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MIND GAMES: RETHINKING BAPCPA'S DEBTOR EDUCATION PROVISIONS

Nathalie Martin* and Ocean Tama y Sweet**

U.S. consumer credit levels are at an all-time high.¹ Historically forgiving U.S. bankruptcy systems, designed to create a vibrant economy through borrowing, have combined with the deregulation of credit markets and post 9–11 admonitions to spend, to create the most indebted public we have ever had.² As a group, we have charged greatly, and saved little. Thus, we have little to invest and no capacity to retire.³

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** J.D. expected, University of New Mexico School of Law, May 2007, B.A., Government, Cornell University. The authors thank Christopher Lopez for his research assistance and Stewart Paley and Fred Hart for their comments on earlier drafts of this Essay. The authors also thank the University of New Mexico School of Law for its financial support, as well as the Southern Illinois University School of Law and Dean Peter Alexander for the wonderful symposium at which these and other ideas were shared. Finally, Professor Martin thanks Professor Karen Gross for inspiring the financial literacy course discussed at the end of this Essay.

1. Tresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 229–32 (2006). In their most recent study of bankruptcy debtors, as well as overall debt levels, bankruptcy and stigma, the Sullivan, Warren and Westbrook research team notes that current “debtors have substantially larger debt loads than in the previous years.” *Id.* at 228.
2. By 2004, total household debt was at an historical high of 112 percent of disposable personal income. *The Condition of the Banking Industry: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 4 (2004) [hereinafter FDIC Testimony] (statement of Donald E. Powell, Chairman, Federal Deposit Insurance Corp. (FDIC)), available at http://banking.senate.gov/_files/powell.pdf; see also Sullivan, Warren and Westbrook, *supra* note 1, at 248.
3. Kathleen H. Czarney, Note, *The Future of American’s Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation’s Deficit*, 51 CLEV. ST. L. REV. 153, 155 (2004). Though Americans have traditionally relied upon the three-legged stool of personal savings, pension funds and social security for their retirement needs, all three have been weakened over time. *Id.* Personal savings are at a 74-year low. Martin Crutsinger, *2006 Personal Savings Drop to 74-Year Low*, Feb. 2, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/01/financial/f053547S48.DTL> (last visited on Apr. 4, 2007). Pension plan assets are significantly reduced today compared to the recent past. See Czarney, *supra* note 3, at 153 n. 140, (stating that “[i]n 2001, some of the largest plans in PBGC’s twenty-seven year history were terminated including ‘Trans World Airlines (36,500 workers and retirees), The Grand Union Company (17,000 workers and retirees), Outboard Marine Corporation (10,000 workers and retirees), Bradlees Stores (8,000 workers and retirees), Northwestern Steel and Wire Company (4,000 workers and retirees) and Laclede Steel Company (4,000 workers and retirees).’”). As Ms. Czarney notes, “both pension plans and Social Security have proven to be inadequate to provide financial stability during retirement.” See *Id.* at 155, n.1 (citing Mary Williams Walsh, *Many Companies Fight Shortfalls in Pension Funds*, N.Y. TIMES, Jan. 13, 2003, at A1; Mary Williams Walsh, *\$8 Billion Surplus Withers at Agency Insuring Pensions*, N.Y. TIMES, Jan. 25, 2003, at A1; Robert Perez and

Clearly a good financial education is needed. As with all useful lessons, however, there is a time and a place. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),⁴ enacted in April of 2005, and made effective for the most part in October 17, 2006, contains two requirements for debtor education in the context of every individual bankruptcy petition filed on or after October 17, 2006. The first requirement is that each individual debtor receive a “credit briefing” before being allowed to file a bankruptcy case at all.⁵ Specifically, the credit briefing must outline opportunities for credit counseling, provide a budget analysis, and provide an analysis of financial conditions, factors that caused such financial conditions, and how the debtor can develop a plan of action for dealing with the debt without incurring negative amortization of debt.⁶

Susan Malley, *Asset Allocation and the Social Security System*, 12 FIN. MGMT. 29 (1983)). “Millions of people have relied on pension funds as an insured income for retirement, yet many have failed to receive” a penny. Czarney, *supra* note 3, at 153 n. 1. Moreover, the future of social security is also uncertain. Neil H. Buchanan, *Social Security and Government Deficits: When Should We Worry?*, 92 CORNELL L. REV. 257, 275–77 (2007).

4. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, codified in various sections of Titles 11, 12, 15, 18, and 28 of the United States Code [hereinafter “BAPCPA”]. In a counterintuitive move economically, this reform makes the bankruptcy system less available and less forgiving by limiting access to the system in various ways. This is counterintuitive because forgiving bankruptcy systems presumably encourage spending, and thus fuel a vibrant U.S. economy. When discussing the process of liberalizing bankruptcy policies around the world, Professor Ronald Mann stated:

[w]riters in the political economy vein consistently have argued that globalizing economies must provide some form of relief (here, the bankruptcy discharge) for consumers that bear the adverse effects of the unforgiving competitive markets that globalization induces (here, those who borrow to the point of financial distress). Indeed, the United States appears to be unique in responding to rising levels of credit-induced financial distress by making the bankruptcy process less friendly to debtors.

Ronald Mann, *Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges, Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 399–400 (2006). The U.S. has now limited access to a forgiving bankruptcy system at a time when credit has been democratized and deregulated, meaning there is an immense amount of credit in the system.

5. 11 U.S.C.A. § 109(h)(1) (West Supp. 2006). There are limited exceptions to this requirement for people who are disabled or incapacitated, or in active military duty in a combat zone. § 109(h)(4). There also is an exception for “exigent circumstances.” § 109(h)(3)(A). Even so, the requirement keeps many debtors out of bankruptcy. *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005). Sometimes even a foreclosure is not enough to constitute “exigent circumstances”. See *In re LaPorta*, 332 B.R. 879 (Bankr. D. Minn. 2005).
6. 11 U.S.C.A. § 109(h)(1). The last list of requirements comes from the instructions to credit counselors. The Executive Office of the United States Trustee (“EOUST”) has published an application form for those seeking to become certified as approved providers of pre-petition budget and credit counseling. These forms, and their appendices and instructions, are *available at*

The new law also requires that individual debtors, under either chapter 7 or chapter 13, take a post-filing debt management course “designed to assist debtors in understanding personal financial management.”⁷ According to the instructions distributed by The Executive Office of the United States Trustee (“EOUST”) and memorialized in the Code of Federal Register, the entity charged with administering this requirement, the course must cover at least three areas of instruction: budget development, money management, and the wise use of credit.⁸

In the abstract, these debtor education courses sound wise. We know so little about personal finance as a society that any instruction is virtually better than no instruction.⁹ In reality, however, these requirements do more harm than good. Like most of BAPCPA, they were thrown together with little thought.¹⁰ Given the timing and the stress levels of a person facing financial crisis, the first course serves no useful function. Importantly, this requirement also keeps deserving people out of bankruptcy.¹¹ Since the instruction is ineffective, this bar to entry has no corresponding benefit.

The second course could be useful, but should not be required until it is redesigned.¹² The course mandates fail to take into account a great deal of available empirical research on learning theory, behavioral economics, the psychology of debt and spending, and the cultural conditions leading to overindebtedness.¹³ As a result, the second course in its present form also serves no useful purpose. Add to this that the current approved consumer credit counselors providing *both* courses have a reputation for predatory practices, and there is a clear need to rethink BAPCPA’s debtor education requirements. This Essay provides some initial ideas about how one might redesign an appropriate course for bankruptcy debtors.

http://www.usdoj.gov/ust/eo/bapcpa/credit_counseling.htm [hereinafter “Instructions”]. In Section 4.1, the instructions suggest that 90 minutes is an appropriate period of time in which to do a “credit briefing.” See also Karen Gross and Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST L. REV 549, 569 n. 62 (2005).

7. 11 U.S.C.A. § 111(d)(1)(B) (West Supp. 2006).

8. See *Application Procedure and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instructional Course by the United States Trustee*, 28 C.F.R. part 58, RIN 1105–AB17, July 5, 2006.

9. See *infra* notes 14–28 and accompanying text.

10. See Gross and Block-Lieb, *supra* note 6, at 562–64.

11. *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005); *In re Hubbard*, 333 B.R. at 377 (Bankr. S.D. Tex 2005); *In re LaPorta*, 332 B.R. 879 (Bankr. D. Minn. 2005).

12. See *infra* notes 8, 134–46 and accompanying text.

13. See *infra* notes 53–133 and accompanying text.

I. THE NEED FOR FINANCIAL HEALTH AND EDUCATION

It is shocking what people do not know about personal finance. Some do not know that it costs extra interest to charge something and not pay off the balance. Some have never heard of compounding interest. Still others cannot tell you if it is more financially advantageous to hold money in a money market account versus a checking account.¹⁴

A. The Societal Cost of Financial Illiteracy

The personal financial condition of Americans, as a group, reflects this lack of knowledge. Between 1992 and 2000, personal savings fell from over 6 percent to zero.¹⁵ Approximately one-half of all American households are living paycheck to paycheck and for many Americans the amount of their 401K retirement plans is less than their outstanding credit card balances.¹⁶ In 2003, consumer bankruptcies hit a record high of 1.7 million, or one in seven households over the past decade.¹⁷

These conditions are harmful for Americans of all races, but even more so for people of color, who generally start from a weaker economic position. African Americans have an estimated average net worth of approximately \$8,000, and

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14. Author Nathalie Martin teaches a one-credit, two-day financial literacy course to both law students and undergraduate students. These data come from the pre-tests administered in that course. More information about the course is provided *infra*, notes 138–54, and in Appendix A.
 15. Stewart Paley, *Money, Money, Money, Must Be Funny, in a Rich Man's World: Making Money Lessons Culturally Relevant*, (draft, on file with authors), at 5 (citing Alexandra Marks and Ron Scherer, *Spendthrift Nation*, *The Christian Science Monitor*, August 3, 2005, also available at <http://www.csmonitor.com/2005/0803/p01s02-usec.html> (last visited on January 29, 2006)).
 16. *Id.*, Mary Suiter & Bonnie T. Meszaros, *Teaching About Saving and Investing in the Elementary and Middle School Grades*, *SOCIAL EDUCATION* 69.2 (March 2005). Adjustable rate mortgages are another looming problem. Foreclosure rates are much higher for adjustable rate and other non-traditional loans than for fixed-rate loans, and many Americans already have lost their homes due to rising interest rates. Foreclosure rates are up 72 percent this year compared to last year in some areas, attributable to adjustable rate mortgages and relaxed borrowing standards. *Adjustable Rate Mortgages Set to Create Trouble*, *THE TRUMPET*, June 2, 2006, also available at www.thetrumpet.com/index.php?page+article&id_2258 (last visited on Apr. 4, 2007).
 17. Paley, *supra* note 15, at 5 (citing *Making the Case for Financial Literacy – 2005 (Jump Start)* (on file with author)). Even in 1990, social scientists found that almost 40 percent of all U.S. households spent more than they made, and the numbers have risen consistently in the 15 years thereafter. *Id.* According to one study, when income and other factors were controlled, *more* educated consumers were more likely to overspend than *less* educated consumers. Mikyoeng Bao, Sherman Hanna, and Suzanne Lindamood, *Patterns of Overspending in U.S. Households*, 4 *FINANCIAL COUNSELING AND PLANNING* 11, 11 (1993). One wonders if this is the result of entitlement, optimism, or simply easier access to credit.

Hispanic Americans have an estimated net worth of approximately \$9,750.¹⁸ Anglo or white Americans, on the other hand, have an estimated average net worth of about nine to ten times those amounts, coming in at approximately \$88,000.¹⁹ While homes represent Americans' largest financial asset, the rates of home ownership are similarly skewed. Home ownership rates among white American families are approximately 74 percent, compared with home ownership rates for African American and Hispanic American families of about 47 percent, meaning that Anglo families are over 50 percent more likely to own a home than their black and Hispanic neighbors.²⁰ Additionally, Anglo homes are likely to be approximately 35–40 percent more valuable than the homes owned by African American and Hispanic families.²¹ Without question, white America enjoys more wealth than “black and brown America.”²²

The effect of redlining and similar discriminatory credit practices, such as steering racial minorities toward higher cost auto and consumer credit products, leave minority consumers at a much greater chance of being taken advantage of by the deregulated (and all-too-frequently unscrupulous) credit industry.²³ As a result, despite the similarities between the racial groups that comprise middle class America, in terms of education, income, and

18. Paley, *supra* note 15, at 6 (citing *The State of Financial Literacy Among Young African-American Adults in America 1* (2005) (on file with author)) [hereafter “*The State of Financial Literacy*”]; *Financial Education in Latino Communities: An Analysis of Programs, Products, and Results 1* (National Council of La Raza 2004) [hereafter “*Latino Communities*”].

19. *Id.* (citing *The State of Financial Literacy*, *supra* note 18, at 1).

20. *Id.* (citing Elizabeth Warren, *The Economics of Race: When Making it to the Middle is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1788 (2004)).

21. *Id.*

22. *Id.*, *The State of Financial Literacy*, *supra* note 18, at 1. Much of these disturbing differences result from historical and ongoing racially motivated financial discrimination. David A. Skeel, *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695, 1712. (2004). The credit industry's practice of “redlining” minority neighborhoods, meaning refusing to lend at all or targeting neighborhoods for high interest loans, has been well-documented by scholars and courts alike, see Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 4 CAL. L. REV. 101 (2006); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994). By formally or informally redlining neighborhoods, lenders harm racial minorities in one of two ways. Paley, *supra* note 15, at 11–12. First, if loans are not given, racial minorities cannot purchase a home and therefore must remain tenants and thereby lose the opportunity to build equity in real estate and enjoy related tax advantages. Second, if loans are granted, they are often accompanied by exorbitant upfront fees and much higher interest rates, thus causing African American and Hispanic American households to spend a much greater percentage of their income on housing costs than white households spend. *Id.* at 7. (citing Warren, *supra* note 20, at 1796).

23. *Id.* (citing Warren, *supra* note 20, at 1797); Skeel, *supra* note 22, at 1713–14.

employment, African American and Hispanic households are three to five times as likely as Anglo Americans to face financial instability and insolvency.²⁴ In other words, if you take a group of middle class people, all with the same type of schooling, jobs, and earnings, Black and Hispanic Americans are far more likely than Anglo Americans to face financial ruin.

In addition, racial minorities seem to know less about financial matters than their white counterparts.²⁵ For example, the National Council of La Raza estimates that one-half of the Latino population does not have a savings or checking account, “which is widely recognized as [the] *fundamental starting point* for financial well-being and growth.”²⁶ In the same study, over 40 percent of Latino workers surveyed said they had no knowledge about investing or saving for retirement.²⁷ In another study, significantly more African Americans than white Americans believed that there was a federal agency that protected one from losing money in the stock market.²⁸

B. Social and Health Problems Associated with Overindebtedness

High debt levels contribute to poor health. Many studies link overindebtedness to poor health. The theory is that excess debt is stressful and causes Americans to spend less money on preventative health care.²⁹ Moreover, families with high consumer debt are unable to pay for health care. One study found that one in seven families has difficulty paying for health care

24. *Id.* (citing Warren, *supra* note 20, at 1797) (stating that Hispanics are two times more likely, and African Americans three times more likely, to file for bankruptcy than white people at the same economic level).

25. Paley, *supra* note 15, at 13 (citing *The State of Financial Literacy*, *supra* note 18, at 1).

26. *Id.* (citing *Latino Communities*, *supra* note 18, at 3).

27. *Id.*

28. See Creola Johnson, *Mandating Financial Literacy Education in America's School System: Making Financial Literacy as High a Priority as Reading, Writing and Arithmetic* (draft, on file with author). As Professor Johnson reports, in its 2003 Investor Survey, NASD reported that 65 percent of 1,086 investors failed a basic investment knowledge survey asking them 55 questions about investing in U.S. stocks, bonds and mutual funds. When asked to identify the “organization that insures you against losing money in the stock market,” only 38 percent of the investors knew correctly that no such organization exists. See *id.* (citing *Applied Research & Consulting LLC, NASD Investor Literacy Research* 1, 9 (2003)), available at <http://www.nasdfoundation.org/surveyexecsum.pdf>. Twenty-two percent did not know whether or not such an organization existed and 46 percent incorrectly believed that the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation or the National Association of Securities Dealers protects stock market investments. *Id.*

29. Melissa Jacoby, *Health, Law, and Everyday Life: Does Indebtedness Influence Health: A Preliminary Inquiry*, 30 J. MED. & ETHICS, 560, 560–61 (2002) (summarizing numerous articles that document the connection between debt and poor health).

costs, and therefore such families must juggle medical expenses with basic living costs.³⁰ Conversely, poor health can also lead to excessive overindebtedness from medical bills, leading one to question which is the chicken and which is the egg.³¹

When the debt comes first, a statistically significant number of study subjects report that their debts cause sleeping disorders, upset stomach, loss of appetite, and headaches, not to mention the occasional heart attack or stroke. One study noted that “credit card debt may be a more sensitive barometer of financial well-being than income because it may tap into more long-term deprivation.”³² Credit card debt was associated with extended financial hardship, less money for health care, and excess stress due to owing money that was costing a high rate of interest.³³

Another study associated high debts with higher levels of periodontal disease.³⁴ Some studies even link debt and suicide.³⁵ Among bankruptcy debtors, studies show that somewhere between 25 percent and 46.2 percent of bankruptcy cases were filed as a result of health-related debts.³⁶

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30. Barbara O. Neill, Jing Jian Xiao, Benoit Sorhaindo, and E. Thomas Garman, *Relationship Among Financial Practices, Financial Well-Being, and Health of Financially Distressed Consumers*, 2005 (forthcoming in the Consumer Interest Annual) [hereinafter “*Financial Well Being*”].
 31. Causation, as opposed to mere correlation, is definitely an issue in some of these studies.
 32. Jacoby, *supra* note 29, at 561 (citing P. Drentea and P.J. Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 Soc. Sci. & Med. 517, 518 (2000)).
 33. *Id.*
 34. Jacoby, *supra* note 29, at 562 (citing R.J. Genco et al., *Relationship of Stress, Disease, and Inadequate Coping Behaviors to Periodontal Disease*, 70 – 7 J. OF PERIODONTOLOGY 711, 711–23 (1999)).
 35. Jacoby, *supra* note 29, at 563 (citing S. Weyerer and A. Wiedenmann, *Economic Factors and the Rates of Suicide in Germany Between 1881 and 1989*, 76 PSYCHOL. REP., no. 3, part 2, 1331 (1995)); see also Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT’L & COMP. L. REV. 1, 63–65(2005); Clarissa Segovia, *Watch out for the Black Hole of Credit Card Debt*, Online Forty-Niner, Aug. 30, 2004, at 1, available at <http://www.csulb.edu/~d49er/2004/fil/news/volLVno2-debt.shtml> (last visited on Apr 4, 2007) (noting that a University of Central Oklahoma student was found dead from suicide next to her checkbook and her credit card bills).
 36. See Jacoby, *supra* note 29, at 563 (citing M.B. Jacoby, T.A. Sullivan, and E. Warren, *Rethinking the Debates Over Health Care Financing: Evidence From the Bankruptcy Courts*, 76 N.Y.U. L. REV., 376 (2001), and M.B. Jacoby, T.A. Sullivan, and E. Warren, *Medical Problems and Bankruptcy Filings*, 5 NORTON BANKR. L. ADVISER 1, (2000)); see also, Aparna Mathur, *Medical Bills and Bankruptcy Filing*, available at http://www.aei.org/publications/filter.all.pubID.24680/pub_detail.asp (last visited Apr. 24, 2007). In this article, the researchers found that nearly 27 percent of all bankruptcy filings are a consequence of primarily medical debt, while in approximately 36 percent of cases medical debts co-exist with primarily credit card debts. See also, New Standard Staff, *Health Care Costs Main Cause of Personal Bankruptcy, Study Finds*, http://newstandardnews.net/content/?action=show_item&itemid=1439 (last visited on Apr. 4, 2007).

Health is not the only thing that suffers as a result of too much debt. Family relations can be strained as well. Overindebtedness is a frequent cause of divorce. Financial problems also keep parents from spending more time with their children. Given the serious negative impacts of overindebtedness, financial education is critical. Nevertheless, the BAPCPA credit counseling requirements are harmful rather than helpful.

II. THE PROBLEMS WITH CREDIT COUNSELORS

While debtor education is a good idea, Congress missed the mark in BAPCPA because it established a system in which members of a misleading and even fraudulent industry are tasked with teaching the two required courses. First, BAPCPA provides that the courses can only be taught by agencies approved by the Office of the United States Trustee (“EUOST”).³⁷ Second, the approval process virtually requires that the credit counselors be experienced in the field, despite that the credit counseling industry has been under federal investigation for fraud, improperly claiming 501(c)(3) tax exempt status, and other violations of federal law.³⁸ In sum, this industry lacks relevant financial literacy teaching experience, lacks integrity in its relations with consumers, and has a penchant for profitable yet predatory strategies.

Anecdotal evidence of consumer credit counseling service abuse is familiar. It is not uncommon for debtors to find multiple answering machine messages from approved “non-profit” consumer credit agencies claiming they can reduce monthly payments and return overwhelmed debtors to credit nirvana.³⁹ In November 2003, The Federal Trade Commission (“FTC”) charged AmeriDebt with bilking consumers for at least \$170 million in hidden fees,⁴⁰ deceiving nearly 300,000 consumers, pushing customers into ill-

37. See Gross & Block-Lieb, *supra* note 6, at 551.

38. See *id.* at 562.

39. We witnessed this first hand in the University of New Mexico School of Law Legal Clinic in the Spring and Summer of 2003. We (Professor Martin and 16 students) kept track of the calls we each got. Most days each person received more than one call a day for over four months.

40. *FTC Settles with AmeriDebt: Company to Shut Down*, <http://www.ftc.gov/opa/2005/03/ameridebt.htm> (last visited on Apr. 4, 2007). The FTC also charged that AmeriDebt misrepresented to consumers that it was a nonprofit organization that could help consumers get out of debt without an up-front fee. But rather than operating for charitable purposes as advertised, AmeriDebt was funneling profits to affiliated for-profit entities. AmeriDebt also deceived new clients into making a “voluntary contribution” to enroll in the program, while AmeriDebt kept these initial “contributions” as fees without consumers’ knowledge, rather than disbursing the money to consumers’ creditors as promised. Finally, despite AmeriDebt’s promises to teach consumers how to manage their finances to avoid future debt, AmeriDebt instead enrolled all customers in debt management plans (“DMPs”), for which it charged a monthly fee. *Id.*

conceived debt-management plans (“DMPs”) without counseling, and funneling the resulting revenues to for-profit entities.⁴¹ As part of its settlement agreement, AmeriDebt agreed to shut down in March of 2005,⁴² and to pay \$35 million for a victim-redress program.⁴³ More recently, in a January 8, 2007 press release, the FTC announced that it had filed a complaint against Florida attorney Randall L. Leshin and his entity, Express Consolidation, for being a “sham nonprofit company,” illegally telemarketing millions of consumers and misleading them about costs, benefits, and nonprofit status, in violation of the FTC Act and the FTC’s Telemarketing Sales Rule (“TSR”).⁴⁴

Such anecdotal evidence of fraud, abuse, and predatory campaigns waged by the consumer credit counseling services industry begs the question of whether there is widespread, systemic abuse, or merely a few bad apples. In May 2006, the IRS announced that it had audited 41 of the largest consumer

41. Andrea Coombes, *A Safer Credit-Counseling World? Another 'Debt Manager' Faces Fire, But Overall Outlook Improves For Consumers*, Market Watch, Jan. 10, 2007, <http://www.marketwatch.com/news/story/despite-bad-actors-credit-counseling/story.aspx?guid=%7b045AD352-936C-4556-9360-0F3113C573C2%7d&print=true&dist=printTop> (last visited on Apr. 4, 2007).

42. *FTC Settles with AmeriDebt*, *supra*; note 40.

43. Andrea Coombes, *supra* note 41.

44. *National Debt Consolidation Scheme Misleads Consumers About Costs, Benefits, and Nonprofit Status*, *FTC Says*, <http://ftc.gov/opa/2007/01/expresscon.htm> (last visited on Apr. 4, 2007). This website contains the actual FTC press release. According to the FTC press release, Express Consolidation bills itself as “America’s Premier Debt Consolidation Company.” According to the FTC complaint, however, it falsely claims it is a nonprofit entity; that the only cost for services is a monthly administrative fee of less than \$49, when in fact the fee is equal to the consumer’s monthly payment and is collected from the consumer’s first payment; that the services will result in savings, typically several thousand dollars, when in fact estimated savings, if any, are overstated; and that its service will improve the consumer’s credit rating, when in fact Express Consolidation does not provide any service to improve a customer’s credit rating. *Id.* The complaint states that Express consolidation is also in violation of the Telemarketing Sales Rules (“TSR”) because it failed to disclose the program’s total costs, and it told consumers that certain payments were refundable, without disclosing the limitations on the refund policy. Express Consolidation is also charged with calling telephone numbers listed on the Do Not Call Registry and calling consumers who have stated they do not wish to receive such calls. *Id.*

According to FTC’s complaint, Express Consolidation has used computerized telemarketing services for “voice broadcasting,” delivering recorded messages to answering machines and voice mail. The TSR requires that such calls answered by a person be connected to a live representative within two seconds. One telemarketer Express Consolidation used is The Broadcast Team (“TBT”). TBT was sued by the U. S. Department of Justice in December 2005 at the FTC’s request for TSR violations. The complaint states that TBT caused almost 11 million abandoned calls on the defendants’ behalf. One recorded message urging consumers to contact Express Consolidation says, “We are a nonprofit agency that can consolidate your credit cards, lower your monthly payments dramatically, and reduce your interest rates down to as low as 1.5 percent.” Monthly payments, however, are typically several hundred dollars. *Id.*

The Commission vote to authorize FTC staff to file a complaint against Express Consolidation was 5–0. The complaint was filed in the U.S. District Court for the Southern District of Florida. *Id.*

credit counseling organizations, representing more than 40 percent of the revenue in the industry.⁴⁵ Every single audit resulted in revocation or other termination of tax-exempt status.⁴⁶ These startling results led IRS Commissioner Mark W. Everson to proclaim that tax-exempt credit counseling had become “a big business dominated by bad actors.”⁴⁷ He concluded that the audits substantiated that consumer credit counseling organizations “have not been operating for the public good and don’t deserve tax-exempt status. They have poisoned an entire sector of the charitable community.”⁴⁸ Bolstering the Commissioner’s strong statements, the U.S. Council of Better Business Bureaus reported that “it received 1,286 complaints about credit-counseling services nationwide in 2005, up from 404 in 2000”⁴⁹ and 261 in 1998.⁵⁰ Finally, in 2003 the first comprehensive study of consumer credit counseling services found that the industry underwent an alarming transformation in the previous decade, resulting in a current industry characterized by aggressive firms masquerading as non-profit organizations that gouge consumers, engage in deceptive practices and commit outright scams.⁵¹

45. *IRS Takes New Steps on Credit Counseling Groups Following Widespread Abuse*, May 15, 2006, <http://www.irs.gov/newsroom/article/0,,id=156996,00.html> (last visited on Apr. 4, 2007). This web source contains the actual IRS press release.

46. *Id.* Revocations of tax exempt status result from consumer credit counseling organizations failing to provide the level of public benefit required to qualify for tax exemption. The IRS found that many of these agencies offered little or no counseling or education, appeared to be primarily motivated by profit, and, in many instances, also served the private interests of related for-profit businesses, officers and directors.

47. *Id.*

48. *Id.*

49. Monica Steinisch, *Steer Clear of Credit Counseling Bad Guys*, University Credit Union, <http://hffo.cuna.org/012433/article/1186/html> (last visited on Apr. 4, 2007).

50. Deanne Loonin & Travis Plunkett, *First-Ever Study Of Credit Counseling Finds High Fees, Bad Advice And Other Abuses By New Breed Of “Non-Profit” Agencies*, <http://www.consumerfed.org/releases2.cfm?filename=040903ccreport.txt> (last visited on Apr. 4, 2007).

51. *Id.* The comprehensive study, undertaken by Georgetown’s National Consumer Law Center (“NCLC”) and the Consumer Federation of America (“CFA”), found a new generation of credit counselors that are a true threat to consumers. “Unlike the previous generation of mostly creditor-funded counseling services, these new agencies often harm debtors with improper advice, deceptive practices, excessive fees and abuse of their non-profit status. An estimated nine million Americans have some contact with a consumer credit counseling agency each year.”

“The report found that creditor practices are the root cause of several key problems. Major banks have continued cutting funding to credit counseling agencies, a trend that started in the mid-1990s. Credit card issuers historically paid agencies 15 percent of the debt they recovered from borrowers in debt management plans (“DMPs”).” However, by 2002 one trade association reported an average 8 percent contribution, while more recent data indicates that creditors often contribute less than 8 percent. As revenue has declined, consumer credit counselors have curtailed the range of services they offer and increased fees.

“Most creditors are also less willing to reduce interest rates for consumers in DMPs. In the last four

Yet this is the industry to which we have entrusted the mandatory credit counseling and debtor education required by federal law. Besides the unsavory, predatory and fraudulent conduct of many consumer credit counseling services, there is no indication that these entities know anything about teaching financial literacy.⁵²

III. THE PHYSIOLOGY, PSYCHOLOGY, AND CULTURE OF DEBT

The ways that people choose to spend, save and make other decisions about money have been studied by psychologists and economists for decades. This research is relevant to any personal finance course, particularly a mandatory course that could keep a person from being eligible for bankruptcy or for a bankruptcy discharge. This section contains a small sampling of some of the research that could be considered in devising an effective debtor education course.⁵³

No one has consulted experts in the highly developed field of behavioral economics to devise the current debtor education scheme.⁵⁴ Rather, this knowledge has been used primarily by the consumer credit industry and other industries to devise advertising schemes that encourage consumers to buy things on credit that they do not need.⁵⁵ Numerous psychological, physiological, and cultural factors encourage indebtedness and discourage saving.⁵⁶

These strong influences, some of which have developed over centuries, must be counteracted with aggressive tactics encouraging a cash-based personal finance plan and discouraging the use of consumer credit. These

years, five of 13 major credit card issuers (Bank One/First USA, Discover, Chase Manhattan, Fleet and Wells Fargo) have increased the interest rate they offer to consumers in DMPs. Only two creditors, Provident and Capital One, have lowered rates, which still leaves Capital One's interest rate at 15.9 percent. Sears, which generally charges interest rates above 20 percent, continues to refuse to negotiate any discount." *Id.*

52. Of course, there could be exceptions, particularly among new agencies or counselors.

53. This is obviously just the tip of the iceberg of the literature on this topic, as many behavioral psychologists and behavioral economists have dedicated their lives to the study of this topic.

54. Other scholars have called for greater attention to psychological factors in devising such courses, however. See Richard L. Wiener, Susan Block-Lieb, Karen Gross & Corinne Baron-Donovan, *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 461-63 (2005).

55. George Loewenstein & Ted O'Donoghue, "We Can Do This The Easy Way or The Hard Way: Negative Emotions, Self-Regulation, and the Law," 73 U. CHI. L. REV. 183, 188 (2006) (noting that firms are specifically studying and seeking ways to overcome individuals' efforts to regulate their spending).

56. *Id.*

factors include physiological reasons for favoring the present over the future, optimism bias, the difficulty of changing past habits, low self-control, and the culture of materialism and consumerism. To be effective, debtor education courses should be designed to overcome these specific impediments to financial well-being.

A. Favoring Now Over Later and the Problem of Self-Control

Many empirical studies have noted a trend in U.S. society toward increased obesity, diabetes, low household savings rates, as well as overindebtedness.⁵⁷ Many social scientists attribute these trends to a lack of self-control.⁵⁸ Whatever the reason, humans tend to favor today over tomorrow, this moment over the next.⁵⁹

As an example, most of us know we should save more and spend less. A 1997 survey found that 76 percent of Americans felt they *should* be saving more for retirement.⁶⁰ This suggests that it is not merely a lack of education that keeps Americans from saving.⁶¹ Many social scientists blame the problem on lack of self-control, leading to an inability to reign in short-term desires to achieve long-term goals.

There may actually be a *physical* reason for our lack of self-control. A recent study by Professor Jonathan Cohen and Sam McClure of Princeton

57. See, e.g., Neill et. al, *supra* note 30.

58. Is this a uniquely American fault? Are we more indulgent than people from other cultures? This would be an area of interest for future research.

59. See Loewenstein & O'Donoghue, *supra* note 55, at 185 (noting that people surely prefer the taste of food now to being thin later). Moreover, because of something called *hyperbolic time discounting*, people tend to attach greater weight to immediate payoffs than they would from a more removed perspective. Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 106 (1999) (discussing how present-biased preferences can lead to unwanted behavioral outcomes); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 445-46 (1997) (discussing how hyperbolic discounting can lead to overconsumption and undersaving); George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209, 1210 (2003) (discussing evidence of such a bias and describing how the bias can lead to unwanted purchases); see also, Christopher K. Hsee & Reid Hastie, *Decision and Experience: Why Don't We Choose What Makes Us Happy?* 10 TRENDS IN COGNITIVE SCI. 31(2006).

60. George-Marios Angeletos, David Laibson, Andrea Repetto, Jeremy Tobacman & Stephen Weinberg, *The Hyperbolic Consumption Model: Calibration, Simulation, and Empirical Evaluation*, 15 JOUR. ECON. PERSPECTIVES 47, 47 (2001). Actual studies show that even under conservative estimates, such as that people will be comfortable on 63 percent of their current income and that their health care costs will remain stable, over 40 percent of Americans are ill-prepared financially for retirement. Humberto Cruz, *The Retirement Crisis*, ALBUQUERQUE J., June 14, 2006, at C-2.

61. People fail to save money even when they know that they should, apparently because they prefer short-term pleasure over long-term gain. Angeletos, et al., *supra* note 60, at 47.

University's psychology department studied how the blood flowed through the brain when people were asked to make a series of financial decisions balancing current satisfaction and future rewards.⁶² Certain parts of the brain literally lit up when the subjects of the study were offered money now versus money later, even if the money they would receive later was worth a lot more. As the scientists explained, the limbic system was developed at a time when all the important things in life were perishable.⁶³ Thus, we appear to be biologically hot-wired to want pleasure now, not later. As the theory goes, grab it or lose it.

Similarly, business professor Dick Thaler of the University of Rochester turned a dinner party into a study of human self-control.⁶⁴ When he noticed his dinner guest munching on the bowl of cashews he had left as a snack, he worried for their appetites. As a result, he pulled them away, an act the guests applauded. He concluded, based upon this and numerous studies by other professors, that people want help eliminating unhealthy options.⁶⁵

Credit card transactions cause unique self-control issues.⁶⁶ Even if it were possible for consumers to actually read and understand the contractual relationships they have with their credit card companies, a dubious

62. Samuel M. McClure, David I. Laibson, George Loewenstein & Jonathan D. Cohen, *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, SCI. MAG., October 15, 2004, also available at <http://www.sciencemag.org/cgi/content/full/306/5695/503> (last visited on Apr. 4, 2007).

63. *Id.*

64. THALER, RICHARD H., *QUASI-RATIONAL ECONOMICS*, at 18–21 (Russell Sage Foundation, 1991).

65. *Id.*

66. See Ronald J. Mann, "Contracting" for Credit, 104 MICH. L. REV. 899, 910 (2006). Credit card debt has become an increasing burden. See Sullivan, Warren, and Westbrook, *supra* note 1, at 228. "Median total debt loads are up an enormous 55.5 percent from 1981 in inflation-adjusted dollars. This seems to be a rise that occurred mostly during the 1990s; 1981 and 1991 mean debt loads were statistically indistinguishable from each other, with the astonishing climb occurring between 1991 and 2001." *Id.* They also note that:

Credit card debt has become a dominant form of lending in recent years, and it has characteristics that make it quite different from traditional consumer loans. The credit is granted over long periods of time without additional credit screening, and it is used incrementally rather than borrowed in one sobering moment, offering a chance to go broke one pizza at a time. At the extreme, nearly one in five debtors in 2001 (21.8%) owe more than a year's income in credit card debt alone. In absolute dollar terms, the amounts are remarkable. More than half (56.2%) of all the families owe more than \$10,000 in credit card debt at the time they file for bankruptcy. Many owe much more: more than a third (34.6%) owe more than \$20,000 in credit card debt. For families with our sample's median income of about \$20,000, a credit card debt of \$10,000 likely means the family would have to hand over 12 percent of every paycheck to the credit card companies just to stay even—that is, interest only—without paying down a single dollar of debt. For the third of the debtors who owe \$20,000, interest only payments would amount to 24 percent—or about every fourth paycheck handed over to the credit card companies just to stay even.

Id.

proposition in itself, those terms can be changed unilaterally by the credit card company at any time.⁶⁷ Moreover, since the structure of a credit card transaction separates the time of the contracting from the time of purchase and payment, people become desensitized to the fact that they are borrowing money. The separation of the three points in the credit card lending transaction hinders a borrower's assessment of the risks and returns of card transactions.⁶⁸ In reality, it is not even clear that consumers consider using a credit card to be taking out a loan.⁶⁹ As a result, people often spend more than they otherwise would, and more than they can realistically repay. Also, because the transaction costs of credit card lending are low, borrowers are more likely to underestimate the risks associated with future income than they might when using another type of consumer credit transaction.⁷⁰

Additionally, imperfect self-control causes consumers to forget how much they have charged, particularly for little things. If one actually considered each one of these transactions to be a loan, at least some consumers would resist the urge to charge things, but again, the psychology of credit card use makes it as easy as possible to use the cards.⁷¹ Moreover, credit cards alleviate the pain of paying by putting it off, and by temporally separating the pleasure from the pain.⁷² This eviscerates the psychological reality that buying one item means foregoing another.⁷³ The plastic money machine is ever-green.

The intuitive understanding that credit cards separate the pleasure of buying from the pain of paying may already be embedded in our popular culture. The sight of a credit card "logo alone is a powerful inducement to spend."⁷⁴ In a recent experiment conducted with a real mail-order firm, merely putting a credit card logo on the cover of a mail order catalog increased sales

67. *Id.* at 232–33. Not surprisingly, the extensive use of consumer credit seems to correlate with the consumer bankruptcy rate. *See id.* at 250–52.

68. Mann, *supra* note 4, at 403.

69. Mann, *supra* note 66, at 918.

70. *Id.*

71. The latest development in easy money is that some machines require only that you waive your card in front of a machine to charge something to your credit or debit card. *See Paying with a Wave, Tap and 'Blink': Contactless Payments in the U.S.*, Smart Card Alliance, August 2005, available at http://www.smartcardalliance.org/newsletter/august_2005/feature_0805.html (last visited on Apr. 4, 2007).

72. Loewenstein & O'Donoghue, *supra* note 55, at 194.

73. *Id.*

74. Eve Downing, *The Psychology Of Spending: The Urge To Splurge*, SPECTRUM, Massachusetts Institute of Technology, <http://mit.edu/giving/spectrum/winter99/spending.html>, (describing Professor Prelec's recent research, last visited on Apr. 4, 2007).

significantly.⁷⁵ Just seeing the credit card logo gets consumers excited to spend.⁷⁶ “It’s like waving a hamburger in front of a hungry person.”⁷⁷

B. Optimism, Denial, and Forgetfulness

Americans as a group also tend to be overly optimistic, assuming a higher future income, and fewer future expenses, than is likely.⁷⁸ This is known in psychological literature as the *optimism bias*.⁷⁹ In a famous study of the optimism bias, psychology Professor Neal Weinstein asked college students the following questions, among others:

- Will you like your future job?
- Will you own a house?
- Will you be hospitalized?
- Will you have a drinking problem?
- Will you have a high salary?
- Will you get a divorce?
- Will you suffer a heart attack?
- Will you be fired?

Weinstein found that people overwhelmingly assumed that positive things would happen to them in the future and that negative events would not happen to them but to others.⁸⁰ Virtually all participants predicted that their lives would be better than is statistically possible based upon existing data.⁸¹ One

75. *Id.*

76. *Id.*

77. *Id.*

78. See Neal D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980); Ron Harris, and Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQUIRIES IN THE LAW 433, 434 – 46 (2006); Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government’s Promotion of Home Equity Financing*, 69 TUL. L. REV. 371, 381–87 (1994) (arguing that excessive optimism and related heuristics lead consumers to underestimate the chance of default and foreclosure and to incur too much in home equity loans); Michael H. Schill, *An Economic Analysis of Mortgage Protection Laws*, 77 VA. L. REV. 489, 526–31 (1991).

79. See Weinstein, *supra* note 78, at 810, 813–14, 818–19.

80. *Id.*

81. *Id.* (Many others have studied the optimism bias). See Mary Helweg-Larsen & James A. Shepperd, *Do Moderators of the Optimistic Bias Affect Personal or Target Risk Estimates? A Review of Literature*, 5 PERSONALITY & SOC. PSYCHOL. REV. 74 (2001); Paul C. Price et al., *Perceived Event Frequency and the Optimistic Bias: Evidence for a Two-Process Model of Personal Risk Judgments*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 242 (2002); Cynthia T. F. Klein & Mary Helweg-Larsen, *Perceived Control and the Optimistic Bias: A Meta-Analytic Review*, 17 PSYCHOL. & HEALTH 437 (2002); Edward C. Chang et al., *Cultural Variations in Optimistic and Pessimistic Bias: Do Easterners Really Expect the Worst and Westerners Really Expect the Best When Predicting Future*

study showed that optimism causes students to take on more student debt than they might otherwise have done.⁸²

Overoptimism contributes to overspending,⁸³ as does the belief that one can control far more of life's events than is realistic.⁸⁴ People believe there is less chance of an accident if they drive, less chance of eating bad food if they cook, and a better chance of winning the lottery if they can hand-pick their ticket from the group behind the counter.⁸⁵ While some scholars doubt that overoptimism leads to overspending, perhaps as a justification to limit bankruptcy rights, even these dubious scholars seem overly optimistic about the effects of optimism.⁸⁶

Most research suggests that optimism, teamed with outright denial, explains some of our credit problems.⁸⁷ Just as Americans frequently underestimate what they eat and overestimate how much they exercise, they also underestimate how much they use a credit card.⁸⁸ They overestimate their ability to resist temptation to finance consumption at a high interest rate.⁸⁹ They overestimate their ability to make rational choices about the need for, and cost of, financed consumer goods.⁹⁰

Life Events? 81(3) J. PERSONALITY & SOC. PSYCHOL. 476 (2001); Geeta Menon et al., *We're at as Much Risk as We Are Led to Believe: Effects of Message Cues on Judgments of Health Risk*, 28 J. CONSUMER RES. 533 (2002).

82. Hamish G. Seaward & Simon Kemp, *Optimism Bias and Student Debt*, 29 N.Z. J. PSYCHOL. 17 (2000); Stephen E.G. Lea et al., *Student Debt: A Psychological Analysis of the UK Experience*, FRONTIERS IN ECONOMIC PSYCHOLOGY 1, 430 (Ellen Nyhus & Sigurd V. Troye eds., 1995); Saul Schwartz, *Personal Bankruptcy Law: A Behavioural Perspective*, CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 61 (Johanna Niemi-Kiesiläinen et al. eds., 2003).
83. Norman I. Silber, *Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law*, 2 LOY. CONSUMER L. REV. 69 (1990); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U.L. REV. 1373, 1375–76 (2004); Richard M. Hynes, *Overoptimism and Overborrowing*, 2004 BYU L. REV. 127, 148–49 (2004); Jason J. Kilborn, Abstract, *Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions* (June 2005) (Cegla Center conference paper), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=690826> (last visited on Apr. 4, 2007).
84. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975).
85. Harris and Albin, *supra* note 78, at 436–37, cited in Susan Block-Lieb and Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behaviorism, and the Misguided 'Reform' of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1542 n. 273 (2006) (citing Weinstein, *supra* note 78, at 814).
86. See Hynes, *supra* note 83, at 148–49.
87. See Richard A. Brown and Susan E. Bushouse, *Implications of the Supply-Side Revolution in Consumer Lending*, 24 ST. LOUIS U. PUB. L. REV. 363, 377 (2005) (noting that consumers are in denial about credit card purchases).
88. See Mann, *supra* note 66, at 918.
89. Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Markets*, 81 AM. ECON. REV. 50, 69–71 (1991).
90. *Id.*

Credit card companies capitalize on this human weakness by increasing credit limits. Credit cards themselves “blur the lines between conventional payment and borrowing decisions, and, in doing so, they are associated with substantial increases in consumer spending and borrowing levels.”⁹¹

Forgetfulness exacerbates the problem in another way. If one forgets to pay the bill on time (even missing the deadline by one day) late fees of \$50 or more can be incurred, not including any additional interest cost. Teaser rates play into the same psychology, by convincing the consumer that the ultimate rate does not matter because the consumer will not use the card once the rate is increased. Consumers tend to overemphasize up-front features and underestimate the features that make a difference over time.⁹² The problem of course is that the consumer may have a balance to pay at that time, and no way to pay it off before the rate goes up. Finally, studies show that people spend more for individual items, as well as overall, using credit cards than they would with cash.⁹³

C. Defining Ourselves Through Our Possessions: \$100,000 Cars, Everybody’s Got ‘Um⁹⁴

It is hard to have self-control when no one else has it. Societal and cultural factors exacerbate problems of overindebtedness. Just as it did in the 1950s,⁹⁵ consumerism continues more than ever to define who we are.⁹⁶ Social events often revolve around consumption, which is heavily commercialized. We think we can “buy” a lifestyle. Shopping has become a hobby. People shop to feel better and to relieve stress, even though excess spending unquestionably puts pressure on relationships and families and leads to greater stress and more health problems. Due to our constant need to compare ourselves with others, as well as the simple fact that material wealth does not create well-being, there is no connection between material wealth and

91. Mann, *supra* note 4, at 398.

92. Ausubel, *supra* note 89, at 70–71.

93. Mann, *supra* note 66, at 921.

94. WILL SMITH, *Miami, on BIG WILLIE STYLE* (Columbia Records 1997).

95. See Martin, *supra* note 35, at 18–21.

96. Anup Shah, *Behind Consumption and Consumerism: Creating the Consumer, Consumerism Drives Most Aspects of Our Lives Today*, available at <http://globalissues.org/TradeRelated/Consumption/Rise.asp>, (describing a series of studies completed by psychologists and reported in a BBC documentary entitled “Shopology” aired on September 2nd and 9th, 2001, studying spending habits in Britain and the U.S) (last visited on Apr. 4, 2007).

happiness.⁹⁷ Some studies even show that people who are very wealthy often find themselves depressed and have lower self-esteem.⁹⁸ It is widely recognized that high quality friendships, a happy marriage and good health, not material wealth, correlate with happiness, a fact that itself could be relevant to financial education.⁹⁹

D. The Desire for Guidance in Money Matters, Not Unlimited Choices

People can only keep track of and pay attention to a limited number of variables at one time.¹⁰⁰ After that, decision-making is impaired. This suggests that fewer choices might be better than more choices when it comes to financial matters. One study showed that when consumers were faced with 30 kinds of jam to choose from at an outdoor market, only 3 percent of the consumers bought jam.¹⁰¹ When faced with just six jams, however, 30 percent bought some.¹⁰² These studies suggest that consumers may be more willing to participate in an activity if the choices are limited. Thus, the easier we can make it for people to save, the more they will likely save. For example, when workers are automatically placed into the company 401(k) plan, few opt out. But when they must fill out a form to join, enrollment drops drastically.¹⁰³ Lower-income employees are the least likely to do anything other than what is done for them automatically. These studies have significant implications for the types of policies and education efforts that could effectively prepare people for the future.

97. See Andrew J. Oswald, *Happiness and Economic Performance*, ECON. J. 1997, available at <http://www2.warwick.ac.uk/fac/soc/economics/staff/faculty/oswald/hapepecperf.pdf> (last visited on Feb. 6, 2007).

98. *Id.*

99. *Id.* at 4. Knowing that money cannot buy happiness may make people think twice about purchases that will require them to work more and thus take valuable time away from their families and friends. For more research on this subject, see MARTIN SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* (Free Press, 2002) and the large body of literature on positive psychology.

100. Mann, *supra* note 66, at 910–11.

101. Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. OF PERSONALITY AND SOC. PSYCHOL. 995 (2000), also available at http://www.columbia.edu/~ss957/articles/Choice_is_Demotivating.pdf (last visited on Apr. 4, 2007).

102. *Id.*

103. WILLIAM G. GALE ET AL., *RETIREMENT SECURITY PROJECT, THE AUTOMATIC 401(K): A SIMPLE WAY TO STRENGTHEN RETIREMENT SAVINGS*, available at [http://www.retirementsecurityproject.org/pubs/File/Automatic401\(k\).pdf](http://www.retirementsecurityproject.org/pubs/File/Automatic401(k).pdf) (last visited on Apr. 4, 2007). The University of New Mexico recently changed its 403(b) to make enrollment automatic for all employees, which is predicted to have a tremendously beneficial economic impact on tens of thousands of employees per year.

E. The Consumer Credit Industry Knows About These Physiological, Psychological, and Cultural Factors, and Uses Them Against Us

Though we do not use any of the above information to design consumer education courses, the consumer credit industry makes ready use of such information, hiring people like Professor Drazen Prelec, a scholar of psychology and economics at the Sloan School of Management, to convince consumers to use more consumer credit.¹⁰⁴ The industry uses established techniques to capitalize, literally, on the innate psychological biases of consumers. Professors Harris and Albin distinguish persuasion from manipulation, and suggest that creditors manipulate consumers' psychological weaknesses to distort consumer preferences and thereby increase the use of consumer credit products:

[W]e define manipulation, in our context, as an act that looks as if it constitutes an intention by the lender to lead a consumer to borrow, while trying to persuade her to reach a decision that is not based on her genuine (non-biased) preferences, through exploitation of one or more of the following: biases and illusions, heuristics, inability to perform complex calculations, lack of relevant information, or a state of mind in which not enough cognitive resources are allocated to the decision. Persuasion does not amount to manipulation when it does not exploit these weaknesses of the borrower. However, manipulation is constituted irrespective of whether the lender fully intends to manipulate or is fully aware of the cognitive processes that allow manipulation.¹⁰⁵

In looking at whether consumers are rational and opportunistic, or instead suffer from decision-making limitations and biases, Professors Block-Lieb and Janger surveyed recent cognitive psychology and behavior decision research, which suggest that consumers' borrowing, purchasing and default decisions are not fully rational.¹⁰⁶ Instead of believing that consumer borrowers are

104. Downing, *supra* note 74.

105. Harris & Albin, *supra*, note 78, at 443. This definition deals with persuasion and manipulation that relate directly to borrowing, as opposed to manipulation that relates to consumption of goods and services and thus indirectly leads to additional borrowing even when there is no manipulation by the lender. *Id.* at 443; See also Jon D. Hanson and Douglas A. Kyser, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 722 (1999).

106. Susan Block-Lieb & Edward J. Janger, *The Myth Of The Rational Borrower – Pt. 1*, http://www.creditslips.org/creditslips/2007/01/the_myth_of_the.html (last visited on Apr. 4, 2007). [hereafter "*Credit Slips I*"]. See also Block-Lieb & Janger, *supra*, note 85, at 1525–48. For detailed analysis of the *payment/interest bias*, particularly how consumers systematically underestimate the interest rate associated with a loan principal and repayment stream, see Victor Stango and Jonathan

strategic and rational, Block-Lieb and Janger find the counterstory more compelling, namely that, in order to compensate for bounded rationality, consumers adopt decisionmaking heuristics that introduce systematic biases into consumers' borrowing decisionmaking, leading consumers to buy and borrow more than a rational credit-using purchaser would.¹⁰⁷ The authors conclude that excess borrowing results more from consumers' decisionmaking biases than from consumers' rational efforts to gain strategic advantages over creditors or take advantage of generous consumer finance and consumer bankruptcy laws.¹⁰⁸ Further, the authors conclude that rational lenders can profit greatly from these biases, even when more and more borrowers default on their obligations.¹⁰⁹

First, the *cognitive limitations* bias teaches us that nearly all “consumers simplify borrowing decisions by reducing the many comparisons to one simple question: Can I afford the minimum monthly payment?”¹¹⁰ This helps us reduce a large quantity of complex information to a kind of mental shorthand. Second, one *heuristic bias*, known as the *availability heuristic*, “leads many consumers to anchor their consumption and borrowing decisions around the minimum payment,” because human minds search for an easily available measure to substitute for complex decision making processes.¹¹¹ Likewise, the *optimism bias*, discussed in Part III (B) above, “likely cause[s] consumers to overestimate their income in the next period, or underestimate their need for borrowed money in future periods.”¹¹² In addition, denial and forgetfulness “may cause consumers to underestimate credit card use so far this month, or to ignore the amount being spent on finance charges.”¹¹³ Third, consumers favor present consumption over future benefits, which is an important factor because borrowing decisions involve a choice between present and future consumption.¹¹⁴ However, contrary to the assumption of traditional

Zinman, *How a Cognitive Bias Shapes Competition: Evidence from Consumer Credit Markets*, available at http://emlab.berkeley.edu/users/webfac/gilbert/e221_f06/stango.pdf (last visited on Apr. 4, 2007).

107. Susan Block-Lieb and Edward J. Janger, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=786427 (last visited on Apr. 4, 2007).

108. *Id.*

109. *Id.*

110. Susan Block-Lieb and Edward J. Janger, *The Myth Of The Rational Borrower—Pt. 2*, http://www.creditslips.org/creditslips/2007/01/the_myth_pt_ii.html (last visited on Apr. 4, 2007) [hereinafter, “*Credit Slips II*”].

111. *Id.*

112. *Id.*

113. *Id.* The authors call this *cognitive dissonance*.

114. *Id.* The authors call this *anomalous preferences*. Intertemporal choices depend on the relative weight attached to future consumption versus present consumption, *i.e.*, the consumer's discount rate. *Id.*

economics, that rational consumers use consistent discount rates over different time periods, in recent experiments consumers have chosen wildly divergent and paradoxical ranges of discount rates over different periods.¹¹⁵

As a result of the cognitive limitations described above, creditors manipulate less than rational consumers, who “may make borrowing and consumption decisions that do not accurately reflect their true . . . preferences.”¹¹⁶ Professors Block-Lieb and Janger conclude that psychological biases, combined with “changes in lending technology . . . provide[] a plausible explanation for the confluence of highly profitable consumer lending and a skyrocketing bankruptcy filing rate between 1980–2005.”¹¹⁷

As discussed in Part III A above, the use of credit cards itself promotes over-consumption. “[C]redit cards are insidious because they disconnect the pleasure of buying from the pain of paying.”¹¹⁸ Humans make purchasing decisions based on implicit rules that we try to follow, for instance, ‘I never buy gourmet cheese if it costs more than \$10 per pound.’¹¹⁹ If we break the rule, we feel less joy eating the gourmet cheese than we otherwise would, because the guilt associated with breaking the rule diminishes our pleasure.¹²⁰ Prelec refers to this sting of guilt as the “moral tax on consumption.”¹²¹ Credit cards, however, “disconnect the consumption transaction, which is pleasant, from the payment transaction, which is painful.”¹²² The effect of the felt disconnect between the pleasure of consumption and the pain of payment is so strong that consumers may be willing to pay twice as much for the same item using a credit card as they are willing to pay if they must use cash.¹²³ The power of this phenomenon stunned even Prelec and his fellow researchers.¹²⁴

115. *Id.* Different discount rates ranged from 345 percent for short time periods to 120 percent for medium time periods to 9 percent for long time periods. See Block-Lieb & Janger, *supra* note 85, at 1565 n. 284 (citing Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistencies*, 8 ECON. LETTERS 201, 205–06 (1981)). This explains why consumers ignore very high lending costs on small amounts or for short time periods, such as in the pay day lending context, and why consumers overpay for health club memberships. See Block-Lieb and Janger, *supra* note 85, at 1541–42, n. 274 (citing Stefano DellaVigna & Ulrike Malmendier, *Overestimating Self-Control: Evidence from the Health Club Industry*, 2 Nat'l Bureau of Econ. Research, Working Paper No. 10819, 2004, available at <http://www.nber.org/papers/w10819>) (last visited Apr. 20, 2007).

116. *Id.*

117. *Id.*

118. See also *supra* note 57–73 and accompanying text.

119. See Downing, *supra* note 74.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

Moreover, creditors actively exploit our psychological and cultural biases when automating decisionmaking in consumer lending, a practice that makes use of consumers' biases toward convenience and immediacy to encourage overleverage.¹²⁵ The internet has increased competition among consumer creditors, driving down profit margins and, from the creditors' perspective, making rate shopping too easy.¹²⁶ At the same time, the internet has made consumer financial records immediately available to creditors. "A consumer's FICO (Fair, Isaac Corporation) score, . . . [condensing] the consumer's credit relationships and payment history into one number, is available in a second or two . . . [and] . . . consumers can easily apply for loans online."¹²⁷ Thus, innovative credit companies can outperform competitors by lending money as quickly as consumers can spend it.¹²⁸ In addition to traditional, large credit card companies that offer automated online credit card applications, smaller startup institutions have increased profits by focusing with more precision on convenience and immediacy.¹²⁹ For instance, LendingTree.com matches consumers with multiple loan offers, frequently within five minutes of completing a loan application.¹³⁰ "LendingTree specializes in mortgages, but also offers home equity loans, auto loans, personal loans and credit cards . . . [and its] lender network includes large banks such as Bank of America and Citibank [as well as] smaller institutions that specialize in automated loan decision-making, such as Deep Green Bank."¹³¹

Deep Green Bank is a fully automated online home equity lender that began offering loans in 2000, and quickly grew to receive "about 12,000 applications per month—of which 2500 become closed loans."¹³² Deep Green's meteoric success is perhaps more remarkable in light of the fact that it does not advertise, "but [rather] gets customers [entirely] from portals like

125. Thomas H. Davenport and Jeanne G. Harris, *Automated Decision-Making in Consumer Lending*, ACCENTURE, http://www.accenture.com/Global/Research_and_Insights/Institute_For_High_Performance_Business/By_Subject/Innovation/AutomatedConsumerLending.htm (last visited on Apr. 4, 2007).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Its process involves three automated steps: first, a computer program "filters" lenders, based on the settings lenders update daily to manage their risk profiles; second, the program uses a proprietary algorithm to send loan requests to lenders whose settings match the profile of the potential borrower; and third, LendingTree virtually mandates that lenders respond to the consumer within five minutes of receiving the loan request, either by using the creditor's own automated decision program or one offered by LendingTree. *Id.*

131. *Id.*

132. *Id.*

LendingTree, mortgage brokers and web searches.”¹³³ Other credit companies that have boosted profits through automated decisionmaking include Washington Mutual (retail banking), GMAC (auto loans), and Bank of America and partners Fidelity National Financial and Accenture through their fully-outsourced (people, process and technology) subsidiary fulfillment utility called Financial Service Solutions (“FSS”).¹³⁴ FSS uses an innovative “grocery store checkout” system to sort and process loans in six “lanes,” according to the complexity of the loan, and thereby optimize automated decisionmaking.¹³⁵

In sum, creditors pay large sums to acquire decision-making research and use it to manipulate consumers to overborrow. Through advertising, they promise to improve debtors’ self-images and help debtors achieve their lifetime consumption goals, all while increasing their own chances of earning interest on consumer purchases. Through automated decision making, creditors also make lending more immediate, knowing that this will encourage even more borrowing.

IV. DESIGNING AN EFFECTIVE DEBT MANAGEMENT COURSE

As discussed above, there are strong physiological, psychological, and cultural reasons why Americans make money decisions the way they do. A successful financial management course should be designed to overcome these impediments, particularly the physiological urge to favor today over tomorrow, the psychological urge to gain comfort from buying and acquiring things, and the cultural urge to define ourselves through consumerism and materialism.¹³⁶

To design effective classes, we need to take into account the data above, as well as other research, on spending habits and money decisions. In considering appropriate debtor education, we also need to be willing to start over and not be bound in any way by the two debtor education provisions that made their way into BAPCPA.

133. *Id.*

134. *Id.* at 3.

135. *Id.*

136. We are not suggesting that Americans overconsume in order to blame borrowers for overindebtedness. We know that job loss, health problems and breakdown of the family are the primary causes of bankruptcy, but also know that huge debt burdens create greater financial vulnerability.

A. Mind Games and Debtor Education

As stated above, it is highly questionable whether *any* debtor education on the way into bankruptcy will be effective. As a result, it would be best to eliminate this requirement. Stress will keep people from understanding their options. Additionally, it is widely accepted among psychologists that it takes at least 21 consecutive days of practicing a behavior in order to develop a habit,¹³⁷ yet there is no time to practice more prudent spending habits on the way through the bankruptcy door. It is simply too late, at that point, to meaningfully affect any decision a debtor could make.

A later course, prior to discharge, has real potential. Consider, however, the topics the EOUST has mandated in the existing second course: budget development, money management, and the wise use of credit. These are not useful categories. They are too broad to be useful in some cases, and in others, have clearly been written by those who favor credit or interests over consumer interests. Otherwise, why teach the wise use of credit, instead of the danger of paying compound interest and the importance of saving? Most wealthy people, as well as many middle class people, know that using consumer credit is one of the worst things you can do if you want to build wealth. The theme of Professor Martin's course in financial health for young adults is to *earn interest not pay interest*. Somehow, we doubt a course with this theme would have made it into bankruptcy reform.¹³⁸

In the remainder of this Essay, we discuss some potential methods for addressing low savings rates and excess indebtedness and some useful topics of study for debtor education. Before doing so, however, one must realize that class issues overlay many of the issues surrounding debtor education. Most bankruptcy debtors are from the middle class, which is a fortunate fact when

137. Mary McKinney, ACADEMIC COACH, *Establish Habits*, http://successfulacademic.typepad.com/successful_academic_tips/2006/11/establish_habit.html (last visited on Apr. 4, 2007); Steven Aitchison, *Develop a New Habit*, <http://ezinearticles.com/?Develop-a-New-Habit&id=326777> (last visited on Apr. 4, 2007); Lars Shirley, *Develop Great Habits with 21 Day Calendar*, http://www.archive.org/details/Goals_Calendar (last visited on Apr. 4, 2007); Josh Hinds, *The Power Of Goal Achievement Is In The Habit*, <http://www.zeromillion.com/personaldev/power-goal-achievement.html> (last visited on Apr. 4, 2007); John Socratous, 12 Proven Steps to Break ANY Habit in 21 Days—Guaranteed!, available at <http://ezinearticles.com/?12-Proven-Steps-to-Break-ANY-Habit-in-21-Days---Guaranteed!&id=132242> (last visited on Apr. 4, 2007); Vin Bhat, *The Power of Affirmations and Music*, <http://www.selfgrowth.com/articles/VinBhat2.html> (last visited on Apr. 4, 2007).

138. We suspect that the consumer credit industry lobbyists that supported BAPCPA would not want individual consumers to earn interest rather than pay interest. Such a goal would turn bankruptcy reform into a nightmare for consumer credit interests.

designing financial management courses for bankruptcy debtors.¹³⁹ However, it is a mistake to think that people who live in poverty are just like wealthier people, culturally, except they have less money.¹⁴⁰ In fact, people who live in poverty approach many issues, including money issues, from a different vantage point. For example, a person in poverty may find it necessary to help a friend with a flat tire, rather than be on time for work, because she knows the friend does not have money or AAA, because the friend has helped her in even worse times of need, and because she knows her friend will reciprocate in the future.¹⁴¹ In times of financial desperation, people need to use any means available to get through an emergency, including title loans, payday loans and other predatory consumer products. This means designing a course for people in poverty may well be different than designing a course for middle class people.¹⁴²

In their article discussing the problems with the BAPCPA credit counseling requirements, Professors Gross and Block-Lieb highlight the many deficiencies in Congress' debtor education mandates.¹⁴³ Professors Gross and Block-Lieb have themselves provided debtor education for years through their Coalition for Consumer Bankruptcy Debtor Education. Their clients are primarily from the lower classes. They pose the question of whether debtor education should be provided in a value-laden or value-neutral way.¹⁴⁴ When dealing with people from lower classes, or those living in generational poverty, it seems obvious that the course work should be value-neutral. When dealing with the middle class, however, I take a different tack.

B. Financial Literacy for the Middle Class

Given the physiological, psychological, and cultural factors influencing the use of consumer credit, as well as the industry's successful efforts to indoctrinate American thinking about what is desirable and affordable, in my view, nothing short of kamikaze tactics will do.

139. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 27 (YALE 2005).

140. RUBY K. PAYNE, *A FRAMEWORK FOR UNDERSTANDING POVERTY* 59 (RFT 1998).

141. *Id.* at 68.

142. Much has been written about class and money issues and it is fertile ground for further research in the area of financial education, but the ideas here focus on courses for the middle class, the economic status of most bankruptcy debtors. I mention people in poverty by way of recognizing that the tactics I advocate for teaching financial literacy to middle class people may not work in courses designed for teaching people living in poverty.

143. See Gross & Block-Lieb, *supra* note 6, at 560, 563.

144. *Id.*

In the University of New Mexico's ("UNM's") college level and law school level financial literacy courses, the general topics covered include: compounding interest; automatic savings from a first job; financial goal-setting; building banking relationships; the legal and financial side of credit card use (again emphasizing compounding interest on debt); debit cards; predatory lending (with guest speakers on payday lending and rent-to-own, among others); credit for lower income individuals; the overall financial literacy of white people versus minorities; credit reporting and scoring; the home mortgage lending market (practicalities such as preparing for a closing as well as theory, such as watching out for and regulating the exotics); saving and investing outside retirement; dollar cost averaging; the basics of stocks, bonds, and similar investments; retirement policy in the U.S. (including the privatization of social security and the effects of U.S. policy on women as caretakers); and retirement savings vehicles. The students prepare a personal financial management plan on the way out the door.

Most of the students in these courses are in their 20s and 30s, though some are in their 50s and 60s. Regardless of their age, many of them are already in financial trouble. In fact, our university and law school sought out such a course in order to attract and keep more qualified graduates, since some students have already been precluded from certain private student loan eligibility due to poor credit.

In the class, Professor Martin asks people to anonymously disclose their current credit card debt. One person was carrying almost \$40,000 while in law school, and others had over \$30,000 in credit card debt.

Together one class of 14 was carrying \$60,000 and was alarmed to learn that at 21 percent interest, a typical rate for students, the class was earning \$14,520 a year for credit card companies. At 32.24 percent, a typical default rate,¹⁴⁵ the class was ponying up \$21,278 a year to the industry. For a bigger class of 65 people in February of 2007, the class was carrying over \$306,000 in credit card debt, which was earning the credit card companies over \$67,000 in interest at 22 percent, and over \$98,000 in interest at a default rate of 32.24 percent. Naturally, this news makes the students mad, and of course, this is part of the point.¹⁴⁶

The idea of trying to incite anger toward the consumer credit industry occurred after reading about a study in which researchers attempted to

145. One of the class exercises requires the students to save credit card solicitations they receive and read the fine print carefully in groups to find the tricks of the trade. In February of 2007, the most common default rate offered on student credit cards was 32.24 percent, up from 29 percent just four months earlier.

146. For more details on what might be useful in a debtor education course, see Appendix A.

determine if people would pay more for a Coke if the temperatures were blistering hot.¹⁴⁷ They invented a Coke machine that adjusted the price for a can of Coke at a rest stop according to the temperature on a built-in thermometer. The results were surprising. The same people used the rest stop repeatedly. They were incensed to find that Cokes cost more when the weather was hot. They refused to buy them and left nasty notes. According to legend, one person even destroyed the machine! My theory is that strong negative emotions are necessary to counteract the industry's highly effective tactics to encourage harmful spending.

Overcoming the cultural side of spending requires some creativity. At least some Americans appear to be programmed to prefer immediate pleasure over long-term gain, and also to define themselves through possessions and materialism. We also know that some people are not materialistic, however, so it is not a lost cause. Making students aware of anti-consumerism movements, such as no shopping days, spending fasts and the environmental reasons for limiting consumption can help.¹⁴⁸ Sometimes, however, it takes much more.

Generation "Y," the term used to describe those born between 1984 and 1994, think of themselves as non-conformists.¹⁴⁹ For that reason, when

147. Constance L. Hays, *Coke Tests Vending Unit That Can Hike Prices in Hot Weather*, NY TIMES, October 28, 1999, available at <http://www.econ.ucsb.edu/~tedb/eep/news/coke.mon.txt> (last visited on Apr. 4, 2007); Charles Memminger, *Coke: It's the Real (Greed) Thing*, HONOLULU STAR BULLETIN, November 1, 1999, available at <http://starbulletin.com/1999/11/01/features/memminger.html>. (last visited on Feb. 10, 2007).

148. The anti-consumerism movement is concerned about the effects of consumerism on the environment and on human well-being. Numerous web sites extol the virtues of scaling back, and the day after Thanksgiving has been declared an official no-shopping day. See, e.g., *Overcoming Consumerism*, <http://www.verdant.net/> (last visited on Apr. 4, 2007); *The New Anti-Consumerism*, <http://www.sustainableenterprises.com/Planet/anticonsumer.htm> (last visited on Apr. 4, 2007); Lifehacker.com, *Buy Nothing This Friday*, <http://lifehacker.com/software/shopping/buy-nothing-day-this-friday-138699.php> (last visited on Apr. 4, 2007); Wikipedia: The Free Encyclopedia, *Buy Nothing Day*, http://en.wikipedia.org/wiki/Buy_Nothing_Day (last visited on Apr. 4, 2007).

149. Consumer Marketing Nationwide, *Generation Y Defined*, <http://www.onpoint-marketing.com/generation-y.htm> (last visited on Apr. 4, 2007). As one consumer marketing entity tells its customers:

marketing to generation y members requires using more involved techniques than the traditional ones used to attract their parents. Members of generation y best respond to marketing methods that bring the message to places the y generation congregates, both offline and online. Successful generation y brands are perceived as hip and popular, but without the air of heavy commercialism. Also, generation y demographics show that generation Y is more racially diverse, with one out of three members considering themselves non-Caucasian. One out of every four members of generation y lives in a single-parent environment and three in every four have working mothers.

Id. See also, Naomi Rockler-Gladden, *Me Against the Media: Notes From the Trenches of a Media Literacy Class*, 70 ADBUSTERS 40–42 (March/April 2007).

speaking to this generation about financial habits, it helps to reduce consumerism to conformist behavior. The clear message is that *The Man* wants you to spend, so be a renegade and save instead.¹⁵⁰

Of course, any course is worthless without some catchy content. Exercises in compounding interest, both from the point of view of the student as saver and the student as debtor, seem highly effective.¹⁵¹ Repetition in different contexts also helps. Professory Martin covers compounding in almost every unit, which amounts to 10 times in two days.

A meaningful course also must overcome the optimism bias. In the case of overindebtedness, a little fear can be very helpful. Stories of people becoming terminally ill, homeless or even suicidal as a result of debt, compared with those of people who saved a little at a time and became very wealthy, can work. Such tactics would likely be too harsh for bankruptcy debtors, who already have seen financial tragedy, but are useful for people who have not yet encountered bankruptcy. Moreover, while the fear ultimately does wear off, saving money and being frugal is habit-forming, and thus, through repetition, reading stock statements can become almost as enjoyable as shopping at the mall.

Optimism works in the saver's favor when it comes to compounding. One author of this Essay knew nothing about compounding until she was 30. Yet nothing has positively influenced her own savings habits more than understanding compounding. Nothing has influenced her credit card charging habits more than seeing compound interest work in the credit card companies' favor.¹⁵²

150. One can draw upon other techniques as well. For undergraduate students, a snow border flies through the air on one power point slide. The slide suggests the freedom of being debt free. The next slide shows a kid stocking shelves while the snow falls outside. The text states that "Debt makes me tired. Must be from working all the time." These are not preachy, but subtle. A slide for law students, with a tango dancer in the background, proclaims: "I think I will like practicing law, but I also have other interests. If I save and keep my expenses down, I can have my life *and* my profession!!"

151. People like the old riddle from Economics 101: Twin #1 got a good job and put \$2,000 a year in a good investment from age 19 through 27, for a total investment of \$18,000. Twin #2 put the same \$2,000 a year in but did not start until age 27. She continued through age 65, her whole adult life, contributing \$76,000. How much would each have if the investments earned 10 percent and compounded? ANSWER: Invested at 10 percent, the first person (who only put in \$18,000 rather than \$76,000) ends up with \$1,035,148. The second one has just \$883,185.

152. For example, if a person had \$20,000 in credit card debt accruing interest at 18 percent, paying a minimum balance of only 2 percent, it would take 57 years to pay off the debt. See www.bankrate.com (last visited on Apr. 4, 2007). Consumers are now required to pay off at least 4 percent a year, but the example is still useful. Press Release, Comptroller of the Currency, Administrator of National Banks, *Comptroller Dugan Expresses Concern about Negative Amortization*, (Dec. 1, 2005), available at <http://www.occ.treas.gov/toolkit/newsr> (consideration of whether the balance could realistically be paid in full) (last visited Apr. 4, 2007). Thus, from their

With students, working with the numbers online can be incredibly powerful.¹⁵³ Overall, the goal is to share information and teach students how to find their own useful numeric data. The data itself is so shocking that it promotes savings and investing and strongly discourages the use of consumer credit. In fact, the data tell the entire story, so little additional drama is required.

From the reports of students, the class has a measurable effect on behavior. It changes behavior in the short term, and quite possibly over the long term.¹⁵⁴ Appendix A shares data from the course offered at UNM regarding which topics students thought would be most useful to them. Anecdotally, many students report that they have paid down debt and spent less since taking the course. Based upon this anecdotal data, and that contained in Appendix A, these subjects and tactics could be tailored for successful use with middle-class bankruptcy debtors.

V. CONCLUSION

Consumer credit counseling services were originally established by the consumer credit industry to help recover bad debt. They were set up as non-profit entities, funded by consumer credit companies, and they were prohibited from counseling consumers to declare bankruptcy. Instead, credit counselors were supposed to encourage consumers to do everything they could to make at least minimum monthly payments on their credit card debts (without consideration of whether the balance could realistically be paid in full). Thus, from their inception, credit counselors were designed to serve the interests of the credit industry. Many of the consumer credit counselors approved for use in the BAPCPA's mandatory debtor education courses come from this tradition, and bring their allegiance to the consumer credit industry with them. However, during the past decade, as credit companies have cut funding to credit counseling services, the credit counseling industry has faced financial pressure that has incentivized predatory and fraudulent practices toward

inception, credit counselors were designed to serve, *available at* release.aspx?Doc=I51QIBS3.xml (last visited on Apr. 4, 2007).

153. In some situations, we treat the exercise like a contest, with people competing to come up with outrageous truths about the credit industry through their own research. Unlike most college or law school classes, there are units in the existing UNM class where randomly searching the web during class time is encouraged.
154. Professor Martin is devising follow-up studies to determine how much of the course information makes a difference in behavior one to two years after completion of the course. As of February 2007, 157 students had taken the course through three weekend offerings.

consumers. Unsurprisingly, consumers have been victimized, their credit problems and financial positions all too frequently made more precarious as consumer credit counselors charged exorbitant fees and pushed them into DMPs that actually decreased their credit ratings.

The few explicit requirements for the BAPCPA's mandatory debtor education courses are insightful. The EOUST requires that consumers be taught how to *use* consumer credit, but *not how to avoid* using consumer credit. Compounding interest (along with the benefits of saving and investing) are not course requirements, despite that these topics more than any other seem to motivate a change in consumer financial behavior.

There has been no attempt to use the plethora of available data regarding the physiology, psychology, and culture of consumer spending and saving decisions, to devise truly effective debtor education classes. This data could easily be used in such courses, to the consumers' advantage.

Further, the astronomical numbers speak for themselves. A course that outlined how the credit industry uses psychological tactics against us, and then juxtaposes the sheer cost of consumer credit with the extensive benefits of compounding interest on savings, would itself be far more effective than a course on budgeting and taking on more debt.

A debtor education course that emphasized these points would be far different from what industry-friendly consumer credit counselors currently offer. It would take an entirely fresh approach to what is relevant and why. Most importantly, it might actually make a difference. Unlike most of the existing courses, it would *not be* your mother's financial education course.

APPENDIX A*

Most Valuable Lessons (n=62)*

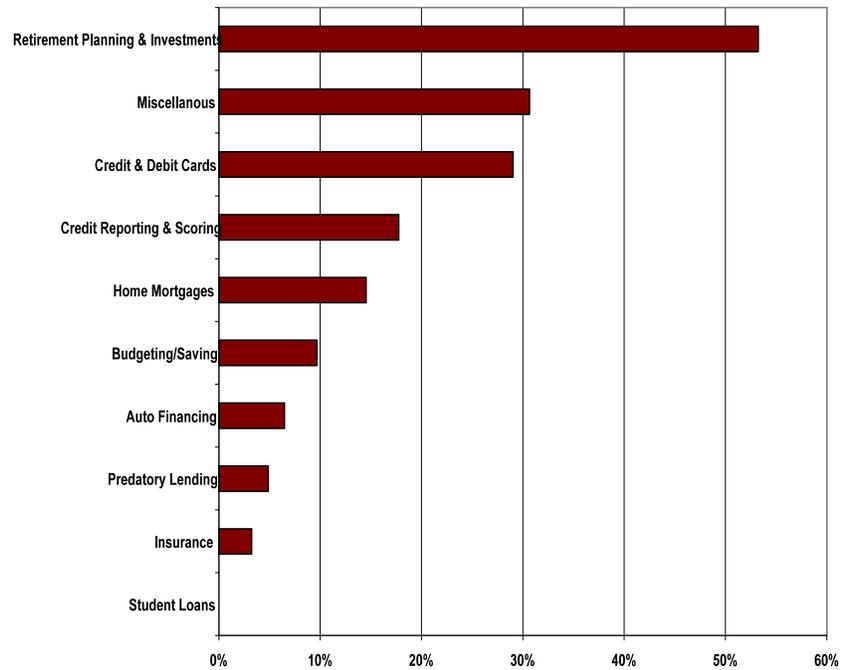


Figure 1: Percentage of students in the class who chose this subject matter as the most useful in the class versus topics found most useful in the February 2007 Financial Literacy Course.

* Sixty-two persons filled out the course evaluations from which this data was collected. They were asked to describe in narrative prose what they found most useful in the course content. The topics they chose appear on the vertical axis.

