

BANKRUPTCY STIGMA: PLAUSIBLE CAUSES FOR SHIFTING NORMS

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ABSTRACT

Traditionally, American society has viewed bankruptcy petitioners negatively. By the 1960s, a number of critics began to voice concerns about the dramatic rise in consumer bankruptcy filings in the United States. The critics predominantly attributed the increase in filing to an alleged decline in morals and shame associated with bankruptcy. Charges of fading bankruptcy stigma have recently intensified. A number of recent studies have attempted to correlate assertions of declining stigma in bankruptcy using indirect variables as proxies. These various attempts to measure bankruptcy stigma have been roundly criticized. The disapproval mainly centers on the studies' failure to directly measure changes in public perception about bankruptcy. A recent study attempted to measure evolving public perception about bankruptcy by examining public sentiments. The public's perception was measured by examining sentiments as manifested through newspaper articles published on the subject over the last 140 years. That study detected a noticeable shift, beginning in the 1960s, in public attitudes towards individuals filing personal bankruptcy.

This Article aims to identify some of the plausible reasons for the evolving public attitudes in the United States relating to personal bankruptcy. By shifting attribution of fault away from the financially troubled individual, American society may have developed a more positive attitude towards the individual that was manifested by less anger and more sympathy with the plight of the individual. Evolving attribution of fault for financial failure may

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have prompted the apparent changing perceptions beginning in the 1960s. However, a number of norm entrepreneurs, including the federal government, the media, and the local bankruptcy bar, may have caused or further reinforced these evolving perceptions. Bankruptcy stigma may have declined over the past decades not only because of evolving social norms, but also because of a decline in the potency of traditional norm enforcement mechanisms.

INTRODUCTION

Traditionally, American society has negatively viewed bankruptcy petitioners. Beginning in colonial America and forcefully continuing throughout the Victorian era and parts of the twentieth century, bankruptcy petitioners were subjected to heavy penalties, including imprisonment and flogging.¹ Furthermore, various states regularly engaged in shaming practices, including publicly cutting the bankrupt's hair, branding the debtor's palm with the letter "T" for "thief," and publicly piercing the debtor's ear with a nail before cutting it off. Contemptuous public discourse about bankrupts, such as commonly referring to them as criminals, thieves, and slaves, further degraded and humiliated bankrupts.²

By the 1960s, a number of critics voiced concerns about the dramatic rise in U.S. consumer bankruptcy filings. The critics mostly attributed the increase in filings to an alleged decline in morals and shame associated with bankruptcy. Charges of fading bankruptcy stigma have recently intensified. A

¹ See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900*, at 249 (1974) (stating debtor's prison was widespread in the American colonies by the close of the seventeenth century); BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 79 (2002) ("The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt . . ."); *id.* at 81 ("So accepted was the idea of imprisonment for debt in early America that opposition to it did not appear until the 1750s . . ."); GEORGE SULLIVAN, *THE BOOM IN GOING BUST: THE THREAT OF A NATIONAL SCANDAL IN CONSUMER BANKRUPTCY* 29 (1968) (stating that after the American revolution, "more people were imprisoned for debt than for any other reason"); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 *TENN. L. REV.* 487, 518 (1996) (asserting debtor's prison was pervasive during the colonial period).

² See Joseph S. Pomykala, *Bankruptcy Laws: The Need for Reform*, in *LEGAL ENVIRONMENT OF BUSINESS*, 178, 180 (Kurt Stanberry ed., 1st ed. 2000) ("In Colonial America, the palms of bankrupts were branded with a "T" for thief. Punishment under Pennsylvania's Bankruptcy Act of 1785 borrowed from English custom and included standing the bankrupt in a public place for two hours then with an ear nailed to the pillory and then cut off. The 'earmark' also served to mark the debtor as not being a reputable person with whom to contract debts."); Joseph Pomykala, *Bankruptcy's Origins in Debtor Perpetrated Crime* 4 n.2 (Oct. 2000) (unpublished manuscript, on file with author) (noting that in Colonial America, the bankrupt's hair commonly cut off).

recent study attempted to measure evolving public perception about bankruptcy by examining the general public's sentiments about bankruptcy as manifested in newspaper articles published on the subject in the last 140 years. That study detected a noticeable shift, beginning in the 1960s, in public attitudes towards individuals who file personal bankruptcy.³ This Article aims to identify plausible reasons for these shifting societal sentiments.

This Article begins by articulating the probable reasons for the traditional stigmatization of bankruptcy in the United States. Part II summarizes recurring public assertions that the stigma traditionally associated with bankruptcy has declined in the recent past. This Article concludes by advancing plausible reasons for the noticeable shift in public attitudes towards bankrupts during the 1960s.

I. THE REASONS FOR STIGMA IN BANKRUPTCY

Stigma is the social devaluation of a person who is deviant from or contrary to a social unit's norm.⁴ The deviant characteristic can be physical (disability, ugliness), a type of conduct (criminal, homosexual), or a group affiliation (religion, nationality, or race).⁵ A behavioral norm is a shared belief of a particular social unit that individuals should act in a certain way under certain circumstances.⁶ Although pluralistic societies may have various conceptions of acceptable conduct, there is likely some broad understanding of what generally constitutes acceptable conduct.⁷

³ See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES IN LAW (forthcoming 2006) (manuscript at 323, on file with author).

⁴ See ROBERT M. PAGE, STIGMA: CONCEPTS IN SOCIAL POLICY TWO I (1984) ("In the final analysis, stigma might best be considered to be the negative perceptions and behaviors of so-called normal people to all individuals who are different from themselves."); SHLOMO SHOHAM, THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIATION 15 (1970) ("An individual who differs in his personality or behaviour, or is considered different in a way that infringes the group's normative system, is liable to be stigmatized as being deviant . . ."); Mark C. Stafford & Richard R. Scott, *Stigma, Deviance, and Social Control: Some Conceptual Issues*, in THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 80 (Stephen C. Ainsley et al. eds., Plenum Press 1986).

⁵ See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4 (1963).

⁶ See Stafford & Scott, *supra* note 4, at 81.

⁷ See PAGE, *supra* note 4, at 3 ("Indeed, any classification [of social norms] is likely to be deficient in this respect given the diversity of opinion over the question of what actually constitutes a social norm. Nevertheless, there is likely to be some agreement concerning what can loosely be regarded as the 'major' social norms in society (many of which will be embodied in legal codes).").

As each social unit adopts common beliefs about what is its acceptable behavior for its members, it will stigmatize conduct held to be unacceptable.⁸ Because stigma is a product of cultural forces, understanding stigma requires an appreciation of how individuals in a social unit perceive their culture.⁹ Furthermore, because culture changes over time, so does stigma.¹⁰

Society tends to regard certain non-conforming characteristics as more deviant than other nonconforming characteristics.¹¹ For example, society is especially unsympathetic towards nonconforming characteristics that are the individual's own fault.¹² Generally, deviant individuals whose non-conforming characteristics are physical or based on group affiliation receive some degree of social acceptance because these individuals are not considered blameworthy for their deviances. In contrast, individuals with nonconforming *conduct*-related characteristics receive harsher treatment because society holds the individuals personally responsible for their nonconformity.¹³

Traditionally, the stigma associated with bankruptcy arose partly because the bankruptcy was deemed the petitioner's fault.¹⁴ Rather than attributing the non-conforming acts of failing to repay debt and filing for bankruptcy to external factors, such as economic conditions, medical catastrophe, or family dissolution, societies attributed bankruptcies to personal failures, such as overspending, overindulging, and financial irresponsibility.¹⁵

Beyond attributing fault to the petitioner himself, bankrupts have traditionally been stigmatized because bankruptcy implied conduct contrary to

⁸ See Gaylene Becker & Regina Arnold, *Stigma as a Social and Cultural Construct*, in THE DILEMMA OF DIFFERENCE, *supra* note 4, at 40.

⁹ *Id.* at 55; Stephen C. Ainlay et al., *Stigma Reconsidered*, in THE DILEMMA OF DIFFERENCE, *supra* note 4, at 3 (“Some of the particular attributes that disqualify people from full acceptance vary between cultural realms and across historical periods.”); Becker & Arnold, *supra* note 8, at 40 (“A system of cultural beliefs is guided by a template of culture that individuals carry with them, underlying thought and action.”).

¹⁰ See Ainlay et al., *supra* note 9, at 3–4.

¹¹ See IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS 4 (1981) (“Stigmas differ in the extent to which the possessor is likely to be held responsible by judges for his or her deviance. . . . Negative attitudes about the obese, for example, are tied to the belief that they could control their weight if they really wanted to.”); PAGE, *supra* note 4, at 6; Bernard Weiner et al., *An Attributional Analysis of Reactions to Stigmas*, 55 J. PERSONALITY & SOC. PSYCHOL. 738, 745 (1988) (finding people with controllable stigmas are likely to be treated worse than people with uncontrollable stigmas).

¹² *Id.*

¹³ *Id.*

¹⁴ See Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL’Y 205, 223 (2003).

¹⁵ See *id.*

the traditional American norms of trust, honor, and thrift.¹⁶ The general public viewed bankruptcy as a violation of trust between a debtor and his creditors.¹⁷ The debtor's betrayal prompted creditors and society to share outrage towards the debtor, which led to stigmatization.¹⁸ The public viewed filing bankruptcy as contrary to established norms of honor because bankruptcy was traditionally associated with improvident, deceitful, or criminal behavior.¹⁹ Lastly, bankruptcy was stigmatized because it suggested conduct inconsistent with the traditionally cherished personal attribute of thriftiness.²⁰

II. THE PERCEIVED DECLINE IN BANKRUPTCY STIGMA

Manifestations of bankruptcy stigma continue to persist today.²¹ Nonetheless, jurists, government officials, scholars, members of the credit industry, as well as popular culture media report the stigma traditionally associated with bankruptcy has declined in recent past. Recently, lawyers and bankruptcy trustees have also reported a decline in bankruptcy stigma.²² They largely attribute this to the increased number of bankruptcy referrals and filings.²³

¹⁶ See Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 135 (1989).

¹⁷ See McIntyre, *supra* note 16, at 135.

¹⁸ See *id.* (suggesting bankruptcy stigma may be the product of a perception that it amounts to a betrayal of trust relationships).

¹⁹ See IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 33 (1st ed. 1990) (describing how bankrupts, who were subjected to significant penalties, were traditionally viewed in England as "a species of criminal"); COTTON MATHER, *A FLYING ROLL, BROUGHT FORTH TO ENTER INTO THE HOUSE AND HAND OF THE THIEF* 16 (1713) ("But then, To *Borrow*, without any due care to *Repay* or to *Return* that which has been borrowed; this is most certainly so near to a sort of *Stealing*, that it will bring one into a *Bundle* with that sort of *Tares*.").

²⁰ See DAVID M. TUCKER, *THE DECLINE OF THRIFT IN AMERICA: OUR CULTURAL SHIFT FROM SAVING TO SPENDING* ii (1991) (detailing America's long-running affair with the virtue of thrift and antipathy towards consumer debt and consumption).

²¹ See Efrat, *supra* note 3, at 335–38.

²² See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 545 (1993) ("Many lawyers said the sense of social stigma about bankruptcy has been waning in recent years . . ."); Diana C. Bork, *Why Personal Bankruptcies Are Surging*, WALL ST. J., Jan. 29, 1997, at A11 ("The bankruptcy code was also premised on the idea that a sense of personal responsibility would deter bankruptcy filings—filing carried a heavy stigma. That's not so today.")

²³ See Braucher, *supra* note 22, at 545 (noting several lawyers attributed increased client referrals to the declining stigma to bankruptcy); *House Committee Looks at Bankruptcy's Role in Consumer Credit Crunch*, 6 CONSUMER BANKR. NEWS 3 (Oct. 5, 1996) ("My own experience as a bankruptcy trustee in consumer bankruptcy cases is that consumers are making the decision to file for a [C]hapter 7 bankruptcy quicker and with less forethought or anxiety than in the past. The ease and simplicity of the filing process, together with the lack of any meaningful stigma attached to being a [C]hapter 7 debtor, contributes to this phenomena."); George J. Wallace, *Taking Aim at Consumer Bankruptcy*, 173 BANKERS MAG. 26, 27 (Mar.–Apr. 1990)

Similarly, some judges agree the stigma has declined as reflected in public statements and judicial decisions finding evidence of bankruptcy filing non-prejudicial and hence admissible at trial.²⁴ Members of the executive and legislative branches of the federal government also observed a recent decrease in personal bankruptcy stigma.²⁵

While acknowledging stigma remains a deterrent to bankruptcy filing, many academics and private research institutions have recently asserted bankruptcy stigma has declined.²⁶ The credit industry is perhaps the most

(“Increasing use of bankruptcy in business and among consumers has significantly reduced the stigma that had discouraged consumers from more widespread use of the technique in the past.”).

²⁴ See, e.g., *State v. Galdine*, No. 91-2400-CR, 1992 WL 276571, at *3 (Wis. Ct. App. July 15, 1992) (finding evidence of a prior bankruptcy had limited prejudicial effect, particularly in light of the reduced stigma associated with filing bankruptcy); Edith H. Jones, *Foreword: The Bankruptcy Galaxy*, 50 S.C. L. REV. 269, 271 (1999) (“At one time, personal shame and social stigma would have bedeviled people filing bankruptcy, and their credit rating would have been ruined. That is no longer true.”); Burton Perlman, *A View from the Bench*, 61 U. CIN. L. REV. 511, 517 (1992) (“No one doubts that there is a stigma to the filing of bankruptcy, though there is a sense that the forcefulness of the stigma is fading.”).

²⁵ See 144 CONG. REC. 125, 650 (1998) (“Bankruptcy should be difficult, and the moral stigma that used to be associated with bankruptcy ought to be resurrected.”) (statement of Sen. Grassley); 144 CONG. REC. S10459-01, S10471 (daily ed. Sept. 17, 1998) (“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.”); (statement of Sen. Hatch) 144 CONG. REC. 74, 4367 (1998) (“The stigma that was once attached to bankruptcy has disappeared.”) (statement of Congresswoman Tauscher); 146 CONG. REC. 142, 11484 (2000) (“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.”) (statement of Sen. Kerry); Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 69 (“The only reasonable explanation [for the dramatic increase in bankruptcy filing] is that the stigma of bankruptcy is all but dead.”) quoting Congressman George Gekas); *Bankruptcy Reform: Balancing the Interests of Debtors and Creditors*, CONG. DIG., Dec. 1998, at 311 (“Today nobody cares about morality anymore. There is no moral stigma. Therefore, people go bankrupt.”) (statement of Congressman Jerrold Nadler); *House and Senate Committees Meet to Consider Bankruptcy Reform*, 8 CONSUMER BANKR. NEWS (Apr. 8, 1999) (in advocating bankruptcy reform, Senator Dodd asserted “the social stigma of bankruptcy is gone”); Julie Kosterlitz, *Over the Edge*, 29 NAT’L J. 870, 871 (1997) (“Personal bankruptcies are soaring because Americans have lost their sense of shame.”) (quoting Alan Greenspan, Chairman of the Federal Reserve); Bill McCollum, *Bankruptcy Law—Reform or Leave Whole?*, WASH. TIMES, Jan. 4, 1998, at B3 (“The social stigma associated with filing for bankruptcy has rapidly eroded. . . .”).

²⁶ See *The Rise in Personal Bankruptcy: Causes & Impact, Testimony Before Subcomm. on Commercial and Admin. Law and H. Comm. on Judiciary*, 105th Cong. (1998), available at 1998 WL 105080 (“[W]e believe there are non-financial issues behind the bankruptcy increase, including . . . a reduction in the social stigma once associated with bankruptcy.”) (statement of Stuart A. Feldstein, President of SMR Research Corp.); *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing on S. 105-89 Before the Subcomm. on Admin. Oversight and the Courts S. Judiciary Comm.*, 105th Cong. 141 (1997) (“Also noticeable is a profoundly different perception toward bankruptcy, consistent with a larger secular change in attitude toward debt and personal responsibility. Unlike a generation ago, there is no shame in debt any more; the stigma associated with bankruptcy has largely disappeared.”) (statement of the American Bankruptcy Institute); LAWRENCE M. FRIEDMAN, *LAW & SOCIETY* 155 (1977); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY L. WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY & CONSUMER CREDIT IN AMERICA* 337

vocal about the decline of stigma in bankruptcy.²⁷ Some in the credit industry point to increased filings by debtors who have not previously shown serious delinquency as evidence of declining stigma.²⁸ Additionally, some in the lending community point to interviews with bankrupts who express no remorse for filing and who exhibit a relaxed attitude towards bankruptcy as additional evidence of reduced stigma.²⁹

Similarly, media outlets persistently have suggested in editorial reports and investigative features that bankruptcy stigma has largely eroded.³⁰ Confirming

(1989) [hereinafter "AS WE FORGIVE OUR DEBTORS"] ("It may be that the social stigma of bankruptcy has declined in recent years, in part because of the bankruptcies of so many famous corporations and prominent individuals."); Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 451 (2001) (reviewing THERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000)) ("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. This decline in shame and stigma is felt most powerfully with respect to middle-class and upper-income debtors."); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 180 ("In our view, the evidence now available tends to suggest that the recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social stigma traditionally accompanying bankruptcy . . ."); Joseph Pomykala, *Bankruptcy Reform: Principals and Guidelines*, REGULATION (Cato Inst., Washington, D.C.), 1997, at 8, available at <http://www.cato.org/pubs/regulation/reg20n4g.pdf> ("The moral cost of stigma felt by those who stiff their creditors has faded. Bankruptcy is no longer an embarrassment.").

²⁷ See, e.g., Albert B. Crenshaw, *Hill Panel Seeks Answers to the Bankruptcy Boom*, WASH. POST, Dec. 8, 1996, at H1 ("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."); Dawn Kopecki, *American Debtors Turn to Chapters 7, 13; Bankruptcy Process Becomes Easier; Stigma of Insolvency Goes Belly Up*, WASH. TIMES, Feb. 15, 1999, at A1 ("The stigma of filing for bankruptcy seems to be diminishing." (quoting the president of the Credit Union National Association)).

²⁸ See *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing on S. 105-89 Before the Subcomm. on Admin. Oversight and the Courts and S. Judiciary Comm.*, 105th Cong. 76 (1997) ("Increasingly, notices of bankruptcy filings surprise creditors. Almost half of the time the debtor has shown no serious delinquency prior to the notice. That is evidence that the stigma formerly attached to bankruptcy has faded significantly . . .") (statement of Don Banks, Director, Legal Services for Retailers National Bank).

²⁹ See VISA, *QUALITATIVE RESEARCH: BANKRUPTCY PROCESS 19* (1997) ("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 . . .").

³⁰ See, e.g., Trevor Armbrister, *Nation of Deadbeats?*, READER'S DIG., Sept. 1998, at 167, 168 ("Some consumers also view bankruptcy as the newest entitlement, a cost-free way to enjoy the American Dream."); Damon Darlin, *The Newest American Entitlement*, FORBES, Sept. 8, 1997, at 113; 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."); Michael Higgins, *Putting Back the Bite*, 84 A.B.A. J., June 1998, at 74 (noting bankruptcy's diminishing social stigma as filings have become more common); Jacob M. Schlesinger, *House Approves Bankruptcy Overhaul Amid Criticism Bill May Be Too Tough*, WALL ST. J., May 6, 1999, at A28 (reporting lenders and legislators blame the decline in bankruptcy stigma for the filing surge); Sandra Ward, *Bailing Out*, BARRONS, 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

these pronouncements, recent polls of the general public have indicated that, by and large, Americans believe bankruptcy has less social stigma than in previous years.³¹

III. THE PLAUSIBLE REASONS FOR THE DECLINE IN BANKRUPTCY STIGMA

While some empirical studies dispute these assertions,³² a number of the studies attempting to measure bankruptcy stigma conclude it is lessening.³³

population, the stigma that formerly accompanied it is gone.”); Jae-Bok Young, *Personal Stigma Eases as Bankruptcy Lines Grow Even Longer*, CHRISTIAN SCI. MONITOR, Apr. 8, 1993, at 1; Editorial, *Bankruptcies*, RICHMOND TIMES-DISPATCH, Jan. 9, 1998, at A12 (“The reasons for the surge in bankruptcies include: excessive consumer debt, the disappearance of the social stigma formerly associated with bankruptcy . . .”).

³¹ For example, Senator Charles Grassley referred to a public opinion poll that found that 85% of Americans believe bankruptcy has less stigma than in the past. See Todd Zywicki, *Why So Many Bankruptcies and What to Do About It: An Economic Analysis of Consumer Bankruptcy Law and Bankruptcy Reform* 83 n.317 (George Mason Univ. Sch. of Law’s Law & Econ. Working Paper Series, Paper No. 03-46, 2003), available at <http://www.law.gmu.edu/faculty/papers/docs/03-46.pdf>; see also James Carter, *The Bankrupt 1990s*, J. COMM., July 10, 1997, at 9A (“As more Americans declare bankruptcy, the stigma once associated with it has diminished. In a recent USA Today poll, 43 percent of the general public said bankruptcy was an acceptable way to overcome financial difficulties.”).

³² See, e.g., THERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 32 (2000) (“Discharging debts that were honestly incurred seems the antithesis of middle-class morality. Public identification as a bankrupt debtor is embarrassing at best, devastating at worst. . . . Bankrupt debtors have told us of their efforts to conceal their bankruptcy.”); Kartik Arthreya, *Shame As It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK RICH. ECON. Q., Spring 2004, at 1, 3, available at http://www.richmondfed.org/publications/economic_research/economic_quarterly/pdfs/spring2004/arthreya.pdf (“Therefore, a main conclusion of this article is that stigma is by no means dead.”); Teresa A. Sullivan, *Bankruptcy and the Social Meaning of Credit* 1, 10 n.6 (June 1991) (“An appreciable number of respondents in the General Social Survey still report that bankruptcy is an acceptable reason for committing suicide . . .”) (unpublished manuscript, on file with author); Deborah K. Thorne, *Personal Bankruptcy Through the Eyes of the Stigmatized: Insight Into Issues of Shame, Gender and Marital Discord*, 73, 78–79, 94, 267 (May 2000) (unpublished Ph.D. dissertation, Washington State University) (on file with author) (discussing survey results of petitioners finding that prior to filing, the majority of bankruptcy petitioners viewed bankruptcy as stigmatizing, were reluctant to file, and did not want their friends and family to know about their filing); Michelle J. White, *Why Don’t More Households File for Bankruptcy?* 14 J.L. ECON. & ORG. 205 (1998) (estimating, based on a national sample, that at least 15% of households could benefit from filing for bankruptcy, yet the personal filing rate represents less than 1% of the adult population and suggesting one explanation for the disparity is the powerful influence of stigma); Frederick C. Yeager, *Personal Bankruptcy and Economic Stability*, 41 S. ECON. J. 96, 102 (1974) (“[A] contention that personal bankruptcy levels increased because of a decline in the ‘puritan ethic’ is not supported by the evidence.”).

³³ VISA U.S.A., INC., CONSUMER BANKRUPTCY: CAUSES AND IMPLICATIONS 4 (1996), available at <http://govinfo.library.unt.edu/nbrcreport/g2a.pdf> (claiming that a reduction in stigma and changes in other social factors prompted the rise in personal bankruptcy filings between 1981 and 1996); F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 194 (1998) (concluding a lessening of stigma and other social norms is responsible for the increase in personal bankruptcy filing rates between 1980 and 1991); Scott Fay et al., *The Bankruptcy Decision: Does Stigma Matter?* (Univ. of Mich., Working Paper No. 98-01, 1998), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=70915 (asserting a

One such study examining newspaper articles published in the *New York Times* over the past 140 years discovered a noticeable shift in public attitude towards bankruptcy beginning in the late 1960s.³⁴ This emerging norm for personal bankruptcy is perhaps a product of shifting societal attribution of fault for financial failure. Societal attribution of fault for financial failure has evolved from a perception of primarily individual fault for financial failure to a perception that personal financial demise is caused by external, uncontrollable events. The initial changes in perceptions in the 1960s, triggered by the evolving attribution of fault for financial failure, were brought about or further reinforced by a number of norm entrepreneurs,³⁵ including the government, media, and local bankruptcy bar.³⁶

Aside from evolving norms, bankruptcy stigma has declined because of a weakened norm enforcement mechanism. Generally, norms are enforced through an internalized sense of duty or through a fear of external non-legal sanctions, or both.³⁷ Possibly, both guilt internalization and external non-legal sanctions have recently declined.³⁸ Guilt internalization may have lost much of its force partly due to weakened trust relationships in the credit market and partly due to the public's considerably increased awareness about bankruptcy filings.³⁹ Fear of external, non-legal sanctions may have lost its vitality in inhibiting bankruptcy. This lost vigor may be due to decreased shaming and ostracizing of bankrupts as well as the decline in available enforcement mechanisms, as reflected in waning community cohesiveness.⁴⁰

The next section discusses the plausible causes for the evolving norms in personal bankruptcy in the United States. A discussion of the decline in norm enforcement mechanisms follows.

reduction in bankruptcy stigma contributed to the increase in personal bankruptcy filing rates in the early 1990s); David B. Gross & Nicholas S. Souleles, *Explaining the Increase in Bankruptcy and Delinquency: Stigma Versus Risk-Composition* 27–28 (Wharton Fin. Insts. Ctr., Working Paper No. 98-28-B, 1998), available at <http://knowledge.wharton.upenn.edu/papers/53.pdf> (claiming a reduction in stigma led to a rise in the number of bankruptcy filings between 1995 and 1997).

³⁴ See Efrat, *supra* note 3.

³⁵ See *infra* note 56.

³⁶ See *infra* notes 56–112 and accompanying text.

³⁷ See Christine Horne, *Sociological Perspectives on the Emergence of Social Norms*, in *SOCIAL NORMS* 3, 4–5 (Michael Hechter & Karl-Dieter Opp eds., 2001); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

³⁸ See *infra* Part III.A.5.a.

³⁹ See *infra* notes 135–44.

⁴⁰ See *infra* Part III.A.5.b.

A. *Evolution of Norms in Personal Bankruptcy*

1. *Attribution Theory and the Evolving Norms in Bankruptcy*

Norms about personal bankruptcy evolved because of shifting societal attribution of fault for financial failure. This shift was a product of society's growing tendency, beginning in the 1960s, to shift blame for individual failure away from personal towards environmental factors.⁴¹ Furthermore, this shift stemmed from an increasingly favorable view of consumerism and debt undertaking.⁴²

The decline in bankruptcy stigma reflects evolving norms in society towards personal bankruptcy filings, shifting from an unreceptive to a more tolerant norm. Stigma is the social devaluation of a person who deviates from the social unit's norm.⁴³ Social norms are non-legal rules or obligations to which a majority of individuals feel compelled to adhere.⁴⁴

The evolving norms in personal bankruptcy may have been prompted by society's changing perceptions about individual conduct relative to financial distress. Beginning in the 1960s, the traditional societal norm that bankruptcy was not an acceptable response to financial hardships was significantly challenged.⁴⁵ In the absence of the traditional consensus in society that financially troubled individuals should forebear from filing for bankruptcy at all costs, the act of filing bankruptcy was no longer viewed as deviant.⁴⁶

Attribution theory describes societal attitude towards individual failure as a product of the failure's perceived cause.⁴⁷ Perceived cause gives rise to a variety of affects. For example, if society perceives bankruptcy as the result of the debtor's lack of efforts or will (referred to as controllable stigma), society would develop negative attitudes towards the individual as manifested through anger, punishment, neglect, or incomprehension.⁴⁸ In contrast, if society attributes bankruptcy to individual incompetence or externally imposed challenges (referred to as uncontrollable stigma), society would develop more

⁴¹ See *infra* Part III.A.2

⁴² See *infra* Part III.A.3.

⁴³ See PAGE, *supra* note 4, at 1; SHOHAM, *supra* note 4, at 15; Stafford & Scott, *supra* note 4, at 80.

⁴⁴ Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1238–39 (2001); Home, *supra* note 37, at 5.

⁴⁵ See Efrat, *supra* note 3, at 347.

⁴⁶ *Id.*

⁴⁷ See Weiner et al., *supra* note 11, at 739.

⁴⁸ See *id.*

positive attitudes towards the individual as manifested through pity or sympathy.⁴⁹ Prior research suggests the categorization of controllable stigma and uncontrollable stigma is not fixed.⁵⁰ Instead, perceptions of most controllable stigmas can be altered in the direction of uncontrollability, which produces more positive affective reactions.⁵¹

2. *Repudiation of Personal Responsibility and the Shifting of Fault Away from the Petitioner*

Societal attribution of fault for financial failure and bankruptcy has evolved from a perceived individual financial failure to a perception that personal financial demise is largely a product of events beyond the individual filer's control. This observation is consistent with other literature suggesting that, beginning in 1960s, there has been an explosion of entitlement claims, which emphasize personal fulfillment and liberation and repudiated personal responsibility.⁵² The explosion of rights and entitlements is alleged to have been accompanied by a corresponding decline in personal responsibility, manifested by the tendency to shift blame from personal fault to external causes.⁵³

The U.S. public traditionally viewed bankruptcy filing as an indication of fraud, deceit, and moral depravity.⁵⁴ This negative perception toward bankrupts could be considered a product of the perceived cause of the bankruptcy filing. Traditionally, filing was viewed as onset-controllable because the bankruptcy filing was viewed largely as an intentional, preventable conduct that the individual controlled and should have been able to prevent.⁵⁵

⁴⁹ See *id.* A recent study on bankruptcy filings among farmers in Canada made similar observations regarding the connection between stigma and fault attribution. See Cameron R. Harder, *The Shame of Farm Bankruptcy: A Sociological and Theological Investigation of Its Effect on Rural Communities* (1999) (unpublished Ph.D. dissertation, University of St. Michael's College), available at http://www.cameronharder.com/publications_presentations/index.htm (explaining that, among farmers in Canada, shame is prevalent with bankruptcy because the public perceives it to be the debtor's fault).

⁵⁰ See Weiner et al., *supra* note 11, at 745–46.

⁵¹ See *id.*

⁵² Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1018 (1994) (“[F]or the communitarians, the 1960s were a Pandora’s Box because that decade unleashed a dangerous explosion of claims of entitlements, an ideology of personal fulfillment and liberation, and a pervasive challenge to traditional morality and all forms of traditional authority. Such a challenge undermined the solidarity, security, and strong family values that held sway in the 1950s and repudiated a traditional morality that emphasized self-control, self-restraint, and self-discipline.”).

⁵³ *Id.*

⁵⁴ See Efrat *supra* note 3, at 332–38.

⁵⁵ See *id.* at 347–48.

Because the public generally views onset-controllable behaviors with little sympathy,⁵⁶ bankruptcy filings were associated with much resentment and disgust.⁵⁷

Over time, however, the cause of financial distress and ultimately bankruptcy was attributed to events beyond the debtor's control rather than to the debtor's conduct.⁵⁸ Starting in the 1960s, newspaper articles began discussing bankruptcy filings in the context of events beyond the petitioner's control.⁵⁹ Those articles frequently pointed to economic and personal conditions beyond the debtor's control that precipitated bankruptcy filings (i.e., recession, high inflation, unemployment, stock market losses, a decline in housing prices, and an increase in foreclosures, overall personal debt, auto accidents, illness, divorce, medical bills, and other unforeseen hardships).⁶⁰ In addition, some articles blamed third parties, such as the government's failure to provide an adequate safety net, lawyers' increased advertising of bankruptcy related services, and creditors' reckless lending practices.⁶¹

3. The Rise in Favorable Disposition Towards Consumerism and Debt Undertaking Shifted Attribution of Fault for Bankruptcy Filing Away from the Petitioner

The evolving norms in personal bankruptcy were also prompted by society's changing perceptions about consumerism and debt undertaking. This further shifted blame for bankruptcy filing away from the petitioner.⁶²

Traditionally, thriftiness was widely endorsed and followed by Americans.⁶³ Borrowing and spending money for consumption purposes was reviled in traditional American society.⁶⁴ The distaste for debt was a product

⁵⁶ See *supra* note 34.

⁵⁷ See Efrat, *supra* note 3, at 347–48.

⁵⁸ See *id.* at 348.

⁵⁹ *Id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 349.

⁶² See Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in SOCIAL NORMS *supra* note 37, at 49 [hereinafter *The Evolution of Social Norms*] (indicating that changing circumstances, such as new economic conditions, can trigger a change in norms).

⁶³ See ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 33–34 (2000) (describing the pervasiveness of thriftiness in American history); TUCKER, *supra* note 20, at viii (“The United States was born in a thrift culture which continued its dominance for more than a century, a culture insisting on frugality as the best means for promoting the general welfare.”).

⁶⁴ See MANN, *supra* note 1, at 56 (describing deep-rooted antipathy among Americans in the eighteenth century towards consumer debt undertaking); TUCKER, *supra* note 20, at 9–10 (describing strong sentiments

of a combination of robust Church influence and a prevailing belief that a successful government is dependent on the self-restraint of its people.⁶⁵ Because the use of personal credit was discouraged, failing to honor one's promise to repay a debt was viewed with great antagonism.⁶⁶ Hence, individuals who experienced financial trouble arising out of personal consumption were not favorably regarded because society attributed financial failure to the individual's reckless and immature handling of his financial affairs.⁶⁷

Beginning in the 1920s and continuing into the 1960s, society embraced consumerism and learned to accept, even relish, debt undertaking for personal consumption.⁶⁸ Following World War I, credit became available in America.⁶⁹ By the end of World War II, American attitudes towards credit changed as

against debt undertaking in the early days of the American tradition that were displayed in a book written in 1757 by Benjamin Franklin, which referred to debt as the number one vice.); Lloyd Klein, *Going for Broke: The Socio-Legal System and the Conceptual Delineation of Consumer Bankruptcy 15* (Aug. 1995) (unpublished manuscript, on file with author) (suggesting consumer debt was viewed with disapproval by most Americans until the 1920s); Sullivan, *supra* note 32, at 4 (“A fear of credit was well established among many Americans even before the Great Depression had begun. . . . [A]n aversion to private debt was usually considered a sign of character.”).

⁶⁵ See TUCKER, *supra* note 20, at 13 (“The American republic emerged amidst feverish declarations of frugality, thrift, and public virtue. Popular histories of classical republics insisted that this form of government survived only as long as citizens practiced the self-restraining virtues.”); *id.* at 18 (“The new Protestant temperament thrived in the North American colonies, where Puritan emphasis on self-mastery built an effective conscience—a superego—that channeled human drives into religion, work, and saving.”).

⁶⁶ See Sullivan, *supra* note 32, at 4 (“Because the use of credit was viewed with ambivalence, bankruptcy was viewed with even greater ambivalence.”).

⁶⁷ For example, during floor debate on bankruptcy legislation in 1910, one Congressman strongly criticized any legislation that forgives petitioners for undertaking debts for consumption purposes. See 45 CONG. REC. 2, 272 (1910) (“Mr. Speaker, I can not refrain from calling attention to the fact that there is all over this country complaint against the bankruptcy law by the retail merchants, because some dishonest people make it a practice to go into debt to these merchants for the necessaries of life and then seek the bankruptcy courts to get relief from the payment of such debts. . . . We ought to go back to the old-fashioned primitive doctrine that requires the payment of all honest debts . . .”).

⁶⁸ See Klein, *supra* note 64, at 16 (suggesting that beginning in the 1920s, a consumption society was emerging in the United States with an emphasis on spending and material possessions, thereby undermining traditional values of thrift); *id.* at 15 (“There was a time when consumer debt was viewed with disapproval by most people. Social attitudes changed when middle and working class families, since the 1920s, relied upon relatively high installment credit payments. . . .”); *id.* at 19 (“The emergent consumer society featured a culture dependent upon increased consumption. Debt becomes an important mainstay in both the consumer culture and everyday economic activity.”); Lloyd Klein, *Consumer Credit and the Institutionalization of Consumerism 15* (1993) [hereinafter Klein, *Consumer Credit*] (unpublished Ph.D. dissertation, City University of New York) (reporting that “consumer credit use spread at a [sic] phenomenal rates [in the United States] in the period between 1920 and 1967.”) (on file with author).

⁶⁹ See Klein, *supra* note 64, at 15, 16 & 19; Klein, *Consumer Credit*, *supra* note 68, at 15.

consumer credit became widespread.⁷⁰ By the 1960s, debt accumulation for purposes of material acquisition was well entrenched in American society.⁷¹ Correspondingly, the virtue of thriftiness began eroding in the 1920s and ended by the 1960s, mirroring the dramatic decline in savings among American families during that time.⁷²

This rampant growth in American consumerism was in part the result of an aggressive campaign by the retail industry advertising the importance of fulfilling one's desires rather than one's needs.⁷³ Concurrently, consumerism was manifested by increased demand for household durable goods and the corresponding increase in supply of goods through mass production.⁷⁴ Along with the rise in consumerism, the credit industry was instrumental in transforming norms regarding debt undertaking.⁷⁵ The credit industry enabled this norm transformation through active marketing and the extension of consumer credit to the masses.⁷⁶ By the 1960s, American attitudes towards debt undertaking had radically evolved as hard work and thriftiness were set

⁷⁰ See MANNING, *supra* note 63, at 38 (describing the social acceptability during the 1950s and 1960s of incurring higher levels of debts); Klein, *Consumer Credit*, *supra* note 68, at 15 (stating that debt was no longer considered a social stigma following World War II.)

⁷¹ See Klein, *Consumer Credit*, *supra* note 68, at iv; *id.* at 7 (“[C]onsumer credit use spread at a phenomenal rate in the period between 1920 and 1967.”).

⁷² See TUCKER, *supra* note 20, at viii (“Americans responded to the general culture [of thrift] by saving about 15 percent of their income. In the twentieth century, after consumption gained control of the culture and promoted spending as best for the common good, the personal savings rate dropped by half.”); *id.* at vii (“Americans’ long-running affair with the virtue of thrift apparently ended in the affluent 1950s, when we killed the concept By then, the theory and practice of thrift had been in decay for at least a generation. Advertising, consumer credit, and self-indulgent psychology had been eroding the practice since the 1920s. By the 1960s, even the public schools had dropped the teaching of frugality and thrift”).

⁷³ See DANIEL HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875–1940*, at 134–35 (1985); LEWIS MANDELL, *THE CREDIT CARD INDUSTRY: A HISTORY 16* (1990) (describing the increase in demand for household durable goods following World War I).

⁷⁴ See Klein, *supra* note 64, at 17 (concluding that consumption grew in the 1920s partly because technological advancements permitted mass production, which led to less expensive products).

⁷⁵ See MANNING, *supra* note 63, at 64 (“As corporate marketing campaigns shifted Americans’ attention from their needs to desires, banks began reinforcing this attitudinal change by offering unrestricted or ‘all-purpose’ consumer credit cards rather than asset-specific installment loans This enabled Americans to satisfy their consumption goals by augmenting their declining wages with greater levels of consumer debt.”); *id.* at 293 (“[T]he institutionalist perspective emphasizes the role of the banking industry and its sophisticated mass marketing machinery . . . in transforming traditional attitudes toward debt in order to promote greater levels of consumption”); TUCKER, *supra* note 20, at 115–21 (suggesting advertising by the credit and retail industry, among other things, prompted the decline of the culture of self-restraint); Klein, *supra* note 64, at 6 (“Marketing strategy [of credit card companies] created during a 1960s consumer demand emphasized ‘buy now, pay later. . . .’”).

⁷⁶ See MANNING, *supra* note 42, at 64, 293; TUCKER, *supra* note 20, at 115–21; Klein, *supra* note 64, at 6 (“Marketing strategy [of credit card companies] created during a 1960s consumer demand emphasized ‘buy now, pay later.’”).

aside for spending and borrowing. This attitude change transformed debt in the 1960s from a stigma to a status symbol.⁷⁷

As a result, society became more sympathetic towards and understanding of the financially troubled individual who incurred debt for consumption or other legitimate purposes such as medical care. This change was the product of evolving societal attribution of fault for financial distress and bankruptcy. Originally, the stigma surrounding bankruptcy was a controllable stigma as society perceived fault for financial failure rested primarily with the individual filer who unwisely chose to borrow money to finance expenditures rather than saving.⁷⁸ That perception evolved over time to a perception that personal financial downfall is largely a product of events beyond the control of the individual filer (i.e., uncontrollable stigma), who has accumulated debt for legitimate consumption purposes.⁷⁹

4. *Norm Entrepreneurs May Have Prompted a Change in Societal Norms Towards Personal Bankruptcy Filings*

The changing perceptions beginning most notably in the 1960s were triggered by evolving attribution of fault for financial failure. These evolving perceptions, however, were brought about or further reinforced by a number of norm entrepreneurs. Norm entrepreneurs are individuals or organizations who promote and campaign to change particular norms.⁸⁰ In the bankruptcy context, the federal government, the media, and bankruptcy attorneys consciously or unconsciously acted as norm entrepreneurs to promote new societal perceptions about personal bankruptcy.

⁷⁷ See SULLIVAN, *supra* note 1, at 103; *The American Debtor—He Gets the Credit*, NEWSWEEK, Jan. 8, 1962, at 54, 54 (“Time has wiped away the Puritan connotations of immorality in debt and godliness in thrift. . . . Debt, in fact, has been transformed from stigma to status symbol, from a last resort of people in need to an entrée to the good, material things in life.”).

⁷⁸ See Efrat, *supra* note 3, at 347.

⁷⁹ See Klein, *supra* note 64, at 6 (“The rise of consumer debt and a transformation in social attitudes toward debt are major elements in the development of new social definitions surrounding bankruptcy status.”); *Personal Bankruptcy & Consumer Credit Crisis: Hearing on S105-89 Before the Subcomm. on Admin. Oversight and the Courts S. Judiciary Comm.*, 105th Cong. (Apr. 11, 1997) (asserting that the recent change in perception of debt may have prompted a change in attitude toward bankruptcy in general) (statement of the American Bankruptcy Institute).

⁸⁰ See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 147–48 (1963); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1664–68 (1998); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

a. *The Federal Government Served as a Norm Entrepreneur in the Area of Personal Bankruptcy by Enacting the 1978 Bankruptcy Legislation*

Legislation has an expressive function.⁸¹ Lawmakers regularly enact laws to express social values they attach to certain behavior.⁸² By applying this expressive function of legislation, legislators act as norm entrepreneurs.⁸³ Legal reform may formally signal a change in social norms that has already taken place. In the alternative, legal reform may have the effect of shaping social norms.⁸⁴ For example, legislation may validate the social meaning of an act, thereby making it more socially acceptable and perhaps even prompting the erosion of well-established social norms.⁸⁵ A recent study of Japanese bankruptcy provides an illustration of the influence legislative reform has had in mitigating the entrenched traditional social stigma of bankruptcy in Japan.⁸⁶

The Bankruptcy Reform Act of 1978 (“1978 Act”)⁸⁷ similarly played a role in altering social norms regarding personal bankruptcy in the United States.⁸⁸ In that year, legislators adopted a major reform to bankruptcy laws that incorporated several key provisions setting in motion a new image for

⁸¹ See Toni M. Massaro, *Show (Some) Emotions*, in *PASSIONS OF LAW* 80, 82 (Susan A. Bardes ed., 1999) (“Of course, that law has such expressive aims and may alter social meanings is hardly a new concept.”); Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 *J. CRIM. L. & CRIMINOLOGY* 467, 476 (2003) (“[W]hen lawmakers make law, they do not just aim to directly control behavior . . . [T]hey also hope to express certain social or cultural values they attach to that behavior.”).

⁸² For example, during the 1990s many states adopted legislation with the aim of stigmatizing sex offenders. See Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 *J.L. & ECON.* 519, 538 (1996).

⁸³ See Ellickson, *supra* note 62, at 59–61 (describing the government as a norm entrepreneur).

⁸⁴ See Massaro, *supra* note 81, at 81 (“[T]he criminal law scholars argue that criminal law can alter the social meaning of criminal behaviors (e.g., from ‘acceptable’ to ‘unacceptable’).”).

⁸⁵ See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* 1003, 1065–85 (1995) (discussing how the Civil Rights Act of 1964 facilitated the erosion of the social norm that kept white business owners from serving or hiring blacks for fear of social stigma); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2031 (1996) (“What is perhaps less standard is to see the law as an effort to produce adequate social norms. The law might either do the work of such norms, or instead be designed to work directly against existing norms and to push them in new directions.”).

⁸⁶ See Mark D. West, *Dying to Get out of Debt: Consumer Insolvency Law and Suicide in Japan* 5 (2003) (unpublished manuscript University of Michigan’s John M. Olin Center for Law & Economics Working Paper No. 03-015) (on file with author) (“My data suggest a causal relation between insolvency law and suicide in Japan. . . . [T]he data . . . show that law plays a role both in controlling debt and in mitigating the social stigma of indebtedness.”).

⁸⁷ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as 11 U.S.C. §§ 101-1330).

⁸⁸ See Zywicki, *supra* note 31, at 90.

bankruptcy petitioners in the United States.⁸⁹ This new image may have fostered ambivalence, rather than disdain, towards bankruptcy petitioners. Likewise, it may have cultivated a portrayal of bankruptcy petitioners as normal rather than deviant.

One of the key provisions in the 1978 Act disallows employment discrimination against individuals based on prior bankruptcy filings.⁹⁰ By prohibiting discrimination based on prior bankruptcy filing,⁹¹ the legislation signaled that an individual's prior bankruptcy records should not be negatively viewed. The mere act of bankruptcy filing should be irrelevant in making employment decisions.⁹² By marginalizing the importance of previous filings, the legislators sent a message that filing bankruptcy is normal and should not be treated as deviant.

Further, the 1978 Act signaled a new and more receptive attitude towards bankruptcy petitioners by enhancing bankruptcy related protections and benefits.⁹³ The enhanced protections and benefits centered primarily on the expansion of property exemption entitlements and on broadening the discharge provisions.⁹⁴ Moreover, the new law continued to be uninterested in the debtor's pre-petition conduct, including the debtor's lack of responsibility.⁹⁵ Because the debtor's lack of responsibility continued to be disregarded in granting relief, the debtor's prepetition fault leading to bankruptcy remained legally irrelevant. By continuing to separate fault considerations from the bankruptcy process, legislators signaled their desire for society to regard bankruptcy filings less judgmentally.

One of the most significant steps legislators took to alter norms regarding bankruptcy petitioners was through the symbolic act of labeling. Labeling has

⁸⁹ 11 U.S.C. § 525 (2000); *see also* Lawrence Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419, 423 (1984) (referring to the federal exemption structure adopted under the 1978 legislation as "generous"); Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 36 (1995) (stating the 1978 Act retained amendments from 1970 that strongly enhanced the debtor's ability to protect and enforce the discharge provisions).

⁹⁰ 11 U.S.C. § 525.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 399 (1994) ("The massive revision of the bankruptcy laws in 1978 may also have been important factor, [sic] because that revision considerably improved the extent of debt relief a typical consumer could obtain through bankruptcy.").

⁹⁴ *See* Shepard, *supra* note 89, at 423; Tabb, *supra* note 89, at 36.

⁹⁵ *See* Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 462 (1997).

proven potently effective in affecting public perceptions of groups in society.⁹⁶ Traditionally, contemptuous labeling of bankruptcy petitioners has been used to reinforce negative stereotypes.⁹⁷ In Italy, England, and France, for example, bankrupts were historically referred to as deceivers, frauds, cheaters, and offenders.⁹⁸ Likewise, the words used in Thai to refer to bankrupts literally mean to fall down on your face and melt.⁹⁹ Similar negative labeling of bankrupts was also traditionally used in the United States.¹⁰⁰

Precisely because of the negative connotation of the term “bankruptcy,”¹⁰¹ a number of countries have recently experimented with transforming societal norms regarding the bankrupt by re-labeling the bankruptcy process and bankruptcy petitioners. For example, in France, Germany, Denmark, and the Netherlands, the bankruptcy process was recently renamed as “debt settlement” to avoid the stigma traditionally associated with bankruptcy filings.¹⁰² Similarly, in England, the government attempted to remove stigma from bankruptcy by adopting a new bankruptcy law titled “The Enterprise Bill.”¹⁰³ Likewise, bankruptcy stigma declined in Scotland following the legislators’ re-labeling of “bankrupt” as “debtor” in the mid-1980s.¹⁰⁴

In 1978, the U.S. Congress undertook similar efforts to re-label bankruptcy petitioners. The new bankruptcy legislation replaced all references to the word “bankrupt” with the word “debtor.”¹⁰⁵ By re-labeling the bankruptcy petitioners as mere “debtors,” Congress signaled its desire to have society

⁹⁶ See Efrat, *supra* note 3, at 329–30.

⁹⁷ See Philip Schuchman, *An Attempt at a “Philosophy of Bankruptcy,”* 21 UCLA L. REV. 403, 413 (1973) (“Bankruptcy is often said to be a labeling process and to inflict a stigma upon the bankrupt.”).

⁹⁸ See Efrat, *supra* note 3, at 329.

⁹⁹ See George M. Kelakos, *ABI in the “Land of Smiles”: A Report on Joint ABI/Thai Educational Projects*, AM. BANKR. INST. J., Mar. 2000, at 4, 28 n.5, available at 19-MAR AMBKRIJ 28 (Westlaw).

¹⁰⁰ See Efrat, *supra* note 3, at 332–33.

¹⁰¹ See FLETCHER, *supra* note 19, at 33 (“In everyday usage, the terms ‘bankruptcy’ and ‘bankrupt’ carry heavy connotations of personal disaster accompanied by social stigma . . .”); Nick Huls, *Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution*, 20 J. CONSUMER POL’Y 143, 144 (1997) (“The term bankruptcy has stigmatic connotations as it puts the blame on the debtor.”).

¹⁰² See Huls, *supra* note 101, at 150.

¹⁰³ See *Personal Finance-Bankrupts Get Chance to Start Again*, BIRMINGHAM POST, Nov. 9, 2002, at 28 (noting government’s attempt to reduce the stigma attached to bankruptcy through the new Enterprise Bill).

¹⁰⁴ See Bill McBryde, *The Scottish Experience of Bankruptcy*, in INSOLVENCY LAW THEORY & PRACTICE 117, 123 (Harry Rajak ed., 1993).

¹⁰⁵ See S. REP. NO. 95-589, at 23 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5809 (“Paragraph (12) defines ‘debtor.’ . . . This is a change in terminology from present law, which calls a person that is proceeding in a straight bankruptcy liquidation case the bankrupt The general term debtor is used . . . as a means of reducing the stigma connected with the term bankrupt.”).

regard bankruptcy petitioners as no different from any other debt-owing individual.¹⁰⁶

The 1978 Act also affected bankruptcy-related societal norms by minimizing the pain associated with the bankruptcy process¹⁰⁷ and limiting public confrontation of petitioners. Public exposure of the bankrupt used to be an integral part of the bankruptcy process. For example, it was a requirement in pre-modern France to preserve the shame of the bankruptcy filing.¹⁰⁸ More recently, public exposure in the United Kingdom was facilitated by requiring that petitioners stand in a witness box in a front of a judge while being scrutinized about their financial affairs.¹⁰⁹ In Scotland, some observed a decline in bankruptcy stigma after public exposure of petitioners was no longer a requirement of the bankruptcy process.¹¹⁰

Petitioners in the U.S. face limited public exposure; the paperwork associated with filing is negligible and actual public confrontation is minimal.¹¹¹ Some have reported spending as little as forty minutes preparing the necessary documents and appearing at a creditors' meeting for less than five minutes.¹¹² Although it is called a meeting of the creditors, it is uncommon for creditors to show up and rare for creditors to challenge a bankruptcy case.¹¹³ Most petitioners do not find the creditors meeting to be

¹⁰⁶ See *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 40–42 (1981) (contending the 1978 Bankruptcy Act reduced the stigma associated with filing for bankruptcy by changing the name of filers from ‘bankrupts’ to ‘debtors.’) (testimony of Professor Jonathan Landers); Jones & Zywicki, *supra* note 26, at 219 (noting that replacing the term “bankrupt” with “debtor” in the U.S. Bankruptcy Code contributed to the loss of stigma associated with bankruptcy).

¹⁰⁷ See VISA, CONSUMER BANKRUPTCY: ANNUAL BANKRUPTCY DEBTOR SURVEY 28 (1997) (“66.4 percent, slightly more than last year, said the process itself was an . . . easy one once they decided to file.”); BANKRUPTCY PROCESS, *supra* note 29, at 15 (1997) (“There was nearly unanimous agreement that bankruptcy proceedings were too easy. Filing took almost no time, few questions were asked, almost no creditors appeared, and the process did not seem to have any serious consequences.”); Kopecki, *supra* note 27, at A1 (quoting an attorney as follows: “[a]fter clients have filed, they were amazed at how easy it was or how painless it was. I think it’s too easy, and I’m a debtors’ lawyer.”).

¹⁰⁸ See James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1875 (1996) (In 1490, French law mandated petitioners appear before a judge “bare-headed and with their clothing hanging open [to expose their naked bodies], to mark and augment their infamy” to reinforce public conformation and humiliation of the bankruptcy petitioner.).

¹⁰⁹ See Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 79 n.52, 81 (1982).

¹¹⁰ See McBryde, *supra* note 104, at 123.

¹¹¹ See Kopecki, *supra* note 27, at A1.

¹¹² See *id.*

¹¹³ See *id.*

embarrassing or intimidating.¹¹⁴ Further, the vast majority of personal bankruptcy cases in the United States are now processed completely outside the formal courtroom at the relatively unceremonious United States Trustee's Office.¹¹⁵

The provisions in the 1978 Act prohibiting discrimination, expanding relief, eliminating negative labels, and reducing public confrontation may have played a role in cultivating a more positive portrayal of bankruptcy petitioners and deemphasized any deviance associated with the act of filing bankruptcy.

b. The Media Served as a Norm Entrepreneur in the Area of Personal Bankruptcy by Providing Social Validation of Bankruptcy Filing

Just as legislation has an expressive function, so does the media. While expressions made in a media forum may also simply reflect existing social sentiments, such expressions may also have the effect of shaping social norms.¹¹⁶ In that regard, the media contributed in part toward the evolving norms relating to personal bankruptcy in the United States. The shift in society's perception beginning in the 1960s may have been prompted by the public's increasing awareness, through media coverage, of the prevalence and ease of bankruptcy filings among the masses and celebrities.¹¹⁷ Media coverage of the rapid rise in the number of personal bankruptcy filings among ordinary citizens in general, and the prevalence of filings among celebrities in

¹¹⁴ See BANKRUPTCY PROCESS, *supra* note 29, at 15 ("A majority of respondents commented on the large number of people in bankruptcy court, a factor many said made their court experience less traumatic."); Thorne, *supra* note 32, at 118–21 (finding the majority of bankruptcy petitioners think the § 341 hearing is easy and not embarrassing).

¹¹⁵ See *Consumer Debt, Delinquencies, and Personal Bankruptcies: Hearing Before the H. Comm. on Banking and Financial Servs.*, 104th Cong. (1996) ("In most no-asset Chapter 7 liquidation cases—the vast majority of consumer cases—the debtor will never see a judge, is rarely examined by creditors and may never even set foot in a court before the case concludes with a permanent forgiveness of debts.") (statement of Ford Elsaesser, Vice-President, American Bankruptcy Institute); see Kopecki, *supra* note 27, at A1 ("About 70 percent of all national personal bankruptcy cases are processed outside the courtroom and never come before a judge. . . . Bankruptcy trustees often process dozens of debtors at a time, closing some cases in less than a minute.").

¹¹⁶ See D.P. Phillips, *Recent Advances in Suicidology: The Study of Imitative Suicide*, in SUICIDE AND ITS PREVENTION: THE ROLE OF ATTITUDE AND IMITATION 299 (René F. W. Diekstra et al. eds., 1989) (finding social stigma associated with suicide is diminished following media coverage that suggests to people that rather than being punished, the deceased is accorded attention and status not conferred in life); S. Stack, *A Reanalysis of the Impact of Non Celebrity Suicides*, 25 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 269 (1990) (finding increases in suicides following front page suicide stories in the news, particularly following celebrity suicides).

¹¹⁷ See MANNING, *supra* note 63, at 134 (summarizing the media's fascination with reporting celebrity bankruptcy filings); *Tyson Filing for Bankruptcy*, MIAMI HERALD, Aug. 3, 2003, at 17C.

particular, made the media to a norm entrepreneur in the field of personal bankruptcy.

Norms can be formed by people observing other people's behavior in a given situation.¹¹⁸ Observing others provides information about what is acceptable or normal behavior, particularly in ambiguous situations.¹¹⁹ When the appropriate conduct is unclear, people tend to rely on "social reality" as reflected by the conduct of others.¹²⁰ The more people respond similarly to the same situation, the more appropriate other people will perceive the conduct to be, and the more normative it becomes.¹²¹ People use the actions of others as a standard of comparison to evaluate the correctness of their own actions.

The media provides information about what is common behavior, and therefore, what is normal. There is a general agreement among media researchers that the media has an indirect but powerful role in influencing perceptions.¹²² As the media began reporting about the increased number of bankruptcy filings, the public began to perceive, bankruptcy filing as a common behavior, and hence, an acceptable norm.¹²³

The media further cultivated the perception that bankruptcy filings are becoming part of the norm by its recurring coverage of bankruptcy filings by

¹¹⁸ See Christine Horne, *Sex & Sanctioning: Evaluating Two Theories of Norm Emergence*, in SOCIAL NORMS, *supra* note 37, at 305, 306 (Michael Hechter & Karl-Dieter Opp eds., 2001) [hereinafter Horne, *Sex & Sanctioning*] ("Actions that are common become normative. Norms therefore reflect existing behavior.").

¹¹⁹ See Daniel T. Gilbert, *Attribution and Interpersonal Perception*, in ADVANCED SOCIAL PSYCHOLOGY 99 (Abraham Tesser ed., 1995).

¹²⁰ See Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUMAN RELATIONS 117 (1954).

¹²¹ See JOHN W. THIABAUT & HAROLD H. KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (5th prt. 1967); Horne, *Sex & Sanctioning*, *supra* note 118, at 306 ("Whatever the reason for the initial action, when many people engage in the same behavior, that behavior comes to be associated with a sense of oughtness. Thus patterns of action emerge that then become normative."); Karl-Dieter Opp, *The Evolutionary Emergence of Norms*, 21 BRIT. J. SOC. PSYCHOL. 139 (1982).

¹²² See Edward Donnerstein, *Mass Media*, in THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 370, 372–74 (Antony S.R. Manstead & Miles Hewstone eds., 1995).

¹²³ As one bankruptcy petitioner put it:

When I found out—this was watching it on the news, on the newspapers—that more and more people are [filing bankruptcy], and . . . it's just a middle class you know, upper class too—rich people—everybody's doing it. And . . . I said: Why not me? You know, I'm just one more of them.

Your Money with John Metaxas (CNN television broadcast Jan. 18, 1999); see Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 19 (1993) (observing there is a natural tendency in society to define deviancy down where behavior previously defined as deviant becomes widespread).

celebrities.¹²⁴ Researchers have found that social stigma associated with a particular behavior may be lifted following favorable media coverage of individuals engaged in the traditionally stigmatized behavior, particularly when the individual is a celebrity.¹²⁵ By highly publicizing leading figures and well-known celebrities' bankruptcy filings,¹²⁶ the media may have shaped public perception on the subject making the traditional bankruptcy stigma less pronounced.¹²⁷

Lastly, the media, at times, has gone a step further in shaping public perception regarding personal bankruptcy filings by suggesting that people should not feel bad about pursuing this recourse. In the late 1960s, the *New York Times* began depicting bankruptcy filers using compassionate sentiments. "Petitioners were referred to as hardworking, poor, struggling, and needy."¹²⁸ Visuals that accompanied bankruptcy articles commonly incorporated pictures of the poor, the disabled, a debtor holding babies, or an unsophisticated blue-collar worker.¹²⁹ Unlike the past where newspaper articles depicted

¹²⁴ See MANNING, *supra* note 63, at 134 (summarizing the media's fascination with reporting celebrity bankruptcy filings); *Tyson Filing for Bankruptcy*, MIAMI HERALD, Aug. 3, 2003, at 17C.

¹²⁵ See Phillips, *supra* note 116, at 299; Stack, *supra* note 116, at 269.

¹²⁶ See MANNING, *supra* note 63, at 133–34 (referring to a magazine's cover story highlighting the bankruptcy filings of several pop icons, including M.C. Hammer, Kim Basinger, Burt Reynolds, Lorraine Bracco, and Willie Nelson); Kim Clark, *First: Why So Many Americans Are Going Bankrupt*, FORTUNE, Aug. 4, 1997, at 24 (referring to the bankruptcy filing of rock and roll legend Jerry Lee Lewis); Christine Dugas, *Bankruptcy Cases Grow Despite Healthy Economy*, USA TODAY, Aug. 11, 1996, at B6 (referring to the bankruptcy filing of Arizona Governor Fife Symington and Dallas fashion designer Victor Costa); Joshua Wolf Shenk, *Bankrupt Policy*, THE NEW REPUBLIC, May 18, 1998, at 16 (noting Toni Braxton, Kim Basinger, Burt Reynolds, and M.C. Hammer have all filed bankruptcy, thereby able to "fend off creditors while continuing to live in luxury"); Ward, *supra* note 30, at 17 ("And who can forget former commissioner of Major League Baseball Bowie Kuhn ignominiously slinking off to Florida to file for bankruptcy?").

¹²⁷ See AS WE FORGIVE OUR DEBTORS, *supra* note 26, at 337 ("It may be that the social stigma of bankruptcy has declined in recent years, in part because of the bankruptcies of so many famous corporations and prominent individuals. . . . Although it surely remains true that bankruptcy is not a badge of honor, these examples may help to legitimize a bankruptcy filing for a family that sees itself in hopeless financial trouble."); Philip S. Corwin, *Bankruptcy Commission's Report Will Soon Face Congressional Review*, 16 BANKING POL'Y REP. 1, 14 (1997) ("There is general agreement that the societal stigma of declaring bankruptcy, while still present, has significantly receded as a deterrent. This may be due in part to both substantial publicity about bankruptcy filings by celebrities . . ."); Zywicki, *supra* note 31, at 69 ("Although the direct impact of this [media coverage of celebrity bankruptcy filings] is hard to measure empirically, it certainly contributes to public awareness of bankruptcy and increases the social acceptance of bankruptcy general."). *But see* McIntyre, *supra* note 16, at 138 ("Arguably, increases in bankruptcies of businesses and famous people would have very little impact on whether or not most people would regard bankruptcy as stigmatizing. The average American does not, I think, consider either businesses or famous people to be salient references against which to evaluate his or her own behavior.").

¹²⁸ See Efrat *supra* note 3, at 347.

¹²⁹ See *id.* at 347–48.

bankruptcy as quasi criminal, it was now perceived and referred to as a matter of basic legal protection.¹³⁰ Similarly, newly emerging self-help books have reinforced the message that people should not feel guilty about filing for bankruptcy.¹³¹

c. Attorneys May Have Served as Norm Entrepreneurs in the Area of Personal Bankruptcy by Exercising Their Informational Influence over the Public's Perception of Bankruptcy

In addition to the government and media, attorneys acted as norm entrepreneurs in the area of personal bankruptcy. Using their influence by advertising, bankruptcy attorneys aided in transforming how the public views bankruptcy filings.¹³²

Informational influence occurs when groups of people accept information from others as valid evidence of reality.¹³³ Informational influence generally succeeds in cases where people are attempting to solve a complex problem unfamiliar to them and individuals considered more knowledgeable provide such information.¹³⁴

Attorneys, considered by the public as knowledgeable in the field of personal bankruptcy, began successfully exercising informational influence over the public in the late 1970s.¹³⁵ The vehicle used by the attorneys to exercise this informational influence was a sustained advertising campaign.¹³⁶ In 1977, the U.S. Supreme Court struck down state laws banning advertising

¹³⁰ See *id.* at 349.

¹³¹ See, e.g., ROBIN LEONARD, *BANKRUPTCY: IS IT THE RIGHT SOLUTION TO YOUR DEBT PROBLEM?* 7 (Stephen Elias ed., 1998) (suggesting people considering to file bankruptcy should not feel guilty because creditors expect bankruptcies and treat them as a cost of doing business).

¹³² See Diane Ellis, *The Influence of Legal Factors on Personal Bankruptcy Filings*, BANK TRENDS (FDIC/Div. of Ins., Washington, D.C.), Feb. 1998, at 1, available at http://www.fdic.gov/bank/analytical/bank/bt_9803.pdf (contending that bankruptcy advertising by attorneys may have reduced some of the stigma of bankruptcy by making it more part of the public consciousness); Sullivan, *supra* note 32, at 11 (“[J]ust as credit advertising has convinced consumers that credit is legitimate, so [sic] lawyer advertising may be convincing consumers that bankruptcy is also legitimate.”); William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1131 (1983) (suggesting advertising has attenuated the stigma of bankruptcy).

¹³³ See H. ANDREW MICHENER & JOHN D. DELAMATER, *SOCIAL PSYCHOLOGY* 326 (4th ed. 1999).

¹³⁴ See *id.*

¹³⁵ See generally Ellickson, *supra* note 62, at 44 (contending that to become successful, the norm entrepreneur, that campaigns to change a particular norm, must “possess a relatively high level of technical knowledge relevant to the norms with his specialty”).

¹³⁶ See generally Braucher, *supra* note 18, at 543–45 (describing in detail the advertising practices of bankruptcy attorneys).

by attorneys on first amendment grounds.¹³⁷ Following this landmark decision, advertising by attorneys in general, and bankruptcy attorneys in particular, has grown at a phenomenal rate.¹³⁸ Furthermore, the liberalized 1978 Act made bankruptcy a monetarily rewarding specialty practice, motivating many new attorneys to enter the field and compete by aggressively advertising their services to the public.¹³⁹

Beginning in the late 1970s, advertising became a vital and pervasive source of information to individuals about bankruptcy.¹⁴⁰ This new and ever increasing advertising not only familiarized the public with the option of bankruptcy, but also sent a not so veiled message that filing for bankruptcy is normal behavior and should no longer be considered deviant.¹⁴¹ The positive image portrayed in their advertising was consistent with the attorneys' financial interest of promoting a high volume bankruptcy practice.¹⁴² The terminology used by the advertising reinforced that message. Some advertisements referred to bankruptcy as "debt relief" that can be used to cure credit card and foreclosure problems.¹⁴³ Through advertising, bankruptcy

¹³⁷ See *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977) (finding no economic or professional justification for the total ban on attorney advertising and holding the Arizona State Bar's regulations prohibiting attorney advertising was violative of the First Amendment).

¹³⁸ Jones & Zywicki, *supra* note 26, at 212 ("Daytime and late-night television, as well as newspapers, magazines, and telephone books, are now awash in bankruptcy advertising by lawyers."); Joseph S. Pomykala, *Wrestling With Bankruptcy: The Economics and Politics of Reform*, MILKEN INST. REV., Fourth Quarter 1999, at 42, 44 ("After the . . . Supreme Court ruled in 1977 that state laws banning . . . advertising violated free speech rights, legal advertising quickly grew . . . from \$5 million [in TV ads] in 1980 to \$129 million in 1994.").

¹³⁹ See AS WE FORGIVE OUR DEBTORS, *supra* note 26, at 336 ("The publicity surrounding the adoption of the new [Bankruptcy] Code and the subsequent continuing legal education programs to train lawyers to use it made bankruptcy very visible to a number of lawyers who had never thought much about it before. At the same time, the law schools graduated a lot of hungry young lawyers, and old established law firms changed longstanding policies of 'not doing' bankruptcy."); Whitford, *supra* note 93, at 400 ("The tremendous growth in consumer bankruptcy filing rates has both facilitated and been facilitated by the development in many communities of lawyers specializing in representing debtors in consumer bankruptcy cases.").

¹⁴⁰ See VISA, CONSUMER BANKRUPTCY: BANKRUPTCY DEBTOR SURVEY 11 (1996) (finding 22 % of surveyed petitioners said they learned about bankruptcy from newspaper and television advertising).

¹⁴¹ See Charles A. Luckett, *Personal Bankruptcies*, 74 FED. RES. BULL. 591, 601 (1998) (arguing advertising by attorneys "helps create a climate in which the declaration of bankruptcy is more readily seen as a legitimate response to financial distress"); Zachary Price, *The Bankruptcy Abuse Prevention and Consumer Protection Act*, 39 HARV. J. LEGIS. 237, 245 (2002) ("[L]awyer advertisements for bankruptcy services may have contributed to a decline in social stigma by presenting bankruptcy filing in a more positive light.").

¹⁴² See Braucher, *supra* note 22, at 543 (suggesting bankruptcy attorneys rely on advertising as a way of routinizing their practice to make it more profitable).

¹⁴³ See *id.* at 552 (describing how some bankruptcy attorneys avoid using the word "bankruptcy" in their Yellow Pages advertising and instead use the words "debt relief"); *id.* at 577 (describing the practice of a

attorneys successfully exercised their informational influence over the public and may have contributed to the norm evolution regarding personal bankruptcy.¹⁴⁴

5. *The Decline in Norm Enforcement Mechanisms Reduced the Influence of Traditional Societal Norms Regarding Personal Bankruptcy*

Bankruptcy stigma may have declined over the past decades not only because of evolving social norms, but also because of a decline in the potency of traditional norm enforcement mechanisms. For norms to have an impact, they must be enforced.¹⁴⁵ Norms are generally enforced either through internalization or external sanctions.¹⁴⁶

Individuals internalize social norms when they sanction their own behavior and respond to internally generated rewards or punishments.¹⁴⁷ Internalization of social norms constrains the conduct of a group member.¹⁴⁸ A group member's conscience and guilt feelings may serve as a powerful weapon in controlling one's behavior consistent with existing social norms.¹⁴⁹

In addition to the internalization of social norms, external sanctions may also serve as an enforcement mechanism.¹⁵⁰ External sanctions may include shame and ostracism.¹⁵¹ Shame and ostracism can arise through formal and

national marketing firm of avoiding the word "bankruptcy" in law firm advertisements, instead referring to chapter 13 as "a wage earner plan" and "debt consolidation.").

¹⁴⁴ See Ellis, *supra* note 3, at 1; Sullivan, *supra* note 32, at 11 ("[J]ust as credit advertising has convinced consumers that credit is legitimate, so [sic] lawyer advertising may be convincing consumers that bankruptcy is also legitimate."); Vukowich, *supra* note 132, at 1131 (suggesting advertising has attenuated the stigma of bankruptcy).

¹⁴⁵ See Horne, *supra* note 37, at 9 ("Of course, for norms to exist, the group must have the ability to enforce its rules.").

¹⁴⁶ *Id.* at 4; Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1583 (2000) (explaining that a person internalizes a norm if she so values obedience to it that she will obey the norm for its own sake, notwithstanding the advantages or disadvantages of the obedience); Horne, *supra* note 37, at 4 ("Whereas some focus on internalization as an enforcement mechanism, the majority of scholars emphasize the role of external sanctions.").

¹⁴⁷ Cooter, *supra* note 146, at 1583; Horne, *supra* note 37, at 4.

¹⁴⁸ See William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 567 (1994).

¹⁴⁹ See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 71 (1989); *The Evolution of Social Norms*, *supra* note 62, at 36 ("A person who has internalized a norm as a result of socialization enforces the norm against himself, perhaps by feeling guilt after violating it or a warm glow after complying with it.").

¹⁵⁰ See Horne, *supra* note 37, at 4 ("Whereas some focus on internalization as an enforcement mechanism, the majority of scholars emphasize the role of external sanctions . . .").

¹⁵¹ See Sunstein, *supra* note 80, at 29–30.

informal sanction mechanisms.¹⁵² Formal sanction mechanisms generally arise through some kind of government action, such as the adoption of laws or practices that humiliate or ostracize.¹⁵³ Unlike formal government acts, informal sanction mechanisms arise through non-governmental societal acts, such as gossip.¹⁵⁴ While shaming is the fear carried by an individual that her deviance would evoke some loss of respect or status among friends or in the community as a whole,¹⁵⁵ shunning involves the fear that deviant behavior will cause exclusion from fully participating in community activities.¹⁵⁶

Traditionally, bankrupts faced external sanctions from the community.¹⁵⁷ Currently, society continues to practice external sanctions with some rigor in certain areas.¹⁵⁸ In the bankruptcy context, however, formal external sanctions have been abandoned and informal external sanctions have become largely ineffective. Aside from a decline in the potency of both formal and informal external sanctions, norm internalization has recently become less forceful in deterring individuals from filing for bankruptcy.

a. Norm Enforcement May Have Declined Due to the Weakening of Bankruptcy Norm Internalization

A number of studies have documented the continuing presence of strong internalized guilt as part of the decision making process of filing for bankruptcy. Two surveys by the credit card industry found former bankruptcy petitioners overwhelmingly report the decision to file for bankruptcy was

¹⁵² See BRAITHWAITE, *supra* note 149, at 58 (providing examples of formal and informal enforcement sanctions).

¹⁵³ *Id.* (Shaming “can be officially pronounced by a judge from the bench or by a government which names a wrongdoer in an official report or in the chamber of the legislature . . .”).

¹⁵⁴ See Sally Engle Merry, *Rethinking Gossip and Scandal*, in REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT 47, 47 (Daniel B. Klein ed., 1997) (“Anthropologists have long assumed that gossip and scandal serve as effective modes of informal social control.”).

¹⁵⁵ See CHARLES R. TITLE, SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE 198 (1980) (“[I]t appears that to the extent that individuals are deterred from deviance by fear, the fear that is relevant is most likely to be that their deviance will evoke some respect or status loss among acquaintances or in the community as a whole.”); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1814 (2001) (defining shaming as “the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions” (quoting Kahan and Posner)).

¹⁵⁶ See Sunstein, *supra* note 80, at 29–30.

¹⁵⁷ See Efrat, *supra* note 3, at 327–33.

¹⁵⁸ See Massaro, *supra* note 81, at 82 (listing examples of shaming practices utilized in the criminal law context).

hard.¹⁵⁹ Findings from focus group research suggest that, for some former bankruptcy petitioners, filing carried a substantial, personal sense of shame and embarrassment.¹⁶⁰ These assessments were collected from consumer counseling groups, lawyers representing bankruptcy petitioners, and other studies of bankruptcy petitioners.¹⁶¹ In the aggregate, these reports and studies suggest internalized guilt continues to play a role in the decision to file bankruptcy, particularly among women.¹⁶²

Some petitioners manifest this sense of internalized guilt by withdrawing from family and the community, participating in support groups for bankruptcy petitioners, and, in extreme cases, suffering from depression or by committing suicide.¹⁶³ Nonetheless, while some petitioners report a strong sense of shame after filing, there is evidence that guilt internalization has been declining since the 1960s.¹⁶⁴

A 1960s study found almost 25% of petitioners felt ashamed about bankruptcy filing.¹⁶⁵ When posed with a similar question in 1995, only 10% indicated they felt shame for filing for bankruptcy protection.¹⁶⁶

¹⁵⁹ See ANNUAL BANKRUPTCY DEBTOR SURVEY, *supra* note 107, at 27 (finding that “76.6 percent of the [bankruptcy petitioners] respondents said that the decision to file for bankruptcy was not an easy one.”).

¹⁶⁰ See VISA, QUALITATIVE RESEARCH: THE FINANCIAL CYCLE 14 (1998).

¹⁶¹ See AS WE FORGIVE OUR DEBTORS, *supra* note 26, at 337 (“[W]e do not doubt that moral conviction continues to play an important part in keeping many people out of bankruptcy.”); Braucher, *supra* note 22, at 540 (describing former bankruptcy petitioners forming support groups to deal with feelings arising from the bankruptcy filing); *id.* (noting lawyers report their clients are often ashamed of filing for bankruptcy protection); *Life After Bankruptcy: Wave of Insolvencies Washing Away Stigma*, THE HARTFORD COURANT, Feb. 7, 1998, at D1 (quoting a president of a consumer counseling group as follows: “Most of our clients really do feel the obligation to pay off their bills.”).

¹⁶² See Kathy R. Davis, *Bankruptcy: A Moral Dilemma for Women Debtors*, 22 L. & PSYCHOL. REV. 235, 235 (1998) (describing women’s strong guilt feelings associated with having to file for bankruptcy).

¹⁶³ See Harder, *supra* note 49, at 34–35 (depression and suicide were reportedly associated with the guilt and shame of bankruptcy among financially troubled farmers); *id.* at 17, 41 (guilt arising out of bankruptcy is manifested by withdrawing from the community); *id.* at 31 (guilt is manifested in communication problems with family members because the petitioner feels he failed to provide for his family); Braucher, *supra* note 22, at 540 (describing former bankruptcy petitioners forming support groups to deal with guilt over filing bankruptcy).

¹⁶⁴ See DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 67–68 (1971); Tahira K. Hira & Kyle L. Kostelecky, *Pilot Study of Consumer Debtors Provides New Insight—What Influences Debtors’ Attitudes?*, 14 AM. BANKR. INST. J., Apr. 1995, at 28, 36, available at 14-APR AMBKRIJ 1 (Westlaw); see also Saul Hansell, *Personal Bankruptcies Surging as Economy Hums*, N.Y. TIMES, Aug. 25, 1996, at A1 (attorneys and court officials interviewed for a newspaper article opined that petitioners display a surprising lack of shame about reneging on their financial obligations).

¹⁶⁵ See STANLEY & GIRTH, *supra* note 164, at 67–68.

¹⁶⁶ See *id.*; Hira & Kostelecky, *supra* note 164, at 36; see also Hansell, *supra* note 164, at A1.

The apparent decline in guilt internalization may be the result of a number of events over the past forty years. First, the decline in internalization of guilt may have been due to the decline of trust relationships in the credit market. Certain trust relationships between debtor and creditor play a role in guilt internalization affecting the bankruptcy decision process.¹⁶⁷ Trust arises as the relationship between the debtor and the creditor develops.¹⁶⁸ The first stage of the trust relationship is deterrence-based trust.¹⁶⁹ It arises when the debtor and creditor do not know each other and as a result rely on the threat of punishment to be able to trust the unfamiliar party.¹⁷⁰ Because the parties are unfamiliar with each other, no emotions are involved in that relationship.¹⁷¹ A decision by any party to breach the level of trust in that relationship will be made largely out of a rational assessment of the costs and benefits involved.¹⁷² Consequently, guilt internalization plays a minor role in the deterrence-based trust relationship because personal attachment considerations are not involved.¹⁷³

A debtor and creditor may develop their relationship into a knowledge-based personal trust relationship.¹⁷⁴ In a knowledge based personal trust relationship, a personal relationship between the parties develops following repeated positive interaction, regular communication and courtship, which creates a certain emotional bond between the parties.¹⁷⁵ In this relationship,

¹⁶⁷ See Rafael Efrat, *The Moral Appeal of Personal Bankruptcy*, 20 WHITTIER L. REV. 141, 155 (1998) [hereinafter Efrat, *Moral Appeal*].

¹⁶⁸ See generally Roy J. Lewicki & Barbara Benedict Bunker, *Trust in Relationships: A Model of Development and Decline*, in CONFLICT, COOPERATION, AND JUSTICE 133 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

¹⁶⁹ Patricia M. Doney & Joseph P. Cannon, *An Examination of the Nature of Trust in Buyer-Seller Relationships*, 61 J. MARKETING 35, 37 (1997).

¹⁷⁰ See Lewicki & Bunker, *supra* note 168, at 163.

¹⁷¹ See *id.* ("While [the parties in a deterrence-based relationship] may be disappointed, they will not feel deeply aggrieved if trust is broken.").

¹⁷² See Doney & Cannon, *supra* note 169, at 37 ("To the extent that the benefits of cheating do not exceed the costs of being caught (factoring in the likelihood of being caught), one party infers that it would be contrary to the other party's best interest to cheat and therefore the party can be trusted."); Lewicki & Bunker, *supra* note 168, at 145 ("[Deterrence]-based trust in any given transaction with another may be derived by determining: [b]enefits to be derived from staying in the relationship; [b]enefits to be derived from cheating on the relationship; [c]osts of staying in the relationship; [c]ost of breaking the relationship.").

¹⁷³ Efrat, *Moral Appeal*, *supra* note 167, at 157.

¹⁷⁴ See Lewicki & Bunker, *supra* note 168, at 157.

¹⁷⁵ See Doney & Cannon, *supra* note 169, at 37 ("Repeated interaction enables the party to interpret prior outcomes better, providing a basis for assessing predictability."); Lewicki & Bunker, *supra* note 168, at 150 ("[A]ccurate prediction requires an understanding that develops over repeated interactions in multidimensional relationships . . . plus two additional factors: regular communication and courtship . . ."); Debra L. Shapiro et al., *Business on a Handshake*, 8 NEGOTIATION J. 221, 225 (1992) ("[R]epeated and multifaceted

the parties are discouraged from violating the other's trust because one's internalized guilt deters the breach.¹⁷⁶

Over the past forty years, there has been a marked transformation in debtor-creditor relationships from largely knowledge-based credit trust relationships towards predominantly deterrence-based credit trust relationships.¹⁷⁷ Traditionally, the credit relationship was based on intensely personal relationships between the debtor and the creditor.¹⁷⁸ The parties were familiar with each other through repeated credit transactions, as well as regular communication and interaction.¹⁷⁹ Lenders extended credit to borrowers primarily based on the borrower's personality and reputation.¹⁸⁰ Personal bonding between the debtor and creditor causes the relationship between the parties to evolve into the knowledge-based credit relationship.¹⁸¹ This knowledge-based credit trust relationship deterred many debtors from violating the trust relationship (i.e., defaulting on the loan or filing for bankruptcy) out of strong internalized guilt feelings.¹⁸²

In contrast, over the past forty years of urbanization, credit relationships have primarily involved institutional lenders.¹⁸³ The relationships with institutional lenders have generally been characterized as involving limited personal interaction and minimal emotional bonding.¹⁸⁴ Hence, over the past forty years, credit relationships have remained deterrence-based trust relationship, involving no significant emotional component and primarily based on rational calculations of costs and benefits. The lack of emotional

relationships [] contribute to understanding and predictability. The more points of contact parties have, the better the chances are that they will come to understand and predict each other's behavior.”).

¹⁷⁶ See J. David Lewis & Andrew Weigert, *Trust as a Social Reality*, 63 SOC. FORCES 967, 974 (1985) (“Personal trust involves an emotional bond between individuals, and the emotional pain that each would experience in the event of betrayal serves as the protective base of trust even where other types of short-term gains could be realized by breaking the trust.”).

¹⁷⁷ See Efrat, *Moral Appeal*, *supra* note 167, at 161.

¹⁷⁸ See MANN, *supra* note 1, at 7 (stating during the eighteenth century, debts in the United States were extended largely based on the personality or reputation of the debtor); Sullivan, *supra* note 32, at 10 n.6 (“In the small towns and city neighborhoods of pre-World War II United States, unsecured credit remained uncommon, but when it was extended it was based at least in part on the character of the borrower and the psychology of the lender.”).

¹⁷⁹ See MANN, *supra* note 1, at 7.

¹⁸⁰ See *id.*; Sullivan, *supra* note 32, at 3.

¹⁸¹ See Efrat, *Moral Appeal*, *supra* note 167, at 159–61.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See Shuchman, *supra* note 97, at 429–30 (“As creditor-debtor relationships have become less personal (more form letters, automated and even computerized bookkeeping, and so forth), the elements of social and personal wrong in not paying one's debts have diminished . . .”).

attachment resulted in debtors progressively retaining a more limited internalized guilt in deciding whether to violate the credit trust relationship and file for bankruptcy.¹⁸⁵ Recent studies provide some empirical support for this hypothesis. For example, a recent VISA study found while most petitioners felt guilty about not being able to pay their debt, many had less guilt about not paying large creditors or creditors they did not know personally.¹⁸⁶

Aside from a decline in knowledge-based credit trust relationships, internalized guilt may have also decreased because of an increase in individuals observing others file for bankruptcy protection.¹⁸⁷ As debtors become more aware of bankruptcy filings by others in society, their internalized guilt for filing their own bankruptcy may decline.¹⁸⁸ As the media publicized the increase in consumer bankruptcies,¹⁸⁹ debtors became more aware of the prevalence of resorting to bankruptcy protection. This increased awareness may have led to a reduction in internalized guilt.¹⁹⁰

In addition to the increase in general awareness of bankruptcy filings, internalized guilt may have been particularly weakened by individuals' increased observations of family members and close friends filing for bankruptcy protection.¹⁹¹ People are most influenced by the expectations and

¹⁸⁵ See AS WE FORGIVE OUR DEBTORS, *supra* note 21, at 337 (“In today’s credit market, most creditors are likely to be large, impersonal corporations. . . . Debtors may feel less compunction about stiffing ITT Financial than they would Mr. Herring . . .”); Shuchman, *supra* note 97, at 429 (“It may also be that, notwithstanding advertising efforts at personalizing large financial institutions, individual debtors of such businesses feel no internalized obligation in the sense that they might if they creditor was a natural person . . .”).

¹⁸⁶ See BANKRUPTCY PROCESS, *supra* note 29, at 9 (“Many [petitioners that were interviewed] felt less guilty about not paying large creditors or creditors they did not know personally . . .”).

¹⁸⁷ See Robert B. Cialdini, *Social Motivations to Comply: Norms, Values, and Principles*, in 2 TAXPAYER COMPLIANCE 200, 213–14 (Jeffrey A. Roth & John T. Scholz eds., 1989) (suggesting people frequently decide how to behave by looking to the actions of other similarly situated people); Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 201 n.113 (1996) (“When we sense something in the world that is inconsistent with the cognitive frame through which we see the world, we initially (unconsciously) ignore or distort our perception. If that becomes impossible, we eventually amend our cognitive frame (i.e., the way we see and understand the world) to incorporate our new perception.”).

¹⁸⁸ See Jones & Zywicki, *supra* note 26, at 212 (“[T]he sheer number of consumer bankruptcies has increased public awareness that bankruptcy is an available and relatively easy process.”).

¹⁸⁹ See *supra* note 23 and accompanying text.

¹⁹⁰ See Zywicki, *supra* note 31, at 90 (“The sheer number of filers alone has also probably helped to reduce the stigma associated with filing bankruptcy. As more individuals file bankruptcy, more people know others who have filed bankruptcy. The recognition that others have filed bankruptcy and have survived . . . makes bankruptcy more routine in society, reducing the stigma associated with it.”).

¹⁹¹ See GALLUP ORGANIZATION, PUBLIC OPINION SURVEY (May 1997) (on file with author) (finding 39% of the respondents indicated they have close friends or relatives who have filed for bankruptcy protection);

behavior of family and friends.¹⁹² Some have detected an increase in the flow of informal advice from family and friends as more people go through bankruptcy.¹⁹³ This increase is reflected in the large numbers of petitioners indicating that they have learned about bankruptcy as an option from family and friends.¹⁹⁴ In fact, studies suggest that those who already knew someone who had filed for bankruptcy were more likely to consider bankruptcy themselves.¹⁹⁵ Having known family members or friends who have gone through the bankruptcy process apparently reduces the discomfort and guilt associated with declaring bankruptcy.¹⁹⁶

Lastly, internalized guilt declined because of attorneys' influence. A number of studies have revealed the vital influence attorneys have over the decision making process of potential clients.¹⁹⁷ One study has documented cases where potential clients expressed hesitation and trepidation about declaring bankruptcy, but attorneys acted to neutralize those feelings of internalized guilt.¹⁹⁸

LOUIS HARRIS & ASSOCIATES, PUBLIC OPINION SURVEY, STUDY NO. 921102 (Feb. 1992) (on file with author) (the national poll found a third of the general population knows someone who had filed for bankruptcy protection).

¹⁹² See, e.g., Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 159 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (discussing study finding undergraduate men's likelihood of engaging in premarital sexual activity was more heavily determined by the expectations of their families and closest friends than by their attitudes toward premarital sex).

¹⁹³ See Braucher, *supra* note 22, at 545 ("Several [bankruptcy] lawyers noted that increasing client referrals result from the declining stigma attached to bankruptcy. The lawyers said that more and more people are telling relatives, friends, and co-workers about their bankruptcies."); David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319, 320 (2002) ("[T]he flow of informal advice from family and friends might have accelerated as more people have been through bankruptcy.").

¹⁹⁴ See ANNUAL BANKRUPTCY DEBTOR SURVEY, *supra* note 140, at 2 ("Fully 45.3 percent of the respondents said that they learned about bankruptcy as an option from friends or family.").

¹⁹⁵ See generally HERBERT JACOB, DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES (1969) (finding that debtors who already knew someone that had filed for bankruptcy were more likely themselves to consider bankruptcy filing); BANKRUPTCY PROCESS, *supra* note 29, at 19 ("For others the decision to file for bankruptcy was actually reinforced by friends and relatives. They reported knowing many other people, including relatives and close friends, who had filed for bankruptcy or had urged them to do so.").

¹⁹⁶ See BANKRUPTCY PROCESS, *supra* note 29, at 11 (1997) ("Some, on the other hand, felt no discomfort in declaring bankruptcy, having known many others who had gone through the same process.").

¹⁹⁷ See, e.g., Braucher, *supra* note 22; Whitford, *supra* note 93, at 397.

¹⁹⁸ See Braucher, *supra* note 22, at 509 ("A number of lawyers in the study said that they find themselves trying to talk debtors out of [the desire to repay their debts in] chapter 13. They use such tactics as raising the question of their clients' moral obligations to their families, especially to their children, in order to diffuse clients' sense of moral obligation to repay creditors.").

b. Norm Enforcement Declined Due to the Weakening of External Sanctions

Norm enforcement relating to bankruptcy may have declined not only as a result of a weakening internalized guilt sanction, but also as a result of weakening external sanctions. As discussed earlier, the decline in shaming sanctions in bankruptcy is manifested in the re-labeling of “bankrupt” as “debtor,” the broadening of relief in bankruptcy, and the minimal public confrontation with the bankruptcy petitioner.¹⁹⁹ Similarly, the decline in ostracizing sanctions in bankruptcy is manifested in the 1978 Act’s prohibition of employment discrimination against former bankruptcy petitioners²⁰⁰ and in pervasive attorney advertising that promotes filing bankruptcy petitions.²⁰¹

Furthermore, for the past forty years the credit industry no longer ostracizes former bankruptcy petitioners. In the past, bankruptcy filers were largely excluded from the credit market following bankruptcy.²⁰² Beginning in the 1960s, however, denial of credit to former petitioners has substantially declined.²⁰³ The expansion of the consumer credit market along with the discharge of most debt under bankruptcy laws and the prohibition against obtaining another discharge for six years provided lenders incentives to lend to debtors who have filed for bankruptcy in the past.²⁰⁴ Some studies report that many petitioners begin enjoying expansive access to credit almost immediately after discharge.²⁰⁵

¹⁹⁹ See *supra* notes 106–07, 111–15 and accompanying text.

²⁰⁰ See *supra* notes 90–92 and accompanying text.

²⁰¹ See *supra* note 132 and accompanying text.

²⁰² See Jones & Zywicki, *supra* note 26, at 213 (“In the past, a compelling disincentive to file bankruptcy lay in the unavailability of credit for those with an impaired credit rating. Bankruptcy was an almost insurmountable hurdle to reestablishing one’s credit.”).

²⁰³ See SULLIVAN, *supra* note 1, at 104 (suggesting that unlike prior practice, lenders began extending credit to former petitioners in the 1960s).

²⁰⁴ See Braucher, *supra* note 32, at 537 (finding lawyers inform their financially troubled clients that filing chapter 7 may help them get new credit as some lenders are targeting newly discharged debtors); Jones & Zywicki, *supra* note 26, at 213 (“The disincentive to bankruptcy has, however, significantly declined in recent years due to the flourishing of the “sub-prime” lending market and the willingness of some lenders to look favorably on those who have wiped the slate clean of most other obligations through bankruptcy.”).

²⁰⁵ See THE FINANCIAL CYCLE, *supra* note 160, at 16 (“Bankruptcy does not mean an end to credit forever. A year after bankruptcy, consumers are able to get car loans, department store cards, and gas cards. After two years, they are able to get secured credit cards. And after three to five years, they can be approved for unsecured credit cards, mortgages, and credit at competitive rates.”); BANKRUPTCY PROCESS, *supra* note 29, at 17 (finding that “[n]early everybody had received at least some offers of credit since declaring bankruptcy, many of which were offers for secured cards.”); Michael E. Staten, The Impact of Post-Bankruptcy Credit on the Number of Personal Bankruptcies 10–11 (Credit Research Ctr., Krannert Graduate Sch. of Mgt., Purdue Univ., Working Paper No. 58,1993), available at <http://msb.georgetown.edu/faculty/>

There are a number of plausible reasons for the decline of external norm enforcement sanctions in bankruptcy. For society to successfully regulate an individual's behavior through the application of social norm sanctions such as shaming and ostracizing, society must lack a robust sense of individualism and share strong sentiments of community cohesiveness.²⁰⁶ The less individualistic and more cohesive the society, the stronger the impact stigma will have on the individual's behavior.²⁰⁷

Historically, American society was able to effectively enforce social norm sanctions upon any detected deviancy.²⁰⁸ Over time, however, shaming and ostracizing norm sanctions lost much of their traditional potency.²⁰⁹ As individualism thrived and community cohesiveness declined in the United States, the external norm enforcement sanctions that were traditionally used to address deviancy were found less effective in many spheres of life, including bankruptcy.

Individualism is a function of the degree of the individual's dependence on society.²¹⁰ The more dependent the individual is on society, the less individualistic she is.²¹¹ The number of groups in the relevant community and the individual's level of affluence determine the extent of the individual's independence.²¹² The more groups there are in society, the less dependent the

research/credit_research_/pdf/wp58.pdf (finding over 16% of bankruptcy filers were able to gain unsecured credit within one year after filing bankruptcy and over 55% within five years).

²⁰⁶ See Harry C. Triandis, *The Self and Social Behavior in Differing Cultural Contexts*, 96 PSYCHOL. REV. 506, 517 (1989) ("The more complex, individualistic, and loose the culture, the more likely it is that people will sample the private self and the less likely it is that they will sample the collective self. When people sample the collective self, they are more likely to be influenced by the norms, role definitions, and values of the particular collective, than when they do not sample the collective self.").

²⁰⁷ See *id.*

²⁰⁸ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 37–8 (1991) (shame sanctions were widespread in the U.S. during the colonial period); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1915 (1991) ("[W]hite colonists lived in intimate, closely bound, and normatively cohesive communities, within which shaming could and did play a signal role in reinforcing standards of behavior."); *id.* at 1922 (suggesting the pervasiveness of individualism in the United States makes shaming sanctions difficult to enforce).

²⁰⁹ See Massaro, *supra* note 208, at 1922.

²¹⁰ See Triandis, *supra* note 206, at 513 ("[I]ndividualism means that the individual is not so attached to the ingroup that conformity to the ingroup is always essential . . ."); Merry, *supra* note 154, at 70 ("The impact of gossip and scandal is greater in social settings where the members of the local social system are more interdependent for economic aid, jobs, political protection, and social support.").

²¹¹ See Triandis, *supra* note 206, at 513; Merry, *supra* note 154, at 70.

²¹² See Triandis, *supra* note 206, at 510 ("The major antecedents of individualism appear to be cultural complexity The more complex the culture, the greater the number of ingroups that one may have, so that

individual is on any particular group and the more likely the individual will be independent and individualistic.²¹³ For example, individuals residing in large urban areas are less likely to find themselves dependent on any particular group and therefore are likely to be more individualistic as compared with individuals in rural areas.²¹⁴

The extent of one's independence (and hence individualism) is also determined by the level of one's affluence.²¹⁵ The more affluent the individual is, the less dependent the individual will be on society for financial or emotional support, and the more individualistic the individual will be.²¹⁶

The growth of individualism in the United States may have had an impact on the declining force of external norm enforcement sanctions. With the expansion of urbanization in the United States, people have become more independent.²¹⁷ Similarly, as individuals in the United States have become more affluent, they have become less dependent on society for financial or emotional support.²¹⁸ The expansion of urbanization and the increase in affluence among Americans has led to people becoming more individualistic and hence less vulnerable to the forces of external norm sanctions surrounding bankruptcy.²¹⁹

Not only have Americans become less vulnerable to external norm sanctions, the forcefulness of norm sanctions has dramatically declined over time as a result of weakening cultural cohesiveness in the United States. The looser the cultural structure, the weaker society is in forcing the individual to conform.²²⁰

a person has the option of joining ingroups or even forming new ingroups."); *id.* at 513 ("When individuals have few ingroups, they are more dependent on them.").

²¹³ See Triandis, *supra* note 206, at 510, 513.

²¹⁴ See *id.* at 510 ("Urban samples tend to be individualistic, and traditional-rural samples tend toward collectivism within the same culture.").

²¹⁵ See *id.* at 510 ("Affluence means that the individual can be independent of ingroups."); Massaro, *supra* note 208, at 1916 (asserting wealthy individuals are mostly likely to be able to defy social norms and risk shaming sanctions because they are insulated by their wealth).

²¹⁶ See Massaro, *supra* note 208, at 1916; Triandis, *supra* note 206, at 510.

²¹⁷ See Massaro, *supra* note 208, at 1922 (suggesting the pervasiveness of individualism in the United States makes shaming sanctions difficult to enforce).

²¹⁸ See James Garbarino, *The Price of Privacy in the Social Dynamics of Child Abuse*, 56 CHILD WELFARE 565 (1977) (arguing people in American society relinquish kinship and neighborhood bonds for the benefits of privacy as they move into the middle class).

²¹⁹ See Massaro, *supra* note 208, at 1922.

²²⁰ See Triandis, *supra* note 206, at 517 ("The more . . . loose the culture, the more likely it is that people will sample the private self and the less likely it is that they will sample the collective self. When people

The degree of looseness in society depends on whether the society is largely homogeneous or heterogeneous. To enforce social norms, there must be a consensus in society regarding the norms.²²¹ A consensus is more likely to develop in homogeneous societies. “In a heterogeneous culture . . . it is more difficult for people to agree on specific norms, and even more difficult to impose severe sanctions.”²²² The decline in the homogenous nature of American society has led to a decrease in community consensus and thus society’s ability to effectively exert informal sanctions against bankruptcy petitioners.²²³

The smaller and more intimate the community, the more likely it is to remain cohesive. Close-knit communities are conducive to the application of external norm sanctions because of higher likelihood of developing community consensus in such communities, higher likelihood of dependency, lower cost of exchanging information, and the high public visibility of a member’s nonconforming conduct.²²⁴ Individuals who are part of a smaller community

sample the collective self, they are more likely to be influenced by the norms, role definitions, and values of the particular collective, [sic] than when they do not sample the collective self.”); see also BRAITHWAITE, *supra* note 149, at 8 (explaining informal sanctions appear to work best within relatively bounded, close-knit communities whose members don’t mind their own business and who rely on each other).

²²¹ See Vernon L. Allen & John M. Levine, *Social Support & Conformity: The Role of Independent Assessment of Reality*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 48 (1971) (finding any breach in the majority consensus will reduce the pressure on the subject to conform); Horne, *supra* note 37, at 26 (concluding characteristics of the group, such as cohesion, effect the likelihood of social sanctioning).

²²² Triandis, *supra* note 206, at 510–11 (“When a society is relatively homogeneous, the norms and values of ingroups are similar. But heterogeneous societies have groups with dissimilar norms. If an ingroup member deviates from ingroup norm, ingroup members may have to make the painful decision of excluding that individual from the ingroup. . . . As a result, homogeneous cultures are often rigid in requiring that ingroup members behave according to the ingroup norms. Such cultures are *tight*. Heterogeneous cultures . . . are flexible in dealing with ingroup members who deviate from ingroup norms.”); Merry, *supra* note 154, at 272 (“The role of gossip in achieving social control in stable, bounded, morally homogeneous, and close-knit societies where escape and avoidance are difficult differs markedly from its function in large, fluid, open, and morally heterogeneous communities where escape and avoidance are realistic possibilities.”).

²²³ See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 23–24 (1993) (arguing the explosion of claims of entitlement left American society with a profound absence of moral consensus on shared values).

²²⁴ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 246–54 (1991) (contending in larger, less tightly-knit groups, where members interact less frequently and information about their behavior is more costly to obtain and diffused, informal social sanctions typically must be supplemented by more formal institutions); *id.* at 180–81 (arguing that close-knit environments are particularly conducive to the development of efficient social norms since members’ dependence on each other makes them value their reputations and the cost of obtaining the exchanging information about members is low); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 141–42 (1996) (explaining that the greater the dependence of members on the group for obtaining various kinds of collective goods, the more effective is the threat of ostracism as a sanction for violating a norm of cooperation).

are more likely to be detected when they engage in nonconforming conduct because their actions are more likely to be generally known in the community.²²⁵

External norm sanctions, such as shaming, played an important role in colonial America because the colonists lived in intimate and closely bound communities.²²⁶ Similar community bonds continued to provide social control over debt repayment in the United State in small towns and city neighborhoods prior to World War II.²²⁷ Shaming sanctions continue to be effective today in small rural communities in North America.²²⁸

America can no longer be considered a close-knit community.²²⁹ The decline of close-knit communities in the United States and the ensuing weakening community consensus, lowering dependency among people, and increasing cost of exchanging information have all contributed to their decline in the vitality of external norm sanctions affecting bankruptcy filings in the United States. Furthermore, the increased anonymity of modern life in the

²²⁵ See GOFFMAN, *supra* note 5, at 99 (“By maintaining physical distance, the individual can also restrict the tendency of others to build up a personal identification of him. By residing in a region with a mobile population, he can limit the amount of continuous experience others have of him [and thereby reducing the likelihood of facing stigma.]”); *id.* at 143 (“When the ‘system of reference’ is further shifted from a face-to-face local community to the wider world of metropolitan settlements (and their affiliated areas, resort and residential), a corresponding shift is found in the variety and meaning of deviations.”); D.J. Hessing et al., *Needy or Greedy? The Social Psychology of Individuals Who Fraudulently Claim Unemployment Benefits*, 23 J. APPLIED SOC. PSYCHOL. 226, 228 (1993) (“[N]orms will have an influence on behavior only if that behavior is public and visible.”).

²²⁶ See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 37–8 (1991) (shame sanctions were widespread in the U.S. during the colonial period); Massaro, *supra* note 208, at 1915 (“[W]hite colonists lived in intimate, closely bound, and normatively cohesive communities, within which shaming could and did play a signal role in reinforcing standards of behavior.”).

²²⁷ See Sullivan, *supra* note 32, at 3 (“In the small towns and city neighborhoods of pre-World War II United States, unsecured credit remained uncommon, but when it was extended it was based at least in part on the character of the borrower and the psychology of the lender. . . . Personal and community bonds provided additional social control, over and above the force of laws, to assist the creditor in collecting the debt.”).

²²⁸ See, e.g., Harder, *supra* note 49, at 41, 45–46 (describing the shame of bankruptcy manifested by a Canadian farm community isolating and avoiding a bankrupt farmer); Timothy D. Moratzka, *An Attorney Discusses Farm Bankruptcies*, FARM MONEY MGMT., Third Quarter 1982, at 11 (“There is certainly a social stigma applied to bankruptcy. [Bankrupt farmers are] still going to have to go into the coffee shop and their friends may be looking at them and treating them somewhat differently than before.”).

²²⁹ See Massaro, *supra* note 208, at 1917 (“Unlike the intimate face-to-face cultures that rely heavily on shaming, cities in the United States typically are not characterized by high interdependence among citizens, strong norm cohesiveness, or robust communitarianism.”); Skeel, *supra* note 155, at 1811 (“While American society may once have been characterized by close-knit communities, this seems far less true now.”).

United States²³⁰ coupled with bankruptcy proceedings taking place largely in unfamiliar forums outside the petitioners' community,²³¹ have resulted in a dramatic decline in the bankruptcy petitioner's public visibility and detection.

Lastly, the degree of looseness in society also depends on the ease of mobility. "Geographic mobility allows people to leave the offended communities in ways that are not available in more stable cultures."²³² Cultures that make mobility possible have looser social structures that make it more difficult for social forces to impose social norms on individuals.²³³

As American society has become more mobile, the prospect of enforcing external norm sanctions against individuals who engage in nonconforming behavior has become more tenuous.²³⁴ Indeed, some researchers have presented empirical data that supports the hypothesis communities with higher mobility rate have less power to inflict shaming or ostracizing sanctions to deter individuals from declaring bankruptcy.²³⁵

CONCLUSION

The evolution of social norms towards bankrupts is a reflection of broader social changes taking place in American society during the twentieth century. People view the bankruptcy phenomenon through a different lens. The negative perception traditionally associated with bankrupts diminished, beginning in the 1960s, as people began to ascribe more sympathetic feelings

²³⁰ See Massaro, *supra* note 208, at 1903 ("shame requires a social encounter, an interaction between an individual and the group that exposes weaknesses or deficiencies in the individual. . . ."); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1063 (1998) (referring to the anonymity of Western city life).

²³¹ See Lynn M. LoPucki, *The Demographics of Bankruptcy Practice*, 63 AM. BANKR. L.J. 289, 300 (1989) ("For three quarters of the population, bankruptcy is a proceeding which takes place in an unfamiliar forum outside their own community.")

²³² See Triandis, *supra* note 206, at 511.

²³³ See *id.* at 511 ("Urban environments are more loose than rural environments, in which norms are clearer and sanctions can be imposed more easily."); see also Steven A. Lewis et al., *Expectation of Future Interaction & the Choice of Less Desirable Alternatives in Conformity*, 35 SOCIOMETRY 440 (1972) (demonstrating members of a group are more likely to conform to group norms when they anticipate their relationship with the group will be permanent or long-lasting); Merry, *supra* note 154, at 282, 286 (asserting that a social sanction is likely to be particularly potent if an individual is dependent on the group or cannot leave the group easily).

²³⁴ See Buckley & Brinig, *supra* note 33, at 204 (finding propensity to file bankruptcy rises in cities and other areas where populations tend to be more transient).

²³⁵ See *id.*

towards the bankrupt. This sympathetic mind set was largely due to a shift in societal attribution of fault for financial failure.

Financial failure was traditionally viewed as largely a product of the individual's own misbehavior or fraud. Prompted by the cultural revolution in the United States that emphasized personal fulfillment and largely rejected personal responsibility, financial failure became viewed as more the result of external factors, such as recession, inflation, lack of welfare, and lender's conduct. Moreover, the evolving norms in personal bankruptcy may have been triggered by society's changing perceptions about consumerism and debt. As personal debt for purposes of consumption became a widely accepted behavior, financial failure resulting from incurring personal debt became tolerable as well.

By shifting blame away from the financially troubled individual, over time American society may have developed a more positive perception towards the individual, manifested by less anger and more sympathy. These evolving perceptions may have been brought about or further reinforced, however, by a number of norm entrepreneurs, including the federal government, the media, and the local bankruptcy bar.

Bankruptcy stigma also declined over the past decades because of a decline in the potency of traditional norm enforcement mechanisms. Traditionally, bankrupts faced external sanctions from the community. Contemporarily, external sanctions continue to be practiced with rigor in some areas. In the bankruptcy context, however, formal external sanctions have largely been abandoned and informal external sanctions have become ineffective. Aside from a decline in the potency of both formal and informal external sanctions, norm internalization may have recently become less forceful in deterring individuals from filing for bankruptcy. The apparent decline in guilt internalization relating to bankruptcy may be the result of a number of events that have unfolded over the past forty years or so. First, the perceptible decline in guilt internalization may have been due to the decline of trust relationships in the credit market. Internalized guilt may have also weakened as a result of an increase in individuals observing others in the general population file for bankruptcy protection. In addition to the increase in general awareness of bankruptcy filings, internalized guilt may have been weakened by individuals' increased observations of family members and close friends filing for bankruptcy protection.

Norm enforcement relating to bankruptcy declined not only as a result of a weakening internalized guilt sanction, but also as a result of weakening formal external sanctions. The decline in shaming sanctions in bankruptcy has been manifested in the re-labeling of “bankrupt” as “debtor, in the broadening of relief in bankruptcy, and in the minimal public confrontation of the petitioner in bankruptcy. Similarly, the decline in ostracizing sanctions in bankruptcy has been manifested in the 1978 prohibition of employment discrimination against former bankruptcy petitioners and in pervasive attorneys advertising promoting the filing of bankruptcy petitions. Lastly, over the past forty years, the ostracizing of former bankruptcy petitioners from access to credit has progressively eroded.

Informal norm sanctions have also eroded in recent past. Historically, American society was able to enforce, informally and effectively, social norm sanctions upon any detected deviancy. Over time, however, shaming and ostracizing norm sanctions lost much of their traditional informal potency. As individualism thrived and community cohesiveness declined in the United States, the informal external norm enforcement sanctions that were traditionally used to address deviancy were found less effective in many spheres of life, including bankruptcy.

