THE PERSISTENCE OF BANKRUPTCY STIGMA

MICHAEL D. SOUSA[*]

ABSTRACT

The debtor-creditor relationship has always been intertwined with notions of morality. Failing to pay one's financial obligations has traditionally been met with social opprobrium, internal shame, and external stigma. This dynamic did not change with the advent of American bankruptcy law. Indeed, for much of the twentieth century, scholars have studied and debated whether the stigma associated with filing for bankruptcy has declined over the years, particularly in the 1980s and 1990s when the number of consumer bankruptcy filings increased dramatically. Existing studies suggest that the stigma regarding personal bankruptcy has declined in the latter portion of the twentieth century.

Using a data set previously untapped by bankruptcy law scholars, this study explores the trend of bankruptcy stigma for approximately four decades, from the advent of the Bankruptcy Code in 1978 to the present day. Contrary to both existing studies on this issue and the arguments set forth by some commentators, the results of the present study suggest that the stigma surrounding personal bankruptcy has actually increased over time, rather than decreased, and this trend paradoxically tracks the number of consumer bankruptcy filings each year.

The results of this study should not only serve to reinvigorate the debate regarding Americans' views about the bankruptcy process from a social perspective, but it also offers evidence for policymakers and Congress should they choose to reexamine the 2005 amendments to the Bankruptcy Code occasioned by the Bankruptcy Abuse Prevention and Consumer Protection Act. If, indeed, the results of this study are accurate insofar as bankruptcy stigma has increased from 1977 to 2016, then our nation's bankruptcy laws currently rest upon an entirely faulty premise.

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[*] Associate Professor of Law, University of Denver Sturm College of Law. The author would like to thank Brook E. Gotberg and Philip Pendergast for their thoughtful comments and feedback. All errors are my own.

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I. THE UNDERCURRENTS OF BANKRUPTCY STIGMA

For much, if not most, of human history, the debtor-creditor relationship has been intertwined with notions of morality.[1] Indeed, the etymology of the word "debt" is synonymous with words for "fault," "sin," and "guilt."[2] On the one hand, moneylenders were frequently equated with villains or the Devil who charged usurious interest,[3] while on the other hand, debtors who failed to pay back their debts were punished and publicly scorned.[4] As I have argued elsewhere,[5] several factors have likely contributed to a culture in the United States that stigmatizes unmanageable indebtedness: (i) the historically punitive treatment of debtors in the early American republic; (ii) long-standing religious admonitions that occupying the status of "debtor" should be avoided at all costs; and (iii) the distinctly American ethos of self-reliance and economic individualism whereby failing financially is a sign of a lack of effort and worth.[6]

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[1] *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 4–9 (2011) (discussing the different ways debt has been treated throughout human history in different parts of the world, informed by moral norms); *see also* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 3 (2002) (noting that in the early stages of American history, an inability to repay one's debts was seen as "a moral failure, not a business risk"); Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 396 (2000) [hereinafter Zywicki, *Social Legislation*] ("Incurring a debt creates a contractual and moral obligation to repay that debt. The failure to repay a debt usually exposes the debtor to severe legal sanctions.").

[2] *See* GRAEBER, *supra* note 1, at 121 ("[J]ust as a criminal owes a debt to society, a debtor is always a sort of criminal.").

[3] *See id.* at 10–11 ("Looking over world literature, it is almost impossible to find a single sympathetic representation of a moneylender . . . .").

[4] *See id.* at 77, 218 ("In fact, for the first several thousand years, we seem to be in a somewhat different world, where debt really was a matter of 'guilt' and treated largely as a criminal matter . . . .").

[5] *See generally* Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 445–53 (2013) [hereinafter Sousa, *Bankruptcy Stigma*] ("The world's major religions, Judaism, Christianity, Islam, and Hinduism, have always instilled in their followers a moral code and conviction that they must avoid becoming a debtor and, if the follower does become a debtor, then they stress the importance of repaying one's financial obligations.").

[6] *See generally* Sousa, *Bankruptcy Stigma*, *supra* note 5 (explaining the religious and societal factors

Of course, one way for an individual to respond to mounting financial indebtedness is to file for bankruptcy protection in an effort to discharge the debt.[7] Though the architects of the Constitution sanctioned bankruptcy legislation,[8] imprisonment for debt was practiced in the United States until the mid-nineteenth century.[9] That is, taking an "act of bankruptcy" during most of the nineteenth century was met with not only social opprobrium, but potential criminal consequences as well.[10] Though the United States had intermittent national bankruptcy laws from 1800 to 1898,[11] Professor Charles Jordan Tabb has argued that the Bankruptcy Act of 1898 "ushered in the modern era of liberal debtor treatment" under the nation's bankruptcy laws.[12] In short, the 1898 Act lifted many prior conditions on debtors receiving a discharge and limited the number of debts that could be excepted from discharge.[13]

The liberalization of debtor treatment under federal bankruptcy law commencing at the turn of the twentieth century is significant insofar as it engendered a narrative that has continued to the present day. That is, a liberal bankruptcy law incentivizes consumers to file for bankruptcy protection, perhaps at a time when they can pay back some percentage of their indebtedness as opposed to opting for a quick discharge. As more Americans file for bankruptcy, the social function of bankruptcy stigma, namely, to induce debtors to make good on their

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surrounding the stigmatism of bankruptcy).

[7] Nancy C. Dreher & Matthew E. Roy, *Bankruptcy Fraud and Nondischargeability Under Section 523 of the Bankruptcy Code*, 69 N.D. L. REV. 57, 57 (1993) ("The most sweeping remedy available to a debtor in bankruptcy is the discharge of the debtor's personal liability to his or her creditors."); *see also* Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy,"* 21 UCLA L. REV. 403, 420–21 (1973) ("The most significant aspect of [debtors'] bankruptcies is the granting of the discharge, which serves as a legally effective bar to further collection efforts by most creditors."); F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 200 (1919) ("The crown jewel of this [bankruptcy] legislation is its capacity legally to discharge the bankrupt from the payment of his provable debts, and to enable him subsequently to enjoy with tranquility the fruit of his labor.").

[8] *See* U.S. CONST. art. I, § 8, cl. 4 (providing the Constitutional basis for bankruptcy proceedings).

[9] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995) [hereinafter Tabb, *History*] (describing the imprisonment of debtors in America leading up to the mid-nineteenth century). As Charles Jordan Tabb notes, "[t]he original conception of bankruptcy was that debtors were in fact bad people, quasi criminals." Charles Jordan Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 28 (2007).

[10] *See* Zywicki, *Social Legislation*, *supra* note 1, at 395 ("Individual bankruptcy has been morally condemned throughout most of human history. Debtor's prisons, for example, remained the dominant response to bankruptcy through most of the world until recent times.").

[11] For a treatment of the historical development of bankruptcy law in the United States, see NOEL, *supra* note 7 (narrating Congress' creation and repeated amendment of nineteenth century insolvency law). *See generally* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935) (chronicling early bankruptcy law in a historical and economical context while drawing parallels to The Great Depression); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001) (providing a historical narration of bankruptcy law from its inception into the twenty-first century); Tabb, *History*, *supra* note 9 (tracing the history of bankruptcy law from its English origins through the nineteenth century and after).

[12] *See* Tabb, *History, supra* note 9, at 24.

[13] *See id.* (describing the shift from previous law which had conditioned discharge upon the consent of creditors).

financial obligations and to exercise self-restraint by living with a Weberian ideal of asceticism,[14] simply erodes.

This underlying narrative escalated in the 1960s, a time when consumer bankruptcy filings increased dramatically as compared to pre-World War II levels.[15] In the twenty-one year period from 1946 to 1967, national consumer bankruptcy filings increased more than twenty-fold.[16] In 1946, 8,566 bankruptcy cases were filed; in 1967, 191,729 cases were filed.[17] Some observers attributed this sharp spike in individual filings to the general expansion of consumer credit in the United States,[18] unemployment trends, and the efficacy of wage garnishment laws.[19] Others viewed this increase as an indirect indication that the stigma surrounding filing for bankruptcy had somehow eroded.[20] In fact, as Professor David Skeel recounts, beginning in the 1960s the consumer credit industry lobbied Congress to adopt a "means test" for chapter 7 bankruptcy, presumably to prevent some "can pay" debtors from seeking a discharge in the first place, or to at least possibly steer some consumer debtors into a chapter 13 bankruptcy whereby they would be statutorily required to pay creditors some portion of their debts over time.[21]

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study the existing bankruptcy law and to recommend reforms.[22] Subsequent to the Commission's report in 1973 and various hearings on proposed changes to the federal bankruptcy law, Congress passed the Bankruptcy Reform Act of 1978, "now known as the modern Bankruptcy Code."[23] The Bankruptcy Code was viewed by many, particularly the credit industry, as favoring consumer debtors to the detriment of their creditors, in part because the Code "imposed no express criterion of need or inability to pay as a precondition to discharge," while at the same time heightening exemption rights and narrowing the class of non-dischargeable debts.[24] Almost immediately after taking effect, the credit industry

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[14] *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM xxxi (1930) (discussing capitalism and the desire for acquisition without restraint).

[15] *See* SKEEL, *supra* note 11, at 126 (illustrating the sharp increase in bankruptcy filings from the late 1950s through the 1960s).

[16] DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 25 (1971).

[17] *See id.*

[18] *See generally* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT (1999), for a broad and comprehensive review of the expansion of consumer credit in America.

[19] *See* STANLEY & GIRTH, *supra* note 16, at 24–32.

[20] *See* SKEEL, *supra* note 11, at 137–38.

[21] *See id.* at 154 (the "means test" was meant to encourage debtors to use chapter 13 if they were capable of paying back part of their debt).

[22] *See id.* at 139.

[23] *See* Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 566 (2010) [hereinafter Sousa, *Consumer Utility*] (the Bankruptcy Act of 1898 was replaced and repealed by the Bankruptcy Reform Act of 1978).

[24] *See* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 86–88 (1986-1987) (allowing debtors to choose between chapter 7 or chapter 13 bankruptcy proceedings). Chapter 13 was more attractive since in chapter 7, "some claims that had traditionally been nondischargeable . . . continued to survive bankruptcy." *Id.* at 87.

embarked on a lobbying campaign for Congress to amend the Bankruptcy Code in order to provide for a "harsher treatment of debtors."[25] This effort was buoyed by the fact that after its enactment in 1978, the number of individuals filing for personal bankruptcy increased dramatically.[26] In the years following the enactment of the Bankruptcy Code, the number of bankruptcy filings increased more than any other time in history.[27] In 1983, 286,000 consumer bankruptcy cases were filed; by 2003, this figure approximated 1.6 million consumer bankruptcy cases per year, an increase of 560% in a twenty-year period.[28]

As the number of personal bankruptcy filings rose during the 1980s and 1990s, an incredibly loud alarm rang through the financial lending industry. "Accompanying the increased filings was a spreading concern (or at least suspicion) that some significant portion of consumers resorting to bankruptcy might be doing so in the absence of 'real need,' obtaining a discharge notwithstanding a capacity to repay and an absence of financial distress."[29] Notably, the credit industry adopted and promoted the notion that debtors were abusing the bankruptcy system and using the bankruptcy laws to shirk their financial obligations, despite having the ability to repay all, or at least some meaningful portion of, their indebtedness.[30] As a result of this perception regarding debtor abuse, a movement for the recalibration of the bankruptcy laws surfaced; creditor interest groups circled their proverbial wagons and began lobbying Congress with even greater intensity for a crackdown on consumer bankruptcy law.[31] Viewing the rise in consumer bankruptcies during the 1980s and 1990s as a function of debtors attempting to evade paying their financial obligations, these creditor interest groups spent more than $100 million lobbying

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However, the amount of non-dischargeable debts was smaller under the modern Bankruptcy Code. *See id.* at 88.

[25] *See* Tabb, *History, supra* note 9, at 37; *see also* Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1301 (2006) ("The credit industry never accepted the 1978 Act's perceived liberalization of personal bankruptcy. The industry continued to fight for constraints on use of personal bankruptcy.").

[26] *See* Sousa, *Consumer Utility, supra* note 23, at 570; *see also* Hallinan, *supra* note 24, at 89 (noting the "apparently sudden and undoubtedly large increase in the number of consumer bankruptcy filings almost immediately following the Code's effective date").

[27] *See* Sousa, *Consumer Utility, supra* note 23, at 570.

[28] Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1071 (2004).

[29] Hallinan, *supra* note 24, at 89.

[30] Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 77 (1986) ("Bolstered by media attention to the rising rate of bankruptcies and by the apparent ability of individual debtors to avoid their obligations through the bankruptcy laws, the [credit] industry maintained that its recoveries were unnecessarily diminished solely because abusive debtors were manipulating the Code to their advantage.").

[31] *See* Sousa, *Consumer Utility, supra* note 23, at 571 (there was a concern that people abused the bankruptcy system and filed for bankruptcy to obtain a discharge when they lacked real financial distress, prompting creditor interest groups to lobby congress); *see also* Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 192–93 (1999) [hereinafter Warren, *Changing Politics*] ("Despite very real conflicts in their interests, they joined together to promote a 'reform' agenda that blamed debtors for the rise in bankruptcy filings, and demanded a crackdown.").

Congress for a reformation of the Bankruptcy Code.[32] The credit industry's efforts to have Congress amend the Bankruptcy Code to make it more stringent for "abusive" consumer debtors has been previously documented in the bankruptcy literature.[33] This campaign, premised upon the "abusive" consumer debtor, resulted in the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005.[34]

Despite a robust economy and low unemployment in the mid-1990s, the number of consumer bankruptcy petitions filed each year rose dramatically during this time.[35] When the number of total bankruptcy filings surpassed the one million

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[32] David K. Stein, Comment, *Wrong Problem, Wrong Solution: How Congress Failed the American Consumer*, 23 EMORY BANKR. DEV. J. 619, 630 (2007) ("Over the past ten years, credit card issuers have spent more than one hundred million dollars lobbying Congress to pass the BAPCPA."); *see also* Warren, *Changing Politics*, *supra* note 31, at 194–96 ("Fueling the fire at every opportunity and making every effort to confirm investigative reporters' worst suspicions, the lobbyists sent out thousands of press releases declaring that the rising tide of bankruptcy was swollen by morally slack consumers who could repay their debts."). Among other things, lobbyists sent out press releases, paid for academic studies, hired the former Secretary of the Treasury, and utilized advertising agencies. *Id.* at 195.

[33] *See* Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 41, 43, 45–47 (1998) (before the creditor interest groups lobbied Congress, they announced the preliminary results of a study and brought it to the Commission, and despite being problematic, the creditors used it in addition to spending millions of dollars); Sousa, *Consumer Utility*, *supra* note 23, at 558–60, 571–74 ("Simply put, the campaign lodged by the credit industry and its minions proved to be keenly focused, well organized, and highly politicized."); Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 133, 134–35, 138–40 (1999) (the credit industry complained the increase in bankruptcy filings caused them to pass along the discharged debts in the form of higher interest rates and fees and wanted reforms which would prevent debtor abuse and make it more difficult for individual consumers to file chapter 7 petitions); Warren, *Changing Politics*, *supra* note 31, at 192–93, 195, 199, 202 ("Regardless, the presence of a strong creditor coalition has changed the bankruptcy debates forever.").

[34] *See* Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 226, 229–32 (2005-2006)

> Fueled by concern about dramatic increases in chapter 7 filing rates, [BAPCPA] accepts the premise, advanced persistently and forcefully by and on behalf of extenders of consumer credit, that too many consumer debtors with the ability to repay meaningful amounts of non-priority unsecured debt have been seeking chapter 7 relief. Advocates of reform have attributed much of this alleged abuse to consumer bankruptcy law that they characterize as lenient . . . .;

see also Christian E. Weller, Bernard J. Morzuch, & Amanda Logan, *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 327 (2010) ("Presuming that bankruptcy no longer carried an adverse stigma and that many filings were 'bankruptcies of convenience,' Congress attempted to draft a statute that would cause a sharp decrease in the bankruptcy rate, that is, the ratio of bankruptcy cases to households in the United States."). For a detailed discussion of the legislative history leading to the enactment of BAPCPA, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005).

[35] *See* Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 399–400 (2003) (noting consumers discharged debts under chapter 7 instead of making partial payments under chapter 13, resulting in a significant increase in consumer bankruptcy filings).

mark in 1996,[36] scholars and commentators took special notice. Consequently, this paradoxical social phenomenon needed to be explained. The explanation most prominently referenced by bankruptcy law scholars and commentators was the stigma associated with filing for bankruptcy. Through the years, scholars have recognized the existence of a general stigma surrounding consumer bankruptcy.[37] But in the mid-1990s, the bankruptcy literature experienced a wave of articles and empirical studies regarding bankruptcy stigma together with a debate among scholars over a singular research question, namely, had the stigma associated with bankruptcy decreased over time, and was this dynamic the explanation behind the stark rise in consumer filings during the 1980s and, in particular, the 1990s?[38]

The next section offers a review of the existing studies on bankruptcy stigma and an abbreviated account of the debate among commentators during the late 1990s and early 2000s.

II. EMPIRICAL STUDIES ON BANKRUPTCY STIGMA AND THE SCHOLARLY DEBATE

The generalized allegation over the societal decline in bankruptcy stigma has been asserted for at least two centuries.[39] However, empirical research and commentary on bankruptcy stigma swelled in the late 1990s and early 2000s as the

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[36] *See* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 471 (2007) (stating consumer bankruptcy amounted to 90% of all bankruptcy filings per year between 1996-2005, contributing to the enactment of BAPCPA).

[37] *See, e.g.*, A. Mechele Dickerson, *America's Uneasy Relationship With the Working Poor*, 51 HASTINGS L.J. 17, 40–41 (1999) [hereinafter Dickerson, *Working Poor*] ("Thus, because of the stigma previously attached to being labeled a bankrupt or debtor, Americans historically were reluctant to file for bankruptcy . . . .") (internal citations omitted); Hallinan, *supra* note 24, at 141 ("One variety of such nonmonetary costs is the 'stigma' . . . traditionally thought to be associated with bankruptcy.") (internal citations omitted); Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 124 (1990) ("Perceptions about excuse and discharge also diverge because of the supposedly greater stigma of bankruptcy.") (internal citations omitted); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1061 (1987) ("[A] debtor unable to satisfy his obligations experiences resulting feelings of shame, but the bankruptcy process that is supposedly psychologically liberating is now said to be stigmatizing.") (internal citations omitted); Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1, 5 (2003) (noting that the phenomenon of stigmatizing consumer debt began in America in the 1700s); Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 131 (1989) ("Much has changed, to be sure, but evidence suggests that the moral aversion to and the stigmatization of bankruptcy survives."); Douglas R. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 N.C. L. REV. 1197, 1205 (1975) ("Society imposes a stigma on the bankrupt."); Shuchman, *supra* note 7, at 413 ("Bankruptcy is often said to be a labeling process and to inflict a stigma upon the bankrupt."); Ferdinand F. Stone, *A Primer on Bankruptcy*, 16 TUL. L. REV. 339, 354 (1942) ("As modern thinking tends to remove the 'stigma' quality from bankruptcy and emphasizes the 'economically ill' viewpoint, it becomes necessary to throw new safeguards about the procedure, lest too many people become 'ill' and the 'well' people see too little advantage in being 'well.'").

[38] *See* F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 187 (1998) (introducing a study on the bankruptcy stigma and the great rise of bankruptcy filings in the 1980s and 1990s).

[39] *See* John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 497 (2004) (explaining that the loss of stigma complaint and allegation has been made for centuries).

economic and social impact of approximately one million individuals and families filing for bankruptcy each year proved an intoxicating, worthwhile area of study.[40]

One of the first studies to tackle the phenomenon of increased bankruptcy filings despite a recovered national economy was Professors F.H. Buckley and Margaret F. Brinig's *The Bankruptcy Puzzle*, published in 1998.[41] In an effort to explain the increased number of filings during the 1980s, Buckley and Brinig utilized multiple regression analysis with the bankruptcy filing rate serving as the dependent variable and several predictor variables to account for the prevailing "legal regime," certain economic indicators, and several social demographic factors.[42] According to their results, the economic and legal variables were unable to account statistically for the run-up in bankruptcy filing rates.[43] Nonetheless, the social variables (e.g., the percentage of the population identifying as Catholic, the percentage of the population over the age of 65, and the number of divorces per 1,000 population) proved significant in the regression models.[44] Buckley and Brinig employed the number of divorces per 1,000 population as a proxy for the hypothesis that bankruptcy rates will be higher when the social sanctions for promise-breaking are weakened.[45] Though Buckley and Brinig could not ultimately opine whether the increased number of consumer bankruptcy filings were attributable "to a decline in social sanctions for promise-breaking or to a greater propensity for risk-taking,"[46] the authors concluded nonetheless that the increased bankruptcy filing rate was "more plausibly attributed to a decline in social sanctions"[47] for promise-breaking. Stated differently, Buckley and Brinig indirectly argued that bankruptcy stigma had decreased throughout the 1980s.

The same year as the Buckley and Brinig study, Professors Scott Fay, Erik Hurst, and Michelle J. White published *The Bankruptcy Decision*: *Does Stigma Matter*?[48] Utilizing data from the 1996 iteration of the Panel Study of Income Dynamics, the authors employed econometric models to test the hypothesis that the probability of debtors filing for bankruptcy rises when the level of bankruptcy

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[40] *See generally* Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77 (2006); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365–66 (2006) [hereinafter Efrat, *Evolution*]; Sousa, *Bankruptcy Stigma, supra* note 5 (all describing research on bankruptcy stigma). Empirical research on bankruptcy stigma continues to the present day.

[41] *See* Buckley & Brinig, *supra* note 38 (reflecting on a study of the large increase of U.S. consumer bankruptcy filing rates between 1984 and 1991).

[42] *See id.* at 191–92 (explaining the puzzle of the bankruptcy run-up using a regression estimation of 1980s filing rates).

[43] *See id.* at 202 (finding that social predictors generally had the expected signs, but economic and legal variables did not).

[44] *Id.* at 205 (concluding that the model's social variables more successfully predicted filing rates than other variables).

[45] *Id.* at 205–06 (determining that divorce coefficients were generally positive and significant, a finding consistent with the authors' hypothesis).

[46] *Id.* at 206.

[47] *Id.*

[48] *See generally* SCOTT FAY, ERIK HURST, & MICHELLE WHITE, U. MICH., THE BANKRUPTCY DECISION: DOES STIGMA MATTER? (1998).

stigma decreases.[49] Based on the 1996 bankruptcy filing rate of 4.15 per 1,000 population, the authors' model predicted "that the contagion effect of reduced bankruptcy stigma will cause the bankruptcy filing rate in the state to increase by an additional 19% . . . in the following year."[50] From this and other observations, Fay, Hurst, and White concluded that the "social disapproval of bankruptcy has been falling and that this change caused more households to file for bankruptcy."[51]

In 1998, Professors David B. Gross and Nicolas S. Souleles issued a working paper to explain the increase in bankruptcy filings from 1994 to 1997, titled, *Explaining the Increase in Bankruptcy and Delinquency: Stigma vs. Risk-Composition*.[52] Utilizing a data set consisting of several hundred thousand individual credit card accounts from various credit card issuers, Gross and Souleles sought to "estimate hazard functions for consumer default, for both bank and credit card delinquency, and to assess the relative importance of different variables in predicting default."[53] The researchers hypothesized that two theories potentially explained the increase in bankruptcy filings in the mid-1990s, namely, either a "risk effect" whereby less credit-worthy borrowers managed to obtain additional credit in previous years (and these were the individuals defaulting and filing for bankruptcy), or a "stigma effect" where people had become more willing to default and file for bankruptcy, even controlling for their respective risk factors and exogenous economic predictors.[54] Gross and Souleles found that neither the risk-composition of the credit card accounts nor external economic conditions explained the rise in defaults and bankruptcies between 1995 and 1997.[55] Rather, "after controlling for account age, balance, purchase and payment history, credit line, risk scores, and economic conditions, a given account was more likely to go bankrupt in 1996 and 1997 than in 1995."[56] Consequently, Gross and Souleles explained their findings by arguing that the results of their econometric model were "consistent with the view that most of the recent increase in default [was] due to a decline in stigma."[57]

In 1999, Professors Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook published the reprint of *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*,[58] the authors' work after collecting data for the

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[49] *See id.* at 1–2 (analyzing data from the Panel Study of Income Dynamics to test whether debtors respond to economic incentives in filing for bankruptcy and whether stigma plays a role in the decision).

[50] *See id.* at 25.

[51] *See id.* at 27.

[52] *See generally* DAVID B. GROSS & NICHOLAS S. SOULELES, WHARTON FIN. INSTITUTIONS CTR., U. PA, EXPLAINING THE INCREASE IN BANKRUPTCY AND DELINQUENCY: STIGMA VS. RISK-COMPOSITION (1998) (investigating the two leading explanations for the recent increase in bankruptcy and delinquency).

[53] *Id.* at 2 (explaining that the paper uses a new data set and how the data set is specifically used).

[54] *Id.* at 1 (introducing the "risk effect" and the "stigma effect" as the two leading explanations for the increase in bankruptcy filings between 1994 and 1997).

[55] *Id.* at 15–16 ("Neither the risk-composition of accounts nor economic conditions changed enough to account for the variation in default rates.").

[56] *Id.* at 12.

[57] *Id.* at 15.

[58] *See generally* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1999).

ongoing Consumer Bankruptcy Project.[59] Although their data could not speak directly to whether the stigma surrounding bankruptcy had increased or declined during the 1980s and 1990s, Sullivan, Warren and Westbrook noted that "few people file bankruptcy without crushing debts."[60] Regarding what their data could suggest, the authors concluded as follows:

> We found virtually no debtors who seemed to take bankruptcy on a lark, to deal with relatively minor debts in relation to their incomes. Instead, the debtors we saw were in so much financial trouble we had to wonder how they had stayed out of bankruptcy so long and what it must have been like in the months or years before filing as they dealt with debts that grew mountainous beside an unsteady income. The fact that the debtors in our sample did not choose bankruptcy earlier, given the disastrous state of their affairs, suggests to us that many of them tried longer than was reasonable to avoid discharging their debts. If the economic theorists are correct that moral conviction and stigma are the principal deterrents to bankruptcy, the data suggest that these deterrents work.[61]

In addition to these empirical studies, during the late 1990s and early 2000s, bankruptcy law scholars argued about whether the social stigma of bankruptcy had declined over the years. Professor Todd J. Zywicki, along with his co-author Edith H. Jones, proved to be the most vocal proponents of a decline in bankruptcy stigma over time,[62] although not the sole voices on this side of the bankruptcy stigma divide.[63] The pair offered a handful of observations in an effort to support their

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[59] *Id.* at 17–21 (explaining that the book was a product of the Consumer Bankruptcy Project study conducted by the authors).

[60] *Id.* at 338 (explaining that "virtually no debtors" file for bankruptcy over minor debts; instead they file mainly when suffering from large amounts of financial trouble).

[61] *Id.*

[62] *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 215–21 (1999) [hereinafter Jones & Zywicki, *Means-Testing*]; *see also* Zywicki, *Social Legislation, supra* note 1, at 405 ("It is generally accepted that one of the factors driving the upward trend in bankruptcy filing rates in recent decades has been a general decline in the social stigma associated with filing bankruptcy.") (internal citations omitted).

[63] *See* A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 951 (1998) ("Forcing all debtors to participate in credit-counseling should satisfy the demand to punish debtors, to make bankruptcy unpleasant, and to ensure that bankruptcy has a 'stigma' attached to it."); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 545 (1993) (finding that consumer bankruptcy lawyers reported a decline in bankruptcy stigma); Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 451 (2001) ("Shame and stigma have traditionally counterbalanced the economic benefits available from bankruptcy, restraining many debtors from filing. As shame and stigma have declined, however, more and more debtors are recognizing the economic benefits of bankruptcy."); Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2, 48 (2006) (opining that "[t]here may be a decline of stigma associated with filing bankruptcy generally"); Dickerson, *Working Poor*, *supra* note 37, at 41 ("Whatever stigma previously was associated with filing for bankruptcy appears to have decreased (or

argument for a "decline in the level of personal shame and societal stigma that previously deterred individuals from filing bankruptcy."[64] First, Zywicki and Jones pointed to the stark increases in consumer bankruptcy filings during the 1980s and 1990s, in and of themselves, as evidence of a decline in stigma.[65]

Second, they maintained that the proliferation of attorney advertising during the 1980s caused bankruptcy filings to increase because of a reduction in "search costs" imposed upon prospective debtors and a reduction in the cost of legal representation due to competition among attorneys.[66] Third, Zywicki and Jones opined about the existence of a "water cooler" effect among social networks, which led to a greater public awareness and acceptance of bankruptcy as an option for dealing with over-indebtedness.[67] Fourth, they argued that the public bankruptcies of several politicians and entertainers served to increase the social acceptance of bankruptcy.[68] Fifth, Zywicki contended that several nomenclature changes to the bankruptcy law in the 1978 Bankruptcy Code (e.g., replacing the term "bankrupt" with "debtor" and denominating the filing of a bankruptcy petition as an "order for relief") stripped bankruptcy of its "moral and emotional baggage" and thereby reduced attitudes of opprobrium toward bankruptcy in general.[69] Sixth, Zywicki argued that the "Baby Boom" generation brought a significant number of changes to American cultural life with respect to personal responsibility, which transcended issues such as marriage and sexuality to views regarding financial accountability, the use of credit, and debt repayment.[70] He asserted that the weakening of personal responsibility overall in the twentieth century may have effectuated a reduction in the social stigma associated with filing for personal bankruptcy.[71] Seventh, and finally, Zywicki argued that bankruptcy attorneys played a role in diminishing the shame and stigma regarding bankruptcy by imparting messages to their clients that filing for bankruptcy was not morally wrong, but rather a legal remedy provided by the Bankruptcy Code and Congress.[72]

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disappeared) in recent years.") (internal citations omitted).

[64] Jones & Zywicki, *Means-Testing*, *supra* note 62, at 208. Many of these same arguments were reasserted again several years later by Zywicki. *See* Todd J. Zywicki, *Institutions, Incentives and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1096–97 (2005) [hereinafter Zywicki, *Reform*] (stating that the increase in bankruptcy filings could be explained by the disappearance of the social stigma surrounding it).

[65] *See* Jones & Zywicki, *Means-Testing*, *supra* note 62, at 209–10 (contending that bankruptcy filing rates have increased due to a decrease in the social stigma surrounding it).

[66] *See id.* at 212.

[67] *See id.*; *see also* Edith H. Jones, *The Bankruptcy Galaxy*, 50 S.C. L. REV. 269, 271 (1999) ("As more citizens file bankruptcy, there is a wider awareness of its generous debt relief provisions and increased social acceptance of the resort to bankruptcy.").

[68] *See* Jones & Zywicki, *Means-Testing*, *supra* note 62, at 213.

[69] *See* Zywicki, *Reform*, *supra* note 64, at 1108.

[70] *See id.* at 1104–05.

[71] *See id.* at 1105.

[72] *See id.* at 1107–08. These explanations were subsequently echoed by Professor Rafael Efrat in attempting to explain why bankruptcy stigma had apparently declined. *See generally* Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481 (2006) [hereinafter Efrat, *Shifting Norms*].

In contrast to the various arguments set forth by Zywicki and Jones, an opposing group of scholars and commentators maintained that a decline in bankruptcy stigma was not the root cause of the increased consumer bankruptcy filings. For example, Henry J. Sommer argued that rather than a general decline in stigma, the higher numbers of bankruptcy filings were the result of, among other things, a "democratization of credit" and a greater proportion of American families "living near the financial edge."[73] Regarding creditors' arguments about the decline in stigma, Sommer criticized this position in the following terms:

> At bottom, the creditors' argument that there is no more stigma is really based upon circular reasoning. According to the creditors, there are so many bankruptcies these days, so there must not be any more stigma. Clearly, the creditors then argue it is this lack of stigma that has caused the rise in bankruptcies.[74]

In concert with Sommer, Elizabeth Warren also sought to counter the narrative that the increased bankruptcy filings in the 1990s were somehow attributed to debtor abuse or the erosion of bankruptcy stigma. Relying upon data collected by the Consumer Bankruptcy Project, Warren argued that bankruptcies were rising because consumers' debts were outpacing their annual incomes rather than any systematic abuse of the bankruptcy system.[75] In addition, Warren, together with colleagues Teresa Sullivan and Jay L. Westbrook, argued that as compared to debtors in 1981, the economic profile of debtors in 2001 demonstrated that the latter group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt carried by bankruptcy filers.[76]

In 2004, Kartik Athreya, a staff economist at the Federal Reserve Bank of Richmond, issued the results of his study, titled, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, an examination of the increased bankruptcy filings from 1991-1997.[77] In short, Athreya concluded that while the stigma regarding bankruptcy had waned in the recent past, the stigma associated with bankruptcy was

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[73] *See* Sommer, *supra* note 33, at 37–38; *see also* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 347 (1999) (arguing that the increase in consumer bankruptcy filings after 1985 was mainly attributable to the widespread availability of consumer credit rather than to a decline in bankruptcy stigma).

[74] *See* Sommer, *supra* note 33, at 39.

[75] Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1097 (1998) [hereinafter Warren, *Bankruptcy Crisis*] ("[N]ot only are the debtors' incomes declining, their debt-to-income ratios are not improving.") (internal citations omitted).

[76] *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 228–33 (2006) [hereinafter Sullivan, Warren & Westbrook, *Empirical Analysis*] ("Median total debt loads are up an enormous 55.5% from 1981 in inflation-adjusted dollars.").

[77] *See generally* Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, 90/2 FED. RES. BANK RICH. ECON. Q. (2004).

"by no means dead," but continued to play some role in the decision to file for bankruptcy.[78]

In addition to the foregoing scholarly research and debate, in the late 1990s studies issued by the credit industry itself pointed to a decline in bankruptcy stigma,[79] while the news media published stories on the apparent demise of stigma,[80] and a handful of congressmen placed their views on the decline of bankruptcy stigma into the federal public record.[81]

The steady rise in consumer bankruptcy filings during the 1990s, the lobbying efforts of the credit industry in response, the scholarly debate regarding bankruptcy stigma, and the general narrative portrayed by the media and by members of Congress, namely, that "can-pay" debtors were abusing the liberal bankruptcy system by discharging their debts, all coalesced and crystallized the political and legislative reforms already seeking to amend the Bankruptcy Code in an effort to make consumer bankruptcy more difficult for individuals; as mentioned above, this groundswell resulted in the enactment of BAPCPA. As has been extensively recounted in the bankruptcy law literature, the proponents of bankruptcy reform leading to BAPCPA couched the debate in terms of needing to curb abusive and irresponsible debtors[82] who no longer felt any sense of shame or stigma associated with filing for bankruptcy, irrespective of whether this assertion had any empirical support.[83]

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[78] *Id.* at 3 (suggesting that although stigma continues to surround bankruptcy, a reduction in the cost of filing for bankruptcy is a more plausible explanation for increased bankruptcy rates).

[79] *See* Efrat, *Shifting Norms*, *supra* note 72, at 487 ("The social stigma that once attached itself to bankruptcy appears to have weakened substantially, if not disappeared entirely. . . . But, while some of the debtors interviewed felt guilt about not having fulfilled their financial obligations, many others took a more relaxed attitude. . . . Some expressed no remorse at all . . . .") (citing VISA, QUALITATIVE RESEARCH: BANKRUPTCY PROCESS 19 (1997)); *see also* VISA U.S.A., INC., CONSUMER BANKRUPTCY: CAUSES AND IMPLICATIONS, VISA CONSUMER BANKRUPTCY REPORTS 4, 22 (1996) (claiming that a reduction in stigma and changes in other social factors caused the rise in personal bankruptcy filings between 1981 and 1996).

[80] *See, e.g.*, Albert B. Crenshaw, *Hill Panel Seeks Answers to the Bankruptcy Boom*, WASH. POST, Dec. 8, 1996, at H1, H7 ("Lenders also lament what they see as a growing societal acceptance of bankruptcy that removes informal pressures that consumers once felt to pay their debts."); Editorial, *Making it Harder to Dodge Debts*, ROANOKE TIMES, May 14, 1999, at A14 ("Bankruptcy, much like unwed pregnancy, seems to have no stigma or shame attached to it these days."); Sandra Ward, *Bailing Out*, BARRON'S, June 17, 1996, at 17 ("In short, bankruptcy, once viewed as shameful, has become an accepted part of the American way of life and debt. To a broad swath of the population, the stigma that formerly accompanied it is gone.").

[81] *See* 144 CONG. REC. 21035 (1998) (statement of Sen. Grassley) ("Bankruptcy should be difficult, and the moral stigma that used to be associated with bankruptcy ought to be resurrected."); *id.* at 20662 (statement of Sen. Hatch) ("Mr. President, the explosion in bankruptcy filings has less to do with causes and more to do with motivations. The stigma of bankruptcy is all but gone."); *id.* at 11882 (statement of Congresswoman Tauscher) ("The stigma that was once attached to bankruptcy has disappeared."); 146 CONG. REC. 26492 (2000) (statement of Sen. Kerry) ("There has been a decline in the stigma of filing for bankruptcy, and appropriate changes are necessary to ensure that bankruptcy is no longer considered a lifestyle choice.").

[82] *See* Thomas Bak, John Golmant & James Woods, *A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates*, 25 EMORY BANKR. DEV. J. 11, 11 (2008) (noting that the rationale for the enactment of BAPCPA was "to curtail alleged consumer abuses arising from the previous quarter century of bankruptcy reform").

[83] *See generally* Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer*

In addition to these quantitative studies on bankruptcy stigma, researchers studied the phenomenon of bankruptcy stigma using qualitative methods as well. In 2006, Professors Deborah Thorne and Leon Anderson published their qualitative study of bankruptcy debtors, titled, *Managing the Stigma of Personal Bankruptcy*.[84] The purpose of the study was not to determine whether bankruptcy stigma had declined over time, but rather to assess former bankruptcy debtors' experiences with stigmatization and shame associated with filing for bankruptcy. Nonetheless, all of the debtors interviewed by Thorne and Anderson reported instances of feeling shame and stigmatization over their decision to file for bankruptcy, lending support to the counter-narrative that bankruptcy stigma had not declined through the years.[85] In 2013, I published my own qualitative study of bankruptcy stigma, titled, *Bankruptcy Stigma: A Socio-Legal Study*.[86] Much like Thorne and Anderson, the goal of the study was not to determine whether bankruptcy stigma had eroded over time, but rather to gather the experiences, thoughts, and feelings of former bankruptcy debtors regarding their decision to file for bankruptcy, particularly after the advent of BAPCPA and its associated messages of debtor abuse and irresponsibility. I found that most of the former bankruptcy debtors that I interviewed experienced deep feelings of shame, embarrassment, and instances of stigmatization, but this feeling was not universal.[87] At least from the sample of former debtors that I interviewed, one can reasonably extrapolate that bankruptcy stigma remains a potent force for many individuals in society.

One qualitative study aimed at measuring the evolution of bankruptcy stigma over time was conducted by Professor Rafael Efrat in 2006, titled, *The Evolution of Bankruptcy Stigma*.[88] Using content analysis of 176 newspaper articles published in the *New York Times* between 1864 and 2002, Efrat looked for "embedded messages" contained within the articles "as a proxy for broad and evolving societal perceptions about the bankruptcy population."[89] Efrat evaluated each article to

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Bankruptcy, 10 GEO. J. ON POVERTY L. & POL'Y 205 (2003); Sousa, *Consumer Utility, supra* note 23; Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933 (2011); Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509 (2003); Vance & Barr, *supra* note 35; Sommer, *supra* note 33; Jensen, *supra* note 34; Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1 (2001); Yvana L.B.H. Mols, Comment, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289 (2012); Stehl, *supra* note 33 (discussing the debates and the underlying issues leading to the enactment of BAPCPA).

[84] Thorne & Anderson, *supra* note 40, at 78, 81.

[85] *Id.* at 81.

[86] Sousa, *Bankruptcy Stigma, supra* note 5, at 438 ("[T]his Article offers a synthesis of existing scholarship on the nature of bankruptcy stigma and then presents the findings of my qualitative, sociological study of this issue.").

[87] *Id.* at 463–64 ("While these individuals felt some amount of shame and embarrassment, they tempered their feelings by either blaming their circumstances on external events, rationalizing that bankruptcy is commonplace, or engaging in deviance avowal (distancing themselves from other debtors), a trait first identified by Thorne and Anderson.").

[88] *See generally* Efrat, *Evolution, supra* note 40.

[89] *Id.* at 388.

determine whether it struck a positive, negative, or neutral tone with respect to filing for bankruptcy, the characterization of bankruptcy debtors, and the validity of seeking formal debt relief under then-existing bankruptcy law.[90] He found that prior to the 1960s, the newspaper articles referred to bankruptcy debtors in negative terms, such as "evil doers," "cheaters," and "crooks," whose financial failures were self-imposed.[91] Beginning in the 1960s, however, Efrat noted that the *New York Times* adopted a more positive attitude towards bankruptcy debtors, often characterizing them as "hardworking, poor, struggling, and needy,"[92] and attributing their financial difficulties to external events such as unemployment, high inflation, medical illness, and divorce.[93] Ultimately, Efrat concluded that the public's attitude towards bankruptcy debtors had softened greatly since 1864, but he "did not find that changing public perception necessarily prompted an increase in bankruptcy filings."[94]

With this background, the following section addresses the methodology of the present study and presents the principal findings.

III. THE PRESENT STUDY: METHODOLOGY AND PRINCIPAL FINDINGS

This study takes a different approach from previous studies by examining the existence of bankruptcy stigma more directly by utilizing a nationally representative sample of Americans who participated in the biannual General Social Survey ("GSS") conducted by the National Opinion Research Center ("NORC") at the University of Chicago. Since 1972, the GSS has gathered individual-level data on American society "in order to monitor and explain trends and constants in attitudes, behaviors, and attributes" of the American population.[95] The GSS is a biannual, representative sample of non-incarcerated, non-homeless American adults.[96] "The GSS contains a standard core of demographic, behavioral, and attitudinal questions, plus topics of special interest. Among the topics covered are civil liberties, crime and violence, intergroup tolerance, morality, national spending priorities, psychological well-being, social mobility, and stress and traumatic events."[97]

Very few large scale, cross-sectional or longitudinal data sets ask respondents about bankruptcy. However, commencing on a fairly consistent basis since the 1980s, the GSS has asked respondents a question that reflects one's attitude towards severe indebtedness. The GSS asks participants the following question: "Do you think a person has the right to end his or her own life if this person has gone

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[90] *See id.* at 386–88.
[91] *Id.* at 389.
[92] *See id.*
[93] *See id.* at 390.
[94] *Id.* at 393.
[95] THE GENERAL SOCIAL SURVEY, http://www.gss.norc.org\About-The-GSS (last visited Feb. 18, 2018).
[96] DAVID KREMELBERG, PRACTICAL STATISTICS 66 (2011).
[97] THE GENERAL SOCIAL SURVEY, *supra* note 95.

bankrupt?"[98] The GSS does not specify to respondents what "gone bankrupt" means, namely, whether this is synonymous with filing for bankruptcy protection. Consequently, the phrase "gone bankrupt" could indeed mean different things to different individuals. It is possible that respondents could interpret "gone bankrupt" to mean either: (i) actually filing for bankruptcy; (ii) having severe debt problems together with the inability to pay back this debt; (iii) having an income insufficient to keep up with current debt payment obligations; or (iv) having assets valued at less than the extent of the individual's outstanding debts. Regardless of how respondents may internalize the import of this survey question, it is reasonable to presume that it prompts respondents to ponder whether having financial difficulties is sufficiently serious that suicide would be an acceptable response to either severe financial strain or filing for bankruptcy, or both.

For purposes of this Article, an affirmative response to this survey question is used as a proxy for the stigma surrounding bankruptcy[99] whereby a "yes" response is considered a reflection of the shame, stigma, and embarrassment one would or should feel (internally or externally) over being indebted to a significant degree (where bankruptcy might be a response) or filing for bankruptcy.[100] Methodologically, the GSS survey question is being treated as one concerning bankruptcy stigma rather than suicide precisely because the question does not ask respondents whether they themselves would commit suicide or presently have feelings about suicide due to their own indebtedness.[101]

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[98] THE GENERAL SOCIAL SURVEY, 1972–1986, App. A (C. Russell & I. Megaard eds., 1988).

[99] Using a proxy for bankruptcy stigma in research is not uncommon in the literature as stigma is a difficult variable to measure directly. *See*, *e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 264 (2000) ("Most recent analyses of the 'decline in stigma of bankruptcy' do not use any direct measure of stigma. Instead, the proxy for declining stigma is the rising bankruptcy rate.").

[100] Scholars have recognized the inherent difficulty in measuring social stigma directly. *See* Zywicki, *Reform*, *supra* note 64, at 1097–98 ("[E]mpirically measuring changes in broad and diffuse social factors such as shame and stigma is difficult, and does not easily lend itself to direct testing.") (internal citations omitted); s*ee also* Moss & Johnson, *supra* note 73, at 326–27 (noting that "stigma is very difficult to measure").

[101] There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental health, including suicide. *See* Patricia Drentea & John R. Reynolds, *Neither a Borrower Nor a Lender Be: The Relative Importance of Debt and SES for Mental Health Among Older Adults*, 24(4) J. AGING & HEALTH 673, 688 (2012) (arguing that "in modern society, indebtedness is a key component underlying the relationship between socioeconomic position and mental health"); *see generally* Sarah Brown, Karl Taylor & Stephen Wheatley Price, *Debt and Distress: Evaluating the Psychological Cost of Credit*, 26 J. ECON. PSYCHOL. 642 (2005) (finding empirically that heads of households who report substantial debt have significantly lower levels of psychological well-being compared to those without any debt); *see also* R. Jenkins et al., *Debt, Income and Mental Disorder in the General Population*, 38 PSYCHOL. MED. 1485, 1489–90 (2008) (reporting that the more debt an individual possessed, the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency); Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 388, 389 (2010) (discovering that respondents who subjectively perceived themselves as having debt problems reported a greater incidence of depression); Deborah Thorne, *Extreme Financial Strain: Emergent Chores, Gender Inequality and Emotional Distress*, 31 J. FAM. & ECON. ISSUES 185, 194 (2010) (finding that indebted women reported instances of depression as well as thoughts of suicide and death); H. Meltzer et al., *Personal Debt and Suicidal Ideation*, 41 PSYCHOL. MED. 771, 771 (2011) (finding personal debt to be a significant correlate of

More particularly, the GSS asked survey participants the "suicide upon bankruptcy" question in the following years: 1977, 1978, 1982, 1983, 1985, 1986, 1988, 1989, 1990, 1991, 1993, 1994, 1996, 1998, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, and 2016.[102] For all intervening years not covered by the GSS, interpolation was employed so as to have data for all years for which bankruptcy filing rates exist, 1977-2016. Therefore, thirty-nine years of data exist which spans the time from the advent of the 1978 Bankruptcy Code through the build-up in consumer bankruptcy filings during the 1980s and 1990s, through the 2000s to the present day. Thus, in contrast to prior studies on bankruptcy stigma which only examine a very discrete number of years,[103] this study adds to the literature by exploring bankruptcy stigma over approximately four decades.

Across all GSS years, 33,093 individuals answered the "suicide upon bankruptcy" question: 30,197 (91.25%) responded "no," a person does not have the right to end his or her own life if this person has "gone bankrupt," while 2,896 (8.75%) answered "yes."[104]

Table 1: Select Descriptive Statistics for Individuals Responding to the "Suicide Upon Bankruptcy" Survey Question

	"Yes" Suicide Upon Bankruptcy	**"No" Suicide Upon Bankruptcy**
Income (mean)	$35,613.98[105]	$27,560.20[106]
Age (mean)	43.6 years[107]	46.4 years[108]
Sex		
Male	1,496 (10.36%)	12,949 (89.64%)
Female	1,400 (7.51%)	17,248 (92.49%)
Race		
White	2,477 (85.53%)	24,090 (79.78%)
Black	264 (9.12%)	4,412 (14.61%)
Other	155 (5.35%)	1,695 (5.61%)
Source: The General Social Survey		

suicide ideation among respondents in a national survey of psychiatric morbidity of adults in England); Simon Hatcher, *Debt and Deliberate Self-Poisoning*, 164 BRITISH J. PSYCHIATRY. 111, 113–14 (1994) (discovering a high prevalence of debt problems among self-poisoning psychiatric patients).

[102] THE GENERAL SOCIAL SURVEY, *supra* note 95 (visit the survey website > search GSS Variables > type "suicide" > click "suicide2" from the variable list).

[103] *See, e.g.*, Buckley & Brinig, *supra* note 38, at 196 (testing the determinants of personal bankruptcy from 1980-1991); *see generally* FAY, HURST & WHITE, *supra* note 48, at 17 (using a data set from 1984-1995 to determine how a household makes the decision to file for bankruptcy); Athreya, *supra* note 77, at 5 (using a model to explain personal bankruptcies from 1991 to 1997); Gross & Souleles, *supra* note 52, at 2 (finding that "the propensity to default significantly increased between 1995 to 1997").

[104] *See* THE GENERAL SOCIAL SURVEY, *supra* note 95, (visit the survey website > search GSS Variables > type "suicide" > click "suicide2" from the variable list > view the tables at the bottom of the page, titled "Summary by Year" and "Summary Statistics").

[105] Standard deviation = $35,841.04; median = $25,582.50.

[106] Standard deviation = $29,009.49; median = $19,938.00.

[107] Standard deviation = 16.49141; median = 41.

[108] Standard deviation = 17.86219; median = 44.

To explore the trend of bankruptcy stigma over time, it was necessary to incorporate a variable for the bankruptcy rate into the existing GSS data. The bankruptcy rate variable was constructed by dividing the number of consumer bankruptcy filings per year[109] by the total national population as provided by U.S. Census Bureau statistics.[110] Table 2 presents these figures for the years of GSS data.

Table 2: Consumer Bankruptcy Rate for Years the GSS Asked the "Suicide Upon Bankruptcy" Survey Question

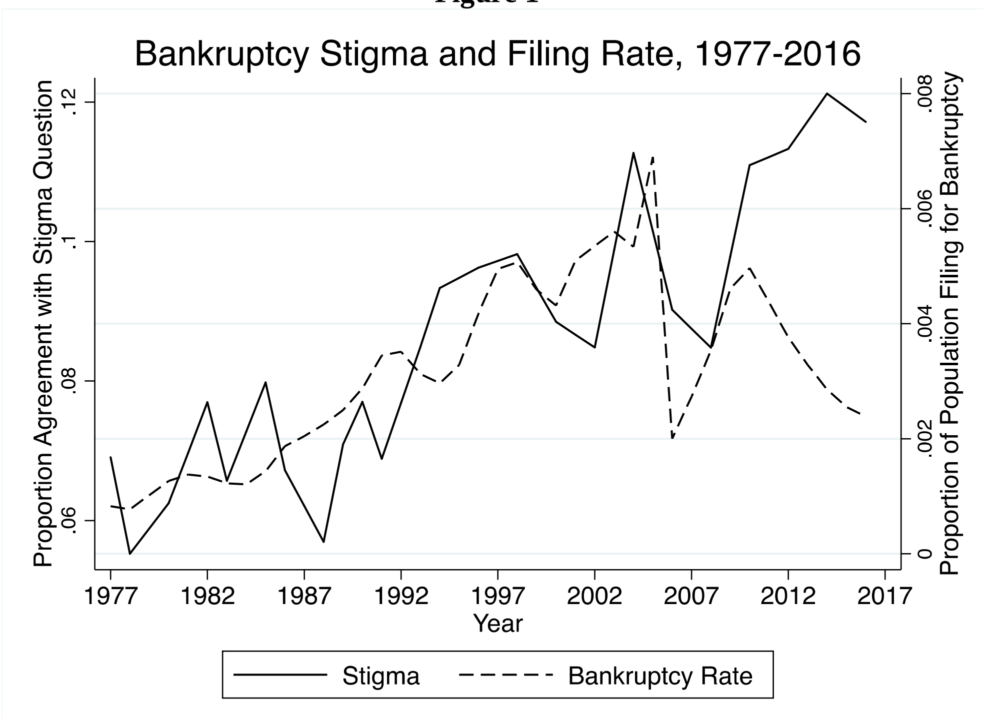
Year	**U.S. Population**	**Consumer Bankruptcy Filings**	**Bankruptcy Filing Rate**
1977	220,240,000	182,210	0.083%
1978	222,580,000	172,243	0.077%
1982	231,660,000	310,951	0.134%
1983	233,790,000	286,444	0.123%
1985	237,920,000	341,233	0.143%
1986	240,130,000	449,203	0.187%
1988	244,500,000	549,612	0.225%
1989	246,820,000	616,226	0.250%
1990	249,620,000	718,107	0.288%
1991	252,980,000	872,438	0.345%
1993	259,920,000	812,898	0.313%
1994	263,130,000	780,455	0.297%
1996	269,390,000	1,125,006	0.418%
1998	275,850,000	1,398,182	0.507%
2000	282,160,000	1,217,972	0.432%
2002	287,630,000	1,539,111	0.535%
2004	292,810,000	1,563,146	0.534%
2006	298,380,000	597,965	0.200%
2008	304,090,000	1,074,225	0.353%
2010	309,350,000	1,536,799	0.497%
2012	314,000,000	1,181,016	0.376%
2014	318,560,000	909,812	0.286%
2016	323,130,000	770,846	0.239%
Sources: U.S. Census Bureau; Administrative Office of U.S. Courts			

[109] *See* AM. BANKR. INST., *Annual Business and Non-Business Filings by Year (1980-2016)*, https://s3.amazonaws.com/abi-org/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf.

[110] National population data obtained from the U.S. Census Bureau, *available at* http://www.multpl.com/united-states-population/table.

To determine initially if bankruptcy stigma had changed over time, I utilized the mean of the "suicide upon bankruptcy" survey question for each year of data and plotted it graphically with the bankruptcy rate over time. Figure 1 depicts this relationship. Figure 1 demonstrates two significant trends. First, from the inception of the Bankruptcy Code in 1978 through 2016, bankruptcy stigma appears to have increased over the past four decades, even considering minor peaks and valleys over time. Second, the perceived stigma surrounding bankruptcy based upon the GSS data appears to track closely with the annual fluctuations in bankruptcy filing rates. Stated differently, Figure 1 suggests a corresponding movement between bankruptcy stigma and the number of bankruptcy filings. The greater number of filings, the increased bankruptcy stigma, though this trend seems to diverge after 2010 when bankruptcy stigma continued to rise while the number of consumer bankruptcy filings fell.

Figure 1



To determine the association between bankruptcy stigma and the passage of time more precisely, several least-square regression models were developed. The dependent variable is the mean for the "suicide upon bankruptcy" survey question for thirty-nine years of data observations (N=39). Table 3 reports the results of the regression models.

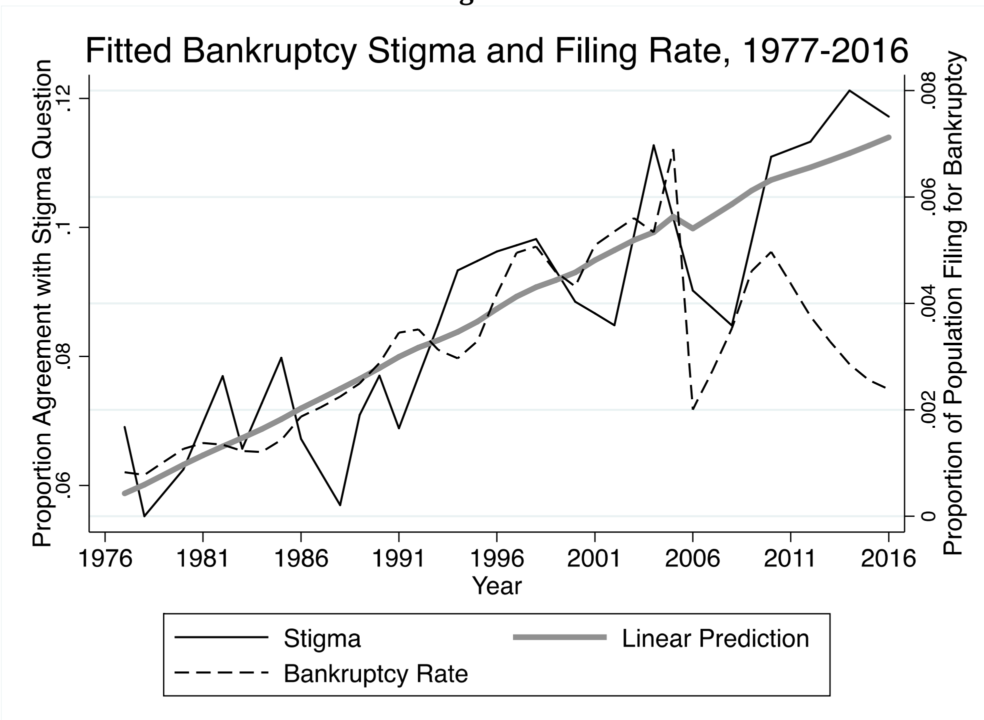
Table 3: OLS Regression Models

	Model 1		**Model 2**		**Model 3**		**Model 4**	
	Coef. (SE)		Coef. (SE)		Coef. (SE)		Coef. (SE)	
Year	0.0014	***			0.0014	***	0.0016	**
	(0.000)				(0.000)		(0.000)	
Bankruptcy Rate			6.8664	***	0.6607		0.1613	
			(1.637)		(1.154)		(1.523)	
Conservatism							0.0343	
							(0.034)	
Religiosity							0.0136	
							(0.049)	
Employment Rate							0.0047	
							(0.060)	
Intercept	-2.7935		0.0659		-2.6892		-3.2037	
Adjusted R^2	0.7828		0.3040		0.7787		0.7694	
BIC	-254.09	+	-208.68		-250.79		-241.58	
N	39		39		39		39	

Source: The General Social Survey
Notes: **p <.01, *** p <.001; + Denotes best fitting model

Model 1 is a bivariate regression using the year as the predictor variable. As provided in table 3 the beta coefficient for year (.0014) is statistically significant (p < 0.001); in other words, the probability of a real association between the "suicide upon bankruptcy" question and the passage of time is .999 or 99.9%. Moreover, the adjusted r-squared score of .7828 in Model 1 provides the proportion of the variance of the dependent variable that is associated with differences in the independent variable. That is, 78.28% of bankruptcy stigma as measured by the GSS survey is associated with the passage of time. To graphically demonstrate this association, Figure 2 displays the fitted regression line for Model 1, which demonstrates a linear trend of increasing bankruptcy stigma over time. Historical events influence the trend of course (e.g., the sharp rise in consumer bankruptcy filings in 2005 prior to the effective date of BAPCPA and the concomitant reduction in bankruptcy cases from 2006 to 2011), but nonetheless Figure 2 depicts a clear trend, namely, that the stigma associated with bankruptcy has increased over time.

Figure 2



Model 2 employs a second bivariate regression with bankruptcy stigma again as the dependent variable and the bankruptcy filing rate as the predictor variable. The bankruptcy filing rate is statistically significant as well ($p < 0.001$). However, the adjusted r-squared score in Model 2 reduces to .3040 (30.40%) so it does not explain the association between the variables as well as Model 1. This observation is corroborated by Model 3, wherein bankruptcy stigma is regressed on both predictor variables for year and the bankruptcy filing rate. As demonstrated in Table 3, the beta coefficient for year (.0014) remains statistically significant ($p < 0.001$), but the bankruptcy rate is no longer statistically significant ($p = 0.661$). Taken together, both variables provide an adjusted r-squared score of .7787, which explains 77.87% of the linear dependency of bankruptcy stigma on both year and bankruptcy filing rate, but again, bankruptcy rate is not statistically significant in Model 3, so it too is not the best fitting model. Further, the linear increase in stigma over time completely explains the association between the two in Model 3 and explains far more of the variance in stigma than the bankruptcy rate alone.

Model 4 introduces three social predictor variables, namely, political views, religiosity, and work status to determine if they had any effect on the linear trend demonstrated by Model 1. The variable for political views is the mean of conservativeness on a seven-point Likert scale as administered by the GSS. The religious activity variable is simply the mean for the amount of time a GSS respondent spends on religious activities, ranging from "never" to "several times a day." The work status was used as a proxy variable for unemployment and was recoded as a dummy variable to reflect a respondent as either being employed (full or part-time) or not currently working. Being more conservative, possessing a job, and greater religious activity were associated at the individual level with responses to the "suicide upon bankruptcy" survey question. However, as seen in Table 3, the beta coefficient for year (0.0016) remains statistically significant ($p < 0.01$), but the newly introduced predictor variables that might affect perceptions of bankruptcy stigma (that is, for example, the greater one's conservatism the greater expected stigmatization regarding bankruptcy) are not statistically significant in Model 4.

IV. Discussion and Conclusion

Contrary to the conclusions of the studies conducted by Buckley and Brining; Fay, Hurst, and White; and Gross and Souleles (the "declining stigma theory"),[111] the findings of this study suggest that bankruptcy stigma has steadily *increased* from the advent of the 1978 Bankruptcy Code to the present day. Moreover, this increase in stigma tracks the increase in the number of consumer bankruptcy filings over the years. Stated differently, as consumer bankruptcy filings increase, the data suggest that the stigma associated with such behavior increases as well, as measured by the respondents in the nationally representative GSS survey.

The results of this study corroborate arguments advanced by Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook well over a decade ago.[112] Largely in response to the "declining stigma theory" and the associated contentions of Zywicki and Jones, Sullivan, Warren, and Westbrook reanalyzed data from the Consumer Bankruptcy Project for the years 1981, 1991, and 2001 to determine if bankruptcy stigma had declined through the years. Sullivan and colleagues argued that if a decline in stigma accounted for the dramatic rise in the number of consumer bankruptcy filings in the 1980s and 1990s, there would be a greater presence of "better-off debtors filing for bankruptcy over time."[113] As noted above, however, that is not what Sullivan, Warren, and Westbrook found. Instead of finding more can-pay debtors in bankruptcy, the researchers found debtors in worse shape financially in 2001 than in 1981.[114] Consequently, Sullivan, Warren, and Westbrook advanced an alternate hypothesis, namely, the "increasing stigma hypothesis."[115] They described this theory in the following terms:

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[111] *See supra* notes 41–57 and accompanying text.
[112] *See generally* Sullivan, Warren & Westbrook, *Empirical Analysis, supra* note 76 (arguing that stigma of bankruptcy has increased over time, not decreased).
[113] *Id.* at 238.
[114] *Id.* at 239.
[115] *Id.* at 242–47.

> Perhaps stigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented even more distressed families from filing. In other words, if more families are in financial trouble, it may be that a shrinking—not a growing—proportion of those troubled families are opting for bankruptcy. The rising levels of distress would then produce an increase in bankruptcies, net of the reduction caused by increased stigma.[116]

The quantitative results presented here cannot directly answer the question why bankruptcy stigma has apparently increased over time. Perhaps, as Sullivan, Warren, and Westbrook suggest, stigma has increased over time because "bankruptcy filings have gone public"[117] in the age of Google and the Internet or as a result of the "credit industry's relentless public relations campaign"[118] in the 1990s and early 2000s prior to the enactment of BAPCPA. Based upon my qualitative work interviewing multitudes of current and former bankruptcy debtors about their experiences, none have reported a concern that their filing could somehow be discovered electronically or publicly on the Internet. Thus, I do not put too much stock in the first explanation. As to the second explanation, it could very well be the case that the increased media and political exposure publicly disseminated for well over a decade did have some measurable effect on bankruptcy stigma.[119] That is, the greater dissemination of the grand narrative of debtors abusing the bankruptcy process and immorally shirking their financial responsibilities during the 1990s and 2000s, the stronger likelihood of this story changing public perception to stigmatize those who file for bankruptcy.[120] Despite this second possibility, I offer my own explanation for the trend in persistent bankruptcy stigma over the past forty years.

From a structural standpoint, the explanation begins with the American ideals of individualism and self-reliance. Peter L. Callero defines the concept of "individualism" in the following terms:

> [I]ndividualism is a belief system that privileges the individual over the group, private life over public life, and personal expression over social experience; it is a worldview where autonomy, independence, and self-reliance are highly valued and thought to be

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[116] *Id.* at 242.
[117] *Id.* at 243.
[118] *Id.* at 244.
[119] *See* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 385 (2008) ("The stigma of bankruptcy . . . may have become stronger after the high-profile public debates of BAPCPA in which bankruptcy filers were portrayed as deadbeats who abused the system.").
[120] *See generally id.*

> natural; and it is an ideology based on self-determination, where free actors are assumed to make choices that have direct consequences for their own unique destiny.[121]

Callero argues that individualism is not only "one of the most dominant values in American society,"[122] but the "defining characteristic of American culture."[123] The American ideal of individualism and self-reliance pervades all aspects of social life, but perhaps none more than our economic system. Indeed, under this societal ethos of individualism and self-reliance in economic affairs, one's social position is the product of effort and talent.[124] Consequently, every individual is personally responsible for his or her class position.[125] Despite the multitude of structural forces that influence our economic class position and personal finances, Americans remain tied to the notion that through some combination of hard work, persistence, and raw talent, anyone can achieve financial success and stability.[126] This social ethos has grown stronger and gained influence over the past forty years with the advent of conservative neoliberalism and what political scientist Jacob S. Hacker labels the "Personal Responsibility Crusade."[127] These cultural messages endorsed by the Reagan administration and conservatives since the early 1980s have had an influential effect of peoples' attitudes towards personal responsibility and finances, paradoxically during a time of expanded income inequality, stagnant wages, and the evaporation of the social safety net.[128] This dynamic may help explain why the data from the GSS suggest the linear increase in bankruptcy stigma is associated with increased bankruptcy filings. That is, as a general observation, we have a disconnect in American society between our cultural beliefs and the reality of many, if not most, of our precarious financial social positions. Despite large swaths of Americans living at the financial edge, we as a society nevertheless remain steadfast in the belief that true meritocracy undergirds our economic lives.[129]

As Linda Coco has argued, BAPCPA itself represents an extension of neoliberalism's core principles.[130] Specifically, Coco argues that "BAPCPA's legal structures and categories are part of a larger structure manifesting a particular set of

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[121] PETER L. CALLERO, THE MYTH OF INDIVIDUALISM: HOW SOCIAL FORCES SHAPE OUR LIVES 15 (2d ed. 2013).

[122] *Id.*

[123] *Id.*

[124] MARTIN N. MARGER, SOCIAL INEQUALITY: PATTERNS AND PROCESSES 226 (6th ed. 2014).

[125] *Id.* at 227.

[126] STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 243 (2d ed. 2009) (stating that "[a]nyone made of the right stuff can seemingly overcome any obstacle or adversity and achieve success").

[127] JACOB S. HACKER, THE GREAT RISK SHIFT 51 (2008).

[128] *See generally* KEVIN T. LEICHT & SCOTT T. FITZGERALD, POSTINDUSTRIAL PEASANTS: THE ILLUSION OF MIDDLE-CLASS PROSPERITY (2007).

[129] SUSAN T. FISKE, ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US 9 (2011) ("[W]e endorse meritocracy most highly in the economic sphere, where we tolerate inequality according to merit.").

[130] Linda Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W. L. REV. 1, 10 (2012).

political and economic beliefs about debt and debt relations for the middle class that ultimately replicates and solidifies social divisions and inequalities."[131] Viewed in this manner, the reports and studies of decreased stigma surrounding bankruptcy and indebtedness during the 1980s and 1990s were used by conservatives as a moral high ground for the recalibration of the 1978 Bankruptcy Code, which institutional creditors and conservative politicians viewed as tipping the balance of creditor-debtor relations unjustifiably in favor of debtors. Reports of decreased bankruptcy stigma were opportunized by creditors and conservatives to change the then-existing Bankruptcy Code to increase creditors' recoveries and to reduce the number of bankruptcy petitions filed each year. Thus, reports of disappearing stigma were employed simply as a rationalization and justification for a conservative realignment of our national bankruptcy laws to the financial detriment of debtors nationwide through, among other things, increased costs to access bankruptcy through rising attorneys' fees along with a statutory mandate for debtors to live spartanly by application of the means test in BAPCPA.

The results of this study add fresh insight to the debate regarding the presence of societal stigma and bankruptcy. Contrary to several past studies on the issue and the musings of bankruptcy law scholars and commentators for the past thirty years, this new data set suggests that bankruptcy stigma has increased over the past four decades from the advent of the 1978 Bankruptcy Code to the present day. Since BAPCPA was predicated on the idea that consumers had lost their sense of internal shame and external stigma regarding bankruptcy and indebtedness, our nation's current consumer bankruptcy system is constructed upon a faulty premise, one that is effectively costing hundreds of thousands of consumer debtors dearly through increased bankruptcy filing fees and attorneys' fees in order to comply with the mandates BAPCPA wrought.

[131] *Id.* at 10–11.