Beyond Failure and Forgiveness: The Debtor’s Place in American Fiscal Identity, Bankruptcy, and Capitalism

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Abstract

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This dissertation is based on six years of original field research in the bankruptcy legal field. It explores the dominant discourses that function as controlling processes for individual fiscal agents within the American free-market system—a system based in credit structures and debt relations. The ways these individual fiscal agents are viewed impacts the behaviors, attitudes and perceptions of the place they inhabit within the social system. This dissertation demonstrates the impact of Enlightenment notions of reason and probity that construct the American fiscal identity. Within the dominant construct of American fiscal identity, “rational” decisions and “sound” processes create wealth accumulation and fiscal success. Conversely, debt and “failure” are seen as a result of irrational, “wrong” decisions and aberrations from this fiscal identity norm. This dissertation argues that reason and responsibility are manifest in success, and the absence of those qualities result in and explain failure. Hence, the subjectivities of individual agents are shaped and manifested through this culturally and economically constructed fiscal identity rooted in notions of reason and responsibility. This dissertation further argues that the stigmatized financial failure is incorrectly identified as a social deviant, sinner, and one who must be pardoned and/or redeemed. In other words, the fiscal failure is a misrecognized cultural creation of a credit-debit system that supports the accumulation of wealth and depends on the existence of debts. This is made visible by tracing the pathways leading to the financial failure filing a bankruptcy petition, and the transformation of the failure into the recognizable bankruptcy debtor. This puts spurious factors in the spotlight and hides from view the actual functioning of our free-market, credit-based structures that have led to the current impending collapse of our economy.

In an economic order that encourages wealth accumulation, credit is required for those who lack wealth. Debt and debt relations are the life of the system, and indebted institutions and individuals are essential to the health of the system. Yet, when the indebted individual enters the bankruptcy system, the individual is viewed as a pariah whose conduct must be reformed so that he can be reintegrated into the economic system. Intrinsic to this model, fiscal identity is an evaluation of the individual’s character and conduct. The conduct of the individual in the marketplace is used to characterize the essential nature of the individual as a moral actor. This process of evaluation and
categorization is most apparent when the person fiscally fails. Therefore, the commercial success or failure of the individual in free-market capitalism defines the identity of the individual for the social world.

Participants in modern capitalism come to view themselves and others as autonomous financial actors in financial matters. It is from this space of separation and isolation that individuals assume responsibility for their financial status. This model for the American fiscal identity is hegemonic because it improperly locates the causes of the boom and bust cycles of free-market capitalism in the individual. In so doing, the larger social and economic forces are personalized. The individual is taught to take responsibility for their location in the economic order rather than viewing themselves as part of the cycles of the larger capitalist structure of power and wealth. The individual’s financial success or failure is viewed as a direct result of the individual’s attitudes, conduct, and behavior, rather than as emerging from particular sets of economic relations, historical processes, class structure, and legal order.

The Introduction locates debt and financial failure as a necessary part of the ebbs and flows of capitalism and wealth creation. As many anthropologists have argued since the work of Marcel Mauss, credit and debt are different sides to the same social relationship. A credit for one is a debt for another. Put differently, debt creates wealth. Rather than viewing the debtor as an aberration to the healthy economy, I place debt in the context of wealth creation.

Chapter One discusses the ethnographic method used to research this topic. Methodologically, this research exemplifies Professor Laura Nader’s approach of studying up, down, and sideways. I administered her approach at multiple fieldwork sites over a six-year period. At each fieldwork site, I also employed the traditional approach of ethnography: participation, observation, interviews, oral histories, document collection, and public records. This fieldwork is an example of the developing trend of repatriated, or insider, ethnography in the United States.

Chapter Two outlines the creation of the notion of an American fiscal identity, the related fiscal failure, and the stigmatization of the bankruptcy debtor. Chapter Three discusses the history and central themes in the development of bankruptcy legislation in English and American law with an emphasis on the emergence of our contemporary bankruptcy legal system. Chapter Three also discusses the powers granted to creditors under those early laws, and it provides a review of the development of the category of the individual debtor from a designation of quasi-criminal to that of civil legal. Chapter Four outlines the transformation of the fiscal failure into the debtor through bankruptcy law and processes. Michel Foucault’s work on regulating and disciplining practices is used to explain the failure’s transformation into a legally recognizable debtor. Chapter Four further explores the disciplining processes at work in three bankruptcy arenas: the debtor attorney’s office, the meeting of creditors, and bankruptcy court hearings.

Chapter Five takes a step back from the individual debtor to provide an analysis of the relationships among interested and disinterested parties in bankruptcy’s legal world. In this chapter, the legal actors and non-legal actors that populate the bankruptcy field are viewed through the theories of French sociologist Pierre Bourdieu. In applying Bourdieu’s theoretical tool of “field,” the positions, relations, and battles among the field
participants are analyzed and discussed. Chapter Six discusses the placement of the individual debtor in relation to the corporate debtor in the bankruptcy field using provisions from the recent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
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Preface

The 2008 financial crisis reminded many Americans that financial failure is and has always been part of our economy since the founding of the American republic—an economy that explicitly supports the accumulation of wealth by a small number of Americans at the expense of many other Americans. The identity of ‘debtor’ (financial failure) in this system is a morally suspect and stigmatized identity. After the 2008 economic crisis, the identity of debtor was familiarized, and financial failure became more common. The debtor is now our neighbor, sister, friend, church member, co-worker, leader, etc. Financial failure is widespread. Economic loss is a common experience. Only the wealthy were able to profit and financially thrive in recent years.

Throughout the time I spent researching and writing this dissertation, I had numerous conversations with informants about their personal financial situations. In those conversations, the informants expressed a mixture of anxiety, shame, confusion, fear, isolation, and dread. The discussions with informants were never rational discussions. If the informant was fiscally successful, a form of myth building surrounded his sense of personal financial decisions and fiscal identity, as if all individuals are entirely responsible for their particular fiscal status and identity. Individuals believe that they are solely responsible for their financial status harboring deep blame for fiscal failures and an elevated, albeit insecure, self-worth when fiscally successful. Many individuals I spoke with in my research believe that their financial status indicates something fundamental about their character.

I became interested in debt, bankruptcy, and financial failure while in law school as I was accruing enormous student loan debt. As an anthropologist, I am deeply embedded with the population I study. I am both a lawyer and a debtor. The bankruptcy legal field is a professional space I inhabit as an active, embodied, and enabled agent. And at the same time, I can just as easily slip from the subject to the object of study. I have accrued debt in the performance of this research. This positioning of my identity facilitated a reflective awareness of my project allowing for critical insights into the unspoken, implicit, and tacit processes at work in the bankruptcy experience. This dissertation is a manifestation of my understanding of the place of financial failure and bankruptcy in American culture and society.
Debtors’ Stories\textsuperscript{1}

Below transcribed are three stories taken from a selection of debtor interviews. Tina, Marian and Mark were particularly insightful informants. Their stories are representative of the life histories that were collected in the course of this research. Each of these informants primarily views their fiscal identities as resulting from their personal, family, and parental values. They did not locate the origin of their fiscal identity in social and cultural values and structures. Each views financial failure and the filing of a bankruptcy petition as stigma or a black mark on their character. Most often, during the interview they would search their conduct for a poor financial decision to explain their current distressed status. Each story illustrates how the collective social processes are localized in the individual.

1. Tina, Female, 37, Single, Caucasian, Beautician\textsuperscript{2}

I introduced myself to Tina after her Chapter 13 meeting of creditors. She told me that she would be willing to talk with me about her experiences before and during bankruptcy. She was very nervous at the meeting of creditors. I explained the procedure of the examination, and she seemed to understand my explanation. Her examination was quick because she prepared her documents and delivered them to the trustee before her examination. I interviewed her later that week at her nail salon (which she owns and operates in Newark, California) while she did my nails. The following is what she told me about her life:

“I grew up in Texas in a small town in the South East. I had one brother and two sisters with lots of immediate family around. We were ranchers. We had about 10,000 acres of land that was a result of a split of land by my grandfather between his wife and his mistress. So his wife’s family, my grandmother, lived on a 10,000 acre ranch. We rented part of the land to grow rice, and the other part was used for raising cattle. We lived in a house on the 10,000 acres. The actual ranch house was not lived in. It was used to run the business and throw parties for celebrities. My father and uncles own the property now. I think that once they die, my generation will sell the land because we do not want to work it.”

“I lived with my parents out there. My mother and father remained married until they were in their 70’s, but they got divorced at that time. My father had a mistress, and he went off with her. I have to be fair to my dad and say that my mother did not believe in sex unless it was for the creation of children. She was just like her mother. So I think my dad needed to have sex, so he found other people. He did end up marrying his mistress. After they divorced, my mother was much happier as well. She just recently died. I think that is part of the reason that I filed bankruptcy. She died last year, and I became very depressed. I found it hard to work and to live my life in general.”

\textsuperscript{1}I neither reviewed the bankruptcy petitions of these informants nor checked the accuracy of the information they provided. My focus is how each one of them viewed their lives, finances, and bankruptcy experience.

\textsuperscript{2}Tina debtor, interview by author, Newark, Ca., April 2004.
“My father is doing great. He was always very healthy. He is my role model for health, but he is not my role model for money. He was generous with money, but I think that he was tight fisted as well. I remember one Saturday we went to town, and my mother gave me some of the money. I went into the store and bought Teen Magazine. When I got back to the car I remember my father turning around in his seat and pointing his finger at me saying, “You don’t spend my money on trash again.” I responded that it was my money, and he just repeated what he had said. I never did buy those magazines again, but I was determined to make my own money and buy what I wanted in the future. I do remember that for a while there he was giving us kids $300.00 at Christmas for gifts. My brother and sister ran out and spent it. I put mine into savings. After years of doing it, he stopped because of my brother and sister. By the end, I had $10,000 in savings. I used that money to move out to California and start beauty school. He helped me finish beauty school by paying rent for me the last two months. That is all he has ever given me. I have worked for everything I have. I never had a handout.”

“I remember the first time I heard the word ‘bankruptcy.’ It was when I was younger. My cousin went bankrupt gambling. Then the IRS seized his accounts. My dad explained it when I asked about it. He said it was trouble, a bad thing to happen when someone does not handle his or her money correctly. He said that my cousin was irresponsible with money and finances. He made it sound like my cousin was criminal or had robbed someone. I knew then that bankruptcy was not something a person should do. The next time I heard about bankruptcy was when my sister filed.”

“My sister filed a Chapter 13. She paid back her debts. It was not much. Huh, let me think. I had financial problems with my business a couple years back, and a client lent me money. I paid her back. I really did not think about bankruptcy at that time. I just got a loan and paid the person back. This time I did not have any friends with money. I think that this time when my business became slow it was different because my mother died and I was really depressed. My mother and I talked every day. She was my closest friend. I went to grief therapy after her death. The therapist suggested that I might consider bankruptcy. I was under a great deal of stress after the death of my mother. The credit card companies called me all the time. I even sold some of the things my mother left me to pay them something. I called the credit companies and offered them a little bit of money.”

“CitiBank was the worst. I called and offered the Citibank guy $500.00, and he screamed at me that I need to pay the whole amount. So I called other people I owed money too and they took small amounts. A week later, I got a call from the guy at CitiBank asking for that little payment. I told him that I no longer had the money. Boy was he mad. [Laughing] He should have taken what I had to offer. Back during Christmas, CitiBank was calling me on the phone. The Rep was telling me that he was going to find me and get me if I did not pay my bills. I was actually getting very scared. He would call me three or four times a day and say, “Your time is running out.” They called my roommate, people I knew; it was horrible. I really did not want my family or friends knowing about my financial condition.”

“I had this other experience with Chase Manhattan Bank. They are another really bad company. They sent me this offer for insurance to be charged to my card, and I just tore up the application. About six months later, I noticed that Chase was charging my account for the insurance. So, I called Chase, and the operator told me to call the company. I called the company
and the company rep told me to call Chase. I went around and around with them for about three months. Finally, I got the two companies on a three-way call. The reps were yelling at each other while I sat on the line and listened. I thought it was interesting. I told them that when they sorted out their differences, they could remove the $800.00 in charges and send me an apology. Well, someone took the charge off; that is all I know. The other thing since I filed bankruptcy is that I am getting all these applications for credit. I do not want more credit. I just do not understand why they want me.”

“I never thought I would file bankruptcy, but I have. At first, when my therapist suggested it, I saw my father’s face. Horror of horrors, I would never be that irresponsible. I felt so guilty with the credit people calling. I tried to resolve the best I could, but nothing would stop these people. Now that I have filed, I am paying some of them back. One of the things that I did not expect is that bankruptcy would change me. At first, I was convinced that it would hurt me. I did not know what to expect. I was scared. I had to tell the attorney everything about my finances. I had to file the papers with the court. Anyone could read them and find things out about me that I really want to keep private. But my fears never manifested.”

“Bankruptcy has actually helped me. After I filed the petition, I told the creditors who called that I was a debtor in bankruptcy. They had to stop calling me. I breathed a sigh of relief. I knew I had more to go. I knew that I had to attend the examination, but for a week, I felt really good. My brain started to function right again. I could finally relax. I could finally work again.”

“At that examination where I first saw you, I was really scared. But I listened to the other people speak, and I just felt for them. They really had it bad. They would have enormous tax debt or they were losing their home. I began to see that I did not have it so bad. I thought that I was in pretty good shape. The meeting did not make me nervous. I thought the trustee was fair. Now, I pay a little each month and at the end of three years, I will be debt free. I feel good about this. I know that I can manage that. I just hope that my business keeps going well.”

Two years later, I contacted Tina. She was still paying her Chapter 13 plan, but her business was slowing down. She was uncertain whether she was going to make it through three years. Tina said she had only missed one payment to the Chapter 13 trustee, and she hoped not to do that again.

2. Marian, Female, 63, Divorced, Caucasian, Marketing Executive

Marian attended a required debtor education course that I taught at the Chapter 13 Trustee’s office. During the class, Marian asked several questions and expressed thoughtful opinions. I asked to interview her as a result of the classroom interactions. She found the research into bankruptcy interesting, so she agreed. We met two times to talk about her bankruptcy experience.

“I grew up in Sacramento, California. My parents were hard working people. My father was a truck driver and my mother did odd jobs and raised us children. I learned from an early age to avoid debt and to pay my bills. I learned to never take help from anyone. My parents thought that you should never purchase anything unless you can afford it. Boy, has that changed. I think

that I grew up in a different time. When I had children, it was different. We were lower middle class, but we owned our own home. Then I got divorced and married again. The second husband was much better off, and he had different views on money. He would spend and spend. He had money. I started to spend like him. I got a better job and made more money.”

“But my second husband had chronic depression. He lost jobs all the time, and his parent’s money would not support him forever. I paid for everything for us. I was doing well so it was ok. I purchased a home in Pleasanton and did a great deal of improvements. But we owed a great deal in taxes. That was our primary debt. Then, the economic change hit California in 2002. People were getting laid off all around me. I was not laid off, but I went from $200,000 a year to $45,000 a year.”

“Then, the next year it went down to $34,000. I started to live on credit cards. I thought that things would get better. Most recessions last less than 18 months. I took a gamble. I mean, I was a VP of marketing. I am with a class of people that are hard working. I figured that I could make it. I had seen people who made it through the worst. Then it kept getting worse. I began to think that I was going to be a bag lady. I thought to myself, ‘I do not know how to live on the streets. I did not know how to learn to develop those skills.’ I asked myself, ‘What am I going to do?’”

“I mean, what do you do with a 63 year old woman who is broke? I want to work. I never dreamed that things would be this bad as a young woman. I have had to make my own way in this world, and it has been hard. I am the first woman at many things that I do. I had to cut new ground as a woman. During my life, I have been paid less than men. I came to expect that I would never make as much as a man would make. But I have not given up.”

“In my childhood, I learned to put one foot in front of the other and keep going. When I went through my first divorce, I lost my husband, then my mother, and then my cat all in one year. But I kept going. Then this divorce happened, and then the bankruptcy. I think it’s the hardest part, bankruptcy that is. I feel like a social failure because of it. I have lost my home. The bank foreclosed on it. The credit card companies have sued me. I have paid everyone off through my plan, but the cost to me was enormous and daunting.”

“When you file bankruptcy people look down on you. They think that bankruptcy does not happen to nice people. Something must be wrong with your character if you lose everything and have to file bankruptcy. It was hard to look people in the eye after filing bankruptcy. I kept thinking that they knew, and that they think that I am a failure. I will not tell my family that I filed bankruptcy. It is shameful. I have a friend that filed and did not tell her family either. Your creditors do everything to make you feel small.”

“When I was forced into a financial bind I wrote to my family, and I asked for help. They would not help me. My children would not help me. I called my friends. They helped me. They gave me the money to file bankruptcy. The people at my church helped me the most. They supported me. They went to court with me. There are classes at my church on how to manage money and learn about my financial situation.”

“The best thing about filing bankruptcy is that the phone has stopped ringing. Before
when it rang, I would feel that the phone was beating me up. I felt like it was going to attack me. The creditors would call at all hours of the day and night. I did not sleep. I would wake in cold fear. I am glad that is over.”

“When I arrived at the room for the meeting of creditors, my heart was pounding. I was shaking, and my mouth was dry. I waited in the chair and watched all the people go up to talk with the trustee. I started to feel better. Then it was my turn. I really do not remember walking up to the debtor’s chair. But then, it was not so bad because the trustee treated me with respect. I did not feel like I was a criminal like so many other times in this process.”

“In this process, I have had to think about who I really am, and how this happened to me. I realized that my image in other people’s eyes is not that important. I feel like before filing bankruptcy I took responsibility for my finances. Now after filing, I have taken responsibility for my life. I used an option that was available to me. At this point, I am working, but I have no health insurance and no car. But I will get some soon.”

A few years later, I called Marian, but I was unable to reach her. Her phone was disconnected. I am not sure what happened to her, but a review of her bankruptcy court file indicated that she was still in a Chapter 13. Her case was neither dismissed for failing to pay the plan payment nor discharged.”

3. Mark, Male, 72, Single, Retired, African-American

I met Mark at his meeting of creditors. I represented Mark as his attorney during the meeting of creditors. Mark was sitting at the other end of the table in the debtor waiting room when I arrived. He is a tall, thin man who is soft spoken. He was wearing an elegant straw hat with a two-inch brim. He was very nervous. As I spoke with him, he consistently shifted in his chair, placed his hands between his legs, and shrugged his shoulders.

Mark has a 77 year-old brother with whom he is close. He never married because he saw one of his other brothers suffer with a “crazy” wife. He said that his parents had 10 children: five female and five male. Three siblings have died. His father lived to 93 and his mother to 87. He said that his parents were sharecroppers in the South.

“My parents worked most of their lives. They never had much rest. You know what that was in the South, that sharecropping business? It was slavery. That is what that was. My parents had to rent the land from the owner. They had to buy on credit the seeds to plant, and then, they had to pay all their profits over to him at the end. Sounds fair? I am living history of credit and debt in this country.”

“I filed bankruptcy because I could not do it anymore. You know, keep up with those credit card payments. I used credit cards to pay for my medication. I owe, I think, $8,000 or so now. I think that it was originally $4,000 two years ago. It just keeps growing. Late charges kept raising the debt owed, and then, the interest rate would go higher. I would get the bill a month after I had paid late, and the amount I owed had increased not decreased. What is the sense in that? Tell me?”

Mark debtor, interview by author, Oakland, Ca., May 2004.
“It is awful. I start paying on a $100 and pretty soon I owe $200. I had to stop it. There is no sense in it. I could not stand to see the debt double. I live on a military retirement pension and social security. It is not a lot of money. The debts are really old, and they keep getting bigger. There is no way that I will ever be able to pay them now even if I gave all the money I receive. I am old, and I am going to die soon. I just want things cleared up.”

“My friend who filed before helped me find an attorney, but I did not tell my family. My brothers and sisters would not understand a bankruptcy. They think it is wrong. I do too, but I really have no choice. I chose to pay a very small amount back on the credit cards. I am not sure how I will afford my medications, but I am trying that new plan from the federal agency.”

“I moved to California with my parents when I was 16 years old. I was the youngest. My parents had a very hard time moving here. They had to wait a long while before they could get any state support. They were old by then. They could not get social security in California. They could not get social security for five years. For five years, my father had no income. I had to work and support them. Sure, he would work trimming trees and all, but he was old. How was he to make a living being so old? I joined the military to support my parents. I sent the money home every month. I was in the military during the Korean conflict. I was part of that and so was my older brother. I was in the air force and he was in the navy. Then he became a merchant seaman. My brother is still alive. He lives near me. He is 79. I have an even older brother in Chicago. We are an old bunch.”

The trustee calls Mark’s name. We stand and I motion to the place he is to sit. I say good morning and state my name for the record. The trustee asks Mark three questions about his pension. The trustee then recommends confirmation of his proposed plan of repayment. The trustee tells Mark he is free to go, and trustee hands him address stickers to make his monthly payment.”

After the meeting, Mark turns to me and says, “Oh my goodness . . . yes. I feel so much better. Thank you so much. You helped me calm down. I can go eat breakfast now. I was worried they were going to say I had done something wrong. I was worried about something bad happening. Thank you. Thank you. You helped me relax. That was so quick. I will come by the office and see you next week. I’ll bring you my book. Bye [waving and smiling].” This is the first time I notice that Mark’s smile covers his entire face. He looks wonderful in his straw hat and seems more buoyant as I watch him walk to the bus stop to catch the bus to a breakfast place near his home.”
Introduction: Debt Culture

Bankruptcy and repudiation are the springboards from which much of our civilization vaults and turns its somersets, but the savage stands on the unelastic plank of famine.

Henry David Thoreau

Debt is a necessary component of a stable free-market capitalist economic social order. Max Weber wrote in *Economy and Society* that “debt bondage is the normal result of the differentiation of wealth in commercial cities”(Gerth 1946, 185). In an economic order such as American capitalism, that supports monetary wealth accumulation for only a limited number of institutions and individuals, the majority of individuals and institutions will lack economic resources and therefore require some form of credit. Credit-based economic systems are established and maintained through structures of debt relations. Via that debt bondage, as Weber phrased it, debt and wealth become reciprocally causal. The wealth of some cannot be extricable from the debt of others and vice versa. As policy researchers Sullivan, Warren, and Westbrook write, the American population has opted for an economic structure that “supports economic success at the price of severe economic inequality and serious economic hardship for some” (Sullivan, Warren and Westbrook 2000, 239). This dissertation maps the construction and use of that American fiscal identity to explore its implications for individuals experiencing bankruptcy and for the future of American free-market capitalism.

In considering the interconnection of wealth, debt, and the American fiscal identity, it is important to note that in most instances in American culture, bankruptcy and debtors are

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6 Free-market capitalism is a phrase used to describe the ideal type of economic order toward which America strives. Many would argue that this ideal type does not exist in practice anywhere on the globe. I do not address those conversations in this dissertation. I assume the reader has a general understanding of market capitalism as it manifests in the U.S.

7 The American fiscal identity is fully discussed in Chapter 2 of this dissertation. I created the notion of a fiscal identity to describe a cluster of cultural beliefs and practices that construct and inform a particular way Americans tend to view their own and others’ relationships to (and management of) fiscal matters, money, and the economic structure. Most of the beliefs and practices informing this identity originate from enlightenment notions of individual reason and responsibility.

8 The term ‘debtor’ has a general cultural meaning of “one who owes money to another.” This definition addresses the general meaning of the word. The term ‘debtor’ also has a specific statutory meaning that was adopted with the Bankruptcy Code in 1978 which states, “‘debtor’ means person or municipality concerning which a case under this title has been commenced.” (11 U.S.C. § 101(3).) The debtor under bankruptcy law is defined as the individual or institution filing for relief under Title 11. This dissertation employs the term ‘debtor’ throughout to denote both the earlier name under the Bankruptcy Act of 1898 for the debtor, ‘the bankrupt,’ and the later term, ‘the debtor,’ under the 1978 Bankruptcy Code. Judges and lawyers identify the fiscal failure in the bankruptcy court as ‘the debtor.’
misrecognized⁹ as marginal to or outside of the stable socio-economic-political order. The misrecognition of the place of debt and the debtor in free-market capitalism is facilitated by the social and historical construction of the American fiscal identity. This identity posits roles, norms, attitudes, and practices for individuals who exchange some form of labor for capital in the marketplace. The fiscal identity is a model or a standard for measuring the past and potential success and failure of each individual in the marketplace: his¹⁰ credit-risk status to lenders. Lenders who extend credit to an individual use this model or standard to assess the individual’s credit-worthiness. However, the lenders do not hold themselves to the same standard of responsibility when they extend too much credit. The individual borrower, not the lender, is held responsible for a problem debt situation. The fiscal “failure,”¹¹ then, is the individual who falls into a situation where he cannot pay on his debts in a timely way. The individual is then held responsible for his financial demise.

When the failure enters bankruptcy the individual is identified as a debtor and the process of misrecognition begins. The debtor experiences a form of social stigmatization through a legalized process of public shaming: the bankruptcy legal processes lay open the debtor’s financial body for public scrutiny; the debtor’s financial decisions are characterized and pronounced upon; and forgiveness is then granted to the debtor deemed worthy. The misrecognition is effectuated most acutely when the debtor in the bankruptcy process is pronounced personally irresponsible and unworthy in performing his fiscal identity. He is seen as subsequently deserving of removal from the fiscal processes of free-market capitalism. The debtor in bankruptcy, simply because he is a debtor, experiences this separation or stigmatization.

This misrecognition was codified in the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) and as such determines present bankruptcy practice. BAPCPA unmade a most-basic tenet of previous bankruptcy law: that each debtor is presumed honest until proven otherwise. According to BAPCPA, the debtor in bankruptcy must pass through the “means test” and prove that he is unable to pay his debts before he is given a

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⁹ “(Mis)recognition” is a term used by French sociologist Pierre Bourdieu with particular meaning in his writing on structures of power and capital accumulation: economic or social power (or capital) is “recognized” as a symbolic power in social interactions. That collectively agreed upon symbolic power is then “(mis)recognized” as real power. Bourdieu explains misrecognition of the economic order: “This anti-economic economy is based on the denial of interest and calculation, or more precisely, on a collective labour devoted to maintaining misrecognition with a view to perpetuating a collective faith in the value of the universal, which is simply a form of individual and collective bad faith. . . . In other words, it is based on a permanent investment in institutions that like gift exchange, produce and reproduce trust, and, more profoundly, trust in the fact that trust . . . will be rewarded.” I use the term of misrecognition similarly to describe the collective labor devoted to viewing the debtor as an outcast or a stigmatized other in capitalism, rather than the debtor in a position which in actuality is a necessary component of the economic order. Pierre Bourdieu. Pascalian Meditations (Stanford: Stanford University Press, 2000) 192.

¹⁰ This dissertation uses both the feminine and masculine pronouns as inclusive of both the male and female identity in American culture unless it is a specific informant.

¹¹ “Fiscal failure” is a phrase that the author has created to discuss the individual who is unable to pay his debts and seeks bankruptcy as a possible solution.
The new law codifies the stigmatizing and scapegoating of the debtor by casting him as first and foremost irresponsible and untrustworthy. By simply being in the role of the debtor, the debtor is viewed as having violated the most-valued tenet of the American fiscal identity: achieve and facilitate profit.

This dissertation offers a new approach to view the identity of the individual debtor. The holistic anthropological lens that informs this research draws together two seemingly disparate economic positions. A link is drawn between the position of debt and the position of wealth in the economic social order. It asserts that the place of bankruptcy and the role of the debtor is a necessary and natural part of American free-market capitalism. It explores the role and identity of “debtor” as normal components of the free-market capitalist economic and legal structures. In addition, it questions the fact that in bankruptcy and in the general culture, debtors in bankruptcy are often viewed as an aberration to the normal economic order in need of fixing. It identifies and discusses the ways that cultural and social processes misrecognize the debtor and place him outside the normal economic order.

The prominent literature on United States bankruptcy provides valuable discussions of the history of bankruptcy law and establishes the normative vision of policy creation in bankruptcy (Warren 1935; Sullivan, Warren and Westbrook 1989; Warren and Tyagi 2003; Gross 1997). However, it provides only limited discussions of the debtor as a necessary component of a stable free market capitalist economic social order. It offers little consideration of the history of the free-market structure, the American fiscal identity, and the social creation of the fiscal failure—the debtor. In addition, it fails to identify these issues and relate them to the misrecognition and experience of the debtor in bankruptcy.

This dissertation delineates the emergence of the American fiscal identity and the debtor as shaped by the confluence of differently configured Western discourses that develop on the path to modernity in particular, enlightenment thought and Christianity. It also explores the current operation of these historical discourses in determining contemporary bankruptcy experiences and practices in the U.S. In addition, it trances the manner in which these discourses have come to obscure the essential connection between debt and wealth.

This research contributes to the theoretical transitions in the study of law in culture and society that started in the mid-1960s and developed in the 1990s (Nader 1969). In this scholarship, legal anthropologists moved away from discussing law as simply a structure for maintaining order and providing individuals a way to achieve desired results. I began to view law as a normative order for mediating and replicating asymmetries of power (Starr and Collier 1989, 1; Nader 1997). Instead of viewing law as separate from the social order and social processes, law and legal processes are now studied as social processes themselves. They are seen as part

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13 The term “law” is used to denote legislation, common law and procedural rules: enlightenment and Christian notions manifest through particular, codified phrases and practices (e.g., the discharge of debts every seven years under the Bankruptcy Code of 1978 is similar to Deuteronomy 15).
and constitutive of hierarchical structures of power, and as upholding the reorganization of such structures of inequality (Starr and Collier 1989). Law and legal processes are studied in society as part of a totality that creates a hegemonic order particular to industrial societies.

In her discussions on the cultural power of law, anthropologist Sally Engle Merry writes, “one of the most important theoretical developments [in legal anthropology] is the analysis of the constitutive nature of law: of the way legal processes construct social and cultural life” (Merry 1995, 14). Merry, who studies how law produces the identity and the experiences of individuals and groups in Hawaii, argues that law and legal processes are productive of culture rather than separate from it. She explains that consideration of this constitutive nature of law requires the anthropologist to pay close attention to legal discourses, language, ideology, and consciousness in culture. Anthropologists must identify dominant cultural discourses as well as the categories of thought and codes of conduct they produce. Such discourses become hegemonic in that they have the “power that ‘naturalizes’ a social order, an institution, or even everyday practices so that ‘how things are’ seems inevitable and not the consequence of particular historical actors, classes and events” (Lazarus-Black and Hirsch 1994, 7).

The work of Merry and of this dissertation is inspired by and reliant upon the work of French philosopher Michel Foucault. Foucault describes dominant cultural discourses as disciplining in that they require a normative and naturalized code of human conduct. Foucault writes that the “discourse of discipline is about a rule: not a juridical rule derived from sovereignty, but a discourse about a natural rule, or in other words about a norm . . . a code of normalization” (Foucault 2003, 38). That code of conduct is not explicitly codified in legal doctrines, rather it is enacted through the “normalizing technologies” in legal processes (Collier 1995, 2). Discourses—codes for human conduct—generate human experiences and identities (Warren 1935; Merry 1990; Rose 1999). Merry writes, “every discourse contains a more or less coherent set of categories and theories of action: a vocabulary for naming events and persons and a theory for explaining actions and relationships. . . . Discourses are rooted in particular institutions and embody their culture. Actors operate within one or another available discourses” (Merry 1990, 110)

Anthropologist Laura Nader discusses discourses as controlling processes that manifest

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14 The phrase “legal processes” is used in this dissertation to denote a broader range of social phenomena. Legal processes include the manner in which the participants in the legal field enact, embody, and enforce law. These legal processes become the reality of law in the world. They are a manifestation of categories of thought and modes of conduct. It is in the moment of manifestation that the dominant discourses for such thought and conduct become most salient.

15 “Controlling processes” is a notion created by Laura Nader in the 1970s. The concept emerged from Nader’s attempts to explain configured networks and the forces at work within them that continually guide and shape human relations. Controlling processes provide a way to trace the dynamics of power through such configurations to grapple with everyday life. Nader’s theory of controlling processes seeks to explain individual events and practices while connecting those seemingly isolated occurrences to coherent (yet shifting) structures of social organization. Controlling processes are social and cultural controls that shape tangible social experience (laws) and intangible social processes (unspoken limitation on conduct). Laura Nader, “Controlling Process: Tracing the Dynamic Components of Power,” Current Anthropology 38, no. 5 (December 1997): 711-737.
as clusters of belief or thought (Nader 1993; Nader 1997). Such clusters shape individual and collective practice through tangible and intangible controls through the dominant discourse but are then misrecognized as natural and part of accepted forms of knowledge. Foucault writes that normative discourses acquire and establish power through “multiple fields of expertise,” “apparatuses of knowledge,” and “knowledges” (Foucault 2003, 38). The law and legal practices found in bankruptcy constitute a disciplinary field of such clusters of belief that discipline and regulate the debtor’s economic and social body through a process of exclusion, stigmatization, and forgiveness.

Before discussing the implications of American capitalism’s misrecognition of the debtor as literally rather than just symbolically outside its economic order, it is important to investigate how the symbolic recognition of the debtor as stigmatized or shamed by social and economic order occurred—via particular codes of conduct and categories of thought—in a historical context. That context is the obfuscation of the essential connection in present-day free-market capitalism in the U.S. between the places of debt, the debtor, and wealth developed through the operation of two dominating discourses in the past four centuries in human history—Enlightenment thought and Christianity.

The Enlightenment’s notions of individualism, reason, free will, and progress culminate in shaping a particular American fiscal identity that is a model for individual conduct. This model permeates American culture, law, and legal processes, and provides the backdrop for defining, understanding, and describing the financial failure. It is in relation to this model that the individual fiscal failure is generated. From the fiscal failure, the stigmatized identity of the debtor emerges as the individual transitions into bankruptcy.

Christian discourses with categories of thought including confession, atonement, and forgiveness work in bankruptcy to regulate and discipline the conduct of the debtor. Once the debtor enters bankruptcy, the debtor is perceived as having exited the normal economic order. The fiscal failure is stigmatized as the debtor, the economic other, becoming the scapegoat to protect the functioning of the volatile economic order. The emphasis on notions of individualism and reason casts the debtor outside, and requires that the debtor be re-integrated into the economic order through confession and forgiveness. Bankruptcy law and legal processes enact this regulation of the debtor’s conduct, and—if the debtor is deemed worthy—they oversee the discharge of his debt and reintegration back into the economic order.

In The Republic of Debtors: Bankruptcy in the Age of American Independence, legal historian Bruce Mann traces the emergence of enlightenment and Christian discourses in U.S. bankruptcy during the American Independence period. He discusses the social battle over the place of failure and debt in the New Republic. Mann examines “the moral economy of debt as a

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16 Rational Actor Theory (“RAT”) developed in the discipline of economics.

17 The term “Christian” is used to denote general principles shared by several branches of Christianity. At work in the American fiscal identity are Protestant notions and beliefs. In the bankruptcy process, Catholic notions take a more prominent role. Because once the debtor assumes the role of fiscal failure, the debtor must atone and ask for forgiveness of the sin of excessive debt. The debtor is given “forgiveness” if the debtor is contrite in the bankruptcy process. Christianity plays a central role in the debt experience.
religious imperative” and debt as a “secular legal imperative” (Mann 2002, 3). Mann explains that “debt was an inescapable fact of life in early America” and it “cut across regional, class, and occupational lines” (Mann 2002, 256). Debt and failure of both individuals and institutions were associated with sinfulness and individual debtors were imprisoned.

Mann traces the expansion and contraction of both the religious imperative and the secular, legal, or rational imperative as they related to individual and institutional debtors. He argues that by the end of the 18th Century the moral economy of debt for institutional debtors had lost its religious underpinnings, and there was a redefinition of insolvency from a moral failure to an economic risk. The rational legal model took primacy in relation to institutional debtors while individual debtors remained morally (and legally) bound to their financial obligations. Mann writes that through the 19th Century individual debtors were still required to “remember the sanctity of their obligations” (Mann 2002, 262). Mann concludes “[t]hus, in one sense, the solution to the struggle over the place of failure in the [economy of the] early republic was to deny it had any place at all” (Mann 2002, 262).

Failure was denied a place in the normal (or healthy) economic and political order then as it is now. That struggle is still apparent in the continued presence of the two dominant discourses of failure. Mann points out these discourses are invoked in contemporary bankruptcy practice. He writes, “today when individuals fail . . . the ethic of personal responsibility remains powerful enough that we may wonder about the social consequences of their failure, but we rarely question the economic and political structures that undermined their independence by creating a world in which mere subsistence often requires husbands and wives to work leaving families vulnerable” (Mann 2002, 263).

Mann’s points are central to this dissertation and to the construction of the American fiscal identity in that the ethic of personal responsibility requires that the individual is held responsible for his financial failure in the marketplace. Mann’s research describes the same misrecognition process concerning the essential place of the economic failure, and the debtor in early America. The individual debtor was denied a rightful place as part of capitalism. His work explains that the struggle and tensions associated with economic failure finds it roots at the formation of the free-market system in America. This deep connection between capitalism and failure found in Mann’s historical analysis is present in the contemporary moment. The contemporary individual debtor is even more a part of the natural cycles of capitalism. Furthermore, Mann identifies the key religious imperatives and the ethic of personal responsibility that creates the categories of thought that misrecognize the essential role of the debtor.

In Debt’s Dominion: A History of Bankruptcy Law in America, historian David Skeel

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18 Mann connects his work in this passage with the recent work of Elizabeth Warren and Amelia Warren Tyagi titled The Two Income Trap: Why Middle Class Mothers & Fathers Are Going Broke. (New York: Basic Books, 2003).

19 Mann’s ethic of personal responsibility is what I identify as a major component in the American fiscal identity.
analyzes the emergence of modern U.S. Bankruptcy law in the final decades of the nineteenth century. Although Skeel examines the historical and political economy of U.S. bankruptcy using theoretical approaches from the fields of political science and economics not pertinent to this dissertation, his work nonetheless provides insight into the social forces at work in two periods crucial to bankruptcy debate and reform: the Great Depression/New Deal era and the early 1970s. In the 1920s, the government\textsuperscript{20} sought to discriminate between individual debtors who were in genuine distress and those debtors who were in debt because “their own demoralization” caused harm to the public interest (Skeel 2001, 79). Also during this period, William Douglas performed an empirical study of bankruptcy in New Jersey and Boston recommending to the government that the courts should distinguish between “deserving and undeserving debtors” (Skeel 2001, 80). In the 1970s, the bankruptcy debates focused on morality and obligation. In a Congressional hearing on the proposed 1978 amendments, a representative from the National Consumer Finance Association emphasized the importance of “credit morality” to preserve a sense of “public morality” (Skeel 2001, 191). Those two periods of political and social reform offer the historical, fiscal, and legal terrain upon which the operations of rationality and morality work to mask the essential place of the debtor in free-market capitalism.

Chapter Summaries

Chapter 1. Multi-Sited Ethnographic Studies

Chapter one discusses the methods used during six years of ethnographic research in the American bankruptcy legal field. The research data and the discussions in this dissertation are a result of multi-sited, insider ethnographic research on debt and the bankruptcy experience in the U.S. The author’s research process and fieldwork experience contains aspects of the traditional methodological approaches of ethnographic research in a foreign locale while applying them to home ground in an attempt to study multiple locales of power in the debt experience.

The author used the fieldwork method of participant observation by working as a volunteer attorney in several locations in the bankruptcy legal field: the Department of Justice; the Office of the United States Trustee; the office of the Chapter 13 Trustee for Oakland; the law office of a solo practitioner debtor attorney; the office of a Maryland law firm in the Chapter 11 litigation division; and the United States Bankruptcy Courts on the East and West Coasts. At these sites, the author considered the interconnections between wealth production, the debtor, and debt discharge. The goal of this research is to engage as many agents and institutions that define the place of the debtor and debt in American capitalism as possible.

Chapter 2. Conceptual History--The American Fiscal Identity and the Fiscal Failure

To understand the process of social stigmatization and casting the debtor outside the normal functioning of the social world, it is important to consider the emergence of a particular fiscal identity in American culture. Fiscal identity is an ideal, a model against which an individual’s conduct in the marketplace is evaluated and measured. This chapter explores the

construction of that ideal and its relationship to the perception of fiscal failure. As a failure, the individual is viewed as outside the economic order and is socially and economically stigmatized. Once the individual crosses over into bankruptcy, the debtor is forced to engage in a legal process that constructs and renders his identity through Christian notions. Bankruptcy becomes a place of social and economic generation of the debtor as social deviant and regeneration back into a normal economic identity. This “reintegration” of the debtor occurs through a process of confession, atonement, and forgiveness (Jacob 1997).

This chapter uses the ideas of Alexis de Tocqueville, Emmanuel Kant, Benjamin Franklin, and Max Weber to provide an understanding of the emergence of a particular part of the contemporary form of the American fiscal identity in credit-debt relations in free-market capitalism: the part which is individualized, idealized, and informed by notions of reason, free will, responsibility, and progress. The American fiscal identity contains the belief that the individual shapes his destiny by reason and action in furtherance of rational decision-making. Each person is responsible for shaping and managing his position in the social world by taking responsibility and engaging rationally with the social world. The notion of progress, particularly economic progress, is part of this identity. The notion of individual progress operates on the assumption that reason applied to the world will continue to reveal knowledge about how to improve the human situation.

These notions of reason, free will, and economic progress, found most prominently in the works of Kant and Franklin, combine to generate a particular perception of the individual who financially fails. Anthropologists Jane Collier, Bill Maurer, and Liliana Suárez-Navaz write about enlightenment thought and identity to explain how those notions work together to create a “[fiscal] identity of the autonomous individual who acts according to his desires [which] not only invoke the pleasures of emancipation, but also the responsibility for the consequences of those decisions” (Collier 1997, 11). The dominant perception is that the individual who fails is personally responsible for his failure. The reason for the financial failure of the individual is located within the individual’s administration of his own free will rather than the exigencies of free-market capitalism.

German philosopher Norbert Elias explains the manner through which the fiscal failure experiences social stigmatization. In The Civilizing Process, Elias discusses how the social functions of the individual within the social world become more and more specialized and differentiated. As a result, individuals come to depend on others for the simplest and most basic aspects of their lives. Civilization is the slow process by which the West moves to a

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21 Although Christianity is not the only religion that incorporates the concept of forgiveness, Western Christian notions and concepts are woven through the fabric of American law and legal practices. One notion is forgiveness. This is not to deny Christianity’s ideas of punishment.

22 This notion of personal will is consistent with Horatio Alger and industrial capitalism’s “self-made man.” There are limitless opportunities for the industrious man in the capitalist economy, and if the individual rationally and systematically evaluates his abilities and situation, he will know how to improve his life and take action to do so.

rationalization of individual conduct. The rationalization of conduct (or civilizing process) develops a particular psychology, behavior, and bodily knowledge\textsuperscript{24} for the individual’s self-control. Elias explains how this internalization results in a collective group belief in which “more and more people must attune their conduct to that of others, the web of actions must be organized more and more strictly and accurately, if each individual action is to fill its social function. Individuals are compelled to regulate their conduct in an increasingly differentiated, more even and more stable manner” (Elias 2000, 367).

Elias locates the social stigma as originating from this process whereby an individual is inculcated with particular social obligations as part of a group. In the marketplace, the individual internalizes—and so is held by and to—standards of reason and responsibility. When the individual is unable to perform all or part of the obligations of that social contract, the individual is viewed as an outcast.

This chapter explains that when the individual fiscal agent crosses into bankruptcy he is viewed as having failed to be a fiscally responsible member of the collective. Rather than being considered an essential part of the free-market capitalist structure, failure is viewed as a threat to, or outside of, the stable social and economic order (Elias 2000, 379). The individual is stigmatized as other than the norm. The failure then takes on the public role of debtor in the bankruptcy system. In this role, the debtor is regulated, disciplined, and reintegrated in accordance with the general Christian practices of confession, atonement, and forgiveness.

\textit{Chapter 3. The History of Bankruptcy Notions}

This chapter explores the ways contemporary bankruptcy laws and practices developed and evolved in direct relation to the development and evolution of the free-market capitalist economy. It discusses how early American capitalism was primarily built on credit from England\textsuperscript{25} (Coleman 1974) and how the expansion and progress of commerce and industry depended on an imported British credit-system.\textsuperscript{26} All early American economic development—foreign and domestic trade, Western expansion, cash crops of wheat, cotton, and tobacco—

\textsuperscript{24} Norbert Elias discusses these components as comprising an individual’s “habitus.” “Habitus” is a concept originally used by Aristotle. Elias, \textit{Civilizing Process}, 210-211. It was later adopted and fully developed by French sociologist Pierre Bourdieu. Pierre Bourdieu, \textit{Outline of a Theory of Practice} (Cambridge: Cambridge University Press, 1977) 78.

\textsuperscript{25} Although the Dutch and French helped fund the American Revolutionary War, the New World required a great deal of credit. Therefore, American credit/debt relations with Britain developed mostly before and after the Revolutionary War. American citizens were also more aligned with Britain’s market, credit, and debt collection practices than those of France and Holland. Peter Coleman, \textit{Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy} (Madison: The Historical Society of Wisconsin, 1974) 7-13.

required an influx of credit as a form of working capital.

The ways merchants and traders grew accustomed to buying on credit and paying down debt over time is explained. Ship owners, exporters, traders, explorers, importers, manufacturers, and millers all bought and sold on credit (Coleman 1974). As historian Peter Coleman writes: “In one form or another—notes of hand, book credit, commercial paper, mortgages, and land contracts—they borrowed to establish beachheads in the New World, to buy and clear land, to build and operate mills, to purchase slaves, to finance the sale of surplus products, to buy household necessities, and to gamble and drink. Some even borrowed to buy their passages across the Atlantic, pledging their labor as indentured servants as security” (Coleman 1974, viii-ix).

Another key component explored in this chapter is the connection between bankruptcy and the volatility of commercial capitalism. The new market was young and immature. The slightest change in credit-debt relations rippled throughout the entire economy. Early Americans were closely tied to each other through these early debt-credit relations and to the financial health of the entire economy (Martin 2005). As a result, many individuals were vulnerable to the volatility. Because the majority of participants lacked meaningful stores of capital, merchants and traders became deeply indebted.

Initially in the colonies and Early America, the individual who could not pay his debts was imprisoned and removed from the marketplace for failure to pay his debts. This practice generated increased instability for the new economy. Social pleas to end the practice of imprisonment of debtors focused on economic grounds. They argued that the entire free-market capitalist system would be more stable in its pursuit of economic progress if debtors were able to remain in the marketplace. The person would not be an economic burden on his family and society. Rather, the person who became indebted would be able to continue to work and generate income. The arguments also focus on exhibiting fairness between the parties in a debt relationship by parceling out the blame between the debtor and the creditor. A writer for the Connecticut Courant acknowledges that risk-taking, debt, and loss are a natural part of the free-market capitalist order for the creditor and the debtor when stating, “he who credits another implicitly agrees to run a risk; and was there a law that none should be imprisoned for debt, perhaps it would be better for society in general. We should see commerce upon sure footing—more pursuing their proper pursuits—our goals clearer, law suits diminished, and a train of evils prevented.”

Each of the early enactments of bankruptcy legislation—1800, 1841, 1867, and 1898—were proposed, passed, and enacted to create and regenerate economic stability in the wake of an economic panic. The Bankruptcy Act of 1800 was enacted to address the panic of 1797, the Bankruptcy Act of 1841 was enacted in response to the panic of 1837, and the Bankruptcy Act of 1867 was enacted after the American Civil War. The emphasis in these early laws was on stability and certainty. Imprisoning individuals and removing them from the marketplace was not part of this early legislation.

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27 Editorial, Connecticut Courant, October, 1799.
Finally, this chapter explains that the foundational goals of U.S. Bankruptcy laws were to generate and maintain stability in the marketplace by: keeping honest merchants in the marketplace rather than locked up in debtor’s prison; allowing creditors to ascertain and access the debtor’s assets; discharging the debtor from his unpaid debts; and accomplishing this process in an efficient, cheap, and timely fashion. The evolving credit-based, capitalist economy needed credit and thus it had debtors. It is from within this historical milieu that contemporary bankruptcy practice finds its roots. This dissertation analyzes that inter-related development and its import to and manifestation in the contemporary bankruptcy field.

In reviewing the development of American and English bankruptcy laws, central themes emerge. First, early bankruptcy legislation was creditor-focused. The laws provided the creditor with socially sanctioned collection practices that publicly disciplined the debtor. Another central theme is the legal creation of the debtor category. This category shapes the identity and role of the debtor, which transitions under early English and American laws from quasi-criminal designations to civil ones. Those central themes develop and manifest according to secular and religious influences in different historical periods.

Insolvency and bankruptcy legislation in England dating back to the 16th century had one focus: protect the creditor. English legal historian E.P. Thompson argues in *Whigs and Hunters: The Origin of the Black Act* that the legal and moral order in English history are defined by the ruling political elite, the property owners (Thompson 1976). They set the tone of the judicial system. The legal powers of the state acted to protect their interests. The British economy was credit-based and since the creditors’ wealth and ability to lend relied on profiting from their holdings, the rule of law protected and extended the rights of the holders of property as its primary purpose. The early British insolvency and bankruptcy laws sought to protect the rights of holders of property against those who were excluded from such rights, the debtors.

The early laws provided the creditor with practices to enforce his property rights and were little more than socially sanctioned collection practices. The creditor was directly involved with locating the debtor and his assets. The laws provided the creditor with the power to have the debtor arrested and imprisoned. The creditor could also publicly examine the debtor, collect the debtor’s assets, and keep the assets in satisfaction of the money owed him. The law assumed that the debtor was dishonest, and he was likened to a criminal—the debtor was hiding assets from the creditor and only if treated in a punitive and invasive manner would the debtor hand over the assets. Until the late 1800s in both England and America, the creditor also retained the right to collect from the debtor even after the bankruptcy process was complete. Discharge of debts for the debtor was not possible. Usually in these early practices, the creditor would receive little from his efforts except the satisfaction of public shame and humiliation of the debtor.

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28 The debtor is identified in several early English laws as the “offender” and in later laws as the “bankrupt.” The author is mindful of this, and these categories are fully discussed in this chapter.

29 The time periods include: the formative years (1750–1890), the Bankruptcy Act of 1898 and the New Deal era (1890–1940), the dark ages of bankruptcy (1940-1978), the golden age of bankruptcy and the Bankruptcy Code of 1978 (1978–2005), and the dishonest debtor returns (2005–present).
The second theme found in the insolvency and bankruptcy legislation is a shift in the social category of the debtor. The identity and the role of the debtor transforms from a quasi-criminal legal category to a civil legal category. E.P. Thompson explains that legal categories are a result of social, political, and economic processes (Thompson 1976, 191). His analysis focuses on the category of crime found in the Black Act in 18th century England. Thompson explains that particular behaviors are considered deviant and unacceptable via the situated interests of a legal structure. He argued that the unacceptable social behavior defined in the Black Act concerned those behaviors that affronted the political powers (and people) of the day (i.e., Walpole, Yorke, and Paxton) (Thompson 1976).

The chapter discusses how, initially, the debtor’s identity and role was similar to that of a criminal. The distinction between the patently dishonest debtor and the honest but unfortunate debtor did not emerge until recently. Debtors were arrested, imprisoned, and remained in prison until they could pay their debts. Debtors had to cooperate with their creditors or undergo severe punishment. They had to list all their assets and turn them over upon demand to the creditor, chancellor, or court (depending on the particular legislation). In England, beginning around 1400, debtors had to submit to an examination by the creditor, the chancellor, the referee, or, more recently, the trustee. Today, those practices remain intact in the civil category of debtor with the exception of imprisonment.

Finally, this chapter provides the thematic groundwork for thinking about the Bankruptcy Code of 1978 and the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It is only through considering the creditor focus of early bankruptcy laws, the evolution of the powers and practices given to creditors throughout those early years, and the transformation of the category of debtor that the disciplining practices of the contemporary bankruptcy legal field are decipherable.

Chapter 4. A Doorway to Freedom from Debt

Chapter four uses Foucault’s notion of docile bodies to examine the transformation of the individual fiscal failure into the legally recognizable “debtor” in bankruptcy. The individual enters the bankruptcy legal field through a legal transformation. The debtor’s messy fiscal life is rendered and ordered according to the mandates of the bankruptcy code, rules, and local practices. This process of rendering occurs at distinct moments of attorney-client interaction: the initial phone conversation; the 30 minute consultation; the retaining of the attorney and the information-gathering interview; the signing of the petitions; the examination of the debtor or meeting of creditors; and finally the discharge letter. At each moment, the debtor’s identity and life are made coherent to the legal actors and processes of the bankruptcy field. In this rendering, the debtor’s identity and life are subject to disciplining and regulating mandates. These processes can work as controlling processes regulating identity and behavior (Nader 1993) and as productive social roles generating identity and behavior (Collier, Maurer and Suarez-Navaz 1995).

Particularly, this chapter considers the art of distribution of a debtor’s body and the creation of a recognizable, cognizable, and functioning debtor identity in the bankruptcy legal field. It also considers the notions of enclosure, partitioning, functional sites, and rank in the rendering of the debtor. Michel Foucault, Discipline and Punish: The Birth of the Prison (New York: Vintage Books, 1979) 141-162.
This chapter discusses three arenas of disciplining the debtor: the individual debtor’s attorney office; the examination of the debtor or meeting of creditors; and the bankruptcy court. This chapter considers the activities and practices of the bankruptcy legal field as it interacts with the individual debtor. Foucault’s notion of the control of activity provides the basis for discussions of the uses of time, the shape of the forms of activity in space, the creation and production of debtor identity, and the results (Foucault 1979). In each physical space of consideration, the identity of the debtor takes on a unique manifestation and role. This chapter delves into how context—physical and spoken words—is a product of social and individual experience.

Chapter 5. The Stigma of Debt and Inferior Justice

Chapter five defines the bankruptcy legal field and examines the field replication of the bankruptcy through the battles waged, alliances created, and positions taken by the agents—institutions and individuals—within the larger legal field. This chapter discusses how the U.S. Bankruptcy Court is established under Article I of the Constitution. The bankruptcy court is not granted pervasive jurisdiction rather it is an adjunct of the federal district court. The bankruptcy court is denied those powers even though it hears and decides a broad cross section of state and federal law matters. The continued Congressional and Judicial branch desire to limit the bankruptcy court jurisdiction and the power of the bankruptcy judge relates to bias and prejudices held by the fully tenured Article III judiciary concerning the subject of bankruptcy and the place of bankruptcy professionals and their clients in the legal field. Connecting chapter five to the thesis of this dissertation, this chapter discusses how the social stigma of debt and financial failure reinforced the taint of illegitimacy that characterized the area of law and the debtor. This chapter explains this positioning by placing the bankruptcy legal field within the implicit larger legal field hierarchy as both arbitrary and unjustified.

Chapter 6. Personhood Examined in the Legal Discourse of the United States Bankruptcy Code

Chapter six discusses the different conceptions of individual versus corporate debtors under bankruptcy laws and practices. A corporate debtor is often viewed as a purely economic actor. When a company files for bankruptcy, the pre-bankruptcy conduct of the company is analyzed through legal standards that focus on the business judgment rule rather than the morality of the corporation’s decisions and conduct. Bankruptcy judges are cautioned in case law against imposing their own reasoning and values when making determinations about the management and operation of a corporation. The United States Trustee similarly rarely imposes its judgment in overseeing the monthly operating reports.

In contrast, an individual debtor is not viewed as a purely economic actor and bankruptcy judges are not cautioned by a clear case law standard to refrain from imposing their own reasoning and values, but rather are advised to use their discretion. The 2005 amendments to the bankruptcy code, Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), make this difference in treatment evident. Under BAPCPA, the legal and moral presumptions of the bankruptcy laws for the individual debtor—and not for the corporate debtor—have reverted
Under the 1978 Code, the debtor—individual and corporate—was presumed to be honest and filing in good faith. If the debtor was filing a Chapter 7, the debtor was presumed unable to afford a Chapter 13. The burden of proving otherwise was on the party objecting, usually the creditor, to the debtor’s petition or the information in it. The standard under the 1978 Code required the United States Trustee to present evidence of a “substantial abuse”31 by the debtor’s Chapter 7 filing. Under the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, the presumption is that the debtor is not honest or acting in good faith. The debtor is immediately subjected to a “means test” to determine if the debtor could afford to pay a portion of the debts owed. The means test requires the debtor to produce voluminous supporting documentation and information to the trustee or the court.32 Under BAPCPA, the debtor must begin the bankruptcy process by proving his moral character. BAPCPA does not place the same requirement on the corporate debtor, nor is the corporate debtor required to subject its accounts receivable and accounts payable to a “current monthly income” analysis to determine if the corporation has an actual ability to pay more of its debts than it indicates in disclosures. Thus, the individual debtor unlike the corporate is not viewed as a purely economic actor by the bankruptcy field and the social world.


32 Depending on the jurisdiction, supporting documentation may be given to the trustee or the court. Pursuant to the 1978 Code, Title 11 U.S.C. § 521, the debtor must give supporting documentation to the court, but the court can designate by local rule that the documentation is filed with the trustee.
Chapter 1. Multi-Sited Ethnographic Studies: An Up, Down, and Sideways Analysis

An informed analysis of debt and debt structures can reveal fundamental features of a society and its culture. In the American setting, understanding debt and debt relations requires study of how fiscal success and fiscal failure are conceptualized in social arenas. To collect the requisite data for this analysis, I used my training as a bankruptcy lawyer to become a participant observer in the U.S. bankruptcy legal field, conducting six years’ worth of multi-sited\textsuperscript{33} ethnographic research.

As a result, the research and discussions in this dissertation are the product of a non-traditional method of ethnographic research in multiple field sites by an insider ethnographer: they incorporate aspects of traditional methodological approaches to ethnographic research while applying them to “home ground” locales of power in the debt experience, thereby building on a research approach that seeks to transform traditional ethnographic tools, methods, and products. Laura Nader’s concept of “studying up, down and sideways” is central to this insider ethnographic research (Nader 1972).

To study debt and debt relations in the U.S., I performed research in social spaces in which manifestations of debt and debt relations emerge: the Office of the United States Trustee – Department of Justice; a Chapter 13 standing trustee office; a Chapters 7 and 13 debtor attorney office; a Chapter 11 corporate debtor firm; and two United States Bankruptcy Courts (in Maryland and California). At each location, I was both an insider working as a group member and a researcher collecting data, conducting interviews, and observing daily experiences. Below, I briefly discuss my role at each location, the social agents I observed, and issues that arose as they related to the research process. Afterward, I comment on traditional, transitional, and contemporary ethnographic processes and practices.

Office of the United States Trustee

A United States Trustee is a person appointed by the U.S. Attorney General to oversee the bankruptcy process in one of twenty-one geographic regions created by the Department of Justice. The office is identified as the Office of the United States Trustee (“UST”). The UST acts as a watchdog for a particular region by enforcing the bankruptcy code and the bankruptcy rules in judicial proceedings. William Neary, the United States Trustee for the region containing the Northern District of California, granted me permission to conduct a study on work performed by the Office of the United States Trustee in Oakland. The United States Trustee’s office for the Northern District of California regulated and monitored the bankruptcy process by reviewing chapter 7 petitions, overseeing meetings of creditors, overseeing the chapter trustees, regulating bankruptcy attorneys, overseeing Chapter 11 cases, and generally preventing fraud.

\textsuperscript{33} Nancy Scheper-Hughes, “Parts unknown: Undercover ethnography of the organs-trafficking underworld,” \textit{Ethnography} 5(1): 29-46, 2004. Scheper-Hughes discusses an innovative approach to multi-sited ethnographic research in 12 countries on a dangerous and difficult topic, the traffic in human organs. Her medical human rights research on organs trafficking highlights the challenges of the multi-sited approach in that such a methodological approach runs the risk of being to thinly spread and lacks the traditional ethnographic depth.
From September 2002 to June 2003, I worked as a civil enforcement attorney in the Office of the United States Trustee at the Department of Justice in Oakland, California. During my research period, the UST’s official statement of activities included supervision of case administration, identification of fraud and abuse in the bankruptcy system, appointment and supervision of private trustees, and identification and referral of federal crime.

In exchange for this opportunity, I worked two to three days a week for the United States Trustee as an intern civil enforcement attorney. My role as an enforcement attorney involved appearance at an office in the federal building, a weekly collection and review of fifty or more Chapter 7 debtor petitions, selection of numerous petitions for further research, review of the PACER docket, research regarding the selected petition in federal and private data bases (i.e., Choice Point, IRS listing, state real property listing, Secretary of State filings) to determine the veracity of the information contained in the petition, attendance at a full day of meeting of creditors, questioning debtors (or their attorneys) in the meeting of creditors concerning the information provided in the petition, determining the existence of any abuse of the bankruptcy system in a particular case using an informal means test, drafting and filing a motion to dismiss an abusive case, arguing the motion to dismiss in the bankruptcy court, filing motions denying attorneys their fees if the case was sloppy, and holding telephone conversations with attorneys about particular cases. This role is characterized by its distance from the debtor as a person, and its deployment of legal tools against the social status of the debtor. The imposition of this role on the identity and body of the debtor is discussed later in the dissertation.

My insider role as attorney generated ethical conflicts with my outsider role as a researcher. The conflicts arose in connection with my loyalty to my role as government officer and the expectations placed on my work in that capacity versus my commitment to my role as a researcher. For example, the senior attorney in the office and I had the following conversation concerning informant confidentiality and my duty as a federal officer:

   Sam: Are you going to interview debtors?

   LC: I was hoping to interview debtors in the San Francisco office because of conflict of interest issues.

   Sam: You can interview debtor[s] out of our office. The cases have to be over a year old, so we cannot go after them for violations of the bankruptcy code if the debtor reveals something to you in the interview. But if they reveal fraud to you in an interview, you know that you are under a duty to report it.

   LC: When I do an interview as an anthropologist the interviews are confidential, so there is nothing to worry about in that regard.

   Sam: Not if there is fraud. You have taken an oath to uphold the laws of the federal government, so you have to report it if the debtor tells you something.

   LC: There is no worry of them telling me something that I would report.
Sam: You know you have to report fraud. (I fall silent and let the conversation shift topics.)³⁴

Thankfully, during this year of work and research at the UST’s office, I did not encounter any fraud during my interviews with several dozen individual debtors. Notably, although the UST agents, of whom I was one, always expected to find fraud, the amount of fraud that I encountered during this period and the following five years in the bankruptcy field was very limited.

Another area of conflict arose in the work environment. Sam placed workload expectations on me when I was in the office that made it difficult to take notes and observe. I found that I was working twice as hard to obtain data because I was busy writing motions, filing papers, and doing case research. During several conversations, Sam asked me if I was coming into the office to work or to do research. It was difficult to explain to her that I wanted to come into the office just to observe and interview people. Also, I found it hard to explain to her that my work was part of my field research. She wanted me to separate the two, because, I believe, she wanted to make sure that she was able to extract enough labor from me to make it worth her time to have me in the office.

The potential conflicts aside, several important benefits accrued from working in the office as an insider anthropologist. The most significant one is trust. The employees in the office trusted me because I worked with them on a daily basis, creating a familiarity and a camaraderie that does not normally emerge between a researcher and her subject. I noticed that interviewees such as Alan³⁵ and Shawn³⁶ felt comfortable around me immediately even when I held a tape recorder. They told me things that they would not tell others, and they pointed to examples of things that we both experienced.

Second, as an insider attorney, I was able to oversee and actually perform the work of a bankruptcy cop regulating and punishing debtor and attorney behavior. As further addressed below, this role, because it is primarily a legal role, does require legal knowledge to be understood. The challenge becomes learning not simply to accept the regulating and punishing activities as the norm, but to question those activities as a researcher. The power of the regulator is intoxicating and generates a particular bodily stance and approach to particular social arenas. As an insider researcher, I took on that bodily stance and attitude. This attitude shaped many aspects of my appearance, my behaviors, the vocabulary I used, and the practices in which I engaged. I became the appropriate social agent with a reflexive tendency.

Office of the Chapter 13 Trustee

After a year of research at the UST-DOJ, I moved my field site to a Chapter 13 Trustee’s office for four months. The Chapter 13 Standing Trustee is appointed by the regional UST (William Neary) for a particular area. It is a full-time, statutorily created position, and unlike the

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³⁵ Alan Interview, interview by author, Oakland, Ca. February 2003; Alan Interview #2, Interview by author, Oakland, Ca. March 2003.

rotating Chapter 7 trustee position, a permanent employment position. The Chapter 13 trustee with whom I worked was located in Hayward, CA in a physically separate office from the UST’s Office in Oakland. The office had approximately thirty-four employees at the time of this research, and the office occupied one half of a floor in an office building.

The duties and activities of the Chapter 13 trustee, and the composition of the Chapter 13 trustee office and support staff, are statutorily specified. The Chapter 13 trustee is the principle administrator of all Chapter 13 cases in the district in which she works. Her duties and activities include the following: review all Chapter 13 petitions, review all Chapter 13 plans proposed by debtors, oversee debtors’ income and payments under a plan, distribute payments to creditors, investigate the financial affairs of debtors, examine proofs of claim filed by creditors, appear and be heard at any bankruptcy court hearing concerning the value of property, and plan confirmation or modification of a confirmed plan. Because the relationship to the debtor in a Chapter 13 repayment setting is continuous, the Chapter 13 trustee and the trustee’s office staff are charged with also providing legal advice and assistance to debtors in performance under the plan (3-5 year duration) and ensuring debtors commence timely payments on the plan.

In exchange for being able to conduct research in the Chapter 13 trustee’s office, I worked as a legal intern in the office. My duties included attendance at the office, assisting the different bankruptcy case analysts, reviewing attorney fee applications, calling overpaid creditors and attempting to obtain reimbursement of the overpayment, and attending meetings of creditors and court hearings with the trustee and staff members. These activities involved a great number of phone conversations and other interactions with attorneys, debtors, and creditors.

This position in the bankruptcy field required daily contact with individual Chapter 13 debtors. The legal bodily posture tended to enforce the separation between the trustee and the debtors. The stance is regulatory and punishing, but more time is spent interacting and dealing with the real lives of debtors than the UST office spent in the same endeavors. The goal is to ensure the debtor maintains regular monthly payment to the Chapter 13 trustee so that she in turn can pay the creditors and realize her percentage.

Several challenges arose conducting this research as well. As an insider, I was expected to behave like the rest of the staff, who were highly time- and duty-regulated and disciplined. This regulation conflicted with my research practices, and often, I had to choose between collecting research data and performing repetitive office tasks. On the other hand, I was also given ample opportunity to observe the Chapter 13 trustee and the staff, as the trustee placed few limitations on what I could observe, read, and research. (For example, I was not permitted into certain staff meetings.)

Debtor Attorney Office Chapters 7 and 13

After working at the Chapter 13 trustee office, I began to conduct research at an individual debtor solo practice office. These types of offices are often identified as ‘debtor
This attorney worked in Oakland, CA but she advertised her services all over the San Francisco Bay area, particularly in publications geared toward the gay community readership. She practiced with one assistant. Her only area of expertise was Chapter 7 and Chapter 13 for individual debtors. She had over three hundred active bankruptcy cases at the time I worked there. She had little-to-no knowledge of Chapter 11 and business bankruptcies. This provided me with an excellent opportunity to interact with individual debtors.

Similarly at this office, I worked as an intern attorney. I worked four days a week during regular business hours. My duties at this office included those of a practicing individual debtor’s attorney: answering phones to bring in new clients, conducting client intake interviews, collecting documentation from clients, collecting money from clients, preparing bankruptcy petitions, researching and writing motions, attending meetings of creditors with debtors, attending court hearings with debtors, calling various creditors on behalf of debtors, negotiating with creditors for debtors, and making sure that the debtor completed the bankruptcy process.

The debtor attorney position stands the closest to the individual debtor in the bankruptcy field. The bodily posture still embodies the distance characteristic of legal actors, but much more personal interaction occurs in this position than in any other in the field. This is obviously due to the fact that the debtor hires the attorney as his legal agent. That said, a professional separation is nonetheless maintained between the attorney and debtor. The attorney views herself as an officer of the court first, and a hired gun for a client second. The attorney is unlikely to simply do what a debtor client suggests, and frequently, when the debtor fails to do as the attorney instructed and another regulating agent in the bankruptcy field has complained to the attorney, the attorney will criticize the client and demand changes. The attorney can always withdraw from the case and end the relationship with the debtor.

Bankruptcy mill life is fast-paced and exhausting. Potential client phone calls come in all day while the attorney is conducting intake interviews with other clients. The bodily posture is always leaning into the next client or meeting or court appearance. There is rarely enough time to engage each activity thoroughly. Another challenging aspect of this work is replying to the lengthy and detailed requests for information and documents required by the bankruptcy petitions. Clients have a difficult time collecting all of the required information, shifting the burden to the attorney to prod the client to comply.

Chapter 11 Corporate Debtor Law Firm

During the last four months of 2004, I observed and semi-interned at a large firm with offices in Baltimore, Maryland, and Washington, D.C. that works with corporate debtors. The firm was headquartered in downtown Baltimore and had a satellite office in Washington D.C. The practice represented some of the largest corporate debtors and creditor committees in the region and employed over 500 attorneys, of which 200 were partners. The practice areas of the firm included business organization, partnerships, corporate law, bankruptcy law, mergers, real

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37 A ‘debtor mill’ is small law firm that works with individual humans. The firm focuses on placing the individual into a chapter 7 or a chapter 13 bankruptcy filings. These firms will not take on a chapter 11 case or a business case. The practice is specialized.
estate, medical malpractice, insurance defense, and trial and appellate litigation. The most profitable sector of the firm was the bankruptcy division, with three partners and five associates. The principal bankruptcy clients were large and medium-sized corporate debtors, bankruptcy creditor committees, and advising large corporate clients about bankruptcy. The practices associated with this representation included client interviews, petition and document preparation, the research and writing of motions, presenting first-day order motions, attending meetings of creditors, attending court disclosure statement hearings, and attending court plan confirmation hearings.

At this field site, I was not allowed to actually do work. I was instructed to watch, listen, and rarely talk. As a result, it was impossible for me to actually function as an attorney in connection with an active Chapter 11 case. I was able to read some Chapter 11 disclosure statements, attend some disclosure statement hearings, and listen as the judge praised the firm’s work. I also attended court with a few of the firm partners and associate attorneys. For the most part, however, I was kept at a safe distance from the large corporate clients.

The most challenging aspect of this field site was access. I could see large meetings taking place in glass-walled conference rooms, I could overhear intense conversations between partners, I could see the stellar performance of the firm’s attorneys in court -- but I was never given access to everything that was really going on in any particular case, only pieces. I learned a great deal more about the Chapter 11 big firm practice working in the bankruptcy courts than I did while working in an actual Chapter 11 big firm.

The bodily posture of this elite group of attorneys is one of distance, efficiency, and efficacy. More than any other area in the bankruptcy field, besides the bankruptcy court, the large firm is a place of distance and insulation. The emphasis is on protection of self, of client, of information, of secrets. The priestly class of the bankruptcy field ushers in a different kind of legal austerity.

United States Bankruptcy Court

Finally, from 2005 until 2007, I worked as a law clerk for three Federal Bankruptcy Judges in Baltimore, Maryland and San Jose, California. The U.S. Bankruptcy Courts are the hub of the bankruptcy field. Legal effects occur in this physical, mental, and emotional space. Each federal district in the U.S. has a bankruptcy court. The number of judges depends on the number of bankruptcy filings in the district. In the first district in which I conducted research, there are eight bankruptcy judges and two bankruptcy courthouses. Three of the judges in this district were recently appointed due to the creation of new positions after the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. During the year I worked in this district, over 150,000 individual bankruptcy petitions were filed. This district was primarily known as a well-established Chapter 11 filing district. In the second bankruptcy court ethnographic field site, there were nine judges and three courthouses. The number of individual debtor filings was under 100,000 during the year I worked there. The court in the area was primarily oriented toward addressing the needs of the Chapter 13 consumer debtor.

I began my research at the Maryland bankruptcy court as an intern law clerk, but I was
soon hired as a full time law clerk to work for two judges. I was given permission to conduct research as long as I kept certain information confidential. I was able to interview several bankruptcy judges from around the country as a law clerk intern and later as a hired law clerk.

My duties as a law clerk included participating in office activities, communicating with outside counsel (this varied by judge), reviewing and preparing the court docket for different types of matters, researching particular issues for the judge, writing memoranda, bench memoranda, and draft opinions, attending courtroom hearings, conducting research for the judge during the hearings, performing order and motion review, reviewing objections to claims, signing simple orders, attending training and judicial conference seminars, and interacting with the case administrators and courtroom staff.

The bodily practice of agents in this context is based on its complete separation from the rest of the bankruptcy field. As a court agent, my interaction with attorneys and unrepresented creditors and debtors was very limited. If an individual debtor was unrepresented (i.e., lacked an attorney), the courtroom staff typically refused to speak with the individual. The judge determines the extent of contact with the debtor. That approach, then, becomes the individual judge’s chamber policy. One judge with whom I worked did not allow any contact between the law clerk and outside persons, insisting that contact with the unrepresented and attorneys occur at a remove, through the courtroom deputy or other courtroom staff. Another judge preferred that the law clerk rather than the courtroom staff have contact with the unrepresented individual debtor and the attorneys.

The challenge at this field site resulted from the dominant ideals underlying judicial legitimacy and power: distance and impartiality. As a court insider, my contact with and access to non-court participants in the bankruptcy legal field was extremely limited. During my two years working in the different U.S. Bankruptcy Courts, I focused my research on interviewing judges, law clerks, and other court staff. I also observed hundreds of lawyers and debtors during many bankruptcy hearings.

The interviews of trustees, lawyers, debtors, and to a very limited extent creditors, occurred before or after my law clerk appointments.

Research Challenges

This multi-sited insider research created numerous challenges and raised several issues that implicate the methods and tools of traditional ethnography, leading to questions concerning the validity of studying American culture; distance and perspective; access; trust; and confidentiality. I was able as an insider researcher to identify key informants at each site, gain the trust of my informants, find the organizing structure for the field site, take on the bodily practice, and feel moved to act or not act like a normal participant. But questions remain concerning the value of the traditional ethnographer role and ethnographic approach when studying power from the insider position.

Traditional Ethnographic Method

Ethnography is considered the most significant contribution of anthropology to the social
sciences. It has grown from a side study of the initial naturalist expeditions of the early nineteenth century to a complex and informed method used by several disciplines in the twenty-first. The ethnographic process is traditionally defined by key characteristics: pre-trip theoretical training, native language training, a distant (untouched) population, or “the other” as object, an exotic landscape, long-term immersion, little contact with native westerners, illness and suffering or culture shock, assuming the role of pupil or child to learn the culture, and the use of central informant(s) (Stocking 1992). Most importantly, the ethnographic text is the culmination of the ethnographic experience. The ethnographic text creates “the other” for western readers. The result of the processes transforms the student into expert. The ethnography creates the written expression of an acquired ethnographic authority.

It is important to stress that although these key characteristics appear systematic, they are the result of historical processes in England and the U.S. In England, the method slowly developed through the work of academic natural scientists, psychologists, and linguists who were fascinated with understanding and comparing “primitive” populations that they encountered in colonized territories. The “primitive” groups were viewed through the “comparative method” lens as survivors of early human populations in the evolutionary record— an evolutionary record that culminated in Western civilization. A small group of ethnologists were motivated to develop a method that would assist them in gaining in-depth knowledge of the particular history of the soon-to-be-extinct native groups that they studied. In the U.S., the goal of researchers was to undermine the contemporary trend in ethnology of classifying groups along a developmental trajectory from primitive to civilized and to arrive at a historically particular understanding of culture. Thus, the two schools developed and emphasized different aspects of an “intensive” or “immersion” method.

The techniques of ethnographic fieldwork developed in the U.S. and in England by Boas and Malinowski achieved the status of an accepted systematic approach to fieldwork in the 1930s, 1940s, and 1950s. The basic tenets of traditional fieldwork in anthropology include the following: the researcher must study a foreign and distant population, learn the native language, live with the group for an extended period of time, behave as the natives do, identify key informants to teach and explain life to him as if he were an infant, collect data on matters such as census materials, kinship structures, and customs and beliefs, and perform these tasks in a scientific manner to preserve their authority and authenticity (Macdonald 2001, 62). This approach was used and information was gathered so that the anthropologist could “study societies as wholes. . . their ecologies, their economics, political and legal institutions, their family and kinship organizations, their religion, their technologies, their arts” (Evans-Pritchard 1951, 11). Most importantly, this approach stresses the need to collect data before developing a theoretical approach to the culture being studied.

Repatriated Ethnography: An Insider Approach

Due to the Euro-American origins of the field of anthropology, with its colonial-paternalistic-jingoistic-moralistic cultural filters, it is only recently that anthropologists have dared to begin scrutinizing western societies and cultures. Application of traditional analytical methodologies to “the other” in one’s own backyard has yielded mixed results, however. As a result, several writers argue that an “insider” or “repatriated” anthropology requires an approach
to anthropology theory and ethnographic method that is significantly different from the traditional one discussed above (Wolcott 1981; Aguilar 1981; Wolf 1974). Insider ethnography is described as “not identical” to ethnographic research in a distant locale (Geertz 1983). Whether the researcher seeks to perform cultural critique, engage epistemological comparisons, connect the West to the Third World, or create a self-reflective analysis of anthropology at home, anthropologists writing ethnographies about the U.S. must address different questions and issues relating to their fieldwork site, their approach, and the nature of their inquiry. As well, the traditional fieldwork questions must be approached from a different angle, creating methodological permutations.

The challenges of performing ethnography in the U.S. have been discussed and explored by various writers (Wolcott 1981; Messerschmidt 1981; Aguilar 1981; Jorgensen and Truzzi 1974; Wolf 1974; Lofgren 1989; Kimball 1955; Marcus 1998). Some of the questions these anthropologists discuss include the following: What is “insider” or “repatriated” anthropology and what are some of its challenges? Are the approaches and elements of the participant-observer role used in traditional anthropology—defining a place, entry, rapport—altered with the “insider” ethnographic? What ethical questions and issues arise with insider ethnographic research?

I will first consider these questions using several ethnographies written about research conducted in the U.S. (urban and rural ethnographies, research on religion, class, and race, and considerations of American identity) and then address the challenges I faced conducting my fieldwork.

In their text *Anthropology as Cultural Critique*, Marcus and Fischer describe “repatriated” anthropology as an approach that moves beyond the typical anthropological interests in the American exotic—native Americans and immigrants—to consider “a vast range of topics in American life, ranging from the culture of corporations and laboratories to the meanings of rock music” (Marcus and Fischer 1986, 112). Marcus and Fischer write that anthropology is about getting at distinctive cultural variation where it is found, and for them, cultural variation is found everywhere, including the U.S. (Marcus and Fischer 1986, 113). As the U.S. becomes a valid location for conducting research, the role of the anthropologist as purely an interpreter enlarges to include a role as an informant to the research. This new role is unstable and troublesome because it fundamentally challenges the researcher’s ability to distance herself and objectively observe and explain.

Aguilar discusses “insider” anthropology as the “study of one’s own society” which he says is distinctive because the researcher is an informant in the research process. In “Insider research: an ethnography of a debate,” Aguilar iterates the conversations he has had about insider ethnography. He explains that the tenets of fieldwork—participation, observation, and informants—have different nuances in the context of an anthropologist studying his home culture. Particularly, the anthropologist is a participant both consciously and unconsciously in the cultural norms of the group. The anthropologist does not only need to acquire knowledge from informants, but rather she must find ways to uncover it within herself. Aguilar writes that critics of insider anthropology doubt the capacity of the anthropologist to uncover this internalized information. Rather, the critics believe that the only way to obtain unconscious information is
through culture shock. According to critiques by Merton and Simmel, without the culture shock of radical difference the unconscious structures of social organization remain hidden, untapped, and, therefore, unexplored (Aguilar 1981).

In “Anthropologizing America,” Lofgren addresses this issue by reviewing four ethnographic works. He explains that in the 1980s anthropologists worldwide were returning home to conduct fieldwork (Lofgren 1989, 366). The rise of symbolic and cognitive anthropology helped to usher in a challenge to the ethnographic method by shifting the emphasis from communities and groups to deep structures and discourses of collective meaning production. The problem he identifies with anthropology at home is the “problem of overcoming the blindness caused by familiarity with one’s own culture scenes: of being both insider and outsider in the research process” (Lofgren 1989, 373). Lofgren believes that this blindness, if it exists, prevents the researcher from grasping the whole and thorough characterization of a society. Thus, Lofgren’s need for objectivity and holism reflects the attachment to perceived objectivity that anthropology at home reveals as a false creation.

Aguilar questions Lofgren’s need for objectivity and holism. He writes that the question whether unconscious patterns of thought influence the anthropologist’s ability to conduct objective research is a concern only if one is intent on reading the ethnographic text as an objective characterization of a population under study. Aguilar is not certain that objectivity is necessarily required or possible. Rather, he argues that the text can be read differently. It can be read as “not only statements about the culture but also as an expression of the culture” (Aguilar 1981, 15). The text of an insider anthropologist becomes part of the ethnographic expression, not simply a representation. Rather than attempting to rid ethnography of biases, the biases, according to Aguilar, become part of the ethnographic textual representation.

In sum, anthropologists working on their home turf are presented with several questions of distance and objective perspective. The concern is whether the research can be detached enough to present an accurate representation of the populations studied. As I mentioned, in most locations of my field research, I worked alongside the individuals I studied. As an attorney, I took on their vision of debt, debt relations, and debtors. I adopted their bodily practices. This part of the research was relatively simple. The most persistent challenge was the process of stepping back to gain. Instead of attempting to create distance, I closely tracked and observed my personal practices in each location and in relation to each group. As Aguilar indicates in his writing, the insider anthropologist becomes part of the ethnographic expression. My practices and behaviors became a way to understand the larger processes in which I was immersed during my research.

By adopting this approach, I was able to grasp central themes in the bankruptcy field as they relate to its structures, practices, and notions. The focus was mostly on the professionals in the field rather than the non-professionals: while I interviewed numerous debtors and several creditors—non-professionals—I did not file a bankruptcy petition, nor have I ever filed a proof of claim as a creditor in a case, and thus I have not been an insider as a debtor or creditor in the bankruptcy field. I do hold a substantial amount of student debt, but in American society, that does not qualify me to be a debtor. In sum, the emphasis of my inquiry, and therefore the limits of my insider knowledge, is from the perspective of a bankruptcy legal professional. The nature of the specific role of attorney created my distance.
Defining Place, Entry and Rapport

As mentioned above, traditional ethnographic fieldwork is defined by the emersion of the anthropologist into the lives of the other. The main challenges to ethnographic research have traditionally been location, access, and rapport-building. The researcher locates a distant and foreign population that fits with the questions she wants to study. Then she attempts to gain access to the field site and the people through bureaucratic, political, and social processes. When she is granted official permission, she makes contact and moves to the location. Once she is “on the spot,” she attempts to access information about the group she is studying by building rapport with key members of the community.

An anthropologist engaged in research at home experiences location and access differently. Unlike traditional anthropology, with its well-defined place and population for engaging in participant observation, anthropology at home strains the ethnographic notion of a “field site” or particular locale for bounded research. In her text *Praying for Justice*, Greenhouse defines her research place as “the synergy of social processes in this region, which was for so long the frontier, is not separate from the individual lives of its inhabitants but, in part, constitutes them” (Greenhouse 1986, 35). Greenhouse conducts her research on conception of order and law in Hopewell, Georgia. She attends church services, interviews people living in the area, and observes local behaviors. Greenhouse allows the people she interviews to define who they are and where they live. She does not attempt to describe or define a southern town, but rather she grapples with the mental mappings of the people with whom she interacts (Greenhouse 1986). The site of research is less geographic and more perceptive.

Key notions of place and rapport in traditional ethnographic research are similarly expanded in repatriated ethnography. The work of Odendahl in her study of philanthropic elites illustrates this point. She conducts 140 in-depth interviews at multiple sites (Odendahl 1990, 4). She is unable to live with or spend long periods with her informants, however, so Odendahl is forced to identify and delineate her population using traditional research tools in an innovative fashion. Odendahl conducts her research at private estates, charity organizations, business offices, private colleges, and exclusive clubs. Through an innovative process, she identifies a nationwide “culture of philanthropy” (Odendahl 1990, 5). Networks of relation connect this culture. It has no particular geographic location, but is rather defined by a set of practices, held together by beliefs, and perpetuated through generations. For the most part, then, anthropologists conducting research at home participate in the lives of separately contacted subjects or subjects located in networks of interaction and association. Moffatt calls this approach to research “dispersed participant observation” (Moffatt 1992, 210).

Anthropology at home also presents challenges when the anthropologist attempts to access the group and build rapport with its members. Participant observation in a foreign context is traditionally the result of consistent interaction between the researcher and the informant. The researcher attempts to gain access to the population, and then, if successful, lives among the population, learns the language, and builds trust with an informant or a small group of informants. In non-western contexts, this process usually follows a narrative of a transformation of the anthropologist from outsider to insider. The population at first rejects the anthropologist or mildly tolerates the anthropologist’s request to “study” them. This rejection usually shifts as the
members of the population interact with the anthropologist. For example, Geertz writes that for the first few weeks after he and his wife moved to a village in Bali, the members in the village acted as if they were invisible (Geertz 1973). It was only after a bonding experience in which Geertz acted like a member of the community did the people acknowledge and allow him to study them. Geertz writes that at this point fieldwork in Bali became possible. Research abroad is often characterized by a trajectory of transformation from outside to insider.

The challenges of entry and rapport are subtly different for anthropologists conducting ethnography at home. Moffatt explains that most “insider” anthropologists conduct their research “close to home” in urban neighborhoods, work places, and places of leisure (Moffatt 1992, 208). The researcher speaks the language and knows the appropriate code of conduct in the appropriate settings. Aguilar explains that when the anthropologist looks like the studied population, the individuals in that population tend to respond in a more positive manner to research questions (Aguilar 1981). The insider anthropologist sharing the same cultural history can grasp the nuances and behavior patterns of the people; therefore, the anthropologist can blend in more completely physically, behaviorally, and expressively than an outsider anthropologist. The initial rough spots experienced by outsider researchers such as Geertz may be limited or eliminated, but new problems emerge from over-identification.

Serber’s work in two regulatory insurance offices highlights the problems of research when the anthropologist is too identified and accepted by members of a population. The ease with which Serber accessed the Pennsylvania Department of Insurance made many of his potential informants suspicious of him and his research. Serber was given complete access to all employees, staff meetings, and employee files by the top management. He could interview any member of the staff and ask any question regardless of content (Serber 1981, 83). The complete acceptance of Serber by the commissioner of insurance caused the employees to believe that Serber was a mole or a Ralph Nader spy in the organization. As a result, many of the employees shunned him and shunned his research project, forcing him to rely on documents and public meetings. Thus, Serber’s native ability and knowledge provided the initial entry and rapport that granted him access to the agency, but other avenues of inquiry were closed to him for the same reason.

Traditional anthropology techniques of defining a place, gaining entry, locating an informant, and building rapport are different with “insider” ethnography. The traditional approaches are fractured as if one is looking through a kaleidoscope. As for the need for the ethnographer to be “on the spot,” with insider ethnography the “spot” is all around, as Carol Greenhouse indicates.

This is particularly true with my research. Every American citizen has a fiscal identity and has understandings and views about financial failure and bankruptcy. Each location at which I conducted research was connected with every other location by collectively-held ideas, beliefs, and practices, as well as by explicit laws and rules. The bankruptcy field was indeed located in the general legal field that occupies a prominent position in American social space. Defining a distinct location was difficult. Each informant in a location or position within the bankruptcy field and within the legal field defined herself or himself in relation to another location or position. In order to address this, I allowed each informant in each location to become defined
for me through the informant’s words, expressions, and actions.

Gaining physical entry was not initially difficult in most locations connected to my research project. I offered free legal work and most agents in the field gladly accepted, with the exception of the elite firm. Physical access was relatively simple, but deep access into the practices and processes posed a challenge at times. In the federal government (Department of Justice, Office of the United States Trustee), I was required to agree to maintain confidentiality regarding names and specific cases. In this federal government location, I was permitted to attend all meetings for the general staff. I was given full access. Often times, I did get a hint that the people I worked with had an underlying presumption that my work was more in line with legal formalism (i.e., focused purely on law and rules rather than practices). Most of the informants did not understand the exact nature of ethnographic research no matter how often I described it.

Access at the large firm, as explained above, proved almost impossible. The elite lawyers granted me interviews, let me read court documents, and took me with them on “field trips” to the court, but they limited my access to information beyond these mostly public interactions. For example, I never attended a firm meeting or an important client interview. Similar to Serber’s exclusion from the activities of his field site, I was excluded from the “real” activities of the firm. The firm’s culture of austerity did not provide fruitful ground for ethnographic inquiry into the deepest practices of firm life, but it did provide insight into the practice of distance and power. In any event, my research at the elite firm was intended to help me locate the large firm in the bankruptcy field and to enable me to compare the Chapter 11 practices with Chapters 7 and 13 practices. This goal I did achieve.

Insider research in places of power has the central challenge that, for the most part, access is granted by some individual or group of individuals. There is a sense that, if not for the graciousness of that gatekeeper individual, I would not be there. At all of the locations, a researcher cannot simply walk in and begin to ask questions, collect documents, and observe interactions among participants. There is often no public access to many of the locations. At each location, I had to obtain permission. I wrote letters explaining my research. I spoke with “a person in charge.” I had to persuade some individuals that my research had value, was different from traditional legal research into bankruptcy, and did not pose a threat to that person or his or her official office.

The process of finding informants is less challenging in that most of the participants at each location spoke English, but it was more challenging in that many people wanted to be my informant. At each location, I had several informants. Due to the fact that at most locations a strict power hierarchy is in place, my official informants were the people who held the positions of power. I would sit next to them in meetings; I would follow them to court; I would listen closely when they spoke. The people, who pulled me aside, took me out privately for lunch, or called me at home to talk about the work environment informed the data collection process. I learned more than was necessary about office politics and bad behaviors by superiors than was needed for this research. The difficulty in selecting reliable informants came from the fact that so many people wanted to talk with me. It took several weeks for me to grasp the professional dynamics of a particular field site, and to weed through the comments and insights different
individuals offered.

Finally, rapport with participants in the bankruptcy field was challenging because conversations and interactions were often limited to the topics of law and legal processes. Since I am legally trained, I had immediate rapport with most professionals in the bankruptcy field, and yet this interaction and rapport was stilted. It took effort for me to get legal professionals to develop areas of interaction and conversation. It was with only a few informants at each location that I was able to create a lasting and deep rapport.

The Death of Ethnography?

After six years of conducting “insider ethnographic research” at multiple field sites in the U.S. Bankruptcy field where I was both an observer and a participant (as a volunteer attorney), I began to think about the notion of fieldwork and the ethnographic process from an academic perspective. Recent anthropological conversations about fieldwork have proclaimed the death of ethnography—a proclamation with which I disagree. Instead, my dissertation research explores the transformations of traditional tools and methods and the uses of them in favor of engaging complex and shifting social phenomena in the U.S. (Schepers-Hughes 2004; Bourgois 2002; Wacquant 1995).

What is clear to me after doing this research is that the proclamation of the death of ethnographic fieldwork fails to recognize the complicated history of the discipline of anthropology and the ethnographic method. The discipline and its tools have persistently resided on shifting ground, shunning master narratives and grand histories. Recently anthropologists have reflected on the place ethnography occupies. In the past two decades, anthropologists have begun to engage questions that encourage self-discovery and home study. “Insider” or “repatriated” ethnographic research encourages new approaches.

In Ethnography Through Thick and Thin, George Marcus explores “anthropology on the move” in the context of the new self-reflexive intellectual trends that shape the field at the fin-de-siècle. Marcus writes:

[w]hile the exotic is in eclipse and there is no more of the literal world to discover, the sense of discovery in ethnographic research is still important and a key to why scholars engage in it. Certainly, there has always been much room for self-discovery in fieldwork, and this has only been reinforced by recent license to explore reflexive forms of analysis (Marcus 1998, 21).

Marcus explains this change in ethnographic research as “a shift away from the ethnography that is so centrally place- and local-world determined toward an ethnography that emphasizes a link-up with the more pluralistically sensitive systems perspectives” (Marcus 1998, 34). Rather than viewing ethnography as dead, Marcus views it as radically alive.

Ethical Questions

Several anthropologists have raised distinct ethical concerns while conducting research
on home ground (Bourgois 2002; Scheper-Hughes 2002; Greenhouse 1986). As mentioned above, ethical questions arose during my research in connection with the tension between my dual professional identities as researcher and lawyer. At several sites in my research, I worked as a lawyer representing a client. In the UST office, I represented the U.S. Government as a volunteer attorney in the Department of Justice. With the individual debtor firm, I worked directly with debtors. I represented the debtor as her attorney at hearings and in court. I was the debtor’s advocate. These roles are contrasted with my role in the U.S. Bankruptcy Courts. The courts assume a role of neutrality when working with the debtor; therefore, I had limited direct contact with debtors.

Each of these positions had the potential to stimulate deep tensions between my research and advocacy roles. To deal with these potential tensions, I looked to the professional ethical rules for each profession. Both professions have ethical rules. As a researcher, I am bound by the rules protecting human subjects and confidentiality. As a California lawyer, I am bound by the ethical rules created by the California State Bar and adopted by the state courts. These rules require my primary loyalty to rest with the profession and the courts first and to the client second. For example, if a client plans to lie, the attorney must inform the court. The first duty is to the integrity of the court and the legal profession. It is to this that my supervisor, Sam, at the UST office was referring. She was attempting to require that I forego my ethical requirements regarding human subjects by elevating my professional role above my research ethics. She believed that my first duty was to the federal government and the bankruptcy court.

Particularly, Sam requested that I report fraud if I found it in interviews with individual debtors. She thought that my research may uncover more fraud than the UST office was currently uncovering. At the time of my research, the frequency of individual fraud in the bankruptcy process was almost non-existent. Sam’s unfounded belief that debtors were committing more fraud than was currently being uncovered by the UST’s investigations, I believe, stemmed from the stigmatization of debtors as sinful and dishonest social actors. The collective belief at the UST’s office is that debtors are liars and they hide property and money from the trustees in the bankruptcy process. The assumption of the UST attorneys is that debtors can pay their creditors, and that debtors are filing bankruptcy petitions in bad faith. Numerous times, Sam complained that bankruptcy had lost its stigma, and debtors did not feel guilty about filing a bankruptcy petition and not paying their creditors.

Sam’s beliefs about debtors and debtor behavior caused her to expect that I would find more fraud in my research process than I actually did. Her instruction to report it to her and the court was never an issue. Of the numerous debtors I interviewed and represented, I never came across a debtor who was committing fraud or acting in bad faith. I was not placed in a position of tension between the two professions’ ethical standards.

Working directly with debtors during my time at the Chapter 7 and 13 bankruptcy mill, I did not confront the same ethical tension as I confronted working at the UST. As an attorney directly representing the debtor, the professional ethics aligned. As an attorney, I was charged with the duty of protecting the interests of my client, the debtor. I am bound to keep my clients secrets and advocate on the client’s behalf. Conflict would arise if I knew that the client planned to lie to the bankruptcy court. In such a situation, the professional rules for the respective roles
would again be in tension. The issue of lying to the bankruptcy court did not arise in my fieldwork. In most instances, if a debtor asked if they had to list on the bankruptcy schedules a piece of real property or some personal property, I explained that such a disclosure is required. Perhaps by explaining to the debtors the requirements of the bankruptcy process, I encouraged misinformation by the client to me or I prevented such misrepresentation to the court. It is hard to know whether the debtors lied or remained silent about assets and therefore hid those assets from the trustee and the court.

At the U.S. Bankruptcy Court, I worked as a law clerk for three bankruptcy judges. In this position, I took an oath of office to serve the court honestly and to not engage in treason against the federal government. I found this mandate easy to follow. As mentioned above, direct contact with individual debtors was extremely limited. I rarely spoke directly with individual debtors. I did not conduct interviews with debtors during my time working for the U.S. Bankruptcy Courts. For the most part, I focused my research away from non-court agents and toward court employees. By doing so, I was able to focus my inquiry on the impact of the social stigma associated with bankruptcy on the bankruptcy court and bankruptcy judges.

Conclusion

The ethnographic method, like the people and institutions I studied in this research, transformed over the past twenty years, and it will continue to transform. This study of fiscal identity, financial failure, and bankruptcy in the U.S. engages a new kind of ethnography emerging in the twenty-first century. It necessarily employs traditional ethnographic tools and processes while transforming them by including consideration of networks of power at the local, regional, and national levels (Nader 1972).
Chapter 2. Conceptual History--The American Fiscal Identity and the Fiscal Failure

The merchant evidently believes the State street proverb that nobody fails who ought not to fail. There is always a reason, in the man, for his good or bad fortune, and so in making money.

Ralph Waldo Emerson

What is a debtor? As an economic phenomenon in America, a debtor is an institution or an individual who owes a debt to another institution or individual. At any given moment, most participants in the capitalist economic structure owe a debt. Therefore, almost every institution and individual in the U.S. is a debtor. “Debtor” becomes an identity in economic relationships. In an economic order that encourages wealth accumulation, credit is required for those who lack wealth. Debt and debt relations are the life of this system. Therefore, an institution or individual with debt is essential to the health of the system. Yet, when the individual with debt fails to timely pay that debt and enters the bankruptcy system, the individual is viewed as a pariah whose conduct must be reformed so that he can be reintegrated into the economic system. As illustrated by an informant who works in a bankruptcy court as a law clerk, the debtor in the bankruptcy system is viewed as one who transgresses the codes of economic participation found in the tenets of the model fiscal identity in America: “a debtor is a person who has violated the delicate balance in his financial life between the assets and cash he has and the debts he owes. It is someone who is not responsible with his finances, he has irresponsible spending habits.”

Intrinsic to this model, fiscal identity is an evaluation of the individual’s character and conduct. The conduct of the individual in the marketplace is used to characterize the essential nature of the individual as a moral actor. This process of evaluation and categorization of the individual is most apparent when the person fails. Historian Scott A. Sandage explains this contemporary identity in his discussion of the transformation of the meaning of the word “failure” during the 1800s and 1900s in the U.S. According to Sandage’s analysis, the social meaning associated with “failure” broadened from an incident in commercial life (i.e., a failed business venture or attempt) to an identity (i.e., a ruinous life without purpose) (Sandage 2005, 260-262). Therefore, the commercial success or failure of the individual in free-market capitalism defines the identity of the individual for the social world.

The cultural and intellectual theories of Western modernity and post-modernity explain the development and characteristics of individual identity in the modern world. In modernity, identity is constructed in terms of self-creation, self-recognition, identification, and reflective recognition. Individual identity emerges through enacting various social roles: teacher, merchant,

38 Jane attorney, interview by author, San Jose, Ca., November 2007.

39 Chapter One of this dissertation discusses free-market capitalism. It provides a short history of the construction and operation of the American economic system. This history is traced in connection with the passage of various bankruptcy acts.
man, woman, parent, American, or foreigner. Individual identity is reflected through social values or norms: responsible, reliable, caring, and thoughtful. An individual’s identity emerges as part of a collective process and experience, but it is felt individually and becomes internalized and personal. This modern view of individual identity is essential, static, unitary, and simultaneously has the potential for change. As philosopher Douglas Kellner explains, “in modernity, the problem of identity consist[s] in how we constitute, perceive, interpret and present our self to ourselves and to others” (Kellner 1992, 143).

The theories of post-modernity expand the modern construction of the self by adding a component of uncertainty to identity. Postmodern theorists discuss individual identity as increasingly unstable. Identity in post-modern capitalist structure is constructed through a myriad of images and texts found in popular cultures as well as from the roles and norms enacted in an individual’s life (Kellner 1992, 145-147). A post-modern identity lacks unity and consistency and is more subject to revision than was the modern identity. Using the perspective of identity found both in modernity and post-modernity, it is possible to explain the emergence of a particular model for the contemporary fiscal identity.

Modern capitalism has dominant discourses with categories of thought that shape social and cultural experience in relation to fiscal matters. These categories of thought create a model against which individuals evaluate their own and others’ monetary and financial behavior and practices. This model works to construct a particular fiscal identity gauging the individual’s success or failure. A key aspect of this model identity is individualism. Participants in modern capitalism come to view themselves and others as autonomous financial actors in financial matters. It is from this space of separation and isolation that individuals assume responsibility for their financial status.

This model for the American fiscal identity is hegemonic in that it improperly locates the causes of the boom and bust cycles of free-market capitalism systems in individuals. In so doing, the larger social and economic forces are personalized. Individuals are taught to take responsibility for their location in the economic order rather than viewing themselves as part of the cycles of the larger capitalist structure of power and wealth. The individual’s financial success or failure is viewed as a direct result of the individual’s attitudes, conduct, and behavior rather than as emerging from particular sets of economic relations, historical processes, class structure, and legal order. Interviews conducted by the author with non-debtor informants and debtor informants illustrate this.

When asked by the author, “What is your general view of debtors in bankruptcy?” non-bankruptcy debtor informants often immediately responded by discussing how they were raised

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40 The best example is the recent home mortgage crisis. Individuals received home mortgages from banks and other financial institutions that have variable interest rates (known as Adjustable Rate Mortgages) that eventually became financially unmanageable. The decisions of lending institutions impacted thousands of individuals and substantially affected the health of the economy. The full results of this top down blunder for the individual consumers are not yet known.

41 Non-debtor informants are those individuals formally or informally interviewed by the author who were and had not been a ‘debtor’ in bankruptcy. These informants included members of the legal community or members of the general public.
to be responsible and pay their bills. They indicate that they would never file for bankruptcy because to file for bankruptcy is “not how they were raised.” Non-debtor informants discuss their spending habits, savings accounts, retirement funds, approach to credit cards, home-loan decisions, and general approaches to responsible spending. The interview subjects often indicate that they have high credit score or FICO score. During interviews, non-debtors emphasized their personal attitudes, beliefs, and practices. They view themselves and others as autonomous economic actors who have control over their economic status. In effect, having control over economic cycles.

Similarly, when asked the same question, debtors in bankruptcy immediately discuss their family upbringing. Debtors often indicate they can never tell their mother, father, or other family members that they filed bankruptcy because “that is not how I was raised.” Debtors in bankruptcy similarly view their financial status as resulting from their own attitudes and behaviors. During interviews, debtors recount the numerous financial decisions about a car, residence, or a child’s schooling that they made in the months leading to filing bankruptcy. The debtors often evaluate several aspects of their pre-bankruptcy conduct to locate a reason or a cause for the bankruptcy filing.

The portrayal of an archetypal bankruptcy debtor in the media, during Congressional hearings, and in other aspects of social interaction, further engrains categories of thought. Bankruptcy debtors are described at various times as individuals who have engaged in irresponsible financial conduct. They have too many credit cards, bought expensive cars and houses, or made other poor financial decisions. These poor decisions lead the fiscally irresponsible person to experience financial demise—house foreclosure and a return to renting, car repossession, and bankruptcy. The focus is on the debtor’s perceived poor, irrational, and sometimes, emotional financial decisions. The presumption is that the reason for the person’s financial failure is always located in the individual rather than in the cycles of free-market capitalism, and therefore the individual deserves what he receives in the form of financial and social exile as well as stigmatization.

The fiscal identity locates that instability of the free-market capitalist economy in individuals. This fiscal individualism model is built on notions of personal responsibility, rationality, and individual control. The individual rarely views himself as part of a large set of uncontrollable powers and processes. In Debt for Sale: A Social History of the Credit Trap, anthropologist Brett Williams questions the naturalization of this model of fiscal identity by pointing to the larger economic forces that limit and shape the possibilities for and decisions of the individual. She asks, “In the face of this rude exploitation [i.e., employment insecurity,

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42 A FICO (Fair Isaac Corporation, founded in 1956 by Bill Fair and Earl Isaac) score is a cumulative, three-digit number that considers the individual’s payment history, outstanding debt, and number and type of accounts as reported to the largest credit reporting agencies—Equifax, Experian, and TransUnion. Scores range from 300 to 850. Anything above 700 is considered to represent very good “financial health.”

43 Over 75 formal and informal debtor interviews were conducted during the six years of this research.

marketing and advertising of the culture of lack in every part of social life, the rising costs of education and healthcare, and the organized credit industry—target marketing, easy credit, and increasing opportunities to use credit in daily life] why aren’t we angry at banks? Why instead do we blame debtors?” (Williams 2004, 51). Williams locates the debtor, the fiscal failure, as part of a wealth structure that relies on credit-debt relations for profit creation.\(^{45}\)

Williams’ analysis considers the particular sets of economic relations, historical processes, class structure, and legal order that have created the conditions of possibility for individuals in the U.S. to find themselves in a sea of what has become known as problem debt. She explores the strategies of financial-service companies to shrink productive investment in exchange for high-interest credit cards, student loans, and predatory lending to the poor. Williams connects these practices to the fall of the middle class, the elimination of small businesses, the exploitation of college students, and the inequalities in the cost of credit for different class groups. When debt becomes a problem for an individual, the individual, his friends and family, and the social collective are exceedingly quick to point an accusatory finger. They attempt to ferret out the person’s poor decisions causing the debt problem. Williams asks the reader to “abandon individualized, distorted, privatist myths of individual responsibility and reaffirm our social responsibility to tighten the labor market, make wages and incomes more equal, and provide a safety net for people who are vulnerable” (Williams 2004, 130).

When the debtor and problem debt are discussed, no significant consideration is given to the conditions of possibility that create this failure or to the wealth consolidation that occurs for the organized banking industry as debt accumulates. In highly differentiated and specialized industrial capitalist economies, the debts of particular individuals and institutions are closely associated with the creation of wealth in other individuals and institutions. For the experience of wealth to exist in social forms of modernity, debt relations are required. The interconnectedness of wealth and debt and of fiscal success and failure in American culture is often left to the imagination.

b. Emergence of the American Fiscal Identity, Social Contract, and the FICO Score

The emergence of a fiscal identity in America is connected to the intellectual movements of the Enlightenment.\(^{46}\) The development of the notion of the individual and pervasive individualism in America is traceable to enlightenment themes and attitudes. In this section, these themes and attitudes are discussed in relation to the development of a particular American attitude toward financial and fiscal matters. This chapter will discuss the themes and attitudes of the individual and the social phenomena of individualism. It will consider: (1) the break from medieval thought to enlightenment thought; (2) the writings of two historical figures on early

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\(^{45}\) Williams traces the development of credit and debt relations from the Revolutionary War to the present. She explains that Americans have long relied on credit and gone into debt during hard times. Williams focuses her analysis on the emergence of the banking industry’s systematic marketing of credit cards to individuals beginning in the 1950s and through the greatest marketing campaigns of the 1970s. Brett Williams, Debt for Sale: A Social History of the Credit Trap (Philadelphia: University of Pennsylvania Press, 2004).

\(^{46}\) The Enlightenment is best known as an intellectual movement that spread from Germany to England and then the United States. The central tenets and attitudes resulting from this movement are still pervasive: belief in science and the scientific method, the use of reason, and ideas about the identity of the individual.
American individualism, Alexis de Tocqueville and Benjamin Franklin; (3) the works of two enlightenment philosophers, Emmanuel Kant and John Locke; and (4) the work of these historical figures and enlightenment philosophers is viewed through the writings of Max Weber and Michel Foucault.

In medieval thought and culture, truth, or God’s law, was achieved through divine revelation. It had little to do with the thought processes of humans. Medieval beliefs denied the place of the individual or individual exploration. Rather, the focus was on the collective, or “the great chain of being.” This view of knowledge was replaced in the Enlightenment by the belief that truth was achieved through the scientific or rational exploration of nature (Jacob 1997). The rational exploration of nature and the subsequent flow of knowledge led to the belief that reason and science would continuously reveal truth about the world (Nisbet 1980). This experience gave birth to the notion of progress, that humans would continuously discover more truths about nature and be able to better their situation. The natural world notions of the idea of progress were applied by late seventeenth century thinkers to the study of human social formations and institutions (Nisbet 1980; Jacob 1997).

John Locke applied enlightenment notions to social policy, generating reform in institutions and law (Locke 1947). Contrary to medieval thought’s emphasis on the divine and the denial of the individual, Locke believed that all individuals had natural rights based on natural laws. He wrote that each individual is able, through reason, to discover the natural laws of life, liberty, and property (Locke 1947). It is through an application of reason that the individual is able to reflect on his rights and position in the world, and work to improve his position. Reason ensures individual progress and social progress. It was believed that the application of reason to human collectives continued the development of rational social institutions.

Anthropologist Bill Maurer explains that this transformation of the European worldview from the Renaissance to the Enlightenment profoundly affected perceptions of the individual and the individual in society (Maurer 2000). The organization of the world as part of the “great chain of being,” with elites and commoners knowing their place and bound together by rights and duties, gave way to a view of the world as centered on individualism. Locke wrote that the rational individual would choose to contract with the government to protect himself in exchange for his obedience and support for the social collective (Locke 1947). Locke promoted the notion of rational individualism. In this view, the collective does not determine the place of the individual in a ranked status structure; rather the individual has the power to make his position in the world based on personal abilities (Maurer 2000). The group no longer defines the individual and his position; instead, the social whole is defined as a collective of individuals. The individual is no longer assigned a place in the social ranking system, but rather becomes master and creator of his own life. As a result, the individual and individual action become the focus of social policy and structure.

In 1831, Alexis de Tocqueville observed this epistemological shift from the collective to the individual in the new American Republic during his tour of the American prison system. He wrote that the citizens of the New Republic believed that “their whole destiny is in their own hands” (Tocqueville [1840] 1990). The individual is severed from the collective. De Tocqueville
described this newfound individualism as “a novel expression, to which a novel idea has given birth. Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that he has thus formed a little circle of his own, he willingly leaves society at large to itself” (Tocqueville [1840] 1990: vol. 2, 98). Individualism for de Tocqueville was a novel idea allowing the individual to experience himself and separate from his family, friends, and the social world.

For de Tocqueville, American democracy not only represented a change in the formation of the government, but also a change in the identity of the citizen. He wrote that “individualism is of democratic origin” (Tocqueville [1840] 1990: vol. 2, 98). As an aristocrat and a lawyer in France, de Tocqueville rejected this new approach as unnatural. He found the intense individualism and the severing of the ties of the individual to the group, the group to the generation, and the generation to the next generation disturbing. He wrote, “The woof of time is every instant broken and the track of generations effaced. Those who went before are soon forgotten; of those who will come after, no one has any idea: the interest of man is confined to those in close propinquity to himself” (Tocqueville [1840] 1990: vol. 2, 99).

De Tocqueville’s view of American individualism and its break with the past differed from the view of the citizens of the New Republic. They considered the creation of a new democracy as a moment of clearing away the past, a break from the traditions and structures of England and the Old World, and an opportunity for creating a new self (Tocqueville [1840] 1990). De Tocqueville wrote of the philosophical method of the Americans that “the operation of the mind of each American appeals only to the individual effort of his own understanding” (Tocqueville [1840] 1990: vol. 2, 3). He believed that Americans enacted the very tenets, principles, and attitudes of the Enlightenment stating that “America is therefore one of the countries where the precepts of Descartes are least studied and are best applied. Nor is this surprising. The Americans . . . follow [Descartes] maxims, because this . . . social condition [of democracy] naturally imposes their minds to adopt them” (Tocqueville [1840] 1990: vol. 2, 3-4).

This epistemological change afforded by the American Revolution was an important shift in consciousness for the founders of the new country who believed that individualism and the break with medieval thought was necessary for the development of a democracy. The break from the past marks what Kant would call the “way out” found in the enlightened self. This involves release from the status of immaturity—defined as a state of will that makes an individual accept someone else’s authority to lead rather than trusting the individual’s own reason—to a status of maturity, or a state of will in which the individual must dare to use his own reason to acquire courage and knowledge for himself (Rabinow 2003, 45). It is this application of practical reason to how the individual lives and how the individual acts that creates the mature, dignified social actor (Korner 1999).

Kant’s works Critique of Pure Reason (1781), Critique of Practical Reason (1789) and Groundwork of the Metaphysics of Morals (1785) establish him as one of the most significant

representatives of Eighteenth-Century Enlightenment in Western thought.\textsuperscript{48} His thought reflects many enlightenment ideals: the importance of reason and science, the notion of progress, the dignity of the individual, the distrust of authoritarianism, and the importance of autonomy and of thinking for oneself. In his short essay, “What is Enlightenment?” Kant urges the reader to overcome the lessons of childhood, from which one learns to blindly accept the authority of others, and to learn to think for oneself (Korner 1999). This model for the individual’s attitude, conduct, and behaviors is described by Kant in a Latin phrase, sapere aude, which means “dare to know” meaning dare to think for oneself, reason for oneself, and come to one’s own conclusions in one’s own way (Foucault 2003).

This moment in history, Foucault\textsuperscript{49} writes, “is when humanity is going to put its own reason to use, without subjecting itself to any authority” (Rabinow 2003, 47). Foucault explains that the Enlightenment is defined “by a modification of the preexisting relation linking will, authority, and the use of reason” (Rabinow 2003, 45). The rational individual emerges who reasons and engages his will as a member of a reasonable humanity. Foucault identifies this creation as “the outline of what one might call the attitude of modernity” (Rabinow 2003, 48). As Foucault explains, “By ‘attitude’ I mean a mode of relating to contemporary reality; a voluntary choice made by certain people; in the end, a way of thinking and feeling; a way too, of acting and behaving that at one and the same marks a relation of belonging” (Rabinow 2003, 48). The attitude or ethos of modernity compels the modern enlightened man not to discover himself,\textsuperscript{50} but through reason and will to create himself. He then becomes responsible for himself. The creation of the self, for Foucault and Kant, is a process of the constitution rather than the discovery of the self as an autonomous subject (Rabinow 2003, 51).

Kant’s enlightenment notions of the individual (i.e., ethos of modernity), as explained by Foucault, provide a foundation for understanding de Tocqueville’s comment about the citizens of the New American Republic and Emerson’s statement concerning failure “in the man.” Enlightenment thought paired with the emergence of particular social forms, particularly legal and political norms create the conditions and forces that generate a particular model for individual identity.

Benjamin Franklin,\textsuperscript{51} a leading public figure in Philadelphia in the American Colonies,

\textsuperscript{48} Kant is one of the central philosophers of the Enlightenment. That said, I do not wish to characterize him or his work as the embodiment of the events and process—political, social, religious, and economic—that occurred at the end of the eighteenth century. His work is used to indicate a general shift in thinking that occurred during the Enlightenment.

\textsuperscript{49} Foucault’s lecture builds on Kant’s thought. Foucault states in his lecture that the discovery of the ethos of modernity is a starting point for further analysis of forms of modernity. Paul Rabinow and Nikolas Rose eds., The Essential Foucault: Selections for the Essential Works of Foucault, 1954-1984 (New York: The New Press, 2003). This idea is used in this chapter of the dissertation to discuss the creation of the modern American fiscal identity.

\textsuperscript{50} Rousseau and the Romantics believed that the self is discovered as part of nature and the natural order. Society of men destroys rather than develops man’s internal nature.

\textsuperscript{51} Franklin is selected as an example because of his instructional financial writings. Several founders of the United States could have been selected.
provides an example of Kant’s notions of the autonomous courageous individual thinking, acting, and behaving for himself in society. Franklin was a model man of the Enlightenment. He believed in deliberately shaping his character and worldly achievements. The Autobiography of Benjamin Franklin\(^2\) is an example of the maxim from Poor Richard’s Almanack that states, “[h]e that can compose himself, is wiser than he that composes books” (Labaree 1964; Sandage 2005). Franklin’s life goal and autobiographical goal was to create an accurate portrait of an enlightened public figure. Franklin was literally a self-made man. Historian Scott Sandage describes Franklin’s life as a life set in movable type (Sandage 2005). He explains that Franklin understood that to rise in social stature and political power one must create a good story of oneself and that such creation is always subject to revision and correction. As Sandage notes, Franklin wrote, “failures were like typographical errors . . . forget small ones and revise ‘great Errata’ in ‘a second Edition’” (Sandage 2005, 105).

Franklin believed that this worldly creation of the individual rational self was a calling. Franklin further linked this political, social, and ethical creation of self with virtues of industry and thrift. His writings represent a weaving together of religious and secular themes to create his individualism which is founded on “industriousness and frugality as the cultural foundation of social and economic success” (Manning 2000, 103). In Necessary Hints to Those that Would be Rich, Franklin advises:

> Time is money. He that can earn ten shillings a day by his labor, and goes abroad, or sits idle, one half of that day . . . he has spent, or rather thrown away, five shillings . . . Credit is money. If a man lets his money lie in my hands after it is due, he gives me the interest . . . Money can beget more, and so on. . . . Remember this saying, “the good paymaster is lord of another man’s purse.” He that is known to pay punctually and exactly to the time he promises, may at any time . . . raise all the money his friends can spare (Franklin 1736, 80).

In Advice to a Young Tradesman, Franklin speaks sharply of time spent idly and without purpose (Franklin 1748, 87). Franklin warns readers, “When you run a debt; you give to another power over your liberty. . . .The borrower is slave to the lender; and maintain your independency: Be industrious and be free; be frugal and be free” (Manning 2000, 103).

Weber writes that Franklin secularizes the religious notion of a calling to serve God. He explains that Franklin’s character and writings represent the spirit of capitalism and the resultant rationalization of conduct in the social world with a classical purity (Weber 1930, 48).\(^3\) For

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\(^2\) Franklin was the first person to write about his life using the term *autobiography* to describe what was previously called *memoirs*. This again indicates his intention to break with the past and create a new self and a new representation of the self.

\(^3\) Mc. Neill refers to the work of A. Hyman and H. M. Robertson. Some religious scholars reject the view of Max Weber in his association of Protestantism and capitalism. Their criticisms appear targeted at the effects of capitalism (i.e., wealth accumulation and its impact on the poor) rather than the spirit of early American capitalism (i.e., worldly labor, rationalizations, spend thriftiness, and saving). Weber is not addressing usury and speculation familiar to the American upper class, nor is he addressing the Protestant charity characteristic in the history of the
Weber, Franklin and the Protestantism found in his writings create a kind of worldly asceticism in which all work in the world is done in God’s service. Service to God in this manner creates God’s favor. This implies that laboring diligently so that one gets ahead in the material world could be an indication of God’s approval. Paired with the notion of hard work to earn God’s favor is the idea that the individual must be frugal. As can be seen from Franklin’s writings and Weber’s discussion of Franklin’s writings, if the individual spends money freely and indulges desires, then he likely will lose God’s favor and therefore be materially unsuccessful.

Weber reflects on Franklin’s advice that a merchant or tradesman must make rational decisions to work hard, be frugal, and save (Weber 1930). The merchant or capitalist represented in Franklin’s writing, which Weber employs throughout The Protestant Ethic, must be dedicated to rational calculation. The individual must be able to defer rewards. Self-discipline is key to the development of the spirit of capitalism in America (Weber 1930, 154). Finally, Weber ties the notions found in Franklin’s writings to Kant’s notion of the enlightened man. He states, “many of [Kant’s] formulations are closely related to ideas of ascetic of Protestantism” (Weber 1930, 270, fn. 58).

De Tocqueville, Kant, Franklin, and Weber provide the theoretical insights to chart the emergence of a particular part of the contemporary model for the American fiscal identity in debt relations. It is an individualized identity, not perceived as shared with a group. Fiscal identity is shaped by reason and a notion of responsible action. The citizens of the New Republic believed that their destiny could be created by an act of personal will. In this model, each person becomes responsible for shaping and managing his position in the social world. Rational engagement and personal responsibility, in this view, generate the social world.

I. The Individual and the Social Contract

Contrary to the medieval emphasis on the divine and the denial of the individual, John Locke writes that all individuals have natural rights based on natural laws. Locke’s Second Treatise of Government proclaims that all men are created equal under the law, and all men have individual rights. Rather than existing within the rules of the group, each individual man is able, through reason, to discover his place according to natural law (Locke 1947). Yet Locke is clear in stating that this ability to reason and discover natural law is not the freedom and liberty to do whatever he likes, to live as he pleases, and to not be bound by the social contract. The social contract is created as an interconnection of the rational individual with other rational individuals to form the social group. Men have power, freedom, and property because of the rationality and, therefore, legitimacy of the social contract.

For Locke, the social contract is legitimate and enforceable because it is based on certain known and agreed-upon principles and relationships – legal equality, different branches of government, and checks and balances. It is not arbitrary or the result of despotism. Locke writes that the rational individual would choose to contract with the government to receive protection.
In exchange, the individual offers obedience and support for the social collective (Locke 1947). The individual naturally promotes this particular form of rational individualism. In this view, the collective does not determine the place of the individual in a ranked status structure as in medieval times. Rather, the individual has the power to make his position in the world based on personal abilities (Maurer 2003). The totality of the order no longer defines the individual and his position. Instead, collections of independent reasoning individuals compose the social whole. The individual is no longer assigned a place in the social ranking system, i.e., the great chain of being connected to the divine monarch. The individual man becomes, as de Tocqueville describes, the master and creator of his own life. As a result, the individual and individual action became the focus of the policy and the structures of what is called Western or bourgeois law (Collier 1997).

With the Enlightenment emerges the rational individual, one who is a member of a reasonable humanity (Rabinow 2003, 45). Individuals engage in rationalized conduct and thought as a mode of “relating to contemporary reality” (Rabinow 2003, 48). Franklin provides an example of the individual’s ideal conduct and behavior within the social contract. He instructs the young tradesman to be honest, forthright, and pay on his contracts in a timely manner to advance his position in the social world. Franklin instructs on rational conduct in the market place so the individual can create his public self within the context of the social contract. Weber explains that Franklin’s attitudes and beliefs are useful for understanding the emerging work ethic and relationships with other tradesmen in the American market place (Weber 1930, 52). The ability of a man to freely engage in and contract with another is central to the emergence of the individuated self.

It is not surprising that the basis of modern American law, economy, and society is contract principles and theory. In Born Losers: A History of Failure in America, which is about fiscal failure in 1841–1843, historian Scott Sandage writes:

Contract was the framework of achieved identity; by his own toil and acumen, any free man could make deals to advance himself. Hence, “nobody fails who ought not to fail.” The law’s proper role was to preserve liberty of contract unfettered and to refrain from hindering its exercise. Massachusetts Chief Judge Lemuel Shaw . . . was a central force in raising “the paradigm of contract to its supreme place in nineteenth century legal thought.” . . . [A]fter the Civil War, contract brought forth a new ideal of freedom: every citizen an entrepreneur. In theory, every man enjoyed unfettered choices to sell his labor for wages . . . to incur debts or not. Those injured on the job or tricked into debt peonage had no recourse, because the law presumed that individuals freely chose their situations (Sandage 2005, 64).

Individualism and freedom join together in the ability to contract in the market place. Sandage describes this trend before and after the Civil War. Individual men came to view themselves and others as responsible for creating and contracting their labor in the market place. The idea was that individuals could make wise decisions for personal economic progress or could choose debt peonage. The decisions a man made, the market relationships he created, and
the outcomes of both became a reflection of the internal ability of the man. The laws and market practices in these time periods were not meant to protect the individual who chooses poorly. Sandage explains that into the Nineteenth Century, a person’s character traits became a marker of the person’s financial success. In the Twentieth Century, these traits became viewed as a part of a man’s psychology. This internalization of the individual fiscal identity is most apparent in the Great Depression.

Sandage’s accounts from the 1920s and 1930s are replete with descriptions of personal character and personality flaws. During the Great Depression of 1929, numerous individuals took their lives to avoid the shame of financial failure. Sandage writes that “ours is an ideology of achieved identity” and failure is an imputed deficiency of self (Sandage 2005, 258-278). The volatility of the free market system is imputed to the beliefs, actions, and behaviors of individuals. If a person is successful in the marketplace, he is imputed to have made good decisions, and according to Weber, he received God’s grace. If the individual is a failure in the marketplace he is at fault and a search is conducted to find a poor decision or defeating behavior that is the cause for the failure.

II. Determining Fiscal Success and Failure in Contemporary Society

Contemporary fiscal identity\(^{54}\) extends beyond what Franklin envisioned when he told the young tradesman to protect his reputation in the marketplace and pay his debt. A successful or failed fiscal identity in contemporary society is no longer determined by the individual’s reputation in a local marketplace or community; rather, it is calculated based on data collected by third parties (Durkheim 1995; Bourdieu 1990; Mauss 1990). The successful or failed fiscal identity is determined by numbers and reports controlled by corporations. Failure and success are now measured by credit scores emanating from primarily three\(^{55}\) credit reporting agencies: Equifax, TransUnion, and Experian.

Each of these corporations collects and compiles certain financial information on individuals. The individual information includes: aliases, birthday, address information for ten years, employment history, all credit card accounts, mortgage accounts, car loans, and sometimes, family member’s names and social security numbers. The agencies keep track of all the activity on the credit accounts: payment history, late payments for 30, 60 or 90 days, any pay offs, account closings, new credit applications, comments by the lender and new inquiries. The information in these reports is compiled by the Fair Issac’s Corporation that generates a “FICO score” for an individual.

Credit reports and FICO scores, rather than interaction in a local community, are now

\(^{54}\) This model of human identity and behavior rejects the classic man found in Western literature--A man subject to his passions and emotions. The character is found in classical tragedy. Reason is assumed to prevent human suffering. The expectation is that the agent can avoid suffering by calculation and reflection before acting. Emotions are to be subject to reason. An emotional individual does not engage the world in a practical and strategic manner. Rational instrumentalism rejects emotions.

\(^{55}\) A fourth credit reporting agency exists to whom the other three report. This agency is not accessible by the individual consumer. Banks and other large corporate lenders have access to the data.
considered indicative of an individual’s financial actions, behaviors, and decisions in the marketplace. Whether the individual behaves in a financially responsible manner is perceived indicated on this report. The reports and the score determine what transactions an individual can engage in: rent an apartment, purchase a vehicle, buy real estate, get a checking account, have utilities, and increasingly, obtain employment.

Interestingly, these reports and FICO scores lack the ability to quantify and reflect other forms of financial behavior. The reports do not list all the savings accounts an individual has or has had. The reports do not list saving history or investments. They also do not provide information on all cash payments for goods and services in the market place.

The contemporary fiscal identity is based on the FICO score. The regulating forces of this identity are then used in the larger rationalizing structures of government, and the forces generate and recreate the structures and practices of marketplace principles. The FICO is part of the collective rational technologies of self-regulating and replicating the social order. The strategy of rationalizing technologies in the market place requiring a particular fiscal identity is the construct upon which social interaction is generated and regenerated.

According to Rose,

those seeking to exercise power have sought to rationalize their authority, and these projects of rationalization have a systematicity, a history, and an effectivity. Further each project or strategy of rationalization, in the name of the market, in the name of the social, in the name of the liberty of the individual, is a strategy to intervene, whether in thought or in reality, upon a set of messy, local, regional, practical, political and other struggles in order to rationalize them according to a certain principle (Rose 1999, 28).

The credit reports are uniform, efficient, and bounded. These reports and the credit score create regularity and coherency. Individuals are identified and separated. Their complex and incoherent financial lives are rendered numerically. The credit reporting agencies assign values to particular financial information according to internal criteria. The credit report represents certain indicators of fiscal behavior and omits others according to market principles. The principles that generate these creations indicate the failure or success of individuals in the marketplace.

Good credit reports and a high FICO score are powerful because individuals and institutions believe in their power. Informants both inside and outside of bankruptcy are obsessed with their credit identity. Non-debtor informants immediately discuss their FICO rating without prompting. Oftentimes, non-debtor informants often mention (as if apologizing or amazed) how high their score is and how they accidentally discovered their good credit score as if they fell on their computer and it appeared.

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56 In a recent article commenting on the home mortgage crisis, Barbara Ehrenreich writes about debtor suicides. As a result of the adjustable rate mortgage, many homeowners can no longer afford their homes. They are forced into foreclosure. Under the stress of losing everything they have worked for, homeowners are taking their lives. Barbara Ehrenreich. “Suicide Spreads as One Solution of the Debt Crisis.” Alter Net. July 29, 2008.
For many debtors in bankruptcy, the credit rating and the FICO score are even more powerful. The first question that the potential debtor asks a bankruptcy attorney is: what is the effect of filing a bankruptcy petition on his/her credit rating or FICO score? One attorney explained it this way: “every person who comes through my door is concerned about their FICO score. Each of them wants to have good credit.” The debtor’s question to the attorney oftentimes focuses on whether a Chapter 13 or a Chapter 7 is better for the credit rating. The answer the potential debtor receives is that by the time an individual is filing a bankruptcy, the individual’s credit report and FICO score are already ruined. Once a collection action occurs against an individual, the credit score drops dramatically. Potential debtors are told that a Chapter 13 or a Chapter 7 does not matter. A bankruptcy is a bankruptcy. It is recorded the same way. In cases with married couples, one spouse files bankruptcy, so that the other’s credit score will remain high. Even during bankruptcy, debtors are attempting to protect their FICO score, their fiscal identity.

American individuals are obsessed with their FICO score because it means freedom in the marketplace. Good credit means an individual has purchasing power. And for most individuals, the power to purchase equates to the ability to purchase a home. Most if not all Americans covet the idea of owning a home. Homeownership is the pinnacle of the American dream. People seek a good FICO score in order to obtain a loan to buy a home. A bankruptcy attorney characterizes this phenomenon stating, “there is a myth in our society that homeowners are real citizens. My grandfather believed that only homeowners should have a right to vote.”

Another attorney explains that all her clients want to protect their credit rating so they can buy a home: “The desire to own a home in this country is amazing. I have people who survive on food stamps thinking that one day they will own a home.” Another debtor’s attorney at a meeting of creditors comments “people with homes have something emotional tied up with them. It is symbolic of success in this country.” One of the badges of fiscal success for individuals is home ownership. The ability to get approved for a home loan, to buy the home, and pay on a mortgage symbolizes financial success. Owning property is an indication of fiscal success.

Many of my non-debtor informants are proud of their high credit rating or FICO score, because the scores represent an achieved identity. The informant believes that he owns a home and a car, because he is responsible and fiscally successful. This success is then attributed to features of his character. He is attributed with the ability to act reasonably, responsibly, and intelligently regarding financial decisions. This individual is likely to be in debt, but he has not yet “violated the delicate balance in his financial life between the assets and cash he has and the debts he owes.” The individual may hold debt and be engaged in debt relations, but he views himself as distant from the circumstances of fiscal failure and fundamentally different than the

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57 Attorney Interview #5, Interview by author, Oakland, Ca., October 2005.

58 Attorney Interview #4, interview by author, Oakland, Ca., October 2004.

59 Attorney Interview #6, interview by author, Oakland, Ca., August 2004.

60 Jane Interview, interview by author, San Jose, Ca., November 2007.
III. Fiscal Failure and the Debtor in Bankruptcy

The model for the American fiscal identity attributes social agents with free will and choice, therefore an individual having problem debt is held responsible for that debt. A debt is defined as “that which is owed or due, as anything (money, goods, or services) which one person is under obligation to pay or render to another.” A debt is something one is bound to do, or a duty. Debt is a relationship one person has to another in the social world. German philosopher Norbert Elias discusses social stigmatization in *The Civilizing Process* as stemming from an inculcation of a social obligation which the individual is unable to perform in the social world (Elias 2000). French sociologist Marcel Mauss in *The Gift* explains how debt and repayment become productive of an individual’s social position. When a gift is not returned, Mauss writes that “the individual unable to repay the loan or reciprocate the potlatch loses his rank and even his status as a free man” (Mauss 1990, 42).

Similarly in bankruptcy, the individual has failed to measure up to the model for fiscal success. In these situations, the individual is viewed as unable to regulate his conduct and return what was given to him in the social order (Elias 2000). Norbert Elias explains in *The Civilizing Process* that as social functions become more and more specialized and differentiated in market capitalism, agents in the social world come to depend on the social contract with others for the simplest and most basic aspects of their lives. In order to provide for this interconnection, Elias explains that the conduct of individuals needs to be regulated. In the process of civilization, agents inadvertently learn about personal “constraint through others from a variety of angles [which] is converted into self-restraints, and . . . the more animalistic human activities were progressively thrust behind the scenes of people’s communal social life and invested with feelings of shame, how the regulation of . . . life by steady self-control became more and more stable, and more and more all-embracing” (Elias 2000, 365) This rationalization and regulation of the individual’s conduct is what he describes as part of an enlightenment project.

As mentioned above, a particular fiscal identity (psychology, behavior, bodily knowledge) has the collective history in this collective rationalization process of self-control. The internalized identity of social agents results in a collective *doxa* of a group in which “more and more people must attune their conduct to that of others, the web of actions must be organized more and more strictly and accurately, if each individual action is to fill its social function. Individuals are compelled to regulate their conduct in an increasingly differentiated, more even and more stable manner” (Elias 2000, 367).

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61 Oxford English Dictionary, Second Edition, 1989. Debt, n. 1. That which is owed or due; anything (as money, goods, or service) which one person is under obligation to pay or render to another: a. a sum of money or a material thing. b. a thing immaterial. c. That which one is bound or ought to do; (one’s) duty. 2. a. A liability or obligation to pay or render something; the condition of being under such obligation.

62 Doxa is a set of unspeakable cognitive and evaluative presuppositions whose acceptance is implied by membership itself. Included in this definition is intra-field debates or polemic positions which share a common backdrop of meanings which are often defined in relation to each other. Pierre Bourdieu, *Practical Reasons* (Palo Alto, Ca.: Stanford University Press 1998) 23.
Debtors in bankruptcy are not people who have debts and are paying them. Rather, debtors are those social agents who are not paying back the money they owe. Debtors are burdened with *problem debt*. They are *insolvent*. Debtors failed to exercise the restraint and self-control to save their financial resources for the future. They fail to see that they may have problems in the future which require them to have resources to protect themselves. And most significantly, their social failure to align their conduct to a larger social entity is believed to place strain on the entire social chain of interdependence. Debtors are viewed as having socially failed and in need of collective forgiveness—i.e., freedom from debt.

In the contemporary market place, the fiscal failure’s conduct is regulated and adjusted. The individual who is unable to pay his debts is punished and forced to atone for his failure. A process of atonement[^63] allows for the granting of forgiveness.[^64] General Christian notions and processes inform the cultural and historical assemblages of the American fiscal identity.[^65] The foundations of the American capitalist marketplace were laid by the normative forces of the Puritan ethic of “economic virtue” (Weber 1930). Similar to Franklin’s advice to young tradesmen are the notions of economic virtue found in Christianity. The values touted by Franklin are the values of Calvinism: self-sufficiency, virtue, frugality, and hard work regulate the individual behaviors. The Protestant ethic valorizes the individual who works hard and saves money. The successful individual is lauded for having long-term vision, restraint, and strength of character for not succumbing to the evil temptations of the moment. Self-denial is associated with individual salvation. On the flip side, the individual who fails to have and save money is viewed as lacking of self-restraint and is viewed as self-indulgent. The individual who financially fails is ultimately viewed through a lens of sin.[^66]

Christian notions and processes add to the rational fiscal identity notions of the chosen, of

[^63]: Oxford English Dictionary, Second Edition, 1989. Atonement, v. 1. The condition of being at one with others; unity of feeling, harmony, concord, agreement. 2. The action of setting at one, or condition of being set at one, after discord or strife: a. Restoration of friendly relations between persons who have been at variance; reconciliation. 3. Reconciliation or restoration of friendly relations between God and sinners.


[^65]: Although I limit my discussion in this passage to Protestantism, Catholicism is also a significant shaping force in the bankruptcy experience. The Bankruptcy Code Section 341 meeting of creditors is likened to a public confessional; notions of sin and guilt are often expressed by agents; and forgiveness is sought and given. Biblical connections to the Bankruptcy Code and Rules are striking; for example, Deuteronomy 15 says every seven years creditors must release those that owe them, and in bankruptcy, a debtor can file a Chapter 7 petition every seven years. Under BAPCPA, the release is now every eight years.

[^66]: Sin is a concept in Catholicism that is mediated through the church. Calvinism, on the other hand, considers failure a private matter to be discussed between the individual and God. In the experience of bankruptcy, debtors look to the state and society for a form of forgiveness. Several religions have notions of atonement and forgiveness. Christian models are used in this research, because English and American law and policy is imbued with Christian notions and ideals. America is a Christian nation. Canonical law provides the basis of much of England’s legal notions.
sin, of atonement, and of forgiveness. As Weber explained in *The Protestant Ethic and the Spirit of Capitalism*, American capitalism flourished due to Protestant beliefs in God’s favor being gained by self-denial, and proven by material success (Weber 1930). Fitting well with the enlightenment notions of individual responsibility, the Protestant Ethic assigns to the individual the ability, through strength of character, to earn divine grace and to prosper. When the individual does not economically prosper and fails, the individual is viewed as lacking strength of character and self-restraint. Fiscal failure in Christianity is associated with indulgence and excess—gluttony. The individual is viewed as having discord or disharmony with God. In Christianity the manner for harmonizing the individual’s relationship with God is to appease, reconcile and unite with God. The individual does this by seeking forgiveness for sins and recovering favor.

In bankruptcy, Enlightenment notions are infused with Christian notions and beliefs concerning favor, sin, atonement, and forgiveness. The process of bankruptcy for seeking a discharge of debts is similar to the Christian process for seeking forgiveness from God for sins. The fiscal failure is in financial discord and disharmony with creditors, and the marketplace. The fiscal failure must recognize his failure, accept responsibility for his failure, confess the actions causing the failure, and ask for forgiveness from the federal government. It is through these notions that the secularized bankruptcy process regulates, punishes, and forgives the fiscal failure. Christianity along with enlightenment notions become normalizing discourses in bankruptcy.

Karen Gross, a leading bankruptcy expert, asserts, “the solution to the problem of nonpaying debtors is forgiveness”(Gross 1997, 93). Gross explains, citing the Old Testament and a biblical tale about God’s treatment of a debtor, that forgiveness is appropriate if certain preconditions are met: there must be a wrong committed (not paying debts), the wrong must harm another (those owed are not paid), the wronged party resents what occurred (creditors must pay), and the wrongdoer acknowledges the wrong done and takes steps to rectify it (debtor goes to the legal system to admit failure). The legal system requires that the debtor’s wrong become public record, and the debtor is submitted to judicial scrutiny (Gross 1997, 93-94).

Assuring the reader, Gross explains the benefits of forgiveness. Forgiveness of a debtor would allow the creditor to feel a little better because the debtor is punished publicly. It would allow the debtor to admit failure and take responsibility, and it would allow all assets of the debtor to be liquidated for the creditors. Forgiveness allows the debtor to again become a productive member of society. Gross explains that the social collective in market capitalism needs debtors to reintegrate into the system. She writes, that forgiveness “enables the wheels of commerce to turn; individuals fend for themselves and do not become a drain on scarce societal resources”(Gross 1997, 94). Most significantly, the belief is that forgiveness promotes individual responsibility. The idea is that once the debtor is forgiven and absolved from his debts, he is more likely to regulate his attitudes, behavior, and conduct.

The individual in bankruptcy can be forgiven provided the individual appropriately engages the bankruptcy process. In filing a bankruptcy petition, the individual reveals his financial identity and admits his failure. The petition provides the bankruptcy professionals and
the public with a complete financial picture of the individual for the last six years. The disclosures of information reveal to the creditors and bankruptcy professionals the debtor’s assets and debts and the reason for the individual’s financial failure. The debtor is then publicly examined at the meeting of creditors by the trustee in the case and by any creditors.

The bankruptcy professional, the trustee, standing in for the creditors, questions and examines the financial body of the debtor. The trustee attempts to locate the reason for the failure. Once located, the trustee evaluates the reason for the debtor’s failure and determines if the reason falls within the category of an “honest, but unfortunate” individual or if the reason falls outside the category as a “dishonest, fraudulent” individual. The focus of these inquiries is on assigning degrees of fault, establishing responsibility, and granting forgiveness.

The following is an example of the public examination, evaluation, and determination of a debtor who is considered worthy of forgiveness for a portion of his debts. The debtor is examined by an assistant trustee in the United States Trustees Office acting as the trustee overseeing the Chapter 11 meeting of creditors:

Debtor: Unfortunately, I am like a snake that ate too large a meal. And most of it is out of my system now, by which I mean that the kids are out of the house and out of school. I paid for all their schooling myself. My oldest is 28. He graduated from Tufts, and he is working as an investment banker in San Francisco. My second son graduated from NYU, and he is working as a jazz guitarist and musical composer in New York. All my children went to College Preparatory School on the Oakland–Berkeley border.

Trustee: I know it well. I live behind it.

Debtor: Oh. Yeah. Well, it is the best school in the Bay Area. [He says this with emphasis.] Anyway, my third son is a senior at Stanford. So he is graduating in a few weeks, so I will be making my last tuition payment. My daughter is 16, and she is a sophomore at College Prep. So really my only major expense is my daughter’s tuition. And if I have any say in it or some sanity, she will go to the UC system.

Trustee: So educational costs are the cause of your credit card and tax debt.

Debtor: Yes. Tuition was so high for these schools. I had to sell my home, and now I rent.

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67 See a bankruptcy petition, the Statement of Financial Affairs, item number 18.

68 The United States Trustee’s Office oversees the meeting of creditors, examination of the debtor, and appoints a trustee in each case.
Trustee: You indicate in your petition that you owe over $450,000 in taxes and $100,000 on credit cards.

Debtor: Yes, that is correct.

Trustee: How did you get that kind of debt?

Debtor: I did not pay taxes for five years so that I could pay for college for my children.

Trustee: Do you have a plan?

Debtor: Yes. My plan is to pay the required amount of taxes back.

* * *

Trustee: So you are not going to continue to pay the tuition for your children?

Debtor: No. It is over. I made a mistake. I cannot afford it. My daughter is working on getting a scholarship or going to a public university.

Trustee: So how are you going to pay back a portion of your taxes and pay tuition for your daughter’s high school?

Debtor: I work seven days a week now. I took on more clients, and I have cut my expenses dramatically.

Trustee: You believe that you can do this?

Debtor: Yes, sir. I have to do this.

Trustee: Then, I will recommend confirmation of your plan for repayment [and discharge of credit card debt].

In questioning the trustee after the examination, I was able to ask what happened in this case that makes it a good case for confirmation and discharge. The trustee responded as follows:

He is a good debtor. I believe him. He made a mistake. He will pay for it by paying some of the taxes back. The debtor gave me a confession that he has his kids in private schools that he could not afford. For some . . . remember I told you that debtors are usually undereducated? This guy is very smart and a good debtor. He was very respectful to me. What you do not hear often with debtors are three things: (1) they have figured out what the problem is, (2) they admit what is wrong and take responsibility, and

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69 Notes of meeting of creditors, Oakland, Ca., March 2003.
(3) they are sorry. No one ever confesses to me that they have a shopping problem. It is usually in the reverse. Not in this case. He is not projecting responsibility on anyone else but himself. He does not have the psychological thing going. What he is doing is recognizing his problem, accepting what he did wrong, and now he will not do it anymore. He is still pawning off some of his children’s education on you and me.70

The debtor admits the reasons for his fiscal failure and takes responsibility. He filed bankruptcy; he attended the meeting of creditors; he admitted to the trustee that he failed; and he plans to pay back some of his tax debt. The debtor atones for his failure by admitting it and taking responsibility. He further seeks forgiveness for the credit card debt and the remaining tax debt. The debtor “comes clean” and places himself before the mercy of the bankruptcy trustee. The trustee found the debtor to be “honest, but [mildly] unfortunate” rather than a debtor who is committing fraud. Initially, the trustee had reservations about the honesty of the debtor, because ‘the debtor pawned the education of his children on the public and on credit cards.’ But the trustee found the crucial elements for forgiveness: the debtor identified the problem, admitted the problem, indicated he was going to stop, and indicated that he was going to attempt to pay the required portion back.

The debtor publicly revealed his financial identity, engaged the appropriate conduct in the examination, spoke in an apologizing manner, and talked about his path to fiscal failure, took responsibility, and altered his conduct. Because of this, the debtor is offered redemption through responsibility and his debts are forgiven. The metaphor often used for the meeting of creditors is baptism or confessional. The examination process can work as a fiscal confessional for a financial cleansing, a baptism of sorts, and a regaining of fiscal harmony. The bankruptcy process is a process of atonement. The debtor submits to the process of revelation and examination. If he is found with limited fault, and admits those faults, his debts are carried away. He came clean, so he can become clean. The debtor receives a discharge of his debts.

The Christian discourse of confession, atonement, and forgiveness generate norms of practice in the bankruptcy discharge process. The bankruptcy professionals perform the debtor transformation process through these practices. Under the bankruptcy code and the rules as they have evolved through legislative history, the debtor is required to reveal all his financial information, submit to an examination, and pay what he can to his creditors. But the process is more than just the application of codes and rules. It is also the application of normalizing and naturalizing codes for human conduct. The bankruptcy professionals evaluate the debtor’s financial history. Every aspect of the financial life of the debtor is analyzed, prodded, and scrutinized to determine “the reason” for the fall from financial grace. They formulate conclusions based on the debtors conduct during the examination. When an individual fails financially, the focus of the bankruptcy professional’s inquiry is on degrees of blameworthiness and its resulting punishment or forgiveness. The professionals regulate the debtor through these cultural and historical norms that find limited basis in law.

70 Trustee Interview #1, interview by author, Oakland, Ca., March 2003.
Foucault writes that normative discourses for regulating and punishing individuals are an acquired and established power through “multiple fields of expertise,” “apparatuses of knowledge,” and “knowledges” rather than from codified laws (Foucault 2003, 38). Foucault writes that the “discourse of discipline is about a rule: not a juridical rule derived from sovereignty, but a discourse about a natural rule, or in other words about a norm. . . . a code of normalization” (Foucault 2003, 38). In his lecture, Foucault clarifies that ideal of a disciplining discourse identifying normative and naturalized codes for human conduct that are not necessarily codified in legal doctrines. Rather the discourses are enacted through the “normalizing technologies” of law and legal processes such as the laws and processes found in bankruptcy (Collier 1995, 2). In this view, bankruptcy practices and law are a discourse of power similar to psychiatry, penology, and history (Rose 1999; Merry 1990; Warren 1935).

Enlightenment notions of rational actors and Christianity’s notions of sin and forgiveness are the dominant normative discourses which manifest through the practices found in bankruptcy and through the identity of the debtor. These discourses generate human experiences and identities in the bankruptcy field. Merry writes, “Every discourse contains a more or less coherent set of categories and theories of action: a vocabulary for naming events and persons and a theory for explaining actions and relationships. . . . Discourses are rooted in particular institutions and embody their culture. Actors operate [individually and with one another] within one or another available discourses” (Merry 1990, 110).

These normative discourses regulating individual conduct are misrecognized as natural and part of accepted forms of knowledge. Bourdieu describes the inculcation and operations of the apparatuses of knowledges (or symbolic orders) in his notions of the logic of practice, misrecognition, habitus, and doxa. Bourdieu writes that human identity, conduct, and social interaction are shaped by a kind of tacit practical knowledge or logic. This practical knowledge is rarely recognized or rationally articulated by the agent (Bourdieu 1990, 91). Rather, the agent upholds an official view of social behavior and interaction, a meta-pragmatic discourse (Goodman 2003). The agent misrecognizes the meta-pragmatic discourse as the correct way to understand his conduct rather than attempting to understand or discover the practical knowledge beneath (Goodman 2003). Practical knowledge remains tacit within conduct and interaction in that it “goes without saying, because it comes without saying” (Bourdieu 1990, 68). But this kind of knowledge organizes social space, time, the movements of the body, and thought. Practical knowledge forms the sediment layers of the individual’s habitus71 and the collectively held doxa. Bourdieu’s practical knowledge and Foucault’s discourse both exist, for the most part, implicitly; they are taken-for-granted as part of the natural order, because they are embedded in official knowledge.

Conclusion

71 Habitus are the result of a particular class of conditions that generate “systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them.” Pierre Bourdieu, The Logic of Practice (Palo Alto, Ca.: Stanford University Press, 1990) 53.
The dominant discourses associated with fiscal identity, fiscal failure, and the debtor obscure the interconnected nature of wealth and debt within free-market capitalism. Class inequalities and debt relations exist in the social-political and economic world for individuals and institutions before an individual becomes a fiscal success or failure. Individuals are positioned vis-à-vis each other before they enter into the financial world and debt relations. The bankruptcy field operates as if these relations, realities, and connections do not exist. The connection is obscured as the individual engages bankruptcy professionals, and the focus is on the model for fiscal identity of the individual alone. The enlightenment discourse of individualism (i.e., a reason in the man) and the imposition of the discourse of Christianity (i.e., punishment and forgiveness) operate to narrow the focus of bankruptcy professionals. The controlling processes that result from the dominant discourses focus the investigation into the individual and eliminate any investigation into the social structure.
Chapter 3. The History of Bankruptcy Notions: Free-Market, Debtor, and Creditor

The contemporary notions and structures (i.e., creditor, debtor, punishment, forgiveness) that shape bankruptcy experience and practice in the U.S. have their roots in Biblical, Roman, English, and American history. The opposing approaches taken by secular and religious sources (i.e., the Bible and Roman law) illustrate the central tension in the dominant historical and contemporary frameworks for addressing debt relations. For decades, the creditor’s right to be repaid dominated the tenor of the secular approach. Confronting that approach is the reality of the debtor’s inability to pay and the possibility of forgiveness found often in religious approaches to debt relations. Because debt relations are typically embedded in social and economic structures that allow for the concentration of wealth, the approach that is adopted often reflects the social and economic precepts of a given historical moment. Although several historians have discussed the history of bankruptcy law and policy in America, few have considered the dominant cultural notions and ideas that are in tension in the secular and religious approaches as they manifest in relation to creditor powers and debtor identity.

This inquiry will consider those influences on the development of the bankruptcy experience in America. To understand the emergence of a particular bankruptcy experience during my research (2002-2008), it is necessary to consider the foundations of the free-market system, the disciplining practices and powers of creditors in the bankruptcy legislation of England and the U.S., the relationship between bankruptcy law and economic development in the U.S., and the creation of a distinct identity of the debtor and treatment of the debtor’s body under bankruptcy laws. Commentary regarding several different historical moments is interwoven throughout this analysis: the millennia preceding American independence (as reflected in Biblical, Roman, and English law), formative years (1750-1890), the Bankruptcy Act of 1898 and the New Deal era (1890-1940), the golden age of bankruptcy (1978-2005), and the return of the punitive stance (2005).

72 Bourdieu identifies the “legal field” as the “juridical field.” In this article, the author uses “legal field” to indicate the legal social space in America. A field is a theoretical concept that provides a tool for describing the positions of legal agents—both institutions and legal actors—in relation and opposition to each other and to other fields and their places in the larger social world. Pierre Bourdieu and Loic J.D. Wacquant, An Invitation to Reflexive Sociology (Chicago: University of Chicago Press, 1992) 96–97.

73 Legal historian David Skeel accurately depicts the history of the actors who shaped the development of the bankruptcy experience in America. He describes the struggle between the organized creditor groups, the pro-debtor and populist movements for the protection of people in debt, and bankruptcy professionals—judges and referees, lawyers, trustees, and others involved with financial failure. He explains how these struggles formed the bankruptcy laws, professional identities, interest groups, and the experience of bankruptcy in society. Skeel, Debt’s Dominion, 16.

74 David Skeel dubbed this time period the “dark ages” to characterize the manner of practice in the bankruptcy field at the time. Skeel, Debt’s Dominion, 4.
The free-market economy ideology was the most significant influence on the bankruptcy experience and the development of the bankruptcy legal field in America. Bankruptcy law and practice grew in direct proportion to the developing commercial republic—the birth of the American “free-market” economy. The early capitalist system, with its entrepreneurial spirit, risk taking, and uncertain markets, paired with the desire for quick profits, required credit. The fits and starts of a credit-based capitalist economy created the perfect milieu for financial failure; debtors were the expected result of this economic approach; and as a result, there was a need for insolvency and bankruptcy laws.

I. The Emerging Free-Market Economy\textsuperscript{75} and the Place of Bankruptcy

The presence or absence of uniform federal bankruptcy legislation in the late 1700s and during the 1800s resulted from the political circumstances of the time. The debated centered on the economic character of the U.S. The question was whether America would follow England’s path to industrialization, or instead remain more agrarian-focused. The battle was primarily fought between the Whigs and the Republicans, the North and the South, and the new merchant capitalists and the traditional agrarian sector. This debate struck at the heart of the New Republic’s identity. Bruce Mann writes in *The Republic of Debtors* that “bankruptcy ceased to be [only] about debtors and creditors and became instead part of the struggle for the soul of the republic” (Mann 2002, 198).

This question generated a great deal of heated debate in Congress, and it ultimately led to the Civil War. The tension is represented by the battle between two prominent founding fathers, Thomas Jefferson and James Madison. The Southern Republican view that America’s economic identity should be more agrarian is characterized by Jefferson’s comments in a key Congressional debate concerning the creation of a uniform bankruptcy law:

\begin{quote}
Is Commerce so much the basis of the existence of the U.S. as to call for a bankrupt law? On the contrary, are we not almost merely agricultural? Should not all law be made with a view essentially to the husbandman? When Laws are wanting for particular descriptions of other callings, should not the husbandman be carefully excepted from their operation, and preserved under that of the general system only, which general system is fitted to the conditions of the husbandman?(Mann 2002,197)
\end{quote}

For Jefferson, the creation and the passage of any bankruptcy legislation addressed the callings of this new country, and for him it was an agrarian country and an agrarian economy. In his view, insolvency needed to be resolved locally according to local practices. For example, he

\textsuperscript{75} A free market economy is an economy in which the production and distribution of good and services takes places through the mechanism of free markets guided by a free price system. In a market economy, businesses and consumers decide of their own volition what they will purchase and produce, and decisions about the allocation of those resources are made without government intervention (Milton Friedman). In theory this means that the producer gets to decide what to produce, how much to produce, what to charge customers for those goods, what to pay employees, etc., and not the government. These decisions in a market economy are influenced by the pressures of competition, supply, and demand.
explained that a uniform federal bankruptcy law was not well suited for the local farmer, because the proposed legislation often called for the surrender of the farmer’s land to pay his creditors. The proposed national law would eliminate the southern farmer’s method of making living. This approach to insolvency threatened to destabilize the southern plantation economy.

The industrializing north believed that creating markets rather than owning and working on the land should form the basis of the economy. Commerce, for the Whigs, was the economic path to success for the New Republic. James Madison represented this view of American economic identity. He thought that America should pursue industrialization, and he somberly recognized what such an economy required. Madison wrote in *The Federalist* that the “power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question” (Mann 2002, 186).

The tension between the capitalists and the agrarian sector had significant bearing on the rise and fall of several early bankruptcy laws that followed the ratification of the U.S. Constitution. And yet, for both the Republican South and the Whig North, the budding American economy was clearly a “credit-based” economy (Balleisen 2001; Martin 2005).

Early America was built on credit from the Mother Country (Coleman 1974). The colonies and the republic were an integral part of the larger British commercial and financial system. The New World adopted the British financial system’s way of conducting commerce. The international commercial structure was organized by Britain before and after the Revolutionary War. The connection between America and Britain involved a full range of mercantile institutions: buying and selling on credit, banking systems for the lending of new funds for expansion, and a legal system to define debt relations, i.e., prevent predatory lending and define the manner and processes by which loans could be collected (Coleman 1974, 8). The British commercial style and the market economy became part of the new republic.

The economic expansion of the U.S. depended on this imported credit system. All early economic development—foreign and domestic trade, expansion to the western reaches of the continent, and commercialization of the cash crops wheat, cotton, and tobacco—required an influx of credit as a form of working capital. Steady commercialization required risk taking for America’s ship owners, exporters, traders, explorers, importers, manufacturers, and millers (Coleman 1974). Credit was considered essential for the development of economic potential in this growing market-based society. Although the 1800s were marked by an increase in the ability of the capitalists to win out against agrarian interests, bankruptcy legislation emerged only in fits and starts.

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76 Although the Dutch and the French funded the Revolutionary War, funding the development of the New World required a great deal more capital; therefore, American’s debt relations were the strongest and most developed with Britain before and after the Revolutionary War. New World citizens were also more aligned with Britain’s debt relationship model allowing payment over time, rather than with the France and Dutch models that required immediate repayment. Coleman, *Debtors and Creditors in America*, 7-13).
Each of the early bankruptcy laws was closely tied to a particular societal economic crisis. In the early years, many citizens were dependent on credit for the development of their businesses. Merchants and traders were accustomed to buying on credit and paying over time. They were extremely vulnerable to the shifting and inconsistent currents of the overall market, yet their fate was closely tied to the financial health of the entire economy (Martin 2005); therefore, when the economy suffered, the community suffered. Individuals fell into deep debt in response to the panics of 1791, 1837, 1857, and 1893, resulting in the passage of uniform bankruptcy legislation in 1800, 1841, 1867, and 1898.

Although Congress was quick to adopt English insolvency laws, the bankruptcy system took on distinctly American features with each enactment. Initially, Congress adopted the creditor-focused features of the mother country, but with each successive amendment or revision, American bankruptcy laws shifted away from that model. These changes generated new categories, practices, identities, and professional roles unique to the American bankruptcy system (Balleisen 2001). This process is revealed by a review of creditor practices regulating and punishing debtors, the shifting shape of the debtor’s identity and role, and the emergence of a professional field for bankruptcy.

II. Creditor Rights and Debtor Protections

Pre-American secular and religious approaches to debt relations date back to the Biblical and Roman times. Because the structures of debt relations are typically embedded in a particular social and economic structure, the approaches vary according to collective beliefs about wealth and debt. The opposing approaches taken by the Bible and Roman law illustrates the central tension in debt relations between the creditor’s right to be repaid and the debtor’s inability to pay.

First, the Christian Bible recognizes the vulnerable place of debtors in debt relations. Debt relations are discussed in the Old Testament and the New Testament. The bias of the proverbs and instructions in the Bible and Gospels is toward debtor protection. These religious texts recognize the problems in societies having a hierarchy for the distribution and differentiation of material wealth. Deuteronomy 15:1-4 instructs the creditor to provide for a release of debtors from any debts that are owed every seven years, stating:

1. At the end of every seven years you must cancel debts. 2. This is how it is to be done: Every creditor shall cancel the loan he has made to his fellow Israelite. He shall not require payment from his fellow Israelite or brother, because the Lord's time for canceling debts has been proclaimed. 3. You may require payment from a foreigner, but you must cancel any debt your brother owes you. 4. However, there should be no poor among

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77 This phenomenon is most apparent during times of economic flourishing. During those times, bankruptcy laws languished in Congress, subject to multiple debates and conflicts between different interests and parties. When panics hit, Congressmen tended to put their differences aside to address the economic crisis and pass legislation. Coleman, Debtors and Creditors in America.

78 The Talmud also deals extensively with debt relations.
you.

Creditors are instructed by Deuteronomy 15: 7-11 to make a release of his neighbor and brother (but not of the foreigner) every seven years. The creditor must release the debtor after seven years of owing and paying on the debts. This will ensure that there are no permanent poor within the community.

The Bible further instructs the creditor to continue to give material wealth and money to debtors because the Lord has given to him:

7. If there is a poor man among your brothers in any of the towns of the land that the Lord is giving you, do not be hardhearted or tightfisted toward your poor brother. 8. Rather be openhanded and freely lend him whatever he needs. 9. Be careful not to harbor this wicked thought: "The seventh year, the year for canceling debts, is near," so that you do not show ill will toward your needy brother and give him nothing. He may then appeal to the Lord against you, and you will be found guilty of sin. 10. Give generously to him and do so without a grudging heart; then because of this the Lord will bless you in all your work and in everything you put your hand to. 11. There will always be poor people in the land. Therefore, I command you to be openhanded toward your brothers and toward the poor and needy in your land.

The creditor is instructed to continue to give to the poor person, and even when the poor person fails to repay the loan, the creditor is instructed to forgive the person who owes him.

The New Testament similarly recognizes the position of the debtor and recommends that the creditor release the indebted. The Gospel of Matthew recounts the story of the servant who owes his master: “the servant fell on his knees before him. ‘Be patient with me,' he begged, ‘and I will pay back everything,’” and “the servant's master took pity on him, canceled the debt and let him go” (Matthew 18:26-27). Forgiveness and release are the emphasis of the Bible.

Unlike the Bible, Roman law in the Twelve Tablets (451-450 B.C.) was creditor-focused and provided creditors with enormous power over the indebted. The law gave creditors the right to carve up the physical body of the debtor, and it authorized each creditor to take a proportionate or pro rata share of the debtor’s physical. Caesar eliminated cutting up the body, imprisonment, and slavery of the debtor as long as the debtor acted in an honest manner and provided his creditors with all his property. The surrender of the debtor’s property to the creditor saved the debtor from death, but the debtor remained eternally obligated to the creditor for the shortfall. Roman law did not provide the debtor with a “fresh start” or a “clean slate” (Kennedy 2004, 3).

Similarly, insolvency and bankruptcy legislation in England initially had one focus: protecting the creditor. The laws were little more than socially sanctioned collection practices. The creditor was directly involved in locating the debtor and his assets. For example, early English law gave the creditor the power to arrest and imprison the debtor. The creditor could
publicly examine the debtor,\(^\text{79}\) as well as collect the debtor’s assets and keep them to satisfy the outstanding debts.

In particular, the 1530 Acts of 34 & 35 Henry VIII, entitled “An Act against such persons as do make Bankrupt,” the creditor could petition to have the debtor’s assets seized by the Chancellor and commissioners who were officers in the courts. The property was then distributed among the creditors “rate and rate alike according to the quantity of their debts” (Levinthal 1919, 15). Often, the commissioners in England were the creditors. Similarly, the 1570 Act of 13 Elizabeth provided for the collection and distribution of the debtor’s assets by the Chancellor and the creditor-commissioners\(^\text{80}\) (Levinthal 1919, 16). The Chancellor and the commissioner were charged with “paying all the creditors in proportion to their claims, and must make a true declaration of the manner which they managers and distributed the bankrupt’s estate” (Levinthal 1919, 17).

Initial debtor protections were introduced into English Law during the 1700s. These protections slightly curtailed creditors’ rights to collect against the debtor, such as found in the Statutes of 4 Anne, 17 (1709) and 10 Anne (1711)\(^\text{81}\). These Statutes introduced the notion of a discharge for the “honest, but unfortunate” debtor. The debtor was granted a discharge if he surrendered all his property to his creditors, but only if the creditors consented. This discharge could easily be denied. Also, under these laws, the fraudulent debtor was executed. The 1732 Statute of George II continued these provisions and allowed the debtor a small allowance and some exempt property. The death penalty remained for the fraudulent debtor. The Statute of George II was in place at the time of the ratification of the United States Constitution in 1787.

Focused on shaming the debtor, many of the early English laws provided for the criminalization of the debtor, the arrest and imprisonment of the debtor’s body, prosecution for fraud, and seizure of his assets by the creditor (Levinthal 1919, 12-13).\(^\text{82}\) The assumption of the early laws was that the debtor was a criminal and was engaging in dishonest conduct. The premise was that the debtor was hiding assets from the creditor, and if treated in such a stigmatizing manner, the debtor would hand over hidden assets. Usually in these processes, the creditor would receive little from his efforts except the satisfaction of public shame and


\(^{80}\) In contrast to the criminal identity of the debtor, the identity of creditors was virtuous. The Act of 13 Elizabeth identified creditors and assumed they were “honest and discreet persons” (Levinthal 1919: 17). The Act of 21 James I in 1623 described the creditors as honest men who had been cheated by debtors. Levinthal, “The Early History,” 18.

\(^{81}\) The change may appear to be a humanitarian act, but scholars have explained that the less harsh laws were usually temporary in scope and meant to relieve overcrowding of prisons. Coleman, *Debtors and Creditors in America*, 12.

\(^{82}\) The Statute of 13 George I from 1284, which allowed a creditor to ask to have a debtor immediately imprisoned for failing to pay on the proclaimed due date; The Statute of 2 Richard II in 1379, which authorized fraud proceedings in connection with the conveyance of property; The Statute of Acton Brunell, The Statute 11 Edward I; The Statute of Merchants, 13 Edward I; and The Statute de Stapulis, 27 Edward III.
humiliation of the debtor.

It was not until the late 1700s in England and the mid-1800s in colonial America that insolvency and bankruptcy legislation attempted to shift the emphasis from creditor protection to debtor protection. This change by the colonies and later the states influenced the debates in Congress. Tensions between creditor-focused and debtor-focused social policy and law advanced new legislative policy. The social and legal disdain for debtors began to shift with the advent of the industrial revolution, as the moral ambivalence of the Renaissance view of the merchant debtor was eroded by the trend in British commerce toward making money in the marketplace rather than through owning land. A commercial morality emerges in which tradesmen viewed each other as part of a common world (Weisberg 1986). Similarly, American versions of bankruptcy legislation had to meet the needs of free-market capitalism.

III. Bankruptcy Law in Early America

Unlike the English insolvency laws, most laws in the colonies gave the right of filing for bankruptcy to the debtor rather than the creditor (Coleman 1974). Colonial legislators believed that it was the debtor rather than the creditor who needed the protection of the bankruptcy laws. Colonial legislation had four distinct objectives: end the creditors’ race to the courthouse to be the first to get a judgment and payment from the insolvent, limit incidents of fraud by debtors who felt trapped by the creditor’s proceeding, equitably distribute the debtor’s assets to all creditors, and provide a fresh start for the debtor in that debts were wiped out, thereby protecting subsequently acquired property.

In spite of these clear objectives, the separate colonies, and later, the individual states, did not have coherent insolvency practices or laws (Coleman 1974). State laws varied greatly and caused confusion for the creditor and debtor alike. It was not until the passage of the first federal bankruptcy laws that an attempt was made to achieve uniformity.

Initially, the structure of the early laws allowed the creditor to have a direct impact on the debtor’s property and the debtor’s body, but slowly, the American system began to place an administrative structure and court officers between the creditor and the debtor.

1. U.S. Bankruptcy Laws 1801-2005: Creditor and Debtor Categories

The U.S. Constitution, ratified in 1787, granted Congress the power to establish uniform bankruptcy laws. The Bankruptcy Clause in the Constitution was intended to create legal uniformity to encourage the development of trade and industry. The merchant community wanted uniformity and clarity regarding insolvency and bankruptcy (Mann 2002). Although there is little historical evidence as to why Charles Pinckney of South Carolina proposed the addition to the Constitution, it appears that there was a general trend at the time toward uniformity of laws in the area of commerce (Mann 2002, 183). As mentioned above, James Madison discussed bankruptcy in The Federalist 42, stating that the “power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce,” (Mann

83 I will use the term “debtor,” instead of “decotor” or “bankrupt,” because it is the contemporary term. The term “debtor” was not in common use during the earlier bankruptcy laws.
Madison argued for the passage of a uniform law to protect the development of commerce and the emergence of industrialization. Practical urgency spurred the political development, then, but not the passage of actual legislation.

Almost fifteen years went by before Congress proposed and passed the first federal bankruptcy law. In 1800, in response to the panic of 1797, Congress enacted America’s first national bankruptcy law. The law was in effect only three years before it was repealed. The law resembled the English law in effect at the time. It was similarly creditor-focused. It provided for a creditor-initiated bankruptcy process against a merchant debtor who owed $1,000 or more. Under the law, the creditor could have the merchant debtor arrested and publicly examined. The creditor could also locate the merchant debtor’s assets and seize them, and the creditor could have the merchant debtor held in debtor’s prison until he was paid (Mann 2002, 222).

It took more than fifty years after the ratification of the Constitution for a uniquely American (i.e., substantially different from English) bankruptcy bill to be proposed and then passed in 1841. Although the 1841 law had features similar to the previous law, limits on creditors’ powers were introduced, including elimination of debtor’s prisons and a discharge of debts for the debtor. A leading proponent of the 1841 Act, Senator Daniel Webster of Massachusetts, explained the social benefits of the new law thusly:

> I believe the interest of creditors would be greatly benefited [by passing bankruptcy legislation] . . . and I am quite confident that the public good would be promoted . . . I verily believe that the power of perpetuating debts against debtors, for no substantial good to the creditor himself, and the power of imprisonment for debt . . . have imposed more restraint on personal liberty than the law of debtor and creditor imposes in any other Christian and commercial country (Skeel 2001, 26).

The law also made significant inroads on the principle of involuntary bankruptcy and moved toward allowing debtors voluntary\(^{84}\) relief.

The 1841 law began to shift the balance of power between creditors and debtors. To do this, the law limited direct control by the creditors over the debtor in the bankruptcy process. First, the debtor (individual or merchant) could voluntarily file a bankruptcy petition (although a creditor could still file an involuntary petition against a merchant). Second, the law created a new federal government-based administrative structure to oversee the collection of the debtor’s assets and the distribution of those assets to the creditors. An individual selected by and working for the government administered the debtor’s estate. The creditors were no longer in control of selecting an individual to oversee the administration of the estate. The emergence of this centralized system for administering the assets of the debtor on behalf of the creditors empowered the federal District Court, rather than the creditors, to administer and oversee the debtor’s actions and his estate (Tabb 1995). As a result, the creditor’s regulation of the debtor and the debtor’s

\(^{84}\) Although voluntary filing by the debtor was debated as if the concept were new, it was not. Most colonial insolvency legislation allowed voluntary filing. After this point, voluntary filing was adopted as the norm. Coleman, *Debtors and Creditors in America.*
resources became increasingly indirect.

The 1841 Act also abolished some of the punishing and regulating powers given to creditors. Debtors’ prisons were eliminated. The debtor was still required to submit to lengthy examinations by creditors and a court appointed trustee and to give over all his property to the estate, but if the debtor did give over all his assets, the debtor was allowed to exempt a limited amount of property. Most significantly, the court could order a discharge for the debtor.

Nonetheless, creditors obtained new powers to control the behavior of debtors under the 1841 Act. Creditors could attempt to block the discharge by using new provisions in the Act to deny the debtor a discharge (Kennedy 1982; Coleman 1974; Tabb 1995). The Act included several new grounds for denying the debtor a discharge: fraud, absconding, and other malfeasance. The creditors, with a majority vote either in number or in amount owed, could file a motion with the court claiming any of the enumerated offenses to deny the debtor a discharge. The court would then review the allegations against the debtor and decide whether to grant the motion.

Finally, with the interjection of an administrative body under the 1841 Act, the creditors’ voices were channeled and softened. Ultimately, the introduction of a complex government administration led to the demise of the new law—the new approach was too costly for the federal government. Due to the significant costs, the court administration, rather than creditors, received a majority of the debtor’s asset upon distribution of the assets in the estate (Coleman 1974). Although it was repealed in 1843 only eighteen months after it passed, the Act provided the foundation for the emergence of a particular American variety of bankruptcy legislation (Coleman 1974; Kennedy 2004).

After the panic of 1857 and the economic disaster of the Civil War, a U.S. commercial agency recorded over 24,000 financial failures involving $737,000,000 worth of debt (Coleman 1974). A bankruptcy law was again enacted in 1867, and it lasted a record eleven years. The law adopted most of the practices of the 1841 law: abolishing distinctions between merchants and other persons for voluntary bankruptcy eligibility, allowing discharge, providing for exemptions, and provision of a minimum dividend to debtors. In the 1867 law, however, the creditors carried the day yet again (Tabb 1995). The law provided creditors with recourse to similar practices to protect their interests: a list of actions for the creditor to invoke for an involuntary filing, examination of the debtor by the creditors, several grounds for the creditor to argue for the denial of the debtor’s discharge, consent of the majority of creditors to the discharge where the debtor’s estate paid less than a dividend of 50% to the creditors, and the granting of the discharge only after a hearing in the district court.

Next, the 1867 Act followed the example of the 1841 Act by creating an administrative structure. The federal district court became the federal court with bankruptcy jurisdiction. This structure maintained the administrative barrier between the creditor and the debtor. The district court judge appointed a “register in bankruptcy” to assist in overseeing the case (Tabb 1995).

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Once again, creditors complained about the court administration costs and fees, and judges on the federal bench even commented on the topic in a few opinions. In 1909, the Second Circuit Court of Appeals in *In re Oakland Lumber Co.* wrote:

> Nothing contributed so much to bring about the repeal of the Act of 1867 as a large expense of administration, the small estates being entirely absorbed in fees. The most economical the administration of the present Act [i.e., Act of 1898] the longer will it continue as an important adjunct to trade and commerce.  

The Missouri District Court iterated this sentiment in *In re Wells*:

> The Act of 1867 carried with it many evils, real or supposed. One such evils (sic.) was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the Federal Court, generally sitting at a great distance from the debtor, the claimant, and the witnesses.

Thus, costs and fees consumed all the assets of the estate, leaving nothing for the creditors, until finally, in 1878, pressure from creditors resulted in the repeal of the 1867 Act.

The new approaches to debt relations and the cause of the Act’s repeal were considered in the passage of the Act of 1898. The focus remained on the rights of and recovery by the creditor, but protection of the debtor against unscrupulous creditors was a growing concern at the time. The 1867 Act had been amended in 1874 to reduce the 50% requirement for creditor consent to a less than 30% requirement for creditor consent for the debtor to receive a discharge and to allow debtors to propose a plan of repayment of creditors similar to a Chapter 13 plan today. This plan of repayment was subject to the a vote by a majority of creditors, however, and if not supported, it was subject to an early version of the “best interest of creditors” test (Kennedy 2004; Tabb 1995).

The economic crises of 1884 and 1893 created new pressure on Congress to try once again to enact effective uniform bankruptcy legislation. Rapid growth of organized creditor groups occurred between the years 1870 and the 1898. Several commercial organizations emerged both locally and on a national scale. The rise of creditor groups was clear evidence of the increasing power of merchant capitalism in the northern states. These forces and organizations pressed the drafting and the debates forward until the enactment of the Bankruptcy Act of 1898 (Skeel 2001).

Creditors sought several protections during the legislative deliberations that resulted in the 1898 Act. Primarily, they sought a minimalist administrative structure to keep court fees and costs from consuming the debtor’s entire estate (Skeel 2001). Creditors also sought to limit debtors’ use of state-based bankruptcy exemptions to protect essential assets, limiting debtors

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86 *In re Oakland Lumber*, 174 Fed. 634, 637 (2nd Cir. 1909).

87 *In re Wells*, 114 Fed. 222, 228 (D. Mo. 1902).
instead to the miniscule federal law exemptions. Creditors worked to expand the list of “acts of bankruptcy” for involuntary bankruptcy and to add to the list of grounds for a denial of a debtor’s discharge (Skeel 2001).

The Bankruptcy Act of 1898 (what has come to be known as “the Bankruptcy Act”) is America’s longest-enacted bankruptcy law. Surviving several repeal attempts and several amendments, it remained in effect until the complete overhaul of the bankruptcy law and system in 1978. The Bankruptcy Act of 1898 created the first workable long–term bankruptcy process in the U.S.

The 1898 Act was directed at facilitating the equitable and efficient administration and distribution of the debtor’s estate to creditors (Tabb 1995). The goal of the Act was to limit the amount of costs and fees associated with the administration of the case while providing for a structure that moved the debtor through the bankruptcy process in an efficient and timely manner. An important feature of the 1898 Act in furtherance of this goal was the introduction of “bankruptcy referees” (Kennedy 2004). The bankruptcy referee’s sole job was the administration of the bankruptcy estate for the benefit of the creditor. The overburdened district court judge was required only to sign orders and enter discharges. This change helped to streamline the early bankruptcy experience for both creditors and debtors.

Although the 1898 Act was touted for its pro-debtor emphasis, creditors retained several aspects of their control over the debtor and the debtor’s estate. First, creditors still had the right to elect the trustee. This was significant because the 1898 Act was a liquidation statute, not a reorganization statute, meaning that all the debtor’s non-exempt assets went into the estate to be distributed to the creditors. Second, creditors could deny the debtor a discharge if the debtor did not cooperate and provide all financial information to creditors during the bankruptcy process. Finally, the Act retained most of the historical practices regulating debtors and debtor behavior: grounds for involuntary filing, listing of assets and debts, public examination, grounds for a denial of discharge, and exceptions to discharge.

In response to the havoc wreaked during the Great Depression years and several bankruptcy studies, Congress amended the bankruptcy laws to provide debtors and creditors with expanded options. The Chandler Act Amendments of 1938 added more restrictions on the

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89 Bankruptcy Act of July 1, 1898, § 3.

90 Bankruptcy Act of July 1, 1898, § 21(a).

91 Bankruptcy Act of July 1, 1898, § 14 (c).

92 Bankruptcy Act of July 1, 1898, § 17 (c).

discharge of the debtor if he did not cooperate with the trustees and creditors (Matejkkovic 2004, 481) and continued to allow creditors to select trustees, but they also created the Wage-Earner’s Debt Adjustment Plan, Chapter XIII, and overall, the 1930s amendments were viewed as pro-debtor.

The 1898 Act was overhauled by the passage of the Bankruptcy Reform Act of 1978 (“Bankruptcy Code”), which is often considered a watershed piece of legislation in the history of bankruptcy law in the U.S. By the 1970s, the nature of the American marketplace had shifted because the credit industry and commercial laws had altered the nature of consumer debt relations. The new code overhauled the entire bankruptcy system structurally and procedurally to address this consumer-oriented marketplace. Most significantly, the new code gave debtors significant power if they had a regular income with which to pay creditors if debtors were willing to pay part to of their future earnings to creditors monthly, under the new law debtors were allowed to retain all of their property. This was a significant change from prior laws.

Although it contained several new pro-debtor provisions, the new law did retain all of the creditor powers of the previous laws: eligibility requirements, the requirement that the debtor make a complete disclosure of assets, income, and debts for the past five years, examination of the debtor at the meeting of creditors, a surrender of property to the trustee, and exceptions to discharge. Creditors were also given the right to ask debtors to reaffirm pre-bankruptcy debts.

The Bankruptcy Code was criticized by the consumer credit industry as pro-debtor, because the new law allowed people to voluntary choose to file a Chapter 13 plan to repay

94 Alabama referees had pioneered the repayment plan approach for debtors to minimize stigma, but many debtors rejected it. Skeel, Debt’s Dominion, 133. Perhaps the Alabama referees were looking to the 1874 amendments to the Bankruptcy Act of 1867 for inspiration.

95 This was the first bankruptcy law in American history that was not enacted to address an economic crisis. It was enacted in response to the Report of the Commission on the Bankruptcy Law of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess. (1973).

96 Under the 1841, 1867, and 1898 Bankruptcy Acts, certain debts were non-dischargeable by nature such as debts incurred for acts of fraud. The 1978 Code allowed a debtor to discharge a portion of the fraud debt if the debtor agreed to participate in a chapter 13 repayment plan.

97 11 U.S.C. § 109 (who may be a debtor).

98 11 U.S.C. § 541(a) (debtor’s duties).


100 11 U.S.C. § 541(a) (debtor’s duties).


debtors or select a Chapter 7 filing and pay nothing. The credit card companies wanted the law to force debtors to pay back credit card debt. In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act,\textsuperscript{103} that, at Section 707(b), imposed a new test to determine whether allowing a particular individual debtor to have a discharge was a substantial abuse of the bankruptcy laws.\textsuperscript{104}

The new test simply stated that the court must dismiss a Chapter 7 case of an individual debtor if allowing it to proceed would be a substantial abuse. The new section did not define what factors or conduct would actually equate to substantial abuse. This determination was left to the individual bankruptcy courts and judges. If the bankruptcy judge found substantial abuse, the individual debtor had two choices, either be dismissed from the bankruptcy process or convert her case into a Chapter 13 case and repay the creditors. The goal of the new section was to provide payment to creditors by moving Chapter 7 debtors (total discharge) into a Chapter 13 repayment plan. This section provided the basis for the major creditor-favoring amendments of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

The 2005 reforms rewrote the conceptual and practical framework of the 1978 Code to embody a presumption that debtors are dishonest. (As one prominent east coast judge joked to a bankruptcy audience in 2006, “I call this new law the ‘leave no creditor behind law’.”) It did so by incorporating the previous informal means test under Code Section 707(b) that had been rejected by Congress in 1978.

The means test initially proposed by creditors and later adopted by several jurisdictions was an informal gauge used to determine if a debtor had sufficient disposable income to pay a portion of his debts. The analysis considered the debtor’s income to debt ratio. The means test is now formalized in a form that each debtor who enters bankruptcy must fill out. The debtor’s income is compared to the median income for the applicable state and household size. If the debtor’s income exceeds the median income, the presumption of abuse arises. The debtor then must take a further step: he or she must list all expenses and the amount spent on each expense item according to Internal Revenue Service ("IRS") standards for that particular expense item (e.g., the IRS allowance for food costs is $277 monthly for one person, $528 monthly for two people, $626 monthly for three people, and $752 monthly for four people). If, after all expenses are subtracted, the debtor has less than $6,575 in annual disposable income, the debtor can file a Chapter 7 petition. If the debtor has between $6,575 and $10,950 of annual disposable income, he or she is subject to further analysis and likely must file a repayment plan. If the debtor has more than $10,950, he is required to file a repayment plan.

The enactment of BAPCPA and the use of the means test constitute a major shift in the law. The informal means test under the 1978 Code required that the party objecting to the debtor’s discharge prove that to allow the debtor’s discharge would be a substantial abuse of the law. The standard was high, and it was hard to provide the bankruptcy court with evidence of an abuse. BAPCPA, on the other hand, requires the debtor to show that, based on an income to debt

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\textsuperscript{104} See 11 U.S.C. §707(b).
ratio, he does not have sufficient disposable income to pay his debts.

A review of the history of insolvency and bankruptcy laws and practices sheds light on the many facets of the bankruptcy field. The original purpose of bankruptcy legislation was to facilitate the creditor’s access to the debtor, to get the debtor to leave his house and appear before his creditors (Cohen 1982). Thus, the early laws provided the creditor with direct “self-help” sorts of remedies against the debtor. Slowly, as the characterization of debtors evolved away from the quasi-criminal, the law interjected a third party, the state, between the creditor and debtor. In England, it was the sheriff or the Chancellor, court officials, while in America, it was the federal courts.

The protection of creditor’s rights continues into the contemporary moment. The practices that regulated the quasi-criminal debtor in the 1700s and 1880s now regulate the civil debtor. The creditor himself is not filing the petition against the debtor, arresting the debtor, or imprisoning the debtor, but the creditor directly examines the debtor, can move to dismiss the debtor’s case, and can block the debtor’s discharge. In the contemporary bankruptcy field, however, enforcement is not necessarily the role of the creditor. That role has shifted to the intermediary administrative body—i.e., the United States Trustee, and, to a lesser extent, the courts.

The identity and role of the debtor in bankruptcy is a category (re)produced socially at different historical moments in English and American society. As mentioned above, two dominant cultural frameworks have shaped the discourse about debt relations—the creditor’s right to be paid and the debtor’s inability to pay coupled with his need to be forgiven. The prevailing framework at any given moment shapes the manner in which the category of debtor is regarded and embodied. The perception of the social category of debtor was produced and reproduced according to collectively held beliefs about the nature of financial failure within the economic structure. A review of the category of the debtor in the Bible and in Roman and English law provides the starting point for comprehending the features of the various forms the identity and category assumes in the U.S.

In the Bible, debtors are not considered sinners or criminals and are not perceived as socially undesirable. The emphasis in the Bible in the area of credit and debt is on the collection and equal distribution of wealth and resources. As seen above in Deuteronomy 15\textsuperscript{105}, the creditor must release his neighbor and his brother, every seven years, and the creditor must be ready to lend to the same debtor again. The Bible stresses forgiveness of the poor debtor, and does not mention a punishment for debtors in any way, even for the fraudulent debtor. The debtor is permitted a discharge and fresh start from his debts every seven years without consideration of his moral character.

Romans, on the other hand, regarded debtors as criminals. Debtors were not perceived with kindness and given a release; rather, the creditor was given the ability to exact a punishment. As mentioned above, the Roman Law of the Twelve Tablets (451-450 B.C.) gave

\textsuperscript{105} See the full passage below in the creditor section.
creditors the right to carve up the body of the insolvent. The debtor was his body and his body was payment for his debts. Debtors and their failure to make payment were not contextualized and placed within the wealth structure; rather, debtors were cast as a social ill or problem to be eliminated.

Similarly, in early England, the social identity of the debtor in bankruptcy was viewed with suspicion. Debtors were viewed and treated as quasi-criminal. From the time of the Romans to the late 1700s in England, an individual’s inability to pay his debts was treated as a quasi-criminal offense. Debtors were punished with incarceration (or death in cases of fraud) until they could pay their debts. Although debtors in the late 1700s generally were imprisoned only for dishonest and fraudulent conduct, the identity of debtor retained a quasi-criminal hue well into the 1800s.

In England, the Statute of 13 Edward I, in 1284, was the first law recognizing a debt that was owed. When the day of payment arrived and passed, the creditor would make a pronouncement of failure of payment upon which the owing party would be instantly considered delinquent, and the owing party would be imprisoned. The Statute of 23 of Henry VIII in 1523 was the next important addition to the bankruptcy laws. It provided the same structure of perception, categorization, and imprisonment of the debtor. Most of these early laws focused on insolvency and the collection of a debt rather than the debtor and bankruptcy. It was not until 1542 that a bankruptcy law to address the debtor was passed (Levinthal 1919).

The first real Bankruptcy Act, passed in 1542 during the reign of Henry the VIII, was titled “Statute 34 & 35, Henry VIII: An act against such persons as do make bankrupt” (Levinthal 1919). The law referenced the individual who could not pay as a “decoctor,” meaning one who wastes or squanders; a ruined spendthrift. The Act itself often referred to the ruined debtor as “the offender.” The debtor was perceived as similar to a criminal, and was placed in debtor’s prison until he could pay his debt. Although the Act made a distinction between the “fraudulent” and “honest” debtor, the statute was aimed solely against debtors who were considered fraudulent. The act had a number of penal provisions that commanded the surrender of all the debtor’s assets for the pro rata distribution of property to the creditors.\footnote{The collection of the debtor’s assets and the distribution to the creditors started with this 1542 law. This practice continues today.}

The Statute 34 & 35 Henry III was the first time that the term “bankrupt” is used in English legislation. It was not applied to a person or used as a noun; rather it was used to describe an act or way of acting: a person was found to be making a “bankrupt.” An “act of bankruptcy was a form of conduct that indicated that the debtor was attempting to prevent creditors from recovering on debt” (Tabb 1995: 8). This conduct would then bring the person under the jurisdiction of the statute. This in turn would give the creditor the grounds needed to proceed, because “commencing a bankruptcy proceeding by the creditor was the commission of an ‘act of bankruptcy’ by the debtor” (Tabb 1995: 8).

Acts of bankruptcy listed in the Statute included conduct such as a debtor “keeping
house” or “kept close,”107 absconding, betaking oneself to sanctuary, voluntarily procuring arrest, and debtor misconduct such as a conveyance of property to a family member or friend rather than the creditor (Tabb 1995; Levinthal 1919; Weisberg 1986; Mann 2002). Passive acts which created a bankrupt emerged in the 1623 Statute in England which stated that “getting oneself into legal trouble for one’s debts” caused a bankrupt act (Weisberg 1986, 37). Therefore, several acts or actions taken against the debtor could also transform him into the bankrupt because of his passive actions.

The Statute of Anne in 1705 changed the act of being a Bankrupt into a state or condition of being a “bankrupt”(Weisberg 1986, 38). Instead of containing a list of actions that a person engaged in such as “keeping house” as actions of “making bankrupt,” the debtor became identified as a “bankrupt.” The active donation of the legal category of bankruptcy became the social status of an individual. It became affixed to an individual identity or person. The individual became a “bankrupt.”

These early English laws had more in common with English criminal statutes than civil law. None of the statutes provided for the debtor’s discharge of debts after the bankruptcy proceeding, most required that the debtor submit to an examination by creditors, all required the debtor to turn over all his property to the creditor or the Chancellor, and often, the debtor could be imprisoned for simply failing to pay. If a debtor or a member of the debtor’s family absconded with assets, the punishment was worse. (Statutes 34 & 35, Henry VIII had more in common with a criminal statute. The 1542 Act provided for a public examination of the debtor, and it did not provide for a discharge of the debts.)

It is interesting to note that in some limited periods and places in England, non-fraudulent debtors were granted asylum in the Catholic Church. The influence of the Abbots was great on the Crown to allow “asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who sought to protect themselves from imprisonment. Fraudulent debtors could be compelled to appear before the Court even if they had fled to asylums” (Levinthal 1919, 10). Under Henry VIII, the number of debtors allowed asylum in the churches was limited to 29 individuals in each religious place. By 1642, the free asylum towns were abolished by the crown (Levinthal 1919, 11).

With the industrial revolution in England, the moral ambivalence of the Renaissance regarding the merchant debtor shifted, reflecting the emergence of commerce and the trend toward making money in the marketplace rather than by owning land. A commercial morality emerges in which tradesmen viewed each other as part of a common world. In 1765, Blackstone wrote about the evolving identity of the debtor from one of criminal to one of unfortunate in the area of trade and commerce-- one who should be viewed with humanity:

107 The strategy of “keeping house” as Mann describes involves a practice whereby the debtor stayed in his home with the windows and doors locked to prevent arrest by the sheriff for debts unpaid to a creditor. The early English law prevented the sheriffs from forcibly entering the dwelling of another to serve a writ on the occupant. Bruce Mann. Republic of Debtors: Bankruptcy in the Age of American Independence (Cambridge, Ma: Harvard University Press, 2002),26-27.
A bankrupt... was formerly considered merely in the light of a criminal... But at present the laws of bankruptcy are considered as law calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the debtor or bankrupt himself (Tabb 1995, 12).

The trend in the economy in England and the U.S. began to shape the way that the debtor was viewed. The movement from agriculture to commerce allowed for the place of a debtor.

2. The Category of Debtor in U.S. Bankruptcy Legislation

In the U.S., as in England, the term “bankrupt” was used in bankruptcy statutes to indicate that person who was unable to pay his debts, and who was filing a petition for relief from those debts. The term was used both as a noun—describing the state of an individual, usually a merchant, and his social position in the marketplace—and as a verb—describing the acts that an individual engaged in to avoid paying debts and acts that occur against him to render him unable to pay his debts. The first U.S. bankruptcy act, copying the English law in effect at the time, identified the debtor as a “bankrupt” and listed the actions that constituted “acts of bankruptcy.” The duel usage of the term “bankrupt” both lead to the perception that “bankrupt” is a state of being and a way of acting. The inability to meet one’s economic obligations was a social status and a set of behaviors.

The Bankruptcy Act of 1800 allowed an involuntary bankruptcy filing against a merchant (making the merchant the only possible bankrupt) who has engaged in “acts of bankruptcy,” including absconding, keeping close to avoid service and arrest, concealment of conveyance of property, escaping from debtor’s prison, or remaining in jail too long (Mann 2002, 222). Although the trend toward commerce was decriminalizing the state of being in debt and the actions that often went with it, the U.S. adopted most of the practices found in the bankruptcy law enacted in England at time. The quasi-criminal status of the debtor remained intact as bankruptcy law crossed the Atlantic.

It is important to emphasize that the bankruptcy acts in England allowed bankruptcy filings only against merchants. The early acts recognized that only merchants could receive credit and experience unsecured debt. As the economy shifted with industrialization in England and the U.S., more non-merchant individuals were given unsecured credit, allowing them to go into debt to start businesses and increase economic and social capital. As a result, the numbers of people in debt increased as well. The social category of debtor under the bankruptcy acts expanded to include “all persons with debts” when the U.S. Bankruptcy Act of 1841 was adjusted to allow all possible types of debtors, merchants and non-merchants alike. This changed the notion that only “a trader encumber[s] himself with debts of considerable value in the U.S.” Thus, the idea that “[i]f a gentleman, or one in a liberal profession, at the time of contracting his debts, has sufficient funds to pay then, the delay of payment is a species of dishonesty” began to fade as America moved from an agrarian economy to a commercial economy (Kennedy 2000; Cohen 1982).

In the 19th century, the restrictive view of credit was that traders and merchants were the
only members of society who would go into debt due to the nature of their businesses. Non-merchants who accumulated significant debt were viewed as being dishonest and unjust to their creditors. In the commercially-focused America of the mid-nineteenth century, this collectively held opinion began to change. The non-merchant who had debt was coming to be viewed with less of a presumption that he was dishonest and a criminal.

The role of the debtor shifted ever so slightly as practices under the bankruptcy laws were altered or abandoned. For example, debtor’s prisons were closed. Yet several punishing practices where retained: extensive examination of the debtor, a surrender of all of the debtor’s property and a distribution of that property to the creditors, and the power of creditors to block debtor’s discharge and move the court for a denial of discharge. As mentioned above, bankruptcy practice was increasingly controlled by the courts and assignees. This injected third-party oversight into a previously creditor-controlled process.

The 1841 Act created a general system for administering the practices that regulated and shaped debtor behavior in the bankruptcy process. As bankruptcy was increasingly viewed as a commercial mechanism to protect the free market system, the distance between debtor and creditor increased, and what used to be a more direct relationship became an indirect interaction. Before the 1841 Act, the creditors tended to shape the debtor role in bankruptcy by directly controlling the bankruptcy process. After the passage of the 1841 Act, the federal government stepped in and took over. With the interjection of a third party, the government became the regulator of the debtor role and identity in the bankruptcy experience.

The identity and role of the debtor continued to be strongly influenced by each successive bankruptcy act. The Bankruptcy Act of 1867 was substantially the same as the 1841 Act. Debtors were identified as “bankrupts,” and they took on a quasi-criminal role, as evidenced by the retention of the practices of previous laws: an expanded list for involuntary filing by the creditor, debtor examinations, surrender of property, creditor consent for discharge, and several grounds for denying the debtor’s discharge. Importantly, however, the district courts were now required to appoint a special “register in bankruptcy” to administer the bankruptcy case for the district court.

The 1874 amendments to the 1867 Act created a shift in the identity and social role of the debtor. The emphasis of the amendments was less penalizing and more rehabilitative of the debtor status. The amendments allowed the debtor to retain his property and propose a plan of repayment of his debts over time. Creditors could vote against the plan or repayment, and the district court would apply a “best interest of the creditors” test with a liquidation analysis to determine the fairness of the plan (Tabb 1995; Kennedy 2004 2000). This shift marked the birth of the view of the individual debtor as a marketplace actor and gave the debtor an opportunity to rehabilitate his financial status.

Although it was considered pro-debtor, the rehabilitative tendencies of the 1874 amendments to the prior act did not make it into the 1898 Act. The Act was purely a liquidation, not rehabilitation, device, yet it did provide the debtor with relief (Tabb 1995). The debtor was given a “fresh start” or a discharge without the vote of the creditors. In doing this, the law reflected an evolution in the view of the identity and role of the debtor to acknowledge his
participation in a market system in which commercial failure was expected and renewal required. The 1898 Act provided a shift in the role of the debtor.

The 1898 Act was focused on the circulation of money in the market place. To further these commercial ends, the Act was directed at facilitating the equitable and efficient administration and distribution of the debtor’s property to creditors (Tabb 1995). Debtors increasingly were viewed through this lens of commerce. It was more economically sound to administer the assets, grant the debtor a discharge, and allow the debtor to return to the market place than to imprison him. The civil role of the debtor was emerging full force and was overtaking the quasi-criminal status of the debtor that had been retained from the early laws.

The 1898 Act did retain several regulating practices from the previous laws: a list, although limited, of actions allowing creditor to file an involuntary petition, provisions for extensive examination of the debtor, the listing of debtor’s assets, the sale of the assets and a distribution to the creditors of the proceeds, and grounds for a denial of discharge (Tabb 1995; Skeel 2001; Kennedy 2004 ). The 1898 Act also continued to identify the debtor as “bankrupt.”

After the Great Depression, Congress enacted several progressive amendments to the bankruptcy act. The Chandler Act of 1938 brought back the 1874 provisions for individual repayment plans and discharge at the end of the payments. Under this amendment, the wage earner could retain his property and still receive a discharge of debts. Interestingly, the amendments provided the debtor with a new identity: the individuals who opted to invoke the payment plan were to be identified as “debtors” rather than as “bankrupts” (Skeel 2001: 99; McNutt 1979). The identity of bankrupt was retained for those individual seeking a full discharge of their debts.

Remarkably, the full transformation of the legal category did not occur until the overhaul of the bankruptcy laws in 1978. The 1978 Bankruptcy Code did away with the term “bankrupt108”, and adopted instead the term “debtor” to identify all persons who filed a bankruptcy petition. The social stigma associated with the term “bankrupt” had negative connotation109 attached to it (Skeel 2001: 98; Kennedy 2004 ; McNutt 1979). The 1970 Congressional Commission on the Bankruptcy Laws of the United States sought to change the identity of the individual in the bankruptcy experience from the stigmatized identity of “bankrupt” to the sanitized identity of “debtor.” The Commission recognized that the notion of a “bankrupt” was infused with a criminal connotation. The quasi-criminal undertones of the “bankrupt” identity carried with it the history of debtor’s prisons and the historical presumptions of misconduct. The Commission sought to neutralize the identity, making the role of a debtor more appropriate given the flux of

108 As the etymology of “bankrupt” indicates, the exact origin of the word “bankrupt” is uncertain. Some sources trace it to the term for a broken bench in the open-air markets in Italy, some to the Latin term for broken bank, and others to the French. What is clear is that the English legislature adopted the term first to describe the conduct of an individual who was perceived as a quasi-criminal social actor under English law.

market capitalism.

The Commission recognized that the financial failure was not a criminal—that the debtor had to be (re)created as an honest, but unfortunate, individual in the marketplace, rather than as one who engaged in misconduct. The presumption of the 1978 Code was that individual debtors wanted to pay their debts and that the debtors would, if given the opportunity, do so. This emphasis was particularly apparent in the 1978 Code in the section that introduced an expanded “wage earner” chapter—Chapter 13. Chapter 13 is a purely voluntary chapter for individuals with regular income and some property to retain and protect. The debtor proposes a plan for repayment of a portion of his debts based on an analysis of what a liquidation of the debtor’s assets would yield at the moment of filing the bankruptcy petition. The debtor pays monthly installments that total an amount over a three to five year period. The debtor is then able to retain all her assets.

The rights of the debtor under the 1978 Code remained subject to the long-held practices of earlier punitive legislation. Debtors were still required to submit to an examination by the referee (in 1973 referees became judges) and creditors (in 1988 Chapter 13 trustees replaced the referees/judges in the examination process). Debtors were still required to provide an accounting of their assets for the bankruptcy court and the creditors. Debtors were now required to pay their disposable income\(^\text{110}\) to creditors monthly. Certain debts were exempted from discharge, and there remained several grounds for denial of discharge. These practices of subjecting the debtor and the debtor’s body and financial life to public scrutiny keep alive the perception of the quasi-criminal undertones of the “bankrupt” identity with the presumption of wrongdoing.

The Bush I presidential administration revived the association of the identity of debtor with a notion of a dishonest social actor in need of punishment in the 1990s. At the end of the twentieth century, bankruptcy reform was on the Congressional agenda. The so-called free-wheeling, guilt-free debtor in bankruptcy was the focus of the legislative investigations. Citing the lack of stigma associated with being a debtor, reformers asserted a need for the return to a social stigmatization of the role of the debtor. Debtors, from the critics’ perspective, needed to be held accountable and punished for their fiscal sins and forced to account for their income. Many critics misguidedley believed that numerous debtors could pay their debts and just chose not to.

The notion that the identity and role of the debtor completely lost its stigmatization resulting in abusive and profiteering bankruptcy filings is inaccurate. It is “poppy-cock,” as one chief judge commented in an interview in 2004.\(^\text{111}\) The long-established procedures of the bankruptcy field ensure that the individual who enters the bankruptcy process and assumes the identity and role of debtor is subject to several practices and experiences that scrutinize his entire financial life, present and past. The debtor’s financial decisions, marital status, divorces, child support, reposessions, foreclosures, current income and expenses, litigation history and much more is publicly listed, and the debtor is publicly examined by a trustee and his creditors. How can a person emerge from this invasive process and not feel socially marked as a disgrace? Mann

\(^{110}\) The disposable income test from case law was added by amendment in 1988.

writes that there is no evidence that bankruptcy has ever lost its stigma and that “there is abundant empirical proof that individuals file bankruptcy for reasons of genuine financial distress untouched by the fraud or irresponsibility alleged” by the critics (Mann 2002: 255).

Even with all the evidence to the contrary presented by several researchers and by the Congressional Review Commission, public disdain concentrated on reforming bankruptcy, and in particular targeted the individual wage earner. The anecdotes of the spendthrift with unlimited credit card purchasing power abounded in the popular media, in newspaper articles, on the news, in courts, and within governmental agencies. The focus of the outcry was the individual debtor—not the corporate debtor or even the small business owner. The belief was that somehow that person, the debtor, was putting something over on the rest of society and getting a free ride.

As a result, several amendments to the Code were proposed during the late 1990s and the early 2000s, and in 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act was passed by Congress and signed into law by President Bush II. The new law adds practices to the already extensive list of regulating practices imposed on the debtor. The Bankruptcy Abuse Prevention part of the new law is clear in its assumption that debtors are suspect social agents and that there is a presumption, since they are “debtors,” that they are engaged in misconduct. The new law is characterized as a return to the days of debtor’s prisons and treating debtors as “offenders” who are deserving of punishment rather than as unfortunate participants in a capitalist system (Landry 2006, 93).

The ‘wrongdoing’ the new law attempts to curb includes not attending credit counseling before filing, filing an immediate discharge under Chapter 7 rather than filing a repayment plan under Chapter 13, hiding disposable income and assets that can be used to pay creditors, filing repeat cases, getting out of a Chapter 13 bankruptcy “too soon,” not paying car lenders the purchase price of the car, and generalized presumptive debtor financial irresponsibility.

Several new practices have been required in order to regulate and curb debtor abuses: participation in pre-bankruptcy credit counseling, a means test as to the ability of the debtor to pay creditors, a current monthly income test to determine how much the debtor must pay, production of payment stubs and tax returns to the courts, trustee, or UST, updates of income and expenses during the execution of a Chapter 13 repayment plan, and additional grounds for dismissal and denial of a discharge. The practices under the new law (re)create the debtor as an individual who is engaged in misconduct and is in need of regulation. The strands of the contemporary identity of the debtor that reflect the quasi-criminal identity of the “bankrupt” under old laws in the U.S. and England are now being highlighted and emboldened. While the stigma associated with the corporate bankrupt decreases, the social mark of shame for the individual wage earner increases.

Conclusion

In the late 1700s and the mid-1800s, debtors had quasi-criminal status, and by the 1900s,
the role of the debtor was purely a civil role. The transition is attributable to the economic shift in America toward a free-market capitalist system. Originally, the debtor was identified by phrases such as “prococtor,” “doing acts of a bankrupt,” a “bankrupt,” and later a “debtor.” These terms assigned a role to the individual against whom or later by whom proceedings were brought. This role has evolved. The distinction between patently dishonest debtor versus the honest but merely unfortunate debtor did not emerge until recently.

Currently, the bankruptcy experience is a stigmatized part of American social space. The notion that filing a bankruptcy petition no longer carries a stigma is not historically informed. One need only consider the disciplining practices found in the law to see that shame necessarily results. The identity and role of the debtor continues to be shadowed by its criminal roots. And bankruptcy professionals, with the exception of the elite bar, continue to occupy one of the lowest positions in the general legal field.
Chapter 4.  A Doorway to Freedom from Debt: The Identity of “Debtor”

Individuals in financial crisis seeking discharges in bankruptcy often share three qualities: they are unable to meet their financial obligations with their current income and assets; they consider themselves fiscal failures; and they are perceived as fiscal failures. Because of the stigma and shame associated with fiscal failure, an individual typically only contacts a bankruptcy attorney when some event has tipped the balance and made her financial life impossible—for example, a wage garnishment, car repossession, a lawsuit, a foreclosure sale, or other creditor collection actions. The tipping event sends ripples through the individual’s life. The individual’s wages are taken, and she is unable to pay rent or buy food. The house is being foreclosed on, so the family will be homeless. The car was taken; thus the individual can no longer get to work. These actions affect every other aspect of the individual’s life. Her life is in a state of fiscal unruliness and disarray. It is at this point that an individual turns to bankruptcy.

As discussed in Chapter 3, the federal bankruptcy laws provide a category and identity for the fiscal failure: debtor. In “The Force of Law: Toward a Sociology of the Judicial Field,” Bourdieu writes that legal institutions and legal agents control entry into the legal field. Bankruptcy law and processes are within the legal field (Bourdieu 1987). In order for individuals and their conflicts to gain entry into the legal field, they have to be clothed and constituted properly in legal constructs and arguments. The individual and his financial life with the help of his legal professional is controlled and disciplined into an orderly and recognizable set of forms and formal processes. This makes the individual comprehensible to the bankruptcy system. Because the legal institutions and processes comprehend the individual as the “debtor,” the individual receives the results he seeks, i.e., a discharge of his debts. As Bourdieu explains, legal institutions “produce their own problems and their own solutions” according to their own logic, which is unavailable to lay people (Bourdieu 1987, 834-835).

In bankruptcy law, “debtor” is an identity. It is a role associated with certain practices and activities. To assume the identity of debtor (and acquire the benefits of the bankruptcy discharge), the fiscal failure must subject himself to the controlling and transforming processes of the bankruptcy. The process of transformation from fiscal failure to actual “debtor” is a process of rendering the previously unruly, disorganized, and messy fiscal life of the individual into the distinct, coherent, organized, recognizable, linear, and legally comprehensible identity of “the debtor.”

Foucault describes this initial naming and coding process as follows: “the first of the great operations of discipline is the constitution of ‘tableaux vivants,’ which transform the confused, useless or dangerous multitudes into ordered multiplicities” (Foucault 1979, 148). This transformation process is part of a larger project of modernity to regulate and create docile bodies:

To sum up, it might be said that discipline creates out of bodies . . . an
individuality that is endowed with four characteristics: it is cellular (by the play of spatial distribution), it is organic (by the coding of activities), it is genetic (by the accumulation of time), it is combinatorial (by the composition of forces) (Foucault 1979, 167).

In *Discipline and Punish*, Foucault discusses the imposition of the monastic and military orders as they relate to prisons and the imprisoned bodies. This process of imposition generates a particular type of individuality, identity, and docility. The process of rendering fiscal failures as debtors through bankruptcy law and in the bankruptcy process has similar steps. Although the identity and role of the debtor is distinct from the identity and role of the inmate, the identity of the debtor was historically a quasi-criminal category that recently changed to a civil category, and the remnants of the punitive nature of criminalization remain in the bankruptcy process.

The transformation of the fiscal failure into the debtor is generative of a particular individuality, identity, role, and bodily docility. The steps in this process of transformation are presented in Foucault’s discussion of the ‘art of distributions’ (Foucault 1979, 141). The steps he identifies in his discussion of prisons can be applied to the bankruptcy process and experience to explain the generation of the identity of the debtor, which identity creates the role and activities of the debtor.

In discussing the ‘art of distributions’, Foucault describes the creation of a standardized identity by the locations of individuals in social space by means of enclosure, partitioning, functionality, and rank. This process generates a coherent and understandable identity. Within the bankruptcy context, it renders the fiscal failure comprehensible for the bankruptcy actors and bankruptcy institutions. The fiscal failure must become the debtor, an entity recognizable to the activities, practices, and processes of the bankruptcy process. It is both a process of constriction or control and a process of emergence or becoming. For the process to proceed, the fiscal failure must surrender to, believe in, and enact the category and identity of debtor. If the transformation process is successful, then the debtor is liberated from his burdensome debt by the bankruptcy judge’s pronouncement by written order of discharge of his debt.

A key actor in the bankruptcy process acts to create the official transformation: the attorney for the fiscal failure. The bankruptcy attorney is skilled in the process that enables the transformation of the debtor. The attorney has knowledge of the legal mandates and process. The attorney knows how to impose the codes and the court orders. The attorney is familiar with rendering the fiscal failure’s financial crisis into the organized patterns required by the bankruptcy codes and rules, court procedures, and local bankruptcy practices. Through the interactions between the fiscal failure and the attorney, the fiscal failure becomes a recognizable debtor. This transformation process from fiscal failure to bankruptcy debtor begins in time and space.

Typically, the fiscal failure contacts a bankruptcy attorney when an event (e.g., wage garnishment, car repossession, lawsuit, home foreclosure) has made his financial situation

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112 The next steps include (2) the control of activity; (3) the organization of genuses; and (4) the composition of forces. Foucault, *Discipline and Punish*, 141.
unmanageable. The process of transforming the fiscal failure into a debtor begins with the initial interactions with the attorney. In time and space, the transformation occurs in the following manner: (1) the fiscal failure makes initial contact, usually telephonic; (2) an in-office thirty-minute consultation between the attorney and the fiscal failure takes place; (3) the fiscal failure returns to the office after completing the paperwork assignments given at the initial consultation and pays the attorney; (4) the attorney completes the bankruptcy petition with information the fiscal failure provided; (5) the fiscal failure signs the bankruptcy petition; (6) the bankruptcy petition is filed with the court by the attorney; (7) the debtor attends the meeting of creditors with the attorney and is subjected to questioning; and (8) the debtor receives a letter of discharge.

In this chapter, I discuss the transformation process at each of these pivotal moments and describe the gradual emergence of the coherent debtor identity. To understand the bankruptcy experience and process, it is important to know the population profile for the individual fiscal failure before he reaches the attorney’s office. A few leading studies provide a general demographic of the typical fiscal failure.

I. Individuals Who File Bankruptcy

Several leading bankruptcy researchers have conducted quantitative and qualitative studies of individuals who file bankruptcy. They have considered why those individuals file bankruptcy petitions and which chapters they select—either Chapter 7 or Chapter 13. The researchers attempt to evaluate the debtor’s complete financial, educational, and employment history. The studies consider the debtor’s income, expenses, family size, property ownership, and creditors. These studies provide a geographic cross section of the American population. For the most part, the studies identified factors that define debtors: individuals who can get credit (not those at the poverty level of income), middle-class families, college-educated people, single mothers, divorced women with children, small business owners, and dual-income families with long-term unemployment.

In 1987, Sullivan, Warren, and Westbrook wrote one of the leading texts on bankruptcy, entitled *We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*. In their text, the authors directly address the rhetoric of bankruptcy reform occurring during the late Regan years. Their research attempts to identify the indicators of financial failure and population risk groups. The study considers debtor gender, occupation, and class, and it identifies debtors, discusses their occupations, describes their debts, and explains the reasons for using a particular bankruptcy chapter. It finds that women, especially former homemakers, file for bankruptcy more than divorced men and that female-headed households are the most vulnerable to the slightest economic stress. The remainder of the bankruptcy population is comprised of small business owners and people with overwhelming medical debts. The authors debunk the myth that individuals with poor spending habits and large credit card debt comprise the debtor population (Sullivan, Warren, and Westbrook 1989, 328-332).

In 2000, Sullivan, Warren, and Westbrook conducted a follow up study to that addressed in *We Forgive Our Debtors*. The researched focused on the downward mobility of the middle class. The central question: Why are so many American families experiencing financial difficulty? (Sullivan, Warren and Westbrook 2000, 3-13) The researchers found that most middle
class families (unlike poverty-level families) obtain credit and mortgages and, when hit by financial and economic hardship, those families filed for bankruptcy. The authors identify the leading factors causing an increase in middle class bankruptcy filings as income loss, illness, divorce, home ownership, available credit cards, reallocation of national wealth away from the middle class, and the rise of consumer credit in the form of credit cards.

The authors also identify the experiences of the middle class in the marketplace that lead to bankruptcy. As Sullivan, Warren, and Westbrook explain that experience in *Fragile Middle Class*, “without universal health insurance to protect every family from the financial ravages of illness and without higher levels of unemployment compensation to cushion the effects of a layoff, each day, in good times and in bad, some families will fall over the financial edge” (Sullivan, Warren and Westbrook 2000, 119). The delicate financial balance of most Americans can be upset by the slightest stress.

Typically, the process of slipping into bankruptcy follows the following pattern: loss of income will occur for an individual due to illness, divorce, or unemployment, then the family experiences an inability to pay debts, leading it to use credit cards to pay routine bills such as utilities and food purchases, causing high-interest debt to grow larger. Interestingly, the marker of middle-class American success, homeownership with a mortgage, is the central cause of tipping over the financial edge (Sullivan, Warren and Westbrook 2000, 119).

In 2003, Warren and Tyagi’s *The Two-Income Trap* further documented the middle class slip into bankruptcy due to the two-income trap with a home mortgage. Warren and Tyagi warn that having children and a mortgage on a home places a family at a heightened risk of filing for bankruptcy (Warren and Tyagi 2003). They explain that the desire to own a home in a safe school district is costly to underwrite and can force families to spend to the limits of two incomes for a home. By way of illustration, Warren and Tyagi tell the story of married couples’ financial successes and failures (Warren and Tyagi 2003). These couples are parents and homeowners. More often than not, the father and mother work to qualify for and pay the mortgage. When one parent loses his or her income and is unable to quickly find work, the family relies on credit cards and loans to support the family and remain in the home. Warren and Tyagi explain that most people do not immediately downsize financially. The couple usually remains in the home, long after they should have abandoned the mortgage (Warren and Tyagi 2003), for several reasons: to maintain social and economic stability for their children; to maintain the appearance of financial security for the family; the location of the home near a particular school; and the safety of the neighborhood.

Although revealing because it statistically identifies and characterizes debtors, provides examples of the economic and market indicators of who is at risk of economic hardship and bankruptcy, and describes the path to bankruptcy for middle class families and the financial consequences of filing for bankruptcy, the foregoing studies do not describe the transformation of the messy fiscal failure into the coherent bankruptcy debtor. This paper provides an analysis of research that does describe that production process.
II. Entering the Bankruptcy Process

While working in the office of an individual debtor’s attorney, I interacted daily with numerous individuals in financial distress. My activities included answering the phone when they called, conducting intake interviews of individuals experiencing financial stress to determine whether they were candidates to file bankruptcy, attending meetings during which the other attorney questioned a potential or existing client, observing meetings of creditors at the United States Trustees Office, attending Chapter 13 confirmation hearings in the Bankruptcy Court, and attending relief-from-stay hearings with debtors. In each of these legal and practice situations, I acted both as an attorney and a researcher.

The debtors I worked with directly as a bankruptcy attorney during my field work at the attorney’s office included the following: Otis, a 77-year-old single African-American male; Mr. Cox, a 56-year-old single white male; Grace, a 45-year-old recently widowed Filipino female; Heather and Dawn, a late-30s white lesbian couple; Linda and John, an early-40s white married couple with two children; Matt, a 26-year-old single white male; Carrie, a 31-year-old single African-American female; Dari and Eric, a 32-year-old white female and 35-year-old African-American male married couple with two children; Tracy, a 35-year-old single white woman with one child; Charles, a 46-year-old single white gay male; Jesse, a 29-year-old single white female; Eric, a 27-year-old single white male; and Ingrid, a 28-year-old single white female.

As noted above, it is important to consider each stage in a person’s transformation from an individual with a failed fiscal identity to an individual who is identified as a debtor in the bankruptcy process. Depending on the chapter under which the debtor files, this process could begin and end within eight months or it could last up to five years. Below I will lay out the complete bankruptcy process from the first contact of the individual with the bankruptcy attorney to the filing of the bankruptcy petition and the final letter indicating the imposition of the bankruptcy discharge.

1. Initial Contact

Contact between the bankruptcy attorney and the potential debtor begins when the fiscal failure seeks legal advice. The individual will often identify an attorney by consulting the “yellow pages.” The attorney I worked with, Suzie, advertised in the yellow pages and various local publications. These advertisements motivate individuals to contact the attorney for bankruptcy advice. Suzie explained to me how her ad drew more individuals than other attorneys’ by appealing to the emotional state of the fiscal failure. Her ad displayed her picture, which she believed comforted people in financial distress because she was a woman. She explained that people with debts would rather admit their failure to “mom” than “dad.” She emphasized how her ad addressed the individual’s feelings of failure, helplessness, and anxiety. The ad asks individuals whether they feel worn out from creditor calls, whether they are experiencing stress from a foreclosure, and whether their wages are being garnished. Apparently, the ad worked well. People seeking advice kept the office phone ringing consistently.

113 In rare instances, a Chapter 13 case lasts longer than the statutory limit of sixty months.
During the first conversation with the fiscal failure, the process of locating the individual in social space begins. The interview begins with questions such as: Do they have the money to pay for an attorney? Do they have significant assets? Do they want to keep those assets? What kinds of debts do they have (credit card, income tax, student loans)? The attorney determines the age, marital status, living situation, employment status, gender, debt load, and type of debt in order to determine whether the individual’s fiscal problems will fit within the bankruptcy mold: the filing of a Chapter 7, 11, or 13 petition.

The bankruptcy law allows the individual in financial difficulty to file a petition under Chapter 7, 13, or 11. Chapter 7 is for the individual who has debts and limited assets. This chapter provides the individual with a complete release from most debt that is not connected to property (i.e., unsecured debts). Tax debt and student loan debt fall into a category of required payment. The individual is required to pay them after the bankruptcy. Chapter 7 requires the individual to inform a trustee of all of the individual’s unprotected property (un-exempt property under California law) so that the trustee can distribute it to the creditors. If the individual does this, then he gets released from any remaining debts.

On the other hand, Chapter 13 is for an individual who has a regular income, as well as has non-exempt assets that he wishes to retain after bankruptcy. In Chapter 13, the debtor proposes a payment plan equal to the monetary amount of his non-exempt assets. The debtor pays that amount each month over a three- to five-year period. To qualify for Chapter 13, the individual must have less than $1.1 million in secured debts and $350,000 in unsecured debts. If the individual’s debts exceed this amount, the individual must proceed pursuant to Chapter 11. Most individuals’ financial circumstances fit within the Chapter 7 or Chapter 13 parameters.

The initial phone conversation with the individual in financial stress would typically proceed in the following manner:

LC: Law offices. My name is Linda. How may I help you?

Potential debtor: Hello, I would like to speak with an attorney about my money being taken from my paycheck each month. I cannot afford it.

LC: I am an attorney. Tell me what is happening.

PD: The credit card is taking money out of my paycheck. It is hundreds a month. I need to pay my other bills. My friend told me about bankruptcy and that it could stop the credit card people.

LC: Ok. I need to ask you some questions. (Ok). Do you own real property?

PD: Yes. My home I bought two years ago.

LC: What is the value of the home?

PD: The neighbors sold their home last August for $600,000. I think
about that much.

LC: How much do you owe on your home?

PD: I think about $650,000.00. I took out a second [mortgage] on the property when the market was better. I needed the money to pay bills.

LC: So the property is upside down? (Huh?) You owe more than it is worth?

PD: Yes. I owe more than I think it is worth if I tried to sell it now.

LC: Do you want to keep the house?

PD: Not sure. It does cost a lot each month.

LC: How many cars do you have?

PD: We have two cars: mine and my wife’s. They are old cars: 1990 Toyota and 1988 Ford that does not work.

LC: Ok. Do you have credit card debt? (Yes) How much?

PD: That is the problem. I think we owe about $35,000, but I cannot tell. Some of the companies are not giving us updated information. Citibank is really hard to get information out of.

LC: Ok. We can talk about that. Why were you unable to pay the credit cards?

PD: I lost my job. I have been out of work for six months. I think I have a new one starting next month. My wife works, and she is paying the mortgage. That is really all we could afford to pay with her income. We have been living on credit cards and the second mortgage until I get another job.

LC: Do you have children?

PD: No.

LC: How much is your total household annual income?

PD: I think it is around $80,000.00 a year when I work. My wife makes about $38,000 or so depending on overtime.

LC: Have you ever filed bankruptcy before?

PD: No.
LC: Ok. Would you like to come for a free thirty-minute consult? (Yes) It seems that you are eligible to file bankruptcy. I am going to mail you a questionnaire. You will need to fill it out. You also need to bring in the wage garnishment order, copies of six months of paycheck stubs for you and your wife, your most recent mortgage statement, and the most recent credit card statements. Can you come in on October 12th? (Yes) And what is your address?  

In this initial phone conversation, I located the debtor in fiscal space as someone with unmanageable credit card debt. The couple could file under Chapter 7, because they do not have equity in their home that could be distributed to creditors. Also, they are uninterested in keeping their home. The couple could possibly keep their greatly depreciated cars in a Chapter 7 as long as the value of the cars falls within an exemption. It is possible the couple could file under Chapter 13 because they are below the debt limits in the Bankruptcy Code, but they might not have any disposable income after paying their expenses. The next step is to meet with the couple and review their financial information.

2. In-Office 30-Minute Consultation

The attorney for whom I worked required the free initial consultation to be exactly thirty minutes. Using the potential client’s answers to the questionnaire and financial documents, the consult is a quick way to determine whether the individual should file for bankruptcy, and if so, under which chapter. When the potential client arrives at the office with the completed four-page questionnaire concerning income, expenses, and debts, I speak with the potential client about his reasons for seeking bankruptcy as an option for the financial problems he is facing. In these conversations, the disarray of the individual’s fiscal life is most apparent.

During the initial consult, the individual discusses what happened in his fiscal life—the potential client lost a job, became ill, or experienced some other event that reduced or eliminated his income. The loss of income would result in a form of denial. Usually, the potential client has not told anyone about his financial difficulties. He feels helpless. He no longer opens the mail or answers the phone. Any bill that could be paid would get paid at the last minute. As the guilt of not paying bills increases, shame prevents the person from acting to change the situation or dealing with any problem that arises.

A foreclosure or judgment is the catalyst that forces many people to seek the assistance of an attorney. The potential client arrives at the office with a bag full of unopened bills, a downcast gaze, and a legal notice evidencing a foreclosure, repossession of a car, or wage garnishment. The stress of his condition is clear from the state of the information and the manner of bodily movement. The stress often resulted in the potential client spending more money and feeling helpless to change his financial trajectory. One potential client commented: “I just got myself into such a state. I thought, ‘What the hell? Order a good meal; you are going to lose the house tomorrow.’”

114 Notes from fieldwork, Oakland, Ca., June 2004.
115 Notes from fieldwork, Oakland, Ca., June 2004.
The case of Mr. Cox is an excellent example. I arrived at work on a Friday morning expecting to write a motion, and the office clerk informed me that the attorney needs me to interview a client who is waiting outside. I agreed, and I went to the lobby to meet Mr. Cox. He is a six-foot-tall 59-year-old single white male wearing a torn grey t-shirt and blue jeans. I notice his two front teeth are missing. I apologized to Mr. Cox for my wearing jeans and explained that I was not expecting to meet with a client. He responds that the fact that I am wearing jeans and not a suit makes him feel better. As I sit in my office, he lifts a white trash bag full of papers onto my desk, and says, “I brought these papers for you.” He slumps into the closest chair.

I thank him and open the trash bag. Inside are approximately thirty-five unopened envelopes. I begin opening them and separating the various bill into piles on my desk. There are credit card bills for about six months, medical bills from about four months ago, mortuary bills, phone bills, and utility bills. I notice that he is watching me and looking for a reaction. He is very tense. I begin to ask him some questions from the questionnaire.

LC: You do own a house or a car?

LC: Are you employed? And what is your annual income?
Cox: Yes, I am employed. I am employed as a security guard at TTY Security for six months. I make about $40,000 a year.

LC: Good, that is below the median income for this state. What was your job before this one? Was it security?
Cox: Yes, for the last six years. Before that I worked at US Airlines for 14 years. I was in middle management. The company moved headquarters back east six years ago, and I could have gone, but my father was ill. I am the only son, so I had to stay here and take care of him. My dad just died. That is why I owe that $6,800 to the mortuary I listed. (He pauses and looks around nervously). I know that is horrible. It is my dad. I feel really bad. I should pay for my father’s funeral, but I really have nothing. I don’t know what has happened to my life since that time (referring to when he had a good job). I had everything together. I was a success financially.

LC: Ok. Do not worry. Let’s see what we can do. How many credit cards do you have?
Cox: Four. The Capital One cards I do not know why I got them. I could not afford them even when I had the US Air Job. That is when I got them. I thought I would get a raise for US Air. I never did. That debt is really old. It is about $1,300. I think it is still around that amount or more. I feel really guilty about not paying them back. But I have paid the minimum balance for six years (equaling $2,520). I still feel responsible. It is so un-
American.

LC: Not paying your debts.

Cox: Yes. I should pay my debts. It is just something you do. That is what my dad taught me. (He looks out the window at Lake Merritt.)

LC: Yes. It is something you do when you have the money. Your income is about $1600 a month and your expenses are about two hundred more than that. Of course you are in debt.

Cox: I also have hospital debts from my heart problems in February this year. I owe them $3,000, and the hospital is collecting against my paycheck. They want to take $200 month. I cannot afford that. I had a heart attack when I had just started this job. I was working less than three months, so I did not have health coverage yet. As an employee you get it after the trial three-month period. I got stuck with the payments. I thought I was covered. (He pauses and sighs.) I guess I should have checked. But how do you check in an ambulance?

LC: (I pause.) Have you used your credit cards in the last six months? It looks like you have just been making payments. Is that correct?

Cox: I stopped using them a few years ago. I just have been making payments.

LC: Do you owe any taxes to the Franchise Tax Board or the IRS?

Cox: No, thankfully.

LC: Mr. Cox, your debts are all unsecured, and they equal about $12,000 in total. And you have no unprotected assets. I think that you could qualify for a Chapter 7 liquidation plan. That would discharge the debts completely.

Cox: (He begins to look less weighed down.) Really? That is great. I am so relieved. Somehow I thought that I would have to pay everything. I was so worried. It took me so long to talk to someone about my problems. I am so grateful.

LC: Ok. That is good. I am going to make copies of the bills, and give you a packet of papers to take home and fill out. Then, you bring them back with a check for the full attorney fee and filing fee, and then we will be set to go.
Mr. C: Is that it? Wow. That is great. (Smiling.)

Mr. Cox waits while I make copies. When I return, I explain that he must pay the attorney’s fee of $750 and the filing fee of $295. Also, I explain the steps he must take to file a bankruptcy petition and get a discharge of his debts. He is happy that he is able to pay the bankruptcy fees in installments and that as soon as he has paid the full attorney’s fee and filing fee, the office will file the petition. During the time before the filing, Mr. Cox can tell all creditors that he has retained an attorney and to contact this office. We make an appointment in two weeks. I return his papers, and we begin to walk to the door. Mr. Cox says, “Thank you so much. I feel much better. I feel some relief. It is really great.” He smiles again and shakes my hand.

When Mr. Cox arrived at the office, our job as attorneys was to fashion his financial life into the categories created by the mandates of the bankruptcy code and rules and according to legal procedure. Specifically, I needed to place Mr. Cox within the limits of either Chapter 7 or 13 of the Bankruptcy Code.

First, I had to determine whether Mr. Cox owned a home or car. Because he did not own a home and his car was well within the $1,500 exemption for an automobile, it was likely that Mr. Cox qualified to file a Chapter 7 bankruptcy petition. A successful Chapter 7 petition would discharge his unsecured debts (funeral home, hospital, and credit card debts) and let him keep his car. Second, I had to determine his income and compare it with the median income for the state of California (~$47,000 a year). Mr. Cox’s income for the year was less than the median income for one person in the state. Third, I had to determine whether Mr. Cox had disposable income. I compared Mr. Cox’s income with his expenses, and I found that he spent more than he made. Mr. Cox did not have excess disposable income to contribute to a Chapter 13 repayment plan. The application of these three statutory and case law tests firmly placed Mr. Cox within the parameters of a Chapter 7 proceeding, thus locating Mr. Cox within the bankruptcy field as a potential Chapter 7 debtor.

This conversation with Mr. Cox lasted about two hours. I did not comply with the rule that the initial consult for potential clients last only thirty minutes. The cost-benefit standards of the attorney’s office required that you spend a very limited amount of time with the individual. The goal is to explain a small amount and get them to pay for legal services. I violated this mandate in my interview with Mr. Cox in order to gather more data for my research. Mr. Cox appeared particularly distressed compared with others in his situation, particularly given that his debt was relatively small. I wanted to spend the time required to understand exactly what caused that degree of distress. For him, filing a bankruptcy petition was indicative of the failure of his life, as reflected by his sentiment that filing a bankruptcy petition was “un-American.”

116 Notes from fieldwork, Oakland, Ca., July 2004.
117 The federal government’s Housing and Human Services Offices create median income charts for each state. The bankruptcy courts, trustees, and attorneys are now required consult these tables in making the income threshold determination.
118 The attorney lectured me on efficiency and priorities for running a bankruptcy mill practice. She explained that she limits the initial consult to one half-hour to make it cost effective. She stated that if she spends more than thirty minutes with a client, her ability to generate revenue decreases.
3. Hiring the Bankruptcy Attorney

Next, the individual returns to the attorney’s office at the scheduled time with the retainer fee and completed paperwork. Once the fee is paid, the attorney starts the “official” transformation process, beginning with the creation of the bankruptcy petition. Essential to this process is a collection of documents constructing the fiscal identity of the individual in the social world: bills, notices, paycheck stubs, bank account information, tax returns, student loan paperwork, court orders, contracts, lawsuit complaints, promissory notes, child support orders, alimony orders, and lease agreements. From these documents, the debtor is created in the bankruptcy petition.

The attorney, in this case Suzie, reviews the paperwork provided by the potential debtor and enters the financial information into a computer software program¹¹⁹ that makes exact calculations of the person’s income-to-expenses ratio, disposable income, and median income. Based on these numeric calculations, she will tell the potential debtor whether he qualifies for Chapter 7 or what he must pay his creditors in a Chapter 13 proceeding.

If the individual does not own property or owns property that he does not want to keep, Suzie will place that person into a Chapter 7. If the potential debtor has excess income beyond his expenses, then he must file a Chapter 13 plan and pay a portion of his debts. In most cases, the individual and the attorney want to file a Chapter 7, but some legal mandate requires otherwise. In these situations, the attorney and the potential debtor must work together to adjust the numbers, so that the individual can fit in a Chapter 7. The following is an example of this regulating and adjusting of the individual.

In the case below, the potential debtor earns too much income to be eligible for a Chapter 7. A delicate interaction occurs in this situation that represents a central tension in the transformation process of the individual into bankruptcy debtor. On the one hand, the attorney, Suzie, needs the debtor to have as many expenses as possible to deduct from his income in order that the debtor not have excess income—but the attorney cannot directly tell the debtor why. On the other hand, the potential debtor is attempting to conform to the dominant discourse of the American fiscal identity and show the attorney and the bankruptcy court that he has limited his expenses and is living frugally. The potential debtor, who views her situation from the position of the fiscally responsibility agent who should not have so many expenses, does not understand why Suzie wants her to state all her expenses. Through this conflict, the coding of bankruptcy laws and practices becomes apparent. Slowly, the potential debtor learns bankruptcy’s mandates.

The potential debtor, Letina, arrives with a cashier’s check for the attorney’s fee and her paperwork. Letina is a retired 63-year-old African-American female who is married and takes care of her grandson.

Suzie: Did you bring proof of your income?

¹¹⁹ The program used by most individual debtor attorneys or debtor mills is Best Case. This program provides the necessary financial calculations and forms to petition the bankruptcy court. The program creates the petition and electronically files it with the bankruptcy court through the Internet.
Letina: Yes. Here it is. I receive about $1,143 a month in Social Security. My husband receives $550.00 a month.

Suzie: Your rent is $443 a month. Telephone is $35 a month. Cable is $62.00 a month. Cell phone is $41.00 a month. Food for the three of you is $250 a month? That is really low for three people in a home. (She pauses.) You know that you are allowed by the federal government about $500. Are you sure that it is $250?

Letina: Yes. That is what it is. We are careful with what we eat. We always eat at home. We never eat out. I shop and I cook.

Suzie: (Sigh. Suzie reviews the client’s expenses listed on her questionnaire for Schedule J in the bankruptcy petition.) Are there any other expenses? Do you purchase clothing for you, your husband, your grandson?

Letina: Oh no, not for me. My husband wears the same thing since 1970. I think it is about $100 a month for clothing for the boy. (Suzie sighs again.)

Suzie: Utilities for the home?

Letina: I think it is about $60 a month?

Suzie: What about medical expenses?

Letina: Medical pays for everything.

Suzie: What about transportation?

Letina: I just take the bus. (Letina notices that Suzie is getting frustrated. She seems to begin to understand that she needs to state all of her expenses; however, Letina does not seem to understand the full significance of the expense information, and ethically, Suzie cannot tell her that she needs to increase her expenses so that Letina does not have to file a Chapter 13 repayment plan.) Well, huh, oh yeah. I do take a cab twice a month for grocery shopping. I think it is about $30. I think that is it.

Suzie: (Suzie leans back from the computer screen in her large chair behind her old wood desk. She looks out the window and over at me taking notes.) Is there anything else? Haircuts? Insurance costs? Do you owe taxes?

Letina: No. No. No. We pay those. Oh. We do tithe ten percent of our income to our church each month. But we have not been paying it because of the credit cards. The payment each month takes more than titheing.
would.

Suzie: So about $150 would go to your church when you do not pay the credit cards? Anything else? (Letina does not know that there are many Christians in Congress and that a debtor in bankruptcy is allowed to tithe as much income to the church in lieu of paying creditors as she desires. Suzie begins calculating the income minus the expenses taking into account the $150 that will go to the church. Letina still has income left over after this deduction.) You appear to have about $300 plus left over a month to pay into a Chapter 13 plan.

Letina: (Appearing shocked and scared.) No, we have nothing. I pay the credit cards more than that each month. I cannot afford this. It is horrible. The calls from the credit card companies, the people talking to Jason (grandson) on the phone. I cannot handle it. No, we do not have any money. I am telling the truth.

Suzie: Yes, but once you file bankruptcy all those credit card payments will go away. That will free up that income. The trustee and the UST know that you will have more income after you stop paying the credit card companies. If what you have told me is true, and I think it is, you are just missing some necessary expenses.

Let me explain to you how Chapter 7 and Chapter 13 work. In bankruptcy, the federal government steps in between you and your creditors. Creditors are forced to leave you alone as soon as you file your bankruptcy petition, but for this to happen you have to tell the federal government all about your income and expenses. If you have any income left after you pay your monthly expenses, you have to pay your creditors. This is the case even if the remaining amount is $10. This will have to go to the Chapter 13 trustee who will pay your creditors. The federal government needs to know where every penny goes. The government will have to approve your spending on everything. The government will not accept you just saying that you do not have any money left. They want proof, and if you spend it on your grandson, you need to tell them where and why. (Suzie is telling the client in the simplest terms the jobs of the United States Trustee and the Chapter 7 Trustee. These federal agents will review the petition and determine if there is any money left over to pay debts. If the amount is significant, either of them will file a motion to dismiss the Chapter 7 petition and force the debtor to file a Chapter 13 petition and repayment plan.)

Letina: So the money I pay to the credit cards will not be paid, and I will have extra money each month? This then has to go to the trustee to give to the creditors? (Suzie nods.) So are you saying that I cannot file bankruptcy?
Suzie: (Suzie looks exhausted. It is late in the day, and the debtor is misunderstanding that her expenses must be higher to eliminate her excess income.) No, that is not what I am saying. I am saying that there are two types of bankruptcy chapters you can file. I am trying to determine which one you can fit into. Are you saying that you would pay $150 to your church if you did not have to pay the credit cards? Is there anything else you pay to eat up the last $150 excess income?

Letina: Yes. I would like to pay that to my church. (Client appears worried.) Okay. You have my transportation down. I also pay co-pays at the doctor for about $5 or more a month. Do I count that as well?

Suzie: Yes. That is good, but I still have you with excess income to pay into a Chapter 13 repayment plan. Any more expenses? Anything. Entertainment? Medicine?

Letina: Well. I cannot feel the heat or the cold on the left side of my body, so I have to keep the heat on in the house almost all the time. The utilities can run high at times. You have the bill in the pile of papers.

Suzie: (Searching.) Here it is. It says $63.00 for June. Is that about average for the year?

Letina: No, it is more in the winter.

Suzie: Let’s say $100 a month to average it out over the year. So we have about $45 left. Anything else?

Letina: Oh yeah, my husband needs an inhaler for his breathing which is getting worse. The insurance did cover it, but not anymore. I think it can run about $75 a month.

Suzie: Okay, great. We are there. You can file a Chapter 7.

Letina: (Client seems confused.) That means I do not need to pay a monthly payment to the trustee on top of all the other bills I pay a month. Is that correct?

Suzie: Yes. (Suzie is exhausted, and so begins to speed up the process to send Letina home.) Okay, what we will do now is fill out the petition. We will call you to come in and review it. You will then need to verify everything in it. Then, if it is accurate you will sign it. I will give you a copy, and we will file it with the bankruptcy court. Then, we wait for a notice for the meeting of creditors. Okay? (Letina nods yes.) So, can you return in two weeks on the twentieth? (Letina nods yes.) Okay, great. We
will see you then. Linda will walk you out.\textsuperscript{120}

As mentioned above, the purpose of the second meeting with Latina is for Suzie to review her income and financial obligations and decide which chapter is appropriate. During the meeting, Letina repeatedly became confused by Suzie’s leading questions. In response to each question, Letina performed as the frugal fiscally responsible citizen. She minimized her expenses and her spending to appear worthy of a release from her credit card debt. What she did not realize was that her monthly income would increase, because she would no longer make her monthly credit card payments. Suzie pressed Letina to increase her expenses without explicitly stating that Letina needs to say she spent more.

After the meeting with Letina, Suzie explained that Letina had an extremely low income. Suzie believed that Letina was artificially keeping her monthly expenses low in order to appear as not abusing the system. Suzie explained that after years of experience, it was clear to her the Letina needed to be pressed. Suzie also explained that it was unusual for her to state the position of the federal government and the trustee. Suzie believed she had to reveal this feature in order to instruct Letina on what to say about her monthly expenses. Letina caught on to what was required of her, but she remained confused as she left the office.

4. Signing the Bankruptcy Petition

Regardless of bankruptcy chapter, the bankruptcy petition is comprised of a set of nationally uniform bankruptcy schedules and forms created by Congress. The petition is a linear rendering of a messy individual financial history into the categories and codes found in the bankruptcy schedules and forms. This process of rendering the debtor’s financial history creates a comprehensible and consumable financial image of an individual in financial difficulty. This image becomes fixed and affixed to the debtor at the exact moment it is filed with the bankruptcy court.

The petition is organized so that it first presents general information, followed by specific facts about the debtor’s finances and financial history. Taking as an example a Chapter 7 petition: the first page lists the name of the debtor and the chapter selected, and the next page has the signature line for the debtor. When the individual signs the second page on the specified line and those two pages are filed with the court, the individual becomes identified in the bankruptcy court as “the debtor.” The next section of pages is a collection of Schedules from A to J that list the debtor’s assets and debts. The final section is the Statement of Financial Affairs providing a history of the debtor’s financial life for years before the filing of the bankruptcy petition.

The schedules require identification of the following:

\textbf{Schedule A:} the debtor’s real property (i.e., real estate interests) and all liens and loans filed against the real property

\textbf{Schedule B:} the debtor’s personal property and its value. Personal property includes motor vehicles, clothing, pets, and livestock

\textsuperscript{120} Notes from fieldwork, Oakland, Ca., June 2004.
Schedule C: the state-allowed exemptions of debtor’s property

Schedule D: creditors who hold secured claims against the debtor’s property, including consensual liens (e.g., mortgages and car loans) and statutory liens (e.g., property tax liens)

Schedule E: the debtor’s unsecured debts that have priority over other unsecured debts. Such debts include taxes, fines, and support payments

Schedule F: all other unsecured debts such as credit cards, personal loans, phone bills, and other service bills

Schedule G: unexpired leases or contracts to which the debtor is a party

Schedule H: co-debtors on loans or contracts

Schedule I: the debtor’s income sources and any automatic deductions from the debtor’s income such as for health and life insurance premiums, union dues, retirement payments, and support payments. Also required are the debtor’s marital status and number of dependents.

Schedule J: the debtor’s current monthly expenses, including mortgage or rent, utilities, home maintenance, food, clothing, laundry, dry cleaning, medical and dental fees, transportation costs, recreation outlays, charitable contributions, insurance premiums, taxes, installment payments (automobile, school tuition), support payments, and business expenses. At the bottom of Schedule J is an entry for monthly income less monthly expenses. This figure is considered “disposable income.” The disposable income is the amount paid to creditors in a Chapter 13 case.  

Schedule C states the California property allowance limits permitted for the debtor’s real and personal property. These limits are called exemptions. Exemptions include the homestead exemption, vehicle exemption, clothing exemption, and office equipment exemption. If an item is not listed on Schedule C, then it is not exempt and the trustee assigned to the case can sell the item and distribute the proceeds to creditors.

The last section of the bankruptcy petition is the Statement of Financial Affairs (“SOFA”). The SOFA is a historical summary of the debtor’s financial life, and it provides the trustee with an idea of the debtor’s path to bankruptcy. The SOFA requires identification of the following: past employment and income two years prior to the filing of the petition; any payment made to a creditor ninety days before filing; lawsuit judgments, garnishments, and attachments

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against the debtor in the year prior to the filing of the petition; repossessions, foreclosures, or tax returns in the year prior to the filing of the petition; assignments or receiverships in the one-hundred-twenty days prior to the filing of the petition; gifts and losses prior to the filing of the petition; payments for debt counseling or to a bankruptcy attorney; closed accounts, stock transfers, and safe deposit boxes; prior addresses during the two years prior to the filing of the petition; and businesses and business holdings.

Under the 2005 amendments to the Bankruptcy Code of 1978, the debtor is subject to a means test found on form B22A. This addition to the bankruptcy process subjects the individual debtor to an extra layer of scrutiny. The debtor’s income and expenses are compared to the median income in the particular state where the debtor lives. If the debtor’s income is higher than the median income for the state, the debtor is forced to file a repayment plan. Once excess is established, the debtor’s expenses are compared to national averages to determine if the expenses exceed the norm. Any amounts beyond the allowed amounts will be used to repay creditors. This process is documented on form B22C, entitled Statement of Current Monthly Income and Expenses, and in a proposed plan of repayment. This process is illustrated by the next case.

The Stagnoi couple is an example of how the fiscal failure’s disorderly financial life is transformed and represented through a legally coherent structure. Their case demonstrates the process of coding and rendering the individual onto bankruptcy forms. The Stagnois first called the office because their residence was being foreclosed upon. Anthony and Sonia Stagnoi are an Italian-American couple living in San Francisco with two children. Anthony had been unemployed for several months and Sonia was disabled, preventing her from working outside the home.

During the previous six months, the couple did not pay the mortgage on either real estate properties they owned: their residence and their rental property. The income from the rental had paid basic living expenses such as food and utilities. Anthony had recently started a new business, and he thought eventually it would generate enough income for the family. They wanted to keep their residence and rental property.

During the 1990s, Anthony and Sonia had owned two restaurants in San Francisco. Over the previous two years, each had closed. Now, Anthony was attempting to obtain financial backing to open another restaurant. Five years ago, Sonia had been a ballet dancer performing in “Phantom of the Opera” and for the President of the United States. After many years of dancing, Sonia’s feet became deformed. She is unable to dance, and she has difficulty walking. She cannot teach ballet because her feet scare children. Although she is physically disabled, Sonia cannot obtain disability payments for her feet.


The couple’s residence is in San Francisco, and the rental property is south of San Francisco in Daly City. The combined value of the two properties is about $1.5 million and the secured debt against the two properties is about $762,362. The couple owes about $81,000 in unsecured debt. Because the couple’s debts are below the debt limits for Chapter 13, they are eligible to file a Chapter 13 plan. The office paralegal and I prepare a Chapter 13 petition and a repayment plan for the Stagnois.

Anthony and Sonia’s bankruptcy petition states:

**Schedule A** Real Property: jointly owned residence that has a fair market value of $970,000. The secured claim held by the bank against the property is $395,421. The rental property is also jointly owned. It has a fair market value of $470,000 and a secured claim against it for $285,000.

**Schedule B** Personal Property: cash on hand--$200.00; checking account--$4,765; household goods--$6,000; wearing apparel--$800; furs, jewelry--$800; stock or shares--$2,100; automobiles--1967 Skylark 5,000, 1997 Olds Bravada $4,500, 1964 Chris Craft Constellation 40’ $15,000; office equipment--$500.

**Schedule C** Exemptions: real property--residence exemption of $75,000; checking account--$4,275; household goods--$6,000; wearing apparel--$800; furs and jewelry--$800; automobile--$2,300 for the Olds Bravada; and office equipment--$500.

**Schedule D** Creditors Holding Secured Claims Against Real Property: Litton Loan Servicing (first and second loan) for $385,000 against the residence; Monterey Bay Resources for $285,000 against the rental; and the City of San Francisco’s statutory tax lien on the residence for $2,800.

**Schedule E** Creditors Holding Unsecured Priority Claims: California Franchise Tax Board back payroll taxes for $470; and Internal Revenue Service 1998 Taxes for $285.

**Schedule F** Creditors Holding Unsecured Non-Priority Claims: Alarm One--$136.78; Alliance One--$1,505.34; American Express-- $92.00; AT&T Wireless--$335.67; Bob Jr. Towing--$1,830.00; California Check Cashing--$1,565.45; Capital One--$800.00; Capital One--$601.00; Chevron--$432.00; Discover--$2,500.00; Fire Insurance--$218.00; National Bank of Marin--$555.90; First USA--$60.00; Kinko’s--$86.98; Macy’s--$452.98; Orchard Bank--$3567.32; SBC--$ 675.32; Sears--$727.00; Sunset Scavenger--$304.40; and West America Bank--$935.34. (Most likely, these unsecured creditors will be paid a portion of the money owed them based on the amount of equity the debtors have in their real property.)

**Schedule I** Income: Anthony Stagnoi is self-employed and makes $4,600
per month from the rental and his business. Sonia Stagno is self-employed and makes $2,600 a month.

**Schedule J** Expenses: mortgage--$2,773.15; utilities--$150.00; Cable--$105.00; home maintenance--$100.00; food--$480.00; clothing--$50.00; medical and dental--$50.00; transportation--$250.00; health insurance--$600.00; auto insurance--$100.00; school tuition--$500.00.

**Disposable Income:** $400.00.  

The Stagnois own property so they must pay their debts in full. The couple has to file a Chapter 13 petition. The couple needs to have income to pay the Chapter 13 trustee. The plan payments will go to the mortgage lenders for the back payments on the mortgages for their residence and the rental property. The credit cards and the other unsecured debts will be paid after the mortgage companies’. The couple is going to be in bankruptcy for five years in order to pay all that they owe. If the Stagnois are unable to pay, they have indicated that they will sell their property and forfeit the unprotected equity to pay the mortgage arrears, taxes, and credit card debts.

After the petition is prepared, the Stagnois return to the office to review and sign it. The couple comes to the office with their two young children. They sit in Suzie’s office, and she explains each page of the petition. She reviews all the financial information with them, and they indicate it is accurate. Suzie informs them that they are signing the petition under penalty of perjury. They acknowledge and sign the petition.

The bankruptcy petition presents a coded image of the debtors. The bankruptcy professionals understand and process the petition based on this information and the meanings associated with the forms and their content. A Chapter 13 trustee will, after the petition is filed, oversee the Stagnois’ financial life.

4. **Entrance into the U.S. Bankruptcy Court**

The official identity of debtor attaches to an individual with the filing of a petition with the clerk of the Bankruptcy Court. When the petition is filed, it is time- and date-stamped, numbered, and assigned to a trustee and a judge. At the moment of filing, the fiscal failure is transformed into a bankruptcy debtor. The fiscal failure considers himself a debtor. The bankruptcy court notifies the creditors listed on the schedules that the person is now in bankruptcy, and they are not permitted to contact the debtor directly. Credit reporting agencies record the petition filing and identify the person as a debtor on their reports. The debtor’s FICO score drops below 500.

A 28-year-old Caucasian male professional describes the process and experience of filing the petition as follows:

I finally found the bankruptcy court in the federal building. I had read in

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125 Notes from fieldwork, Oakland, Ca., June 2004.
the Nolo Press book on bankruptcy that I had to prepare and file the petition with the clerk of the court. After about a month of collecting the documents and typing out the forms, I was ready to file. I typed the forms, although I learned later that I did not need to. At the bankruptcy court, the clerks were less grumpy than I expected. I had imagined a large stone building with a forbidding window and grumpy old men. Instead, I found myself wandering in unremarkable sets of hallways, with plain offices and doors. I began to wonder about the building having the power to rescue me from the credit collection agencies.

The clerk who processed my papers asked for my signature page, then my schedules, and my statement of financial affairs. I waited as she typed the information into the court computer. I thought about all the information in the schedules about my personal finances. Every detail is there for everyone to see. I felt exposed in some way, and I think about how my mother thinks that filing bankruptcy was low class. I did have a well-paying job when I first got the credit cards. I can no longer pay them, I guess that is low class.

The clerk reviews everything. The clerk asked me questions about my “pro se” status and the petition. She and I modified my creditor matrix to remove my social security number. She asked me why I listed my social security number on a document that was going to be sent publicly. I responded, “Well, order 13 says to list your social security number on the second line.” She asked, “It does?” I showed her a copy and she replied, “It does. Well, I will have to talk with my manager about that. You will want to keep your social security number a secret.” I am amazed and fascinated that I read the forms closer than the clerk.

She finished the computer information and gave me a copy of a time-stamped record of filing. I was filed. I felt different. Something had changed. It took twenty minutes, but I felt relief. I could go home and work on other things. I knew that I was now a debtor in bankruptcy. My mother would not approve. I also knew that my creditors could not call me anymore, and I did not have to pay them.126

The filing of the petition casts the individual into a debtor identity and into a world of specialized codes, processes, and practices. The debtor must learn what a bankruptcy process includes and means. A debtor must understand three key concepts regulating bankruptcy activity and practices—automatic stay, relief from stay, and discharge. The automatic stay protects the debtor from his creditors. The automatic stay goes into effect when the petition is filed. For example, the moment my informant filed his petition, his car loan creditor had to return the repossessed car and other creditors had to cease garnishing wages from his paycheck. The automatic stay remains in effect for the duration of the bankruptcy as to property of the debtor’s

126 Greg Interview, interview by author, Berkeley, Ca., May 2005.
estate and the debtor’s exempt property.

The second concept relates to the first: relief from stay. The only way a creditor can circumvent the automatic stay is to successfully litigate a motion for relief from the automatic stay. Many grounds exist in the bankruptcy code and case law that allow a creditor to obtain possession of the debtor’s property, but it is only after a court hearing and sufficient proof from the creditor that the creditor can collect money or obtain possession of property. If the court grants the creditor’s motion, then only that creditor may collect the property identified in the motion from the debtor.

A debtor files a petition in bankruptcy to receive a full or partial discharge of his debts. The discharge occurs at the end of the bankruptcy case. In a typical Chapter 7 proceeding, a debtor will receive a discharge after he has made a full financial disclosure to the court and the trustee, the trustee has investigated all of the debtor’s assets, the debtor has complied with debtor education requirements, and the debtor has attended and cooperated with the trustee and creditors during the Bankruptcy Code Section 341 meeting of creditors. After the meeting of creditors, the debtor waits for one-hundred-sixty days for any objections to his discharge by his creditors. If this does not occur, the debtor receives a letter in the mail indicating that he has received a discharge of all the debts listed in the bankruptcy petition.

6. Examination of the Debtor: The Meeting of Creditors

Debtors often consider their examination at the meeting of creditors to be the most transformative experience of the bankruptcy process. The debtor is required to attend an examination by the trustee and creditors at what is identified in the Bankruptcy Code as the “meeting of creditors.” The debtor is subject to this public examination at the meeting of creditors, by the trustee and by the creditors, forty-five days after the filing of the petition. In the examination, the trustee and the creditors can ask the debtor any question about the debtor’s financial life (e.g., to explain certain sales of assets, a reduction in income, the reason for particular expenses). The trustee attempts to determine the extent of the debtor’s assets (i.e., cash, real property, personal property, potential lawsuits and anything else of value) and the exact value of those assets. If an asset exceeds its exemption level, then the trustee will collect the asset from the debtor, take her fee, and distribute the remainder to creditors based on their filed proof of claim listing the amount they are owed. If there is nothing for the trustee to distribute to the creditors, the trustee files a “no asset case” declaration with the court. In a no asset case, the trustee receives a set fee (typically $75), and the creditors receive nothing. If there is no objection, the debtor will receive a discharge within six months after the meeting of creditors.

The debtor attends the meeting of creditors alone or with his attorney. Typically the office of the United States Trustee, which is part of the U.S. Department of Justice, conducts the meeting of creditors. There is the main meeting room or rooms and separate non-meeting waiting rooms where debtors wait to be called. The meeting room is open to the public. The trustee calls the cases every hour by the debtors’ names. Once called, the debtors enter the meeting room and sit. The trustee sits at the front of the room in the center of a large table. The trustee calls each debtor individually to the table. The debtor sits at the table. The trustee asks for identification
and proof of social security number. The person is sworn to honesty and the meeting is electronically recorded. The trustee asks the debtor questions, and then the creditors or any other interested party may ask the debtor questions.

Through this process, the debtor is subject to public examination by the trustee and by creditors. The meeting of creditors is the primary method by which the trustee and the creditors can examine the debtor to obtain contact information and employment information, ascertain the accuracy of the information contained in the schedules and statement of financial affairs, determine whether the debtor wants to make any changes to the petition, and give the trustee, creditors and the UST the opportunity to question the debtor under oath and the threat of perjury.

A typical, uncomplicated, and routine Chapter 7 examination of the debtor proceeds in the following manner. This examination is of a 35-year-old African-American male who is a United Airlines employee and a resident of Oakland, California.

Trustee calls all the names on the 10:00 a.m. calendar. The debtors come from the waiting room and sit in the meeting of creditors. The trustee takes his seat behind the table.

Trustee: Good morning. I am your Chapter 7 trustee appointed to oversee the collection and distribution of the assets in your case. Many of you have already received information from me. This is the time set for your meeting of creditors. When I call your name, please come forward. Have your social security card and photos IDs out. I will check your IDs. Then please have a seat to my right behind the nameplate that says “debtor.” If there are any creditors, when I call you, please sit to my left behind the nameplate which says “creditor.”

Trustee: Troy Wilson please come forward and show me your social security card and photo ID. The debtor has shown me a social security card and a photo ID and the name on the card matches the name on the photo ID.

Trustee: Please have a seat in the seat by the debtor nameplate. Thank you. Please raise your right hand and repeat after me:

Do you solemnly swear or affirm that the information you are about to provide is the whole truth and nothing but the truth?

Debtor: I do.

Trustee: Did you read the information sheet in the waiting room? (The information sheet explains the difference between a Chapter 7 and Chapter 13, the role of the trustee, and the debtor’s duty to provide information to the trustee and the United States Trustee.)

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127 Surprisingly, the requirement of identification is recent. It resulted from debtors filing cases under different social security numbers.
Debtor: Yes.

Trustee: Did you understand the information on the sheet?

Debtor: Yes.

Trustee: The following questions relate to the information provided in your schedules and statement of financial affairs. Please state your name for the record.

Debtor: My name is Troy Wilson. I live at 4568 Lambard Avenue, Oakland California 95481. My telephone number is 510 123-4567.

Trustee: Did you read the petition before you signed it?

Debtor: Yes.

Trustee: Did you sign the petition?

Debtor: Yes.

Trustee: Are you familiar with the information in the documents?

Debtor: Yes.

Trustee: Are there any changes that you would like to make to the petition?

Debtor: No.

Trustee: Have you ever filed bankruptcy before?

Debtor: Never.

Trustee: Do you own any real property?

Debtor: No.

Trustee: Are you keeping the car?

Debtor: Yes.

Trustee: Is the insurance and the payments current?

Debtor: Yes.

Trustee: Are there any creditors who like to question the debtor? No. Okay. You are free to go.
Debtor: Thank you.128

In this typical questioning by the Chapter 7 trustee of a Chapter 7 debtor, the debtor is subject to a scripted public examination by the trustee. As for the individual debtor’s experience at the meeting of creditors, my informants explained that they experience the calling out of their names to come forward by the trustee as a moment of transformation. Debtors say that to hear their names called in the crowded room publically transforms them into debtors. After their names are called, the debtors must stand and come forward to the front of the room to sit across from the trustee and be questioned. Most people in the room can hear the questions and the answers. This experience creates a public record.

Debtors are unfamiliar with the bankruptcy process and the meeting of creditors; therefore, many do not know who will attend and which questions the trustee and creditors will ask. Many debtors feel embarrassed and scared during the process. Some debtors believe that law enforcement will appear and they will be arrested. Many debtors do not know that major credit card companies never appear at a meeting of creditors. Many expect that the credit card companies will ask them detailed questions about their purchases, spending habits, and lifestyle.

A 28-year-old professional Caucasian woman describes her experience as follows:

Linda Coco: What was it like for you to drive to the meeting of creditors?

Ingrid: I felt okay. I went with my worthless dog (commenting on the fact that in bankruptcy her mixed breed dog has no resale value). I drove there alone. It was a four-hour trip, and I actually felt like it was a rite of passage. Just that it was the preparation to go to a new status in my life. There was a buildup and I was actually preparing myself for it. I felt that I was in a liminal stage. The drive and the arrival was a liminal stage. When I got there, I did not feel that I was in my body at all. I did feel like I was ready to put up a fight if somebody was going to fight with me. I felt that if somebody was going to disrespect me or something, I could deal with it. I went there with folders. I went there with every document that they had even suggested that I bring—credit card statements, tax returns for three years, pay check stubs. I had them in chronological order. I was ready to go. Of course I did not need any of it.

It was an emotional experience. I had dressed up nicely. I think I had graded a whole bunch of papers the day before. (Pause.) You know, I am a professor. I am a professional. I have a job. And I get there, and I felt like a total fraud inside. There was a total double consciousness. I was outside the building, and I was an adult who was responsible. Walk into the room and there is this guy sitting up at that table who can tell me that he is not going to discharge my debt, and that I did not handle myself appropriately.

128 Notes from fieldwork, Oakland, Ca., May 2004.
He is going to tell me that I am not financially responsible.

LC: Sitting in the meeting of creditors room, what did you notice about the people?

Ingrede: I noticed whether they had a lawyer or not; whether the individual or their lawyer was speaking. I was trying to see what the official script was that the trustee was saying, what questions the trustee was asking. I noticed after watching three cases that he had a set of questions and a desired response. I was also noticing what kinds of answers made him divert from the script. I was trying to plan as best as I could what my answers would be. And what I noticed from the people was how much they were deferring to their lawyers. I try to see if creditors were there and what types of questions they were asking of the people.

I wanted to figure out if I should just say yes or no, or if I should try to answer the question. What I noticed was that the more people actually tried to explain themselves, it seemed like the more annoyed the judge [trustee] got. I noticed that he liked quick answers that were usually one word. I decided that I was just going to say “yes” or “no.”

LC: Did you want an attorney?

Ingrede: No. But it was nagging me at the back of my mind because I noticed that some people were walking in and out, and I did not know if any of them were my creditors. I kept thinking to myself that if one of them is my creditor, I wish that I had an attorney. But I was sure that they were not going to show up. So I thought I was alright.

Another thing was that I was paying attention to what the lawyers were saying to the creditors. The only creditor that did show up was this one guy who was an employee of a local company where people rented furniture from. Three of the people there had actually leased furniture from this company.

I was looking around the room to figure out who the creditors were. It was funny, I could tell who the lawyers were because they were dressed in suits, and they had a briefcase. They had all the documentation. The other people looked scared as shit. They were slouched in their seats. They were crossing and uncrossing their legs. They all sat in the aisle as if they wanted to make a fast getaway.

I was torn because I did not know with whom to identify. I knew I was a debtor. But after I went through the mental transformation about why I was doing it, I felt justified in being there, and I did not identify with anyone equally.
I had a conversation with one woman out front. She was talking about how terrible it was going to be, and that they could just decide not to do this on a whim. I asked her if she had a lawyer, and she said, “Yeah.” I was like “Okay, I do not think that this is going to happen, so I do not think that you have to worry so much.” I thought that it was interesting that the people with the lawyers really saw this as something to be worried about or think about and be nervous about it. I wondered how much of that is the lawyer creating a need for his services.

So this whole stereotype of the debtor as criminal gets perpetuated throughout the bankruptcy process. I am glad that I filed my bankruptcy petition pro se for more reasons than the money. The hilarious part is that the secretary said to me, “Oh, you filled out the forms so well.”

My case was simple because I do not have property.

LC: Tell me what happened when they called your name?

Ingrede: I felt like god had pointed down at me from the sky over the loud speaker and said, “You.” The trustee calling my name made it real. I was a debtor in this room. I was being called to answer for my debts. This is probably what started that transitional phase where I did not feel like I was in my body. I was floating down to my seat marked “debtor.” It was embarrassing. People were watching me.

LC: When you moved toward the desk, what did you do?

Ingrede: I brought my folders with all my bills and statements with me to let them know that I meant business. I put them on the table, and I sat down. I remained silent. I had seen that the more silent people were, the faster the process went. I felt really vulnerable. My back was to the room where my creditors may be.

The trustee asked me the questions on the sheet. Oh, before I sat down I showed him my photo ID and SSI number. He did not even look up at me or write it down. He just glanced at it. That made me feel better, because he was not really seeing me for me at all. He just saw me as some case he needed to get through to finish the day, and I thought, “Good.” I did not want to be recognized.

The impersonal nature of the process was helpful, because I did not feel that this was a personal indictment of me. This was something that I can learn the process of and get through. I do not think that the normal debtor could get through this the same way.
LC: How was your body in the chair?

Ingrede: I was sitting up very straight because I felt the need to level myself with them, because they (the trustee and his staff) are up higher. I did notice that there were people sitting in the chair who were slouching as if they were criminals or they had something to be guilty of. I thought that I did not want to do that. I sat up very straight and spoke very clearly.

LC: When the trustee asked if there were any creditors in the room, did you turn your head?

Ingrede: No.

LC: Why?

Ingrede: I do not know.

LC: What did you feel when he asked that question?

Ingrede: I felt like, “Eww, maybe one was going to sneak in” . . . I was scared. To be honest, I did feel more scared about dealing with the creditors than with the judge (trustee) because of all the conflicting feelings about these being the people that I owe the money to. That I had made a contract with these people, and I was breaking it. If there was anyone who could call me a criminal it would be these people, and they could make a case for it. I was hoping they would not show up.

LC: What happened when it was dead silent in the room?

Ingrede: And it was dead silent because there was no one left in the room. When this happened, I totally relaxed. Then, I sat back in the chair and thought that all I have to do was say “yes” or “no” to the next five questions and I can be out of here. So he asked them, I answered, and he concluded the meeting.

Then the judge (trustee) says his closing remarks, he turns off the microphone, and I am just getting up from the table and he starts talking to me. He said that he noticed on my forms that I lived in Highland, Wisconsin and that is where he went to graduate school. He said it was an interesting place, and he wanted to know if I liked it. I did not want to talk to him. I did not want to talk to him at all. I said, “Yeah, it is a really nice place.” I just wanted to get out of there, and I remember he was trying to break the separation between us by changing the dialogue.

LC: So you felt you were following a script and he was changing it?
Ingredé: Yeah. And he started to come down from his high level, and I was thinking, “I do not want to talk to you.” So I thanked them and I left. I just wanted to get outside. So I went outside and called Tom and said, “It is over, and I can start saving money.”

LC: When you walked out the front door, how did you feel?

Ingredé: I felt so good. And I felt that I wanted to get out of the room. When the judge (trustee) said that he closed it as a no asset case, I did not feel anything. It was only when I got out of the room did I feel better. I thought, “I never have to come to this building again.” I went to the fountain outside, and I felt so much better.

And since then, life has been so much better. I sleep better. I really do not think about it like I thought that I would if I declared bankruptcy. Then they sent me the letter, and I put the letter in a file, and I do not feel an ounce of guilt. I don’t feel an ounce of shame. I do not feel shit. I just feel better. Like I did the most responsible thing that I could have done for myself, which is face the fears and move on.129

Ingredé’s description is an excellent reflection on the experience of the debtor in the meeting of creditors. She was able to both live and describe the experience in the meeting as a debtor.

The body of the debtor in the meeting of creditors is a docile body. The debtor is forced to attend the meeting, sit in the waiting room until called into the meeting room, and wait again until the trustee calls the debtor’s name to come forward to sit at the examination table. Once called, the debtor must walk to the front of the room and sit behind the table placard marked “debtor.” (One debtor commented sarcastically that it was not as if the trustee could not distinguish between a debtor and creditor or would become confused by a debtor sitting in a different seat). The debtor must prove her identity with documentation to the trustee and take a sworn oath of truth. If the debtor lies, he can go to jail for perjury. Depending on the trustee and the case, questioning lasts from five to thirty minutes or more.

Debtors are uncertain about bankruptcy practices and processes. They feel anxiety, confusion, and defensiveness, and they are afraid they will be arrested. The woman with whom Ingredé interacted prior to the meeting of creditors reflected such anxiety when she expressed fear that the trustee can just deny a debtor a discharge on a whim. This fear is often reflected in the debtor’s bodily posture and physical movements. Debtors often fidget in their chairs and try to leave the room. One informant, a 40-year-old Caucasian male real estate agent, describes his experience as follows:

Linda Coco: What was it like the morning you had to go to the debtor

129 Ingredé Interview, interview by author, March 2004.
examination?

Terry: I did not want to go. I did not want to drive there. I did not want to go in that room. I went to the building entrance and my heart was racing and I was shaking. I forced myself to go. Man, when I found my lawyer and I went into the room, I wanted to leave so bad. I was looking around the room for the doors and exits. I was wondering where the police were. I felt criminal. There were so many people in the room. I thought that they were there for me.

LC: Tell me about sitting in the audience and when they called your name.

Terry: Oh man, I heard the (trustee) judge say Terry. And just shot up straight in my chair. (He moves his body into an erect position in his seat.) I felt I had entered another zone. Everyone was looking at me. I stood up shaking, and I walked shaking to the front of the room. I handed the judge (trustee) my ID and social security card. (Terry mimes this by putting out his hand and it is shaking).

LC: So what happened when you sat in the debtor’s chair?

Terry: Oh god it was horrible. I felt so scared. I was moving around. I was rocking back and forth. I felt that I was sitting on peach nuts. I was looking around, . . . I was looking for the nearest exit so I could leave. I was waiting for the handcuffs. I just knew that the police were coming.

LC: What did you expect?

Terry: My attorney had told me that they were going to question me about a few things and then let me go. But I really did not believe him. I was expecting to be taken away to jail.

LC: How did you sit in the chair and respond to the trustee?

Terry: I sat upright, and I was trying to be good. I answered his questions. I would look at him and look out into the audience expecting someone to come forward and say that I was lying and really get me. I thought that judge (trustee) was going to accuse me of lying.

LC: What happened when the trustee asked if there were any creditors in the room?

Terry: That was the worst experience I ever felt. I have never been so scared in my life. I just look around.
LC: Was it silent?

Terry: Yeah, it was dead silent, but I was looking for the door. But nothing happened.

LC: So how did you feel when they said you are free to go?

Terry: Well, I really could not feel anything at that point. I just wanted to get out of the room. My attorney said something. I did not hear him. I wanted out of the room. So I headed for the door. I was still in a zone or something. I got to my car, and all I could do was think about it and think about it. I was so upset.\(^\text{130}\)

Like Ingrede, Terry experienced the examination in a state of fear and uncertainty. He forced himself to appear and submit to the examination by the trustee and the creditors. Each experienced a discipline of their behavior, their bodies, and their thoughts. Neither Ingrede nor Terry understood enough about bankruptcy law to feel certain that they were going to receive a discharge of their debts, and both felt as if something they were doing was criminal, like they were getting away with something, and someone was going to criminalize their conduct.

7. Discharge of Debts

A discharge is the final stage of a Chapter 7 bankruptcy. After the meeting of creditors, when the Chapter 7 trustee files a report with the bankruptcy court declaring that the case was a “no asset case,” the case remains open for sixty to ninety days, depending on the jurisdiction, to allow creditors or other interested parties the opportunity to object to the debtor’s discharge. If no objection is filed, the debtor is granted a discharge by the court. Then the bankruptcy court mails the debtor a letter indicating the court has discharged the debtor.

Ingrede stated that a few months after the meeting of creditors she received a letter from the bankruptcy court indicating that she had received her discharge. She initially believed that if she was told that her debts were discharged she would feel guilty for not paying them completely. She believed she would feel shame and want to repay her creditors. Much to her surprise, the day she received the discharge letter she felt only relief.

Conclusion

Bankruptcy is the process that transforms the messy individual experiencing financial difficulty into the coherent and comprehensible “debtor.” As Nikolas Rose writes: “[i]t is possible to govern only within a certain regime of intelligibility--to govern is to act under a certain description. Language is not secondary to government; it is constitutive of it. Language not only makes acts of government describable; it also makes them possible” (Rose 1999: 28-29). The category of “debtor” is a doorway to freedom from debt. It is an active cultural and

\(^ {130} \) Terry Interview, interview by author, Mendocino Ca., April 2003.
social category. The imposition of the category onto the individual makes a release from debt possible. The category, in turn, is connected to the official processes of the Bankruptcy Courts and the Department of Justice.
Chapter 5. Subordinate Law: The Stigma\textsuperscript{131} of Debt and Bankruptcy

Thank you for inviting me to this conference, because most CEOs do not want to be seen with me.

Harvey R. Miller’s opening remark to the 2009 JP Morgan corporate leadership summit.\textsuperscript{132}

As discussed in previous chapters, throughout history, debt and financial failure have occupied an ambiguous place in American society and culture. Discourses of debt and financial failure associate debt with sin and at the same time incurring debt is deemed necessary to participate in the risk-taking required for marketplace. Financial failure is expected, and yet, it is stigmatized. These non-legal social and cultural views of debt and financial failure impact what are considered strictly legal policies, texts, professionals, and practices within the bankruptcy legal field, much in the same way the sexual revolution impacted the legal world of family law. Moreover, the bankruptcy legal texts, practices and professionals have impacted the larger social and cultural perception of debt and financial failure in the same way that plaintiffs and their attorneys, through tort litigation, have impacted the practices of large corporations. As Nader explains in The Life of the Law, “the changes in law in the past two centuries did not just happen, nor did the law respond unconsciously. The changes came because of the cumulative sense of injustice generated by individual plaintiffs and plaintiff’s attorneys (among others) who argued cases or wrote legislation governing litigation” (Nader 2002:183).

In an interview before he filed the Chrysler bankruptcy petition, Harvey R. Miller, a leading bankruptcy attorney\textsuperscript{133} at Weil, Gotshal & Manges in New York, told the following story about the perception of financial failure and bankruptcy in society, the place of bankruptcy law in the general legal field, and the view of himself as a bankruptcy legal professional in the 1980s:

Bankruptcy was not something that companies considered, but by the middle of the 1980s, large corporations began to consider [bankruptcy]. That is when it became a moneymaker for law large law firms. A story I

\textsuperscript{131} The author employs the terms “stigma” or “stigmatized” to describe bankruptcy law and practice throughout this article. The intended meaning of the term is defined in the Oxford English Dictionary (Oxford University Press: Oxford, England. (1971)): “Stigma. . . . 2.: “a mark of disgrace or infamy; a distinguishing mark or characteristic.” . . . . “a stain or reproach, as on one's reputation.” The stigma is not an actual or visible mark on any physical body in the bankruptcy legal field, rather is a symbolic, socially agreed upon belief about this particular area of legal practice. Similar to the stigma identified by Orlando Patterson in Slavery and Social Death when he describes the invisible stigma that socially marks the free slave in civil society (Patterson 198 247).

\textsuperscript{132} Interview by the author of Harvey R. Miller. New York City. April 2009.

\textsuperscript{133} Harvey R. Miller’s recent Chapter 11 cases include: Lehman Brothers Holdings, Inc., et al. – Attorneys for Debtor; General Motors Corporation – Attorneys for Debtor; Pacific Gas & Electric, Inc. – Attorneys for Parent Holding Company; Texaco Inc. – Attorneys for Debtor. Further information concerning the legal work of Mr. Miller can be located on his personal webpage connected to the page of Weil, Gotshal & Manges.
tell about this time is that an investment banker calls me up and says he has a very wealthy CEO and business owner as a client whom he thinks is in real serious trouble. The client, he says, needs your advice. I say, “Ok when are we going to meet.” The investment banker says, “He will not meet with you.” I reply, “What do you mean he will not meet with me?” The investment banker replies, “He absolutely will not get near you. He is scared to death of you.” I say “well ok. I cannot help him then.” Two weeks later the phone rings. The investment banker calls and says, “He does not want to do this but he has agreed to meet with you. The company is in Houston, Texas.” The investment banker explains, “But you cannot come to Houston. He is afraid that someone will see him talking with you. So the meeting is in Dallas. You two are going to meet in a private mansion on turtle creek.” The banker gives me the date and tells me that all the arrangements have been made. I was about to hang up, and the investment banker says, “By the way we have given you a different name. It is Mr. Jones.” I say, “ok.” I take the last plane down on the designated day. I go to the hotel, and I forget my name. I get to the desk and I take a guess. I was right. The next morning I meet with the guy. He was in the oil producing business. He was petrified of bankruptcy. 134

This story illustrates the turning point in the mid- to late-1980s that occurred for the place of bankruptcy law in the larger legal and social worlds. The CEO of this Texas oil company was petrified of the perception of excessive debt and financial failure. He did not want to be seen with a New York bankruptcy lawyer. He did not want to be associated with bankruptcy law. Yet, financial failure is a possibility for all corporations. The CEO potentially needed bankruptcy law to manage a downturn of his company. Since the passage of the Bankruptcy Code of 1978, large companies and many consumers found it an effective tool for addressing unexpected financial failure, and that is what the law was intended to address.

As large corporations began to consider bankruptcy as a viable option, bankruptcy law began to shake its social stigma and its image in the legal field “as an inferior form of justice.” Due to the work of a determined group of bankruptcy scholars and practitioners, the general legal world that had at one time ignored bankruptcy law began to take notice. During the 1960s and 1970s, this group worked to reform the Bankruptcy Act of 1898. The uneven and insider practice of bankruptcy that dominated the field for several decades receded into history with the new rules and code. After the creation and enactment of the Bankruptcy Rules in 1973 and most particularly the Bankruptcy Code of 1978, bankruptcy practice became increasingly uniform and accessible. As larger clients such as banks and corporations sought bankruptcy as legal tool, the

134 Interview by the author of Harvey R. Miller. New York City. April 2009. A similar story was told to the author by a Bankruptcy Judge about his former Chapter 11 large firm bankruptcy practice. In an interview, this judge explained that upon entering the CEO’s office of a large chemical company in the early 1980s, he was told after identifying the area of his legal practice to leave the office and the corporate offices immediately. Interview by author with a bankruptcy judge in the District of Maryland, United States Bankruptcy Court in Baltimore, Maryland: May 2006.
larger law firms who previously shunned the stigmatized area of law began to seek lawyers with bankruptcy law experience.

Harvey Miller’s story raises numerous questions about the role of bankruptcy law and legal practitioners in American society and culture: Is bankruptcy a legitimate solution both morally and legally to un-payable debts? What are the collectively held beliefs about debt both historically and contemporary? How do these collectively held beliefs impact bankruptcy law and practice? Why was the practice of bankruptcy law traditionally relegated to Jewish lawyers? Why did the large Wall Street firms reject bankruptcy for so many years? How did the use of bankruptcy become a possible and viable solution for prominent corporate entities? The answers to these cultural and social questions cannot be found in legal texts.

Studies of the social forces in the workings of the bankruptcy legal field illustrate the ideas of legal anthropologist Laura Nader in her text Law in Culture and Society. Employing the perspective of an anthropologist, Nader explains that law and legal processes are constituted by social and cultural beliefs and practices. The social forces shape what law is and what constitutes most aspects of legal practice. At the same time, law and legal practices shape social and cultural beliefs and practices. There is a reciprocal influence between collectively-held beliefs and practices and the legal world. According to Nader, law is not isolated from the larger social world as legal formalists argue, nor is law solely determined by the social world as some legal realists argue. Law and legal processes, as French Sociologist Pierre Bourdieu explains in “The Force of Law: Toward A Sociology of the Juridical Field,” inhabit a separate and distinct social space (i.e., a “professional field”), but that distinct social space is located within the larger social world (Bourdieu 1987).

In order to perform this analysis, Bourdieu’s concept of a ‘field’ is employed. The concept of a ‘field’ provides a theoretical tool for the close consideration of the creation of a distinct social space within which bankruptcy law, practitioners and courts work to replicate and maintain their autonomy vis-à-vis other social realms. The concept provides a way to discuss the boundaries of this distinct social space by indicating who is in the professional field and who is excluded. Most significantly, the concept helps to map the interactions of the bankruptcy field with the larger legal field, and provides a way to describe the manner through which bankruptcy legal professionals fought to create a legitimate social space for bankruptcy law.

The first section of this chapter describes the perception and location of the bankruptcy legal field. The second section explores the discourses of debt, debt relations, and bankruptcy in American culture. The next section traces the development of the bankruptcy legal field in relation to the larger legal field. This exploration will focus primarily on the history of the relationship between the professionals in the legal field from the 1940s to the present. It will also focus on the impact of certain bankruptcy legal professionals on the development and creation of

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135 Pierre Bourdieu identifies the “legal field” as the “juridical field.” In this piece the author will use the phrase “legal field” to indicate the legal social space in America. A field—artistic field, academic field, juridical field, bureaucratic field—is a theoretical concept which provides a tool for describing the positions of legal agents—both institutions and legal actors, i.e., biological individuals—in relation (and opposition) to each other, in relation to other fields and their place in the larger social world i.e., the field of power. To think in terms of “a field” is to think relationally. A professional field works to pull people to work together as a kind of force field or it works to cause actors to engage and be repelled as on a battlefield (Bourdieu 1992: 96-97).
the 1973 Bankruptcy Rules and the Bankruptcy Code of 1978. This section highlights the discourses on the path to legitimacy for the bankruptcy professionals and courts. Finally, this chapter makes some observations about the location of actors inhabiting the field, as they are located today. This chapter is part of a contribution to the larger discussions in the legal world about the construction and creation of legitimacy of bankruptcy law and legal processes. This case study of the development of the rightful place of bankruptcy law and process in the social and the legal worlds is an illustration of how law is in society and culture (Nader 1969).

I. The Bankruptcy Legal Field

The contemporary bankruptcy field is located within the larger legal professional field in the U.S. The professional legal field contains several areas of legal practice—constitutional law, criminal law, corporate law, etc. The bankruptcy field is a distinct area of law and practice within this larger field. Similar to the larger legal field, the contemporary practice of bankruptcy law is nationally systematized and conformed by a set of codes and rules (i.e. the Bankruptcy Code of 1978 and Bankruptcy Rules). These sets of explicit and implicit nomos, or rules of structure and engagement, tend to create national uniformity and consistency. This uniformity, as Bourdieu explains, creates legitimacy and, ultimately, field autonomy. He reflects that these features are necessary for the “creation of a socially distinct, recognizable and valuable form of power vested in legal processes” (Bourdieu 2000: 880). Bankruptcy law and practice achieves this in the contemporary moment, but only as a result of struggles of the bankruptcy professionals in the 1960s and 1970s.

Bankruptcy clients, professionals, law, and practice had a seedy or shabby tinge to its legal character in the larger legal world. First, bankruptcy law deals with clients who have debt and are experiencing financial failure, a stigmatized social group. Second, bankruptcy professionals were primarily drawn from the stigmatized groups of lawyers (i.e., non-Christian, Jewish, non-whites, and women). Next, the bankruptcy law and practice was confusing and uneven in the different regions in the country. In many areas, the court procedures were not written. Only folks who were initiated by other practicing attorneys knew how to practice. Also, the selection and appointment of the trustees, referees, and later judges was an informal insider process. The bankruptcy field was replete with region and “ring” specific attributes which caused a deep discrediting of and disgrace to the professional field. To add to the lack of legitimacy, the bankruptcy courts were to akin magistrate courts and never bestowed Article III status.

Over the past five decades, bankruptcy professionals have fought to shift this perception and reality of bankruptcy law and practice. Bankruptcy Judge David Houston for the Northern District of Mississippi discusses some of the struggles of bankruptcy professionals in an interview: “We still fight the fight. The fights never go away. . . . [The] Article I verses Article III fights are out there. . . and because of what bankruptcy judges have gone through over the past twenty-five to thirty years, we are very protective of our turf. . . .”


explains that he and other bankruptcy professionals fought for thirty years to create their rightful place in the legal field. The battles resulted in the creation of “turf” or a legitimate space for bankruptcy law in the legal and social world. He notes that the battles between Articles III and I status for bankruptcy judges still exists. Bankruptcy practitioners are always reminded that they need to fight for their rightful place.

As Nader explains in *Law in Culture and Society*, law is constituted by and constitutive of extra-legal social forces (Nader 1969). First, law and legal processes and actors are constituted by larger social and cultural beliefs and values. With the history of debtor’s prisons in American culture, debt and the bankruptcy are illegitimate social experiences. Financial failure and debtors are stigmatized. The legal actors and the law dealing with social failure have been similarly illegitimatized. The social and cultural discourses of debt create the social forces that shape the perceptions and place of the bankruptcy laws and practices within the larger legal field.

Nader also explains law and legal processes are constitutive of the social world. The work of legal professionals in the legal field impacts and changes the social world. The legal field, as Bourdieu explains in the article, is different from other professional fields in social space. It has a different form of power that generates its autonomy or unique place in the larger social world. The power and autonomy of the legal field is found in its process of creating legitimacy through legal action. Law and legal processes have a normative power over the structure of the social world and behaviors of actors in the social world. The pronouncements of legal processes (i.e., court orders and legislative enactments) can change illegitimate practice into legitimate practice. Bourdieu explains that this is the social effect of the work of law and lawyers. This process is seen in the process of the (re)creation of the bankruptcy field that occurred in the 1960s and 1970s in the legal field. By considering the work of a small group of relatively powerful legal professionals, it is apparent that legal processes thought to be isolated to the legal field impact not only law and legal practice, but the larger social world as well.

During the mid- to late-1960s and 1970s, the members of the National Bankruptcy Conference (“NBC”), the members of the National Conference of Bankruptcy Judges (“NCBJ”), and Congressional representatives and their staffers worked to transform the place of bankruptcy law in the larger legal world. This work resulted in the Bankruptcy Rules of 1973

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138 Examples: Protections of civil rights; rights to privacy (abortion).

139 Professor of Law at New York University, Lawrence King explained that the “National Bankruptcy Conference started in about 1937. The NBC started at time when a certain group of lawyers around the country were called on to help the U.S. Congress with the drafting the Chandler Amendments to the 1898 Bankruptcy Act. Congress was addressing chapters X, XI, and XII of the 1898 Act. The NBC evolved after that into a standing group [that meets annually]. Its purpose was to help Congress to draft legislation, conduct hearings, and passing legislations. NBC’s charter is to help Congress. It is not a public organization, NBC is private and self perpetuating.” Lawrence King, interview by Randall J. Newsome, October 13, 1993, Randall J. Newsome Oral History Collection, National Bankruptcy Archives, Biddle Law Library, University of Pennsylvania School of Law, Philadelphia, Pa.

140 The National Conference of Bankruptcy Judges is a voluntary association of bankruptcy judges founded in the 1930s. Unlike NBC that has an invitation only membership policy, the NCBJ permits anyone who wished to become a member to join. The goal of NCBJ is to “secure a greater degree of quality and uniformity in the administration of the Bankruptcy system and to improve the practice of law in the Bankruptcy Courts of the United States.”
and the enactment of the 1978 Bankruptcy Code. The struggle of this small group of legal actors made significant changes in the legal world which impacted the larger social world; they made the Code possible and the code made bankruptcy law and legal process uniform by combining Chapters 10 11 to make bankruptcy friendlier for corporations. In other words, the Code made the law easier to use by powerful social and economic actors. Bankruptcy thus gained legitimacy in the social world. The most significant and powerful contribution in the transformation of the world of bankruptcy was the creation by NBC of the Automatic Stay in bankruptcy.

In order to understand the (transitional) character of the bankruptcy field, its place in the social world, and its relation to the larger legal professional field this Chapter discusses: (1) the view that bankruptcy law, because it handles debt and debtors, is a subordinate area of legal practice; (2) the ethnic stereotype that only undesirable legal professionals practice bankruptcy law; (3) the dismantling of the image of bankruptcy as a regional “insiders’ practice” lacking uniformity and consistency nationally; (4) the corrupt practices of bankruptcy law and practice found in the “bankruptcy rings;” (5) the view that bankruptcy was not an appropriate tool for large corporations; (6) and the battle for Article III status for bankruptcy judges endures.

Because of these various features of bankruptcy legal practice, bankruptcy law along with bankruptcy professionals have suffered from a poor reputation in the larger legal world. David Skeel writes in this book Debts Dominion that “the perception [was] that bankruptcy courts … ‘dispensed an inferior brand of justice . . . [a]less-thorough brand of justice’” (Skeel 2001: 136).

II. The Stigma of Debt

In America, there is social stigma associated with bankruptcy because debt and financial failure has occupied a precarious and unstable position in social discourse and experience. The discourses of debt and financial failure in American culture include notions that borrowing money (i.e. owning a debt) is a sin, and the payment of debt is a moral, rather than a legal, obligation; failing to pay a debt is immoral even when legal. Yet, America has been built upon unmanageable public and private debt. Institutional and individual debt is necessary for the development of the market system. Marketplace actors often borrowed money to start a business. This tension between debt as sin and debt as necessity for economic development creates a social and cultural dissonance denying a rightful place to debt and fiscal failure as a legitimate experience. The American legal field is impacted by these tensions in bankruptcy law because the law provides a solution to the sin of debt and debtors ensuring its position as a subordinate area of legal practice.

In Margaret Atwood’s recent book Payback: Debt and Shadow Side of Wealth, she discusses the role and place of debt in American culture (Atwood 2008). She explains that owing a debt has historically been associated with sin in Western Judeo-Christian societies. She writes: “it is interesting to note that in Aramaic, the Semitic language that was spoken by Jesus, the word for “debt” and the word for “sin” are the same” (Atwood 2008: 45). She explains that the designation of debt as sin originates from the notions of balance in social relationships. Debt is about social relationship; it is about a kind of balance in relationships between social actors. When money is lent it creates an imbalance that requires payback or retribution to right the balance. Debt is the situation where one owes something to someone or some other entity and the relationship is out of balance. She explains that when the borrower becomes unable to pay the
credit, the borrower is often viewed as having sinned against the creditor, and more importantly against moral society. Debt becomes more about individual morality rather than about an economic contract. This view is reflected in early American cultural discourse.

An 1842 article entitled “Insolvency” from the Hartford Daily Courant explains that there is a moral duty beyond a legal duty to pay debts by asking, “Why is a man obligated to pay his debts? It is hoped that few people will reply, ‘because the law compels him.’ Why, then? Because the moral law requires it.” The article reflects the notion that there is something beyond ‘the law’ that requires the repayment of a financial obligation. Morality requires repayment. As Margaret Atwood explains in her discussion of debt and sin, the obligation to another is bound up with collectively held moral standards rather than rational legal standards (Atwood 2008).

Questioning the rightful place of the legal right to a discharge from debt and bankruptcy law, the Hartford Daily Courant article continues with its appeal to morality asking: “does the legal discharge exempt him from the obligation to pay them? No, for this reason—that the legal discharge was not a moral discharge. The duty to pay was not founded primarily on the law.” The Hartford Daily Courant article rejects the new provisions of the Federal Bankruptcy Act of 1841 that allowed for the voluntary debtor to legally obtain a discharge of his debts. The article explains that the law, passed in response to 1937 economic crisis, does not address the moral obligation of debt. Although clearly passed to address the inevitable flux of the marketplace to allow for failure, the legal mandates should be ignored. Forces of moral order collide with the economic order.

Although legal, bankruptcy law and the legal discharge of debts are considered as a kind of immoral theft and wickedness in the eighteenth and nineteenth centuries. One writer against the passage of the 1898 Bankruptcy Act in an 1897 New York Times article also encouraged men not to measure their moral obligations by their legal obligations. Even if the debtor was able to legally obtain a discharge from his debts, many believed the obligation to repay a debt is found in religious principles rather than legal principles. The debtor who could not pay his debts was often called a “deadbeat,” and was socially shunned. Debtors who could not pay their debts were viewed as if somehow they lacked knowledge of what is right and what is wrong. A poem on borrowers at the time read: “Mans wants but little here below, Nor wants that little long. Yet,

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141 “Insolvency.” Hartford Daily Courant (1840-1887); December 3, 1842.

142 “Insolvency.” Hartford Daily Courant (1840-1887); December 3, 1842.

143 Editorial Article 2- No title. New York Times (1857-current file), March 17, 1897. p

144 “Insolvency.” Hartford Daily Courant (1840-1887), December 3, 1842.


some there be, it seems to me, That know not right from wrong—And hence ‘tis mine to quite despise. The meanness of the man Who, when he borrows ‘anything,’ Will keep it if he can.”  

In some states, individuals who could not pay were placed in debtor’s prisons or debt servitude (Cohen 1982, 153-171; Daniels 1995,232-250). The debtor experienced a social death. And yet, enormous debt created and developed in the U.S. in all areas of social and economic life. It is interesting to note that the early marketplace practices required merchants to borrow money and take risks to start new businesses, obtain needed products, and develop a business. The debtor-creditor relationship was the basis of social relations in the marketplace.

Bruce Mann explains in *The Republic of Debtors: Bankruptcy in the Age of American Independence*, that “debt was an inescapable fact of life in early America” and that it “cut across regional, class, and occupational lines” (Mann 2002). At the close of the Revolutionary War, the country owed $77 million to the French and the Dutch. Every social entity and institution also held debt in the early Republic. In 1874, the *Hartford Daily Courant* column entitled “Under Obligations” writes about the age of debt as much as economic progress stating: “Everything is borrowing and almost everybody is or has been ready to lend. School districts, towns, counties, cities, states and the general government all have their debts, while those incorporations for business purpose are indeed few which have no bonds and do not depend more or less upon borrowed money.”

In the new Republic was this central tension of debt as moral obligation and legal rights under bankruptcy law. Bruce Mann explains that the appeal to morality created payment of “debt as a religious imperative”; and at the same time in the marketplace, debt was viewed as a necessity for the development of the economy (Mann 2002, 3). Mann traces the expansion and contraction of both the religious imperative to pay debts and the marketplace requirement of debt relations. Mann concludes, “[t]hus, in one sense, the solution to the struggle over the [il/legitimate] place of failure in the [society and economy of the] early republic was to deny it had any place at all” (Mann 2002, 262). The denial of a legitimate place of debt, fiscal failure and bankruptcy abounded in the early Republic.

This denial of a legitimate place for debt, fiscal failure and bankruptcy survived for decades in the U.S. Into the twenty-first century, the dominant discourses concerning debtors and the right to bankruptcy were in tension over individual responsibility, sin, and merchant capitalism. Failure and bankruptcy law were denied a legitimate place in the normal (or healthy) economic and social world despite the fact that the development of capitalism over the last hundred years has been thoroughly based on intricate and vast debt relations. As a result, the contemporary debates that continue are generated by the same confusion around debt, failure, and the uses of bankruptcy discharge. As writer Margret Atwood reflects on the dominant cultural messages:

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And if you borrow, you’ll be spending money that isn’t yours and you haven’t earned, rather than managing within your income. Good advice, Polonius! Strange that so few people follow it. Or possible strange that anyone at all still follows it, since we are constantly told that borrowing is actually laudable because it turns the wheels of “the system,” and that spending lots of consumer money keeps some large, abstract, blimpish thing called “the economy” afloat. (Atwood 2008: 79).

Atwood illustrates that the message is confused. The individual is told he should not borrow, rather, he should live within his income. The individual should not engage in debtor-creditor relationships. On the other hand, she writes that few people follow this advice. In fact, debt and debt relations are necessary for the “the wheels of ‘the system’ to keep turning” and for “the economy” to continue unimpaired. With debt relations, there necessarily must be a way for release from debts: bankruptcy law’s discharge from debt.

Several newspaper articles from the middle of the 1990s to the creation of the bankruptcy reform act of 2005 provide an insight into the perception of debt and financial failure as sin in tension with the notion that debt is a necessary part of the economy and financial failure a real possibility. One 2002 New York Times article entitled “A Blasphemy Spreads: Debts are O.K.; Can the Bible, Shakespeare and Ben Franklin All Be Wrong?” asserts “[t]here are not many issues on which the Bible, Shakespeare, and Benjamin and the modern mass media offer nearly identical social criticism. On the matter of saving money and going into debt . . . . The New Testament advises readers to ‘owe no man anything,’ . . . Hamlet, ‘Neither a borrower nor lender be,’ . . . [and] Franklin [instructs against] becoming ‘a slave to the lender.’”¹⁴⁹ This article is a strong admonishment to avoid debt. The modern mass media characterizes debt as evil and bankruptcy as morally corrupt. The article harkened back to the time of debtor’s prisons and debt servitude in this country.

Interestingly, the mass media also rejects the discharge of bankruptcy as a way out of debt. The bankruptcy discharge is not a path to financial freedom. Rather, being “imprisoned” by burdensome debt is immoral, and paying debt has to do with a person’s values. One New York Times article on the 2005 reform entitled “Bankruptcy, the American Morality Tale” explains that personal responsibility is “a core American value,” and that individuals should not feel that they can avoid their debts. Another article asks “[w]hen did going into debt lose its stigma?”¹⁵⁰

The clashes are again between the notion that individuals should be moral and responsible and pay their debts, and the legal right to a bankruptcy discharge of burdensome debt. These articles often leave out the fact that debt is a natural part of economic life and financial failure is a real possibility. As leading bankruptcy policy researchers explain, in America, debt and debt relations are pervasive. Their research shows that the failure of individual debtors is a result of purely economic processes. Sullivan, Warren, and Westbrook


explain that the American population has opted for an economic structure which “supports economic success at the price of severe economic inequality and serious economic hardship for some” (Sullivan 2000, 239). The logic of market capitalism requires that individuals take risks, and because it is a highly stratified economic structure, most folks who take such risks will fail. These researchers describe the slip into bankruptcy as resulting from market place inequality. They indicate that the unequal distribution of wealth ensures failure and that protections are needed for those groups of people.

The ambiguity about the rightful and legitimate place of debt and financial failure impacts bankruptcy law and legal practice. Although it is a Constitutional right, debt and financial failure are marked by a legacy of stigma, and as a result, bankruptcy law is denigrated. It has been considered by legal clients and legal professionals as a “shabby” area of law when compared with most other areas such as constitutional law or corporate law. As leading bankruptcy law practitioner and member of the National Bankruptcy Conference George Triester explains, federal district court judges in Los Angeles (1953) described the profession of bankruptcy law:

I knew about the substantive law of bankruptcy and I thought that area of the law was interesting. So, I thought I would check about the bankruptcy practice. I went to see most of the federal district court judges in Los Angeles, having tried cases before them for a couple of years. I talked to most of them about the possibility of going into the bankruptcy practice and every one of them told me, “Don’t do it.” That it is a shabby practice.151

The federal district court judges cautioned young George Treister against practicing bankruptcy law.

Treister explains that bankruptcy law was considered a subordinate practice area because of the stigma of debt, the debtor as a client, and the fact that the large moneyed clients avoided bankruptcy. Mainstream legal professionals and their clients rejected it as a legitimate area of law. Bankruptcy Judge Conrad Duberstein explains about his experience as a bankruptcy lawyer in the 1940s and 1950s in New York City:

[Before the 1980s] the big firms were not in bankruptcy. The larger Manhattan banks along with their big legal firms refused to be involved with bankruptcy. Bankruptcy was considered a demeaning practice area. It was an area of law that the large firms looked down on. The white shoe firms I think they were called.152


Across the country it was the same. In the 1960s, Ronald Trost explains that the big firms in Los Angeles did not practice bankruptcy law:

Randall J. Newsom:  In the 1960s in Los Angeles, were there any big firms in Los Angeles that had bankruptcy capability at that time?

Ronald Trost: No.

RN:  Was it a Jewish practice in Los Angeles?

RT:  Yes.

RN:  Was it the same dynamic I've heard about in other cities where this was the only thing that Jewish lawyers could get involved in?

RT:  Jewish lawyers could do three things: bankruptcy, criminal law, and personal injury. Everywhere the same. Even in New York until very recently it's been that way. 153

Before the 1980s, the world of “big law” avoided bankruptcy.154 Until the 1980s, bankruptcy was rejected by many economically powerful clients (i.e., Manhattan banks and corporation) and by many legal professionals as a legitimate legal option. Financial failure, debt, and bankruptcy were culturally and legally associated with denigration. In the story above about his client in Texas, Harvey Miller tells of a corporate executive who is scared of other people just seeing him with the New York bankruptcy lawyer. Bankruptcy filing was considered such an undesirable choice that Mr. Miller was given a false name for his travel within the state of Texas (Duberstein 1994). The large clients, such as this Texas corporation, and the large banks all avoided bankruptcy when faced with financial difficulty. As a result, the most powerful legal professionals in the field, the large “white shoe” firms, refused to practice bankruptcy law (Duberstein 1994). The big firms, as leading bankruptcy practitioner, Bernard Shapiro, surmised “did not want to want to be brought into disrepute by practicing bankruptcy during the 1940s, ‘50s, ‘60s and ‘70s.”155 This left the practice of bankruptcy law to attorneys shunned by the large firms.

III.  Subordinate Legal Professionals

Another reason for the denigration of the bankruptcy legal field is that, for the most part, bankruptcy law has traditionally been a practice area for stigmatized attorneys (i.e. non-Christians, minorities, and women). In an interview, George Paine explained that some segments of the population were excluded from legal practice in larger Christian firms:

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154 Treister, Newsome interview.

George Paine: Strangely enough, bankruptcy law in the ‘70s and before, was kind of low-end stuff—it was bottom-feeder stuff—meaning, in a pond, the fish that are bottom feeders. I’ll try to reduce my “southernness.”

Susan Imswiler: I understood bottom feeders.

GP: Okay. So at the time bankruptcy started becoming big business, people had started hiring women in their law firms, and they gave them the bankruptcy, because it was bottom-feeder stuff—this is my theory. So we had a lot of women who got their start in bankruptcy law, where it was much harder to break into trial work and corporate work. And they, like me, lucked into a job, they also lucked into something that became very lucrative for their firms, and were able to gain some power they would have never had otherwise—and far more power than they would have had if they had stayed in litigation or corporate stuff. It’s a much more level playing field. We also tended to get black judges disproportionately with other benches. And lastly, we got a lot of Vietnam veterans, which was really interesting to me, since I’m a Vietnam veteran. But we had a nice group of people who had been to Vietnam. So the diversity made it a very interesting bench to me.

The bankruptcy bar was, for decades, primarily comprised of and dominated by Jewish attorneys. This close pairing of bankruptcy law and Jewish attorneys is a result of a double stigmatization. As mentioned above, the large firms in the legal field rejected bankruptcy law and practice as undesirable. Traditional firms excluded the practice area. Until the late 1970s, Jewish attorneys were also excluded from mainstream legal practice. Upon graduating and even well into their careers, many Jewish attorneys could not obtain work in the large firms. They were excluded from the mainstream legal world. Harvey Miller’s career path reflects this stigmatization of the Jewish attorney.

In 1959, Harvey Miller graduated from Columbia University, School of Law. He was unable to find legal work through the traditional channels provided by his law school. After several rejections from the federal agencies and large firms, he put an ad in the New York Law Journal stating, “law graduate interested in employment.” Harvey Miller received some interest from small firms. After a few interviews, he got his first job with Ballon, Stoll, and Itzler doing insolvency work for the New York garment industry. He explains that the small Jewish firms and solo practitioners served the garment industry clients, because the industry was primary Jewish. He explains:

Jews were excluded from major law firms. Jews were forced into serving Jewish businesses. The garment center was a Jewish business. That continued through the 1950s and 1960s. There were some Jewish firms.

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But remember the line of demarcation was very sharp. There were Jewish firms that did litigation downtown. But to get into a Sterling or a Cromwell, it was impossible for a Jew.  

The exclusion of Jewish attorneys was common practice across the country at all stages of their career regardless of their work history and experience. On the west coast, Ronald Trost, a leading bankruptcy attorney and member of the National Bankruptcy Conference, had a similar experience attempting to obtain work with a large firm. He describes in an interview with Bankruptcy Judge Randall J. Newsom his exclusion from the big law firms in Los Angeles:

RN:  As a Jew you couldn't have gotten a job let's say at Latham or someplace like that?

RT:  No. When I went back to San Francisco my qualifications were impeccable. Anybody should have taken me in any law firm. I was trained in the Department of Justice, rave reviews, everything you could want. No large firm would take me. I went to Brobeck, Phleger, and Harrison. I wanted to see Moses Laskey. He was a famous anti-trust lawyer. Moses Laskey was still an associate there when he was 55 years old. I’ll never forget it. I met this guy Richard Haas who was a partner at the firm, and he said, "Ron, I've got to tell you the way it is here." I said, "You've got to be kidding." I could not get a serious interview in any major law firm in San Francisco, and it was the same in New York.  

The large firms would not consider Ronald Trost for partner track position. When the firms did hire an occasional Jewish attorney, they kept him as only an associate.

As Harvey Miller stated above when Jewish attorneys were unable to find work in the “white shoe” Christian law firms, they either opened their own practice or worked for the small Jewish firms. Triester spoke of his early years and trying to find a job in California as a young Jewish lawyer. “In those days the big law firms were fairly segregated. They were either big Jewish law firms or [non-Jewish firms].” These small boutique firms were forced to practice in areas that the Christian firms rejected (i.e. insolvency, bankruptcy, or personal injury). Bankruptcy law professor at New York University, Lawrence King explains this connection in bankruptcy legal practice:

Bankruptcy was viewed as a seedy practice. It was a step above collection work, divorce work, and personal injury work. [The belief] was that Jewish people could not do anything else. The reason for the low opinions and lack of respect for the bankruptcy bar was a result of the fact that the people in the bankruptcy world came from the small Jewish firms.

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157 Miller, Interview by author.

158 Trost, interview by Newsome.

159 Treister, interview by Newsome.

160 King, interview by Newsome.
The small Jewish firms referred to by Professor King provide the majority of New York’s bankruptcy and insolvency throughout the 1950s, 1960s and into the 1970s.

After the passage of the Bankruptcy Code in 1978 with the new integrated Chapter 11 and the automatic stay, the world of bankruptcy law became increasingly the world of big law. The career trajectory of Harvey Miller reflects this transition.

After working at Ballon for a few years, Harvey Miller migrated to a prominent Jewish bankruptcy firm in Manhattan, Seligson, Morris, and Neuberger. As Charlie Seligson’s main associate, Harvey Miller received extensive training and began to make a name for himself in the bankruptcy world. In 1970, Seligson, Morris and Neuberger dissolved after the retirement of Neuberger. A prominent law firm, Weil, Gotshal, & Manges, seeing the growing significance of bankruptcy law in a corporate practice, offered Charlie Seligson the opportunity to start their bankruptcy department. He took Harvey Miller with him to the new firm.\(^\text{161}\) This marked the beginning of the transition for bankruptcy law and professionals in the larger legal world.

Large firms began to consider bankruptcy law as a potential power tool for corporate clients as well as a powerful moneymaker for the firms. Especially after the passage of the Bankruptcy Code in 1978, the tools and practices of bankruptcy became coherent and useable. The practice of bankruptcy and the professionals of bankruptcy were no longer shunned by the large firms. New York bankruptcy attorney, Josh Angel at Herrick, Feinstein LLP describes this transition:

> Back in the early 1980s, large law firms—always looking for sources of revenue—said, “look at those fellows [Jewish boutique bankruptcy law firms] doing this case and that case.” We had to publish fees in the newspaper in those days, and the fees were six and sometimes seven figures. The writing was on the wall. The economy of administration went out with introduction of the bankruptcy code. The large firms began to gobble up the mom and pop shops here in New York.\(^\text{162}\)

This marked change in the early 1980’s is further illustrated by the initial story told by Harvey Miller about how large corporate powers in the U.S. began to seek the advice of bankruptcy professionals and consider bankruptcy as an option. Large money clients sought bankruptcy legal advice, so large firms began to seek those professionals with those skills. As Weil Gotshal & Manges did, the large firms began to look to the small Jewish boutique firms to start their bankruptcy departments. Slowly, the bankruptcy departments in most large firms began to bring in the enormous revenue, and today, most bankruptcy departments in large firms are the most lucrative for the partners.

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\(^{161}\) King, interview by Newsome.

\(^{162}\) Bankruptcy Professional: Spotlight. Interview of New York Bankruptcy Attorney Josh J. Angel from Herrick, Feinstein LLP. Boston, MA. (date not provided, check webpage www.bankruptcyprofessional.com)
IV. Insider Practice: Pre-1978 Bankruptcy Court

The insider nature of bankruptcy practice created and reinforced its subordinate position vis-à-vis other areas of law in the mainstream legal world. In the years following the passage of the Bankruptcy Act of 1898, bankruptcy practice took on a distinct and isolated legal culture and character in each region of the country due to the existence of bankruptcy “rings” in many regions; the limited number of legal professionals who would practice bankruptcy law; the unwritten nature of bankruptcy procedure in the bankruptcy courts; the informal processes for the selection of the bankruptcy judicial officer; and the lack of experience of the judicial officer. Each of these features was both a symptom and cause of the continued denigration of bankruptcy that worked to replicate the subordinate position of bankruptcy practitioners, judicial officers, and the court.

In his article *The Force of Law*, French sociologist Pierre Bourdieu explains that the key to the power of the American legal field is the perception that legal practice is ordered by sets of explicit legal pronouncements such as procedures, processes, codes, and rules (Bourdieu 1987, 820). The mainstream legal field has a universalizing attitude and requires a uniform existence. Laws and legal processes must appear unbiased and impartial to maintain their unique position and power (i.e., legitimacy) in the social world (Boudieu 1987, 821). Early bankruptcy practice lacked such coherence and impartiality and therefore lacked the appearance of legitimacy. This undermined the bankruptcy court’s status and power in the legal field hierarchy.

1. Bankruptcy Rings

Bankruptcy rings were typical of bankruptcy practice throughout the country from the 1920s to the 1970s. A bankruptcy ring was a small group of professionals who consistently appointed and selected each other to perform the functions of the bankruptcy court process. Former Bankruptcy Judge for the Eastern District of New York, Asa Hertzog, describes the bankruptcy “ring” phenomenon from his early bankruptcy practice:

Judge Randall Newsome: What do you mean by a ring? You hear that word all the time, but what does that mean to you when you say “a ring”?
Judge Asa Hertzog: Very easy. You appoint me and I’ll appoint you. You elect me trustee, and I’ll appoint you receiver in the next case. Passing the

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163 Bankruptcy Judge Randall J. Newsome discusses the insider practice of bankruptcy pre-1978 Bankruptcy Code in each oral history document found in the National Bankruptcy Archives. See the Randall J. Newsome Oral History Collection, National Bankruptcy Archives, Biddle Law Library, University of Pennsylvania School of Law, Philadelphia, Pa.

164 Before adoption of the 1973 Bankruptcy Rules and the passage of the Bankruptcy Code of 1978, bankruptcy “judges” were identified under the Bankruptcy Act of 1898 as “referees.” They were not identified as a “judge.” For this reason, this chapter will use the title “referee/judge” to discuss the bankruptcy official during the transition period from the 1960’s to the 1980s.

buck from one to the other and then controlling these cases. They would gather up claims. There were no rules against soliciting claims. So they’d solicit claims, and they would file petitions, they’d file involuntaries, and they’d control the situation, and it was hard for anyone like me to get into it.  

The rings were characterized by consistent dealings over a period of many years among the same group of attorneys, trustees, and judicial officers. Professor Frank Kennedy remembers: “[They] got a very bad reputation because there was a lot of insider manipulation. There were people who exploited the insider position, and the insiders exploited the situation . . . [They c]ontrolled and manipulated the whole process.” These insular practice groups were able to monopolize and control the bankruptcy process by selecting and appointing one another for key positions to ensure that they and their friends benefited from the statutory fee structure.

The statutory structure of the Bankruptcy Act of 1898 implicitly facilitated the emergence and functioning of the bankruptcy rings. First, the working relationship between the judicial officer, known as the bankruptcy referee, and the trustee who oversaw the distribution of estate assets was too intimate. The default position of the Act when creditors failed to appoint a trustee allowed the judicial officer to appoint the trustee. The judicial officer was then charged with the duty to supervise his appointee in the performance of his duties administering the case. This relationship between the judicial officer and the trustee led to ex parte communications. Judge Randall J. Newsome explains:

The [bankruptcy judge referee] supervised trustees. The referees appointed the trustees. The referee also set the trustee’s compensation. And it also wasn’t atypical to have ex-parte communications with them. And [because of this] the court developed a very bad reputation. It wasn’t anything that the referee was doing maliciously or that it was intentionally wrong. It’s just the way things were done in bankruptcy back then. You know, if a trustee had a question about how to handle a case, he just came right in and talked to referee Gartner. One of the first big changes was we judges didn’t do that anymore when I became [his successor]. And I was warned about the ex-parte communications before I went over there. So anyway, I was not exactly welcomed with open arms, as an outsider, which at that


167 Skeel. Debt’s Dominion.


time, the district court thought was a good thing, because there was this perception of there being a bankruptcy ring . . . . But, you know, it was an adjustment for everybody. 171

Ex parte communication between the referee and the trustee was so common in some regions that the practice of the trustee going into the referee’s chamber was described as: “chamber them.” Treister confirms in his interview that the local vernacular in this way described the private communications between the bankruptcy trustee, a party to the litigation in the bankruptcy court, and the referee, the judicial officer rendering decisions in the bankruptcy court. The other party to the litigation, the debtor, was excluded from these private sessions.

Judge Randall J. Newsome: But they were still also holding a lot of ex parte conferences?

George Treister: Oh yes. Oh yes.
RN: Was that just the way the business ran?
GT: Well, how else . . . I mean, they had the job of supervising the Trustees. And they were involved in things. Were you selling the property too cheap? Well, you have to talk to people to find out about that. And to this day with some of the old judges, you walk into their chambers and “chamber them”, as they call it. The new breed of bankruptcy judges would think that’s unethical and wouldn’t do it. 172

This practice created numerous impartiality problems when disputes arose with third parties.

Second, the appearance of the judicial officer as an impartial arbiter was severely compromised by the Act’s blending of administrative and judicial functions in one office.173 The bankruptcy judicial officer oversaw the first meeting of creditors and any other examination or deposition of the debtor.174 In these non-judicial proceedings, the judicial officer would rule on the permissibility of questions and in the process hear inadmissible evidence.175 If a dispute or cause of action arose from these administrative proceedings, the judicial officer was required to


172 Treister, interview by Newsome.


175 H.R. Rep. 95-595, at 6052.
perform a hearing and make a ruling.\textsuperscript{176} Often, the judicial officer was unable to discern whether the evidence used for the ruling was admitted at the meeting of creditors or at the hearing.\textsuperscript{177}

Along with selecting trustees and overseeing the meeting of creditors, the judicial officer often made financial decisions concerning the failing debtor’s assets (Mund 2008, 177). These broad administrative referee powers were often abused. Referee Saul Seidman of the District of Connecticut Bankruptcy Court provides an example of the corruption, cronyism, and favoritism facilitated by the power of the referee’s position. Referee Seidman appointed his friends as the trustees to handle the cases that appeared before him. The trustees were paid a percentage of the money collected for the estate. Referee Seidman gave the most lucrative cases to his favorite trustee, Martin Hoffman (Mund 2008, 177).

The bankruptcy ring phenomenon in the bankruptcy court was not isolated to Hartford, Connecticut. From the East Coast to the West Coast, inside groups of bankruptcy practitioners controlled the bankruptcy process. Although each region had a distinct version of the insider group, the features of practice were similar and the negative impression in the mainstream legal field long-lasting (Skeel 2001, 76).\textsuperscript{178} Similar to the Connecticut Bankruptcy Court, “in the South, bankruptcy rings existed allowing some attorneys who were friendly with the referee to receive juicy appointments and trusteeships.” In an interview Attorney Jerome Kaplin explains:

Judge Randall Newsome: Do you think rings existed and/or do exist?

Jerome Kaplin: They did exist, yes . . . . The ring that they refer to was the fact that there were certain people who were intimate with bankruptcy judges who perhaps they practiced with a bankruptcy judge or judges for years and just coincidentally those were the very people who seemed to get all the juicy appointments, trusteeships, and so they wanted to cut that out, and I guess they have to at a certain point, but the reality is it’s those same people who still are handling the work and so there is no longer a formal bankruptcy ring but still the same people who are doing the bankruptcy work.\textsuperscript{179}

\footnotesize{\textsuperscript{176}H.R. Rep. 95-595, at 6052.} 
\footnotesize{\textsuperscript{177}H.R. Rep. 95-595, at 6051.} 
\footnotesize{\textsuperscript{178}The bankruptcy ring phenomena in bankruptcy legal practice started at the beginning of the 20th Century, but it took the changes of the Bankruptcy Reform Act of 1978 to adequately address and substantially change the practice of the bankruptcy rings. The decades of corruption left a lasting impression on all legal practitioners. Skeel, Debt’s Dominion, 76, 133, 142, 146, 159.} 
\footnotesize{\textsuperscript{179}Jerome Kaplin, interview by Randall J. Newsome, April 15, 1994, Randall J. Newsome Oral History Collection, National Bankruptcy Archives, Biddle Law Library, University of Pennsylvania School of Law, Philadelphia, Pa.}
In Maryland, the insider group that received the best positions and results was referred to as the bankruptcy gang.” Bankruptcy Judge Paul Mannes describes the perception of bankruptcy practice as a gang practice:

And the bankruptcy practice, as I recall—though I’ve had no first-hand knowledge of it in those days—was not the most desirable practice in the world. And the people that practiced the bankruptcy law were not the people that everybody looked up to, as they are today. Large firms didn’t do this. There were always a few bankruptcy lawyers. Some of it was described as the “bankruptcy gang.” And it had a bad reputation.180

In Ohio, like the rest of the country, the bankruptcy ring excluded non-members from the practice. Bankruptcy Judge Joseph Patchen from the Northern District of Ohio explains:

Bankruptcy was looked upon as dirty business, it was shabby . . . . Bankruptcy was an insider kind of court. There were[sic] always a quandary of views that only those who knew each other would talk to each other, bankruptcy practice elbows out people, yea, there was a ring, you could call them a ring, you can call them specialists, and there are all kinds of words for the word ring.181

In Northern California, the “cozy” group of bankruptcy practitioners lasted well into the 1970s. Bankruptcy Judge Robert Hughes describes the practice in Northern California.

Robert Hughes: [The referee/judge] drank. There were lots of attorneys down there who were willing to buy him drinks, and so most of his work was accomplished in the morning so he had to be very efficient. [This referee/judge] found one way of efficiency was to have one trustee, and he had a man named Jack Costello to serve as trustee. And Jack followed Bernie everywhere, and Jack basically did the work that needed to be done to keep the consumer bankruptcies going and he was sometimes elected trustee by the Board of Trade, and then he would hire the favored attorneys as his trustee attorney. The attorneys for his consumer cases I just don’t know who he hired other than Rothschild, yeah, I think he hired Rothschild for that. That was a very cozy arrangement that went on for a long, long time.


RN: What you’re talking about is the classic ring set up, isn’t it?

RH: Oh yeah. We’re talking about a bankruptcy ring that existed in San Francisco and it certainly existed in the ‘30’s and it existed at least until the early ‘60’s... There was[sic] among the non-bankruptcy practitioners I associated with frequent references to the bankruptcy ring and the notion that you just couldn’t break into this solid phalanx that existed including the notion that there was only one trustee in Oakland. I was also very much aware of the fact that we did not see people from Pillsbury or from Morrison and Forester or any of the other silk stocking firms come into bankruptcy court. 182

Unprofessional conduct characterized the daily practices of the bankruptcy rings around the country during this period of bankruptcy history. This conduct led many practitioners to state that the bankruptcy court was the only federal court in the country in which the judge was an interested party. 183 Often left unacknowledged by contemporary bankruptcy judges, the impact of bankruptcy rings and the reputations of prior bankruptcy referees engaged in improper conduct damaged the reputation of the bankruptcy court, further subordinating the bankruptcy court within the mainstream legal field.

2. Small Town Practice

The limited number of bankruptcy professionals in any region reinforced the perception and reality of bankruptcy as an insider practice. The bankruptcy bar was comprised of a small group of attorneys who tended to be well-acquainted with each other. George Treister describes the scale of the bankruptcy legal field in Los Angeles during the 1950s and ’60s as “essentially Craig, Weller & Laugharn, us, and Gendel Raskoff and a few individual practitioners. And all together . . . I don’t think there were 75 people in the bankruptcy practice even counting appraisers and trustees, I mean non-lawyers. . . . It had a small town feel.” 184

The same legal players worked together frequently on a range of cases, leading the bankruptcy process to resemble more of a collective settlement process than an adversarial system. Treister describes a legal practice in which he knew everyone—the local referees, the trustees, and the practitioners. Over the years, each of the small local bankruptcy bars, like that of Los Angeles, became a distinct and insular professional group within the legal mainstream.

3. Lack of Uniform Bankruptcy Rules


184 Treister, Newsome interview.
Bankruptcy court practice lacked a key feature: uniformity. As Bourdieu explains, the necessary elements for creating legal legitimacy, authority, and power is procedural uniformity. Under the Bankruptcy Act of 1898 and before the adoption of the Bankruptcy Rules of Procedure in 1973, bankruptcy practice lacked nationally uniform rules, thus undermining the reliability and legitimacy of the process. The Supreme Court issued 48 general orders attempting to guide the bankruptcy court, but these orders were too broad, leaving too much control to local authority. In this mandate gap, each of the 84 judicial districts adopted different rules of procedure to suit the particular local practice. Local gangs of practicing bankruptcy judicial officers, trustees, and lawyers inevitably developed unique “folklore” practices to further fill the void. These practices and procedures were unwritten and unclear, specific to each court, and unknowable to outsiders. In an interview with Bankruptcy Judge Randall J. Newsome, George Treister commented on how lawyers learned to navigate the localized bankruptcy practices:

Bankruptcy Judge Randall J. Newsome: Bankruptcy practice had a reputation for being an insider’s game with no written rules. Was that largely true under the general orders [of the Supreme Court]?

George Treister: Yes. The general orders didn’t say anything. The general orders, if you look through those old general orders, you could throw them away and you wouldn’t have lost much.

RN: How did you practice in a system like that?

GT: Well, it was very uneven. I mean, you learned how they did it in a particular courtroom, or a particular courthouse if you were lucky, maybe. But everybody did it the same way—it was unwritten law. The process was called by a different name [depending on the area]. We called them Orders to Show Cause in Los Angeles. Some people called them Rules to Show Cause or Notices. There was no standardization at all . . . Unless you did a lot of it, how were you ever going to keep up with things that you couldn’t find written anyplace? You just had to do it in order to know how it was done.

This lack of procedural uniformity insulated bankruptcy practice from penetration by attorneys in the mainstream legal field. Bankruptcy lawyers knew how to practice bankruptcy law because they were part of a small group who knew the procedures for their particular court. The structure of the Bankruptcy Act of 1898 and the Supreme Court’s general orders provided

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185 The Supreme Court, under the Bankruptcy Act [July 1, 1898, ch. 541, 30 Stat. 544], promulgated 38 General Orders by an order dated November 28, 1898, which provided in part: “[T]hat the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January 1899.”


187 Treister, interview by Newsome.
only limited guidance as to the manner in which the bankruptcy petition and process was to proceed.

4. Selection of the Bankruptcy Judicial Officer\textsuperscript{188} under the Bankruptcy Act of 1898

In contrast to Article III judges, who are selected pursuant to a uniform and transparent process, local district court judges selected bankruptcy judicial officers.\textsuperscript{189} As described by several former bankruptcy judicial officers, the selection process was extremely informal and rife with cronyism and favoritism.\textsuperscript{190} The district court judge selected a candidate from a pool of attorneys with whom he was familiar.\textsuperscript{191} Before the 1978 Bankruptcy Act, the selection process was constructed as follows: an applicant who was pre-selected by a district court judge was notified of an open position; one applicant was interviewed once by a district court judge; an applicant’s actual knowledge of bankruptcy law was not a consideration; the district court judge’s recommended candidate was appointed by the other members of the district court bench; and no record or review of the selection process was kept. Moreover, no other branch of the federal government oversaw the selection process.

Initially, the potential candidate received inside information from the district court judge that the position was open. This candidate would likely be a favorite or a friend of a friend of the district court judge. For example, a district court judge would call a former law clerk or law partner inquiring about candidates to fill the open position. One prominent practitioner explains the initial candidate selection process:

The District Judges did [appoint the bankruptcy judicial officer], but it was just as political. . . . In the same sense it was political in the bad sense of the term. . . . In the old days the person appointed as a referee in

\textsuperscript{188}Before the adoption of the Bankruptcy Rules of 1973, the bankruptcy judicial officer was identified as a “referee.” Rule 901 of the Bankruptcy Rules of 1973 changed the judicial officer’s title from “referee” to “judge.” The selection process for the bankruptcy official was not formalized until the Bankruptcy Amendments and Federal Judgeship Act of 1984.

\textsuperscript{189}John Adriance Bush, \textit{The National Bankruptcy Act of 1898}. The Banks Law Publishing Co. (1899). Chapter II. Section 2. Creation of Courts of Bankruptcy and Their Jurisdiction. (“That the courts of bankruptcy are herein defined this district court of the United States.”) Chapter V, Section 34. Appointment, Removal, and Districts of Referees. (“Courts of bankruptcy shall. . . appoint referees, each for a term of two years, and may, at their discretion, remove them.”)

\textsuperscript{190}The best example of judicial favoritism is found in the account of how Warren Moore became a bankruptcy judge in Los Angeles. His colleague, Bankruptcy Judge Robert Hughes, states: “Warren Moore was a friend of the judges so to speak. Warren Moore was a highway patrolman, and he was on the Bayshore Freeway [in Los Angeles] one day and he saw this young lady in distress; her car had broken down . . . . And I think it was a flat tire, and he pulled over and stopped and he helped her. She got his name and she gave that name to her Dad. Her daddy was Chief Judge Harris, District Court. And Judge Harris insisted Warren come in. Judge Harris took Warren to lunch, and then a relationship developed . . . . Warren had already been going to night law school. Warren eventually passed the bar and Judge Harris said, “Do you want to be a Bankruptcy Judge?” Warren said, “What’s that?” And he lived happily ever after.” Hughes, interview by Newsome.

\textsuperscript{191}Randall J. Newsome, interview by author, June 8, 2004, Oakland, Ca. See also Hughes, interview by Newsome.
bankruptcy would normally be patronage, you know, someone you want to
do a favor for.\footnote{Treister, interview by Newsome.}

The referred individual would then interview with one of the district court judges for an
hour or two. The district court judge would recommend his selected candidate to his fellow
district court judges.\footnote{Hughes, interview by Newsome. Several Bankruptcy Judge Interviews established this pattern.} The rest of the district court judges would typically agree to hire the
referred candidate. This process was done with few, if any, other candidates offered as possible
choices. Bankruptcy Judge Randall J. Newsome explains this in his account of how his former
boss, District Court Judge Carl B. Rubin, contacted him to determine whether he wanted a
bankruptcy judge position in Ohio:

One day my old boss called and asked if I wanted to work as a bankruptcy
judge. I thought, “Why not?” He couldn’t appoint me, but at that time, of
course, the district court judges did the appointing, and he had to get the
agreement of his colleagues. But of course you know it was his pick, and
they weren’t really going to disagree with him, unless he got somebody
really awful. So I got appointed to a six-year term.\footnote{Newsome, interview by author 2004.}

Judge Newsome’s experience applying for and receiving his first bankruptcy judicial
officer position is typical of many of those who initially occupied the position. Many candidates
selected for the position were members of the local bar who had connections with the district
court judges or had appeared before the district court judges in many cases. Many appointment
stories indicate that the selection process was highly informal and internal. Ultimately, the
selection process rendered the position of judicial officer undesirable because it reinforced the
perception that bankruptcy courts were illegitimate.

Another reason for the low opinion of the officer selection process and bankruptcy
practice more broadly is that the bankruptcy judicial officer usually did not have significant
bankruptcy law experience before taking the bench.\footnote{Mannes, interview by Patrick Carlton.} Many judicial officers lacked first-hand
experience with bankruptcy law and practice—a fact known by district court judges. As
demonstrated by Judge Newsome’s recounting of his experience, it was not uncommon for an
appointed judicial officer to have never practiced bankruptcy law:

[When Judge Rubin said], “How would you like to be a bankruptcy
judge?” I said, “I don’t know anything about bankruptcy.” He said, “Eh,
none of ’em do. I don’t know why that should worry you.” (Laughter) So I
said, “That’s really something.” I knew nothing about bankruptcy; I’d
handled one insolvency case. So, I thought about it for a couple of days
and I thought, “Why not? I can always come back to practice. This’ll be

\footnote{Treister, interview by Newsome.}
\footnote{Hughes, interview by Newsome. Several Bankruptcy Judge Interviews established this pattern.}
\footnote{Newsome, interview by author 2004.}
\footnote{Mannes, interview by Patrick Carlton.}
something new, and I can learn this, just like I’ve learned everything else.”
So I said, “Yeah, okay, I’ll apply.”

When recounting their pre-bench professional histories, many former bankruptcy referees and current judges admit they lacked the requisite experience and knowledge for the position when they applied to be a bankruptcy judicial officer. Judge Paine discusses his reasons for deciding to become bankruptcy judge.

I wanted to leave the law firm. I didn’t want to make a public leaving, so being a lawyer and somewhat lazy, I was just waiting to leave gracefully. A bankruptcy judgeship came open in 1981. At that time, the district judges selected the bankruptcy judges. We had three district judges, one of whom was a former law partner of mine. His [district court judge’s] leaving our law firm was one of the things that took some of the fun out of practice for me, because I worked very closely with him. I was having lunch with him . . . District Court Judge Tommy Wiseman said, “Why don’t you take the bankruptcy judgeship?” And I said, “I don’t want to do that.” I’d only had one bankruptcy case. I really didn’t know that much about the court. I said no and kept eating. Then I started thinking, “I never see my two-year-old son at home, because I’m involved in two- and three-week trials, depositions, I’m always on the road.” So I came back to it and I said, “How much vacation do you get?” And he said, “As much as you can afford. . . . And it gives you a chance to get out of your firm, and you can learn a new practice, which is bankruptcy law.”

This earlier loose selection process—now joked about among bankruptcy judges and other legal professionals—eventually led to the contemporary adherence to the strict selection, appointment, and review processes for new bankruptcy judges. The transformation of the selection process is apparent when Bankruptcy Judge Robert D. Martin of the Western District of Wisconsin compares his initial interview, selection, and appointment experience as a bankruptcy referee candidate with his later experiences surrounding reappointment as a bankruptcy judge after the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984:

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196 Newsome, interview by author 2004.
197 Paine, interview by Imswiler. See also Mannes, interview by Patrick Carlton. Paul Mannes: I was appointed by the United States District Court for the District of Maryland. The chief judge of the court at the time—my opening occurred rather suddenly—and at that time, the chief judge was probably one of the few judges on that court who had ever come from our part of the state, suburban Washington—was in the Rockville area. He decided that since the court was moving to a private office building in Rockville, all things considered, he would like a lawyer from the Montgomery County area. I heard about the opening. I knew about it because I had represented my predecessor in some family matters, and I applied. Of course, I did it without the benefit of having any bankruptcy experience.

198 In the selection process for a new bankruptcy judge, there is a profound concern that formal procedures are employed. There is a strong leaning toward avoiding selecting insiders, such as bankruptcy law clerks, as the new bankruptcy judge. During 2 ½ years of ethnographic research as a law clerk to three bankruptcy judges in the United Bankruptcy Courts in the 4th and 9th Circuit, the author observed three bankruptcy judge appointments. The emphasis was on preventing a replication of the past corrupt practices. Insiders are not ever chosen.
When I was reappointed in 1988, by that time I was the co-author of a treatise; I had written 200 opinions, give or take; I had taught bankruptcy at the law school; I would like to contrast the fact that the first time I was appointed, when it was by a district judge. I provided the district court judge with a two-and-a-half-page résumé and we had a forty-minute interview. I’d tried some cases before the judge, so he knew me, and I knew him. I had applied for a judicial clerkship with him in law school. So we knew each other a little bit, but that’s all it took.

Second time I’d done just about everything anybody could to establish credentials. But this time I had to fill out a 65-page application and go sit with a committee of the Seventh Circuit—fifteen people in a room where they grilled me. I thought it was sort of ironic that the first time, when I was thirty-three years old, and nobody would have thought I would have been a potential candidate, it was a very easy appointment. And then after I’d had all the credentials anybody would expect to have, all of a sudden it became a hard appointment.

The selection process before the 1984 Act was easy because it lacked oversight and formality. These early practices undermined the legitimacy of the bankruptcy court and created a perception that bankruptcy judicial officers were not qualified for their positions as decision makers. That perception was reinforced by their lack of actual experience in the bankruptcy field at the time they assumed their positions. Indeed, this dearth of experience and knowledge was known to Article III judges and figured prominently in the battle over bankruptcy judges’ Article III status.

Bourdieu explains that it is universally noted that judges are typically drawn from members of the elite classes in several western societies (Boudieu 1987, 842). Judicial officers are often raised in the upper classes and are part of the cadre of well-educated legal professionals. These legal professionals are held in high regard because they exhibit a class- and education-based “judicial temperament.” Article III judges in particular, because of their extensive power and lofty position within the U.S. judicial system, must have the appropriate temperament.

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201 “By the time that he was named to the District Court in 1950, at the age of forty-nine, a widely shared consensus had formed among the New York City elites that Weinfeld would bring exceptional talent to the court and would make an outstanding judge.” Weinfeld was responsible for keeping bankruptcy judges off the 1970 Commission. William E. Nelson, In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge, (New York: New York University Press, 2004) 113.

202 Nelson, In Pursuit of Right and Justice, 131–32. (Judicial temperament includes “importance of neutrality,” “adherence to principle,” “objective spirit,” “wise,” “self-less” and “detached.”)
judicial temperament and ability to “think like a judge.”

Also, because of their position and training, federal judges are the legal professionals held in highest regard in the American legal field. However, bankruptcy judges are not held in high regard because they are drawn from bankruptcy legal practice. As Bankruptcy Judge Paul Mannes recalls, “[P]eople who practiced bankruptcy law were not the people that everybody [in the legal field] looked up to.”

Bankruptcy law and legal professionals occupy a subordinate position in the legal field due to the lack of prestige associated with representing the socially stigmatized debtor client and the corruption that existed in the bankruptcy courts for decades before the Bankruptcy Reform Act of 1978. Leading bankruptcy practitioners and judges attribute the diminished power and status of the bankruptcy court among prominent members of the mainstream legal field to these features. As Professor King explains, district court judges led the opposition to granting higher status to bankruptcy judges because they “did not have respect for the bankruptcy lawyers. The bankruptcy referees turned bankruptcy judges had risen up through the ranks of the bankruptcy bar. [The federal district court judges] did not have respect for the bankruptcy bar.” Based on this perception, Article III judges believe that bankruptcy judges lack the qualities necessary to “think like a judge” and therefore are not qualified to exercise the full Article III judicial power of the United States (Nelson 2004: 199–202). This bias is unsupported by contemporary bankruptcy court judicial ability, expertise, and work ethic; yet this perception, because it is accepted, operates to demoralize and destabilize what is arguably one of the most vital and essential judicial forums in the U.S. today.

V. Split Bankruptcy Court Powers

The jurisdiction over bankruptcy cases and proceedings is vested in the federal district courts for “all cases under Title 11.” A district court judge can withdraw any proceeding from the bankruptcy court for cause, and must withdraw a proceeding if it involves Title 11 and


204 Mannes, Interview by Carlton.


206 King, interview by Newsome.

207 The Judicial Conference of the United States (above discussed) is the governing body of the federal judiciary. The Conference creates and votes on the policies and practices that impact and shape the entire judicial branch. During the debate to restructure the bankruptcy system, there were provisions that would have had two bankruptcy judge representative on the Conference. Warren Burger and the other Article III judges opposed the proposal. The National Conference of Bankruptcy Judges have struggled to gain access, and in 2004, the first non-voting bankruptcy judge representative began to participate on the Conference. To this day, the bankruptcy judges remain non-voting members of the Judicial Conference. 28 U.S.C. § 331.

208 28 U.S.C. §1334 (a) Confers original and exclusive jurisdiction on the district courts of all cases under title 11. (b) Confers original jurisdiction on the district courts over all civil proceedings arising under title 11, or arising in, or related to a case.
another law of the United States affecting interstate commerce. The district court rarely exercises its discretionary authority to withdraw a case from the bankruptcy court, however. Instead, it refers cases under Title 11 to the bankruptcy court, and, in most districts, the referral is automatic by means of a local rule. This referral of jurisdiction is two-tiered depending on whether the proceeding is “core”—meaning one that arises under or arises in Title 11—or “non-core”—meaning a case involving a third party that is merely related to a case under Title 11. The bankruptcy judge may enter final orders in core proceedings but may only enter a final order in non-core proceedings when the parties expressly consent to the bankruptcy judge deciding the issue.

This two-tiered approach, similar to the divided jurisdiction under the Bankruptcy Act of 1898, results in significant delay and expense to the estate, creditors, and third party litigants. Disputes arise over what is a non-core issue because Congress did not provide a clear definition of “related-to” jurisdiction to be exercised by the district court. The ambiguity and uncertainty adds a second layer of litigation to the bankruptcy process. Such litigation over this non-substantive issue can last years, and resolution of substantive issues occurs only after the resolution of any jurisdictional issue. Litigants who have resources and weaker positions on substantive issues often use jurisdictional ambiguities to their advantage. In some cases with uncomplicated facts, the issues are repeatedly litigated to delay the proceedings rather than address the substantive issues in the case.

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209 28 U.S.C. § 157(a) authorizes each district court to refer any or all title 11 case and proceedings under, arising in, or related to a case under title 11 to the bankruptcy judges for the district.

210 Lawrence King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, Vanderbilt Law Review, 68, 675-678 (1985). (“The authority to refer cases and proceedings under section 157(a) has been exercised by local rule or order in all federal judicial districts. Accordingly, bankruptcy judges continue to handle most, if not all, bankruptcy cases.”)

211 28 U.S.C. § 157(b), authorizes a bankruptcy judge to “hear and determine” all core proceedings.

212 28 U.S.C. § 157(c)(1), authorizing bankruptcy judges to hear non-core proceedings and submit proposed findings of fact and conclusions of law to the district court. The district court judge can consider the bankruptcy judges findings and issue a final order, or the district court judge may review de novo. See Celotex Corp. v. Edwards, 514 U.S. 300, 322–23 (Justices Stevens and Ginsburg in their dissent state that the bankruptcy judge has an “advisory role” in the exercise of jurisdiction under § 157(c)(1) over a “related” proceeding).


215 See In re Conejo Enterprises, Inc., 78 F. 3d. 1456 (9th Cir. 1996); In re Orion Pictures, Corp., 4 F. 3d. 1095 (2d. Cir. 1993).

216 In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996) (see 78 F. 3d. 1456 (9th Cir. 1996) (earlier inaccurate opinion withdrawn by the 9th Circuit Court on March 27, 1996, Reported at: 1996 U.S. App. LEXIS
The dominant test for the outer limits of “related-to” bankruptcy jurisdiction in third-party disputes is the Pacor test. Scholars describe the Pacor test as “manifestly inadequate” because it fails to provide clear limits for “third-part[ies] ‘related-to’ bankruptcy jurisdiction.” As a result, numerous circuit court opinions apply the test to facts “with countless instances of identical factual and procedural postures producing diametrically disparate results” and creating jurisdictional determinations that are essentially arbitrary. Bankruptcy judges are often unsure about the exact boundaries of a “non-core” proceeding.

Further, the line of demarcation between what is “core” and “non-core” is similarly confusing. The statutory list in the jurisdictional provisions of BAFJA provides “core matters, include, but are not limited to” all “matters concerning the administration of the estate” such as the allowance and disallowance of claims against the estate; claims against persons filing proofs of claim against the estate; suits for the turn-over of property to the estate; avoidance of preferential transfers; fraudulent conveyances; confirmations of plans; and sale of property of the estate. This list is not exclusive; therefore, the bankruptcy judge must make difficult determinations as to whether other matters are part of “core” jurisdiction. One bankruptcy judge describes his experience by stating:

The biggest problem that the non-Article III position creates for a bankruptcy judge is not the lack of the status of being an Article III judge, but it has been with the lack of clear court jurisdiction. It is a grey line where the judge has to ask himself: Is this core or non-core? Does this affect the property of the estate or not? If I hear this case, is it going to make any difference to creditors? On the one hand, it is nice to send things to the district court. “So sorry, I would have loved to hear this, but it is yours.” I do not miss the RICO cases and the state law cases. On the other hand, it is nice to send things to the district court.

15432)). This Ninth Circuit case resulted in three Ninth Circuit opinions on procedure that were based on two simple substantive claims: breach of contracts and proof of claim.

Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (The test is “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy?”). See also Robinson v. Michigan Consolidated Gas Co. Inc., 918 F. 2d 579, 583 (3d Cir. 1990) (“The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor’s property. An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”). The Pacor test was adopted by the Supreme Court in Celotex Corp. v. Edwards, 514 U.S. 300, 308, footnote 6 (1995).


Id. at 749–50.

28 U.S.C. §157(b)(2)(A)-(O) sets forth a long list of matters delineated as core. This list grants broad and pervasive jurisdiction to the bankruptcy court in core matters.
hand, if the district court gets a piece of the case that is essential to the outcome of a Chapter 11, it is tough on the bankruptcy judge who has to look at the total case to confirm a plan or make a ruling.221

Jurisdictional ambiguity also makes overseeing the Chapter 11 reorganization process for a corporate entity more difficult and time consuming. From the first determination as to whether a matter is “core” or “non-core” to the final disposition, the bankruptcy judge’s decisions are subject to appeal and review. This often causes bankruptcy judges to avoid particular legal issues when the categorization of jurisdiction as “core” or “non-core” is uncertain. In situations where the district court judge hears parts of a case and the bankruptcy court judge hears other parts of the case, the bankruptcy judge is left with an incomplete picture for viewing the Chapter 11 debtor’s disclosure statement and plan of reorganization. This split jurisdiction makes the bankruptcy judge’s job particularly challenging. Ultimately, the two-tiered jurisdiction undermines the efficiency and speedy disposition of a bankruptcy case; this is a chief concern for all parties involved in the bankruptcy process and, at times, a great concern for our financial system.222

Since the enactment of the BAFJA of 1984, moreover, bankruptcy legal scholars have argued that the bankruptcy judge exercises “essential attributes of the judicial function” in hearing and entering final orders in issues “core” to the bankruptcy process.223 With “core” jurisdiction, Congress granted the bankruptcy court comprehensive jurisdiction so that it could address all matters directly impacting the debtor and the bankruptcy estate;224 however, this grant of pervasive jurisdiction in “core” matters might be unconstitutional.225

221 Interview by author with Bankruptcy Judge, Research File: HJK. Baltimore, Maryland. Fall 2004.

222 See Ex Parte, The City Bank of New Orleans, 44 U.S. 292, 315 (1844). (“The manifest object of the [bankruptcy] act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favour [sic] of or against the bankrupt’s estate, in the most expeditious manner, consistent with justice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.”) See also Bailey v. Grover, 88 U.S. 342, 346 (1875) (“It is obviously one of the purposes of the Bankrupt law, that there should be a speedy disposition of the bankrupt’s assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay.”)


224 28 U.S.C. §157(b)(2)(A)-(O) set forth a long list of matters delineated as core proceedings including the following: administration of the estate; allowance and disallowance of claims against the estate; claims against persons filing proofs of claim against the estate; suits for turn-over of property to the estate; avoidance of preferences; fraudulent conveyances; confirmations of plans; sale of property of the estate, etc. This list grants broad and pervasive jurisdiction to the bankruptcy court in core matters. See also Celotex Corp. v. Edwards, at 308.

225 It is uncertain because the Supreme Court has yet to directly address the bankruptcy court’s “core” jurisdiction.
In the 1995 *Plaut v. Spendthrift Farm* decision, the Supreme Court considered the Securities Exchange Act of 1934 and addressed whether a particular provision constituted an exercise of “the judicial power of the United States” by a non-Article III judge.\(^{226}\) The court articulated a clear standard for determining when another branch of the federal government unconstitutionally exercises the judicial power. Citing *Marbury v. Madison*, the court ruled that the judicial power in Article III of the Constitution is the “province and duty . . . to say what the law is” by rendering “dispositive judgments” in particular cases and controversies.\(^{227}\) Relying on the doctrine of separation of powers, the court stated that the judicial department is the only department of the federal government charged with that duty and the ability to enter final judgments. The Supreme Court reasoned that there is “a sharp necessity to separate the legislative from the judicial power.”\(^{228}\) A non-Article III court, therefore, is denied the right to exercise judicial power to hear and enter dispositive orders.

The question arises as to whether the exercise of “core” jurisdiction by the bankruptcy court is within a court-created exception to the rule that non-Article III courts cannot exercise the “judicial Power of the United States.” The exceptions allowing a non-Article III court to enter dispositive orders articulated by the *Marathon* court include 1) proceedings in territorial courts; 2) proceedings in courts martial; and 3) proceedings by a legislative court to decide “public rights.” The only exception within which a “core” proceeding could fall is the narrow public rights exception. The *Marathon* court first limited the application of the public rights exception to those proceedings involving the United States as a party. In *Thomas v. Union Carbide Agricultural Products*, the Supreme Court expanded the application of the private rights exception to include private parties when the private right is incorporated “within a public regulatory scheme.”\(^{229}\)

Within the bankruptcy court’s “core” jurisdiction, the public vs. private rights question arose in dicta in *Granfinanciera v. Nordberg*, in connection with the issue whether an action by the bankruptcy trustee against a private party to recover a preferential or a fraudulent

\(^{226}\) *Plaut*, 514 U.S. at 211.

\(^{227}\) Id. at 218 (stating that “[b]y retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.”)

\(^{228}\) Id. at 219.

\(^{229}\) *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1984). (“In our most recent discussion of the “public rights” doctrine as it bears on Congress’ power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that “a matter of public rights must at a minimum arise ‘between the government and others.’ “ *Northern Pipeline Construction Co.*, 458 U.S., at 69, (opinion of BRENAN, J.), quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). We held, instead, that the Federal Government need not be a party for a case to revolve around “public rights.” *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S., at 586. (BRENAN, J., concurring in judgment). The crucial question, in cases not involving the Federal Government, is whether “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” Id., at 593–594.”)

conveyance under the Bankruptcy Code fell within the expanded public rights exception. The court concluded that it did not, stating that “[a]lthough the issue admits of some debate, a bankruptcy trustee’s right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions.” On this approach, if a core proceeding, such as an action to recover a fraudulent conveyance or a preferential transfer, is an action involving a private right, then the non-Article III bankruptcy court, when it enters a final order in such a “core” proceeding, is exercising the judicial power of the United States in a non-excepted context.

The Supreme Court has left open the question of the constitutionality of the non-Article III bankruptcy court hearing and deciding a “core” issue involving an action against a third party not directly connected the bankruptcy process. It seems unwilling to state outright that the statutory characterization of a proceeding as “core” ensures the constitutionality of the action of the bankruptcy court in hearing and entering a final order. Rather, the Court in Marathon seems to imply that the bankruptcy process may fall within the “public rights” exception to the general rule, but it remains unclear.

This novel constitutional challenge within the two-tiered jurisdictional structure ensures the Supreme Court will return to the issue of the U.S. Bankruptcy Court’s structure and power. As Professor Richard Lieb states, “[i]n view of the serious doubt as to the constitutionality of the grant of full adjudicatory power over ‘core’ proceedings to non-Article III judges, the time is ripe for Congress to create an Article III bankruptcy court.”

Conclusion

The decision by Congress to maintain and establish the U.S. Bankruptcy Court as a non-Article III tribunal is arbitrary. In 2009, 1,402,816 bankruptcy petitions were filed, representing over $200 million in personal and real property assets and over $300 million in liabilities. These filings resulted in cases that touch upon a broad cross-section of state and federal laws, including those relating to commercial, tax, contracts, torts, estates and trusts, real estate, landlord/tenant, labor, family, and federal regulations matters. Due to this enforcement of

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232 Granfinanciera, at 56.
233 Gibson, at 168.

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laws of national applicability,”236 the U.S. Bankruptcy Court needs to be an Article III court. Its continued non-Article III status is a manifestation of the legal field hierarchy that excludes particular federal judicial officers from exercising the coveted federal judicial power “to say what the law is.”

The actions of other legal actors in the field in locating bankruptcy law and legal institutions in a subordinate position in the field hierarchy are founded on bias and stigma. Collectively-held cultural beliefs about the nature of financial failure and the debtor permeate the legal field and influence the perceptions of its actors. The isolated and insider aspects of bankruptcy practice caused these perceptions to gain further salience, but these dominant perceptions are no longer viable. The subordinate position of bankruptcy law and the bankruptcy court is legally indefensible and ultimately detrimental to the market needs of the American economy.

The U.S. Bankruptcy Court should be a fully vested Article III court with jurisdiction over bankruptcy matters unified in the bankruptcy court and not divided between the bankruptcy court judge and the district court judge. The bankruptcy judge is far more qualified than the district court judge to preside over bankruptcy matters, and judicial economy and effectiveness demand that the bankruptcy judge preside over the entire bankruptcy case to make informed and appropriate final determinations. Furthermore, district court judges have repeatedly expressed a lack of interest in deciding bankruptcy law issues, thus reinforcing the point that the jurisdictional battle is fueled by a preoccupation with status rather than substance.

Maintaining the current two-tiered jurisdictional structure is legally unsupported. Divided jurisdiction causes a confusion of process for the bankruptcy judge. From the initial determination of whether an issue is core or non-core to the final determination of the substance of the matter, the bankruptcy judge consistently second-guesses decisions and is apprehensive about being reversed. This uncertainty ultimately delays the bankruptcy process. Also, the exercise of core jurisdiction by the bankruptcy court might still be an unconstitutional exercise of the “judicial powers of the United States” because a bankruptcy proceeding does not involve the exercise of a “public right.” Rather, it involves numerous matters between private parties. Finally, there is no Supreme Court grounding for the current bifurcated system.

Perhaps the bankruptcy court’s jurisdictional limitations were appropriate in earlier times, but contemporary economic structures require an independent court upon which Congress confers Article III judicial power. Market forces are incredibly influential in contemporary American society. Because of the power and influence of market forces, our volatile economy needs an independent bankruptcy judiciary that is not subject to extra-legal field forces. This

point was illustrated during the 2008 financial crisis\textsuperscript{237} when the bankruptcy court occupied a central place in the economic turnaround of the American economy. Bankruptcy judges were called upon to address the failure of large financial institutions\textsuperscript{238} and corporations,\textsuperscript{239} as well as the consumer mortgage crisis.\textsuperscript{240} These judges need to be independent and authorized to make difficult decisions that impact the nation. As clearly stated in legislative history from the 1978 Bankruptcy Reform act, the market needs a bankruptcy court form and function that matches the market’s changes in law affecting credit, banking, and commercial practices.

The final battle in the 40-year war for a bankruptcy court with Article III power and status has yet to be fought. The bankruptcy laws and court are too important to the American economy and social structure to allow bias and stigma to control and limit the power of the bankruptcy court.


\textsuperscript{238}Bear Stearns, AIG, Lehman Brothers.

\textsuperscript{239}General Motors, Chrysler.

Chapter 6. Personhood Examined in the Legal Discourse of the United States
Bankruptcy Code: The Corporate and Individual Debtor

After the passage and enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 several questions arose as the application of a significant section of the Act known as the ‘means test.’ This new bankruptcy code section was a codification of a previous informal test applied by the U.S. Trustee’s Office in the Department of Justice. The test focused on the debtor’s ability to repay his debts based on his income. The informal test involved a calculation of the debtor’s total debt in relation to the debtor’s income over a three to five year period. If the debtor could pay 30% or greater of the outstanding total debt, then the U.S. Trustee’s Office would motion the bankruptcy court to require the debtor to repay his creditors in a Chapter 13 repayment plan. In essence, through this test it is determined whether the debtor has the means to repay his creditors. With such a finding that the debtor has the means, the debtor is required to repay his creditors. The new act codified this previously informal practice making the means test a required calculation for consumer debtors. Therefore, before the debtor files a Chapter 7 or Chapter 13 petition, the debtor must calculate his income based on national standards, and he must consider whether he can repay a small portion of his total debt. If so, then the debtor must file a Chapter 13 repayment plan, and he cannot file a Chapter 7 for a complete discharge.

After the enactment of the 2005 Act significant question arose as to the imposition and enforcement of this new ‘means test’ section. The bankruptcy judges and their law clerks needed to create clear procedural guidelines and practices for the enforcement of the new Act. One question arose during my fieldwork in the bankruptcy courts soon after the enactment as to the applicability of the ‘means test’ to particular classes of debtors. The following is an exchange I had with a new-to-the-bench bankruptcy judge (former Chapter 11 bankruptcy attorney) with whom I worked. The judge had asked me to write a memo with recent case law discussing the application of the ‘means test’ to debtors.

Bankruptcy judge: Linda, I have reviewed the memo you wrote on the new means test. I have a question regarding the A1 Autoparts Chapter 7 case. Does the Code require the debtor in that case to perform the means test before filing?

Linda Coco: No, judge. The debtor in that case is a business. The new Code requiring the court to dismiss a Chapter 7 debtor’s case when the debtor does not perform the ‘means test’ or the debtor fails the repayment test only applies when the debtor is a human individual.

BJ: An individual, not a person.
LC: An individual under the Bankruptcy Code is defined as a natural person not a legal person such as a company or corporation. The Bankruptcy Code includes companies and corporations within the meaning of a person, but not within the meaning of an individual. This classification of the company as a person allows such legal entities to file a bankruptcy petition. However, the “means test” section states that it applies only to “an individual debtor under this chapter whose debts are primarily consumer debts.”

BJ: So, a company or a business debtor need not perform the ‘means test’ before filing and need not determine whether it can pay a portion of debts, and such a debtor is not required to repay its creditors if it can stay in business and pay.

LC: That is correct.

BJ: (Pause) Wow, companies are treated differently in bankruptcy. Huh, I had not thought of that before.241

This exchange demonstrates several things: First, the target of ”the debtor must pay” reforms of the 2005 Act are isolated to the natural person debtor and are not directed at the corporate debtor. Second, the natural person debtor is held to a higher standard of responsibility and is forced into repayment whereas the entity debtor is not. Finally, in the bankruptcy process the entity debtor is treated differently than the individual human debtor.

The judicially-created corporate person receives a patchwork of several protections reserved for natural persons without shouldering the same social and cultural duties. The judicially-created corporate persons are not measured against the same ethical and moral benchmarks as the human individual. Under the law, natural persons are held to a higher standard than corporate persons. For example, the criminalization of corporate actor conduct is much less developed than the criminalization of individual conduct. Similarly in the bankruptcy legal process, the corporate actor experiences less social stigma from filing a bankruptcy petition and more benefits in the form of power over creditors than the individual debtor.

In the bankruptcy process, questions arise as to why the different social perception of the corporate person verses the natural person? Why the distinction as to the stigma associated with filing a bankruptcy petition? Why are the corporations given different treatment in the threshold filing process and standards? Why are corporations not subject to the same income-based ability to pay tests as natural persons? Why are corporate debtors given more rights under the Bankruptcy Code than individual debtors, while at the same, the individual debtor is required to be more responsible than the corporate debtor?

In order to understand the roots of these questions and what it means to be a natural or corporate person in the discourse of the United States Bankruptcy Code and related case law, it is important to study the historical and philosophical context of the category of person. From this

241 Notes from fieldwork, Oakland Ca., October 2007.
review, key notions will be extracted to inform further analysis of ways that these categories operate, function, shape, and are reshaped in bankruptcy law and practice. The Supreme Court’s pivotal role in creating the idea of a corporate person is discussed in order to shed light on the recent changes to Bankruptcy procedures. Through this analysis considerations of the notion of individual fiscal responsibility are explored as they relate to natural persons and corporate persons.

I. Persons: Natural and Corporate

“Person,” natural and corporate, is a socially salient category in American culture. “Persons” are culturally constructed and socially determined according to the cultural cognitive map or structure (Bourdieu 1981). Dominant cultural notions constitute this cultural map. Bourdieu explains that the dominant cultural notions structure is predisposed to function as structuring structures (Bourdieu 1982, 72). The dominant notions that shape the notion of a person find root in the history and practices of the American free market capitalist system. According to Franz Boas, cultural anthropologist, in order to understand a culture’s cognitive map and categories of thought, one must first examine their histories to contextualize their adaptiveness and meaning to that culture and to the cultural practices. The culturally constructed categories of natural or corporate persons are used in culture discourse, particularly legal discourse. The manner in which they are defined and used reveal very powerful controlling processes (Nader 1993).

Legal discourse characterizes the category of “person” in a uniform fashion in some circumstances, while in other circumstances it draws sharp distinctions between the natural person and corporate person. While both are constructed categories created by legal discourse, the natural person category has an anchor in the human biological body. The biological body creates a social and cultural unit that pre-exists the pronouncements of U.S. Supreme Court about the category. Although the natural person is also founded on religious and philosophical notions, it takes on further manifestations under the law. The corporate person, on the other hand, is created by judicial definition. The U.S. Supreme Court fashioned the notion through a myriad of opinions granting the corporate person particularized rights under the Constitution. From these opinions, the corporate person springs to life with increasing powers and protections. The U.S. Bankruptcy Code and Bankruptcy Court case law in one area of the American legal system that provides the corporate person with increased protections, rights and powers when compared with the protections, rights and powers of the natural person.

1. What is a “person”?

The notion of a “person” has its roots in the Latin word persona, “meaning among other things, a theatrical role” (Radin 1982, 962). Person is connected to the idea of an identity or outward expression of traits. Roman law added to this idea. The word persona under Roman law connected to an idea of that natural person as an entity possessing legal rights and duties. The Oxford English Dictionary and in Black’s Law Dictionary adopt these ideas and define the person in the modern sense as the biological human or the human person. In philosophical and theoretical discussions, “person” is discussed as an entity within and, at the same time, separate from the social collective. The person is discussed as an individual anchored to a biological body.
with capacities, capabilities and as possessing a coherency. Persons are not robots, chimpanzees or corporations. The individual person is not a free floating and inconsistent entity without form.

First, the person in society and the social collective is often where the philosophical debated begins. In sociological and anthropological discourse, person and personhood are about a distinct identity with discernable boundaries, i.e., an individual or entity. The individual or entity exists in relation to, in reaction to, and at the same time is shaped by, the social world. As French Sociologist Pierre Bourdieu writes in *Pascalian Meditations*, “The idea of a separate individual is based on the naïve apprehension of what . . . is perceived from outside . . . . Nothing is more familiar to us than the impression that man is an individual living being among others and that the skin is his boundary.” (Bourdieu 2000, 132) Bourdieu describes this vision of society as a form of personalism and a personalist belief in the unique person. Personhood, therefore, is socially constructed as a unique constitution or composition of attributes in one body. These characteristics and beliefs create a separate from the social collective body of the individual discernable according to the cultural cognitive map.

This socially situated individual or natural person is largely a creation of the Enlightenment found in the writings of John Locke and Emmanuel Kant. These rights theorists were responding to the dominant ideas of their times found in the theistic monarchies that legitimized social order through testaments of God’s will and the great chain of being. Within that dominant view, all individual humans were connected to the sovereign as subjects. The idea within this framework was that the living, breathing human being was part of the great chain of being and the natural human being with a biological body did not constitute a separate social unit. In contrast to these ideas, Locke proposed that the basic unit of society was a collective of individual humans, and not God, and that social order was created by agreement of those individuals. The agreement of free men to submit to the social contract would, by necessity, create the social world and a civil government.

Locke’s view of the individual in the social world emphasizes self-consciousness and memory. A person in Locke’s writings is a thinking, intelligent being that has the ability to reason, to engage rational thought, and to reflect. A person can consider himself as himself. A person, because of memory, is a collection of beliefs, capacities, capabilities and dispositions that, for the most part, remain consistent in different places and times. Kant added to this definition of the person the idea that a person is a thinking and reasoning individual that is a holder of legally recognized rights.

Calvinism and Protestantism influenced both Locke and Kant. Therefore, rights theories, while reflecting secular views, also embraced certain elements of Protestant faith. In essence, rights theories of the person in society emphasized the virtues of Calvinism—hard work, resilience, and frugality. Locke contended that the individual, through his labor, gained access to property. He could accrue wealth through his toils, and his personhood was guaranteed by the property of his person. Hence, rights theories substantiated Calvinist attitudes in three ways: First, they expressed Protestant beliefs about the body as a toilsome entity. The individual should work hard as part of a religious calling. Second, they proposed that, through the embrace of Protestant virtues, one could accrue significance and wealth. And, third, because prosperity was gained through hard work, one’s successes or failures could be attributed to their adherence to, or
denial of, Calvinist qualities. Individual wealth accumulation indicated divine favor. Accordingly, rights theories advanced the Calvinist idea of personal responsibility and individualism.

As mentioned in Chapter Three, Benjamin Franklin subscribed to Calvinist utility and embraced of rights theories to characterize the fiscal role of the person in society. Franklin’s moral attitudes concerning the individual or person focused on the rational and useful conduct of the individual (Weber 1930). Most especially in the area of fiscal identity, the person must learn to economize and act rationally in the marketplace. The Calvinist dictum—a penny saved is a penny earned—attributed to Benjamin Franklin, has guided individual economic morality ever since its inception (Manning 2000). The individual person in American culture is held to this standard whereas the corporate person is not. The corporate person is more active in the marketplace, and it has more power and impact in most instances than an individual person.

II. The Corporate Person

The corporation is a fundamental unit of American culture. Since the post-Civil War years in the U.S., the presence and power of corporations has continuously increased. Corporations and their vision of the social and economic world permeate American culture. The corporate marketplace creates, for the most part, the economic foundation of American life. The average citizen works for a company or corporation, engages in some contractual relationship with such entities, and purchases most products from corporations in the marketplace. In many respects, the corporation is central to American life and has become a major force in American culture. So much so that it is important to understand the foundations of the corporate person in order to understand the perception and place of the bankrupt corporation.

The dictionary definition of a “person” does not include the notion of “corporation” or “association.” The philosophical debates over what constitutes a person—capacities, capabilities, and dispositions—do not substantively address the corporate person. The corporate person is not likened in any way to a natural person. The corporation person does not have consciousness or memory. The corporate person is not anchored to a biological body, and is therefore, the philosophical antithesis of a “person” in that the corporate is a floating or fictive phenomenon. Further, the corporate person does not, without agents, engage in rational thought nor does it have self-reflective moments. The corporate person lacks an inherent morality or ethic that adheres to the telltale features and disposition of a natural person. Most significantly, in the American marketplace, the corporate person lacks the fiscal responsibility mandates of the Protestant Ethic imposed on a natural person. The difference between the mandates imposed on natural and corporate persons result from the origins of the notion of a corporate person.

The notion of a corporate person with rights and duties is created by judicial definition. Through a patchwork of holdings in numerous opinions spanning over a hundred years, the Supreme Court fashioned a corporate person. This fictive legal person resulted from the Court protecting the corporation from the power of individual states by using the U.S. Constitution’s
due process and equal protection clauses. In several opinions, the Court stated that a state could not deprive a corporate person of property without the same protections afforded a natural person. Further, in other cases, the Court has held that the corporate person is secure from unreasonable search and seizures and the risks of double jeopardy. In these cases, corporations are able to challenge the validity of any state action adversely affecting their interests. The corporate person, therefore, asserts and creates its rights entirely from judgments about its rights relative to its opponent’s rights, most often the state. It is through Supreme Court fiat that an entity that does not directly act, speak, or think is able to curtail state regulatory action.

The definition of the corporate person did not always exist in America. The definition of corporate person is judicially created, but what about the social role of the corporate person? Initially, the corporation had to be granted charters by their respective townships. The role of the corporate person initially was to service its charter community. This measure assured that companies were somewhat liable to the communities they serviced, but, given the cryptic nature of corporate personhood, companies found the power in legal rulings from the 1880s onward to undermine local and state authority limiting and circumscribing their actions. The Supreme Court decisions consistently supported the creation of an autonomous and unconnected corporate person. By the turn of the twentieth century, dramatic changes in business structures, coupled with corporate strength gained through the Industrial Revolution, increased corporate power. In this process, companies moved progressively beyond the moral realm, and therefore, local communities could not hold them responsible for their actions and failures. The corporation existed in two spaces, within the economy and outside societal, ethical, and moral mandates. Consequently, the corporation need not adhere to social standards even as it influenced them.

Internally, the corporate person gradually focused exclusively on the well-being of the corporation and its members rather than the well-being of the community. This focus creates tensions in the social world. The tension is illustrated in Roman law with corporate associations that could take two forms—as societas or universitas—often simultaneously. In one form (societas), the corporation is bound together based on contractual relations made between its members to serve each other’s interests (Scruton and Finnis 1989, 242). In its universitas form, the corporation accrued power as a separate legal entity that could hold property and had rights “distinct from those of its members” (Scruton and Finnis 1989, 242). Scholars Scruton and Finnis explain that “legally speaking, the modern firm is like a universitas,” in that the corporation is a separate legal entity, and “morally speaking, however, it is a partnership for gain for it members, and in this, it resembles the societas” (Scruton and Finnis 1989, 242). This

242 14th Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

243 Legal scholars argue that the holdings in the corporate person line of cases is tantamount to two constitutional amendments: 1. “Corporations are free to challenge any governmental action opposed to their interests.” 2. “The Supreme Court is empowered to review all governmental action-State and Federal-pertaining to corporations and to veto any such action deemed arbitrary or unreasonable.” Howard Jay Graham. “An Innocent Abroad: The Constitutional Corporate Person.” University of California, Los Angeles Law Review, 2 (2) (1955) 115-211.
tension, they explain, shapes the role of the modern corporate person. The autonomous form of the corporation moves forward with the self-interested actions of the member parts.

While the corporate person has evolved to encompass more rights and less social responsibility, the natural person’s decisions and behaviors are subject to increasing moral scrutiny. This is best exemplified by an economist’s recent statement about corporate and individual conduct during the mortgage crisis. Individual homeowners with underwater mortgages were counseled differently from similarly-situated corporations. Former Secretary of the Treasury (and Former Chairman of Goldman Sacks) Hank Paulson admonished that “any homeowner who can afford his mortgage payment but chooses to walk away from an underwater property is simply a speculator—and one who is not honoring his obligations.” In other words, the individual debtor who walked away from an unprofitable deal was reprimanded for failing to honor his obligations, but the corporate investor was not. Investment firms Morgan Stanley and Tishman Speyer Properties walked away from properties in San Francisco and New York City that were billions of dollars underwater rather than continuing to pay untenable mortgages because it is better for the viability of the entity and the profits for its shareholders.

Corporate persons are expected to reason, make decisions and act according to the logic of a societas form of association. The officers and managers must act and make decisions to protect the financial interests of the owners. The goal is to increase profit, not incur expenses, in furtherance of community needs. Corporate persons are not expected to live by Calvinist virtues—namely responsibility for their fiscal promises as natural persons. Such adherence runs counter to the profit logic and self-interested behavior mandate of the societas form of association. The views of the corporate person’s role in society emerge when the corporate person becomes bankrupt.

III. Persons in Bankruptcy

As discussed in earlier chapters, filing a bankruptcy petition is a socially-stigmatized act. And yet, numerous corporate persons file bankruptcy petitions to deal with mounting debts rather than pay their creditors. Bankruptcy, as a leading Chapter 11 attorney Paul Naussbaum explains in an interview, is part of the corporate fiscal arsenal. Bankruptcy is simply a tool devoid of morality for corporations. Bankruptcy has become, according to Naussbaum, a fiscal sword against encroaching creditors for the amoral corporate persons. And the Bankruptcy Code and process is particularly amenable to the corporate person in Chapter 11.

Under the 1978 Code, a corporate debtor has significant powers in both Chapter 7 and Chapter 11 that were intended and unintended by the drafters. Because the corporate person is able to file a bankruptcy petition when it is solvent, there is no requirement of insolvency, only a requirement that the corporation act in good faith when filing the petition. Corporate persons, as a result, can and do invoke the power of the Bankruptcy Court for a myriad of reasons. First, corporations will file simply to obtain the benefits of the automatic stay to stop creditors from seizing property. This power gives the corporation time to address its financial situation that is unavailable under state law. Second, the corporation in a Chapter 11 can use the bankruptcy

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244 Paul Naussbaum, interview by author, Baltimore, Md., December 2004.
process to renegotiate or reject leases and other contracts that the corporate person finds unprofitable or unbeneﬁcial. This power to reject particular contracts allows the corporation to eliminate burdensome union contracts. Third, the corporate person beneﬁts from the general emphasis of the Bankruptcy Code in that the underlying assumptions of the 1978 Code are preservation and support of the corporate person.

When enacting the Bankruptcy Code in 1978 with the new Chapter 11, Congress implicitly believed that a company is more useful to the economy if it remains intact and functional. The assumption is grounded in the idea that the protections of corporate interests are necessary for capitalism to optimally function. This belief ascribes to traditional notions of identity and power. The idea is that preserving corporate property supports and stabilizes corporate identity. Corporate identity and stability are important, so it goes, for the optimally functioning economy. Therefore, corporate property needs to be protected from dismantling by creditors. The Bankruptcy Code provides that protection when a corporation ﬁles a Chapter 11 petition. There are also signiﬁcant protections for corporate persons that ﬁle a Chapter 7 when compared with their natural person counterparts.

Under the recent amendments entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the individual consumer is targeted with a new label and a new process that does not impact the corporate person. First, the removal of the phrase “substantial abuse” and the imposition of the presumption of abuse in Chapter 7. Under the 1978 Code, the debtor—individual and corporate—was presumed to be honest and ﬁling in good faith. If the debtor was ﬁling a Chapter 7, the debtor was presumed unable to afford a Chapter 13. The burden of proving otherwise was on the party objecting, usually the U.S. Trustee or other interested parties. The objecting creditor had to ﬁle a motion to dismiss for substantial abuse if the creditor believed that the debtor could actually pay back a substantial portion of his debts. Under the 2005 amendments, the presumption is that the debtor is not honest or acting in good faith. The debtor is immediately subjected to a “means test” to determine if the debtor could afford to pay a portion of the debts owed. Under BAPCPA, the debtor must begin the bankruptcy process by proving his moral character. The actual mean’s text takes this reclassiﬁcation of the individual consumer a step further.

The “means test” determines if the individual consumer is abusing the bankruptcy process and not paying creditors. The BAPCPA means test is a formal codiﬁcation of a previously informal income-to-debt ratio test performed by the attorneys in the U.S. Trustee’s Ofﬁce in the Department of Justice. The purpose of the means test is to determine whether the individual debtor earns enough income to pay creditors a portion of the debts owed over a three to ﬁve year period. In every consumer case, the individual’s income and expenses are compared with national standards. Each aspect of the consumer case is scrutinized for reasonableness and appropriateness given the averages nationwide. If the individual has excess income or unreasonable expenses, the individual will be required to ﬁle a Chapter 13 to pay creditors. Every aspect of the individual’s life is reviewed and analyzed.

For example, the application of the means test to the individual consumer proceeds in the following manner: The individual person enters the bankruptcy process and the ﬁrst question the attorney asks is whether taking an average of the individual’s income for the last six months and
multiplying it by twelve the individual’s income exceeds the median income for a similarly sized household in the particular state in which the individual lives. If the individual’s income does not exceed the median income, the individual can file a Chapter 7 receiving a complete discharge and not paying any amount to creditors. If the individual’s income exceeds the median income, a further calculation is performed to determine if the individual must pay creditors. Allowed actual and standardized (based on the IRS Tax Code) expenses are then deducted from the individual’s average income to determine the individual’s ‘disposable income’ annually. If the individual’s expenses exceed the national average, the individual is forced to reduce his expenses to create excess income. The excess amounts are counted as ‘disposable income.’ If the amount of individual’s disposable income exceeds $10,950 annually, the individual must file a Chapter 13. Meaning that the individual must pay creditors out of future earnings for the next three to five years. Once this is determined, the debtor is locked into paying creditors. Debt servitude is reborn with the 2005 amendments. For this reason, several debtor attorneys refer to the test as the “mean test.” The corporate person is not subject to the means test under the 2005 amendments to the Bankruptcy Code.

Referenced in my discussion at beginning of this chapter is a conversation I had with a bankruptcy judge about the A1 Autoparts Chapter 7 case. The judge was surprised that the 2005 amendments, particularly the means test, did not apply to the corporate person in the same manner. In Chapter 7 case, the corporate person is not subject to the intense scrutiny and analysis applied to the consumer. The income and account receivables of the corporation are not compared with a national standard for a particular sized company. The corporate person’s expenses are not compared against an Internal Revenue Service grid for regional average expenses. There is no determination as to whether the corporate debtor’s expenses are in line with the regional averages. The corporate person is not forced to explain excessive expenses. The corporate person’s future income is not considered for a plan or repayment of creditors. The only analysis required of the corporate person is the liquidation analysis and ‘best interest of the creditors’ test found in the 1978 Bankruptcy Code. This is a very different and less burdensome calculation than the means test.

The liquidation analysis calculates the amount of money creditors would receive if the corporate debtor sold all assets at the exact moment of filing the bankruptcy petition. The total earned from the sale of all the assets would create a bankruptcy estate that would be distributed to all the creditors. Unlike the new requirements under the 2005 amendments applied to the natural person, the future income of the corporate person is not considered as part of the bankruptcy estate. If it was a repayment under a Chapter 11, the plan of repayment of creditor considers only those assets in the possession of the corporation at the time of filing the bankruptcy petition. Money earned beyond the point of filing is not included in the bankruptcy estate.

In the A1 Autoparts Chapter 7 case above, the company listed several civil law judgments entered against it due to contract violations in the bankruptcy schedules. The company filed the bankruptcy petition to address those judgments. Outside the bankruptcy process, the company would be forced to pay the debt in total. In bankruptcy in a Chapter 7, the company could eliminate those judgments. If the company had chosen a Chapter 11 bankruptcy filing, the judgments would be classified unsecured debts owed to an unsecured creditor. This is the lowest
position in the ranking of creditors in the bankruptcy process. Such a creditor is characterized and similar to a credit card creditor.

In a Chapter 11 bankruptcy proceeding, the company would not be forced to pay the entire judgment nor would it be forced to pay based on its income. The “best interest of the creditors” test determines the amount the company would pay to its judgment creditors and other creditors. Due to the fact that A1 had limited assets at the time of filing, A1 would pay only a small portion of the judgments. The Chapter 11 plan would have been likely to give unsecured creditors only ten cents on the dollar. This means the creditors would only receive ten percent of the judgment. Finally, in a Chapter 11 filing, the company is not required to explain its expenses and income to the bankruptcy court or creditors. This difference is a significant incentive for corporate persons to use the bankruptcy system when faced with unprofitable debts.

The corporate person further benefits in Chapter 11 in that the debtor (the managers and officers) remains in control of the company. Despite many questions about the effectiveness of a company’s management in the events leading up to the bankruptcy, corporate persons are allowed to retain their same directors and managers and proceed with business as before. Unlike individual persons, the corporate person is not expected to explain its operation and practices. There is no expectation that the corporate person should cut costs and function on a ‘bread and water diet’. Although the corporate debtor is subject to the oversight and jurisdiction of the court, the exact spending behaviors of the corporation are not typically questioned. This is why the large “retention” bonuses given to executives working in corporations during bankruptcy are rarely scrutinized or challenged by the U.S. Trustees Office or the Bankruptcy Court.

Social Consequences of Bankruptcy for Persons

For the corporate debtor, the social and economic meaning of bankruptcy is different from what it means for the individual. The Calvinist ideologies of the American fiscal identity such as frugality and god’s grace measured by economic success do not apply to the corporate person. For the most part, marketplace logic creates the lens of interpretation for the corporate bankruptcy verses the consumer bankruptcy. While both corporations and individuals are defined similarly by legal rhetoric, they are both debtors, their debtor identities are not constructed or comprehended in the same fashion. Corporate debtors are more often than not considered unfortunate participants in the game of chance that characterizes market capitalism rather than indulgent failures.

Americans firmly believe corporate bankruptcy should be weighed differently than it is for the individual person. Corporate persons are viewed most often as amoral actors whereas individuals are judged solely on their actions as moral or immoral. The key features of individual personhood inform their choices in consumer spending and debt. The individual in American culture is defined by a fiscal identity in that his financial decisions are measurements of his rational and moral worth. As discussed above, Secretary of the Treasury Paulson was the most prominent public figure to admonish individual consumers by telling them to stay in homes that were upside down. Paulson did not admonish corporations such as Morgan Stanley and others to keep commercial property that was clearly way under water. The corporate person’s decision to abandon the real property was considered prudent. At the same time, the individual
consumer’s decision to walk away from her home was considered irresponsible and immoral because she signed the contract and agreed to the terms for the loan.

In the 2008 recession, Americans were reminded of how rapidly the economic and social world can be thrown into crisis. The category of debtor expanded to include many more individuals and corporations. The crisis created the process through which Americans could see what underside of the economic structure. The power of the institutions on Wall Street became strikingly clear. And questions arose as to who was responsible for the economic collapse. While most Americans would point to Wall Street as the sources of the economic crisis, very few Americans understand the connection between the largest corporations and the economic collapse.

Corporations now have more power and influence than ever before, and they are often viewed as purely economic actors. The Protestant Ethic is never applied to their behavior and decisions. After the unscrupulous business practices lead to the economic crisis, perhaps morality should be connected with business practices, and Puritan thrift should circumscribe corporate greed. When a company files a bankruptcy petition, the pre-bankruptcy conduct of the company is analyzed through the narrow legal standard of the business judgment rule; it is applied to the executive’s conduct and decisions rather than the wider gaze of community morality and ethical conduct. Bankruptcy judges are cautioned in case law against imposing their own reasoning and values when making determinations about the management and operation of a corporation.

In contrast, individual debtors are viewed as moral and ethical actors. They are left outside of the purely economic realm. Bankruptcy judges are encouraged to consider the conduct and decisions of individual consumers. The 2005 amendments adding the presumption of abuse to the required review of the individual consumers conduct and decisions is a perfect example of the imposition of morality onto the individual. Individual debtors are presumed dishonest or forced to prove their non-abuser status at the outset of the petition filing.

Conclusion

“Person” under the United States Bankruptcy Code includes both the human individual and the corporate entity. Throughout the Code, the category person is used. The dictionary definition of the term ‘person’ is expanded by Supreme Court case law stating that a corporation is a person with Constitutional protections. This expansion gives corporate entities the same protections as the individual human debtor in bankruptcy, and yet, the expansion does not impose the same responsibilities on the corporate debtor. The recent 2005 amendments make this discrepancy most apparent. The corporate benefit under the bankruptcy code and within the bankruptcy reveals the paradox of our current economic structure.
Conclusion

This dissertation research began with several questions: Why are discussions about financial loss focused solely on the individual “failure” rather than focused on failure as a result of collective social processes? Why is the bankruptcy process focused on the forgiveness of the individual? Why are debtors considered outside the normal functioning of corporate capitalism and wealth concentration? These questions open a new pathway for viewing the social and cultural manifestation of financial loss and bankruptcy. Many scholars have answered the questions of financial loss and bankruptcy by addressing the conduct and actions of individual debtors. This dissertation views the social failure as a result of the functioning of the normal structures of the shared economy. It steps back from the focused gaze on the individual debtor to take a wide-angle view of the now-prevalent social phenomena of pandemic economic failure.

Moving “Beyond Failure and Forgiveness” is necessary to account for a theoretical gaze that peers beyond these dominant discourses toward understanding the social phenomena of financial failure and bankruptcy. This dissertation considers economic and social forces outside the individual’s rational decision-making processes accounting for financial failure. It places the individual in the collective, and questions forgiveness as the dominant social narrative for bankruptcy manifestations and processes. It posits a view of bankruptcy as expected and the norm within which corporate capitalism is properly regulated. All economic panics in the United States from 1800 to the present are a result of this structure. The bankruptcy laws and processes following the economic panics are a natural outgrowth rather than an economic aberration.

Social stigma operates as the most significant discourse in this realm of American culture. The cultural discourse of stigma generates controlling processes that regulate manifestations of financial failure. These manifestations impinge upon human bodies and minds.\textsuperscript{245} This dissertation traces and explores the trap of stigma associated with debt and financial failure. The introduction provides an overview of the issues. It places debt and financial failure within the cultural and social context. It adds to the work of sociologists and anthropologists who have argued since the work of Marcel Mauss that credit and debt are different sides of the same coin: a credit (wealth) for one is a debt for another. Put differently, Roitman and others explain that debt creates wealth. Rather than viewing the debtor as an aberration in a healthy economy, the debtor is a natural result of the interconnection of the place of debt in wealth creation. The discourse of stigma serves only to facilitate this structure in a process of misrecognition and replication. The collectively held beliefs about failure provide the parameters for social and individual actions and reactions.

An individual’s fiscal identity is constructed in relation to the discourses of stigma,

\textsuperscript{245} One informant, Mary, describes the impact of the cultural discourse of stigma in the following manner: “I experienced such a burden from the social stigma from external and internal sources that I put off actually acting in my best interest. My finances as a result of the fear generated about the stigma were so much worse; my life so much more difficult because of the delay in filing the bankruptcy petition. Once I went through the bankruptcy process, the stigma and the pressure disappeared. The social pressure from the stigma operates before the actual filing of the bankruptcy petition. The fears of bankruptcy are unfounded about what financial failure all mean socially, economically and every other way. Before the bankruptcy petition filing, I felt almost suicidal. This feeling was completely unfounded and unnecessary. Self-hatred and turmoil ruled my life. Before I filed, I tried to pay the credit card debts. This did not help me. That was irrational and it made everything worse. I actually paid the credit card debt in total repeatedly.” Mary debtor, interview by author Berkeley 2011.
financial failure, and success. The roots of the American fiscal identity are traceable to Enlightenment notions of self, other and self in the collective. The features most pronounced are reason and personal responsibility. This creates a paradox when individuals are faced with the natural consequences of capitalism, namely the cycles of the market as we have recently seen in the 2008 market collapse. The ups and downs of “free-market” capitalism require that a majority fail. Wealth is only available to a limited few, but most participants view themselves as personally responsible for the impacts the cycles have on them. As seen in Mary’s statement above, her notions of her financial failure were connected to her fiscal identity. She became very depressed and unable to act. The stigma of “personal” failure prevented her from being reasonable and taking the steps to protect her interests. It was only after the process was complete that she understood the impact.

That it is absurd to view financial failure solely from the perspective of the aberrant, stigmatized individual is now obvious to all of us. Virtually everyone was touched (with the notable, non-coincidental exception of the super-rich) by current downtrends: people lost their homes, the banks stopped lending, small businesses failed, people could not pay their credit cards, individuals lost their retirement accounts, investments dropped precipitously, properties went underwater, credit dried up, hard money lenders exited, and the federal government took over banks and major lending institutions. With these shifts in the economic structure, discussion of the uses of bankruptcy law took center stage in Washington D.C., Wall Street and the media. Bankruptcy code reforms to Chapter 13 were suggested to address the consumer mortgage crisis. Lenders, corporations and Congress automatically rejected these reforms.

The debates over a solution to the financial crisis revealed the dominant discourses associated with financial failure and bankruptcy. In their recent article, legal historians Kenneth Ayotte and David Skeel demonstrate how the dominant discourses of debt interact and impact bankruptcy practice. The discourse of debt associating financial failure with stigma was employed in the political struggles over the role of bankruptcy in the recent financial crisis. This deployment was to the detriment of the economy. They argue that the discourse of stigma created misconceptions about bankruptcy law and its practice is identifiable as a “bankruptcy phobia.” In this article focusing on the role of regulators and lawmakers in the financial crisis, they explain that this bankruptcy phobia led regulators and lawmakers to be unconvinced by a pro bankruptcy proposal and to shy away from viable bankruptcy solutions.

Ayotta and Skeel explain that a reason for the avoidance of bankruptcy solutions was a lack of knowledge about ways that bankruptcy can be and has been used to address the expected fluctuations in the capitalist marketplace. The key decision-makers in the crisis were unfamiliar with the marketplace possibilities of bankruptcy law. Therefore, they clung to collectively-held beliefs about debt, financial failure and bankruptcy practice that stem from stigma and avoidance. Moreover, financial institutions and their executives effectively exploited this bankruptcy phobia to obtain a taxpayer bailout rather than succumb to the oversight of a federal bankruptcy judge.

Ayotta and Skeel explain that rather than using the structure of the bankruptcy laws to appropriately manage the economic crisis, regulators and lawmakers regarded bankruptcy as if it was radioactive. They argue that this attitude reflects particularly harmful long-held social and cultural beliefs about debt, failure, and bankruptcy. The stigma and the notions of sin associated with debt and bankruptcy work against the effective marketplace tools found in the legal texts of bankruptcy laws. Ayotta and Skeel’s research and the research in this dissertation stress that a legitimate social and legal space for debt and bankruptcy law needs to be developed.

This dissertation suggests, taking from the work of Public Anthropologist, that as
anthropologists we need to continue focusing our work in the public sphere and in the academy on how to transform the dominant model of the self-sufficiency based “me” that is solely responsible for individual success or failure, to a more realistic and practically useful view of the “we” – that we are all in the system together, as a holographic collective whose complex and interactive interrelationships define up- and down-trends as a natural result of partially understandable yet largely unpredictable factors. Future anthropological research needs to consider the post collapse concentrations of wealth into a small number of private investors and banks. Credit and debt structures are shifting. As anthropologists, we need to account for and study the individual and the collective in this process. The structural divide between wealth and poverty needs to be drawn together to understand the important economic shifts that are occurring globally. The gaze of the anthropologist is particularly well suited to the make insightful connections.

This dissertation is my contribution to a larger clarification and cultural understanding of wealth transfers in the United States.

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