Borrowing After Bankruptcy

by Katherine Porter*

I. INTRODUCTION

Competing ideas about the causes of consumer bankruptcy fueled the intensity of the debate about bankruptcy reform. With millions of Americans seeking bankruptcy relief in each of the recent years, scholars and policymakers struggled to understand the reasons for the rising numbers of families in financial hardship. Theorists offered conceptualizations; empiricists presented data; policymakers were challenged with reconciling different explanations. All parties justified their position on bankruptcy reform, at least in part, by advocating a particular view on the causes of bankruptcy.

Three major explanations for financial distress dominated the discourse. First, some politicians and scholars posited that many people who file bankruptcy are profligate spenders. They portrayed bankruptcy debtors as possessing different norms about promise-keeping and being susceptible to the temptations of credit.[1] Supporters of this "profligacy" theory asserted that the stigma of filing bankruptcy had declined and that bankruptcy relief was too easy, cheap, and generous. Second, the "adverse event" model of bankruptcy suggested that a financial shock to income or expenses such as a job loss, family break-up, or illness/injury triggered a vast majority of bankruptcies.[2] In this view, families arrive in bankruptcy with overwhelming debts because they used credit as a buoy to try to keep them afloat during an adverse financial event.

---

* Associate Professor, University of Iowa College of Law. I thank Melissa Jacoby, Deborah Thorne, and Elizabeth Warren for their helpful comments and suggestions. Saray Bermeo and Ariane Holtschlag provided able research assistance.

[1] Judge Judith H. Jones & Todd J. Zwyicki, *It's Time for Means-Testing*, 1999 BYU L.REV. 177, 215-221 (1999); F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 193-194 (January 1998).

[2] TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 15-18 (2000).

Third, Americans were hypothesized to be in financial trouble because they lacked financial education or sophistication. This "ignorance" model was the purported justification for making financial education a required part of bankruptcy relief and for improved disclosures in credit agreements. All three models shared one feature. They relied on the prebankruptcy circumstances and behaviors of debtors to support their model of financial failure.

This Article takes a fresh approach. Using original empirical data, I reveal how families' postbankruptcy circumstances and behaviors offer crucial insights on the causes of bankruptcy. The three models' conceptions of debtors are tested against empirical data on postbankruptcy borrowing. My findings tend to negate the profligacy or ignorance theories of consumer bankruptcy. The data show that families use much less credit than they are offered. Indeed, many families eschew postbankruptcy borrowing altogether. I also find that most families have only modest amounts of debt and are successfully managing these debts, even years after bankruptcy. These conclusions are inconsistent with the profligacy and ignorance models of bankruptcy. Because former debtors exhibit significant discipline in limiting credit use after bankruptcy, it seems unlikely that these families are generally unwilling or unable to make responsible borrowing decisions. The data do support the adverse event theory of bankruptcy. Most families were reluctant to accumulate new debts postbankruptcy, even in the face of substantial privations. These financial behaviors suggest that the prebankruptcy debts that overwhelmed bankruptcy filers were the result of hardship triggered by a financial shock. Compared to most Americans, families who have filed bankruptcy are cautious about credit.

The experience of bankruptcy may have transformed families' attitudes about borrowing and their use of credit. This possibility means that postbankruptcy data cannot definitively prove the causes of bankruptcy. Nonetheless, the postbankruptcy data do refute the ideas that families who file bankruptcy are inherently profligate or financially unsophisticated. The way in which families borrow after bankruptcy aligns most closely with the adverse events model. Moreover, the possibility that bankruptcy may have changed families' borrowing behaviors offers important insights on the rehabilitative potential of bankruptcy. Scholarly research on what happens to consumer debtors after bankruptcy is sparse.[3] Illuminating the realities of postbankruptcy borrowing facilitates an assessment of whether the bankruptcy system succeeds in providing families with financial fresh start. On this point, the empirical evidence reveals countervailing behaviors by debtors and creditors. Most families constrain their use of credit and have avoided incurring large debts. This behavior, combined with bankruptcy's discharge of their past debts, shows the desire of families to achieve a lasting fresh start. On the other hand, the credit industry inundates former bankruptcy debtors with opportunities to borrow. Such actions suggest that the lending industry itself believes that bankruptcy is exogenous to debtors. Widespread access to postbankruptcy credit is inconsistent with a view that debtors are ignorant spendthrifts. The gap between the ample borrowing opportunities provided by creditors and the limited use of credit displayed by debtors suggests that families are determined to capitalize on bankruptcy's rehabilitative potential despite the effects of unregulated credit markets.

This Article begins with a brief exploration of the theoretical construct of credit rehabilitation and examines the usefulness of prior studies in understanding what postbankruptcy credit reveals about the families who file bankruptcy. The remainder of Part II describes the methodology used to obtain the original data presented in this Article, which are drawn from Chapter 7 cases included in the 2001 Consumer Bankruptcy Project, a longitudinal study that

[3] *See* Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety-Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065 (2004) (explaining the value of more postbankruptcy research); *see also* Melissa B. Jacoby, *Ripple or Revolution? The Indeterminancy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 187-88 (Spring, 2005) (citing the need for empirical research on postbankruptcy research to inform policymakers).

created a multi-faceted database about consumer debtors.[4] Part III presents my findings about access to credit after bankruptcy and shows how the active solicitation of recent bankruptcy filers for new credit is consistent with the adverse events model of bankruptcy. Part IV reveals the extent to which families use credit after bankruptcy and shows a general trend toward avoiding or curtailing postbankruptcy credit. These behaviors negate the profligacy or financial ignorance of families in bankruptcy. The final part of the Article analyzes the implications of understanding postbankruptcy credit. I conclude that the data provide powerful evidence that families who file bankruptcy are not inherently profligate. Part V concludes with an explication of how understanding the contours of the postbankruptcy credit economy can enrich bankruptcy policy making and future scholarship.

II. THE ROLE OF CREDIT IN CONSUMER BANKRUPTCY

A. *Credit as a Rehabilitative Mechanism*

The "fresh start" is rhetorical shorthand for the principal goal of America's consumer bankruptcy system. Although courts,[5] policymakers,[6] and scholars[7] have relied on the "fresh start" concept to justify their conclusions, the construct is nebulous.[8] Margaret Howard has identified three different ways that the bankruptcy system could provide a fresh start to consumer debtors: (1) consumer financial education of the debtor, (2) emotional and psychological relief from financial failure, and (3) renewed debtor participation in the open credit economy.[9] To date, the third goal of economic rehabilitation has been the core of the fresh-start policy in

[4] *See* ELIZABETH WARREN & AMELIA TYAGI WARREN, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE (2003), Appendix at 181 (giving complete methodology of Consumer Bankruptcy Project.)

[5] *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[6] *See, e.g.*, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 71, 79–80 (1973).

[7] *See* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1059 (1987).

[8] *See* Howard, *supra* note 7, at 1059 (comparing the term "rehabilitation" with the "equally elusive term 'fresh start'"); KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 91 (1997).

[9] *See* Howard, *supra* note 7, at 1060-61.

bankruptcy.[10] Scholars have identified normative bases for this objective.[11] Society collectively improves when individuals become successful economic actors. Debt relief reduces demand on social service programs by preventing families' reliance upon government or charitable assistance to make ends meet.[12] More importantly in a free-market economy, bankruptcy is believed to fuel economic growth. By relieving debtors of oppressive debt service burdens, bankruptcy gives incentives for such individuals to earn income and frees up future income for purchasing goods and services. In short, consumer bankruptcy relief is supposed to position individuals to reengage successfully with the credit economy. The macro-economic benefits of this renewed participation in the economy are the leading justification for bankruptcy's reordering of private contract between individual debtors and creditors.[13]

Yet, such theories about how society benefits from the availability of debt relief do not mandate the contours of rehabilitation for individuals. The law's primary mechanism for facilitating debtors' renewed participation in the credit economy is a discharge of past debt.[14] The discharge relieves debtors of the consequence of past borrowing decisions and offers the potential for a different economic future. Yet, because discharge only addresses the past, it does

[10] *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 107 (2006) (discussing why first two goals are not as much a part of bankruptcy's fresh start policy as the third goal)

[11] *See, e.g.,* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1397 (1985) ("A normative theory of the fresh-start policy must . . . explain why, in the context of a social and economic order premised on individual autonomy, the law should make inalienable the right to a fresh start."); F.H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDISC. L.J. 67 (1995); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515 (1991); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49 (1986).

[12] SULLIVAN ET AL., *supra* note 2 at 259-60 (discussing bankruptcy in free-market economy as individualized risk alternative to government social safety programs that collectivize the risk of financial failure).

[13] *See, e.g.,* Jackson, *supra* note 11, at 1393.

[14] *See* 11 U.S.C. § 727 (discharge); 11 U.S.C. § 523 (describing types of debts that may not be discharged in Chapter 7); *see also* Howard, *supra* note 7, at 1047 ("The purpose of the consumer bankruptcy system, effectuated by discharge, is to give a fresh start to the honest but unfortunate debtor."); Jackson, *supra* note 11, at 1393 ("For these reasons discharge is viewed as granting the debtor a financial "fresh start.").

not ensure any particular outcome for debtors after they exit the bankruptcy system.[15] Indeed, little is known about what happens to debtors after bankruptcy.[16] The rhetorical power of the "fresh start" concept has masked our collective lack of knowledge about how debtors fare after bankruptcy and has deterred scholars from considering what postbankruptcy behavior may reveal about the causes and consequences of bankruptcy.

In a free-market economy, financial rehabilitation should not equate to consumer debtors indefinitely abstaining from using credit. Borrowing is essential to capitalism and stimulates entrepreneurial activity.[17] On an individual level, borrowing facilitates an immediate improved lifestyle for individuals and helps smooth gaps between income and consumption. Borrowing activity also sustains the macro-economy, which increasingly relies on consumer debt.[18] Bankruptcy then should not necessarily deter borrowing, but instead should foster a different outcome from the behavior: repayment instead of default.[19] Karen Gross has explained, "[w]e do not want debtors simply to stop incurring debt . . . we want debtors to be able to *continue* borrowing if they put themselves in the position to be able to repay what they owe their creditors."[20] Knowing whether and how debtors borrow, therefore, is a critical tool for assessing the economic rehabilitative goal of bankruptcy. Data on use and access to credit after bankruptcy

---

[15] *See* 11 U.S.C.A. § 1328(g)(1) (West 2005).

[16] Mark L. Power, Tahira K. Hira, & Roger P. Murphy, *Personal Bankruptcy, A Risk Management Technique: Policy Implications*, 2 RISK MGMT. & INS. REV. 81, 82-83 (1998-99) ("A review of bankruptcy literature shows that none of the studies have reported the long-term personal and financial consequences of filing bankruptcy."). For an analysis of Chapter 7 debtors' economic conditions one year after bankruptcy, *see* Porter & Thorne, *supra* note 10, at 67.

[17] Although this article focuses solely on consumer bankruptcies, the relationship between borrowing and entrepreneurship merits serious attention. A recent study shows that small business owners or solo entrepreneurs file a substantial fraction of consumer bankruptcy cases. Elizabeth Warren & Robert Lawless, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 747 (2005) (estimating that as many as 17.4% of consumer bankruptcy cases involve the failure of a business).

[18] *See* FED. DEPOSIT INS. CORP., EVALUATING THE CONSUMER LENDING REVOLUTION (Sept. 17, 2003), http://www.fdic.gov/bank/analytical/fyi/2003/091703fyi.html (last visited Feb. 28, 2006) (noting that consumer spending makes up more than two-thirds of America's gross domestic product and contributed over 85 percent of the nation's economic growth between 2001 and 2003).

[19] GROSS, *supra* note 8, at 99.

[20] *Id.*

reveal the realities of the fresh start and help us measure whether debtors avoid future financial trouble and achieve sustainable financial well-being. Such findings force a sharper articulation of what successful economic rehabilitation should encompass and allow analysis of whether current bankruptcy law produces desirable future consequences.

This line of inquiry about postbankruptcy borrowing has the potential to reorient scholars and policymakers on how to design a consumer bankruptcy system that achieves its goal of rehabilitation. Recent bankruptcy policy has been obsessed with the *ex ante* behavior of debtors.[21] Leading studies have focused on documenting the causes of bankruptcy and evaluating theories that people seek bankruptcy because of profligacy, financial mistakes, or adverse events.[22] These data are useful in unraveling the causes of financial failure but confront the difficult problem of trying to understand financial decisions that may have occurred months or years before bankruptcy. Moreover, such a focus distracts scholars and policymakers from considering how the bankruptcy system serves the families that do file.

Further, an exclusively *ex ante* perspective on bankruptcy misses an opportunity to assess whether the theories that debtors are profligate or financially ignorance has any traction. Are the families who file bankruptcy haunted by a credit addiction? Do they continue to borrow to live beyond their means after having experienced one serious consequence of overindebtedness—

---

[21] *See, e.g.*, Warren & Lawless, *supra* note 17, at 784 (describing the overspending consumer as the dominant narrative about the high rates of consumer bankruptcy in the last decade). Warren and Lawless note that the causes of rising bankruptcy filing rates are hotly debated.)

[22] *See* SULLIVAN ET AL., *supra* note 2, at 16. (presenting empirical data showing that most families who file consumer bankruptcy have experienced one or more of a job loss or problem, an illness or injury, or a divorce or family break-up); J. Jones & Zwyicki, *supra* note 1, at 210 (attributing the rise in bankruptcies to two factors: "(1) changes in the law and the bankruptcy system that have increased the net economic benefit of filing bankruptcy and (2)a decline in the personal shame and social stigma traditionally attached to filing bankruptcy."); Buckley & Brinig, *supra* note 1, at 187 (providing econometric analysis suggesting that changes in social norms might account for the increased bankruptcy filings). Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit*, 27 Hofstra L. Rev. 33 (1998) (contending that increased lending to riskier borrowers is primary contributor to consumer bankruptcy); Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 3 (1999) (pointing to "the extraordinary increase in consumer bankruptcies is connected to the decline of unions and wage stagnation.")

bankruptcy? Are such families unwise in their credit decisions or do they lack understanding of the consequences of using credit. If so, what conclusions should we draw from such borrowing activities? Data on postbankruptcy borrowing can usefully prod theorists to explicate their notion of profligacy and contextualize it against debtors' actual behaviors. Postbankruptcy borrowing and spending reveal these families' financial habits when bankruptcy relief is not immediately available because of the time bar on subsequent filings.[23] Such data reveal what families do to make ends meet when they cannot file bankruptcy,[24] and may help us begin to understand the hardships that families face when bankruptcy is unavailable. Understanding the contours of postbankruptcy life is essential to a reasoned determination of when bankruptcy relief should be available and what benefits it should provide. A theory of the fresh start that is tethered to the realities of what happens after bankruptcy would broaden our assessment of how the bankruptcy system actually works and foster new policy goals for how it should function.

B. *Prior Studies on PostBankruptcy Credit*

Existing scholarship on postbankruptcy credit for former debtors is sparse and diffuse. In the previous section, I suggested that examining prebankruptcy behavior, while useful, has some limitations in testing models of consumer bankruptcy. Such a focus also exacerbates our collective ignorance about the *ex post* effects of bankruptcy. The existing studies on postbankruptcy credit contain useful perspectives on bankruptcy's effectiveness as a rehabilitative process. Although no study explicitly considers how postbankruptcy behavior may

---

[23] 11 U.S.C.A. § 727(a)(8) (prohibiting grant of discharge if debtor received a discharge in the eight years preceding the current filing).

[24] Approximately 1 in 3 families that file Chapter 7 report that their financial situation is the "same" or "worse" than it was when they filed bankruptcy. *See* Porter & Thorne, *supra* note 10, at 103. About one-quarter of families continue to struggle to pay routine monthly expenses, *id*. at 117-18, and a substantial minority of families reported an income decline of at least 10 percent since their bankruptcy filing, *id*. at 124.

illuminate the causes of bankruptcy, findings from such research provides some clues in this regard. I survey the relevant prior studies below.

Anecdotal and ethnographic research about credit use reveals the texture of debtors' postbankruptcy experiences. Fifteen years ago, Jean Braucher conducted qualitative research about the attitudes and practices of consumer bankruptcy attorneys.[25] Although her study had a much broader focus,[26] Braucher assessed the perceptions of debtors' attorneys about postbankruptcy access to credit. Because these attorneys are the closest link in the bankruptcy system to the families, their knowledge about postbankruptcy borrowing are useful. She reported that "[m]ost debtors who consult bankruptcy lawyers are concerned about future access to credit," and that lawyers are frequently asked about the impact of bankruptcy on future credit.[27] She noted that while "nearly all" lawyers give advice to clients on this matter that most do so without the benefit of accurate information.[28] Most lawyers believed that Chapter 7 debtors had fast access to credit after bankruptcy and had experiences with clients being offered new credit immediately after filing bankruptcy (even before discharge.)[29] Many attorneys expressed concern about the easy access to postbankruptcy credit.[30] This concern caused some attorneys to understate the availability of credit for Chapter 7 debtors.[31] Braucher also identifies attorneys'

---

[25] *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 516 (1993).

[26] *Id.* at 503 ("The 'simple' thesis of this article is that debtors' lawyers pursue different mixes of four goals in consumer bankruptcy practice. They seek to serve their clients' and their own financial interests, and they also attempt to fulfill some version of appropriate social role playing on the part of their clients and themselves.").

[27] *Id.* at 537.

[28] *Id.* ("Most lawyers have not systematically researched these questions. It is not clear that they can obtain valid information from creditors or credit reporting agencies. All the lawyers have rough impressions about credit availability after chapter 7 and chapter 13 based on feedback from former clients, and nearly all give advice on this basis.).

[29] *Id.* at 538.

[30] *Id.* ("Many lawyers said that it is common for debtors to obtain credit within a year or two of a chapter 7 filing. "It's too easy to get new credit," said one lawyer. Another said, "the credit industry is recycling people." Car loans and credit cards can often be obtained quickly after filing a chapter 7 case, the lawyers in all four cities said.").

[31] Braucher, *supra* note 25, at 538 ("Another reason some lawyers do not discuss better credit availability in general after chapter 7 as opposed to chapter 13 is that they do not want to play up the idea of getting new credit.

desire to have clients file Chapter 13 as a factor that dampens lawyers' full and honest disclosure about credit availability after Chapter 7 bankruptcy.[32] Attorneys apparently use their impressions about the type of credit, not just the availability of credit, to bolster their preference for Chapter 13 cases.[33] Braucher reports that several lawyers believed that after a Chapter 7 bankruptcy, the available credit was "often at the highest rates and from the sleaziest purveyors."[34] Braucher does not identify whether the attorneys had any evidence for these beliefs or how debtors responded to expensive or low-status credit offers after bankruptcy. These attorney impressions, even if inaccurate, are important because as Braucher establishes, they shape debtors' decisions about bankruptcy and their impressions about the process.[35] Reliable empirical data about the realities of postbankruptcy credit could require attorneys to advise clients accurately about this issue and powerfully influence consumers' perceptions about the consequences of filing bankruptcy.

Other sources contradict the conventional wisdom that debtors endure sharply constrained credit after bankruptcy.[36] Knowledge about credit marketing to bankruptcy debtors dates at least back to the time of the 1973 Report of the Commission on Bankruptcy Laws. An

---

"You can get credit fast after chapter 7," said one lawyer, who added quickly, "but I don't tell them that!" This lawyer has his clients cut up their credit cards in his office. He and other lawyers said that they try to get clients to focus on living within their means in the future and on saving rather than borrowing.").

[32] *Id.* at 538-9.

[33] *Id.* The motivation to have clients chose Chapter 13 is driven largely by the ability to recover fees in installments through a debtor's plan. Attorneys may also prefer Chapter 13 because most districts approve higher attorneys' fees for Chapter 13 cases than Chapter 7 cases. Finally, some attorneys believe that Chapter 13's repayment scheme has moral or educational benefits for their clients.

[34] *Id.* at 540.

[35] *Id.* ("Most lawyers in the study acknowledge that better credit availability after chapter 13 is a myth, but it is one that many clients believe and that can be used to manipulate them into choosing chapter 13.").

[36] The conventional wisdom that credit is hard to get after bankruptcy is typically spread by non-specialists. *See, e.g.,* Michael Moody, *Obtaining Credit After Bankruptcy: Mission Impossible* (Oct. 16, 2006), *http://ezinearticles.com/?Obtaining-Credit-After-Bankruptcy:-Mission-Impossible&id=330141* (advising potential bankruptcy filers that they likely will not be able to get credit for at least a year or two after bankruptcy); Total Bankruptcy website, *What the Credit Industry Doesn't Want You to Know About* Bankruptcy, *http://www.totalbankruptcy.com/credit_industry_secrets.htm* (debunking the myth that you cannot get credit after bankruptcy).

empirical survey of bankruptcy practitioners, judges, and academics in 1973 reported that participants saw the "problem of 'aggressive solicitation of recently discharged bankrupts' as very important."[37] Despite the prominent source of this observation, thirty years later the postbankruptcy solicitation of debtors is still newsworthy and controversial. Both the Washington Post and the New York Times have recently reported on the numbers of credit offers that former debtors receive.[38] In an April 2005 story, the Washington Post profiled a woman who tried to avoid credit cards after bankruptcy but accepted one of many "preapproved" offers that she received because she found it hard to rent a car without a credit card. The Post noted that database firms specialize in marketing to bankrupt consumers and quoted their advertising materials that trumpeted this as a "unique and lucrative market."[39] The New York Times used the experience of a recent bankruptcy filer to shape its story, sharing her reports that every day she got "at least two or three new credit card offers—Citibank, MasterCard, you name it—they want to give me a credit card."[40] Quotes from banking industry representatives reflected some variation in credit marketing to recent debtors,[41] but neither paper turned up any industry or government data to support the extent and nature of postbankruptcy credit availability.[42] Thus, these sources are mainly useful for observing broad outlines of the postbankruptcy credit landscape and for generating empirical hypotheses about postbankruptcy credit. Studies of attorneys' beliefs and isolated anecdotes from consumers do not permit a nuanced analysis of

[37] Selwyn Enzer, Raul de Brigard, & Frederick D. Lazar, *Some Considerations Concerning Bankruptcy Reform* at 90 (March 1973) *in* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Part III (July 1973).

[38] Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, NY TIMES, Dec. 11, 2005; Caroline Mayer, *Bankrupt and Swamped with Credit Offers*, WASH. POST., April 15, 2005, at A1.

[39] Mayer, *supra* note 38, at A1.

[40] Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, NY TIMES, Dec. 11, 2005.

[41] *Id.*

[42] The Washington Post article reported preliminary data from the Consumer Bankruptcy Project sample that is the basis for this article's analysis. Mayer, *supra* note 38, at A9.

postbankruptcy credit availability, and perhaps most importantly, they do not reveal anything about how debtors actually use credit after bankruptcy.

Empirical data more precisely measure the landscape of postbankruptcy credit. Two studies use datasets of proprietary credit reports to examine postbankruptcy credit use. David Musto analyzed the effect of the law prohibiting a bankruptcy that was filed more than ten years prior from appearing on a credit report,[43] and found that consumers' FICO credit scores jumped significantly after the bankruptcy was expunged from their reports.[44] In the months after this boost in apparent creditworthiness, Musto shows that former bankruptcy debtors are likely to acquire new bank credit cards.[45] He then suggests that this new consumption of credit eventually leads to a higher rate of delinquency.[46] Thus, he concludes that the legal rule barring bankruptcy from appearing on credit reports distorts the information market about true creditworthiness of consumers.[47] Musto's analysis is provocative and has obvious implications for the Fair Credit Reporting Act. However, because he is studying postbankruptcy credit at such a distant moment—ten years after the bankruptcy filing—his research has limited utility in understanding how bankruptcy theory and policy should initially construct the relationship between postbankruptcy credit and the fresh start. Such research may also be too distant from the experience of bankruptcy filing to be useful to draw inferences about prebankruptcy uses of credit. Research by Braucher strongly suggests that regardless of credit patterns ten years after bankruptcy, debtors are confronted with immediate opportunities to borrow after bankruptcy.

---

[43] David K. Musto, *What Happens When Information Leaves a Market? Evidence from Postbankruptcy Consumers*, 77 J. OF BUS. 725, 726 (2004). The relevant federal law is the Fair Credit Reporting Act. *See* 15 U.S.C. § 1681c(a)(1).

[44] *Id.* at 735.

[45] *Id*. at 737 (estimating one extra card is obtained per four consumers in the tenth year postbankruptcy).

[46] *Id.* at 745.

[47] *Id.* at 747.

The other significant study of postbankruptcy credit examined credit activity of debtors immediately after bankruptcy. Conducted by the Credit Research Center, this study examined 2,000 proprietary credit reports on people who filed bankruptcy between 1978 and 1988.[48] This is the most in-depth study of postbankruptcy credit use. The study contains many important findings but it is now quite dated, especially in light of the increasing quantity of subprime credit in the market. The study's author, Michael E. Staten, reports that one year postbankruptcy 16.2 percent of Chapter 7 debtors had received at least one new credit line.[49] By three years postbankruptcy, the number of debtors with new credit grew to 38.6 percent.[50] At the one-year mark, half of these new credit lines were revolving, likely in the form of credit cards, and half were for installment loans.[51] Prior creditors, those who had lent prebankruptcy, accounted for a significant fraction of these postbankruptcy credit extensions. At one year, 25.5 percent of new lines were held by prior creditors.[52] Staten observes that an indeterminate amount of this new credit could result from pre-screened offers that were processed before the debtors filed bankruptcy. Regardless, debtors have widespread access to credit after bankruptcy. Staten uses the credit reports to measure how successful debtors are at managing new credit. Among individuals who accepted new credit,[53] approximately one in four debtors had at least one

---

[48] MICHAEL E. STATEN, *The Impact of Post-Bankruptcy Credit on the Number of Personal Bankruptcies* *12 (Credit Research Center, Purdue University, Krannert Graduate School of Management,Working Paper 58, January 1993).

[49] *Id.* at 13. Staten finds regional variation on this variable in his sample but does not specify whether these differences are statistically significant. He also suggests, quite plausibly, that these figures are a lower-bound estimate of the amount of new credit obtained postbankruptcy because not all creditors report to all national bureaus. *Id.* at 14.

[50] *Id.* at 26; Exhibit 8.

[51] *Id.* at 15; Exhibit 11 at 28.

[52] *Id.* at 15.

[53] Note that the size of this group never exceeds approximately half of all debtors (53.3 percent at the five-year postbankruptcy mark and usually significantly less than that). *See* Exhibit 8 at 26. Staten does not report how debtors who have no new credit lines are managing any credit that survived their bankruptcy. Such data could indicate if refraining from future borrowing entirely and working with existing creditors (presumably approved by an attorney who signed a reaffirmation agreement) results in a lower delinquency rate.

postbankruptcy charge-off or delinquency greater than 60 days.[54] Staten concludes that "[c]learly, some former bankrupts have recurring problems in handling new credit,"[55] but emphasizes that without nonbankruptcy comparison data, no conclusion about the relative credit management skills of former debtors is possible.[56] While credit industry standards and practices may have changed significantly since the 1978-1988 period considered therein, the Credit Research Center study provides useful comparison findings for the original data from 2001-2004 considered in this article.

Credit reports are useful tools for studying actual credit behavior. Because they consist of creditor-supplied information, the reports eliminate the possibility of debtors either intentionally or unintentionally underreporting. However, the drawbacks of relying on such data are significant. First, credit reports reveal nothing about credit availability in a general sense. That is, they do not measure how much credit is offered to debtors who do not accept these opportunities. The accuracy of credit reports is also questionable. Half of all credit reports may contain errors.[57] Privacy requirements mandate that any released reports would be stripped of identifying information. As a result, credit reports cannot be matched to debtors' bankruptcy court files, preventing useful observations about the correlation between pre- and postbankruptcy credit behavior. A final problem arises because of credit bureaus' claims that consumer reports are proprietary. While the Musto and Staten studies indicate the bureaus' willingness to share such

[54] STATEN, *supra* note 48, at 20.

[55] *Id.*

[56] *Id.* at note 27. I have not located any data that estimates the number of Americans who have a recent delinquency or charge-off on their accounts. However, about six percent of credit card debt is written off each year, only a fraction of which is due to bankruptcy filings. *See* Fed. Reserve Statistical Release, *Charge off and Delinquency Rates* at http*://www.federalreserve.gov/releases/chargeoff/chgallsa.htm* (reporting a charge off of between two and four percent for the period covered by Staten's study).

[57] CONSUMER FEDERATION OF AMERICA NATIONAL CREDIT REPORTING ASSOCIATION, CREDIT SCORE ACCURACY AND IMPLICATIONS FOR CONSUMERS at 37-39, December 2002, http://www.ncrainc.org/documents/CFA%20NCRA%20Credit%20Score%20Report.pdf (categorizing approximately one in five consumers is at potential risk for misclassification as subprime borrower because of inaccurate information in their credit reports and noting that one in three consumers has a credit score variation between the leading credit reporting agencies of at least 50 points).

data on occasion, they are under no obligation to do so and indeed may reveal such data selectively based on their judgment about the study's author and likely findings.[58]

Other studies surveyed debtors to collect empirical data about postbankruptcy credit. In the landmark Brookings study of bankruptcy described by David Stanley & Marjorie Girth, 400 debtors reported their experience with credit after bankruptcy.[59] They reported that most former bankrupts found credit was widely available after bankruptcy. Nearly half of debtors found that obtaining credit was the same or easier than before bankruptcy.[60] Only nine percent of respondents reported "can't get credit, hard to get credit" as a sentiment that described their attitude about having filed bankruptcy.[61] Indeed, 70 percent of those interviewed had made major purchases on credit during the two-year period after their bankruptcy; approximately four in ten had borrowed money.[62] They conclude that "[d]ebtors *can* get credit after going through bankruptcy, but many of them find this more expensive or more difficult than before."[63] This conclusion reflects the historic conventional wisdom about postbankruptcy credit but is challenging to square with the data they provide showing that that most debtors reported no difficulty in getting credit and had in fact borrowed after bankruptcy. A key limitation of the Stanley & Girth study is its age. It is now nearly forty years old and predates the enactment of

[58] For this study, I did not request credit reports from the three leading bureaus. Thus, I have no idea whether they would have granted or refused such a request. I also have no evidence that they have refused any particular request. I raise this as a theoretical concern about proprietary data. *Cf*. Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, WIS. L. REV. 1 (2002).

[59] DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 224-25 (1971). A private research firm conducted the interviews. Because Stanley and Girth could not locate the debtors who were originally included in their study, they had to draw a new sample for the postbankruptcy interviews. The result is that they could not connect their pre-bankruptcy findings with their postbankruptcy findings in a robust way because the samples may have differed.

[60] *Id.* at 63 (This statistic includes only filers of "straight" bankruptcy, a process basically similar to Chapter 7 bankruptcy under the Bankruptcy Code). Significantly, 13 percent of debtors reported that they had not tried to get credit at the time of the interview.

[61] *Id.* at 68.

[62] *Id.* at 63.

[63] *Id.* at 62.

the 1978 Bankruptcy Code.[64] Nevertheless, it remains the most exhaustive study of debtors' own perceptions about postbankruptcy credit availability and debtors' self-reporting of credit use.

The only other study relying on debtor surveys come from a pilot study, whose main purpose was to test the research methodology, not to present substantive analysis. [65] The study's author, Tahira Hira, sent debtors either a telephone or mail survey after bankruptcy. Only 32 debtors completed the surveys, sharply limiting the study's usefulness for quantitative analysis.[66] The study did suggest two things about postbankruptcy credit. First, a majority of debtors believed that filing bankruptcy would make it difficult to get credit in the future.[67] This belief contradicts Stanley & Girth's findings about credit availability, but the intervening decades between the two studies may explain this disparity between perception and reality. Hira also reports that debtors were much less likely to use credit cards after bankruptcy, finding that 87 percent of respondents had no credit cards two years postbankruptcy.[68] Such data suggest that debtors constrain their credit use in the first years after bankruptcy and are inconsistent with a conception of debtors as profligate spenders or foolish financial actors.

Significant difficulties exist to studying postbankruptcy behavior. Scholars must confront serious practical problems with such research. One barrier to studying credit is the private nature of these transactions. Credit reports would be useful to measure the use of postbankruptcy credit, but privacy concerns hinder access. More significantly, these reports are proprietary. The leading

[64] *Id.* at 41 (explaining that sample was chosen at random from bankruptcy files closed in fiscal year 1964). The study was published in 1971. Id.

[65] *See* Tahira K. Hira & Kyle L. Kostelecky, *Pilot Study of Consumer Debtors Provides New Insights—What Influences Debtors' Attitudes?*, 14 AM. BANKR. INSTITUTE J. 1 (April 1995) (discussing the main purpose of the study and cautioning against generalizing the findings).

[66] *Id.* Hira & Kostelecky treat the data appropriately in this regard and repeatedly warn of the problems the small sample size creates.

[67] *Id.*

[68] *Id.* "Before bankruptcy, a majority of the debtors used credit cards, whereas after bankruptcy, a majority of the debtors did not have any credit cards (87 percent)."

credit reporting bureaus apparently have released data to some researchers,[69] but these are not widely or equally available to scholars. An alternative avenue to understanding postbankruptcy credit patterns is to survey debtors, which is how the original data presented in this Article were obtained. However, such longitudinal work is generally difficult and expensive.[70] These practical concerns may explain why very few studies have documented what happens after debtors exit the bankruptcy system.[71] The law itself poses another problem with postbankruptcy research about credit. Bankruptcy law has different rules for credit use for Chapter 7 and Chapter 13 bankruptcies. These differences complicate analysis of postbankruptcy credit availability and use. Researchers either must limit their sample to cases filed in only one chapter,[72] or must contend with trying to separate out the effects of different legal rules from general postbankruptcy behaviors.

Despite the usefulness of understanding postbankruptcy credit access and use in testing theories of consumer bankruptcy and understanding the rehabilitative power of the fresh start, there are relatively few existing studies. They are dated and do not reflect the current credit economy. Identifying the methodological limitations of these studies is useful in evaluating the approach used in obtaining the data presented in the next parts of the Article. Additionally, the insights from the existing studies help to contextualize the new empirical findings on postbankruptcy credit that this Article provides. Against the scholarly backdrop of these studies, this Article offers recent research about creditors' actions in offering postbankruptcy credit and

[69] *See supra* at pp. 14-15 and note 58.

[70] *See* Porter & Thorne, supra note 10, at ___; *see also* Hira & Kostelecky, *supra* note 65 at 1("Since the debtors are not connected with the system any longer [after discharge], it may be hard to locate them to solicit their views on pre and post bankruptcy circumstances.")

[71] Porter & Thorne, *supra* note 10, at ___.

[72] My own research faced this issue. While debtors who filed either Chapter 7 or Chapter 13 were asked all questions about postbankruptcy credit, I chose to limit the sample for analysis to Chapter 7 cases. I explain the legal differences between Chapter 7 and Chapter 13 and hypothesize about how these differences may affect postbankruptcy credit availability and use in Section II C, *infra* at 19-20.

debtors' use of such credit. These data improve our collective knowledge about postbankruptcy credit and allow for a fresh evaluation of the ways in which understanding postbankruptcy borrowing should influence bankruptcy theory and policy.

C. *Methodology*

This Article presents and analyzes fresh data about the credit practices of debtors after bankruptcy. These data update the findings of the older studies and rely directly on debtors' reporting of their postbankruptcy credit experiences. This section describes the methodology used to gather the data and presents general findings about the respondents. An Appendix contains further detail on these matters.

Unless indicated otherwise, all data presented in the remaining parts of this Article were collected during Phase III of the Consumer Bankruptcy Project, a large, multiresearcher, multistate study of consumer bankruptcy.[73] The research sample consists of consumer bankruptcy cases filed in the first months of 2001 in five judicial districts across the nation. The overall sample contains a total of 1,250 consumer bankruptcy cases. The ratio of sampled Chapter 7 and Chapter 13 cases reflected the distribution in each judicial district. Consequently, the sample consists of 780 Chapter 7 bankruptcies and 470 Chapter 13 bankruptcies.

The Consumer Bankruptcy Project used three instruments to gather data. First, a questionnaire was distributed to debtors at the mandatory meeting of creditors.[74] The questionnaire requested demographic information such as age, occupation, and marital status, and inquired about the family's reasons for seeking bankruptcy relief. For each debtor who

[73] I served as Project Director of the Consumer Bankruptcy Project during its first six months of data collection. My responsibilities included pretesting the data instruments, overseeing the distribution and collection of the written questionnaires, and helping to design the court record coding protocols. A fuller discussion of the Consumer Bankruptcy Project's methodology is in the Appendix; *see also* WARREN & TYAGI, *supra* note 4.

[74] *See* 11 U.S.C. § 341 (2005).

completed a questionnaire, researchers coded data from the corresponding public court records, including the bankruptcy petition and schedules. This second data instrument yielded information about the debtors' assets, liabilities, income, and expenses at the time of their bankruptcies.

The questionnaire invited debtors to participate in a series of three follow-up telephone interviews in return for compensation of $50 per interview. These telephone interviews comprise the third method of data collection. Approximately one year after bankruptcy, a small team of trained researchers conducted telephone interviews with 601 families in the sample. Approximately three years after the debtors filed bankruptcy (the spring of 2004), the Consumer Bankruptcy Project conducted a second round of telephone interviews. Researchers attempted to contact each family who agreed to participate in telephone interviews and asked them a second set of questions. Second interviews were conducted with 474 families in the core sample. Thus, all four data instruments (questionnaire, court records, one-year interview, and three-year interview) are available for 38 percent of the original sample of 1,250 households.

Both the one-year and three-year telephone interviews were approximately one hour long. A general set of questions was posed to every participant. Based on corresponding questionnaire or court record data, some participants were asked subsets of questions on topics such as homeownership and medical debt. The research team coded all responses into a specially designed database. Most questions were closed-ended, although several points in the interview invited less structured responses. Many of the general questions were designed to explore families' postbankruptcy experiences.

For this Article, I limit the Consumer Bankruptcy Project sample to include only debtors who filed Chapter 7 bankruptcy and who completed at least the first round of telephone interviews. This narrowed sample consists of 359 bankruptcy cases. This group captures 45.9 percent of the 780 Chapter 7 cases in the sample.[75]

I restrict this Article's analysis to Chapter 7 cases and exclude Chapter 13 cases because the two types of relief differ in ways that directly bear on the use of credit after filing bankruptcy. After filing Chapter 7, most debtors receive a discharge of most of their unsecured debt within a few months.[76] The discharge effectively ends the bankruptcy process for Chapter 7 debtors. No trustee or bankruptcy court supervises the credit activities of debtors after discharge. This last statement is equally true in Chapter 13, but the discharge under Chapter 13 does not enter until the debtor has completed all payments under her plan, which occurs between three and five years after plan confirmation.[77] Bankruptcy law creates obstacles for obtaining new credit while a debtor is subject to a Chapter 13 plan. Specifically, debtors should have to obtain court authorization before obtaining new credit.[78] Many trustees emphasize this requirement to debtors,[79] although in fact trustees may liberally grant such requests for new credit.[80] Even if Chapter 7 and Chapter 13 debtors have identical postbankruptcy borrowing preferences, the law creates differential risks for lending to debtors in the two chapters. Because consumers can

[75] Some debtors could not be contacted at the contact information that they provided because the debtors had apparently moved or provided incorrect information. In anticipation of this problem, we asked debtors to provide us with two alternative contacts, which increased the response rate. Nevertheless, some debtors gave only their own information, and sometimes the alternative contacts could not be located. We were unable to complete interviews with these debtors. This non-participation may have skewed the data to overrepresent the economic stability of the postbankruptcy population. That is, those who could not be located for interview may be those facing the most severe financially distress, considering that they either moved and/or changed telephone numbers in the immediate aftermath of their bankruptcy.

[76] ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY (15 ed. Revised) §§ 700.04 – 700.05.

[77] ID. at § 1328.01.

[78] 11 U.S.C. §§ 1305(c), 1306(a)(2) and (b) and 549(a)(2)(B) (2006).

[79] *See, e.g.*, Office of the Chapter 13 Trustee, Thomas P. King, http://www.ch13oshkosh.com/profile.html#newcredit; *see also* The Administrative Office of the U.S. Courts includes the limitation on new credit in its public information about Chapter 13 Bankruptcy. *See* Admin. Office of U.S. Courts, Chapter 13 Bankruptcy Basics, http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter13.htm/.

[80] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 25, at 539 & n. 130 (1993) (stating that trustees are receptive to new credit requests). Braucher's research is anecdotal, but carefully conducted. Query whether the same attitude exists today—nearly fifteen years after her research.

convert their bankruptcies from Chapter 13 to Chapter 7,[81] credit extended to a Chapter 13 debtor after their initial filing would be subject to discharge if the case was converted to Chapter 7.[82] This may sharply constrain the availability of credit to Chapter 13 debtors while they are paying into their plan. To avoid the difficulty of disentangling the influence of these legal rules from debtor and creditor behavioral preferences, I restrict this Article to considering only Chapter 7 cases.

To increase the longitudinal perspective on postbankruptcy life, I also present data from the second round of telephone interviews. Of the 359 households in the sample used in this Article, 302 households completed the second round of interviews approximately three years after their bankruptcy. This modest atrophy in the sample size reflects the increased difficulty in locating the debtors as time elapsed following the filing of the bankruptcy and their completion of the written questionnaire. Thus, the data from the second round of interview are based on a smaller sample size than data from the first round of interview. I report the “n” for all findings.

Primary petitioners in the sample averaged 43 years old. Approximately one-third were married and living with a spouse, while another 7 percent were married but living separately. The median occupational prestige score was 36; occupations such as office clerk, bricklayer, teacher’s assistant, and steel worker are represented by this score. Approximately 31 percent of the respondents reported that they owned their home at the time of filing. When we reviewed the economic variables, we found a wide range of incomes. Eight debtors, or just over two percent of the sample, said they received no income whatsoever. At the other end of the spectrum, one

[81] *See* 11 U.S.C.A. § 1307(a).
[82] *See* Braucher, *supra* note 25, at 538.

debtor reported annual earnings of just over $101,000. Overall, median annual income for the sample was $21,870, about half of the national average.[83] Median unsecured debt was $27,528.

Debtors who completed the telephone interviews were self-selected, introducing the possibility of respondent bias.[84] To test for this, Dr. Deborah Thorne,[85] the Project Director of the Consumer Bankruptcy Project when the interviews were conducted, compared interview participants and nonparticipants on several important demographic and economic variables. Demographically, the two groups were comparable on the variables of age, employment status, and homeownership. Interview participants were, however, significantly more likely to be single and white than those who did not complete interviews. Analysis of the economic variables did not reveal any statistically significant differences between the two groups. Debtors' court records revealed similar incomes, assets, and liabilities. Based on this analysis, the narrowed sample appears to be generally representative of the 780 Chapter 7 cases that comprised the Consumer Bankruptcy Project's core sample.[86] The findings that support this conclusion are reported in a published article about the financial situations of families after bankruptcy.[87] To further test the validity of the sample, I compared it to the samples used in previous bankruptcy studies.[88] These studies measured common demographic and economic characteristics of debtors, such as age, marital status, occupational prestige score, homeownership, median annual income, and median unsecured debt. Data on the qualities of respondents in the sample used in this Article are consistent with prior profiles of families who filed Chapter 7 bankruptcy. Like other researchers,

[83] Elizabeth Warren, *Financial Collapse and Class Status*, 41 OSGOODE HALL L.J. 115, 125 (2003) (citing U.S. Census Bureau data for median household income in 2001 at $42,228 and comparing that figure with the median bankrupt debtor's income of $24,108 in 2001).

[84] EARL BABBIE, THE PRACTICE OF SOCIAL 187-90 (2004).

[85] Assistant Professor of Sociology, Ohio University.

[86] The Appendix contains further detail on the participant/non-participant analyses.

[87] Porter & Thorne, *supra* note 10, at 153 (reporting detailed respondent and nonrespondent data for subsample of 359 Chapter 7 bankruptcy cases from Consumer Bankruptcy Project 2001).

[88] SULLIVAN, ET AL., *supra* note 2; WARREN & TYAGI WARREN, *supra* note 4; Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1 (2004).

I conclude that most bankruptcy debtors are demographically similar to middle-class Americans but earn much lower incomes at the time of their bankruptcies.[89]

The next two parts of the Article present original data about former debtors' borrowing patterns. Two principal lines of inquiry are considered: First, to what extent do debtors have access to credit after bankruptcy? Consideration of this question provides crucial context for evaluating debtors' credit decisions. Second, to what extent do debtors actually borrow after bankruptcy? Data on postbankruptcy borrowing are suggestive of the attitudes and behaviors of families about credit. Such findings are usually in examining which of the competing ideas about the causes of consumer bankruptcy is most appropriate. Further, these data allow an evaluation of the attitudes and behaviors of postbankruptcy families with regard to credit, which provides crucial context for examining how bankruptcy facilitates financial rehabilitation and a fresh start.

III. AVAILABILITY OF CREDIT

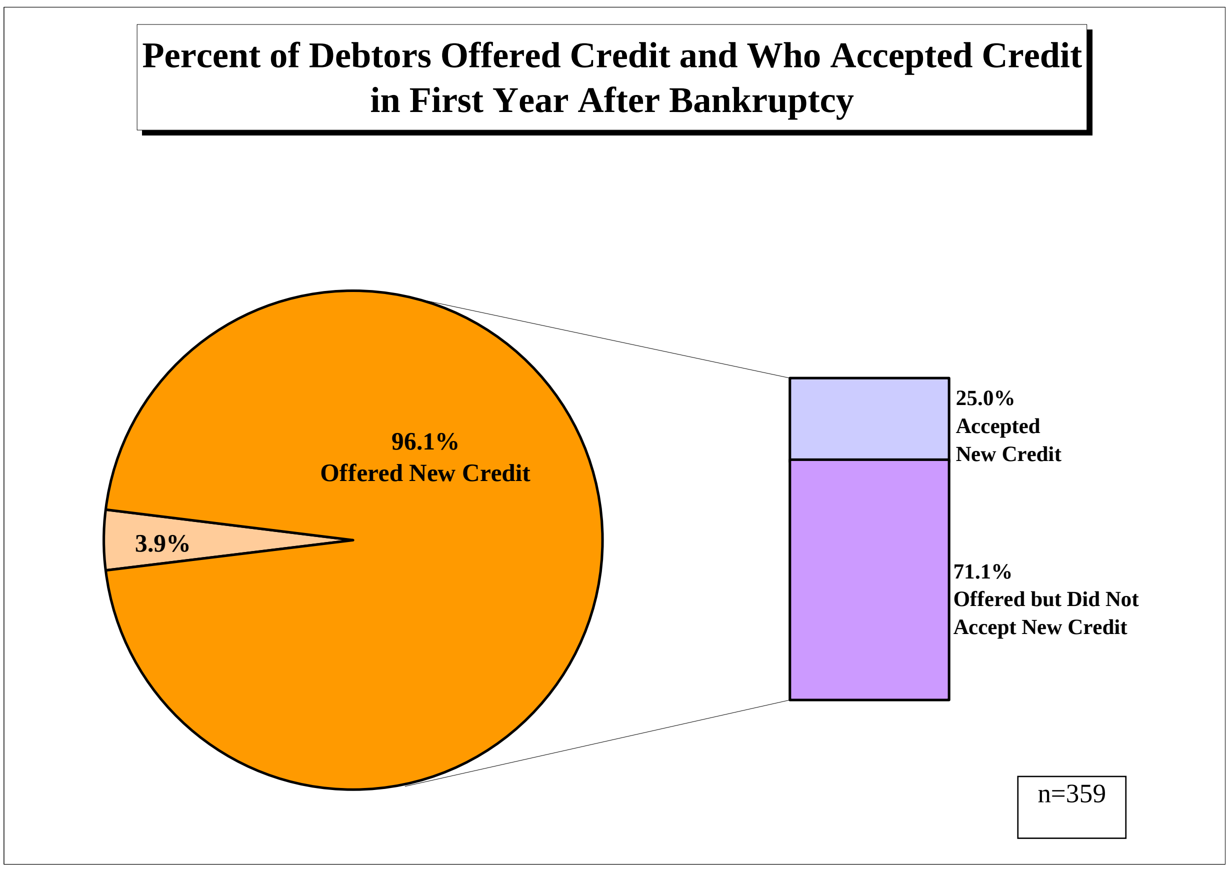
A bankruptcy discharge transforms debtors. Released from their liminal status in the consumer credit economy, the newly discharged exit bankruptcy freed from most unsecured debt. The availability of postbankruptcy credit bears on the rehabilitation process that debtors experience. If no creditors will lend to them, debtors may find it difficult to rebuild their financial reputation, engage in entrepreneurial activity, or use credit to smooth small gaps in income. On the other hand, if inundated with borrowing opportunities, debtors could quickly ensnare themselves in high debts and again suffer financial trouble. Access to credit also powerfully reveals the perspective of the lending industry on the creditworthiness of families who have declared bankruptcy. These data bear on the appropriate model for understanding why debtors face overwhelming debts. If the families who file bankruptcy are immoral profiligates

[89] *See* SULLIVAN, ET AL., *supra* note 2; Warren, *supra* note 83, at 155.

who borrow without repaying, creditors should refrain from lending to them. The findings resoundingly show wide credit availability—borrowing after bankruptcy is not an oxymoron.

Credit solicitation of the recent debtors is rampant. Nearly all debtors stated that they had received offers for credit. Figure 1 shows that during the first year following their bankruptcy filing, 96.1 percent of debtors had the opportunity to borrow. To the extent that the conventional wisdom says that debtors will not able to borrow immediately after a bankruptcy filing,[90] the adage is neither wise nor reflective of today's conventions.

FIGURE 1



In fact, debtors not only had the chance to borrow, they were inundated with solicitations urging them to borrow. Even less than one year postbankruptcy, creditors were targeting these families

[90] *See supra* Section II, subsection B.

with an average of 16 credit offers per month. In practical terms, this means that more often than not, each day after bankruptcy presented these former bankrupts with a chance to borrow. Table 1 shows that while the number of offers ranged significantly between families, the median number of credit offers reported was still sizeable. Most debtors did not expect these solicitations. The response of this married Texas man in his early 30s to the frequency of credit offers was common. "I was surprised at how fast they wanted to get you back into the credit game, [at] all of the offers of credit. It was incredible. They sent us lots and lots of offers for credit right after we filed. And I was told that it would improve my credit history."[91] Postbankruptcy, families clearly have ample opportunity to borrow.

TABLE 1

Frequency of Credit Offers Per Month in Year After Bankruptcy	
Average	16
Median	10
Range	
Minimum	1
Maximum	300
St. Dev.	29.35
n=339	

Indeed, families that have filed bankruptcy appear to be particularly desirable future borrowers. They receive more credit solicitations than the general (not necessarily bankrupt) American. Industry researchers say that the average American gets six credit offers each month.[92] The average bankrupt receives nearly three times this number. Many people already

[91] Consumer Bankruptcy Project III, Respondent Interviews, TX-07-067.

[92] *See* Frontline, *Secret History of the Credit Card* (2004) (citing research conducted by Synovate a private research firm).

feel overwhelmed with credit solicitations;[93] former bankruptcy debtors' experiences must be even sharper. Credit functioned as the mechanism for their downward spiral, and the number of dollars of debt that they discharged reflected to some degree the depth of their financial hardship. Being inundated with credit solicitations so quickly after bankruptcy could make families feel vulnerable to another round of borrowing. Many debtors were not prepared for the onslaught of credit offers and expressed concern about the situation. A debtor in his mid-50s with some college education used the open-ended question asking what else the respondent wanted to tell us to share her frustrations about credit marketing. "The bottom-line profit mentality we have in the United States is one of the main issues here. I can't believe how many credit applications are coming in even now."[94] This man's response to the credit applications suggests two important things. First, his surprise at the credit offers reveals that people who file bankruptcy do so without the expectation of widespread opportunity to borrow after bankruptcy. Second, his consternation at being a target of credit marketing reflects a certain disdain for the credit industry. He appears to understand that his postbankruptcy borrowing could be profitable for a lender but feels that the credit industry's willingness to market to him is a significant cause for concern.

Major lenders have sophisticated tools to deploy in identifying future customers who are likely to generate profits for them. During the same period in which the number of bankruptcies escalated,[95] technology improved the credit reporting and scoring system and marketing geniuses

---

[93] Bob Sullivan, *Deluged with Credit Card Mail? Help is Coming*, MSN Money Online (Aug. 8, 2005), http://www.msnbc.msn.com/id/8827007/ (describing number of solicitations mailed each month and describing law allowing consumers to opt-out of prescreened solicitations that responds to complaints about offers).

[94] Consumer Bankruptcy Project III, Survey Respondent TX-07-057.

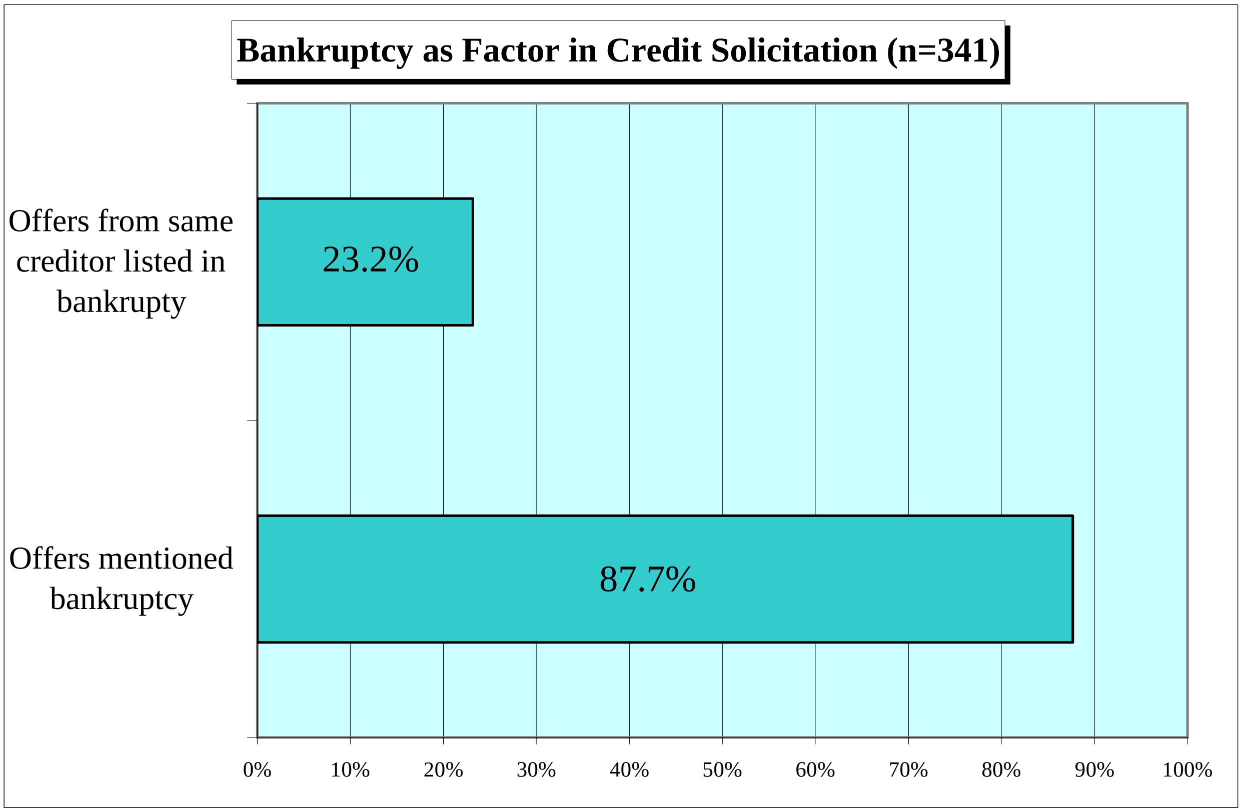
[95] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS, http://www.uscourts.gov/bnkrpctystats/Bk2002_1990Calendar.pdf (number of filings per calendar year between 1990 and 2002).

used insights from behavioral economics to create “teaser” interest rates and affinity programs.[96] Any claim that credit offers made to former bankruptcy filers are inadvertent or unintended is probably dubious.[97] Filing bankruptcy is a public act.[98] Individual creditors and the credit reporting bureaus can and do search the public records to obtain the names and contact information of recently bankrupt families. A small fraction of credit offers to postbankruptcy debtors may result from prescreened offers that were developed and put in process before the debtors filed bankruptcy. However, given major banks’ formidable mail centers and marketing prowess, most of these offers could probably be prevented. Nevertheless, the data show the simple reality is that the credit industry specifically targets those who have recently filed bankruptcy.

The evidence for this assertion comes from the credit offers themselves. Figure 2 illustrates two findings that suggest that most postbankruptcy credit offers result from targeted marketing, not random chance or inadvertent mailings.

[96] S*ee* Frontline, *supra* note 92.
[97] *Id.*
[98] 11 U.S.C.A. § 107(a).

FIGURE 2



A vast majority of debtors who received postbankruptcy credit solicitations said that these solicitations specifically mentioned their bankruptcy. Nearly 88 percent of debtors reported that lenders had made them offers that referenced the debtor's bankruptcy. The prevalence of these offers reflects the degree to which creditors are intentionally seeking out recent bankruptcy debtors as future customers. Bankruptcy law itself makes these recent bankruptcy filers so desirable. The discharge does not only eliminate the obligation to pay many past debts; it also changes the context for future borrowing. Instead of competing with other creditors, the first company to lend to a postbankruptcy debtor has little competition for a borrower's dollars from other lenders. Whereas before bankruptcy families were hard pressed to meet myriad obligations and had to choose which debts to pay from an insufficient income, after bankruptcy the family theoretically has less debt to service and fewer lenders to repay.

Because a bankruptcy discharge is only available if a debtor has not received a discharge in the prior eight years,[99] new lenders do not have to worry for many years about a future bankruptcy forcing them to write-off postbankruptcy debts. People in financial distress are more likely to have revolving accounts, to have exceeded their credit limit, and to use cash advances (which carry a higher interest rate), creating what some researchers have called "attractive cash flows."[100] If families continue these financial practices after bankruptcy, they will generate more income for lenders than card holders who frequently pay off their balance in full and obey the terms of their contract.

This profit potential explains perhaps the most remarkable fact about postbankruptcy credit offers. A substantial fraction of these credit offers are made by the exact same creditors who recently charged-off the debtors' account because of the bankruptcy filing. Over one in five debtors reported receiving at least one credit solicitation from a lender that was a scheduled creditor in their bankruptcy. Less than one year after receiving notice that these families were no longer obligated to pay their debt to them, such creditors were actively seeking to again lend to these families. Given the incredible consolidation in the banking industry in the last decade,[101] this figure may substantially underreport the frequency with which prebankruptcy creditors seek to become postbankruptcy creditors because debtors may not accurately identify the bank extending credit in a particular offer. For example, people will often say that they have a "United

[99] 11 U.S.C.A. § 727(a)(8). At the time these data were gathered in 2001, the ban on subsequent filings was six years.

[100] A. Charlene Sullivan & Debra Drecnik Worden, *Bankruptcy in a Bank Credit Card Portfolio*, 13:4 J. OF RETAIL BANKING 3, 36-37 (1991-92).

[101] Kenneth D. Jones & Tim Critchfield, *Consolidation in the U.S. Banking Industry:Is the "Long, Strange Trip" About to End?* FDIC Banking Review, http://www.fdic.gov/bank/analytical/banking/2006jan/article2/index.html.

Airlines credit card", without remembering that Chase Manhattan is the actual lender. When Chase Manhattan sends them an offer to have a "Chase PerfectCard" card,[102] they may not recognize that this offer emanates from the bank to which they owed the debt accumulated on the United Airlines card.[103] Even taking the finding as is, it must shock some debtors to discover that the very creditor who told them that filing bankruptcy would end their ability to get credit is now asking the postbankruptcy consumer to choose to borrow from them again.[104]

Their disbelief at receiving credit solicitations is probably tempered when the debtor realizes that the offer for postbankruptcy credit is sometimes an attempt to collect discharged debt. Ten percent of debtors who received a postbankruptcy credit offer from a prebankruptcy creditor reported that some of the offers asked them to make payments on old debts. The future offer of credit was presumably conditioned on the debtor deciding to make a payment on its discharged debt. While the overall rate at which debtors were asked to repay old debts in order to get new credit was very low (two percent of sample), these offers are disturbing. A request to pay prebankruptcy debt that was discharged in bankruptcy is prohibited.[105] Thus, some offers for postbankruptcy credit reached families only because the creditors were willing to ignore the injunction against asking debtors to repay discharged debts. Given the large number of credit offers, families had ample choices for lending that were not conditioned on repayment of old

---

[102] This is actually the name of a real general purpose credit card issued by Chase Manhattan. *See* Chase PerfectCard Credit Card Offer at http://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/card_acquisitions/unsolicited/page/PFSCreditCardDetails&sourcecode=64DY.

[103] Of course, it is possible that some people think of VISA as their lender, instead of recognizing that VISA is the provider of the card processing. This could lead to an overestimation of the number of same lenders, if debtors thought that a postbankruptcy offer from VISA was one from the "same creditor listed" in their bankruptcy. The fact that the schedules do not actually list VISA and that VISA would not have been the party that tried to collect the debt before bankruptcy and that VISA would not be the name or address displayed most prominently on the credit offer substantially reduce this risk.

[104] S*ee* Frontline, *supra* note 92.

[105] Apparently, creditors frequently violate the discharge injunction. Nearly four in ten (39%) of debtors in the sample said that a prebankruptcy creditor had contacted them after bankruptcy and asked them to "make a payment on the old debt." The wording of this question did not make clear whether the "old debt" meant only those debts that were discharged or included prebankruptcy debts that were reaffirmed or were non-dischargeable.

debts. While some families repaid prebankruptcy debts,[106] the multitude of borrowing opportunities freed debtors from having to repay past debt to secure new credit.[107] Nonetheless, any debtors who accept these offers reinforce creditors' incentives to violate the discharge. Such fortunate creditors will not only reduce their loss from the discharged debt but will also accrue the profits from postbankruptcy borrowing. This complicated dynamic reveals the extent to which the credit industry is a repeat-player market. A substantial fraction of creditors will try to engage the very same debtors in new borrowing. Creditors' prebankruptcy threats never to lend again dissipate quickly when debtors emerge from bankruptcy.

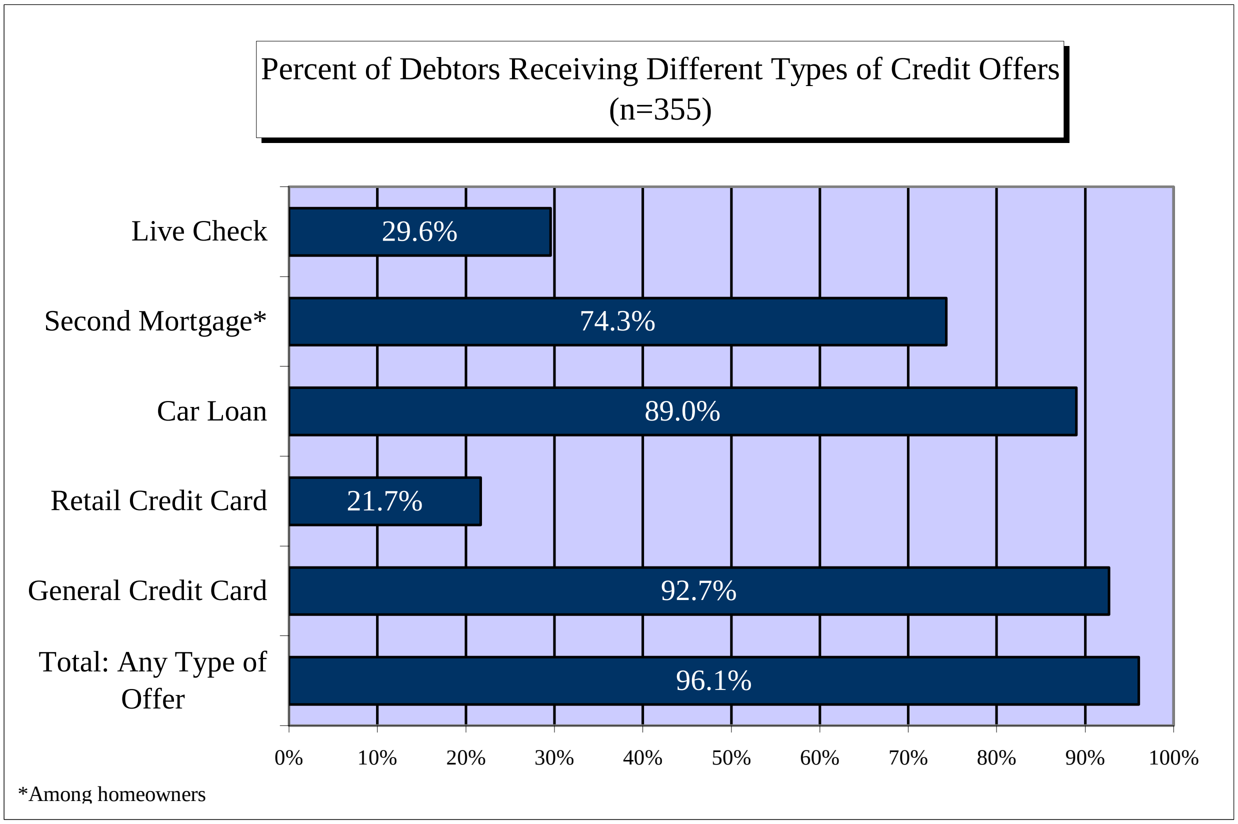
Debtors receive offers for most types of common credit. Figure 3 illustrates the percentage of debtors who received postbankruptcy offers for different types of credit. Many debtors were offered opportunities to borrow on both a secured and unsecured basis. Car loans were extremely common. In contrast, the general population only rarely gets solicitations for car financing. Presumably the prevalence of car loan offers reflects targeted marketing aimed at postbankruptcy families. Repossession of a car may have been the last straw that precipitated some families' decision to file bankruptcy; other families surrender a car in bankruptcy or are unable to successfully defend creditors' motions for relief from the automatic stay. The prevalence of these car loan offers reflects that families experience hardship during and as a result of bankruptcy. Without a car, these families are rich targets for car financing after bankruptcy.

---

[106] Three years after bankruptcy, 20.8% of households reported they or someone else had made a payment on a debt that they had at the time of their bankruptcy. This included reaffirmed debts.

[107] Among the 62 families who made payments on at least one prebankruptcy debt, only three families cited "creditor required payment before agreeing to new credit" as one of the reasons for their voluntary repayment. This finding highlights the fact that debtors may repay discharged debts for reasons other than their own financial benefit. Understanding why one in five debtors makes a payment after bankruptcy would provide useful insights into debtors' attitudes about their prebankruptcy creditors.

Figure 3



General purpose credit card offers were ubiquitous. Nearly 93 percent of postbankruptcy debtors could again enjoy use of a credit card. Filing bankruptcy is plainly an ineffective technique for eliminating the phalanx of credit card offers that arrive in one's mail. Whether you pay your balance in full every month or declare yourself broke, the banking industry appears to have designed a credit card product that is suitable for your profile. Retail charge cards were less common. Only about one in five debtors were solicited to open these accounts. These products are typically one-size-fits-all and are marketed with a rate and fees that reflect the creditworthiness and risk of the entire customer base of the retailer.

The differential between general and retail credit card offers suggests that many of the general credit cards available to postbankruptcy families were subprime products. Some may have required collateral for the credit extension;[108] others may have charged unusually high interest rates or required consumers to pay unusually expensive annual fees.[109] Further evidence to support this hypothesis comes from debtors' experiences in trying to actually get companies to issue them credit cards. Three years after bankruptcy, 44 percent of debtors said they were denied at least once when applying for a credit card. The interviews did not ask for detail about these credit rejections. Given the large number of credit offers most debtors received each month, I hypothesize that these rejections perhaps resulted from the debtor applying directly for a credit card (such as when offered to them during a retail purchase), rather than responding to prescreened solicitations aimed at postbankruptcy families. The data suggest that while credit marketing is rampant, that these solicitations are tailored for postbankruptcy debtors and carry correspondingly high rates.

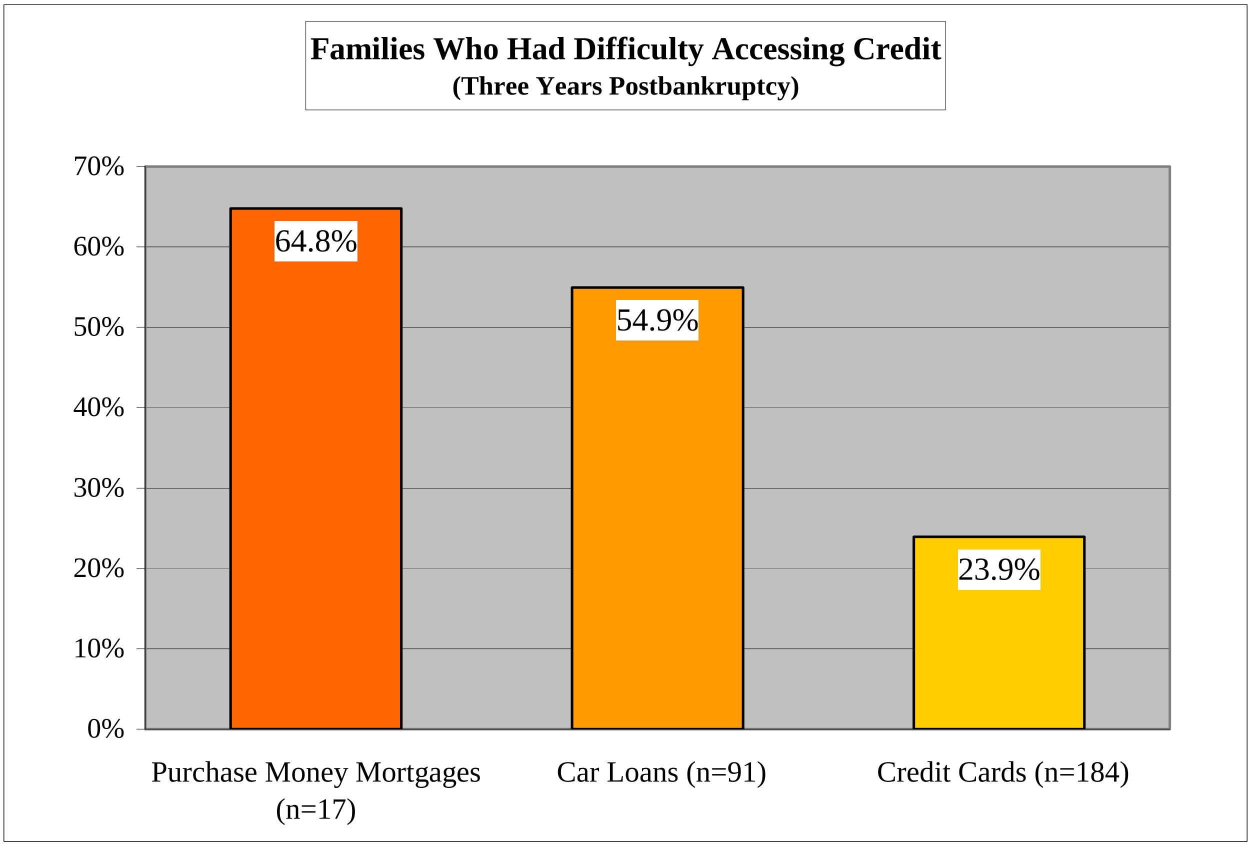
Debtors who tried to obtain new credit on their own—not in response to an offer—had somewhat more difficulty. Notwithstanding some rejections, most debtors who wanted to borrow after bankruptcy seem able to do so. Credit cards were particularly easy to obtain. Three years postbankruptcy, 60 percent of debtors had at least one new credit card.[110] Approximately 24 percent of these new credit card holders found that their bankruptcy had made it difficult for them to get these new cards. Viewed from the other direction, three in four families who were issued postbankruptcy credit cards said that their bankruptcy did not make it difficult for them to obtain this credit. Figure 4 summarizes these findings. The main point is that credit cards are widely available after bankruptcy.

[108] Secured Cards Survey – November 2006 at http://www.cardweb.com/perl/cardlocator/survey/secured (describing secured cards as "ideal" for consumers with poor credit or no credit).

[109] *Id.* (reporting cards offering annual fees as high as $150 with interest rates as high as 23% APR.

[110] Use of credit after bankruptcy is discussed in more detail in the next section, *infra*.

FIGURE 4



Paradoxically, secured credit proved harder to get after bankruptcy than credit cards, most of which are unsecured. The presence of collateral should reduce a loan's risk and facilitate borrowing to less creditworthy consumers.[111] Yet, over half of postbankruptcy debtors found getting a car loan somewhat difficult. Approximately 55 percent of those who financed a car purchase in the first three years after bankruptcy reported having difficulty obtaining a car loan.[112] As Figure 4 illustrates, families were twice as likely to find it difficult to get a car loan as to obtain a credit card. About one in three families who obtained a home loan after bankruptcy said that their bankruptcy caused them trouble in borrowing. These data suggest that filing

[111] Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 626 (1997).

[112] This number reflects only those who tried to take out a car loan. Many debtors paid cash for a car purchased after bankruptcy. These findings are discussed in detail in the next section on use of credit.

bankruptcy does create obstacles to obtaining credit. The interviews did not probe how many debtors were unable to obtain these types of credit after all. Thus, while I cannot document the entire range of experiences in trying to access credit, the available data show that many debtors get credit solicitations and many do obtain credit without difficulty from having filed bankruptcy.

Despite debtors' trepidations and creditors' threats, borrowing after bankruptcy is not only possible, such activity is actively encouraged by the credit industry. These data suggest that creditors' threats to refuse credit after bankruptcy are hollow. The credit industry may tell consumers considering bankruptcy that creditors never will lend to them if they file, but such statements are largely untrue. Far from a marketing mishap, the widespread availability of postbankruptcy credit reflects a careful calculus about the profits of such lending. Recognizing the widespread access to postbankruptcy credit forces us to confront the issue of whether such credit helps or hinders families' rehabilitation after bankruptcy.

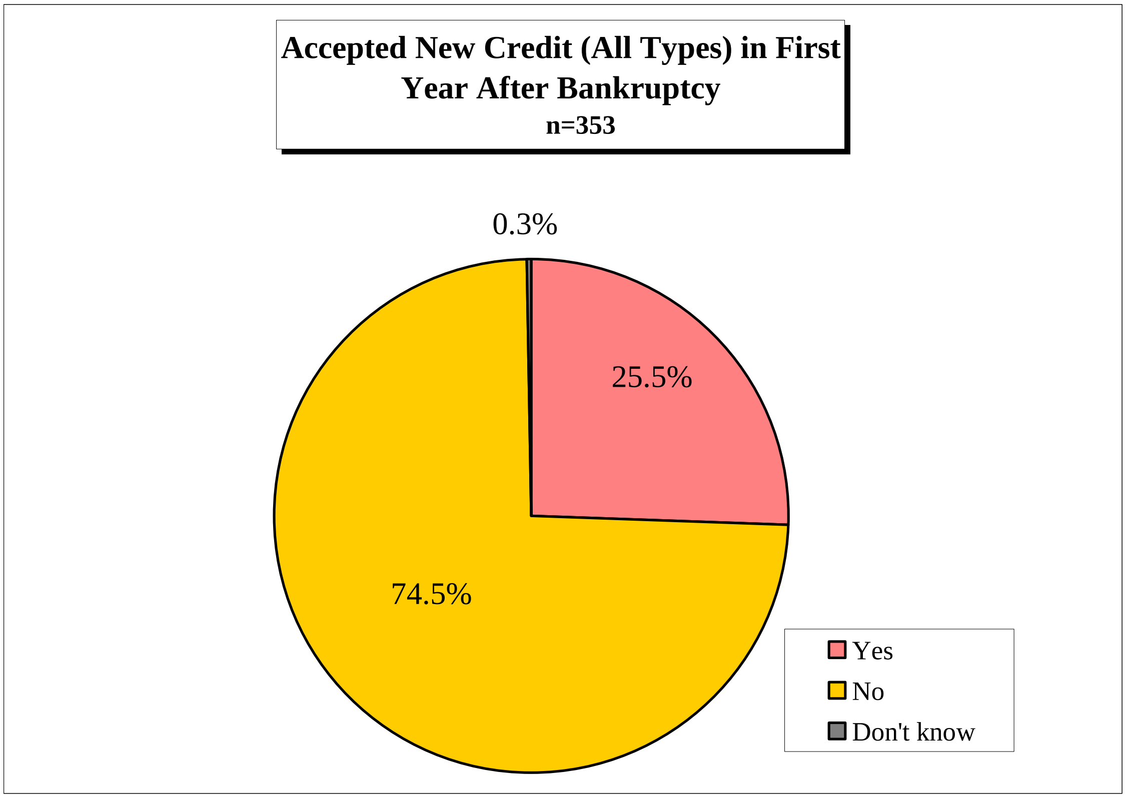
IV. USE OF CREDIT

A. One Year after Bankruptcy

Debtors will confront ample borrowing opportunities during their first few postbankruptcy years. Their decisions about how to use postbankruptcy credit are concrete measures of their economic rehabilitation. Pinpointing the optimal use of credit for any aggregate group of debtors is likely impossible because the postbankruptcy experiences of each family will cause them to have different expenses and needs. However, the data are useful in other ways. First, the extent to which postbankruptcy families use credit puts the rehabilitation process in context. Successful financial education of bankruptcy debtors should be developed around a rich understanding of postbankruptcy financial practices. Second, analysis of data on postbankruptcy borrowing can test the hypothesis that people who file bankruptcy cannot live within their means and are inherently profligate. If this hypothesis is correct, families should continue to make ample use of credit after bankruptcy. It can also reveal whether people who file bankruptcy make risky or poor credit decisions. Finally, knowing how families are managing their postbankruptcy credit reveals the extent to which bankruptcy is a transformative experience. Data on postbankruptcy borrowing can illuminate whether families are sustaining the fresh start or are suffering continued financial strain.

Taken together, the data reveal a constrained pattern of borrowing. A majority of debtors do not report any new borrowing in the immediate aftermath of bankruptcy, although more debtors return to borrowing as additional years elapse from their bankruptcy. In interviews conducted one year after their bankruptcy, only about one in four debtors had accepted any new form of credit. This includes not only credit cards but other forms of borrowing such as live checks, payday loans, retail cards, car loans, etc. As Figure 5 illustrates, a majority of debtors refuse postbankruptcy offers for any form of credit. Despite widespread marketing, the yield from marketing credit to postbankruptcy families is low.

FIGURE 5



This restraint in accepting new credit is remarkable the consequences of a bankruptcy filing. Most debtors had all their general and retail credit card accounts cancelled as soon as lenders learned of their bankruptcy, and that many lost a car as a result of their financial distress. Notwithstanding the loss of these credit sources, the approximately quarter of families that accepted new credit chose to accept few credit offers. The average number of credit offers accepted among this group was 1.3.[113] The median number of new credit accepted was one. These figures reflect that 95 percent of the minority of families that had any new credit had only one or two credit lines. Only five percent had either three or four new sources of borrowing. Not one family in the sample of 354 debtors had more than four new postbankruptcy credit lines. For

[113] This statistic reflects the number of cards among the 90 postbankruptcy families that had at least one card. Calculated for the entire sample, the average number of cards was only .3, reflecting the fact that most families had no cards.

at least twelve months after bankruptcy, families refuse an overwhelming number of credit solicitations and eschew even the possibility of running up debt from several entities. The question about credit offers was broad and included all types of credit, such as credit cards, live checks, car loans, payday loans, etc. The data show that families who have filed bankruptcy are able to refrain from using credit cards. Few Americans have only one or two credit cards; the average number of cards in the general population is many multiples of this.

Both the small percentage of families who accepted credit and the number of new credit lines are particularly remarkable in light of the debtors' incomes. When they filed bankruptcy, most families had low incomes. The median amount was only $21,870.[114] One year after bankruptcy, three-quarters of families appear to be living on these incomes, without resorting to credit as a supplement. Rather than supplementing their low incomes by paying with plastic, these families are adverse to credit.

Many debtors expressed strong resolve to avoid credit, particularly credit cards, after bankruptcy. In response to an open-ended question at the end of the interview that invited the respondents to share anything else they wanted the researcher to know about their bankruptcy,[115] several families shared their opinions about credit cards. A 62 year-old single woman from California described her new financial habits after bankruptcy. "I've become smarter with credit cards and that sort of thing. I won't buy unless I can afford it; if I need something and I don't have the money, it can wait."[116] Other debtors volunteered that they intended never to use credit cards again,[117] or that they would only use a credit card for an emergency.[118] These statements

---

[114] Porter & Thorne, *supra* note 10, at 115.
[115] This question was the last one in the interview. The exact wording was: "Is there anything else that you would like the researchers to know about your bankruptcy? About your experience, your feelings, your reactions? Anything else?"
[116] Consumer Bankruptcy Project III, Respondent Interviews, CA-07-007
[117] Consumer Bankruptcy Project III, Respondent Interviews, TX-07-051.
[118] Consumer Bankruptcy Project III, Respondent Interviews, CA-07025.

reflect the influence that filing bankruptcy may have on a family's decisions about future financial practices. A few debtors expressed frustration with a perceived paradox about credit cards. A Tennessee woman told us that "credit should not be necessary" and that people should be encouraged to live without credit. Yet, she noted that the "credit card companies have created a market for themselves," a statement that could reflect how difficult ordinary tasks can be without a credit card.[119] Another debtor lamented that without new credit cards she would be unable to rebuild a positive credit history, and asserted "there needs to be other ways to build credit."[120] These statements suggest that many people who have filed bankruptcy are often suspicious, and even hostile, to credit cards. Yet, their ambivalence about credit cards is also evident. They recognize the usefulness of credit cards and their ubiquity in modern life.

The pattern of avoiding borrowing applies not only to credit cards, the most ubiquitous of credit offers, but also to so-called "fringe" credit. Families were asked whether they had borrowed from a payday or title lenders since they had filed for bankruptcy. Only four percent of all families responded affirmatively. In light of the fact that the median family had an income near the bottom-quartile of all American families at the time of their bankruptcy, this rate of payday or title loan use seems remarkably low. This is especially remarkable given others' findings that people who are credit-constrained (low credit scores, delinquencies on credit reports) are much more likely to use payday or title lenders instead of mainstream credit. In the immediate aftermath of their bankruptcies, a majority of families simply eschew all credit.

B. Three Years after Bankruptcy

Families increased their use of credit as time elapsed from their bankruptcy filings. These changes took two forms. Some families who had not accepted any credit began to borrow, and

[119] Consumer Bankruptcy Project III, Respondent Interviews, TN-07-029.
[120] Consumer Bankruptcy Project III, Respondent Interview, TN-07-051.

some families increased their credit use. Although the trend is to increase credit, the overall amount of borrowing remains modest.

Three years after bankruptcy, families have had more opportunities to borrow. Not only have they received dozens and dozens more credit offers with each passing month, they may have needed to or wanted to make a large purchase. The data on car purchases illustrates how postbankruptcy families make substantial financial decisions. Forty-three percent of families said that they had purchased a car during the three years after bankruptcy.[121] Among this group, 65 percent of those who purchased a car during the three-year period after bankruptcy took out a car loan. The remaining one-third of families paid cash for their car—no small feat given the size of such a purchase. These families may have purchased relatively inexpensive cars, which would negate profligacy, or they may have saved and planned for such a purchase, which negates financial ignorance. The fact that the other two-thirds of families could obtain a car loan reinforces the availability of postbankruptcy credit. Indeed, some of these families even reported taking out a zero percent car loan.

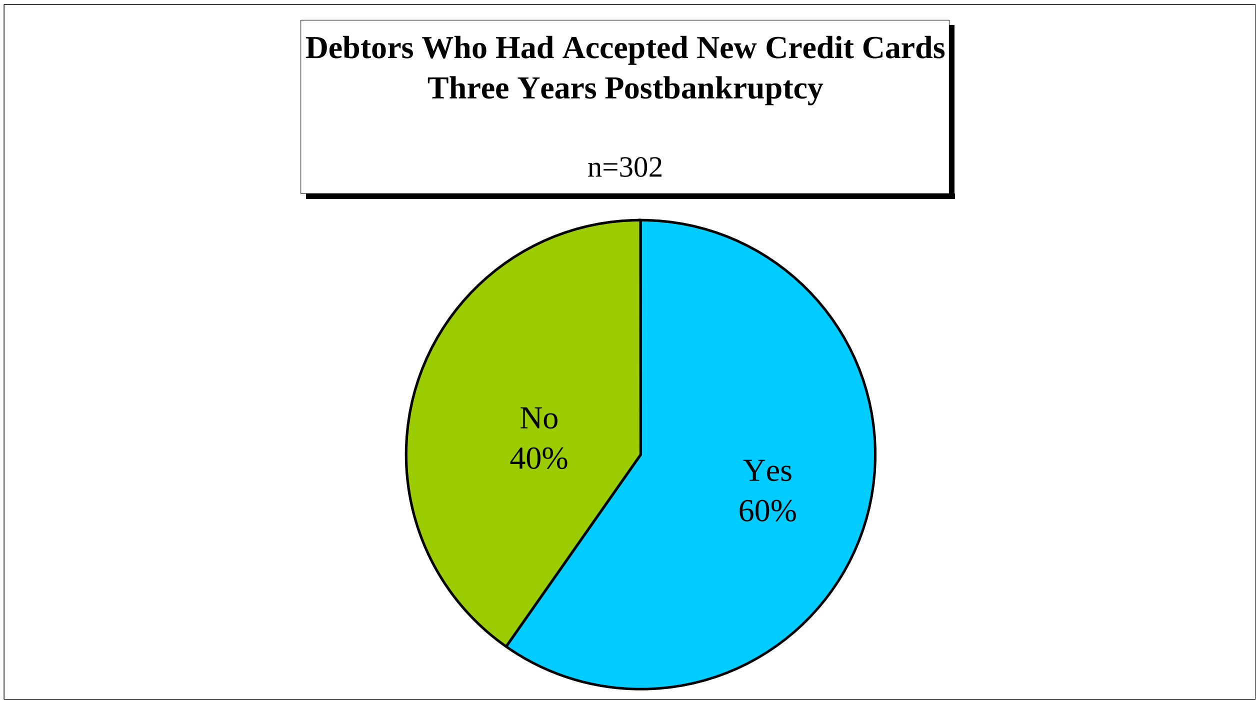
The data on credit card use reflect a similar take-up rate of credit use as the car loan data. About six in ten families (59.6 percent) reported that they had at least one new credit card after bankruptcy, as illustrated in Figure 6. The percentage of families with credit cards three years postbankruptcy is more than double the rate reported one year postbankruptcy. Put another way, over half of those who did not have any new credit one year after bankruptcy changed their financial practices and accepted a card during the second or third year after their bankruptcy.[122] Notwithstanding this increase over time, families who have filed bankruptcy remain less likely to

[121] n=302. The number who purchased cars was 131.

[122] There were 130 families who were included in both the one-year and three-year interviews who had not accepted any new credit one year postbankruptcy. Seventy of these households had credit cards when interviewed again three years after bankruptcy.

have a credit card than the general population. Seventy-five percent of all Americans have at least one credit card.[123] Filing bankruptcy appears to have a strong negative affect on a families' penchant for credit cards.

FIGURE 6



Data on the number of credit cards per family reinforces the conclusion that postbankruptcy families are less likely to use credit cards than most Americans. As previously reported, in the first year after bankruptcy, the minority of families with any new credit accepted only one credit offer. This behavior generally continues for a more extended period. In interviews three years after bankruptcy, families continued to report having few cards. Table 2 shows these data. Including those who retained a card during bankruptcy and those who got a

123 Liz Pulliam Weston, *The Truth about Credit Card Debt* at http://moneycentral.msn.com/content/Banking/creditcardsmarts/P150744.asp; *see also* Federal Reserve Board, *Recent Changes in U.S. Family Finances: Evidence from 2001 and 2004 Survey of Consumer Finances*, Federal Reserve Bulletin A31, available at http://www.federalreserve.gov/PUBS/oss/oss2/2004/bull0206.pdf.

new card, the frequency of card-holding was 65 percent.[124] Among families who had any cards, the median number of cards was two and the average number of cards was 1.96. The standard deviation and range for the inquiry about new credit cards suggest that most families have only a few cards. These statistics reflect the credit practices of the 60 percent of families that had at least one new credit card since bankruptcy. Table 2 reports that the number of cards is modest even among families who have a balance on their credit cards. These statistics show that the low number of cards among the larger group is not the result of families who have cards that they never use. Instead, even families who use cards show a sustained reluctance to allowing their card holdings to proliferate. These findings contradicts the idea that people who file bankruptcy are chronic credit users who shuffle balances among dozens of cards or do not understand the consequences to their credit scores of having many credit lines.

TABLE 2

Credit Cards Three Years After Bankruptcy				
Total Credit Cards			**Credit Cards with Balances**	
% with cards	65.6%		% with balances	54.6%
n=302			n=302	
Median	2		Median	1
Average	1.96		Average	1.67
Range			Range	
Minimum	1		Minimum	0
Maximum	6		Maximum	5
Standard Deviation	1.11		Standard Deviation	.82
n=198			n=165	

[124] 198 of the 302 families in the sample had any credit card, whether it was obtained prebankruptcy or postbankruptcy. Since the 180 families said they had gotten new cards after bankruptcy, it appears that 18 families of the sample of 302 retained the same cards during and after their bankruptcy.

These findings starkly contrast with the financial habits of most Americans. Researchers estimate that between 76 and 80 percent of all Americans has at least one credit card.[125] Studies show that the average American has between six and eight credit cards.[126] This gap in credit card use suggests that bankruptcy has a measurable impact on how families use credit, and that this difference cannot be explained by a lack of access to credit after bankruptcy. Instead, I conclude that a majority of families are, by choice, adverse to credit cards after bankruptcy. The frequency of cardholding and the number of cards both suggest that families who have filed bankruptcy are neither incapable nor unwilling to resist the temptation of credit or use credit in a limited and responsible manner.

This conclusion is buttressed by the substantial minority of families that refuse to accept any new credit cards after bankruptcy. This unwillingness must stem from a fear of or hostility to credit cards, rather than a lack of access. As the prior section showed, almost all families had been offered some kind of general credit card,[127] meaning that they had the opportunity to open a credit card account. These are also not families who as a matter of established practice refrain from using cards. Before bankruptcy, essentially all families (97 percent) had credit cards.[128] Interpreting the meaning of families' constrained use of credit is difficult. Refusing to borrow after bankruptcy does not necessarily mean that families enjoy improved family circumstances. Some families never borrowed on credit cards until they lost their job or got sick or got divorced, and if these events have not occurred since their bankruptcy, such families are not yet in trouble.

---

[125] Weston, *supra* note 123 (comparing data from Cardweb and 2001 Survey of Consumer Finances).

[126] S*ee* Frontline, *supra* note 92 (reporting that average American has eight credit cards; MSNBC Money Central website at http://moneycentral.msn.com (stating that excluding debit cards, Americans carry 6.5 credit cards in their wallets.) ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT (2000); RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS (2006) (comparing credit card use among countries).

[127] *See supra* Figure 3.

[128] At the time of their bankruptcy filings, 96.9% of families had some credit card debt. These debts were coded off each debtor's Schedule F bankruptcy court records.

Yet, they could still just barely be meeting their expenses on their postbankruptcy income, be failing to save, or not purchasing adequate insurance. Under such circumstances, these families may be separated from another round of intense credit card borrowing only by sheer luck. On the other hand, the limited number of credit cards certainly reflects at least an attempt to avoid borrowing. Given the ubiquity of credit cards and the rampant solicitation of postbankruptcy families, this restraint in card use is noteworthy. The data on credit access showed that cards were the most marketed form of credit to postbankruptcy families. These data on card use strongly suggest that families exit the bankruptcy system with a resistance to even the easiest form of credit. While a profile of all credit sources would be helpful, credit cards seem likely to be the most common form of postbankruptcy borrowing.

My finding that a majority of families have at least one credit card at three years postbankruptcy shows that mainstream credit economy is open to former debtors. Bankruptcy is a financial collapse, but it is not financial death. Most families return to the mainstream credit economy by obtaining a credit card within a few years after bankruptcy. This postbankruptcy use of credit cards does not necessarily indicate profligacy. Indeed, given the multiple functions of credit cards,[129] some fraction of families with new credit cards may have them for identification purposes, for purchases in which a credit card is the only method of payment (such as Internet shopping) or use them instead of a debit card, at least intending to pay their balances in full each month.

These findings on credit cards are buttressed by the overall pattern of postbankruptcy credit use. People do reenter the economy after bankruptcy, doing normal activities such as purchasing new cars and holding credit cards. Families who file bankruptcy are not spendthrifts

[129] MANN, *supra* note 126, at 23-28.

who are unable or unwilling to live within their means. After bankruptcy they exhibit a sustained tendency to limit the number and type of credit that they use.

C. Managing Postbankruptcy Credit

Data on how families manage their postbankruptcy credit give flesh to the ephemeral idea of rehabilitation. Such data are useful in evaluating whether families who do use credit cards again become overwhelmed with debt after bankruptcy. Because the relatively high interest rate makes the financial impact of carrying a balance ratchet up sharply over time, the debtors were queried about how they paid their credit card bills. Three years postbankruptcy, approximately half of all families (45.4 percent) in the sample had no balance. This finding negates the idea that families who file bankruptcy cannot budget to meet living expenses without resort to credit cards. Over four in ten families remain free of credit card debt even after three years have elapsed in which they could have obtained a card and made charges.

Among only those families with a credit card,[130] 17 percent did not have a balance on any card at the time of the interview. These families (who constitute about 6 percent of the entire sample) chose to obtain cards but are avoiding accumulating debts and paying interest charges. The remaining 83 percent of families reported that they had a balance on one or more credit cards.[131] Families with balances were using the "credit" function of the credit card, not merely using a card as a payment device. By paying with credit cards instead of debit cards or cash, families had the option to delay paying in full. A majority of families who choose to obtain credit cards use them as borrowing devices. This is an expensive situation. The average rate of the most expensive card held by those postbankruptcy families who carried a balance was 17.4 percent.

[130] n=198

[131] The question asked "On how many of these [total credit] cards are you carrying a balance?" The reference to "carrying a balance" was aimed at asking about cards that were not paid off in full the previous month. Admittedly, a respondent could have interpreted it to be inquiring whether they had any balance—that is, any charges, currently on their card.

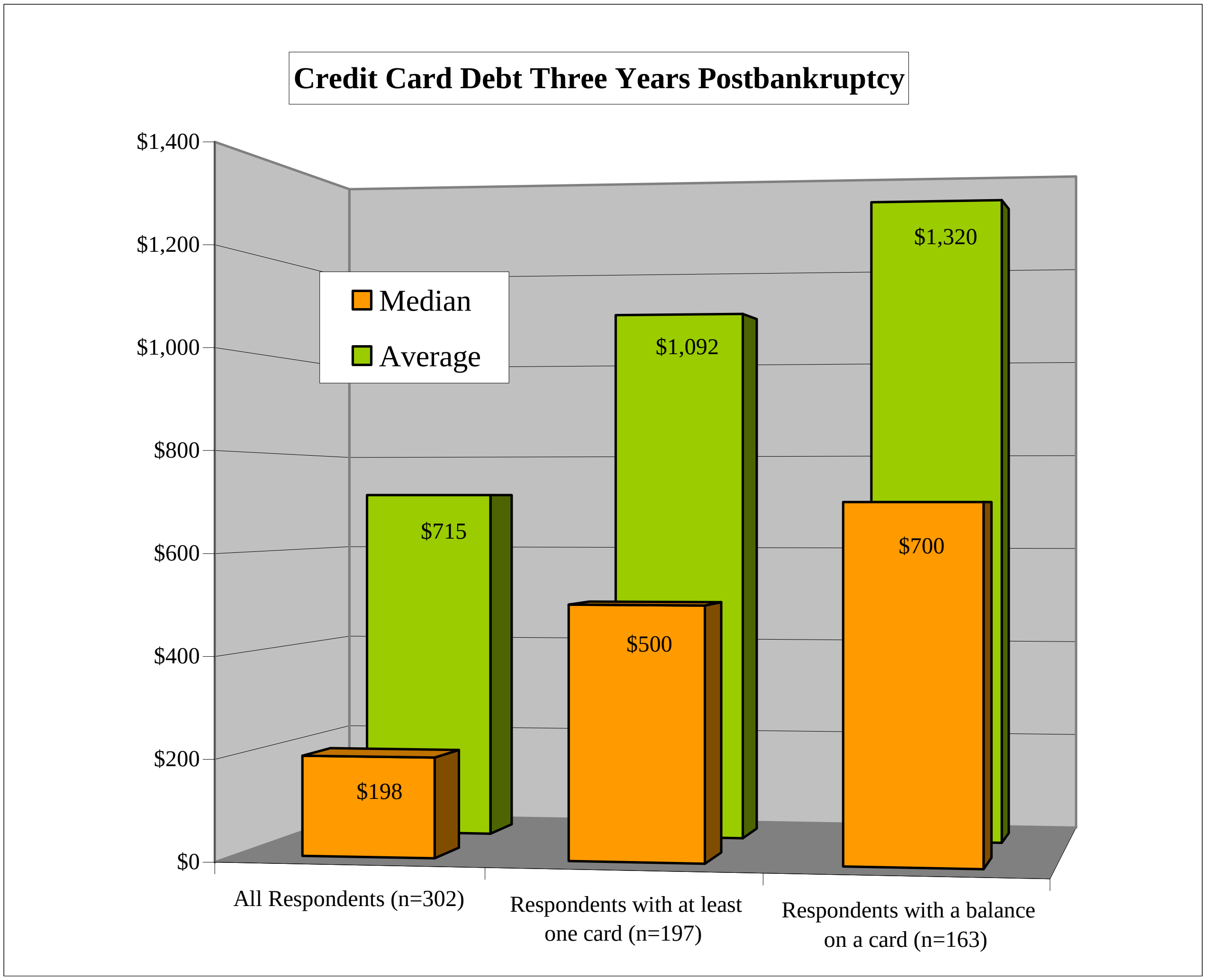
The median rate was slightly higher at 19 percent.[132] In comparison, the national average rate on credit cards of 13.49 percent in July 2004 when the interviews were conducted.[133] This translates into former bankruptcy debtors paying about 20 percent more for their credit cards. As expected, bankruptcy makes credit more expensive. The increase is relatively modest, however, and most of these families probably had high rates on their cards before they filed bankruptcy as their creditworthiness deteriorated as they approached financial collapse.

The impact of this higher interest rate on families' budgets depends on the size of their credit card balances. The amount of credit card spending was quite modest, however, which reduces concern about the percentage of families with balances. Data on credit card debt was obtained during the interviews three years after bankruptcy. Among families with at least one credit card, the median amount of total credit card debt (on all cards combined) was $500. The average debt was $1,092, reflecting the fact that a few families had more substantial amounts of debt. Both of these statistics include families who had no debt but had a credit card. The relatively small amount of debts may partially reflect the presence of convenience users in the sample. These families may have the card for emergencies or as a form of identification, or they may have obtained the card right after their bankruptcy out of a fear that they would not be able to get a card.

[132] The standard deviation for this variable was 6.04, reflecting that the sample had a wide range of rates. Indeed, several families said their card carried no finance charge, while the most expensive card reported carried an APR of 44%.

[133] *See* Federal Reserve Board, *Recent Changes in U.S. Family Finances: Evidence from 2001 and 2004 Survey of Consumer Finances*, Federal Reserve Bulletin A31, available at http://www.federalreserve.gov/PUBS/oss/oss2/2004/bull0206.pdf (reporting "the median interest rate on the card with the largest balance (or on the newest card, if there were no outstanding balances)…[at]…11.50 percent."); *see also* Sandra Block, *Low Credit Card Rates Getting Rarer*, USA Today Online at http://www.usatoday.com/money/perfi/columnist/block/2004-09-20-ym_x.htm.

Figure 7



The more salient finding is the amount of debt among the "revolvers"—the families that are carrying a balance. Among this group, the median amount of debt was $700 and the average amount of credit card debt was $1,320.[134] Given that families have had three years after bankruptcy to accumulate such balances, these figures show that families either are infrequently using their credit cards or that they are paying down or paying off their balances fairly successfully. These figures for families that carry a balance are much lower those reported for

[134] The standard deviation was 1,807.

the general American population. The Federal Reserve reported that the median amount of credit card debt was $1,900 among households that had a balance.[135]

Evaluating whether a debt load is manageable requires considering the income available to service that debt. At the three-year mark, debtors were asked to report their current household income.[136] The average income was $46,227; the median income was $36,000.[137] These incomes are markedly higher than those reported by families on their court records at the time that they filed bankruptcy.[138] This upward trend after bankruptcy aligns with an adverse events model of bankruptcy. Families who find employment, whose employer increases their hours, who overcome illness, or whose injuries heal will experience income increases. Measured against their current postbankruptcy incomes, most families had manageable amounts of credit card debt.[139] The median family owed less than one percent of its income in credit card debt.[140] This reflects the fact that many families have no credit card or owed no credit card debt. Even among the high end of the distribution, the ratio of credit card debt to income would seem manageable. At the top quartile mark, the ratio was only .019, meaning that this family had total credit card debt that equaled about two percent of its annual income. These figures reinforce my conclusion

[135] *See* Federal Reserve Board, *Recent Changes in U.S. Family Finances: Evidence from 2001 and 2004 Survey of Consumer Finances*, Federal Reserve Bulletin A31, available at http://www.federalreserve.gov/PUBS/oss/oss2/2004/bull0206.pdf.

[136] n=275. A larger than usual number of respondents (25) refused this question. Additionally, data was missing for two families.

[137] Incomes ranged from $0 to $300,000. The standard deviation was $40,118, reflecting broad distribution of incomes in the sample.

[138] *See* Porter & Thorne, *supra* note 10, at 115, Fig. 6. ("[M]edian annual income for the subsample was $21,870"). Current income at the time of filing was derived from figures on Schedule I. During the one-year interviews, families were asked whether their incomes had increased by ten percent, stayed about the same, or decreased by ten percent. A majority of families reported increasing income.

[139] The credit card debt-to-income ratio was calculated by dividing each household's total credit card debt at three years after bankruptcy by the household's current income at three years after bankruptcy. As explained in note 135, *supra*, only 275 families from the sample of 302 reported income. To calculate the ratios, families with zero income were removed; there were seven such families.

[140] n=267. The exact figure was .33. The average credit card debt-to-income ratio was 3.86.

that a vast majority of families either eschew credit cards or use them in a manner that is unlikely to put them under financial stress.

Postbankruptcy, families have relatively small amounts of credit card debt. While it may not be surprising that their credit card debts are much smaller than when they filed bankruptcy, it is nonetheless important that most families remain free of significant credit card debts for at least three years after bankruptcy. These families may have faced adverse economic events after bankruptcy such as a reduction in income or a new round of medical bills, yet they have weathered these financial shocks without resorting to credit cards. Most Americans are much more leveraged. The Federal Reserve found that in 2001 the median debt among those who carried credit card balances was $1,900.[141] This figure is more than double the median of $700 debt reported by former bankruptcy debtors. While the balances carried by Americans may be more than three years old, making a direct comparison with credit card borrowing among postbankruptcy families and other families impossible, the differential in average credit card debts reinforces my conclusion that bankruptcy significantly reduces families' use of credit cards.

In a prior paper, Dr. Deborah Thorne and I found that 35 percent of families who filed Chapter 7 bankruptcy reported that their financial situations one year later were either about the same or worse than at the time of their bankruptcy.[142] The majority of families (65 percent) said their financial situations had improved after bankruptcy. The credit habits of families whose situations were the same or worse than when they filed bankruptcy are of particular concern because the continued financial difficulty of these families makes them particularly vulnerable to again becoming overwhelmed with debt. In fact, there was no statistically significant difference

---

[141] Federal Reserve Board, *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances* 1, 22, tbl. 11 (2001).

[142] Porter & Thorne, *supra* note 10, at 67, Fig. 3.

in credit card ownership among families who had improved financial situations after bankruptcy and those families whose situations were the same or worse than when they filed bankruptcy.[143] However, the relatively small fraction of families with a credit card at one year postbankruptcy (25 percent) means that the number of families with cards who have either improved, same, or worsened financial situations are relatively small. This increases confidence in the result. Nonetheless, these are the only data of their kind, and the results indicate that regardless of their postbankruptcy financial recovery, families are about equally likely to have accepted a new credit card after bankruptcy.

The adversity to credit cards of most families suggests a sustained reluctance to accumulate debt. Families were queried about their current financial situations to examine the types of debts and bills that troubled them after bankruptcy. These findings, particularly those on credit card bills further disrupt the hypothesis that families who file bankruptcy are habitual credit card users or profligate. One year after bankruptcy, one in four families said they struggled to pay one or more debts one year after bankruptcy.[144] Three years after bankruptcy, 60 percent of families reported struggling with at least one particular type of bill.[145] These data support an adverse events model for causation of consumer bankruptcy. Even after bankruptcy, families are struggling with persistent income problems. If the primary reason for their bankruptcy were overspending, the discharge would have provided more complete relief from future financial distress, especially since families used new credit after bankruptcy only modestly, if at all.

The data on debtors' struggles with postbankruptcy bills powerfully refute the conception of debtors as profligates. Credit cards were not the primary culprit for families continued

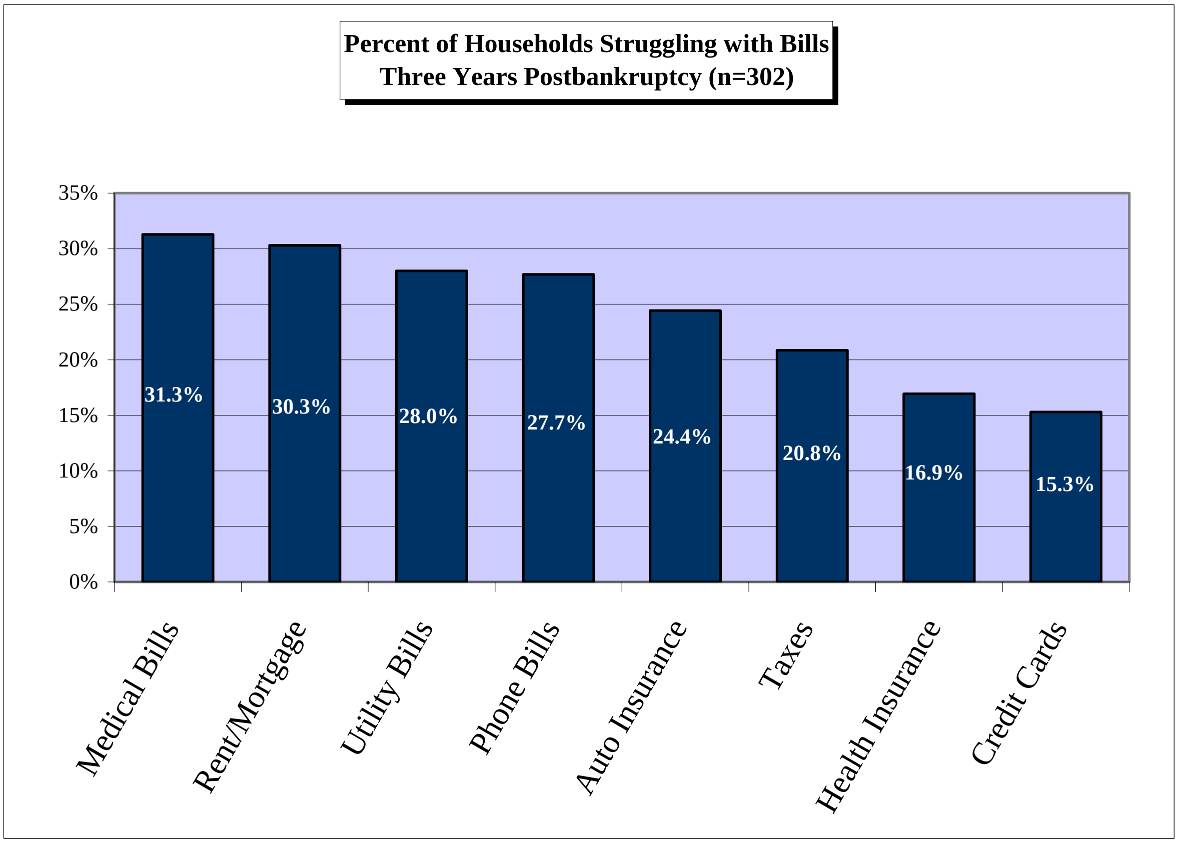
[143] 32 percent of worse off families, 18 percent of unchanged families, and 28 percent of better off families reported that they had new credit cards.
[144] Porter & Thorne, *supra* note 10, at 104.
[145] n=300

financial struggles after bankruptcy. In interviews one year after bankruptcy, only 15 percent of those struggling to pay bills one year after bankruptcy cited credit card debt as a problem.[146] Even among those families who said their financial situations were the same as or worse than before bankruptcy, only eight percent reported that credit card bills were a problem. Families more commonly cited utilities, car, insurance, housing, medical and student loan bills as debts that they struggled to pay one year after bankruptcy.

This conclusion remains valid as time elapses. Figure 8 shows the percentage of postbankruptcy bills that troubled families three year after bankruptcy. Just as at the one-year mark, only 15 percent of families struggled with credit card bills. In contrast, more than 25 percent of families reported difficulty in paying medicals bills, utility bills, phone bills, and their mortgage or rent. Failing to pay for housing or a utility subjects a family to immediate hardship. In contrast, the consequences of allowing credit card debt to accumulate may not make themselves apparent to families until years later when the balance grows large enough to create a sizeable minimum payment. Notwithstanding the ease with which credit card bills may be put off, most families either do not have such bills or can pay them on time without undue difficulty.

[146] Porter & Thorne, *supra* note 10, at 67, Fig. 2.

FIGURE 8



My finding that families who were struggling to pay bills largely avoided trouble with credit card bills is particularly remarkable in light of the substantial postbankruptcy privations some families experience. During the three years since they filed bankruptcy, 18 percent of families had gone without food because of a lack of money. Nearly one in three had their phone shut off, and 44 percent had risked eviction or foreclosure by making a rent or mortgage payment late. These data are a sobering reminder of the difficult choices that confront families trying to rebuild after financial failure. A fresh start after bankruptcy does not translate into a free ride.[147] While a bankruptcy discharge frees families from having to use income to service old debt, it

[147] Porter & Thorne, *supra* note 10, at 151-52.

does not generate sufficient income. Families still have to match their income to their expenses, and with the low incomes reported at the time of their bankruptcy, this task proves difficult.[148] T

Despite continued financial difficulties, many families avoid using credit cards and those that do borrow seem to keep their spending to manageable levels. This sparing use of credit cards is a testament to these families desire to avoid becoming ensnared in credit card debt. Rather than using credit to finance the gap between income and expenses, families endure serious hardships. Families that continue to struggle after bankruptcy are largely trying to make ends meet without using credit cards. The restraint in postbankruptcy borrowing directly conflicts with a view of debtors as credit addicts. These families are trying to live within their means, even as many have difficulty paying routine monthly bills for non-credit items. This resistance to credit should be placed in the context of the widespread availability of postbankruptcy credit. In the face of constant solicitations, most families appear determined to avoid large credit card debts. The rehabilitative potential of bankruptcy is undermined if families are quickly mired in new debts after bankruptcy. Most families seem to be doggedly hanging on to the relief from credit card debt that the bankruptcy discharge granted to them.

V. IMPLICATIONS

A. *Implications for Understanding Causes of Bankruptcy*

Understanding what happens after bankruptcy can inform our theories about what happens before bankruptcy. Scholars disagreed about how to explain the large number of bankruptcy filings in the years preceding the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Some have contended that stigma about bankruptcy has declined,

[148] *Id.*

causing consumers to run up debts without concern about repaying them.[149] Others have developed empirical evidence showing that adverse events such as job loss, illness or injury, or family break-ups trigger most bankruptcies and have suggested that changes in economic and social policy have left families increasingly vulnerable to the financial consequences of such events.[150] Central to these competing visions of bankruptcy are factual disputes about how debtors use credit. Are families who file bankruptcy profligate? Are they victims of a "plastic generation" that is unable to live without credit cards? Or do credit cards serve as useful tool for families trying to pay for necessities in times of hardship?

The postbankruptcy borrowing habits of families provide a window into the credit behavior of those who seek consumer bankruptcy relief. The data suggest that families sharply constrain borrowing in the first year after bankruptcy and slowly return to borrowing in later years. Particularly with respect to credit cards, the data show a substantial fraction of families (four in ten) continuing to avoid that form of potential borrowing even three years after bankruptcy. Many families can and do live without credit cards after bankruptcy. The majority of the remaining families appear to use credit cards fairly conservatively, having both a small number of cards and small balances. These findings do not support a model of consumer bankruptcy debtors as credit addicts or spendthrifts. The median family who filed bankruptcy earns an income that is near half that of the median American. Notwithstanding the potential hardship that reduced incomes create, most families appear to be finding ways to live on their incomes. Doing so is a strain, and many families suffer substantial privations after bankruptcy to make ends meet. Families report going without food, having their water or phone shut off, or paying rent or mortgages late after bankruptcy. Yet, many of these families are not using credit

[149] J. Jones & Zwyicki, *supra* note 1, at 215-221; Buckley & Brinig, *supra* note 1, at 194.
[150] J. Jones & Zwyicki, *supra* note 1, at 208.

cards, even when the widespread availability of this credit must be a constant temptation to ease threatening or actual privations. Families who file bankruptcy simply are not inherently profligate. A vast majority of families seem willing and able to avoid credit cards and are managing the credit that they do use successfully. Indeed, the data suggest the families may avoid credit because the stigma of bankruptcy and the stress of being behind on their debts left them fearful of the potential of credit to ensnare them in unmanageable debt.

My findings on access to credit after bankruptcy offer a twist on hypotheses about the causes of bankruptcy. Rather than focusing on debtors' behavior, consider what postbankruptcy borrowing reveals about creditors' understanding of the consumer bankruptcy system. The data demonstrate that families will have ample opportunity to borrow after bankruptcy. In fact, the data show that families receive an overwhelming number of new credit offers each month after bankruptcy, and that a substantial number of these are from the same creditors who had to charge-off debts because of the family's bankruptcy. The findings suggest that credit industry may actually embrace an exogenous view of the causation of consumer bankruptcy,[151] despite public protests that stigma about bankruptcy is declining.[152] The plethora of new credit suggests that lenders do not believe that a family who would seek bankruptcy relief is a "deadbeat" who will not pay their debts.[153] Instead, the credit industry seems to think that such families are excellent credit risks—and at least at a slightly higher price than paid by the typical American. Lending to families who filed bankruptcy is consistent with a belief that bankruptcy is caused by factors exogenous to a family's desire or ability to manage credit successfully. In other words,

---

[151] John Pottow made this point to me, and I gratefully acknowledge his insight on this issue.

[152] *See, e.g.*, Warren & Lawless, *supra* note 17, at 743-744 (describing prevalence of stigma concerns in policy debates about bankruptcy reform).

[153] I put this term in quotes because in reality credit card issuers call people who pay off their balances in full each month "deadbeats." Those who accumulate balances and make minimal payments are termed "revolvers," a group that the lobbyist for the American Bankers Association called the "sweet spot" of lending. *See* Frontline, *Secret History of the Credit Card*, supra note 92 (interview with Edward Yingling).

lenders at least ostensibly believe that families who file bankruptcy are not inherent promise-breakers, or they would not wish to have them as customers again. If the converse was true, and bankruptcy was endogenous in origin, the lenders would want to avoid these families for fear of future default.

There is a less pleasant theory that could explain creditors inundating families with borrowing opportunities after bankruptcy. Families who do not repay quickly or in full are the most profitable customers because they generate income for lenders from late fees, over the limit fees, and accumulating interest. As Ronald Mann has posited, the credit industry wants to put and keep debtors in a "sweatbox" of debt in which they are generating high fee income and interest income for the lenders.[154] If lenders' intense solicitation of families in bankruptcy results from their belief that these families will again pay late, go over the limit, and revolve large balances, society may wish to prohibit or at least constrain borrowing to debtors after bankruptcy or to treat such new postbankruptcy debt differently as to legal remedies for nonpayment. I explore this idea further in the next section about how to evaluate postbankruptcy borrowing against the rehabilitative goal of bankruptcy.

The difficulty in pinning down the implications of postbankruptcy borrowing (or the lack thereof) is identical to the difficulty in understanding the reasons for families' prebankruptcy borrowing: To what extent does bankruptcy law, rather than debtor's unadulterated desires, shape credit decisions? Families could be conscious of the availability of bankruptcy relief as they make decisions about borrowing. If this is true, they would borrow without fear of impunity before bankruptcy, knowing that they could discharge the debts. Similarly, after bankruptcy, families would sharply constrain borrowing to avoid debts that they cannot manage because they

---

[154] Ronald Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt* (The University of Texas School of Law, Law and Economics Research Paper No. 77, September 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895408#PaperDownload.

know they cannot receive bankruptcy relief again for several years. Untangling the influence of the law is similarly difficult in understanding lenders' motivation for postbankruptcy credit solicitations. Rather than turning on a belief that bankruptcy is precipitated by exogenous factors, lenders may exploit the legal prohibition on repeat bankruptcy filings to maximize profits from postbankruptcy lending.

Admittedly, the data are consistent with either theory. Perhaps, the law does influence some families, and it almost certainly influences most lenders. However, the data are equally consistent with a view that families restrain their borrowing after bankruptcy for reasons that are untainted by the law. That is, they either have weathered the adverse event that triggered their overindebtedness and no longer need to borrow or they are finding ways to retool their expenses and income to align and thereby adjusting to a diminished economic situation. I do not think that additional or different data can completely resolve this issue. People may be unable to explain or understand the factors that shape their credit decisions, even if queried extensively under the best research conditions imaginable. Cognitive problems in identifying and separating the multiple reasons behind such decisions may make it impossible for them to pinpoint whether and how the availability or lack of availability of bankruptcy relief played into their economic behaviors. Having data on families' postbankruptcy access to and use of credit is a first step. These data are a baseline against which we can measure how changes to bankruptcy law may shape credit behavior. I offer a few ideas on how to do so, and hope that the data presented herein are sufficiently stimulating to encourage further study on this point.

The Bankruptcy Abuse and Consumer Prevention Act of 2005 extended the length of time that must pass before a debtor who received a discharge in one bankruptcy may receive a discharge in a second bankruptcy.[155] If debtors are quite sensitive to their legal rights in making borrowing decisions, this additional two-year wait before a subsequent bankruptcy could give them debt relief should further constrain their postbankruptcy borrowing. The hypothesis would be that because families will be unable to file bankruptcy for a long period, they should be more reluctant to incur debt because they know they will have to wait longer for bankruptcy relief. Available studies show a very small number of repeat filers,[156] which suggests that this line of inquiry will not be particularly fruitful. With so few families returning to bankruptcy relief, the law would not seem a significant explanation for why families constrain their borrowing after bankruptcy.

Extended longitudinal research on borrowing habits could measure the influence of the law more directly. The data presented in this Article only measure credit use three years after bankruptcy, which is still a significant distance from the time at which a new bankruptcy could be filed.[157] It might be helpful to know whether borrowing significantly increased during the year before or during which a family was eligible to receive a subsequent bankruptcy discharge. These data could be correlated with the number of families who actually did file a subsequent case, but as mentioned earlier, repeat bankruptcy filings are historically rare enough as to make any study very difficult. Similarly, one could measure whether lenders continue to market credit aggressively to families as the time after bankruptcy elapses. To the extent that they do so, it suggests that the ability for a family to discharge debt in bankruptcy is not a driving concern behind lenders' decisions. Put another way, their desire to lend (and their judgment about a

[155] 11 U.S.C.A. § 727(a)(8).

[156] TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 192 (1989) (reporting that eight percent of consumer debtors who filed Chapter 7 or 13 were repeat filers). Serial Chapter 13 filings are considered more common.

[157] *See supra* note 99, explaining that these data were gathered in 2001 at that time six years must have elapsed from a prior discharge before a debtor could receive a discharge in a subsequent bankruptcy filing.

customer's profitability) may be shown to be unrelated to a family's potential to file bankruptcy. If true, this suggests that lenders embrace an adverse event theory of bankruptcy and operate on the assumption that families who have filed bankruptcy are not particularly likely to suffer another bout of job loss, illness, divorce, etc.

The findings on postbankruptcy borrowing are clear, but their implications on prebankruptcy borrowing are less so. After bankruptcy, lenders deluge debtors with credit offers, but families generally refuse most of these offers and constrain their borrowing. These behaviors could reflect both lenders and debtors responding to the legal constraints on subsequent bankruptcies. I think it is more likely that the avoidance of or restraint in postbankruptcy borrowing reflect to a significant degree the fact that families turn to credit before bankruptcy to deal with adverse economic events. Families who file bankruptcy are certainly not incapable of turning down credit, or refusing to suffer privations rather than borrow, or managing credit successfully. These data deal another blow to the myth of bankruptcy debtor as inherently profligate.

B. Implications for Rehabilitative Goal of Bankruptcy

The discharge of most unsecured debts that families receive after filing Chapter 7 bankruptcy is designed to provide them with a fresh start in their economic lives. Empirical research on what happens after bankruptcy is crucial to evaluating whether the discharge performs its function. My findings about postbankruptcy credit enrich our understanding of bankruptcy's rehabilitative potential and suggest ways that the legal system could ensure that families achieve a lasting fresh start.

The first implication of the data is that families who file bankruptcy need to be prepared to deal with an onslaught of credit solicitations. Bankruptcy law now requires post-filing financial education as a prerequisite to receiving a discharge.[158] To be effective, these programs need to be grounded in the realities that will confront people after bankruptcy. Families will benefit from knowing that creditors' threats never to lend to them if they filed bankruptcy will not necessarily be honored. Education programs should alleviate fears that credit will be impossible to obtain after bankruptcy and eliminate this source of stress. Families should be prepared for the arrival of postbankruptcy credit solicitations and to understand that they will have multiple opportunities to borrow. The data suggest that they need not seize on initial solicitations but can choose from among a variety of options to borrow. Informed by data on the widespread availability of credit, financial education curricula should expect that debtors will be able to shop for credit and should train them to do so. These programs should also warn families that many creditors will violate the discharge injunction and should give them concrete instructions on what to do if they receive requests to pay discharged debts.

The data suggest a second, more subtle implication for financial education. To the extent that these programs are designed consciously or subconsciously around a conception of debtors as profligate, they miss their audience. Most households open few credit lines after bankruptcy and use only cautiously those that they do accept. The data show that bankruptcy itself provides a powerful deterrent to future use of credit cards. Because these data were gathered in 2001, before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005, these families were not required to attend financial education courses. Nevertheless, the substantial portion of families who had no card even three years after bankruptcy and the relatively small balances carried by those who did use the credit feature of a card suggest that

[158] 11 U.S.C.A. § 109(h)(1).

financial education programs need not use their time to lecture families on the "evils" of credit cards. Given the relative paucity of credit use after bankruptcy, most families seem to be using cash or cash-equivalents such as debit cards, checks, or money orders to pay bills and purchase goods and services.

Instead of focusing on the ills of credit, the thrust of financial education programs after bankruptcy should be on helping families engage in financial planning. The number of families who report experiencing financial distress after bankruptcy is alarming,[159] and the data on postbankruptcy privations suggests that even after bankruptcy relief, some families hover on the verge of a serious financial catastrophe—such as eviction or foreclosure.[160] As Deborah Thorne and I have previously pointed out, bankruptcy does not generate or guarantee sufficient income.[161] While credit card bills are not a major problem for most families, many routine monthly expenses such as insurance, utilities, taxes, and doctor or prescription costs do pose serious challenges. These bills do not reflect unnecessary spending and are not truly debts at all; most utilities, insurance companies, and taxing authorities are prepaid. The substantial minority of families that find it difficult to pay their bills refutes the notion that a bankruptcy discharge allows families to simply walk away from further financial trouble. That families largely avoid becoming ensnared in new debts after bankruptcy is good news; that they do not capitalize on a fresh start to move toward economic stability and well-being is bad news.

To avoid another bout of hardship, families need strategies to help them retool their expenses and income to align. Unless they achieve this task, these families remain vulnerable to a binge of future borrowing if they suffer a drop in income or a jump in expenses. Given that the median family who filed bankruptcy was earning about half the national median income, this

[159] Porter & Thorne, *supra* note 10, at 121.
[160] *Id.* at 111.
[161] *Id.* at 104.

admonition to live within one's means may prove challenging, if not impossible. A broader conception of bankruptcy rehabilitation might address this problem by combining a discharge of past debt with other social intervention. For example, if a debtor enters bankruptcy with high medical bills, financial education should inquire whether this is a chronic problem and whether the family has tapped into available resources for free or low-cost treatment. Similarly, financial education could provide resources on job training programs and employment counseling to debtors who continue to be out of work or who are underemployed. These suggestions are a radical change from the one-size-fits-all model of financial education that is currently deployed. Notably, this suggestion is not new. The 1973 Bankruptcy Commission recommended that counseling include helping debtors address "nonfinancial" problems such as illness or marital break-up that often cause financial problems.[162] While empirical data about the current array of financial education programs is needed,[163] the fact that many programs can be completed online or only last an hour or two suggest that they are not aiming to provide holistic financial planning. Instead, they rest on the presumption that families who file bankruptcy need math lessons on the cost of credit or moral finger-wagging not to repeat the mistakes of their past.

The data on postbankruptcy credit behavior suggest that financial education would be better directed by addressing adverse events that precipitate families' financial collapse and to ensuring that families are taking steps to insulate themselves from future economic shocks. To this end, data about families' savings after bankruptcy would be instructive. Purchased insurance and individual savings have their limits; it takes a high income to obtain enough protection to

[162] Report of the Commission on Bankruptcy Law (July 1973) at 91 ("It [counseling] should alert him about sources of assistance in his community for dealing with non financial problems, e.g., illness or marital difficulty, that have had or threaten adverse economic consequences.")

[163] Ntl. Ass'n of Consumer Bankr. Attorneys, *Study: Controversial Bankruptcy Law Reforms Not Working* (Feb. 22, 2006) at http://nacba.com/news/releases/022206.php.Press Release (Feb. 22, 2006) *at* http://nacba.com/news/releases/022206.php.

weather a spouse who develops a permanent, complete disability or a child who requires constant nursing care. However, many less serious events, such as a six month period of unemployment or a newborn who requires a month of neonatal care push families to their financial breaking point. Adequate savings and insurance can shield families from many common job, medical and family problems. We simply do not know the extent to which families are protecting themselves after bankruptcy. While the data show that many families are staying out of debt and avoiding new credit in the first few years after bankruptcy, they do not indicate the extent to which families are capitalizing on a discharge of past indebtedness to *prevent* future debt.

To date, bankruptcy relief has been narrowly tailored. The discharge merely provides the opportunity for a fresh start. It does not offer families any tools for avoiding a financial relapse or any check on their future behavior or that of creditors. The law need not take such a limited view of bankruptcy. The data on postbankruptcy credit suggest that bankruptcy has the potential to be a transformative economic moment. Families exit the system desperate to avoid another round of hardship and unable to file for bankruptcy relief again for several years. A more developed bankruptcy system could tap into the legal and emotional power of a bankruptcy filing to provide the resources that families need to improve their life chances. For example, the prohibition on repeat bankruptcy filings could be structured to give families incentives to avoid credit and begin saving. Another option is to require debtors to file periodic reports with bankruptcy trustees about their post-filing financial situations and to delay discharge until debtors have established some equilibrium in their financial situations. Developing such ideas is beyond the scope of this Article. However, evaluating these suggestions or other proposals to change consumer bankruptcy relief requires knowing how families fare after bankruptcy. The data on postbankruptcy credit provide valuable insights about the potential of bankruptcy to change debtors' financial practices. With a better understanding of the realities of postbankruptcy life, theories about how to enrich the fresh start can be grounded to enhance their potential efficacy.

Some may marshal the data about postbankruptcy borrowing to argue for or against restricting access to credit. I refuse to do so here, instead taking as a given that the credit economy will remain unregulated. The data suggest that most families are moderating their use of credit despite unfettered access to new borrowing opportunities. In light of this, I conclude that these data do not offer a persuasive case for barring or conditioning postbankruptcy credit. While such limitations could take the form of restrictions on creditors rather than debtors, perhaps by prohibiting credit solicitations for a cooling-off period after bankruptcy[164] or by giving debtors a defense of suitability for loans made after bankruptcy without evidence that the debtor is likely to repay,[165] such policies are likely to restrict the availability of credit. Because credit can be a powerful tool for helping families improve their financial prospects,[166] policies to limit access to credit may be as or more harmful than helpful.

However, it is important to view the data herein as a product of our current legal regime, and not an inevitable absolute. The widespread solicitation of families who have just filed bankruptcy is shaped by the law's prohibition on repeat filings. The current eight-year ban insulates lenders from the risk of nonpayment because of a bankruptcy and masks the true creditworthiness of families who have filed bankruptcy. The law inflates credit access, without

---

[164] Selwyn Enzer, Raul de Brigard, & Frederick D. Lazar, *Some Considerations Concerning Bankruptcy Reform* at 90 (March 1973) *in* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Part III (July 1973) (reporting that the only suggestion specifically directed at the issue of postbankruptcy credit was a six-month prohibition on credit and that this was found to be "very undesirable" with problems of "feasibility" and "interference" with debtors' lives raised).

[165] *Cf.* Kathleen C. Engle & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1317-1366 (May 2002) (discussing government imposition of a suitability standard as a possible solution to the problem of predatory lending.)

[166] George J. Wallace, *The Uses of Usury: Low Rate Ceilings Reexamined*, 56 B.U. L. REV. 451 (1976).

taking steps to ensure that that such credit is suitable for recent bankrupts and without consideration of what optimal postbankruptcy credit use should be. Bankruptcy law shapes incentives to lend and to borrow but it has generally failed to do so without a theory of economic rehabilitation or data about postbankruptcy experiences. This Article's data provide a foundation for further research and thinking about bankruptcy's rehabilitative potential that considers postbankruptcy experiences.

V. CONCLUSION

Our understanding of why families fail financially shapes the nature and extent of bankruptcy relief that we believe should be provided. The recent bankruptcy reform debates revealed multiple divergent views of the causes of consumer bankruptcy. Looking at concrete data about the end of the bankruptcy process, rather than trying to unravel the source of hardship, provides a useful alternative approach to determining why families experience overwhelming debts and seek bankruptcy relief. Families are squarely presented with ample borrowing opportunities after bankruptcy, such that their decisions about postbankruptcy credit reflect meaningful financial choices. Most families are cautious in using common forms of postbankruptcy credit, with nearly half avoiding credit cards even years after bankruptcy. Those who do borrow tend to have modest debts, and only a small number of families report difficulty with credit obligations. While such data are not conclusive, they suggest that ideas about debtors as profligates or financial illiterates are probably inapt.

The findings on postbankruptcy borrowing are consistent with a theory of bankruptcy that is triggered by an adverse financial event. In this conception, families became overwhelmed with debt because they used credit as a crutch during a period of high expenses or low income, such as during unemployment, illness, or divorce. Free from most of their unsecured debts by the bankruptcy discharge, families struggle to live within their means and constrain their use of credit. Indeed, the data show that families are willing to endure substantial postbankruptcy privations and face sustained difficulties in paying routine bills without resort to overuse of credit. Such behavior is a testament to the rehabilitative potential of bankruptcy. Families appear to understand that despite heavy solicitations to borrow, careful decisions about postbankruptcy credit improve their chances of turning their fresh start into lasting financial well-being. Confronting the realities of postbankruptcy borrowing provides an opportunity to examine different models of prebankruptcy borrowing. Additional, a rich understanding of postbankruptcy credit enables a thorough evaluation of bankruptcy's rehabilitative potential that considers how credit use intersects with the theory of a fresh start.