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Mandatory Protections as Veiled Punishments: Debtor Education in H.R. 975, The Bankruptcy Abuse and Consumer Protection Act of 203

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Mandatory Protections as Veiled Punishments

DEBTOR EDUCATION IN H.R. 975, THE BANKRUPTCY ABUSE AND CONSUMER PROTECTION ACT OF 2003*

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I. INTRODUCTION

Judging from the title of pending bankruptcy legislation, H.R. 975 – the Bankruptcy Abuse and Consumer Protection Act of 2003[1] – one could reasonably presume that the proposed bill is intended to reaffirm consumer bankruptcy law as consumer protection law and strengthen the social safety net provided to consumer debtors by means of the bankruptcy discharge.[2] But just as we have been cautioned never to judge a book by its cover, we should also be cautious about judging the contents and purposes of a legislative provision by its title.

H.R. 975 is dedicated to eradicating abuse from the consumer bankruptcy system – abuses supposedly perpetrated by consumer debtors. The bill does little to protect the

† Professor of Law, Fordham University School of Law. Many thanks to Corinne Baron-Donovan, Karen Gross and Richard Wiener for their comments and questions on this piece, and for their expertise, patience and long hours spent on related co-authored works. I am also indebted to my research assistants, Marat Saks and Sean Wright (Fordham 2004), for all their hard work. This Article is part of the Edward V. Sparer Public Interest Law Symposium, The New Economy and the Unraveling Social Safety Net.

1 H.R. 975, 108th Cong. (2003).

2 Commentators have in the past suggested that federal bankruptcy law should be construed as consumer protection law. *See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994).

consumers who access the bankruptcy system, because it presumes that consumer debtors strategically load up on borrowed funds and then file for bankruptcy even though they could repay this debt out of their income.[3] Instead, Congress construes the pending bankruptcy legislation as consumer protection legislation because it claims that the bill will benefit the hundreds of millions of consumers who have not filed for bankruptcy by protecting them from the profligacy of the roughly 1.5 million people who do file each year.[4] They claim that enacting H.R. 975 will reduce the cost of consumer credit, a benefit that lawmakers contend will redound to every consumer borrower in the United States to the tune of four hundred dollars per family.[5]

Would lenders actually rebate this money to consumer borrowers? In a competitive consumer finance industry, the argument runs, creditors realize only normal profits on consumer finance transactions.[6] The claim is that, as a result,

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[3] *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 31 (Mar. 8, 1999) (statement of Rep. Marge Roukema) ("Bankruptcy is fast becoming the first stop financial planning tool rather than a last resort.").

> Bankruptcies of convenience are driving this enormous increase. Bankruptcy was never meant to be used as a financial planning tool, but it is becoming a first stop rather than a last resort because our current bankruptcy system encourages people to walk away from their debts regardless of whether they have the ability to repay any portion of what they owe.

Bankruptcy Reform: Joint Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Jucidiary and the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judicary, 106 Cong. 58 (Mar. 11, 1999) (statement of Rep. Rick Boucher).

"Congress must confront the [bankruptcy] issue directly and curb abusive and predatory practices of those who would game the system." American Bankruptcy Institute, *Statements Made upon the Introduction of the Bankruptcy Reform Act of 1999* (Feb. 24, 1999) (statement of Rep. Henry Hyde), *at* http://www.abiworld.org/legis/bills/statements2-24-99.html (last visited Feb. 22, 2004).

See also Rep. George W. Gekas, *Statement to the* Dickinson Law Review *Bankruptcy Symposium*, 102 DICK. L. REV. 859, 861 (1998) (arguing that "bankruptcy has become viewed more as a financial planning tool, a government debt forgiveness program, and a first choice rather than a last resort").

[4] For statistics on the number of non-business bankruptcy petitions filed each year, see American Bankruptcy Institute, *Non-Business Filings*, *at* http://www.abiworld.org/stats/ nonbusiness.html (last visited Feb. 22, 2004).

[5] *See* Gekas, *supra* note 3, at 862.

[6] *See, e.g.*, Barry Adler, Ben Polack & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 589 (2000) ("When credit markets are competitive, as we suppose, the borrower side gets the entire ex ante surplus that credit makes possible."); William H. Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, 41 LAW & CONTEMP. PROBS. 13, 21-23 (1977) ("[I]n a competitive lending market interest rates and loan terms will be set to cover all the costs incurred by lenders . . . [A]ll increases in lending costs as perceived by lenders will in the long run be borne by potential borrowers.").

cost savings realized from the bill's provisions would drive down the cost of consumer credit for society as a whole. On this basis, lawmakers spin legislation protecting creditors' interests in a bankruptcy case as legislation protecting debtors' interests. Their characterization of H.R. 975 is simply a variation on the theme that what's good for Citibank is good for America.

I do not mean to argue that H.R. 975 contains nothing that directly benefits consumer debtors. It does contain several provisions intended to protect consumers who file for bankruptcy.[7] At times, however, it looks to protect consumer debtors through measures that, as a practical matter, are as likely to punish as to benefit. For example, the bill promotes the need for consumer debtors to obtain financial literacy training after filing for bankruptcy.[8] Rather than rely on individuals to determine on their own whether they would benefit from learning about personal financial management, the bill mandates that consumer debtors receive financial literacy training and penalizes a debtor's failure to participate in these protections by withholding the discharge in bankruptcy.[9]

This mandate and the harsh penalty adopted to enforce it could substantially undercut the beneficial protections inherent in post-bankruptcy debtor education. By imposing mandates and conditions on the limited protections it offers to consumer debtors, in the end, H.R. 975 erodes the social safety net that consumer bankruptcy law currently provides to individuals in financial distress – much in the same way that a practical joker might offer a chair but then yank it away at the last moment and charge for its use.

Providing consumer debtors with access to accurate and impartial information on consumer credit, credit reports, and credit scams is, of course, a laudable goal. However, mandatory financial literacy can work against and ultimately undermine the protection that debtor education is meant to provide, depending on the nature of the penalty for failure to comply with the mandate. In the past several years, I have been intimately involved with a program that provides personal

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[7] *See, e.g.*, Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. §§ 105-106 (2003) (debtor education); *id.* § 203 (reaffirmation agreements); *id.* §§ 1301-1309 (consumer credit disclosure).

[8] *Id.* §§ 105-106.

[9] *Id.* § 106(b)-(c).

financial management courses to consumer debtors on a voluntary basis.[10] Based on my experience, I argue in this essay that the discharge in bankruptcy should not be conditioned on completing mandatory debtor education. A mandate of this sort would preclude some debtors from obtaining a discharge in bankruptcy, converting consumer protection into a punitive measure. Moreover, mandatory debtor education serves questionable pedagogical goals and undercuts the message that financial literacy training can empower consumer debtors.

The remainder of this essay is organized as follows. Part II describes the provisions in the pending bill that mandate post-bankruptcy debtor education. Part III considers whether debtors are, in fact, unsophisticated or, worse yet, illiterate as relates to their personal financial affairs. Part IV describes the pilot debtor education project that I have been working on in the Eastern District of New York, together with the Coalition for Consumer Bankruptcy Debtor Education. Based on this first-hand experience, Part V explores the wisdom of mandatory versus voluntary debtor education. It raises some of the problems created by conditioning a debtor's discharge on the completion of a financial literacy course.

II. DEBTOR EDUCATION IN THE BANKRUPTCY ABUSE AND CONSUMER PROTECTION ACT OF 2003

To ensure that debtors make more responsible financial determinations after bankruptcy, H.R. 975 would require nearly every individual debtor seeking a discharge under either chapter 7 or 13 to receive personal financial management training.[11] It would enforce this mandate by withholding the discharge from those who fail to comply with this requirement.[12]

Much of the legislative proposal details the certification and review of financial literacy providers by the office of the

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[10] *See* Corinne Baron-Donovan, Susan Block-Lieb, Karen Gross, Richard Wiener & Sean Wright, *The Coalition for Consumer Bankruptcy Debtor Education: An Overview of Its Pilot Program*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES (2003) (on file with *Brooklyn Law Review*); Susan Block-Lieb, Karen Gross & Richard L. Wiener, *Lessons From the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503 (2002); Susan Block-Lieb & Karen Gross, *Debtor Education: Making Sure a Good Idea Does Not Go Awry*, NORTON BANKR. L. ADVISER, Jan. 2000, at 6.

[11] H.R. 975, § 106(b)-(c).

[12] *Id.*

United States Trustee. Section 111 of the proposed bill would permit the U.S. Trustee for each region to authorize that "an instructional course concerning personal financial management" be offered by certified providers for an initial probationary period.[13] Following the expiration of this probationary period, the U.S. Trustee would be required to re-certify the provider by determining that the course "has been effective in assisting a substantial number of debtors to understand personal financial management" and that it "is otherwise likely to increase substantially debtor understanding of personal financial management."[14]

Section 111 requires that in order to be certified and recertified, "the course will provide at a minimum:"[15]

> (A) trained personnel with adequate experience and training in providing effective instruction and services;
>
> (B) learning materials and teaching methodologies designed to assist debtors in understanding personal financial management and that are consistent with stated objectives and directly related to the goals of such course of instruction;
>
> (C) adequate facilities situated in reasonably convenient locations at which such course of instruction is offered, except that such facilities may include the provision of such course of instruction or program by telephone or through the [I]nternet, if the course of instruction or program is effective; and
>
> (D) the preparation and retention of reasonable records (which shall include the debtor's bankruptcy case number) to permit evaluation of the effectiveness of such course of instruction or program requirements for each debtor attending such course of instruction or program, which shall be available for inspection and evaluation by the Executive Office of the United States Trustee, bankruptcy administrator, or chief bankruptcy judge for the district in which such course of instruction or program is offered.[16]

Post-filing debtor education is rendered mandatory under the bill by amending sections 727 and 1328 of the Bankruptcy Code to provide that an individual's discharge under those chapters is conditioned upon the completion of "an instructional course concerning personal financial management."[17] However, these conditions "shall not apply

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[13] H.R. 975, § 106(e).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] H.R. 975, § 106(b)-(c).

with respect to a debtor who resides in a district for which the United States trustee or bankruptcy administrator of that district determines that the approved instructional courses are not adequate to service the additional individuals required to complete such instructional courses under this section."[18] Presumably, the adequacy of existing personal financial management courses in a district depends upon the factors informing the U.S. Trustee's decision to certify and re-certify financial literacy providers.[19]

Is it necessary or even appropriate to mandate debtor education by withholding the discharge in bankruptcy from those who do not comply? In the following section, I explore the need to educate consumer debtors about consumer credit by examining statistics on the financial literacy of American adults.[20]

III. FINANCIAL LITERACY AMONG CONSUMER DEBTORS

We do not have data on the prevalence of financial illiteracy among consumers who access the bankruptcy system.[21] Sources agree, however, that innumeracy and financial illiteracy are widespread problems in the United States.[22]

Empirical analysis of the ability of American consumers to assess basic financial information should begin with data on

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[18] *Id.*

[19] *Id.*

[20] The prevalence of financial illiteracy is not the only factor for determining the need to provide financial literacy courses for consumers who file for bankruptcy. *See infra* notes 83-90 and accompanying text for a review of other rationales for debtor education.

[21] In their study of consumer debtors, Sullivan, Warren and Westbrook looked at the education levels debtors had attained by the time of their filing, and ironically found debtors to be better educated, on average, than the general population. *See, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS 53 (2000) (debtors in five-state study were somewhat better educated than adult population). They did not, however, endeavor to study the financial literacy of these debtors.

[22] *See, e.g.*, A.K. DEWDNEY, 200% OF NOTHING: AN EYE-OPENING TOUR THROUGH THE TWISTS AND TURNS OF MATH ABUSE AND INNUMERACY, at v, 1 (1993) (contending that we are "beset more than ever by the abuses that stem from this innumeracy" in that "[w]e become prey to commercial chicanery, financial foolery, medical quackery, and numerical terrorism from pressure groups"); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (relying on recent data on illiteracy to argue that commonly used contract and disclosure forms are incomprehensible to most American consumers).

literacy more generally.[23] If a significant portion of the U.S. population struggles to read and write in English on topics of general interest, then most certainly it will fail to comprehend descriptions of financial transactions that necessarily involve more complex concepts and vocabulary.[24]

It is generally assumed that illiteracy is not a significant problem in the United States.[25] The Census Bureau stopped measuring true illiteracy in 1940.[26] Subsequently, the census has used completion of five years of school as a proxy for literacy and found very little to report.[27] Similarly, adopting a narrow definition of the term, the United Nations Educational, Scientific and Cultural Organization (UNESCO) estimates that less than ten percent of the U.S. population is illiterate.[28]

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[23] There is a lack of consensus on how to define and, therefore, to measure financial literacy and innumeracy. Some define numeracy as a schoolteacher would, looking to individuals' proficiency in arithmetic, basic statistical concepts and related skills. *See, e.g.*, DEWDNEY, *supra* note 22, at 1 (defining "innumeracy" as "the inability or unwillingness to understand basic mathematical ideas involving numbers or logic as they apply in everyday life"); Lynn Arthur Steen, *Pattern, in* ON THE SHOULDER OF GIANTS: NEW APPROACHES TO NUMERACY 1 (Lynn Arthur Steen ed., 1990) (defining numeracy in terms of need to recognize numerical or mathematical patterns); ALEXANDRA WITHNALL, OLDER ADULTS' NEEDS AND USAGE OF NUMERICAL SKILLS IN EVERYDAY LIFE (1995) (same). The better definition conceives of the term from a functional perspective, which considers whether individuals possess those arithmetic and related skills necessary to function in everyday commerce. ALAN J. BISHOP, K. HART, S. LERMAN & T. NUNES, SIGNIFICANT INFLUENCES ON CHILDREN'S LEARNING OF MATHEMATICS 4-11 (UNESCO 1993) (defining "innumeracy" as arithmetic knowledge that empowers citizens for life in their particular society); Lynn Arthur Steen, *Numeracy,* in LITERACY IN AMERICA 211 (S.R. Graubard ed., 1990) ("Reality dictates a continuum of types and levels of numeracy distinguished by purpose, accomplishment, and style."); NATIONAL ENDOWMENT FOR FINANCIAL LITERACY, WHITE PAPER REPORT, FINANCIAL LITERACY IN AMERICA: INDIVIDUAL CHOICES, NATIONAL CONSEQUENCES (Oct. 11, 2002) [hereinafter NEFE WHITE PAPER] (defining "personal financial literacy" as "the ability to read, analyze, manage, and communicate about the personal financial conditions that affect material well being," including "the ability to discern financial choices, discuss money and financial issues without (or despite) discomfort, plan for the future, and respond competently to life events that affect everyday financial decisions"), *available at* http://www.nefe.org/pages/whitepaper2002symposium.html.

[24] Indeed, Dewdney argues that innumeracy presents more serious problems for consumers than illiteracy:

> Literacy, after all, concerns a translation skill – learning to move easily between written and spoken speech. Numeracy concerns thought itself. You might exploit people's innumeracy through an advertisement, for example, making a claim that seems to be valid but isn't. But how would you exploit their illiteracy through an ad they can't even read?

DEWDNEY, *supra* note 22, at 2.

[25] For a powerful refutation of this position, see JONATHAN KOZOL, ILLITERATE AMERICA 7-12, 37 (1985).

[26] U.S. CENSUS BUREAU, WE THE AMERICANS: OUR EDUCATION 1 (1993).

[27] KOZOL, *supra* note 25, at 7-12, 37.

[28] UNESCO Institute for Statistics, *A Global Overview of Illiteracy Rates, at* http://portal.unesco.org/uis/ev.php?ID=4950_201&ID2=DO_TOPIC (last visited Jan. 9,

Not all agree, however, that illiteracy is rare among Americans.[29] Where "illiteracy" is instead functionally defined to consider the practical abilities of an individual to perform commonplace cultural, political, and economic activities, it becomes clear that a significant portion of the American public suffers literacy problems. Adopting this broader definition of literacy,[30] the U.S. Department of Education recently conducted a comprehensive survey involving nearly 13,600 adults to evaluate adult literacy in three areas:[31] prose literacy,[32] document literacy,[33] and quantitative literacy.[34] Rejecting simple proxies for determining literacy, such as the ability to read and write short prose sections or years of schooling, the National Center for Education Statistics developed a detailed measure for literacy in each of these three areas, which it then

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2004). UNESCO defines "literacy" as pertaining to a person who "can, with understanding, both read and write a short simple statement on his or her everyday life." UNESCO, *Revised Recommendation Concerning the International Standardization of Educational Statistics* (Nov. 2, 1978), *available at* http://portal.unesco.org/en/ev.php@URL_ID=13136&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

[29] *See, e.g.*, KOZOL, *supra* note 25, at 4-5.

[30] *See* IRWIN S. KIRSCH & ANN JUNGEBLUT, LITERACY: PROFILES OF AMERICA'S YOUNG ADULTS I-8 (1986) (defining literacy functionally as follows: "Using printed and written information to function in society, to achieve one's goals, and to develop one's knowledge and potential.").

[31] The National Adult Literacy Survey (NALS) was completed in 1992. *See* IRWIN S. KIRSCH, ANN JUNGEBLUT, LYNN JENKINS, & ANDREW KOLSTAD, NATIONAL CTR. FOR EDUC. STATISTICS, ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY xv (3d ed. 2002) [hereafter FIRST LOOK], *available at* http://www.nces.ed.gov/pubs93/93275.pdf. The study was conducted at the request of Congress who, in 1991, adopted the National Literacy Act "to ensure that all adults in the United States acquire the basic skills necessary to function effectively and achieve the greatest possible opportunity in their work and in their lives." Pub. L. No. 102-73, pmbl., 105 Stat. 333 (1991), *repealed by* Workforce Investment Act of 1998, Pub. L. No. 105-220, § 251, 112 Stat. 936, 1079 (1998). In enacting the National Literacy Act, Congress found that "nearly 30,000,000 adults in the United States have serious problems with literacy." Pub. L. No. 102-73, § 2, 105 Stat. 333 (1991).

[32] The NALS defines "prose literacy" as the ability to read expository material in books and periodicals and is the type of literacy typically emphasized in elementary education. FIRST LOOK, *supra* note 31, at 3.

[33] "Document literacy" involves the skills needed to locate and use information from more varied texts, such as charts, tables, manuals, and instructions. FIRST LOOK, *supra* note 31, at 3. *See also* Susan Gerber & Jeremy D. Finn, *Learning Document Skills at School and at Work*, 42 J. ADOLESCENT & ADULT LITERACY 32, 33-34 (1998).

[34] "Quantitative literacy" is defined as the ability to apply arithmetic operations to numbers in written materials. FIRST LOOK, *supra* note 31, at 3-4. Quantitative literacy and numeracy involve interchangeable concepts. Financial literacy demands basic numeracy skills, as well as a comprehension of basic commercial concepts and terms. *See* NEFE WHITE PAPER, *supra* note 23 (defining "personal financial literacy").

reduced to numerical scores divided into five intervals: Level 1 (0 to 225), Level 2 (226 to 275), Level 3 (276 to 325), Level 4 (326 to 375), and Level 5 (376 to 500).[35] The National Adult Literacy Study (NALS) found that approximately fifty percent of the respondents performed at the lowest two levels of proficiency, no matter whether prose, document, or quantitative literacy was studied. The following figures summarize these findings:[36]

Figure 1: Average Prose Literacy Proficiency – 272

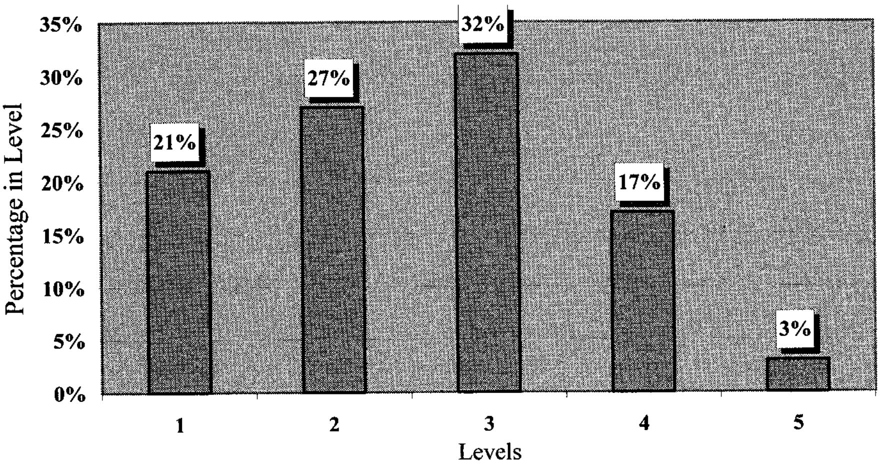
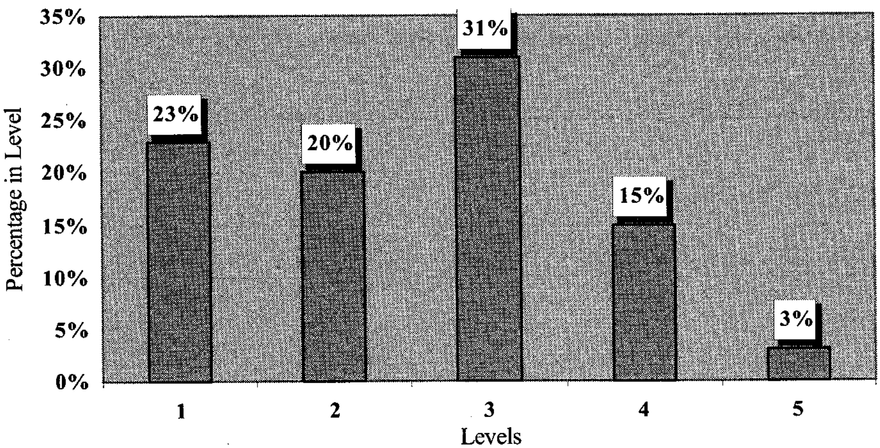


Figure 2: Average Document Proficiency – 267



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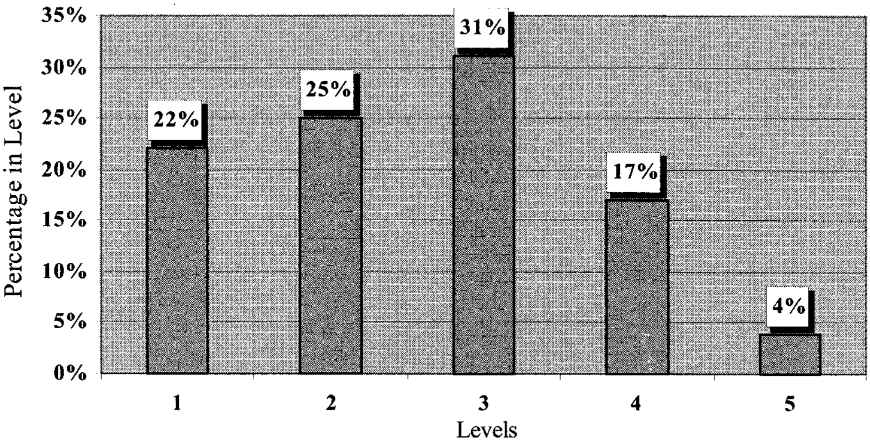
[35] For a more detailed discussion of these scales, see IRWIN KIRSCH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, TECHNICAL REPORT AND DATA FILE USER'S MANUAL FOR THE 1992 NATIONAL ADULT LITERACY SURVEY (Jan. 2001), *available at* http://www.nces.ed.gov/pubs2001/2001457.pdf.

[36] The data in these figures appears in FIRST LOOK, *supra* note 31, at 17.

Figure 3: Average Quantitative Literacy Proficiency - 271



The following subsections provide a more detailed examination of the data that reveals the extent and nature of illiteracy among American adults, including their financial illiteracy.

A. *Prose Literacy*

When measuring respondents' prose literacy, the survey found approximately twenty-one percent performed at Level 1 and twenty-seven percent performed at Level 2. Level 1 prose literacy requires respondents "to read relatively short pieces of text to find a single piece of information,"[37] whereas Level 2 prose literacy refers to the "ability to make low-level inferences based on what [is] read, and to compare or contrast information that can easily be found in the text."[38] Only twenty percent of the respondents displayed Level 4 or 5 prose literacy, with a mere three percent of respondents demonstrating Level 5 proficiency in this area.[39] Adults in Level 4 demonstrated an ability to synthesize information from lengthy or complex text; Level 5 materials required readers to compare and contrast complex written information, to make high-level inferences, or

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[37] FIRST LOOK, *supra* note 31, at 16.

[38] *Id.* at 18.

[39] *Id.* at 19.

search for information in dense prose.[40] The following chart provides examples of activities at each of the five prose literacy levels:[41]

Chart 1: Prose Literacy – Levels 1-5

Level 1 (0-225), Level 2 (226-275), Level 3 (276-325),
Level 4 (326-375), Level 5 (376-500)

149 Identify country in short article
210 Locate one piece of information in sports article
224 Underline sentence explaining action stated in short article
226 Underline meaning of government brochure on supplemental security income
250 Locate two features of information in sports article
275 Interpret instructions from an appliance warranty
280 Write brief letter explaining error in credit card bill
304 Read news article and identify sentence interpreting situation
316 Read lengthy article to identify two behaviors that meet stated condition
328 State in writing an argument made in lengthy newspaper article
347 Explain difference between employee benefits
359 Contrast views expressed in two editorials on available technology on fuel-efficient cars
362 Generate unfamiliar theme from short poems
374 Compare two metaphors used in poem
382 Compare approaches in narrative on growing up
410 Summarize two ways lawyers may challenge prospective jurors
423 Interpret brief phrase from lengthy news article

As demonstrated by some of the tasks covered in the survey, commercial transactions demand more than rudimentary prose literacy. Here, we are told that writing a brief letter to explain an error in a credit card bill scores 280, demanding Level 3 prose literacy. Elsewhere, the survey scores "making out a check and writing a letter to explain a billing error" at 280, requiring Level 3 prose literacy, and "interpreting an American Express bill regarding similarities and differences" at 346 and 441, requiring Level 4 and 5 prose literacy, respectively.[42] For the forty-eight percent of respondents performing at Levels 1 and 2 prose literacy, comprehension and analysis of day-to-day purchasing, banking, and consumer credit transactions present a challenge.

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[40] *Id.*
[41] *Id.* at 10.
[42] KIRSCH ET AL., *supra* note 35, at 309 tbl.13-2.

B. Document Literacy

Roughly twenty-three percent of the respondents performed at Level 1 document literacy levels.[43] Level 1 document literacy refers to the ability to complete extremely simple tasks such as signing one's name to a form or locating a single piece of explicitly labeled information on a form.[44] Twenty-eight percent of respondents performed at Level 2 document literacy,[45] requiring readers to locate information on row and column tables, and perform other location tasks despite visual distractions.[46] Based on these results, the survey concluded that more than half of the respondents "could not be expected to consistently extract information from lists, forms, tables, and similar documents."[47] The following chart provides examples of activities at each of the five levels of document literacy:[48]

Chart 2: Document Literacy – Levels 1-5

Level 1 (0-225), Level 2 (226-275), Level 3 (276-325),
Level 4 (326-375); Level 5 (376-500)

69 Sign your name to document on space provided
151 Locate expiration date on driver's license
180 Locate time of meeting on a form
214 Using pie graph, locate type of vehicle having specific sales
232 Locate intersection on a street map
245 Locate eligibility from table of employee benefits
259 Identify and enter background information on application for social security card
277 Identify information from bar graphs depicting source of energy and year
296 Use sign out sheet to respond to call about resident
314 Use bus schedule to determine appropriate bus for given set of conditions
323 Enter information given into an automobile maintenance record form
342 Identify correct percentage meeting specified conditions from table of information
348 Use bus schedule to determine appropriate bus for given set of conditions
379 Use table of information to determine pattern in oil exports across years
387 Using table comparing credit cards, and identify and contrast two categories

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[43] FIRST LOOK, *supra* note 31, at 16.
[44] *Id.* at 16.
[45] *Id.* at 17.
[46] *Id.* at 18-19.
[47] White & Mansfield, *supra* note 22, at 237.
[48] FIRST LOOK, *supra* note 31, at 10.

As with prose literacy, the skills associated with document literacy are critical to commonplace commercial transactions. The above chart scores at 387, or Level 5 document literacy, a task using a table to compare and contrast two credit cards on the basis of two categories. Reading a MasterCard or VISA statement scores at 363,[49] demanding Level 4 document literacy, although only eighteen percent of respondents possessed Level 4 document literacy or higher.

C. *Quantitative Literacy*

Because the survey chose to define literacy functionally, it also looked at respondents' quantitative literacy, sometimes also referred to as numeracy. Experts contend that innumeracy is more accepted than prose illiteracy in the United States, and surprisingly commonplace.[50] For example, although the United States ranks about the international average for math attainment levels for fourth graders, by the time U.S. students reach twelfth grade their attainment is among the lowest in the industrial world.[51] In an international study of math skills among fifteen developed nations conducted in 1982, U.S. students ranked fourteenth, nearly the bottom of the pile.[52] Students from Canada fared only slightly better; Japan ranked first.[53]

The National Adult Literacy Survey found little difference among prose, document, and quantitative literacy.[54] This is not to applaud the quantitative literacy of the respondents, however. Twenty-two percent of the respondents performed at Level 1 – "able to add numbers on a bank deposit slip, or to perform other simple arithmetic operations using numbers presented to them."[55] Another twenty-five percent of the respondents demonstrated Level 2 quantitative literacy

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[49] KIRSCH ET AL., *supra* note 35, at 322 tbl. 13-4.

[50] *See, e.g.*, JOHN ALLEN PAULOS, INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES (2001); Robert M. Gagne, *Some Issues on the Psychology of Mathematics Instruction*, 14 J. RES. MATH. EDUC. 7, 10 (1983) (citing evidence of widespread innumeracy of U.S. high school students and indicating a declining trend).

[51] DEWDNEY, *supra* note 22, at 133. *See also* LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE AND AMERICA 158-59 (1992).

[52] DEWDNEY, *supra* note 22, at 133.

[53] *Id.*

[54] KIRSCH ET AL., *supra* note 35, at 278 ("The three literacy scales – prose, document, and quantitative literacy – are relatively highly related[.]").

[55] FIRST LOOK, *supra* note 31, at 16.

skills.[56] "Individuals in Level 2 on the quantitative scale were likely to give correct responses to a task involving a single arithmetic operation using numbers that can easily be located in printed material."[57] The following chart provides examples of activities at each of the five quantitative literacy levels:[58]

Chart 3: Quantitative Literacy – Levels 1-5

Level 1 (0-225), Level 2 (226-275), Level 3 (276-325), Level 4 (326-375); Level 5 (376-500)

191 Total a bank deposit entry
238 Calculate postage and fees for certified mail
246 Determine difference in price between tickets for two shows
270 Calculate total costs of purchase from order form
278 Using calculator, calculate difference between regular and sale price from advertisement
308 Using calculator, determine discount from oil bill if paid within 10 days
325 Plan travel arrangements for meeting using flight schedule
331 Determine correct change using information in menu
350 Using information stated in news article, calculate amount of money that should go to raising child
368 Using eligibility pamphlet, calculate yearly amount couple would receive for basic supplemental security income
375 Calculate miles per gallon using information given on mileage record chart
382 Determine individual and total costs on an order form for items in a catalog
405 Using information in news article, calculate difference in times for completing race

The authors of the survey concluded that respondents' quantitative literacy skills ill prepare them for our credit economy:

> In general, it appears that many individuals can perform simple arithmetic operations when both the numbers and operations are made explicit. Yet, when these same operations are performed on numbers that must be located and extracted from different types of documents that contain similar but irrelevant information, or when these operations must be inferred from printed directions, quantitative tasks become increasingly difficult.[59]

Concrete examples of the sorts of quantitative tasks pertaining to the various literacy levels measured by the survey illuminate the difficulties American consumers must experience when engaging in household commercial

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[56] *Id.* at 17.
[57] *Id.* at 19.
[58] *Id.* at 10.
[59] KIRSCH ET AL., *supra* note 35, at 323.

transactions. For example, "one such task having a scale value of 270 [Level 2] required the reader to locate the appropriate shipping charges in a table before entering the correct amount on an order form and calculating the total price for ordering office supplies."[60] A score of 312, or Level 3, was assigned to a table of money rates that asked the reader to determine how much more interest would be earned in money market accounts provided by mutual funds than in those provided by savings and loan associations.[61]

One of the most difficult quantitative tasks the survey asked readers to perform involved reading a newspaper advertisement for a home equity loan and explaining how they would calculate the total amount of interest charges to be paid.[62] It asked respondents to imagine the following scenario:

> You need to borrow $10,000. Find the ad for Home Equity Loans on page 2 in the newspaper provided. Explain to the interviewer how you would compute the total amount of interest charges you would pay under this loan plan. Please tell the interviewer when you are ready to begin.

FIXED RATE • FIXED TERM
HOME EQUITY LOANS
14.25%
SAMPLE MONTHLY REPAYMENT SCHEDULE

AMOUNT FINANCED /	MONTHLY PAYMENT
$10,000	$156.77
$25,000	$391.93
$40,000	$627.09

This task received a score above 376, and required Level 5 quantitative literacy, which only four percent of the respondents demonstrated.

Other studies of financial literacy corroborate the National Adult Literacy Survey. For example, Professor Lewis Mandell, on behalf of the Jump$tart Coalition for Personal Financial Literacy, conducted a longitudinal study of high

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[60] *Id.* at 324.
[61] *Id.* at 325, 326 exhibit 13-31.
[62] *Id.* at 325, 326 exhibit 13-32.

school students' proficiency in personal finance basics in 1997, 2000, and 2002.[63] In the 2002 study, Mandell asked 4,054 twelfth graders in 183 schools across the United States to complete a short examination on saving, borrowing, and investing.[64] He found that, on average, participants in the 2002 survey answered 50.2% of the questions correctly – a failing grade in most high schools.[65] Moreover, Mandell found that twelfth graders' proficiency in personal finance had decreased over the past five years – the average scores in the 2000 and 1997 surveys were 51.9 percent and 57.3 percent, respectively.[66]

Given the statistics on illiteracy and innumeracy among Americans, it should come as little surprise that commentators argue that most individuals would benefit from instruction on personal financial management skills. But this observation does not lead to the conclusion that we should mandate that consumers who access the bankruptcy system obtain this training, as the next two sections explain.

IV. THE COALITION FOR CONSUMER BANKRUPTCY DEBTOR EDUCATION

H.R. 975 would require every individual debtor to receive personal financial management education in order to obtain a discharge in bankruptcy.[67] The next two sections question the wisdom of mandating financial education, but not the wisdom of voluntarily providing it to individuals in the bankruptcy system. This section begins by describing my involvement in a pilot project for providing debtor education to consumers who filed for bankruptcy in the Eastern District of New York. Relying on these experiences, the next section explores the pros and cons of mandating financial literacy courses for consumer debtors.

Since October 2001, I have been working with Professor Karen Gross of New York Law School and other members of a non-profit organization we call the Coalition for Consumer Bankruptcy Debtor Education.[68] Through this organization, we

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[63] LEWIS MANDELL, FINANCIAL LITERACY: A GROWING PROBLEM (2002) (reporting on results of 2002 National Jump$tart Survey).

[64] *Id.* at 7.

[65] *Id.*

[66] *Id.*

[67] Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 106(b), (c) (2003).

[68] The Coalition is a non-profit corporation for which Professor Karen Gross

provide financial literacy training to individuals who file for bankruptcy (either chapter 7 liquidation or chapter 13 debt repayment plans) in the Eastern District of New York, which includes Staten Island, Brooklyn, Queens, and Long Island.[69] Between October 2001 and May 2003, we offered financial literacy classes, free of charge, to individual debtors.[70]

The financial literacy course utilizes a financial management guide developed by a diverse committee of the Coalition's board of directors, comprised of academics, bankers, debt counselors, a psychologist, and specialists in adult education. The curriculum, which we call *Making Sense of Cents*, covers the psychology of money, buying, and borrowing, as well as information on developing spending and saving plans, learning about basic credit terms and concepts, avoiding credit scams, and reestablishing credit after bankruptcy by rebuilding credit reports and credit scores. Although originally written in English, it has also been translated into Spanish.

We rely, nearly exclusively, on volunteer teachers whom we recruit from the bankruptcy legal community, the financial services industry, and community-based organizations. We held five "train the trainer" sessions,[71] in which these volunteers learned, not just about the curriculum we ask them to teach, but also about consumer finance and consumer bankruptcy law, the psychology of money, and basic principles

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serves as President and a member of the board, and for which I serve as Treasurer and a member of the board.

[69] In addition to providing financial literacy training to consumer debtors, the Coalition also studied the effect that these classes had on debtors' borrowing behavior and attitudes about borrowing. In this empirical study, we asked consumer debtors to answer questions about their borrowing behavior and attitudes about borrowing on two occasions – once immediately before taking one of the financial literacy classes discussed above and again three months later. Two additional control groups responded to the same questions at the same intervals. Together with Dr. Richard Weiner, director of the Law and Psychology Institute at the University of Nebraska, and Corinne Donovan, a Ph.D. candidate at Baruch College, we analyzed this data to assess whether attendance in the class improves debtors' knowledge acquisition, or alters their attitudes about borrowing and borrowing behavior. Due to the longitudinal nature of the study, we collected data through May 2003 to include debtors who received financial literacy training in classes offered through February 2003.

[70] On average we offered between six and seven classes per month between October 2001 and March 2003. The bulk of these classes were conducted between March 2002 and March 2003; however, while we collected data for the empirical project between October 2001 and March 2002, we offered only a handful of classes while we learned the ropes of running a district-wide system of debtor education. After March 2003, we decided to reduce the frequency with which we offered these classes, and currently offer no more than 3 classes per month.

[71] For more information about our "train the trainer" sessions, see http://www.debtoreducation.com (last visited Feb. 22, 2004).

of adult education.[72] The training sessions are interactive in that the trainees practice teaching a segment of the curriculum, and observe and critique others' teaching.[73] Trainees receive a teacher's manual containing information on the program and providing concrete and detailed suggestions for in-class activities and exercises.[74]

Getting debtors to attend the financial literacy classes we offered was our greatest challenge. Although we offered the three-hour class free of charge and provided to the students a copy of the financial management guide, food (sometimes coffee and cookies, sometimes sandwiches), a small parting gift (such as a stress ball, small calculator, or pen and paper sets), and a certificate of completion (suitable for framing), it was a struggle to solicit debtors for the classes. Even though we offered two to four classes a week at diverse locations, including Brooklyn, Queens, Manhattan, and Nassau and Suffolk Counties in Long Island, attendance was never robust.

We contacted debtors in numerous ways, employing various marketing strategies. First, we contacted most of the debtors by mail. As a part of our empirical study of the efficacy of the debtor education project, we mailed informational packages to approximately fifteen thousand debtors between May 2002 and February 2003.[75] These packages contained both information about the classes we offered and information about the empirical study we were conducting, including a questionnaire for all debtors to complete and return to us if they wished to participate, regardless of whether they were interested in attending the class. In the end, we received approximately four hundred completed questionnaires from debtors who attended the class and more than three hundred completed questionnaires from debtors who did not attend.[76]

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[72] We enticed lawyers to attend the training session by offering continuing legal education credit to them free of charge if they agreed to teach three classes in our pilot project. We enticed bankers to do the same by offering them credit under the Community Reinvestment Act, 12 U.S.C. §§ 2901-2908 (2000).

[73] In the "train the trainer" session, we also encouraged prospective financial literacy educators to utilize interactive exercises in their classes.

[74] *See* Baron-Donovan, Block-Lieb, Gross, Wiener & Wright, *supra* note 10 (describing teacher training sessions, teachers' manual and mentoring program offered through Coalition in greater detail).

[75] For a brief description of this study, see note 69. *See also* Block-Lieb, Gross & Wiener, *supra* note 10, at 513-17.

[76] *See* Baron-Donovan, Block-Lieb, Gross, Wiener & Wright, *supra* note 10, at 15.

After we had compiled sufficient data for the empirical study and decided to cease mailing questionnaires to debtors, we continued to mail an informational letter, flyer, and schedule of classes to additional debtors during February and March 2003.[77] Moreover, throughout this period, the clerk's office for the Eastern District of New York graciously allowed us to add a short informative paragraph at the bottom of their official notice sent to every debtor filing between September 2002 and March 2003. The official website for the Eastern District also provided general notice of the financial literacy classes offered through the Coalition.[78]

Second, we sent students and other volunteers to some but not all of the § 341 meetings conducted in Brooklyn and Central Islip.[79] At § 341 meetings, volunteers handed out flyers and other written information about the classes and spoke about the pilot project to debtors and their attorneys. In some instances, the trustees conducting the § 341 meetings informed debtors about the financial literacy classes. The volunteers also left behind flyers and other written materials at meeting places, and periodically replaced them.

Third, we worked through intermediaries to contact debtors.[80] Whether through the "train the trainer" sessions or other means, we contacted individuals, community groups, and professional associations with interests in consumer bankruptcy law or financial literacy. We attempted to partner with law firms and solo practitioners, bankruptcy trustees, labor unions, the Legal Aid Society and community legal services offices, bar associations and other professional and para-professional groups, financial institutions, credit counseling services, law school clinics, church groups, and

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[77] Although we did not study this in any formal way, it seemed to us that more debtors called us in response to the mailings that contained only the flyer and schedule of classes than in response to the mailings containing the same information plus the questionnaire. We surmise that the questionnaire was either confusing or off-putting to the recipients.

[78] The Coalition for Consumer Bankruptcy, *Making Sense of Cents: A Debtor Education Program*, *at* www.nyeb.uscourts.gov/announcements/debtoreduc/faqs092602.pdf (last visited Aug. 8, 2003).

[79] Baron-Donovan, Block-Lieb, Gross, Wiener & Wright, *supra* note 10, at 7-8. Section 341 of the Bankruptcy Code requires the U.S. Trustee to convene and preside over a public meeting of creditors and equity security holders. 11 U.S.C. § 341 (2000). In chapter 7 liquidation cases involving a consumer debtor, this may be the only time the debtor comes in direct contact with the bankruptcy system.

[80] Baron-Donovan, Block-Lieb, Gross, Wiener & Wright, *supra* note 10, at 6-7.

numerous community organizations. We worked closely with several of these intermediaries to communicate directly with their clients, especially those clients who were about to file or had already filed for bankruptcy. We employed this intermediary system on the theory that debtors would be more amenable to suggestions that they attend a financial literacy class if the suggestion came from someone that they knew and trusted.

Fourth, we established a website[81] and a newsletter[82] to communicate about the Coalition's mission, including the financial literacy classes and the "train the trainer" sessions. The website includes information for debtors about debtor education classes, information for people interested in becoming debtor educators for the Coalition, and information for organizations, agencies, professionals, and academics interested in financial literacy. It also contains hyperlinks to articles and other websites about financial literacy and related topics. The newsletter, also entitled *Making Sense of Cents*, features articles about the Coalition, its pilot debtor education project, and a variety of other topics related to financial literacy and consumer bankruptcy.

As a result of these efforts, between 2001 and 2003 we taught approximately six hundred debtors, offered approximately one hundred financial literacy classes and trained over one hundred thirty volunteer financial literacy teachers.

V. MANDATING FINANCIAL COMPETENCE, OR ENABLING IT?

Should we offer financial literacy courses for those in bankruptcy? Absolutely. Many debtors would benefit from taking a personal financial management course, provided it satisfies basic criteria of fairness and quality. The course should follow a pre-established curriculum that looks to empower rather than demonize debtors. The information the course provides should be objective and accurate. Those teaching the course should be trained in the subject matter and sensitive to the stresses faced by debtors in their day-to-day situation. The course should be affordable and offered at convenient times and locations.

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[81] Coalition for Consumer Bankruptcy Debtor Education, *at* http://www.debtoreducation.org (last visited Feb. 21, 2004).

[82] Our newsletter is available through the website. *Id.*

Offering financial literacy courses to consumer debtors in the context of bankruptcy is a good idea because the filing of a bankruptcy case creates a teachable moment for consumer debtors.[83] No matter why an individual debtor filed for bankruptcy, the filing itself will have a profound and detrimental effect on access to consumer credit, and the cost of this access. Although consumer debtors do not fit any predictable demographic pattern,[84] each member of this heterogeneous group can benefit from learning more about consumer credit – how to manage credit obligations and how to repair their standing in the market for consumer credit.[85] Providing information on personal financial management can provide debtors with practical assistance in realizing the promise of a fresh start after bankruptcy.[86]

Technological changes and market innovations in the consumer finance industry also point out the need to provide financial literacy courses to consumer debtors.[87] Deregulation and advances in information technology, credit scoring models, and the Internet have all combined to enable financial service providers to market financial products expansively to an ever-widening cross-section of the American population.[88] With increased access to consumer credit comes an increased need

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[83] *See* Block-Lieb, Gross & Wiener, *supra* note 10, at 508 ("Consumer debtors in the bankruptcy system are an identifiable audience of individuals with financial trouble and a need for information about personal finance."); Karen Gross, *Establishing Financial Literacy Programmes for Consumer Debtors: Complex Issues on the Platter*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 347-48 (Iain Ramsay, Johanna Niemi-Kiesilainen & William C. Whitford eds, 2003). *But see* A. Mechele Dickerson, *Can Shame, Guilt or Stigma Be Taught?: Why Credit-Focused Debtor Education May Not Work,* 32 LOY. L.A. L. REV. 945 (1999) (questioning whether personal financial management should be taught to consumer debtors in bankruptcy).

[84] For detailed discussion of the demographics of individual debtors, see TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS (1989), and SULLIVAN, WARREN & WESTBROOK, *supra* note 21.

[85] Block-Lieb, Gross & Wiener, *supra* note 10, at 508.

[86] *Id.*

[87] Sandra Braunstein & Carolyn Welch, *Financial Literacy: An Overview of Practice, Research, and Policy*, FED. RES. BULL. 445, 445-48 (2002).

[88] *Id.* at 447 (noting changes in personal finances and demographics of American borrowers). As Braunstein and Welch note, college students enjoy increasing access to consumer credit, especially credit card credit. *Id.* at 448. *See also* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, CONSUMER FINANCE: COLLEGE STUDENTS AND CREDIT CARDS (June 2001). Similarly, sub-prime lending has "democratized" the market for consumer credit, resulting in increasing numbers of low-income families gaining access to consumer credit, especially credit card credit. *See, e.g.*, Thomas A. Durkin, *Credit Cards: Use and Consumer Attitudes, 1970-2000*, FED. RES. BULL., Sept. 2000, at 623, 625; Arthur B. Kennickell, Martha Starr-McCluer & Brian J. Surrette, *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances,* FED. RES. BULL. 1, Jan. 2000, at 26.

for information about credit vocabulary, financial concepts, and commercial transactions.[89] This need is especially pressing in light of evidence that predatory lending practices may be on the rise, particularly unfair and deceptive home equity loan lending practices.[90]

As noted above, H.R. 975 does more than provide consumer debtors with access to financial literacy courses, however. The bill mandates that consumer debtors receive debtor education, and provides that individual debtors cannot receive a discharge in bankruptcy until they have completed a certified course.[91] By making financial literacy courses mandatory, and attaching such a heavy penalty for a failure to obtain this education, Congress looks to send a strong message. But what is the content and wisdom of this message? Why should we mandate financial literacy courses for those in bankruptcy, and what should the penalty be for a failure to comply with the mandate?

Many argue that mandatory debtor education is justified because, under a voluntary regime, too few debtors would attend the class. My involvement with the financial literacy courses offered through the Coalition for Consumer Bankruptcy Debtor Education confirms that it is difficult to attract debtors' attendance in voluntary programs, especially where they are not strongly encouraged to attend by the Office of the United States Trustee, their trustee in bankruptcy, or their attorney. Mandating debtor education will improve attendance, without a doubt. But the desire to increase attendance in debtor education classes does not justify the grave penalty the bill would impose for the failure to complete a financial literacy course – denial of a chapter 7 or chapter 13 discharge. Every other basis for generally denying a discharge

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[89] Braunstein & Welch, *supra* note 87, at 445-46.

[90] *Id.* at 446-47. *See also* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1258 (2002) (arguing that "the market incentives that historically led lenders to engage in credit rationing have given way to a market where lenders can profit from exploiting new information asymmetries to the detriment of unsophisticated borrowers"); Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 507 (2002); Anne-Marie Motto, Note and Comment, *Skirting the Law: How Predatory Mortgage Lenders Are Destroying the American Dream*, 18 GA. ST. U. L. REV. 859 (2002); Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. BANKING INST. 111, 112 (2002); Marsha L. Williams, *Predatory Lending: Overview of the HUD/Treasury Report and Related Issues*, 55 CONSUMER FIN. L. Q. REP. 48 (2001).

[91] Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 106(b)-(c) (2003).

in bankruptcy to a consumer debtor is grounded on the actual or presumed fraudulent conduct of the debtor.[92] If Congress enacts H.R. 975, consumer bankruptcy law would condition a debtor's discharge on her ability to get time off from work, obtain childcare, and pay a course fee.

Because the rules are structured as mandates, the proposed legislation will inevitably punish consumer debtors for failing to live up to its requirements. The penalty that H.R. 975 would impose – general denial of discharge – is overly harsh as compared to the conduct at issue. Harsh penalties undermine the beneficial effects of provisions otherwise intended to protect consumer debtors, such as the provision regarding mandatory debtor education. In addition, complex mandates, whether pertaining to eligibility or imposing conditions to discharge, will have especially harsh effects on the hundreds of thousands of consumer debtors who currently access the consumer bankruptcy system pro se, without the advice of counsel.[93]

Nor is it necessary to penalize a debtor's failure to attend mandatory debtor education by conditioning the discharge in bankruptcy on such attendance. Other less punitive remedies are available. For example, Canadian consumer bankruptcy law mandates post-bankruptcy consumer counseling, but debtors who fail to attend might still receive a discharge.[94] While Canadian consumer debtors who fail to complete the mandatory consumer counseling session are not eligible for a fast-track automatic discharge,[95] they are still free to request and receive a discharge following bankruptcy.[96]

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[92] 11 U.S.C. § 727(a) (2000).

[93] *Cf.* Susan Block-Lieb, *A Comparison of Pro Bono Representation Programs for Consumer Debtors*, 2 A.B.I. L. REV. 37 (1994).

[94] *See* Canadian Bankruptcy and Insolvency Act, R.S.C. ch. B-3, § 157.1(1)(a) (2002) (Can.) [hereafter BIA] ("The trustee shall provide, or provide for, counseling for an individual bankrupt[.]"). For discussion of the Canadian mandate, see Ruth E. Berry & Sue L.T. McGregor, *Counselling Consumer Debtors Under Canada's Bankruptcy and Insolvency Act*, 37 OSGOODE HALL L.J. 369 (1999) (supporting Canadian mandate for debtor education); Carol Ann Curnock, *Insolvency Counselling – Innovation Based on the Fourteenth Century*, 37 OSGOODE HALL L.J. 387 (1999) (critiquing Canadian mandate for debtor education); Iain Ramsay, *The Political Economy of Consumer Bankruptcy Reform in Canada*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=350060 (last visited Feb. 21, 2004) (discussing politics associated with legislative history of consumer provisions in BIA).

[95] *See* BIA, § 157.1(3) (2002) (foreclosing automatic discharge to individual bankrupts who fail to obtain mandated counseling); *id.* § 168.1(1)(f) (providing for automatic discharge, except as provided in § 157.1(3)).

[96] Iain Ramsay, *Mandatory Bankruptcy Counseling: The Canadian*

In any event, it is premature to mandate financial literacy training for all consumer debtors in bankruptcy until the benefits of these courses in general, and mandatory debtor education in particular, are empirically established.[97] Sandra Braunstein and Carolyn Welch recently conducted a survey of research on financial literacy courses for the Federal Reserve Bank and found that "[w]hile studies generally find a positive correlation between financial training and the achievement of specific goals, the results of surveys measuring the acquisition of more general, more comprehensive financial literacy are less clear cut."[98] Moreover, none of the existing studies on the effectiveness of financial literacy initiatives test whether a mandate undermines or otherwise influences the success of a course.[99]

Experience, 7 FORD. J. CORP. & FIN. L. 525, 528 (2002) ("A failure to attend a counseling session results in a debtor not receiving an automatic discharge and requires a court application for discharge."); Saul Schwartz, *The Effect of Bankruptcy Counseling on Future Creditworthiness: Evidence from a Natural Experiment*, AM. BANKR. L.J. (forthcoming) ("The counseling is mandatory only if, as is true in the majority of cases, the bankrupt desires an automatic and unconditional discharge, one given without a court appearance.").

[97] Pending bankruptcy legislation concedes the wisdom of studying debtor education empirically. *See* Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 105 (2003) (requiring Executive Office of U.S. Trustee to develop financial management and training curriculum and materials, test, evaluate the effectiveness of such materials in six judicial districts, and report to Congress during an 18-month period beginning not later than 270 days after the date of enactment of the Act). Ironically, however, the study it mandates begins and ends after the mandate itself becomes effective under the terms of H.R. 975.

[98] Braunstein & Welch, *supra* note 87, at 452, 456 (concluding, as a result, that significant "challenges remain in identifying the most effective and most efficient means of providing relevant information to educate consumers at appropriate points in their financial life cycle"). Braunstein and Welch are right to emphasize the importance of identifying the goals of a financial literacy initiative as a prerequisite to any study of its efficacy. For if we do not know the goals of a program, it is meaningless to determine whether the program has been a success. Unfortunately, Congress has not identified the goals of mandating personal financial management education for individual debtors in bankruptcy. Block-Lieb, Gross & Wiener, *supra* note 10, at 519-22. This failure will, inevitably, hamper efforts to study the effectiveness of this mandate. *Id.*

[99] In summarizing the findings of empirical studies of financial literacy programs, Braunstein and Welch note that "the primary challenge is defining and quantifying 'success.'" Braunstein & Welch, *supra* note 87, at 449. Studying the success of initiatives with a specific goal-oriented educational component, such as homebuyer counseling programs, savings initiatives and workplace programs, researchers look to see whether participants achieved the specified goal over time; Braunstein and Welch conclude that these studies may often find success, as so defined. *Id.* at 449-52. *See also, e.g.*, GREGORY ELLIEHAUSEN, E. CHRISTOPHER LUNDQUIST & MICHAEL E. STATEN, GEO. UNIV. CREDIT RESEARCH CENTER, THE IMPACT OF CREDIT COUNSELING ON SUBSEQUENT BORROWER CREDIT USAGE AND PAYMENT BEHAVIOR 31 (Jan. 2003) (finding positive relationship between participation in financial counseling and changes in credit scores); ABDIGHANI HIRAD & PETER M. ZORN, A LITTLE BIT OF KNOWLEDGE IS

In addition, because mandatory education presents difficult pedagogical issues, there is reason to suspect that a mandate would undercut the substance of a sound financial literacy curriculum and the likelihood that debtors will succeed in implementing course material into their everyday lives. Experts on adult education recommend against requiring adults to learn anything they have not volunteered to learn.[100] Psychologists also report diminished motivation to learn when course material is mandatory rather than voluntary.[101]

A GOOD THING: EMPIRICAL EVIDENCE OF THE EFFECTIVENESS OF PRE-PURCHASE HOMEOWNERSHIP COUNSELING 3 (May 2001) (finding, for example, that borrowers who received counseling had, on average, 19% lower 90-day delinquency rates than comparable borrowers who had not), *available at* http://www.freddiemac.com/corporate/reports; B. Douglas Bernheim & Daniel M. Garrett, *The Effects of Financial Education in the Workplace: Evidence from a Survey of Households*, 87 J. PUBLIC ECON. 1487 (2003) (finding significant relationship between financial education in the workplace and rate of total saving, but no relationship between financial education and total wealth accumulation). *But see* Schwartz, *supra* note 96, at 32 (studying Canadian mandatory debtor counseling and finding little to support notion that it improves debtors' creditworthiness after bankruptcy and, indeed, "few substantive differences between counseled and uncounseled debtors"). Where researchers look more broadly for increases in comprehensive financial literacy, Braunstein and Welch conclude that their findings "are less clear." Braunstein & Welch, *supra* note 87, at 452. *See also, e.g.*, Jeanne M. Hogarth, Sondra G. Beverly & Marianne Hilgert, Federal Reserve System Community Affairs Research Conference, Patterns of Financial Behaviors: Implications for Community Educators and Policy Makers (Discussion Draft 2003) (concluding that high scores for cash flow, saving and investing behaviors were consistently influenced by financial knowledge and financial learning experiences); B. Douglas Bernheim, Daniel M. Garret & D. M. Maki, *Education and Saving: The Long-Term Effects of High School Financial Curriculum Mandates,* 80 J. PUB. ECON. 435 (2001) (studying long-term effect of financial curricula in high schools across nation and finding that state-mandated financial education resulted in increased exposure to financial information and improved asset accumulation upon adulthood); Donald Bradley, Abdi Hirad, Vanessa Gail Perry & Peter Zorn, *Is Experience the Best Teacher? The Relationship Between Financial Knowledge, Financial Behavior, and Financial Outcomes* (Rodney L. White Center for Financial Research, Univ. of Penn., Workshop on Household Financial Decision Making, March 2001) (finding, based on data from a 1999 Freddie Mac Consumer Credit Survey, that "specific and detailed knowledge of financial concepts had little effect on behaviors or outcomes, and that confidence and broad understanding were more important predictors"); MANDELL, *supra* note 63 (finding that mandated curriculum did little to improve financial literacy of high school seniors over time; over 5-year period of longitudinal study, 12th graders' scores actually worsened). As noted in the text, none of these studies explicitly compares the effectiveness of mandatory and voluntary financial literacy initiatives, although some of the courses that were studied were voluntary and some mandatory.

[100] *See, e.g.,* ROLAND G. THARP & RONALD L. GALLIMORE, ROUSING MINDS TO LIFE: TEACHING, LEARNING, AND SCHOOLING IN SOCIAL CONTEXT (1988).

[101] *See, e.g.*, Annjanette Agnew Nease, *Do Motives Matter? An Examination of Reasons for Attending Training and Their Influence on Training Effectiveness, in* DISSERTATION ABSTRACTS INTERNATIONAL, SECTION B: THE SCIENCES & ENGINEERING (No. 61(4-B)) 2257 (Oct. 2000) (concluding that individuals who reported attending training program based on intrinsic interest or desire for skill improvement reported higher motivation to learn, while those who attended due to a compliance motive were less motivated to learn).

Although I argue that every consumer debtor could benefit from financial literacy training,[102] individual debtors may themselves disagree.[103] Given the difficulties associated with teaching to someone who does not want to learn, mandatory debtor education would not constitute a successful learning experience, either for the reluctant student, the others who have volunteered to take the class and are eager to learn, or the teacher hoping to keep the attention of both groups.

Moreover, a mandate requiring individual debtors to obtain financial literacy training would undermine the substance of the curriculum by turning the course into an occasion for judging debtors rather than an occasion for enriching and developing the lives of those in voluntary attendance. Mandatory debtor education, especially a mandate enforced through a conditioned discharge, treats financial literacy training as though it were a punishment and bankruptcy the crime, much in the same way that many states mandate drunk drivers or drivers with too many points to sit through driver education and safety awareness classes. Financial literacy courses are most likely to succeed when they empower debtors to make sound financial decisions in the future. By removing from debtors the ability to choose how best to address the question of their financial future after bankruptcy, treating consumer debtors as having committed economic transgressions, and characterizing financial literacy classes as punitive, mandatory debtor education contradicts the message that should be communicated in financial literacy courses. Put succinctly, punitive paternalism will not enable consumer debtors to gain control over financial and economic issues.

In addition, mandatory debtor education would ignore differences among consumer debtors, both in terms of their demographic backgrounds and the reasons they have filed for bankruptcy. The premise underlying these mandates is that all

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[102] *See* Block-Lieb, Gross & Wiener, *supra* note 10, at 505-10.

[103] Self-assessment can be unreliable, however. The NALS study found that most individuals, even those ranked at Level 1 or 2, thought they functioned at a high level of literacy. FIRST LOOK, *supra* note 31, at xvii.

> The approximately 90 million adults who performed in Levels 1 and 2 did not necessarily perceive themselves as being 'at risk.' Across the literacy scales, 66 to 75 percent of the adults in the lowest level and 93 to 97 percent in the second lowest level described themselves as being able to read or write English 'well' or 'very well.'

Id.

debtors are alike – immoral and incompetent. Mandatory rules treat debtors as homogeneous, although empirical studies confirm the heterogeneity of those who seek bankruptcy protection.[104] Although studies show that individual debtors who access the bankruptcy system are much more heavily indebted than those who do not seek bankruptcy protections,[105] it would be a giant leap to assert that all overextended debtors borrowed beyond their means as a result of their ignorance about matters of finance. Imposing a punitive mandate for financial literacy training on consumer debtors would vastly oversimplify a complex situation.

VI. CONCLUSION

H.R. 975 would require every individual who seeks a discharge in bankruptcy, whether filing under chapter 7 or chapter 13 of the Bankruptcy Code, to attend an "instructional course concerning personal financial management."[106] Failure to comply with this mandate would preclude an individual debtor from obtaining a bankruptcy discharge.[107] More than 1.6 million non-business bankruptcy petitions were filed in 2002.[108] This mandate could apply to cases filed on and after the effective date of pending legislation, although H.R. 975 does not fund this initiative.[109] Although H.R. 975 would require the Executive Office of the U.S. Trustee to study the effectiveness of debtor education,[110] the bill's mandate is not delayed pending review of the office's eventual report to Congress.[111]

Currently, financial literacy courses are provided to consumer debtors in only a handful of judicial districts across the country, primarily to chapter 13 debtors.[112] While providing consumer debtors with voluntary access to financial literacy courses would enhance, in a very practical and immediate way,

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[104] SULLIVAN, WARREN & WESTBROOK, *supra* note 21, at 59, 73.

[105] *See id.* at 65, 69-74.

[106] Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 106(a) (2003).

[107] *Id.* at § 106(b)-(c).

[108] For statistics on bankruptcy filings, see American Bankruptcy Institute, *at* http://www.abiworld.org (last visited Feb. 22, 2004).

[109] Block-Lieb, Gross & Wiener, *supra* note 10, at 522.

[110] H.R. 975, § 105.

[111] Block-Lieb, Gross & Wiener, *supra* note 10, at 521-22.

[112] Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 557-63, 592 (2001).

the financial fresh start that bankruptcy provides, requiring individuals to attend an educational initiative as a condition to obtaining a discharge in bankruptcy would do as much to punish debtors as to protect them. "[R]ather than assisting consumer debtors in effectuating their fresh start, mandatory debtor education may stand in the way of their bankruptcy discharge."[113]

[113] Block-Lieb, Gross & Wiener, *supra* note 10, at 523.