

WRONG PROBLEM, WRONG SOLUTION: HOW CONGRESS FAILED THE AMERICAN CONSUMER

INTRODUCTION

An advantage to borrowing money from loan sharks is the certainty involved. You either pay on time or have your thumbs broken. Although society frowns on that method of debt collection, it should embrace the blatancy of the process. If consumers were equally aware of the risks that come with using credit cards,¹ a major problem would be averted. Instead, many consumers make unwise decisions, using their cards to incur more debt than they are able to repay.² In 2005, Congress misdiagnosed the problem facing American consumers: instead of targeting the skyrocketing accumulation of credit card debt, Congress passed the Bankruptcy Abuse Prevention and Consumer Prevention Act (“BAPCPA”),³ a measure targeting consumer bankruptcy abuse. This Comment—which asserts that credit card debt is the problem that requires Congress’s attention—provides a solution to consumer indebtedness: mandatory warning provisions in credit card agreements and statements.⁴

This solution would reduce excessive credit card debt, which has far-reaching and unpredictable effects. First, debt burdens people by increasing

¹ There are two common functions of credit cards. The first is as a “transactional medium,” which means use as a cash substitute, and the second is as credit. Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 83 (2000) [hereinafter Zywicki, *Economics of Credit Cards*]. Within this Comment references to credit card use—especially with regard to the dangers involved—will primarily pertain to the credit function.

² See Creola Johnson, *Maxed Out College Students: A Call to Limit Credit Card Solicitations on College Campuses*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 191, 206–08 (2004–2005) (explaining that students, for example, are likely to incur excessive debt as a result of insufficient knowledge and experience regarding financial responsibility); Symposium, *Socialization of Risk: Bankruptcy Law and Financial Institution*, 77 CORNELL L. REV. 1078, 1108–09 (1992) (explaining that it is neither uncommon nor unpredictable that some people will spend more money on their credit cards than they will be able to repay).

³ BAPCPA of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of title 11 of the United States Code).

⁴ This solution admittedly is only a partial remedy. For an alternative solution, albeit one with its own limitations, see Adam Goldstein, *Why “It Pays” To “Leave Home Without It”: Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827 (2006).

economic instability and limiting financial flexibility.⁵ Heavily-indebted consumers are unlikely to be active and successful participants in our economy.⁶ People who accumulate credit card debt often find that the debt has left them with an inadequate credit rating to buy a home or car.⁷ Second, debt causes health issues and emotional problems.⁸ The health issues that accompany excessive indebtedness are exacerbated when the debt at issue is credit card debt.⁹ The emotional strain that accompanies excessive debt is detrimental to marital and familial relations.¹⁰ Divorce is a common result,¹¹ and, in the worst cases, excessive debt can lead to tragedy.¹²

Notwithstanding these consequences, credit card debt is pervasive in this country, where millions of consumers struggle to free themselves of it.¹³ American consumers have amassed roughly \$800 billion in credit card debt.¹⁴ By early 2006, the average household debt in the United States was \$9300.¹⁵

The impetus for this mass incurrence of debt is linked to the minimal information available to consumers. Unlike other potentially harmful products, there is no explicit notice to warn consumers that substantial risk exists with the use of credit cards. Consequently, consumers use credit cards with insufficient information to properly weigh the costs and benefits of the activity. This practice is inconsistent with the general practice of requiring companies to warn consumers of the risks of products, especially for those products with less obvious risks. The lack of mandated warning provisions has precipitated the

⁵ See *infra* note 32 and accompanying text.

⁶ See *infra* Part I.

⁷ See Johnson, *supra* note 2, at 216.

⁸ CHRISTOPHER G. DAVIS & JANET MANTLER, THE CONSEQUENCES OF FINANCIAL STRESS FOR INDIVIDUALS, FAMILIES, AND SOCIETY 9–11 (2004), available at http://www.doylegroup.ca/personal/reports/financial_distress_DSI.pdf.

⁹ See *infra* note 46 and accompanying text.

¹⁰ See DAVIS & MANTLER, *supra* note 8, at 14–17.

¹¹ *Id.* at 14.

¹² See Alan Gathright, *Memorial Services Set for Slain Wife, Daughters*, S.F. CHRON., Aug. 24, 2005, at B7 (describing the actions of a depressed, frantic, deeply-indebted man who murdered his wife and her daughters before committing suicide).

¹³ See *infra* Part III.

¹⁴ ABC News, *Fast Facts About Credit Card Debt*, Jan. 2, 2006, <http://www.demos.org/pubs/Fast%20Facts%20about%20CC%20Debt%20ABC%20News%201.2.06.pdf> [hereinafter *Fast Facts*]. This figure includes the debt charged on “store and gas credit cards.” *Id.*

¹⁵ *Id.* The statistic only considers those households that have at least one credit card. *Id.* (“Eighty percent of American households have at least one credit card.”).

current reality of credit cards; they are no longer “constructive financial tool[s], instead they often] result in a [user’s] downward financial spiral.”¹⁶

In conjunction with consumers’ lack of information, psychological and sociological forces contribute to the increase in credit card debt. This is why otherwise rational (albeit uninformed) people voluntarily use credit cards and incur excessive credit card debt.¹⁷ Unfortunately for the modern American consumer, the credit card industry has learned to manipulate these psychological and sociological forces for its benefit.¹⁸ One psychological characteristic that is targeted by the credit card industry is consumer overconfidence.¹⁹ Behavioral economists cite overconfidence—a person’s belief that he is less likely than the average person to realize a given risk—as the reason that people ignore the risks inherent in their actions.²⁰ The overconfidence is exacerbated by people’s tendency to “overestimate their ability to avoid negative events.”²¹ One sociological force that the credit card industry manipulates for its advantage is the host of societal pressures which consumers must resist. Consumers—especially in this country—are driven to buy goods out of their desire to impress their friends and neighbors instead of by necessity.²² The pressure to live beyond one’s means is a chief cause of the mass accumulation of credit card debt in the United States.²³ The credit card industry²⁴ feeds this need to obtain material goods by offering extra incentives to do so.²⁵ Finally, in addition to taking advantage of the psychological and

¹⁶ DEMOS AND THE CTR. FOR RESPONSIBLE LENDING, *THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA*, 19 (Oct. 12, 2005), available at http://www.demos.org/pubs/PSN_low.pdf [hereinafter *THE PLASTIC SAFETY NET*].

¹⁷ See *infra* Part I.

¹⁸ See Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 *THEORETICAL INQUIRIES J.* 432, 432 (2006), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1132&context=til>.

¹⁹ *Id.* at 433–34, 436.

²⁰ Jason J. Kilborn, *Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*, 22 *EMORY BANKR. DEV. J.* 13, 18–19 (2005).

²¹ *Id.* at 18.

²² *Too Much Debt Can Make You Sick*, *BCD NEWS AND COMMENT*, May 3, 2000, at 1.

²³ See *id.*; Larry Bates, *Excepting Credit Card Debt from Discharge in Bankruptcy: Why Fraud Can’t Mean What the Courts Want it to Mean*, 78 *N.D. L. REV.* 23, 23–25 (2002).

²⁴ For the purposes of this Comment, the following terms are synonymous: “credit card industry,” “credit card issuers,” and “credit card lenders.”

²⁵ Ronald J. Mann, *Global Credit Card Use and Debt: Policy Issues and Regulatory Responses* 52 (Univ. of Tex. Sch. of Law, Law and Econ. Working Paper, Working Paper No. 49, 2005), available at <http://www.utexas.edu/law/academics/centers/clbe/assets/CardsPolicySSRN.pdf>.

sociological forces, credit card issuers systematically target consumers who are unlikely to pay off their balance on a monthly basis.²⁶

In sum, there are many smart, rational people assuming more credit card debt than they can repay. Many do so despite confronting no emergency.²⁷ People are simply unable to appreciate the serious risks that they assume with each credit card purchase.²⁸ The lack of information combined with an aggressive, profit-driven credit card industry has launched Americans into an age of overwhelming credit card debt.

This Comment advocates a solution that will warn consumers of the risks of credit card use. Raising consumer awareness regarding the dangers of credit card use will have a significant impact on preventing future indebtedness. When people are more aware of a particular risk, they tend to perceive the risk to be more serious than previously considered.²⁹ Thus, a viable method for reducing indebtedness is a federally mandated warning provision. The provision would warn consumers of the risks of credit card use and would appear in all credit card agreements and statements.³⁰ This remedy would be inexpensive, easy to implement, and effective. A warning provision would expose consumers to the risks of credit card spending and would decrease the incurrence of debt.

Part I of this Comment examines the problem of credit card debt, including the financial burden, the health risks, and the effects on families. Part II analyzes the economic, behavioral, and societal forces at play in the accumulation of credit card debt. Part III examines the relationship between credit card debt and consumer bankruptcies and briefly critiques Congress's decision to enact the BAPCPA. Finally, in Part IV, the Comment concludes with outlining the federally mandated warning label, explaining why it would be both effective and inexpensive to implement.

²⁶ Bates, *supra* note 23, at 25; Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, N.Y. TIMES, Dec. 11, 2005, National Desk, at 1.

²⁷ Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers, Charging Their Way into Bankruptcy*, AM. BANKR. INST. J., Oct. 2000, 22. *But see A Bad Bankruptcy Bill*, S.F. CHRONICLE, Mar. 15, 2001, at A26.

²⁸ *See infra* Part II.

²⁹ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 152 (HarperCollins Publishers Inc. 2005) (“[W]hen hazard is low and outrage is high, [people tend to] overreact.”). This principle may be less useful with regard to those who accrue debt primarily due to overconfidence. *See generally* Kilborn, *supra* note 20.

³⁰ In addition, there could be a sticker on all new cards before they are originally authorized by the user.

I. THE PROBLEM OF (CREDIT CARD) DEBT

Elizabeth Warren, bankruptcy professor at Harvard Law School, stated eloquently that even though

our neighbors seem to be doing fine and the families on television never worry about money, it is hard to grasp the breadth or depth of financial distress sweeping through ordinary suburbs, small towns, and nice city neighborhoods [A] growing number of typical Americans[, however,] . . . are in complete financial ruin.³¹

Perhaps the most direct and predictable effect of debt is on the financial stability and flexibility of the consumers.³² Debt can lead to an increase in the credit card interest rates that consumers are paying, for example.³³ In extreme scenarios, credit card debt can cause “financial collapse.”³⁴ Credit card debt sends many into bankruptcy, which brings problems of its own such as stigma and tarnished credit.³⁵

Less predictably, debt may cause problems beyond the financial realm. The National Institute of Health “identified debt as a *leading* cause of marital and familial discord.”³⁶ A study conducted several years ago “found that financial stress was correlated negatively with perception of one’s . . . marriage satisfaction, and family functioning.”³⁷ Simply put, debt and financial stress make couples more likely to fight and break up.³⁸ Financial strain constitutes a major cause of marital problems and divorce.³⁹ The negative effects of debt carry over to the children in the household as well. Debt can cause people to

³¹ Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 401 (2004) [hereinafter Warren, *Growing Threat to Middle Class Families*].

³² *Money Matters: Why is it so Critical to Avoid Debt?*, FSS NEWSLETTER (Tuscarawas Metro. Hous. Auth., New Philadelphia, OH), July 2003, <http://tuscarawasmha.org/fssnews/july2003/page6.html> (“Debt limits your options—and heavy loads of debt eliminate your options altogether.”).

³³ *Your Debt May Raise Your Credit Card Rates; Outstanding Debt Could Raise the Rate On Your Credit Cards*, ABC NEWS, June 2, 2006, <http://abcnews.go.com/WNT/FinancialSecurity/story?id=129664&page=1>.

³⁴ See Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1504 (2004) (citing Warren, *Growing Threat to Middle Class Families*, *supra* note 31, at 412) [hereinafter Zywicki, *Crisis*].

³⁵ This stigma arguably has diminished. *Consumers are Less Reluctant to File For Bankruptcy, Researchers Say*, BCD NEWS AND COMMENT, Sept. 12, 2001, at 12 [hereinafter *Consumers Reluctant*]. But see Janet Kidd, *Money Problems Enough to Make You Sick*, CHI. TRIB., Feb. 20, 2005, § 5, at 6.

³⁶ Jeffrey Steele, *Building a Better Life; Getting Rid of Credit Card Debt Has Many Pluses*, CHI. TRIB., Oct. 2, 2001, § 3, at 5 (emphasis added).

³⁷ DAVIS & MANTLER, *supra* note 8, at 10.

³⁸ *Id.*

³⁹ *Id.* at 8, 14–15.

neglect their parental duties.⁴⁰ This in turn can lead to devastating results for the children in the households mired in debt: “Children of financially stressed parents tend to be more prone to mental health problems, depression, loneliness, and are more emotionally sensitive[,] . . . [t]hey are less sociable and more distrustful, and are more likely to feel excluded by their peers.”⁴¹

People tend to experience emotional and physical problems as a result of carrying debt.⁴² For example, people who are under financial strain commonly suffer from depression, anxiety, and feel like they lack control.⁴³ Financial stress causes health to deteriorate at a rate faster than for people who are not under such stress.⁴⁴ Debt has also been identified as a leading cause of drug and alcohol abuse in this country.⁴⁵

As if these problems are not enough, studies show that credit card debt is more detrimental to a person’s health than other types of debt.⁴⁶ A recent survey found that “[m]ore than 75% of [those surveyed] with credit card debt have experienced some type of physical symptom they attribute to the financial strain.”⁴⁷ Some of the most common afflictions attributed to the stress of credit card debt include difficulty concentrating, nausea, and headaches.⁴⁸ Over fifty percent suffered from insomnia.⁴⁹

One group of people that suffers especially from credit card debt is college students. As of 2000, seventy-eight percent of college students used credit cards and carried an average debt of \$2748.⁵⁰ One out of ten college students has credit card debt exceeding \$7000.⁵¹ The consequences have been severe. At the University of Indiana, credit card debt has surpassed academic failure as

⁴⁰ *Id.* at 16–17; see Kidd, *supra* note 35, at 6.

⁴¹ See DAVIS & MANTLER, *supra* note 8, at 18.

⁴² *Id.* at 9–11.

⁴³ *Id.*

⁴⁴ *Id.* The study confirmed that the financial strain caused these symptoms, as opposed to a finding that the depression caused by the strain, caused the deteriorating health conditions. *Id.*

⁴⁵ Steele, *supra* note 36.

⁴⁶ *Too Much Debt Can Make You Sick*, *supra* note 22. Several possible reasons for this are listed, including the pressure of matching lifestyles with others and the aggressive collection tactics used by credit card issuers. *Id.*

⁴⁷ Kidd, *supra* note 35, at 6 (citing a survey performed by Impulse Research Corp. of Los Angeles in November 2004, and commissioned by Family Credit Counseling Service, of Rockford).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ DARA DUGUAY, *DON’T SPEND YOUR RAISE 125* (McGraw-Hill 2003).

⁵¹ *Id.*

a leading cause of student dropouts.⁵² Many students have had “to cut back to part-time status or drop out of school altogether to make enough money to pay off their balances.”⁵³ The negative effects persist even after graduation, as many employers review credit reports with the idea of not hiring financially irresponsible candidates.⁵⁴ After graduation, they have trouble obtaining credit, and when they do, it is often not on favorable terms.⁵⁵ In addition, indebted college students often “pay excessive amounts to obtain home loans, insurance coverage, and utility services, and resort to filing for bankruptcy to get debt relief.”⁵⁶

Unfortunately, the detrimental effects to college students’ academic and financial prospects are just the beginning of the problem. College students faced with substantial credit card debt often “suffer emotional problems [and] engage in destructive behavior.”⁵⁷ A 2002 survey conducted at Ohio State University revealed that college students tend to consider drastic actions when faced with credit card debt.⁵⁸ Of the students who responded, 27.2% said that they would consider stealing; 33.9% indicated an inclination toward increasing alcohol or drug consumption; and, incredibly, 21.4% reported that they would consider committing suicide in response to significant credit card debt.⁵⁹ Tragically, there have been several college students, mired in credit card debt, who have committed suicide already.⁶⁰

II. WHY CONSUMERS BECOME INDEBTED

Millions of Americans have a significant amount of credit card debt.⁶¹ Studies show that most consumer credit card debt does not result from medical

⁵² *Groups Target Mounting Student Credit Card Debt*, CONSUMER BANKR. NEWS, July 26, 2001, at 8.

⁵³ DUGUAY, *supra* note 50, at 125.

⁵⁴ IOWA DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., *Credit Cards on Student Incomes: Proceed With Caution—and Shop With Care*, CONSUMER ADVISORY BULLETIN (Fall 2004), available at http://www.iowaattorneygeneral.org/consumer_advisories/credit_finance/shop_with_care.html.

⁵⁵ Johnson, *supra* note 2, at 206–07.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 208–09.

⁵⁹ *Id.* at 209.

⁶⁰ Edward Wyatt, *College and Money; Plastic: Handle With Care*, N.Y. TIMES, Jan. 13, 2002, § 4A, at 18. Such tragedies occur in other countries as well. Editorial, *Fatal Plastic Money*, KOREA HERALD, Apr. 2, 2002. In Japan, there were “a record number of suicides attributed to economic causes such as job loss and heavy debt.” Rana Foroohar & Tony Emerson, *A Heavier Burden*, NEWSWEEK, Aug. 23, 2004, at 36.

⁶¹ See David W. Moore, *Average American Owes \$2,900 in Credit Card Debt*, GALLUP POLL, Apr. 16, 2004, available at <http://poll.gallup.com/content/default.aspx?ci=11377&pg=1>.

emergencies, living expenses, or any other necessary expenses.⁶² Since indebtedness carries with it so many negative effects, one has to wonder why so many people become voluntarily indebted. One possibility is that the incurrence is not voluntary; consumers may suffer from compulsion which forces them to spend until they are heavily in debt.⁶³ There is a rising faction of organizations and writers that label credit card spending and debt incurrence an addiction or compulsion.⁶⁴ Indeed, credit cards' addictive nature has been analogized to tobacco⁶⁵ and crack cocaine.⁶⁶ Debtors Anonymous, a support group for debtors, refers to "recovery," analogizing credit cards to alcohol.⁶⁷

While compulsion may explain some of the debt accumulation, a second theory provides a more complete explanation. Debtors use credit cards without realizing that (a) the use will likely lead to indebtedness; and (b) indebtedness can cause adverse effects pertaining to financial status, family life, and mental and physical health. This theory is supported by the fact that there is currently no mechanism in place to inform consumers about the risks of credit card use. The credit card industry has not tried to inform consumers in this way. Likewise, there are no significant government actions seeking to decrease consumer ignorance of the risks of credit card use and indebtedness.⁶⁸

Thus, a lack of reliable information almost certainly contributes to the phenomenon of American consumers' indebtedness. Cognitive processes and social forces contribute to this phenomenon as well.⁶⁹ A cognitive process that contributes to unwise spending is risk analysis.⁷⁰ People are generally unable to reliably analyze risk.⁷¹ This leads to a tendency to miscalculate the amount

⁶² Flynn & Bermant, *supra* note 27.

⁶³ Support groups have surfaced with the goal of supporting debtors as they struggle to cope with their spending addictions. *See, e.g.*, Debtors Anonymous, www.debtorsanonymous.org (last visited Feb. 14, 2007); Overcomers Outreach, <http://www.overcomersoutreach.org> (providing support for problems stemming from "addiction to spending & debt") (last visited Feb. 14, 2007).

⁶⁴ *See, e.g., id.*; Joan Caplin, *Confessions of a Compulsive Shopper*, MONEY, Aug. 2004, at 104.

⁶⁵ *See Credit Addiction Should Be Fought Like Tobacco*, CONSUMER BANKR. NEWS, July 31, 1997, at 8.

⁶⁶ Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 520 (2005). The statement was made by Rep. Jackson Lee. *Id.* at 520 n.199.

⁶⁷ Efrén L. Cruz, *On the Money; Consumer Debt: the New Slave Master*, BUSINESS WORLD, July 23, 2001, at 21. The founders of Debtors Anonymous graduated from Alcoholics Anonymous ("AA"), from which they borrowed the name. Debtors Anonymous uses a set of questions, akin to those used in AA meetings, to aid potential compulsives in determining whether they are compulsive debtors. *See id.*

⁶⁸ *See infra* notes 198–202 and accompanying text.

⁶⁹ *See Harris & Albin, supra* note 18, at 433–42.

⁷⁰ Kilborn, *supra* note 20, at 17.

⁷¹ *Id.* at 17–19.

of money they should prudently spend.⁷² In addition to this cognitive defect, strong societal pressures affect spending decisions as well.⁷³ As society has become more materialistic, many people feel pressure to spend beyond their means in order to portray wealth and comfort to their friends and neighbors.⁷⁴

While these psychological and sociological forces may be developed and understood by academics, another demographic is using the information to its advantage. These forces grant credit card issuers an opportunity to manipulate consumers⁷⁵ and “an opportunity for exploitation that no profit-maximizing manufacturer [could] ignore.”⁷⁶ Credit card issuers have been able to manipulate and persuade consumers—using their knowledge of these forces—through advertising and other marketing techniques.⁷⁷ This is true to such an extent that some attribute the rise in consumer bankruptcies over the past few decades entirely to the aggressive techniques of the credit card industry.⁷⁸

In 2005, roughly 5.3 billion credit card solicitations were mailed.⁷⁹ This number is about double the amount of solicitations that were mailed out ten years earlier.⁸⁰ Over the same span of time, credit card debt has rapidly increased,⁸¹ even during times of economic prosperity in the country.⁸² Essentially, the credit card issuers have “waged an unrelenting effort to expand the number of consumers using credit cards.”⁸³ Credit card issuers actively

⁷² *Id.* at 22.

⁷³ *Infra* Part II.B.

⁷⁴ *Id.*

⁷⁵ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 722 (1999).

⁷⁶ *Id.*

⁷⁷ See Harris & Albin, *supra* note 18, at 442–47.

⁷⁸ *Id.* at 449 (citing David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311 (1999); Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L. J. 249 (1997) [hereinafter Ausubel, *Credit Card Defaults*]).

⁷⁹ Carolyn Bigda & Amanda Gengler, *What Should be in Your Wallet; These Seven Credit Cards Beat All Contenders in Their Class. One of them Is Just Right for You*, MONEY, Dec. 5, 2005, at 133; *Fast Facts*, *supra* note 14.

⁸⁰ David F. Snow, *The Dischargeability of Credit Card Debt: New Developments and the Need for a New Direction*, 72 AM. BANKR. L.J. 63, 66 (1998); Stephen Brobeck, Letter to the Editor, *Skyrocketing Bankruptcy Is Propelled By Easy Credit*, WASH. TIMES, Oct. 1, 1997, at A16.

⁸¹ Margaret Howard, *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, 75 AM. BANKR. L.J. 63, 63 n.3 (2001) (consumer credit card doubled over a span of four years from 1993–1997).

⁸² See *How Do We Reduce Consumer Bankruptcy Filings?*, CONSUMER BANKR. NEWS, May 18, 2000, at 6.

⁸³ Snow, *supra* note 80, at 66.

seek new customers who are unlikely to pay off their monthly balances.⁸⁴ In fact, “the pricing strategies of credit card companies make it more likely that a family will endure persistent and burdensome debt, with little chance of paying or keeping down their debt.”⁸⁵ The increased availability of credit, and the ease with which it is used, has caused the incurrence of more credit card debt.⁸⁶

Mailed solicitations are not the only symbol of the aggressive marketing of credit cards in recent years. Credit card companies have been especially vigilant in seeking new customers on college campuses.⁸⁷ Strategies include advertising and giving free gifts on campuses.⁸⁸ There are several reasons for the focus on soliciting college students. First, college students are an untapped market. The majority of them do not have credit cards before arriving at school.⁸⁹ Also, because there is a general loyalty to particular brands of cards, the issuers prioritize attracting customers who do not yet own credit cards.⁹⁰ Finally, there is the belief that college students will likely find well-paying jobs after graduation and eventually spend a lot of money using their credit cards.⁹¹

Another reason for the focus, however, is more central to the credit card issuers’ profit motives. College students tend to have little or no income.⁹² Thus, they are prone to incurring some debt while having a safety net in their parents, who typically act to prevent defaults or bankruptcy filings. Furthermore, college students tend to make worse decisions regarding their finances.⁹³ Specifically, they tend to assume debt that they will be unable to repay.⁹⁴

⁸⁴ See, e.g., *House Committee Looks at Bankruptcy’s Role in Consumer Credit Crunch*, CONSUMER BANKR. NEWS, Oct. 10, 1996, at 5; Bigda & Gengler, *supra* note 79; Snow, *supra* note 80, at 66; Brobeck, *supra* note 80.

⁸⁵ THE PLASTIC SAFETY NET, *supra* note 16, at 21.

⁸⁶ See Brobeck, *supra* note 80; Steele, *supra* note 36.

⁸⁷ Johnson, *supra* note 2, at 201. In addition, “Some credit card representatives have also been accused of aggressive, unsavory, and deceptive tactics to get students to complete applications.” *Id.* at 203.

⁸⁸ *Id.* at 277.

⁸⁹ *Id.* at 200.

⁹⁰ *Id.*

⁹¹ *Id.* at 201.

⁹² See *id.* at 205.

⁹³ *Id.* at 200.

⁹⁴ *Id.*

Credit card issuers systematically seek out people who are the most likely to incur debt which they will not immediately repay.⁹⁵ In addition to students, they solicit people who are unemployed as well as those who have recently filed for bankruptcy.⁹⁶ Although it may seem counterintuitive, these customers are the most profitable for credit card issuers.⁹⁷ With the average interest rates for credit card purchases at about eighteen percent, credit card issuers' top priority is to find customers who will carry a monthly balance.⁹⁸ In recent years, companies that concentrate in "lending to borrowers with tarnished credit histories have been among the fastest-growing credit issuers."⁹⁹ Finally, "[t]hrough marketing techniques and especially advertising, credit lenders take advantage of consumers using persuasion and manipulation."¹⁰⁰ The credit card industry has calculated the income it generates from high interest rates and late fees and realized that the income justifies the risk of nonpayment.¹⁰¹ In fact, credit card issuers abhor customers who pay off their balance each month and thus pay no interest.¹⁰² Issuers call such customers "freeloaders"¹⁰³ and "deadbeats."¹⁰⁴

Despite the increasing number of defaults and consumer bankruptcies, the credit card issuers are not facing any significant downside.¹⁰⁵ The issuers reap

⁹⁵ See Bates, *supra* note 23, at 25; Craig A. Bruens, Note, *Melting the Plastic Theories: Advocating the Common Law of Fraud in Credit Card Non-dischargeability Actions under 11 U.S.C. § 523(a)(2)(A)*, 50 VAND. L. REV. 1257, 1258 n.1 (1997); Egan, *supra* note 26.

⁹⁶ Bates, *supra* note 23, at 25; Egan, *supra* note 26.

⁹⁷ See Bates, *supra* note 23, at 25 (explaining that these people have a "propensity to charge a great deal, to carry high balances on their accounts, and to make only the minimum monthly payments required on each account").

⁹⁸ Bruens, *supra* note 95, at 1258–59.

⁹⁹ Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 227 (1999) (quoting Brady C. William et al., National Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years* 84 (Oct. 20, 1997), <http://162.140.225.1/report/05acons.pdf>).

¹⁰⁰ Harris & Albin, *supra* note 18, at 443. Manipulation is defined as

an act that . . . lead[s] a consumer to borrow, while trying to persuade her to reach a decision that is not based on her genuine (non-biased) preferences, through exploitation of one or more of the following: biases and illusions, heuristics, inability to perform complex calculations, lack of relevant information, or a state of mind in which not enough cognitive resources are allocated to the decision.

Id. at 16–17.

¹⁰¹ Egan, *supra* note 26.

¹⁰² *Infra* notes 103–04.

¹⁰³ Bruens, *supra* note 95, at 1258 n.1.

¹⁰⁴ Egan, *supra* note 26.

¹⁰⁵ *FDIC Advises Credit Card Lenders to Monitor Borrowers' Creditworthiness*, CONSUMER BANKR. NEWS, Aug. 29, 1996, at 7.

greater profits with each new customer and with each new dollar of debt that borrowers incur. In fact, there is a strong correlation between credit card industry profits and defaults by credit card holders.¹⁰⁶ This is not to say, however, that the industry is ambivalent to the rate of rising bankruptcies. Indeed, quite the opposite is true. The issuers see bankruptcies as directly affecting their bottom line.¹⁰⁷ Over the past ten years, credit card issuers have spent more than one hundred million dollars lobbying Congress to pass the BAPCPA.¹⁰⁸

A. *Optimism-Bias and Overconfidence*

The mass accumulation of debt in this country may be attributable to several inherent characteristics that cause people to be poor risk assessors.¹⁰⁹ Studies show that most people suffer from some of the same characteristics: overconfidence,¹¹⁰ inability to weigh risk accurately,¹¹¹ and the succumbing to “bounded willpower.”¹¹² These characteristics may cause the failure to adequately evaluate the costs and benefits of spending,¹¹³ leading people to “severely underestimat[e] future costs [while] overvaluing present benefits.”¹¹⁴

These characteristics are helpful in explaining the phenomenon of credit card debt accumulation.¹¹⁵ The “underestimation hypothesis” contends that “consumers systematically underestimate the extent of their . . . credit card borrowing.”¹¹⁶ The result is that people make “suboptimal decisions regarding the choice and usage of credit cards.”¹¹⁷ These characteristics help explain why consumers so frequently incur debt for which their future income will be insufficient to repay.¹¹⁸ College students, as a group, may be especially

¹⁰⁶ Ausubel, *Credit Card Defaults*, *supra* note 78, at 257.

¹⁰⁷ Elizabeth Warren, Address, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 7 (2002).

¹⁰⁸ Egan, *supra* note 26.

¹⁰⁹ LEVITT & DUBNER, *supra* note 29, at 151.

¹¹⁰ See Hanson & Kysar, *supra* note 75, at 654–62.

¹¹¹ Kilborn, *supra* note 20, at 18.

¹¹² See, e.g., Hanson & Kysar, *supra* note 75, at 678, 679 & n.215, 280.

¹¹³ *Id.* at 678–80.

¹¹⁴ Kilborn, *supra* note 20, at 18.

¹¹⁵ See Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50 (1991), reprinted in ADVANCES IN BEHAVIORAL FINANCE 527 (Richard H. Thaler ed., Russell Sage Found. 1993).

¹¹⁶ Ausubel, *Credit Card Defaults*, *supra* note 78, at 261.

¹¹⁷ *Id.*

¹¹⁸ Kilborn, *supra* note 20, at 18. Because consumers’ overconfidence negatively affects spending decisions, it is possible that even if informed of the risks of credit card use, people would continue to make

affected by these characteristics.¹¹⁹ They are more likely than the general population to focus on the short-term effects of their decisions.¹²⁰ This makes them more likely to make credit card purchases for items that their income will not be able to cover.¹²¹

The credit card industry “actively persuade[s] and manipulate[s] over-optimistic” consumers to incur more debt than people originally intended to accumulate.¹²² Indeed, credit card lenders “target low-income consumers into increasing their debt-to-income ratio.”¹²³ This targeting, while profitable for lenders, often leads to defaults for consumers.¹²⁴

B. *Social Pressures*

Social influence also has a major impact on consumers’ spending decisions.¹²⁵ In fact, the effect of social pressure may work in congruence with behavioral factors.¹²⁶ Americans tend to judge one another and themselves based on their wealth. With the availability of credit cards, however, people no longer have to make a lot of money to impress the people around them. Americans now spend \$1.10 for every \$1 of their income,¹²⁷ ostensibly in an effort to be perceived as more successful than their paycheck shows.¹²⁸ The old axiom that people should save for a rainy day has been discarded in favor of the desire to impress with a huge house and a shiny, new car.

poor spending decisions. This may be especially true because credit cards are a product with risks that people generally feel that they can control. Harris & Albin, *supra* note 18, at 436; see Citicorp Credit Servs., Inc. v. Hinman (*In re Hinman*), 120 B.R. 1018, 1023 (Bankr. D.N.D. 1990) (explaining that credit card defaults should be attributed to people who exhibit “unbridled and irresponsible use of credit”).

¹¹⁹ Harris & Albin, *supra* note 18, at 436; see also Johnson, *supra* note 2, at 225–30.

¹²⁰ Johnson, *supra* note 2, at 207.

¹²¹ *Id.*

¹²² Harris & Albin, *supra* note 18, at 449.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 439 (“[Social] influence has many forms; its effect can differ from one person to another, and it may change in different situations and circumstances. Its consequences are not as robust, systematic and predictable as the consequences of biases and heuristics.”).

¹²⁶ *Id.* (“Consumers of credit may respond automatically, emotionally, or mindlessly. But even in situations where they operate cognitive thinking in full, when they act within the bounded rationality paradigm, and consider the probability and effect of negative life events, cognitive biases, such as the optimism bias and illusion of control, may lead them to irrationally accepting the credit offered.”).

¹²⁷ House Committee Looks at Bankruptcy’s Role in Consumer Credit Crunch, *supra* note 84.

¹²⁸ See *Too Much Debt Can Make You Sick*, *supra* note 22.

This cause of debt may be especially potent when the economy takes a downturn.¹²⁹ When the economy slows, consumers are unwilling to curtail their spending.¹³⁰ Credit cards, due to their “ease and accessibility,” are the perfect crutch for those unable to earn enough to placate their material desires.¹³¹ People justify their indulgent expenditures by pointing to the stock market which is “sure to rebound” or their 401(k)s, even though they will not be accessible for years.¹³²

Consumers, ever drawn to the chance of improving their material status, spend more and more on their credit cards in order to achieve that standing. They are even more likely to increase their spending beyond reasonable limits when they feel that they are getting a bargain on that for which they are shopping.¹³³ Credit card issuers play into this by offering rewards for spending.¹³⁴ Buttressed by the idea that a free airplane ticket or cash-back reward is within reach,¹³⁵ consumers spend more,¹³⁶ rationally believing that they are getting more bang for their buck.¹³⁷ Of course, when they incur debt that they will be unable to repay at the end of the month as a result, they end up spending more on their purchases than they originally intended. This constant struggle to obtain material status, combined with the behavioral and psychological issues at play, has led consumers into serious debt.

The credit card industry is understandably driven by profit motives. The industry’s domination of information and ability to manipulate consumers, however, makes for a dangerous situation. Currently uninformed consumers, who are further driven by cognitive bias and social pressure to spend, stand no chance against the predatory lenders. It is not surprising then that the credit card issuers have taken advantage and that consumers have accumulated immense debt as a result.

¹²⁹ See *House Committee Looks at Bankruptcy’s Role in Consumer Credit Crunch*, *supra* note 84. This may be compounded by the fact that when the economy slows, people are more prone to defaulting on their credit cards, sending them further into debt and one step closer to bankruptcy. Ausubel, *Credit Card Defaults*, *supra* note 78, at 256.

¹³⁰ See *House Committee Looks at Bankruptcy’s Role in Consumer Credit Crunch*, *supra* note 84.

¹³¹ *Id.*

¹³² See Bates, *supra* note 23, at 23–25.

¹³³ Mann, *supra* note 24, at 52.

¹³⁴ *Id.*

¹³⁵ Zywicki, *Economics of Credit Cards*, *supra* note 1, at 91; Mann, *supra* note 25, at 52.

¹³⁶ Steele, *supra* note 36.

¹³⁷ Mann, *supra* note 25, at 58.

III. CREDIT CARD DEBT AND CONSUMER BANKRUPTCIES

Credit card debt has skyrocketed in the United States. There are more than a billion credit cards in use¹³⁸ and nearly every adult has at least one.¹³⁹ In fact, people who carry at least one credit card carry an average of seven.¹⁴⁰ There are more credit cards in use in the United States than in the rest of the countries in the world combined.¹⁴¹ What's more, most Americans using credit cards carry some amount of debt on their cards.¹⁴² According to a Gallup Poll conducted in 2004, "The average outstanding balance—the amount that credit card owners say they *will not pay off this month*—is \$3,815."¹⁴³ In 2001, the Federal Reserve calculated that revolving consumer credit—which includes "credit cards, check-accessed revolving lines and checking account overdraft balances"—equaled nearly \$800 billion.¹⁴⁴ Meanwhile, consumer bankruptcies have increased by 500% over the last twenty-five years.¹⁴⁵ Consumer bankruptcies have continued to increase despite a strong national economy and a low unemployment rate.¹⁴⁶

The relationship between the rise in consumer bankruptcies and the increase in consumer credit card debt has been the subject of significant debate.¹⁴⁷ While a strong contingent of experts contend that the rise in credit card debt is a cause of the increased filing rate in consumer bankruptcies,¹⁴⁸ Congress was not convinced. Congress passed the legislation, despite the "proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law . . . and many professional associations filled

¹³⁸ Howard, *supra* note 81.

¹³⁹ See Richard H. Gibson, *Credit Card Dischargeability: Two Cheers for the Common Law and Some Modest Proposals for Legislative Reform*, 74 AM. BANKR. L.J. 129, 129 (2000).

¹⁴⁰ *Fast Facts*, *supra* note 14. Four out of five American households have at least one credit card. *Id.*

¹⁴¹ Niall McKay, *Paying With Plastic: How it Works in the Rest of the World*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/world.html> (last visited Jan. 25, 2007).

¹⁴² Bruens, *supra* note 95, at 1258–59.

¹⁴³ Moore, *supra* note 61 (emphasis added).

¹⁴⁴ Steele, *supra* note 36; *Fast Facts*, *supra* note 14 (citing www.cardweb.com and the Federal Reserve).

¹⁴⁵ *Shock and Owe Don't Explain Filings Professor Says Increase in Filings Is a Matter of Debtor Choice*, CONSUMER BANKR. NEWS, Sept. 30, 2004, at 1 [hereinafter *Shock and Owe*].

¹⁴⁶ Ausubel, *Credit Card Defaults*, *supra* note 78, at 249. While the fact that the number of bankruptcies has risen during times of prosperity may be surprising, consumer debt tends to increase in such scenarios. *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 4 (1997).

¹⁴⁷ See Jones & Zywicki, *supra* note 99, at 180.

¹⁴⁸ *Infra* note 156 and accompanying text.

with the best of the bankruptcy lawyers in the country [calling attention to] the perceived flaws in the Act.”¹⁴⁹

The fact that Congress came out on the wrong side of the debate is not surprising considering the amount of money and lobbying that went into the credit card industry’s effort to remain unrestrained in their profit-seeking venture.¹⁵⁰ The positive message that Congress did send, however, is that it realizes there is a problem and is willing to act. Hence, the goal now must be to raise awareness of the risks involved in credit card use.

Central to the BAPCPA’s purpose and effect was its implementation of means testing.¹⁵¹ Means testing constitutes an attempt to screen debtors filing for chapter 7 bankruptcy by ensuring that they are incapable of paying off their debt.¹⁵² Those who “fail” the means test would have their chapter 7 petitions dismissed unless they agreed to a conversion to chapter 13.¹⁵³ Advocates of means testing assert that it is the best method for decreasing the number of preventable bankruptcies in this country.¹⁵⁴

To properly understand Congress’s motivation for enacting BAPCPA, it is necessary to consider the opposing argument that the lenient Bankruptcy Code is the cause of the rise in consumer bankruptcies and therefore, by extension, the rise in credit card debt.¹⁵⁵ Before launching into that line of reasoning

¹⁴⁹ *In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005).

¹⁵⁰ Egan, *supra* note 26.

¹⁵¹ 11 U.S.C.A. § 707 (West 2005); David W. Allard, *Means Testing, Dismissal and Conversion Under the New Law*, AM. BANKR. INST. J., Jul–Aug. 2005, 8 (2005); Ann Morales Olazabal, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 318 (2002–2003); Katherine Porter, *Going Broke The Hard Way: The Economics Of Rural Failure*, 2005 WIS. L. REV. 969, 1021 (2005).

¹⁵² Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 171 (2005); Porter, *supra* note 151, at 1021.

¹⁵³ See § 707(b)(1) (“[T]he court, on its own motion . . . may dismiss a case filed by an individual debtor . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.”); see also Jean Braucher, *Chapters, Changes, And Challenges: Article: A Fresh Start For Personal Bankruptcy Reform: The Need For Simplification And A Single Portal*, 55 AM. U. L. REV. 1295, 1307 (2006) (using the “pass” terminology to describe filings in which the debtor’s income and surplus do not create a presumption favoring dismissal or conversion). The Code directs the courts to perform the means test in order to determine whether there is substantial abuse. See § 707(b)(2)(A); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 28 (1999) (means testing will lead to a decrease in judicial discretion in bankruptcy proceedings). A finding of abuse can be rebutted by the petitioner by proof of “special circumstances.” § 707(b)(2)(B).

¹⁵⁴ See Jones & Zywicki, *supra* note 99, at 177–78.

¹⁵⁵ *Id.*

however, it is compulsory to emphasize that the rise in consumer bankruptcies is a symptom—not a cause—of the increase in credit card debt.¹⁵⁶

Credit card debt is one of the leading factors in debtors' decisions to file for bankruptcy.¹⁵⁷ Indeed, it is this overextension (not its release through bankruptcy) that is most threatening to social welfare.¹⁵⁸ Even if the 2005 legislation effectively curbs the number of consumer bankruptcy filings, it will almost certainly have no positive effect on the incurrence of credit card debt.¹⁵⁹ Indeed, the proposal for means testing is “substantially misdirected;” means testing will “most likely lead to an increase in the level of credit card debt among persons least able to afford it and [will] possibly result in a generally worsened social outcome.”¹⁶⁰ Consumers likely will continue their current spending practices and use of credit cards despite the Act's passage.¹⁶¹ Thus, “the likely effect of further limiting the dischargeability of credit card debt in bankruptcy is an *increase* in the outstanding balances . . . [and an] *increase* [in]

¹⁵⁶ *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 39 (1997) (statement of Kim J. Kowalewski, Chief, Financial and General Macroeconomic Analysis Unit, Macroeconomic Analysis Division, CBO) (“The incidence of bankruptcy in the adult population closely follows the indebtedness of the household sector.”); Ausubel, *Credit Card Defaults*, *supra* note 78, at 250 (the rate of consumer bankruptcies is “astonishingly highly correlated with the rise in credit card defaults”); George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L.J. 325, 336 (1997) (“many individual bankruptcies are driven by . . . desire to be free from . . . insurmountable credit card debt”); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1080 (1997–1998) (“The line of argument that casts families as villains—or at least as suspects—starts and ends with the sharp rise in consumer bankruptcy filings The actual explanation for the rise in consumer bankruptcies is . . . that consumer bankruptcies are rising because consumers' debts are rising faster than their incomes.”) [hereinafter Warren, *Bankruptcy Crisis*]; Ronald J. Mann, *Credit Cards, Consumer Credit & Bankruptcy* 30 (Univ. of Tex. Sch. of Law, Law & Econ. Working Paper, Working Paper No. 44, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690701.

¹⁵⁷ Gibson, *supra* note 139, at 129 (“Since nearly every adult American has one or more credit cards, virtually all of [the bankruptcy] cases were filed, in whole or in part, to discharge credit card debt.”); James Denn, *Filings for Financial Protection Head Up*, TIMES UNION (Albany, NY) (THREE STAR EDITION), Jan. 3, 1996, B7 (“The main reason consumers [file for] bankruptcy is their crushing credit card debt.”).

¹⁵⁸ Ausubel, *Credit Card Defaults*, *supra* note 78, at 264–65; Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem Of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 410 (2001) (“The reason we have had more bankruptcies in recent years is because of a huge growth in consumer debt, particularly among lower income debtors, not because better-off individuals are filing more often in bankruptcy.”); Warren, *Bankruptcy Crisis*, *supra* note 156, at 1080.

¹⁵⁹ See Warren, *Bankruptcy Crisis*, *supra* note 156, at 1101 (“[L]owering the bankruptcy filing rate should not be an end in itself; a decline in rates is good only if it is a sign that fewer families are failing.”).

¹⁶⁰ Ausubel, *Credit Card Defaults*, *supra* note 78, at 264–65.

¹⁶¹ *Id.* at 264, 269.

the frequency with which consumers are buried under mountains of credit card debt.”¹⁶²

Those who contend that consumer bankruptcies cause credit card debt have proposed, among other things, means testing as a way to decrease consumer bankruptcies.¹⁶³ Jones and Zywicki proffer the moral hazard argument: the theory is that because consumers know they can force the cost of their spending on to others (through bankruptcy), they cease to be cautious in using their credit cards.¹⁶⁴ Proponents of this theory point to an increasingly affordable and available bankruptcy system and decreasing social stigma directed at those who select bankruptcy.¹⁶⁵ With an accommodating consumer bankruptcy code, one of the main deterrents has subsided and Americans no longer fear credit card debt.¹⁶⁶ Proponents assert that these conditions create a moral hazard, in which people feel encouraged to spend more money than they should.¹⁶⁷ Consequently, people choose to take on more credit card debt.¹⁶⁸ Credit cards, according to the theory, merely make this process easier for debtors to scam the system.

This theory “confuse[s] the direction of causation and more importantly . . . misperceive[s] the social problem at hand.”¹⁶⁹ The theory does not explain adequately the increase in credit card debt.¹⁷⁰ First, the theory ignores the many problems in filing for bankruptcy in addition to social stigma, the primary deterrent being the damaged credit line.¹⁷¹ Second, the majority of people who have unpaid or delinquent credit card debt do not go into bankruptcy.¹⁷² Finally, there are the studies finding that debt causes a host of

¹⁶² *Id.* at 269.

¹⁶³ Jones & Zywicki, *supra* note 99, at 177–78.

¹⁶⁴ *Id.* at 208; see Howard, *supra* note 81, at 84; Warren, *Bankruptcy Crisis*, *supra* note 156, at 1080.

¹⁶⁵ See Culhane & White, *supra* note 153, at 28.

¹⁶⁶ See Howard, *supra* note 81, at 84; *Consumers Reluctant*, *supra* note 35; *Shock and Owe*, *supra* note 145.

¹⁶⁷ See Charles J. Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S.256 8–9* (Univ. of Ill. Col. of Law Law & Econ. Working Paper, Working Paper No. 47, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=859645 (“Reform advocates . . . [assert] . . . that debtors are abusing the law by taking out too much credit, living the high life, and sliding down the easy path of discharge when they could repay a significant portion of their debts.”).

¹⁶⁸ *Consumers Reluctant*, *supra* note 35.

¹⁶⁹ Ausubel, *Credit Card Defaults*, *supra* note 78, at 270; see Warren, *Bankruptcy Crisis*, *supra* note 156, at 1080.

¹⁷⁰ See Warren, *Bankruptcy Crisis*, *supra* note 156, at 1080.

¹⁷¹ Harris & Albin, *supra* note 18, at 452.

¹⁷² Symposium, *supra* note 2, at 1109 (Elizabeth Warren, discounting the idea that the ease of filing for bankruptcy correlates to the hesitation to the idea of filing for bankruptcy).

undesirable physical and emotional problems. While this information has yet to be widely disseminated, it seems likely that most people do not naturally relish the prospects of being financially constrained by debt.¹⁷³ Supporters of this misguided theory claim that the rampant abuse of the bankruptcy system is detrimental to the retailers, credit card issuers, and to the honest Americans who help bear the costs.¹⁷⁴

It is not difficult to see the flaws in the theory. In reality, consumer bankruptcies are a negative phenomenon for two reasons only. First, they are difficult on the debtors for reasons not limited to social stigma and a tarnished credit rating. The adverse effects for the debtors aside, bankruptcies are a problem to the extent that they enable the discharge of debt.¹⁷⁵ The only debt that consumer bankruptcies discharge, however, is unsecured.¹⁷⁶ A significant portion of this unsecured debt is credit card debt.¹⁷⁷ The nature of credit card debt is that the consumers already have obtained goods and the retailers already have been paid for the goods (by the credit card companies).¹⁷⁸ Thus, a considerable percentage of the debt that is discharged in consumer bankruptcies is owed to credit card companies. The credit card industry—one of the most profitable in existence—is more than capable of bearing these costs. More to the point, however, credit card companies are exerting all of their influence to encourage unstable consumers with little or no income to incur sizeable credit card debt.¹⁷⁹ The credit card industry is bringing this on itself.¹⁸⁰

The fact that many have criticized means testing as inappropriate and unlikely to bring positive change begs the question of why Congress enacted it. In reality, there is only minimal pretense that the legislation was enacted for the good of consumers.¹⁸¹ The relevant provisions were drafted by the credit card industry, which lobbied for years for the bill's passage.¹⁸² Indeed, the Act

¹⁷³ See Harris & Albin, *supra* note 18, at 451.

¹⁷⁴ See Jones & Zywicki, *supra* note 99, at 182–83 (“Providers of goods and services . . . bear the initial brunt . . .”).

¹⁷⁵ See generally 11 U.S.C.A. § 727(a)(1) (West 2005).

¹⁷⁶ Unsecured debt is the debt owed to creditors who have failed to acquire collateral in exchange for the lending. See BLACK'S LAW DICTIONARY 433 (8th ed. 2004).

¹⁷⁷ Howard, *supra* note 81, at 63 (“debtors in bankruptcy often bring with them considerable debt owed to credit card issuers”); Symposium, *supra* note 2, at 1107–08.

¹⁷⁸ Zywicki, *Economics of Credit Cards*, *supra* note 1, at 83.

¹⁷⁹ See Bates, *supra* note 23, at 26; Bruens, *supra* note 95, at 1258 n.1; Egan, *supra* note 26.

¹⁸⁰ See *supra* Part II.

¹⁸¹ See *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005).

¹⁸² Egan, *supra* note 26.

has been criticized as an effort “to make more money off the backs of the consumers in this country.”¹⁸³ In an effective ploy to swing Congressional sentiment, several credit card issuers commissioned studies on the potential effectiveness of means testing.¹⁸⁴ The studies have been criticized widely for their partiality and methodology.¹⁸⁵ Ultimately, the enactment of the legislation can be (at least partially) attributable to the years of urging by the credit card industry.¹⁸⁶

It has been argued that credit card debt is merely a change in composition of debt.¹⁸⁷ In other words, that if people no longer had credit cards the *amount* of their debt would remain the same, but the debt would be recomposed. If this were true, then any attempt to minimize credit card debt would arguably do more harm than good by driving consumers into pawn shops and other short term credit lenders. Proponents of this theory argue that people would simply turn to pawn shops and other short-term credit lenders if they no longer used credit cards.¹⁸⁸ While this is certainly true for necessary expenditures (such as living or emergency expenses) that are made on credit, it is equally untrue with regard to discretionary spending. Indeed, it is hard to imagine consumers pawning last year’s i-Pod® for next year’s i-Pod Nano® if only for the reason that it is impossible to sustain or increase spending in this manner. A recent sampling of chapter 7 debtors with extremely high credit card debt¹⁸⁹ showed they tended not to have faced disasters such as fire, theft, or medical problems, but instead merely had taken on “more credit card debt than they could ever hope to repay.”¹⁹⁰ Hence, to minimize credit card debt is not merely to

¹⁸³ *Sosa*, 336 B.R. at 114.

¹⁸⁴ Culhane & White, *supra* note 153, at 30.

¹⁸⁵ *Id.* (citing U.S. General Accounting Office, *Personal Bankruptcy, The Credit Research Center and Ernst & Young Reports on Debtors’ Ability to Pay: Testimony Before the Subcomm. on Commercial and Administrative Law, Comm. On the Judiciary of the H. of Rep.*, 105th Cong. 1 GAO/T-GGD-98-79 (1998) (statement of Richard M. Stana, Associate Director, Administration of Justice Issues, General Government Division)); Gary Klein, *Means Tested Bankruptcy: What Would It Mean?*, 28 U. MEM. L. REV. 711, 713–28 (1997–1998); Warren, *Bankruptcy Crisis*, *supra* note 156, at 1091–94.

¹⁸⁶ Culhane & White, *supra* note 153, at 28; Tabb, *supra* note 167, at 32.

¹⁸⁷ See Jones & Zywicki, *supra* note 99, at 230–31 (arguing that “credit cards are merely a *means* to conduct [a certain] transaction[] and must be compared against alternative sources of short-term credit”); Zywicki, *Crisis*, *supra* note 34, at 1492 (“Although consumers have increased their use of credit cards as a borrowing medium, this increase represents primarily a *substitution* of credit card debt for other high-interest consumer debt.”); Zywicki, *Economics of Credit Cards*, *supra* note 1, at 96–99.

¹⁸⁸ See Jones & Zywicki, *supra* note 99, at 230–31 (stating that the practical alternatives to credit cards include “pawn shops, loan sharks, [and] low-interest layaway plans”); Zywicki, *Economics of Credit Cards*, *supra* note 1, at 96–99.

¹⁸⁹ Flynn & Bermant, *supra* note 27.

¹⁹⁰ *Id.* But see Editorial, *A Bad Bankruptcy Bill*, S.F. CHRONICLE, Mar. 15, 2001, at A26.

recompose consumer debt. Decreasing credit card debt would decrease a substantial amount of harmful and unneeded consumer debt.

IV. THE CASE FOR A WARNING LABEL¹⁹¹

The mass-accumulation of credit card debt by American consumers is attributable to the behavior of imprudent borrowers and aggressive lenders.¹⁹² The solution proposed in this Comment, however, focuses primarily on affecting borrower behavior.¹⁹³ Benjamin Disraeli, former British prime minister, once said that “[a]s a rule the most successful man in life is the man who has the most information.”¹⁹⁴ Applying this principle to the state of consumer credit in this country, it is logical to recommend regulation that will lead to better-informed consumers. Increased access to information would lead to superior decisions by American consumers.¹⁹⁵

Given the host of problems inherent in indebtedness, informed people should be apprehensive about taking on new debt. Certainly, people should be wary of apparatuses that facilitate the incurrence of debt. Contrary to these notions however, American consumers are employing credit cards with greater frequency than ever before. Currently, there is no mechanism in place that warns consumers of the dangers of credit card use. It stands to reason that many people continue to use credit cards with great abandon because they do not appreciate the risks.

¹⁹¹ This proposal does not purport to have a solution to all credit card debt accumulation. The purpose of the warning label is to help uninformed consumers become more informed of the risks of credit card use. Hence, for those consumers who depend on their credit cards to pay for necessary costs, it will likely make no difference to them that there are risks involved in credit card use. Most “debt for low- and middle-income households is ‘safety net’ debt. That is, families are going into credit card debt as a way to cope with drops in income or unexpected expenses.” THE PLASTIC SAFETY NET, *supra* note 16, at 9–10. About one third of low- and middle-income debtors said that they used credit cards to pay their monthly expenses. *Id.* at 11. Most debt-stressed low- and mid-income debtors are not racking up debt on discretionary purchases. *Id.*

¹⁹² Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, FED. DEPOSIT INS. CORP., BANK TRENDS: ANALYSIS OF EMERGING RISKS IN BANKING 1 (1998).

¹⁹³ Several books have been written with the express goal of informing consumers of the predatory nature of credit card issuers and the risks of credit card use. See ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION (W.H. Freeman and Company, 1992); MAX SUTHERLAND & ALICE K. SYLVESTER, ADVERTISING AND THE MIND OF THE CONSUMER (Allen & Unwin, 2d. 2000).

¹⁹⁴ BRUCE BARTON, MORE POWER TO YOU: FIFTY EDITORIAL FROM EVERY WEEK 93 (Century Company, 1919) (1917).

¹⁹⁵ Warren, *Bankruptcy Crisis*, *supra* note 156, at 1101.

A. *The Current Information Landscape: Why More Information Is Needed*

While there is a dearth of accessible information about the risks of credit card use, the Truth in Lending Act (“TILA”)¹⁹⁶ does mandate some disclosures by credit card issuers.¹⁹⁷ TILA forces credit card issuers to “disclose all the important financial information to the consumer” in their solicitations.¹⁹⁸ TILA’s mandatory disclosure system has drawn strong criticism however, for its lack of efficacy.¹⁹⁹ TILA’s limited success should not be taken as an indication that no written warning could be useful. The problem with TILA’s mandatory disclosures is that they compel disclosure of the wrong type of information. TILA requires, for example, “an explanation of how the finance charge is calculated on outstanding balances, the minimum finance charge per billing cycle, any transaction or annual fees, the grace period, the APR, and any fees for cash advances, late payments and exceeding the credit limit.”²⁰⁰ While this information may be found useful, it clearly does not warn consumers as to the *danger* of the product they are using. Consequently, these disclosures often end up unread and in consumers’ trash cans.²⁰¹

Consumers’ credit card use is similar to the use of other dangerous products of which consumers did not previously fear. The situation is analogous to that of cigarette smokers throughout the past forty years.²⁰² In the 1960s, the percentage of Americans who smoked cigarettes approached fifty percent.²⁰³ In 1964, however, Surgeon General Luther Terry issued a report on the adverse health effects of smoking.²⁰⁴ The report led to massive anti-

¹⁹⁶ 15 U.S.C. §§ 1601-1667(f) (2000). One of the reasons for TILA’s enactment was the need “to protect the consumer from unfair and inaccurate credit card practices” George S. Mahaffey Jr., *A Product of Compromise: Or Why Non-Pecuniary Damages Should Not Be Recoverable Under Section 2605 of the Real Estate Settlement Procedures Act*, 28 U. DAYTON L. REV. 1, 31 (2002).

¹⁹⁷ Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J. L. & PUB. POL’Y 199, 203 (2005); see §§ 1601-1667(f).

¹⁹⁸ Laurie A. Lucas, *Integrative Social Contracts Theory: Ethical Implications of Marketing Credit Cards to College Students*, 38 AM. BUS. L.J. 413, 422 (2001).

¹⁹⁹ Edwards, *supra* note 197, at 204.

²⁰⁰ Lucas, *supra* note 198, at 414 n.7 (citing Reg. Z, 12 C.F.R. §§ 226.5-226.5a (2000)).

²⁰¹ See Edwards, *supra* note 197, at 200.

²⁰² This is not the first article to draw the analogy between credit card issuers and cigarette manufacturers. See, e.g., Mann, *supra* note 25, at 58. The optimism-bias, discussed in Part II, contributes to people’s decision to smoke as well. Harris & Albin, *supra* note 18, at 451.

²⁰³ AMERICAN CANCER SOC’Y, *Questions About Smoking, Tobacco, and Health*, http://www.cancer.org/docroot/PED/content/PED_10_2x_Questions_About_Smoking_Tobacco_and_Health.asp (last visited Jan. 25, 2007) (in 1965, about forty-two percent of the population smoked).

²⁰⁴ Office of the Surgeon Gen., <http://www.surgeongeneral.gov/library/history/bioterry.htm> (last visited Jan. 25, 2007).

smoking campaigns and a change in public awareness.²⁰⁵ With the necessary information finally available to them, Americans began to make better decisions. Since 1965, the percentage of Americans who smoke has decreased at a fairly steady rate.²⁰⁶ By 2004, the percentage had fallen to barely more than one in five Americans.²⁰⁷ People finally were exposed to the risks of tobacco use, allowing them to make wise and informed decisions. Given the chance, they acted prudently as a result. It stands to reason that many Americans, given the requisite information about the risks involved, would make better decisions about their credit card use.

This may be true especially for college students.²⁰⁸ College is when many young people first learn to handle their finances.²⁰⁹ However, there is a general lack of financial education courses offered to college students.²¹⁰ Many college students are unaware of the consequences that may arise from their inability to consistently pay their balances each month.²¹¹ Fortunately, financial education and counseling have become more prevalent in recent years, giving a reason for some optimism in this arena.²¹²

Congress has not abandoned its attempt to achieve results through a system of mandatory disclosures.²¹³ Thus, there is promise in the idea of a warning provision that positively affects consumer behavior. Warning consumers as to the risks of credit card use will impact their behavior from both psychological and sociological perspectives. From the psychological perspective, warning labels are “sufficient to bring the risk into consumer consciousness, [transforming perception of] the risk from a very low probability ‘hidden’ risk to a low probability risk which tends, if anything, to be overestimated.”²¹⁴

²⁰⁵ *Id.*

²⁰⁶ CDC: *Number of U.S. Women Smoking at 30-Year Low*, USA TODAY, May 26, 2005, Nation, available at http://www.usatoday.com/news/nation/2005-05-26-cdc-smoking_x.htm.

²⁰⁷ AMERICAN CANCER SOC’Y, *supra* note 203.

²⁰⁸ See GEN. ACCOUNTING OFFICE, COLLEGE STUDENTS AND CREDIT CARDS 43 (2001), available at <http://www.gao.gov/new.items/d01773.pdf> (“Because of inexperience with credit and finance, some college students may not be financially literate and may be at greater risk of substantial debt burdens than more experienced consumers.”).

²⁰⁹ *Id.* at 42.

²¹⁰ *Id.* at 35.

²¹¹ *Id.*

²¹² See *Groups Target Mounting Student Credit Card Debt*, *supra* note 52. So far, these programs have had only limited success. *Id.*

²¹³ See *infra* note 216.

²¹⁴ Hanson & Kysar, *supra* note 75, at 717. *But see* Kilborn, *supra* note 20, at 23 (“perhaps . . . we ought to abandon thoughts of curing overindebtedness and focus on treating its inevitable effects”) (emphasis omitted).

Hence, a warning provision that effectively heightens consumer awareness of the risks of credit card use could change consumer behavior in an affirmative way.²¹⁵ From the sociological perspective, consumers who are striving to match their neighbors expense for expense, luxury car for luxury car, will likely rethink the decision to spend beyond their means. After all, the realization that health problems or insolvency could follow likely will put things into perspective.

Congress is aware that consumer credit card debt is a problem. Senators Feinstein, Kyl, and Brownback offered an amendment to BAPCPA last year in an attempt to warn consumers about the danger of uninformed credit card use.²¹⁶ Senator Feinstein stated, “Too many consumers are uninformed about how they are affected by simply paying the minimum on their credit card bills, [m]any of these consumers end up debt-ridden or bankrupt as a result.”²¹⁷ Indeed, at least as far back as 1999, Congressmen have been worried about the credit card industry’s ability to snare helpless consumers.²¹⁸ Representative Louise Slaughter, commenting on the Bankruptcy Reform Act of 1999, noted that the credit card industry “actively solicits unsuspecting consumers” in an attempt to hook them with “terms of easy credit.”²¹⁹ In Congress’s defense of American consumers, a mandated warning provision would prove to be an effective weapon against the credit card industry’s exploitation of uninformed consumers.

B. What the Warning Label Should Say and Why

As stated in the previous subpart, TILA currently requires some mandatory disclosures on the part of credit card lenders. While mandatory disclosures are the right idea, these requirements do not elicit the correct information on behalf of the American consumers. An effective warning provision for credit cards should perform three distinct functions. First, it should put consumers on notice that credit cards are a dangerous product. Second, the provision should instruct consumers how to minimize their risk. Third and finally, the warning should provide the requisite information so that consumers can act in accordance with these recommendations.

²¹⁵ See LEVITT & DUBNER, *supra* note 29, at 151; Hanson & Kysar, *supra* note 75, at 717.

²¹⁶ Feinstein, Kyl, Brownback Offer Amendment to Warn Consumers About Impact of Making Minimum Credit Card Payments, STATE NEWS SERVICE, March 2, 2005.

²¹⁷ *Id.*

²¹⁸ Jensen, *supra* note 66, at 520.

²¹⁹ *Id.*

Warning provisions should be able to put consumers on notice fairly easily. The primary risk that the warning seeks to avert is the unwanted incurrence of debt. Consumers should understand that debt brings a host of unwanted problems with it impacting health, family, and future financial prospects. This function is critical because it will be responsible for achieving consumer awareness that using credit cards is a risky proposition. The warning provision must grab the attention of the consumers and convince them that the risks are real and menacing. Without achieving the first goal, the warning provision would be ineffective in changing the current landscape of consumer credit card use.

The warning provision must provide guidance for obvious reasons. If the warning succeeds in getting the consumers' attention but fails to provide guidance for future action, it could create confusion or panic. As the Introduction noted, credit cards do have utility and there are benefits to using them in some situations. Hence, it should not be a goal to dissuade people from using them entirely.

Finally, it is critical that consumers understand their options. Every monthly statement should contain information necessary to allowing for informed decisions. Thus, consumers should be given the following information: (i) the length of time, in months, that it will take to pay the entire balance by making minimum payments only; (ii) the amount of interest that will be paid by the time that the entire balance has been paid in monthly minimum payments; (iii) the length of time, in months, that it will take to pay the entire balance by making payments that are twice the minimum payment; and (iv) the amount of interest that will be paid by the time that the entire balance has been paid in monthly payments in the amount equal to twice the minimum payment.

The burden of providing this information should fall on the lender. The credit card industry is in the best position to provide this information as it has already performed many of these calculations.²²⁰ The cost to the industry will be negligible given the relative brevity of the required disclosure and the ease with which the industry can calculate the aforementioned amounts. The benefits to consumers could be a windfall.

The following warning label should appear on the initial credit card agreement and on each statement. It should be worded as follows:

²²⁰ Ellis, *supra* note 192, at 8.

CAUTION: Use of this product MAY lead to UNWANTED DEBT.

- 1. Debt limits your purchasing power by limiting your ability to get the necessary credit to buy items such as a house or car.**
- 2. Debt causes EMOTIONAL PROBLEMS such as stress and anxiety. These problems can exacerbate family discord leading to DIVORCE and other problems within families.**
- 3. DEBT CAN ADVERSELY AFFECT YOUR HEALTH. Debt can cause headaches, insomnia, and various other physical ailments. Credit card debt in particular causes health problems worse than those caused by other types of debt.**
- 4. THE BEST WAY TO ENSURE THAT YOU DO NOT AMASS UNWANTED CREDIT CARD DEBT IS TO STOP USING CREDIT CARDS.²²¹**

The best way to maintain the convenience of credit cards while eliminating the danger is to USE DEBIT CARDS for your purchases.

²²¹ Mann, *supra* note 25, at 10 (increasing the use of the debit card has lessened “the relevance of credit in [some] countries . . . and [is] limiting its rise in countries where [credit] has never been important”).

The monthly statement should contain the following disclosures:

WARNING: Please consider the following information BEFORE deciding how much to pay this month.

If you pay *only* your minimum monthly payments until your balance has been fully paid, you will be making that payment for ____ months.

During that period, you will have paid an *additional* \$_____ in interest.

If you pay *only double* your minimum monthly payments until your balance has been fully paid, you will be making those payments for ____ months.²²²

During that period, you will have paid an *additional* \$_____ in interest.

CONCLUSION

As credit card debt continues to be a serious problem in this country, a solution is necessary. Debt causes emotional and health problems, family discord, and a myriad of financial troubles. Beyond the noteworthy impact debt has on a person's financial life, debt has other serious consequences.

The accumulation of debt can be attributed primarily to two types of behavior: consumer and lender. Consumers, driven by psychological and societal forces, spend unwisely. Worse, they largely are uninformed about the dangers of credit card use. The credit card industry knows this and takes advantage by manipulating consumers. Lenders specifically target the uninformed and those that are most likely to carry a monthly balance.

²²² Compare to 15 U.S.C. § 1637(b)(11) (2000) ("In the case of an open end credit plan that requires a minimum monthly payment of not more than 4 percent of the balance on which finance charges are accruing, the following statement, located on the front of the billing statement, disclosed clearly and conspicuously: 'Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 2% minimum monthly payment on a balance of \$ 1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: _____.' (the blank space to be filled in by the creditor).") (emphasis added).

Congress, recognizing that problems face American consumers, recently passed BAPCPA. Ultimately, this will be regarded as a misguided attempt to fix a nonproblem: the rise in the rate of consumer bankruptcies. Consumer bankruptcies merely are an indication of the financial health of American consumers. The next time that Congress steps up to provide a remedy, it should consider mandating a new type of disclosure on behalf of consumers. If the credit card industry is going to remain a predator, Congress should level the playing field by informing consumers of the risks they face in using credit cards.²²³ Consumers need to know at least three things before they will be able to use credit cards wisely: (i) the risks inherent in the use of credit cards; (ii) the optimal way to make purchases without incurring unwanted debt; and (iii) the requisite information needed to allow them to act in accordance with these recommendations.

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²²³ Harris & Albin, *supra* note 18, at 447–51 (the fact that the credit card industry takes advantage of characteristics such as overconfidence and illusions of control can “justify intervention”).

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