* (London, PwC, 2006) 20. See further my discussion of this study in I Ramsay, '"Wannabe WAGS" and "Credit Binges": The Construction of Overindebtedness in the UK' in Niemi, Ramsay, and Whitford, *Consumer Credit, Debt and Bankruptcy* (n 26) 85–86.

[100] Lawless and Warren, 'The Myth' (n 98).

Finally, these data often provide a sufficient but not proximate cause of filing for bankruptcy. The actual decision to access bankruptcy may depend on the particular institutional framework of bankruptcy access in a country, including the costs and the effects of legal proceedings.[101]

Data on the reasons for filing bankruptcy fuel the debate over the effects of bankruptcy liberalisation on consumer incentives, credit availability and debtor character. Economic analysis views bankruptcy as a form of consumption insurance.[102] The concept of moral hazard, when associated with insurance, suggests that individuals will take more credit risks if they are protected by the insurance of bankruptcy and be more willing to turn to insolvency relief if they face debt difficulties. Moral hazard was often invoked after the Great Recession by governments unwilling to introduce a bankruptcy discharge because of its impact on payment culture, and international institutions often identified concerns about moral hazard when implementing reforms.[103] 'Moral hazard' is a curious term since it represents, in ordinary understanding, a judgement about individual behaviour, notwithstanding economists' arguments that it is a technical concept. It functions not merely as a technical concept, however, but also has a performative effect[104] in constructing an identity for a debtor as lacking character, implying a deterioration in that character through the introduction of the bankruptcy discharge.[105] The concept does not merely describe a phenomenon, but in public debates on debt contributes to the creation of the character of the debtor.

The effects of moral hazard are difficult to measure and a distinction should be drawn between its *ex ante* and *ex post* effects. An individual's credit choices are likely to be affected by many factors, including the widespread advertising of credit products and the behaviour of other consumers. The insights of behavioural economics suggest that, in general, individual consumers are unlikely to take into account the remote likelihood of bankruptcy when taking on credit commitments[106] or increasing their borrowing. Moreover creditors have incentives to monitor and control such behaviour. This observation raises the question of the possibility of creditor moral hazard when a restrictive bankruptcy law may create incentives for reduced monitoring by firms and excessive risk-taking. Creating

[101] See discussion in RJ Mann and K Porter, 'Saving up for Bankruptcy' (2009) 98 *Georgetown Law Journal* 289.

[102] See eg B Adler, L Polak, and A Schwartz, 'Regulating Consumer Bankruptcy: A Theoretical Inquiry' (2000) 29 *The Journal of Legal Studies* 585.

[103] See below, ch 6.

[104] On the idea of performativity and the role of economics in creating rather than describing phenomena see eg D Mackenzie, F Muniesa, and L Siu, *Do Economists Make Markets? On the Performativity of Economics* (Princeton, Princeton University Press, 2007).

[105] See the discussion in T Baker, 'On the Genealogy of Moral Hazard' (1996) 75(2) *Texas Law Review* 237.

[106] See the discussion by S Schwartz, 'Personal Bankruptcy Law: A Behavioural Perspective' in Niemi, Ramsay, and Whitford, *Consumer Bankruptcy In Global Perspective* (Oxford, Hart Publishing, 2003) 68–71, arguing that consumer biases are likely to lead to an underestimation of the risks of borrowing. The classic article justifying bankruptcy discharge based on behavioural biases is T Jackson, 'The Fresh Start Policy in Bankruptcy Law' (1985) 98 *Harvard Law Review* 1393.

access barriers to discharge may promote a model of lending that profits from high levels of defaulting borrowers.[107]

Focusing on decision-making *ex post*, for example when an individual loses a job and is facing credit difficulties, we might expect an individual to weigh the costs and benefits of a bankruptcy discharge. These costs are not purely economic but include concerns for loss of reputation and stigma associated with bankruptcy which remains significant.[108] The danger here is that a policy concern for moral hazard, with its undertones of character and responsibility, may crowd out a consideration of the social benefits of a bankruptcy discharge. These benefits include relief of hardship, increased productivity, reducing the likelihood of individuals leaving the formal economy to avoid collection action, a reduction in externalities from debt to families and the state, the creation of incentives for responsible lending and accounting by creditors, and risk shifting to creditors who are generally in the best position to bear and spread the risks of non-payment.

All personal insolvency systems have mechanisms to deter moral hazard and strategic behaviour.[109] When establishing new systems states often set up unnecessarily complex or restrictive criteria for entry or exit from bankruptcy which substantially increase the transaction costs of bankruptcy and overly deter individuals from seeking relief. Sweden, for example, created very high hurdles to entry.[110] As a consequence, the average age of the Swedish debtor in the plan is in mid-50s or older, and a category of 'eternity debtor' exists on the unpaid debt register unable to access debt relief. Personal insolvency continues to carry a stigma in many countries, which may contribute to an underuse of insolvency as a solution for over-indebtedness.

III. Household Debt, Neo-liberalism, and Personal Insolvency Law

The rise in household debt in many countries since the 1980s frames this study (see Figure 1.1). Consumers rather than corporations have become an important

[107] See R Mann, 'Bankruptcy Reform and the "Sweat Box" of Credit Card Debt' (2007) *Illinois Law Review* 375.

[108] The Insolvency Service in England and Wales concluded, in their review of the Enterprise Act liberalisation of discharge procedure, that bankruptcy still carried a significant stigma. See below, ch 3 section IV. For the US, see T Sullivan, E Warren and J Westbrook, 'Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings' (2006) 59 *Stanford Law Review* 213.

[109] Examples include: minimum levels of debt, qualified insolvency, bankruptcy restriction order, conditional discharge, requirements of good faith, a period of good behaviour, requirements of mandatory counselling before bankruptcy, requirement to have attempted a negotiated settlement before filing. Financial costs may act as a barrier. Failure to disclose assets or the provision of false information may result in annulment or absence of discharge.

[110] See below, ch 5.

site of profits for financial institutions, and credit a mechanism for maintaining demand in an era of stagnating wages.[111] David Harvey writes of Thatcherism engendering the growth of a 'debt culture' into 'a formerly staid British life'.[112] Critics such as Wolfgang Streeck argue that it is one technique for capitalism to 'buy time for the existing social and economic order'.[113] Even more mainstream economists fear that 'debt is dangerous'.[114]

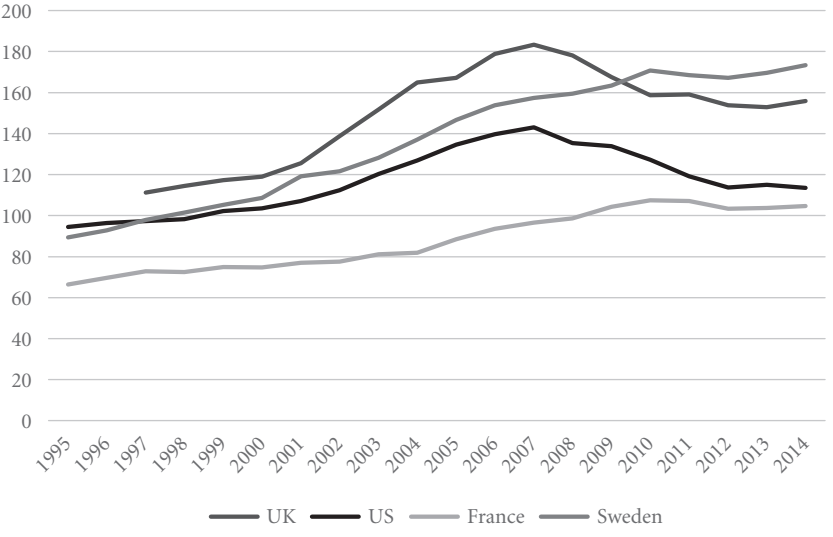

Figure 1.1: Household debt-to-income in selected European countries and US: 1995–2012 (UK from 1997)

Source: OECD National Accounts at a Glance (various years): Household Debt http://www.oecd-ilibrary.org/economics/national-accounts-at-a-glance-2015_na_glance-2015-en.

Since the crisis, a variety of studies have examined the role of household credit in the economy, but with only modest discussion of personal insolvency. Neo-liberalism remains a powerful discourse in both the US and the EU and writers point to its resilience after the Great Recession.[115] Neo-liberalism promotes freeing up markets internationally, reducing the power of labour and welfare entitlements,

[111] See sources listed in n 11.

[112] D Harvey, *A Brief History of Neoliberalism* (Oxford, Oxford University Press, 2005) 61.

[113] Streeck, *Buying Time* (n 11) 4.

[114] A Mian and A Sufi, *House of Debt* (n 7) 12; see also A Turner, Between Debt and the Devil: *Money, Credit, and Fixing Global Finance* (Princeton, Princeton University Press, 2015) 49.

[115] See T Williams, 'Continuity Not Rupture: The Persistence of Neoliberalism in the Internationalisation of Consumer Finance Regulation' in T Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Surrey, Ashgate Publishing, 2013) ch 2; P Dardot and C Laval, *The New Way of the World: On Neoliberal Society* (London, Verso Books, 2014) 2: 'Far from impairing neo-liberal policies, the crisis led to their dramatic reinforcement, in the shape of austerity plans put in place by states that were increasingly active in promoting the logic of competition in financial markets.' See also VA Schmidt and M Thatcher (eds), *Resilient Liberalism in Europe's Political Economy* (Cambridge, Cambridge University Press, 2013).

and embracing consumerism and entrepreneurialism.[116] Neo-liberalism is not, however, a return to laissez-faire. The state constitutes and structures the ground rules of markets within neo-liberalism which do not arise naturally as a spontaneous order.[117]

Neo-liberalism is increasingly a dominant rationality, associated with governance in contemporary capitalism.[118] Continental theorists link debt to forms of neo-liberal governance where individuals are required to take responsibility for managing their biography.

Maurizio Lazzarato, in *The Making of the Indebted Man: An Essay on the Neo-Liberal Condition*,[119] develops themes initiated by Foucault,[120] arguing that in contemporary society with fewer traditional 'sites of discipline', such as the factory, we have moved to a society of control[121] and that the creditor-debtor relationship is central to contemporary capitalism. The growth of a debt-dominated economy shapes the subjectivity of the indebted person so that individuals 'develop a way of life, discipline, attitudes and conduct appropriate to the "indebted man" [sic] who should learn to exploit credit markets appropriately'.[122] Credit scoring technologies and credit bureaux perform a significant sorting, channelling and disciplining role. Individuals are encouraged to check their credit score and learn how to improve their credit rating just as they might check their cholesterol level. The worldwide financial literacy and education movement[123] assists consumers to

[116] Schmidt and Thatcher, ibid 3.

[117] The transition from communism to capitalism in Eastern Europe is a stark illustration of how credit markets must be constructed involving new technologies of credit as well as changes in individuals See discussion in A Rona-Tas, 'The Rise of Consumer Credit in Postcommunist Czech Republic, Hungary, and Poland' in N Bandelj and DJ Solinger (eds), *Socialism Vanquished, Socialism Challenged* (Oxford, Oxford University Press, 2012); A Guseva and A Rona-Tas, *Plastic Money: Constructing Markets for Credit Cards in Eight Postcommunist Countries* (Stanford, Stanford University Press, 2014).

[118] Dardot and Laval conceive of neo-liberalism as 'a form of rationality' which structures not only the 'action of rulers but also the conduct of the ruled'. P Dardot and C Laval, *The New Way of the World* (n 115).

[119] M Lazzarato, *The Making of the Indebted Man: An Essay on the Neo-Liberal Condition* (Cambridge, Massachusetts Institute of Technology, 2012).

[120] See M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79* (n 39). Individuals are invited to conceive of themselves as enterprises attempting to improve their human capital and in a constant competition with other individuals. Neo-liberalism posited a new form of homo economicus, the 'entrepreneur of the self' who must exploit their human capital, continuously adapting and searching for self-improvement, and taking responsibility for managing biographical risks. This individualisation of risk is described in the US as the 'Great Risk Shift' by Jacob Hacker. See JS Hacker, *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream*, revised edition (Oxford, Oxford University Press, 2008).

[121] See G 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'.

[122] Lazzarato, *The Making of the Indebted Man* (n 119) 104.

[123] See eg the relevant page on the OECD website which notes that: 'Awareness of the importance of financial education is gaining momentum among policy makers in economies the world over. The OECD and its International Network on Financial Education (INFE) provide a unique policy forum for governments to exchange views and experiences on this issue', see http://www.oecd.org/finance/

adapt to a world where they must 'live with debt'.[124] The consumer is enlisted as a regulatory subject[125] in making credit markets competitive (for example, through enhanced switching) and policing 'internalities'[126]—such as impulsiveness or myopia—which may result in over-indebtedness or obesity.[127] This is the world of the responsible borrower. Neo-liberalism is not, therefore, associated with a hedonistic consumerism, but rather the responsible consumer who manages their budget effectively.

The above ideas are not unfamiliar to historians of consumer credit. Lendol Calder argued that in the US the rise of instalment debt, which required individuals to adjust to the discipline of monthly payments, extended the discipline of the Fordist factory system to private consumption.[128] 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. This shift in the ideology of debt was part of a more general shift to consumerism in the US. The transition to the dominance of a consumer identity was promoted by ordoliberal writers, such as Walter Lippman, to reduce class conflict between capital and labour.[129]

Contemporary neo-liberalism represents an influential background to thinking about contemporary insolvency law. All the countries considered in this book have been influenced by neo-liberal ideas, as have international institutions and the EU. But what is the role of individual insolvency in neo-liberalism? Neo-liberalism

financial-education/. For a critique see T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 *Law & Policy* 226.

[124] Lazzarato, *The Making of the Indebted Man* (n 119) 112: 'Learning how to "live with debt" has now been made part of certain American school curricula.' See also I Ramsay, 'Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in an Informational Economy' in J Niemi-Kiesilainen, I Ramsay and WC Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Oxford, Hart Publishing, 2003) 38.

[125] See Williams, 'Empowerment' (n 123): D Marron, '"Informed, Educated and More Confident": Financial Capability and the Problematization of Personal Finance Consumption' (2014) 17 *Consumption Markets & Culture* 491. See discussion of this theme in N Moloney, *How to Protect Investors: Lessons from the EC and the UK* (Cambridge University Press, 2010) 47. See discussion in relation to EU in V Mak and J Braspenning, 'Errare Humanum Est: Financial Literacy in European Consumer Credit Law' (2012) 35 *Journal of Consumer Policy* 307.

[126] This is in contrast to traditional economic rationale of externalities. See G Loewenstein and others, 'Can Behavioral Economics Make Us Healthier?' (2012) 344 *The British Medical Journal* 3482.

[127] Margaret Atwood referred to 'Debt as the new Fat'. See M Atwood, *Payback: Debt and the Shadow Side of Wealth* (Toronto, House of Anansi Press, 2008).

[128] See eg L Calder, *Financing the American Dream: A Cultural History of Consumer Credit* (Princeton, Princeton University Press, 2009). Calder drew on J Baudrillard, 'The Consumer Society', *Selected Writings* (Stanford, Stanford University Press, 2001) 81. This point was also made by David Caplovitz in the 1970s. See D Caplovitz, 'The Social Benefits and Costs of Consumer Credit' in RM Goode (ed), *Consumer Credit* (Sijthoff, Leyden, 1978).

[129] See eg Lippman quoted in JQ Whitman, 'Consumerism versus Producerism: A Study in Comparative Law' (2007) 117 *Yale Law Journal* 340, 361. And see discussion of ordoliberal influence in France below, ch 4.

celebrates entrepreneurialism and chapter six discusses the extent to which encouraging entrepreneurial risk-taking through a liberal bankruptcy law has become a dominant trope in the EU's quest for innovation and growth. But the EU is also committed to a 'competitive social market economy',[130] including fighting social exclusion, which suggests wider social objectives and poses the question of how individual insolvency fits with the values of a 'social Europe'.[131] The idea of a social Europe focused initially on hard law in the area of worker rights and non-discrimination. Much social policy associated with the welfare state is within national competences, but the impact of economic integration, including freedom of movement, on social policies has resulted in greater coordination through soft law approaches.

Individual insolvency law straddles both economic and social policy, encouraging entrepreneurialism but also addressing potential social exclusion and compensating for market risks by transferring certain risks of default to creditors who are in the best position to spread these losses and monitor debtor behaviour. A swift discharge permits an individual to get back into the credit market. However, this model of a liberal individual bankruptcy discharge contrasts with a neo-liberal policy of 'responsibilisation' of the consumer. In the US, the enactment in 2005 of the BAPCPA, with its 'means test' for access, and mandatory debt counselling for bankrupts, was inspired by neo-liberal ideas of personal responsibility.[132] A tension exists within liberalism between personal insolvency law and the discharge of debts as both a site of liberation and a site of discipline.

Neo-liberalism also undercuts the distinction between consumer and producer identity through its construction of the 'entrepreneur of the self' exploiting and managing their human capital. The traditional distinction between the business risk-taker and the responsible consumer is challenged. Individuals of all social classes are faced with managing risk. More affluent individuals may embrace actively such an opportunity while lower-income individuals may have to use credit defensively to manage day-to-day uncertainties.[133]

A. False Dichotomies?—US Neo-liberalism versus EU Social Market?

A recent Swedish report on personal insolvency[134] concludes that cultural differences exist between the US and Europe in the approach to over-indebtedness.

[130] Treaty on the Functioning of the European Union (TFEU) Art 3 para 3.

[131] For a useful summary of EU social policy initiatives see C Barnard and G de Baere *Towards a European Social Union: Achievements and Possibilities under the current EU constitutional framework* (Leuven, KU Leuven Forum, 2015) https://www.kuleuven.be/euroforum/viewpic.php?LAN=E&TABLE=DOCS&ID=937 and see discussion below, ch 6.

[132] See discussion below, ch 2 section V.

[133] See N Fligstein and A Goldstein, 'The Emergence of a Finance Culture in American Households, 1998–2007' (2015) *Socio-Economic Review* 1.

[134] *An Opportunity for a Fresh Start for Serious Entrepreneurs* SOU (Statens Offentliga Utredningar/National Public Inquiry) 2014: 44. See below, ch 5.

> In the US system, writing off liabilities is regarded as an efficient way to distribute risks. Over-indebtedness is seen as a market failure—a failure of the market to assess the risks. With this approach, it is logical to regard debt restructuring as a means of efficiently tackling problems of over-indebtedness so as to enable the individual to rapidly return to the market as a consumer and borrower. It has been pointed out that in Europe over-indebtedness is regarded as a social or moral problem and that the debtor is expected to bear more of the risk.

This broad-brush cultural contrast between the US and Europe is not unusual suggesting deep differences between the US and other nations in their approaches to credit, debt and insolvency. David Skeel and Monica Prasad, for example, describe the liberal fresh start in the US as, respectively, 'unique' and 'peculiarly American'.[135] The liberal fresh start in US bankruptcy law before the enactment of the BAPCPA in 2005 seemed to 'fit' a demand-led economy[136] where consumer credit maintains demand and substitutes for social redistribution.[137] Access to credit was supported by political groups on both the political left and right in the US as a method of achieving the 'standard package' of middle-class consumption and providing workers with consumption smoothing.[138] However, high levels of credit created the danger of over-indebtedness, and bankruptcy law, although not originally designed for this purpose, performed a useful safety net function in permitting workers to return to productivity and further consumption. The US system of employment-related welfare and healthcare meant that unemployment and illness could have more dramatic effects than in those countries with public systems of healthcare and public housing benefits. This US 'open credit economy'[139] and approach to credit regulation in a minimal social welfare state contrasts with a European social model of solidarity providing a greater level of security for citizens through state regulation and redistribution. If, however, European countries are increasingly adopting the US model of the role of credit in the economy then one might, *ceteris paribus*, expect the growth of similar models of bankruptcy. The development of personal insolvency in Europe is linked to credit liberalisation

[135] Skeel, *Debt's Dominion* (n 49) 1; M Prasad, *The Land of Too Much: American Abundance and the Paradox of Poverty* (Cambridge, Harvard University Press, 2012) 183.

[136] Prasad, ibid. See also L Hyman, 'The Politics of Consumer Debt: U.S. State Policy and the Rise of Investment in Consumer Credit, 1920–2008' (2012) 644 *The ANNALS of the American Academy of Political and Social Science* 40, 40–49.

[137] See Rajan, *Fault Lines* (n 11).

[138] See G Trumbull, *Consumer Lending in France and America: credit and welfare* (Cambridge, Cambridge University Press, 2014). Trumbull argues that a coalition of political groups supported the narrative of widespread access to credit with those on the right seeing it as a bulwark against communism and labour unions supporting it as an important income-smoothing device during strikes.

[139] 'Open credit economy' was the term used by the US Bankruptcy Commission in 1970 to contrast the US system with socialist regimes. It reflected the background of the Cold War era. In its chapter on the 'Philosophy of the Bankruptcy System' the Commission noted that 'there is in the US pervasive support for the processes with which bankruptcy relates, most notably 'the open credit economy'. See *Report of the Commission of Bankruptcy Laws of the US* (Washington, Government Printer, 1973) ch 3.

since the 1980s and the subsequent crises and social costs associated with the growth of over-indebtedness.[140]

I would make three comments on the above story of US–European contrasts. First, the cultural story of the US liberal discharge policy underplays the political conflicts over the availability of bankruptcy and the relative responsibility of the debtor. The concept of personal responsibility was not only a dominant trope in the debates over the US reforms in 2005, but also was a continuing theme in earlier periods[141] and used to support restrictions on the fresh start in the US. Second, references to a 'European approach' underplay the substantial differences between European countries in approaches to credit and personal insolvency.[142] Differences in social policy between EU Member States remain as great as those between the US and Europe.[143] Authors sometimes argue that European personal insolvency procedures take a more social approach, citing the role of debt counselling in the process. However, contrary to this image, France and Sweden do not take a social welfare approach and make little attempt to integrate debt management within the welfare system. England, often characterised as a neo-liberal state, has a significant social welfare role through the large Citizens Advice network. Third, appeals to overarching cultural values may simply be an attempt to elevate the interests of a particular group. The Swedish quotation above claiming a deep cultural difference between the US and Europe may be playing a 'cultural card'[144]—a political strategy to block particular reforms by elevating one particular value—which happens to favour financial interests—into a deep cultural value. Therefore, this book rejects the story that US consumer bankruptcy law reflects an enduring cultural characteristic of the US or that there is 'an American culture of maximal consumer sovereignty and [a] European culture of maximal consumer protection'.[145] I argue in chapter two that US consumer bankruptcy law reflects conflicting values that result in a continuing debate about its role in society.

The contrast between a neo-liberal US model and a European social model also underlies the argument that the US consumer bankruptcy system is primarily a private system organised around courts and lawyers whereas European systems often involve state bureaucracies playing a more paternalistic role in managing

[140] Note that average outstanding household debt-to-income ratio in the EU countries is similar to that in the US (approximately 100%).

[141] The US Bankruptcy Commission above (n 139) noted that 'the 'moral obligation' to pay debts is widely accepted'.

[142] See below, ch 6.

[143] See eg P Baldwin, *The Narcissism of Minor Differences How Europe and America are Alike* (Oxford, Oxford University Press, 2009).

[144] Halliday and Carruthers discuss this in the context of individual state resistance to the adoption of international norms of corporate bankruptcy law. They describe 'cultural incompatibility' as a common tactic to foil international financial institutions (IFI) recommendations. This is a powerful tactic because the agencies are sensitive to the critique that they attempt to impose a 'one size fits all' approach on countries. See Halliday and Carruthers, *Bankrupt: Global Lawmaking* (n 74), 344–45.

[145] JQ Whitman, 'Consumerism versus Producerism (n 129) 383.

debtors.[146] David Skeel contrasts the English system of Official Receivers, which confers 'a pervasively governmental and administrative character' on English bankruptcy law, with the US 'judicial process' where the 'primacy of the lawyers rather than an administrator—distinguish US bankruptcy law from every other insolvency law in the world'.[147]

In fact, European countries represent a diversity of approaches, and a description of the US system as non-governmental may mislead by its implicit image of government as a Weberian top-down model of the state where political goals are established in legislation and implemented through impersonal state employees, contrasting with private regulation through lawyers and judges.[148] The US reveals, in fact, a 'loosely connected (infra)structure'[149] of judges, Chapter 13 standing trustees, court-appointed trustees and the Federal Public Trustee Service, a regulatory body with extensive monitoring powers since 2005. Lawyers also play an increasing administrative role as gatekeepers in US consumer bankruptcy. This is not a vertical Weberian bureaucracy but it represents a substantial bankruptcy infrastructure that plays an important administrative, judicial and political role. The US system demonstrates the significant 'interpenetration of public and private spheres', a further example of William Novak's argument that many historians have underestimated the role of the US state through a focus on the state as a vertical bureaucracy.

B. The Demographics of Personal Insolvency—US and Europe

Teresa Sullivan, Elizabeth Warren and Jay Westbrook concluded on the basis of a series of path-breaking empirical studies in the 1980s and 1990s that bankruptcy was primarily a middle-class phenomenon in the US (defined in terms of education, employment status and home ownership).[150] Bankruptcy in the US functioned, therefore, as a middle-class safety net, representing a pragmatic response

[146] Some writers identify an evolutionary drift towards administrative processing of debtors, driven by cost concern, a recognition that individual bankruptcy cases rarely raise adversarial issues of rights, and a concern for uniform treatment of debtors. See KA Littwin, 'The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success' (2011) 52 *William & Mary Law Review* 1933.

[147] Skeel, *Debt's Dominion* (n 49) 38, 43.

[148] See W Novak, 'The Myth of the "Weak" American State' (2008) 113 *The American Historical Review* 752, 770.

[149] The phrase is taken from the Brookings Institution Report in 1971. See D Stanley and M Girth, *Bankruptcy: Problem, Process, Reform* (Washington DC, Brookings Institution, 1971) 147.

[150] See T Sullivan, E Warren, and JL Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (New York, OUP, 1989); Sullivan, Warren and Westbrook, *The Fragile Middle Class* (n 97). See also, TA Sullivan, E Warren, and JL Westbrook, 'Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture' (1997) 20 *Journal of Consumer Policy* 223: 'The system functions to provide middle-class debt relief.' In 2010, the Office of the Vice President of the United States, *Annual Report of the White House Task Force on the Middle Class* (Washington, Vice-President of the United States, February, 2010) drawing on a Department of Commerce report "Middle

to a high debt economy where individuals may lose jobs, have limited medical insurance or misjudge their repayment ability. This is in contrast with earlier studies that viewed bankrupts as those who were primarily poor or employed in marginal jobs.[151]

Social science research in European countries on the demographics of personal insolvency is limited. Conceptions of class may also differ between countries. Existing studies of individual insolvency have often used occupational divisions and income as measures of class. However, Pierre Bourdieu's conception of class as linked to economic, social, and cultural capital may be a more useful framework for understanding the role of individual insolvency in the twenty-first century[152] when addressing economic and social exclusion.

Some evidence exists of middle-class use of insolvency procedures by individuals in the UK[153] and Germany.[154] In France, the growth in the use by individuals of over-indebtedness commissions is linked to the growing precariousness of middle-class life and the phenomenon of *déclassement*.[155] However, French data suggest that the use of over-indebtedness commissions is more a working-class phenomenon[156] and that those who use the *rétablissement personnel* procedure, available to individuals with no capacity to repay and no assets, are in marginal jobs or outside the labour market. In Sweden, the Hedborg report in 2012 concluded that individuals registered with the Swedish enforcement authority were generally from lower-income backgrounds with debts related to public sector bills. Only 10 per cent of the 500,000 individuals registered with the authority had a mortgage. The sick and unemployed were over-represented.[157] Studies in England, Germany, France and Sweden indicate that homeowners use the process much less than in

Class in America" (Washington, U.S. Department of Commerce, Economics and Statistics Administration, January 2010) noted at 10 that '[m]iddle-class families are defined by their aspirations more than their income. The Commerce report assumes that middle-class families aspire to home ownership, a car, college education for their children, health and retirement security and occasional family vacations … Families at a wide variety of income levels aspire to be middle class and under certain circumstances can put together budgets that allow them to obtain all six items above, which are assumed to be part of a middle-class lifestyle'.

[151] See P Shuchman, 'The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States' (1983) 88 *Commercial Law Journal* 288; P Shuchman, 'New Jersey Debtors 1982–1983: An Empirical Study' (1984) 15 *Seton Hall Law Review* 541. The Brookings Institution study of bankrupts in 1964 concluded more ambiguously that the bankrupt 'presents a picture of neither poverty nor instability'. Stanley and Girth, *Bankruptcy* (n 149) 42.

[152] See the discussion of this approach in M Savage, *Social Class in the 21st Century* (London, Pelican, 2015) 46.

[153] See I Ramsay, 'Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU' (2012) 35(4) *Journal of Consumer Policy* 421–41.

[154] 'Filing for bankruptcy is not an experience limited to people at the lower end of society. Nonetheless, there are some more people in lower prestige positions, like unskilled workers, and fewer people at the upper end of the distribution.' See Backert, Brock, and Maischatz, 'Bankruptcy in Germany' (n 25) 282.

[155] See discussion below, ch 4.

[156] Ibid.

[157] See ch 5.

the US. However, Greek research indicates that resort to personal insolvency is not restricted to poor households, but that significant numbers of homeowners used debt adjustment procedures, reflecting both the very high level of homeownership in that country and the possibility in Greek law of adjusting mortgage debt in insolvency.[158] In addition, in those countries that include both individual traders and non-traders in their insolvency systems, individuals who have been in trade comprise up to 20 per cent of insolvents.[159] We might conclude that, although it would be misleading to use the term 'middle class', in these European countries the use of insolvency is not restricted to the very poor but may often be drawn from the 'lower middle-class of the rich world', the primary losers from the globalisation of the world economy since the 1980s.[160]

A subset of debtors is associated with very high levels of unemployment and the receipt of social benefits. They may be using credit to supplement inadequate income and owe money to the central and local state as well as financial institutions. In France, these characteristics represent those using the *rétablissement personnel* procedure, and in England and Wales, the debt relief order, both of which provide a discharge of debts within one year. Single parents and the unemployed are often within this group with women over-represented. This group challenges the limits of insolvency law in bringing about a fresh start.

IV. Summary

Chapters two to five examine how four economically advanced states developed personal insolvency law and policy since the early 1980s and in the case of England and the US sets these changes in a longer historical context. These chapters illustrate the continuing influence of financial interests over the policy and administration of debt relief and, in England and France, the influential role of different ministries and agencies with particular agendas. These distinct institutional contexts for reform in each country often influenced the institutional framework for handling debt cases. Although policy solutions seemed initially relatively contingent, such as the role of the Bank of France in over-indebtedness management, once those solutions were in place a significant path dependency existed. Distinct narratives about debtors played particularly important roles in both France and the US in the establishment of the agenda for change. The state played an influential role in promoting these narratives in France, while financial interests promoted in the US the narrative of 'personal responsibility'.

[158] See E Marsellou and Y Bassiakos, 'Bankrupt Households and Economic Crisis. Evidence from the Greek Courts' (2016) 39 *Journal of Consumer Policy* 41.

[159] See eg England, Germany, Finland noted in Ramsay (n 166).

[160] Milanovic, *Global Inequality* (n 14) 20.