

# CAN SHAME, GUILT, OR STIGMA BE TAUGHT? WHY CREDIT-FOCUSED DEBTOR EDUCATION MAY NOT WORK

*A. Mechele Dickerson\**

## I. INTRODUCTION

*Debtor Education!* became a rallying cry during recent legislative efforts to solve “the bankruptcy problem.” Virtually everyone liked the concept of debtor education.<sup>1</sup> Unfortunately, congressional bills that mandated debtor education<sup>2</sup> did not specify what would be taught, who would teach, when debtors would be taught, and who would pay for this education. Even though Congress has proposed sweeping bankruptcy reforms, no one really knows why individual bankruptcy filings have skyrocketed<sup>3</sup> during a period of relative economic prosperity.

---

\* Associate Professor of Law, William and Mary Law School. A.B., Harvard-Radcliffe; J.D., Harvard Law School. I am grateful to Professor Neal E. Devins, the Honorable David H. Adams and the Honorable Stephen C. St. John for commenting on this essay.

1. A report on debtor education submitted to the National Bankruptcy Review Commission observed that “it is hard to be against debtor education—it would be like being against apple pie.” NATIONAL BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT 20 YEARS app. G-3.a at 2 (1997) [hereinafter REPORT] (statement of Professor Karen Gross).

2. See Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998); Consumer Bankruptcy Reform Act of 1998, S. 1301, 105th Cong. (1998); Bankruptcy Reform Act of 1999, H.R. 333, 106th Cong. (1999).

3. There were 287,570 non-business filings in 1980, 718,107 in 1990, and 1,350,118 in 1997. See *U.S. Bankruptcy Filings 1980-1998 (Business, Non-Business, Total)* (visited Feb. 12, 1999) <<http://www.abiworld.org/stats/1980annual.html>>. For the year ending September 30, 1998, 1,436,964 total bankruptcies were filed. This represents a 5.1% increase from the same 12-month period in 1997. The 1,389,839 individual filings accounted for 96.7% of all filings during this period, a 5.8% increase over the comparable period last year. In contrast, business bankruptcies decreased by 15.1% to 47,125. See *Bankruptcies Break Another Record Dur-*

Despite the disconcerting absence of current, comprehensive empirical data,<sup>4</sup> many legislators supported bills that radically restructured bankruptcy laws based on the following assumptions. People do not understand how credit works. Because of this ignorance, people overextend themselves and use credit, especially credit cards, irresponsibly. Using credit irresponsibly makes it difficult for debtors to make payments on the debt and maintain what they have come to accept as a reasonable standard of living. Faced with the choice of either sacrificing to dig themselves out of debt or filing for bankruptcy to discharge those debts, people choose the easy, painless, bankruptcy route. Bankruptcy is easy and painless because it no longer has a stigma attached to it and people no longer feel guilt or shame when they file for bankruptcy.<sup>5</sup>

To solve the bankruptcy problem, Congress proposed to make it harder to discharge debts, which would prevent debtors from using the easy way out, and to require debtors to participate in debtor education programs, which would prevent them from overextending themselves in the first place and in the future. Working from the assumption that financial irresponsibility caused the debtors' financial

---

*ing 12-Month Period Ending Sept. 30* (visited Feb. 13, 1999) <<http://www.abiworld.org/release/98thirdquarterfilings.html>>.

4. The most frequently cited consumer bankruptcy study is TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989) [hereinafter *AS WE FORGIVE*]. Though rarely attacked on its methodology, the data in this study is approximately ten years old and, thus, does not adequately explain the increase in filings. Ironically, before they completed that study, the authors noted that "empirical research has played almost no role in the development of bankruptcy policy." Teresa A. Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 *LAW & CONTEMP. PROBS.* 195, 195 (1987). Unfortunately, we now find ourselves back in the same position with Congress proposing massive reforms without having empirical research to support those reforms.

5. See Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws*, *WALL ST. J.*, June 17, 1998, at A1 (reporting that creditor groups feel the "bankruptcy boom" is driven by "a decline in the social stigma of bankruptcy"); Peter Pae & Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record; Easy Credit Blamed, Congress May Act*, *WASH. POST*, June 7, 1998, at A1 (noting concern expressed by Rep. Bill McCollum (R-Fla), a major supporter of recent bankruptcy reforms, that the "stigma" of filing for bankruptcy is gone).

predicament, legislators concluded that debtors needed to be taught the importance of using credit responsibly and paying their debts. If the reformers' assumptions are correct, then implementing a credit-focused education program should solve the bankruptcy problem. But what if they are wrong?

What if, as many argue, debtors find themselves unable to pay their bills for reasons that have little to do with their knowledge, or lack thereof, of the true cost of credit?<sup>6</sup> For example, what if most debtors who paid their bills understood how credit works and paid their debts on time until they lost their jobs, found that they could not collect court-ordered child support, or incurred unexpected, catastrophic, uninsured medical expenses?<sup>7</sup> A generally responsible, but suddenly under- or unemployed debtor who files for bankruptcy to discharge credit card debts incurred to pay for expenses reasonably necessary to support a family does not need to be taught how to use credit responsibly. The debtor needs a new or better paying job. Likewise, a debtor who files for bankruptcy to discharge massive medical bills does not need to learn how to live within a budget. The debtor needs health insurance.

This Essay examines the inherent limitations of credit-focused debtor education programs. While the concept of debtor education is laudable, Congress should not treat education as a panacea that will

---

6. See Schlesinger, *supra* note 5, at A1 ("Many analysts say the surge in bankruptcies reflects continuing hardship amid prosperity; divorce, layoffs and the loss of medical insurance can quickly put people in a bind. Sharing the blame is an industry-encouraged rise in consumer debt.").

7. See, e.g., *Star Banc Fin., Inc. v. Bird (In re Bird)*, 224 B.R. 622 (Bankr. S.D. Ohio 1998); *First Card Servs., Inc. v. Team Motorsports, Inc. (In re Team Motorsports, Inc.)*, 227 B.R. 427 (Bankr. D.S.C. 1998). Both of these cases illustrate how responsible people nonetheless can find themselves hopelessly in debt. The debtors in *Bird* initially paid their bills until the wife developed psychological problems and lost her job. Her husband quit his job in order to find a higher paying one to pay his wife's mounting medical bills. See *Bird*, 224 B.R. at 624-25. After these economic setbacks, the couple accepted a creditor's unsolicited offer for unsecured signature loans. See *id.* at 624. The debtor in *Team Motorsports* successfully operated a business for 20 years, but ended up with massive credit card debt after his business was destroyed by a fire. See *Team Motorsports*, 227 B.R. at 429. After the insurance company delayed in paying the claim, the debtor accepted an unsolicited pre-approved credit card with a \$10,000 credit limit. See *id.*

singlehandedly solve the bankruptcy problem. Part II briefly describes the debtor education programs recently considered by Congress and Part III discusses the potential benefits to debtors, creditors, and society overall, of mandating that debtors participate in debt counseling programs.

Part IV suggests that while debtor education is a worthwhile concept, credit-focused programs have substantial structural and pragmatic limitations. Because of these limitations, it is likely that the cost of mandating and paying for credit-based education for *all* debtors will substantially outweigh any benefits society receives if credit-ignorant debtors participate in debtor education. Moreover, even if empirical research proves that most debtors are credit-ignorant and *would* benefit from debt counseling, I argue that debtor education is unlikely to solve the bankruptcy problem unless Congress also places restrictions on debtors' access to credit. The Essay concludes by arguing that debtor education will combat bankruptcy abuse only if Congress mandates and funds programs that take on the daunting task of teaching potential and actual debtors how to avoid an economic crisis *before* it occurs.

## II. RECENT PROPOSALS FOR CREDIT-FOCUSED EDUCATION

During the 105th Congress, legislators considered two principle bankruptcy bills, House Bill 3150 and Senate Bill 1301, that mandated credit-focused debtor education programs. Similar bills, House Bill 333 and Senate Bill 625, were introduced in the 106th Congress. Under House Bill 3150, debtors would be denied a discharge unless they used, or attempted to use, a consumer debt counseling service to negotiate a debt repayment plan with their creditors before they filed for bankruptcy.<sup>8</sup> This bill also required the Office of the United States Trustee ("Trustee's Office") to develop a course in financial management.<sup>9</sup> Senate Bill 1301 was substantially similar as it also

---

8. See H.R. 3150, 105th Cong. § 104 (1998). A conference bill submitted during the 105th Congress proposed to make debtors ineligible to file unless they received credit counseling during the ninety days preceding filing unless they showed that "exigent circumstances" exist or they requested credit counseling but could not obtain it during that five-day period. See Conference Bill, § 302(a).

9. See H.R. 3150, 105th Cong. § 112 (1998).

required debtors to participate in pre-petition debt counseling and made participation a prerequisite to receiving a discharge.<sup>10</sup>

Congress was not the only entity to suggest that debtors should be encouraged to participate in debt counseling. In late 1997, the National Bankruptcy Review Commission<sup>11</sup> issued a report that included a discussion of debtor education. The Commission endorsed the concept of debtor education, but did not recommend mandatory debtor education. It recommended, instead, that debtor participation in existing private-sector financial education programs be voluntary<sup>12</sup> and it argued that debtors who participate in credit-focused education should be rewarded by having their credit reports indicate that they completed a consumer financial education program.<sup>13</sup>

### III. ADVANTAGES OF A CREDIT-FOCUSED DEBTOR EDUCATION PROGRAM

#### A. Debtor Education Helps Combat Debtors' Credit-Ignorance

Because most debtors probably have not taken a course on "how to prepare a budget," a financial management course should be useful.<sup>14</sup> Many Americans appear to have no idea how much they pay in

---

10. See S. 1301, 105th Cong. § 321(a) (1998). The Trustee's Office could waive this requirement by certifying that "suitable" courses were not available. Unfortunately, Congress gave no guidelines or criteria that explained when a debt-counseling program should be deemed to be "suitable."

11. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, tit. VI, § 604, 108 Stat. 4106, 4147-48 (1994) (National Bankruptcy Review Commission Act). For a comprehensive description of the history of the Commission, see REPORT, *supra* note 1, at 47-75.

12. See REPORT, *supra* note 1, at 1.1.5.

13. See *id.* at app. G-1.a, *American Bankruptcy Institute Consumer Bankruptcy Reform Forum Report*.

14. I have always assumed that "money management" is not a skill most secondary or post-secondary schools teach. To "test" this assumption, I asked the 17 students in my Fall 1998 Bankruptcy Fraud seminar how many of them have a monthly budget (approximately 60%), how many of those with a monthly budget consistently adhere to it (50%), how many have *never* exceeded their budget (0), and, how many had taken a course on how to budget (0). When I asked the students how they learned to prepare and live within a

interest when they pay only the monthly minimum balance on their credit cards.<sup>15</sup> For example, recent litigation involving Sears and other major retail stores revealed that some debtors agreed to repay fairly sizeable debts in return for the retailer's promise to extend them a nominal line of credit even though executing the reaffirmation agreements obligated them to pay actual annual percentage rates as high as 124.2%.<sup>16</sup>

A properly crafted and implemented credit-counseling program should teach individuals both how much credit actually "costs" and why they should try to pay more than the minimum monthly payments on their credit cards.<sup>17</sup> Mandatory debt counseling also should help make debtors realize why it seldom, if ever, is in their economic interest to execute a reaffirmation agreement that requires them to repay discharged debts if all they receive is a nominal line of credit.<sup>18</sup> Finally, a thoughtfully created financial management program should help debtors understand the general importance and necessity of budgeting and using credit responsibly.

#### *B. Debtor Education Helps Modify Debtors' Credit Values*

Mandatory credit-focused debtor education would have the addi-

---

monthly budget, answers included: "trial and error/just picked it up," "my parents taught me," or "I don't know." While this "test" by no means qualifies as a scientific survey—especially since it necessarily excluded all full-time workers—it supports the contention that many debtors would benefit from a financial management course.

15. See Gene Tharpe, *Students: Beware the Credit Card Trap*, ATLANTA J. & CONST., Sept. 27, 1998, at 08R (citing consumer group report that only 20% of students knew how long it would take to pay off credit card debt if they make only the monthly minimum payment).

16. See *In re Bruzzese*, 214 B.R. 444, 448 (Bankr. E.D.N.Y. 1997).

17. A provision in S. 1301, which did not make it into the final conference report, would have required credit card companies to include a prominent disclosure on each credit card statement that explained how long it would take the consumer to repay the debt if the consumer paid only the minimum monthly payment. A bill introduced in the 106th Congress seeks to impose this requirement on credit card issuers. See Consumer Credit Act of 1999, S. 641, 106th Cong. (1999).

18. See Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 499 (1997) (relaying the story of a debtor who reaffirmed a \$1,700 debt to get an additional \$300 in credit even though this caused the debtor to pay an effective interest rate of 567%).

tional benefit of satisfying society's need to "punish" debtors for acting irresponsibly. Just as states force people who drive irresponsibly to take safe driving courses,<sup>19</sup> Congress could force people who use credit irresponsibly to take a debt counseling course.<sup>20</sup> Though many debtors are "honest" people who find themselves in bankruptcy for reasons largely beyond their control, media reports suggest that many people believe that far too many debtors refuse to make sacrifices to repay their bills.<sup>21</sup> Forcing all debtors to participate in credit-counseling should satisfy the demand to punish debtors, to make bankruptcy unpleasant, and to ensure that bankruptcy has a "stigma" attached to it.

Mandatory credit-focused education also should provide non-financial help for "creditholics." Some debtors find themselves deeply in debt because they cannot seem to control their spending—especially when they find themselves temporarily short of cash.<sup>22</sup> For compulsive spenders, or those otherwise addicted to credit, mandatory credit-focused education could give them emotional or psychological support just as programs like Alcoholics Anonymous, Narcotics Anonymous, and Gamblers Anonymous provide support to people with other addictions.

---

19. See, e.g., IOWA CODE ANN. § 321J.3 (West 1997 & Supp. 1998); MISS. CODE ANN. § 63-11-30(2) (1996); WIS. STAT. ANN. § 345.60 (West 1991).

20. Cf. Karen Gross, *Testimony of Professor Karen Gross Regarding Debtor Education, Before the House Subcommittee on Commercial and Administrative Law (March 12, 1998)*, 52 CONSUMER FIN. L.Q. REP. 180, 181 (1998) (arguing that debtor education programs should not be compared to drunk driving schools because doing so suggests that the debtor has committed some kind of criminal wrong).

21. See Jamie Clary, *Bill Would Make It Harder to Wipe Away Bankruptcy Debt*, NASHVILLE BUS. J., Apr. 17, 1998, at 9 (quoting statement by a banking industry representative that "[b]ankruptcy is no longer a last resort. It has become a first resort."); Editorial, *Bankruptcies*, RICHMOND TIMES-DISPATCH, Jan. 9, 1998, at A12 (stating that reform is necessary to curb the practice of using bankruptcy as "something less than" a last resort); Editorial, *End Abuses of Bankruptcy Option with Regulations, Common Sense*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 18, 1997, at 30A (stating that "[m]any debtors wrongly treat bankruptcy as a first-choice option, not a last resort").

22. See, e.g., *In re Beles*, 135 B.R. 286, 287 (Bankr. S.D. Ohio 1991) (debtors incurred extensive credit card debt primarily for living expenses after the husband lost his job and then suffered a heart attack).

#### IV. FLAWS OF THE PROPOSED CREDIT-FOCUSED DEBTOR EDUCATION PROGRAMS

##### A. Structural Flaws

##### 1. Timing of debt counseling

It is unclear whether it would be more beneficial for debtors to receive credit counseling before, or after, they file for bankruptcy. There are advantages and disadvantages to both. Post-petition programs that help people who have used credit irresponsibly learn how to use credit responsibly ostensibly will prevent people from becoming repeat filers.<sup>23</sup> They cannot, however, solve the debtor's current problems, since learning how to use credit responsibly will not undo the damage caused by prior irresponsible acts. While post-petition education may have limited benefits, making debt counseling a *pre-requisite* to bankruptcy is potentially disastrous.

Requiring debtors either to engage in debt negotiations with a creditor or to complete a credit-counseling course as a prerequisite to bankruptcy could have dire financial consequences. Except for high income debtors who file for bankruptcy even though they easily can repay their debts,<sup>24</sup> most people file for bankruptcy because they need immediate economic relief. Forcing a debtor to negotiate with creditors—who have no legal duty to negotiate with debtors—or denying bankruptcy relief until *after* the debtor completes a financial management course would exacerbate the debtor's financial distress and impose an intangible emotional cost. While it is impossible to place a monetary value on the "cost" of extending a debtor's finan-

---

23. Despite suggestions in the media that people file numerous Chapter 13 petitions, empirical evidence suggests that serial filing is not a problem. See AS WE FORGIVE, *supra* note 4, at 192.

24. Some people undoubtedly abuse bankruptcy laws by filing for bankruptcy even though they can repay all their bills. Most individual Chapter 7 debtors, however, genuinely appear to need economic relief. See Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AMER. BANKR. INST. L. REV. 27, 31 (1999) (suggesting that, at most, only 3.6% of Chapter 7 debtors could repay even as little as twenty percent of their unsecured debts over five years).

cial distress, bankruptcy is designed to provide *help* to those in economic distress by temporarily preventing creditor collection activities.<sup>25</sup> Harming a debtor—whether financially or emotionally—is justified only if the emotional cost is outweighed by the tangible economic benefits either the debtor or creditors receive *in the current case* if the debtor completes debt-counseling before she files for bankruptcy.<sup>26</sup>

## 2. Length of credit-focused programs

Congress also has not specified for how long debtors must receive debt-counseling. It is highly unlikely that a day-long financial management seminar will cause a compulsive spender to be born-again and become a responsible spender. Likewise, if debtors do not understand even the fundamentals of credit, such as interest rates, it will take more than a few hours to teach them how to manage their finances responsibly. The length of counseling ultimately may depend on the goal of debtor education.

If the goal of credit-counseling is punitive, to make sure debtors understand that they have behaved irresponsibly and that they should not do it again, then a short counseling program can accomplish this goal. This goal can be accomplished by requiring all debtors to attend credit-counseling programs even if the debtor is not credit-ignorant. In contrast, if Congress wants credit-counseled debtors to obtain skills they can use to prevent them from making unwise credit decisions in the future, then an extensive, and undoubtedly expensive, program is needed since only intensive counseling will produce long-term benefits to debtors, creditors, and society overall.

---

25. See 11 U.S.C. § 362(a) (1988) (bankruptcy filing acts as an automatic stay of creditor collection activity).

26. Many have suggested that preventing a debtor from filing for bankruptcy until she learns how to use credit responsibly is like preventing a sick person from going to a hospital until she learns how to live a healthy life. See Pae & Stoughton, *supra* note 5, at A1 (quoting Professor Elizabeth Warren as saying “[t]hose who want to say [that] the way to solve rising consumer bankruptcy is by changing the law are the same people who would have said during a malaria epidemic that the way to cut down on hospital admissions is to lock the door.”).

### 3. Funding for debt counseling

The 105th Congress appropriated no funding for debtor education programs. Debt-counseling could be funded in a number of ways. First, debtors could be charged "tuition" in the form of higher filing fees. However, since many "honest" debtors already cannot afford to pay filing and attorney fees,<sup>27</sup> it would be unfair to impose yet another cost on them. Moreover, potential debtors may use funds they had earmarked for paying an attorney to pay for pre-petition credit-counseling. If these individuals ultimately become *pro se* debtors, this would impose an additional administrative cost on the bankruptcy clerk's office, trustees, and ultimately bankruptcy judges.

A second possibility is to tax creditors to pay for the programs. Given the credit card industry's apparent political influence<sup>28</sup> in Congress, however, this is not a likely funding mechanism. Another possibility is to slightly increase filing fees then use the increase and part of the existing fees to fund debt-counseling. This funding method is more equitable as it would spread the cost between debtors, who would pay slightly more in fees, and creditors, who would receive a smaller distribution from the estate. Since one of the primary goals of the programs is to make debtors financially responsible and thus prevent future filings, creditors should not object to at least partially funding these programs. Other ways to fund debtor education include increasing federal income taxes or using a portion of the settlement proceeds of the reaffirmation agreement litigation involving Sears and other retailers.<sup>29</sup>

---

27. See generally *Interim Report Discusses Pilot Program To Allow IFP Ch. 7 Consumer Filings*, BNA BANKR. L. DAILY, Apr. 9, 1997, at d4 (discussing impoverishment of many debtors).

28. See Schlesinger, *supra* note 5, at A1 (reporting that the American Financial Services Association (AFSA), Visa, and MasterCard combined spent more than \$2 million in lobbying in 1997); Common Cause, *Going for Broke: Consumer Credit Industry Bankrolls Candidates and Parties With \$61.1 Million Since 1987; Senate Poised to Act on Bankruptcy Legislation* (visited Feb. 13, 1999)

<[http://www.commoncause.org/publications/goingforbroke\\_prelease.htm](http://www.commoncause.org/publications/goingforbroke_prelease.htm)> (reporting that the consumer credit industry gave \$61.6 million, an average of \$100,000 in political action committee contributions to each member of the Senate, since 1987).

29. For a fuller discussion of these, and other suggestions, see Gross, *supra*

Admittedly, all funding proposals are problematic and will add some type of financial burden to either debtors, creditors, or society. Nonetheless, if Congress expects debtor education to be successful, it simply must state how the education will be funded.

#### 4. Selecting debt counselors

Congress also failed to state who should provide debt-counseling. If debtor education becomes a prerequisite for filing a bankruptcy petition, debtors most likely will learn of this requirement from the attorney they consult to file their bankruptcy petition. If Congress mandates pre-petition counseling, lawyers who currently represent debtors may seize the opportunity to offer counseling services to potential debtors. However, having attorneys provide this advice may not accomplish the goal of ensuring that debtors receive proper credit, not legal, advice since reported cases indicate that some debtors' counsel are not providing credit advice which the Code already mandates.<sup>30</sup> Moreover, if the not-yet-retained bankruptcy attorney provides debt-counseling but has not been paid in full for the service at the time the debtor files for bankruptcy, the attorney may find that he is disqualified from representing the debtor in the bankruptcy case.<sup>31</sup>

It is possible that one of the existing profit or non-profit institutions will develop and offer debt counseling courses either independently or in conjunction with an attorney who has a high volume debtor practice. In many ways, this result is preferable to having one

---

note 20, at 182-83.

30. See, e.g., *In re Bruzzese*, 214 B.R. 444, 449 (Bankr. E.D.N.Y. 1997) (finding that the debtor's "[c]ounsel breached his fiduciary duty to represent his client effectively by his total lack of awareness of or disregard for the true economic costs of this [reaffirmation agreement], and his resultant failure to explain these costs and to point out other available sources of consumer credit at a much lower effective rate of interest.").

31. If the lawyer has not been paid for his services as of the time the petition is filed, the lawyer would be viewed as a creditor and may be treated as a disinterested person who cannot represent the debtor in the bankruptcy case. See 11 U.S.C. § 327(a) (1988) ("[T]he trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . ."); 11 U.S.C. § 101(14) (1994) (defining "disinterested person" as someone who is not a creditor).

of the existing bankruptcy professionals counsel debtors since using existing counseling services would not add an additional task to, or otherwise burden, the existing bankruptcy process.<sup>32</sup> Unfortunately, encouraging debtors to receive counseling from a largely unregulated and unknown industry poses a number of problems.

First, if the credit counselors associate themselves with a high volume debtors' counsel, there is an increased likelihood that the counselor will collect a counseling fee from the debtor, conclude that the debtor's problems cannot be solved outside of bankruptcy, then shuttle the debtor to the counselor's attorney cohort who will then collect another fee from the debtor. In addition to creating a potential conflict of interest, allowing counselors to provide credit advice as a prerequisite to a bankruptcy filing increases the likelihood that the counselors will give bankruptcy advice. Since most credit counselors are probably not lawyers, they would be prohibited from giving legal advice by their state's applicable unauthorized practice of law regulations.<sup>33</sup>

Because credit counselors currently are not regulated, there is no way to determine the type of advice they will give debtors. Though Congress recently amended the Bankruptcy Code to regulate the activities of bankruptcy petition preparers,<sup>34</sup> courts continue to encounter problems with petition preparers who engage in activities that exceed those permitted by the Code.<sup>35</sup> Given this, it is questionable whether Congress should encourage non-lawyers to give mandatory pre-petition debt counseling.

If Congress permits these groups to provide debt counseling, it

---

32. One bill required the Trustee's Office to develop a financial management course. *See* H.R. 3150, 105th Cong. § 112 (1998). This requirement assumes that current employees of the Trustee's Office are competent to both develop and teach such a course or that the Trustee's Office has funds in its current budget to hire a person to conduct the course.

33. *See In re Soulisak*, 227 B.R. 77 (Bankr. E.D. Va. 1998) (requiring financial counselor, an unlicensed attorney, to disgorge consulting fees because the counselor's financial advice constituted an unauthorized practice of law).

34. *See* 11 U.S.C. § 110 (1994) (imposing penalties upon persons who negligently or fraudulently prepare bankruptcy petitions).

35. *See In re Jones*, 227 B.R. 704, 705-06 (Bankr. S.D. Ind. 1998) (holding that a non-attorney bankruptcy petition preparer could not deliver bankruptcy documents to clerk of bankruptcy court).

must require that some entity—either the court or the Trustee’s Office—oversee the counselors to ensure that they are competent and that the counseling programs provide accurate financial information that will help debtors make more informed credit decisions.<sup>36</sup> The House Bill suggested that the Trustee’s Office create a “certification” process.<sup>37</sup> Unfortunately, Congress gave no guidelines, suggested no criteria, and appropriated no funds for this certification process. Moreover, requiring the Trustee’s Office to “certify” the competency of credit counselors adds an additional layer of administrative bureaucracy (with the possibility of a due process challenge) that could paralyze the efficient operation of the Trustee system.

### B. Pragmatic Flaws

#### 1. Gauging “mastery” of financial management

If debtors who fail to “successfully” complete a pre- or post-petition financial management course are denied a discharge, courts will be forced to define “success.” Developing and applying a fair and workable definition will be difficult. For example, if a debtor attended all classes and completed any required assignments but nonetheless either chose, or felt compelled, to file a bankruptcy petition, should she be deemed to have “failed” the program? Similarly, if the debtor “successfully” completes the program, renegotiates debts with her creditors, loses her job four months later, then attempts to file a bankruptcy petition, should she be required to enroll in another counseling program before being allowed to file the petition? Given the difficulties courts already face when interpreting vague standards like “good faith,” “abuse,” “undue hardship,” and “reasonable,”<sup>38</sup>

---

36. Neither bankruptcy judges nor the Trustee’s Office is presently situated or prepared to supervise these programs. Moreover, a strong argument could be made that bankruptcy judges should under no circumstances supervise debt counseling programs, as Congress intentionally removed courts from serving in administrative roles when it enacted the Code in 1978. See S. REP. NO. 95-989, at 27 (1978), reprinted in 1978 U.S.C.C.A.N. 5787.

37. See H.R. REP. NO. 105-540 § 104 (1998).

38. See A. Mechele Dickerson, *Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy*, 45 BUFF. L. REV. 629, 639-40 (1997) (discussing courts’ struggle to define these imprecise concepts).

Congress should carefully specify when a debtor should be deemed to have “successfully” completed a financial management course.

2. Successfully completing a financial management course may not “cure” all economic disabilities

Mandating credit-focused education assumes that most debtors currently are financially irresponsible, but will behave responsibly once they learn how to manage their finances. Credit counseling will not help debtors who *intentionally* act irresponsibly, because they will ignore any advice they receive in debt counseling.<sup>39</sup> Debt counseling should, however, help debtors who are credit-ignorant.<sup>40</sup> Unfortunately, if empirical data show that most debtors become “economically disabled” for reasons unrelated to their knowledge of credit, then credit-focused counseling may not help even those “honest” debtors.

The proposed debtor education programs do little for debtors who become economically disabled because they lack marketable job skills, health insurance, or are not receiving timely child support payments.<sup>41</sup> A debtor who understands credit will not benefit from debt-counseling if she becomes unable to pay her bills because a fi-

---

39. Indeed, if the court concludes that the debtor is abusing the bankruptcy system, the debtor need not be sent to counseling: the debtor should be prosecuted for bankruptcy fraud or, at a minimum, have the case dismissed for substantial abuse. *See* 11 U.S.C. § 707(b) (1994).

40. *See* Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 478-79 (1997) (proposing that participation in educational programs be limited to debtors whose histories demonstrate a “curable” lack of understanding of budgeting and using credit).

41. Existing debtor education programs, which have a somewhat broader scope than the proposed programs, suffer from the same types of deficiencies as they also fail to help debtors get better jobs, collect child support, or improve their educational level. *See* REPORT, *supra* note 1, Tim Truman and Tom Powers, app. G-3.b (“Background of the Dallas-Fort Worth Chapter 13 Debtor Education/Credit Rehabilitation Program.”). *See also* Marion A. Olson, Jr., *Debtor Rehabilitation Credit Re-establishment Program Handbook* (1990) (unpublished manuscript, on file with author) (discussing Western District of Texas bankruptcy education program); Ad Hoc Creditor Committee, *Debtor Rehabilitation and Re-establishment of Credit Program*, (May 2, 1986) (unpublished manuscript, on file with author) (discussing debtor education program in Southern District of Ohio).

nancially devastating divorce makes it hard, or impossible, to support her family on her income. While pre-divorce marital counseling may have helped her, once she becomes economically disabled by a divorce she needs help getting child support or a better job—not help calculating the interest payments on her credit cards. Likewise, an employed debtor who diligently paid her bills until she incurred massive uninsured medical expenses may need help getting a job that provides health benefits, but is unlikely to derive any direct benefit from being shown how to prepare a budget.

### 3. Some disabilities may be incurable

Properly structured educational programs must do more than simply respond to a debtor's intellectual deficiencies. The programs also must address what some have characterized as their "moral" deficiencies. Though teaching values or morality is hard—and perhaps even impossible—debtor education programs must stress that, unless you have the present means to repay your bills in full, it is simply wrong to accept the twelfth credit card offer you receive that month or to buy your kids expensive shoes marketed by famous athletes. To prevent people from overspending, they somehow must be taught to believe that (1) it is important to engage in economically responsible behavior, even if that means delaying the immediate gratification of purchasing whims; (2) you should feel guilty when you cannot pay your bills; and (3) you should make personal sacrifices in order to dig yourself out of debt.

Resisting the urge to have ten credit cards and to use those cards to purchase shoes advertised by a sports superstar is not something that can be taught in a brief credit-counseling course. Arguably, a "Debtors Anonymous" support group would need to be a component of debtor education.<sup>42</sup> Without such a value-laden, guilt-based component of debtor education, it is unlikely that debtor education will

---

42. Such a program currently exists. A 12-step support group, called Debtors Anonymous, is based on the principles of Alcoholics Anonymous and offers mutual help to compulsive spenders. See Tracy LeMay, *Throttling the Debt Monster: Debtors Anonymous Emphasizes Spiritual Route to Solvency*, NAT'L POST, Jan. 13, 1999, at D5; Jenifer B. McKim, *Holidays Harry Compulsive Debtors*, ORANGE COUNTY REG. (Cal.), Dec. 13, 1998, at A1.

help alter debtors' general economic philosophy, or make them feel "stigmatized."

#### 4. Creditors encourage debtors to overspend

Finally, a properly structured debtor education program must do more than just preach *to* the debtor. It also must remove temptations *from* the debtor. That is, any attempt to prevent debtors from indulging themselves or their children will fail as long as debtors have almost unlimited access to credit. While the credit industry clearly appears to support debtor education, it does not appear willing to voluntarily curtail the number of credit offers they extend to already over-extended Americans.<sup>43</sup> Likewise, it is unclear whether the industry would support education programs that stress that debtors should: (1) use credit cards only if they encounter an unexpected, catastrophic emergency, (2) never carry a credit card balance, (3) refuse a credit card issuer's offer to skip a payment unless the issuer also tolls the accrual of interest, and (4) never take out a cash advance "loan" since some interest rates on cash advances would constitute usury under some states' laws.

If debtors can learn to resist the urge both to accept credit card solicitation offers *and* to refuse to carry a monthly minimum balance, they necessarily will use credit less frequently, will pay little or no interest, and will incur no finance charges. Because credit card issuers derive profits primarily from interest and finance charges, it is not in the industry's economic interest for debtors to radically modify their undisciplined spending patterns.<sup>44</sup> Indeed, one indication of the

---

43. See *In re Wegner*, 91 B.R. 854, 855 (Bankr. D. Minn. 1988) (noting that debtor had 26 credit cards and credit card debt that exceeded \$100,000). One can only imagine why any creditor would give this debtor his 15th, 16th, etc. card. See also *First Card Servs., Inc. v. Cruz (In re Cruz)*, 179 B.R. 975, 977-78 (Bankr. S.D. Fla. 1995) (questioning why twelve credit card issuers extended credit to an unemployed refugee who spoke little English and had only a third grade education).

44. See George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 337 (1997) ("[T]he issuer prefers not to receive full payment on the outstanding balance in most cases, as its income is primarily derived from the substantial interest received on minimum monthly payments."); *AT&T Universal Card Servs. v. Ellingsworth (In re Ellingsworth)*, 212 B.R. 326, 330

profits the industry feared it would lose if consumers decided, *en masse*, to charge only what they can afford to pay each month is demonstrated by a credit card issuer's recent threat to impose a monthly fee on the accounts of credit card holders who pay their balances in full.<sup>45</sup>

Simply forcing debtors to participate in a financial management course that teaches them the true cost of credit will not prevent them from being lured back to their irresponsible ways. To remove the temptation for debtors to revert back to their irresponsible spending patterns, Congress should either enact laws that prevent debtors from reaffirming debts or from obtaining credit cards post-discharge,<sup>46</sup> or should reform bankruptcy laws to ensure that creditors who make irresponsible lending decisions are directly or indirectly penalized in bankruptcy cases.<sup>47</sup>

---

(Bankr. W.D. Mo. 1997) (“[C]reditors actively seek out undisciplined spenders who carry large unpaid balances from month to month.”); *Sears, Roebuck and Co. v. Hernandez (In re Hernandez)*, 208 B.R. 872, 879 (Bankr. W.D. Tex. 1997) (“[C]redit card companies seek customers who will charge more than they can afford on a month-to-month basis but who will eventually pay back their bills.”).

45. See Patrick Lee, *GE to Tack On \$25 Fee to Cardholders Who Pay Off Their Balances Promptly*, L.A. TIMES, Sept. 11, 1996, at D1 (reporting that GE Capital Services' Rewards MasterCard will affix a \$25 annual charge to customer accounts that do not carry a balance from month to month or incur less than \$25 in annual charges). See also Albert B. Crenshaw, *Ending a Free Ride; Credit Card Firm Plans Fee if Balance Is Paid Monthly*, WASH. POST, Sept. 11, 1996, at F1 (reporting one company's claim that credit cardholders who pay their balances in full cost the company \$30 annually whereas the company earns \$318 annually on customers who carry a balance).

46. While it is easy to say, as many currently are, that existing bankruptcy laws encourage people to use credit irresponsibly, our market economy cannot survive if people cease using credit altogether. Moreover, since it is virtually impossible to rent a car or reserve a hotel room without a credit card, debtors can legitimately claim that they *need* a credit card at least for limited purposes.

47. See LoPucki, *supra* note 40, at 466, 477-82 (proposing a bankruptcy system that removes perverse incentives for irresponsible lending); cf. *Hernandez*, 208 B.R. at 879 (“[T]he same industry that seeks customers who will spend more than their means requests that discharge be denied to these customers because of an implied promise (which courts must infer) not to spend more than their means.”).

## V. AN ALTERNATIVE APPROACH TO DEBTOR EDUCATION

### A. *Targeting Those Who Should Be Subject to Mandatory Debtor Education*

Congress should not mandate credit-focused counseling for all debtors until it has empirical data that show that most debtors are credit-ignorant. Financially responsible people who file for bankruptcy because of an unexpected, uninsured catastrophic event do not need credit counseling—they need a quick and simple fresh start. If Congress mandates debtor education before it has empirical data to support the necessity of this type of education, then it should require debtors to attend only a brief post-petition counseling course. While such a course will have little, if any, effect on current filings, a properly structured course should at least prevent some repeat filers.<sup>48</sup>

### B. *Scope of Debtor Education Programs*

If empirical research shows that most debtors find themselves economically disabled for reasons unrelated to their knowledge of credit, debtor education will fail unless it addresses the debtors' individual economic deficiencies. A properly structured debtor education program should treat each debtor's life circumstances as unique. The type of counseling a debtor receives should be based on the deficiency that needs to be corrected, for example: how to budget, how to avoid compulsive spending, how to obtain vocational skills that will lead to a better job or one that has health insurance, et cetera. Though individually tailored counseling is more expensive than a

---

48. An alternate would be to allow debtors to opt-out of credit counseling if they can show that they are not credit-ignorant and that they filed for bankruptcy for reasons unrelated to their financial management skills. Unfortunately, giving debtors the right to opt-out of credit counseling will require that courts conduct an "opt-out" hearing. One bankruptcy judge commented that, given the number of filings each year, requiring judges to conduct this type of a hearing would be a "nightmare administratively." See Letter from Stephen C. St. John, Judge, United States Bankruptcy Court, Eastern District of Virginia, to A. Mechele Dickerson, Associate Professor of Law, College of William and Mary School of Law 3 (Dec. 18, 1998) (on file with author).

standard counseling course, teaching debtors something they already know, or something that will not help cure their economic disabilities, will waste money and will not solve the bankruptcy problem.

### *C. Timing and Funding Educational Programs*

Finally, the best way to prevent a person from becoming economically disabled, and thus being unable to pay his bills, is to enroll the person in a financial management course *before* the person becomes financially irresponsible. Thus, the educational process should begin before people develop bad credit habits. A provision in one House bill noted that it was the “sense of the Congress” that states should develop elementary and secondary curricula relating to consumer personal finances.<sup>49</sup> Though this may have been the sense of the Congress, it failed to appropriate even one cent to fund this program.

To prevent people from forming bad credit habits, Congress should mandate and fund credit counseling courses for middle or high school students and should recommend that credit counseling courses be offered at nominal cost at community college or adult education centers. This will be an expensive mandate to fund. But, if early credit education prevents naive adolescents, who are the fastest growing group of credit card holders,<sup>50</sup> from becoming financially irresponsible adults, then the education will ultimately result in a net gain to society. Likewise, if Congress truly believes that society overall is harmed by the increase in consumer bankruptcy filings, it should subsidize the costs of employer-provided financial management programs by, for example, allowing employers to offer credit counseling as part of their employee benefit plans, just as many employer plans pay for substance abuse counseling.

## V. CONCLUSION

A properly structured and funded debtor education program

---

49. See H.R. 3150, 105th Cong. § 109 (1998) (“It is the sense of the Congress that States should develop curricula relating to the subject of personal finance, designed for use in elementary and secondary schools.”).

50. See Robin Washington, *Credit Card Companies Target Teens*, BOSTON HERALD, Sept. 18, 1998, at 45.

could work. Unfortunately, the proposed credit-focused programs are poorly structured and are inadequately funded. While many debtors need to learn how to prepare a budget and how to calculate interest payments, not all bankruptcies can be traced to credit-ignorance. To solve the bankruptcy problem, Congress must be prepared to directly and comprehensively address it by: (1) penalizing both irresponsible debtors *and* over-zealous creditors; (2) teaching financial management to teens; and (3) creating and funding debtor education programs that teach debtors how to overcome their credit and non-credit based economic disabilities.