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Book Review: Comparative Consumer Bankruptcy

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COMPARATIVE CONSUMER BANKRUPTCY

by Jason J. Kilborn. Durham, NC: Carolina Academic Press, 2007. 128pp. Paper. \$20.00. ISBN: 9781594601477.

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As someone used to muttering my research interests under my breath at dinner parties or on airplanes I am quite pleased to see that bankruptcy and credit issues have experienced a renaissance of sorts in popular culture. For example, a recent documentary by filmmaker and author James Scurlock, *MAXED OUT* – that has won awards at film festivals and carved out an audience that extends far beyond the likes of bankruptcy law professors – offers a biting critique of the modern financial industry. In a style that is simultaneously humorous and disturbing, Scurlock draws on stories of individuals from across the United States painting a bleak view of personal debt and the predatory strategies of lenders.

Thanks to representations in the popular press and in film, the “democratization of credit” – a phrase used to describe the recent expansion in access to credit by households in the lower ranges of the distribution of income – has become a sexy topic lately. While this phenomenon has a number of positive aspects for lower income individuals who can smooth their consumption over time in the same way that higher income households can and do, it also has a dark side. The recent sub prime meltdown in the United States has highlighted how greater access to credit can lead to financial disaster for some borrowers. Repaying the debt may prove difficult or even impossible if the borrower runs into trouble in the form of a failed investment, a rise in interest rates, the loss of the job whose wages were to repay the loan or a divorce that leads to higher living expenses. If the lender has not carefully assessed the ability of the borrower to repay, the borrower may have difficulty repaying her/his loans even if no adverse event occurs.

A major policy question raised by the democratization of credit is how to adapt consumer bankruptcy law and parallel out-of-court measures to the increased incidence of overindebtedness. As the recent sub prime crisis and the media accounts highlight, common law systems have generally taken a laissez-faire approach to the regulation of credit granting and used the bankruptcy system as the primary legal remedy when debtors cannot repay their loans. In *COMPARATIVE CONSUMER BANKRUPTCY* Jason Kilborn seeks to sketch out the approaches taken in continental Europe and to compare these approaches with the American regime. In writing the book, Kilborn draws on a number of country specific articles he has written in recent years (p.xii).

COMPARATIVE CONSUMER BANKRUPTCY is most successful as a reader for an advanced law school bankruptcy law seminar. Throughout the book Kilborn employs the welcoming tone of a seasoned and passionate educator, with a touch of humor, at the same time appealing to the [*189] sense of certainty that law students so often crave. While this certainty can be surprising

to an academic reader, with the intended audience in mind, the book may also be useful as a primer for readers without a law background and/or specific understanding of bankruptcy law. In particular, it may serve as a useful starting point for a political scientist interested in offering a nuanced, on-the-ground account of the politics of reform in this area.

Kilborn begins in the first chapter by justifying or explaining his comparative approach and his decision to use an American lens to understand the developments in continental Europe. It is probably fair to say that a comparative approach to consumer bankruptcy issues, while relatively new, is now widely accepted. This is most evident in the recent increase in publications on the issue (see, e.g. Anderson, 2004). More controversial and less convincing is Kilborn's decision to use the United States as his lens. Kilborn suggests that the United States is "vaguely representative of similar developments in other common law systems" and that jurisdictions such as Australia and Canada are already over-compared (p.xii). Perhaps one truly needs to stand outside of a system or work within a system that is not usually considered the "main comparator" to understand the difficulties this perspective presents. There are certain unique aspects of the American bankruptcy system and American consumer credit culture that make this approach somewhat unsettling, but this may be the case only for an international reader, which may not be Kilborn's intended audience.

In the second chapter Kilborn compares out-of-court debt restructuring in continental Europe and the United States. He starts by describing the rise of the American bank funded credit counseling industry, recent scandals surrounding their fees, and the role they are now playing, as mandatory counseling is required prior to filing for bankruptcy (pp.21-26). This section is a very helpful overview of the American situation. However, as someone who is familiar with the Canadian system that has required counseling as a pre-requisite to bankruptcy for more than a decade, I was surprised to read that "[o]nly in the United States, individual debtors must receive financial management training after filing a formal case but before receiving a discharge" (p.25). Kilborn hypothesizes about the potential for this "teachable moment" but notes that no reliable data exist on this yet (p.25). In the Canadian context, empirical data suggest that this exercise has largely failed and has limited behavioral modification potential (Schwartz, 2003).

The most useful part of Chapter Two is the second part where Kilborn highlights how in many parts of continental Europe consensual negotiation is the "central focus of the entire framework" for insolvency relief (p.26). This part of the second chapter, as well as the third chapter, which compares formal bankruptcy procedures, is particularly useful for North American academics, policy-makers, and others considering the types of reform to the consumer bankruptcy system that may be needed in light of the increasing number of low-income consumers who now have credit and may need to resort to the bankruptcy system. Generally, European insolvency [*190] procedures have been designed with the poor in mind, since widespread credit problems have not yet afflicted the middle class. This difference in focus can lead to very different perspectives on how to handle debt problems.

One example that Kilborn highlights is the Dutch insolvency system (pp.42-44, 84-87). The Dutch focus is on social inclusion so that the procedures for handling over-indebtedness try to keep the debtors – usually a person on low income – in touch with the whole set of government and NGO services. A unique example of this kind of integration is the court-formulated payment

plan which is a prerequisite for gaining access to the court-based Dutch insolvency procedure. The payment plan requires debtors to give all of their income (often only monthly social assistance payments) to an intermediary, such as a municipal bank or a non-governmental organization (p.86). The intermediary works with the debtor to develop a budget and then controls the debtor's expenditures to make sure that s/he sticks to the budget. Since the debtor is in close contact with the intermediary, any related issues – housing problems, substance abuse, relationship difficulties – can be addressed during the period when debtors are under the supervision of the agency. As Kilborn highlights, while no other European country has the same kind of payment plan procedure, many have insolvency laws that demand that the debtor devote all income above a fairly low “social minimum” to their creditors for an extended period of time.

The Dutch model is in sharp contrast to North American out-of-court and formal bankruptcy procedures. Outside of formal bankruptcy options, debtors have few opportunities to resort to neutral government agencies that can assist them by outlining their rights and developing strategies when it comes to dealing with their debt. Formal bankruptcy procedures are only available to debtors who can afford the high cost of the intermediary they need to access these procedures – in Canada this amount is approximately \$1600. Accordingly, this option is restricted to middle class debtors for the most part.

From a North American perspective, procedures such as the Dutch court-formulated payment plan can be seen as preventing the debtor from getting a “fresh start,” independent of outside oversight. Similarly, requiring a long repayment period before any discharge is allowed may also be viewed as impeding the “fresh start.” However, the recent amendments to the American Bankruptcy Code that have attempted to shift debtors into Chapter 13 plans highlight the erosion of the purity of the North American fresh start concept. Further, the Canadian system has never adopted a pure fresh start concept and requires payments into the debtor's estate for a minimum of nine months where the debtor is earning an income above the Low Income Poverty Line.

Kilborn's fourth and final chapter offers a counterbalance to his focus on debtors and shifts the discussion to creditor responsibility. In this context Kilborn describes the Belgian law which “takes a unique and aggressively direct approach to encouraging responsible credit practises while at the same time reducing the public burden of financing the consumer insolvency system” (p.106). Instead of redirecting the costs of risky [*191] lending to all consumer lenders, forcing the court to absorb the costs or denying access to the insolvency system to debtors, the insolvency system imposes a kind of bankruptcy tax on the creditors of risky debtors. The tax is paid into a fund and is assessed on the portion of creditors' total consumer lending portfolio in default at the end of each year. The fund is used to cover costs in formal insolvency cases and also for public education campaigns.

The US sub prime lending crisis has caused North American policy makers to take seriously the idea of front-end regulation of debt. The widespread impact of the crisis makes the Belgium attempt to limit the costs of such practises appealing and merits further consideration in the North American context.

Kilborn is to be congratulated for making accessible the historical trajectory of continental European approaches to over-indebteness, primarily for low-income debtors, at a time when

many North Americans policy-makers are struggling with how to deal with an increasing number of low-income over-indebted individuals.

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